

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JEANNINE PALMER, JANET COOK,
LAURA BEVAN, JEREMY TEPLINSKY, AARON CHENEY, VLADIMIR LOUIS
JACQUES, DAGMAWI SELASSIE, AMADON N'DIAYE, NOAH FIRESTONE,
DEVIN GOWLING and JARROD PACHOLKO

Plaintiffs

and

SONY BMG MUSIC ENTERTAINMENT, SONY CORPORATION OF AMERICA,
SONY BMG MUSIC (CANADA) INC./SONY BMG MUSIQUE (CANADA) INC.,
SONY MUSIC ENTERTAINMENT (CANADA) INC.,
SONY OF CANADA LTD./SONY DU CANADA LTD., BERTELSMANN, INC., and
FIRST 4 INTERNET LTD.

Court File No. 06-0044

**BRITISH COLUMBIA
SUPERIOR COURT OF JUSTICE**

BETWEEN:

VLADIMIR LOUIS JACQUES, DAGMAWI SELASSIE, AMADON N'DIAYE
NOAH FIRESTONE, DEVIN GOWLING, JARROD PACHOLKO, and JOHN DOE LTD. I

Plaintiffs

- and -

SONY OF CANADA LIMITED, SONY MUSIC ENTERTAINMENT (CANADA) INC.,
SONY BMG MUSIC (CANADA) INC., SONY BMG MUSIC INC., SONY BMG MUSIC
ENTERTAINMENT, SONY CORPORATION OF AMERICA, BERTELSMANN, INC., and
FIRST 4 INTERNET LTD.

Defendants

**QUÉBEC
SUPERIOR COURT**

BETWEEN:

PHILIPPE GUILBERT

Plaintiff

- vs. -

SONY BMG MUSIQUE (CANADA) INC.

- and -

SONY BMG MUSIC ENTERTAINMENT

Defendants

Court file No. 06-CV-304178CP

AFFIDAVIT OF CHRISTINE J. PRUDHAM

(Sworn August , 2006)

I, **CHRISTINE J. PRUDHAM**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Vice President, Legal and Business Affairs of SONY BMG MUSIC (CANADA) INC. ("SONY BMG Canada"). In that role I am responsible for all legal and regulatory issues for SONY BMG Canada, including this litigation. As such, I have personal knowledge of the matters described in this affidavit, except where otherwise indicated. To the extent I do not have personal knowledge, I believe the information set forth to be true.

2. SONY BMG denies the allegations made by the plaintiffs in these actions. However, this affidavit is only intended to explain the reasons for inclusion of injunctive relief in settlement of the parallel United States action. This affidavit will not restrict the reply that SONY BMG Canada may make to any certification or settlement motion materials filed by the plaintiffs in this action.

A. U.S. Settlement of Litigation Concerning the Software

3. On December 28, 2005, SONY BMG Canada's U.S. parent SONY BMG MUSIC ENTERTAINMENT ("SONY BMG U.S.", and together with SONY BMG Canada, "SONY BMG") entered into a Settlement Agreement with class counsel across the United States (the "US Settlement") to settle all of the class action litigation that has arisen recently in that country concerning certain technological protection measures ("TPMs") used by SONY BMG. The TPMs at issue in this litigation are computer software known as "XCP" and "MediaMax" (collectively, the "Software"), one or the other of which was installed on certain music compact discs sold by SONY BMG.

4. The US Settlement was the product of intense negotiations between SONY BMG U.S. and class counsel in the United States. Class counsel were advised and assisted throughout the negotiations by various consumers' rights organizations in the United States. The US Settlement provided a number of benefits to consumers, including:

- the exchange of XCP CDs for identical CDs without XCP;
- cash payments to purchasers of XCP CDs;
- free music downloads for all purchasers of CDs containing the Software;

- the waiver of various provisions in the End User License Agreement ("EULA") between SONY BMG U.S. and its customers in respect of the Software; and
- the retention of an independent expert to ensure that SONY BMG U.S. had not retained any personal information about its customers.

5. In addition to private class actions, in the United States several state attorneys general, the Federal Trade Commission and other governmental authorities either brought proceedings or commenced inquiries with respect to the Software (collectively, the "US Government Inquiries"). To date, and to the best of my knowledge, information and belief, no Canadian government authority has commenced any inquiry into SONY BMG Canada concerning SONY BMG Canada's use of the Software.

6. In response to the US Government Inquiries and the unique US legislation on which they were based, the US Settlement also contained a conditional injunctive provision tied to the US Government Inquiries. SONY BMG U.S. expects to settle the US Government Inquiries on terms that will restrict SONY BMG U.S.'s future conduct. These restrictions include agreements: (1) not to distribute CDs containing the Software; (2) to ensure that any future TPMs do not raise the issues that gave rise to the US Government Inquiries; and (3) to promptly address any issues that may emerge as a result of the Software or any future TPM (collectively, the "Injunctive Provisions").

7. The US Settlement has now been approved. SONY BMG has not yet settled the US Government Inquiries, and so the US Settlement currently includes the Injunctive Provisions. If SONY BMG U.S. does eventually settle the US Government Inquiries on terms that include the Injunctive Provisions, then the US Settlement may be

amended to exclude the Injunctive Provisions. If, however, SONY BMG U.S. does not settle the US Government Inquiries on such terms, then the US Settlement will continue to include the Injunctive Provisions, enforceable by the US court having jurisdiction over the US Settlement.

B. Impact of the Injunctive Provisions in Canada

8. SONY BMG's operations in the United States dwarf those in Canada as a result of the size of the populations of both countries. To avoid duplication and take advantage of economies of scale and specialization, SONY BMG Canada uses services from SONY BMG U.S. This includes, to date, the assessment, licensing and implementation of TPMs used on compact discs. SONY BMG Canada relies on the expertise of SONY BMG U.S. to seek out, assess, test and contract for TPMs and other software that may be included on CDs distributed in the United States and Canada. For this reason, the Software used in Canada was identical to the Software used in United States (with the exception of minor additions to accommodate bilingual requirements in Canada), and was made available to SONY BMG Canada through contractual and operational arrangements undertaken by SONY BMG U.S. SONY BMG often used common manufacturing parts, created in the United States, to manufacture CDs containing the Software in both Canada and the United States.

9. The practical result of these overlapping operations is that consumers in Canada will obtain the benefit of the Injunctive Provisions in the United States, albeit indirectly, even though they were negotiated and agreed to in the United States in completely different circumstances than apply in Canada, and pursuant to unique United States legislation. For example, in the United States, SONY BMG U.S. will be

required to ensure that future TPMs on CDs do not raise any of the issues that gave rise to the US Government Inquiries. Since SONY BMG's operations in Canada and the United States have used the same TPMs on CDs and the operations in Canada have relied upon the specialized services in the United States for new technologies of this nature, for the foreseeable future SONY BMG Canada will not use TPMs on CDs distributed in Canada that have not undergone the review mandated by the Injunctive Provisions. SONY BMG Canada undertakes to advise the Ontario and Québec Superior Court of Justice if and when it implements any Content Protection Software (as that term is defined in the U.S. Settlement Agreement dated December 28, 2005 in Southern District of New York Court File No. 1:05-cv-09575 (NRB)) on CDs in Canada on or before December 31, 2007, which Content Protection Software has not undergone the review mandated by the Injunctive Provisions.

C. SONY BMG Cannot Agree to the Injunctive Provisions in Canada

10. SONY BMG does not believe that the Injunctive Provisions are necessary in Canada for three reasons: (1) the Injunctive Provisions were specifically based on the US Government Inquiries, for which there is no counterpart in Canada; (2) the Injunctive Provisions may prove incompatible with Canada's international copyright obligations; and (3) the Injunctive Provisions may prove incompatible with forthcoming federal copyright legislation.

11. ***Absence of Canadian Government Inquiries:*** SONY BMG U.S. agreed to the Injunctive Provisions in response to the US Government Inquiries and the unique US legislation on which they are based. To the best of my knowledge, information or belief, there are no Canadian government inquiries.

12. Moreover, as an aspect of copyright it is arguable that the scope and protection of TPMs fall under the exclusive jurisdiction of the Federal Court pursuant to s. 20(1)(a) of the *Federal Courts Act*. SONY BMG is therefore concerned about conceding provincial Superior Court jurisdiction over TPMs, as would be implicit in agreeing to the Injunctive Provisions as part of a settlement of the instant class proceedings.

13. ***Anticipation of Federal Legislation:*** In 2005, the Federal government introduced Bill C-60 into the House of Commons. This Bill was intended to amend the Copyright Act and implement certain international intellectual property treaties (the "1996 WIPO Treaties"). These treaties were intended to modernize intellectual property laws, including specifically copyright, in the digital age. Among other things, Bill C-60 created legal protection for TPMs as required under the 1996 WIPO Treaties. When the 38th Parliament was dissolved and an election called in the fall of 2005, Bill C-60 expired without being passed.

14. Representatives from the Department of Canadian Heritage of the current Federal Government have indicated that they plan to introduce a new bill to address the implementation of the 1996 WIPO Treaties within the next year. There will be review in Legislative Committees of such new bill and all interested parties will have the opportunity to offer views on how provisions pertaining to TPMs should be implemented in Canada.

15. Until the contemplated new legislation has been introduced and passed, SONY BMG is of the opinion that there is a legal vacuum around TPMs in Canada.

SONY BMG Canada is unwilling to accept Injunctive Provisions that derive from the US Government Inquiries, which were based on United States legislation. To impose in Canada the Injunctive Provisions provided for in the US Settlement because of the US Government Inquiries, based on U.S. legislation, would amount to adopting in Canada the U.S. approach to the 1996 WIPO Treaties without giving the Canadian Government the opportunity to decide what its policies will be on TPMs in light of the 1996 WIPO Treaties. The prevailing U.S. approach is inconsistent with Canada's historic approach to copyright, is arguably inconsistent with Canada's international copyright treaty obligations (which are not identical to the United States' obligations in that regard), and is not a valid basis for restricting the use of TPMs in Canada. Until the Canadian government resolves this issue, SONY BMG Canada is not willing to potentially prejudice itself by agreeing to the Injunctive Provisions in the Canadian Agreement.

16. Moreover, as an aspect of copyright it is arguable that the scope and protection of TPMs fall under the exclusive jurisdiction of the Federal Court pursuant to s. 20(1)(a) of the *Federal Courts Act*. SONY BMG is therefore concerned about conceding provincial Superior Court jurisdiction over TPMs, as would be implicit in agreeing to the Injunctive Provisions as part of a settlement of the instant class proceedings.

17. ***Additional Benefits to Canadian Class Members:*** In order to settle the pending class action litigation in Canada regarding the Software, SONY BMG Canada is willing to agree not to manufacture and distribute any further CDs containing the XCP Software in Canada and not to manufacture any further CDs containing the MediaMax

Software in Canada.¹ This avoids the problems associated with broad-based U.S. style Injunctive Provisions limiting the future use of TPMs, as SONY BMG Canada will agree not to use the particular forms of TPMs that are the subject matter of these proceedings. In the US Settlement, SONY BMG U.S. has only agreed to these restrictions as a part of the Injunctive Provisions. As a result, this agreement only becomes an operative provision of the US Settlement if there is no settlement of the US Government Inquiries. In Canada, SONY BMG Canada's offer to restrict its use of the TPMs at issue in Canada is not contingent on the US Government Inquiries, and therefore goes beyond what has been offered to putative class members in the United States.

SWORN BEFORE ME at)
 the City of Toronto, in the)
 Province of Ontario, this)
 14th day of August, 2006.)
)
“Judy Naiberg”)
 A Commissioner, etc.

 “C. J. Prudham”
 CHRISTINE J. PRUDHAM

¹ Distribution of existing MediaMax CDs was permitted in the U.S. settlement and is contemplated in the Canadian settlement because many of the concerns raised about XCP do not relate to MediaMax. Furthermore, the nature of the security issues concerning MediaMax were not uncommon for Windows-based software, and could be fully addressed through a software update.