

The Role of Copyright Policy in the Enforcement of Copyright Licenses, Information Contracts and Technical Protection Measures

Christopher K. Ridder¹

The primary purpose of copyright law is to promote the progress of science and the useful arts by maximizing the creation of valuable new works. In effectuating this purpose, copyright law strikes a delicate balance between the need to provide incentives to authors in the form of certain exclusive rights, and the need for a strong public domain. Among the limitations employed by copyright law to define and preserve the public domain are fair use, a limited copyright term, and the originality requirement.

Licensors of commercial databases, entertainment and informational content, and even free and open source software, have turned to increasingly clever strategies to impose comprehensive regulatory regimes of their own choosing - not just on particular parties to a transaction, but on the public at large. Although many features of these regulatory regimes are consistent with copyright policy, I focus on the contractual strategies and technical protection measures (“TPMs”) that information licensors may employ in a ways that arguably conflict with copyright policy.

Many commentators have described the problems with contractual provisions or TPMs that attempt to circumvent copyright limitations. In this article, I seek to gain further insight into these problems through an analysis of the diverse forms of contractual provisions and TPMs available to information licensors. Among the forms I examine are scope restrictions, contractual covenants, conditions precedent, conditions based on access to a work rather than on exclusive rights, and technical protection measures.

By choosing which form to cast a given license restriction in, licensors have a significant ability to vary the legal rules that apply to their information, without substantively altering the restriction itself. Although this a useful tool in the licensor’s arsenal, the question of whether a particular license restriction is consistent with copyright policy should be relevant regardless of the form of restriction used. Otherwise, licensors will be incited to migrate to forms that allow them to ignore important copyright limitations with impunity, harming the public domain.

Because the forms I examine, and the contexts in which they are used, are diverse, I review a range of options for ensuring the viability of the public domain in this complex licensing environment.

¹ Residential Fellow, Stanford Law School Center for Internet and Society.