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Protecting library rights

Considerations for Congress

The US Congress granted libraries special rights through limitations and exceptions in the US Copyright Act, but there is nothing to stop private contracts from contravening these rights and conflicting with the public policy objectives that Congress intended. This article suggests approaches that the US Congress may take to protect library rights, including revisiting a 2002 legislative proposal by Representative Zoe Lofgren.¹

Background

Today, research libraries spend the majority of their acquisitions budgets on acquiring digital scholarly works. But these materials are often subject to license agreements that restrict libraries' ability to preserve scholarly works, make accessible format copies for people with disabilities, and other mission-critical activities that are otherwise lawful under US copyright law, and beneficial to the public interest.

Some libraries are able to retain their rights when negotiating with vendors for digital scholarly content. For instance, University of Washington disallows licenses that expressly prohibit fair use of information by authorized users.² Most libraries, unfortunately, do not have sufficient bargaining strength to prevent inclusion of these unfair terms in their license agreements.

Licenses that conflict with statutory limitations and exceptions to the exclusive rights of rights holders (library and user rights) may be preempted by the US Constitution or by the US Copyright Act. The US Court of Appeals for the Second Circuit held that a nonnegotiable license that purported to prohibit copying was expressly preempted under Section 301(a) of the US Copyright Act. The Supreme Court recently decided not to take up the case, *ML Genius Holdings v. Google*. Circuit courts are divided on the question of whether Section 301(a) preempts claims arising from contractual terms that prevent copying; it is likely that the court will see additional certiorari petitions on this issue in the future.

Faced with uncertainty, libraries likely will tend to follow the license terms, and not always fully exercise their statutory rights. Accordingly, libraries continue to search for other possible solutions to this problem.

State laws may test preemption theories

In 2023, state legislatures have introduced bills to prevent the enforcement of contractual terms that limit copyright exceptions and limitations. Contract law is typically a matter of

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state, rather than federal, law. These bills generally have two key provisions: first, a clause establishing that any contract or license for electronic books and digital audiobooks is governed by that state's law. For instance, a Rhode Island bill (House Bill 5148) states:³

(a) Any publisher who offers a contract or license for acquisition of electronic books and digital audiobooks to the public in this state shall be governed by Rhode Island law with respect to the contract or license.

After establishing that the license is governed by state law, a subsequent provision prevents enforcement of any term that is inconsistent with copyright exceptions. The Rhode Island bill, for example, states:

(b) Any license term that limits the rights of a library or school under the U.S. Copyright Act shall not be enforceable.

The approach in Rhode Island is straightforward. The bill first establishes that licenses for e-books are governed by Rhode Island law, regardless of the choice of law set forth in the license. This is followed by a clause holding that the Rhode Island law prohibits enforceability of contract terms that limits the rights of a library or a school.

Limitations and exceptions in US copyright law leave space for user rights

While these state bills may be challenged if enacted, an argument that they are preempted by federal copyright law is unlikely to stand. Rather than conflicting with the exclusive rights provided to a rights holder, these state bills vindicate the exceptions and limitations in the US Copyright Act. The US Congress enacted these exceptions and limitations to leave space for library activities, such as preservation, accessibility, teaching, learning, and research. Thus there is no conflict between the state law and federal law. This is different from the Maryland e-book law,⁴ which the court found to conflict with the publishers' distribution right by requiring the publishers to license titles on reasonable terms (*Association of American Publishers v. Frosh*).

To be sure, the recent state bills also include language requiring licenses to libraries to contain reasonable terms. These provisions generally differ from the Maryland e-book law. The Maryland law stated that if a publisher licensed an e-book to a consumer in Maryland, the publisher had to license the same title to libraries on reasonable terms. In contrast, the bills introduced in other states in 2023 are not linked to consumer licenses. Instead, they simply provide that a license to a library in the state must be reasonable. The publisher is free to elect not to license e-books to libraries in the state. This distinction may be sufficient to avoid a conflict preemption as in *Frosh*. But even if such a clause is found to be preempted, the other clauses protecting against the overriding of exceptions will survive because the bills contain severability clauses providing that if one part of the statute is found to be unlawful, the rest of the statute survives.

In sum, there is a good chance that state legislation protecting against license terms purporting to limit copyright exceptions would survive a challenge by rights holders. However, such legislation would need to be enacted in each state to protect all libraries. Such an undertaking would consume significant time and resources and may not succeed. Moreover, the scope of

the protections against contract override could vary from state to state. Federal legislation, if it were enacted, would solve the contract override problem uniformly in every state.

Revisiting the Digital Choice and Freedom Act

If members of Congress wish to consider a federal solution to prohibitive contracts, they may start by revisiting the Digital Choice and Freedom Act,⁵ which Representative Zoe Lofgren introduced in 2002. Had the bill passed, a provision of it would have created a new section of the US Copyright Act asserting that license terms that restrict or limit any of the limitations on exclusive rights are not enforceable under any state statute.

(b) EFFECT OF LICENSES.—When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title.

This clause would protect the rights of libraries and other consumers of digital works by voiding nonnegotiable license terms that restrict limitations and exceptions. In contrast with the state bills, the federal proposal would only apply to nonnegotiable licenses, which may take the form of shrink-wrap licenses, browse-wrap licenses, or end-user license agreements (EULAs).

The Digital Choice and Freedom Act also included language that would preserve the rights of libraries and other users who lawfully obtain a copy of a digital work to reproduce, store, adapt, or access the digital work for archival purposes, and for private performance or display.

Protecting library and user rights

It's been more than 20 years since the Digital Choice and Freedom Act was introduced. In those two decades, Congress and the courts have expanded user rights—rights that could be undermined by license terms.⁶

Accessibility

In the past 20 years, courts have affirmed and strengthened the rights of libraries to create and distribute accessible copies of works. For instance, in *Authors Guild v. HathiTrust*, the US Court of Appeals for the Second Circuit found that making digital copies of works to create a full-text search database and provide access for people with print disabilities is a fair use.⁷ In the decision, the court held that the use of digital copies to facilitate access for print-disabled persons is a valid purpose under the first statutory factor, even though it was not transformative. The Marrakesh Treaty bolstered this right; in accordance with the treaty, the US Congress amended the US Copyright Act to add an explicit right to distribute accessible format copies across international borders.

Research

Other international developments in copyright law during the past two decades highlight the opportunities for amending the US Copyright Act to protect research. Copyright laws in many other countries include exceptions for research or scientific uses; as a group of global scholars wrote in December 2022, these exceptions may be interpreted to apply to text and data mining research, or TDM.⁸ According to the scholars, “TDM is a crucial first step to

many machine learning, digital humanities, and social science applications, addressing some of the world's greatest scientific and societal challenges, from predicting and tracking COVID-19 to battling hate speech and disinformation.” The *Authors Guild v. HathiTrust* case mentioned above upheld TDM research as an exercise of fair use rights under US copyright law.

Teaching and learning

In 2020, the world experienced a pandemic that pushed most teaching and learning online. Many libraries and institutions of higher education relied on US copyright law to stream films for educational purposes in multiple fields of study. In particular, Section 110(1) of the US Copyright Act permits the performance of an entire film or other audiovisual work in an educational setting, while Section 110(2) was specifically designed for distance education and allows for the performance of portions of films. Together with fair use, these elements of the US Copyright Act give educators a strong legal foundation for streaming full-length films for educational and research purposes. However, misperceptions of copyright law, and scare tactics by rights holders, threaten to chill these lawful uses.

A role for Congress

Congress could pass federal legislation striking a balance between the critical functions of libraries described above, and the importance of preserving the exclusive rights of copyright holders, while ensuring there is no conflict with the US Copyright Act. Any amendment to the US Copyright Act would be more comprehensive than a state-by-state approach, as it would affect all 50 states at once. The current divided Congress is unlikely to pass such legislation, but in the meantime, the state bills may serve as test beds concerning the appropriate scope of protections against contract override.

Federal legislation might lay out specific exceptions that may not be restricted, such as fair use, preservation or replacement, reproduction and distribution of accessible format copies, text and data mining for the purpose of research and teaching, and the use of the work for physical and virtual classroom purposes. Or, like the Digital Choice and Freedom Act, federal legislation might take a broader approach of rendering unenforceable any license term that would “restrict or limit any of the limitations on exclusive rights.”

There is a strong argument for federal law to preserve library rights in the face of browse-wrap licenses or end-user license agreements; in such situations, libraries do not have an opportunity to pursue alternative ways to achieve their functions. Such a law would provide certainty that libraries may engage in lawful activities with works that vendors make available on the marketplace, including works that are licensed for personal consumer use. The Copyright Office has argued that preservation in particular is an important public policy objective, and that nonnegotiable licenses should not be permitted to supersede the Section 108 exceptions, particularly the preservation and replacement provisions. Congress may wish to review language recommended by the US Copyright Office stating that libraries, archives, and museums will not be liable for copyright infringement if they make preservation or security copies of works covered by nonnegotiable contract language prohibiting such activities.⁹ The Copyright Office proposal, however, would not protect libraries against breach-of-contract actions.

On May 18–19, 2023, the Library Copyright Alliance (LCA) sponsored a user-rights symposium with the American University Washington College of Law Program on Information

Justice and Intellectual Property, exploring ways that copyright law protects users' rights internationally.¹⁰ Participants discussed federal legislation as one way to address the problem of restrictive contracts in the US, as well as other types of advocacy opportunities like challenging contract terms, passing state legislation, and pursuing negotiation-based solutions. The symposium will inform ongoing LCA advocacy around contracts that conflict with copyright law. To get involved in these conversations, contact kklosek@arl.org. *zz*

Notes

1. For more on library rights, see the Association of Research Libraries ARL project [KnowYourCopyrights.org](https://www.knowyourcopyrights.org).

2. "UW Libraries' Principles in Licensing Scholarly Resources—UW Libraries," University of Washington Libraries, adopted April 2019, updated September 2022, <https://www.lib.washington.edu/cas/uw-libraries-principles-in-licensing-scholarly-resources>.

3. "Rhode Island H5148 | 2023 | Regular Session," LegiScan, accessed July 5, 2023, <https://legiscan.com/RI/bill/H5148/2023>.

4. "Section 23-702 - Licensing of Electronic Literary Products to Public Libraries, Md. Code, Educ. § 23-702 | Casetext Search + Citator," 2021, Casetext.com, <https://casetext.com/statute/code-of-maryland/article-education/division-iv-other-education-provisions/title-23-libraries/subtitle-7-electronic-literary-product-licenses/section-23-702-licensing-of-electronic-literary-products-to-public-libraries>.

5. "H.R. 5522—Digital Choice and Freedom Act of 2002," sponsored by Zoe Lofgren, October 2, 2002, <https://www.congress.gov/bill/107th-congress/house-bill/5522?q=H.R.+5522+%28107%29>.

6. "Know Your Copyrights," Association of Research Libraries, accessed July 5, 2023, <https://www.arl.org/know-your-copyrights/>.

7. Review of *Authors Guild, Inc. V. HathiTrust*, 2014, United States District Court for the Southern District of New York.

8. Sean M. Fiil-Flynn, Brandon Butler, Michael Carroll, Or Cohen-Sasson, Carys Craig, Lucie Guibault, Peter Jaszi, Bernd Justin Jütte, Ariel Katz, João Pedro Quintais, Thomas Margoni, Allan Rocha de Souza, Matthew Sag, Rachael Samberg, Luca Schirru, Martin Senftleben, Ofer Tur-Sinai, and Jorge L. Contreras, "Legal Reform to Enhance Global Text and Data Mining Research," *Science* 378, no. 6623 (December 1, 2022): 951–53, <https://doi.org/10.1126/science.add6124>.

9. US Copyright Office, "Section 108 of Title 17 a Discussion Document of the Register of Copyrights," September 2017, <https://www.copyright.gov/policy/section108/discussion-document.pdf>.

10. "User Rights Network Symposium: Protecting Copyright User Rights from Contractual Override," Association of Research Libraries, accessed July 5, 2023, <https://www.arl.org/event/user-rights-network-symposium-protecting-copyright-user-rights-from-contractual-override/>.