

PERMANENT DIGITAL DOWNLOADS: WITHIN THE OWNERSHIP-POSSESSION DISCOURSE

AUTHOR – KEERTHNA NAIR, STUDENT AT NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

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INTRODUCTION

The distinction between possession and ownership has long been settled in the context of physical goods, but when it comes to Digital Virtual Goods (DVGs), the discourse shifts towards the concept of temporary access rights. This shift primarily stems from the nature of DVGs, which are often governed by time-bound license agreements, restricting the rights of users to mere access. However, this framework fails to adequately address scenarios involving permanent licenses or permanent downloads of copies of digital goods without explicit licensing terms. In such cases, the notion of temporary access does not fully capture the broader spectrum of rights, such as selling, distribution, and communication to the public. These rights extend beyond mere access, suggesting the need for an ownership- possession based framework to understand ownership of copies of DVGs.

This paper argues that in the context of intangible digital goods, when downloads are permanent, possession itself can amount to ownership. This argument aligns with the definition provided by Rebecca D. Watkins. Moreover, the Bombay High Court case of *Tips Industries v. Wynk Music* supports this argument by categorizing permanent downloads as a 'sale' of goods, thereby granting resale and distribution rights to the buyer. Similarly, the *Used Soft* case reinforces the notion that the sale of software licenses can entail ownership rights for the buyer, once the software is permanently downloaded.

The recognition of an individual's rights over an object—whether physical or digital—is often tied to possession or personal identification with that object. This perspective provides a framework for understanding the rights associated with digital goods through the lens of ownership and possession, rather than the simplified model of access rights.

I. 'PERMANENT DOWNLOADS' AS 'SALE OF GOODS'

For the purposes of this paper, DVGs being considered are, digital music, videos, software and digital art that is permanently downloaded with permanent licences or without a licence agreement. First, we must consider whether 'permanent downloads' constitute the 'sale of goods' to do so, the author here is making use of the five identifiers as laid down by *BSNL v. UOI* case to differentiate between 'service' and 'sale of goods'

In the landmark case of *Bharat Sanchar Nigam Limited v. Union of India*¹⁴¹⁷, the central question before the court was applying the Sales of Goods Act¹⁴¹⁸ to qualify as to what would constitute a 'sale of goods' and how this would be distinguished from a service. BSNL, operating as a telecom service provider, filed a writ petition in the Supreme Court of India to determine

¹⁴¹⁷ *Bharat Sanchar Nigam Limited v. Union of India* [2006] SCC Online,[2006] SC 258

¹⁴¹⁸ Sales of Goods Act 1930

whether a mobile phone connection was a sale or service, as this classification had a material bearing on how BSNL would be taxed. In attempting to determine this, the court identified that a sale would require the transfer of the right to use the goods. The Supreme Court went on to stipulate five conditions under which such a transfer of the right to use goods would be deemed to exist. These are:

- i) there must be goods available for delivery.
- ii) consensus ad idem between the buyer and seller regarding the identity of the good.
- iii) the buyer must possess the legal right to use the good, including all associated legal consequences of use, such as a permit or license.
- iv) When the transferee possesses such a right to use the good, it must be in a way that the transferor is excluded from the exercise of these rights. So, there must be a transfer of right to use and not license to use.
- v) If the right to use goods has been transferred during a specific time period, the seller cannot transfer the same rights again

It went on to hold that electromagnetic waves, the goods involved in the operation of telecommunication services, were not in the possession of the consumer and no right to use the good could be found to exist, describing telecommunication systems as services with certain aspects of sale associated with them (like SIM cards) that could be taxed accordingly.

Let us now attempt to apply these five conditions to 'permanent downloads' to determine whether they would qualify as 'sale of goods'

1. Yes, goods available for delivery are all the above-mentioned intangibles that can be permanently downloaded.

2. When making a payment to download a certain virtual good, such consensus ad idem is known to exist
3. When the good has been legally downloaded based on a consideration, the legal rights to use that good are transferred to such buyer
4. Since the scope of this paper is only limited to examining permanent downloads that are not brought on time bound licences, it is a clear case of transfer of right to use.
5. Digital Virtual goods that are downloaded in the absence of licence agreements do not give the seller a right to resale or right to hold a copy because it is not a mere access right but a right to possess, use and enjoy the fruits of the same in the hands of the buyer.

This juxtaposition clearly indicates that permanent downloads with permanent licence or downloads that are not licence agreements constitute 'sale of goods'

II. NEED FOR AN OWNERSHIP-POSSESSION DISCOURSE

The current discourse on digital virtual goods is centred on an access- based consumption also called the access theory.¹⁴¹⁹ Such a theory does not operate within the ownership-possession framework, leaning towards a 'post ownership' economy where the language of access is claimed to be sufficient for consumption of digital virtual goods. However, this paper argues that while time bound licences for DVGs are merely accessed, permanent downloads with permanent licences and non-licence permanent downloads that are based on a consideration give the buyer a spectrum of rights that are not adequately captured by the term 'access-rights'

¹⁴¹⁹ Watkins, Rebecca D., Janice Denegri-Knott, and Mike Molesworth. "The relationship between ownership and possession: observations from the context of digital virtual goods." [2016] *Journal of Marketing Management* 32, no. 1-2.

Therefore, a need to revisit the ownership-possession framework arises. This paper attempts to situate permanent digital downloads within such a discourse to do justice to the rights that accompany permanent downloads when the sale occurs. Pertaining to the scope of this paper, ownership would be defined as: The legal and social recognition of one's right over a virtual object. While possession would mean, the right to use, enjoy the proceeds of and personally identify with an object.¹⁴²⁰

When copies of DVGs are permanently downloaded, a separate document or receipt that specifically confers ownership on the buyer is unavailable, thus, the social or legal recognition of the buyer's right over that particular good sold, is derived from the fact of the person's possession of that good only. Thus, permanent downloads with money consideration or 'price'¹⁴²¹ are sale of goods for which ownership is derived from possession.

Such ownership derived from the actual or constructive possession of the reproduction of a digital virtual good downloaded, allows a more accurate depiction of the many rights that accompany permanent downloads.

III. ANALYSING JUDICIAL DECISIONS

The Bombay High Court and the Court of Justice of the European Union (CJEU) have taken decisions that reinforces the argument that in case of permanent downloads with a consideration, ownership will be derived from possession.

In the case of *Tips Industries v. Wynk Music*¹⁴²², the defendant provided songs to its customers through an online platform and mobile app. Customers could either (a) pay a one-time fee and download a song permanently, or (b) pay a subscription fee and listen to songs during the

subscription period, or (c) stream songs and listen to them online.

The defendant was providing songs owned by the plaintiff without a valid licence. The plaintiff therefore instituted an action for copyright infringement of the sound recordings against the defendant. The Copyright Act grants the owner of a copyright in sound recordings, among other rights, the exclusive right to sell the sound recordings. In this regard, in order to establish infringement, the plaintiff was required to show that the defendants continued to 'sell' the plaintiff's sound recordings without authorisation. The plaintiff was successful in establishing this with respect to the songs that were permanently downloaded by users for payment of a one-time fee. The factors that led the court to equate a permanent download for payment as a sale were the following: (a) sound recordings are permanently downloaded onto the customer's device; (b) the permanently downloaded copy could be accessed and enjoyed by the customer without the app; (c) such a copy could also be further copied and/or transferred without restrictions to other devices. These factors led the court to hold that a permanent download of the plaintiff's song by customers from the defendant's platform amounted to a 'sale' of the sound recording. Since the 'sale' of a sound recording was the exclusive right of the plaintiff, without a valid license, the defendant's act of selling these songs amounted to copyright infringement.¹⁴²³

From the above, it appears that the Indian view, so far, is that copyrighted material supplied through digital formats for permanent download could qualify as sale of goods. Taking this conclusion a step further would imply that, **upon the first lawful sale of a copy of a digital good, the exclusive distribution right of the copyright holder over that copy is exhausted.** It may therefore be possible to argue that digital

¹⁴²⁰ Watkins, Rebecca D., Janice Denegri-Knott, and Mike Molesworth. "The relationship between ownership and possession: observations from the context of digital virtual goods." [2016] *Journal of Marketing Management* 32, no. 1-2

¹⁴²¹ The Sale of Goods Act 1930, s 4,5

¹⁴²² *Tips Industries v. Wynk Music* [2019] MANU/MH/0862/2019

¹⁴²³ *Ibid*

exhaustion applies in India and resale of lawful digital copies is permissible in India.¹⁴²⁴

Analysing this further, when doctrine of exhaustion is said to apply in case of permanent downloads, essentially possession and ownership also gets exhausted when a subsequent lawful sale is made. Therefore, while the main intention of this case was to determine whether Wynk music was liable for copyright infringement, it also dictated that in case of permanent downloads doctrine of exhaustion applies as in the United States, which acts as support for my argument that possession itself becomes ownership which transfers with subsequent sale to the next buyer.

The EU has had the opportunity, in notable instances, to decide whether the supply of digital content for permanent download would amount to “distribution” or “communication to the public” under their copyright act. This determination becomes necessary even for placing DVGs within the ownership–possession discourse. If courts place permanent downloads within ‘communication to the public’ it would be a mere right to access similar to a movie displayed on theatre screens that audience can only access but not sell or destroy. However, if courts place permanent digital downloads within the former category, the good has been delivered, this when combined with doctrine of exhaustion would amount to possession and possession being the only source of social and legal recognition of one’s rights over that good, it will also result in ownership.

In *UsedSoft GmbH v Oracle International Corporation*,¹⁴²⁵ it was held that when software is supplied for permanent download, such supply amounts to a sale of the software irrespective of the agreement being a licence agreement, since the licence permitted permanent and not time bound access to the software. Consequently, the court has held that a lawful

permanent download of a software results in the exhaustion of the ‘distribution’ right over that copy of software and onward resale was held to be lawful. This decision also attempts to curb free-riding by requiring persons reselling software to ensure that the software is rendered unusable pursuant to the resale. Further, reproduction of the software, to facilitate the second-hand sale and for use after the second-hand purchase, was not considered an infringement of the exclusive right of reproduction.

In 2019, in *Nederland Uitgeversverbond v Tom Kabinet Internet BV*¹⁴²⁶, (“Tom Kabinet Decision”) the CJEU held that the supply of a book on a material medium and the supply of an e-book cannot be considered equivalent from an economic and functional point of view. It held that the supply of an e-book to the public by downloading, for permanent use, is covered by the concept of ‘communication to the public’ and not by the exclusive right of distribution, and their rights would not be exhausted because only authors can remain owners of the e-copies while the electronic platform gets the licence to sell.

IV. ADDRESSING SOME DIGITAL SALE CONCERNS

In the context of considering permanent downloads as a sale of goods, some pertinent contractual concerns arise, practical problems of ensuring that a copy that is resold is actually a lawful copy and does not continue to reside with the seller after the sale. Technical solutions such as locks and keys and monitoring tools may be used to ensure that copies that are resold are lawfully acquired copies.¹⁴²⁷

Another concern is lack of clarity in law with regard to copies of DVGs because of international treaties acceptance of certain doctrines like the doctrine of exhaustion while

¹⁴²⁴ Lath, Aparajita. ‘Permanent Downloads and the Resale of Digital Content: Another Exhausting Journey.’[2020] Indian JL & Tech. 16

¹⁴²⁵ C-128/11, *UsedSoft GmbH v Oracle International Corpn.*[2012] ECLI:EU:C:2012:407 2013 Bus LR 911.

¹⁴²⁶ C-263/18, - *Nederlands Uitgeversverbond et al v Tom Kabinet Internet BV et al.* (“Tom Kabinet”) [2019] European Court of Justice.

¹⁴²⁷ Lath, Aparajita. ‘Permanent Downloads and the Resale of Digital Content: Another Exhausting Journey.’[2020] Indian JL & Tech. 16

domestic non-acceptance or lack of clarity on the same.

Advances in technology and the growing prevalence of the internet may gradually make permanent downloads obsolete. However, the concept of downloads has not entirely disappeared. The current gap in legal regulation on this matter needs to be addressed to ensure that the digital distribution of content—whether it involves permanent downloads or online streaming—is free from ambiguities and uncertainties. Clear guidelines on the treatment of such content would benefit users, businesses, and the whole economy and allow a more apt placement of DVGs within the ownership-possession discourse.

CONCLUSION

The legal discourse around digital virtual goods, particularly permanent downloads, remains in flux as technology evolves and traditional frameworks of ownership and possession are challenged. This paper has argued that in the context of permanent downloads, possession can and should amount to ownership. By applying the five identifiers from the *BSNL v. UOI* case to digital goods, it becomes clear that permanent downloads, without restrictive licensing, constitute a sale of goods. This position is further reinforced by key judicial decisions, such as *Tips Industries v. Wynk Music* and the *UsedSoft* case, both of which recognize the buyer's rights stemming from permanent possession of digital goods.

However, challenges remain, particularly in addressing concerns about resale, piracy, and the application of the doctrine of exhaustion in digital environments. As courts continue to grapple with these issues, a more nuanced legal framework is necessary to adequately address the rights associated with permanent digital downloads. The current access-based approach fails to capture the breadth of rights buyers should hold when they permanently acquire copies of digital goods.

The shift towards a post-ownership economy is a notable trend, but it does not entirely negate the relevance of ownership in digital markets. As such, there is a pressing need for the law to evolve, providing clarity and legal certainty for all stakeholders involved—whether users, businesses, or regulators.

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