

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

Plaintiffs

- and -

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

Defendants

**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 important precedent-setting proceeding.

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

PART II – THE FACTS

2. The Applicant seeks leave to intervene in order solely to make argument on points of law, and not to adduce evidence or cross-examine parties.

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

3. 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 Jennifer Chandler, *Applicant's Motion Record*, Tab 2, paras.2, 3, 4, 12

4. 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 Jennifer Chandler, *Applicant's Motion Record*, Tab 2, para.7

PART III – SUBMISSIONS

5. 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.
6. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervenor 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.D.T.D.)

7. Ultimately, the proper matters to be considered in determining whether an application for intervention should be granted are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., [1990] O.J. No. 1378 (QL) (Ont.C.A.)

8. CIPPIC wishes to make submissions regarding the following points of law:
 - a. the legal test that should be applied by the court in motions for disclosure by non-party Internet Service Providers (ISPs) of the identity and contact information of unnamed defendants who are the subject of unproven allegations by plaintiffs;
 - b. why it is important that a high threshold test be applied in such circumstances;
 - c. whether the plaintiffs have established a *prima facie* case on the law, as well as the facts, in this case (and in particular, whether the alleged activities in question infringe copyright under the *Copyright Act*); and
 - d. what further measures, if any, should be taken in order to ensure that the defendants in this case are afforded full due process, and in recognition of the likelihood that no claim will be defended to trial.
9. CIPPIC's perspective on the issues in this proceeding is distinct from that of the parties as well as from that of the non-party 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, as well as the rights of

copyright holders under the *Copyright Act*, and the duties of ISPs under privacy legislation and common law.

10. The interests of non-party respondents in this proceeding are largely limited to their exposure to liability and cost as a result of the requested Orders. The non-party Respondents are unlikely to argue points of law that go beyond their limited self-interests.
11. The unnamed defendants in this proceeding are so far unrepresented, and may not be represented at this stage of the proceeding. Some defendants may indeed be unaware that they are the subject of a lawsuit. 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 represented on the plaintiffs' motion.
12. CIPPIC's intervention 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.
13. In the absence of CIPPIC's intervention, it is likely that some important points of law will not be fully argued, if indeed raised. For example, the non-party Respondents are unlikely to challenge the plaintiffs' interpretation of copyright law in this case – a central issue relevant to whether the Plaintiffs have made out a *prima facie* case on the merits. 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 would fill this gap and thus assist the court in its determination of important and precedent-setting legal issues.

No Prejudice; Effort to Minimize Delay, Inconvenience and Expense

14. CIPPIC's intervention will cause no prejudice to any party or non-party Respondent. Nor will CIPPIC's intervention cause unnecessary delay in the resolution of these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February, 2004

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