

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.

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.

**AFFIDAVIT OF DAVID A. FEWER
(Sworn September 18, 2006)**

I, David Fewer, of the City of Ottawa, Ontario, Canada, MAKE OATH AND

SAY:

1. I am a member of good standing of the Ontario Bar. I have personal knowledge of the matters stated in this affidavit. If called upon to do so, I am competent to testify to all matters set forth herein.
2. I am staff counsel for the Canadian Internet Policy and Public Interest Clinic (“CIPPIC”), a nonprofit technology law clinic operating out of the Faculty of Law at the University of Ottawa.
3. I am also a member of the Ontario Class contemplated by the terms of the proposed Settlement Agreement that is the subject of this fairness hearing (the “Canadian Settlement Agreement”).

4. Class action lawsuits in the United States against Sony BMG in respect of the same technology resulted in a settlement agreement, a copy of which is attached to the affidavit of Cindy Cohn as Exhibit 4 (the “U.S. Settlement Agreement”).
5. The U.S. Settlement Agreement includes several important consumer protections governing Sony BMG’s conduct with respect to use of “Content Protection Software” in the future, all of which have been deliberately and explicitly excluded from the Canadian Settlement Agreement.
6. The absence of these protections is purportedly explained by an affidavit sworn by Christine J. Prudham, Vice President, Legal and Business Affairs of Sony BMG Canada, attached as Exhibit “C” to the Canadian Settlement Agreement.
7. In Paragraph 5 to that affidavit, Ms. Prudham states that “To date, and to the best of my knowledge, information and belief, no Canadian government authority has commenced any inquiry into SONY BMG Canada concerning SONY BMG Canada's use of the Software.” She states a similar sentiment in paragraph 11 of the affidavit. Ms Prudham also suggests that consumer protections were agreed to by Sony BMG in response to U.S. regulatory actions based on “unique US legislation” and the consumer protections contained in the U.S. Settlement Agreement.
8. CIPPIC in the past considered filing complaints with Canadian regulatory authorities to address Sony BMG’s conduct. CIPPIC considered filing complaints with a number of authorities, including the Privacy Commissioner

of Canada, the Competition Bureau, **and provincial** trade practices authorities. However, in light of the relatively rapid conclusion of the **U.S. Settlement Agreement**, and the likelihood of Canadian class actions achieving the same results, it did not seem a wise investment of either CIPPIC's resources or of the resources of Canadian regulatory authorities when Sony BMG was apparently committing itself to improve its business practices via class action **settlements**.

9. Administrative review of Sony BMG's conduct remains a viable option for advocates seeking to address Sony BMG's business practices.
10. Sony BMG has now shown itself unwilling to provide Canadian consumers with the same assurances of proper conduct. Accordingly, the triggering of regulatory action may now prove warranted. The practices of Sony BMG complained of in this class action proceeding remain amenable to Canadian regulatory action.
11. In paragraphs 8 and 9, Ms. Prudham states that Sony BMG's overlapping operations in Canada and the United States will effectively provide Canadians with the benefit of the protections afforded Americans in the **U.S. Settlement Agreement**.
12. This overlap means there is no practical reason for not granting **Canadians** similar protections in the Canadian Settlement Agreement. **The absence of** these protections renders Canadians vulnerable to Sony BMG's market testing of new digital rights management technologies that do not **comply with the** terms of the protection provisions of the **U.S. Settlement Agreement**. **The**

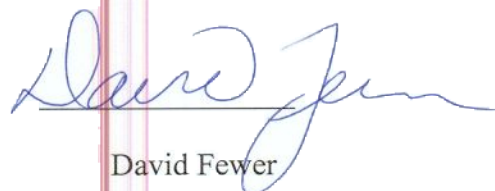
proposed Canadian Settlement Agreement potentially renders Canadians Sony BMG's guinea pigs.

13. In paragraph 10, Ms. Prudham states that Sony BMG does not believe the consumer protections are warranted because they "may prove incompatible with Canada's international copyright obligations."
14. Ms. Prudham provides no basis whatsoever for this statement, and for good reason: I am aware of no authority or court that would support this assertion. I note that the United States is a party to all international copyright convention and treaties to which Canada is also a party, and yet Sony BMG did not feel constrained to accede to these protections in the U.S. Settlement Agreement.
15. Also in paragraph 10, Ms. Prudham states that the consumer protections "may prove incompatible with forthcoming federal copyright legislation." Ms. Prudham goes on to argue, in paragraphs 12 to 16, that there is currently a "legal vacuum around TPMs [technological protection measures] in Canada," and that incorporating the consumer protections into a Canadian settlement agreement would "amount to adopting in Canada the U.S. approach to the 1996 WIPO Treaties without giving the Canadian Government the opportunity [to] decide what its policies will be on TPMs in light of the 1996 WIPO Treaties."
16. Ms. Prudham provides no rational basis whatsoever for these assertions, and they are each without merit.
17. This action does not involve copyright law. Legal protection (or its absence) for technological protection measures is irrelevant to the plaintiffs' claims in

this action, and irrelevant to Sony BMG's defences. This action raises consumer protection, contractual, and privacy issues, not copyright.

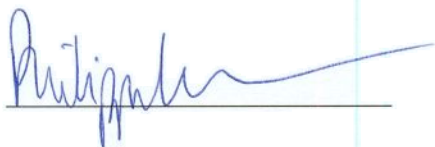
18. The adoption of consumer protection provisions in a class action settlement agreement would in no way bind Parliament. The plethora of legal claims asserted against Sony BMG dispels the notion that there is a "legal vacuum" in Canada in respect of technologies deployed in ways harmful to Canadians.
19. At paragraphs 12 (and again at 16), Ms. Prudham states that "as an aspect of copyright it is arguable that the scope and protection of TPMs fall under the exclusive jurisdiction of the Federal Court pursuant to s. 20(1)(a) of the Federal Courts Act."
20. Besides addressing copyright law and so being irrelevant to this action, this statement of the law is simply incorrect. Paragraph 20(1)(a) of the *Federal Courts Act* provides the Federal Court with exclusive original jurisdiction over "conflicting applications for any . . . registration of any copyright." Sub-section 20(2) of the *Federal Courts Act* provides that the Federal Court has concurrent jurisdiction in all other cases where a "remedy is sought . . . at law or in equity respecting any . . . copyright." If copyright were relevant to the claims in this action – which it is not – this provision of the *Federal Courts Act* assures provincial court jurisdiction.

21. I submit this affidavit in order to ensure that this Court has a more complete and accurate record before it prior to accepting or rejecting any settlement agreement in this proceeding.



David Fewer

Sworn before me in the City of Ottawa, Ontario, September 18, 2006.



Philippa Lawson

A Commissioner etc.