

Interface between IP limitations and contracts

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The issue

- Clause 666 – “Unquote me obligation”
- The licensee shall be prevented (forever, or until the expiration of the pertinent author’s rights, whichever last longer) to quote the “literary work”, in whole or in any portion whatsoever (except when the quotation does not exceed three successive letters or numbers) in any and all books or other literary works of any nature (“subsequent work”) to be published, sponsored, printed, or otherwise given to the public through any means whatsoever, by the licensee’s agency or in which the licensee may have any direct or indirect economic interest, irrespective of the critical or educational nature of such “subsequent work”, *and* irrespective of any circumstance which would - but for this very provision - legitimize a quotation under any applicable law, usage or tradition.

The issue

- The effects of voluntary yielding of the benefits provided by limitations to IP rights.
- May private parties contract out of statutory limitations?
- In essence the question is to recognize the limitations either
 1. as a containment of the interests of the right holder on account of the interest of another party,or, to the contrary,
 1. the presence of public or societal interests that transcend the parties.

The issue

Both cases may be at stake.

- - "regulating the relationship between copyright and contract law with respect to limitations and exceptions may depend on different groups of justifications.
 - For market failure remedies (such as, under one reading, exceptions for private copying), contracts may legitimately trump statutory permissions.
 - For fundamental rights (such as those implied by exceptions for criticism or parody), these must trump.
- KRETSCHMER, Martin, et alii, *The Relationship Between Copyright and Contract Law* (2010), found at eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf, visited Dec. 12, 2012.

The solutions

- The laws may defer to such distinctions, or simply consider that all limitations are imposed on the will of the private parties.
- For instance, in the National rendering of the European pertinent directives, some countries (Portugal, Ireland and Belgium) have opted to make no difference among market failure and Constitutionally-mandated limitations. All possible limitations were included as insusceptible of *jus variandi* by private will.

Our proposal for the Brazilian Bill

- In our proposal for inclusion in the current. Author's Rights Bill to be submitted by the Brazilian Federal Government to its Congress, both approaches are followed - as alternatives.
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- **First alternative (flexible approach)**
- - Art. 46 (...)§ 4o - É nula toda e qualquer disposição de vontade que vise, ou tenha por efeito, eliminar ou impedir o exercício normal pelos beneficiários das utilizações enunciadas nos artigos 46, incisos I a IX, XII a XVII, XIX a XXI, assim como dos art. 47 e 48, ou das hipóteses a que se refere o § 3o deste artigo
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- Art. 46 (...) § 4 - Any provision which aims or have as effect to eliminate or prevent the normal exercise by the beneficiaries of the uses set out in Articles 46, items I through IX, XII to XVII, XIX to XXI, as well as the art. 47 and 48, or the situations referred to in § 3 of this article, is null and void.
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Our proposal for the Brazilian Bill

- What is excludable from a inflexible approach
- The portfolio limitation
 - X – reprodução e colocação à disposição do público para inclusão em portfólio ou currículo profissional, na medida justificada por este fim, desde que aquele que pretenda divulgar as obras por tal meio seja um dos autores ou pessoa retratada, e após a publicação da obra por aquele que a encomendou;
- The exposition publicity limitation
 - XVIII – a reprodução de obras de artes visuais para fins de publicidade relacionada à exposição pública dessas obras, na medida em que seja necessária para promover o acontecimento, excluída qualquer utilização comercial.



Our proposal for the Brazilian Bill

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- **Second Alternative (Portugal approach)**
- - Art. 46 (...)§ § 4o - É nula toda e qualquer disposição de vontade que vise, ou tenha por efeito, eliminar ou impedir o exercício normal pelos beneficiários das utilizações enunciadas nos artigos 46 a 48, ou das hipóteses a que se refere o § 3o deste artigo.
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- Art. 46 (...) § 4 - Any provision which aims or have as effect to eliminate or prevent the normal exercise by the beneficiaries of the uses set out in Articles 46 to 48, or the situations referred to in § 3 of this article, is null and void.
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