# The Democratic Deficit in Copyright Law:
# A Legislative Proposal

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# *FLOSS Law – as it is*

Software all copyrighted, automatically

FLOSS and proprietary distinguished by licensing terms

Sub-division in FLOSS spectrum:
**BSD v. GNU GPL**

# BSD v. GNU GPL (1, 2 or 3)

BSD – almost unconditional use (and abuse?)

GNU GPL – principle of reciprocity for distribution and published modifications

# Legally Sound? Proprietary v. FLOSS licensing

All software –
copyright plus licence/contract

Proprietary software – near non-obser-
vence – civil disobedience

FLOSS – widely obeyed – informal en-
forcement mechanisms – civil obedi-
ence?

# *Legally complex arrange-ment*

Copyright binds third parties – not an international standard, eg:

Life plus 70 years, Mexico plus 100

Ireland: 5 potential sources of copy-right, as follows:

# *Statute, Constitution and Common Law*

1. Statute: Copyright and Related Rights Act, 2000

2. *PPI v Cody* [1994] (property right)

3. Category of unenumerated rights – natural law

4. Right to earn a livelihood

# *Excuse the Tangent!!!*

Four primary sources of law in Ireland:

1. EU law

2. Constitution

3. Statute

4. Common law (judge-made law)

# *Phonographic Perform-ances v. Cody [1994] ILRM*

In Ireland, unlike other former colonies of England, the common law copyright may have survived,

Keane, J.

# *Common law of former colonies...*

1922 – Free State

1937 – Current Constitution

1949 – Left Commonwealth

1960s – Current Courts Constituted

Almost no case law...

# The Point for FLOSS being?

Copyright, on which FLOSS relies, is not an international standard

Relevance? Collaborative FLOSS pro-jects within EU

How about contract law?

# *Contract/licensing*

1. Contracts only bind the parties

2. Not an international standard

3. Contractual failure – rely on copy-right

Any more problems of this nature???

# *The issue of moral rights*

Ireland:  Copyright Act protects moral rights of programmers

In the UK, no protection

# *Let's talk about solutions*

1. FLOSS's informal resolution mech-
   anisms

2. The fingers crossed approach to
   courts upholding licences

3. Design an international licence –
   one size does not fit all

# *Continuing...*

4.  The CC-GNU GPL approach (Brazil)

5.  Standardise copyright and contract law

6.  The Valencia approach – cultural heritage

7.  How about a FLOSS Act?

# The Free Software Act idea

Why? Dichotomy between copyright law and civil behaviour

So? Pardon the idealism – representat-ive democracies, organs of the state, separation of the powers, legislation by elected representatives...

# *Continuing…*

## <u>Democratic, ground-up ap-proaches</u>:

Political science: Anarchism (Malatesta), early days of the Internet

Law: Sociology of Law (Sumner - folk-ways, Von Savigny – law and culture, Ehrlich – the living law)

# *Lex Mercatoria – a blue-print?*

The Law Merchant – Middle Ages, traders, no international law, designed their own rules, became part of inter-national commercial law

Difference:

we have international IP law…

# *However...*

Is FLOSS law (licensing out of copy-right) really about IP?  Or subversive?

Positively, talking more about moral rights – recognition, no false attribu-tion...

# *Giving ground up "law" le-gislative force*

Making the legislature respond...

Why? – threats to FLOSS

Of interest – Spain, the patent threat

Protecting virtual public spaces

# *Latin American approaches*

1. CC-GNU GPL – harmonise licence in line with 2004 – year of open source

2. Ignore IP issues – use procurement law – emerging left-wing governments

3. Vulnerabilities to political process

# How would a FLOSS Act work?

Ideally, UN-driven

UNESCO, 1997, Phillippe Queau – copyleft should be a positive right

Ideal for developing countries

What about TRIPs? - don't classify as IP

# *Redefining FLOSS*

Extremadura, Spain:
1. Job creator – IT graduates

2. Educational tool (plus health, govt.)

3. Societal facilitator

4. Public property – exporting know-how

# *Work done so far on Free Software Act*

1. Report for European Commission for Three Roses and Prelude projects

2. Advised Brazilian government 2004

3. Informal advice

4. Spain, especially Extremadura

# *Communicating through education*

1.  Sociology of Law – ground-up and top-down, civil activism

2.  Intellectual Property – Philosophy of IP, Copyright in Ireland, Copyleft, EU-Database right...

3.  Irish Legal System – in the absence of law...

# *Current status of project*

Dormant, awaiting revival!

# Question time!

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Go raibh mile maith agaibh!