

COMMENTS OF ALLEN N. DIXON
INTERNATIONAL IP AND TECHNOLOGY CONSULTING (IIPTC)
European Commission Hearing on Content Online
11 October 2006

I would like to focus my comments on four particular issues about Digital Rights Management, or DRM. DRM is simply the technology that allows content or service providers to manage the use of content, data or services. The four points I want to emphasise today are

1. **DRM promotes rather than limits consumer choice.**
2. **There is no reason to interfere with the market-based bargains struck between consumers and digital content and service providers.**
3. **DRM needs legal protection, not regulatory interference. Interference hurts technology development and the security of DRM systems, and likely violates EU and international law.**
4. **Consumer choice – that is, competition – as well as industry-led co-operation, are the best options for promoting interoperability and other features of digital services based on DRM.**

* * *

1. **DRM promotes rather than limits consumer choice.**

In the past, there were a very limited number of ways of enjoying copyright material, and these usually came at a fairly high price. Music for example came on vinyl, cassette, and then CD, for 10-or-20-Euros a copy, and you got a bundle of 10 or 12 songs that someone else had picked, many of which you may not have wanted.

New digital services offer a whole range of usage options at different price points, which give you the opportunity to pay for only what content and uses you want. If you want unlimited use, you can still buy and burn an entire album onto disc—a popular option, apparently. But if you want just one track, that will be a fraction of the album cost. If you just want to rent tracks for listening, on a month to month basis or say for just a weekend party, the rental or ‘streaming’ price is less still for an almost unlimited amount of music – 2 million tracks now on the service I use for about 10 Euros a month.

DRM is the technology that underlies all this diversity. It allows content providers to get beyond the one-size-fits-all, high-priced options of the past, and compete with each other for new options and uses that are only limited by the imagination and by what we as consumers ultimately decide to buy. DRM allows the content providers to offer and charge us only for what we consume. Like most technological innovations, therefore, DRM *promotes* consumer choice.

2. There is no reason to interfere with the market bargains struck between consumers and digital content and service providers.

Nothing is forcing consumers to buy any particular only content or service, whether DRM protected or not. Online content is delivered pursuant to market bargains struck between consumers and content and service providers. The bargains struck determine which content, device and copying options are provided and paid for. If a consumer does not like a particular offer, he or she simply can purchase another device or service. In the music area, for example, there are now more than 130 digital online music services in operation in Europe to choose from, mostly DRM-protected, indicating that consumers like what is on offer. So long as the market-driven bargains between consumer and provider are clear as to what device, copying and other options the user is buying—such transparency is required under consumer protection laws already—governments should support and not interfere with the bargains or the underlying DRM technology that enables them. Consumers should be left free to accept any particular offer or go elsewhere. This allows healthy competition among providers and improvements to the technology and service offerings based on consumers' buying preferences.

3. DRM needs legal protection, not regulatory interference.

The European Community in the 1991 Software Directive and the 2001 Copyright Directive, and the international community in the 1996 WIPO Copyright Treaties, recognised that legal protection of DRM is crucial to the development of the digital content marketplace. Interference with this technology under any variety of excuses simply undermines the technology, the security of copyright material, and the very digital marketplace they are meant to promote.

Some member states for example have failed to protect all kinds of DRM technology adequately, as required by the Copyright Directive. Others have non-market private copy and levy regimes which may try to force DRM systems to allow copying that simply has not been paid for on any kind of market basis. This just pushes us back to the one-size-fits-all market for use of copyright material that the digital revolution was supposed to change.

The recent DRM legislation in France is particularly ill conceived. It allows compulsory licensing of copyrighted and patented DRM technology in a way that is prohibited under

both the EU software directive and the WTO TRIPs agreement's copyright and patent rules. I must say it is shocking policy to say that in trying to *protect* someone's intellectual property in the content, you can just *take* someone else's intellectual property in the DRM. This law also threatens the security of DRM technology. And it simply undermines investment and improvement of the technology—effectively forcing one, and may I say one *country-specific*, model for what users can be offered in the way of device options for DRM-protected content. All of this is simply *counterproductive* to what we should be doing—promoting innovation and competition in digital online services by *protecting* DRM technology.

4. Consumer choice – that is, competition – as well as industry-led co-operation, are the best options for promoting interoperability and other features of digital services based on DRM.

A lot has been made in the press about the fact that Apple's Fairplay DRM technology in the iTunes service only works on the iPod player. But frankly, so what? If a consumer wants a simple device and service where he just presses the button and gets his music, why should a government intervene? Judging how popular the iPod and iTunes are, a lot of consumers seem to like the simple option.

Now I don't work for Apple and in fact I use a service that lets me burn my music to different devices, but again, this is how competition works. So long as it's clear what we're buying, shouldn't we be able to buy or not buy any service as we see fit.

Some of Apple's competitors in France in fact tried to force licensing of its DRM technology under the guise of 'interoperability' by challenging Apple at the competition authority. The French Competition Council said pretty much exactly what I'm saying right now: Apple had no obligation to license FairPlay because the DRM was not essential for the development of legal online music download platforms—as evidenced by the considerable number of competitors in the market.¹

Now there *are* a number of interoperability initiatives among the market players, and a number of discussions going on about how to move content securely from one DRM system to another—a very technically complex issue. But my point here is that the market is the only place that these issues can be sorted out. Consumers can and will vote with their feet

¹ Décision n° 04-D-54 du 9 novembre 2004 relative à des pratiques mises en oeuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques (France Conseil de la Concurrence), <http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>.

if they don't like particular content, device or usage options, including device portability.

There is simply no reason for governments to intervene in the market at this very early stage, or to give any particular content, device or usage option enabled by DRM a regulatory preference or a regulatory handicap over any other.

Thank you.

Allen N. Dixon

International Intellectual Property and Technology Consulting
London, England

Email: allendixon@hotmail.com