



## INTELLECTUAL PROPERTY

### Apple's Causes Célèbres

**As Apple breathes a sigh of relief this month, Rebecca Swindells asks: is this the end or just the beginning of Apple's problems?**

The champagne corks must have been flying high at Apple's headquarters in California over the past few weeks as the computer giant celebrated two significant events.

#### A Hard Day's Work

First came its hard-earned victory over the Beatles' record label, Apple Corps, regarding its alleged use of the APPLE trade mark in the area of activity reserved to Apple Corps, namely music products and services. The High Court in London ruled that Apple's use of the APPLE mark was in relation not to music products and services but rather to its iTunes store. It was therefore held not to have breached the 1991 Settlement Agreement with the Beatles' label under which it had agreed to restrict its use of the mark so as not to impinge upon Apple Corps' prior rights in "APPLE" in relation to music products and services.

This latest round in the seemingly endless "battle of the Apples" was prompted by the relatively recent launch of Apple iPods and the iTunes music store from which approximately 3 million songs are downloaded every day. Indeed, it was Apple's apparent stronghold on the music download market which gave rise to another of its high profile legal spats this month, namely the controversial French Copyright bill.

#### The Problem with the French

The Copyright bill was drafted by the French government in February of this year. Its main aim is to prevent any single company from dominating the music download market. As Apple currently owns approximately 75% of that market, it is not difficult to understand why the bill has been regarded as primarily targeted at Apple.

One of the ways in which Apple has been able to monopolise the market is by using certain software codes in order to protect the music which is played on Apple devices such as the iPod and Nano. This is a form of digital rights management ("DRM") used by many technology corporations such as Apple, Sony and Microsoft who argue that it is essential in order to protect copyright and to stay one step ahead of the infringers.

However, it is misleading to suggest that Apple's "FairPlay" DRM is a safeguard against unauthorised downloads and hence a bar to copyright infringement. Indeed, it is thought that the vast majority of iPod users obtain their music not from iTunes (which costs 79 pence per song) but from illegal (and free) peer-to-peer networks or from "ripping" the CDs of others. From research undertaken for the purposes of this article, it appears that many iPod users are willing to admit that they have not paid for any of the hundreds of songs which they currently enjoy listening to on their iPods. Most do not regard this as "stealing" given the absence of controls in place to prevent it. Consequently, people worldwide are able to illegally download millions of tracks everyday in a matter of minutes. It is not difficult to see why most consumers regard digital music as "free for all".

While Apple's FairPlay DRM does not, then, prevent copyright infringement, it does effectively bar Apple customers from playing their iTunes music on any device other than iPods, PCs and iTunes mobile phones. Apple consumers are therefore tied into the Apple brand. Similarly, purchasers of music which uses DRM from rival companies such as Microsoft or Sony cannot play this music on their iPods. It could therefore be argued that Apple's and its rivals' use of DRM is motivated not by a desire to protect copyright (which is of course the main concern of the artists and their record companies) but, rather, by self-interest, namely to maximise their market share by enforced customer loyalty.

It is these manufacturer-imposed restrictions which the French government wants to remove from the digital music market. At the heart of the draft legislation is a desire to open up the market in favour of the consumer, by ensuring that the devices onto which music is downloaded are "interoperable", that is, compatible with other devices with the result that music can be downloaded onto and shared between all such devices regardless of its source or format.



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In order to achieve this result, the original bill required DRM owners to disclose their software codes to interested parties such as music store operators and music player manufacturers. The obvious argument against this is that it makes a nonsense of DRM, the whole aim of which is to control access to the music. The danger is that, once the source code is disclosed, those who have gained unauthorised possession of the code will be able to by-pass the DRM and exploit the music without paying for it with the result that the retailer, distributor, manufacturer and ultimately the record company and artist all lose out.

Commentators have interpreted the draft French legislation as a potentially huge blow for Apple, whose iTunes/iPods success has resulted primarily from the very fact that the technology used is both incompatible and inoperable with almost all other devices and services on the market.

Currently, iPod users can download music from the following sources:-

- (a) iTunes, at the cost of 79 pence per track;
- (b) illegal peer-to-peer networks;
- (c) legitimate sites (such as eMusic.com and bleep.com) offering music in a standard, non-DRM protected mp3 format.

The legitimate sites falling into the third category above are comparatively small and far less advanced or sophisticated than DRM-protected services such as iTunes and those offered by Apple's rivals Sony and Microsoft. They may not therefore be a viable or attractive option to many iPod owners who then are left only with options (a) and (b) because they cannot currently access any DRM-protected services other than iTunes.

Concerns about restrictions on consumer choice and potentially anti-competitive behaviour in the industry are seemingly what prompted the French government to action. It was no doubt influenced by consumer pressure groups such as the Union Federale des Consommateurs-Que Choisir ("UFCC") which argues that "the total absence of interoperability between DRM removes not only consumers' power to independently choose their purchase and where they buy it from but also constitutes a significant restraint on the free circulation of creative works". The UFCC has commenced Court proceedings on this issue against both Sony and Apple, with both cases expected to go to trial later this year.

## Apple's reaction

Unsurprisingly, Apple did not give a warm welcome to the proposed legislation, warning that it would lead to "state-sponsored piracy" by enabling consumers freely to download onto their iPods and other devices, and to transfer from one device to another, unprotected music from potentially illegal sources.

However, as noted above, piracy is already rife among iPod users. One could argue that the illegal download of music onto iPods is prolific precisely because iPod consumers are so restricted in their use of the device; that, if iPods were made interoperable, consumers would be able to access a much wider and better range of legitimate products and services which might in turn deter them from pursuing illegal options. On the other hand, this analysis might be rather naive and over-simplistic, the more cynical view being that consumers will always opt for the illegal download if they can get away for it - why pay for something which you can get for free?

Whatever the impact of interoperability might be on iTunes, Apple acknowledges that it would inevitably cause an increase in iPod sales. Interoperable iPods would be versatile and therefore much more valuable assets to consumers who want to be able freely to download, share and distribute music from and to a variety of sources. As noted above, Apple is unlikely to be dependent upon its iTunes sales as the majority of iPod users download their music from other sources. This begs the question: is interoperability such a bad thing for Apple?

## Amendments to bill

Notwithstanding the above, and perhaps in response to Apple's accusation of state-sponsored piracy, the French government has now backed down on the issue and amended the wording of the proposed legislation so as to allow companies to prohibit the publication of their DRM source code if they are able to show the following:-



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- (a) the DRM system only restricts exploitation of music in a way approved by the author or copyright owner;
- or
- (b) publication of the source code would seriously affect the security and effectiveness of the DRM system.

In order to satisfy the first requirement, music store operators such as Apple will probably renegotiate their agreements with record companies and artists - for example by signing exclusive distribution contracts – in order to avoid going interoperable. Copyright holders are likely to agree to such a move if convinced it will enhance the security of the DRM systems protecting their works.

Similarly, the second requirement should not pose a problem given the obvious risk that, once confidential information is disclosed, it could be used for unlawful or unauthorised purposes. Consequently, Apple and its competitors are unlikely to struggle to satisfy the wording of the legislation and keep their DRM code confidential.

## Regulatory Authority

In its current form, the bill provides for the creation of a new Regulatory Authority in France whose responsibilities will include:-

- (a) mediating requests for DRM source codes from those wishing to develop interoperable systems;
- (b) ordering companies to share details of their DRM, if they do not satisfy the requirements set out above for keeping such information confidential;
- (c) imposing fines against copyright infringers including:-
  - (i) between Euro 38 and Euro 150 for individuals who download or share protected files without paying for them;
  - (ii) up to Euro 3,750 for those who circumvent DRM technology for piracy reasons;
  - (iii) Euro 30,000 for distributing technical means to crack DRM; and
  - (iv) Euro 300,000 for those dealing in software patently aimed at unauthorised distribution of copyright works.

While rights holders will no doubt welcome statutory fines for infringers, there are concerns that the legislation does not set out comprehensive guidance for the policing and enforcement of infringement, with the result that many infringers may slip through the net. For instance, it is not clear whether the fines for unauthorised downloading and sharing of files are to be calculated per file or per download session. In respect of point (ii), there may be difficulties in judging whether someone has circumvented DRM technology “for piracy reasons” as it is often impossible to prove the intention of the user in question. Furthermore, it is not clear what “patently aimed at” in point (iv) means. Therefore, while the measures seem a step in the right direction, they may be difficult to implement and enforce. The bill is still being debated and will take several months to finalise.

## Consequences of the French Legislation

It is widely thought that, had the legislation been passed as originally intended, Apple would have responded by withdrawing its iTunes stores from France. While the French market represents approximately 25% of European music companies’ sales, it accounts for only a small part of Apple’s iTunes business.

Provided Apple is satisfied that it can meet the requirements of the legislation to qualify for maintaining the confidentiality of its DRM code, it is likely that iTunes will remain in France.

Whatever the final outcome for Apple, the debate as to the pros and cons of DRM will no doubt continue, with supporters of DRM seeing it as essential to protect the rights in innovative music products and services, and therefore to encourage creativity of new technology. Dissenters maintain that DRM is anti-competitive and favours global music giants to the detriment of the consumer, by presenting a bar to interoperability and stifling a creative



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market which they argue should be fluid.

This issue is also likely to spark a debate as to whether the French government should have adopted a different approach to the problem from the outset, for instance offering incentives to businesses to invest and adapt to interoperability rather than seeking to impose harsh mandates by seeking to force companies to share their legitimately created technology with competitors.

The above considerations are particularly timely for the UK Government which recently commissioned an independent review into the UK's intellectual property framework. The so-called Gowers Review will focus particularly on updating the IP system for today's digital market. In doing so, the UK will have to undertake a delicate balancing act between, on the one hand, ensuring adequate rights protection for owners of intellectual property including music copyright and, on the other, maximising consumer choice in the digital music market.

Unfortunately for Apple, its legal disputes are far from at an end. As mentioned above, it is being sued in France by a national consumer association, and it is also fighting a claim brought by Creative Technology which alleges that the iPod's interface infringes Creative's patent. If Creative succeeds in its claim, Apple would be unable to sell, market or import into the US iPods or Nanos. And that really would have an impact on its business.

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