Editorial

Iain G. Mitchell Q.C.[a]

on behalf of the IFOSS L. Rev. Editorial Committee'

*(a) Chairman, Scottish Society for Computers and Law;
Chairman, Scottish Lawyers' European Group; Chairman,
Faculty of Advocates IT Group; United Kingdom
representative on the IT Committee of the CCBE; Lecturer,
Honorary Board of Lecturers, Institut für Informations-,
Telekommunikations- und Medienrecht, Westfälische
Wilhelms- Universtät, Münster; Liveryman, Worshipful
Company of Information Technologists.*

Abstract

Iain G. Mitchell Q.C. looks back at the first two years of IFOSS L. Rev. sets the context for the exciting articles which appear in this issue and looks forward to the future.

Keywords

Law; information technology; Free and Open Source Software

Info

This item is part of the **Editorials** section of IFOSS L. Rev. For more information, please consult the relevant section policies statement.

When the International Free and Open Source Software Law Review was launched in July, 2009, the Foreword stated:

> *"The Editorial Committee presents this first issue of the International Free and Open Source Software Law Review 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, whilst staying true to the underlying aim of enhancing digital freedoms for all."*

Now as we enter 2011, we might ask whether and to what extent the Review has lived up to its promise.

There were those who questioned the sustainability of such a publication - after all, what is there to be said, not even about software licensing but, indeed Open Source Licensing? Is this not a very narrow field?

Well, the Review was launched into a changing world, and it is a pace of change which has not only been maintained, but has picked up speed in the intervening period, and with change, new questions present themselves and old ones come up again in very different contexts. This constant freshness is apparent from the range and scope of articles which have appeared.

The first edition carried the hopes of the Free and open Source licensing Community, not only in the terms of the editorial, but also in an article from Karen Faulds Copenhaver. At the time of the first Issue, the hot topic was the *Jacobson v Katzer* case, for here was a blessing from a U.S. Appeals Court of the open source licensing model. The review carried analysis of the case from both the U.S.[1] and English[2] perspectives and the hope seemed, as it still seems, justified. But the Review did not restrict itself to commentary and analysis as the first issue also launched the Risk Grid,[3] a useful, practical tool for all of those involved in the field.

By the second issue, the perspective had broadened, both in scope, with articles considering the interaction of Open Source licensing with other forms of intellectual property, including Trademarks (the Tiki Dare and Harvey Anderson article),[4] Patents and Open Standards (Sylvia Pfeiffer's *Techwatch* article)[5] and also in time, looking back to the past (in Iain Mitchell's Article on *Hinton v Donaldson* in 1773 throwing old light on new controversies)[6] and forward to the future (as in Susannah Sheppard's article looking forward to a future where open source solutions become *de facto* standards and analysing the issues that might cause with Competition Law).[7]

The Third Issue (Volume 2, number 1) saw new judicial support for Open Source Software, this time by the Italian Constitutional Court in relation to the freedom for a Regional Authority, consistently with procurement law, to favour open source software, and this provided material for a case report from Carlo Piana.[8] The tradition for solid practical guidance established by the first issue was carried forward by Neil Brown's article on the GPL 2.0 and GPL 3.0 obligations to include licence text and provide source code,[9] Martin Von Willebrand and Mikko-Pekka

---

1   Rosen, Lawrence (2009) 'Bad facts make good law: the Jacobsen case and Open Source', *IFOSS L. Rev.*, 1(1), pp 27 – 32,

2   Henley, Mark (2009) 'Jacobsen v Katzer and Kamind Associates – an English legal perspective', *IFOSS L. Rev.*, 1(1), pp 41 – 44

3   Coughlan, Shane; Katz, Andrew (2009) 'Introducing the Risk Grid', *IFOSS L. Rev.*, 1(1), pp 33 – 35

4   Dare, Tiki & Anderson, Harvey (2009) 'Passport Without A Visa: Open Source Software Licensing and Trademarks', *IFOSS L. Rev.*, 1(2), pp 99 – 110 DOI: 10.5033/ifosslr.v1i2.11

5   Pfeiffer, Dr Silvia (2009) 'Patents and their effect on Standards:Open video codecs for HTML5', *IFOSS L. Rev.*, 1(2), pp 131 – 138 DOI: 10.5033/ifosslr.v1i2.21

6   Mitchell QC, Iain G (2009) 'BACK TO THE FUTURE: Hinton v Donaldson, Wood and Meurose (Court of Session, Scotland, 28th July, 1773)', *IFOSS L. Rev.*, 1(2), 111 – 122 DOI: 10.5033/ifosslr.v1i2.23

7   Sheppard, Susannah (2009) 'Balancing free with IP: if open source solutions become de facto standards, could competition law start to bite?', *IFOSS L. Rev.*, 1(2), pp 73 – 82 DOI: 10.5033/ifosslr.v1i2.16

8   Piana, Carlo (2010) 'Italian Constitutional Court gives way to Free Software friendly laws', IFOSS L. Rev., 2(1), pp 61 – 66 DOI: 10.5033/ifosslr.v2i1.38

9   Brown, Neil (2010) 'GNU GPL 2.0 and 3.0: obligations to include license text, and provide source code', *IFOSS L.*

Partanen's article on Package Review as part of the compliance process[10] and Pieter Hintjens article on the Consensus-Oriented Specification system.[11] The forward-looking orientation was maintained by Luis Villa's Platform piece on Challenges and opportunities for open source legal communities.[12]

The trend which emerges from the first three issues is of a growing realisation of the way in which Open Source Software is not only developing but is also more and more becoming part of the mainstream as it continues to receive recognition from public authorities as well as courts and the wider business community. But if Open Source has well and truly broken out of the ghetto, that is going to throw into sharper relief the question of how it interacts with the wider world, technically, economically and legally. These questions, already flagged up in the first three issues, move on to centre stage in the present issue, which is, more than ever, about interoperability: Malcolm Bain looks at software interactions and the GPL;[13] Noam Shemtov gives a review of the current approach of the EPO to Software patents,[14] which serves to put into context the fraught issue of levelling the playing field for Open Source by compelling FRAND licensing of patents, a topic tackled by Maurits Dolmans;[15] whilst the Procurement thread is carried forward by Mathieu Paapst in his article on affirmative action for Open Standards procurement.[16] Lest all this seem a bit like looking at the trees rather than the wood, one could not do better than read Matt Assay's article, *Never a better time for Open Source*.[17]

And what of the future? The European Commission is now clearly convinced of the advantages of Open Source Software, and with the publication in December 2010 of the new European Interoperability Framework, the level of discussion, analysis and, it may be, litigation surrounding Interoperability looks set to gather pace. As Open Source increasingly becomes a serious contender in Public Procurement exercises, competitive restrictions, such as proprietary vendor lock-in will finally begin to be taken seriously, and, it may well be, will start to become the subject of litigation in both the procurement and competition fields. No doubt there will be much to be written, as time progresses, about how successful or not the Interoperability framework will have been.

In short, as the Review heads towards the start of its third annual volume, there will be no shortage of new things to write about and in respect of which to lead discussion, all as *the Review* has done

since its inception. We might modestly suggest that the promise made in the first editorial looks set to be fulfilled.

Iain G. Mitchell QC