

**BOOK REVIEW****FREE AND OPEN SOURCE SOFTWARE:  
POLICY, LAW, AND PRACTICE**

*By Noam Shemtov and Ian Walden (Editors)*

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In today's digital environment, Free and Open Source Software (FOSS) plays an increasingly important role that cuts across social, commercial, and political spheres of activity. Its susceptibility to inquiry through a diverse range of disciplines, methods, and normative frameworks however makes it a source of contestation and controversy, all too often resulting in confusion for the uninitiated. At its core, FOSS is about providing access to the underlying source code of a computer program along with permissions for its use, modification and distribution. In its most abstract form though FOSS is said to embody a philosophy or ideology; a revolutionary notion subverting the established norms of proprietary culture.

Shemtov & Walden's work seeks to provide a comprehensive and detailed analysis of the phenomenon of FOSS as expressed through *law*; with law in this sense conceived broadly to include private law arrangements (and related commercial structures) public law, and policy as a form of soft or quasi-law. By focusing on the legal aspects of FOSS in this manner the work sets clear expectations for the reader, providing a defined methodological lens through which the more contested elements of FOSS are given neutral and less overtly political treatment. Furthermore, this legal focus makes the work one of great practical value to practitioners, scholars, and those further afield who may deal with FOSS in a commercial or public capacity.

The work adopts a three-part structure covering intellectual property regimes, business models and usage, and public policy issues respectively. Each part is further divided into chapters, twelve in total, each written by a leading practitioner or scholar based principally in the United Kingdom.

Before arriving at the main body of the work readers are given two introductory overviews, the first of which by Ian Walden explores the legal treatment of software, the challenges and uncertainty that this treatment raises, and the response of FOSS as a movement which places emphasis on the concepts of freedom of expression and the public domain (or 'commons'). Walden briefly hints at some of the more normative, existential questions underlying FOSS (e.g. what it means to be 'free' or 'open?'), but does so only to the extent that this serves to inform readers' understanding of 'why law is being used in this way'.

In the second introductory chapter, Ross Gardler examines the collaborative, community-based nature of FOSS development and the implications this has for models of governance. He counters the myth of community homogeneity by showing how FOSS development is supported by a diverse ecosystem of communities each with their own distinct values and objectives. These communities are, nonetheless, shown to share certain fundamental characteristics in how they are structured and governed.

Part I is comprised of four chapters that set out FOSS's relationship to the core applicable regimes of *intellectual property law* (copyright, trademark and patent). In the first of these, Luke McDonagh looks at the role of copyright and contract (Chapter 3). This chapter features a comparative analysis of the main categories of licence (i.e. 'permissive,' 'weak copyleft' and 'copyleft'), closely examining the key terms and clauses in each with reference to a handful of well-known licences. McDonagh touches upon some of the ongoing debates with respect to FOSS and copyright (e.g. whether the various technical processes by which programs interact with each other result in the creation of derivative works) before turning to the perennially debated issue of whether FOSS licences are contractual in nature or merely 'bare' copyright licences; the outcome of which is shown by the author to have certain consequences for the enforceability of the licence and available remedies. The chapter finishes with a brief overview of FOSS licence compatibility (i.e. where code subject to licence A is taken, modified and released under licence B or vice versa) which is a topic of particular concern given the growing number of different FOSS licences in use.

Chapters 4 and 5 deal with trademarks and patents; regimes not traditionally associated with FOSS. Nonetheless, they have been shown to play an increasingly important role in the FOSS legal landscape, albeit one that is commonly seen to pose threats to – or at least create 'friction' within – the copyright-based licensing model. Noam Shemtov and Malcolm Bain provide a brief overview of the trademark and patent regimes respectively (focusing exclusively on US and EU law) and identify the points at which they overlap or clash with FOSS both in principle and in practice. They then proceed to examine the various measures that have been taken by FOSS actors in response including; the introduction of express trademark provisions and patent clauses (peace & retaliation) in certain licences; defensive disclosure initiatives; crowd-sourced prior-art searches (Peer-to-Patent); and defensive patent pooling (Open Innovation Network). In keeping with the detailed approach, the writers do well to identify and discuss both the risks that parties encounter in relation to these rights and those that the right-holders themselves may encounter when engaging with FOSS (e.g. trade mark revocation, genericide, the loss of ability to enforce patents etc.).

Concluding on the intellectual property regimes, Langley and MacKernan discuss in Chapter 6 the recent 'smartphone wars' patent litigation in an attempt to "illustrate principles and practices which are likely to apply to any litigation brought against FOSS." In some respects, this chapter covers

similar ground to the prior chapter on patents. However, it make some very interesting observations on the strategic dimensions of patent litigation in the software industry and the circumstantial (as opposed to intrinsic) value of software patents which is evidenced in particular with regard to determining royalty rates. The effects that this litigious form of law-making may have on FOSS in the future are also explored.

Part II of the work deals with the *commercial dimensions* of FOSS. In Chapter 7, Amanda Brock provides a detailed examination of FOSS-related commercial agreements with her intention being "not to analyse FOSS licences, but to work out how commercialisation can work from a contractual standpoint." Readers are guided through various drafting considerations that are relevant to different FOSS-based business models (e.g. subscription-based, support services, dual-licensing) all the while being alerted to the common pitfalls that tend to expose those less familiar with the field. The chapter concludes with a helpful diagrammatic "Risk Grid" that lists common drafting issues along with suggested sample wording and supporting commentary.

Chapter 8 further examines the commercial dimensions of FOSS from a business point of view. Neil Brown addresses not only how to avoid the dangers of FOSS but also how to best embrace it as part of an effective business strategy. Companies are advised to approach FOSS with a clear objective in mind, such that their company FOSS policy (i.e. the document setting out internal procedures for the handling of FOSS) can be interpreted and applied in a purposive manner in accordance with their overarching strategy. Further to this, the chapter provides a step-by-step guide for handling alleged license violations, outlines various competition law concerns relating to FOSS, and identifies key FOSS considerations for both the acquirer and target in the context of corporate acquisitions.

Finally, Part III turns to consider FOSS's role within the framework of public law and broader *public policy*. Chapter 9 sees Jakub Menčl and W Kuan Hon open with an overview of cloud computing technologies and their various applications to online services (e.g. Software as a Service, Infrastructure as a Service, and Platform as a Service). They then discuss how copyleft licence provisions are undermined in the cloud computing context as a result of how these services operate remotely over a network (i.e. there being no 'distribution' as such to trigger the copyleft obligations). The chapter concludes with an examination of the largely unsuccessful attempts to close these 'loop holes' in copyleft licences by redrafting and repurposing them for the online environment.

Chapter 10 deals with standardisation, innovation and FOSS. Alan Cunningham begins the chapter with an illustration of the conceptual overlap between standards and open source, both of which are understood to promote similar objectives, for example; connectivity in networks; the removal of barriers to interoperability; and the moving of product/service differentiation to layers where it most valued. Traditional standardisation models, which are largely reliant on Fair, Reasonable and Non-Discriminatory (FRAND) licences for making technical standards accessible, are then examined and

compared with the emerging notion of ‘open standards’ (i.e. the application of open source principles to the licensing of technical standards). Cunningham then gives an overview of both private and state-based initiatives in this area which seek to define and encourage adoption of these new models.

Chapter 11 focuses on procedures applicable to the procurement of software for use in the public sector. Iain G Mitchell QC gives readers a detailed analysis of the procurement law framework and relevant cases found at EU level, followed by a summary of national approaches in this area. Overall, the chapter illustrates how procurement can act as a valuable tool in ‘levelling the playing field’ for FOSS (although perhaps more so in theory than in practice, given Mitchell’s assessment of current contracting authorities’ activity) while promoting interoperability and mitigating any “lock-in” effects resulting from proprietary software use.

Andrew Katz’s chapter concludes the work, both figuratively and literally, with an ‘open’ question that considers the broader application of the ideas underlying FOSS: namely, what defines ‘openness’ and to what extent can this concept be applied in other areas? A brief overview of its application in relation to content, data, specifications and formats, education, publishing, and government, shows the concept to be rather flexible, although perhaps not as developed in areas outside of software at this stage.

Overall, Shemtov and Walden’s work is comprehensive in scope and thorough in detail. Its objective navigation of a field fraught with technical complexity and rhetoric makes it a highly valuable contribution to the legal literature on FOSS. If forced to find fault, one might criticise the work’s European and, to a lesser degree, US-centric focus given the global-nature of FOSS development. Furthermore, for the more critically-minded, one may question the extent to which the work’s apolitical treatment of the subject matter embodies a certain politics in itself. However, with that said the work is not intended to be abstract or theoretical in nature, but, as its subtitle would suggest, is one grounded in the legal and commercial realities of FOSS in practice.

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