

## Restrictions on the Waiver of Rights

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The Department of Commerce Internet Policy Task Force's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy recognizes that "[i]ncreasingly, business models for certain types of works may structure the transaction as a license rather than a sale, avoiding application of the first sale doctrine." Internet Policy Task Force, Dep't of Commerce, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 36 (2013). The Green Paper observes that if "this becomes the only way in which a particular type of work is offered to consumers, the result could be to render the first sale doctrine meaningless for that type of work." *Id.* This tension between licensing and the first sale doctrine is an aspect of the broader problem of contract terms intended to vary the provisions of the Copyright Act – in essence, rights-holders' initiative to replace the public law of copyright with the private law of contract.

Courts have considered a variety of legal theories for refusing to enforce contractual restrictions on copyright exceptions in the mass-market license context. These include questioning whether a consumer manifested assent sufficient to form a contract, preemption under Section 301(a) of the Copyright Act, and constitutional preemption. No consensus has emerged on any of these theories, in part because of variations in the facts of these cases in terms of the nature of the contract, the nature of the relationship between licensor and licensee, and the nature of the work.

The Green Paper indicates that the USPTO will convene roundtables on issues related to the first sale doctrine in the digital environment. In the absence of judicial consensus on the enforceability of contractual restrictions of copyright exceptions, these roundtables, and the copyright law review underway in the House Judiciary Committee, may provide appropriate fora for a consideration of statutory limitations on the waiver of rights provided by the Copyright Act.

Congress and other legislatures frequently restrict the waiver by contract of protections they have provided to individuals. Indeed, in the Copyright Act itself, Congress provided that a termination of a grant of copyright "may be effected notwithstanding any agreement to the contrary." 17 U.S.C. § 203(a)(5). Congress included this provision to protect authors from publishers who might take advantage of their bargaining strength to force authors to waive their termination rights.

The attached tables provide examples of statutory limitations on contractual waivers of rights. These examples come from the U.S. Code; the New York and California Codes; uniform acts; and the European Union. They provide ample precedent for Congress to adopt restrictions on the enforcement of contractual terms that attempt to limit exceptions to the Copyright Act such as first sale or fair use.

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## Federal

	Section	Language	Context
1	5 U.S.C. § 8479(a)	Any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this subchapter shall be void.	No provision can waive the statutory duties of a fiduciary in the Federal Retirement Thrift Investment Management System.
2	7 U.S.C. § 7a-2(c)(5)(C)(ii)	No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.	No contracts for commodity exchanges contrary to the public interest can be listed or made available.
3	7 U.S.C. § 26(n)(1)	The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.	Statutory protections regarding commodity exchanges cannot be waived.
4	10 U.S.C. § 987(d)(2)(B)	States shall not ... permit ... waiver of any State consumer lending protections for the benefit of residents of the State on the basis of nonresident or military status of a covered member or dependent of such a member, regardless of the member's or dependent's domicile or permanent home of record.	State consumer lending protections cannot be waived when credit is extended to military members or their dependents, even when they are nonresidents of the state.
5	10 U.S.C. § 987(e)(2)	It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which ... the borrower is required to waive the borrower's right to legal recourse under any otherwise applicable provision of State or Federal law, including any provision of the Servicemembers Civil Relief Act;	Creditors cannot extend credit to military members or dependents and require waiver of their right to legal recourse against the creditor.
6	11 U.S.C. § 522(e)	A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or	Waivers of statutory exemptions in bankruptcy proceedings benefitting the creditor are unenforceable.

		under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.	
7	12 U.S.C. § 5567(d)(1)	Except as provided under paragraph (3), and notwithstanding any other provision of law, the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.	The rights provided to employees offering consumer financial products and services cannot be waived.
8	15 U.S.C. § 77n	Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.	Statutory protections regarding domestic securities cannot be waived.
9	15 U.S.C. § 77aaaa	Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.	Statutory protections regarding trust indentures cannot be waived.
10	15 U.S.C. § 78cc(a)	Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.	Statutory protections regarding securities exchanges cannot be waived.
11	15 U.S.C. § 80a-46(a)	Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.	Statutory protections from investment companies cannot be waived.
12	15 U.S.C. § 80b-15(a)	Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.	Statutory protections from investment advisers cannot be waived.
13	15 U.S.C. § 717y(c)	Any provision of any contract, which provision prohibits any transfer of any contractual interests thereunder, or any commingling or transportation of natural gas..., or terminates such contract on the basis of any such transfer, commingling, or transportation, shall be unenforceable...	Any contractual provision prohibiting commingling or sale, or restricting transportation, of natural gas will not be enforceable in court.
14	15 U.S.C. § 1639c(e)(3)	No provision of any residential mortgage loan or of any extension of credit under an open end consumer credit plan	No residential mortgages or other covered extensions of

		secured by the principal dwelling of the consumer, and no other agreement between the consumer and the creditor relating to the residential mortgage loan or extension of credit referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction, pursuant to section 1640 of this title or any other provision of law, for damages or other relief in connection with any alleged violation of this section, any other provision of this subchapter, or any other Federal law.	credit can bar consumers from bringing proper causes of action.
15	15 U.S.C. § 1681g(g)(2)(A)	Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.	Consumer reporting agencies or loan agents cannot waive their ability to disclose a credit score.
16	15 U.S.C. § 1693L	No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this subchapter.	No provision can waive statutory protections regarding electronic fund transfers.
17	15 U.S.C. § 1712	Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this chapter or of the rules and regulations of the Director shall be void.	Statutory protections regarding interstate land sales cannot be waived.
18	15 U.S.C. § 3374(a)	Any provision of any contract for the first sale of natural gas is hereby declared against public policy and unenforceable with respect to any natural gas covered by this chapter if such provision...	Any contractual provision prohibiting commingling or sale, or restricting transportation, of natural gas is void.
19	15 U.S.C. § 3609	Any provision in any lease or contract requiring unit owners or the owners' association, in any conversion project involving a contract meeting the requirements of section 3607 of this title or in any project involving a lease meeting the requirements of section 3608 of this title, to reimburse, regardless of outcome, the developer, his successor, or affiliate of the developer for attorneys' fees or money judgments, in a suit	Provisions in leases or contracts for condominiums or cooperative housing units to reimburse the developer for attorneys' fees regardless of the outcome of a suit are void.

		between unit owners or the owners' association and the developer arising under the lease or agreement, is against public policy and void.	
20	15 U.S.C. § 3614	Any condition, stipulation, or provision binding any person to waive compliance with any provisions of this chapter shall be void.	Statutory protections regarding conversion of condominiums and cooperatives to low-income housing cannot be waived.
21	17 U.S.C. § 203(a)(5)	Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.	The right to terminate a grant of copyright rights cannot be waived.
22	18 U.S.C. § 1514A(e)(1)	The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.	The statutory protections of whistleblowers from retaliation in fraud cases cannot be waived.
23	29 U.S.C. § 218c(b)(2)	The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.	Fair labor standards cannot be waived.
24	29 U.S.C. § 501(a)	... A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.	In laying out the fiduciary duties of officers of labor organizations, this voids any provisions relieving said officers of their duties, thereby restricting the organization's ability to waive statutory duties.
25	45 U.S.C. § 60	Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void...	Railroad employees cannot be prevented from voluntarily furnishing information regarding the facts incident to the injury or death of an employee.
26	49 U.S.C. § 14101(b)(1)	The parties may not waive the provisions governing registration, insurance, or safety fitness.	Parties entering into a shipping contract may not waive certain statutory provisions.

## State

### New York

	Section	Language	Context
1	N.Y. Real Prop. Law § 226-b(6) (Consol. 2013).	Any provision of a lease or rental agreement purporting to waive a provision of this section is null and void.	Terms waiving the right to sublease or assign are void.
2	N.Y. Real Prop. Law § 227-a(4) (Consol. 2013).	Any agreement by a lessee or tenant of premises occupied for dwelling purposes waiving or modifying his or her rights as set forth in this section shall be void as contrary to public policy.	Terms waiving protections for senior citizen tenants moving to health care facilities are void.
3	N.Y. Real Prop. Law § 227-b(10) (Consol. 2013).	Any agreement by a senior citizen waiving or modifying any of the rights set forth in this section shall be void as contrary to public policy.	Terms waving statutory protection for senior citizens to terminate contracts are void.
4	N.Y. Real Prop. Law § 227-c(4) (Consol. 2013).	Any agreement by a lessee or tenant of premises occupied for dwelling purposes waiving or modifying his or her rights as set forth in this section shall be void as contrary to public policy.	Terms waiving statutory right of domestic violence victims to terminate leases are void.
5	N.Y. Real Prop. Law § 233(x)(3) (Consol. 2013).	Any agreement modifying any of the rights set forth in this subdivision shall be void as contrary to public policy.	Terms modifying or waiving responsibilities of landlords of manufactured home parks are void.
6	N.Y. Real Prop. Law § 234 (Consol. 2013).	Any waiver of this section shall be void as against public policy.	Tenants cannot waive their statutory right to attorneys' fees in lease disputes.
7	N.Y. Real Prop. Law § 235-b(2) (Consol. 2013).	Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.	Lease agreements cannot waive the statutory warranty of habitability.
8	N.Y. Real Prop. Law § 235-d(6) (Consol. 2013).	Any agreement by a tenant in a written lease or other rental agreement waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.	Tenants cannot waive their statutory protections against harassment.
9	N.Y. Real Prop. Law § 235-f(7) (Consol. 2013).	Any provision of a lease or rental agreement purporting to waive a provision of this section is null and void.	Statutory protections against unlawful occupancy restrictions cannot be waived.
10	N.Y. Real Prop. Acts. Law § 753(5) (Consol. 2013).	Any provision of a lease or other agreement whereby a lessee or tenant waives any provision of this section shall be deemed against public policy and void.	Terms waiving statutory protections regarding property of hold over tenants are void.

### California

	<b>Section</b>	<b>Language</b>	<b>Context</b>
1	Cal. Civ. Code § 798.15(i)(2) (Deering 2013).	No rental or sales agreement may contain a provision by which a purchaser or a homeowner waives any of his or her rights under the MRL.	Rental agreements waiving mobilehome owners' statutory rights are void.
2	Cal. Civ. Code § 798.19 (Deering 2013).	No rental agreement for a mobilehome shall contain a provision by which the homeowner waives his or her rights under the provisions of Articles 1 to 8, inclusive, of this chapter. Any such waiver shall be deemed contrary to public policy and void.	Mobilehome leases cannot waive tenants' statutory protections.
3	Cal. Civ. Code § 800.24 (Deering 2013).	No rental agreement for a floating home berth shall contain a provision by which the homeowner waives his or her rights under any of the provisions of this chapter. Any waiver of these rights shall be deemed contrary to public policy and void.	Rental agreements for floating home berths waiving statutory protections are void.
4	Cal Civ. Code § 1812.624(a)(4) (Deering 2013).	No rental-purchase agreement or any document that the lessor requests the consumer to sign shall contain any provision by which ... [t]he consumer waives or agrees to waive any defense, counterclaim, or right the consumer may have against the lessor, its agent, or its successor in interest.	Tenants cannot waive defenses, counterclaims, or rights against lessor in a lease agreement.
5	Cal Civ. Code § 1812.624(a)(15) (Deering 2013).	No rental-purchase agreement or any document that the lessor requests the consumer to sign shall contain any provision by which ... [t]he consumer waives or offers to waive any right or remedy against the lessor, its agents, or its successors in interest for any violation of this title or any other illegal act.	Tenants cannot waive rights and remedies against lessor in a lease agreement.
6	Cal. Civ. Code § 1812.624(b) (Deering 2013).	Any provision in a rental-purchase agreement that is prohibited by this title shall be void and unenforceable and a violation of this title. A rental-purchase agreement which contains any provision that is prohibited by this title is voidable by the consumer.	Leases which violate statutory protections and requirements are void.
7	Cal. Civ. Code § 1953(a) (Deering 2013).	(a) Any provision of a lease or rental agreement of a dwelling by which the lessee agrees to modify or waive any of	Tenants cannot waive certain rights in a lease agreement.

		<p>the following rights shall be void as contrary to public policy:</p> <p>(1) His rights or remedies under Section 1950.5 or 1954.</p> <p>(2) His right to assert a cause of action against the lessor which may arise in the future.</p> <p>(3) His right to a notice or hearing required by law.</p> <p>(4) His procedural rights in litigation in any action involving his rights and obligations as a tenant.</p> <p>(5) His right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law.</p>	
8	Cal. Civ. Code § 2782.9(c) (Deering 2013).	This section shall not be waived or modified by contractual agreement, act, or omission of the parties.	Statutory protections regarding construction indemnity rights cannot be modified or waived.
9	Cal. Civ. Code § 2986.3(b) (Deering 2013).	No lease contract shall contain any provision by which ... [t]he lessee waives any right of action against the lessor or holder of the contract or other person acting on his or her behalf for any illegal act committed in the collection of payments under the contract or in the repossession of the motor vehicle.	Lessees cannot waive rights of actions against vehicle lessors.
10	Cal. Civ. Code § 2986.3(c) (Deering 2013).	No lease contract shall contain any provision by which ... [t]he lessee relieves the lessor from liability for any legal remedies which the lessee may have against the lessor under the contract or any separate instruments executed in connection therewith.	Lessees cannot waive remedies against lessors of vehicles.



## Uniform Codes

	Section	Language	Context
1	Uniform Commercial Code, § 9-406(g)	Subject to subsection (h), an account debtor may not waive or vary its option under subsection (b)(3).	Debtors cannot waive rights to proper notification when debt is assigned.
2	Uniform Commercial Code, § 9-602	Except as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections...	Debtors may not waive or modify certain rights.
3	Uniform Computer Information Transactions Act, § 115(b)(2)	The limitations on enforceability imposed by unconscionability under Section 111 and fundamental public policy under Section 105(b) may not be varied by agreement.	People cannot waive protections against unconscionability and questionable public policy.
4	Uniform Computer Information Transactions Act, § 115(b)(3)	Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs may not be varied by agreement except to the extent provided in each section...	Certain rights granted by the Act cannot be waived by contract.
5	Uniform Consumer Credit Code § 3.403(5)	An agreement may not limit or waive the claims or defenses of a cardholder under this section.	Credit card holders may not contractually waive their provided claims or defenses.
6	Uniform Consumer Credit Code § 3.404(4)	An agreement may not limit or waive the claims or defenses of a consumer under this section.	Consumers may not contractually waive their provided claims or defenses against a seller's assignee.
7	Uniform Residential Landlord and Tenant Act, § 1.403(a)(1)	A rental agreement may not provide that the tenant... agrees to waive or forego rights or remedies under this Act.	Tenants cannot waive their rights or remedies in a lease.

## Foreign

### European Union

	Section	Language	Context
1	Council Directive 2009/24/EC, art. 5.	The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.	Contracts cannot prevent users from making back-up copies of software.
2	Council Directive 2009/24/EC, art. 8.	Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.	Provisions limiting user rights are void.
3	UsedSoft GmbH v. Oracle Int'l Corp., Case C-128/11 (Apr. 24, 2012).	[I]n the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder's website, ... the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right under Article 4(2) of that directive, and hence be regarded as lawful acquirers of a copy of a computer program.	Statutory exhaustion provisions trump license restrictions on resale.

### Belgium

	Section	Language	Context
1	Law on Copyright and Neighboring Rights, art. 1(2).	The author of a literary or artistic work shall enjoy an inalienable moral right in his work. Overall renunciation of the future exercise of this right shall be null and void.	Moral rights cannot be given away or renounced.
2	Law on Copyright and Neighboring Rights, art. 3(1).	Notwithstanding any provision to the contrary, the assignment of rights in respect of as yet unknown forms of exploitation shall be null and void.	Rightsholders cannot assign the right to exploit a work in a yet unknown form.
3	Law on Copyright and Neighboring Rights, art. 24.	An author who transfers or assigns his right of rental in a sound or audiovisual work shall maintain his right to equitable remuneration on account of the rental. This right may not be waived by the author.	Authors of sound or audiovisual works cannot waive their right to equitable remuneration for rentals of their works.
4	Law on Copyright and Neighboring Rights, art. 32.	An author may not waive enjoyment of this right in advance.	Authors cannot waive their right to request modifications of

			remuneration to afford them an equitable share in profits of performances before said performance takes place.
5	Law on Copyright and Neighboring Rights, art. 34.	Performers shall enjoy an inalienable moral right in their performances. Overall renunciation of the future exercise of the right shall be null and void.	Performers cannot give away or otherwise renounce their moral rights in their performances.
6	Law on Copyright and Neighboring Rights, art. 55.	This right to obtain equitable remuneration may not be waived by authors or performers.	Authors and performers of sound or audiovisual works cannot waive their right to equitable remuneration for private copies made.

#### France

	<b>Section</b>	<b>Language</b>	<b>Context</b>
1	Intellectual Property Code, art. L121-1.	It shall be perpetual, inalienable and imprescriptible.	The moral rights of a creator cannot be given away, even by contract.
2	Intellectual Property Code, art. L121-4.	Notwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee.	Despite assigning rights to exploit copyrighted works, authors can withdraw such assignment.
3	Intellectual Property Code, art. L122-6-1(V).	Any stipulation contrary to the provisions of paragraphs II, III and IV of this Article shall be null and void.	Provisions protecting software users cannot be contractually waived.