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-observance – civil disobedience

FLOSS – widely obeyed – informal enforcement mechanisms – civil obedience?
Legally complex arrangement

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

Life plus 70 years, Mexico plus 100

Ireland: 5 potential sources of copyright, 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)
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 projects within EU

How about contract law?
**Contract/licensing**

1. Contracts only bind the parties

2. Not an international standard

3. Contractual failure – rely on copyright

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 mechanisms

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 – representative democracies, organs of the state, separation of the powers, legislation by elected representatives...
Continuing...

Democratic, ground-up approaches:

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 blueprint?

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

Difference:

we have international IP law...
However...

Is FLOSS law (licensing out of copyright) really about IP? Or subversive?

Positively, talking more about moral rights – recognition, no false attribution...
Giving ground up “law” legislative 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!