Editorial

Malcom Bain[a]

(a) Partner, ID Law, member of the Editorial Committee

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Abstract
Introducing Volume 4, Issue 1

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Welcome to the 4th volume of IFOSSLR, Issue 1!

This issue covers a broad variety of topics that are relevant to free and open source software licensing, from core issues such as the meaning of "distribution" of software under US law (highly relevant with respect to GPL licensing), to the more exploratory issues of open hardware and open database licensing. It also touches upon dealing with the GPLv2's "*liberty or death*" clause and the pros and cons of setting up an open source foundation to shepherd a FOSS project.

The variety of articles show two trends which I think are important. First, that there are still key legal issues relevant to free and open source licensing that need "digging into" and sharing, such as Heather Meeker's article on the meaning of distribution, but also topics that have also been touched upon the Law Review, such as the meaning and scope of copyleft under the GPLv2, or issues about multiple ownership of code.

Second, that "freedom" and "openness" are (and indeed already have been) branching out into new areas such as data, and more particularly databases, and hardware. Without mentioning the trends for open governance, open standards, open APIs… These areas are raising new legal issues that are both interesting and challenging to get to grips with.

Open data is a movement that is gaining ground, as governments are leading the way in making more and more information (data) available, often under laws or directions given regarding access and reuse of what is called "Public Sector Information". I have seen several such online data repositories, "released" under open source software licenses (!), Creative Commons or other content licenses, or custom made licenses using terms that are associated with generic copyright protected works, or even patent-style wording. Creating understanding and inertia towards

adapting open data licensing terms to the legal framework for data and databases (legislated, at least, in the EU, but also under common law principles in the US, for example) is a good idea, as would be some consensus and even standardisation, to avoid the fragmentation that the free and open source software community is facing. Simone Aliprandi's article here comes at the right moment. And Open Data Commons[1] has made a good start – something that may need "internationalising" as governments may want or have to use jurisdiction specific licenses (in their own language). Mixing and reusing data is going to be as useful and innovative as mixing and reusing software, so anything to make this easier must be a good thing.

So this is a highly "active" space, albeit in our own quite specialist manner. Space that the courts are currently moulding (or remoulding), in their own way, viz. the recent European Court of Justice decision in *SAS Institute Inc. v. World Programming Ltd.*[2], the US Supreme Court's decision in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*[3] and the hot-off-the-press decision of Judge Alsup in Oracle America Inc. v. Google Inc.[4]

While on a preliminary reading of Oracle America v. Google it seems that Oracle's Java APIs have been held not to be protected by copyright (in the circumstances of the case - which is ripe for a full IFOSSLR article and we recommend a visit to Groklaw to review the full text and comment), the other two decisions are of similar interest.

We are grateful to Rob Tiller for the his note on the Mayo decision, which will have overall implications in the software patentability debate and the application of the "law of nature" exclusion to patenting.

The ECJ decision, while not ground shaking, is of considerable interest and something that we hope will provide an incentive to contribute a new paper (or papers) to the Law Review – in the next issue! Coincidently, it bears some similarity to the Mayo decision, in that the Court is creating an exclusionary ("no-go") zone for things that are not protected or monopolised by Intellectual (and Industrial, for continental EU lawyers) Property Rights. Maybe not so "coincidently", if we are - hopefully? - seeing a jurisprudential trend towards defending the public interest, innovation and "technical progress".

> *44. As the Advocate General states in point 57 of his Opinion, to accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development.*

It seems, from a quick reading of this decision in the short time available since being handed down, that it supports the argument that certain "elements" of a computer program, such as its programming language, its "functionality" (a more abstract concept that I think needs deeper analysis), or the format of data files requested for APIs or for exchanging parameters, are not protected by copyright law, reinforcing the principle set out in the EU Software Directive that only

1 Online at http://opendatacommons.org/

2 Case C-406/10, 2 May 2012, online at http://curia.europa.eu/juris/document/document.jsf?text=&docid=122362&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=115060

3 Decision online at http://www.supremecourt.gov/opinions/11pdf/10-1150.pdf

4 Online and commented at Groklaw: http://www.groklaw.net/article.php?story=20120531173633275

the expression of a computer program is protected by copyright. The devil will probably be in the details, and it will be interesting to see how the English High Court applies this decision (clarification?) to the case before it.

We would also like to welcome on board the new members of the Editorial Committee, Jilayne Lovejoy, Alex Newson and Daniel German, to whom we are enormously grateful for the knowledge, skills and experience they bring to our team, and for helping us share the "not unburdensome" task of editing this and future Issues of the IFOSSLR.

About the author

Malcolm Bain *is partner at id law partners, boutique IP/IT law firm in Barcelona. English solicitor and Spanish lawyer, he has advised many open source based technology projects and teaches "open source legal issues" at the Open University of Catalonia, among other FOSS related activities.*