

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Proctorio, Incorporated v. Linkletter*,  
2022 BCSC 400

Date: 20220311  
Docket: S208730  
Registry: Vancouver

Between:

**Proctorio, Incorporated**

Plaintiff

And

**Ian Linkletter**

Defendant

Before: The Honourable Mr. Justice Milman  
(via videoconference)

## Reasons for Judgment

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## **I. Introduction**

[1] The coronavirus pandemic has brought about many changes in society, not least in the field of education. Educational institutions, like many others, have had to adapt to a new reality. Among other things, many courses that would normally be taught in person have had to move online. As a result, students are regularly having to write examinations on their computers at home, where they are not as easily supervised.

[2] The plaintiff, Proctorio, Incorporated (“Proctorio”), has developed a software product designed to fill that growing niche. As the company name suggests, the product is intended to replace human proctors with an algorithm that monitors students remotely during examinations through their computers, with a view to maintaining academic integrity.

[3] Proctorio’s software is used by many universities in North America, including the University of British Columbia (“UBC”). Its use has generated controversy, there and elsewhere, due to concerns about its perceived invasiveness and what is thought by some to be its disparate and discriminatory impacts on some students. That controversy forms an important part of the background to this action.

[4] The defendant, Ian Linkletter was, at the material time, employed at UBC in the Faculty of Education as a Learning Technology Specialist. His job description included assisting faculty members in delivering online courses, although the Faculty of Education itself did not use Proctorio.

[5] In June 2020, Mr. Linkletter took offence at the manner in which Proctorio and its CEO had dealt with a UBC student’s complaint about the quality of service the student received after calling Proctorio’s helpline during an examination.

Mr. Linkletter joined the public discussion online, expressing a view that was highly critical of Proctorio and its CEO. Over the following weeks, the more Mr. Linkletter read about Proctorio and its product, the more concerned he became. He expressed his opinions publicly on Twitter, asserting that what he referred to as Proctorio’s “surveillance software” was causing emotional distress and harm to students.

[6] As part of his effort to learn more about Proctorio, he created a fictitious course and designated himself as its instructor. On August 23, 2020, he logged in to Proctorio's online "Help Center" and "Academy", where instructors or administrators can go to be taught how the software functions, including by viewing instructional videos. The videos are accessed from there by clicking on embedded links that take the user to YouTube, where the videos are hosted and available to anyone with the correct link.

[7] Over the next two days, Mr. Linkletter published the links to seven of those instructional videos on Twitter. When Proctorio learned of this, it disabled the links. This led Mr. Linkletter to post a number of tweets advising his Twitter audience that the links were no longer working. He criticized Proctorio on Twitter for having disabled the links (in fact, Proctorio had merely disabled the links that Mr. Linkletter had made public and substituted new ones in their place). In one of those tweets, posted August 29, 2020, he reproduced a screenshot of the Academy website page showing the original links to be unavailable.

[8] Proctorio commenced this action a few days later, on September 1, 2020. The notice of civil claim alleges that Mr. Linkletter is, because of that conduct, liable for the following:

- a) the tort of breach of confidence;
- b) infringement of copyright, contrary to ss. 3 and 27 of the *Copyright Act*, R.S.C. 1985, c. C-42 [CA]; and
- c) circumventing a technological protection measure, contrary to s. 41.1 of the CA.

[9] On the following day, September 2, 2020, Proctorio's counsel appeared in chambers before Giaschi J. to obtain an interim injunction, without notice to Mr. Linkletter. The injunction it obtained prohibited him from, among other things, downloading or sharing information from the Help Center or Academy, or encouraging others to do so.

[10] On this application, Mr. Linkletter alleges that Proctorio is not really advancing a *bona fide* claim against him. Rather, he says that this is “strategic litigation against public participation” or a “SLAPP” suit, the real purpose of which is to stifle criticism of Proctorio and its product. On that basis, Mr. Linkletter seeks to have the action dismissed under s. 4 the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [PPPA], British Columbia’s anti-SLAPP legislation. He also seeks full indemnity costs and damages under the PPPA. In the alternative, he seeks to have the injunction set aside on the basis that Proctorio did not make full and frank disclosure when obtaining it; or, in the further alternative, to narrow its scope on the basis that it is overbroad.

[11] Proctorio opposes the application on various grounds.

[12] First, Proctorio raises a constitutional argument, namely, that provincial legislation like the PPPA cannot apply to prevent otherwise viable claims under the CA, a federal statute, from proceeding, having regard to the constitutional principles of federal paramountcy and interjurisdictional immunity.

[13] Second, Proctorio says that, to the extent the PPPA does apply to the claims advanced in this action, the application should be dismissed because:

- a) this action is not directed at curtailing expression on a matter of public interest; and
- b) Proctorio advances a meritorious claim that should be allowed to proceed.

[14] Finally, Proctorio opposes any change to the injunction, which it says is necessary to protect its copyrighted and confidential information.

[15] The Attorney General of British Columbia (“AGBC”) appeared at the hearing in response to Proctorio’s Notice of Constitutional Question. The AGBC, like Mr. Linkletter, disputes Proctorio’s assertion that the PPPA cannot apply to prevent Proctorio’s claims under the CA from proceeding. All three parties agree, however,

that the constitutional question should be addressed only if necessary: *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201.

[16] For the reasons that follow, I have concluded that the application should be allowed in part.

## **II. The Facts**

### **A. Proctorio and its Business**

[17] Proctorio is a privately-held Delaware corporation with its headquarters in Arizona. When Proctorio was founded in 2013, remote online proctoring could only be done using human proctors who watched students through computer cameras. Proctorio pioneered the development of software to automate the process.

[18] The software monitors and records students and their surroundings during examinations. The instructor is able to configure the software with varying degrees of sensitivity to behaviours that might be deemed suspicious, depending on the context. The recordings can later be reviewed by the instructor to determine if cheating had in fact occurred. The recordings are stored on an encrypted server for a period of time chosen by the instructor.

[19] The development and marketing of its proprietary software remains Proctorio's primary line of business. It has seen significant growth with the move to online instruction during the current pandemic. Between April 2019 and April 2020, Proctorio saw a 900% increase in the number of examinations that were written using the software. It now has approximately 1,200 customers, consisting mostly of colleges and universities. As of November 16, 2020, Proctorio had 41,214 active examination administrators registered to access the Academy.

[20] UBC has been using Proctorio's software since 2017. The relationship between Proctorio and UBC is governed by an agreement that, among other things, restricts the use that can be made of Proctorio's intellectual property. UBC uses a programme known as "Canvas" to deliver educational content and administer examinations. Proctorio's software can be installed as a browser extension to

Canvas, at the option of the course administrator, to provide a remote invigilation function.

[21] The online Proctorio support centre invites users to select one of the following portals when they arrive at the main page:

- a) General Support;
- b) Administrators;
- c) Professor Support; and
- d) Student Support.

[22] Instructors and administrators can access Proctorio's "Help Center" which contains various guides and tutorials. Embedded in the Help Center are links to instructional videos hosted on YouTube. Although accessed on YouTube, they are "unlisted", which means they cannot be found by browsing or searching YouTube and can only be accessed with their specific links.

[23] Proctorio operates a second online instructional facility known as the "Academy." When a new course is created in Canvas and Proctorio's software is activated for use in the course, the instructor is automatically sent an email with a link providing access to the Academy. The email requires the user to acknowledge and agree to Proctorio's Terms of Service before proceeding.

## **B. The Controversy Surrounding Remote Invigilation in General and Proctorio in Particular**

[24] The increased use of remote invigilation software during the current pandemic has not been without controversy. Some students and educators have raised concerns about the effect of being continuously monitored and recorded on students with test anxiety. It has also been suggested that the software raises additional barriers for students with certain disabilities and that it can, in some situations, discriminate against students of colour. Petitions have circulated in several universities seeking to discontinue the use of the software for those and other

reasons. The ongoing debate has been the subject of many media reports in both specialist educational and general news publications.

[25] Mr. Linkletter became interested in Proctorio as a result of the incident in June 2020. Thereafter, he tweeted criticisms of Proctorio and its CEO for perceived breach of privacy and other misconduct, stating as follows:

- a) June 26, 2020: "I'm agitated tonight because the CEO of Proctorio attacked a student in my University's subreddit, calling them a liar and posting their chat support logs. Many examples of this online. Unacceptable behaviour. One sloppy CTRL+F away from breaking the law...";
- b) June 27, 2020: "Defund Proctorio";
- c) July 14, 2020: "Mike Olsen, Proctorio's CEO, is now blaming his social media team for posting a student's chat logs to Reddit. That's not true"; and
- d) July 14, 2020: "Mike Olsen defended posting a student's chat logs by saying he was protecting his (pseudonymous) employee. It's very hypocritical and dishonest that he is now attempting to blame his innocent social media team. Shameless, even. Sorry your boss is doing this, @proctorio".

### **C. The Tweets in Issue**

[26] Although Mr. Linkletter had been having discussions with others at UBC about Proctorio, he never had occasion to work with the software itself. He decided to learn more about it. To that end, he added Proctorio to a "sandbox" course that he or a member of his team created. A sandbox course has no students and is used, Mr. Linkletter says, "to practice, play or test". He designated himself as its instructor so that he could access the materials intended for instructors and administrators in the Support Center. The evidence, although disputed in part, suggests that once



there, Mr. Linkletter was required to acknowledge and accept Proctorio's Terms of Service before proceeding.

[27] John Devoy is Proctorio's Director of Communications and Marketing. In his second affidavit sworn in opposition to this application, he deposed that a review of Proctorio's records revealed that on August 23, 2020, someone named "Ian" accessed the Academy and accepted the Terms of Service. That evidence was later undermined in cross-examination, when Mr. Devoy testified that he did not in fact review those records himself and could not say if that particular statement was true or not. Nevertheless, in a subsequent affidavit, Mr. Devoy reproduced the initial email that Mr. Linkletter received inviting him to the Academy on August 23, 2020. Mr. Devoy deposed that when users seek to access the Academy for the first time upon receiving such an invitation, they are first required to acknowledge and accept Proctorio's Terms of Service. To ensure that occurs, a window appears containing the following text:

Either you're a new user or the Acceptable Use Policy has changed since you last agreed to it. Please agree to the Acceptable Use Policy before you continue.

[28] Below that there is a box, beside which appear the following words: "I agree to the Acceptable Use Policy." When the user clicks on that box, they are taken to another window titled "Acceptable Use Policy", where the following text appears: "I agree to the Proctorio Privacy Policy [link] and Terms of Service [link].

[29] The Terms of Service that were accessible through that second link prohibit users from, among other things, copying or duplicating any of the "Application Service", text, and/or graphical documentation describing the Application Service's functionality" (all of which is defined as the "Application Documentation"). The term "Application Service" is defined to mean Proctorio's "various websites ... documentation ... [and] software ..."

[30] In any event, on August 23 and 24, 2020, Mr. Linkletter accessed the Help Center and from there, clicked on links that took him to a number of unlisted tutorial videos hosted on YouTube. While viewing those videos on YouTube, he was able to

share them openly, which he did by reproducing the links to the following videos at the following times:

- a) “Abnormalities” (posted August 23, 2020 at 9:21 PM);
- b) “Behaviour Flags” (posted August 24, 2020 8:06 PM);
- c) “Display Room Scan” (posted August 24, 2020 at 8:23 PM);
- d) “Abnormal Eye Movement” (posted August 24, 2020 at 8:44 PM);
- e) “Abnormal Head Movement” (posted August 24, 2020 at 8:46 PM);
- f) “Record Room” (posted August 24, 2020 at 8:46 PM); and
- g) “Behaviour Setting” (posted August 24, 2020 at 8:49 PM).

[31] Those tweets formed part of a larger conversation on Twitter. In the accompanying text, Mr. Linkletter explained why he was reproducing the links. For example, in a separate tweet posted on August 24, 2020 at 8:43 PM, he stated as follows:

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?

[32] One minute later, he tweeted the following text, along with the relevant link:

This video from Proctorio's YouTube channel shows how the Abnormal Eye Movement function works. This is the one that will show you, beyond a doubt, the emotional harm you are doing to students by using this technology.

[33] Two minutes after, he tweeted as follows:

This video from Proctorio's YouTube channel shows how the Abnormal Head Movement function works. This is the one that will identify students with medical conditions that affect their head movement. They will get a higher Suspicion Level for it.

[34] On the following day, August 25, 2020, Mr. Linkletter tweeted as follows in response to a fellow user:

Yep! Maybe is [sic] somebody leaks the source code they'll delete the company.

[35] When asked by another Twitter user how he had obtained the links to the instructional videos, he responded as follows:

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.

[36] He tweeted as follows on August 28, 2020:

I posted some more videos from their instructor help, straight from their YouTube channel. Proctorio hid them very quickly. Proctorio can't hide. We know their CEO. We know he's unethical.

[37] Mr. Linkletter conveyed a similar message in a tweet posted one day later, on August 29, 2020:

How EXACTLY does this non-magical software work? Why is Proctorio hiding this information? Their OWN COURSE on how Proctorio works was censored this week after I share some of the videos.

[38] After that tweet, Mr. Linkletter attached a screenshot of the Academy website showing the disabled links. He then added the following text, apparently in answer to another question about how he got it:

I'm not sure I understand. Proctorio spammed me with an email to join Proctorio Academy (proctorio.academy) which I added the LTI to a shell in our Canvas install. That was kind of weird because I didn't provide my email address – do you think their LTI is secure?

[39] Finally, in a tweet posted on August 30, 2020, Mr. Linkletter responded as follows to another user's suggestion that he himself might be responsible for the broken links:

Does Proctorio not take responsibility for the broken course? You seem to imply that I am responsible because I shared the "copyrighted" videos that Proctorio posted to YouTube.

**D. This Action and its Aftermath**

[40] Proctorio made no effort to contact Mr. Linkletter before commencing this action and obtaining the injunction on September 2, 2020.

[41] Mr. Linkletter has deposed that this action in general and the injunction in particular has caused him stress, aggravated a medical condition and caused difficulties in his home life, leading to a need for counseling. Because of the injunction, he says, he is anxious about criticizing Proctorio in public and even in private.

[42] Despite those assertions, Mr. Linkletter has continued since the commencement of this action to post content critical of Proctorio to the public on social media.

**III. Discussion**

**A. Should the action be dismissed under s. 4 of the *PPPA*?**

***i. The Test under s. 4 of the PPPA***

[43] Section 4 of the *PPPA* states as follows:

**Application to court**

**4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

(a) the proceeding arises from an expression made by the applicant, and

(b) the expression relates to a matter of public interest.

(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

(a) there are grounds to believe that

(i) the proceeding has substantial merit, and

(ii) the applicant has no valid defence in the proceeding, and

(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.

[44] The leading case on the interpretation and application of that provision is *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, which considered equivalent legislation enacted in Ontario. Justice Côté, writing for the Court, described the purpose of anti-SLAPP legislation as being “to screen out lawsuits that unduly limit expression on matters of public interest through identification and pre-trial dismissal of such actions” (*Pointes* at para. 16).

[45] At the first branch of the test to be applied under s. 4, Mr. Linkletter must demonstrate on a balance of probabilities that this action arises from expression of his that “relates to a matter of public interest” (*Pointes* at para. 23).

[46] If he does, then the action must be dismissed unless Proctorio demonstrates on the remaining branches of the test that:

- a) there are grounds to believe that:
  - i. the action has substantial merit;
  - ii. Mr. Linkletter has no valid defence; and
- b) the harm that Proctorio’s is likely to have suffered, or to suffer in the future, as a result of Mr. Linkletter’s expression is serious enough to outweigh the public interest in protecting Mr. Linkletter’s expression.

***ii. Has Mr. Linkletter demonstrated that this action “arises from expression on a matter of public interest”?***

[47] In *Pointes*, the Court emphasised the need for a causal connection of some kind between the expression and the litigation. The nature of that connection must be construed in a “broad and liberal” manner, having regard to the objectives of the legislation (at paras. 24-30). On the other hand, not every connection, no matter how tenuous, will suffice. Justice Côté noted that expression that merely “makes

reference” to a matter of public interest, or to a matter about which the public is “merely curious”, falls short of the mark (at para. 29).

[48] Proctorio argues that Mr. Linkletter has failed to satisfy the onus placed upon him at this first branch of the test. Proctorio does not dispute that the ongoing debate about the impact of its product on students is a matter of public interest. However, it argues that this action does not arise from that, but rather from something else entirely, namely, Mr. Linkletter’s improper sharing of the confidential links and Academy screenshot. Those things, Proctorio says, played no part in the debate and this action is not directed at the criticism levelled against it by Mr. Linkletter or anyone else.

[49] I am not persuaded that is so.

[50] The seven tweets attaching the links to the YouTube videos were posted on August 23 and 24, 2020. Their obvious purpose was to convince Mr. Linkletter’s Twitter audience that his professed misgivings about Proctorio and its software were justified. He was using the content of the videos in an effort to illustrate his point about the harm that Proctorio’s software was capable of causing to some students. The commentary accompanying several of the links specified how he thought the videos made that clear. That same purpose is also evident from his contemporaneous tweet stating that “I think it’s important for us in our communities to know how this software functions so we can criticize it.” Even when inviting others to follow in his footsteps, he encourages them to “blow the whistle” as he has done.

[51] Mr. Linkletter posted the tweet attaching the Academy screenshot five days later, on August 29, 2020. The point he was making on that occasion appears to have been a slightly different one. The message there was that Proctorio was improperly “hiding this information” (namely, how the software works). The tweet is critical of Proctorio for having “censored” its own course materials after Mr. Linkletter shared the links to the videos, thereby putting them beyond the reach of public scrutiny. He attached the screenshot merely to demonstrate that the links were indeed no longer available.

[52] That being so, I am satisfied that all of the impugned tweets can fairly be characterised as expression on a matter of public interest. Proctorio’s arguments to the contrary go to the quality of the expression, a consideration more properly addressed on the final branch of the test: *Sokoloff v. Tru-Path Occupational Therapy Services Ltd.*, 2020 ONCA 730.

[53] It follows that Mr. Linkletter has met his threshold burden on this first stage of the test.

**iii. Does the claim have substantial merit?**

**Overview**

[54] The second stage of the test presents a “merits-based hurdle” for Proctorio to meet. This is not a final adjudication on the merits but an assessment of the likelihood of a successful claim (*Pointes* at para. 37). To meet its burden here, Proctorio must show “a basis in the record and the law – taking into account the stage of litigation at which a [PPPA] motion is brought – for finding that the underlying proceeding has substantial merit and that there is no valid defence” (*Pointes* at para. 39).

[55] As summarised in *Pointes*, at para. 54, Proctorio must show:

... that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.

[56] A similar analysis applies to the defences that Mr. Linkletter has raised. Proctorio “must show that *none* of those defences are valid” and “that there are grounds to believe that the defences have no real prospect of success” (*Pointes* at para. 60, original emphasis).

[57] With that test in mind, I will consider the three causes of action advanced together with the defences raised.

**Breach of Confidence**

[58] The notice of civil claim alleges that Mr. Linkletter is liable for the tort of breach of confidence. The elements of that tort were conveniently summarised by Ballance J. in *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491, as follows:

[462] Breach of confidence is a *sui generis* hybrid claim with roots in the common law and in equity: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 20 [Cadbury]. The three-part test for the claim of breach of confidence was affirmed by La Forest J., for the majority on this point, in *Lac Minerals [Lac Minerals Ltd. v. International Corona Resources, [1989] 2 S.C.R. 574 (S.C.C.)]* at 635-635:

The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case [*Saltman Engineering Co v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.)] on page 215, must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it...

[463] In *Lac Minerals* Sopinka J. provided this succinct iteration of the test at 608:

1. the information must have a necessary quality of confidence about it;
2. the circumstances under which the information was imparted must give rise to an obligation of confidence; and,
3. the defendant must have made unauthorized use of the information.

[59] Mr. Linkletter argues that Proctorio has not satisfied any of those elements.



[60] With respect to the first branch, Ballance J. summarised the issue to be resolved as follows:

[464] At 610, Sopinka J. adopted the oft-cited definition of the meaning of necessary quality of confidence from the following passage in *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.) (leave to appeal to House of Lords refused) at 610:

I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[465] Sopinka J. endorsed two general categories of confidential information: information that is confidential because it has not been made public; and information that may have been assembled from publicly available materials, but amounts to a confidential work product because its assembly required the application of some independent thought process: *Lac Minerals* at 610.

[466] There is also authority for the proposition that information generally known within a particular industry may not qualify as confidential: *Monarch Messenger Services Ltd. v. Houlding* (1984), [1984] A.J. No. 1018, 56 A.R. 147, (Alta. Q.B.) at para. 18; *Lake Mechanical Systems Corp. v. Crandell Mechanical Systems Inc.*, [1985] B.C.W.L.D. 2373, [1985] B.C.W.L.D. 2422.

[467] The threshold for establishing confidentiality is a low one. However, the law recognizes a continuum of specialness with respect to confidentiality, and that the placement of such information on that continuum may affect the remedy awarded for a breach: *Cadbury* at paras. 75-76.

[61] In arguing that the seven videos and Academy screenshot shared by Mr. Linkletter were confidential in nature, Proctorio relies on the following facts:

- a) the information posted in the Help Center and Academy is intended for and accessible by instructors and administrators exclusively;

- b) users can only access the Help Center and Academy after acknowledging and agreeing to abide by Proctorio's Terms of Service, which prohibit them from copying or duplicating the materials posted there;
- c) although stored on YouTube, the videos are unlisted, which means they cannot be accessed unless the user has the correct link;
- d) Proctorio's agreement with UBC restricts the use that can be made of its intellectual property;
- e) the value of Proctorio's product will be diminished if students or competitors have access to instructional materials intended solely for instructors and administrators; and
- f) Proctorio actively protects its confidential information, including by asking prospective customers to sign non-disclosure agreements before being permitted to review details of the kind shared publicly by Mr. Linkletter.

[62] Mr. Linkletter responds that virtually all of the information conveyed in the videos and the Academy screenshot was publicly available already. Indeed, counsel for Mr. Linkletter conducted internet searches of their own to demonstrate that fact. Those searches reveal that many of Proctorio's partners have publicly posted information of the kind that Proctorio claims to be confidential, including some of the actual videos that are the subject of this action. In addition, Mr. Linkletter argues that the material posted in the Help Center and Academy cannot be considered confidential because those facilities are open to approximately 41,000 individuals at any given time. Proctorio does not even attempt to control who receives access, a matter left instead to the discretion of its 1200 institutional customers. Finally, Mr. Linkletter says that by choosing to post the videos on YouTube, a platform designed for sharing information rather than preserving confidentiality, Proctorio has effectively granted a license to other YouTube users to share that material publicly.

[63] The evidence generally supports Proctorio's assertion that it has taken concrete steps to keep the materials posted in the Help Center and Academy

confidential, at least insofar as access to those materials is restricted to a discrete group that is required to acknowledge and agree to Terms of Service requiring users to preserve their confidential nature. Nevertheless, Proctorio appears to have been less stringent in controlling the public sharing of that same material by its partners and others online. Although Proctorio asserts that it actively protects the confidentiality of its intellectual property by, for example, insisting on non-disclosure agreements with prospective customers, the evidence supporting that assertion is not particularly compelling. When asked about this during his cross-examination, Mr. Devoy said only that he knew that such agreements were signed “sometimes”.

[64] It is noteworthy that none of the videos stated on their face that they were commercially sensitive or should be kept from public view. I agree with Mr. Linkletter that the choice to make them available on a public platform like YouTube, when more secure options could have been used, dilutes the strength of Proctorio’s case in asserting that the information they contained had the requisite quality of confidence about it.

[65] On the other hand, it is not disputed that the unlisted links that Mr. Linkletter shared were themselves confidential and not in the public domain. Mr. Linkletter would not have been able to access them had he not signed in to the Academy as a UBC course instructor and accepted Proctorio’s Terms of Service. As he himself has deposed, an unlisted link is akin to an unlisted telephone number. Both may embody information that is confidential and even sensitive. When an unlisted number is shared without authorization, something of value may be lost. In this case, Proctorio’s ability to control who has access to what information in its Help Center has value in and of itself, apart from the information contained in the videos.

[66] I appreciate that the importance of preserving confidentiality in the unlisted links is tied to the sensitivity of the information in the videos. Although it appears that much of that information was already available to the public elsewhere on the internet, it was in a form that was diffuse and scattered. To assemble the same information that Mr. Linkletter shared with his Twitter audience on August 23 and 24,

2020, one would have to gather it from many sources, as Mr. Linkletter's counsel later did. The public did not have ready access to it in that assembled form.

[67] Finally, I am not persuaded that, simply by having posted the tutorial videos on YouTube, Proctorio effectively granted Mr. Linkletter and other users of YouTube a license to share the links through YouTube's Terms of Service, as Mr. Linkletter argues.

[68] Those terms state that by posting content on YouTube, "you" (in this case, Proctorio):

... also grant each other user of the Service a worldwide, non-exclusive, royalty-free licence to access your Content through the Service, and to use that Content, including to reproduce distribute, prepare derivative works, display, and perform it, only as enabled by a feature of the Service (such as video playback or embeds). For clarity, this license does not grant any rights or permissions for a user to make use of your Content independent of the Service.

[69] The YouTube Terms of Service also confer the following rights with respect to "unlisted" videos:

You can share an unlisted video's URL with other people. The people you share the video with don't need a Google Account to see the video. Anyone with the link can also reshare it.

[70] Proctorio responds that YouTube's Terms of Service also contain the following provisions that restricted how Mr. Linkletter could use YouTube's service:

You [in this case, Mr. Linkletter] may access and use the Service as made available to you, as long as you comply with this Agreement and applicable law. You may view or listen to Content for your personal, non-commercial use. You may also show YouTube videos through the embeddable YouTube player.

The following restrictions apply to your use of the Service. You are not allowed to:

1.access, reproduce, download, distribute, transmit, broadcast, display, sell, license, alter, modify, or otherwise use any part of the Service or any Content except: (a) as expressly authorized by the Service; or (b) with prior written permission from YouTube and, if applicable, the respective rights holders;

2.circumvent, disable, fraudulently engage with, or otherwise interfere with any part of the Service (or attempt to do any of these things), including

security-related features or features that (a) prevent or restrict the copying or other use of Content or (b) limit the use of the Service or Content.

...

[Emphasis added.]

[71] Relying on those provisions, Proctorio argues that Mr. Linkletter required the permission of Proctorio, as “the respective rights holder,” to share the links. I do not find that argument persuasive. It misconstrues paragraph #1 by reading it as if the “or” between clauses 1(a) and 1(b) were an “and”. If Mr. Linkletter’s conduct was authorized by clause 1(a), he need not show that it was also authorized under clause 1(b).

[72] Proctorio also argues that Mr. Linkletter violated paragraph #2 by having gained access to and shared the unlisted links as he did. However, I am not persuaded that Mr. Linkletter did anything to “interfere with any part of the [YouTube] Service” which would, in any event, raise an issue as between Mr. Linkletter and YouTube, not Proctorio.

[73] On the other hand, I do agree with Proctorio that nothing in YouTube’s Terms of Service permitted Mr. Linkletter to share unlisted links that he was only able to access in the first place through Proctorio’s Help Center. In particular, the license that Mr. Linkletter relies on only allowed him and other users of YouTube “to access [Proctorio’s] Content through the [YouTube] Service” (emphasis added).

Mr. Linkletter did not access the videos through YouTube’s service, but rather through Proctorio’s Help Center, and therefore on and subject to Proctorio’s, not YouTube’s, Terms of Service.

[74] For those reasons, I am satisfied that there are grounds to believe that Proctorio can meet its burden to show that the information that Mr. Linkletter shared was confidential.

[75] In *Sateri*, Ballance J. summarised the factors to be considered at the second branch of the test (namely, whether the information was imparted in confidence), as follows:

[468] In *No Limits Sportswear Inc. v. 0192139 BC Ltd.*, 2015 BCSC 1698 [No Limits], Griffin J. provided a helpful overview of the principles that inform the second constituent ingredient of a breach of confidence claim, namely that the circumstances in which the information was conveyed give rise to an obligation of confidence:

[15] An obligation to keep information confidential may arise by express contract, or by implication based on the circumstances and relationship of the parties.

[16] Even if no mention of confidentiality is made, a communication may be considered to have been made in confidence if there was a mutual understanding that the parties were working towards a joint venture or some other business arrangement: *Lac Minerals* at 612-613.

[17] In *Lac Minerals* at 612-613, and at 642, the Court adopted the following passage of the judgment of Megarry J. in *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41. at 48:

In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence....

[469] In *Lac Minerals*, La Forest J. confirmed that a party's receipt of confidential information in circumstances of confidence established a duty that the recipient party will not use that information. The use of confidential information other than in the permitted way therefore constitutes misuse. At 642, La Forest J. explained that where it is shown that the confidential information was used by the defendant, the burden then falls to the defendant to demonstrate that it was a permitted use.

[76] I am satisfied that there are grounds to believe that Proctorio can meet its burden to show that the circumstances in which Mr. Linkletter gained access to the Help Center and Academy were such as to give rise to a duty on his part to maintain the confidentiality of the materials he found there. That conclusion flows from the following:

- a) his having acknowledged and agreed to abide by Proctorio's Terms of Service before accessing those materials; and

- b) his awareness of the need to identify himself as an instructor in order to access them.

[77] In *Sateri*, Ballance J. summarised what must be shown to satisfy the third branch of the test, as follows:

[471] This third mandatory element appears to contemplate that the misuse of the information must be to the detriment of the confider of the information. In the words of La Forest J., if confidential information is used by the recipient for a purpose other than that for which it was conveyed, “and detriment to the confider results, the confider will be entitled to a remedy”: *Lac Minerals* at 638-639.

[78] Mr. Linkletter argues that Proctorio cannot satisfy this branch of the test because it suffered no detriment as a result of what was done. Proctorio responds that the detriment is at least twofold, and includes the following:

- a) students who have access to instructor-level information may learn how to circumvent the software’s oversight function, making it less effective in its intended purpose; and
- b) competitors may learn how the software works and is introduced to instructors, thereby reducing the value of Proctorio’s intellectual property.

[79] I accept that the risks to which Proctorio refers are at least theoretical possibilities. However, there is no concrete evidence before me to show how those things might actually have occurred, particularly given that there is evidence, described above, suggesting that much of the information in issue was already in the public domain anyway.

[80] Nevertheless, I am satisfied that Proctorio can still show at least some detriment flowing from Mr. Linkletter’s conduct, even if those particular risks have not been shown to have materialised. One of the concerns that animated Proctorio to seek immediate injunctive relief was that Mr. Linkletter was improperly using his credentials as faculty at UBC to undermine the virtual barrier on which Proctorio relies to segregate the information that it wishes to make available only to instructors

and administrators from that available to students and members of the public. The ability to preserve that divide is, one can infer, an important component in the value of Proctorio's business. For that reason, I am satisfied that there are grounds to believe that Proctorio can meet its burden to show at least some detriment flowing from Mr. Linkletter's conduct.

[81] Finally, Mr. Linkletter raises the defence of "disclosure in the public interest", relying on *Initial Services Ltd v. Putterill*, [1967] 3 All E.R. 145, [1967] 3 W.L.R. 1032 (Eng. CA) and *Steintron International Electronics Ltd. v. Vorberg* (1986), 10 C.P.R. (3d) 393, 1986 CanLII 1234 (B.C.S.C.). In *Steintron*, Cowan, L.J.S.C. cited the following headnote from *Initial Services* with approval (at para. 16):

In support of the appeal, counsel for Initial Services, Ltd. said that in the employment of every servant there is implied an obligation that he will not, before or after his service, disclose information or documents which he has received in confidence. Now I quite agree that there is such an obligation. It is imposed by law. But it is subject to exceptions. Take a simple instance. Suppose a master tells his servant: "I am going to falsify these sale notes and deceive the customers. You are not to say anything about it to anyone." If the master thereafter falsifies the sale notes, the servant is entitled to say: "I am not going to stay any longer in the service of a man who does such a thing. I will leave him and report it to the customers." It was so held in the case of *Gartside v. Outram* (1856), 26 L.J. Ch. 113, see at p. 114 and at p. 116. Counsel suggested that this exception was confined to case where the master has been "guilty of a crime or fraud"; but I do not think that it is so limited. It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. Wood, V. C., put it in a vivid phrase: "There is no confidence as to the disclosure of iniquity."

[82] I am not persuaded that the defence applies here. In his judgment in *Initial Services*, Lord Denning, M.R. added the following qualification at p. 148:

... The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act, 1956, to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

[83] The qualification suggests that the defence is available only insofar as the disclosure of confidential information went no further than was necessary in order to vindicate the public interest. In this case, even if one assumes that the Help Center



videos and Academy screenshot could be said to contain evidence of “misconduct of such a nature that it ought in the public interest to be disclosed to others”, Mr. Linkletter did not have to share all that he did in order to disclose that “misconduct” to his Twitter audience.

[84] To summarise, I have concluded that Proctorio has met its burden under s. 4(2)(a) of the *PPPA* to show that there are grounds to believe that its claim for breach of confidence has substantial merit and that there are no valid defences to it.

### ***Infringement of Copyright***

[85] In its notice of civil claim, Proctorio asserts rights as copyright owner under s. 3 of the *CA*, which states in relevant part as follows:

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 ...

[86] Copyright is enforced under Part III of the *CA*, where one finds s. 27, which states as follows:

Infringement generally

27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[87] Mr. Linkletter does not dispute that Proctorio owns copyright in the YouTube videos and Academy screenshot that he shared. However, he argues that he cannot be liable for infringement of that copyright for the following reasons:

a) with respect to the video links:

i. It is not an infringement of copyright to share a hyperlink to content already on the internet; and

- ii. Proctorio granted all viewers of the videos an implied license to share them without restriction, having posted them on YouTube and thereby accepted YouTube's Terms of Service;
- b) with respect to the Academy screenshot, it was not a "substantial part" of the work; and
- c) with respect to both, the defences of "fair dealing" and "non-commercial user generated content" apply.

[88] Turning first to the video links, Mr. Linkletter's first argument is that sharing a link to content published elsewhere on the internet cannot be an infringement of copyright because a link merely communicates that something exists and does not actually convey the copyrighted content, citing *Crookes v. Newton*, 2011 SCC 47.

[89] In that case, Abella J., for the majority, concluded that hyperlinking was not a "publication" of defamatory content, for the following reasons:

[26] A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.

[27] Hyperlinks are, in essence, references. By clicking on the link, readers are directed to other sources. Hyperlinks may be inserted with or without the knowledge of the operator of the site containing the secondary article. Because the content of the secondary article is often produced by someone other than the person who inserted the hyperlink in the primary article, the content on the other end of the link can be changed at any time by whoever controls the secondary page. Although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked. (See David Lindsay, *Liability for the Publication of Defamatory Material via the Internet* (2000), at pp. 14 and 78-79; Collins, at paras. 2.42 to 2.43 and 5.42.)

[28] These features — that a person who refers to other content generally does not participate in its creation or development — serve to insulate from liability those involved in Internet communications in the United States: see *Communications Decency Act of 1996*, 47 U.S.C. §230 (1996); see also Jack M. Balkin, “The Future of Free Expression in a Digital Age” (2009), 36 Pepp. L. Rev. 427, at pp. 433-34; *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006); *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

[29] Although the person selecting the content to which he or she wants to link might facilitate the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that, by hyperlinking, an individual is referring the reader to other content. (See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 97-102.)

[30] Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.

[Original emphasis.]

[90] I agree with Proctorio that *Crookes* does not support Mr. Linkletter’s argument. *Crookes* was a defamation case in which the defamatory content was located in the original material to which the hyperlink referred. The Court concluded that by merely conveying where that material could be found, the defendant was not repeating it because he was not thereby exerting control over it. In the context of copyright law, however, the same reasoning does not apply. The wrongdoing lies not in the original work itself but in the very act of sharing access to it without the owner’s authorization.

[91] Moreover, Abella J. also noted that there may be a distinction to be drawn between hyperlinks of the kind in issue in *Crookes* and those, like the ones in issue in this case, that “automatically display other content.” Such links may attract

different treatment, even under the rubric of defamation law, for the following reasons:

[43] I am aware that distinctions can be drawn between hyperlinks, such as the deep and shallow hyperlinks at issue in this case, and links that automatically display other content. The reality of the Internet means that we are dealing with the inherent and inexorable fluidity of evolving technologies. As a result, it strikes me as unwise in these reasons to attempt to anticipate, let alone comprehensively address, the legal implications of the varieties of links that are or may become available. Embedded or automatic links, for example, may well prove to be of consequence in future cases, but these differences were not argued in this case or addressed in the courts below, and therefore need not be addressed here.

[92] Mr. Linkletter also relies on *Warman v. Fournier*, 2012 FC 803, for the proposition that merely sharing a hyperlink to content found elsewhere on the internet cannot be an infringement of copyright. In that case, Rennie J. dismissed an application alleging infringement of copyright in a variety of works, one of which was a photograph taken by M. Barrera (the “Barrera Work”), in which the applicant, Mr. Warman, held copyright. The respondents operated an online political news discussion forum known as “Free Dominion.” The Barrera Work was temporarily displayed there when a Free Dominion member posted a hyperlink to the Barrera Work from Mr. Warman’s own website. In dismissing Mr. Warman’s claim in relation to the Barrera Work, Rennie J. stated as follows:

[36] The application in respect of the Barrera Work must fail because any communication of the Barrera Work by telecommunication was authorized by the applicant. Communication of a work by telecommunication will only constitute infringement if it was unauthorized. In *Public Performance* [*Public Performance of Musical Works (Re)*, [1999] CBD No 5], the Copyright Board held at page 19 that making a work available on an internet website accessible to the public constitutes authorization of communication by telecommunication:

“Authorization” constitutes a separate protected use under the Act. To authorize is to sanction, approve or countenance. The person who makes a musical work available on an Internet-accessible site authorizes its communication. The work is posted for the sole purpose of being communicated and with full knowledge and intention that such a communication would occur. The person who makes the work available does more than merely provide the means to communicate the work; he/she either controls or purports to control the right to communicate it.

[37] The evidence is clear that the Barrera Work was posted on the applicant's personal website and thus the communication of the Barrera Work occurred by creating a hyperlink to the applicant's own website. Thus, the applicant authorized communication of the Barrera Work by posting it on his website and therefore there is no infringement.

[38] Counsel for the applicant argued that the respondents cannot rely on the fact that the Barrera Work was posted on the applicant's website because that would amount to "blaming the victim". However, the applicant is only a victim of infringement if the respondents did something only he has the right to do without his authorization. As the respondents submit, the Barrera Work was within the applicant's full control and if he did not wish it to be communicated by telecommunication, he could remove it from his website, as he eventually did.

[93] I agree with Proctorio that *Warman* is distinguishable inasmuch as Rennie J. found that Mr. Warman had implicitly authorized the public to view the Barrera Work on his own website, apparently without restriction. In this case, Proctorio did not display the links to the videos on its website in a manner that made them generally available to the public. Rather, they were accessible in the Help Center only to users who had logged in as an accredited instructor or administrator, having previously acknowledged and agreed to abide by Proctorio's Terms of Service.

[94] Proctorio refers to European jurisprudence holding that the unauthorized sharing of hyperlinks can amount to copyright infringement if the effect is to cause copyrighted content otherwise available only to a restricted segment of the public to be shared with a wider "new public": Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 E.C.D.R. 9 (Court of Justice of the EU); Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV*, 2016 E.C.D.R. 25 (Court of Justice of the EU).

[95] For those reasons, I agree with Proctorio that there are grounds to believe that Mr. Linkletter has no valid defence to the infringement of copyright claim based on his having merely shared a link rather than the copyrighted material itself.

[96] I have already rejected Mr. Linkletter's argument arising from the license granted through the YouTube Terms of Service.

[97] I turn next to the Academy screenshot. Mr. Linkletter argues that he cannot be liable for copyright infringement in respect of it because it was not "a substantial

part” of the copyrighted work (in this case, the eight Academy modules, which, the evidence suggests, would take about an hour for the user to complete). Section 3 of the CA confers on Proctorio “the sole right to produce or reproduce the work or any substantial part thereof” (emphasis added).

[98] The test to be applied in determining whether what was reproduced was a “substantial part” of a copyrighted work for the purpose of s. 3 of the CA was set out by McLachlin, C.J., writing for the Court in *Cinar Corporation v. Robinson*, 2013 SCC 73, as follows:

[23] The *Copyright Act* strikes “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30; see also *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, at paras. 8-11; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at paras. 7-8; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 40. It seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works. However, it does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works. For example, “[t]he general stock of incidents in fiction or drama is free for all to use — a substantial part of everyone’s culture, not of any one individual’s work”: D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 182.

[24] The Act protects original literary, dramatic, musical, and artistic works: s. 5. It protects the expression of ideas in these works, rather than ideas in and of themselves: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 8. An original work is the expression of an idea through an exercise of skill and judgment: *CCH*, at para. 16. Infringement consists of the unauthorized taking of that originality.

[25] However, the Act does not protect every “particle” of an original work, “any little piece the taking of which cannot affect the value of [the] work as a whole”: Vaver, at p. 182. Section 3 of the *Copyright Act* provides that the copyright owner has the sole right to reproduce “the work or any substantial part thereof”.

[26] A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, per Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a

substantial part of a work is a part of the work that represents a substantial portion of the author's skill and judgment expressed therein.

[99] In this case, Mr. Linkletter argues that there was very little original content of any kind disclosed in the Academy screenshot beyond the large images showing that the links to certain tutorial videos were unavailable.

[100] Proctorio responds that the screenshot also depicted some interlineated text in which some "key points" from the "Behaviour Settings Overview" video and other original text were revealed. Proctorio cites *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 for the proposition that a summary of a larger work (in that case, the headnotes to reported court decisions) could be the subject of copyright protection. I do not find that argument persuasive. In *CCH*, the summary was the entire work for which protection was sought. The same cannot be said here.

[101] On balance, I am not satisfied that Proctorio has met its burden to show that this particular defence has no real prospect of success.

[102] What remains to be addressed in my analysis of the copyright claim under s. 4(2)(a) of the *PPPA*, therefore, is whether Proctorio has met its burden to show that Mr. Linkletter's last two defences, namely, "fair dealing" and "non-commercial user generated content", offer no real prospect of defeating that claim in relation to the Help Center video links.

[103] The "Fair Dealing" defence flows from s. 29 of the *CA*, which states that "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." The test to be applied in determining the applicability of that defence was helpfully summarised by McLachlin, C.J., writing for the Court, in *CCH*. That test consists of two branches:

- a) Mr. Linkletter's sharing of the links must have been for at least one of the purposes listed in s. 29; and
- b) it must have been "fair."

[104] Proctorio does not dispute that Mr. Linkletter satisfies the first branch of the test. It disputes the validity of this defence entirely on the second branch.

[105] In assessing what should be considered “fair” for this purpose, McLachlin C.J. agreed (at para. 53) with Linden J.A. in the Ontario Court of Appeal that the following list of factors, although they might not arise in every case of fair dealing, did “provide a useful analytical framework to govern determinations of fairness in future cases”:

- a) the purpose of the dealing, where an objective assessment is made of the user’s “real purpose or motive” in using the work;
- b) the character of the dealing, which involves an examination of how the work was dealt with, including (among other things) whether multiple copies are widely distributed;
- c) the amount of the dealing, which considers how much of the original work is used or the proportion of the excerpt in relation to the whole;
- d) alternatives to the dealing, including whether a non-copyrighted equivalent could have been used instead (for example, “...if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness” – *CCH* at para. 57);
- e) The nature of the work, such as whether the work has been published or is confidential (for example, “[i]f...the work in question was confidential, this may tip the scales towards finding that the dealing was unfair” – *CCH* at para. 58); and
- f) The effect of the dealing on the work, including whether the disputed use is likely to compete with the market for the original.

[106] I have concluded that all but the first of those factors favour Proctorio’s position that Mr. Linkletter’s dealing in this case was not fair.



[107] With respect to item (a), I accept Mr. Linkletter's submission that his "real purpose or motive" in copying the links to his Twitter feed was to demonstrate his point about the harm that he believed Proctorio's software to be causing students. I also accept that he expressed himself as he did primarily out of a genuine sense of public duty, rather than out of malice, as Proctorio argues. Although some of his tweets were clearly intemperate (his call for someone to "leak the source code" or "delete the company" come to mind), I am not persuaded that, on the whole, they demonstrate malice.

[108] With respect to item (b), the links were circulated widely. Mr. Linkletter had 958 followers on Twitter at the time. Some of his followers appear to have retweeted the links – a result Mr. Linkletter appears to have encouraged. It is clear that "multiple copies were widely distributed".

[109] With respect to item (c), Mr. Linkletter shared links that permitted his audience and anyone else who received them to see the entirety of each video.

[110] With respect to item (d), I am not persuaded that it was necessary for Mr. Linkletter to share all of the videos publicly as he did in order to make the points he wanted to make. He could, for example, have reported that he had reviewed some instructional videos personally and described the features he saw in them that were worthy of note. I accept that in some cases at least, his point was made most convincingly by sharing the videos themselves (for example, in refuting Proctorio's assertion in its public-facing "Frequently Asked Questions" page that the software did not track eye movements, when the relevant video showed otherwise). Nevertheless, the fact that so much of the information in the videos was available publicly by other means (including the fact that eye movements are tracked), as Mr. Linkletter argues, suggests that he could have drawn on other sources to make the points he wanted to make without infringing copyright or breaching his duty of confidence.

[111] With respect to item (e), for the reasons I gave earlier when I addressed the tort of breach of confidence, I am satisfied that the links themselves were indeed

confidential, even if most of the information in the videos was already available elsewhere on the internet.

[112] Finally, with respect to item (f), I have already found that Proctorio has a legitimate interest in keeping segregated the instructional material made available to instructors and administrators on the one hand, from other material made available to students and the general public, and particularly competitors, on the other. By effectively removing that barrier unilaterally, Mr. Linkletter created a risk that Proctorio's product would be rendered less effective for its intended purpose (because students could more easily anticipate how instructors can configure the settings) and its proprietary information more readily available to competitors.

[113] On the other hand, I accept, as Mr. Linkletter argues, that the risk of such harm actually materialising may be speculative, given the amount of similar information already available online about Proctorio and its product. But that does not mean that Proctorio has no enforceable interest in maintaining the integrity of its system for segregating proprietary information intended solely for instructors and administrators, or that it has not lost something of value if that system is undermined by conduct like Mr. Linkletter's.

[114] On balance, I agree with Proctorio that Mr. Linkletter's "fair dealing" defence shows no real prospect of success.

[115] The last defence that Mr. Linkletter raises is that of "non-commercial user generated content." That defence flows from s. 29.21 of the *CA*, which states as follows:

**29.21** (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

[116] I agree with Proctorio that this defence is simply not applicable in these circumstances. Mr. Linkletter did not create any “new work” by copying an existing work that had previously been “published or otherwise made available to the public”. Rather, he shared seven links that allowed members of the public to view copyrighted material that the copyright owner did not wish to share publicly. The defence therefore has no real prospect of success.

[117] To summarise, I have concluded that Proctorio has met its burden under s. 4(2)(a) of the *PPPA* to show that there are grounds to believe that its claim alleging infringement of copyright by sharing the seven links has substantial merit and that there are no valid defences to that claim.

### ***Circumventing Digital Protection***

[118] Subsection 41.1(1) of the *CA* prohibits anyone from circumventing a “technological protection measure.” The terms “circumvent” and “technological protection measure” are defined in s. 41, which states as follows:

***circumvent*** means,

(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition *technological protection measure*, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition *technological protection measure*, to avoid, bypass, remove, deactivate or impair the technological protection measure. (*contourner*)

***technological protection measure*** means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19. (*mesure technique de protection*)

[119] The evidence suggests that Mr. Linkletter did not “circumvent” any “technological protection measure” in order to gain access to the Help Center and Academy within the meaning of the first paragraphs (a) of the two definitions in s. 41, as Proctorio alleges. Although he had to set up a “sandbox” course in order to gain access, he had the requisite qualifications to do so.

[120] With respect to the second paragraphs (b) of the two definitions, although I have found that there are grounds to believe that, after he got there, he infringed Proctorio's copyright and acted in breach of confidence by sharing the links, he did not, in doing so, “avoid, bypass, remove, deactivate or impair” an “effective technology, device or component”.

[121] It follows that Proctorio has not met its burden to substantiate this claim.

***iv. Does Proctorio's interest in carrying on with the action outweigh its deleterious effects on expression and public participation?***

[122] In *Pointes, Côté J.* described, at para. 82, the burden that Proctorio must meet on this final branch of the test under s. 4(2)(b) of the *PPPA*. In particular, Proctorio must:

... show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression established under s. [4], and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. [4]

analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a [PPPA] motion.

[Original emphasis.]

[123] I have concluded that Proctorio has met its burden under s. 4(2)(a) of the *PPPA* to show that there are grounds to believe that its claims for breach of confidence and, in relation to the video links, infringement of copyright, have substantial merit and that there are no valid defences to those claims.

[124] I have also concluded, however, that the corresponding harm that Proctorio has been able to demonstrate is limited. Although I have found that there is, as a result of Mr. Linkletter's disclosure, at least a theoretical risk that:

- a) students who have access to instructor-level information may learn how to circumvent the software's oversight function, making it less effective in its intended purpose; and
- b) competitors may learn how the software works and is introduced to instructors, thereby reducing the value of Proctorio's intellectual property,

the evidence suggests that those particular risks are unlikely to materialise.

[125] On the other hand, I have also found that the evidence supports Proctorio's allegation that Mr. Linkletter's conduct compromised the integrity of its Help Center and Academy screens, which were put in place in order to segregate the information made available to instructors and administrators from that intended for students and members of the public. But for the injunction granted early on in this proceeding, moreover, the harm in that category may well have been greater.

[126] On the other side of the scales, I have found that, in the impugned tweets, Mr. Linkletter was expressing himself on a matter of public interest. I have also found that he acted primarily out of a genuine sense of public duty. He has demonstrated a history of activism in the public interest. I have found no convincing evidence of malice in his tweets. That being said, some of them crossed the line from being

intemperate to being actionable. His invitation to others to follow in his footsteps “on a computer you can torch” betrays an awareness that what he was doing, and encouraging others to do, would likely be viewed, at least beyond his Twitter audience, as improper.

[127] Mr. Linkletter argues that this action has all the hallmarks of a classic SLAPP suit. I am not persuaded that is so. Rather, I agree with Proctorio that the focus of this action is a narrow one. It does not, properly framed, target the right of Mr. Linkletter or anyone else to express themselves in a manner critical of Proctorio, its software, or remote invigilation generally. Rather, the only expression that Proctorio seeks to enjoin is the public sharing of confidential information from the Help Center and Academy intended exclusively for instructors and administrators. In that regard, I have already found that it was not necessary for Mr. Linkletter to breach his duty of confidence or infringe copyright in order to convey the opinions he wished to convey.

[128] Although I accept that, as Mr. Linkletter argues, students have a right to know what information is being collected from them and how it will be used, that does not mean that they and everyone else are entitled to see all of the instructor-side training materials in their raw form. The point is that Mr. Linkletter’s right to freedom of expression does not include a right to decide for himself what, among Proctorio’s confidential information, the public should be allowed to see.

[129] Mr. Linkletter notes, fairly, that dozens of other individuals and institutions have been publicizing similar information about Proctorio. The only reason he has been singled out, he says, is that he alone is a vocal and influential critic of Proctorio. I disagree that this action can be explained in that manner. The reason he has been singled out is that he did not just share information as others have. Rather, he was systematically reproducing to his Twitter audience one link after another directly from the Help Center. No one else was doing anything of that kind.

[130] I therefore reject the submission that this action was brought with the tacit objective of constraining legitimate expression or that it has had or will have that

effect (assuming, that is, that the injunction is narrowly tailored, an issue that I address below). Mr. Linkletter has been and will continue to be free to express his views, as long as he does not misuse the access he was given to instructor-level materials.

[131] For those reasons, I have concluded that Proctorio has met its burden under s. 4(2)(b) and that the application under s. 4 of the *PPPA* should therefore be refused.

### **B. Other *PPPA* Issues**

[132] In view of my conclusions under s. 4, the constitutional question and Mr. Linkletter’s claims for indemnity costs and damages under the *PPPA* do not arise.

### **C. Should the injunction continue in its present form?**

#### ***i. Non-Disclosure***

[133] Mr. Linkletter seeks to have the injunction set aside due to Proctorio’s “numerous omissions and misstatements” in obtaining it.

[134] The test to be applied on an application to set aside an *ex parte* order on those grounds was conveniently summarised by Warren J. in *Regal Ideas Inc. v. Haus Innovations Inc.*, 2018 BCSC 136, as follows:

[30] It is trite and fundamental that an applicant for an *ex parte* order must make full, fair and frank disclosure of all material facts and potential defences, and if the court subsequently concludes that the applicant failed to do so the court may set aside the order without regard to the merits of the application: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at paras. 32–34; *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 36–38.

[31] However, not every omission necessarily results in an *ex parte* order being set aside. The full, frank and fair disclosure requirement is not a standard of perfection and it is impractical to expect every nuance of the situation to be brought to the attention of the court: *K.P.I.N. v. K.N.N.*, 2005 BCSC 1259 at para. 14. The materiality of any alleged non-disclosure must be assessed by considering the importance of the alleged non-disclosure to the issues decided at the *ex parte* hearing: *Pierce* at para. 37.

[135] Mr. Linkletter argues that the following omissions and misstatements justify such an order here:

- a) failing to mention:
  - i. the license that Proctorio granted to other YouTube users through the YouTube Terms of Service;
  - ii. that YouTube readily facilitates the sharing of videos with others; and
  - iii. that the supposedly confidential information that Proctorio was seeking to protect was already widely available on the internet;
- b) the false assertion that the videos were stored on a “private channel on YouTube” when in fact the channel was public;
- c) failing to mention important details pertaining to the June 2020 incident;
- d) failure to mention that Proctorio’s agreement with UBC contains exceptions, including a provision stating that it does not cover information that is already in the public domain;
- e) failing to refer to authority holding that hyperlinking to material posted elsewhere on the internet cannot be an infringement of copyright; and
- f) failing to refer to Mr. Linkletter’s possible defences to the breach of copyright claim such as “fair dealing”.

[136] I am not persuaded that any of these items, alone or in combination, justify an order setting aside the injunction.

[137] First, I have already rejected Mr. Linkletter’s arguments forming the basis for his complaints in items (a), (e) and (f). Moreover, with respect to items (a) and (d), I accept that the degree to which the information contained in the videos was already publicly available elsewhere on the internet would have been an important detail for Giaschi J. to be made aware of, but Mr. Linkletter has not shown that Proctorio had



knowledge of it at the time. That evidence was adduced through internet searches conducted by Mr. Linkletter's counsel and was attached to an affidavit made six months later.

[138] With respect to item (b), I am not persuaded that Mr. Devoy's assertion, when read in its entirety, conveyed an inaccurate or false impression. What he meant by "private" was explained, accurately, in the next sentence. The entire paragraph reads as follows:

The Help Center provides the "Application Documentation", which includes how-to guides and tutorials for using the Software and embedded on certain pages of the Help Center documentation are links to explanatory videos. These videos are hosted on a private channel on YouTube, an online video sharing platform. However, Proctorio's videos are stored as "unlisted videos", meaning that they cannot be searched for by the public and can only be accessed with the correct web link which Proctorio controls.

[139] With respect to item (c), I am not persuaded that the details of the June 2020 incident that Mr. Linkletter alleges to have been improperly omitted were of sufficient importance in the context of the claim being advanced that they ought to have been mentioned, even if Mr. Linkletter has described the incident accurately, which is disputed.

[140] I therefore refuse to set aside the injunction on those grounds.

***ii. Overbreadth***

[141] Paragraph 1 of the order granted September 2, 2020 states as follows:

THIS COURT ORDERS THAT:

1. [sic] 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 plaintiff's Help Center documentation located at proctorio.zendesk.com (the "Application Documentation");
    - (ii) the Proctorio Academy training and course materials located at proctorio.academy (the "Academy Course Materials");

- (iii) any other Application IP or Confidential Information of the plaintiff; or
- (iv) hyperlinks to any of the above;
- (b) In any manner whatsoever circumventing the technological protection measures used by plaintiff to protect the Academy Course Materials, the Application Documentation and/or the Application IP; and
- (c) Encouraging others in any manner whatsoever, to download, disseminate, copy, record, post, transfer, or share the Academy Course Materials, the Application Documentation and/or the Application IP, or hyperlinks to any of the foregoing[.]

[142] Mr. Linkletter argues that those terms are overly broad. In particular, he says that they prohibit conduct extending beyond the relief sought in the notice of civil claim. Moreover, by using capitalised terms like “Application IP” and “Confidential Information” that are not defined in the order, it unduly restricts his freedom of expression because it leaves him unable to know with precision what is prohibited.

[143] Mr. Linkletter also argues that Giaschi J. was led into error because Proctorio’s counsel did not alert him to the requirement to consider Mr. Linkletter’s right to freedom of expression when assessing the balance of convenience, citing *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 and *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36.

[144] Proctorio disputes that the injunction is overly broad. It argues that there was no need to raise the issue of freedom of expression before Giaschi J., given the limited nature of the conduct it was seeking to enjoin.

[145] In view of my conclusions under s. 4 of the *PPPA*, I am satisfied that the injunction was indeed granted in terms that are overly broad. Proctorio has successfully resisted Mr. Linkletter’s s. 4 application on the basis that its claim is a narrow one that minimally impairs Mr. Linkletter’s freedom of expression. The injunction should therefore be narrowly crafted so that it prohibits no more than the conduct that I have found to be properly actionable, namely, Mr. Linkletter’s public sharing of materials posted on the Help Center and Academy webpages, and

encouraging others to do so. The injunction, in its current form, goes well beyond that.

[146] First, I have found that Proctorio does not advance a viable claim for circumventing a technological protection measure. Sub-paragraph 1(b) should therefore be removed. In addition, I also agree with Mr. Linkletter that the order should not use undefined capitalised terms as it does in sub-paras. 1(a)(iii) and 1(c), because they are insufficiently clear and extend the reach of the order beyond what is required.

***iii. Conclusion on the Injunction***

[147] I am ordering that Giaschi J.'s order made September 2, 2020 be varied by deleting paragraph 1 and replacing it with a new paragraph that prohibits Mr. Linkletter from:

- a) downloading, disseminating, copying, recording, posting, transferring, or sharing:
  - i. Proctorio's Help Center documentation located at [proctorio.zendesk.com](https://proctorio.zendesk.com);
  - ii. the Proctorio Academy training and course materials located at [proctorio.academy](https://proctorio.academy); and
  - iii. hyperlinks to any of those things; and
- b) encouraging others to do any of the foregoing.

[148] For greater clarity, I am also amending the order to add a new term to the effect that nothing in the order prohibits Mr. Linkletter from downloading, disseminating, copying, recording, posting, transferring, sharing or commenting on material that he has obtained from any public source.

**IV. Summary and Disposition**

[149] Mr. Linkletter's application to have the action dismissed under s. 4 of the *PPPA* is refused. His application to set aside the order made September 2, 2020 is allowed in part. The order is varied in the manner described above.

[150] As success was divided, the parties will bear their own costs.

"Milman J."