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Supreme Court of British Columbia Dismisses First Anti-SLAPP Motion Brought Against Breach of Confidence and Copyright Infringement Claims

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On March 11, 2022, the Supreme Court of British Columbia released its decision in *Proctorio, Incorporated v. Linkletter*, 2022 BCSC 400, dismissing an “anti-SLAPP” application by the defendant. The decision represents the first time that the Court has considered an anti-SLAPP application in the context of breach of confidence and copyright infringement claims.

What You Need to Know

Proctorio v. Linkletter addresses some important concepts for creators and distributors of online content. It confirms that

- sharing a hyperlink to copyright-protected material can constitute copyright infringement, particularly if it causes the content to be shared with a “new public”;
- the non-commercial user generated content exception in s. 29.21 of the *Copyright Act* is unavailable to users unless an existing work is used to create a new work; and
- the ability to control who gets to access confidential and copyright-protected content is inherently valuable, even if the practical risk of harm is perceived to be low.

Background

The Plaintiff, Proctorio Incorporated (Proctorio), licenses software that monitors students remotely during virtual examinations without the need for a human proctor. The Defendant, Ian Linkletter, is a former learning technology specialist at the University of British Columbia, which licenses and uses Proctorio’s software.

Mr. Linkletter began criticizing Proctorio and its software on his public Twitter account, suggesting that it caused harm to students. Mr. Linkletter then used his credentials at the University to set up a practice course so that he could access Proctorio’s Help Center, which is available only to course instructors and administrators. The Help Center includes links to videos stored in an unlisted channel on YouTube that

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provide confidential details about the software's functionality. Mr. Linkletter copied these links and retweeted them from his public Twitter account, making them available to anyone viewing his Twitter feed. As well he tweeted a screenshot of a confidential webpage from Proctorio training material.

Objecting to the public disclosure of its copyrighted and confidential information, Proctorio sued Mr. Linkletter for copyright infringement, circumvention of technological protection measures, and breach of confidence, and obtained an ex parte injunction. In response, Linkletter brought an "anti-SLAPP" application under section 4 of the B.C. *Protection of Public Participation Act*, SBC 2019, c 3 (the PPPA). Under s. 4 of the PPPA, the Court will dismiss an action that arises from expression that relates to a matter of public interest unless the plaintiff can show "grounds to believe" that the action has substantial merit, that the defendant has no valid defence, and that the harm the plaintiff suffered from the defendant's expression outweighs the public interest in protecting that expression.

Proctorio was successful and Mr. Linkletter's application was dismissed in a decision released on March 11, 2022.

Copyright Infringement

Despite finding that Mr. Linkletter's expression in sharing the video links and web page in his tweets related to a matter of public interest, the Court found that Proctorio met its burden to show that its copyright claim had substantial merit and that Mr. Linkletter had no valid defence.

The Court rejected Mr. Linkletter's argument that sharing a hyperlink to published content cannot constitute copyright infringement. The Court acknowledged the Supreme Court of Canada's recent jurisprudence in the defamation context, which held that sharing a link to a page with defamatory content may not itself constitute publication of defamatory content. However, the Court distinguished the defamation context from the copyright infringement context. While the wrongdoing in a defamation claim lies with the content itself, the wrongdoing in a copyright infringement claim is the very act of sharing access to content without the owner's authorization.

The Court also agreed with Proctorio that a Federal Court decision addressing the issue of hyperlinks (*Warman v. Fournier*, 2012 FC 83) was distinguishable because the judge in that case found that the plaintiff had implicitly authorized the public to view the work on his own website without restriction. In this case, there was no such authorization, leading the Court to conclude that the unauthorized sharing of a hyperlink could constitute copyright infringement if it causes content that was only available to a restricted segment of the public to be shared with a wider "new public."

The Court also found that Mr. Linkletter's fair dealing defence was bound to fail, as all but one of the "fairness factors" suggested that his dealing was not fair. Among other things, the Court found that Mr.

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Linkletter had alternatives to the dealing and could have availed himself of non-copyrighted equivalents to achieve his purpose of informing the public about the software's allegedly harmful features. The Court also considered the confidential nature of the works and that Proctorio had a legitimate interest in keeping its materials for instructors separated from its other public materials. Although it was unlikely that a violation of this separation would harm Proctorio's business, Proctorio still had the right to control who gets to view information about its software.

The Court also rejected Mr. Linkletter's defence based on the "non-commercial user generated content" exception in s. 29.21 of the *Copyright Act*, R.S.C. 1985, c. C-42. Mr. Linkletter had merely shared a link to an existing work (the videos and the screenshot) and did not create a "new work," which is a fundamental element of the exception.

Breach of Confidence

Proctorio also met its burden of showing that its breach of confidence claim had substantial merit and that Mr. Linkletter did not have any valid defences to it. The Court distinguished between the confidentiality of the videos and the confidentiality of the hyperlinks. Although the information in the videos may not have had the necessary "quality of confidence" to ground a breach of confidence claim (since Proctorio had made the videos available on YouTube), the links were confidential because users had to sign into their instructor accounts to access them. The links were inherently valuable, separately from the videos, because they let Proctorio control who can access information about the software.

The Court further found that Mr. Linkletter had a duty to maintain the confidentiality of the links because he had to identify himself as an instructor and agree to Proctorio's Terms of Service to access them. The Court rejected Mr. Linkletter's defence of disclosure in the public interest because Mr. Linkletter had shared more than necessary to achieve his public interest goal of highlighting Proctorio's alleged misconduct.

The Balancing Exercise

In addressing the final criterion under the BC PPPA, the Court concluded that the harm to Proctorio outweighed the need to protect Mr. Linkletter's expression.

As the Court suggested in its fair dealing analysis, the harm to Proctorio was that Mr. Linkletter had compromised the integrity of its Help Center, which had been purposely designed to segregate instructor information from public information. On the other side of the weighing exercise, the Court accepted that Mr. Linkletter's expression stemmed from a genuine sense of public duty, but some of Mr. Linkletter's tweets had "crossed the line" and suggested that he knew that what he was doing was improper.

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Overall, the Court found that Proctorio's action did not constrain legitimate expression because of the narrow nature of Proctorio's claims. Proctorio was not trying to stop Mr. Linkletter or anyone from criticizing its software. Instead, Proctorio's action was only intended to prevent people from sharing information that was intended to be solely for instructors. As the Court summarized: "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."

The Court dismissed Mr. Linkletter's anti-SLAPP application, allowing Proctorio's action to proceed to trial.

Key Takeaways

This is the first case in Canada to decide an anti-SLAPP motion in the context of a copyright infringement claim.

It also contributes to the evolving caselaw around hyperlinks and copyright infringement. Even though the Supreme Court of Canada has held that sharing a hyperlink may not constitute sharing the underlying content in a defamation claim, the Court in this case accepted that sharing a hyperlink *could* constitute copyright infringement. This contextual, claim-specific approach to the role of hyperlinks will likely continue to be refined in future cases.

Lastly, this case is a comforting development for online content creators who wish to restrict access to some of their content to certain segments of the public. The Court repeatedly emphasized that the ability to control who gets to access different levels of content is inherently valuable, even if the practical risk of harm from this control being disrupted is low.

Cassels, with a team including Tim Pinos, Jessica Lewis, Jessica Zagar, and Layne Hellrung, represented Proctorio in this matter. Special thanks to Hardeep Dhaliwal, Michael Marot, and Campbell Brooks for their assistance responding to the application and to Steven Henderson for his assistance preparing this Cassels Comment. Find the full decision [here](#).

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