

**The Future Digital Economy
Digital Content – Creation, Distribution and Access**

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**Presentation by Fred von Lohman, Senior Intellectual Property Attorney,
Electronic Frontier Foundation,
31 January 2006**

Session 8b: Content diffusion, IPR, DRM, licensing, content security, standards

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****The "Consumer" is Only Part of the Public****

In discussions about the future of broadband and digital distribution, the habitual use of the terms "consumer" or "customer" often obscure the wide range of public interests that are at stake. Particularly when it comes to copyright and digital rights management (DRM) technologies, it is not merely "consumers" who will be affected by policy decisions. Copyright law and DRM technologies will also powerfully influence the ways in which libraries, amateur creators, disabled populations like the blind, and educators are able to utilize new broadband possibilities. Perhaps a better term would be "public" or "fans," both of which evoke a more complete picture than simply a consumer paying his or her mobile phone bill each month. Whatever term is used, policy-makers and regulators have a special responsibility to see to it that the interests of all segments of the public are considered, not only those whose expenditures in the market give them the ability to influence the marketplace. For example, the blind will never have enough market power to ensure that their needs are adequately met by copyright and DRM. The same is true for many educational users, amateur creators, and libraries. There is a role for regulators in making sure that their legitimate needs are not trampled by expanding copyright and DRM regimes.

****Copyright and DRM Threaten the "New Amateur"****

At this conference, several themes emerged repeatedly in discussions regarding new broadband markets:

First, in the words of Google's founders at Davos, the key to success in the broadband world is offering "a cool user experience." In other words, pleasing users is the key.

Second, we are witnessing the renaissance of the "amateur creator." Just as Darwin was an amateur scientist, today amateurs are leading the way in broadband content markets, represented by bloggers, Flickr, the BBC Creative Archive, and Creative Commons. In other words, the future of broadband is in user-created content, not in blockbuster movies controlled by large corporations.

Third, many have emphasized the importance of sharing to our culture. As people begin forming communities online, it is entirely natural that they want to discuss, reference, remix, and adapt the cultural objects around them -- music, movies, television, literature.

In light of these themes, what can we say about the role of copyright and DRM in the new broadband markets? Many have intoned that strong copyright enforcement and deployment of DRM are critical to the broadband future. Yet, when compared to the themes above, this seems fundamentally misguided. What music fan thinks that DRM offers a "cool user experience"? What blogger wakes up in the morning hoping for more copyright enforcement and DRM restrictions? (In fact, in light of the lawsuit currently underway in the U.S. between Agence France Press and Google, bloggers may have much to fear from copyright law.) In fact, early indications are that copyright enforcement and DRM are impeding amateur creators. Already, "mash-up" artists who are remixing music and sharing it on a noncommercial basis are being harassed by cease-and-desist letters that result in their works being taken off the internet.

****Protecting Innovation Protects the Public****

Finally, when considering the role that copyright and DRM play in the broadband future, it is important to remember that perhaps the paramount concern of the public is encouraging innovation. Most of all, the public wants the future, the new possibilities that have not been invented yet. In 1972, the public did not know that it

wanted the VCR. In 1990, the public did not know that it wanted the World Wide Web. So, above all, we must be sure to leave the vistas open for innovators. Regulators must not, in the name of copyright or otherwise, restrict technologies to "customary uses".

Copyright and DRM represent one of the biggest threats to innovation in the broadband environment. Already, the entertainment industries are pressing for changes in the law that would require that innovators ask permission before they introduce disruptive new technologies. It is important to remember that, had that been the rule, the public would never have enjoyed the fruits of the VCR.

In fact, history teaches that innovation flourishes best in an environment of low copyright protection. In the United States, the player piano, broadcast radio, cable television, and the VCR all arose thanks to loopholes in copyright regulation, and might not have developed in an environment of high protection.

This is not to say that copyright is not important, but simply to recognize that strong protections may not be consistent with new broadband industries that depend on disruptive innovation. In this regard, emerging markets characterized by low copyright protections, such as Korea, China and India, may have an advantage in adapting to the opportunities created by the broadband economy.