

Norway takes fresh bite at Apple iTunes

There's been no letup in the Norwegian consumer ombudsman's campaign against the iPod giant's restrictive terms and conditions. Now German, French and Finnish authorities are also on board as he issues a second salvo report ARNE RINGNES and INGVID NÆSS

The Norwegian consumer ombudsman has received a great deal of attention recently in connection with his battle against iTunes SARLs ('iTunes') (a subsidiary of Apple Computer Inc) standard terms and conditions for its iTunes Music Store. This action is only the beginning and iTunes' competitors will also be followed up, the ombudsman has warned.

In a letter dated 30 May 2006, he asserted that several of the provisions set forth in iTunes' standard terms and conditions violate the Norwegian Marketing Control Act (the Act) and other legislation. Apple replied to the consumer ombudsman's objections during autumn 2006. In January 2007, however, the ombudsman sent a new letter to iTunes, announcing that the German and French consumer authorities have joined the Norwegian ombudsman in his Apple/iTunes campaign. Finland has also joined forces with the Norwegian consumer ombudsman over this issue.

The ombudsman and his associates claim that iTunes' standard terms and conditions are one-sided and unreasonable in contravention of section 9a(2) of the Act, which states: "when assessing whether terms are reasonable, emphasis shall be placed on the need for balance between the parties' rights and responsibilities". They also make the

following main points of criticism:

iTunes' standard terms and conditions are governed by English law, yet all four consumer organisations assert that purchasers entering into a contract with iTunes should be able to rely on the consumer protection rules of the country in which they live.

According to consumer groups, iTunes' digital rights management (DRM) is unreasonable in so far as it prevents purchasers of music files at iTunes from using MP3 players other than iPods. All four organisations believe consumers have a right to play material purchased online on a portable device of their own choice and that it is not sufficient that the material may be played on computers, CD etc. They say a positive answer to solve this question might be, for instance, renegotiating with record-companies so that the music can be sold without DRM, begin licensing their own DRM, or the development of a common DRM for the industry as a whole. For now, the organisations suggest that iTunes allow consumers to make songs playable on other devices through re-ripping burnt CDs containing songs downloaded from iTunes. However, they maintain this will not serve as a long-term solution.

iTunes' terms and conditions restrict consumers' entitlement to compensation. According to

the consumer organisations, iTunes should at least change the provisions to recover customers' damages if caused by content sold by iTunes.

One key bone of contention has been that, in several clauses, iTunes reserves the right to unilaterally alter consumers' rights in relation to material already purchased. According to the Norwegian consumer ombudsman and the other supporting organisations, it is unreasonable to reserve the right to unilaterally change the customer's rights after the music files have been purchased and downloaded.

In response to this criticism iTunes plans to amend the terms and conditions in order to clarify that changes will only affect future purchases and not content already acquired. Further, the company is currently working on a technical solution which will require that users actively accept the new terms and conditions the first time they attempt to make an account transaction after the changes have been made. The consumer organisations seem to be satisfied with this proposal.

According to the consumer ombudsman, iTunes limits competition by dividing up the European market through the use of technical requirements, ie by preventing foreign consumers from accessing iTunes.no (the Norwegian version of the service) and stopping Norwegian

customers using credit cards issued by overseas providers when making iTunes.no purchases or to utilise the service when they are abroad. As the Norwegian consumer ombudsman sees it, this is in breach of the principle of free trade in services. However, none of the other consumer groups seem to support the Norwegian ombudsman on this point and, in his latest letter, he appears to accept his competence is restricted in this area.

With respect to the consumer organisations' general view that the conditions are unbalanced, iTunes has affirmed that it will be explicitly declared in the terms and conditions that nothing in the agreement deprives or limits its liability according to mandatory consumer protection law. In addition, the company has stated consumers will be provided with an explanation that they are entitled to replacement or refund if the purchased product is delayed or defective. The Norwegian consumer ombudsman's latest letter suggests these solutions will be acceptable to the consumer organisations.

The ombudsman will bring the iTunes case before the Norwegian Market Council if the changes are not implemented in iTunes' standard terms and conditions before September 2007. Apple was given until March 2007 to answer the ombudsman's latest objections. ■