Protecting User Rights Against Contract Override

Jonathan Band

PROTECTING USER RIGHTS AGAINST CONTRACT OVERRIDE

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Abstract: Rightsholders often distribute digital content subject to licenses that seek to override exceptions contained in national copyright laws. Recognizing that these license terms could upset their copyright law's balance between rightsholders and users, legislators around the world have enacted clauses that invalidate license terms inconsistent with their copyright law's exceptions. This compilation assembles the copyright override prevention clauses adopted in 48 countries over the past 30 years. It also sets forth references to contract override prevention in documents officially presented in the World Intellectual Property Organization, as well as clauses that have been proposed in various *fora* in the United States.

INTRODUCTION

Copyright laws around the world provide exceptions that limit the exclusive rights granted to copyright owners. However, the shift towards the digital distribution of content has led to publishers distributing this contract under license. And these licenses frequently contain terms that seek to "override" the exceptions provided under the copyright statutes.

For thirty years, the EU directives relating to copyright have required the nullification of license terms that override specific exceptions mandated by those directives. The EU recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract. For example, the 2019 Directive on Copyright in the Digital Single Market renders unenforceable any contractual provision contrary to exceptions mandated under the Directive for preservation and text and data mining by cultural heritage institutions.[1]

All EU Member States must implement these protections against contract override in their law. Moreover, some Member States have adopted more extensive contact override prevention ("COP") clauses than those required by EU directives. The copyright laws of Germany, Ireland, Portugal, and Belgium prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions. Likewise, prior to Brexit, the UK adopted COP clauses more extensive that those required by the EU directives.

Additionally, candidates for admission to the EU, including Albania, Moldova, North Macedonia, Montenegro, Serbia, Turkey and Ukraine, have amended their copyright laws to comply with some of the directives, including the COP clauses of the Software or Database Directives. Likewise, the European Free Trade Agreement countries—Norway, Switzerland, Iceland, and Liechtenstein—have enacted the Software Directive's COP clause. So, too, did the Russian Republic.

Some countries outside of Europe recently have adopted COP clauses. Malawi has a narrow provision targeted at software, while the Cook Islands, Kuwait, Nigeria, and Singapore have

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[1] Significantly, this is a different issue from provisions in copyright laws that make certain rights of the author unwaiveable, *e.g.*, moral rights. These provisions protect *authors* from publishers and other intermediaries. The provisions discussed in this document protect *users and other licensees* from publishers.

adopted provisions that apply to a much broader range of exceptions. Singapore appears to have the most complex provision; among other factors, it takes into consideration the bargaining power of the parties.

The following compilation[2] of COP clauses first includes such clauses set forth in EU directives. As noted above, these must be implemented in all EU member states. The compilation then lists COP clauses of members states that exceed those required by directives. Next, the compilation lists the COP clauses in non-EU countries, followed by the clauses that have been formally introduced in national legislatures, but not enacted. After this, the compilation sets forth references to contract override prevention in documents officially presented in the World Intellectual Property Organization. Finally, the compilation lists a variety of COP clauses that have been proposed in various *fora* in the United States.

COUNTRIES WITH TARGETED CONTRACT OVERRIDE PREVENTION CLAUSES

The following countries have adopted statutory provisions protecting against the contract override of a limited number of user rights. The EU Member States have COP clauses relating to some of the exceptions provided by the Software Database, Marrakesh, and Copyright in the Digital Single Market Directive. In most of the other countries with targeted COP clauses, those clauses are directed at software reverse engineering and backup exceptions based on the EU Software Directive.

<u>EU Member States</u>
Austria
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Greece
Hungary
Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Romania
Slovakia

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[2] This compilation includes information derived from International Federation of Library Associations and Institutions, *Protecting Exceptions Against Contract Override*, https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf (2019).

Slovenia
Spain
Sweden

Countries Seeking EU membership
Albania
Bosnia and Herzegovina
North Macedonia
Turkey
Ukraine

European Free Trade Agreement Members
Iceland
Liechtenstein
Norway
Switzerland

Others[3]
Australia
Greenland
Malawi
New Zealand
Russia

COUNTRIES WITH GENERAL CONTRACT OVERRIDE PREVENTION CLAUSES

Belgium
Cook Islands
Germany
Ireland
Kuwait
Moldova
Montenegro
Nigeria
Portugal
Singapore
United Kingdom

I. EUROPEAN UNION

A. Directives

Set forth here are the COP clauses in four EU directives. All EU Member States are required to implement these protections in their domestic law.

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[3] There may be other countries that have targeted COP clauses, particularly with respect to software. Please contact the author at jband@policybandwidth.com with any information concerning additional COP clauses.

Software Directive (1991)

Article 9
Continued application of other legal provisions

1. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

Article 5(2)—backup copies; Article 5(3)—"black box" reverse engineering; Article 6—decompilation for interoperability

Database Directive (1996)

Article 15
Binding Nature of Certain Provisions

Any contractual provision contrary to Articles 6(1) and 8 shall be null and void.

Article 6(1)—acts necessary for the purpose of access to and normal uses of contents of database; Article 8—database user may extract and re-utilize insubstantial parts of a database

Marrakesh Directive (2018)

Article 3
Permitted Uses

5. Member States shall ensure that the exception provided for in paragraph 1 cannot be overridden by contract.

Making and distributing accessible format copies

Copyright in the Digital Single Market Directive (2019)

Article 7
Common provisions

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.

Article 3—text and data mining by research organizations and cultural heritage institutions for scientific research; Article 5—use of works in digital and cross-border teaching activities; Article 6—preservation by cultural heritage institutions

B. EU Members States that Exceed Directives

Below are the COP clauses of EU Member States that apply to more exceptions than required by the four directives set forth above.

Belgium
Code de Droit Economique (2016) Art XI.193

The provisions of Articles XI.189, XI.190, XI.191, XI.192, § § 1 and 3 and XI.192/1 are mandatory.

> *Quotation (XI.189(1)); Research anthologies (XI.189(2)); Transitory copying (XI.189(3)); Reproduction of works in news reporting (XI.190(1)); Incidental reproduction of works in public spaces (XI.190(2)); Private use (XI.190(3)); Use in schools (XI.190(4)); Private copying (XI.190(5)) Non-digital illustration for teaching (XI.190(6)) Digital illustration for teaching (XI.190(7)); Research copying (XI.190(8)); Digital private copying (XI.190(9)); Caricature, pastiche and parody (XI.190(10)); Exams (XI.190(11)); Preservation (XI.190(12)); Supply of documents which are not commercial available (XI.190(13)); Incidental recordings (XI.190(14)); Marrakesh (XI.190(15)); Exhibition and advertising (XI.190(16)); Public institutions (XI.190(17)); Private copying of databases (XI.191(1)); Research or education copying of databases on paper (XI.191(2)); Research of education copying of databases on other supports (XI.191(3)); Communication of databases for education or research by recognised associations (XI.191(4)); Copying for public security or administrative procedures (XI.191(5)); Lending of literary works, photographic works, scores, audio works and AV works (XI.192(1)); Parallel importation of works which are not on sale within the EU for purposes of lending (XI.192(3)); Orphan works (XI.192/1)*

Germany
Act on Copyright and Related Rights (2017), Article 55a

The adaptation or reproduction of a database work shall be permissible for the owner of a copy of the database work which was brought to the market by sale with the consent of the author, that person who is otherwise authorised to use the database work or that person who is given access to the database work on the basis of a contract concluded with the author or with his consent with a third party if and insofar as the adaptation or reproduction is necessary to gain access to the elements of the database work and for its customary use. If, on the basis of the contract in accordance with the first sentence, access is given only to a part of the database work, only the adaptation and reproduction of that part shall be permissible. Any contractual agreements to the contrary shall be null and void.

Article 60g(1)

The rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance with sections 60a to 60f and such restriction or prohibition is to the detriment of the persons entitled to such use.

> *Article 60a—Copying for illustration for teaching (different volumes by type of work); Article 60b—Non-commercial media collections; Article 60c—Scientific research; Article 60d—Non-commercial text and data mining; Article 60e—Library copying, restoration, exhibition, document supply; Article 60f—Archival copying*

Ireland
Copyright and Related Rights Act (2000), Section 2(10)

Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.[4]

> *All exceptions*

Portugal
Code of Copyrights and Related Rights (2017), Article 75(5)

Any contractual clause that seeks to eliminate or prevent the normal exercise by the beneficiaries of the uses listed in paragraphs 1, 2 and 3 of this article is null and void, without prejudice to the possibility for the parties to freely agree on the respective forms of exercise, namely with regard to the amounts of equitable remuneration.

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[4] In 2013, the Irish Copyright Review Committee recommended that this language be clarified, but the Parliament did not act on this recommendation. The Committee proposed that Section 2(10) be replaced with the following language:
(a) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, any unfair term in a contract which purports to prohibit or restrict that act shall be void.
(b) Whether a term is unfair shall depend on all of the circumstances of the case.
(c) In particular, where a contract has not been individually negotiated, a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the party who had not drafted the term in question, taking into account the nature of the work which is the subject-matter of the contract and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.
(d) A term shall always be regarded as having not been individually negotiated where
(i) it has been drafted in advance by one party and the other party has therefore not been able to influence its substance, particularly in the context of a pre- formulated standard contract, or
(ii) it is a term of a licensing scheme made pursuant to this Act.
(e) It shall be for any party who claims that a term was individually negotiated to show that it was.
(f) In making an assessment of good faith, particular regard shall be had to
(i) the strength of the bargaining positions of the parties,
(ii) whether the party who had not drafted the term in question had an inducement to agree to it,
(iii) whether the subject-matter of the contract was sold or supplied to the special order of the party who had not drafted the term in question, and
(iv) the extent to which the party who had drafted the term in question has dealt fairly and equitably with the other party whose legitimate interests he has to take into account.

Transitory copying; Private copying; Speeches; Press reviews; Reporting; Preservation and internal uses by libraries, archives, and museums; Illustration for teaching; Quotation; Incidental uses; Disabilities; News of the day; Short uses of educational works; Dedicated terminals in libraries; Public proceedings; Rebroadcasting of works in public institutions; Panorama.

II. OTHER JURISDICTIONS WITH ENACTED CONTRACT OVERRIDE PREVENTION CALUSES

Albania
Law on Copyright and Related Rights

Art. 86(3) Any contractual provision contrary to the provisions of this article is void.

Using a database

Art. 91(4) Any contractual provision, contrary to paragraphs 2 and 3 of this Article, shall be void.

Backup copies and black box reverse engineering

Art. 92(4) Any contractual provision, contrary to the provisions of this Article, is null.

Decompilation for interoperability

Australia
Australia Copyright Act (1999), Section 47

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect.

Section 47B—copying in order to use a programme; Section 47C—back-up copies; Section 47D—reverse engineering for interoperability; Section 47E—correcting errors; Section 47F— security testing

Bosnia and Herzegovina
Law on Copyright and Related Rights

51.2 The contractual provisions which are contrary to paragraph (1) of this Article shall be rendered null and void.

Using a database

105.6 The contractual provisions, which are intended to limit the rights of a lawful user contrary to paragraphs (2) and (3) of this Article, shall be null and void.

Backup copies and black box reverse engineering

106.4 The contractual provisions which are contrary to the provisions of this Article shall be null and void.

Decompilation for interoperability

144.4 The contractual provisions which are contrary to the provisions of this Article shall be null and void.

Use of insubstantial parts of database

Cook Islands
Copyright Act, Section 11(5)

Any contractual provision contained in an agreement for the assignment or licensing of a work that is contrary to any of the exceptions to copyright infringement set out in sections 14 to 25 has no lawful effect.

All exceptions

Greenland
Copyright Law

Sec. 36. The provisions of subsection 1, paragraphs 2 and 3, as well as subsection 2, cannot be deviated by agreement.

Backup copies and black box reverse engineering

Sec. 37. The provisions of subsections 1 and 2 cannot be deviated by agreement.

Decompilation for interoperability

Iceland
Copyright Law, Section 11a

It is not permitted to deviate from the provisions of this article through agreements.

Backup copies and reverse engineering of computer programs

Kuwait
Copyright Law (2019), Article 32

Any agreement contrary to the limitations and distinctions set forth in this chapter shall be null and void.

> *Includes inter alia Private use; Quotation; Illustration for teaching; Performance in the home; Copying software, including to make it work, studying how programmes work, modifying language from English, replacing damaged copies, improving performance, interoperability, security testing; Communication of works produced in the classroom; Preservation; Completing works*

Liechtenstein
Law on Copyright and Related Rights

Art. 24(3) The right of decryption according to paragraph 1 cannot be waived.

> *Decompilation for interoperability*

Art. 26(2) Whoever has the right to use a computer program may make a backup copy of it, insofar as this is necessary for the use of the computer program; this authorization cannot be contractually waived.

> *Backup copies*

Malawi
Copyright Act (2016), Section 52

(3) Notwithstanding any contractual obligation to the contrary, a user may be permitted to make a copy of the code of a computer programme and translate the form of the code when this is indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer programme with other programmes.

Moldova
Law on Copyright and Related Rights, Article 31

(4) Any clauses in a copyright contract that are contrary to the provisions of this Law shall be deemed null and void, and the conditions set out in this Law shall apply in place thereof.

> *All exceptions*

Montenegro
Law on Copyright and Related Rights (2011), Article 45

Limitations to copyright shall only be permitted in the cases referred to in Articles 43, 46-61, 76, 113, 114 and 144 of this Act, provided they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The limitations to copyright referred to in Par. (1) of this Article may not be waived. The provisions of a contract or

other legal act stipulating the user's waiver of the permitted limitations referred to in Par. (1) of this Article, shall be null and void. During the exploitation of a work referred to in Par. (1) of this Article, the user shall indicate the source and authorship of the work, unless this is not possible.

> *Article 43—Reconstruction of architectural objects; Article 46—Education and use in Media; Article 47—Broadcast in Public Institutions; Article 48—People with Disabilities; Article 49— Temporary Reproduction; Article 50—News of the Day and Political Speeches; Article 51— Teaching; Article 52—Private Copying and Library Copying; Article 53—Quotation; Article 54—Official proceedings; Article 55—Works in public places; Article 56—Incidental uses; Article 57—Exhibition catalogues and posters; Article 58—Private adaptation; Article 59— Demonstration and repair; Article 60—Dedicated terminals; Article 61—Use of databases; Article 76—Allowing broadcasters to make copies in the process of broadcasting a work; Article 113—Using a computer programme, making a back-up copy, and observing, studying and testing it; Article 114—Decompilation of a computer programme in order to make it interoperable; Article 144—Other database usage rights*

New Zealand
Copyright Act (2008), Section 80D

A term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts any activity undertaken in accordance with section 80A(2) or 80B(1).

> *Decompilation for interoperability (Section 80A(2)); Copying for use (Section 80B(1)(a)); Copying in order to get hold of an error free version when the market isn't supplying (Section 80B(1)(b))*

North Macedonia
Law on Copyright and Related Right

97.4 The provisions of the contract which are contrary to paragraphs 2 and 3 of this Article shall be null and void.

> *Backup copies and black box reverse engineering*

164.4 The contractual provisions which are contrary to paragraph 1 of this Article shall be null and void.

> *Exceptions from application of technological protection measures*

Nigeria
Copyright Act, Section 20(3)

Any contractual term which purports to restrict or prevent the doing of any act permitted under thus Bill shall be void.

Norway
Copyright Act

41. The provisions in the second, third and fourth paragraphs cannot be waived by agreement.

Backup copies of computer programs; black-box reverse engineering; actions necessary for use of a database

42. The provisions in this section cannot be waived by agreement

Decompilation for interoperability

Russian Federation
Civil Code

1280. The Right of the User of a Computer Program and Database.
1. The person that legally possesses a copy of a computer program or database (user) is entitled to do the following without the author's or other right holder's consent and without paying out a fee:

    1) carry out actions required for the functioning of a computer program or database (in particular in compliance with their use for their purpose), including recording and storing in the computer memory (of a single computer or single network), making amendments in a computer program or database solely for their functioning at the user's facilities, and to correct obvious errors, unless otherwise provided for by the contract made with the right holder;

    2) make a copy of the computer program or database, provided this copy is intended only for archiving purposes or for replacing the legally acquired copy if the copy is lost, destroyed or inoperable. In this case, the copy of the computer program or database shall not be used for purposes other than those mentioned in Subitem 1 of the present item, and it shall be destroyed if the possession of the copy of the computer program or database is no longer legal.

2. The person legally possessing a copy of a computer program is entitled to do the following without the right holder's consent and without paying a fee: to study, research or test the operation of the program for the purpose of assessing the ideas and principles underlying any component of the computer program by means of carrying out the actions envisaged by Subitem 1 of Item 1 of the present article.

3. The person legally possessing a copy of a computer program is entitled to do the following without the right holder's consent and without paying a fee: to reproduce and convert the compiled code into the initial text (to decompile the computer program) or to instruct other persons to carry out such actions if they are needed to enable a program independently developed by this person for a computer to interact with other programs which can interact with the program decompiled, provided the following conditions are observed:

    1) the information required for enabling the interaction was not available to this person from other sources;

2) the said actions are committed only in respect of those portions of the decompiled computer program which are needed for enabling the interaction;

3) the information obtained as a result of the decompilation may only be used to enable the interaction of the independently developed computer program with other programs; it shall not be transferred to other persons, except for cases when it is required for enabling the interaction of the independently developed computer program with other programs, or be used for developing a computer program of a kind significantly similar to the computer program decompiled or for committing another action infringing the exclusive right to the computer program.

4. The application of the provisions of the present article shall neither conflict with the normal use of a computer program or database nor infringe without grounds the lawful interests of the author or another right holder.

1286. A Licence Contract Granting the Right to Use a Work
4. The user of a computer program or database, along with the rights held by him by virtue of Article 1280 of this Code, may be granted the right under the licence agreement to use the computer program or database within the limits established by the contract.[5]

Serbia
Copyright Act

47. A contract cannot prohibit the creation of a backup copy of the computer program on a permanent medium if it is necessary for its use.

47a. Provisions of a contract that contradict the provisions of this article are null and void.

Decompilation for interoperability

Singapore
Copyright Act (2021)

Permitted uses may be excluded or restricted by reasonable contract term

186.—(1) Subject to this section and section 187, a rights owner may, by contract with a person, exclude or restrict the application of a permitted use to that person.

(2) A contract term between the rights owner and another person (called in this section the counterparty) is valid for the purposes of subsection (1) only if —
(a) the contract is individually negotiated; and
(b) the term is fair and reasonable, having regard to the circumstances that are, or ought reasonably to be, known to or in the contemplation of the parties when the contract is made.

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[5] Whether these provisions override contract terms is not free from ambiguity. However, they probably should be read to override conflicting contract terms given: 1) the explicit statement in Art. 1280.1.1 that contracts can override the exception for error correction, 2) the absence of such a statement in the other provisions of Art. 1280; 3) the wording of Art. 1286.4 (in particular the reference to the "rights" of the user); and 4) the fact that this provision is based on the EU Software Directive, which override conflicting contract terms.

(3) For the purposes of subsection (2)(b), relevant matters in deciding whether a term of a contract is fair and reasonable include —

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the counterparty's requirements could have been met;

(b) whether the counterparty received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the counterparty knows or ought reasonably to know of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and

(d) whether at the time of the contract it is reasonable to expect that the contract is workable without the term.

(4) Subject to any contrary intention in the contract, where a contract term between a rights owner and a person excludes or restricts the application of a permitted use to that person, the benefit of that term passes to the rights owner's successors in title.

(5) This section applies to any contract made before, on or after 21 November 2021.

Permitted uses that may not be excluded or restricted

187.—(1) Any contract term is void to the extent that it purports, directly or indirectly, to exclude or restrict any permitted use under any provision in —

(a) Division 6 (public collections), but not section 234 (supplying copies of published literary, dramatic or musical works or articles between libraries and archives);

(b) Division 7 (computer programs);

(c) Division 8 (computational data analysis); or

(d) Division 17 (judicial proceedings and legal advice).

(2) Without limiting subsection (1), a contract term is void to the extent that it purports, directly or indirectly, to prevent or restrict the doing of any of the following acts in circumstances that constitute a permitted use under the provisions mentioned in subsection (1):

(a) making a copy of a work or a recording of a protected performance;

(b) supplying (whether by communication or otherwise) a copy of a work or a recording of a performance;

(c) performing a work or a recording of a protected performance.

(3) This section applies to any contract made before, on or after 21 November 2021.

Evasion through choice of law clause to be void

188.—(1) A contract term that purports to apply the law of a country other than Singapore is void if —

(a) the application of that law has the effect of excluding or restricting the operation of any permitted use; and
(b) either —
      (i) the term is imposed wholly or mainly for the purpose of evading the operation of any permitted use; or
      (ii) in the making of the contract one of the parties dealt as consumer, and he or she was then a Singapore resident, and the essential steps for the making of the contract were taken in Singapore (whether by him or her or by others on his or her behalf).

(2) For the purposes of subsection (1)(b) —
(a) the interpretation of section 27(2)(b) of the Unfair Contract Terms Act 1977 must be considered; and
(b) if a person claims that a party does not deal as a consumer, the burden is on the person to prove this.

(3) This section applies to any contract made before, on or after 21 November 2021.

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Switzerland
Copyright Act, Article 24(2)

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Any person entitled to use a computer program may make one backup copy thereof; this right may not be waived by contract.

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Turkey
Copyright Act, Article 38

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The loading, running and error correction of a computer program by a person who has lawfully acquired the program may not be prohibited by contract. The making of a backup copy by a person having the right to use the computer program may not be prevented by contract insofar as it is necessary to ensure the use of such program.

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Ukraine
Law on Copyright and Related Rights, Section 24

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Free copying, modification and decompilation of computer programs
1. A person who legally owns a legally produced copy of a computer program has the right, without the consent of the author or another person who has a copyright to this program:
1) to make changes (modifications) to the computer program in order to ensure its functioning on the technical means of the person who uses these programs, and to perform actions related to the functioning of the computer program in accordance with its purpose , in particular recording and saving in computer memory, as well as correction of obvious errors, unless otherwise provided by an agreement with the author or other person who owns the copyright;
2) make one copy of the computer program, provided that this copy is intended only for archival purposes or to replace a legally purchased copy in cases where the original computer program is lost, destroyed or becomes unusable. At the same time, a copy of the computer program cannot be used for purposes other than those specified in this clause and clause 1 of this part, and must be destroyed in the event that the possession of a copy of this computer program ceases to be

lawful;

3) decompile a computer program (convert it from object code to source text) in order to obtain the information necessary to achieve its interaction with an independently developed computer program, subject to the following conditions:

> a) the information necessary to achieve the ability to interact was not previously available to this person from other sources;
> b) the specified actions are performed only in relation to those parts of the computer program that are necessary to achieve the ability to interact;
> c) the information obtained as a result of decompilation can be used only to achieve the ability to interact with other programs, but cannot be transferred to other persons, except when it is necessary to achieve the ability to interact with other programs, and also cannot be used to developing a computer program similar to a decompiled computer program or to commit any other act that infringes copyright;

4) observe, study, explore functioning computer program for the purpose of defining ideas and principles that are at its core, provided that this is done in the process of performing any action of downloading, displaying, operating, transmitting or recording in memory (saving) a computer program.

2. The application of the provisions of this article should not harm the use of the computer program and should not limit the legal interests of the author and (or) another person who has the copyright to the computer program.[6]

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United Kingdom
Copyright, Designs, and Patents Act, Section 29

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To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.

> *Similar language found in sections 28B (personal use); 29A (noncommercial text and datamining); 30 (criticism, review, quotation, and news reporting); 31 (caricature and parody); 31A-BB (disabilities); 32 (illustration for education); 41(5) (supply of copies to other libraries); 42(7) (replacement copies); 42A (single copy to user); 50A (backup copies of computer programs); 50 (decompilation); 50BA (observing computer programs); 50D (databases)[7]*

III. Jurisdictions with Proposed Contract Override Prevention Clauses

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[6] As with the parallel provision in the Russian Federation, whether this provision overrides conflicting contractual terms is not free from ambiguity.

[7] Prior to Brexit, the UK Department for Business, Innovation, and Skills issued a memorandum stating that "it appears that Member States generally have a choice over whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract terms. The judgment in the recent ECJ cases C457/11 to C460/11 VG Wort supports this view, and moreover suggests that the default position where contract or licence terms are not expressly allowed to limit the scope of an exception is that the exception will prevail over any rights holder authorisation."

In the following two countries, COP clauses have been formally introduced in legislation, but not yet enacted. Additionally, the Australian Productivity Commission has proposed adoption of a more general COP clause.[8]

Kosovo (Draft Law on Copyrights and Related Rights, 2022)
Article 39(3)

Any clauses in a copyright contract that are contrary to the provisions of this Law shall be deemed null and void, and the conditions set out in this Law shall apply in place thereof.

South Africa (passed by National Assembly in 2022)
Section 39B Unenforceable contractual term

(1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.

(2) This section does not prohibit or otherwise interfere with open licences or voluntary dedications of a work to the public domain.

IV. PROTECTIONS FROM CONTRACT OVERRIDE IN WIPO

The issue of protection of exceptions from contract override has arisen on several occasions in the World Intellectual Property Organization.

Marrakesh Treaty

A contract override prevention clause was included as bracketed text in an early draft of Marrakesh Treaty. This text was removed at the request of Singapore.

SCCR/29/4 (2014)
Consolidation of Proposed Texts Contained in Document SCCR/26/3 prepared by
African Group, Brazil, Ecuador, India and Uruguay

TOPIC 10: CONTRACTS

1. Any contractual provisions which provide exemptions from the application of the limitations and exceptions adopted by Member States/Contracting Parties according to the provisions of this instrument/treaty, or otherwise prohibit or restrict their exercise or enjoyment, shall be null and void.

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[8] Productivity Commission (2016), *Intellectual Property Arrangements*, https://www.pc.gov.au/inquiries/completed/intellectual-property/report; Department of Industry, Innovation and Science (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-governmentresponse.pdf.

Additional Provisions and Conditions

Note: These provisions might be included elsewhere in the copyright law, and not necessarily in the specific preservation exception.

- Limits on infringement liability
- Circumvention of technological protections
- Non-waiver of the exception by licenses and agreements
- Specific provisions related to orphan works
- Cross-border delivery and receipt of works and copies for preservation purposes
- Rights management information

Relationship to Licenses.	Member States invest heavily in the careful development and implementation of a copyright exception, only to face the possible override of the provision by contract. Many copyrighted works are art of the collections of libraries and other institutions under the terms of license or purchase agreements. Some countries have enacted provisions that protect the goals of the exception by making contrary agreement void.	*Possible language:* "…the preservation opportunities pursuant to this copyright exception may not be waived by agreement or terms of a grant; any attempt to stipulate such waiver may not be enforced in a manner that limits the implementation and carrying out of the terms of this exception…"

SCCR/43/8 (2023)
Proposal by African Group for a Draft Work Program on
Exceptions and Limitations *adopted by the Committee*

6. Once the issues under points 1-3 have been discussed, the Committee may consider facilitating future discussion and exchanges of views and information pertaining to other issues relevant to this agenda item such as:

- models for protection of limitations and exceptions from override by terms in contracts, safe harbor protections for educational, research and cultural heritage institutions (and their agents), and exceptions to technical measures of protection and rights management information to protect uses permitted by limitations and exceptions.

V. U.S. PROVISIONS RELATED TO CONTRACT OVERRIDE PREVENTION

The U.S. Copyright Act does not contain a COP clause. However, the issue has arisen on several occasions.

17 U.S.C. § 108(f)(4)

(f) Nothing in this section—

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

House Report explanation of this provision:

"the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections: For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced."

17 U.S.C. § 301(a)
Preemption with Respect to Other Laws

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

36 C.F.R. § 701.7(e)
Certain Terms in License Agreements

In addition to the clauses deemed to be incorporated into license agreements pursuant to paragraph (d) of this section, the following clauses are deemed to be inserted into each license agreement to which the Library of Congress is a party, other than for the license of computer software to the Library of Congress:

Rights Under Copyright Law

The Library of Congress does not agree to any limitations on its rights (e.g., fair use, reproduction, interlibrary loan, and archiving) under the copyright laws of the United States (17 U.S.C. 101 et seq.), and related intellectual property rights under foreign law, international law, treaties, conventions, and other international agreements.

Digital Choice and Freedom Act of 2002, H.R. 5522
Proposed Section 123

Sec. 123. Limitations on exclusive rights; Permissible uses of digital works

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

(c) Definitions.--As used in this section, the following terms have the following meanings:

(1) A `digital work' is any literary work (except a computer program), sound recording or musical work, or a dramatic work, motion picture, or other audiovisual work, in whole or in part in a digital or other nonanalog format.

(d) Construction.--Nothing in this section shall enlarge or diminish any of the other limitations on exclusive rights contained in this title, including any limitations that relate to archival activities by a library or an archives under sections 107 and 108.".

Copyright Office Proposed Amendment to Section 108 (2017)

(2) This section does not in any way affect any contractual obligations assumed at any time by the eligible institution when it obtained, or licensed the use of, a copy or phonorecord of a work in its collection: Provided, that the eligible institution is not liable for infringement under this title for violating any nonnegotiable contractual provision that prohibits the making of preservation or security copies, as those activities are permitted under subsection (c).

VI. PROPOSED STATE CONTRACT OVERRIDE PREVENTION CLAUSES

In 2023, contract override protection clauses were introduced in several state legislatures. In the United States, contracts are a matter of state law rather than federal law.

Rhode Island
H 5148/S 498

6-59-4. General provisions - Severability.

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

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

(c) The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Massachusetts
HD 3425

B. Contracts Between Libraries and Publishers

(a) Any contract offered by a publisher to a library for the purposes of licensing electronic literary materials to the public in this state is governed by Massachusetts law.

(b) A contract between a library and a publisher shall contain no provision that:

    (1) Precludes, limits, or restricts the library from performing customary operational functions, including any provision that:

        (C) Precludes, limits, or restricts the library's right to make non-public preservation copies of the electronic literary materials;

        (D) Precludes, limits, or restricts the library's right to loan electronic literary materials via interlibrary loan systems….

Connecticut
HB 6800/HB 6829

(c) No contract or license agreement between any publisher and any library in this state shall preclude, limit or restrict the library from performing customary operational or lending functions, including any provision that:

    (1) Prohibits the library from loaning any electronic literary material, including through any interlibrary loan system;

    (4) Prohibits the library from making nonpublic preservation copies of any electronic literary material….

(f) Any contract or license agreement concerning electronic literary material that includes provisions prohibited by section (c) of this act is unconscionable within the meaning of section 42a-2-302 of the general statutes.

Hawaii
HB 1412

§ 2 Contracts between publishers and libraries.
(a) No contract or license agreement entered into between any publisher and any library in the State shall:
(1) Preclude, limit, or restrict the library from performing customary operational functions, including:
        (C) A library's right to make non-public preservation copies of electronic literary materials; and
        (D) A library's right to loan electronic literary materials via interlibrary loan systems;
(b) A contract to license electronic literary materials to a library that includes prohibited provisions under section 2 shall be unconscionable within the meaning of section 490:2-302 and shall be deemed unenforceable and avoid. Any attempt to waive any provisions of this chapter is contrary to public policy and shall be deemed unenforceable and void.

B. No contract offered by a publisher to license any electronic literary material to the Library shall contain any provision that:

> 1. Precludes, limits, or restricts the Library from licensing any electronic literary material; employing technological protection measures as necessary to loan any electronic literary material; making nonpublic any preservation copies of any electronic literary material; loaning any electronic literary material via interlibrary loan systems to Library patrons; determining loan periods for any licensed electronic literary material; or disclosing any terms of any licensing contact to other libraries….