

Internet and E-Commerce Law in Canada

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• AN OVERVIEW OF THE *BMG* CASE •

Linda Wright

Legal Editor, LexisNexis Canada Inc.

*Editor's note: The *BMG v. John Doe* case has generated enormous interest in both the legal community and the general public. The editor-in-chief asked lawyers involved in both sides of the case to provide their perspective on the recent decision and its implications. Thanks to Linda Wright for preparing an excellent overview on the trial and appellate decisions.*

BMG Canada Inc. v. John Doe, [2004] F.C.J. No. 525 (QL), [2004] 3 F.C.R. 241; app'l dismissed, [2005] F.C.J. No. 858 (C.A) (QL). The reasons of

the Federal Court of Appeal, in the appeal from the lower level decision issued by Judge von Finckenstein, were delivered on May 19, 2005.

THE FACTS

The lower level court had denied a motion brought by a number of corporations in the recording industry business. These plaintiffs had sought disclosure by certain ISPs of the identity of customers said to be guilty of copyright infringement by trading in music downloaded from the Internet. The plaintiffs could not identify these Internet users because they operated under pseudonyms related to software. The plaintiffs sought relief by relying on *Federal Court Rules, 1998*, SOR/98-106, Rules 233 and 238. The plaintiffs said that each of these unidentified defendants had downloaded in excess of 1,000 songs onto home computers. It was said that the defendants utilized the KaZaA and iMesh file-sharing programs, which allowed them to share computer files with others connected to a peer-to-peer network. The defendants possessed software by which they could search the pool of shared files by title or artist and it was submitted that multiple transfers to other users could take place simultaneously from a user's computer.

It was raised by all parties that Internet service provider ("ISP") account-holders expect that their identities will be kept confidential. This expectation is based on both ss. 3 and 5 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") and on their ISP account

• In This Issue •

AN OVERVIEW OF THE <i>BMG</i> CASE <i>Linda Wright</i>	37
A GREEN LIGHT FOR FILE SHARING LAWSUITS <i>Peter Ruby and Richard Naiberg</i>	40
THE FEDERAL COURT OF APPEAL DISMISSES APPEAL IN FILE SHARING PRELIMINARY MOTION — BUT LEAVES DOOR OPEN TO FUTURE LAWSUITS <i>Howard Knopf</i>	42

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agreements. But, under PIPEDA, para. 7(3)(c), an ISP may disclose personal information if so required by court order.

A potential plaintiff may seek pre-action discovery to ascertain a defendant's identity by way of an equitable bill of discovery, but once an action has been commenced the plaintiff must follow the procedure set out in Rule 233 or 238. However, the same principles should apply to a Rule 238 application as to an equitable bill of discovery:

- the applicant must establish a *prima facie* case against the unknown alleged wrongdoer;
- the person from whom discovery is sought must be more than an innocent bystander;
- that person must be the only practical source of information;
- that person must be reasonably compensated for expenses arising out of compliance with the discovery order; and
- the public interests in favour of disclosure must outweigh legitimate privacy concerns.

The plaintiffs argued that Rule 233 gave them access to the information they sought, but that rule compels the disclosure of documents that are in existence. In this case, there were no pre-existing documents linking an IP (Internet Protocol) address to an ISP customer.

TRIAL COURT DECISION

The trial division judge denied the plaintiffs' motion. In his reasons, Judge von Finckenstein stated that the plaintiffs had not made out a *prima facie* case: the content of the plaintiffs' affidavits was deficient. The affidavits, deposed to by the President of an on-line anti-piracy protection company, were based upon information gained from his employees and accordingly consisted of largely hearsay. While hearsay is admissible under Rule 81(1), if the grounds for the belief are set forth, these were insufficiently stated herein. The judge opined that there must have been other MediaSentry employees who would have been in a better position to swear the affidavits and undergo cross-examination thereon. No explanation was given for non-compliance with the best-evidence rule. Furthermore, the affiant acknowledged that he had not listened to any of the files copied from the alleged infringers and there was accordingly no evidence before the court as to whether the files offered for uploading were infringing files of plaintiffs.

There was no evidence of connection between the pseudonyms and the IP addresses. Neither the affidavits nor the cross-examination thereon provided clear evidence as to how the pseudonyms of the KaZaA or iMesh users were linked to the IP addresses identified by MediaSentry. While the affidavit indicated that the pseudonym (Geekboy@KaZaA) was identified as the IP address 24.84.179.98 and that, according to the American Registry for Internet Numbers' public database, that address had been assigned to Shaw Communications (one of the ISPs from which disclosure is sought), no evidence explained how the pseudonym was linked to the IP address in the first place. Given these circumstances the court refused to order disclosure of the name of the account-holder of IP address 24.84.179.98 thereby exposing that person to litigation.

On the question of whether there was evidence that copyright had been infringed, the plaintiffs submit that the alleged infringers: installed the peer-to-peer application on their computers; copied files to "shared directories"; used ISP services to connect their computers to the Internet; ran the peer-to-peer application while on the Internet; and made files in the shared directories available for copying, transmission and distribution to any one of millions of users of the peer-to-peer service. It was argued that there was copyright infringement by this reproduction, authorization of reproduction and distribution of unauthorized copies of sound recordings. Further, there was the possession, for the purpose of distribution, of unauthorized copies which the infringers either knew or should have known were infringing.

The judge acknowledged that copyright law is a creature of statute and it does not assist the interpretive analysis to import tort concepts. Under s. 80(1) of the *Copyright Act*, R.S.C. 1985, c. C-42, the downloading of a song for a person's private use does not amount to infringement. There was here no evidence that the alleged infringers either distributed or authorized the reproduction of sound recordings. Their action was to place personal copies into shared directories accessible by other computer users: the element of authorization is missing.

The judge stated that absent a positive act by the owner of the shared directory, such as sending copies or advertising the material's availability for copying, there is no distribution. The exclusive right of making available is covered by the World Intellectual Property Organization Performances and Phonograms Treaty of 1996: it remains to be implemented in Canada and so forms no part of Canadian

copyright law. He stated that secondary infringement had not been made out since knowledge on the infringer's part, a necessary condition under s. 27(2) of the *Copyright Act* was not established.

Second, the Internet access providers (subjects of the discovery motion) were not mere bystanders but rather the means by which downloaders and uploaders access the Internet and contact one another.

Third, the affidavits filed in support of this motion failed to provide the information which would allow the court to make a determination as to whether the ISPs were the only practical source of the names behind the pseudonyms.

Fourth, as to reasonable compensation for expenses, it would not be easy to provide the name and address of an account-holder who used a specific IP address at a given time. The point was made in an affidavit filed by Telus that, while it can identify who opened an account, it would be incapable of identifying who was using the computer at the time of the alleged infringement. For example, the account-holder could be an institution or there could be a local area network having numerous users.

Fifth, privacy cannot be used as a shield against civil or criminal liability. Both statute and case law require the court to balance privacy rights against the rights of other individuals and the public interest. Reference was made to a number of Canadian cases in which courts have ordered third parties to disclose documents identifying the name and address of a defendant previously identified only by an IP address.

The plaintiffs have a legitimate copyright in their works and are entitled to protect it against infringement. But, before ordering disclosure, the court must be satisfied that the information to be disclosed is reliable. Any order made should include appropriate restrictions and provisions for confidentiality. The evidence in this case had been gathered from October to December, 2003, but the notice of motion was filed only in February, 2004. This delay made it more difficult to obtain the requested information and also decreased its reliability. There was a serious possibility that an innocent account-holder might be identified. In the result, the privacy concerns outweighed the public interest.

In additional comments, the judge indicated that had he granted the order asked by plaintiffs, it would have been subject to restrictions in order to safeguard the privacy interests of the as yet unnamed defendants. An invasion of privacy should always be as limited as possible. It would also have provided that only the Internet pseudonyms appear as defendants in the statement of claim. An annex (protected by the confidentiality or-

der) would have been added to the statement of claim relating each pseudonym to the name and address of an ISP account-holder. Finally, the ISPs would not have been required to provide affidavits in support of their findings.

THE APPEAL

The plaintiffs appealed Judge von Finckenstein's decision dismissing the plaintiffs' motion for an or-

der requiring Internet service providers to disclose to the plaintiffs the identities of their customers participating in Internet music file sharing. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) had status as an intervener on the appeal. The Federal Court of Appeal dismissed the appeal, without prejudice.

[*Editor's note:* Linda Wright is a Legal Editor with LexisNexis Canada Inc., Markham, Ontario.]

• A GREEN LIGHT FOR FILE SHARING LAWSUITS •

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The Federal Court of Appeal in *BMG Canada Inc. v. John Doe*¹ unanimously lifted the legal barriers, erected by the earlier decision of Justice von Finckenstein (the "Motion Judge"), to pursuing copyright infringement actions against on-line infringers of copyright works ("Internet Infringers"). There were four crucial elements to the Motion Judge's decision. The Federal Court of Appeal dealt with these issues as follows:

- The Motion Judge made conclusions to the effect that Canada's existing copyright law was insufficient to permit the recording industry to sue Internet Infringers for copyright infringement. The Federal Court of Appeal vacated these conclusions.
- The Motion Judge held that privacy rights enjoyed by Internet Infringers trumped the recording industry's copyright interests. The Federal Court of Appeal reversed this finding.
- The threshold test applied by the Motion Judge before he would order an Internet service provider ("ISP") to disclose the identity of an Internet Infringer was very high. The Federal Court of Appeal lowered the threshold.
- The Motions Judge found that certain key elements of the evidence on the motion before him were hearsay and therefore inadmissible. While the Federal Court of Appeal accepted that some of the evidence was hearsay, and thus dismissed the appeal, the court invited the recording industry to return to the court with improved evidence. Such an opportunity is rarely granted.

The Federal Court of Appeal entirely accepted the recording industry's position in principle, but found the evidence in the record to be defective. The court found that it was permissible for the industry to seek disclosure of the identity of Internet Infringers where "...the plaintiffs will be frustrated from pursuing their actions because they are unaware of the identity of the people they wish to sue".² The court dismissed the appeal but allowed the recording industry to adduce fresh evidence and again seek the names and addresses of the Internet Infringers — either by means of a Rule 238 examination for discovery of a non-party or equitable bill of discovery.

The court's Reasons for Order provide a roadmap for the recording industry to follow in order to obtain an order compelling the disclosure of the identities of Internet Infringers. The principal aspects of the decision are discussed below.

COPYRIGHT

The Federal Court of Appeal expressly addressed the conclusions of the Motion Judge relating to copyright law. The court provided a number of examples to demonstrate that it was premature for the Motion Judge to have reached any conclusions with respect to copyright without having heard the full evidence and legal argument that will be presented at trial. In particular, while not reaching any final conclusions, the Court of Appeal commented that:

- the Motions Judge did not consider all the requirements of s. 80(1) of the *Copyright Act*, for example, that the defence is only available to persons using an "audio recording medium";

- the Motions Judge had not addressed s. 80(2) of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended (a provision that specifies the circumstances where the s. 80 private copying defence is not available) when he considered the scope and applicability of s. 80 of the *Copyright Act*;
- Internet Infringers may be found to be authorizing copyright infringement because they "...invited and permitted other persons with Internet access to have the musical works communicated to them and be copied by them";³
- "distribution" may not require a positive act, and in any event, making copies available on shared disk drives may be such a positive act; and
- under s. 27(2) of the *Copyright Act* Internet Infringers may be liable for secondary copyright infringement even without actual knowledge of infringement.

Prior to the appeal, the recording industry was concerned that the motion decision might have acted as a precedent stating that downloading from the Internet does not infringe copyright. The Court of Appeal removed that concern: The court stated that "...if this case proceeds further, it should be done on the basis that no findings to date on the issue of infringement have been made".⁴

BALANCING COPYRIGHT AND PRIVACY

With respect to the balance between privacy and copyright, the Court of Appeal tipped the balance in favour of copyright owners.⁵

...Intellectual property laws originated in order to protect the promulgation of ideas. Copyright law provides incentives for innovators – artists, musicians, inventors, writers, performers and marketers – to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruit of their efforts, their incentive to express their ideas in tangible form is diminished.

Modern technology such as the Internet has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. This technology must not be allowed to obliterate those personal property rights which society has deemed important. *Although privacy concerns must also be considered, it*

seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights. [Emphasis added.]

The court added that "...it must be said that where there exists evidence of copyright infringement, privacy concerns may be met if the court orders that the user only be identified by initials, or makes a confidentiality order".⁶

THE TEST FOR OBTAINING DISCLOSURE

The threshold test enunciated by the Federal Court of Appeal is one the recording industry will likely be able to meet. In order to obtain disclosure of the names and addresses of identified Internet Infringers, the court found that the recording industry will only need to demonstrate that:

- The recording industry intends to bring an action for infringement of copyright and that there is no other improper purpose for seeking the identity of the Infringers. This is a low threshold requiring only a *bona fide* claim and not a *prima facie* case.⁷
- The person from whom discovery is sought must be involved in the matter under dispute in some way. It was conceded by all parties (and the Motion Judge) that ISPs are such persons.
- There is no reasonable and practical alternative to the order sought.
- Practical measures must be taken to address privacy concerns.
- Consideration must be given to the costs incurred by the ISPs in assembling the information requested.

HEARSAY

The Federal Court of Appeal accepted the Motion Judge's finding that the recording industry's evidence was insufficient in this particular case. However, the court provided for an unusual outcome: it dismissed the appeal, but expressly granted the recording industry the right to apply again for an order for the disclosure of the identities of the very 29 Internet Infringers that were the subject of this appeal. Moreover, the appeal was dismissed without costs, reflecting the fact that although the appeal was dismissed, the recording industry achieved substantial success in the appeal.

Notably, on appeal the recording industry argued that its investigation was conducted by an automated computer process and, therefore, the investigation re-

sults were real evidence — not hearsay. The court did not expressly address this argument. It can be expected that the automated nature of the investigation will be more fully described in future motions for disclosure, if any.

CONCLUSION

The ultimate test to measure the recording industry's success in *BMG Canada Inc. v. John Doe* will be future attempts by the recording industry, or other holders of copyright, to obtain the true identities of Internet Infringers. Nevertheless, it is clear that the decision of the Federal Court of Appeal prevents Internet Infringers from hiding behind pseudonyms to thwart the administration of justice.

[*Editor's note:* Peter Ruby and Richard Naiberg, along with Harry Radomski, all of Goodmans LLP, represented the record companies with respect to their appeal in *BMG Canada Inc. v. John Doe.*]

¹ [2005] F.C.J. No. 858 (QL), 2005 FCA 193.

² *Ibid.*, at para. 26.

³ *Ibid.*, at para. 51.

⁴ *Ibid.*, at para. 54.

⁵ *Ibid.*, at paras. 40 and 41.

⁶ *Ibid.*, at para. 45.

⁷ The court applied the test set out in *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, [1998] F.C.J. No. 874 (QL), 81 C.P.R. (3d) 372 (C.A.) and *Straka v. Humber River Regional Hospital*, [2000] O.J. No. 4212 (QL), 51 O.R. (3d) 1 (C.A.).

• THE FEDERAL COURT OF APPEAL DISMISSES APPEAL IN FILE SHARING PRELIMINARY MOTION — BUT LEAVES DOOR OPEN TO FUTURE LAWSUITS •

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THE RESULT

On March 31, 2004, Justice von Finckenstein of the Federal Court (the Motions Judge) ruled against the request by the Canadian Recording Industry (“CRIA”) for disclosure of the identities of 29 “John and Jane Does” in the Canadian version of the mass litigation campaign that the Recording Industry Association of America (“RIAA”) had already in the U.S.A. Essentially, he ruled that CRIA had not:

- made out a *prima facie* case (their affidavit evidence is deficient, they have not made a causal link between P2P pseudonyms and IP (Internet Protocol) addresses and they have not made out a *prima facie* case of infringement);
- established that the ISPs (Internet Service Providers) are the only practical source for the identity of the P2P pseudonyms; and
- established that the public interest for disclosure outweighs the privacy concerns in light of the age of the data.¹

Instead of returning with answers to these deficiencies, CRIA appealed. The appeal was heard on April 21, 2005 and the Federal Court of Appeal's judgment was delivered quickly on May 19, 2005.

CRIA's appeal was dismissed.² It took CRIA three law firms and a trip to the Federal Court of Appeal (“FCA”) to finally grasp that it will require substantial, admissible, non-hearsay, and reliable evidence — more, apparently than the record industry has been willing and able to file anywhere else — to obtain disclosure of the private identities of alleged file sharers in Canada. CRIA still does not have the disclosure of any names. And CRIA will still have an uphill battle in proving copyright infringement against downloaders and even file sharers under current Canadian law, largely because private copying from the Internet was made legal in Canada as a direct result of the levy scheme put in place at the insistence mainly of CRIA itself. Incredibly, CRIA was quick to call this a “complete success”.³

BACKGROUND

The Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) intervened in the original disclosure motion⁴ because CRIA was attempting to import the RIAA's “shock and awe” litigation strategy into Canada, where the relevant law on privacy and copyright is different than in the U.S.A. Significant Internet-related privacy principles were at stake, and only two of the ISPs, namely Shaw and Telus, vigorously resisted CRIA's motion for disclosure.

CIPPIC's role, though severely constrained as an intervener, thus became all the more important.

It was conceded by CRIA's very experienced counsel at the motion and the Motions Judge ruled that the plaintiffs needed to show a "*prima facie*" case against the unknown alleged infringers in order to get disclosure of their identities. Notwithstanding his findings on the blatant inadequacy of the evidence, the most controversial aspect of the Motions Judge's ruling concerned his comments on copyright, which were made in the context of the lack of evidence submitted to establish a *prima facie* case of infringement. With respect to downloading and "reproduction", his comments noted Canada's private copying levy scheme, which provides that it is not an infringement to make copies of sound recordings for private use onto an "audio recording medium".⁵ The Copyright Board explicitly indicated in 2003 that neither the fact that music is downloaded from the Internet nor the fact that a tariff has not yet been sought on computer hard disks make such copying illegal.⁶ Subsequent dicta in the judicial review of the Board's decision relating to memory "embedded" in devices such as iPods®⁷ is unlikely to affect the legality of downloading onto hard drives in or attached to PCs. CRIA also faced other hurdles under the *Copyright Act*, most notably the lack of a "making available" right in Canadian law.⁸

THE APPEAL

Justice Sexton's unanimous judgment for the FCA began by recognizing the importance of privacy concerns:⁹

This case illustrates the tension existing between the privacy rights of those who use the Internet and those whose rights may be infringed or abused by anonymous Internet users.

Justice Sexton agreed with the Motions Judge's findings on hearsay:¹⁰

...In particular, the evidence purporting to connect the pseudonyms with the IP addresses was hearsay thus creating the risk that innocent persons might have their privacy invaded and also be named as defendants where it is not warranted. *Without this evidence there is no basis upon which the motion can be granted and for this reason alone the appeal should be dismissed.* [Emphasis added.]

CRIA's only apparent inroad was that the FCA held, based upon jurisprudence from the equitable

bills of discovery cases, that the plaintiffs need only meet a "*bona fide*" test, rather than the apparently more rigorous test of "*prima facie*". The court stated:¹¹

...It is sufficient if they show a bona fide claim, i.e. that they really do intend to bring an action for infringement of copyright based upon the information they obtain, and that there is no other improper purpose for seeking the identity of these persons.

However, when taken in context as explained below, this test if properly applied should prove almost as rigorous as the *prima facie* test sought by CIPPIC and the ISPs.

Because the FCA decided to approve the lower threshold of "bona fide", it held that the Motions Judge should not have commented as he did with respect to copyright law because he did not have sufficient evidence before him and his comments could be "...damaging to the parties if a trial takes place and should be avoided".¹² In the end, the FCA put the copyright issues back into neutral, but notably stopped short of reversing the Motions Judge in substance.

COMMENT

Above all, the FCA recognized the importance of privacy and specifically noted CIPPIC's contribution to this discussion.¹³ The "bona fide" test, with all the safeguards required by the Court of Appeal, will not be an easy one for CRIA to meet, as the following distillation¹⁴ illustrates:

- The plaintiff must show that it has "a *bona fide* claim" against the proposed defendant, "...i.e., that they really do intend to bring an action... based on the information they obtain, and that there is no other improper purpose for seeking the identity of these persons".¹⁵
- The *bona fide* claim must be based on admissible evidence linking the IP address(es) with the impugned action(s).¹⁶
- "There should be clear evidence to the effect that the information cannot be obtained from another source such as the operators of the named websites".¹⁷
- "...[T]he public interest in favour of disclosure must outweigh the legitimate privacy concerns of the person sought to be identified if a disclosure order is made".¹⁸

- The information on which a request for identification is made (*e.g.*, IP address) must be timely; no undue delay between investigation and motion for disclosure.¹⁹
- The plaintiffs must not collect more personal information than necessary for the purpose of their claim.²⁰
- Re: disclosure orders, "...caution must be exercised by the courts in ordering such disclosure, to make sure that privacy rights are invaded in the most minimal way".²¹ In particular, "...if a disclosure order is granted, specific directions should be given as to the type of information disclosed and the manner in which it can be used". In addition, the court should consider making a confidentiality order or identifying the defendant by initials only.²²

Interestingly, the cases upon which the FCA relied for the lower "bona fide" test were based upon well-established causes of action, such as patent infringement or defamation.²³ This is perhaps unfortunate, because the underlying cause of action in this instance, namely copyright infringement in respect of downloading and file sharing activity, is at best seriously doubtful in Canada given current law. The Motions Judge's comments on copyright may yet prove very telling.

Lost in the controversy about copyright is the long-term issue of privacy. Today's alleged copyright infringer may be tomorrow's alleged whistle blower or political activist, engaged in activity that is not clearly and seriously illegal. It can only be hoped that future courts will interpret the "bona fide" threshold in the light of the still stringent tests required by the FCA and in the spirit of strong privacy protection, for which Canada can be proud.

CRIA may attempt to use any future lawsuits to extract substantial "settlements" in the range of US\$4,000 based upon the Damoclean sword of statutory minimum damages, which exists apparently uniquely in Canada and the U.S.A. As these lawsuits may unfold, CRIA members will continue to collect substantial revenues from the private copying levy scheme — unless it is struck down by the Supreme Court of Canada, repealed, substantially amended or the Copyright Board dramatically revises its tariff. The Government has included a "making available" right and technical protection measures ("TPMs") in its Bill C-60 proposed revi-

sions to the *Copyright Act*. All of this could prove to be a policy dystopia of levies + litigation + TPMs + statutory damages + overlapping potential tariffs at the Copyright Board. At some point soon, Parliament and the courts will surely react.

[*Editor's note:* Howard Knopf practises with the Ottawa-based law firm Macera & Jarzyna LLP. He was outside counsel to the Canadian Internet Policy and Public Interest Clinic ("CIPPIC") of the University of Ottawa, which was accorded intervener status in this litigation. However, the views expressed are solely those of the author.]

* © Howard Knopf 2005.

¹ *BMG et al v. John Doe*, [2004] F.C.J. No. 525 (QL), 2004 FC 488 at para. 43.

² *BMG et al v. John Doe*, [2005] F.C.J. No. 858 (QL), 2005 FCA 193.

³ CRIA's General Counsel Richard Pfohl, as quoted in the *Globe and Mail*, etc., May 20, 2005.

⁴ CIPPIC's mandate and details of this and other cases are at <www.cippic.ca>. The dedication and skill of co-counsel Alex Cameron, Director Pippa Lawson, staff counsel David Fewer, then-student Jason Young and many other student volunteers cannot be overstated.

⁵ *Copyright Act*, R.S.C. 1985, c. C-42, s. 80, as amended. This is the "*quid pro quo*" for the levy scheme enacted in 1997, for CRIA was a prime instigator.

⁶ Private Copying 2003-2004. Pp. 20-21. <<http://cb-cda.gc.ca/decisions/c12122003-b.pdf>>.

⁷ *Canada (Canadian Private Copying Collective) v. Canadian Storage*, [2004] F.C.J. No. 2115 (QL), 2004 FCA 424 at para. 147. The author was counsel in this matter for the Retailers.

⁸ *Supra*, note 1, at para. 28.

⁹ *Supra*, note 2, at para. 1.

¹⁰ *Ibid.*, at para 21.

¹¹ *Ibid.*, at para 34.

¹² *Ibid.*, at para. 47.

¹³ *Ibid.*, at para. 44.

¹⁴ Based upon analysis done by Philippa Lawson and Alex Cameron of CIPPIC.

¹⁵ *Supra*, note 2, at para. 34.

¹⁶ *Ibid.*, at para. 21.

¹⁷ *Ibid.*, at para. 35.

¹⁸ *Ibid.*, at para. 36.

¹⁹ *Ibid.*, at para. 43.

²⁰ *Ibid.*, at para. 44.

²¹ *Ibid.*, at para. 42.

²² *Ibid.*, at para. 45.

²³ *Ibid.*, at para. 32.