Fair Breach

Michael Carroll, American University Washington College of Law &

Pamela Samuelson, Berkeley Law School

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Argument for Fair Breach in a Nutshell

- Problem: mass market information licenses often contain restrictions on uses of works or uses of information embodied in works that is permissible to achieve copyright law's public policy goals

Argument for Fair Breach in a Nutshell

- Example: researcher wants to conduct text- and data-mining (TDM) research on a corpus of ebooks.
  - Copying works to engage in TDM to enable new knowledge is fair use (*Authors Guild v Google*)
  - Copyright Office approved a specific triennial exemption to permit circumvention of technical protection measures for TDM purposes
  - David Bamman, a TDM researcher at UC Berkeley, is thwarted because ebooks' "license" terms prohibit such use

Argument for Fair Breach in a Nutshell

- Subject to conditions detailed below, we recommend a new defense of "fair breach" of mass market license restrictions to permit copyright-justifiable uses, free from liability

The Fair Breach Idea Is Not New

- In 1990s, Jane Ginsburg proposed that "fair breach" might become a useful defense if the information licensing law known as Art. 2B of the UCC displaced copyright's limiting doctrines, such as fair use.

The Fair Breach Idea Is Not New

- ALI withdrew from the 2B project a week after a Berkeley conference focused on ways in which 2B would conflict with IP laws' norms & concepts

- NCCUSL reworked it as UCITA, but it too garnered more criticism than support

- Even though Article 2B was rejected, the problem of mass-market license restrictions displacing copyright policy has arguably gotten worse because virtually all commercial transactions in digital copyrighted works are available only under 'license" terms

The Fair Breach Idea Is Not New

- Fair breach would have analogous effect to fair use
  - That is, it would relieve the fair breacher from legal liability

Why Doesn't Contract Law Already Solve?

- Doctrines based on public policy are narrowly construed
  - Unconscionability
    - Some context-sensitivity
    - But too much focus on overreaching behavior by powerful industry actors
    - Need to show procedural as well as substantive unconscionability
    - Rare that defenses succeed
  - Against public policy – e.g. covenants not to compete (CNCs)
    - CNCs enforceable if reasonable in most states, but often "blue pencil" if too broad
    - Anti-benchmarking clause held unenforceable by NY AG
    - Rare that such defenses succeed

Partial Solutions in Contract Law?

- Non-performance is sometimes excused
  - Requires changed circumstances that make complying with the contractual duty overly onerous (impossibility, impracticability, frustration of purpose)

Partial Solutions in Contract Law?

- Limits on remedies
    - Existence of damages and amount of damages must be shown with certainty
    - Causation problems arise
    - In "fair breach" situations, damages would be nominal only
    - Restitution would also be unavailable
    - But the use of information would still be a breach of K.
        - Not a problem for actors who can do cost-benefit analysis
        - Many institutional actors cannot choose breach as a practice

Other Partial Solutions?

- Lack of mutual assent
  - May apply in some cases, but not a global solution
- Interpretation
  - Terms of use may not be as restrictive as they seem
  - Canons of construction – contra proferentum (construe against the drafter)
  - Potential conditions
- But contract law is resistant to change
  - Few new doctrines take hold
  - Promissory estoppel & concept of efficient breach rare exceptions
  - But a more tailored rule for mass-market licenses as to copyright policy might have a chance

Other Partial Solutions?

- Preemption
  - Courts generally have rejected conflict preemption arguments in this context
  - Same for express preemption because the K is an extra element

- Copyright Misuse
  - In some cases, the terms may rise to level of misuse
  - But many lack the coercive element needed for misuse

How to Get to Fair Breach?

- Four main options:
  - State common law evolution;
  - State legislation;
  - Federal common law of copyright licensing
  - Federal legislation (least likely)

How to Get to Fair Breach?

- Key ingredients
  - Covered conduct would be need to be context-specific
  - Covered conduct would need to be non-infringing
  - Covered conduct would also have pro-social effects (e.g. use of information for research, education)
  - Fair breach declares the conduct to be lawful, similar to how fair use turns what is *prima facie* infringing acts into non-infringing conduct

Fair Breach – Policy

- Fair breach would interweave copyright policy with contract policies that in some contexts cause a contract or term to be unenforceable or to excuse non-performance
- Context-sensitive
  - As cf. unconscionability
  - Excused non-performance
- Other sub-areas in which limits on contract based on pro-social policy
  - CNCs
  - Trade secret – whistleblower disclosures permitted
  - NDAs as conditions of settlements of sexual harassment charges
  - Other examples?

Fair Breach – Doctrinal Considerations

- What would the legal effect of a "fair breach"?
  - Technical breach, but no remedy – analogous to § 512
  - Breach is excused based on context & justification
- What about a presumption vs enforcement of terms that purport to prohibit uses that copyright law would permit based on context?

Why Hasn't Fair Breach Happened Already?

- Just a nascent idea when Ginsburg floated it; it seems to have died after 2B died

- Breaches of mass-market license restrictions are often invisible to licensors
  - Adobe only found out about Vernor's sales of "used" copies of Adobe software because he did it on eBay

- Even if a licensor knew about a particular breach, the licensor might decide not to sue for fear of making "bad" (from its standpoint) law

- Moreover, even if the licensor went to court, damages for breaches of the sort that might be fair that would be nominal

- A fair breach may be knowing & willful, but not in a malevolent sense

Who Would Benefit From Adoption of Fair Breach?

- Individual tinkerers (engineers who bought Aibo dogs)

- Researchers (such as David Bamman)

- Institutions with limited resources (litigation risks might ruin them)

- Institutions that have other reasons to be risk-averse (e.g., libraries who have to negotiate with publishers over access to digital materials)

- May be particularly salient in the context of "open data," collections of which are now typically made available under licenses

- Big firms make risk assessment & just go ahead & breach

Policy Justification for Fair Breach

- Congress & courts have recognized that limits on copyright, such as fair use, are essential to achieving copyright's constitutional purposes
  - Sometimes invoking fair use as a way to enable "breathing space" for ongoing creations that build on previous creations, as in Campbell v. Acuff-Rose so that the "progress of Science" can continue
  - Sometimes invoking the need for limits on copyright scope to make it consistent with the 1st Amendment

Policy Justification for Fair Breach

- Congress codified many limits, having been persuaded that they are justifiable as a matter of social policy
  - 17 U.S.C. § 108(f)(4) characterizes fair use as a "right"
- Why should private companies be able to override these limits by slapping mass-market license restrictions to thwart Congressional policy?

What Other Use Cases for Fair Breach?

- What other ebook license restrictions besides TDM might qualify for fair breach?
  - Restrictions on preservation (libraries need to be able to do their jobs)
  - Personal use only (but what if I share carefully?)
  - No read-aloud functions
- What else?
  - Anti-reverse engineering or modification clauses in SW licenses?
  - Anti-training data or anti-webscraping clauses in website terms of use?
  - Where multiple licenses have different & arguably conflicting license terms?

Fair Breach Factors or Considerations?

- Should we propose specific factors?
  - Or just keep the focus on relevant copyright policy consideration on which licensee bases justification for breaching & specific context of licensee's use?
- Should these considerations matter?
  - Licensee's motivation?
  - Downstream impacts on the public (or not)?
  - Ownership of device (e.g., car in which SW is embodied)
  - Harms to the licensor's market?
  - Relative power as between the licensor & licensee?
  - How is clear the (c) exception being relied upon as justification?

Is Fair Breach a Better Solution Than Preemption?

- Fair breach would focus attention on why a breach is justifiable
    - Can't just breach because you don't like the restriction
    - Tie the justification to a copyright policy purpose
- Besides copyright preemption case law is a mess
    - Too easy for licensee's "agreement" (assent) to be the extra-element distinguishing 301(a)
- Courts have been quite reluctant to find preemption based on conflicts with limiting policies of (c) (*Vault v. Quaid* is rare exception)
- Traditionally preemption is all-or-nothing, not leaving space for contextual responses