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A State Law Approach to Preserving Fair Use in Academic Libraries

David R. Hansen*

*University of North Carolina (UNC) at Chapel Hill - School of Law ; University of California, Berkeley - School of Law, drhansen@email.unc.edu

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Abstract

Every year academic libraries spend millions of dollars to provide their users access to copyrighted works. Much of that money goes not toward purchasing physical copies of books or journals, but toward licensing electronic content from publishers. In those electronic license agreements, the default rules for how users interact with copyrighted content is often altered, and academic library users are deprived of basic rights — especially rights such as fair use — which are granted under federal copyright law. The literature is flush with discussion of the misuse of private contracts to alter the rights granted by Congress in copyright's statutory scheme. As a result, there have been many proposals to maintain copyright's balance between content owners' and users' rights through either the adoption of model licenses or changes to federal law. Because those proposals have thus far failed to slow private contracts' fervent erosion of users' rights, this paper proposes a modest state-law solution to the problem for one class of users that is especially hurt by this change: academic library users. This paper envisions a state law that would render void any contract provision between a rights holder and a state institution that modifies or eliminates fair use for users. This approach is especially valuable in preserving fair use for public academic library users — a class of users for whom fair use is particularly important given their interest in free speech, academic freedom, and the creation of new, innovative uses for creative works. Given the growth in general of licensing (an area largely governed by state law) this proposal is also a useful starting place for discussion about the use of state law to preserve users' rights in copyrighted works.

KEYWORDS: fair use, copyright law, free speech

*Thanks to Lolly Gasaway, Barbara Moran, Kevin Smith and, of course, Janice Hansen, for their many helpful comments.

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Because those proposals have thus far failed to slow private contracts’ fervent erosion of users’ rights, this paper proposes a modest state-law solution to the problem for one class of users that is especially hurt by this change: academic library users. This paper envisions a state law that would render void any contract provision between a rights holder and a state institution that modifies or eliminates fair use for users. This approach is especially valuable in preserving fair use for public academic library users—a class of users for whom fair use is particularly important given their interest in free speech, academic freedom, and the creation of new, innovative uses for creative works. Given

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INTRODUCTION

For years now, academic libraries have spent their money licensing copyrighted content. In the past, a book was a book, and libraries were free to lend, manipulate, or even destroy the copies of the works that they had purchased. The doctrine of first-sale permitted such activities.¹ Likewise, library users were able to copy, redistribute, and transform content so long as those uses fell within the amorphous bounds of “fair use.”² But for the last

¹ 17 U.S.C. § 109 (2006). *See generally* Aaron Parzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011) (discussing the doctrine of first sale and the broader principle of “exhaustion,” and explaining how the doctrine is perceived of as of as having limited usefulness as applied to digital distribution).

² *Id.* § 107.

several years, the percentage of academic library expenditures on licensed electronic content has dwarfed that of traditional print acquisitions. In 2008–2009, fifty-seven percent of Association of Research Library (“ARL”) member materials expenditures were devoted to licensed electronic content.³ In total, ARL libraries spent over \$700 million on electronic resources in that same time period, compared to only about \$77 million ten years earlier in 1998–1999 (constituting about ten percent of total materials expenditures for that year).⁴ Nearly all of this new electronic content is licensed to libraries under either perpetual or recurring terms.⁵ Those licenses are contracts that change the default rules for how libraries and their users interact with copyrighted content.⁶ The new norm among libraries is licensing access, not purchasing copies; this change can mean a significant reduction in library users’ rights.⁷

Because of this shift, much has been written on how libraries (and users in general) deal with licenses. The literature focuses on two of the most noxious aspects of licenses. The first is the reality that licenses are legal documents drafted by lawyers, which can

³ ASS’N OF RES. LIBR., ARL STATISTICS 2008–2009 20–21 (2010), available at <http://www.arl.org/bm~doc/arlstat09.pdf> [hereinafter ARL STATISTICS]. Association of Research Libraries (“ARL”) membership is made up of “126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada.” *About ARL*, ASS’N OF RES. LIBR., <http://www.arl.org/arl/index.shtml> (last visited July 31, 2011).

⁴ ARL STATISTICS, *supra* note 3.

⁵ See Duncan E. Alford, *Negotiating and Analyzing Electronic License Agreements*, 94 L. LIBR. J. 621, 640 (noting that while some are of the view that publishers should provide perpetual access to material, license agreements are more valuable to publishers when they require recurring payments); see also Kristin H. Gerhard, *Pricing Models for Electronic Journals and Other Electronic Academic Materials: The State of the Art*, 42 J. LIBR. ADMIN. 1, 13 (2005).

⁶ As a general point, use and access issues associated with electronic content may extend well beyond the actual terms of the license itself. See Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. TELECOMM. & HIGH TECH. L. 451, 464–65 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)) (“Most electronic publications are licensed, rather than sold, under terms and conditions that may not be readily negotiable. It is not at all clear that digitization enhances access, and it may instead be true that it decreases the scope of collections over time, because when a subscription runs out, even the back issues of a periodical may be rendered unavailable.”).

⁷ See *id.*

make them difficult to read, interpret, and negotiate without previous legal experience.⁸ In contract-law terms, these are onerous procedural elements of contract formation through which librarians must navigate to achieve access for their users.⁹ The second aspect that is regularly explored is how licenses change the default rules of copyright which dictate how users may interact with creative content.¹⁰ These substantive modifications—especially when considered across the amalgam of licenses that academic libraries enter into—create a patchwork of users’ rights that is more restrictive than what copyright law naturally provides, and that stifles normal academic exploitation of the subject copyrighted works.¹¹

This paper focuses on the substantive changes that licenses make—alteration of default legal rules, with particular regard to the fair use right—and explains how proposed solutions to preserve the balance of rights between rights holders and users have not been particularly effective. So far, proposals to remedy the situation have been either too ambitious or too conservative in scope. Proposals to rectify the situation at the federal level—either through Congress or the courts—are appealing, but fail to realistically gauge the likelihood of these politically-fraught modifications to copyright law in the current political climate. Likewise, the growing panoply of voluntary model licenses and best practices fails to recognize the necessity of uniformity and enforceability in both the law and practice.

After explaining the importance of maintaining copyrights’ balance of rights for academic library users (focusing heavily on

⁸ *Licensing Digital Information: Introduction*, YALE UNIV. LIBR. LIBLICENSE, (2006), <http://www.library.yale.edu/~llicense/index.shtml> [LIBLICENSE, *Introduction*].

⁹ Scrutinizing the conscionability of a contract is sometimes done by splitting the analysis into two, looking first at the procedure of contract formation (procedural unconscionability) and then at the actual substance of the contract terms (substantive unconscionability). This approach was pioneered by Arthur Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967), and has been adopted by many courts. This paper does not suggest that licensing terms that impinge on educational fair use rights are necessarily unconscionable, but uses the procedural-substantive framework to facilitate the discussion in familiar terms.

¹⁰ See *supra* note 6 and accompanying text.

¹¹ *Id.*

fair use), this paper explores three currently proposed potential solutions: federal intervention, voluntary model licenses, and wholesale modification of state contract law. Because those reforms have thus far proved ineffective, this paper suggests a more limited solution that uses state law as way to maintain balance, at least in the context of academic library licensing. Namely, this paper proposes a state-law restriction on public institutions that would render void any contract terms entered into between rights holders and state institutions that eliminate or modify the scope of fair use. After outlining the strengths and weaknesses of such a change, the paper concludes by suggesting other areas of concern that may be addressed with similar state-law changes.

I. THE PROBLEM WITH LICENSES

Licenses serve an important role in academic libraries. They establish the ground rules by which vendors and libraries interact.¹² They memorialize hard-negotiated prices, subscription packages, and other details of what, exactly, libraries will pay and what they will get in exchange for their payments.¹³ While some of these terms are common to any contract—and may even remain unstated, left to be filled in by the default rules of commercial contract law¹⁴—licenses also address important goals that are

¹² See generally *Principles for Licensing Electronic Resources*, ASS'N OF RES. LIBR. (July 15, 1997), <http://www.arl.org/sc/marketplace/license/licprinciples.shtml>.

¹³ See, e.g., *Ebsco Publishing License Agreement*, EBSCO HOST, <http://support.ebscohost.com/ehost/terms.html> (last visited Sept. 22, 2011). See generally Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing that Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29, 40 (2007).

¹⁴ The rules of contract law have long been conceived of as the default rules which apply to fill in gaps left either intentionally or unintentionally in contracts. The classic article explaining this view is Ian Ayres and Robert Gertner's *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). Article 2 of the Uniform Commercial Code (UCC) is one such set of contract rules that has been created to provide a uniform set of gap-filling provisions for contracts dealing with the sale of goods. UCC art. 2. An alternative set of UCC provisions—originally dubbed UCC Article 2B—is the Uniform Computer Information Transactions Act (UCITA), which was created in an attempt to provide alternative default rules to address the difficulties of electronic commerce, specifically addressing things such as software licensing and online transactions. See *infra* notes 113–19 and accompanying text (discussing UCITA and

peculiar to academic libraries, such as setting terms for preservation, access, privacy, and maintenance of digital content contained in databases.¹⁵ Licenses and licensing negotiations provide great benefit to academic libraries that wish to carefully tailor subscriptions to their institutional needs.¹⁶ At the same time, even carefully drafted licenses can be costly to negotiate and may still leave libraries (and their users) without the rights on which they rely for normal academic uses of the underlying works.¹⁷

A. Problems

Given the sheer scale of electronic subscriptions and purchases, librarians must spend a great deal of time reading and evaluating the terms of their electronic licenses.¹⁸ The literature is replete with guides to understanding and managing licenses in academic libraries.¹⁹ Perhaps because of the breadth of issues that license contracts must consider, they can easily become complicated legal documents.²⁰ Typically drafted by a lawyer, the terms of these contracts are often long, confusing, and ambiguous.²¹ From the library's perspective, negotiating these contracts can be difficult, especially because many of the terms are presented as non-negotiable.²² Although large academic libraries are sophisticated enough to know that some negotiation may be possible, take-it-or-

related attempts to address some of the "procedural" issues with contract formation). Modifying default contract rules to address the imbalance of rights that has arisen because of the licensing of digitally distributed content may be an appealing alternative to the more limited approach advocated in this paper, and is an area worthy of further study.

¹⁵ See Cichocki, *supra* note 13, at 40; *Libraries and Licensing*, AM. LIBR. ASS'N, <http://www.ala.org/ala/issuesadvocacy/copyright/librariesandlicensing/LibrariesAndLicensing.cfm> (last updated Aug. 25, 2006).

¹⁶ See *Principles for Licensing Electronic Resources*, *supra* note 12 (noting that negotiation is important in arriving at "mutually acceptable" terms in a license).

¹⁷ See generally *id.*

¹⁸ See generally LIBLICENSE, *Introduction*, *supra* note 8.

¹⁹ See, e.g., KARAN RUPP-SERRANO, *LICENSING IN LIBRARIES: PRACTICAL AND ETHICAL ASPECTS* (2d ed. 2005) (discussing the practical and legal issues that arise with using licensed content on campus); LESLEY ELLEN HARRIS, *LICENSING DIGITAL CONTENT: A PRACTICAL GUIDE FOR LIBRARIANS* (2d ed. 2009).

²⁰ See LIBLICENSE, *Introduction*, *supra* note 8.

²¹ *Id.*

²² See Anna May Wyatt, *Licenses, the Law, and Libraries*, 42 J. LIBR. ADMIN. 163, 163 (2005).

leave-it “adhesion contracts” like these force libraries to spend resources haggling over terms that may or may not be alterable.²³

Procedural costs of contract formation can also rise quickly because, while vendors present these contracts as standard-form, the contracts actually vary significantly from vendor to vendor.²⁴ Even terms that appear uniform may not have a uniform meaning from contract to contract, and understanding and negotiating these terms can be time consuming.²⁵ For example, one recent question regarding a license limitation, providing that users of licensed works can only engage in “non-commercial use,”²⁶ sparked a listserv debate over the meaning of the term among librarians from across the country.²⁷ Does the “non-commercial use” clause mean that just “profit-producing” uses are prohibited, or is cost-recovery allowed? Basic contract terms like these can become even more complicated with the incorporation and misuse of technical legal terms.²⁸

Of course, the formation of almost any contract is subject to the same criticism. But for academic libraries, which license literally millions of works from thousands of vendors, the problem is exacerbated; they must spend enormous amounts of time evaluating, discussing, and negotiating many individual licenses

²³ See Gerhard, *supra* note 5, at 15.

²⁴ See Stephen Bosch, *Using Model Licenses*, 42 J. LIBR. ADMIN. 66, 67 (2005).

²⁵ See *id.* at 66.

²⁶ E.g., *Ebsco Publishing License Agreement*, *supra* note 13 (stating simply that “[r]emote access to the Databases or Services is permitted to patrons of subscribing institutions accessing from remote locations for personal, non-commercial use.”). Other license terms are more specific. E.g., *Terms and Conditions of Use*, JSTOR, <http://www.jstor.org/page/info/about/policies/terms.jsp> (last visited Apr. 30, 2011) (stating “Institutional Licensees and users may not . . . use or authorize the use of the JSTOR Platform or Content for commercial purposes or gains, including charging a fee-for-service for the use of JSTOR beyond reasonable printing or administrative costs. For purposes of clarification, ‘commercial purposes or gains’ shall not include research whose end-use is commercial in nature.”).

²⁷ See Posting of Charles Hamaker, cahamake@unc.edu, to liblicense-1@lists.yale.edu (Feb. 28, 2011, 21:57 EST), available at <http://www.library.yale.edu/~llicense/ListArchives/1103/msg00001.html>.

²⁸ See Bosch, *supra* note 24, at 73.

separately.²⁹ Given the difficulties in the procedure of contract formation (nevermind the substantive terms of the agreements), it is unsurprising that librarians have taken these issues seriously,³⁰ resulting in the creation of a whole host of model licenses and best practices,³¹ and instigating calls for more thorough legal education of librarians at ALA-library schools.³²

In terms of contract substance, licenses can be problematic for academic libraries because licenses restrict the way that libraries and their users interact with copyrighted content.³³ Federal copyright law grants authors (or their assignees—typically publishers) certain exclusive rights over the works they create.³⁴ Exceptions to those exclusive rights exist for the benefit of users and the public at large.³⁵ Congress crafted federal copyright law, it has been said, to strike a delicate balance between the rights of copyright owners and those of the user-public.³⁶

In striking that balance, authors are given the exclusive right to reproduce, prepare derivative works, distribute copies to the

²⁹ The problem of varying license terms has been extensively considered and addressed through the proposal of a variety of standard license terms. For a more thorough discussion, see *infra* notes 99–119 and accompanying text.

³⁰ The sheer volume of library-licensing literature is a testament to how seriously librarians have taken this issue. LibLicense, a website devoted to library licensing issues, maintains this through a bibliography of library licensing resources. *Licensing of Digital Information: Bibliography of Licensing Sources*, YALE UNIV. LIBR. LIBLICENSE, <http://www.library.yale.edu/~llicense/bibliogr.shtml> (last visited Apr. 24, 2011) (listing well over 100 sources that discuss licensing issues for libraries in depth).

³¹ See *infra* notes 99–119 and accompanying text (discussing the proposed model licenses as solutions to library licensing problems).

³² See William M. Cross & Phillip M. Edwards, *Preservice Legal Education for Academic Librarians Within ALA-Accredited Degree Programs*, 11 PORTAL: LIBR. & ACAD. 533, 541 (2011).

³³ See David C. Fowler, *Licensing: An Historical Perspective*, 42 J. LIBR. ADMIN. 177, 179–83 (2005).

³⁴ 17 U.S.C. § 106 (2006) (listing six exclusive rights); 17 U.S.C. § 201(a) (2006) (copyright ownership vests initially in the author of the work).

³⁵ See 17 U.S.C. §§ 107–20 (2006) (listing exceptions to the exclusive rights of copyright owners).

³⁶ See *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“[A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.”).

public, and perform the copyrighted work publicly.³⁷ Balancing against authors' broad rights are a number of exceptions and limitations intended to benefit users. Included among these are specific statutory exceptions for face-to-face and distance education,³⁸ library preservation,³⁹ as well as the "first sale" limitation,⁴⁰ which is particularly useful in the library context because it allows purchasers, but not licensees, of copies of copyrighted works to freely transfer (sell, lend, inter-library loan) their legally acquired copies. The broadest and most difficult to apply exception, however, is likely that of fair use,⁴¹ an "equitable rule of reason" that permits users to make unauthorized uses of copyrighted works under certain circumstances.⁴² The discussion below focuses on how licenses change the scope of fair use with respect to uses of materials in academic libraries; however, many of the same observations can also be made with respect to the other exceptions mentioned above.

Fair use is the most general and most ambiguous exception to the exclusive rights of copyright owners. It permits the unauthorized use of copyrighted works whenever its four-factor, "context-specific" balancing test weighs in the user's favor.⁴³ Fair uses include such statutorily-favored areas of use such as "criticism, comment, news reporting, teaching . . . , scholarship, or

³⁷ *Id.* § 106(1)–(4). That statute also grants special exclusive rights with respect to the public display of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works and for the public performance of sound recordings by means of a digital audio transmission. *Id.* § 106(5)–(6).

³⁸ *Id.* § 110(1)–(2).

³⁹ *See, e.g., id.* § 108.

⁴⁰ *See id.* § 109(a) (first sale doctrine); *see generally* *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (identifying the first sale limitation). First sale is another doctrine whose importance for libraries has eroded with the rise of digital distribution and licensing. *See generally* Parzanowski & Schultz, *supra* note 1.

⁴¹ *See* 17 U.S.C. § 107; H.R. REP. NO. 94-1476, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 ("The judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive right of copyright owners.").

⁴² *See* H.R. REP. NO. 94-1476, at 20 ("[S]ince the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.").

⁴³ *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1089, 1090, 1096–99 (2007) (explaining the context-specific nature of the fair use analysis).

research,”⁴⁴ but also include more imprecise applications, such as those which generally involve some type of “transformative use.”⁴⁵ The factors themselves focus on (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁶

The application of fair use in the context of higher education, and academic libraries in particular, is well recognized both in the literature and by the courts.⁴⁷ Section 107, the statutory section which outlines fair use, specifically calls out uses for “teaching, scholarship, and research” as being within the scope of the doctrine,⁴⁸ and goes on to identify “nonprofit educational purposes” as weighing at least one of the statutory factors toward a finding fair use.⁴⁹ Further, although the burden of proving fair use

⁴⁴ 17 U.S.C. § 107 (2006).

⁴⁵ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (holding that 2 Live Crew’s commercial parody of Roy Orbison’s song “Oh, Pretty Woman” was “transformative” (and fair use) because it changed the work by adding “new expression, meaning, or message”); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721–22 (9th Cir. 2007) (holding that a search engine’s thumbnail reproduction of entire copyrighted images for inclusion in a search results page was “transformative”).

⁴⁶ 17 U.S.C. § 107. Note that the text merely states that “[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include [the four factors].” *Id.* The purpose of the codification of fair use was to restate fair use, not to supplant the judge-made nature of the doctrine, and courts are still free to consider other factors and apply it to new areas, such as digital distribution in the context of academic libraries. See H.R. REP. NO. 94-1476, at 21 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680 (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).

⁴⁷ See *Campbell*, 510 U.S. 569, 577 (1994) (stating that the fair use doctrine “‘avoid[s] rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law is designed to foster’” (citing *Stewart v. Abend*, 495, U.S. 207, 236 (1990))). See generally Carol M. Silberberg, Note, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617 (2001) (summarizing the state of fair use in higher education).

⁴⁸ 17 U.S.C. § 107. Note that three of the seven statutory examples (teaching, scholarship, and research) are uses directly facilitated by academic libraries.

⁴⁹ *Id.* § 107(1) (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of

rests firmly on the defendant asserting the defense,⁵⁰ there is at least some statutory and judicial warrant for a presumption that part of the fair use analysis weighs in favor of educational uses, especially in the context of non-profit libraries.⁵¹ Section 108, which grants additional, specific exceptions for library preservation purposes, provides that nothing in that section “in any way affects the *right* of fair use.”⁵² Although Section 108 has received virtually no judicial interpretation, the view that fair use is a right—not a defense—of libraries and their users is at least aspirationally shared by some librarians:

Even though librarians likely hold other core values related to copyright, the last one critical to mention is fair use. To librarians, fair use is a user’s right and not just a defense to copyright infringement. . . . The word used in the statute is “right” and not “privilege”⁵³

Further, the examples of fair uses (“criticism, comment, news reporting, teaching . . . , scholarship, or research,”⁵⁴) provided in the preamble to section 107 are almost all types of uses that libraries facilitate. While these examples of uses are afforded no

the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . .”). The commerciality or non-profit nature of the use is not, however, determinative. *See Campbell*, 510 U.S. at 584 (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

⁵⁰ *See* H.R. REP. NO. 102-836, at 2 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553 (asserting fair use is an affirmative defense); *id.* at 9 n.3 (stating that the burden of proving fair use is always on the party asserting the defense); *Campbell*, 510 U.S. at 569 (raising fair use as an affirmative defense in response to a claim of infringement).

⁵¹ *But see* *Brownmark Films, L.L.C. v. Comedy Partners*, No. 10-CV-1013, 2011 WL 2648600, at *5 (E.D. Wis. July 6, 2011) (“[T]he central issue is whether this court can resolve a motion to dismiss in the defendants’ favor because of the existence of the affirmative defense of fair use. . . . [but] an affirmative defense can be the basis for a dismissal under FED. R. CIV. P. 12(b)(6) when the allegations of the complaint and material that expressly referenced the complaint and is central to the plaintiff’s claim ‘set forth everything necessary to satisfy the affirmative defense.’”) (internal citations omitted).

⁵² 17 U.S.C. § 108(f)(4) (emphasis added).

⁵³ Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 123 (2000).

⁵⁴ 17 U.S.C. § 107.

presumptive weight in the fair use analysis as a whole, at least some courts have held that uses in accord with these examples are entitled to a presumption that the first factor (“purpose and character of the use”) weighs in favor of a finding of fair use.⁵⁵ Though no one factor is determinative,⁵⁶ the first factor—termed the “soul” of the fair use by some⁵⁷—is highly correlated to a finding of fair use.⁵⁸

There are few cases that directly confront fair use in a non-profit library setting.⁵⁹ Indeed, the most frequently cited and influential cases for academic libraries come not from suits against

⁵⁵ See *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) (“As we held in *Wright*, ‘there is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in § 107.’” (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991))). This view is contested as inconsistent with the *Campbell* Court’s command against presumptions of fair use, but at least in the Second Circuit, the presumption lives on both in pre- and post-*Campbell* fair use cases. See 4 PATRY ON COPYRIGHT § 10:12 (Westlaw 2011) (citing the *Wright* decision and asserting that it is “clearly erroneous and has been subsequently overruled by the Supreme Court’s *Campbell* decision.”).

⁵⁶ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

⁵⁷ See Leval, *supra* note 45, at 116 (“Factor One is the soul of fair use.”).

⁵⁸ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 583–85 (2007) (describing the positive statistical relationship between a favorable finding under the first factor and the overall outcome in the fair use analysis).

⁵⁹ See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2582 (2009) (“There is relatively little caselaw on fair use in educational or research settings.”). In synthesizing fair use cases, Professor Samuelson goes on to explain that

Because this Article principally aims to analyze clusters of decided fair use cases, there is relatively little it can say about how courts would apply fair use as to a wide array of educational and research uses that lie outside the negotiated guidelines. There are simply too few decisions to analyze It is, however, fair to observe that the small number of litigated educational/research cases contrasts sharply with the very high volume of everyday educational and research uses that arguably implicate copyright

Id. at 2586–87 (citations omitted). *Cf.* Defendants’ Proposed Conclusions of Law at 35, *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE (N.D. Ga. July 22, 2011), ECF No. 411 (“The Court has found no case on point with the present, dealing purely with the application of the fair use doctrine in the academic environment.”).

There are now a few major cases that buck this trend. See *Cambridge Univ. Press v. Patton*, No. 1:08-CV-1425-ODE (N.D. Ga. filed Apr. 15, 2008) (Justia); *Ass’n for Info. Media & Equip. v. Regents of the Univ. of Ca.*, No. CV 10-09378 CBM (MANx) (C.D. Ca. filed Dec. 7, 2010) (Justia); *The Authors Guild, Inc. v. Hathitrust*, No. 1:2011 CV 06351 (S.D.N.Y. filed Sept. 12, 2011).

libraries at all, but against copyshops that created unlicensed coursepacks for classroom use.⁶⁰ These “copyshop” cases have uniformly failed to find fair use in the creation and sale of coursepacks,⁶¹ and have led libraries to adopt those rulings as fearsome precedent for their own practices.⁶² Those cases, however, place heavy emphasis on the commercial purpose of the use by the for-profit copyshops, and do not address how non-profit academic library uses may alter the analysis.⁶³ Thus, even caselaw that provides a close analogy to library practices, as these copyshop cases do, may not be as instructive as librarians have presumed it to be.

Non-profit educational uses are fondly touted as prime examples of acceptable fair use,⁶⁴ but they have received less

⁶⁰ See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (finding no fair use for a commercial copyshop that reproduced and distributed works for purchase by university students); *Basic Books Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).

⁶¹ See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 641–52 (2001) (summarizing multiple “copyshop” cases and finding consistent rejection of fair use in them).

⁶² See Samuelson, *supra* note 59, at 2585–86 ([“Copyshop” cases] have caused a good deal of agitation and anxiety in educational, library, and research communities, because they contribute to fears that publishers are pushing for a rule that if it can be licensed, it must be licensed . . .”).

⁶³ One case, *Addison-Wesley Publ’g. Co. v. N.Y. Univ.*, No. 82-CIV-8333, 1983 WL 1134, at *1 (S.D.N.Y. May 31, 1983), was made out directly against educators, naming several faculty members in the complaint. See Edwin McDowell, *Nine Publishers Sue N.Y.U., Charging Copyright Violation*, N.Y. TIMES, Dec. 15, 1982, at A1, available at <http://www.nytimes.com/1982/12/15/books/nine-publishers-sue-nyu-charging-copyright-violation.html>. This case was of particular importance to universities because publishers explicitly threatened other universities on the same grounds unless they would agree to abide by a very rigid set of guidelines for educational fair use. See Crews, *supra* note 61, at 640 (“[Universities] followed it because the publishing industry sent hundreds of letters to colleges and universities throughout the country urging them to adopt the guidelines or face a risk of litigation.” (citing Form Letter from Townsend Hoopes, President of the Ass’n of Am. Publishers, Inc., to college and university administrators (June 10, 1983))). Although the case was settled, it has had a lasting impact on university and library practice in this area. See *id.*

⁶⁴ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994) (contrasting commercial uses with educational uses, stating “that the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985))).

definition by the courts than other uses.⁶⁵ Given the ambiguity of the doctrine in the area of educational fair use, this absence of litigation is surprising. Matters of legal certainty are rarely litigated,⁶⁶ but uncertain and dynamic doctrines like fair use are regularly tested in the courts.⁶⁷ Indeed, fair use in general has been heavily litigated,⁶⁸ but that litigation has remained focused on commercial or personal uses, and not higher education.⁶⁹ The absence of litigation in this context seems to be partly the result of risk aversion on the part of academics who might otherwise assert fair use.⁷⁰ The net result is an educational fair use right that is

⁶⁵ See H.R. REP. NO. 94-1476, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (“Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”); *see also* Beebe, *supra* note 58, at 609–10 (noting that uses described as “news” were ultimately successful in asserting fair use 78% of the time, and “critical” uses 62% of the time, but that educational or research uses were less certain to succeed—ultimately only 40–48% of the time); Crews, *supra* note 61, at 664 (stating that while there are guidelines for acceptable fair use in educational settings, “no court ever has read them into law in a legal decision.”); Samuelson, *supra* note 59, at 2541, 2582 (arguing that fair use is in general “more coherent and more predictable than many commentators have perceived” but recognizing that educational fair use in particular remains unsettled).

⁶⁶ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–6 (1984). The Priest-Klein hypothesis is that cases selected for litigation or settlement are not chosen at random, but are selected based on “the expected costs to parties of favorable or adverse decisions, the information the parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement.” *Id.* at 4. The most important assumption of their model is that litigants “form rational estimates of the likely decision,” which are based, in part, on the settled or unsettled nature of the law. *Id.*

⁶⁷ See generally Beebe, *supra* note 58 (reviewing nearly 300 fair use decisions decided between 1978 and 2005).

⁶⁸ *Id.*

⁶⁹ See Silberberg, *supra* note 47, at 646. See also Samuelson, *supra* note 59, at 2582–83.

⁷⁰ Some have suggested that more certainty is needed for fair uses’ benefits to be within the reach of certain classes of risk-averse users. These assertions have led to calls for the establishment of an administrative fair use rulemaking or adjudication board. See, e.g., Carroll, *supra* note 43, at 1087 (proposing the creation of a “Fair Use Board”); Mark Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1413 (2004) (proposing an administrative dispute resolution process); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 412–27 (2009) (offering two proposed models of administrative regulation of fair-use); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 11–15 (2006) (proposing a panel of “Fair Use Arbiters” appointed by the Register of Copyright). A proposal for a similar body designed to

strong but ambiguous—a right that rights holders eagerly define away, and a right that librarians are unsure how to assert.⁷¹

Despite higher-education's favored status in claiming fair use, the doctrine's ambiguity in this area has caused librarians and administrators to hesitate in taking advantage of its benefits. Academic librarians act as “de facto arbiters of copyright practice for their institutions,”⁷² yet many are reluctant to engage in a fair use analysis for fear of subjecting their institution to an infringement suit. In many libraries, “[d]ecisions are made on the basis of avoiding copyright difficulties rather than fulfilling [the] mission.”⁷³ The fear of fair use is fueled by a belief that the

administer educational fair use has also been made. See David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 527–49 (2010).

Most of these proposals are intent on solving two of fair uses' most vexing problems for would-be asserters. The first is that “[l]iability for copyright infringement is strict,” because the exercise of any of the copyright owner's exclusive rights under Section 106 makes the fair use asserter a prima facie infringer, who then has the burden of proving that fair use applies. See Carroll, *supra* note 43, at 1098. The second is that the consequences for infringement are severe. Statutory damage awards can be as high as \$150,000 per work infringed, and it is not uncommon for awards in some cases to reach into the millions. *Id.* at 1098–99.

For fair use in academic libraries, these two problems are less harsh. First, the burden of proving fair use by academic libraries (those that qualify for § 108 exceptions) may well be lower or even reversed as compared to other asserters of fair use. This theory is untested but, as noted above, *supra* note 52 and accompanying text, it carries at least some statutory weight. Furthermore the second problem is mitigated by the fact that nonprofit educational institutions, libraries, and archives are excepted from statutory damages so long as they had reasonable grounds for believing the fair use determination weighed in favor of their use. The statute provides:

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords

17 U.S.C. § 504(c)(2) (2006).

⁷¹ PRUDENCE ADLER, BRANDON BUTLER, PATRICIA AUFDERHEIDE & PETER JASZI, FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES 3 (2010), http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf.

⁷² *Id.* at 5.

⁷³ *Id.* at 19.

analysis is so complex, and the result of an incorrect determination so harmful, that fair use decisions must always be made conservatively, if at all.⁷⁴

This attitude extends to others in the university setting. For example, the University of Texas “Copyright Crash Course” for academics takes a position on fair use that is common in the academic environment by asking “what is fair use?”

We would all appreciate a clear, crisp answer . . . but far from clear and crisp, fair use is better described as a shadowy territory whose boundaries are disputed, more so now that it includes cyberspace than ever before. In a way, it’s like a no-man’s land. Enter at your own risk.⁷⁵

⁷⁴ One recent study found that librarians generally believed that “libraries incur high risks, including exposure to statutory damages, for good-faith efforts to employ fair use.” *Id.* As discussed above, in many cases this fear is unfounded. See 17 U.S.C. § 504(c)(2) (2006); Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J. L. & TECH. 461, 504 (2010) (discussing how non-profit academic libraries are excepted from statutory damage awards when asserting fair use).

This safe haven for educational non-profit fair use is one reason why academic library fair use determinations are unique. Otherwise, with a range of almost anywhere between \$750 and \$150,000 per work infringed the prospect of a statutory damage award in the face of an incorrect fair use determination can be financially ruinous. Many commentators and even some courts have concluded that awards on the high end of the range may be unconstitutional. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480–90 (2009) (arguing that statutory awards on the higher end of the given range are both “plainly punitive” and “grossly excessive,” violating Due Process as they go beyond the guideposts for punitive damage awards established by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996)); Memorandum of Law & Order at 8, 34–35, *Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. July 27, 2011) (holding a statutory damage award unconstitutionally excessive even under the less rigorous standard for non-punitive awards).

⁷⁵ Office of the General Counsel, California Institute of Technology, *Fair Use*, CAL. INST. OF TECH., <http://www.ogc.caltech.edu/forms/fairuse> (last visited Sept. 14, 2011). Since this paper was written, the University of Texas’ “Crash Course” has now tempered its assessment of fair use. See UNIV. OF TEX. LIBR., *Copyright Crash Course: Fair Use of Copyrighted Materials*, UNIV. OF TEX., <http://copyright.lib.utexas.edu/copypol2.html> (last visited Oct. 11, 2011).

Because of its inherent ambiguity, fair use is often a last resort for those hoping to find a way to use copyrighted content.⁷⁶ Risk-averse librarians faced with such uncertainty are unwilling or unable to marshal the resources necessary to make fair use determinations, and instead rely on licenses that provide a quick and a simple “yes” or “no” answer to each proposed use.⁷⁷ Fair use analysis requires time, thought, and an understanding of the underlying legal and practical risks. The legal education of librarians who would make these decisions, however, can be lacking or nonexistent,⁷⁸ and even those comfortable with the analysis are forced to rely on a thin record of case law which addresses on-campus fair use only at the fringes.⁷⁹

Despite its ambiguity, asserting fair use in the university setting is important. For one, assertion of the fair use right is, in many respects, an assertion of First Amendment free speech rights. Fair use has been widely discussed as the copyright act’s “internal safety valve,”⁸⁰ protecting users’ rights to free expression from excessive limitation by rights holders. As copyright law has expanded over the last decades to extend the control of owners

⁷⁶ For example, in “The Five Step Approach for Analyzing Copyright Use Questions” for academics, fair use is the fourth of five steps (seeking permission is step five). *The Five Step Approach For Analyzing Copyright Use Questions*, J. MURREY ATKINS LIBR. UNC CHARLOTTE, <http://library.unc.edu/copyright/teaching/fivesteps> (last visited Sept. 14, 2011). I do not to suggest that such an approach is inappropriate, but rather that turning to fair use as a last resort has become a reality given the current state of the law.

⁷⁷ See Crews, *supra* note 61, at 695–97 (criticizing overreliance by both the courts and educational users on “rigid” fair use guidelines, reiterating that “[f]air use in [sic] an inherently flexible doctrine, dependent on the specifics of the relevant facts of each case . . . The Classroom Guidelines, the Multimedia Guidelines, and most of the fair-use guidelines make that crucial error with emphasis. They attempt to find and hit the bull’s eye of a moving target.”).

⁷⁸ See Cross & Edwards, *supra* note 32, at 541; see also David R. Hansen, William M. Cross & Phillip M. Edwards, *Copyright Policy and Practice in Electronic Reserves Among ARL Libraries*, 73 C. & RES. LIBR. 23 (forthcoming 2012) (finding that in a recent survey of ARL libraries on electronic course reserve practices, more than half of respondents reported that paraprofessionals and other non-librarians were primarily responsible for adherence to university copyright guidelines).

⁷⁹ See, e.g., Gerhardt & Wessel, *supra* note 74, at 495 (noting the lack of case law precedent in certain on-campus fair use issues).

⁸⁰ See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (discussing the conflicted relationship between copyright and the First Amendment).

even further, fair use has taken on added importance as a tool used by courts to harmonize the often conflicting goals of copyright and the First Amendment.⁸¹ Free speech benefits are amplified in the educational setting where academic freedom values are of particular concern.⁸²

In addition to free speech benefits, a healthy fair use doctrine is thought to promote a degree of social justice and equality among institutions of higher education.⁸³ Wealthier institutions are able to license access to more content, can afford to hire copyright specialists to enable alternative uses, and can afford to evaluate and, potentially, litigate fair use claims.⁸⁴ Institutions with fewer resources, however, are caught in a double bind. On the one hand, less content is licensed because of the rising costs of electronic-content licenses;⁸⁵ while on the other hand, assertions of fair use—which, if correctly determined, would allow free, unauthorized uses—are thought to pose a risk beyond which the institution can afford to defend.⁸⁶ As explained below,⁸⁷ because the strength of fair use is in some ways dependent on how frequently it is relied upon, a strong and sustained effort to assert fair use reduces the risk for all institutions, and thus maintains a semblance of equality. This has led some scholars to conclude that “[t]he educational community must assert and defend fair use if it is to retain some

⁸¹ See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537, 543 (2004) (describing recent copyright legislation as a “one-way ratchet,” granting more rights for longer periods of time, and explaining that fair use must be reinforced to maintain its role as copyright’s “built-in free speech safeguard,” harmonizing copyright restrictions with the First Amendment).

⁸² *Id.* at 587.

⁸³ See Gerhardt & Wessel, *supra* note 74, at 464–65.

⁸⁴ *Id.* at 464, 529.

⁸⁵ See Kittie S. Henderson & Stephen Bosch, *Seeking the New Normal: Periodicals Price Survey 2010*, 135 LIBR. J. 36, 36 (2010) (discussing the trend toward decreasing library budgets, especially for state-supported libraries, amidst increasing subscription costs for, among other things, electronic content).

⁸⁶ See Gerhardt & Wessel, *supra* note 74, at 465; Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 45–46 (1996) (“[F]air use is a troublesome privilege because it requires a hideously expensive trial to prove that one’s actions come within its shelter.”).

⁸⁷ See *infra* notes 88–93 and accompanying text.

autonomy over academic content and preserve some equity in the delivery of its mission.”⁸⁸

The assertion of fair use is also an important end in itself. Because fair use is context-specific and relies heavily on previous applications in factually-analogous situations,⁸⁹ the less fair use is actually asserted, the less important it becomes. Exercise of fair use in new and changing environments, as in the world of digital content, is the only way to maintain fair use’s relevance; unused, the right will atrophy.⁹⁰

This is especially true in the face of mass-licensing schemes that are now available to academic libraries.⁹¹ Recall the fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work.”⁹² If libraries seek licenses to cover uses that would otherwise be permissible under fair use, the potential market expands, thereby decreasing the strength of fair use.⁹³ In examining this “doctrinal feedback,” Professor James Gibson describes the result as “a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.”⁹⁴ Educational fair use already suffers from a dearth of case law. Contractual terms that make libraries and their users unable to exert fair use in at least the ways that are currently agreed upon

⁸⁸ Gerhardt & Wessel, *supra* note 74, at 529.

⁸⁹ *See id.* at 484, 488.

⁹⁰ *See id.* at 530.

⁹¹ *See, e.g., Annual Copyright License for Academic Institutions*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/annualLicenseAcademic.html> (last visited Apr. 30, 2011).

⁹² 17 U.S.C. § 107 (2006).

⁹³ *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (“This practice of unneeded licensing feeds back into doctrine because of one final uncontroversial premise: the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.”).

⁹⁴ *Id.* at 887. *See also* Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 971 (2007) (“[A] copyright owner can nearly always argue that she has suffered harm, if only because the defendant could have paid a license fee for the use being challenged.”).

as acceptable will result in even less definition of the right in this context.

Each of the above-listed benefits of a strong and regularly asserted fair use is diminished, or in extreme cases, extinguished by overreaching licenses. By either completely removing fair use (“The Licensee has no rights in or to the Licensed Materials other than as set forth herein”) or by narrowly defining terms (“Permissible uses of a ‘Reasonable Amount’ shall mean not more than 10 percent of the content contained in the Licensed Materials”),⁹⁵ the deliberately indefinite bounds of fair use are reigned in to encompass only a fraction of its potential scope.⁹⁶ A license term that removes fair use and replaces it with “ten percent,” “thirty seconds” or any other such contrived number will certainly give users more confidence about their use decision, but the reduced risk also strips fair use of one of its most important attributes—the ability to adapt and conform to new and creative uses.⁹⁷

Although it is impossible to determine the extent to which licenses impose these restrictions (many licenses contain non-disclosure clauses that prohibit libraries from advertising such details),⁹⁸ at a certain level it does not matter. The fact that these limitation clauses exist at all hinders the ability of students, faculty, staff, and librarians to make assertions of fair use because they cannot be sure that their time and effort in making that determination will be of any use.⁹⁹ Users rarely, if ever, investigate the license terms of each and every database they use because the transaction costs of such an investigation are too great.¹⁰⁰ Instead, users make decisions based on incomplete information about particular license terms, and when that incomplete information is tainted by a fear that fair use is not

⁹⁵ Stanley Wilder, *The Erosion of Fair Use Protections for Digital Scholarship*, CHARLESTON ADVISOR 57, 57–58 (2011), http://www.carli.illinois.edu/mem-serv/mem-train/1104ereslicensing/Erosion_of_fair_use.pdf (discussing both examples).

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ Ellen Finnie Duranceau, *License Compliance*, 26 SERIALS REV. 53, 57 (2000).

⁹⁹ *Id.* at 53.

¹⁰⁰ *Id.* at 55.

permitted, the costly, time-consuming fair use analysis will simply be avoided.¹⁰¹ Any solution that truly encourages fair use determinations must not only make the fair use analysis a valid exercise (by removing restrictive license terms), but must also make it known that the right is generally a beneficial one that may be freely asserted without the extra step of a time-consuming investigation into confusing contractual terms.

B. Proposed Solutions

Contractual alteration of copyright's "delicate balance" between user and author rights is well debated and a number of proposals to preserve that balance have been suggested.¹⁰² This section outlines three general categories of proposals, specifically focusing on model licenses, federal preemption, and the modification of state contract law. Each of these solutions is appealing, but for a variety of reasons none has emerged as a viable solution to preserving fair use in the face of mass academic-library licensing.

1. Model Licenses

The most obvious remedy to restrictive licensing terms is to ask negotiating librarians not to agree to terms that give up or modify the right of fair use for their library users. Indeed, as University Librarian Stanley Wilder points out, "there is no reason to believe that contract law should be more conducive to the erosion of fair use principles. Licenses are agreements, after all, requiring the consent of both parties."¹⁰³ To this end, a number of model licenses and best practices have been developed specifically for academic libraries.¹⁰⁴ These guidelines offer librarians a uniform contractual base that preserves important rights like fair use.¹⁰⁵ The sheer number of these model licenses is a testament to how important the underlying goal is. The number, and indeed the

¹⁰¹ *See id.*

¹⁰² *See generally* Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616 (2008) (reviewing the debate).

¹⁰³ *See, e.g.,* Wilder, *supra* note 95, at 57.

¹⁰⁴ *See id.* at 58.

¹⁰⁵ *See id.*

growth in new models, also speaks to how few of these licenses have been adopted consistently by libraries.

All of the following groups have created guidelines for license language that seeks to, at a minimum, preserve the existing scope of fair use: American Association of Law Libraries,¹⁰⁶ Association of Research Libraries,¹⁰⁷ Council on Library Resources/Digital Library Federation,¹⁰⁸ International Coalition of Library Consortia,¹⁰⁹ International Federation of Library Associations, North Eastern Research Libraries Consortium,¹¹⁰ and the National Information Standards Organization.¹¹¹ Notably, all of these guidelines are based on the idea that librarians can, and should, negotiate with vendors to preserve rights like fair use.

Preserving fair use in the license terms themselves is a laudable goal and should be taken up wholeheartedly by librarians who negotiate their institutions' licenses. The achievement of this goal, however, has been a long time coming. Librarians have been proposing model language and guidelines for decades,¹¹² but there is little evidence that publishers are receptive to or even aware of

¹⁰⁶ *Principles for Licensing Electronic Resources*, SPECIAL LIBR. ASS'N (1997), <http://www.sla.org/content/SLA/advocacy/infobank/principles.cfm>.

¹⁰⁷ *Copyright & Intellectual Property Policies*, ASS'N OF RES. LIBR., <http://www.arl.org/pp/ppcopyright/index.shtml> (last visited Apr. 30, 2011); *see also Licensing*, ASS'N OF RES. LIBR., <http://www.arl.org/sc/marketplace/license/index.shtml> (last visited Apr. 30, 2011).

¹⁰⁸ *CLIR/DLF Model License*, YALE UNIV. LIBR. LIBLICENSE, <http://www.library.yale.edu/~llicense/standlicagree.1st.html> (last visited Apr. 30, 2011).

¹⁰⁹ *Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information*, INT'L COAL. OF LIBR. CONSORTIA (ICOLC), <http://www.library.yale.edu/consortia/statement.html> (last visited Apr. 30, 2011).

¹¹⁰ *NorthEast Research Libraries Consortium Generic License Agreement for Electronic Resources*, NE. RES. LIBR. CONSORTIUM (2008), <http://www.library.yale.edu/NERLpublic/NERLGenericLicjeRev092410.pdf>.

¹¹¹ *Shared Electronic Resource Understanding*, NAT'L INFO. STANDARDS ORG. (2008), <http://www.niso.org/publications/rp/RP-7-2008.pdf>.

¹¹² *See* Charles W. Bailey, Jr., *Legal Issues: License Agreements*, SCHOLARLY ELEC. PUBL'G BIBLIOGRAPHY § 5.2, <http://digital-scholarship.org/sepbllicense.htm> (last updated Oct. 30, 2011) (outlining the long history of literature on library licensing issues and the many proposals and adoptions of model licensing language); *see, e.g.*, Trisha L. Davis, *License Agreements in Lieu of Copyright: Are We Signing Away Our Rights?*, 21 LIBR. ACQUISITIONS: PRAC. & THEORY 19, 19–27 (1997).

librarians' concerns.¹¹³ Librarians are, as Wilder points out, still “play[ing] defense” with regard to licensing terms.¹¹⁴ The problem will only grow as licensing continues to become an even bigger part of the way librarians provide access to content. This is especially true given the proliferation of more consumer-oriented products (and more electronic content generally).¹¹⁵ With copyright owners presenting these adhesion contracts, libraries may have little chance to “play offense” and assert their own preferred license terms.¹¹⁶

These standard-form, non-negotiable contracts present one area of concern that model licenses cannot reach. Netflix, for example, is a DVD and streaming video subscription service whose primary customer is a consumer, not a library.¹¹⁷ As Netflix has grown, libraries have added subscriptions with hopes of capitalizing on the Netflix collection.¹¹⁸ Netflix's license terms, however, are presented as non-negotiable, standard-form contracts directed at consumers;¹¹⁹ they do not contemplate library lending, and in fact, limit the Netflix service and content to “personal and non-commercial use.”¹²⁰ As a result, libraries that lend out Netflix-owned DVDs to library users face potential legal action for violating the terms of use.¹²¹

¹¹³ Examples of aggressive licensing terms that restrict users' rights abound. Some of the more egregious vendor terms are cataloged here: Peggy Hoon, *Running In Circles: Copyright, Licensing, and the Educational Environment*, COLLECTANEA BLOG (Feb. 19, 2011, 9:13 AM), <http://www-apps.umuc.edu/blog/collectanea/2011/02/running-in-circles-copyright-l.html>.

¹¹⁴ Wilder, *supra* note 95.

¹¹⁵ See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 65–66 (1997) (discussing the development of a new market for electronic informational services and tools).

¹¹⁶ See *id.* at 66, 71; Peggy Hoon, *If You Build It, Will They Come? Customizable Licensing*, COLLECTANEA BLOG (Sept. 12, 2011, 1:16 PM) <http://www-apps.umuc.edu/blog/collectanea/2011/04/if-you-build-it-will-they-come.html> (addressing the practice of allowing libraries to suggest their own licensing terms).

¹¹⁷ See Travis Kaya, *Academic Libraries Add Netflix Subscriptions*, CHRONICLE OF HIGHER ED.: WIRED CAMPUS BLOG (Sept. 18, 2010, 10:34 AM), <http://chronicle.com/blogs/wiredcampus/academic-libraries-add-netflix-subscriptions/27018>.

¹¹⁸ See *id.*

¹¹⁹ See *generally Terms of Use*, NETFLIX, <https://signup.netflix.com/termsfuse> (last visited Nov. 10, 2011).

¹²⁰ *Id.*

¹²¹ See Kaya, *supra* note 117.

Even with traditional academic publishers, libraries can be left out of the licensing picture. West Publishing (“West”), a large legal publisher that sells millions of dollars worth of licensed content to academic law libraries, recently released an “interactive casebook series” to accompany purchases of print casebooks.¹²² Although West is surely aware that it sells casebooks to law libraries (and that law librarians—typically lawyers themselves—will be particularly aware of licensing terms), the license for the interactive casebook series is directed solely toward students. It strictly limits the use of the interactive casebook to “coursework at law school or for bar preparation,”¹²³ but gives no indication as to whether these uses may be personal or institutional. Moreover, it is silent on the issue of whether libraries are permitted to access content on behalf of users. Stock licenses like these, which leave no opportunity for negotiation, are blunt-force instruments that achieve the goals of neither the library nor the publisher. But libraries, increasingly forced to act as purchasing agents for consumer-users, simply do not have a way to assert alternative licensing terms for these products.

Admittedly, Netflix and West’s interactive casebook are examples of products that are relatively unimportant in the grand scheme of the electronic content to which academic libraries provide access. They are, however, good illustrations of the limited usefulness of model licenses. Model license language is only effective if publishers are willing to negotiate. As the world of licensed electronic content grows, it is unlikely that libraries will represent a large enough segment of the customer population to warrant special attention from publishers in all areas, and without that attention, there is no “playing defense” or “playing

¹²² *West Interactive Casebook Series*, INTERACTIVE CASEBOOK SERIES, <http://interactivecasebook.com/> (last visited Apr. 30, 2011).

¹²³ *License Agreement*, INTERACTIVE CASEBOOK SERIES, <http://interactivecasebook.com/license/licenseagreement.htm> (last visited Apr. 30, 2011). Read literally, these license terms would seem to prohibit faculty use as well, although the site registration form clearly contemplates faculty registration. See *Create a New Account*, INTERACTIVE CASEBOOK SERIES, <http://interactivecasebook.com/register.aspx> (last visited Apr. 30, 2011) (allowing for special registration for law school faculty in order to gain access to “Professor Only” materials). To its credit, the license does specifically allow for uses “as allowed under the fair use provision of the Copyright Act (17 U.S.C.A. § 107).” *Id.*

offense.”¹²⁴ There is no game at all. These areas of consumer-oriented licensing are growing, and for library users who are making costly and time-consuming fair use decisions, the added burden of evaluating multifarious licensing terms is great.¹²⁵ Thus, model licenses, even if uniformly adopted and vigorously negotiated (which they are not), can only ease a portion of the burden imposed by a licensing culture, and must still accept consumer-oriented licenses that are outside the model licenses’ reach.

2. Federal Preemption

One of the most appealing proposals, at least from a legal perspective, is the suggestion that Congress or the courts should declare that federal copyright law—and in particular, the right of fair use—preempts any contract provisions to the contrary.¹²⁶ The logic is straight forward: licenses are creatures of state contract law, and state laws are generally valid only so long as they do not conflict with federal law on the same subject matter.¹²⁷ Federal

¹²⁴ See Reichman & Samuelson, *supra* note 115, at 66 (discussing the low bargaining power of database users or customers).

¹²⁵ See Gasaway, *supra* note 53, at 154–55.

¹²⁶ See Bohannon, *supra* note 102, at 629–35. A less drastic variation would be one that supports preemption only for specific contract provisions that purport to restrict the limitations on exclusive rights, such as the fair use right, if the contract is not non-negotiable. Such an approach has been proposed in Congress but has failed. See Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. (2003) (“When a digital work is distributed to the public subject to nonnegotiable 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.”). See also Kevin Smith, *Copyright Renewal for Libraries: Seven Steps Toward a User-Friendly Law*, 10 PORTAL: LIBR. AND THE ACAD. 5, 9–11 (2010) (discussing the proposal). This approach would potentially be easier to implement than wholesale preemption, but because the language of the existing preemption statute is specifically worded, it would be difficult for courts to read in such a restriction under the existing law. See *supra* notes 137–41 and accompanying text. Furthermore, as a legislative solution, such a proposal would suffer from many of the same problems as wholesale preemption would, but the difficulty may be less exaggerated. See *supra* notes 142–47 and accompanying text. These uncertainties suggest that this option should be further explored.

¹²⁷ This is only a rough generalization of the actual rule. Federal preemption can follow two routes, “express preemption” (where the statute explicitly states that it preempts state law) or “implied preemption,” which, in turn, can take the form of either “conflict preemption” (where courts must determine whether the state law actually conflicts with

law is, in the words of the Constitution's supremacy clause, the "supreme law of the land."¹²⁸ Because copyright and the right of fair use are created by federal law, those rights should not be alterable by state-law created contracts. This position is supported by the fact that the courts, under an express provision of the copyright act which directs the courts to find preemption for "equivalent rights,"¹²⁹ have regularly held that federal copyright law preempts state laws granting "equivalent rights" to those enumerated in the federal copyright law.¹³⁰

Federal preemption has a number of strengths. It would produce a uniform, nationwide rule. It would also more legitimately restore the current imbalance of rights between users and copyright holders; if Congress used federal law to create a balance of rights, then federal law should be used to maintain that balance. Although there is some concern about how such a federal-only rule would work,¹³¹ these benefits, among others, have led many to support this approach to preemption.¹³²

Despite scholarly commentary that roundly supports federal preemption of contract restrictions,¹³³ courts have generally

the purpose of the federal statute) or "field preemption" (where the federal statutory scheme is so broad as to "occupy the field" in that area of law). A thorough discussion of preemption doctrine in the context of copyright can be found in 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B] (LexisNexis 2011) [hereinafter NIMMER ON COPYRIGHT].

¹²⁸ U.S. CONST. art. VI, cl. 2.

¹²⁹ 17 U.S.C. § 301 (2006).

¹³⁰ See NIMMER ON COPYRIGHT, *supra* note 127, § 1.01[B][1][b]–[k] (discussing cases that have held that federal law preempts certain state law claims for breach of fiduciary duty, invasion of privacy or publicity, defamation, deceptive trade practices, misappropriation, unjust enrichment, trade secrets, conversion, trespass, and other causes of action).

¹³¹ For example, if state contract law is preempted as a whole with respect to copyrighted works, what contract law would apply? Federal common law?

¹³² Bohannon, *supra* note 102, at 622–30.

¹³³ See *id.* at 634 ("[T]he thrust of the scholarly criticism of ProCD has been that contracts, especially form contracts such as shrinkwrap licenses, alter the 'delicate balance' of rights established by the Copyright Act, and must therefore be preempted."). See also Maureen A. O'Rourke, *Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995); Joel R. Wolfson, *Contracts and Copyright are not at War: A Reply to "The Metamorphosis of Contract into Expand"*, 87 CALIF. L. REV. 79, 82 (1999); Kathleen K.

concluded that contracts which modify or replace copyright-related rights are nonetheless valid.¹³⁴ In *ProCD, Inc. v. Zeidenberg*,¹³⁵ Judge Easterbrook reasoned,

Rights “equivalent to any of the exclusive rights within the general scope of copyright” are rights established *by law*—rights that restrict the options of persons who are strangers to the author. . . . Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create “exclusive rights.”¹³⁶

Thus, the court concluded that “a simple two-party contract is not ‘equivalent to any of the exclusive rights within the general scope of copyright’ and therefore may be enforced.”¹³⁷

While other courts have taken a less categorical approach to preemption,¹³⁸ the general point remains that contractual restrictions on usage are valid, even when those restrictions conflict with federal rights such as fair use.¹³⁹ Many federal circuits have adopted some version of the *ProCD* holding,¹⁴⁰ and

Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL’Y 83, 84 (2006).

¹³⁴ See NIMMER ON COPYRIGHT, *supra* note 127, § 1.01[B][1][a][iii].

¹³⁵ 86 F.3d 1447 (1996).

¹³⁶ *Id.* at 1454.

¹³⁷ *Id.* at 1455.

¹³⁸ *E.g.*, Nat’l Car Rental Sys., Inc. v. Comp. Assocs. Int’l, 991 F.2d 426, 431 (8th Cir. 1993) (implicitly adopting the “extra element” rule, whereby a contractual obligation constitutes an “extra element” for enforcement that goes beyond the bare exclusive rights granted by copyright). The extra element approach, in at least some circuits, is in reality just as categorical—the only extra element that needs to be proved is that a contractual promise exists in addition to the underlying exclusive right granted by § 106. *See* Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990).

¹³⁹ While recognizing that it is the courts that have been the source of the current contract preemption rule, recent reform efforts continue to hope that the judiciary will reverse course on the issue. *See* Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1, 60 (2010) (presenting a list of factors to consider in the preemption analysis, but noting that “[t]hese factors are not intended as a multi-part balancing test or for statutory codification, but rather as suggestions for some considerations relevant to resolving, through case-by-case development, the ultimate question of whether enforcing a given contract right in a given set of circumstances will frustrate copyright’s purposes.”).

¹⁴⁰ Bohannon, *supra* note 102, at 633.

there is little evidence that the courts are looking to reverse course on this issue.¹⁴¹

Congress could, in theory, change the preemption rule to make it clear that state contract terms are preempted. In reality, however, such a change is unlikely. Such a change in course on this issue would almost certainly result in an expansion of users' rights in the Copyright Act¹⁴²—something Congress has rarely done before. In fact, over the last century, copyright has expanded to give authors and their assignees more rights over more formats for a longer period of time.¹⁴³ An expansion of users' rights would be unprecedented and extremely difficult.¹⁴⁴ This area of the law is subject to intense lobbying¹⁴⁵ pulling the politics toward more rights for holders of concentrated blocks of copyrights, and away from the rights of individual or even institutional users. Further, although some in Congress have signaled a willingness to consider users' rights issues, the past two Congresses have produced over thirty copyright-related bills, only one of which would have even arguably expanded users' rights.¹⁴⁶ Political attitudes can, of course, change quickly, and the scope of users' rights is not set in stone. At the federal level,¹⁴⁷ however, an apparent disparity

¹⁴¹ See, e.g., *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 614–17 (S.D.N.Y. 2010) (reviewing the Second Circuit intra-circuit split on preemption and noting an overall trend toward following *ProCD*, the court opted to adopt the reasoning of Judge Easterbrook's *ProCD* decision).

¹⁴² See Samuelson & Members of the CPP, *supra* note 139, at 59–62 (noting that failing to change course, and allowing such preemption, places limitations on users' rights).

¹⁴³ See NIMMER ON COPYRIGHT, *supra* note 127, §1-TL. In 1962, Congress extended the copyright term from a maximum of 56 to 75 years, then the Copyright Act of 1976 extended the term further to cover the life of the author plus 50 years. *Id.* §1-OV. Finally, the Sonny Bono Copyright Term Extension act then extended the term even further to cover the life of the author plus 70 years. *Id.* During this period, Congress has also extended protection to works such as computer software and architectural works. *Id.*

¹⁴⁴ This is despite the numerous proposals for copyright reform, focusing particularly on the fair use right. See, e.g., *supra* note 66.

¹⁴⁵ According to the Senate Lobbying Disclosure Act Database, nearly a billion dollars were spent last year on lobbying related to issues of “COPYRIGHT / PATENT / TRADEMARK.” See *LDA Reports*, U.S. SENATE, http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm (last visited Aug. 12, 2011).

¹⁴⁶ See *Copyright Legislation*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/legislation/archive> (last visited Aug. 12, 2011) (listing copyright-related bills dating back to the 105th Congress).

¹⁴⁷ See *LDA Reports*, *supra* note 145.

currently exists: the relative lobbying strength of parties primarily concerned with greater copyright protection for authors is much greater than those whose primary concern is access (such as academic libraries). Accordingly, Congress's interest in addressing these issues is likely limited.

Still, options remain to change the law on this point; courts *could* reverse the trend toward finding no preemption, or Congress *could* act. But given the inaction of both the courts and Congress over the last two decades—a period of time in which the “debate has been raging” over contractual preemption¹⁴⁸—such a change seems unlikely. Academic library users must look elsewhere for the time being.

3. Wholesale Modification of State Contract Law

A wholesale modification of state contract law is another way to address the issue. Although not well discussed by scholars, states could simply decide that any contractual provisions—as between any grouping of public or private parties—which limit or modify the right of fair use are void as against public policy. This approach, while worthy of further investigation, seems unlikely to be easily implemented by either federal or state courts, or by state legislatures.

Federal courts, for their part, are unlikely to alter state contract law in any meaningful way because it is simply not theirs to alter. As discussed above, federal courts have accepted as a matter of course that “state law determines the rights and obligations arising under a publishing contract that assigns a copyright.”¹⁴⁹ While federal courts are free to exercise jurisdiction over state law contract claims that are supplemental or ancillary to an underlying federal claim (such as copyright infringement),¹⁵⁰ expanding or modifying settled issues in state law is decidedly outside the realm

¹⁴⁸ Bohannon, *supra* note 102, at 616.

¹⁴⁹ Yount v. Acuff Rose-Opryland, 103 F.3d 830, 835 (9th Cir. 1996).

¹⁵⁰ 28 U.S.C. § 1367 (2006). The original grant of jurisdiction over copyright suits comes from 28 U.S.C. § 1338 (2006), although general federal question jurisdiction, under 28 U.S.C. § 1331 (2006), would also seem to be sufficient.

of permissible federal court activity.¹⁵¹ Thus, federal courts will apply state law as it exists, and will not initiate changes.

State courts, which have traditionally played an important role in developing contract law, are also unlikely to alter the law in this area for at least two reasons. First, courts are conservative when it comes to changing contract law. Exceptions to the principle of freedom of contract—cast as public policy exceptions and viewed as consumer protections—are difficult to initiate¹⁵² and raise

¹⁵¹ See, e.g., *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499–501 (1943) (“But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of [the state law] . . . belongs neither to us nor to the district court but to the supreme court of [the state]. . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘exercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.”).

¹⁵² Almost always prefaced by language such as “that parties are free to contract for whatever terms on which they may agree,” *Hanks v. Powder Ridge Rest. Corp.*, 276 Conn. 314, 326, 885 A.2d 734, 742 (2005), courts have most often created public policy exceptions with respect to exculpatory provisions that seek to insulate one party from her own ordinary negligence. See 8 WILLISTON ON CONTRACTS § 19:22 (4th ed. 2011). The factors that justify these exceptions, however, also provide a powerful argument for the acceptance of a “fair use” public policy exception:

Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445–46 (Cal. 1963).

serious concerns from courts about paternalism and the role of the court in creating, and possibly conflicting with, other public policies.¹⁵³

Second, even if state courts wanted to address this issue, state courts never have the opportunity to actually hear contract disputes in the copyright context. Federal district courts are explicitly granted original jurisdiction over copyright cases,¹⁵⁴ and that jurisdiction is “exclusive of the courts of the states.”¹⁵⁵ Exclusive jurisdiction means that federal courts—and only federal courts—can hear copyright disputes.¹⁵⁶ Because licensing disputes are invariably tied to an underlying copyright claim (necessarily so, if fair use is asserted), the federal courts are the only forum available to hear both copyright and contract claims together. Thus, state courts are in the curious position of never having an opportunity to clarify what their own law is, while federal courts are obliged to conservatively apply state law as they believe it currently exists.

While the courts may be unable to properly address the issue, state legislatures may. In the past, state legislatures have indicated some willingness to modify contract law to deal with electronic licensing issues. The Uniform Computer Information Transactions Act (“UCITA,” formerly UCC Article 2B)¹⁵⁷ was designed to be

¹⁵³ Although more reflection is necessary, such a change in the general rules of contract construction could arguably cause a conflict with “copyright policy” (perhaps a principle of freedom of contract, as implied in *ProCD*), and may be overridden by federal law. “Usually, state law rules of contract construction do not violate federal copyright policy, and the two work hand in glove. . . . But, if and to the extent that such dissonance may occur, the state law, of course, must give way to the federal policy.” NIMMER ON COPYRIGHT, *supra* note 127, § 10.08. Whatever these policy conflicts are, they have been described as “extreme situations.” See *Fantastic Fakes, Inc. v. Pickwick Int’l, Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (“It is possible to hypothesize situations where application of particular state rules of construction would so alter rights granted by the copyright statutes as to invade the scope of copyright law or violate its policies. We need not, however, set forth these extreme situations.”).

¹⁵⁴ 28 U.S.C. § 1338 (2006).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ UCC Art. 2B (1999), available at <http://www.law.upenn.edu/bll/archives/ulc/ucc2/2b498.htm>; UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (1999) [hereinafter UCITA] available at <http://www.law.upenn.edu/bll/archives/ulc/ucita/ucita200.htm>. The UCITA was originally proposed as part of UCC Art. 2B, but is now a separate act. See *Article 2B Is Withdrawn from UCC and Will Be Promulgated by*

adopted by states as a way to uniformly regulate license terms related to software purchases, online databases, software access contracts and similar transactions. The UCITA, as it happens, was strongly opposed by libraries as an affront to library services like interlibrary loan and library lending of electronic media like CD-ROMs and DVDs.¹⁵⁸ Librarians argued that it would also “restrict traditional ‘fair use’ of a product by defining what rights buyers have in relation to an information product” by validating license terms that are hidden “deep within online licenses that are not readily available before purchase.”¹⁵⁹ In the end, only two states—Virginia and Maryland—adopted the UCITA,¹⁶⁰ and four states have instead adopted so-called “bomb shelter” legislation to shield their residents from being subject to UCITA-governed contracts.¹⁶¹ While it has been more than ten years since the UCITA was proposed,¹⁶² its existence and the states’ reaction with bomb shelter legislation indicates at least a willingness on the part of state legislatures to address the issues, albeit in different ways.

Modification of state contract law as a whole, however, is a major undertaking that would have a widespread impact on consumers and businesses. A more in-depth study is necessary to determine how state contract law may be modified to preserve fair use and other federally-created rights. Because states have been hesitant to rush into studying or implementing such sweeping changes, this paper makes a more modest proposal.

II. A RESTRICTION ON PUBLIC ACADEMIC LICENSING

To protect the scope of fair use in the academic environment, this paper proposes that state legislatures impose a limited

NCCUSL as Separate Act, ALI REP. (Sept. 27, 2011), http://www.ali.org/ali_old/R2103_Art2b.htm.

¹⁵⁸ See *UCITA Impact on Libraries*, AM. LIBR. ASS’N, <http://www.ala.org/ala/issuesadvocacy/copyright/ucita/impact.cfm> (last visited Apr. 30, 2011).

¹⁵⁹ *Id.*

¹⁶⁰ See MD. CODE ANN., COM. LAW § 22-101 (West 2011); VA. CODE ANN. § 59.1-501.9 (West 2011).

¹⁶¹ See IOWA CODE § 554D.104 (2011); N.C. GEN. STAT. § 66-329 (2011), VT. STAT. ANN. tit. 9 § 2463a (2011); W. VA. CODE § 55-8-15 (2011).

¹⁶² See UCITA, *supra* note 158.

restriction, applicable only to public institutions of higher education, that would render void any license terms that purport to eliminate or modify the scope of fair use for its users. For legal, equitable, and practical reasons, the restriction would apply only to new contracts entered into after the act's effective date,¹⁶³ and would reach only to those institutions that are acting as arms of the state.¹⁶⁴

A. *Proposed Text*

Restrictions on contract terms between private parties and state institutions are fairly common. In North Carolina, for example, state institutions are prohibited from agreeing to a whole host of contract terms, including provisions that provide for: acceleration of payment, arbitration, assignment of rights, governing law, indemnity, hold harmless, assumption of liability, limitation of liability, liquidated damages, material breach, irreparable harm, statute of limitations, and non-compete clauses.¹⁶⁵ An additional requirement that state institutions may not contract away the right of fair use for its users would not represent a significant burden on state institutions either in terms of compliance or actual licensing expenditures.

The draft text below is but one way to approach this issue. It is offered as a point of discussion for one possible implementation of this proposal. Although drafted as part of the statutory law of a given state, the contract restrictions described below could easily be implemented as either a state regulation, or as a university governing-board level policy.¹⁶⁶ As long as the provisions are non-waivable and are binding on the institution for all contracts,

¹⁶³ Applying the change retroactively may run afoul of the Constitutional command that "No State shall . . . pass any bill . . . or Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. See *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21–32 (1977) (explaining the application of the Contract Clause to modifications of government contracts).

¹⁶⁴ As opposed to private institutions that only incidentally receive some minimal level of state funding.

¹⁶⁵ See *Negotiating Prohibited Contract Clauses*, OFF. OF LEG. AFFAIRS, UNC CHARLOTTE, <http://legal.uncc.edu/prohibitedclauses.html> (last visited Apr. 30, 2011).

¹⁶⁶ See 1 GOV'T CONTRACTS: LAW, ADMIN. & PROCS. § 1.120 (2011) (noting the diverse ways that state and local governments structure their procurement statutes).

the effect would be the same. A more complete example of proposed text for this Act is attached as an appendix to this paper. The first part of the proposed act lays the groundwork for licensing practices regarding fair use provisions. It provides

No publicly supported college or university, as defined in [statutory definition], shall enter into any contract or license which alters, restricts, or eliminates any of the fair use rights or defenses granted in Section 107 of Title 17 of the United States Code. State supported colleges and universities may comply with this provision by incorporating the following language: [compliance language].

This provision disallows universities themselves from entering into contracts that restrict fair use. Although such language may not be completely necessary given the second paragraph (below, which renders void those contract terms anyway), the first paragraph forestalls any equitable defense of estoppel or waiver that vendors could potentially raise if institutions continued to assent to restrictive contract terms, even while knowing that the terms themselves should be rendered void.¹⁶⁷ This term also ensures that licenses on file with the institution would not contain restrictive language, allowing librarians and users to confidently assert fair use for the licensed works without second guessing the validity of the contract.

The first paragraph leaves open the definition of “state supported college or university.” Many states already have statutory definitions or lists of state-funded academic institutions that would be appropriate for reference here.¹⁶⁸ The important

¹⁶⁷ This concern may not be well-founded, but is included in an abundance of caution. A defense of waiver or estoppel would be unlikely to succeed given the second paragraph. *See* 17A C.J.S. *Contracts* § 369 (2011) (“Generally, as between the parties to a contract, validity cannot be given to it by estoppel if it is prohibited by law or is against public policy. Thus, an agreement which is void as against public policy, or because prohibited by law, cannot be rendered valid by invoking the doctrine of estoppel.”).

¹⁶⁸ *See, e.g.*, N.C. GEN. STAT. § 115D-2 (2011) (defining community colleges); N.C. GEN. STAT. § 116-2 (2011) (defining constituent institutions of the University of North Carolina System). Other states leave the definition of specific entities to state agencies.

point is that states should be as inclusive as possible and capture as many state-funded institutions as possible within the definition. As discussed above,¹⁶⁹ the inability of underfunded institutions to freely exercise and challenge fair use determinations contributes to the inequity of access to information as between those institutions and their well-funded counterparts.¹⁷⁰ States should resist applying these provisions only to flagship universities or research-intensive institutions. Community colleges, small universities, and other institutions with relatively small amounts of resources would benefit from these provisions as well.

As a final matter, the first paragraph also provides model compliance language that institutions may incorporate into their contracts to ensure compliance with the previous sentences. This provision is designed to reduce administrative and negotiating costs on the part of universities. Where this language is incorporated, there is no doubt that the contract is in compliance with the statute's terms and that fair use rights are preserved for library users.

See CAL. EDUC. CODE § 66700 (West 2011) (leaving the definition and establishment of community colleges to the Board of Governors of the California Community Colleges).

¹⁶⁹ *See* Gerhardt & Wessel, *supra* note 74, at 529; *see also supra* notes 83–87 and accompanying text (discussing why the assertion of fair use is important in allowing institutions of higher education to “retain some autonomy over academic content and preserve some equity in the delivery of its mission.”).

¹⁷⁰ Another option is to simply apply the provisions to *all* arms of the state, regardless of educational purpose. One way of deciding which agencies to include under this broader-reaching directive might be to just adopt the test of which state agencies are covered by the 11th Amendment. Because they are exempt from damage awards, those agencies would pose a lower risk in terms of potential damages awards under the Copyright Act, which can be substantial. *See supra* note 70 and accompanying text.

Furthermore, the test for 11th Amendment applicability is often phrased in terms that support this paper's proposal as a funding, rather than ideological, restriction on what the state should be paying for:

Six factors determine whether an entity is an arm of the state: “(1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state.”

Gorton v. Gettel, 554 F.3d 60, 62 (2d Cir. 2009) (quoting *McGinty v. New York*, 251 F.3d 84, 95–96 (2d Cir. 2001)).

The second paragraph does most of the work. Its provides that

Any contract or license term, between any person or entity and a state supported college or university, as defined in [statutory definition], which alters, restricts, or eliminates any of the fair use rights and defenses granted in 17 U.S.C. § 107 shall be rendered void and against the public policy of [state]. The provisions of the previous sentence shall only apply to contracts entered into after the effective date of this Act.

This paragraph does two things. First, it renders void any contract terms that restrict the scope of fair use. It makes clear that even in the case of an institution that ignores the first paragraph, those contract terms are nonetheless void. Second, it applies the terms of this provision only to new contracts, avoiding problems with the Constitutional prohibition on impairments of contracts.¹⁷¹

B. Strengths and Weaknesses

The major benefit of this kind of legislation is that it allows academic libraries and their users to freely assert fair use without the burden of contractual restrictions that render the fair use analysis meaningless. Unlike the model licenses, a uniform rule that applies to all state institution contracts will give users some degree of certainty that their efforts in making the fair use analysis are meaningful and valid.

Likewise, this approach avoids the problems of wholesale modification of state contract law, which would constitute a sweeping change to the way businesses and consumers, as well as state institutions, contract for copyrighted goods. To be sure, this is an area ripe for more study, in particular to examine the way such a sweeping change might be implemented for other classes of

¹⁷¹ U.S. CONST. art. I, § 10, cl. 1. Though, in enacting this provision as a matter of public policy, the state may have some footing to assert retroactive application. “[T]he reservation of the reasonable exercise of the protective power of the state is read into all contracts . . .” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934). This may be especially true of a state-law protection of fair use—a right that is unlikely to be heavily used even without contractual restrictions, and a right that is provided in federal law in part to protect First Amendment free speech rights.

users or for consumers as a whole, with due regard for issues of federalism, statutory preemption, and dormant commerce clause jurisprudence. While changes to state contract law as a whole may be desirable, those changes are undoubtedly more difficult than this paper's more modest proposal. Contractual restrictions that apply only to state institutions represent an incremental step in the same direction, but are less jarring because they apply only to a specialized set of copyrighted content purchasers. Further, for many institutions the change in licensing practices would be small. Many libraries already strive to preserve fair use with model license language,¹⁷² and this proposal simply makes those license terms non-negotiable.¹⁷³

Because this approach represents only an incremental change, it also has a legitimate chance of being implemented. State legislatures have shown some interest in modifying their laws to meet the demands of electronic licensing issues, but wholesale changes to contract law are more difficult because of the widespread impact those changes would have. States have regularly created self-imposed restrictions on government contract practices, many of them similar to this proposal.¹⁷⁴

As compared to changes to federal copyright law itself, this state-level approach is not necessarily preferable. It does however, represent a more achievable level of change than other proposals made thus far. At the federal level, Congress is unlikely to act. Generating and passing legislation at the federal level is an incredibly difficult process.¹⁷⁵ Moreover, legislation that benefits copyright users or academic institutions is far outside the current

¹⁷² See, e.g., *CLIR/DLF Model License*, *supra* note 108; UNIV. OF CAL. COLLECTION DEVELOPMENT COMMITTEE, *Principles for Acquiring and Licensing Information in Digital Formats*, UNIV. OF CAL. LIBR. (2006), <http://libraries.universityofcalifornia.edu/cdc/principlesforacquiring.html>.

¹⁷³ In contrast to the non-negotiable adhesion contracts discussed above, that had the effect of severely restricting, if not eliminating fair use, this non-negotiable regulation or contract provision in state institution contracts would ensure full access to fair use rights, and would protect the arguably less sophisticated party in any negotiation over other terms.

¹⁷⁴ See *supra* note 166 and accompanying text.

¹⁷⁵ See generally *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/content/learn/legislative_process (last visited Sept. 12, 2011).

realm of legislative proposals; instead, federal lobbying is tilted toward protection of existing content owners.¹⁷⁶

States legislatures may be more likely to act on this issue for two reasons. First, the restriction is in the state's own best interest—it is, after all, their state budgets that underwrite public university access to these databases. Public university funding can be heavily scrutinized, and state legislatures have a very real interest in seeing that their universities get the most for their money. Congress, by comparison, has less of a direct financial interest in users' rights because it does not have to pay for this content. Second, the lobbying dynamic at the state level may be more considerate of the interests of large state institutional stakeholders. At the state level, public university lobbying can be relatively influential, given its size and economic impact on the particular states, as compared to at the federal level. These two reasons for adopting a state-level approach may, of course, vary significantly from state to state and from time to time, and it is difficult to state with certainty how these dynamics would play out in reality. The stagnation of solutions from the federal level, however, makes the state level approach one option worth pursuing.

Ultimately, however, the strength of this proposal as a small, incremental, local change may also be its weakness. For one, it may not do enough. This proposal focuses on a narrow change in the law that applies only to state institutions. Private institutions, however, experience many of the same licensing problems that public institutions experience.¹⁷⁷ Private institutions would feel some spill-over effects because vendors would have to justify why they can concede fair-use protections in state licenses but not in private licenses, but the benefit is less direct. Private institutions would also not experience the same level of uniformity among their licenses. Because any gains in fair-use protections would still be negotiable with vendors, private users might still face uncertainty in determining the value of the fair use analysis with respect to work taken from any given database.

¹⁷⁶ See *LDA Reports*, *supra* note 145.

¹⁷⁷ See McDowell, *supra* note 63, at A1.

The opposite side of this weakness is that public institutions may be at a competitive disadvantage when bargaining with vendors. Because public institutions would now have to insist on contract terms that private institutions would not, public institutions may be forced to pay higher prices than their private counterparts. This problem may be exacerbated if only one or a few states implement this papers' proposed change, leaving a small and discrete group of institutions against which rights holders may discriminate in pricing licensing contracts. Although existing contractual restrictions on state institutions have not resulted in an appreciable price difference between public and private licenses, terms that preserve fair use rights may come at some cost to public institutions.

On balance, the negative aspects of this limited proposal are outweighed by the fact that some change is needed, and alternative solutions are either unlikely to be implemented or are simply ineffective and unenforceable by themselves. Further, the small changes suggested here should be thought of as a first step toward restoring balance between copyright owners' and users' rights. Applying these contract restrictions to private institutions, or to the public at large, may be a logical next step.

III. OTHER AREAS FOR STATE LAW LICENSE RESTRICTIONS

Restrictions on state contracting may be used to protect other important copyright-related rights in ways that are currently impossible under existing federal law. One area that may be amenable to this type of change would be rules of contract construction in determining the distinction between a sale and a license. The doctrine of first sale allows libraries to "sell or otherwise dispose of" copies of works that they have legally purchased—that is, particular copies over which the library is the "owner," not merely a licensee.¹⁷⁸ This right justifies library lending and is vital to the distribution of single-copy digital media in physical formats (DVD or CD, usually).¹⁷⁹ Recent federal cases

¹⁷⁸ 17 U.S.C. § 109 (2006).

¹⁷⁹ *Id.*

have challenged the stability of the first-sale doctrine as applied to these formats,¹⁸⁰ and carefully drafted state restrictions on the ability of vendors to easily substitute “licensee” status over “owner” status for libraries (or users in general) may be beneficial.

Another application may be to promote author-archiving in open-access repositories, as an alternate way that university, state-funded authors can make their works available. Universities in particular fund a large amount of creative content, but they pay for it twice—once in faculty salaries, and a second time through licensing contracts that purchase back access for many of the very same works that faculty have authored.¹⁸¹ Academic authors rarely receive direct compensation for their writing, and universities also see no direct revenue for those activities.¹⁸² Thus, the lifecycle of scholarly communication involves significant and repeated outlays by scholars and their universities, with little direct benefit for either the institution or, in the case of public institutions, the citizens of the state that supports the institution. Requiring that state institutions maintain public or, at a minimum, institutional access to works which they have already funded through salaries would be one way to partially avoid these double payments.

At the federal level, funding agencies, such as the National Institutes of Health¹⁸³ and the National Science Foundation,¹⁸⁴

¹⁸⁰ See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (holding that restrictions on sale of second-hand software were valid license terms not subject to first sale doctrine); Complaint, *Ass’n for Info. Media & Equip. et al v. Regents of The Univ. of Cal. et al.*, No. CV 10-9378 (C.D. Cal. Dec. 7, 2010), available at <http://dockets.justia.com/docket/california/cacdce/2:2010cv09378/489296/> (asserting that DVDs held by the UCLA are subject to licenses which prohibit reuse or copying for “time” and “format” shifting purposes). See generally Parzanowski & Schultz, *supra* note 1 (exploring in detail the problems courts have faced when applying the first sale doctrine to digitally distributed materials).

¹⁸¹ See generally Gerhardt & Wessel, *supra* note 74, at 464.

¹⁸² Lloyd L. Weinred, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1233 (1998).

¹⁸³ NAT’L INSTS. OF HEALTH, *NIH Public Access Policy Details*, NAT’L INSTS. OF HEALTH PUBLIC ACCESS (Apr. 30, 2011) <http://publicaccess.nih.gov/policy.htm> (“[A]ll investigators funded by the NIH submit or have submitted for them to the National Library of Medicine’s PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication . . .”).

have seen success in conditioning funding on the requirement that authors make the published results of their research available in an open-access repository.¹⁸⁵ ARL libraries have already suggested model language that conditions licenses between publishers and libraries on the condition that those same publishers grant institutionally-affiliated authors the right to archive their works in open-access repositories.¹⁸⁶ Making those archiving rights for authors mandatory through contractual restrictions on public institutions would further that initiative.¹⁸⁷

CONCLUSION

Contracts can do funny things to the balance of rights granted by Congress in the Copyright Act. For public institutions that spend large amounts of money on copyrighted content, contractual restrictions on users' rights are especially problematic given the needs of academic library patrons. In recent years, academic libraries have experienced a dramatic shift in the acquisitions practice—from purchasing physical copies of works to licensing access to those works. With this shift toward licensing, academic library users' rights under federal copyright law have been diminished. In particular, these restrictions have narrowed the scope of fair use, a right whose free exercise is important to academic freedom and equity across institutions of higher education. These contractual limitations alter the delicate balance of author and user rights, and have garnered significant criticism

¹⁸⁴ *NSF Data Management Plan Requirements*, NAT'L SCI. FOUND. (Apr. 30, 2011), <http://www.nsf.gov/eng/general/dmp.jsp>.

¹⁸⁵ Support for these mandates has not been universal and legislation has been introduced to discontinue the practice. *See* Fair Copyright in Research Works Act, H.R. 801, 111th Cong. § 2(a) (2009) (“No Federal agency may, in connection with a funding agreement . . . impose or cause the imposition of any term or condition that . . . requires the transfer or license to or for a Federal agency . . .”).

¹⁸⁶ *Model Language*, AUTHOR RIGHTS MODEL LICENSING LANGUAGE <http://authorrights.wordpress.com/model-language> (last visited Apr. 30, 2011).

¹⁸⁷ Unlike the preservation of a federally created balance of rights, however, a mandatory license term which dictates author self-archiving rights would venture dangerously close to granting an “equivalent right,” that may be preempted by federal copyright law. *See* 17 U.S.C. § 301 (2006); NIMMER ON COPYRIGHT, *supra* note 127 § 1.01[B]. Thus, the boundaries of this application and the possibility of preemption should be further explored.

from scholars. Thus far, proposals to restore the balance have not been effective because they are either too ambitious (as with federal preemption) or too weak (as with model licenses). This paper proposes a solution that falls between those two extremes, and which may be useful to rebalance the rights of content owners and users with respect to other academic uses as well.

Academic library users are not, however, the only group of users that are negatively impacted by licensing restrictions on rights like fair use. As the digital distribution of copyrighted works becomes more common, consumers are presented with the same problems as those in academia. Because contracts—creatures of state law—are what enable these problems, state courts and legislatures should give serious thought to modifying state contract law, either for individual classes of users (as this paper proposes), or for consumers in general.

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USING STATE LAW TO PRESERVE FAIR USE

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APPENDIX: PROPOSED TEXT FOR STATE CONTRACT LIMITS ON FAIR
USE RESTRICTIONS

EDUCATIONAL FAIR USE PRESERVATION ACT

To amend the General Statutes, to preserve educational fair use for state college and university library users.

SECTION 1. SHORT TITLE. This Act may be cited as the “Educational Fair Use Preservation Act of 2011.”

SECTION 2. FINDINGS.

Whereas, [state] seeks to support the academic mission of its colleges and universities by providing access to educational and research materials to the greatest extent possible,

Whereas, it is also the policy of the state of [state] to take advantage of the rights and defenses provided under the federal copyright laws,

Whereas, state supported colleges and universities pay high and increasing fees associated with the provision of electronically distributed works, while at the same time ceding rights and defenses of federal copyright law through restrictive licensing terms,

Whereas, those reductions in rights and defenses are impacting the core academic mission of state supported colleges and universities,

Whereas, the most egregious of these reductions involves a contractual modifications to the scope of fair use, as provided for in Section 107 of Title 17 of the United States Code, a right which is of central importance to academic writing and research,

Therefore,

SECTION 3. NO CONTRACTS RESTRICTING FAIR USE.

“Sec 101. Restriction on College or University Contracts.

“(a)—Restriction

“No publicly supported college or university, as defined in [statutory definition], shall enter into any contract or license which

alters, restricts, or eliminates any of the fair use rights or defenses granted in Section 107 of Title 17 of the United States Code.

“(b)— Compliance Language

“State supported colleges and universities may comply with this provision by incorporating the following language in contracts and licenses:

“In accordance with the Educational Fair Use Preservation Act of 2011, nothing in this contract shall be construed to restrict [name of college or university] or its users from asserting the rights or defenses of fair use, as provided by Section 107 of Title 17 of the United States Code.

SECTION 4. FAIR USE RESTRICTIONS VOID.

“Sec. 201. Fair Use Restrictions Void

“(a)— Restrictions Void

“Any contract or license term, between any person or entity and a state supported college or university, as defined in [statutory definition], which alters, restricts, or eliminates any of the fair use rights and defenses granted in 17 U.S.C. § 107 shall be rendered void as against the public policy of the [state].

“(b)— Date of Application

“The provisions of Subsection (a) shall only apply to contracts entered into after the effective date of this Act.