



Consumer Protection in Digital Media

Study on licensing and use conditions and technical protection measures which are used on the German market: The consumer perspective

Summary of the Study

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erstellt im Auftrag des
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Content and Goals of the Study

The study entitled "Consumer Protection in Digital Media" examined whether and to what extent the interests of the consumer were adversely affected by the providers of digital copyrighted content. For this purpose, a variety of use and licensing conditions and technical protection measures related to various types of digital content marketing services and copyrighted products were examined. The study extended among other things to music download services, commercial electronic publications, online archives, audio and image media, software and eBooks.

Selected examples of contract stipulations were examined for their compatibility with consumer protection regulations and copyright limitations. In this case, it was first necessary to examine the extent to which German law protects against the encroachment of consumer interests in this regard.

What prompted the study was the realization that both the legal and actual situation of the user is unsatisfactory when it comes to using digital content. The mission of the Federation of German Consumer Organisations is to counteract this situation within the framework of legal possibilities.

The Consumer's Situation when Dealing with Digital Content

The consumer in the digital world is increasingly confronted with legal obligations and contract provisions. This inherent complicating of everyday behavior is demonstrated especially clearly when dealing with copyrighted content. Included in this copyrighted content are most of the informational and cultural goods that are consumed, i.e., read, listened to or viewed, in today's information society. According to copyright law, complicated legal provisions usually have to be observed when protected material is used. Regardless of whether music is downloaded from a service and copied to an MP3 player, software is acquired, utilized and resold, or copies of computer games are produced for personal use, the user must observe the legal regulations.

This complexity is exacerbated further by the behavior of providers who offer digital content in the marketplace. A clear trend has been noted among product and service providers who regulate the use of digital content using contracts, primarily General Terms and Conditions in the form of use and licensing conditions. As a rule, these do not appear to be used primarily to transfer rights to the user, which he needs in order to use the protected material, or to regulate contractual agreements with the provider in a clear way. On the contrary, the study showed that use or licensing conditions being used in the marketplace are commonly

intended first and foremost to curtail, more or less substantially, rights of use that have been legally granted or uses that have been customary till now.

With this background, there has been a distinct change in the market behavior of providers of cultural assets and entertainment as compared to the “analog era.” Whereas the use of conventional content was generally regulated exclusively by the law, it now takes place increasingly via use and licensing conditions that are imposed by providers or rightsholders. Frequently, the purchasers of digital products are forced to accept conditions of use imposed by the provider upon initial use or even upon acquisition. Occasionally, this practice is coupled with far-reaching consequences for the consumer, as the following example shows.

A consumer is entitled to largely clear-cut rights regarding the usage of a book that he purchases. He can read it as often as he wants, resell it, lend it to his friends, put it on the bookshelf and make photocopies of excerpts, etc. His legally granted rights in this respect are certainly not marginalized or restricted by additional conditions of use outlined on the cover of the book.

On the other hand, the purchaser of the same book in a digital form is confronted with numerous contractual agreements. Someone who purchases an eBook in an online store via download frequently has to consent to comprehensive General Terms and Conditions just to “enter” the virtual store (“The use of this online shop is subject to our General Terms and Conditions”). In addition, an eBook reader is necessary to actually use the digital book and its use is subject to an additional agreement (the licensing conditions of the software provider). The use of the eBooks themselves are subject in turn to their own conditions of use, whose validity the purchaser must observe if he wants to use (i.e., read) it or utilize it in another conventional way. In many cases, these documents contain stipulations stating that the electronic book (i.e., the file in which the work is stored) may only be used in a restricted manner. Even though a relatively high purchase price is charged for an eBook, especially when one considers that the user does not receive a physical copy of the book and correspondingly low costs are incurred for production and shipping, he is placed at a considerable disadvantage as compared with the purchaser of a conventional book when it comes to the possibilities for using his book. Thus, he is often prohibited from reselling the eBook, copying it to all devices at his disposal (which would be necessary in order to be able to read it at any desired location) or lending it out.

Most users are not just limited in terms of their rights by these types of contractual agreements, but also overwhelmed by them. Many use and licensing conditions are formulated in an extremely complicated manner and are of a considerable length. It is a rare consumer who is able to surmise without hesitation the content and consequences of the agreements that he has accepted. In view of the numerous conditions of use with which the

average consumer (especially those who are active online) is confronted on a daily basis, it is effectively impossible for him to deal intensively with each individual stipulation.

One can assume with certainty that by far most consumers do not at all or only fleetingly read use and licensing conditions and therefore are not aware of their rights and responsibilities. The level of information that the consumer possesses about his position as a purchaser and owner is dropping dramatically as a result. With this as the backdrop, it is getting harder and harder for the user to make informed purchasing decisions.

Ultimately, this sort of “contractual over-regulation” leads inevitably to the consumer withdrawing from the increasing complication of daily life. The consequence is that very often he is unaware of becoming a lawbreaker or a contract violator. As the study showed, the situation is aggravated by the fact that use and licensing conditions certainly do not permit everything that the average consumer presumes is taken for granted in view of his customary use habits.

Also added to this is that possibilities for use that exist in actuality, primarily in the case of certain commodities like music or films, are increasingly prohibited by the implementation of technical protection measures by rightsholders. These types of technical means also usually serve, often in addition to legal restrictions imposed by contracts, to control and restrict or even monitor use by the end consumer in accordance with the provider’s notions.

The use of technical protection measures can adversely affect the interests of the consumer in many different respects. It is not just the fact that these measures frequently prohibit actions that are legally permissible and presumed to be a matter of course, such as creating private or backup copies. In some cases, even sensitive security issues of the user are severely compromised by the functions of technical protection systems. For example, it came to light that music company Sony BMG sold audio CDs in foreign countries whose copy protection programs installed damaging functions on the user’s PC. The media reported that when the user listened to the CD on the computer, software was installed without the user’s knowledge, which created security gaps and made the computers vulnerable to spyware.

In another case, the film company Kinowelt is said to have supplied DVDs with a copy protection system that could also have massive “side effects” for the user. According to media reports, these DVDs could only be played on PCs if software was installed on the user’s computer first. Prior to installation, the user had to accept the conditions of an EULA (i.e., end user licensing agreement). In the licensing conditions, the manufacturer of the image media made it known among other things that the operating system would be modified by the installation. Users who had performed this installation later complained that CD and DVD burners no longer functioned at all or only incorrectly. Technical analyses made by various IT security experts confirmed the occurrence of these types of hardware errors.

Above all the latter case clearly points out the dilemma for the consumer. If he wants to use the purchased products in accordance with regulations, he is forced to submit to the provider's regulations regardless of whether this is in his own interest or not. The consequence is that the user himself must consent to the installation of damaging program functions in order to be able to use the product at all. There is no effective legal protection against technical protection measures that can cause damage for the user.

Quite the reverse: The prohibition introduced by the reform of the German Copyright Act (Urheberrechtsgesetz) in 2003 on circumventing technical protection measures (Section 95a of the German Copyright Act) shows very little consideration for the consumer's concerns. It can go so far that the user may not so much as remove or modify a damaging copy protection system. This is because the personal removal of a technical protection measure is prohibited by the German Copyright Act if it leads to "circumventing an effective technical protection measure." No provision is made for an exception for "self-help" against damaging functions caused by these types of protection systems.

In other concerns as well, it was more likely that the legal situation of the consumer was weakened by the German reform of the Copyright Act so far. Thus, the German lawmaker decided in the so-called "first basket" of the Copyright Law reform (passed in 2003) to rank private copies that are especially important for the consumer as a lower priority than the protection of technical measures. Instead of granting "genuine" consumer protection in the form of subjective rights of use, the German legislator limited himself to requiring rightsholders to utilize appropriate labeling when using DRM systems and other technical protection measures (see Section 95d of the German Copyright Act). Even in the current, ongoing deliberations on a "second law to regulate copyright law in the information society" (the so-called "second basket") no changes are on the horizon in this connection.

In this case, transparency requirements and notification responsibilities ultimately are hardly suitable for improving the consumer's situation. Naturally, they alter nothing about the fact that the accumulation of restrictive General Terms and Conditions, technical protection measures and statutory circumvention protection produces a legal situation in which the rightsholders can control the consumer's possibilities and rights of use almost at will. Limits are at best still set by the legal provisions of General Terms and Conditions, which can only extend protection, however, if the Copyright Law itself provides clear legal assessments in favor of consumer rights. This is frequently not the case. Rather the focus of today's Copyright Law is primarily on protecting the interests of rightsholders. Limitations of the absolute rights that they have been granted are generally considered to be secondary.

For the user the problem of prosecuting a claim is an added complication. Whether individual stipulations in use and licensing conditions are invalid according to consumer protection

provisions is something that is not normally ascertainable by the user due to the complex legal situation. In such cases, he simply lacks a basis for making a decision about whether he must comply with the respective stipulation of the contract or whether he risks legal action with violations. As a result, great importance is attributed to the fact that consumer organizations exercise their right to challenge in court whether specific stipulations of General Terms and Conditions are legally valid or not.

Results of the Study

For the context at hand, the study resulted in various findings in legal and factual respects.

Thus, with respect to the use of technical protection measures, it turned out that these are used primarily for music, film, computer programs, computer games and electronic publications. The systems that were examined function in very different ways. Even the use possibilities and restrictions related to these systems vary greatly. While for example very restrictive mechanisms are used with DVDs, which as a rule do not permit any copyright-related acts whatsoever (above all no copies), the DRM systems for music download services are less rigid. For the most part, the files acquired from such download services can often at least be copied in a limited way, and copied to different devices. As for the rest, it was shown that the manufacturer's labeling requirements to make reference to technical protection measures are frequently not complied with at all or only inadequately. Even if these types of labels appear on packages or on the internet, they often appear so obscurely and inconspicuously that they cannot be considered "clearly visible indications" within the sense of Section 95d of the German Copyright Act.

In legal respects, the study revealed an extremely complex situation. It turns out that it is difficult to determine copyright and contractual limits with respect to restricting the rights of the purchaser of copyrighted material. This is because the German Copyright Act itself grants the user subjective, enforceable rights only in rare exceptions. On the contrary, his interests are supposed to be protected by copyright limitations, which must be considered merely exceptions to the general principle that the author is entitled to the exclusive right to make decisions about any use of his work. Copyright law also rarely addresses contractual regulations related to consumer protection (as a result of which, e.g., certain contract structures are declared legally invalid). A rare exception applies, e.g., to the backup copy rule for computer programs. A stipulation that prohibits making backup copies of a software product is null and void in accordance with Section 69g Paragraph 2 of the German Copyright Act.

If such regulations do not exist, as is the case most of the time, an investigation whether legally granted rights of use can be excluded contractually must be made on the basis of general

contractual provisions of the German Civil Code. The legal investigation within the course of the study is based as a result mostly on Section 307 of the German Civil Code, which states that stipulations in General Terms and Conditions are invalid, if they unreasonably place the user at a disadvantage. Whether excluding copyright limitations from use and licensing conditions in individual cases is, according to Section 307 of the German Civil Code, incompatible, e.g., with “the essential basic idea of the legal regulations,” however, frequently cannot be clarified definitively for lack of a clear interpretation of legislative intent.

A thorough legal examination of the use and licensing conditions selected in the course of the study revealed that in practice very often stipulations are used, which unreasonably place the consumer at a disadvantage. This was evident in some cases, where the respective stipulations violate legal prohibitions for instance (e.g., bans on backup copies for computer programs). Most of the time, however, the investigation required an involved investigation of the legal situation. Complicating matters is the fact that the majority of legal questions examined have not as yet been clarified by established case law, and the legal literature has also not yet dealt with many aspects thereof.

For example, a question that remains unresolved to this day is whether digitally acquired non-physical copies of works may be resold. The study showed that many providers prohibit the resale of music, computer games or eBooks that have been downloaded from their online store. Whether this is permissible or whether there is a legally granted right to resell legitimately acquired copies of works has only been clarified so far for physical copies of works. Thus, the copyright exhaustion principle says that for example a computer game stored on a CD-ROM may be resold freely after it has initially been put into the stream of commerce. This right cannot be excluded by General Terms and Conditions. Whether this also applies when the computer game is acquired in a non-physical form, above all downloaded from the internet in exchange for payment, has not been clarified, however. In view of the fact that the market for these types of products is shifting more and more to the selling of files (i.e., non-physical copies of works), considerable importance is attached to clarifying this question, above all from the consumer’s point of view. Because if a resale right does not exist or if it can be waived by licensing conditions, the value to the user of the property purchased is reduced substantially. On the one hand, the user pays a considerable price for a computer game purchased via download, on the other hand, he is not able to realize the “used value” of his copies of works, however. As a result, much speaks in favor of the idea that resale prohibitions, even with respect to non-physical copies of works, are invalid or at least should be. Nevertheless, the applicable law leaves this question open resulting in considerable legal uncertainty.

Legal uncertainties concerning these and other fundamental questions affect not just the consumer, but the provider as well. However, because of his “contract drafting authority” the

latter is in a better position than the consumer. He dictates the contractual conditions. If a user does not want to comply with these conditions, he must check whether the respective stipulation is invalid. Mistakes can lead to legal consequences, for instance in the form of a consumer receiving a cease and desist letter, because he is selling the music he acquired from a download service on eBay.

For providers, there are additional legal uncertainties with respect to the legitimacy of their conditions of use above all when they market their content internationally. The legal situation can vary from country to country. Thus, liability and warranty claims for example can be excluded more or less completely according to US American law. However, this is not possible according to German law, especially in General Terms and Conditions that are used for commercial transactions with consumers. The study showed that international providers frequently attempt to shift this legal uncertainty to the user. Thus, several conditions of use contain special kinds of “severability clauses” that basically read: “In some legal systems the following stipulations are not permissible. If you are located in a country in which this stipulation is not permissible, you do not have to follow it and local national legal regulations apply.” The fact that these types of stipulations are impermissible almost without exception under German law is of little help to the user. Since as a rule he does not know whether the respective stipulation is permissible and valid in his legal system, he is left with only two, less attractive, possibilities: Either he relies on the regulation being invalid and thereby runs the risk of legal action or he must verify the legal situation in every individual case or seek out the expensive advice of a legal expert.

A further practice detrimental to the consumer has also shown up in many cases with respect to the linguistic wording of use and licensing conditions. Providers frequently confront the user with overly complicated General Terms and Conditions that in some cases are poorly adapted to the respective services or products or to German law. General Terms and Conditions that are ten or more letter-sized pages in length are no rarity. These frequently contain extensive redundancies and in some case even contradictory regulations, a fact that considerably impedes the comprehensibility of regulations being imposed on the consumer. Now and again, it was also clear that the conditions of use had been translated directly from a foreign language without making the necessary adjustments to the German language. Most of the time, these types of Terms and Conditions violate the transparency requirement in Section 307 Para. 1 of the German Civil Code and are therefore invalid.

In this respect, conditions of use that have not been adapted in terms of their content are also legally problematic. Some companies always use the same General Terms and Conditions for a number of very different services. It is not just that these types of contracts are generally extremely long and hard to understand. For the customer they also involve the difficulty that he is responsible for seeking out the stipulations that apply to him. As a result,

the user can hardly ascertain which of the many rights and responsibilities covered in the General Terms and Conditions actually apply to him and which do not.

The fact that even expert legal opinions do not always produce clear-cut information about the legal situation illustrates that the user is being overburdened by the current situation. If providers do not begin to use easily understood and fair conditions of use in their commercial transactions with the consumer, the situation will continue to persist where the end user enters into agreements on a daily basis without recognizing his rights and responsibilities. Ultimately, this might also run contrary to the interests of manufacturers and rightsholders, because responsibilities that are not understood or taken note of cannot be complied with.

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