

FEDERAL COURT

B E T W E E N:

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

Plaintiffs

- and -

MUSICRYPT INC.

Defendant

RESPONSE TO REQUEST FOR PARTICULARS

1. (1) Destiny Software Productions, Inc. operates out of the Vancouver office referenced. The operations of Destiny Media Technologies, Inc. are through Destiny Software Productions, Inc. in Vancouver. The head office of Destiny Media Technologies, Inc. is at 1560 Broadway, Denver, Colorado, United States of America, 80202.
- (2) The Plaintiffs' servers are located in Vancouver.
2. (1) All relevant aspects of the software distributed under the trademark MPE were first developed in 1999. The Promo Only MPE system is in all relevant aspects the same as the MPE software developed in 1999, with differences only in such aspects as interfaces, marketing and the nature of encryption of digital files (with the addition of the new "watermarking" technology described below at (10)).
- (2) The MPE product was first made public through offering for sale to the public in 1999. The MPE product was also presented at

the Consumer Electronics Show in Las Vegas, Nevada in January, 2000. A related patent application, Canadian Patent Application No. 2,299,946, was filed on March 3, 2000 and laid open to public inspection on September 3, 2001. International Patent Application No. PCT/CA2001/000250 was filed on March 5, 2001 and published on September 7, 2001.

(3) MPE was offered for sale worldwide commencing in 1999. At that time (as now), the MPE system involved:

- the distribution of content, including musical, graphical and text content (including music previews and advertisements), in digital form via the Internet to one or more computers;
- the content being provided by one or more providers of content, including record labels;
- a list of authorized computers to which the content may be distributed;
- optionally, notification of users of availability of content;
- access to the MPE system by a computer via the Internet;
- a request by that computer for a content file from the MPE system;
- identification of the computer by the technology described at paragraph 7 of the Statement of Claim and paragraph 3 below (referred to for ease of reference as the "fingerprint" technology);

- authentication of the computer using the “fingerprint” technology and confirmation that the computer is on the list of authorized computers;
- delivery of the digital content to the authorized and authenticated computer in an encrypted form permitting access to the content only on that computer;
- optionally, obtaining opinion or feedback from the user.

In addition, the MPE system allows for e-commerce functionalities (used in the MPE product launched in 1999, but unnecessary for the Promo Only MPE product).

- (4) All that is relevant to the within action is that Destiny Media Technologies, Inc., through Destiny Software Productions, Inc., currently offers MPE software for sale in Canada. Beyond this, this request for particulars is not relevant to the within proceeding.
- (5) See response to (3) above.
- (6) See response to (4) above.
- (7) The reference in paragraph 6 of the Statement of Claim is to digital delivery providing enhanced speed and cost savings. Digital delivery using the Internet is faster and more cost-effective than other music delivery modes such as, for example, compact discs.
- (8) The MPE technology has always involved digital delivery of content using the Internet, since its inception in 1999.

- (9) See response to (2) above.
 - (10) Security of the digital content is addressed through the use of the technology described in paragraph 7 of the Statement of Claim and paragraph 3 below (referred to for ease of reference as the “fingerprint” technology). In addition, digital content distributed through the MPE system is “watermarked” in that it contains variations in code that do not affect the playback of the audio content, but which render the file identifiable as to source, thereby allowing an unlawfully distributed file to be traced to the source of the distribution.
 - (11) The MPE “fingerprint” technology was developed in 1999. The “watermark” technology was developed in 2004.
 - (12) With respect to the MPE “fingerprint” technology, see response to (2) above. With respect to the “watermark” technology, it was made public at the National Association of Broadcasters’ trade show in 2004.
3. (1) An “authorized computer” is a computer to which authorization has been given as being recognized by the MPE system and being on a list of authorized computers. The digital “fingerprint” is a unique identifying number that the MPE system generates through an algorithm from information on the computer, and which allows the MPE system to identify the computer and to differentiate it from other computers.
 - (2) A computer will be authorized when its unique identifying number is generated and placed on a list of authorized computers.

- (3) See response to (1) above.
 - (4) Through the use of a proprietary algorithm that references various features of the computer and generates a unique identifying number.
 - (5) Through the use of a database that contains a list of authorized identifying numbers.
 - (6) Access to the MPE system involves a user name and password, but this is not core to its functioning in that the computer itself must still be identified.
 - (7) No, the user name and password does not allow access to the MPE technology from any computer other than an authorized computer.
4. (1) There are no relevant aspects of the Promo Only MPE system that are not found in the MPE product that was launched in 1999. There are some differences that are not relevant to the within action:
- the Promo Only MPE system has a program that is resident on the end computer that is used both to access the MPE system and to play the content files, as opposed to having a self-executing file as was the case in the product launched in 1999;
 - as the Promo Only MPE system is for promotional purposes, the e-commerce functionalities contained in the product launched in 1999 are not necessary and are not included;

- the nature of the encryption of the content file is somewhat different in the Promo Only MPE system, although in both cases an encrypted content file is sent to the user computer, and the content file can only be decrypted and accessed on that computer.

- (2) As the differences are not relevant, the date of development of these other aspects are not relevant to the within action.
 - (3) Please see response to (3).
 - (4) To date, no sales of the Promo Only MPE system have been made in Canada.
 - (5) Yes.
 - (6) How the makers of music content make their selections of which radio stations, disc jockeys and select individuals are to receive promotional copies is up to the makers of the music content. Based on those decisions, the MPE allows the makers of music content to place users' computers on a list of authorized computers.
5. (1) All elements of the MPE system were developed prior to July 16, 2002, except the "watermarking" technology described in 2(10) above.
 - (2) See response to 2(2) above.
 6. This request seeks interpretation of the '774 Patent, which is properly the subject of expert evidence and determination by the Court and not particulars. The particulars requested are therefore not proper, and are further not necessary to plead in response to the Statement of Claim.

7. This request seeks argument and conclusions as to the interpretation of the '774 Patent, which is properly the subject of expert evidence and determination by the Court and not particulars. The particulars requested are therefore not proper, and are further not necessary to plead in response to the Statement of Claim.
8. Users of the Promo Only MPE system use player software that is present on their computer. This software accesses the MPE system via the Internet, both automatically upon startup and in response to specific requests from the user.
9. The MPE system contains content files and distribution lists, but does not contain a database containing both a content file and an associated distribution list.
10. As stated, paragraph 22 of the Statement of Claim is an alternative pleading based on alternative constructions of the claims of the '774 Patent that may be put forward by the Defendant or may be determined by the Court. It is therefore not possible to particularize this allegation further. However, any construction of any claim of the '774 Patent that results in the Promo Only MPE system reading on such claim is overbroad on the basis that it claims the prior art, and is therefore invalid. In any event, this request calls for seeks argument and conclusions as to the interpretation of the '774 Patent, which is properly the subject of expert evidence and determination by the Court and not particulars. The particulars requested are therefore not proper, and are further not necessary to plead in response to the Statement of Claim..
11. (1) Please see Appendix "A" to this Response to Request for Particulars. The particulars given therein are intended to

provide the Defendants with as much information as possible and necessary to plead in response to the Statement of Claim, and therefore include particulars of prior art based on alternative interpretations of the '774 Patent that may be put forward by the Defendant or determined by the Court.

- (2) FidoNet.
- (3) No other web server systems are referenced.
- (4) Please see Appendix "A" to this Response to Request for Particulars.
- (5) Additional prior art references are as follows:
 22. Canadian Patent Application Number CA02299946
 23. Canadian Patent Application Number CA02201200
 24. United States Patent No. 4,805,222
 25. International Patent Application No. PCT/CA2001/000250
 26. United States Patent Application (Provisional) No. 60/186,605
 27. "Bandits on the information superhighway", Daniel J. Barrett, February 1996, O'Reilly & Associates.
 28. "Maximum Linux Security", Anonymous, September 1999
 29. Online music distribution and sale systems (MusicNet, launched late 1999)
 30. Online text distribution and sale systems (NetLibrary, launched March 29 1999; Lancet.com, launched late 1999)
 31. Online banking systems

Please see Appendix "A" to this Response to Request for Particulars for further details.

12. (1) The aspects of the common general knowledge are set out in the prior art as described in Schedule "B" of the Statement of Claim and further particularized herein, notably at Appendix "B".
 - (2) Please see Appendix "B" to this Response to Request for Particulars. The particulars given therein are intended to provide the Defendants with as much information as possible and necessary to plead in response to the Statement of Claim, and therefore include particulars of prior art based on alternative interpretations of the '774 Patent that may be put forward by the Defendant or determined by the Court.
 - (3) FidoNet.
 - (4) No other web server systems are referenced.
 - (5) Please see Appendix "B" to this Response to Request for Particulars.
 - (6) Please see Appendix "B" to this Response to Request for Particulars.
13. This request seeks argument and conclusions as to the interpretation of the '774 Patent, which is properly the subject of expert evidence and determination by the Court and not particulars. The particulars requested are therefore not proper, and are further not necessary to plead in response to the Statement of Claim.

May 30, 2006



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Solicitors for the Plaintiffs

APPENDIX A – Request No. 11

Items 1 through 17 (Request No. 11(1))

No.	Reference	Portions (11(1)(a))	Claims of '774 Patent (11(1)(b))
1.	WO9709801	Pages 3-41; abstract; drawings; and claims.	1, 4, 5, 7, 8, 9, 13, 14, 17, 18, 21, 22, 23, 25, 26, 29, 30, 33, 34, 35, 36, 39, 41, 42, 45, 46, 48, 49, 50, 54, 55, 58, 59, 63, 66, 67, 68, 69, 70, 72, 74
2.	WO0079826	Pages 1-64; abstract; drawings; and claims.	1, 2, 7, 12, 14, 15, 21, 24, 26, 27, 30, 31, 35, 38, 39, 40, 42, 43, 48, 53, 55, 56, 63, 64, 68, 71, 72, 73
3.	WO0133829	Pages 4-43; abstract; drawings; and claims.	1, 2, 12, 13, 21, 24, 25, 30, 31, 38, 42, 43, 53, 54, 63, 64, 71
4.	WO0154324	Pages 1-47; abstract; drawings; and claims.	1, 4, 9, 10, 11, 12, 13, 17, 21, 22, 23, 24, 25, 29, 30, 33, 37, 38, 41, 42, 45, 50, 51, 52, 53, 54, 58, 63, 66, 70, 71, 74
5.	WO0182023	Pages 1-101; abstract; drawings; and claims.	1, 12, 13, 14, 21, 24, 25, 26, 30, 38, 39, 42, 53, 54, 55, 63, 71, 72
6.	WO0198903	Pages 4-35; abstract; drawings; and claims.	1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 21, 22, 23, 24, 25, 26, 30, 31, 35, 36, 37, 38, 39, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 62, 63, 64, 68, 69, 70, 71, 72, 75
7.	WO0245316	Pages 1-51; abstract; drawings; and claims.	1, 11, 12, 13, 21, 22, 24, 25, 30, 38, 42, 52, 53, 54, 63, 71
8.	US20020016718	Pages 1-25; abstract; drawings; and claims.	1, 3, 21, 30, 42, 44, 63
9.	US20020052887	Pages 1-4; abstract; drawings; and claims.	1, 21, 30, 42, 63
10.	US20020083006	Pages 1-7; abstract; drawings; and claims.	1, 3, 4, 10, 11, 12, 13, 17, 21, 24, 25, 29, 30, 33, 41, 42, 44, 45, 51, 52, 53, 54, 58, 63, 66, 74
11.	US 5,765,152	Pages 2-26; abstract; drawings; and claims.	1, 4, 10, 11, 12, 13, 21, 24, 25, 30, 33, 38, 42, 45, 51, 52, 53, 54, 63, 66, 71
12.	JP2000330881	Pages 4-5; abstract; drawings; and claims.	1, 21, 30, 42, 63
13.	JP2002169973	Pages 4-20; abstract; drawings; and claims.	1, 21, 30, 42, 63
14.	Luni & Whitman	Chapter 1: Introduction to Streaming Audio; Part II Chapters 3-7; Part III Chapters 8-9	1, 8, 9, 21, 23, 30, 36, 37, 42, 49, 50, 63, 69, 70

No.	Reference	Portions (11(1)(a))	Claims of '774 Patent (11(1)(b))
15.	McEvoy	Chapters 2,3 and 4	1, 2, 9, 10, 11, 13, 21, 23, 25, 30, 31, 37, 42, 43, 50, 51, 52, 54, 62, 63, 64, 70, 75
16.	Ford et al.	Chapter 6: Delivering to the Audience	1, 2, 4, 9, 10, 11, 21, 30, 31, 33, 42, 43, 45, 50, 51, 52, 63, 64, 66, 70
17.	Bereners-Lee	Pages 1-21	1, 4, 10, 11, 21, 30, 33, 42, 45, 51, 52, 63, 66

Items 18 through 21 (Request No. 11(4))

No.	Reference	Aspects (11(4)(a))	Claims of '774 Patent (11(4)(b))
18.	MPE System	As set out in the Statement of Claim and herein.	All claims.
19.	Bulletin Board Systems	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback.	All claims.
20.	Bulk unsolicited e-mail.	As set out in document 27 below	1, 21, 30, 42, 63.
21.	Web servers	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback, and as set out in document 28 below	All claims.

Additional Prior Art (Request No. 11(5))

No.	Reference	Portions (11(5)(a)(ii))	Claims of '774 Patent (11(5)(a)(iii))
22.	CA02299946	Pages 1-9; abstract; drawings; and claims.	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 67, 68, 70, 71, 72, 73, 74, 75
23.	CA02201200	Pages 5-28; abstract; drawings; and claims.	1, 15, 16, 20, 21, 27, 28, 30, 40, 42, 56, 57, 61, 63, 73
24.	US 4,805,222	Pages 5-47; abstract; drawings; and claims.	All claims.
25.	PCT/CA2001/000250	Pages 1-25; abstract; drawings; and claims	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 67, 68, 70, 71, 72, 73, 74, 75
26.	US60/186,605	Pages 1-28; abstract; drawings; and claims	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 67, 68, 70, 71, 72, 73, 74, 75
27.	Barrett	Chapter 7: Pranks, Spams, and time wasters	1, 21, 30, 42, 63
28.	Anonymous ("Maximum Security") Linux	Chapter 14: Web Server Security	1, 21, 30, 42, 63

Additional Prior Art (Request No. 11(5))

No.	Reference	Aspects (11(5)(b)(i))	Claims of '774 Patent (11(5)(b)(iii))
29.	Online music distribution and sale systems	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback	All claims.
30.	Online text distribution and sale systems	Distribution of content, including text and graphics, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback	All claims.
31.	Online banking systems	Distribution of content, including text and graphics, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback.	All claims.

APPENDIX B – Request No. 12

Items 1 through 17 (Request No. 12(2))

No.	Reference	Portions (12(2)(a))	Claims of '774 Patent (12(2)(b))
1.	WO9709801	Pages 3-41; abstract; drawings; and claims.	1, 4, 5, 7, 8, 9, 13, 14, 17, 18, 21, 22, 23, 25, 26, 29, 30, 33, 34, 35, 36, 39, 41, 42, 45, 46, 48, 49, 50, 54, 55, 58, 59, 63, 66, 67, 68, 69, 70, 72, 74
2.	WO0079826	Pages 1-64; abstract; drawings; and claims.	1, 2, 7, 12, 14, 15, 21, 24, 26, 27, 30, 31, 35, 38, 39, 40, 42, 43, 48, 53, 55, 56, 63, 64, 68, 71, 72, 73
3.	WO0133829	Pages 4-43; abstract; drawings; and claims.	1, 2, 12, 13, 21, 24, 25, 30, 31, 38, 42, 43, 53, 54, 63, 64, 71
4.	WO0154324	Pages 1-47; abstract; drawings; and claims.	1, 4, 9, 10, 11, 12, 13, 17, 21, 22, 23, 24, 25, 29, 30, 33, 37, 38, 41, 42, 45, 50, 51, 52, 53, 54, 58, 63, 66, 70, 71, 74
5.	WO0182023	Pages 1-101; abstract; drawings; and claims.	1, 12, 13, 14, 21, 24, 25, 26, 30, 38, 39, 42, 53, 54, 55, 63, 71, 72
6.	WO0198903	Pages 4-35; abstract; drawings; and claims.	1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 21, 22, 23, 24, 25, 26, 30, 31, 35, 36, 37, 38, 39, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 62, 63, 64, 68, 69, 70, 71, 72, 75
7.	WO0245316	Pages 1-51; abstract; drawings; and claims.	1, 11, 12, 13, 21, 22, 24, 25, 30, 38, 42, 52, 53, 54, 63, 71
8.	US20020016718	Pages 1-25; abstract; drawings; and claims.	1, 3, 21, 30, 42, 44, 63
9.	US20020052887	Pages 1-4; abstract; drawings; and claims.	1, 21, 30, 42, 63
10.	US20020083006	Pages 1-7; abstract; drawings; and claims.	1, 3, 4, 10, 11, 12, 13, 17, 21, 24, 25, 29, 30, 33, 41, 42, 44, 45, 51, 52, 53, 54, 58, 63, 66, 74
11.	US 5,765,152	Pages 2-26; abstract; drawings; and claims.	1, 4, 10, 11, 12, 13, 21, 24, 25, 30, 33, 38, 42, 45, 51, 52, 53, 54, 63, 66, 71
12.	JP2000330881	Pages 4-5; abstract; drawings; and claims.	1, 21, 30, 42, 63
13.	JP2002169973	Pages 4-20; abstract; drawings; and claims.	1, 21, 30, 42, 63
14.	Luni & Whitman	Chapter 1: Introduction to Streaming Audio; Part II Chapters 3-7; Part III Chapters 8-9	1, 8, 9, 21, 23, 30, 36, 37, 42, 49, 50, 63, 69, 70

No.	Reference	Portions (12(2)(a))	Claims of '774 Patent (12(2)(b))
15.	McEvoy	Chapters 2,3 and 4	1, 2, 9, 10, 11, 13, 21, 23, 25, 30, 31, 37, 42, 43, 50, 51, 52, 54, 62, 63, 64, 70, 75
16.	Ford et al.	Chapter 6: Delivering to the Audience	1, 2, 4, 9, 10, 11, 21, 30, 31, 33, 42, 43, 45, 50, 51, 52, 63, 64, 66, 70
17.	Bereners-Lee	Pages 1-21	1, 4, 10, 11, 21, 30, 33, 42, 45, 51, 52, 63, 66

Items 18 through 21 (Request No. 12(5))

No.	Reference	Aspects (12(5)(a))	Claims of '774 Patent (12(5)(b))
18.	MPE System	As set out in the Statement of Claim and herein.	All claims.
19.	Bulletin Board Systems	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback.	All claims.
20.	Bulk unsolicited e-mail.	As set out in document 27 below.	1, 21, 30, 42, 63.
21.	Web servers	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback, and as set out in document 28 below.	All claims.

Additional Prior Art (Request No. 12(6))

No.	Reference	Portions (12(6)(a)(ii))	Claims of '774 Patent (12(6)(a)(iii))
22.	CA02299946	Pages 1-9; abstract; drawings; and claims.	All claims.
23.	CA02201200	Pages 5-28; abstract; drawings; and claims.	1, 15, 16, 20, 21, 27, 28, 30, 40, 42, 56, 57, 61, 63, 73
24.	US 4,805,222	Pages 5-47; abstract; drawings; and claims.	All claims.
25.	PCT/CA2001/000250	Pages 1-25; abstract; drawings; and claims	All claims.
26.	US60/186,605	Pages 1-28; abstract; drawings; and claims	All claims.
27.	Barrett	Chapter 7: Pranks, Spams, and time wasters	1, 21, 30, 42, 63
28.	Anonymous ("Maximum Security") Linux	Chapter 14: Web Server Security	1, 21, 30, 42, 63

Additional Prior Art (Request No. 12(6))

No.	Reference	Aspects (12(6)(b)(i))	Claims of '774 Patent (12(6)(b)(iii))
32.	Online music distribution and sale systems	Distribution of content, including musical content, text, graphics, video, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback	All claims.
33.	Online text distribution and sale systems	Distribution of content, including text and graphics, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback	All claims.
34.	Online banking systems	Distribution of content, including text and graphics, to multiple recipients over the Internet, using distribution lists, identity verification, encryption and decryption, downloading and streaming, opinion and feedback.	All claims.