

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Bureau of Consumer Protection
Division of Advertising Practices

June 23, 2010

M. Sean Royall, Esq.
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6911

Re: Wal-Mart Stores, Inc., FTC File No. 092-3003

Dear Mr. Royall:

As you know, the staff of the Federal Trade Commission has conducted an investigation into whether Wal-Mart Stores, Inc. (“Walmart”) violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The investigation concerned Walmart’s announcement in September 2008 that it would discontinue digital rights management (“DRM”) support for downloadable digital copies of musical sound recordings (“Music Files”) sold via its online Walmart.com Digital Music Service (the “Service”).

From approximately March 2004 through February 2008, Walmart represented to prospective customers that they could use the Service to “buy” or “purchase” Music Files. Consumers can use the Music Files on Windows-based computers running the Service’s “download manager” program and compatible music player programs, but only in ways permitted by the Service’s DRM system. The Music Files can be copied to and used on only those computers that have been authorized via the Service’s DRM license servers. If copied from authorized computers, the Music Files can be played on an unlimited number of compatible portable devices and “burned” a limited number of times to compact discs (“CDs”) formatted for audio playback in an unprotected, uncompressed format. Among other things, the DRM system limits to three at one time the total number of computers consumers can use to play a Music File, burn audio CDs, or copy it to portable devices.

On September 26, 2008, Walmart announced that, effective October 9, 2008, it would terminate DRM license support for the Music Files. An email to Music File purchasers bearing the subject line “Important Information About Your Walmart.com Digital Music Purchases,” stated, *inter alia*: “As the final stage of our transition to a full DRM-free MP3 download store, Walmart will be shutting down our digital rights management system that supports protected songs and albums purchased from our site.” It added: “If you do not back up your files [by burning them to recordable audio CDs] before [October 9, 2008], you will no longer be able to transfer your songs to other computers or access your songs after changing or reinstalling your

operating system or in the event of a system crash. Your music and video collections will still play on the originally authorized computer.”

Thus, had the DRM license servers been shut down, consumers would have been unable to transfer their Music Files to new computers and play them after that date, and unable to play the Music Files on existing computers if they were later to reinstall or upgrade operating systems. Consumers could still burn the Music Files from authorized computers to audio CDs and re-convert them into compressed, digital music files for storage and playback on new, unauthorized computers. This process, however, would require consumers to buy blank CDs and expend time to complete it, and the resulting sound files would be of lower quality than the original Music Files.

Following contact by the FTC staff about this investigation on October 1, 2008, Walmart announced on October 10, 2008, that it had reversed its decision to shut down the DRM servers. Walmart stated that it would support the authorization of new computers and devices and the delivery of new license files “for the present time.” Walmart has also made available to Music File purchasers a software tool to authorize new computers, to de-authorize previously authorized computers, or to re-authorize computers that have been de-authorized. Consumers can take these actions an unlimited number of times so long as the total number of computers authorized at any time does not exceed three.

The Commission has the challenge of ensuring, in the context of sales of digital products, “that consumers are provided sufficient information prior to purchase so that they understand any inherent limitations on the use of the products they buy.” *Protecting Consumers in the Next Tech-ade: A Report by the Staff of the Federal Trade Commission*, at 17 (Spring 2008). As the staff stressed in the FTC’s Town Hall on Digital Rights Management on March 25, 2009, consumers and digital entertainment content vendors alike benefit from clear, effective disclosures about DRM systems, when they are used, and about technological limits on the uses of that content. Moreover, the content marketplace will likely suffer if consumers distrust the willingness or ability of content vendors to provide the technological support necessary to ensure that consumers receive the benefit of their bargains.

Increasingly, companies are selling entertainment content to consumers as downloadable, digital copies. When consumers purchase content in this form, they may not expect the seller to restrict certain ownership and usage rights via DRM systems. Boilerplate disclosures in lengthy “Terms of Service” or “End User License Agreements” (*e.g.*, content is “sublicensed to you and not sold, notwithstanding the use of the terms ‘sell,’ ‘purchase,’ ‘order,’ or ‘buy’ on the Service”) are unlikely to be sufficient to apprise consumers of important limitations on their purchases, particularly if the limitations may lead to an inability to view or listen to content in the future. Similarly, a unilateral decision to discontinue DRM support, the existence of which is necessary for consumers to enjoy the benefits of the bargained transaction, might result in substantial consumer injury not outweighed by countervailing benefits to consumers or competition. Boilerplate provisions in an online agreement purporting to allow the vendor to terminate that support unilaterally, without any financial obligation to consumers, might not

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suffice to enable consumers to avoid such injury. Consumers' subsequent attempts to mitigate harm could also be problematic given the loss in quality and additional expense likely involved in converting digital content to an unprotected format, and given the anti-circumvention and anti-trafficking provisions of the Digital Millennium Copyright Act.¹

Upon careful review of the matter, including non-public information submitted to the staff, we have determined not to recommend enforcement action at this time. Among other things, we considered Walmart's commitment to ensuring that consumers will be able to have the benefits of their bargained transactions, as evidenced by its ongoing DRM support. Thus, it appears that no further action is warranted at this time and the investigation is closed.

This action is not to be construed as a determination that a violation has not occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Very truly yours,



Mary Koebel Engle
Associate Director

¹ 17 U.S.C. § 1201(a)(1)(A) (prohibits circumvention of “technological measure[s] that effectively control[] access” to a copyrighted work); and 17 U.S.C. § 1201(a)(2) and (b)(1) (prohibits offering to public or “traffic[ing] in” tools or software that could circumvent technological measures that control access to copyrighted works or that protect copyright owners' rights).