

Copyright License Enforcement Through the Contract Lens

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Even though copyright licenses are now a fixture of the market for information goods, the question of which license terms ought to be enforceable in copyright as opposed to contract has not yet found a satisfactory answer. Scholars arguing under the banner of consumer protection and users' rights argue copyright remedies should be limited to terms with a nexus to copyright's traditional concerns, notwithstanding the difficulty of applying this standard or the risk of stifling innovative licensing models like those championed by the free software and free culture movements. Other scholars, seeking to preserve open-licensing models, urge a contractual approach that would award liberal copyright enforcement to terms denominated as copyright conditions, yet they do so without tending to users' rights or reconciling the punitive remedies available through copyright with contract law's hostility towards supra-compensatory remedies.

An alternative approach grounded in a richer account of contract law would address the concerns of the two camps while overcoming the drawbacks of their approaches. Contract is normatively and doctrinally committed to proportionality between breach and remedy. While contract law sometimes permits parties to opt out of proportionality, it burdens such attempts with high notice requirements. Because copyright's statutory damages are often far greater than the actual damages caused by breach of a copyright license, the notice requirements for enforcing a license term in copyright ought to be substantial. Many licenses, particularly consumer licenses, would fall short of this standard.

This focus on proportionality and notice nonetheless points towards an alternate enforcement mechanism—license termination—as the appropriate means for licensors to vindicate their rights following breach of a purported condition. The proportionality concerns that ordinarily counsel against termination would be overcome in many contemporary license arrangements because loss on the part of the licensee would be minimal. While use of the work past the point of termination might give rise to the full weight of the copyright regime, including its statutory damages, such liability would hinge on the licensor first providing affirmative notice to the licensee through the act of termination.

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