

Floss and the 'Crisis'

Foreigner in a Free Land?¹

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“... capitalism (or any other name that one wants to give to the process that today dominates world history) was not only directed toward the expropriation of productive activity, but also principally toward the alienation of language itself, of the very linguistic and communicative nature of humans, of that logos which one of Heraclitus's fragments identified as the Common. The extreme form of the expropriation of the Common is the spectacle, that is the politics we live in. But this also means that in the spectacle our linguistic nature comes back to us inverted. This is why (precisely because what is being expropriated is the very possibility of the common good) the violence of the spectacle is so destructive; but for the same reason the spectacle retains something like a positive possibility that can be used against it”.²

- Giorgio Agamben, *The Coming Community*

There is a lot written about the world of Linux, Free, Libre or Open Source Software³ production. Most of it is gushingly positive and written in a manner that only seeks to promote the benefits of this type of software over the apparently dominant corporate or proprietary forms. Supportive reportage generally posits Floss (Free/Libre Open Source Software) as being more advantageous in terms of personal or community autonomy than are the dominant corporate/proprietary alternatives. The basic argument is based upon the premise that Floss grants the technologically savvy user/producer greater control over the machine to which their production is tied. As *The Seattle Times* reported on the eve of the 2003 World Summit on Information Society (WSIS): “Particularly in the developing world, Linux and other free and open-source software have economic and political attractions ... Politically, a shift to open-source can be a digital declaration of independence in an era when the United States and its software industry are not universally trusted”.⁴ It should go without saying that this political attraction is not confined to the ‘developing world’.

At first glance there are not a lot of ‘essays in self criticism’ surrounding Floss and not much seems to be written that, even by implication, appears relevant to these times of perpetual crisis that this issue of the *Sarai Reader* is devoted to. However, I think it can be reasonably argued that Floss, its methods of production, as a form of labour and its location within the realm of the global politic, is firmly a part and parcel of the world of crisis.⁵ Floss is in many ways the archetypal crisis media, and its potential as an alternative thus

rests with decisions made by those that live and act within these crisis times. Floss inhabits a space that is signified by the tendency of global corporate sovereignty, and here I will seek to outline an argument that Floss currently resides within a particularly American vision of freedom which seems to be spreading virus-like in its quest to smooth the space of the globe. With this vision and this tendency, fear and control are sought to be generated with the invoking of images of the enemies of freedom often related to the 'war on terror'. But these images form only some of the gloss of the spectacle necessitated by this overarching tendency toward global corporate or Imperial sovereignty.

In some ways the label, Floss, that is the term or description itself, appears in fact to be situated at the heart of this tendency. The American flavour to the rhetoric embodied in the name, and in the language that abounds around it, causes me to have concerns as to whether the Floss machine in its present incarnation can live up to the expectations, and whether it is a real and viable alternative – that is, whether its potential can survive the increasingly imperial form of global sovereignty within which we live. In saying this, it is probably necessary to point out that the enquiry I seek to commence is not 'against' Floss but one that seeks to contribute to the continuation of the political benefits of the machine. In this regard, borrowing from Foucault, I think it is fair to say that "... there are no machines of freedom, by definition ... the exercise of freedom can only function when there is a certain convergence; in the case of divergence or distortion, it immediately becomes the opposite of that which had been intended..."⁶ Or to paraphrase what he said in another place, my point is not that Floss is either bad or good in itself, but that "everything is dangerous ... (and if) everything is dangerous, then we always have something to do".⁷

Therefore, what I would like to try and do here is to raise the question, open it for comment as it were, about the rhetoric, the language, the discourse that envelopes the Floss machine, and look a little at its particular place and heritage in order to try and see if this factor in any way gives cause for concern, and to reconsider the current, particularly uncritical, approach. My interest here lies in trying to come to grips with a snippet of the rhetoric of this vision of Floss in order to try and understand what sort of vision of 'free' it is tied to. I want to raise the questions as to whether the 'Free as in Freedom' of Floss-speak is bound to a certain vision of 'Free as in America', and in doing so raise the possibility of considering other ways with which we may be able to re-imagine Floss and its future, and thus possibly continue to pursue its emancipatory potential.

I intend to start exploring here the intersections of the rhetoric of 'Free as in Freedom', the law of copyright, and what I have dubbed, "Lessig's transcendental foundationalism" within the global 'kingdom of money'. Here I can only seek to lay out the bare bones of an argument suggesting that the intersection of these various lines do not coincide with a drift toward 'free as in speech', but with a drift toward a machine that proposes property itself as the basis of liberty and freedom. It appears to me that to pose speech against property in the forums of capital, as the rhetoric of Floss seeks to do, within the context of the rhetoric of American freedom, is to concede the struggle to a form of American constituted power, privileged by capital within the realms of imperial sovereignty. It is more than likely, given the intersections I seek to describe, that it will be property that comes out on top – even if that means perpetual crisis, and continual management and control of the hackers,

pirates, terrorists and other barbarians who seek to escape the bounds of freedom.⁸

At this point a brief digression is probably in order to position the conceptions of freedom that I will discuss. I have let forth here with a phrase 'Free as in America' – I am attempting to take the piss out of Stallman's "Free as in Freedom" – probably without luck; and I am sure my characterisation of this sort of logic as being 'Free as in America' will rile some and be held against me and what I am trying to grapple with. I could be open to attack that I am treating America and its visions of free as some totalized whole. But what I am alluding to here is that 'constituted' freedom as signified by aspects of American law, politics, culture and power. To help set the bounds of this particular 'freedom in the American sense', it might be useful to first refer to Larry Lessig, one of the chief proponents of American free speak in relation to things digital.

Speaking of the struggle for control of the internet, a topic interwoven with the life of Floss, Lessig states in his second tome, *The Future of Ideas*, that this struggle "will determine what the 'free' means in our self congratulatory claim that we are now, and will always be, a 'free society'. ... This is a struggle about an ideal". He continues to deny that this meaning of free is either a moral or a political question, but "instead best described as a constitutional question: it is about the fundamental values that define this society and whether we will allow those values to change. Are we, in the digital age, to be a free society? And what precisely would that idea mean?"⁹ Lessig may be just carving the meat off the bone in order to dissect what he feels is the core issue, but it is easy to get the feeling that to him, either we are all Americans now, or that decisions about the internet are best made within the US constitutional context. For me, here lays the heart of Lessig's analysis, the line that runs through his two books: he proceeds as if the struggle regarding the future of the internet, its control, is a purely constitutional matter, and, at that, an American constitutional matter. For all that Lessig gives us, this is the thing that gets stuck in my throat when I read him: his abiding faith in America, its Constitution and its 'founders'. For Lessig, 'the' constitution is an architecture "that structures and constrains social and legal power, to the end of protecting fundamental values – principles and ideals that reach beyond the compromises of ordinary politics".¹⁰

We can try and situate Lessig's constitution and its freedom in a wider context by looking at Toni Negri's work, *Insurgencies*.¹¹ Here Negri takes us on a journey that traverses America, Machiavelli, Spinoza, Harrington, Rousseau, Marx and beyond. In particular, he examines the "freedom of the frontier" in a way that obviously was taken up later in his writing with Michael Hardt in *Empire*.¹² Negri characterizes the American revolution as an example of constituent power, "an effective, social, political alternative"¹³ to the transcendent constituted power of sovereignty or constitutionalism. For Negri, constituent power is founded in the multitude, "an always open form of democratic government".¹⁴ Negri chronicles how American constituent power, founded upon the frontier, in the end was submitted to the constitution: "The *homo politicus* of the revolution must submit to the political machine of the constitution, rather than in the free space of the frontier, the individual is constrained to that of the constitution. ... [I]t is absorbed, appropriated by the constitution, transformed into an element of the constitutional machine. It becomes constitutional machinery. What constituent power undergoes here is an actual change of paradigm ... shift-

ing it away from its meaning as active participation in the government to a negative meaning - that of an action ... under the aegis of the law".¹⁵ It "is not conceived as something that founds the constitution, but as the fuel of its engine ... no longer an attribute of the people ...(it) has a model of political society".¹⁶ The constitution becomes an organism with its own life, with the people reduced to a formal element of government - "a modality of organised power".¹⁷ And at the heart of this organized power, "the constitution is elevated to the kingdom of monetary circulation". Money replaces the frontier, as Negri describes the "organism by which Hamilton is inspired is that of the 'powerful abstraction' of money, of its circulation, and of its pulse. ... [He] reorganises power around financial capital".¹⁸ Thus when I speak of 'free as in America', I refer to this America constituted on power and confined by "the transcendental theory of the foundation", and with it the "always theological foundations of capital's economy".¹⁹

With this as background, let's continue. In its pure state, the Floss machine may bear some of the hallmarks of a form of communal production, as described for example by Marx in *Grundrisse*.²⁰ Or because of its apparent 'rejection' of the proprietising aspects of copyright law, Floss appears to be, or is professed to be, beyond (or even prior to) property, and thus embodying a tendency that is outside the realms inhabited by commodities and even in the longer term, capital. However, although differences exist within the high priests of Floss, their mantras are well expressed by Stallman's position that Floss is not "Free as in Beer"²¹ - that is as in price, and hence it is Libre and not Gratis - but "Free as in Speech". The reference to "as in Speech" links us back again to 'The Constitution' and in particular to its First Amendment. And thus it is here, with this intersection of 'free' with "free speech" and not with "free beer" that we encounter the beginnings of the production or piloting of the rhetoric of "free as in freedom". With this intersection, the production of the logic and rhetoric of Floss are immediately caught within the bounds of American visions (and hence imperial capital's visions) of what it means to be free. Our initial point of departure is immediately caught within the bounds of an American, a constitutional freedom.²²

Two quick points here - within this American vision there is a definite binary, but complementary, vision of what 'free' means. It is clearly tied to capital and its attendant concepts of innovation. Here, free speech is often perceived as founding a marketplace of ideas that in turn nurtures private acts of development associated with commodity relations. Speech here is the breeding ground of "the kingdom of monetary circulation",²³ rather than the boundary of the frontier. Second, this particularly American vision of freedom is not what many of us, who find ourselves at the edges of or within contemporary capital, envisage when we think about 'free', and/or even the benefits of Floss. But as the smooth space of Empire is widened, through the work of the imperial military, corporate and NGO (non-government organization) machine, we find ourselves more and more within this particularly American vision of 'free as in freedom'. Thus we succumb to this virus of American freedom, whether we like it, believe it, think it, intend it, want it, or not.

Without a doubt, Floss plays an integral role in the production of knowledge in the contemporary world, especially where linked by the coverage of the internet. In this way Floss forms a part of the new forms of "immaterial labour"²⁴ made possible by communications technology. In fact, to a large degree, Floss actually makes a large part of communications

technology possible. It is indisputable today that many of the links and portals within the internet are themselves products of Floss. And, as with the internet, it is arguable that in its original peer-to-peer form Floss constitutes a vegetal, rhizomatic model of production in which concepts or products are never stable but in a state of constant flux, as they are modified or transformed by producers and users in their communal passage from one problem to the next. If these characterizations are accurate, Floss may then contain the possibility of being a "system in perpetual heterogeneity", or even crisis.²⁵ Therefore, in many ways it could be said that Floss is against the arborescent, the corporate, the proprietary or the cathedral image which has been, up until recent times, the prevailing model of production within capital. Nevertheless, it has been convincingly argued (as far back as *Grundrisse*) that capital itself is a system of this type, continually coming up against and seeking to overcome its own limit.²⁶ And it is precisely because capital is a system that continually requires new forms and methods for its own survival, and because of this hunger for new sustenance, that more than the mere repetition of the benefits of Floss and its current rhetoric and logic is required in order to resist such consumption – an over-coding that tends toward control and a functioning consistent with its ever present "cash nexus".²⁷ While Floss does have within it an enormous emancipatory potential that may be realized by creating "continuous connections and transversal tie-ins",²⁸ this threat of over-coding by capital, the threat of blockage of its lines of flight is continuous. And as Floss, like capital, is in a constant state of crisis, there is always work to be done to realize its emancipatory potential. There is little to ensure that capital will not devour and regurgitate Floss anew in its own likeness. It will come "back to us inverted" or at least not bearing the likeness with which it was originally conceived. In the light of this, the intersections I seek to describe here, through the production of meanings, tend to produce Floss, pilot it, to take on the likeness required by capital.

I will now try and sketch some factors in order to flesh out the ways these intersections may tend to confine Floss within a particular form of logic and piloting. By considering some statements related, in one way or another, to the position of Floss within law, economy and discourse, it is possible to understand how its potential to go beyond the acceptable bounds of imperial freedom is being watched, monitored, controlled, and when necessary, castigated. At present, little attention is being paid to these movements; there is very little critical analysis of this side of the picture. There is a tidal wave of promotion surrounding Floss's benefits, self-congratulatory back patting and repetition of mantras such as "information just wants to be free". But critical analysis of this rhetoric is too often avoided, and when raised, dismissed as coming from a non-believer or from someone 'against'. This state of affairs is open to attack on many a level.

The attacks upon the Floss machine's potential lines of flight are being made and becoming clearer by the day as the rhetoric of the other, complementary side of the American free-speak machine tends to include Floss and its various coordinates within its sights. A notable occurrence was when WIPO decided to can its planned meeting to discuss Floss. *The Washington Post*²⁹ reported, "It is understood that lobbyists ... pressed the US State Department and the US Patent and Trademark Office to have the meeting called off. ... Lois Boland, Director of International Relations for the US Patent and Trademark Business

says that open-source software is contrary to WIPO's mission to promote intellectual property rights. 'To hold a meeting to disclaim or waive such rights seems to us to be contrary to the goals of WIPO', she says". In characteristic form, Lessig dismissed her comments as ignorant and sought to give her and us all a lesson on what copyright is "correctly" all about.³⁰ But the point was that the lobbyists and Boland had set the stage for WIPO's withdrawal and opened the path for the questioning of the most acceptable role for Floss within the bounds of imperial sovereignty.

At the other end of the spectrum are the direct calls for control. Reflect upon the language of SCO's Darl McBride in his "Open letter to the Open Source Community".³¹ McBride couches his language in familiar 'you're with us or against us' rhetoric: "No one can tolerate DDoS (Distributed Denial of Service) attacks and other kinds of attacks in this Information Age economy that relies so heavily on the internet. Mr Raymond and the entire Open Source community need to aggressively help the industry police these types of crimes. If they fail to do so, it casts a shadow over the entire Open Source movement and raises questions about whether Open Source is ready to take a central role in business computing. ... Until these illegal attacks are brought under control, enterprise customers and mainstream society will become increasingly alienated from anyone associated with this type of behaviour". Now it might be easy to dismiss the SCO drama as an aberration, as the death throes of a failed company, or even to try and disprove that the attacks did in fact occur, but the language surrounding their case, their legal claims and even McBride's Bush-like rhetoric sit well with much of the discourse of late.

We are used to this language when it comes to the crimes of file sharers, with whose 'pirating' the 'worst excesses' of the P2P culture are associated. Not so very long ago, a few kids in Sydney had to face the music in court. Their story, as told in the media, is one of castigation and control.³² Law in this case castigated by use of the criminal sanction, but at the same time the example serves the tendency of law in its becoming-economic, its tendency toward economy. That is, it is becoming-economic in both the sense of the free market and in the sense used by Foucault concerning the correct and efficient management of individuals.³³ Here is an example of law intervening to discipline deviant, un-commercial relations, and in so doing, shows how law plays its part in producing smooth capitalist relations.

With these instances of castigation, whole communities and fields of communication and practice are concurrently and implicitly called into question. They become suspect. These events occur and with them arrive far wider desires for control and restraint, as one of the pirates/sharers, Tran, told the press after his conviction: "I strongly discourage anyone else from doing this as well". The example of Tran and his fellow pirates turned into unwitting agents of control oils the economy of law, which in turn oils the economy of economy. In the spectacle of the imperial machine there is a link, no matter how tenuous in reality, how rhetorical and attention-grabbing it may seem, between cyber-delinquency and that other evil, global terrorism. Cyber-delinquency, file sharing, become in the spectacle of Empire, the metaphoric equivalent of smoking pot behind the school shed, a simple step away from the heroin of Al Qaeda.

Lessig and others were able to dismiss the US Patents Office 'outside' interference in WIPO's plans as ignorant, but it became a little harder after the organisation decided to

contribute to the spectacle itself by announcing in the weeks prior to WSIS 2003 that IP theft was in fact a form of “terrorism”.³⁴ Closer to the homeland, as they call it, technology companies are urged to cooperate in the battle against cyber-terrorism – or submit to government-imposed security regulations. “The enemies of freedom use the same techniques as hackers do”, U.S. Homeland Security Secretary Tom Ridge said to 350 industry executives gathered for the first National Cyber Security Summit in Santa Clara.³⁵ And then, funny things happen: late in November ICANN’s³⁶ name registry website was hacked. As reported, “... visitors to the name registry home page [found] a mysterious black screen upon visiting the site ... The bottom of the black screen ... included a rotating image displaying the following text in sequence: “It’s good. www.slackware.com Open Source is Good. Free is Good. Slackware Linux”.³⁷ And very soon after, SCO’s own website was repeatedly, or allegedly, attacked. Whatever the facts may be is probably not the point.³⁸ The point is the contribution to the spectacle, as the file sharer, the hacker, the cyberdelinquent, the pirate and the terrorist, become the scapegoats of the information society, “charged with everything ... bad ... everything that resist(s) the signifying signs” of American free speak, the incarnation of “a line of flight the signifying regime cannot tolerate ...”.³⁹ The tendency of this rhetoric appears to want to keep deviant technology, and by implication, Floss, within the bounds of American freedom to ensure it does not escape capture, that it is functional and controlled within the global machine.

This tendency toward the limiting of the frontier of Floss intersects dangerously with the rhetoric of “free as in freedom” with which I opened. How does this intersection manifest itself; that is, what do we encounter with this convergence of the Ridge/McBride/WIPO allusions to terror with the freedoms of Stallman and Lessig? Is the consequence of the intersection of their freedoms incompatible, or are they just two complementary sides of the same American freedom bound together by the organized power of the Constitution? I am not suggesting that Lessig or Stallman hold views of the nature of Ridge, but that their language and the meanings that it produces tend to permit only an American freedom. That is to say, Lessig’s foundationalism intersects with Stallman’s freedoms so as to bind them to a constituted freedom within the context of global capital. The question to ask is – what is being produced? Is it a Floss that is being piloted within the acceptable outer boundaries of freedom, centred as they are upon the axiom of a marketplace of ideas that nurtures private acts of development?

One way to come to grips with this tendency is by considering some of the legal discourse concerning these issues. The current SCO related litigation⁴⁰ and the Eldred case⁴¹ provide us with one way in which to commence such an enquiry. In looking at these instances, it is useful to step back a little and commence by providing a brief reconnoitre of the American vision of liberty enunciated within the US Constitutional context. Liberty and hence freedom in America has a particular Lockean genealogy or derivation. For Locke, society was based on property and property embraced a man’s right in his own person to use his labour as he saw fit. At the time of the much vaunted ‘founders’ of the US Constitution, people recognized “the exclusive use of some tangible property as essential to survival and the right to such as essential to autonomy”; that vision embraced the notion that, “to the extent that a person is dependent on another for the necessities of life, that

person is not autonomous".⁴² It was one of the 'founders', Alexander Hamilton, who wrote that "a power over a man's subsistence amounts to a power over his will".⁴³ For the "generation of 1787-91, property was a natural right ... that basic right included a cognate right to contract with other property holders...".⁴⁴

By the latter part of the nineteenth century, and as the movement from an agrarian to industrial economy occurred, the prevailing wisdom was that uncalled for interference with property rights, and the new industrial market where "...competition was a law of nature" risked paying "... the price of mitigating the economic struggle" which in the end may signal "... the destruction of liberty...".⁴⁵ Property was thus "the fundamental constitutional value, liberty ... the primary constitutional right, and substantive due process ... the instrument for their accomplishment...".⁴⁶ *Allgeyer vs. Louisiana*⁴⁷ summed up the Supreme Court's jurisprudence at the time: "The liberty mentioned in (the fourteenth) amendment means not only the right of the citizen to be free from the mere physical restraint of his person ... but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; ... and for that purpose to enter into all contracts which maybe proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned". It "was the last right, that of contract, which the Court came to consider paramount". Of course, the paradigm case of this period and of *laissez faire* capital and substantive due process was that of *Lochner vs. New York*.⁴⁸ *Lochner* has been much criticized, but has also been the subject of some writing about the new cyber-economists who characterize neo-liberal thinking about the information society.⁴⁹ Whether or not the specifics of *Lochner* are what lawyers call "good authority" may be a moot point. What is not moot, however, is that the liberal vision that found its voice in *Allgeyer* and *Lochner* is alive and well in the current neo-liberal US Supreme Court.

How does this short history intersect with the SCO cases and with the rhetoric I have previously set out? As I have briefly tried to state, much of the Floss rhetoric of 'freedom' is couched in terms of being the 'correct' argument or position because of its alleged conformity with the vision of the 'founders'. I don't want to buy into an argument as to whether SCO will be or could be successful; that is not my point here.⁵⁰ It is the role that SCO plays in the wider tendency of piloting that I am describing which is of interest to me for the present. This is where the real game of the economy of law in the contemporary world is played out. Becoming-economic entails law acting as much through its signals of control, 'fundamental values' or truths and power, as much as it does by the positive legal word.

Thus it is important to try and locate SCO's claims within the broad vision and genealogy of American freedom as described above. Situating it in this way, and considering its intersections with the rhetoric described, suggests that what is at stake may not be whether SCO survives but, in the end and at its core, the very meaning of (American) liberty itself. It goes without saying (or it should) that American meanings are of course increasingly important for us all these days. Globally, very few of us are immune to the virus of American freedom – even more so for those outside of the Floss machine; just ask those that now camp out, free, in the rubble of Afghanistan or Iraq. But within the Floss machine and amongst its high priests – its academics, lawyers and developers – to even suggest that SCO's claims should be seriously considered as relevant in any way is dismissed. To

Flossers, their legal arguments seem plain ludicrous. Their claims are unfathomable merely because Floss-ers are bound to hold dear their particular vision of 'free' as being the correct and the only logical one. Thus SCO's claims are given scant attention and are simply labelled "nonsense"⁵¹ by those within, or who hold their work as being the ultimate embodiment of, the dreams of the 'founding fathers'. In this way, the rhetoric of Floss in itself suffices to exemplify this strain of faith in law and liberty. However, let's go back to the SCO vision of copyright and why they say it is the 'correct' one, why Darl McBride says it is the one consistent with the vision of the 'founders', and read it in the light of the small piece of constitutional discourse set out above.

McBride's version is summarized in his analysis of the majority US Supreme Court opinion in *Eldred*. McBride argues that the "Court's analysis of the constitutional foundation of the Copyright Act applies directly to the debate between SCO and FSF/Red Hat regarding intellectual property protection for software". SCO's position is that the authority of Congress under the US Constitution to "promote the Progress of Science and the useful arts" inherently includes a profit motive, and that protection for this profit motive includes a constitutional dimension. Put simply, SCO says that the US Constitution protects a right to profit as a central element of its copyright provisions, and that the "progress of science" is best advanced by vigorously protecting the right of authors and inventors to earn a profit from their work. On the other hand, SCO says "... The Free Software Foundation, Red Hat and other GPL advocates take the contrary position. The FSF and Red Hat believe that the progress of science is best advanced by eliminating the profit motive from software development and insuring free, unrestricted public access to software innovations. The Free Software Foundation was established for this purpose. The GPL implements this purpose. Red Hat speaks for a large community of software developers dedicated to this purpose. However, the US Supreme Court has dramatically undercut this position with its guidance in *Eldred* in how to define the term 'promote the Progress of Science and the useful arts...'"⁵²

Whether McBride's characterizations of the GPL and its backers are ultimately accurate is again not the point. In the spectacle, things are about perception and, as I have tried to explore, rhetoric, and of course, power. The Floss machine privileges speech over property in its quest for innovation. This was the argument that Lessig so passionately ran in *Eldred*. But McBride is accurate when he says that the *Eldred* court privileges property and contract – profit – over speech as the fundamental underpinning of the copyright regime. This is probably best enunciated in a footnote to the majority opinion in *Eldred* where Justice Ginsburg wrote, "As we have explained, '[T]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors'. ... Accordingly, 'copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will rebound to the public benefit by resulting in the proliferation of knowledge ... The profit motive is the engine that ensures the progress of science'. ... Copyright law serves public ends by providing individuals with an incentive to pursue private ones"⁵³

This is the vision of freedom, the vision of the 'founders' of the US Constitution, that

holds sway within the bounds of freedom in America today. This is the vision of the becoming-economic of law and the functionality of the global machine. With this vision it is clear that the tendency toward freedom in America, “free as in freedom”, is the tendency toward that which favours property, contract and profit. Eldred specifically privileged ‘free as in profit’ over ‘free as in speech’. Keeping all this in mind – that is, the intersections of rhetoric and law that I have described – is there not some cause for concern? Does not using property to go beyond property, or using constitutional notions of freedom (whilst possibly a pragmatic and tactical decision in the circumstances) carry with it the risk of the most emancipatory possibilities of the project coming up against some sort of blockage, some sort of institutional opposition to its intended line of flight? Especially when all signs suggest that the tendency of global corporate sovereignty is toward the (en)closing of more and new forms of property to feed the engine of global information capital? If the global tendency of law becoming-economic is to act as a facilitator in the enclosing of open spaces, to act with the insurance of capital’s efficiency as its core *raison d’être*, as one of its axioms, why, or better how, can Floss-ers remain bound to their position which is bolstered (or boosted) by blind faith in the objectivity and reason of law, and trust that law will act to defend the vision of the ‘founders’, or that which they see as the ‘correct’ principles upon which their rhetoric seeks to justify their vision?

With all of this in mind – the intersections of Lessig’s transcendental foundationalism, the liberal and neo-liberal visions of contract, property and profit that underpin both the concepts of liberty in the US Constitution and that of innovation and progress in copyright – can we not conceive that the rhetoric of “free as in freedom” of Floss is in danger of being piloted in such a manner that it comes back to us “inverted”? Is there not the “very possibility of (a) common good” being produced by these intersections that is not the one that we originally intended, but one that has been expropriated by the necessities of the “cash nexus” that reigns within the “kingdom of money”?

I wonder, therefore, if without more than the hollow mantras – of invoking the vision of the ‘founders’ or “free as in freedom” or the more banal “information just wants to be free” – if there is any defensible position of Floss possible.

Floss at its heart is another form of community knowledge production; it is a community formed through a language of production that goes beyond the discourses and rhetoric I have tried to describe here, and as is the case with other forms of community knowledge production, its longevity as an alternative to imperial sovereignty requires more than simple repetition of currently accepted dogma. To do so will simply continue us along the merry path of totalizing one vision of the world and imposing it upon the rest. Should we – rather than trying to make all forms of community knowledge production conform to this peculiarly American vision of freedom, chanting along the way, “information just wants to be free” – not recognize that the potential and position of Floss is just one of the many manifestations of community knowledge production, a very special one indeed, and thus commence our analysis and discourse from there? Is not the desire to push all knowledge production into this logic of “free as in freedom” within the intersections set out here simply a corollary of the imperial tendency that seeks to allow no space for flight? To make us all “Americans” within the new “kingdom of money”?

To borrow some rhetoric myself, information and machines will not set us free, but a language and rhetoric which allows those that produce to control their machines may. Or, it is not enough to say that the machine gives you freedom; you also have to create intellectually mobile concepts of freedom to converge with it. But for now, it is probably enough to say that the quest of some Floss-ers for “universals of communication” should indeed tend “to make us shudder”.⁵⁴

NOTES

1. I wrote this paper while in Mozambique and the Basque Country for Sarai based upon some thoughts and doubts I encountered during research work I am undertaking into “The Logic, Rhetoric and Law of Open Source Software” for my post-graduate degree in law at the University of New South Wales in Sydney, Australia. I must thank Hans Skott Myhre, Derek Merrill, Michael Hardt, Benjamin Murphy and Monica Narula for their assistance in trying to formulate my ideas. I must also thank my thesis supervisor Kathy Bowrey for her constant assistance, criticism and her caring vegemite parcels which got me through this process, and no doubt will continue to get me through my larger research. The title changed with the text and in the end the subtitle “Foreigner in a Free Land” seemed to sum up the contradictions and doubts I had and which appear inherent in the situation. The subtitle as such also continues my tendency to adopt or adapt titles of Ornette Coleman tunes for my recent written work. See for example “The Shape of Law to Come”, <http://openflows.org/~auskadi/shapeoflaw.html>. I also must apologize to our friends in Latin America who know all too well about colonization and language coming as they do from a country (once) known as “América”.
2. Agamben, Giorgio. *The Coming Community* (University of Minnesota Press, 2001) p. 80.
3. Free, Libre or Open Source Software which for the sake of ease I will call here Floss, rather than Open Source, Free Software or one of the other variants. Peer-to-peer software production may be a more appropriate description at another time but the object here is better served by using a conjunction of the more common Free, Libre and Open Source labels.
4. http://seattletimes.nwsourc.com/html/nationworld/2001808984_linux06.html
5. Here I want to begin dealing with the questions surrounding rhetoric, language and law relating to Floss. But another line of enquiry relating to Floss as crisis media would indeed be to consider the actual method of producing software itself as a form of ‘crisis’. By this I mean the continual scratching or itches, the continuing ability to always seek to resolve problems afresh, and of always re-proposing the question at the limit. In this way Eric Raymond’s itch scratching, Deleuzian notions of thought and Toni Negri’s ideas of constituent power and crisis can be used as tools to examine the differences between peer-to-peer software production and that of corporate/proprietary software production. This question and intersection of the ideas of a gun toting US right wing libertarian, a couple of French philosophers and Negri’s relevant and most contemporary Marxism I must however leave for another day.
6. Foucault. “Space, Knowledge and Power,” in Rainbow (ed.) *The Foucault Reader* (Panthenon, 1984) p. 247.
7. Foucault, “On The Genealogy of Ethics: An Overview of a Work In Progress”, in Rainbow (ed.)
8. In my description of these intersections I will adopt as a part of my approach Foucault’s position outlined in his work, Michel Foucault, *The Archaeology of Knowledge* (Routledge Classics, 2002) pp. 39-42. For my purposes here, what I take as important from this exposition is that when one is within a certain theme of rhetoric or discourse, variants may and do occur, but the options open, the possibilities to act within a given field are bound by the pre-conditions inherent within the overall discourse of the theme.

9. Lessig, Lawrence. *The Future of Ideas* (Vintage, 2002) p. 11.
10. Lessig, Lawrence. *Code and Other Laws of Cyberspace* (Basic Books, 1999) p. 5.
11. Negri, Antonio. *Insurgencies* (University of Minnesota Press, 1999).
12. Hardt, Michael and Antonio Negri, *Empire* (Harvard University Press, 2001). *Empire* also provides us with the hinge with which to articulate the links between the American and Imperial constitutionalism.
13. Negri, Antonio. *Insurgencies*, p. 82.
14. *Ibid.*
15. *Ibid.*, pp. 157-8.
16. *Ibid.*, p. 160.
17. *Ibid.*, p. 161.
18. *Ibid.*, p. 164. At page 167: Constituted power erases "in the constitution the subjects that were its origin, it gives back to society pure and simple constitutional products, juridical individuals ... one thing is forgotten: the creative capability of the subjects ... (s)trengh has yielded to power, and nothing was left of it in the constitution".
19. *Ibid.*, pp. 307 - 308.
20. Marx, Karl. *Grundrisse: Foundations of the Critique of Political Economy* (Penguin, 1973). See for example pages 171-173, and later for example "The Fragment on Machines" and sections on the "General Intellect", pages 690ff.
21. The Free Software Definition – "'Free software' does not mean 'non-commercial'. A free program must be available for commercial use, commercial development, and commercial distribution..."
<http://www.gnu.org/philosophy/free-sw.html>.
22. As Lessig teaches us: "Free resources have nothing to do with communism ... I am not arguing that there is such a thing as a 'free lunch' ... Resources cost money to produce. They must be paid for if they are to be produced. ...But how a resource is produced says nothing about how access to that resource is granted. Production is different to consumption". Lawrence Lessig, *The Future of Ideas*, p. 13. Again I must leave this argument for another day.
23. Negri, Antonio. *Insurgencies*, p. 164.
24. Hardt, Michael and Antonio Negri. *Empire* (Harvard University Press, 2001). The fullest definition given by Hardt and Negri of immaterial labour is probably found at pages 290-294.
25. Patton, Paul. *Deleuze and the Political* (Routledge, 2000) p. 17.
26. See for example Gilles Deleuze and Felix Guattari, *Anti-Oedipus, Capitalism and Schizophrenia* (Viking, 1977) p. 230.
27. Patton, Paul. *Deleuze and the Political*, p. 96.
28. Deleuze, Gilles and Felix Guattari. *A Thousand Plateaus* (University of Minnesota Press, 2002) p. 166.
29. Krimm, Jonathan. "The Quiet War over Open-Source", *The Washington Post*, <http://www.washingtonpost.com/wp-dyn/articles/A23422-2003Aug20.html> See also <nettime> dossier: WIPO Knuckles under on open-source software, 29 August 2003, <http://www.nettime.org> and Paul Kedrosky, "A Reasonable Discussion Hijacked", *National Post*, Canada, 23 August 2003.
30. Lessig, Lawrence. *The Extremists in Power*, <http://www.lessig.org/blog/archives/001436.shtml>
31. McBride, Darl. *Open letter to the Open Source Community*, <http://www.linuxworld.com/story/34007.htm>
32. November 18th, 2003. First Internet music piracy convictions – Suspended sentences over music piracy <http://www.abc.net.au/news/newsitems/s991935.html>

33. Foucault, Michel. "On Governmentality" (1978), *Ideology and Consciousness*, No. 6 (Autumn 1979) pp. 8,10. Cited in Paul Rainbow, ed., *The Foucault Reader* (Pantheon, 1984) p. 15.
34. <http://australianit.news.com.au/common/print/0,7208,8061044^15317^nbv^,00.html> Here again the link between policing and the economic functioning of the 'information society' was made clear to be both the duty of the state and all honest citizens: "The UN agency says it is actively involved in building awareness, the demystification of what intellectual property means and training law enforcement authorities. ... I know that combating piracy is not an easy task, but it requires efforts of governments and international organizations and of course the NGO (non-governmental organization) community".
35. <http://australianit.news.com.au/articles/0,7204,8061136^15319^nbv^,00.html> Ridge continued: "We must be as diligent and determined as the hackers". And note that there is not so much light between the position of SCO and Ridge on this one.
36. ICANN – the Internet Corporation for Assigned Names and Numbers, a US Company that 'governs' the use and assignment of internet domain names, internet protocol addresses, port numbers and related matters.
37. http://www.circleid.com/article/383_0_1_0_C/
38. See Groklaw's contributing coverage of the SCO spectacle at <http://www.groklaw.net/>. In particular regarding the "attacks":
<http://www.groklaw.net/article.php?story=20031210163721614>
<http://www.groklaw.net/article.php?story=20031212171912108>
<http://www.groklaw.net/article.php?story=20031213111633554>
39. Deleuze and Guattari. *A Thousand Plateaus*, p. 116.
40. The SCO related cases are: *SCO v IBM* case and the *Red Hat v SCO* case. The various court documents can be found on the Groklaw site:
<http://www.groklaw.net/staticpages/index.php?page=legal-docs>
41. Eldred et al. vs. Ashcroft, <http://laws.findlaw.com/us/000/01-618.html>
42. Murphy, Fleming and Barber. "The Right to Property: To Individual Autonomy and Back", *American Constitutional Interpretation*, 2nd Ed, Ch 16 (Foundation Press, 1995) p. 1071.
43. Murphy et al, p. 1072.
44. Murphy et al, p. 1073.
45. Murphy et al, p. 1074 -5.
46. Murphy et al, p. 1076.
47. *Allgeyer vs. Louisiana* 165 U.S. 578 (1897) <http://laws.findlaw.com/us/165/578.html>; see Murphy et al, page 1077.
48. *Lochner vs. New York* 198 U.S. 45 (1905) <http://laws.findlaw.com/us/198/45.html> In *Lochner*, the Court held that a state law limiting bakers to no more than a sixty hour work week was a 'mere meddlesome interference' with freedom of contract.
49. Cohen, Julie E. *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 Mich. L. Rev 462 (1988), <http://www.law.georgetown.edu/faculty/jec/Lochner.pdf>
50. Whether the issues is up for grabs and the SCO litigation has any legal basis is another topic entirely but those issues could be briefly summarised as: 1. The 'restrictive nature' of the GPL that gives rise to the licences alleged unconstitutional; 2. The 'restrictive nature' of the GPL and its alleged subsequent anti-competitive status; and 3. Its not restrictive enough nature that gives rise to the charges laid against

it in relation to the its breach of US Export Regulations – that is it is all too freely available to people who are not part of the free world.

51. <http://www.linux.org/news/2003/08/19/0006.html>
52. <http://www.sco.com/copyright/>
53. *Eldred et al. vs. Ashcroft*, Footnote 18.
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-618#FR1.18>
54. Negri, Antonio. "Control and Becoming, An interview with Gilles Deleuze"
<http://www.generation-online.org/p/tpdeleuze3.htm>