

Chapter 8.14

Intellectual Property Rights—or Rights to the Immaterial—in Digitally Distributable Media Gone All Wrong:

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ABSTRACT

In the light of three major ethical theories, Lockean liberalism, consequentialism, and Kantian deontology, it seems that the intellectual property rights in digitally distributable media—be it software or other—have not been derived correctly. The three theories and their implications are reviewed and handled individually and conclusions based on each will be presented. Many aspects of these theories do not match with the current copyright and patent laws affecting digitally distributable media in western societies. A different, less restricting approach is offered.

INTRODUCTION

In today's globalized world of enhanced information and communication technology (ICT), the

rights to the immaterial—generally understood as Intellectual Property Rights (IPRs)—are a central issue. The common usage of the term “intellectual property rights” already implies that the immaterial can be owned. Contrary to many expectations during the earlier decades of ICT, copyright is extending and thus limiting dissemination of information and knowledge into our societies. Laws such as the US Digital Millennium Copyright Act (DMCA) of 1998 and its European counterpart the European Copyright Directive of 2001, are limiting access to information further. Similar restrictions can be seen in the trend in the United States towards the patenting of software features—a trend that is expected to be taken up in Europe in the not too far distant future.

Considering the enlarging of markets, the growing speed of dissemination of the marketed items—especially in the digital form—it is somewhat surprising that the protection of the immate-

rial should need to be strengthened, particularly with regard to the time extension now in place. Instead, one might surmise that the benefits of the growing markets and speed of dissemination would make the time needed for a limited monopoly to gain back its investment shorter rather than longer. After all, the idea of IPRs is not to grant an effective monopoly to the item but to ensure the bringing forth of new inventions and fine arts and to ensure their dissemination to the general public. After the investment (with some decent profit, maybe) has been regained, the idea surely is not to limit the functioning of the markets. Considering the strength and length of current IPR law in most western nations (and increasingly in other nations), it seems that most patent and copyright-protected digitally distributable media (DDM) is covered by IPR protection longer than its expected lifetime.

The main purpose of this chapter is to critically analyze the benefits individuals and societies actually gain from intellectual property rights in digitally distributable media, be it software, journal articles, children's books, etc. An alternative solution to the current regime is also offered.

The chapter will look into liberalist (mainly Lockean), consequentialist (or utilitarian), and deontological (mainly Kantian) arguments pro but especially con intellectual property rights. It will analyze what benefits and drawbacks intellectual property rights can offer from the selected perspectives. The traditional positions for IPRs are not introduced comprehensively, but rather only named. It is presumed that the reader is at least somewhat familiar with the current justifications for IPRs, since they are presented quite often, even in the mainstream media. The reason for choosing these particular ethical theories is their undeniable influence reflected in the social foundations and laws of our societies in the Western world. Liberalist and consequentialist arguments have especially been used in the Anglo-American traditions and are clearly visible in the laws in Great Britain and the constitution of the US. On the

European continent, deontological theories have had great influence and are thus of importance to the topic at hand.

Each of the previous views will be discussed separately and then, based on the discussions, some conclusions will be drawn. In addition, some differing views, such as Free and Open Source Software (F/OSS) will be introduced and handled as alternatives to current proprietary views on digitally distributable media. No conclusions regarding which view is "the best" will be presented; the intention is rather to stimulate critical reflection on the part of the reader.

The theoretical contribution of the chapter is to analyze the field of IPRs at a more theoretical level based on sound ethical theories rather than the bottom-up approach rising from the field and applications, which seems to be the norm in most (although arguably not all) information technology ethics today.

Contributions to practice are two-fold. First, the issues in IPRs related to ethical theories are presented for the specialists in the areas involved. This will benefit people in information science, information ethics and law, and the layperson, be they representatives of government agencies or interested citizens or even business executives (after all, F/OSS software has proven to be also a marketable good). Secondly, it is proposed that the current trend of expanding the protections of digital media and software is not necessarily preferable for the individual or society at large. Rather, a weaker or shorter—and in some cases no—protection scheme might be more viable.

HISTORY AND ETHICAL POSITIONS TO IPRS IN DDM

In this chapter, I will consider what has happened so far in the field of IPRs in general and IPRs in DDM in particular. I will also consider the philosophical justifications behind the story.

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