THE EDGE OF ETHICS IN IPARADIGMS

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ABSTRACT

In an attempt to stem a perceived rise in student plagiarism, educational institutions are increasingly turning to anti-plagiarism technologies. The use of these technological means to police student writings has been controversial, socially, politically, and legally. This article discusses the outcome of A.V. et al. v. iParadigms, to date the most important opinion on the legality of such technology's use. The author examines the case in detail and presents arguments against the technology's use, on the grounds that such use undermines educational policy by allowing the ethics of teachers to become a by-product of available technological means and by contributing to a detrimental framing of students as criminals.

Some especially tony colleges, such as Harvard, do not subscribe to Turnitin or other plagiarism-detection software services but prefer to preach to their students about the evils of plagiarism. These schools are naïve. [2]

Let's be serious. [3]

One can hardly spend a nanosecond within the walls of academia without hearing tell of the epidemic of student plagiarism. [4] While empirical evidence of an epidemic may remain wanting, it is clear that a collective perception of crisis has taken hold in educational circles. [5] A noteworthy reaction to this perception of escalating plagiarism has been the academic embrace of commercial anti-plagiarism systems. This article is an examination of a recent ruling, A.V. et al. v. iParadigms, [6] stemming from this embrace. In section I, I sketch the context for that legal controversy that foregrounds its entangled technological and social aspects. [7] Sections II-V comprise a discussion of the case's facts, and the case's rulings in the area of contract law and copyright law. A speculative exploration of the possible pitfalls of too quickly embracing the plagiarism epidemic mood along with the technological fixes subsequently touted as its solution constitute sections VI and VII.

SECTION I: A TECHNOLOGICAL CONTEXT

Even if only on the basis of the opinion's economical clarity, *iParadigms* contends for a place in the canon of teachable jurisprudence. In addition to its crystalline brevity and the clarity of its legal logic, the ruling presents its reader with an admirable map of the technological and social forces that are the field in which its legal questions take on their meaning and significance. But that map's merit has limits. And to more fully understand the field of forces at play, that map must be extended.

Sitting near, if not simply defining, the center of gravity of *iParadigms* is a virtual machine: iParadigms' proprietary plagiarism detection system, Turnitin™. [8] Turnitin™ is widely used for detection of unoriginality in student-produced texts, and is as well known to judicial affairs practitioners and scholars as to principals, school boards and school district officials, university and college administrators and, naturally, students. [9]

In effect, Turnitin™ approximates a modern-day anti-printing press, a technological counter-measure to the Gutenberg printing press' offspring, at least within the bounds of textual production by students in educational settings. [10] Half a millennia has passed since Gutenberg's elegant device set the cost of producing textual copies slipping down a precipitous shoot, the present terminus of which is an efflux of Internet applications. [11] What once called for tedious work from an expert class of cloistered professional scribes now comes in a flash with a button's press. “Ever since Gutenberg made the first commodity--cheaply duplicated words,” Kevin Kelly notes trenchantly, “--we have realized that intangible things can easily be copied.” [12]

With its own algorithmic elegance, Turnitin™ pushes against this virtual tide. After "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" [13] (a report on the comparative history of plagiarism, literary allusion and copyright law, for example) via Turnitin™. "[Turnitin™] subsequently compares the submitted works to those contained in digitally archived databases, both commercial and publicly available Internet sites, as well as [Turnitin™]'s own cache of earlier submitted student papers." [14]

Before submitting a document for Turnitin™'s analysis, a student writer first completes an online registration process, including a clickwrap agreement. [15] After registration completion and subsequent submission, "a grading teacher receives an 'Originality Report' indicating the probability of 'unoriginality"' [16] and, if she believes it warranted, can receive copies of works the algorithmic system indicates may have been the targets of plagiary. [17] In the realm of primary and secondary schools, a contracted school district can authorize storage of district-generated written student works in the Turnitin™ database.

SECTION II: THE FACTS OF IPARADIGMS

When their complaint was filed, the plaintiffs, A.V., K.W., E.N. and M.N., each minor, were underclassmen in districts under contract with the Oakland, California-based iParadigms, the first pair attending McLean High School in the public school district of Fairfax County, Virginia, the second enrolled at Desert Vista High School, a public institute in the Tempe Union High School District of Phoenix, Arizona. [18]

"Faced with troubling levels of plagiarism, both districts compelled their students, on pains of a failing grade, to turn in their works to [Turnitin™]." [19] Both districts sanctioned iParadigms' archiving of student work.

A.V., K.W., E.N. and M.N. each agreed to the terms of the Turnitin™ clickwrap agreement, but each also attempted to prevent their written works from becoming archival elements in iParadigms' system by affixing a disclaimer [20] to their respective works. "Upon submission, despite disclaimers, iParadigms archived the works. Subsequently, the students filed complaint against iParadigms alleging the archiving amounted to infringement of their copyrights in their written works." [21] iParadigms counterclaimed that the contractual relationship between it and the plaintiffs was valid, and, pace that digitally-engaged document, claimed indemnification against the four students, and further claimed, if that defense should fail, that the company's archiving of the plaintiffs' works fell under the fair use doctrine of copyright. Finally, in the particular case of A.V., who used a "login ID and password for the UCSD system that A.V. or A.V.'s next friend found on the internet" [22] to virtually masquerade as a University of California, San Diego student, and to submit his work to that institute, iParadigms also alleged trespass to chattels, as well as violation of federal and state computer crime acts. [23]

SECTION III: ISSUES OF CONTRACT LAW

a. *Clickwrap Agreement*

To begin, the court confirmed that in the presence of the three basic elements of contract formation--offer, acceptance and consideration--a valid "contract is no less a contract simply because it is entered into via a computer." [24] Clickwrap agreements of the nature agreed to by the plaintiffs are non-controversial and "there is no impediment to such an agreement," one oft-cited commentator notes, "as long as the traditional requirements for assent are met." [25] And, since the Turnitin™ clickwrap agreement was determined by Judge Hilton to be an agreed to and valid contract the terms of which included both (1) an anti-modification clause explicitly stating that service was offered to the students "conditioned on [their] acceptance without modification of the terms, conditions, and notices contained [therein]", [26] and (2) a limited liability clause that effectively shielded iParadigms from any user damages stemming from the use of Turnitin™, plaintiffs attempted to void the contract through two defenses. [27]

b. *Infancy Defense*

Drawing on the doctrine of the infancy defense, plaintiffs first sought avoidance on the grounds that, by virtue

of their minority, they lacked the contractual capacity necessary to be bound by contract law. [28] A common law tradition stretching back to the medieval age, [29] the contract-voiding defense of infancy has customarily been justified by jurists by virtue of the notion that, since juveniles cannot comprehend the full significance of their actions, contractual obligations enforced on them by law are unfair. [30]

Judge Hilton ultimately relied on an exception [31] to the general infancy defense to dismiss avoidance. Since the students were plaintiffs, not defendants, and, on Judge Hilton's understanding of the facts, "received benefits from entering into the Agreement with iParadigms" [32]--benefits inclusive of "a grade from their teacher, allowing them the opportunity to maintain good standing in the classes in which they were enrolled," [33] as if the students would not have otherwise received a grade, albeit "F," and "the benefit of standing," [34] the legal term for adequate personal interest in a legal case's outcome prerequisite to becoming a party to suit-- the court concluded that the plaintiffs would use the exception as a "sword," not a "shield," and so must be barred from deploying it because the defense cannot allow the minority to take the contract's benefits while leaving behind its burdens. [35]

c. *Doctrine of Duress*

Plaintiffs next attempted to void the clickwrap agreement due to its alleged coercive nature, citing the duress doctrine. [36]

Judge Hilton's analysis of this claim's merit rested upon Virginia's definition of duress: the "overbearing of a person's free will by an unlawful or wrongful act or by threat such that the party's consent to a contractual agreement is involuntary." [37] And here, plaintiffs' strategy failed for two reasons.

First, the plaintiffs failed to note the absence in Virginia of a doctrine of third party duress. If there was "an unlawful or wrongful act" or a threat fueling the plaintiffs' assent, as Judge Hilton noted, "there is no evidence that anyone was coerced in any fashion by Turnitin™ or iParadigms" [38] and "there is no support for the proposition that a contract can be invalidated on the basis of third party duress." [39]

And even if there was evidence of coercion, or granting the hypothetical viability of third party duress in Virginia, secondly, the special relationship between public schools and their students would have blocked the coercion from reaching the status of "an unlawful or wrongful act"; [40] by virtue of that school-student relationship, schools have the right "to decide how to monitor and address plagiarism [ ] and may employ companies like iParadigms to help do so." [41] And Judge Hilton's citation of Justice Thomas could hardly be more ironically, more jejunely appropriate: "If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move." [42] So stands extant applicable contract law. [43]

SECTION IV: DEFENDANT'S COUNTERCLAIMS

iParadigms leveled four counterclaims against the plaintiffs. First, iParadigms sought indemnification against each of the plaintiffs based on Turnitin™'s "Usage Policy," which contained an indemnification clause. However, as the Usage Policy was neither incorporated into *nor* made reference to by the clickwrap agreement, plaintiffs having never assented to the Usage Policy as an independent second contract, no grounds existed for recognizing a right to indemnification on iParadigms' part. [44]

iParadigms' three remaining counterclaims were all alleged against A.V. alone. Defendant counterclaimed that plaintiff A.V. was liable for trespass to chattels "based on A.V.'s acts of submitting written works to UCSD, where he was not enrolled." [45] iParadigms' third counterclaim alleged that plaintiff A.V. violated the Computer Fraud and Abuse Act. [46] And in its fourth counterclaim, iParadigms alleged that A.V. violated the Virginia Computer Crimes Act. [47]

As iParadigms only presented evidence of consequential damages arising from "the steps taken by iParadigms in response to A.V.'s submissions", [48] the court found each of the final three counterclaims to be baseless. [49]

Liability for trespass to chattel requires that the chattel be "impaired as to its condition, quality, or value"; [50] under The Computer Fraud and Abuse Act, in addition to intentional access of "a protected computer without authorization", A.V.'s unauthorized access would need to trigger damage [51] leading to "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value"; [52] and the Virginia Computer Crimes Act states that "Any person who uses a computer or computer network, without authority and: 1. Obtains property or services by false pretenses ... is guilty of the crime of computer fraud", [53] and, as well, that "Any person who willfully obtains computer services without authority is guilty of the crime of theft of computer services", [54] damages and costs of suit can be collected by "any person whose property or person is injured by reason of a violation". [55]

However, to have been successful, Judge Hilton reasoned, each of these counterclaims would have required that iParadigms suffered some damage as a direct result of A.V.'s allegedly unauthorized access and document submissions. And since the defendant produced no evidence of damage, the court found counterclaims two, three and four unpersuasive. [56]

SECTION V: ISSUES OF COPYRIGHT LAW

iParadigms also addressed the question of whether, as plaintiffs' alleged, iParadigms' archiving of the plaintiffs' works violated the plaintiffs' copyrights. iParadigms' digital archive of student-submitted written works comprises one aspect of a collection of databases the company uses when checking newly submitted works. [57] The defendant claimed that the statutory defense of fair use cleared it of any liability for infringement. [58]

"Copyright protection is traditionally understood as a means to incentivize creativity by granting innovators a bundle of exclusive rights in their creations." [59] The fair use doctrine counterbalances these rights. "[F]or purposes such as criticism, comment, news reporting, teaching [ ], scholarship, or research," [60] the use of copyrighted material in the absence of the copyright holder's permission is considered a fair use. [61] In the interplay between the rights bundle and such limiting exceptions, the inducement to creativity that is copyright laws' widely acknowledged intent [62] stands less of a chance of being paradoxically snuffed out by those same laws. In a nutshell, if copyright law were buggy software, fair use would be a good patch.

A court consideration of the fair use defense is a function of the weighing of four factors: (1) the purpose and character of the use, (2) the copyrighted work's nature, (3) the amount and substantiality of the use relative to whole copyrighted work and (4) the economic effect of the use on the copyrighted work. [63]

a. *Purpose and Character of the Use*

Determining the purpose and character of the use of the copyrighted material constitutes the first factor of a fair use analysis. [64] "In its weighing, a court is to determine to what degree a use has changed or augmented the copyrighted work, whether its character or purpose has been extended or somehow changed." [65] This factor also directs courts to assess whether the use "is of a commercial nature of is for nonprofit education purposes." [66] By some commentators' account, chief [67] among the factors, this first diminishes the others' determinative relevance in inverse proportion to the use's transformative effect: "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. [68]

The court in *iParadigms* first recognized that while the students created writings for the purposes of "education and creative expression," [69] that in subseuquently using those works to deter student plagiarism, iParadigms had clearly made a transformative use of the works. [70] Likewise, as the use of the students' works leads, in Judge Hilton's opinion, to a "substantial public benefit through the network of educational institutions using Turnitin [™]," [71] the court stated that its "highly transformative" assessment of the use was not impacted by the fact that iParadigms profits through provision of this service. [72] Therefore, the first factor favored a finding of fair use.

b. *The Nature of the Copyrighted Work*

The second doctrinal factor, an assessment of the nature of the copyrighted work, [73] calls for a gauging of a work's creativity, "[t]he general rule afford[ing] the greatest degree of protection to highly creative works, and the least to works that are factual or practical in nature" [74] and a determination of whether the use cultivates or retards the spirit of copyright law--creative expression induction. [75] Judge Hilton minimized the significance of this factor since "the allegedly infringing use makes no use of any creative aspect of the student works." [76] This logic seems strained, however. The use in question is the "continued archiving of [the plantiffs'] works," [77] an on-going process encompassing the entire works, and not merely the "comparative value of the works." [78] The remainder of the court's second factor analysis remains sound, though: iParadigms' use of the students' works does not seem to diminish "the incentive for creativity on the part of students," but rather shields "the creativity and originality of student works by detecting any efforts at plagiarism by other students." [79] The court accordingly determined this factor to support a fair use finding, or, to be neutralized on account of iParadigms' use of creative as well as "unoriginal" aspects of student works.

c. *Amount and Substantiality*

The third statutory factor must examine whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" [80] is reasonable in light of the use's purpose. [81] This factor does "embody the logical intuition that the more of a work a defendant takes, the more likely to undermine the plaintiff's markets" [82] and, as a result, "extensive takings" have a lesser chance than "terse borrowings" of contributing positively to a fair use finding. But even a perfect and complete copying of the work in its entirety need not necessarily negatively impact a defendant's claim of fair use. [83]

The court noted clearly that iParadigms' use includes entire student works, [84] but also stated that such use was requisite to Turnitin™'s success as a service, and that the comparative nature of the use "limited [its] purpose and scope," [85] since iParadigms' archiving is digital, the works only become readable to humans when and if a subsequently submitted student writing is flagged by the system and that student's teacher requests a copy of the possible target of plagiarism. [86]

Therefore, considering the transformative effect of iParadigms' use and the societal benefit of Turnitin™, the court found the factor supportive of neither plaintiffs nor defendant. [87]

d. Market Effect

In analyzing the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," [88] a court will consider detrimental financial impacts as weighing against a finding of fair use. The court must additionally base its consideration on implications of the defendant's use were it to become widespread. [89] This factor rivals the first factor in importance, perhaps even surpassing it in certain circumstances. [90]

The plaintiffs found themselves in the comically awkward position of having their strongest claim to negative market impact be based on their inability, given iParadigms' use, to sell their works to an on-line student paper mill that would go on to re-sell the works to other high school students. [91] The court rightly found that reasoning corrosive to copyright law's spirit of creative expression induction. And the court disregarded it as "unpersuasive," along with the plaintiffs' contention that possible future sales of their works to publishers who subscribed to Turnitin™ would be hindered by the suggestion of plagiarism. [92]

And, thus having considered the four factors, the court determined iParadigms' use of plaintiffs' written works to be fair use. [93] On the substantive matters of both contract and copyright law, plaintiffs failed to prevail, and as legal matter, *iParadigms* is, for now, settled. [94]

SECTION VI: CAN VERSUS SHOULD

Post-*iParadigms*, academic administrators and judicial affairs officers can take solace in the reduced degree of uncertainty regarding legal liability should they chose to deploy Turnitin™; the possibility of copyright infringement and the potential of contract avoidance, as discussed above, are, for now, settled in favor of iParadigms. [95] But as several commentators have noted, [96] the question of *whether* to use Turnitin™ and similar technologies to address the "plagiarism epidemic" [97] should not be considered simply a matter of determining if such use violates copyright law. Not even a legal opinion as clear-sighted and well reasoned as Judge Hilton's can definitively tell us--we educators and managerial overseers of educational institutes--whether we *should* use Turnitin™. Properly, *iParadigms* does not address the implications of using Turnitin™, or whether such use as described in the case makes for sound education policy. *iParadigms* takes us to the edge of such ethical analysis; it would be folly to confuse this legal opinion with an ethical *fait accompli*. In the remainder of this article, I discuss two reasons why Turnitin™ should not be simply embraced, even in the wake of *iParadigms*.

A disturbing aspect of anti-plagiarism technologies such as Turnitin™ emerges once we look closely at a common rationale for their use. Whether advocate, critic, booster or removed observer, a preponderance of commentators who discuss contemporary student plagiarism look to information technologies and cyberspace as the phenomenon's fundamentally enabling engine. [98] Many only imply it, but some go further, directly deducing a quasi-causal link between the technological changes that lead to the Internet as we know it presently, and the ethical reasoning and subsequent actions of students faced with the possibility of plagiarizing. [99] In other words, student plagiarists are condemned for allowing their ethical reasoning to become a function of technological change. [100]

This critique, to the extent that it is held, however, is hypocritical. Educators who use Turnitin™ simply respond in kind, reflecting the same technologically determined "ethics" as they imagine guides their students' behavior. Our educational ends are simply being modified to suit the presently available technological means. [101]

A second matter is perhaps more disturbing yet. In our consideration of the societal significance of using Turnitin™ to "combat the plagiarism epidemic," [102] it may be useful--one might even imagine *necessary*--to seek guidance in a vision of the larger cultural meaning and significance of American education. In fact, in giving American academia an opportunity to reflect on the meaning of its vocation and task, *iParadigms*, I believe, achieves it maximal yield. The ruling all but forces us to question what the great task of modern American education is.

A vision that has held sway near the gravitational center of American culture since it's founding is liberal education. [103] Liberal education, the Association of American Colleges and Universities tells us, "is an approach to learning that empowers individuals and prepares them to deal with complexity, diversity, and change. It provides students with broad knowledge of the wider world (e.g. science, culture, and society) as well as in-depth study in a specific area of interest." [104]

As well, liberal education has regularly carried a charge of deep civic significance to American culture, particularly with respect to freedom and liberty. The Task Force on General Education accordingly defines the purpose of liberal education thusly: "... to unsettle presumptions, to defamiliarize the familiar, to reveal what is going on beneath and behind appearances, to disorient young people and to help them to find ways to re-orient themselves." [105]

While Turnitin™ may marginally incentivize the venerable educational goal of original student-produced writings, the larger educational effect of its use is arguably opposed to the spirit of liberal education. Rather than move society marginally towards the ideal of a stronger democracy [106] wherein minor citizens are recognized as the lifeblood of that politico-social order's further democratic enrichment, Turnitin™'s use contributes to a radically different valuation of youth: call it The Bad Seed model of juveniles. [107] This model incorporates a vision of modern children as deceptively sophisticated, [108] market-savvy proto-criminals, [109] particularly in technological domains. [110] In underwriting this cynical vision of youth, the Bad Seed model undermines the project of liberal education. Through their use of Turnitin™, teachers quietly express to students their fearful distrust, and the policing medium itself becomes the ultimate instructive message.

SECTION VII: CONCLUSION

In the context of contract law and copyright law, *iParadigms* represents a profound legal defeat for the student plaintiffs. The court's legal reasoning is sound, unlikely to be overturned in the absence of the development of powerful and novel legal arguments unimagined by this author. Nevertheless, educators should not be tempted to blindly use Turnitin™ to police student-produced writings for instances of plagiarism. For while *iParadigms* clears school's uses of Turnitin™ of much of the uncertainty concerning potential legal liability, [111] the ruling does not free educators of the ethical duty of considering the broader educational and societal effects of such uses. *iParadigms* ushers educators up to the edge of such ethical analysis; we should not confuse it with that analysis' completion. Considering the relatively simple legal questions addressed in the ruling, we can imagine *iParadigms* as signifying an extension of an old legal aphorism: an easy case aids bad policy; at least when we outsource our ethical obligations as teachers to the courts.

POSTSCRIPT

After this article was accepted for publication, the parties cross appealed. Judge Traxler of the Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment for the matters of copyright infringement, but reversed and remanded for consideration the grant of summary judgment regarding two of defendant-appellant's counterclaims. [112]

Though the Computer Fraud and Abuse Act was largely revamped following the district court's ruling, Judge Traxler's reversal bears on a constancy between the Act's old and new forms: the meaning of “economic damages.” And more specifically, whether that term should be understood to include “consequential damages”. [113]

Judge Traxler found that the lower court too narrowly interpreted “economic damages,” noting that the Act includes within its definition of that term “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damages assessment ... or any other consequential damages incurred because of interruption of service,” [114] in the appellate court's view, the very type of damages the defendant-appellant sought. [115]

Similarly, the appellate court reversed the lower court's opinion regarding whether iParadigms failed to produce evidence of actual or economic damages under the Virginia Computer Crimes Act. Judge Traxler found “nothing in the statute to suggest that consequential damages are not available” and agreed with appellant-defendant that the lower court erred when it dismissed iParadigms' counterclaim on that basis. [116]

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[2]. RICHARD POSNER, THE LITTLE BOOK OF PLAGIARISM 82 (PANTHEON BOOKS 2007).

[3]. Jacques Derrida, Limited Inc. 34 (Northwestern University Press 1988).

[4]. *See* David A. Thomas, Note and Comment, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic*, 2004 BYU EDUC. & L.J. 421. PROFESSOR THOMAS' ANALYSIS IS STRIKINGLY APROPOS IN ITS TITULAR ADMIXTURE OF MEDICAL AND MILITARISTIC ALLUSIONS. THOUGH HARDLY CONSONANT WITH THE GOALS OF HIS DISCUSSION AS I INTERPRET THEM, THE HUNT-AND-HEAL THEME INVOKED AT HIS NOTE'S HEAD IS IN LINE WITH THE PEDAGOGIC MOOD SEEMINGLY ANIMATING MUCH OF THE ACADEMIC COMMENTARIAT THAT HAS TURNED TO THE

TOPIC OF STUDENT PLAGIARISM; SEE INFRA, NOTES 95-97. ONE GOAL OF MY ARTICLE IS TO HUNT DOWN AND CONTRIBUTE TO THE ERADICATION OF THIS MOOD.

[5]. Thomas, *supra* note 4, at 425. *See also* Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War Against Student Plagiarism*, 2007 BYU Educ. & L.J. 119, 119. Professor Ryesky's article, in title as well as argument, embraces the medical-military theme, providing further evidence of the pedagogical mood that is a high-value target of my article.

[6]. A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008), aff'd in part, rev'd in part, remanded by 2009 U.S. App. Lexis 7892 (4th Cir. 2009). In the remainder of my analysis I will use "*iParadigms*" to refer to the ruling, and "iParadigms" when I mean the defendant.

[7]. Neither whimsical nor ornamental, this foregrounding of socioetechnical entanglement serves to signal my disciplinary approach as one heavily influenced by the theories and literatures of Science and Technology Studies. Though published more than a decade ago, David Hess' SCIENCE STUDIES: AN ADVANCED INTRODUCTION (NEW YORK UNIVERSITY PRESS 1997) PROVIDES A GOOD OVERVIEW OF THE FIELD. THIS ARTICLE DRAWS INSPIRATION IN PARTICULAR FROM THE THEORETICAL APPROACHES OF LANGDON WINNER AND DONNA HARAWAY, INFRA.

[8]. The™ symbol I attach to "Turnitin" serves a greater purpose than merely reminding us that that phrase has been registered as a trademark by iParadigms for "Educational services, namely providing on-line grading; statistical analysis" and, most importantly for my purposes, "plagiarism detection," but also "peer review; class assignment, submission and retrieval; and class information services accessible through the internet or through an intranet." United States Patent and Trademark Office, Trademark Database search results for "Turnitin," available at http://tess2.uspto.gov/bin/gate.exe? f=tess&state=4010:sd7lcm.1.1 (last visited Mar. 5, 2009). I also deploy the symbol to register a curiosity concerning "what kinds of bodies, what forms of frozen as well as motile sociotechnical alliances, also called social relationships, these little ornaments can adorn, at whose cost, and to whose benefit." *See* Donna J. Haraway, Modest_Witness@Second_Millennium.FemaleM an©_ Meets_OncoMouse™ 7 (Routledge 1997). The simple economic fact that "students are giving their work to a company that's making money and they are getting no compensation" should not be obscured or minimized in import; Maria Glod, *Students Rebel Against Database Designed to Thwart Plagiarists*, WASH. POST, SEPT. 22, 2006, AT A0.

[9]. "Over 7,000 educational institutions worldwide use Turnitin, resulting in the daily submission of over 100,000 works to Turnitin." *See iParadigms*, 544 F. Supp. 2d at 478.

[10]. The use of plagiarism detection software systems is spreading beyond student populations, however. Professional research journals are beginning to use similar techniques to prevent instances of plagiarism and dual-submission by researchers. *See* Catherine Rampell, *Journals May Soon Use Anti-Plagiarism Software on Their Authors*, Chron. Higher Educ. (Wash., D.C.), April 25, 2008.

[11]. *See* James Moran, Printing Presses; History and development from the Fifteenth Century to Modern Times (University of California Press 1973).

[12]. *See* Kevin Kelly, New Rules for the New Economy: 10 Radical Strategies for a Connected World 40-41 (Penguin Books 1998).

[13]. *See* Michael G Bennett, *A Nexus of Law and Technology: Analysis and Postsecondary Implications of A.V. et al. v. iParadigms*, 2 J. Student Cond. & Admin. 1 (Mar. 2009), available at www.asjaonline.org/; Roger E. Schechter and John R. Thomas, Intellectual Property--The Law of Copyrights, Patents and Trademarks 212 (West Group 2003).

[14]. Bennett, *supra* note 13.

[15]. A clickwrap agreement is an electronic contract, commonly used in Internet site usage and software license agreements, in which assent to contractual terms is indicated by an offeree's pressing an onscreen button that typically reads "I Agree."

[16]. *See* Bennett *supra* note 13. *See also* Amended Complaint For Copyright Infringement, A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008) (Civil Action No. 1:07 CV 293 CMH/LO).

[17]. *See* Samuel J. Horovitz, Note, *Two Wrongs Don't Make a Copyright: Don't Make Students Turnitin if You Won't Give it Back*, 60 FLA. L. REV. 229, 232-233, 237-238.

[18]. *See* Amended Complaint For Copyright Infringement, A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008) (Civil Action No. 1:07 CV 293 CMH/LO).

[19]. *See* Bennett, *supra* note 13.

[20]. *iParadigms*, 544 F. Supp. 2d at 478.

[21]. See Bennett *supra* note 13.

[22]. *iParadigms*, 544 F. Supp. 2d at 479.

[23]. *Id*. at 477.

[24]. *Id*. at 480 (citing *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010 (D.C. 2002)).

[25]. E. A. FARNSWORTH, CONTRACTS 292 (ASPEN PUBLISHERS 4TH ED. 2004).

[26]. *iParadigms*, 544 F. Supp. 2d at 480.

[27]. *Id*. at 478, 480.

[28]. *Id*. at 480-81.

[29]. *See* Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 481 N.3 (1994).

[30]. "The long-accepted rationale for the minority incapacity doctrine," Professor Daniel notes, "has been that children lack the ability to understand and appreciate the consequences of their acts, and thus should not be inextricably bound by the consequences of their youthful follies." *See* Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 240 (2007/2008).

[31]. Exceptions seem the rule of the day for the infancy law doctrine, and so much so that commentators speculate somewhat dramatically on the defense's existential death. DiMatteo, *supra* note 29, at 484.

[32]. *iParadigms*, 544 F. Supp. 2d at 481.

[33]. *Id*.

[34]. *Id*.

[35]. "[T]he infancy defense cannot function as 'a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong."' *Id*. at 481, citing MacGreal v. Taylor, 167 U.S. 688, 701 (1897).

[36]. *iParadigms*, 544 F. Supp. 2d at 481.

[37]. *Id*.

[38]. *Id*.

[39]. *Id*. The Restatement (Second) of Contracts § 175(2) (1981) does, however, offer some supporting ground for third party duress:

If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

[40]. *iParadigms*, 544 F. Supp. 2d at 481.

[41]. *Id*.

[42]. *Id.*, citing Morse v. Frederick, 127 S.Ct. 2618 (2007).

[43]. Though Judge Hilton does not address it, a third rhetorico-logical argument weakens the duress defense further. "A threat is a manifestation of an intent to inflict some loss or harm on another," Farnsworth states, noting further that duress concerns threats "made to induce the victim to manifest assent to a contract. But not all such threats are improper for ... an offer may be regarded as such a threat." See Farnsworth, *supra* note 25, at 256. In other words, in the offering of A for B, there is an embedded albeit quiet threat of *no* A *unless* B. So, the very basis of contract always already mitigates the theoretical possibility of a threat crossing the thresholds of impropriety, inducement, and gravity necessary for a finding of threat-based duress. By definition, contract mingles with threat, and "it is thus indirect compulsion." *See* OXFORD ENGLISH DICTIONARY (2ND ED.) AVAILABLE AT HTTP://WWW.OED.COM/ (LAST VISITED AUG. 15, 2008). THIS DEFINITIONAL MATTER MAKES THREAT-BASED DURESS A WEAK PLAY UNDER VIRGINIA LAWW.

[44]. *iParadigms*, 544 F. Supp. 2d at 484-85.

[45]. *Id.* at 485-86.

[46]. 18 U.S.C. § 1030(a)(5).

[47]. Va. Code. § 18.2-152.3.

[48]. *iParadigms*, 544 F. Supp. 2d at 486.

[49]. *See* the postscript concluding this article.

[50]. *Id.*, citing *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998).

[51]. 18 U.S.C. § 1030(a)(5)(A)(iii).

[52]. 18 U.S.C. 1030 (a)(5)(B)(i).

[53]. *iParadigms*, 544 F. Supp. 2d at 486.

[54]. Va. Code. § 18.2-152.6.

[55]. *Id*. § 18.2-153.12.

[56]. *iParadigms*, 544 F. Supp. 2d at 486.

[57]. *Id*. at 477-78.

[58]. *Id*. at 481-82.

[59]. *See* Bennett *supra*, note 13. Embryonic elements are drawn *verbatim ac litteratim* from "A Nexus of Law and Technology: Analysis and Postsecondary Implications of A.V. et al. v. iParadigms" to draw attention to the complex relationship between copyright and plagiarism, as well as to underscore, through contrast, the relatively obscure, oft-ignored, technical possibility of plagiarizing one's own work. "Self-copying," Judge Posner clarifies for us, "becomes fraudulent and therefore plagiaristic only when the author represents his latest work to be newly composed when in fact it is a copy of an earlier work of his that readers may have read." *See* Posner, *supra* note 2. Derrida's dense examination of the consequences of the structural iterability of writings, and his rigorously fashioned performance of citation in his seminal exchange with John R. Searle on speech act theory, though in reach, elegance and effect, far out-stripping this author's ability, nonetheless also inspires my self-referentiality. *See* Derrida, *supra* note 3. The bundle of rights afforded an author through copyright includes the rights to (i) reproduce, (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. *See* 17 U.S.C. § 106(1)-(6). Visual art works are granted additional moral rights protection under the Visual Arts Rights Act of 1990. *See* 17 U.S.C. § 106A.

[60]. 17 U.S.C. § 107.

[61]. "A perfectly airtight system of copyright would probably be intolerable." Roger E. Schechter and John R. Thomas, *supra* note 13, at 212. As Schechter and Thomas note, "academic writers may have a strong need to quote extensively from prior work." *Supra*, at 224. Here I articulate at a rhetorical and syntactical scale that that need is acute in the context *iParadigms*' mingling of copyright law and plagiarism.

[62]. "[T]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[63]. 17 U.S.C. § 107. While it is clear that the statute requires an assessment of the four factors, in stating that "the factors to be considered shall include--" the statute also makes room for the consideration of other, extra-statutory factors. See Schechter and John R. Thomas, *supra* note 13, at 210-18.

[64]. 17 U.S.C. § 107(1).

[65]. Bennett, *supra* note 13.

[66]. 17 U.S.C. § 107(1).

[67]. While more recent case law places heavy weight on the transformation factor, courts continue to formally express a *de jure* co-eminency by pointing out, for example, that even though "no one factor is dispositive, courts traditionally have given the most weight to the first and fourth factors." Blake A. Field v. Google, Inc., 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006). *iParadigms* would seem to contribute to the judicial tendency to lend singular, quasi-

determinative import to transformative uses.

[68]. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[69]. *iParadigms*, 544 F. Supp. 2d at 482.

[70]. *Id*. *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007) (discussing the socially beneficial and transformation effect on images produced by Google's reproduction of them via its search engine results.)

[71]. *iParadigms*, 544 F. Supp. 2d at 482.

[72]. *Id*.

[73]. 17 U.S.C. § 107(2).

[74]. *See* Schechter and John R. Thomas, *supra* note 13, at 224.

[75]. *See* Bennett, *supra* note 13; Bond v. Blum, 317 F.3d 385, 395-96 (4th Cir. 2003).

[76]. *iParadigms*, 544 F. Supp. 2d at 483.

[77]. *Id*. at 478.

[78]. *Id*.

[79]. *Id*. at 483.

[80]. 17 U.S.C. § 107(3).

[81]. *Campbell*, 510 U.S. at 586.

[82]. *See* Schechter and John R. Thomas, *supra* note 13, at 226.

[83]. "... we recognize that the extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586-87. Compare Professor Dan Burk's arguments in Andrea L. Foster, *Plagiarism-Detection Tool Creates Legal Quandry*, Chron. Higher Educ. (Wash., D.C.), A37, May 17, 2002.

[84]. This element of the court's discussion is difficult to square with its assertion that iParadigms' "use makes no use of any creative aspect of the student works." *See iParadigms*, 544 F. Supp. 2d at 483.

[85]. *iParadigms*, 544 F. Supp. 2d at 483.

[86]. *See* Bennett, *supra* note 13.

[87]. *iParadigms*, 544 F. Supp. 2d at 483.

[88]. 17 U.S.C. § 107(4).

[89]. *See* Sony Corp. Of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)

[90]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

[91]. *See* *iParadigms*, 544 F. Supp. 2d at 484, note 1.

[92]. The court too quickly dismisses the hypothetical possibility of self-plagiarism when it states that, once flagged by Turnitin™ as a possibly plagiarized work, the hypothetical publisher would quickly realize that no plagiarism had occurred; rather the match merely indicated an earlier submission. *See* *iParadigms*, 544 F. Supp. 2d at 484. But this hypothetical *could* be deemed plagiarism if we follow Judge Posner in defining plagiarism as "fraudulent copying and fraud tied to reliance and ... expectations. *See* Posner, *supra* note 2, at 49.

[93]. *See* *iParadigms*, 544 F. Supp. 2d at 484.

[94]. See the postscript concluding this article.

[95]. *See* Bennett, *supra* note 13.

[96]. *See* Jeffrey R. Young, *The Cat-and-Mouse Game of Plagiarism Detection*, Chron. Higher Educ. (Wash., D.C.), Jan. 6, 2001; Paula Wesley, *Antiplagiarism Software Take on the Honor Code*, Chron. Higher Educ. (Wash., D.C.), Feb. 29, 2008; Maria Glod, *Students Rebel Against Database Designed to Thwart Plagiarist*s, Wash. Post, Sept. 22, 2006, available at www.washingtonpost.com (last visited Feb. 26, 2009).

[97]. *See* Thomas, *supra* note 4.

[98]. *See* Horovitz, *supra* note 17, at 232 (noting that "Internet environment where plagiarism is easier than ever, academic institutions face the daunting challenges of promoting honesty and respect for the work of others ..."); Thomas, *supra* note 4, at 421 ("... the possibilities of for plagiarism, both deliberate and inadvertent, are today vastly increased because of technology."); Kristin Gerdy, *Law Student Plagiarism: Why It Happens, Where It's Found, and How to Find It*, 2004 BYU Educ. & L. J. 431; Ryesky, *supra* note 5; and the author's own discussion of technologically-enabled textual copying, *supra* Section 1. *See also* Rebecca Attwood, *Institutions Limit Access to Anti-Cheat Software*, Times H. Educ., July 24, 2008 (discussing student appropriation of anti-plagiarism technologies to better mask plagiarism); Andrew Trounson, *Cut and Paste 'Not Plagiarism,'* THE AUSTRALIAN, JULY 6, 2008, AVAILABLE AT HTTP://WWW.THEAUSTRALIAN.NEWS.COM.AU/ (LAST VISITED FEBRUARY 26, 2009) (DISCUSSING THE EDUCATIONAL SIGNIFICANCE OF DIGITAL CUTTING AND PASTING IN AN INTERNET-INFUSED AGE).

[99]. "The proliferation of paper mills, full-text databases, and World Wide Web pages has made plagiarism a rapidly growing problem in academia." Nicole J. Auer and Ellen M. Krupar, *Mouse Click Plagiarism: The Role of Technology in Plagiarism and the Librarian's Role in Combating It*, 49 LIBRARY TRENDS 3, 415 (2001).

[100]. My argument is analogous that of Professor Lessig's in another context regarding what could be called technologically determined privacy. *See* Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE, 111-121 (BASIC BOOKS 1999).

[101]. See LANGDON WINNER, AUTONOMOUS TECHNOLOGY: TECHNICS-OUT-OF-CONTROL AS A THEME IN POLITICAL THOUGHT, CHAPTER 6 (MIT PRESS 1977) FOR A DISCUSSION OF THE CLOSELY RELATED PHENOMENA OF "REVERSE ADAPTATION."

[102]. *See* Thomas, *supra* note 4.

[103]. Association of American Colleges and Universities, *What is Liberal Education?* available at http://www.aacu.org/leap/What_is_liberal_education.cfm (last visited Feb. 26, 2009).

[104]. *Id*.

[105]. The Task Force on General Education, *Report of The Task Force on General Education*, 1-2 (Harvard University 2007). *Cf*. David Brooks, *What Life Asks of Us*, N.Y. TIMES, JAN. 26, 2009, AVAILABLE AT HTTP:// WWW.NYTIMES.COM/2009/01/27/OPINION/27BROOKS.HTML (LAST VISITED FEBRUARY 25, 2009). PUTTING PERHAPS THE FINEST POINT TO DATE ON THIS CONFLUENCE OF CIVICS AND EDUCATION, WALT WHITMAN, IN AN ABSOLUTE CONFLATION OF GOVERNMENT AND CIVIC EDUCATION, TOOK THE ULTIMATE PURPOSE OF EDUCATION TO BE "HIGHER THAN THE HIGHEST ARBITRARY RULE," AND NOTHING LESS THAN THE "TRAIN[ING OF] COMMUNITIES THROUGH ALL THEIR GRADES, BEGINNING WITH INDIVIDUALS AND ENDING THERE AGAIN, TO RULE THEMSELVES." WALT WHITMAN, DEMOCRATIC VISTAS, IN THE PORTABLE WALT WHITMAN 335 (MARK VAN DOREN ED., PENGUIN BOOKS 1973).

[106]. One approach to strengthening democracy can be found in BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (UNIVERSITY OF CALIFORNIA PRESS 1984); FOR A DISCUSSION OF STRONG DEMOCRACY IN THE CONTEXT OF TECHNOLOGICAL DEVELOPMENT AND DESIGN, SEE RICHARD E. SCLOVE, TECHNOLOGY AND DEMOCRACY (GUILFORD PRESS 1995).

[107]. I derive this title from William March, The Bad Seed (Rinehart 1954). Professor Etheridge's concept of the "cultural geography of childhood" was invaluable in defining the model. The air of contagion that hovered over the film and stage versions of the book resonates disturbingly with rhetorical allusions to medicinal militarism in the legal discourse on plagiarism. *See* Stephani Etheridge Woodson, *Mapping the Cultural Geography of Childhood or, Performing Monstrous Children*, 22 J. Am. Cult. 4 (1999); *see also* Thomas, *supra* note 4.

[108]. *See* Melvin John Dugas, Comment, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 Tul. L. Rev. 745 (1988) (discussing the history f infancy doctrines).

[109]. Social science studies of childhood have noted the emergence of new theme in "the recent history of childhood": "Parents becoming fearful of the latent monster in all children, a parental fear of what their children may become." Stephani Etheridge Woodson, *supra* note 105, citing Shirley R. Steinberg and Joe. L. Kincheloe (eds.), Kinderculture: The Corporate Construction of Childhood 19 (Westview 1997).

[110]. "The technologically oriented and knowledgeably mature youth of our hectic age is not at all comparable to the minor of even five or six decades ago who needed the solicitous attention and protection the law so thoroughly afforded him." Irving M. Mehler, *Infant Contractual responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 KAN. L. REV. 361, 373 (1963).

[111]. However, uncertainty remains. Retaliatory litigation by students accused of plagiarism is a risk academic institutions must still assess and manage. *See* Posner, *supra* note 2, at 39; *see also* Boozer v. Univ. of Cincinnati Sch. of Law, 2006 Ohio App. LEXIS 2426 (Ohio Ct. App. 2006).

[112]. A.V. v. iParadigms, LLC, 562 F.3d 630, 634 (4th Cir. 2009).

[113]. *Id*. at 645-46.

[114]. 18 U.S.C. 1030(e)(11).

[115]. *iParadigms*, 544 F. Supp. 2d at 486.

[116]. *iParadigms*, 562 F.3d at 647.