

Lecture by Eben Moglen and Mishi Choudhary

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The Software Freedom Law Center, National Law School, and the Centre for Internet and Society organised a lecture by Mishi Choudhary and Eben Moglen for students of NLS on Saturday, December 13, 2008.

Saturday, December 13, 2008 had Mishi Choudhary and Eben Moglen of the New York-based Software Freedom Law Center speaking to the students of the National Law School of India University in Nagarbhavi, Bangalore, in a talk organized by CIS.

Mishi Choudhary, who will head the Software Freedom Law Center in New Delhi, spoke on "Globalising Public Interest Law: The SFLC Model". She told the students about the importance of non-profit legal work as well as its viability as a career choice. She also laid out the background to the work that SFLC does, and traced a brief history of software patent cases

Eben Moglen chose to speak on "Who Killed Intellectual Property and Why We Did It?". He started off by talking of the interconnections between law and societal change: how law can't keep pace with the changes we see around us, and how law actually sometimes changes in the reverse direction, while trying to maintain the status quo.

This is not a new phenomenon, he noted, and that when law is responsive to anybody, it listens to the 'people of the past' more carefully than the 'people of the future'. This, he says, is compounded by the fact that the primary mode of change in the law is not legislation (since there is nothing legislators hate more than legislating), and that the better lawyers usually represent only those who can afford to pay them, hence resulting in systemic injustice. He emphasised that the clients of the SFLC, on the other hand, are people who create software worth billions of dollars, but who do not own it.

On that point of creation for the purpose of sharing and not owning, a student raised the question of why proprietary rights shouldn't exist in creations of the intellect. In response Mr. Moglen pointed out that while his personal opinions might be different, the Software Freedom Law Center does not seek to bring into dispute the concept of property rights in software, nor the fundamentals of patent law: it is merely concerned with the scope of patent law, and seeks a literal enforcement of patent law as it exists in most jurisdictions.

Another question that cropped up was on the economics of software creation and the anti-competitive nature of free software. To this, Mr. Moglen provided a brief summary of the tragedy of the anticommons by using land to be acquired for public works in the centre of a city as an example. In software, this problem is only exacerbated, he pointed out. Most physical creations over which patents are granted have something like 8 or 10 steps. Software code is different because it contains thousands of instructions. Even big companies face the anticommons problem; but they manage to evade it by cross-licensing agreements which results in efficient transactions for them since it involves no exchange of money whatsoever. Small companies are in a worse situation, since they don't have those kinds of patent portfolios to be able to enter into cross-licensing agreements, no matter how innovative they are. Thus, in effect, the system is rigged against them. This provides a partial answer to the antitrust question, he noted. Competition law is actual in favour of free software. The right to practise a trade or profession, and the right to speech get implicated in any case where a FLOSS-based company is hauled up before a court being accused of conspiring with other to take cost to zero.

Mr. Moglen further explained that when it comes to software, the problem of patenting is very different. A 20-year monopoly is more reasonable from the viewpoint of physical creations. Patent law, however doesn't tailor the rights that are granted by a patent. The problem starts right from the process of granting a patent. The job of a patent office being to apply the tests of non-obviousness, novelty and utility, most patent offices can do a reasonable job in most fields of technological endeavour, since there is a large body of innovation with which the proposed patent can be compared. Software, however, is a recent field with a large number of applications coming in all at once. While the patents that are sought might include claims on ideas and applications that existed in software in 1956, those aren't easy for the patent offices to dig up, since the field of software patents and software itself have not existed for the same length of time.