

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



Bureau of Consumer Protection  
Division of Advertising Practices

October 9, 2008

Randal M. Shaheen, Esq.  
Arnold & Porter LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004-1206

Re: MLB Advanced Media, L.P., FTC File No. 082-3043

Dear Mr. Shaheen:

As you know, the staff of the Federal Trade Commission has conducted an investigation into whether MLB Advanced Media, L.P. ("MLBAM") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in connection its advertising and sale of videos consumers purchased and downloaded via the MLB.com web site.

From approximately Autumn 2003 through Summer 2008, MLBAM sold to consumers downloadable digital copies of Major League Baseball game telecasts and other baseball content via its MLB.com web site ("Downloads"). Consumers who used MLBAM's MLB.com Digital Download service could purchase Downloads for viewing on their PCs and compatible mobile devices. MLBAM restricted the Downloads with a digital rights management ("DRM") system that makes it necessary for a consumer's media player application to download a DRM license the first time a consumer plays a Download on a particular computer. Once a DRM license is issued for that computer, a Download can be played an unlimited number of times on that computer (assuming no significant system changes are made). MLBAM will issue a maximum of three DRM licenses per Download, thereby limiting to three the total number of computers consumers can ever use to watch a Download. Thus, over time, as Download customers replace their computers and then attempt to watch Downloads in their video collections, they would encounter the three-computer DRM limit and be unable to view the content that they lawfully purchased.

Through at least the end of 2006, MLBAM's advertisements on its MLB.com web site represented that consumers would "own" the Downloads. For example, one banner ad read:

Don't just watch the game OWN IT! Get complete game broadcasts as  
downloadable files you can OWN. Only \$3.95 each! Own the moment.  
MLB.com Digital Download Service

Similar claims that consumers would “own” the Downloads and could use them in a manner comparable to their use of other copies of entertainment content that they own included:

OWN THE MOMENT. Key highlights from last night’s game you can OWN.

OWN complete game downloads from this year or yesteryear.

[Y]ou can watch [‘Minivision clips’ highlight videos] where you want, when you want, on your PC at home or work, or on a Windows Mobile™-based Portable Media Center to view them on the go. You can even burn them onto a CD to start your own baseball library.

Store them on your PC or portable media device, or burn them to a CD to build your own baseball library.

A [Boston Red Sox] Championship 86 Years in the Making; re-live the glory!; Own a piece of history . . . get them all now to have the complete collection.

Own the History. Downloadable files of baseball’s classic matchups, available as full-game replays you can own – yours for only \$3.95! Start your own collection of baseball’s best games from this season or from seasons past. Burn them to a CD or enjoy on your laptop or portable media device, only from MLB.com.

From late 2007 through Summer 2008, MLBAM advertised Downloads with the language: “Own today’s games and yesterday’s classics” at the top of its main Downloads page on the MLB.com web site. MLBAM has at all relevant times disclosed the three-computer DRM limit only in an “FAQ” page accessible via an inconspicuous link on the MLB.com Downloads pages.

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.<sup>1</sup> Boilerplate disclosures in

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<sup>1</sup>See *Sony BMG Music Entertainment, Inc.*, FTC Docket No. C-4195 (June 28, 2007 consent order) (Commission alleged record label deceived consumers by failing to adequately disclose that some of the CDs it sold contained DRM restrictions that limited the portable devices to which music files could be transferred from a computer and limited consumers to making three copies of the music files directly from the CDs).

lengthy “Terms & Conditions” or “End User License Agreements” 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.<sup>2</sup> In addition, MLBAM’s representations that consumers would own the Downloads could, in the context of MLBAM’s advertising, cause reasonable consumers to believe that they had the ability to play the content on a potentially unlimited number of compatible devices, or could otherwise use and dispose of the copy consistent with how consumers can use and dispose of other copies of copyrighted works that they own.

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 in making this decision are MLBAM’s discontinuation of advertising claiming that consumers will own their copies of any downloadable baseball content they purchase, and the accommodations that MLBAM is making to its customers who purchased Downloads directly from the MLB.com web site and encounter the three-computer DRM limit. MLBAM will advise those Download customers, in messages generated on-screen when they unsuccessfully attempt to view Downloads on new computers, that all non-functioning Downloads previously purchased directly from it will be made available at no additional charge to those customers, without regard to the number of computers to which the Downloads have been transferred. If MLBAM is unable to provide those Download customers with replacement videos, it will offer them a refund. Moreover, it is advising those Download customers of this policy via its web site. 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 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,



Mary Koelbel Engle  
Associate Director

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<sup>2</sup>Consumers’ right and ability to access and play DRM-protected digital content is constrained, as a legal and practical matter, by the Digital Millennium Copyright Act. *See* 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).