

For Immediate Release

Federal Appeals Court upholds Canadians' online privacy rights

Court refuses to pierce Canadians' privacy rights on music industry's weak evidence

Ottawa, ON – May 19, 2005 – The Federal Court of Appeal today issued a highly-anticipated ruling in *BMG Canada v. John Doe*, the music industry's first effort at launching an American-style litigation campaign targeting alleged Canadian file-sharers.

"This is a landmark privacy decision that affects all Canadians," said Philippa Lawson, CIPPIC's Executive Director, remarking on the significance of the ruling. "The court has reaffirmed the importance of online privacy and confirmed that those seeking to sue Internet users cannot uncover the anonymity of their targets on the basis of mere allegations. Instead, plaintiffs must provide solid and timely evidence that supports a *bona fide* claim against the alleged wrongdoer".

David Fewer, CIPPIC's staff counsel, agrees: "In these kinds of cases, Canada's privacy laws trust the courts to protect Canadians' privacy interests. CRIA came to Court with unaccountably weak evidence, with a poorly constructed case, and said to the Court, 'Trust us.' Fortunately, the Court was not willing to roll the dice with Canadians' privacy rights. The Court essentially said to CRIA 'don't tell us to trust you, show us we can trust you' – and CRIA's evidence did not show itself to be trustworthy."

In March 2004, the trial court heavily criticized the music industry's evidence and refused to order ISPs to hand over their customers' identities. The trial court concluded that the music industry's electronic investigations were unreliable and full of gaps, creating a real risk of exposing innocent people to litigation. The trial court held that it would be "irresponsible" to order disclosure on this evidence. This ruling protected Canadians' online privacy rights because it required a careful investigation and solid evidence of wrongdoing before disclosure would be ordered.

The Court of Appeal upheld the trial court's decision to refuse disclosure based on the weak evidence presented by the recording industry.

However, in a move that disappointed privacy advocates, the Court of Appeal overturned the lower court's ruling that plaintiffs must make out a *prima facie* case of wrongdoing before they can obtain the identity of alleged wrongdoers. Instead, the Court of Appeal required only that plaintiffs have a *bona fide* claim against the proposed defendants. "While we think that the court rightly rejected CRIA's requests in this case, we are concerned that this lower threshold test might allow for unjustified privacy invasions,

such as stripping the anonymity of individual human rights activists or whistleblowers in order to silence them through groundless lawsuits", said Ms. Lawson.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) intervened in the case, assisting the Court of Appeal by presenting public interest arguments on privacy and copyright law that the parties to the motion might not otherwise put forward. CIPPIC Associate Alex Cameron and outside counsel Howard Knopf, of the Ottawa law firm Macera Jarzyna, argued the case for CIPPIC. The Court of Appeal explicitly adopted CIPPIC's argument that disclosure orders should not be made where plaintiffs extract more personal information than necessary for the pursuit of their claims, noting that the unnecessary gathering of confidential information about an anonymous user "would be an unjustified intrusion into the rights of the user".

The case has also attracted attention because of the Federal Court's decision last year that merely making music files available on one's computer does not constitute copyright infringement under Canadian law. The Court of Appeal ruled that these findings were premature. As a result, the question of whether file-sharing infringes copyright in Canada remains unclear.

David Fewer notes the significance of the copyright aspect of the decision: "This decision leaves open the possibility for CRIA to come back to the court with better evidence, and to begin a US-style 'sue your customer' mass litigation campaign in Canada. But it also leaves open the question of whether file-sharers are infringing copyright law – that remains to be seen."

He added: "These campaigns have had no impact on deterring file-sharing in the US and will do nothing to compensate Canadian artists. US-style litigation campaigns only tie up Canadian judicial resources, force ordinary consumers into paying outrageously high settlements, and alienate the public. If sued, file sharers face potential minimum liability of \$750,000 or more each, as a result of Canada's controversial statutory damages scheme. These provisions of the Copyright Act were never intended to cover the common practice of downloading more than 1,500 songs for private use, a practice previously ruled to be legal by the Copyright Board."

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