UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMENTS SUBMITTED BY BENJAMIN MASSE
DIGITAL RIGHTS MANAGEMENT_ FTC TOWN HALL: PROJECT NO. P094502

Here are short written comments submitted by Benjamin Masse regarding Digital Rights Management ("DRM").

STATEMENT OF INTEREST

Benjamin Masse is a Canadian citizen living in *Montr_al, province de Qu_bec*. Mr. Masse is an entrepreneur developing software programs designed mainly for the entertainment industry. Lately, Mr. Masse has filed an application before the U.S. Patent and Trademark Office in order to obtain a patent for a software program. Moreover, on February 5, 2009 Mr. Masse has submitted written comments in response to the Commission's notice of public hearings seeking views of interested parties as to the evolution of intellectual property marketplace. (Comments: Project No. P093900). DRM raises issues of prime interest to entrepreneurs developing and selling computer programs. The views expressed below are those of Mr. Masse alone. Mr. Masse has retained Daniel Martin Bellemare, attorney at law, to prepare written comments on a *pro bono* basis.

COMMENTS

In previous comments filed before the Commission on February 5, 2009 we have submitted that increased public antitrust enforcement in the area of tying arrangement, whereby a tying patented product is tied to a distinct product, is warranted in the wake of the Supreme Court's decision in Illinois Tool Works v. Independent Ink Inc. 547 U.S. 28 (2006). In that decision the Supreme Court ruled that there is no presumption of market power in tying patented product

market stemming from patent ownership. As a result, anyone challenging the legality of tying arrangement under Sherman Act _ 1 must prove defendant has market power in tying patented product market in order for a court to declare such arrangement illegal *per se*. We then concluded that economic and legal barriers associated with proving market power under the partial *per se* rule of illegality enunciated in Illinois Tool Works must be offset by public antitrust enforcement.

We have reviewed written comments filed by Electronic Frontier Foundation ("EFF") before the Commission in the above-referenced project_ in particular Part III dealing with DRM impact on competition and innovation. As EFF points out: " *Via DRM *** industry leaders can thwart the normal market forces that drive innovation by 'managing' how consumers and competitors use their products. Because significant improvements to the functionality of*

a seller's products can only be developed and sold with the seller's consent, DRM renders the seller impervious to the normal forces of market competition. This leaves consumers seeking innovative technologies with three options: an expensive supply, an illicit supply, or no supply at all. The restrictive power of DRM depends on and is extended by two legal mechanisms: the Digital Millennium Copyright Act ('DMCA')3 and End User License Agreements ('EULAs')"). (EFF Comment. Part III. Footnote omitted).

EFF's above assertion further illustrates the need to strengthen public antitrust enforcement in the areas of intellectual property and the Internet. Absent an horizontal agreement designed to suppress price competition or divide territories among competitors, conduct *per se* illegal (Palmer v. BRG of Georgia Inc. 498 U.S. 46, 49 (1990)), the legality of a practice under Sherman Act _ 1 is assessed either under the rule of reason (Board of Trade of the City of Chicago et

al. v. U.S. 246 U.S. 231, 238 (1918)) or the partial rule of reason known as "*quick look analysis*". California Dental Ass'n v. F.T.C. 526 U.S. 756, 770 (1999). However, see Broadcast Music, Inc., et al. v. Columbia v. Broadcasting System, Inc., et al. 441 U.S. 1, 8-10 (1979).

As mentioned in our previous written comments, although successful private plaintiff (Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources 532 U.S. 598, 606 (2001)) may recover treble damages and reasonable attorney fee (15 U.S.C. _ 15 (a)), costs of antitrust litigation under the rule of reason are substantial, therefore representing an impediment to private enforcement. Aside from economic and legal barriers to private antitrust enforcement, the nature of potentially anti-competitive practices aimed at expanding scope of statutory monopoly rights over intellectual property is more appropriately dealt with under 15 U.S.C. _ 45 (b) ("*unfair methods of competition*"). This public remedy provides more flexibility from an enforcement standpoint. F.T.C. v. Sperry & Hutchinson Co. 405 U.S. 233, 239 (1972). By statute, antitrust public interest proceedings are vested in the Commission.

Finally, there is another element deserving a brief comment regarding DRM. Copyright owner enjoys wide protection against infringement. For instance, copyright owner may sue for copyright infringement on a theory of inducement. Recently, the Supreme Court held that "*one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties*". Metro-Goldwyn-Mayer Studios, Inc. et al,. v. Grokster, Ltd., et al. 545 U.S. 913, 919 (2005). The theory of inducement adopted by the Supreme Court provides an effective remedy against copyright infringement.

We are grateful to the Commission and the University of Washington Law School for

this opportunity to submit written comments.

Signed this 13th day of February 2009

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