

No. S208730
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

PROCTORIO, INCORPORATED

PLAINTIFF

AND:

IAN LINKLETTER

DEFENDANT

RESPONSE TO CIVIL CLAIM

Filed by: Ian Linkletter (the “defendant”)

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant’s Response to Facts

1. The facts alleged in paragraphs 1 (first sentence only), 4, 5, and 9 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 2, 3, 6, 7, 10, 11, 12, 14, 15, 18, 19, 21, 22, and 23 of Part 1 of the notice of civil claim are denied.
3. The facts alleged in paragraphs 1 (second sentence), 8, 13, 16, 17, and 20 of Part 1 of the notice of civil claim are outside the knowledge of the defendant.

Division 2 – Defendant’s Version of Facts

4. In this proceeding, the plaintiff alleges breach of confidence for information that was already available to the public, infringement of copyright for works it licensed to the defendant, and circumvention of non-existent or ineffective technological protection measures. The defendant denies all the facts and claims alleged in the notice of civil claim unless expressly admitted herein.

Proctorio's Software

5. In response to paragraphs 6 and 7 of the notice of civil claim, the defendant admits that the plaintiff makes academic surveillance software. The defendant denies that the plaintiff's software allows education providers to ensure the integrity of quizzes and exams, that the behaviours flagged by the software are "irregular" or that the software detects academic misconduct.

The Plaintiff's Allegedly Confidential Material

6. In response to paragraph 10 of the notice of civil claim, the defendant denies that the content of the plaintiff's web pages were confidential to the plaintiff, and denies that the plaintiff's web site was technologically protected.
7. In response to paragraph 11 of the notice of civil claim, the defendant denies that the unlisted YouTube videos were not publicly accessible.
8. In further response to paragraph 11 of the notice of civil claim, the plaintiff granted every other user of YouTube, including the defendant, a worldwide, non-exclusive, royalty-free license to use, reproduce, distribute, prepare derivative works, display and perform its content.
9. In response to paragraphs 14 and 15 of the notice of civil claim, the defendant denies that the Academy Course Material is confidential to the plaintiff, denies that the Academy Course Material is technologically protected, and denies that he consented to any agreement with the plaintiff.

The Defendant's Tweets

10. In response to paragraph 18 of the notice of civil claim, the defendant admits that he uses Twitter but the question of whether his Twitter followers, or any of them, received any of the tweets complained of by the plaintiff is outside the defendant's knowledge.
11. In response to paragraph 19 of the notice of civil claim, the defendant admits to writing the tweets complained of but denies that the videos were confidential and proprietary, and denies that the videos were accessible only to administrators and instructors via the Help Center.
12. In response to paragraph 20 of the notice of civil claim, the plaintiff's disclosure of new links to its YouTube videos is outside the defendant's knowledge.
13. In response to paragraph 21 of the notice of civil claim, the defendant admits to writing a tweet with an attached screenshot but denies that the information was confidential, denies that he consented to any agreement with the plaintiff or, in the alternative, denies he violated any such agreement.

The Plaintiff's Relationship With UBC

14. In response to paragraphs 1, 8, 16 and 17 of the notice of civil claim, the defendant is aware that the plaintiff has a relationship with UBC but the particulars of that relationship were outside the defendant's knowledge at the material times. The defendant is not party to any such agreement.

The Plaintiff's Alleged Loss or Damage

15. In response to paragraphs 12, 22 and 23 of the notice of civil claim, the defendant says the information at issue was already available to the public, and denies that the plaintiff has suffered harms as pleaded, or at all.

Division 3 – Additional Facts

16. The defendant's tweets concern a matter of public interest in the university community, namely the ethics and efficacy of academic surveillance software such as Proctorio.

Part 2: RESPONSE TO RELIEF SOUGHT

17. The defendant does not consent to the granting of any of the relief sought in Part 2 of the notice of civil claim.
18. The defendant opposes the granting of any or all of the relief sought Part 2 of the notice of civil claim. The defendant says the claim should be dismissed with costs.

Part 3: LEGAL BASIS

Alleged Copyright Infringement

19. It is not infringement of copyright to publish a hyperlink to content available on the Internet.
20. The plaintiff granted a license to every other user of YouTube, including the defendant, to use, reproduce, distribute, prepare derivative works, display and perform its content.
21. The defendant's communications did not involve a substantial part of the plaintiff's work.
22. In the alternative, the defendant's communications constituted "fair dealing" permitted under the *Copyright Act*.
23. In the further alternative, the defendant's communications constituted non-commercial user-generated content permitted under the *Copyright Act*.

Alleged Circumvention of Technological Protection Measures

24. An “unlisted” YouTube video is not a technological protection measure within the meaning of the *Copyright Act*.
25. The plaintiff did not employ any technological protection measure to prevent the taking of a screenshot from the Academy Course Material.
26. In the alternative, the defendant did not circumvent any technological protection measure.
27. In the further alternative, if the defendant did circumvent a technological protection measure, which is denied, the defendant was not aware and had no reasonable grounds to believe that his acts constituted a contravention of section 41.1(1) of the *Copyright Act*.

Alleged Breach of Confidence

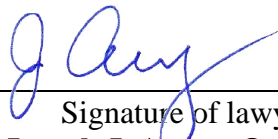
28. The tort of breach of confidence requires three elements: (1) that the information must have the necessary quality of confidence about it; (2) that the information must have been imparted in circumstances importing an obligation of confidence; and (3) that there must be unauthorized use of that information to the detriment of the party communicating it.
29. The information at issue did not have the necessary quality of confidence about it, because it was available to the public prior to the defendant’s communications.
30. In the alternative, the plaintiff did not suffer any detriment as a result of the defendant’s communications.
31. In the further alternative, the defendant’s communications were made in the public interest.

Defendant’s address for service: **Arvay Finlay LLP**
1512 – 808 Nelson Street
Box 12149, Nelson Square
Vancouver BC V6Z 2H2

Fax number address for service (if any): 1.888.575.3281

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Dated: 16 Oct 2020



Signature of lawyer for defendant
Joseph J. Arvay, O.C., O.B.C., Q.C.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.