

Federal Court



Cour fédérale

Date: 20161110

Docket: T-1391-14

Citation: 2016 FC 1255

Ottawa, Ontario, November 10, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**1395804 ONTARIO LTD., OPERATING AS
BLACKLOCK'S REPORTER**

Plaintiff

and

CANADA (ATTORNEY GENERAL)

Defendant

JUDGMENT AND REASONS

[1] This is a case about copyright. More specifically, it is a case about the fair dealing provisions of the *Copyright Act*, RSC, 1985, c C-42 [the Act] in the context of third party use of content protected by a paywall.

[2] The Plaintiff, carrying on business as Blacklock's Reporter [Blacklock's], contends that officials in the Department of Finance [the Department] violated its copyright by obtaining, reading and distributing two of its news articles without authorization.

[3] The Attorney General argues that Blacklock's conduct is a misuse of copyright and that the conduct Blacklock's complains about constitutes fair dealing under section 29 of the Act.

I. Background

[4] Blacklock's is a small Ottawa-based, online news agency. It is owned and operated by Tom Korski and Holly Doan. Mr. Korski is the managing editor and Ms. Doan is the publisher. Mr. Korski writes news copy for Blacklock's along with a number of free-lance reporters. Among other duties, Ms. Doan looks after the negotiation of licensing agreements for institutional subscribers.

[5] Blacklock's employs a paywall to protect its news copy. In order to gain access to the full content of its news articles a paid subscription and a password are required. Single subscriptions are available through an online application. The application does not require a subscriber to acknowledge and accept any terms of use before the transaction is concluded. It does, however, refer to the purchase of custom bulk rates for institutional subscribers who would like to distribute or share Blacklock's content in-house. At the foot of the subscription application is a reference to "Terms and Conditions" but these are not particularized and would only be seen by a subscriber following a search of Blacklock's website.

[6] Blacklock's complains that in October 2013 certain Department officials acquired and distributed two of its news articles without its consent and without payment. For this alleged infringement it seeks damages of \$17,209.10.

[7] The underlying relevant facts are largely undisputed. Indeed, the parties tendered an Agreed Statement of Facts which generally describes the conduct that is the subject of this proceeding.

[8] In the course of writing a news story about changes to Canadian sugar tariffs, Mr. Korski interviewed the President of the Canadian Sugar Institute, Sandra Marsden. Mr. Korski also made enquiries of the Department seeking information about the tariff changes. The Department's media relations officer, Stéphanie Rubec, responded to Mr. Korski and provided an explanation. Further email exchanges between Mr. Korski and Ms. Rubec took place throughout the afternoon of October 9, 2013 culminating in a detailed response sent to Mr. Korski by Ms. Rubec at 7:25 pm. According to Mr. Korski, he had earlier signed off on his article and did not see Ms. Rubec's final response until sometime the next day. Mr. Korski's article was then published online on October 10, 2013 without any reference to Ms. Rubec's last response.

[9] Mr. Korski's article carried the headline "\$30,000,000 Sugar Tax is Averted". Notwithstanding Ms. Rubec's several on-the-record responses to Mr. Korski's questions, his article improperly attributed "did not comment" to the Defendant.¹ The article quoted

¹ This is a practise Mr. Korski adopts when he does not accept or approve of the answers he is given from a source: see Exhibits D-33 and D-52 and confirmed by Mr. Korski's testimony.

Ms. Marsden at length and included Mr. Korski's characterization of a "Department of Finance error" in the imposition of a \$30 million sugar tax on the Canadian sugar industry.

[10] Ms. Marsden's attention was drawn to Mr. Korski's article upon receipt of an email sent to her by Blacklock's at 9:12 am on October 10, 2013. The email included the following digest of Mr. Korski's article:

\$30,000,000 Sugar Tax Is Averted

A Department of Finance error that meant a \$30 million sugar tax is being remedied following appeals from industry. A trade group said a mistaken tariff hike on Brazilian imports would have forced the closure of at least one Canadian sugar refinery: "We would have been a casualty."

[Read more.](#)

[See Exhibit D-53]

[11] At about the same time, a Twitter message was sent by Blacklock's to Ms. Marsden stating: "Lucy and Ethel at Finance Canada impose a \$30M sugar tax by mistake at blacklocks.ca".

[12] Because Ms. Marsden could not access the entire article without a subscription she went online and paid for a single annual subscription at a price of \$148.00. She then copied Mr. Korski's article.

[13] Ms. Marsden testified that she was immediately concerned about the accuracy of Mr. Korski's article and particularly, with his pejorative attribution of an "error" to the Department. She was concerned that this statement might be linked to her and cause damage to

her working relationship with Department officials. In order to manage that relationship she sent Mr. Korski's article to Patrick Halley in the International Trade Policy Division by pasting the content of the article into an email. Ms. Marsden's email stated: "Most of the facts are accurate although I'm not all happy with the spin – obviously I wouldn't have characterized this as a 'sugar tax' nor a Department of Finance 'error'."

[14] On October 11, 2013 Mr. Korski wrote a second article on the same subject. The title of the second piece was "It didn't make any sense..." Once again Mr. Korski cast the Department in an unfavourable light. Notwithstanding Mr. Korski's awareness of Ms. Rubec's detailed responses, this article contained the following opening sentence:

The Department of Finance is at a loss to explain how it mistakenly set a \$30 million sugar tax, then had to withdraw it by special amendment amid industry protest.

[15] Using her subscription password Ms. Marsden obtained a copy of this article and again sent it by email to Mr. Halley. Ms. Marsden testified that she was unaware of Blacklock's Terms and Conditions for use and it never crossed her mind that, by sending the articles to Mr. Halley, she could be infringing Blacklock's copyright.

[16] At the time of receiving the subject articles, the Department did not have a Blacklock's subscription. The evidence discloses, however, that Ms. Rubec had made an earlier enquiry to Ms. Doan about a bulk subscription allowing for general departmental access. Ms. Doan provided multiple user rates of between \$11,470.00 and \$15,670.00 (see Exhibit P-61), but nothing further came of the matter.

[17] When Mr. Halley received the first Blacklock's article he forwarded it by email to Ms. Rubec. Mr. Halley expressed some concern about the content of the story stating: "I think the spin can be corrected by going through the dates and facts, especially as sugar industry clearly understands what we did and does not agree with the reporter's characterization" (see Exhibit D-83). Ms. Rubec responded, in part, as follows: "The reporter wrote at about 4:30 that he would put us down as a no comment regardless and was set on his spin [...]. I'm going to ask the reporter to update his story with what I provided as lengthy information/comment. I'll let you know what he says."

[18] Mr. Halley also forwarded the first article to his departmental colleagues Dean Beyea and Scott Winter, advising them that he was in contact with Ms. Rubec "in Media Relations on whether follow-up is needed". Scott Winter, in turn, sent the article to his colleague, Karen LaHay.²

[19] When Mr. Halley received Blacklock's second story "It didn't make any sense..." he sent it to another colleague, Michèle Govier. He also sent it to Mr. Beyea, Mr. Winter and Ms. LaHay with the comment: "Not totally accurate still but better than the first story" (see Exhibit D-84).

[20] Mr. Winter was a senior policy analyst in Mr. Halley's working group and Mr. Beyea was Mr. Halley's immediate supervisor. Ms. LaHay was also a senior policy analyst who worked with Mr. Winter in Mr. Halley's group. Mr. Halley testified that each of these individuals was included in the circulation of the Blacklock's articles because of their possible involvement in a follow-up to the articles. Ms. Govier was included because she was working on a related anti-

dumping file involving the sugar industry. Ms. Rubec was involved because she was the media relations officer who had been directly communicating with Mr. Korski on the story and who would be expected to communicate with him in the future.

[21] The documentary record indicates that only six departmental officials received copies of one or both of the Blacklock's articles beginning with Mr. Halley.³ Notwithstanding the stated departmental concerns about the content of Mr. Korski's articles no further follow-up was deemed necessary and the matter was dropped.

II. Analysis

[22] To resolve this matter I need only decide whether the conduct Blacklock's impugns is protected under the fair dealing provisions of the Act and, in particular, section 29. Although there are certainly some troubling aspects to Blacklock's business practices it is unnecessary to resolve the Attorney General's allegation that this litigation constitutes a form of copyright abuse by a copyright troll.

[23] I accept Blacklock's point that it has established that its copyrighted material was used by the Department without payment or consent. Indeed, the Defendant admits those facts. The burden accordingly rests on the Attorney General to establish, on a balance of probabilities, that this acknowledged use is protected by section 29 of the Act.

² Ms. LaHay also received a copy of the article by email from Mr. Halley on October 18, 2013.

³ I do not accept that the evidence establishes that the articles made their way to the Minister's office, but even if they did, nothing turns on that point.

[24] Fair dealing by a user of copyrighted material is a well-recognized right under the Act. Section 29 provides basic legal protection where the purpose of use is “research, private study, education, parody or satire.” The scope of protection afforded by section 29 is also well-understood. The policy rationale for protecting user rights has been described by Professor David Vaver in *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed (Toronto: Irwin Law, 2011) at page 215:

The *Copyright Act* lets users carry on a wide range of activities without needing to worry about copyright. What the Act specifically permits is not an infringement. Whoever does a permitted act is not just taking advantage of a limitation, exception, exemption, defence, “loophole,” or gracious indulgence extended by a copyright owner. He is exercising a right inherent in the balance the *Copyright Act* strikes between owners and users. Both owner and user rights must receive the fair and balanced reading that befits remedial legislation. User rights need to be as liberally interpreted as owner rights are, lest copyrights become “instruments of oppression and extortion” and unduly interfere with people’s rights to deal as they wish with their own tangible property.

[Footnotes omitted.]

[25] The two leading cases dealing with section 29 are *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [CCH] and *Society of Composers, Authors and Music Publishers of Canada v Bell Media*, 2012 SCC 36, [2012] 2 SCR 326 [SOCAN]. In *CCH*, Chief Justice McLachlin writing for the Court noted that, in order to maintain the proper balance between the protection of and access to copyrighted materials in the Act, the fair dealing provision “must not be interpreted restrictively” (paras 48, 54). The Court set out a two-part test for determining whether use of copyrighted material constitutes fair dealing, which it characterized not as a defence but as a “user’s right” (para 48):

1. Whether the dealing is for the purpose of “research” or “private study”, also known as an allowable purpose; and
2. Whether the dealing is “fair” (para 50).

[26] While the Court in *CCH* did not define “research”, it notably concluded that “[r]esearch” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained” (para 51). With respect to the second part of the test, whether something is “fair” is a question of fact and depends on the facts of each case (*CCH*, para 52). Relevant factors to consider are:

1. The purpose of the dealing, where an objective assessment is made of the “real purpose or motive” behind using the copyrighted work, such as for commercial purposes versus charitable purposes (para 54);
2. The character of the dealing, examining how the works were dealt with, such as whether multiple copies of works are being widely distributed, or whether a single copy of a work is used for a legitimate purpose (para 55);
3. The quantity or amount of the dealing, including the importance of the work allegedly infringed (para 56);
4. Alternatives to the dealing, such as whether there is a non-copyrighted equivalent of the work that could have been used instead (para 57);
5. The nature of the work, such as whether the work has been published or is confidential (para 58); and
6. The effect of the dealing on the work, such as whether a reproduced work is likely to compete with the market of the original work (para 59).

[27] In *CCH*, the issue was whether the Law Society of Upper Canada's [LSUC] provision of custom photocopy services to members of the LSUC was an infringement of legal publishers' copyrights, or whether it constituted "fair dealing". The Court's operative conclusion with respect to the service being an allowable purpose is as follows:

64 The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism . . . may be provided to users of the Great Library." When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

[28] The Court went on to conclude that the dealing was also fair, considering the LSUC provides single copies of works for the specific purposes allowed under section 29, the existence of an "Access Policy" provided to all users, the lack of alternatives to the custom photocopy service, the public interest in access to judicial decisions and other legal resources not being unjustifiably restrained, and the lack of evidence tendered to show the market for the publishers' work decreased as a result of the copies being made.

[29] Also notable in the *CCH* decision is the following:

[t]he availability of a license is not relevant to deciding whether a dealing has been fair ... If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests (para 70).

[30] In *SOCAN*, the issue was whether the appellants were entitled to collect royalties from Bell for the provision of music “previews” – 30 to 90 second excerpts – that could be streamed online by consumers before purchasing the entire musical track. The previews helped users decide whether to purchase a permanent download of the work. In concluding that the use of the previews constituted “research” under section 29, Madam Justice Abella said:

[18] The Federal Court of Appeal endorsed the Board's view that listening to previews was part of planning the purchase of a download of a musical work and was therefore “for the purpose of research”, concluding:

. . . it would not be unreasonable to give the word “research” its primary and ordinary meaning. The consumer is searching for an object of copyright that he or she desires and is attempting to locate and wishes to ensure its authenticity and quality before obtaining it. . . . “[L]istening to previews assists in this investigation”. [para. 20]

...

[21] It is true that an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity: Abraham Drassinower, “Taking User Rights Seriously”, in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (2005), 462, at pp. 467-72. But that does not argue for permitting *only* creative purposes to qualify as “research” under s. 29 of the *Copyright Act*. To do so would ignore the fact that the dissemination of works is also one of the *Act's* purposes, which means that dissemination too, with or without creativity, is in the public interest. It would also ignore that “private study”, a concept

that has no intrinsic relationship with creativity, was also expressly included as an allowable purpose in s. 29. Since “research” and “private study” both qualify as fair dealing purposes under s. 29, we should not interpret the term “research” more restrictively than “private study”.

[22] Limiting research to creative purposes would also run counter to the ordinary meaning of “research”, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

...

[27] In mandating a generous interpretation of the fair dealing purposes, including “research”, the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair. SOCAN’s submission that “research” be restricted to the creation of new works would conflate the allowable purpose with the fairness analysis and unduly raise the bar for entering that analysis. Moreover, its restricted definitional scope of “research” contradicts not only the Court’s admonition in *CCH* that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, [the fair dealing exception] must not be interpreted restrictively” (para. 48), but also its direction that the term “research” be given a “large and liberal interpretation” so that in maintaining that balance, users’ rights are not unduly constrained (paras. 48 and 51).

...

[30] Similarly, in considering whether previews are for the purpose of “research” under the first step of *CCH*, the Board properly considered them from the perspective of the user or consumer’s purpose. And from that perspective, consumers used the previews for the purpose of conducting research to identify which music to purchase, purchases which trigger dissemination of musical works and compensation for their creators, both of which are outcomes the *Act* seeks to encourage.

[Emphasis added.]

[31] From the discussion of “research” in *SOCAN*, the following additional principles can be distilled:

1. Research does not need to be undertaken for the purpose of the user engaging in its own act of authorship or creativity;
2. Research is not limited to creative purposes but can be “piecemeal, informal, exploratory, or confirmatory”, and can be undertaken for no purpose except personal interest;
3. The first step in the fair dealing analysis is a relatively low threshold and does not require the creation of a new work; and
4. The analysis should be undertaken from the perspective of the user or consumer’s purpose.

[32] In *Warman v Fournier*, 2012 FC 803 at para 5, 414 FTR 249, this Court also found fair dealing to exist where website operators reproduced a copyrighted article on their website, described as an “online political news discussion forum which is accessible to any member of the public and which is used for discussing political issues from a conservative viewpoint.”

Justice Rennie held that the use was for an allowable purpose (news reporting under section 29.2), and was fair, despite there being an arguable alternative to the dealing and despite the excerpts being widely distributed on the internet.

[33] I am satisfied that the Department’s acknowledged use of the two Blacklock’s articles constituted fair dealing. There is no question that the circulation of this news copy within the

Department was done for a proper research purpose. There is also no question that the admitted scope of use was, in the circumstances, fair.

[34] The evidence establishes that Mr. Halley and Ms. Rubec were directly involved in responding to Mr. Korski. They each had legitimate concerns about the fairness and accuracy of Mr. Korski's reporting. In particular, Mr. Korski's attribution of "no comment" to the Department was a misrepresentation and his attribution of a mistake to the Department was, at best, ill-informed. Even Mr. Korski admitted that this pejorative description was based on assumptions about what had occurred. Based on what actually took place Blacklock's reference to "Lucy and Ethel" was also inapt and unfair. Mr. Halley and Ms. Rubec therefore had an interest in correcting the record with Blacklock's.

[35] Mr. Halley's further limited distribution of the articles to five departmental colleagues for their review also falls squarely within the scope of permitted research. Everyone involved had a legitimate need to be aware in the event that further action was deemed necessary.

[36] In finding the scope of use of the articles to be fair I have considered the following factors, all of which favour the Defendant's position:

- (a) The articles were legally and appropriately obtained by Ms. Marsden who was a paid subscriber to Blacklock's. Blacklock's website was not hacked or accessed by illicit means. In the result, the articles were no longer behind Blacklock's paywall when the Department obtained them.

- (b) Ms. Marsden sent the articles to Mr. Halley for a legitimate business reason (i.e., to protect her business reputation and to manage her working relationship with the Department);
- (c) The Department received the articles unsolicited and used them (i.e., read them) for a legitimate business purpose (i.e., to consider whether the stories required a response or correction);
- (d) The articles were circulated among only six Department officials all of whom had a reason to see them;
- (e) No commercial advantage was sought or obtained by the Department's use of the articles nor were they republished in any form;
- (f) The two articles represented only a small fraction of the protected news copy on Blacklock's website and one of them was shortly-after publically exposed on Blacklock's website;
- (g) The articles contained information obtained from the Department in response to Mr. Korski's queries. As a source, the Department had a direct and immediate interest in their content. 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. Such a result cannot be in the public interest;
- (h) Mr. Halley and Ms. Rubec had a reasonable basis for their concern that the articles misrepresented some of the information they had conveyed to Mr. Korski

and that a correction might be warranted. The involvement of their colleagues in a possible follow-up was, in the circumstances, reasonable;

- (i) Neither Ms. Marsden nor the Department were aware of, or agreed to, Blacklock's Terms and Conditions. In any event and as noted below, those provisions did not unambiguously prohibit the circulation of Blacklock's copy for personal or non-commercial purposes. If Ms. Marsden, as a subscriber, had the right to use and distribute the articles for a non-commercial purpose, those who received the articles lawfully could reasonably expect to enjoy the same privilege;
- (j) What occurred here was no more than the simple act of reading by persons with an immediate interest in the material. The act of reading, by itself, is an exercise that will almost always constitute fair dealing even when it is carried out solely for personal enlightenment or entertainment; and
- (k) While the public interest is served by the vigilance of the press, copyright should not be a device that serves to protect the press from accountability for its errors and omissions. The Department had a legitimate interest in reading the articles with a view to holding Blacklock's to account for its questionable reporting.

[37] I agree with Mr. Hameed that the deliberate breach of the accepted terms of access to and use of copyrighted material, whether protected by a paywall or not, is a relevant consideration in applying the fair dealing provisions of the Act. However, the owner of copyright must establish that the terms of use actually prohibit the access or distribution in question and that the person involved was aware of the limitations.

[38] It is a simple exercise to bring the stipulated terms of use to the attention of a subscriber to a paywall-protected news service. All that is required is an acknowledgement at the time of acquiring access that the terms in question were read and accepted.

[39] In this case Blacklock's failed to ensure that its subscribers were aware of the Terms and Conditions it sought to impose. According to Mr. Korski and Ms. Doan, an astute or sophisticated subscriber to Blacklock's would be aware of its limitations on use by the reference on the application form to bulk user access and by the generic reference to "Terms and Conditions" at the foot of every website page.

[40] In my view Blacklock's approach is deficient and potentially misleading to subscribers like Ms. Marsden. Because the Terms and Conditions of use were not clearly brought to Ms. Marsden's attention for acceptance, she had no reason to think that by sharing the two Blacklock's articles she was breaching Blacklock's copyright or facilitating a breach by others.

[41] The requirement for bringing contractual conditions to the attention of a subscriber at the time of purchase is well-known in the law. It is not something that is imposed by bare inference or by falling back on the supposed sophistication of users. At a minimum the party to be bound must be shown to have been aware of the Terms and Conditions at the time of purchase: see *Kobelt Manufacturing Co v Pacific Rim Engineered Products (1987) Ltd*, 2011 BCSC 224 at para 124, 84 BLR (4th) 189.

[42] I do not accept that Ms. Marsden or the Department should be taken to be aware of Blacklock's web-based terms of use.⁴ But even if they had been aware they would have been no further ahead. Blacklock's Terms and Conditions contain a material ambiguity concerning downstream distribution. On the one hand they seemingly prohibit distribution by subscribers but, on the other, they permit it for personal, or non-commercial uses:

Blacklock's Reporter and its contents are the property of 1395804 Ontario Ltd., and are protected, without limitation, pursuant to Canadian and foreign copyright and trademark laws.

You acknowledge and agree one subscription is allotted per subscriber. Distribution of articles, photographs, images, writings or other content of any kind by a single subscriber by paper, electronic file, disc, intranet or any and all methods is not permissible. For purchase of bulk subscriptions, see "Contact".

Reproduction, duplication, or distribution of *Blacklock's Reporter* and/or all or any part of its content for anything other than your personal, non-commercial use is a violation not only of these Terms and Conditions but also of copyright laws unless you have written permission from *Blacklock's Reporter*. The content on *Blacklock's Reporter* is made available to you for non-commercial, personal, or educational purposes only. The content may not be modified in any manner and the intellectual property notice must be included on every display and copy of the content. No other use is permitted. Nothing contained herein shall be construed as conferring any right under any copyright of *Blacklock's Reporter* or any other person who owns the copyright in the content provided on *Blacklock's Reporter*. [Emphasis added.]

[43] As the drafter of the above conditions, Blacklock's is bound to the interpretation most favourable to the users of its copy which, in this case, permitted Ms. Marsden's distribution to the Department for a non-commercial purpose, and by implication, permitted a similar use by Mr. Halley.

⁴ Ms. Marsden testified that she only wanted copies of the two articles and had no reason to search Blacklock's website for its conditions of use when she completed the subscription application.

[44] All of this is not to say that subscribers like Ms. Marsden have unlimited rights of use of copyrighted material. Absent consent, subscribers and downstream users are subject to the obligations imposed on them by the Act. But at the same time they enjoy the considerable protection afforded to them under the statutory fair dealing provisions.

[45] Blacklock's maintains that this case challenges the viability of its business model including its right to protect news copy behind a subscription-based paywall. The suggestion that Blacklock's business cannot survive in the face of the minor and discrete use that took place here is essentially an admission that the market places little value on Blacklock's work-product. All subscription-based news agencies suffer from work-product leakage. But to customers who value easy, timely and unfettered access to news that may not be readily available from other sources, the price of a subscription is worth paying. It also goes without saying that whatever business model Blacklock's employs it is always subject to the fair dealing rights of third parties. To put it another way, Blacklock's is not entitled to special treatment because its financial interests may be adversely affected by the fair use of its material. Nothing in these reasons should however be taken as an endorsement of arguably blameworthy conduct in the form of unlawful technological breaches of a paywall, misuse of passwords or the widespread exploitation of copyrighted material to obtain a commercial or business advantage.

III. Conclusion

[46] For the foregoing reasons this action is dismissed with costs payable to the Defendant. I am given to understand that offers to settle may have been exchanged. I will therefore invite the

parties to address this issue in writing within ten days of this decision. Neither submission is to exceed ten pages in length.

JUDGMENT

THIS COURT'S JUDGMENT is that this action is dismissed.

THE COURT FURTHER ORDERS that the issue of costs is reserved pending the receipt of written submissions from the parties.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1391-14

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APPEARANCES:

Mr. Yavar Hameed FOR THE PLAINTIFF

Mr. Alex Kaufman FOR THE DEFENDANT
Ms. Orlagh O'Kelly

SOLICITORS OF RECORD:

Hameed Law FOR THE PLAINTIFF
Barristers and Solicitors
Ottawa, ON

William F. Pentney FOR THE DEFENDANT
Deputy Attorney General of Canada
Ottawa, ON