

FEDERAL COURT OF APPEAL
(ON APPEAL FROM THE FEDERAL COURT)

B E T W E E N:

JEREMY COOPERSTOCK

APPELLANT

- and -

UNITED AIRLINES, INC.

RESPONDENT

MOTION RECORD
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC
INTEREST CLINIC (CIPPIC)

(Motion in Writing for Leave to Intervene)

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NOTICE OF MOTION
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND
PUBLIC INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Courts Rules

TAKE NOTICE that the *Proposed Intervener*, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), hereby applies to a Judge of the Court pursuant to Rules 109 and 369 of the Federal Courts Rules, as amended, for an order:

1. granting CIPPIC leave to intervene in this appeal;
2. permitting CIPPIC to file a factum of no greater length than 20 pages;
3. permitting CIPPIC to present oral arguments at the hearing of this appeal; and
4. any further or other order as said Judge or this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. the affidavit of Tamir Israel, Staff Lawyer at CIPPIC, sworn May 10, 2018; and
2. such further and other material as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT this motion shall be made on the following grounds:

1. CIPPIC has a direct and significant interest in this appeal, and expertise on which it will draw to provide useful submissions different from those of other parties to the appeal:

(i) CIPPIC is a legal clinic with a mandate to advocate in the public interest on legal and policy issues arising at the intersection of law and technology. CIPPIC's mandate encompasses concern for the interests and due process rights of citizens , for balanced intellectual property laws in Canada;

(ii) CIPPIC has participated in numerous legal and policy processes relating to copyright and trademark law in particular regarding fair dealing and parody. This has included interventions before the courts, testimony before parliamentary committees, appearances in quasi-judicial processes, as well as participation in various national and international policy-making fora on related issues. If granted leave to intervene, CIPPIC will draw on this extensive institutional expertise in order to provide useful submissions that are different from those of other parties; and

(iii) the matters raised by this appeal have implications that extend beyond those of the immediate parties. CIPPIC has a special and direct interest in these broader implications, arising from its mandate. This case raises important issues about freedom of speech, a brand's trademark and the enforcement of its mark in the public sphere;

2. if granted leave, CIPPIC will offer the Court useful and different submissions as to interpretation of the causes of action raised in this appeal under the *Trade-marks Act*. CIPPIC

will argue that the statute, properly construed, balances trade-mark owners' legitimate interests with those of competitors, consumers, and the wider Canadian public;

3. the proposed intervention will not cause delay or prejudice to the parties;
4. CIPPIC does not seek costs and asks that it not be liable for costs to any other party in the event it is granted leave to intervene in this appeal;
5. Rules 109 and 369 of the Federal Courts Rules, *as amended*; and
6. such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th of May, 2018.

[original signed by]

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)

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AFFIDAVIT OF TAMIR ISRAEL

I, Tamir Israel, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am a Staff Lawyer with the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) based at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa. This Affidavit is sworn in support of CIPPIC's motion for leave to intervene in this appeal.

2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true. Where specific CIPPIC activities are referred to below in which I have had no personal participation, I have familiarized myself with the relevant files, and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded at the University of Ottawa, Faculty of Law. It was established in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com *Cy Pres* fund with the purpose of filling voids in public policy debates on technology

law issues, ensuring balance in policy and law-making processes, and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. In 2007, CIPPIC received additional funding from the Samuelson-Glushko Foundation, enabling CIPPIC to continue fulfilling its mandate and to join the international network of Samuelson-Glushko technology law clinics.

4. CIPPIC operates under a Director and a Staff Lawyer, presently David Fewer and myself, respectively. Both are called to the bar of Ontario and work for CIPPIC full time. CIPPIC benefits from the expertise of an internal Advisory Committee comprising faculty members of the Centre for Law, Technology and Society, as well as of an external Advisory Board composed of highly respected lawyers and academics in the technology law field from across North America.

5. CIPPIC's core mandate is to advocate in the public interest in debates arising at the intersection of law and technology. CIPPIC has the additional mandate of providing legal assistance to under-represented organizations and individuals on law and technology issues, and a tertiary education-based mandate that includes a teaching component and a public outreach component. In pursuit of these mandates, CIPPIC's activities regularly extend to provision of expert testimony to parliamentary committees, participation in regulatory and quasi-judicial proceedings and strategic interventions before the Courts. CIPPIC is also deeply involved in research and advocacy on the nature and social impact of technological change, and the manner in which the evolving legal landscape interacts with the distinct challenges of a technology-driven world.

6. Some of CIPPIC's general expertise in intellectual property and Internet policy issues is described below, with particular emphasis on activities relating to intellectual property and consumer protection in digital settings.

II. INSTITUTIONAL EXPERTISE

(a) Judicial

7. CIPPIC has been granted leave to intervene by the Supreme Court on Canada on many previous

occasions engaging matters relating to law and technology, including:

- a) *Sean Patrick Mills v. Her Majesty the Queen*, SCC File No. 37518, addressing whether Canadians enjoy a reasonable expectation of privacy in emails sent to fictitious on-line personae and surreptitiously captured using a screenshot program by recipient undercover police officers;
- b) *Thomas Reeves v. Her Majesty the Queen*, SCC File No. 37676, addressing whether the state may rely upon the consent of a third-party co-resident to justify a warrantless search of a person's home and seize a computer located therein;
- c) *Rogers Communications Inc. v. Voltage Pictures, LLC, et al.*, SCC File No. 37679, addressing the interpretation of the “notice and notice” regime of the *Copyright Act*;
- d) *R v Jarvis*, SCC File No 37833, addressing the reasonable expectation of privacy in public places in the context of a voyeurism offence;
- e) *BC v Philip Morris*, SCC File No. 37524, which balanced concerns about due process against the privacy of Canadians' individual health records;
- f) *Haaretz.com, et al v Mitchell Goldhar*, SCC File No. 37202, on access to justice considerations arising in jurisdiction analysis;
- g) *R v Jones*, 2017 SCC 60, on whether the *Charter* and Part VI of the *Criminal Code* apply to text messages sought from their recipient's service provider by law enforcement;
- h) *R v Marakah*, 2017 SCC 59, on the reasonable expectation of privacy in the text messages sent from the defendant's cell phone to another recipient;
- i) *Douez v Facebook, Inc.*, 2017 SCC 33, on protecting privacy rights implicit in the *Charter* from being overridden by non-negotiable forum selection clauses;

- j) *Canadian Broadcasting Corporation v SODRAC 2003 Inc*, 2015 SCC 57, on the application of the technical neutrality principle where efficiencies gained from technological advancements impact on copyright laws;
- k) *R v Fearon*, 2014 SCC 77, on the expectations of privacy attracted by mobile devices such as cell phones, and the resulting need to include safeguards in the historical doctrine that permits law enforcement to search incident to arrest;
- l) *R v Chehil*, 2013 SCC 49, and *R v MacKenzie*, 2013 SCC 50, addressing the parameters of the reasonable suspicion standard in the context of the common law power to conduct a privacy-invasive search through the deployment of a drug detection dog;
- m) *R v TELUS Communications Co*, 2013 SCC 16, on the need to adopt a flexible, purposive approach when applying Criminal Code protections intended to safeguard against the interception of private communications to technologically-advanced communications delivery methods in the context of Short Messaging Service text messaging;
- n) Five copyright-related appeals heard in conjunction, which raised issues related to the application of copyright concepts to a range of digital activities as well as the importance of technological neutrality in applying copyright laws to digital activities: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; and *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38;
- o) *AB v Bragg Communications Inc*, 2012 SCC 46, on the need to ensure privacy rights are protected in the context of the open court principle, particularly in light of the greater risk to privacy posed by the online publication of judicial decisions; and

- p) *Crookes v Newton*, 2011 SCC 47, wherein CIPPIC intervened to argue that more robust action than the mere posting of a hyperlink must occur before a hyperlinker can be held to have published defamatory statements in the linked content.
8. CIPPIC has also been granted intervener status before other courts, including the Federal Court and Federal Court of Appeal, on intellectual property rights enforcement issues:
- a) *Voltage v Doe*, 2016 FC 881, wherein CIPPIC was granted leave to intervene on the need for privacy safeguards in the third party discovery order sought in respect of a copyright infringement “reverse” class proceeding;
- b) *Voltage v Doe*, 2014 FC 161, which addressed the balancing of copyright and Internet users’ privacy rights with respect to an ISP’s disclosure of the Internet Protocol addresses associated with downloading activity to copyright holders;
- c) *National Post v Fournier*, File Nos A-394-12 & A-395-12 (FCA), on the obligations imposed by copyright law on online discussion forums, touching on issues of substantial reproduction, intermediary liability, and fair dealing (discontinued following written submissions); and
- d) *BMG v Doe*, 2004 FC 488, 2005 FCA 193, the seminal case in Canada on the rights of copyright holders to seek the third-party disclosure of the personal information of Canadian Internet subscribers involved in file-sharing.
9. CIPPIC has also been active as counsel to primary parties in proceedings implicating law and technology, and Internet policy, including:
- a) *Bell Canada v Amtelecom*, 2015 FCA 126, on the retrospective application of elements of the CRTC’s Wireless Consumer Protection Code to pre-existing contractual relationships, in the context of a consumer protection regime imposed onto Wireless Service Provider contracts;

b) *Craig Northey v Sony Music Entertainment Canada Inc et al*, Ont Sup Ct File No CV 0800360651 00CP, in which CIPPIC acted for part of the class seeking damages from music labels for failure to pay the class license fees for the making of mechanical copies of musical works in the form of CDs; and

c) *Authors Guild v Google, Inc, No. 05-Civ-8136 (DC)(S.D.N.Y. March 22, 2011)*, in which CIPPIC acted on behalf of a group of independent Canadian authors and the Canadian Association of University Teachers (CAUT) in opposing a proposed U.S.-based class action settlement agreement that would have established an intermediary, Google, as a centralized hub for digital books—affecting the rights of international copyright holders, including Canadian authors, as well as the privacy rights of Canadians.

(b) Parliamentary Committees and Governmental Consultations

10. CIPPIC has frequently provided expert testimony and submissions to Parliamentary Committees and other governmental processes regarding copyright, privacy, due process, and Internet issues for Canadians, such as:

a) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), “Study: Personal Information Protection and Electronic Documents Act” (March 23, 2017);

b) testimony before the Legislative Assembly of British Columbia Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, on the implications of recent trade agreements for legislative provisions aimed at protecting the privacy of government-held Canadian data in cross-border contexts (November 18, 2015);

c) testimony before Committee on Bill C-32, An Act to amend the *Copyright Act*, on how copyright law should not encourage litigation as a business model, and that digital infrastructure should be content neutral so as to provide wide incentive for innovation (March 8, 2011);

- d) submissions to the Parliamentary All-Party Arts Caucus on policy options for updating Canada's copyright laws in light of new digital exigencies. Submissions addressed how to balance competing interests as to protect the legitimate interests of creators of copyright works, distributors of those works, and downstream authors, innovators and users online (June 3, 2010);
- e) extensive participation in the 2009 copyright consultations, launched jointly by the Ministers of Industry and Canadian Heritage, which generated the copyright regime at issue in this appeal;
- f) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill C-27: *Electronic Commerce Protection Act*, addressing the regulation of unsolicited electronic messages and the unauthorized installation of computer programs (September 28, 2009);
- g) a submission, with the Public Interest Advocacy Centre (PIAC), to the House of Commons Standing Committee on Canadian Heritage urging them to consider important public interest implications of proposed copyright law reforms, and to take a more balanced approach than that reflected in the previous Committee's interim report (October 26, 2004);
- h) presenting a brief to the Senate Standing Committee on Social Affairs, Science and Technology on Bill S-9, proposed amendments to the *Copyright Act* that would give photographers first ownership of copyright in the photographs they take (November 3, 2004); and
- i) submitting comments to the Heritage Committee as part of the Committee's general review on copyright reform, urging Parliament to recognize disparities in bargaining power between different types of parties as well as the reasonable expectations of consumers in the copyright context (April 14, 2004).

(c) Quasi-Judicial Tribunals

11. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives. A representative sample of CIPPIC's advocacy in this field includes:

- a) filing an *amicus curae* brief, jointly with McGill University's Centre for Intellectual Property Policy, in *Eli Lilly v. Government of Canada* UNCT/14/2, a NAFTA trade dispute before an arbitration tribunal involving the compliance of Canada's utility standard under patent law with Canada's obligations under North American Free Trade Agreement;
- b) participation in a regulatory proceeding which examined challenges arising from managing jurisdiction conflicts and in consumer protections regimes within Canada and at the federal level, as applied to wireless service provider contracts (Telecom Notice of Consultation CRTC 2012-557, *proceeding to establish a mandatory code for mobile wireless services*, October 11, 2012, CRTC Reference No: 8665-C12-201212448);
- c) a submission to the Copyright Board of Canada, filed on behalf of the Canadian Association of University Teachers (CAUT) and the Canadian Federation of Students (CFS), objecting to a copyright tariff that, among its various problematic claims, placed at issue the legal repercussions under copyright law that sharing a hyperlink to a work may have. CIPPIC argued that authors' rights do not extend to the posting of a hyperlink to a work available on the Internet and continues to represent CAUT and CFS through the proceedings (Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013); and
- d) participation in consultation processes with respect to domain name registration dispute resolution procedures in the U.S. (ICANN – June 2004) and Canada (CIRA – January 2005) and the potential implications for online anonymity of such procedures. CIPPIC addressed the need to properly balance privacy and freedom of expression rights of anonymous domain name owners when allegations of intellectual property infringement are made.

12. In addition to its parliamentary, quasi-judicial and judicial activities, CIPPIC routinely advises and represents both individuals and organizations on a range of issues related to intellectual property rights. CIPPIC has frequently advised individuals and organizations on copyright and trade-mark rights acquisition matters as well as on infringement disputes with third parties. CIPPIC has also participated in international policy-making processes on matters relating to the role of Internet intermediaries such as ISPs in facilitating rights enforcement through its membership in the Civil Society Information Society Advisory Council to the OECD (e.g. OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, DSTI/ICCP(2010)11/FINAL, June 22, 2011).

13. CIPPIC and the Centre for Law, Technology and Society both enjoy in house practical experience in trade-mark law matters. CIPPIC Director David Fewer has written and published extensively on the intersection of intellectual property and freedom of expression. CIPPIC's internal Advisory Committee includes among its faculty members Professor Teresa Scassa, author of *Canadian Trademark Law*, 2nd Ed. (LexisNexis Canada, 2015) and Professor Florian Martin-Bariteau, author of *Le droit de marque dans l'économie globale et numérique* (LexisNexis Canada, 2017). Both Professors Scassa and Martin-Bariteau are working with CIPPIC to develop its proposed intervention submissions in this appeal.

14. Through these activities, CIPPIC has offered valuable perspectives on the development of intellectual property and Internet law and policy in Canada. CIPPIC's expertise is further supplemented by its Faculty advisors and, more generally, its role within the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society.

III. CIPPIC'S INTEREST IN THIS APPEAL

15. CIPPIC's historical concern regarding public policy issues arising at the intersection of law and technology places this appeal squarely within its mandate. Its enduring interest in maintaining the balance between the enforcement of copyright owners' legitimate rights, the rights of individuals, the obligations of corporations and the intersection of intellectual property laws is best reflected in

CIPPIC's extensive contributions to policy and legal discussions around such matters. Balancing these interests, and the costs associated with enforcing them, raises broad implications for the general public extending beyond those of parties to this appeal.

IV. POSITION AND PROPOSED SUBMISSIONS

16. CIPPIC has co-ordinated with the Canadian Civil Liberties Association, another proposed intervener in this appeal, to ensure that CIPPIC's submissions do not overlap with theirs.

17. If granted leave, CIPPIC proposes to offer three related submissions.

18. First, CIPPIC will argue for an interpretation of the *Trade-marks Act* that recognizes the manner in which the Act pursues policy objectives other than merely protecting the property interests of brand owners.

19. Second, CIPPIC will support this argument through an exercise of statutory interpretation of the *Trade-marks Act* that considers its legislative history and subsequent historical judicial interpretation.

20. Third, CIPPIC will apply this interpretive approach to the three *Trade-marks Act* causes of action raised in this appeal, namely:

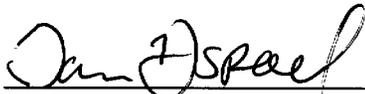
- a) s. 7(b) passing off;
- b) s. 20 confusion; and
- c) s. 22 depreciation of goodwill.

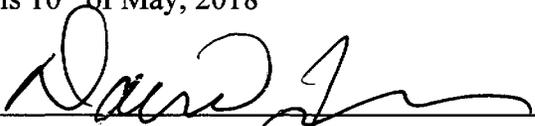
21. In none of its submissions will CIPPIC raise new issues or broaden the issues on appeal. Rather, CIPPIC will offer this Court a useful and different perspective on how the central issues in this appeal impacts and is impacted by the aforementioned considerations.

22. CIPPIC will not seek costs and asks that it not have costs awarded against it in the event that leave to intervene is granted.

23. I make this Affidavit in support of CIPPIC's Motion for Leave to Intervene in this appeal and for no improper purpose.

SWORN before me at the City of
Ottawa in the Province of Ontario
this 10th of May, 2018

) 
) _____
) Tamir Israel



David Fewer, Commissioner for Taking Oaths

LSUC #45307C

FEDERAL COURT OF APPEAL
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MEMORANDUM OF ARGUMENT
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC
INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 109 and 369 of the Federal Courts Rules

PART I – THE NATURE OF THIS MOTION

1. By way of this motion, the Applicant, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order 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 to make argument on points of law.

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

3. CIPPIC is a legal clinic based at the Centre for Law, Technology and Society at the University

of Ottawa. CIPPIC's mandate is to research and advocate in the public interest on important public policy issues arising from the intersection of law and technology. CIPPIC's activities in support of its mandate include intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important public interest 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 the manner in which the *Trade-marks Act* and the *Copyright Act* are interpreted to have addressed competing public policy objectives, which will have an impact on online expression, competition, and consumer protection concerns, and, by extension, the ability of the general public to use the Internet as a forum for critical expression.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, paras. 3 and 5

4. CIPPIC has extensive and distinct institutional knowledge of and expertise in intellectual property law and technology, and this will inform the arguments and submissions we seek leave to present.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, paras. 7, 8 and 9

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. 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.) at paras. 8, 11**

6. This Court, in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, listed the factors that must be considered in deciding whether leave to intervene should be granted (the so-called “CUPE Factors”):

- 1) Is the proposed intervener directly affected by the outcome?

- 2) Does there exist a justiciable issue and a veritable public interest?
- 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
- 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- 5) Are the interests of justice better served by the intervention of the proposed third party?
- 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

***Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 F.C.R. 226 at para. 8**

7. The criteria are meant to be applied flexibly to account for the different factors at play in different interventions:

The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention.

***Sport Maska Inc. v. Bauer Hockey Corp.*, [2016] 4 FCR 3, 2016 FCA 44 at para. 42**

8. Intervention ought to be allowed where the potential intervener brings a distinct perspective and expertise that will assist the court. In addition, a proposed Intervener must demonstrate an interest in the matter in which it proposes to intervene. The interest must be more than merely ‘jurisprudential’ in nature.

***Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119, para. 5
Amnesty International Canada v. Canada (Canadian Forces), 2008 FCA 257, para. 6**

9. A demonstrated commitment to a legal position in public law qualifies as a genuine interest in the litigation beyond a mere “jurisprudential interest”. In addition, where the mandate of a proposed public interest intervener coincides with the public interest dimensions of an issue before the court, the interest of the intervener will qualify as genuine.

***Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119 5
Amnesty International Canada v. Canada (Canadian Forces), 2008 FCA 257, para. 6**

10. 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.)

11. CIPPIC has expertise in the legal and factual matters at issue in this motion. CIPPIC has a long track record of participation in public interest matters involving intellectual property, technology and expressive interests that demonstrates a genuine interest in such matters that goes beyond a mere “jurisprudential interest”.

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, paras. 7, 8 and 9

12. CIPPIC’s staff have practical experience in trade-mark law matters. CIPPIC Director David Fewer has written and published extensively on the intersection of intellectual property and freedom of expression. CIPPIC’s internal Advisory Committee includes among its faculty members Professor Teresa Scassa, author of *Canadian Trademark Law*, 2nd Ed. (LexisNexis Canada, 2015) and Professor Florian Martin-Bariteau, author of *Le droit de marque dans l’économie globale et numérique* (LexisNexis Canada, 2017). Both Professors Scassa and Martin-Bariteau are working with CIPPIC to develop its proposed intervention submissions in this appeal.

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, para. 13

13. In addition, CIPPIC’s interest in intellectual property matters that impact on technology and the public interest has been recognized in a number of previous occasions. For example, CIPPIC was recognized as a public interest intervener by the Supreme Court of Canada in five recent copyright-related appeals (heard in conjunction), which raised issues related to the application of copyright concepts to a range of online activities: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc., v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Canadian*

Copyright Licensing Agency (Access Copyright), 2012 SCC 37; and *Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38. CIPPIC's copyright expertise has also been recognized in its intervention before the Federal Court of Canada in *Voltage v. Doe*, Federal Court File No. T-2058-12 (legitimacy of mass litigation copyright monetization models; need to protect online anonymity in third party discovery) and before the Supreme Court of Canada in respect of the same matter (*Rogers Communications Inc. v. Voltage Pictures, LLC, et al.*, SCC File No. 37679). This expertise was also recognized by the Supreme Court of Canada in granting CIPPIC leave to intervene on the issue of technological neutrality and copyright in *Canadian Broadcasting Corporation v SODRAC 2003 Inc.*, 2015 SCC 57.

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, paras. 7 and 8

14. CIPPIC's interest and expertise in other technology-related public interest issues has been additionally recognized in: *Dell v. Union des consommateurs*, 2007 SCC 34 (applying principles of contract law to online transactions); *Crookes v. Newton*, 2011 SCC 47 (defamatory publication and hyperlinking); *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 (the need for anonymity in judicial proceedings in light of privacy risks raised by online dissemination of judicial decisions); and *Warman v. Fournier*, 2010 ONSC 2126, Ont. Div. Ct. (the need to protect online anonymity in third party discovery motions).

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, paras 7

15. CIPPIC's perspective on the issues in this proceeding is distinct from that of the parties.

16. The interests of the Appellant are personal interests. They are defendants to an action for copyright infringement and violation of numerous provisions of the *Trade-marks Act*. As such, they are not well placed to address the broader public interest implications of this matter for online discourse.

17. CIPPIC, in contrast, will draw on its institutional expertise and mandate to provide the court with

a broader perspective on the interpretation of the statutes at issue and on the impact the issues before it will have on competition in the marketplace, consumer protection, and freedom of expression.

18. CIPPIC submits that there is a lack of any other reasonable or efficient means to bring before the Court the questions CIPPIC raises. The particular fact situation at issue in this case — the appearance of parodical or satirical logos on an individual’s website that is critical of the respondent — calls for general findings of law. These facts are already before the Court; however, the parties have not raised all the relevant legal issues.

19. There are three main issues that CIPPIC seeks to address in its intervention, none of which the parties have adequately addressed: (i) the multiple objectives of the *Trade-marks Act*; (ii) statutory interpretation of the Trade-marks Act that accounts for the Act’s legislative history and historical judicial interpretation; and (iii) the manner in which this interpretive exercise and these multiple and competing objectives internal balances trade-mark owners’ legitimate interests with those of competitors, consumers, and the wider Canadian public. These gaps, and the arguments CIPPIC would make in order to fill them in, are described in detail below.

Intended Submissions Should Leave be Granted

20. CIPPIC has co-ordinated with the Canadian Civil Liberties Association, another proposed intervener in this appeal, to ensure that the proposed interveners’ submissions do not overlap.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, para 16

21. If granted leave to intervene, CIPPIC proposes to offer three related submissions.

22. First, CIPPIC will argue for an interpretation of the *Trade-marks Act* that recognizes the manner in which the Act pursues policy objectives other than merely protecting the property interests of brand owners. These objectives include promoting healthy competition in the marketplace, protecting consumers, and respecting freedom of expression. CIPPIC will argue that the Act must be interpreted in a manner that properly balances these objectives by recognizing trade-mark owners’ rights while

giving due weight to their limited nature. This is the Supreme Court of Canada's interpretative approach to intellectual property statutes generally and to the *Trade-marks Act* in particular.

23. Second, CIPPIC will support this approach to interpreting the *Trade-marks Act* by construing the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. CIPPIC will consider the legislative history of the Act and review the subsequent judicial treatment of the relevant provisions of the Act to support the claim that the *Trade-marks Act*, properly construed, grants limited rights that accommodate competing policy objectives. CIPPIC will argue that the relatively recent emergence of "brand values marketing" has placed pressures on the *Trade-marks Act* that courts must balance with competing values such as freedom of expression, freedom of competition, and consumer protection.

24. Third, CIPPIC will apply this interpretive approach to the three *Trade-marks Act* causes of action raised in this appeal, namely:

- a) s. 7(b) passing off;
- b) s. 20 trade-mark infringement; and
- c) s. 22 depreciation of goodwill.

CIPPIC will argue that each cause of action, properly construed, balances trade-mark owners' legitimate interests with those of competitors, consumers, and the wider Canadian public. This balancing is to be found in key statutory concepts such as "services", "use", and "depreciation". Because they set the boundaries for the application of the *Trade-marks Act*, the interpretation of these terms must necessarily be informed by an approach that balances the different dimensions of the public interest protected by the statute.

The Interests of Justice would be Better Served by CIPPIC's Intervention

25. The effects of the Court's decision in this case will reach far beyond the Appellant's activities in running a website critical of the Respondent. It will also, at least, affect any criticism of an actor that

seeks to employ the intellectual property of the criticism's target. Intermediaries such as search engines, blogs, news websites, and social media may be affected by this decision. The decision will affect individual consumers, creators such as artists and authors of user generated content, and market competitors. The Court should have the benefit of a perspective that will enable it to understand the potential implications of its decision.

PART IV– COSTS

26. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V– ORDER SOUGHT

27. CIPPIC respectfully requests an Order from this Court:

- a) granting CIPPIC leave to intervene in this appeal;
- b) permitting CIPPIC to file a factum of no greater length than 20 pages;
- c) permitting CIPPIC to present oral argument at the hearing of this appeal; and
- d) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th of May, 2018.

[original signed by]

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PART VI- TABLE OF AUTHORITIES*Authority**Reference in Argument*

	<u>Cases</u>	
1	<i>Amnesty International Canada v. Canada (Canadian Forces)</i> , 2008 FCA 257	8 and 9
2	<i>Apotex Inc. v. Canada (Minister of Health)</i> , 2000 FCJ No.248 (QL) (F.C.T.D.)	5
3	<i>Canadian Airlines International Ltd. v. Canada (Human Rights Commission)</i> , [2010] 1 F.C.R. 226	6
4	<i>Globalive Wireless Management Corp. v. Public Mobile Inc.</i> , 2011 FCA 119	8 and 9
5	<i>Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.</i> , 1990 OJ No. 1378 (QL) (Ont.C.A.)	10
6	<i>Sport Maska Inc. v. Bauer Hockey Corp.</i> , 2016 FCA 44	7