

In the Matter of:

SONY BMG Music Entertainment,

Respondent.

**ASSURANCE OF VOLUNTARY COMPLIANCE OR DISCONTINUANCE**

This Assurance of Voluntary Compliance or Discontinuance ("Assurance") is entered into by the Attorneys General of the States of Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, and by the Attorney General for the District of Columbia ("the States"), acting pursuant to their respective consumer protection statutes,<sup>1</sup> and SONY BMG Music Entertainment ("SONY

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<sup>1</sup> **ALABAMA:** Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1, *et seq.*; **ALASKA:** Unfair Trade Practices and Consumer Protection Act, AS 45.50.471, *et seq.*; **ARIZONA:** Arizona Consumer Fraud Act, A.R.S. § 44-1521 *et seq.*; **ARKANSAS:** Ark. Stat. Ann., § 4-88-101 *et seq.*; **CONNECTICUT:** Conn. Gen. Stat. § 42-110a, *et seq.*; **DELAWARE:** Consumer Fraud Act, 6 Del.C. § 2511, *et seq.*; **DISTRICT OF COLUMBIA:** District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.*; **FLORIDA:** Deceptive and Unfair Trade Practices Act, Fla. Stat. Ch. 501.201 *et seq.*; **IDAHO:** Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*; **ILLINOIS:** Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*; **INDIANA:** Ind. Code Ann. § 24-5-0-5-1; **IOWA:** Iowa Consumer Fraud Act, Iowa Code section 714.16; **KENTUCKY:** Consumer Protection Act, Ky. Rev. Stat. §§ 367.110 to 367.990; **LOUISIANA:** Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. §§ 51:1401 to 51:1420; **MAINE:** Maine Unfair Trade Practices Act, 5 M.R.S.A. sections 207 and 209; **MARYLAND:** Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-101, *et seq.*; **MASSACHUSETTS:** Massachusetts Consumer Protection Act, G.L. c. 93A; **MICHIGAN:** Michigan Consumer Protection Act, MCL 445.901 *et seq.*; **MISSISSIPPI:** Consumer Protection Act, Section 75-24-1, *et seq.*, Mississippi Code Annotated of 1972; **MONTANA:** Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. §§ 30-14-101 to 30-14-142; **NEBRASKA:** Consumer Protection Act, Neb.

BMG"). SONY BMG understands that additional States may determine to enter into this Assurance, and may do so by a process agreed to by SONY BMG, which requires that any such additional State indicate its intention to enter into this Assurance on or before January 4, 2007.

## I. BACKGROUND

### SONY BMG AND THE USE OF DIGITAL RIGHTS MANAGEMENT SOFTWARE

1. SONY BMG, a joint venture formed in 2004 between SONY Corporation of America and Bertelsmann AG, distributes, markets, and sells audio compact discs ("CDs," as further defined below).
2. Between January and November 2005, SONY BMG distributed 79 CD titles that contained one of two Windows-compatible Digital Rights Management ("DRM") software programs: (1) eXtended Copy Protection ("XCP"), licensed to SONY BMG by First 4 Internet, Ltd., a U.K. company ("First 4 Internet"); or (2) MediaMax Version 5.0, licensed to SONY

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Rev. Stat. §§ 59-1601, *et seq.* (Reissue 2004) and Neb. Rev. Stat. § 87-301, *et seq.* (Reissue 1999; Cum. Supp. 2004; **NEVADA:** Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 41.600, 593.360, *et seq.*; **NEW JERSEY:** New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*; **NEW MEXICO:** Unfair Practices Act, N.M. Stat. Ann. §§ 57-12-1 to 57-12-22; **NEW YORK:** N.Y. Gen. Bus. Law §§ 349 & 350 and Executive Law § 63(12); **NORTH CAROLINA:** N.C.G.S. § 75-1.1, *et seq.*; **NORTH DAKOTA:** N.D.C.C. §§ 51-15-01, *et seq.*; **OHIO:** Ohio Consumer Sales Practices Act, R.C. 1345.01 *et seq.*; **OKLAHOMA:** Oklahoma Consumer Protection Act, 15 OS §751, *et seq.*; **OREGON:** Oregon Unlawful Trade Practices Act, Oregon Revised Statutes 646.605, *et seq.*; **PENNSYLVANIA:** Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1, *et seq.*; **RHODE ISLAND:** R.I. Gen. Law, § 6-13.1-1, *et seq.*; **SOUTH DAKOTA:** Deceptive Trade Practices and Consumer Protection, SDCL Ch. 37-24; **TENNESSEE:** Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. Sec. 47-18-101, *et seq.*; **VERMONT:** Consumer Fraud Act- 9 Vt. Stat. Annot. ch. 63; **VIRGINIA:** Virginia Consumer Protection Act, Va. Code §§ 59.1-196, *et seq.*; **WASHINGTON:** Unfair Business Practices Consumer Protection Act, RCW 19.86 *et seq.*; **WEST VIRGINIA:** W.Va. Code, § 46A-6-101, *et seq.*; **WISCONSIN:** Wis. Stat. Ann. §§ 100.18 and 100.20; and **WYOMING:** Wyo. Stat. § 40-12-101.

BMG by SunnComm International Inc., an Arizona company (“SunnComm”). DRM software, in this context, refers to computer programs designed to limit the copies or transfers, through the use of a computer, of the copyrighted music on a CD. The software at issue has no effect on non-computer-based players.

3. XCP and MediaMax version 5.0 and the initial versions of their associated uninstall programs rendered users’ computers vulnerable to different security exploits.

4. In 2003, Bertelsmann Music Group, a predecessor to SONY BMG, began distributing CDs that included a DRM program called MediaMax version 3.0, which also was licensed to SONY BMG by SunnComm.

### XCP

5. In April 2005, SONY BMG began selling the first of 52 titles that included XCP on the CDs.<sup>2</sup> Approximately 5 million SONY BMG CDs that contained XCP were shipped to retail, and, of these, consumers purchased approximately 3 million. These CDs can be played on computers with CD-ROM drives as well as on stereos or other non-computer-based devices with CD playing capabilities.

6. SONY BMG used XCP to protect its intellectual property and that of artists and songwriters from what is known in the industry as “casual piracy” – the copying of CDs by consumers who then distribute physical copies to others or make the audio files available to others via peer-to-peer file-sharing networks. XCP prevents users from making unlimited digital copies of a CD and controls the means by which the music can be played on a Windows-based

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<sup>2</sup> The list of XCP CD titles is available at <http://www.sonybmgcdtechsettlement.com/pdfs/XCPTitles.pdf>.

computer. In an effort to prevent consumers from avoiding or disabling these control functions, First 4 Internet designed XCP to hide, or "cloak," a number of the program's files and operations. XCP is able to do this by means of a driver. A driver is a specific type of computer software, typically developed to allow interaction between the operating system and hardware devices such as CD-ROMs. The driver used in XCP, called "aries.sys," prevents users from viewing files that begin with the prefix "\$sys\$" through standard Windows graphic tools such as Windows Explorer or Add/Remove Programs.

7. Because of First 4 Internet design measures, XCP creates a security vulnerability on Windows-based computers on which the software is installed by creating the possibility that malicious code, such as viruses, worms, or Trojans, may use the prefix \$sys\$ to hide from the consumer and from security software.

8. Consumers attempting to remove XCP from their computers running Windows operating system could not do so using the standard "Add/Remove Program" applet in the Windows Control Panel. Sophisticated users may have been able to locate XCP on their computers and attempt to remove it manually. Removing XCP manually can result in the disabling of the CD-ROM drive, which would prevent the consumer from listening to, or using, any CD on their computer until additional remedial measures are taken. In addition, certain third-party anti-virus and anti-spyware software attempted to remove XCP from consumers' systems, which in certain instances also resulted in disabling the CD-ROM drive.

9. SONY BMG did not provide an XCP uninstaller program on the CDs containing the XCP DRM software. Initially, SONY BMG required consumers to obtain an XCP uninstaller by email. SONY BMG required these consumers to provide information including the CD title,

location purchased, and email address for the consumer. After a consumer provided this information, SONY BMG provided the consumer with a unique link to download the uninstaller. This link could only work for that particular consumer.

10. The original XCP uninstaller, designed by First 4 Internet, created an additional security vulnerability. Once the uninstaller patch was executed on a computer it created the possibility that a consumer who inadvertently visited a malicious website (i.e., a site designed to force the installation of viruses or other malicious code) could inadvertently download, install, and run additional programs without the consumer's knowledge or consent.

11. Since December 4, 2005, SONY BMG has provided through its website a new uninstaller for XCP that can be downloaded from the Internet, for free, without the consumer providing any personal information. This uninstaller has been tested and confirmed to be safe and effective.

12. In November 2005, SONY BMG instituted a recall program for all CDs containing XCP. This program, which remains ongoing, allows consumers to return XCP CDs, and receive replacement CDs without copy protection, at no charge. The recall program also provides financial incentives for retailers to return unsold XCP CDs to SONY BMG. In addition, SONY BMG voluntarily ceased shipping XCP CDs from warehouse stock to retailers, and destroyed unsold warehouse stock of CDs with XCP. Despite SONY BMG's efforts, approximately 3 million of these CDs have not been returned.

### **MediaMax 5.0**

13. SONY BMG released CDs containing MediaMax 5.0 beginning in May 2005. A total of 27 titles were produced with the MediaMax 5.0 software. 6.9 million CDs containing MediaMax 5.0 were distributed by SONY BMG.<sup>3</sup>

14. MediaMax software presents consumers with an End User License Agreement (“EULA”) at the time the MediaMax CD is first placed in a computer. But, because of SunComm design measures, MediaMax 5.0 installs several files on consumers’ hard drives prior to the presentation of a EULA, i.e., the program installs 13 MediaMax files consisting of 15.8 megabytes.

15. MediaMax also installs a driver meant to interfere with copying from protected CDs. Even if a consumer declines the EULA, the downloaded file or files remain on the computer and the driver remains loaded unless and until the consumer re-boots the computer. In some situations the MediaMax driver is activated despite the consumer not consenting to the EULA.

16. Consumers attempting to remove MediaMax 5.0 from their computers running the Windows operating system could not do so using the standard “Add/Remove Program” applet in the Windows Control Panel.

17. SONY BMG did not provide a program to uninstall MediaMax 5.0 on the CDs containing the MediaMax DRM software.

18. Because of SunComm design measures, MediaMax 5.0 also created a security vulnerability on computers running the Windows operating system. MediaMax installed into a directory that allowed any subsequent user of the computer to modify its contents – even if the

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<sup>3</sup> The list of MediaMax CDs (both version 5.0 and version 3.0) is available at <http://www.sonybmgcdtechsettlement.com/pdfs/MMTitles.pdf>.

user was not designated as the computer's administrator. This could make it easier for malicious users who had local access to a computer to obtain enhanced privileges on that machine, potentially running dangerous programs that they otherwise would not have been able to run.

19. SONY BMG provided via the Internet a SunnComm-developed patch to eliminate the security vulnerability associated with MediaMax 5.0 and a SunnComm-developed uninstall program. The SunnComm uninstaller also created a vulnerability similar to the original MediaMax 5.0 vulnerability. Since December 8, 2005, SONY BMG has made available at no charge, through its website, a SunnComm-developed patch for MediaMax 5.0 and a SunnComm-developed uninstaller that have been confirmed to be safe and effective.

### **MediaMax 3.0**

20. Bertelsmann Music Group, a predecessor to SONY BMG, first released CDs containing MediaMax 3.0 in 2003. A total of 35 titles were released with MediaMax 3.0. Since 2003, approximately 10.3 million CDs containing MediaMax 3.0 software were distributed by SONY BMG or its predecessor.

21. In November 2005, SONY BMG ceased the manufacturing of CDs containing either version of MediaMax.

22. No security vulnerabilities have been reported in MediaMax 3.0. However, a small portion of the software (less than with 5.0) installs on the hard drive prior to presentation of the EULA, and, as with MediaMax 5.0, no uninstaller is provided with the CD.

### **Enhanced CDs**

23. "Enhanced CD" is an industry term indicating that the CD contains bonus content in addition to music, such as music videos or links to special Internet-based content. All of the 52

CD titles that contained XCP, and six of the 27 titles that contained MediaMax 5.0, also contained a particular enhanced CD function referred to as the "banner." The banner function is technologically unrelated to the DRM software. The banner is a small area on the user's computer screen that initially will display an image of the artist found on the CD. If the user is connected to the Internet, an updated image (e.g., a more current picture of the artist) may be supplied and will appear in the banner space. The banner function involves the user's computer sending to SONY BMG (or, in the case of MediaMax CDs, to SunnComm) the Internet Protocol address ("IP address") of the computer contacting the server. This is generally the IP address of a proxy server belonging to the consumer's Internet provider, but can be an IP address associated with the consumer's own computer. The banner function also results in sending the server a numerical identifier associated with the title of the SONY BMG CD being played on the computer's CD-ROM drive. A "privacy audit" conducted by an outside consultant has confirmed that the banner functionality was not being used to collect personal information or to monitor listener habits.

#### **Information on the CD Packaging**

24. The States contend that SONY BMG fails to disclose on the CD packaging certain material terms and conditions of the CDs containing XCP or MediaMax DRM software.

Specifically, the States contend that SONY BMG does not disclose the following:

- On CDs with DRM, the fact that DRM software must be installed on a consumer's computer in order to fully use the CD on a Windows-based computer, and that the CD does not include any program to uninstall or deactivate the software;