



notice and consent from purchasers. The CDs also condition use of the music on unconscionable licensing terms. These, plus other problems caused by Sony BMG's use of this software on its CDs, violate federal and New York law and public policy. After public revelations about security risks associated with the XCP software, including warnings issued by the United States Government, and demands made to address the problems by the Electronic Frontier Foundation and its co-counsel, defendant Sony BMG began to take steps to respond to the security risks created by the XCP technology. It failed, however, to address security concerns raised by the MediaMax software or the consumer privacy and consumer fairness problems created by both technologies, or to provide adequate notice to the consuming public of the XCP issues and the remedies for those problems.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1332.

3. Venue is proper in this District under 28 U.S.C. §1391(b), because Defendant Sony Corporation of America has its principal place of business in this District, Defendant Sony BMG Music Entertainment has its principal place of business in this District, and Defendant Bertelsmann, Inc. has its principal place of business in this District.

### **PARTIES**

4. At all times mentioned herein, Plaintiff Tom Ricciuti was and still is an individual and resident of New York, New York.

5. At all times mentioned herein, Plaintiff Yvonne Ricciuti was and still is an individual and resident of New York, New York.

6. At all times mentioned herein, Plaintiff Mary Schumacher was and still is an individual and resident of Port Orange, Florida.

7. At all times mentioned herein, Defendant Sony BMG Music Entertainment ("Sony BMG"), is and at all relevant times was, a Delaware General Partnership, with its principal place of business in New York, New York.

8. Defendant Sony Corporation of America ("Sony Corp.") is the U.S. subsidiary of Sony Corporation, a multinational corporation based in Japan. At all times mentioned herein, Defendant Sony Corporation of America, is and at all relevant times was, a New York corporation, with its principal place of business in New York, New York.

9. Defendant Bertelsmann, Inc. ("Bertelsmann, Inc.") is the U.S. subsidiary of Bertelsmann AG, a multinational corporation based in Germany. At all times mentioned herein, Defendant Bertelsmann, Inc., is a Delaware Corporation with its principal place of business in New York, New York.

#### **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

10. In August 2004, Sony Corp. merged its Sony Music Entertainment, Inc. with Bertelsmann AG's BMG to create a joint venture, Sony BMG. Sony Corporation of America and Bertelsmann AG are the parent companies, respectively, of Sony Music Entertainment and BMG.

11. Sony BMG is the world's second largest music company. Its labels include Arista Records, Columbia Records, Epic Records, J Records, Jive Records, LaFace Records, Legacy Recordings, Provident Music Group, RCA Records, RCA Victor Group, RLG – Nashville, SONY BMG Masterworks, Sony Music Nashville, Sony Urban Music, Sony Wonder, So So Def Records, and Verity Records. Sony BMG manufactures, distributes, markets, and sells audio compact discs ("CDs").

12. In 2003, Sony BMG began to distribute to the public CDs that contain software that Sony BMG refers to as Digital Rights Management ("DRM"). This DRM software on Sony BMG CDs includes MediaMax software created by SunnComm ("MediaMax CDs") and Extended Copy

Protection (“XCP”) software created by First4Internet (“XCP CDs”). On information and belief, Sony BMG intended that most of its CDs sold in the United States would incorporate one of these technologies.

13. Sony BMG is the first company to commercially deploy XCP. Sony BMG has been using versions of XCP since 2002 on prerelease CDs sent to radio stations and internal employees.

14. Sony BMG and BMG have been using versions of MediaMax on some CDs since at least 2003. Sony BMG currently uses MediaMax 5 on its recently issued MediaMax CDs.

15. Since March 2005, Sony BMG has distributed at least 52 music titles with XCP software. Sony BMG has shipped at least 4.7 million CD’s containing the XCP software, of which around 2 million were sold to consumers.

16. Sony BMG also distributed many more music titles with MediaMax software – including a number one hit CD last year by Velvet Revolver, entitled Contraband. Sony BMG distributed approximately 20 million CDs with MediaMax software.

17. In a November 11, 2005, MSNBC.com article, by Bob Sullivan, SunnComm CEO Peter Jacobs was quoted as stating that MediaMax is “now on about 20 million Sony BMG music discs.”

**THE SUNNCOMM SOFTWARE IS UNDISCLOSED SPYWARE  
AND COMPROMISES SECURITY**

18. The Anti-Spyware Coalition (“ASC”) 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 ASC’s definition of spyware.

19. 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.

20. MediaMax installs 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 that consume approximately 15 MB 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.

21. This kernel-level driver is the heart of the MediaMax copy protection system. When it is running, it attempts to block CD ripping and copying applications from reading the audio tracks on MediaMax CDs. The software refrains from making one final change until after users accept the EULA – it does not set the driver to automatically run again every time Windows starts. Even if the EULA is declined, the code remains on the hard disk indefinitely. Further, even if the EULA is declined, the code keeps running on the computer until the computer is shut down and restarted, which rarely occurs on many computers. In addition, when a subsequent CD with MediaMax is installed in the computer, the inactive software will reactivate, even if the EULA for the subsequent CD is declined.

22. Only after these files are installed and at least one has launched does the software display a EULA, which the user may accept or decline, making it a contract of adhesion.

23. The MediaMax CDs' EULA states: "As soon as you have agreed to be bound by the terms and conditions of the EULA, this CD will automatically install a small proprietary software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is intended to protect the audio files embodied on the CD, and it may also facilitate your use of the DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER until removed or deleted." This statement is not true, as alleged above. Attached hereto as Exhibit A and incorporated herein by reference is a true and correct copy of the MediaMax EULA.

24. Sony BMG's MediaMax EULA states that, "[T]he SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise."

25. If purchasers seek more information about the software that has been installed on their computer, they are directed to the SunnComm Sony BMG customer care website, which falsely tells users that "No information is ever collected about you or your computer without you consenting" and also states: "Is any personal information collected from my computer during the digital key delivery process? No, during the digital key delivery process, no information is ever collected about you or your computer."

26. In addition to the SunnComm Sony BMG customer care website, purchasers are also directed to the "Readme.html". The "Readme.html" file is located on the MediaMax CD. The Readme.html file falsely tells users that, "AT NO TIME DURING THESE PROCESSES WILL DATA BE COLLECTED ABOUT YOU OR YOUR COMPUTER." (emphasis in the original).

27. Despite the representations to the contrary in the EULA and the SunnComm website, and without notification or consent of the user, the MediaMax software “phones home” to Sony BMG and/or SunnComm every time a user plays a protected CD. The software causes the computer to connect to a Sony BMG and/or SunnComm server via the internet. The MediaMax software conveys a unique code that identifies the album to which the user is listening. The request also contains standard HTTP headers which determine the operating system the computer is running and what version of Internet Explorer web browser the user has.

28. Prior versions of the MediaMax software still used on some Sony BMG CDs contact Sony BMG and/or SunnComm to obtain “digital keys” that permitted the CDs to be copied.

29. The SunnComm Sony BMG customer care website does not have a visible privacy policy.

30. The Media Max software connects to an online service at <http://license.sunncomm2.com/>, which does not have a visible privacy policy.

31. The MediaMax software opens a web page from a Sony BMG and/or SunnComm server and sends a 32-character identifier through an HTTP request. On information and belief, this is a unique code that tells Sony BMG and/or SunnComm to which album the user is listening. The request also contains standard HTTP headers that can be used to determine the user’s operating system.

32. The server to which the MediaMax software connects returns an HTTP response to the MediaMax software. According to SunnComm’s public statements, this response is intended to facilitate the placement of dynamic, interactive advertisements that can be changed at any time by Sony BMG and/or SunnComm.

33. The MediaMax software also transmits the computer's Internet Protocol or "IP" address to servers controlled by Sony BMG or its agents, without receiving permission from the computer user. No two IP addresses are alike and IP addresses provide the means to determine information about the person who used the particular IP address. Users are assigned an IP address by their Internet service provider or system administrator. Many users are issued frequently changing "dynamic" IP addresses that make it difficult to track them individually, but others have fixed, "static" addresses that can permit Sony BMG to ascertain their identities and associate listening habits with particular individuals across many different CDs containing the SunnComm software.

34. The MediaMax software contains a program referred to as "Perfect Placement." In a July 13, 2005, press release, SunnComm states that Perfect Placement provides "unparalleled targeted marketing opportunities . . . . This unique feature centrally serves up dynamic promotional content controlled by the record label to reserved spaces located throughout the MediaMax interface while a user is enjoying their CD on the computer." The press release further states: "Imagine an artist's album is coming out and the record company has the ability to announce this event to all those playing the artist's previously released album in their computer."

35. The SunnComm MediaMax support website (<http://tickets.sunncomm.com/selfhelp/>), also misleadingly states, "Please note that MediaMax was designed to manage and safeguard the copyrights of specified artists' CDs while giving you an enhanced visual and listening experience. It does not interfere with or impact any of the normal operations and/or functions of your computer." (Emphasis in the original.) As described above, this statement is false.

36. Sony BMG fails to disclose, prior to purchase, that users running the MediaMax CDs on Windows-based computers could have files downloaded and stored on their computers without



their consent, and fails to disclose that the software would transmit information about user, including monitoring whenever users listen to the CDs, without notification to or consent of the users.

**SUNNCOMM'S MEDIAMAX'S FIRST UNINSTALLER CREATED A GREATER SECURITY RISK AND VIOLATED USER'S PRIVACY**

37. Upon request, SunnComm will provide an internet-based uninstaller for the MediaMax software. Until approximately November 21, 2005, SunnComm provided this uninstaller only after repeated requests that require the disclosure of personally identifying information.

38. The uninstaller provided by SunnComm until November 21, 2005, suffered from a design flaw. When a user visited the SunnComm uninstaller web page, the user was prompted to accept a small software component – an ActiveX control called “AxWebRemoveCtrl” created by SunnComm.

39. This ActiveX control was designed so that any web page can ask it to download and execute code from an arbitrary website location or URL.

40. If a user visits a malicious website, the site can use the flawed ActiveX control to download, install, and run malicious or dangerous software code on the user's computer without the user's knowledge or consent. Such code could severely damage a user's computer, including but not limited to erasing a user's hard disk.

41. The uninstaller available until November 21, 2005, failed to remove the vulnerable ActiveX control from the user's computer following completion of the uninstallation process.

42. On or about November 21, 2005, SunnComm issued a patch to address the security flaw in the prior uninstallation.

43. On or about November 21, 2005, the SunnComm Sony BMG customer care website provided a link to a web page that allows a user to access an internet-based uninstaller. The uninstaller uses an ActiveX control.

44. Sony BMG fails to disclose the security risks created by the MediaMax software and the potential harm to a user's computer.

**THE XCP SOFTWARE IS UNDISCLOSED SPYWARE  
AND COMPROMISES SECURITY**

45. Sony BMG's actions and omissions with respect to the MediaMax software are part of a pattern of corporate failure to investigate, address, and disclose the security and privacy risks associated with its inclusion of so-called DRM software on music CDs.

46. Similar and, in some respects, more serious risks have been identified in CDs loaded with another Sony BMG technology, Extended Copy Protection, or XCP. As with the MediaMax software independent researchers and consumer advocates disclosed these risks, not Sony BMG.

47. The software on a Sony BMG XCP CD is designed to operate only on Windows-based computers that run Windows 98SE/NT/2000/XP.

48. When a computer user places the Sony BMG XCP CD in a Windows based computer, the software is designed such that the user is first required to agree to a EULA. According to the EULA, a user cannot utilize the audio files or the digital content of the CD on the computer unless the user agrees to the EULA, making it a contract of adhesion. Attached hereto as Exhibit B and incorporated herein by reference is a true and correct copy of the XCP EULA.

49. The user is told that the XCP software automatically installs player software into the user's computer that will allow the user to play, save and copy the audio files on the CD.

50. According to the EULA, the software automatically installed by the XCP CD is intended to protect the "digital content" embodied on the XCP CD. Digital content appears to include audio files converted into digital music files as well as unspecified other "already existing digital content."

51. While the user is led to believe that Sony BMG's XCP software is installing the player software into the user's computer, it is actually installing software as a "rootkit" into the user's hard drive. The Sony BMG XCP software also installs a CD drive filter driver that intercepts calls to the computer's CD drive.

52. A rootkit is used to hide login, processes, files, and logs and may include software to intercept data from terminals, network connections, CD drives, and keyboards. A rootkit is invisible to the operating system and antivirus and security software, and is frequently used by unauthorized third-parties, after gaining access to a computer system, to hide their activities.

53. Specifically, the Sony BMG rootkit is a system filter driver which intercepts all calls for process, directory or registry listings, and then modifies what information is visible to the operating system in order to hide every file, process, or registry key beginning with the characters "\$sys\$."

54. Unbeknownst to users, once the rootkit is installed by the software on a Sony BMG CD, the rootkit degrades the performance of the user's computer.

55. In a November 1, 2005, eweek.com article by Paul Roberts, computer security analyst Mark Russinovich states that the rootkit files interact with the Windows operating system at a very low level and fail to account for certain conditions that could cause the files to overwrite areas of memory, crashing applications that use that memory, or even crashing the entire Windows operating system. On information and belief, this article correctly illustrates some of the damage the rootkit could do.

56. The rootkit causes significant and cumulative injury to a user's computer. Specifically, the rootkit can interfere with the computer's CD drive, file copying software, and media players. The rootkit also uses up system memory that would otherwise be available.

57. On or around November 4, 2005, on National Public Radio's "Morning Edition" program, Thomas Hesse, President of Sony BMG's global digital business division, when asked about the XCP controversy, responded "Most people, I think, don't even know what a rootkit is, so why should they care about it?" In the same program, Mr. Hesse also denied that Sony BMG's software communicated with Sony BMG, saying "No information ever gets gathered about the users' behavior, no information ever gets communicated back to the user, this is purely about restricting the ability to burn MP3 files in an unprotected manner."

58. In a November 29, 2005, Business Week article, by Steve Hamm, the article states that F-Secure, a Finland-based antivirus company, notified Sony BMG on October 4, 2005, with problems associated the XCP rootkit. The article further states that F-Secure informed Sony BMG that the rootkit "was a major security risk."

59. Sony BMG failed to disclose that the XCP software, in the rootkit, automatically connects the user's computer via the internet to a server owned or operated by Sony BMG or its affiliates, without the user's consent. Once a user's computer is connected to the Sony BMG website, the software sends an identification code associated with each XCP CD that is played on that computer to the Sony BMG website. The Sony BMG server then automatically checks for updates to the album art and lyrics for that album. This process uses the bandwidth that would otherwise be available to the user's computer for other tasks.

60. As with the MediaMax software, this network connection provides Sony BMG with the ability to record each time a CD with XCP software is played and the IP address of the computer playing it, without receiving permission from the computer user. As discussed above, no two IP addresses are alike and IP addresses provide the means to determine information about the person who used the particular IP address. Sony BMG does not disclose the possibility of this use of DRM

software in its packaging, the installation process, or its EULA. Instead the EULA states, “the SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.”

61. The Anti-Spyware Coalition and computer security firm Computer Associates identify Sony BMG’s XCP software as “Spyware.”

62. Sony BMG’s XCP software meets the ASC standards for spyware because the rootkit is placed on the computer without the user’s consent and it changes the user’s system security because the rootkit makes the user’s computer more vulnerable to other types of malware.

63. Computer Associates has classified the Sony BMG XCP rootkit as a form of spyware known as a “Trojan,” noting that the “XCP.Sony.Rootkit modifies you[r] operating system at a low level, represents a large threat to both corporate and consumer users system integrity.” Computer Associates also has noted that “[t]he Rootkit functionality hides files and enables hackers and other spyware to hide files with impunity.”

64. Computer Associates has categorized Sony BMG’s “Media Player” as spyware, noting that “When launched from the CD, Music Player sends information back to Sony BMG, indicating which album is being played.”

65. Once the rootkit is on a user’s computer, it creates an undisclosed risk of security breach to that computer because other malicious software, such as computer viruses, worms, and spyware that enter the computer could exploit the software concealed by the rootkit.

66. Malicious software coders have discovered that they can effectively render their programs invisible by using names for computer files similar to ones cloaked by the Sony BMG technology. On information and belief, several malicious programs that exploit the XCP technology’s ability to avoid detection have already been distributed over the internet. Further, as

stated above, XCP software transmits information about the user's computer, IP address, and listening habits.

67. On or around November 12, 2005, Microsoft, Inc., the maker of the Windows operating system stated that "Rootkits have a clearly negative impact on not only the security, but also the reliability and performance of their systems" and Microsoft's Anti-Malware Engineering Team informed consumers that "in order to help protect our customers we will add a detection and removal signature for the rootkit component of the XCP software."

68. The nature of a rootkit makes it extremely difficult for a computer user to remove, often leaving reformatting the entire hard drive as the only solution. Reformatting a hard drive requires backing up all data on the hard drive, as reformatting a hard drive deletes all data on the hard drive. The user is then required to re-install the operating system and all applicable programs and drivers. This process can take many hours and is beyond the technical capabilities of many users. Sony BMG's XCP CD EULA and install process do not disclose nor does the CDs' software prompt users with information about the rootkit or the need to reformat the hard drive in order to remove it.

69. In response to the public outcry about the deceptive nature of Sony BMG XCP CDs, Sony BMG made available a software patch. The patch was only available on the Sony BMG support site (<http://cp.sonybmg.com/xcp/english/home.html>). The patch does not remove the software or allow the user to remove the software. The software patch merely makes the software visible to system tools and antivirus software while installing an additional 3.5 MB of updated versions of the software into the user's computer. Additionally, the patch contains a design flaw that could cause a computer to crash as it is installed.

70. Sony BMG failed to disclose that if a user attempts to disable the software it will likely disable the audio CD driver on the computer, rendering the user's CD drive inoperable. If the rootkit is removed manually, the Sony BMG software's changes to the user's system will render the user's CD drive non-functional. According to computer security firm Computer Associates, "[r]econfiguring the CD-ROM driver to a functioning state will be beyond the ability of the average home user."

71. Computer Associates categorized Sony BMG's patch as a "Trojan" and noted that the Sony BMG software, even when patched with Sony BMG's update, continues to "represent a threat to the user's control over their system . . . ."

72. The United States Computer Emergency Readiness Team (US-CERT), part of the Department of Homeland Security that is charged with the task of "protecting the nation's Internet infrastructure" by coordinating "defense against and responses to cyber attacks across the nation" has stated that the XCP rootkit "can pose a security threat" and that "one of the uninstallation options provided by Sony BMG also introduces vulnerabilities to a system."

73. Installation of a rootkit on a computer undermines the security of that computer.

74. Installation of a rootkit on a computer causes impairment to the integrity or availability of data, a program, a system or information.

75. The software installed by Sony BMG includes a set of computer instructions that are designed to modify, damage, destroy, record, and/or transmit information within a computer, computer system, or computer network without the intent or permission of the owner of the information.

**SONY BMG'S FIRST XCP UNINSTALLER CREATED A GREATER  
SECURITY RISK AND VIOLATED USER'S PRIVACY**

76. The only known way for typical users to safely uninstall the XCP software is to obtain an uninstaller from Sony BMG.

77. Until approximately November 15, 2005, in order to obtain an uninstaller from Sony BMG, a user was required to navigate an extensive request process and disclose personal information to Sony BMG. First, the user was required to go to the Sony BMG support website and fill out a form stating: a country where the CD was purchased; the artist's name; the album title; the store name; and the user's e-mail address. After submitting the form, the user was directed to a website which states that the user that the user will receive an e-mail with a "Case ID." Next, the user received an e-mail that directed the user to install the patch and then visit another website if the user still wanted to uninstall the DRM software.

78. This further website, available until November 15, 2005, required the user to install ActiveX control software. The user was then required to enter the Case ID and fill in the reasons for the request. Once the user submitted this information, the user received an email that notified the user that a customer service representative would email the uninstall instructions to the user within a business day. The user then received an e-mail with a link to a confidentiality notice, which had to be accepted before software could be uninstalled.

79. Sony BMG states that the information collected by Sony BMG before providing the uninstaller is subject to its Privacy Policy, <http://www.sonybmg.com/privacypolicy.html>. The Sony BMG Privacy Policy states, *inter alia*, that Sony BMG "may share the information we collect from you with our affiliates or send you e-mail promotions and special offers from reputable third parties in whose products and services we think you may have an interest. We may also share your information with reputable third-parties who may contact you directly."



80. On information and belief, if the Sony BMG software was uninstalled using the uninstaller available until November 15, 2005, the user was no longer able to receive the full use and value of the XCP CD on his or her computer. Therefore, Sony BMG required the user to either accept the malicious software or lose the full use and value of the XCP CD. Sony BMG did not disclose this fact to users prior to purchase.

81. The Sony BMG software could not be uninstalled if the user proceeded to the link from a different computer than the one on which the user installed the ActiveX control software. If the user is not at that same computer he or she will receive an error message. The uninstall link contains the Case ID in the address, so when the user proceeded to the uninstall link, the ActiveX control software sent a Sony BMG website an encrypted block of data. This encrypted data was a signature that is tied to the hardware configuration of the user's computer.

82. On information and belief, the ActiveX uninstaller left behind numerous software methods that can be exploited by others.

83. The ActiveX uninstaller also exposed a user's computer to additional risks by enabling malicious third parties to download and install over the internet because the ActiveX uninstaller failed to restrict such access only to Sony BMG or First4Internet. Such malicious code could severely damage a user's computer, including but not limited to erasing a user's hard disk.

84. Sony BMG did not cause the ActiveX control to be removed from user's computers following completion of the installation process.

85. On information and belief, the uninstallation could cause further damage to users' computers, including but not limited to, causing a user's Windows operating system to crash.

86. On or around November 15, 2005, Sony BMG posted the following message on its website: "We currently are working on a new tool to uninstall First4Internet XCP software. In the

meantime, we have temporarily suspended distribution of the existing uninstall tool for this software. We encourage you to return to this site over the next few days. Thank you for your patience and understanding.” Sony BMG failed to disclose the problems associated with the old uninstaller.

87. On or about November 28, 2005, Sony provided individuals who had requested the first uninstaller for the XCP software information on how to uninstall the first uninstaller. Yet, as of the filing of this complaint, no new uninstaller has been made available.

88. On information and belief, the software released by Sony BMG to resolve the flaws in the XCP software can cause further damage to users’ computers.

**SONY BMG HAS MADE MATERIAL  
MISREPRESENTATIONS AND OMISSIONS REGARDING  
THE SOFTWARE IT HAS INCLUDED ON MUSIC CDS**

89. In addition to the material misrepresentations and omissions set forth above, Sony BMG has made numerous additional misrepresentations and omissions of material facts.

90. On information and belief, the XCP and MediaMax CDs are disseminated to the public with identical EULAs.

91. Sony BMG’s EULAs state that the MediaMax and XCP software installed on a user’s computer will not be used to collect any personal information. As set forth above, this is untrue.

92. Sony BMG’s EULAs state that the MediaMax and XCP software will remain on the user’s computer until it is removed or deleted. Neither the MediaMax nor the XCP software allows a user to use the standard “add/remove program” function on the Windows operating system to remove the program. Sony BMG’s MediaMax and XCP CDs and its software fail to provide information about how to remove the program or even how to contact Sony BMG to resolve any problems with the program.

93. The EULAs disclose that the MediaMax and XCP drivers try to “protect the audio files embodied on the CD.” However, the drivers also attempt to restrict access to any other CD that

uses MediaMax or XCP technology. Therefore, users need only agree to installation on one album for the software to affect users' ability to use many other titles.

94. Sony BMG uses its website to advertise and promote the sale of its CDs to the public. On its website, until November 15, 2005, Sony BMG falsely denied that its software is spyware and that it posed a security risk. Sony BMG also made the false claim that the software does not collect any personal information nor is it designed to be intrusive to the user's computer system.

95. On or around November 8, 2005, Sony BMG publicly and falsely stated, on the <http://cp.sonybmg.com/xcp> website, that the XCP software's rootkit "component is not malicious and does not compromise security."

96. The above website directs users to another site, <http://updates.xcp-aurora.com/>, where users can obtain a software update to remove the rootkit component of the XCP technology. As of the filing of this complaint, the website states that the cloaking component "is not malicious and does not compromise security."

97. On its support website (<http://cp.sonybmg.com/xcp/english/home.html>), Sony BMG stated, until approximately November 16, 2005, that its XCP software simply acts to prevent unlimited copying and ripping from discs featuring the technology. Sony BMG created the false impression that the only effect of software included on CDs would be to restrict the ability to create copies of CDs or the quantity of CDs that a user can copy.

98. On or around November 16, 2005, Sony BMG announced, on the <http://cp.sonybmg.com/xcp> website, that it shared the security concerns of consumers regarding the XCP discs, and offered to exchange new CDs for CDs with XCP software. Sony BMG did not indicate the nature or extent of the security risks associated with the XCP software. Sony BMG also affirmed that the XCP software was not a "monitoring technology."

99. Sony BMG uses its website to advertise and promote the sale of its CDs to the public. On its website, until November 15, 2005, Sony BMG falsely denied that its software is spyware and that it posed a security risk. Sony BMG also made the false claim that the software does not collect any personal information nor is it designed to be intrusive to the user's computer system. Sony BMG has failed to make efforts to publicize the flaws in its XCP software and uninstaller, apart from statements on its websites and statements to the press. Therefore, many XCP CD purchasers are unaware of the security and other risks caused by the software.

100. Sony BMG has failed to publicly disclose or address the risks associated with MediaMax software and its uninstaller. Therefore, many MediaMax CD purchasers are unaware of the security and other risks caused by the software.

101. As set forth above, the MediaMax CD EULA and the SunnComm Sony BMG support website misleadingly represent that the software will not be used to collect personal information about the user without his or her permission.

102. As set forth above, the MediaMax CD EULA and the SunnComm Sony BMG support website falsely represent that MediaMax software will not be installed if the user declines the EULA.

103. The MediaMax EULA fails to disclose other important details about what the uninstaller does, including but not limited to the security risks it poses to users' computers.

104. According to Sony BMG, the purpose of the software is to restrict the ability to create copies of CDs or the quantity of CDs that a user can copy. The MediaMax and XCP software goes far beyond copyright protection, however. For example, the software makes it extremely difficult for a consumer with a PC to transfer their music to an Apple Corporation-manufactured iPod but easy to transfer to other portable digital music players, such as those sold by Sony. Sony BMG asks

iPod owners who have XCP CDs to complain to Apple about the inability to play Sony BMG protected music on an iPod. The MediaMax support website also asks iPod owners who have MediaMax CDs to complain to Apple about the inability to play Sony BMG protected music on an iPod. To the extent that this is intended to advantage Sony BMG or its partners in the portable digital music player market, this advantage comes at the expense of consumers.

**SONY BMG'S EULAS CONTAIN NUMEROUS UNCONSCIONABLE  
AND UNREASONABLE PROVISIONS**

105. The XCP and MediaMax CDs are disseminated with identical EULAs.

106. Sony BMG utilized unconscionable provisions in the EULA that accompanies the XCP and MediaMax CDs. These provisions include:

- (a) Restrictions on the user's ability to use the digital content on the CD in the event that that consumer chose to leave the United States;
- (b) Restrictions on resale and transfer of the digital content on the CDs;
- (c) Restrictions on user's ability to use the digital content on the CDs at work;
- (d) Restrictions on user's ability to use and retain lawfully-made copies of the digital content on the CDs in the event that the original CD is stolen or lost;
- (e) Restrictions on user's ability to use the digital content on the CDs following a bankruptcy;
- (f) Conditioning the user's continued use of the digital content on the CDs on acceptance of all Sony BMG software updates;
- (g) A purported \$5.00 limit on Sony BMG's entire liability to the purchaser of the CDs;
- (h) Restrictions on user's ability to examine and test his or her computer to understand and attempt to prevent the damage cause by the rootkit;

(i) A reservation of rights by Sony BMG to use technological “self-help” measures against the computers of users who desire to make use of the digital content on the CDs “at any time, without notice to [the user];” and

(j) A disclaimer of all warranties, including implied warranties of merchantability, satisfactory quality, noninfringement, and fitness for any particular purpose.

#### **SONY BMG HAS CAUSED DAMAGE TO CONSUMERS AND THE PUBLIC**

107. On or around November 16, 2005, Sony BMG issued a public statement announcing that it would recall XCP CDs and allow customers to exchange the XCP CDs for CDs that would not contain any DRM.

108. A November 30, 2005, press release by the Office of the Massachusetts Attorney General states that some of the XCP CDs are still available in stores.

109. As of the filing of this Complaint, Sony BMG has not offered to refund the purchase price of the XCP CDs.

110. As of the filing of this complaint, Sony BMG has not offered to recall, replace, or refund the purchase price of MediaMax CDs.

111. As of the filing of this complaint, Sony BMG has not compensated or offered to compensate consumers for the damage it has caused to their computers.

112. Through the actions set forth above, Sony BMG damaged its customers, including Plaintiffs and Class members, to an extent to be determined at trial, caused them actual injury, and caused them to lose money and property.

113. Investigation into the scope and extent of the effects and damage caused by Sony BMG’s software is ongoing. Plaintiffs, on behalf of themselves and the Class, reserve the right to amend these allegations as new information is discovered.

## **CLASS ACTION ALLEGATIONS**

114. Pursuant to Federal Rules of Civil Procedure 23 (a) and (b), Plaintiffs Tom Ricciuti, Yvonne Ricciuti, and Mary Schumacher bring this action on behalf of themselves and a Class of similarly situated persons defined as:

All persons or entities who purchased an audio compact disc distributed by Sony BMG that XCP or SunnComm software and every person or entity who suffered damage or loss as a result of Defendants' violation of the Computer Fraud and Abuse Act ("CFAA").

Excluded from the Class are Defendants, any entity in which any Defendant has a controlling interest, the officers, directors, and employees of Defendants, and the legal representatives, heirs, successors, and assigns of Defendants.

115. This action is brought as a class action and may properly be so maintained; pursuant to the provisions of the Federal Rules of Civil Procedure 23.

### **Numerosity**

116. Members of the Class are so numerous that their individual joinder is impracticable. The precise numbers of members of the Class and their addresses are unknown to the Plaintiffs. Plaintiffs estimate that the Class consists of millions of members. The precise number of persons in the Class and their identities and addresses may be ascertained from Defendants' records. Members of the Class may be notified of the pendency of this action by mail, supplemented (if deemed necessary or appropriate by the Court) by published notice.

### **Commonality**

117. Common questions of fact and law exist as to all members of the Class. These questions predominate over the questions affecting only individual members of the Class. These common legal and factual questions include:

- (a) Whether Sony BMG engaged in deceptive business practice in connection with the sale and advertising of the XCP and MediaMax CDs;
- (b) Whether some or all of the terms of the EULA are unconscionable;
- (c) Whether the MediaMax software installs on consumers' computers without authorization;
- (d) Whether the MediaMax and XCP software exceed the authorizations given by consumers;
- (e) Whether the MediaMax and XCP software are in violation of the Consumer Fraud Abuse Act, 18 U.S.C. §1030; and
- (f) Whether the communications by the MediaMax and XCP software over the internet are disclosed and necessary uses of the copy protection software.

**Typicality**

118. Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs purchased a CD distributed by Defendants, and Plaintiffs were required to agree to the EULA, which did not notify Plaintiffs of the true nature of the software that the CD was to install on Plaintiffs' computers.

**Adequacy**

119. Plaintiffs are adequate representatives of the Class because of their interests do not conflict with the interests of the members of the Class they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation and Plaintiffs intends to prosecute this action vigorously. The interests of the member of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

120. This suit may also be maintained as a class action because Plaintiffs and the Class seek declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(b)(2) as



Defendants acted on grounds generally applicable to Plaintiffs and the Class, thereby making declaratory and/or injunctive relief proper.

121. This suit may also be maintained as a class action under Federal Rules of Civil Procedure 23(b)(3) because a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual Class member may be relatively small, especially given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. Furthermore, it would be virtually impossible for the Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Moreover, even if Class members themselves could afford such individual litigation, the court system could not. Individual litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the complex legal issue of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of a single adjudication, economy of scale and comprehensive supervision by a single court.

122. In addition, this suit may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3), because:

(a) The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for Defendants; or

(b) The prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(c) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole.

### **FIRST CAUSE OF ACTION**

#### **(Violation of the Computer Fraud and Abuse Act, 18 U.S.C. §1030)**

123. Plaintiffs incorporate by reference the allegations in all proceeding paragraphs of this complaint.

124. As defined by 18 U.S.C. §1030, the Computer Fraud and Abuse Act (“CFAA”), the computers used by Plaintiffs and Class members are “protected computers.”

125. By engaging in the above-described acts and practices, Sony BMG (i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; and/or (iii) intentionally accesses protected computers, and as a result of such conduct, causes damage, without authorization, in violation of the Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(5)(A).

126. By engaging in the above-described acts and practices, Sony BMG “intentionally accesse[d] a computer without authorization or exceeds authorized access, and thereby obtain[ed] . . . information from any protected computer if the conduct involved an interstate or foreign communication” in violation of the Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(2)(C).

127. By engaging in the above-described acts and practices, Sony BMG “knowingly and with intent to defraud, accesse[d] a protected computer without authorization, or exceed[ed]

authorized access, and by means of such conduct further[ed] the intended fraud” and obtained information “of value,” in violation of the Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(4).

128. By engaging in the above-described acts and practices, Sony BMG caused and causes (i) loss to 1 or more persons during any 1-year period aggregating at least \$5,000 in value; (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals; (iii) a threat to public health or safety; or (iv) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security; in violation of the Computer Fraud and Abuse Act, 18 U.S.C. 1030(a)(5)(B).

129. Plaintiffs and the Class suffered and will continue to suffer damages, and there continues to be a threat to public health or safety; or damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security, as a result of Sony BMG’s computer fraud and abuse. Plaintiffs, on behalf of themselves and on behalf of the Class seek compensatory damages, injunctive relief and other equitable relief as specified below in an amount to be determined at trial.

## **SECOND CAUSE OF ACTION**

### **(Violation of New York General Business Law §349, *et seq.* – Deceptive Acts and Practices)**

130. Plaintiffs incorporate by reference the allegations in all proceeding paragraphs of this complaint.

131. Defendants’ acts and practices, as described above, occurred in the conduct of business, trade, or commerce as defined in N.Y. Gen. Bus. Law § 349, *et seq.*

132. Defendants’ acts and practices, as described above, were and continue to be deceptive to consumers.

133. Specifically, Sony marketed and sold to the public the XCP and MediaMax CDs in defective condition and deceptively failed to disclose their defects as described above; advertised its XCP and MediaMax CDs with intent not to sell them as advertised; represented that the purchase and/or use of its XCP and MediaMax CDs confers or involves rights, remedies, or obligations which they do not have or involve, or which are prohibited by law; inserted unconscionable provisions into the EULA that accompanies the XCP and MediaMax CDs infected with the XCP and MediaMax software; took control and modified the settings of user's computers, collected personally identifiable information about users and attempted to prevent users from blocking or disabling the XCP and MediaMax software; and failed to ensure that the XCP and MediaMax software was distributed with required copyright notices.

134. The general public, including members of the Class, routinely rely on this type of information in making purchase decisions. If Sony BMG disclosed this material information, Plaintiffs and other class members would not have purchased the XCP and MediaMax CDs.

135. Sony BMG's policies and practices are unlawful, unethical, oppressive, fraudulent, and malicious. The gravity of the harm to all consumers from Sony BMG's policies and practices far outweighs any purported utility of those policies and practices.

136. Plaintiffs and Class members suffered injury in fact and lost money or property as a result of Defendants violations of N.Y. Gen. Bus. Law §349, *et seq.*

137. The unlawful, unfair and deceptive business practices conducted by Defendants deceived members of the Class and the general public.

138. Plaintiff and the Class are entitled to all applicable damages, equitable relief and attorneys' fees pursuant to N.Y. Gen. Bus. Law §349(h).

### **THIRD CAUSE OF ACTION**

#### **(Violation of New York General Business Law §350, *et seq.* – False Advertising)**

139. Plaintiff incorporates by reference the allegations in all proceeding paragraphs of this complaint.

140. Defendants engaged in deceptive and misleading advertisements through its advertising practices, promotional materials, packaging, and public statements.

141. Defendants' advertising practices, promotional materials, packaging, and public statements were made in the conduct of business, trade or commerce as defined by NY Gen. Bus. Law §350, *et seq.*

142. Defendants made untrue and materially misleading statements and omitted material facts about the XCP and MediaMax CDs. Defendants' deceptive and misleading advertising practices deceived Plaintiff and members of the class along with general consumer public.

143. Defendants' deceptive and misleading advertising practices caused harm to Plaintiff and Class members. Defendants' continuing practice of distributing MediaMax CDs will continue to harm the Class. Defendants' deceptive and misleading advertising practices were and are directed toward the public and such acts have caused and continue to harm the public interest.

144. Plaintiff is entitled to all applicable damages and attorneys' fees pursuant to N.Y. Gen. Bus. Law §350-e.

### **FOURTH CAUSE OF ACTION**

#### **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

145. Plaintiffs incorporate by reference the allegations in all proceeding paragraphs of this complaint.

146. New York law implies a covenant of good faith and fair dealing in every contract.

147. By engaging in the above described acts and practices, Sony BMG violated the implied covenant of good faith and fair dealing in the consumers' purchase of the XCP and MediaMax CDs.

148. By engaging in the above described acts and practices, Sony BMG caused Plaintiff and the Class to suffer damages in an amount to be determined at trial.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- A. For compensatory damages in an amount to be proven at trial.
- B. For restitution and disgorgement of profits realized as a result of the unlawful conduct of defendants.
- C. For any treble and/or punitive damages to the extent permitted by law.
- D. For declaratory relief, including but not limited to, i) declaring the distribution of CDs with MediaMax and XCP software to be illegal under CFAA and ii) declaring the EULAs to be unconscionable, misleading and void.
- E. For further equitable relief, including but not limited to, requiring Sony BMG to:
  - (i) Notify consumers, through widespread publicity, of the potential security and other risks associated with the XCP and MediaMax technology, to allow consumers to make informed decisions regarding their use of those CDs. The notification process should include issuing a public statement describing the risks associated with both XCP and MediaMax software and listing every Sony BMG CD, DVD or other product that contains MediaMax software. In addition, Sony BMG must use the banner communication system incorporated in its software to advise consumers that refunds and uninstall software is available. The notifications must be reasonably calculated to reach all consumers who have purchased the products.

(ii) Cooperate fully with any interested manufacturer of anti-virus, anti-spyware, or similar computer security tools, and with security researchers, to facilitate the identification and complete removal of both XCP and MediaMax software from the computers of those infected. Among other actions, Sony BMG should publicly waive any claims it may have against such vendors or researchers under the EULA, the Digital Millennium Copyright Act (DMCA), and any similar laws.

(iii) Refund the purchase price of the CDs containing XCP technology for those consumers who prefer a refund to a replacement CD.

(iv) Refund the purchase price of the CDs containing MediaMax technology or, at the consumer's election, provide a replacement CD that does not contain the MediaMax technology. For those consumers who choose to retain CDs containing the MediaMax technology, develop and make widely available a software update that will allow consumers to easily uninstall the technology without losing the ability to play the CD on their computers, without causing further damage to their computers, and without revealing any personally identifying information.

(v) To avoid future abuses, prior to releasing any future product containing technology with similar functions, thoroughly test the software to determine the existence of any security risks or other possible damages the technology might cause to any user's computer and certify in a statement included in the packaging of every CD containing the technology that the product does not contain any concealed software such as the XCP rootkit, does not electronically communicate with Sony BMG or any other party nor initiate the download of any software update or other data without informed consent of the consumer immediately prior to each communication, can be uninstalled without any need to contact and/or disclose personal information to Sony BMG or its affiliates and

agents, does not present any security risks to any consumer's computer, and will not damage or reduce the functionality of the consumer's computer in any way.

- F. For the award to Plaintiffs of their attorneys' fees and other costs of suit.
- G. For such other and further relief as the Court deems just and equitable.

DATED: December 2, 2005

LERACH COUGHLIN STOIA GELLER  
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**IMPORTANT-READ CAREFULLY:** This compact disc ("CD") product contains standard so-called "Red Book" compliant audio files that can be played on any standard CD player, including those contained in many personal home computer systems. As an added feature, this compact disc ("CD") product also enables you to convert these audio files into digital music files and/or may also contain other already existing digital content (such files and content, collectively, the "DIGITAL CONTENT"), any of which may be stored on the hard drive of a personal home computer system owned by you ("YOUR COMPUTER") and accessed via YOUR COMPUTER or certain approved, compatible portable devices owned by you (each, an "APPROVED PORTABLE DEVICE").

Before you can play the audio files on YOUR COMPUTER or create and/or transfer the DIGITAL CONTENT to YOUR COMPUTER, you will need to review and agree to be bound by an end user license agreement or "EULA", the terms and conditions of which are set forth below. Once you have read these terms and conditions, you will be asked whether or not you agree to be bound by them. Click "AGREE" if you agree to be bound. Click "DISAGREE" if you do not agree to be bound. Please keep in mind, however, that if you do not agree to be bound by these terms and conditions, you will not be able to utilize the audio files or the DIGITAL CONTENT on YOUR COMPUTER.

As soon as you have agreed to be bound by the terms and conditions of the EULA, this CD will automatically install a small proprietary software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is intended to protect the audio files embodied on the CD, and it may also facilitate your use of the DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER until removed or deleted. However, the SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.

Once the SOFTWARE has been installed on YOUR COMPUTER, a menu will then appear on the screen of YOUR COMPUTER, giving you the option of playing the audio files on YOUR COMPUTER, creating a copy of the DIGITAL CONTENT directly onto the hard drive of YOUR COMPUTER, or making a limited number of back-up copies of the CD onto other, recordable CDs. If you choose to create a copy of the DIGITAL CONTENT, the menu will then prompt you to select a file format for the DIGITAL CONTENT. Once you have selected a file format, a copy of the DIGITAL CONTENT will automatically be created in that file format and transferred onto the hard drive of YOUR COMPUTER, where you will be able to access it using an APPROVED MEDIA PLAYE (see below) or, at you election, transfer it from YOUR COMPUTER onto an APPROVED PORTABLE DEVICE.

In order to access the DIGITAL CONTENT on YOUR COMPUTER, you will need to have a copy of an approved media player software program that is capable of playing the DIGITAL CONTENT in the file format you selected (each such approved media player, an "APPROVED MEDIA PLAYER") on YOUR COMPUTER. You may already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER. If you do, you will be able to play the DIGITAL CONTENT on YOUR COMPUTER without doing anything further. This CD may also contain an APPROVED MEDIA PLAYER for the file format you selected. If it does, the menu that appears on the screen of YOUR COMPUTER will prompt you on how to transfer a copy of that APPROVED MEDIA PLAYER onto YOUR COMPUTER. To the extent you utilize an APPROVED MEDIA PLAYER

contained on this CD, your use of such APPROVED MEDIA PLAYER may be subject, in each instance, to separate terms and conditions provided by the owner of the APPROVED MEDIA PLAYER concerned. If you do not already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER, and if this CD does not contain a compatible APPROVED MEDIA PLAYER, then you will then need to secure a compatible APPROVED MEDIA PLAYER elsewhere (e.g., on an Internet website, where you can download one).

#### END-USER LICENSE AGREEMENT

This End-User License Agreement ("EULA") is a legal agreement between you and SONY BMG MUSIC ENTERTAINMENT ("SONY BMG"), a general partnership established under Delaware law. By clicking on the "AGREE" button below, you will indicate your acceptance of these terms and conditions, at which point this EULA will become a legally binding agreement between you and SONY BMG.

#### Article 1. GRANT OF LICENSE

1. Subject to your agreement to the terms and conditions set forth in this EULA, SONY BMG grants to you a personal, non-exclusive and non-transferable license, with no right to grant sublicenses, to:

- (a) install one (1) copy of SOFTWARE onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
- (b) install one (1) copy of any APPROVED MEDIA PLAYER(S) contained on this CD onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
- (c) use the SOFTWARE and any APPROVED MEDIA PLAYER(S) contained on this CD to access the DIGITAL CONTENT on YOUR COMPUTER or on an APPROVED PORTABLE DEVICE;

in each instance, solely for your own personal and private use and not for any other purpose (including, without limitation, any act of electronic or physical distribution, making available, performance or broadcast, or any act for profit or other commercial purpose) and in accordance with the terms and conditions set forth in this EULA.

2. The DIGITAL CONTENT and the SOFTWARE contained on this CD are sometimes referred to herein, collectively, as the "LICENSED MATERIALS".

#### Article 2. PRODUCT FEATURES

1. This CD contains technology that is designed to prevent users from making certain, unauthorized uses of the DIGITAL CONTENT, including, without limitation, the following:

- (1) making and storing more than one (1) copy of the DIGITAL CONTENT in each available file format on the hard drive of YOUR COMPUTER;
- (2) accessing the DIGITAL CONTENT on YOUR COMPUTER (once you have installed a copy of it on the hard drive of YOUR COMPUTER) using a media player that is not an APPROVED MEDIA PLAYER;
- (3) transferring copies of the DIGITAL CONTENT that reside on the hard drive of YOUR COMPUTER on to portable devices that are not APPROVED PORTABLE DEVICES;
- (4) burning more than three (3) copies of the DIGITAL CONTENT stored on YOUR COMPUTER (ATRAC OpenMG file format only) onto AtracCDs;
- (5) burning more than three (3) copies of the DIGITAL CONTENT onto recordable compact discs in the so-called "Red Book"-compliant audio file format; and
- (6) burning more than three (3) backup copies of this CD (using the

burning application provided on the CD) onto recordable CDs and burning or otherwise making additional copies from the resulting backup copies.

2. PLEASE NOTE: Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS may be subject to additional restrictions, under applicable copyright and other laws, that are not enforced or prescribed by any technology contained on this CD. The absence of any such technology designed to enforce these additional restrictions should in no way be viewed or interpreted as a waiver, on the part of SONY BMG or any other person or entity owning any rights in any of the LICENSED MATERIALS, of their respective rights to enforce any such additional restrictions regarding your use of the LICENSED MATERIALS. Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS shall, at all times, remain subject to any and all applicable laws governing the use of such materials, including, without limitation, any restrictions on your use prescribed therein.

3. All of your rights to enjoy the DIGITAL CONTENT, as described herein, shall be subject to your continued ownership of all rights in and to the physical CD on which such DIGITAL CONTENT is embodied; should you transfer your ownership rights in the physical CD on which such DIGITAL CONTENT is embodied (in whole or in part) to any other person (whether by sale, gift or otherwise), your rights in both the physical CD and such DIGITAL CONTENT shall terminate.

#### Article 3. RESTRICTIONS ON USE OF LICENSED MATERIALS

1. Except to the extent otherwise expressly permitted hereunder or otherwise by the owner of the relevant rights in or to the LICENSED MATERIALS concerned, and without limitation, the following restrictions shall apply to your use of the LICENSED MATERIALS:

(a) You may not copy or reproduce any portion of the LICENSED MATERIALS.

(b) You may not distribute, share through any information network, transfer, sell, lease or rent any of the LICENSED MATERIALS to any other person, in whole or in part.

(c) You may not change, alter, modify or create derivative works, enhancements, extensions or add-ons to any of the LICENSED MATERIALS.

(d) You may not decompile, reverse engineer or disassemble any of the LICENSED MATERIALS, in whole or in part.

(e) You may not export the LICENSED MATERIALS outside of the country where you reside. (This clause 1(e) of Article 3 shall not be applicable within the European Economic Area (EEA).)

(f) You will at all times comply with, and will not circumvent or attempt to circumvent, any of the restrictions on use set forth in this Article 3 or elsewhere in this EULA.

2. In the event that the owner of the LICENSED MATERIALS is a party other than SONY BMG (each, a "LICENSOR"), you agree that such LICENSOR shall be a third party beneficiary under this EULA and, as such, shall have the right to enforce the terms and conditions of this EULA that pertain directly to such LICENSOR'S rights in and to the LICENSED MATERIALS concerned as if such LICENSOR was a party to this EULA. The rights granted to a Licensor under this Article shall not be revoked.

3. SONY BMG and each LICENSOR reserve the right to use the SOFTWARE and/or any APPROVED MEDIA PLAYER to enforce their respective rights in and to the DIGITAL CONTENT, including any and all of the restrictions on use set forth in this Article 3, at any time, without notice to you.

#### Article 4. INTELLECTUAL PROPERTY RIGHTS

All title to, and intellectual property rights in, the LICENSED

MATERIALS and any related documents are and shall remain owned and/or controlled solely and exclusively by SONY BMG and/or its LICENSORS. SONY BMG and/or all respective LICENSORS reserve all rights in the LICENSED MATERIALS not specifically granted to you under this EULA.

**Article 5. EXCLUSION OF WARRANTIES**

YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT YOU ARE INSTALLING AND USING THE LICENSED MATERIALS AT YOUR OWN SOLE RISK. THE LICENSED MATERIALS ARE PROVIDED "AS IS" AND WITHOUT WARRANTY, TERM OR CONDITION OF ANY KIND, AND SONY BMG, ITS LICENSORS AND EACH OF THEIR LICENSEES, AFFILIATES AND AUTHORIZED REPRESENTATIVES (EACH, A "SONY BMG PARTY") EXPRESSLY DISCLAIM ALL WARRANTIES, TERMS OR CONDITIONS. EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, NON-INFRINGEMENT AND FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. NO ORAL, WRITTEN OR ELECTRONIC INFORMATION OR ADVICE GIVEN BY ANY SONY BMG PARTY SHALL CREATE ANY WARRANTY, TERM OR CONDITION WITH RESPECT TO THE LICENSED MATERIALS OR OTHERWISE. SHOULD THE LICENSED MATERIALS PROVE TO BE DEFECTIVE, YOU (AND NOT THE SONY BMG PARTY CONCERNED) AGREE TO ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIRS OR CORRECTIONS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, TERMS OR CONDITIONS IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY MANDATES LIABILITY, DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 6. LIMITATION OF LIABILITY**

NO SONY BMG PARTY SHALL BE LIABLE FOR ANY LOSS OR DAMAGE, EITHER DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR OTHERWISE, ARISING OUT OF THE BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, TERM OR CONDITION, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY MISREPRESENTATION, FAILURE OF ANY REMEDY TO ACHIEVE ITS ESSENTIAL PURPOSE OR ANY OTHER LEGAL THEORY ARISING OUT OF, OR RELATED TO, THIS EULA OR YOUR USE OF ANY OF THE LICENSED MATERIALS (SUCH DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF DATA, LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT, DOWN TIME AND USER'S TIME), EVEN IF THE SONY BMG PARTY CONCERNED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, THE ENTIRE LIABILITY OF THE SONY BMG PARTIES, COLLECTIVELY, UNDER THE PROVISIONS OF THIS EULA SHALL BE LIMITED TO FIVE US DOLLARS (US \$5.00). SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY REQUIRES LIABILITY DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 7. DAMAGES ARISING OUT OF YOUR ACTIONS**

You shall defend and hold the SONY BMG PARTIES harmless from and against any and all liabilities, damages, costs, expenses or losses arising out of your use of the LICENSED MATERIALS, your negligent or wrongful acts, your violation of any applicable laws or regulations, and/or your breach of any provision of this EULA.

**Article 8. UPDATES TO THE LICENSED MATERIALS**

The SONY BMG PARTIES may from time to time provide you with updates of the SOFTWARE in a manner that the SONY BMG PARTIES deem to be appropriate. All such updates shall be deemed to be part of the

SOFTWARE for all purposes hereunder. In the event that you fail to install an update, the SONY BMG PARTIES reserve the right to terminate the term of this EULA, along with your rights to use the LICENSED MATERIALS, immediately, without additional notice to you. The SONY BMG PARTIES shall not be liable for any loss or damage caused by reason of your failure to install any such update or your failure to do so in the manner instructed.

#### Article 9. EXPIRATION AND TERMINATION

1. The rights granted to you hereunder to use the DIGITAL CONTENT are conditioned upon your continued possession of, and your continued right under a license from SONY BMG to use, the original CD product that you purchased. In the event that you no longer possess or have the right under such license to use the original CD product, your rights hereunder to use the DIGITAL CONTENT shall expire immediately, without notice from SONY BMG.
2. Without prejudice to any other rights SONY BMG or any SONY BMG PARTY may have hereunder, the term of this EULA shall terminate immediately, without notice from SONY BMG, and all rights you may have hereunder to use the LICENSED MATERIALS shall be immediately revoked, in the event that you: (i) fail to comply with any provision of this EULA (ii) fail to install an update of the SOFTWARE that was previously provided to you by the SONY BMG PARTIES within the time specified, or (iii) file a voluntary petition or are subject to an involuntary petition under applicable bankruptcy laws, are declared insolvent, make an assignment for the benefit of creditors, or are served with a writ of attachment, writ of execution, garnishment or other legal process pertaining to any of your assets or property.
3. Upon the expiration or termination of this EULA, you shall immediately remove all of the LICENSED MATERIALS from your personal computer system and delete or destroy them, along with any related documentation (and any copies thereof) that you may have received or otherwise may possess.
4. Articles 4 (Intellectual Property Rights), 6 (Limitation of Liability), 7 (Damages Arising Out Of Your Actions), 9 (Expiration and Termination), 10 (Governing Law and Waiver of Trial By Jury), and 11 (General) shall survive and remain in full force and effect following the expiration or termination of this EULA.
5. To the extent relevant under applicable law, you and SONY BMG each agree, for the effectiveness of the termination clauses under this EULA, to waive any provisions, procedures and operation of any applicable law that might otherwise require judicial approval or a court order in order to effect the termination of this EULA.

#### Article 10. GOVERNING LAW AND WAIVER OF TRIAL BY JURY

1. THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS EULA SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW). THE NEW YORK COURTS (STATE AND FEDERAL), SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS IN NEW YORK COUNTY AND NOT ELSEWHERE. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS.
2. YOU HEREBY WAIVE ALL RIGHTS AND/OR ENTITLEMENT TO TRIAL BY JURY IN CONNECTION WITH ANY DISPUTE THAT ARISES OUT OF OR RELATES IN ANY WAY

TO THIS EULA OR THE SOFTWARE.

Article 11. GENERAL

If any provision of this EULA is subsequently held to be invalid or unenforceable by any court or other authority, such invalidity or unenforceability shall in no way affect the validity or enforceability of any other provision of this EULA. This EULA shall be binding upon the parties' authorized successors and assignees. Neither party's waiver of any breach or failure to enforce any of the provision of this EULA at any time shall in any way affect, limit or waive such party's right there after to enforce and compel strict compliance with every other provision. No modification of this EULA shall be effective unless it is set forth in a writing signed by SONY BMG.

**IMPORTANT-READ CAREFULLY:** This compact disc ("CD") product contains standard so-called "Red Book"-compliant audio files that can be played on any standard CD player, including those contained in many personal home computer systems. As an added feature, this compact disc ("CD") product also enables you to convert these audio files into digital music files and/or may also contain other already existing digital content (such files and content, collectively, the "DIGITAL CONTENT"), any of which may be stored on the hard drive of a personal home computer system owned by you ("YOUR COMPUTER") and accessed via YOUR COMPUTER or certain approved, compatible portable devices owned by you (each, an "APPROVED PORTABLE DEVICE").

Before you can play the audio files on YOUR COMPUTER or create and/or transfer the DIGITAL CONTENT to YOUR COMPUTER, you will need to review and agree to be bound by an end user license agreement or "EULA", the terms and conditions of which are set forth below. Once you have read these terms and conditions, you will be asked whether or not you agree to be bound by them. Click "AGREE" if you agree to be bound. Click "DISAGREE" if you do not agree to be bound. Please keep in mind, however, that if you do not agree to be bound by these terms and conditions, you will not be able to utilize the audio files or the DIGITAL CONTENT on YOUR COMPUTER.

As soon as you have agreed to be bound by the terms and conditions of the EULA, this CD will automatically install a small proprietary software program (the "SOFTWARE") onto YOUR COMPUTER. The SOFTWARE is intended to protect the audio files embodied on the CD, and it may also facilitate your use of the DIGITAL CONTENT. Once installed, the SOFTWARE will reside on YOUR COMPUTER until removed or deleted. However, the SOFTWARE will not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.

Once the SOFTWARE has been installed on YOUR COMPUTER, a menu will then appear on the screen of YOUR COMPUTER, giving you the option of playing the audio files on YOUR COMPUTER, creating a copy of the DIGITAL CONTENT directly onto the hard drive of YOUR COMPUTER, or making a limited number of back-up copies of the CD onto other, recordable CDs. If you choose to create a copy of the DIGITAL CONTENT, the menu will then prompt you to select a file format for the DIGITAL CONTENT. Once you have selected a file format, a copy of the DIGITAL CONTENT will automatically be created in that file format and transferred onto the hard drive of YOUR COMPUTER, where you will be able to access it using an APPROVED MEDIA PLAYER (see below) or, at your election, transfer it from YOUR COMPUTER onto an APPROVED PORTABLE DEVICE.

In order to access the DIGITAL CONTENT on YOUR COMPUTER, you will need to have a copy of an approved media player software program that is capable of playing the DIGITAL CONTENT in the file format you selected (each such approved media player, an "APPROVED MEDIA PLAYER") on YOUR COMPUTER. You may already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER. If you do, you will be able to play the DIGITAL CONTENT on YOUR COMPUTER without doing anything further. This CD may also contain an APPROVED MEDIA PLAYER for the file format you selected. If it does, the menu that appears on the screen of YOUR COMPUTER will prompt you on how to transfer a copy of that APPROVED MEDIA PLAYER onto YOUR COMPUTER. To the extent you utilize an APPROVED MEDIA PLAYER contained on this CD, your use of such APPROVED MEDIA PLAYER may be subject, in each instance, to separate terms and conditions provided by the owner of the APPROVED MEDIA PLAYER concerned. If you do not already have a copy of an APPROVED MEDIA PLAYER on YOUR COMPUTER, and if this CD does not contain a compatible APPROVED MEDIA PLAYER, then you will then need to secure a compatible APPROVED MEDIA PLAYER elsewhere (e.g., on an Internet website, where you can download one).

#### END-USER LICENSE AGREEMENT

This End-User License Agreement ("EULA") is a legal agreement between you and SONY BMG MUSIC ENTERTAINMENT ("SONY BMG"), a general partnership established under Delaware law. By clicking on the "AGREE" button below, you will indicate your acceptance of these terms and conditions, at which point this EULA will become a legally binding agreement between you and SONY BMG.

##### Article 1. GRANT OF LICENSE

1. Subject to your agreement to the terms and conditions set forth in this EULA, SONY BMG grants to you a personal, non-exclusive and non-transferable license, with no right to grant sublicenses, to:
  - (a) install one (1) copy of SOFTWARE onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
  - (b) install one (1) copy of any APPROVED MEDIA PLAYER(S) contained on this CD onto the hard drive of YOUR COMPUTER, solely in machine-executable form;
  - (c) use the SOFTWARE and any APPROVED MEDIA PLAYER(S) contained on this CD to access the DIGITAL CONTENT on YOUR COMPUTER or on an APPROVED PORTABLE DEVICE;



- in each instance, solely for your own personal and private use and not for any other purpose (including, without limitation, any act of electronic or physical distribution, making available, performance or broadcast, or any act for profit or other commercial purpose) and in accordance with the terms and conditions set forth in this EULA.
2. The DIGITAL CONTENT and the SOFTWARE contained on this CD are sometimes referred to herein, collectively, as the "LICENSED MATERIALS".

#### Article 2. PRODUCT FEATURES

1. This CD contains technology that is designed to prevent users from making certain, unauthorized uses of the DIGITAL CONTENT, including, without limitation, the following:
  - (1) making and storing more than one (1) copy of the DIGITAL CONTENT in each available file format on the hard drive of YOUR COMPUTER;
  - (2) accessing the DIGITAL CONTENT on YOUR COMPUTER (once you have installed a copy of it on the hard drive of YOUR COMPUTER) using a media player that is not an APPROVED MEDIA PLAYER;
  - (3) transferring copies of the DIGITAL CONTENT that reside on the hard drive of YOUR COMPUTER on to portable devices that are not APPROVED PORTABLE DEVICES;
  - (4) burning more than three (3) copies of the DIGITAL CONTENT stored on YOUR COMPUTER (ATRAC OpenMG file format only) onto AtracCDs;
  - (5) burning more than three (3) copies of the DIGITAL CONTENT onto recordable compact discs in the so-called "Red Book"-compliant audio file format; and
  - (6) burning more than three (3) backup copies of this CD (using the burning application provided on the CD) onto recordable CDs and burning or otherwise making additional copies from the resulting backup copies.
2. PLEASE NOTE: Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS may be subject to additional restrictions, under applicable copyright and other laws, that are not enforced or prescribed by any technology contained on this CD. The absence of any such technology designed to enforce these additional restrictions should in no way be viewed or interpreted as a waiver, on the part of SONY BMG or any other person or entity owning any rights in any of the LICENSED MATERIALS, of their respective rights to enforce any such additional restrictions regarding your use of the LICENSED MATERIALS. Your use of the DIGITAL CONTENT and the other LICENSED MATERIALS shall, at all times, remain subject to any and all applicable laws governing the use of such materials, including, without limitation, any restrictions on your use prescribed therein.
3. All of your rights to enjoy the DIGITAL CONTENT, as described herein, shall be subject to your continued ownership of all rights in and to the physical CD on which such DIGITAL CONTENT is embodied; should you transfer your ownership rights in the physical CD on which such DIGITAL CONTENT is embodied (in whole or in part) to any other person (whether by sale, gift or otherwise), your rights in both the physical CD and such DIGITAL CONTENT shall terminate.

#### Article 3. RESTRICTIONS ON USE OF LICENSED MATERIALS

1. Except to the extent otherwise expressly permitted hereunder or otherwise by the owner of the relevant rights in or to the LICENSED MATERIALS concerned, and without limitation, the following restrictions shall apply to your use of the LICENSED MATERIALS:
  - (a) You may not copy or reproduce any portion of the LICENSED MATERIALS.
  - (b) You may not distribute, share through any information network, transfer, sell, lease or rent any of the LICENSED MATERIALS to any other person, in whole or in part.
  - (c) You may not change, alter, modify or create derivative works, enhancements, extensions or add-ons to any of the LICENSED MATERIALS.
  - (d) You may not decompile, reverse engineer or disassemble any of the LICENSED MATERIALS, in whole or in part.
  - (e) You may not export the LICENSED MATERIALS outside of the country where you reside. (This clause 1(e) of Article 3 shall not be applicable within the European Economic Area (EEA).)
  - (f) You will at all times comply with, and will not circumvent or attempt to circumvent, any of the restrictions on use set forth in this Article 3 or elsewhere in this EULA.
2. In the event that the owner of the LICENSED MATERIALS is a party other than SONY BMG (each, a "LICENSOR"), you agree that such LICENSOR shall be a third party beneficiary under this EULA and, as such, shall have the right to enforce the terms and conditions of this EULA that pertain directly to such LICENSOR'S rights in and to the LICENSED MATERIALS concerned as if such LICENSOR was a party to this EULA. The rights granted to a Licensor under this Article shall not be revoked.
3. SONY BMG and each LICENSOR reserve the right to use the SOFTWARE and/or any APPROVED MEDIA PLAYER to enforce their respective rights in and to the DIGITAL CONTENT, including any and all of the restrictions on use set forth in this Article 3, at any time, without notice to you.

**Article 4. INTELLECTUAL PROPERTY RIGHTS**

All title to, and intellectual property rights in, the LICENSED MATERIALS and any related documents are and shall remain owned and/or controlled solely and exclusively by SONY BMG and/or its LICENSORS. SONY BMG and/or all respective LICENSORS reserve all rights in the LICENSED MATERIALS not specifically granted to you under this EULA.

**Article 5. EXCLUSION OF WARRANTIES**

YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT YOU ARE INSTALLING AND USING THE LICENSED MATERIALS AT YOUR OWN SOLE RISK. THE LICENSED MATERIALS ARE PROVIDED "AS IS" AND WITHOUT WARRANTY, TERM OR CONDITION OF ANY KIND, AND SONY BMG, ITS LICENSORS AND EACH OF THEIR LICENSEES, AFFILIATES AND AUTHORIZED REPRESENTATIVES (EACH, A "SONY BMG PARTY") EXPRESSLY DISCLAIM ALL WARRANTIES, TERMS OR CONDITIONS. EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, NON-INFRINGEMENT AND FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. NO ORAL, WRITTEN OR ELECTRONIC INFORMATION OR ADVICE GIVEN BY ANY SONY BMG PARTY SHALL CREATE ANY WARRANTY, TERM OR CONDITION WITH RESPECT TO THE LICENSED MATERIALS OR OTHERWISE. SHOULD THE LICENSED MATERIALS PROVE TO BE DEFECTIVE, YOU (AND NOT THE SONY BMG PARTY CONCERNED) AGREE TO ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIRS OR CORRECTIONS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, TERMS OR CONDITIONS IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY MANDATES LIABILITY, DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 6. LIMITATION OF LIABILITY**

NO SONY BMG PARTY SHALL BE LIABLE FOR ANY LOSS OR DAMAGE, EITHER DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR OTHERWISE, ARISING OUT OF THE BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, TERM OR CONDITION, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY MISREPRESENTATION, FAILURE OF ANY REMEDY TO ACHIEVE ITS ESSENTIAL PURPOSE OR ANY OTHER LEGAL THEORY ARISING OUT OF, OR RELATED TO, THIS EULA OR YOUR USE OF ANY OF THE LICENSED MATERIALS (SUCH DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF DATA, LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT, DOWN TIME AND USER'S TIME), EVEN IF THE SONY BMG PARTY CONCERNED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, THE ENTIRE LIABILITY OF THE SONY BMG PARTIES, COLLECTIVELY, UNDER THE PROVISIONS OF THIS EULA SHALL BE LIMITED TO FIVE US DOLLARS (US \$5.00). SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CERTAIN INSTANCES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS ARTICLE WILL NOT APPLY ONLY WHEN AND TO THE EXTENT THAT APPLICABLE LAW SPECIFICALLY REQUIRES LIABILITY DESPITE THE FOREGOING DISCLAIMER, EXCLUSION AND LIMITATION.

**Article 7. DAMAGES ARISING OUT OF YOUR ACTIONS**

You shall defend and hold the SONY BMG PARTIES harmless from and against any and all liabilities, damages, costs, expenses or losses arising out of your use of the LICENSED MATERIALS, your negligent or wrongful acts, your violation of any applicable laws or regulations, and/or your breach of any provision of this EULA.

**Article 8. UPDATES TO THE LICENSED MATERIALS**

The SONY BMG PARTIES may from time to time provide you with updates of the SOFTWARE in a manner that the SONY BMG PARTIES deem to be appropriate. All such updates shall be deemed to be part of the SOFTWARE for all purposes hereunder. In the event that you fail to install an update, the SONY BMG PARTIES reserve the right to terminate the term of this EULA, along with your rights to use the LICENSED MATERIALS, immediately, without additional notice to you. The SONY BMG PARTIES shall not be liable for any loss or damage caused by reason of your failure to install any such update or your failure to do so in the manner instructed.

#### Article 9. EXPIRATION AND TERMINATION

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2. Without prejudice to any other rights SONY BMG or any SONY BMG PARTY may have hereunder, the term of this EULA shall terminate immediately, without notice from SONY BMG, and all rights you may have hereunder to use the LICENSED MATERIALS shall be immediately revoked, in the event that you: (i) fail to comply with any provision of this EULA, (ii) fail to install an update of the SOFTWARE that was previously provided to you by the SONY BMG PARTIES within the time specified, or (iii) file a voluntary petition or are subject to an involuntary petition under applicable bankruptcy laws, are declared insolvent, make an assignment for the benefit of creditors, or are served with a writ of attachment, writ of execution, garnishment or other legal process pertaining to any of your assets or property.
3. Upon the expiration or termination of this EULA, you shall immediately remove all of the LICENSED MATERIALS from your personal computer system and delete or destroy them, along with any related documentation (and any copies thereof) that you may have received or otherwise may possess.
4. Articles 4 (Intellectual Property Rights), 6 (Limitation of Liability), 7 (Damages Arising Out Of Your Actions), 9 (Expiration and Termination), 10 (Governing Law and Waiver of Trial By Jury), and 11 (General) shall survive and remain in full force and effect following the expiration or termination of this EULA.
5. To the extent relevant under applicable law, you and SONY BMG each agree, for the effectiveness of the termination clauses under this EULA, to waive any provisions, procedures and operation of any applicable law that might otherwise require judicial approval or a court order in order to effect the termination of this EULA.

#### Article 10. GOVERNING LAW AND WAIVER OF TRIAL BY JURY

1. THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS EULA SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW). THE NEW YORK COURTS (STATE AND FEDERAL), SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS IN NEW YORK COUNTY AND NOT ELSEWHERE. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS.
2. YOU HEREBY WAIVE ALL RIGHTS AND/OR ENTITLEMENT TO TRIAL BY JURY IN CONNECTION WITH ANY DISPUTE THAT ARISES OUT OF OR RELATES IN ANY WAY TO THIS EULA OR THE SOFTWARE.

#### Article 11. GENERAL

If any provision of this EULA is subsequently held to be invalid or unenforceable by any court or other authority, such invalidity or unenforceability shall in no way affect the validity or enforceability of any other provision of this EULA. This EULA shall be binding upon the parties' authorized successors and assignees. Neither party's waiver of any breach or failure to enforce any of the provision of this EULA at any time shall in any way affect, limit or waive such party's right thereafter to enforce and compel strict compliance with every other provision. No modification of this EULA shall be effective unless it is set forth in a writing signed by SONY BMG.