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# David Slays Goliath

## Sony BMG Retreats on Copy Protection

**H**UMOR NEWSPAPER *The Onion* recently ran a short piece about how the Recording Industry Association of America (RIAA) will be “taking legal action against anyone discovered telling friends, acquaintances, or associates about new songs, artists, or albums.”

The article goes on to quote a supposed RIAA anti-piracy staffer that the organization is “merely defending our right to defend our intellectual properties from unauthorized peer-to-peer notification of the existence of copyright material.” He added that the RIAA will “aggressively prosecute those individuals... who generate ‘buzz’ about any proprietary music, movies or software... in the company of anyone other than themselves.”

While *The Onion* was merely poking fun at an easy target, as it is known to do, the piece underscores the

futility in attempting to curb piracy via unproven copy protection technologies, exemplified by Sony BMG Music’s recall in early November 2005 of 3 million CDs, although approximately 17 million discs in total were affected by two types of faulty software, according to the Electronic Frontier Foundation (EFF), a lead plaintiff in subsequent litigation. Fifty-two Sony BMG Music titles (see the list in the sidebar) were affected by the faulty software, which only caused problems on PCs; Macs were unaffected.

To recap, Sony BMG and its two copy-protection software suppliers — U.K.-based First4Internet (whose product is XCP) and U.S.-based Sunncomm (whose product is MediaMax, which had two versions causing problems) — were sued by as many as 50 parties throughout the country (20 cases in New York alone,

not including an investigation contemplated by the New York State Attorney General Elliot Spitzer). Attorneys General in Illinois, Florida and Massachusetts also are weighing whether they should sue as well due to consumer rights issues raised by the problem.

MediaMax is automatically installed on the hard drive even if the user declined in a pop-up window detailing an end user license agreement (EULA). XCP unleashed a "rootkit" then would play havoc with the hard drives, and leave the computers susceptible to viruses and security breaches.

To Sony BMG's credit, the company quickly reacted to contain the problem within days of it being reported on cyberspace blogs, first by halting the manufacturing of the copy protected CDs, then by offering a "patch" (Microsoft did as well) that would supposedly undo any damage caused by the software, and finally quickly settling several dozen class-action lawsuits filed in December.

I attended the Jan. 6 hearing for *The Audiophile Voice*, where federal Judge Naomi Reice Buchwald, of the U.S. District Court for the Southern District in New York, approved a preliminary settlement agreed to by the defendants. Virtually all of the suits, both federal and state, have been consolidated by Buchwald's court.

The terms of the settlement involve giving consumers who had bought the flawed CDs replacements without digital rights management (DRM); some will also receive downloads of other Sony BMG music from several different services, including iTunes.

The settlement would also waive several restrictive EULA terms and commit Sony BMG to a detailed security review process prior to including any DRM on future CDs, as well as providing for adequate pre-sale notice to consumers in the future.

Consumers can exchange CDs with XCP software for clean CDs now, but the rest of the settlement benefits will not be available until an official notice to the class has been issued. The court ordered that the notice — via newspaper ads, Google ads, email and other means — must occur by February 15. Once that notice goes out, consumers can begin submitting claims for settlement benefits and should get those benefits within 6-8 weeks of submitting the proof of claim form. The deadline to opt out of the settlement is May 1, 2006.

The settlement, announced Dec. 29, 2005 by the Electronic Frontier Foundation (EFF) and to be final May 22, 2006, requires Sony BMG to offer the 2 to 3 million customers who purchased CDs containing XCP software a replacement disc not containing anti-piracy software and a choice between two compensation options. The first option would give customers \$7.50 and a code to download an album from a list of about 200 titles. Customers who forgo the \$7.50 could download three albums from the list. An additional 8 million customers who bought Sony BMG CDs containing MediaMax anti-piracy software would be eligible to download unprotected replacement tracks and, in some cases, an album from the list of 200 titles.

At the hearing, plaintiff attorney Scott A. Kamber, partner in the firm Kamber & Kolav, opened by telling

the judge that the case "was not about whether a record company can use software to protect its intellectual property." Rather, it's about providing relief to individuals whose computers were left susceptible to security risks, and the record firm's obligations to consumers who buy a music product.

Representing the defendants at the hearing, Jeffrey S. Jacobson, of the high-powered corporate law firm Debevoise & Plimpton LLP, pretty much agreed with Kamber's assessment of what transpired, except his description of the capabilities of Sony BMG's enhanced CD technology. Kamber stated that when a user signed

on to a Sony BMG artist website via an affected CD, the company gained valuable information about the location of that computer. Jacobson said Kamber was wrong with that assertion. "Sony BMG was not spying on

its customers," Jacobson said. Any information logs of IP addresses of computers hitting the company's website are discarded, and do not identify a computer user's location, he added. "If [Sony BMG] had that capability, it didn't know it or didn't use it," Jacobson said, conceding that his client "needs to prove to the world that it wasn't spying on consumers."

One potential area of the litigation that the plaintiffs decided to not pursue was whether consumers could make claims that their hardware was damaged by the Sony BMG copy protection software. Kamber said the plaintiffs' security experts concluded that no permanent damage could have been done. Judge Buchwald said she was relieved by that development because if it became an element of the suit it could present a logistical nightmare, although her staff came up with a possible remedy of the defendants reimbursing consumers' the equivalent of three hours of computer repair time.

## The Settlement & The Big Picture

Chalk up one for the little guy. The case is classic David vs. Goliath. The plaintiffs not only won a decisive legal victory but a moral one as well.

According to various sources, Sony BMG claimed it did not intend for the copy protection to behave the way it did. In any case, it behooves the record industry to rethink its strategy to clamp down with Draconian measures on any activity that it perceives might result in unauthorized file-sharing. With the July 2005 U.S. Supreme Court unanimous ruling in favor of the RIAA, and against the file-sharing services Grokster and Morpheus, all content owners no doubt feel emboldened that they are on the right path to protect their assets, and to hell with anyone or thing that gets in its way.

Such a strategy doesn't, unfortunately, produce the intended results, as demonstrated by the Sony BMG fiasco. But such an exercise in crisis management is not without precedent. A few years ago, Sony was previously embarrassed by its proprietary Key2Audio copy protection defeated simply by using a felt-tip pen along the rim of a CD.

All this preoccupation protecting the family jewels does not rest solely with Sony Music; all of the majors have been active in copy protection for at least the past

## Sony BMG Learns Hard Lesson Trying to Copy-Protect CDs

five years. Prior to its merger with Sony Music, BMG aggressively pursued copy protection, using Sunncomm's Mediamax on Anthony Hamilton's *Coming From Where I'm Comin'*. And Universal announced in September 2001 its intent to incorporate various copy protection measures on all its CDs by March 2002, but it didn't happen on that wide a scale.

At a recent CES press conference, keynoter and Sony Corp. chairman Howard Stringer explained the quandary his company is facing. "Clearly the perception out there is that we shouldn't be doing too much of that copy protection stuff," Stringer said. "We'll just have to tread very, very carefully. We have to walk the line at Sony between the needs of technology and the consumer, and the rights of the artist, which we feel very strongly about."

### The Peanut Gallery

*The Audiophile Voice* queried various interested parties on what they thought of what transpired:

**Sony BMG spokesman**, who requested to speak on "background": "We had no intention to [help] create [an environment for] a virus," he said, adding that his company first became familiar with the term "rootkit" when it emerged on a Nov. 3 blog. Sony BMG intended nothing more than to create "a series of speed bumps" that would "limit the number of burns" a consumer could make. Three copies of a purchased CD is OK, but the company has a problem with making 100 copies for every kid who comes to a birthday party. When asked what the status of copy protection is at Sony BMG and whether copy protection exists in any form on discs besides the now-infamous XCP and MediaMax CDs, all that the spokesman would say is, "We're reviewing all efforts in the entire program."

**EFF staff attorney Corryne McSherry**: "Sony [BMG] and all record companies have to be learning from this mistake, and think twice before they take on their customers as adversaries." She hopes that labels would "think long and hard before they put in DRM." Whether or not Sony BMG had intended for the software to do what it did is a non-issue, as far as EFF is concerned. While Sony was sued for violating various laws, the

crux of the litigation, she said, was that the copy protected CDs introduced software without receiving "user licensing agreement" (ULA) consent. If the user declined the license agreement that would pop up on the screen, the CD wouldn't play.

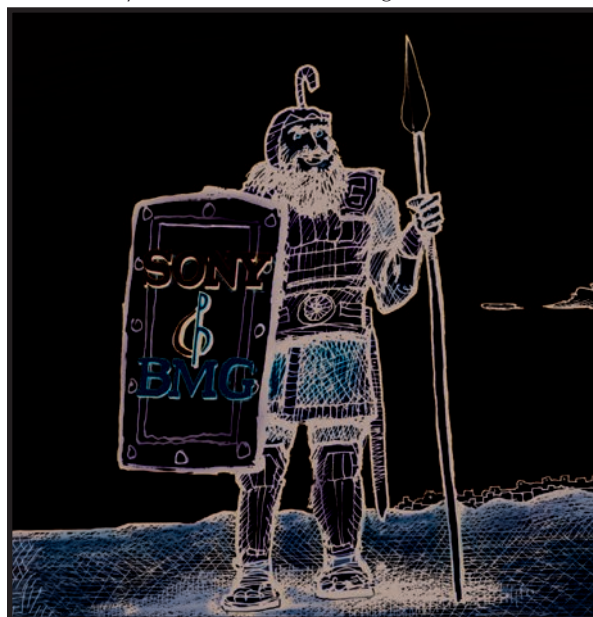
**Gary Shapiro, President/CEO of the Consumer Electronics Association (CEA) and Chairman of the Home Recording Rights Coalition (HRRC)**: "It's the risk of trying to protect in an overly obtrusive way. It's the downside to excessive copy protection" and "what could happen when you're not careful." That being said, Shapiro believes that "no one at Sony BMG intended this to happen. This was a mistake — move on." The fallout is that Sony's "reputation is smeared." As far as he's concerned, the CEA will stay out of the litigation fray, likening the subsequent suits as the handiwork of "ambulance chasers." (Sony is a member company of CEA, and its chairman Howard Stringer was one of the keynoters at CES in January.) Still, Shapiro concedes that "nobody expects a CD will start doing something to your computer." He noted that members of Congress are presently especially sensitive to anything that could change consumers' products. Considering the HRRC's mission, Shapiro urged labels to ask themselves whether they were taking away consumers' fair-use rights with copy-protected CDs.

**Steve Sussmann, former Sr. Director of Advertising & Creative Services for Sony Music and *The Audiophile Voice* contributor**: Laid off in the first wave of staff reductions coinciding with the arrival of new Sony Music head Andy Lack, who pushed for the merger with BMG, Sussmann's tenure with the record company spanned 1990 until 2003, making him uniquely qualified to observe the company's obsession with copy protection during the digital age. He remembers the first time that a Sony Music copy-protected CD made some noise around the water cooler. "It was a Celine Dion release a few years ago out of Europe. I remember hearing about how it was screwing up people's computers. People felt that the company was shooting itself in the foot by criminalizing their customer." Sussmann says he not condoning unauthorized file sharing, which he agrees is illegal. "You're not supposed to do it."

On the other hand, Sony's attempts at DRM, such as found in its Atrac system, left much to be desired since Sony downloads wouldn't work on any digital device. "People feel, 'This is my music. I should be able to put it on any device.'" He also sensed that Sony resisted the notion of selling single tracks a la iTunes in order to protect the full-album concept. "That's like going to a restaurant and ordering two eggs but they tell you have to take the whole dozen," Sussmann said.

**Former RIAA staffer James Fleming, currently an industry consultant**: "The current situation facing the industry of declining sales and a confused and sometimes 'alienated' consumer base, is the direct result of business decisions made concerning the implementation of DRM schemes. One of the outcomes of the failure of the SDMI was the genesis of a 'Fort Knox' mentality regarding content protection. This has led to the adoption of a technology-centric approach to solving the problems associated with declining sales.

"There are two major myths rampant in the record business concerning content protection. First is that protecting content will boost sales and second is that technology offers a silver bullet to the threat of copying.





Needless to say, this decision has led to a business situation that has side-tracked the labels away from their core-competency, created unmanageable risk in their business models, and seduced them into losing sight of what they are about: providing a valuable listening experience for the consumer. They seem to have forgotten that the best way to protect and increase sales is by creating a valued-added product that provides the consumer with a superior listening experience. This doesn't mean technology shouldn't have a significant role to play in the process; it can enhance the listening experience by improving fidelity, it can offer a better context, both aural and visual, within which the content is to be displayed or rendered, and it can enable a foundation for reasonable DRM. A major truism in technology is 'what one man can do, another can undo' and the result of this is an escalating competition to develop the most hack-proof solution. Unfortunately, in choosing this course of action, it is very easy to fall prey to a well-known trap in the technology business of mistaking complexity for sophistication. This is the situation facing the industry today. And it is the wrong path to achieve the desired results of improved sales. Content can be protected and sold digitally, look at iTunes and others. But the DRM has to be the side dish of the experience and not the entree."

**Current Sony BMG staffer (who requested anonymity for obvious reasons):** She's not surprised that the company undertook such an aggressive copy protection strategy, comparing it to "any large corporation trying to protect their assets. This was the method that they put their faith in." The employee notes she's "removed from the [corporate] decision-making process" that sets policy, but it's obvious to her for Sony BMG "to put on more restraints was a bad idea." She notes that two years ago, it was even worse when the company was resisting a new business model. She thinks the suits upstairs now finally realize "they have to retool their thinking processes."

But she ends the conversation on a somewhat sobering note. Mesmerized last year by the musical track playing against the final five minutes of the HBO series *Six Feet Under*, she was dismayed that a CD containing the song wasn't then available; nor was it on iTunes. She found it on unauthorized file-sharing service Limewire, and unapologetically downloaded it.

### The Origins of Copy Protection

It's been long lamented by the record industry that if the CD was originally equipped with some form of copy protection, perhaps there would not be such a big worldwide piracy problem. It was no accident that CD recorders and blank media only became affordable to consumers nearly 15 years after the format launched. CD burners as standard PC features coincided with the birth of Napster, and contemporary life was never the same. But how did we get where we are today? Serious discussion about how to use digital watermarks in CDs began in the late 1980s with the then-forthcoming Digital Audio Tape (DAT) recorders, and the realization of the potential threat posed by a perfect copy. On Oct. 28, 1992, President Bush [Sr.] signed the Home Audio Recording Act into law, which confirmed consumers' right to use — and retailers' right to sell — all analog and digital audio recording formats. As part of a compromise between the consumer electronics and music

industries, it was stipulated that digital audio devices must include a system which prohibits serial copying, and manufacturers or importers must pay a modest royalty new digital audio recording devices and media.

But DAT took hold as a professional format, and recordable CDs copied by a PC peripheral (i.e., a burner) were not covered by the compromise because the IT industry was not involved in the talks, which produced SCMS (Serial Copy Management System), allowing DAT only one "perfect digital copy." Who could have predicted then the Internet revolution that would transpire in a few short years? RIAA president/CEO Hilary Rosen confirmed in November 1999 a plan for digital watermarking to be introduced on Red Book CDs in six months' time. That never materialized, although various nascent copy protection schemes were tested but usually under the guise of the Secure Digital Music Initiative (SDMI), which initially was focused on digital distribution but whose members could never agree on compatibility standards.

In 2000, the major labels began testing copy protection in other regions of the world, but seemed to be staying clear of the U.S. Soon DVD-Video would surpass VHS as the most popular home video format, and its copy protection software was famously cracked by a Swedish teenager. Meanwhile, by 2004 the DVD-Audio companion to the widely popular DVD-Video format suffered an early embarrassing death. Sony's competing Super Audio CD hasn't fared much better, appealing solely to the audiophile niche. (Sorry, gang.)

One wonders whether consumers would have been more interested in the high-resolution aural discs if the record industry powers-that-be spent as much time figuring out an effective marketing plan to espouse the virtues of high-resolution, multichannel music experiences than they did on copy protecting those discs now gathering dust on retail shelves. DualDiscs, usually containing DVD-Audio content on one side with Red Book CD on the other, may have some isolated impressive sales numbers but that is more driven by artist (e.g., Bruce Springsteen's *Devils & Dust*) than affection for the format.

To find out what's in the future, we might look at what's happening with the next-generation DVD-Video format (i.e., the stupid Blu-Ray vs. HD DVD war; gee, didn't the movie studios learn that everyone lost in the DVD-Audio vs. Super Audio CD feud? Both have complex copy protection, but who cares since no one but



audiophiles are buying the discs.) But isn't it interesting that Sony acquiesced this past fall when Warner Bros. (as well as HP) pressed the Blu-Ray Disc Association adopt the HD DVD feature known as "Managed Copy" within the spec's Advanced Access Content System (AACS), which allows the consumer to make a copy.

Back in November 1999, the pre-Napster age, then IBM executive Alan Bell, now with Warner Bros., noted somewhat prophetically that IT companies involved in the SDMI discussions strongly opposed any attempt by the music companies to not allow any copies at all, and such a scenario was eventually excluded from the framework." There couldn't be a reduction of what computer users can legally do now," Bell said then of the IT position somewhat prophetically. Going back to the XCP/Mediamax debacle, isn't it time for Sony to be as flexible on music CDs?

## Epilogue

Twenty years ago, the RIAA bellowed that "Home Taping Is Killing The Industry." The truth is that taping didn't kill the industry then, and file sharing is not killing the industry now. (Editor's Note: See my editorial on how copying actually helps sales in *TAV* Vol. 10, No. 2. E.P.) There's a lack of admission on the part of the RIAA that its member companies moved too slow establishing legitimate digital music alternatives while Napster won the hearts and minds of consumers equipped with computer burners. Imagine what the world would look like if Steve Jobs didn't invent the nifty iPod, and the rest of the world played catch-up. The industry is also being disingenuous by not admitting that just perhaps file sharing is exposing music to millions of people that otherwise would not be heard,

and that is resulting in CD sales that would otherwise not be made.

Let's go back to the *The Onion* example at the top. Peer suggestions certainly outrank other means today (e.g., radio, print reviews) of finding out what's hot musically, and will generate sales of both physical CDs and digital downloads whether they're legal or unauthorized. A recent study conducted by CEA found that only 16 per cent of adults who access the Internet through a portable entertainment device subscribe to an authorized music downloading service that allows them to download content legally. So despite the thousands of RIAA suits against individuals for illegal downloading, 84 percent still are flocking to Napster's offspring.

Lucky for the industry, legitimate digital sales are finally becoming more than a blip on the radar screen. Nielsen SoundScan reported in early January that 332.7 song downloads were sold online in 2005, up from 134.2 million in 2004, adding that last-minute holiday shoppers propelled digital sales to a record week of 9.7 million downloads. Meanwhile, U.S. album sales fell 7.2 percent in 2005 to their lowest level in eight years, while sales of digital song downloads grew 194 percent. A total of 618.9 million albums were sold during 2005, near 1996's tally of 616.6 million. However, overall music sales — which includes albums, singles, music videos and digital downloads — were up 22.7 percent and topped 1 billion units for the year. Despite new competition in the form of DVD, video games, PSP, 500-channel cable/satellite TV systems, etc. among other leisure-time options, the latest Nielsen numbers clearly demonstrate that the paradigm shift of recent can get people to buy when they might have not in the past, and we're all better off for that.

## A Spotters' Guide to XCP and SunnComm's MediaMax

*The Audiophile Voice* is grateful to the Electronic Frontier Foundation and to Fred von Lohmann for their front-line work in gathering and posting this "Spotters Guide" as well as lists of affected CDs on their web site ([www.eff.org](http://www.eff.org)). In addition to the XCP list, reprinted nearby, they've posted an even larger list of CDs with MediaMax, as well as a Quicktime movie or slide show and several pictures showing the Sunncomm MediaMax labeling. *TAV* is especially indebted to the EFF for allowing us to reprint these materials. They deserve your support. *Gene Pitts*

### XCP Tip-off #1

On the front of the CD, at the left-most edge, in the transparent "spine," you'll see "CONTENT PROTECTED" along with the IFPI copy-protection logo. A few photos make this clearer.



### Tip-off #2

On the back of the CD, on the bottom or right side, there will be a "Compatible with" disclosure box. Along with compatibility information, the box also includes a URL where you can get help. The URL has a telltale admission buried in it: [cp.sonybmg.com/xcp](http://cp.sonybmg.com/xcp). That lets you know that XCP is on this disc (discs protected with SunnComm have a different URL that includes "sunncomm").

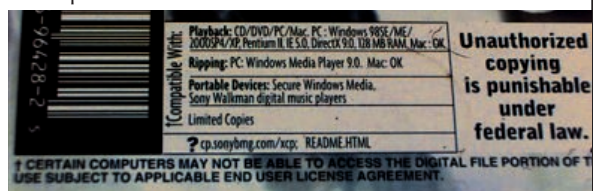
### SunnComm MediaMax Software

Compact Discs with the SunnComm MediaMax software are harder to spot, but can be identified by a wide variety of means. See [the EFF] slide show mentioned above. Most commonly, you will see a "Compatible with" disclosure box on the bottom of the back of the CD (see images here). From what [the EFF] have seen so far, only discs with MediaMax version 5 have this disclosure box. Along with compatibility information, the box also includes a URL where you can get help. The wording

"? [www.sunncomm.com/support/sonybmj](http://www.sunncomm.com/support/sonybmj);  
README.HTML"

lets you know that SunnComm MediaMax is on this disc.

However, a number of SunnComm MediaMax CDs use different methods, notably stickers on the front and, less helpfully, fine print on the back. These are generally MediaMax version 3, but at least one, Defined by Amici Forever, contains SunnComm MediaMax Version 5 and the URL but does not have the black and white "Compatible with" table noted above.



# CDs With XCP Content Protection Technology

from the Sony BMG web site

**S**ONY BMG has now released replacement and/or DualDisc versions for most of the titles on this list. You therefore need to check this list for both the name of the album and the item number (which can be found on the spine of the CD). Alternatively, you can check for the content protection grid on the back cover of the package, which looks like this:



If your CD does not use the item number listed below or show the grid on the back cover, your CD does not contain content production software.

## Artist Album Item Number(s)

1. A Static Lullaby *Faso Latido* CK92772
2. Acceptance *Phantoms* CK89016
3. Amerie *Touch* CK90763
4. Art Blakey *Drum Suit* CK93637
5. The Bad Plus *Suspicious Activity?* CK94740
6. Bette Midler *Sings the Peggy Lee Songbook* CK95107  
CK74815
7. Billie Holiday *The Great American Songbook* CK94294
8. Bob Brookmeyer *Bob Brookmeyer & Friends* CK94292
9. Buddy Jewell *Times Like These* CK92873
10. Burt Bacharach *At This Time* CK97734
11. Celine Dion *On Ne Change Pas* E2K97736
12. Chayanne *Cautivo* LAK96819, LAK96818, LAK95886
13. Chris Botti *To Love Again* CK94823
14. The Coral *The Invisible Invasion* CK94747
15. Cyndi Lauper *The Body Acoustic* EK94569
16. The Dead 60's *The Dead 60's* EK94453
17. Deniece Williams *This Is Niecy* CK93814
18. Dexter Gordon *Manhattan Symphonie* CK93581
19. Dion *The Essential Dion* CK92670
20. Earl Scruggs *I Saw The Light With Some Help From My Friends* CK92793
21. Elkland *Golden* CK92036
22. Emma Roberts *Unfabulous and More: Emma Roberts* CK93950, CK97684

23. Flatt & Scruggs *Foggy Mountain Jamboree* CK92801
24. Frank Sinatra *The Great American Songbook* CK94291
25. G3 *Live In Tokyo* E2K97685
26. George Jones *My Very Special Guests* E2K92562
27. Gerry Mulligan *Jeru* CK65498
28. Horace Silver *Silver's Blue* CK93856
29. Jane Monheit *The Season* EK97721
30. Jon Randall *Walking Among The Living* EK92083
31. Life Of Agony *Broken Valley* EK93515
32. Louis Armstrong *The Great American Songbook* CK94295
33. Mary Mary *Mary Mary* CK94812, CK92948
34. Montgomery Gentry *Something To Be Proud Of, The Best of 1999-2005* CK75324, CK94982
35. Natasha Bedingfield *Unwritten* EK93988
36. Neil Diamond *12 Songs* CK94776, CK97811
37. Nivea *Complicated* 82876671562
38. Our Lady Peace *Healthy In Paranoid Times* CK94777
39. Patty Loveless *Dreamin' My Dreams* EK94481
40. Pete Seeger *The Essential Pete Seeger* CK92835
41. Ray Charles *Friendship* CK94564
42. Rosanne Cash *Interiors* CK93655
43. Rosanne Cash *King's Record Shop* CK86994
44. Rosanne Cash *Seven Year Ache* CK86997
45. Shel Silverstein *The Best Of Shel Silverstein* CK94722
46. Shelly Fairchild *Ride* CK90355
47. Susie Suh *Susie Suh* EK92443
48. Switchfoot *Nothing Is Sound* CK96534, CK96437, CK94581
49. Teena Marie *Robbery* EK93817
50. Trey Anastasio *Shine* CK96428
51. Van Zant *Get Right With The Man* CK93500
52. Vivian Green *Vivian* CK90761

**Note:** Three titles — Ricky Martin, "Life"; Peter Gallagher, "7 Days in Memphis"; and a limited number of "Hidden Beach Presents Unwrapped Vol. 4" — were released with a content protection grid on the back of the CD packaging but XCP content protection software was not actually included on the albums.

**TAV Editor's Note:** All of the items on this page, including the album/artist list, the "content protection grid," and the note just above are from the Sony BMG web site. I have to say good on them for coming clean and addressing the problem. That it occurred is a strong indication of how crazy this has become. *Gene Pitts*