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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERIN MELCON, on behalf of herself and all
others similarly situated

Plaintiff,

v.

SONY BMG MUSIC ENTERTAINMENT,
SONY CORPORATION OF AMERICA,
and BERTELSMANN, INC.

Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Erin Melcon, by and through her attorneys, brings this action on behalf of herself
2 and all others similarly situated, and alleges against Defendants as follows:

3 **INTRODUCTION**

4 1. By including a flawed and overreaching computer program in over 20 million
5 music CDs sold to the general public, Sony BMG created serious security, privacy and consumer
6 protection problems that damaged Plaintiff and the members of the class. At issue are two
7 software technologies – MediaMax and Extended Copy Protection, also known as XCP – which
8 defendant Sony BMG claims to have placed on the music CDs for the purpose of copyright
9 protection, but which in truth do much more, including monitoring customer listening of the CDs
10 and installing undisclosed and in some cases hidden files on users' computers. These computer
11 programs expose users to malicious attacks by third parties and create a threat to public safety,
12 without appropriate notice and consent from purchasers. The CDs also condition use of the
13 music on unconscionable licensing terms. These, plus other problems caused by Sony BMG's
14 use of this software on its CDs, violate federal and California law and public policy. After
15 public revelations about security risks associated with the XCP software, including warnings
16 issued by the United States Government, and demands made to address the problems by the
17 Electronic Frontier Foundation and its co-counsel, defendant Sony BMG began to take steps to
18 respond to the security risks created by the XCP technology. It failed, however, to address
19 security concerns raised by the MediaMax software or the consumer privacy and consumer
20 fairness problems created by both technologies, or to provide adequate notice to the consuming
21 public of the XCP issues and the remedies for those problems.

22 **JURISDICTION AND VENUE**

23 2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and
24 1332.

25 3. Venue is proper in this District under 28 U.S.C. § 1391(b), because Defendants
26 transact business in this district, and a substantial part of the events giving rise to the claims
27 arose in this district.

1 **PARTIES**

2 4. At all times mentioned herein, Plaintiff Erin Melcon ("Plaintiff") was and still is
3 an individual and resident of Petaluma, California.

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

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

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

15 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

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

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

26 10. In 2003, Sony BMG began to distribute to the public CDs that contain software
27 that Sony BMG refers to as Digital Rights Management ("DRM"). This DRM software on Sony
28

1 BMG CDs includes MediaMax software created by SunnComm ("MediaMax CDs") and
2 Extended Copy Protection ("XCP") software created by First4Internet ("XCP CDs"). On
3 information and belief, Sony BMG intended that most of its CDs sold in the United States would
4 incorporate one of these technologies.

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

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

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

13 14. Sony BMG also distributed many more music titles with MediaMax software—
14 including a number one hit CD last year by Velvet Revolver, entitled *Contraband*. Sony BMG
15 distributed approximately 20 million CDs with MediaMax software. Sony BMG has distributed
16 at least 27 titles with the MediaMax 5 software.

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

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

22 16. The Anti-Spyware Coalition ("ASC") describes spyware as technologies deployed
23 without appropriate user consent and/or implemented in ways that impair user control over:
24 (1) material changes that affect a user's experience, privacy, or system security; (2) use of the
25 user's system resources, including what programs are installed on the user's computer; and/or
26 (3) collection, use, and distribution of a user's personal or other sensitive information. Computer
27 Associates defines spyware as, "Any product that employs a user's Internet connection in the
28 background without their knowledge, and gathers/transmits info on the user or their behavior."

1 As discussed below, the MediaMax software used by Sony BMG on many of its CDs meets the
2 ASC's definition of spyware.

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

7 18. MediaMax installs without meaningful consent or notification. When a
8 MediaMax CD is inserted into a computer running Windows, an installer program already starts
9 and MediaMax installs, prior to the appearance of the End User License Agreement ("EULA"),
10 approximately eighteen files that consume approximately 15 MB on the computer's hard drive.
11 These files remain permanently installed even if the user declines the EULA presented later.
12 One of them, a kernel-level driver with the cryptic name "sbcphid," is loaded into the memory
13 and ready to run at all times, even when there is no disc in the CD drive and no music is being
14 played. A "kernel" is the core of a computer operating system, which controls and secures
15 access to the computer's basic operations.

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

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

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

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

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

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

23 25. Despite the representations to the contrary in the EULA and the SunnComm
24 website, and without notification or consent of the user, the MediaMax software "phones home"
25 to Sony BMG and/or SunnComm every time a user plays a protected CD. The software causes
26 the computer to connect to a Sony BMG and/or SunnComm server via the internet. The
27 MediaMax software conveys a unique code that identifies the album to which the user is
28

1 listening. The request also contains standard HTTP headers which determine the operating
2 system the computer is running and what version of Internet Explorer web browser the user has.

3 26. Prior versions of the MediaMax software still used on some Sony BMG CDs
4 contact Sony BMG and/or SunnComm to obtain "digital keys" that permitted the CDs to be
5 copied.

6 27. The SunnComm Sony BMG customer care website does not have a visible
7 privacy policy.

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

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

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

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

28

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

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

15 34. Sony BMG fails to disclose, prior to purchase, that users running the MediaMax
16 CDs on Windows-based computers could have files downloaded and stored on their computers
17 without their consent, and fails to disclose that the software would transmit information about
18 user, including monitoring whenever users listen to the CDs, without notification to or consent of
19 the users.

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

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

26 36. The uninstaller provided by SunnComm until November 21, 2005, suffered from
27 a design flaw. When a user visited the SunnComm uninstaller web page, the user was prompted
28 to accept a small software component—an ActiveX control called "AxWebRemoveCtrl" created

1 by SunnComm.

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

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

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

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

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

16 42. On or about December 6, 2005, Sony BMG and EFF issued a joint press release
17 announcing a software patch was available to address a security vulnerability with its Media Max
18 version 5 content protection software. The SunnComm Sony BMG customer care website
19 provided a link that allows a user to download the software patch for the MediaMax version 5
20 software. The patch does not remove MediaMax from a user's computer. According to the
21 SunnComm Sony BMG customer care site, the patch addresses a potential issue security issue
22 with software.

23 43. The software patch for Media Max version 5 also suffers from a design flaw.
24 Independent researchers have discovered that the software patch does not completely address the
25 security concerns of the MediaMax software and the patch itself is subject to the security
26 concerns that it was designed to address.

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

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

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

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

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

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

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

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

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

1 intercepts calls to the computer's CD drive.

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

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

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

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

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

21 57. On or around November 4, 2005, on National Public Radio's "Morning Edition"
22 program, Thomas Hesse, President of Sony BMG's global digital business division, when asked
23 about the XCP controversy, responded "Most people, I think, don't even know what a rootkit is,
24 so why should they care about it?" In the same program, Mr. Hesse also denied that Sony
25 BMG's software communicated with Sony BMG, saying "No information ever gets gathered
26 about the users' behavior, no information ever gets communicated back to the user, this is purely
27 about restricting the ability to burn MP3 files in an unprotected manner."
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1 58. In a November 29, 2005, Business Week article, by Steve Hamm, the article
2 states that F-Secure, a Finland-based antivirus company, notified Sony BMG on October 4,
3 2005, with problems associated the XCP rootkit. The article further states that F-Secure
4 informed Sony BMG that the rootkit "was a major security risk."

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

12 60. As with the MediaMax software, this network connection provides Sony BMG
13 with the ability to record each time a CD with XCP software is played and the IP address of the
14 computer playing it, without receiving permission from the computer user. As discussed above,
15 no two IP addresses are alike and IP addresses provide the means to determine information about
16 the person who used the particular IP address. Sony BMG does not disclose the possibility of
17 this use of DRM software in its packaging, the installation process, or its EULA. Instead the
18 EULA states, "the SOFTWARE will not be used at any time to collect any personal information
19 from you, whether stored on YOUR COMPUTER or otherwise."

20 61. The Anti-Spyware Coalition and computer security firm Computer Associates
21 identify Sony BMG's XCP software as "Spyware."

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

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

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

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

10 66. Malicious software coders have discovered that they can effectively render their
11 programs invisible by using names for computer files similar to ones cloaked by the Sony BMG
12 technology. On information and belief, several malicious programs that exploit the XCP
13 technology's ability to avoid detection have already been distributed over the internet. Further,
14 as stated above, XCP software transmits information about the user's computer, IP address, and
15 listening habits.

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

21 68. The nature of a rootkit makes it extremely difficult for a computer user to remove,
22 often leaving reformatting the entire hard drive as the only solution. Reformatting a hard drive
23 requires backing up all data on the hard drive, as reformatting a hard drive deletes all data on the
24 hard drive. The user is then required to re-install the operating system and all applicable
25 programs and drivers. This process can take many hours and is beyond the technical capabilities
26 of many users. Sony BMG's XCP CD EULA and install process do not disclose nor does the
27 CDs' software prompt users with information about the rootkit or the need to reformat the hard
28

1 drive in order to remove it.

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

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

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

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

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

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

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

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

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

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

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

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

27 80. On information and belief, if the Sony BMG software was uninstalled using the
28 uninstaller available until November 15, 2005, the user was no longer able to receive the full use

1 and value of the XCP CD on his or her computer. Therefore, Sony BMG required the user to
2 either accept the malicious software or lose the full use and value of the XCP CD. Sony BMG
3 did not disclose this fact to users prior to purchase.

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

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

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

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

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

21 86. On or around November 15, 2005, Sony BMG posted the following message on
22 its website: "We currently are working on a new tool to uninstall First4Internet XCP software.
23 In the meantime, we have temporarily suspended distribution of the existing uninstall tool for
24 this software. We encourage you to return to this site over the next few days. Thank you for
25 your patience and understanding." Sony BMG failed to disclose the problems associated with
26 the old uninstaller.

27
28

1 87. On or about November 28, 2005, Sony provided individuals who had requested
2 the first uninstaller for the XCP software information on how to uninstall the first uninstaller.

3 88. On or about December 5, 2005, the Sony BMG support site provided a link to an
4 uninstaller program for the XCP software.

5 89. On information and belief, the software released by Sony BMG to resolve the
6 flaws in the XCP software can cause further damage to users' computers.

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

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

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

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

17 93. Sony BMG's EULAs state that the MediaMax and XCP software will remain on
18 the user's computer until it is removed or deleted. Neither the MediaMax nor the XCP software
19 allows a user to use the standard "add/remove program" function on the Windows operating
20 system to remove the program. Sony BMG's MediaMax and XCP CDs and its software fail to
21 provide information about how to remove the program or even how to contact Sony BMG to
22 resolve any problems with the program.

23 94. The EULAs disclose that the MediaMax and XCP drivers try to "protect the audio
24 files embodied on the CD." However, the drivers also attempt to restrict access to any other CD
25 that uses MediaMax or XCP technology. Therefore, users need only agree to installation on one

1 spyware and that it posed a security risk. Sony BMG also made the false claim that the software
2 does not collect any personal information nor is it designed to be intrusive to the user's computer
3 system.

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

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

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

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

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

28

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

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

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

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

12 105. According to Sony BMG, the purpose of the software is to restrict the ability to
13 create copies of CDs or the quantity of CDs that a user can copy. The MediaMax and XCP
14 software goes far beyond copyright protection, however. For example, the software makes it
15 extremely difficult for a consumer with a PC to transfer their music to an Apple Corporation-
16 manufactured iPod but easy to transfer to other portable digital music players, such as those sold
17 by Sony. Sony BMG asks iPod owners who have XCP CDs to complain to Apple about the
18 inability to play Sony BMG protected music on an iPod. The MediaMax support website also
19 asks iPod owners who have MediaMax CDs to complain to Apple about the inability to play
20 Sony BMG protected music on an iPod. To the extent that this is intended to advantage Sony
21 BMG or its partners in the portable digital music player market, this advantage comes at the
22 expense of consumers.

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

25 106. The XCP and MediaMax CDs are disseminated with identical EULAs.

26 107. Sony BMG utilized unconscionable provisions in the EULA that accompanies the
27 XCP and MediaMax CDs. These provisions include:
28

- 1 a. Restrictions on the user's ability to use the digital content on the CD in the
2 event that that consumer chose to leave the United States;
- 3 b. Restrictions on resale and transfer of the digital content on the CDs;
- 4 c. Restrictions on user's ability to use the digital content on the CDs at work;
- 5 d. Restrictions on user's ability to use and retain lawfully-made copies of the
6 digital content on the CDs in the event that the original CD is stolen or lost;
- 7 e. Restrictions on user's ability to use the digital content on the CDs following a
8 bankruptcy;
- 9 f. Conditioning the user's continued use of the digital content on the CDs on
10 acceptance of all Sony BMG software updates;
- 11 g. A purported \$5.00 limit on Sony BMG's entire liability to the purchaser of the
12 CDs;
- 13 h. Restrictions on user's ability to examine and test his or her computer to
14 understand and attempt to prevent the damage cause by the rootkit;
- 15 i. A reservation of rights by Sony BMG to use technological "self-help"
16 measures against the computers of users who desire to make use of the digital
17 content on the CDs "at any time, without notice to [the user];" and
- 18 j. A disclaimer of all warranties, including implied warranties of
19 merchantability, satisfactory quality, noninfringement, and fitness for any
20 particular purpose.

21 **SONY BMG'S SOFTWARE IS A COMPUTER CONTAMINANT**

22 108. Sony BMG has introduced a computer contaminant, in violation of California
23 Penal Code Section 502, into the Plaintiffs' and the Class' computers, computer systems or
24 computer networks.

25 109. Sony BMG software includes a set of computer instructions that are designed to
26 modify, damage, destroy, record, or transmit information within a computer, computer system, or
27 computer network.

1 110. Sony BMG software transmits information about which CDs the user is playing
2 through the Internet.

3 111. By engaging in the above-described acts, Sony BMG caused damage.

4 112. By engaging the above described acts, Sony BMG has caused or attempted to
5 cause a threat to public health or safety,

6 113. It is important to public safety not to defeat or undermine the security measures
7 on computers.

8 114. Keeping the Internet infrastructure functioning is important to public safety.

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

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

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

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

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

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

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

24 121. Investigation into the scope and extent of the effects and damage caused by Sony
25 BMG's software is ongoing. Plaintiff, on behalf of herself and the Class, reserves the right to
26 amend these allegations as new information is discovered.

1 **CLASS ACTION ALLEGATIONS**

2 122. Pursuant to Federal Rules of Civil Procedure 23 (a) and (b), Plaintiff Erin
3 Melcon brings this action on behalf of herself and a Class of similarly situated persons defined
4 as:

5 All persons or entities who purchased an audio compact disc distributed by Sony
6 BMG that XCP or SunnComm software and every person or entity who suffered
7 damage or loss as a result of Defendants' violation of the Computer Fraud and
8 Abuse Act ("CFAA").
9

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

13
14 123. This action is brought as a class action and may properly be so maintained;
15 pursuant to the provisions of the Federal Rules of Civil Procedure 23.

16 **Numerosity**

17 124. Members of the Class are so numerous that their individual joinder is
18 impracticable. The precise numbers of members of the Class and their addresses are unknown to
19 the Plaintiff. Plaintiff estimates that the Class consists of millions of members. The precise
20 number of persons in the Class and their identities and addresses may be ascertained from
21 Defendants' records. Members of the Class may be notified of the pendency of this action by
22 mail, supplemented (if deemed necessary or appropriate by the Court) by published notice.
23

24 **Commonality**

25 125. Common questions of fact and law exist as to all members of the Class. These
26 questions predominate over the questions affecting only individual members of the Class. These
27 common legal and factual questions include:
28

- 1 a. Whether Sony BMG engaged in deceptive business practices in connection
2 with the sale and advertising of the XCP and MediaMax CDs;
3 b. Whether some or all of the terms of the EULA are unconscionable;
4 c. Whether the MediaMax software installs on consumers' computers without
5 authorization;
6 d. Whether the MediaMax and XCP software exceed the authorizations given by
7 consumers;
8 e. Whether the MediaMax and XCP software are in violation of the Consumer
9 Fraud Abuse Act, 18 U.S.C. § 1030; and
10 f. Whether the communications by the MediaMax and XCP software over the
11 internet are disclosed and necessary uses of the copy protection software.
12

13
14 **Typicality**

15 126. Plaintiff's claims are typical of the claims of the members of the Class because
16 Plaintiff purchased a CD distributed by Defendants, and Plaintiff was required to agree to the
17 EULA, which did not notify Plaintiff of the true nature of the software that the CD was to install
18 on Plaintiff's computer.

19 **Adequacy**

20 127. Plaintiff is an adequate representatives of the Class because her interests do not
21 conflict with the interests of the members of the Class they seek to represent. Plaintiff has
22 retained counsel competent and experienced in complex class action litigation and Plaintiff
23 intends to prosecute this action vigorously. The interests of the member of the Class will be
24 fairly and adequately protected by Plaintiff and her counsel.
25

26 128. This suit may also be maintained as a class action because Plaintiff and the Class
27 seek declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(b)(2) as
28

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

3 129. This suit may also be maintained as a class action under Federal Rules of Civil
4 Procedure 23(b)(3) because a class action is superior to other available means for the fair and
5 efficient adjudication of this dispute. The damages suffered by each individual Class member
6 may be relatively small, especially given the burden and expense of individual prosecution of the
7 complex and extensive litigation necessitated by Defendants' conduct. Furthermore, it would be
8 virtually impossible for the Class members, on an individual basis, to obtain effective redress for
9 the wrongs done to them. Moreover, even if Class members themselves could afford such
10 individual litigation, the court system could not. Individual litigation presents a potential for
11 inconsistent or contradictory judgments. Individualized litigation increases the delay and
12 expense to all parties and the court system presented by the complex legal issue of the case. By
13 contrast, the class action device presents far fewer management difficulties, and provides the
14 benefits of a single adjudication, economy of scale and comprehensive supervision by a single
15 court.
16
17

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

- 20 a. The prosecution of separate actions by individual Class members would
21 create a risk of inconsistent or varying adjudication with respect to
22 individual Class members that would establish incompatible standards of
23 conduct for Defendants; or
24
25 b. The prosecution of separate actions by individual Class members would
26 create a risk of adjudications with respect to them that would, as a
27 practical matter, be dispositive of the interests of other Class members not
28

1 parties to the adjudications or substantially impair or impede their ability
2 to protect their interests; or

3 c. Defendants have acted or refused to act on grounds generally applicable to
4 the Class, thereby making appropriate final injunctive or corresponding
5 declaratory relief with respect to the Class as a whole.
6

7 **FIRST CLAIM FOR RELIEF**

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

9 131. Plaintiff incorporates by reference the allegations in all proceeding paragraphs of
10 this complaint.

11 132. As defined by 18 U.S.C. § 1030, the Computer Fraud and Abuse Act ("CFAA"),
12 the computers used by Plaintiff and Class members are "protected computers."

13 133. By engaging in the above-described acts and practices, Sony BMG (i) knowingly
14 causes the transmission of a program, information, code, or command, and as a result of such
15 conduct, intentionally causes damage without authorization, to a protected computer; (ii)
16 intentionally accesses a protected computer without authorization, and as a result of such
17 conduct, recklessly causes damage; and/or (iii) intentionally accesses protected computers, and
18 as a result of such conduct, causes damage, without authorization, in violation of the Computer
19 Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A).
20

21 134. By engaging in the above-described acts and practices, Sony BMG "intentionally
22 accesse[d] a computer without authorization or exceeds authorized access, and thereby
23 obtain[ed] . . . information from any protected computer if the conduct involved an interstate or
24 foreign communication" in violation of the Computer Fraud and Abuse Act, 18 U.S.C. §
25 1030(a)(2)(C).
26

1 to consumers.

2 140. Plaintiffs and each member of the class are “consumers” within the meaning of
3 Civil Code Section 1761(d).

4 141. The Sony BMG products that are the subject of this litigation are “goods” within
5 the meaning of Civil Code section 1761(a).

6 142. Sony BMG has engaged in deceptive practices, unlawful methods of competition
7 and/or unfair acts as defined by Civ. Code §1770, to the detriment of Plaintiffs and the Class.
8 Plaintiffs and members of the Class have suffered harm as a proximate result of the violations of
9 law and wrongful conduct of Defendant alleged herein.

10 143. Sony BMG intentionally and unlawfully perpetrated harm upon Plaintiffs and the
11 Class by the above described acts.

12 144. In violation of Civil Code section 1770(5), Sony BMG has represented that its
13 CDs have characteristics, uses or benefits which they do not have.

14 145. In violation of Civil Code section 1770(a)(9), Sony BMG has advertised its CDs
15 with intent not to sell them as advertised.

16 146. In violation of Civil Code section 1770(a)(14), Sony BMG has represented that
17 the purchase and/or use of its XCP and MediaMax CDs confers or involves rights, remedies, or
18 obligations which it does not have or involve, or which are prohibited by law.

19 147. In violation of Civil Code section 1770(a)(19), Sony BMG has inserted several
20 unconscionable provisions into the end-user license agreement (EULA) that accompanies the
21 XCP and MediaMax CDs.

22 148. Sony BMG concealed material information regarding the XCP and MediaMax
23 CDs from Plaintiffs and other class members, including but not limited to the existence of the
24 rootkit program and its effects on users’ computers and the lack of a reasonable way to uninstall
25 the software in the event of security or privacy violations.

26 149. Users, including Plaintiffs and class members, routinely rely on this type of
27 information in making music purchase decisions. Had Sony BMG disclosed this material
28

1 information, Plaintiffs and other class members would not have purchased the XCP and
2 MediaMax CDs.

3 150. Plaintiffs and other class members relied on this material information to their
4 detriment.

5 151. Sony BMG's deceptive acts and omissions and unfair business practices occurred
6 in the course of selling a consumer product and violate Civil Code section 1770(a).

7 152. As a direct and proximate result of Sony BMG's violations of the CLRA,
8 Plaintiffs and other class members have suffered harm.

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

12 154. Pursuant to Civil Code section 1780(a), Plaintiffs seek an order enjoining
13 Defendant from engaging in the methods, acts or practices alleged herein, including an order
14 enjoining the defendant from continuing to sell and market XCP and MediaMax CDs and
15 continuing to disclaim the risks of using such CDs.

16 155. Pursuant to Civil Code section 1782, on November 14, 2005, Plaintiffs notified
17 Sony BMG of its commission of unlawful acts under Civil Code section 1770, specifying the
18 particular violations, and demanded that Sony BMG rectify its illegal acts within 30 days. The
19 demand letter requested that Sony BMG compensate consumers for computer problems related
20 to the XCP and MediaMax software.

21 156. On November 18, 2005, Sony BMG responded. In its response, Sony BMG did
22 not agree to provide compensation or to discuss a process for assessing claims. Therefore,
23 Plaintiffs and the Class also request (a) actual damages; (b) restitution of money to Plaintiffs and
24 Class members; (c) punitive damages; (d) attorneys' fees and costs; and (e) other relief that this
25 Court deems proper.

1 **THIRD CLAIM FOR RELIEF**

2 **(Violation of California Business and Professions Code Section 17200)**

3
4 157. Plaintiffs incorporate the allegations set forth above by references, as if set forth
5 fully herein.

6 158. Plaintiffs and the Class have suffered injury in fact and lost money or property as
7 a result of such unfair competition. Such injuries and losses include, but are not limited to,
8 computer damage, time and effort spent identifying and attempting to remove the damaging
9 software, loss of use of the ability to listen to the music on the CDs, and the purchase price of the
10 CDs.

11 159. Sony BMG has engaged in unfair, unlawful and fraudulent business practices as
12 set forth above.

13 160. By engaging in the above-described acts and practices, Sony BMG has committed
14 one or more unfair business practices within the meaning of Bus. & Prof. Code §17200, et seq.
15 Specifically, Sony BMG's business practices offend the public policies set forth in California
16 Constitution Art. 1, section 1; Civil Code sections 1750 et seq (Consumer Legal Remedies Act);
17 Business and Professions Code section 22947 (Consumer Protection Against Computer Spyware
18 Act); Business and Professions Code section 17500 et seq.; Business and Professions Code
19 sections 22575-579 (Online Privacy Protection Act); and California Penal Code section 502.

20 161. Sony BMG's above-described deceptive and misleading acts and practices have
21 and/or are likely to deceive Plaintiffs and other Class members.

22 162. Sony BMG's acts and practices are also unlawful because they violate Civil Code
23 sections 1750 et seq (Consumer Legal Remedies Act); Business and Professions Code section
24 22947 (Consumer Protection Against Computer Spyware Act); and California Penal Code
25 section 502.

26 163. Specifically, Sony BMG marketed and sold the XCP and MediaMax CDs in
27 defective condition and deceptively failed to disclose their defects as described above; advertised
28

1 its XCP and MediaMax CDs with intent not to sell them as advertised; represented that the
2 purchase and/or use of its XCP and MediaMax CDs confers or involves rights, remedies, or
3 obligations which it does not have or involve, or which are prohibited by law; inserted several
4 unconscionable provisions into the EULA that accompanies the XCP and MediaMax CDs
5 infected with the XCP and MediaMax software; took control and modified the settings of user's
6 computers, collected personally identifiable information about users, tracked users as they listen
7 to the CDs and attempted to prevent users from blocking or disabling the XCP and MediaMax
8 software; violated the implied covenant of good faith and fair dealing; and failed to comply with
9 the implied warranty of merchantability.

10 164. Plaintiffs and the Class have suffered injury in fact and have lost money or
11 property as a result of such unfair competition.

12 165. Plaintiffs, on behalf of themselves and on behalf of the Class, seek an order of this
13 Court awarding restitution, disgorgement, injunctive relief and all other relief allowed under
14 §17200, et seq.

15 **FOURTH CLAIM FOR RELIEF**

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

17
18 166. Plaintiffs incorporate the allegations set forth above by references, as if set forth
19 fully herein.

20 167. California law implies a covenant of good faith and fair dealing in all contracts
21 between parties entered into in the State of California.

22 168. By engaging in above-described acts and practices, Sony BMG has violated the
23 implied covenant of good faith and fair dealing in the consumer's purchase of the XCP and
24 MediaMax CDs.

25 169. By engaging in the above-described acts and practices, Sony BMG has caused
26 Plaintiffs and the Class to suffer damages in an amount to be determined at trial.

1 **FIFTH CLAIM FOR RELIEF**

2 **(False or Misleading Statements)**

3 170. Plaintiffs incorporate the allegations set forth above by references, as if set forth
4 fully herein.

5 171. Through its advertising practices, promotional materials, packaging, EULA,
6 public statements, and other acts and practices described herein, Sony BMG has made untrue and
7 misleading statements and omitted material facts in violation of California Business and
8 Professions Code §§17500, et seq.

9 172. The misrepresentations, omissions and other misleading conduct described herein
10 concerning the XCP and MediaMax CDs were "likely to deceive." These misrepresentations and
11 omissions continue to this date.

12 173. Sony BMG knows or should know that these misrepresentations and omissions
13 concerning the XCP and MediaMax CDs are false and misleading.

14 174. Plaintiffs and the Class were actually deceived by the misrepresentations and
15 omissions.

16 175. Plaintiffs and the Class relied on these misrepresentations and omissions to their
17 detriment.

18 176. Plaintiffs and the Class have been harmed. Plaintiffs, on behalf of themselves and
19 on behalf of the Class seek restitution, disgorgement, injunctive relief and all other relief
20 allowable under §17500, et seq.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

23 A. For compensatory damages in an amount to be proven at trial.

24 B. For restitution and disgorgement of profits realized as a result of the unlawful
25 conduct of defendants.

26 C. For any treble and/or punitive damages to the extent permitted by law.

27 D. For declaratory relief, including but not limited to, i) declaring the distribution of
28

1 CDs with MediaMax and XCP software to be illegal under CFAA and ii) declaring the EULAs
2 to be unconscionable, misleading and void.

3 E. For further equitable relief, including but not limited to, requiring Sony BMG to:

4 (i) Notify consumers, through widespread publicity, of the potential security
5 and other risks associated with the XCP and MediaMax technology, to
6 allow consumers to make informed decisions regarding their use of those
7 CDs. The notification process should include issuing a public statement
8 describing the risks associated with *both* XCP and MediaMax software
9 and listing every Sony BMG CD, DVD or other product that contains
10 MediaMax software. In addition, Sony BMG must use the banner
11 communication system incorporated in its software to advise consumers
12 that refunds and uninstall software is available. The notifications must be
13 reasonably calculated to reach all consumers who have purchased the
14 products.

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

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

24 (iv) Refund the purchase price of the CDs containing MediaMax technology
25 or, *at the consumer's election*, provide a replacement CD that does not
26 contain the MediaMax technology. For those consumers who choose to
27 retain CDs containing the MediaMax technology, develop and make
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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 Plaintiff of their attorneys' fees and other costs of suit.
- G. For such other and further relief as the Court deems just and equitable.

DATED: 12/8/05

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EXHIBIT A

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.

EXHIBIT B

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").

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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).

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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

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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, DOWNTIME 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 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.