

11-18-2012

Two Wrongs Don't Negate a Copyright: Don't Make Students Turnitin if You Won't Give it Back

Samuel J. Horovitz
samjh@ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/flr>

 Part of the [Education Law Commons](#), and the [Intellectual Property Commons](#)

Recommended Citation

Samuel J. Horovitz, *Two Wrongs Don't Negate a Copyright: Don't Make Students Turnitin if You Won't Give it Back*, 60 Fla. L. Rev. 229 (2008).

Available at: <http://scholarship.law.ufl.edu/flr/vol60/iss1/5>

This Note is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

TWO WRONGS DON'T NEGATE A COPYRIGHT: DON'T MAKE
STUDENTS TURNITIN IF YOU WON'T GIVE IT BACK

*Samuel J. Horovitz**

I.	INTRODUCTION	230
II.	THE PLAGIARISM PROBLEM	233
	A. <i>The Prevalence of Plagiarism</i>	233
	B. <i>The Harms of Plagiarism</i>	235
III.	TURNITIN	236
	A. <i>The Origins of Turnitin</i>	236
	B. <i>How It Works</i>	237
IV.	COPYRIGHT	238
	A. <i>Copyright Basics</i>	238
	B. <i>General Copyright Analysis of Turnitin</i>	242
	1. Document Submission	242
	2. Fingerprinting	242
	3. Originality Evaluation	244
	4. Archiving	245
	C. <i>Fair Use</i>	245
	1. Fair Use Defined	245
	2. The Statutory Factors	246
	3. Plagiarism vs. Copyright Infringement: Does Plagiarism Prevention Merit Special Treatment in a Fair Use Analysis?	255
	D. <i>Other Considerations</i>	265
	1. Consent	265
	2. Should Student-Authored Papers Be Copyrightable?	268

* J.D. expected May 2008, University of Florida Levin College of Law; B.S. in Journalism, 2005, University of Florida. Many thanks to Professors Jeffrey Harrison and Elizabeth Rowe for their comments, to Kate Munkittrick for her help as my Note advisor, and to the members and staff of the Florida Law Review for their numerous contributions. This Note is dedicated to my family. Thank you for your love and support.

V. FURTHER IMPLICATIONS 268
 A. *Secondary Liability* 268
 B. *Fiduciary Duties* 269
 C. *A New Market* 270
 D. *Ramifications of the “Turnitin Culture”* 271

VI. EFFECTIVENESS 272

VII. ALTERNATIVE SOLUTIONS TO THE PLAGIARISM
 PROBLEM 274

VIII. CONCLUSION 275

The story goes something like this:¹

There was a particularly difficult college professor notorious for a low grading scale. After years of low grade following low grade, one paper finally earned a B minus, the highest grade ever awarded by this professor. Word spread about the paper, and the student author sold it to the highest bidder, who later turned in the same paper to the same professor and received a B. The next year, after being recycled yet again, the paper received a B plus. When the paper was recycled and submitted a fourth time, it finally received an A and a comment from the professor, “I’ve read this paper four times now, and I like it better each time.”²

I. INTRODUCTION

The story may be true, but it is more likely a college legend.³ Either way, this story and others like it⁴ help reduce the strain of college life and keep alive the eternal hope of one day outwitting a professor.⁵ But the stories also foster an improper sense of ease and comfort with plagiarism. Recycling another’s paper and resubmitting it does not gradually lead down the path to higher grades; rather, this is likely an academic violation

1. JAN HAROLD BRUNVAND, CURSES! BROILED AGAIN! THE HOTTEST URBAN LEGENDS GOING 286–87 (1989).

2. *Id.* at 287.

3. *Id.*

4. Consider also the tale of a student who submitted a years-old term paper taken from a file of ready-made papers kept by his fraternity. *Id.* Unbeknownst to the student, the professor had been in the same fraternity as an undergraduate twenty years earlier, and the paper the student submitted had actually been written by the professor. The student received an A plus and a note from the professor: “This paper got only a B minus twenty years ago, but I always felt that it was worth more.” *Id.*

5. *Id.* at 288.

that could lead to failing grades or worse.⁶

6. See Deborah R. Gerhardt, *Plagiarism in Cyberspace: Learning the Rules of Recycling Content with a View Towards Nurturing Academic Trust in an Electronic World*, 12 RICH. J.L. & TECH. 10, 29–39 (2006) (discussing the consequences of plagiarism and the potential exposure of plagiarists to copyright liability); Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 467 (2001) (“Plagiarism is a capital offense for law students.”). “Plagiarism is considered by most writers, teachers, journalists, scholars, and even members of the general public to be the capital intellectual crime.” RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 107 (2007). Outside the school setting, the most common punishments for plagiarism are ostracism, humiliation, and other variations of shaming social stigmas. *Id.* at 35–36. One such situation is humorously portrayed in the movie *Good Will Hunting*. See *GOOD WILL HUNTING* (Miramax 1997). In an early scene, Will, the title character, goes to a Harvard bar with a group of friends. As one of the friends, Chuckie, is flirting with two women at the bar, an arrogant local student, Clark, approaches and attempts to belittle Chuckie and show off his superior intellect in front of the women. Will, himself a genius, comes to Chuckie’s aid, quickly making Clark’s point look silly as the following exchange unfolds:

WILL: Of course that’s your contention. You’re a first-year grad student. You just got finished readin’ some Marxian historian—Pete Garrison, prob’ly—you’re gonna be convinced of that till next month when you get to James Lemon; then you’re gonna be talkin’ about how the economies of Virginia and Pennsylvania were entrepreneurial and capitalist way back in 1740. That’s gonna last until next year, you’re gonna be in here regurgitatin’ Gordon Wood, talkin’ about, you know, the pre-Revolutionary Utopia and the capital-forming effects of military mobilization.

CLARK: Well, as a matter of fact I won’t because Wood drastically underestimates the impact of social dis—

WILL: Wood drastically—Wood drastically underestimates the impact of social distinctions predicated upon wealth, especially inherited wealth. You got that from Vickers. *Work in Essex County*, page 98, right? Yeah, I read that too. Were you gonna plagiarize the whole thing for us? Do you have any thoughts—of your own on this matter? Or do you, is that your thing? You come into a bar, you read some obscure passage, and then pretend you, you—pawn it off as your own—as your own idea, just to impress some girls? Embarrass my friend? See the sad thing about a guy like you is in fifty years you’re gonna start doing some thinkin’ on your own, and you’re gonna come up with the fact that there are two certainties in life: one, don’t do that, and, two, you dropped a hundred and fifty grand on a[n] . . . education you coulda’ got for a dollar fifty in late charges at the public library.

CLARK: Yeah, but I will have a degree. And you’ll be serving my kids fries at a drive-through on our way to a skiin’ trip.

WILL: Yeah, maybe. Eh, but at least I won’t be unoriginal.

Id. Soon after, Skylar, one of the women at the bar—obviously impressed by Will and disgusted by Clark—approaches Will and introduces herself. Later that night, the social implications of the prior event become abundantly clear. As Will and his friends are leaving the bar, they notice Clark

In a “cut-and-paste”⁷ Internet environment where plagiarism is easier than ever, academic institutions face the daunting challenges of promoting honesty and respect for the work of others and of ensuring the integrity of the learning and grading processes. Many academic institutions have accordingly turned to commercial plagiarism prevention and detection services, such as those provided by a company called Turnitin.⁸ Yet those institutions that use the Turnitin system may be fostering infringement of the intellectual property rights of their students. When Virginia’s McLean High School recently announced plans to use Turnitin, students balked and collected 1,190 student signatures on a petition that opposed mandatory use of the system, because that use of Turnitin would infringe their intellectual property rights by automatically adding their essays to the company’s massive database.⁹ In response, school officials backed off a plan to require students in all grades to submit essays to Turnitin, deciding instead to phase in use of Turnitin by making it mandatory only for ninth- and tenth-grade students in specified classes.¹⁰ As one student stated, “‘It seems they pretty much changed the policy so they don’t have to deal with the people who are protesting it.’”¹¹

But as the plagiarism problem grows¹² and questions about the legality and effectiveness of the Turnitin system linger and extend far beyond McLean High School,¹³ the academic world will be able to dodge the problem only for so long.¹⁴ Part II of this Note examines the plagiarism

through the window of a coffee shop. Will walks up to the window, knocks to get Clark’s attention, and asks Clark if he likes apples. After an answer in the affirmative, Will slams a napkin against the window, boasting, “Yeah? Well I got her number. How do ya like dem apples?” *Id.* As Judge Posner explains (in a slightly more scholarly tone than *Good Will Hunting*), “The stigma of plagiarism seems never to fade completely, not because it is an especially heinous offense but because it is embarrassingly second rate; its practitioners are pathetic, almost ridiculous.” POSNER, *supra*, at 37.

7. See *infra* notes 15, 17–18 and accompanying text.

8. See Turnitin, Home Page, <http://turnitin.com> (last visited Nov. 15, 2007). For the origins and workings of the Turnitin system, see *infra* Part III.

9. Maria Glod, *Students Rebel Against Database Designed to Thwart Plagiarists*, WASH. POST, Sept. 22, 2006, at A1 [hereinafter Glod, *Students Rebel*].

10. Maria Glod, *Score One for McLean High Students: Administration Amends Anti-Cheating Policy After Protests*, WASH. POST, Oct. 4, 2006, at B1 [hereinafter Glod, *Score One*].

11. *Id.* (quoting Nicholas Kaylor, a senior at McLean High School).

12. See *id.*

13. See Glod, *Students Rebel*, *supra* note 9.

14. Indeed, the McLean incident may be the event that breaks the ice and starts the judicial process that will eventually resolve the legal issues presented by the use of Turnitin or other similar services. On March 27, 2007, several students filed the first copyright complaint against iParadigms, Turnitin’s parent company, see *infra* notes 33–34 and accompanying text, in the U. S. District Court for the Eastern District of Virginia. See Follow the Case, <http://www.dontturnitin.com/followthecase.html> (last visited Nov. 15, 2007); see also Maria Glod, *McLean Students Sue Anti-Cheating Service; Plaintiffs Say Company’s Database of Term Papers*,

problem facing the academic world; Part III examines the origins and workings of the Turnitin system; Part IV analyzes the copyright issues raised by Turnitin's service and examines the broader question whether plagiarism prevention justifies deferential treatment in a fair use inquiry; Part V examines further implications of the copyright analysis; Part VI examines Turnitin's effectiveness; and Part VII provides alternative solutions to the plagiarism problem.

II. THE PLAGIARISM PROBLEM

A. *The Prevalence of Plagiarism*

Educators agree that plagiarism is a growing problem that is exacerbated by the ease with which students can cut and paste from multiple online sources.¹⁵ Research by the Center for Academic Integrity¹⁶

Essays Violates Copyright Laws, WASH. POST, Mar. 29, 2007, at B5. On April 16, 2007, prior to any responsive pleading, the plaintiffs filed an amended complaint. See Amended Complaint for Copyright Infringement, *Vanderhye ex rel. A.V. v. iParadigms, LLC*, No. 07-0293 (E.D. Va. Apr. 9, 2007), available at http://www.dontturnitin.com/images/iParadigms_Amended_Complaint.pdf. For its part, iParadigms had previously filed a complaint for declaratory relief in the U. S. District Court for the Northern District of California. See Complaint for Declaratory Relief, *iParadigms, LLC v. McLean Comm. for Student Rights*, No. C06-07493 (N.D. Cal. Dec. 6, 2006), available at <http://www.dontturnitin.com/images/Filing.pdf>. However, according to the students' amended complaint, iParadigms has withdrawn its complaint for declaratory relief. Amended Complaint for Copyright Infringement, *supra*, at 5–6. On May 11, 2007, the Honorable Claude M. Hilton, the district court judge presiding over the case in the Eastern District of Virginia, denied iParadigms's motion to dismiss for failure to state a claim, ruling that the students properly stated a claim upon which relief could be granted. See Order, *Vanderhye ex rel. A.V. v. iParadigms, LLC*, No. 07-0293 (E.D. Va. May 11, 2007), available at http://www.dontturnitin.com/images/Court_Denial_of_iParadigms_Motion_to_Dismiss.pdf.

15. See Glod, *Score One*, *supra* note 10. This agreement is not unanimous, however. "Plagiarism is attracting increasing attention," writes Judge Posner, "though whether this is because it is becoming more common, or because its boundaries are becoming vague and contested, or because it is being detected more often . . . are among the many questions about it that call for investigation." POSNER, *supra* note 6, at 9. Some educators feel that the fear of plagiarism is blown out of proportion and that plagiarism is not on the rise. See Brian Hansen, *Combating Plagiarism*, 13 CQ RESEARCHER 773, 778 (2003). For a discussion of a (slightly dated) study by two Rochester Institute of Technology professors who concluded that there is not yet a plagiarism epidemic and that reports of increasing plagiarism due to the prevalence of Internet use are exaggerated, see Alex P. Kellogg, *Students Plagiarize Online Less than Many Think, a New Study Finds*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 15, 2002, at A44.

16. The Center for Academic Integrity, associated with the Rutland Institute for Ethics at Clemson University, is a consortium of more than 360 institutions. The Ctr. for Academic Integrity, About Us, http://www.academicintegrity.org/about_us/index.php (last visited Nov. 15, 2007). The Center seeks to "provide resources and catalyze commitment to academic integrity in educational institutions, with emphasis on higher and secondary education." The Ctr. for Academic Integrity, Mission Statement, http://www.academicintegrity.org/about_us/mission.php (last visited Nov. 15,

shows that while 10% of undergraduate students admitted to “cut-and-paste plagiarism”¹⁷ in 1999, almost 40% admitted to such behavior in studies conducted since 2002.¹⁸ The research also shows that 70% of students believe such cheating is not a serious issue.¹⁹ Half of the undergraduate students surveyed admitted to one or more instances of “serious cheating” on written assignments.²⁰ In a study of high-school students, 60% admitted to some form of plagiarism.²¹ Indeed, plagiarism appears to be part of a larger culture of cheating: one study of high-school students revealed that 80% admitted to having cheated at least once, half said cheating was not necessarily wrong, and 95% of those who had cheated said they had never been caught.²² In recent years, the media have documented several plagiarism scandals at leading academic institutions.²³ Augmenting the escalation of student plagiarism is the difficulty and inconvenience that teachers often face in proving that a student has actually plagiarized.²⁴

2007).

17. For purposes of this study, the term “cut-and-paste plagiarism” referred to “using a sentence or two (or more) from different sources on the Internet and weaving this information together into a paper without appropriate citation.” The Ctr. for Academic Integrity, CAI Research (copy of archived website on file with author). The Center for Academic Integrity recently moved to Clemson University, and its new website is still under revision. *See generally* The Ctr. for Academic Integrity, Home, <http://www.academicintegrity.org/> (last visited Nov. 15, 2007).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* Carolyn Kleiner & Mary Lord, *The Cheating Game: ‘Everyone’s Doing It,’ from Grade School to Graduate School*, U.S. NEWS & WORLD REP., Nov. 22, 1999, at 54, 56. While this culture of cheating is not confined to academia, the remedy to cheating in society at large may be to stop it at its roots, which lie in the academic world. *See* Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 975 n.201 (2003) (noting that imposing higher ethical standards on students may be the cure for future white-collar crime (citing Miguel Roig, Letter to the Editor, *In School, at Work, Lessons in Cheating*, N.Y. TIMES, June 5, 2002, at A26)).

23. *See, e.g., Plagiarism Investigation Ends at Virginia*, N.Y. TIMES, Nov. 26, 2002, at A24 (reporting a plagiarism scandal at the University of Virginia that led to the dismissal of forty-five students and the revocation of three graduate degrees); Kelly Simmons, *Student Cheating Taking New Tack; Some May Be Honest Mistakes*, ATLANTA J.-CONST., Jan. 20, 2002, at C1 (describing a plagiarism investigation at Georgia Tech involving 187 students); Robert Tomsho, *Familiar Words: Student Plagiarism Stirs Controversy at Ohio University*, WALL ST. J., Aug. 15, 2006, at A1 (chronicling a plagiarism scandal at Ohio University).

24. *See* THOMAS MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* 95 (1989) (analogizing a faculty member who brings a plagiarism charge to a rape victim who comes forward only to be grilled by a defense lawyer: “Admit it! You *wanted* her to plagiarize!”). Additionally, academic institutions, fearing litigation, often hesitate to take action against students caught plagiarizing. *See* POSNER, *supra* note 6, at 39. Most plagiarism litigation is initiated “by rather than against” students disciplined for plagiarism. *Id.*; *see also* Brian Hansen,

B. *The Harms of Plagiarism*

To comprehend fully the plagiarism problem, one must examine not only plagiarism's prevalence but also its harms. Plagiarism is difficult to define;²⁵ one commentator's search for a definition of plagiarism led him to combine four metaphors that nicely highlight the harms of plagiarism.²⁶ Plagiarism can appropriately be viewed as stealing,²⁷ as an ethical violation,²⁸ as borrowing without returning,²⁹ or as intellectual laziness.³⁰ Additionally, plagiarism "undermines the academic environment" by denying proper credit to original authors, by preventing professors from accurately grading and evaluating work, by giving students who plagiarize an unfair advantage over their honest colleagues, and by preventing students from progressing academically.³¹ Perhaps worst of all, plagiarism precludes the evolution of scholarship by destroying trust in academic integrity.³²

Confronting Plagiarism Can Pose Risk, 13 CQ RESEARCHER 779, 779 (2003) (chronicling the struggles faced by educators who accused students of plagiarism).

25. Laurie Stearns suggests that plagiarism may be difficult to articulately define, but, like pornography, people "know it when they see it." See Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 5, 7 (Lise Buranen & Alice M. Roy eds., 1999).

26. See David Leight, *Plagiarism as Metaphor*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 25, at 221, 221.

27. "By defining plagiarism in this sense, words become metaphorically 'owned' by someone else, a kind of property in which the worst form of dishonesty and immorality is in the taking of them." *Id.* at 222.

28. "In this case, the 'profession' is that of student, and the ethical violation is the shirking of one's responsibilities as a learner by using the work of another." *Id.* at 223.

29. "Since the plagiarist cannot in any sense 'put the item back'—one cannot return words to their original source—the good writer should give 'credit' to the source." *Id.* at 225. In this sense, the plagiarist borrows not only the words but also the due credit and acknowledgment owed the original author. *Id.*

30. "[T]he plagiarist avoids doing valuable intellectual work that would help not only him or her but the entire academy as well." *Id.* at 227.

31. See Univ. of N.C. at Chapel Hill, Honor System: What is Plagiarism?, <http://honor.unc.edu/students/plagiarism.html> (last visited Nov. 15, 2007).

32. See Gerhardt, *supra* note 6, at 3. Nonetheless, some argue that cut-and-paste plagiarism is not as harmful as it is portrayed. See *Essay Copying is 'Self-Teaching,'* BBC NEWS, Apr. 4, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/education/3598161.stm. While full-blown plagiarism is always a problem, small-scale copying can actually demonstrate comprehension of the subject. See *id.* Thus, one educator argues that taking material off the Internet and rewording it is a form of self-teaching that allows students to learn the material, which would not be possible without mastery of the subject. See *id.*

III. TURNITIN

A. *The Origins of Turnitin*

John Barrie, a former student at the University of California, Berkeley, and the current president and CEO of iParadigms, the company behind Turnitin, developed the core Turnitin technology in 1994.³³ In 1996, iParadigms was born when its founders used a series of computer programs to track the recycling of research papers in large undergraduate classes.³⁴ Teaming with a group of mathematicians, computer scientists, and teachers, the group formed Plagiarism.org, which by 1998 had become an established Internet-based plagiarism detection service.³⁵ Today, Plagiarism.org consists of Turnitin and iThenticate,³⁶ which iParadigms boasts as the Internet's "most widely used and trusted resources for preventing the spread of internet plagiarism."³⁷ Millions of students and faculty in more than eighty-five countries use Turnitin, which receives thousands of student papers daily.³⁸ The company's clients include

33. See Turnitin, Company: About Us, <http://turnitin.com/static/company.html> (last visited Nov. 15, 2007); Turnitin, Executive Bios, <http://turnitin.com/static/bios.html> (last visited Nov. 15, 2007). The use of a computerized plagiarism detection device is not new. Several years before Barrie developed the Turnitin technology, Walter Stewart and Dr. Ned Feder were already using a "plagiarism machine" to detect plagiarism in science literature. See Philip J. Hilts, *Plagiarists Take Note: Machine's on Guard*, N.Y. TIMES, Jan. 7, 1992, at C1. Interestingly, but not altogether surprisingly, scientists viewed the plagiarism machine with a reticence similar to that which students express toward Turnitin today; one critic called the plagiarism machine "chilling" and another griped that the technology at issue seemed more suited for use by the C.I.A. or Interpol than by plagiarism detectors. *Id.*

34. See Turnitin, Company: About Us, *supra* note 33.

35. *Id.*

36. Whereas Turnitin is designed to prevent plagiarism in the academic world, *see supra* note 8 and accompanying text, iThenticate is designed to allow corporations, publishers, and law firms to check documents and manuscripts for originality and to see if any of those entities' intellectual property is being misappropriated on the Internet, iThenticate, Home Page, <http://ithenticate.com/static/home.html> (last visited Nov. 15, 2007).

37. See Turnitin, Company: About Us, *supra* note 33.

38. See Turnitin, Executive Bios, *supra* note 33. While the Turnitin website indicates that the company receives nearly 40,000 student papers a day, *see id.*, recent articles report the number of student papers submitted daily to be 120,000, *see* Linda L. Briggs, *Turnitin: Fighting Plagiarism and Saving Time at Fresno State*, CAMPUS TECH., Mar. 14, 2007, available at <http://www.campustechnology.com/articles/45391>; Douglas MacMillan, *Looking over Turnitin's Shoulder*, BUS. WK. ONLINE, Mar. 13, 2007, available at http://www.businessweek.com/technology/content/mar2007/tc20070313_733103.htm. As evidence that the news stories are a more accurate reflection of Turnitin's current figures (and as evidence of Turnitin's rapid growth), see Press Release, Thomson Corp., Thomson Higher Education Becomes Exclusive Educational Distributor of Turnitin® Online Originality Tracker (Aug. 5, 2005), available at http://www.lexdon.com/article/Thomson_Higher_Education_Becomes_Exclusive/350.html.

Georgetown University, University of Florida, Rutgers University, Hofstra University, University of California Los Angeles, and more than 90% of all colleges and universities in the United Kingdom.³⁹ Thus, while the plagiarism problems described in the preceding Part provided only headaches for academics, they also provided opportunities for entrepreneurs like Turnitin founder John Barrie. The more demanding the problem, the more profitable the solution: Turnitin, which sells individual licenses, department licenses, single-campus licenses, and multiple-campus licenses,⁴⁰ nets earnings that exceed \$10 million per year.⁴¹ Profits figure only to rise in the near future; iParadigms' membership has doubled in each of the last seven years, and the company expects to sign 100,000 new clients in the next ten years.⁴²

B. *How It Works*

For comparison purposes, Turnitin applies mathematical algorithms to each paper it receives to create a “digital fingerprint” of the paper.⁴³ Turnitin then checks for plagiarism by creating a “customized Originality Report” for each paper it receives.⁴⁴ To create this report, Turnitin compares the digital fingerprint of the submitted paper to other sources and checks for originality⁴⁵ based on “exhaustive searches” of three database types: (1) current and archived Internet documents,⁴⁶ (2)

At the date of the press release, Turnitin received more than 40,000 student papers per day, but the figure was projected to escalate to more than 100,000 student papers per day by the end of 2006. *Id.* The company's Complaint for Declaratory Relief also estimates nearly 100,000 student submissions per day. *See* Complaint for Declaratory Relief, *supra* note 14, at 2, 5.

39. *See* Turnitin, Selected Client List, <http://turnitin.com/static/clientlist.html> (last visited Nov. 15, 2007).

40. *See* Turnitin, Pricing: How to Buy, <http://turnitin.com/static/price.html> (last visited Nov. 15, 2007).

41. *See* Hollister Kids, Newspapers Plus, *High-Tech Efforts to Stop Cheating Spark a Debate on Student Papers*, DETROIT NEWSPAPERS IN EDUC., Oct. 9, 2006, <http://nieonline.com/detroit/plus.cfm?lessondate=20061009>; Randy Dotinga, *Electronic Snoops Tackle Copiers*, WIRED NEWS, Apr. 2, 2004, <http://www.wired.com/techbiz/media/news/2004/04/62906>.

42. *See* MacMillan, *supra* note 38.

43. *See* Turnitin, Turnitin Legal Document 6, http://turnitin.com/static/pdf/us_Legal_Document.pdf (last visited Nov. 15, 2007).

44. Turnitin, Plagiarism Prevention, <http://turnitin.com/static/plagiarism.html> (last visited Nov. 15, 2007).

45. *Id.*; *see* Turnitin Legal Document, *supra* note 43, at 6.

46. Turnitin, Plagiarism Prevention, *supra* note 44. Turnitin uses a web crawler to archive “any publicly accessible documents up to 2 MB in size.” *See* Turnitin, The Broadest Search: Turnitin Outperforms Search Engines, http://turnitin.com/static/pdf/datasheet_search.pdf (last visited Nov. 15, 2007) [hereinafter Turnitin, The Broadest Search]; *see also* Turnitin, TurnitinBot General Information Page, <http://turnitin.com/robot/crawlerinfo.html> (last visited Nov. 15, 2007)

“millions” of Turnitin’s previously submitted student papers,⁴⁷ and (3) journal articles and periodicals found in other commercial databases.⁴⁸ For each submission, Turnitin provides the teacher with a detailed originality report, which highlights text that matches another source in the database.⁴⁹ Turnitin stresses that its system does not determine whether a student has plagiarized.⁵⁰ Instead, the system simply highlights for teachers any matches found in the databases and provides teachers the sources of the matches; teachers must then make their own determinations regarding plagiarism.⁵¹

IV. COPYRIGHT

A. Copyright Basics

Constitutionally authorized⁵² and statutorily implemented,⁵³ copyright law balances the rights of authors and the rights of the public.⁵⁴ As an incentive to create new works, copyright law provides the creator of a new work, for a limited period, a set of exclusive rights to the work.⁵⁵

(providing information about Turnitin’s web crawling robot, TurnitinBot). Although this Note takes no stance regarding the legality of Turnitin’s web crawler or archiving of Internet pages, it is worth noting, as a starting point tangential to those issues, that a district court in Nevada has ruled that Google’s caching feature, which allows users to view archival copies of websites that would otherwise be unavailable, does not constitute copyright infringement. *See* Field v. Google Inc., 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006).

47. Turnitin, Plagiarism Prevention, *supra* note 44. Turnitin refers to this database as its own “proprietary database of millions of previously submitted student papers.” *Id.* According to the Turnitin Legal Document, only the fingerprints of archived works are checked in the comparison. *See* Turnitin Legal Document, *supra* note 43, at 8. The implications of archiving, the “fingerprinting” process, and discrepancies between the Turnitin Legal Document and other Turnitin publications are all addressed more thoroughly in Part IV, *infra*.

48. Turnitin, Plagiarism Prevention, *supra* note 44.

49. *Id.*; *see* Turnitin, Sample Originality Report, http://turnitin.com/static/images/props/sample_report.gif (last visited Nov. 15, 2007).

50. Turnitin, Copyright and Privacy: Turnitin Promotes Fairness and Integrity, http://turnitin.com/static/pdf/datasheet_ip.pdf (last visited Nov. 15, 2007).

51. *Id.*

52. *See* U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

53. *See* Copyright Act of 1976, 17 U.S.C.A. §§ 101–1332 (West 2007).

54. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 526–27 (1994) (“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” (omission in original) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975))).

55. *See* Mazur v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the

Copyrights protect original works of authorship.⁵⁶ Copyrights need not be registered because rights vest as soon as the work is fixed in a “tangible medium of expression.”⁵⁷ Copyright ownership initially vests with the work’s author.⁵⁸ Copyright owners receive several exclusive rights,⁵⁹ including, most relevant to this Note’s discussion, the exclusive right to reproduce a copy of the copyrighted work and the exclusive right to prepare a derivative work based on the copyrighted work.⁶⁰ Copyright

clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize . . . [are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

56. 17 U.S.C. § 102(a) (2000).

57. *Id.*

58. *Id.* § 201(a). There is an exception concerning works made for hire. *See id.* § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . .”). A work made for hire is either

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101. This exception generally would not apply to student works, however. The second provision is inapplicable absent express written agreement. *Id.* Regarding the first provision, while the terms “employment” and “scope of employment” are not defined in the Copyright Act, the U.S. Supreme Court has noted that Congress intended to describe the conventional employer–employee relationship as understood by the general common law of agency. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989). The Court listed several factors used to determine whether a hired party is an employee under the common law of agency, *see id.* at 751–52, but because students neither meet the initial label as a hired party nor fall within the conventional understanding of the employer–employee relationship, the exception does not apply to them.

59. 17 U.S.C.A. §§ 106–122 (West 2007).

60. *See* 17 U.S.C. § 106 (Supp. IV 2004).

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and

ownership may be transferred in whole or in part, by conveyance or by operation of law.⁶¹ The exclusive rights that accompany copyright ownership may be transferred and owned separately.⁶² Anyone who violates any of the exclusive rights given to the copyright owner infringes the copyright.⁶³

In making an infringement determination, there are some important limitations on the exclusive rights provided to authors.⁶⁴ Most notably, notwithstanding the general announcement of exclusive rights given to an author, the “fair use” of a copyrighted work is deemed to be non-infringing.⁶⁵ The copyright statutes provide the basic framework within which the specific issues presented by Turnitin’s use of student-authored works must be analyzed. This Note examines the specific issues below, but because Turnitin does not contest that it copies and archives student-authored works and seemingly concedes a *prima facie* showing of copyright infringement, the ultimate infringement analysis hinges on a single, outcome-determinative inquiry: Is Turnitin’s use of student-authored works a fair use?⁶⁶

choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

61. 17 U.S.C. § 201(d)(1).

62. *Id.* § 201(d)(2).

63. 17 U.S.C. § 501(a) (Supp. IV 2004). If a court finds infringement, the remedies may include injunctive relief, 17 U.S.C. § 504 (2000 & Supp. IV 2004), and costs and attorney’s fees, 17 U.S.C. § 505 (2000).

64. *See* 17 U.S.C.A. §§ 107–112 (West 2007). One limitation that at first blush might seem applicable, but upon further review does not apply to Turnitin, is the limitation of exclusive rights that affords extra protection to copying by libraries or archives. *See id.* § 108. Although the Copyright Act does not define the terms “library” or “archive,” it does outline specific conditions from which “we can deduce that for purposes of § 108, a library or archive is a collection of copyrighted works which the public or persons doing research in a specialized field might wish to copy, presumptively for private study, scholarship, or research, at no cost beyond the cost of copying.” Scott J. Burnham, *Copyright in Library-Held Materials: A Decision Tree for Librarians*, 96 LAW LIBR. J. 425, 438–39 (2004). Because Turnitin’s “archive” is not open to the public or persons within a specialized field and because charges for access to the Turnitin archive exceed the simple cost of copying, Turnitin’s archive does not qualify as a § 108 archive and is thus ineligible for heightened protection. *See id.*

65. 17 U.S.C. § 107 (2000).

66. This Note frequently refers to Turnitin’s use of student works. It bears emphasizing, however, that the infringing activity is either the copying of the works or the creation of derivative works in the form of digital fingerprints. Unlike patent law, copyright law does not give owners the right to exclude others from using the copyrighted work. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[A] (rev. vol. 2007) [hereinafter NIMMER ON COPYRIGHT]. This point raises two issues. First, it raises the issue whether copying for the purpose of using is an

infringement. Although “the Copyright Act does not expressly prohibit ‘use’ *per se*, . . . neither does it expressly immunize ‘use’ *per se*.” *Id.* § 2.18 [C][2]. For a detailed analysis of why “[n]othing in either the present Copyright Act or in prior copyright laws justifies the . . . doctrine that copying for purposes of use (as distinguished from copying for purposes of explanation) is not an act of infringement,” see *id.* The second issue raised is whether the copying or fingerprinting is even infringing. Assuming, as this Note does, that the initial copying or fingerprinting is justified as part of an implied license, it is arguably the *use* to which that copy or fingerprint is later put—archiving—that extends beyond the scope of an implied license and not the act of copying. This muddies the infringement analysis because it is the copying or fingerprinting that must be viewed as the infringing activity, not the subsequent use. If the copying or fingerprinting is within the scope of an implied license, the basis for infringement collapses. One potential response to this issue is that just because the copying or fingerprinting is done for two purposes, the fact that one purpose falls within an implied license does not mean that the same act, insofar as it is also done for the other purpose, cannot be infringing. Furthermore, arguing that the *use* and not the copying or fingerprinting exceeds the scope of an implied license concedes that the license has been exceeded and at the very least invites breach-of-contract litigation, hardly freeing Turnitin of all liability. Ultimately, under this analysis, whether the cause of action should be brought as a copyright or contract claim turns on whether the violation is a breach of a covenant or of a condition of the license. As the Ninth Circuit has stated,

Generally, a “copyright owner who grants a nonexclusive license to use [the] copyrighted material waives [the] right to sue the licensee for copyright infringement” and [must instead] sue only for breach of contract. If, however, a license is limited in scope and the licensee acts outside the scope [of the license], the licensor can bring an action for copyright infringement.

Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1121 (9th Cir. 1999) (citations omitted) (quoting *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)). Thus, “[i]f the grantee’s improper conduct constitutes a breach of a covenant undertaken by the grantee . . . and if such covenant constitutes an enforceable contractual obligation, then the grantor will have a cause of action for breach of contract.” 3 NIMMER ON COPYRIGHT, *supra*, § 10.15[A] (footnotes omitted). But “[i]f the nature of a licensee’s violation consists of a failure to satisfy a condition to the license . . . , any use by the licensee is without authority from the licensor and may therefore, constitute an infringement of copyright,” and likewise, “when a license is limited in scope, exploitation of the copyrighted work outside the specified limits constitutes infringement.” *Id.* One court—albeit in a factual scenario involving direct dealings between two parties accompanied by an express contract and thus markedly different from that presented by Turnitin—has suggested that conditions precedent are disfavored in implied licenses. See *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 n.7 (9th Cir. 1990). Because of this suggestion, the more appropriate path to a copyright claim seems to lie in the argument that any implied license to teachers or to Turnitin is limited in scope and that Turnitin’s commercial exploitation of the work is outside that scope. See 3 NIMMER ON COPYRIGHT, *supra*, § 10.15[A].

Once free of these initial hurdles, the nature of Turnitin’s use, which is not itself the infringing activity, becomes paramount because the fair use defense can absolve otherwise infringing activity based on the nature of the use. In sum, Turnitin’s use is relevant not because it is infringing but because it is not fair and it exceeds the scope of any implied license. Further, because Turnitin’s use is not fair and it exceeds the scope of any implied license, Turnitin’s copying of a student’s work (and perhaps its creation of a derivative work via fingerprinting) remains infringing.

B. General Copyright Analysis of Turnitin

When analyzing Turnitin, it is helpful to break down Turnitin's process into several stages—document submission, fingerprinting, originality evaluation, and archiving—and discuss the copyright issues at each stage.⁶⁷

1. Document Submission

Initial document submission to Turnitin is justified, the company argues, by an implied license from student to teacher to “comment on, criticize and otherwise evaluate the academic quality of . . . both the work's content and integrity.”⁶⁸ This justification may be valid, but it does little to resolve the ultimate copyright issues. Even if there were no implied license, the same aspects of the Turnitin system that would be within the scope of an implied license are also likely a fair use.⁶⁹ The problem for Turnitin, as described below, is that those aspects of Turnitin's system that reach beyond the scope of any implied license⁷⁰ are the same aspects most likely not to be considered a fair use.⁷¹

2. Fingerprinting

Turnitin's fingerprinting⁷² of student works presents an interesting issue that is worthy of a brief discussion, even though it too may have little practical effect on the ultimate infringement analysis. Copyright law gives an original author the exclusive right “to prepare derivative works based

67. Recognizing the abundance of legal issues surrounding its system, Turnitin has taken a proactive legal stance and, with the services of the law firm Foley & Lardner, LLP, created a document outlining its position concerning various legal issues. *See* Turnitin Legal Document, *supra* note 43. For ease of comparison, this subsection, which draws heavily from and comments on arguments and cases presented in the document, imitates, to the extent practical, the organizational structure of the document. Although the document discusses additional legal issues concerning Turnitin, such as compliance with the Child Online Privacy Protection Act, *see id.* at 9, and the Family Educational Rights and Privacy Act, *see id.* at 2, 6–8, this Note, focusing primarily on copyright, does not address these issues. For those interested in investigating the non-copyright legal issues raised by Turnitin's system, this document may serve as a helpful starting point.

68. *See id.* at 4.

69. *See infra* Part IV.C.

70. “Since a nonexclusive license does not transfer ownership of the copyright from the licensor to the licensee, the licensor can still bring suit for copyright infringement if the licensee's use goes beyond the scope of the nonexclusive license.” *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 779 (3d Cir. 1991) (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 n.5 (9th Cir. 1990)).

71. *See infra* Part IV.C.

72. *See* Turnitin Legal Document, *supra* note 43, at 6.

upon the copyrighted work.”⁷³ A derivative work is defined in part as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁷⁴

Turnitin argues that because the fingerprint does not contain any of the actual contents of the original work, the fingerprint is not a “true derivative” of the work.⁷⁵ The argument rests on the premise that “[t]he fingerprint is merely a digital code, which relays the unprotectable factual information that certain pre-defined content is present in the work.”⁷⁶ Without pretrial discovery, it is difficult to properly ascertain and examine the exact details of the fingerprinting process, but the nature of the use of the fingerprint seems to belie Turnitin’s argument. If the fingerprint is to have any value as a plagiarism detection tool, it must accurately represent the author’s original construction and expression.⁷⁷ Functionally, the fingerprint seems to operate as a derivative translation of the submitted work into a mathematical digital code.⁷⁸ It is critical to remember that the fingerprint is used both for the initial originality determination and for

73. 17 U.S.C. § 106 (Supp. IV 2004).

74. 17 U.S.C. § 101 (2000).

75. See Turnitin Legal Document, *supra* note 43, at 6.

76. See *id.*

77. Facts are not copyrightable, but the particular method of expression is copyrightable. See *infra* note 132 and accompanying text. Thus, insofar as Turnitin argues that the fingerprint captures only the factual underpinnings of the original work, the fingerprint would seem incapable of detecting plagiarism: a plagiarism detection tool is nothing without the original author’s expression. Insofar as Turnitin argues that the presence of a match between an original and subsequent paper is itself an uncopyrightable fact, the argument misconstrues the reasons facts are not copyrightable. See *infra* note 132 and accompanying text. Indeed, taking this latter argument to its logical conclusion, a would-be infringer could *always* avoid liability by simply couching the act of copying within a factual statement of the content of the work. For example, suppose Author *A* writes a book. Under Turnitin’s argument of escaping liability by copying only “the unprotectable factual information that certain pre-defined content is present in the work,” see *supra* note 76 and accompanying text, Infringer *B* could presumably copy Author *A*’s book in its entirety and avoid liability by simply introducing the copying with the statement: “Author *A* wrote the following in his book, . . .” The copying that would follow this simple statement would be a “fact”—after all, Infringer *B* is simply stating what it is that Author *A* wrote in *A*’s book—but this copying would also undoubtedly be copyright infringement. See *infra* note 159 and accompanying text (discussing the insignificance of attribution in a copyright infringement analysis). For further explanation of why this argument is misguided, see *infra* note 132 and accompanying text.

78. See Emanuella Grinberg, *Student Wins Battle Against Plagiarism-Detection Requirement*, CNN.com (COURT TV), Jan. 21, 2004, available at <http://www.cnn.com/2004/LAW/01/21/ctv.plagiarism> (quoting John Barrie as saying, “The value to our company is not in the collection of words and characters in an essay, but in the series of numbers derived from the essay once we transform those words and characters into digital fingerprints”); see also Essayfraud.org, “Guilty Until Proven Innocent”: Hypocritical Profiteering, Oct. 20, 2006, http://www.essayfraud.org/turnitin_john_barrie.html#5.

subsequent originality determinations of other works. Thus Turnitin's proposition—that student submission of a paper to a teacher includes an implied license to “utilize available technologies and tools to accomplish the grading task”⁷⁹ and that “[s]uch a right necessarily encompasses the ability to transfer the work to other media (e.g., by scanning the work), where such transfer is required for the teacher's personal use of a particular grading tool”⁸⁰—presents a double-edged sword. If accepted, this argument would justify the initial use of the fingerprint but would undermine the additional use of the fingerprint to analyze future submissions. This latter use would not be within the implied license as “required for the teacher's personal use of a particular grading tool.”⁸¹ Thus, this latter use could not be justified, because a teacher could neither utilize nor transfer to Turnitin more rights than were granted by an implied license.⁸² Once in a realm beyond the scope of any implied license, the “ability to transfer the work to other media”⁸³ would no longer be encompassed and would instead undercut Turnitin's argument that the fingerprint is not a derivative work.⁸⁴

Alas, while the fingerprinting issue presents an interesting academic issue, it will likely have little bearing on a final infringement determination. Even if the fingerprint were not a derivative work, because Turnitin archives an actual copy of the original work, which itself plays a vital role in the ultimate plagiarism determination,⁸⁵ Turnitin would not be able to evade infringement absent a fair use determination. Conversely, even if the fingerprint were a derivative work, if it were also deemed to be a fair use, then it would be by definition non-infringing.⁸⁶

3. Originality Evaluation

Turnitin's primary justification for the originality evaluation also invokes the concept of an implied license.⁸⁷ As was the case concerning document submission, however, the implied-license argument is superfluous.⁸⁸ The initial originality evaluation is most likely a fair use,⁸⁹ and even with an implied license, the aspects that go beyond the scope of the license are not fair uses and are infringing.⁹⁰

79. See Turnitin Legal Document, *supra* note 43, at 5.

80. *Id.*

81. *Id.*

82. See *supra* note 70 and accompanying text.

83. See Turnitin Legal Document, *supra* note 43, at 5.

84. See *supra* notes 73–75 and accompanying text.

85. See *infra* notes 129–36 and accompanying text.

86. See *supra* note 65 and accompanying text.

87. See Turnitin Legal Document, *supra* note 43, at 6–7.

88. See *supra* notes 68–71 and accompanying text.

89. See *infra* Part IV.C.

90. See *infra* Part IV.C.

4. Archiving

The most legally sensitive, and thus, for purposes of this Note, relevant, aspect of the Turnitin system is the archiving of submitted works for use (along with digital fingerprints) in originality evaluations of subsequently submitted works.⁹¹ Conceding that, absent consent,⁹² the implied-license argument championed for other purposes “may not”⁹³ extend to archiving, Turnitin seemingly concedes a *prima facie* showing of infringement and justifies its archiving entirely on a defense of fair use.⁹⁴

C. Fair Use

Having briefly acknowledged the interplay among the various copyright issues and the common convergence to a fair use inquiry, this section analyzes the fair use issues. This analysis concludes that up to and including the first originality report, Turnitin’s use of student works is, even if not protected by an implied license, a fair use. Archiving student works and comparing them against subsequent papers, however, is not a fair use and results in copyright infringement.

1. Fair Use Defined

Fair use is an affirmative defense that excuses otherwise infringing activity by examining the nature of the use in light of the goals of copyright law.⁹⁵ The fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁹⁶ This doctrine has its roots in the common law, and the Copyright Act of 1976⁹⁷ codified it.⁹⁸ The results of fair use claims are difficult to predict, and although the pertinent statute provides four non-exclusive factors that

91. Turnitin concedes that the archiving presents sensitive issues and requires a different copyright analysis than other aspects of the system. *See* Turnitin Legal Document, *supra* note 43, at 7.

92. For discussion of the consent issue, see *infra* Part IV.D.1.

93. Turnitin Legal Document, *supra* note 43, at 5.

94. *Id.* at 5, 7–8.

95. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574–75, 590 (1994); *supra* note 65 and accompanying text.

96. *See* *Campbell*, 510 U.S. at 577 (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

97. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.A. §§ 101–1332 (West 2007)).

98. 17 U.S.C. § 107 (2000). The codification of fair use was meant as an articulation of the common-law doctrine, and it was not intended to alter the common law. *See* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

courts should consider, a fair use analysis often hinges on very specific facts woven into a fairness argument.⁹⁹ Fair use analyses evade simplification to bright line rules, and the four statutory factors should not be considered in isolation.¹⁰⁰ Rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.”¹⁰¹ “The ultimate test of fair use . . . is whether the copyright law’s goal of ‘promot[ing] the Progress of Science and useful Arts’¹⁰² ‘‘would be better served by allowing the use [in question or] by preventing it.’’¹⁰³ Because fair use is an affirmative defense, the would-be infringer bears the burden of proof.¹⁰⁴

2. The Statutory Factors

The Copyright Act directs courts to consider four non-exclusive statutory factors in a fair use analysis:¹⁰⁵ “the purpose and characters of the use,” “the nature of the copyrighted work,” “the amount and substantiality” of the portion used relative to the whole copyrighted work, and the use’s effect on “the potential market for or value of the copyrighted work.”¹⁰⁶ These factors are examined and applied to Turnitin’s use below.

The first of the four non-exclusive statutory factors that the Copyright Act directs courts to consider in a fair use analysis is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁰⁷ While Turnitin certainly serves the educational purpose of detecting—and thus hopefully deterring—plagiarism, Turnitin also admits that “the system is provided to institutions on a for-profit basis, and is therefore commercial in nature.”¹⁰⁸ Thus, because Turnitin serves both commercial and educational functions, it is necessary to analyze carefully which portions of the system promote which function. It is not difficult to focus on the educational

99. See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990) (“Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. . . . Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.” (footnotes omitted)).

100. *Campbell*, 510 U.S. at 577–78.

101. *Id.* at 578.

102. *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

103. *Id.* (quoting *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992)).

104. See *Campbell*, 510 U.S. at 590.

105. 17 U.S.C. § 107 (2000).

106. *Id.*

107. *Id.* § 107(1).

108. See Turnitin Legal Document, *supra* note 43, at 7.

function of the initial originality evaluation, which is directly tied to the educational purpose. But the subsequent step of archiving papers for future evaluations has a more attenuated relationship to the educational function and seems to serve primarily commercial purposes.¹⁰⁹ Consider that Turnitin is not the only plagiarism detection service on the market¹¹⁰ and that using computer algorithms to detect plagiarism is hardly a novel concept.¹¹¹ What separates Turnitin from its competitors is its massive student-works database. Turnitin does not shy away from this fact—to the contrary, the company heavily markets its database, advertising that “Turnitin is the only technology that searches against comprehensive databases” of Internet websites, published works, and other student papers.¹¹² The company even boasts that “[s]earch engines do not have access to . . . student papers, so no amount of Googling will help in these cases.”¹¹³ Turnitin is a multi-million dollar enterprise,¹¹⁴ and the only novelty it brings to the marketplace—its massive database comprised largely of student works—is simply a combination, in its entirety and without compensation, of previous works. This sort of piggybacking hardly fosters the creative advancement notion underlying copyright law. Because archiving serves primarily commercial goals, it cannot be justified simply because the eventual uses to which archived papers will be put (future originality evaluations) are educational.¹¹⁵

109. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (noting that the defendant’s argument that its purpose for copying was “not purely commercial” did not sway the first factor toward fair use and “misse[d] the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).

110. See Univ. of Md. Univ. Coll., Center for Intellectual Property, Plagiarism, Detection Services, http://www.umuc.edu/distance/odell/cip/links_plagiarism.shtml#detection (last visited Nov. 15, 2007) (providing links to other plagiarism detection services).

111. See *supra* note 33. Rather than rely on outside services, one University of Virginia professor developed his own computerized program to scan student papers and identify matched phrases of six or more words. See Amy Argetsinger, *Technology Exposes Cheating at U-Va.; Physics Professor’s Computer Search Triggers Investigation of 122 Students*, WASH. POST, May 9, 2001, at A1. The purely educational function of such a program presumably shifts the fair use analysis toward non-infringement. This raises the question whether databases of student works developed, maintained, and run entirely by schools or teachers, without commercial implications, would be an economically feasible solution to many of the copyright problems addressed in this Note.

112. See Turnitin, *The Broadest Search*, *supra* note 46. Arguably, Turnitin’s chief selling point, more than its plagiarism detection software, is its databases.

113. *Id.*

114. See *supra* notes 41–42 and accompanying text.

115. See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383, 1386 (6th Cir. 1996). In *Princeton*, the Sixth Circuit rejected a claim of fair use by a commercial copyshop that sold to students “coursepacks” consisting of substantial portions of copyrighted works reproduced without permission from or compensation to the copyright holder. *Id.* at 1383. The court

Although archiving serves a commercial purpose, that does not necessarily mean that it cannot be a fair use.¹¹⁶ The key inquiry may be whether the use is transformative. Transformative works do more than merely supplant the original works; rather, transformative works “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹¹⁷ Because they add something new, transformative works further the primary goal of copyright law by promoting science and the arts. Thus transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright,” and the more transformative a new work, the less significant other factors that weigh against fair use, such as commercialism, become.¹¹⁸ While courts have not uniformly defined or characterized transformative works,¹¹⁹ the most helpful framework may be that urged by a leading copyright treatise¹²⁰ and adopted by the Seventh Circuit. This framework merges the transformative analysis with a functional analysis and determines, in economic terms, whether a second use is complementary or substitutional.¹²¹

The second of the four non-exclusive statutory factors looks to “the nature of the copyrighted work.”¹²² When applying this factor, a court is guided by how closely the copied work meshes with the goals of copyright protection; the closer an original work aligns with the core goals of copyright protection, the more difficult establishing fair use becomes.¹²³ While this factor might make it easier to show fair use of works authored by students, who have other incentives to create and arguably do not need the incentives of copyright protection,¹²⁴ this factor generally weighs

noted that even though students ultimately put the coursepacks to use in their classes and toward educational purposes, the challenged use by the copyshop, “the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits—and give itself a competitive edge over other copyshops—by declining to pay the royalties requested by the holders of the copyrights,” was commercial in nature. *Id.* at 1386.

116. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994) (“[T]he commercial or nonprofit educational character of a work is ‘not conclusive,’ but rather a fact to be ‘weighed along with other[s] in fair use decisions.’” (alterations in original) (citations omitted) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984))).

117. *Id.* at 579.

118. *Id.* at 578–79.

119. *See* 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[A][1][b] (discussing varying and inconsistent interpretations of transformative works).

120. *See id.*

121. *See* *Ty, Inc. v. Publ’ns Int’l*, 292 F.3d 512, 517–18 (7th Cir. 2002). This framework is discussed more thoroughly below in the context of the fourth statutory factor—the effect on the value of or market for the copyrighted work. *See infra* notes 137–56 and accompanying text.

122. 17 U.S.C. § 107(2) (2000).

123. *See Campbell*, 510 U.S. at 586.

124. *See infra* note 210 and accompanying text.

against Turnitin because the works in question are most likely unpublished and because “[t]he scope of the fair use doctrine is considerably narrower with respect to unpublished works.”¹²⁵ Nonetheless, the rationale for giving greater protection to unpublished works—protecting first publication rights¹²⁶—is arguably unharmed by Turnitin’s use, which does not disseminate works to the public but uses them internally for plagiarism detection.¹²⁷ Still, because Turnitin’s effectiveness as a plagiarism detection tool often necessitates disseminating matching texts to teachers for comparison purposes, the use is not entirely internal and thus may offend the first publication rights.¹²⁸

The third factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹²⁹ Although Turnitin claims that no portions of archived student works, other than direct textual matches in subsequently submitted works, are “displayed, used, published, distributed or further copied without prior author consent,”¹³⁰ its policies and user guide suggest otherwise. Recall that Turnitin places the burden of the final plagiarism determination on the teacher and that the system is not designed to make this determination.¹³¹ To have any value to teachers, the system must provide a way to check potentially plagiarized materials against the originals. It is difficult to surmise how this check against originals can have any veracity if it simply shows matching textual runs without referencing any other text or the context of the complete original.¹³² This is verified by the Turnitin user guide, which provides a mechanism for viewing original papers.¹³³ Thus, because Turnitin uses the

125. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 597 (1985) (quoting 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[A][2][b]).

126. See *id.* at 551–53, 564.

127. See Turnitin, Plagiarism Prevention, *supra* note 44.

128. See *infra* notes 130–33 and accompanying text.

129. 17 U.S.C. § 107(3) (2000).

130. See Turnitin Legal Document, *supra* note 43, at 8. At a minimum, however, Turnitin itself archives and maintains entire works. See *id.*

131. See *supra* notes 50–51 and accompanying text.

132. Turnitin validates the limited textual matches that it admits to disclosing by arguing that the presence of a textual match is an unprotected fact and that where there is no other way to disclose a fact other than by copying the original, the fact and the material representing it “merge” and neither is protected by copyright. See Turnitin Legal Document, *supra* note 43, at 8. This is an odd argument because the reason that facts do not receive copyright protection is that the author does not create facts, and only the original expression, which was created by the author, merits protection. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–50 (1991). As the Supreme Court noted, facts are not protected, “because facts do not owe their origin to an act of authorship.” *Id.* at 347. In the instant scenario, however, the “fact” of a textual match lies in the particular expression by the original author. This is not the type of fact intended to be precluded from copyright protection: Were there no original author, there would be no fact, and thus the fact of a textual match owes its origin directly “to an act of authorship.” See *id.*

133. See TURNITIN, INSTRUCTOR USER GUIDE 20 (2006), available at <http://turnitin.com/static/>

entire work, this third factor appears to weigh heavily against fair use.¹³⁴ In appropriate circumstances, however, even copying an entire work can be consistent with fair use.¹³⁵ Turnitin's argument that its entire copying should not weigh against fair use may very well parallel its functional argument, described below, because showing a different functional use can lessen the effect of entire copying.¹³⁶

The fourth statutory factor looks to "the effect of the use upon the potential market for or value of the copyrighted work."¹³⁷ This factor asks courts "to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."¹³⁸ This factor requires a court to undertake the functional analysis (merged with the transformative analysis) above¹³⁹ and to examine

pdf/tii_instructor_guide.pdf. Rather than requiring original-author approval, however, this mechanism instead requires approval of the submitting instructor. *Id.* Turnitin's *Instructor User Guide* provides:

Because of our strict privacy policy, sources in the Turnitin database are handled differently from internet sources. If a source is from our database, *student papers* will show up next to the source.

If the source of matching text is a student paper that belongs to one of your classes, the paper will be displayed with the matching text highlighted.

If the paper is from another instructor's class, we cannot provide direct access to the paper. To view the paper, you must first request permission from the instructor in possession of the paper by clicking the permission request button. We will then auto-generate an e-mail detailing your request. If permission to view the paper is granted, a copy of the paper will be sent back to you via e-mail.

Id. In addition to being inappropriate and contrary to Turnitin's assertions, the procedure of relying on prior instructor approval raises the question whether teachers who authorize release of a student paper could themselves face liability for authorizing the reproduction of a copyrighted work. *See* 17 U.S.C. § 106(1) (Supp. IV 2004). For a discussion of a response certain schools have taken to this procedure, see *infra* note 208.

134. Ordinarily, copying does "not constitute a fair use if the entire work is reproduced." *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (quoting 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[A][3]).

135. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984) (holding the use of home videotape recorders for timeshifting to be a fair use and noting that because "timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge," a copying of the entire work "does not have its ordinary effect of militating against a finding of fair use").

136. *See* 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[D][1].

137. 17 U.S.C. § 107(4) (2000).

138. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (omission in original) (quoting 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[A][4]).

139. *See supra* notes 120–21 and accompanying text.

three potential harms to the value of or market for the original student works.

The first, and perhaps most cynical, market harm is stopping potential sales by students to other students or to term-paper mills for the express purpose of cheating or recycling content.¹⁴⁰ Obviously, a paper in the Turnitin database has a drastically deflated value in such a market because no one would buy a paper to recycle its content if that person knew that the paper was in the Turnitin database and thus knew that detection was far more likely. However, admitting the existence of this potential market raises two issues. First, in light of the public interest in limiting such a market and the questionable legality of such a market—selling papers for the purpose of copying is illegal in some states¹⁴¹—it remains to be seen whether courts would even acknowledge such a potential market. Before casually dismissing this market, however, consider the case of *Mitchell Bros. Film Group v. Cinema Adult Theater*.¹⁴² Declining to impose content restrictions on copyrightability, the Fifth Circuit in *Mitchell* held that obscenity did not preclude copyright protection.¹⁴³ This raises a question: If obscenity, and arguably by extension works with illegal content,¹⁴⁴ does not preclude copyright protection, can the illegality of a potential market preclude recognizing it in a fair use analysis? The answer may be no. As the *Mitchell* opinion noted, “Because the private suit of the plaintiff in a copyright infringement action furthers the congressional goal of promoting creativity, the courts should not concern themselves with the moral worth of the plaintiff.”¹⁴⁵ The first issue would warrant more discussion were it

140. See Jared Slade, *A Fair Response to Students' Intellectual Property Rights*, IBLAWG PRESENTED BY: DUKE L. & TECH. REV., Oct. 18, 2006, <http://www.law.duke.edu/journals/dltr/iblawg/?p=41> (noting this potential market but arguing that Turnitin should be protected by fair use).

141. See CAL. EDUC. CODE § 66400 (West 2007); COLO. REV. STAT. § 23-4-103 (2007); CONN. GEN. STAT. § 53-392(b) (2007); FLA. STAT. § 877.17 (2007); 110 ILL. COMP. STAT. 5/1 (2006); ME. REV. STAT. ANN. tit. 17-A, § 705 (2007); MD. CODE ANN., EDUC. § 26-201 (West 2007); MASS. GEN. LAWS ch. 271, § 50 (2007); NEV. REV. STAT. § 207.320 (2005); N.J. STAT. ANN. § 18A:2-3 (West 2007); N.Y. EDUC. LAW § 213-b (McKinney 2007); N.C. GEN. STAT. § 14-118.2 (2007); OR. REV. STAT. § 165.114 (2005); 18 PA. CONS. STAT. § 7324 (2007); TEX. PENAL CODE ANN. § 32.50 (Vernon 2007); VA. CODE ANN. § 18.2-505 (2007); WASH. REV. CODE § 28B.10.584 (2006).

142. 604 F.2d 852 (5th Cir. 1979).

143. *Id.* at 854. Although the Fifth Circuit in *Mitchell* was interpreting a prior version of the Copyright Act, the Ninth Circuit followed *Mitchell* in a case interpreting the current Copyright Act. See *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982). *Mitchell* is also cited by a leading copyright treatise as stating the prevailing law. See 1 NIMMER ON COPYRIGHT, *supra* note 66, § 2.17. Nonetheless, one court expressed skepticism about the *Mitchell* decision. See *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175–76 (S.D.N.Y. 1998).

144. See 1 NIMMER ON COPYRIGHT, *supra* note 66, § 2.17.

145. *Mitchell*, 604 F.2d at 862.

not for the decisive second issue raised by this potential market. The second issue is functional: The type of harm caused to this market is not the type of harm copyright law seeks to prevent. This market is not harmed by the use of papers in a plagiarism detection database replacing or substituting for papers sold to cheat; rather, like a scathing review, which also undeniably harms the work or product it concerns, the harm to the original flows from a complementary use.¹⁴⁶

The second potential market harmed is that of student licensing to Turnitin itself for the exact purpose for which Turnitin currently uses student papers. This circular reasoning makes for tricky analysis. Courts cannot automatically follow such logic, or else the fourth statutory factor would always favor the plaintiffs.¹⁴⁷ Instead, courts should look to whether such licensing falls within “traditional, reasonable, or likely to be developed markets.”¹⁴⁸ There is no traditional market for licensing papers to plagiarism detection services, but the cut-and-paste plagiarism problem is also a relatively new phenomenon.¹⁴⁹ As for reasonable or likely to be developed markets, it is difficult to determine whether such a market could or would exist. The fourth statutory factor contemplates widespread

146. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994) (noting that courts must distinguish between legitimate use, such as a scathing review, which merely suppresses demand, and copyright infringement, which usurps demand).

147. See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 n.17 (2d Cir. 1994).

148. *Id.* at 930. In *American Geophysical Union*, the Second Circuit noted, “It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.” *Id.* at 929 (citation omitted). The question arose whether licensing individual articles within a scientific journal was for “traditional, reasonable, or likely to be developed markets.” *Id.* at 914, 930. The Second Circuit found that, although the plaintiff journal publishers, who were assigned copyrights in the individual articles, failed to establish a “conventional market for the direct sale and distribution of individual articles,” the fourth statutory factor nonetheless weighed against fair use because, through a clearinghouse, they created “a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying.” *Id.* at 930. This holding came despite recognitions by the Second Circuit that “writers of journal articles do not directly seek to capture the potential financial rewards that stem from their copyrights by personally marketing copies of their writings” and that “though there is a traditional market for, and hence a clearly defined value of, *journal issues and volumes*, . . . there is neither a traditional market for, nor a clearly defined value of, *individual journal articles*.” *Id.* at 927. While the court noted the narrowness of its holding—“We do not decide how the fair use balance would be resolved if a photocopying license for [individual] articles were not currently available”—it also noted that “[t]he vice of circular reasoning arises only if the availability of payment is conclusive against fair use.” *Id.* at 931. Thus, although student authors do not necessarily expect to market their papers for use as plagiarism detection aids, nor do they necessarily expect to profit from such a use when they create the papers, this lack of expectations should not preclude finding against fair use if such a market is reasonable or likely to develop.

149. See *supra* notes 17–18 and accompanying text.

existence of the defendant's conduct,¹⁵⁰ but in the instant analysis, no artificial exaggeration is necessary: Turnitin's use is so widespread that, relative to its competitors, it already has a significant advantage, if not a stranglehold, on the student-paper market.¹⁵¹

The same problem applies to the closely related third potential market—licensing to Turnitin's plagiarism detection competitors. While no individual student could create this market, it is possible that in the aggregate, enough student papers could be licensed to create such a market, at least if all companies were starting with a blank slate. But with Turnitin's millions-plus paper head start in its ever-growing database, the entry barrier is simply too high for a competitor to offer licensing fees for the papers that Turnitin appropriates for free. As John Barrie stated, "We'll become the next generation's spell checker. . . . There will be no room for anybody else, not even a Microsoft, to provide a similar type of service because we will have the database."¹⁵² In sum, the lack of licensing of papers for use in plagiarism detection may be more a product of Turnitin's longstanding conduct than of the infeasibility of such a market.

150. See *supra* note 138 and accompanying text.

151. See *infra* note 152; *supra* notes 112–13 and accompanying text.

152. Kate Masur, *Papers, Profits, and Pedagogy: Plagiarism in the Age of the Internet*, PERSP., May 2001 (omission in original), available at <http://www.historians.org/perspectives/issues/2001/0105/0105new3.cfm>. If nothing else, one must certainly question the logic of provoking Microsoft by pointing out the competitive advantages gained by techniques that are at the very least of questionable copyright legality. Considering Microsoft's recent blistering attack on Google's copyright policies, it would appear that waking the sleeping Microsoft giant would not be Turnitin's most cost-effective legal strategy. See *Microsoft Attacks Google on Copyright*, N.Y. TIMES, Mar. 6, 2007, at C5. Indeed, one complaint by Microsoft's counsel, "[c]ompanies that create no content of their own, and make money solely on the backs of other people's content, are raking in billions," *id.* (quoting Thomas Rubin, associate general counsel of Microsoft), seems just as pertinent to Turnitin as it does to Google. In fact, in light of parallels between Turnitin and certain Google practices—Google currently faces litigation related to its attempt to make books searchable online by adding to its database digital copies of copyrighted books from libraries—the Turnitin analysis may ultimately be at least partially affected by how the Google litigation shapes copyright law. See *id.*; see also John Gapper, *Microsoft to Attack Google's 'Cavalier' Attitude*, FIN. TIMES (London), Mar. 6, 2007, at 1. For a more detailed analysis of Google's book-search issues, see Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 123–51 (2006) (arguing that Google's actions should be considered a fair use). As with Turnitin, Google presents a challenge because its overall purpose is praiseworthy, but its mechanisms and policies raise questions. Thus the comment by one lawyer involved in a suit against Google—"One of the challenges is 'This is Google. What would the world be without Google?' We don't want the world without Google. We want the world without Google infringing our copyrights"—is also applicable to Turnitin: We don't want a world without plagiarism detection services, we simply want a world where those services don't infringe copyrights. See Declan McCullagh, *Copyright Tussles for Google*, CNET NEWS.COM, Aug. 4, 2006, http://news.com.com/2100-1025_3-6102153.html.

The final issue, which has already been addressed briefly, is that of function:

Suppose *A* is the copyright owner of a published novel. *B* produces a motion picture copied from and substantially similar to *A*'s novel. . . . *B*'s motion picture has not prejudiced the sale of *A*'s work in the book medium, but it has certainly prejudiced the sale of *A*'s work in the motion picture medium. If the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the adaptation right), the use is not fair, even if the rights thus affected have not as yet been exercised by the plaintiff.

But, if regardless of medium, the defendant's work, although containing substantially similar material, performs a different function than that of the plaintiff's, the defense of fair use may be invoked.¹⁵³

In this regard, Turnitin argues that because the paper is not being used for its original purpose, as a class assignment or expression of ideas, but is being used for a new purpose of plagiarism detection, the use should be considered fair.¹⁵⁴ Although this is certainly valid to some extent, there are also shortcomings with this argument. Turnitin's work is no "work" at all. An exact copy of an existing work, Turnitin's "new work" gives no creative benefit to the public. Also, unlike other contexts, there is no additional factor to militate against viewing this function as a not-yet-exercised right.¹⁵⁵ Thus, the test reverts to the analysis above, and a court must determine whether the licensing of papers for plagiarism detection is either a primary or derivative market¹⁵⁶ of the papers themselves.

In a final reconciliation of the statutory factors, the brief use of the student works in the initial stages of document submission and originality evaluation both primarily serve educational purposes. At the archiving stage, however, it is hard to escape the fact that Turnitin is copying

153. 4 NIMMER ON COPYRIGHT, *supra* note 66, § 13.05[B][1] (footnotes omitted).

154. See Memorandum from Paul Wedlake, Dir. of Sales, iParadigms, LLC/Turnitin.com, to Duke Info. Tech. Advisory Council, <http://www.oit.duke.edu/itac/minutes/2001/11101minutes.html> (last visited Nov. 15, 2007) [hereinafter Turnitin Legal Memo]. The same memorandum, which contains Turnitin's standard response to copyright inquiries, is also available elsewhere. See E-mail from Paul Wedlake, Dir. of Sales, iParadigms, LLC/Turnitin.com, to inquirer (Oct. 25, 2001), <http://www.bedfordstmartins.com/technotes/workshops/fullcopyright.htm>.

155. For example, because an author is unlikely to create a parody of the author's own work, the market for parody of an original work is not considered a potential licensing market of the original work. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

156. "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." *Id.*

unpublished works in their entirety and is using those copies, without compensation, to derive a significant and profitable commercial benefit. If there is a justification for finding Turnitin's archiving use to be a fair use, it does not seem to lie in the statutory factors. Rather, the justification must lie in some embedded feature of plagiarism detection that evades articulation within the statutory framework but nonetheless comports with the goals of copyright law and warrants deferential fair use treatment.

3. Plagiarism vs. Copyright Infringement: Does Plagiarism Prevention Merit Special Treatment in a Fair Use Analysis?

There is considerable overlap between plagiarism and copyright infringement. But, both to fully develop the fair use arguments in this Note and to understand the broader implications that the ultimate resolution of these issues could have on the future of copyright law, it is necessary to compare and distinguish the two concepts. Plagiarism is a breach of ethics and morality, while copyright infringement is a legal violation.¹⁵⁷ While unattributed copying of a copyrighted work can be both plagiarism and copyright infringement, it is also entirely possible to run afoul of either doctrine without offending the other.¹⁵⁸ For example, someone who copies an entire book but carefully attributes this copying and properly notates direct quotations would not be a plagiarist but might be a copyright infringer.¹⁵⁹ On the other hand, someone who borrows without attribution only a small fraction of another's work might evade a copyright infringement suit by claiming fair use but would still be a plagiarist.¹⁶⁰

157. See *Kindergartners Count, Inc. v. Demoulin*, 249 F. Supp. 2d 1233, 1251–52 (D. Kan. 2003). Quoting a law dictionary, the *Kindergartners* court noted:

Plagiarism, which many people commonly think has to do with copyright, is not in fact a legal doctrine. True plagiarism is an ethical, not a legal offense and is enforceable by academic authorities, not courts. Plagiarism occurs when someone—a hurried student, a neglectful professor, an unscrupulous writer—falsely claims someone else's words, whether copyrighted or not, as his own. Of course, if the plagiarized work is protected by copyright, the unauthorized reproduction is also a copyright infringement.

Id. (quoting BLACK'S LAW DICTIONARY 1170 (7th ed. 1999)); see also POSNER, *supra* note 6, at 38, 48 (noting that plagiarism is an ethical violation that is better left to “informal, private sanctions” and that “[p]lagiarism that infringes copyright adds a clear legal violation to an ethical violation and by invading a property right does more harm to the author of the copied work”).

158. See POSNER, *supra* note 6, at 12. Even when the two concepts overlap, they remain “different wrongs in the sense of injuring different interests of the victims.” *Id.* at 46.

159. See *id.* at 17.

160. See Lisa Maruca, *Plagiarism and Copyright: Connections in the Turnitin Culture*, SWEETLAND WRITING CENTER NEWSL., Winter 2006, at 8, 8, available at http://141.211.177.75/UofM/Content/SWC/document/SWC_W06.pdf. On this point, however,

Additionally, it is possible to plagiarize something that does not receive copyright protection. For example, a person who, without attribution, copies extensively from a work that is in the public domain may be a plagiarist but would not be a copyright infringer.¹⁶¹ Thus, plagiarism and copyright infringement are not legal equivalents—finding no copyright infringement does not, as a matter of law, mean that no plagiarism occurred.¹⁶² In contrast to plagiarism, copyright applies to expression, not ideas.¹⁶³ Judge Posner contends that, at least relative to commercial writing, plagiarism is more akin to a trademark infringement—“passing off one’s inferior brand as a well-known superior brand”—than a copyright infringement.¹⁶⁴ Perhaps the most helpful way to differentiate between the concepts is to view plagiarism as a defect in process and copyright infringement as a defect in result.¹⁶⁵

Judge Posner disagrees, noting that “[t]he plagiarist does not play fair” and arguing that there can be no fair use “when the copier is passing off the copied passage as his own.” See POSNER, *supra* note 6, at 16–17. Judge Posner’s argument is well taken, and the conduct of the person claiming fair use is certainly a relevant factor. See *Marcus v. Rowley*, 695 F.2d 1171, 1175–76, 1176 n.8 (9th Cir. 1983) (finding against fair use where the defendant copied nearly verbatim with no attempt to attribute). But, like most fair use factors, conduct alone is not dispositive. See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (finding a fair use despite recognizing the defendant’s misconduct). Whatever the ultimate resolution of the issue, Judge Posner acknowledges that it is possible to plagiarize without running afoul of copyright laws. See *infra* note 161 and accompanying text.

161. See POSNER, *supra* note 6, at 46–47, 73. The “creative commons” created by the public domain should not be discounted; it is an invaluable tool and “a resource that creators throughout history have drawn upon freely.” Lawrence Lessig, Professor of Law, Stanford Law Sch., Dunwoody Distinguished Lecture in Law: The Creative Commons (Apr. 26, 2002), in 55 FLA. L. REV. 763, 764 (2003).

162. *Kindergartners*, 249 F. Supp. at 1252. Conversely (and more pertinent to the instant analysis), a finding of plagiarism does not mean, as a matter of law, that a copyright infringement has occurred. See *supra* note 160 and accompanying text.

163. See *Kindergartners*, 249 F. Supp. at 1251.

164. See POSNER, *supra* note 6, at 69. “Trademark infringement in the market for ordinary goods corresponds to plagiarism in the market for expressive goods. Trademarks and author ‘branding’ (by naming) coevolved as ways of protecting sellers and consumers as markets expanded and became impersonal.” *Id.* The analogy still holds true in the academic context, where passing off another’s work as one’s own still unfairly enhances one “brand,” only in this scenario the deception is of the teacher not the consumer, and the competition is for grades not market share. See *id.* at 69, 106–07. That said, Judge Posner is more critical of student plagiarism, which he views as the only type of plagiarism that potentially presents “a social problem grave enough to warrant draconian solutions.” *Id.* at 38. To that end, Judge Posner, albeit without discussion of the copyright issues examined in this Note, supports the use of Turnitin as a plagiarism detection tool, calling schools that do not use it naïve. See *id.* at 82. Regardless whether Turnitin is the proper solution, it is, even if not naïve, certainly disingenuous for a school simply to rest on its honor code, which is less effective if not accompanied by some proactive procedures. See Moohr, *supra* note 22, at 975.

165. See Stearns, *supra* note 25, at 9. “Copyright law’s indifference to the issue of attribution, despite attribution’s central place in the definition of plagiarism, demonstrates . . . the law’s focus

With this distinction in mind, it is necessary to revisit the plagiarism problem. As presented in Part II, the plagiarism problem focused only on the perspective of the academic world. In some other regards, however, plagiarism can benefit society. Some of the greatest and most recognized literary works of all time would be considered plagiarism if judged by today's standards.¹⁶⁶

Remember that plagiarism is a defect in process, not result,¹⁶⁷ and the reality is that plagiarism may often lead to a remarkable result, significantly improving the original work along the way.¹⁶⁸ Although this

on result, not process. . . . [P]lagiarists shortchange both themselves and the original authors. In . . . copyright law, the only harm that counts is the resulting harm to the infringed work" *Id.* at 11; accord POSNER, *supra* note 6, at 91–92.

166. See POSNER, *supra* note 6, at 51 (“[W]as not Shakespeare a plagiarist by modern standards? Thousands of lines in his plays are verbatim copies or close paraphrases from various sources, along with titles and plot details, all without acknowledgement.”). Writers such as Homer, Plato, Socrates, and Aristotle all borrowed heavily from previous works, sometimes in the form of whole pages without attribution. See Hansen, *supra* note 15, at 782. Of course, this could also be a critique of copyright law because today it too would likely label these writers infringers, but at least copyright law provides corresponding creative benefits. See POSNER, *supra* note 6, at 73. After discussing one such example in Shakespeare’s work, Judge Posner comments, “If this is plagiarism, we need more plagiarism. The standard reason given for why it is not plagiarism is that in Shakespeare’s time, unlike ours, creativity was understood to be improvement rather than originality.” *Id.* at 53–54. Still, many other classic works, some in literature and some not, involve copying but should not be considered plagiarism. See *id.* at 54–55. For example, when Bob Dylan was discovered to have possibly lifted certain song lyrics without attribution, rather than being viewed as just “one more plagiarist,” Dylan was lauded for “doing what he has always done: writing songs that are information collages.” Jon Pareles, *Critic’s Notebook; Plagiarism in Dylan, Or a Cultural Collage?*, N.Y. TIMES, July 12, 2003, at B7. After all, “[i]deas aren’t meant to be carved in stone and left inviolate; they’re meant to stimulate the next idea and the next.” *Id.* In fact, not only did the Dylan revelation boost sales of the book from which the verses were purportedly lifted, but its author was also “ecstatic to have inspired such a well-known songwriter.” *Id.* For a discussion of many other such works in various contexts, all involving some degree of copying but none involving plagiarism, see POSNER, *supra* note 6, at 54–61. As explained, for example, in a self-deprecating episode of *The Simpsons*: “Animation is built on plagiarism. If it weren’t for someone plagiarizing *The Honeymooners*, we wouldn’t have *The Flintstones*. If someone hadn’t ripped off *Sergeant Bilko*, there’d be no *Top Cat*. Huckleberry Hound, Chief Wiggum, Yogi Bear? Ha! Andy Griffith, Edward G. Robinson, Art Carney.” *The Simpsons: The Day the Violence Died* (Fox television broadcast Mar. 17, 1996). Ultimately, the problem may be that the modern meaning of plagiarism is improperly influenced by the “absurd idea that ‘copying’ is inherently bad.” See POSNER, *supra* note 6, at 74.

167. See *supra* note 165 and accompanying text.

168. “To the extent that an imitator or copier produces something better than the original . . . or interestingly different from it . . . , the imitation is producing value.” POSNER, *supra* note 6, at 60. Furthermore, if “the person whose work is copied is long dead and the work out of copyright, the copying does not harm him.” *Id.* at 61; see also *id.* at 70 (discussing plagiarism accompanied by “changes that improved on” the original such that it “might have been deemed creative imitation” in the seventeenth century but nonetheless “is unequivocally plagiarism today”). Not to overstate the point, Judge Posner also recognizes that “[c]reative imitation cannot have as

Note accepts that in a Machiavellian sense plagiarism that improves the original work ought to be encouraged, from an ethical standpoint this Note does not condone plagiarism. The point is simply that plagiarism can be cured by fastidious attribution and proper quotation, neither of which concerns the quality or content of the plagiarizing work.

With a grasp of the differences both in objectives and enforcement of plagiarism and copyright, it is now possible to examine the most intriguing fair use argument offered by Turnitin—an argument that could alter the parameters of fair use and have implications that reach beyond the Turnitin litigation. Consider this argument taken from Turnitin’s standard response to legal inquiries:

We believe that use of the student’s paper would be deemed fair because rather than constituting infringement, the use prevents infringement of that paper from occurring. The student’s paper is only being used to catch someone who might have stolen from it. That’s the primary purpose of the use and so it would likely be accorded even more deference than other recognized purposes of fair use such as education, commentary and research because its promotion of the underlying goal of the copyright statute, i.e., to promote creativity, is higher.¹⁶⁹

There are several problems with this argument. First, it commingles copyright infringement with plagiarism. Turnitin is not a copyright infringement detection tool; it is a plagiarism detection tool. Second, the purpose of Turnitin is to detect any plagiarism in submitted works,¹⁷⁰ not to protect archived works from being plagiarized—iParadigms has a

capacious a scope or as positive a connotation in a modern commercial society of commodified intellectual works as it did in Shakespeare’s time.” *Id.* at 71. Yet even this plea to economics seems more appropriately tailored to copyright, or at least to the overlapping area of the two concepts, than to plagiarism unaccompanied by copyright infringement. Because changing attitudes toward plagiarism trace their roots to the advent of the printing press and the correlative viewing of writing as a craft and works as intellectual property, the distinction between plagiarism that also infringes a copyright and plagiarism that infringes no copyright remains relevant. *See Hansen, supra* note 15, at 783–86. While student plagiarism arguably poses problems more serious than other forms of plagiarism, *see supra* note 164, it would be shortsighted to suggest that student plagiarism is so drastically different that it cannot likewise improve prior works in the process. Indeed, Turnitin’s own data suggest that less than one percent of students plagiarize by turning in papers entirely copied from another source; rather, the vast majority of student plagiarism draws from multiple sources. *See Turnitin, The Broadest Search, supra* note 46.

169. Turnitin Legal Memo, *supra* note 154. The company’s Complaint for Declaratory Relief offered substantially the same argument, albeit slightly less articulately. *See Complaint for Declaratory Relief, supra* note 14, at 4–5.

170. *See Turnitin, Plagiarism Prevention, supra* note 44.

separate business for that type of protective service, iThenticate.¹⁷¹ Consider what happens—or more importantly what does not happen—when Turnitin finds a match: The match is highlighted in an originality report, which is sent to the instructor, but at no point is the original author contacted and warned about potential infringement.¹⁷² Perhaps the second author does not get a failing grade and is allowed to resubmit a revised paper. This revised paper can fix any plagiarism—but not copyright—issues with more careful attribution,¹⁷³ yet the copyright owner of the original work is never notified. Thus, while there may be some secondary benefits of deterring plagiarism, and in turn protecting student copyrights, it is a misnomer to state that the *primary* purpose of Turnitin is student-author copyright protection. But even more problematic (and important) than this faulty logic is the faulty premise that underlies it—by protecting copyrights from infringement, plagiarism prevention necessarily promotes the goals of copyright law.

Even assuming *arguendo* that Turnitin is correct when it asserts that it serves primarily as a mechanism to prevent copyright infringement, the argument still raises significant questions. Notwithstanding the statutory factors previously examined—and recognizing that those statutory factors are not exclusive—does plagiarism detection, if it serves primarily to “protect” copyrights from infringement, promote the goals of copyright law such that it warrants a special expansion of the notion of fair use? In other words, should plagiarism detection and prevention therefore “be accorded even more deference than other recognized purposes of fair use such as education, commentary and research”?¹⁷⁴ Turnitin’s premise answers these questions affirmatively and essentially seeks acknowledgment of a special expansion of fair use to protect plagiarism prevention.¹⁷⁵ As discussed below, however, for three distinct reasons, the appropriate answer to these questions is no. Plagiarism prevention should not receive expanded recognition as a fair use, because it (1) enforces rights contrary to the wishes of the copyright owner,¹⁷⁶ (2) restricts subsequent use by second authors even of limited recycled material, which might nonetheless be acceptable for copyright purposes,¹⁷⁷ and (3) encourages self-censorship by original authors.¹⁷⁸

First, although copyright law grants a monopoly to the author of an original work, it does so with reluctance: It is only for consideration of,

171. See *supra* note 36 and accompanying text.

172. See *supra* Part III.B.

173. See POSNER, *supra* note 6, at 17, 91–92.

174. Turnitin Legal Memo, *supra* note 154.

175. See *id.*

176. See *infra* notes 179–93 and accompanying text.

177. See *infra* notes 194–96 and accompanying text.

178. See *infra* notes 197–99 and accompanying text.

and as incitement for, the creation of original works (which benefit the public) that the law is willing to grant this monopoly.¹⁷⁹ Even then, the reluctance with which the monopoly is granted mandates that it be granted only for a limited period.¹⁸⁰ Ideally the law would not need to offer incentives to create, but in that vein ideality is synonymous with naïvety. Nonetheless, the best scenario from the copyright perspective would be for any original author immediately to renounce all copyright exclusivities and to donate all potential uses to the public domain. From the perspective of copyright law, enforcing the exclusive rights of the author is not a lofty ideal but merely a tolerated price of the bargain.¹⁸¹ The law does not champion these exclusive rights;¹⁸² instead, it trades them in return for creativity.¹⁸³ In essence, the public pays its end of the bargain every time an author enforces a copyright. Yet Turnitin purports to enforce the rights of another, the student, who is not a willing party in the enforcement. This argument offers fair use, contrary to the wishes of the author, as a method of increasing the strength of a copyright to the detriment of the creation of additional works.¹⁸⁴ At this point, the creative work has already been

179. See *supra* notes 54–55 and accompanying text.

180. See U.S. CONST. art. I, § 8, cl. 8 (providing that Congress shall promote copyright objectives “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”).

181. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).

182. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

183. See Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 HOFSTRA L. REV. 853, 855 (2004) (“The end is to benefit the public. The means is to permit creative people to internalize the benefits of their efforts by limiting free riding.”).

184. The net result of this fair use concept may well be to prevent the creation of new works that copyright law would be prepared to accept. Consider a scenario where student *B* copies, without attribution, a small portion of student *A*'s work. Although this is most certainly plagiarism, remembering the discussion in note 160 *supra*, assume that the copying is used in such a manner that it might nonetheless be considered a fair use. Now assume that the student *B* is flagged, the paper is tossed aside as plagiarism, and student *B* is expelled. In this scenario the new paper would have been acceptable and in fact encouraged by copyright law, but due to the more stringent standards of plagiarism, the new paper has been lost forever.

Likewise, there can be plagiarism without copyright infringement “when noncopyrightable features of a work . . . are copied without acknowledgement, so that readers of the new work are invited to think that those features are the invention or discovery of the plagiarist.” See POSNER, *supra* note 6, at 14. Assume that student *A*, in response to topic *X*, submits a paper that quotes historical works by Shakespeare, which are in the public domain. Student *B* reads student *A*'s paper and, also writing in response to topic *X*, and without ever reading the Shakespearian work itself, copies the same passages from Shakespeare as student *A*, without any attribution. Student *B* has

authored. Additional incentives to create are unnecessary.¹⁸⁵ Although the pre-existing incentives must be enforced to honor the bargain between the author and the law and to show future authors that the promise of exclusivity is not an empty one, enforcing the exclusive rights serves no purpose if it is not done by or on behalf of the copyright holder.

Furthermore, the goals of copyright law are best served if the exclusive rights afforded to the copyright holder are ignored.¹⁸⁶ To understand the backward reasoning of argument on this point, consider the logic behind allowing parody as a fair use.¹⁸⁷ In the case of parody, the fair use argument weakens the copyright by allowing another to use portions of the original work for the purpose of creating a new work with new expressions.¹⁸⁸ Thus, while the traditional fair use application serves to

arguably plagiarized student *A*'s work, *see id.* at 15–16, and would certainly be flagged by Turnitin. Yet the idea of applying Shakespeare to topic *X*, like all ideas, is not copyrightable. *See id.* at 12–13. The copyrightable aspect is the particular form of expressing that idea. *See id.* at 13. But in the present scenario, that form consists of a quote that is already in the public domain. Although Turnitin's use of the entire paper could violate the other copyrightable portions of student *A*'s paper, student *B*, by plagiarizing only the non-copyrightable quote already in the public domain, is again guilty of plagiarism but not copyright infringement. Thus, if student *B*'s work is discarded as plagiarism, the public is deprived of a work that copyright law would have accepted.

185. Consider Professor Harrison's critique of an act that retroactively extended the duration of copyright protection by twenty years: "In the [case of an author who has yet to create a work], the argument can be made that the twenty-year extension increases the income the author earns for works yet to be created and, therefore, provides an incentive to produce more," but "[i]n the case of the work that is already in existence, the impact is strictly distributive and whatever effort the author makes to protect the income associated with the twenty-year windfall cannot be seen as beneficial to the public generally." Harrison, *supra* note 183, at 861–62; *see also* Jeffrey L. Harrison, Dunwoody Commentary, *Creativity or Commons: A Comment on Professor Lessig*, 55 FLA. L. REV. 795, 803–05 (2003) (arguing that a retroactive extension neither improves an author's incentives nor enhances the public benefits).

186. Of course, by complaining about Turnitin, the student authors are obviously not ignoring these exclusive rights. But in this regard, they are enforcing their rights against only another who seeks to use the exact same work as opposed to enforcing the rights against one who seeks to take that work and, even if plagiarizing it in the process, potentially build upon it.

187. Even parody is not presumptively fair, and it too must work its way through a case-by-case analysis for a fair use determination. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

188. "The 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law. . . . Whatever aesthetic appeal [an original work of authorship with elements of parody] may have results from the creativity that the copyright law is designed to promote." *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242–43 (2d Cir. 1983). Thus, giving the author of the work subject to the parody "further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness." *Id.* Parody thus lends itself to fair use because of its transformative value: "Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one." *Campbell*, 510 U.S. at 579.

allow more works (in turn benefiting the public) by frustrating enforcement attempts by an overly enthusiastic original author, Turnitin's argument of fair use, in contrast, would disallow more works (in turn harming the public) by encouraging enforcement by an indifferent original author.¹⁸⁹ Thus, while parody results in a new work, which benefits the public and achieves the goals of copyright law by promoting "the Progress of Science and useful Arts,"¹⁹⁰ the benefits of Turnitin's proffered use are primarily internalized;¹⁹¹ any ancillary benefits to the public relate to plagiarism prevention, which is impertinent to copyright concerns.¹⁹² These ancillary benefits to the public do not justify expanding fair use either. Plagiarism may be a pressing social dilemma, and archiving student papers for plagiarism prevention may promote a very legitimate public benefit. But because that benefit is impertinent to the goals of copyright law, its promotion does not justify expanding fair use.¹⁹³

189. It is worth noting the oddity of Turnitin using a student's work as it wishes and trying to validate its actions by arguing that the use is in the student's best interest. Perhaps the student author is not indifferent at all. Perhaps the student has determined that the "free" protection provided by Turnitin against other potential infringers is not worth the opportunity cost of the forgone potential for exclusive licensing to Turnitin, *see supra* note 148 and accompanying text (discussing the circular logic of claiming the defendant's use as a potential market), or even to other plagiarism detection services, which might not provide the same level of protection against future infringement but could provide an immediate market for the work. Perhaps instead, as discussed *supra* note 140 and accompanying text, the law would be willing to recognize a sale to other students or term-paper mills for the purpose of cheating as a potential market. For the original student who pursues those purposes and is acutely aware of the paper's increased value if it is not in Turnitin's database, this market may also present a more valuable option than the "free" protection passed over. In these scenarios, Turnitin's use ceases to be enforcement on behalf of an indifferent party. Instead, it deprives the student of the value of the exclusive rights by denying the student the autonomy of determining the most valuable use of those rights. "It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights," *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 n.28 (1984), so it is certainly not the role of the secondary user to do just that by compelling a particular use and claiming that the offsetting benefit to the copyright holder justifies finding an otherwise infringing use to be fair.

190. U.S. CONST. art. I, § 8, cl. 8.

191. *See supra* notes 109–15 and accompanying text (discussing how archiving primarily serves Turnitin's economic goals).

192. Although plagiarism prevention certainly benefits the public, its benefits are purely ethical and academic and are distinguishable from the goals of copyright. *See supra* notes 157–64 and accompanying text. The student work may serve a public purpose if used for plagiarism detection, but "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980)).

193. "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public" because to "propose that fair use be imposed whenever the social value [of dissemination] . . . outweighs any detriment to the artist, would be

The second flaw in Turnitin's premise is much more basic. Because of the innate differences between those works that lie within the boundaries of plagiarism and those works that lie within the boundaries of copyright infringement,¹⁹⁴ it is inappropriate to seek the former in an effort to collect the latter. In other words, because it is possible to plagiarize without offending copyright law,¹⁹⁵ applying the rules of plagiarism to protect copyrights from infringement will sweep too broad. Thus, a mechanism that collects copyright-infringing works by looking for plagiarism potentially sweeps within its ambit some works that are properly identified as plagiarism but that nonetheless infringe no copyrights. Thus, this mechanism inhibits works that, from the perspective of copyright law, ought to be allowed.¹⁹⁶

to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.” *Harper & Row*, 471 U.S. at 559 (alterations in original) (internal quotation marks omitted) (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)). Despite facing potentially compelling social reasons, various courts have nonetheless declined to expand the doctrine of fair use to create a public-figure exception, *see id.* at 560; to create an exception based on newsworthiness, *see* *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981); *Roy Exp. Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1143–44, 1148 (S.D.N.Y. 1980); or to create an exception for religious use, *see* *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115, 1121 (9th Cir. 2000).

194. *See supra* notes 157–65 and accompanying text.

195. *See supra* notes 158, 160–62 and accompanying text; *see also supra* note 184.

196. *See supra* notes 158, 160–62 and accompanying text; *see also supra* note 184. Remembering that promoting creativity lies at the heart of copyright law, consider the thought-provoking piece by Malcolm Gladwell (his own previous work victimized by plagiarism), which, hardly with an eye to the law, aptly zeroed in on the principal divergence between plagiarism and copyright: “And this is the . . . problem with plagiarism. It is not merely extremist. It has also become disconnected from the broader question of what does and does not inhibit creativity. . . . The ethics of plagiarism have turned into the narcissism of small differences . . .” Malcolm Gladwell, *Something Borrowed; Should a Charge of Plagiarism Ruin Your Life?*, NEW YORKER, Nov. 22, 2004, at 40, 47, available at http://www.newyorker.com/archive/2004/11/22/041122fa_fact. Of the portion of his work that was plagiarized, Gladwell wrote, “It is difficult to have pride of authorship in a sentence like that. My guess is that it’s a reworked version of something I read in a textbook.” *Id.* at 47. Of the new work created with his words: “I found it breathtaking. . . . [I]nstead of feeling that my words had been taken from me, I felt that they had become part of some grander cause.” *Id.* at 42. In a reflection that at once seems both to parallel fair use’s search for a transformative value in non-infringing uses and to underscore the differences between plagiarism and copyright, he wrote:

Borrowing crosses the line when it is used for a derivative work. It’s one thing if you’re writing a history of the Kennedys, like Doris Kearns Goodwin, and borrow, without attribution, from another history of the Kennedys. But [the person who copied my work wasn’t writing on the same subject]. She was writing a play about something entirely new And she used my descriptions . . . as a building block in making that . . . plausible. Isn’t that the way creativity is supposed to work? Old

The third flaw in Turnitin's premise, at least as it relates to Turnitin's specific use, concerns the restricting effect that this use has on original authors. Faced with coerced acquiescence to a use of their work that many students oppose on both moral and legal grounds, the prospect of unnecessary self-censorship among students becomes a very real possibility.¹⁹⁷ Indeed, John Barrie has been quoted as telling instructors to respond to students who express concern over misappropriation of their intellectual property rights by explaining, "[W]rite as much creative stuff as you want—just don't do it at this institution."¹⁹⁸ Such an attitude hardly furthers "the underlying goal of the copyright statute, i.e., to promote creativity."¹⁹⁹

Thus, contrary to Turnitin's contention, archiving for the purpose of plagiarism detection is antithetical to the goals of copyright law.²⁰⁰ First,

words in the service of a new idea aren't the problem. What inhibits creativity is
new words in the service of an old idea.

Id. at 47.

197. With each additional level of disclosure this becomes more of a concern. Perhaps a student with a brilliant idea would have no qualms writing about it if the student knew that the only person to read the paper would be the student's own teacher, whom the student trusted. But knowing that any faceless and unknown teacher down the line who, even coincidentally, gets a paper with a textual match may also be able to read this idea, the student may opt not to write about it. Before casually discounting the creative ability of students, consider that Google, now one of the most profitable and successful ideas of all time, began in Stanford University dorm rooms. *See* Russ L. Juskalian, *Google's Evolution Makes a Great Story; Meticulous Research Brings Tale to Life*, USA TODAY, Sept. 12, 2005, at B6; *see also* Essayfraud.org, "Guilty Until Proven Innocent": Does Turnitin.com Profit from Students' Actual Work?, Oct. 20, 2006, http://www.essayfraud.org/turnitin_john_barrie.html#8 ("[M]ost great inventions spring from the minds of our youth."); *cf.* Essayfraud.org, "Guilty Until Proven Innocent": Proof that Turnitin Violates "Fair Use" by Destroying Marketability, Scenario #4, Oct. 20, 2006, http://www.essayfraud.org/turnitin_john_barrie.html#7 (posing a hypothetical in which the idea for Google is stolen through the use of Turnitin).

198. Andrea L. Foster, *Plagiarism-Detection Tool Creates Legal Quandary*, CHRON. HIGHER EDUC. (Wash., D.C.), May 17, 2002, at A37 (quoting John Barrie, Turnitin's founder), *available at* <http://chronicle.com/free/v48/i36/36a03701.htm>.

199. Turnitin Legal Memo, *supra* note 154.

200. In addition to the problems already posed, Turnitin's specific policy raises another issue. Even assuming that plagiarism prevention should receive deferential fair use treatment or be justified on general public-policy grounds (an assumption this Note strenuously discourages), Turnitin's use still raises a question of proportionality. Turnitin receives thousands of student papers each day, *see supra* note 38, and the vast majority of these papers will presumably never be plagiarized, *see infra* note 235 and accompanying text (discussing Turnitin's primary value being as a deterrent). If the rights of student authors are diminished for the corresponding benefit Turnitin's use will have on certain student authors or the general public, the use should be somewhat more narrowly tailored to serve its purpose so as not to also diminish the rights in the thousands of student papers that are never plagiarized. To properly evaluate whether Turnitin's use is justifiable, we need more data concerning how often student papers are plagiarized. The greater the number of archived student papers that never legitimately flag other papers (archived student

archiving enforces rights contrary to the wishes of the copyright owner.²⁰¹ Second, it restricts subsequent use by second authors even of limited recycled material,²⁰² which might nonetheless be acceptable for copyright purposes. Third, archiving encourages self-censorship by original authors.²⁰³ Therefore, plagiarism prevention should not receive expanded fair use protection.

D. Other Considerations

1. Consent

Turnitin strongly encourages its users to have students send their papers directly to Turnitin, attempting to buttress legal arguments with student consent.²⁰⁴ While alleviating some of the legal problems, this policy has also been criticized,²⁰⁵ and questions remain whether students following such directions actually consent to Turnitin's use of their papers. For example, the power dynamic between student and teacher casts doubt on the voluntariness of any "consent" given by the former at the latter's instruction.²⁰⁶ Furthermore, even when students recognize their rights, they

papers that flag subsequent papers as false positives only compound the problem) and that lead to detection of actual plagiarism, the less persuasive Turnitin's arguments become.

201. See *supra* notes 179–93 and accompanying text.

202. See *supra* notes 194–96 and accompanying text.

203. See *supra* notes 197–99 and accompanying text.

204. See Turnitin Legal Memo, *supra* note 154 ("Having students submit their work, rather than instructors . . . , adds one more level of consent on the part of the student, as nothing is done without the student's knowledge. We do not feel that this is required to meet the requirements of fair use, but it certainly removes any ambiguity."). Not surprisingly, the initial stages of the Turnitin litigation in Virginia, see *supra* note 14, focused on issues related to consent and contract law, which, if decided in Turnitin's favor, could have absolved Turnitin without even reaching the copyright issues. See Defendant's Motion to Dismiss, Vanderhye *ex rel.* A.V. v. iParadigms, LLC, No. 07-0293 (E.D. Va. Apr. 26, 2007), available at http://www.dontturnitin.com/images/Motion_to_Dismiss.pdf; Plaintiffs' Opposition to Defendant's Motion to Dismiss, Vanderhye *ex rel.* A.V. v. iParadigms, LLC, No. 07-0293 (E.D. Va. May 7, 2007), available at http://www.dontturnitin.com/images/turnitin_opposition.pdf. This Note, while briefly addressing the often fact-specific issues related to consent and contract law, focuses primarily on the broader and more legally significant copyright issues.

205. See Foster, *supra* note 198 ("The procedure, though, raises questions about whether students feel coerced into submitting their papers to the service, and what would happen if they told their professors that they objected to handing over their work because doing so would undermine their legal rights."); see also Michael Donnelly et al., *(Mis)Trusting Technology that Polices Integrity: A Critical Assessment of Turnitin.com; Why "Consent" May Not Be Sufficient*, INVENTIO, Fall 2006, available at http://www.doit.gmu.edu/inventio/issues/Fall_2006/Donnelly_13.html ("[N]o, it's not enough to put the uploading in the hands of students . . . and assume that they've done so willingly and knowledgably.")

206. As one teacher candidly admits:

may acquiesce simply because the hassles they face in exercising them make the game not worth the candle.²⁰⁷ Thus, having students submit

Though I did tell students from the beginning of the semester that the school subscribes to and uses Turnitin.com, I think this hardly counts as acquiring their permission to upload their writing to its database. Further, the power dynamic itself involved in that first day of class, when a teacher attempts to put down the proverbial foot and establish rules and expectations, doesn't exactly open its doors to students' questions about the protection of their Intellectual Property. In addition, many students don't even understand fully the concept of Intellectual Property, let alone realize that such protection exists.

Michael Donnelly et al., *(Mis)Trusting Technology that Polices Integrity: A Critical Assessment of Turnitin.com; The Concept of Intellectual Property*, INVENTIO, Fall 2006, available at http://www.doit.gmu.edu/inventio/issues/Fall_2006/Donnelly_11.html.

207. When a sophomore at McGill University in Montreal turned in essays directly to his professor instead of following a mandatory policy that required students to submit to Turnitin, he received failing grades. Grinberg, *supra* note 78. After the student appealed to the university senate committee, the professor reluctantly graded the papers without submitting them to Turnitin. *Id.* While the senate committee sided with the student, *id.*, the student's plight corroborates doubts about the veracity of blindly equating direct student submission with consent. Perhaps the effectiveness of consent should turn on whether the student is given other options. For example, a teacher who intends to use Turnitin at the University of Hawaii West O'ahu must prominently include the following statement, which makes consent a condition of class enrollment, in the class syllabus:

UH West O'ahu has a license agreement with iParadigms, LLC for the use of their plagiarism prevention and detection service popularly known as Turnitin. Faculty may use Turnitin when reading and grading your assignments. By taking a course where Turnitin is used, you agree that your assigned work may be submitted to and screened by Turnitin. Turnitin rates work on originality based on exhaustive searches of billions of pages from both current and archived instances of the Internet, millions of student papers previously submitted to Turnitin, and commercial databases of journal articles and periodicals. Turnitin does not make a determination if plagiarism has taken place. It makes an assessment of the submission's originality and reports that to the course instructor. These Originality Reports are tools to help your teacher locate potential sources of plagiarism in submitted papers.

All papers submitted to Turnitin become part of Turnitin's reference database solely for the purpose of detecting plagiarism. Use of Turnitin is subject to the Usage Policy as posted on the Turnitin.com web site.

See Plagiarism, Turnitin, and Academic Honesty for Faculty at UH West O'ahu, <http://socrates.uhwo.hawaii.edu/library/turnitin/turnitinfacultyinformation.html> (last visited Nov. 15, 2007). By comparison, the University of North Carolina at Charlotte suggests that a teacher who intends to use Turnitin place in the class syllabus the following language, which requires written consent for submission to Turnitin and provides alternatives for those students who do not wish to consent:

As a condition of taking this course, all required papers may be subject to submission for textual similarity review to Turnitin.com for the detection of

papers may provide some comfort, but it should not provide a false sense of security that replaces a careful analysis of the legal issues that use of Turnitin raises.²⁰⁸

plagiarism. All submitted papers will be included as source documents in the Turnitin.com reference database solely for the purpose of detecting plagiarism of such papers. No student papers will be submitted to Turnitin.com without a student's written consent and permission. If a student does not provide such written consent and permission, the instructor may: (i) require a short reflection paper on research methodology; (ii) require a draft bibliography prior to submission of the final paper; or (iii) require the cover page and first cited page of each reference source to be photocopied and submitted with the final paper.

See Univ. N.C. Charlotte, Suggested Standard Syllabus Policies, <http://www.legal.uncc.edu/syllabus.html#plagiarism> (last visited Nov. 15, 2007).

208. Consent is not the only action schools have used to try to avoid legal concerns. Some schools have specific guidelines that govern Turnitin use. For example, rather than submit all student papers, Duke University suggests that its professors submit only papers that they suspect might be plagiarized. *See* Foster, *supra* note 198. Although this approach may alleviate some of the trust concerns associated with Turnitin, *see infra* note 239 and accompanying text, it provides little help concerning the copyright issues. In fact, this approach creates a paradoxical result: if Turnitin infringes student copyrights, then this approach adds salt to the wound by concentrating the harm primarily among those students who are incorrectly accused or suspected of plagiarism. Additionally, although Turnitin is merely supposed to flag suspicious material and leave the ultimate plagiarism determination to the professor, *see supra* notes 50–51 and accompanying text, this approach in effect reverses the roles, which increases the risk that a teacher will use Turnitin as a crutch in lieu of a reasoned and independent plagiarism determination, *see infra* note 237.

Another policy (which again intimates that Turnitin's user agreement is more forthright than its Legal Document, *see supra* notes 130–33 and accompanying text) suggests that some schools like the taste but not the way the sausage is made. The University of Hawai'i West O'ahu directs faculty as follows:

Notice: Faculty at other institutions may discover a reference to one of your student's papers in the Turnitin database of student papers. If you receive a request for a copy of a student paper, or permission to release a student paper, do not permit its release. As a matter of privacy, we will not allow release of a UH West O'ahu student's work.

See Plagiarism, Turnitin, and Academic Honesty for Faculty at UH West O'ahu, *supra* note 207 (emphasis omitted).

Rather than beat around the bush, the University of Kansas, which considered canceling its subscription to Turnitin due to high costs and copyright concerns, addressed its concerns more directly. *See* Sophia Maines, *KU Renews Anti-Plagiarism Software Subscription*, LAWRENCE J.-WORLD, Oct. 4, 2006, http://www2.ljworld.com/news/2006/oct/04/ku_renews_antiplagiarism_software_subscription/. Before renewing its subscription, the University of Kansas made Turnitin agree to remove student papers from the company's database if requested by the KU Writing Center, which administers Turnitin services for the school. *See id.* Ironically, by negotiating control over archiving of student papers, KU may have made itself more vulnerable to a secondary-infringement claim, *see infra* notes 213–16 and accompanying text, so the school would be wise to use its option to remove student papers liberally.

2. Should Student-Authored Papers Be Copyrightable?

As this Note emphasizes, copyright law provides the creator of a new work, for a limited period, a set of exclusive rights to the work.²⁰⁹ That raises the question, however, whether students, who are arguably amply motivated by grades or other academic ends, need copyright protection as an additional incentive to create.²¹⁰ Despite the prevalence of similarly situated authors who may have other incentives to create, copyright law has steadily expanded,²¹¹ making it difficult to argue that student-authored work is not copyrightable.

V. FURTHER IMPLICATIONS

A. Secondary Liability

Although the Copyright Act does not expressly provide for any liability based on another's infringement, "[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity."²¹² This indirect or secondary liability can be found in the concepts of vicarious liability, which is appropriate in "virtually all areas of the law," and contributory infringement, which "is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."²¹³ If Turnitin infringes copyrighted material, courts would need

209. See *supra* note 55 and accompanying text.

210. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 541 (2004). "[T]here are numerous sources of creative works that are produced without the incentive of copyright (though they might not be published and distributed as effectively without copyright)." *Id.* Thus, due to "the many intangibles and unknowns surrounding authorship, there is ample opportunity for debate about how to shape copyright law to best further the creation and dissemination of expression." *Id.*

211. See *id.*

212. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35 (1984).

213. *Id.* at 435. Note that there cannot be contributory infringement or vicarious liability absent direct infringement. See *Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252, 257–58 (D. Mass. 2006); see also 3 NIMMER ON COPYRIGHT, *supra* note 66, § 12.04[D][1] (acknowledging that because the exclusive right of authorization is not tied to actual infringement, "one could argue that no further requirement exists of direct infringement" but opining that such a conclusion is "overly facile," and "it is more in keeping with traditional notions of third party liability to confine the inquiry into whether there can be culpable participation in an infringement to those instances when such infringement has in fact occurred"). These are not the exclusive forms of secondary liability, however. In addition to a recognized concept of inducement liability, schools should be aware that even if they avoid culpability under those methods of secondary infringement that are already recognized, the schools are "not automatically out of the woods," because

to determine under what circumstances, if any, liability should extend to schools or teachers who use the system. Although the lines between the two concepts are not clearly drawn,²¹⁴ contributory infringement generally arises when one induces or encourages direct infringement,²¹⁵ while vicarious infringement generally arises when one profits from direct infringement and declines to exercise a right to stop or limit the infringement.²¹⁶ Because schools adopt different internal policies regarding Turnitin and retain different levels of control over student papers,²¹⁷ it is difficult to generalize the prospects of a successful suit for secondary liability. But the potential class of defendants should, at the very least, be aware of the possibility of such a suit.

B. *Fiduciary Duties*

Independent of secondary infringement, a school addressing the plagiarism problem must also carefully determine whether it owes students fiduciary duties and, if it does, be careful not to run afoul of those duties.²¹⁸

“[n]othing forecloses yet another doctrine from arising in future cases where appropriate analogy to common law can fill the gaps left by existing species of secondary liability.” 3 NIMMER ON COPYRIGHT, *supra* note 66, § 12.04[A][5][a].

214. See *Sony*, 464 U.S. at 435 n.17.

215. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

216. See *id.* (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)).

217. See *supra* note 208. The more control a school has over student papers and the more direct its connection to Turnitin, the greater its potential for exposure to secondary liability. See 3 NIMMER ON COPYRIGHT, *supra* note 66, § 12.04[A][2] (explaining that the ability to supervise the infringing activity is an element of vicarious liability); *id.* § 12.04[A][3] (noting that contributory infringement can be conduct that furthers or forms part of infringing activity).

218. “A fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them.” See Warren A. Seavey, Commentary, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 n.3 (1957). One view suggests that “because schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students.” *Id.* Nonetheless, “Assertions that educators have fiduciary duties continue to be controversial. The teacher–student relationship is not a ‘formal fiduciary relationship,’ but a number of courts have held that this relationship rises to the level of an ‘informal fiduciary relationship’ in a variety of contexts and circumstances.” Brett G. Scharffs & John W. Welch, *An Analytical Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159, 229. Explaining the difference between informal and formal fiduciary relationships, Scharffs and Welch wrote:

Cases involving breach of fiduciary duty often distinguish between formal and informal fiduciary relationships, and the magnitude of duty owed in informal fiduciary relationships tends to be lower. To the extent that a fiduciary relationship is found to exist between educators and students, we would expect

This task requires schools to strike a delicate balance because courts have been asked to hold educational institutions or teachers liable for fiduciary duties both related to using student intellectual property and related to grading and evaluating students.²¹⁹ Thus, because litigation could ensue from either overly aggressive plagiarism prosecution without due regard to student copyrights or from apathy to the plagiarism problem such that proper grading and evaluation is compromised, teachers and administrators, in determining the proper course of conduct, would be wise to consider carefully whether they are acting as fiduciaries and, if so, what their fiduciary duties entail.²²⁰

C. *A New Market*

Judge Posner predicts that because technology like Turnitin makes plagiarism easier to detect, “[w]e may be entering the twilight of plagiarism.”²²¹ He suggests that although Turnitin’s technology is relatively new and underutilized at this point, in time would-be publishers may begin using Turnitin or similar systems to ensure that they are not publishing plagiarized work.²²² In addition to providing valuable new clients, this market could provide Turnitin a source for another database. One of the major limitations of Turnitin’s current database is that it cannot

courts to evaluate those situations under rubrics applicable to informal fiduciary relationships, in which case courts would be expected to focus upon factors such as whether there was an especially high degree of reliance and trust, an unusual amount of power, or particular vulnerability on the part of the beneficiary.

Id. at 178–79.

219. See Scharffs & Welch, *supra* note 218, at 161. Admittedly, most of the intellectual-property issues concern patents, not copyrights, *see id.* at 223–26, and courts have been reluctant to find fiduciary duties relative to grading, *see id.* at 219–22, yet educators would still be wise to address these potential issues.

220. For a comprehensive overview of the concept of educators as fiduciaries and a helpful framework for analyzing potential issues therein, see generally Scharffs & Welch, *supra* note 218.

221. See POSNER, *supra* note 6, at 86.

222. *Id.* at 85–86. As examples of published plagiarism become more prevalent—recent examples include writings by Kaavya Viswanathan, Doris Kearns Goodwin, and Stephen Ambrose—consternation among publishers is certainly understandable. *See id.* at 91. Six publishers, for example, recently agreed to allow their full-text content to be indexed for the pilot run of a cross-publisher plagiarism detection service to be known as CrossCheck. Press Release, Cross Ref, Crossref Pilots Cross-Publisher Plagiarism Detection Service (Aug. 1, 2007), available at <http://www.crossref.org/01company/pr/press080107.htm>. CrossRef, a non-profit membership association of publishers, and iParadigms are working together to develop CrossCheck *Id.* CrossCheck is marketed as a tool that “allows scholarly and professional publishers to verify the originality of submitted and published works.” *Id.* Thus, as the plagiarism prevention and detection industry grows, both for Turnitin and others, the implications of deferential fair use treatment for plagiarism prevention and detection loom larger. *See supra* Part IV.C.3.

check against books that are not online.²²³ But if publishers began running prospective works through Turnitin before publication, Turnitin could simply add those works—and their digital fingerprints—to a new database. Thus, Turnitin's database-compilation methodology has the potential to sweep far beyond the academic world.

D. *Ramifications of the "Turnitin Culture"*

Looking more broadly, the "Turnitin Culture" may present another issue regardless of which way the copyright issues are resolved. Professor Lisa Maruca suggests that both Turnitin's view of its proprietary databases and students' view of their intellectual property being misappropriated are misguided.²²⁴ Both of these views "construct[] writing as fundamentally, perhaps primarily, a commodity in a market economy, subject to the laws of intellectual property."²²⁵ This is part of a Turnitin Culture that creates a "crime and punishment" environment where "every key phrase or language string is viewed as a potential act of piracy that must be traced."²²⁶ If this atmosphere, which demands the utmost originality and invariable attribution, extends to other domains, it could erode the concept of fair use and consequently extend the domain of copyright.²²⁷ Thus, "increased vigilance over source use that results because of and as part of the plagiarism panic also works to actually increase the domain of copyright, extending its reach by working to limit fair use and commercialize texts not usually considered part of the market economy."²²⁸ The corollary of this argument is that whenever copyright is extended, the extension comes at the expense of the public domain.²²⁹ But this dwindling of the public domain comes without a corresponding benefit because "texts not usually considered part of the market economy"²³⁰ should not need the added economic incentive of exclusivity to stimulate production.

223. See POSNER, *supra* note 6, at 85; see also *infra* note 238.

224. See Maruca, *supra* note 160, at 8.

225. *Id.*

226. *Id.*

227. *Id.*; see also *supra* notes 194–96 and accompanying text (discussing the potentially more stringent tenets of plagiarism detection services than of copyright law).

228. See Maruca, *supra* note 160, at 8. Professor Maruca, who argues that "plagiarism is much more than 'merely academic,'" advocates viewing the recent plagiarism panic in the context of "the increasingly restrictive global culture of copyright." *Id.* Because of the ease with which its moral and ethical underpinnings are invoked, the plagiarism panic might best be classified as the "propaganda wing of the corporate copyright wars." *Id.*

229. See Lessig, *supra* note 161, at 764; see also *supra* note 54 and accompanying text.

230. See Maruca, *supra* note 160, at 8.

VI. EFFECTIVENESS

A more basic question has been lurking in the background of this Note's discussion of the various legal issues surrounding Turnitin: How effective is Turnitin? The question is certainly pertinent in evaluating Turnitin's usefulness as a solution to the plagiarism problem posed in Part II. But this simple question is also more important to a legal analysis than one might initially realize because Turnitin's effectiveness is intricately intertwined with its legality. For example, the effectiveness of Turnitin correlates with the persuasiveness of its fair use argument.²³¹ Likewise, academic institutions that use Turnitin and face issues related to secondary infringement²³² or fiduciary obligations²³³ benefit legally from an effective Turnitin system.

Turnitin has had its share of success both as a plagiarism detection service and as a tool that leads to better writing.²³⁴ Some feel that its value as a detection tool is surpassed by its even greater value as a deterrent.²³⁵

231. In its hybrid commercial and educational capacity, Turnitin should focus on its educational aspects as much as possible. *See supra* notes 107–10 and accompanying text. This becomes easier if Turnitin can demonstrate its educational benefits, which directly depend on its system's effectiveness. Conversely, if Turnitin fails to meet its educational goals, its appropriation of student works becomes less beneficial to society and less characteristic of fair use.

232. Because there cannot be contributory infringement or vicarious liability absent direct infringement, *see supra* note 213 and accompanying text, the persuasiveness of the fair use argument, which is affected by Turnitin's effectiveness, *see supra* note 231 and accompanying text, is likewise important to the potential secondary infringer.

233. If fiduciary obligations of accurate grading and safeguarding intellectual property exist and clash with each other, *see supra* notes 218–19 and accompanying text, a school that uses Turnitin should justify its use by emphasizing its obligation to grade accurately and by demonstrating Turnitin's value in achieving that objective. This justification necessarily collapses if Turnitin is ineffective and thus fails to actually promote accurate grading.

234. *See* Turnitin, Success Stories, <http://turnitin.com/static/success.html> (last visited Nov. 15, 2007); *see also* Turnitin, Testimonials, <http://turnitin.com/static/testimonials.html> (last visited Nov. 15, 2007).

235. *See* Using Turnitin.com: A Guide for Instructors at Indiana University Bloomington, http://www.indiana.edu/~iss/publications/tii_pamph_0507.pdf (last visited Nov. 15, 2007) (“Turnitin.com is most effective as a deterrent . . .”); TURNITIN, INSTRUCTOR USER GUIDE, *supra* note 133, at 18 (“Although Originality Reports can be very effective at helping to identify suspected individual cases of plagiarism, Turnitin plagiarism prevention works even more powerfully when used as a deterrent.”); *see also* Todd Ackerman, *Colleges' War Against Cheats Goes High-Tech: Computers Used to Fight Rising Internet Plagiarism*, HOUSTON CHRON., Oct. 6, 2003, at A1 (quoting John Barrie as saying, “What institutions like about Turnitin.com is that our database is so massive it serves as an extremely effective deterrent.”). Of course, this also serves as yet another example of the importance of the massive database to the Turnitin system. *Cf. supra* notes 112–13 and accompanying text. One must wonder, however, if implicit in the commendation of Turnitin's ability to deter is a condemnation of its detection service. *See* Shelly Savage, *Staff and Student Responses to a Trial of Turnitin Plagiarism Detection Software*, 2004 AUSTRALIAN U. QUALITY F., <http://www.auqa.com.au/auqf/2004/program/papers/Savage.pdf> (evaluating student and staff responses to an experimental run of Turnitin and determining that those responses indicate

But others question its effectiveness. Some question whether Turnitin's traditional use as a policing tool neglects the learning process.²³⁶ Others point to the potential for inappropriate reliance on Turnitin,²³⁷ which is

that Turnitin is "a useful but limited tool for combating Internet-assisted plagiarism," that "Turnitin is thought to be most useful as a deterrent rather than as a solution to Internet-assisted plagiarism, and that it would be wise to concurrently pursue other methods to reduce the problem of plagiarism in higher education").

236. See Ashlee Monroe, *Prof Tries Out Teaching, Anti-Cheating Web Site*, ATHENS NEWS (Athens, Ohio), Feb. 1, 2007, http://www.athensnews.com/issue/article.php3?story_id=27233.

237. Because Turnitin provides only data, not a determination of guilt or innocence, *see supra* notes 50–51 and accompanying text, faculty review of student papers remains critical. See JOHNS HOPKINS CTR. FOR EDUC. RES., DETERRING AND DETECTING PLAGIARISM WITH TURNITIN.COM (2006), *available at* <http://www.cer.jhu.edu/presentations/tiitips.pdf>. For example, because "a match is a match," Turnitin will flag even properly quoted material. *See id.* In this regard, Turnitin is comparable to a spell checker—a valuable tool that does not obviate the need for human review. *See id.* As one critic concluded, detection services such as Turnitin are useful as a tool and deterrent but far from comprehensive: "The human element remains vital, and without further investigation of their findings, both positive and negative, innocent students stand to be accused of plagiarism and guilty students could still get away with it. Plagiarism services are a tool, but caveat emptor, buyer beware!" John Royce, *Has Turnitin.com Got It All Wrapped Up? (Trust or Trussed?)*, TCHR. LIBR., Apr. 1, 2003, at 26, 30. The comparison to a spell checker and the potential pitfalls of using Turnitin as a crutch to replace an independent and critical analysis bring to mind the witty poem designed to highlight the parallel pitfalls of using a spell checker as such a crutch:

Eye halve a spelling chequer,
It came with my pea sea.
It plainly marques four my revue
Miss steaks eye kin knot sea.

Eye strike a key and type a word,
And weight four it two say
Weather eye am wrong oar write;
It shows me strait a weighh.

As soon as a mist ache is maid,
It nose bee fore two long,
An eye can put the error rite;
Its rare lea ever wrong.

Eye have run this poem threw it.
I am shore your pleased two no
Its letter perfect awl the weighh.
My chequer tolled me sew.

Hev uh gud dae, furenz!

The Mysteries of a Spell Checker, *available at* Virginia Tech Department of Computer Science Web Site, <http://courses.cs.vt.edu/~cs3604/support/Writing/Spell.Checker.html> (last visited Nov. 15, 2007). Yet some continue to overemphasize Turnitin results. For example, in one school, no

augmented by the natural limitations of Turnitin's methodology.²³⁸ Others argue that, even factoring in the effect on plagiarism, Turnitin still has a negative net effect on academia because it "cultivates a culture of distrust between professors and students."²³⁹ In sum, Turnitin's effectiveness is debatable. To the extent Turnitin's methodology is ineffective, Turnitin fails to solve the plagiarism problem, compromising the company's legal position.

VII. ALTERNATIVE SOLUTIONS TO THE PLAGIARISM PROBLEM

Those concerned with the effectiveness, legality, or ethicality of Turnitin's system hardly need to tolerate plagiarism. Retired English professor Robert Harris²⁴⁰ offers several strategies to combat plagiarism.²⁴¹ These strategies focus on three areas: awareness, prevention, and detection.²⁴² Awareness can help prevent plagiarism by attacking its causes and by explaining to students why it is important to do their own work.²⁴³ Plagiarism prevention is a strategy that seeks to make unique assignments

matter how strong a professor's suspicions of plagiarism, the professor may not act unless the paper was first flagged by Turnitin. See Phil Baty, *Litigation Fear Lets Cheats off Hook*, TIMES HIGHER EDUC. SUPPLEMENT, Oct. 13, 2006, at 56.

238. Because Turnitin cannot detect ideas, it can miss extensive paraphrasing; because Turnitin's detection is limited to its databases, it cannot detect offline material not otherwise represented in a Turnitin database; and because of the same database limitation, it often cannot detect papers purchased from term-paper mills. See JOHNS HOPKINS CTR. FOR EDUC. RES., *supra* note 237. For a discussion of the history of term-paper mills and the failure of judicial efforts to curtail them, see generally Darby Dickerson, *Facilitated Plagiarism: The Saga of Term-Paper Mills and the Failure of Legislation and Litigation to Control Them*, 52 VILL. L. REV. 21 (2007).

239. See Brock Read, *Turnitin Makes Its Ivy League Debut*, CHRON. HIGHER EDUC. ONLINE, Nov. 3, 2006, <http://chronicle.com/wiredcampus/article/1688/turnitin-makes-its-ivy-league-debut>. This negative effect is likely magnified by the double standard in academia, whereby student plagiarists are dealt with much more harshly than professor plagiarists. See POSNER, *supra* note 6, at 89–90. For example, in contrast to the stiff penalties imposed on student plagiarists, see *supra* note 6 and accompanying text, when a historian at the University of Chicago was found to have plagiarized a book review written by a graduate student, his "censure took the curious form of barring him from teaching graduate students for five years. (Undergraduates were indignant!)," POSNER, *supra* note 6, at 31.

240. About Robert A. Harris, <http://www.virtualsalt.com/bioblurb.htm> (last visited Nov. 15, 2007). Professor Harris wrote a comprehensive book on plagiarism. See ROBERT A. HARRIS, *THE PLAGIARISM HANDBOOK: STRATEGIES FOR PREVENTING, DETECTING, AND DEALING WITH PLAGIARISM* (2001).

241. See Robert Harris, *Anti-Plagiarism Strategies for Research Papers*, VIRTUALSALT, Nov. 17, 2004, <http://www.virtualsalt.com/antiplag.htm>.

242. *Id.*

243. *Id.* From the instructor's perspective, plagiarism awareness requires understanding both why students cheat and how they cheat. *Id.* From the student's perspective, plagiarism awareness means students must receive both a clear definition of plagiarism and an unambiguous recitation of the penalties for plagiarizing. *Id.* Students should also be aware of the benefits of citing sources. *Id.*

that only original papers will be able to satisfy.²⁴⁴ If both awareness and prevention fail to preemptively combat plagiarism, detection provides the final safeguard.²⁴⁵

VIII. CONCLUSION

Plagiarism is a growing problem that evades a simple solution. Academic institutions must, in the interests of fairness, academic integrity, and scholastic progress, do all they can to prevent, detect, and deter plagiarism. Counteracting plagiarism, which concerns the writing process, promotes ethical behavior and fosters a culture of academic trust. It is thus important for anti-plagiarism mechanisms likewise to be ethical and to foster academic trust. Turnitin, a solution to the plagiarism problem popular among academic institutions, infringes students' copyrights. Turnitin's key selling point, its massive database, is largely the product of archiving and copying of student-authored works. Both copyright law and copyright policy—the latter differing substantially from plagiarism-prevention policy—dictate that this archiving is not a fair use and infringes copyrighted works. Thus, to the extent that lack of concern for—and indeed mandated infringement of—student copyrights is unethical and fosters distrust in the academic community, use of the Turnitin system is counterproductive to the objectives of plagiarism prevention and is both an inappropriate and an ineffective remedy. Schools that use Turnitin also expose themselves to potential liability. Therefore, schools must seek alternative solutions to the plagiarism problem.

244. *Id.* Professor Harris offers the following suggestions: be clear about expectations and requirements for the assignment; provide a list of specific topics from which students must choose; require a specific research makeup; assign the paper in various stages with specific due dates; require students to give oral reports of their papers, which should include responding to questions about the research process, not just the content; require an annotated bibliography; accept only up-to-date references; and require students to write an in-class essay about their writing experience. *Id.* Even if these suggestions could not all reasonably be implemented at the university level, taking those individual measures that are practical would still help curb plagiarism.

245. *Id.* In this final category, Professor Harris has a number of recommendations: looking for clues of plagiarism (for example, mixed citation formats, unusual formatting, or inconsistent style or diction); keeping abreast of popular term-paper mills; using Internet search engines to check for plagiarism; and using commercial detection tools (Plagiarism.org, *see supra* notes 35–36 and accompanying text, is on Professor Harris's list). Harris, *supra* note 241.