

“Who owns this car?”: Intellectual property protection of software-featured products

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Software-featured products in the increasingly connected world of the Internet of Things (IoT) are creating situations that customers find perplexing. Unlike tangible items, copyright-protected software features are rarely “sold,” only licensed. Such features are therefore subject to seemingly-anomalous terms of acquisition and ongoing use.

For example, software features may be remotely disabled within a purchased product. Recent reports are that Tesla remotely disabled advanced software features within a 2017 Model S after purchase, via software update. The car was purchased from a dealer that had previously bought the car from Tesla at auction as a California Lemon Law buyback, due to an unrelated defect. As sold by the dealer, the car had enabled—and listed on the window sticker—Enhanced Autopilot (with Summon feature) and Full Self Driving (FSD) Capability, software features normally costing a sales price premium of \$8,000. Upon auditing the car’s features during a routine software update, Tesla determined that the purchase price did not include the premium for the two advanced software features. The features were disabled as part of the update.

Ownership of the tangible article, licensing of the software

Consumer confusion stems from the typical commercial practice of only licensing, not selling, software. Various forms of intellectual property—utility and design patents, copyright, and trademarks, at a minimum—apply to tangible products that are regularly sold. Sale normally “exhausts” the intellectual property owner’s rights in the specific product, including copyrights applicable to tangible articles such as books, paintings or sculptures.

Considered “intangible,” copyrighted software is not subject to the same presumptions of ownership and the rights of possession and use that are associated with the purchase of tangible products under the Uniform Commercial Code. Instead, software developers can—and normally do—merely license the use of the software (instead of selling the software). Unlike sales, software licensing is not legally required either to exhaust all rights of the “seller” (licensor) or to confer rights in perpetuity to the “purchaser” (licensee). Instead, licensing is a creature of contract law, and may contain whatever terms to which the purchaser agrees. The combination of “buying” a tangible article (such as a car or a smart phone) but merely licensing software features within the product can create confusion for consumers.

The product must actually be sold for the apparent conflict with licensed software features to arise. Many articles are merely leased rather than purchased, which impacts the right to control the product via disabling software features. Modems from an Internet service provider, for example, are normally leased for upfront payment but are contractually required to be returned when service is discontinued. In contrast to a purchased modem, the service provider would have greater legal rights in remotely disabling software features.

Within purchased products, the removal of premium features following purchase highlights that consumers must now be cognizant of how specific software-implemented features are priced, and how such pricing may evolve over time.

Essential and non-essential features

Disabling essential features of a purchased product merely because those features were implemented via software is unlikely to be legally sustained. Disabling software features should not render a utilitarian product unsuitable for its intended use. A purchased car or smartphone should not have software features disabled in a manner preventing the purchaser—or any subsequent purchaser when the car or phone is resold—from driving the car or placing calls using the phone.

By contrast, non-essential features are fair game for various price-based marketing schemes. In addition to the possibility of features being disabled for non-purchase, several such schemes are already in use.

Promotional features

The concept of “loss-leader” or promotional features takes on new meaning when those features are implemented in software. After all, specialty wheel rims cannot be repossessed merely because an introductory or promotional period has elapsed. For software features, however, promotions may include temporarily free use of the feature, with a subscription or other additional payment required to continue the use of the feature after the expiration of the promotional period. This model is common with entertainment media libraries and video games.

Subscription versus “purchase”

Software as a Service (SaaS) or subscription-based licensing is becoming increasingly prevalent, despite perpetual or paid-up licensing having previously been predominant. Such subscription-based licensing makes the periodic adjustment to market segmentation easier. A software feature previously included within a “base” package may be moved into a higher cost package once a current subscription period has elapsed.

The intellectual property protection afforded to software has created a dichotomy for how consumers acquire products versus the software features within such products.