

## Contractual balance in digital content services

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**Abstract:** Alongside copyright balance, the question of contractual balance will gain in relevance as consumption and contract practices change with the evolution of new services. Using the analytical distinction of "consumption use" and "copyright use" the paradigm shift is demonstrated between the "legacy model" of book/CD purchase and new services like iTunes music store and 48-hour online "video rental" services. Admittedly the new focus on contracts goes together with new challenges.

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### Introduction

Digital content services delivered over electronic networks are changing contract practices in how works are offered to consumers. Not everyone agrees with me when I claim that we have seen only early experiments for digital content services and that many other and substantially different bargains will be offered to consumers. But for the sake of argument, let's assume that this is so and consider where this view forward takes us.

The detailed characteristics of new services are enabled by technical protection measures such as Digital Rights Management (DRM). My aim in this article is to illustrate that technical protection measures serve a dual purpose – they are not only used to structure copyright-related aspects of what is offered to the consumer. They are also to a significant extent used to structure the commercial offering, what is the bargain offered to the consumer. My suggestion is that this duality of purpose is relevant for analysis of "fairness" and "balance" of a given offering and that the perspective of contractual balance is an important factor in that analysis.

As this article focuses on the contract aspects, I largely omit discussion of balance under copyright law. Copyright balance involves the system of "copyright rights" and the exceptions and limitations to those rights defining the respective legal positions of the rightsholder and the consumer/user. Important public policy objectives are also served by the existing copyright balance system. These considerations continue to be important, but alongside copyright balance, the question of contractual balance will gain in relevance as consumption and contract practices change with the evolution of new services.

### Consumption use and copyright use: technical, legal and commercial duality

When the content of a copyrighted work is accessed in a digital device (computer, TV set top box, game console, mobile phone), and if technical protection measures are not imposed, it is technically easy and convenient to carry out both

- ▶ **"consumption uses"**: rendering and playback acts of accessing the work such as listening, viewing and reading; and
- ▶ **"copyright uses"**: exploitation acts such as generation of further instances of the work (copies) and distribution, display, performance or the making available of the work to others.

I have here adopted the term "consumption uses" to distinguish consumption opportunities from the special meaning that the noun "use" has in copyright law. Vastly simplified, "copyright uses" are acts within the "copyright rights" of the rightsholder. They do not include what most people associate with consumption, the enjoyment of a work by a consumer.

Technical protection measures are the technical way of addressing risks and opportunities inherent in the multiplicity of uses enabled by the unprotected digital format. Yet it is more or less impossible to "cleanly" address only one of these two sets of uses and not the other. This is due

to an overlap of the legal and technical ramifications of the choices in what is enabled in a service: The more the consumer's "copyright uses" are restricted to preserve the rightsholder interests, the more is the consumption opportunity also affected. The broader the enabled consumption opportunities are, the greater is the risk of unauthorized "copyright uses". But the overlap is not limited to this technical/legal dichotomy. Whether a broader or narrower scope of consumption is offered also is a matter of commercial choice for the distributor and a matter of alternative offerings for the user. From the consumer's perspective, a narrower consumption scope can be quite attractive if it is associated with a substantially different price point. In this manner, use of technical protection measures has technical, legal and commercial dimensions. They enable and are being used for both:

- ▶ the structuring of "copyright uses" afforded to the user in a manner that may not conform to the established contours of the balance under existing copyright law; and
- ▶ the structuring of "consumption uses" afforded to the user in a variety of ways that may significantly alter the contractual essence of what the user is provided.

Despite some limitations in their design (e.g. creation of derivative works often cannot be supported), DRM solutions – and the "rights expression languages" underlying those solutions – are capable of a very granular articulation of what "consumption use" and what "copyright use" is afforded to a user. From a contract lawyer's perspective, such use of DRM is very likely to alter the contract, the bargain in comparison to traditional models, at least when requirements related to contract formation are met, such as description/disclosure, transparency of terms, reasonable expectations etc. Structuring of digital content services in this manner challenges traditional notions of balance under copyright law – and previous contractual models.

#### **The paradigm shift: old paradigm described**

We all are inherently familiar with the printed book and the CD recording. I consider these to represent the "legacy paradigm" of the offline/analog era. I include the (admittedly digital) unprotected CD format here as it is offered to users in exactly the same manner as the analog book. At least the following contractual characteristics typically are present:

- ▶ User purchases a permanent copy of the work; no contractual restriction is imposed on the time during which it may be consumed;
- ▶ Purchaser acquires legal title, ownership of the physical object – with the property rights in the physical copy (right to undisturbed possession, right to dispose by resale, gift, inheritance etc.);
- ▶ No restriction is imposed on the user regarding the number of times the content is accessed, by whom or where this occurs;
- ▶ No restriction is imposed regarding type or number of devices for playback/rendering;
- ▶ The contract includes neither a license to the user under "copyright rights" nor any curtailment of activities permitted under "copyright exceptions".

Outside the contract, the user is authorized to carry out certain copyright-relevant acts – e.g. legal ability to create copies for noncommercial use or to privately display and perform the work. These authorizations flow from copyright law, under exceptions and limitations to copyright "rights". They have contractual relevance – one hardly can claim they are entirely ignored by the contracting parties. But they are usually not a core part of the contract. The seller does not, as a rule, even have legal license to grant (sub)licenses to consumers and subsequent users under the rightsholder's copyright rights. The traditional book/CD paradigm contractually is a sale of movable property with no express elements of a copyright license. Copyright law fills in the "copyright uses" aspects.

Consumer-oriented discussion about digital works with technical protection measures often compares new services with this "legacy model" of book/CD purchase – mostly unfavourably. To push the point, when one takes the unprotected CD as a benchmark, practically all restrictions present in the protected digital version tend to be a step backward from the consumer's

point of view. Close review of the consumption scope granted, copyright uses enabled and the price point associated with the modified digital service offering may however suggest that a direct comparison to the book/CD paradigm is flawed.

Further, traditional consumption model examples structured as a service – rather than a sale of physical goods – suggest that it is not always offensive to structure both "copyright uses" and "consumption uses" by contract in a manner departing from the book/CD paradigm. Many services impose contractual restrictions that arguably extend to acts the user could engage in without violating copyright. Live performances, movies, museums, galleries etc. prohibit audio taping, videotaping, still photography, creation of painted replicas etc. (In what I regard to potentially mark an act of legislative overkill, videotaping of movie performances was recently (2005) made expressly illegal in the United States under the Family Entertainment and Copyright Act, Public Law no. 109-9).

### **The iTunes offering**

Apple's iTunes service is the technically protected digital content service that at the time of writing this article (June 2005) is receiving the most attention worldwide. The iTunes music store provides protected audio content for use on computers and Apple's portable iPod devices. Based on a review of promotional language at the iTunes website and the U.S. version of the iTunes Music Store Terms of Service (found at <http://www.apple.com/support/itunes/legal/terms.html>), the commercial proposition on offer can be identified, albeit with some difficulty – even the generally user-friendly Apple site leaves much to be desired in this regard. The following is a decidedly incomplete list of important contractual characteristics, resting on heavy interpretation of Apple's license terms and promotional language:

- ▶ User purchases a "permanent" music item (and associated artwork) called a "Product";
- ▶ The Product may be stored and used on up to 5 computers and portable devices at any one time, and only on Apple-authorized devices such as Apple's own iPods;
- ▶ One iPod can accept and use Products from a maximum of 5 iTunes accounts at a time;
- ▶ There is an express limitation of the permitted "use" for personal and noncommercial purposes but the legal nature of possible "uses" does not appear to be defined
- ▶ There is no express copyright license to do so – and an express disclaimer of any license granted under copyright – but the user is provided a fairly liberal ability to convert ("export" or "burn") Products into other formats. Of particular relevance is the ability to burn music onto CD disks with relatively few limitations.

The bargain is in some respects materially different from the book/CD paradigm. For instance, the limitation on "use" on Apple-authorized devices only is a significant departure from the book/CD paradigm. But so is the express authority to use the Product on up to 5 devices at the same time – and the possibility to use Products from 5 different accounts (e.g. within a circle of friends or a family) on any one device. While there is no crystal clear copyright license language granting the right to create up to 5 reproductions of each Product to accomplish this, the disclaimer of most other copyright licenses clearly does not extend to this ability to put the music on up to 5 devices. At least to this writer, it seems that there, then, is a contract expressly permitting 5 copies and not objecting to practically unlimited, but unlicensed, burns to CDs (as an aside, I note here that this express authority appears to have relevance to the issue of copyright levies on devices, as the up to 5 reproductions in this example appear to be affirmatively licensed and do not rely on copyright exceptions). Clearly, the bargain is different from the CD bargain for the same content.

The relative success of iTunes at this time is the result of multiple factors – not the least of which is the exterior design and ease of use of the iPod device. There reportedly also are complaints from disappointed users. Nonetheless, the sustained growth and rave reviews of the iTunes/iPod experience seem to suggest that there also are users who, at least so far, are satis-

fied with what they have received in terms of the "consumption uses" and "copyright uses" enabled by the technical protection measures in the iTunes Products delivered to them.

### **Network based rental or library loan**

A second service example – hypothetical for the purposes of this article, as I have not researched whether such a service already exists – would be a 48-hour online "video rental" service, which could be technically enabled to include:

- ▶ Download of a copy of a movie;
- ▶ Unlimited number of playbacks within a 48-hour time window;
- ▶ Possibly restricted to one device at a time, or to a technically defined location;
- ▶ Without technical ability to create permanent copies for future playback.

My reason for raising the rental example here is that, due to its similarity with DVD rentals, it is likely to be recognized by most consumers. If priced at a sufficient differential to the "permanently owned" copy of a work (like DVDs are priced at €1 or €2 per rental, in contrast to €15 for an "owned" copy), it is possible to argue that the bargain, also for the consumer, can contractually be an adequately balanced one – even when ability to create a personal permanently usable copy is excluded. Another service example with significant restrictions closely resembling restrictive terms of analog services is a DRM-enabled eBook library loan – see e.g. a description of the New York City public library's eBook service at <http://ebooks.nypl.org>.

### **New focus on contracts – and new challenges**

Technical protection measures enable an unprecedented flexibility for distributors of digital protected works to adhere to or depart from existing consumption and contractual paradigm(s) regarding both "copyright uses" and "consumption uses". The restrictions on either use, imposed by technical protection, are not necessarily offensive. What matters is: what is "the deal" and how it is understood. One trend of the shift taking place is a movement away from a product/sale paradigm towards a service paradigm that can be flexibly structured.

This new flexibility is not unproblematic – my objective is not to offer an apology for overly restrictive services. It is easy to get a service offering "wrong": With novel use of technical protection measures, especially with poor disclosure and poor marketing, user disappointment and rejection is often the result. Second, unlimited versatility means that it is difficult and frustrating for users to identify what consumption (and copyright) uses exactly they are getting when they obtain content from multiple services, all having different detailed structures for broadly similar offerings. In this issue of the INDICARE Monitor Philipp Bohn (2005) ably describes typical varieties of subscription services. While variety is welcome in early experimentation, it is not conducive to achievement of more mature success in a mass market. Mass market cannot happen without broad consumer acceptance.

Many consumer, business and public policy challenges need to be addressed. To illustrate the tip of the iceberg in this regard, I here suggest some obvious areas for development:

- ▶ How to harmonize multiple offerings serving more or less similar consumer needs, to reduce confusion and match expectation with experience?
- ▶ How to improve transparency of terms and remove ambiguity of what is on offer and at what price?
- ▶ Should there be some collaborative process to foster "best practices", even coupled with a trust mark to guide consumers?
- ▶ What is the role of standard contracts and how should they be generated?
- ▶ What effective and proportionate consumer protection tools can be used to address abuses?
- ▶ What kinds of support services are needed to address ancillary consumer needs such as restoration of content on broken (or stolen) devices, availability of extensions to time limited works, migration of paid for content between service providers?

- ▶ How to best preserve public policy objectives that may be affected by new contract models utilizing technical protection – such as information access and library service – as well as how to ensure access for civil, administrative and judicial purposes (heirs, regulatory, tax, law enforcement, courts etc.) to information within technically protected works?

### Bottom line

These are major challenges. Yet I believe the new services can and eventually will provide significant value to consumers, once the experimentation dust settles. New opportunities – lending, rental, even "disposable" consumption of works that one may be quite willing to purchase several times, if priced accordingly – are still largely unexploited.

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