

Consequentialist Considerations of Intellectual Property Rights in Software and other Digitally Distributable Media

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Abstract: This article answers consequentialist questions raised by various parties about the consequences of the implications of some recent liberalist and libertarian thoughts of intellectual property rights (IPR's) in software and other digitally distributable media. It argues that most typical consequentialist arguments why IPR's ought to be granted to software and other digitally distributable media are lacking in their power to prove the necessity of IPR's. The aim of the article is to show that the proofs are either purely theoretical and can't be tested in real world situations or ad hoc rationalizations and that the counter examples given – even though often just as theoretical – at least seem as plausible if not more so. When neither side can be verified, no IPR's would seem more logical than IPR's 'just in case'.

Keywords: utility, utilitarianism, consequences, consequentialism, intellectual property, IPR, patent, copyright, free software, open source

1. Introduction

Spinello (2003) points out that IPR's have received too little attention in the field of information technology ethics from philosophers. The legal scholars (see e.g. Sixth Annual Ethics and Technology Conference Proceedings, various legal publications, including the Yale Law Journal and the Journal of Law and Philosophy) have tackled the problems to a larger degree, but mainly, although not only, from a more applied point of view rather than approaching the question of what kinds of rights, if any, would be right or good. Philosophers should contribute more to this discussion. Spinello also points out, that “[i]n light of digital technology it is especially critical to re-examine the underpinnings of the moral legitimacy for intellectual property protection.” (Spinello, 2003.) The re-examination of the underpinnings of the moral legitimacy for IPR's seems to both start from and lead us to somewhat different directions. Spinello seems to start from the current situation rather than a no-IPR's situation which leads him to advocate a shortened and possibly less stringent IPR protection, labeling a situation of no intellectual protection 'information anarchy'. In my understanding, anarchy leads to the laissez-faire situation where the strongest rule with monopolies or oligopolies and that resembles more the current situation in software and other digitally distributable media than a situation where IPR's would not be granted at all.

Spinello (2003) claims that if we “accept some version of the Lockean perspective that individuals have a natural entitlement to control the results of their labor” it would transfer over to the immaterial as well as the material results of that labor. Kimppa (2003a) (see also e.g. Long, 1995 and Kinsella, 2001) has approached the question of IPR's from a Lockean liberalist position and come to quite different conclusions. Since the immaterial is

nonrivalrous, the Lockean claim that as much and as good must be left for others, at least in the starting situation, still holds. Thus we need to start from a situation where no IPR's are granted and consider whether such rights would benefit or worsen the condition of the society or societies. Papers presented by Kimppa (2003a, 2003b) have raised considerations of whether the consequences of such a system would be, in the consequentialist sense, good or not.

In this paper I aim to go through the main arguments for IPR's from the consequentialist point of view and show their weaknesses, and the main criticisms which the no-IPR's view has received from the consequentialist camp and try to rectify the latter. I will start by showing that the main utilitarian argument that we should try to maximize the good of the society has been misunderstood to mean only quantitative good measured in – especially when considering the loss of potential profits if IPR's were to be abandoned – profit. Not enough attention has been paid to the qualitative aspects of good, of understanding what constitutes good for the members of society and whether it is equally transferable from one person to another through some medium such as money.

Then I will consider that in consequentialist thinking 'as much good for as many as possible' the 'for as many' seems to have been forgotten. I will first approach the issue of whether a society in which one has lot and others have little is better or worse than a society in which all have some, even if the latter society has less over-all than the first society. Then I will tackle the question of whether the so-called 'trickle down theory' seems to work or not and who the current IPR system will benefit; whether it will benefit the rich or the poor, the corporation or the citizen – with-in societies and in-between them.

After this I will turn my attention to the claims that innovation would suffer were we to abandon IPR's. I will point out, that not all innovations are qualitatively equal in importance for the users. Those innovations that stem from the need of the innovator, rather than the need of the marketing department, rise from concerns of what is needed rather than the concerns of what can be marketed.

I will also approach the question of whether IPR's in software and other digitally distributable media indeed grant limited monopolies as claimed by their advocates or actually grant unlimited monopolies, at least for all practical purposes, and what are the consequences of that.

I will point out that verification of the benefits of current IPR's is very difficult if not impossible and that the original reasoning for them has long since abated. I will argue, that they can't be upheld for 'just in case', for the reason that they might promote creativity, if we have no solid grounds for the claim and if we have multitude of examples where they clearly inhibit creativity instead of promoting it.

And finally, I will propose alternative solutions rising from Free Software Foundations position and consider gains and losses we would have to face if they were adopted instead of the current laws and practices.

2. Common consequentialist arguments for intellectual property rights and their critique

Some liberalist and libertarian papers (see e.g. Long, 1995; Kinsella, 2001; Kimppa, 2003a and 2003b) have lately raised some concerns about the consequences for society/societies of their respective approaches to IPR's. This paper answers some of the concerns presented by those worried.

2.1 Quantitative or qualitative good?

Utility is not measured only in monetary rewards. This misunderstanding seems to be pervasive when talking about IPR's. The 'good' has been misunderstood as 'profit' or 'benefit' or even as 'money', which are not directly the same thing – at least from a philosophical point of view. In consequentialist terms, we must consider other things, like what constitutes good for the society. If granting IPR's should diminish that, IPR's must be reconsidered.

Utility has been misunderstood – especially when talking about losing potential profits if IPR's would be abandoned – as profit. Profit, or money, is a good way to measure utility, as it is easily countable and many things are easily measurable in monetary terms. A problem arises when things such as love or – as Johnson (2001) defines utility – happiness are attempted to transfer to money or profit. This seems at least difficult. The basis of consequentialism and utilitarianism is 'as much good for as many as possible', not 'as much quantitative, or easily countable, good for as many as possible'. We can't only count the easily measurable, we must also remember such joys as the joy to invent, the joy of love, the joy of understanding, which do not transfer to money or other easily comparable forms.

As seen, the 'as much' in 'as much good as possible to as many as possible' seems to have been misunderstood. It is understood, that only the quantitative matters. Qualitative is out of the picture (because it is difficult to measure in dollars or euros). All innovations, however, are not qualitatively equally valuable. If we are to believe the economists, it would seem (to large degree) be the reasoning that only quantitative amounts can be measured. The more innovations we get the better. However, if we look at what kind of innovations the current 'limited' monopoly produces to us; it produces innovations that can be marketed. It doesn't necessarily produce innovations that the people would actually need or want. If, on the other hand, we approach the innovations from what people need and want, a most profound reason for innovating is to innovate for the needs of oneself and those one considers important – be that only themselves, their close ones, or, for some hopelessly idealistic people, the society's members or even humankind at large. This kind of innovation would, instead of easily marketable results, lead to products that the people actually need and thus be better for the society or societies as whole than the current innovations, which most time are made to be marketed if motivated by IPR's and not the need or want to innovate. The innovations that we now receive from the need or want to innovate would be innovated in any case, and thus they do not necessarily need IPR's to protect them. IPR's can, however stifle innovation of needed or wanted applications due to someone already having IPR's to the same innovation or parts necessary for the innovation the innovator might want to create. (See e.g. Spinello, 1995.)

Typical example on how IPR's can stifle innovation would be DVD protections which can't be overcome under GNU/Linux operating system with free and open source software

(F/OSS) due to the protections being proprietary and that a licence fee must be paid to bypass them with already written software and even forward engineering a solution to bypass them is illegal.

2.2 As much good to as many as possible or as much good as possible?

Feldman (1978) has proposed different definitions of utilitarianism; I am interested in his favorite, U7 “an act is right if and only if there is no other act the agent could have done instead that has higher utility than it has” and mine, U8 “an act is right if and only if it produces the greatest happiness of the greatest number”, although I would like to rephrase U8 to U8’ as “an act is right if and only if it produces as much good for as many as possible”. Johnson (2001) has a similar phrasing to Feldman’s U8 and my U8’, “everyone ought to act so as to bring about the greatest amount of happiness for the greatest number of people” – she doesn’t seem to worry about the issue which Feldman finds problematic with U8 and its variations, namely that there are two separate variables in them. I am neither troubled by this, for various ways to analyze them can be created, certain limits on when the happiness, or good, as I want to put it becomes more important than the amount of people it concerns and vice versa. To me, as seems to be to Johnson, it is intuitively clear, that U7 would result in far more troublesome situations than U8 and its variations.

The ‘as many’ seems to have been either forgotten or ignored or, as well, misunderstood. If we get X amount of ‘good’ (which seems to equal money for the economists) distributed unequally, it is better than X-Y (where Y is a positive natural number) equally distributed, however small the Y. If one looks at the world around one, one is bound to notice, that the former seems to be the rule, to an ever growing amount within, but especially in-between countries. There is more ‘good’ (or money in today’s economically charged political climate in the western world) to be distributed, and percentage wise less and less people distribute it between one-another. This, however, seems intuitively wrong, when we are aware that some suffer from hunger while others have more money than they and their heirs can spend in several lifetimes. This is a consequence of the kind of consequentialist thinking that seems to be prevalent; the kind of thinking just described in the previous chapter.

2.3 Who is the target of good; the citizen or the corporation?

The future of the industry – both in content and software production – seems to be forming on the rules of the content industries and technology companies. Other stakeholders, namely the scientists, developers and the general public seem to have been forgotten when changes in the copyright protection are made. As Grove (2003) amongst others points out, for example the DMCA limits scientists from learning from already existing software; even if the circumvention of the protections of the software is done purely on research basis. Also, learning about possible security hazards of programs becomes impossible to be done for the outsiders and thus preventing misuse (misuse, for which the circumvention of the protections will be done regardless of whether the law allows it or not) of the possible security holes is left purely in the hands of the IPR holder. F/OSS are fully open and thus anyone can find, point out and even repair possible security holes, thus increasing the security of the program. Other bugs in software fall under this same rule. Bugs, which lessen the usability of the program for what ever purpose it was designed are transparent in F/OSS and are especially difficult to find and/or correct in IPR protected software, especially if the circumvention of the protections is illegal.

Having IPR's causes a situation where developers of the immaterial can't stand on 'the shoulders of giants' but instead have to limit their development by the artificial barriers caused by IPR's. The way to further develop the immaterial, especially in the software business be employed by the developing corporation, thus one has to 'stand on the shoulders of IPR holders'. This causes according to Stallman (1992) the development and distribution of software (and other immaterial) to become far more expensive than it would be if no IPR's were in place, thus implicitly supporting the need of IPR's because it is easy to point out that development is expensive, difficult and time consuming and thus needs to be rewarded by IPR's – prime example of circular argumentation.

2.4 Does it really trickle down?

The 'trickle down theory' doesn't seem to maximize utility. It functions too slow and too late from a human scale, which ought to be paramount when considering what is right and what is wrong. Maximizing utility is social well-being. We have forgotten the rule of 'for as many' in the utilitarian line of argument. It is claimed that innovations need a property-like protection for them to be created. According to some, these innovations will then enter the society (with a limited monopoly) and finally, dribble (with a delay) down to other societies – innovations, that wouldn't be made at all were it not for the intellectual property rights. First only the ones with enough resources to meet the licensing fees or monopoly costs will be able to appropriate these innovations, then when the first niche has been drained, those with lesser resources will be able to purchase them and finally, when the (limited) protection time is over, anyone will be able to acquire them. The problem with this is, that the limited monopoly has turned in a human scale and in a computer-age scale to an *unlimited* monopoly and thus, when the people and organizations who would have benefited the most from these innovations are finally able to use them, the innovations are already either not helping them at all or not a viable basis for further innovation. This is true for AIDS medicines – if the patent times of 20 years are the hindrance to the use of AIDS medicine, the people who would have needed the medicine will already be dead by the time they had access to the medicines – as well as for software – by the time copyright in software ends, the need of further developing that software (and thus the potential other innovation directions than the copyright owners chosen ones) has already passed, for who would want to further develop a software that was new over 70 years ago?

Lessig's (2001) idea of a 5 year copyright term once renewable for software or Spinello's (1995) idea of 6-8 years patent term for software seem reasonable, but are they? The 5-10 year copyright term will still encourage massive software since there is no incentive to publish the source code further development of such software is still crippled by a system like it. Also, the ten year protection term would mean that further developing and learning from software like windows 95 (not that I would be claiming that someone would want to enhance or learn from windows 95 particularly) would still be difficult even if the source would have to be opened to public scrutiny even after the ten years. Lessig's approach would still lead to massive rather than modular software, which by its very nature would slow the development of it down further. The 6-8 years patent term for software patents sounds much more reasonable first of all since the patent itself would be public, but it would still stifle development for that period of time. Often being first to market is quite sufficient enough benefit to come up even with currently patentable inventions and since the markets have quickened and broadened considerably since the global information exchange and global markets emergence, the time to cover development costs has also shortened considerably.

This holds especially true with software patents, which often are not very novel and thus have low development costs (e.g. 1-Click shopping patent).

Even if IPR's would locally in one country create a net benefit they still might globally cause net losses (Drahos, 1996), the following cases give examples of this. WTO has finally admitted, if one looks at late news, that by-passing IPR's in medicines may be morally and economically correct. The negative consequences for the drug companies developing cures for malaria, AIDS, and so forth, are lesser than the beneficial consequences for third world countries. What baffles the writer is how is it then possible to claim, that when over two thirds of the world's population could gain on the less than one third by opening all intellectual property rights for the next say, 20-30 years, that it would be less beneficial? Quite the contrary could be claimed. The need for opening drug IPR's would become unnecessary if the countries could freely utilize all intellectual creations of today and they could actually be able to raise their standard of living to the current western standards. Japan serves as a good example on a country that didn't acknowledge western IPR's during its industrialization and managed to become an industrial and post-industrial state very quickly. To whom ever who would claim that after that the standards of living could proportionally fall to the same difference again, it is absurd to say, that if even all western people could achieve the living standard of, say, Bill Gates, or Michael Jackson and at the same time the average third world country member would be 'only' at the living standard of the average Joe or his aunt Tilly, that the situation would in some way be comparable to the situation existing today.

Access to information is crucial if we want to equalize the world's living conditions. Access to basic information is not enough, but also access to applied information must be available, lest the weaker never catch up with the stronger. Application advances need to be understood and the possibility to further develop them needs to be available, else the gap between the rich and the poor countries can never be gapped, and the relative, and likely also the actual distance will continue to grow rather than abate.

2.5 Might promote good?

The main argument against strong IPR's from the consequentialist or utilitarian point of view is, that most if not all arguments for IPR's from the consequentialist point of view are theoretical, they seem more like ad hoc rationalizations for a system that was not built for the good of the people, but rather for the good of the ruling class, and thus if a truly consequentialist system to govern the immaterial is wanted, basic arguments for and against it must be placed in equal starting point and the system must be built from there up. Even if the later systems are looked at we notice, that the original times for patents were short compared to the expected return times (Free Software Foundation, 1993) and for example in the United States no copyrights were granted for foreigners until 1891 (Alford, 1995), for as long as it was net-benefactor of imported copyrighted knowledge (this seems to be awfully close to importing and creating pirated copies). We have not been able to actually verify whether the claims for IPR's hold true or not, since it is impossible to create competing societies with other variables equal. Thus, even though the consequentialist arguments for lesser or no IPR's are quite as theoretical, the burden of proof should be on those introducing IPR's rather than those claiming that no such thing is necessary. If the arguments from both sides are weighed to be even approximately equal, then no IPR's should be placed rather than 'let's give them IPR's just in case it might stimulate creative activity' for they always limit others' possibilities to use these otherwise unlimited resources and thus unarguably lessen the overall

good of the society/societies. What we do know, however, is that the situation in both the realm of patents and copyright differs considerably from the times of a hundred years ago (Free Software Foundation, 1993; Stallman, 1994). Yet, even though dissemination times are shorter and spread of products wider and thus, one would imagine, profits faster and greater, rather than shortening the protection times for the immaterial, the protection times seem to lengthen and smaller and smaller things are considered as patentable innovations.

“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.” (Free Software Foundation, 1993)

As Karp (2003) points out, the worry about potential profits has been with us ever since the invention of tape and video recorder and copy machine. Contrary to expectations, at least some of these media actually enhanced the profits of the industries after the correct ways to utilize them were found. The same seems to hold especially for digitally distributable media, such as music and video's. The distribution channel eliminates the middle-men from the equation and the creators of the media can sell their products directly. Thus, even if some or even a lot of profits are lost due to copying of media in question, the profits themselves can go directly to the producers instead of the oligopolistic market functioners and the retail stores. The form of the internet distribution also benefits such actors, which would have little or no hope of getting to be known through the old distribution channels. Most of the profits actually given to the artist, author or developer of software after all go to main names in the business. (See e.g. Agre, 2003.) The attempts to protect the existing business model will only delay the emergence of new distribution channels. Losses in potential profits are also counted in a very strange way.

All copied products are often considered lost potential profits even if the users copying the product would not have purchased the product irrespective of whether they were able to copy it or not (Stallman, 1994). When the real harm is that fewer users will have the possibility to use the program if the use is artificially – through IPR's – restricted (Stallman, 1992).

“Software hoarders try their damndest to stop you from running a proprietary program without paying the standard price. If this price is high, that does make it hard for some users to use the program.” (Free Software Foundation, 1996.)

Patents seem to be accepted at face value. Even when there is no actual ground breaking invention needed, but rather a commonly known and even used solution is first applied for protection. This can lead to situations, where even an average Joe doing his homepages can violate a patent – unaware of the violation – and then be asked to remove the violating procedures and even prosecuted for using them. The overhead of considering who owns the rights to certain features or even whole programs can also be eliminated by dropping IPR's all together – to find out with whom different licensing agreements should be made or even just to upkeep a system, especially in this time of Internet when copying is easy, to pay royalties for usage of the immaterial occur at a great financial and social cost (Free Software Foundation, 1993). Typical example of such frivolous patent would be the 1-Click patent. (Besaha, 2003.) Even if we were to accept the IPR's as they have been meant to function and

the justifiability of them in that context, clearly most of the late legal actions (CTEA, DMCA) and the application of them (see e.g. the previously mentioned 1-Click patent or Vivendi vs. BnetD, both widely covered even in mainstream media) have defeated the purpose of the IPR protections, namely to introduce new artistic creations and innovations to the society for a limited monopoly time then to be submitted to the public domain for free use and improvement of the creations or inventions.

There are some considerations that clearly speak against giving IPR holders exclusive rights to their creations or inventions. Most clear ones are the limits on utility of the user in a situation where they need to make changes to the software for it to function correctly, to patch up a security risk or to make it do what the user wants, if that happens to differ from the ideas the creator had in mind (Stallman, 1992; Free Software Foundation, 1993).

2.6 Would be created anyway?

The main argument for IPR's is that if none are granted, no immaterial will be created. This argument is flawed in multiple ways. First of all, it assumes that there is only one possible way for rewarding creativity, to provide proprietary control over its results. This of course is clearly false. It is a loaded question, which can be expressed in the words of Richard Stallman:

“The economic argument goes like this: ‘‘I want to get rich (usually described inaccurately as ‘making a living’), and if you don't allow me to get rich by programming, then I won't program. Everyone else is like me, so nobody will ever program. And then you'll be stuck with no programs at all!’’ This threat is usually veiled as friendly advice from the wise.” (Stallman, 1992.)

Many people will program regardless whether they get paid for it or not. Simply from the need of programs or the need of changes in existing programs they themselves have. On top of this, they can hire their work for those wanting changes in a program and thus get paid or get paid for ‘hand-holding’, i.e. help desk support functions. (Free Software Foundation, 1993; Stallman, 1994.) Also, we have many examples from software, music and even books that have been available for free, yet people are willing to pay for them on voluntary basis. Maybe not as much as if they were sold proprietary only, but as ethicists we ought to be more concerned about the total good they produce rather than the income they produce. So possibilities for making a living with creating immaterial do indeed exist even if proprietary software or any IPR protected immaterial wouldn't. If this distribution method creates possibilities for greater happiness than proprietary methods it ought to be advocated.

Even though Spinello (2003) citing Lessig (2001) thinks, that copyright incentives are important to stimulate creative activity, my claim is, that especially a lot of the software needs to be developed whether there is an intellectual property protection to it or not. For example the hardware manufacturers create software or give incentives to create it to be able to sell their hardware (Stallman, 1994). Also, a lot of software and other digitally distributable media is created in which the IPR's are voluntarily set up so that no licensing fees need be paid.

“Post-modern critics, for example, find it hard to accept that creative works have a single author, so the assignment of a ‘property right’ loses intelligibility” (Spinello, 2003). Note that many inventions would be made irrespective of giving a property right, for the pure reason,

that not many works have a single author/creator but are creations that have been studied in many places at the same time. The airplane would function as a typical example of such inventions. Thus, they'd be created even without a strong intellectual property regime in place.

Also, as was previously pointed out, if people invent for the needs and wants arising from themselves or their close ones, or from the pure joy of inventing, at least some of the wanted things would be invented in any case.

3. What then?

But does this need to be the case? If IPR's didn't exist, any party could use advances of another party, and instead of these monstrous development projects (be they in software or other immaterial) we could instead advance by multiple smaller steps. This is specifically beneficial in software development where modularity would often time (see e.g. many F/OSS projects, most predominantly GNU/Linux development (Raymond, 2001)) work much better than grandiose projects that try to answer all problems in one centrally organized software.

As Spinello (2003) notes, the IPR laws are getting more and more stringent (See also Stallman, 1994) and at the same time the intellectual commons is pushed to a smaller and smaller area. Even though the F/OSS movement and similar appear to be independent of the proprietary software creators, this is actually not true. If the F/OSS side wants to keep their competitiveness, they will have to be able to reverse (or forward) engineer technologies, technologies, of which some are now patented, rather than copyrighted and protected by laws such as the DMCA, according to which it is claimed, that reverse-engineering is actually breaking encryptions.

From the consequentialist point of view IPR's cut into the natural rights of the public and thus can only be justified if they benefit the public (Stallman, 1994). If the previous has convinced the reader, that this is not at least *prima facie* the case, we ought to reconsider IPR's and start from an empty playing field in our consideration of their justifiability rather than just accept them as they stem from the current, how ever traditionally accepted laws.

Both Stallman (1992) and Spinello (2003) note that the specialists called in when considering the copyright law are most time representatives of the industries in question. Hardly ever are the consumer organizations or the users of the products of these industries heard and if they are, their possibility to influence the decisions seems limited compared to the power and influence of the industry representatives. This is bound to lead to a situation where the interests of one party in a multiparty situation are over represented in the decisions made. From a consequentialist point of view however, the prosperity and freedom of the public is of utmost importance. Does this method of finding the solution actually promote or hamper the good of the people? Stallman's answer – and Spinello is, albeit more reservedly, somewhat along the same lines – is that it rather hampers than promotes the good of the programmers, users and eventually, the people in general. The public sphere of the immaterial lessens if the only parties listened to are from the production side, they would of course want stronger protection and less immaterial that would be freely available since it serves their short term (and in some cases long term as well) interests by allowing them to have limited monopolies on immaterial goods that could otherwise be easily copied and distributed. The recent case of software patents in EU is a fine example of this. When constructing the directive, people

were not listened to but fortunately the public pressure by citizens' organizations forced the directive – at least temporarily – to be stopped from passing.

If all media which now is distributed in paper or other physical form would be distributed (also) in electronic form, it would even be beneficial to the human populace in that it would pollute less. The problem with IPR's in this is, that first there is no reliable way to pay electronically which would be available to all people – this of course is only a temporary problem which can be overcome, but still real, none the less. Second, since the IPR's are so strong, many of the producers of immaterial in electronic form are switching towards one-use or limited-use products (Felten, 2003), which again shuns the consumers from using digitally distributable media over physically distributed media or from using the media all together, which in itself lessens (at least social) utility. Third, digital rights management (DRM) in digitally distributable media prevent users from utilizing their rights still available in other media. A book or a music CD is possible to copy to oneself or a friend, which in DRM protected product is not possible. (About the limitations of fair use in DRM see e.g. Erickson, 2003; Felten, 2003 and Fox and LaMacchia, 2003.)

The copying of digitally distributable media runs as rampant as it can (we are all aware of P2P distribution such as Kazaa). Even tightening up the protection only leads to counter measures (encrypted transmissions where the source of the files is not viewable from outside) created by the (non-profit) parties distributing unauthorized copies. The persons who do not want to pay for their software will get it without paying for it as situation is. The situation as it stands also feeds into the hands of organized crime in profits that can then be used for other organized crime than the distribution of digitally distributable media which can in many ways be much more destructive for the society than this particular aspect can ever be. The parties wanting to copy and distribute copied products for monetary gain can function rather well even under the current systems. If there were no IPR's, and thus this kind of distribution being legal, the criminal organizations hold on the distribution of such digitally distributable media would weaken and eventually disappear. Eliminating IPR's and thus allowing these functions would contribute to the general well-being of the society and thus increase the utility or good of the society. This by no means indicates that the organization creating the digitally distributable media could not still distribute it for profit, as we can see from the examples of several GNU/Linux compilation distributors. Also, the creators could offer other services, such as enhancements, services or support for the product, as pointed out elsewhere in this article.

4. Conclusions

What I've been aiming to show is that from a consequentialist point of view, the currently prevalent restrictive system has first of all serious problems showing that it produces the largest amount of good and second of all, doesn't seem to fare too well compared to many of the alternative approaches I showed. If this is so, it is hard to justify the restrictions it places upon the freedom of the common man and instead the privileges it gives to the software companies. This is, what I have been worried about in my two previous articles (see Kimppa, 2003a and 2003b), in which I have aimed to tackle this problem from a Lockean liberalist position.

The total amount of hedons might be smaller in the system which I propose due to it not creating massive software that could as easily be marketed as the current one does, but so would also be the total amount of dolors, due to it not being restrictive on the users in the way

the current one is. In my opinion, we would still remain more on the positive side in my proposed system than in the current one. Unfortunately, this can not be tested, due to obvious reasons; we do not have an alternative world, where we could test my hypothesis, so it will have to be this world or no world, where it is tested.

Despite the system which promotes proprietary software, F/OSS software has fared reasonably well – with approximately 15% of the ‘market share’ of operating systems. This, however, is under threat by software patent. The future might not be as rosy. If software patents become common place, they will drive the F/OSS out of ‘business’ due to the F/OSS developers not being able to even themselves create competing software, since patents, unlike copyright, just can’t be lawfully reproduced, even if it is done from scratch. Were it so, that some or even many software patents were such, that the consumers wanted to use programs benefiting from those patents, the big software companies are sure to buy the patents (if they don’t develop them themselves) if for no other reason, then to ensure, that the F/OSS developers can’t get their hands to them at all due to F/OSS being non-proprietary and thus being unable to pay licensing fees and therefore weaker in anything that is totally exclusive in the proprietary market. This kind of competing is what Richard Stallman (1992) calls combat: “Withholding information that could help everyone advance is a form of combat.”

Is that the kind of competition and the kind of world we want to promote? I hope that we have risen above the ‘natural state’ of war against everyone and instead to join Locke’s commonwealths and can try to compete fairly. The dolors created by the nasty competition itself seem plentiful enough to direct us to think that maybe, just maybe, we have gone the wrong way and ought to reconsider our road.

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