06-CV-033329

COURT FILE NO.:

SUPERIOR COURT OF JUSTICE

BETWEEN:

[illegible]RON CHENEY, 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

Brought
"~~Brought~~ under the *Class Proceedings Act*"
& am

STATEMENT OF CLAIM

TO THE DEFENDANT:
A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs and file it with proof of service, in the court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory in Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO

DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: January 4, 2006

Issued by: Christina Falsetto
Local Registrar

Address of court office:
161 Elgin Street
Ottawa, Ontario
K2P 2K1

TO: Sony of Canada Limited
115 Gordon Baker Road
Toronto, Ontario
M2H 3R6

Sony Music Entertainment (Canada) Inc.
1121 Leslie Street
North York, Ontario
M3C 2J9

Sony BMG Music (Canada) Inc.
44th Floor - 1st Canadian Place
Toronto, Ontario
M5X 1B1

Sony BMG Music Inc.
550 Madison Avenue
New York, New York
USA 10022

Sony BMG Music Entertainment
550 Madison Avenue
New York, New York
USA 10022

Sony Corporation of America
550 Madison Avenue
New York, New York
USA 10022

Bertelsmann, Inc.
1540 Broadway #24,
New York, New York,
USA 10036

First 4 Internet Ltd.
6 South Bar Street
Banbury, Oxfordshire
United Kingdom
OX16 9AA

STATEMENT OF CLAIM

The Plaintiffs

1. The Plaintiff, Aaron Cheney, is a resident of Ottawa, Ontario. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

2. The Plaintiff, Vladimir Louis Jacques, is a resident of Montreal, Quebec. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

3. The Plaintiff, Dagmawi Selassie, is a resident of Montreal, Quebec. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

4. The Plaintiff, Amadon N'Diaye, is a resident of Montreal, Quebec. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

5. The Plaintiff, Noah Firestone, is a resident of Ottawa, Ontario. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

6. The Plaintiff, Devin Gowling, is a resident of Vancouver, British Columbia. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

7. The Plaintiff, Jarrod Pacholko, is a resident of Calgary, Alberta. He purchased music CDs encoded with MediaMax and/or XCP software, and played encoded CDs on his computer(s) resulting in the installation of software on his computer(s).

8. The Plaintiff, John Doe Ltd. I, with offices located in the Province of Ontario, either purchased a disk encoded with MediaMax and/or XCP software, or had encoded CDs played on their computers resulting in the installation of software on their computers.

The Defendants

9. The Defendant, Sony of Canada Limited, is a corporation incorporated pursuant to the laws of the Province of Ontario and is registered Extra-Provincially in other provinces. Sony Canada maintains its head office at 115 Gordon Baker Road, Toronto, Ontario, M2H 3R6.

10. The Defendant, Sony Music Entertainment (Canada) Inc., is a corporation incorporated pursuant to the laws of the Province of Ontario and is registered Extra-Provincially in other provinces. Sony Music maintains its head office at 1121 Leslie Street, North York, Ontario, M3C 2J9.

11. The Defendant, Sony BMG Music (Canada) Inc., is a corporation incorporated pursuant to the laws of the Province of Ontario and is registered Extra-Provincially in other provinces. Sony Music maintains its head office at 44th Floor, 1st Canadian Place, Toronto, Ontario, M5X 1B1.

12. The Defendant, Sony BMG Music Inc., is a corporation incorporated pursuant to the laws of the State of Delaware, with its principal place of business at 550 Madison Avenue, New York, New York, USA, 10022.

13. The Defendant, Sony BMG Music Entertainment, is a Delaware General Partnership, incorporated pursuant to the laws of the State of Delaware, with its principal place of business at 550 Madison Avenue, New York, New York, USA, 10022.

14. The Defendant, Sony Corporation of America, is a corporation incorporated pursuant to the laws of the State of Delaware, with its principal place of business at 550 Madison Avenue, New York, New York, USA, 10022.

15. The Defendant, Bertelsmann, Inc., is the U.S. subsidiary of Bertelsmann AG, a multi-national corporation based in Germany, and is a corporation incorporated pursuant to the laws of the State of Delaware, with its principal place of business at 1540 Broadway #24, New York, New York, USA, 10036.

16. In or about August, 2004, Sony Corporation merged its Sony Music Entertainment, Inc. with Bertelsmann's BMG to create a joint venture known as "Sony BMG". Sony Corporation and Bertelsmann are the parent companies, respectively, of Sony Music Entertainment and BMG.

17. Hereinafter, all the Sony and Bertelsmann Defendants are collectively referred to as "Sony BMG", as inter alia, they are a related group of companies dealing with the public and consumers under the trade name Sony BMG.

18. The Defendant, First 4 Internet Ltd. ("F4i"), is a corporation organized and existing under the laws of the United Kingdom with its principal place of business in England, United Kingdom. First 4 Internet is a developer of digital rights management software including XCP1 Burn Protect.

Ontario Class Members

19. The Plaintiffs are representatives of a class of persons, corporations, and entities resident or situated in Ontario, more particularly described as follows:

(a) All persons (including their estates, executors, or personal representatives) corporations, and other entities who purchased compact discs from the Defendants encoded with digital rights management software ("Encoded CDs"); and,

(b) All persons (including their estates, executors, or personal representatives) corporations, and other entities who played any Encoded CDs on their computer resulting in the installation of software on a computer.

Non-Resident Class Members

20. The Plaintiffs also make this claim, on their own behalf and on behalf of all members of a Non-Resident subclass of persons, corporations, and entities not resident or situated in the Province of Ontario, however, are resident or situated in another Canadian province or territory, more particularly described as follows:

(a) All persons (including their estates, executors, or personal representatives) corporations, and other entities who purchased compact discs from the Defendants encoded with digital rights management software ("Encoded CDs"); and,

(b) All persons (including their estates, executors, or personal representatives) corporations, and other entities who played any Encoded CDs on their computer resulting in the installation of software on a computer.

(hereinafter both resident and non-resident Class Members are collectively referred to as "Plaintiffs", Class Members", the "Class", or "customers")

Factual Background

21. In 2003, Sony began to distribute to the public CDs that contain software that Sony refers to as Digital Rights Management ("DRM"). This DRM software on Sony CDs included MediaMax software created by SunnComm ("MediaMax CDs"); and then beginning in 2005, Extended Copy Protection ("XCP") software created by First4Internet ("XCP CDs"). Sony BMG currently uses MediaMax Version 5 on its recently issued MediaMax CDs or XCP on its XCP CDs. Sony BMG intended that most of its CDs sold in Canada would incorporate one of these technologies. Sony BMG distributed approximately 20 million CDs with MediaMax software and 2 million with XCP software.

MediaMax and XCP Software Compromises Computer Security and Contains Undisclosed Spyware

22. Internet advocates describes spyware as technologies deployed without appropriate user

consent and/or implemented in ways that impair user control over: (1) material changes that affect a user's experience, privacy, or system security; (2) use of the user's system resources, including what programs are installed on the user's computer; and/or (3) collection, use, and distribution of a user's personal or other sensitive information. Computer Associates defines spyware as, "Any product that employs a user's Internet connection in the background without their knowledge, and gathers/transmits info on the user or their behavior." As discussed below, the MediaMax software used by Sony BMG on many of its CDs meets the definition of spyware.

23. The software on a Sony BMG MediaMax CD is designed to operate only on Windows-based computers that run Windows 98SE/ME/NT/2000/XP. MediaMax requires that the user have administrator privileges on the Windows operating system in order to listen to the CD.

24. MediaMax installs on a user's computer without meaningful consent or notification. When a MediaMax CD is inserted into a computer running Windows, an installer program already starts and MediaMax installs, prior to the appearance of the End User License Agreement ("EULA"), approximately eighteen files on the computer's hard drive. These files remain permanently installed even if the user declines the EULA presented later. One of them, a kernel-level driver with the cryptic name "sbcphid" is loaded into the memory and ready to run at all times, even when there is no disc in the CD drive and no music is being played. A "kernel" is the core of a computer operating system, which controls and secures access to the computer's basic operations.

F4i and Sony Create a Customized Version of the XCP Software

25. In March 2003, F4i introduced its XCP software. According to F4i, XCP stands for "extended copy protection" and was an end-to-end solution to protect the rights of record labels and artists against the unauthorized copying of CD content.

26. Sometime thereafter F4i and Sony entered into an agreement under which F4i would produce a customized, version of its XCP software for Sony's use on its compact discs ("CDs") worldwide, Sony was the first major record label to agree to use the XCP software.

Sony Began Encoding Titles in Early 2005 with New Spyware

27. In March 2005, Sony began encoding numerous music titles that it sold worldwide with the XCP software. CDs containing XCP software are referred to herein as "Encoded CDs".

28. While Sony publicly touted this development as a "speed bump" for consumers seeking to illegally share its music, in reality it was something far more malicious. For reasons not yet disclosed, Sony and F4i crafted an anti-burning scheme that would make permanent and irreversible alterations to the core Windows operating system which could be later utilized by hackers or Sony to take control of the users' computer without the users' knowledge or consent.

29. The moment someone attempts to play a CD on their Windows-based machine, the malicious software installs itself without the users' knowledge. This occurs even if the CD was simply accessed by computer for the users own personal use or for use on an MP3 player. Since most users have "autorun" feature enabled on their PC, once a CD is inserted and the disc tray is closed, the disc plays and the software installs without requiring any further action by the user.

30. According to Computer Associates, the Encoded CDs are "spyware" meaning that the software is a "trojan that opens securities vulnerabilities through rootkit functionality".

31. No disclosure of the rootkit or the risk the user is exposed to is included in the end user license agreement ("EULA") included with the Sony CDs.

32. Once the software is installed, Sony is able to compile a record of the music listening habits of the user and have that information uploaded to a location of Sony's choosing. All this is done without the users consent or knowledge.

33. By November 2005, several viruses have been reported to exploit the weakness created by the playing of Encoded CDs. These viruses can destroy software, steal personal information, and do

other irreversible harm to individuals and businesses computers and computer systems.

34. In selling and distributing Encoded CDs, Sony and F4i have decided that their desire to protect intellectual property is more deserving of protection than the intellectual property and personal information on millions of computer users worldwide.

Plaintiffs Purchased Their Titles Unaware Of The XCF Encoding

35. Unaware that these Encoded CDs were installing an administrative level program on each system on which the CDs were used, hundreds of thousands of Canadian computer users have unknowingly infected their computers, and the computers of others, with the surreptitious rootkit contained on the Encoded CDs. This rootkit has been responsible for conflicts within computer systems, crashes of systems, infection of viruses and other serious damage.

36. Class members have been damaged through the unauthorized installation of software that has slowed computer function, compromised personal information and/or allowed their computers to be infected with damaging viruses. Some class members are completely unable to use their computers, others have diminished use. In other cases, class members purchased CDs to use on their computers but once they learned of the nature of the Encoded CDs determined that such a use would be reckless. Many of these users have been unable to return the purchased CDs and are stuck with CDs that, for all practical purposes, are unuseable.

Defendants Have Covered Up The Problem and Exposed Their Customers To Serious and Ongoing Unacceptable Risks

37. Sony and F4i have taken concerted action to cover up their actions under the guise of trying to fix the problem. Sony and F4i have repeatedly made changes to their EULA and FAQ sections of their websites, seeming to disclose whatever information had thus far become public from other sources, but no more. They have worked together to make posts on certain websites that downplay the risks and thus increase the vulnerability of consumers. Sony also refused to disclose which titles it sold that were encoded with the XCP technology.

38. Under mounting pressure, Sony and F4i have made a corrective patch available that is not corrective at all. The only way for a consumer to get the patch is via internet and requires everyone who wishes to receive the uninstaller to do so through Sony BMG's official process, which involves releasing personally identifiable information for marketing use by Sony BMG and disclosure third parties. The patch that they have made available does not uninstall the software but simply uncloaks the software and updates Sony's protections. It does nothing to disable the part of the software that compiles a record of user listening habits for Sony.

39. The plans Sony and F4i may have for future usage of this inappropriate technology in the game or video sector is currently unknown.

The Common Issues

40. Common questions of law and fact exist as to all of the members of the Class and predominate over any questions affecting individual members of the Class. Among the common questions of law and fact are:

(a) Whether the Defendants adequately disclosed the nature and purpose of its programs on its CDs;

(b) Whether Sony made representations that the music CDs had characteristics, uses, benefits or qualities which it did not have;

(c) Whether Defendants made false and/or misleading statements of fact to the Class and the public concerning the content of the music CDs;

(d) Whether Defendants knew, or was reckless in not knowing, that its rootkit program would detrimentally affect the computers of users who installed its CDs on their computers;

(e) Whether Defendants engaged in deceptive and unfair trade practices;

(f) Whether Sony engaged in false advertising;

(g) Whether Defendants engaged in an unlawful conspiracy to hide the true nature of the software encoded on Sony music CDs from the general public;

(h) Whether the members of the Class have sustained damages, and if so what is the proper measure of damages;

(i) Whether Sony is liable for punitive damages, and if so, in what amount; and

(j) Whether the Class is entitled to injunctive relief.

41. The member of the proposed Class number in the thousands, if not millions. As a result, the Class is so numerous that joinder in a single action is not practical. However, proceeding with the Class Members' claim by way of a class action is both practical and feasible, and each Class Member should be readily identifiable from information and records available from the Defendants.

42. Individual members of the proposed class do not have a significant interest in individually controlling the prosecution of their claim by way of separate actions, and individualized litigation would also present the potential for varying, inconsistent, and contrary judgements, and would magnify the delay and expense to all parties resulting from multiple proceedings on the same issues. The cost to pursue individual actions concerning this claim would effectively deny the individual Claimants access to the Courts and appropriate legal relief.

43. The Plaintiffs will fully and adequately protect the interests of the proposed Class, and have retained counsel to represent the class who are qualified to prosecute complex class action litigation. Neither the Plaintiffs nor their solicitors have interests which are contrary to, or conflicting with, the interests of the proposed Class.

Breach of Contract and Duty to Inform

44. The actions, omissions, and breaches of legal obligations made by the Defendants have caused the Defendants to be in breach of the sales contract between the Defendants and the Plaintiffs. The Defendants, both directly and through their agents, entered into agreements with the Plaintiffs and Class Members to provide a usable music CD, that would not cause harm to the any equipment that may be used to play that music CD; and the Defendants are in breach the implied sales contract by having failed to disclose, falsely described or advertised, or misrepresented the effect of playing

the Encoded CDs on computer systems.

45. Further, the Plaintiffs have suffered injury, economic loss, and damages, as a result of breaches by the Defendants of their duty to inform the Plaintiffs of the true nature and scope of what was contained on the Encoded CDs.

Warranties and Conditions

46. The Defendants have breached a warrantee and/or condition that the products that they are selling are safe for their customers to use. Instead, the Defendants' customers got a product that insidiously installs software that has slowed computer function, compromised personal information and/or allowed their computers to be infected with damaging viruses. Many of these customers have been unable to return the purchased CDs and are stuck with a CD that, for all practical purposes, cannot be used on a PC.

47. The Plaintiffs have suffered injury, economic loss and damages caused or materially contributed to by the Defendants being in breach of implied warranties and/or conditions offered by the Defendants.

Deceit, Misrepresentation, Negligence, and Wrongful Acts and Omissions

48. The Defendants have misrepresented and failed to disclose that the CDs that they were selling would download onto the Plaintiffs' computers software that would slow computer function, compromised their personal information and/or allowed their computers to be infected with damaging viruses.

49. The Plaintiffs have suffered injury, economic loss, and damages caused by or materially contributed to by the deceit, misrepresentation, and concealment of the Defendants, respecting the nature of the dangerous software that was downloaded on to their computers without their knowledge or consent.

50. The Defendants negligent acts and omissions have breached the duty of care they owed to their customers and caused the Plaintiffs to suffer injury, economic loss and damages, which they continue to suffer.

51. The Defendants negligent acts and omissions have breached the duty of care they owed to their customers and caused the Plaintiffs to suffer injury, economic loss and damages, which they continue to suffer.

Competition and Consumer Protection Legislation

52. The Defendants are in breach of their statutory duty or obligation to consumers under the *Competition Act* RSC 1985, chapter C-34 and amendments thereto.

53. The Defendants, in breach of their statutory duty and obligation to consumers, engaged in deceptive acts or practices in relation to consumer transactions by representation or other conduct which had the capability, tendency, or effect of deceiving or misleading consumers.

54. The Plaintiffs plead and rely upon competition, consumer protection and trade legislation and common law as it exists in this jurisdiction, and the equivalent/similar legislation and common law in all Canadian provinces and territories. The Plaintiffs have suffered injury, economic loss and damages caused or materially contributed to by the Defendants inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

Causation

55. The acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants have caused or materially contributed to the Plaintiffs suffering injury, economic loss, and damages.

Damages

56. The Plaintiffs have suffered real and substantial injury, economic loss, and damages arising

from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants.

57. By reason of the acts, omissions, wrong doings, and breaches of the legal duties and obligations of the Defendants, the Plaintiffs and have suffered injury, economic loss, and damages, the particulars of which include the following:

(a) Invasion of privacy;

(b) Increased risk that the Plaintiffs' computer would be infected by a computer virus;

(c) Plaintiffs' computers that were infected with a computer virus;

(d) Harm caused to the Plaintiffs by the information divulged by the either the computer viruses or by the software installed by the Encoded CDs;

(e) Loss of enjoyment of the Plaintiffs' property;

(f) Being subject to breach of the implied sales contract due to the Defendants' actions, which were either not disclosed, misrepresented, or not properly explained, when contracting with the Plaintiffs; and

(g) Such further and other general and special injury, economic loss, and damages, to be proven at trial.

Aggravated, Punitive and Exemplary Damages

58. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Plaintiffs.

59. At all material times, the conduct of the Defendants as set forth above was malicious, deliberate and oppressive towards their customers and the general public, and the Defendants conducted themselves in a willful, wonton, and reckless manner, as set forth above.

60. The Defendants aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations constitute a wonton and outrageous disrespect for fair business practices and contractual dealings with customers and the public.

61. As a result of the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations by the Defendants, the Plaintiffs and Class Members have sustained substantial injury, economic loss and damages, and are entitled to awards of aggravated, punitive, and exemplary damages.

General

62. If issue is taken with service of documents upon the Defendants, the Plaintiffs seek leave to have service on any related Defendants be accepted as valid service against its subsidiaries, parent corporations, affiliates, predecessors, associated, or related companies and entities.

63. The Plaintiffs plead and rely upon the *Class Proceedings Act*, S.O. 1992, c.6, or similar legislation where applicable.

64. The Defendants are also in breach of their statutory duty or obligation the *Personal Information Protection and Electronic Documents Act.*

65. The Plaintiffs, as representatives of the class of persons, corporations, and entities resident or situated in Ontario, and a subclass of persons, corporations, and entities not resident or situated in the Province of Ontario, but resident or situated in another Canadian province or territory, have suffered injury, economic loss, and damages as a result of the Defendants' acts, omissions, wrong doings, and breaches of legal duties and obligations, included but not limited to, deceit, misrepresentation, negligence, intentional and negligent misrepresentation, inappropriate and unfair trade and business practices, misleading and misinforming their customers and members of the public, being in breach of the implied sales contract with the Plaintiffs, failure to make proper public disclosure, and failure to fulfill their statutory and common law duties and obligations to the Plaintiffs and the Class Members. The Plaintiffs on behalf of themselves and all Class Members claim for the following relief, on a joint and several basis, against all of the Defendants:

(a) General damages in the amount of $50,000,000.00 or in an amount to be determined

for each member of the class;

(b) Special damages in the amount of $50,000,000.00 or in an amount to be determined for each member of the class;

(c) Punitive, aggravated, and exemplary damages for each member of the class in an amount to be determined at trial;

(d) Restitution;

(e) Damages for breach of trust;

(f) Damages for interference with the economic interests of class members;

(g) Such further and other costs and damages as may be proven at trial;

(h) Pre-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;

(i) Post-judgment Interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;

(j) Costs of this action, on a solicitor and client basis; and

(k) Such further and other relieve as counsel may advise and/or this Honourable Court may allow.

THE PLACE OF TRIAL

66. The Plaintiffs propose that Trial in this action take place in the City of Ottawa, in the Province of Ontario.

Date of Issue: January 4, 2006

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Whose address for service is: same as above

AARON CHENEY et al. v. SONY OF CANADA LIMITED et al.

Court File No.: 06-CV-033329

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

STATEMENT OF CLAIM

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