

FEDERAL COURT

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.

Plaintiffs

- and -

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

Defendants

**WRITTEN REPRESENTATIONS
on behalf of the Plaintiffs (Applicants)
for motion returnable March 12, 2004**

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I. Overview

1. This is a motion to discover the identities of copyright infringers. Without this, the plaintiffs would be “non-suited” and thereby unable to enforce their copyright in recorded music. The order sought on this motion is to ensure that a good cause of action for infringement will not fail for want of identity of the infringer. The general object of the order is therefore to do justice.
2. A person who becomes involved in the wrongful acts of another, even if innocently, is under a duty to assist a person who is injured by those acts by giving full information to disclose the identity of the wrongdoer pursuant to a court order. The respondent ISPs are undisputedly in possession of evidence that is critical to this case -- the name and particulars of the alleged copyright infringers. The respondent ISPs should be required to disclose the names and particulars of these customers. This applies whether the relief sought is by way of an equitable bill of discovery or through third party production or discovery under rules 233 and 238. The privacy laws themselves provide for the disclosure of such evidence pursuant to a court order in the usual way.
3. Substantial copyright infringement of recorded music is taking place on the Internet in Canada. Canadian law and international agreements, such as the *Berne Convention* and the *Gatt TRIPs Agreement*, entered into by Canada guarantee that owners of intellectual property rights, including copyright, can take prompt and effective action against such activity. That includes providing legal processes and remedies to obtain evidence to prosecute such actions. The order sought gives the plaintiffs the only opportunity to proceed to have their day in court to enforce their copyright and seek remedies for infringement as provided by the Copyright Act.
4. At this stage, the merits of the substantive case need not be tried. The test here is whether the plaintiffs have pleaded a *bona fide*, arguable or prima facie case of infringement and whether the respondents have relevant information that will assist in identifying the alleged infringers. The process must be fair to both the plaintiffs and respondent ISPs and lead to the most expeditious, cost-effective, and just result. The proposed terms of the order accomplish the needs of the plaintiffs to proceed with the lawsuit while respecting the concerns of the respondent ISPs, or those of their customers.

II. Relevant Facts

5. The plaintiffs own Canadian copyright in certain sound recordings.

Affidavit of Kathy Yonekura, Plaintiffs' Motion Record, paras. 5 to 9 and Exhibits 'A' to 'E'.

6. The defendants are persons, the identities of whom are presently unknown to the plaintiffs, who have infringed and continue to infringe the plaintiffs' copyright by copying, authorizing of copying, distributing or possessing for the purpose of distribution of the copyrighted sound recordings over the Internet. The plaintiffs have not authorized these activities.

Affidavit of Gary Millen, Plaintiffs' Motion Record, para. 14

7. The plaintiffs commenced the present action by way of statement of claim, issued February 10, 2004 against the as yet unknown defendants, seeking remedies for infringement of the plaintiffs' copyright.
8. An investigation conducted on behalf of the plaintiffs has determined that these infringements of copyright were committed by, among others, the individuals with the network usernames and Internet Protocol addresses listed at Schedule "A" to the Order requested.

Affidavit of Gary Millen, Plaintiffs' Motion Record, para. 16.

Notice of Motion, Plaintiffs' Motion Record, Schedule "A"

9. That these Internet Protocol addresses are registered to the respective Internet service provider business unit of the ISPs indicates that the defendants are subscribers of the Internet access service offered by the respective ISPs.

Affidavit of Gary Millen, Plaintiffs' Motion Record, paras. 24, 33, 42, 51, 60, 69, 78 and 87.

10. The plaintiffs are unable to determine the real names, addresses, or telephone numbers of the defendants.

Affidavit of Gary Millen, Plaintiffs' Motion Record, para. 90.

11. The ISPs are able to determine the names and contact information of their subscribers who were using the Internet Protocol addresses at the date and time identified during the plaintiffs' investigation. The ISPs are the only known or practical source of the information required by the plaintiffs.

Affidavit of Gary Millen, Plaintiffs' Motion Record, para. 91.

12. Some of the respondent ISPs have already identified some of the defendants and in some cases have already notified them of this lawsuit. In particular, Rogers Cable has notified eight (8) of its customers saying that it will not disclose names and addresses or other identifying information to the plaintiffs unless ordered to by this Court. The purported reason for sending the notice was to give its customers an opportunity to "consult a lawyer or take other steps to object" to this motion if they so wished.

**Cross-examination of Andrew Ho, Plaintiffs' Motion Record, p.17-19.
Letter dated February 16, 2004**

13. Videotron, one of the respondent ISPs, has notified the plaintiffs and the other ISPs in writing that it does not object to the granting of the Order sought on this motion.

Letter dated February 17, 2004, Appendix A

14. The order sought by the plaintiffs seeks solely the disclosure by the respondent ISPs of the infringers' names and other particulars, for the plaintiffs' use in enforcing its copyright in respect of the particular instances of alleged infringement.

III. Plaintiffs' Positions on the Issues

Test

15. The ISPs have a duty to disclose the identity of their customers pursuant to court orders in infringement cases of this kind. Where, as here, there is no overriding principle or interest militating against disclosure, this duty prevails.
16. The plaintiffs need to show a prima facie or *bona fide* case of wrongdoing and the need for the disclosure to proceed with its lawsuit against the alleged infringers.

Privacy

17. Although there may be expectations of privacy in certain Internet communications, these are not privacy rights that are equivalent to the rights that are raised by government action where the power of the state is circumscribed by the Charter. Cases involving privacy that arise from the context of government action are not relevant to the contractual and technical expectations of privacy that are in play in this case.
18. There is no reasonable expectation of privacy in the circumstances of this case. Further, disclosing the information requested will involve no violation of PIPEDA. PIPEDA specifically authorizes disclosure of personal information in cases such as this. As well the subscribers have consented to the disclosures by agreeing to the terms of service with their ISPs.

Reliability

19. ISPs are in the business of providing IP addresses to their account holders. The data maintained by the ISPs is reliable; there is no suggestion that the data itself is erroneous.
20. The ISPs have identified certain circumstances where data may have become unavailable. In such circumstances the request for discovery will result in no useable information being provided. This is not a reason to deny all discovery.
21. The ISPs Shaw and Rogers have admitted that this type of information has been provided regularly in response to other requests.

22. The ISPs and interveners hypothesize a number of situations in which affirmative defences to infringement might conceivably be raised. These situations can only be discussed in the hypothetical here. They must be raised and decided in the proceedings that will follow on the basis of any factual record and legal briefing that are developed there. Simply put, the ISPs are merely holders of very specific but crucial evidence which they must produce at this stage in order for such proceedings to commence.

Plaintiffs Have Made Out Prima Facie Case, At Least, Of Copyright Infringement

23. The plaintiffs have filed **uncontradicted** evidence of copyright ownership or exclusive rights to copyright in Canada to certain sound recordings.

24. Evidence is before the Court to show:

- a. Individuals have copied the sound recordings to publicly shared directories on computers;
- b. The sound recordings have been made available from such shared directors for copying, transmission and distribution to millions of others on “file sharing” networks over the Internet.

25. The above is sufficient to show a *prima facie* case of copyright infringement by those individuals.

26. Possible affirmative defences and the specific facts of any particular defendant’s activities are all potentially raised in proceedings that will follow. The Court need not and ought not to rule on these hypothetically posed defences at this stage involving limited discovery from third parties.

Breadth of Order and Due Process

27. The Rules of the Federal Court, including Rules 233 [documentary production], 238 [third party examination] and 99 [written examinations] provide the basis for the order sought.

28. The ability of the sought-after information and documents to be used in other proceedings is restricted to use in proceedings involving allegations of infringement against the individuals identified. This is an appropriate use of the information and is not unrelated or collateral in any way to the rights asserted. The plaintiffs seek discovery by way of affidavit with relevant

documents attached. This means of discovery is least burdensome for the ISPs. Alternatively the plaintiffs would accept discovery by way of oral examination instead.

29. The full set of safeguards against abuse of process remain available to the parties sought to be named in proceedings by the plaintiffs.
30. This motion itself is one by which this Court is able to act as a gate-keeper and ensure that a “spurious” claim cannot be used to make available identity information that is not otherwise available.

IV. Plaintiffs' Argument

A. Test for Obtaining Relief

31. There is a duty on the ISPs to disclose the identities of their customers in this set of circumstances. A person who becomes involved in the wrongful acts of another, even if innocently, is under a duty to assist another who is injured by those acts by giving full information to disclose the identity of the wrongdoer.

Glaxo Welcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

Norwich Pharmacal Co. v. Customs and Excise Comrs. [1974] A.C. 133 (H.L.) per Lord Reid at 175

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A) at 13-14.

K. LaRoche & G.J. Pratte, "The Norwich Pharmacal Principle and Its Utility in Intellectual Property Litigation" (2001) 24 Advocates Quarterly 301 at 301.

32. This principle can go beyond merely identifying the wrongdoer to requiring the person to include all information necessary to enable the plaintiff to decide whether it is worth suing the wrongdoer or not. In this case, the plaintiffs merely want to learn the identity of certain wrongdoers; they already have evidence of wrongdoing.

Glaxo Welcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

Norwich Pharmacal Co. v. Customs and Excise Comrs. [1974] A.C. 133 (H.L.) per Lord Reid at 175

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A) at 13-14.

33. The criteria for issuing a bill of discovery involves three threshold requirements:

- 1) The applicant must establish a *bona fide* (i.e. *prima facie*) claim against the alleged wrongdoer;
- 2) The applicant must share some sort of relationship with the respondent through the wrongdoing; and,

3) The person from whom discovery is sought must be the only practical source of information available.

The general object is to do justice. The requirements are satisfied on the facts of this case. In exercising its discretion, a court should also take into account the public interests both in favour of and against disclosure. Without disclosure, the plaintiffs would be “non-suited”. On the facts of this case, there is nothing that weighs against giving the plaintiffs the opportunity to go forward with their lawsuit.

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A) at 14

Glaxo Welcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

34. This motion is brought pursuant to Rules 233 and 238 of the Federal Court Rules, 1998¹.

35. The Federal Court has the power, under Rule 233(1), to order the production of any document in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.

Rule 233(1), Federal Court Rules, 1998, SOR/98-106, as am.

36. **The defendants are identified by the specified Internet Protocol addresses.** The specified Internet Protocol addresses are registered to ISPs who have assigned those Internet Protocol addresses to subscribers whose identity is solely known by the ISPs. The information sought is relevant and could be compelled at trial; only the ISPs have possession of the relevant information.

Affidavit of Gary Millin, Plaintiffs’ Motion Record, paras. 16, 24, 33, 36 and 37

Notice of Motion, Plaintiffs’ Motion Record, Schedule ‘A’

¹ In a letter dated February 25, 2004, the Plaintiffs indicated to counsel for the ISPs that the motion would be based on Rule 238 as well as 233.

37. Rule 238(1) of the *Federal Court Rules* permits a party to an action, with leave, to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in an action.

Rule 238(1), *Federal Court Rules, 1998, SOR/98-106, as am.*

38. In exercising its discretion under Rule 238(1), the Court must consider the following factors under Rule 238(3):

- (a) the person may have information on an issue in the action;
- (b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;
- (c) it would be unfair not to allow the party an opportunity to question the person before trial; and
- (d) the questioning will not cause undue delay, inconvenience or expense to the person or to the other parties.”

Rule 238(3), *Federal Court Rules, 1998, SOR/98-106, as am.*

Stevens v. Canada (Attorney-General) (2001), 1 F.C. 156 (F.C.) at 163.

39. An applicant, under Rule 238 must show that the evidence cannot be obtained from anyone other than from the person to be examined. Moreover, in order to satisfy Rule 238(3)(b), there should be evidence of the efforts made by the requesting party to obtain the information informally or reasonably from other sources and of the failure or frustration of those efforts. The plaintiffs, prior to bringing these motions, asked the ISPs to voluntarily provide the information and documents. None would do so.

Bayside Towing Ltd. v. C.P.R. [2000] F.C.J. No. 1122, (2000), 187 F.T.R. 247 affirmed [2000] F.C.J. No. 1534, (2000), 194 F.T.R. 158 (F.C.)

Snook v. “Cape Marnier” (The) [1999] F.C.J. No. 412, (1999), 165 F.T.R. 151 (F.C.).

40. In considering the factors under Rule 238, the following should be noted:

(a) the ISPs have information on an issue in the action, namely the identity of the alleged infringers.

(b) the plaintiffs have been unable to obtain the information from the ISPs through informal means. The ISPs are the only practical source of the information.

(c) it would certainly be unfair not to allow the plaintiffs an opportunity to question the ISPs; otherwise, the plaintiffs would be non-suited without this information.

(d) providing the information would not cause unreasonable delay, inconvenience or expense.

Affidavit of Gary Millin, *Plaintiffs' Motion Record*, paras. 90, 91

41. The criteria for the granting of an order under Rules 233 and 238 generally mirror those for the equitable bill of discovery. The principle of the duty to identify the wrongdoer can be invoked whether the order is sought in a John Doe action against the wrongdoer or in another action brought against the third party by way of a bill of discovery.

42. This motion is not a novel proceeding. Third parties have been compelled to disclose documents identifying the name and address of a defendant previously identified solely by an Internet Protocol address. In no case have privacy or other concerns against disclosure outweighed the interest in obtaining the documents and information to identify the defendants.

Irwin Toy v. Doe (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.).

Ontario First Nations Limited Partnership v. John Doe (3 June 2002) (Ont. S.C.J.)

Canadian Blood Services/Société Canadienne du Sang v. John Doe (June 17, 2002) (Ont. S.C.J.)

Wa'el Chehab v. John Doe (October 3, 2003) (Ont. S.C.J.)

Kibale v. Canada, [1991] F.C.J. No. 634 (QL) (FC)

Loblaw Companies Ltd. v. Aliant Telecom Inc. and Yahoo [2003] N.B.J. No. 208 (N.B.Q.B.), online: QL (NBJ).

43. In *Irwin Toy v. Doe*, the Ontario Superior Court of Justice granted the applicant leave to examine an Internet service provider for discovery of the name, address or other identification information of a customer of the ISP who had sent out allegedly defamatory e-

mail messages, which had attached to them two private and confidential electronic files of the plaintiff. The plaintiff required the information to take legal proceedings against those customers of the ISP who had defamed it and misappropriated its confidential information. Satisfactorily to the court, the applicant had made out a *prima facie* case of actionable wrongdoing perpetrated by the defendants from that Internet Protocol address.

Irwin Toy v. Doe (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.).

44. The *prima facie* test set out in Irwin Toy is appropriate. Indeed, this test has been followed in cases in which the remedies made available by the Federal Court have been far more invasive than the order sought here. For example, on injunction applications, which often have far reaching consequences for the party affected, the *prima facie* test is applied. Only in the case of an *Anton Piller* order, which permits attendance, preservation and removal remedies far more invasive than the scope of the order sought in this case, must the parties seeking the order satisfy a higher “strong *prima facie*” test.

45. Information disclosing the identity of customers behind IP addresses by ISPs is routinely sought and provided under court orders of the type the plaintiffs seek. On a monthly basis over the last two-year period, through search warrant or court order, government agencies have obtained the identity of persons assigned IP addresses by Rogers Cable Communications.

Cross examination of Ho, Plaintiffs’ Motion Record, p. 4.

46. On this motion, the plaintiffs have demonstrated the following:

- a. a *prima facie* or *bona fide* case, at least, of infringement (see paragraphs below);
- b. a relationship exists between the ISPs and the alleged infringers (the IP addresses are registered to the ISPs who have assigned use of them to customers or subscribers);
- c. the fact that the ISPs have documents and information about the identities of customers who are alleged to infringe copyright;
- d. no other practical source of this information;
- e. the necessity of this information for the plaintiffs to proceed;

- f. the fact that such information and documents would be compellable at trial and useful to the plaintiffs' case; and
- g. the fact that neither the ISPs nor the alleged infringers have any interest that would outweigh the ISPs duty to disclose the identity of the alleged infringers.

B. Privacy

Applicability of the Charter

47. The present action is exclusively a matter of private law. The Charter is not applicable in the absence of government action. In private law matters the common law must be interpreted in a manner which is consistent with Charter principles, but, it is important not to import into private litigation the analysis which applies in cases involving government action.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1170.

R. v. Fegan (1993), 13 O.R. (3d) 88 (Ont.C.A.)

48. Section 8 of the Charter protects the privacy interests of individuals against intrusion by the state where there is a reasonable expectation of privacy. Where a process, like the execution of an Anton Pillar order, is civil in nature, the search and seizure requirements established for searches under s. 8 are not applicable.

R. v. Plant, [1993] 3 S.C.R. 281 at paras. 23-4.

Viacom Ha! Holding Co. et al. v. Jane Doe et al. (2000), 6 C.P.R. (4th) 36.

Basis for obtaining disclosure

49. PIPEDA sets out the rules that govern the collection, use and disclosure of personal information by organizations during the course of conducting commercial business.

50. Section 4.3 of Schedule 1 reads as follows: "The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate". The relevant text of the associated note reads:

In certain circumstances personal information can be collected, used or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. ...

51. Section 7(3)(c) provides an exception to the rule in s. 4.3 of the Schedule:

7. ...

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is ...

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records.

52. The purpose of the present motion is to obtain an order from a court for the production of information from the ISPs that will allow the plaintiffs to enforce their copyright against the defendants. This is precisely the circumstance under s. 7(3)(c) in which disclosure of personal information without should be made without consent.

PIPED Act case summary #198: www.privcom.gc.ca/cf-dc/2003/cf-dc_030801_03_e.asp.

PIPED Act case summary #174: www.privcom.gc.ca/cf-dc/2003/cf-dc_030428_3_e.asp.

PIPED Act case summary #143: www.privcom.gc.ca/cf-dc/2003/cf-dc_030306_2_e.asp.

PIPED Act case summary # 96: www.privcom.gc.ca/cf-dc/cf-dc_021203_2_e.asp.

53. The word "court" used in section 7(3)(c) has its ordinary meaning. Rules of discovery and production of relevant documents as well as disclosure and inspection under rules of court fall within the scope of s. 7(3)(c).

Lisozzi v. Bell Distribution Inc., [2001] O.J. No. 2378.

54. PIPEDA provides no basis for precluding the issuance of the orders sought on these motions or from the ISPs from disclosing the information sought in the face of a court order.

55. The information that is being requested is highly relevant to the action for copyright infringement, rests solely in the possession of the ISPs and consists of only the information that is necessary to determine the identity of the infringers.

Defendants' Reasonable Expectation of Privacy

56. Any expectation of privacy that the defendants' may enjoy does not extend to an expectation that their identities will not be disclosed where the right of another party to seek redress from a wrong committed by them is at stake.

R. v. Fegan (1993), 13 O.R. (3d) 88.

57. Where records are maintained as part of a commercial relationship, it is relevant, even where the Charter applies, to examine the nature of the commercial relationship and determine the extent of any expectation of privacy. If information is not "personal and confidential" in nature there can be no expectation of privacy. Further, a request for documentary information is generally less invasive than seizures carried out in personal residences which are a feature of Anton Pillar orders

R. v. Plant, [1993] 3 S.C.R. 281 at paras. 28-32.

58. A condition on the use of the services offered by ISPs is to abide by the terms of "acceptable use" agreements. These agreements describe the relationship between the service provider and the subscriber and establish limitations on the use of the services.

Exhibit "A" to the Affidavit of Greg Pultz Preliminary Motion Record of the Non-Party Respondent Shaw Communications Inc.

Exhibit 1 to the Cross-examination of Greg Pultz, held February 27, 2004, p. 4, s. 9.

59. These agreements notify subscribers that the ISP may conduct investigations from in which the ISP may monitor their bandwidth usage and content. Transmissions may be monitored in order to detect violations or to respond to complaints.

Exhibit 1 to the Cross-examination of Greg Pultz, held February 27, 2004, p. 2, s. 4; p. 4-5, s. 9.

60. These agreements further notify subscribers that identifying information may be disclosed if they engage in certain prohibited activities including the dissemination material that violates copyright and the use of peer-to-peer file sharing programs that causes them to exceed bandwidth limitations. Accordingly, all necessary consents have been obtained from subscribers to make the disclosures of information being requested in this motion.

Exhibit 1 to the Cross-examination of Greg Pultz, held February 27, 2004, p. 2, s. 2(b); p. 4, s. 8; s. 9, p.5.

Exhibit "A" to the Affidavit of Greg Pultz Preliminary Motion Record of the Non-Party Respondent Shaw Communications Inc, p. 15, 16.

61. Section 7(3)(c) of PIPEDA and section 4.3 of Schedule 1 also make it clear that an exceptions to the requirements that notice be given and consent be sought before disclosure of personal information is disclosed are needed where the violation of legal rights are at issue.

62. Based on the provisions of PIPEDA and the terms of use of the services provided by the ISPs, there is no reasonable expectation on the part of the defendants that extends to the right to remain anonymous in light of clear evidence of a *prima facie* case of copyright infringement.

Privacy Policy Concerns Respecting the disclosure of Identities

63. The interveners have raised concerns that a decision to grant the order sought in this motion will have ramifications that extend beyond the scope of the present action to issues such as online freedom of speech.

64. This case is limited to one specific activity: the uploading by certain individuals of large numbers of copyright protected sound recordings. The evidence presented by the plaintiffs only describes certain, limited, activities the defendants have engaged in while using specific peer-to-peer file sharing software.

Affidavit of Greg Millin, Plaintiffs Motion Record.

65. The likelihood that members of the public would be able to trace the defendant's activities at large on the Internet based solely on the Kazaa user names and the IP addresses disclosed by the plaintiffs is remote due to the dynamic way IP addresses are reassigned, the limited utility Kazaa pseudonyms have in identifying the defendants and the ability of users change pseudonyms.

Transcript of the cross-examination of Greg Pult, held February 27, 2004, p. 70.

Affidavit of Greg Pultz, Preliminary Motion Record of the Non-Party Respondent Shaw Communications Inc., p.3.

Affidavit of David Shrimpton, Sworn March 4, 2004, paragraphs 5, 13, 23.

66. The plaintiffs do hope that this Court will establish a prompt, efficient and workable mechanism for issuance of discovery orders in copyright infringement cases. But this is not a novel case of widespread applicability. Like any other case, the applicability of the decision on these motions to others is entirely dependant on the similarity of the factual scenario that is in issue.

67. In very different circumstances, future actions might arise where freedom of expression becomes relevant, for example, in the context of protest, parody, whistle-blowing or defamation. Publication of information in those cases might have substantial prejudicial effects. None of these scenarios, however, are at issue on these motions. There is no need or justification for deciding issues that are irrelevant to this case.

68. Indeed, the intervener CIPPIC acknowledges in their written submissions that the privacy interests of the defendants are limited:

The right to privacy online is not absolute. For example, a person does not have the right to anonymously defame, infringe or extort. But nor should plaintiffs be allowed to uncover the identities of individuals on the basis of mere allegations.

Memorandum of Argument of intervener CIPPIC, paragraph 21.

69. CIPPIC admits that a person does not have a right to anonymity to carry out activities that infringe the rights of others and states that the test that should be met before the person's identity should be disclosed, namely, there must be something more than a mere allegation.

70. The **defendants** may have an interest in keeping their activities on the Internet anonymous. However, any interest they may have in remaining anonymous must be balanced against the plaintiffs' interest in being able to bring an action to enforce their copyright in sound recordings and to have their case heard in open court.

71. There are no privacy concerns at issue on these motions that outweigh the duty to disclose the identity of the **alleged infringers** to the plaintiffs so that they can proceed with their lawsuit.

C. The Information Sought is Available and Reliable

72. The following section deals with technical aspects of peer-to-peer (“P2P”) file-sharing systems accessed using Internet services. The facts before the Court on this Motion indicate that the information sought is both available and reliable. In addition, the technical aspects of peer-to-peer file sharing are relevant to several issues arising on this Motion:

- a. the infringing acts are alleged to have been carried out using Internet peer-to-peer services accessed through the ISPs’ services;
- b. the anonymity that these peer-to-peer services offer mean that disclosure by the ISPs is the only mechanism that will allow the plaintiffs to assert their copyright rights; and
- c. the way in which ISPs provide access to the Internet is alleged by certain of the ISPs to make it difficult or impossible to provide certain of the information by the plaintiffs.

Infringing Acts

73. Once a sound recording has been copied from its original medium (e.g. a CD) onto a computer (e.g. in “MP3” or “WMA” format), an unlimited number of copies can be made and transmitted over the Internet, without significant degradation in sound quality.

Affidavit of Gary Millin, Plaintiffs’ Motion Record, Tab 2, para. 5.

74. Peer-to-peer services operate by individual computers that can communicate on the Internet each running a copy of a peer-to-peer application (program).

Affidavit of Gary Millin, Plaintiffs’ Motion Record, Tab 2, para. 10.

75. Peer-to-peer services enable an ISP subscriber to:

- a. copy files (including sound recordings) onto the subscriber’s computer and make those files available for copying and distribution to others over the Internet;
- b. search for files being offered by others on the peer-to-peer service; and

- c. transmit exact copies of files from the subscriber's computer to another via the Internet.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 8.

76. "File sharing" is not mere downloading. The alleged infringers are ISP subscribers who have offered files for copying, transmission and distribution to others via peer-to-peer services. They have stored those files in special, shared directories on the subscriber's directory that they have opened to other users to view and access on the Internet using the file-sharing service.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 9.

77. The way that a sound file is "shared" in a peer-to-peer file-sharing service involves the ISP subscriber's computer creating a copy of the sound file that is broken up into "packets" of data which are sent by the subscriber's computer over the Internet to another computer. The recipient's computer reassembles the packets into an exact duplicate of the original sound recording file.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 10.

78. It should be noted that the Kazaa peer-to-peer application provides a screen that shows the transmittal when a file is copied by a subscriber's computer and transmitted to the requesting computer over the Internet connection using the Kazaa system.

Cross-examination of Gary Millin, p. 55.

79. An ISP subscriber may use one or more file-sharing services to share a potentially large number of sound recordings. When a peer-to-peer user copies a music file into a shared directory on a computer, connects to the Internet and runs the peer-to-peer application on the computer, he or she authorizes massive numbers of other peer-to-peer users to search his or her computer for that file, and also authorizes, facilitates and participates in copying and distribution of copies of that sound recording to other users over the Internet.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 10-11.

80. The plaintiffs have retained MediaSentry, Inc. to search for infringing uses of sound recordings on the Internet, including by Canadian ISP customers that have copied sound recordings into their shared directories for copying and distribution to others.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 14-16.

81. MediaSentry collected evidence of the entire list that each of the alleged infringers had copied to such shared directories and authorized for copying, transmission and distribution from his or her computer.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 17-18.

82. MediaSentry also downloaded and stored samples of the sound recording files that each of the alleged infringers had copied into his or her shared directory.

**Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 18, 23,
Ex. B.**

83. The result is that the plaintiffs, who have Canadian copyright interests in these sound recordings, have secured and provided detailed evidence that each of the alleged infringers have copied these sound recordings into shared directories on their computers, have connected to the Internet using the ISPs' services, and have made available these sound recordings for copying, transmission and distribution over the Internet using peer-to-peer services. The number of computers connected to the Internet that are using a file sharing system may be in the millions at any one time, with hundreds of millions of files being made available.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 22.

84. To summarize, the plaintiffs have provided detailed evidence alleging that individuals who are referred to in the Millin affidavits and whose identities are sought in this motion, have taken the following steps:

- a. installed the peer-to-peer application on their computers (Millin, para. 10);
- b. copied files to "shared directories" on their computers (Millin, para. 9);
- c. used ISP services to connect their computers to the Internet (Millin, para. 16);

- d. run the peer-to-peer application on their computers while on the Internet (Millin, para. 16); and
- e. made the files in the shared directories available for copying, transmission and distribution to any one of millions of users of the peer-to-peer service (Millin, para. 22).

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 9, 10, 16, 22.

Anonymity

85. When an ISP subscriber uses a peer-to-peer file sharing service, the service allows the subscriber to select a pseudonym (a user name) for use in the service. Examples in this case include the colourful names “Geekboy@kazaa” and “greenpiece@kazaa”.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras 17, 80.

86. No user of the peer-to-peer systems at issue in this action can determine the identity or physical address of a peer-to-peer user from the peer-to-peer system or other publicly available information.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 90.

ISP Data Can Identify Users of Peer-to-Peer Services

87. Most individuals who are connected to the Internet do so by making use of ISPs to gain access. Using either cable or telephone line connections, ISPs allow subscribers to connect their computers to the telecommunication networks of the ISPs which, in turn, are connected to the Internet.

***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (F.C.A.) at para 16.**

88. All sending computers and the recipient computers on the Internet are identified by standard numerical designations known as Internet Protocol (IP) addresses. The IP addresses of both the sending and recipient computer are usually contained in every communication transmitted across the Internet.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 10.

Cross-examination of Greg Pultz, pp. 34-35.

89. MediaSentry has determined the IP addresses for the relevant ISP subscribers at the dates and times when sound recording files at issue in this case were available in the shared directory of the subscribers' computers and connected to the Internet using the file sharing applications. For example, the Geekboy@kaZaA IP address was 24.84.179.98 at the time that the evidence was collected. Using public information, MediaSentry has determined that this IP address was assigned to Shaw Communications Inc.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 24.

90. The IP addresses of ISP subscribers are managed by the ISPs.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 91.

91. The plaintiffs' evidence is that ISPs are able to connect the IP address with account information to reflect the individual who was assigned the IP address at a given time. The ISP Shaw has suggested that it cannot make a link between IP address and account information. However, on cross-examination, Shaw has admitted that if the data has been kept internally, Shaw is able to make the connection between an IP address as of a given time, and the subscriber information that the plaintiffs are seeking.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 93.

Affidavit of Greg Pultz, paras. 34-35

Cross-examination of Greg Pultz, pp. 37-43.

92. It is the ISP alone who has the information to connect an IP address at a given date and time with a subscriber.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 90-91.

93. The evidence of both ISPs Shaw and Rogers is that they have received and complied with requests to provide such account information in the past. In fact, Rogers has complied with such requests at the rate of approximately one a month for the past two years.

Cross-examination of Andrew Ho, Plaintiffs' Motion Record, p. 4.

Cross-examination of Greg Pultz, Plaintiffs' Motion Record, pp. 69-70.

D. Plaintiffs' *Prima Facie* Case Of Copyright Infringement

Summary

94. The plaintiffs have filed uncontradicted evidence of copyright ownership or exclusive rights to copyright in Canada to certain sound recordings. They have put evidence before the Court to show that individuals have copied the sound recordings to shared directories on computers and that the individuals have run peer-to-peer applications (Kazaa or Kazaa Lite) and made the sound recordings available for copying, transmission and distribution to others.
95. The plaintiffs have provided a significant evidentiary basis supporting a *prima facie* case of copyright infringement by those individuals.
96. Potential affirmative defences and facts related to any particular aspect of the alleged infringements are specific to the individual alleged infringer and are all potentially raised in proceedings that will follow. The Court need not and should not rule on these hypothetically-posed defences at this very preliminary stage.

Plaintiffs' Copyright Rights

97. The plaintiffs are record companies seeking to assert Canadian copyright in certain sound recordings.

Affidavit of Kathy Yonekura, Plaintiffs' Motion Record, Tab 4, paras. 5-9.

Statement of Claim, paras. 2-18.

98. Lists of the titles of sound recordings are set out in the affidavit material of the plaintiffs. Information is provided to show that each of the plaintiffs has a copyright right (through ownership or by licence) in a number of the listed sound recordings, corresponding to computer files of interest.

Affidavit of Kathy Yonekura, Plaintiffs' Motion Record, Tab 4, paras. 5-9.

99. There has been no evidence filed to suggest that the evidence of the plaintiffs is inaccurate or that the plaintiffs have no such alleged copyright interests in the sound recordings, as set out in the Statement of Claim and the plaintiffs' affidavit evidence.

100. There is therefore at least a *prima facie* case made out that the plaintiffs do have copyright in the sound recordings as alleged in the Statement of Claim, sufficient to support the motion currently before the Court.

Infringement

101. The following statutory provisions define infringement as it is relevant to the sound recordings at issue in this motion:

18.(1) Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or any substantial part thereof:

- (a) to publish it for the first time,
 - (b) to reproduce it in any material form, and
 - (c) to rent it out,
- and to authorize any such acts

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
- (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or
- (e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

(3) In determining whether there is an infringement under subsection (2) in the case of an activity referred to in any of paragraphs (2)(a) to (d) in relation to a copy that was imported in the circumstances referred to in paragraph (2)(e), it is irrelevant whether the importer knew or should have known that the importation of the copy infringed copyright.

80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of

- (a) a musical work embodied in a sound recording,
- (b) a performer's performance of a musical work embodied in a sound recording, or
- (c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied

onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording

(2) Subsection (1) does not apply if the act described in that subsection is done for the purpose of doing any of the following in relation to any of the things referred to in paragraphs (1)(a) to (c):

- (a) selling or renting out, or by way of trade exposing or offering for sale or rental;
- (b) distributing, whether or not for the purpose of trade;

- (c) communicating to the public by telecommunication; or
- (d) performing, or causing to be performed, in public.

Copyright Act, supra Sections, 18, 27 and 80

102. The plaintiffs allege copyright infringement in the Statement of Claim, and in the evidence filed on this motion, on the following grounds:
- a. **reproduction** of sound recordings by the alleged infringers (s. 18(1) and s. 27(1));
 - b. **authorization** of the reproduction of the sound recordings (s. 18(1) and s. 27(1));
 - c. **distribution** of unauthorized copies of the sound recordings to such an extent as to affect prejudicially the plaintiffs (s. 27(2)(b)), and
 - d. **possession** of unauthorized copies, which the alleged infringers knew or ought to have known were infringing, for the purpose of distribution, as set out above (s. 27(2)(d)).

(a) Reproduction

103. The evidence of the plaintiffs is that each of the 29 alleged infringers has copied a number of sound recordings into a respective shared directory on their computer for copying, transmission and distribution to substantial numbers of people over the Internet. The plaintiffs have copyright interests in the enumerated sound recordings.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 17

Affidavit of Kathy Yonekura, Plaintiffs' Motion Record,

104. Such copying into a shared directory is *prima facie* an infringement of copyright.

Copyright Act, supra, s. 18(1), s. 27(1).

105. The exemption provisions of s. 80 of the *Copyright Act* do not apply. Copying the files into a directory opened on the Internet for copying, transmission and distribution to others using the peer-to-peer network is, by definition, not copying for "private use" as is described in the section:

"The exemption in section 80 applies only when a copy is made for the private use of the person making it. This expressly excludes selling, renting out, exposing for trade or rental, distributing, communicating to the public by telecommunication, or performing in public the copy made. This means that

making a copy of a CD of the latest release by the hottest star to give to one's friend is still an infringing action, as it is not a copy for personal use. *In the same vein, distributing this same copy to friends online is prohibited.*"

Re Private Coping 2003-2004, Tariff of Levies to be Collected by CPCC (2003), 28 C.P.R. (4th) 417 (Copyright Board) at 439, emphasis added.

106. Even if the copying into a shared directory were to somehow qualify as being for "private use", the terms of s. 80(2) mean that the copying does not qualify as non-infringing under the s. 80(1) provisions. Section 80(2) provides that s. 80(1) does *not* apply if the copying is done for the purpose of either *distributing* (subs. (b)) or *communicating* to the public by telecommunication (subs. (c)).

Copyright Act, supra, s. 80.

107. The inclusion of the sound recording files in a shared directory that is available for copying in a peer-to-peer file sharing system over the Internet allows others to request copies. Thus the copying into the shared directory is both a distribution and, once the copies are transmitted over the Internet, is a communication to the public by telecommunication. Thus the s. 80(2) provisions (regarding distribution and communication) mean that the alleged infringer cannot rely on s. 80(1), even if it were to be available. As set out above, s. 80(2) need not be considered in this case as the copying to a shared directory viewable on the Internet is not a "private use" in the first place.

Public Performance of Musical Works 1996, 1997, 1998, (1999), [Phase 1: Legal Issues], 1 C.P.R. (4th) 417 (Copyright Board) at 444, 449-450 [hereinafter "Tariff 22"]

108. **The *Tariff 22* decision sets out the law with respect to communication:**

"... a work is communicated to the public even if it is transmitted only once, as long as it is made available on a site that is accessible to a segment of the public."

"... one should look at the source of the transmission to find out who is responsible for it. Any communication of a work occurs because a person has taken all the required steps to make the work available for communication. The fact that this is achieved at the request of the recipient or through an agent neither adds to, nor detracts from the fact that the content provider effects the communication."

"The fact that the communication is automated is irrelevant."

Tariff 22, supra, at 449, 450.

109. In addition, the plaintiffs expect to have evidence at trial to show that sound recording files have been reproduced in transmission to numerous recipient computers during use of the peer-to-peer service.

(b) Authorization

110. Section 3(1) and s. 27(1) provide that ‘authorization’ is a “separate protected use under the *Act*”.

Tariff 22, supra at 455;
***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* (C.A.). [2002] 4 F.C. 3 [F.C.A.].**

111. The Supreme Court of Canada has recently considered what it means to “authorize” the infringement of copyright:

“‘Authorize’ means to ‘sanction, approve and countenance’ ... Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, ‘give approval to, sanction, permit, favour, encourage.’”

***CCH Canada Ltd. v. Law Society of Upper Canada*, [2004] S.C.J. No. 12 at para. 38 (S.C.C.), online: QL (SCJ), citations omitted.**

112. “Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference.”

***CCH Canada Ltd. v. Law Society of Upper Canada*, 2004 S.C.J. No. 12 at para. 38 (S.C.C.), online: QL (SCJ).**

113. “By making a work available, a person authorizes its communication.” When an ISP subscriber has placed the sound recording file in the computer’s shared file, the sound recording is communicated to the public when someone requests the file. The person thereby authorizes its communication.

***Tariff 22, supra*, at 442; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2002] 4 F.C. 3 (F.C.A.).**

114. The plaintiffs’ evidence shows that the alleged infringers have made the sound recording files available in the shared directory, using the peer-to-peer service, on the Internet.

Affidavit of Gary Millin, Plaintiffs’ Motion Record, Tab 2, paras. 90-91.

115. By making the files available in this manner, the alleged infringers have authorized the infringement of the copyright in the sound recording.

116. In determining the question of authorization, there is a distinction between the provision of equipment that may or not be used for infringement (no authorization), and the copying of files into a system that is aimed at having others receive copies (authorization).

Tariff 22, supra; Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers [2002] 4 F.C. 3 (F.C.A.).

CCH Canada Ltd. v. Law Society of Upper Canada, [2004] S.C.J. No. 12 (S.C.C.), online: QL (SCJ).

117. The acts of the alleged infringers as set out in the Statement of Claim and in the evidence on this Motion thus make out a *prima facie* case for “authorization”.

(c) Distribution

118. The Nova Scotia Court of Appeal in *R. v. J.P.M.* held that the infringer distributed copyrighted programs by placing them on his computer bulletin board and allowing third parties to access the programs. The appellate court stated: “there can be no doubt that the appellant created infringing copies of the software by placing them on the bulletin board in such a way that they were available to be used and copied by 16 “special” users.” An Ontario Court also held that uploading files onto bulletin boards that the public can access is “clear evidence of distribution” under the *Copyright Act*.

R. v. J.P.M. (1996), 67 C.P.R. (3d) 152 (N.S.C.A).

R. v. Pecciarich (1995), 22 O.R. (3d) 748 (Ont. Div. Ct)

119. Placing files on a bulletin board and placing files in a shared directory are functionally equivalent. In the case of peer-to-peer services, the shared directories are “hosted” on an individual’s own computer rather than on someone else’s computer, as happens with a bulletin board service (BBS). In a peer-to-peer file sharing context, the file sharing application on the user’s own computer and the user’s own shared file directory act as a bulletin board.

120. The allegedly infringing sound recording files have, in fact, been copied by the computers of the alleged infringers to those of MediaSentry, a company retained by the plaintiffs in this action.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 23.

121. The combination of making the files available, and the copying and transmission to at least one party (here MediaSentry), is "distribution". The plaintiffs expect evidence to be adduced in the principal proceedings that there was substantial distribution of numerous files from the computers of the alleged infringers.

122. Evidence filed on this Motion indicates that literally millions of potential file-sharing computers may be connected to the Internet at one time. There are hundreds of sound recordings for which the plaintiffs hold copyright contained in shared directories of the 29 individuals subject to this Motion. The effect of the mass distribution of these hundreds of sound recordings is necessarily prejudicial to the copyright holders named as plaintiffs in this action.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 22.

Affidavit of Kathy Yonekura, Plaintiffs' Motion Record, Tab 4, Exhibits.

123. The "secondary infringement" provisions of s. 27(2) require that the alleged infringer "knows or should have known" that the copy of the work infringes copyright. The question of knowledge is to be inferred from the facts of the case. It can mean notice which, if given would put a reasonable person "on enquiry".

Milliken & Co. v. Interface Flooring Systems (Canada) Inc. (1998), 83 C.P.R. (3d) 470 (F.C.T.D) at 486.

124. Notice of copyright was provided to the alleged infringers whose identities are sought by forwarding an Instant Message to the alleged infringers using the Kazaa service.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, paras. 13, 25.

125. This is not a case involving simply personal downloads. Nor is this a case of one or two stray files being made available. Each of the alleged infringers made significant numbers of different sound recording files available for copying, transmission and distribution to millions of people over the Internet.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2.

(d) Possession

126. The evidence is that the sound files are maintained on the shared directories of the alleged infringers and that therefore the copies are in the possession of the alleged infringers.

Affidavit of Gary Millin, Plaintiffs' Motion Record, Tab 2, para. 17.

127. Section 27(2)(d) makes it infringement to possess copies of works for the purpose of distributing to affect prejudicially the owner of copyright. The knowledge requirement set out above applies in the case of s. 27(2)(d), also.

Affirmative Defences

128. The responding parties and interveners on this Motion have raised a number of affirmative defences that could, given the proper factual basis, be raised by alleged infringers in arguing the merits of the case. In the absence of any factual foundation for these alleged infringers, it is submitted that these arguments cannot and should not be resolved in the context of this initial discovery request.

129. For example, one sort of hypothetical fact situation and defence posed by the ISPs and the Interveners involve the suggestion that the particular customer to be named might not be the person actually operating the computer at the time the connection to the Internet was made and the alleged infringements took place.

130. The evidence of the ISP Shaw, however, was that the expectation of the parties is that the subscriber will be given access to the Internet on a personal basis. The Terms of Use between the ISP and the subscriber contain numerous provisions that are intended to ensure that the named subscribing customer is responsible for activity that takes place on the connection, that is, that the Internet access provided is personal in nature. For example, Shaw's Terms of Use do not allow, nor it is part of the arrangement that a subscriber can allow shared access through the Shaw cable modem.

Cross-examination of Gary Millin, Plaintiffs' Motion Record, p. 59 .

131. In fact, the evidence of the ISP Shaw was that reports of unauthorized access to ISP services were received “not frequently” and that the taking of an Internet identity (by a technique known as cloning a MAC address) was “rare.”

Cross-examination of Gary Millin, Plaintiffs’ Motion Record, pp. 57, 74-75 .

132. Indeed, an ISP subscriber can control the access through his or her equipment. For example, a wireless router that could otherwise be open to unauthorized access can be closed to such access using encryption. Physical access to equipment can be restricted.

Cross-examination of Gary Millin, Plaintiffs’ Motion Record, pp. 57-58.

133. On a balance of probabilities standard, the ISP subscriber whose account information is sought in this Motion is the person using the ISP connection in the manner described in the plaintiffs’ allegations of copyright infringement. It is theoretically possible that the account holder identified will be able to raise an affirmative defence to suggest that another individual carried out the allegedly infringing acts – even if the ISP itself would hold the named account holder responsible for activity taking place on his or her account. However, this type of speculation can only be resolved through the facts to be adduced in the principal proceedings. This type of affirmative defence can be raised in the proceedings in the same way that any party may raise an affirmative defence.

Conclusion re Copyright Infringement

134. The above indicates that, at least, a *prima facie* case of copyright infringement has been made out. The uncontradicted evidence is that the plaintiffs have copyright interests in sound recordings. Each of the allegations of reproduction, distribution, authorization and possession are supported as a *prima facie* matter by the evidence made available on this Motion.

E. Breadth of Order and Due Process

135. Videotron, one of the ISPs, has notified counsel for the plaintiff that it does not oppose this motion and will not be filing written material or making oral submissions at the hearing on March 12.

Letter from Serge Sasseville, dated February 17, 2004, Appendix A

136. The terms of the order provide for the basic information about the identity of the alleged infringers be given to the plaintiffs. The order does not ask for evidence to prove infringement; it asks for evidence to identify the infringers.

137. The order calls for disclosure and production of documents within five (5) days of service of the order and delivery of an affidavit within ten (10) days. The information in the disclosure and the documents relates to the identity of the defendants only and nothing else. This is well within what would be required under an equitable bill of discovery or given in an order under both Rules 233 and 238.

138. The order also asks for a waiver of the implied undertaking rule. This is done out of an abundance of caution, for example, to allow the bringing of summary proceedings separate from the main case, and may not even be necessary. The implied undertaking does not attach to evidence under an order of an equitable bill of discovery in any event, however, and presumably need not attach under this order as well.

K. LaRoche & G.J. Pratte, "The Norwich Pharmacal Principle and Its Utility in Intellectual Property Litigation" (2001) 24 Advocates Quarterly 301 at 311

139. Due process has been observed and there is urgency to granting this order. Some of the ISPs have complained that such records are becoming stale. Worryingly for the plaintiffs, some of the defendants in this action have had notice of the statement of claim for several weeks. It is likely that some will "as quickly as may be, cover up their tracks".

SmithKline v. Global Pharmaceuticals [1986] R.P.C. 394 (C.A. (Civil Division)).

140. The issue of costs payable to or by the plaintiffs can be addressed after a decision on the merits of this motion.

V. ORDER SOUGHT

141. The plaintiffs respectfully request that the Order as requested in the Notice of Motion be granted.

DATED at Toronto, Ontario, this 10th day of March, 2004.

Ronald E. Dimock, of Counsel

Bruce W. Stratton, of Counsel

Denis Sloan, of Counsel

VI. List of Authorities

1. *Glaxo Welcome PLC v. Canada (Minister of National Revenue)* (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused 82 C.P.R. (3d) vi.
2. *Norwich Pharmacal Co. v. Customs and Excise Comrs.*, [1974] A.C. 133 (H.L.).
3. *Straka v. Humber River Regional Hospital et al.* (2000), 51 O.R. (3d) 1 (Ont. C.A.).
4. K. LaRoche & G.J. Pratte, "The Norwich Pharmacal Principle and Its Utility in Intellectual Property Litigation" (2001) 24 *Advocates Quarterly* 301.
5. Rules 233 and 238, *Federal Court Rules, 1998*, SOR/98-106, as am.
6. *Kibale v. Canada*, [1991] F.C.J. No. 634 (F.C.T.D.), online: QL (FCJ).
7. *Irwin Toy v. Doe* (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.).
8. *Ontario First Nations Limited Partnership v. John Doe* (3 June 2002) (Court File No. 02-CV-229617CM3) (Ont. S.C.J.).
9. *Canadian Blood Services/Société canadienne du sang v. John Doe* (17 June 2002) Ontario 02-CV-20980 (Ont. S.C.J.).
10. *Wa'el Chehab v. John Doe* (3 October 2003) Ontario 03-CV-247939CM2) (Ont. S.C.J.).
11. PIPED Act case summary #198: www.privcom.gc.ca/cf-dc/2003/cf-dc_030801_03_e.asp
12. PIPED Act case summary #174: www.privcom.gc.ca/cf-dc/2003/cf-dc_030428_3_e.asp
13. PIPED Act case summary #143: www.privcom.gc.ca/cf-dc/2003/cf-dc_030306_2_e.asp
14. PIPED Act case summary # 96: www.privcom.gc.ca/cf-dc/cf-dc_021203_2_e.asp
15. *Lisozzi v. Bell Distribution Inc.*, [2001] O.J. No. 2378 (Ont. S.C.J.), online: QL (OJ).
16. *Re Private Copying 2003-2004, Tariff of Levies to be Collected by CPCC* (2003), 28 C.P.R. (4th) 417 (Copyright Board).
17. *Copyright Act*, R.S. 1985, c. C-42, ss. 18(1), 27(1), 80.
18. *Public Performance of Musical Works 1996, 1997, 1998, (1999), [Phase 1: Legal Issues]* (1999), 1 C.P.R. (4th) 417 (Copyright Board); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (F.C.A.).
19. *CCH Canada Ltd. v. Law Society of Upper Canada*, 2004 S.C.C. 13, [2004] S.C.J. No. 12 (S.C.C.), online: QL (SCJ).

20. *R. v. J.P.M.* (1996), 67 C.P.R. (3d) 152 (N.S. C.A.)
21. *R. v. Pecciarich* (1995), 22 O.R. (3d) 748 (Ont. Div. Ct)
22. *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1998), 83 C.P.R. (3d) 470 (F.C.T.D.).
23. *Loblaw Companies Ltd. v. Aliant Telecom Inc. and Yahoo* [2003] N.B.J. No. 208 (N.B.Q.B.)
24. *SmithKline v. Global Pharmaceuticals* [1986] R.P.C. 394 (C.A. (Civil Division)).
25. *Stevens v. Canada (Attorney-General)* (2001), 1 F.C. 156 (F.C.T.D.)
26. *Bayside Towing Ltd. v. C.P.R.* (2000), 187 F.T.R. 247 affirmed (2000), 194 F.T.R. 158 (F.C.T.D.)
27. *Snook v. "Cape Marnier" (The)* [1999] F.C.J. No. 412, (1999), 165 F.T.R. 151 (F.C.T.D.).
28. *R. v. Fegan* (1999), 13 O.R. (3d) 88 (ON. C.A.)

VII. APPENDIX "A"