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Are rules incompatible with the web? Let's hope not: A response to Tim Wu
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According to Cory Doctorow over at Boing Boing, Tim Wu has written an open letter to W3C Chairman Sir Timothy Berners-Lee, expressing concern about a proposal to include Encrypted Media Extensions (EME) as part of the W3C standards. W3C has a helpful description of EME:

> Encrypted Media Extensions (EME) is currently a draft specification... [for] an Application Programming Interface (API) that enables Web applications to interact with content protection systems to allow playback of encrypted audio and video on the Web. The EME specification enables communication between Web browsers and digital rights management (DRM) agent software to allow HTML5 video play back of DRM-wrapped content such as streaming video services without third-party media plugins. This specification does not create nor impose a content protection or Digital Rights Management system. Rather, it defines a common API that may be used to discover, select and interact with such systems as well as with simpler content encryption systems.

Wu's letter expresses his concern about hardwiring DRM into the technical standards supporting an open internet. He writes:

> I wanted to write to you and respectfully ask you to seriously consider extending a protective covenant to legitimate circumventers who have cause to bypass EME, should it emerge as a W3C standard.

Wu asserts that this "protective covenant" is needed because, without it, EME will confer too much power on internet "chokepoints":

> The question is whether the W3C standard with an embedded DRM standard, EME, becomes a tool for suppressing competition in ways not expected.... Control of chokepoints has always and will always be a fundamental challenge facing the Internet as we both know... It is not hard to recall how close Microsoft came, in the late 1990s and early 2000s, to gaining de facto control over the future of the web (and, frankly, the future) in its effort to gain an unsupervised

*monopoly over the browser market."*

But conflating the Microsoft case with a relatively simple browser feature meant to enable *all* content providers to use *any* third-party DRM to secure their content — in other words, to *enhance* interoperability — is beyond the pale. If we take the Microsoft case as Wu would like, it was about one firm controlling, far and away, the largest share of desktop computing installations, a position that Wu and his fellow travelers believed gave Microsoft an unreasonable leg up in forcing usage of Internet Explorer to the exclusion of Netscape. With EME, the W3C is not maneuvering the standard so that a single DRM provider comes to protect all content on the web, or could even hope to do so. EME enables content distributors to stream content through browsers using their own DRM backend. There is simply nothing in that standard that enables a firm to dominate content distribution or control huge swaths of the Internet to the exclusion of competitors.

Unless, of course, you just don't like DRM and you think that any technology that enables content producers to impose restrictions on consumption of media creates a "chokepoint." But, again, this position is borderline nonsense. Such a "chokepoint" is no more restrictive than just going to Netflix's app (or Hulu's, or HBO's, or Xfinity's, or…) and relying on its technology. And while it is no more onerous than visiting Netflix's app, it creates greater security on the open web such that copyright owners don't need to resort to proprietary technologies and apps for distribution. And, more fundamentally, Wu's position ignores the role that access and usage controls are playing in creating online markets through diversified product offerings

Wu appears to believe, or would have his readers believe, that W3C is considering the adoption of a mandatory standard that would modify core aspects of the network architecture, and that therefore presents novel challenges to the operation of the internet. But this is wrong in two key respects:

1. Except in the extremely limited manner as described below by the W3C, the EME extension does not contain mandates, and is designed only to simplify the user experience in accessing content that would otherwise require plug-ins; and
2. These extensions are already incorporated into the major browsers. And of course, most importantly for present purposes, the standard in no way defines or harmonizes the use of DRM.

The W3C has clearly and succinctly [explained](#) the operation of the proposed extension:

> *The W3C is not creating DRM policies and it is not requiring that HTML use DRM. Organizations choose whether or not to have DRM on their content. The EME API can facilitate communication between browsers and DRM providers but the only mandate is not DRM but a form of key encryption (Clear Key). EME allows a method of playback of encrypted content on the Web but W3C does not make the DRM technology nor require it. EME is an extension. It is not required*

*for HTML nor HMTL5 video.*

Like many internet commentators, Tim Wu fundamentally doesn't like DRM, and his position here would appear to reflect his aversion to DRM rather than a response to the specific issues before the W3C. Interestingly, in arguing against DRM nearly a decade ago, Wu [wrote](#):

> *Finally, a successful locking strategy also **requires intense cooperation between many actors** – if you protect a song with "superlock," and my CD player doesn't understand that, you've just created a dead product.* (Emphasis added)

In other words, he understood the need for agreements in vertical distribution chains in order to properly implement protection schemes — integration that he *opposes* here (not to suggest that he supported them then, but only to highlight the disconnect between recognizing the need for coordination and simultaneously trying to prevent it).

Vint Cerf (himself no great fan of DRM — see [here](#), for example) has offered a number of thoughtful responses to those, like Wu, who have objected to the proposed standard. Cerf writes on the ISOC listserv:

> *EMEi is plainly very general. It can be used to limit access to virtually any digital content, regardless of IPR status. But, in some sense, anyone wishing to restrict access to some service/content is free to do so (there are other means such as login access control, end/end encryption such as TLS or IPSEC or QUIC). EME is yet another method for doing that. Just because some content is public domain does not mean that every use of it must be unprotected, does it?*

And later in the thread he writes:

> *Just because something is public domain does not mean someone can't lock it up. Presumably there will be other sources that are not locked. I can lock up my copy of Gulliver's Travels and deny you access except by some payment, but if it is public domain someone else may have a copy you can get. In any case, you can't deny others the use of the content IF THEY HAVE IT. You don't have to share your copy of public domain with anyone if you don't want to.*

Just so. It's pretty hard to see the competition problems that could arise from facilitating *more* content providers making content available on the open web.

In short, Wu wants the W3C to develop limitations on rules when there are no relevant rules to modify. His dislike of DRM obscures his vision of the limited nature of the EME proposal which would largely track, rather than lead, the actions already being undertaken by the principal commercial actors on the internet, and which merely creates a structure for facilitating voluntary commercial transactions in ways that enhance the user experience.

The W3C process will not, as Wu intimates, introduce some pernicious, default protection system that would inadvertently lock down content; rather, it would encourage the development of digital markets on the open net rather than (or in addition to) through the proprietary, vertical markets where they are increasingly found today. Wu obscures reality rather than illuminating it through his poorly considered suggestion that EME will somehow lead to a new set of defaults that threaten core freedoms.

Finally, we can't help but comment on Wu's observation that

> *My larger point is that I think the history of the anti-circumvention laws suggests is (sic) hard to predict how [freedom would be affected]– no one quite predicted the inkjet market would be affected. But given the power of those laws, the potential for anti-competitive consequences certainly exists.*

Let's put aside the fact that W3C is not debating the laws surrounding circumvention, nor, as noted, developing usage rules. It remains troubling that Wu's belief there are *sometimes* unintended consequences of actions (and therefore a potential for harm) would be sufficient to lead him to oppose a change to the status quo — as if any future, potential risk necessarily outweighs present, known harms. This is the Precautionary Principle on steroids. The EME proposal grew out of a desire to address impediments that prevent the viability and growth of online markets that sufficiently ameliorate the non-hypothetical harms of unauthorized uses. The EME proposal is a modest step towards addressing a known universe. A small step, but something to celebrate, not bemoan.

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