

NO. \_\_\_\_\_

THE STATE OF TEXAS,  
Plaintiff,

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IN THE DISTRICT COURT OF

v.

TRAVIS COUNTY, T E X A S

SONY BMG MUSIC ENTERTAINMENT,  
LLC,  
Defendant.

\_\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff the STATE OF TEXAS, acting by and through the Attorney General of Texas, GREG ABBOTT, complains of Defendant, SONY BMG MUSIC ENTERTAINMENT, LLC (“Sony BMG”), and for cause of action would respectfully show the Court the following:

**DISCOVERY CONTROL PLAN**

1. Discovery is intended to be conducted under Level 2 pursuant to TEX. R. CIV. P. 190.3.

**JURISDICTION**

2. Greg Abbott, Attorney General of Texas, through his Consumer Protection and Public Health Division, in the name of the State of Texas, brings this action under the authority granted to him by section 48.102 of the Consumer Protection Against Computer Spyware Act (“CPACSA”), TEX. BUS. & COM. CODE § 48.001 *et seq.* (Vernon Supp. 2005).

**DEFENDANT**

3. Defendant Sony BMG is a limited liability company registered to do business in this State with its principal place of business at 550 Madison Avenue, Floor 15, New York, New York 10022-3211. Defendant Sony BMG may be served with process through its registered agent, Corporation Service Company d/b/a CSC - Lawyers Incorporating Service Company, 701 Brazos, Suite 1050,

Austin, Texas 78701.

#### **VENUE**

4. Venue for this cause of action lies in Travis County, Texas, because under § 15.002 of the TEX. CIV. PRAC. & REM. CODE, a substantial part of the violations are alleged to have occurred in the county of suit.

#### **PUBLIC INTEREST**

5. Because Plaintiff STATE OF TEXAS has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe that Defendant has caused, and will continue to cause damage to residents of the State of Texas and cause adverse effects to legitimate business enterprises that conduct their trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

#### **ACTS OF AGENTS**

6. Whenever in this Petition it is alleged that Defendant did any act, it is meant that:
- A. Defendant performed or participated in the act; or
  - B. Defendant's officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

#### **STATEMENT OF FACTS**

7. Defendant Sony BMG markets, distributes, and sells audio compact discs ("CDs") throughout the United States, including in Travis County, Texas. As part of recent CD releases, Sony BMG has included on these CDs its own proprietary media player designed to play audio tracks

on a personal computer (as opposed to a consumer using third-party programs such as Microsoft Windows Media Player). These audio CDs utilize XCP Technology (“XCP”) which Sony BMG represents is designed to “protect the audio files embodied on the CD.” Audio CDs distributed by Sony BMG that utilize XCP are marked “Content Protected,” on the spine of the CD package; however, Sony BMG makes no disclosures on the packaging that anything will be installed on the consumer’s computer. Once a consumer places a Sony BMG copy-protected CD in their computer for play, the CD will generally trigger a pop-up multi-page Sony BMG end user license agreement (“EULA”), following which the consumer must click “agree” or “disagree.” The consumer must click “agree” in order to continue to access the audio files on the CD. After clicking “agree,” Sony BMG’s own media player will load, allowing the consumer to listen to the CD. If the consumer clicks “disagree,” the CD will eject from the computer.

8. During the installation of its media player, Sony BMG creates and installs components of its XCP technology in a folder it names “C:/Windows/System32/\$sys\$filesystem.” Unbeknownst to the consumer, Sony BMG also installs a file named “Aries.sys” in the same folder which conceals the XCP files and the folder in which they are installed, such that the owner of the computer performing a search of the file system would not be able to locate and remove the XCP technology. Essentially, the Aries.sys driver masks any folder or file name on a consumer’s computer that begins with the characters “\$sys\$,” which are the first characters of the folders, files, and registry entries associated with the XCP technology. Moreover, these hidden files and folder are installed within the consumer’s Microsoft Windows “System32” subfolder, such that a consumer may confuse that software with essential files needed to run the computer’s operating system.

9. The Aries.sys file is not required to play Sony BMG’s copy protected CDs; rather its purpose

is to conceal the copy protection software installed by Sony BMG. In fact, renaming or deleting the Aries.sys file will uncloak the XCP files, and the consumer will be able to continue to use their CD in the same manner as if the driver remained. Sony BMG does not disclose the fact that its technology includes this cloaking component to consumers on either the CD itself or in its licensing agreement.

10. Moreover, the audio tracks on Sony BMG's copy protected CDs do not require Sony BMG's proprietary media player to play on a computer. On some occasions, consumers inserting a Sony BMG copy-protected CD into their computer are not prompted with Sony BMG's EULA, rather they are prompted by a window by the operating system asking the consumer if he/she wants to play the CD. Using another media player (for example, Windows Media Player), the consumer is then able to play the audio CD. However, if the consumer inserts the CD and the Sony BMG EULA is displayed, the consumer will no longer be able to use these other media players to play the audio CD.

11. Sony BMG discusses its XCP technology on the website <http://cp.sonybmg.com>. As part of its frequently asked questions, Sony BMG included the following:

“I have heard that the protection software is really malware/spyware. Could this be true?

Of course not. The protection software simply acts to prevent unlimited copying and ripping from discs featuring this protection solution. It is otherwise inactive. The software does not collect any personal information nor is it designed to be intrusive to your computer system. Also, the protection components are never installed without the consumer first accepting the End User License Agreement.

If at some point you wish to remove the software from your machine simply contact customer service [through this link](#). You will, though, be unable to use the disc on your computer once you uninstall the components.

Our technology vendors are constantly looking to improve the product as well as respond to any critical software issues found. Please check [here](#) for upgrades to address any known issues.”

12. In reality, Sony BMG's XCP technology remains hidden and active on a consumer's computer at all times after installation, even when Sony BMG's media player is not active. During the installation process, Sony BMG installs another hidden file named, "\$sys\$drmsserver.exe" which is cloaked and constantly consumes system memory, resulting in a reduction in a consumer's available system resources. In addition, a consumer attempting to remove the XCP technology finds that Sony BMG has made it extremely burdensome if not impossible to do so - Sony BMG does not make an uninstall utility readily available. The consumer must first contact customer service via email to receive a patch that will "uncloak" the hidden files (in part by deleting the Aries.sys file), and then requiring the consumer to contact customer service again if he/she wants to remove the XCP software.

13. In light of the recent public awareness regarding Sony BMG's XCP technology, Sony BMG issued the following statement regarding the service pack that uncloaked the installed components:

"This Service Pack removes the cloaking technology component that has been recently discussed in a number of articles published regarding the XCP Technology used on SONY BMG content protected CDs. This component is not malicious and does not compromise security. However to alleviate any concerns that users may have about the program posing potential security vulnerabilities, this update has been released to enable users to remove this component from their computers."

Despite Sony BMG's assertions, various news sources have recently reported the spread of newly created viruses which exploit Sony BMG's cloaking technology. As a result, a consumer without knowledge of the installation of the Aries.sys file on their computer may be vulnerable to new security risks, and given the cloaked nature of these files, and the extremely burdensome impediments to removing them, that consumer may find it difficult or impossible to protect themselves from future risks.

**CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT VIOLATIONS**

14. Paragraphs 1 through 13 are incorporated herein by reference.
15. Defendant, as alleged above, has knowingly caused computer software to be copied to a computer in this state, of which it is not the owner or operator, and used that software to:
- A. Change the name, location, or other designation of computer software to prevent the owner from locating and removing the software, in violation of CPACSA § 48.053(5); and
  - B. Create randomized or intentionally deceptive file names or random or intentionally deceptive directory folders, formats, or registry entries to avoid detection and prevent the owner from removing computer software, in violation of CPACSA § 48.053(6).
16. Defendant, as alleged above, has further induced the owner or operator of a computer in this state, of which Defendant is not the owner or operator, to install a computer software component to the computer by intentionally misrepresenting the extent to which the installation is necessary for security or privacy reasons, to open or view text, or to play a particular type of musical or other content, in violation of CPACSA § 48.055(1).

**PRAYER**

17. Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the law as alleged in this Petition. Unless enjoined by this Honorable Court, Defendant will continue to violate the laws of the STATE OF TEXAS and cause injury, loss, and damage to the STATE OF TEXAS and to the general public.
18. WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; and upon notice and hearing TEMPORARY and PERMANENT INJUNCTIONS be issued,

restraining and enjoining Defendant, Defendant's agents, servants, employees and attorneys and any other person in active concert or participation with any Defendant from engaging in practices declared unlawful by the CPACSA, including but not limited to:

- A. Offering for sale or selling any good which includes or installs any software which violates the CPACSA by either:
  - 1) Changing the name, location, or other designation of computer software to prevent the owner from locating and removing the software, or
  - 2) Creating randomized or intentionally deceptive file names or random or intentionally deceptive directory folders, formats, or registry entries to avoid detection and prevent the owner from removing computer software.
- B. Misrepresenting the extent to which a computer software component must be installed on a computer in order to play a particular type of musical or other content.

19. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court:

- A. Adjudge against Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of One Hundred Thousand Dollars (\$100,000.00) for each violation of the CPACSA, pursuant to CPACSA § 48.102(a);
- B. Order Defendant to pay Plaintiff STATE OF TEXAS attorneys' fees and costs of court pursuant to CPACSA § 48.102(c);
- C. Order Defendant to pay all costs of Court, costs of investigation, and reasonable attorney's fees pursuant to TEX. GOVT. CODE ANN. § 402.006(c); and
- D. Grant all other relief to which the Plaintiff STATE OF TEXAS may show itself entitled.

Respectfully submitted,

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PAUL D. CARMONA  
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