

FTC Hearing - DRM Interoperability

This morning, I had the pleasure and honour to speak - "as the European voice" - at the FTC hearing on "[Protecting Consumers in the Next Tech-ade](#)" (check out the [official weblog](#) for more information and summaries of the discussion.) I was asked to report about the legal and regulatory discussions on DRM in Europe and to focus on DRM interoperability in particular. The latter question is also part of an ongoing research collaboration between the [Berkman Center](#) at Harvard Law School and our St. Gallen [Research Center for Information Law](#). The research project is aimed at exploring the interaction between interoperability and e-innovation, an important aspect that was only briefly mentioned at today's hearing.

Here is the longer and slightly modified (links added) written version of my statement. For a more detailed discussion, check out the excellent paper "[DRM Interoperability and Intellectual Property Policy in Europe](#)" by Mikko Valimaki and Ville Oksanen.

Over the past few years, much of the legal/regulatory debate in Europe about DRM has focused on the legal protection of technological protection measures and its ramifications for the digital ecosystem, because EU member states have faced the challenge to transpose the rather vague [EU Copyright Directive](#) into their national laws and comply with the relevant anti-circumvention provisions of the [WIPO Internet Treaties](#).

Introducing and harmonizing anti-circumvention laws across Europe has been a long and an enormously [controversial process](#). As far as DRM is concerned, three topics in particular have caused heated controversies:

- DRM and its legal protection vis-à-vis traditional limitations on copyright such as the "right" (or privilege) to make copies for private purpose;
- DRM and "fair compensation";
- DRM and interoperability.

Given our panel's topic, please let me address the interoperability issue in some greater detail - a topic that has gained much attention in the context of iTunes' penetration of the European market, esp. in France.

At the European level, though, no coherent DRM interoperability framework exists, although DRM interoperability has been identified as an emerging issue by the European Commission, which has established - among other things - a multi-stakeholder [High Level Group on DRM](#) that has also addressed DRM interoperability issues.

The lack of specific and EU-wide DRM interoperability provisions leaves us with three areas of law that address this issue more generally, both at the EU level as well as the level of EU member states. The areas are: copyright law, competition law, and consumer protection law.

Copyright Law

The EU Copyright Directive, mandating the legal protection of DRM systems, does not set forth rules on DRM interoperability. Recital 54 only mentions that DRM interoperability is something member states should encourage, but does not provide further guidance and seems to trust in the market forces. However, [one might argue](#) that the anti-circumvention framework itself allows the design of interoperable systems - e.g. a music player able to play songs encoded in different DRM standards - by outlawing only trafficking in such circumvention devices that are (inter alia) primarily designed and marketed for circumvention of effective TPM. Along these lines, at least one Italian Court has ruled - in one of the [Bolzano rulings](#) - that the use of modified chips aimed at restoring the full functionality of a Sony PlayStation (incl. its ability to read all discs from all markets despite region coding) is not illegal under the EUCD's anti-circumvention provisions.

At the EU member state level, France has taken a much more [proactive approach](#) to DRM interoperability. A draft of the revised copyright law (implementing the EUCD) introduced an obligation of DRM providers to disclose interoperability information upon requests without being compensated. This "lex iTunes" has triggered strong [reactions](#) by the entertainment industry, and the final version of the law softened up the original proposal. Current French law states that a regulatory authority mediates interoperability requests on a case-by-case basis. Under this regime, too, DRM providers can be forced (under certain conditions) to disclose interoperability information on non-

discriminatory terms, but they now have the [right to reasonable compensation](#) in return.

Competition Law

The baseline is: Competition law in Europe may become relevant in cases where a company with a dominant market position refuses to license its DRM standard to its competitors. However, to date, there exists no case law at the EU level where competition law has been applied to the DRM interoperability problem. But there are important cases ([IMS Health](#) and [Magill](#), but also the [anti-trust actions](#) against Microsoft) illustrating how competition law — at least in exceptional circumstances — can give the need for interoperability more weight than the IP claims by dominant players. In France, Virgin Media tried to use competition law as an instrument to enforce access to iTunes FairPlay system. The French competition authority, however, has ruled [in favour of iTunes](#), partly because it considered the market for probable music players to be sufficiently competitive (click [here](#) for more details).

Consumer Protection

From a consumer protection law perspective, three issues seem particularly noteworthy. First, the Norwegian Consumer Ombudsman has been very [critical about Apple's iTMS interoperability policy](#) in response to a complaint by the consumer council. The Ombudsman argues that iTMS is using DRM and corresponding terms of services to lock its consumers into Apple's proprietary systems.

Second, a French court fined EMI Music France for selling CDs with DRM protection schemes that would not play on car radios and computers (check [here](#) and [here](#)). EMI violated consumer protection law because it did not appropriately inform consumers about these restrictions. The court obliged EMI to label its CDs with the text: "Attention - cannot be listened on all players or car radios".

Third, a recent proposal by the [European Consumers' Organisation](#) proposes to include DRM in the [unfair contract directive](#). The idea behind it is that consumer protection authorities should also be able to intervene against unfair consumer contract terms if the terms are "code-" rather than "law-based".

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