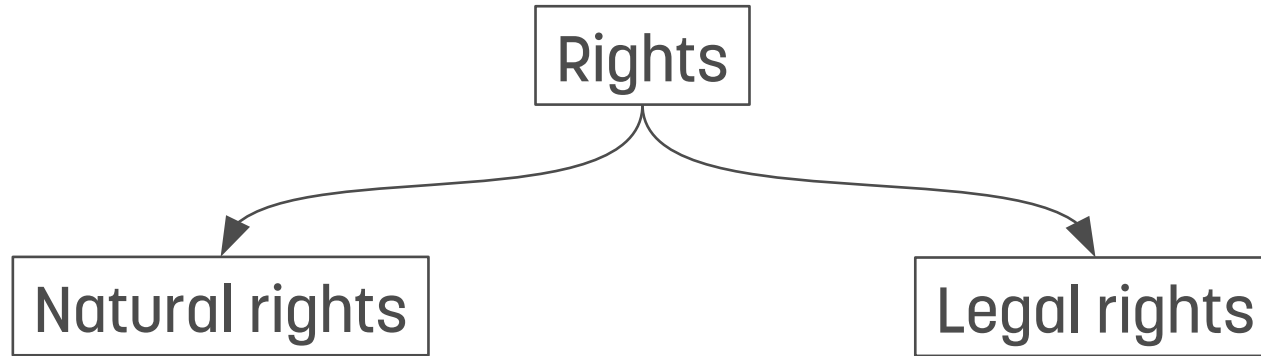


Exhaustion of distribution rights: Copyrights, trademarks and other third-party rights

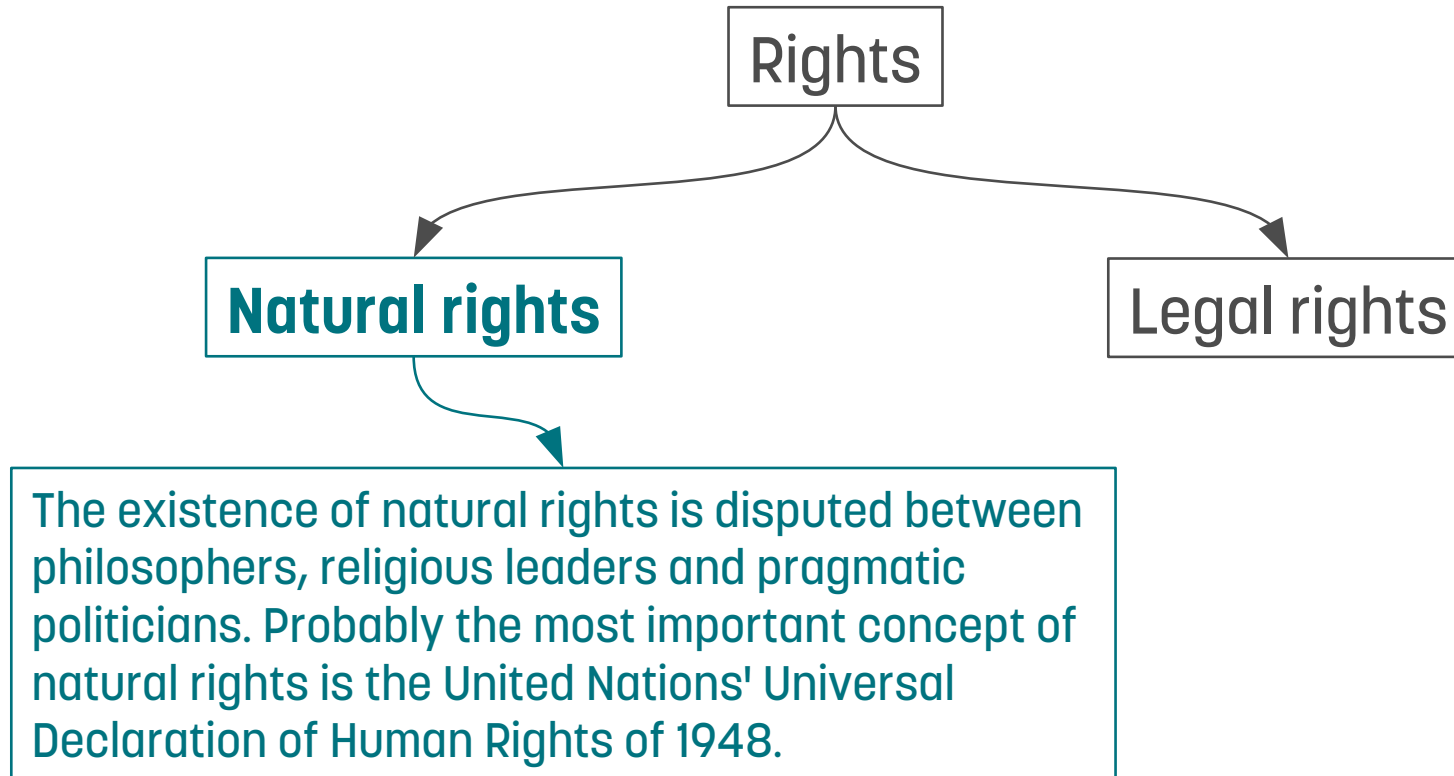
Carsten Emde
Open Source Automation Development Lab (OSADL) eG

What are “rights”?



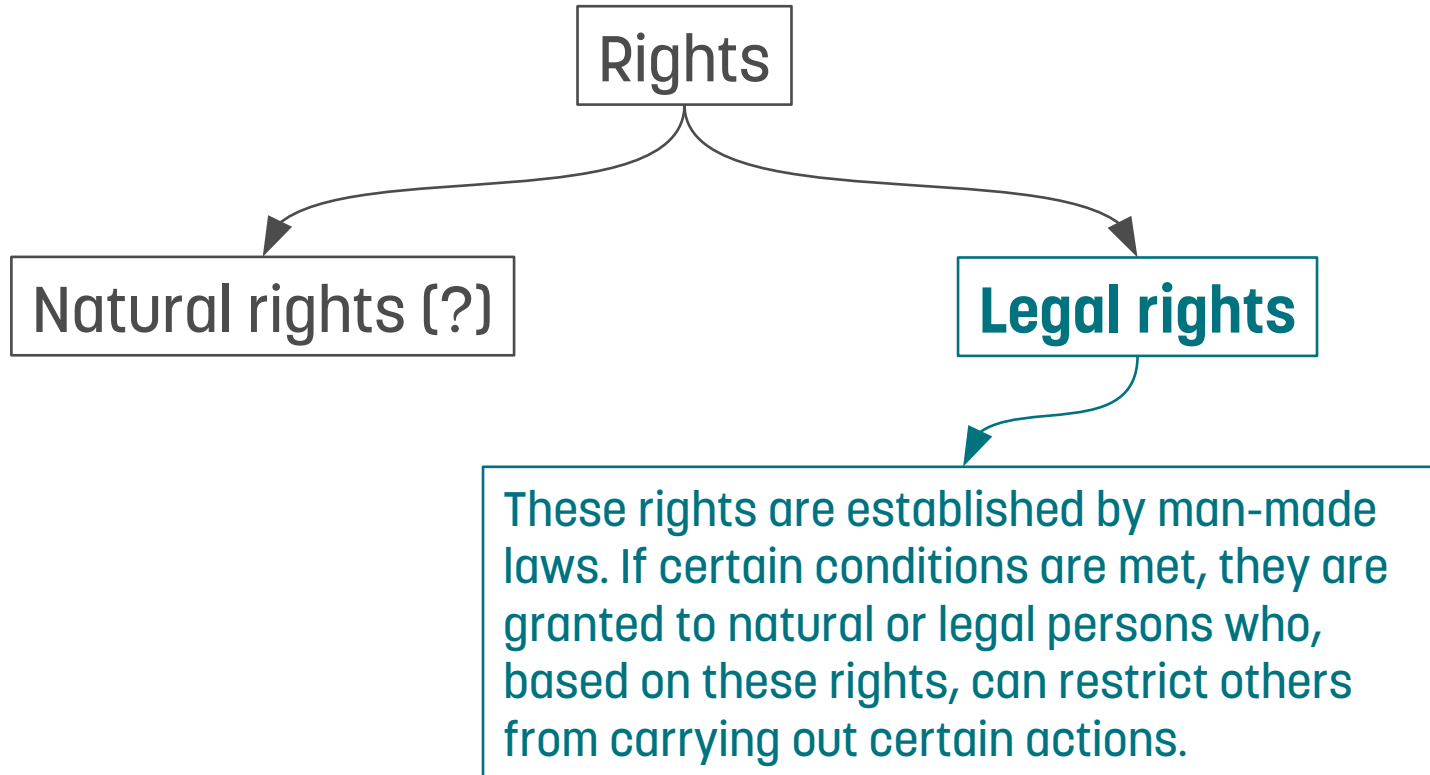
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What are “rights”?



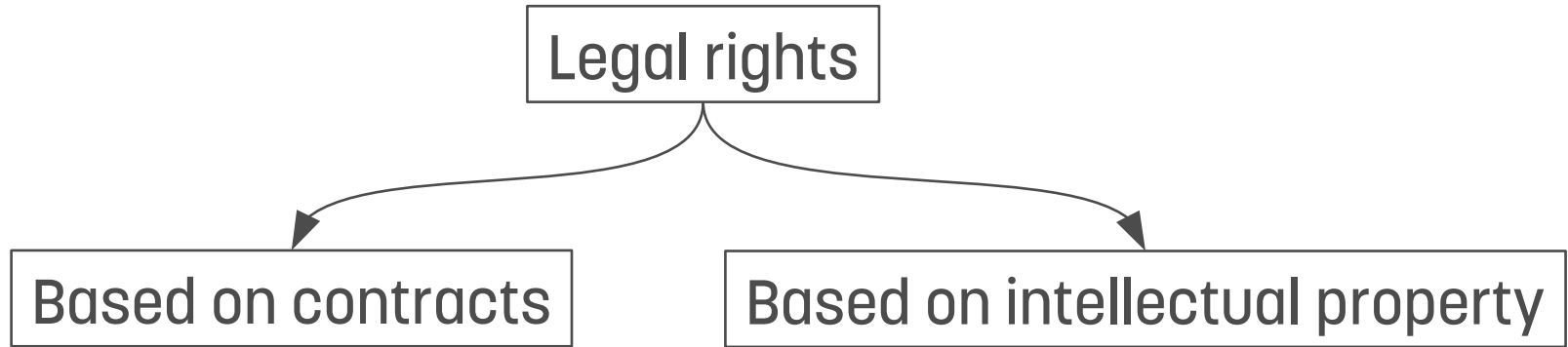
The existence of natural rights is disputed between philosophers, religious leaders and pragmatic politicians. Probably the most important concept of natural rights is the United Nations' Universal Declaration of Human Rights of 1948.

What are “rights”?



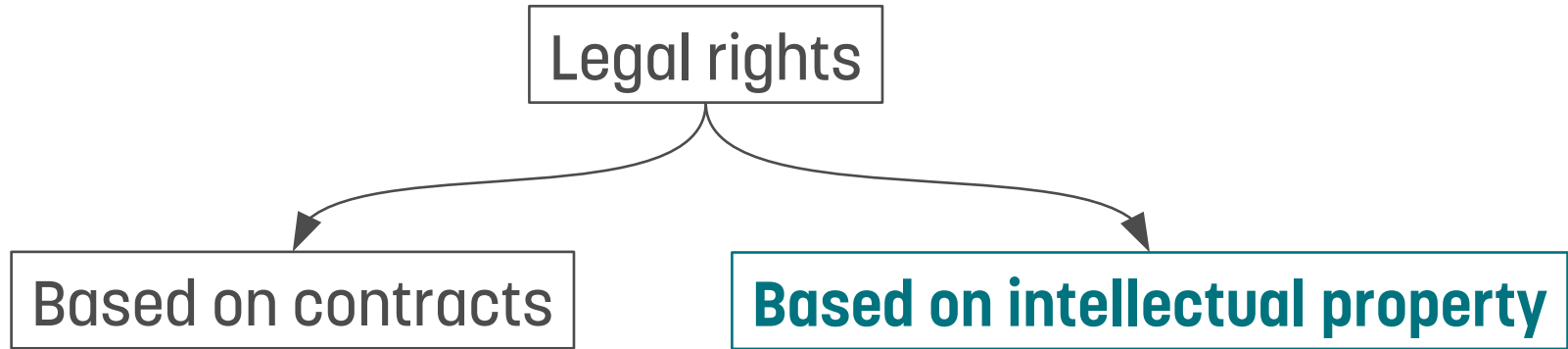
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Different forms of legal rights



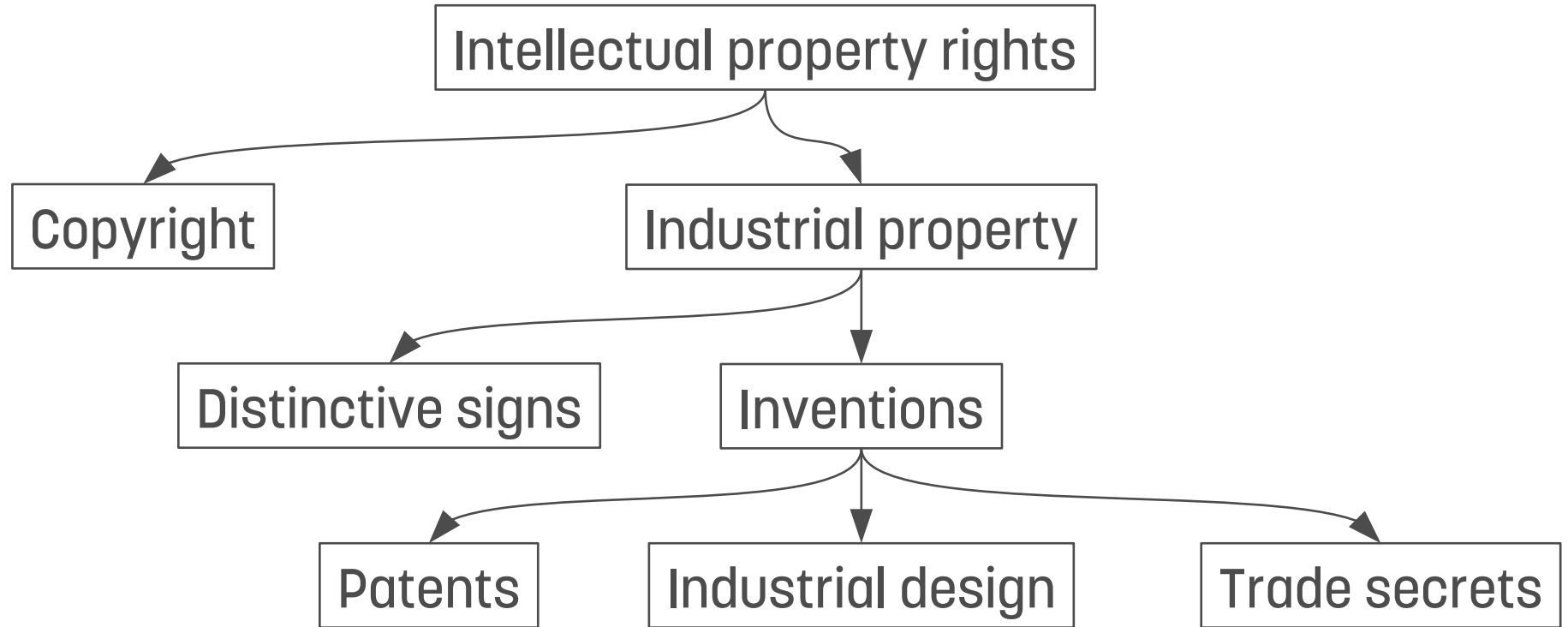
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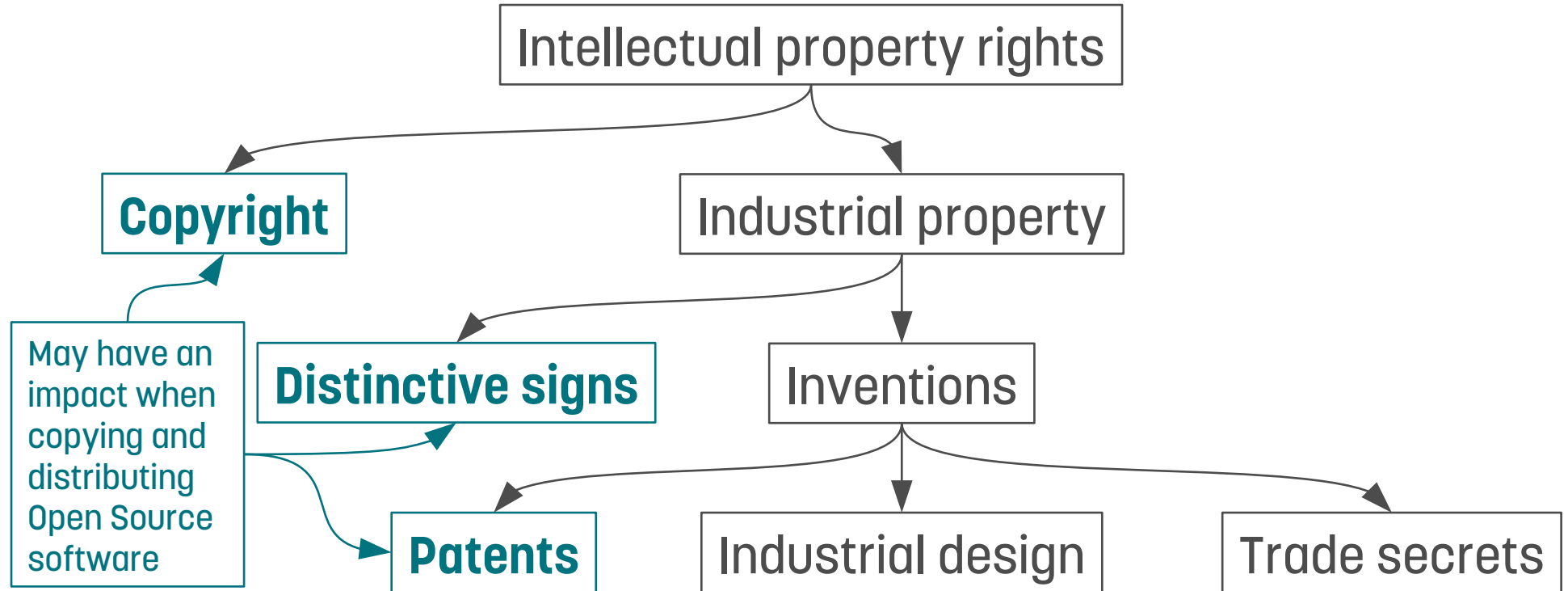
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What are “intellectual property rights”?



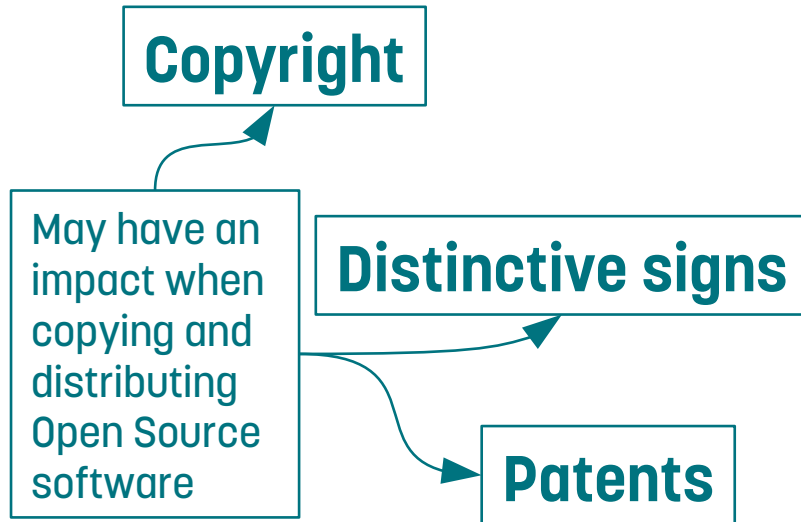
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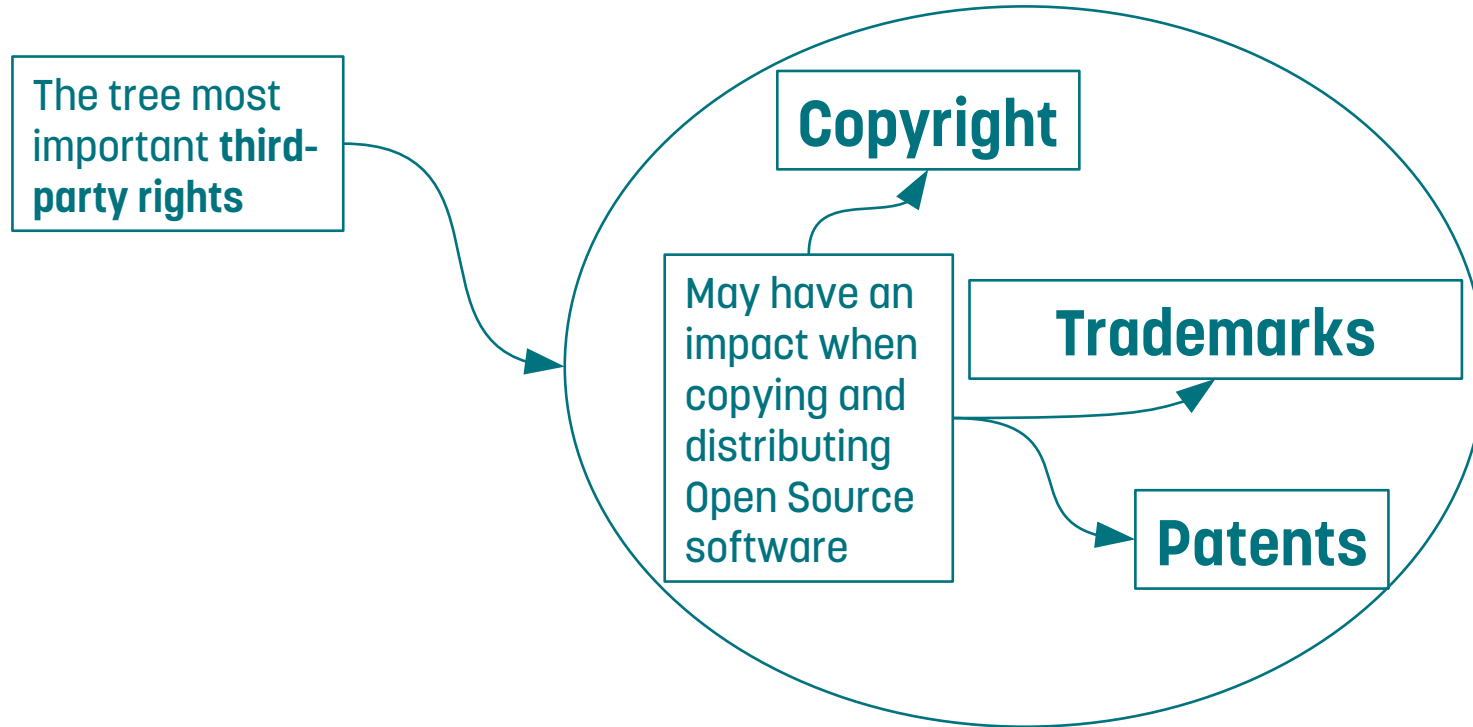
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The three most important third-party rights

Third-party right	Scope	Registration required	Expensive registration	Validity regionally limited	State mandated violation detection	Automated detection of violation
Copyright	Copy, modify, distribute, publish	No	n.a.	No*	No	Yes
Patent right	Use	Yes	Yes	Yes	No	No
Trademark right	Show	Yes	No	Yes	Yes	Yes

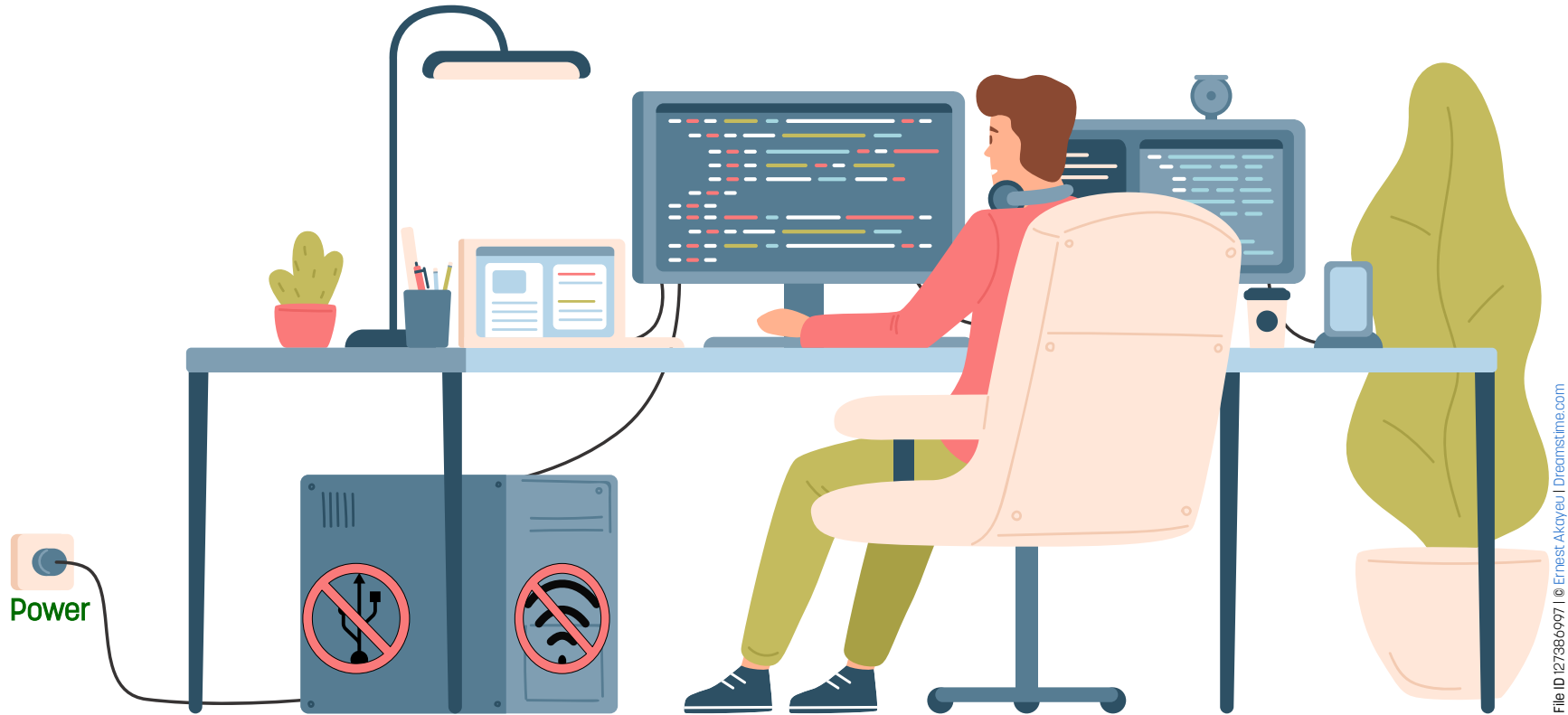
*Depends on whether the respective territory has joined the international convention

The three most important third-party rights

Third-party right	Scope	Registration required	Expensive registration	Validity regionally limited	State mandated detection	Automated detection of violation
Copyright	Copy, modify, distribute, publish	No	No*	No*	No	Yes
Patent right	Use	Yes	Yes	Yes	No	No
Trademark right	Show	Yes	No	Yes	Yes	Yes

*Depends on whether the respective territory has joined the international convention

How to violate “third-party rights”?

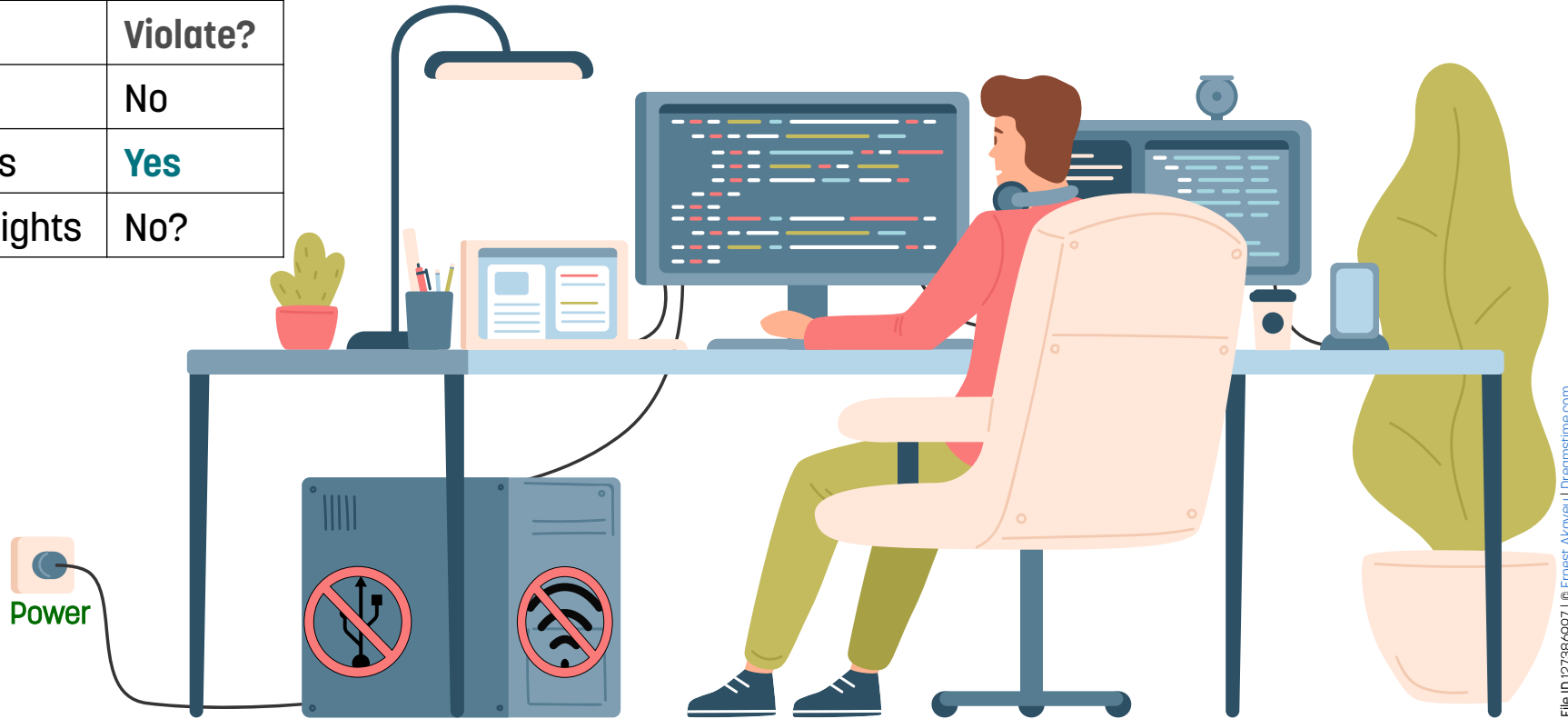


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How to violate “third-party rights”?

Rights	Violate?
Copyrights	No
Patent rights	Yes
Trademark rights	No?



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How to violate “third-party rights”?

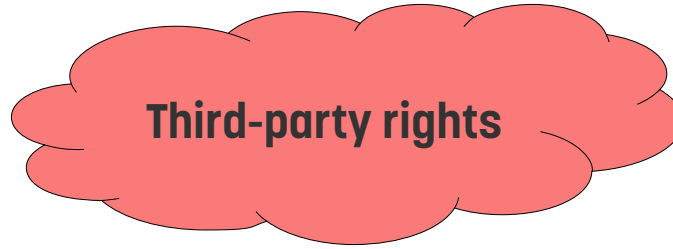
Rights	Violate?
Copyrights	Yes
Patent rights	Yes
Trademark rights	Yes



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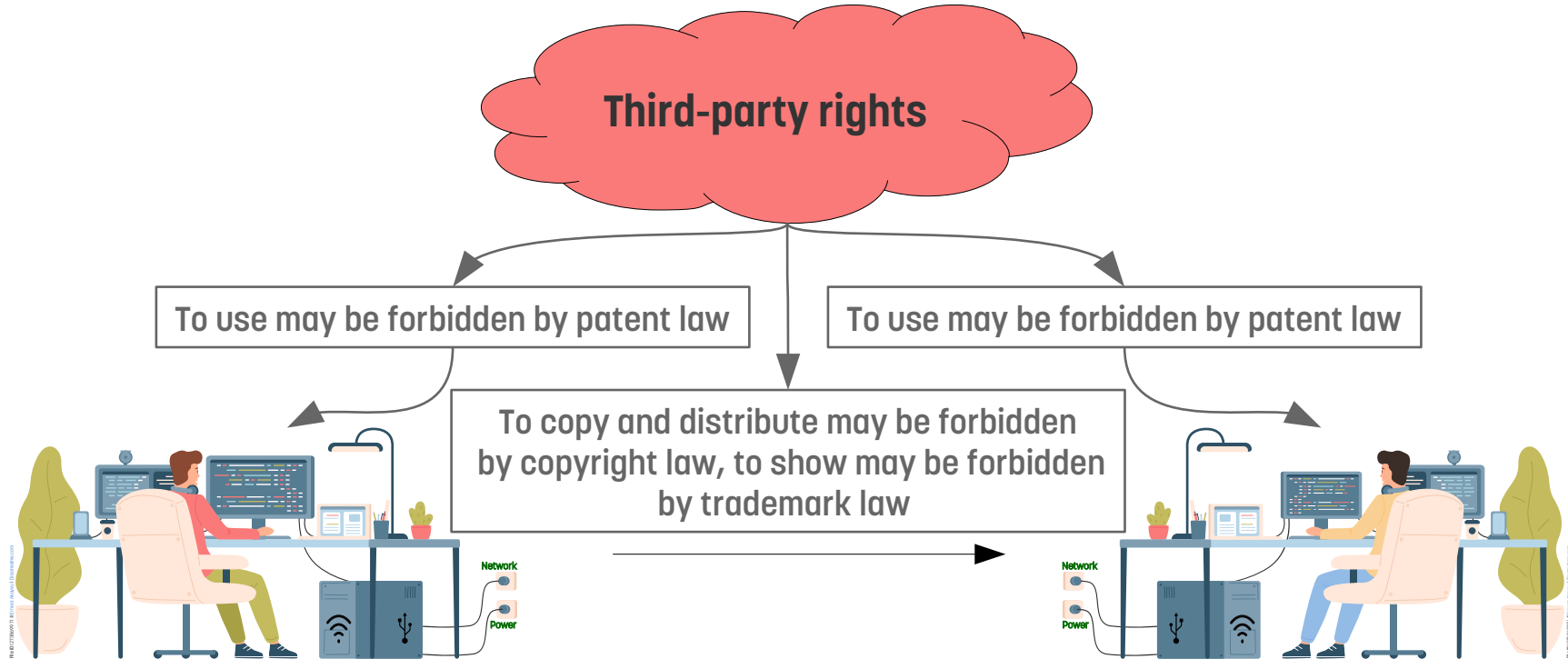
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Taking care of „third-party rights“



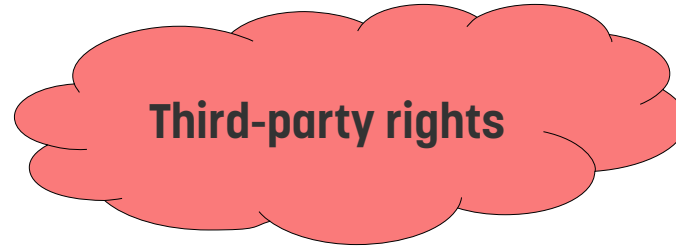
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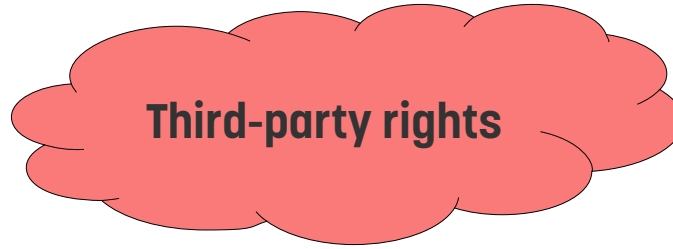
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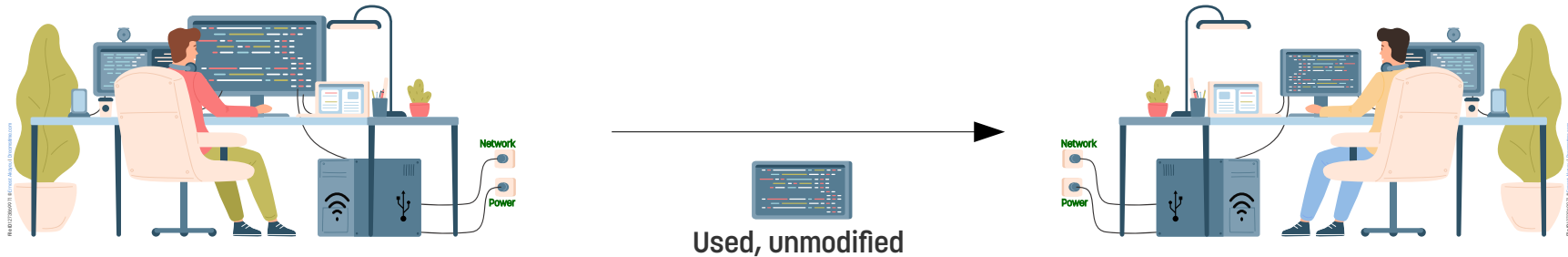
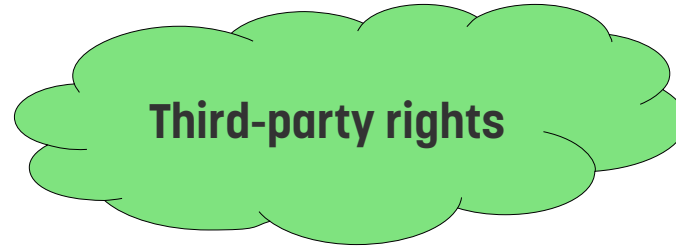
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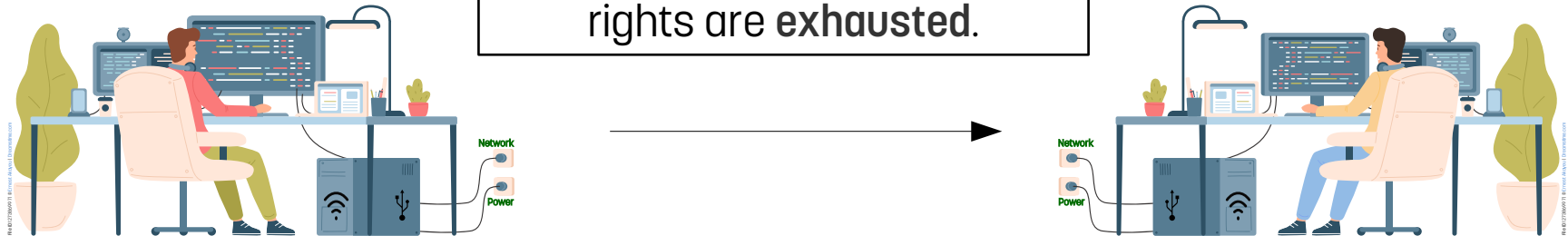


Exhaustion of distribution rights:
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Taking care of „third-party rights“

Third-party rights

If a product is passed on unchanged without a copy being retained, all third-party rights are **exhausted**.



Exhaustion of distribution rights:
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Prerequisites for exhaustion

- The product must have been originally marketed in accordance with the license.
- No changes may have been made to the product, in particular no changes that damage the reputation of the original manufacturer or author.
- No copies may be retained.
- All documents required for correct licensing must be supplied with the product when it is forwarded.

Prerequisites for exhaustion

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-
- All license obligations must then be fulfilled by the original marketer: 😊

Typical example of using exhaustion

Problem

- A product is based on a Linux distribution, but licensing an entire distribution is either labor-intensive or completely impossible.

Typical example of using exhaustion

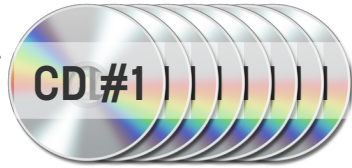
Condition of a particular product

- Although the product is largely based on a Linux distribution, only minor adaptations and additions are required for the product to run.
- The customer is able to perform software installation on the product.

Typical example of using exhaustion

Solution

- The installation image of the Linux distribution is obtained as many times as required from the manufacturer and forwarded unmodified to the customer.



- The needed adaptations and additions are provided on a separate installation medium to the customer.
- The installation manual instructs the customer how to subsequently install the two products.



Exhaustion of distribution rights:
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Typical example of using exhaustion

Advantage

- The license obligations of the large amount of software that is contained in the Linux distribution must be fulfilled by the original manufacturer.
- Only the much smaller amount of software provided on the second installation medium must be separately fulfilled by the company.

Conclusion (1)

- The most important **third-party rights** are copyright, patent rights and trademark rights.
- Although the **third-party rights** are summarized under this term, they are very different; copyright and patent rights in particular could hardly be more different.
- Whenever software of any kind is used, copied or distributed, **third-party rights** must be observed. Open source software is no exception to this rule.

Conclusion (2)

- If a person invented software exclusively himself or herself without including any external material, only **patent rights** may be relevant when the software is executed.
- If **Open Source software** that contains **third-party software** is copied and distributed, **copyright and trademark law** may be relevant; **patent law** may be relevant in the sense of aiding and abetting patent infringement.

Conclusion (3)

- If an item has been properly licensed with respect to all third-party rights, has not been modified in any way and is sold second-hand, the third-party rights are not relevant to this second-hand transaction. In this case, the original manufacturer remains responsible for fulfilling all license obligations.
- This is called “Exhaustion of the exclusive distribution rights of the original author” or simply “Exhaustion”. It is a welcome legal mechanism as it ensures that no third-party rights interfere with the right to free trade.