COURT OF APPEAL

ON APPEAL FROM the Order of Mr. Justice Milman of the Supreme Court of British Columbia pronounced the 11th day of March, 2022

BETWEEN:

IAN LINKLETTER

APPELLANT
(Defendant)

AND:

PROCTORIO, INCORPORATED

RESPONDENT
(Plaintiff)

APPELLANT'S REPLY
Ian Linkletter

IAN LINKLETTER

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APPELLANT'S REPLY TO RESPONDENT'S FACTUM ON APPEAL

A. This Proceeding Undoubtedly Arises From an "Expression"

1. Proctorio takes issue with the chambers judge's conclusion that this proceeding arose from an "expression" made by Mr. Linkletter, though not with the twin conclusion that his expressions were on a matter of public interest. In doing so, it fails to mention the definition of "expression" in the *PPPA*, s. 1:

> "expression" means any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity;

2. Mr. Linkletter's tweets were plainly "communication[s]" coming within the ambit of this definition. There is no merit to Proctorio's submission on this point.

B. Proctorio's Breach of Confidence Claim is Based in Wishful Thinking, Not Evidence

3. As a starting point, it must be remembered what Proctorio's breach of confidence attempts to do: hold a university technological support worker legally liable for sharing links to videos that were hosted on a public platform accessible to tens of thousands of people;[1] where Proctorio in fact has no say over (or even information about) who can access the videos;[2] where that worker was never told that the videos were considered "confidential"; and where the videos say nothing, either in their contents or in their description, about confidentiality.[3]

4. In the face of this evidentiary lacuna, Proctorio grasps at irrelevant considerations. It points to Proctorio's contract with UBC[4]—an agreement to which Mr. Linkletter was not a party and by which he cannot be bound. It points to Proctorio's Terms of Service[5]—which, even if Mr. Linkletter agreed to them at all, do nothing to establish that links to videos Proctorio posts on YouTube cannot be shared. Proctorio asserts that, by merely *sharing links* to Proctorio's videos, Mr. Linkletter was "copying or duplicating" them[6]—an

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[1] RFJ, ¶¶23, 19, AR 58-59
[2] Devoy #1, ¶13; NOCC, ¶¶10, 14, AR 14
[3] RFJ, ¶64, AR 71
[4] Respondent's Factum, ¶60(a)
[5] Respondent's Factum, ¶60(d)-(g), 61
[6] Respondent's Factum, ¶¶4, 14, 61

interpretation unsupported by the plain meaning of those terms. It further incorrectly asserts that Mr. Linkletter accepted those Terms before sharing the YouTube Links[7]—in reliance on evidence its deponent unequivocally admitted was false.[8]

5. Proctorio does not stop there, but claims that Mr. Linkletter's access to Proctorio's material by virtue of his UBC employee credentials "alone" creates an obligation of confidentiality[9]—as if needing credentials to access materials creates a universal understanding that those materials are imparted in confidential circumstances. By that logic, issuing someone a library card creates an objective understanding that the information in any books they access with their library credentials is confidential.

6. Finally, the respondent makes much of the fact that Mr. Linkletter understood that Proctorio did not want him or anyone else to share the links.[10] Yet Proctorio not wanting links shared does not equate to the information found at them being, objectively considered, confidential. There are many other reasons for which Proctorio may have been disabling links—such as a desire to avoid legitimate public scrutiny of its product. Proctorio goes to great lengths to conflate behaviour it did not like—repeated, irritating, critical tweets—with behaviour that is actionable, yet these are simply not the same thing.

7. Proctorio's submissions on the other two elements of the breach of confidence test are similarly shaky. On the quality of confidence of the information, it asserts that it is "not at all evident" the McGraw Hill document contains all the same information as Proctorio's videos without pointing to a single difference between the two.[11] For clarity, Mr. Linkletter says they are "nearly" the same because there are slight differences in the video graphics, but there are no substantive distinctions.

8. On detriment, the respondent relies on paragraphs 52-53 of *Cadbury* to argue that

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[7] Respondent's Factum, ¶60(d), citing to Devoy #2, ¶38
[8] Again, Mr. Devoy claimed he reviewed evidence that Mr. Linkletter had accepted the Terms of Service on August 23, before sharing the links, then said this was untrue. The only actual evidence on the Terms is that if Mr. Linkletter accepted them at all, this would have been on August 25, after sharing the links. See Appellant's Factum, ¶49
[9] Respondent's Factum, ¶60(b)
[10] Respondent's Factum, ¶53
[11] Respondent's Factum, ¶52

the legal concept of detriment can include a change in Proctorio's ability to control allegedly confidential information because detriment "is a broad concept."[12] Yet *Cadbury* in no way suggests that a disclosure of corporate secrets causing no economic harm can be detriment; instead, it notes that detriment can "include the emotional or psychological distress that would result from the disclosure of intimate information."[13] Absent a change in the law to conclude a corporation can suffer emotional harm, the legal concept of detriment, however broad, still does not include Proctorio's alleged harm.

9. Throughout,[14] the respondent attempts to confuse questions of law and questions of fact. For example, it claims the chambers judge's quality of confidence analysis raises purely factual questions, when Mr. Linkletter argues both a factual error (in finding the information was "diffuse and scattered") and a legal error (in concluding that even if it *was* diffuse and scattered this meant it was confidential). These submissions are blatant attempts to muddy the waters on this complex appeal and should be rejected.

C. Proctorio's Submissions Misunderstand the Law of Copyright

10. In its factum, just as the chambers judge did, the respondent ignores the text and scheme of the *CA* to attempt to justify a claim that makes no sense under that statute. Proctorio asserts that, despite relying on s. 2.4(1.1) of the *CA* in its pleading, it did not intend to only allege that Mr. Linkletter performed its protected works, but it (presumably alternatively)[15] also meant to allege Mr. Linkletter reproduced or published the works.[16] Yet it pled no basis, and still cannot point to a basis, in the *CA* on which to say Mr. Linkletter's actions constitute reproduction or publication—because there is none. Nothing in s. 3(1) or elsewhere captures sharing a link to a video someone else uploaded.

11. Similarly, Proctorio at paragraphs 76-78 attempts to buttress the chambers judge's analysis on s. 2.4(1.1) by pointing to his conclusion at paragraph 93 that Proctorio had not "made [the videos] generally available to the public." Yet s. 2.4(1.1) does not refer to

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[12] Respondent's Factum, ¶71
[13] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (S.C.C.) [***Cadbury***], ¶53
[14] Respondent's Factum, Opening Statement, ¶¶48, 76, 87
[15] Recall that publication, performance, and reproduction are mutually exclusive acts under the *CA*: see Appellant's Factum, ¶60
[16] Respondent's Factum, ¶75

making a work "generally" available, but making it available at all, which Proctorio did by uploading it to the internet.

12. In addition, Proctorio's submission on technological neutrality misunderstands the concept. It argues that Mr. Linkletter's sharing of links cannot be compared to another form of reference, such as a poster telling someone where to view a show, because where one talks of the poster "the author of the referenced work has authorized the public to view the work."[17] It is unclear how the respondent reaches this conclusion. A play can, for example, be performed without the writer authorizing the performance. Someone can then make and distribute a poster advertising that play. The person distributing the poster does not breach copyright, just as Mr. Linkletter does not by sharing a link. This is the exact point: there is no legal difference between these scenarios.

13. Proctorio's failure to grasp the nature of its copyright claim continues into its argument on YouTube's Terms of Service. It argues that YouTube's terms cannot authorize use of the work because they "would not override Mr. Linkletter's common law and contractual obligations."[18] But Proctorio's copyright claim against Mr. Linkletter has nothing to do with his common law or contractual obligations: it sues him pursuant to a statute. The *CA* only creates liability for unauthorized uses of an artistic work, and granting someone a license to use one's work through YouTube is fatal to a *CA* claim.

D. Proctorio Misrepresents the Scope and Strength of Its Claim for Injunctive Relief in Its Section 4(2)(b) Analysis

14. Proctorio at paragraph 96 claims Mr. Linkletter is taking issue with its lack of evidence of the specifics of its alleged loss. This is not true. Mr. Linkletter takes issue with the lack of evidence of any harm to Proctorio whatsoever: here, as in *Pointes*, there "is simply a dearth of evidence on the motion linking [Mr. Linkletter's expression] to any of the undefined damages that are claimed."[19] Proctorio asserts that "the value of obtaining injunction relief is relevant to any assessment of proportionality" on s. 4(2)(b). Mr. Linkletter agrees: the "dearth of evidence" supporting Proctorio's entitlement to an

[17] Respondent's Factum, ¶80
[18] Respondent's Factum, ¶83
[19] *Pointes*, ¶115

injunction does illustrate how fundamentally disproportionate it would be for this claim to go to trial. Proctorio seeks a permanent *quia timet* injunction—i.e., an order seeking to prevent harm that has not yet occurred, issued "sparingly and with caution."[20] Such an order requires evidence of "a high degree of probability that the harm will in fact occur."[21] Having failed to send Mr. Linkletter even a simple email informing him of its views on confidentiality before suing him, Proctorio cannot hope to demonstrate a high degree of probability that Mr. Linkletter will share its information absent a court order. Indeed, Mr. Linkletter's swift removal of the Academy Screenshot when eventually asked provides strong evidence of how unnecessary such an injunction would be.[22]

15. Proctorio at paragraph 101 now suggests that of course the injunction needed to be narrowed, because its claim was always a narrow one. This submission is thoroughly inconsistent with Proctorio's approach to this entire litigation. Proctorio obtained the interlocutory injunction against Mr. Linkletter to prohibit the sharing of its "Confidential Information"; it seeks a final injunction on the same terms. Its affiant deposed that "[a]nything that shows the exam or administrator side of the software is confidential," including publicly available documents not created by Proctorio describing the software's functionality.[23] The broad injunction Proctorio initially obtained and still seeks in its claim represents a correspondingly broad limitation on a passionate critic's ability to speak of how its product actually works.

16. It is patently untrue on the pleadings that the respondent only seeks to enjoin the sharing of "information from the Help Centre and Academy."[24] If it had sought such narrow relief, this action may well not have advanced to this point—again, Mr. Linkletter agreed to retract expressions falling within that narrow scope when asked.[25] The *PPPA* does not ask the court to assess the effects of the lawsuit Proctorio could have pled and advanced instead, but the case it did. There is no public interest in that case proceeding.

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[20] *Mortifee v. Harvey*, 2022 BCSC 275, ¶40
[21] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at 458*d*
[22] Linkletter #1, Ex. BT–BV
[23] Devoy Cross, p. 69, ll. 1-9
[24] Respondent's Factum, ¶98; RFJ, ¶127, AR 90; NOCC, ¶¶24(b)(ii)–(iii), AR 16
[25] Linkletter #1, Ex. BT–BV

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 2nd day of September, 2022.

Catherine Boies Parker, Q.C.
and Julia W. Riddle
Solicitors for the Appellant

APPENDICES: LIST OF AUTHORITIES

APPENDICES: ENACTMENTS

COPYRIGHT ACT
[RSC 1985] CHAPTER C-42

Communication to the public by telecommunication

2.4 (1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

Copyright in works

3 (1) For the purposes of this Act, ***copyright***, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts.

PROTECTION OF PUBLIC PARTICIPATION ACT
[RSBC 2019] CHAPTER 3

Definitions

1 In this Act:…

"expression" means any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity;

Application to court

4 (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

…

(b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.