ACCESS v CONTRACT
Competing freedoms in the context of copyright limitations and exceptions for libraries

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- This article explores the on-going debate at the World Intellectual Property Organisation (WIPO) on the conflict between restrictive contracts issued by publishers of digital works, and current copyright exceptions for libraries. Of particular focus is whether the principle of "freedom of contract" has overridden certain "freedoms" of access and use of information available to libraries and the public. The author argues that a resolution may be possible if the inherent balance between competing private and public interests in copyright law is upheld. The steps proposed are revisiting the historical rationales behind copyright and author's rights systems in order to fashion appropriate modern rules, applying the human rights approach to balancing competing rights and; extending the ambit of public policy regulations on selected US and EU contractual laws to cover the activities of libraries.

- Dit artikel bestudeert het debat dat lopende is in de Wereldorganisatie voor de Intellectuele Eigendom m.b.t. het conflict tussen enerzijds de restrictieve contracten die uitgevers van digitale werken opstellen en anderzijds de huidige aan bibliotheken toegekende uitzonderingen op het auteursrecht. Het gaat er vooral om te bekijken of het principe van "contractvrijheid" bepaalde "vrijheden" van gebruik en toegang tot informatie voor gebruikers en bibliotheken teniet doet. De auteur argumenteert dat een oplossing mogelijk is als het inherente evenwicht tussen tegenstrijdige private en publieke belangen in auteursrecht gevrijwaard wordt. De onderdelen die achtereenvolgens behandeld worden grijpen terug naar de historische logica achter de systemen van auteursrecht en copyright om geschikte moderne regels uit te werken, waarbij de benadering van de mensenrechten gebruikt wordt om tegenstrijdige rechten in overeenstemming te brengen, terwijl het bereik van bepaalde algemene regelgevingen uit het contractrecht van de Europese Unie en de Verenigde Staten uitgebreid wordt zodat ook de activiteiten van bibliotheken eronder vallen.

- L'article explore le débat en cours à l'Organisation mondiale de la Propriété intellectuelle (OMPI) relatif au conflit entre les contrats restrictifs rédigés par les éditeurs des ouvrages numériques, et les exceptions actuelles accordées aux bibliothèques. Le point est plus précisément de voir si le principe de la "liberté de contrat" surpasse certaines "libertés" d'accès et d'utilisation des informations disponibles pour le public et pour les bibliothèques. L'auteur argumente qu'une éventuelle solution est possible si le maintien de l'équilibre inné entre l'intérêt privé et public est conservé. Les étapes proposées redécouvrent le raisonnement historique derrière les systèmes de droits d'auteur et de copyright afin de façonner des règles modernes appropriées, tout en utilisant l'approche des droits de l'homme pour équilibrer les droits en concurrence et en élargissant la portée des réglementations d'ordre public sur certaines lois contractuelles des États-Unis et de l'Union européenne pour couvrir les activités des bibliothèques.

Libraries have traditionally been the primary service providers of free public access to information, past and present. With the increase of publications in digital format, libraries are being required to accept contracts which impose controls on the access to and use of the information provided. Whilst recognising the rights of creators and publishers of copyright works to be fairly remunerated for their efforts and investment, the libraries nevertheless argue that the restrictions undermine not only their "raison d'être", but moreso, the public's right, under established copyright principles, to access and use these works.

In this scenario, it may be said that the principle of "freedom of contract" has overridden certain "freedoms" of access and use of information available through the exceptions and limitations placed on the exercise of copyright.

In defending the libraries cause, developing countries at the World Intellectual Property Organisation (WIPO) have mounted a campaign for a new international treaty on copyright limitations and exceptions. The intended instrument, endorsed by international library coalitions such as the International Federation of Library Associations (IFLA), contains an express provision that private contracts will not override internationally established copyright exceptions.

The below discussion seeks to justify the libraries claims and propose steps to resolve the dilemma between contracts and copyright. It will be argued that copyright law has historically sought to bal-

ance competing private and public interests and that where they conflict, the balance should weigh in favour of the public so as to prevent consequences harmful to both. This argument will be illustrated through the philosophical and legislative origins of copyright law in the UK, USA, France and Germany- these four jurisdictions having significantly influenced the content of today's international copyright laws. In this respect, revisiting copyright's roots may help current policy-makers to fashion appropriate modern rules that address the current conflict but also maintain the "copyright balance". Policy-makers may also be guided by human rights doctrines which similarly advocate an outcome that benefits the public interest when facing conflicts between competing rights. Finally, revising existing checks on selected US and EU contractual laws may enable libraries to continue their reliance on copyright exceptions while safeguarding the integrity of right-holders' works.

Philosophical and legislative origins

"*The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law today by seeing how it took shape.*"
Per Justice Windeyer, *Victoria v Commonwealth*, Commonwealth Law Reports, 1962, vol.107 p 595.

The copyright laws of the UK, US, France and Germany share a common heritage in certain natural rights and utilitarian theories[1]. The claim by English philosopher John Locke that man has the right to exclusively own the outcome of his labour "mixed" with publicly available resources[2] "the commons", finds resonance with Germany's Hegel who asserted that where man expressed "his will" or personality through an external embodiment, "a thing", it acquired the "character of private property"[3]. Hegel's affirmation that expressions of man's personality are inalienable and his right to them "imprescriptible" is in turn comparable to the ideals of liberty, equality and inalienable rights reflected in the 1789 French Declaration of the Rights of Man and of the Citizen[4]. These revolutionary ideals also inspired utilitarian objectives as the "first framers" of the French copyright laws, like their revolutionary US counterparts, *"sought primarily to encourage the creation of, and investment in the production of works furthering national social goals"*[5]. Hegel also envisioned that sharing the "products of one's mind" could stimulate others to "possess" or deliberate on the thoughts expressed, and consequently impart their own learning with others[6], thus feeding into a continuous cycle of creation of new works.

These philosophical sources emphasized however, that an individual's rights or the extent of private property was tempered by its potential impact on the rest of society. According to Locke, man should only appropriate a reasonable portion of the "commons" for his use and that "enough, and as good"[7] should be left for others; neither should another be harmed "in his life, health, liberty or possessions"[8]. The 1789 French Declaration also called for balance in the enjoyment of freedoms – "the exercise of natural rights has only those limits that allow other Members of Society to enjoy the same rights."[9] Although property was an "inviolable and sacred right", it could be deprived where "public necessity, legally determined" so required but upon equitable indemnification to the property owner[10]. Hegel likewise acknowledged that there may be circumstances where private property has to be cancelled, "subordinated to a higher sphere of rights' such as those belonging to the State but these should be "exceptional cases" and should only take effect "in the rational organism of the state"[11]. More recently, Chafee's often cited six ideals of US copyright law advocated that copyright's first focus is the author bounded by three conditions; protection should not go substantially beyond the purposes of protection (ideal #4), protection should not stifle independent creation by others (ideal #5) and the legal rules should provide certainty (ideal #6)[12].

These foundational philosophies therefore sought to resolve the tensions inherent in balancing private and public interests by proposing boundaries to property ownership and promoting a reasonable exercise of individual rights that did not prejudice the entitlement of others. These intentions and tensions were duly carried over into early legislation.

Within common law copyright law, beginning with the 1710 English Statute of Anne[13] and including the US Constitution and Copyright Act of 1790[14] four core elements are identifiable and have remained steadfast over three centuries of evolution; the law's intent to assure right-holders, namely authors and publishers, a **defined control over the publication** of their works and **remuneration** therefrom, but that the public should be concomitantly provided with **access** to **affordable** works.

Two classic English cases, *Millar v Taylor*[15] and *Donaldson v Beckett*[16] highlighted the challenge of balancing these competing interests. In both cases, the courts supported the author's right to derive financial benefit from his creative labours and his entitlement to protection of his work after publication. The court in *Millar* however, supported copyright in perpetuity. This view held until

the later House of Lords decision in *Donaldson,* which by a slim majority, statutorily limited the duration of author's control so as to prevent an absolute monopoly over the dissemination of works into the public sphere. It is useful to refer to the dissenting opinion of Mr Justice Yates in *Millar*[17], in which he foresaw "the inconvenient consequences"[18] that could arise should authors be granted a permanent and absolute publication right; there would be arbitrariness and unpredictability in the publication of works, unreasonable prices and continuous litigation over whether subsequent works incorporated ideas and thoughts contained in much earlier works. The book trade and consumption of books would be effectively reserved for only the few who had obtained the rights to sell or could afford to purchase books. An inevitable result would be the suppression of "the advancement of learning and knowledge"[19] rather than its encouragement, by "lock[ing] up the work from the general bulk of mankind"[20].

The US Supreme Court also acknowledged the difficulty of balancing authors interests in controlling the exploitation of their works and society's interest in the "free flow of ideas, information and commerce"[21]. It underlined, however, that the statutory copyright protection was an incentive for persons to create works to ultimately benefit the public.

France and Germany have placed greater emphasis on authorial rights thus being described as "author's rights systems". Indeed in the earliest French law, the Revolutionary Decree of 1791, the fruit of an author's mind was deemed *"the most sacred, legitimate, unassailable and personal of all properties"*[22]. French and German laws nevertheless embody the four named elements found in common law and, have contributed a fifth element, that of "**recognition**". This refers to an author's "moral right" for respect of his name and authorship of his work. The French Intellectual Property Code, 1992, states that moral rights are *"perpetual, inalienable and imprescriptible"*[23], however German law fixes the time-limit on both exploitation and moral rights[24]. This latter jurisdiction has also been guided by its 1949 Constitution, the "Basic Law"[25], towards maintaining a balance between private and public interests. An author's right to exploit his work is a protected property right under Art.14 (1) but is not guaranteed in absolute. Courts may apply the "principle of proportionality" to balance competing rights and have held[26] that the boundaries on the exercise of author's right should *"[correspond] to the nature and social meaning of the right"*[27]. Echoing Hegelian influences, the law also prescribes that there also may be justifiable cases in which "the intellectual public interest" is of greater import than the author's, overriding his right to remuneration[28].

The four above-selected countries were[29] and undoubtedly still are authoritative influences on the formulation of international copyright rules. The core objectives within their legal regimes along with the underlying rationales and tensions in balancing private and public interests have been transposed into the international system; through direct export to other common or civil law countries, and through the establishment of internationally applicable minimum standard instruments. The international rules began with the 1886 Berne Convention ("Berne")[30] and include the 1994 TRIPS[31] Agreement under the World Trade Organisation (WTO), the 1996 WIPO Copyright ("WCT") and Performers and Phonograms Treaties ("WPPT") and regional harmonising rules in seven EU copyright Directives[32].

Under Berne, the five core elements have been implemented by granting authors exclusive economic or **remunerative** rights, a **defined control over the publication** of their works[33] for a fixed duration[34] and moral or **recognition** rights to claim authorship and object to derogatory treatment of their works prejudicial to their honour and reputation[35]. Attention to the public interest through **access** and **affordability** has been classified into three types[36]; protection of only certain types of created subject-matter[37], permitted free uses such as making quotations from lawfully published works or illustrative use for teaching purposes[38] and, permitted uses requiring equitable remuneration[39].

Of particular importance in maintaining the copyright balance is Article 9(2) which provides an adaptable "three step test" that allows for free reproduction of works in special cases that neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interest of the author. A fixed reading of the test was not prescribed by Berne but left to members to apply to national needs as necessary. An interpretation was however, proffered in the WTO Panel decision on *US Copyright Act: s.110(5)*[40] in which the panel held that accepted "special cases" should be narrow in scope and reach[41], and not compete economically with nor unreasonably deprive right-holders of a loss of income[42]. Although relating specifically to WTO law[43], it is the only international tribunal decision on the test and may nevertheless have "de facto" influence on Berne jurisprudence[44]. The panel acknowledged that it had adopted an economic and conservative focus, and was therefore only one way, albeit incomplete, of examining the issues[45]. The decision was nevertheless strongly criticised as misinterpreting the objectives of the

test, potentially leading to an undue restriction on countries policy freedom to respond to national circumstances[46]. A number of European scholars[47] responded by issuing a "Declaration on a Balanced Interpretation of the "Three Step Test" in Copyright Law"[48] ("the Munich Declaration") with the aim of providing a proper construction of the test and in particular re-establishing its flexibility characteristics. The Declaration stated that the test's accurate application requires an "overall comprehensive assessment" of each step[49] to arrive at a true equilibrium of competing interests. Legislatures may enact "open ended limitations and exceptions" provided their scope is "reasonably foreseeable"[50]. Additionally, the legitimate interests of third parties, including those arising from "human rights and fundamental freedoms" should be respected[51].

Other key international copyright instruments, TRIPS, WCT and WPPT, also speak of the need to balance legal obligations with social and humanitarian perspectives. The Objectives and Principles of TRIPS call for the protection and enforcement of intellectual property rights, in a manner inter alia conducive to social and economic welfare and to a balance of rights and obligations[52]. Members also have the right to promote the public interest through laws and regulations in sectors of vital importance to socio-economic and technological development, provided these are consistent with the Agreement[53]. The preambles of WCT and WPPT explicitly recognise the need to maintain a balance between right-holders and "the larger public interest, particularly education, research and access to information".

From the above brief review of the philosophical and jurisprudential bases of copyright and author's rights laws at national and particularly international levels, one may conclude that from their inception to present day, the laws contain an intrinsic intention and capacity to balance the interests of their primary stakeholders – authors, publishers (more so in common law copyright) and the public, taking account of economic as well as social and humanitarian dimensions.

WIPO discussions and the proposed Treaty on limitations and exceptions

Libraries are *"primary purchasers of information products and services"*[54] spending an estimated USD 31 billion annually on goods and services[55]. They provide their services on the basis of equality for all and in principle, free of charge[56] for a breadth of clientele. Based on their *"unique role of collecting, preserving and providing access to knowledge"*[57], the library may be seen as a bridge between the author and publisher, and the consumer[58]; the institutional actualisation of copyright's public interest - affordable access to works.

Many libraries make an additional contribution to education in the digital era by facilitating distance-education programmes, particularly where the library is a central internet access point in communities with low domestic internet penetration[59]. By providing physical space and supplies of material, libraries also represent an intersection between the fundamental human rights of expression and education, and copyright's public interest.

Since March 2008, the impact of digital technologies on copyright limitations and exceptions for libraries has been actively debated in the Standing Committee on Copyright and Related Rights (SCCR), WIPO's ad hoc expert committee for copyright. Digital technologies have undoubtedly brought vast opportunities for increasing the availability, affordability and accessibility to information, however the resulting ease and low cost of exchanging information have been both a blessing and a curse. Copyright-holders, understandably concerned about safeguarding the integrity of their works and recouping due remuneration from their use, have secured exclusive rights to make works available online and on-demand[60], and to take legal action against acts of circumvention of effective technological protection measures (TPMs)[61] and rights management information[62] attached to copyright works.
These new rights however carried little commensurate access for the public. A commissioned study on library exceptions in the laws of WIPO Member States[63] revealed that while most have at least one statutory exception[64], the scope varied widely and very few addressed digital issues.

Libraries have openly expressed the challenges they face in executing their usual functions in the digital environment. Digital has restrained such activities as reproducing works for preservation purposes[65], supporting virtual learning environments and converting works into formats accessible by disabled persons[66]. Other activities ordinarily permitted under copyright law have been stymied by the use of TPM's which control access to works and prevent reading, viewing, hearing and browsing of the work without right-holder authorisation. Other uses have been policed by the inclusion of restrictive terms in licensing agreements such as standardised "shrink-wrap" licences or on-line "click-through" licenses which preclude direct negotiations between contracting parties. The terms include:

- restrictions on users printing or downloading or emailing [extracts of] material,

- restrictions on libraries performing inter-library loan/document supply,
- restrictions on the use of a work beyond a certain date,
- restrictions on libraries networking the work across the premises of the library,
- restrictions on the right to quote, analyse and index a work[67].

A study conducted by the British Library in 2008 of 100 random samples of its contracts with digital publishers revealed that more than 50% conflicted with the exceptions granted under the UK Copyright Act[68] Many licences were silent on permitted statutory uses, and it was not apparent whether licences distinguished between works still under copyright or in the public domain.

With terms as diverse as the number of licences offered to libraries, it has been difficult for libraries to adopt a consistent policy on the public's use of digital material. Out of caution, they often choose the most restrictive terms as the common denominator[69]. Other libraries, faced with expired passwords, obsolete software and unresponsive publishers, only have the choices of "constantly buying new copies" if their budget permits, or "simply not buying the restricted materials at all"[70].

Concerned with this lack of parallelism between increasing digital rights for right-holders and expected exceptions for the public, the delegations of Chile, later supported by Brazil, Nicaragua and Uruguay, proposed in the SCCR, the establishment of a global framework of minimum mandatory standards on limitations and exceptions in the digital environment[71] with emphasis on "educational activities, people with disabilities and libraries and archives"[72]. This would address what they deemed to be the cause of the paucity of national digital exceptions - members uncertainty on how to appropriately adapt the "three step test" or overcome legitimately-applied TPMs.

The debate expanded in June 2010 when a draft *Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers* was submitted to the SCCR by the African Group of Member States[73]. Among the proposed exceptions were libraries entitlement to circumvent TPMs to make copies of works for non-profit teaching and preservation of cultural heritage uses[74] and a requirement that contractual provisions exempting application of the proposed limitations and exceptions "shall be null and void"[75].

In the ensuring discussions SCCR members have generally agreed on; the importance of maintaining limitations and exceptions to balance competing interests, the vital services provided by libraries in today's knowledge economy and, the need for national laws to be updated for the digital era. Positions on the appropriate action to be taken, however, diverge along geo-political lines. Developed countries argue for non-binding recommendations so as to retain current flexibilities to accommodate local needs[76], that the existing "three step test" provides sufficient flexibility to introduce appropriate exceptions into national legislation[77], or that existing treaties provide sufficient balance with no need for a new international agreement[78]. Developing countries however are keen on a binding international agreement in order to provide legal certainty and predictability. Minimum standards would form the basis for further expansion by national governments as deemed necessary[79].

Comments from NGOs with observer status in WIPO meetings also reflect their respective interests. Right-holders agree on the need for a balanced copyright system but dispute negotiating new rules as the "three step test" presents a sound and flexible solution[80]. Those championing international harmonization believe that minimum standards would facilitate digital education, the building of internationally acceptable digital libraries[81], and promote trans-border trade, innovation and competition[82]. Such a positive response would also improve the "unfortunate public perception" of copyright law as "unreasonably [restricting] uses"[83]. A number of key international library organisations welcomed the African group proposal including the International Federation of Library Associations (IFLA)[84] representing over 1500 members from more than 150 countries, Electronic Information for Libraries (eIFL.net)[85], the International Council on Archives (ICA), and Innovarte, a library NGO. They subsequently jointly submitted a complementary draft treaty proposal[86] expounding on the revisions being sought. The SCCR now moves into its fourth year of debating the structure and potential content of an appropriate legal instrument with the target of submitting recommendations to the WIPO General Assembly in 2014[87].

A concrete response to the libraries concern is crucial. Failure to provide digital-appropriate exceptions and controls on restrictive contracts will create barriers to accessing information that may produce a backlash on the institution of copyright itself. The libraries have cautioned that the publication of e-books is on the rise and if every use becomes a licensed economic transaction, access will become a privilege benefitting only those who can afford it[88]. This premonition recalls similar comments made by Mr Justice Yates, nearly 250 years prior when he estimated the potential consequences of granting right-holders

a permanent monopoly over the dissemination of their works[89]. Libraries also advise that unless they can preserve digital works, the world could ironically experience a dearth of information of the information age[90].

Additionally, from Hegel's observation of an ongoing exchange of ideas, the creation of new works can be seen as "an inescapably social process" rather than an "individual phenomenon"[91]. Arguably, the copyright work is a "joint enterprise between the public and the author"[92]. Private and public interests are not separate entities but intertwined in a symbiotic relationship[93]. As such, weakening one stage of the creativity cycle may inevitably endanger the entire process. Removing affordability and denying access to the building-blocks for new expressions, especially access to public domain material, can impede "progress in the science and arts" and potentially infringe an individual's fundamental right to enjoy and participate in cultural life, freedom of expression and education. Drahos writes of a growing "information feudalism"[94], in which information is being "locked" away from the wider public, the keys being owned by a powerful few[95]; copyright law being a "social lock" and TPMs "electronic locks"[96]. Restrictive licensing terms are potentially a third; contractual locks.

Anti-intellectual property rights sentiment has also been growing globally[97] and against perceived barriers to information and communication. The extensive on and offline protests in 2012 against Stop Online Piracy Act (SOPA), Protect Intellectual Property Act (PIPA)[98] and Anti-Counterfeiting Trade Agreement (ACTA)[99], draft legislations regarded as potentially censoring the internet and denying access to information and infringing civil liberties, bear testament to this possibility. These contested legislations have since been withdrawn with some credit being given to aggressive public campaigns[100]. Similar opposition action has already been signalled should pending negotiations between the US and EU for a new Trans-Atlantic Free Trade Agreement (TAFTA) include provisions on Intellectual Property deemed to "limit free speech and constrain access to educational materials"[101] inter alia. If the issues facing the libraries were re-framed as private interests attacking the public's entitlement to freely access information, convincing global support could be mobilised to defend this cause.

Resolving the libraries dilemma

The human rights approach: Human rights offer a compelling framework within which to reconcile competing interests in the use of a copyright work. Human rights share a natural rights heritage with the copyright/author's rights systems and the constitutional international instrument - the 1948 Universal Declaration of Human Rights (UDHR)[102] is now widely considered part of customary international law or general principles of law[103]. The UDHR has influenced many national and regional laws[104] and contains elements from earlier texts such as the French Revolutionary Declaration, the US Bill of Rights and, its contemporaries, the German Basic Law and the European Convention of Human Rights.

Helfer identifies two schools of thought on the relationship between intellectual property rights (IPRs) and human rights[105]. The "antagonistic" view sees a fundamental conflict between the two – that IPRs undermine socio-economic goals of human rights with human rights being the superior of the two. Under the "compatibility" approach, both regimes aim to incentivise creativity and innovation *"while ensuring that the consuming public has adequate access to the fruits of [creators] efforts"*[106]. The difference lies in how each balances monopoly rights and access[107].

By pursuing the compatibility approach, IPRs can be seen as the implementing vehicle for Article 27 of the UDHR which declares the individual's right to *"freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"*[108] and, to enjoy "*the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"*[109]. This Article envisions the co-existence of benefits to both creator and consumer thus satisfying the five core elements of copyright/author's right systems; defined control of publication, remuneration, recognition, access and affordability. Art. 27 is supported inter alia by the right to own property alone or with others and not to be arbitrarily deprived of one's property[110] and the freedom of expression including the right to receive and impart information and ideas[111] and the right to an education[112].

Arguably, both antagonistic and compatibility approaches anticipate that resolution of conflicts between rights will be in accordance with the UDHR. Comparable to Locke's no-harm principle, Article 29(2) states that the only limitations on an individuals' exercise of rights and freedoms are laws concerned with "securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". To be justifiable, these limitations must be prescribed by law, pursue a legitimate objective and, be appropriate and proportional[113].

Further, the "general welfare in a democratic society" is interpreted as pursuing the "well-being of the people as a whole"[114] akin to "public interest".

Human rights are therefore similar to the philosophical rationales undergirding copyright/author's rights systems in promoting a balance between private and public interests in protected works and, by instructing that where two rights conflict, resolution should pursue the best outcome for a broader stakeholder base rather than a single, exclusive group. Furthermore, the idea of an "appropriate and proportional" limitation on the individual's rights anticipates action that is reasonable in the circumstances and no more than necessary to maintain the balance between rights.

Returning to historical rationales and referencing new ones: It could be said that 21st century solutions are needed to resolve 21st century problems. Historical approaches can however, offer practical insights. The drafters of the first international norms under Berne were motivated to establish minimum national standards to ensure stability in international copyright relations[115]. This is the very objective of the proponents for a new treaty on limitations and exceptions. Berne was intended to achieve "effective uniformity" in protecting the rights of authors[116] but also be dynamic and subject to revision as necessary[117]. Subsequent amendments and additional treaties have accommodated new stakeholders such that author's rights *"were no longer to be seen as possessing any intrinsic merit that set them apart from the pleas for fairness from…other quarters [including] broadcasting interests, educationalists, or developing countries"*[118]. The Berne negotiators also appreciated the "ever-growing need for mass instruction"[119] but that public access to information should not "abuse" author's rights. The present-day dilemma created by digital technologies is that they dually enable access for "mass instruction" and "abuse" of rights which in turn prompted the imposition of TPMs and restrictive contracts on libraries.

One route to resolving this impasse lies in pursuing an "appropriate and proportional" response as advocated in human rights doctrines and as anticipated by the foundational philosophies of copyright/author's rights laws - balancing private rights subject to its impact on the wider society. Proportionality requires an objective assessment of the circumstances, seeking out the relationship between the measure undertaken and the "aim sought to be achieved"[120]. Alternately stated, an "appropriate and proportional" response should be evidence-driven in order to be defensible. Professor Ian Hargreaves in his commissioned Independent Review of the state of the UKs Intellectual Property framework (2011) endorsed an evidence-based approach to formulating Intellectual Property policy as it requires balancing "measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests."[121]

In designing an evidence-based solution to the concern of libraries, it is therefore suggested to view the five core elements of **defined control, remuneration, recognition, access and affordability** as the desired results, and the "three step test" as a consensual vehicle through which to achieve these results. Regarding the first and second steps of the test, if the libraries traditional activities were acceptable in the analogue era, that is "special cases" not "conflicting with normal exploitation", could they still be acceptable in dealing with digital formats? A reply may be that some but not all activities may be non-conflicting; preservation of works possibly, but not all copying by library users[122]. This segues into step three, "unreasonable prejudice" which queries whether a conflicting activity such as preservation or copying an extract of a digital work, impairs the rightholder's ability to sell his work on the market. If it does not impair his ability, the act could pass as "reasonable". If it does impair his ability, does the "prejudice" serve a higher cause rendering it "reasonable"? Geiger defends non-economic public interest goals as justifiable "higher causes"[123]. If libraries are the institutional representation of copyright's public interest - affordable access to information - this could reflect a "higher cause" justifying access to and use of digital works. Such use could still be subject to reasonable restraints such as minimal copying amounts and/or with equitable remuneration[124].

Revising contractual principles: Common law and continental civil law systems both espouse the principle of "freedom of contract"[125] but this "freedom" is not absolute. Existing legislative and judicial restraints aim to minimise potential distortions in the marketplace particularly where parties are of unequal bargaining power. As noted earlier, the libraries acquisition of digital content is largely subject to "shrink-wrap" or "click-through" licenses. These are generally enforceable in the four selected jurisdictions[126]. The following explores whether selected restraints under US and EU contract and copyright law can be employed by libraries to restore their reliance on copyright exceptions.

United States

"Unconscionable" clauses

The federal law on commercial transactions, the Uniform Commercial Code (UCC) provides that if a court deems a contract clause to be "unconscionable" at the time of making, it may refuse to enforce the contract or enforce only the remainder of the contract[127]. "Unconscionable" is defined as effecting "oppression and unfair surprise"[128]. Elkin-Koren also posits that this section is more concerned with the procedural formalities of "informed and voluntary assent" than the actual subject of the clause[129].

Unless libraries can demonstrate unawareness of the likely restrictions to be contained in the licences, it may be difficult to raise this defence. It is nevertheless debatable whether libraries have truly assented to the terms if licences are handed on a "take-it-or-leave-it" basis. Commentators have remarked that through the widespread use of standardised licences, dominant providers of such licensed products are "binding countless individuals to the same non-negotiated provisions... imposing their own private order"[130]. These terms are inevitably enforceable against the world as the licence exceeds its contractual nature and assumes the characteristics of a "property" right, effectively expanding the exclusive rights of the right-holder[131]. This "private ordering" arguably upsets the balance in relations between stakeholders in both the marketplace and in the copyright framework.

Misuse of copyright

The doctrine of "copyright misuse" based on the equity maxim "clean hands", was initially raised as a defence in an anti-trust case, *Lasercomb*[132]. Copyright was "misused" where the copyright holder attempted to expand his statutory rights in a manner that violated the utilitarian objectives underlying copyright law. The court indicated that the doctrine could be relied on outside of anti-trust disputes and a defendant need not be injured by the misuse.

Pursuing this line of reasoning, libraries could contend that contractual restrictions have the effect of "misusing" copyright by overriding the Constitutional mandate to promote the "progress of learning", or as noted above, create an unauthorised "private ordering". Gibault however cautions that the doctrine is "an exceptional remedy whose scope and rationales are still vague"[133]. As a defence to copyright infringement claims and yet untested as a cause of action, it is debatable whether libraries would initiate such a claim.

Pre-emption

Section 301(a) of the US Copyright Act states that "legal or equitable rights" equivalent to the exclusive rights granted under that Act will be governed by copyright and not by state law or common law. *ProCD*[134] held that "shrink-wrap" licences embodied "extra elements" unrelated to copyright which could negate pre-emption and render the licence enforceable under contract law only. This was deemed a controversial ruling[135] which the Uniform Computer Information Transaction Act (UCITA) attempted to alleviate by providing that a UCITA provision which is pre-empted by federal law is unenforceable to the extent of the pre-emption[136]. Additionally, UCITA provided that if the contract term violates "fundamental public policy", the court has the option of not enforcing the contract or limiting the application of the violating term[137]. UCITA's accompanying Official Comments[138] identified three public policy areas - promotion of innovation, competition (i.e., ensuring publicly available information in order to promote competition) and freedom of speech.

UCITA could be a more promising ground for action by libraries as they could argue that access restrictions potentially stymie creative expression contrary to the identified public policy grounds. There have only been two states subscribing to UCITA however[139], and other provisions have been widely criticised by industry, consumer groups and libraries themselves[140].

European Union

Unfair contract terms (in consumer contracts) directive[141]

According to Art.3, the imposition of a contractual term which has not been "individually negotiated" may be deemed to be "unfair" if it causes significant imbalance in the parties' rights and obligations to the detriment of the consumer[142], and will not be binding on the consumer[143]. The term is assessed on the circumstances of the contract including the nature of the goods/services supplied[144].

Libraries could possibly demonstrate that standardised licences are not "individually negotiated" and the terms have been to the detriment of their clients and services. However, whereas "seller" under the Directive may be either a natural or legal person functioning in the course of business, "consumer" is confined to natural persons thus excluding such public institutions as libraries. Additionally, assessment of the term does not take account of "the main subject-matter of the contract"[145]. Arguably, the Directive is similar to

the USA's UCC being concerned more with formalities than substance and reinforces the functioning of freedom of contract.

Copyright Directives on Legal protection of databases[146], legal protection of computer programs[147] and the information society (InfoSoc)[148]

The Database[149] and Computer Programs[150] Directives expressly render null and void, contracts that override the rights of lawful users to access and make normal use of the works[151]; whether to extract and utilize insubstantial parts of the work for whatever purpose[152], to access the programme to determine its underlying ideas and principles[153], or to carry out decompilation in order to achieve interoperability[154]. Rephrased, the Directive preserves both private and public interests; users have access to information and, the commercially remunerative acts of reproduction, adaptation and distribution of right-holders remain protected[155]. Furthermore, both Directives were enacted in response to identifiable needs in the marketplace. Gibault cites the former Head of the EC Copyright Unit at the time of the passage of these Directives who underlined that it would have been redundant to grant users the freedom to perform certain acts only for the right-holder to withdraw it contractually[156].

The InfoSoc Directive is broader in coverage but has been criticised for weakly treating the public interest[157]. Although EU members have the option of exempting reproduction by non-profit public institutions (such as libraries and educational establishments) whose purposes are not for "direct or indirect economic or commercial advantage" [158], access to works subject to TPMs is through voluntary measures by rights-holders[159]. In the absence of such measures, the State is to implement appropriate measures to maintain the exception[160] but guidance on executing voluntary measures or State action has been deemed obscure[161]. Additionally, works supplied on-demand online under "agreed contractual terms" are expressly precluded from the exemption under Art.6(4)[162]. One could conclude that the Directive allows a right-holder to contractually release himself from observing statutory exceptions to his rights[163]. If knowledge-works are increasingly supplied through on-demand formats, the benefit of any exception could be effectively nullified by Art. 6(4) causing a "chilling effect" on the public's entitlement to access information. An alternate opinion is that this contractual exemption only applies where the parties have truly agreed on the terms through fair bargaining, potentially excluding the majority of standard form online licences to which libraries are subject[164].

Abuse of right

Gibault suggests that the civil law doctrine on abuse of rights is of general application and could potentially be cited to protect user's constitutional rights[165]. The doctrine however requires three conditions to be satisfied; civil liability, intention to cause harm and conflict with the objective behind the rights granted. It is questionable however whether libraries could successfully establish all three conditions.

Nevertheless as highlighted in the US case *Lasercomb*[166], competition issues are related to the abuse of right principle. According to the ECJ decision in *Magill*[167], monopoly rights under copyright can be subject to competition rules if the exercise of an exclusive right has the effect of distorting trade in the market. In that case, the right-holders were held to have abused their dominant market position by refusing to grant access to their informational works through compulsory licensing, leading to the elimination or exclusion of actual or potential competitors in the marketplace.

There may be grounds on which to place libraries and publishers in the same relevant market if reproduction and distribution by libraries are considered "competing" with right-holders[168].

Further, as noted by Bath, achieving the EU's goals of free movement of goods and undistorted competition is predicated on access to information[169], such as the Software Directive mandating access to non- protectable materials in order to promote competition in interoperability.

Building a case on *Magill*, an European library could argue that contracts and TPMs amount to a refusal to grant access to information including public domain material and this can prevent actual or potential authors from releasing derivative works affecting both domestic and regional trade. Additionally, right-holders of original works may be considered "dominant" if each knowledge-work is deemed a unique product, albeit part of a genre, and therefore without a specific market substitute[170].

This argument nevertheless has its limitations. Libraries may not be deemed true competitors, but merely disseminators of right-holders goods; providing access to, but not producing, knowledge. It may also be challenging to satisfy the economic factors for proving dominance[171] or substantiate claims of reduced creative output by users, if this is an estimated long-term impact. Right-holders may also contend that the threat to their livelihood by unrestrained digital access justifies their refusal to grant access. Courts

would inevitably have to balance these claims on a case-by-case basis which could defeat the objective of establishing predictable rules[172].

The above-described public policy grounds on which legislatures and courts on both sides of the Atlantic have intervened to control the exercise of "freedom of contract" reflect universal themes – promoting fairness in the marketplace, protecting weaker negotiating parties and stemming abuse of rights. Despite the diversity of contractual systems represented at WIPO, safeguarding the right to education and the public's entitlement to access information could provide undisputable public policy platforms from which to enact rules that restrain contracts overriding library exceptions. Promising but as yet untested grounds on which to pursue the libraries' cause have also been identified. It may be prohibitive and impractical however, for publicly funded libraries to initiate speculative legal action against every publisher. Furthermore, the benefit of a favourable ruling would be confined to the immediate parties, claims and jurisdiction. Minimum international standards provide a securer route to achieve "effective and uniform" national rules.

If certain changes are made to the selected national/regional laws, these could serve as precedents for international action or other national laws. The scope of the EU Unfair Contracts Directive could be extended to copyright licences and to non-profit, public entities such as libraries and archives. Clear statements nullifying contract overridability along the lines of the Database and Computer Directives could be introduced into the InfoSoc Directive. Elkin-Koren proposes a legal presumption that terms overriding exceptions are invalid unless their enforcement can be justified by the licensor in special cases[173]. This could prompt right-holders to negotiate with libraries to arrive at mutually agreed terms[174]. Another option is a US "pre-emption" type provision. Such a positive mandate was enacted in the Portuguese Copyright Act which renders void contractual provisions which prevent reliance on an exception[175]. This Act also prevents right-holders from using Art. 6(4) of InfoSoc to contractually excuse themselves from observing exceptions[176].

It is also suggested that certain dicta in *ProCD*[177] create room for advancing an exception for US libraries. The court recognised that in certain circumstances, public policy[178] or pre-emption[179] may render "shrink-wrap" licences unenforceable and, as such its ruling applied only to the immediate case[180]. As asserted by O'Rourke, the court was influenced by market factors affecting the field of trade under consideration and it adjudicated on what was reasonable for the intents and purposes of that private arrangement[181]. As such, even though the work purchased by the defendant was of a non-copyrightable nature, his commercial use of the work was held as impairing the right-holder's market. This could be viewed as an "appropriate and proportional" approach or evidence-based approach. One could distinguish this situation from libraries non-commercial use of works which, under the "three step test" may establish non-impairment of the right-holder's market. Right-holders could therefore replace standardised licences with licensing models that differentiate between commercial and non-commercial users and purposes.

Finally, the court in *ProCD* considered the licence a simple "two-party" contract enforceable only against the immediate parties. "Strangers" would be subject to copyright law[182]. It was earlier asserted that the widespread use and non-negotiable nature of the "shrink-wrap" licences have assumed property characteristics[183]. If property rights, they should be subject to pre-emption and the appropriate copyright exception provisions, thus preserving copyright over contract rules. The converse would be true if the licence was the outcome of equal bargaining. The doctrine of freedom of contract could prevail and render the contract enforceable including any agreed restrictions on copyright rules.

Other recommendations: In the absence of supportive national laws, IFLA has proposed guidelines for concluding licences with right-holders[184]. Licences should be negotiable and at a minimum, permit legitimate library users to browse, read, listen, view material on site or remotely, and copy or have copied for them, a reasonable proportion of the work for personal, educational or research use. Differentiated tariffs could be implemented and digital works should not exceed the price of the print equivalent[185].

Libraries would still need to overcome TPMs even if contractual restrictions are removed. "Fair use designed" TPMs have been envisioned but software that is able to simultaneously deliver the diversity of permitted uses possible and maintain right-holders protection interests may not be available[186]. The scope of TPM use should therefore be narrowly construed. Ricketson et al. argue that libraries should be entitled to legally circumvent TPMs on a strict reading of Art.11 WCT[187], for statutorily guaranteed uses or access to non-protected works. Although referring specifically to the obligatory Berne exception for quotation purposes, their proposal on circumventing TPMs may be useful in addressing all limitations:

- if analogue versions of the work are available, digital versions remain under TPM control,

- if only digital versions exist, then the exception should be upheld and if necessary limited to manual copying.[188]

It is also noted that the accompanying Agreed Statement to Art. 10 WCT permits members to extend existing Berne limitations into the digital environment and to formulate new ones. Ricketson et al., however, consider the operation of this article to be potentially circuitous[189], such that a "distinct regime for new limitations and exceptions… should [in fact] be the subject of an express provision."[190]. An alternate argument is that digital exceptions should be the subject of a separate, new Treaty. In this vein it is asserted that even if countries undertake legislative action at national or regional levels, minimum international norms can promote greater predictability, certainty and lower transaction costs[191]. Concrete obligations as opposed to non-binding commitments also may be the better safeguard for libraries interests. Pursuing "soft law" options such as recommendations or declarations as a "holding position" until full consensus is reached for binding commitments[192] is persuasive, however, subsequent rounds of negotiations may not be guaranteed if political impetus dissipates after achieving non-binding rules[193].

Finally, it is noted that Recommendation 22 of the WIPO Development Agenda[194] instructs its norm-setting activities to support UN development goals including those cited in its Millennium Declaration. The Geneva Declaration of Principles from the 2003 World Summit on the Information Society (WSIS) identified the development of digital public libraries and fostering worldwide corporation between libraries[195], as a step towards fulfilling the Millennium Development Goals. The 174 countries giving political support to the Geneva Declaration, many of which are Berne signatories, recognised that "education, knowledge, information and communication are at the core of human progress, endeavour and well-being"[196]. Establishing effective limitations and exceptions for libraries that support the goals of WSIS could be a significant contribution by WIPO as a member of the UN family.

Conclusion

Current international rules have been built on the historical experiences of copyright and author's rights systems. They share five identifiable substantive goals – defined control over publication, remuneration and recognition for right-holders, public access to and affordability of works. Their underlying philosophies mandate balancing private and public interests in the use of creative works. It has been illustrated that these commonalities accord with human rights doctrines which anticipate that right-holders' concerns for control, remuneration and recognition would not inhibit benefits to "the general welfare". Access and affordability should be preserved.

As an intermediary between the public user and the creator, libraries are a vehicle to realising the goals of access and affordability. Stifling its ability to function through restrictive contracts and TPMs, stifles copyright's public interest. Opsahl and Samuelson even assert that any country which endorses the "supremacy of freedom of contract without the limitations of public policy" endangers the very foundations of the information society and self-harms its own development[197].

Meaningful solutions to addressing the digital challenges facing libraries are an imperative. The Director-General of WIPO has himself acknowledged that if the copyright system does not "intelligently… adapt" to the "inevitability of technological change… it will perish."[198]. Ricketson et al. anticipate difficulties for countries to domestically find a balance between TPMs, "shrink-wrap" licences and user entitlements. As such, "new international substantive guidelines" may be necessary[199] to avoid disparate national solutions and, ensure a predictable approach to the contours of today's borderless digital world.

In this respect, pursuing evidence-based rules has been recommended as the appropriate path to address conflicting interests[200], along with binding rules over "soft law" options. Narrowing the scope of TPMs or varying licensing models to suit the type of user are other recommendations. Additionally, constructive precedents regulating the operation of contracts on public policy grounds have been cited from the laws of influential WIPO members. These suggestions may strengthen the libraries' appeal to members to agree on an international solution.

The recent conclusion of binding new norms at WIPO, to protect the rights of audio-visual performers in the digital environment (June 2012)[201] and, to provide limitations and exceptions for the visually impaired (June 2013)[202] confirms Member States capacity to respond to the modern needs of both groups of stakeholders; right-holders and consumers. In this regard, failure to make progress on the case for libraries could be taken as a lack of political will rather than a valid cause[203]. It is hoped that with nearly 130 years of experience, the international copyright regime would be "mature enough to establish precise and effective exceptions and limitations"[204] that remain true to its historical rationales.

"*There is one who withholds more than is right but it leads to poverty.*
The generous soul will be made rich and he who waters will also be watered himself."
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62 Art. 12 WCT, Art. 19 WPPT.

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[164] (note 125) p. 112.

[165] (note 133) p. 280.

[166] (note 132).

[167] Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann and Independent Television Publications Limited* sub.nom *Magill*. Common Market Law Reports, 1995, p. 718.

[168] Gibault (note 133) p. 248.

[169] Bath, Ulrika. Access to information v intellectual property rights. Intellectual Property Review, 2002, p. 138.

[170] Gibault (note 133) p. 247.

[171] 'An undertaking's ability to act independently of competitors and consumers'. Michelin v Commission. *European Court Reports*, 1983, p. 3461, para. 30.

[172] Hugenholtz, P. Bernt; Okediji, Ruth L. *Conceiving an international instrument on limitations and exceptions to copyright*. Open Society Institute, 2008, p. 33.

[173] Elkin-Koren (note 129).

[174] This however may raise transaction costs, the avoidance of which was one of the reasons for introducing standardised licences.

[175] Art. 75 (5), Act No.50/2004 cited in: Institute of Information Law (note 125) p. 161.

[176] Ibid. Art. 222.

[177] (note 134).

[178] Ibid. [1449].

[179] Ibid. [1455].

[180] Ibid.

[181] (note 135) p. 53, 82.

[182] (note 134) [1454].

[183] Opsahl and Samuelson (note 130).

[184] *IFLA Licensing Principles, 2001* [online]. <http://archive.ifla.org/V/ebpb/copy.htm> (consulted on 19 October 2013).

[185] Ibid.

[186] Burk, Dan L.; Cohen, Julie E. Fair use infrastructure for rights management systems. Harvard Journal of Law and Technology, 2001, No. 1, p. 55.

[187] Ricketson et al. (note 29) para. 13.132.

[188] Ibid.

[189] Ibid. para. 13.128.

[190] Ibid.

[191] Hugenholtz and Okediji (note 172) p. 37-38.

192 Cassese, Antonio. *International Law*. 2nd Edition. Oxford University Press, 2005, p. 196.

193 It is recognised however that a binding Treaty with few signatories may also be of limited effect. Hugenholtz and Okediji (note 172) p. 38.

194 Adopted in 2007 with the goal of integrating a development dimension into all aspects of WIPO's work. <http://www.wipo.int/ip-development/en/agenda/> (consulted on 19 October 2013).

195 Action line C3 (10) (h) <http://www.itu.int/wsis/docs/geneva/official/poa.html> (consulted on 19 October 2013).

196 Principle A (8). <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf> (consulted on 19 October 2013).

197 (note 130) p. 393.

198 Gurry (note 97).<http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html> (consulted on 23 October 2013).

199 Ricketson and Ginsburg (note 29) para. 15.25.

200 Hargreaves (note 69) para.3.22.

201 Beijing treaty on audiovisual performances concluded on June 26, 2012.
<http://www.wipo.int/pressroom/en/articles/2012/article_0013.html> (consulted on 19 October 2013).

202 Marrakesh treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled concluded on June 27, 2013.
<http://www.wipo.int/pressroom/en/articles/2013/article_0017.html> (consulted on 19 October 2013).

203 SCCR/20/13, para. 117, delegate of Barbados.

204 SCCR/22/18, para. 313, delegate of Brazil.