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### **FOX ON CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS, 4<sup>th</sup> EDITION**

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**Release No. 4, 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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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 updates to case law and commentary in Chapters 21 (Infringement of Copyright), 24 (Civil Remedies for Infringement of Copyright), and 32 (Breach of Confidence).

## Highlights

- **Infringement of Copyright — Musical Works — Producing or Reproducing a Substantial Part of the Work** — concerning unconscious reproduction of a musical work: *Sheeran v. Chokri Musical*, [2022] EWHC 827
- **Civil Remedies for Infringement of Copyright — Libraries, Archives and Museums — Statutory Provisions** — Federal Court unreported decision. Motions for particulars, without a strong evidentiary basis to persuade the court that the defendant cannot plead over, are to be discouraged: *Sony Music Entertainment Canada Inc. SUVA Beauty Inc.*, Doc. T-1256-21 Federal Court unreported decision (January 31, 2022)
- **Civil Remedies for Infringement of Copyright — Machines Installed in Educational Institutions, Libraries, Archives and Museums — Statutory Provisions** — Cause of action estoppel applies if the following four conditions are shown:
  - i) there was a final decision of a court of competent jurisdiction in the prior action;
  - ii) the parties to the subsequent litigation were the parties to or in privity with the parties to the prior action;
  - iii) the cause of action in the prior action is not separate and distinct; and
  - iv) the basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the party bringing the subsequent action had exercised reasonable diligence.  
*Wiseau Studio, LLC v. Harper*, 2022 FC 568
- **Civil Remedies for Infringement of Copyright — Ephemeral Recordings — The Activities Subject to the Exception** — The requirement to show a “extremely strong *prima facie* case” in the context of application for an *Anton Pillar* order has been replaced by a requirement to show a “strong *prima facie* case”: *White (Beast IPTV) v. Warner Bros Entertainment Inc.*, 2022 FCA 34
- **Civil Remedies for Infringement of Copyright — Anton Pillar Orders — Solicitor-client Privilege** — where it is shown that an opposing party or its lawyers have had access to relevant confidential information that is protected by privilege, prejudice is presumed and the onus rests on the recipient of the information to rebut the presumption of prejudice. The recipient was unable to satisfy the onus and the action was stayed: *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 ONSC 647

- **Civil Remedies for Infringement of Copyright — Summary Proceedings — Summary Trial** — The respondent to a motion seeking summary trial can bring a motion to quash if it appears that the motion for summary trial has little merit but it is quite harmful in terms of the time and the expense it will cause. When brought early and dealt with quickly before time is wasted and the resources of the Court and the parties are squandered, such a motion can proactively advance the objectives of the Rules and stop harmful litigation conduct in its tracks. In this way, motions to quash are analogous to motions under the Rules concerning scheduling, case-management and the restraining of abuses of process.  
On a motion for summary trial there is “no genuine issue for trial” where the judge has “the evidence required to fairly and justly adjudicate the dispute” on a summary basis, *i.e.*, where “the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result”. A case should not proceed to trial unless there is a genuine issue that can only be resolved through the full apparatus of a trial: *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.* 2021 FCA 122
- **Civil Remedies for Infringement of Copyright — Statutory Damages — The Amount of Statutory Damages when the Infringements Are for Commercial Purposes** — A copyright owner seeking statutory damages need not establish a link between the statutory damages sought and the damages suffered by it as a result of the infringement. The trial Judge stated she agreed with the principle that probable damages were not determinative and the use of such estimates in determining statutory damages was but one means of ensuring that any damages award is fair and proportionate. This was not in error and the appeal was dismissed: *2424508 Ontario Ltd. v. Rallysport Direct LLC*, 2022 FCA 24
- **Breach of Confidence — Copyright, Physical Ownership and Breach of Confidence** — The doctrine of breach of confidence is of fundamental practical importance because it can protect of confidential business information including trade secrets. Maintaining this protection is an important part of an intellectual property strategy.  
The relevant requirements of the doctrine relate primarily to maintaining the confidentiality of the information. There are no specific requirements relating to the nature of the information to be protected, or limits to the term of protection.
- **Breach of Confidence — Confidentiality in Legal Proceedings— Confidentiality Orders Including Protective and Hybrid Orders** — The plaintiff brought a second action in the Ontario Superior Court of Justice after having brought an action in the Federal Court. The Ontario court granted a confidentiality order on the same basis as had been granted by the Federal Court and the Federal Court of Appeal in the earlier proceeding. The plaintiff’s argument that the confidential information was in the public domain as a result of disclosure at trial in the Federal Court was rejected: *Mediatube Corp. v. Bell Canada*, 2022 ONSC 342

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