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Dear Robyne

ALDIS Associates Pty Ltd: Plagiarism Prevention Advice

We refer to your instructions in this matter.

Instructions

1. You have asked us to review the advice that was provided to Caval Collaborative Solutions (**Caval**) on the issue of whether use by a university subscriber of the plagiarism detection system Turnitin.com (**Turnitin**) involves any contravention of the *Copyright Act 1968* (Cth) (**the Act**). Specifically, you have asked us to advise whether recent changes made to Australian copyright law by the *Copyright Legislation Amendment Act 2004* (Cth) and the *Copyright Amendment Act 2006* (Cth) have affected the advice provided to Caval on 6 October 2003 or the supplementary advice provided on 20 April 2004 (**Advice**).

We **enclose** a copy of the Advice for your records, and outline the effect of relevant changes to Australian copyright law in detail below.

Summary of Conclusions

2. Based on our understanding of the background to this matter, and for the reasons discussed below, we consider that recent changes to Australian copyright law implemented by the *Copyright Legislation Amendment Act 2004* (Cth) and the *Copyright Amendment Act 2006* (Cth) do not materially affect the conclusions outlined in the Advice. We consider that it is still highly unlikely (although not completely inconceivable) that a Court would consider that the use of the Turnitin system by a subscriber to the service in Australia would infringe a student's copyright in their research paper. Given this, it is also highly unlikely that ALDIS Associates Pty Ltd (**ALDIS**) would be liable for authorising any infringement of copyright in a student's research paper.
3. As outlined in the Advice, we consider that on balance, a court would hold that an implied licence exists for assessors to utilise a plagiarism detection service

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such as the one conducted by Turnitin. However, we still have some reservations about whether this implied licence would extend to Turnitin retaining a copy of a student's research paper for the purpose of using it as source material for subsequent plagiarism checks. As we originally advised, any doubt in relation to this issue could be removed by asking students to sign an express licence as part of their assignment cover sheet in the form outlined in paragraph 14 of the Advice.

4. The likelihood of a copyright owner taking action in respect of an infringement is still similarly remote (although not completely inconceivable), particularly if an express licence were granted by each student by signing an assessment cover sheet.

Recent amendments to Australian copyright law

5. As originally advised, a student will be the owner of copyright in his or her original research paper pursuant to section 35(2) of the Act. For the purposes of the Act, a student research paper will be a "literary work".
6. Copyright gives the owner certain exclusive rights. In particular, section 31(1)(a) of the Act gives the copyright owner the exclusive right (among other things) to:

 "(i) reproduce the work in a material form;

 ...

 (iv) communicate the work to the public..."
7. Section 36 of the Act provides that copyright is infringed by a person who, not being the owner and without the licence of the owner, does in Australia or authorises the doing in Australia of any act which would fall within the exclusive rights conferred by copyright.
8. Recent amendments to Australian copyright law have not affected the definitions of any of the terms relating to the exclusive rights described above. Similarly, the principles applicable to implied licences to reproduce or communicate copyright materials have not been affected by the recent changes.
9. Given this, we still consider that on balance, a court would hold that an implied licence exists for assessors to utilise a plagiarism detection service such as the one conducted by Turnitin, and to "reproduce" a student's work in any of the ways outlined in paragraph 27 of the Advice.

"Special case" exception for educational institutions

10. The *Copyright Amendment Act 2006* (Cth) has introduced amendments to the Act allowing use of copyright material for certain purposes, including a new section

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200AB(3) that allows the use of copyright material by or on behalf of a body administering an educational institution for the purpose of giving educational instruction. This exception does not apply if the use is partly for the purpose of obtaining a commercial advantage or profit. In addition, the use must:

- (a) amount to a special case;
- (b) not conflict with a normal exploitation of a work; and
- (c) not unreasonably prejudice the legitimate interests of the owner of the copyright.

Although this 3-step test has been used extensively in international documents such as the TRIPS agreement, there is still some uncertainty about how it will be interpreted in Australia as it has not yet been applied by Australian courts.

11. Subscribers to the Turnitin service may be able to rely on section 200AB(3) if they can establish each element in the "3 step test" outlined above. However, it is difficult to predict whether a court would construe the submission of a student's research paper to the Turnitin system as falling within the ambit of "educational instruction". This term is not defined in the Act, but it has been described as being wide enough to include "classroom and remote teaching".¹ Furthermore, a Turnitin subscriber may have difficulty proving that their use of a student's research paper in this way amounts to a "special case".
12. Turnitin would be unable to rely on section 200AB(3), as Turnitin's use of past student papers as a source of material against which it makes subsequent plagiarism checks confers a commercial advantage on the company.
13. Given the above, we consider that the introduction of this "use" exception for educational institutions does not materially affect the conclusions outlined in the Advice.

Caching on a server for educational purposes

14. The *Copyright Amendment Act 2006* (Cth) also inserted a new section 200AAA into the Act to allow for active caching on a server operated by or on behalf of a body administering an educational institution for educational purposes under certain conditions. This section requires that the cached material must be password protected, and must not be retained beyond the end of the particular course of study in question.

¹ *Copyright Amendment Bill 2006* Explanatory Memorandum, p110

15. Where the conditions required by section 200AAA are met, copyright in a work or other subject-matter is not infringed by reproducing it or communicating it from the server.
16. We consider that any temporary electronic copies made during the process of submitting a student's work to Turnitin or conducting the plagiarism check are likely to fall within the scope of section 200AAA. Therefore, it is unlikely that they would infringe a student's copyright in their research paper. However, any copies of student papers retained for subsequent plagiarism checks are unlikely to be protected by this section, as it does not apply in situations where the work or subject-matter is retained on the server beyond the end of the relevant course of educational instruction.

Other recent changes to copyright law relevant to educational institutions

17. The *Copyright Legislation Amendment Act 2004* (Cth) introduced significant amendments relating to (among other things) extension of the term of copyright protection, provisions of the Act relating to criminal offences, presumptions and remedies available against carriage service providers. We have reviewed these changes, and consider that they do not materially affect the conclusions outlined in the Advice.
18. The *Copyright Amendment Act 2006* (Cth) also introduced a range of significant amendments that have directly affected Australian Universities and their libraries. In addition to the amendments discussed above, they include (among other things) an expansion of the Part VA statutory licence to cater for free-to-air podcasts and webcasts, a new limit to the amount that may be copied from a work published in electronic form, and an amendment permitting copying and communicating up to 15 pages from an electronic anthology. However, we do not consider that these changes affect the Advice in any material way.

New enforcement provisions

19. The *Copyright Amendment Act 2006* (Cth) has also introduced a range of new enforcement provisions, including criminal offences that include:
 - (a) Substantial infringement on a commercial scale (s132AC);
 - (b) Making infringing copies commercially (s132AD);
 - (c) Distributing infringing copies (s132AI); and
 - (d) Possessing infringing copies for commerce (s132AJ).
20. As originally advised, we do not consider that the use of the Turnitin system by a subscriber to the service in Australia would infringe a student's copyright in their research papers. Similarly, it is highly unlikely that the activities of ALDIS or

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Turnitin will amount to copyright infringement *in Australia*. Given this, subscribers to the Turnitin service are unlikely to be affected by the new enforcement provisions introduced by the *Copyright Amendment Act 2006* (Cth).

Thank you again for your instructions in relation to this matter. Please do not hesitate to contact us if you have any queries.

Yours sincerely



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BLAKE DAWSON WALDRON

L A W Y E R S

CAVAL COLLABORATIVE SOLUTIONS: PLAGIARISM PREVENTION ADVICE

Instructions

1. You have sought our opinion as to whether the use by a university through the Caval Plagiarism Consortium (trading as Caval Collaborative Solutions) (**Caval**) of the plagiarism prevention and detection system of Turnitin.com (**Turnitin**) involves, specifically:
 - (a) an infringement of copyright;
 - (b) a breach of privacy; or
 - (c) a breach of any other intellectual property rights.
2. We have informed you that, if anything, only a breach of copyright could be involved.
3. You have asked us to examine the issue from the perspective of the subscribers to the service.

Summary of conclusions

4. Based on our understanding of the background to this matter, and for the reasons discussed below, we consider that it is highly unlikely (although not completely inconceivable) that a Court would consider that the use of the Turnitin system by a subscriber to the service in Australia would infringe a student's copyright in their research papers.
5. The likelihood of a copyright owner taking action in respect of an infringement is similarly remote (although not completely inconceivable), especially if an express licence were granted by each student, by each student being required to sign an assignment cover sheet which granted such licence.

Background – Business Structure

6. The key background facts are as follows:

- (a) Caval is a company owned by the Victorian University Vice Chancellors and which specialises in library services, with particular expertise in relation to digital information;
- (b) Caval established a consortium that uses products and services offered by Turnitin (a United States company);
- (c) specifically, Turnitin offers a plagiarism prevention and detection system; and
- (d) existing Australian subscribers (universities) have joined the Caval plagiarism detection consortium established by Caval.

Background – Plagiarism Service

7. Using the Turnitin products and services, a subscriber can implement the following process:
 - (a) a student essay (which may be received electronically but which otherwise will be scanned into digital format) is transmitted to a database maintained by Turnitin on a server located in San Francisco;
 - (b) the database comprises academic materials sourced from the internet worldwide and electronic books and journals, together with previous student material submitted by subscribers for assessment;
 - (c) a subscriber will generally submit a class batch of papers for assessment;
 - (d) by comparing each paper in the subscriber's batch against the material stored in its database, Turnitin can generate a report which, through a colour coding system, identifies the level of replication in each student's work compared with pre-existing work contained within the database; and
 - (e) if the subscriber, prompted by the relevant colour code, is alerted to the possibility of significant plagiarism by a student, it can generate the full text of the student's paper in which the replicated wording will be highlighted.

Copyright Implications

Relevant copyright principles

8. A student will be the owner of copyright in his or her original research paper: section 35(2) *Copyright Act 1968* (Cth) (**the Act**). For the purposes of the Act, a student research paper will be a "literary work".
9. Copyright gives the owner certain exclusive rights. In particular, section 31(1)(a) of the Act gives the copyright owner the exclusive right (among other things) to:
 - "(i) reproduce the work in a material form;
 - ...
 - (iv) communicate the work to the public..."
10. Reproduction in a material form can occur in different ways. A straightforward reproduction in a material form would be to photocopy a printed literary work. However, under section 21(1A) of the Act reproduction in a material form can also take place by:
 - Converting a work into or from a digital or other electronic machine-readable form. This includes the first digitisation of a work.
 - Storing a work in digital form on floppy disk or in a computer. This is because the definition in the Act of "material form" includes any visible or non-visible form of storage from which the work or a substantial part of the work can be reproduced.
11. Communication of a work to the public occurs if a work is made available online or electronically transmitted (whether over a path, or a combination of paths, provided by a material substance or otherwise).
12. Section 36 of the Act provides that copyright is infringed by a person who, not being the owner and without the licence of the owner, does in Australia or authorises the doing in Australia of any act which would fall within the exclusive rights conferred by copyright.

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13. Section 10(1) of the Act requires exclusive licences of the copyright to be in writing, but non-exclusive licences may be given orally or may be implied by conduct. It is a question of fact in each instance as to the extent to which a student may have granted an implied licence for reproduction or communication of his or her work when submitting it for assessment.
14. An express licence to a university to reproduce a student assignment and communicate it to the Turnitin server would be granted by a student who signs a cover sheet for an assignment which contains the following acknowledgment (for example):

I declare that this assignment is original and has not been submitted for assessment elsewhere, and acknowledge that the assessor of this assignment may, for the purpose of assessing this assignment:

- **reproduce this assignment and provide a copy to another member of faculty; and/or**
 - **communicate a copy of this assignment to a plagiarism checking service (which may then retain a copy of the assignment on its database for the purpose of future plagiarism checking).**
15. Where an assignment is submitted electronically (for example, via WebCT or Blackboard), the words set out in the above cover sheet should be required to be added to the assignment by the student before electronic submission.
16. However, assuming that all assignments submitted to Turnitin do not contain a cover sheet to the effect of that suggested in paragraph 14, the issues arising under the Act are:
- (a) *What is the extent of any implied licence?*
 - (b) *Is there an unauthorised reproduction by the subscriber (university) of the student's work?*
 - (c) *Does the transmission of the work to the Turnitin server in San Francisco involve an unauthorised "communication to the public" by the subscriber?*
 - (d) *Do the activities of Caval or Turnitin constitute an infringement of a student's*

copyright?

- (e) *Can a subscriber be held liable for an infringement by Caval or Turnitin of a student's copyright?*

What is the extent of any implied licence?

17. A threshold issue to address is the extent to which a student has by implication (if not expressly in writing, for example, by university rules or by-laws which bind the student) consented to the reproduction or communication of his or her work when submitting it for assessment.
18. By submitting a work in digital form for assessment, and in the absence of any express arrangement to the contrary, a student is likely to be impliedly consenting to any activity normally incidental to the process of assessment. This could include creating a hardcopy and, perhaps, communication (whether by the provision of a second hardcopy or by electronic transmission) of the work to another lecturer for a second opinion.
19. Similarly, it seems reasonable for a student to expect that a work submitted in hardcopy might be digitised to ensure a consistency of process in the evaluation of all papers.
20. It is somewhat speculative as to whether a typical student would expect the papers to be subjected to a service of the nature provided by Turnitin. Nevertheless, a Court would probably accept that a student would expect assessors to take reasonable measures to satisfy themselves as to the originality of the work. Logically, this should extend to the utilisation of modern techniques for this purpose. It may be worthwhile checking some examples of plagiarism "warnings" given to students (such as those in the universities' rules or by-laws or those commonly found in faculty guides distributed to students) to assess the extent to which students are informed of the measures that might be taken to detect plagiarism.
21. While it is impossible to predict with any certainty how a Court would decide this question, on balance we consider a court would hold that an implied licence exists for assessors to utilise a plagiarism service such as the one conducted by Turnitin. Given that plagiarism can amount to academic misconduct, and may itself constitute copyright infringement, it is difficult to imagine a Court being sympathetic to a student alleging that

copyright in his or her work as submitted for assessment is infringed by subjecting it to the plagiarism detection process of Turnitin's product.

22. However, we have some reservations about whether the implied licence would extend to permit Turnitin to retain a copy of the student's work for the purpose of using it as source material for future plagiarism checks.
23. Turnitin's use of past student papers as a source of material against which it makes subsequent plagiarism checks confers a commercial advantage on Turnitin without any compensation being made by Turnitin to the owners of copyright in those works. While a licence to a subscriber university may be readily implied in relation to any use of the copyright work made during the process of the plagiarism check, the relationship between the student and Turnitin is more remote. For example, it is difficult to identify any consideration passing from Turnitin to the student for the subsequent use of the student's work by Turnitin in providing its plagiarism detection service. Turnitin is purely deriving a commercial benefit by using the student's work.
24. Any doubt could, of course, be removed by informing students in advance that their submitted work might be subjected to the plagiarism detection process and that copies of their works would be retained by Turnitin and used as source material for conducting future plagiarism checks (as suggested in paragraph 14 above). In such circumstances, a student would, by submitting his or her assessable work, be deemed to be consenting to the process and the retention of a copy by Turnitin (although it would be wise to leave students in this situation with an ability to withhold their consent, leaving open the question of how the subscriber should deal with the consequences of an individual student refusing to allow his or her paper to be submitted to the service).
25. If, however, there is no express or implied consent by the student to a plagiarism detection check and subsequent retention of a copy of their work by Turnitin, then it is necessary to consider whether the subscribers' use of the Turnitin service would infringe a student's copyright in his or her work submitted for assessment.

Is there an unauthorised reproduction by the subscriber (university) of the student's work?

26. At the outset, it should be emphasised that these issues do not arise if, and to the extent, a student has given express or implied consent to the reproduction.

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27. Having regard to what constitutes "reproduction" under the Act (as noted in paragraph 10 above), reproduction of a student's assessable work may occur at a number of points:
- loading a disk provided by the student;
 - scanning a student's handwritten paper into digital format;
 - opening a paper which has been emailed by the student;
 - downloading a paper submitted in digital form;
 - opening and perhaps downloading the student's paper in highlighted form when returned by Turnitin.
28. In relation to the loading of the disk provided by a student, we imagine that a Court would have no difficulty in holding that there is a clear implied licence granted by the student to the assessor for the assessor to reproduce the work in order for it to be read, whether in hardcopy or in digital form.
29. With respect to the scanning of a handwritten paper into digital format, section 21(1A) of the Act provides that this does amount to a reproduction of the work. Accordingly, the authority of the subscriber to digitise the work in this manner is dependent on express or implied consent from the student. Again, it is difficult to see how a Court could refrain from holding that there is an implied licence to reproduce a student work for the purposes of assessment.
30. With respect to the opening of an emailed attachment, it would seem most doubtful that a Court would conclude there was not an implied licence to open the emailed work in these circumstances.
31. As to the downloading of a paper submitted in digital form, this would amount to a reproduction by virtue of section 21(1A) of the Act. Again, however, we have little doubt that a Court would find that an implied licence existed in these circumstances unless there was an express stipulation or understanding between the student and the institution that the work would not be downloaded in hardcopy.
32. A similar consideration would apply to the downloading of the student's paper in

highlighted form when returned to the assessor by Turnitin.

Does the transmission of the work to the Turnitin server in San Francisco involve an unauthorised "communication to the public" by the subscriber?

33. The immediate issue is whether, by uploading via a browser a batch of student papers to the Turnitin server in San Francisco, a subscriber is infringing a student's exclusive right under section 31(1)(a)(iv) of the Act to "communicate" that work "to the public".
34. The transmission of the paper to the Turnitin server certainly falls within the term "communicate" as defined by the section 10(1) of the Act (see paragraph 11 above). It is unlikely, however, that the communication would be regarded as having been made "to the public" if the papers are simply sent to the Turnitin server for the purpose of being subjected to the process of plagiarism checking. While the Courts have interpreted the term "to the public" so that it does not necessarily mean the "public at large", the term nevertheless contemplates a form of public expression, albeit to a restricted audience. A discrete communication by the subscriber to the Turnitin server is unlikely to fall within this definition.

Do the activities of Caval or Turnitin constitute an infringement of a student's copyright?

35. It becomes relevant to consider whether Turnitin's activities amount to an infringement of a copyright and, if so, whether Caval is also involved in an infringement of copyright by authorising Turnitin's activities.
36. Although the processing of the student paper for the purpose of undertaking the plagiarism checking process may constitute a reproduction if it is stored on the Turnitin server while it is subjected to the checking process, given that reproduction does not take place in Australia, Turnitin will not be liable for that infringement *in Australia* as there is no direct infringement in Australia.
37. We have not considered whether Turnitin infringes, under US law, copyright subsisting in the student papers it processes. We note that this is the subject of a legal analysis dated 28 October 2002 provided by Turnitin and Turnitin is satisfied that its plagiarism detection service does not give rise to infringement of copyright under US law.

38. We understand that Turnitin stores previous student papers submitted for assessment and that when a plagiarism check is made by a subscriber, the Turnitin software will identify any previous paper that has been plagiarised on an anonymous basis as (for example) "submitted to Smith College on 2003-02-17". We understand that Turnitin does not display the text of the previous paper and an assessor wishing to see that paper must contact the copyright owner (ie, the student) through the institution in possession of the matching paper. Accordingly, Turnitin will not infringe copyright in previous student papers submitted for assessment as Turnitin will not be communicating those papers to the public.
39. We understand that the Turnitin User Manual states that "[t]his system is in place to protect the work of students using Turnitin - we never disclose the text of papers in our database".
40. For further assurance, a university could require Turnitin to delete assignments from its database after the current originality check (although this would remove the advantage of checking successive years' submissions). This would avoid inadvertent communication of assignments by Turnitin.

Likelihood of proceedings

41. The final issue to consider is whether, if there is the possibility of a technical breach of copyright being committed by subscribers to the service, there is any likelihood of proceedings being commenced against the university concerned.
42. It might be concluded that any breach of copyright that arises during the course of subjecting a student's assessable work to the plagiarism detection service provided by Turnitin will be "technical". While this fact in itself will not necessarily prevent an action being commenced by a student, it is relevant to take into account the likelihood of a student commencing proceedings in these circumstances.
43. It seems highly unlikely that an action would ever be commenced against a university or against Caval. This is because it would be difficult to establish liability and because of the dubious merit inherent in obtaining a court order to prevent a plagiarism check. The expense of litigation may also be a deterring factor.

44. It is probably more pertinent to consider whether, as a body, students might object to the process and in that way cause some embarrassment to one or more universities. Again this seems unlikely, from practical and cultural perspectives, given the legitimate objectives of the service and the dubious justification for opposing the service.

Blake Dawson Waldron

6 October 2003

CAVAL COLLABORATIVE SOLUTIONS: SUPPLEMENTARY ADVICE

Introduction

1. You have also asked us to advise you on some further issues related to the potential liability of subscribers to the Turnitin.com (**Turnitin**) plagiarism detection database under the *Copyright Act 1968* (Cth) (**the Act**). Specifically, you have asked us to address:
 - (a) Lachlan Williams's comment in the *Australian HE Supplement* (31 March 2004) (**the Lachlan Williams letter**) that "the definition of an adaptation under the *Copyright Act 1968* (Cth) points to a clear intellectual property infringement"; and
 - (b) subscriber concerns about the commercial value Turnitin obtains from retaining a digital fingerprint of a student's work on the database for the purposes of future plagiarism detection activities.

Summary of conclusions

2. Based on our understanding of the background to this matter, and for the reasons discussed below, it is highly unlikely that the ordinary activities undertaken by subscribers or Turnitin could constitute an "adaptation" for the purposes of the Act.
3. It is also highly unlikely that subscribers to Turnitin could be exposed to any liability arising from the fact that Turnitin derives a commercial benefit from student work by retaining essays on their database subsequent to the plagiarism detection process.

Background

4. Subject to any additional information included below, our understanding of the background to this matter is set out in our original advice to Caval Collaborative Solutions (**Caval**) given on 6 October 2003 (**our original advice**).

Copyright and "Adaptations"

5. The Lachlan Williams letter claims that the definition of "adaptation" under the Act points to a clear intellectual property infringement on behalf of either or both of subscribers and

Turnitin when processing student research papers through the Turnitin plagiarism detection database.

6. A student is the owner of the copyright in his or her original research paper and therefore has the exclusive rights comprised in the copyright. In addition to the rights discussed in our original advice, a further right enjoyed by a student under section 31(1)(a)(vi) of the Act is the exclusive right to "make an adaptation" of a research paper. Any subscriber who was to make an "adaptation" of a student's work in the course of submitting an essay for plagiarism assessment would therefore infringe the student's copyright.
7. Section 10(1) of the Act provides an exclusive definition of those acts which constitute making an "adaptation" in relation to a literary work. Specifically, the following activities are capable of constituting an "adaptation" of a literary work:
 - (a) re-creating a non-dramatic literary work in a dramatic form (**dramatisation**); or
 - (b) re-creating a dramatic literary work in a non-dramatic form (**transformation**); or
 - (ba) in relation to a literary work *being a computer program* – creating a version of it which is not a reproduction of the work (**computer version**); or
 - (c) translating the literary work (**translating**), or creating a version of it in which the story or action is conveyed by pictures (**picturisation**).

We noted in our original advice that a subscriber might undertake a number of arguably infringing activities when preparing an essay for submission to the plagiarism detection database including:

- downloading a version of the essay from an e-mail or disk provided by a student;
- digitising the essay so that it can be uploaded onto the Turnitin database;
- storing the essay in digital form on a university computer;
- uploading the document to Turnitin for assessment; or
- downloading a student's paper in highlighted form when returned from Turnitin.

8. Notwithstanding Lachlan Williams's assertions to the contrary, we consider that none of these activities can be characterised as "adaptations" within the meaning of the Act. The subscriber is clearly not creating a dramatisation, transformation, linguistic translation or picturisation of the student's work for the purposes of legislative definitions (a), (b) and (c) above. Further, in relation to legislative definition (ba) above, even if an electronically submitted essay were to be regarded as a "computer program" (see [10] below), the activities of a subscriber in downloading the essay for storage or uploading it to Turnitin would in any case represent a *reproduction* of the work rather than an adaptation, and most likely be covered by an express or implied license as discussed in our original advice. Accordingly, it is difficult to see how a subscriber could be said to create an "adaptation" of the student's literary work in the course of submitting a student's work for Turnitin plagiarism assessment.
9. It is unnecessary to consider whether the actions of Turnitin in the United States might constitute the creation of an "adaptation" of the student's work. This is because any activities undertaken by Turnitin which might constitute an "adaptation" would take place in Oakland, California, and infringement under the Act only extends to acts which take place *within Australia*. Accordingly, subscribers would not be liable under Australian law for authorising the creation of an "adaptation" by Turnitin as any such adaptation takes place in the United States.
10. In any case, we note that even if the detection database was operating within Australia, it would be highly unlikely that any of Turnitin's activities would constitute an "adaptation" within the meaning of the Act as set out above. Turnitin does not create dramatisations, fictionalisations, transformations or translations of student essays in the course of its plagiarism detection or essay retention activities. Further, an electronically submitted essay is unlikely to be construed as a "computer program" within the meaning of the Act for the purposes of definition (ba) above. Computer programs are defined under the Act as a "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result". The original work of the student protected under the Act (ie, written research paper itself) could not be construed in this manner.

Implications of commercial benefit obtained by Turnitin*Background*

11. It is our understanding that the Turnitin system evaluates the originality of a student essay by applying mathematical algorithms to produce a digital "code" or fingerprint of the written material in an electronically submitted research paper. Turnitin then retains this digital fingerprint for the purposes of future plagiarism detection activities.
12. The issue of Turnitin retaining student research papers in this manner has been subject to recent media debate (see, eg, Jim Buckell, "Plagiarism Risk Irks Students" *The Australian HE Supplement*, 17 March 2004). The main concern of student interest groups is that Turnitin's retention and use of past student papers confers a commercial advantage on Turnitin (in the sense that the database is made more attractive to subscribers) without any consideration (ie, royalties) passing to the student copyright owners.

Legal Position

13. While a licence to a subscriber university may be readily implied in relation to any use of the copyright work during the process of the plagiarism check, we reiterate our reservations as to whether any implied licence would extend to permit Turnitin to retain research papers for this purpose.
14. As we originally advised, any doubt in relation to this issue can easily be resolved by having students sign an express licence before submitting work acknowledging that their work might be subjected to the plagiarism detection process and that it may be retained by the Turnitin database for the purposes of future plagiarism checks. Paragraph [14] of our original advice provides an example of how such a licence could be contained in an assignment cover sheet.
15. However, even in the absence of an express or implied licence to deal with student papers in this manner, we remain of the opinion that subscribers are highly unlikely to be exposed to any liability under the Act as a result of Turnitin obtaining this commercial advantage. Because the Turnitin software only identifies previous papers that have been plagiarised on an anonymous basis and an assessor wanting to see the research paper must contact the copyright owner student before he or she is able to gain access to the

original paper, subscribers are most unlikely to be held liable for authorising Turnitin to communicate copyright works to the public. As we noted in our original advice, any risk of inadvertent communication of assignments on behalf of Turnitin could also be reduced by requiring Turnitin to delete assignments from its database after the current originality check.

16. Furthermore, incidental reproductions of research papers by Turnitin in the course of including essays on the database (ie, the making of a digital copy) do not expose subscribers to any further liability under the Act because those activities take place outside Australia.
17. For these reasons, we consider that although Turnitin obtains a commercial benefit from retaining research papers for future plagiarism detection activities, the obtaining of this benefit is not an infringement of the student's copyright under the Act. Accordingly, in the absence of any breach of the Act, neither subscribers nor Turnitin are exposed to any legal obligation to pay royalties to students.

Blake Dawson Waldron

20 April 2004