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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Erik Johnson, Plaintiff, vs. Proctorio Inc., Defendant.	No. **COMPLAINT** (Jury Trial Demanded)

INTRODUCTION

1. This is a civil action seeking a declaratory judgment of noninfringement under the Copyright Act, 17 U.S.C. §§ 106, 107, as well as injunctive relief and damages for misrepresentation of copyright claims under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(f), in order to finally quash a campaign of

harassment designed to undermine important concerns about software used by universities around the United States to monitor student activity.

2. As a consequence of the COVID-19 pandemic, schools and universities have increasingly adopted surveillance software to observe students as they complete assignments and tests electronically. These "proctoring" computer programs, like the Proctorio Software owned by Defendant Proctorio Inc. ("Proctorio"), are ostensibly intended to ensure adherence to assignment rules and to identify potential cheating by relying on surveillance methods such as face detection,[1] eye movement tracking, keyboard and mouse monitoring, and audio and visual recording. Students, teachers, and civil liberties advocates have noted that such software may compromise student privacy and digital security while exacerbating socioeconomic divides in student performance.

3. Plaintiff Erik Johnson, a college student whose university uses the Proctorio surveillance software, is one such critic. After carefully reviewing publicly available information, including portions of Proctorio's software code, Johnson concluded that the Proctorio software code contradicted Proctorio's claims about its software and raised a number of privacy, security, and equity concerns. To inform his classmates and the public, he shared his conclusions on Twitter, a social media website. To help explain his conclusions, Johnson linked to excerpts of the software's code that he had uploaded to the code-sharing websites Pastebin and GitHub. This code was found in files that were automatically saved to Johnson's computer when he installed the software. Johnson's use of the code was a textbook fair use, and obviously lawful under Section 107 of the Copyright Act.

4. Proctorio promptly responded by pressuring Johnson to delete his code analysis. When Johnson resisted, Proctorio turned to the DMCA to force the material's removal. As a result of Proctorio's false claims, Twitter removed several portions of

[1] Face detection is a technology that detect faces as well as facial movement and direction within an image or video.

Johnson's critical commentary, and Pastebin and GitHub removed the code excerpts Johnson shared to support his assertions.

5. Johnson has made every effort to explain the lawfulness of his conduct to Proctorio, to no avail. To ensure that Proctorio will finally cease its efforts to abuse copyright law to interfere with his speech, Johnson has no choice but to seek a declaration of noninfringement.

PARTIES, JURISDICTION, AND VENUE

6. Plaintiff Erik Johnson is an individual domiciled in Libertyville, Illinois.

7. On information and belief, Defendant Proctorio is a corporation that maintains a principal place of business in Scottsdale, Arizona.

8. This Court has subject-matter jurisdiction over this claim under the Copyright Act (17 U.S.C. §§ 101 *et seq.*), 28 U.S.C. §§ 1331 and 1338, and the Declaratory Judgment Act (28 U.S.C. § 2291).

9. On information and belief, Proctorio has sufficient contacts with this district, both generally and in connection to the events herein alleged, that it is subject to the exercise of this Court's jurisdiction.

10. Venue is proper in this district under 28 U.S.C. § 1391.

GENERAL ALLEGATIONS

A. Johnson's Speech

11. Erik Johnson is a security researcher and an undergraduate student in computer engineering at Miami University in Oxford, Ohio. Due to the COVID-19 pandemic, Johnson attended all of his classes virtually from his home in Illinois from August 2020 through December 2020. Although he returned to campus in January 2021, Johnson's courses have continued to be conducted almost exclusively online.

12. During this period of remote schooling, some of Johnson's instructors have chosen to administer exams using remote exam proctoring software offered by Proctorio (the "Proctorio Software"). On information and belief, the Proctorio Software

works by using eye tracking, face detection, and computer monitoring to surveil exam-takers and flag allegedly "suspicious" behaviors as possible indications of cheating.

13. Like many other students, Johnson was concerned about the Proctorio Software, including the risks it poses to students' privacy and security. Currently, Johnson is a member of a subcommittee appointed by his university's senate tasked with investigating whether or not the use of remote proctoring services such as Proctorio is in line with his university's values. He is the only undergraduate on this subcommittee comprised mainly of graduate students and university officials.

14. To explore Proctorio's potential harm to students' interests, Johnson examined Proctorio Software files that are automatically downloaded to any computer (including Johnson's) that installs the Proctorio Software: (1) language files, which contain lists of messages that the software is able to display on a computer to the software user ("display messages") in multiple natural (human) languages, including English[2]; and (2) a file written in the computer programming language JavaScript that contained both intentionally scrambled (or "obfuscated") code and non-scrambled plain text.

15. On September 7, 2020, following his investigation of the software code in these files, Johnson published a tweet thread[3] critiquing Proctorio and the Proctorio Software. Annotated screenshots of these tweets are attached as **Exhibit 1**. Among other things, Johnson's tweets identified contradictions between Proctorio's public statements and the actual functionality of the software as indicated by its code; demonstrated the

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[2] Language files are used to facilitate software use and adaptation in different countries or regions and allows the software to display the appropriate natural language based on location.

[3] Tweets are user-generated content posted to the social media website Twitter. A thread is a group of tweets linked together by the user who posted them so that the tweets appear in chronological order instead of Twitter's default of reverse-chronological order. Because users can choose whether new tweets they post are linked to any of their existing tweet threads, threading allows for discussions longer than the per-tweet character limit and that span some period of time.

invasiveness of the Proctorio Software; illustrated the high level of access that the Proctorio Software has to users' computers; and noted the difficulty of determining the full extent of Proctorio's collection of and access to user data.

16. To illustrate the basis for his conclusions, Johnson included, in three of the September 7 tweets, links to relevant software code that he had excerpted from the language files and uploaded to the website Pastebin.[4] **Exhibit 1** at 1–2.

17. In the first of these tweets, Johnson listed various metrics that the Proctorio Software monitors during exams and apparently uses to determine each exam-taker's "suspicion level." He also linked to a code excerpt of the display messages referencing those same metrics. A printout of that code excerpt is attached as **Exhibit 2**. Among the metrics named in Johnson's tweet and found in the linked code is "eye movement," something Proctorio claims its software does not track.

18. In the second tweet, Johnson discussed how the Proctorio Software compares different exam-takers to one another using these metrics. He also linked to a code excerpt of the display messages for reporting these statistics. A printout of that code is attached as **Exhibit 3**.

19. In the third tweet, Johnson identified various reasons the Proctorio Software may terminate a student's exam, such as interruptions in internet connectivity and plugging in an additional monitor. He also linked to a code excerpt listing the display messages for 20 different bases for exam termination. A printout of that code is attached as **Exhibit 4**.

20. In another of his September 7 tweets within the tweet thread, Johnson reported: "In some cases, you will have to scan your room. At the begining [sic] of the exam, and during if your suspicion level raises. Proctorio compiles the footage into a

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[4] Pastebin is a website that allows users to upload snippets of text, most often software code, for public viewing. One common use of these "pastes" is to share text referenced in a message that is constrained by character limits, such as the 280-character limit for tweets.

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