Court of Appeal File No.: CA041923

COURT OF APPEAL

B E T W E E N:

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS and CLARMA ENTERPRISES INC.

RESPONDENTS
(PLAINTIFFS)

- and -

MORGAN JACK, DATALINK TECHNOLOGIES GATEWAYS INC. and DATALINK TECHNOLOGIES GATEWAYS LLC

RESPONDENTS
(DEFENDANTS)

- and -

GOOGLE INC.

APPELLANT
(RESPONDENT)

MOTION RECORD
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rule 36 of the Court of Appeal Rules

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NOTICE OF MOTION
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
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TAKE NOTICE THAT AN APPLICATION is hereby being made by the Proposed Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), pursuant to Rule 36 of the *Court of Appeal Rules*, B.C. Reg. 297/2001, *as amended* for an order:

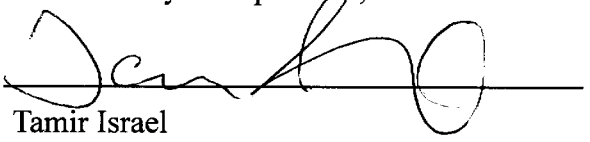
1. granting CIPPIC leave to intervene in this appeal;
2. permitting CIPPIC to file a factum of no greater length than 20 pages;
3. an order indicating that this motion be heard in writing, further to paragraph 26(1)(b) of the *Court of Appeal Act*, RSBC 1996, c. 77; and
4. any further or other order as this Court may deem appropriate.

AND TAKE NOTICE THAT that the following documentary evidence is being filed in support of this application:

1. the affidavit of David A. Fewer, Director of CIPPIC, sworn September 9, 2014; and
2. such further and other material as counsel may advise and this Court may permit.

The Applicant asks that the motion be heard in writing, further to paragraph 26(1)(b) of the *Court of Appeal Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2014



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(RESPONDENT)

AFFIDAVIT OF DAVID A. FEWER
(In support of application for leave to intervene)

I, David Anthony Fewer, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am Director of the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) based in 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 reviewed the relevant files, documentation and submissions and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded at the University of Ottawa's 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. 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, presently myself, as well as a Staff Lawyer, Tamir Israel. We are both called to the bar of Ontario and work for CIPPIC full time. As Director, I report to an internal Advisory Committee made up of faculty members of the Centre for Law, Technology and Society, as well as to an external Advisory Board composed of five highly respected and accomplished lawyers and academics in the technology law field from across North America. CIPPIC also regularly benefits from the expertise of a number of law students who are involved in CIPPIC activities as interns for academic credit, as research assistants, as summer interns and fellows, or as volunteers.

5. CIPPIC's core mandate is to advocate in the public interest in legal and policy debates arising at the intersection of law and technology. This is primarily furthered by ensuring public interest perspectives that would not otherwise be heard receive due consideration. 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 is deeply involved in research and advocacy on the nature and social impact of telecommunications networks and the manner in which the evolving legal landscape interacts with such activity.

6. Some of our general expertise in Internet policy issues is described below, with particular emphasis on activities relating to Internet intermediaries and questions of Internet jurisdiction. Given the far-reaching impact Internet intermediaries can have on activities in digital networks, a significant range of CIPPIC advocacy activities have included assessments of the proper role of these entities. This has included interventions at various levels of various Canadian courts, parliamentary testimony and active participation in policy-formation processes relating to Internet intermediaries in various international fora such as the Organization for Economic Co-operation and Development (OECD).

II. INSTITUTIONAL EXPERTISE

(a) Judicial

7. CIPPIC has been granted leave to intervene in a number of public interest and technology law related issues in the past, including:

(i) *R. v. Fearon*, S.C.C. File No. 35298, applying section 8 *Charter* protections to searches of mobile devices conducted incident to arrest;

(ii) *Voltage v. Doe*, 2014 FC 161, which adopted the test for third party discovery orders involving Internet intermediaries in the context of *en masse* peer-to-peer file-sharing lawsuits. The court adopted a range of new safeguards into the Norwich process designed to secure the due process and privacy rights of individual anonymous Does accused of copyright infringement;

(iii) *National Post et. al. v. Fournier*, F.C.A. File Nos. A-394-12 and A-395-12, an appeal which raised novel issues regarding the scope of copyright liability in the context of an online political discussion board, including the nature of Internet intermediary liability for content posted by users of political messaging platforms (Appeal abandoned by Appellants prior to oral arguments);

(iv) *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;

(v) *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 SMS text messaging. This involved a detailed assessment of the legal impact of Internet intermediaries as mere conduits for delivering messages between end users;

(vi) *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, on the need to ensure privacy rights are protected in the context of the open court principle, and the greater risk of secondary uses of information posed by the online publication of judicial decisions;

(vii) Five appeals heard in conjunction, examining 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;

(viii) *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;

(ix) *Warman* v. *Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.): an appeal addressing the proper balance between the need to preserve the privacy rights and free expression rights of anonymous online speakers with the need to facilitate legitimate allegations of defamation within the context of third party intermediary discovery orders; and

(x) *Dell Computer Corp.* v. *Union des Consommateurs*, 2007 SCC 34: wherein CIPPIC intervened to address the appropriate adaptation of consumer contract law principles to an online environment so as to take into account unique Internet issues, such as whether additional terms referenced through a hyperlink were 'external' to the contract; and

(xi) *BMG Canada Inc.* v. *Doe*, 2004 FC 488, 2005 FCA 193: CIPPIC intervened both at first instance and on appeal in order to ensure privacy safeguards were in place in a motion to compel a third party Internet intermediary to disclose the identities of anonymous online defendants.

8. Additionally, CIPPIC has also been active in the courts as counsel to primary parties:

(i) *Bell et al. v. Amtelecom et al.*, F.C.A. File No. A-337-13: CIPPIC is representing the Open Media Engagement Network (OpenMedia.ca), respondent in this appeal that challenges the application of a recently adopted Wireless Consumer Protection Code to pre-existing contractual arrangements by the Canadian Radio-television and Telecommunications Commission (CRTC);

(ii) *Authors Guild v. Google, Inc.*, No. 05-Civ.-8136 (DC) (S.D.N.Y. March 22, 2011): CIPPIC acted on behalf of a group of independent Canadian authors and for the Canadian Association of

University Teachers (CAUT) in opposing the proposed settlement to a U.S.-based class action settlement agreement between Google Inc. and the Authors' Guild that would have affected the rights of international copyright holders, including Canadian authors, as well as the privacy rights of Canadians. CAUT objected on the basis of this inclusion; and

(iii) *Lawson* v. *Accusearch*, 2007 FC 125: CIPPIC sought judicial review of the Office of the Privacy Commissioner's decision to refuse on jurisdictional grounds to exercise its investigatory mandate against an United States-based company collecting, using and disclosing the personal information of Canadians. CIPPIC successfully argued that in an online world, territorial location cannot immunize an organization from the privacy protections guaranteed to Canadians by PIPEDA where a real and substantial connection exists.

9. CIPPIC routinely advises and represents both individuals and organization regarding privacy issues. Recent and current retainers address issues such as the transparency obligations of ISPs to their customers under PIPEDA, non-profit compliance with S.C. 2010, c. 23, Canada's Anti Spam & Spyware Legislation (CASL) and attempts to insulate an individual's privacy from non-anonymized information published in a judicial decision online.

(b) Parliamentary Committees and Governmental Consultations

10. CIPPIC has had many opportunities to provide expert testimony and submissions to Parliamentary Committees and other governmental processes regarding the challenges posed by online environments for Canadians, a sampling of which includes:

(i) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the growing problem of identity theft (June 3, 2014);

(ii) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the evolving privacy implications of social media (Study: Privacy and Social Media, June 19, 2012);

(iii) testimony before the House Committee on Bill C-32, *An Act to amend the Copyright Act*, on striking the appropriate balance in copyright law and policy while taking proper account for competing interests of authors, owners, distributors, consumers, downstream creators and

innovators (Bill C-32, *Copyright Modernization Act*, March 8, 2011); and

(iv) testimony before the House of Commons Standing Committee on Industry, Science and Technology on proposed legislation aimed at providing new remedies for a number of online harms, including SPAM, phishing, malware, and unauthorized access to computer systems. (Bill C-27: *Electronic Consumer Protection Act*, September 28, 2009).

(c) Quasi-Judicial Tribunals

11. CIPPIC has also 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:

(i) submissions and testimony before the Canadian Radio-television and Telecommunications Commission in Telecom Notice of Consultation CRTC 2011-77 arguing the detrimental harm to downstream innovation and emerging online services that results from the imposition of usage-based rates that would deter Internet usage by Canadians;

(ii) submissions and testimony in Telecom Public Notice CRTC 2008-19 before the Canadian Radio-Television and Telecommunications Commission arguing for a normative regulatory net neutrality framework to prevent ISPs from undermining the communicative power of the Internet by unjustly discriminating against online protocols such as the peer-to-peer protocol;

(iii) a complaint under the *Personal Information Protection and Electronic Documents Act* applying existing privacy norms and principles to the new and emerging medium of online social networking (PIPEDA Case Summary #2009-008: *CIPPIC* v. *Facebook*); and

(iv) a complaint under the *Personal Information Protection and Electronic Documents Act* that sought to address privacy issues arising from the extra-territorial storage of Canadian data in foreign jurisdictions and subject to foreign state data acquisition laws (PIPEDA Case Summary #2008-394, *Outsourcing of canada.com e-mail services to U.S.-based firm raises questions for subscribers*).

12. Through these activities, CIPPIC has had a substantial impact to date on the development of Internet and telecommunications law and policy in Canada. Expertise gained from these activities is supplemented by CIPPIC's client-based advisory activities and its participation in international policy-making forums. CIPPIC staff members are frequently called upon to do presentations,

media interviews, and sit on panel discussions as experts in law and technology issues.

13. CIPPIC expertise is further supplemented by its Faculty advisors and, more generally, its access to the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society. CIPPIC relies upon this expertise and the multi-faceted perspective it has gained on the ways in which Canadians interact online and the ways in which legal and normative principles adapt to the challenges posed by such interactions in this intervention.

III. CIPPIC'S INTEREST IN THIS APPEAL

14. CIPPIC's historical concern regarding public policy issues arising at the intersection of law and technology places this appeal squarely within its mandate. Particularly salient CIPPIC activities include its judicial review application in *Lawson v. Accusearch*, 2007 FC 125 (real and substantial connection between U.S.-based data broker and PIPEDA); its intervention in *Crookes v. Newton*, 2011 SCC 47 (need for lower liability for those who merely link to defamatory content but do not publish it, as a contrary rule would undermine expressive online platforms); its intervention in *National Post et. al. v. Fournier*, F.C.A. File Nos. A-394-12 and A-395-12 (addressing in part liability of Internet intermediaries such as political discussion forums for content posted by users of such sites); and its interventions in *BMG v. Doe*, 2004 FC 488, 2005 FCA 193, *Warman* v. *Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.) and *Voltage v. Doe*, 2014 FC 161 (all of which addressed the need for proper protections in third party Internet intermediary discovery orders in order to safeguard user privacy, due process rights and freedom of expression).

IV. POSITION AND PROPOSED SUBMISSIONS

15. If permitted to intervene, CIPPIC will argue that:

(a) the world-wide impact of the injunction is contrary to public policy, principles of comity and equitable values and can detrimentally impact on the freedom of expression;

(b) the injunction too readily encompassed entire websites of the defendants; and

(c) the injunction too readily enlisted the assistance of a non-infringing third-party Internet intermediary as an enforcement tool.

16. I believe that CIPPIC's submissions will be of assistance to the Court in deciding the important

issues in this appeal. CIPPIC's submissions will be unique in that they will derive from its public interest mandate. CIPPIC will inform its submissions with its extensive experience articulating and advancing the public interest in technology law.

17. CIPPIC further asks that this application be heard in writing, as hearing this application in person would cause undue cost and delay.

18. CIPPIC's proposed intervention will not cause a delay in the hearing of this appeal nor prejudice the parties to this appeal. It will not take away the litigation from the parties. CIPPIC does not seek oral argument in this matter.

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

20. 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 9th day of September, 2014

)
)
)

David A. Fewer

Tamir Israel, Commissioner for Taking Oaths

Court of Appeal File No.: CA041923

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

Pursuant to Rule 36 of the Court of Appeal Rules

PART I – OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") applies for an Order granting it leave to intervene in this appeal.

2. If successful in its motion for leave to intervene, CIPPIC will assist the Court in its consideration of the issues before it by offering a valuable public interest perspective on the broader impact of this Appeal. CIPPIC will draw on its expertise as a technology law clinic in order to highlight the potential detrimental impact this type of court order can have on a range of Internet intermediaries and, centrally, on those individuals around the world who rely on such platforms to receive and impart information.

PART II – THE PROPOSED INTERVENOR

3. CIPPIC is a law and technology clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its core mandate is to advocate in the public interest where the law intersects with new technologies in ways that may detrimentally impact on the public interest. CIPPIC has intervened in the courts, testified before Committees of the House of Commons and Senate, participated in numerous quasi-judicial fora, helped shape Internet policy at the International level through participation in various Internet governance processes and produced numerous publications and public outreach documents on law and technology issues.

Affidavit of David A. Fewer, sworn on September 9, 2014, Motion Record, Tab 2 [Fewer Affidavit]

PART III – ARGUMENT

4. An applicant seeking leave to intervene under section 36 of the *Rules of the Court of Appeal*, B.C. Reg. 297/2001, *as amended*, must demonstrate either:

(a) that it has a direct interest in the litigation; or

(b) that it can make a valuable contribution to the proceedings.

In matters engaging the public interest, no direct interest is required. An Applicant must only demonstrate that its proposed intervention will provide a valuable contribution to the proceedings in order to qualify for intervenor status.

***Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, (in Chambers), para. 6; *Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers), paras. 17 and 19; *Rules of the Court of Appeal*, section 36**

5. Where no direct interest is engaged, a proposed intervention will be assessed based on its capacity to make valuable contributions to the proceeding without taking the matter away from the parties. These over-riding considerations will be coherently assessed on the following criteria:

1. the nature of the group seeking intervenor status;
2. whether the appeal legitimately engages the proposed intervenor's interests; and

3. the suitability of the issues in the appeal to an intervention.

A public interest group with expertise in the issues raised and a mandate that is implicated by the appeal is more likely to offer a valuable contribution on the public dimensions of an appeal. CIPPIC does not assert a direct interest, but submits that its contributions will be valuable in resolving the matters under appeal without taking the matter away from the parties.

***Director of Civil Forfeiture v. Lloydsmith*, 2013 BCCA 516, (in Chambers), paras. 6-8; *Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers), paras. 15-16 and 23; *Reference Re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335, para. 12**

A. SUITABILITY OF THE ISSUES IN THE APPEAL TO AN INTERVENTION

6. Where an appeal raises public interest issues, it will be more suitable to an intervention as public interest intervenors are better able to enhance the court's understanding of such issues. By contrast, where the matter under appeal does has no broader public dimension, an intervenor will have little of value to contribute to the proceedings as the parties directly affected by purely private matters are best placed to inform the court of the issues in question.

***Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, (in Chambers), para. 31 ("EarthCare does not have a direct interest in the outcome of the appeal but it does have a public interest perspective on two of the important legal issues on this appeal"); *Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers), para. 19**

7. While the underlying dispute between the Plaintiffs and the Defendants in the Court below is primarily a private matter, the injunction that is the subject of this Appeal is not. As recognized by Madam Justice Fenlon in issuing the order under appeal, the matter raises novel and difficult questions regarding the capacity of Canadian courts to order non-infringing Internet intermediaries to remove infringing content. This order in particular, and future orders that might be issued on its template, will affect not only the Appellant and Respondents in this Appeal, but also other Internet intermediaries, as well as individuals who generally rely on the platforms provided by Internet intermediaries to receive and impart information in Canada and abroad.

***Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para. 1; *Crookes v. Newton*, 2011 SCC 47, para. 36**

8. The matters canvassed the careful reasons under appeal are complex with wide-ranging public policy implications that a number of courts have been grappling with in jurisdictions around the world and at all levels of court. This Court recognized these broader potential implications in granting the Appellant leave to appeal: “The issues on appeal are important to the parties but, more significantly, are important to those engaged in e-commerce generally.”

***Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 295, (in Chambers) para. 19**

B. CIPPIC AND ITS INTEREST IN THIS APPEAL

9. Where a proposed intervenor can demonstrate, through its mandate, historical activities and composition, a sustained involvement in issues raised by the Appeal, it is more likely to be able to have the perspective and expertise necessary to assist the court in its resolution of the matters at issue. Similarly, where dimensions of the Appeal engage the legitimate interests of the proposed intervenor, its intervention will more likely assist the Court in its ultimate resolution of the matter. A public interest group with expertise in environmental law matters, for example, may have little expertise to offer in resolving a matter relating to systemic discrimination. Nor will the latter issue legitimately engage the interests of such an environmental group.

***Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, (in Chambers), paras. 22-23; *Director of Civil Forfeiture v. Lloydsmith*, 2013 BCCA 516, (in Chambers), paras. 9-10 and 25; *Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers), paras. 22, 23 and 25**

10. As noted above, the public interest dimensions of this Appeal impact directly on the use of a core feature of technologically advanced digital networks – Internet intermediaries – in order to facilitate enforcement of a private right. This raises fundamental questions regarding the appropriate role of Internet intermediaries and platforms in law enforcement, regarding the need to balance the instant and global reach of such intermediaries with national sovereignty, and the need to adopt rules that properly account for free expression and innovation on such platforms while still adequately protecting rights of litigants.

11. As a public interest technology law clinic, CIPPIC has extensive expertise in the matters

raised by this appeal. CIPPIC's mandate is to advocate in the public interest on legal and policy issues arising at the intersection of law and technology. In pursuit of this mandate, CIPPIC has been called upon to provide parliamentary testimony on a range of Internet law issues, has developed a range of public education and advocacy resources on technology law matters and has intervened in various courts on such matters. CIPPIC's composition adds to its depth of knowledge and expertise on such matters internal and external advisory boards consisting of leading experts in Canadian and foreign technology law.

Fewer Affidavit, Tab 2; *Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, (in Chambers), para. 22; *Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers), para. 21; *Director of Civil Forfeiture v. Lloydsmith*, 2013 BCCA 516, (in Chambers), para. 9

12. Some past CIPPIC activities that are particularly salient to the matter under appeal include its judicial review application in *Lawson v. Accusearch*, 2007 FC 125 (real and substantial connection between U.S.-based data broker and Canada); its intervention in *Crookes v. Newton*, 2011 SCC 47 (need for lower liability for those who merely link to defamatory content but do not publish it, as a contrary rule would undermine expressive online platforms); its intervention in *National Post et. al. v. Fournier*, F.C.A. File Nos. A-394-12 and A-395-12 (addressing in part liability of Internet intermediaries such as political discussion forums for content posted by users of such sites); and its interventions in *BMG v. Doe*, 2004 FC 488, 2005 FCA 193, *Warman* v. *Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.) and *Voltage v. Doe*, 2014 FC 161 (all of which addressed the need for proper protections in third party Internet intermediary discovery orders in order to safeguard user privacy, due process rights and freedom of expression, within the context of *Norwich* orders).

Fewer Affidavit, Tab 2

C. CONCLUSION

13. CIPPIC's activities have furnished it with significant expertise in the matters in question that CIPPIC will draw upon if its intervention is granted. Moreover, the public dimensions of this appeal intersect directly with CIPPIC's mandate and legitimate interests. As noted below, CIPPIC's proposed intervention will limit itself to the issues raised by this Appeal. If granted leave, it will rely

on its expertise and experience as a public interest technology law clinic to offer a perspective on these issues that are distinct from that of the parties on the public dimensions of this Appeal. The Respondent in this matter is primarily interested in enforcing its rights. While the Appellant's interest intersects more directly with the broader matters under Appeal, CIPPIC can address issues relating to the utility of the Appellant's platform that are distinct from it and more directly focused on the impact on end users of the Appellant's platform as well as on other similarly situated platforms who will be subject to future applications of the framework for injunctions developed by the court below.

D. CIPPIC'S PROPOSED SUBMISSIONS

14. If granted leave to intervene, CIPPIC will argue that the court's equitable discretion to issue injunctions cannot – and should not – be used to enlist Internet intermediaries in the enforcement of rights they have not violated. Specifically, CIPPIC will argue that there must be carefully circumscribed limits on the extent to which third party Internet intermediaries can be used as enforcement tools for private rights holders. Care must be taken where equitable relief is sought and is likely to detrimentally impact on fundamental rights such as free expression. As the Supreme Court of Canada acknowledged in *Pro Swing Inc. v. Elta Golf Inc.*, in the context of assessing whether to exercise its equitable jurisdiction in order to enforce a foreign injunction with global effect:

> Since equity is about ethics and the prevention of unconscionable conduct, it may be tempting to spring into action to remedy conduct by Elta that looks like blatant defiance of the law and the judicial system. However, care must be taken to ensure that the law and the justice system are not harmed by engaging them too quickly...

Internet intermediaries, sitting as they do at the crux of all our digital interactions, provide an easy avenue for enforcement of legal wrongs. Their inherently global reach provides an easy one-stop-shop for removing unwanted content from the world. However, if they are engaged as tools of enforcement too readily and without careful limits, unintended consequences to the public interest will ensue.

***Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, para. 33**

15. If granted leave, CIPPIC proposes to address four areas of concern regarding the potential

detrimental impact raised by the injunction under consideration. CIPPIC will argue that:

(a) the world-wide impact of the injunction is contrary to public policy, principles of comity and equitable values and can detrimentally impact on the freedom of expression;
(b) the injunction too readily encompassed entire websites of the defendants; and
(c) the injunction too readily enlisted the assistance of a non-infringing third-party Internet intermediary as an enforcement tool.

CIPPIC does not intend to address matters relating to jurisdiction *simpliciter* in this context, beyond issues of comity raised by the world-wide impact of the order under review.

16. **Global impact.** If granted leave to intervene, CIPPIC will argue that the world-wide impact of the order under review is problematic and, as formulated, inconsistent with principles of comity, equity and free expression. When issuing equitable remedies such as injunctions, courts must consider the appropriateness of a given remedy including, where private international law considerations are engaged, the principle of comity. British Columbia courts have recognized the complications inherent in asking a California court to enforce a non-monetary judgment such as that at issue here. As a matter of comity, if the Appellant were to refuse compliance with the injunction in question, it will be in contempt of court. Primary enforcement of the injunction will fall to a California court. Regardless of whether a California court is or is not likely to ultimately enforce such an order, issuing the injunction violates principles of comity, as a Canadian court asked to enforce a comparable injunction issued by a foreign court is likely to refuse to do so. Canadian courts have refused, for example, to enforce an Ohio court order deemed to provide worldwide protection to a U.S. trademark (in the absence of a binding consent order by the defendant).

***Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, paras. 40, 56 and 58; *Ruloff Capital Corp. v. Hula*, 2013 BCSC 322, paras. 60-62**

17. Nor is it advisable for Canadian courts to enforce, as a matter of comity, the type of order at issue here. This court has recognized in the past the "crippling effect" to freedom of expression that arises

when online expression is subjected to laws in multiple competing jurisdictions. The application of injunctions to Internet intermediaries such as the Applicant creates just such a reality as the intermediary provides an immediate vehicle for, on the one hand, global enforcement of Canadian law and, on the other, Canadian enforcement of global laws. This can be deeply problematic even where enforcing a foreign order will not breach the law of the domestic jurisdiction. For example, Canada protects copyright term for a period of fifty years following the death of the author of a work, whereas in the United States copyright term subsists for seventy years following the death of the author. An injunction against an online Canadian platform accessible from the United States could easily force the removal of content that is in the public domain in Canada, but remains protected by copyright in the United States. Were a U.S. court to issue such an order, its enforcement by a Canadian court would not 'breach Canadian law'. However, it *would*, in effect, deprive Canadians of the balance inherent in Canadian copyright law. Such an order should not be issued, nor should it be enforced.

***Braintech Inc. v. Kostiuk*, 1999 BCCA 169, para. 63; *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para. 143; *Copyright Act*, R.S.C. 1985, c. C-42, section 6; 17 U.S.C. § 302(a) (U.S.)**

18. As noted by the Supreme Court of Canada in *Pro Swing* with respect to trademark protection:

> Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems.

The framework for worldwide injunctions against non-infringing Internet intermediaries adopted here seeks to do just that – solve all the challenges of rights holders through equitable jurisdiction.

***Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, paras. 52-53 and 58**

19. **Applying the injunction to entire websites.** The order under review too readily encompasses entire websites. The order prohibited the Defendants from "operating or carrying on business through any website" and included a list of twenty-seven domain names deemed to be websites operated by the Defendants. In such contexts, there is a tangible risk of over-broad takedown. Great care must be taken to ensure that non-infringing content is not affected by a removal order. This is particularly concerning

where, as here, the defendants are not present to defend the content and nature of the impugned websites. Websites, as opposed to web pages, can often include a diverse mix of infringing and non-infringing content and overbroad removal can be contrary to freedom of expression rights.

***Equustek Solutions Inc. v. Jack, Order of Mr. Justice Tindale,* December 13, 2012, B.C. Supreme Court File No. S112421, Motion Book of the Appellant, Motion for Leave to Intervene, B.C. Court of Appeal File No. CA041923, June 19, 2014, Tab 4**

20. Where a first party operator is ordered to take down or limit access to a website, that party is well-placed to explain the nature and scope of the impugned site. It can explain, for example, the difference between a domain name of general application and purpose where the impugned product is listed for sale on a single page, a discussion or review site where the impugned product is merely described or discussed, and a domain name dedicated to the sale of the product. Each of these may have different legal salience and some may be more conducive to a removal order than others yet each will look similar from the perspective of a search engine as each will return search results associated with the impugned product. Where the defendant is not present to defend itself, the obligation falls to the court to ensure, on its own accord, that impact of the order is not overbroad. In addition, where entire domain names become the object of removal orders, some mechanism must be adopted to account for future uses of these domains. Will it fall to the future owner of 'protocolconverter.com' or 'ethernetinterfaces.com', whoever that may be in whatever country in the world, to discover why its domain is blocked and initiate new proceedings in British Columbia to unblock it? Were Google to proactively unblock this hypothetical owner's domain, do they risk contempt of court?

***Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, para. 59**

21. **Intermediaries as Enforcement Tools.** Historically, it has been recognized that Internet and other communications intermediaries should have limited liability for interactions that are merely facilitated by their respective platforms and services. More recently, these limitations have been codified in a few legislative regimes. Such liability limitations have been adopted in part out of considerations of fairness to the intermediaries, which are not the ultimate source of such interactions but merely innocent facilitators. However, these liability limitations have also played a vital role in

preserving the expression and privacy rights of downstream users of such platforms. The presence of liability, in its limited intermediary format, as a precursor to the imposition of content removal obligations has therefore played a central role in securing downstream freedoms. The injunction under review effectively bypasses this important safeguard. Moreover, it does so under threat of quasi-criminal contempt and accompanying stigma if any elements of the injunction are refused.

***Crookes v. Newton*, 2011 SCC 47, paras. 20-12, 33-36; *R. v. TELUS Communications Co.*, 2013 SCC 16, para. 41**

22. Injunctions regarding access to content implicate freedom of expression and must generally be used with restraint. These should not be used to co-opt non-infringing Internet intermediaries as tools to enforce private wrongs. Other options exist for enforcement of private rights online – options that do not raise the same public interest concerns. If granted leave, CIPPIC will elaborate on these other options, as well as on the need to carefully curtail the use of injunctions in this manner.

23. Finally, CIPPIC asks that this application be heard in writing to minimize cost and delay.

***Court of Appeal Act*, paragraph 26(1)(b)**

PART IV – COSTS

24. 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

25. CIPPIC respectfully requests an Order from this Honourable 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 10h day of September, 2014.

Tamir Israel

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PART VI – TABLE OF AUTHORITIES

Authority		Reference in Argument
	Cases	**Para.**
1	*Braintech Inc. v. Kostiuk*, 1999 BCCA 169	17
2	*Crookes v. Newton*, 2011 SCC 47	7, 21
3	*Director of Civil Forfeiture v. Lloydsmith*, 2013 BCCA 516, (in Chambers)	5, 9, 11
4	*Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063	7, 17
5	*Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 295, (in Chambers)	8
6	*Equustek Solutions Inc. v. Jack, Order of Mr. Justice Tindale*, December 13, 2012, B.C. Supreme Court File No. S112421, Motion Book of the Appellant, Motion for Leave to Intervene, B.C. Court of Appeal File No. CA041923, June 19, 2014, Tab 4	19
7	*Friedmann v. MacGarvie*, 2012 BCCA 109, (in Chambers)	4-6, 9, 11
8	*Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557, (in Chambers)	4, 6, 9, 11
9	*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52	14, 16, 18, 20
10	*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335	5
11	*Ruloff Capital Corp. v. Hula*, 2013 BCSC 322	16
12	*R. v. TELUS Communications Co.*, 2013 SCC 16	21
	Legislation	
13	Duration of Copyright: Works created on or after January 1, 1978, 17 U.S.C. § 302(a) (U.S.)	17
14	*Copyright Act*, R.S.C. 1985, c. C-42, section 6	17
15	*Court of Appeal Act*, paragraph 26(1)(b)	23
16	*Rules of the Court of Appeal*, section 36	4

PART VII – LEGISLATIVE PROVISIONS

17 U.S.C. § 302(a) (U.S.) – Duration of Copyright: Works created on or after January 1, 1978

(a) **In General.—** Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

***Copyright Act*, R.S.C. 1985, c. C-42, section 6**

TERM OF COPYRIGHT	DURÉE DU DROIT D'AUTEUR
6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.	**6.** Sauf disposition contraire expresse de la présente loi, le droit d'auteur subsiste pendant la vie de l'auteur, puis jusqu'à la fin de la cinquantième année suivant celle de son décès.

***Court of Appeal Act*, RSBC 1996, c 77, section 26**

Limiting argument

26 (1) Before the hearing of an appeal or application, the court or a justice may

(a) limit the time for the hearing of the appeal or for the hearing of argument by any party, or

(b) direct that argument be submitted in writing.

(2) During the hearing of an appeal or application, the court or a justice may

(a) limit the time for argument by any party,

(b) decline to hear further argument by a party either generally or on a particular issue, or

(c) direct that argument be submitted in writing.

Rules of the Court of Appeal*, B.C. Reg. 297/2001, *as amended

Applications for intervenor status

36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

(2) A party seeking leave under subrule (1) to intervene in an appeal must, within 14 days after the filing of the appellant's factum,

(a) prepare

(i) a notice of motion in Form 6, and

(ii) a memorandum of argument in Form 18,

(b) file 2 copies of that notice of motion and memorandum of argument for use by the court plus such additional copies of those documents as are required for the purposes of paragraph (c), and

(c) serve one filed copy of the notice of motion and memorandum of argument on each of the other parties.

(3) In any order granting leave to intervene, the justice

(a) is to specify the date by which the factum of the intervenor must be filed, and

(b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.

(4) An intervenor must file a factum in Form 10 on or before the date referred to in subrule (3) (a).

(5) Unless a justice otherwise orders, an intervenor

(a) must not file a factum that exceeds 20 pages,

(b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and

(c) is not to present oral argument.

[am. B.C. Reg. 62/2002, s. 3.]