

The interface between copyright and contract:

*Suggestions for the future **

Abstract

In the UK, copyright law provides a property right to authors for works that meet certain criteria. Contracts can be used to help a right holder exploit that property right. Copyright has been alleged to provide a balance between the interests of right holders and other stake holders. Whilst there is much debate as to what that balance is, there is evidence that the use of contracts could nonetheless be affecting it. Contracts can be used in a way that extends or restricts protection that would otherwise exist under Copyright law. Legal rules regulate the extent to which this is permitted, but this varies between the UK, EU and the US. In the UK and EU the function of copyright remains vulnerable to an imbalance introduced by contracts. A test adapted from an overruled US case could resolve that imbalance.

Introduction

Whilst debates are ongoing as to what the copyright balance is and whether a balance has been achieved,¹ it cannot be denied that copyright law provides legal protection for works that might otherwise be reproduced without the threat of legal sanction. In order to exploit the copyright that is granted by law, right holders will often use contracts in both the creation and distribution of a copyright work. Contracts influence the copyright balance in a number of ways, affecting the authorial process and the relationship between authors, publishers and the public. It is usual for authors to transfer their copyright interests to publishers using contracts. Contracts can also be used to provide permission to recipients to perform acts that would otherwise be an infringement of copyright. However, contracts can be used to restrict what content recipients do with the right holder's work. This may involve copyright style protections. However, a contract only binds those who are a party to the contract, whereas a copyright binds the entire world. Nonetheless, in the digital context, in many situations contracts which contain copyright style clauses have to be agreed to in order to access the original work. The distinction between contracts and copyright, in the sense that a contract is between individuals and copyright against the world, is breaking down. This has meant that contractual clauses which extend copyright protection can undermine the balance within copyright law.

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¹ For discussion see *inter alia* Lessig, L, 'Free Culture: How Big Media uses technology and the law to lock down culture and control creativity', Penguin Press, New York (2004); Boyle, J., 'Shamans, Software and Spleens', Harvard University Press, Harvard (1996); Goldstein, P., 'Copyright's Highway', Stanford University Press, Stanford (2003); Vaidhyanathan, S., 'Copyrights and Copywrongs: The rise of Intellectual Property and how it threatens creativity', 1st edition, New York University Press, New York (2001).

The increased use of copyright style contractual clauses in the digital context is an issue which UK and EU law has insufficiently dealt with. The CDPA 1988 only provides a piecemeal legislative response to the challenge that such contracts pose. The accusation that the law has insufficiently dealt with the challenge that contractual clauses may provide to the copyright balance may also be levelled at the US, however, in the US there is at least a line of overruled case law which could restore the copyright balance. That line of case law argues that whenever contracts are within “the general subject matter” of copyright law, then they should be subject to the copyright balancing exercise.² If that test were implemented in to UK and EU law, it would provide a platform by which courts could analyse the impact of copyright style contractual clauses on the copyright balance.

Contracts & the Copyright Balance.

Contracts have been used in a way which influences the copyright balancing exercise. This is particularly so where contracts give protection for works protected by copyright which is broader than that granted by legislation. For instance, a clause in a contract could seek to extend the period of duration of protection of a work from that provided by legislation – 70 years from the death of the author – to any period beyond that, potentially into perpetuity. Equally, a contractual clause might seek to broaden the protection granted by the legislation in relation to reproduction of a work protected by copyright. Insufficiently original information might not be protected under copyright law, but a contractual clause may state that the information is not to be reproduced. There is a piecemeal approach that has been taken in UK and EU copyright law to the regulation of this situation. For instance, a contractual clause cannot be enforced if it prohibits decompilation of computer software.³ However, beyond these few examples there is no explicit policy dealing with contracts and contractual terms that seek to extend copyright protection beyond that laid down in the legislation.

In the digital environment contracts are increasingly used by copyright owners to control the use of their works on-line. Many of these seek to exert broader, stronger and longer control over protected works than would be available either in the analogue world, or in the legislation. It seems therefore essential that a common approach is adopted by regulators and policy makers to these practices. After all, law, with all the compromises, checks and balances that entails, is made by regulators and not by copyright owners seeking to (over-enforce) their intellectual property.

In contrast to the UK and EU, in the US there is a line of case law which provides controls over the use of such contracts and contract terms. The test that has been formulated states that whenever contracts are within “the general subject matter” of copyright law, then they should be subject to the copyright balancing exercise.⁴ If “the general subject matter” test were adopted in UK and EU law, then this would mean that the copyright balance would remain a fundamental element in the protection of creative works. This naturally raises the question of what the copyright balance actually is. As implemented by statute, copyright law provides a property right against the world.⁵ In order for a work to be eligible for copyright protection

² *ProCD, Inc. v Zeidenberg, ProCD, Inc. v Zeidenberg*, 908 F.Supp. 640 (WD Wis. 1996) at 656.

³ See s.50B CDPA 1988.

⁴ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 656 & 658.

⁵ Note that independent creation is still possible – for detail see Davies, G., Garnett, K., Harbottle (eds), ‘Copinger and Skone James on Copyright’, 15th edition, Sweet and Maxwell, London (2005) at 2-01 and

certain requirements must be met, and these include being within certain statutory categories,⁶ having sufficient originality,⁷ being in material form,⁸ having a link to the country concerned⁹ and to not be excluded on the grounds of public policy.¹⁰ If these requirements are met, then the owner of the copyright work will be able to exercise exclusive rights such as reproduction, adaptation and communication, and be able to authorise others to perform these acts.¹¹ When these rights are interpreted by the courts they regularly refer to the notion of the “copyright balance” between creators of content and their recipients. For instance, the copyright balance was described in 1785 by Lord Mansfield in Sayre v Moore:¹²

“we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”¹³

In the UK, that sentiment has been present in numerous cases up to the present day. For example, judgments in seminal UK copyright cases such as Designers Guild¹⁴ and the Da Vinci Code case¹⁵ have balanced the breadth of protection against the ability of recipients to re-use elements of the work. Those cases focused upon the degree to which ideas could be re-used in subsequent works.¹⁶ In early US law, the focus was often on the balance between the author, the promotion of learning, to prevent monopoly or to provide order in the book trade by Government grant,¹⁷ but the recent trend has been to cite or follow Sayre.¹⁸ The notion of the copyright balance is perhaps best considered as a judicial tool by which competing interests can be assessed within the confines of copyright law. For instance, the copyright balance was invoked by the US Supreme Court in order to justify the introduction of the test of inducement from patent law into copyright law.¹⁹

In contrast to copyright, contracts contain the details of agreements between legal entities or individuals. Unlike copyright, they have an *in personam* character, which means that they cannot

7-14; for the US see Barrett, M., 'Intellectual Property: Cases and Materials', 2nd edition, Minnesota (2001) p.2, and p.394.

⁶ In the UK s.1(1) CDPA 1988; in the US, 17 USC §102.

⁷ In the UK s.1(1) CDPA 1988, University of London Press v University Tutorial Press [1916] 2 Ch 601; Ladbroke v William Hill [1964] 1 WLR 273; in the US 17 USC §102.

⁸ In the UK s.3(2) CDPA 1988; s.178 CDPA 1988; in the US 17 USC §102.

⁹ In the UK Chapter XI CDPA 1988; in the US 17 USC §104.

¹⁰ In the UK Glyn v Weston Film Feature [1916] 1 Ch 261 & AG v Guardian (No 2) [1990] 1 AC 109; in the US Mitchell Brothers Film Group v Cinema Adult Theater (5th Circuit, 1979) 604 F 2d 852.

¹¹ In the UK s.16 CDPA 1988; in the US 17 USC §106.

¹² Sayre v Moore (1785) the report of which is available within Cary v Longman 1 East 357 (1801) at 358.

¹³ Sayre v Moore *ibid.*, at 362.

¹⁴ Designers Guild v Williams [2001] 1 WLR 2416.

¹⁵ Baigent v The Random House Group [2007] FSR 579

¹⁶ Designers Guild v Williams *supra* 14 at 2423; Baigent v The Random House Group *ibid.*, at 592.

¹⁷ Patterson, L.R., 'Copyright in Historical Perspective', Vanderbilt University Press, Nashville (1968) at 193.

¹⁸ *Inter alia* Sony v Universal City Studios (Supreme Court, 1984) 464 US 417 at 480; Whelan Associates v Jaslow (1986, 3rd Cir.) 797 F.2d 1222 at 1235.

¹⁹ Metro-Goldwyn-Meyer Studios Inc v Grokster 545 US 913 (Supreme Court, 2005) at 928.

be enforced against the world but only against the parties to the contract. Contracts that involve copyright works rely on the protection provided by copyright law in order to make these works a valuable, exploitable commodity. For instance, copyright may protect the first sale and reproduction of a literary work, but contract can then also govern in more detail how and where the work is first sold, or to what extent reproduction of the work is authorised. If this were not so it would not be possible for licensees to regulate the use of copyright content. For instance, a licensed user of Windows would potentially be in breach of the right of reproduction when the software is installed on a computer were it not for the licence. However, contracts may go further than simply permitting an act that would otherwise be an infringement of copyright. A contractual clause may prohibit a subsequent recipient of copyright content from exercising their rights in copyright. Furthermore, contracts can govern works that are both protected and not protected by copyright. A contractual clause could, for instance, prohibit the reproduction of a non copyrightable element in a copyright work, such as an insufficiently original fact. This would be an extension of copyright style protection. It is also arguable that this may even preclude copyright law if the majority of uses have to agree to the contract in order to access the work. These scenarios will now be examined in turn.

An example of where a contract expressly prevents future recipients using copyright law to regulate subsequent re-uses of a work is 'free software.' 'Free software' is software that is governed by a contract which states that software should not be encoded to prevent individuals from accessing the underlying computer code. GNU/Linux, an Operating System based upon Unix, has a contract which regulates re-use known as the GNU GPL (the "GNU's Not Unix" General Public Licence). The GNU GPL incorporates a concept described by founder Richard Stallman as "copyleft." In his words, the "central idea of copyleft is that we [the coders] give everyone permission to run the program, copy the program, modify the program, and distribute modified versions – but not permission to add restrictions of their own."²⁰ Each subsequent work must therefore not constrain particular re-uses. If a subsequent owner of code does so, then they can be liable for a breach of contract.²¹ The breach of contract will occur regardless of whether copyright covers the software. Furthermore, a breach can still occur even if copyright grants to a right holder rights over *inter alia* reproduction and communication to the public. A right holder cannot exercise the right over reproduction if it is in breach of the contract. Due to the binding nature of the GNU GPL over subsequent content, it is arguable that this upsets the copyright balance.

Contracts can regulate re-use not just where there is a contract not to exploit a copyright, but also where the contract extends copyright style protection beyond that normally permitted by copyright law. An example of a contract such as this is the Microsoft EULA (End User License Agreement) that is provided with Microsoft Windows XP. Users are deemed to acknowledge acceptance of the contract terms often on the opening of the shrink wrap packaging, or by clicking "I agree" to the EULA on the computer. This will occur with any legitimate copies of Windows XP. According to the EULA, a 'transfer' of a copy of Windows XP will be permitted

²⁰ Stallman, R., 'Free Software Free Society: Selected Essays', GNU Press, Massachusetts (2002) at 20

²¹ Jacobsen v Katzer 535 F.3d 1373 (Court of Appeals, Federal Circuit, 2008) at 1.

under the licence only once.²² This is different to copyright law where if a work is sold, then there can be no further control by the right holder over the distribution of the work.²³ This is because the right of distribution is exhausted after first sale. Whenever a user installs an original copy of Windows XP, they need to agree to the EULA if they are to be able to activate the software. In practice, this license therefore affects the copyright balance in relation to the distribution right because the contract applies to all authorised copies of Windows XP that contain the EULA. Contractual clauses that extend copyright style protection may also affect the copyright balance.

Contracts can go beyond extending the rights of copyright. They have even been held to preclude copyright law. In this situation, copyright style protection may be provided through a contractual clause even though copyright protection has been explicitly denied by either statute or by a court. This situation occurred in the US case of *Pro CD v Zeidenberg* in the Seventh Circuit.²⁴ A telephone directory, of the sort which had been denied protection in *Feist*,²⁵ was given copyright style protection by a contract. The contract differentiated in prices between different types of consumers. Zeidenberg took data that was only protected by contract and not by copyright law, and redistributed this at a lower price. Despite the lack of copyright protection, the Seventh Circuit upheld the contract.²⁶ Increasingly in the online context, users have to agree to such contracts whenever they access information.²⁷ As with the Windows XP EULA, the *in personam* and *in rem* distinction between copyright and contract is breaking down, because the contract will apply to the majority, if not all, those who legitimately access the content. When a contract such as that in *Pro CD* provides copyright style protection, it therefore has clear potential to undermine the copyright balance.

It is therefore possible to identify three types of contractual clauses that regulate copyright works – those that inhibit future copyright holders from exploiting their rights, those contracts that extend copyright style controls into new areas, and those contracts that exclude copyright style controls contrary to the rules found in copyright law. All three have the potential to undermine the balance between authors and re-users that is found within copyright law. Copyright law grants rights to right holders that can be exploited in particular circumstances, and subject to certain defences. These three types of contractual clauses affect the ability of right holders to exploit their copyright, for contracts can require both wider and narrower degrees of exploitation. Copyright law has dealt with these different types of contract in different ways.

²² 'Microsoft Windows XP Professional End-User License Agreement' – available at <http://www.microsoft.com/windowsxp/eula/home.mspx>, Article 4.

²³ UK- s.18 CDPA 1988; *Microsoft Corporation v Computer Future Distribution Ltd* [1998] ETMR 597US: 17 USC 109; *Bobbs-Merrill Co v Straus* 210 U.S. 339 (1908, Supreme Court).

²⁴ *ProCD, Inc. v Zeidenberg* 86 F.3d 1447 (7th Circuit, 1996).

²⁵ *Feist Publications, Inc. v Rural Telephone Service Co.*, 499 U.S. 340 (Supreme Court, 1991).

²⁶ *ProCD, Inc. v Zeidenberg* *supra* 24.

²⁷ See generally Rifkin, J., 'The Age of Access', Penguin Books, London (2000).

The UK

In the UK, where the law has been amended as a consequence of domestic implementation of EU Directives,²⁸ the main focus has been on contracts which restrict specific acts not covered by copyright. According to the preambles of the Directives, this was necessary to maintain the copyright balance. However, outside of specific circumstances there is no broad approach in relation to contracts that could extend the copyright style protection. In contrast to this, in the US, the focus has been establishing a broad approach to contracts which not only restrict the exploitation of copyright, but also those which extend existing copyright and those which create new copyright style rights in direct disregard of copyright law.

In the UK, the only statutory provision which governs the relationship between contracts and copyright is to be found in the Fair Dealing chapter. The Fair Dealing provisions are statutory sections which detail various “permitted acts” of infringement, and according to s.28(1):

“..[the provisions] relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts.”²⁹

An act that would otherwise be permitted by copyright law can therefore be restricted by contract. However, the provision only applies where there is existing copyright protection; it cannot be used to extend copyright protection and so only applies to the former situation. By way of comparison, if a contractual clause states that it is not permissible to make a copy of a book supplied to a public library, but a copy is nonetheless made, there will still be a breach of contract. However, if a contractual clause extends the period of duration of copyright protection to 200 years, then this will not be covered by s.28(1). Increasingly, contracts are extending protection over areas not covered by copyright. Furthermore, the increasing use of licenses on the Internet and in digital works has meant that it is more likely that content recipients will be bound by a copyright style contractual clause. For instance, a library could sign up to a database of e-books, but a contractual clause in the access agreement could forbid reproduction of any kind of the e-book, whether to make a private copy of for the purpose of research. This access agreement could bind all users who legitimately access the work.

The growth in the use of contracts which bind all those who access the software has the potential to upset the copyright balance. Use of such contracts will limit the application of the Fair Dealing provisions and consequently the possibility of a user being able to argue that a particular use is one that is a “permitted act” under the Statute. This situation was not unique to the UK, and so in the 2001 Information Society Directive³⁰ the EU introduced a number of provisions which Member States could implement which would maintain the copyright balance in relation to certain acts. The EU has chosen to focus on areas specific to the digital domain,

²⁸ For example, Directive 91/250 of the Council of 14 May 1991 on the legal protection of computer programs OJ L 122/42 and Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10 (hereafter ‘EUCD’).

²⁹ s.28(1) CDPA 1988.

³⁰ Directive 2001/29 *supra* 28. Implemented in the UK by SI 2003/2498 Copyright and Related Rights Regulations 2003.

rather than ones which will cover both analogue and digital works. As a result, the CDPA 1988 now requires that where a person uses a computer program under an agreement, any term or condition in the agreement shall be void if it prohibits or restricts a) the right to make necessary back-up copies, b) the right to decompile a program or the use of any device or method to analyse the ideas and principles which underlie any element of the program or is c) for the purposes of lawful use, the copying or adapting of a computer program or d) a lawful use prevented by a contract enforced by DRM.

The narrow scope of these provisions immediately reveals that they do not seek to provide a broad brush approach to maintaining the traditional copyright balance into the digital sphere. They are for certain acts in specific situations. The broader issue of the increasing use of click wrap and shrink wrap licenses in the digital era has been sidestepped. Nonetheless, due to the nature of the digital environment, there is the potential for these specific provisions to be of wider ranging application. A requirement, for instance, that back up copies be permissible could result in unencrypted versions becoming available, which in turn could reduce the use of encryption to protect ideas and concepts that copyright law would otherwise allow to be reproduced and adapted. Indeed, if a contractual clause seeks to bind a party to the contract from making a back up reproduction of a copyright work for a “lawful use,” then this will be held void under s.50A of the CDPA 1988, as introduced by the amending Regulations which implemented the 2001 Information Society Directive. The wording of s.50A is as follows:

“ (1)It is not an infringement of copyright for a lawful user of a copy of a computer program to make any back up copy of it which it is necessary for him to have for the purposes of his lawful use.

..

(3)Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void.”³¹

There are two key variables in s50A that require clarification. The first concerns what is meant by “lawful use.” That has been taken to refer to uses which would be “permitted acts” – in other words, the provisions to be found within the Fair Dealing chapter within the CDPA.³² However, the second variable - that the back up be “necessary” – has been interpreted in a particularly restrictive fashion. For instance, making a back up copy of a CD-ROM might be considered “necessary” by a user due to the possibility of damage to the original disk. However, the UK judiciary has taken a particularly narrow approach to the definition of the term. Back up copies are not deemed to be “necessary” in most situations. In *Sony v Owen*,³³ Justice Jacob said that the making of back up copies of software on CD-ROMS was not something that was “necessary.” This was because the CD-ROM is sold as a unit: “The fact is that if you spoil your CD, which has a recording of music on it, you have to go and buy another. The same is true of a CD carrying a game. Backups are not necessary at all.”³⁴ This is a particularly restrictive interpretation which will considerably limit the scope of the provision. The interpretation suggests that a back up

³¹ s.50A CDPA 1988.

³² Chapter III CDPA 1988.

³³ *Sony v Owen* [2002] EWHC 742

³⁴ *Sony v Owen* *ibid.*, at 748.

copy for the purpose of, for instance, reverse engineering will not be permissible. It makes the provision appear to be more relevant to data systems that have only one unique copy of the stored data, where the loss of one copy of the data will result in that data being unobtainable from any other source. Furthermore, in light of Justice Jacob's interpretation, it appears that the court would be willing to accept that a licence to use a work would merely be a licence, and that making a back up copy could be a breach of that licence in most, if not all, circumstances. This is because it would probably be possible to sign a new licence agreement. Consequently, the scope of s.50A has been considerably limited. Its use in relation to back up copies is only for very limited circumstances, much more limited than those found within the Fair Dealing chapter of the CDPA. A wide reading of s.50A could allow back up copies for any purpose so long as it is "necessary," or alternately it could be read slightly more narrowly to merely enable or perhaps guarantee particular acts beyond that in *Sony*. However, both readings are not permitted under Justice Jacob's interpretation of s.50A.

In relation to the provision that concerns decompilation, there is similarly a restrictive interpretation. Decompilation describes the process whereby code of low level abstraction is turned into a higher level of abstraction, in order to make it readable for humans. Decompilation is not an infringement of UK copyright under s.50B CDPA 1988 if necessary for program to program interoperability. The information obtained is also only to be used for that purpose.³⁵ This is particularly restrictive (and potentially arbitrarily so) because program to program interoperability only covers situations where programs need to 'talk' to each other, as opposed to the more common situation where hardware needs to converse with a program. To add to this restrictive application, s.50B also states that decompilation is not permitted if the content recipient "uses the information to create a program which is substantially similar in its expression to the program decompiled or to do any act restricted by copyright."³⁶ As Copinger and Skone James have noted, that is likely to be a reference to where there is reproduction of a substantial part.³⁷ This means that if program to program interoperability is sought in order to change the way in which a computer program operates, it must do so only by directly altering the program and not by replacing components of that software – to do that would be an infringement of copyright. This restricts the application of the provision considerably because in many situations interoperability does require reproduction of (often) large parts of an existing programme and it is therefore quite possible that there will be reproduction of a substantial part under cases such as *Designers Guild*.³⁸ Consequently, the provision is a narrow one, and therefore is of limited application to the broader copyright balancing exercise.

Another limit to the enforceability of contractual clauses which affect the copyright balance is in relation to the copying or adaptation of computer programs for lawful uses, as laid down in s.50C(1)(a).³⁹ As Atkins has noted, "it is fundamental to remember that for a user to be able to make any changes to a program, in this instance to correct errors, depends on whether or not

³⁵ s.50B CDPA 1988. The section is implementing Directive 91/250/EC on the Legal Protection of Computer Software, OJ L 122/42.

³⁶ s.50(3)(d) CDPA 1988.

³⁷ Davies, G., Garnett, K., Harbottle (eds), 'Copinger and Skone James on Copyright', 15th edition at 9-135

³⁸ *Designers Guild v Williams* *supra* 14.

³⁹ s.50C(1)(a) CDPA 1988.

they have access to the program source code. Yet, the legislation does not prescribe that the supplier should supply the source code for error correction purposes..."⁴⁰ The provision is therefore limited in terms of its reach, because coders of computer programs will rarely provide the source code with their products.

The EU revisions to the CDPA that will void contractual clauses in certain circumstances therefore have limited application due partly to judicial interpretation, and partly due to the narrowness of the legislative provisions themselves. However, whilst the s.50 provisions are ones that deal relatively specifically with contractual clauses, they are not the only ones that have an impact on the enforceability of such clauses. There are further statutory provisions, which also arise from an EU Directive and are implemented by changes to the CDPA. These are the provisions that deal with Digital Rights Management (DRM) mechanisms.

DRM mechanisms are typically pieces of software or hardware that control access to content that is stored on the computer. They will often be enforcing license agreements between a copyright holder and the recipient of the content. For instance, on i-Tunes DRM known as "Fair Play" was used to enforce the Apple i-Tunes EULA which stated that users could make up to seven copies of each piece of music downloaded from its online store. However, a DRM mechanism itself can behave similarly to a contract, in that it does not require a EULA to be effective. A purchaser of a DVD does not sign an agreement not to reproduce the DVD – the reproduction is prevented by the use of the DRM mechanism known as the Content Scrambling System (CSS). Importantly, this style of contractual regulation has no regard to the notion of copyright. The "rights" element of Digital "Rights" Management refers to the right to access any information on the computer, whether it is copyrighted or not. The use of the word "right" is not a reference to "copyright." In the same manner as contractual clauses which extend copyright protection over elements of a work that either does not have copyright, or extends the duration of existing protection, a DRM mechanism can extend copyright style controls over non copyright works and non copyright elements. However, the manner in which this is regulated is different to the approach taken by the CPDA to specific contractual clauses.

In relation to DRM, the CDPA was amended by the Information Society Directive 2001. Unlike the specific provisions dealing with contractual clauses, the approach of the Directive was to take, what appears on first glance, to be a broad brush approach. The Directive required that right holders and users should attempt to come to a "voluntary agreement" if measures were in place that would prevent a use that would otherwise be permitted under the exceptions.⁴¹ A list of the implemented exceptions is provided in Schedule 5A of the CDPA, and this broadly reflects the list of Fair Dealing provisions. However, there have been significant issues in relation to its implementation which has rendered the provision of limited, if any, use. In the UK the provision was implemented through s.296ZE. If it is not possible for a user of a protected work to be able to reach a "voluntary agreement" with a right holder, then the user is supposed to be able to have recourse to the Secretary of State to force the right holder to grant access. In the UK this has been problematic. Although s.296ZE states that there should be a recourse of appeal to the Secretary of State – and this can be achieved through filling in a form on the Internet – the

⁴⁰ Atkins, R., 'Copyright, contract and the protection of computer programs', 23 *International Review of Law, Computers and Technology* 143 (2009) at 148.

⁴¹ Directive 2001/29 *supra* 28 article 6(4).

Gowers Review noted that few people have made use of this procedure.⁴² The interface between DRMs enforcement of contracts, DRM mechanisms themselves, and copyright law is therefore heavily influenced by the initial efficacy of the DRM mechanism in question. As outlined earlier, this is important because works on the Internet are often accessed under a DRM contractual licence rather than by sale of the work.⁴³ The mass selling computer game *Half Life 2*⁴⁴ was only playable once the player was logged in on a program called Steam.⁴⁵ Access can be terminated at any time, e.g. if contractual terms regarding re-use are broken. If the contract prohibits reproduction of a non copyright element of a work, then the user may lose access to the work for reproducing something that is not protected by copyright law. Similarly, access could be withdrawn if the contract forbids certain alteration of the work,⁴⁶ even though the work in question is a copyright work, and the only way to access it is through an access mechanism. Thus again copyright law has failed to grasp the full impact of contracts upon the balancing exercise.

There is, however, a nascent broad approach that has developed within the 'Restraint of Trade' doctrine. The doctrine has arisen through case law, and it is not present within the CDPA. It has been applied by judges when considering exclusive licence agreements between right holders and authors. For instance, a music distributor may sign an exclusive licence agreement with a musician; those agreements may be covered by the doctrine. However, the doctrine will only apply in very specific, defined circumstances. Lord Reid in *Macaulay v Schroeder*⁴⁷ stated that "... contractual restrictions appear to be unnecessary or to be reasonably capable of an enforcement in an oppressive manner they must be justified before they can be enforced."⁴⁸ Humphries J in *Silvertone Records*,⁴⁹ following an extract of Lord Reid's comments in *Macaulay* and discussion of the plaintiff's submissions, argued that:

"It may be permissible for a short time to absorb the output of the party or to prevent the party using its output other than strictly within the terms of the contract. But if an artist is effectively able to be prevented from reaching the public over a prolonged period I find it unrealistic to say that this is not a contract in restraint of trade."⁵⁰

However, whilst the doctrine implies that a contract may restrict the dissemination of the output of a creator, it does not draw a clear parallel or link through to the copyright balancing exercise. The judgments could have drawn a clear link through to the copyright balancing exercise, but they do not do so. The emphasis in *Macaulay* is instead on the issue of oppressiveness; in *Silvertone*, it is the underlying concern of oppressiveness combined with the issue of

⁴² Gowers Review, HM Treasury, HMSO, London (2006) at 73.

⁴³ Rifkin, J., 'The Age of Access' *supra* 27.

⁴⁴ <http://orange.half-life2.com/> last accessed on 14th August 2007.

⁴⁵ Anon, 'Ban hits Half-Life 2 pirates hard' at <http://news.bbc.co.uk/2/hi/technology/4041289.stm> last accessed on 10th July 2007.

⁴⁶ See, for example, the terms of the EULA for Steam:

http://store.steampowered.com/subscriber_agreement/, at C., last accessed on 26th August 2009.

⁴⁷ *Macaulay v Schroeder* [1974] 1 WLR 1308 at 1314.

⁴⁸ *Macaulay v Schroeder* [1974] *ibid.*, at 1314.

⁴⁹ Joined cases *Silvertone Records v Mountfield, Zomba Music v Mountfield* [1993] EMLR 152. Note corrections to this report made at [1993] EMLR 171.

⁵⁰ Joined cases *Silvertone Records v Mountfield, Zomba Music v Mountfield* *ibid.*, at 160

dissemination. The doctrine does not provide any specific guidance in case law as to the manner in which the copyright balancing exercise may or may not be affected, but it does at least demonstrate that the courts are willing limit such contracts on broad policy grounds.

A similar situation can be found at the EU level. Under EU law, the equivalent doctrine is that of “essential facilities.” It is also a court based doctrine, though in this instance the doctrine may be applied where there “is something owned or controlled by a dominant undertaking to which other undertakings need access in order to provide products or services to customers.”⁵¹ Following the *Microsoft*⁵² case, an ‘essential facility’ could be part of something protected by copyright. Microsoft, in developing Windows XP, had developed a set of Application Program Interfaces (APIs) which allowed programs to easily ‘plug’ themselves into Windows. However, due to the design of the APIs only software coders who had an agreement with Microsoft could make use of these APIs. The European Commission initiated a competition investigation into the practice and ordered that Microsoft make their APIs more accessible.⁵³ The ECJ affirmed this decision.⁵⁴ The outcome of the case is that if an “essential facility” within a copyright work such as software is not accessible to others, then this will be contrary to competition law. As with the restraint of trade doctrine, the main focus is not whether the copyright balance is upset, but instead principles relating to fair competition.

In sum, the approach of the UK is to permit contractual clauses that restrict the enforcement of copyright, but that there is a piecemeal approach towards where contractual clauses extend existing copyright law. In certain particular situations, such clauses will be held void. Whilst contractual clauses that extend copyright style protection may be subject to broader balancing exercises in relation to restraint of trade and competition law, these balancing exercises do not specifically address the relationship between contracts and the copyright balance. With the growth in the distribution of digital works that are regulated by contract, it is increasingly important that a broader policy is developed. This is especially so where contractual clauses provide for copyright style protection over works that are not covered by copyright. Unlike the UK, there is such an approach in the US within case law.

The US approach

In the US, the focus of the law has been on the manner in which contractual clauses may extend the scope of copyright style protection. Unlike the UK, the focus is not on specific areas such as the making of back up copies. A line of US decisions focus dealing with non copyright works focus on the fundamental relationship between the reach of a contract and the copyright balancing exercise, which is patently not the case in the UK or EU. The line of case law in question concerns two hearings involving a company called Pro CD.

Pro CD used contractual clauses to prohibit their customers from reselling ProCD’s own compilation of telephone numbers. Traditionally, such compilations would have had protection

⁵¹ Jones, A., and Sufrin, B., ‘EC Competition Law’, OUP, Oxford (2004) at 476.

⁵² T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

⁵³ Commission Decision C(2004)900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 – Microsoft)

⁵⁴ T-201/04 *Microsoft v Commission supra* 52.

under US copyright law because of the “sweat of the brow”⁵⁵ by the company in compiling the telephone numbers. However, following *Feist*⁵⁶, the “sweat of the brow” test was overruled and such compilations lost copyright protection. ProCD therefore used a contractual clause to provide copyright style protection. The clause was contained in a shrink wrap licence, to which users had to agree in order to access the compilation data. The case was heard before both the Western District of Wisconsin,⁵⁷ and on appeal, the Seventh Circuit.⁵⁸ Both courts took a broad approach in establishing a policy towards contractual clauses which extend copyright style protection over potentially copyright works. In the Western District of Wisconsin it was decided that contractual clauses could not be used to provide copyright style protection where copyright itself would not provide protection. On appeal, the Seventh Circuit reached the opposite conclusion, due to copyright being a property right, and contract being a personal right. However, to reiterate the above point, both courts drew up a policy towards contractual clauses that extend copyright style protection and that seek to preclude copyright law.

In holding that the contract could not be used to protect content that would otherwise not be protected by copyright law, the Western District of Wisconsin utilised rules relating to the relationship between federal and state law. Chief Justice Crabb discussed §301,⁵⁹ which states that Federal copyright law will be supreme when state law conflicts with that Federal law. The Chief Justice submitted that when a work is within the “general subject matter”⁶⁰ of copyright, then that would be sufficient to invoke §301. He also held that this would be so whether or not the works “qualify for protection.”⁶¹ That analysis allowed Chief Justice Crabb to argue that in this case, because of *Feist*,⁶² to allow for protection could affect the “delicate balancing” of copyright law. He stated that “Contracts that seek to protect reproduction and distribution rights step into territory already covered by copyright law. It would alter the ‘delicate balance’ of copyright law to allow parties to avoid copyright law by contracting around it.”⁶³ The “delicate balance” to which he refers is that which is determined by Federal law, which relates to a balance of a number of interests, which includes those of right holders, content recipients, and broader policy issues. However, this case goes further than that, because the Chief Justice makes some comments about when this copyright balance is being affected by a contractual clause for he stated that the copyright balance should only be safeguarded when “a contract erects a barrier on access to information that under copyright law should be accessible.”⁶⁴ It is in relation to this latter point that a difference between contract and copyright needs to be raised, for it is the point on which the Chief Justice’s judgment was to be reversed on appeal. Copyright is a right *in rem*, which binds the whole world. Contractual clauses, however, only bind the parties to the contract. If an individual, who was not a party to the contract, were to reproduce ProCD’s compilation of phone numbers, then there would be no recourse in contract by ProCD against

⁵⁵ *Jeweler’s Circular Publishing Co. v Keystone Publishing* 281 F 83.

⁵⁶ *Feist Publications, Inc. v Rural Telephone Service Co.*, (Supreme Court, 1991) *supra* 25.

⁵⁷ *ProCD, Inc. v Zeidenberg*, 908 F.Supp. 640 (WD Wis. 1996).

⁵⁸ *ProCD, Inc. v Zeidenberg* (7th Circuit, 1996) *supra* 24.

⁵⁹ 17 USC §301.

⁶⁰ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 656.

⁶¹ *Ibid.*

⁶² *Feist Publications, Inc. v Rural Telephone Service Co.*, (Supreme Court, 1991) *supra* 25.

⁶³ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 658.

⁶⁴ *ProCD, Inc. v Zeidenberg* *ibid.*,

them. It was for this reason that, on appeal, Judge Easterbrook argued that rights created by contract were not “equivalent”⁶⁵ to rights created by copyright. For him, copyright law created a property right against the world, whereas contracts are used by individuals in order to utilise that property against other individuals. As he argued:

“A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’ Someone who found a copy of SelectPhone (trademark) on the street would not be affected by the shrinkwrap license-- though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.”⁶⁶

The facts of *ProCD* were important in reaching this conclusion. The information in question – the telephone numbers – could easily be transmitted to others, and so once a contract had been breached the information will be readily accessible to other individuals without those individuals being at risk of infringement of a contractual clause. This distinction makes the reasoning of Judge Easterbrook to appear to have a sound logical basis. However, in the online environment, it is increasingly the case that works that are within the scope of copyright are being regulated through the use of contractual clauses that provide copyright style protection. The works in question are not always of a character that they can be easily reproduced. A work may be only accessible through an online gateway – as is the case, for instance, with online games or with other services that require online functionality. In this common factual scenario, the use of copyright style contractual clauses has a greater impact because the in rem – in personam distinction is of less importance, because the information has to be accessed on an in personam basis.

There is historical precedent for acknowledging that contractual clauses can upset the copyright balance where the majority of access to information is on an in personam basis. In *Bobbs-Merrill Company v Strauss*⁶⁷ of 1908, the Supreme Court identified some of the ideology within copyright law as containing in rem principles which could not be overridden by in personam contractual clauses. *Bobbs-Merrill* had attempted to use a contractual clause for every new sale of its books which would prevent any application of certain in rem copyright. The defendant was a third party book seller who had obtained the books in question from a wholesaler, and that wholesaler had obtained the books from Bobbs-Merrill. The case involved consideration of the first sale doctrine.⁶⁸ The doctrine revolves around the exhaustion of rights – the notion that once a work is distributed, the right holder cannot then control the subsequent sale of the work. The contractual clause in question was on the copyright notice page of a book. That clause stated:

“The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of copyright.”⁶⁹

⁶⁵ *ProCD, Inc. v Zeidenberg supra* 24 at 1454.

⁶⁶ *ProCD, Inc. v Zeidenberg ibid.*, at 1454.

⁶⁷ *Bobbs-Merrill Company v Straus* (Supreme Court, 1908) *supra* 23.

⁶⁸ 17 USC §109(a).

⁶⁹ *Bobbs-Merrill Company v Straus* (Supreme Court, 1908) *supra* 23 at 341.

In that case, Justice Day argued that copyright did not impose such a right, and wrote that “In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.”⁷⁰ The contract in *Bobbs Merrill* therefore was strictly construed as only affecting the original parties to the contract and not subsequent purchasers. To translate this to the *ProCD* situation, the contract could not be used to extend protection over those who subsequently access information obtained in breach of contract. This is consistent with both the District of Wisconsin and the Seventh Circuit. However, *Bobbs Merrill* is less clear where there is privity of contract, but where there is not copyright protection – for example, where an idea in a copyright work is protected by a license but not by copyright. On the one hand, it could be suggested that if there is deemed to be privity of contract, then the clause will always take effect. On the other, it could be suggested that there is a limit to extending copyright protection. However, the Supreme Court makes clear that it has reached its conclusion in “..view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work,-a right which is the special creation of the statute.”⁷¹ The judgment thereafter emphasises the purpose of the copyright statute, and this relates back to the balancing exercise. It is therefore suggested that rather than the issue of privity of contact, the key issue is whether the balancing exercise in copyright law is being affected.

In contrast to the UK, the US therefore has a number of rules dealing with the situation where a contractual clause has extended copyright style protection over a work denied copyright protection. It is suggested that the approach of the Western District of Wisconsin is most appropriate in the digital era, and that it is also more in line with historical precedent. In the UK, it is suggested that the same rule should be used as that proposed by Chief Justice Crabb—namely, that so long as a work is within the “general subject matter” of copyright, the copyright balancing exercise will apply.⁷² This raises a question as to the actual scope of the “general subject matter” test. The elementary view would be that the test should be implemented whenever copyright is involved in a given case. However, in *ProCD*, the work itself was not copyrightable. There is no clear cut guidance on this in *ProCD*. However, the following was stated in by Circuit Judge Crabb:

“The law in this circuit is that the “subject matter of copyright” includes works that fit within the general subject matter of §§ 102 and 103, whether or not the works qualify for actual protection.”⁷³

The law to which Crabb refers is that which governs the relationship between federal and state copyright law. Nevertheless, the case law remains unclear as to where the precise boundaries lie. However, a common theme is that a point of law pertaining to copyright has been argued in

⁷⁰ *Bobbs-Merrill Company v Straus* *ibid.*, at 350.

⁷¹ *Bobbs-Merrill Company v Straus* *ibid.*, at 350-351.

⁷² *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 656 and *ProCD, Inc. v Zeidenberg*, (7th Circuit, 1996) *supra* 25 at 1453.

⁷³ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *ibid.*, 656

relation to copyright subsistence.⁷⁴ It is therefore suggested that if a point of copyright law is arguable before a court, then for the purposes of the proposed system it would be this that would bring the case within the purview of the “general subject matter” test.

How would the proposed system work in practice?

The *Pro CD* cases provide a good case study of how the proposed “general subject matter” of copyright test would work. The *Pro CD* case has already been discussed above, particularly in relation to the test used by Chief Justice Crabb. To recall, the work in question was a digitised compilation of telephone numbers, and was not *per se* capable of copyright protection. However, Chief Justice Crabb argued that the work was within the scope of copyright protection, and so consequently it was within the scope of the copyright balance. To quote the words of the Chief Justice:

“The telephone listings on the Select Phone™ CD-ROM discs are a compilation of facts that would qualify for protection under §103 if they were sufficiently original; that they lack originality does not affect their status as coming within the subject matter of copyright”⁷⁵

As confirmed by Chief Justice Crabb, any work that could be argued before court as being capable of coming within the categories of copyright in §102 will be within the “subject matter” of copyright – such as literary, musical and dramatic works. To apply this test across the broad range of works would require consideration of the copyright balance in relation to many licences and copyrights that concern potentially copyrightable works: particularly shrink wrap and click wrap agreements of the sort found on software, for instance, Microsoft’s End User Licence Agreement (EULA).

Whilst the “general subject matter” test has only been applied in the US, in the UK such a test could be applied without much difficulty. In the UK s1(1) CDPA 1988 is a provision similar to §102. It has already been noted that in the UK a contract could be used to permit certain acts that would otherwise be an infringement of copyright. It was also noted that contracts could exclude some of Fair Dealing provisions contained within the CDPA.⁷⁶ The proposed test of “general subject matter” would require that any such contract be brought within the copyright balancing exercise. Such defences could not be opted out of through the use of contracts. Right holders who currently restrict Fair Dealing through the use of contractual clauses (e.g. as in the Microsoft EULA) will in all likelihood not welcome such a change to the law which will restrict their bargaining powers. Nonetheless, it is suggested that this is an acceptable position. Increasingly, with the use of technology, there are contractual provisions which govern access to, and the use of, copyright works.⁷⁷ The rise of technology such as video streaming and pay per play for computer games means that in certain situations licensing is the preferred method of

⁷⁴ See *Baltimore Orioles v Major League Baseball* 805 F.2d 663; *Harper & Row Publishers. v Nation Enterprises* 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Nash v CBS* 704 F.Supp. 823, 832 (N.D.Ill.1989) and *United States Trotting Association v Chicago Downs Association* 665 F.2d 781 (7th Cir.1981).

⁷⁵ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 657.

⁷⁶ Davies, G., Garnett, K., Harbottle (eds), ‘Copinger and Skone James on Copyright’, 15th edition *supra* 5 at 9-12.

⁷⁷ Rifkin, J., ‘The Age of Access’ *supra* 27.

legal regulation. The proposed changes to the law redress that change in distribution methods in order to ensure that the copyright balance is applied to copyright works distributed in this manner. Authors will often re-use existing works in later works, and contracts may govern this re-use.

In relation to the “general subject matter” test at an international level, it is suggested that any amendments to UK, EU or US law will not run counter to any of the international agreements. For instance, the three step test of Berne is still fulfilled.⁷⁸ Right holders will still be able to enforce their copyrights as a norm; the proposed test simply requires an adherence to the copyright balance when contracts are being used in relation to copyright works. For this reason, there should also be no issues of compliance raised in relation to TRIPS.⁷⁹

Conclusions

In the UK and at the EU level, there has been considerable lack of clarity in relation to the relationship between contracts and the copyright balance where a contractual clause extends or seeks to override existing copyright protection. This is particularly important in the online context where licensing of copyright works is increasingly common on a one-to-one basis. The traditional distinction between copyright as a right against the world, and a contract being an agreement between individuals, is breaking down. There is a need to restore the copyright balance where contracts between individuals contain clauses that extend copyright style protection.

The “general subject matter” test within US law for such contracts is one way in which this pressing issue can be addressed within UK and EU level copyright law. It is a way to ensure that the copyright balance is applied to copyright works regulated by contracts. In the *Pro CD* case, Chief Justice Crabb makes a blunt statement about the relationship between copyright and contract specifically in relation to the plaintiff - “[the] plaintiff cannot [sic] use a standard form contract to make an end run [sic] around copyright law.”⁸⁰ It might be said that this statement represents a bold assertion of copyright principles, but it is really reinforcing the pre-existing copyright balance and prevents right holders from contracting out of it. Existing right holders may not welcome the restriction of their freedom of contract in terms of the distribution of copyright works, but it does mean that future authors will be able to have “balanced” access to the level that the state has decreed desirable under copyright law. Contracts have principally been a way to exploit a work protected by copyright, rather than being the principal means of protection in place of copyright. In addition to the benefits introduced in relation to the balancing exercise, another benefit is that the law will provide a much clearer demarcation of the role of contracts.

⁷⁸ Art 13, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised in Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [The 1979 amended version does not appear in *UNTS* or *ILM*, but the 1971 Paris revision is available at 1161 *UNTS* 30 (1971)].

⁷⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, 15th December 1993, 33 *ILM* 81 (1994).

⁸⁰ *ProCD, Inc. v Zeidenberg*, (WD Wis. 1996) *supra* 2 at 659.

Although the proposed test does help to restore the copyright balance, one of the issues that the proposed “general subject matter” test raises is its scope. An overly broad test could include many works within the scope of copyright balancing which otherwise would not be. However, this can be rectified by establishing a basic test that if a point of copyright law is arguable before the court, then the “general subject matter” test should be applied.

The proposed test would therefore

- a) provide a clear rule which would establish where contracts need to adhere to the copyright balance;
- b) restore the copyright balance where new forms of distribution, based on new technologies, utilise licensing;
- c) re-establish the role of contracts as being a means by which to exploit copyrights rather than becoming a replacement of copyright rules.

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