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### COMPUTER, INTERNET AND ELECTRONIC COMMERCE LAW

Sookman

Release No. 3, July 2022

#### Publisher's Special Release Note 2021

The pages in this work were reissued in December 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the December 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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From a single volume as first published in 1989 to the present eight volumes of detailed, comprehensive coverage, this publication has become the foremost Canadian authority on the law of computers, the Internet and Electronic Commerce and is frequently referred to and applied by the courts.

This release features updates Appendix § B5: 2 – Quantum Table: Copyright Infringement. This release also features updates to Appendix E9. Privacy Commissioners. The Office of the Privacy Commissioner of Canada (OPC) has, as of August 13, 2021, updated several guidance documents to reaffirm some of the types of personal information generally considered sensitive in the context of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Those documents include Guidelines on Privacy and Online Behavioural Advertising, Guidelines for Obtaining Meaningful Consent, What you need to know about mandatory reporting breaches of security safeguards, PIPEDA Fair Information Principle 7 – Safeguards, Personal Information Retention and Disposal: Principles and Best Practices, and PIPEDA Self-Assessment Tool. This release also includes the addition to Appendix L. Internet Taxation of the following documents: E-Commerce, GST/HST and E-commerce, and Canada Revenue Agency FAQ – Application of the GST/HST in relation to electronic commerce supplies. This release also features updates to Appendix N1. Remedies Table – Misuse of Confidential Information in Appendix N. Trade Secrets.

## Highlights

- **Quantum Table – Copyright Infringement– Statutory Damages –** The plaintiffs originally sought statutory damages under s. 38.1 of the *Copyright Act* based on damages paid for each infringing copy of the plaintiffs’ copyright materials. Under that approach, the plaintiffs maintained that statutory damages would amount to \$5.3 million, based on the numbers of devices that the Datalink defendants likely sold, each of which were accompanied by a manual and application notes. The plaintiffs now submitted that this assessment of the law was wrong as statutory damages are not awarded per infringing copy, but per work infringed. If copyright damages are assessed on the basis of work infringed, the statutory limit is \$40,000: \$20,000 for the infringement of the manual and \$20,000 for the infringement of application notes. The plaintiffs now sought general damages under s. 35 of the *Copyright Act*, as s. 38.1 allows the plaintiff to make their election at any time before final judgment is rendered. They maintained that the provision should be interpreted liberally. Justice Duncan was not inclined to permit the plaintiffs to change their election based on their own oversight in litigation which had been ongoing since 2011 and awarded damages for copyright infringement of \$40,000, jointly and severally, against Jack, the Datalink defendants and Crawford: *Equustek Solutions Inc. v. Jack*, 2021 CarswellBC 4280, 2021 BCSC 2126 (B.C.S.C.).
- **Privacy – Office of the Privacy Commissioner of Canada – Guidance Documents –** The updated guidance sets out that certain types of information that will generally be considered sensitive and require a higher degree of protection. This includes health and financial data, ethnic and racial origins, political opinions, genetic and biometric data, an individual’s sex life or sexual orientation, and religious/philosophical

beliefs. The updated guidance aims to better explain the concept of sensitive information under PIPEDA so it can be evaluated more accurately against the GDPR. The GDPR includes specific considerations for sensitive data that must be observed by commercial organizations engaged in processing special categories of personal data across international boundaries. It also requires that the personal data of EU residents receive an adequate level of protection to that provided by the GDPR if the information is transferred outside the EU. The OPC will issue an Interpretation Bulletin later this year to further explain issues related to sensitive personal information, including categories of personal information we have found to generally be considered sensitive in previous reports of findings, guidance or in keeping with Canadian jurisprudence.

- **Remedies Table – Misuse of Confidential Information – Damages – Post-Trial Damages for Loss of Sales** – Justice Duncan awarded damages in the amount of \$1 million CAD for Equustek's loss of sales from March 2008, when Datalink began selling the GW1000, to the date of trial but deferred the assessment of damages post-trial to allow fuller argument on the issue of whether the plaintiffs could obtain judgment for damages in addition to injunctive relief designed to curtail sales of the defendants' product via Google. Justice Duncan was satisfied that both remedies were available. Jack and the other non-participating defendants abandoned the litigation. There was cogent evidence that they continued to sell devices made from technology stolen from the plaintiffs even after the Google injunctions were in place. While the Google injunctions slowly but surely had an effect on Datalink's sales, Google is not the only internet search engine. Depriving the plaintiffs of a damages award in favour of injunctive relief alone would not be fair or equitable in the circumstances. The plaintiffs had been hampered in their ability to ascertain the Datalink defendants' actual profits, due to the fact that Jack and the Datalink defendants exited the litigation without producing any documentation. There was some evidence at trial about Datalink's sales, from which future damages may be extrapolated, but Justice Duncan was satisfied that the expert's calculations of the plaintiffs' loss of income under three different scenarios provided a more reliable measure of damages. Justice Duncan observed that assessing damages in the circumstances involved a certain amount of crystal ball gazing. The future of the injunction preventing Google from indexing Datalink websites was an unknown. Justice Duncan was satisfied that the damages award should reflect the highest risk scenario for Equustek's future losses and awarded \$1,189,000, jointly and severally, against Crawford, Jack, the Datalink defendants and the Cheifots. Justice Duncan noted that determining Datalink's future profits was more difficult. Justice Duncan was satisfied that the same issues of profitability that the expert built into the 20% discount rate would apply to Datalink's future sales. That was, assuming Datalink was still selling the GW1000, at some point it would not be profitable for them to continue to do so. In the circumstances, Justice Duncan concluded that Datalink's future profits would roughly approximate Equustek's future profits and fixed the amount of future profits at \$1,189,000: *Equustek Solutions Inc. v. Jack*, 2021 CarswellBC 4280, 2021 BCSC 2126 (B.C.S.C.).

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