

**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) LIMITED, UMG RECORDINGS INC.,  
MERCURY RECORDS LIMITED AND WEA INTERNATIONAL INC.**

**Appellants  
(Plaintiffs)**

**- and -**

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

**(Defendants)**

**- and -**

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

**Respondents  
(Third Party Respondents)**

**WRITTEN REPRESENTATIONS  
OF THE APPLICANT FOR LEAVE TO INTERVENE,  
THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC**

**PART I – THE NATURE OF THIS MOTION**

1. By way of this motion, the Applicant, the Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order, in the form attached as Schedule "A" to the Notice of Motion, for leave to intervene in this proceeding.

Notice of Motion, *Applicant's Motion Record*, Tab 1

**PART II – THE FACTS**

2. CIPPIC is a body established by the University of Ottawa and the Ontario Research Network on Electronic Commerce, to research and advocate on important public policy issues involving the intersection of law and technology, from a public interest perspective. CIPPIC's mandate includes intervening before courts, tribunals, and other decision-making bodies on such issues, in order to bring forward important points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will affect free speech and individual privacy on the Internet.

Affidavit of Susan Gemmell, *Applicant's Motion Record*, Tab 2

3. CIPPIC's Executive Director and associated faculty and students have particular knowledge of and expertise in the copyright law, privacy law, and due process issues on which they seek leave to present arguments.

Affidavit of Susan Gemmell, *Applicant's Motion Record*, Tab 2

4. CIPPIC applied for, and was granted, leave to intervene in the Federal Court proceeding on which this appeal is based. CIPPIC's intervention focused on issues that the third party respondents (Internet Service Providers, or "ISPs") were not addressing or were not fully addressing. These issues included the test to be applied to requests for disclosure of subscriber identity, and whether the plaintiffs had made out a *prima facie* case of copyright infringement under the *Copyright Act*.

Affidavit of Susan Gemmell, *Applicant's Motion Record*, Tab 2

5. A central issue in the Notice of Appeal is whether the alleged activities of the defendants constitute copyright infringement under ss.18(1) or s.27(1) of the *Copyright Act*.

Notice of Appeal, paras.7, 8.

6. CIPPIC was the only party other than the Plaintiffs to address this issue in the lower court.

### **PART III – SUBMISSIONS**

7. Under Rule 109 of the *Federal Court Rules, 1998*, the Court has the power to grant leave to any person to intervene in a proceeding.
8. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding.

*Apotex Inc. v. Canada (Minister of Health)* [2000] F.C.J. No.248 (QL)  
(F.C.T.D.)

9. Other factors that the court may consider on a motion to intervene include:
  - a. Is the proposed Intervener directly affected by the outcome?
  - b. Is there a justiciable issue and a veritable public interest?
  - c. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
  - d. Is the position of the proposed Intervener adequately defended by one of the parties to the case?
  - e. Are the interests of justice better served by the intervention of the proposed party?
  - f. Can the Court hear and decide the cause on its merits without the proposed intervener?

*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Limited* (Feb.15, 2000), Doc. A-346-99 (Fed. C.A.)

10. CIPPIC clearly passes the test for intervener status in this proceeding, for the same reasons that the Federal Court granted CIPPIC leave to intervene in the first instance.
11. The privacy and copyright law issues in this case are justiciable and involve the public interest. CIPPIC's position on these central issues is not adequately defended by any of the other parties to the case. The interests of justice have been better served by CIPPIC's intervention to date, and will be better served by the continued intervention of CIPPIC in this proceeding.
12. Indeed, the Court cannot properly hear and decide the cause on its merits without the intervention of CIPPIC. CIPPIC was the only party to challenge the plaintiffs' claims regarding the legality of music file-sharing under the *Copyright Act*, a central issue in the appeal. Having not addressed this issue in the Federal Court proceeding, the respondents cannot be expected to address it in the appeal.
13. CIPPIC's perspective on other issues in this proceeding is clearly distinct from that of the other respondents. CIPPIC is interested in a resolution of the issues in a manner that respects individual privacy and rights to due process under Canadian law. In contrast, the interests of ISP respondents in this proceeding are largely limited to their exposure to liability and cost as a result of the requested Orders. These parties are unlikely to argue points of law that go beyond their limited self-interests.
14. No defendant participated in the Federal Court proceeding, and no defendant is likely to be represented in the appeal. While CIPPIC is not representing any defendant, its intervention on certain points of law will go some way toward filling the void left by unrepresented defendants and thus balancing the interests that will be affected by the court's decision in this case.

15. CIPPIC's continued intervention in this case will provide the court with an otherwise unrepresented perspective on important legal issues that have generated high levels of public interest and that will have significant consequences for thousands of Canadians, as well as the Internet and recording industries.
16. In the absence of CIPPIC's intervention, important points of law in this appeal are unlikely to be fully argued. In particular, the ISP respondents may not challenge the plaintiffs' interpretation of copyright law. They are also unlikely to raise important public interest arguments relevant to the issue of the test to be applied to the Plaintiffs' motion, where such arguments do not further their own interests. CIPPIC's intervention will continue to fill this gap and will thus assist the court in its determination of important and precedent-setting legal issues.
17. CIPPIC's intervention will cause no prejudice to any party. Nor will CIPPIC's intervention cause unnecessary delay in the resolution of these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2004

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