

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

FOX ON CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS, 4th EDITION

John S. McKeown

Release No. 5, September 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.

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

This comprehensive statement of Canadian law and practice has been the bedrock of Canadian copyright research and argument for more than half a century.

This release features the addition of the following Copyright Board Tariffs to Appendix C. Tariffs: SOCAN Tariffs 12.A – Theme Parks, Ontario Place Corporation and Similar Operations & 12.B – Paramount Canada’s Wonderland Inc. and Similar Operations (2018-2022), May 22, 2021, Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007-2016), May 29, 2021, CBRA Commercial Media Monitoring Tariff (2020-2022) & CBRA Non-Commercial Media Monitoring Tariff (2020-2022), July 31, 2021, SOCAN Tariff 7 – Skating Rinks (2018-2022), August 7, 2021, SOCAN Tariff 11.B – Comedy Shows and Magic Shows (2018-2022), August 21, 2021, SOCAN Tariff 9 – Sports Events (2018-2023), October 2, 2021, Re: Sound Tariff 3.B – Background Music (2016-2020), October 9, 2021, SOCAN Tariff 4.B – Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts (2018-2024), November 27, 2021, CPCC – Private Copying Tariff (2022-2024), December 18, 2021, and CBRA Commercial Media Monitoring Tariff (2023-2025), March 26, 2022. This release also features updates to Appendix F – Quantum Table – Copyright Infringement. This release also features updates to Appendix G – Remedies Table – Misuse of Confidential Information.

Highlights

- **Quantum Table — Copyright Infringement — Damages for Copyright Infringement** — 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.).
- **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.).

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases, Table of Statutes and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages