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Analysis and Postsecondary Implications of A.V. at al. v. iParadigms, LLC.

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Clearly reasoned and concisely rendered, this past spring's A.V. et al. v. iParadigms (2008) opinion is a classic textbook ruling, and judicial affairs practitioners and scholars alike will profit from its close, careful reading. In this article, the author discusses the case's rulings in the area of copyright law and, briefly, its broader legal, administrative, and political implications in the context of domestic postsecondary education.

Basis of the Case

When contracting for service with iParadigms, a college, high school or some other educational establishment can oblige its students to turn in a copy of their written assignments (say, an essay on the morality of copyright law) by way of Turnitin.com, iParadigms' proprietary anti-plagiarism software system. Turnitin.com subsequently compares the submitted works to those contained in digitally archived databases, both commercial and publicly available Internet sites, as well as Turnitin.com's own cache of previously submitted student papers.

To submit an assignment to Turnitin.com, student writers must register with the service online, a process whose last step involves acquiescing to a clickwrap agreement, in other words a contractual arrangement "formed entirely in an online environment such as the internet, which sets forth the rights and obligations between parties."[1] After the student registers with Turnitin.com and submits her paper, a grading teacher receives an "Originality Report" indicating the probability of "unoriginality" as well as copies of the source materials located in Turnitin's database, if the teacher believes this step is warranted.

When the complaint was filed, the plaintiffs were high school students in districts under contract with the Oakland, California-based iParadigms. The students were enrolled in McLean High School in the public school district of Fairfax County, Virginia, and Desert Vista High School, a public institute in the Tempe Union High School District of Phoenix, Arizona.[2] Faced with troubling levels of plagiarism, both districts compelled their students, on pains of a failing grade, to turn in their works to Turnitin.com and to allow archiving of their works in the Turnitin.com database. The plaintiffs each agreed to the terms of the Turnitin.com clickwrap agreement, but in an effort to stave off their works' archiving in iParadigms' system, the students attached a "disclaimer" to their respective works stating their refusal to have them added to the Turnitin.com database.[3] Upon submission, despite disclaimers, iParadigms archived the works. Subsequently, the students filed a complaint against iParadigms alleging the archiving amounted to infringement of their copyrights in their written works. In its counterclaim response, iParadigms contended among other defenses that the company's archiving of the plaintiffs' works fell under the fair use doctrine of federal copyright law.[4]

Copyright and Fair Use Doctrine

Discussed by numerous media sources of note and intensely blogged, the more intensely attended to issue in *iParadigms* goes to copyright law and the statutory defense to copyright infringement known as the fair use doctrine. Copyright protection is traditionally understood as a means to incentivize creativity by granting innovators a bundle of exclusive rights in their creations. This protection include rights to (i) reproduce the copyrighted material, (ii) prepare works derived from the copyrighted matter, (iii) distribute by transfer of ownership, sale, rental, lease or lending copies of the copyrighted matter, (iv) in specified cases, perform the matter, (v) in specified cases, display the matter publicly, and (vi) regarding sound recordings, use "digital audio transmission" to perform the work publicly.[5]

The fair use doctrine can be understood as a counterforce to copyright protection. "[F]or purposes such as criticism, comment, news reporting, teaching [ ], scholarship, or

research," the use of copyrighted material in the absence of the copyright holder's permission is considered a fair use.[6]

In order to determine fair use, the court had to weigh four factors: (a) the purpose and character of the use, (b) the copyrighted work's nature, (c) the amount and substantiality of the use relative to whole copyrighted work, and (d) the economic effect of the use on the copyrighted work.[7]

> *". . . the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes"*[8]

We might call factor one the transformation test. In its weighing, a court determines to what degree a use has changed or augmented the copyrighted work and whether its character or purpose has been extended or somehow changed. "The more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use."[9]

Relying upon the Ninth Circuit's recent Perfect 10, Inc. v. Amazon.com, Inc. (2007) ruling, the court found iParadigms' use of the student works to be "highly transformative."[10] Originally produced by the students for purposes of "education and creative expression," the works were used for the new purpose of deterring student plagiarism. The court determined that the explicitly profit-driven educational purpose of iParadigms' use did not detract from the "highly transformative" determination, since the use generated a "substantial public benefit through the network of educational institutions using Turnitin."[11] If, as it seems, plaintiffs did not intend their works to deter plagiarism, but rather to satisfy the requirements of their schools' writing assignments, then iParadigms' use could only with great straining be judged "superceding" or substitutional. Accordingly, the court determined that this first factor favored a fair use determination.

> *". . . the nature of the copyrighted work"*[12]

The second factor in determining fair use explores the degree of a work's creativity. The court must judge how close to the "spiritual epicenter" of copyright law —"creative expression" and its induction— the work sits, and whether the alleged infringing use crimps or quickens the spirit of copyright law.[13] In the factual context of *iParadigms*, the second factor is practically irrelevant since a transformative use determination has already been made. And supposing this second factor was meaningful, as Judge Hilton correctly points out, iParadigms' use by definition seems to steer clear of the creative components of the works, even offering itself up as a spur to and protector of student creativity in writing. Even granting a perfectly creative expressiveness of each of the student works (the actual question of *whether* any plagiarism occurred is not a matter of concern in this case), this measure of the degree of the plaintiffs' works' creativity would neutralize itself, and so Judge Hilton determined that it "either favors neither party or favors a finding of fair use."[14]

> *". . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole"*[15]

This third factor gauges the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In other words, in weighing it, a court must assess whether the appropriated portion of the work —ranging from a fraction to its entirety— is reasonable given the purpose of the use.[16] This portion test is arguably the weakest of the four, for even complete copying fails to defeat a fair use defense where the use function

is sufficiently novel: “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”[17]

The iParadigms system clearly uses the entirety of archived student works. The court described the “use of the original works” as “limited in purpose and scope,” since they are digitally archived and viewable only “when another student’s submission triggers an Originality Report that indicates the possibility of plagiarism” and a teacher requests a copy for examination.[18] Even though there are technically at least two uses at play here —the standing database, growing with each new archived student work, and the comparisons made by the Turnitin.com algorithms— the court determined that the copy maintained by iParadigms served a different function than the original work, and therefore, was fair use.

> *“. . . the effect of the use upon the potential market for or value of the copyrighted work”*[19]

If a use negatively impairs the market value of the copyrighted work, this fourth factor supports the opposition of fair use. Traditionally, courts have considered this so-called market test as comparable to the transformation test in importance. In Harper & Row Publishers, Inc. v, Nation Enters (1985) the U.S. Supreme Court even deemed the market test of singular weight in a fair use ruling, the doctrine’s “single most important element” in determining fair use.[20]

In *iParadigms*, the court found the plaintiffs' claims of harm to market potential unpersuasive. No evidence of marketability harm, potential market harm or substitution of the students' works by iParadigms' use in the marketplace were found by the court. The plaintiffs' strongest argument, that iParadigms' use prevented them from selling their works to online student term paper mills, further contradicted the basic purpose of copyright law, namely creativity's incubation. Thus, the court found that the market test favored a finding of fair use. iParadigms' fair use defense was upheld and the students found no relief in copyright law.

Implications

Although Judge Hilton's legal reasoning is sound and would seem to close the book on the copyright infringement argument, there exist at least three reasons why *iParadigms* may be a mere skirmish in a larger technological battle over student rights in the context of 21st century academic arenas.

Firstly, while *iParadigms* is unlikely to be overruled, future student-plaintiffs could theoretically more effectively bring suit against iParadigms by way of the contract law doctrine of unconscionability. When a contract "include[s] an absence of meaningful choice on the part of one of the parties together with [ ] terms which are unreasonably favorable to the other party," courts have struck out offensive portions, in extreme cases even adding clauses or refusing to enforce a contract *in toto*.[21] As well, contradictory explicit or implicit contract language regulating other aspects of the relationship between a student and the university, e.g. intellectual property rights related to research, could

theoretically trigger a weakening of any contract defense. iParadigms' legal victory means that both an effective contract law stratagem and a new copyright stratagem are needed to overcome the decision's reasoning. Improbable, but hardly impossible.

Secondly, technological innovations (and new scientific knowledge) are often as important for the questions they create, as for the new possibilities and powers they promise and grant. The pursuit of answers to these questions in the courtroom, through conventional technological jurisprudence such as the *iParadigms* decision, for example, is traditional and occasionally effective. Expanding on Justice Thomas' cited suggestion in the context of *Morse v. Frederick* (2007), student critics of iParadigms' service can turn to other conventional sources for redress, such as student governments, school boards, disciplinary committees, and/or legislatures, as their situations permit.[22] But Turnitin.com poses technological or *technopolitical* questions not easily understood, much less answered, by these conventional sources. Technologically savvy student software programmers, sympathetic hackers and, in the worst case scenario "trolls" could mount much more effective, more immediately impactful answers than any court.[23] When we consider that American universities and colleges house and train some of the most gifted computer enthusiasts and activists, and that Turnitin.com is a service used in many other nations, each one housing its own indigenous cyberspace gurus, the potential for answers that are *technologically legislative* rather than traditionally jurisprudential becomes obvious.

Finally, in our increasingly cut-and-paste-based world, the apparent cultural incoherency of using the technological fix that is Turnitin.com to solve the ethical problem of

plagiarism seems to clash with mores of contemporary youth culture. For this reason alone, practitioners and scholars should look suspiciously on any claim that, with *iParadigms*, we now have undone this knotty problem.

[1] Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of Click Wrap Agreements*, 4 J. Tech. L. & Pol'y (1999), *available at* http://grove.ufl.edu/~techlaw/vol4/issue3/friedman.html.
[2] *See* Amended Complaint for Copyright Infringement at 1-2, A.V. v. iParadigms, L.L.C, (2007) (Civil Action No. 1:07 CV 293 CMH/LO).
[3] *See* A.V. v. iParadigms, L.L.C., 544 F. Supp. 2d 473, 478 (E.D. Va. 2008).
[4] *Id.* at 482.
[5] 17 U.S.C. § 106 (1)-(6).
[6] *Id.* at § 107.
[7] *Id.*
[8] *Id.* at (1).
[9] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[10] Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007).
[11] *iParadigms*, *supra* note 3, at 482.
[12] 17 U.S.C. § 107(2).
[13] Bond v. Blum, 317 F.3d 385, 395-96 (4th Cir. 2003).
[14] *iParadigms*, *supra* note 3, at 483.
[15] 17 U.S.C. § 107(3).
[16] *See, e.g., Campbell*, 510 U.S. 569.
[17] Kelly v. Arriba Soft Corp., 336 F.3d 811, 818-19 (9th Cir 2003).
[18] *iParadigms*, *supra* note 3, at 483.
[19] 17 U.S.C. § 107(4).
[20] *Harper & Row Publishers, Inc.*, 471 U.S. 539, 566.
[21] E.A. FARNSWORTH, CONTRACTS 301 (Aspen Publishers 4th ed. 2004).
[22] Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
[23] Mattathias Swartz, *The Trolls Among Us*, N.Y. TIMES, Aug. 3, 2008, at MM24.