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A Fair Use Response to Students' Intellectual Property Rights

by Jared Slade

The Internet has proved itself to be both friend and foe to educators. While it has offered students remarkable sources of information, it has simultaneously provided substantial temptation to cheat, leaving educators uncertain how to tame the resource. [See Sherri A. Whiteman and Jay L. Gordon, Cross Conversations: The Price of an "A": An Educator's Responsibility to Academic Honesty, THE ENG. J., Vol. 91, No. 2 \(Nov., 2001\), at 25 \(considering "One Teacher's Frustration"\).](#) Entrepreneurs rose to the challenge and created services that would check student submissions against various sources.

One such company is [Turnitin](#), a California for-profit service that "checks student work against a database of more than 22 million papers written by students around the world, as well as online sources and electronic archives of journals." [Maria Glod, Students Rebel Against Database Designed to Thwart Plagiarists, WASH. POST, Sept. 22, 2006, at A1.](#) Students at McLean High School, in Fairfax County, Virginia, have complained about the use of the service for, among other reasons, infringing their intellectual property. *Id.* However, a simple fair-use analysis suggests that particular assertion is meritless. That is, even assuming that the students would be able to copyright their work—see Copyright Office Basics, <http://www.copyright.gov/circs/circ1.html#wccc> (listing as an exception from copyrightable subject matter "a work specially ordered or commissioned for use as . . . answer material for a test")—and that submitting a paper does not give an implied license for reproducing the work, Turnitin should still be permitted to use the students' work.

Fair use constitutes a protection for some disseminators of copyrighted material against copyright infringement claims by copyright holders. What

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constitutes "fair use" is outlined in the Copyright Act of 1976, 17 U.S.C. § 107 (2000). The Act describes the four factors at minimum that should be considered: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work. Importantly, the Supreme Court has noted that "[t]he task [analyzing whether a particular use is 'fair'] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis." Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994). Also, the factors are considered in sum, meaning that not all of the factors must favor the party using the copyrighted material. See Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 778 (9th Cir. 2006). Looking at just those factors, the students' claims that the use of their papers by Turnitin and similar companies violates their intellectual property rights should not succeed if ever tested in court.


The first factor considers the purpose and character of the use of the copyrighted material. Even though Turnitin provides a for-profit service, services like Turnitin further the interests of the public by preventing plagiarism and cheating. The second factor discusses the nature of copied work. Here, the students' research papers do not necessarily possess much inherent artistic value because they are mostly responses to an assigned topic and most likely lack the artistic or unique quality that courts seek in voiding fair use, even if they possess enough creativity to satisfy the low standard for being copyrightable. The third factor looks to the amount and substantiality of the portion of the copyrighted material used. Here, even though all of the copyrighted material might be used, it is not being reproduced for others to use. In that way, this factor favors Turnitin because the use of the students' papers in the Turnitin database, even though the database is using all of the work, does not lead to unauthorized distribution of the work. Finally, the fourth factor looks to the effect upon the copyrighted work's value. Here, that the copyrighted paper is added to Turnitin's database should have no effect upon the copyrighted work's value. A student could still publish the paper or use it in another fashion that would not be affected by having it in Turnitin's database. However, the student would lose one aspect of his or her work's value—its value on the research paper market. Whereas before it was submitted to Turnitin, the student could sell the paper to a research paper seller, *see, e.g.*, <http://www.essaytown.com>, the research paper seller would likely either not purchase the paper or would lower the value of that paper. In that way, the potential market for the student's paper is affected; however, the decrease in the paper's market actually furthers the public policy concern reflected in the first factor—deterring plagiarism and cheating.

Generally, the fair use exception is viewed as a necessary exception for promoting progress by leaving certain uses of copyrighted works in the public domain. But the fair use exception can also promote other public interests. Given the public interest in preventing plagiarism in our schools, Turnitin's use of students' work should be considered a fair use.

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Rachelle :: 10/26/06 at 1:49 am

Jared,

Although I respect your conclusion, I must strongly disagree. I suggest that you read this article:

[About Turnitin.com](#)

Bob :: 12/29/06 at 4:37 pm

Apparently you are unaware that Turnitin will send a complete copy of student’s paper that has been archived to a client who requests a copy without the student’s agreement. Apparently you are also unaware that Turnitin is ineffective against plagiarism unless the plagiarist is silly enough to bleep in the entire text - it can easily be avoided merely by putting synonyms in place of the original language at spaced intervals, so it deters only the silly. How can you justify Turnitin taking student’s work without compensation in the name of protecting rights? Also, if deterring plagiarism is against public policy, why is there no law against plagiarism? Your citation of Wall Data does not support Turnitin — it supports the students; the Sheriff’s Department was denied the fair use defense by summary judgment (affirmed by the 9th Circuit) despite its lame “public policy” argument. Finally, your analysis of the undesirable effect of Turnitin’s archiving on the value of the students’ papers is shallow.