

On Beyond Contract: Reflections on Contracts and TPM's

Margaret Jane Radin

1. Background: Mass-market contracts—or purported contracts—are being used to supersede state-imposed IP entitlement regimes.

(a) These are adhesion contracts whose terms are promulgated by a firm

(b) They extend the promulgating firm's rights over information beyond what is granted in the background IP regime

(c) My nickname for such promulgated superseding entitlement regimes is EPSERs [see the excerpt from my draft paper, "Machine Rule," included in the draft casebook chapter section on "Contracting Out of the Limits of Intellectual Property," posted on the AALS website]"

2. Policy problem posed by EPSERs: To what extent do we want firms that promulgate these contracts to be able to restructure the prevailing pattern of information entitlements? Various approaches:

(a) Recognize background commitment to private ordering, and explore its limits

Starting point: Private ordering presupposes some version of liberal public/private distinction, which posits a distinction between authoritative acts of the state to set entitlements and acts of private entities rearranging them

(b) Consider to what extent such contracts are or should be unenforceable under normal contract or other legal doctrines (lack of consent, unconscionability, competition policy ...)

(c) Consider to what extent federal IP law can or should preempt some entitlement alterations accomplished by such contracts. [See articles by Lemley and O'Rourke, excerpts available in my draft revised chapter on "Contracting Out," posted on the AALS website]

(d) Consider whether the waivability of background IP rights should be differentiated in various ways (rather than treating the entire IP entitlement scheme as a set of easily altered default rules).

3. Focusing on problem of waivability: This is a continuum ranging from slightly stricter scrutiny of purported waiver of a right to complete inalienability of that right

- (a) We could simply caution legal decisionmakers to scrutinize purported contractual waivers somewhat more strictly if they fall into a particular category.
- (b) Or, we could consider whether any category or subcategory of contractual waiver warrants instead of legislative mandate of inalienability.

4. Some proposed categories for considering the issue of waivability:

- (a) Copyright limits as coordination solution: The “holes” (limitations on owner’s rights) in copyright law can be seen as a solution to a coordination problem (prisoner’s dilemma). If this perspective is appropriate, then allowing individual firms to “defect” by means of waivers of those limitations would be prima facie inefficient.
- (b) Maintaining meaningful possibility of legal redress: There are a number of significant situations where promulgated clauses apparently impinge on the ability of the legal system to enforce its ordering and to stand behind the rights that users of that system are afforded, and these situations are candidates for considering at least stricter scrutiny of waivers.
- (c) Possible “human rights” limitations: Data privacy, freedom of expression, cultural preservation?
- (d) Political economy considerations: Perhaps the background rights most likely to be undermined by rent-seeking should be less easily waived. This is most likely where two conditions are met:
 - (i) Strong interest groups have reason to try to undercut the right
 - (ii) The right is not being supported by a strong interest group of its own with money to spend to defend it

5. Now, consider TPM’s [Technological Protection Measures]. How should we analyze the situation when (if) all these adhesion contracts are replaced by (software) machines? [For examples of TPM’s and how they are deployed, see John Rothchild, “Economic Analysis of TPM’s,” draft posted on the AALS website.]

6. It is evident that TPM’s—if wide deployment of them does come to pass—will attempt to accomplish by machine fiat what was previously attempted by contract.

- (a) A EULA that comes with a software product and says that I may not copy it for any purpose can be replaced by a TPM that simply makes all copying impossible.

- (b) A EULA that says my right to use the software will be revoked if I attempt to copy it can be replaced by a TPM that simply disables the software when copying is attempted.
- (c) The TPM can be configured to render a video or DVD unplayable after a certain window of time, or on somebody else's machine, or in a different geographical area from the one in which it was purchased or rented.

7. It may seem that TPM's give rise to the same policy problems that I have mentioned above with respect to the promulgated superseding contractual regimes they replace. But TPM's are EPSEER's on steroids:

- (a) EPSEER's exist in the shadow of the law of contract (the state's structuring of the legal infrastructure of exchange), but TPM's bypass that structuring.
 - (i) The TPM operates like an infallible "injunction" controlled by one party.
 - (ii) The recipient has no option to infringe and then argue fair use to a court; the safety-value of fair use is "repealed."
 - (iii) The recipient has no option to plead unconscionability or void as against public policy in order to stop the "injunction" from issuing."
 - (iv) No entity of the state will balance the hardships and look for irreparable harm before issuing the "injunction."
 - (v) The recipient cannot ask the court to consider reliance, reasonable expectation, economic duress, etc., in order to defuse or mitigate liability.
- (b) TPM's will make even non-waivable background entitlements irrelevant, unless legal limitations on the operation of machine "injunctions" come into existence.

Note: So far we have the DMCA to protect TPM's, but no countervailing regulations of what TPM's may or may not do

8. Practical (and political) question: What might such legal limitations on TPM's look like? Suggestions might include:

- (a) Require actual notice of the TPM and how it operates
- (c) Restrict TPM's unless there is an opportunity to obtain goods and services without the TPM, perhaps at a higher price.
- (c) Prescribe exemptions for mission-critical systems

(d) Create an opportunity for a recipient to seek a judicial declaration that a TPM is illegally locking up information or preventing activities that should be available under the applicable background regime or as a matter of public policy.

9;. More theoretical question: Are non-regulated TPM's contrary to the Rule of Law?
Possible avenues to explore:

- (a) Lack of access to adjudication by neutral disinterested courts (branch of sovereign power)
- (b) Not "enacted" with benefit of whole of society as intent or purpose
- (b) Situations where party cannot escape operation without foregoing a necessary product.