Beyond Free Culture: Configuring the Networked Self

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I have spent the past several years exploring the connections between and among copyright, creativity, privacy, and the design of digital artifacts and architectures. That exploration has convinced me that the perspective from which legal scholars and advocates approach the project of a "free culture" is far too narrow. Specifically, the free culture movement is dominated by the liberal/Cartesian paradigm of the autonomous, rational, disembodied self, even as that paradigm undermines the movement's prospects for success in the linked realms of law and public policy. I will frame my preliminary conclusions in terms of three challenges that theorists and architects of the networked information society must confront.

1. What "Freedom" Means. The individual relationship to culture is neither autonomous nor disembodied. Individuals and communities are situated within cultures, and experience cultural artifacts, geographies, and networks from the vantage point of embodied perception [Crossley, 2001; Grosz, 1994; Lakoff & Johnson, 1999]. Situated subjects interact (with each other and with their environments) in ways that are imitative, iterative, and semantically and geographically constrained [Bourdieu, 1993; Cohen, 2007b; Geertz, 1973; Lefebvre, 1991]. The development of both artistic culture and subjectivity is best understood not via grand theoretical paradigms – like freedom of choice or freedom of expression – but rather via the anti-paradigm of everyday practice [deCerteau, 1984]. The everyday practice of situated subjects is simultaneously reactive and transgressive; like water in a streambed, it flows over, under, and around the regular, predictable structures established by institutional behavior. Put differently, everyday practice is the day-to-day process of negotiating the dialectical relationship between constraint and possibility. This means that the freedom that individuals and communities enjoy is of a very different sort than that contemplated by the liberal model of autonomy; it is characterized by constraint and path-dependence as well as by unpredictability.

This understanding of embodied, situated perception and everyday practice has important implications for copyright's model of creativity. Creativity is not a disembodied act of authorial will emanating from the "black box" of the autonomous liberal subject. It is a process of engagement with cultural context – of creative practice – that is always-already shaped by that context. At the same time, and importantly, creative practice is fundamentally appropriative and opportunistic [Cohen, 2007b]: it both builds on elements in the existing cultural landscape and profits from exploiting gaps and fortuitous juxtapositions within that landscape.

A model of experience based on embodied perception and everyday practice also has important implications for our ability to understand the functions that "privacy" serves. Privacy is best understood not as a steady state, but rather as a dynamic process of boundary management [Altman, 1975] by which people negotiate their places within the world. In particular, the ability to maintain degrees of both information and spatial shelter [Cohen, 2008] is essential for constructing the kind of critical subjectivity that our own culture purports to value. Like creative practice, the development of critical subjectivity is opportunistic: it exploits gaps and fortuitous interconnections. Privacy's vital importance creates a need for categories of unfree or less-free information, and for a correspondingly more multi-dimensional approach to questions of control and access.

2. How "Code" Regulates. Legal theorists have struggled to assimilate network architecture, or "code," into the liberal paradigm, with only partial success. Code always constrains negative liberty in one way or another, and the complex market arrangements through which network architectures emerge are not readily amenable to simple models of market choice. Lessig's [1999] four-vector model emphasizes this complexity but understates both interdependency and cultural embeddedness. Code is not simply an exogenous vector that can be deployed to regulate behavior. Its design is endogenous to social and institutional contexts. In particular, the architectures of control now coalescing around issues of copyright and security signal systemic realignments in the ordering of vast sectors of activity both inside and outside markets, in response to asserted needs that are both economic and societal.

Critically, code and embodied perception also are not distinct. Networked information technologies have effects that go far beyond the virtual; they mediate both our understanding of the physical world as it now exists and our sense of the possibilities for changing it. As digital artifacts and networks become ever more seamlessly integrated into the everyday, they reshape both experienced space and embodied perception [Cohen, 2007a; Ihde, 2002; Verbeek,2005]. One way of describing this process is that when networked digital technologies are designed well – think, for example, of the push toward "unremarkable computing" or the rise of the "semantic web" – they can take on functions analogous to those performed by the autonomic nervous system: They mediate our connection to the real at a level just beyond our conscious awareness [cf. Haraway, 1991; Hayles, 1999]. The malleability of embodied perception in a networked information environment dominated by "autonomic technologies" in turn has powerful implications for everyday practice. Everyday practice pushes against the semantic structures that define networked space, sometimes conforming to them, sometimes repurposing them, and sometimes finding ways to work around them [McCarthy & Wright, 2004]. That process becomes more difficult as the semantic structures grow more opaque, and even more difficult as those structures are reinforced by legal and technical prohibitions against "unauthorized access."

This means, in part, that those who argue for the repeal of certain legal constraints on tinkering – including most notoriously DMCA-style prohibitions against circumvention of technical protections for copyrighted works – are right. But in a networked environment characterized by increasing opacity, winning a "right to tinker" would not be enough to preserve the degrees of freedom that everyday practice requires. A right to tinker cannot, for example,

work effectively to preserve privacy in the era of the semantic web, and it appears increasingly unlikely that market institutions will provide effective privacy. This raises difficulties for legal thinkers and advocates committed to the conventional wisdom on government versus market regulation of networked information technologies. An important challenge for such thinkers, and for the free culture movement in particular, involves devising legal and institutional regulatory regimes that preserve enough operational transparency for network users [e.g., Pasquale, 2010].

3. Freeing Code and Coding Freedom. Finally and most critically, thinkers of the networked information society need to understand that designing legal and technical systems to foster human flourishing requires not rational, Cartesian logic, but rather a commitment to a species of illogic that I will call "semantic discontinuity." Semantic discontinuity refers to a form of logical incompleteness in legal systems and technical architectures.

Both creativity and subject-formation are processes that require degrees of freedom to reuse elements of common culture and to encounter and exploit the unexpected. Preserving degrees of freedom within the cultural landscape requires a system of copyright in which the legal and economic rights of copyright owners are incomplete by design. Preserving degrees of freedom for the play of subjectivity requires the ability to maintain spatial and informational reserve – incomplete surveillance and incomplete profiling – and requires architectural discontinuities that reinforce semantic incompleteness. Preserving room for everyday practice in the era of autonomic technologies requires not only access to information about the network, but also gaps and inconsistencies in the architecture itself.

It follows that a function of both law and technical best practice should be to foster and preserve semantic discontinuity – by designing systems of copyright in which the rights of copyright owners are deliberately left incomplete in a way that hedges against judicial expansion; by instituting privacy rules and practices that create "arbitrary" boundaries to access, surveillance, and profiling; and by introducing visible seams, glitches, and incompatibilities into interfaces and architectures.

All of our most ingrained intellectual habits drive against that result. We prize systems of legal right and obligation most highly when they are complete and logical, interfaces most highly when they are seamless and intuitive, and platforms most highly when they facilitate smooth interoperability. The largest challenge for thinkers of the networked information society involves reversing this polarity: learning to prize – and insist on – gaps, potholes, and fissures in the emerging networked landscape, so that the human beings and societies that exist within that landscape can thrive.

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Biography

Julie E. Cohen is a professor of law at the Georgetown University Law Center, and a visiting professor at the Harvard Law School for the 2009-2010 academic year. She teaches and writes about intellectual property law and privacy law, with particular focus on copyright and on the intersection of copyright and privacy rights in the networked information society. She is a

co-author of Copyright in a Global Information Economy (Aspen Law & Business, 2d ed. 2006), and is a member of the Advisory Boards of the Electronic Privacy Information Center and Public Knowledge.

Why This Essay Is Interesting Fodder for Discussion

The essay seeks to provoke reexamination of some basic assumptions that underlie the "free culture" movement. It sets forth several challenges that the free culture movement as a whole needs to address if it is to advance the goal of human flourishing in a meaningful way.

Bullet Summary of Argument

1. The freedom that individuals enjoy within culture is more modest than that posited by the liberal paradigm of autonomous, disembodied rationality, and enjoying that freedom requires the ability to maintain both spatial and information privacy; therefore, not all culture can or should be "free."
2. The design of networked information technologies reshapes individual perception of the threshold of possibility in a way that has profound implications for individuals' capacity to engage in ordinary acts of repurposing; therefore, such design is too important to be left wholly to private/market actors.
3. Human flourishing in a networked information society requires a commitment to creating and maintaining "semantic discontinuity" in regimes of rights, in personal profiles, and in network architectures.