



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



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

March 20, 2026

# Password Reset Required! The Federal Court of Appeal Weighs in on TPMs

Savvy content creators and copyright owners often use technological protection measures (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 the *Copyright Act*, but the interpretation of those provisions and how they fit within the broader *Copyright Act* is the subject of ongoing debate.

As we noted in our earlier comment on the Federal Court's decision in *1395804 Ontario Ltd v Canada (Attorney General)*, Justice Roy provided judicial guidance on such questions, albeit on a less than exhaustive evidentiary record.

In a decision released yesterday, the Federal Court of Appeal weighed in and set aside most of that guidance. Justice Webb, writing for the Federal Court of Appeal, held that the decision below had little "practical utility" and did not settle a "live controversy" between the parties, as required by the Supreme Court of Canada's decision in *Daniels v Canada (Indian Affairs and Northern Development)*.

Although the Federal Court had claimed to circumscribe its decision and "resist the temptation to be helpful," the Court of Appeal found that even the narrow declarations provided should not have been granted at all.

This decision is a victory for rightsholders. The Federal Court's initial guidance on passwords, paywalls, and TPMs under the *Copyright Act* arose against the rightsholder's will on a deficient evidentiary record. The Court of Appeal has now removed that guidance from the legal landscape.

## Background and Key Facts

The Federal Court decision under appeal was part of a series of copyright lawsuits by 1395804 Ontario Ltd (operating as Blacklock's Reporter, Blacklock) against federal departments and agencies. This particular case involved Parks Canada. Blacklock, an Ottawa-based subscription news service, previously lost a similar suit against the Department of Finance in 2016.

In the matter under appeal, Parks Canada's media officer

bought a Blacklock subscription using a Parks Canada credit card and generic email, wanting to address allegedly misleading articles about the agency. The officer shared 15 relevant articles within Parks Canada. Although the sharing method was unclear on the record, Parks Canada admitted to sharing the subscription password. 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 Blacklock's 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 support a series of pending actions – continued against Blacklock's wishes.

Parks Canada asked the Federal Court to issue broad declarations for use in other Blacklock copyright lawsuits, but 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.

Parks Canada asked the Federal Court to consider and issue three declarations:

**(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 should be interpreted in favour of Parks Canada. There was no distinction 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).

**(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.

Before the Federal Court, Parks Canada largely succeeded on

points two and three. The Federal Court issued two declarations:

- Parks Canada's use of the password constituted fair dealing under section 29 of the *Copyright Act*.
- The lawful acquisition and use of a password do not constitute circumvention of a TPM.

As noted above, the Federal Court restricted its decision to addressing the issues on the evidence before the Court and resisted the invitation to address hypotheticals beyond the record.

Blacklock appealed.

### **The Court of Appeal's Decision**

The Federal Court of Appeal did not engage with the merits of either the fair dealing analysis or the TPM question. Instead, it resolved the appeal on a threshold issue: whether the declarations should have been made at all. The Court's answer was a resounding "No."

Applying the test from *Daniels*, the Court held that a declaration can be granted only if it will have "practical utility" (i.e., if it settles a live controversy between the parties). The Court found that the Federal Court had not meaningfully engaged with this requirement, noting there was "no further discussion" of *Daniels* in the reasons below, or any explanation of why the declarations would have practical utility.

**The first declaration (no TPM circumvention or intent to do so)** was rooted in findings about the specific facts of Parks Canada's subscription purchase. Since Blacklock had discontinued the underlying copyright infringement action, the Court found that this fact-specific declaration had no bearing on any remaining live dispute. The Court observed that it was "far from clear" how a declaration tied to one department's particular subscription purchase could assist in actions involving other government departments.

**The second declaration (the lawful acquisition and use of a password does not constitute circumvention of a TPM)**

was, in the Court of Appeal's view, essentially self-evident as framed. As the Court put it: if the acquisition and use of a password is authorized, "how could such acquisition and use constitute the circumvention of a TPM?" Notably, the declaration did not address whether a password is in fact a TPM. The Court concluded that this kind of generic statement does not settle any live controversy between the parties and, accordingly, has little value.

The Court also addressed Blacklock's argument that the Federal Court erred in finding that the paywall, as opposed to the password, was not the relevant TPM. The Court of Appeal confirmed that the Federal Court's decision did not contain any declaration about the paywall, and because the counterclaim's requested declarations focused exclusively on password sharing, this issue did not arise from the pleadings.

The Court of Appeal found that the Federal Court's statement that "the paywall is not the TPM" was *obiter dicta* (i.e., a passing remark not necessary to the outcome of the case). The Court of Appeal expressly declined to endorse or criticize that comment, leaving the question open for future cases.

**Key Takeaways**

- **The core questions around TPMs remain open.** This decision does not advance the law on whether a password or a paywall constitutes a TPM, or on the interplay between fair dealing and TPMs. As we flagged in our earlier comment, whether a password can be a TPM remains an open question that depends on case-specific circumstances. The Court of Appeal's decision reinforces that these questions await a case with a proper evidentiary foundation and a live controversy. The courts have yet to identify any principled or factual reason paywalls or passwords should not be considered TPMs.
- **Evidence matters and so does a live dispute.** In our prior post, we emphasized that parties asserting TPMs must get their evidence in order, including expert testimony on the technical nature of the TPM and admissible evidence on terms and conditions. This decision underscores a related but equally important point: even with evidence, a court will not issue declarations in the abstract. The *Daniels* framework requires practical utility and a live controversy, and those requirements have teeth.
- **Declaratory relief is not a substitute for litigation on the merits**

. The Attorney General sought broad declarations to help resolve other pending Blacklock actions. The Court of Appeal was unpersuaded. Fact-specific declarations based on one department's circumstances, rendered after the underlying action is discontinued, will not necessarily assist in other proceedings. Parties contemplating declaratory relief should ensure their claims are tied to a genuine, ongoing dispute.