Legislation of Open Source Usage in Public and Private Institutions in Comparison in Developing Countries, Existing Legislation and New Challenges

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Abstract
Since 1837, when Charles Babbage discovered his machine of data analysis, until 1886, where in Berne, the Convention for the Protection of Literary and Artistic Works was signed, the protection of intellectual property developed at a frantic pace until now. The revolution in this field took place during last thirty years. Since 1980's and onwards the science of law has been required to cover radical developments and novel concepts, like the free and open source software movement. These developments affect most developing countries, each of which has separate legal background and historical development. This paper examines, from a historical overview of the international context and the circumstances of developing countries using Balkans as example, the existing legal framework and the actual conditions of open source usage in public and private institutions. In parallel it examines the reconciliation achieved due to the different developments and the process of European integration. Furthermore since most of the development of software has been originated from the United States and the UK, a comparison is taking place between the continental family of legislation with the Anglo- Saxon family of Law mainly examining the impact of the recent accession of US in the Berne Convention. Pivotal in this discussion would be the experience of Intellectual Property in UK, where the IP legislation has been established as a concept for the first time, and what could be the lessons shared. Furthermore it analyses the prospects, developments and the consolidation of copyright law open source software.

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Introduction

Intellectual property (IP) rights are the legally recognised exclusive rights of creation of the mind. Under intellectual property law, creators and owners of intellectual property are granted certain exclusive rights to a variety of intangible assets, such as musical, literary and artistic works. The same applies for discoveries, inventions, words, phrases, symbols and designs. Common types of intellectual property rights include copyright, trademarks, patents, industrial design rights, trade dress and in some jurisdictions trade secrets. The latest legislation in Greece (in article 2 paragraph 1 of law 2121/93) is defining the notion of creation of the mind of intellectual property as every original creation of the mind, manifested in any form, including an indicative number of mind creations under protection. Intellectual products, and original in form, have been achieved since the dawn of human civilisation. The rapid industrial and scientific development though, of the last 3 centuries have altered as well the nature and the extent of coverage of intellectual property law. New, recent and rapid developments, like the developments related to software, hardware, databases, internet and so forth are challenging the rigid regime of intellectual property law, which is based on the protection of any intellectual creation granting rights to its owner. The old almost absolute protection has been challenged especially in the field of software. Concepts of Free and Open Software and Creative Commons licensing are to differentiate the view of future status of intellectual property law. Free and Open Source Software is based as well in a contractual relationship between the user and the creator but on the fundamental aspect of free and unrestricted use and access of the source code. A more recent development of Free and Open Source Software is the Creative Commons Licenses. In this area, as well, the relationship between the user and the creator is defined in its range and values by the common agreement. This legal context is of course influencing both private and public sector to different extent due to the fact that in the intellectual property law during last years there is a tendency to introduce certain elements of public law and public rights. This is applicable not only in Free and Open Source Software movement or Creative Commons licenses but also in the creator-centric continental law in Europe but as well in copyright law of USA.

Moral Base

The moral principal of the protection of Intellectual property is based on a functionality concept that in creating a strong link between labour, its creation and the fact that the outcome of intellectual creation is for the benefit of the society. There are several moral justifications revolving around the natural right of every person over the labour and the products which produced by his/her body in Chapter V of his Second Treatise, Locke argues. A similar one is extending the argumentation to utilitarian prospect for the society and a more related to personality argument is stating that its person has the right to turn his will upon a thing or make the thing an object of his will according to Hegel (Richard T. De George, "14. Intellectual Property Rights," in The Oxford Handbook of Business Ethics, by George G. Brenkert and Tom L. Beauchamp, vol. 1, 1st ed. (Oxford, England: Oxford University Press, n.d.), 417. According to Article 27 of the Universal Declaration of Human Rights, everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Historical Overview

Examples of Intellectual property law can be found in the Ancient World, in Greece, in Syvaris for example, in Talmud and in Rome based in concepts known to Cicero and Seneca for intangible property, as well. (Intellectual Property Law and EuropeAcquis Communitaire , Lambros E Kotsiris Sakkoulas Press Athens 201).With the invention of typography the intellectual property is entering a new phase which is altered by the Industrial Revolution. The intellectual property law from a national legal issue is becoming international and the necessity of protection of intellectual products regarding industrial and technological inventions lead to Berne Convention in 1886. Among others the principal of Assimilation is stipulated (foreign intellectual creations are considered equal with the creations of the subjects of the country where protection is sought). From the initial 10 members, Berne Convention now has 158 members. In order to bridge the American legal system with the European the Treaty of Geneva has been signed in 1952, and later , Intellectual Property has been covered by European Law (Directives 2001/29, 91/250 for software and 96/9 for data bases). In parallel the Trade Related Aspects of Intellectual Property of the World Trade Organisation which was approved in EU with decision 94/800 EC, The WIPO Copyright Treaty (WCT) 1996 has lead to a concrete legal system protecting the rights of the owner of the intellectual creation. In the core of this legislation there is strong recognition of the intellectual property rights of the creator or lately of the person in possession of the right as well. The current legislation is recognising very few (1st critirion) , special, non profoundly harmful of the usual exploitation exemption of the rights (Three steps criteria).

Development

The initial necessity to protect the individual from any infringement and to give initiative to creation for the sake of society and common good gradually has been replaced with a more mercantilistic definition summing up to the point that every intellectual product is for usage and therefore for trading. The person was replaced with corporations yielding much more power than the state itself and obeying mostly to profit targets. The author of a book is protected in the same way as the author of software run by millions of computers. Knowledge now can be channelled through internet and thus is no more the prerogative of a certain audience. Also the same fundamental concept of audience in intellectual property law is now replaced with the term of user. The user is no longer passive and receptive but also interactive with the possibility to explore, create and modify.

Software / Hardware

A field where the conflict between the traditional concept of intellectual law (copyright or creator - centered with few exemptions or restrictions) with the new concept of user and the possibility of acknowledgement of rights of the user is the one revolving around the software, internet and data base. First of all the impact of those developments were massive in the society. The impact was also huge because a new, extremely profitable market emerged. New developments in the computing power caused a fundamental shift away from the old model of sales in computers. The focus was not any more in the hardware and when in 1969 IBM decided to unbundle its hardware and software activities, a new huge market was born. Rapid technological

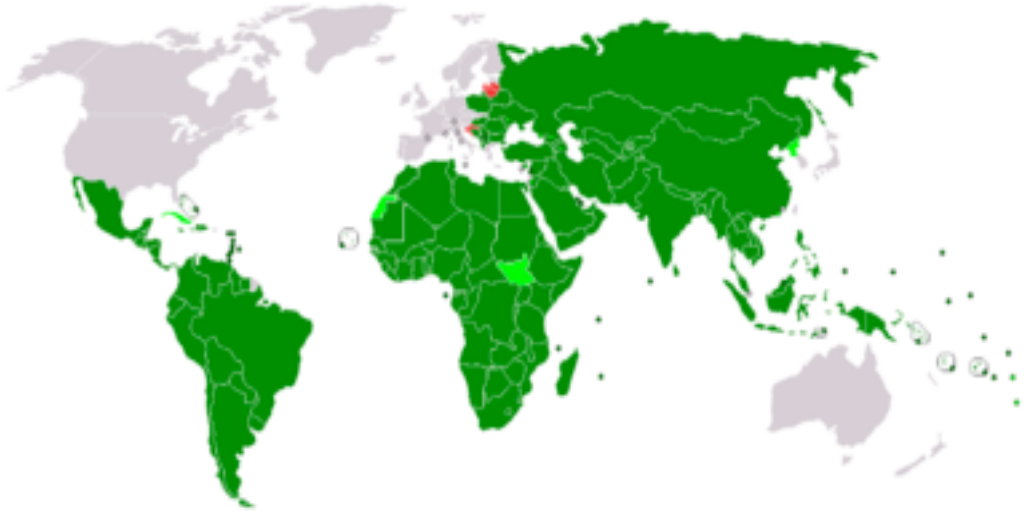
developments in faster computing, smaller machines and bigger capabilities changed everything. Software was first sold as a book (the shrink wrap period) and afterwards Software was licensed. Debate among lawmakers and lobbyists led to various proposals ranging from copyright and patent law to a sui generis right specifically designed to protect software. The USA was the first to adopt copyright protection (Computer Software Protection Act of 1980) and then EU followed with its Directive, largely based on the USA legislation but with more liberal provisions like the permission of reverse engendering (Council Directive 91/250/EEC)

Free and Open Source Software , Open Access , Creative Commons

The reaction in the above restricted legislation came immediately after with the introduction of public law concept in intellectual property law. Especially when that software was regarded as a treasured business and the source code a highly lucrative trade secret. The famous MIT programmer , Richard M. Stallman, considered this " hoarding " unacceptable. He quit MIT in 1983 and founded what later became the Free Software Foundation. The goal of this foundation is to create and stimulate software available to everybody. Stallman drafted the GNU General Public License (GPL), a software license that allows anyone to freely use, distribute and adapt the licensed software at no charge. In contrast of copyright the lawyer of Stallman thought of the term copyleft. The concept of Free and Open Source Software (FOSS) was well established. The endeavor was a huge success. In 1991 a Finnish second year student Linus Torvalds created Linux. Similar concepts were applied by Open Access (OA), which means unrestricted online access to peer reviewed scholarly research. Open Access is primarily intended for scholarly articles. There are two main separations into gratis OA, which is free online access and libre OA which is free on line access plus additional rights. Licences are issued by the organization Creative Commons, a foundation created in 2001 by Lawrence Lessing. Creative commons licenses are a compromise between the traditional intellectual property law, (all rights reserved) with the free and open source software (no right reserved) stating the term some rights reserved. (http://creativecommons.org/about/.)

Free Open Software , OA , Creative Commons And Developing Countries

According to the International Monitory Fund the definition of a country as developing is based on lower living standard, under developed industrial base and a low Human Development Index (HDI) relative to other countries. The question that is arising revolves around the possibilities to decrease and bridge the gap. Unless new natural resources are discovered one of the most secure way to succeed in this is the enhancement of learning. The creation of capable workforce is the best path forward. Of course this process should be achieved in parallel to the development of more developed countries. Learning is not only achieved by the traditional methods but also with media like internet, movies, music and other elements that constitute the so called cultural assimilation. This process is not always negative but is creating the same level of understanding and awareness among people of developed and less developed countries .On the other hand corruption in the less developed countries could lead to misuse of resources. The institution of open government and similar methods of e-publications could lead to decrease of corruption. Less corruption could lead to faster development because more resources would be available.



Legislation in Greece

In Greece the Berne Treaty was ratified in 27.10/9.11.1920. The initial Greek Law covering the Intellectual Property Law was 2387/20 which remained in force for more than seventy years. Currently Law 2121/1993 is covering intellectual property. Directive 91/250/EEC of the European Council on 14/5/1991 and Directive 96/9/EEC of the European Council on 11/5/1996 were basically introduced with Law 2121/93. So the protection of the intellectual property including software and data bases is valid in Greece, as in most countries of the region , that are members of European Union or in the phase of harmonising their legislation in order to achieve full membership. On the other hand FOSS and Creative commons licenses are already used in Greece. For Greece Creative Commons foundation has authorised a local work group to harmonise those licenses (mainly based on copyright concept as developed in US) to Greek Law . This practice is followed to all countries. In Greece more specifically Working Group 13 of business forum is working to this direction. The commencement of use of creative commons licenses took place in Greece on 13 /2007.

Developments in Balkans, an example in the field of open source usage in developing countries

In that frame we could detect that similar activities to above mentioned process are taking places all over Balkans as well. In Kosovo there is an annual Software Conference (SFK) for promoting FOSS. This conference is organized by Free/Libre Open Source Software Kosova (FLOSSK), Kosovo Association of Information and Communication Technology, IPKO Foundation and Faculty of Electrical and Computer Engineering of the University of Prishtina. Internet Society Bulgaria (http://www.isoc.bg) is promoting an initiative based on Free/Open Source Software (FOSS) at the local (municipality) level in the Southern- Eastern Europe. In nine municipalities in the region (Bulgaria – Kardjali, Vratza, Mezdra, Peshtera, Belovo, Dryanovo Kostenetz, FYROM Gevgelija, Kosovo – Klina) Open Office and Mozilla Firefox were installed in 200 workstations. Linux was installed in 45 work stations. Benefits and impacts are studied while lessons learned are evaluated

Conclusion

There is a difference between treatment of private and public institutions according to intellectual property law but not one that could be described as fundamental. On the other hand, regarding the treatment of FOSS and Creative Commons, indeed is the same. In this frame private and public institutions are considered the same and total freedom is provided. This overview has particular importance now days for the developing countries all over the world. During last years and since 2008 an acute recession creep in and the global economy has felt the implications severely both in private and public sector. Funding was slashed and resources are very limited. The use of FOSS , OA and Creative Commons licenses is well spread and well known not only in US and Europe. Enhancing this trend will not only save valuable resources but will also create a culture of participation in the research and in the development of software and applications. Furthermore in the sphere of the intellectual property legislation a discussion could open regarding the current status of the exemptions and the restrictions of the rights of the owner of the intellectual property rights. There are many argument deriving from the Constitutional and Public Law, from the Universal Declaration of Human rights and the arguments of the current developments in law that could support the discussion about the elevation of the exemptions / restrictions to rights of user. The current position of the law accepting few and detailed exemptions could be enlarged, especially to areas of less developed countries, to endorse open and free access, not only to databases of the traditional form but also to digital data bases. Indeed the argument used that " digital is different " should be also be interpreted as a first step of enlargement of the exemptions / restrictions or establishment of new rights of the user. That could be for example possible only for educational reasons.

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