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By Martin Hardie

The much touted ‘freedoms’ of FLOSS are coming under increasing scrutiny as they are applied to contexts beyond their original formation. Is ‘freedom as in speech’ enough or are there other freedoms upon which the construction of the commons depends? Martin Hardie has worked extensively on an archeology of how the GNU/Linux operating system was developed, exposing the myths that are at its foundation. Here, he asks how the licensing of FLOSS operates within the constitution of Empire and locates in the new forms of ‘producing in common’ the means to reverse the proliferation of alternative law and instead affirm a true alternative to law

The key to the coming community is a positive possibility for a means against the destruction which the society of the spectacle wreaks on the common. The spectacle, the form that capital takes in today’s globalised world, is the ‘extreme form of the expropriation of the common’ where ‘our own linguistic nature comes back to us inverted’. It is on this terrain that we also find ‘a positive possibility that can be used against it’.¹ In pursuing an archaeology of the Linux computer operating system and Free/Libre and Open Source Software (FLOSS), this positive possibility embodies in many ways my quarry.²

Despite its rhetoric of freedom, FLOSS does not directly address how it is captured within capital. What implications this has, and how, despite this, it may offer some possibility of life beyond the spectacle is absent from any debate. FLOSS sits comfortably within the Chestnut Cafe of Nineteen Eighty Four – a space where free spirits gathered for human contact and a sense of community allowing the possibility of open expression within the strictures of Orwell’s repressive state.³ The logic of FLOSS seems only to promise a new space for entrepreneurial freedom where we are never exploited or subject to others’ command. The sole focus upon ‘copyright freedom’ sweeps away consideration of the processes of valorisation active within the global factory without walls.⁴ It denies the necessary productive force that FLOSS provides for new forms of capital. In this Chestnut Cafe we are never subject to the machine of capital, we are machines of capital. The archetype of the Yankee inventor is teleported from its 19th century home through time into cyberspace. Free of the chains that bound us to the old system, we are now vogelfrei - free as the birds – to participate in the new global hi-tech economy.⁵

This lacuna in the logic of FLOSS brings up the difference between ‘the common’,⁶ and ‘the commons’ of ‘movements’ such as the Creative Commons or FLOSS. The latter notion appears as a vast basin of things ready for consumption, facilitated by a commons constituted by law. The common takes on a somewhat different form. It does not concern individuals’ ability to consume, but focuses upon relations, life and production in common. These two notions are as different as the village and the castle on the mountain of which Kafka wrote.⁷

FLOSS appears as a somewhat ‘a-historical’ form of freedom, in the sense that its logic locates its particular genealogy within a transcendental and ever present notion of foundational legal principle, rather than any material, historical or productive forces. Once read within a broader history of time machines – that is the quest for and development of both time coordination and time sharing, consolidated by the development of Unix – the freedom of FLOSS begins to appear in a different and more complex light than that promoted by its popular storytelling.

One noticeable theme in the history of time machines from the second half of the 19th century until today is how American notions of freedom, innovation and law feed into the global machine of sovereignty. Time coordination – the method of doing science that gave rise in part to the telecommunications infrastructure of modernity – appears as constitutive of a form of sovereignty and production that was confined within the bounds of the corporation and the nation state. Time sharing – the method of interactive communal computing – points to an escape from these bounds. There appears an interface in this history where disciplines and practices of science, academia, law, military, sovereignty, governance, technology and mythology all become imbricated in each other. Here, power relations seem exposed, but at the same time they are hidden by law, popular stories and rhetoric. The task of excavating these relations is at once social, political, philosophical, technological, scientific and legal, therefore a biopolitical matter. This mixture appears as ‘critical opalescence’ – the point at which water and vapour no longer appear stable but flash back and forth between each other.⁸ Critical opalescence is more than a mere metaphor. This is the consistent terrain on which we must seek to locate that elusive positive possibility: ‘an ambiguous and uncertain zone’, ‘where law and fact seem to become undecidable.’⁹

THE LOGIC AND RHETORIC OF FREEDOM

Considering FLOSS within this zone, two primary conditions are exposed. On one hand, there are the technical conditions, the standards, that are necessary for the perpetuation of the particular technological, informational and communications infrastructure. On the other hand, these wires transmit a rhetoric and logic that purports to be counter cultural or a ‘social movement’, based upon the alternative use of legal principles. On investigation, this ‘social movement’ appears as broadly constructive of the imperial regime and its pursuance of the creation and sustenance of global market conditions.

The narrative of FLOSS and law extends particular American notions of innovation and Intellectual Property (IP) across the globe. This logic pilots the technological processes and their portrayal in popular storytelling, feeding back into the broader meaning of freedom in today’s globalised world. It is this telling of freedom and its deference to legal principle that seems to prevent us from encountering any positive possibility.

Here law plays a unifying role. It presents a linear and unified story that masks over many of these signal flashes throughout the network. This approach reduces the contrast space of the enquiry by constraining both its presuppositions and the possible open alternatives. The discourse surrounding FLOSS is limited to only considering FLOSS as an alternative to forms of production bounded within the walls of the modern corporation and does not conceive of alternatives within the postmodern forms.¹⁰ The detail of time sharing’s history and critical opalescence defies both the linear approach and the sort of unification that the popular legal story portrays.

In the popular narrative, ‘social movements’ such as the Free Software Foundation (FSF), and its relations, the Creative Commons and the Electronic Frontier Foundation, act as ‘patriots’ and guardians of ‘our’ law and freedom.¹¹ This freedom is bound intimately with the logic of open democracy and with free and open markets. Witness pop professor and driving force behind the Creative Commons and Electronic Frontier ‘movements’, Lawrence Lessig, writing about his trip to the World Social Forum in Brazil in June 2005 under the banner of ‘The People Own Ideas’.¹² Under the subheading ‘Truly Free Market’, Lessig gets to the core of this freedom: it is about technology, wealth, efficiency and growth. In rejuvenating a long standing U.S. Republican logic, this rhetoric seeks to justify the link between science and commercial prosperity, both national and global, by invoking a moral and political vision of freedom. In its shamelessly American vision: ‘the kids at Porto Alegre’ find their solace in a ‘free culture’; an ‘economy that governed creative industries for at least the first 186 years of the American republic.’¹³

The rhetoric of FLOSS proposes the technical device (the software) and the literary device (the licence) as machines of liberty and freedom. 'Free as in speech and not as in beer', locates FLOSS firmly within the tradition of U.S. constitutionalism. Lessig envisages the 'Future of Ideas' concerning 'our future' as a 'free society' in the age of the internet as a constitutional question – explicitly, then, as an American constitutional question determined by reference to the intent of 'our founders'.¹⁴

This spreading of American freedom is consistent with the imperial, supranational form of the global constitution, Empire, and its heritage in an American constitutional genealogy.¹⁵ Consistent as well is the acknowledgment by the FSF of a licensing model that seeks to spread the application of U.S. Law globally in a liminal, or barely perceptible manner. I have recently sought to describe how the FSF's General Public License (GPL) takes on a form that is not law, but assumes the force of law within the state of exception.¹⁶ The point here is that the FSF's perception of its legal model forms a part of the global encroachment of and by U.S. notions of freedom.

The GPL 'legal' model springs from the same constitutional heritage. The FSF does not recognise offshore or onshore legal environments, only a harmonised global copyright system that facilitates the distribution of its 'portfolio' in the form of an internationalised GPL. This global licensing model seeks to evade the hard questions that arise in relation to the enforceability of the GPL under national legal principles through a combination of 'careful transactional planning', 'properly assembled code' and legal assignments of copyright from developers. Here a form of legal literature flashes U.S. legal principles through the wires of the global ITC infrastructure which in turn become global principles apparently possessing the force of law. This liminal layer of 'code as law'¹⁷ is not law as we knew it, but is something that has sprung up from the very depths of the system that is in construction. Licences, standards and stories comprise here a level of private ordering that hovers above formal law, but which is increasingly something that appears as having the force of law, and increasingly acts or is treated as if it actually was law. In the process these devices reconfigure our conception of law in line with the global machine.

LEGAL PRINCIPLE, PRACTICALITY AND THE EXCEPTION

The GPL does not assume the force of law because of some entrenched legality, or interpretation of legality in the way we conceive the rule of law in modernity. Neither does it gain its force because of some consistency with a particular tradition and interpretation of US copyright history. The GPL – the constitution of the Free Software community – remains valid at the threshold of the imperial constitution because it is consistent with the single logic of the global system. The point of validity or invalidity, or better still, the threshold point at which it assumes the force of law is marked by this functional fit. On the other hand, production in common, as distinct from the licence fetishism of the legally constituted commons of use and consumption of FLOSS, 'is anything but accountancy, compatibility and systematisation'.¹⁸

FSF legal counsel Eben Moglen, has commented upon what they envisage as the key to the GPL's success. He acknowledges that the lack of adversarial situations arising in respect of the GPL is in part because the large organisations which use the software are 'the major players building information technology systems' who 'understand the benefits from free software'. From this point of view the apparent force of law of the GPL receives its support not from legal principle or freedom, but from the very fact that major corporations involved in the ITC economy depend upon innovation and production occurring in a networked environment. Large corporations depend upon the existence of the factory without walls and the apparent force of law of the GPL is a result of its instrumentality in this environment.

The dependence of major corporations upon external innovation coincides with the embedding of FLOSS within environments of administration and governance. Moglen quite openly admits the desirability of embedding FLOSS within the global machine of administration as key to its long term

success. ‘ ... Let me put it in the shortest possible way. Five years from now there’s going to be not a government on earth that isn’t using our stuff. There won’t be a court system on earth that won’t be using our stuff. Every judge will be aware of the fact that if the system breaks, his computer breaks. All I have to do is stand off until then.’

Being a part of the machine of governance, being embedded, and industry dependence, are the factors that shall ensure the GPL’s ‘success’. In embedding the licence and FLOSS these U.S. legal principles and notions of freedom are seeping through through the wires of the global ITC infrastructure. In turn they become global principles which appear to have the force of law. Embedding the technology and the legal literary device is the key to this force of law – as the system works, and becomes constructive of the global system, force of law self-executes.

The two strands of the FSF strategy, legal principle and corporate embedding should however still be considered within this genealogy of U.S. Constitutionalism. The ‘freedom of the frontier’ has been submitted to the constitution and has been organised around the ‘kingdom of monetary circulation’. In this America, money has replaced the frontier and has re-organised power around financial capital.¹⁹ Freedom of speech (and not as in beer) has become the breeding ground of the kingdom of money – the place where innovation takes place; rather than the threshold of the frontier. Freedom in this context is always capped by property and money. Here is the Hamiltonian concept of freedom in full view: property is essential to survival and the right to property is essential to autonomy.²⁰

In the FSF’s realist rational approach, legal principle takes a back seat, as does any notion of a new world which might have a social vision. With its realism, practicality, compatibility and systematisation, the GPL’s functionality within the global system is central to its success: ‘It is a very straight forward capitalist proposition and it is driven to success, not primarily by our cleverness or ingenuity, but by capitalism’s need referred to in the original Communist Manifesto, to reinvent the mechanisms of its production all the time.’²¹

LOCATING POSSIBILITY

This bifurcated (schizo?) approach of the FSF reflects the imperial method of resorting to universal calls to justice whilst relying upon the state of exception as a tool of universal rule and command. The FSF genuflects to, and invokes the traditions of law and justice in a situation where the imperial machine prefers not to apply law. However at the foot of law’s mountain, fact and law blur, and appear as simply life. This is the site of Galison’s critical opalescence, of Agamben’s state of exception,²² it is the space where K stands below the Castle and prefers not to be entranced by the glitter of law above him.²³

FLOSS finds itself within this space. However, rather than seeking any positive possibility within time sharing’s method of production in common, it obscures these processes by its deference to the maniacal glitter of law’s promise. The focus on freedom in FLOSS does not concern, and even denies production and labour. It is this denial that blocks us from increasing our power in the face of the spectacle. Richard Stallman has recently written that the FSF is ‘ ... more concerned with the use of software than with its development for a specific practical reason: the use of software ... affects our freedom, whereas its development does not. Therefore, the details of the social system of use of software are directly important to us, in the way that the system of development isn’t’.²⁴ This position is reflected by Lessig’s view that ‘how a resource is produced says nothing about how access to that resource is granted. Production is different from consumption’.²⁵

This approach is directly at odds with the idea of the common, and of new forms of language and value produced within the circuits of immaterial labour. This factor, along with valorisation, opens up a reading of the genealogy of FLOSS as not one of a commons, but of privatisation. In the prehistory of FLOSS during the 1950’s, AT&T and IBM relinquished the right to exclude in relation to their

factories of patents and technical information. The knowledge of these quasi-public corporations was privatised in a micro-shift of antitrust settings. This shift coincided with a situation after the Second World War which required collaboration between corporations in order to construct a global ITC infrastructure. Thirty years on, when that infrastructure was well on its way to being up and running, it was not the corporation that relinquished the right to exclude, but the individual outside of the corporation. This relinquishing of a right to exclude or control the fruits of one's own labour, or the labour that produces in common with others, has been portrayed as freedom.

If legal practice and criticism is to go beyond its foundations and methods - beyond the confines of the State, and beyond reformism and alternative uses of law, it will need to find a 'new ontological setting of criticism'.²⁶ The GPL model is within the tradition of alternative uses of law and does not by itself point to any positive possibility, any new life beyond the shadow of law's mountain. In this regard Kirsty Best has noted that the FSF 'replicates elements of representative elitism and the leftists' metanarrative of utopia, discipline and planning', in its role as 'a form of avant-garde [leading] programmers and participants into the new utopia.'²⁷

A 'new ontological setting of criticism' in this context entails a recognition of the state of exception as a flattened space that provides a basis for an alternative to law and not alternative law. It might be illuminated by the contrast between generality and repetition. In contradistinction to generality, repetition is the application of a particular idea or conduct to different circumstances – or better, a necessary and justified conduct only in relation to something irreplaceable. Generality exists 'as an empty form of difference, an invariable form of variation', which, as law, 'compels its subjects to illustrate it only at the cost of their own change.'²⁸ A new critical setting will have to reject the general, the rule to be applied to facts across the board, for the repetition of a means of acting, of a behaviour.²⁹

One way of thinking about law as a means without ends,³⁰ might be by reference to equity's tradition.³¹ Equity provides a fertile thinking ground for the organisation of FLOSS production.³² As an exceptional power in itself, equity bears some of the traits of repetition. It is not about rules, but about an idea, a behaviour. It looks to substance, over form; it regards as done what ought to have been done. One who seeks equity must come with clean hands, they must have done equity themselves to be entitled to its relief.³³

In the logic and rhetoric of FLOSS, the door to justice appears as an end, as a goal manifested by the referring back to legal principle, in a situation where although that principle no longer generally applies, it manages to maintain the fiction of law's transcendence. The door in this way holds out the promise that by genuflecting to law we will somehow manage to return to the glory days of its founders. But in fact, we can only pass through the door when it is closed. That is when we recognise that the common – that which we produce in common – is a constitutive power, and not the commons of consumption constituted by a law or a deference to legal principle. It is when we no longer seek an end in the fatal attraction of transcendental law and the phantasmagoria of its rotten (although in so many other cases irresistible) promises that the door will remain closed. Only then may we be able to pass beyond it, to a life of means and ethics in the village below its decaying façade.

Thanks to Ornette Coleman for the title

FOOTNOTES

¹ Giorgio Agamben, *The Coming Community*, *Theory Out of Bounds Volume 1*, University of Minnesota Press, 2001, p. 80

² To come to grips with this quarry it is necessary to consider how what is produced in Common is subsequently valorised within the spectacle of daily life. There is no space here to examine how FLOSS is valorised but only to outline why organisations such as the FSF and CC ignore this aspect of production. In a work in progress I address these issues in the context of the development and dissemination of the Unix time sharing computer system. See: <http://openflows.org/~auskadi/nix1.pdf>

³ Kathy Bowrey, *Law and Internet Cultures*, Cambridge University Press, 2005, p. 81

⁴ Martin Hardie, *The Factory without Walls*, <http://openflows.org/~auskadi/factorywoutwalls.pdf>

⁵ Karl Marx, *Capital Volume One, Part VIII Primitive Accumulation*, p. 896. See also Michael Hardt and Antonio Negri, *Empire*, pp. 157-159, and Gilles Deleuze and Felix Guattari, *Anti-Oedipus*, p.225

⁶ Agamben's expression 'the common' bears considerable similarity to that which Hardt and Negri use concerning production 'in common' and rather than trying to split hairs between their approaches what interests me more is what their conceptions have share in contradistinction to the idea of 'the commons'

⁷ Franz Kafka, *The Castle*, in *The Complete Novels*, Vintage, 1999. This passage from Kafka is central to Giorgio Agamben's discussion of the relation of law to life in his recent book, *State of Exception*, Chicago University Press, 2005

⁸ Peter Galison, *Einstein's Clocks, Poincaré's Maps, Empires of Time*, Hodder and Stoughton, 2003, pp. 26 ff. Cited in Martin Hardie, 'Time Machines and the Constitution of the Globe' <http://openflows.org/~auskadi/timemachines.pdf>

⁹ Giorgio Agamben, *State of Exception*

¹⁰ Manuel Delanda, *Intensive Science and Virtual Philosophy*, Continuum, London, 2004, p 130

¹¹ Free Software Foundation, <http://www.fsf.org/>. See also the free software definition: <http://www.fsf.org/licensing/essays/free-sw.html>, and philosophy: <http://www.gnu.org/philosophy/philosophy.html>. Creative Commons, <http://creativecommons.org/>. Note the page 'Founders Copyright': <http://creativecommons.org/projects/founderscopyright/>, 'The Framers of the U.S. Constitution understood that copyright was about balance — a trade-off between public and private gain, society-wide innovation and creative reward.' Electronic Frontier Foundation, <http://www.eff.org/>. Note the page 'Our Mission': <http://www.eff.org/mission.php>, 'If America's founding fathers had anticipated the digital frontier, there would be a clause in the Constitution protecting your rights online, as well. ... Instead, a modern group of freedom fighters was necessary to extend the original vision into the digital world. ... That's where the Electronic Frontier Foundation comes in. ... Just as patriots fought for liberty and freedom, we fight measures that threaten basic human rights. Only the dominion we defend is the vast wealth of digital information, innovation, and technology that resides online. ... '

¹² Lawrence Lessig, 'The People Own Ideas!', *TechnologyReview.com*, http://www.technologyreview.com/articles/05/06/issue/feature_people.1.asp

¹³ Lawrence Lessig, 'The People Own Ideas!', http://www.technologyreview.com/articles/05/06/issue/feature_people.7.asp Regarding the liberation of the globe by American notions of freedom, see Lawrence Lessig's map of the spread of the Creative Commons, <http://www.lessig.org/blog/archives/002952.shtml>. 'As of Thursday, (June 8 2005)' he

writes, 'the current spread of Creative Commons. The green are countries where the project has launched. The yellow are close. The red is yet to be liberated'

¹⁴ Lawrence Lessig, *The Future of Ideas*, Vintage, 2002; Martin Hardie, 'Foreigner in a Free Land?', *Sarai Reader 4*, Sarai, India, 2004, pp. 384-387
http://www.sarai.net/journal/04_pdf/51martin_hardie.pdf

¹⁵ Michael Hardt and Antonio Negri, *Empire*, pp.160 ff

¹⁶ 'Liminal Law and the Exceptional Art of Linux Licensing', paper presented at the Critical Law Conference, Kent University, Canterbury, U.K., 2 September 2005

¹⁷ Editor's note: the GPL is made available in both human and machine readable form

¹⁸ Antonio Negri, 'Alma Venus: Love', in *Time for Revolution*, Continuum, 2003, p. 222

¹⁹ Martin Hardie, 'Foreigner in a Free Land?', pp. 384-387

²⁰ *Ibid.* pp. 390-391

²¹ Eben Moglen interviewed by Kathy Bowrey available at:
<http://auskadi.civiblog.org/blog/archives/2005/6/25/972325.html>

²² This is also Negri's Kairos – time as qualitative duration; it is also the site of the passage described by Deleuze 'a lived phenomenon, ... It is increase or decrease of my power, even infinitesimally.' Deleuze, Gilles. 'Lecture Transcripts on Spinoza's Concept of Affect', http://www.goldsmiths.ac.uk/csisp/PDF/deleuze_spinoza_affect.pdf

²³ Franz Kafka, *The Castle*

²⁴ Richard M. Stallman, [Upd-discussion list] Paper: 'Digital property', Sabine Nuss, NY, NY, April 12-14, 2002, Sat, 06 Aug 2005, <http://lists.essential.org/pipermail/upd-discuss/2005q3/001255.html>

²⁵ Lawrence Lessig, *The Future of Ideas* p. 13

²⁶ Antonio Negri, 'Postmodern Global Governance and The Critical Legal Project', *Global Jurist Advances* Volume 1, Issue 3, 2001

²⁷ Kirsty Best 'The Cultural Politics of the Open Software Movement and the Gift Economy' *International Journal of Cultural Studies*, Vol. 6, No. 4, (2003), pp.449-470

²⁸ Gilles Deleuze, *Difference and Repetition*, Columbia University Press, 1995, pp 2-3

²⁹ Repetition 'is by nature transgression and exception, always revealing a singularity opposed to particulars subsumed under laws, a universal opposed to the generalities which give rise to laws.' Gilles Deleuze, *Difference and Repetition*, p.5

³⁰ In *Means without End*, Giorgio Agamben argues for a politics of pure means that is not altogether dissimilar to that projected by Walter Benjamin, 'politics is the sphere neither of an end in itself nor of means subordinated to an end; rather, it is the sphere of a pure mediality without end intended as the field of human action and of human thought' Giorgio Agamben *Means without End: Notes on Politics* Translated by Vincenzo Binetti and Cesare Casarino, Minnesota, 2000

³¹ 'A branch of law that developed alongside common law in order to remedy some of its defects in fairness and justice', The Oxford English Dictionary

³² Kathy Bowrey, *Law and Internet Cultures*, pp.95-97, and Martin Hardie, 'The Shape of Law to Come?' <http://openflows.org/~auskadi/shapeoflaw.html>

³³ Martin Hardie, 'The Shape of Law to Come?'

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