The Copyright Rule We Need to Repeal If We Want to Preserve Our Cultural Heritage

By Benj Edwards

The anti-circumvention section of the Digital Millennium Copyright Act threatens to make archivists criminals if they try to preserve our society’s artifacts for future generations.

Perhaps by now you’ve heard about the campaign to repeal the anti-circumvention section (1201) of the Digital Millennium Copyright Act. This most recent challenge to the DMCA arose from a recent decision by the Librarian of Congress to discontinue a three-year exemption that made cell phone unlocking legal.

Opponents of the DMCA anti-circumvention provision claim that the law threatens consumer control over the electronic devices we buy, and they’re right. But the stakes are much higher than that. Our cultural history is in jeopardy. If the DMCA remains unaltered, cultural scholarship will soon be conducted only at the behest of corporations, and public libraries may disappear entirely.

That’s because the DMCA attacks one of the of the fundamental pillars of human civilization: the
sharing of knowledge and culture between generations. Under the DMCA, manmade mechanisms that prevent the sharing of information are backed with the force of law. And sharing is vital for the survival of information. Take that away, and you have a recipe for disaster.

**The DRM Problem**

In the last decade, more and more commercial cultural products have become available for purchase (or, more accurately, license) over the Internet -- works like music, movies, video games, apps, TV shows, novels, and educational texts. They arrive free of any fixed media as a stream of bits coming in through a network cable.

To protect these cultural products against unauthorized duplication and distribution, most vendors of digital goods wrap them in encrypted data formats as part of digital rights management (DRM), a form of copy protection. Most DRM systems tie the "ownership" of digital goods to a certain user account or a certain device which is then verified by a connection to a remote server on the Internet.

The DMCA makes it illegal and punishable by a $500,000 fine or up to five years in prison to circumvent copy control and access control technologies like DRM.

Common wisdom would tell you, "Don't copy things without permission, and everything will be fine." But just as DRM-based copy protection prevents unauthorized users from making copies of digital goods, it also prevents cultural institutions from making copies for archival purposes. Every encrypted cultural work is locked, and to get the key, you have to pay the content owner.

Certain big publishers and copyright aggregators will immediately point out that DRM-protected cultural works will remain available to cultural institutions because they will gladly license the rights to use them. Currently, most US libraries have agreements like this with book publishers to provide e-book access to their patrons.

But this scenario gives content holders undue powers over the machinery of cultural scholarship and preservation. When shrouded in DRM and license agreements, a cultural work is never truly and legally in the possession of the libraries, meaning that libraries cannot properly preserve them for use by future generations.

What's worse, not all cultural works -- take, for example, iOS Apps, Steam games, and Xbox Live titles -- are available for license to cultural institutions. So they're inaccessible from legitimate scholarly study and preservation even at present, never mind 100 years from now.

The anti-circumvention provision of the DMCA was created primarily to protect DVDs; it did not anticipate our rapid shift to media-independent digital cultural works, so it is absurdly myopic when it comes to digital preservation.

To properly preserve digital works, libraries must be able to copy and media-shift them with impunity. It may sound strange, but making a DRM-free copy of a digital work is the 21st century equivalent of simply buying a copy of a paper book and putting it on a shelf. A publisher can't come along and take back that paper book, change its contents at any time, or go out of business and leave it unscrambled and unreadable. But publishers can (and have done) all three with DRM-protected works.
So why don't librarians just defeat DRM, as it is often possible to do, and jailbreak Kindles and iPads to collect these materials? Because it's illegal, of course. And if these chronically under-funded institutions want to keep their funding, they need to stay above the board.

**DMCA Makes Piracy Culturally Important**

To complicate things, there is a way to legally circumvent the anti-circumvention part of the DMCA. Every three years, the Librarian of Congress may review and implement temporary exemptions to the anti-circumvention provision based on suggestions from the public.

Cultural institutions have taken advantage of this the best they can, but it's been a frustrating exercise in endless legal petitioning and campaigning every three years when the exemptions come up for review. At present, the current slate of DMCA exemptions don't cover nearly enough, and law-abiding archivists are forced to sit on their hands while digital cultural works come and go, missing opportunities to legitimately archive them for future study.

In the course of my reporting on similar issues, I've recently spoken to a number of cultural historians and archivists, and they universally take issue with section 1201 of the DMCA, citing it as a major barrier to their work.

"DMCA is a mess," says Henry Lowood, Curator for History of Science & Technology Collections at Stanford University Libraries. "It's basically putting cultural repositories in positions where they either have to interpret very murky scenarios or they have to decide that they are going to do something that they realize is forbidden and hope that nobody's going to notice."

Lowood says that Stanford stays on the murky (but legal) side of things, so unless the law changes, his university and others will be forced to rely on the work of amateurs who break the law to free cultural works from DRM, collecting them in underground archives that will some day become available to scholars.

Thanks to the DMCA, the future of our cultural history will be based on the work of people who ignored the law -- the same people that many copyright holders would call "pirates." How ironic that the pirates will be the ones that save the day when they're supposed to be the bad guys. If librarians wanted to do the same thing, they'd be branded as criminals.

**Repeal Section 1201 of the DMCA**

Digitally distributed cultural works are here to stay, and it is very possible that such works will subsume every information-based cultural format over the next decade. Some books are now only published as e-books, and even TV shows are beginning to show up only on the Internet, such as Netflix's House of Cards series.

So we're looking at a future where 100% of all major cultural commercial works could be protected with DRM, taking 100% of those works out of the flow of cultural history until they become public domain, at which point they will likely already be lost due to technological obsolescence and media decay. (Interestingly, this will tilt our future understanding of the history of this period toward those works that never relied on DRM for copy protection.)
This status quo is simply unacceptable and must change, or we have to be willing, as a society and a nation, to say goodbye to libraries and the concept of universal public access to knowledge.

It’s time to repeal the anti-circumvention provision of the DMCA. It unfairly dictates how consumers can use electronic products they own, and it jeopardizes our cultural history while providing only marginal protections to copyright holders.

Let’s not make this generation the one where cultural scholarship dies.

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