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Court rules password sharing for subscription constituted fair dealing in 'landmark decision'

By **Anosha Khan**

Law360 Canada (June 6, 2024, 4:44 PM EDT) -- In what one copyright law expert is describing as a huge win for copyright user rights in Canada, the Federal Court has found that Parks Canada employees who shared the password for a single account to access a subscription-based news site were engaged in fair dealing under the *Copyright Act* and did not infringe copyright law.

In *1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General)*, 2024 FC 829, the Attorney General of Canada was a defendant in an action launched by Blacklock's Reporter, an online news site that covers topics related to politics, legislation and parliamentary committees.

The matter involved a subscription to Blacklock's Reporter that was purchased by an employee of Parks Canada. Blacklock's Reporter alleged that Parks Canada used the subscription in a manner contrary to the *Copyright Act* by "obtaining, reading and distributing news articles without proper authorization."

Blacklock's Reporter had discontinued the action, but the Attorney General counterclaimed and brought a summary judgment motion. The motion sought declaration on three matters related to the terms and conditions to gain access to the site, whether Parks Canada's access constituted fair dealing, and whether sharing of a password circumvented technological protection measures (TPM) under the Act.

"The Federal Court has issued a landmark decision on copyright's anti-circumvention rules, which concludes that digital locks should not trump fair dealing," University of Ottawa law professor Michael Geist wrote in a blog post. "Rather, the two must co-exist in harmony, leading to an interpretation that users can still rely on fair dealing even in cases involving those digital locks.

"The decision could have enormous implications for libraries, education, and users more broadly as it seeks to restore the copyright balance in the digital world," added Geist, an expert in copyright and technology law.

Federal Court Justice Yvan Roy referred to the case in which Blacklock's Reporter had sued the Department of Finance for violating its copyright for the same reasons as Parks Canada: *1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General)*, 2016 FC 1255. The attorney general successfully argued that the use constituted fair dealing for the purposes of research.

In that case, there was "no description or explanation as to what constitutes a password from a technical standpoint," similar to the case at hand. However, in that case, there was also no indication that "access to a password was used by Finance officials."

While the Attorney General was successful, the Federal Court "acknowledged that the copyrighted material had been used by the Department without payment and without consent."

The articles were found to be legally and appropriately obtained, as they were sent to departmental officials for a legitimate business reason, and they received them unsolicited and read them for a legitimate business purpose.

It was said that "no commercial advantage was sought or obtained by the Department's use of the articles, nor were they republished in any form," and that the department had a direct and immediate

interest in the content. The department was not aware of nor agreed to the terms and conditions.

"Indeed, a finding of copyright infringement against a news source for the simple act of reading the resulting copy is likely to have a chilling effect on the ability of the press to gather information," said Justice Roy. "Such a result cannot be in the public interest."

Parks Canada's interest in the publication was alleged to be for "correcting erroneous or misleading information" that occurred in Blacklock's Reporters articles. The agency said the articles accessed by Parks Canada and shared within the organization only related to the agency's mandate and activities.

It was further alleged that Parks Canada employees would receive emails from Blacklock's Reporter "referring to contents that were either deceitful or misleading, or alarmist." The limited sharing of articles would "help ensure a coordinated response or position on behalf of the government."

The employee who bought the subscription was not asked to agree to the terms and conditions, as most vendors require. The terms and conditions provided that one subscription is allotted per subscriber and the distribution of articles through any method was not permissible.

The attorney general sought declarations that there was no binding agreement between the parties, the TPM was not circumvented and that Parks Canada did not infringe on Blacklock's Reporter's copyright. Parks Canada contended that it did not consent to the purchase of a subscription for a single user.

"There was one level of membership and that did not deviate," said Justice Roy. "That is the evidence before the Court and, in my view, it is insufficient to infer some nefarious purpose on the part of Blacklock's Reporter."

He found that Parks Canada did not infringe Blacklock's Reporter's copyright, noting that this conclusion largely stemmed from the Department of Finance case since the facts in both cases led to the same conclusion.

"There is in this case clear evidence that Parks Canada acquired the subscription that was made available in order to gain access to articles produced by Blacklock's Reporter. It used it exclusively for a purpose consonant with the fair dealing provision of the Act, in line with the use made of BR's articles in the Blacklock's Reporter Judgment rendered by my former colleague, Barnes J (Department of Finance)."

He noted that "research" is to be given a large and liberal interpretation to ensure that users' rights are not unduly constrained. Also, similar to the Department of Finance case, the terms and conditions were not ignored; rather, they were not known. Even if they were, the provisions did not "unambiguously prohibit the circulation of Blacklock's copy for personal or non-commercial purposes."

"There was no reason to think that sharing a very limited number of articles to a limited number of officials solely interested in the content for business reasons having to do with the Agency's mandate and reputation could constitute somehow a violation of the Act."

Further, in previous cases, it was noted that courts had declined to address issues concerning TPM without a solid evidentiary base. In this case, no evidence was provided. Circumvention was not established as the password was used "as it was meant to be used."

The court found that the attorney general was entitled to the declaration that the circumstances of this case constituted fair dealing under s. 29 of the *Copyright Act*, "having purchased the only type of subscription offered, which allowed the acquisition of a password needed to access articles produced by Blacklock's Reporter."

It was further entitled to the limited declaration that the permitted acquisition and use of a password was not a circumvention of the TPM of the *Copyright Act*.

Counsel for the respondent were Scott Miller and Deborah Meltzer of MBM Intellectual Property Law LLP.

Counsel for the moving party was Alexander Gay.

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