



September 21, 2006

Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario
K1A 1H3

Dear Commissioner:

Re: Complaint under PIPEDA against Sony BMG Music (Canada) Inc.

This is a complaint filed under section 11 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) against **Sony BMG Music (Canada) Inc./Sony BMG Musique (Canada) Inc.** ("Sony BMG Canada"), a Canadian Corporation, and **Sony BMG Music Entertainment** ("Sony BMG US"), a Delaware General Partnership (Sony BMG US and Sony BMG Canada" being collectively referred to as "Sony BMG"), **First4Internet Ltd.** ("First4Internet"); and **SunnComm International Inc.** ("SunnComm"). Collectively, we refer to these companies as "Sony et al".

By way of this complaint, we allege that Sony et al, in the course of their joint commercial activities, intentionally collected Canadian consumers' personal information without the knowledge or consent of those consumers, contrary to PIPEDA.

Background

In 2005, Sony BMG released CDs in Canada that included certain "Digital Rights Management" software. We complain in respect of the following Sony BMG Digital Rights Management Software:

- MediaMax 3.0, designed and licensed to Sony BMG by SunnComm;
- MediaMax 5.0, designed and licensed to Sony BMG by SunnComm; and
- XCP, designed and licensed to Sony BMG by First4Internet.

(collectively, the "Sony BMG DRM").

Through the Sony BMG DRM, Sony et al engaged in a number of anti-consumer behaviours (the "Wrongful Conduct"). These include:

- Installing the Sony BMG DRM, and/or parts thereof, on consumers' computers without adequate notice or consent;
- Introducing significant security risks into consumers' computers;
- Collecting personal information of consumers without notice or consent; and
- Failing to offer consumers the means to remove the Sony BMG DRM.

More specifically, Both XCP and MediaMax rely on the autorun feature of Windows – the DRM runs whenever a CD containing the software is inserted into a Windows PC. Both XCP and MediaMax are distributed with associated End User Licence Agreements ("EULA's"). On installation, the XCP DRM presents users with a EULA that states that "the SOFTWARE will

not be used at any time to collect any personal information from you, whether stored on YOUR COMPUTER or otherwise.” Nonetheless, when running, the XCP DRM contacts a Sony web site (<connected.Sony music.com>) in order to collect information about the user electronically.

MediaMax’s EULA states that the software will not be used to collect personal information and SunnComm’s website says “no information is ever collected about you or your computer.” MediaMax DRM will install without presenting the user with the EULA, or where the user declines the installation. However, the MediaMax DRM in fact contacts <license.sunncomm2.com>, a site operated by MediaMax’s creator, SunnComm, in order to collect information about the user electronically.

These contacts permit both sites to log the user’s IP address, the date and time, and the identity of the album. In both cases, the Sony BMG DRM collects personal information about users without notice or consent, and does so when users are not expecting such collection and, in the case of MediaMax DRM, even where users have expressly declined to install the DRM or otherwise have no knowledge that the DRM has installed.

A more complete description of the behaviour associated with the Sony BMG DRM may be found in a paper by Princeton University professors J. Alex Halderman and Edward W. Felten, “Lessons from the Sony CD DRM Episode”, available at <http://itpolicy.princeton.edu/pub/Sony_drm-ext.pdf>.

Sony has settled class actions in the United States instituted in response to Sony BMG’s Wrongful Conduct (see <<http://www.Sonybmgcdtechsettlement.com/pdfs/SettlementAgreement.pdf>>). Sony is in the process of settling parallel class actions in Ontario, British Columbia and Quebec (see <http://cdtechsettlement.sonybmg.ca/>). This matter has thus been the subject of extensive negotiations with Sony BMG over the past year, in both Canada and the US. Any attempt by CIPPIC to resolve the matter directly with Sony BMG, outside the class action, would clearly be fruitless and inappropriate.

In the Canadian settlement agreement, Sony states:

T. No Collection of Personal Data. SONY BMG asserts that it has not used the MediaMax or XCP Software, or any of the enhanced content on XCP CDs or MediaMax CDs, to collect, aggregate or retain Personal Data about persons who listened to XCP CDs or MediaMax CDs on computers, without such persons’ express consent. SONY BMG further asserts that it has only collected information necessary to provide enhanced CD functionality. SONY BMG believes and, on that basis, asserts that such functionality requires that the album title, artist, IP address, and certain non-personally identifiable information be collected. Beginning after the date on which the Approval Order is first granted in Québec or Ontario, SONY BMG will take commercially reasonable steps to destroy the information it collects to provide enhanced CD functionality, including logs of IP addresses, within ten (10) days after the collection of such data, except as required by law, regulation, litigation discovery rule or court order. SONY BMG shall, however, be permitted to compile aggregate, non-personally identifiable data about hits to its servers from enhanced CDs.

The Canadian settlement agreement defines “Personal Data” to explicitly exclude certain information, including IP addresses:

G. "**Personal Data**" means information stored on a computer that itself discloses the identity of the individual using that computer or that discloses websites, other than the SONY BMG and SunnComm websites, that the user has visited using the browser on such computer, but does not include the IP address of the computer's Internet connection or any information with respect to an album title, artists and tracks, or other non-personally identifiable information, which is routinely logged by SONY BMG in connection with CDs containing Content Protection Software.

An IP address is thus "personal information" if it can be associated with an identifiable individual. In at least one case, the Privacy Commissioner of Canada has found that an IP address constitutes "personal information" under PIPEDA (See PIPEDA Case Summary #319). Indeed, Sony BMG itself has relied in the past on IP addresses to seek an order to disclose the identities of individuals for the purposes of suing them in Federal Court. (See *BMG Canada Inc. v. Doe* 2005 FCA (CanLii)). Sony BMG therefore understands very well the ways in which IP addresses can be linked to individual users.

In explicitly excluding IP addresses from the definition of "personal data" under the Canadian settlement agreement, Sony BMG seeks to evade liability and responsibility for its personal information practices, in particular the gathering of user IP addresses for undisclosed purposes.

With respect to content usage data, Justice LeBel of the Supreme Court of Canada has sounded a warning about why we ought to tread carefully at the intersection of copyright and privacy:

[an individual's surfing and downloading activities] tend to reveal core biographical information about a person. Privacy interests of individuals will be directly implicated where owners of copyrighted works or their collective societies attempt to retrieve data from Internet Service Providers about an end user's downloading of copyrighted works. We should therefore be chary of adopting a test that may encourage such monitoring.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, 2004 SCC 45, at para. 155.

We submit that these same considerations apply to the use of Sony BMG musical content within the privacy of one's own home. Personal use is, by definition, private use. Moreover, Canadians have the right under PIPEDA to be informed of the collection, use and disclosure of personal use data where it can be linked back to their identity, and to refuse consent to such unnecessary collection, use or disclosure.

PIPEDA VIOLATIONS

Principle 4.3, Schedule 1

4.3 – Consent – The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

4.3.2 - The Principle requires "knowledge and consent". Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated

in such a manner that the individual can reasonably understand how the information will be used or disclosed.

4.3.5 – In obtaining consent, the reasonable expectations of the individual are also relevant...

Sony et al did not obtain consumers' consent before gathering their IP addresses and personal use data through the use of CDs they had purchased. Indeed, Sony et al made no effort to advise consumers of the purposes for which such information was being collected, or even that the information was being collected at all. Since a reasonable consumer would not expect an ordinary product such as a music CD to have the power to collect personal information and report back to the manufacturer, it is clear that some form of notification, at a minimum, would be required to ensure there was consumer consent to the activity. Since no such notification was provided, and since consent to such practices cannot reasonably be implied in the circumstances, Sony et al violated PIPEDA's central requirement of consent.

These practices are in clear violation of s. 5(1) of PIPEDA, and none of the exceptions in s.7 apply.

We therefore request that you investigate the above-named companies and render a finding as to their compliance with PIPEDA. Note that we have filed parallel complaints with the Privacy Commissioners of Alberta and British Columbia under their respective data protection laws.

We await your investigation, findings, and response.

Yours truly,

David Fewer