

Technological copyright and user autonomy

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Autonomy denotes self-determination, i.e., a person's capacity to live his life as he wishes, writes SYED HASAN IMAM

The inspiration for this exercise is an article by John Gilmore of the Electronic Frontier Foundation, "What's Wrong With Copyright Protection?" (at <http://www.toad.com/gnu/whatswrong.html>). In it, Gilmore expresses his views on technological protection measures by the entertainment and consumer electronic industries to deter Copyright piracy. In the past, technological measures have failed because consumers have actively resisted their adoption by choosing alternative technologies that did not restrict access to or copying of content. Due to recent changes in the United States and European Union copyright laws that impose prohibitions on circumvention of technological measures, such alternative technologies may no longer be available. Gilmore contends that the entertainment industry is conspiring with the consumer electronics industry under this umbrella of legal protection to deprive consumers of their fundamental rights to free speech and publication and to shift the balance between private and public interest under copyright law.

The examples Gilmore uses to illustrate his arguments are quite horrendous. In a nutshell, companies like IBM, Sony, Apple and (naturally) Microsoft are developing technologies that prevent users from using digital media to reproduce and even use any content without authorization from the copyright industry, even when no such authorization is needed, such as where the use would fall under the fair use/private use exemptions under US and EU copyright laws or, perhaps more importantly, where the content is cre-

ated by the users themselves.

This article spins off Gilmore's by investigating how the use of technological protection measures to control actual use of content, and the de facto elimination of the fair use/private use privilege under copyright law, diminish the autonomy of end users, autonomy being that aspect of privacy protecting a person's capacity to live, think, and use his property as he wishes.

Privacy and Copyright

The relationship between the right of privacy and copyright law as opposing forces has not been the subject of any real scrutiny until now, when the use of technological protection measures has extended the reach of copyright holders so that they now have the capability to control the actual use made of their works even in the users' private sphere. Private use of copyrighted works has traditionally been kept outside the scope of copyright. Although the right of privacy is not explicitly taken into account, respect for user privacy has been one of the primary social justifications for private use exceptions found in copyright law. In the digital environment, however, the threat of copyright piracy to the economic interests of the copyright industry has been perceived to be so great as to warrant an almost complete abolition of exceptions that permit private use and thus protect autonomy privacy. The system envisaged in the DMCA and the proposed EC Directive on Copyright and Re-

lated Rights in the Information Society (the Information Society Directive) is one of "voluntary" licensing whenever that is technologically and economically feasible. To support this system, copyright holders have been granted protection against circumvention of technological measures used to protect their content, which protection is applicable regardless of whether circumvention is undertaken in order to commit infringement or to perform an act exempted from the scope of copyright protection. In essence, this approach gives the industry free reign to construct absolute rights vis-à-vis users over content by technological means, without further recourse to legislation. Thus, user autonomy privacy in the context of the use of copyrighted content has been quietly removed from the realm of government protection and made subject to private ordering.

Autonomy as an Aspect of Privacy

The concept of autonomy denotes self-determination, i.e., a person's capacity to live his life in accordance with his wishes. The core of the idea of autonomy is the right to make choices and decisions about one's body, one's property, and one's personal information. In the context of copyright, autonomy includes the capacity to use and enjoy goods, such as copies of copyrighted works, within one's private sphere as one sees fit. To take a well-worn example, a user who buys a book is permitted to read it as many or

as few times as she wants, copy it (but not, alas, distribute those copies to persons outside her private sphere) and even use it to light a cozy fire on a cold winter morning or light up a dark night without any interference by the book's copyright holder. In the context of the functioning of society as a whole, autonomy privacy in relation to the enjoyment of works by private individuals functions to protect the formation of personal opinions and thus the independent decision-making process that informs each individual's participation in the development of society.

In the context of technological protection measures, user autonomy is diminished insofar as the use of such measures causes users to behave along lines determined by the copyright holder. The use of technological measures gives copyright holders control over copies as well as the media whereby users access copies, which control is most effectively exercised if users are not permitted to retain any copies stored on or extracted from such media without the copyright holder knowing it and dictating the terms under which that may be done.

Seen from the limited perspective of copyright policy, allowing copyright holders to limit user autonomy in order to protect their legal rights might seem entirely fair. After all, technological measures combined with electronic contracting procedures would allow for more diversified licensing prac-

tices that would better meet the needs of individual users while eliminating many of the enforcement problems previously encountered. However, from a broader perspective, allowing the copyright industry to control the extent to which individuals enjoy works in private, as opposed to exploiting them commercially, has the effect of suppressing the formation of individual opinion, a capacity that is essential in a democratic society. The use of technological protection measures facilitate the monitoring and limitation of what people read, listen to, or watch in private, thus limiting the so called deliberative aspect of personal self-governance. To put it more simply, the knowledge that someone somewhere knows that I have read a particular book, watched a movie, or listened to a song, and how many times I have done it, will inevitably induce me to censor myself, thereby depriving society of my distinctly individual input.

In not preserving user autonomy in relation to technological measures by permitting circumvention for private use, the United States and the European Union seem to have seriously erred. Mercifully, however, legislation is not irreversible - the knot in the sausage can be undone. Within the space of only a few years, the copyright industry has proven itself unworthy of the new level of legal protection accorded to their products by developing technological measures that overreach their purpose and thus infringe on the fundamental rights of users. And, most important, Governments should be prepared to take that protection away if the situation continues.