

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



Bureau of Consumer Protection
Division of Advertising Practices

September 30, 2008

Charles E. Buffon, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Re: Microsoft Corporation, FTC File No. 082-3189

Dear Mr. Buffon:

As you know, the staff of the Federal Trade Commission has conducted an investigation into whether Microsoft Corporation violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The investigation concerned Microsoft's decision, announced in April 2008, to discontinue digital rights management ("DRM") support for downloadable digital sound recordings sold via its online MSN Music service.

From approximately September 2004 through November 2006, Microsoft sold to consumers downloadable digital copies of musical sound recordings via its online MSN Music service ("Downloads"). In accordance with "Content Usage Rules" incorporated into the MSN Music online agreement, consumers can only use their purchased Downloads on up to five computers at a time. This usage restriction is enforced by a DRM system that prevents a consumer's Downloads from playing on a computer unless the computer has first been authorized by the MSN Music service. Authorization requires the computer to download from the MSN Music service license keys that will permit the computer to play the Downloads. Consumers can authorize up to five computers at once, de-authorize any previously authorized computers, authorize new computers to replace them, and in some circumstances, re-authorize computers. The license keys for an authorized computer do not expire, but when a consumer makes certain types of changes to his or her computer (*e.g.*, upgrading the operating system from Windows XP to Windows Vista), the computer must reacquire license keys for the Downloads to play.¹

¹In November 2006, Microsoft announced that future sales of music downloads would be through the Zune Marketplace service. That decision did not affect previously purchased Downloads. Microsoft continued to support the ability of its customers to manage their existing Downloads purchased from MSN Music, including the ability to transfer previously purchased Downloads to additional computers and compatible devices.

In April 2008, Microsoft announced that it would “change the level of support” being provided to MSN Music customers by eliminating DRM support altogether after August 31, 2008. Consumers, after that date, would no longer be able to retrieve license keys for their Downloads or authorize additional computers (or existing computers with upgraded operating systems) to play them. Thus, consumers would have been unable to transfer their Downloads to new computers and play them after that date, and unable to play the Downloads on existing computers if they were later to upgrade operating systems. Although the Downloads can apparently be burned from authorized computers to audio CDs and re-converted into compressed, digital music files for storage and playback on new, unauthorized computers, this process would result in a loss of sound quality of the resulting files. In June 2008, however, Microsoft announced that it had reversed this decision, and would support the authorization of new computers and devices and delivery of new license keys through at least the end of 2011, “after which [it will] evaluate how much this functionality is still being used and what steps should be taken next to support [its] customers.”

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 16 (Spring 2008). Increasingly, companies are selling entertainment content to consumers as downloadable, digital copies. When consumers purchase content in this form, they may not expect certain ownership and usage rights to be restricted by the seller via DRM systems. Boilerplate disclosures in lengthy “Terms & Conditions” or “End User License Agreements” (e.g., content is “licensed not sold”) may be insufficient 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 suffice to enable consumers to avoid such injury. Consumers’ subsequent attempts to mitigate harm could also be problematic given the likely loss in quality introduced by converting digital content to an unprotected format and the anti-circumvention and anti-trafficking provisions of the Digital Millennium Copyright Act.²

²17 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).

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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 the factors we considered is Microsoft's June 2008 announcement, described above, and Microsoft's representation that it will ensure that MSN Music customers will not be harmed by Microsoft's future decisions regarding support for MSN Music Downloads. 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 may or may not have 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,

A handwritten signature in cursive script that reads "Mary K. Engle". The signature is written in black ink and is positioned above the printed name and title.

Mary Koelbel Engle
Associate Director