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Summary of User Rights Network Symposium: Protecting Copyright User Rights from Contractual Override

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Abstract

In this paper, Benson, Blumenthal, and Klosek summarize the proceedings of the public symposium on the "Protection of Copyright User Rights from Contractual Override." The American Library Association (ALA) and the Association of Research Libraries (ARL)—together, the Library Copyright Alliance (LCA)—sponsored the symposium in partnership with the American University Washington College of Law Program on Information Justice and Intellectual Property (PIJIP). The paper includes summaries of each panel, questions that were discussed, and takeaways for the library community to consider.

Keywords: copyright, contracts, public policy, limitations and exceptions

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Background: Libraries, Copyright, and contracts

On May 18, 2023, the American Library Association (ALA) and the Association of Research Libraries (ARL) —together, the Library Copyright Alliance (LCA)—sponsored a public symposium on the "Protection of Copyright User Rights from Contractual Override," hosted by the American University Washington College of Law Program on Information Justice and Intellectual Property (PIJIP).

This symposium is a continuation of LCA's exploration of contracts that conflict with limitations and exceptions in the US Copyright Act. In 2006, ALA framed this issue as follows:

> License agreements, rather than outright sales, have become an accepted and prevalent means for publishers to provide their products to libraries. And although licensing has proven to be a convenient way to obtain journals, for example, license terms can expand—or restrict—the uses of a work that would have been allowed under the copyright law. Some people even ask, "Is copyright dead?" That is, does increased use of licensing of information make copyright law irrelevant? (ALA, 2006)

In 2019, ALA hosted the "Copyright Contract Override Workshop" to continue this inquiry. The conversations at that workshop led to a shift from discussing contract override to contract preemption, a term that appears in the Copyright Act itself. Participants of the ALA workshop also observed that issues and strategies around contract preemption vary at the state and federal level. In 2020, the Joint Digital Content Working Group published "The Need for Change: A Position Paper on E-lending"; the paper acknowledged that some library vendors' business practices mean that libraries cannot access certain content, especially streaming.

In 2022, ARL's Advocacy and Public Policy Committee launched KnowYourCopyrights.org, which is a resource to help libraries fully exercise their statutory rights and ensure that these rights are well understood by research libraries, by Congress, by the Copyright Office, and by the courts. ARL's 2022 paper, Copyright and Contracts: Issues and Strategies (Klosek, 2022), described the problem of contracts restricting library and user rights and previewed some of the strategies presented during the symposium.

The ideas, questions, and takeaways shared during the May 2023 symposium will inform the continued advocacy of the Library Copyright Alliance.

Overview of the Symposium

In-person and virtual attendees participated in the user rights network symposium: protecting copyright user rights from contractual override on May 18, 2023. During this public hybrid event, librarians, researchers, lawyers, and practitioners from Africa, Amsterdam, Australia, Canada, Israel, the United Kingdom, and the United States explored three central questions during themed panel sessions that included a question-and-answer period:

1. Why have some jurisdictions and not others adopted protections from contract override?
2. What impacts have protections from contract override had on both licensors and licensees in the jurisdictions where they have been adopted?
3. In jurisdictions where protections from contract override have not been adopted, such as the United States, are there alternative legal theories that could have the same effect?

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Participants included scholars, library leaders, and civil society organizations.

This paper summarizes the presentations made during the public event; the summary, takeaways, and observations are based on notes by ALA and ARL staff. On May 19, PIJIP held an invite-only workshop to hone in on specific strategies for protecting user rights from contract override in the United States and on potential international approaches; this summary does not include conversations from the workshop.

Protecting User Rights Against Contract Override

Jonathan Band, copyright counsel for LCA, opened the symposium with an overview of his paper, "Protecting User Rights Against Contract Override" (2023), which describes copyright override prevention clauses that 48 countries have implemented in their national copyright laws. Following is a summary of Jonathan's remarks.

Licenses for digital content purport to limit copyright exceptions, a trend that began with software and now applies to all forms of digital content. Today's contract override discussions will focus on protecting user rights from restrictive contract terms. For instance, since 1991, the European Union (EU) software directive has included clauses requiring nullification of license terms that override specific exceptions, under the logic that there is no point in having exceptions if a rightsholder can just override them. Other examples of EU directives with contract override prevention clauses include the 1996 database directive, the 2018 Marrakesh Directive, and the 2019 Copyright in the Digital Single Market Directive (CDSMD). European Free Trade Agreement members typically follow EU directives and thus have implemented some of these clauses. Other countries follow EU clauses as well, and there are 13 additional countries that exceed EU provisions. In short, there is not just one way to approach this problem. For more analysis on contract override prevention clauses internationally, see "Protecting User Rights Against Contract Override" (Band, 2023). In the United States, federal legislation might seem like the easiest solution, but of course the reality is challenging. Canada has a similar problem and is looking for a solution. The panel discussions will explore the lay of the land—where these clauses have been adopted, the modes of achieving these results, and what they look like in practice.

Panel 1: How Do Contracts Purport to Override User Rights?

Dave Hansen, Executive Director of the Authors Alliance, opened the first panel with a problem statement: concentrating the ebook and streaming video markets means a small number of contracts control large numbers of copies. Hansen presented data from a Berkeley Law Clinic study demonstrating that these contracts often restrict users to personal, noncommercial use. Hansen suggested that licensing librarians who are experts in copyright law—particularly those in large systems, like the University of California—may negotiate for fair use savings clauses. However, firms with a larger market share have no incentive to negotiate for more permissive terms.

Benjamin White, a researcher at Bournemouth University and a cofounder of Knowledge Rights 21, presented a case study on the 2014 UK copyright law update that prohibits contracts from removing many rights users have in UK copyright law. Evidence was necessary to persuade the legislature: a study of 100 contracts by the British Library found that most contracts undermine exceptions. Members of Parliament were concerned that their policymaking role was removed by private actors, and there was also concern about public bodies signing contracts under foreign laws.

Rowena Johnson, a Copyright Officer with University of Calgary Libraries and Cultural Re-

sources and a Visiting Program Officer with the Canadian Association of Research Libraries (CARL), presented a Canadian practitioner perspective about text and data mining (TDM). Institutions are discussing whether fair dealing allows TDM; however, institutions are wary of taking risks as there is no case law on this and no exception allowing TDM in Canadian copyright law. When a license is silent on certain uses, it is interpreted as requiring permission. Some vendors claim that researchers conducting TDM from library databases is an additional service and cost. This problem has implications for research and science: a group of researchers was forced to retract a publication that included results using unauthorized TDM.

The objective of US copyright law is to further knowledge, but the strong right to contract conflicts with this goal. For instance, the US Supreme Court has said one can sign away speech rights. Are contract override prevention clauses improper government interference in markets?

Panel II. Legislative Protections Enacted Overseas

Lucie Guibault, professor of law at the Dalhousie University Schulich School of Law, pointed out that targeted provisions seem to work better than general prohibitions on override. For instance, the Marrakesh Treaty provides rights to people with blindness or other print disabilities; it follows that if a country grants rights to people with disabilities, it should also prevent override of those specific exceptions. Article 9 of the CDSMD (which provides that licenses for out-of-commerce works may apply to cultural heritage institutions in any EU member state) is great on the books, but people are not aware of it, there is no case law, and therefore there seems to be no point in suing. Contracts preventing breaking technical protection measures (TPMs) can still prevent access to works under copyright.

Estelle Derclaye, intellectual property law professor at the University of Nottingham, discussed EU contract override provisions and the courts. In the EU, lack of case law means those in the know ignore the contractual overrides, and those who don't know abide. More empirical work needs to be done, especially with practitioners. Derclaye emphasized the need to educate the public and to oblige rightsholders to state users' rights and lack of overridability of those rights.

Maja Bogataj Jančič, founder of the Intellectual Property Institute, shared that Slovenia's implementation of the CDSMD TDM exception appears to be an excellent law, but it is unclear how it works in practice. The Slovenian exception says contract override is a no-go; there is also a provision on security protection measures that prevent actions permitted under TDM exception. If a researcher cannot rely on an exception (for example, one can't do TDM on the Netflix corpus), that person can ask rightsholders to provide access within 72 hours; otherwise, the researcher can pursue mediation. It is unclear what this process looks like in practice.

Martin Senftleben, professor of intellectual property law and director of the Institute for Information Law (IViR) at the Amsterdam Law School, discussed the tension between the lawful access provisions of the Text and Data Mining provisions of the CDSMD and the contract override protections. If vendors cannot prohibit TDM, they might increase the price for TDM researchers. Article 3 of the CDSMD is promising. It allows researchers to conduct TDM on works to which the research organization has "lawful access;" however, the law is silent on the definition of lawful access, and on subscription fees. And, technological protection measures and legal access provisions are still a problem. Martin referred to Rowena's example of vendors raising subscription fees when Canadian researchers ask to be able to do TDM as an example of how industry responds to policy change—charging higher subscription fees, or offering cheaper subscriptions that don't allow TDM.

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Competition law could be a solution. Martin suggested working on a market definition that defines a database as an essential knowledge resource and then introducing fair terms.

Leanne Wiseman of Griffith University discussed the relationship between Australia's consumer laws and copyright law. In Australia, consumers are educated about their statutory rights regarding products and services overseas. A review of copyright law revealed intellectual property and copyright laws were causing the most harm in connection with constrained access to product manuals and repair guidance or systems, what is now discussed as the right to repair. Members of the Productivity Commission, a federal economic think tank in Australia, asked for evidence and recommended broadening copyright law to allow broad repair (beyond the literary sphere) through fair use or a new purpose. The Commission recognized that any new repairability defense would be worthless if a contract could override it, pointing to Australia's consumer laws. Wiseman pointed out that with end-user license agreements (EULAs) there is no genuine negotiation, and there is still the concern that manufacturers in all sectors will change contracts to adapt to new exceptions.

Sanya Samtani, from the University of the Witwatersand, Johannesburg, discussed "contracting out" of exceptions in South Africa copyright law. In South Africa, contractual overrides can arguably be challenged as unenforceable based on the principle that contracting out of a statutory provision contravenes public policy or the Bill of Rights. However, there is no case law on this. There is hope for a future position: Copyright Amendment Bill [B13D-2017]: Section 12D(10) under "Reproduction for education and academic activities" states that any agreement that attempts to override by contract is unenforceable. The hope is that this brings similar provisions to the Copyright Act as exists in the South African Consumer Protection Act and the National Minimum Wage Act. But the Copyright Amendment Bill is still in Parliament, and has been for 15 years.

These are the highlights of the discussion that followed the presentation: How controversial has adoption of override clauses been compared to the adoption of exceptions? Is copyright law the best means of addressing restrictive contracts? Don't we still have issues with digital rights management even if we have an anti-contractual override provision? How should we be framing this issue—should we call this a user rights priority? We need empirical research on the Marrakesh implementation regarding contractual overrides and the use of technological protection measures.

Panel III. Possible Protections in the United States

Guy Rub, from The Ohio State University Moritz College of Law, distinguished between implied and express preemption (301(a)). There is promise in implied preemption theories, under which state law cannot stand as an obstacle to the purpose and objective of Congress. But to date, most opinions have been on express preemption, which holds that rights which are equivalent to the exclusive rights in US copyright law are preempted.

Pamela Samuelson, cofounder of the Berkeley Center for Law and Technology, laid out an argument for a legal theory she referred to as fair breach. Mass market licenses restrict the use of copyrighted works, or the use of information in them, that would otherwise be permissible to achieve the public policy goals of copyright. "Fair breach" implies that executing protected rights in contravention of a contract would be fair even if it were a breach. For instance, fair breach may come into play if a researcher cannot proceed with a TDM project because an ebook license term prohibits TDM. Fair breach could benefit individuals, researchers, and institutions with limited resources; it may be particularly salient to enable sharing of open data collections that are presently made available under licenses, even when the collections are not copyrightable for lack of originality. Fair breach may be

a better solution than preemption, because it ties its justification to a copyright policy purpose and brings attention to why a breach is justifiable. Fair breach could come about through common law evolution or legislation.

Margaret Chon, Seattle University School of Law, described the doctrine of copyright misuse and how it might provide protections for user rights from contract override. Misuse of copyright may cover anticompetitive practices that do not rise to the level of antitrust violations, as well as other violations of public policy objectives that are embodied in copyright. There are a few key copyright misuse cases, but Maggie cautions that this doctrine should be used sparingly; most cases find no misuse.

Kyle Courtney, Director of Copyright & Information Policy at Harvard University, discussed legislative proposals that states have put forward to protect user rights from contract override. States including Connecticut, Massachusetts, and Hawaii have introduced bills based on a model law. The bills would require that if a vendor wants to do business with a library within the state, the vendor must abide by certain terms. The bills do not require vendors to sell books to libraries. Kyle referred to Rowena's point that licensing is eviscerating fair use.

Corynne McSherry, the Legal Director at the Electronic Frontier Foundation (EFF), talked about how legal defenses based on doctrines such as copyright misuse and unconscionability may be applied in a particular case. McSherry noted that legislative approaches should focus on the things you want to do, like preservation or fixing your car, in order to win in the court of public opinion. Litigation approaches require a good opponent in order to take on hard cases, bring declaratory judgment on ideas such as fair breach and copyright misuse, and build the law. According to McSherry, no one reads EULAs but courts treat them as if they are negotiated contracts between sophisticated parties. We should revive traditional contract doctrines around procedural and substantive unconscionability, rather than looking at whether there was agreement.

These are the highlights of the discussion that followed the presentation: Are we tackling this problem on a state by state or federal level? Unconscionability, fair breach, state legislature—there is no doubt that states will differ here. Fair breach is tied to doctrines of public policy, one bucket of which is anticompetition. This issue can be tied in to procurement law, where the federal government cannot tell states what to spend their money on.

Panel IV. Possible Protections in Other Jurisdictions

Naama Daniel, with Hebrew University of Jerusalem's Federmann Cyber Security Research Center, talked about Israel's policy regarding contracts that override user rights. Under Israel's contracts law, a court will nullify or amend any unfair term in an adhesion contract. One district court held that if an adhesion contract conflicts with the copyright law and prohibits the use of facts and data, it should not be adhered to. The executive branch says a contract term that conflicts with permissible uses should be nullified and government agencies should not abide by such terms in adhesion contracts. Making use of facts and data is permitted, even if a contract says it is not allowed.

César Ramírez-Montes, Leeds University, described Mexico's approach to contractual override in its copyright law. Mexican copyright law has technological override protection for people with disabilities but no contractual override provisions. Under the technical override provision, it is not copyright infringement to circumvent a TPM that controls access to a work or performance. Accessible formats do not infringe copyright. Mexican copyright law pays insufficient attention to exceptions and limitations (the list includes only eight). Looking to the future, might policy debate

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around TPMs and free expression help to propel a conversation about contractual override of user rights in Mexico?

Pascale Chapdelain, with the University of Windsor Faculty of Law, shared five questions to ask as we consider whether exceptions—which are user rights—can be set aside by contract:

1. What is the copyright act relative to private (common) law?
2. Which copyright user rights are we talking about? For whom? Under what human rights or public policy justification?
3. What, if anything, does the copyright act say about overridability of user rights? Or is it silent?
4. What is the effect of a contract on copyright infringement claims?
5. If a contract cannot override user rights, so what, and what next?

Graham Reynolds, from the University of British Columbia, addressed situations in which Canadian courts should consider attempts by parties to contract out of copyright user rights to be void. Freedom of expression can play a role in protecting against contractual override. There is a connection between user rights and fundamental rights, like the right to freedom of expression. In Canada, contracts will be enforced unless they are contrary to public policy; this has not been applied in the copyright context. Particularly, Reynolds asked, to what extent can and should Indigenous peoples be able to protect their cultural heritage? Indigenous peoples have the right to control their cultural heritage, raising questions about attempts to copyright certain content. User rights protect fundamental rights, but in certain limited instances when a countervailing interest is present (such as the Indigenous communities' right the control the way their cultural heritage is used), the user right may not be overridden.

As suggested earlier by Lucie Guibault, David Fewer, from the University of Ottawa, said that focusing on an individual right, such the Marrakesh Treaty or right to repair, may be successful. Canada is seeing some movement on the right to repair, which implicates anticircumvention law, copyright, contract, and competition. Fewer is skeptical of solving contractual override through the courts.

Ariel Katz, of the University of Toronto, talked about how common law can provide user protections against contract override. There is jurisprudence to support the argument that user rights embody public interest objectives. Rules against waiving user rights may need more nuance, as there are times when contracting out user rights might seem justified. Katz asked the audience to consider when override may be legitimate versus when it is not valid.

These are the highlights of the discussion that followed the presentation: Human rights and fundamental rights might be a way to focus on protecting rights with contract law. We could say user rights cannot be overridden by contract; rightsholders would not be able to sue for copyright infringement, although they could challenge conduct under contract law. The risk is that a rightsholder might say that once the contract is breached it expires, and then sue for copyright infringement. This is problematic because the user needs the contract, which includes a license to use the work, and because being sued for copyright infringement is worse than breach of contract.

The Authors' Reflections

Benson: The conference certainly convinced me of the need for contractual override policies for libraries and archives, in particular. One of the most striking examples, to me, was the intent of the Marrakesh Treaty drafters to include override policies in the language of the treaty itself.

However, upon adoption, the override policies were removed. I believe Jonathan Band included this example in his remarks along with the wonderful news that the EU reinstated the language in the contractual override provision in their Directives on Marrakesh. Marrakesh implementing law in the US includes no such provision. I think that libraries and archives can use the inability to provide accessible copies to patrons with visual impairments due to contractual provisions as just one poignant example of how contractual provisions can undermine the overall purpose of copyright exceptions and limitations for libraries and archives. Strong examples like these can persuade lawmakers to take action, I hope. I am in favor of persuading lawmakers to take one step and then another, so it seems to me that beginning with a modification to our Marrakesh-implementing statutes by adding a provision prohibiting contractual override would be an excellent place to begin.

Blumenthal: The symposium demonstrated the value of convening people from multiple countries to surface new ways of looking at and/or addressing an issue like onerous licensing terms. It was also an exploration of balance of power and asymmetries in understanding of rights and contracts. I was struck by Estelle Derclaye's observation that because case law is so limited, at least within the United States, those who understand their rights might choose to ignore contractual overrides of them, while those who don't fully understand their rights generally abide by the constraining contracts. Pamela Samuelson's concept of "fair breach" takes such thinking further. In so doing, it illuminates the need for the kind of legal resolution that seems elusive, especially if it depends on updating copyright law and or on people willing to be sued—and those are very few. Hence the status quo includes the "haves"—entities such as large academic libraries with specialists in contract law backed by purchasing power—and the "have-nots"—entities such as public libraries that might be limited in budget, expertise, and political backing.

Klosek: One idea I took away from multiple speakers was the importance of having a clear message for policymakers, the public, and other stakeholders. Whether it's the right to repair a car, preserve a scholarly work, or add accessibility features to a digital copy, it's important to be specific about what we want to accomplish in order to achieve wins in the court of public opinion, as Corynne McSherry mentioned. With accessibility, for instance, we can tell stories demonstrating how contracts that override user rights contravene the public policy objectives of US copyright law, and human rights objectives like those protected by the Marrakesh Treaty; this came through in Lucie Guibault's remarks about the effectiveness of targeted provisions versus general prohibitions on override. Ben White also talked about the effectiveness of explaining to lawmakers how contracts undermine their policymaking role. His example was based on the United Kingdom, but I have no doubt this strategy would resonate with members of the US Congress!

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References

American Library Association (2006, August 25). *Libraries and Licensing*. Retrieved August 1, 2024 from https://web.archive.org/web/20240120120024/https://www.ala.org/ala/washoff/WOissues/copyrightb/librariesandlicensing/LibrariesAndLicensing.htm

Band, J. (2023). *Protecting user rights against contract override*. PIJIP/TLS Research Paper Series no. 97. https://digitalcommons.wcl.american.edu/research/97/

Joint Digital Content Working Group. (2020, December). *The need for change: A position paper on e-lending*. American Libraries Association. https://www.ala.org/tools/sites/ala.org.tools/files/content/The-Need-for-Change-A-Position-Paper-on-E-Lending-by-the-Joint-Digital-Content-Working-Group.pdf

Klosek, K. (2022). *Copyright and contracts: Issues & strategies*. Association of Research Libraries. https://www.arl.org/wp-content/uploads/2022/07/Copyright-and-Contracts-Paper.pdf

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