

Chapter 50

Open Content in Libraries: Contractual Issues

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ABSTRACT

The basic issue examined in this chapter is how can open access be achieved through the instrument of contracts. In the digital environment right holders have the power to restrict access to works by using restrictive contractual terms enforced by means of technical measures. As a counterbalance to the extended authority of the right holder, open access movements have appeared which express the users' need to have open access to creative content. It is put forward that the terms used in contractual forms that have been standardized and express the ideology of open content are not always compatible with the existing copyright law contractual provisions and the way in which collective management functions.

1. INTRODUCTION

Copyright is an extrovert, absolute and exclusive right, which is characterized by its inherent boundaries: the originality of the work and the limited term of protection of the author's rights. However, regarding these natural limits there are some other mechanisms, which have been introduced in order to control the author's monopoly. So, e.g., unfair competition is applied in cases

of abuse of rights. Further equilibrium between right holders and the public is accomplished with the provision of limitations and exceptions to the economic rights of the author.

In the digital environment the protection of copyright is set in three levels: the first one regulates the legal protection of the rights, the second provides for the technological measures of protection (TPM) and the third sets the legal protection against the circumvention of the technological protection measures. The last two levels appear exclusively in the digital environment.

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TPM do not seek to exclude the public from accessing and using the works, but to protect the exclusive rights of the author, to safeguard his monopoly, his property.¹ Along with contracts, they enable the online exploitation of the works by securing the distribution of the digital content and by stipulating the permitted uses (Koskinen-Olsson, 2006).

This contractualisation of the relations between users and right holders, secured by technology, overset the balance of the analogue environment. Contracts and TPM have become a regulative mechanism, known as a private ordering mechanism that provokes the exclusion of users from accessing and using the works (Dussolier, 2007). Users reacted asking for the “socialisation” of copyright. Availing themselves of the private ordering mechanisms, they want to change the way copyright is exercised. They demand open access to content, accusing the lawmakers of creating a *de facto* access right, which exceeds the limits of the exclusive rights of the authors.²

Although TPMs as well as contracts are necessary for the online exploitation of the works, their combination poses several questions, such as whether the author has the right to control who will access or how will someone use the work and designate unilaterally the amplitude of his rights disregarding the exceptions and limitations set by the law. The social criticism against copyright and its marginalisation is linked more to the question where copyright’s boundaries should be drawn and less to the use of TPM. The amplified contractual model of the digital environment harms the digital libraries whose role is crucial for the cultural promotion and either imposes modifications on the present system with the provision of new exceptions or leads to alternative contractual models.

Contracts and TPM as a Mechanism that Controls Access: What Access Right?

In the analogue environment the acquisition of the physical carrier that embodies the work results in

the creation of proprietary rights over the tangible copy. The owner of the copy can access the work whenever he wants without having to ask for permission from the right holder. Passive uses, such as the simple hearing of a song or the reading of a book, are set outside the scope of copyright. These kinds of use do not fall under the notion of the exploitation right, not only because their control is almost impossible or because any attempt to control them would conflict with constitutional rights of the members of the public (private life etc), but also because access to the tangible copies can take place without necessarily reproducing or communicating the work to the public. Thus, they do not ‘challenge’ the economic rights of the author.

While in the analogue environment the content, thus the work, is discernable from the physical material that carries it, in the digital environment the work (content) is not contained on a tangible vehicle. Thus, “any dealing with the content is dealing with rights” (Koskinen-Olsson, 2006). The price of the work transmitted on-line corresponds to a specific use, but cannot lead to the acquisition of the work. Every use is based on a service supply contract, which gives the opportunity to the right holder to define unilaterally the permitted uses.

Control of access arises from the combination of the TPMs with the contractual regulation of the permitted uses, necessary for the function of the online exploitation. Managing access by means of technology and contracts is *de lege lata* permitted: the adoption of a *lato sensu* reproduction right, which includes temporary reproduction³ along with the protection of the TPM legalise control by the author (Ginsburg, 2003). In addition, the possibility of the author to control the access to the work contractually does not interfere with the nature of copyright and does not change the legal situation (Lucas/Lucas, 2006). Control of access does not convert into a new exclusive right; it emerges from the exploitation of the work meaning the decision of the author to exercise his exclusive rights (Heide, 2001).

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