the consumer ombudsman

European Commission
DG Information Society and Media

avpolicy@ec.europa.eu

Your ref.	**Our ref.**	**Date:**
COM(2007) 836	**Case nr:** 07/3064-3 **Executive Officer:** Frode Elton Haug **Dir.tlf:** +47 98 66 05 66	28.02.2008

The Norwegian Consumer Ombudsmans comments to the Communication from the Commission on Creative Content Online

I am referring to the Commission's Communication on Creative Content Online of 03.01.08.

The Consumer Ombudsman (CO) is an independent administrative body responsible for enforcing the national rules on commercial practices set out in the Norwegian Marketing Control Act.

Over the last couple of years my office has been working intensely on questions concerning the use of DRM and contract terms offered to consumers when purchasing content online. The main case we have considered regards the DRM and contract terms used by iTunes Music Store.

Our negotiations with iTunes and the contact that we have had with the music industry in relation to this, has thrown up several perspectives that I will try to elaborate on in the following comments to the questions raised in Commission's proposal.

Digital Rights Management

1. My main concern with the DRM used by iTunes was that it is not interoperable. This has always been the core of our case against iTunes Music Store. What makes the iTunes-DRM particularly unfair is that the same company (Apple) has a leading position as both a content provider and as a manufacturer of the equipment used to play back the content. This places Apple in a situation where they are able to force people who would like to enjoy something so "universal" as music from their favourite artists to buy Apple's iPod music player in order to do so even though the music is available in file formats that are playable on a host of different players. However the DRM is constructed in a way that does not allow playback on these other players and this is an unfair practice.

   When it comes to other DRMs used to protect content, we have not seen the same type of lock between providers of content and equipment manufacturers as has been the case with iTunes. Most DRMs used to protect content allows the user to

choose from a range of equipment to decide what he wants to use to access the content. Nevertheless, it is a problem for consumers that different types of DRMs exist that are not fully interoperable or do not work equally well with all types of equipment, effectively discouraging people to purchase digital content online because of fear of complications when using the content.

I am in no doubt that the development of interoperable DRMs for creative content would greatly support the development and legal distribution of such content. I can quote several examples regarding consumers who have written to this office giving examples of how non-interoperable DRMs give them problems and discourage them from buying DRM-protected content.

2. One of the things we were first met with when we confronted iTunes with their use of DRM, was that they pointed to the fact that information was given to the consumers about the DRM and that the consumers, because of this, fully knew what they were buying. Nevertheless, we pursued the matter because, in our view, the particular DRM used by iTunes represented an unfair practice as it required people to buy an iPod to listen to DRM-protected content purchased from iTunes. Even if iTunes had improved the information about the DRM it still would have been an unfair practice, similar to an unfair contract term, to continue using this lock between content and equipment through the use of DRM.

   As we know now, iTunes and the record companies have opted to move towards selling DRM-free content, instead relying on other technical protection measures to try and safeguard their interests. This is a very positive move, and shows that the industry has realised that the use of strict and cumbersome DRM-technology does not help the distribution of digital music online.

   With this in mind, I am somewhat surprised about the suggestions from the Commission about looking at developing guidelines for providing better information about DRMs. The Commission has accurately described the problems caused by non-interoperable DRMs in the Communication. The solution then is not to look at ways of improving information about something that causes severe problems for consumers and also contributes to "under-performance" in the online selling of creative content. Instead of contributing to solving the problem by removing non-interoperable DRMs this can in fact be seen as a contribution to sustaining the existence of unwanted non-interoperable DRMs by looking at information as a way of "damage reduction".

   Developments over the last few months have shown that the music industry itself is moving towards using universal standards without DRM to encourage a rise in the distribution of their content. In making this move they show that they have come to the same conclusions as consumer representatives all over Europe: That non-interoperable DRMs is in fact counterproductive and not in the best interest of consumers and the industry. With this in mind, I urge the Commission to support the push towards freedom for users of music and other digital content purchasable online by shelving the proposal for an information strategy and instead demanding that DRMs used to protect "universal" content such as music, film, books and so on are to be interoperable. A consumer who has bought a computer, a digital media player, or a mobile telephone that's capable of storing music and video files should ideally be able to buy content from any online store without having to worry about

ideally be able to buy content from any online store without having to worry about technicalities such as non-interoperable DRMs. Of course some problems would still exist related to use of file formats that are not compatible with all types of players or operating systems and so on, but removing the obstacle of non-interoperable DRMs would at least be one major step towards making digital content more easily available for European consumers.

3. In our discussions with iTunes we have looked closely at the terms of their EULA. Our first impression of this was that the contract was severely unbalanced and unfair to consumers. It was also very complex and hard to understand.

   We have now gone through the whole contract with iTunes resulting in several important changes. These include a significant improvement in the right for the consumer to claim compensation from iTunes in case of damages caused by the software provided by the company. iTunes is also no longer allowed to change the contract terms to decrease the rights consumers have to already purchased products.

   The contract has also been made easier to understand, although it is still fairly complex. To aid consumers in understanding the contract, a list containing the most important terms from the contract is presented clearly in easy to understand language at the screen when the consumers enters into the contract. I feel that this is a practice that could be recommended as it gives consumers who do not take the time to read through the whole EULA an overview of what the most important terms are.

   For our own work we are now going to use the iTunes EULA as a benchmark and compare other EULAs to this. A possible creation of European guidelines for digital content EULAs, based on the results achieved by ourselves and other European consumer organisations, is something that could be considered.

4. When it comes to alternative dispute resolution mechanisms, I feel that this not really something that should be a priority to develop at the moment. In my view, the focus now should be on finding solutions that encourage "universal" availability for consumers who want to buy digital content. As a second priority one should look to develop and improve the basic consumer rights people have when buying digital content. If amendments to the EULAs through negotiations between the industry and consumer representatives on the basis of the Unfair Contract Terms directive do not give good enough results, one need to look at specific legislation on the subject. Only when these top priorities are in place should the focus be turned to better ADR.

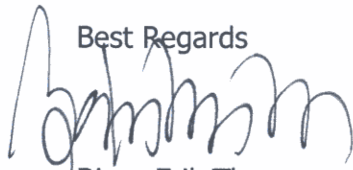
5. I am of the opinion that in so far as DRMs are still used as a way to regulate use of content it is necessary to find standards that secure interoperability. Because of this, all companies with an interest in providing content should be given non-discriminatory access to the DRM solutions. I am aware of an initiative by the Coral Consortium where the goal is to develop interoperable DRM solutions that may be utilised by whole industries and where access is provided on a non-discriminatory

basis. More information about this commendable initiative may be found here: http://www.coral-interop.org/

Regarding multi-territory licensing I will only say that this is obviously something that would be of benefit for consumers and encourage to increased competition throughout the single market. Making a Recommendation about this seems to be a sensible way of moving forward.

When it comes to the other aspects of multi-territory licensing and the issue of legal offers and piracy, I will leave to others to comment on that.

Best Regards



Bjørn Erik Thon
Consumer Ombudsman