

FEDERAL COURT OF APPEAL

BETWEEN:

RICHARD WARMAN and NATIONAL POST COMPANY

APPELLANTS

- and -

MARK FOURNIER and CONSTANCE FOURNIER

RESPONDENTS

WRITTEN REPRESENTATIONS

PART I – THE NATURE OF THIS MOTION

1. By way of this motion, the Applicant, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order, in the form attached as Schedule "A" to the Notice of Motion, for leave to intervene in this important precedent-setting proceeding.

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

PART II – THE FACTS

2. The Applicant seeks leave to intervene in order to make argument on points of law and fact.

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

3. CIPPIC is a legal clinic based at the Centre for Law, Technology and Society at the University of Ottawa. CIPPIC's mandate is to research and advocate in the public interest on important public policy issues arising from the intersection of law and technology. CIPPIC's activities in support of its mandate include intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important public interest points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will affect copyright and fair dealing in online discussions and, by extension, the ability of the general public to use the Internet as a forum for interaction and debate.

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, paras. 4-7

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

Affidavit of Tamir Israel, Applicant's Motion Record, Tab 2, paras. 8-18

PART III – SUBMISSIONS

5. Under Rule 109 of the Federal Court Rules, 1998, the Court has the power to grant leave to any person to intervene in a proceeding.
6. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding.

Apotex Inc. v. Canada (Minister of Health), [2000] F.C.J. No.248 (QL) (F.C.T.D.)

7. Intervention ought to be allowed where the potential intervener can bring a distinct perspective and expertise that will assist the court. In addition, a proposed Intervener must demonstrate an interest in the matter in which it proposes to intervene, nor can this interest be merely 'jurisprudential' in nature.

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

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

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

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

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

10. CIPPIC has expertise in the legal and factual matters at issue in this motion. CIPPIC has a long track record of participation in public interest matters involving copyright and fair dealing vis-à-vis the internet that demonstrates a genuine interest in such litigation that goes beyond a mere “jurisprudential interest”.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, paras. 4-18

11. In addition, CIPPIC’s interest in copyright matters that impact on technology and the public interest has been recognized in a number of previous occasions. For example, CIPPIC was recognized as a public interest intervener by the Supreme Court of Canada in five recent copyright-related appeals (heard in conjunction), which raised issues related to the application of copyright concepts to a range of online activities: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc., v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; and *Re: Sound v. Motion*

Picture Theatre Associations of Canada, 2012 SCC 38. CIPPIC’s copyright expertise has also been recognized in its ongoing intervention in *Voltage v. Doe*, Federal Court File No. T-2058-12 (legitimacy of mass litigation copyright monetization models; need to protect online anonymity in third party discovery).

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

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

14. The interests of the Respondents to the appeal are personal interests. They are defendants to an action for copyright infringement. As such, they are not well placed to address the broader public interest implications of this matter for online discourse.

15. CIPPIC, in contrast, will draw on its institutional expertise and mandate to provide the court with a perspective on the impact the issues before it may have on online discourse, various Internet platforms and, more generally, on online innovation.

16. If granted leave to intervene, CIPPIC will seek to make the submission on the following legal issues:

- a. the proper application of the statutory limitation period set out in subsection 41(1) of the *Copyright Act*, R.S.C. 1985, c. C-42 to works published on the Internet;
- b. the scope of copyright liability that an intermediary can incur for a work posted to its site by an arm’s length party;
- c. the interpretation of “distinctive”, as stated in the definition of “work” in section 2 of the *Copyright Act*;

- d. what constitutes ‘substantial’ reproduction under the *Copyright Act*;
 - e. the interpretation of statutory conditions precedent to the fair dealing exceptions, as listed in section 29 and sections 29.1 and 29.2 of the *Copyright Act*; and
 - f. whether minor excerpting for the purpose of news reporting or criticism should be considered ‘fair’ dealing.
17. Each of these issues can have direct and immediate implications for the Internet discourse and online innovation. The recognition of the ‘ongoing reproduction’ rule suggested by the Appellants will effectively end the availability of statutory limitations for copyright infringements online, by transforming content hosting into a daily act of reproduction.

Memorandum of Fact and Law of the Appellant, National Post Company, paras. 36, 43-44
Memorandum of Fact of Law of the Appellant, Richard Warman, para. 26

18. The National Post proposes that the Respondent is liable not only for the excerpted version of the Kay Work which it reproduced on April 18, 2010 upon receiving notice of infringement, but also for the initial full reproduction of the article, which was posted to the Respondent’s online discussion forum by a third party. This imposes primary liability on the Respondent for what is, at best, secondary liability, as there is no evidence the Respondent had any specific knowledge of the infringing work posted by one of its third party members prior to notification of infringement. The protection offered to online intermediaries such as the Respondent from liability for content posted by others to their platforms has been a cornerstone of the innovative and expressive force of the Internet.

Memorandum of Fact and Law of the Appellant, National Post Company, paras. 36, 44-45
***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, paras. 120-127**
***Warman v. Fournier*, 2012 FC 803, paras. 7, 22**

19. The definition of ‘distinctive’ proposed by the National Post appellant is expansive and, if adopted, threatens to expand the scope of copyright protection over titles attached to works that do not warrant protection. Additionally, the decision in the Court below correctly states that no substantial reproduction has occurred where only the ‘background’ or ‘introductory’ elements of an article are excerpted alongside the title of the work are reproduced. Excerpting is a common means of conveying information in online mediums and where merely factual or cursory elements are reproduced, no substantial copyright interest is engaged.
20. The overly narrow interpretation of ‘news reporting’ advocated by the National Post appellant would undermine several Supreme Court of Canada judgements calling for a broad and expansive interpretations of the purposes listed in section 29 of the *Copyright Act*.
21. Similarly, an overly restrictive interpretation of the attribution requirements listed in sections 29.1 and 29.2 of the Act will greatly undermine the utility of online discourse and exchange while ignoring the underlying purpose of these requirements – to indicate the source of a citation. Source identification by means of hyperlink not only meets these requirements, but exceeds them by *directly* taking the reader to the *actual* source. In addition, a hyperlink explicitly includes the Uniform Resource Locator or ‘textual address’ of the source document to which it points.

22. Finally, minor excerpting for the purpose of news reporting or criticism should not be considered an ‘unfair dealing’. To hold so would be to render significant proportions of online communication liable to copyright suit or, more accurately, to censorship as anyone who dislikes the manner in which their works are being discussed will be able to sue. In addition, such a finding would undermine important innovative online platforms that rely on excerpting as a means of conveying or aggregating news or discussion from diverse sources across the Internet.

23. CIPPIC submits, on the basis of the foregoing, that its participation in this appeal will assist the Court in its determination of important and precedent-setting legal issues. CIPPIC will draw on existing jurisprudence, as well as its knowledge and expertise with copyright issues. In this manner, CIPPIC proposes to offer useful submissions that are different from those of other parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2013.

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