

Consumer Ombudsman here

Official in charge:
Lars Grøndal

Our date:

Our reference:

Your date:

Your reference:

Complaint against iTunes Music Store

The Consumer Council of Norway hereby wishes to lodge a complaint against iTunes Music Store with the Consumer Ombudsman. The complaint is based on iTunes' standard terms and conditions as specified at <http://www.apple.com/no/support/itunes/legal/terms.html> (Terms of Service) and <http://www.apple.com/no/support/itunes/legal/policies.html> (Terms of Sale). It is the view of the Consumer Council that several aspects of these terms are in breach of the Marketing Control Act (*Markedsføringsloven*) and other legislation.

In addition, iTunes uses DRM (Digital Rights Management), a type of technical standard terms and conditions, which determine how the service can be used. The Consumer Council of Norway also believes that certain aspects of the technical terms and conditions are in breach of the Marketing Control Act.

1. Is the Marketing Control Act applicable?

The first issue is to what extent Norwegian law is applicable to this service at all. Clause 22 of the Terms of Service states that "[t]his Agreement and the use of the Service is governed by English law".

Section 1 (2) a of the E-commerce Act¹ states that it applies to "any service that is normally provided in return for remuneration and that is supplied electronically". The services sold by iTunes are supplied electronically. The main rule in the E-commerce Act is that the country of origin principle applies; cf. Section 5. This means that iTunes in principle is only governed by the legislation of the country in which iTunes is established. This raises the issue of to what extent iTunes can be viewed as being "established" in Norway.²

However, this matter does not need to be addressed here, as the country of origin principle does not apply to "terms and conditions of consumer contracts"; cf. Section 6c of the Act. In the preparatory works to the Act, the Ministry says of this exception that "a consumer can deal with his or her national legislation, and a vendor (commercial enterprise) can never contractually deprive the consumer of protection that is given by invariable rules in his or her

¹ Act of 23 May 2003 relating to certain aspects of e-commerce and other information society services

² See Gebhart, case no. C-55/94, in which the European Court of Justice defined the distinction between establishment and service provision on the basis of the duration, frequency, periodic nature and continuity of the service.

national legislation.”

It should also be mentioned that purchases made on iTunes.no have a strong link to Norway.

- iTunes.no can only be used by Norwegian consumers
- the domain name is Norwegian
- the language used is Norwegian
- prices are stated in Norwegian kroner
- iTunes.no has a support line with a Norwegian number

On the basis of the above, it is the view of the Consumer Council of Norway that Norwegian rules protecting consumers are applicable to the terms and conditions.

2. Unreasonable terms and conditions

Section 9a of the Marketing Control Act allows the Consumer Ombudsman to intervene against and prohibit unreasonable terms and conditions. The Consumer Council is asking the Ombudsman to use this statutory authority to intervene against a number of clauses in the iTunes standard terms and conditions as they are set out in writing and through the use of technical restrictions.

Standard terms and conditions that are in breach of mandatory legislation are prohibited by Section 9a of the Marketing Control Act. However, the service provided by iTunes is not governed by contract law. Nevertheless, general principles of contract law, as stated in consumer protection legislation, form the framework within which iTunes is allowed to limit consumers' rights.

It is the view of the Consumer Council that the terms and conditions are in breach of a number of principles of contract and EEA law, and that in general they appear to be unbalanced.

a. Choice of law

Clause 22 of the Terms of Service states that "[t]his Agreement and the use of the Service is governed by English law". As demonstrated above, the agreement is governed by Norwegian rules on consumer protection. This cannot be departed from by agreement; cf. the statements in the preparatory works to the E-commerce Act quoted above.

The terms and conditions are in this respect clearly in breach of mandatory legislation.

b. Can only use Apple's iPod MP3 player

iTunes' Fairplay DRM means that music downloaded from the iTunes Music Store can exclusively be played on an iPod.⁴ Both iTunes and iPod are owned by Apple. iTunes' DRM can be circumvented by copying a file on to a CD and then ripping it back on to the PC. The file will then no longer have the DRM, and it will be possible to play it freely on

³ See p. 59 of [White paper no. 31](#) (2002-2003)

⁴ See http://www.consumersdigitalrights.org/mdoc/OnlineMusicDownloadServices_TechnicalReport_90041.pdf

other types of MP3 players.

It is the view of the Consumer Council that iTunes' DRM is an unreasonable technical term of use, in so far as it prevents purchasers of music files at iTunes from using other MP3 players than iPods. The sole purpose of this type of DRM is to lock consumers into buying products from a dominant market player.

Clause 9b of the Terms of Service states that:

You agree that you will not attempt to, or encourage or assist any other person to, circumvent or modify any security technology or software that is part of the Service or used to administer the Usage Rules, or interfere with, remove or alter any rights management information on the Products.

The same clause also states that:

You shall be authorized to use the Products on up to five iTunes-authorized devices at any time.

Infringement of the Terms of Service has serious consequences; see Clause 8b, for example.

The Terms of Service prevent customers from changing or removing the DRM in order to use other MP3 players to play the music files bought from iTunes.

It is the view of the Consumer Council that this condition is unreasonable, and we would like to cite the second sentence of Section 53a (3) of the Copyright Act in support of this view. Pursuant to that provision, consumers are free to circumvent technical protection systems in order to play legally acquired works on appropriate players.⁶

The terms and conditions are in breach of mandatory legislation, and are there in breach of Section 9a of the Marketing Control Act.

c. Unilateral alteration of the terms and conditions

In several of the clauses of the standard contract, iTunes reserves the right to unilaterally alter the rights of the consumer in relation to material already purchased, cf. e.g. Clauses 9c and d, 14b, 18a (i) and 20. This can be illustrated by the fact that consumers who buy music files from iTunes can currently copy the files on to a maximum of 7 CDs. This means that iTunes can block the copying of material that the consumer has already downloaded and is storing on his or her hard drive. This applies in spite of the fact that at the time of purchase consumers were given the impression that they would be able to copy the file on to more CDs than this.

An investigation carried out by Intertek and commissioned by BEUC, the European Consumers' Organisation, shows that it will be technically feasible for iTunes to do this. According to BoingBoing, a web site that provides ICT related news, iTunes has made use

⁵ See Act no. 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works

⁶ You could also question whether the Copyright Act protects iTunes' DRM at all. Section 53a prohibits the circumvention of *effective* technical protection systems. iTunes' DRM can probably not be considered an effective protection system, cf. our earlier comments about the possibility of circumventing the DRM.

⁷ See http://www.boingboing.net/2005/03/16/apple_steals_itunes_.html

of its ability to restrict consumers' rights.

The annex to Directive 93/13/EF regarding unreasonable terms and conditions in consumer contracts lists examples of terms and conditions that can be considered unreasonable. Two of the examples of unreasonable terms and conditions are particularly relevant here:

- j) permission for the commercial enterprise to alter the terms and conditions unilaterally and without a valid reason specified in the agreement
- k) permission for the commercial enterprise to change – unilaterally and without valid reason – the properties of the product or service supplied

It is the view of the Consumer Council that it is unreasonable to reserve the right to unilaterally change the consumer's rights after the music files have been purchased and downloaded.

d. Restricts consumers' rights to compensation

It is a general principle of contract law that you are entitled to compensation for foreseeable financial losses caused by what is considered to be a defect under contract law. This principle can be seen in Section 33 of the Consumer Purchases Act.

iTunes' terms restrict consumers' entitlement to compensation. See, for example, Clause 18a (ii) of the Terms of Service:

iTunes does not represent or guarantee that the service will be free from loss, corruption, attack, viruses, interference, hacking, or other security intrusion, and iTunes disclaims any liability relating thereto.

There are other examples of liability disclaimers in Clauses 12, 18b and d, and 19.

This term bars consumers from lodging compensation claims in the event of iTunes' software creating security holes that can be exploited by computer viruses. This is a very real issue, which can be illustrated by the problems relating to Sony BMG's latest DRM, XCP. It leaves a security hole that gives viruses access to very sensitive parts of the computer. The security hole has resulted in financial losses for a number of, mainly American, consumers.

This kind of limitation on iTunes' liability for compensation is in breach of the general principles of contract law, and it is the view of the Consumer Council that it is unreasonable.

e. Geographic discrimination

iTunes limits competition by dividing up the European market through the use of technical requirements and standard terms and conditions.

Clause 10 of the Terms of Service states that:

⁸ See http://www.consumersdigitalrights.org/mdoc/OnlineMusicDownloadServices_TechnicalReport_90041.pdf

⁹ See the Act of 21 June 2002 relating to Consumer Purchases

The service is only available to customers in Norway. You agree not to use or attempt to use the Service from outside of the available territory, and that iTunes may use technologies to verify your compliance.

The Terms of Sale also state that “we are unable to accept credit cards or debit cards issued by banks outside of Norway”. iTunes’ Norwegian website rejects foreign credit cards. The same applies to Norwegian consumers at foreign iTunes websites. This makes geographic price discrimination possible. The prices are therefore different on the various iTunes websites.

The Terms of Sale mean that:

- foreign consumers are unable to use iTunes.no,
- Norwegian consumers are unable to use credit cards issued by overseas credit card providers when making purchases at iTunes.no,
- that Norwegian consumers are unable to use the service when they are abroad.

It is the view of the Consumer Council that it is unreasonable to discriminate against consumers on the basis of their nationality. iTunes’ terms and conditions and technical requirements are in breach of the principle of free trade in services. It is a general principle of EEA law that neither businesses nor authorities shall be able to restrict competition within the EEA area by creating barriers to trade between the EEA countries.

In connection with this it is worth mentioning that as a result of a complaint from the UK consumers’ association Which?, the European Commission is now considering whether the nationality requirement is in breach of the Treaty of Rome’s rules on competition.¹¹ Norwegian competition law includes similar prohibitions.

The Consumer Council of Norway also wishes to point out that it will under no circumstances be possible to maintain this type of discrimination once the new directive on services has been adopted. Article 21 of the proposed directive instructs member states to ensure that service providers do not discriminate consumers on the basis of their nationality.

f. Unbalanced terms and conditions

Pursuant to Section 9a (2) of Marketing Control Act, “when assessing whether terms are reasonable, emphasis shall be placed on the need for balance between the parties’ rights and responsibilities”. It is the view of the Consumer Council that in general the terms and conditions appear to be one-sided. Consumers are given few or no rights, whilst the vendor, iTunes, reserves a number of rights, some of which are unreasonable.

3. Information requirement

The Consumer Council of Norway also wishes to point out that iTunes does not comply with the information requirements for distance sales set out in Section 9 of the Cooling-off Period

¹⁰ iTunes shops in other countries have similar regulations. This means that Norwegian consumers are prevented from buying cheaper music from iTunes in other countries.

¹¹ See Articles 81 and 82 of the Treaty of Rome

¹² See Sections 10 and 11 of Act no. 5 of 3 May relating to Competition between Businesses and to Mergers and Acquisitions

Act.¹³ The information that is given “in writing and on a permanent medium” in connection with an agreement being entered into is enclosed.

It also appears to be questionable whether iTunes satisfies the information requirements as set out in Sections 8 and 11 of the E-commerce Act.

4. Other providers of music downloads

Finally we would like bring to the Ombudsman’s attention the fact that the other suppliers of music download services have similar terms and conditions. The Consumer Council therefore also requests that they be investigated. This applies, for example, to:

- MSN: <http://sib1.od2.com/common/help/TermsAndConditions.aspx>
- CDON.COM: <http://www.cdon.com/main.phtml?nav=10954&navroot=904&page=delivery>
- Musiconline: <http://www.musiconline.no/shop/default.asp>
- Prefueled: <http://prefueled.com/terms>

Yours faithfully

on behalf of the Consumer Council of Norway

Erik Lund-Isaksen
Director

Gro-Ellen Linnås
Deputy Director

Copied to: iTunes SARL, 8 rue Heinrich Heine, L-1720 Luxembourg

Enclosures: (1) E-mail that you receive from iTunes when you download iTunes

Music Store (2) E-mail that you receive from iTunes when you buy music

¹³ Act no. 105 of 21 December 2000 relating to the Right to Repent a Sale after a Cooling-off Period