

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

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A. V., a minor, by his next friend Robert Vanderhye	:	
K. W., a minor, by his next friend Kevin Wade, Sr.	:	Civil Action No. 1:07 cv 293 CMH/LO
E. N., a minor, by her next friend Scott Nelson and	:	DEFENDANT IPARADIGMS, LLC'S COUNTERCLAIMS AGAINST PLAINTIFFS
M. N., a minor, by her next friend Scott Nelson	:	
	:	
Plaintiffs,	:	
	:	
Versus	:	
iParadigms, LLC	:	
Defendant.	:	
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Defendant, iParadigms, LLC (“iParadigms” or “Defendant”), by and through its attorneys, Stephen R. Pickard, P.C. and Satterlee Stephens Burke & Burke LLP, respectfully counterclaims against plaintiffs, upon information and belief, as follows:

COUNTERCLAIMS

Jurisdiction and Venue

1. This Court has subject matter jurisdiction over iParadigms’ counterclaims pursuant to 28 U.S.C. §§ 1331 and 1367 because iParadigms asserts claims against plaintiff A.V. under 18 U.S.C. § 1030 et seq., and iParadigms’ remaining counterclaims arise from the same facts as plaintiffs’ copyright claims and iParadigms’ 28 U.S.C. § 1030 claims.

2. In addition, this Court has subject matter jurisdiction over iParadigms' counterclaims pursuant to 28 U.S.C. § 1332 because plaintiffs and iParadigms are citizens of different states and iParadigms is seeking at least \$75,000 in indemnification for legal expenses incurred to date arising from plaintiffs' use of Turnitin.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to these counterclaims occurred in this judicial district.

Facts

The Orchestration and Creation of this Action by Plaintiffs, Plaintiffs' "Next Friends," and Plaintiffs' Counsel.

4. This action arises from a deliberate abuse and orchestrated manipulation of Turnitin to manufacture this lawsuit by plaintiffs, their "next friends," and their counsel.

5. Indeed, in or around November 2006, plaintiff A.V.'s "next friend" and plaintiffs' counsel, Robert Vanderhye ("Vanderhye"), threatened iParadigms with a copyright infringement lawsuit on behalf of the supposed "McLean Committee for Student Rights."

6. Recognizing that none of the McLean students had effected copyright registrations for any of their papers, Vanderhye indicated that he would effect registrations for McLean students in order to bring the instant lawsuit in the Eastern District of Virginia.

7. In addition, while waiting to receive copyright registrations for the papers at issue in this litigation – all of which he filed and paid for – Vanderhye requested an active enrollment code and password to access Turnitin.

8. Vanderhye's request was denied and, although Vanderhye threatened to obtain access through "subterfuge," as conveyed in an e-mail dated January 11, 2007, he seemed to understand that the access he was requesting would have to await lawful discovery.

The Action and The Papers

9. Apparently, despite Vanderhye's threat that he would have numerous plaintiffs from McLean High School, he was unable to find more than two students at McLean willing to follow him on his orchestrated campaign. Accordingly, Vanderhye found two additional minions for his campaign in Tempe, Arizona and filed the instant lawsuit.

10. At least one of the papers at issue in this litigation appears to have been submitted to Turnitin prior to the effective date of the copyright registration. It appears that the remaining papers were submitted to Turnitin after the registrations were effected and prior to the commencement of the instant action.

11. In order to submit a paper to a class on Turnitin, a student must have authority to access the specific course on Turnitin, which requires a course enrollment identification and password.

12. Only students and instructors in courses are authorized to submit papers to that course using the above-referenced enrollment id and password.

13. Upon information and belief, three of the papers, "Under A Pear Tree," "Golden Heart," and "Day is Weary," were submitted by the two Arizona students, E.N. and M.N, to classes at Desert Vista High School.

14. In addition, "Day is Weary" was also submitted to Turnitin on March 28, 2007 by a "Rube Goldberg," who appears to be Vanderhye using a fictitious name and the email address ravar46@yahoo.com, to a class at the University of Texas, Dallas.

15. Moreover, “Day is Weary” was also submitted to the University of California, San Diego by a “Quigley Vanderhye,” who also appears to be Vanderhye using a fictitious name and the email address rav@nixonvan.com, on March 26, 2007 – one day before the complaint was filed.

16. Quigley Vanderhye and Rube Goldberg are not plaintiffs in this action and are not enrolled in any course at the University of Texas, Dallas or the University of California, San Diego.

17. Quigley Vanderhye and Rube Goldberg are not authorized and have no authority to use Turnitin to submit papers to courses at the University of Texas, Dallas or the University of California, San Diego.

18. Of the remaining three papers at issue in this litigation, only “DBQ1: Ancient Greek Contributions” and “What Lies Beyond The Horizon” were actually submitted at McLean High School by K.W.

19. Remarkably, “DBQ1: Ancient Greek Contributions” was also submitted by a “Perpetual Motion,” who also appears to be Vanderhye using a fictitious name and using Vanderhye’s email address in this action -- ravar@nixonvan.com, to a Chemistry class at the University of Indiana, Bloomington and to a Modern Latin class at the University of Texas, Dallas.

20. Perpetual Motion and Vanderhye are not students at Indiana University, Bloomington or the University of Texas, Dallas.

21. Perpetual Motion and Vanderhye are not authorized to use Turnitin to submit papers to courses at Indiana University, Bloomington or the University of Texas, Dallas.

22. The third paper, “Scenes of Realism,” was submitted to the University of San Diego, California by A.V.

23. A.V. is a student at McLean High School– not the University of California, San Diego.

24. A.V. does not have authority to use Turnitin for courses at the University of California, San Diego.

25. A.V. could only conceivably have authority to use Turnitin at a course at McLean High School.

26. Upon information and belief, A.V. has submitted no paper to any course at McLean High School.

27. Upon information and belief, Vanderhye has submitted papers through Turnitin to courses at McLean High School, Virginia; Freie Universitat, Berlin; Indiana University, Bloomington; University of Minnesota, Twin Cities; and University of Texas, Dallas.

28. Vanderhye does not have authority to use Turnitin for any course at any educational institution.

Plaintiffs are Bound by Both the Clickwrap Agreement and the Usage Policy

29. The basis of plaintiffs’ claims in this action is that Turnitin has archived the papers referenced in the Amended Complaint in violation of the copyright laws. There is no dispute that plaintiffs’ use of Turnitin created the archiving that serves as the basis of this suit. Indeed, without submitting their papers to Turnitin, there would be no archiving and no possible claim for copyright infringement.

30. As alleged in plaintiffs’ amended complaint, each plaintiff necessarily clicked “I Agree” to the terms of the Clickwrap Agreement in order to use Turnitin.

31. In addition, as alleged supra, Vanderhye also registered for Turnitin under the names Quiggley Vanderhye, Perpetual Motion, and Rube Goldberg and submitted papers to Turnitin. Therefore, Vanderhye necessarily clicked “I Agree” to the terms of the Clickwrap Agreement.

32. Plaintiffs and Vanderhye submitted papers to Turnitin by accessing www.turnitin.com (the “Turnitin Website”) and logging into Turnitin by entering their respective email address and password that they used to register for Turnitin.

33. Every page of the Turnitin Website, including plaintiffs’ individual log-in screen (the screen that they are directed to once they have successfully entered their email address and password) contains the Turnitin “Usage Policy.”

34. This Usage Policy governed plaintiffs and Vanderhye’s use of Turnitin and the Turnitin website:

THIS SITE AND RELATED SERVICES ARE PROVIDED SUBJECT TO THESE TERMS AND CONDITIONS. PLEASE READ THE FOLLOWING INFORMATION CAREFULLY. YOUR CONTINUED USE OF THIS SITE WILL INDICATE YOUR AGREEMENT TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH BELOW. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, PROMPTLY EXIT THIS SITE. (emphasis in original).

35. Upon information and belief, plaintiffs, plaintiffs’ “next friends,” and plaintiffs’ counsel were all aware of and had viewed the terms of the Usage Policy.

36. In fact, plaintiffs, plaintiffs’ “next friends,” and plaintiffs’ counsel were intimately aware of all aspects of the Turnitin Website, including the Usage Policy and the Privacy Policy. A link to the Privacy Policy is provided directly next to the Usage Policy link on the Turnitin website.

37. Indeed, plaintiff A.V.'s "next friend" and plaintiff K.W.'s "next friend" have complained about specific terms contained in the Privacy Policy to the press and have questioned the veracity of certain terms in various policies found on the Turnitin Website.

38. Accordingly, upon information and belief, there is no question that plaintiffs and their agents were well aware of the Terms and Conditions that governed their use of Turnitin.

39. The Terms and Conditions of the Usage Policy provide for complete indemnification to iParadigms arising out of plaintiffs' use of the Turnitin Website. Specifically, the Usage Policy provides:

Indemnification: You agree to indemnify and defend iParadigms from any claim (including attorneys fees and costs) arising from your (a) use of the Site, (b) violation of any third party right, or (c) breach of any of these Terms and Conditions.

40. As stated above, the claims asserted in this Action clearly arise from plaintiffs' use of the Turnitin Website. Indeed, the use of the Turnitin Website directly creates the archiving that serves as the basis of this lawsuit.

COUNT I

(Indemnification as against all plaintiffs)

41. Defendant repeats and realleges each and every allegation in paragraphs 1 through 40 of the Counterclaims as if set forth in full herein.

42. In order to submit the papers at issue in this litigation to Turnitin, each plaintiff logged in to the Turnitin Website.

43. Likewise, plaintiff A.V.'s "next friend" Vanderhye submitted a number of papers to Turnitin, many of which contain the papers at issue in this litigation, under the names Quiggley Vanderhye, Perpetual Motion, and Rube Goldberg.

44. In order to submit these papers, Vanderhye necessarily logged in to the Turnitin Website.

45. The Turnitin Website contains a Usage Policy that each plaintiff, plaintiffs' "next friends," and plaintiffs' counsel were well aware of and assented to in order to submit their respective papers to Turnitin.

46. The Terms and Condition of the Usage Policy provide for complete indemnification to iParadigms arising out of plaintiffs' use of the Turnitin Website.

47. As a direct and proximate result of plaintiffs, plaintiffs' "next friends," and plaintiffs' counsel's use of Turnitin, each of their respective papers were archived in Turnitin.

48. As a direct and proximate result of plaintiffs, plaintiffs' "next friends," and plaintiffs' counsel's use of Turnitin, plaintiffs have instituted this lawsuit and iParadigms has been incurring legal expenses defending this actual lawsuit.

49. In addition, plaintiffs have sought \$900,000 in damages in this action directly relating to the archiving of the papers at issue.

50. Accordingly, plaintiffs are liable to iParadigms for any damages iParadigms sustains a result of this lawsuit, including but not limited to attorney's fees, which are already in excess of \$75,000, costs, and expenses incurred.

COUNT II
(Trespass to Chattels as against A.V.)

51. Defendant repeats and realleges each and every allegation in paragraphs 1 through 50 of the Counterclaims as if set forth in full herein.

52. Vanderhye is plaintiff A.V.'s "next friend" in this action.

53. Both plaintiff A. V. and his “next friend” used class enrollment identifications and passwords for courses in which they are not enrolled at educational institutions where they are not enrolled, in order to submit papers to Turnitin.

54. Indeed, Vanderhye and A.V. intentionally intermeddled with iParadigms’ Turnitin service and undermined the integrity of Turnitin by improperly logging in and submitting papers to educational institutions where they are not enrolled.

55. As a direct and proximate result of A.V. and Vanderhye’s improper activities, Turnitin has expended substantial time and resources investigating and rectifying the situation with the instructors at the educational institutions in which A.V. and Vanderhye improperly logged in as students in order to submit papers.

56. Accordingly, A.V. has impaired Turnitin’s condition and has directly caused iParadigms damages, including but not limited to expenses and attorney’s fees incurred in remedying Turnitin and investigating A.V.’s misuse of Turnitin.

COUNT III

(Exceeding Authorized Access in Violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(5)(A)(iii) and 1030(a)(5)(B)(i), as against A.V.)

57. Defendant repeats and realleges each and every allegation in paragraphs 1 through 56 of the Counterclaims as if set forth in full herein.

58. Vanderhye is plaintiff A.V.’s “next friend” in this action.

59. Plaintiff A.V. and Vanderhye intentionally accessed Turnitin without authorization by improperly using class enrollment identifications and passwords from courses at schools in which neither A.V. nor Vanderhye are enrolled in order to access Turnitin and submit papers to the Turnitin computer system.

60. In fact, Vanderhye has used false names to register and log into Turnitin, including Rube Goldberg, Perpetual Motion, and Quiggley Vanderhye, in order to submit various papers at public educational institutions where he is not enrolled.

61. Turnitin is operated by computers that operate in both foreign and interstate commerce and communication. 18 U.S.C. § 1030(e)(2)(B).

62. The Computer Fraud and Abuse Act provides for civil remedies. 18 U.S.C. § 1030(g).

63. As a direct and proximate result of A.V.'s improper and unauthorized use of Turnitin to submit papers to courses at institutions where he is not enrolled, he has caused direct and consequential damages in an amount in excess of \$5,000, including but not limited to attorney's fees and time and resources spent remedying Turnitin and investigating A.V.'s misuse of Turnitin.

COUNT IV

(Violations of the Virginia Computer Crimes Act, Va. Code. Ann. §§ 18.2-152.3 and 18.2-152.6 as against A.V.)

64. Defendant repeats and realleges each and every allegation in paragraphs 1 through 63 of the Counterclaims as if set forth in full herein.

65. Vanderhye is plaintiff A.V.'s "next friend" in this action.

66. A.V. and Vanderhye both used passwords and enrollment codes at public educational institutions where they are not enrolled to submit papers to courses in which they are not enrolled and have therefore obtained use of the Turnitin service without authority and under false pretenses.

67. In fact, Vanderhye has used at least false names to register and log into Turnitin, including Rube Goldberg, Perpetual Motion, and Quiggley Vanderhye, in order to submit various papers at public educational institutions where he is not enrolled.

68. Both A.V. and Vanderhye have also obtained use of Turnitin computer services without authority.

69. Turnitin is a Computer Service as that term is defined in the Virginia Computer Crimes Act.

70. The Virginia Computer Crimes Act provides for civil remedies.

71. As a direct and proximate result of A.V.'s improper and unauthorized use of Turnitin to submit papers to courses at institutions where he is not enrolled, he has caused direct and consequential damages, including but not limited to attorney's fees and time and resources spent remedying Turnitin and investigating A.V.'s misuse of Turnitin.

WHEREFORE, iParadigms prays for judgment against plaintiffs as follows:

ON THE FIRST CAUSE OF ACTION

For actual indemnification in an amount to be determined against all plaintiffs, but in no event less than iParadigms' attorney's fees and expenses incurred relating to this action, which are already in excess of \$75,000.

For such other further and different relief as this Court deems just and proper.

ON THE SECOND CAUSE OF ACTION

For actual damages in an amount to be determined against plaintiff A.V., but in no event less than iParadigms attorney's fees and expenses incurred in repairing Turnitin and investigating the misuse;

For such other further and different relief as this Court deems just and proper.

ON THE THIRD CAUSE OF ACTION

For actual and consequential damages in an amount to be determined against plaintiff A.V., but in no event less than iParadigms attorney's fees and expenses incurred in repairing Turnitin and investigating the misuse, which are already in excess of \$5,000;

For such other further and different relief as this Court deems just and proper.

ON THE FOURTH CAUSE OF ACTION

For actual and consequential damages in an amount to be determined against plaintiff A.V., but in no event less than iParadigms attorney's fees and expenses incurred in repairing Turnitin and investigating the misuse;

For such other further and different relief as this Court deems just and proper.

Dated: May 30, 2007

STEPHEN R. PICKARD P.C.

By: _____ /s/

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