

IN THE FEDERAL COURT – TRIAL DIVISION

BETWEEN:

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

MEMORANDUM OF ARGUMENT
OF THE INTERVENER
CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(CIPPIC)

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PART I – OVERVIEW OF CIPPIC’S POSITION

1. This case involves the balancing of privacy rights of individuals against the need for disclosure by plaintiffs wishing to pursue civil actions. The Court must determine the nature of the test to be applied to requests for disclosure of defendant contact information in the context of civil suits, and must then determine whether the Plaintiffs in this case have met that test.
2. CIPPIC submits that a high threshold test is appropriate in the circumstances of this case, as well as other cases involving allegations of civil wrongdoing against anonymous participants on the Internet. CIPPIC further submits that the Plaintiffs have not made out any case of copyright infringement on the facts or on the law and that the Plaintiffs’ motion should be dismissed.

PART II – FACTS

3. The Plaintiffs filed a Statement of Claim against 29 unnamed defendants on February 10, 2004, seeking remedies for copyright infringement. On the same date, the Plaintiffs filed a Notice of Motion pursuant to Rule 233 of the *Federal Court Rules, 1998*, seeking production of information about the unnamed defendants from non-party Internet service providers (ISPs).
4. The Plaintiffs and a number of the non-party ISP respondents to the motion have filed affidavit evidence. Although cross-examinations have taken place on some of these affidavits, not all transcripts were available to CIPPIC at the time of preparing and filing these Written Representations.
5. CIPPIC was granted leave to intervene in this proceeding by Order of this court dated March 1, 2004.

PART III - SUBMISSIONS

A. The Court should apply a high threshold test in this case

6. Rule 233 of the *Federal Court Rules, 1998* grants the Court a discretionary power to order production of a document from a non-party, provided the document is relevant and could be compelled at trial. Although this threshold appears to be low, the order is discretionary and courts in similar circumstances have considered other relevant factors in deciding whether to order production, including privacy of non-parties.

See e.g., Royal Bank of Scotland v. Golden Trinity (The), [2001] F.C.J. No. 1230 (QL) (F.C.T.D.) at para. 18 [*Royal Bank of Scotland*]. TAB 1.

7. The *Kibale v. Canada* case cited at paragraph 13 of the Plaintiffs' Written Representations is factually distinguishable from the present case and contains almost no analysis. *Kibale v. Canada* is an example of a straightforward application of Rule 233 in a case where the defendant was not only a named party to the action but also participated in the Rule 233 hearing. Further, the non-party in that action took no position on the plaintiff's motion. In the unprecedented circumstances of the present case, *Kibale v. Canada* has no application and provides no guidance to the Court in exercising its discretion.

Kibale v. Canada, [1991] F.C.J. No. 634 (QL) (F.C.T.D.). PLAINTIFFS' MOTION RECORDS TAB 6.

8. In *Irwin Toy v. Doe*, the Ontario Superior Court of Justice granted the plaintiff discovery of a non-party ISP in a defamation case where the plaintiff sought to identify an unnamed defendant. As discussed in paragraph 18 of these Written Representations, the court in *Irwin Toy v. Doe* correctly identified and discussed a number of important public policy issues in its reasoning. The court concluded that the test to be applied was whether the plaintiff had shown a *prima facie* case of defamation.

Irwin Toy Ltd. v. Doe [2000] O.J. No. 3318 (QL) (Ont. S.C.J.) at para. 12 and 18 [*Irwin Toy*]. PLAINTIFFS' MOTION RECORDS TAB 7.

9. On its face, the so-called ‘*prima facie*’ standard applied in *Irwin Toy* appears to be a relatively low threshold, akin to the ‘serious question to be tried’ test routinely applied in injunction cases. A serious question to be tried requires the motions judge to make a determination “on the basis of common sense and an extremely limited review of the case on the merits.” This appears to be the level of inquiry and review that the court undertook in *Irwin Toy*.

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 (QL) at para. 78 [*RJR-Macdonald*]. TAB 2.

10. In addition to the fact that the decision is not from this Court and considers different rules, there are a number of reasons why *Irwin Toy* is distinguishable and of limited utility in the present case:
- a) no one appeared on behalf of the alleged defendant;
 - b) the non-party ISP did not appear and did not oppose the plaintiff’s motion;
 - c) a cause of action for defamation is a well-established tort and appeared to be fairly clear in the factual context of the case, in contrast to the current cause of action which is one of first instance;
 - d) the court provided no analysis to support its conclusion that the appropriate test for disclosure was whether the plaintiff’s affidavit evidence demonstrated a *prima facie* case of defamation; and
 - e) the court did not explain the meaning of the *prima facie* standard in the context of the case.

Fundamental privacy values are at stake in this case and demand a high threshold test

11. The protection of private life lies at the heart of liberty in a modern democratic state:

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.

R. v. Dymont, [1988] 2 S.C.R. 417 at 429-30 [*Dymont*]. TAB 3.

12. This notion of privacy derives from the assumption that all information about a person is in a fundamental way her own, for her to communicate or retain for herself as she sees fit:

Grounded in [our] physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order.

Dymont, supra at 428. TAB 3.

13. Parliament has recognized a right to informational privacy in recently enacted legislation, which establishes individual rights to control the collection, use and disclosure of their personal information by organizations in the course of commercial activities. The provinces of Québec, British Columbia and Alberta have also passed private sector data protection legislation in recent years.

Protection of Personal Information and Electronic Documents Act, 2002, S.C. 2002, c. 5, s. 3, Part I [*PIPEDA*]. TAB 4.

An Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q. c. P-39.1.

Personal Information Protection Act, S.B.C. 2003 c. 63.

Personal Information Protection Act, S.A. 2003, c. P-6.5.

14. The Supreme Court of Canada has recognized a right to privacy inherent in sections 7 and 8 of the *Charter of Rights and Freedoms*, noting that respect for individual privacy is an essential component of what it means to be free.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

R. v. O'Connor, [1995] 4 S.C.R. 411 at 110-119. TAB 5.

Hunter v. Southam, [1984] 2 S.C.R. 145 at 159. TAB 6.

15. The common law must be interpreted in a manner which is consistent with *Charter* principles.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1169. *TAB 7*.

16. The applicability of *Charter* considerations is particularly relevant in this case given the personal and private nature of the information at issue and the potential uses to which it could be put.

The importance of online anonymity

17. The Internet provides an unprecedented forum for freedom of expression and democracy.

The ability to engage in *anonymous* communications adds significantly to the Internet's value as a forum for free expression. Anonymity permits speakers to communicate unpopular or unconventional ideas without fear of retaliation, harassment, or discrimination. It allows people to explore unconventional ideas and to pursue research on sensitive personal topics without fear of embarrassment.

18. If the Plaintiffs are able, by virtue of a court order, to link an IP address (*e.g.*, 66.51.0.34) and a KaZaA user name to a presumptive "real world" person, (*e.g.*, John Smith) and thus commence an action against that person, the action could connect information about John Smith to the world (with consequences beyond the scope of the allegation). For example, John Smith might have visited a Web site on sexually-transmitted diseases, posted or shared documents criticizing the government or his employer, discussed his religious beliefs using a pseudonym in a chat room, or virtually any other type of expression. John Smith would likely hold an assumption that he was and would remain anonymous in many of these activities. The effect of the Court order in this case would shatter that anonymity and potentially cause significant embarrassment and irreparable harm to John Smith, independent of and prior to a determination of his culpability. It would have a corresponding chilling effect on free speech and online activity generally.

19. The test adopted in this case will set an important precedent for other kinds of civil suits in which the defendant is an unnamed Internet user – suits involving protest and parody, corporate and government whistle-blowing, and alleged defamation – cases in which freedom of expression is directly implicated, and where publication of the information in question could be even more prejudicial than is the case here.

20. The court in *Irwin Toy v. Doe* recognized the value of online anonymity:

Implicit in the passage of information through the internet by utilization of an alias or pseudonym is the mutual understanding that, to some degree, the identity of the source will be concealed. Generally speaking, it is understood that a person's internet protocol address will not be disclosed.

...

In keeping with the protocol or etiquette developed in the usage of the internet, some degree of privacy or confidentiality with respect to the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with what should be perceived as being good public policy.

Irwin Toy, supra at para. 10-11. *PLAINTIFFS' MOTION RECORDS TAB 7.*

21. 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. Without a sufficiently high threshold test for court-ordered disclosure, plaintiffs will be able to engage in "fishing expeditions" and to abuse or misuse the judicial process. In keeping with fundamental privacy and free speech values, the test for disclosure of subscriber identity in the context of civil actions such as this should therefore involve a high threshold.

B. Determining the nature of the high threshold test to apply in this case

Injunction jurisprudence provides useful direction to the Court in this case

22. Drawing on themes discussed in the preceding section, there are a number of factors in this case which intuitively demand a high threshold test, including the following:

- a) The order sought is invasive;

- b) The order sought is without notice to the unnamed defendants;
- c) The order sought will irrevocably remove the unnamed defendants' anonymity;
- d) The order sought will impact on the privacy rights of the unnamed defendants, including those expressed in the *Charter* and *PIPEDA*;
- e) The order sought may cause irreparable harm to the unnamed defendants;
- f) The unnamed defendants have not been found to have committed any wrong;
- g) There is significant uncertainty as to whether there is a cause of action for copyright infringement in the circumstances of this case; and
- h) The order sought will for all practical purposes amount to a final determination of the action.

23. The combination of the intrusiveness of the order sought and the fact that it is made without notice to the defendants in itself justifies a high standard: "The making of an intrusive order *ex parte* even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff."

Lock International plc v. Beswick, [1989] 1 W.L.R. 1268 at 1281. TAB 8.

See also Ontario Realty Corporation v. P. Gabriele & Sons Ltd., [2000] O.J. No. 4340 (Ont. S.C.J.) at para. 19 [*Ontario Realty*]. TAB 9.

24. A number of the above-listed factors are also commonly considered by courts in determining whether to grant injunctive relief. Principles developed in injunction cases, particularly Anton Piller cases, parallel a number of issues faced by the Court in the present case and are instructive in determining how the Court should exercise its discretion under Rule 233 in these kinds of cases. The approach in both instances involves balancing privacy and other rights of individuals against the needs of plaintiffs.

25. The invasiveness of the order sought in this case parallels the invasiveness of Anton Piller orders. In each case, a plaintiff seeks the right to have access to the private premises (or in this case highly private information) of an individual without notice to the individual and prior to the court making a determination regarding the alleged wrongs. Indeed, it is arguable

that the present case is even more extreme than an Anton Piller order because the unnamed ISP subscribers have no ability to close the metaphorical door on a plaintiff who comes knocking for access.

Hunter, supra at 159. TAB 6.

26. Although Anton Piller orders are not identical to the order sought in the present case (because the former are motivated by a desire to prevent the destruction of evidence), the similar degree of invasiveness suggests an appropriate threshold test for the present case. In the Anton Piller context, the invasiveness of the order requires that “there must be an extremely strong *prima facie* case” and that “the damage, potential or actual, must be very serious for the applicant.” It is submitted that these are the tests that should be applied in cases such as the present case.

Anton Piller K.J. v. Manufacturing Process Ltd. et al [1976] 1 Ch. 55 (C.A.) at 62. TAB 11.

Nintendo of America, Inc. v. Coinex Video Games Inc. (1982), 69 C.P.R. (2d) 122 at 129 (F.C.A.). TAB 12.

27. In the intellectual property context, this Court has described part of what plaintiffs must show in order to meet the high Anton Piller standard:

... the copyright or trade mark rights which are asserted must be clearly identified (*e.g.*, by production of the relevant registration documents, by photocopies of the relevant designs). ... The applicant's rights to the intellectual property being asserted must also be clearly demonstrated.

Fila Canada Inc. v. Doe (T.D.), [1996] F.C.J. No. 736 (QL) (F.C.T.D.) at para. 9-10 [*Fila Canada*]. TAB 13.

28. In addition, plaintiffs should be required to show clear evidence of actual infringement and that the ISP account is the actual account of the party alleged to have committed the infringement.

See e.g., Royal Bank of Scotland, supra at para. 18. TAB 1.

29. Where a case is unlikely to proceed to trial if an injunction is granted, courts will engage in a more extensive review of the merits of the plaintiff's claim. This situation might arise, for example, "when the right which the applicant seeks to protect can only be exercised immediately or not at all." In the present case, the anonymity right of the unnamed ISP subscribers is such a right. This justifies a more extensive review of the Plaintiffs' claims to ensure that they meet a high standard.

RJR-Macdonald, supra at para. 51. *TAB 2.*

30. Further, faced with the hardship of enormous time and money costs to defend themselves, as well as the threat of very substantial statutory damage awards, individual alleged infringers will likely settle in each case even if they may have defences to the Plaintiffs' claims. This is a particular concern where, as here, disclosure of the defendants' identities could lead to seizure of computers and consequent loss of privacy, ability to work, and even livelihood. As in the Anton Piller context, these considerations further justify a high threshold test:

Even in those cases where the defendants appear and are represented at the motion for review, the likelihood of a claim being defended to trial is remote. It is therefore incumbent upon the Court to go further than an "extremely limited review of the case on the merits" since in most cases it amounts to a final determination of the actions.

Tommy Hilfiger Licensing Inc. v. Jane Doe, [2000] F.C.J. No. 1267 (QL) (F.C.T.D.) at para. 17. *TAB 14.*

Injunction jurisprudence supports a regard for Charter rights in this case

31. In addition to the general applicability of *Charter values* to the present case (as discussed in paragraphs 14-16 above), it is submitted that the Court must account for and respect the *Charter rights* of the unnamed defendants in determining whether to grant a discretionary order under Rule 233.

32. In *Fila Canada*, this Court discussed how section 8 of the *Charter* should have application in Anton Piller cases:

It is at least arguable that [the *Charter*] applies to the civil search and seizures authorized by order of the Court under an Anton Piller order. ... When Anton Piller orders are sought and obtained from this Court it is important to place them within this context.

Fila Canada, supra at para. 6. TAB 13.

33. Although a recent Ontario Superior Court decision questioned whether the *Charter* applies to Anton Piller orders, in *obiter* the court assumed for the purposes of analysis that the *Charter* does apply. The court concluded that the high threshold required to obtain Anton Piller orders (and the other safeguards inherent in those orders) exceeded the requirements of section 8 of the *Charter*. On the same basis, the court concluded that a possible infringement of section 8 could be justified under section 1 of the *Charter*.

Ontario Realty, supra at para. 34-39. TAB 9.

34. Finally, an article by Paul Godin referenced in *Ontario Realty* suggests that, in contrast using the inherent jurisdiction of the court as a basis to grant Anton Piller orders, “if the Rules or the statutory powers are the foundation for Anton Piller orders, these orders are clearly subject to *Charter* scrutiny”.

Paul D. Godin, “Anton Piller Orders in an Age of Scepticism: Charter Application and Other Safeguards for Judicially-Ordered Searches” (1996), 54 U.T. Fac. L.R. 107 (QL) at para. 12 and 18 [*Godin*]. TAB 14.

Ontario Realty, supra at para. 13. TAB 9.

35. In the present case, the authority for the Court’s ruling is found in Rule 233. It is therefore submitted that the order sought by the Plaintiffs should attract *Charter* scrutiny and that the test applied by the Court in this case should be a high one consistent with *Charter* requirements. In the Anton Piller context, Godin also points out that:

Since orders can be made on ex parte evidence, which may present a skewed version of the facts because it is unchallenged, the threshold in practice is already quite low. To lower it further would be tantamount to presuming that defendants are guilty; Denning’s tool of justice would become a blunt instrument for anyone who wields it.

Godin, supra at para. 27. TAB 14.

36. Godin's reasoning is equally applicable in the circumstances of the present case.

The nature of the appropriate test in the circumstances of this case

37. Taking the foregoing analysis into account, in circumstances such as the present case, CIPPIC submits that the Court should consider the following questions in exercising its discretion under Rule 233. All questions are relevant but none are determinative:

- a) Has the plaintiff made out an extremely strong *prima facie* case?
 - i) Is there clearly a cause of action which would apply to the facts as alleged by the plaintiff?
 - ii) In the intellectual property context, has the plaintiff clearly demonstrated its rights as well as the alleged infringement?
 - iii) Has the plaintiff made a full and frank disclosure to the court, including the strengths and weaknesses of the plaintiff's case in fact and law? (*e.g.*, as to whether KaZaA users may be unintentional or inadvertent file-sharers)
 - iv) Has the plaintiff filed affidavits based on personal knowledge of the representatives of the plaintiff?
- b) Are there alternative ways for the plaintiff to obtain the information sought? (*e.g.* from the file-sharing services directly, as suggested by the Affidavit of David Shrimpton (TELUS), at para. 14)
- c) What is the harm to the plaintiff if the order is not granted?
- d) Will granting the order respect *PIPEDA* and *Charter* rights and values?
- e) Will granting the order potentially cause irreparable harm to innocent ISP subscribers?
- f) Will the order likely amount to a final determination of the action?
- g) Does the plaintiff have clean hands at the time the order is sought?
- h) Has the plaintiff provided undertakings regarding damages?

38. In the extremely rare cases where the Court determines that an order for disclosure should be made, CIPPIC submits that the order should be made with terms and safeguards that account for the important issues raised by the questions above.

C. The Plaintiffs have failed to establish any case of copyright infringement

39. The Plaintiffs claim that:

27. At times unknown to the plaintiffs but known to the defendants, the defendants reproduced the plaintiffs' Sound Recordings and authorized the reproduction of the Sound Recordings in a manner that is not permitted by the Act. The defendants also: (i) distributed to such an extent as to affect prejudicially the owner of copyright and (ii) possessed for the purpose of doing the things referred to in paragraph (i) unauthorized copies of the Sound Recordings that the defendants knew or should have known infringe copyright or would infringe copyright if they had been made in Canada by the person who made them.

Statement of Claim, para.27.

40. CIPPIC submits that the Plaintiffs' have not made out any claim of copyright infringement in this case, let alone the *extremely strong prima facie case* which is the appropriate test in this type of motion. In particular:

- a) Any reproduction of copyrighted materials that may have been made by the Defendants is legal by virtue of s. 80 of the *Copyright Act*.
- b) Distribution must entail a purposeful, intentional and active sending and receipt. There is no evidence of any illegal distribution by any of the defendants.
- c) Secondary infringement as set forth in s. 27(2) of the *Copyright Act* requires knowledge on the part of the infringer. There is no evidence before the Court sufficient to establish that any of the Defendants knew or ought to have known that any activity of the nature alleged has ever taken place, or to establish a potential basis for vicarious liability.
- d) There is no "making available" right of copyright holders in Canadian law.
- e) Merely providing equipment or authorizing the use of equipment that could be used for infringement does not amount to infringement. Even if there is infringement, a defendant will not be liable if it lacks sufficient control over the activity.
- f) The Plaintiffs have failed to file sufficient evidence to show that any of them are the owners or exclusive licensees of specific copyrights so as to entitle them to succeed in this action.

Downloading is legal in Canada

41. The law is clear in Canada that downloading for private use onto audio recording media (“downloading”) is legal. This necessarily entails an act of reproduction onto an audio recording medium. Thus, any downloading or reproduction undertaken in accordance with s. 80 cannot give rise to liability.

Copyright Act, R.S. 1985, c. C-42, s. 80. *TAB 16.*

Private Copying 2003-2004, Copyright Board of Canada, (12 December 2003), Unreported at 20. [*Private Copying III*] *TAB 17.*

42. According to established specialized dictionary meanings:

“Downloading” is the transmission of a file from one computer system to another, usually smaller computer system. “Uploading” is transmission in the other direction: from one, usually smaller computer to another computer. From an Internet user's point-of-view, uploading is sending a file to a computer that is set up to receive it. E.g. People who share images with others on bulletin board systems (BBS) upload files to the BBS.

searchNetworking.com, a TechTarget site for Networking professional,
http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci211996,00.html.

See also, B. Sookman, *Computer, Internet and Electronic Commerce Terms*, (Toronto: Thomson/Carswell, 2003) at 117, 338. *TAB 18.*

43. The general nature of KaZaA, iMesh and similar peer to peer (“P2P”) programs (hereinafter referred to as “KaZaA-type programs”) is that there is no uploading taking place. The program entails a decentralized architecture that does not resemble a BBS service. Users do not send or transfer files to any central server and do not send files to any individual or entity. Rather, the user may (but may also decline to) allow files to be copied by another user, *i.e.* the “downloader”. The general nature of the architecture of KaZaA-type programs is described in the judgment of Wilson, J. in *MGM v. Grokster*.

Metro-Goldwyn-Mayer-Studios, Inc. v. Grokster, 259 F.Supp.2d 1029 (C.D.Cal. 2003)
TAB 19.

44. Uploading is also analogous to the sending of an attachment by e-mail. It requires a deliberate act to send a file to another computer or server from where it can be accessed or downloaded by the recipient.
45. In fact, downloaders who use KaZaA-type programs are simply downloading from each other. No evidence has been filed as to any uploading whatsoever in the sense of a user actively and intentionally “sending” or transferring a file to another person, another server, a website or to a BBS. Thus, virtually all KaZaA-type program users are downloaders, and downloading has been declared to be legal in Canada. The Plaintiffs have filed no evidence whatsoever that any of the unnamed defendants in the current litigation has ever actually purposefully “sent” a music file to a computer that is set up to receive it. In fact, it is simply not possible to “upload”, intentionally or otherwise, using KaZaA. File sharing is not “uploading”.
46. KaZaA-type programs are often referred to as “file sharing programs” because they allow users to download from each other. However, such sharing may be completely inadvertent and unintentional. Many KaZaA users are unaware that they are allowing file sharing, or even if so aware, which files are actually available for sharing. Moreover, even if a user intentionally wishes to share files, it does not follow that any of these files will actually be downloaded by another user.
- Nathaniel S. Good and Aaron Krekelberg, “Usability and privacy: A Study of KaZaA P2P file-sharing,” Information Dynamics Laboratory, HP Laboratories, Palo Alto, HPL-2002-163, (5 June 2002) [*HP Report*]. TAB 20.
47. As well, many KaZaA users may be unaware that, even though they shut down the program, it can still be active in the system tray.
48. Downloading and reproduction are legal as long as they are not done for the “purpose” of certain specified activities, including “distributing”. The inclusion of the word “purpose” in s. 80 clearly imports an element of deliberative intention, analogous to *mens rea*. Thus, unless the downloading was undertaken at the time with one of the specific purposes as set forth in s. 80(2), it is legal in Canada.

Copyright Act, s. 80. TAB 16.

The unnamed Defendants have not engaged in any form of distribution

49. The Plaintiffs have filed no evidence whatsoever that any of the 29 unnamed defendants ever had any intention of “distributing” as set forth in s. 80(2)(b) or that any of them ever caused a distribution to be made to anyone in contravention of s. 27(2)(b).

Copyright Act, s. 27(2)(b); s.80(2)(b). TAB 21.

50. In *CCH v. LSUC*, the Supreme Court ruled that secondary infringement (*i.e.*, infringement under s.27(2) of the *Copyright Act*) must meet the following test to be actionable:

... (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale.

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, para.81. TAB 22.

51. Although the Supreme Court’s reasoning was in reference to s. 27(2)(a) (“sell or rent out”), it is directly applicable to s. 27(2)(b) (“distribute to such an extent as to affect prejudicially the owner of the copyright”) as follows:

- a) The copies in issue in this instance are legal, as a result of s. 80.
- b) The alleged secondary infringer is, by virtue of s. 80, not “dealing with a product of infringement”. The copies are legal. In any event, the Plaintiffs have not adduced any evidence that any of the Defendants “[knew] or should have known that he or she [was] dealing with a product of infringement”.
- c) If “there must have been a sale” pursuant to s. 27(2)(a), it follows that there must have at least been a recipient of any distribution pursuant to s. 27(2)(b).

52. Black's Law Dictionary defines the term "distribute" as "1. To apportion; to divide among several. 2. "to deliver". 3. To deliver. 4. To spread out; to disperse." The Oxford English Reference Dictionary defines "distribute" as "1 give shares of; deal out. 2 spread about; scatter. 3 divide into parts; arrange; classify...."

Black's Law Dictionary, 7th Edition. TAB 23.

Oxford English Reference Dictionary, 2nd Ed. TAB 23.

53. The term "distribution" should be interpreted in its normal sense, which connotes the delivery of something to several persons. A single sale does not amount to "distribution".

R. v. McNiven, [1943] 81 C.C.C. 166 (Sask. King's Bench) citing *Marino & Yipp v. The King*, [1931], 4 D.L.R. 530, S.C.R. 48. TAB 24.

54. Under American law, the concept of "distribution" necessarily implies actual dissemination or transfer:

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

...

4(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other *transfer of ownership, or by rental, lease, or lending*;

17 U.S.C. 106(4)

55. This is an exclusive right in the USA, which is notably not the case in Canada, since the terms "distribute" or "distributing" do not occur in s. 3 of Canada's *Copyright Act* and occur in somewhat comparable context to the American law only in ss. 27 and 80. The two leading American copyright treatises clearly confirm distribution requires more than merely making available. Nimmer states that "[i]nfringement of [the distribution] right requires *an actual dissemination* of either copies or phonorecords," not a mere offering. Goldstein states that to "violate the distribution right ... an actual transfer must take place; a mere offer of sale will not violate the right".

P. Goldstein, 2 *Copyright* § 5.5.1 at 5:102

Nimmer on Copyright, § 8.11[a], at 8-137 (emphasis added) TAB 25.

National Car Rental v. Computer Associates, 991 F.2d 426 (quoting Nimmer) TAB 26.

56. The only Canadian cases that have found there to be a "distribution" under the *Copyright Act* of files in the online context involve the deliberate and intentional uploading of files to a BBS, where they could in turn be "widely dispersed", or the intentional provision of software to assist in the downloading of computer programs and packaging or compressing them for efficient storage and "ease of transmission". Both of these cases involved alleged criminal activity.

R. v. Pecciarich, (1995) 22 O.R. 3rd, 748. TAB 27.

R. v. J.P.M., [1996] N.S.J. No. 124 (N.S.C.A.). TAB 28.

57. Even if any Defendant has actually distributed anything in which one of the Plaintiff's holds copyright (which is denied), there is no evidence on record that even purports to meet the requirement that such distribution amount "to such an extent as to affect prejudicially the owner of the copyright" in the language of s. 27(2)(b).

There is no "making available" right of copyright holders in Canadian law

58. The Plaintiffs are, in effect, attempting to assert (though not claiming explicitly) an exclusive right of "making available". The mere "making available" of a music file to another person is not illegal or infringing in Canada. This is an exclusive right which is included in the World Intellectual Property Organization Performances and Phonograms Treaty [WPPT] that Canada has signed but not yet implemented or ratified. The Copyright Board of Canada has explicitly ruled that the "making available" right is not part of Canadian law:

A work is communicated not when it is made available, but when it is transmitted

Those who argue that a work is communicated when it is made available, for example, by storing it on a host server where it can be accessed by members of the public, rely both on an international treaty and on Canadian court decisions.

They quote Article 8 of the World Intellectual Property Organization (WIPO) Copyright Treaty adopted in December 1996. It provides that the right to authorize the communication to the public of a work includes making it available in such a way that members of the public may access it from a place and at a time individually chosen by them. However, the Treaty is not binding in Canada since it has been signed but not ratified by the Canadian Government.

SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)] 1 C.P.R. (4th) 417 at 448. TAB 29.

WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996 ("WCT"), Article 8. TAB 30.

WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996 ("WPPT"), Articles 7, 8 and 14. TAB 30.

59. Article 14 of the WPPT is virtually the same for present purposes as Article 8 of the WIPO Copyright Treaty, Neither have been implemented or ratified by Canada.

60. In fact, the WPPT sets forth separate rights of “reproduction”, “distribution”, and “making available” in Articles 7, 8, and 14 respectively confirming that these rights are entirely different from one another. The principle of *expressio unius exclusio alterius* clearly applies. The act of making available is very different from that of distribution or reproduction.
61. Millin’s description of “peer to peer services” (paragraph 8 of the Affidavits) uses the phrase “make those files available” and essentially confirms that these services do not entail any act that is illegal under Canadian law.

There is no illegal authorization in this case

62. Moreover, the Plaintiffs are suggesting in their claim for relief in paragraph 1(b)(iii) of the Statement of Claim (though apparently not mentioned elsewhere) that there may be infringement by “authorization” on the part of the Defendants who own Internet accounts by holding them responsible for activity taking place using this account. This is precisely that type of liability that the Supreme Court of Canada has refused to recognize in the *CCH v. LSUC* decision:

In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

CCH v. LSUC, supra at para. 43. TAB 22.

... even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library’s patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement.

CCH v. LSUC, supra at para. 45. TAB 22.

63. This principle is clearly applicable in the current case. Any person whose Internet account can be used by others, such as her children, her children’s friends, her babysitter, etc. or a neighbor using WI-FI cannot “control” the activity that takes place and there is nothing in the *CCH v. LSUC* ruling that would suggest that any person need to take active steps to assert such control. The fact that a person's computer could be sharing files even when the person thinks that the KaZaA program is closed or if the person is unaware in any event that sharing can take place is a perfect example of activity that cannot necessarily be “controlled” by

anyone. Since many computers may be using the same IP address, the holder of the Internet account cannot possibly control what is happening on these computers.

Affidavit of David Jones, paras. 10 and 11. *EFC MOTION RECORD*.

64. Quite apart from the *CCH. v. LSUC* decision, there are long standing common law and now statutory principles establishing that parents would not normally be held responsible for the file sharing activity of their children. Judicial notice may be taken of the fact that parents are likely to pay for Internet accounts their children, and that children are more likely than the parents to be engaged in downloading and file sharing (knowingly or not). In this context, parents need not and should not bear legal responsibility for such activity. Parents cannot generally be held liable, either strictly or vicariously, for the civil wrongs of their children except in the following three circumstances: first, using agency principles where the child was acting on behalf of the parent; second, if the parent directed or encouraged the child; and third, if they were negligent in their supervision of the child. .

Larry C. Wilson, “Parental Responsibility for the Acts of Children” (2000) 79 Canadian Bar Review 375. *TAB 31*.

Parental Responsibility Act, 2000, S.O. 2000, c.4. TAB 31.

The Court cannot provide rights and remedies that do not exist in the Copyright Act

65. It is axiomatic that copyright law can be invoked by owners only to the extent explicitly set forth in the statute. A court cannot infer or provide rights that are not provided for in the statute:

Mr. Hughes for the respondent in answer to a question from the Bench put it very well when he said that copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute. This creature of statute has been known to the law of England at least since the days of Queen Anne when the first copyright statute was passed. It does not assist the interpretive analysis to import tort concepts. The legislation speaks for itself and the actions of the appellant must be measured according to the terms of the statute.

Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357 at 372-373. *TAB A*.

66. The same is true in the United States:

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. See, *Teleprompter Corp. v Columbia Broadcasting System, Inc.*, 415 US 394, 39 L Ed 2d 415, 94 S Ct 1129 (1974); *Fortnightly Corp. v United Artists Television, Inc.*, 392 US 390, 20 L Ed 2d 1176, 88 S Ct 2084 (1968); *White-Smith Music Publishing Co. v Apollo Co.*, 209 US 1, 52 L Ed 655, 28 S Ct 319 (1908); *Williams & Wilkins Co. v United States*, 203 Ct Cl 74, 487 F.2d 1345 (1973), aff'd by an equally divided Court, 420 US 376, 43 L Ed 2d 264, 95 S Ct 1344 (1975). Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Sony Corporation of America v. Universal City Studios, Inc., (1984) 464 U.S. 417 at 431. TAB B.

Problems with Plaintiffs' Investigation

67. Whatever the nature of the activity allegedly engaged in by the 29 alleged infringers may be in fact and law, it is clear that the Plaintiffs have put no evidence whatsoever before this Court that such activity took place other than in relation to the Plaintiff's investigator. Moreover, it is not clear from the Millin affidavits that his knowledge of the investigations is personal knowledge.

68. The fact that only the agents of the Plaintiffs have allegedly downloaded any sound recordings from any of the defendants suggests that defendants have been manipulated into committing an activity that would not "normally" have otherwise taken place, or that the downloading occurred with the Plaintiffs consent. A comparable situation was noted in the *CCH V. LSUC* decision where it was suggested that such a practice meant that the alleged activity took place with the consent of the Plaintiffs, but the Court found that "it is not necessary to answer this question to dispose of this appeal". The question is therefore, at a minimum, open.

CCH v. LSUC, supra at para. 75. TAB 22.

69. The apparent theory of the Plaintiffs case is grounded on a notion of secondary infringement liability that attaches, as it were, to a place and not to a person. An IP address is analogous to a place, such as a hotel, apartment, office building, or a house. However, an IP address

cannot definitely establish the identity of the actual person involved in the complained of activity any more than a simple street address can necessarily identify the person who actually committed a wrong doing at that address.

The Plaintiffs' evidence is significantly deficient

70. Even if the Plaintiffs' investigation can reliably link an IP address to an account owner at a particular time (the possibility of which is emphatically denied by SHAW and also questioned by Rogers and Telus), it is clearly obvious that there is no necessary connection between such a linkage and any linkage to the actual person that may have engaged in the activity of which the Plaintiffs complain. Assuming that the account holder linked to particular IP address at a certain time is likely to be an adult individual (as opposed to a business), the actual person allegedly engaged in the allegedly infringing activity could be a relative, friend, baby sitter, guest, or other person with or without a colour of right to use the account holder's IP address at any given time. The person who engaged in the complained of activity might easily be someone with a "WI-FI" card who could utilize a defendant's Internet connection without detection. As is commonly known, such utilization can occur within a radius of approximately 100 metres. In an apartment building, this could allow for hundreds of other persons to gain access through a Defendant's account.

Affidavit of David Jones, at para.s.10,11 *EFC MOTION RECORD*.

Affidavit of David Shrimpton (TELUS), at para. 19-27.

71. The Plaintiffs bear the burden of showing that each Defendant - and *a fortiori* all 29 defendants - is the person who allegedly committed the copyright infringement or is somehow vicariously responsible for any alleged infringement committed by another or others using the IP address allegedly linked to a specific defendant's IP address on a specific occasion. The Plaintiffs also bear the burden of showing that the IP address will accurately identify the source of the alleged infringement. For all of these possible scenarios, the Plaintiffs have not offered any actual evidence, much less met their burden of proof on this issue.

Affidavit of David Shrimpton (TELUS), at para. 5.

72. Even if the underlying copyright issues were clear in the manner expressed by the Plaintiffs (which is denied), it would be offensive and contrary to *Charter* values and rights and to the rule of law to allow the Plaintiffs to force any of the 29 defendants into litigation merely to discover whether the named defendant is the correct party, and, if not, to find out who the correct party might be.

No evidence of copyright ownership

73. Since the Plaintiffs must show an extremely strong *prima facie* case of copyright infringement to succeed on this motion, it must be noted that the Plaintiffs have not submitted any admissible evidence of copyright ownership. The affidavit of Kathy Yonekura relies solely on blatant hearsay (paragraphs 5 and following) to establish alleged copyright ownership. In the instance of Warner Music Canada and the Warner group, (paragraph 9), she does not even allege that Warner is an exclusive licensee but rather that they “own or are licensees”. Mere licensees cannot sue for copyright infringement.

Affidavit of Kathy Yonekura. *PLAINTIFFS' MOTION RECORDS TAB 3.*

D. Vaver, *Copyright Law*, (Toronto: Irwin Law, 2000) at 239-241. *TAB C.*

74. No copyright registration certificates have been filed, and therefore the Plaintiffs cannot rely on any presumption as to the ownership or existence of copyright, as provided for in s. 53 of the *Copyright Act*. In the absence of such a presumption, the Plaintiffs in this instance have no admissible evidence as to copyright ownership. Moreover, there is nothing in any of the Plaintiffs' evidence to indicate that he or anyone else actually listened to the allegedly downloaded sound recordings to confirm that they were the same as the titles in which copyright ownership is alleged.

Copyright Act, s. 53. TAB D.

PART IV – ORDER SOUGHT

75. CIPPIC respectfully submits that:

- a) The Plaintiffs' motion should be dismissed;
- b) In the alternative, if an order for production is granted, that the defendants, in any cases on which the plaintiffs elect to go forward on a test case basis, shall be entitled to full

costs on a solicitor and client basis up to and including the completion of trial in any event of the cause, and that the Plaintiffs waive any possible damages in this test case litigation.

76. In support of its alternative position, CIPPIC submits that the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising its discretion to award costs, the Court may consider, among other factors, "whether the public interest in having the proceeding litigated justifies a particular award of costs".

Federal Court Rules, 1998, Rule 400(1) and 400(3)(h); TAB E.

77. The Supreme Court of Canada recently confirmed that the power to order interim costs is inherent in the nature of the court's equitable jurisdiction as to costs. It set out the criteria that must be present to justify an award of interim costs in public interest cases, as follows:

- a) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial;
- b) The claim to be adjudicated is *prima facie* meritorious (i.e., of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and
- c) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] S.C.J. No.76 (QL); *TAB F.*

78. This is a case that falls within the narrow range of public interest cases in which an interim cost award is justified, other than in the unlikely event that one of the defendants can afford to defend themselves. It is highly likely that any lawsuits in this case will result in settlements, given the high cost of litigation to individual defendants, notwithstanding that there may be viable defences on the facts and the law. The central question of whether the

activities complained of constitute copyright infringement may therefore never be determined, leaving the public without a clear understanding of their rights in respect of online file-sharing.

RESERVATION OF RIGHTS REGARDING REPRESENTATIONS

79. In view of the Court's March 1, 2004 Order that the Interveners may not file further evidence, and in view of the fact that transcripts of cross-examinations were not available at the time of filing these Representations, and in view of the fact that the Interveners must file their written representations in advance of other parties, the Intervener CIPPIC reserves its right to file a supplementary memorandum referring to evidence that may be filed by others and to seek the Court's leave to file such further material as may be advised up to and including at the hearing on March 12, 2004.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March 2004

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