CENTER FOR
DEMOCRACY
&
TECHNOLOGY
Working for Civil Liberties on the Internet

1634 I Street, NW Suite 1100
Washington, DC 20006
202.637.9800
fax 202.637.0968
http://www.cdt.org

THE CENTER FOR DEMOCRACY & TECHNOLOGY'S PUBLIC COMMENTS
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In the Matter of Sony BMG Music Entertainment, a general partnership,
File No. 062-3019

The Center for Democracy & Technology would like to thank the Federal Trade Commission for the opportunity to comment on its recently announced settlement agreement with Sony BMG Music Entertainment. We are hopeful that our comments will provide the FTC with useful feedback as the Commission reviews this case.

I. General Comments

CDT would like to commend the FTC for obtaining an important pro-consumer settlement that sets valuable precedents for digital rights management (DRM) software and more broadly for consumer privacy and security in the digital era. The FTC has crafted the settlement agreement around several general principles which we hope will continue to be promoted in the future across the contexts of content protection, software, and the Internet. There are three areas of the agreement that CDT finds particularly valuable in setting appropriate standards for maintaining a consumer-friendly digital environment.

The first of these is the requirement that Sony BMG clearly disclose the presence of DRM software and obtain affirmative consumer consent before installing the software. This requirement, expressed in sections I-III of the settlement agreement, promotes the principle that consumers – not software distributors – should be in control of which applications are installed on their computers. This principle has been advanced in several previous FTC spyware cases, and it is an important part of the Anti-Spyware Coalition's best practices for software.[1] By including it in this settlement, the FTC further reinforces the necessity of clearly disclosing the presence of software and obtaining affirmative consumer consent for installation, providing a standard for the entire software industry. This requirement also gets to the heart of DRM transparency, one of the "metrics" laid out in CDT's recent paper, *Evaluating DRM: Building a Marketplace for the Convergent*

[1] *Best Practices: Factors for Use in the Evaluation of Potentially Unwanted Technologies*, Anti-Spyware Coalition (January 25, 2007), http://antispywarecoalition.org/documents/BestPractices.htm.

World.[2] CDT believes that setting high standards for the manner, timing, and content of DRM disclosures is essential to maintaining a vibrant marketplace for digital content. Sections I-III of the settlement provide such standards.

Second, the FTC has required Sony BMG to obtain affirmative consumer consent prior to transmitting information about consumers, their computers, or their use of content back to Sony BMG servers, as discussed in section V of the agreement. In establishing this requirement, the FTC recognizes that this kind of information transfer is a significant event from the consumer perspective, and that consumers deserve to be informed and given a choice about the uses of this information. The privacy implications of using content protection software to collect consumer information are at the core of another of CDT's DRM metrics – the collateral impact that DRM has on consumers. By establishing the requirements in section V of the agreement, the FTC has acknowledged the privacy impact that DRM can have on consumers and has taken steps to safeguard consumer privacy in this area.

Finally, the FTC has continued to promote the best practice of requiring software distributors to provide a reasonable and effective mechanism for consumers to uninstall their software, as expressed in section VII of the agreement. This principle has been established in previous FTC spyware cases and is an important part of both the Anti-Spyware Coalition's best practices and CDT's collateral impact metric for DRM. We welcome the FTC's persistence in demanding that all installed software, whether for content protection or another purpose, should be easily removable by consumers.

These three areas of the settlement represent important precedents that are worth carrying forward. There is a fourth area that CDT believes could strengthen this agreement even further – promoting good security practices in software distribution. With all software there is always the possibility that sloppy or overaggressive programming could impair the general security of consumers' computers. One of the major problems with the Sony BMG DRM was that it created security vulnerabilities that could be used by malware distributors seeking access to consumers' computers. Including additional settlement requirements similar to those listed below would help mitigate those risks and establish another important precedent for the software industry:

- Software security testing should be required prior to the release of new software. In settlements such as the Sony BMG agreement, the FTC might also consider requiring that an independent third party conduct the security testing and submit the results to the FTC for review.
- Patches for security vulnerabilities should be issued in a timely and accessible manner. Software distributors should cooperate with security vendors to minimize the threat posed by security flaws discovered after software has been released.

We believe that including provisions such as these will give the settlement even more weight in setting standards for DRM and software in general.

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[2] *Evaluating DRM: Building a Marketplace for the Convergent World*, Center for Democracy & Technology (September 2006), http://www.cdt.org/copyright/20060907drm.pdf.

II. Section-by-section comments

The following comments highlight specific details about individual provisions of the agreement. Only sections on which CDT has specific comments are discussed below.

Definitions

The agreement states in the definition of the term "clear[ly] and prominent[ly]" that on-screen disclosures shall be "unavoidable." CDT interprets this to mean that in order for a disclosure to be clear and prominent, it must appear separately and apart from any End User License Agreement (EULA). CDT supports this type of requirement and we are pleased that the FTC has included it here, although we believe this idea has been expressed more clearly in other FTC settlements. In the recent agreements with adware distributors Zango Inc. and DirectRevenue LLC, the FTC required that material terms be disclosed "prior to the display of, and separately from, any final End User License Agreement."[3] Matching the language in the Sony BMG settlement more closely to this language from the adware agreements would make the requirement of disclosing material terms outside of the EULA even more explicit.

Section I

Providing DRM disclosures in a relevant and timely manner is important in helping consumers navigate the DRM marketplace. The FTC has done well in section I to require disclosures on the product packaging so that consumers can make informed decisions about whether to purchase protected CDs. This section is phrased so as to require that disclosures appear on the rear of the product packaging, with a note on the front to direct consumers to the rear. While this is a sound formulation, we see no reason why Sony BMG (or any other distributor of DRM) should be prevented from issuing the disclosures on the front of the product packaging if they so desire. The FTC might consider re-phrasing section I.A as follows to allow for this possibility:

> *A. On the front of the product packaging, that important consumer information regarding limits on copying and use can be found on the rear of the product packaging, if that is the case; and*

Section I requires disclosure if the product's digital content can be transferred only to playback devices that support secure Windows or Sony ATRAC file formats. We support this provision, and since this section applies to all protected Sony BMG audio CDs going forward, it seems reasonable that the list of formats that need to be disclosed should not be limited too specifically. It also seems that if consumers need a particular operating system to use protected content, that information should be disclosed on the product

[3] *See In the Matter of Zango, Inc., formerly known as 180solutions, Inc., Keith Smith, and Daniel Todd*, FTC File No. 052 3130 (filed Nov. 3, 2006), available at http://www.ftc.gov/os/caselist/0523130/index.htm; *In the Matter of DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook*, FTC File No. 052 3131 (filed Feb. 16, 2007), available at http://ftc.gov/os/caselist/0523131/index.htm.

packaging along with the file formats. Thus, the FTC might consider broadening the language of I.B.3 as follows:

> *(3) allows the direct transfer of the product's audio files or other digital content only to playback devices that use specific file formats or operating systems, if that is the case.*

Section IV

We applaud the FTC for requiring Sony BMG to limit its use of information collected about consumers who may be unaware that their CDs transmit data about them. Arguably, the language in IV.A – which prohibits the use of such information for "marketing purposes" – would bar the disclosure or sale of the information to a third party, but it may be worth stating this more explicitly. Both IV.A and IV.B focus on the "use" of information by Sony BMG and do not refer to disclosure or sale. The FTC should consider making the prohibition against disclosure or sale to a third party more explicit.

Section VI

Prohibiting software distributors from taking measures to hide their software on consumers' computers is an important step in building consumer trust in the Internet and the software distribution environment. Section VI of the agreement applies this idea to audio CDs, but it could be applied more broadly – to digital music sold over the Internet, for example. In fact, the FTC has expressed this idea in several past spyware cases covering a range of different software.[4] In this or future settlements, the FTC should consider broadening the scope of provisions barring the hiding or cloaking of content protection software, since the same arguments apply whether such software is distributed via CD, digital music download, or some other method.

III. Conclusion

CDT applauds the FTC for achieving a settlement that will be of great value to both consumers and the software and content industries. Although we have suggested refinements to some parts of the agreement language, overall we believe that the current settlement will prove useful as a set of guidelines for software distribution and content protection.

We appreciate the opportunity to comment on this significant case. We look forward to the final version of the agreement and the positive impact that it will have on consumers and the digital marketplace.

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[4] *See, e.g., FTC v. Digital Enterprises, Inc., et al.,* No. 06-4923-CAS (C.D.C.A. filed August 8, 2006); *In the Matter of DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook*, FTC File No. 052 3131 (filed Feb. 16, 2007), available at http://ftc.gov/os/caselist/0523131/index.htm.