

Inside.....

Current Projects and Cases.....	3
2004 Summer Program.....	4
Upcoming Events.....	4
CIPPIC in the News.....	4
Past Events.....	4

The CIPPIC Bulletin is also available in French

Announcements

CIPPIC has expanded! **David Fewer, LL.M.**, joined the Clinic as staff counsel in November 2004. With six years of practice in intellectual property and technology law, David is leading CIPPIC's advocacy on IP matters, as well as other projects.

Since fall 2004, CIPPIC has been benefiting from *pro bono* assistance provided by the Toronto-based law firm, Fogler Rubinoff. **FR's Technology Law Group**, led by Gary Bouchard, LL.B., is assisting CIPPIC counsel in the review of student work and the preparation of materials for use in casework, project work and public education via the CIPPIC website.

CIPPIC's Associates for the 2004/2005 academic year are Marcus Bornfreund, LL.M.; Alex Cameron, Barrister & Solicitor; and Marina Pavlovic, LL.M. Marcus is leading the Creative Commons Canada project and other open source initiatives. Alex is acting as counsel for CIPPIC in the CRIA case and is actively involved in CIPPIC's copyright law research and advocacy. Marina is directing student work on public domain projects and on mandatory arbitration in consumer contracts. See <http://www.cippic.ca/en/cippic-associates.html>.

After a very successful inaugural 2004 program, **CIPPIC's 2005 Summer Internship Program** will run from May 9th to July 29th. The program is open to upper year law students from across the country.



(L-R) EFF Senior Staff Attorney Fred von Lohmann, Clinic Director Philippa Lawson, Clinic intern Jamie Telfer, Clinic volunteer Vicky Laurens, and EFF Staff Technologist Seth Schoen.

Recent Advocacy

Broadcast Flag in Canada?

The "broadcast flag" is a Digital Rights Management (DRM) technology mandate for digital television (DTV) recently introduced in the United States. The Federal Communications Commission (FCC) requires all DTV receiver equipment manufactured, imported or sold in the United States after June of 2005 to contain "approved" technology controlling user dealings with over-the-air DTV signals. Supporters of the broadcast flag – largely the major motion picture industry – say that the flag is necessary to combat piracy of DTV content over peer-to-peer networks. Despite this claim, the broadcast flag DRM affords only very weak protection against piracy. The regime's regulatory approval process itself, on the other hand, affords significant protection to the industry against downstream innovators. No one can market DTV receiver equipment in the U.S. without first submitting the equipment to the FCC. Through this process, the content industry can oppose approval of equipment and demand technological changes. The VCR would never have come to market in a form we would recognize had its developers had to submit to a broadcast flag-type regime.

Not surprisingly, the broadcast flag scheme has been roundly criticized in the United States. Currently, the entire scheme is being challenged in court as beyond the jurisdiction of the FCC.

In the fall of last year, an Industry Canada official suggested that Canada would likely move quickly to import the broadcast flag into Canada. Following this announcement, CIPPIC counsel David Fewer,

intern Jamie Telfer, Professor Michael Geist and EFF staffers Fred Von Lohmann and Seth Schoen met with Industry Canada officials to voice concerns over this course of action. The broadcast flag's purpose is to choke off innovation and raise barriers to entry into the DTV equipment market. If enacted, the broadcast flag will have significant impacts on consumers – who may face huge costs replacing equipment rendered obsolete by the flag – on user rights under the *Copyright Act*, and on the consumer electronics industry, who will be asked to bear the cost of protecting someone else's intellectual property.

Following this intervention, Industry Canada has taken a "wait and see" position: it will monitor developments in the US prior to taking any action on the flag. Intern Jamie Telfer and volunteers Rob Tomkowicz, Vicky Laurens and Alex Munoz have prepared background materials and assisted in CIPPIC's advocacy on this issue. See CIPPIC's broadcast flag webpage at: www.cippic.ca/en/faqs-resources/broadcast-flag.

Copyright and Photographs

CIPPIC spoke before the Senate Standing Committee on Social Affairs, Science and Technology in the autumn on Senate Bill S-9. This bill would amend the Copyright Act to give photographers first ownership of copyright in the photographs they take. CIPPIC Associate Alex Cameron repeated CIPPIC's call for the adoption of balanced rules of copyright ownership that respect consumers' reasonable expectations and address inequalities of bargaining power. Comments and questions from the Senators indicated that CIPPIC's message came through loud and clear. See CIPPIC's Copyright Reform webpage at: www.cippic.ca/en/projects-cases/copyright-law-reform.

Anti-Spam Legislation

After filing a submission with the federal government's Spam Task Force on its "Anti-Spam Action Plan for Canada" in August 2004, CIPPIC was commissioned by the Task Force to prepare a report on private rights of action against spammers. Clinic intern Andy Kaplan-Myrth worked with clinic counsel on this report, which was completed and submitted in December 2004. Meanwhile, Clinic Director Philippa Lawson has been actively participating in the Spam Task Force, both at its December Roundtable and through its working groups on legislation and enforcement, and public education and awareness. See CIPPIC's Action Item on Spam at: <http://www.cippic.ca/en/action-items/>, as well as our FAQs and resources on Spam at: <http://www.cippic.ca/en/faqs-resources/spam/>.

Making Privacy Laws Work

Online investigation services (Abika.com) – CIPPIC's complaint against Abika.com, alleging gross violation of Canadian privacy laws by this online investigation service, has generated a lot of attention, both because of the extent of the alleged privacy invasions and because of the jurisdictional issues raised by the fact that the company is wholly based in the USA. The Privacy Commissioner of Canada is currently investigating the company, based on submissions prepared in part by CIPPIC intern Dina Mashayekhi. We have also laid a formal complaint under

US law, with the Federal Trade Commission. See <http://www.cippic.ca/en/projects-cases/privacy/>.

CRTC website posting policy – After being alerted by a concerned citizen about the CRTC's policy of posting on its website comments received from members of the public in the context of public processes, together with all personal contact information provided by the individual, CIPPIC investigated the matter and wrote to the CRTC, explaining how this policy is inappropriately privacy-invasive and possibly illegal, and proposing an alternative, privacy-respectful approach. See <http://www.cippic.ca/en/projects-cases/privacy/>.

WHOIS database – CIPPIC filed comments in response to consultations first by ICANN (June 2004) and later by the Canadian Internet Registration Authority (CIRA) (January 2005) on the current policy of publishing contact information for domain name holders through the publicly available WHOIS database. CIPPIC strongly supports CIRA's proposal not to disclose contact information for individual registrants unless the registrant so requests, noting that the current policy violates Canadian privacy law. CIPPIC's comments to ICANN (drafted by CIPPIC intern Matt Kindree) note that the public benefits of a completely open WHOIS database (the current situation) are outweighed by the costs of this approach in terms of spam, privacy invasions, and an incentive for registrants to provide inaccurate data in order to protect their privacy. See <http://www.cippic.ca/en/projects-cases/privacy/>.

USA PATRIOT Act – CIPPIC responded to the BC Privacy Commissioner's call for comments on the issue of the *USA PATRIOT Act* and its impact on Canadians, in August 2004. CIPPIC summer fellow Matthew Kindree worked on this submission, which argued that BC Privacy laws require the BC government to take effective measures to prevent personal data under its control from being accessed by US authorities under the *USA PATRIOT Act*. See <http://www.cippic.ca/en/projects-cases/privacy/>.

Privacy and Library Reference Services – As part of an international comparative study led by Paul Neuhaus, Senior Librarian at Carnegie Mellon University, CIPPIC has been researching how Canadian privacy laws apply to library reference services, and how Canadian libraries protect the privacy of user information. Research conducted by CIPPIC students April Brousseau, David Madani, and Louisa Garib formed the basis of a presentation by Paul Neuhaus on "Digital Reference, Privacy, and the Law in The United States and Canada" at a virtual reference desk conference in Cincinnati, Ohio, on November 8, 2004.

Client Advice

Over the past six months, CIPPIC has provided advice to individuals and non-profit organizations on various technology-related issues including workplace privacy, e-mail privacy, liability for website postings under copyright, defamation, and privacy law, copyright in photographs and films, the legality of unsolicited faxes, domain name rights, and access to information law.

Current Projects and Cases

BMG et al v. John Doe et al – The Canadian Recording Industry Association (CRIA) appealed the Federal Court’s decision last spring not to order Internet Service Providers to hand over subscriber identities to CRIA. CRIA wants the names of the ISP subscribers so that it can sue them for copyright infringement, based on their alleged file-sharing activities. CIPPIC is intervening in the appeal, after having successfully argued in the lower court that CRIA had not made out a *prima facie* case against the 29 individual defendants. Written submissions have been filed. See <http://www.cippic.ca/en/projects-cases/file-sharing-lawsuits/>.

Copyright Legislation – Slouching Towards Ottawa

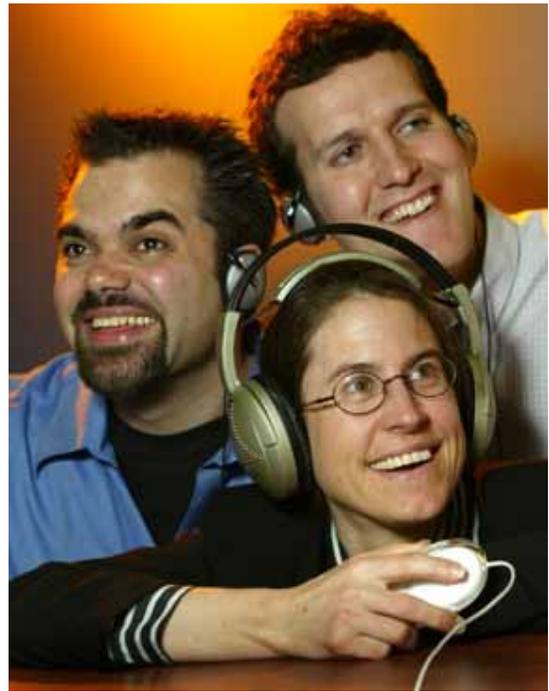
- All signs indicate that Canada will introduce long-awaited legislation to amend the Copyright Act to address digital issues sometime in 2005. If the May, 2004, *Interim Report* of the Standing Committee on Canadian Heritage is any indication, that legislation may lean heavily towards positions lobbied for by the copyright owner community, to the detriment of innovation policy, user rights of access, privacy, expressive rights, quality of education, and Canada’s balance of payments. CIPPIC is currently active behind the scenes, meeting with Parliamentarians and other stakeholders to advocate on behalf of the public interest, and will be actively involved in the process on introduction of the bill.

Those efforts are starting to bear fruit. CIPPIC’s intervention with the Privacy Commissioners and Ombudsperson’s of Canada prompted the Federal Privacy Commissioner to meet with officials from the departments of Industry and Canadian Heritage over the privacy implications of digital rights management technologies. See CIPPIC’s Copyright Reform webpage at: www.cippic.ca/en/projects-cases/copyright-law-reform.

Identity Theft – CIPPIC is working with the British Columbia Freedom of Information and Privacy Association (BCFIPA) on a report to the federal Privacy Commissioner. The report will focus on private sector practices that facilitate identity theft, and will analyze how well Canadian privacy legislation addresses these issues. CIPPIC Intern Jennifer Manning conducted research during the fall on techniques used by ID thieves, and on legislative responses to ID theft in various jurisdictions.

Privacy and Consumer Surveillance – CIPPIC interns and volunteers are working with the clinic director on a project designed to identify and understand how personal consumer information is collected, used and shared by organizations in the marketplace.

Privacy legislation – Following its fall 2003 submission on proposed ‘investigative bodies’ under the *Personal Information Protection and Electronic Documents Act* (PIPEDA), CIPPIC is preparing comments on the latest round of applications for ‘investigative body’ status. Such status permits organizations to collect and disclose personal information for purposes related to investigating an alleged illegality, without their knowledge or consent. CIPPIC Research Assistant Catherine Thompson, who worked on



(L-R) Clinic intern Jason Young, associate Alex Cameron, and Director Philippa Lawson; photo by Bruno Schlumberger, Ottawa Citizen

the original submission as a volunteer, is again preparing the current submission. CIPPIC also intends to participate in the upcoming five-year review of PIPEDA.

Access to Information Manual – CIPPIC Research Assistant Catherine Thompson, together with colleagues from the “On the Identity Trail” project, is drafting a user manual covering access to information laws across the country. The manual will provide guidelines, tips, and explanations for accessing one’s personal information held by governments and by private sector organizations, as well as guidelines and tips for accessing non-personal records held by governments.

Anonopedia – CIPPIC is working with colleagues from the “On the Identity Trail” project to create a document that will provide definitions and explanations for technical, legal, and other common terms relevant to online anonymity and privacy. See <http://anonequity.org/en3/index.html>.

Unfair Terms and Online Contracts – CIPPIC is launching a significant investigation into the consumer contracting practices of Canadian businesses. Research is already underway on mandatory arbitration clauses. We will report our findings later in the year.

The Public Domain – The whole point of copyright law is to fill up the Public Domain. CIPPIC is involved in a number of projects to help Canadians understand the wealth of Canada’s Public Domain heritage. These projects include the preparation of an FAQ on the public domain, participation in the development of an online “Public Domain Wizard”, and participation in the

Upcoming Events

March 4/5, 2005 – “The Concealed I: Anonymity, Identity, and the Prospect of Privacy”: CIPPIC and its research colleagues in the project entitled “On the Identity Trail”, together with the University of Ottawa, Faculty of Law, are hosting a two-day conference dedicated to investigating privacy issues arising as a result of our increasingly networked society. See <http://www.anonequity.org/concealedI/>.

CIPPIC in the News

CIPPIC’s work has generated a lot of attention over the past months. In addition to being widely quoted on various issues, we’ve been the focus of news articles in the national media as well as local papers.

- On December 31, 2004, Canwest ran a story on consumer surveillance in papers across Canada, featuring Clinic Director Philippa Lawson.
- On November 8, 2004, CIPPIC’s privacy complaint against Abika.com was the focus of a Canadian Press article that ran in papers from BC to Quebec.
- Last spring (April 8, 2004), the Ottawa Citizen ran a multi-page feature on the clinic.
- CIPPIC has also been profiled in Law Times (May 3, 2004), Decima’s Canadian New Media newsletter (Sept. 17, 2004), and Ottawa University’s Gazette (June 15, 2004) and Tabaret Magazine (Fall, 2004).

Watch for more!

Past Events

Creative Commons Launch – CIPPIC launched the Creative Commons Canada with a party on September 30, 2004. CIPPIC External Advisory Board member Professor Lawrence Lessig was the guest of honour. See the Creative Commons Canada webpage at: <http://creativecommons.ca>.

EFF Visit – Fred Von Lohmann and Seth Schoen of the Electronic Frontier Foundation visited CIPPIC recently to speak on their recent experiences in defense of user rights in the United States. Our guests then joined CIPPIC staff and CIPPIC Board advisor Michael Geist in a meeting with Industry Canada officials to discuss the potential for Canada to import the “broadcast flag”. See CIPPIC’s broadcast flag webpage at: www.cippic.ca/en/faqs-resources/broadcast-flag.

CIPPIC Talks to Canadian Federation of Students – CIPPIC Staff lawyer David Fewer spoke to the Canadian Federation of Students at their Annual General Meeting in December, 2004, on the potential impact on students of the Standing Committee on Canadian Heritage’s legislative proposals in its May, 2004, *Interim Report on Copyright Reform*.

coming launch of Project Gutenberg Canada – CIPPIC staff lawyer David Fewer has accepted a seat on PG Canada’s board of directors.

Creative Commons – CIPPIC Associate Marcus Bornfreund continues to lead the effort on the Canadian Creative Commons. Marcus will be preaching the CC•CA gospel at a number of conferences in the coming months, and he continues to target organizations who would benefit from adoption of the CC•CA license. Browse the Creative Commons Canada webpage for future announcements: <http://creativecommons.ca>.

2004 Summer Program

CIPPIC’s 2004 summer program was a resounding success. CIPPIC’s five summer fellows worked with Director Philippa Lawson on a number of different projects during the summer of 2004. Highlights of their work included:

- raising the profile of techlaw issues in the federal election campaign (see <http://www.cippic.ca/en/projects-cases/election-2004/>)
- drafting a background paper on Identity Theft for the Ontario Research Network on Electronic Commerce;
- drafting and updating FAQs and resources on Domain Names, File-sharing, Open Source, Privacy, and Spam;
- preparing a submission to BC Privacy Commissioner on the *USA Patriot Act* and its impact on Canadians’ privacy (see <http://www.cippic.ca/en/projects-cases/privacy/>);
- researching alternatives to illegality of file-sharing;
- developing the Canadian Creative Commons licence (see <http://www.creativecommons.ca/>); and
- assisting with the drafting of CIPPIC’s factum in the appeal of *BMG et al v. John Doe et al* (see <http://www.cippic.ca/en/projects-cases/file-sharing-lawsuits/>).



Summer Fellows Ian M. Kerr, Matt Kindree, April Brousseau, Karen Yolevski. (Missing: Louis Raphael Beliveau)

Canadian Internet Policy and Public Interest Clinic Clinique d'intérêt public et de politique d'internet du Canada

Faculty of Law, University of Ottawa
506 – 57 Louis-Pasteur, Ottawa ON K1N 6N5
Tel: 613.562.5800 ext: 2553
Fax: 613.562.5417
Website: www.cippic.ca
email/courriel: cippic@uottawa.ca

Philippa Lawson: Executive Director
extension: 2556 plawson@uottawa.ca

David Fewer: Staff Counsel
extension: 2558 dfewer@uottawa.ca

Susan Gemmell: Administrative Assistant
extension: 2553 sgemmell@uottawa.ca