



Approved Aug 27 2018

POSITION STATEMENT PROTECTING COPYRIGHT EXCEPTIONS FROM CONTRACT OVERRIDE

ISSUE:

Libraries are unable to provide clear information to their patrons about permitted uses of digital content because rights holders override copyright exceptions and limitations in library licences. Use for research, private study, education, parody, satire, criticism, review and news reporting, and exceptions and limitations for libraries, are restricted in licenses although they are permitted in Canada's *Copyright Act*. This leads to inefficiency, redundancy, and added costs in libraries, schools, research settings and innovative businesses, while hindering research and innovation. We therefore view the lack of an explicit clause forbidding contract override to be an imbalance in copyright that limits users' rights.

BACKGROUND:

Policy makers use copyright exceptions and limitations in an effort to balance the interests of rights holders and the public through legislation. Libraries operate in an increasingly digital environment and purchase much of their content under licences. In many cases, rights holders use these licences to override copyright exceptions that were created through transparent legislative processes, at the expense of users and at the cost of the spread of knowledge, discovery and innovation.

As a result, libraries are unable to provide clear information to their patrons about the permitted uses for digital content. Researchers at institutions that cannot afford expensive digital journals are prevented from accessing content that they would have received through interlibrary loan in print. Library users are left confused about whether they can print an article to read at home. Individual consumers experience the same issues, unable to understand complex terms of use and uncertain whether they can back up their digital purchases. Some common contradictions include the following:

"Notwithstanding the provisions of Clauses x, it is understood and agreed that neither the Licensee nor Authorized Users may provide, by electronic means, to a user at another library a copy of any part of the Licensed Materials for research or private use or otherwise." **Overrides fair dealing in s.29 and interlibrary loan of digital materials in s.30.2 (5.02).**

"You shall use the Content only for your personal, non-commercial use and may copy, transfer, and burn the Content solely for your personal, non-commercial use only where permitted by the copyright owner...The Content and any other copyrighted material shall not be modified, copied, distributed, repackaged, shared, displayed, revealed, extracted, emailed, transmitted, sold or otherwise transferred, conveyed or used, in a manner inconsistent with the Agreement, or rights of the copyright owner." **Violates fair dealing in s.29.**

The Hargreaves Report¹, an independent report in the United Kingdom that was part of the UK's review of their intellectual property framework, noted that permitting contracts to override limitations and exceptions means that rights holders can override the limits the law has set on the rights conferred by copyright. Without protection, the Hargreaves report noted a risk that the UK Government could choose to permit certain activities in copyright legislation, such as private copying or text mining, and then these permissions could be denied by contract.

This same risk is present in the current Canadian *Copyright Act*, and our members have seen these issues borne out. As a result, clarity has been replaced by uncertainty.

ANALYSIS:

The CFLA-FCAB has determined that any contractual provisions that allow exemptions from the application of copyright limitations and exceptions, or otherwise prohibit or restrict their exercise or enjoyment, should be unenforceable.

On examination of comparable and preferable systems in place worldwide we have determined that the Irish model would provide a suitable legislative framework. A secondary approach would be to address this issue as part of each exception, following the United Kingdom's model. The United Kingdom's legislation may limit the scope of contract override, whereas the Irish legislation deems irrelevant any act that would infringe on rights set out in the legislation:

“Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.”²

RECOMMENDATION:

The Government of Canada should amend the Canadian *Copyright Act* to make it clear no exception to copyright can be overridden by contract.

¹ Ian Hargreaves, Digital Opportunity, A Review of Intellectual Property and Growth, May 2011. Section 5.40. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf

² <http://www.irishstatutebook.ie/eli/2000/act/28/section/2/enacted/en/html#sec2>