



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 28, 2007

Jeffrey Harris

Re: *In the Matter of Sony BMG Music Entertainment*
File No. 062-3019, Docket No. C-4195

Dear Mr. Harris:

This responds to your letter commenting on the Federal Trade Commission's consent agreement in the above-entitled proceeding. Your letter was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission.

Your comment appears to recommend that the Commission reject the proposed order, and instead: (1) refer the matter to the Office of the U.S. Attorney for criminal trespass; (2) file a complaint seeking major financial damages on behalf of all consumers affected by Sony BMG's actions; and (3) seek a permanent injunction barring Sony BMG from using any "malware that interferes with a user making additional copies of Sony BMG distributed CDs for their own private use." In addition, you propose that the Commission impose an injunction against Sony BMG prohibiting the installation of any "malware," which you appear to suggest includes all Digital Rights Management ("DRM") software. All of your recommendations for order modifications appear to stem from a belief that DRM software itself, and not just cloaking technology, is "malware" and should be prohibited by this order.

Regarding your apparent suggestion that the Commission ban the use of DRM software, the Commission believes that DRM technology has legitimate copyright protection uses. Therefore, this order settling charges against alleged specific practices by Sony BMG is not intended to prevent the legitimate use of DRM software. Nor would such an order be appropriate. The Commission's complaint does not allege that the mere installation of DRM software is an unfair practice in violation of the Federal Trade Commission Act. Rather, the unfair practices alleged in the complaint are that Sony BMG installed the vulnerable software without adequate notice or consent and employed a technology that hid the software, thus preventing its removal. The order adequately remedies the alleged illegal practices by: requiring notice of, and consumers' consent to, installation of the DRM software (Parts I and II); prohibiting the installation of any software that hides or cloaks the DRM software or otherwise prevents

consumers from readily locating or removing it (Part VI); and obligating Sony BMG to provide a reasonable and effective means for consumers to uninstall the software (Part VII. A.).

Concerning restitution, consumers have received substantial financial relief as a result of Sony BMG's voluntary remedial actions and a class action settlement finalized last year.¹ Our proposed consent order expands upon and enhances that relief. In December 2005, Sony BMG has implemented a generous exchange and refund program for purchasers of XCP and MediaMax 5.0 CDs. For example, consumers exchanging XCP CDs can receive, along with a replacement CD that has no content protection software, \$7.50 in cash and free music downloads. Also, Sony gives consumers exchanging MediaMax CDs an additional CD and free music downloads. The class action settlement requires Sony to continue operating its exchange and compensation program.

The proposed consent order expands and enhances the relief that the class action settlement provides. In terms of monetary relief, the consent order makes clear that all purchasers, prior to December 31, 2006, of XCP and MediaMax CDs are eligible to participate in the compensation program. Part VIII.B.1 also requires Sony BMG to extend the period for accepting exchanges to six months after December 31, 2006. Further, the proposed order provides additional relief to XCP CD purchasers who damaged their computers attempting to remove XCP before Sony BMG provided an effective uninstall tool. Accordingly, Part VIII.D.1 of the order requires that Sony BMG reimburse these consumers up to \$150 of their costs to repair the computer damage resulting from their attempts to remove XCP. Finally, Sony BMG is required to publish notices on its website informing consumers about the extended period for exchanging CDs and the "repair reimbursement" program.

Finally, regarding referral to the U.S. Attorney, the Commission maintains a Criminal Liaison Unit that cooperates closely with criminal law enforcement agencies in matters of consumer fraud. The Unit's purpose is to increase criminal prosecution of marketers engaged in such conduct as telemarketing fraud, online scams, or other deceptive marketing practices. Accordingly, the Commission, where appropriate, will refer matters to interested criminal authorities.

After reviewing your comment, the Commission has determined that the public interest would best be served by accepting the consent order as final. Thank you again for your comment.

By direction of the Commission.

Donald S. Clark
Secretary

¹ See *In re SONY BMG CD Technologies Litigation*, No. 05 CV 9575 (NRB) (S.D.N.Y.) (May 24, 2006).