

DIGITAL: THE GREAT LET DOWN?

Even with digital growth, global sales continue to leak

PUBLISH OR BE DAMNED

Roger Faxon of EMI Music Publishing
on chasing the missing ringtone millions

FORMAT WARS

Can Sony BMG cut it as a TV format
development house?

VIVE L'INTEROPERABILITY

France votes for interoperability.
Who's next?



Vive l'interopérabilité

France votes to tear up proprietary DRM

THE FUTURE OF PRIVATE COPYING LIES AT THE HEART OF FRANCE'S MOVES TO FORCE THROUGH DIGITAL INTEROPERABILITY. WILL OTHER COUNTRIES NOW FOLLOW SUIT?

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To have a clear perspective on the international shockwaves caused by recent legislative activity in France, one must appreciate the fundamental difference between the Continental and the Anglo-American approaches to private copying.

Most British owners of iPods busily ripping their CD collections appear to be blissfully unaware (as indeed are many entertainment lawyers, I have discovered) that they are infringing copyright if they don't have the consent of the copyright owners; even if that copying is for private purposes.

This is not the case in France (and most of Continental Europe) which is why law-abiding iPod owners in the UK should ensure that they take their PCs and record collections to France (or to any of the other Continental European countries where private copying is permitted) before ripping their collections onto their iPods. They can then bring their iPods back into the UK so long as they are not proposing to sell them!

The Continental European approach to private copying is mostly to accept that it will happen, that it is impracticable and unrealistic to forbid it, but to compensate rights owners through levies on blank recording media and on recording devices. That's why your canny French consumer would pop over to the UK to buy their brand new iPods (avoiding the €40-odd levy on the equivalent device in France) and to also buy their recordable CDs here since they also carry no levy ballast.

The levy system is currently under

examination by the European Commission who announced an investigation in October 2005. This has been prompted by the embracing of DRM by content owners as a panacea to tame what has been the Wild West of the emerging digital world. If DRM curtails the scope for private copying, then levies should be reduced. Or so runs the argument.

In December last year, an alliance of open software and consumer lobbies managed to persuade enough members of the French National Assembly to vote in favour of an amendment to a Bill introduced

ecosystem.

Interoperability is obviously attractive to consumers and might seem attractive to content owners; but the devil is in the detail of the current wording of Article 7. The particular concern expressed by various commentators is that, as currently drafted, Article 7 could force owners of proprietary software to open up their interfaces in such a way that would render other aspects of their DRM ineffective.

One fundamental object of DRM is to enable content owners to control use. This element of control is required to sustain the

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by the French government to implement the European Commission Directive on author's rights and neighbouring rights. This amendment would permit P2P activity by extending the private copying exemptions currently enjoyed by consumers to P2P file-sharing. A royalty of €5 per month was proposed as a rate to be paid by such consumers. This caused a furore and provoked intensive lobbying by content owners.

In March, the French government succeeded in defeating that amendment in the National Assembly. But, another 'hot potato' has emerged in the form of Article 7 of the proposed Bill; this is intended to ensure interoperability between consumer devices to allow access to content regardless of format. This would end the walled gardens of the current delicate, digital music

à la carte and subscription models of digital music delivery currently playing a significant part in refreshing the fortunes of the music business

Ineffectiveness of DRM could also enable easier and, therefore, more widespread unlicensed P2P activity. A major lobbying campaign is, as a result, now under way to ensure that the baby (DRM) is not thrown out with the bath water (interopérabilité).

Interoperability is a key proposition of the Coral Consortium whose membership comprises: content owners including all the major music labels (and IFPI and the RIAA); the four major film studios (and the MPAA); several major service providers (including AOL); five major consumer electronics companies (eg Samsung, Matsushita); and IT companies and technology providers.

The proposition of the Coral Consortium

is that the concepts of interoperability and DRM are not mutually exclusive. Interoperable access to content can be achieved independently of DRM, the consumer device used and the media format.

The aim is to ensure full respect for the rights of content owners, to enhance the consumer experience and to enable service providers to reach the broadest range of consumers. The key that unlocks this is the development of a trusted standard that mediates between different DRM technologies whilst ensuring interoperability.

It is important to note that neither Apple nor Microsoft are not part of the Consortium. Apple is on the offensive about the impending French legislative insistence on opening up its proprietary FairPlay. This is presumably since it would seem to have most to lose as the dominant player.

However an opening of the market providing access to digital music could enable Apple to sell even more iPods and would not necessarily impact on its iTunes Music Store (which is also the current market leader).

Microsoft has kept its counsel so far,

possibly because interoperability could enable it to secure dominance for its own Windows Media DRM. Some commentators have objected to the idea that primary legislation should undermine the current walled garden ecosystem on the grounds that this is the business of competition authorities, not parliaments. They argue that Apple should not be penalised for its success in developing

retailers such as FNAC and Virgin. This is also supported by SACEM.

The French Senate is no simple rubber-stamping body for legislation emanating from the National Assembly. It comprises elected members – though not elected by the public at large but by the few hundred thousand French officials and civil servants (most of whom have themselves been elected

“Content owners will defend DRM though they accept interoperability would bring significant benefits”

the market for digital music by insisting on its own exclusive proprietary standards.

The Bill goes to the French Senate for approval in May. This has spurred a further bout of lobbying. A common platform has been established on revisions to Article 7 between French record companies and

by popular mandate). They are, therefore, indirectly responsive to voters' concerns and it is to be expected that a degree of revision to the current legislation will be on the cards.

The Waterloo of interoperability and open software currently being fought on French, rather than Belgian, soil is not a simple matter of two armies lined up against each other. The consumer lobby has formed a pretty clear battle formation with the open software movement at its vanguard.

This has an incredible level of public interest in France; some 150,000 signatures were mustered by the open software movement to support its opposition to aspects of the proposed legislation. Articulating consumer perspectives are academic commentators, many of whom are opposed to the restrictive aspects of DRM. A clear exposition is contained in Richard Stallman's now-legendary letter to the Boston Public Library condemning DRM in audio books on the basis that it was "a mechanism intended to deny the public the exercise of those rights which copyright law has not yet denied them".

Content owners will defend DRM to the death though they clearly accept that interoperability would, at this stage of the evolution of the musical ecosystem, bring significant benefits. The French government and its legislators have, on occasion, shown themselves to be highly receptive to consumer-based intense lobbying pressure. Whether it will be receptive to sustaining an effective DRM system within the context of interoperability remains to be seen.

A leading figure in the consumer movement in France clearly feels that the battle is not yet lost on any front. In a suitably colourful, Gallic fashion he states: "Le gouvernement n'est pas sorti de l'auberge." ■

■ The District Court of Paris rules in December that a KaZaA user did not break the law and that downloading and uploading qualified as "private copying".

■ Proposed 'global licence' that would charge users (a voluntary) €5 to download as much as they want from P2Ps.

■ Some 13,000 musicians sign a petition in favour of the global licence and consumer bodies call for the decriminalising of file-sharers.

THE ORIGINS OF THE BILL

■ The 2001 European Copyright Directive to be implemented into French law.

■ Lower fines for file-sharers (of €38-150).

■ Fines of €30,000/prison sentences for those caught distributing DRM-cracking software.

■ Fines of up to €300,000/prison sentences for those who 'patently' distribute copyrighted works without authorisation.

OTHER LEGAL CHANGES