

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

- and -

BELL MEDIA INC AND OTHERS

RESPONDENTS

**MOTION RECORD
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY &
PUBLIC INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)**

Pursuant to Rules 109 and 369 of the Federal Court Rules

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Canada Inc and Videotron Ltd**

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TAB 1

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

- and -

BELL MEDIA INC AND OTHERS

RESPONDENTS

**NOTICE OF MOTION
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC
INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)**

Pursuant to Rules 109 and 369 of the Federal Court Rules

TAKE NOTICE THAT the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order, in the form attached as Schedule “A” to this Notice of Motion, granting CIPPIC leave to intervene in this proceeding.

THE GROUNDS FOR THE MOTION ARE:

1. CIPPIC will draw on its institutional mandate and expertise to provide useful submissions that are distinct from those of other parties on the public interest dimensions of this appeal:
 - a. this appeal raises important matters of public interest. CIPPIC’s public interest perspective differs from those of the parties to this proceeding, and will provide the Court with distinct views on the matters raised by this appeal. The novel remedy issued by the Court below will implicate the Canadian public at large and engages online freedom of expression, balanced copyright law, and the appropriate rights enforcement role for online intermediaries such as Internet service providers (“ISPs”) – all issues central to CIPPIC’s mandate;

- b. CIPPIC's institutional expertise on matters relating to intermediary-based copyright enforcement will allow it to provide meaningful and distinct contributions to the resolution of the matters raised by this appeal. CIPPIC has participated in numerous parliamentary hearings, regulatory processes, and judicial proceedings that addressed the need for balanced copyright and restrained rights-enforcement roles for Internet intermediaries. If granted leave, CIPPIC will draw on its extensive and multi-disciplinary expertise to provide useful submissions that are distinct from those of other parties to this appeal; and
 - c. CIPPIC's expertise in these matters has been recognized by courts that have granted it intervention status on similar matters, including in *Rogers Communications v Voltage Pictures*, 2018 SCC 38, where CIPPIC was granted leave to argue that courts should take into account the appropriate balance between copyright holders and users' rights when applying the *Copyright Act's* recently adopted notice-and-notice regime, which articulates a specific role for ISPs whose assistance is sought by rights-holders seeking to identify alleged infringers;
2. CIPPIC's intervention will provide useful and distinct insight on the matters raised by this appeal without raising new issues not already before the Court;
 3. if granted leave, CIPPIC will address the following points, which are distinct from those of other parties:
 - a. ISP-based website blocking is an intrusive remedy, incompatible with the right to free expression, the legislative balance between copyright holders' and users' rights that sits at the heart of the *Copyright Act*, and principles of common carriage found in the common law and encoded into the *Copyright Act* and the *Telecommunications Act*;
 - b. ISP-based website blocking orders have a significant potential to disrupt communications networks and interfere with network innovation. Any ISP-based website blocking order must therefore ensure it does not undermine the CRTC's

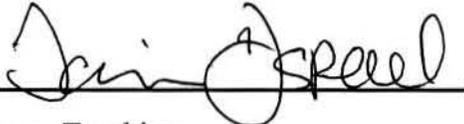
role, legislatively mandated under section 36 of the *Telecommunications Act*, for monitoring net neutrality and ISP interference with transmitted content;

- c. Parliament enacted a complete, specific and carefully balanced regime for Internet intermediaries in the *Copyright Act*, with clearly articulated and explicit enforcement roles for specific Internet intermediaries, including ISPs. The Court's inherent powers must be informed by this statutory framework;
 - d. ISP-based website blocking remedies should not issue as interim orders, particularly, though not exclusively, in legislative contexts where such orders are not available as a final remedy; and
 - e. a website blocking injunction should remain extraordinary in nature, and factors justifying its issuance in particular instances must be strictly applied;
4. CIPPIC does not seek costs and asks that costs not be awarded against it as a result of its intervention in this appeal;
 5. Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106 as amended; and
 6. such further and other grounds as counsel may advise, and which this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied upon in support of this motion to intervene:

1. the affidavit of David A Fewer, General Counsel, CIPPIC, sworn on February 3, 2020; and
2. such further and other material as counsel may advise, and which this Honourable Court may permit.

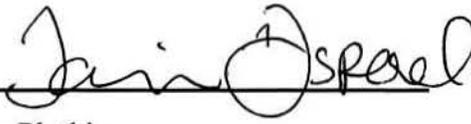
ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of February, 2020.

for 

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SCHEDULE “A”

Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

- and -

BELL MEDIA INC AND OTHERS

RESPONDENTS

ORDER

UPON MOTION by the moving party, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), for an order pursuant to Rule 109 of the *Federal Courts Rules*, 1998, SOR/98-106;

THIS COURT GRANTS LEAVE TO INTERVENE to the moving party in this proceeding on the following terms:

1. CIPPIC shall be added to the style of cause as intervener;
2. CIPPIC will take the issues in this appeal as they are and shall not add to them;
3. CIPPIC shall be permitted to file a factum;
4. CIPPIC shall be permitted to present oral arguments at the hearing of this appeal;
5. CIPPIC shall cooperate with other parties and interveners to expedite the hearing and avoid duplication;
6. CIPPIC shall not seek or be made subject to any order for costs; and
7. CIPPIC shall be served with electronic versions of all materials filed and to be filed by other parties and interveners.

**TO: OFFICE OF THE REGISTRY
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Media Inc, Bell Canada, Fido Solutions Inc, Rogers Communications
Canada Inc and Videotron Ltd**

TAB 2

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

- and -

BELL MEDIA INC AND OTHERS

RESPONDENTS

AFFIDAVIT OF DAVID A FEWER

I, **DAVID A FEWER**, of the City of Ottawa, in the Province of Ontario, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am General Counsel at the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), a law and technology clinic hosted at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa's Faculty of Law. 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 or submissions and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic based at the University of Ottawa. 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, ensuring balance in policy and law-making processes, and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. 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. CIPPIC currently operates under an Executive Director, a Staff Lawyer, and a General Counsel, presently Vivek Krishnamurthy, Tamir Israel, and myself, respectively.

4. CIPPIC’s core mandate is to advocate in the public interest on matters arising at the intersection of law and technology. 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 and public outreach component. In pursuit of these mandates, CIPPIC regularly provides expert testimony to parliamentary committees, participates in regulatory and quasi-judicial proceedings, and conducts strategic interventions before the courts. CIPPIC is also deeply involved in research and advocacy on the nature and social impact of technological change, and the manner in which the evolving legal landscape interacts with the distinct challenges of a technology-driven world.

5. This appeal engages online freedom of expression, the legislative balance between users’ rights and copyright holders struck in the *Copyright Act*, and the enforcement role played by various Internet intermediaries when users of their services are alleged to have infringed various legal rights. Examples of relevant CIPPIC expertise includes:

- CIPPIC’s testimony before the House of Commons Legislative Committee on Bill C-32 (the *Copyright Modernization Act*, March 8, 2011);
- CIPPIC’s participation as a party in the regulatory proceeding that led to Telecom Decision CRTC 2018-384 (refusing an application to establish an independent body for compelling Internet service providers (“ISP”s) to block access to websites alleged to have infringed copyright law);
- CIPPIC’s interventions in *National Post v Fournier*, FCA File Nos A-394-12 & A-395-12 (the obligations imposed on online discussion platforms with respect to user activity alleged to have infringed the *Copyright Act*); *Rogers Communications v Voltage Pictures*, 2018 SCC 38 (obligations imposed on ISPs by the *Copyright Act* when copyright holders seek their assistance in identifying alleged infringers); and *Crookes v Newton*, 2011 SCC 47 (whether publication occurs where an individual or a search engine

posts a hyperlink to content alleged to contain defamatory statements); and

- through its membership in the Civil Society Information Society Advisory Council to the OECD, CIPPIC's role in generating OECD, "The Role of Internet Intermediaries in Advancing Public Policy", June 22, 2011, DSTI/ICCP(2010)11/FINAL and related policy instruments.

Additional details of CIPPIC's general expertise in Internet law are provided below, with particular emphasis on activities that implicate online freedom of expression, applying the *Copyright Act* to digital contexts in a manner that respects its legislative balance, and intermediary-based rights enforcement.

II. INSTITUTIONAL EXPERTISE

(a) Judicial

6. This Court has previously granted CIPPIC leave to intervene, including in:

- (i) *National Post v Fournier*, File Nos A-394-12 & A-395-12 (FCA), on the obligations imposed by copyright law on online discussion platforms including with respect to liability for user activity (discontinued following written submissions);
- (ii) *Cooperstock v United Airlines Inc*, File No A-262-17 (FCA), regarding the application of the *Trade-marks Act* as online parody in light of implicated consumer protection and freedom of expression values (settled following written submissions); and
- (iii) *BMG v Doe*, 2004 FCA 193, on the balance between privacy and copyright enforcement in the third party discovery process, taking into account applicable elements of PIPEDA.

7. CIPPIC interventions before other courts on Internet law matters include:

- (i) *Uber Technologies v Heller*, SCC No 38534, on the extent to which private contractual restrictions on fair access to justice engage the equitable doctrine of unconscionability;

- (ii) *Keatley Surveying v Teranet*, 2019 SCC 43, on the degree to which authors' copyright can be diminished by crown copyright when the government republishes individuals' works;
- (iii) *Voltage Pictures v Salna*, 2019 FC 1047, on the implications of a novel copyright "reverse" class proceeding for alleged infringers named in the class;
- (iv) *Rogers Communications v Voltage Pictures*, 2018 SCC 38, addressing the interpretation of the "notice and notice" regime of the *Copyright Act* as it applies to Internet Service Providers' obligation to assist in identifying customers accused of infringing copyright;
- (v) *Douez v Facebook Inc*, 2017 SCC 33, on consumer access to domestic class proceedings relating to privacy rights implicit in the *Charter* and despite a non-negotiable forum selection imposed by a global e-commerce platform;
- (vi) *Voltage Pictures v Doe*, 2016 FC 881, on the need for privacy safeguards in a third-party discovery order sought in support of a copyright infringement "reverse" class proceeding;
- (vii) *R v TELUS Communications Co*, 2013 SCC 16, applying Part VI of the *Criminal Code* to Internet Service Providers in a manner that is technologically neutral and takes into account principles of common carriage;
- (viii) Five copyright-related appeals heard in conjunction, which raised issues related to the application of copyright concepts to a range of digital activities in a manner that is technologically neutral and respects the legislative balance embedded in the *Copyright Act: 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; and

- (ix) *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 hyperlink can be held to have published defamatory statements in the linked content.

8. CIPPIC has also participated in the courts as a primary party, including in:

- (i) *Bell Canada v Amtelecom*, 2015 FCA 126, on the retrospective application of elements of the CRTC's Wireless Consumer Protection Code to pre-existing contractual relationships, in the context of a consumer protection regime applied to wireless service provider contracts;
- (ii) *Craig Northey v Sony Music Entertainment Canada Inc et al*, Ont Sup Ct File No CV-080036065100 CP, in which CIPPIC acted as co-counsel for the class seeking damages from music labels for failure to pay the class license fees for the making of mechanical copies of musical works in the form of CDs; and
- (iii) *Authors Guild v Google, Inc*, No. 05-Civ-8136 (US, SDNY, March 22, 2011), in which CIPPIC acted on behalf of a group of independent Canadian authors and the Canadian Association of University Teachers (CAUT) in opposing a proposed US-based copyright class action settlement agreement that would have established an intermediary, Google, as a centralized hub for digital books.

(b) Parliamentary Committees and Governmental Consultations

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

- (i) submissions to the House of Commons Standing Committee on Industry, Science and Technology pursuant to its statutory review of the *Copyright Act* (November, 2018);

- (ii) testimony before House of Commons Committee on Bill C-32, An Act to amend the *Copyright Act*, on how copyright law should not encourage litigation as a business model, and that digital infrastructure should be content neutral so as to provide wide incentive for innovation (March 8, 2011);
 - (iii) submissions to the Parliamentary All-Party Arts Caucus on policy options for updating Canada's copyright laws in light of new digital exigencies. Submissions addressed how to balance competing interests as to protect the legitimate interests of creators of copyright works, distributors of those works, and downstream authors, innovators and users online (June 3, 2010);
 - (iv) submissions, with the Public Interest Advocacy Centre (PIAC), to the House of Commons Standing Committee on Canadian Heritage urging them to consider important public interest implications of proposed copyright law reforms, and to adopt a balanced approach (October 26, 2004); and
 - (v) submissions to the Senate Standing Committee on Social Affairs, Science and Technology on Bill S-9, proposed amendments to the *Copyright Act* that would give photographers first ownership of copyright in the photographs they take (November 3, 2004).
- (c) **Quasi-Judicial Tribunals**
10. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives, including:
- (i) participated as a party and represented the OpenMedia Engagement Network before the Canadian Radio-television and Telecommunications Commission (CRTC) in the regulatory proceeding leading to Telecom Decision CRTC 2018-384, objecting to a proposed expedited remedy that would compel Canadian Internet service providers to block access to websites accused of systemically violating copyright;

- (ii) represented the Canadian Association of University Teachers (CAUT) and the Canadian Federation of Students (CFS) before the Copyright Board of Canada, objecting to a copyright tariff claiming, among other things, that teachers require authorization for sharing hyperlinks to works with students (Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013); and
- (iii) participated as a party before the Canadian Radio-television and Telecommunications Commission (CRTC) in regulatory proceedings leading to Telecom Regulatory Policy CRTC 2009-657, Telecom Decision CRTC 2017-105 & Telecom Regulatory Policy CRTC 2017-104 which, collectively, establish the parameters of Canada's net neutrality regulatory framework.

11. In addition to its parliamentary, quasi-judicial and judicial activities, CIPPIC routinely advises and represents individuals and organizations on a range of issues related to online expression, intellectual property, and intermediary-based rights enforcement. CIPPIC has also participated in international policy-making processes on matters relating to the role of Internet intermediaries such as ISPs in facilitating rights enforcement through its membership in the Civil Society Information Society Advisory Council to the OECD (e.g. OECD, "The Role of Internet Intermediaries in Advancing Public Policy Objectives", DSTI/ICCP(2010)11/FINAL, June 22, 2011).

12. Through these activities, CIPPIC has developed substantial expertise in Internet law in Canada, including specific expertise in the matters raised by this proceeding.

III. CIPPIC'S INTEREST IN THIS APPEAL

13. CIPPIC's long-standing public interest advocacy on intermediary-based digital rights enforcement as well as its broader historical concern with matters arising at the intersection of law and technology is the basis for its intervention in this appeal.

14. This appeal challenges the issuance and scope of a novel copyright remedy which would compel a number of Canadian Internet Service Providers to block access to websites found to have infringed copyright on a strong *prima facie* basis. The remedy

under appeal impacts the freedom of expression, upsets the legislative balance between user rights and copyright which is at the heart of the *Copyright Act*, and adopts an inappropriate enforcement role for Internet Service Providers. CIPPIC is well-placed to speak to these matters, which directly intersect with its mandate and institutional expertise.

IV. POSITION AND PROPOSED SUBMISSIONS

15. If granted leave to intervene, CIPPIC will address the following issues:

- a. ISP-based website blocking is an intrusive remedy that is incompatible with the right to free expression, the legislative balance between copyright holders' and users' rights that sits at the heart of the *Copyright Act*, and principles of common carriage found in the common law and encoded into the *Copyright Act* and the *Telecommunications Act*;
- b. ISP-based website blocking orders have a significant potential to disrupt communications networks and interfere with network innovation. Any ISP-based website blocking order must therefore ensure it does not undermine the CRTC's role, legislatively mandated under section 36 of the *Telecommunications Act*, for monitoring net neutrality and ISP interference with transmitted content;
- c. Parliament enacted a complete, specific and carefully balanced regime for Internet intermediaries in the *Copyright Act*, with clearly articulated and explicit enforcement roles for specific Internet intermediaries, including ISPs. The Court's inherent powers must be informed by this statutory framework;
- d. ISP-based website blocking remedies should not issue as interim orders, particularly, though not exclusively, in legislative contexts where such orders are not available as a final remedy; and
- e. a website blocking injunction should remain extraordinary in nature, and factors justifying its issuance in particular instances must be strictly applied.

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 distinct in that they will derive from its public interest mandate.

17. I am further informed by CIPPIC Staff Lawyer, Tamir Israel, that CIPPIC has coordinated with other known potential interveners in this appeal and that, should leave be granted, that CIPPIC is willing to continue to coordinate with any parties in order to minimize duplication. Specifically, should leave be granted to the British Columbia Civil Liberties Association (BCCLA), CIPPIC will not extensively address freedom of expression implications and, in any event, will not duplicate BCCLA's submissions. Similarly, should the Canadian Internet Registration Authority (CIRA) be granted leave to intervene, CIPPIC's submissions related to the *Telecommunications Act* will be distinct. I verily believe this to be true.

18. CIPPIC's proposed intervention will not cause a delay in the hearing of this case nor prejudice the parties.

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 matter and for no improper purpose.

SWORN before me at the City of
Ottawa in the Province of Ontario
this 3rd day of February, 2020

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)
)


DAVID A FEWER



Tamir Israel, Commissioner for Taking Oaths, etc

TAB 3

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

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BELL MEDIA INC AND OTHERS

RESPONDENTS

WRITTEN REPRESENTATIONS

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

PART I - THE FACTS

2. The decision under appeal in this proceeding would establish a novel website-blocking remedy, compelling Canadian Internet Service Providers to prevent Canadians from accessing websites found on a *prima facie* basis to have infringed Canadian copyright laws. The decision is both novel and potentially wide-ranging. It implicates interests beyond those of the parties to the proceeding, including the rights of Internet subscribers in Canada under section 2(b) of the *Charter of Rights and Freedoms*. The Moving Party seeks leave to intervene on the public interest dimensions of this appeal.
3. CIPPIC is a legal clinic based at the University of Ottawa. CIPPIC's mandate is to research and advocate in the public interest on issues arising at the intersection of law and technology. CIPPIC regularly intervenes before courts, tribunals, and other decision-making bodies in order to bring forward important public interest 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 impact online freedom of expression, the *Copyright Act's* legislative balance between copyright holders' and users' rights, and the enforcement role played by Internet intermediaries when users of their services are

¹ Notice of Motion, Moving Party's Motion Record, Tab 1.

accused of infringing various legal rights.² CIPPIC has extensive and distinct institutional knowledge and expertise relating to the specific impact of intermediary-based rights enforcement on digital expression and legal doctrine. Indicative examples include:

- CIPPIC’s testimony before the House of Commons Legislative Committee on Bill C-32 (the *Copyright Modernization Act*, March 8, 2011);
- CIPPIC’s participation as a party in the regulatory proceeding that led to Telecom Decision CRTC 2018-384 (refusing an application to establish an independent body for compelling ISPs to block access to websites alleged to have infringed copyright law);
- CIPPIC’s interventions in *National Post v Fournier*, FCA File Nos A-394-12 & A-395-12 (the obligations imposed on online discussion platforms with respect to user activity alleged to have infringed the *Copyright Act*); *Rogers Communications v Voltage Pictures*, 2018 SCC 38 (obligations imposed on ISPs by the *Copyright Act* when copyright holders seek their assistance in identifying alleged infringers); and *Crookes v Newton*, 2011 SCC 47 (whether publication occurs where an individual or a search engine posts a hyperlink to content alleged to contain defamatory statements); and
- through its membership in the Civil Society Information Society Advisory Council to the OECD, CIPPIC’s input into “The Role of Internet Intermediaries in Advancing Public Policy”, (OECD, 2011).³

PART II - POINTS IN ISSUE

4. The only issue in this motion is whether CIPPIC should be granted leave to intervene.

PART III - SUBMISSIONS

5. Under Rule 109 of the *Federal Court Rules* (“Rules”), the Court has the power to grant any person leave to intervene in a proceeding.⁴ Paragraph 109(2)(b) requires a proposed intervener to describe how its proposed participation will assist the court in determining the factual or legal issues before it.⁵ Rule 3 generally requires that the *Rules* be applied “so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.”⁶

² Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6-14.

³ Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, para 5.

⁴ *Federal Court Rules*, SOR/98-106, Rule 109.

⁵ *Federal Court Rules*, SOR/98-106, paragraph 109(2)(b)

⁶ *Federal Court Rules*, SOR/98-106, Rule 3.

6. The test for granting public interest intervener status is flexible and discretionary. The factors to be considered were affirmed in *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, and are listed in *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120.⁷ These factors are non-exhaustive, and their relative weight and emphasis is contextually driven.⁸ In this instance, the central consideration is whether the moving party has demonstrated its proposed intervention will assist the Court in determining the public dimensions of a factual or legal issue before it in an expeditious manner.⁹
7. It may be sufficient to establish an organization's capacity to assist the court by demonstrating that its interest in an appeal is 'genuine' rather than 'jurisprudential' in nature,¹⁰ based on its institutional competence on the legal or factual matters at issue.¹¹ Where an organization can demonstrate practical experience with the legal context of its proposed intervention, its interest is 'genuine' and indicative of its ability to offer useful insights on the effects of competing legal interpretations.¹² Practical experience can be demonstrated through 'on the ground' experience with the legal or factual context at issue or through a history of high-profile interventions in appellate courts on related matters.¹³ By contrast, where an organization would focus its intervention on the effect competing interpretations will have on its members or the general state of the law, its interest will be jurisprudential in nature and insufficient.¹⁴

⁷ *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 40.

⁸ *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 42.

⁹ *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 40; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19; *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 5-6, 9 and 18; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 6.

¹⁰ *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 6 and 20-21.

¹¹ *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, paras 19 and 28-29; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 11.

¹² *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19.

¹³ *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, paras 11 and 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19.

¹⁴ *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 20-22; *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34, para 30.

8. A public interest organization must further demonstrate through its proposed submissions that it will offer useful insights distinct from those of other parties. An organization can do so by proposing submissions that “invoke a body of jurisprudence that existing parties have not invoked, ask [the Court] to interpret certain jurisprudence differently, or acquaint the Court with the larger implications associated with its ruling.”¹⁵ The level of granular particularity with which an organization must establish this non-duplicative utility can vary. Where an organization has demonstrated substantial institutional expertise, less granular particularity is required.¹⁶ Where an organization is not drawing on substantial institutional expertise in its proposed submissions, it must demonstrate its capacity for useful differentiation with greater particularity in its proposed submissions.¹⁷
9. Finally, a number of residual contextual factors are relevant. First, a proposed intervener cannot expand the issues raised by the parties, and should file its motion to intervene expeditiously so as not to disrupt pre-existing timelines.¹⁸ Where an appeal raises novel and complex issues with important public dimensions, it becomes additionally important for the Court to be exposed to perspectives beyond those offered by the parties before it.¹⁹ Also, where a proposed intervention would remedy or create an ‘inequality of arms’ among parties, this can impact whether its intervention will be granted or not.²⁰
10. CIPPIC’s interest in this proceeding is genuine, and arises from its long history of involvement in online expression, balanced copyright, and the enforcement role played by various Internet intermediaries with respect to user-initiated rights infringement. CIPPIC’s historic involvement has included substantial on-the-ground experience

¹⁵ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102, para 49.

¹⁶ *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19 and paras 27-29; *Gitxaala Nation v Canada*, 2015 FCA 73, paras 32 and 34, and paras 21 and 25.

¹⁷ *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, para 19.

¹⁸ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174, para 15; *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34, para 29; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 15.

¹⁹ *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19; *Gitxaala Nation v Canada*, 2015 FCA 73, para 35.

²⁰ *Gitxaala Nation v Canada*, 2015 FCA 73, paras 23-24 and 35-36.

advising entities impacted by competing intermediary-based enforcement models, and has included numerous high profile interventions in appeals that defined a rights-enforcement role for Internet intermediaries.²¹ CIPPIC has a comparable record of institutional involvement in advocating for interpretations that fully realize the legislative balance between copyright and users' rights which permeates the *Copyright Act*.²² CIPPIC will draw on this institutional expertise to provide the court with insights into the legislative purpose underpinning the intermediary enforcement regime for copyright.²³ In addition, CIPPIC's proposed submissions (detailed below) invoke a body of jurisprudence that the parties to the proceeding have not invoked, and will acquaint the Court with the broader implications raised by its ruling.

11. A number of residual contextual factors weigh in favour of granting CIPPIC's proposed intervention. CIPPIC has sought leave to intervene in a timely manner, and its intervention will not impede the just and expeditious determination of the matters before the Court. CIPPIC has coordinated with other known potential interveners in order to avoid duplication, and will continue to do so should it be granted leave to intervene.²⁴

12. The website blocking order adopted by the Court below is novel, complex, and implicates public dimensions that CIPPIC is well placed to address. No order of this type has been previously issued in Canada.²⁵ The detrimental impact of the order under appeal will fall most heavily on Internet users in Canada. Yet the ISP third party respondents to the order sought in the court below are predominantly aligned with the Applicant or neutral as to the remedy in question.²⁶ While the single Appellant in this proceeding is capable of advancing concerns on its customers' behalf, CIPPIC's mandate is to advocate in the public interest on matters arising at the intersection of law and technology, and is better placed to speak to these impacts.

²¹ Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6(i) and (iii), 7(iii)-(vii) and (ix), 8(iii), 10(i) and (iii), and 11.

²² Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6, 7(ii)-(iv), (vi) and (viii), 8(ii)-(iii), 9(ii)-(v), 10(ii) and 11.

²³ *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17.

²⁴ Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, para 17.

²⁵ *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, para 8.

²⁶ *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, para 3.

CIPPIC’S PROPOSED SUBMISSIONS LEVERAGE ITS EXPERTISE AND WILL BE USEFUL AND DISTINCTIVE

13. The grounds for appeal are set out in the Appellant’s Notice of Appeal, namely that:
- a. The Judge erred in law in finding that the remedy for ordering Third Party Responding Internet Service Providers to block access to websites (the “site-blocking remedy”) was available at law, including in particular, that it was available under the *Copyright Act*, RSC 1985, c C-42 (the “*Copyright Act*”).
 - b. The Judge erred in law in finding that section 36 of the *Telecommunications Act*, SC 1993, c 38 (the “*Telecommunications Act*”) did not apply to the site-blocking Order ... given that section 36 provides that Canadian carriers cannot control the content of telecommunications that they carry for the public without the approval of the Canadian Radio-television and Telecommunications Commission.
 - c. The Judge erred in law in his interpretation and application of the test for a mandatory injunction under *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (“*RJR-MacDonald*”). In particular, the Judge erred in law by importing and substituting factors from foreign jurisdictions into the *RJR-MacDonald* test.
 - d. The Order ought to be set aside because it is not compliant with section 2(b) of the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the “*Charter*”), and affects the free speech of millions of Canadian Internet users.

CIPPIC’s proposed submissions will provide a different, yet relevant and valuable, perspective on these grounds without expanding the issues as framed by the parties.

14. Specifically, CIPPIC’s proposed submissions will address the following points:
- a. ISP-based website blocking is an intrusive remedy, incompatible with the right to free expression, the legislative balance between copyright holders’ and users’ rights that sits at the heart of the *Copyright Act*, and principles of common carriage found in the common law and encoded into the *Copyright Act* and the *Telecommunications Act*;

- b. Section 36 of the *Telecommunications Act* provides the Canadian Radio-television and Telecommunications Commission (“CRTC”) with an important role to play in securing net neutrality, including by ensuring that ISP-based traffic handling measures are not excessive or disruptive in their application. ISP-based website blocking orders have a significant potential to disrupt communication networks and interfere with future network innovation.²⁷ Any ISP-based website blocking order must therefore ensure it does not undermine the CRTC’s legislatively mandated role for monitoring net neutrality and ISP interference with transmitted content;
- c. Parliament enacted a complete, specific and comprehensive regime for Internet intermediaries in the *Copyright Act*, with clearly articulated roles for different types of intermediaries such as Internet Service Providers, search engines, and content hosts. This comprehensive regime was designed to carefully balance the interests of competing stakeholders in addressing the issue of online piracy. It purposefully excludes website blocking injunctions issued against ISPs for user-generated infringement, even as it expressly includes such relief for other intermediaries such as search engines. Remedies for copyright infringement must be found in the *Copyright Act*, and more specifically, in the complete regime adopted by Parliament for intermediary rights enforcement. The Court’s reliance on its inherent powers of injunctive relief must be informed by this legislative context;
- d. Website blocking remedies should not issue as interim relief. In this instance, no additional steps are being taken to bring the defendants before the Court to defend their actions. It is therefore possible for the Court to determine now, on a final basis, whether the websites in question infringe copyright. In other contexts, courts have recognized the importance of rigorously testing the factual and legal basis of a copyright infringement claim prior to enlisting Internet intermediaries. The intrusive nature of ISP-based website blocking orders is such that these should not issue on a *prima facie* basis alone, particularly in legislative contexts where they are not

²⁷ See, for example, CRTC, Enforcement and Compliance Branch, Commission Letters to Rogers Communications Inc, Re Section 36 of the *Telecommunications Act*, and Paragraphs 126 and 127 of *Telecom Regulatory Policy CRTC 2009-657*, CRTC File #545613, dated January 20, 2012; February 29, 2012; and June 28, 2012, CIPPIC Motion Record, Tab 5.

available as a final remedy. The test for a permanent injunction must be met, including the obligation to rigorously demonstrate that monetary compensation cannot make the plaintiff whole; and

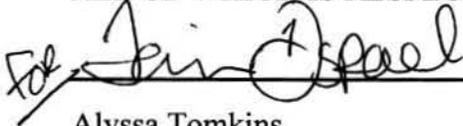
e. A website blocking injunction, if available, should remain extraordinary in nature, and factors justifying its issuance in particular instances must be strictly applied. In light of the intrusiveness of such remedies, they must only issue as a last resort, where less intrusive and more effective remedies have been shown to fail. The test for issuing injunctive relief of this nature must therefore be applied stringently, in particular with respect to criteria such as ‘necessity’ and ‘effectiveness’. The record of this Appeal demonstrates that less intrusive, more effective options are readily available to the Respondents, and therefore fails to demonstrate that this new and intrusive remedy is necessary for addressing the problem of online copyright infringement in Canada.

15. In addressing these points, CIPPIC will draw on its extensive institutional expertise and its perspective as an organization whose mandate is to advocate in the public interest.

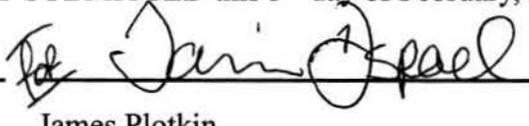
PART IV - ORDER SOUGHT

16. CIPPIC respectfully requests that its motion for leave to intervene be granted, with conditions set out in Schedule A to its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2020



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PART V - AUTHORITIES

<u>Statutory Provisions</u>	
1.	<i>Federal Court Rules</i> , SOR/98-106, Rules 3 and 109
<u>Regulatory Decisions</u>	
2.	Canadian Radio-television and Telecommunications Commission, Enforcement and Compliance Branch, Commission Letters to Rogers Communications Inc, Inc, Re Section 36 of the <i>Telecommunications Act</i> , and Paragraphs 126 and 127 of <i>Telecom Regulatory Policy CRTC 2009-657</i> , CRTC File #545613, dated January 20, 2012; February 29, 2012; and June 28, 2012
<u>Case Law</u>	
3.	<i>Atlas Tube Canada ULC v Canada (National Revenue)</i> , 2019 FCA 120
4.	<i>Bell Media Inc v GoldTV.Biz</i> , 2019 FC 1432
5.	<i>Canada (Attorney General) v Canadian Doctors for Refugee Care</i> , 2015 FCA 34
6.	<i>Gitxaala Nation v Canada</i> , 2015 FCA 73
7.	<i>Lukács v Canada (Transportation Agency)</i> , 2014 FCA 292
8.	<i>Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)</i> , 2016 FCA 120
9.	<i>Sport Maska Inc v Bauer Hockey Corp</i> , 2016 FCA 44
10.	<i>Tsleil-Waututh Nation v Canada (Attorney General)</i> , 2017 FCA 102
11.	<i>Tsleil-Waututh Nation v Canada (Attorney General)</i> , 2017 FCA 174