

PLAGIARISM AND COPYRIGHT IN TERTIARY EDUCATION: RISKS POSED BY PLAGIARISM DETECTION TOOLS FOR BOTH STUDENTS AND EDUCATIONAL INSTITUTIONS

JULIET HYATT[†] & PHEH HOON LIM
AUT UNIVERSITY, AUCKLAND, NEW ZEALAND

Many educational papers have examined the 'value' of online detection services by assessing the benefits and drawbacks of using such devices in dealing with text-based plagiarism issues.¹ This paper intends to go further by identifying and assessing the legal and educational risks to institutions of relying on such tools and by examining the risks posed to students who agree to participate in such plagiarism detection processes. Many explanations have been proffered for what is widely perceived to be an increasing incidence of plagiarism by students beginning in high school right through to postgraduate studies.² These reasons may be intentional or unintentional and will be addressed in a limited fashion in this paper as background for suggestions of ways to minimise risks associated with the use of online detection services. Whatever the reasons, it is fair to say that educational institutions are expending considerable resources on addressing the prevalence of plagiarism and it is timely to take stock of the potential and existing perils inherent in relying on the widely promoted online detection systems.

*To provide a context for this discussion, this paper looks at the relationship between copyright and plagiarism. It discusses the definition of plagiarism used in New Zealand universities, but is not an exhaustive analysis of plagiarism definitions. The authors' focus is on the legal and practical impact for institutions of the US Court of Appeals decision in *AV v iParadigms*,³ a high profile US case where the use of the Turnitin® (Turnitin) software, a popular plagiarism detection tool, was challenged by students on the basis of, *inter alia*, a breach of copyright.*

Legal risks for tertiary institutions and students arise also from requiring students to submit assessments to online detection programmes and from false accusations of copying. These and other areas of concern, identified from the practical experience of the writers, are canvassed with a view to raising awareness for those in tertiary institutions utilising online detection tools as the basis of a plagiarism prevention strategy. This analysis does not purport to be a complete examination of these topics but does seek to highlight a number of potentially risky areas that should be considered when assessing the educational advantages and limitations of relying too greatly on online plagiarism detection services. The discussion centres primarily on the Turnitin plagiarism detection service as the writers are most familiar with that system and this type of system is widely used in tertiary institutions throughout the world.

I INTRODUCTION

While copyright infringement must involve plagiarism to the extent of a substantial taking of another person's original work, plagiarism by itself does not necessarily amount to copyright infringement. Early cases on copyright infringement involved plagiarism of literary works. The English case of *Pike v Nicholas*⁴ concerned two essays submitted for a prize in a contest, while

[†]Address for correspondence: Juliet Hyatt, juliet@lautrec.co.nz

more than a century later the US case of *Nichols v Universal Pictures*⁵ concerned the plot of two plays, each simply a version of a modern day ‘Romeo & Juliet’. Copyright concerns an exclusive bundle of rights protected as an intellectual property right. There is, however, no property right or copyright in an idea — ideas remain free for all in the public domain. Copyright subsists not in the idea but in its expression (or ‘the form in which the ideas are expressed’).⁶ To disallow the use of ideas by another would mean the monopoly of ideas.⁷

Plagiarism and copyright are as separate as ethics and law; unethical behaviour may not be legally wrong while illegal actions always breach ethical norms. Plagiarism in preventing even the copying or use of another’s idea without acknowledgment admittedly sets a very high benchmark for ethical conduct.⁸ Today in education we are confronted by the problem of alleged breaches of ethical conduct, albeit of a different magnitude, no thanks to the information superhighway. Cyberspace has allowed access to ideas and works at the mere click of a mouse and a cut and paste culture of research and writing has evolved. The authors argue that the use of online detection programmes, such as the Turnitin system, to detect and analyse the extent of similarities between students’ work, should not be focused solely on mechanisms to combat ‘cheating’. A more effective approach is to employ such systems as an educative tool to assist in learning correct referencing techniques. This would encourage and inculcate referencing as part of good academic practice in research and writing.

II LEGAL RISKS

A Copyright and Plagiarism

University websites in general devote space to inform students of the academic standards to be adhered to by defining plagiarism with guidelines on how to avoid it. Assessment guidelines for undergraduate students further define plagiarism as presenting others’ work as one’s own. Examples of how plagiarism can occur are given such as direct copying of or paraphrasing other’s work from hard copies or the internet without referencing, and collaborating with others without identifying or acknowledging their contribution in the submitted work. Students are given information on why academic honesty is important to demonstrate integrity on their part during the course of study at the university.⁹ Some definitions from the websites of New Zealand tertiary institutions include:

Using another person’s words, constructs or ideas as one’s own without acknowledgement.
... any student found guilty of plagiarism will be liable to penalties.¹⁰

Copying images, sounds, tables, graphics, research results, computer programmes, statistical data, ideas, concepts or text without proper acknowledgement or referencing.
... Submitting someone else’s work or ideas without acknowledgement or attribution is not evidence of your own grasp of the material and cannot earn you marks.¹¹

The University of Otago highlights plagiarism as a dishonest practice and students are advised that part of their study at university is about developing their own thoughts and ideas. There is a reminder to students that it is vital to ‘reference these correctly’ when using others’ words or ideas.¹² The University of Canterbury takes its definition from the Oxford Dictionary of English to define plagiarism for its students as ‘the practice of taking someone else’s work or ideas and passing them off as one’s own’.¹³ In contrast to copyright, defining a plagiarist involves the taking of another’s ideas. Nevertheless, its application in cases of students allegedly caught in the act might need further contemplation, bearing in mind the limit it imposes on the use of ideas.

Where students are required to submit a soft copy of their assignments to Turnitin, an originality report is created showing an overall similarity index (OSI). The OSI is stated as a percentage (for example, 25 per cent), which refers to the total percentage of similarity captured by the Turnitin system as it trawls through its database comparing a submitted assignment with the archived works, as well as outside sources such as the internet and publications. The 25 per cent is then broken down and listed in order of the individual percentage matches and referenced to the suspected sources. The number of individual matches varies depending on whether the similarities comprise small matches of four and six per cent or bigger matches of 10 and 15 per cent. An investigator can scroll through the report and click on any of the identified passages to be linked to the source from which the material was allegedly copied or plagiarised, or request Turnitin for a copy in certain instances. The interpretation of the originality reports churned out by the Turnitin system by some universities might have been too literal when the Turnitin system was first introduced, as one author observed while advocating students' rights at a student association. Students were being hauled up for questioning based on a few lines. While the outcomes were not always punitive, the importance of how plagiarism is defined was highlighted and it is clear that a consistent approach in interpretation across each institution is needed.

The Australian decision in *Re Humzy-Hancock*¹⁴ demonstrated the importance of such definitions as in that case the Court was simply obliged to apply the university's definition when considering the liability of a student. In those proceedings there were three instances of alleged academic misconduct by a student who had applied for admission to the legal profession. The first instance involved wrongful collaboration with another student for an assignment. The students had 'pooled' their research notes as Humzy-Hancock had mistakenly perceived that this was permitted as 'normal practice amongst law students'. He asserted, however, that he was unaware that part of his assignment had been copied by the other student. The other two instances involved plagiarising material for another assignment and a take-home exam without adequate attribution to the sources used. It was noted that the Griffith Law School Assessment Policy and Procedures defined plagiarism at that time as the 'knowing presentation of the work or property of another person as if it were the student's own'.¹⁵ The Queensland Supreme Court, however, did not find the alleged misconduct to come within the definition of plagiarism. Focusing on the question of intent the Court could not equate sloppy work or the failure to properly reference the work with an intention to pass off the work of another as one's own. Poor work, in this instance, did not equate to plagiarism,¹⁶ though arguments by commentators do differ.¹⁷ Griffith University's website now defines plagiarism as representing another's work, whether intentionally or unintentionally, without proper acknowledgement of the author or source.¹⁸

The dispute in *Pike v Nicholas*¹⁹ mentioned earlier concerned the plagiarised sections of two essays submitted for a contest. Both plaintiff and defendant had researched on the same topic '*The Origins of the English Nation, with reference to the Question how far that Nation is descended from the Ancient Britons*'. Though neither party won the coveted prize of 100 guineas at the first submission, the plaintiff managed to publish his essay. The defendant competed a second time the following year, and although he again did not win, he successfully submitted his essay for publication as well, leading to the instant suit by the plaintiff. The plaintiff won at first instance on the alleged instances of plagiarism and successfully stopped the publication on the basis that the defendant's work was a piracy of his book, which made it an unfair and illegitimate use. The result on appeal (when their Lordships overturned the decision) provided some arguments that remain as convincing today as they were a century back:

A case of alleged piracy like this was obviously very difficult to determine when the authors took a common subject and depended upon authors open to both of them, and when portions of the one work, which were said to resemble portions of the other work, might be taken from those common authors to which each was at liberty to resort.²⁰

Before the Court could find copyright infringement, the issue as to whether the alleged plagiarised passages amounted to substantial copying had to be determined. First, as the Court emphasised (in approaching the question whether or not one author had taken from the other), it was important to bear in mind that there was a similar topic and a great deal of similarity would naturally be found between the two works. Secondly, once the common sources were established, it was logical that similar statements of fact would be narrated from those common sources.²¹ While there were one or two instances of the defendant having referred to and taken parts from the plaintiff's book, there was no 'slavish copying'.²² Both had referred to similar authorities and text but it was clear that the defendant had done his original research albeit from the same sources. There was no monopoly in the main theory propounded by the plaintiff.²³ The important point stressed by the Court was that the defendant should have openly acknowledged the fact that he had referred to the plaintiff's earlier work and publication and avoided the allegations made against him.²⁴

A subsequent Court in *Morris v Wright*²⁵ was inclined towards the same reasoning that it was perfectly legitimate for a person to refer to another's work and be guided by the same sources and authorities to come up with an original compilation or book.²⁶ The defendant, Wright (an ex-employee), had referred to the directory he had worked on during his employment with Morris when compiling a new directory. The Court's view was that he could not just simply cut out the slips and use the information for his new directory but he should be able to use such slips to direct him to the parties themselves to obtain or update the information.²⁷ Juxtaposed against contemporary scholarly pursuits, the above arguments are a reminder that students, especially those enrolled in first year courses, do rely on a list of recommended textbooks or digital references. The relevant considerations discussed then apply just as much to current plagiarism cases especially when there is a common assignment for assessment in an uncontrolled environment (where students research and complete the work for submission outside the institution instead of being confined under test conditions and an invigilation process).

The cases *Pike* and *Morris* above on copyright infringement have a commercial element in terms of the works for publication, and such infringement must entail a substantial taking of the expression of the work in dispute. By contrast, in the academic context of plagiarised work, no one should have the right to take another's work, be it an idea or theory, and without any independent effort come to a similar conclusion. The key is that there must be a material difference in style for originality with proper acknowledgement of sources. In research, it would be impossible for different authors not to articulate similar phrases; the mundane and everyday language or jargon in a particular subject. The Turnitin report, however, highlights all similarities and links these to the sources, which requires further investigation as to the nature and extent of copying, if any. A proper scrutiny of each case is thus needed rather than the adoption of a strict liability approach to plagiarism detection. There are just so many ways of expressing one idea and sooner or later, the various permutations would be exhausted and captured in the Turnitin database, making every next user a plagiarist!

B *AV v iParadigms*

In the well-known 2008 case of *AV v iParadigms*,²⁸ four minor high school students in the United States had taken iParadigms (the company that develops and runs Turnitin) to task for copyright infringement of their work submitted to Turnitin. Though the facts of the case revolved around the papers submitted to Turnitin for plagiarism detection, the case brought to the fore questions over the copyright of the archived works. The dispute centred on iParadigms' right to use another's intellectual property for a commercial purpose while requiring students to submit a soft copy of their work to Turnitin or receive no grade.

Copyright, which protects original works of authorship such as a literary work,²⁹ subsists in the students' assignments submitted to Turnitin, protecting the authors from the misappropriation of their work by others. While sentiments in some quarters would allow it for a greater public good, opposing camps derided iParadigms' ability to profit from such a venture. The licence to use Turnitin between the institution and iParadigms provides for a click wrap agreement between students and the institution on submission of the soft copy into Turnitin. Once students click on the 'I Agree' icon, they have entered into a legally binding agreement. There is no basis under the click wrap agreement for students to vary these terms by stipulating separately their own conditions not to allow for the archiving of their respective works.³⁰

Contractual obligations under the click wrap agreement aside, the more resounding effect of the *iParadigms* decision lies in the Court's resort to the statutory fair use exception to copyright infringement, which allows unauthorised use or reproduction of copyrighted work for 'criticism, comment, news reporting, teaching, scholarship or research'.³¹ While copyright arises automatically and students are first owners of the intellectual property in their written work and assignments, this does not mean there is no basis for access by others. The US District Court granted summary judgement in March 2008 in favour of iParadigms on the plaintiffs' copyright claim as the use of archived students' papers constituted fair use. The Court of Appeals for the Fourth Circuit affirmed the decision in April 2009,³² a commonsensical conclusion to say the least as it must be remembered that the ultimate aim of copyright is to advance public welfare.³³ Though private reward is one of the means to an end (the public good), it is not about protection of private interests in the exclusive ownership of a work.³⁴

C *Fair Use of Copyrighted Works*

The more open-ended fair use provisions under § 107 of the United States *Copyright Act* provide that the fair use of a copyrighted work [...] for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. The four factors to be considered when determining whether a particular use amounts to fair use are:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (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 upon the potential market for or value of the copyrighted work.³⁵

In considering the factors stated above, the District Court concluded that while the students had submitted an original piece of work and creative expression, iParadigms used it for a different

transformative purpose to detect plagiarism in the work submitted and to prevent others from copying such works archived in the database. The creative aspect of the work was not in issue as the whole work was stored in digital code merely for such comparative purposes. The use served by Turnitin in no way ‘diminished’ the incentive for creativity of students, as the purpose and nature of its use in fact would ensure that the original expression of each work was preserved and not copied.³⁶

The further argument that Turnitin used the entire work to evaluate other papers did not convince the Court that this amounted to a substantial taking and thus copyright infringement. Its use for a limited and highly transformative comparison purpose necessitated the entire work to be submitted to successfully detect plagiarism.³⁷ The commercial nature of the service to the educational sector for a profit was noted but the service contributed to the public good and in itself added a further purpose to the works.³⁸ Undoubtedly the single most important element would be ‘the effect of the use upon the potential market for or value of the copyrighted work’,³⁹ but it was concluded that the Turnitin system did not serve as a market substitute or even harm the value of the work.⁴⁰

The District Court was obviously not convinced by the plaintiff students’ claims that the archiving of their work in the Turnitin system adversely impacted on their ability to market their papers for sale to other students, a dishonest practice in itself. Had Turnitin been in the business of making a commercial profit from the resale of papers submitted, the outcome might be different but nothing turns on this. The plaintiffs’ contention that, by archiving their works, future submissions of their work to other colleges or journals could display a lack of originality was also dismissed as mere conjecture.⁴¹

In affirming the decision, the Court of Appeals further stated that the copyright works submitted to Turnitin were not read or reviewed by any third parties or even the employees of iParadigms, other than the instructor to whom plaintiffs submitted their own papers. There was no public display or dissemination of the papers except for the digital archiving process and there was thus no danger that the system would undermine potential future rights to first publication.⁴² The appellate court made it very clear there was no per se rule that a commercial use barred any finding of fair use.⁴³ The victory was hailed by iParadigms’ own Chief Executive Officer as heralding an ‘educational revolution’ against cheating students.⁴⁴ It is sufficient to say for interested observers in the educational and tertiary sector, the Turnitin mechanism in fact plays a further role to help impair the sale of papers in the ‘paper mill’ market. As the appellate court put it:

Clearly no market substitute was created by iParadigms, whose archived student works do not supplant the plaintiffs’ works in the ‘paper mill’ market so much as merely suppress demand for them, by keeping record of the fact that such works had been previously submitted.⁴⁵

In the overriding interests of maintaining the integrity and credibility of students and tertiary institutions alike, the Turnitin mechanism serves a useful purpose. It is obvious that in order to secure some public interest rights in the educational sector, there is a need for the right to access works created by student authors in some instances. While copyright aims to protect the exclusive rights of authors, the overriding rationale is to provide a balance between the protection of and fair use of some information.⁴⁶ Copyright would not have been intended to be a barrier to the use of such information archived in the Turnitin database.

D *Unfair Bargaining Power*

Alongside the possible infringement of intellectual property rights of students lies the suggestion that students are the ‘victims’ of an inevitably unfair balance of power when institutions require that they submit assessment work to an online detection programme.⁴⁷ Do students surrender all proprietary rights when they agree to abide by the university’s procedures for plagiarism protection?

To cover any possible issues of the unlicensed use of students’ work, many tertiary institutions require express agreement at enrolment that assessments can be submitted to an online detection programme. In other cases, students are put on notice that their work may be liable to scrutiny by such systems.⁴⁸ Despite such technical legal protection for making submission of work to anti-plagiarism websites compulsory, students in a number of jurisdictions have criticised the way consent is obtained.⁴⁹ Many feel that the institution leaves the student without any option but to comply and in 2003 a student, Jesse Rosenfeld, of McGill University, Montreal, challenged the ability of the university to require him to submit a paper to Turnitin, or face receiving a zero grade for that assessment.⁵⁰ Rosenfeld threatened court action but the university eventually backed down and other students have approached their university Senate, heartened by Rosenfeld’s success at McGill.⁵¹

The legal opinion of Australian law firm Blake Dawson Waldron,⁵² commissioned by Turnitin and referred to on the websites of a number of Australian universities,⁵³ itself advocates for students to retain the right to withhold consent to the submission of their assessments to Turnitin.⁵⁴ One of the legal arguments put forward by the counsel for Turnitin in the *AV v iParadigms* case, and accepted by the judge, was that the contract between the student and iParadigms could not be voided on the basis of duress.⁵⁵ It is accepted that students make an agreement with iParadigms when they submit their work to the Turnitin service directly. It was noted by the judge that any duress would be on the part of the teaching institution, which may require that a student submit a piece of work to a detection service in order to receive a grade for it, rather than the online detection provider, so students should look to their institutions for remedies.⁵⁶ Even then, the District Court pointed out an assertion by the Supreme Court⁵⁷ that students’ rights in the educational setting may differ from those of other citizens. In the absence of any clear direction from the courts, at this point institutions must make their own decision whether there is any risk involved in making submission to online plagiarism services compulsory. The question remains however, from a contractual point of view, is student consent sufficiently informed?

E *Privacy Issues*

Many of the online detection providers have gone to great lengths to ensure concerns about data protection have been satisfied by requiring students to sign consent forms before submitting work to their systems.⁵⁸ The Turnitin Privacy Pledge complies with New Zealand Privacy legislation in respect of the use of personal information⁵⁹ although, in the case of that service provider, as the information is being collected, stored and distributed from the United States, any action for breach would have to be brought within that jurisdiction. Safeguards have also been installed in services such as Turnitin where it is necessary to make a request to another registered user to enable access to an original paper because a match has been identified with a more recent submission.⁶⁰ Consent to disclose contact information to enable such ‘tracking’ is given in the registration agreement. The issue of privacy has not been raised as vehemently by students as their concern at possible commercial exploitation of their work (see *AV v iParadigms*

case) and Turnitin has worked hard to pre-empt any such apprehension with its Privacy Pledge document which appears not only on the homepage, but also every time personal information might be provided by a user.⁶¹ The risk of students having their personal information disclosed without their consent is small, and to date has not been tested in court, however protection of personal data is one of the concerns that many students have in relation to the broader issue of any requirement that they submit their work to an external online plagiarism detection service.

F *Incorrect Interpretation*

The possibility of misinterpreting reports from the detection systems poses threats to both the institutions and students. Tools such as Turnitin do not distinguish between correctly or incorrectly referenced passages; they cannot immediately highlight self-plagiarism and they do not recognise standard phrases from a specific discipline that may be repeated often.⁶² Equally, students are not always able to identify these days whether the information they have obtained from a source and have referenced has itself been plagiarised.⁶³ Consequently, there is a risk that students may be accused of plagiarism where they have in fact not knowingly passed off the work of another as their own, although it has been identified as a match by an online detection tool. As the databases for these detection systems increase, so too does the potential for commonly used phrases and terms to appear as plagiarised where in fact this is not the case at all. If this occurs, students may be put in the position of having to defend themselves, with very little but their word to combat the seemingly compelling evidence of the online detection report.

Thus, at first blush, the OSI in the Turnitin report might show a high and alarming similarity but a different picture might emerge. Over reliance on Turnitin as a detection tool by assessing plagiarism based strictly on the percentage figures can be erroneous, as the authors' experience in analysing cases reveals. The OSI percentage may not necessarily be an accurate indicator of actual copying. There is still the need for 'human judgement' to obtain a balanced perspective in interpreting the originality report. As the software 'nabs' each assignment for similar phrases from cumulative semesters of submissions, there is the danger of higher and higher OSIs appearing on the originality reports. Too literal an interpretation will exaggerate the problem when there might not be much plagiarism involved. It is foreseeable that the Turnitin mechanism might outlive its utility as a detection device sooner than not though some of its other functions remain useful.⁶⁴

In the context of group work, where students produce a combined piece of work that receives a single common grade, they are not always in a position to be able to verify the source or originality of their co-authors' contributions. Equally, when students are encouraged to work together on a common topic, then submit work individually for assessment purposes, as academics we must be conscious not to adopt a mistakenly narrow approach that any collaboration and resulting similarity between pieces of a group assignment is evidence of plagiarism. Our experience has revealed strong abilities to memorise work that has been researched and prepared with others and despite clear evidence that no party had directly copied from another, similarities in work inevitably remained. Plagiarism allegations do not have the safeguards of a legal challenge in copyright — the burden is on the accused to show they did not plagiarise and intention is apparently irrelevant. In the absence of standards, it is extremely hard to mount a defence in plagiarism cases.⁶⁵ It is conceivable that students are at risk of being penalised and acquiring a 'dishonesty record' at their institution when in fact they are innocent of any plagiarism. If this error is subsequently acknowledged, the institution may then be liable for the effect of any unwarranted sanction. As Maurer and Kulathuramaiyer rightly state:

Plagiarism detection tools cannot be used as a proof beyond doubt. It merely presents evidences of possible infringements.⁶⁶

Institutions are coming to recognise the need to scrutinise very carefully the plagiarism detection service reports, taking into account common phrases and using the personal discipline knowledge of academic staff. As the writers' experience in this area would reinforce, a measured interpretation of the reports will act to safeguard students and institutions alike.

III EDUCATIONAL RISKS

To some extent there is an overlap between the potential for infringement of legal rights and the educational or academic threats posed by reliance on online plagiarism detection tools. Again, both the institutions that employ online detection services, and their students can be prejudiced by too great a dependence on such systems as the complete solution to plagiarism. Students are developing increasingly sophisticated methods of avoiding detection. It is hardly surprising that anti-anti-plagiarism software has been developed⁶⁷ that will substitute a number of words and alter text so that the plagiarism detection tool is unable to recognise the similarities to works in its database. Detection systems are not able to detect paraphrasing or material not previously submitted and students are getting cleverer at making small changes and not just cutting and pasting.⁶⁸ The authors, in their capacity as 'academic discipline contacts', are often questioned by students as to the percentage of copying that is acceptable. Needless to say the answer is always – *no* copying without proper acknowledgement can be permitted, but the mere asking of the question would indicate that students are looking to work the system wherever possible.

In addition, a serious flaw in systems such as Turnitin is the inability of these online tools to ascertain whether the version of the assessment submitted to it is identical or even remotely similar to the copy being submitted to the lecturer for marking.⁶⁹ The authors have, from time to time, encountered exactly this discrepancy as a result of chance rather than any effective detection method, and most students are quick to make excuses that the wrong submission to Turnitin was inadvertent. There is a concern that the writing of assessments can thus become an exercise in detection avoidance, rather than in scholarly advancement.⁷⁰ The danger is therefore in the negative message being sent to students to start expending more energy on avoiding detection than on engaging with study.⁷¹

The negative impact on the student-teacher relationship from employing online detection services has been documented by many researchers.⁷² It has been seen to cause the loss of a relationship of trust and respect. Examples where students may have a valid concern include the situation when they are involved in group assessments. The institution has access to a tool not available to students. How can students determine whether other group members have plagiarised?⁷³ This inability to check the work of fellow students, and the possible risk of the 'group' being responsible for the plagiarism of just one or two students, raises issues of equity.

Without significant time spent on analysing the origins of research, it can be hard to distinguish between bad cases and more minor cases of plagiarism. There are questions as to how you measure the degree of misconduct or dishonesty, as the face value pure percentage of copied work highlighted by services such as Turnitin does not make clear the type of source.⁷⁴ There is criticism that relying on online plagiarism detection tools demonstrates too great a concern with the literal use of words rather than the copying of ideas.⁷⁵ It has become acceptable to reference where an idea has been mentioned without having to acknowledge the real author of that idea!

Use of these plagiarism detection tools might be considered as perpetuating or even creating a concept of plagiarism that demonises the use of another's work in order to make money — rather than allowing for intellectual development through the use of others' ideas.⁷⁶ The obsession with 'originality' is perhaps misleading and academics may be straining to ascertain proportions of 'unoriginal' work at the risk of missing the value of building on the knowledge of others by imitation and reproduction in a current context. Linking back to the distinction between copyright and plagiarism; it seems somewhat paradoxical that students are being penalised for being 'intellectually dishonest'⁷⁷ in using the words or ideas of others without proper acknowledgment in their learning, when many of the tools employed to detect such dishonesty rely on using the intellectual property of others without such acknowledgment.

IV RISK AVOIDANCE

A Legal Solutions

Solutions to a number of the potential legal issues surrounding the use of online plagiarism detection services are already being provided by both tertiary institutions and the online service supplier. To overcome the possibility of copyright infringement it is common for either the institution or the service provider to obtain explicit licensing to use students' work for plagiarism detection purposes together with the contractual surrender of property rights to work submitted for assessment.⁷⁸ This implied licence results from the contractual nature of the university/student relationship.⁷⁹ The US decision in the *AV v iParadigms* case clarifies the application in that particular jurisdiction of the 'fair use' defence to any breach of copyright by online plagiarism detection services. It is likely that a similar approach would be taken in any other common law jurisdiction with corresponding provisions.

To prevent any breach of the university/student contract on the basis of wrongly penalising a student for academic dishonesty, institutions must ensure careful academic interpretation of plagiarism detection service reports. Further, due consideration must be given to when it is appropriate to employ such a service, depending on the nature of assessments and the type of 'irregularities' it is being employed to detect.

It appears that institutions can provide a level of protection from the risk of legal claims of unfair coercion by clear reference to the use of online detection systems in the enrolment and course guidelines. However, although these student rights have not yet been tested in court, in recognition of the limitations of these systems, as outlined in this paper, and to avoid a potential source of litigation, an alternative should be made available for those students objecting to compulsory submission to this form of plagiarism detection system.

B Educational Solutions

Institutions often find it hard to define plagiarism although most have some sort of description of plagiarism, sometimes without employing that term, in their academic policies and regulations. The consensus is that it is 'wrong' and should be punished heavily. All discourse presupposes that there is an accepted and 'correct' approach to producing original work, in the western academic tradition, which is the foundation of the concept of plagiarism.⁸⁰

The current pedagogical approach to tackling plagiarism is moving away from the preoccupation with a 'battle'⁸¹ to be won against student plagiarists. Not all practitioners by any means share this more formative attitude but researchers in the area demonstrate a strong

consensus in their recommendations for ways to combat copying.⁸² A starting point is the need to understand cultural differences in knowledge acquisition.⁸³ Asian students particularly are often educated to show respect for academics by copying their obviously superior work. Even with students from a western educational background in their first year of tertiary study there are many who have little appreciation of acceptable approaches to researching, writing and referencing and thus many are plagiarising through an ignorance of good academic processes.⁸⁴

Suggestions for educational solutions therefore include clear instructions from academics to students at every level of tertiary study about what constitutes plagiarism in a particular discipline context.⁸⁵ In addition to providing more information, greater consistency is required between lecturers and departments within an institution in terms of the messages they are sending out to all students about academic expectations and the consequences of failing to meet them.⁸⁶

To assist with this, more instructional materials about plagiarism may be needed for lecturers.⁸⁷ Once the ground rules are clear, it is wise not to allow any excuse of ‘misunderstanding’ the policies or consequences around plagiarism as studies have shown that enforcement, to be fair and effective, must be carried out without fail. Penalties must be sufficiently severe and consistently applied to act as a deterrent.⁸⁸

To develop the academic skills of students, lecturers must model good academic behaviour and an ethical approach in their use of citations for all their instructional material.⁸⁹ An increasing trend is to use the online tools such as Turnitin as an instructional method of explaining good academic writing. Some have found that students still perceive that these programmes are primarily employed to detect offending and the presumption of guilt lingers over even formative uses.⁹⁰ Turnitin itself is trying to promote this use and to reassure users that the system is an educational, not just a policing tool.

A simple and obvious answer to avoid any plagiarism involves more effort by academics to make assignments very specific so they cannot be copied easily and ideally it is advisable never to repeat an assignment from one semester to another. Such practice removes the risk of misuse of any plagiarism detection system by removing the ability of students to plagiarise.

A clear link between unethical behaviour at university and that in the work place demonstrates the need to teach students about ethics in all areas — including their study at university.⁹¹ Many institutions have honour codes including plagiarism and studies have shown the efficacy of raising student awareness by appealing to ethical and moral values in this way. Indeed many ivy league institutions in the United States purport to rely on such codes to combat plagiarism and have not signed up to the ‘Turnitin method’.⁹²

V CONCLUSION

Do the risks inherent in this computer based detection system outweigh those to the students and institutions of failing to employ such a tool? The answer seems to be ‘perhaps’. The adoption of a more educative method when employing these online tools could not only enhance the learning experience (as suggested now by Turnitin.com and other practitioners) but also alleviate some of the potential legal risks to both students and institutions of relying on such tools to identify and provide evidence to ‘convict offenders’.⁹³

The perception that students are presumed guilty — and therefore must submit to a detection system — may be detrimental to the student-academic relationship. This requirement to submit, given the flaws in the system, may also open up institutions to the risk of legal action if students are wrongly accused of copying.

It is clear that reliance on online detection tools cannot replace more emphasis on the need for honesty on the part of students. It is only one device in what must be a wider approach to combating cheating and promoting a higher standard of academic integrity.⁹⁴ Institutions that come to see dependence on online detection tools as sufficient to fulfil their responsibilities to all students and the academic community are not only ignoring the educational consequences of such a limited approach, but also putting their institutions and students at risk of legal action arising from the shortcomings of what is just a single technological tool.

Keywords: plagiarism; tertiary education; Turnitin; copyright; risks.

ENDNOTES

- 1 See, eg, Cem Kaner and Rebecca Fiedler, 'A Cautionary Note on Checking Software Engineering Papers for Plagiarism' (2008) 51 *IEEE Transactions on Education*, 184; Lucy McKeever, 'Online Plagiarism Detection Services — Saviour or Scourge?' (2006) 31 *Assessment and Evaluation in Higher Education* 155.
- 2 Janie Sheridan, Raid Alany and Dulcie-Jane Brake, 'Pharmacy Students' Views and Experiences of Turnitin® — an Online Tool for Detecting Academic Dishonesty' (2005) 5 *Pharmacy Education* 241.
- 3 *AV v iParadigms, Ltd Liability Co.*, 544 F Supp 2d 473. [232 *Education Law Reporter* 176] (EDVa, 2008).
- 4 *Pike v Nicholas* (1869–70) LR 5 Ch App 251.
- 5 *Nichols v Universal Pictures Corp* (1930) 45 F 2d 119 (2nd Cir, 1930).
- 6 *Designers Guild Ltd v Russell Williams* [2000] FSR 121, Morritt LJ at [15].
- 7 *Ibid* [37].
- 8 See also David A. Thomas 'How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic' (2004) *Brigham Young Education and Law Journal* 421, 424.
- 9 AUT University 2010 Calendar, 81 & 98.
- 10 *Ibid* 6.
- 11 University of Auckland, <<http://www.auckland.ac.nz/uoa/home/about/teaching-learning/honesty/tl-about-academic-honesty>> at 12 May 2009.
- 12 <<http://www.otago.ac.nz/study/plagiarism.html>> at 4 August 2009.
- 13 <<http://library.canterbury.ac.nz/services/ref/plagiarism.shtml>> at 4 August 2009. See also Oxford Reference Online <http://www.oxfordreference.com/views/SEARCH_RESULTS.html?y=7&q=plagiarism&x=23&ssid=999600256&scope=global&time=0.746026858678679> at 4 August 2009.
- 14 *Humzy-Hancock, Re* [2007] QSC 34.
- 15 *Ibid* [14].
- 16 *Ibid* [18].
- 17 Lillian Corbin and Justin Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2007) 17(1 & 2) *Legal Education Review* 53, 54.
- 18 See the 'Institutional Framework for Promoting Academic Integrity Among Students' (approved 7 December 2009) <<http://www62.gu.edu.au/policylibrary.nsf/xmainsearch/03ee5c37f0926a0e4a25736f0063eaea?opendocument>> at 19 May 2010.
- 19 *Pike v Nicholas* (1869-70) LR 5 Ch App 251.
- 20 *Ibid* 259-260.
- 21 *Ibid* 260-261.
- 22 *Ibid* 264.
- 23 *Ibid* 268.
- 24 *Ibid* 267, 269.
- 25 *Morris v Wright* (1870) LR 5 Ch App 279.
- 26 *Ibid* 287.

- 27 Ibid 279–280.
- 28 *AV v iParadigms, Ltd Liability Co.*, 544 F Supp 2d 473, 478.
- 29 *Copyright Act 1994*, s 2 (New Zealand).
- 30 *AV v iParadigms, Ltd Liability Co.*, 544 F Supp 2d 473, 479-480. In terms of the click wrap agreement, *ProCD Inc v Zeidenburg* 86 F 3d 1447 (7th Cir, 1996) led the law here; the buyer of the CD Rom database had the opportunity to read the terms and conditions by which they would be bound clearly stipulating that no copying for commercial purposes would be allowed. They buyer could reject the purchase if he/she did not wish to be bound. Likewise the students in *iParadigms* could read the terms and conditions of the Turnitin submission.
- 31 17 USC § 107, Limitations on Exclusive Rights: Fair Use.
- 32 *AV v iParadigms, LLC* 16 April 2009 No 08-1424.
- 33 See also *Lotus Development Corporation v Paperback Software International* 18 IPR 1, 15.
- 34 Ibid.
- 35 Under the New Zealand *Copyright Act 1994* ss 42 & 43 provide for a fair dealing exception, which is framed as a permitted act, to allow the of use works for criticism, review and news reporting as well as research or private study. Copying of literary works for educational purposes is covered under s 44.
- 36 *AV v iParadigms, Ltd Liability Co.*, 544 F Supp 2d 473, 482-483.
- 37 Ibid 483.
- 38 Ibid 482.
- 39 Ibid 483.
- 40 Ibid.
- 41 Ibid 484.
- 42 *AV v iParadigms, LLC* 16 April 2009 No 08-1424, 5 & 16.
- 43 Ibid 12 — citing *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417, 434; 78 L Ed 2d 574, 588 commonly known as the *Sony-Betamax* defence wherein the movie industry had sought to ban the sale of the video cassette recorder (VCR) that allowed users to tape a show for later viewing or other purposes (time-shifting). The US Supreme Court held that there was no contributory copyright liability despite the fact that Sony knew that the machines could be used, and were being used, to infringe the plaintiffs’ copyrighted works. Because VCRs were capable of both infringing and substantial noninfringing uses, ‘constructive’ knowledge of infringing activity was insufficient to warrant liability based on the mere retail of Sony’s products. The decision supports the view that creators of new technology should not bear the burden of preventing copyright infringement where the technology is capable of substantial noninfringing use. The Court focused on whether the technology was ‘merely capable’ of substantial noninfringing uses instead of the proportion of noninfringing uses. In the case of *AV v iParadigms* there is clearly no infringing use.
- 44 John M Barrie, ‘Catching the Cheats — How Original’ (December 2008). The Biochemical Society <http://turnitin.com/resources/documentation/turnitin/sales/How_Original.pdf> at 30 June 2010.
- 45 *AV v iParadigms, LLC* 16 April 2009 No 08-1424, 21.
- 46 Ibid. See discussion generally at 7–9. See also Benjamin Kaplan *An Unhurried View of Copyright* (1967), viii.
- 47 Mary Wyburn and John MacPhail, ‘The Intersection of Copyright and Plagiarism and the Monitoring of Student Work by Educational Institutions’ (2006) 11 *Australian & New Zealand Journal of Law and Education* 73, 83, 88.
- 48 See, eg, Faculty of Law, University of Auckland, ‘Plagiarism/cheating’, (2009) <http://www.law.auckland.ac.nz/uoalaw/for/undergraduate/handbook/course_info/han> at 14 July 2009.
- 49 Travis Lowry, ‘Turnitin Controversy Reaches Brock’ (2004) *Brock Press*; Brock Read & Paula Wasley, ‘Anti Cheating Crusader Vexes Some Professors’ (2008) 54 *Chronicle of Higher Education* A1-A12.
- 50 Ibid.
- 51 Read & Wasley, above n 49.
- 52 Turnitin, *Turnitin Australian Legal Document* (2004) <http://turnitin.com/static/pdf/australian_legal.pdf> at 17 July 2009.

- 53 See, eg, websites: La Trobe University <<http://www.latrobe.edu.au/turnitin/index/htm>> at 17 July 2009; RMIT <<http://www.rmit.edu.au/academicintegrity>> at 17 July 2009).
- 54 Turnitin, above note 52, 5.
- 55 *AV v iParadigms, Ltd Liability Co.*, 544 F Supp 2d 473, 481.
- 56 Ibid.
- 57 *Morse v Frederick* 127 S Ct 2618, 2622 (2007).
- 58 McKeever, above n 1, 162.
- 59 See relevant sections of the New Zealand *Privacy Act 1993* such as: s 6 principle 2 (2)(g) where it states that the requirement to collect information directly from an individual does not apply where the information – (i) will not be used in a form in which the individual concerned is identified; and the various parts of s 6 principle 3 relating to collection of personal information and making the individual aware of the uses to which that information will be put.
- 60 Turnitin, *Turnitin Privacy Pledge* (2004) <http://turnitin.com/static/pdf/Privacy_Pledge.pdf> at 14 July 2009.
- 61 Ibid.
- 62 Sheridan et al., above n 2, 242.
- 63 Hermann Maurer and Narayanan Kulathuramaiyer, ‘Addressing Plagiarism and IPR Violation’ (2007) 27 *Information Services & Use* 185, 186, 187.
- 64 See Stephan Dahl ‘Turnitin — The Student Perspective on Using Plagiarism Detection Software’ (2007) 8(2) *Active Learning in Higher Education* 173. The student survey here shows that students, on the whole, welcome the method of electronic submission offered by Turnitin and the feedback students can receive.
- 65 K. Matthew Dames, ‘Understanding Plagiarism & How it Differs from Copyright Infringement’ (2007) June *Computers in Libraries* 25, 27.
- 66 Maurer and Kulathuramaiyer, above n 63, 187.
- 67 Ibid.
- 68 James Warn, ‘Plagiarism Software: No Magic Bullet!’ (2006) 25 (2) *Higher Education Research & Development*, 195, 196.
- 69 Dale Spender, ‘Plagiarism and Plausibility’ (2004) Draft Paper for Talk to Academic Board; Thinking About Plagiarism (21 April 2004) <<http://www.gsu.uts.edu.au/academicboard/forums/papers/spender.pdf>> at 21 July 2009.
- 70 Ibid 14.
- 71 Sheridan et al., above n 2, 242.
- 72 McKeever, above n 1, 162.
- 73 See, eg, Jerry Kirkpatrick, ‘Teaching Acknowledgement Practice Using the Internet-Based Plagiarism Detection Service’ (2006) 16(1) *Marketing Education Review* 29; McKeever, above n 1, 162.
- 74 Jennifer Jenson & Suzanne de Castell, “‘Turn It In’: Technological Challenges to Academic Ethics’ (2004) 4 *Education, Communication & Information* 311, 321.
- 75 Ibid 320.
- 76 Ibid 323.
- 77 Ibid 328.
- 78 Wyburn and McPhail, above n 47.
- 79 Turnitin, *Turnitin Canadian Legal Document*, 2 <http://turnitin.com/static/pdf/canadian_legal.pdf> at 18 July 2009.
- 80 Betty Leask, ‘Plagiarism, Cultural Diversity and Metaphor — Implications for Academic Staff Development’ (2006) 31(2) *Assessment and Evaluation in Higher Education* 183, 185.
- 81 Ibid 184.
- 82 See, eg, Spender, above n 69; Carol Megehee and Deborah Spake, ‘The Impact of Perceived Peer Behaviour, Probable Detection & Punishment Severity on Student Cheating Behaviour’ (2008) 18(2) *Marketing Education Review* 5.
- 83 Leask, above n 80, 186.

- 84 Karen Ellery, 'Undergraduate Plagiarism: a Pedagogical Perspective' (2008) 33 *Assessment & Evaluation in Higher Education* 507, 514; Marcia Devlin and Kathleen Gray, 'In Their Own Words: a Qualitative Study of the Reasons Australian University Students Plagiarize' (2007) 26 *Higher Education Research & Development* 181, 188.
- 85 Leask, above n 80, 186; Ellery, above n 84; Neil Granitz and Dana Loewy, 'Applying Ethical Theories: Interpreting and Responding to Student Plagiarism' (2007) 72 *Journal of Business Ethics* 293.
- 86 Granitz and Loewy, above n 85; Ranald Macdonald and Jude Carroll, 'Plagiarism — a Complex Issue Requiring a Holistic Institutional Approach' (2006) 31 *Assessment & Evaluation in Higher Education* 233, 237.
- 87 Kirkpatrick, above n 73, 33.
- 88 Granitz and Loewy, above n 85, 301; David F. Martin, 'Plagiarism and Technology: A Tool for Coping with Plagiarism' (2005) *Journal of Education for Business* 149, 152.
- 89 Granitz and Loewy, above n 85, 300.
- 90 Kirkpatrick, above n 73, 30.
- 91 Granitz and Loewy, above n 85, 301.
- 92 Neil Selwyn, "'Not Necessarily a Bad Thing...': a Study of Online Plagiarism Amongst Undergraduate Students' (2008) 33 *Assessment & Evaluation in Higher Education* 465.
- 93 Ibid.
- 94 Ibid 477.