

Court File No. 06-CV-304178CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JEANNINE PALMER, JANET COOK,
LAURA BEVAN, JEREMY TEPLINSKY, AARON CHENEY, VLADIMIR LOUIS
JACQUES, DAGMAWI SELASSIE, AMADON NDIAYE, NOAH FIRESTONE,
DEVIN GOWLING AND JARROD PACHOLKO

Plaintiffs

And

SONY BMG MUSIC ENTERTAINMENT, SONY CORPORATION OF AMERICA,
SONY BMG MUSIC (CANADA)/SONY BMG MUSIQUE (CANADA), INC., SONY
MUSIC ENTERTAINMENT (CANADA) INC, SONY OF DANADA LTD/SONY DU
CANADALTD., 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 NDIAYE, NOAH
FIRESTONE, DEVIN GOWLING JARROD PACHOLKO AND JOHN DOE LTD. I

Plaintiffs

and

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

Court File No. 500-06-000318-051

**QUEBEC
SUPERIOR COURT**

BETWEEN:

PHILLIPE GUILBERT

Plaintiff

vs.

SONY BMG MUSIQUE (CANADA) INC.

and

SONY BMG ENTERTAINMENT ET AL.

Defendants

**AFFIDAVIT OF CINDY COHN
(Sworn September 18, 2006)**

I, Cindy Cohn, of the City of San Francisco, California, United States of America,

MAKE OATH AND SAY:

1. I am a member of good standing of the California State Bar, and am admitted to practice before, *inter alia*, the Supreme Court of the United States, the Ninth Circuit Court of Appeals, and the United States District Court for the Northern District of California. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

2. I am Legal Director for the Electronic Frontier Foundation (EFF), a nonprofit legal foundation that represented plaintiffs Tom and Yvonne Ricciuti and Joseph Halpin in *In re Sony BMG Technologies Litigation*, Case No. 05 CV 9575.

3. In this capacity, I served as lead counsel in EFF's negotiations with Sony BMG U.S. ("Sony BMG") relating to the litigation, including the negotiations that culminated in the agreement that settled that litigation, ("U.S. Settlement Agreement"). That agreement, to which EFF was a signatory, is attached hereto as Exhibit 1.

4. The U.S. Settlement Agreement includes several provisions governing Sony BMG's conduct with respect to use of content protection software during the period from the date the settlement was preliminarily approved and December 31, 2007 ("the Injunctive Period").

5. Specifically, the U.S. Settlement Agreement requires that, if Sony BMG manufactures any CDs with any content protection software during the Injunctive Period, Sony BMG must have such software tested for security vulnerabilities by a third party, ensure that such software will not be installed without the buyer's explicit permission, and provide ready access to an uninstaller for such software. If a security problem is found after the software is released, Sony BMG is required to notify security experts and work with them to address the problem quickly. In addition, Sony BMG must adequately disclose the nature and function of the software to music buyers before they buy.

6. These provisions are essential consumer protection. **They will help** consumers understand the nature and function of the software they purchase with their compact discs, help consumers protect themselves against potential security vulnerabilities, and ensure that, if such vulnerabilities are found, Sony BMG will take appropriate steps to correct the problem.

7. The Canadian Settlement Agreement, although modeled after the U.S. Settlement Agreement, does not include these future conduct provisions.

8. The absence of these future conduct provisions is purportedly explained by Exhibit C to the Canadian Settlement Agreement,

9. In Paragraphs 10-11 of this Exhibit, Christine J. Prudham, Vice President, Legal and Business Affairs of Sony BMG Canada suggests that Sony BMG U.S. agreed to these provisions solely in response to investigations that were led by United States governmental entities.

10. This claim is demonstrably false.

11. On November 14, 2006, two weeks after the security flaws in Sony BMG's content protection software were revealed, and one week before the first lawsuit brought by a government entity, *Texas v. Sony BMG Music Entertainment*, EFF sent a letter to Sony BMG demanding that Sony BMG commit to most of the future conduct provisions later included in the U.S. Settlement Agreement. A copy of that letter, which was also posted on EFF's website, is attached hereto as Exhibit 2.

12. Sony responded to EFF's letter on November 18, 2005—before any government inquiry was announced—agreeing to implement some of the measures EFF had proposed. A copy of that response is attached hereto as Exhibit 3.

13. Because Sony BMG declined to address several of EFF's concerns, particularly concerns regarding the MediaMax software and Sony BMG's future conduct, EFF filed suit against Sony BMG on November 21, 2005.

14. Between November 15 and December 28, 2005, when the U.S. Settlement Agreement was signed, I conferred (by telephone, email and in person) with Sony BMG representatives on numerous occasions concerning the various commitments Sony BMG must make to compensate U.S. consumers and resolve the litigation. **Much of this**

communication was devoted to drafting and revising provisions regarding Sony BMG's future use of content protection software.

15. In short, the future conduct provisions were an integral part of the negotiations leading to the settlement of the U.S. civil litigation. Sony BMG never indicated otherwise and I can unequivocally state that EFF would not have advised its clients to settle the case without the inclusion of the future conduct provisions.

16. Ms. Prudham also claims, in Paragraph 7 and 17 of Exhibit C, that the U.S. Settlement Agreement could be amended to exclude the future conduct provisions.

17. This statement is false. Indeed, EFF would not have recommended that its clients agree to such a settlement.

18. The settlement does provide that if the governmental entities required even more than agreed-to in the negotiations settling the U.S. civil litigation, those stricter requirements would be enforced. This intent is reflected in the language of Section IV.A to the U.S. Settlement Agreement, which states as follows: "If, as of the date of the Fairness Hearing, SONY BMG has not entered into such an enforceable agreement, and/or if such agreement is not nationwide in scope and does not address each and every one of the [future conduct provisions], then as of the date of the Fairness Hearing, this Settlement Agreement will be deemed amended to include an entitlement by Settlement Class Members to an injunction, issued by and enforceable by the Court, implementing each and every such provision not so addressed." No such agreement was reached prior to the Fairness Hearing. Further, Section XI.Q of the Agreement states "the Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all affected Parties or their successors in interest."

19. submit this affidavit in order to ensure that this Court has a more complete and accurate record of the proceedings in the U.S. litigation



Cindy Cohn



Sworn before me in the City of San Francisco, **California, United States of America,**
September 18, 2006.



Notary Public