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November 15, 2006

VIA Fax #1-510-444-1952/THEN MAIL

Dr. John Barrie
iParadigms, LLC
1624 Franklin Street, 7th Floor
Oakland, CA 94612

RE: Turnitin.com; McLean High School

Dear Dr. Barrie:

I represent the McLean Committee for Student Rights (an unincorporated association of the Commonwealth of Virginia) made up of students at McLean High School [MHS] in McLean, Virginia, and individual members thereof.

As you are aware, freshman and sophomore students at MHS are – and in the future all students will be – required to submit unpublished manuscripts that they create to your Turnitin® system. You then archive those unpublished manuscripts in machine readable form, and put them into a permanent database of student authored documents. The archiving of these unpublished manuscripts is clearly copyright infringement. All of the students listed on the attached sheet require that you stop archiving their unpublished manuscripts immediately.

Your archiving of unpublished manuscripts is a clear violation of §106 of the Copyright Act [17 U. S. C.], and is not “fair use” under §107 of the Copyright Act. This is readily apparent from the statutes themselves, and existing case law. All four factors that are typically considered in evaluating fair use under §107 indicate no fair use. You should already have grave concerns in this area because the very Foley & Lardner legal opinion that you have posted on your website – and refer to in many written and oral communications – states those concerns. Page 7 of the web version of that opinion provides “The archival of a submitted work is perhaps **the most legally sensitive aspect** of the TURNITIN system.” (emphasis added). In fact the very case cited by Foley & Lardner at the top of page 8 of the opinion – *Harper & Row v Nation Enterprises*, 105 S. Ct. 2218, 471 U. S. 539 (1985) – makes it clear that not only is your archiving “legally sensitive”, it is clearly copyright infringement.

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So that it is not an issue in your future evaluation, I can assure you that the fact that students at MHS are required – under penalty of getting a “zero” on a class assignment – to submit manuscripts to your system is not an indication that they are agreeing to your archival of their unpublished manuscripts. The law in Virginia – and virtually everywhere else in the U. S. – is that performing an act, or signing a document, under duress negates any legal validity of the act or document. Duress is found whenever there is external pressure and internal loss of volition in response to outside compulsion. “Duress may exist whether or not the threat is sufficient to overcome the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of threats made by the other and that the contract is obtained by reason of such fact.” *6B Michie’s Jurisprudence Duress and Undue Influence*, §§2-3 (Repl. Vol. 1985). The question of duress is evaluated in view of all of the surrounding circumstances, including age, capacity, situation, and relation of the parties. *Jacobs v Jacobs*, 237 S.E.2d 124, 218 Va. 264 (Va. 1977).

There can be no doubt that informing a minor at a public school, which the minor is required to attend and guaranteed the right to attend by law, that she/he will get zeros on all class writing assignments unless he/she submits the assignment to your service and allows you to convert her/his property to your own, is duress. It is clearly a wrongful act to require students to give up their property (be it intellectual or any other) in order to get the education they are guaranteed by the Commonwealth of Virginia.¹ Each student’s free will is completely destroyed. Therefore this is a classic case of duress, and the fact that the listed students will be submitting manuscripts to your system cannot be considered by you as their agreement for you to archive their manuscripts and infringe their copyrights.

You consistently argue that your system and acts are appropriate as being covered by the “fair use” exception. As indicated above, an examination of the facts relating to your archiving in relation to existing law clearly illustrates that is incorrect.

That your act of archiving student submissions is not “fair use” is especially true since Turnitin® is taking unpublished manuscripts and in effect “publishing” them. Unpublished manuscripts have a higher degree of protection

¹ As stated by the Supreme Court in *Tinker v Des Moines*, 393 U. S. 503 (1969) “It can hardly be argued that either students or teachers shed their constitutional rights ... at the schoolhouse gates”. This includes that they not be required to give up personal property at school to be converted to another’s use. No one would have a right to make a student in a public high school in Virginia pay \$5 to Coca Cola to get into school every day, and intellectual property rights are potentially much more valuable.

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under the copyright law², as the first case cited by your attorneys on the subject, *Harper & Row v Nation Enterprises, supra*, makes clear (even though your attorneys ignored this aspect of *Harper & Row* in their opinion). In *Harper & Row* the Supreme Court found that the use of 300 words from an unpublished manuscript of former president Ford was not "fair use" despite the public interest in disclosing President Ford's analysis of world events. *Harper & Row* pointed out that under common law the "fair use" doctrine had no relationship to unpublished manuscripts. Even though a 1992 amendment to §107 (last sentence) states that the fact that a manuscript is unpublished does not alone mean there can be no "fair use", unpublished manuscripts are still given broad protection. See *Sundeman v Seajay*, 142 F.3d 194 (4th Cir 1998), decided six years after the 1992 amendment to §107 and specifically discussing it.

The first of the four factors given in §107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes". Even if you did not already admit at the MHS meeting on October 16, 2006 that your purpose is commercial, there would be no doubt that it is. You make money by selling your services. One of the selling points you use to entice and keep customers is that your database of student submissions is continuously increasing. The figures you used at the MHS October 16 meeting were about 80,000 student papers added to your database every day, and likely 100,000 per day in the future. You are thus clearly getting a commercial benefit from students' unpublished manuscripts that you archive.

The fact that your archived version of a student's unpublished manuscript is in machine readable form rather than in human readable form does not provide it with an exculpatory character. A work is transformative if it adds something new to the original. Your use adds nothing. It merely changes how the work is "fixed", that is on paper or in a machine. It is no different than if a copyrighted book were read on the radio, put in DVD form, or published in a different language. It is the same work. 17 U. S. C. §101 defines "copies" protected under the Copyright Act as material objects "in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Existence in a computer in machine readable form is clearly a copy under this definition. *Mai Systems Corp v Peak Computer, Inc.*, 991 F.2d 511 (9th Cir 1993); *Advanced Computer Servs. of Michigan v Mai Systems Corp.*, 845 F. Supp. 356 (E D Va. 1994).

Therefore this first factor clearly indicates no "fair use".

² Including the right by the owner not to publish at all.

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The second factor in §107 is the nature of the copyrighted work. As indicated above since the students' works are typically unpublished manuscripts, they are entitled to a heightened level of protection. *Harper & Row, supra.*; *Sundeman v Seajay, supra.* Further, many of the works have truly creative expressions, including fictional accounts, poetry, and metaphor. Thus for this reason too they are entitled to a heightened level of protection. *Gorman, Fact or Fantasy? The Implication for Copyright*, 29 J. Copyright Soc., 560, 561, 563 (1982). Therefore this factor clearly indicates no "fair use".

The third factor in §107 is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. You input the entire work in each case. Therefore this factor clearly indicates no "fair use".

The fourth factor in §107 is the effect of the use upon the potential market for or value of (two different criteria) the copyrighted work.

With respect to "potential market for", there can be no doubt original term papers, research papers, and the like can be sold; but no one will buy a plagiarized paper. For example, ibuytermpapers.com purchases original high school students' papers for cash. However, they check for originality. If they check Turnitin.com, they will find it plagiarized, completely destroying its marketability.

Also, newspapers and magazines purchase articles from freelance writers all the time (as one of hundreds of examples see www.undercover-medicine.com), and have no age requirement for the submitter. If a student submits an unpublished manuscript used in a course at MHS, or used as the basis for a derivative work (specifically protected and authorized under §106(2)), and that is checked against Turnitin.com, again it will be found to have been plagiarized, completely destroying its marketability. Your statement at the MHS October 16 meeting that this last scenario could never happen is totally unconvincing. You have no positive knowledge of what present abilities magazines or newspapers have to use the student paper parts of your database, let alone what availability they might have in the future.

Further, if a student submits his/her essay prepared for a course at MHS in the World Bank's essay contest, it will come back as plagiarized, and she/he will have her/his essay disqualified.

With respect to "value of" the copyrighted work, the situation is even more serious. College essays submitted by college applicants are commonly run through Turnitin.com (as Mrs. Strauss pointed out at the October 16 MHS meeting). Therefore if an MHS student produces a derivative work from an unpublished manuscript she/he produced in an MHS course – as he/she has

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every right to do – that is used as a college essay, it will be found plagiarized. What chance does the student have of getting into that college then? Thus, not only is the "value of" the paper destroyed, there are potentially enormous consequential damages in the future. It is well known that getting into and graduating from prestigious colleges and universities greatly enhances one's earning ability, therefore there could be significant economic loss (perhaps even hundreds of thousands of dollars worth) from your archiving of a student's unpublished manuscript in this situation.

As yet another scenario related to the "value of" a copyrighted work, consider the situation where a student at MHS transfers to another high school next year, one that uses Turnitin®. The student wants to get on the school newspaper staff at his/her new school and produces a derivative work from a course work unpublished manuscript she/he created at MHS. The student submits the derivative work for publication consideration to the staff of the newspaper at the new school. The derivative work is run through your service, and found plagiarized by comparing it to the student's own MHS manuscript. The student then has no chance of getting on the staff of the new school's newspaper, again with potential economic consequences in the future.³

Therefore this fourth factor also clearly indicates no "fair use".

We know from the published details of your contract with the University of Maryland, and your statements at MHS on October 16, that you have the technical ability to purge a student's paper once reviewed, rather than archiving it. **To resolve this matter to my clients' satisfaction it is necessary that you purge from Turnitin.com all of the manuscripts of all of the students on the attached list within one week of submittal of each manuscript to Turnitin.com.**

Please provide me with your written assurance, by **December 7, 2006**, that you will proceed as requested in the preceding paragraph. If I have not heard from you by then, I will assume you do not agree to proceed as we have requested, and we will institute suit for copyright infringement in the U. S. District Court for the Eastern District of Virginia, Alexandria Division. Since there will be litigation if you do not comply it is necessary that you retain all attorney client communications with respect to this or related matters (since you have waived attorney client privilege we will be entitled to see all opinions, notes of conversations with your attorneys, etc.), and retain all e-mails, letters, reports,

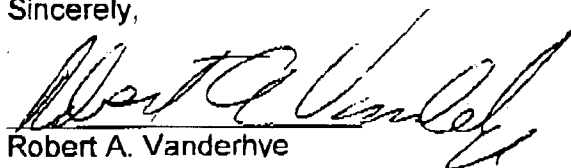
³ The fact that in these scenarios it MAY be possible to somewhat mitigate the consequences by getting more detailed information from you, MHS, or other sources, is irrelevant. The first impression is negative and may be impossible to recover from. Also, the organization may never even tell the student what happened, leaving no possibility for mitigation. Requiring the student to explain the situation in advance would also be impractical and prejudicial.

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computer discs, or other documents that in any way relate to the relationship of copyright to your services, and your technical abilities to do what we ask. If litigation is necessary we will be seeking an injunction, statutory damages, costs, and attorney fees, all of which are provided for by the Copyright Act.

I look forward to hearing from you.

Sincerely,


Robert A. Vanderhve

Attachment

cc: Mrs. Jane K. Strauss
Mr. Paul Wardinski