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A NEW FRENCH REVOLUTION?

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If you follow technology news or music news (or both), you will be aware that an amendment to an on-line copyright bill was adopted today in the French legislature that would make it legal to thwart the digital rights protection (DRM) software of the fabulously successful Apple iTunes/iPod system. In the run up to that vote, Apple stated that if it the law passed, it might no longer offer French customers the ability to purchase music from its iTunes site.

This is pretty juicy news, and therefore most of the press reports have focused on the commercial consequences for Apple and other vendors if the law were to go into effect. In fact, the new law could have a profound impact on the world of commerce and standards, extending well beyond DRM and the control of audio content.

The underlying politics of the new law, of course, are more protectionist than profound. The French are not fond of being controlled in any way from abroad, and have passed legislation many times in the past to protect everything from local industries to the French language. In this case, they are touting what they refer to as "economic patriotism."

Notwithstanding such jingoist motivations, the actual consequences of such a shift in rights could be very wide reaching. The reason is this: the gist of the law is that music that you buy should not be held captive within any proprietary system. In short, content that should be transportable to other systems, so that the purchaser is not put to the choice of remaining the customer of a single vendor or abandoning her investment.

Of course, there is nothing unique about music, from a legal perspective. Why not movies and electronic books? And why stop with content one buys, and not also include content that one creates, including photos and documents that must be archived in software created by for-profit vendors?

While the effects of the French law could be revolutionary, the legal significance of the legislation would be merely evolutionary. The reason is that the law simply expands an existing exception to the copyright laws as they relate to software. That exception works as follows: normally, the law bars the use of a copyrighted work for any purpose other than those that are permitted by the owner of the software in the license agreement that the end-user must acknowledge. One of the purposes that is always barred in non-open source licenses is using the product in order to reverse engineer it.

But under the existing copyright exception, there is a limited right to reverse engineer solely for the purpose of achieving interoperability with other products. This right has been permitted in Europe for some time.

The new law widens this exception significantly, however, to provide the right to reverse engineer not only for the purpose of enabling interoperability at the device level, but to liberate data as well. In short, if your device is not interoperable, your content must be.

As already suggested, the intriguing question thus becomes: having made this breach in a copyright owner's rights, where does one stop? If an end user has a right to transport musical content absolutely, should they not also have the right to carry their documents from one system to another, with formatting and other useful attributes intact?

If so, imagine what this would mean for products such as Microsoft Office (or any other office productivity software). Microsoft has already submitted its XML Reference Schema to Ecma as a result of a commercial decision. But if the underlying concept behind the proposed French legislation takes hold, would Microsoft have really had any choice in the matter, in order to preempt a user's right to reverse engineer one of its most profitable products? After all, if the French government thinks that Apple should be barred from placing rap singers in bondage, should not works of literature, philosophy, and science be similarly protected by law?

If so, a more difficult question necessarily arises: who will decide how "open" (because that is what we are really talking about here) a product must be before anyone becomes entitled to reverse engineer it to make the content it creates or holds more accessible?

If the law were to take such a turn, then the decisions that proprietary vendors would make about their products might change dramatically. For example, if a vendor must surrender the right to protect its content anyway, then it might as well seek the full benefit that standards can bring and promote its openness, rather than fight a constant, rearguard action against those that would otherwise challenging its degree of legal compliance.

More cynically, a vendor might as well try and control the standards process, allying with other vendors, to create standards that would be respected by the law as meeting the minimum requirements of interoperability, but otherwise conforming as closely as possible to its commercial interests. In short, a vendor might as well follow the classic military strategy of abandoning its more vulnerable forward defenses, and fall back to rally its forces behind a more defensible, if more limited, perimeter.
It will be fascinating to watch this story unfold. If the French law survives the inevitable court challenges, then there is the possibility that other countries in the EU may emulate it. This would result in a dramatic rebalancing of the rights equation between content owners and content users – and, who knows – could spread from there.

But from there to where?

Well, why stop at content owners, or even software, and not speak of end-users generally, and in favor of avoiding lock-in everywhere? Perhaps even in operating systems and microprocessor designs?

Now *that* would be a revolution.

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