

Chapter 8.22

The Impact of Open Source Development on the Social Construction of Intellectual Property

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ABSTRACT

This chapter discusses the impact that open source software has on our perception and use of intellectual property. The theoretical foundation of the paper is constructionist in that it holds intellectual property to be a social construction that is created and legitimized by narratives. In a first step, the chapter recounts the narratives that are usually found in the literature to justify the creation and protection of intellectual property. The two most important streams of narratives are the utilitarian and the natural rights arguments. In a second step, the paper proceeds to the impact that the use of information and communication technology (ICT) has on the narratives of intellectual property. From there, the chapter progresses to a discussion of the impact of open source software on these narratives. It will be argued that open source software changes our perception of intellectual

property because it offers evidence that some of the classical narratives are simplistic. At the same time it will become clear that open source is not a frontal assault on intellectual property because it is partly based on ownership of intellectual artefacts. The conclusion discusses how this change of narratives caused by open source software may reflect on our institutions, laws, and regulations of intellectual property.

INTRODUCTION

There can be little doubt that the way we regulate intellectual property is of high importance for the oft-cited information society. Intellectual property regulations affect the way we do business on the Web, but they also go to the heart of other developments in fields such as education, recreation, or government. In this chapter, I will

take a narrative approach to intellectual property, with the aim of studying how new developments such as open source software impact on it. The central idea is that intellectual property is a social construction that is based on the acceptance of narratives. These narratives form the basis of the regulations that societies adopt. The main thesis is that open source software brings with it new narratives that conflict with the established ones and that this will lead to consequences in the way we perceive, regulate, and enforce intellectual property.

In order to render this hypothesis plausible, the chapter will start out by recounting the narratives that are used to justify and legitimize property in general. It will proceed to the stories that are used to constitute intellectual property and how these differ from physical property narratives. The subsequent section will discuss the influence that information and communication technologies have on intellectual property, and it will give an account of the development of intellectual property regulations based on these narratives. The following section will then discuss the impact that open source software has on this debate. It will relate how the stories upon which open source is based conform to or contradict the traditional justifications of intellectual property. The conclusion will then attempt an outlook on how these changing narratives may be reflected in intellectual property regulations.

THE NARRATIVE OF INTELLECTUAL PROPERTY

The plausibility of this chapter hinges on the acceptance of the hypothesis that intellectual property is a set of rules that are based on narratives. It should be clear that the stories that we associate with social norms and their believability determine the effectiveness of these norms. Only if this starting point is accepted will it make sense

to tell these stories, which will be done for the remainder of this section.

What are stories, what are narratives, which narratives are good, which are not, who tells them, who receives them? All of these are questions that cannot be answered exhaustively, especially not in one chapter. Narratives are those stories that we use to make sense of the world on an individual as well as a collective level (Ricoeur, 1994). These stories are transmitted by a multitude of channels, they can be contradictory, they change over time and between geographical areas, and they are very hard to pin down. Nevertheless, they are the stuff of which our culture and identity are made (Stahl, 2003). And like most concepts that have to do with culture, identity, personality, meaning, and understanding, they are highly fuzzy at the edges and therefore tend frustrate analytically minded scholars. This fuzziness need not concern us at this stage, however, because it is not the purpose of this chapter to prove, disprove, analyze, or scientifically validate narratives. This chapter aims to tell a narrative about narratives. It is a story about the stories that are told about intellectual property. As such, it cannot claim to be objective or true. At best, it will be plausible and believable to the reader. The point of the exercise is to look at the effects that a new narrative, namely, that of open source software, has on older narratives of intellectual property. The reason for doing so is to see how far these narratives are compatible and where they may need to change. This is a very broad exercise that can absolutely not do justice to all of the aspects involved. It is nevertheless useful because it may help us refocus on what intellectual property means to us, why we value it, and how we want to use it.

The Story of Property

Since intellectual property is one aspect of a wider field of rights that are summarized under the heading of “property,” it is a good starting point to

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