

Christopher D. Lewis

Class of Works: Data archival mechanisms

Summary: Click-wrap restrictions on use of data archival mechanisms, if enforceable through the DMCA, can cripple the ability of businesses and individuals to move their own data to new computer systems. Access to one's own data is surely "fair use" of a copyrighted data archival mechanism, even if under circumstances which were not anticipated by the vendor at the time of sale. Copyrighted software code governing data archival and retrieval can be barred prevented, using technological means and click-wrap "contract" terms, from access to custodians' data for this legitimate purpose to the detriment and penury of data custodians seeking migration to new computing environments.

Description:

Custodians of data which have been archived using a copyrighted data archival mechanism have an intense interest in being able to retrieve the data which they have stored or generated from an archive at a later date. The custodians' need to retrieve their data can easily outlive (a) the commercial life and availability of support for the copyrighted data archival mechanism, (b) the custodians' use of the computing environment for which the copyrighted data archival mechanism was intended when designed and sold, or (c) the availability of persons or devices able to operate either the copyrighted data archival mechanism or the operating environment for which it was designed and sold.

My personal experience includes migration from a computer system on which a particular group of data manipulation applications was available, to a completely different system which would not operate the software which had been in use on the former system. Access to data generated and stored using the mechanisms available on the former system became a critical problem. File format translators commercially available were not up to the task of converting data into accessible format. The plausible techniques for obtaining the data generally violate the broad language of the click-wrap "agreement" concealed within the copyrighted data archival mechanism's installer at the time of sale, and thus are not permitted by the copyright holder.

Click-wrap licenses' terms generally restrict in broad terms all unintended use of software, and generally do not anticipate the obsolescence and replacement of the covered software with anything other than upgrades of the same software, if that. Thus, content access restrictions in copyrighted data archival mechanisms can pose a barrier to accessing the data stored using the copyrighted data archival mechanism. Because vendors of copyrighted data archival mechanisms, if in existence at the time the problem becomes acute, may be unable or unwilling to provide a solution which is feasible to implement on data custodians' new systems, respect for software or file format access restrictions will require abandonment of all data possessed by the custodians prior to adoption of the new systems, unless violating the access restrictions in the pursuit of the custodians' data is permissible. Retrieval of data for alternate archival or for migration to different systems is critically necessary to protect, or existing vendors of data archival mechanisms of all kinds -- including those imbedded in other general-purpose applications -- will be able to use the DMCA to prevent customers from migrating data to competing systems.