
Contractual and technological approaches for protecting digital works: their relationship with copyright limitations

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Abstract

To deal with the new circumstances arising in the digital environment, with its particular conditions for the access, distribution and use of intellectual works, three distinct approaches exist: legal (copyright laws are modified to adapt them to the new context), technological (systems designed to control access and use of works), and contractual (through licenses to regulate the conditions of use of the works). The joint use of technological measures and licenses, together with the laws that protect both, are seriously endangering the effectiveness of the limitations to copyright set forth by law to benefit libraries, their users and citizens in general. This represents a strong privatisation of access to information. Using as a point of reference the laws of countries that are on the front lines of this terrain – the USA, the European Union and Australia – some problems created by the new forms of protection of intellectual works are examined.

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Introduction

The widespread development of computer processing, the Internet and telecommunications in general has led to what we know as the digital environment, a context that has meant a drastic change in the conditions of access, distribution and use of intellectual works. Nowadays it is possible to gain access to digital works almost instantaneously, from any place and at any time. Their creation, diffusion and modification is very simple, with multiple copies easily made with the same quality as the original, and at practically no cost. In short, “digital is different”, not only for the copyright holders but also for anyone using a work. The former now have greater perspectives for displaying and diffusing works, with new formats, channels of distribution and markets. They also run new risks, however, as in the digital setting it is more difficult to protect a work from non-authorised uses than in the traditional publishing world. Meanwhile, users of the works benefit from wider possibilities of accessing works, and are able to dispose of them and modify them according to their interests, and easily redistribute them. They also encounter new difficulties though, as copyright limitations are increasingly reduced or invalidated.

There are three types of solutions to these problems: legal, technological and contractual. The first of these, the legal route, consists of modifying copyright legislation to adapt it to the new reality. Bearing in mind the transnational character of the transmission and use of digital works, this approach is adopted from an international perspective. Over recent years a manifest process of international harmonisation of everything related with copyright is underway (Dinwoodie, 2000; Ginsburg, 2000; Okediji, 2000; Long, 2001). This means that the differences among the laws of different countries will be notably reduced over the coming years, even in the case of lands with different legal traditions (civil law or common law).

Technological solutions include systems that identify intellectual work and control the use made thereof: digital watermarks to identify a work, programs that detect any alterations that might have been made, that prevent copying, that track its movements on the Web, that count each use, etc. (Koelman and Helberger, 2000; Foroughi *et al.*, 2002). Finally, the contractual approach stems from the fact that, unlike printed works, digital works are not usually purchased, but rather used in agreement with the terms established in a license. That is, a contract is drawn up between two parties – the publisher/vendor and the user, be it a person or institution (library, information centre, university, etc.).

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These three categories of solutions do not trace fully independent paths, as we shall see, but are complementary. In sum, the conditions of access to and use of digital works are not only going to be determined by the new copyright laws of each country, but also by the technological systems implemented to protect them and by the provisions specified in the corresponding licenses.

All national copyright laws try to balance the divergent interests of the authors, the users and the commercial exploiters of works. A series of limitations to copyright is therefore set forth, so the copyright owner does not have absolute control. In practice, the duration of these rights is limited, and in certain cases a work may be used freely, without authorisation by the copyright holder: fair use/dealing, private copying, library and archive privileges, quotations, news reports, parody, etc. Yet this delicate balance, well resolved by copyright laws in the past, is endangered by the fact that through licenses and technological measures there is an invalidation (legally or in practice) of the rights and privileges that the copyright law grants to libraries and information centres, their users, and citizens in general. This gives rise to a strong privatisation of copyright (Elkin-Koren, 2000; Benkler, 2001). Copyright holders now wield a tremendous capacity for setting their own rules and building a “private legislation” that will not necessarily take into account the counterbalances provided by copyright laws.

The objective of the present study is to analyse to what degree we are risking such limitations to copyright through the joint action of the technological systems, the licenses, and new legislation. After a brief analysis of the situation of such copyright limitations in the digital setting, we go on to describe the main problems arising from technological systems, licenses and the regulation of both under the new laws of countries leading the way for changes in this realm: the USA, the European Union, and Australia.

Copyright limitations in the digital environment

Copyright does not have an absolute character, but rather, as any other type of property right, it is subject to a variety of limitations. There is an international treaty, the Berne Convention (WIPO, 1971), that expounds the main limitations existing for copyright. Although it has been undersigned by the vast majority of the countries of the world (150 at present), each land has full sovereignty to decide whether to include the norms, and to what degree, in the national legislation. As a consequence, we find ourselves with a wide array of means of incorporating them into the national laws, and of

justifications for doing so, such as the defence of fundamental rights, competition law, public interest or “market failure” (Guibault, 2000).

Regardless of the reason behind their inclusion, any limitation to copyright must surpass the “three-step test”, described for the first time in art. 9.2 of the Berne Convention and later adopted by the TRIPS Agreement of the World Trade Organisation (WTO, 1994) and by the two new treaties of the World Intellectual Property Organisation (WIPO, 1996a, b) – the WIPO Copyright Treaty (hereinafter WCT) and the WIPO Performances and Phonograms Treaty (hereinafter WPPT). These three steps or conditions, of a cumulative character, are: in certain special cases; that do not conflict with a normal exploitation of the work; and do not unreasonably prejudice the legitimate interests of the author.

As we have just mentioned, the matter of copyright limitations is also posed in the two treaties approved by the WIPO in 1996, which stand as the point of departure of the reforms that are being made or should be undertaken in national copyright laws. The two articles that regulate them (art. 10 of the WCT and art. 16 of the WPPT) start with the same basic idea: we need to respect what is established in the Berne Convention, and in the TRIPS agreement. The first paragraph of art. 10 of the WCT says that the parts may establish exceptions to the rights granted in it “in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”, essentially repeating the formula of the three steps contained in art. 9.2 of the Berne Convention and art. 13 of TRIPS.

One of the main WCT proposals was that the control of limitations should be maintained, but without allowing an absolute preponderance of the interests of the copyright holders. This was acknowledged in the preamble as “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”. Proof of this interest in maintaining the balance of interests can be found in the Agreed Statement of art. 10, which affirms that countries can “carry forward and appropriately extend into the digital environment limitations and exceptions” in their national laws, and can establish “new exceptions and limitations that are appropriate in the digital network environment”.

In short, the digital environment does not have to lead to a decrease or cutback of the limitations to copyright, but only to a simple adaptation. In practice, nonetheless, its maintenance is not such a simple task. The most significant example available comes from the USA, a country that has been at the forefront of the recent modernisation of copyright. The main limitation of US copyright protection, the

doctrine of fair use, is under fierce attack in recent years. The White Paper (Information Infrastructure Task Force (USA), 1995) hoped to reduce fair use drastically, which caused great opposition on the part of a number of experts (Phan, 1998; Newby, 1999) who defended its full permanence as the means of balancing the different interests in play (Denicola, 1999). The law that was finally passed, the Digital Millennium Copyright Act (US Government, 1998) (hereinafter DMCA), does not contain any norm referring directly to fair use, but there are some provisions that affect its very essence, for instance the norms that protect technological measures and prohibit their circumvention.

Technological protection of copyright

To protect copyrighted works and prevent their illegal use, a series of mechanisms has been developed that allows the identification of materials susceptible of being protected by copyright and that control the use made of them, avoiding economic loss for copyright holders and the violation of authors' moral rights (Fernández-Molina and Peis, 2001). These systems, which have different denominations – ECMS (Electronic Copyright Management Systems), ERMS (Electronic Rights Management Systems), DRMS (Digital Rights Management Systems) – now allow the use of fences or walls, methods of protection of property normally used in other sectors, and until now not technically feasible for copyright (O'Rourke, 1998). This type of regulation through technology – “by the code”, to use the expression by Lessig (1999) – is different from the traditional means of regulation by law, as instead of defining the undesired conducts, technology makes it possible to prevent certain behaviours and allow others (Reidenberg, 1998).

WIPO Treaties

The legal protection of these technological systems has its origins in the two WIPO Treaties of 1996, in articles 11 and 18, respectively. Article 11 of the WCT, entitled “Obligations concerning Technological Measures”, establishes that:

“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law”.

The fundamental content can be summed up in the following way. The countries undersigning

this treaty should legally protect those technological measures that: are “effective” (a concept that will have to be defined in each national law); are used by the authors for the exercise of their author rights; and restrict acts which are not authorised by the authors or permitted by law (which allows the respect of the technological measures along with the limitations to copyright, because it assumes that circumvention of the technological measures in order to carry out acts permitted on the basis of some of these limitations is not prohibited).

In addition to the conditions for technological measures to be legally protected, there is one significant question that remains confusing and unresolved in this article: what acts does it prohibit? There are three ways to look at the matter (DeWerra, 2001): the act of circumvention itself, that is, the party eluding the technological measure is held responsible; the traffic/commerce/supply of the technological devices that allow the circumvention, called “preparatory acts”, so that whoever sells or facilitates the means of circumvention to others is held responsible; and the two possibilities. As we will see below, the laws that have developed from this article have adopted different solutions for this point.

Until now, rarely have legal norms been implemented to protect the technological measures established in article 11 of the WCT, although in the future no doubt most countries will participate in this treaty and consequently will have to modify their copyright legislation in order to afford such technological protection. The main laws that have been implemented so far are the US DMCA, the Australian Copyright Amendment (Digital Agenda) Act (Australian Government, 2000), and the European Copyright in the Information Society Directive (European Union, 2001).

US Digital Millennium Copyright Act 1998

The first country to try to adapt its copyright law to the digital environment was the USA, with the 1998 enactment of the DMCA. This law has largely set the stage for other countries to follow. It adds a new chapter 12 to the US Copyright Act and its section 1201 is dedicated to the protection of technological measures. This Section is structured according to an essential division – it either deals with the technological measures that control access to the works, or with those that protect copyright. Thus, access to a work is prohibited in two ways: the act of circumvention; and the business of trafficking in circumvention devices (the so-called “preparatory acts”). With respect to the technological measures that protect copyright, this law does not in itself prohibit the very act of circumvention, only the “preparatory acts”.

The DMCA does not contain any exceptions to these prohibitions in its original formulation,

but during the legislative process, some were added as a result of the pressure applied by certain special interest groups. These exceptions include one that benefits “nonprofit libraries and educational institutions to determine if they wish to acquire a work” (of limited usefulness), in addition to others for reverse engineering of computer programs, law enforcement, intelligence and other government activities, security testing, encryption research, protection of minors, etc. These exceptions comprise a closed list, and each of them has its own criteria and is based on specific policies.

There was an attempt to include a general exemption of circumvention of technological measures based on fair use, but it was finally rejected. As a compromise solution, and bearing in mind that the protection of the right to access works could mean a sharp decrease in public access to information, it was decided that the onset of the prohibition of circumventing the controls to access be suspended for two years (until 28 October 2000). In addition, the Librarian of Congress, upon the recommendation of the Register of Copyrights, was put in charge of carrying out a study to determine to what degree the systems of controlled access to works actually prevent users from making use of the works when no infringement of copyright is involved, or fair use is respected.

This study had the goal of defining what kinds of works should be left exempt (during a three-year period, until 20 October 2003) from the prohibition of circumvention. After the rulemaking procedure, the Librarian of Congress (US Library of Congress, 2000) established that only two types of works would enjoy such an exemption for the stipulated three-year period: compilations consisting of lists of Websites blocked by filtering software applications; and literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence. The result of this procedure is quite disappointing, as it does not help protect fair use and the non-infringing uses by patrons. A interesting proposal of the library associations to include “thin copyright” works (consisting primarily of matter unprotected by copyright), or “fair use” works did not succeed. Because the DMCA plans to reconsider all these matters every three years, more may be added in October 2003.

EU Directive on Copyright in the Information Society 2001

The European Directive of 2001 aims to implement the WCT while harmonising throughout the member States the protection of copyright. Its confusing and tangled article 6 is dedicated to the protection of technological measures. Not only is the personal act of

circumventing technological measures prohibited (art. 6.1), but the so-called preparatory activities are prohibited as well (art. 6.2). However, unlike the US law, there is no distinction made between the measures that protect access to works and those that protect copyright.

The relationship between copyright and its exceptions and limitations is regulated in the fourth section of article six, where it establishes a system for setting up voluntary measures for defining the scope of copyright: invite the interested parties (copyright holders and users) to adopt agreements to permit users to benefit from the exceptions to copyright guaranteed by national laws. If such agreements do not come about, the member States are required to take the proper measures to ensure that the copyright holders make available to the beneficiary of an exception or limitation all means of making use of them. But these measures have no validity for the online licensed works, as made perfectly clear in the fourth paragraph of this article, which states that “the provisions of the first and second subparagraphs shall not apply to works of other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”. This statement leaves the application of limitations and exceptions to copyright practically invalid, as it describes precisely the most habitual type of usage in the digital environment.

Australian Copyright Amendment (Digital Agenda) Act 2000

Australia, too, has very recently modified its copyright law to adapt it to the new technological environment. Although it follows, for the most part, the basic scheme established by the DMCA, it features some interesting novelties in the regulation of technological measures. The most noteworthy characteristics are the following: its definition of protected technological measure is very similar to that of the other laws we have seen, but it does not distinguish between measures that control access and those that protect copyright; the technology for circumvention is defined similarly, as it only includes those devices or services whose sole or principal objective or utility is to circumvent technological measures; and unlike the DMCA and the European Directive, it does not prohibit the act of circumvention in itself, but only the “preparatory acts”.

Most interesting of all is this law’s system of guaranteeing the exceptions to copyright, with its idea of “permitted purpose”. The Australian law allows the manufacture and supply of anti-circumvention devices and services if they are to be used for a “permitted purpose”. This occurs if the use falls within one of a specified number

of statutory exceptions to copyright infringement: reproduction of computer programs to make interoperable products, to correct errors, and for security testing; lawful copying by libraries, archives, educational and other institutions, etc.

Practical consequences

It is not possible to arrive at a favourable judgment of these laws, particularly of the DMCA and the European Directive. They lead to an excessive protection of copyright in detriment to user rights. By means of these technological controls of access and use the lawful uses of protected works are prevented. There are a number of examples: the purchaser of a CD, DVD, or eBook is unable to carry out lawful activities (such as using it in a device other than the foreseen one, be it a laptop, a PC with Linux . . .) as there is a digital lock that cannot be bypassed without breaking the law, because the law does not take into account whether or not the use is allowed under copyright legislation; nor can the user resort to someone to provide information or software to circumvent these digital locks, as that would be considered a “preparatory act” prohibited by law; a user cannot bypass the access control system of a work even if most of its contents are not copyrighted, and wants to use something pertaining to the public domain; or online work subscribers who drop their subscriptions cannot later gain access to the contents previously subscribed to, as it is not possible to legally elude the technological control system. Even when the underlying use fulfils the requirements for fair use, the user cannot avoid the technological protection measures without infringing the law.

In essence, these laws stand as an imposing obstacle for consumer rights and for the educational, cultural or research uses of intellectual works (Fernández-Molina, 2003). As Therien (2001) points out, it is not a good idea to permit rightholders to expand their monopolies at the expense of the public interest simply because technology is substituting the law as the fundamental means of protecting works in the digital setting. Without a doubt, the Australian law is the one deserving a more positive appraisal, as, thanks to its original system of exceptions, it achieves a better equilibrium between the interests of copyright holders and users.

Licenses of copyrighted works

The development of the digital environment has meant the progressive substitution of sales in lieu of licenses as the main medium for accessing information resources. There are significant differences between selling a work and licensing

it. The sale of a physical copy of a work implies the total transfer of property rights on that specific copy of the work, which gives the buyer a number of benefits, such as its resale or lease. In contrast, licenses are contracts, that is, private agreements that grant a limited transfer of rights to use the work. This means a series of terms and conditions that do not need to incorporate considerations of public policy beyond some basic limitations about what constitutes a valid contract.

The tendency for transactions related to digital information to be governed by contracts entails the possible annulment of the limitations to copyright through the terms and conditions established in such licensing contracts. In reality, libraries and other consumers of digital works are obliged to renounce copyright limitations such as the first sale doctrine, fair use and preservation, thereby impeding the development of their usual and legitimate activities. Examples of such restrictive practices are many: the interlibrary loan of digital materials is prohibited; classroom and off-campus uses are complicated (giving rise to a situation reminiscent of the medieval “chained books” that could only be read at a specific desk); it is impossible for libraries to make copies of electronic materials for the purpose of archiving and preservation; even when libraries sign agreements that allow them to have perpetual access, there is not necessarily a solid copy (and then what happens if the content provider fails?); and donations become more difficult (leaving the libraries obligated to purchase works that they could have obtained free from private donors). In addition, these restrictions can even be asserted through technological measures. For instance, one patron’s misuse may be used as the pretext for precluding subsequent access not just to the offending individual but to all authorised users.

To what extent are these licenses valid? There is no easy answer, as the legal dispositions often do not clearly establish when copyright norms have priority over contractual conditions. For this reason, it would be necessary to analyse each case separately to see if a specific copyright limitation pre-empts the contractual stipulations or not. It might even be that a limitation is relegated by the conditions established in a contract; but then, would this also be the case under a non-negotiated license, such as a shrink/click-wrap?

This complex relationship between copyright and contract law is, to a greater or lesser intensity, under the spotlight in the USA, the European Union and Australia. We focus on the USA, as the primary producer and distributor of digital works and the country where this debate has been underway the longest.

The US scenario

Owing to the federal structure of the US government, the relationship between their norms on copyright and those that regulate contracts is particularly complex. Whereas the former fall under the power of Congress, the legislation surrounding contracts is the responsibility of the different states, leading to the problem of the preference of one over the other. Thus the content of contracts is not only limited by those norms strictly relating to their validity (fraud, duress, etc.), which are applicable to the digital setting or any other setting. There is also the possibility that copyright may pre-empt the terms and conditions established in a contract. Specifically, section 301 of the Copyright Act establishes that a law or state right will be pre-empted, leaving the copyright law as the only applicable norm, if the following two circumstances occur: the “something” must fall under the subject matter of copyright as an original work of authorship fixed in a tangible medium of expression; and the state law at issue must provide rights that are “equivalent” to those provided by copyright.

Besides this “statutory” preemption of state law, the preference can also be achieved from a general analysis based on the Constitution’s Supremacy Clause, the aim of which is to determine whether a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”. If this is indeed the case, the state law will be pre-empted even if the prerequisites of section 301 are not satisfied (Hardy, 1995).

Nonetheless, the general doctrine of preemption does not offer clear guidelines concerning the contracts granting the rights established by copyright. Most experts believe the impact on federal copyright policy that would give rise to preemption is different when the contract is totally negotiated or is presented to the user as a standard contract. In case of fully negotiated contracts, it would be unlikely for a contract to be pre-empted. The contrary would be true of the click/shrinkwrap-type contracts, which apply to many people and in most cases have not been read, or their terms and conditions of licensing understood, implying greater risks for the objectives of copyright policy. The application of the Supremacy Clause to this context is even murkier, given the scarcity of relevant cases.

This lack of definition, together with the fact that libraries and other consumers of digital works are required to routinely sign agreements in which they renounce limitations to copyright, has led representatives of the library community, among others, to ask that section 301 of the Copyright Act be modified. Their aim is to ensure that the clauses of the licenses nullifying the privileges of consumers and users granted by this law be considered invalid. Evidence of this

debate can be found in the recent report about the DMCA put out by the US Register of Copyrights (2001). Though the goal of this report was actually to analyse the effects on sections 109 and 117 of the Copyright Act, it also looks briefly at the problem of annulment of the limitations to copyright on the part of the licenses of a restrictive nature. It comes to no real conclusions, adopting instead an attitude of “wait and see”.

Yet as we commented earlier, contract law falls under the responsibility of the states. This takes us directly to the controversy known as UCITA (Uniform Computer Information Transactions Act), a law whose objective is to make uniform the diverse legal norms of the US states. It was written up initially by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and by the American Law Institute (ALI) to give way to a new article, Article 2B, of the Uniform Commercial Code (UCC). However, in its attempts to modify the UCC to include the transactions of digital information (of an intangible nature), the NCCUSL and ALI found numerous difficulties for their integration with the already existing Article 2 of the UCC which regulates the sale of tangible goods. As a result, in April of 1999, ALI retired its support of this initiative and the NCCUSL decided to give a new name to the proposal of Article 2B – UCITA – and try to implement it as an independent addition to the legislation of each State law (Gatten, 2002).

UCITA is based on the premise of the capacity of the parties to freely determine the contractual conditions, so that, with certain exceptions, the terms and conditions agreed upon by the parties govern the contract. If there is no agreement on the conditions of a contract that involves “computer information transactions” (materials with copyright available online, software, multimedia products, etc.) the provisions of UCITA are applied by default.

This law stands as a buttress of the validity of contracts, even when they substantially alter the balance defined in the Copyright Act. Such a tilt in the equilibrium between user interests and copyright holder interests has attracted sharp criticism from experts (Litman, 1998; Samuelson, 1998; Lemley, 1999; McManis, 1999; Neal, 2000; Heller, 2001), whose arguments may be summed up as: the definition of “license” has been stretched to include transactions which would otherwise be considered sales; the validity of the mass-market agreements habitually used to regulate the digital materials is facilitated; and library services such as interlibrary lending or archiving/preservation of information are clearly threatened. After considerable pressure on the part of the academic sector, consumer groups, and others, UCITA was obliged to include the possibility (section 105(b)) that a contract may

not be valid if it contravenes public policy. Still, this safeguard does not offer adequate protection (Crews, 2001) as it is too confusing and generic.

Although the NCCUSL approved UCITA on 29 July 1999, its implementation in the states is turning out to be highly complicated. To date in fact, only two states have made it a law: Virginia, in 2000, and Maryland, in 2001 (with some reforms). Other states (North Carolina, West Virginia, Iowa and Vermont) have set in motion initiatives in the opposite direction, urging for laws (known as “bomb shelters”) aimed to block the application of UCITA to any companies or individuals residing in that state. While it is not clear what usefulness these laws might have, they reflect a growing anti-UCITA sentiment. Nevertheless, a limited adoption of this law would not necessarily mean that its provisions have limited effect. If the law applicable to contract is from a state that has adopted UCITA, then UCITA can be applied to the contract. Furthermore, a conflict of this sort is not restricted within the realm of the USA, but could take place in the rest of the world as well, as any provider of information from any country can insert in a license a clause of choice of law applicable, designating UCITA as the law governing the given license of access and use of information (Dreyfuss, 2000; Ragueneau, 2002).

At present, the debate about UCITA continues, with important firms involved in software and information technology supporting it (including Microsoft, AOL and the Business Software Alliance) and with a wide coalition against (which includes consumer associations, financial institutions, technology professionals, insurance companies, and library associations) led by AFFECT (Americans for Fair Electronic Commerce Transactions). In this long battle, two recent events are clearly unfavourable to UCITA. In the process of attempting to extend it to all the states, the NCCUSL is required to present UCITA for approval by the American Bar Association (ABA); however, as of February of 2003 this approval had not yet been obtained. Moreover, in August the NCCUSL (2003) decided not to spend any additional resources in promoting state adoptions of UCITA, due to the continued lack of acceptance by state legislatures. This does not mean that UCITA is dead, as its president, K. King Burnett, makes clear: “UCITA will remain in place as a resource for the American legal and political community and for reference by the courts”.

European Union directives

In the European Union these problems have hardly even been discussed, perhaps because copyright norms are not the object of constitutional preemption in any of the member states. In some rare cases, the legislature has avoided possible conflicts by establishing

expressly that when contradictory, copyright norms have priority over contractual provisions. Such is the case of the directives for the legal protection of computer programs (European Union, 1991) and for the legal protection of databases (European Union, 1996). Both contain provisions establishing that contractual stipulations impeding users from carrying out acts allowed by the law are null and void. For instance, the Computer Programs Directive recognises the right of the lawful user to make a security copy of the program (art. 5.2 and 3) or to decompile it to attain interoperability (art. 6), establishing furthermore that any contractual stipulation contrary to these rights will be null and void (art. 9.1). In similar terms we have article 15 of the Directive on Databases regarding the right of the lawful user to make certain reproductions, extractions or reutilisations of their contents.

Nonetheless, the Directive on Copyright in the Information Society of 2001 changes its criteria and does not clearly establish the relationship between copyright and contract law. Whereas the computer programs and databases directives specified the situations of conflict between the two, this directive avoids the subject (Guibault, 2003). Only recital 45 touches on it slightly: “The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law”. Moreover, we have the aforementioned final paragraph of article 6.4, in which it is made clear that the limitations to copyright are not relevant when the work is technologically protected and the user is obliged by contract to derive no benefit from such limitations.

Hugenholtz (2000) harshly criticises these aspects of the directive and is surprised that what is established in the computer program and database directives, to set out the mandatory nature of certain user rights, has suddenly become irrelevant. With reference to this point, we should take note that EBLIDA (European Bureau of Library, Information and Documentation Associations), representing the interests of the libraries and their users, made an interesting request (unfortunately not heeded) during the proceedings of this directive. It proposed that a section be added to article 5 (which regulates the limitations to copyright) to make clear that the contractual stipulations contrary to certain limitations contemplated in art. 5 were null and void (EBLIDA, 2000).

The Australian report

Finally, we should briefly mention the case of Australia, particularly interesting because, as Fitzpatrick (2000) notes, it is not a country that exports copyright products, but rather an

importer of them, making its legislation less contrary to the rights of libraries and citizens in general. To date Australian law has not been modified to face the problem of the relationship between licenses and copyright limitations. However, an intense analysis of the problem has been undertaken, resulting in a recent report put out by the Copyright Law Review Committee (Australia) (2002).

After analysing this situation, the Committee arrived at two important conclusions: it is clear that the balance of copyright is being substantially altered in favour of the copyright holders; and none of the solutions of internal legislation (competition law, consumer protection, etc.) is appropriate for facing this problem.

As a consequence, then, the Committee decided to make specific recommendations for a legislative change that would effectively address the problem. It proposes that certain – not all – limitations to copyright be considered mandatory, so that they cannot be nullified by private agreements. But which should be considered mandatory? The opinion of the Committee is that only those that are fundamental for maintaining the balance of copyright: the traditional defences of fair dealing and the provisions related to the libraries and archives that allow copying and communication to the public with no compensation within specified limits, and that reflect the public interest in education, the free flow of information and the freedom of expression; the more recent exceptions that allow reproductions of a temporary and transitory character; and finally, to maintain the integrity of the aforementioned “permitted purposes” to prevent the copyright holder from making it a condition of access that the users do not acquire or use a technological measure circumvention device or service for a permitted use. These recommendations should be analysed by the Australian Government in the context of its scheduled 2003 review of the reforms made to the Copyright Act of 2000.

Conclusion

Over the past few years, a real revolution of copyright law is underway. The result is an absolutely disproportionate protection of the interests of rightholders, who benefit from several cumulative layers of protection: copyright, technological protection, legal protection of technological measures and contract law, with the corresponding decrease of the public domain and the effectiveness of copyright limitations. As a consequence, the rightholders now have a much stronger right to control information. This is altering the function of copyright laws: conceived to serve the public

by promoting “the progress of science and the useful arts”, they now facilitate the private control of information. We must not overlook the strong relationship between social welfare and information (Boyle, 1996; Cohen, 1998) with its inherent power to transform society. It can influence public opinion, political interaction and participation, and provide a circuit of feedback so that more information is produced and received. The traditional copyright regime, with a strong public domain, favoured the transformative effects of information. The new era of the post-modern copyright, however, is minimising these positive effects.

In order to put the brakes on this process, a new movement has been set in motion to defend and promote an open information environment, with a strong public domain and a balanced copyright law. This is exemplified by two recent legislative initiatives in the USA, presented by Representatives Rick Boucher (Digital Media Consumers’ Rights Act, H.R. 5544, 2002) and Zoe Lofgren (Balance Act, H.R. 1066, 2003). Particularly interesting is the latter, which addresses the problem of anti-circumvention norms (the objective of the Boucher proposal) and that of the non-negotiable licenses that restrict copyright limitations. Also deserving praise is the Australian case, because of its better balanced laws on technological measures and its recent proposal about the relationship between licenses and copyright limitations. It remains to be seen whether or not the recommendations of the CLRC are heeded by the Australian legislature.

Depending on the success of this movement, libraries and information centres may or may not continue to carry on with their important social function of facilitating access to information for all citizens. For this reason, they need to continue enjoying their legal rights and privileges, safeguarding them from the dangers of the joint use of technological protection and licenses. It is vital to maintain the traditional balance of copyright, finding mechanisms to prosecute and sanction piracy, without interfering with lawful use. We should not forget that libraries and information centres have always adopted a responsible attitude in the compliance with copyright law, as users of copyrighted works and by educating their patrons to likewise make legal and appropriate use of resources for education, work and research.

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