



## iTunes Green Paper Summary of Conclusions

The iTunes Case Study examines both international and national legal frameworks that govern the areas of copyright, contract, and anti-circumvention. One of the most important insights of the study is that there is an international trend toward convergence on many of the basic principles in these domains.

### Signs of Convergence:

- In the US as well as in Europe and Asia-Pacific, contract law regarding digital media uses provisions like “[terms of service](#)” and “license agreements” to govern the way consumers manage digital content. License agreements may override rights consumers would otherwise enjoy under copyright law. In both Europe and Japan, these provisions often prohibit users from reselling, lending, or transferring songs -- actions which are ordinarily protected under the first sale doctrine of fair use.
- Increasingly, digital content providers are turning to technological protection measures, generally referred to as DRM schemes, to constrain uses of e-content. iTunes, for instance, developed a system called [FairPlay](#) to restrict transformative use of music and limit the number of burns allowed per playlist. Technological protection measures are often bolstered by laws that prohibit circumvention of DRM. At the international level, the [World Intellectual Property Organization \(WIPO\) treaties](#) call for “adequate legal protections and effective legal remedies against the circumvention of effective technological measures.” Legislators around the globe have enacted policies like the [DMCA](#) in the U.S. and the [European Union’s Copyright Directive](#) to implement the WIPO treaties. Copyright holders and online music stores have relied on this combination of self-enforcing technical protections and strong anti-circumvention legal codes to retain control of their content.
- A trend towards international legal convergence is also evident in doctrines such as “first sale,” or as it is known under international law, the principle of exhaustion. Currently, U.S. and European Union laws have denied that the first sale doctrine applies to digital works distributed over the Internet, despite good arguments to the contrary. And the principle has yet to emerge in Asian Pacific jurisdictions. The WIPO treaties currently stipulate application of the first sale doctrine to tangible goods like books and CDs and not to “intangible” content distributed over the Internet.

## Signs of Divergence:

Despite this overall trend towards convergence, the iTunes Case Study reveals several significant differences among international jurisdictions in four main areas.

- **Anti-circumvention laws:** The anti-circumvention provisions of the DMCA and the EU Copyright Directive prohibit circumventing DRM or trafficking in devices for circumvention. Many European nations are still in the process of determining exact implementation of the EU directive, and the case law on this subject is just beginning to emerge. It is too early to predict exactly how European nations will interpret anti-circumvention provisions, but based on statements from government officials, a range of interpretations is likely to emerge, specifically with regard to circumventing “access controls” such as those used in DVD’s region coding.
- **Fair Use rights:** The fair use doctrine in the U.S. codifies reasonable exceptions to rights-holders' exclusive control of copyrighted material. This idea of "fair use" appears in most foreign copyright regimes, but the specifics of implementation and the granting of privileges vary widely. These differences may have two important effects on online music services. First, broad fair use privileges might decrease the record industry’s willingness to license their music to online music services. Second, and even more importantly, fair use doctrines affect users' expectations regarding what they can and cannot do with purchased digital content. In order to be successful abroad, services like iTunes must address both the concerns of copyright holders and the different expectations of users around the world.
- **Consumer protection laws:** Online music providers may face a wide range of consumer protection laws in different jurisdictions. For example, the EU-legislator has enacted two important directives that affect agreements between an online music service and its users -- the [Distance Contracts Directive](#) and the [Electronic Commerce Directive](#).
  - The Distance Contract Directive, for instance, grants consumers the right to withdraw from any distance contract within seven business days without penalty, and this right cannot be waived by contract. To comply with this regulation, European music stores such as [Tiscali Music Club](#) grant customers the right to “return” downloaded digital music within seven days.
  - The E-Commerce Directive for instance, requires online suppliers to inform consumers in great detail about their products, contract terms, rights of withdrawal, and other contract-related information *before* the user places an order.

Whether these EU consumer protection provisions apply to U.S.-based services like iTunes is not certain and will depend on the location of the store's European business center.

- **Law Enforcement:** While there is a trend toward international convergence in the substance of many laws, enforcement of contractual and copyright obligations continues to vary widely around the world. In the U.S., barriers to litigation are relatively low, as the [RIAA's](#) suits against individual file-sharers indicates. By contrast, the European

music industry has seems to be more reluctant to bring lawsuits prior to March 30, 2004. Though the RIAA has announced several legal campaigns in Denmark, Germany, Italy, and Switzerland, only a few raids against server operators and peer-to-peer uploaders have taken place. Foreign recording industry has placed greater emphasis on developing DRM, drawing public attention to the illegality of file-swapping, and increasing cooperation with ISPs rather than pursuing litigation. There are at least three possible explanations for this difference:

- First, it is possible that illegal file-sharing is a greater problem in the U.S., due to higher broadband penetration.
- Second, structural difference in international court systems might affect a copyright holder's willingness to litigate. Barriers like high burdens of proof for plaintiffs or limited awards for damages might change a copyright holder's economic calculus and make litigation a less attractive strategy.
- Third, different countries have different cultural barriers to litigation. In Japan, for example, enforcement of obligations tends to occur through negotiation and long-term interaction rather than litigation.

On March 30, 2004, however, the [International Federation of the Phonographic Industry \(IFPI\)](#) announced that legal actions against 247 alleged illegal file-sharers have been taken in Denmark, Germany, Italy, and Canada by the national record associations on behalf of their member record companies. According to IFPI, this is only the first wave of international lawsuits outside the U.S. Given the structural differences between the U.S. and Europe, it remains to be seen what the legal and economic effects of this international campaign will be, and what role new legislation such as the pending [EU Directive on Enforcement of Intellectual Property Rights](#) will play.