Foreword and statement of purpose: an introduction to IFOSS L. Rev.

by The Editorial Committee, coordinated by Iain G. Mitchell Q.C.[a]

(a) Iain G. Mitchell QC is Chairman of the Scottish Society for Computers and Law; Chairman of the Faculty of Advocates Information Technology Group; Chairman of the Scottish Lawyers' European Group; a visiting lecturer at the Institut für Informations- Telekommunikations- und Medienrecht at the Westfälische Wilhelms-Universität Münster, Germany; former Joint Editor of the E-Law Review; and a Freeman of the Worshipful Company of Information Technologists

Abstract

This editorial article by the Editorial Committee of the International Free and Open Source Software Law Review introduces the rationale behind the publication's establishment, its objectives and operating methods. The editorial also presents an overview of the articles which comprise the first issue.

Keywords

Law; information technology; Free and Open Source Software; International Free and Open Source Software Law Review

Purpose

The world is changing. Old structures, old business models and old ways of thinking are breaking down. Such a world is, at once, full of challenges or, depending on your point of view, opportunities.

In his book, The Media Lab: Inventing the Future at MIT, Stewart Brand wrote:

> "Information wants to be free. Information also wants to be expensive. Information wants to be free because it has become so cheap to distribute, copy, and recombine - too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It leads to endless wrenching debate about price, copyright, 'intellectual property', the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better."

Yet tension may be creative: it may lead to constructive change. Once it seemed that the future belonged to the large monopoly corporations which had as their business model, software as a commodity - a commodity to be expensively packaged, shrink-wrapped, shipped, and retailed. The source code was the crown jewels, to be guarded, and legally fenced to preserve its value.

But in a world of ever-increasing connectedness and convergence, where software can be downloaded or services supplied across the Internet at a unit cost which is as near to free as you

can get, commoditising software in the most expensive way possible - by turning a virtual good into a physical good, no longer makes as much sense as it used to. Even the value of software as a commodity (however it is distributed) makes less and less sense when one realises that most of the end-users do not want software for what it is, but for what it does.

In such a market place, the large corporations' dominant positions, so important in bolstering their control of the software market, count for less if the customers, in place of having sitting on their desktops software they don't want, acquire the services they do want over the Internet. This new paradigm of service delivery makes it irrelevant what the software is, and helps opens up competition to a wider diversity of software models.

In the old days of the big corporations' unchallenged market dominance, there arose a movement which was as much aspirational and philosophical as it was grounded in market considerations - the Free and Open Source Software movement. Like most movements, it was not homogeneous: a few of its adherents prophesied the death of copyright and fancied themselves close to the epicentre of a cause which would shake the earth and bring down the heavens, but many more of its supporters saw clearly that the idea was profoundly market-oriented, pitting against the large anti-competitive monopolies a healthier and more vigorous market where software developers and users shared the source code and worked together in freedom to run, modify, distribute and redistribute programs. The old monopolistic corporations used copyright law to close the source code down and to restrict its use, but the new model was to use copyright to do the opposite, to open the source code up and freely to share it, and so, Richard Stallman coined the epithet 'copyleft' to describe this new use of copyright law.

Free and open source software is software which is covered by a licence very different from a traditional commercial software licence, in that it grants the users - under certain conditions - the right to use, study, modify and distribute the software. For these purposes, the user is granted access to the source code and the right (and sometimes even the obligation) to distribute the source code further afield.

New ideas need time to gain general acceptance and, to begin with, few of those in the wider business community were aware of the profound changes which were taking place, and many of those who were aware of the changes misunderstood them. By and large, business people sought legal certainty and what they perceived as reliability, so clung on to nurse for fear of something worse. They regarded words like 'copyleft' with suspicion; and they looked at the preamble to GPL 2 and saw a document which looked to them more aspirational than legal in nature: a Constitution for the State of Hackerdom rather than a serious business tool.

However, some more far-sighted businesses saw Free and Open Source software much more accurately as a valuable business tool, upon the back of which entire business models might realistically be built. They were the pioneers, but it would not be long before the rest of the world began to catch up. Governments and institutions around the world began to see considerable gains in respect of strategic independence, lowered costs and increased reliability through the use of Free and Open Source software. In the commercial world, the old proprietary software business models daily seemed less and less relevant to the modern market place, and Free and Open Source software broke through as a serious player. There was a definite sense that the tide had turned.

And yet now, years later, there is still baggage. Free and Open Source software, though now a robust business proposition, evokes for many, memories of the days when it was seen as crusade. Its proponents as well as its opponents still occasionally address the subject as though they were engaging in a philosophical debate. There are also differences of emphasis, and a whiff of

sectarianism amongst the proponents of the various standard licences.

It is for others to address these theological disputes. It is, rather, the purpose of this Review to take one step back and look behind the rhetoric in a rigorous and objective fashion, to probe, to analyse, to question received wisdom, and to bring proper academic discipline to the study of Free and Open Source software in its legal and wider context.

Free and Open Source Software has become a serious player. It deserves serious analysis.

Objectives

a) Scope

It is with this end in view that the Editorial Committee presents this first issue of the International Free and Open Source Software Law Review (*IFOSS L. Rev.* or *IFOSSLR*), in the hope and expectation that it will provide a centre of excellence for the very best in analysis of issues facing users and advisors in the development, deployment and governance of Free and Open Source software, recognising the importance of digital rights issues to the daily professional and personal lives of many of the Review's readers and the role that open solutions might play in their resolution. The Review aims to present the perspectives of those most experienced and knowledgeable in the field and to ask how there might be attained sustainable solutions which foster the growth and development of the marketplace.

However, it is by no means the intention of the editors that the Review should exist solely for those who have an attachment, whether ideological or merely pragmatic, to Free and Open Source software. It is recognised that much of the readership will be drawn from the wider world and will include the sympathetic, the merely curious, and the actively hostile. So, the Review does not exist to preach to the converted: the readership will be much wider than that; nor, in what is intended as a publication of integrity and intellectual rigour, is there any place for preaching. This is worth stressing in light of the history of the Free Software and the Open Source Software movements.

Both of those movements largely endorse similar software licences and pursue similar goals, but the two terms have historically tended to carried different emphases. Those who use the term "Free Software" stress the rights (or freedoms) which that software provides to its users, whereas users of the term "Open Source Software" focus on the perceived benefits of peer-to-peer software development. Put differently, Free Software emphasises the long term goal, Open Source Software emphasises the means to promote the long term goal of Software Freedom.

The Review does not endorse any one licensing model, focus or emphasis, but rather seeks, in an academically rigorous and objective manner, to increase the knowledge and understanding about the legal mechanisms used by all forms of Free and Open Source Software licences. It uses the term *Free and Open Source Software* to cover both Free Software and Open Source Software.

b) Consolidation of knowledge

IFOSS L. Rev. aims to provide a focal point for discussion of, and research into, the legal aspects of Free and Open Source software, and in doing so to enhance the level of understanding among legal professionals and researchers of key issues facing the industry. Existing discussion *fora* serve their purposes well, and it is not the objective of this publication to replace them. Rather, it is intended that IFOSS L. Rev. should become the place where promising new approaches and insightful analysis can gain a voice – a voice which will reach all those most involved and

interested in the questions at hand.

c) Professionalism of research and discussion

In everything that the publication does, it will strive to achieve or surpass the highest standards of academic enquiry. It will be the first publication specialising in Free and Open Source software legal issues to insist upon such standards, and in doing so the publication will raise the level of analysis of such issues and provide a stimulus for new research and analysis.

d) Marketplace and community relevance

A final central objective of IFOSS L. Rev. is to maintain a close degree of connectedness to the fundamental processes driving the marketplace and community. This means that it must ensure that those with expertise in realms such as software engineering, community project management and business are brought 'into the body of the kirk'.

IFOSS L. Rev. will maintain ties to these crucial stakeholders through the diverse and changing composition of its Editorial Committee and the legal network it represents. It will also devote space in each issue to examination of pertinent issues by invited non-lawyers, allowing the publication's core legal audience to increase their awareness of upcoming issues and ground their legal knowledge in practical examples.

It will also recognise that professionals, both lawyers and non-lawyers who are experienced in the field will have had an opportunity to develop informed opinions about matters of concern or contention; and for this reason, the Review will also publish an occasional series of articles under the title *Platform*, which series will give scope for the expression of those opinions, but only where such opinions are informed, perceptive and likely to advance debate and discussion in the wider community.

Scope of coverage and methods

The core topics covered by IFOSS L. Rev. include copyright, licence implementation, licence interpretation, software patents, open standards, case law and legislation. However, the review, as its name implies, is international in scope and there are no limitations as to the jurisdictions covered.

The Editorial Committee accepts proposals and submissions on any of these, or related, topics, though it does insist on maintaining the Review's core focus on the legal aspects of Free and Open Source Software. The subject matter of submissions must reflect this.

Each issue of IFOSS L. Rev. will include a combination of full-length research articles, case law reports, legislative review articles, book reviews and editorials covering these themes. Peer-review is applied to the appropriate sections: for full details of the submission process, please see our website at http://www.ifosslr.org .

Operating principles and governance

The Editorial Committee of the Review is made up of members who also belong to the European Legal Network, a non-partisan professional network of Free Software legal experts. This network is facilitated by Free Software Foundation Europe (FSFE), though membership extends across a broad spectrum of interests engaging in Free and Open Source Software across four continents.

FSFE exerts no editorial control over the Editorial Committee,. The composition of the Editorial Committee rotates regularly among European Legal Network members. This normally happens after the publication of each issue, and is governed by consensus decisions taken by the European Legal Network as a whole. The Review receives financial support from the NLNet Foundation.

Overview of Volume 1, Issue 1:

This first issue of the Review contains a variety of articles which key into what is said above about the scope and ambition of the Review.

The most newsworthy case-law development in recent months in the world of FOSS licensing was the decision of the United States Federal Appeal Court in *Jacobsen v. Katzer* 535 F.3d 1373, a decision which is interesting to Free and Open Source lawyers for the Court's analysis of the fundamental nature of FOSS licensing conditions and to the wider public for its story of duplicity and dirty dealing in the world of model railway enthusiasts. In his article, *Bad Facts Make Good Law*, Lawrence Rosen magisterially unpacks the decision from the perspective of a U.S. lawyer, whilst Mark Henley looks at the decision from the other side of the pond in his stimulating article, *Jacobsen v Katzer and Kamind Associates – an English legal perspective*.

In a major contribution to working with Free and Open Source Software, Shane Martin Coughlan and Andrew Katz, in their article *Introducing the Risk Grid*, report on the work of a Special Interest Group of the European Legal Network. This Group considered possible methods to reduce or contain risk in transactions related to the supply chain in relation to commercial procurement of Free and Open Source Software. That work culminated in the creation of a Risk Grid, an invaluable tool for which both Customers and Suppliers will have cause to be grateful, regardless of their relative experience in Free andOpen Source Software and methods.

Also of great practical utility is Ywein Van den Brande's *The Fiduciary Licence Agreement: Appointing legal guardians for Free Software Projects*, which discusses the new version of the Fiduciary Licence Agreement released by the Free Software Foundation Europe. This Agreement allows Developers of Free Software Projects to assign their copyright to a single person, with the intention of (amongst other things) preserving the ability to relicense and allowing the assignee to demonstrate to the court sufficient title and interest to enforce Free and Open Source Licences.

The difficult and persistent problem of living with software patents is addressed by Christopher Wong and Jason Kreps in their article *Collaborative Approach: Peer-to-Patent and the Open Source Movement*, which gives useful guidance on how the Open Source movement, through using a process of peer review of pending patent applications, can cope with the threat of the proliferation of non-meritorious or overly broad patents.

In a *Tech Watch* article, KDE Vice President of Legal Affairs Adriaan de Groot reviews some of the issues presently confronting community software authors: copyright consolidation, making a living from coding, and, as he puts it, 'doing legal stuff right'.

Finally, Andrew Katz, in a sceptical and entertaining book review touches on some of the themes already canvassed in this editorial, underlying that theological debate on the virtues of different "movements" is more often productive of heat than light; whilst, in an equally provocative *Platform* article, *Collaboration among Counsel*, Karen Copenhaver challenges us with the question "why don't the lawyers get it?".

Consideration of this overview of the first issue should prove that one can be serious-minded and intellectually rigorous in addressing vital questions, yet at the same time be entertaining, stimulating and provocative.

And so, gentle readers, if you find yourself educated, informed, entertained, stimulated or provoked by this first issue of the International Free and Open Source Law Review, then perhaps you might find yourself moved (or even irritated) enough to write a contribution for the second issue.

In that spirit, your Editorial Committee offers this first ever issue of the Review to the world: it no longer belongs to us, but to you, all of our readers.

Iain G. Mitchell Q.C. and the other members of the IFOSS L. Rev. Editorial Committee