



March 15, 2016

Via E-Mail: melissa.nowak@cojk.com

Melissa A. Nowak
Christensen O'Connor Johnson Kindness PLLC
1201 Third Avenue
Suite 3600
Seattle, WA 98101-3029

Re: Demand to Cease and Desist - PKP

Dear Ms. Nowak:

We are writing to you because you have previously represented the Public Knowledge Project ("PKP") in connection with a dispute with Paxter, LLC. If you no longer represent PKP or if this letter should be sent directly to the company, please let us know.

Our office represents Paxter, LLC and its subsidiary, OpenJournalSystems.com, with whom you are familiar. Paxter is the leading service provider for publishers using Open Journal Systems (OJS). It has recently come to our attention that persons associated with PKP, including staff and affiliates, have been publicly defaming Paxter for the purpose of increasing business to its own competing product and eliminating the ability of consumers to utilize the free market economy by choosing Paxter for its publishing needs. By way of this letter, we ask that PKP cease making such false and defamatory statements regarding Paxter, and that it do everything within its power to ensure that no such statements are made on behalf of PKP. We further request that PKP cease its interference with the business of Paxter, including reinstating Paxter within the PKP forums and cessation of communications with current clients of Paxter for the primary purpose of disparaging its business.

By way of background, PKP and Paxter are well acquainted with each other due to prior trademark issues between the two parties. Back in July 2014, PKP demanded that Paxter cease its use of the mark OPEN JOURNAL SYSTEMS in any manner, including abandoning its pending federal registration for the name and use of the name on any social media platform. Although PKP filed its own competing registration with the USPTO, both registrations were rejected and neither PKP nor Paxter has the exclusive right to utilize the mark OPEN JOURNAL SYSTEMS within the United States.

Despite having no legal justification for doing so, PKP has taken the position that Paxter is an imposter who should not be allowed to compete with its own Open Journal Systems platform. Even at the time of the parties' initial contact, Paxter expressed concern regarding PKP's habit of engaging in

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defamation and interference with Paxter's business through social media and other forums. That pattern of behavior has not stopped, despite the parties reaching a resolution regarding the trademark question.

Over the course of the past two years, PKP and its representatives have engaged in a pattern of conduct that appears to have one sole purpose in mind – eliminate Paxter as a competitor. This has taken many forms, but appears to be a concerted effort on the part of PKP, its representatives, and its affiliated companies and vendors.

Defamation

We will first address the defamation, because it has come from many angles and all appears to be directed to trying to differentiate PKP's services from Paxter, while at the same time making false and defamatory statements regarding Paxter to the public, consumers, and Paxter's own customers. For example, Paxter has received notice from a number of its customers that they have received "anonymous" communications from persons friendly with PKP. This anonymous person (or persons) advised the Paxter client that the services offered by Paxter are inferior to PKP, and that Paxter is fraudulently stealing customers from PKP by using its name.

In late 2015, this refrain was repeated and republished on Twitter by a PKP employee, Karen Meijer-Kline, who supported additional false and defamatory statements about Paxter being made by J Whyte Appleby. The statements from these persons, which appear to be supported fully by PKP, included comments that the testimonials on the OpenJournalSystems.com website were fake; that the list of clients on the OpenJournalSystems.com website was fake; and recommending to contact all clients of OpenJournalSystems.com to tell them to stop using Paxter.

In November 2015, PKP complained to Twitter that Paxter was infringing on the name OPEN JOURNAL SYSTEMS by using the Twitter handle @OpenJournalSys. This false statement resulted in the suspension of Paxter's Twitter account, which is a critical mechanism through which it communicates with its customers. It took a letter from Paxter's counsel to resolve this issue, and get the Twitter account reinstated.

These statements are false and defamatory because they tend to bring Paxter into "disrepute, contempt or ridicule." *Central Arizona Light and Power v. Acres*, 45 Ariz. 526, 46 P.2d 126, 131 (1935). If this issue continues to occur, Paxter is interested in pursuing claims against PKP for, among other things, defamation. PKP will be liable not only for what was said, but also for what was insinuated through its words about Paxter. *Phoenix Newspaper, Inc. v. Church*, 103 Ariz. 582, 447 P.2d 840, 846 (1968). The accusations about Paxter are false, and in order for those statements to not be defamation, the burden is on PKP to prove the truth of its statements. *Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 264 P.2d 413, 416 (1953). We are confident you cannot do so, but if you have such evidence to support any of the false statements that have been said about Paxter, please provide them to me no later than March 30, 2016. If you do not produce all such evidence to me by that date, it will be presumed that PKP has none.

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In addition, because the statements about Paxter were made with actual malice, PKP is liable not only for presumed damages, *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092, 1096 (App. 1986), but punitive damages as well. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 567 (1986).

Further, the false statements also constitute a violation of federal statute. Specifically, 15 U.S.C. §1125 provides that any person who misrepresents the nature, characteristics, or qualities of another person's goods is liable for the other party's damages and is subject to an order enjoining further violations. By making false statements regarding the quality of services provided by OpenJournalSystems.com, as well as falsely stating that the testimonials on Paxter's website were fabricated, this statute has been violated.

Access to the PKP forums

The second issue which we are seeking to resolve through this letter is reinstating Paxter's access to the PKP community forums. Despite claiming to be a nonprofit and open source supporter, PKP has banned Paxter from publishing any content on any PKP forum without cause or explanation for doing so. We can only assume that the reason for this ban is that you did not like the competition utilizing the PKP forum. Unfortunately, this is not a legitimate justification for denying Paxter access to the information and communications that you claim to be public and intended to "grow an open publishing alternative." Please immediately reinstate Paxter's account within the community forums.

Intentional Interference With Business

We are then brought to the final issue, which is thematic throughout the ongoing relationship between PKP and Paxter. While we understand that PKP desires to have a complete monopoly over the service channel for open access journals management. However, as a matter of law, it may not do so. An inevitable risk of the open source environment is that someone else will come along and build off of the open source software, and make it better than what you are already offering. But that is also the benefit of open source, and, at least, the stated purpose behind PKP when it was originally created. There is no legitimate justification for PKP to continue to promote and facilitate the downfall of Paxter for its own financial benefit. Its conduct in encouraging and participating in defamation of Paxter, attacking Paxter clients, and encouraging its vendors to blacklist or otherwise refuse service to Paxter is neither equitable nor allowable as a matter of law.

Demand to Cease and Desist

We are well aware that PKP is a Canadian entity. However, due to the fact that PKP has actual knowledge that Paxter is an Arizona corporation, and that PKP conducts business in the State of Arizona and has directed its conduct into the State of Arizona for the purpose of causing harm within this state, we are confident there will be no jurisdictional issues to be addressed here.

In the event that PKP continues to encourage and itself make false and defamatory statements about Paxter, we will have no choice but to proceed with further measures to end the defamation,

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including filing a lawsuit against PKP for defamation, trade libel, violation of federal statute, intentional interference with business expectancies, and declaratory judgment, among other causes of action. In addition, because PKP's continued defamation from this point forward would be made with malice due to the actual knowledge of the falsity of your representations, we will seek punitive damages as well. Punitive damages are designed to "punish the defendant and serve as an example to deter future similar misconduct." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 501, 733 P.2d 1073, 1084 (1987). The award of punitive damages we would seek would be substantial in order to deter you from engaging in similar anti-competitive conduct against our client or others.

But, this is not the route Paxter wishes to go. At the end of the day, the mission of PKP is and should be to encourage the best possible software to improve the quality and reach of scholarly publishing. That includes not only allowing for competitors, but encouraging them within the marketplace so that the scholars and universities are able to have access to the most competent publishing platforms around. To further the spirit and purpose of PKP necessarily means inviting companies like Paxter to flourish, not to try to squash them as an unwanted competitor. We ask that PKP reconsider its stance regarding Paxter, and cease not only the defamation campaign against it, but cease contacting Paxter clients, and allow Paxter back into the fold of PKP forums and preferred vendors.

Please feel free to contact me with any questions.

Sincerely,

JABURG & WILK, P.C.

A handwritten signature in black ink that reads "Laura Rogal". The signature is written in a cursive, flowing style.

Laura Rogal

LAR:lar
cc: client (via email)