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

Samuel J. Horovitz*

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* 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.
The story goes something like this:

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.”

I. INTRODUCTION

The story may be true, but it is more likely a college legend. Either way, this story and others like it help reduce the strain of college life and keep alive the eternal hope of one day outwitting a professor. 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.
that could lead to failing grades or worse.\(^6\)

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6. See Deborah R. Gerhardt, \textit{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, \textit{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, \textit{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. \textit{Id.} at 35–36. One such situation is humorously portrayed in the movie \textit{Good Will Hunting}. See \textit{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:

\begin{quote}
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.
\end{quote}

\begin{quote}
CLARK: Well, as a matter of fact I won’t because Wood drastically underestimates the impact of social dis—
\end{quote}

\begin{quote}
WILL: Wood drastically—Wood drastically underestimates the impact of social distinctions predicated upon wealth, especially inherited wealth. You got that from Vickers. \textit{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 an . . . education you coulda’ got for a dollar fifty in late charges at the public library.
\end{quote}

\begin{quote}
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.
\end{quote}

\begin{quote}
WILL: Yeah, maybe. Eh, but at least I won’t be unoriginal.
\end{quote}

\textit{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” 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. 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. 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. 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.”

But as the plagiarism problem grows and questions about the legality and effectiveness of the Turnitin system linger and extend far beyond McLean High School, the academic world will be able to dodge the problem only for so long. 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.
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. Research by the Center for Academic Integrity

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” in 1999, almost 40% admitted to such behavior in studies conducted since 2002. The research also shows that 70% of students believe such cheating is not a serious issue. Half of the undergraduate students surveyed admitted to one or more instances of “serious cheating” on written assignments. In a study of high-school students, 60% admitted to some form of plagiarism. 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. In recent years, the media have documented several plagiarism scandals at leading academic institutions. Augmenting the escalation of student plagiarism is the difficulty and inconvenience that teachers often face in proving that a student has actually plagiarized.

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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

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25. Laurie Stearns suggests that plagiarism may be difficult to articulate 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.


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. 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. 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. Today, Plagiarism.org consists of Turnitin and iThenticate, which iParadigms boasts as the Internet’s “most widely used and trusted resources for preventing the spread of internet plagiarism.” Millions of students and faculty in more than eighty-five countries use Turnitin, which receives thousands of student papers daily. 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.

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. 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.


42. See MacMillan, supra note 38.


“millions” of Turnitin’s previously submitted student papers, and (3) journal articles and periodicals found in other commercial databases. For each submission, Turnitin provides the teacher with a detailed originality report, which highlights text that matches another source in the database. Turnitin stresses that its system does not determine whether a student has plagiarized. 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.

IV. COPYRIGHT

A. COPYRIGHT BASICS

Constitutionally authorized and statutorily implemented, copyright law balances the rights of authors and the rights of the public. 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.

(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.


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”).


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))).

Copyrights protect original works of authorship. Copyrights need not be registered because rights vest as soon as the work is fixed in a “tangible medium of expression.” Copyright ownership initially vests with the work’s author. Copyright owners receive several exclusive rights, 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. 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.”).

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);

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. The exclusive rights that accompany copyright ownership may be transferred and owned separately. Anyone who violates any of the exclusive rights given to the copyright owner infringes the copyright.

In making an infringement determination, there are some important limitations on the exclusive rights provided to authors. 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. 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?

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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._

62. Id. § 201(d)(2).
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.
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,

General, 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.

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

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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.
The fingerprinting issue presents an interesting academic issue, but it is likely to 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, it would be difficult for Turnitin 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.

3. Originality Evaluation

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

80. Id.
81. Id.
82. See supra note 70 and accompanying text.
83. See supra note 73–75 and accompanying text.
84. See supra notes 65 and accompanying text.
85. See infra notes 129–36 and accompanying text.
86. See infra Part IV.C.
87. 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.\textsuperscript{91} Conceding that, absent consent,\textsuperscript{92} the implied-license argument championed for other purposes “may not”\textsuperscript{93} extend to archiving, Turnitin seemingly concedes a prima facie showing of infringement and justifies its archiving entirely on a defense of fair use.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{96} This doctrine has its roots in the common law, and the Copyright Act of 1976\textsuperscript{97} codified it.\textsuperscript{98} The results of fair use claims are difficult to predict, and although the pertinent statute provides four non-exclusive factors that

\begin{itemize}
  \item \textsuperscript{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, \textit{supra} note 43, at 7.
  \item \textsuperscript{92} For discussion of the consent issue, see \textit{infra} Part IV.D.1.
  \item \textsuperscript{93} Turnitin Legal Document, \textit{supra} note 43, at 5.
  \item \textsuperscript{94} \textit{Id.} at 5, 7–8.
  \item \textsuperscript{95} See \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 574–75, 590 (1994); \textit{supra} note 65 and accompanying text.
  \item \textsuperscript{96} See \textit{Campbell}, 510 U.S. at 577 (alteration in original) (quoting \textit{Stewart v. Abend}, 495 U.S. 207, 236 (1990)).
  \item \textsuperscript{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).
\end{itemize}
courts should consider, a fair use analysis often hinges on very specific facts woven into a fairness argument. \textsuperscript{99} Fair use analyses evade simplification to bright line rules, and the four statutory factors should not be considered in isolation. \textsuperscript{100} Rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” \textsuperscript{101} The ultimate test of fair use . . . is whether the copyright law’s goal of ‘promot[ing] the Progress of Science and useful Arts’ \textsuperscript{102} would be better served by allowing the use [in question or] by preventing it.” \textsuperscript{103} Because fair use is an affirmative defense, the would-be infringer bears the burden of proof. \textsuperscript{104}

2. The Statutory Factors

The Copyright Act directs courts to consider four non-exclusive statutory factors in a fair use analysis: \textsuperscript{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.” \textsuperscript{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.” \textsuperscript{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.” \textsuperscript{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

\textsuperscript{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)).

\textsuperscript{100} Campbell, 510 U.S. at 577–78.

\textsuperscript{101} Id. at 578.

\textsuperscript{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).

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

\textsuperscript{104} See Campbell, 510 U.S. at 590.


\textsuperscript{106} Id.

\textsuperscript{107} Id. § 107(1).

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.\textsuperscript{109} Consider that Turnitin is not the only plagiarism detection service on the market\textsuperscript{110} and that using computer algorithms to detect plagiarism is hardly a novel concept.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{113} Turnitin is a multi-million dollar enterprise,\textsuperscript{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.\textsuperscript{115}

\begin{thebibliography}{11}

\bibitem{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 “mis[e]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.”).


\bibitem{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.

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

\bibitem{113} Id.

\bibitem{114} See supra notes 41–42 and accompanying text.

\bibitem{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

\end{thebibliography}
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 treatise 120 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

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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.


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.'"\textsuperscript{125} Nonetheless, the rationale for giving greater protection to unpublished works—protecting first publication rights\textsuperscript{126}—is arguably unharmed by Turnitin’s use, which does not disseminate works to the public but uses them internally for plagiarism detection.\textsuperscript{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.\textsuperscript{128}

The third factor considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."\textsuperscript{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,"\textsuperscript{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.\textsuperscript{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.\textsuperscript{132} This is verified by the Turnitin user guide, which provides a mechanism for viewing original papers.\textsuperscript{133} Thus, because Turnitin uses the

\textsuperscript{126} See id. at 551–53, 564.
\textsuperscript{127} See Turnitin, Plagiarism Prevention, supra note 44.
\textsuperscript{128} See infra notes 130–33 and accompanying text.
\textsuperscript{130} See Turnitin Legal Document, supra note 43, at 8. At a minimum, however, Turnitin itself archives and maintains entire works. See id.
\textsuperscript{131} See supra notes 50–51 and accompanying text.
\textsuperscript{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.
entire work, this third factor appears to weigh heavily against fair use.\textsuperscript{134} In appropriate circumstances, however, even copying an entire work can be consistent with fair use.\textsuperscript{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.\textsuperscript{136}

The fourth statutory factor looks to “the effect of the use upon the potential market for or value of the copyrighted work.”\textsuperscript{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.”\textsuperscript{138} This factor requires a court to undertake the functional analysis (merged with the transformative analysis) above\textsuperscript{139} and to examine

pdf/iti_instructor_guide.pdf. Rather than requiring original-author approval, however, this mechanism instead requires approval of the submitting instructor. \textit{Id.} Turnitin’s \textit{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.

\textit{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 \textit{4 Nimmer on Copyright}, \textit{supra} note 66, § 13.05[A][3]).

135. See \textit{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 \textit{4 Nimmer on Copyright}, \textit{supra} note 66, § 13.05[D][1].


139. See \textit{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 states\(^{141}\)—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

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\(^{142}\) 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.\footnote{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).}

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.\footnote{See Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 n.17 (2d Cir. 1994).} Instead, courts should look to whether such licensing falls within “traditional, reasonable, or likely to be developed markets.”\footnote{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, \textit{journal issues and volumes}, . . . there is neither a traditional market for, nor a clearly defined value of, \textit{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.\footnote{See supra notes 17–18 and accompanying text.}
existence of the defendant’s conduct, 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.

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.” 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 Hamnil 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 market\textsuperscript{156} 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

\begin{footnotes}
\footnotetext[153]{4 Nimmer on Copyright, supra note 66, § 13.05[B][1] (footnotes omitted).}
\footnotetext[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.}
\footnotetext[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).}
\footnotetext[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.}
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{160}

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

\begin{quote}
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.
\end{quote}

\textit{Id.} (quoting \textit{BLACK'S LAW DICTIONARY} 1170 (7th ed. 1999)); see also Posner, \textit{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”).\textsuperscript{158}

\textsuperscript{158} See Posner, \textit{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.” \textit{Id.} at 46.

\textsuperscript{159} See id. at 17.

\textsuperscript{160} See Lisa Maruca, \textit{Plagiarism and Copyright: Connections in the Turnitin Culture}, \textit{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. 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. In contrast to plagiarism, copyright applies to expression, not ideas. 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. 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.

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 Assoc., 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.

Judge 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., Dunwody Distinguished Lecture in Law: The Creative Commons (Apr. 26, 2002), in 55 Fla. L. Rev. 763, 764 (2003).

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.

161. 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.

162. See Kindergartners, 249 F. Supp. at 1251.

163. 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.

164. 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

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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, not to protect archived works from being plagiarized—iParadigms has a

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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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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”?\textsuperscript{174} Turnitin’s premise answers these questions affirmatively and essentially seeks acknowledgment of a special expansion of fair use to protect plagiarism prevention.\textsuperscript{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,\textsuperscript{176} (2) restricts subsequent use by second authors even of limited recycled material, which might nonetheless be acceptable for copyright purposes,\textsuperscript{177} and (3) encourages self-censorship by original authors.\textsuperscript{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,
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
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, Dunwody 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.


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. 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,” the benefits of Turnitin’s proffered use are primarily internalized; any ancillary benefits to the public relate to plagiarism prevention, which is impertinent to copyright concerns. 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.

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.


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, 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, 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.

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 overly extremist. It has also become disconnected from the broader question of what does and does not inhibit creativity. . . .” 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. 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.’” Such an attitude hardly furthers “the underlying goal of the copyright statute, i.e., to promote creativity.”

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

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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).


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
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. 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.


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.  

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.


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.\textsuperscript{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.\textsuperscript{210} Despite the prevalence of similarly situated authors who may have other incentives to create, copyright law has steadily expanded,\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{213} If Turnitin infringes copyrighted material, courts would need

\begin{itemize}
\item \textsuperscript{209}See supra note 55 and accompanying text.
\item \textsuperscript{210}See Rebecca Tushnet, \textit{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).” \textit{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.” \textit{Id.}
\item \textsuperscript{211}See \textit{id.}
\item \textsuperscript{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
\end{itemize}
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, contributory infringement generally arises when one induces or encourages direct infringement, while vicarious infringement generally arises when one profits from direct infringement and declines to exercise a right to stop or limit the infringement. Because schools adopt different internal policies regarding Turnitin and retain different levels of control over student papers, 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.

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.\textsuperscript{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.\textsuperscript{220}


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.

\textit{Id.} at 178–79.

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

\textsuperscript{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, \textit{supra} note 218.

\textsuperscript{221}. \textit{See POSNER, \textit{supra} note 6, at 86.}

\textsuperscript{222}. \textit{Id.} at 85–86. As examples of published plagiarism become more prevalent—recent examples include writings by Kaavya Viswathan, Doris Kearns Goodwin, and Stephen Ambrose—consternation among publishers is certainly understandable. \textit{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. \textit{Press Release, Cross Ref, Crossref Pilots Cross-Publisher Plagiarism Detection Service (Aug. 1, 2007), available at} http://www.crossref.org/01company/pr/press080107.htm. \textit{CrossRef, a non-profit membership association of publishers, and iParadigms are working together to develop CrossCheck \textit{Id.} CrossCheck is marketed as a tool that “allows scholarly and professional publishers to verify the originality of submitted and published works.” \textit{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. \textit{See supra} Part IV.C.3.
check against books that are not online. 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. Both of these views “construct[] writing as fundamentally, perhaps primarily, a commodity in a market economy, subject to the laws of intellectual property.” 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.” 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. 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.” The corollary of this argument is that whenever copyright is extended, the extension comes at the expense of the public domain. But this dwindling of the public domain comes without a corresponding benefit because “texts not usually considered part of the market economy” 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. Likewise, academic institutions that use Turnitin and face issues related to secondary infringement or fiduciary obligations 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. Some feel that its value as a detection tool is surpassed by its even greater value as a deterrent.

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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.


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. Others point to the potential for inappropriate reliance on Turnitin, 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”).


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 weigh.

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 weigh.
My chequer tolled me sew.

Hev uh gud dae, furenz!

augmented by the natural limitations of Turnitin’s methodology.\textsuperscript{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.”\textsuperscript{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 ethically of Turnitin’s system hardly need to tolerate plagiarism. Retired English professor Robert Harris\textsuperscript{240} offers several strategies to combat plagiarism.\textsuperscript{241} These strategies focus on three areas: awareness, prevention, and detection.\textsuperscript{242} Awareness can help prevent plagiarism by attacking its causes and by explaining to students why it is important to do their own work.\textsuperscript{243} Plagiarism prevention is a strategy that seeks to make unique assignments

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{242} Id.

\textsuperscript{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. If both awareness and prevention fail to preemptively combat plagiarism, detection provides the final safeguard.

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.