Redistribution of Power from Government to Intellectual Property Rights Owners and Organizations Looking After Their Interests: Justifiable from a Liberalist Position? – The Free Software Foundations Position Compared to John Locke's Concept of Distributable Rights

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Abstract. John Locke's Two Treatises of Government and especially The Second Treatise of Government can be seen as the starting point of liberalist thinking in distribution of power and the concept of property, be it material or immaterial. This paper offers a new view on what rights in intellectual property can be redistributed from the people to the government and organizations and from the government to organizations – and especially which can't if one is consistently liberalist in the Lockean sense. In this paper will be shown how the redistribution of people's rights to the immaterial can not be based on Locke and how that in fact fits with the Free Software Foundations (FSF) view to the immaterial. An alternative will be introduced – an alternative, that closely follows the FSF's position – and how the GNU (GNU's Not Unix) General Public License and copyleft are the tools to this end.

Of Joining Commonwealths

The reason for people to join in communities according to Locke [1] is the benefit they gain from that.

> "Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and *preserving of property*, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and *all this only for the public good*." [1, §3, emphasis mine.]

One has a right to the preservation of ones property, that is, ones life, liberty and estate. But people may join in a commonwealth and give their power over to its legislative for it to further their needs i.e. to see to the preservation of their property. And the legislative then, is supposed to better the condition of the people joining in the commonwealth, for if one would join in a society which would worsen ones condition, it would be absurd. Thus it can be seen, that the aim of the commonwealth

is the Should it be, that intellectual property rights (IPR's) do not enhance the condition of those joining the commonwealth, but instead were not property rights at all, and thus would not necessarily enhance the preservation of the life, liberty and estate of the people, they ought to be reconsidered as rights.

Of Intellectual Property

IPR's, as pointed out by Kimppa [2], are not property rights at all but privileges to the immaterial for the potential benefit of the commonwealth and the people in it (see also e.g. [3], [4] and [5]). According to Kimppa Locke saw property as something which the property owner had full rights to. Something, with which the property owner could do as they wished, whether they wanted to keep it, sell it, trade it or give it away as a gift. Locke was worried about others having arbitrary power over ones property, one thus loosing it and that is why he saw property rights as necessary. Labour was Locke's way of showing how property rights were attained (see e.g. [5] and [6]), but the reason for property rights is not labour, as is often misunderstood, but scarcity. The immaterial is in no way away from one if shared with another, but instead all parties can use it at the same time. Whether rediscovered, reinvented, recreated or just copied from another, the other still has the possibility to use theirs. Thus the immaterial can not be said to be scarce – at least in the same sense as the material. [2]

IPR's are a form of method, a way to express an idea, an idea in themselves – not something concrete like a copy of a CD, a book or a car. There are plentiful examples in Locke, where someone uses a method to acquire property. In none of these examples, however, it is supposed that the method itself would be owned by the person using it. Instead, it is thought to be common to use the same method for either the same or similar purpose. Thus the right to ones labour doesn't apply to methods of work and the method can not be said to be of one. Instead of the limited commons so apparent in the material realm, the immaterial commons is unlimited. When there is a question of whether as much and as good can be left to another, it is clearly evident, that in the material commons this is not the case, at least after the population of people reaches certain limits (which we seem to have crossed). In the immaterial this is however not a problem. According to Kimppa [2] this has traditionally been seen falsely due to the immaterial being infinite, it has been thought, that as much and as good is left in any case. The as much is easily proven; if one takes away from infinite any finite number of things, there still is infinite number of things left. The as good is another case all together. Some inventions or discoveries are better for some things than others, thus the as good doesn't necessarily fulfill. However, there are no grounds in the infinite immaterial to grant even limited monopolies due to deprivation, since there is none. No one is deprived of the things they have in the immaterial even if another shares the same immaterial. Thus the only recourse to granting limited monopolies – be they in the form of patent or copyright – to the methods, ideas or their expressions are given to further the benefits of society, *not* because they are things that can be owned, i.e. property.

Were these privileges contradictory to the aims of the persons joining in commonwealth i.e. lessen their possibility to see to the preservation of their property, they ought not to be granted. To clarify the difference between property and the immaterial, Long [3] has an example:

> "Suppose you are trapped at the bottom of a ravine. Sabre-tooth tigers are approaching hungrily. Your only hope is to quickly construct a levitation device I've recently invented. You know how it works, because you attended a public lecture I gave on the topic. And it's easy to construct, quite rapidly, out of materials you see lying around in the ravine.
>
> But there's a problem. I've patented my levitation device. I own it — not just the individual model I built, but the universal. Thus, you can't construct your means of escape without using my property. And I, mean old skinflint that I am, refuse to give my permission. And so the tigers dine well." [3]

The example itself is of course an extreme one. The argument embedded in it, however, stands. One ought to be able to do with ones possessions as one pleases independent of others' IPR's (or in this sense, privileges).

Of Transferable Rights

One can not transfer to another, be it a person or a collective of persons, such as the legislative of a commonwealth, more power than one has. And since one does not have an absolute arbitrary power over oneself, or over any other, but instead one can not destroy or take away the life or the right to property of oneself or another, one can not give an absolute arbitrary power over oneself or ones property to the commonwealth. The power distributed to the legislative has one goal and one goal only, namely the preservation of the members of the commonwealth; that including life, liberty and estate, which is possessions of theirs, and thus has no right to impoverish its members. The law of nature, which means the preservation of oneself, one's freedom and ones property, stands as an eternal rule to all members of a commonwealth, be they subjects or legislators. The legislators must not pass laws which take any of these away from the members of the commonwealth. [1] And thus, if one is consistently Lockean in ones liberalism, the legislative of the commonwealth can not pass a law which would give an absolute arbitrary power over ones possessions for it would be absurd for men to join in such commonwealth in which they have less than they had in the state of nature. This is exactly what the legislatives of commonwealths have done when it comes to the immaterial, for after appropriating a piece of software or of digital media or any object one has possession of the software or the digital media or any object appropriated and thus ought to have, by natural law, control over it over any other, even the creator of it, let alone a distributing organization.

> “It cannot be supposed that they [men joining the commonwealth] should intend, *had they a power so to do*, to give any one or more an *absolute arbitrary power* over their persons and *estates*, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them; this were to put themselves into a worse condition than the state of Nature[.]” [1, §137, emphasis mine]

Now, the situation may have been, and may still be when considering material goods, that patents and copyrights have been useful for the public in aiding the distribution of innovations, books, works of music and other artworks. The introduction of means of digital distribution has changed the rules in such a manner, that it is questionable whether this holds true any more. [7]

> "The case of programs today is very different from that of books a hundred years ago. The fact that the easiest way to copy a program is from one neighbor to another, the fact that a program has both source code and object code which are distinct, and the fact that a program is used rather than read and enjoyed, combine to create a situation in which a person who enforces a copyright is harming society as a whole both materially and spiritually; in which a person should not do so regardless of whether the law enables him to." [7]

Due to IPR's being privileges to the immaterial rather than rights at all, people are starting to question the rights holders' justifications. This is noticeable by the rights holders trying to propose more and more draconian measures to uphold their privileges. [8]

> "Digital technology is more flexible than the printing press: when information has digital form, you can easily copy it to share it with others. This very flexibility makes a bad fit with a system like copyright. That's the reason for the increasingly nasty and draconian measures now used to enforce software copyright." [8]

Examples of these new draconian measures can be found in e.g. the digital millennium copyright act, in its European counterpart, in companies trying to extend their grasp of copyright to include such forms of copying which have traditionally been outside the scope of copyright. Model example of the last is the law passed in Finland, according to which copying of software (copyright protected) to ones own personal use and the use of ones closest persons is forbidden, even though it has been legal to do so for all copyrighted material before.

According to Locke [1] however, these kinds of privileges, when they do not benefit the participants of the society, can not be given. The rights of the commonwealth to govern over its participants do not give it a right to further distribute abilities to pass laws from the legislative to outside parties. The previous would give outside parties arbitrary power over the commonwealth's citizen’s life, liberty or estates. The way the IPR holders (through lobbying [9], unilateral negotiations with foreign powers) by attempting to upkeep their privileges even

though they do not benefit the society, are trying to effect the legislative is against the interests of the people, and thus their privileges ought to be revoked.

On top of attempting to hold on to privileges which are not beneficial for the participants of the commonwealth, the immaterial privilege holders extend their grasp to tax-like payments from the public. International organizations such as CISAC and WIPO are – through negotiations with national organizations – extending the grasp of IPR holders. Examples from Finland include organizations like Teosto, Gramex, Kuvasto and Kopiosto, which all attempt to limit what persons, organizations and companies can do with their property. Similar organizations are working around at least the western world. They collect tax-like payments, from playing music in restaurants to buying empty CD's, yet these tax-like payments are not used for the society's benefit, as they according to Locke [1] ought to be.

> "[F]or if any one shall claim a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take when he pleases to himself?" [1, §140]

Were it so, that the payments they collect would be collected for the use of the commonwealth, there would not necessarily be a problem. Alas, it is collected for the IPR holders, who are not part of the legislative nor answer to it.

Of Alternative Solutions

The main reason for the need for an alternative approach is that if the current property approach to IPR's is wrong, IPR's ought then be considered privileges. And if they are considered privileges, the commonwealth can not transfer rights to them to the IPR holders unless these IPR's do not risk the publics' right to their property (which is a basic, natural right). This is clearly the case, thus giving arbitrary power over ones life, liberty and estate to the hands of third parties, which is unjust. If it can be proven, that giving IPR's to third parties and thus improving the condition of the people joining commonwealths (for that is the purpose of joining commonwealths), it may can be argued that privileges to IPR's are justifiable. This is a widely accepted truism, whether true, is another question. In any case, it is a consequentialist, rather than purely liberalist argument, and is not the argument this article tries to clarify and prove false (for an extended handling of this problem see [10]).

If we accept the notion presented in this paper, that IPR's are not a form of property, but rather a form of privilege and if they do not benefit the society at large, especially when it comes to digitally distributable media (which doesn't suffer the limitations of material property as it can be copied easily and is, in the case of software rather a method than a thing to be owned [2]) or limit the possibility of the public to use what they have, the FSF [11] and Stallman [12] offer a different view on how to handle the distribution of such material. Instead of giving IPR holders 'limited' monopoly, they could be paid to produce the immaterial, i.e. those in need of software

would contact a party willing to produce what they need and pay for the production. Deals about help services and further development could of course also be made on top of the original delivery, but the software itself, after completion, would enjoy no artificial protection.

Stallman [13] seems to agree with the interpretation offered from Locke, that people should be able to decide what they do with their possessions without the interference from an outside party. The main reason for this – as I have shown based on Locke [2] – is that software is different from material objects in that it can be copied and reproduced as wished and is not away from another like a material object would be, if it was taken from another [14]. If what can be done with a program is controlled by an IPR's holder, that would limit the rights of the person having the software to do with it as they please [8]. To be able to fully use the code one has, one must be in control of the code one possesses. This kind of control given to an elite few would not be in the interests of the general public. [15]

According to Stallman [9] computers and networks (mainly Internet, but other networks as well) offered a new way to distribute information. Copying and manipulating information, be it software, books or music, became simple. This raised hopes among the early adopters of the medium that the need for restrictive practices (based largely on the necessity of a distribution channel to deliver the music and text formerly in a material form) could come to an end. Unfortunately, and now unnecessarily, copyright extended its grasp also to this new medium. The reason for granting copyright and thus limiting the rights of the people in the society – to spread physical copies of music and texts – had disappeared. The world had changed, but the law had not. Surprisingly, when the new circumstances came about, the law didn't relax, as was expected; it tightened. Under the new situation, the old rights of the user were restricted even further. No longer was it allowed to make copies of copyright protected media and distribute these amongst friends in the new format. The new medium could be used also to restrict users, by for example creating e-books which can be locked so that even the old allowed copying is now impossible, and were there ways around it, it has been seen to that these ways have been blocked by the DMCA [16] and hampered by its European counterpart. The reason for so little commotion about these apparent restrictions in our rights to handle what we have purchased is, according to Stallman [9], that the rise of electronic publishing is yet to come. Stallman hopes, that this will change once the general public becomes aware of the new, more restricted situation. I fear for a different outcome. As we are entering the new regime of IPR's, 'make believe laws' [17] are being put forth in the traditional media and the new medium to make us believe, that copying to our friends is illegal, that when it actually becomes so, we have already accepted it as a truism, which can not be changed.

Publishing in the net should be encouraged especially in the field of scholarly papers for it helps to make the works of the scientists more available for the public [9 and 11]. Text books should also be published in the net, for it would encourage learning. They should be available for modification to encourage improvement. [9] The same – according to Stallman holds true for software. When paying over the net becomes possible, it is easy enough to add 'pay a dollar to the author' button on the page, to make mandatory payments obsolete. If the publication, be it a book, music or software, is liked enough, people are bound to pay – a dollar is not much from one,

but it becomes so when paid by many. [9] To this, it is easy to say as counter that this all seems fine and good, but can people actually make a living this way. Stallman himself – amongst many other free and open source software writers – is an excellent example on that it can be done. If one tries to claim, that free and open source software is not viable as a marketed good, one can look at Red Hat and other free and open source software companies listed at Wallstreet.

Conclusions

If one has gained possession of software or digitally distributable media through trade, gift or purchase one ought to be able to use, modify and redistribute it without external restrictions. IPR's in software and digitally distributable media give arbitrary power to control ones possessions by an outside party, which is not justifiable either by Locke or Stallman and Free Software Foundation. The proposed system would result in a very different world when it comes to IPR's in general, but especially in IPR's in software and digitally distributable media. That world, however, needs not be in opposition to market economy as the opposition would claim; it would just mean, that more small inventions would be made and that making riches with programming would not necessarily be quite as easy. Free Software Foundation [11] actually encourages people to do just that, to sell software. What they do not encourage is keeping the rights to modify and reproduce as IPR holders' exclusive right. What is meant by this is "distributing free software for a fee" [11] ("free" as in "free speech", not as in "free beer" [18]).

> "Strictly speaking, "selling" means trading goods for money. Selling a copy of a free program is legitimate, and we encourage it. […] You can charge nothing, a penny, a dollar, or a billion dollars. It's up to you, and the marketplace, so don't complain to us if nobody wants to pay a billion dollars for a copy." [11]

So charging for software – according to the view proposed by FSF and my interpretation of Locke – is quite fine with the exception that the source bust be distributed with the copy or must be made available for the purchaser with no additional cost.

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