



Sana Halwani
416-865-3733
shalwani@litigate.com



Jim Lepore
416-865-2881
jlepore@litigate.com

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Password Protected! The Federal Court Revisits TPMs

Savvy content creators and copyright owners often use technical protection measures (also known as “TPMs”) to restrict what users can do with their works (often digital materials). The prohibition against circumventing TPMs is rooted in sections 41 and 41.1 of the *Copyright Act*, but their fit within the broader *Copyright Act* is the subject of ongoing debate.

Justice Roy’s decision in *1395804 Ontario Ltd, operating as Blacklock’s Reporter v Canada (Attorney General)* provides useful judicial guidance to such questions, albeit on a less than exhaustive evidentiary record.

Parks Canada was largely successful in this action and the Court found that the Defendant’s use of the copyrighted works was fair.

As a top line (detailed further in the 'Takeaways' section at the end of this comment), this decision serves as a crucial reminder that liability for circumventing a TPM requires a case-specific analysis. Companies asserting TPMs should ensure their evidence is robust. This might include presenting expert testimony to explain the TPM in question and providing admissible evidence regarding the state of your terms and conditions. Additionally, since fair dealing is relevant to TPMs, a party’s terms and conditions governing use are particularly significant. These terms are not only actionable in cases of breach but also play a role in fair dealing analysis.

Background

This case was part of a series of copyright lawsuits by 1395804 Ontario Ltd (operating as Blacklock’s Reporter, “Blacklock”) against federal departments and agencies, here involving Parks Canada. Blacklock, an Ottawa-based subscription news service, previously lost a similar suit against the Department of Finance in 2016. Justice Roy’s recent decision considers the 2016 decision where applicable, though the differing facts and procedural history offer unique insights.

In the present case, Parks Canada’s media officer bought a Blacklock subscription for the benefit of Parks Canada to address allegedly misleading articles about the agency. Using a Parks Canada credit card and generic email, the officer shared

15 relevant articles within the agency. Although the sharing method was unclear on the record, password sharing was admitted. Parks Canada representatives testified to have limited the sharing to personnel that might contribute to a response.

Parks Canada accused Blacklock of baiting agency personnel with misleading snippets of pending articles to induce allegedly improper link sharing under their ambiguous terms and conditions. Blacklock would then file access to information requests to confirm and gauge article sharing before commencing litigation. Despite Blacklock's decision to voluntarily discontinue this action in 2020, Parks Canada's counterclaim – seeking declaratory relief to aid in the series of pending actions – continued.

Parks Canada asked that the Court consider and issue three declarations as follows:

(i) No binding agreement due to ambiguous terms.

There was no binding agreement between the parties. The Terms and Conditions of the subscription were ambiguous and unenforceable, and at any rate they should be interpreted in favour of Parks Canada.

(ii) No TPM circumvention or intent to do so. Parks Canada did not circumvent any TPM, nor did it intend to do so. Sharing the password does not constitute a circumvention of the TPM, and at any rate, sharing the password was permitted, under the Terms and Conditions.

(iii) Fair dealing in using and sharing articles. Parks Canada's use of Blacklock articles and any sharing of the subscription password was fair dealing and did not infringe Blacklock's copyright.

Parks Canada largely succeeded on points two and three. Interestingly, Justice Roy explicitly restricted his decision to addressing the issues on the evidence before the Court and was not tempted to “be helpful” by deciding more than is appropriate, especially in view of a lack of evidence on certain issues and the Plaintiff having chosen to discontinue its action.

The Court's Analysis

(i) What was the nature of the agreement between the parties?

The Court accepted Parks Canada's evidence that:

- There was no distinction drawn on Blacklock’s website between individual and institutional/corporate subscriptions (i.e., there was “only one type of subscription” available for purchase on Blacklock’s website at the relevant time).
- Shortly after the purchase of a subscription, Blacklock sent a generic invoice email, confirming membership. Although the email referenced “custom bulk rates” for “institutional subscribers who would like to share or distribute content in-house”, the recipient employee did not believe that this sentence applied as she did not intend to distribute articles beyond the organization.
- Although the words “Terms and Conditions” appeared on Blacklock’s home page in small font, there was no indication that there was any connection with institutional subscriptions, and it was not brought to the attention of the potential purchaser.
- These Terms and Conditions were ambiguous (see e.g., here), and indicate that reproduction or distribution for “personal, non-commercial use” is not a violation.
- The subscription was purchased in response to emails sent by Blacklock to Parks Canada that referred to information concerning the agency and its activities that was misleading and alarmist. Blacklock’s emails asked for an official reaction. Perhaps most importantly, the very nature of these emails called for some sharing of information within the organization in order to formulate an adequate response.

The Court also rejected claims of copyright abuse or some other “nefarious purpose” by Blacklock. Justice Roy also denied Parks Canada’s request to rectify/strike down Blacklock’s terms to the extent they did not conform with Park Canada’s understanding.

(ii) Was there a circumvention of a TPM?

Although Parks Canada asked the Court to issue a broad declaration that it intended to rely on in other copyright lawsuits initiated by Blacklock, the Court expressed concern about the dearth of technical evidence. Specifically, the Court noted the complete absence of evidence identifying the specific TPM and the specific action that would constitute circumvention at issue in the case.

Although both parties canvassed whether a password could be considered a TPM (the circumvention of which would be actionable), Justice Roy did not decide on this issue because it

was unnecessary. The Court found no evidence that the password had been circumvented. The Court concluded that obtaining and using a password as intended does not count as circumventing a TPM under the *Copyright Act*.

(iii) Was there fair dealing?

On the record before him, Justice Roy found that Parks Canada had purchased a subscription and used its subscription solely for research. Accordingly, and consistent with Justice Barnes' finding of fair dealing in Blacklock's previous claim against the Department of Finance, Justice Roy found that Park's Canada's use was consonant with the fair dealing provision of the *Copyright Act*.

The Court emphasized that fair dealing is integral to the copyright regime and is relevant even in the context of TPMs. Significantly, in the Court's view, "how access to the work has been accomplished" will obviously be relevant to the analysis of whether the dealing is fair. To that end, the Court expressly cautioned that nothing in this decision should be taken as condoning practices which contravene the *Act* in the guise of monitoring the media at large: "Different facts may generate different outcomes."

Takeaways

This decision raises several considerations involving TPMs, terms and conditions, and fair dealing. In brief:

- **If you are asserting a TPM, get your evidence in order**. The parties in the present action did not advance any expert evidence to assist the Court with technical questions related to the TPM at issue, including how it may have been circumvented. Blacklock, as the plaintiff, failed to lead admissible evidence as to the state of its website and terms and conditions. A more fulsome evidentiary record may have assisted the moving party in advancing their claim.
- **Consider your terms and conditions**. Irrespective of whether you are relying on TPMs, have clear terms and conditions that must be agreed to by a party before accessing your content. In this manner, a breach of those terms may constitute an independent cause of action.
- **Circumvention of TPMs is a case-specific analysis**. The facts surrounding *how* a work is accessed, and whether TPMs were circumvented to do so, is relevant to whether a dealing is fair. Similarly, whether a password can be a TPM remains an open question and will depend on the specific circumstances at hand. It remains to be

seen how a Court will ultimately view passwords, but we note that at least one academic institution refers to passwords as a form of TPM.

- **Fair dealing is germane to TPMs.** As discussed above, fair dealing remains an essential part of the copyright regime. TPMs do not render that analysis moot.