

FEDERAL COURT

BETWEEN:

DESTINY MEDIA TECHNOLOGIES, INC. and
DESTINY SOFTWARE PRODUCTIONS, INC.

Plaintiffs

- and -

MUSICRYPT INC.

Defendant



STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on

request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

March 7, 2006

Issued by: **ORIGINAL SIGNED BY**
JULIEN RAYMOND
~~**ORIGINAL SIGNÉ PAR**~~

Address of local office: 90 Elgin Street
Ottawa, ON
K1P 5B8

TO: MUSICRYPT INC.
225 East Beaver Creek Road
Suite 300
Richmond Hill, Ontario L4B 3P4

CLAIM

1. The Plaintiffs claim:
 - (a) a declaration pursuant to subsection 60(2) of the *Patent Act* that the manufacture and sale by the Plaintiffs of the products and services manufactured and sold under the name "Promo Only MPE" do not infringe Canadian Letters Patent No. 2,407,774 (the "'774 Patent");
 - (b) a declaration pursuant to subsection 60(1) of the *Patent Act* that the '774 Patent is invalid;
 - (c) in the alternative to (b), a declaration pursuant to subsection 60(1) of the *Patent Act* that such claims of the '774 Patent as this Honourable Court may determine are invalid;
 - (d) their costs of this action on a solicitor and client scale; and
 - (e) such further and other relief as to this Honourable Court seems just.

The Plaintiffs

2. The Plaintiff, Destiny Media Technologies, Inc., is a publicly traded corporation incorporated pursuant to the laws of Colorado. The Plaintiff, Destiny Software Productions, Inc., is a corporation incorporated pursuant to the laws of British Columbia, and is a wholly owned subsidiary of Destiny Media Technologies, Inc. The Plaintiffs are referred to collectively as "Destiny" herein. Destiny's head office is at 1040-1055 W. Hastings St., Vancouver, British Columbia, V6E 2E9.
3. Destiny is in the business, *inter alia*, of developing, manufacturing and selling tools for distributing media via the Internet.

The Defendant

4. The Defendant, Musicrypt Inc. ("Musicrypt"), is a publicly traded corporation incorporated pursuant to the laws of Ontario with its registered office address at 225 East Beaver Creek Road, Suite 300, Richmond Hill, Ontario, L4B 3P4. Musicrypt is also in the business of media distribution via the Internet.
5. Musicrypt is the registered owner of the '774 Patent.

The Promo Only MPE Product

6. Destiny currently offers, among other products, software distributed under the trade-mark "MPE" (from "Media Protected by Encryption"). MPE, which was first developed in 1999, is a digital media distribution system technology that allows for the movement of digital content through the Internet while maintaining and protecting the security of that content. In particular, the MPE technology enables music, video, pictures and other content to be delivered digitally, providing enhanced speed and cost savings, while addressing the security issues that are particularly important for content providers, particularly in the music industry.
7. The MPE technology allows, among other things, for music content to be transferred through the Internet in a manner that permits the content to be played only on authorized computers. In general terms, the MPE technology achieves this by taking a digital "fingerprint" of any computer that attempts to play the music file. If the fingerprint is not authorized, the music will not play.
8. The scope of the MPE technology is beyond music delivery and can be used to move any kind of digital content, such as music, music videos,

software, photographs, research reports or electronic books. Virtually any content that has value associated to it can be moved by the MPE system so long as it can be expressed digitally.

9. Destiny has developed a particular music delivery software that uses the MPE technology and that is sold by Destiny, together with its marketing partner Promo Only Inc., under the trade-mark "Promo Only MPE". The Promo Only MPE system delivers promotional copies of music and music videos to radio stations, disc jockeys, and select individuals. The Promo Only MPE system uses the digital "fingerprinting" MPE technology to identify and validate the particular computer on which the promotional copy of the music is being played. The Promo Only MPE system thereby enables the makers of music content – such as record labels – to distribute promotional copies of music without fearing that such copies will be pirated and distributed broadly through the Internet.

The '774 Patent

10. Musicrypt is the registered owner of the '774 Patent, entitled "Content Distribution System and Method". The application for the '774 Patent was filed on October 11, 2002 with a claimed priority date of July 16, 2002 (both dates well after the MPE system was developed) and was laid open for inspection on September 16, 2003. The '774 Patent was issued on January 4, 2005.
11. In correspondence to third parties, Musicrypt has alleged or implied that the Promo Only MPE product infringes the '774 Patent. As set out further below, Destiny states that the Promo Only MPE system does not infringe the '774 Patent, and further that the '774 Patent is invalid in its entirety.

12. The '774 Patent claims a method and system for secure distribution of content to authorized persons, set out in five independent claims (1, 21, 30, 42 and 63) and a number of dependent claims.
13. The method described in claim 1 of the '774 Patent involves a content file and an associated distribution list being received; the content file and distribution list being stored in a database; a request for access to the database being received from a recipient; verification of the recipient's identity as being a person on the distribution list; and providing a copy of the content to the recipient upon such verification.
14. The claims dependent on claim 1 include further specification or further steps but all require the foregoing. The other independent and dependent claims of the '774 Patent describe a system, method or computer program product having equivalent or similar features as set out in the patent claims.
15. In particular, the method, system or computer program of the '774 Patent involves, among other things, a validation process that verifies the identity of an individual recipient that is seeking to access the content, rather than simply identifying the computer terminal that is being used by the recipient.
16. Each and every claim of the '774 Patent includes as an essential element, among others, the verification of the identity of the individual recipient, as distinct from the computer terminal used by the recipient. The verification of the identity of the individual recipient, as claimed in the '774 Patent and as that term is used in the '774 Patent, involves the use of biometrics, including keystroke dynamics.

17. Further, each and every claim of the '774 Patent includes as an essential element, among others, the existence of a database that contains both a content file and an associated distribution list.

The Plaintiffs Do Not Infringe the '774 Patent

18. Even if the '774 Patent is presumed to be valid, Destiny has not committed any acts that infringe the '774 Patent. In particular, the Promo Only MPE system does not infringe the '774 Patent.
19. The Promo Only MPE system does not include all essential elements of any of the claims of the '774 Patent. The Promo Only MPE system therefore cannot and does not infringe the '774 Patent.
20. In particular, but without limiting the foregoing, the Promo Only MPE system does not include the essential element of verifying the identity of the recipient, as that term is used in the '774 Patent, which element is required by all of the claims of the '774 Patent. The Promo Only MPE system therefore cannot and does not infringe the '774 Patent.
21. In further particular, but without limiting the foregoing, the Promo Only MPE system does not include the essential element of having a database that contains both a content file and an associated distribution list, which element is required by all of the claims of the '774 Patent. The Promo Only MPE system therefore cannot and does not infringe the '774 Patent.
22. In the alternative, any construction of any claim of the '774 Patent which results in the Promo Only MPE system reading on such claim must also render such claim invalid as claiming what is in the prior art and therefore as being overbroad.

23. Destiny therefore seeks and respectfully requests a declaration that the Promo Only MPE system does not infringe any claims, or, in the alternative, any valid claims, of the '774 Patent.

The '774 Patent is Invalid

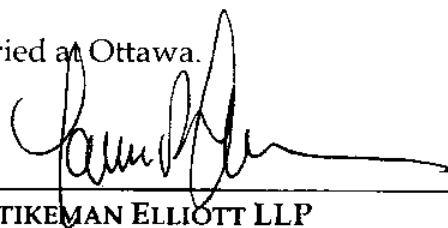
24. The '774 Patent, including each and every claim thereof, is and always has been invalid as:
- (a) contrary to paragraph 28.2(1)(b) of the *Patent Act*, the alleged invention claimed in each and every claim of the '774 Patent is not new and was disclosed before the claim dates of said claims by persons other than the applicant or those obtaining knowledge from the applicant in such a manner that the subject matter became available to the public in Canada or elsewhere. Particulars of such prior disclosure include but is not limited to that which is set out in Schedule A attached hereto; and
 - (b) contrary to paragraph 28.3(b) of the *Patent Act*, the alleged invention claimed in each and every claim of the '774 Patent was obvious on the claim dates of said claims to a person skilled in the art or science to which the alleged invention pertains, having regard to the common general knowledge in the art as of that date and the prior art made public including but not limited to that which is set out in Schedule B attached hereto.
25. Further, each of the independent claims 1, 21, 30, 42 and 63 of the '774 Patent and each of the claims dependent thereon claim subject matter that includes the essential element of verifying the identity of recipient, as that term is used in the '774 Patent. The identity verification technique employed must comprise at least one of the specific identity

verification techniques listed in the '774 Patent but none of said techniques are included or claimed in the independent claims.

26. The identity verification techniques listed in the '774 Patent involve receiving biometric input from the recipient and comparing said received biometric input with a stored biometric profile. Furthermore, the only biometric listed in the '774 Patent is keystroke dynamics. Accordingly, if claims 1, 21, 30, 42 and 63 of the '774 Patent are construed as including identity verification techniques other than those disclosed in the '774 Patent, then claims 1, 21, 30, 42 and 63 and all claims dependent thereon are invalid as being broader than the invention made and/or disclosed.
27. Destiny therefore seeks and respectfully requests a declaration that the '774 Patent is invalid in its entirety.
28. Destiny therefore respectfully requests that the relief in paragraph 1 herein be granted, with costs to Destiny on a solicitor and client scale.

The Plaintiffs propose that this action be tried at Ottawa.

March 7, 2006



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Solicitors for the Plaintiffs

SCHEDULE A

1. World Intellectual Property Organization (“WIPO”) International Publication Number WO9709801
2. WIPO International Publication Number WO0079826
3. WIPO International Publication Number WO0133829
4. WIPO International Publication Number WO0154324
5. WIPO International Publication Number WO0182023
6. WIPO International Publication Number WO0198903
7. WIPO International Publication Number WO0245316
8. United States Patent Application Publication Number US20020016718
9. United States Patent Application Publication Number US20020052887
10. United States Patent Application Publication Number US20020083006
11. United States Patent No. 5,765,152
12. Japanese Patent Application Publication Number JP2000330881
13. Japanese Patent Application Publication Number JP2002169973
14. Jon R. Luni & Allen E. Whitman, “Streaming Audio: The FezGuys’ Guide”, New Riders Publishing, May 2002.
15. Seth McEvoy, “Windows Media Player 7 Handbook”, Microsoft Press, 2000.
16. Bradley Ford et al., “Revolutionary QuickTime Pro”, Friends of Ed, March 2002.
17. Tim Berners-Lee, “Information management: a proposal”, the history of the World Wide Web on W3.org archive <http://www.w3.org/History/1989/proposal.html>, 1989 and subsequent revisions thereto.
18. Destiny’s MPE system, which has been developed and available since 1999.
19. Bulletin Board Systems, which systems have been around since at least the early 1980’s.
20. Bulk unsolicited email, which has been around since at least the early 1990’s.
21. Web servers having mechanisms of authentication, authorization, and access control, which systems have been around since the beginning of the World Wide Web, and at least since the early 1990’s. Two examples are Apache and CERN’s httpd.

SCHEDULE B

1. WIPO International Publication Number WO9709801
2. WIPO International Publication Number WO0079826
3. WIPO International Publication Number WO0133829
4. WIPO International Publication Number WO0154324
5. WIPO International Publication Number WO0182023
6. WIPO International Publication Number WO0198903
7. WIPO International Publication Number WO0245316
8. United States Patent Application Publication Number US20020016718
9. United States Patent Application Publication Number US20020052887
10. United States Patent Application Publication Number US20020083006
11. United States Patent No. 5,765,152
12. Japanese Patent Application Publication Number JP2000330881
13. Japanese Patent Application Publication Number JP2002169973
14. Jon R. Luni & Allen E. Whitman, "Streaming Audio: The FezGuys' Guide", New Riders Publishing, May 2002.
15. Seth McEvoy, "Windows Media Player 7 Handbook", Microsoft Press, 2000.
16. Bradley Ford et al., "Revolutionary QuickTime Pro", Friends of Ed, March 2002.
17. Tim Berners-Lee, "Information management: a proposal", the history of the World Wide Web on W3.org archive <http://www.w3.org/History/1989/proposal.html>, 1989 and subsequent revisions thereto.
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