PROTECTING LIBRARY EXCEPTIONS AGAINST CONTRACT OVERRIDE

by JONATHAN BAND[1]

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, particularly exceptions for libraries and archives. This article describes the copyright override prevention clauses related to libraries adopted in over 30 countries. One country notably is missing from this list: the United States. This article recommends adoption of such a clause by Congress.

INTRODUCTION

Copyright laws enacted by legislatures around the world provide exceptions that limit the exclusive rights granted to copyright owners.[2] Libraries in developed countries have benefited greatly from these exceptions in their daily operations with respect to their physical collections.[3] However, the shift towards the digital distribution of content has led to publishers distributing this content under license.[4] These licenses frequently contain

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[2] *See, e.g.*, Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (November 2, 2017), *available at* https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=389654. These exceptions can be viewed as rights or privileges that the legislature has granted users and other beneficiaries, just as the legislatures have bestowed exclusive rights of exploitation upon copyright owners. For the sake of clarity, this article refers to the privileges or rights granted to libraries as "exceptions."

[3] *Id.* (describing exceptions for preservation, replacement, and document supply to researchers, among others).

[4] Software publishers began distributing software subject to licenses in the 1960s when it was unclear whether copyright protection extended to software. Other content distributors adopted this

terms that seek to "override" the exceptions provided under the copyright statutes, thereby altering the contours of copyright established by the legislature.[5]

For thirty years, the EU directives relating to copyright have required the nullification of license terms that override specific exceptions mandated by those directives.[6] This reflects the EU's recognition that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by license terms.[7] The EU concluded that copyright owners usually would have sufficient market power to force licensees to waive rights granted them by legislatures.[8] Accordingly, to preserve the policy balances embodied by the directives, the directives provided that certain exceptions could not be waived by contract.[9] Two of these directives—the Marrakesh Treaty Directive and the Copyright in the Digital Single Market Directive—mandate the adoption of certain exceptions relating to libraries, and further mandate that these exceptions cannot be undone by contract. [10]

All EU Member States have implemented these protections against contract override in their domestic law.[11] They have done so by enacting what this article refers to as contract override prevention ("COP") clauses in their copyright laws. These clauses typically are a single sentence stating that contract terms inconsistent with an exception

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business practice when they began digital distribution. The challenges posed to libraries by this migration to digital distribution is explicated in Guy Rub, *Reimagining Digital Libraries* (February 19, 2024), 113 GEO. L. J. 191 (2024); and Margaret Chon, *Protecting Progress: Copyright's Common Law and Libraries,* __ J. COP'Y SOC'Y __ (2025).

[5] *See* British Library, *Analysis of 100 Contracts Offered to the British Library* 1-4 (2008), *available at* https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/100contracts.pdf.

[6] Jonathan Band, *Protecting User Rights Against Contract Override*, PIJIP/TLS Research Paper Series No.. 97 at 1 (2023), https://digitalcommons.wcl.american.edu/research/97.

[7] *See, e.g.*, Jean-Francois Verstrynge, *Protecting Intellectual Property Rights Within the New Pan-European Framework–Computer Software*, 5 INT'L COMPUT. L. ADVISER 7, 14 (June 1991) (explaining that Article 9(1) of the EU Software Directive, which provided that the decompilation exception in Article 6 was valid notwithstanding to any contractual provision to the contrary, was designed to prevent companies that had market power or similar leverage from undoing the delicate balance reached in the Software Directive by including in their licenses provisions overriding Article 6).

[8] *Id.*

[9] International Federation of Library Associations and Institutions, *Protecting Exceptions Against Contract Override* 1-4 (2019), *available at* https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf ("IFLA").

[10] Directive (EU) 2017/1564 of the European Parliament and the Council of 13 Sept. 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, O.J. (L 242) 6; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on Copyright and Related Rights in the Digital Single Market, O.J. (L 130) 92.

[11] Band, *Protecting User Rights* at 1-3.

in a particular section (or sections) are unenforceable.[12] Some Member States have adopted COP clauses applying to more exceptions than those required by EU directives. The copyright laws of Belgium, Germany, Ireland, and Portugal prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions, including the specific exceptions for libraries.[13] Likewise, in 2014, when the UK was an EU Member state, it adopted COP clauses more extensive than those required by the EU directives. It retained these COP clauses after Brexit.[14] Some countries outside of Europe recently have adopted COP clauses. The Cook Islands, Kuwait, Nigeria, and Singapore have adopted provisions that apply to a broad range of exceptions, including the library exceptions. Singapore appears to have the most complex provision; among other factors, it takes into consideration the bargaining power of the parties.

The U.S. Copyright Act contains numerous exceptions that benefit libraries.[15] But U.S. libraries currently spend more than 75 percent of their acquisition budgets on licenses for digital materials, and these licenses typically contain terms prohibiting the copying otherwise permitted under the Copyright Act's exceptions.[16] In the absence of a COP clause in the U.S. Copyright Act similar to those referenced above, the balanced framework for libraries established by Congress will continue to erode in the digital environment.

This article argues for the adoption in the United States of a COP clause that preserves the balance Congress created in the Copyright Act between the interests of libraries and their users on the one hand, and copyright owners on the other. Part I of this article examines the COP clauses benefitting libraries adopted in the EU. Part II reviews the COP clauses adopted in other jurisdictions. Part III assesses the status quo in the United States, which lacks a COP clause for libraries generally, but where the Library of Congress has promulgated a regulation that has the effect of a COP clause. Finally, in Part IV, the article considers the arguments for and against adoption of a COP clause for

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[12] For example, Section 60g(1) of the German Act on Copyright and Related Rights provides that "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." Both Band, *Protecting User Rights*, and IFLA compile the language of many of the COP clauses.

[13] Band, *Protecting User Rights* at 1-7.

[14] IFLA at 10-12.

[15] For example, a U.S. research library that subscribed to a scholarly journal could, under 17 U.S.C. § 109(a), lend a physical issue of the journal to researchers; under 17 U.S.C. § 108(d), it could make and provide to a researcher a copy of an article in an issue; under 17 U.S.C. § 108(c), it could make replacement copies of issues that were damaged, deteriorating, lost, or stolen; and under 17 U.S.C. § 121, it could make a copy of an article in a format accessible to a person with print disabilities. The fair use right in 17 U.S.C. § 107, which supplements these specific exceptions, has been found to permit the copying necessary for electronic reserves and text and data-mining. *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014); and Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

[16] *See* Libr. Copyright All., *Library licenses for digital content under library rights and public policy* (2023), www.librarycopyrightalliance.org/wp-content/uploads/2025/03/Library-licenses-for-digital-content-undermine-library-rights-and-public-policy.pdf.

libraries in the United States, concluding that such a clause could significantly assist libraries without adversely affecting copyright owners.

I. EUROPEAN UNION

A. COP Clauses Consistent With Directives

The first two EU directives with COP clauses did not specifically concern libraries or archives.[17] The Software Directive, adopted in 1991, mandated that Member States adopt exceptions permitting the making of backup copies, and the copies incidental to reverse engineering.[18] Furthermore, Article 9(1) of the Directive provides that "any contractual provisions contrary" to these exceptions "shall be null and void."[19] Because software publishers typically distributed their products subject to a license, EU decision makers recognized that the Directive's exceptions would have no effect if they could be overridden by license terms.[20] Similarly, the 1996 Database Directive required exceptions for acts necessary for the purpose of access to and normal use of the contents of a database, as well as the extraction and reutilization of insubstantial parts of a database.[21] Article 15 of the Directive then provided that any contractual provision contrary to these exceptions would be null and void.[22] A COP clause was needed to preserve the Directive's exceptions because databases, like software, often were distributed subject to licenses. Article 5(2)(c) of the Information Society Directive, adopted in 2001, permitted Member States to enact exceptions allowing "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage."[23] The Directive did not prohibit the overriding of this exception by contract, presumably because the exception was not mandatory.

In contrast, under the 2017 Marrakesh Directive, adoption of exceptions implementing the Marrakesh Treaty was mandatory.[24] The Marrakesh Directive required

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[17] For a more detailed discussion of the theoretical underpinnings of COP clauses preserving mandatory provisions in the EU, *see* Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (2002).

[18] Article 5(2), 5(3), & 6, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009 O.J. (L 111) 16 [hereinafter Software Directive].

[19] Article 9(1), Software Directive.

[20] Jonathan Band and Masanobu Katoh, I*nterfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry* 255 (1995).

[21] Directive 96/9/EC of the European Parliament and of the Council of 11 Mar. 1996 on the legal protection of databases, 1996 O.J. (L 77) [hereinafter Database Directive].

[22] Article 15, Database Directive.

[23] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10.

[24] Article 3 and 4, Directive (EU) 2017/1564 of the European Parliament and the Council of 13 Sep. 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled and amending Directive 2001/29/EC on the harmonization of certain

Member States to enact exceptions permitting "authorised entities" to make accessible format copies of works and distribute them to people with print disabilities.[25] Authorised entities include public and non-profit institutions that provide education, training, or adaptive reading access to people with print disabilities, and thus are understood to include libraries.[26] Significantly, Article 3(5) provides that "Member States shall ensure that the exception" required by the Directive "cannot be overridden by contract."[27]

Likewise, the 2019 Copyright in the Single Digital Market Directive[28] contained mandatory exceptions for cultural heritage institutions to engage in text and data mining[29] and the preservation of the works in their collections.[30] Article 2(3) of the Directive defines cultural heritage institutions as a "publicly accessible library or museum, an archive or film or audio heritage institution."[31] Article 7(1) provides that "any contractual provision contrary to the exceptions" for text and data mining and preservation "shall be unenforceable."[32]

All 27 EU Member States have implemented the protections mandated by both the 2017 Marrakesh Directive and the 2019 Copyright in the Single Digital Market Directive in their domestic law.[33]

B. COP Clauses that Exceed Directives

Several EU Member States have enacted provisions protecting most if not all of their copyright exceptions from being overridden by contracts. In particular, these jurisdictions invalidate contract terms that purport to limit the specific exceptions enjoyed by libraries and archives. They are:

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aspects of copyright and related rights in the information society, O.J. (L 242) 6 [hereinafter Marrakesh Directive].

[25] *Id.*

[26] Article 2(4), Marrakesh Directive.

[27] Article 3(5), Marrakesh Directive.

[28] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on Copyright and Related Rights in the Digital Single Market, O.J. (L 130) 92 [hereinafter CDSM Directive].

[29] Article 2(2) defines text and data mining as "any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends, and correlations." The exception is in Article 3.

[30] Article 6 states the Member States shall provide for an exception "in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter to the extent necessary for such preservation."

[31] Article 2(3), CDSM Directive.

[32] Article 7(1), CDSM Directive.

[33] The following EU Member States have adopted COP clauses limited to those mandated by the Directives: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden. *See* Band, *Protecting User Rights* at 3.

- **Belgium.** Article XI. 193 of the Belgian Code de Droit Economique renders void contract terms contrary to the exceptions for document supply,[34] lending,[35] orphan works,[36] preservation[37] and Marrakesh Treaty implementation.[38]
- **Germany.** Under Article 60 g(1) of the German copyright law, "the rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance" with the exceptions for non-commercial media collections,[39] libraries,[40] and archives and museums.[41]
- **Ireland.** Section 2(10) of the Irish Copyright and Related Rights Act broadly provides that "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." Thus, a contractual restriction on any activity by a library permitted under the copyright law is unenforceable.[42]
- **Portugal.** Similarly, Article 75(5) of the Portuguese Code of Copyrights and Related Rights provides that "any contractual clause that seeks to eliminate or prevent the normal exercise by the beneficiaries" of uses permitted by specified exceptions "is null and void," including preservation and internal uses by libraries, archives, and museums; and dedicated terminals in libraries.[43]

II. JURISDICTIONS OUTSIDE THE EU

Several countries outside the EU have also adopted contract override prevention clauses. In most cases, they apply to all or virtually all copyright exceptions, including exceptions for libraries and archives.

A. United Kingdom

In 2014, when it was still a member of the EU, the United Kingdom adopted COP clauses with respect to many of the exceptions in the UK Copyright, Designs, and Patents Act, including those permitting the supply of copies to other libraries,[44] the making of replacement copies,[45] and the making of copies for users.[46] The UK had enacted COP clauses relating to software and databases in the 1990s after implementing

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[34] [Code of Economic Law] Title 5, Art. XI.190(13) (Belg.).
[35] [Code of Economic Law] Title 5, Art. XI.192(1) (Belg.).
[36] [Code of Economic Law] Title 5, Art. XI.192/1 (Belg.).
[37] [Code of Economic Law] Title 5, Art. XI.190(12) (Belg.).
[38] [Code of Economic Law] Title 5, Art. XI.190(15) (Belg.).
[39] Copyright Act, Art. 60b (Ger.).
[40] Copyright Act, Art. 60e (Ger.).
[41] Copyright Act, Art. 60f (Ger.).
[42] Copyright and Related Rights Act (2000), Sec. 50 (fair dealing) and Secs. 59-70 (libraries and archives) (Ir.).
[43] Code of Copyright and Related Rights (2017), Art. 75(5) (Port.).
[44] Copyright, Designs, and Patent Act, § 41(5) (U.K.)(adding language stating that "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").
[45] Copyright, Designs, and Patent Act,§ 42(7) (U.K.).
[46] Copyright, Designs, and Patent Act,§ 42A (U.K.).

the EU Software and Database Directives. In 2011, the Hargreaves Report, commissioned by the Prime Minister, recommended that "the Government should change the law to make it clear no exception to copyright can be overridden by contract."[47] The report observed that under existing law, it was "possible for rights holders licensing rights to insist, through licensing contracts, that the exceptions established by law cannot be exercised in practice."[48] As an example, the report cited a study by the British Library that analysed 100 contracts offered to the British Library and found that they often overrode the exceptions and limitations allowed in copyright law. The Hargreaves Report stated that enforcing these license terms "means a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright."[49] The report further observed that:

> Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted. Often, the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law. Even if unused, the possibility of contractual override is harmful because it replaces clarity ("I have the right to make a private copy") with uncertainty ("I must check my licence to confirm that I have the right to make a private copy").[50]

The Government's response to the report agreed with the recommendation "that unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception."[51] In 2014, the recommendation of the Hargreaves Report was implemented by the enactment of COP clauses applicable to most of the copyright exceptions in the UK Copyright, Designs, and Patents Act. The COP clauses remained in place after Brexit in 2020.

The UK's COP clauses are particularly noteworthy because the U.S. legal system is largely based on the UK's. U.S. contract, property, and copyright traditions all derive from the UK. The UK enacted COP clauses notwithstanding its deep-seated respect for the freedom of contract, and the COP clauses have not resulted in any reported legal tensions or incompatibilities. Moreover, the COP clauses have not caused economic difficulties for UK rightsholders, which include several of the world's largest publishers.

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[47] Ian Hargreaves, *Digital Opportunity:A Review of Intellectual Property and Growth* 51 (2011), https://assets.publishing.service.gov.uk/media/5a796832ed915d07d35b53cd/ipreview-finalreport.pdf.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Her Majesty's Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* 8 (2011), https://assets.publishing.service.gov.uk/media/5a7970f4ed915d042206873c/11-1199-government-response-to-hargreaves-review.pdf.

B. Singapore

Singapore, a former British colony, also has enacted COP clauses. In contrast to the simple, typically one-sentence COP clauses in Europe, Singapore has adopted a more complex and nuanced approach.[52] Under section 186 of the Singapore Copyright Act (2021), a rights owner can restrict application of a permitted use only through an individually negotiated contract.[53] In other words, restrictions on exceptions asserted through adhesion contracts, such as subscription agreements, are not enforceable.[54] Even if the contract is individually negotiated, its terms are enforceable only if they are fair and reasonable under a set of criteria set forth in the statute.[55] These criteria include the relative bargaining positions of the parties.[56]

Section 187 further restricts enforcement of individually negotiated contracts to the extent they purport to limit uses permitted by public collections such as galleries, libraries, archives, and museums under sections 221 through 236.[57] Thus, library exceptions prevail over individually negotiated contracts to the contrary. The only exclusion to this COP clause is section 234, which permits a library to make a copy of a work for inclusion in the collection of another library or supply to an individual.[58] Accordingly, a prohibition in a negotiated contract on a library making a copy of a work for another library or an individual would be enforceable if the prohibition were fair and reasonable under section 186.[59] All other restrictions on the exercise of library exceptions would not be valid.

Finally, section 188 anticipates efforts to circumvent the COP clauses through choice of law provisions. Section 188, entitled "Evasion through choice of law clause to be void," invalidates a term that purports to apply the law of a country other than Singapore if "the application of that law has the effect of excluding or restricting the operation of any permitted use;"[60] and "the term is imposed wholly or mainly for the purpose of evading the operation of any permitted use."[61]

C. Other Non-EU Jurisdictions

In addition to the UK and Singapore, several other non-EU jurisdictions have adopted COP clauses that apply to exceptions for libraries and archives. They are:

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[52] Copyright Act, §§ 186-188 (Sing.), *available at* https://www.wipo.int/wipolex/en/legislation/details/21883.
[53] Copyright Act, § 186(2)(a) (Sing.).
[54] Although Israel's Copyright Act also does not include a COP clause, the Ministry of Justice issued an opinion that under the Israel Standard Contracts Law, a clause that prohibits a permitted use under the Copyright Act is not enforceable as against public policy. Opinion of the Civil Law Department, Israel Ministry of Justice, *The relationship between permitted uses according to copyright law, and provisions in a standard contract that prohibit these uses* (July 5, 2016).
[55] Copyright Act, § 186(2)(b) (Sing.).
[56] Copyright Act, § 186(3)(a) (Sing.).
[57] Copyright Act, § 187(1)(a) (Sing.).
[58] Copyright Act, § 234 (Sing.).
[59] Copyright Act, § 186(2)(b) (Sing.).
[60] Copyright Act, § 188(1)(a) (Sing.).
[61] Copyright Act, § 188(1)(b)(i) (Sing.).

- **Cook Islands.**[62] Section 11(5) of the Copyright Act of the Cook Islands provides that "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."[63] This provision applies to the exceptions for libraries, archives, museums, and galleries in section 20.
- **Kuwait.**[64] Article 32 of the Kuwait Copyright Law states that "any agreement contrary to the limitations and exceptions set forth in this chapter shall be null and void," including library exceptions for replacing damaged copies, preservation, and completing works.[65]
- **Moldova.** Article 31(4) of the Moldova Law on Copyright and Related Rights provides that "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."[66] This applies to Article 21 concerning libraries.
- **Montenegro.** Article 45 of the Montenegro Law on Copyright and Related Rights (2011) asserts that "limitations to copyright … may not be waived," and that "the provisions of a contract or other legal act stipulating the user's waiver of the permitted limitations ... shall be null and void."[67] This provision applies to Article 52 and 60, concerning library copying and dedicated terminals.
- **Nigeria.**[68] Recent amendments to the Nigeria Copyright Act added Section 20(3), declaring that "any contractual term which purports to restrict or prevent the doing of any act permitted under this Bill shall be void." This COP clause covers the exception for libraries and archives[69] and the fair dealing provision based on 17 U.S.C. § 107.[70]

III. THE CURRENT SITUATION IN THE UNITED STATES

In contradistinction to the copyright laws of the countries discussed above, the U.S. Copyright Act does not include a provision directly preventing the exceptions granted libraries from being overridden by contract. To the contrary, section 108, which sets forth exceptions for libraries and archives, states that "nothing in this section … in any way affects … 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."[71]

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[62] The Cook Islands follow British legal traditions. They became a British Protectorate in 1888, and then were annexed into the colony of New Zealand in 1901. Since 1965, the Cook Islands have been a self-governing territory in free association with New Zealand.
[63] Copyright Act, S 11(5) (Cook Islands).
[64] Kuwait was a British protectorate from 1899 to 1961, and its legal system incorporates some British common law traditions.
[65] Copyright Law (2019), Art. 32 (Kuwait).
[66] Law on Copyright and Related Rights, Art. 31(4) (Mold.). Moldova is a candidate for joining the EU.
[67] Law on Copyright and Related Rights, Art. 45 (Montenegro). Like Moldova, Montenegro is a candidate for joining the EU.
[68] Nigeria is a former British colony that follows many British legal traditions.
[69] Copyright Act, 2022 § 20(1)(m), § 25 (Nigeria).
[70] Copyright Act, 2022§ 20(1) (Nigeria).
[71] 17 U.S.C. § 108(f)(4).

On its face, this provision appears to ensure that the section 108 exceptions yield to conflicting contract terms. However, the House Report explaining this provision arguably narrows its intent: "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."[72] In such a situation, the right of reproduction granted by section 108 would not override any contractual arrangements assumed by the library when it obtained the work for its collection.[73] Arguably, Congress did not intend for this clause to reach the more typical circumstance of a library obtaining a published work on the open market.

Moreover, the existence of this provision in section 108 creates a negative pregnant with respect to other exceptions relied upon by libraries, such as fair use in section 107 and the Marrakesh Treaty implementation provisions in sections 121 and 121A.[74] In other words, Congress's assertion that section 108 does not affect contractual obligations prohibiting copying indicates that sections 107, 121, and 121A may affect such obligations; that is, that sections 107, 121, and 121A supersede conflicting contract limitations. In effect, section 108(f)(4) could be read as indicating that other copyright exceptions do have preemptive effect on the enforcement of inconsistent contract terms under state law, either by operation of the express preemption provision in 17 U.S.C. § 301(a) or conflict preemption under the Supremacy Clause of the U.S. Constitution.[75]

Nonetheless, in the absence of clear case law on either express or conflict preemption of contract terms inconsistent with the Copyright Act's exceptions, the Library of Congress promulgated a regulation that in effect creates a COP clause with respect to any license it joins. 36 C.F.R. § 701.7(e) provides that the following clause "is deemed incorporated in each license agreement to which the Library of Congress is a party:"

> 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.

The Library of Congress is in a unique position among U.S. libraries in that it can promulgate legally binding regulations to protect itself. To be sure, a publisher could in theory refuse to license its digital works to the Library of Congress in order to avoid this clause, but there is no reported instance of a publisher doing so. Other libraries can attempt through negotiations to limit publishers' demands for contractual restrictions on

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[72] H.R. Rep. No. 94-1476 at 77 (1976).

[73] *Id.*

[74] 17 U.S.C. §§ 107, 121, 121A.

[75] Preemption of inconsistent contract terms is a complex issue beyond the scope of this article, which focuses on explicit COP clauses. For a more detailed discussion of preemption in the United States, *See, e.g.*, Guy Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 Va. L. Rev. 1141 (2017). For a discussion of other contract law theories which could be used to challenge license terms limiting exceptions, *See* Jonathan Band and Krista Cox, *The Enforceability of License Restrictions on Ingestion for Artificial Intelligence Training Purposes*, *available at* https://www.arl.org/wp-content/uploads/2024/04/Contract-override_AI.pdf (Apr. 2024).

exceptions, but typically they do not have the bargaining power to succeed.[76] A library's ability to enjoy an exception enacted by Congress should not have to depend on the library's leverage in licensing negotiations with a publisher.

IV. THE ARGUMENTS CONCERNING ENACTMENT OF A COP CLAUSE FOR LIBRARIES IN THE UNITED STATES

U.S. libraries have engaged in efforts to preserve their statutory rights against encroachment by contracts on digital content by advocating for the enactment of a COP clause similar to those adopted overseas.[77] In 1997, they supported the introduction of legislation that would have amended 17 U.S.C. § 301 to preempt explicitly contract terms limiting exceptions.[78] Likewise, in 2002, they endorsed legislation that would have created a COP clause in a new section 17 U.S.C. § 123: "When a digital work is distributed to the public subject to non-negotiable 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."[79] Unfortunately, from the library perspective, neither bill advanced.

The issue has been addressed in various government-sponsored inquiries in which libraries participated. Although the Copyright Office decided that what it referred to as "contract preemption" was outside the scope of its DMCA Section 104 study, it noted that "the issue is complex and of increasing practical importance, and, as such, may be worthy of further consideration at some point in the future."[80] The Office observed that "copyright has long coexisted with contract law, providing a background of default provisions against which parties are generally free to order their own commercial dealings to suit their needs and the realities of the marketplace." [81] At the same time, the willingness of courts to enforce non-negotiated licenses "increases the likelihood that right holders, and not the copyright policies established by Congress, will determine the landscape of consumer privileges in the future."[82] The Office opined that "although market forces may well prevent right holders from unreasonably limiting consumer

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[76] Katherine Klosek, *Protecting Library Rights,* 84 College & Research Library News (2023), https://crln.acrl.org/index.php/crlnews/article/view/26045/33975.

[77] *See, e.g.,* Robert Oakley, The Principles of the Library Copyright Alliance, Goal 4.2 (2004) https://www.librarycopyrightalliance.org/principles/. ("The goals and policies set out in this document are important statements of national and international principle and should not be varied by contract.").

[78] H.R. 3048, 105th Cong., § 7 (1997) (providing that "when a work is distributed to the public subject to non-negotiable license terms, such terms shall not be enforceable under the common law or statutes of any state to the extent that they… abrogate or restrict the limitations on exclusive rights specified in sections 107 through 114 and sections 117 and 118 of this title").

[79] H.R. 5522, 107th Cong. (2002).

[80] U.S. Copyright Office, DMCA Section 104 Report 164 (2001), *available at* www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[81] *Id.*

[82] *Id.*

privileges, it is possible that at some point in the future a case could be made for statutory change."[83]

Subsequently, this issue was a major point of contention in the Section 108 Study Group, a task force of publishers and librarians assembled by the Library of Congress and the Copyright Office to review the exceptions for libraries in section 108.[84] The Study Group considered whether to recommend amendment of the statement in section 108(f)(4) that nothing in section 108 affects contractual obligations. The Study Group reached the following conclusion:

> The Study Group agreed that the terms of any negotiated, enforceable contract should continue to apply notwithstanding the section 108 exceptions, but disagreed as to whether section 108, especially the preservation and replacement exceptions, should trump contrary terms in non-negotiable agreements.[85]

In explaining its conclusion that negotiated terms should be enforced notwithstanding exceptions to the contrary, the Study Group stated that

> freedom to contract is a fundamental principle in American law, and the statutory nullification of a contract is generally allowed only in cases of unequal bargaining power (as reflected in certain labor and employment laws) and contracts that are unconscionable, fraudulent, or threats to public safety (as reflected in consumer protection laws).[86]

The Study Group opined that it did "not believe that the goal of preservation warrants interfering with valid, negotiated, enforceable agreements at this time."[87]

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[83] *Id.* The Department of Commerce Internet Policy Task Force reached a similar conclusion in 2016. It found that "licensing agreements between eBook publishers and libraries are new and evolving, and we worry that early government intervention into the eBook market could skew the development of innovative and mutually beneficial arrangements. More time should be given to see whether market forces…will produce desired outcomes. If over time it becomes apparent that libraries have been unable to appropriately serve their patrons due to overly restrictive terms imposed by publishers, further action may be advisable." U.S. Dep't of Com. Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages*, 61 (2016), *available at* www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf.

[84] *See* SECTION 108 STUDY GROUP, https://www.section108.gov/ ("The Section 108 Study Group was a select committee of copyright experts formed in 2005 and charged with updating for the digital world the Copyright Act's balance between the rights of creators and copyright owners and the needs of libraries and archives. The Study Group was convened as an independent group by the former National Digital Information Infrastructure and Preservation program of the Library of Congress and by the U.S. Copyright Office. The Study Group issued its final report in March 2008. The recommendations, conclusions, and other outcomes of the Study Group's Report are its own and do not reflect the opinions of the Library of Congress or the U.S. Copyright Office.")

[85] Section 108 Study Grp., *Report of the Section 108 Study Group*, 120 (2008), available at www.section108.gov/docs/Sec108StudyGroupReport.pdf.

[86] *Id.* at 121.

[87] *Id.*

Conversely, there was a divergence of views with respect to non-negotiated agreements:

> Preservation is nonetheless an important public policy objective, and some Study Group members believe it is sufficiently important that non-negotiable licenses, such as shrink-wrap, click-wrap, and browse-wrap agreements, not be permitted to trump the section 108 exceptions, particularly the preservation and replacement provisions.[88]

The librarians in the Study Group argued that licenses for electronic content typically are offered only on a "take it or leave it" basis, where libraries have "no opportunity to affect the terms of the bargain."[89] They suggested that section 108's exceptions should "trump" non-negotiated contracts "because adherence to these non-negotiable terms could interfere with the ability to preserve important materials for posterity and undermine the public policy goals of section 108."[90]

In contrast, the publishers in the Study Group argued that the enforceability of terms in non-negotiated contracts "should continue to be decided by reference to existing state law and judicial decisions that address issues related to the enforceability of contracts, and not determined by changes in federal copyright law."[91] They noted that "there are well-developed rules under state law for 'policing the bargain' and for refusing to enforce contracts where enforcement would be unjust."[92] For example, a court could void a contract it finds to be unconscionable, or it could invalidate a particular term of a contract when the term violates a tenet of public policy, such as a clause that unfairly dictates the forum in which disputes are to be litigated. In short, they believed that "existing legal tools are sufficient to address contractual issues among libraries and archives and rights holders."[93] Because of the lack of consensus on this and other points, no action was taken on the Study Group Report.

In 2017, in its discussion document on section 108, the Copyright Office proposed amending section 108(f)(4) discussed above as follows:

> (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).[94]

While the proviso represented a helpful first step, it did not go far enough. In particular, while a library would not be liable for copyright infringement for violating a contractual provision prohibiting the making of preservation copies, it could still be liable

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[88] *Id.*
[89] *Id.* at 122.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Register of Copyrights, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* U.S. COPYRIGHT OFFICE, 55 (2017).

for breaching the contract. An effective COP clause would shield the library from liability for both copyright and contract claims.

The Copyright Office based its refusal to limit libraries' liability for breach of contract on its belief "that the sanctity of the freedom to contract remains an integral part of a well-functioning copyright system."[95] The Office viewed its proposed language as a compromise between the needs of preservationists and the sanctity of contracts.

From the Copyright Office's Section 104 Study, the Section 108 Study Group Report, and the Copyright Office's Section 108 Discussion Document, three rationales emerge for opposing adoption of a COP clause for libraries: 1) the sanctity of the freedom of contract; 2) faith that market forces will resolve the libraries' concerns; and 3) the availability of state law doctrines such as unconscionability. These three rationales are inadequate, particularly in the face of the potential harm to preservation activities, which the Copyright Office acknowledges is "a crucial public good,"[96]

The freedom of contract is "sacred" until it isn't.[97] There are numerous examples in both the U.S. Code and state statutes of prohibitions on the waiver by contract of rights granted by statute.[98] These arise in situations where the legislature decides that unequal bargaining strength could lead to the compromise of important public interests.[99] That precisely describes libraries licensing digital content from publishers.[100] When a professor of astrophysics requests her university library to license the leading astrophysics journal, the library needs to license that particular journal; a different astrophysics journal would not contain the same articles and would not serve the professor's research needs. The library therefore has little leverage and must accept the terms imposed by the publisher.

For the same reason, the argument that market forces could resolve this issue fails. Indeed, it is odd that the Copyright Office and publishers would even suggest that it could. The argument implies that works of authorship are fungible; that if, for example, one publisher places restrictions on a library making an accessible copy of an ebook, a blind student's needs would be satisfied if the library could make an accessible copy of a different ebook distributed by a different publisher.

The argument that libraries could rely on existing state contract law doctrines is equally flawed. It would require a library to decide to engage in an activity that violates a license term in the hope that an unconscionability defense would prevail in the event the publisher sued, and that the publisher wouldn't simply terminate the contract and suspend access to the content. Libraries typically do not have the funds to engage in this sort of

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[95] *Id.* at 48.

[96] *Id.* at 47. Although the Register in the Section 108 Discussion Document referred to preservation of cultural heritage as "a crucial public good," the Copyright Office in its Section 104 Report viewed "contract preemption" merely as a matter of protecting "consumer privileges." U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 164 (2001). An exception enabling the preservation of cultural heritage is far more than a "consumer privilege." Copyright cannot fulfill its constitutional objective of promoting public access to information if it prevents the preservation of information.

[97] *See Section 108 Study Group Report* at 121.

[98] *See, e.g.*, 5 U.S.C. § 8479(a) (duties of fiduciaries); 7 U.S.C. § 26(n)(1) (commodity exchanges); 10 U.S.C. § 987(e)(2) (consumer lending); and 11 U.S.C. § 522(e) (bankruptcy).

[99] *See Section 108 Study Group Report* at 121.

[100] *See* Klosek, *supra* note 77.

litigation, and the general counsel of even well-resourced institutions would not authorize such an aggressive approach. It is also unrealistic to expect risk-averse libraries to initiate a declaratory judgment action against a publisher concerning the license terms it imposed. The publisher could just terminate the contract, suspend access to the material, and leave the library to contend with frustrated faculty members who cannot access the content they need for their research.[101]

The deliberations discussed above concerning a COP clause in the U.S. for libraries all occurred before COP clauses for libraries became ubiquitous in Europe over the past five years. It appears that the COP clauses were adopted in Europe with little public opposition from publishers, and there have been no reports of the clauses having adverse effects on publishers. The existence of COP clauses for libraries throughout Europe, including in countries with major publishing industries, indicates that such a clause here would not prejudice the interests of copyright owners in the United States.[102] And the existence of a COP clause in the UK, where the concept of freedom of contract first developed, should put at ease those concerned with its sanctity.[103] At the same time, it would ensure that libraries could continue to perform their historic mission of preserving and providing access to our cultural heritage as it is increasingly distributed in digital format. Otherwise, rightsholders could unilaterally erase the exceptions adopted by Congress under the Constitution's IP clause. The COP clause could have the granularity of Singapore's, treating negotiated and non-negotiated contracts differently, applying differently to different library privileges, and anticipating choice of law clauses attempting to evade the effectiveness of the COP clause. These are details that could be worked out during the course of the legislative process.[104]

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[101] In the section 1201 triennial rulemakings, some copyright owners have suggested that an exemption from the prohibition on circumvention for the purpose of film preservation was not necessary because the vast majority of motion picture titles remain available through streaming services, download services, and on-demand cable and satellite services. *See, e.g.*, REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION at 92 (2021). Taken to its logical conclusion, this argument suggests that preservation exceptions, and by extension a COP clause directed towards preservation, are no longer needed. Contrary to this assertion, copyright owners often do not have the economic incentive to properly preserve their entire backlist and there is no shortage of examples of works that have been lost due to inadequate preservation by their copyright owners. Preservation remains a critical function of cultural heritage institutions.

[102] Three of the five largest trade publishers are based in Europe. Penguin Random House is owned by the German publisher Bertelsmann; Hachette is French; and Macmillan is owned by the German publisher Holtzbrinck. Similarly, three of the four largest scientific, technical, and medical (STM) publishers have European headquarters. Elsevier is a Dutch company owned by a British holding company; Springer Nature is owned by the German publisher Holtzbrinck; and Taylor & Francis is British. Pearson, the world's largest textbook publisher, is British.

[103] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Cannan ed., 1815).

[104] The bills previously introduced in Congress in 1997 and 2002 applied broadly to all non-negotiated licenses for digital content. The paper argues for a narrower COP clause focused only on licenses with cultural heritage institutions.

If Congress fails to act, then it is up to individual states and their contract law.[105] In 2023, contract override prevention clauses were introduced, but ultimately not enacted, in Rhode Island,[106] Massachusetts,[107] Connecticut,[108] Hawaii,[109] and Virginia[110] legislatures as part of broader legislation addressing ebook-related issues. Similar bills are still under consideration in some states.[111] The 2023 Rhode Island bill, for example, provided that "any license term that limits the rights of a library or school under the U.S. Copyright Act shall not be enforceable."[112] The bill also provided that any ebook license offered to the public in Rhode Island would be governed by Rhode Island law.[113] The Rhode Island COP clause, had it been enacted, likely would not have been found preempted by the federal Copyright Act because it would have sought to eliminate, rather than create, a conflict between federal and state law.[114] Nonetheless, a federal COP clause obviously would be preferable to 50 state COP clauses because it would preserve "a nationally uniform system for the creation and protection of rights in a copyrighted work."[115]

CONCLUSION

More than thirty countries in four continents have adopted clauses in their copyright laws that prevent contracts from overriding the copyright exceptions granted to libraries. These countries include Germany and the UK, where many of the world's largest publishers are headquartered. To enable U.S. libraries to continue to perform their historic mission of preserving and providing access to copyrighted materials, Congress should follow the lead of these jurisdictions and enact a statutory provision that voids license terms inconsistent with the copyright exceptions benefitting libraries.

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[105] In the late 1990s, libraries sought to include a COP clause for libraries in the Uniform Computer Information Transactions ACT ("UCITA") then under development by the National Conference of Commissioners on Uniform State Law ("NCCUSL"). This effort did not succeed, and the libraries participated in a coalition that prevented the adoption of UCITA in any state other than Maryland and Virginia.

[106] H.B. 5148/S 498 2023 Gen. Assemb., Reg. Sess. (R.I. 2023).

[107] H.D. 3425 2023 Gen. Assemb., 193rd Gen. Ct., (Mass. 2023).

[108] H.B. 6800/H.B. 6829 2025 Gen. Assemb., Jan. Sess. (Conn. 2025). The ebook legislation passed by the Connecticut legislature in 2025, SB1234, did not contain a COP clause. Instead, it prohibited a state funded library from entering into an ebook license agreement that, inter alia, "[p]rohibits the library from making nonpublic preservation copies of any electronic literary material." *See* Sec. 1(c)(4).

[109] H.B. 1412 2023 Gen. Assemb., Reg. Sess. (Haw. 2023).

[110] S.B. 1528 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

[111] *See* eBook Study Grp., State-By-State Legis. Updates, https://www.ebookstudygroup.org/bill_tracker.

[112] H.B. 5148/S.B. 0498, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023), §6-59-4(b).

[113] H.B. 5148/S.B. 0498 2023 Gen. Assemb., Reg. Sess. (R.I. 2023), §6-59-4(a).

[114] *See* Orson, Inc. v. Miramax Film Corp., 189 F.3d 377, 386 (3d Cir. 1999) (en banc) ("a state regulation falling within the federally established exceptions to those rights, such as fair use, *See* 17 U.S.C. § 107, may obligate a copyright holder to change its practices to accommodate such uses").

[115] *Id.* at 382.