

NARM Baseline Principles

For Online Commerce In Music

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The Internet offers the music industry a tremendous opportunity to sell more music than ever before; but it also poses tremendous challenges. As the industry struggles to make sense of the different technologies, the different software strategies, and the different economic models, various voices are demanding to be heard, including the voice of the consumer and the voice of the retailer. With this in mind, NARM has drafted a position paper that seeks to articulate the concerns of consumers and retailers about this newest configuration of music, the digital download. This document is not a final position paper, but rather a work in progress that is evolving as we learn more about how the different technologies, software strategies, and economic models work. As we use the paper as a starting point for discussions with various industry groups, we urge our partners in the industry to view each of these variables through the prism of the consumer without whom music will exist as art, but not commerce. We welcome your feedback.

— Pamela Horovitz
NARM President

Consumers have traditionally enjoyed certain rights and developed certain expectations concerning their music shopping experiences. The development of Internet-based electronic commerce business models, efforts to increase security against intellectual property piracy, and the increasing phenomena of treating individualized consumer data as a commodity, potentially pose a serious threat to these consumer rights and expectations and, consequently, may threaten to seriously erode consumer confidence in electronic commerce and consumer satisfaction with the retail music buying experience.

Although many business models may succeed or fail in a competitive environment, the chaotic market shakeout for these models is taking place with valued customers – consumers who may be lost or marginalized by a repeated negative experience with test market failures. Consequently, retailers who may be in a position to implement the best consumer-based models may suffer irreparable harm to their own customer bases, not because of any weakness of their own, but as a result of unethical industry practices, restrictive trading policies and the use of short-sighted business strategies that devalue the consumer, the product, and the online shopping method.

To encourage the highest standards for interfacing with consumers and the least restraint on retail competition, the National Association of Recording Merchandisers has developed the following baseline principles for online commerce in music. It is NARM's intention that these principles primarily guide those who are developing the tools or industry standards for online commerce, and particularly the digital delivery of music.

Narrow Anti-Piracy Focus

NARM strongly supports aggressive efforts to fight piracy of sound recordings, but the anti-piracy objectives of cooperative efforts among competitors, such as SDMI, should be the sole objectives, with care taken to avoid any agreements or standards that go beyond the prevention and detection of copyright infringement, or the identification of the sound recording (including its authors and copyright owners). Digital rights management systems should be used solely to manage and protect copyrights, and not serve as technological means of circumventing the restrictions imposed upon copyright owners under law, such as by technologically extending the copyright term or preventing the extinguishment of the distribution right.

Consumer's Right to Anonymity

Consumers are increasingly aware that the online shopping experience is often punctuated by a request for personal information that is not essential to the transaction. Divulging personal information is becoming a *de facto* method of payment for goods or services. Consequently, consumers who prefer anonymity will tend to avoid the online shopping environment completely unless they are given choices among those who are competing to meet their demands for anonymity. Retailers should be free to compete with each other in meeting such consumer demands. Any technology standard to be deployed on an industry-wide basis, and any technology solution to be implemented by any sole-source content provider, must not interfere with the retailer's option of competitively providing consumer anonymity.



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Consumer's Right to Privacy and Confidentiality

For similar reasons, consumers are increasingly concerned with the protection of their privacy when confidential information is provided to a merchant. Moreover, government regulations are now in place or being proposed throughout the world to protect consumer privacy. There is an increasing risk of liability for reputable retailers with strong privacy policies in the event that confidential information is passed on to third parties by way of automated electronic transactions. There is also an increasing chance that retailers who object to privacy-breaching requirements placed upon them by content providers will be placed at a competitive disadvantage if the option of obtaining the same content without such restrictions is not available. Any technology standard to be deployed on an industry-wide basis, and any technology solution to be implemented by any sole-source content provider, must not interfere with the retailer's ability to protect consumer privacy and confidential information, whether from disclosure inconsistent with the retailer's own privacy policy or inconsistent with the law of the retailer's jurisdiction.

Consumer's Right of Transferability

Consumers expect that when they purchase or otherwise lawfully obtain copies of sound recordings they are free to purchase them as gifts, loan them to friends, take them to parties, or give away their collections. Copy protection systems should not interfere with the ability to continue such practices. The First Sale Doctrine, which extinguishes the copyright owner's distribution right following the first sale of a sound recording, should not be circumvented by using technology to give the copyright owner a continuous right to control the further lawful transfer of lawfully made and acquired phonorecords or copies. Moreover, any technology designed to identify pirated product by tracing its source must avoid creating any risk that law-abiding consumers who lawfully acquire a phonorecord or copy will be caught up in an investigation of piracy on the part of a downstream user.

(The right of transferability involves transfer of the tangible medium. A license to use "move" technology, which deletes or locks out the data on the original medium at the time it is copied to another medium, thereby allowing a new copy to replace the original, may be desirable — but not required — to overcome problems of medium incompatibility with certain hardware.)

Antitrust Concerns

There is an increasing danger that technology solutions selected by sole-source content providers or implemented by agreement on an industry-wide basis will create or protect certain business models by default, removing the ability of merchants to bargain competitively for rights more favorable to them or to their customers. Indeed, just as an agreement in unreasonable restraint of trade is unlawful, any agreement to implement a technology that automatically forecloses all but the selected business strategies runs the risk that if the selected strategy is in restraint of trade, an agreement to protect such strategy would be actionable.

Copyrights Must Not Be Misused

There is an alarming trend among technology developers to view Digital Rights Management ("DRM") not as the management of intellectual property rights conferred by law (such as to prevent unauthorized performances or copies), but as a way to manage a complex variety of new "rights" created by technology rather than any bargained for agreement with the consumer — rights that are antagonistic to the consumer and to copyright law. No DRM system applicable to sole-source product, and no system developed or protected through the SDMI or similar standard-setting process or agreement among competitors, should go beyond the minimum necessary to prevent and detect infringement of lawfully created copyrights. Unless those entities that are downstream from the copyright owner are given the option to reject such additional restrictions, any system that attempts to circumvent the limitations on the monopoly right conferred by applicable copyright laws should be condemned as a misuse of copyright law and as an unfair business practice.

Clear Notice of Functionality, Compatibility and Warranty

The growth of electronic delivery of music will be slowed in proportion to consumer confusion, frustration and disillusion. Consumer wariness over unclear privacy statements or surreptitious gathering of personally identifiable information will, likewise, be a barrier to successful commerce. Prior to making payment to purchase or obtain a license to download (manufacture) a sound recording, consumers should have an easy way of becoming informed of: (1) the functional capability and limitations of a given digitally-delivered sound recording, including compatibility and interoperability with other systems; (2) any automated functions that, while transparent to the user, may be material to a decision to install or use it, such as data-mining activity of the system or vulnerability to use by third parties for data mining purposes, altering files or placing new files on a user's system, or providing third parties with identification or tracking capabilities; (3) the system requirements for listening to the sound recording; and (4) warranties and technical support. Retailers, likewise, should be informed of all relevant product compatibility considerations, warranties and technical support, such as how "returns" of defective or incompatible downloads would be handled.

NARM is the principal trade association representing retailers and distributors of sound recordings in the United States. Its members are engaged in the distribution and retail sale of digital music in prerecorded format and through digital distribution.