OLIVIA WHITCROFT

# "Is it possible to own digital assets? If not, what are you getting legally when you buy a digital item?"

**Copyright and ownership of digital assets is even more complicated than they are for physical assets – such as the issue of *PC Pro* in your hands**

Are you reading the digital edition of *PC Pro* or are you holding a shiny magazine? If you've bought the paper version, it's yours to keep – you own it. Perhaps you're sitting with a friend, each reading your own copies. Maybe you'll give your copy to another friend when you've finished reading it.

But if you and your friend are reading a digital version, do you each "own" it? If another friend wants to read it, is it possible to hand them over your unique copy?

This leads to the bigger question of whether it's possible to own digital assets. If not, what are you getting legally when you buy a digital item?

## Property rights

Things to which personal property rights (such as ownership) can relate have traditionally been split into two categories: "things in possession" and "things in action". The former are tangible objects that you can possess and move around. Things in action are those which are "denied physical enjoyment" and exist due to the legal system. An example is a debt; the property rights in the debt rely on legal action that can be taken against the person who owes the money.

Digital assets do not fit neatly into either category. In July 2022, the Law Commission consulted on this issue, and the final report (following the consultation) was published in June 2023. The report concludes that the law should expressly recognise a third category of personal property: one that encompasses "digital objects", which are not tangible, but exist independently of the legal system. At the time of writing, a Bill has been proposed to address this.

But there is another condition of being a digital object: the thing must be rivalrous. This means that use or consumption of the thing by one person inhibits its use or consumption by another person. In other words, a digital object cannot be held or used by more than one person (or group of people) at a time. Physical objects, such as your paper copy of *PC Pro*, are rivalrous (though not digital, of course). But your digital copy of *PC Pro* is a collection of pure information, and lots of subscribers have exactly the same information. It is therefore not rivalrous and not a data object.

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**"You can own the copyright in a digital file, but you do not own the digital file itself"**

An example of a digital object is a crypto-token. As well as being data, it exists within a specific set of rules and infrastructure, meaning that the same discrete crypto-token can only be held and used by one person at a time.

The Law Commission's paper also distinguishes digital objects from intellectual property, which I discuss below. The thing to which property rights attach is the intellectual property right itself (which depends on the legal system), rather than the underlying work which it protects. So, for example, someone can own the copyright in a digital file, but they do not own the digital file itself.

## What are you getting, then?

I was recently advising a company selling downloadable ebooks on the terms of its sales contracts. In a contract of sale for a traditional book, the buyer takes possession of the book, and ownership (also known as title) is transferred from the seller to the buyer. When my client sells an ebook, the buyer receives a file containing the data for that book. Some software (which understands the file format, which I'll touch on below) will process the data and turn it into something a human can read.

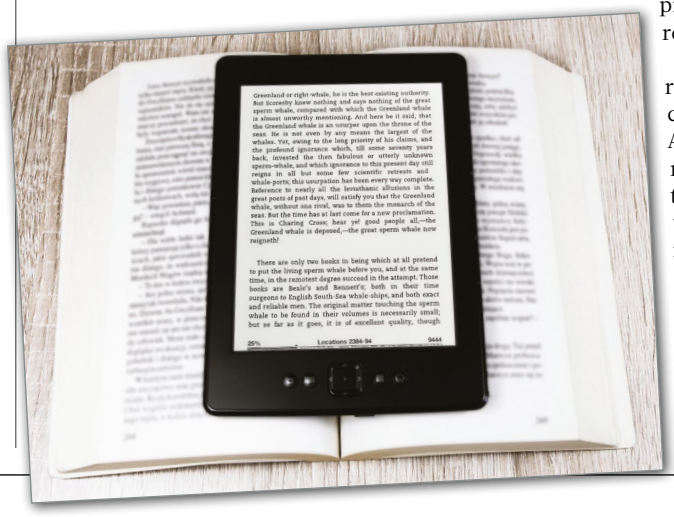
As discussed above, the buyer will not own that data file. So the contract would not transfer title to the buyer. But the seller is doing two things: supplying the data file to the buyer, and allowing the buyer to download a creative work in which copyright subsists. To prepare the terms of the contract, we therefore need to consider rules relating to the supply of digital content, and the laws of intellectual property.

## Supply of digital content

Historically, sales transactions were split into two categories: goods and services. If I purchase a physical book, or (with apologies for being so old-fashioned) some software or an audiobook on CD, there's a sale of goods (under which property rights in that book or CD pass to me). If I ask a business to write some software or a story for me, it's performing a service. The Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 implied terms into this contract of sale or supply, with the aim of ensuring, for example, that goods were of satisfactory quality, and that services were supplied with reasonable care and skill.

When software started to be offered as a download rather than sold on physical media, it was unclear whether something intangible could fall within the meaning of "goods" under the legislation. Sales of downloads were often treated as supplies of services, meaning that purchasers would miss out on protections of implied terms relevant to goods.

In 2015, this uncertainty was resolved, at least for sales to consumers. The Consumer Rights Act 2015 (CRA) provides that terms relating to goods apply only to tangible, movable objects. But a third category of transaction was introduced: supplies of digital content, intended to cover products such as software apps, films, games, music and ebooks. Terms relating to quality, purpose and description are now implied into contracts for the supply of digital content,



**BELOW Digital versions of products are legally distinct from physical ones**

akin to sales of goods contracts. Consumers have a clear remedy if a digital product is faulty or doesn't match what they were sold.

There is still some uncertainty for sales of digital products to businesses. However, a purchaser can seek to negotiate the inclusion of similar terms to those under the CRA. And, just to muddy the waters, software *may* be treated as "goods" for other purposes, such as under commercial agents regulations (where a company sells goods as an agent of another organisation).

Digital content is also addressed in relation to the right to cancel, under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Consumers have a right to cancel any distance contract (such as purchasing digital content online) within 14 days of entering into the contract. But the right to cancel will end if the consumer consents to begin the supply of digital content before then, acknowledging that the right will be lost.

My ebook client therefore needed to take into account the implied terms and the right to cancel within its contracts and sales processes.

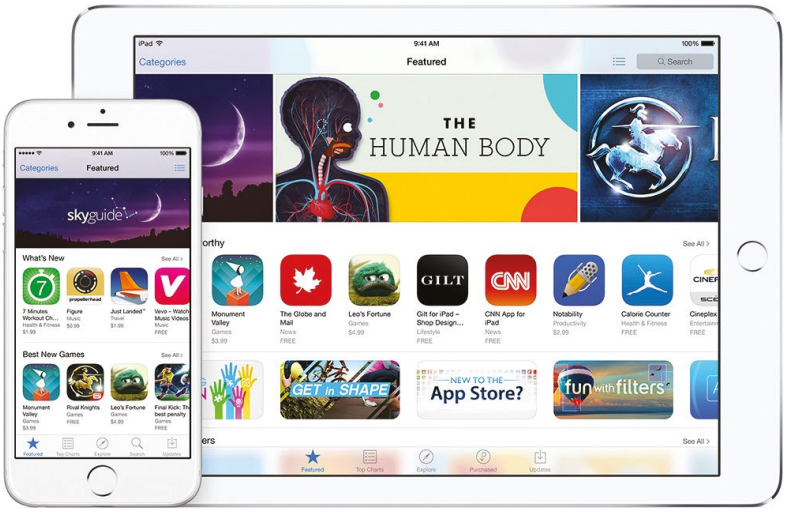
Additional rules on digital content will apply under the Digital Markets, Competition and Consumers Bill (currently going through Parliament). These include additional rights for consumers in relation to cancelling or ending subscriptions. Not that you'd ever want to end your subscription to *PC Pro*, of course.

## Intellectual property

Much digital content attracts intellectual property (IP) protection. A key IP right is copyright, which subsists in relation to original literary, artistic, musical or dramatic works, films and sound recordings.

So there is copyright, which can be owned, in your digital edition of *PC Pro*. Is Future Publishing assigning ownership of copyright to you in your digital copy? I hope not, as that would be silly! The copyright holder has exclusive rights, including the right to make more copies and communicate the work to the public. If Future Publishing assigned copyright to you, it couldn't sell a copy to other subscribers without infringing your rights. What it may do, however (as with my ebook client), is grant you a licence of copyright, allowing you to access and download a copy for you to read.

There may be circumstances in which copyright is assigned, where the purchaser is intended to take exclusive control. I advised a company creating bespoke digital videos for its customers. Once a video was created for a customer, the company didn't intend to reuse it, nor sell the same video to anyone else. As well as supplying the video, the company could therefore assign the copyright to its customer, so the customer was free to copy and use the bespoke creative work as it wanted in future.




**ABOVE Downloads were legally a grey area until the 2015 Consumer Rights Act**

Another issue is whether, once you have some digital content, you can give or sell it on to someone else. This is a complex area of IP law known as "exhaustion of rights". If you've purchased a physical copy of a work in which copyright subsists, such as a book, magazine or one of those old-fashioned CDs, you're able to sell it on (in the UK) without infringing copyright. However, for something digital, due to technical differences within the legislation, there's a distinction between software and other digital content. You may be able to resell software supplied to you (as it has been "distributed" to the UK public), but the supply of other digital content is treated as a "communication" rather than distribution, and the exhaustion rules don't apply. You should therefore check the terms of the copyright licence before giving or selling a copy of digital content to anyone else.

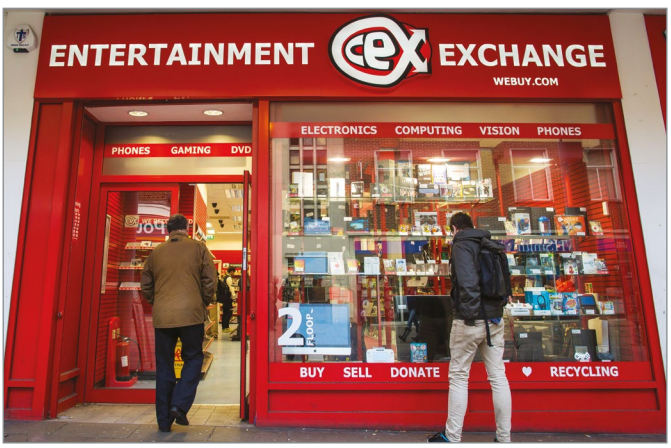
## What if there is no copyright?

There may be digital content you purchase that no copyright subsists in. This could be because copyright has expired; for a literary work in the UK, copyright expires 70 years after death of the author. Or it could be something that doesn't attract copyright, either because there's insufficient originality, or it isn't something capable of protection under the legislation.

**"Consumers have a clear remedy if a digital product is faulty"**

I was advising a business in relation to a licence of a file format, which was needed for software to process data files using that format. It's a contentious issue as to whether a file format can be protected by copyright. Case law has established that it would not attract copyright as a computer program, but it may still attract copyright as a literary work (if it's sufficiently original). There are also exceptions to copyright infringement relevant to certain uses of file formats, including in relation to interoperability and studying functionality.

So the question was, if the file format didn't attract copyright protection (or the proposed use was not an infringement of any such copyright), what would a licensee be getting under a licence? Well, they would still be getting access to the information itself, and the confidentiality of information may be protected by contract. Confidential information could also qualify as a trade secret, for which there is statutory protection against unlawful acquisition, use or disclosure. So the licence of a confidential file format could potentially include a right to use this information, with a contractual obligation to maintain confidentiality.




**BELOW You can resell physical copies of products without infringing copyright**

## Money well spent

I hope you enjoy reading the rest of this edition of *PC Pro*. Whether paper or digital, I'm sure you'll agree it has been money well spent accessing all the authors' highly creative and original works.

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