

## **Research Presentation Outline**

### **E. Ian Wiebe – 26 March 2010**

#### **Free or Open Source Licensing: Creating a (Type of) Commons Through Licensing Agreements.**

With the advent of the Internet and widespread daily use of personal computers, most people come into frequent contact with the licensing system which regulates the use of software. However, this contact tends to be superficial; a license pops onto the screen and disappears just as soon as the user can find the “I Agree” button or locate a recycling bin into which they can dispose the license agreement placed prominently under plastic wrapping.

Free or Open-Source Software (F/OSS) represent a significant departure from the traditional licensing approach. In effect, the writers of F/OSS licenses co-opt a tool of proprietary copyright law, the license, and employ it to create and maintain a type of programming commons which maximizes the liberty of downstream users and programmers.

In my presentation, I first outline the form and features of proprietary software licenses. I will describe the features of F/OSS licenses and the concept of “copyleft.” Third, I consider the vexed question of the enforceability of these licenses, and in particular provide a critique of *Jacobsen v. Katzer*, a U.S. case which commentators have taken to show that courts will enforce F/OSS licenses. Finally, I argue that F/OSS licenses are should be seen as significant to property theorists.

#### **Proprietary Software Licensing**

Proprietary software licenses often place numerous restrictions on licensees. These can include bans on reproduction, alteration, reverse engineering, use for unauthorized purposes, and use on unauthorized platforms.

Furthermore, proprietary software licenses generally restrict or bans access to a program's source code and bars users from access the source code by other means. This is significant, as access to a program's source code is generally necessary to alter a program or to understand how exactly it functions. Source code is distinct from machine code, which is a series of 1s and 0s into which the source code is rendered so that the software to run on a platform.

#### **F/OSS Licenses**

The two largest players in the F/OSS community, the Free Software Foundation and the Open Source Initiative, disagree as to the exact definition of F/OSS software and even on the correct term for such software.

The Free Software Foundation states that free software is software that does not limit any one of four freedoms:

- Freedom 0: The freedom to run the program, for any purpose.
- Freedom 1: The freedom to study how the program works, and adapt it to your needs. (Access to the source code is a precondition for this.)
- Freedom 2: The freedom to redistribute copies so you can help your neighbor.
- Freedom 3: The freedom to improve the program, and release your improvements to the public, so that the whole community benefits. (Access to the source code is a

precondition for this.)<sup>1</sup>

The Open Source Initiative designates software as open source if the license conforms to ten criteria, many of which overlap with the FSF's four freedoms. The notable exception is that to be an open-source license, the OSI requires that the license require that any redistribution be made under a similar license, in effect requiring that the license be copyleft. The FSF definition of "free software" does not require that subsequent distribution be made under a similar license; to conform with Freedom 3, a subsequent distributor could simply release the improvements absent any license at all). However, as the FSF's GNU Public License, which is a copyleft licence, is seen within the programming as the standard F/OSS license, this difference between the two groups is less important than it might appear.

### Copyleft

The concept of "copyleft" is the truly important innovation of F/OSS licenses. With a copyleft license, subsequent innovators are required by the terms of the license to distribute their improvements under the same conditions as the original program. This ensures that subsequent users cannot remove the original program or portions of it from the public domain. This would not be possible if the original developer merely posted the program on the Internet for download absent any condition. The copyleft license excludes exclusivity, and, as some commentators state, makes the public nature of the program viral in that it "infects" each subsequent redistribution.

### **Enforcement**

To my knowledge, no Canadian court has ruled as to whether F/OSS licenses can be enforced.

In the United States, commentators take the Third District Court of Appeal's decision in *Jacobsen v. Katzer*<sup>2</sup> to mean that F/OSS licenses will be enforced by the Courts. That said, the decision is not as absolute as F/OSS admirers might hope. Hersh Reddy notes that the Court's decision in large part turns on Californian contract law, it is unclear how applicable the decision will be outside of that state.

I believe factors in the judgement may make it less influential that it has been stated to be. First, the breach of the F/OSS license in this case was a breach of an attribution clause, rather than a copyleft provision. Second, and from a Canadian perspective, copyleft provisions protect non-economic interests, which Canadian copyright law does not protect as rigidly as economic interests.

### **Why Do F/OSS Licenses Matter?**

I believe F/OSS licenses should be important to property theorists. First, the elegant use of copyright law to create a programming commons has a kind of aesthetic appeal.

More importantly, I think F/OSS licenses represent an acknowledgment of the personhood interest in property while at the same time leaving space for downstream users to express their own personhood in the same project. Again, while F/OSS licenses are a tool created through the mechanisms of private property, which prizes the ability to exclude, what is excluded in F/OSS licenses is exclusivity itself.

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1 Stallman, Richard. M., "Free Software Definition," in *Free Software, Free Societies: Selected Essays of Richard M. Stallman*, Gay, Joshua, ed., (Boston: GNU Press, 2002) at 43, available at <http://shop.fsf.org/product/free-software-free-society/> (accessed 10 February, 2010).

2 535 F.3d 1373 (Fed. Cir. 2008).