Published on Free Software Magazine (http://www.freesoftwaremagazine.com)

A law for free software

Don’t we have enough laws already?

By Maureen OSullivan

Free software, also known as open source, libre software, FOSS, FLOSS and even LOSS, relies on traditional software legal protection, with a twist. Semantics aside (I will describe all the above as “free software”), the tradition at law is that free software is copyrighted, like most other software, and is not released, unbridled, to the public domain. Authorial or ownership rights can be asserted as with any bit of proprietary software.

The twist emerges when one examines what a free software licence actually does in contrast with what its proprietary counterpart seeks to achieve. Whereas the latter aims to control and inhibit the rights normally granted under copyright, such as fair use, the former augments the rights generally available within copyright law. Thus while all licences grant you access to the source code of the program in question, some may allow you to privatise your modifications while others prevent you from exercising this option. This article contrasts proprietary and free software licences in terms of their effectiveness and also gives a brief overview of free software licensing, highlighting legal vulnerabilities and their possible remedies by an intervention of the legislature.

Whilst no solution should be seen as a panacea for all possible ills, the legal lacunae under the present copyright-cum-licensing regime need to be addressed without delay

Whilst no solution should be seen as a panacea for all possible ills, the legal lacunae under the present copyright-cum-licensing regime need to be addressed without delay.

Contrasting proprietary and free software licences

An interesting starting point for the purposes of the following discussion is the contrast between the observance rates of proprietary and free software licences. On the proprietary software side, a multitude of forces are amassed against would-be, so-called software “pirates”, which probably tarnishes a large portion of the population in general. We have copyright law—an old bottle, arguably not well tailored to house this new wine—but chosen in the 1980s as an appropriate legal protection for a number of reasons, including the fact that it was considered a good idea to treat software code in the same way as you would treat a literary work. Signatories to the Berne Convention could provide this protection almost instantaneously and, therefore, a rapid, international coverage for software was achieved.

Copyright is not the same in all countries so software owners get a bundle of rights rather than a single one that will suffice in every jurisdiction

Copyright is not the same in all countries so software owners get a bundle of rights rather than a single one that will suffice in every jurisdiction. Moreover, proprietary software licences tend to restrict these rights, in return for permission to use the work in a limited way. Copy protection is also used in tandem with copyright law and this creates a physical fence to keep software “thieves” and other miscreants out. Despite the copyright bargain of leaving ideas free while protecting expression, patent law has subsequently been applied

to this material, which was supposed to lie in the public domain. Industry representative bodies, such as the Business Software Alliance, are fond of pointing out the humungous losses caused by “pirates” and they have developed a moral arsenal of a type of online confessional by proxy where disgruntled employees are encouraged to report their errant bosses.

Despite the copyright bargain of leaving ideas free while protecting expression, patent law has subsequently been applied to this material, which was supposed to lie in the public domain

Often the threat of a lawsuit, whether well founded or vexatious, is enough to send an institution into a flurry of panic about a visit from BSA representatives. None of these increasingly restrictive and repressive practices appear to have much effect—in many parts of the world, piracy rates still soar and in other parts, governments, tired of continual name-calling by foreign bodies, have decided to abandon proprietary software and replace it with free software. This apparent panacea has not proven to be an acceptable solution for the proprietary software folk either. Their motto would appear to be “my product, my way”.

By way of contrast, free software licences are rarely litigated and the most prominent, the Free Software Foundation’s GNU GPL, has only recently made its court debut, which in its 15 year history, is a remarkable achievement. Free software licences enshrine a sort of customary law or act as a declaration of customs within hackerdom. The preamble of the GNU GPL, in particular, employs a style of language richly reminiscent of the often countered “We the People…” sections from the constitutions of many nations. Its terms lay out clearly what one may and may not do with the code to which the licence applies. It is a sort of lex scripta or transcription of long-established and practised customs. So when a failure to observe such norms is encountered, the mail in the mailbox of the guilty party will steadily increase into a stream of less and less friendly messages, the longer the non-observance of the licence persists.

The FSF is a veteran of this informal style of enforcement and, in contrast with the BSA, its moral prescriptions largely keep its flock in line

The FSF is a veteran of this informal style of enforcement and, in contrast with the BSA, its moral prescriptions largely keep its flock in line. Participants in the free software community generally have an incentive to comply as there are ongoing relationships and reputations at stake, which could be affected, should a prolonged violation be sustained. It is an insider’s law and is inherently democratic because it is chosen from a range of different options and voluntary observance is the norm. Outsiders who have benefited from free software also generally contribute back to the free software commons—IBM being a case in point—and they respect established licences, as a failure to do so would provoke hostility and ultimately damage their business.

Free software’s legal vulnerability arises from businesses that do not participate in using and contributing to the free software commons, and whose market hold is threatened by the incursion of free software into their monopoly

Free software’s legal vulnerability arises from businesses that do not participate in using and contributing to the free software commons, and whose market hold is threatened by the incursion of free software into their monopoly. Those who in their day relied on a sympathetic legal system to convert software sharing into theft may also depend on the same system, 25 years on, as a way to dampen free software’s growing popularity in business and government software around the world. The next section delves a bit deeper into whence these vulnerabilities may arise.

Free software's legal threats

Free software also depends upon the copyright system, but in an amusing and subversive way. Had legislators done the right thing in the early 1980s, they would have created a sui generis law, specially tailored toward enhancing this resource and not facilitating the creation of monopolies in the operating systems market. However, this inappropriate law was a fait accomplit and has been used by free software advocates to achieve the opposite of what it was intended to achieve.

Thus free software "law" has operated up to now as a community custom rather than as a legally binding document

Thus free software "law" has operated up to now as a community custom rather than as a legally binding document. Its vulnerabilities stem from the fact that what may be, in one country copyrightable, is not necessarily in another. This also applies to the licence which sets out the terms on which the copyrighted work may be used, because contract or licensing laws differ in each country too. Moreover, at times, particularly in common law jurisdictions, judges may have difficulty in determining ownership rights in collaborative works. The FSF encourages their programmers to assign their code to the Foundation, whereas Linus Torvalds now requires the author of each chunk of code to be identified. In other cases, there may be a delay in choosing a licence; or a licence may not be passed on to third parties, who would then not be bound by any conditions stated in the licence.

The FSF encourages their programmers to assign their code to the Foundation, whereas Linus Torvalds now requires the author of each chunk of code to be identified

Copyright provides a fall-back position in such cases, as it does bind third parties. However, with the increasing internationalization of code creation and the growth of the internet, pursuing violators and resolving matters in favor of the authors of free software may not be so straightforward. Effectively, at present, free software relies on a patchwork of various laws, which may or may not provide the desired support at crucial moments. An ideal would be an international, harmonized piece of legislation. This would bind third parties, because a contract would no longer be necessary to set out the agreed terms. A statute could do this and violators would have no place to hide if they failed to observe the terms of a "Free Software Act". Any such legislation should not be imposed from the top down but, rather, should emanate from the ground up. It should be drafted as a collaborative venture between lawyers, technicians, politicians and also, most importantly, free software creators, without whose enormous efforts, you would not be reading this article because I would not have written it.

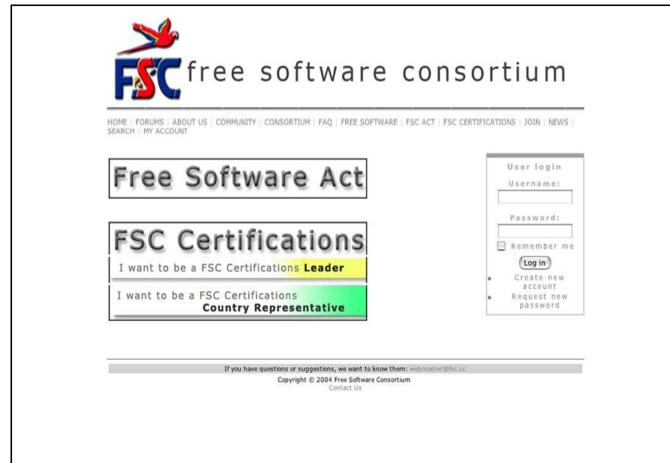
The Free Software Act project

I concluded several years ago that free software licenses, and particularly the GNU GPL (possibly because this is the most demanding licence in terms of what it expects back from users of its software), had become a sort of customary, international law within hacker communities.

I concluded several years ago that free software licenses, and particularly the GNU GPL had become a sort of customary, international law within hacker communities

Despite the fact that it was designed in a common law jurisdiction, countries from the civil law tradition have adopted it without too much further thought. It binds communities more through a sense of obligation rather than a fear of an external law. When democracies function well, laws should be enacted to protect commonly developed resources from outside threats; and governments should work with the people and not as puppets of

large corporations, whose interests tend to clash with those of the masses. Law can often emanate from the ground for a plethora of reasons but in this case in particular, a recognition of hacker-law needs to take place by legislatures and courts around the world. Free software has matured and the law needs to keep up with it, not to thwart it, not to control or curtail it. It should help cultivate its development in the manner with which its creators would deem appropriate. These creators, of course, will not hold a unanimous opinion. Therefore, it is imperative that lawmakers work with the community as a whole and while in the process of drafting legislation in this area, they should be led by their vision.



The Free Software Consortium’s home page

The importance of this cannot be overstated: free software is becoming crucial to the development of many societies and, in certain cases, cannot actually be replaced by proprietary software because it has become more than just a means to contact people or find out information.

It is now deeply embedded in education, society and local government, the best example in the world of this being in the region of Extremadura in Spain.

About 15 months ago, I sketched a rough draft of how I thought such a law should look and called the draft the Free Software Act. The Free Software Consortium and I have worked hard to promote this and I got as far as version 3, all of which can be viewed on our web site.

Free software is becoming crucial to the development of many societies and, in certain cases, cannot actually be replaced by proprietary software because it has become more than just a means to contact people or find out information

I am just putting the finishing touches on version 4 which will be available there shortly. The difference between version 4 and the earlier versions is that I have now set up an international, interdisciplinary committee to advise on its terms and to promote its enactment around the world. It addresses the aforementioned legal lacunae, which currently leave free software vulnerable to attack by hostile forces. An ideal would be for such a law to be passed at an international legal forum but if this is not possible, it could also be used at national level, local level or even as a political declaration to focus attention on what is at stake. As this project is intended to be representative, democratic, interdisciplinary and grassroots, comments are always welcome either at this web site or direct to me at maureen AT fsc DOT cc.

Conclusion

This article has sought to draw attention to why legally enforced proprietary software licences are treated with such disdain by the people to whom they are meant to apply. And, by way of contrast, how free software

licences are rarely litigated, as their enforcement doesn't rely on an arsenal of hostile forces and propaganda but, rather, negotiation, albeit sometimes tough. It traces the manner in which free software licences rely on existing law for their operation. Further, it discusses how, as the market for free software expands and the numbers and associations of the community grow, the licences may lose some of the force they have had up to now because external actors may not feel the same obligations as community members.

At this point in time we should be building legal defences to ensure that a repeat of the privatisation of software a quarter of a century ago is not repeated

Therefore, it is imperative to enshrine their customs in statute, directive and/or international law so that however and wherever a custom is broken, it can be enforced. Failing to act now, while free software is still relatively unthreatened, is a risky strategy. At this point in time we should be building legal defences to ensure that a repeat of the privatisation of software a quarter of a century ago is not repeated.

Biography

Maureen OSullivan (/user/73" title="View user profile.): Maureen Oâ’ Sullivan wrote a thesis in socio-legal aspects of Linux and is now a researcher and lecturer in international software law, covering both licensing and legislation. She has published extensively in the field and has recently undertaken a number of consultancies in the area, both in Europe and Latin America.

Copyright information

Verbatim copying and distribution of this entire article is permitted in any medium without royalty provided this notice is preserved.

Source URL:
http://www.freesoftwaremagazine.com/articles/free_software_act