

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION, INTELLECTUAL PROPERTY

DEFENCE STATEMENT OF MR STEVEN SPY

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I. INTRODUCTION

This case is not about Sony Computer Entertainment Europe (“Sony”) attempting to protect its intellectual property or otherwise seek bona fide relief from the court. Rather, it's an attempt for Sony to send a message to any would-be individual that attempting to use any hardware it manufacturers in a way it does not deem appropriate will result in harsh legal consequences, irrespective of any legal basis or authority for such action. It is for this reason that Sony filed a motion for *ex parte* protective relief, complete with numerous misstatements of fact and law.

The claimants in this case do not manufacture the Playstation3 product. Sony inc a Japanese company manufactures this product and they are not a party in this case. Sony Computer Entertainment Europe and Sony Computer Entertainment UK have not been subsidiary companies of Sony inc since 1st April 2010. Sony Computer Entertainment Inc may itself not own full Patent on the Playstation3 as it is currently being sued by electronics manufacturer LG for Patent infringement and therefore cannot licence the use of this product. Sony’s representatives refused to give any information on this case (See Appendix Q).

Contrary to Claimants depiction, Mr. Spy is an expert in electronics and computer software design that has gained notable reputation for his research papers on the design faults on game consoles including the Sony Playstation3 computer. Mr Spy is also and expert in Japanese bushido by way of holding a 3rd Dan Black Belt in Jiu Jitsu and being a Technical Officer for the World Jiu Jitsu Federation. Many of Sony’s Japanese executives still follow this code.

The website Playbackups.com deals in the upgrade, repair and diagnosis of faults on games consoles, at customers request and currently occupies the number 1 position on GOOGLE, in the world, for "INDEPENDENT FAULT REPORT". Sony has filed this *ex parte* motion for relief, which grossly mis-categorises the underlying facts and fails to meet the minimum burden.

II. RESPONSE TO PARTICULARS OF CLAIM:

The claimants carry on business in the development, manufacture, sale and distribution of multimedia console apparatus and accessories and software for use therewith.

- 1 It is denied, the respondent carries on business in the development and or manufacture, and or distribute, multimedia console apparatus and or accessories and or software use therein. It is also denied that the respondent develops and or manufactures and or distribute to retailers any products or software. It is accepted the respondent is a sole trader, however it is denied that the respondent conducts any large-scale business. It is accepted that the respondent does place for sale multimedia console apparatus and or accessories.

Part if the claimants' product range is the Playstation3 (PS3) games console.

- 2 It is denied, the respondent has ever stocked as part of the product range the Playstation3 games console. Further the reason why this is denied, this is manufactured with defects. It is a retailer's responsibility to ensure that products are free from manufacture defects. The manufacture defect on the Playstation3 relates to the failure of BGA points on the underside of the Graphics Processing Unit. The console also has manufacture defects relating to failure of the Blue-Ray diode and problems relating to fragmentation on the internal hard drive. It has further problems associated with failure during updates online. The product is poorly designed and manufactured in China. Microsoft who had a similar problem with the BGA points on the Xbox360. They spent over £1Billion in redesigning the console to operate at a lower temperature and extending the warranty on Xbox360's with this fault to 3 years. Sony denies the BGA problems exist and does not appear to have spent money on curing the fault. The manufacture defects on the Playstation 3 have been widely publicised on the internet and mainstream media such as: BBC THE ONE SHOW 3rd July 2009, BBC consumer rights program WATCHDOG 17th September 2009, What consumer.co.uk 20th September 2009. The 'Yellow Light of Death' a nickname for the fault indicator on the PS3 for a main board failure even has its own website <http://www.yellowlightofdeath.com> which details the causes and google statistics on consumer interest in the fault indicator (See Appendix H).

The PS3 console comprises, inter alia, a CPU, RAM memory, internal hard drive memory, a USB port suitable for use with an external hard drive or memory stick, and a Blue Ray disc Player.

- 3 It is accepted The PS3 is essentially a computer pre-loaded by Sony with its own software restricting the usage to software developed by Sony and its associated companies. However this has not always been the case. Linux an operating system allowing consumers and independent developers to write their own software was removed from the Playstation3 in April 2010 by Sony, even though this was a feature advertised to customers that the PS3 console would support and cited by Sony as one of the reasons for the premium price of the system. It is no

surprise that a few months later, developers started to produce products that would allow applications written in LINUX to run on the PS3 system. By removing the “Other OS” feature from the console, users who refused to do the update were denied access to the Playstation Network (PSN), access to online game play, access to online features, and the ability to play new Blue Ray movie titles. Whilst those who carried out the update lost access to “Other OS” feature and were effectively locked out from accessing 10 gigabytes of memory on their PS3’s system effectively depriving them of anything they had developed on the Linux system. This is a breach of the Universal Declaration of Human rights.

UNIVERSAL DELARATION OF HUMAN RIGHTS

Article 27.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Sony’s PS3 Manual, 2006-2010, provides:

“Install other system software on the hard disk. For information on types of compatible system software and obtaining the installer, visit Open Platform for Playstation3”

In February 2007, Phil Harrison of Sony said:

“One of the most powerful things about the PS3 is the ‘Install Other OS’ option.”

Sony’s PS3 Linux Distributor’s Starter Kit, 2006-2009, provides:

“The Linux Distributor’s Starter Kit provides information, binary and source codes to Linux Distribution developers who want to make their distro support PS3.

In May 2006, Izumi Kawanishi of Sony said:

“Because we have plans for having Linux on board [the PS3], we also recognize Linux programming activities... Other than game studios tied to official developer licenses, we’d like to see various individuals participate in content creation for the PS3”

In August 2009, Geoffrey Levand of Sony said:

“Please be assured that SCE is committed to continue the support for previously sold models that have the “Install Other OS” feature and that this feature will not be disabled in future firmware releases.”

In May 2006, Phil Harrison of Sony said:

“The Playstation 3 is a computer. We do not need the PC.”

Sony recently affirmed it’s continued commitment to support the full features on the

“fat” original PS3 units via mailing list posts:

“The feature of “Install Other OS” was removed from the new “Slim” PS3 model to focus on delivering games and other entertainment content. Please be assured that SCE is committed to continue the support for previously sold models that have the “Install Other OS” feature and that this feature will not be disabled in future firmware releases.”

Further in regards to the claimants position regarding Universal Serial Bus ‘USB port’ it is denied the 'USB' is just for use with Memory. The fact is the USB allows the connection of a multitude of devices including, Keyboards, Controllers, Digital Cameras, Printers, Scanners and is designed to be 'Universal' allowing the end user to select which devices they wish to use. The fact that Sony includes a 'Universal' socket on the PS3 suggests, that Sony wish the end user to select which devices they wish to plug into this socket. Sony Computer Entertainment Europe ("Sony") marketed and sold its Playstation3 video games console ("PS3") as including valuable functions, such as the "Other OS feature, unified online gaming service, Playstation Network, multimedia capabilities and Blu-Ray technology. The PS3 could run a Linux operating system that transforms the PS3 into a home computer. Because of such exception features, the PS3 was the most expensive gaming console on the market when launched in 2006. It appears Sony has now intentionally disabled valuable functions of the PS3 for which consumers paid a premium price over other gaming consoles. This retroactive crippling PS3 functionality breaches the contract between Sony and its PS3 customers, breaches the covenant of good faith and fair dealing, and violates Unfair Competition Law. Sony stated, *"It was fully intended that you, a PS3 owner, could play games, watch movies, view photos, listen to music, and run a full-featured Linux operating system that transforms your PS3 into a home computer."* Many users purchased usb keyboards and mice to use with the Linux system.

In Case number in NEW ZEALAND CIV-2009-094-000642 (See Appendix J), Sony attempted to argue that the PS3 was not a computer and therefore should not last as long as a computer. The tribunal ruled that the PS3 was not of acceptable quality and ordered Sony to reimburse the cost of repair.

The PS3 console utilizes operating system software which is stored on its internal hard drive and loaded (i.e. copied) into RAM when the console operates.

- 4 It is accepted the PS3 utilizes operating software, which is in fact encrypted and duplicates itself into Random Access Memory. This encryption prevents third parties from writing accessories that they would normally be allowed to do on a standard computer system. However it should be noted by encrypting the operating system and then removing the LINUX capability on the PS3, Sony creates a monopoly and prevents the fair use of the Computer game system by legitimate third party developers.

According to Wikipedia the system software itself is called 'CellOS' and is believed to be a branch of a free operating system called 'FreeBSD'(See Appenix O). It would appear that Sony is attempting to licence the use of software that at least

some elements of may not be entirely Sony's software to licence.

The said operating system is a copyright work. Copyright belongs to the Claimants' associated company Sony Computer Entertainment Inc (a Japanese corporation). The first Claimant is the exclusive licensee of that copyright in certain territories which include the UK and all other EEA Member States.

- 5 It is denied that 'Sony Computer Entertainment Inc' are or is an associated company of 'Sony Computer Entertainment Europe Ltd' and or "Sony Computer Entertainment UK Ltd" and they will be put to test. We believe that these companies have restructured and separated in April 2010. Although the software, loaded onto the hard drive, which is encrypted, may be copyrighted, this does not prevent an end user from doing whatever they want with the software. Just as a PC user running Windows can load lots of different applications developed by many different companies, the PS3 user is quite entitled to change aspects of the operating system especially where there are faults. There are many problems on the Playstation3; one of them is the complete lack of de fragmentation utilities available to the user. Fragmentation on the hard drive, which occurs on all computers, compounded due to encryption, can cause the failure of the console and/or individual elements of it. I have carried out repairs to many PS3 consoles that have had many fragmentation and data corruption problems.

End users of the PS3 console are licensed to use (and reproduce in RAM) the said operating system with its standard functionality. However the license does not extend to use of the operating system in an unauthorized or modified form.

- 6 It is denied that the claimants have any rights to the license as the license is owned by a Japanese company, Sony Computer Entertainment INC. In any event, the end user of the Playstation3 system have not signed any contract with Sony and I believe that many users will be totally unaware of any 'license' that Sony claim to have granted to them and or restricts their usage to such a degree. Further it may be argued that such a restriction breaches consumer rights and may in fact be a hidden term. Unfair Condition Terms Act 1977 . Sony used its superior bargaining strength to impose the license upon customers and customers had no meaningful choice whether to accept or reject these provisions. Thus the System Software License Agreement was the product of oppression and the lack of negotiation, not any meaningful choice. It defies common sense to suggest that an end user cannot change aspects of the system he purchased in its entirety from a retailer distributed by Sony. If I purchase a car, I do not ask if I am 'licensed' to change the engine or indeed any other part of the vehicle. Many users of the PS3 computer are minors and are therefore not able to enter into a License agreement. I am not a Playstation3 owner and have never agreed to Sony's License conditions.

It is suggested that Sony's license agreement may in fact be invalid. In a case launched in February 2011, LG, of Seoul, South Korea, claims in a complaint with the International Trade Commission that the Sony PS3 violates two patents in connection with how the videogame console renders Blu-ray data.

It is further suggested Sony's license agreement may be invalid, given that Sony when sued for Patent Infringement by Taiwanese LCD manufacturer Chimei Innolux Corp's (奇美電子), on 23rd August 2010 for Patent infringement of Patent numbers: 6-134-092, (092 patent) 6-671-019 (019 patent) 5-732-241 (241 patent) by Sony in the Playstation3. They claimed that the Cache Memory System was their patented technology and the International Trade Commission launched an investigation. Sony settled the case out of court, suggesting to me that Sony do not own full Patent on the PS3 system and cannot therefore licence its use. Despite my request, the claimants have through their instructing solicitors refused to disclose the settlement agreement with Chimei Innolux Corp. By doing so, they are in breach of the CPR as the document is clearly within the claimant's control. Further, by refusing to release this document it will adversely affect my defence case.

Computer games for use with the PS3 console are made available on BluRay disc and as a download over the internet.

- 7 It is agreed that games are available on Blue ray disc and for download from the Internet. Both homebrew games and non homebrew games are available for download from the Internet. I am aware that third party applications have been written under operating systems such as LINUX, which many were free to download and could have functioned, on the Playstation3 prior to April 2010. By changing the Playstation3 system to prevent LINUX applications from running (See Appendix A,B,C,D,E and F), Sony Computer Entertainment Inc (who is not party to these proceedings) is attempting to create a monopoly for their own software developers on this Computer platform.

Computer games made available by Internet download are copied on and stored on the internal hard drive of the console.

- 8 It is agreed that some games downloaded from the Internet are stored on the internal hard drive of the console. In addition to these games, third party games could be loaded onto the internal hard drive prior to April 2010. Since the Sony Entertainment INC update in this month, only software written by one of the Sony Entertainment INC authorized software developers can be loaded onto the internal hard drive without the aid of additional hardware devices. However, the claimants will be put to test as to who owns the copyright and the property contained therein.

Computer games made available on BluRay disc may copy some part (typically data required for animation), but never all, of the game to the internal hard drive of the games console.

- 9 It is neither agreed nor denied that games loaded from Blue Ray copy parts of the game onto the internal hard drive. It is entirely up to the end user of the game to decide how much of that game is loaded onto their hard drive as it is their property. It is suggested a possible failure point of the PS3 is the malfunction of the Blue-Ray laser diode. The fact that Sony wish to restrict users from copying the entire contents of the Blue-Ray disc to the internal hard drive means that in normal operation the Blue-Ray laser is reading constantly. Poorly manufactured diodes have been failing due to this operational feature. The failure of these lasers could have been extended by months if not years if Sony allowed the content to be duplicated onto hard drive and stop the constant wear and tear on the Blue Ray laser. Not to mention the fact that if games were loaded onto Hard Drive, the end user would have the added benefit of not having discs scratched and damage by children or adults changing the Blue-Ray discs. The security measures on the Blue Ray disc prevent repair that can be carried out on normal DVD discs. Attempting to remove scratches from the discs surface easily damages the security strip preventing the disc from being read. Games loaded onto hard drive also run faster and smoother for the end user. In cases of total failure of communication of the system with the Blu-Ray drive, the console would still be usable if the game content was stored on the Hard Drive. The end user (consumer) would have significantly more usage of the console with this facility available to them and would not have to pay for a costly replacement by Sony or repair by an independent repair centre.

In both the aforementioned cases of storage of the whole or part of a computer game on the internal hard drive of the games console the computer game (or part thereof) is stored to a part of the internal hard drive reserved for computer games.

- 10 It is neither agreed or denied that a section of the hard drive is reserved for storage of computer games. However, I suggest it is the end user who should have the say of which and how much of a game is stored on hard drive. It is certainly up to the consumer's discretion as to how their property is configured and partitioned. The fact that Sony allocated a portion of hard drive for gaming purpose suggests that the Playstation3 was designed with the capability to load games onto the hard drive. The end user/consumer should certainly not be restricted from accessing 10 gigabyte of the hard drive supplied with the Playstation 3. Something that was added as a restriction by the April 2010 PS3 firmware update which further diminishes the consumers rights .

When a computer game is used with a PS3 console it is loaded from BluRay and/or the internal hard drive (i.e. copied) into the console's RAM.

- 11 It is neither accepted or denied that games on any personal computer are loaded into RAM to function. The Playstation3 operates as a normal PC except for the restrictions Sony is attempting to enforce on the end user. It is a matter of great concern and significant contradiction of Sony Computer Entertainment Inc 'User License Agreement' the game is copied into RAM could be viewed as a 'backup copy' of the game. Sony does not specify in their license that this particular backup is allowed neither does it specify that the copy, of a section of game, written to the hard drive of the PS3 computer is allowed. If the license is taken literally, end users could be subject to sanctions by Sony for normal playing of games on the Playstation3. Equally it is argued that the end user is entitled to backup purchased software in a similar fashion to protect their purchase.

Computer games for use with the PS3 console ("PS3 computer games") are produced by the Claimants and their associated companies and by third party developers. Third parties developing PS3 computer games sold in the EEA are licensed by the First Claimant as to their use and incorporation in the games of basic library routines are copyright works owned by the Claimants or the Claimants associated company Sony Computer Entertainment Inc (a Japanese corporation). In the latter case, the First Claimant is the exclusive licensee of that copyright in certain territories which include the UK and all other EEA Member States. Copyright in PS3 computer games developed by the Claimants, or others in the Sony group, ("Sony PS3 computer games") is owned by or in the latter case, exclusively licensed to the Claimants.

- 12 It is neither accepted or denied. However it is suggested that Sony is a massive Japanese corporation with some executives who still follow the ways of bushido, "the way of the warrior" (See Appendix M). A way of life that makes it dishonorable to admit to a mistake, for each mistake he makes a Japanese Yakuza, who follow a similar code to Bushido, would have to chop off the end of his little finger and present it as an apology. This system of punishment is derived from the ability to hold a Samurai sword. Sony were described by former president of Warner Home video Warren Lieberfarb said 'They compete like Samurai, It is not the way we compete in the West'(See appendix U).An identical problem with Japanese business culture was encountered by Toyota. Defects in the production of its vehicles started to cause deaths in the United States and other countries around the world. All faults were denied by Toyota until they were legally forced to admit the defects. Sony is adopting the same business culture and denying any faults on the PS3 PC (See appendix X). The fact that nobody is dying due to these defects mean that Sony is continuing with the policy of 'deny all faults' and charge end users to rectify any problems with the console outside of its inadequate 12 month manufacture warranty. EU regulation stipulates that manufacturers should provide a 24 months warranty on products. Sony seems to consider itself above European law yet seeks its protection in these proceedings.

PS3 computer games, including Sony PS3 computer games, incorporate copyright works other than computer programs such as artwork, music and sound recordings.

- 13 It is accepted that PS3 games, similar to many other PC based applications contain copyrighted work.

The First Claimant provides and licenses specific games developers with a suite of hardware and software tools to facilitate them to develop PS3 computer games.

- 14 It is accepted that the first claimant does as stated in paragraph 14, however it is further accepted that it is unfair to restrict and end user of a PC game platform to only allow them to only use software written by a single Cartel. However Sony Computer Entertainment INC wish to structure their business by calling the software development a 'different company', it is clear that they are not giving software developer's equal standing on the Playstation3 platform. A major restriction was April 2010 removal of the GUI/LINUX capability by the Playstation3 firmware update.

Part of the suite of tools is a developers' version of the operating system that has additional functionality enabled.

- 15 The claimants have not made the point sufficiently clear to provide a response, therefore it cannot be either accepted or denied. I have asked for further information on this point but Sony has replied through their solicitors "the information requested is not relevant to the case".

An additional part of the suite of tools is a library of software routines that enable the copying of computer games files and data to different storage media not normally possible. The said software routines are copyright works. Copyright belongs to the First claimant or to other companies in the Sony group, and in the latter case is exclusively licensed to the First Claimant.

- 16 The claimants have not made the point sufficiently clear to provide a response, therefore it cannot be either accepted or denied. The claimants should provide further documentary evidence as to the suite of tools, software routines, and what is normally possible and not normally possible as this may go to the heart of my defense.

A yet further part of the suite of tools that is provided by the Claimants to specific games developers is a developers' electronic signature, that can be applied to games in development and recognized by the developers' version of the operating system (but not the standard PS3 operating system). The developers' electronic signature is a literary work in which copyright subsists. Copyright belongs to the first Claimant or to other companies in the Sony group and in the latter case is exclusively licensed to the First Claimant.

- 17 The claimants have not made the point sufficiently clear to provide a response, therefore it cannot be either accepted or denied. The claimants should provide further documentary evidence as to the suite of tools, software routines, and what is normally possible and not normally possible as this may go to the heart of my defense.

The Claimants adopt a variety of different technical devices/technological measures to ensure that computer games made available to the public may not be unlawfully copied and played. Each of the said technical devices/technological measures provides an additional layer of protection to prevent unlawful copying and playing of the said computer games. The Claimants particularly rely upon the following:

- 18 It is neither denied nor accepted. However whilst adopting ever increasing levels of security on their PS3 PC based system, the system itself is becoming more restrictive. The applications that users run are operating through encryption. This causes delays in the reading and writing of data to and from the Hard Drive and ever increasing problems to the operator of such a machine. Fragmentation on the Hard Drive can cause the console to stop working altogether.

Copy protection applied to the BluRay discs so that copies of a computer game on a BluRay created using standard computer and BluRay burning equipment are recognized by a PS3 console as not being an original PS3 BluRay computer game.

- a) Such copy prevention methods makes the discs themselves vulnerable to accidental damage. A better way to secure such software is to have a code for each individual game. Something used on standard computer games for years without problems.

Several layer of Encryption/Decryption both of content stored on BluRay disc and the internal hard drive of the PS3 console. This prevents encrypted content being read from the hard drive and/or BluRay disc and copied to another storage device (such as a further hard drive) using standard computing equipment.

- b) Several layers of encryption/decryption cause problems for PS3 users. If

the console fails, they will LOSE ALL of their data. Sony does not offer a Data recovery service for this information. The ONLY solution Sony has is to replace faulty consoles with 'refurbished' ones at a cost of £131 causing further and significant disadvantage to the consumer.

Content stored on an internal hard drive is tied to use with the particular PS3 console with the individual serial number. This prevents a hard drive being removed and used in another PS3 console.

- c) By coding the Hard Drive to the PS3 system, if a console suffers failure of the BGA points under the GPU, the information stored by the user cannot be read by either another PS3 console or a computer. Sony will not recover information for end users in the event of this problem. They in fact deny there are and inherent faults with the PS3 PC based console. Any failure of the console will result in total loss of information. We provide repair services for the BGA points underneath the GPU to recover this data, Sony do not offer any repair services for the Playstation3 causing further and significant disadvantage to the consumer.

Every game is supplied with an electronic signature (that only the Claimants can apply, even if the game is developed by a third party developer) specific to the media upon which the game is provided. This prevents a copy of a game supplied eg on BluRay being played from a copy on a hard drive and prevents software not licensed by Sony for use with the PS3 console (for instance software that would manipulate the manner in which the console operates) being used at all.

- d) Sony merely confirms by restricting the electronic signature, to software they approve, they maintain a total monopoly on software being run on the PS3 platform. This is unfair and against Article 101 of the European Treaty preventing companies from making agreements that can disrupt free competition.

The functionality of the operating system is such that the internal hard drive may store games content (either part (but not all) of a BluRay game or the whole of a downloaded game) and files created by the user (for instance photographs), but the game content is stored in a separate part of the hard drive and may not be copied to any external storage device (eg external hard drive) connected to the USB port of the console. This prevents a copy of the whole or any part of a game being copied from the internal hard drive (or BluRay) to an external hard drive, which may then be transported to another games console.

- e) The restrictive nature of the operating system attempts to manipulate an end user in only using the Console in the manner that Sony 'see fit'. It leaves little scope for fair usage and allowing individuals to develop their console in the way they see fit. Sony seems to want to sell a product then dictate in every little way, how that console is used, indeed it could be suggested that

they seek to retain proprietary interest and/or ownership. It is not fair to the end users, independent developers or independent repair centre's who wish to use third party applications to repair the many faults on the PS3 system.

Computer games for use with the PS3 console incorporate copyright works other than computer programs – such as artwork, music and sound recordings.

- 19 The claimants have not made the point sufficiently clear to provide a response, therefore it cannot be either accepted or denied. The claimants have used the term 'Computer Games' as they are referred to in this section of the Particulars of Claim indicate that the PS3 is indeed considered by Sony to be a computer. It is somewhat confusing as the claimants are also using the term 'game console' to describe the PS3 product. It is therefore difficult to provide a meaningful response in regard to their product and related claim. It may be that the claimant are confused and are referring to the Playstation2 which was argued in High Court by Sony to be a "digital processing unit" in an attempt to avoid the import duty of 1.7 per cent in 2001, (See Appendix T); But computers attracted no duty in that time. Sony attempted to claim a rebate of £34.2million that was rejected in the High Court. I would also suggest that a computer would be expected to last a reasonable amount of time, say 10 years. This figure was claimed by Sony, in press releases, to be the expected life duration of the PS3. Yet a little after 3 years after release, a high percentage of Playstation3 consoles are failing due to the 'Yellow Light of Death'. This name has become synonymous with the failure of the BGA points underneath the GPU of the PS3. Sony is failing in its duty as a manufacturer to ensure the PS3 is fit for purpose. Microsoft extended the warranty on Xbox360 consoles that suffered the BGA problem to 3 years. It would cost Sony in the Billions to rectify the problem and warranty the PS3 fault for a similar amount of time.

In the premises a technical device within the meaning of s 296 Copyright, Designs and Patents Act 1988 is applied to each computer game issued to the public for use with the PS3 consoles and to the operating system of the PS3 console. In particular the Claimants rely upon the matters identified at paragraph 18 above cumulatively and individually.

- 20 This is denied, s296 Copyright Designs and Patents Act 1988 as the Act states "the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of the technical device". The PS3KEY allows users to load applications written in LINUX. One such application is called "DRLTools", a program written by independent software developers to cure the problem of large flash NAND PS3 consoles that have stopped playing Blue-Ray movies. Linux has 1000's of applications such as defragmentation utilities. The Playstation3 when released was also advertised with downward compatibility. Many people of the years have purchased the Sony Playstation product because of this feature. This feature was removed on slim versions of the PS3 apparently because of cost cutting measures by Sony. Applications are now being written to emulate the

hardware fitted in older Playstation3 models to allow users to play their original Sony PS1 and PS2 games. These emulators require a device like the PS3KEY to allow them to run. The PS3 Jailbreak has countless benefits to the consumer and I would suggest that Sony will sell more Playstation3 consoles because of the extra software being developed by the Independent Homebrew LINUX development scene. Applications to rectify some of the faults on the PS3 have already been developed and more are in development according to notable sources on the Internet such as "PS3news.com". Sony's attempt to Bolt the stable door after the horse has clearly bolted from the stable is a waste of Sony shareholders money and a vast waste of the Courts time. Consumers can buy blank devices like the 'AVRKEY' and program themselves with software freely available on the internet. If they want to buy a PS3KEY or JAILBREAK ready programmed, they can order one from Spain, where the court ruled the product legal in December 2010, or a Spanish website or indeed any number of the websites advertising them from China. A simple Google search for 'PS3 Jailbreak' will show a myriad of websites offering them for sale. It is a little puzzling to me why Sony would pick on small UK retailers in an attempt to stop this product. . It is suggested that Sony UK seek to silence or discredit the 'Independent Fault Reports' (See Appendix X).

Further and in the premises effective technological measures within the meaning of ss 296ZA and 296ZD Copyright, Designs and Patents Act 1988 is applied to the copyright works (i.e. artwork music sound recordings etc) incorporated into the said computer games. In particular the Claimants rely upon the matter identified at paragraph 18 above cumulatively and individually.

- 21 It is denied that the sole intended purpose of the PS3key is to facilitate the unauthorised removal or circumvention of the technical device. The PS3key has many legitimate uses other than circumvention. The PS3key on its own does not facilitate the circumvention of any technical measures. There are many applications currently available to run on PS3KEY that do not circumvent any technological measures. There are numerous applications written under operating system Linux that allow users to use the PS3 system like a normal Personal Computer. This allows third party games written by other PS3 users and a multitude of user applications developed by PS3 owners and third party developers of which I am neither.

The First Claimant is the registered proprietor of Community Trade Mark number 5610472 for the trade mark PS3, registered for computer peripherals and data carriers.

- 22 This is denied, I have not breached sections 296ZA and 296ZD of the Copyright Design and Patents Act 1988. The claimants have failed to present a prima facie case and therefore should be put to test. Furthermore I have not advertised the PS3KEY for the purpose of circumvention. I have clear statements on my website stating that products should not be used for illegal purposes. The PS3key has

many uses that benefit users by running LINUX software applications, something Sony removed in April 2010 even though the product was advertised with this facility. The PS3KEY is designed to allow LINUX applications to run. There are many uses for this device and currently many new software applications in development. As a PC platform the end user of the Playstation 3 should be able to run LINUX and/ or any other operating system they choose.

The First Defendant trades under the name PLAYBACKUPS.COM and operates the website at www.playbackups.com.

- 23 It is accepted sole trader with the website <http://www.playbackups.com>. I carry out repairs and upgrades to game consoles as customers require.

The First Defendant sometimes uses the alias Steve Spy.

- 24 There is nothing strange about the use of 'Steve Spy'. This identification is clearly related to just myself and used purely as a 'nickname' for myself in the electronic and surveillance industry. In the many years of my professional career I have never had my integrity questioned therefore Sony must be put to test as to what they mean and/or infer and/or suggest either by innuendo or otherwise. Failure to do so makes the comment questionable and prejudicial.

I can only draw inference that the claimants are seeking negative innuendo which I find offensive, ironic and without basis. As an individual who has never been taken to the High Court before and has never infringed patents or copyright should have my integrity questioned by a company that has been in the High Courts throughout the world for Copyright and Patent infringement NUMEROUS times and has had to pay hundreds of millions in legal damages to many companies that Sony has infringed the Copyright and Patents of.

The actions of the Sony legal team were criticised in the High Court in 2006 where Sony lost its case over income tax on the PS2 console. The judge said "My concern is with the repeated aspersions that are cast in the document on the intellectual honesty of the High Court Judge from whose decision this appeal is brought" (See Appendix T).

There are currently many cases and class actions going throughout the world of which Sony is the defendant (See Appendix A,B,C,D,E and F). Indeed Sony has no grounds to question my integrity given the convictions it has for deception. Sony admitted in court in the US state of Connecticut in June 2001 fabricating reviews and deceiving their customers (Appendix I). In January 2007 Sony was fined by a court in France for 'deceiving' their customers (See Appendix N). In 2008 Sony was convicted in the US and fined \$18.5 million for wilfully infringing Agere systems Patent and using the technology in the PSP handheld gaming system.

(See Appendix R)

This matter of 3 usb dongles is petty when compared to the \$82 million plus damages paid by Sony to “Immersion Corp” in 2004 for large scale patent infringement. There are many more cases that I could list to show that Sony is not in a position to question my integrity.

I find it highly suspicious that Sony feels the need to register many different company names to trade under. By removing GUI/LINUX from the Playstation3 computer system in the guise of an ‘UPDATE’, (deceitfully implying improvements to the system) Sony are acting in direct contravention of Article 102 of the European treaty. Sony is acting as a ‘CARTEL’, which is a breach European Law. Sony should be aware of this as it has already been convicted by the European Commission and fined heavily for acting as a Cartel between 1999 and 2002 by fixing the price of videotapes sold to customers in Europe (See Appendix L).

Sony's history of deceptive behaviour can also be seen in the 'Sony Rootkit Scandall' (See Appendix G) and the class action lawsuit for 'Green Haze' (See Appendix P).

Names used by Sony : Aiwa Co. Ltd. (50.6%); Intervision Inc.; Sony Ichinomiya Corporation; Sony Inazawa Corporation; Sony Oita Corporation; Sony Enterprise Co., Ltd.; Sony Kisarazu Corporation; Sony Kita Kanto Corporation; Kibo Industry Corporation; Sony Chemicals Corporation; Sony Kohda Corporation; Sony Kokubu Corporation; Sony Communication Network Corporation; Sony Computer Entertainment Inc.; Sony Components Chiba Corporation; Sony Siroisi Semiconductor Inc.; Sony Life Insurance Co., Ltd.; Sony Senmaya Corporation; Sony Assurance Inc.; Sony/Taiyo Corporation; Sony Digital Products Inc.; Sony Denshi Corporation; Sony Tochigi Corporation; Sony Trading International Corp.; Sony Nagasaki Corporation; Sony Nakaniida Corporation; Sony Neagari Corporation; Sony Hamamatsu Corporation; Sony Pictures Entertainment (Japan) Inc.; Sony Pictures Television Japan Inc.; Sony PCL Inc.; Sony Finance International, Inc.; Sony Plaza Co., Ltd.; Sony Precision Technology Inc.; Sony Broadcast Products Corporation; Sony Broadcast Media Co., Ltd.; Sony Bronson Corporation; Sony Marketing Co., Ltd.; Sony Max Corporation; Sony Mizunami Corporation; Sony Minokamo Corporation; Sony Miyagi Corporation; Sony Music Entertainment (Japan) Inc.; Sony Logistics Corporation; Sony of Canada Ltd.; Sony Computer Entertainment America Inc. (U.S.A.); Sony Corporation of America (U.S.A.); Sony Electronics Inc. (U.S.A.); Sony Latin America Inc. (U.S.A.); Sony Magnetic Products Inc. of America (U.S.A.); Sony Music Entertainment Inc. (U.S.A.); Sony Pictures Entertainment Inc. (U.S.A.); Sony Argentina S.A.; Sony Comercio e Industria Ltda. (Brazil); Sony Componentes Ltda. (Brazil); Sony da Amazonia Ltda. (Brazil); Sony Chile Ltda.; Sony de Mexico S.A. de C.V.; Sony Corporation of Panama, S.A.; Sony Puerto Rico, Inc.; Sony de

Venezuela S.A.; Sony Austria GmbH; Sony DADC Austria A.G.; Sony Service Centre (Europe) N.V. (Belgium); Sony Czech, spol. s.r.o.; Sony Nordic A/S (Denmark); Sony France S.A.; Sony Berlin G.m.b.H. (Germany); Sony Deutschland G.m.b.H. (Germany); Sony Europe GmbH (Germany); Sony International (Europe) G.m.b.H. (Germany); Sony Hungaria kft (Hungary); Sony Italia S.p.A. (Italy); Sony Logistics Europe B.V. (Netherlands); Sony Poland Sp.z.o.o.; Sony Portugal Ltda.; Sony C.I.S. A/O (Russia); Sony Slovakia Spol. Sr. O.; Sony España, S.A. (Spain); Sony Overseas S.A. (Switzerland); Sony Eurasia Pazarlama A.S. (Turkey); Sony United Kingdom Limited; Sony Computer Entertainment Europe Limited (U.K.); Sony Entertainment Holdings Europe Ltd. (U.K.); Sony (China) Limited (Beijing); Sony Corporation of Hong Kong Ltd.; Sony International (Hong Kong) Ltd.; Sony India Limited; P.T. Sony Indonesia; P.T. Sony Electronics Indonesia; Sony Electronics of Korea Corp.; Sony Electronics (Malaysia) Sdn. Bhd.; Sony Technology (Malaysia) Sdn. Bhd.; Sony Philippines, Inc.; Sony Electronics (Singapore) Pte. Ltd.; Sony Industries Taiwan Co., Ltd.; Sony Video Taiwan Co., Ltd.; Sony Magnetic Products (Thailand) Co., Ltd.; Sony Mobile Electronics (Thailand) Co., Ltd.; Sony Semiconductor (Thailand) Co., Ltd.; Sony Siam Industries Co., Ltd. (Thailand); Sony Thai Co. Ltd. (Thailand); Sony Vietnam Limited; Sony Australia Ltd.; Sony New Zealand Ltd.; Sony Gulf FZE (United Arab Emirates); Sony South Africa (Pty.) Ltd.

Microsoft was fined heavily for similar anti competitive practices and abusing its dominant position in the market. By removing GUI/LINUX from its system Sony is abusing its dominant position and blocking end users from developing on the PS3 Computer platform. The claimants should respond in full to the points raised above should they wish to deny any of point 24.

The Defendants have imported, and possessed, distributed, sold, marketed and promoted a device known as the PS3KEY device. It is a device that connects to a PS3 console via its USB port.

(a) The Defendants offered the PS3Key device for sale via a website at www.playbackups.com at least on 21 and 22 October 2010.

(b) The Defendants admitted that they had sold samples of the PS3KEY device by email dated 23rd October 2010 to the Claimants solicitors.

(c) The Defendants sold and supplied a PS3KEY device to the Claimants agent on about 28th October 2010, despite claiming in the said email dated 23rd October that they had no stock remaining.

25 It is accepted that I possessed 3 PS3keys and I sold 3 in total, 1 to the claimants representatives. It is denied that I have 'imported, and distributed, marketed and promoted a device known as the PS3KEY'. I received samples sent to me from a supplier. For a brief period I put an article on my website advertising this product.

As soon as I was contacted by Sony's solicitors, I removed the product from the website as a precaution until it could be established as to the product's legitimacy as doubt had been cast by Sony's request. The product itself has not been ruled illegal anywhere in the world. In a ruling in Spain in December 2010 (**See Appendix S**), the product was ruled legal. The PS3key connects via the USB port, something provided on the PS3 for 3rd party connectivity. (a) The PS3KEY was advertised briefly on the website and removed immediately I was made aware of Sony's objection. (b) I personally sold 3 samples supplied to me. (c) Sony claim that I sold them a PS3key on the 28th of October 2010. This is untrue and I believe Freshfields are fully aware of this fact. The year 2010 is very far in the future and it would not be possible for me to sell one on this future date without the aid of a time machine. The fact that this date is 18,000 years in the future means that Freshfields cannot accurately predict what will occur on this date. Freshfields have also provided in other paperwork a presumably different sale on 28th October 2010. They are aware that the premises at 1144a Rochdale Road, M9 6FQ are shared with another company. The address is used by Playbackups.com mainly as a postage address for parcels. I was not present on the 28th of October and I am not responsible for the actions of other companies. Freshfields are fully aware that there is another company trading from this address but seem happy to ignore court instructions and give paperwork for the attention of myself to a different company, whose identity is known by the claimants' representatives of which they should make available to the court.

The said PS3KEY device is promoted by the Defendants (and others) for use with software made available on the internet called 'Back-up-Manager' and said to enable its user to play games downloaded from the Internet.

- 26 It is denied that the PS3KEY is promoted by me for use with software called 'Back-up Manager'. I have never promoted the use of this software. It suits Sony to claim this is the only use of the device, when in fact it clearly allows users to run many different applications on their PS3. The use of LINUX was removed by Sony in April 2010 from the PS3 system. It cannot be considered legal to advertise a feature on a product, sell millions and then remove such feature as Sony sees fit.

It is denied and certainly not proven that the PS3key enables its user to play games downloaded from the internet nor is this indicated by Playbackups.com. My website itself has a disclaimer at the bottom of every page, stating we do not condone the illegal copying of games. Any devices supplied are for legal uses only. The PS3key is not supplied with any applications and I have never suggested using the product with any such applications.

In summary, the manner in which the device operates is as follows. First when the PS3 console is powered up with the device connected it causes the memory in the PS3 console allocated to data provided from a device connected USB device to

describe its nature to overflow so that data is written into another part of the memory. That data causes the PS3 console to read and execute short piece of executable code from the PS3KEY device. The function of this executable code is to modify (or patch) the console operating system loaded into RAM (but not the non volatile copy residing on the internal hard drive).

- 27 It is denied and I am not privy to the inner workings of the device and Sony should be put to test in order to establish such a vexatious claim. The manufacturers and designers of the product are very clear. The device contains no Copyrighted code. The device itself does not allow the user to do anything. Third party applications can be downloaded; it is up to the end user to download any applications. It is denied that the PS3key functions in quite the way Sony claim. The fact that the device functions when inserted into the PS3 gives IMPLIED CONSENT. It would seem more logical that the PS3key is accessing a function previously designed into the PS3 to allow it to run.

It is further denied and suggested it would be impossible to 'modify/patch' the actual code in RAM as Sony claim. It is possible to append data to RAM and then redirect the starting point to execute and set variables. The code itself would remain unchanged therefore Sony should be put to test on this issue.

The modifications to the operating system include the following:

- (a) Removing the requirement that code must be signed with a code-specific signature and enabling the functionality of recognizing the developers electronic signature so as to run software bearing this;*
- (b) Enabling copying of files from BluRay and/or any part of the internal hard drive of the console to an external device connected to a USB port, such as an external hard drive.*

- 28 It is denied there are permanent modifications to the PS3 console made by such a device. By simply turning the console off and on again, all systems are restored to the original state: (a)Linux users require the removal of the electronic signature to run third party applications. (b) The PS3Key does not enable anything. It is a big leap to actually perform such tasks and I believe they are beyond the average user. There are a myriad of steps to perform to actually get to a position where a game can be copied to an external hard drive.

Users of the PS3Key device are instructed to acquire a copy of the Back-up Manager software from the internet. That software is not authorized by the Claimants and does not incorporate any electronic signature applied by the Defendants. It comprises a copy of the developers electronic signature referred to

above. As the operating system of the PS3 console has been modified to accept this electronic signature Back-up Manager will run on the console. Back-Up Manager also incorporates part of the Claimants library of routines normally only provided to (and licensed for use by) specific games developers mentioned above.

- 29 It is denied users are instructed by me to get a copy of 'Backup Manager'. This has never been on my website and I have had no dealings with this software. Sony is clearly pointing to this program because of the copyrighted code contained in it. I am not responsible for this software and do not recommend its use. Claimants should be put to test to support the assertion the defendant has now or in the past an electronic signature which the claimant seeks to rely on. Further the claimants should be put to test in regards showing the claimant has promoted the use of 'Backup Manager'. It is denied that the claimant has ever promoted the use of this software. It appears that the claimant is seeking to take the retailer to task when in fact they should be addressing all concerns to the manufacturer, as in **R v Higgs** [2008] EWCA Crim 1324, [2009] 1 WLR 73, [2008] FSR 932, the Court of Appeal the legal argument that modchips do not circumvent copyright protection was upheld by Judge Justice Jacobs. The court will note that 'modchips' primary function was to allow backup and imported media to run on game consoles. PS3 Jailbreak has far greater functionality.

When Back-Up Manager operates it offers the user the ability (i) to copy files (complete games) from BluRay and/or the consoles internal hard drive to an external storage device such as a hard drive connected via the USB port; and (ii) the ability to load into memory and play games stored on such an external storage device.

- 30 It is denied as stated above, I do not promote the use of 'Backup Manager'. My personal view would be that the backup made on Hard Drive as 'fair usage' and similar to the backup Sony's original games make of some of their content to Hard Drive.

The user of the PS3KEY device is thus able to circumvent the device/technological measures adopted by the Claimants and make copies of computer games on external devices that may be further copied and distributed and which can then be copied (and played) from such external storage devices.

- 31 It is denied that I am the user of the 'PS3KEY' and the claimant should be put to test on this matter. I seek to rely on the judgement of **R v Higgs** as relied on in paragraph 29. It is accepted that I am a retailer.

This is the whole rationale of the existence of the PS3KEY device.

- 32 It is denied that this is the rationale of the 'PS3key' device. I am unable to comment on the rationale of the 'PS3key' as I am a small retailer and not the manufacturer who would best place to comment on the rationale of this device.

The user of the device infringes the Claimants copyright in the operating system software by making an unauthorized modification of it in RAM of the console, which comprises a copy of a substantial part of the said software. The user has no license to make or use such a copy, and therefore infringes the Claimants copyright.

- 33 I can neither agree or deny that the user of the device infringes the claimants copyright as I am simply a retailer and seek to rely on the ruling of **R v Higgs** . As stated in section 27 my position remains as stated.

Yet further the user of PS3KEY device also downloads and makes a copy of the Back-Up Manager software, both in permanent memory (such as hard drive) and in RAM each time it is used. Such acts reproduce, without the license of the Claimants (i) the routines identified above that are normally only provided to games developers; and (ii) the developers electronic signature.

- 34 It is denied that I am the user of the 'PS3KEY' and the claimant should be put to test on this matter. I seek to rely on the judgement of **R v Higgs** as relied on in paragraph 29. It is accepted that I am a retailer.

Accordingly the users further infringe the Claimants copyright.

- 35 It is Denied, my position remains as stated in point 34. Accordingly the claimant should be put to test.

By selling and supplying the PS3KEY device the Defendants authorize its use as aforesaid. Accordingly they authorize the users acts of copyright infringement in (i) the operating system software; (ii) the routines normally only provided to games developers; (iii) the developers electronic signature. In the premises the Defendants have also infringed each of the Claimants' said copyrights.

- 36 It is denied that by selling the PS3KEY I authorize it for use in infringement. There are many legal reasons for the use of the product, the main one being the fact that it enables LINUX to run, a function that was removed by Sony in April 2010. I am not an end user of the PS3. An end user has a choice how they manage their property. As a retailer I have no say whatsoever as to the end users choices. Further It is denied that I am a user of the 'PS3key' and the claimant should be put to test on this matter. I seek to rely on the judgement of **R v Higgs**.

Further the Defendants have imported, distributed, sold, offered for sale, advertised for sale, had in their possession for commercial purposes means (namely the PS3KEY devices) the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of the said technical device or devices applied to the said computer games.

- 37 It is denied that have imported or distributed the PS3KEY. I have sold 3 samples that allow third party applications to run on the PS3 system. There is not just one sole purpose for the device, there are many legal applications. It is denied the PS3key has a sole intended purpose. The claimant should be put to test to establish this. It is further denied that I am a user of the PS3key. It is accepted that I am a retailer. I seek to rely on the ruling of **R v Higgs**. It seems somewhat vexatious for the claimant to focus on the negative aspects of the product.

Further by advertising and promoting the said PS3KEY device the Defendants have published information, namely the existence and availability of the said device intended to enable or assist persons to remove or circumvent the said technical device or devices.

- 38 It is denied that to advertise and promote the PS3KEY would enable or assist any persons to remove or circumvent said technical devices. The PS3Key on its own does not allow any circumvention.

The defendants have carried out the acts referred to in the foregoing two paragraphs knowing or having reason to believe that the PS3KEY device and information as to its availability will be used to make infringing copied of computer games. Hereunder the Claimants rely upon the fact that the PS3KEY device is advertised and promoted as being for making 'back-up' copies of computer games and enabling their subsequent use. No license is granted to any person to make further copies of a game they acquire. Further it is well know that the loading of such copies of the computer game is unauthorized and involves making copies of the computer game in RAM and the CPU of the PS3 console

- 39 It is denied the defendant knew or had reason to believe the PS3key device would be used to make infringing copies of computer games. I am a retailer not and end user. Further it is a requirement of all PC/PS3 games that they copy themselves into RAM. Sony does not specify in their License that this copy is a legal one. As the PS3 is clearly a PC, it does not seem unreasonable, and well as 'fair usage' to load games onto the Hard Drive. It is denied that 'it is well known that loading of such copied games is unauthorized' and therefore the claimant should be put to test. Many different computer software games commonly load themselves onto PC hard drive to play. It is accepted that many end users would view this as a normal

computer function. It appears the Claimants rely upon the website being called 'PLAYBACKUPS' to assert that the site is only about making backups run on consoles. The site name is just the title of the site and the main advertisement on the website is for the repair and upgrade of consoles. The site has no illegal products or services advertised and any objections raised by console manufacturers are quickly dealt with. The PS3KEY was removed from the site when we were made aware of Sony's objection to the product. Given the current position in Spain, where it is perfectly legal to sell the PS3KEY and all similar devices, I feel that I have acted in more than reasonably in removing the product from sale when asked to.

Accordingly the Defendants have breached s. 296 Copyright, Designs and Patents Act 1988.

- 40 It is denied that I have breached the 296 Copyright, Design and Patents Act 1988. The 2008 ruling at the court of appeal in favor of **R v Higgs** ruled that the retailer was not responsible for breaches of copyright that had occurred in the manufacture of such products.

Further, the Defendants have imported distributed sold offered or exposed for sale advertising for sale, and had in their possession for commercial purposes the PS3KEY device which is (i) promoted advertised and marketed for the purpose of circumvention; and/or (ii) has only a limited commercially significant purpose or use other than the said circumvention; and/or is primarily designed produced and adapted for the purpose of enabling or facilitating the said circumvention.

- 41 It is denied that I have imported or distributed the PS3KEY. It is further denied that I have promoted advertised and marketed the aforesaid product for the purpose of circumvention. I do not manufacture the PS3key product. However, I am somewhat of an expert in regards to computers and individual components. It is my belief that the PS3key has other significant use, I have no knowledge as to this product being capable of circumvention nor is it primarily designed produced and adapted for the purpose of enabling and facilitating the said circumvention.

Accordingly the Defendants have breached s.296ZD Copyright, Designs and Patents Act 1988.

- 42 It is denied I have breached 296ZD Copyright Design and Patents Act 1988. The claimants are relying on their own spurious accusations to support their allegations. I have neither breached nor threatened to breach or intend to breach such acts.

Further by carrying out the acts complained of the Defendants are carrying out acts which circumvent the aforesaid technological measures. Further the Defendants know or have reasonable grounds for knowing that they are pursuing that objective. Hereunder the Claimants rely upon paragraph 39 above.

43 It is denied, my position remains as stated in paragraph 42.

Accordingly the Defendants have breached s.296ZD Copyright, Designs and Patents Act 1988.

44 It is denied, I have neither breached nor threatened to breach or intend to breach such acts.

By reason of the Defendants aforesaid breaches of ss296, 296ZA and 296ZD Copyright Designs and Patents Act 1988 the Claimants are entitled to all relief against the Defendants as a copyright owner is entitled to us against an infringer.

45 It is denied that the claimants are entitled to 'relief' in this case. The claimant have not established any breach has taken place and in any event all allegations and claims are denied and resisted. If the court agreed with all of Sony's claims, the fact is that I am a small retailer. I had 3 samples which were sold at no significant loss to Sony. Sony has other reasons for bringing this case, namely the wish to silence the independent reports on the failure of many PS3 consoles due to flawed design and manufacture.

Yet further, in addition to authorizing the infringement of copyright by users referred to above, the Defendants also authorize the use of the PS3KEY device by users to make unlawful copies of computer games. The making of such copies (on permanent memory (such as external hard drive) and in RAM on every occasion the copy is played) is without the consent of the Claimants (and in the case of a game developed by a third party without the consent of the third party). Accordingly the Defendants have authorized the making of these copies and accordingly infringed copyright.

46 It is denied that I authorized any infringement. It is further denied that the respondent authorised the use of the PS3key to make unlawful copies of computer games. It is accepted that I am a retailer, I have never owned a PS3 computer. The respondent does the opposite and instructs customers not to make illegal copies of games. The fact that the PS3key functions when it is inserted into a PS3 gives **IMPLIED CONSENT** due to the loading ability of the Operating System.

In the case of games developed by the Claimants the Defendants have thereby infringed the Claimants copyright in the whole of the software and other works comprising the game. In the case of games developed by third parties the Defendants have infringed the copyright in the software comprising the routines incorporated by the games developer into the game.

47 It is denied that I have infringed any copyright by the sale of the PS3KEY.

Accordingly the Defendants have further infringed the Claimants copyright.

48 It is denied that any infringement to the Claimants copyright has occurred.

Further the Defendants have used a sign, namely PS3, identical to the First Claimants said Community Trade Mark in relation to goods identical to those for which it is registered.

PARTICULARS – Hereunder the Claimants rely upon the Defendants use of the sign PS3 in the name PS3KEY device which is a computer peripheral and a data carrier.

49 It is denied that I have used the 'PS3' sign. The manufacturer of the product is responsible for its naming of the product and ensuring that Trade Marks are not infringed therefore this claim is vexatious and without merit.

Alternatively the Defendants have used a sign, namely PS3, identical to the First Claimants said Community Trade Mark in relation to goods similar to those for which it is registered and by reason of the aforesaid there exists a likelihood of confusion on the part of the public.

PARTICULARS – Hereunder the Claimants rely upon the particulars to paragraph 49.

50 It is denied, my position remains as stated in paragraph 49. I believe that Sony is attempting to blame retailers for the use by a manufacturer of the PS3 logo. I neither agree that the trade mark has been infringed or that an individual retailer should be held responsible for acts of infringement that occur at the time of manufacture.

In the further alternative the Defendants have used a sign, namely PS3KEY, similar to the First Claimants said Community Trade Mark in relation to goods identical, alternatively similar, to those for which it is registered and by reason of the aforesaid there exists a likelihood of confusion on the part of the public.

PARTICULARS – Hereunder the Claimants rely upon the particulars to paragraph 49.

- 51 It is denied to suggest that the public would have been under any 'confusion' between the PS3 console and the PS3KEY device. It is simply not credible to say confusion would have occurred. A small USB device could not be confused with the large, heavy and bulky black shape of the PS3 computer. My position remains as stated in paragraph 49.

In the premises the Defendants have infringed the First Claimants aforesaid Community Trade Mark.

- 52 It is denied that I have infringed any Community Trade Mark. If there any such breach then the breach has occurred by the manufacturer. It is up to the claimant to take the manufacturer to task and not the retailer. Under the June 2010 ruling by District Judge Louis L Stanton a website is not in breach of Copyright if it takes down the infringing content when given a 'TAKE DOWN NOTICE'. I removed all 'PS3KEY' references when asked to by the claimant's solicitors. I would note that the format of the TAKE DOWN NOTICE was incorrect and no proof was given that there was any breach of copyright, something required by the DMCA.

Pending disclosure the Claimants do not know the full extent of the Defendants acts of infringement of copyright, rights under ss296, 296ZA and 296ZD and Community Trade Mark but will at trial rely upon and on all of them and seek to recover relief in respect of all of them.

- 53 The defendant has had full disclosure in the form of an affidavit dated 12th November 2010.

By reason of the aforesaid the Claimants have suffered loss and damage, alternatively they will do if the Defendants act as they threaten and intend to act.

- 54 It is denied that the claimant has suffered any loss or damage. Sony should Quantify and prove such a claim. I have removed the PS3key from sale as requested by Sony, prior to court proceedings. I have not threatened or intended to

act in any negative way, quite the opposite. The claimant's solicitors were offered an undertaking from me not to sell this product. They clearly have other motives other than just the removal from sale of this product. Further the claimants assertion that the defendant has threatened or intended to act in a negative manner is both scandalous and untruthful and should be put to test to support such comments.

The Claimants claim additional damages. The Claimants rely upon all the circumstances of the case including the flagrancy of the acts of the Defendants, and in particular their knowledge as set out above.

- 55 It is denied it the claimants are the ones who are acting entirely improperly in this case. They are attempting to stop retailers in the UK from stocking a product that is legal to sell in Spain, a fellow member of the European Union. Any claim for additional damages is without merit, unquantifiable and should be dismissed.

The Claimants claims interest pursuant to s35A Senior Courts Act 1981 or the equitable jurisdiction of this Honorable Court.

- 56 My position remains as stated in paragraph 55 in regards to additional damages accordingly claiming the interest should be dismissed. The claimants have already been put on notice that I will seek costs against them for wasting mine and the courts time in this matter.

IN RESPONSE TO THE CLAIMANTS CLAIM

1. In the event, the claimants are unsuccessful any permanent order would be unlawful further the court has already ruled on the 5th November 2010 by Mr Justice Warren that the claimants will have to pay losses. I invite the court to order the claimants to pay losses in this matter.
2. The order sought by the claimants is unnecessary as the respondent has no PS3key's in his possession as stated in his Affidavit. Further this order is sought on the basis the claimants are successful, if they are not, no order can be granted.
3. This order is not required as the respondent has already provided all Ps3key's to the claimant. Further this order is sought on the basis the claimants are successful, if they are not, no order can be granted.
4. This order has already been complied with in the Affidavit supplied by the respondent on 12th November 2010.
5. This order should be denied.
6. This order should be denied as it is known that I have no assets and am subject to a bankruptcy restriction undertaking. As all breaches are denied.
7. This order should not be granted for the reasons stated above.
8. The respondent seeks the following:

An order that the claimants pay damages for loss of sales which would have arose had the injunction not been in place. (ruled on the 5th November 2010 by Mr Justice Warren)

An order that the claimants pay costs and damages arising out of defending this claim.

An order that the judgement of this court is advertised and publicised at the expense of the claimants.

An order that all sums found due from the damages and/or costs be paid to the respondent together with interest thereon pursuant to section 35a of the Senior Court Act 1981 or the equitable jurisdiction of this honourable court.

Further or other relief.

Costs.

Statement of Truth

The respondent believes that the facts stated in this response to particulars of claim are true.

Signed

Mr Steven Spy

SONY HAS FAILED TO DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE SONY'S PLAYSTATION 3 IS NOT MERELY A DEVICE FOR

PLAYING COPY-PROTECTED VIDEO GAMES BUT FUNCTIONS AS A MULTIMEDIA PERSONAL COMPUTER.

When Sony launched the Playstation 3 in 2006 it was the most expensive gaming console on the market. Sony marketed and sold the product as including valuable functions such as "Other OS" feature, unified online gaming service, Playstation network, multimedia capabilities and Blu-ray technology. The PS3 could run a Linux operating system that transformed it into a home computer. Sony, in its update of April 2010, has now intentionally disabled valuable functions of the PS3 for which customers paid a premium price over other gaming consoles. This retroactive crippling of the PS3 functionality breaches the contract between Sony and its customers, breaches the covenant of good faith and fair dealing and European unfair competition law.

Sony, through its marketing of the Playstation computer has touted its versatile ability to do more than play video games. And yet, this is the crux of Sony's argument as to why the system cannot be treated like the computer that it is. The Playstation computer has the ability to play films on BluRay discs and other media and it has the ability to access the internet and play music and a myriad of other features. All of these additional features can be enhanced by an end user's ability to install and run third party software on the Playstation computer. Instead of pointing out the possibilities in innovation and enhancement to the Playstation, Sony has instead chosen to quote internet chat boards and other unauthenticated hearsay sources to demonstrate the "truth" of the matter asserted: that "jailbreaking" the Playstation computer has no use other than to play pirated, copyright-protected, video games. Unlike a physical modchip which doesn't permit end users to install no infringing software and features to the Playstation computer, the technique and devices sold by Mr Spy enables users to enhance the non infringing aspects of the Playstation and treat the apparatus as it is, a computer. Yet with all the no infringing possibilities of the PS3KEY, Sony offers nothing more than internet-based quotes and declarations of Sony employees to determine the plausibility of no infringing uses of a "jailbroken" Playstation computer.

CONCLUSION

Sony cannot quantify its losses. Sony is misrepresenting to the court its motives for bringing these proceedings. Sony are attempting to silence independent reports on the faults on the Playstation3 computer and deprive end users of the 'PS3Key' and other similar devices that can cure some of the design manufactured faults, extend the life of the Playstation3 and allow third party software to run on the Playstation3 computer platform.

Sony have cynically calculated that it is cheaper to bring Court proceedings against small retailers that are reporting the faults on the Playstation3 and making efforts to repair the faults for customers, than to correct the manufacture defects or compensate retailers that are having to replace defective PS3 computers under the Sale of Goods Act 1979. Sony themselves refuse to repair the Playstation3 or recover any data for their customers. Their only solution to these problems is to replace the console at a cost of £131 if the console was purchased more than 12 months prior to the fault occurring.

Sony is attempting to hold end users to their 'licence agreement'. Many users of the Playstation 3 are minors (under the legal age of consent to a legal agreement) and are therefore not legally bound by their licence. I am not a Playstation3 owner and have not agreed to Sony's licence agreement and I am not bound by it whatsoever.

If Sony is allowed to make these claims, then any software/content company that offers you a long license, where you don't obey each and every claim, can say you've infringed on their copyright and owe huge statutory damages.

The PS3 has no problem copying illegally downloaded movies to HDD – For video files, including the highly pirated DivX format, the PS3 allows owners to install and copy films directly to the hard drive. These movies can be illegally downloaded and include some of the hottest blockbusters by the end user. The question ought to be asked, “would it be fair if the movie industry ‘banned’ the PS3 because it allows people to copy and playback downloaded movie files?”, It seems to me the answer is simply is would not.

Sony itself assist people wishing to play pirated movies by supplying on their website ‘CODEC’ for facilitate the playing of DIVX titles.

We should be minded the PS3 does allow this. Ultimately, it is the end user who decides the most reasonable course of action with a codec or software. Some will legitimately copy their games to HDD; some will legitimately run homebrew, it would seem some what punitive to seek to restrict and/or punish these people because of the end users choice when using the PS3 computer?

With PSJailbreak, the makers can rightfully arguing that they are simply duplicating technology already in existence within the PS3 Console/Computer.

End users using the PS3key are simply trying to re-instate a similar function to one Sony initially offered. I refer the reader to Paragraph 3 page 3 of this statement. Sony have acted in breach of promise, not to remove the 'Other OS'. This is not the first example of Sony's scandalous and duplicitous conduct in which they have misled UK consumers (supported via appendices).

Bearing in mind Sony's numerous past convictions for dishonesty, any claim they make should be treated with extreme caution.

Though large company's like Sony will try to call it a "crime" or "theft", copyright infringements are an infringement on somebody's rights for which no criminal charges can be laid and no criminal penalty can be enforced. There is no property taken or lost and no criminal laws are broken because it is an ephemeral right and not a tangible property at the heart of the matter. The best these extortionists can do, under the law, is request that the courts find the alleged infringer liable, not "guilty", and order monetary compensation or injunctions to repair the damages.

Sony's preferred position that the law is wrong about the difference between rights and property and must be subverted by deception to give them undeserved power over culture and creativity, securing their fortunes and freeing them from responsibility. They continually try to deceive the public and lawmakers about this fundamental issue by crafting their language and statements to hide the fact that they are trying to turn a civil right which is justly limited by law into a property over which they can exert absolute power and use as a weapon against the rights of artists and the public in order to seize undeserved wealth

VI. LARGE COMPANIES THAT ADVERTISE THE PS3 JAILBREAK

If Sony is concerned about 'losses' it is suffering because of the availability of the PS3 Dongle, surely it would make more sense to address large online retailers who are selling large quantities of the dongles instead of small insignificant retailers who have only sold 3, 1 of which was purchased by Sony. I suggest that Sony is attempting to deceive the Court by using the procedures against small retailers that do not have sufficient funds to mount a full and adequate defence to highly technical legal matters.

Large companies currently advertising the PS3 Jailbreak: (Appendix K)

Amazon.com, Inc. (NASDAQ: AMZN) is a US-based multinational electronic commerce company. Headquartered in Seattle, Washington, it is the largest online retailer in the United States.

http://www.amazon.co.uk/BRAND-JAILBREAK-PROTECTIVE-HARD-CASE/dp/B004DJQER2/ref=sr_1_2?s=electronics&ie=UTF8&qid=1296402011&sr=1-2

Date first available at Amazon.co.uk: 23 Nov 2010

http://cgi.ebay.co.uk/Amaze-Break-Usb-Dongle-Ps3-/250764495195?pt=UK_VideoGames_VideoGameConsoles_VideoGameConsoles&hash=item3a62ba895b#ht_500wt_1156

<http://www.ps3-key.co.uk/>

http://www.shopzilla.co.uk/8B--Miscellaneous_Video_Game_Accessories_-_cat_id--13714__keyword--ps3+jailbreak