



# Protecting Exceptions Against Contract Override

## A Review of Provisions for Libraries

### Introduction<sup>1</sup>

A key advance in the most recent European copyright reform was the decision to protect most of the new exceptions granted from being overridden by contract. This marks an important step forwards for users, and an affirmation that the public interest goals of copyright exceptions need to be protected.

In effect, the fact that freedom of contract is seen as superior to the exceptions set out in law means that unless there is protection, libraries and other users are obliged to follow the terms of licences, even when these offer fewer rights. This happens regardless of the level of choice libraries have over the terms of the contract, or the inconvenience of cost this creates.

This is a real challenge. A study of resources licenced by the British Library in 2008 showed that 96% of contracts limited the possibilities open to the library and its users compared to what was provided for in law<sup>2</sup>. This happened both by explicitly banning activities, or simply not mentioning them on an exhaustive list of all the things that a library and its users can do. Australian studies suggested that over  $\frac{3}{4}$  of resources were affected in this way.

This creates a number of issues. Fundamentally, it risks undermining the public interest goals pursued by law-makers (as well as their own authority) when they introduce exceptions and limitations (i.e. supporting research, education and preservation of heritage)

It also makes the work of libraries far more complicated when they have to check each contract individually, rather than relying on the law. In particular, it poses a major challenge to large scale uses of works (such as for text and data mining or mass-digitisation).

Finally, it creates a risk of rent-seeking or anti-competitive behaviour when a rightholder can demand supplementary remuneration or withhold authorisation for activities generally seen as being good for the consumer (such as the interoperability of software).

This is not a static issue either. With a growing share of content accessed via licences rather than simply purchased as a physical object, it is also becoming increasingly pressing to act to protect user rights. Fortunately, law makers in a number of countries have recognised this. This short report sets out the three general approaches taken by countries which have chosen to act. In annex, there are extracts from the laws of countries which have acted.

### 1) Narrow Provisions

A first category of cases come where countries have introduced new rights – primarily for software – and from the start have ensured that contracts cannot override exceptions. This makes sense – politically it tends to be easier to limit a rightholders' rights when they are being introduced, rather than give rights and then restrict them later.

There is also a strong efficiency and consumer rights argument for ensuring that certain activities – using software, making it interoperable, understanding how it works, repairing it – should be permissible, even if a contract tries to stop it. Without contract override, users can be forced only to use one suppliers' systems, or to buy new devices each time the software breaks, rather than repairing them.

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<sup>1</sup> Thanks to Barbara Stratton and Jonathan Band for their support in gathering examples

<sup>2</sup> British Library (2008), *Analysis of 100 Contracts Offered to the British Library*, <https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/100contracts.pdf>

The first provision on contract override, it seems, therefore dates from the 1991 Software Directive in what was the European Community<sup>3</sup>, and ensured that the user's rights to create back-up copies, to decompile software, and to carry out reverse engineering were protected.

The European Union applied the same logic in creating database rights through the 1996 Database Directive<sup>4</sup>, ensuring that contracts could not prevent acts necessary for accessing and using databases normally, or to extract and reuse insubstantial parts of databases.

Australia brought in its own rules relating to software in 1999, ensuring that regardless of contract terms, users could copy for use, to create back-up copies, to allow for interoperability, to correct errors, and to carry out software testing<sup>5</sup>.

New Zealand followed suit in 2008<sup>6</sup>, preventing contract override for decompilation and interoperability, copying for use and copying in order to get hold of an error free version when the market isn't supplying. However, it is still possible to prevent copying for observation, studying and texting of software.

## 2) Broader Applications

The challenges posed by contracts overriding exceptions do not of course stop at particular types of rights, such as over software or databases. They also prevent users from carrying out activities that involve more traditional copyright, for example preservation, or taking copies in the context of text-and-data mining. Both often take place at scale, making an obligation to check contracts each time into a major obstacle, as underlined in the Hargreaves Report<sup>7</sup>.

A number of countries and regions, recognising this, have therefore sought to look beyond the very narrow provisions that exist in countries like Australia and New Zealand, and address contract override for a wider range of activities.

An obvious example is the European Union<sup>8</sup> itself, which has chosen to make the terms of contracts unenforceable when they prevent TDM by research organisations (including libraries), teaching (except when the exception as a whole is pre-empted by a licence), and preservation.

Germany's 2018 Copyright Act<sup>9</sup> also extends contract override provisions to a sub-set of all exceptions, namely copying for teaching, research, non-commercial text and data mining, and library and archive copying.

Singapore<sup>10</sup> too has announced that it will allow users to disregard contract terms that prevent uses by libraries, archives and museums, as well as TDM and use in judicial proceedings, but continues to allow users to 'contract out' of other exceptions.

In determining which exceptions should or should not be protected from contract override, the recent Singapore Copyright Review offers a valuable discussion, suggesting that there should be

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<sup>3</sup> See Annex A

<sup>4</sup> See Annex A

<sup>5</sup> See Annex A

<sup>6</sup> See Annex A

<sup>7</sup> See Annex C

<sup>8</sup> Directive on Copyright in the Digital Single Market, See Annex

<sup>9</sup> See Annex

<sup>10</sup> See Annex

an assessment of reasonableness. In situations where contracts have not been individually negotiated, or where the balance of power is clearly unfair, the judgement will favour the user. The European Union looked at things on a case-by-case basis, recognising, for example, that in the case of preservation, this risked simply being forgotten in the development of a commercial contract. As for TDM, this could be impossible if it was necessary to look through thousands of contracts each time<sup>11</sup>.

A similar discussion has taken place in Australia, with the Australian Law Review Commission (ALRC)<sup>12</sup> and the Australian Productivity Commission (PC)<sup>13</sup> both considering the question. While seeing the value of preventing contract override, it suggested that other forms of law, such as consumer protection could apply, and stopped short of proposing that the country should not look to combine flexible copyright (Fair Use) with protection against contract override.

The PC, taking more of an economic perspective (and so perhaps feeling less constrained by legal precedent) suggested that the best outcomes would come from a wide application of contract override provisions.

### 3) Blanket Application

Even as some countries expanded the application of protections against contract override in a piecemeal way, others took a more ambitious approach. For example, in 2000, Ireland added a general provision to its Copyright Act, underlining that the exceptions it set out could not be undermined by contract terms<sup>14</sup>.

The United Kingdom followed suit in 2014<sup>15</sup>, although rather than having a single provision applying to the entirety of the law, introduced provisions in individual articles<sup>16</sup>. This still leaves out a number of uses, but users are still protected against contract terms in a much wider range of areas than under the EU, Singapore or German examples above.

Portugal in 2008<sup>17</sup>, Montenegro in 2011<sup>18</sup>, Belgium in 2016<sup>19</sup> and Kuwait in 2018<sup>20</sup> also all added in general provisions that simply underlined that (almost) all exceptions and limitations to copyright were protected. Australia will join them, should the recommendations of the Productivity Commission be adopted as the previous government suggested it would<sup>21</sup>, as will South Africa<sup>22</sup>. In both cases, contract override provisions would be combined with flexible fair use exceptions.

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<sup>11</sup> See Annex C

<sup>12</sup> Australian Law Review Commission (2013), *Copyright and the Digital Economy*, [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_alrc_122_2nd_december_2013_.pdf)

<sup>13</sup> Productivity Commission (2016), *Intellectual Property Arrangements*, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>

<sup>14</sup> See Annex A

<sup>15</sup> See Annex A

<sup>16</sup> See Annex A

<sup>17</sup> See Annex A

<sup>18</sup> See Annex A

<sup>19</sup> See Annex A

<sup>20</sup> See Annex A

<sup>21</sup> Department of Industry, Innovation and Science (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, <https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf>

<sup>22</sup> See Annex B



The arguments for such an approach are simple enough. Limitations and exceptions, by their nature, are not supposed to conflict with normal market exploitation of works or cause unreasonable harm, and so there is no sound economic reason for restricting them. Furthermore, the complexity and uncertainty created by allowing contract terms to override the law creates major costs for libraries and users, and of course also undermines the will of lawmakers when introducing exceptions and limitation in the first place.

## Conclusion

Once the European Union's Copyright Directive is properly implemented, and assuming that Singapore's Copyright Reforms pass as currently planned, over 30 countries around the world will have more or less broad provisions protecting copyright exceptions against override by contract.

In doing so, they will have saved libraries and other users with legitimate access to works extensive time and effort, without restricting the freedom of rightholders to determine the price charged for original access. There is more to come if progress does take place in South Africa and Australia, both of which may be on the verge of combining a flexible copyright exception with protection against copyright override.

## ANNEX A: LAWS IN PLACE

### Australia

#### Australia Copyright Act (1999 Revisions)

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

#### This covers:

Section 47B: copying in order to use a programme  
Section 47C: back up copies  
Section 47D: interoperability  
Section 47E: correcting errors  
Section 47F: security testing

Everything else is not covered

### Belgium

#### Code de Droit Economique ([Link](#)) (2016 Revisions)

Art XI.193 : *Les dispositions des articles XI.189, XI.190, XI.191, XI.192, § § 1er et 3 et XI.192/1 sont impératives.*

#### This covers:

- Quotation (XI.189(1))
- Research anthologies (XI.189(2))
- Transitory copying (XI.189(3))
- Reproduction of works in news reporting (XI.190(1))
- Incidental reproduction of works in public spaces (XI.190(2))
- Private use (XI.190(3))
- Use in schools (XI.190(4))
- Private copying (XI.190(5))
- Non-digital illustration for teaching (XI.190(6))
- Digital illustration for teaching (XI.190(7))
- Research copying (XI.190(8))
- Digital private copying (XI.190(9))
- Caricature, pastiche and parody (XI.190(10))
- Exams (XI.190(11))
- Preservation (XI.190(12))
- Supply of documents which are not commercial available (XI.190(13))
- Incidental recordings (XI.190(14))
- Marrakesh (XI.190(15))
- Exhibition and advertising (XI.190(16))
- Public institutions (XI.190(17))
- Private copying of databases (XI.191(1))
- Research or education copying of databases on paper (XI.191(2))
- Research of education copying of databases on other supports (XI.191(3))
- Communication of databases for education or research by recognised associations (XI.191(4))



- Copying for public security or administrative procedures (XI.191(5))
- Lending of literary works, photographic works, scores, audio works and AV works (XI.192(1))
- Parallel importation of works which are not on sale within the EU for purposes of lending (XI.192(3))
- Orphan works (XI.192/1)

**Does not Cover:**

- Lending of audio or audiovisual works within two months of their release (XI.192(2))

## European Union

(Directives must be implemented in all Member States)

**Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC ([link](#))**

### Article 7

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

**This covers:**

- Text and data mining research organizations and cultural heritage institutions (Article 3)
- Use of works in digital and cross-border teaching activities (Article 5)
- Preservation by cultural heritage institutions (Article 6)

**Does not cover:**

- Text and Data Mining by actors other than research organisations and cultural heritage institutions

**Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 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 harmonisation of certain aspects of copyright and related rights in the information society ([link](#))**

*Article 3(5): Member States shall ensure that the exception provided for in paragraph 1 cannot be overridden by contract.*

**Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases ([link](#))**

### Article 15: Binding Nature of Certain Provisions

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

**This covers:**

- Acts necessary for the purpose of access to and normal uses of contents of database (Article 6(1))
- The right to extract and re-utilize insubstantial parts of a database] (Article 8)



## Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs ([link](#))

Article 9: Continued application of other legal provisions

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

### This covers:

- Back up copies (Article 5(2))
- Reverse engineering (Article 5(3))
- Decompilation (Article 6)

## Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ([link](#))

Article 8: Continued application of other legal provisions

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

### This covers:

- Back up copies (Article 5(2))
- Reverse engineering (Article 5(3))
- Decompilation (Article 6)

## Germany

### Act on Copyright and Related Rights ([link](#)) (2017 Revisions)

**Article 55a:** *The adaptation or reproduction of a database work shall be permissible for the owner of a copy of the database work which was brought to the market by sale with the consent of the author, that person who is otherwise authorised to use the database work or that person who is given access to the database work on the basis of a contract concluded with the author or with his consent with a third party if and insofar as the adaptation or reproduction is necessary to gain access to the elements of the database work and for its customary use. If, on the basis of the contract in accordance with the first sentence, access is given only to a part of the database work, only the adaptation and reproduction of that part shall be permissible. Any contractual agreements to the contrary shall be null and void.*

**Article 60g(1):** *The rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance with sections 60a to 60f and such restriction or prohibition is to the detriment of the persons entitled to such use.*

### This covers:

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

### Does not Cover:



- Article 60a: Recordings of recitals
- Article 60a: Copying scores
- Article 60a: Copying works purely aimed at the education market
- Article 60e(4): Dedicated terminals
- Article 60e, 60f: Archive, museum and education establishment use of Article 60e possibilities
- Article 16: transmission of copies of works in immaterial form held by the national library under legal deposit
- Article 44a: temporary reproduction
- Article 45: Administration of justice and public security
- Article 45a: Persons with disabilities
- Article 46: Religious uses
- Article 47: School broadcasts
- Article 48: Public speeches
- Article 49: Newspaper Articles and Broadcast Commentaries
- Article 50: Reporting on current events
- Article 51: Quotation
- Article 52: Non-commercial broadcast, broadcast in public institutions
- Article 53: Private use
- Article 56: Videos for use in TV shops
- Article 57: Incidental use
- Article 58: Advertising an exhibition and public sale
- Article 59: Works in public spaces
- Article 60: Reproduction by the commissioner of a portrait of the portrait

## Ireland

### Copyright and Related rights Act 2000 ([link](#))

#### Section 2

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

## Kuwait

### Law No. (75) of 2019 The enactment of the Copyright Law and the Convention ([link](#))

Article 32, last sentence

ويقع ابطال كل اتفاق خالف للقيود والست ناء الواردة يف هذا الفصل.

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

This covers (amongst other things):

- Private Use
- Quotation
- Illustration for teaching
- Performance in the home
- Copying software, including to make it work, studying how programmes work, modifying language from English, replacing damaged copies, improving performance, interoperability, security testing



- Communication of works produced in the classroom
- Preservation
- Completing works

## Montenegro

Law on Copyright and Related Rights (Official Gazette of Montenegro, No. 37/2011) ([Link](#))

**Article 45:** *Limitations to copyright shall only be permitted in the cases referred to in Articles 43, 46-61, 76, 113, 114 and 144 of this Act, provided they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*

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

### Covers:

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

## Portugal

### Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08)

Article 75(5) : *É nula toda e qualquer cláusula contratual que vise eliminar ou impedir o exercício normal pelos beneficiários das utilizações enunciadas nos n.os 1, 2 e 3 deste artigo, sem prejuízo da possibilidade de as partes acordarem livremente nas respectivas formas de exercício, designadamente no respeitante aos montantes das remunerações equitativas.*

This applies to :

- Transitory copying
- Private copying
- Speeches
- Press reviews
- Reporting
- LAMs (preservation and internal uses)
- Illustration for teaching
- Quotation
- Incidental uses
- Disabilities
- News of the day
- Short uses of educational works
- Dedicated terminals
- Public proceedings
- Rebroadcasting of works in public institutions
- Panorama
- Demonstration and repair
- Cataloguing etc within LAMs
- Reconstruction

## United Kingdom

### Copyright, Designs and Patents Act 1988

<http://www.legislation.gov.uk/ukpga/1988/48/contents>

#### **Section 29: Research, private study and text and data analysis for non-commercial research**

*(4B) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

#### **Section 29A: Copies for text and data analysis for non-commercial research**

*(5) 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."*

#### **Section 30: Criticism, review, quotation, and news reporting.**

*(4) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of subsection (1ZA), would not infringe copyright, that term is unenforceable.]*

#### **Section 30A: Caricature, parody or pastiche**

*(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.]*

### **Section 31F: Print Disabilities**

*To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of section 31A, 31B or 31BA, would not infringe copyright, that term is unenforceable (Section 31A: Disabled persons: copies of works for personal use; Section 31B: Making, communicating, making available, distributing or lending of accessible copies by authorised bodies; Section 31BA: Making, communicating, making available, distributing or lending of intermediate copies by authorised bodies)*

### **Section 32: Illustration for instruction**

*(3) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”.*

### **Section 36: Copying and use of extracts of works by educational establishments**

*(7) The terms of a licence granted to an educational establishment authorising acts permitted by this section are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted by this section.*

### **Section 41: Copying by librarians: supply of single copies to other libraries**

*(5) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

### **Section 42: Copying by librarians etc: replacement copies of works**

*(7) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

### **Section 42A: Copying by librarians: single copies of published works**

*(6) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

### **Section 75: Recording of broadcast for archival purposes**

*(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”.*

### **Section 50A: Back up copies.**

*(3) Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void).]*

### **Section 50B: Decompilation**

*(4) Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void).*

### **Section 50BA: Observing, studying and testing of computer programs**

*(2) Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void).*

### **Section 50D: Acts permitted in relation to databases**

*(2) Where an act which would otherwise infringe copyright in a database is permitted under this section, it is irrelevant whether or not there exists any term or condition in any agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296B, void).*



### Section 75: Recording of broadcast for archival purposes

*(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.]*

To note, **Section 28B** on private copying also included such a provision, but was struck down by the courts.

#### Not Covered:

Section 31: Incidental inclusion of copyright material.

Section 33: Anthologies for educational use.

Section 35: Recording by educational establishments of broadcasts

Section 36A: Lending of copies by educational establishments

Section 40A: Lending of copies by libraries or archives

Section 40B: Libraries and educational establishments etc., including making works available through dedicated terminals

Section 43: Copying by librarians or archivists: single copies of unpublished works

Section 40B: Libraries and educational establishments etc: making works available through dedicated terminals

Section 44A: National libraries and legal deposit

Section 45: Parliaments and legislative proceedings

Section 46: Royal Commissions and national enquiries (giving you access to all you need)

Section 50C: Other acts permitted to lawful users (including copy and adaptation, in particular for repair)

Section 51: Design documents and models (making something on the basis of a design).

Section 54: Use of typeface in ordinary course of printing.

Section 59: Public reading or recitation.

Section 61: Recordings of folksongs.

Section 62: Representation of certain artistic works on public display.

Section 63: Advertisement of sale of artistic work.

Section 65: Reconstruction of buildings.

Section 66: Lending to public of copies of certain works.

Section 68: Incidental recording for purposes of broadcast.

Section 69: Recording for purposes of supervision and control of broadcasts and other services.

Section 70: Recording for purposes of time-shifting.

Section 71: Photographs of broadcasts

Section 72: Free public showing or playing of broadcast.

## United States

### 17 U.S.C. § 203: Termination of transfers and licenses granted by the author ([link](#))<sup>23</sup>

(a)(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

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<sup>23</sup> Termination of transfer arguably is not an exception or limitation. It does limit a publisher's rights, but in favor of the author, not the user. In many countries, the moral rights of the author are not waivable.



## New Zealand

### Copyright Act 1994 (2008 Amendments) ([link](#))

*80D: Certain contractual terms relating to use of computer programs have no effect* ([link](#))

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

This covers:

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

This doesn't cover:

- Observing, studying, texting (Section 80C)
- All other uses

## ANNEX B: FUTURE/POSSIBLE REFORMS

### SINGAPORE

#### Copyright Review ([link](#))

*A contractual term which attempts to override an exception will not be allowed if it is unreasonable. The following sets out what would be considered unreasonable:*

- *If a contract has not been individually negotiated, any terms or conditions which restricts copyright exceptions will be considered unreasonable.*
- *If a contract has been individually negotiated, any exception (except those listed below) can be restricted by any term or condition that is reasonable.*

*The courts will determine whether a term or condition is reasonable based on a set of statutory guidelines, which may be adapted from the guidelines under the Second Schedule of the Unfair Contract Terms Act.*

*The current list of exceptions that cannot be restricted by contracts will be expanded to include the following exceptions:*

- *Exceptions for reproduction for purposes of judicial proceedings or professional advice.*
- *Exceptions relating to galleries, libraries, archives and museums.*
- *The new exception for data analysis.*

### South Africa

#### Copyright Act (not yet signed by President)

##### Section 39B

##### Unenforceable contractual term

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

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

## ANNEX C: FURTHER RESOURCES

### Court of Justice of the European Union

“[I]t appears that Member States generally have a choice over whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract terms. The judgment in the recent ECJ cases C457/11 to C460/11 VG Wort supports this view, and moreover suggests that the default position where contract or licence terms are not expressly allowed to limit the scope of an exception is that the exception will prevail over any rights holder authorisation.”

[Memorandum](#) of UK Department for Business, Innovation, and Skills ¶5.

### Hargreaves Review (2011) ([link](#) – p51)

5.40 Applying contracts in this way means a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright. It creates the risk that should Government decide that UK law will permit private copying or text mining, these permissions could be denied by contract. 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”). The Government should change the law to make it clear no exception to copyright can be overridden by contract.

### Impact Assessment for the EU Directive on Copyright in the Digital Single Market ([link](#))

#### Text and Data Mining

’330. However, researchers have generally not received favourably these developments (i.e. STM gradually making things better) (their representatives left "Licences for Europe" considering that only legislative changes, as opposed to a voluntary approach, would allow to fully address their problems) and generally point out that making TDM subject to specific authorisation in addition to the subscription risk to always make them subject, at least potentially, to different conditions and policies of different publishers, something which they see as particularly problematic in view of the large scale of material which has to be mined in the context of scientific research.

331. These different conditions may give rise to transaction costs for research organisations having to clarify to what extent they are allowed to perform TDM on the basis of their subscriptions and possibly to renegotiate them to make sure they can do so in full legal certainty. In some cases, individual researchers may need to take up licences for TDM if their organisation's subscriptions do not cover it.

332 Before the adoption of a TDM exception in the UK, a large research university indicated that the costs for them to check the compliance of their TDM activities with the different applicable licences could amount to up to GBP 500,000 per year.

333. Together with other noncopyright related issues such as skills, technology and infrastructure which also play a significant role, lack of certainty in the current copyright framework contributes to the current situation of slow development of TDM in European research’.



## Preservation

385. The authorisation of rightholders for preservation copying is in some particular cases explicitly foreseen. However, this normally occurs as part of broader licences or agreements that are first and foremost concerned with access to works by CHIs (and its final users) and/or their acquisition of permanent copies (which they can then permanently host, e.g. on their servers, for subsequent preservation). These licences do not have as their primary focus the conditions of preservation (the problem addressed here), and exist in some specific contexts only, notably in instruments on voluntary deposit of works concluded between certain categories of rightholders and CHIs, and in scientific publishing licences. The latter can alternatively also refer preservation to well-established third-party specialised organisations. Rightholders often referred to these solutions as responding well to the current preservation needs.

## ANNEX D: TIMELINE OF REFORMS

- 1991 – EU Software Directive (narrow focus)
- 1996 – Database Directive (narrow focus)
- 1999 – Australia Copyright Reform (narrow focus)
- 2000 – Irish Copyright (broad focus)
- 2008 – Portuguese Copyright Law (broad focus)
- 2008 – New Zealand Copyright Law (narrow rule)
- 2009 – Software Directive (limited rule)
- 2011 – Hargreaves Report (report)
- 2011 – Montenegro Copyright Law (broad focus)
- 2013 – ALRC calls for library and archive exceptions to be protected from CO... but also suggests that either you have CO for FD, but not for FU
- 2014 – UK Copyright Law (broad focus)
- 2015 – Belgian Copyright Law (broad focus)
- 2017 – German Copyright Law (medium focus)
- 2017 – Kuwait Copyright Law (broad focus)
- 2019 – EU Copyright Directive (medium focus)
- 2019 – Singapore Copyright Law (medium focus)
- 20?? – South African Copyright Law (broad focus)
- 20?? – Australian Copyright Law (broad focus?)