

**FEDERAL COURT OF APPEAL**

BETWEEN:

**1395804 ONTARIO LTD., operating as  
BLACKLOCK'S REPORTER**

Appellant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

- and -

**THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND  
PUBLIC INTEREST CLINIC (CIPPIC)**

Intervener

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**INTERVENER'S MEMORANDUM OF FACT AND LAW**

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Table of Contents

**PART I – OVERVIEW ..... 1**

**PART II – POINTS IN ISSUE ..... 2**

**PART III – STATEMENT OF SUBMISSIONS ..... 2**

A. Text, scheme and purposes: TPM’s do not trump fair dealing..... 3

    1) The *Act*’s text indicates the TPM Provisions do not trump fair dealing ..... 3

    2) The *Act*’s scheme indicates the TPM Provisions do not trump fair dealing ..... 7

    3) Subordinating the TPM Provisions to fair dealing furthers the *Act*’s purposes ..... 9

B. The broader legislative and constitutional context favours subordinating the TPM Provisions to fair dealing..... 13

    1) Interpreting the TPM Provisions as coextensive with copyright protection respects the constitutional division of powers..... 13

    2) The legislative history shows no intent for TPM’s to trump fair dealing ..... 15

    3) Subjecting the TPM Provisions to fair dealing respects the WIPO Treaties ..... 16

C. Circumvention of TPMs occurs only in the face of illicit activity ..... 17

**PART V – LIST OF AUTHORITIES ..... 22**

## PART I – OVERVIEW

1. CIPPIC is grateful for the privilege of intervening in this Appeal to make two submissions: (1) the “**TPM Provisions**” contained in [sections 41 and 41.1](#) of the *Copyright Act*<sup>1</sup> do not preclude fair dealing; and (2) employing a validly obtained password does not “circumvent” a TPM as defined in [section 41](#) of the *Act*.
2. **TPMs do not trump fair dealing:** Permitting copyright owners to effectively negate fair dealing by employing TPMs defeats the *Act*’s careful balance between owner and user rights. The *Act*’s text, context and purpose, read in light of the jurisprudence on fair dealing, show Parliament did not intend this outcome. Absent irresistibly clear language, the Court should reject an interpretation that would enable copyright owners to unilaterally and self-servingly eviscerate the *Act*’s cornerstone user right, one the Supreme Court characterizes as “integral” to its function.<sup>2</sup>
3. CIPPIC acknowledges that where a person circumvents a TPM in furtherance of a fair dealing, both the context and method of circumvention may form part of the factual matrix relevant to fair dealing analysis. Whether the circumvention militates against fair dealing will vary. However, and contrary to the Appellant’s position, the mere fact of circumvention does not automatically render a dealing unfair.
4. **Using a validly obtained password is not “circumvention”:** The record lacks expert evidence on the technological nature of password systems, let alone the one at issue here. The record is also bereft of evidence on what the terms [section 41](#) uses to describe “circumvention”—like “decrypt”, “descramble” or “bypass”—mean *when applied to passwords*.
5. However, should the Court consider the record sufficient, CIPPIC submits that inputting an authentic and licitly obtained password does not circumvent a password system within the meaning of [section 41](#). This is consistent with Parliament’s intention

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<sup>1</sup> [RSC 1985, c C-42](#), BOA, Tab 1[*Act*].

<sup>2</sup> *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [paras 48-51](#), BOA, Tab 9 [*CCH*]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [para 19](#), BOA, Tab 10 [*Alberta (Education)*]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [para 27](#), BOA, Tab 11 [*Bell*].

to prevent illicit acts, like hacking, without inviting unintended, far-reaching consequences on innocent third parties.

## PART II – POINTS IN ISSUE

6. CIPPIC accepts the issues as the parties framed them.

## PART III – STATEMENT OF SUBMISSIONS

7. When interpreting the *Act*, the Court must give effect to Parliament’s carefully encoded balance between owners’ and users’ rights.<sup>3</sup> Allowing the TPM Provisions to categorically restrain fair dealing imperils that balance, returning to the “author-centric” view the Supreme Court rejected from *Théberge* onward.<sup>4</sup> CIPPIC submits that, properly interpreted, those provisions do not, as a matter of law, prohibit circumventing a TPM to engage in fair dealing. That said, both the fact and method of circumvention may be relevant to the fair dealing analysis in some cases.

8. The Court’s interpretive exercise sits within the legislative context of the 2012 *Copyright Modernization Act*. The *CMA* overhauled the *Act*, and that overhaul bears importance as it: (1) enacted the TPM Provisions; (2) expanded fair dealing; and (3) added a host of new users’ rights. In other words, Parliament recently considered and updated the *Act*’s nuanced ‘give and take’ between owner and user rights, including the very rights at issue on appeal. The fair dealing and TPM Provisions represent a key part of Parliament’s recalibration exercise. As argued below, the new users’ rights inform the TPM Provisions’ intended scope, specifically respecting fair dealing.

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<sup>3</sup> *Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34, [para 30](#), BOA, Tab 12 [*Théberge*]; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [paras 88-89](#), BOA, Tab 13 [*CAIP*]; *CCH*, [para 48](#), BOA, Tab 9; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2020-168*, 2012 SCC 68, [paras 64-66](#), BOA, Tab 14 [*Broadcasting Reference*]; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [para 67](#), BOA, Tab 15.

<sup>4</sup> *Bell*, [para 9](#), BOA, Tab 11.

9. As always, in construing the TPM Provisions, the Court must read the *Act*'s words in their entire context and in their grammatical and ordinary sense, harmoniously with the *Act*'s scheme, object and Parliament's intent.<sup>5</sup>

10. (A) The TPM Provisions' text, read harmoniously with the *Act*'s other relevant provisions, its scheme and purposes, demonstrates Parliament did not intend copyright owners to be able to hold fair dealing hostage based on their unilateral decisions to employ TPMs. (B) The relevant context, including the constitutional division of powers, legislative history and Canada's treaty obligations, reinforce this conclusion.

11. (C) Independent of these submissions, CIPPIC argues that whether a given technology is an "effective" TPM is contextual. A password system is not an "effective" TPM when accessed with an authentic password. This is because entering a valid and licitly obtained password to access password-protected content does not "circumvent" a TPM, as defined in [section 41](#).

**A. Text, scheme and purposes: TPM's do not trump fair dealing**

12. (1) The *Act*'s drafting demonstrates Parliament's intent that fair dealing remain unfettered by a copyright owners' arbitrary decision to employ TPMs. (2) The *Act*'s scheme and (3) recognized purposes further support this conclusion.

**1) The *Act*'s text indicates the TPM Provisions do not trump fair dealing**

13. When read together, the *Act*'s relevant provisions show Parliament did not intend to subordinate fair dealing to the TPM Provisions. Those relevant provisions include the TPM Provisions, the fair dealing provisions, and some of the other new user rights enacted through the *CMA*.

14. [Subsection 41.1\(2\)](#) grants copyright owners a broad remedial toolkit to address TPM circumvention. However, those remedies remain "subject to this Act". A copyright owner's ability to access a remedy is thus conditional on limits housed elsewhere in the *Act*.<sup>6</sup>

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<sup>5</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [para 21](#), BOA, Tab 16.

<sup>6</sup> *Opitz v Wrzesnewskyj*, 2012 SCC 55, [para 154](#), BOA, Tab 17.

15. Contrary to the Appellant’s argument, “subject to this Act” does not only refer to the conditions and limitations for remedies in [subsection 41.1\(2\)](#).<sup>7</sup> Where Parliament means to subject a right to conditions contained in the same section, it says so.<sup>8</sup> Parliament also indicates when a provision is only subject to other provisions within the same Part of the statute.<sup>9</sup>

16. In contrast with [subsection 41.1\(2\)](#), [section 29](#), the key fair dealing provision, contains no contingent “subject to” language. It states: “[f]air dealing for the purpose of research, private study, education parody or satire does not infringe copyright”.<sup>10</sup> This means the dealing falls outside the sphere of activity a copyright owner may control. [Sections 29.1](#) and [29.2](#) extend fair dealing to criticism/review and news reporting, respectively. Unlike [section 29](#), [sections 29.1](#) and [29.2](#) impose legislated threshold requirements germane to their particular contexts.

17. Nothing in [sections 29](#), [29.1](#) or [29.2](#) suggests their application is contingent on not circumventing a TPM. CIPPIC acknowledges that silence sometimes cuts both ways. But **the Act is not silent** on when a user right is subject to the TPM Provisions.

18. Unlike [sections 29-29.21](#), the “**New User Rights**” found in [sections 29.22](#) (reproduction for private purposes), [29.23](#) (reproduction for later listening or viewing) and [29.24](#) (backup copies) are only available if the user does not circumvent a TPM. [Paragraphs 29.22\(c\)](#), [29.23\(b\)](#) and [29.24\(c\)](#) clarify that the New User Rights apply only if: “...the individual did not circumvent, as defined in section 41, a technological protection measure...or cause one to be circumvented”.<sup>11</sup>

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<sup>7</sup> Appellant’s Memorandum of Fact and Law, para 74.

<sup>8</sup> E.g., *Act*, [ss 32.01\(1\)](#), [38.1\(1\)](#), BOA, Tab 1.

<sup>9</sup> E.g., *Excise Tax Act*, RSC 1985, c E-15, [s 68](#), BOA, Tab 5; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, [ss 17\(1\)](#), [18\(1\)](#) and [19\(1\)](#), BOA, Tab 6.

<sup>10</sup> *Act*, [s 29](#) (emphasis added), BOA, Tab 1.

<sup>11</sup> *Act*, [ss 29.22\(c\)](#), [29.23\(b\)](#), [29.24\(c\)](#), BOA, Tab 1.

19. The Supreme Court recently reiterated that statutory text “remains the anchor of the interpretive exercise”.<sup>12</sup> The textual difference between the fair dealing and New User Rights provisions thus cannot be ignored.

20. This is exactly what the Appellant asks this Court to do. It argues that the fair dealing provisions need not expressly say they are subject to the TPM Provisions “because of the presence of other preconditions that clearly imply that the exception could not be applicable in the event a TPM was circumvented”.<sup>13</sup> In support, it reproduces a table setting out various user rights provisions and their internal restrictions. The Appellant’s argument fails.

21. Accepting the Appellant’s position would render [paragraphs 29.22\(c\), 29.23\(b\)](#) and [29.24\(c\)](#) mere surplusage. This runs contrary to the presumption against tautology—that the Court make every effort to assign meaning to all the *Act*’s provisions.<sup>14</sup> The Supreme Court has many times affirmed this interpretive maxim.<sup>15</sup> To conclude that fair dealing and other user rights are *impliedly* subject to the same *express* pre-condition in [paragraphs 29.22\(c\), 29.23\(b\)](#) and [29.24\(c\)](#), would rob those provisions of any meaning. This could not have been Parliament’s intent.

22. The Appellant’s reading is even more implausible when one considers that the fair dealing provisions, New User Rights provisions **and** TPM Provisions were before Parliament at the same time. Again, with the *CMA*, Parliament: 1) amended [section 29](#) to add education, parody and satire to the existing fair dealing categories; 2) enacted [sections 29.21-29.24](#), along with other new user rights provisions; and 3) enacted the TPM Provisions.<sup>16</sup> Parliament could have easily written non-circumvention of TPMs

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<sup>12</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, [para 24](#), BOA, Tab 38.

<sup>13</sup> Appellant’s Memorandum of Fact and Law, para 74.

<sup>14</sup> *Sullivan on the Construction of Statutes*, 6ed (2014), § 8.23 [*Sullivan*], BOA, Tab 41

<sup>15</sup> E.g., *R v Kelly*, [1992 CanLII 62 \(SCC\)](#), [1992] 2 SCR 170, p 188, BOA, Tab 18; *R v Proulx*, 2000 SCC 5, [para 28](#), BOA, Tab 19; *John Doe v Ontario (Finance)*, 2014 SCC 36, [para 24](#), BOA, Tab 20.

<sup>16</sup> *CMA*, [ss 21, 22](#) and [47](#), BOA, Tab 2.

into the fair dealing provisions. It did not. The Court should decline the Appellant's invitation to ignore this legislative signal.

23. In that regard, far from assisting the Appellant, the table at paragraph 74 of its memorandum makes CIPPIC's point. In the narrower user rights provisions the Appellant excerpts, many of which came in through the *CMA*, Parliament legislates precise limits and pre-conditions. [Section 29](#) contains none of this limiting language. Rather, it is "always available" when the dealing passes muster under the *CCH* test.<sup>17</sup>

24. The drafting differences between the fair dealing provisions and those creating the New User Rights reveal two things:

- a. **First**, they show Parliament's legislative design choice to take a **high-resolution approach** to the different user rights rather than treat them identically. In scoping the different rights, Parliament made some subject to various conditions, including compliance with the TPM Provisions, and others not.
- b. **Second**, they tie relief for TPM circumvention to **relief for copyright infringement** as a conceptual matter: for the New User Rights, whether one infringes copyright depends, in part, on whether he or she circumvents a TPM.

25. Tying remedies for TPM circumvention to copyright infringement is also consistent with the TPM Provisions' internal drafting. [Section 41](#)'s definition of "circumvent" for access controls prohibits a series of acts unless "done with the authority of the copyright owner".<sup>18</sup> Likewise, the definition of "technological protection measure" in respect of an access control pertains to "...technology...that, in the ordinary course of its operation, (a) controls access to a work...whose use is authorized by the copyright owner".<sup>19</sup>

26. This language, which speaks about circumvention without the copyright owner's *authorization*, and controlling unauthorized *use*, indicates the TPM protections only apply to activities a copyright owner may otherwise control. This perforce excludes fair dealing, for which a user does not require "authorization of the copyright owner".

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<sup>17</sup> *CCH*, [para 49](#), BOA, Tab 9.

<sup>18</sup> *Act*, [s 41](#), BOA, Tab 1.

<sup>19</sup> *Ibid.*

27. Finally, on this point, The Appellant says [section 41.1](#) creates a distinct “cause of action”.<sup>20</sup> As explained below, this is at odds with its placement in the *Act*’s “remedies” Part, rather than the Parts that confer rights. In any event, the Appellant’s submission misses the point. Even if one characterizes section 41.1 as creating a cause of action, its availability remains “subject to [the] *Act*”. CIPPIC submits that one limb of section 41.1’s legal test is that the copyright interest is engaged. The following submissions on the *Act*’s scheme and purposes further support this view.

**2) The *Act*’s scheme indicates the TPM Provisions do not trump fair dealing**

28. Parliament placed the TPM Provisions in Part IV of the *Act*, which catalogues remedies for infringement. This supports the conclusion that they only apply when a corresponding right is infringed. This is not so in the case of fair dealing.

29. Parts I and II of the *Act* create and confer rights on owners.<sup>21</sup> The rights conferred in Parts I and II developed over time to keep pace with, among other things, technological change.<sup>22</sup> Part III describes the instances where infringement of those rights *does* or, in the case of fair dealing and other user rights, *does not* occur. The fair dealing provisions are in Part III.

30. Part IV “specifies the remedies that may be awarded in cases where copyright has been infringed”.<sup>23</sup> It follows Parts I-III. This is significant because, from an operational perspective, the question of remedy only arises in cases where: 1) the *Act* confers a right (Parts I or II); and 2) that right is infringed (Part III). Where fair dealing applies, there is no copyright infringement in the first place.<sup>24</sup> Absent infringement, the analysis never reaches the question of remedy.<sup>25</sup>

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<sup>20</sup> Appellant’s Memorandum of Fact and Law, paras 68 & 73.

<sup>21</sup> *Reprographic Reproduction 2005-2014, Re*, 2013 FCA 91, [para 15](#), BOA, Tab 21.

<sup>22</sup> *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [paras 16-19](#), BOA, Tab 22 [*ESA SCC*]; *Icotop Inc v Ferrand*, 2005 CanLII 28462 (QC CS), [para 107](#), BOA, Tab 23.

<sup>23</sup> *CCH*, [para 12](#) (emphasis added), BOA, Tab 9.

<sup>24</sup> *CCH*, [para 48](#), BOA, Tab 9; *FC Decision*, [para 128](#).

<sup>25</sup> In *CCH* itself, the Court did not address the remedy issues pertaining to [subsection 34\(1\)](#) (also in Part IV) on appeal in light of its finding that the Law Society had proven fair dealing such that there was no infringement ([paras 85 and 86](#), BOA, Tab 9).

31. If the TPM Provisions were intended to generate **stand-alone rights**, they would figure among the *Act*'s rights-conferring provisions. If the TPM Provisions *do not* create stand-alone rights, and thus provide an additional remedy tied to infringement, a full defense to infringement, like fair dealing, precludes their application.

32. The Appellant criticizes the Motion Judge for holding that “fair dealing precludes liability under the [Act]”, noting that it is no defence to moral rights infringement.<sup>26</sup> This is uncharitable and fails to read the Motion Judge’s reasons functionally and contextually.<sup>27</sup> Moral rights were not at issue; the Motion Judge was speaking to the *lis* before him, the interplay between fair dealing, a defence to *copyright* infringement, and the TPM Provisions. The Appellant essentially uses moral rights to repackage its “distinct cause of action” argument. But the comparison to moral rights is a red herring.

33. Moral rights and copyright are, in effect, parallel regimes both in terms of rights and remedies. Moral rights are an “extension of [the author’s] personality”.<sup>28</sup> Unlike copyright, they are not assignable<sup>29</sup> and exist outside the *Act*'s balance between **copyright owners**, who cannot invoke them (unless they are the author), and **users**, who cannot transgress them, even when they do not infringe copyright. They also have different remedial regimes. [Subsection 34\(2\)](#) exhaustively lists the remedies for moral rights infringement. They are fewer and narrower than those available for copyright infringement.<sup>30</sup> The TPM remedies apply only to copyright infringement.<sup>31</sup>

34. Most importantly, moral rights are just that, rights. They sit among the *Act*'s rights-conferring provisions in Parts I and II. The Appellant’s argument is circular; it assumes the TPM Provisions confer a standalone right that may be violated absent copyright infringement. But that begs the very question before the Court.

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<sup>26</sup> Appellant’s Memorandum of Fact and Law, paras 68-70.

<sup>27</sup> *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122, [para 22](#), BOA, Tab 35.

<sup>28</sup> *Théberge*, [para 15](#), BOA, Tab 12.

<sup>29</sup> *Act*, [s. 14.1\(2\)](#), BOA, Tab 1.

<sup>30</sup> For example, wide injunctions ([s. 39.1](#)) and statutory damages ([s. 38.1](#)) are only available for copyright infringement.

<sup>31</sup> *Act*, [s. 41.1\(2\)](#), BOA, Tab 1.

### 3) Subordinating the TPM Provisions to fair dealing furthers the Act's purposes

35. As the Supreme Court held in *CAIP*, when interpreting the *Act*: “the rights of the copyright owner and the limitations on those rights should be read together to give ‘the fair and balanced reading that befits remedial legislation’”.<sup>32</sup> This requires the Court to have due regard to the limits on the otherwise powerful and broad rights the *Act* grants owners.<sup>33</sup>

36. The *Act* balances the interests of different stakeholders, key among them copyright owners and users. That carefully encoded balance reflects the *Act*'s purposes, three of which are relevant: 1) securing fair remuneration for copyright owners;<sup>34</sup> 2) protecting users' rights to engage in activities that, but for those rights, would infringe;<sup>35</sup> and 3) ensuring technological neutrality.<sup>36</sup> The latter two—users' rights and technological neutrality—inform and sometimes limit the first.<sup>37</sup>

37. Untethering TPM protection from copyright protection upsets the *Act*'s owner/user rights balance. It would allow copyright owners, specifically of digital or digitized works, to **expand the scope** of their rights by nullifying fair dealing whenever they employ a TPM. Given Parliament recently and carefully sculpted the contours of user and owner rights, the Court should reject an interpretation that would allow copyright owners to destabilize that balance at will, and in their self-interest.

38. The Appellant asks the Court to cheapen fair dealing in a manner incommensurate with its recognized status as a right, and not a mere defence.<sup>38</sup> Scholars writing before the *CMA*'s enactment warned about how TPM protections

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<sup>32</sup> *CAIP*, [para 88](#) (emphasis added), BOA, Tab 13; cited with approval in *Broadcasting Reference*, [para 66](#), BOA, Tab 14.

<sup>33</sup> *Théberge*, [paras 30 and 31](#), BOA, Tab 12.

<sup>34</sup> *Ibid.*

<sup>35</sup> *CCH*, [para 48](#), BOA, Tab 9.

<sup>36</sup> *CMA*, Summary Provision, BOA, Tab 2; *ESA SCC*, [para 5](#), BOA, Tab 22, citing *Robertson v Thomson Corp*, 2006 SCC 43, [para 49](#), BOA, Tab 24.

<sup>37</sup> *CCH* is an example of user rights limiting owners' right to remuneration. For a situation in which technological neutrality limits owners' right to remuneration, see *ESA SCC*, BOA, Tab 22.

<sup>38</sup> *CCH*, [paras 11 and 12](#), BOA, Tab 9.

could do just that if drafted or interpreted incautiously.<sup>39</sup> To the contrary, and given fair dealing is a *right*, “it can be argued that copyright owners have a correlative *obligation* to permit users’ fair dealings with their works, TPMs notwithstanding”.<sup>40</sup>

39. Whether copyright owners must proactively assist users in disengaging TPMs to enable fair dealing is a question for another appeal. However, given fair dealing is to enjoy a large and liberal interpretation,<sup>41</sup> at a minimum, a copyright owner should not be able to unilaterally eliminate a user’s ability to deal fairly with his or her work.

40. Moreover, concluding a user cannot circumvent a TPM to engage in fair dealing would extend copyright owners’ monopoly in a way the Supreme Court rejected in *CCH*. It would also offend technological neutrality, contrary to *ESA SCC*.

41. On the first point, *CCH* argued at trial before the Federal Court that a user’s ability to obtain a license—i.e., the copyright owner’s permission—was a basis to discard the Law Society’s defences.<sup>42</sup> In addressing the “alternatives to the dealing” factor, the Chief Justice rejected this as an improper encroachment on fair dealing:

The availability of a licence is not relevant to deciding whether a dealing has been fair...fair dealing is an integral part of the scheme of copyright law in Canada...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.<sup>43</sup> [emphasis added]

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<sup>39</sup> Carys J. Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism" (2010) 13:4 J World Intell Prop 503, at 511 [*Craig*], BOA, Tab 39. See also in the American context: Lydia P. Lorren, “Technological Protections in Copyright Law: Is More Legal Protection Needed” (2002) International Review of Law, Computers & Technology, 16(2), 133 at 136, BOA, Tab 40.

<sup>40</sup> *Craig*, at 511 (emphasis in original), BOA, Tab 39.

<sup>41</sup> *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [para 45](#), citing *Bell and Alberta (Education)*, BOA, Tab 36.

<sup>42</sup> *CCH Canadian Ltd v Law Society of Upper Canada* 1999 CanLII 7479 (FC), [para 169](#), BOA, Tab 25.

<sup>43</sup> *CCH*, [para 70](#), BOA, Tab 9.

42. Requiring a user to obtain permission to circumvent a TPM enables the precise mischief the *CCH* precluded, only through the TPM Provisions.<sup>44</sup> This could not have been Parliament’s intent. It assuredly would have employed clearer language to abrogate the common law of fair dealing,<sup>45</sup> which the Supreme Court articulated only eight years earlier in *CCH* and reaffirmed twice right before the *CMA* became law.<sup>46</sup>

43. The Appellant suggests the Motion Judge’s interpretation “undermines the owner’s right to control and monetize its works online”.<sup>47</sup> Here the Appellant employs the same circular reasoning as before. It assumes a copyright owner has a “right” to “control” its works regardless of whether the copyright interest is engaged. That is not, and never has been, how copyright works. Copyright law does not traditionally grant owners control over access to a copy of a work once disseminated.<sup>48</sup> Thus, a copyright owner’s *control* over a work should extend no farther than the *rights* the *Act* confers.

44. As discussed, fair dealing is a critical limit to the copyright owner’s right to control how a work is used. By definition, fair dealing does not require authorization. However, if a fair dealer needs authorization to circumvent a TPM, fair dealing becomes essentially meaningless.

45. CIPPIC’s interpretation also respects the Supreme Court’s admonition to interpret the *Act* through a technologically neutral lens,<sup>49</sup> which Parliament had in mind when it enacted the *CMA*.<sup>50</sup> This is not lip service. Failing to adequately weigh technological neutrality can render an administrative decision unreasonable.<sup>51</sup> The Supreme Court has also said that the balance between user and owner rights extends

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<sup>44</sup> This would be so if the TPM Provisions trump fair dealing since “circumvention” means doing the listed acts “unless...done with the authority of the copyright owner”.

<sup>45</sup> *Sullivan*, § 17.5, BOA, Tab 41.

<sup>46</sup> *Bell*, BOA, Tab 11; *Alberta (Education)*, BOA, Tab 10.

<sup>47</sup> Appellant’s Memorandum of Fact and Law, para 77.

<sup>48</sup> *Craig*, at 508 gives the examples of flipping through a magazine at a doctor’s office, borrowing a book or listening to a roommate’s music, BOA, Tab 39.

<sup>49</sup> *ESA SCC*, paras 5 and 6, BOA, Tab 22; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, para 66 [*CBC*], BOA, Tab 26.

<sup>50</sup> *CMA*, Summary Provision para. (g), BOA, Tab 2.

<sup>51</sup> *CBC*, paras 65-96, BOA, Tab 26. CIPPIC notes that *CBC* was decided when administrative deference was at its apogee. See generally: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, BOA, Tab 27.

to the digital environment.<sup>52</sup> The Appellant’s proposed interpretation would create unnecessary asymmetry between owner’s rights over digital works and analog versions of the same works—and a corresponding asymmetry in the scope of user rights over those works when fixed in digital versus analog media.

46. Consider fair dealing in the case of a book. Assuming the fair dealing analysis is met, one could reproduce a fair part of the paper book, but not the exact same part of the same book in TPM-protected e-book form. This blatantly offends technological neutrality by back-dooring the full arsenal of copyright infringement remedies<sup>53</sup> to restrain an activity that a court would adjudge fair on the facts and the law.

47. The TPM Provisions’ purpose was to better enable digital copyright owners to enforce copyright in the online environment.<sup>54</sup> They provide an additional remedial arrow in the copyright owner’s quiver where an infringement occurs in a digital context “to better address the challenges and opportunities of the Internet”.<sup>55</sup> They were not intended to **effectively enlarge** copyright protection for digital works by allowing owners to employ TPMs to defeat fair dealing, an inherently non-infringing activity. As the Motion Judge observed: “the ability of copyright owners to protect against the distribution of their works, which is made so much more broad scale in the digital world, is now a reality. But that cannot be if the cost is to negative fair dealing” (emphasis added).<sup>56</sup>

48. A final point on the *Act*’s purpose: CIPPIC’s proposed interpretation does not create a remedial gap. Rights holders can and do regulate access to their intellectual property by contract. Fair dealing precludes liability for copyright infringement; it may not preclude liability for breach of contract. The *Act* in general, and the TPM Provisions in particular, need not cover the field of all of a rightsholders’ interests,

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<sup>52</sup> *ESA SCC*, [para 8](#), BOA, Tab 22.

<sup>53</sup> *Act*, [s 41.1\(2\)](#), BOA, Tab 1.

<sup>54</sup> Government of Canada, [Fact Sheet: “What the Copyright Modernization Act Says About Digital Locks”](#), BOA, Tab 49.

<sup>55</sup> *CMA*, Summary Provision, [para \(a\)](#), BOA, Tab 2.

<sup>56</sup> *FC Decision*, [para 131](#).

even those exceeding the limits of copyright protection. Indeed, as explained below, there is a good constitutional basis for finding they do not.

**B. The broader legislative and constitutional context favours subordinating the TPM Provisions to fair dealing**

49. Although CIPPIC’s argument from text, scheme and purpose in **Section A** is sufficient to find the TPM Provisions do not restrain fair dealing, other contextual factors buttress this conclusion. **(1)** Interpreting the TPM Provisions’ scope as coextensive with copyright protection best accords with Federalism and the division of powers. **(2)** The legislative history surrounding the TPM Provisions’ interaction with fair dealing is equivocal; it does not establish Parliament intended the TPM Provisions to trump fair dealing. **(3)** Finally, subjecting the TPM Provisions to fair dealing accords with Canada’s obligation under the WIPO Copyright Treaty and Performances and Phonograms Treaty (“**WIPO Treaties**”).

**1) Interpreting the TPM Provisions as coextensive with copyright protection respects the constitutional division of powers**

50. In enacting the TPM Provisions, Parliament presumptively intended to respect its legislative authority and not trespass on the provincial power over property and civil rights in the province. Reading the TPM Provisions as restraining activity falling outside copyright owners’ exclusive bundle of rights violates that presumption.

51. In *MacDonald v Vapor Canada Ltd.*<sup>57</sup>, the Supreme Court struck down former paragraph 7(e) of the *Trademarks Act*<sup>58</sup> because it lacked a connection with any enumerated federal power.<sup>59</sup> In contrast, the Court in *Kirkbi* found paragraph 7(b) of the *Trademarks Act*, codifying the tort of passing off, “rounds out an otherwise incomplete trade-mark scheme”, which the Court concluded encompassed both registered and common law trademarks.<sup>60</sup>

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<sup>57</sup> [1976 CanLII 181 \(SCC\)](#), [1977] 2 SCR, BOA, Tab 28 [*Vapor*].

<sup>58</sup> [RSC 1985, c T-13 \[TMA\]](#). s 7(e) read “no person shall... do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada”, BOA, Tab 3.

<sup>59</sup> [Vapor](#) at pp 157-158, BOA, Tab 28; *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65, [para 26](#) [*Kirkbi*], BOA, Tab 29.

<sup>60</sup> *Kirkbi*, [paras 26 and 29](#), BOA, Tab 29.

52. It is unclear whether the TPM Provisions are necessary to “round out” copyright protection under the *Act*.<sup>61</sup> The TPM Provisions’ constitutionality is a question for another day, however. For present purposes, if the Court interprets the TPM Provisions as coextensive with copyright protection, they are (at least arguably) sufficiently integrated into the *Act*, which falls within Parliament’s authority over copyrights. The TPM Provisions would be “one of the arsenal of remedies”<sup>62</sup> the *Act* creates to discourage copyright infringement.

53. On the other hand, if the TPM Provisions’ application is divorced from copyright protection, they lose their nexus with any federal head of power. Although Parliament may create a private cause of action, it should only survive constitutional scrutiny if linked with subject-matter falling within Parliament’s constitutional authority.<sup>63</sup> The additional scope the Appellant proposes is, by definition, uncoupled from copyright protection. CIPPIC notes this view is validated in the scholarly literature.<sup>64</sup>

54. The Appellant says, “liability for circumvention under Section 41 is independent of liability under Section 27 for copyright infringement”.<sup>65</sup> If so, then in the case of fair dealing or some other limit on the copyright interest, such as the public domain, the TPM Provisions merely regulate property rights. The Court should resist an interpretation that would rest the TPM Provisions on such precarious constitutional footing when another and, in CIPPIC’s submission, preferable interpretation exists.

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<sup>61</sup> See e.g.: Jeremy de Beer, “[Constitutional Jurisdiction Over Paracopyright Laws](#)”. In *The Public Interest: The Future of Canadian Copyright Law*, BOA, Tab 42 [*De Beer*]; EA Crowne-Mohammed and Y Rozenszajn, “[DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada?](#)”, 2009(2) JILT, BOA, Tab 43.

<sup>62</sup> *General Motors of Canada Ltd v City National Leasing*, [1989 CanLII 133 \(SCC\)](#), [1989] 1 SCR 641, p 684, BOA, Tab 30 [*City National Leasing*].

<sup>63</sup> *Vapor*, pp 157-158 and 165, BOA, Tab 28; *Kikrbi*, [para 27](#), BOA, Tab 29; *City National Leasing*, pp 690-691, BOA, Tab 30.

<sup>64</sup> *De Beer*, BOA, Tab 42.

<sup>65</sup> Appellant’s Memorandum of Fact and Law, para 72.

## 2) The legislative history shows no intent for TPM's to trump fair dealing

55. The legislative history surrounding the *CMA* is, at best, equivocal on the relationship between fair dealing and the TPM Provisions does not tip the balance in either direction. In any event, it cannot overwhelm text, context and purpose.

56. According to Professor Sullivan, legislative history covers “everything that relates to [an enactment’s] conception, preparation and passage”, including “materials published by the government during the legislative process, such as explanatory papers or press releases”.<sup>66</sup>

57. When Parliament undertook the legislative process culminating in the *CMA*, it heard from many stakeholders and interest groups on both sides of the fair dealing/TPM discussion.<sup>67</sup> The result is a pronounced lack of clarity on whether the TPM Provisions were meant to impair fair dealing. Though some indicators point in that direction, others reveal ambivalence as to Parliament’s intention.

58. CIPPIC acknowledges that an earlier attempt to modify the *Act*, Bill C-60, was more explicit in showing the TPM Provisions only trigger in the face of infringement.<sup>68</sup> That drafting change is not dispositive, however. This is because, the “subject to this Act” language features in both the previous version and the final [subsection 41.1\(2\)](#). As CIPPIC argues above, this and the other aspects of its proposed interpretation show Parliament would have expressed itself far more clearly had it intended to allow copyright owners to unilaterally impair fair dealing with their works.

59. Further, and unlike Parliament’s ambiguous motive in omitting express reference to infringing purpose from [subsection 41.1\(2\)](#), there are two other, clearer changes from the C-60 version evidencing legislative intent.

60. First, C-60 would have given moral rights holders access to TPM circumvention remedies.<sup>69</sup> The *CMA* limited these remedies to copyright owners. Second, C-60

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<sup>66</sup> *Sullivan*, §23.53, BOA, Tab 41.

<sup>67</sup> Library of Parliament, [Legislative Summary – Bill C-11: An Act to amend the Copyright Act](#) (Publication No. 41-1-C11-E), p 1, BOA, Tab 50.

<sup>68</sup> Bill C-60, [An Act to amend the Copyright Act](#), s. 27, 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005 [C-60], BOA, Tab 4 [*Bill C-60*].

<sup>69</sup> *Ibid.*

defined circumvention more vaguely than does [section 41](#), which provides a more detailed definition befitting the technical IT context surrounding TPMs.<sup>70</sup>

61. These differences between C-60 and the *CMA* explain Parliament’s decision to alter the TPM Provisions’ text. In contrast, and despite calls from some stakeholders for expansive TPM protections, the drafting differences between C-60 and the *CMA* are inadequate to infer Parliament intended the TPM Provisions to usurp fair dealing.

### 3) Subjecting the TPM Provisions to fair dealing respects the WIPO Treaties

62. Concluding the TPM Provisions do not trump fair dealing respects Canada’s obligations under the WIPO Treaties. It is consistent with international legislation adopting the Treaties as well as commentary on their proper implementation. CIPPIC’s proposed interpretation thus complies with the rule that, where possible, the court should interpret legislation as consonant with Canada’s international obligations.<sup>71</sup>

63. Article 11 of the WIPO Copyright Treaty provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>72</sup>

64. The Treaties’ language does not contemplate a strict liability regime. Rather, it endorses a flexible and balanced approach to national implementation of TPM legal protections. This view is supported by scholars.<sup>73</sup> It also accords with the Treaties’

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<sup>70</sup> Bill C-60 did not contain a stand-alone definition section for “circumvention”. Instead, draft [subsection 34.02\(1\)](#) triggered liability on an infringer who “circumvents, removes or in any way renders ineffective a” TPM, BOA, Tab 4.

<sup>71</sup> *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [para 51](#), BOA, Tab 31.

<sup>72</sup> WIPO Copyright Treaty, [Article 11](#), BOA, Tab 7. WPPT [Article 18](#) is similar, BOA, Tab 8.

<sup>73</sup> Ian Kerr et al, “[Technological Protection Measures: Tilting at Copyright’s Windmills](#)” (2002-03) 34 *Ottawa L. Rev.* 7, BOA, Tab 44; Michael Geist, “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements”, in *From Radical Extremism to Balanced Copyright*: *Canadian Copyright and the Digital Agenda*, pp 221, 236-244, BOA, Tab 45; Jane Ginsburg, “[Legal Protection of Technological Measures Protecting Works of](#)

preambles, which recognize the “need to maintain balance between the interests of the authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention”.<sup>74</sup>

65. Most importantly, the Treaties only require contracting states to provide TPM protections “used by authors in connection with the exercise of their rights ...and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law” (emphasis added).<sup>75</sup> An exception for fair dealing sits perfectly within this qualified language.

66. The foregoing demonstrates that the Court may rest assured CIPPIC’s proposed interpretation would not put Canada offside its international obligations. On the contrary, it allows Canada to fully comply with those obligations while respecting Parliament’s choice to preserve a robust fair dealing user right—one not subject to a sword of Damocles any copyright owner may drop at will by implementing a TPM.

### **C. Circumvention of TPMs occurs only in the face of illicit activity**

67. Reading [section 41](#) in light of the case law and its legislative context, employing an authentic and validly obtained password is not “circumvention”. This reading accords with Parliament’s expressed purpose for enacting the TPM Provisions, which was to discourage hacking and other illicit acts. Consistent with that purpose, it also prevents copyright owners from unleashing the *Act’s* powerful remedies on unsuspecting third parties who happen to access content in breach of a contract to which they are not privy.

68. As a preliminary comment, CIPPIC takes the record as it finds it. Given the technical nature of TPMs and circumvention, it is unclear whether that record permits this Court to assess whether, as a matter of statutory interpretation, the password system at issue is an “effective” TPM. The Motion Judge noted this evidentiary gap.<sup>76</sup>

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[Authorship: International Obligations and US Experience](#)” (2005) Columbia, Public Law & Legal Theory Working Paper Group, p 8, BOA, Tab 46.

<sup>74</sup> WIPO Treaties, [preamble \(WCT\)](#) and [preamble \(WPPT\)](#), BOA, Tabs 7 and 8.

<sup>75</sup> WIPO Copyright Treaty, [Article 11](#), BOA, Tab 7.

<sup>76</sup> *FC Decision*, [para 132](#).

But if the Court considers technical evidence unnecessary, CIPPIC submits that using an authentic alphanumeric password does not circumvent a password system.

69. Regarding the jurisprudence, the B.C. Supreme Court in *Proctorio Incorporated v Linkletter* found that accessing an online platform using valid credentials did not circumvent a TPM.<sup>77</sup> In that case, the defendant, a UBC employee, set up an account in the plaintiff’s virtual proctoring software.<sup>78</sup> He then criticized the software on social media.<sup>79</sup> He also posted links to instructional videos he obtained by logging into the platform and accessing a portal leading to the videos.<sup>80</sup> The Court found the plaintiff’s position that these actions amounted to circumvention lacked sufficient merit to survive the defendant’s anti-SLAPP motion:

The evidence suggests that Mr. Linkletter did not “circumvent” any “technological protection measure” in order to gain access to the Help Center and Academy within the meaning of the first paragraphs (a) of the two definitions in s. 41...Although he had to set up a “sandbox” course in order to gain access, he had the requisite qualifications to do so...With respect to the second paragraphs (b) of the two definitions, although I have found that there are grounds to believe that, after he got there he infringed Proctorio’s copyright and acted in breach of confidence by sharing the links, he did not, in doing so, “avoid, bypass, remove, deactivate or impair” an “effective technology, device or component”.<sup>81</sup>

70. Unlike *Proctorio*, the Federal Court’s decision in *Nintendo of America Inc v King*, which the Appellant relies upon, is of little assistance. In that case, the Court found the respondent liable for circumventing TPMs and offering circumvention services. However, the actions in *King*—selling and installing hardware and software permitting gamers to download and play illegal game copies, eliminating the need to

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<sup>77</sup> *Proctorio Incorporated v Linkletter*, [2022 BCSC 400](#) (aff’d [2023 BCCA 160](#)), BOA, Tab 33 [*Proctorio*]. This was a decision under B.C.’s anti-SLAPP legislation. The plaintiff was required to prove its case has “substantial merit” and that the defendant had “no valid defence” ([paras 44-46](#)). The Court found the plaintiff did not meet this burden on the TPM circumvention claim: *Proctorio*, paras 118-121.

<sup>78</sup> *Proctorio*, [paras 6](#) and [26](#), BOA, Tab 33.

<sup>79</sup> *Proctorio*, [para 5](#), BOA, Tab 33.

<sup>80</sup> *Proctorio*, [paras 6, 7, 21 and 22](#), BOA, Tab 33.

<sup>81</sup> *Proctorio*, [paras 119 and 120](#), BOA, Tab 33. The Court of Appeal for British Columbia dismissed the plaintiff’s appeal: *Linkletter v. Proctorio, Incorporated*, [2023 BCCA 160](#), BOA, Tab 37. This issue was not addressed on appeal.

purchase a genuine Nintendo game cartridge<sup>82</sup>—unambiguously fall within the “circumvention” definition. These activities are a far cry from entering a valid password into a corresponding field, which was not at issue in *King*. The applicant also led substantial, detailed evidence supporting the Court’s conclusion that its TPMs were “effective”, and that the respondent “circumvented” them.<sup>83</sup>

71. Further, the Court in *King* did not benefit from a full adversarial process. The respondent led no evidence, did not test the applicant’s evidence, did not respond to the applicant’s 50-page supplementary submissions<sup>84</sup> and made no oral argument.<sup>85</sup> The respondent also **admitted** its copiers descrambled/decrypted the applicant’s TPM—i.e., the very part of the Federal Court’s analysis the Appellant now relies on.<sup>86</sup> Some commentators suggest aspects of *King* were decided *per incuriam*.<sup>87</sup> In any event, given significant parts of the reasoning were “untested in the crucible of the adversarial process”,<sup>88</sup> the Court should, at a minimum, treat *King* with caution.

72. With respect to the legislative history, the Government’s Fact Sheets published during the *CMA*’s legislative process shed light on what Parliament meant by circumvention. Three of the Fact Sheets repeatedly describe TPM circumvention as “hacking”, and the TPM Provisions as “[p]rohibiting the hacking of digital locks”.<sup>89</sup> CIPPIC submits “hacking”, even in its broadest sense, cannot capture using an authentic and validly obtained key to open a lock.

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<sup>82</sup> *King*, [paras 32-39](#), BOA, Tab 32.

<sup>83</sup> *King*, [paras 9, 28-39, 104-107](#) and [120](#), BOA, Tab 32.

<sup>84</sup> Supp. written submissions of the applicant (Dec 14, 2016), Court File No. T-245-16.

<sup>85</sup> *King*, [paras 6-12](#), BOA, Tab 32.

<sup>86</sup> *King*, [para 103](#), BOA, Tab 32.

<sup>87</sup> See for e.g.: Michael Geist, “[Canadian DMCA in Action: Court Awards Massive Damages in First Major Anti-Circumvention Copyright Ruling](#)” (March 3, 2017), BOA, Tab 47; Howard P. Knopf, “[The Canadian Nintendo Circumvention Decision – Should it be given ‘high precedential value’?](#)” (May 30, 2017), BOA, Tab 48.

<sup>88</sup> *Rodaro v Royal Bank of Canada*, [2002 CanLII 41834 \(ON CA\)](#), BOA, Tab 34.

<sup>89</sup> Government of Canada, [Fact Sheet: “What the Copyright Modernization Act Says About Digital Locks”](#), BOA, Tab 49; Government of Canada, [Fact Sheet: “What the Copyright Modernization Act Means for Business Innovation”](#), BOA, Tab 51; Government of Canada, [Fact Sheet: “What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators”](#), BOA, Tab 52.

73. Requiring that the “circumventor” engage in some sort of illicit activity best addresses the mischief Parliament sought to address. The Fact Sheets show bad actors, not innocent third parties, drove its concerns. In contrast, the Appellant’s broad interpretation gives rise to what are surely unintended consequences.

74. Recall that the circumventor in this scenario is not the one who shares the password, in breach of contract or otherwise, but the one who uses it. This person will often be a stranger to the contract or other restriction limiting the password’s use. They may not even know about the restriction, which does not bind them in the first place. The Appellant’s interpretation would impose a general duty of care on anyone who uses someone else’s password in respect of (potential) pure economic loss absent any undertaking. This is out of step with how such duties are generally understood.<sup>90</sup>

75. From a pure technological perspective, a basic password system, like a physical lock, is designed to disengage without discriminating based on who holds the key. This may not be so for other TPMs, which may employ more sophisticated authentication processes than a basic alphanumeric password entered on *any* device belonging to *any* person connected to the Internet from *anywhere* in the world.

76. A more advanced systems might employ, for example, biometrics, multi-factor identification, blockchain technology or MAC address verification to exclude unauthorized users. In contrast, a basic password system is agnostic about who inputs the password. It is only “effective” in authenticating the password, not governing who inputs the password, or from where.

77. Finally, interacting with a TPM in the precise technological manner intended cannot be “circumvention” under [section 41](#). Otherwise, the TPM Provisions are no more than a remedy for breach of contract. This is especially so when the content accessed is either subject to a user right, like fair dealing, or consists public domain works. As argued above, we must presume Parliament did not intend to regulate property and civil rights absent any nexus to copyright.

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<sup>90</sup> *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017 SCC 63](#). CIPPIC acknowledges this is a question of statutory interpretation. However, the specter of indeterminate liability voiced in the negligence case law can inform statutory interpretation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19<sup>th</sup> day of February, 2025



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**PART V – LIST OF AUTHORITIES**

<b>Legislation</b>	
1.	Bill C-60, <i>An Act to amend the Copyright Act</i> , 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005 (first reading June 20 2005)
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3.	<i>Copyright Modernization Act</i> , SC 2012, c 20
4.	<i>Excise Tax Act</i> , RSC 1985, c E-15
5.	<i>Greenhouse Gas Pollution Pricing Act</i> , SC 2018, c 12, s 186
6.	<i>Trademarks Act</i> , RSC 1985, c T-13
<b>International Instruments</b>	
7.	WIPO Copyright Treaty, adopted in Geneva December 20, 1996
8.	WIPO Performances and Phonograms Treaty, adopted in Geneva December 20, 1996
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11.	<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , <a href="#">2004 SCC 13</a>
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21.	<i>Keatley Surveying Ltd. v. Teranet Inc.</i> , <a href="#">2019 SCC 43</a>
22.	<i>Kirkbi AG v Ritvik Holdings Inc</i> , <a href="#">2005 SCC 65</a>
23.	<i>Linkletter v. Proctorio, Incorporated</i> , <a href="#">2023 BCCA 160</a>
24.	<i>MacDonald et al v Vapor Canada Ltd</i> , <a href="#">1976 CanLII 181 (SCC)</a> , <a href="#">[1977] 2 SCR 134</a>
25.	<i>Nintendo of America Inc v King</i> , <a href="#">2017 FC 246 (CanLII)</a> , <a href="#">[2018] 1 FCR 509</a>
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27.	<i>Proctorio, Incorporated v Linkletter</i> , <a href="#">2022 BCSC 400</a>
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30.	<i>Reprographic Reproduction 2005-2014, Re</i> , <a href="#">2013 FCA 91</a>
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35.	<i>Robertson v Thomson Corp</i> , <a href="#">2006 SCC 43</a>
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<b>Legislative History</b>	
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