

Introduction to FLOSS

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1. Introduction

- The general buzz around free software and the open source movement
 - Bill gates and the Matrix spoof: Linux is the single greatest threat to Windows
 - Abdul Kalam praising open source
 - PIL's filed in India
 - Important to remember that free software is not merely Linux and there isn't anyone in this room who does not use free software atleast once a day:- Linux, Mozilla, Sendmail, Zope, Open Office, - Amazon, google, dramwors- shrek; US Postal services etc.
- The initial purpose of intellectual property laws and copyright, more particularly in terms of the balance that it seeks to create between producers/ authors and users/ public
- **Lawrence Lessig-** "In 1774, free culture was born. In a case called Donaldson v. Beckett in the House of Lords in England, free culture was made because copyright was stopped. In 1710, the statute had said that copyright should be for a limited term of just 14 years. But in the 1740s, when Scottish publishers started reprinting classics (you gotta' love the Scots), the London publishers said "Stop!" They said, "Copyright is forever!" Sonny Bono said "Copyright should be forever minus a day," but the London publishers said "Copyright is forever." These publishers, people whom Milton referred to as old patentees and monopolisers in the trade of book selling, men who do not labor in an honest profession (except Tim here), to [them] learning is indebted. These publishers demanded a common-law copyright that would be forever. In 1769, in a case called Miller v. Taylor, they won their claim, but just five years later, in Donaldson, Miller was reversed, and for the first time in history, the works of Shakespeare were freed, freed from the control of a monopoly of publishers. Freed culture was the result of that case."
- Molly Van Howling - **the initial idea of the public domain**
 - Public domain- initially like a state of nature- different ways in which we can see it expanding or contracting
 - On the one side- under-enforcement, technological advancements, state subsidiaries, GPL and creative commons, internet, DRM, contracts

- On the other hand- stronger enforcement and language of piracy; increasing the scope of protection and the duration of protection; of protection;
- In the domain of software – the big threat of the EULA – Compare for instance Sec. 52AA of the Copyright Act and the pre-emption of statutory rights granted
 - **Parody of a classical EULA**
 - *1.2 You may make and distribute unlimited copies of the Website, including copies for commercial distribution, as long as each copy that you make and distribute contains this Agreement and is created in one of the following media: carved out of ice, as in an ice sculpture centerpiece; smeared in mustard on the side of a white or off-white panel van; or taught to a parrot who is then condemned to fly the earth for eternity, incessantly repeating the mantra of this Website.*
 - *The Website is also protected by United States Copyright Law and a group of big, scary goons who will happily beat you until you're ejecting teeth like a winning slot machine*
- The era of para copyright and meta copyright (The EULA and the DMCA)
- Nature of information goods and the fundamental challenges that they pose to traditional copyright
- The public goods problem- is information just like any other good?
- Copyright and the interface of freedom of speech and expression

2. FLOSS: History and Introduction

- In the initial days of computing software was never protected: IBM for instance sold their mainframes while giving away software for free
 - Originally, software was treated as a service. It was viewed simply as the labor component of a computer sales transaction. Purchasers would buy the computer, and the computer company would program it for them. Computer engineers commonly gave away software because it was the hardware that brought in the money. Initially, there was very little software available and "researchers typically swapped programs, embellishing one another's work without much attention to taking credit or nailing down commercial rights
- In fact in 1966 the Vice President of IBM campaigned vigorously against IP protection for software
- By the late seventies the demand for software had grown drastically, and the price of computers were beginning to fall creating the conditions that

- were just right for the creation of a mass market for computers : The PC revolution
- This was a period of major lobbying and by the 80's IBM was arguing for a stronger copyright protection for software: This would backfire as Microsoft would emerge through the very same tool of licensing overshadowing IBM
 - Stallman and the **printer driver** at MIT:- had written a code which informed them whenever there was a problem with the printer- AT & T which owned the operating system Unix started asking their users to sign non disclosure agreements which also prevented anyone from looking at the source code: So when Stallman wanted to write the driver for the new printers that had been installed, he found that he could not look at the code.
 - He therefore started his own project, which he called **GNU**: "GNU's Not Unix." Stallman's philosophy was that everyone should be able to use the GNU software without signing a nondisclosure agreement. Everyone should be able to download, use and modify the software in complete freedom
 - The next step in the development of **Linux was a message that Torvalds** posted on the Internet. In his message he provided the source code of the kernel and invited other people to take a look at it and suggest further improvements. At first ten people downloaded the source code and five sent back bug fixes, code improvements and new features (Naughton, 1999). Torvalds then took the time to review the responses and always explained why he chose to ignore or add a suggestion. Many people on the Internet were attracted to this development model. As a result, a thousand people had downloaded the Linux kernel only a year after he had posted his original message. By then, the kernel had become a functional operating system that counted 40,000 lines of code
 - The free software philosophy: Free as in freedom of speech and not free as in free beer: so it is not the pricing issue but the fundamental freedoms that a user of software should have
 - The difficulty of using the phrase free software- in India the swatantra software and mukt software and not muft software
 - Free software in India means Microsoft
 - Differentiate between free software and shareware, free ware, adware etc

3. The legal innovation of the GNU GPL

- The irony of the GNU GPL that it is based ultimately on a valid copyright
- The general public license as opposed to the end user license agreement; and the license specifically allowed the user all the rights that a traditional software license would deny: But this also included a clause which said that software which was created using a GPL software had to be licensed out on the same terms as the GNU GPL

- The language and structure of the GNU GPL relies on the exclusive rights that a owner of copyright is granted and asserts its claims on the basis of this right
- Structure of the GPL
 - Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software. More precisely, it refers to four kinds of freedom, for the users of the software:
 - The freedom to run the program, for any purpose (freedom 0).
 - The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
 - The freedom to redistribute copies so you can help your neighbor (freedom 2).
 - The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.

Principles of Open Source Licensing

If a user wishes to redistribute software she has received under the GPL, whether in modified or unmodified form, the license permits that activity as well. Here, however, the permission is qualified by three primary conditions:

- Redistribution must itself occur under GPL and only GPL, with no additional license conditions.
 - Redistribution must include “source code,” the human-readable form of computer programs that allows programmers to understand and modify computer programs for themselves, as opposed to “object code,” which is the “machine language” version of computer programs that is very difficult for programmers to understand or modify. and
 - Redistribution must include a copy of the GPL, so that users are aware of their rights to use, copy, modify and distribute, and so that anyone engaged in redistribution is also aware of the conditions under which redistribution is permitted.
- The Author's Attribution and Integrity.
 - No Warranties.
 - Self-Perpetuating License Terms.
 - Non-Discriminatory.

Legal validity of the GNU GPL

- Not really been tested in a court of law as yet but it has been an issue for a while:

- Eben Moglen the author of the GPL says that anyone can use free software licensed under the GPL without any restrictions. The only time any restrictions arise is when there is an attempt to redistribute the software or the derivative work created in which case the user has to abide by the terms and conditions of the license
- *Eben Moglen affidavit- Because anyone in possession of a program released under GPL must be in actual possession of the license itself, the licensor is entitled to presume that anyone engaged in redistribution is actually on notice of the only terms on which redistribution is permitted. Redistribution on any other terms is intentional violation of the GPL*
- Two cases in which the question becomes critical
- MYSQL v. Progress software
 - My SQL had a dual licensing scheme
 - Progress software had created a program called Gemini which used MYSQL but did not make available the source code
 - The case was settled out of court with Progress software agreeing to release their code into the public domain
 - *FSF's policy with respect to GPL violations is to secure compliance, not damages. When a party has violated GPL, and the violation is called to our attention (which happens on the average some dozens of times each year), we inform the party in violation of its responsibilities, and advise it on the steps necessary to come into compliance. It is our practice that once a party has taken steps to comply, and has entered into confidence-building measures to ensure that future non-compliance will be avoided wherever possible, and rapidly discovered and remedied where inadvertently reproduced, distribution rights under GPL §4 are restored on a cooperative non-judicial basis. In this fashion, I have secured compliance with the license in dozens of cases over the past decade, and have never had to resort to judicial measures of mandatory enforcement*
- SCO v IBM- ongoing case
- Legal validity of the GNU GPL- some issues
 - Is it a license at all
 - Nature of the contract
 - Is there adequate consideration
 - Is there privity of contract
 - Is it a contract in violation of trade or any public policy
 - Breach and enforcement- who sues?
 - Viral nature of the license

Eben Moglen- *In the case of the GPL, no one is bound to do anything in particular unless she redistributes the software, modified or unmodified. Because copying and redistribution, or the making of derivatives are never authorized in the absence of a license, undertaking to redistribute is clear acceptance of our terms for redistribution”*

Statement from Eben Moglen- “The license does not require anyone to accept it in order to acquire, install, use, inspect, or even experimentally modify GPL'd software. All of those activities are either forbidden or controlled by proprietary software firms, so they require you to accept a license, including contractual provisions outside the reach of copyright, before you can use their works. The free software movement thinks all those activities are rights, which all users ought to have; we don't even want to cover those activities by license. Almost everyone who uses GPL'd software from day to day needs no license, and accepts none. The GPL only obliges you if you distribute software made from GPL'd code, and only needs to be accepted when redistribution occurs. And because no one can ever redistribute without a license, we can safely presume that anyone redistributing GPL'd software intended to accept the GPL. After all, the GPL requires each copy of covered software to include the license text, so everyone is fully informed

- While there is a lot of noise made about the fact that the GNU GPL has not been tested in a court of law, the fact remains that even the Microsoft EULA has not been tested in a court of law. According to NSG, there is a clear conflict for instance between the Microsoft EULA and the statutory rights granted by copyright

Role of FSF in enforcing the EULA

- FSF does three things
 - Begins projects and undertakes particular projects
 - Publishes books and pamphlets etc
 - Full time person who monitors compliance with the GPL
- The IBM Corporation, for example, not only releases some programs under the GPL, but also assigns copyright to FSF in some of the programs it so releases, for the purpose of empowering FSF to enforce the GPL against license violators. But many other authors of programs choose to release their works under GPL while retaining the ownership of their copyrights: the Linux kernel itself, for example, is owned by its authors
- Danger of reducing the entire issue into a licensing issue
- The informal regulation by the free software community

4. Free software and Open Source

- The ideological split between the free software movement and the open source movement :- the chief difference is with respect to the clause on derivative works being subject to the GNU GPL
- The different kinds of licenses- over 30 licenses in the area
- The major ones apart from the Gnu GPL include the BSD License, the LGPL, the mozilla GPL, the apache license
- Open Source initiative definition
- Eric Raymonds- the cathedral and the bazaar v. Stallman and the free software movement
- The efficiency v. philosophy of libertarianism
- Fragmentation of the copyleft movement
- FLOSS communities and how they work
- Ranging from the Highly hierarchical to the relatively open
- Debian
- Business models of the Open source movement- Red Hat; Root Linux
- Motivations for the FLOSS community

5. FLOSS and development

- Free as in free beer is an important component
- Digital divide and making up the gap
- Why has there been a shift to Linux in recent years
- Rishab Aiyar Ghosh and the GDP analysis
- 94% of IP owned by ten countries in the world
- India owns 0.02 % of the IP in the world
- Royal Commission Report
 - It is clearly beyond our mandate to recommend what kind of policies developing countries should follow for procurement of computer software. For instance, whilst low cost or open source software may a priori offer cost and other advantages over proprietary software, many factors besides software licence fees affect the total cost of an IT system such as customising the system to the user's specific needs, as well as servicing, and maintaining the system. That said, given the considerable needs which developing countries have for information and communication technologies and the limited funds which are available, it would seem sensible that governments and donors should certainly consider supporting programmes to raise awareness about low cost options, including open source software, in developing countries.

- Developing countries and their donor partners should review policies for procurement of computer software, with a view to ensuring that options for using low-cost and/or open-source software products are properly considered and their costs and benefits carefully evaluated. Developing countries should ensure that their national copyright laws permit the reverse engineering of computer software programmes beyond the requirements for inter-operability, consistent with the relevant IP treaties they have joined.
- Factors contributing to growth of free software in India
 - Piracy drive
 - Increasing popularity
 - Security concerns- the elections in the US for instance
- Carlos Osorio and the problem of lock in
- The Microsoft paradox

6. FLOSS and the fundamental challenges to philosophy of copyright

- Copyright doctrines narrated in a teleological manner as though they have a universal truth in them: so for instance the idea of solitary authorship, the ,myth of the poor struggling author etc: Important to locate these doctrines in terms of their historical contexts
 - Authorship
 - Originality
 - Incentive
 - Collaborative production
- Copyright is embedded in the technology of paper
- What happens with information especially digital information and the problems that it poses of being a non rival good, a
- The user producer model
- FLOSS is not a new phenomenon- for instance the Oxford English dictionary was one of the first FLOSS experiments
- But what is new about it is the public discourse that it has created; the proof of an alternative paradigm being a viable and valid one and the establishment of a quasi formal structure of enforcement

Articulating A Positive Rights Doctrine Of Intellectual Property

- Phillipe Agraïne and a positive rights framework of IP
 - GPL etc arose in the context of a response to a particular phase of privatization of the commons
 - It is now time to move and capitalize on the strengths of the GPL and free software movement to articulate a positive rights framework

- The test case for a formalised viable model of open culture has been established and now time to capitalizae on network effects
- How do you restore the blance of copyright law
- A positive rights framework recognises a number of interests
 - Creators/ collaborators
 - Users/ social authorship
 - Public interest- Montaigne quote
- So rights cannot be merely about negative rights such as the right of exclusion but also use rights and the grant of one cannot be at the cost of the other- even within copyright this balnce is envisaged for instance in fair use, the copyright misuse doctrine
- Aggraine-
 - Right to create new works using older pre existing works
 - Right to make one's work public (the priginal meaning of publication)
 - Right to be acknowledged as the creator of a work of all or part of the entity
 - Right to obtain economic or non economic benefit in proportion to the interest that others may have in the work
 - Right to access materials in the public domain
 - Right to contribute one's work to the public domain, without future restrictions on the openness of such work
- Reconceptualising the public domain- classically seen in a very narrow manner either a the domain in which protection does not exist or the domain in which protection has expired
- How do we argue for a public domain which recognises the public domain as the law's primary safeguard of the raw material that makes authorship possible.

7. The symbolic importance of the free software movement as a model

- What does it mean to replicate the open source model into other realms of knowledge production
- Cultural licenses
- The idea of the social contract v. the narrative contract
- The license is not the story
- Creative commons
- Open music
- Open law
- Network effects

- Simputer GPL

8. Miscellaneous issues

- IBM and the Commercialization of the open source movement- the dulling of the political edge that Stallman and others brought into the movement
- Patents and the threat to free software
- Business models which have to emerge- Pantoto
- How do you migrate from Windows to Linux

9. The Publics Problem

- Mapping out the free software domain in terms of the elite cyber geeks
- How/ where does it map into the various publics
- Piracy as the subterranean other of the free software movement