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New approaches to intellectual property : from open software to knowledge based industrial activities.

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Nous abordons dans cet article la propriété intellectuelle dans le secteur du logiciel. Nous montrons que ni le droit d'auteur, ni le brevet ne sont parfaitement adaptés aux besoins et spécificités de cette industrie. Le modèle « alternatif » du logiciel libre (open source), basé sur un concept juridique innovant, la licence GPL, prend une importance croissante. Nous en présentons les principales caractéristiques, qui imposent au producteur de rendre public le code source du programme protégé par une licence de ce type, ainsi que celui de toutes les modifications postérieures en cas de redistribution. Cela entraine une modification profonde des stratégies industrielles de valorisation de la propriété intellectuelle, allant vers un plus faible niveau de protection. Nous analysons les conséquences d'un tel mouvement en terme institutionnel et de politique publique. Enfin, nous notons que cette approche apparaît exemplaire pour un nombre croissant d'industries dans le contexte d'une économie basée sur la connaissance.

Though software intellectual property could not satisfactorily fall into any existing legal framework, all countries have taken the decision to range it under the category of copyright. Then the double objective of intellectual property protection is not satisfied, which consists, on the one hand, to grant to the inventor a provisional monopoly for exploiting his invention and, on the other hand, to oblige him to disclose the principles of his invention. To resort to the patents system as it became more and more usual in the US and which is in debate in Europe, raise other kind of problems. Now the alternative model of Open Source Software, based on a very peculiar juridical tool called GPL "General Public Licence", tends to take a growing importance. Its main principle is to impose to its adopters to disclose the source-code of the concerned programs and of any further improvement if they circulate them, as well as the free circulation of the code under the sole condition to maintain its "open" character.

This does not exclude a possible commercialization of these programs and do not limit "open source software" to a non-marketable sphere. Understanding that, firms have more recently joined the world of cooperative development and of free access to sources-codes. This enlargement is concerned with two types of strategies. On the one hand firms distribute open software products to enlarge base of users with the services that can help to use them : training, adaptation to specific case or context, hotline, maintenance, updating, ... On the other hand, a growing number of enterprises began to "free" part of their software products aiming to draw benefits from the potential of development of the free software community or to favour a large diffusion of a key-product imposing it as a de facto standard and looking for gains from the commercialisation of proprietary complementary products.

By doing that they introduce a totally different approach of intellectual property within their industrial strategies. But these strategies didn't accommodate very well with the GPL terms as they were and this actors enlargement has led to a juridical enlargement beyond the strict framework of the GPL. Number of "hybrid" licenses have been designed in order to control the extent of their openness.

So open software approach doesn't represent a denial of intellectual property but a new way to manage intellectual property. Through the GPL, intellectual property is not rejected, authors do not renounce to their rights but to the sole monopoly rent, such rights would authorize in a copyright regime. The main legal aspect is that, when a program is declared under GPL license, any code derived from it or integrating GPL code lines must also be available under GPL License. Hence GPL status is "contagious" in the sense that this status attached to any number of lines is automatically transmitted to the whole program into which they are incorporated. The authors do authorize anyone who wants to make use of their work (modifications, improvements, additional features ...) under the sole condition that the new product could also circulate freely.

Such an approach appears exemplary in the context of a knowledge based economy, for a growing number of industrial activities, for which the scope of knowledge that has to be mastered appears to be too large for a single even powerful agent. Consider knowledge as a mutual resource implies a reshaping of the value chain concept, cash flow being drawn from the usage of the knowledge base (services, complementary products), not from the knowledge itself. We shall illustrate this idea on a short list of knowledge based activities, like biotechnologies and health in order to bring to openness approach a larger extent.

In this paper, we propose to explain the reasons why the copyright framework has been chosen for computer intellectual property protection, why it does not work very well, but also why a patent system may not be better suited (part 1). We will then consider the alternative model of Open Source Software, based on a new concept of authorship rights as expressed by the GPL "General Public License". We shall replace the appearance of the free-software movement in its peculiar context and explain the main reasons of its present industrial success (part 2 and 3). We will defend the idea that this new way of considering intellectual property management echoes debated in other industries, such as biotechnologies (part 4). This has different implications in institutional and public policy we discuss in the last part (part 5).