

SEP 01 2020



S-208730

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROCTORIO, INCORPORATED

Plaintiff

AND:

IAN LINKLETTER

Defendant

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this Court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this Court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

01SEP20 2008078 RISS 200.00
31422 5208730

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the Court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

Introduction

1. The defendant is an individual and is an employee of the University of British Columbia (“**UBC**”), Faculty of Education. The plaintiff is a corporation which has developed and licensed software to *inter alia* UBC.
2. The defendant has repeatedly caused the plaintiff’s copyrighted, confidential and proprietary information to be disseminated online *inter alia* via Twitter, and has encouraged others to share the plaintiff’s information, including the source code for its software.
3. The plaintiff brings this action for copyright infringement, circumventing technological protection measures and breach of confidence. The plaintiff seeks damages against the defendant as well as an interlocutory and a permanent injunction.

The Parties

4. The plaintiff, Proctorio, INCORPORATED, is a privately-held corporation incorporated in Delaware, with its head office located in Scottsdale, Arizona. The plaintiff has an address for service in this action of 2200 – 885 West Georgia Street, Vancouver, B.C., c/o Cassels Brock & Blackwell LLP.
5. The defendant, Ian Linkletter, is an individual, with an address for service unknown to the plaintiff. The defendant is an employee of UBC’s within the Faculty of Education, and currently holds the job title of “Learning Technology Specialist”.

The Software and the Relationship with UBC

6. The plaintiff’s flagship product is an online proctoring tool (the “**Software**”). The Software allows education providers to ensure the integrity of quizzes and exams (the “**Assessments**”) delivered to students over the internet.
7. 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 academic misconduct.
8. Since approximately March 2017, the plaintiff has licensed the Software to UBC.
9. UBC uses the Software in conjunction with its online learning platform, Canvas, to deliver online courses.

The Help Center and the Academy

10. To assist the administrators and instructors of its clients, the plaintiff has created a "Help Center", which is housed on its' website. 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 the plaintiff. 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.
11. Embedded within certain webpages on the Help Center are videos created and owned by the plaintiff, which provide the administrators/instructors with video tutorials on the use and functionality of the Software. These videos are hosted on YouTube, but are "unlisted" and are not publicly accessible or searchable on YouTube. The unlisted YouTube videos are embedded and accessible by links which Proctorio does not make public.
12. If the Help Center information 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, the plaintiff's competitors could adopt similar technologies to those used by the plaintiff, which would harm the plaintiff's business and dilute the plaintiff's competitive advantage.
13. Each webpage within the Help Center contains a copyright notice.
14. In addition to the Help Center, the plaintiff has established an additional training facility called Proctorio Academy (the "**Academy**"), also located on a Proctorio web site, which provides online courses in the use of the Software (the "**Academy Course Material**"). Access to the Academy is also technologically protected, in that only administrators and instructors authorized by licensees of the Software can access the Help Center. Academy Course Material is confidential to, subject to the copyright of, and owned 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 the Proctorio's Privacy Policy and Terms of Service.
15. The Terms of Service *inter alia* restrict a user from copying or duplicating any of the documentation describing the Software's functionality.

The Plaintiff's Relationship with UBC

16. The plaintiff's relationship with UBC is subject to a written agreement (the "**Agreement**").
17. 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 UBC to use the "**Application Documentation**" during the "**Term**" for the Customer's "internal purposes" in connection with the use of the Software. The Help Center documentation constitutes Application Documentation pursuant to the terms of the Agreement;

- (c) UBC shall be responsible for all acts and omissions of an Authorized End User;
- (d) UBC will make reasonable efforts to make all Authorized End Users aware of the provisions of the Agreement;
- (e) UBC will not, and will not permit any Authorized End User to copy, duplicate or create any derivative product of *inter alia* the Application Documentation or interfere or attempt to interfere in any manner with the software or the Application Documentation;
- (f) The plaintiff and UBC agree to *inter alia* (i) use the confidential information, which includes the Application Documentation, disclosed by the other party only for the purposes described in the Agreement; (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; and (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
- (g) 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".

The Defendant's Conduct

- 18. The defendant is an active user of Twitter, a popular microblogging platform. The defendant has 958 followers, which are registered users who receive the defendant's Tweets.
- 19. Between August 23, 2020 and August 30, 2020, via Twitter the defendant shared publicly links to at least seven of the plaintiff's confidential and proprietary videos which are accessible only to administrators and instructors via the Help Center, the particulars of which include:
 - (a) A Tweet of August 23, 2020 with a link to the "Abnormalities" function video;
 - (b) A Tweet of August 24, 2020 with a link to the "Behaviour Flags" function video;
 - (c) A Tweet of August 24, 2020 with a link to the "Display Room Scan" function video;
 - (d) A Tweet of August 24, 2020 with a link to the "Abnormal Eye Movement" function video;
 - (e) A Tweet of August 24, 2020 with a link to the "Abnormal Head Movement" function video;
 - (f) A Tweet of August 24, 2020 with a link to the "Record Room" function video; and
 - (g) A Tweet of August 24, 2020 with a link to the "Behaviour Setting" function video.

20. After becoming aware of this, the plaintiff deactivated the links, and replaced them with new links which were not publicly disclosed.
21. On August 29, 2020 the defendant posted a screenshot from the Academy Course Material which describes functionality of aspects of the Software. Mr. Linkletter's conduct is in direct violation of the Terms of Service which he consented to before being provided access to the Academy.

The Plaintiff's Loss and Damage

22. If the Help Center information or the Academy Course Material 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, the plaintiff's competitors could adopt similar technologies to those used by the plaintiff, which would harm the plaintiff's business and dilute the plaintiff's competitive advantage.
23. As a result of the defendant's conduct, the plaintiff has and will continue to suffer loss and damage.

PART 2: RELIEF SOUGHT

24. The plaintiff seeks the following relief from the defendant:
 - (a) A declaration that the defendant has infringed the copyright of the plaintiff;
 - (b) An interim injunction and a permanent injunction restraining the defendant from, directly or indirectly:
 - (i) From downloading, disseminating, copying, recording, posting, transferring, or sharing
 - (A) the Help Center documentation located at proctorio.zendesk.com;
 - (B) the Academy Course Material located at proctorio.academy;
 - (C) the Application Documentation, or
 - (D) hyperlinks to any of the above;
 - (ii) Circumventing the technological protection used by plaintiff/applicant to protect the Help Center documentation, the Academy Course Material, the Application Documentation, the Application IP or Confidential Information;
 - (iii) 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), confidential information or hyperlinks to any of the foregoing
 - (c) An order that the defendant return any and all confidential information of the plaintiff, stored electronically or in paper format by the defendant, to the plaintiff;

- (d) General and special damages on the basis of copyright infringement, circumventing technological protection measures and breach of confidence, with pre and post-judgment interest pursuant to the *Court Order Enforcement Act* (R.S.B.C. 1996, c. 78); and
- (e) Costs.

PART 3: LEGAL BASIS

25. The plaintiff claims damages for copyright infringement, circumventing technological protection measures and breach of confidence.

Copyright Infringement

26. 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).
27. 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 and 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).
28. The plaintiff is (i) the owner of copyright in the Help Center and Academy Course Materials, and (ii) without the consent of the plaintiff published to the public the links to the Help Centre videos without the consent of the plaintiff, thus enabling the unauthorized reproduction or publication of the Help Center videos and screenshot of the Academy web site, and the unauthorized making available of the work via communication to the public.

Circumventing Technological Protection Measures

29. 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.

Breach of Confidence

30. 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.

Injunctive Relief

31. The applicant relies on section 39 of the *Law and Equity Act*, on Rules 10-4, and 14-1, on the inherent jurisdiction of this Court and on the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Plaintiff's address for service: c/o Timothy Pinos
Cassels Brock & Blackwell LLP
2200 - 885 West Georgia Street
Vancouver, BC V6E 3C8

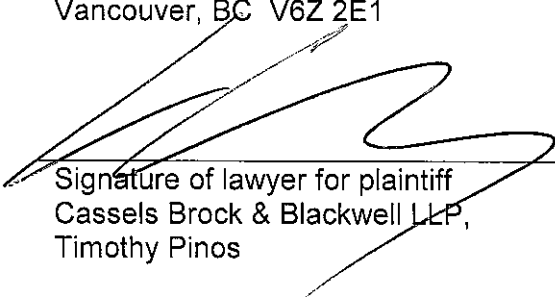
Fax number address for service (if any): 604.691.6120

E-mail address for service (if any): tpinos@cassels.com

Place of trial: Vancouver, BC

The address of the registry is: 800 Smithe Street
Vancouver, BC V6Z 2E1

Date: August 31, 2020



Signature of lawyer for plaintiff
Cassels Brock & Blackwell LLP,
Timothy Pinos

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Copyright infringement, circumventing of technological protection measures and breach of confidence.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Copyright Act, RSC 1985, c. c-42