

FEDERAL COURT OF APPEAL

B E T W E E N:

BMG CANADA INC., EMI MUSIC CANADA, A DIVISION OF EMI GROUP
CANADA INC., SONY MUSIC ENTERTAINMENT (CANADA) INC.,
UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA LTD.,
BMG MUSIC, ARISTA RECORDS, INC.,
ZOMBA RECORDING CORPORATION, EMI MUSIC SWEDEN AB,
CAPITOL RECORDS, INC., CHRYSALIS RECORDS LIMITED,
VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC.,
SONY MUSIC ENTERTAINMENT (UK) INC., UMG RECORDINGS, INC.,
MERCURY RECORDS LIMITED AND WEA INTERNATIONAL INC.

Appellants
(Plaintiffs)

- and -

JOHN DOE, JANE DOE AND ALL THOSE PERSONS WHO ARE INFRINGING
COPYRIGHT IN THE PLAINTIFFS' SOUND RECORDINGS

(Defendants)

- and -

SHAW COMMUNICATIONS INC., ROGERS CABLE COMMUNICATIONS INC.,
BELL CANADA, TELUS INC., AND VIDEOTRON LTEE.

Respondents
(Third Party Respondents)

- and -

CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER
CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

INTRODUCTION AND OVERVIEW

1. This is an appeal from an interlocutory order of von Finckenstein, J. (the “Motion Judge”), who denied the Appellants’ request to order five Internet Service Providers (“ISPs”) to disclose the names and addresses of 29 alleged peer-to-peer (“P2P”) music file-sharers. Although the underlying litigation raises important and novel questions concerning both privacy and copyright law in Canada, the order appealed from was based fundamentally on the insufficiency of evidence presented by the Appellants to support their claims of copyright infringement.

2. The Canadian Internet Policy and Public Interest Clinic’s (“CIPPIC’s”) intervention was and continues to be based upon the principle that the privacy of Canadian Internet users is of fundamental importance and should not be sacrificed absent a strong *prima facie* case that each Defendant in question has personally engaged in illegal activity. This concern is exacerbated by the potentially draconian financial consequences to Defendants in terms of minimum statutory damages that flow from the *Copyright Act* in the order of \$750,000 per Defendant¹ and the reality that any Defendants, once named, will realistically be forced to “settle” with the plaintiffs for substantial sums of money, whether or not they have a good defence.

3. Throughout their memorandum, the Appellants refer to the Defendants as “infringers” and to their activities as “infringements”, even “rampant infringement”. Such prejudgement of the outcome of the case should not be countenanced. Whether or not there is evidence of infringement is a central issue to be determined by the Court. Parties should not use prejudicial language to buttress a weak case.

¹ Based upon the Appellants’ own estimate of “an average of approximately 1,500 songs per IP address” with minimum statutory damages of \$500 per song in accordance with s. 38.1(1) of the *Copyright Act*. See Appellants’ Memorandum, fn. 2. In theory, the amount could treble, since each “song” typically comprises three copyrights - that in the sound recording allegedly held by the Appellants and that in each of the performer’s performance and the underlying musical composition.

PART I - STATEMENT OF FACTS

4. Rather than repeat facts set out by the Appellants, CIPPIC's statement of facts below focuses only on facts missing from, or misleadingly presented in, the Appellants' Memorandum.

5. The Defendants in this case are identified only by their file-sharing pseudonyms. The three ISPs who provided evidence in this proceeding do not have records containing the file-sharing pseudonyms listed in the Appellants' motion. The Appellants attempted to link these file-sharing pseudonyms to IP addresses. IP addresses are used by ISPs to provide service to their customers.

Affidavit of Greg Pultz, sworn Feb. 13, 2004, para.10; AB Vol. IX, Tab 21, p. 2492.

Affidavit of Andrew Ho, sworn March 4, 2004, para.5; AB Vol. IX, Tab 20, p. 2487.

Affidavit of David Shrimpton, sworn March 4, 2004, para.13; AB Vol. IX, Tab 22, p. 2520.

6. The Appellants provided no evidence to explain the critical issue of how they linked the file-sharing pseudonyms with the specific IP addresses for which subscriber identity is requested. As the Motion Judge found:

*There is **no evidence** explaining how the pseudonym "Geekboy@KaZaa" was linked to IP address 24.84.179.98 in the first place. **Without any evidence at all** as to how IP address 24.84.179.98 has been traced to Geekboy@KaZaa, and **without being satisfied that such evidence is reliable, it would be irresponsible** for the Court to order the disclosure of the name of the account holder of IP address 24.84.179.98 and expose this individual to a lawsuit by the plaintiffs. [emphasis added]*

Reasons for Order, para. 20, AB Vol. I, Tab 2, pp. 20-21.

Affidavit of David Shrimpton, sworn March 4, 2004, para.23(a); AB Vol. IX, Tab 22, p. 2523.

7. The Appellants have relied upon automated computer systems to gather and generate evidence in support of their motion. They have not disclosed the details of how these systems work. Without explaining how the error was made, the Appellants admit that they made an error in one of the IP addresses at issue - rather than 64.231.255.184, one of the targeted IP addresses should be 64.231.254.117.

Appellants' Memorandum, paras. 47-48.

Supplementary Affidavit of Gary Millin, sworn Feb. 9, 2004, AB Vol. IX, Tab 14, para. 1.

8. Account-holders associated with specific IP addresses may not be the file-sharing users in question. Many institutional accounts use routers to share use among multiple (up to a hundred or more) users. If a user accesses an Internet chat room, hackers can access their PC and share files on it. Wireless networks are also typically vulnerable to hacking by outside users. In all these cases, including family ISP accounts, the account-holder may have no knowledge of or control over the alleged file-sharing.

Affidavit of David Shrimpton, sworn March 4, 2004, para. 26; AB Vol. IX, Tab 22, p. 2524.

Affidavit of Greg Pultz, sworn Feb.13, 2004, para. 29; AB Vol. IX, Tab 21, p. 2496.

Cross-examination of Gary Millin, AB Vol. IX, Tab 23, Q. 116, p. 2586; Q. 128-36, pp. 2571-2573; Q. 147-155, pp. 2575-77; Q. 164-168, pp. 2580-81.

9. The default setting for many of the KaZaA software packages is to permit file transfers; users must take positive action to change this setting. The main screen of KaZaA does not indicate whether any files are being transferred to others. Even when a user thinks they have shut down KaZaA, the program may continue to run in the system tray without the user's knowledge.

Cross-examination of Gary Millin, AB Vol. IX, Tab 23, Q. 200-204, pp. 2586-87; Q. 216-219, p. 2590.

10. Many KaZaA users are unaware that they are allowing file sharing, or even if so aware, which files are actually available for sharing. Moreover, even if a user intentionally wishes to share files, it does not follow that any of these files will actually be downloaded by another user.

Nathaniel S. Good & Aaron Krekelberg, "Usability and privacy: A Study of KaZaA P2P file-sharing," Information Dynamics Laboratory, HP Laboratories, Palo Alto, HPL-2002-163, (5 June 2002) [Good & Krekelberg, "HP Study"].

11. MediaSentry provides a service called “MediaDecoy” that distributes bogus files over the Internet. These files look like real music files, but are not. People downloading them think incorrectly that they are music files. Mr. Millin admitted that he did not listen to any of the files copied from the alleged infringers so as to ensure that the files were not decoy files. No evidence was provided as to whether any of the listed files had been downloaded by anyone other than MediaSentry.

Cross-examination of Gary Millin, AB Vol. IX, Tab 23, Q. 106-108, p. 2566; Q. 189-196; pp. 2584-85; Q. 197, p. 2586; Q. 212-215, pp. 2589-90.

12. The capacity of KaZaA users to receive messages sent to their KaZaA user name account is disabled by default in some versions of KaZaA.

Cross examination of Gary Millin, AB Vol. IX, Tab 23, Q. 174-183, pp. 2582-83.

13. The Appellants allege a number of facts that are unsubstantiated by the evidence. References in this paragraph are to paragraphs in the Appellants’ Memorandum:

- a) Contrary to para. 6, the Appellants submitted nothing other than hearsay evidence as to their interests in the copyright in the sound recordings in question. One of the Appellants is apparently not even an exclusive licensee of the sound recordings in question and thus is not entitled to sue under Canadian law;

Affidavit of Kathy Yonekura sworn Feb. 10, 2004, AB Vol. IX, Tab 15, Ex. E.

- b) Contrary to paragraph 9 and 10, the user of P2P services is not necessarily aware that downloaded files are automatically made available to others to download from that user’s computer. Disabling the automatic file-sharing feature of KaZaa requires effort on the part of the user;

Cross-examination of Gary Millin, AB Vol. IX, Tab 23, Q. 200-204, pp. 2586-87; Q. 216-219, p. 2590.

- c) Contrary to para. 12, there was no evidence that any of the 29 Defendants ever shared any sound recording with anyone other than the CRIA investigator, and even this evidence was hearsay;
- d) Contrary to para. 13, there was no evidence that any of the 29 Defendants actually received the notices allegedly sent out;

- e) Contrary to para. 14, CRIA’s investigators did not confirm that the sound recordings allegedly downloaded by them were there same as those allegedly owned by the Appellants;
- f) Contrary to para. 53, there was no evidence that anyone actually verified that the audio files allegedly downloaded by MediaSentry were those that form the basis of this action;
- g) Regarding paras. 70 and 72, there was no evidence concerning the issue of whether the Defendants copied sound recordings onto an “audio recoding medium” and no pleading in the Statement of Claim on this issue. This issue was not before the Motion Judge; and
- h) Notwithstanding the statements in paragraphs 12 and 63 that the Appellants’ “songs” were shared or distributed by the Plaintiffs to “millions” of users, there is no evidence on record that anyone other than the Appellants’ investigator actually downloaded files from any of the Defendants’ computers.

Cross-examination of Gary Millin, AB Vol. IX, Tab 23, Q. 197, p. 2586

PART II- POINTS IN ISSUE

14. The issues to be determined on this appeal are:
- a) What is the appropriate standard of review in this case?
 - b) What is the proper test for ordering ISPs to disclose the identity of their subscribers in this case?
 - c) Did the Motion Judge make any reviewable error in applying the appropriate test to the facts in this case? In particular:
 - i) Did the Motion Judge properly weigh and assess the evidence of alleged infringement?
 - ii) Regardless of the evidentiary findings, did the Motion Judge err in his interpretation of the *Copyright Act*?

PART III - SUBMISSIONS

A. Standard of Review

15. This appeal arises from a motion brought pursuant to Rules 233 and 238 of the *Federal Court Rules, 1998*, SOR/98-106. These rules respectively grant the Court a broad *discretionary* power to order production of documents and examination for discovery of a non-party.

16. The exercise of discretion in this motion involved a great deal of fact-finding by the Motion Judge, based on voluminous evidence of the Appellants and three ISPs. Findings of fact are not to be interfered with absent a palpable and overriding error. On an assessment of the evidence as a whole, the Motion Judge gave sufficient weight to all relevant considerations and determined that he should not exercise his discretion to grant the order sought. This ultimate finding is a mixed question of fact and law reviewable on the basis of reasonableness *simpliciter*.

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 248, 252, 256.

Canada v. Olympia Interiors Ltd., [2004] F.C.J. No. 868 at paras. 8-9.

17. When applying a reasonableness standard, a reviewing court must look to the reasons given and ask whether, taken as a whole, they are tenable as support for the decision. A decision may meet the reasonableness standard even if the reviewing court does not find the explanations of the Motion Judge to be compelling.

Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247 at paras. 55-56.

18. The Motion Judge provided written reasons for his decision. The reasons reveal that he gave careful consideration to the evidence and all relevant considerations and that he determined an appropriate analytical base - a test - by which he could decide how to exercise his discretion. As described below, the Motion Judge made no palpable or overriding error and the reasons he gave are unquestionably tenable as support for the decision. The factual findings of the Motion Judge are correct and would satisfy a correctness standard if that standard were applied. However, a more deferential standard of review with respect to the

factual findings is applicable in this instance even though the record before the Motion Judge consisted solely of sworn affidavits, transcripts of cross-examination, and other documents filed as exhibits, with no oral evidence.

Equity Waste Management v. Halton Hills (Town), (1997) 35 O.R. (3d) 321 at 333-336 (Ont. C.A.)

B. The Appropriate Test for Disclosure

(i) Introduction

19. This appeal raises the question of the circumstances under which the law should allow a private litigant to access sensitive *personal information* about individuals, *without notice* to them and on the basis of *unproven allegations*.

20. Rules 233 and 238 are exceptional discretionary discovery rules. Those Rules require the court to consider certain factors; for example, relevance. However, contrary to the Appellants' principal argument in this appeal, an applicant who satisfies the factors in the Rules is not automatically entitled to an order for disclosure. Because the order is discretionary, an order may be refused on any relevant grounds even where an applicant meets the factors in the Rules.

Appellants' Memorandum, paras. 26-34.

Stevens v. Canada (Attorney General), 2002 FCT 2.

21. There are a number of fundamental privacy and public interest factors implicated by the extraordinary order sought in this case. These factors demand that a reasonably stringent test should be met before a court should exercise its discretion to grant the order. The Motion Judge held that the Appellants should be required to show a *prima facie* case.

Reasons for Order, paras. 14-15; AB Vol. I, Tab 2, pp. 17-18.

22. In the court below, the Appellants argued for a *prima facie* threshold. The contradiction between the Appellants' argument in this appeal and their argument before the Motion Judge is laid out in Part (III) below.

(ii) The Court should apply a stringent threshold test

(a) Core privacy values are at stake in this case and demand a stringent threshold test

23. Privacy is at the heart of liberty in a modern democratic state. Privacy is grounded in our physical and moral autonomy and is essential for the well-being of the individual. Our privacy is worthy of constitutional protection and has profound significance for the public order. Retention of information about oneself is of utmost importance, especially in modern society. Indeed, Parliament has recognized a right to informational privacy in recently-enacted legislation which regulates the collection, use and disclosure of personal information.

R. v. Dyment, [1988] 2 S.C.R. 417 at 427-30.

Protection of Personal Information and Electronic Documents Act, 2002, S.C. 2002, c. 5 s. 3. [*PIPEDA*].

24. Privacy has taken on special significance in the online context. Courts have recognized that online privacy has significant safety value and is consistent with what should be seen as good public policy. There is no duty on an ISP to disclose the identity of an account-holder associated with a particular IP address. On the contrary, in our information society we increasingly trust and are dependent on ISPs to safeguard our personal information and communications.

Ian Kerr, "Personal Relationships in the Year 2000: Me and My ISP" in Law Commission of Canada, ed., *Personal Relationships of Dependence and Interdependence in Law* (Vancouver: UBC Press, 2002) 78 at 110-11.

25. As the Ontario court reasoned in a similar motion under the Ontario rules:

Implicit in the passage of information through the internet by utilization of an alias or pseudonym is the mutual understanding that, to some degree, the identity of the source will be concealed. Generally speaking, it is understood that a person's internet protocol address will not be disclosed.

...

In keeping with the protocol or etiquette developed in the usage of the internet, some degree of privacy or confidentiality with respect to the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with what should be perceived as being good public policy.

Irwin Toy Ltd. v. Doe [2000] O.J. No. 3318 (QL) (Ont. S.C.J.) at paras. 10-11.

26. It is beyond doubt that the privacy interests of individuals are directly implicated

where copyright owners attempt to obtain information from ISPs about a person's downloading of copyright works. Information about an individual's Internet surfing and downloading activities tends to reveal *core biographical information* about a person.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, 2004 SCC 45 at para. 155 [*SOCAN v. CAIP*].

27. The protection of core biographical information is significant because it protects the intimate details of an individual's life choices. When private information is released, the invasion is not with respect to the particular information in question: "Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society."

R. v. O'Connor, [1995] 4 S.C.R. 411 at para. 119.

28. Where individuals' fundamental privacy is at stake, as it is in this case, the Court "cannot afford to wait to vindicate it only after it has been violated". Once private information about a person is exposed and their anonymity is shattered, it can never be regained. The associated potential harms to individuals and to society are irrevocable and irreparable. In light of these considerations, the threshold test means *everything* in this case.

R. v. Dymment, *supra* at 430.

(b) Public policy considerations require a stringent threshold test

29. P2P systems can be and are used to share virtually any type of file, including text documents, video, software, and pictures. As with other Internet-based forms of communications, they provide an unprecedented forum for intellectual freedom and freedom of expression where, from the privacy of their homes, users can explore and communicate unpopular or unconventional ideas and information without fear of ridicule, harassment or discrimination on the basis of race, gender, or socio-economic status. For example, using their P2P pseudonyms, any one of the 29 people targeted in this case might have been anonymously (and even unintentionally) file-sharing sensitive documents regarding their political views, religious beliefs, sexual interests or opinions of their employers. Or they might have used their pseudonym to send private messages to other anonymous P2P users.

30. Because the activities referenced above are performed on an assumption of anonymity, revealing the identity of those people could have devastating consequences for their lives and reputations. This is particularly important in this case because there is a real risk of exposing innocent people and because, at best, ISPs can only identify the name of the ISP subscriber, not the actual person who was sharing files. There is further potential harm for the subscriber because the next step in this litigation, if the Appellants are successful, could be forced settlements or *ex parte* orders to seize the subscribers' computers in order to preserve and analyze evidence, thereby exposing the entire contents of the Defendants' computers to scrutiny and potential public disclosure.

Reasons for Order, paras. 20 and 34; AB Vol. I, Tab 2, pp. 21, 28.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1179.

31. If granted on the basis of a low threshold test, an order in this case will have a significant chilling effect on legitimate and valuable uses of the Internet and innovative file-sharing technology.

(c) *Injunction jurisprudence supports a stringent threshold test*

32. The invasiveness of the order sought in this case parallels and exceeds the invasiveness of *Anton Piller* orders. In each case, a plaintiff seeks access to the private premises (or in this case highly private information) of an individual without notice to the individual and prior to the court making a determination regarding the alleged wrongs. However, the present case is even more extreme than an *Anton Piller* because of the potentially sensitive information at stake and because the ISP subscribers have no notice or ability to close the metaphorical door on a plaintiff who comes knocking for access. In the *Anton Piller* context, the invasiveness of the order demands that the plaintiffs make out “an extremely strong *prima facie* case” on a motion.

Anton Piller K.J. v. Manufacturing Processes Ltd. et al., [1976] 1 Ch. 55 (C.A.) at 62 (per Ormrod, L.J.).

(d) *The Charter requires a stringent threshold test*

33. The Supreme Court of Canada (“SCC”) has recognized a right to privacy inherent in

sections 7 and 8 of the *Charter*, noting that respect for individual privacy is an essential component of what it means to be free:

[Privacy in relation to information] is based on the notion of dignity and integrity of the individual... 'This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit'. In modern society, especially, retention of information about oneself is extremely important.

R. v. Dyment, supra at 429.

See also *R. v. O'Connor, supra* paras. 110-119.

See also *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [the *Charter*].

34. The common law must be interpreted in a manner which is consistent with the *Charter*. Further, the court must exercise its statutory discretion under Rules 233 and 238 using a test that is sufficiently stringent so as to be in compliance with the *Charter* rights of individuals who will be affected by the order.

Hill v. Church of Scientology, supra at 1169.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at para. 68.

(e) *The nature of the evidence requires a stringent test*

35. The Appellants rely on undisclosed automated computer processes for much of their evidence. Reliance on automated computer processes is naturally fraught with potential for machine and human error. It is not surprising that they made an error in at least one IP address (see paragraph 7 above).

36. When dealing with this kind of evidence in support of such extraordinary *ex parte* relief, the court should be presented with frank and full disclosure. For example, full disclosure might include an explanation from an independent expert as to how the P2P pseudonyms are linked to IP addresses (along with a solid documentary backup to put the explanation beyond doubt in every case). One incorrect number in an IP address means all the difference to the innocent person that would be exposed by the order sought.

(iii) *The Motion Judge applied the correct test*

37. For the purpose of determining whether to exercise his discretion under the Rules, the Motion Judge required that the Appellants demonstrate a *prima facie* case of infringement. This test is a reasonable and correct analytical basis for the exercise of discretion in light of *Irwin Toy*, the invasive and extraordinary nature of the order sought and the fundamental privacy and public policy issues at stake.

Irwin Toy v. Doe, supra at para. 18.

38. The *Glaxo* line of cases is consistent with a *prima facie* standard. Both *Glaxo* and *Norwich* establish what is common sense - in deciding whether it is right to grant an order, in each case the court “would no doubt consider such matters as the strength of the applicant’s case against the unknown alleged wrongdoer...”. The *Glaxo* line of cases does not stand for the proposition that the threshold test is a *subjective bona fide* belief.

Norwich Pharmacal v. Customs and Excise Commissioners, [1974] A.C. 133 at 199 (H.L.)

Glaxo Wellcome PLC v. Canada (1998), 81 C.P.R. (3d) 372 (F.C.A.) at para. 24.

39. If the Court finds that *Glaxo* line of cases establishes a hard-and-fast standard of mere *bona fides* (which is not admitted), then the Motion Judge was correct and within his right to modify *Glaxo*’s equitable test to reflect the unique circumstances of this case. Equitable relief is discretionary, inherently flexible and requires the court to approach each case in its proper context. Moreover, substantial differences exist between the present case and the cases in the *Glaxo* line - differences which explain why a lower threshold might be appropriate in those cases but not in this case. Among many such differences, in *Glaxo* and *Norwich* key facts were undisputed, there was a clear cause of action, the targets were unambiguously identifiable, only names were sought, the names sought were readily available and the names sought were not particularly sensitive.

See *e.g. Glaxo, supra* at para. 44, 60, 62.

See *e.g. Norwich, supra* at 198, 199.

R. v. Fitzpatrick [1995] 4 S.C.R. 154 at para. 49.

40. Contradicting their arguments in this appeal, when this case was before the Motion

Judge the Appellants unequivocally agreed that the *prima facie* merits standard is the correct test. They stated that: “[t]he prima facie test set out in *Irwin Toy* is appropriate”. The Motion Judge accepted the Appellants’ submission on this point. The Appellants should not be permitted to advance a contradictory position in this appeal.

Written Representations on behalf of the Plaintiffs, para. 44, attached hereto as Schedule “A” in Tab B.

New Hampshire v. Maine, 532 U.S. 742 at 749-751 (2001).

41. The Appellants now suggest that the court needs only to be satisfied that they have a *subjective bona fide belief* that the 29 people in this case had infringed their copyrights.² If that is a legal test at all, then it is not an appropriate test in the circumstances of this case. A *subjective bona fide belief* threshold is inherently self-serving, insensitive to the fundamental privacy and public interest issues at stake in this case, inconsistent with *Irwin Toy*, injunction jurisprudence and the *Charter*, and ultimately incommensurate with the invasive nature of the order sought. The order sought in this case is discretionary and, if granted, extraordinary - the order will expose core biographical information about individuals without notice to them and on the basis of unproven allegations. In our free and democratic society, the court has a right and a responsibility to expect that applicants seeking such an order will meet a stringent standard. Requiring anything less than a stringent standard risks abuse of the court’s process in a way that would undermine the very foundations of Canadian society.

C. Application of Test to Facts and Law

(i) Even if proven, the alleged acts do not constitute copyright infringement

42. The Appellants failed to provide sufficient evidence, even if it were all admissible, that the activities in question constitute copyright infringement.

Reasons for Order, paras. 21-29, (particularly paras. 26-29).

43. For example, the Appellants provided no independent expert evidence as to the nature of P2P activity and how it does or does not correspond with specific provisions in the

² *Appellants Memorandum*, paras. 39, 82.

existing *Copyright Act*. Rather, they simply reiterate their unsupported conclusion, as if it were a finding of law, that “MediaSentry’s investigations confirmed that the Defendants have ***infringed*** the Appellant’s copyright in the songs”. [emphasis added]

Appellants’ Memorandum, para. 14.

44. The Appellants refer to “infringing” copies and reproductions and to “pirated songs” as if the infringing status were self-evident, when the opposite is the case in view of s. 80 of the *Copyright Act* and the recent reasoning of the Copyright Board. Section 80 explicitly permits copying of music for private use. It was enacted as part of a *quid pro quo* to legalize private copying of music in exchange for a “levy” scheme that generates tens of millions of dollars *per annum* for the music industry.³ File-sharing is merely the practice of downloading from others who, intentionally or otherwise, allow their files to be shared.

Appellants’ Memorandum, paras. 54, 60, 65.

45. CIPPIC supports the learned Motion Judge’s reasoning on copyright law, and his application of the law to the evidence. Accordingly, the following points deal only with new issues raised by the Appellants and new jurisprudence and authority not available at the time of the hearing by the Motion Judge.

(ii) New issues being raised by the Appellants

46. The Appellants claims below were limited in their statement of claim to the following:

27. At times unknown to the plaintiffs but known to the Defendants, the Defendants reproduced the plaintiffs’ Sound Recordings and authorized the reproduction of the Sound Recordings in a manner that is not permitted by the Act. The Defendants also: (I) distributed to such an extent as to affect prejudicially the owner of copyright and (ii) possessed for the purpose of doing the things referred to in paragraph (I) unauthorized copies of the Sound Recordings that the Defendants knew or should have known infringe copyright or would infringe copyright if they had been made in Canada by the person who made them.

Statement of Claim, para. 27; AB Vol. I, Tab 3.

³ *Private Copying 2003-2004*, Copyright Board of Canada, December 12, 2003, pp. 19-21.

47. The Motion Judge carefully considered each alleged act and found no evidence to support the allegations. The Appellants now suggest that the Defendants:

*...made copies of the Songs [sic⁴] and communicated the copies by **transmitting** them over the Internet, to any user who requested such communication. Thus the Defendants made reproductions of the Songs for **the purpose of communicating such copies by telecommunications** to the public". [emphasis added]*

Appellants' Memorandum, para. 76.

48. These are new allegations that suggest new causes of action, and are not, in any event, supported by any evidence. In particular, there was no reliable and admissible evidence on record as to the "purpose" of the Defendants in making their alleged reproductions, or indeed awareness of any of them that they actually "transmitted" anything to anyone. The concept of "purpose" is essential to the exemption found in s. 80 of the *Copyright Act*. The concept of "transmitting" simply does not occur in any relevant part of the Canadian *Copyright Act*. The suggestion that the Defendants are engaged in "communicating such copies by telecommunication" is a new cause of action and is unsupported by any evidence. In any event, a recent ruling of the Supreme Court of Canada has stated that:

The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339 at para. 78 [CCH v. LSUC].

49. Moreover, the Appellants are now raising for the first time an issue as to "whether the memory location to which the Defendants copied the Songs constituted an 'audio recording medium' within the meaning of the *Copyright Act*".

Appellants' Memorandum, para. 70.

⁴ The Appellants are record companies who are claiming for infringement of copyright in sound recordings. "Songs" are musical compositions (i.e. "works") and treated differently than "other subject-matter", such as sound recordings, under the *Copyright Act*. See ss. 2, 3, 15-20. Their use of the terminology "songs" is, at best, inaccurate.

50. Quite apart from the inappropriateness of raising such an issue for the first time on appeal, and the complete lack of evidence of any kind relating to it, the Copyright Board has specifically ruled that hard drives in personal computers (presumably the “memory location” to which the Appellants refer) are an “audio recording medium”, that the fact that no levy has been sought for them does not vitiate the exemption, and that a contrary interpretation would “add a condition that is not currently included in section 80.”

Private Copying 2003-2004, Copyright Board of Canada, December 12, 2003, p. 21.

(iii) Recent Jurisprudence and Authority

51. Since the Reasons for Order were delivered by the Motion Judge on March 31, 2004, the Supreme Court of Canada has rendered a landmark decision concerning copyright law and music downloaded *via* the Internet. In *SOCAN v CAIP*, the Court instructed that:

The capacity of the Internet to disseminate “works of the arts and intellect” is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.

SOCAN v. CAIP, supra at para. 40.

52. Since P2P technology can be used for many productive and legal purposes involving the sharing of many different file types⁵, it be inconsistent with the holding of the SCC to render a broad ruling that could discourage such technology, especially in view of the unsatisfactory record below.

53. The SCC has also instructed that an exemption in the *Copyright Act* that was carefully considered by Parliament as an intrinsic part of the balance required for copyright law is not be regarded as a loophole but rather as “an important element of the balance struck by the statutory copyright scheme”. This is consistent with the SCC’s pronouncement a few weeks earlier that fair dealing exceptions “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained”. Section 80 of the *Copyright*

⁵ Good & Krekelberg, “HP Report”, *supra* para. 10 at 1.

Act is a perfect example of an exemption enacted by Parliament for the purpose of legitimizing private copying in exchange for the payment of a lucrative levy.

CCH v LSUC, supra at para. 51.

Private Copying 1999-2000, Copyright Board, December 17, 1999, pp. 1-2.

54. The private copying exemption was sought at the behest of the music industry. It should not now be regarded by them in such a way as to enable the continued collection of tens of millions of dollars a year in levies while permitting law suits against those have paid the cost of the levies in accordance with the legislation.

55. The SCC also expanded on the meaning of “authorization” in the context of the Internet. While allowing that “The operation of the Internet is obviously a good deal more complicated than the operation of a photocopier...”, the Court also held that:

The knowledge that someone might be using neutral technology to violate copyright (as with the photocopier in the CCH case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did “[g]ive approval to; sanction, permit; favour, encourage” (CCH, para. 38) the infringing conduct.

SOCAN v CAIP, paras. 123, 127.

56. It is submitted that there was no evidence before the Motion Judge, let alone sufficient evidence, to constitute a *prima facie* case that any of Defendants who allegedly used KaZaA or similar P2P software were “authorizing” infringement. Indeed, as set out above in paragraph 9, there was evidence that the “default” settings of P2P software can make users into inadvertent file sharers. It is contrary to any interpretation of the concept of “authorization” to hold a person liable for activity of which they are unaware and which may be difficult for them to stop, even if they are aware.

57. There was no reliable evidence that any of the Defendants were ever made aware of the allegedly illegal nature of their alleged activity. In particular, there was no evidence that the notices allegedly sent out by MediaSentry were ever actually received by any of the Defendants. Indeed, the Plaintiffs’ main deponent Mr. Millin admitted that the capacity of recipients to receive such messages is disabled by default in some KaZaA P2P software.

Cross examination of Gary Millin, AB Vol, 9, Tab 23, Q. 174-183, pp. 2582-83.

(iv) No Evidence of Prejudicial Effect

58. Under s. 27(2)(b), the Appellants must show that the Defendants engaged in distribution “to such an event as to affect prejudicially the owner of the copyright”.

59. The SCC indicated recently that it takes note that the evidence of harm to the music industry from Internet-based file sharing is ambiguous:

*It has been estimated that in 2002, sales of recorded music fell by almost 10% due to Internet-based file sharing: see Anonymous, “The music industry: In a Spin” (March 2003), The Economist 58, but this “estimate” is a matter of ongoing controversy. **Some say Napster was a boon to the music recording industry.** [emphasis added]*

SOCAN v CAIP, supra at para. 130.

60. This observation underscores the complete lack of evidence presented to the Court below as to whether any alleged distribution in contravention of s. 27(2) of the *Copyright Act* was “prejudicial” to the copyright owners. In fact, after the motion was heard and one day before the order and reasons for order were released, an important study was published by academics at Harvard University and the University of North Carolina concluding that file-sharing has “no statistically significant effect” on purchases of the average album and that it may have a “positive” impact on sales of “superstar albums”. This is the only independent academic econometric study to date based upon empirical data concerning the effect of file sharing.

F. Oberholtzer and K. Strumpf, The Effect of File Sharing on Record Sales - An Empirical Analysis, (March 2004), pp. 24-25.

(v) Lack of evidence as to copyright ownership

61. Ms. Yonekura’s affidavit setting forth the alleged copyright entitlement of the Appellants is based solely on information she allegedly received from other people. In the instance of Warner Music Canada and the Warner Group, (paragraph 9), she does not even allege that Warner is an exclusive licensee but rather that they “own or are licensees”.

62. Mere licensees cannot sue for copyright infringement.

D. Vaver, *Copyright Law*, (Toronto: Irwin Law, 2000) at 239-241.

63. The Appellants might easily have provided certificates and other evidence as to ownership of copyright but failed to do so. No explanation has ever been given for the failure to file such certificates, as is the normal practice in copyright litigation. Therefore the Appellants cannot rely on any presumption as to the ownership or existence of copyright, as provided for in s. 53 of the *Copyright Act*. In the absence of such a presumption, the Appellants in this instance have no admissible evidence as to copyright ownership. Moreover, there is nothing in any of the Appellants evidence to indicate that anyone actually listened to the allegedly downloaded sound recordings to confirm that they were the same as the titles in which copyright ownership is alleged.

Copyright Act, s. 53.

D. Application of Standard of Review to Findings

64. The Motion Judge gave appropriate weight to all relevant considerations in this case and exercised his discretion in a manner that meets both a reasonableness test and a correctness test. He made findings of fact that were clearly reasonable and supported by the record. His determination of the appropriate test to apply in this case was correct, and was indeed supported by the Plaintiffs at that time. His application of the test to the facts was carefully reasoned. There is thus no basis on which to overturn his findings on appeal.

PART IV - ORDER SOUGHT

65. For the above reasons, CIPPIC seeks an order dismissing this appeal.

66. CIPPIC reiterates its position below that, as a public interest advocate, it neither seeks nor ought to be liable for costs in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF AUGUST, 2004,

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