



No. S-208730
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROCTORIO, INCORPORATED

Applicant

AND:

IAN LINKLETTER

Respondent

NOTICE OF APPLICATION

Name of the applicant: Proctorio, INCORPORATED

WITHOUT NOTICE to the respondent, Ian Linkletter

An application will be made by the applicant to the presiding judge at the Vancouver registry at 800 Smithe Street, Vancouver, BC, V6Z 2E1 on September 2, 2020 at 9:45 am for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. An interim and interlocutory injunction restraining the defendant/application respondent, Ian Linkletter, directly or indirectly:
 - (a) From downloading, disseminating, copying, recording, posting, transferring, or sharing
 - (i) the Help Center documentation located at proctorio.zendesk.com;
 - (ii) the Proctorio Academy training and course materials located at proctorio.academy (the "Academy Course Materials");
 - (iii) the Application Documentation;
 - (iv) any other Application IP or Confidential Information of the plaintiff/applicant, Proctorio, INCORPORATED; or
 - (v) hyperlinks to any of the above;

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- (b) Circumventing the technological protection measures used by plaintiff/applicant to protect the Help Center documentation, the Academy Course material, the Application Documentation or the Application IP; and
 - (c) Encouraging others in any manner whatsoever, to download, disseminate, copy, record, post, transfer, or share the Help Center documentation, the Academy Course Material, the Application IP (including the Application Documentation), or hyperlinks to any of the foregoing;
2. The defendant may apply on five (5) clear days notice to the plaintiff to set aside this injunction, with a Notice of Application and supporting affidavits served by email to Tim Pinos (tpinos@cassels.com);
 3. The plaintiff/applicant hereby undertakes to the Court to abide by any order the Court may make as to damages;
 4. The plaintiff's Notice of Civil Claim, this Notice of Application, any Order of this Court made in relation to this application, and the affidavit #1 of John Devoy may be served by way of email to ian.linkletter@ubc.ca; and
 5. Costs of this application in the cause.

PART 2: FACTUAL BASIS

1. This is a without notice application for an interlocutory injunction in the context of an action for copyright infringement, circumventing technological prevention measures and breach of confidence. Under the proposed terms of the order, the injunction can be set aside on five (5) days notice to counsel for the applicant.
2. The plaintiff/applicant, Proctorio Incorporated ("**Proctorio**"), is a software developer. The respondent/defendant, Ian Linkletter ("**Linkletter**") is an employee of the University of British Columbia ("**UBC**"), which licenses the Software (as defined below).
3. The purpose of the injunction is to prevent the defendant from further publicly disseminating or providing public access to the applicant's copyrighted and confidential information and from downloading and sharing that information, as well as from encouraging or enabling others to do so.

The Plaintiff/Applicant & the Software

4. Proctorio is the developer, owner and licensor of an online proctoring tool (the "**Software**"). The Software allows education providers to ensure the integrity and security of quizzes and exams (the "**Assessments**") administered to students over the internet.
5. The Software monitors the student's screen, microphone and keyboard during the Assessment and flags any irregular behaviours for the instructor. Following the Assessment, the instructor or their teaching assistants can review the identified behaviours for any potential academic misconduct.

The Defendant/Respondent, Linkletter

6. UBC's website identifies Linkletter as a "Learning Technology Specialist" at UBC, within the Faculty of Education.

Proctorio's Help Center and the Academy

7. To assist the administrators and instructors of its clients, Proctorio has created a "Help Center", which is located at proctorio.zendesk.com. The Help Center contains web pages of support materials and descriptions of the functionality of the Software, all of which are confidential to, subject to the copyright of, and owned by Proctorio. Access to the Help Center is technologically protected, in that only administrators and instructors authorized by licensees of the Software can access the Help Center.
8. Embedded within certain webpages on the Help Center are videos created and owned by Proctorio, which provide the administrators/instructors with video tutorials on the use and functionality of Proctorio's Software. These videos are hosted on YouTube, but are "unlisted" and are not publicly accessible or searchable on YouTube. The unlisted YouTube video are embedded and accessible by confidential links which Proctorio does not make public.
9. Each webpage within the Help Center contains a copyright notice.
10. In addition to the Help Center, Proctorio has established an additional training facility called Proctorio Academy (the "**Academy**"), located at proctorio.academy, which provides online courses in the use of the Software. The Academy is also technologically protected,

and is available only to administrators and instructors in institutions licensed by Proctorio. When an administrator or instructor accesses the Academy training course, they are prompted to agree to the Acceptable Use Policy which requires consent to Proctorio's Privacy Policy and Terms of Service.

11. The Terms of Service *inter alia* restrict a user from copying or duplicating any of the documentation describing the Software's functionality.
12. If the Help Center documentation or the Academy Course Material, the Application IP or Confidential Information which is restricted to administrators and instructors became publicly known, students could change their behaviour or adopt strategies to circumvent the Software, giving them an unfair testing advantage over other students. Moreover, Proctorio's competitors could adopt similar technologies and methodologies based on Proctorio's confidential information to those used by Proctorio, which would harm Proctorio's business and dilute Proctorio's competitive advantage.

Proctorio's Relationship With UBC

13. Since approximately March 2017, Proctorio has licensed the Software to UBC. UBC uses the Software in conjunction with its online learning platform, Canvas, to deliver online courses.
14. Proctorio's relationship with UBC is subject to a written agreement (the "**Agreement**"). The terms of the Agreement provide for, among other things:
 - (a) A non-exclusive, non-transferable right to "**Authorized End Users**" to access the features and functions of the Software. The Authorized End Users are the employees, agents or contractors of the "**Customer**" (i.e. UBC and its employees, agents and contractors);
 - (b) A non-exclusive, non-transferable right and license for the Customer to use the "**Application Documentation**" during the "**Term**" for the Customer's "internal purposes" in connection with the use of the Software;
 - (c) The Customer shall be responsible for all acts and omissions of an Authorized End User;

- (d) The Customer will make reasonable efforts to make all Authorized End Users aware of the provisions of the Agreement; and
 - (e) The Customer agrees to indemnify the Company for its or its Authorized End Users "negligence or wilful misconduct" including the "use of the Application IP in a manner not authorized or contemplated by this Agreement".
15. With respect to intellectual property, the Agreement provides for certain usage restrictions:

2.3 Usage Restrictions. Customer will not, and will not permit any Authorized End Users to, (i) copy or duplicate any of the Application IP; (ii) decompile, disassemble, reverse engineer or otherwise attempt to obtain or perceive the source code from which any software component of any of the Application IP is compiled or interpreted, or apply any other process or procedure to derive the source code of any software included in the Application IP, or attempt to do any of the foregoing, and Customer acknowledges that nothing in this Agreement will be construed to grant Customer any right to obtain or use such source code; (iii) modify, alter, tamper with or repair any of the Application IP, or create any derivative product from any of the foregoing, or attempt to do any of the foregoing, except with the prior written consent of Company; (iv) interfere or attempt to interfere in any manner with the functionality or proper working of any of the Application IP; (v) remove, obscure, or alter any notice of any intellectual property or proprietary right appearing on or contained within any of the Application IP; or (vi) assign, sublicense, sell, resell, lease, rent or otherwise transfer or convey, or pledge as security or otherwise encumber, Customer's rights under Sections 2.1. Customer will not use any of the Application IP except in compliance with Company's obligations to any third party with respect thereto incurred prior to the Effective Date, including without limitation complying with those terms set forth on Schedule B, provided that Company has notified Customer of such obligations. Customer will ensure that its use of any of the Application IP complies with all applicable laws, statutes, regulations or rules and will not use or compile any of the Application IP for the purpose of any illegal activities.

16. The "**Application IP**" is defined in the Agreement as "the Application Service, the Application Documentation, and any and all intellectual property provided to Customer (and/or any applicable Authorized End Users) in connection with the foregoing".
17. The Application Documentation is defined in the Agreement as "text and/or graphical documentation, whether in electronic or printed format, that describe the features, functions and operation of the Application Service, ("functionality") whether such functionality is provided in a scheduled release, an Update or an Upgrade which materials

are designed to facilitate use of the Application Service and which are provided by Company to Customer in accordance with the terms of this Agreement”.

18. The “**Application IP**” is defined in the Agreement as “the Application Service, the Application Documentation, and any and all intellectual property provided to the Customer (and/or any applicable Authorized End Users) [...]”. The “**Application Service**” includes the Software.
19. Pursuant to the Agreement, the Application Documentation is deemed “**Confidential Information**”. The Agreement contains broad confidentiality provisions:

5.1 Ownership of Confidential Information. The Parties acknowledge that during the performance of this Agreement, each Party will have access to certain of the other Party’s Confidential Information or Confidential Information of third parties that the disclosing Party is required to maintain as confidential. Both Parties agree that all items of Confidential Information are proprietary to the disclosing Party or such third party, as applicable, and will remain the sole property of the disclosing Party or such third party.

5.2 Mutual Confidentiality Obligations. Each Party agrees as follows: (i) to use Confidential Information disclosed by the other Party only for the purposes described herein; (ii) that such Party will not reproduce Confidential Information disclosed by the other Party, and will hold in confidence and protect such Confidential Information from dissemination to, and use by, any third party; (iii) that neither Party will create any derivative work from Confidential Information disclosed to such Party by the other Party; (iv) to restrict access to the Confidential Information disclosed by the other Party to such of its personnel, agents, and/or consultants, if any, who have a need to have access and who have been advised of and have agreed in writing to treat such information in accordance with the terms of this Agreement; and (v) to return or destroy, pursuant to Section 10.4, all Confidential Information disclosed by the other Party that is in its possession upon termination or expiration of this Agreement. Notwithstanding the foregoing, Customer agrees that Company may collect aggregated statistical data regarding Customer’s use of the Application Service and provide such aggregated statistical data to third parties for the purposes of improving both the quality of the Application Service and improving the support processes relating to the Application Service, and other similar purposes. In no event shall Company provide to third parties specific data regarding Customer or Customer’s Authorized End Users.

Linkletter's Tweets

20. Linkletter is an active user of the popular microblogging platform Twitter, and currently has 958 followers. On his "feed", he has a June 27, 2020 Tweet pinned at the top which reads "Defund Proctorio".
21. Between August 23, 2020 and August 30, 2020, via Twitter, Linkletter shared publicly links to at least 7 Proctorio videos which are part of the Application Documentation, and thus Confidential Information, accessible only to administrators and instructors via the Help Center. After becoming aware of this, Proctorio deactivated the links, and replaced them with new links which were not publicly disclosed.
22. Linkletter's Tweets during this time include the following statements with reference to the links to the videos published and the videos themselves:
 - (a) "These are from their help documentation. Maybe someone should invent Proctorio for YouTube that prevents students from ever seeing this stuff".
 - (b) "I think I may have bought some time. There are videos from Proctorio's instructor help. I think it's important for us in our communities to know how this software functions so we can criticize it. I will keep sharing information, OK?"
 - (c) "It's from their instructor help. Who works for an institution that uses Proctorio? Ask your educational technology support for a sandbox LMS shell, enable Secure Exam Proctor, install the Proctorio Chrome extension on a computer you can torch, access the help, blow the whistle"
 - (d) "Of course. The more we can share information in our communities, the more difference we can make."
 - (e) "Yep! Maybe if somebody leaks the source code they'll delete the company."
 - (f) "Proctorio removed every instructor help video I shared from their YouTube channel. The following features now have incomplete instructor help: [...]"
23. Linkletter's conduct in posting the links to the videos infringes the copyright of Proctorio, circumvents the technological protection used to protect the Help Center documentation material, and misuses the confidential information of Proctorio.

24. On August 29, 2020, Linkletter posted a screenshot from the Academy Course material which describes specific functionality of aspects of the Software. Linkletter's conduct infringes the copyright of Proctorio, circumvents the technological protection used to protect the Academy Course material and is in direct violation of the Terms of Service which he consented to before being provided access to the Academy.
25. On August 31, 2020, Proctorio filed a Notice of Civil Claim against Linkletter seeking *inter alia* an interlocutory and a permanent injunction and damages on the basis of copyright infringement, circumventing technological protection measures and breach of confidence, and brought this application.

PART 3: LEGAL BASIS

1. The applicant seeks an interlocutory injunction, which can be set aside on five (5) clear days notice. The applicant relies on section 39 of the *Law and Equity Act*, on Rules 8-5(4), 10-4, and 14-1, and on the inherent jurisdiction of this Court.
2. The applicable test is that set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, which requires that the applicant for an interlocutory injunction show:
 - (a) A serious issue to be tried;
 - (b) Irreparable harm to the plaintiff if the injunction is not granted; and
 - (c) The balance of convenience in favour of the granting of the injunction.
3. These three factors are to be considered as a whole in determining whether the award of an injunction is just and equitable in all the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para 25.

Serious Question to Be Tried

4. The threshold as to whether there is a serious question to be tried is a low bar. Proctorio's claim is founded in breach of copyright, circumvention of a technological prevention measure and breach of confidence.
5. With respect to the claim in copyright, it is an infringement for any person to do without the consent of the owner of the copyright, anything that under the terms of the Copyright

Act only the owner of the copyright has the right to do so: *Copyright Act*, RSC 1985, c. c-42, (the "**Act**") s. 27(1).

6. Under the *Act*, the owner of copyright in a video recording has the sole right to reproduce or publish the work, and to communicate the work to the public by telecommunication, which includes making the work available to the public in a way in a way that allows access at a time chosen by that member of the public: The *Act*, s. 2,4 (1.1) and s. 27(1).
7. In this case, the evidence supports the existence of a serious issue to be tried with respect to infringement of copyright in that:
 - (a) Proctorio is the owner of copyright in the Help Center and Academy Course Materials; and
 - (b) Linkletter has without the consent of Proctorio published to the public the links to the Help Centre videos and a screenshot of the Academy Course Material, thus enabling the unauthorized reproduction or publication of the videos and from the Academy Course Material, both of which are the unauthorized making available of the work via communication to the public by telecommunication.
8. Further, under s. 41.1 of the *Act*, it is a breach of the *Act* to circumvent a technological protection measure with respect to any copyrighted work.
9. The evidence shows that by making public the links to Help Center videos which are restricted to administrators and instructors, and posting a screenshot of the Academy Course material, Linkletter has circumvented the technological protections which Proctorio has put into place to restrict access to those materials, all in breach of the *Act*.
10. Under the *Act*, the Court has jurisdiction to grant injunctions to restrain both infringement and the circumvention of technological protections: The *Act*, ss. 34(1), 41.1(2).
11. Further, the *Act* provides that an injunction granted in respect of an infringement of copyright in a work may also enjoin the defendant from infringing the copyright in any other work owned by the plaintiff, or works which may be owned by the plaintiff in the future: The *Act*, s. 39.1.

12. With respect to its claim for breach of confidence, the evidence establishes a serious issue to be tried that (i) the information was confidential, (ii) it was disclosed in circumstances that imposed an obligation on the defendant to respect the confidentiality of the information, and (iii) the defendant has breached that obligation.

Proctorio Will Suffer Irreparable Harm

13. Linkletter's conduct causes irreparable harm to Proctorio in three respects:
 - (a) It compromises the integrity of the testing process, by potentially providing certain students with the proprietary with an unfair advantage over others;
 - (b) It provides competitors with access to Proctorio's proprietary information; and
 - (c) It creates concerns regarding Proctorio's security, which will impact sales and its goodwill and reputation.
14. Damages are an inadequate remedy as (i) it is not clear that Linkletter would be able to pay any damage award, (ii) Linkletter's conduct puts honest students at a competitive disadvantage, (iii) Linklater's conduct may result in a loss of Proctorio's competitive position, sales, market share and lost sales, reputation and good will, and (iv) the extent of the harm caused by Linkletter's actions to date, and of any future actions, is not readily ascertainable.
15. Moreover, Linkletter's conduct diverts Proctorio's resources from other tasks and projects, and causes it to incur legal fees.

Balance of Convenience

16. The balance of convenience strongly favours the granting of the relief sought. There is a serious question to be tried and there is evidence of irreparable harm.
17. The injunction sought is limited in scope. The purpose of the injunction is limited to preventing the defendant from further publicly disseminating or providing public access to the applicant's copyrighted and confidential information and from downloading and sharing that information, as well as from encouraging or enabling others to do so.

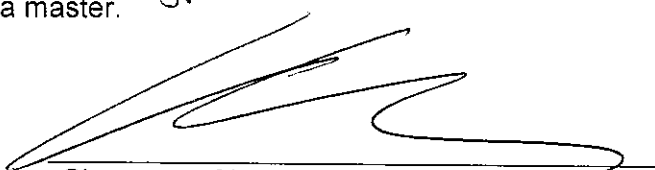
PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of John Devoy, made August 31, 2020

The applicant estimates that the application will take 30 minutes.

This matter is not within the jurisdiction of a master. *JN.*

Date: August 31, 2020



Signature of lawyer for the filing party
Timothy Pinos
Cassels Brock & Blackwell LLP

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7