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

Office of the Secretary

June 28, 2007

Jerry Berman, President
Center for Democracy
& Technology
1634 I Street, NW, Suite 1100
Washington, D.C. 20006

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

Dear Mr. Berman:

Thank you for 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 recommends that the Commission make several specific order modifications, discussed in turn below.

Testing all Software for Security Vulnerabilities

You recommend adding a new provision to the order that would require Sony BMG to: (1) test all software for security-related problems prior to release, and submit the results to the FTC; (2) issue patches for security vulnerabilities in a timely and accessible manner; and (3) ensure that its distributors cooperate with security vendors to minimize the threat posed by security flaws discovered post-release. In your comment, you opine that adding the above requirements would mitigate the risk that sloppy or over-aggressive programming could impair the general security of consumers' computers, and that this order should set testing standards for DRM software and software in general.

Although the Commission agrees that pre-release security testing is a good business practice, the purpose of this order is not to set security testing standards for DRM software or software in general. The Commission's complaint does not allege that failing to test the DRM software is an unfair practice. Rather, the unfair practices alleged in the complaint are that Sony BMG installed the software without adequate notice and consent, and employed a technology that hid the software, thus hindering or preventing its removal. The order adequately remedies the alleged illegal practices by: (1) requiring notice of, and consumers' consent to, installation of the DRM software (Parts I and II); (2) 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 (3) obligating Sony BMG to provide a reasonable and effective means for consumers to uninstall the software (Part VII.A.).

The Definition of "Clear and Prominent"

You next suggest that the definition of clear and prominent be changed to incorporate the requirement contained in the recent adware settlements, *In the Matter of Zango* and *In the Matter of Direct Revenue*,[1] that disclosure of material terms be "prior to the display of, and separately from, any final [EULA]." The order against Sony BMG requires that the computer screen disclosure be "unavoidable," but does not require it to be separate from the EULA. In your comment, you state that including such a requirement here would make even more explicit the requirement that material terms need to be disclosed outside of the EULA.

The Commission does not believe that changing the definition as you suggest is necessary or appropriate. First, as you aptly observe, any on-screen disclosure required by the order will be *de facto* separate from any EULA. Given that the only portion of a EULA that is "unavoidable" is the first screen that appears automatically, any disclosure that is a part of a EULA would be compliant only if it appeared on that first screen. Second, in responding to commenters on the proposed *Zango* order, the Commission noted that requiring disclosures separate from a EULA was fencing-in relief based on the conduct and software at issue. Although cautioning industry that a EULA disclosure alone may not be sufficient to correct a misleading representation made elsewhere, the Commission did not say that a EULA-only disclosure was *per se* insufficient. Instead, the Commission noted that it would analyze EULA-only disclosures on a case-by-case basis, weighing what information is material to consumers and the overall, net impression the consumer has regarding the transaction.[2]

Disclosing the Effects of DRM

You propose two changes to Part I of the order, which compels Sony BMG to disclose on product packaging the existence and effects of DRM software. First, Part I.A. requires that Sony BMG disclose:

> On the front of the product packaging, that important consumer information regarding limits on copying and use can be found on the rear of the product packaging;

Part I.B. requires that the informational disclosures themselves must be on "on the product packaging" in an unspecified locale.

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[1] *In the Matter of Zango, Inc.*, Dkt. No. C-4186 (March 7, 2007), available at http://www.ftc.gov/os/caselist/0523130/index.shtm, and *In the Matter of DirectRevenue LLC*, FTC File No. 052 3131 (Feb. 16, 2007) (accepted for public comment), available at http://www.ftc.gov/os/caselist/0523131/index.shtm.

[2] See Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Mark Bohannon, Esq., March 7, 2007, at 2, available at http://www.ftc.gov/os/caselist/0523130/0523130c4186lettercommenterSIIA.pdf.

In your comment, you observe that this provision effectively prohibits Sony BMG, if it so chose, from making the required disclosures more prominently on the front of the packaging. You suggest that there is no reason to prevent Sony BMG from including the informational disclosures on the front of the packaging if it so desires. To rectify this concern, you suggest adding the phrase "if that is the case" to the end of Part I.A. The Commission agrees that CDT's suggested change would clarify that Sony BMG has the option to disclose its DRM use limitations on the front of the product packaging.

Second, you suggest that Part I.B.3 of the order is too narrow because it requires Sony BMG to disclose that its DRM software limits transfer of the digital content only to playback devices that support secure Windows or Sony ATRAC file formats, if that is the case. You opine that the list of formats should not be so limited, presumably because the list may grow going forward, and should also include any known operating system limitations. To accomplish these two purposes, you recommend that the Commission substitute the phrase "specific file formats or operating systems" for the current provision's "secure Windows formats or the Sony ATRAC format," so that the provision would read:

> (3) allows the direct transfer of the product's audio files or other digital content only to playback devices that use specific file formats or operating systems, if that is the case.

The current provision reflects the Commission's determination that the fact that the DRM software restricts transfer of the CDs' digital content to secure Windows formats or the Sony ATRAC format is material to consumers. The Commission believes that the disclosure you propose would require Sony BMG to make disclosures whenever its CDs are compatible with any file format, whether these formats are material to consumers or not, thereby diluting the effect of disclosures of material information.

Sony's use of phone-home information

You further recommend that the Commission modify Part IV.A. of the order to explicitly ban Sony BMG from selling the consumer information – IP addresses and the identity of CDs played – received via its enhanced connectivity CDs that already are in consumers' hands.[3] The current provision bars the use of this information for marketing purposes and requires its destruction within three days.

The Commission believes that the proposed change is unnecessary. In order to comply with the destruction requirement, Sony BMG must maintain control of all of the collected information. In addition, based on non-public information obtained in our investigation, we are confident that this remedy adequately addresses any remaining issue regarding collection of information through CDs sold before the order becomes final.

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[3] Part V of the order requires post-purchase notice and consent before any information collection occurs through CDs sold after the order becomes final.

Ban on cloaking limited to CDs

Finally, you suggest that Part VI of the order, which bans Sony BMG from installing any software that prevents consumers from readily locating or removing the software, including by means of hiding or cloaking files, should be broadened to apply to digital music sold over the Internet. You opine that the same arguments against the cloaking of content protection software apply whether such software is distributed via CD or digital music download.

The Commission believes that the more narrow coverage of the current order is appropriate. The staff's investigation showed no evidence that Sony BMG had used any cloaking technology in any DRM software embedded in digital music it sold over the Internet, nor does the Commission have reason to believe it might do so going forward. The Commission retains the ability to bring a *de novo* action if Sony BMG ever uses cloaking technology in a way that would violate Section 5 of the FTC Act.

After reviewing your comment, the Commission has determined that the public interest would best be served by accepting the consent order as final with your suggested modification to Part I.A. That would change the provision to read:

> On the front of the product packaging, that important consumer information regarding limits on copying and use can be found on the rear of the product packaging, if that is the case.

Thank you again for your comment.

By direction of the Commission.

Donald S. Clark
Secretary