

Challenge of Licensing Scheme on Public Access in Copyright Realm

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Introduction

The purpose of the copyright law is to advance the progress of science and the useful arts to benefit the public. The right holders or creators is awarded a set of exclusive rights namely a limited, statutory monopoly over reproduction, distribution, display, performance, and adaptation of the created work-in order to provide creators an economic incentive to create. Meanwhile, the copyright law also sets aside numerous exceptions to right holders' right to ensure that users of copyrighted works can lawfully use the materials in other ways.

In recent years, a copyright legislative battle has ensued between copyright holders which primarily represented by the publishing, entertainment, and software business industries and those who wish to use or have access to copyright materials which primarily represented by library, educational, and public interest communities. Many instruments including the digital right protection measures have been continuously created to protect the right holder's legitimate interest from free-based information access.

Contractual agreement under the licensing system becomes the potential option for the right holder to control and choose who, when, and how they would like to deal with for they are of opinion that copyright law cannot prevent them from being infringed and protect the marketplace for intellectual property by

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controlling access and use. Furthermore, in order to remedy this deficiency of current copyright law, creative common is designed to sculpture an innovative licensing scheme. It provides an infrastructure, legal and technological advancement. However, it is arguable whether or not the creative common could overcome the impediments on access to informational works.

At the same time, users argue that their rights to information should be upheld regardless of technological innovation and digital formats. Additionally, they are of views that licensing system can control their access over copyrighted works which contravenes the free-based access granted under the realm of fair use doctrine.

Public Access in Copyright Realm

Copyright law has been promulgated to protect copyright holder's interests on the one hand and to promote public access to ideas, information, and works of authorship in a number of ways on the other hands. The grant of exclusive rights to authors promotes public access because it presumes usually correctly that authors intend to make their works widely available to the public and will, in fact, do so as long as they have the right to control unauthorized exploitations.

Numerous other means to promote public access have also been adopted. First, the first sale doctrine, a limitation on the right of right holders to control copies of their works that have been distributed to the public, is created to promote public access. This doctrine provides that the first sale of copy of a work to a member of the public "exhausts" the right holder's ability to control further distribution of that copy. Besides, this doctrine can ensure the public that they will not be in charge of violating the right holder's ownership. Moreover, the first sale doctrine also greatly assists non-profit institutions, such as libraries and

educational institutions to exercise the right of public-access- promoting privileges for their operation.

Secondly, copyright legislation additionally grants provisions concerning compulsory licenses to promote new recordings of copyrighted music, cable distribution of broadcast network programming, and jukeboxes of sound recordings, all of which have public access implication.¹ Thirdly, fair use doctrines created to promote public access. The most common form of fair use is the ability of an author to quote from previous works in order to comment on them or report news about them. Also, fair use rules about the reproduction of copyrighted works for research or study purposes regardless the right holder's permission.

Finally, public access is also promoted by the limited duration of monopoly rights conferred under copyright law. Every copyrighted work eventually becomes part of the public domain, making the work even more widely accessible to the general public by virtue of its royalty free public domain status. Nonetheless, a problem may occur in a public domain work if such work may go out of print in case that no one is willing to invest in preserving the work without the ability to assert exclusive rights as a way of recouping the investment.² Contractual arrangements can attempt, as a matter of contract between two parties, to create protection beyond the date of copyright expiration. Recently, within the form of licensing agreements, contractual system made between two parties for making use of copyrighted materials with the royalties fees are required, is dramatically popular since the printed copyright materials

¹ Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington, U.S.A, 2000, p. 99-100

² Ibid, p. 96.

have been transformed to digital copyrighted materials. In order to control information access, contractual agreement is the potential option in this particular role. It seems to say that the free-based use of copyrighted work is gradually diluted (as fee-based access can facilitate the right holders the right of access control, copy control, and award from their creations) nowadays even such reproduction is done for non-commercial purposes.

Contractual system is another layer of protection available to copyright holders. Copyright holders are able to set the terms of use through licences. To operate the markets for copyright materials in the most efficient way for the benefit of right holders and users of such copyright materials, the operation will include contractual modification of the relationship between the parties where modification is dictated by the market. The right holders will attempt to ensure that usage is governed by contractual terms in private transactions as well as the rights provided by copyright laws to obtain the benefit of extra protection that contractual rights will bring. The right holders have always negotiated contracts which specify the particular nature of the relationships,³ in regard to commercial rights such as distribution, reproduction, and translation. Users also accept the need for specific terms to facilitate their use and enjoyment of these works.

Phenomenon of Licensing System on Today-Copyrighted Work Access

Licensing system including contractual system has been widely used in our daily life—a digital era particularly in software world. Software programmers and developers currently distribute their products under licenses, rather than by the sale of copies. A variety of licensing schemes exist. Shrink wrap license, a

³ Graw S, *An Introduction to the Law of Contract*, 5th ed, Thomson Lawbook Co., Sydney, NSW, 2005, pp. 442-446.

license that typically recites as one of its first points that the consumer is purchasing a right to use the software and that the software remains the property of the manufacturer, is currently addressed for it can deliver a mass market software which can return the right holder invaluable compensation.⁴ However, the law is unsettled on issues concerning the enforceability of shrink-wrap licenses. This is because it seems to believe that shrink-wrap license would be an invalid contract of adhesion in which a standard contract form offered to consumers without affording the consumer a realistic opportunity to bargain.⁵ Uncertainty on this kind of licensing agreements is still questionable as to whether it can help maintain the right to access information for the consumers or not.

Furthermore, another type of licensing schemes, site licenses--the license in which organization purchases the right for all its members at a particular location to use-metered payment for software,⁶ are offered to the community by the licensors. More generally, licenses for software offer the potential to custom tailor the agreement in ways that are less easily done with outright sale. Within the entertainment industry, licensing is often used, for instance, in the exhibition

⁴ Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, VIRGINIA JOURNAL of LAW and TECHNOLOGY, University of Virginia, Fall 2000, 5 VA. J.L. & Tech. 11, also see at <http://www.vjolt.net/vol5/issue3/v5i3a11-Ravicher.html>.

⁵ David L. Hayes, ESq., *The Enforceability of Shrinkwrap License Agreements On-Line and Off-Line*, March 1997, retrieved at <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf>. (June 2010)

⁶ Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington, U.S.A, 2000, p. 96.

of movies in a theater. Access to online databases also occurs frequently under a licensing arrangement.⁷

It is simply say that licensing system is a newer phenomenon for some other digital information products particularly for those traditionally delivered in physical form. An increasing amount of the information acquired by libraries, for example, is in digital form, and unlike print materials, which have historically been available on a sale-of-copy basis; digital materials are frequently available only through licenses.

Since the introduction of existing licenses is successful, the right holders and licensors keep developing and offering new licensing systems in order to close the ambit of free-based information access, private use exceptions granted by the copyright legislation, which can basically cause them the loss to control their works from being infringed. The vagueness of reasonable proportion of fair use reproduction is come across the right holder's mind as to whether such reproduction is able to strike a power to protect their exclusive rights from the unfair practice or not. Thus, it is undoubtedly for the right holders to uphold the adoption of licensing system in these present days as they give a viewpoint that the licensing agreement benefit them a great outcome. There are potential advantages of licensing agreement as follows:

- The licensing agreement may provide clarity on terms and conditions of access.
- The licensing agreement may provide for an increase in the rights for the institution that go beyond those provided under copyright. This is because the agreement made under the licensing system is private matters which efficient preventing the controversial concern between parties if a point to negotiate is done in good order.

⁷ Ibid.

- The licensing agreement may limit the organization's liability in the case of misuse by patrons.⁸ Considering the degree of financial, ethical, and legal exposure, establishing a written agreement is increasingly endorsed by both librarians and publishers.

- The licensing arrangement can also allow consumers to access information at a more specific level. For instance, consumer is plausibly allowed to obtain access to the exclusive summary for a limited period of time instead of purchasing a book. Thus, licensing can increase the options for making information available.

Nevertheless, some stakeholders argue about the effect of the application of licensing agreement on the users' benefit in terms of fair practice on information access. There are concerns about licensing as a model of information dissemination, particularly the impact it may have on public access. The trend toward licensing means that digital information is in some ways becoming a service rather than a product.⁹ The increased use of licensing seems to diminish greatly the public access accorded through the first sale doctrine. Consider libraries as an archetypal example. In the print world, a library's failure to renew a subscription or buy an updated version of a book has no effect on the availability to patrons of earlier volumes or editions.¹⁰ In the world of licensed

⁸ Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington, U.S.A., 2000, p. 97-100.

⁹ Ibid, p 1

¹⁰ Davis R, 'The Digital Dilemma', 20001 retrieved at

information, ending a subscription to an electronic journal may mean the end of access to earlier volumes or editions, as well.

A second issue arises from the nature of licenses as contracts. Contracts might not incorporate and indeed may attempt to override the public policy considerations that have been carefully crafted into copyright law. Those who contract for information may find that their access is far more restrictive than what they were accustomed to for printed materials, unless fair use and other such considerations are explicitly a part of the agreement.

Some institutions, especially libraries have worked to negotiate licenses that preserve fair use and other public access features. Publishers are currently experimenting with licensing models to respond to these concerns. Yet the concerns remain about the use of mechanism such as licensing that lacks any of the built-in protections for public access that are embodied in copyright law.

Mass marketed information products raise a more general concern about the proliferation of licenses.¹¹ Where some institutions are by necessity becoming more sophisticated negotiators, the institutions is far less clear for the typical consumer. Consumer may face the prospect of having to scan tiny print of licenses to see whether fair use or other public access policy considerations have been incorporated. This prospect can be supported by the belief of the override of contracts to those considerations. If a license term prohibits making disparaging

http://www.wipo.int/edocs/mdocs/ecommerce/en/wipo_ec_conf_01/wipo_ec_conf_01_spk_2c.pdf (July 2010), See also at *Communications of the ACM*, Vol. 44, No. 2 (February 2001), p 77-83

¹¹ Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington, U.S.A, 2000, p 96

remarks about the licensed information or disclosing flaws to other potential users, should that term be enforced? This question has been the subject of debate and is far from resolved.

In the printed world, efforts to impose “license” restrictions on mass marketed copies of copyrighted works were generally treated as ineffective. New license models that entirely avoid the foregoing problems could be part of these new paradigms for public access. Some recent case law and proposed legislation would enforce mass market licenses in the case of digital information. Nevertheless, the issue remains unsettled. The mass market issue raises an additional concern if licensing becomes the dominant model of distribution for works that are considered part of our intellectual and social heritage.¹²

The cost associated with licensing copyrighted materials has increased exponentially in recent years. This can be attributed to two developments. One is substantive: the expanded scope of copyright protection. The other is procedural: removing formal requirements. The expansion of copyright protection to cover more subject matters, extended duration and additional rights reduced the volume of works that are freely available to build upon. Furthermore, not only the expansion of copyrights, but also some characteristics of the digital environment make informational works less available. For instance, overlapping rights — held by different right holders — make it more costly to secure a license to use a copyrighted work.

Some authors and right holders believe that if copyright law is perceived as inadequate or providing too many exceptions, the right holders may ignore

¹² Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington, U.S.A., 2000, p 96

copyright altogether and rely on contractual remedies. Although access to material via contract may provide users with greater certainty as to the scope of “private uses”, use of contract law together with technological forms of protection, such as through encryption, will weaken current rights to access and re-use ideas.¹³ However it should be noted that potential problems may exist under contract and trade practices law when imposing harsh or unreasonable contractual terms in relation to information or copyright material deemed essential to the production of new goods.

The extension of electronic and other trade in copyrighted works and other subject matter is subject to agreements which exclude or modify the copyright exceptions and the nature of any differences between online and offline trade. This is because both owner and user interests variously accepted that electronic trade in copyright material differs from non-electronic trade in that:

- 1) contracts generally take the form of licenses for access to copyright material;
- 2) copyright material in electronic form is more vulnerable to unauthorized copying;
- 3) copyright (and other) material can be protected by technological protection measures;
- 4) mass direct contracting with end-users is possible; and
- 5) contracts are more likely to be transacted across national borders.

In general, if a contractual provision prohibits an activity allowed by the copyright legislation, that activity will not infringe copyright, but it may breach the contract. The exceptions imposed in the copyright legislation are not excluded

¹³ Brudenall P, ‘The Future of Fair Dealing in Australian Copyright Law’ (1997) 1997(1) *Journal of Information, Law & Technology* <http://www.worldlii.org/int/journals/JILT/1997/3.html>. (3 January 2007).

or overridden by contract, but an activity allowed under the copyright legislation may breach a contract. It may also breach other areas of law.

It is timely to discuss whether the contractual and licensing systems affect the tradition of the copyright law. There is another kind of licensing system, which is currently called for attention, *creative common*-- a new non-profit licensing system whereby the copyright owner can define which rights are transferred to an end-user, for the users. The creative common is introduced to handle the belief that copyright law creates barriers on access to creative works. Several stakeholders believe that copyright law creates relatively high information costs, due to the nature of copyright subject matters. There is no wondering that creative commons perceives the current copyright regime as the major obstacle for creative activity.

Thus, creative common system is widely used and it is now available in over 40 countries, and mainly covers audio, images and video. Licenses have been utilized by individuals and by large corporations. Perhaps one key advantage of these licenses is that some of them can allow remixing or adaptation of content, a right usually missing from more traditional licenses.¹⁴ The idea is to facilitate the release of creative works under generous license terms that would make works available for sharing and reuse. Creative Commons advocates the use of copyrights in a rather subversive way that would ultimately change their meaning. It introduces an innovative way of exercising legal rights to bring about social change.¹⁵

Nevertheless, the licensing agreement under the scope of creative common can still charge the user for the licensing fees even though this kind of

¹⁴ Louise Cole, 'Copyright in the digital age: a UK perspective' 2006 retrieved at <http://uksg.metapress.com/app/home/contribution.asp?referrer=parent&backto=issue,15,29;journal,1,1;linkingpublicationresults,1:120087,1> (July 2010)

¹⁵ Ibid.

license may significantly reduce transaction costs. Thus, creative common still lifts a major barrier on access as the use of copyrighted work for non-commercial purposes must reach the requirement of fee based access. Some critics question as to whether creative common licenses are truly useful for artists, suggesting that creative commons is directed mainly toward a “remix culture” that often fails to account for the real needs, such as financial compensation and recognition, of fine artists, especially in the visual arts world.¹⁶ Some critics also worry that a system that does not allow authors to obtain a reward for their creations will cause some artists to avoid sharing their work.¹⁷ Moreover, some copyright protectionists are of views that creative commons lacks a comprehensive vision of the information society and a clear definition of the prerequisites for open access to creative works.

Creative common system is still being questionable in its application. Also, other types of licensing systems still put the challenges to the intention of fair use doctrine designed. The fee-based information access replaces the free-based information access. Licensing arrangement currently plays an important role in this new information environment. As with licenses, technical protection systems can allow content owners to restrict access to and uses of their works in ways not possible in the printed world. These systems are intentionally pushed forward to control information access.

Many right holders have high hopes that the licensing system will provide them with control over unauthorized uses, thereby enabling worldwide markets

¹⁶ David berry, Gil Moss, ‘On the :Creative Common”: A Critics of the Commons Without Commonalty’, (2005-07-15) Retrieved at http://www.freesoftwaremagazine.com/articles/commons_without_commonality (July 2010)

¹⁷ Sharee L. Broussard, ‘The Copyleft Movement: Creative Commons Licensing’, (September 2005), Retrieved at http://findarticles.com/p/articles/mi_7081/is_3_26/ai_n28457434/?tag=content:coll, (July 2010)

for a variety of digital information products to emerge and thrive on the Internet. Indeed, without effective technical protection systems, right holders may well choose to restrict greatly the availability of their most valuable digital content. This would clearly remove much of the public access that has been an inevitable part of more familiar information access methods. Some stakeholders believe that the new information environment poses challenges on the way of public access to copyrighted materials.

Conclusion

In the absence of notice and registration requirements, copyright becomes the default. A new work is copyrighted from the moment it is created. Consequently, not only works produced for commercial purposes, but also every original work of authorship is automatically covered by copyright. Expiration date is not marked on works and it is difficult to tell whether a work is still protected. Consequently, it becomes more expensive to identify works that are in the public domain and are available for reuse and free of any legal restrictions.

Licensing system is created to keep control the copyrighted works from unauthorized uses, while facilitating the users to make use of copyright with the agreeable price within the specified period of time. This system can be helpful to the stakeholders to protect themselves from copyright infringement. Licenses are private contracts between two parties and are written to define what the users can or cannot do with licensed materials. Once a license agreement is signed, the agreement takes precedence over any rights users may enjoy under the federal copyright law. It is sometimes hard for the right users to negotiate license terms for their best interests as better terms frequently mean higher subscription fees. Some fees are too expensive for the users so they may settle for license terms that restrict access, lending and fair use activities, like printing an article from a full-text database for personal use.

There is recognition that the licensor often has a bargaining advantage in crafting the initial license terms. The licensee or user is thus forced to obtain the restrictive terms and conditions of such licensing agreement. It is deemed to believe if the licensing systems as well as contractual systems manage the access of copyrighted works in today-information environment, free-based public access allowed under the copyright regime will be gradually diluted. More importantly, the instrument to keep balance between the right holders and the right users which is so-called "fair use doctrine" will be disvalued.