

The Philosophy behind Fair Use: Another Step towards Utilitarianism

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Abstract. iParadigms, a company involved in plagiarism detection, was held not liable for the unauthorized use and archival of students' papers. Both the District and Appellate Courts of Virginia, in fact, maintained that the exception of fair use applied to the copyright infringement action. As the relevant facts represent a novelty in case law, it might be plausible to hypothesize that iParadigms' precedent is not going to be followed in forthcoming cases. This investigation is an attempt to appreciate the possibilities that such an event could happen. In particular, the attention is focused on the special nature of the Copyright Act which is simultaneously backed by opposite theoretical backgrounds such as utilitarianism and moral desert as well as personhood theories, among others. The prevailing of one theory over another shall depend on how liberally or strictly the fair use doctrine shall be interpreted. Despite findings demonstrating that judges have applied the fair use doctrine according to the correct conceptions of justice, the discussion ends up recommending a new system of plagiarism detection that drastically reduces the likelihood of copyright infringement actions.

1. Introduction

The problem of plagiarism is not something new that the digital revolution has brought to education¹ and to many other human activities. Yet, one cannot deny that the digitalization of life has made plagiarism much simpler: the information is just few clicks away.

There are several categorizations of plagiarism which basically follow what has been plagiarized in a given case: a song, industrial design, or just text. This paper will be focusing on text plagiarism: the unauthorized and unreferenced copying of someone's texts.

Text plagiarism is indeed a burning issue in education. Studies show that the problem is common to many educational institutions regardless of the socio-economic development level of the country². It is true: plagiarism detection is a very labour intensive task³ which requires two major steps: 1) narrowing

¹ Chandrasoma, R., C. Thompson, and A. Pennycook. (2004). Beyond plagiarism: transgressive and nontransgressive intertextuality. *Journal of Language, Identity, and Education*, Volume 3(Issue 3) p. 171–93.

² Jensen, L.A., Arnett, J.J., Feldman, S.S. & Cauffman, E. (2002). It's wrong, but everybody does it: Academic dishonesty among high school and college students. *Contemporary Educational Psychology*, Volume 27(Issue2), p. 209-228

Teferra, D. (2001). Academic dishonesty in African universities-trends, challenges, and repercussions an Ethiopian case study. *International Journal of Educational Development*, Volume 21(Issue2), p. 163–178.

³ Mishra, R.K., & Ramesh R. (2006). IPR, Plagiarism and the Text Data Security Pyramid. *Journal of Intellectual Property Rights*, Volume 11, p. 326-329

down the number of potential sources from hundreds of billions to tens; 2) performing detailed side-by-side comparison of the sources and documents in question.

Fortunately, as long as education is concerned, there are quite a few services which have been developed to tackle plagiarism, including, but not limited to Turnitin (www.turnitin.com, UK), SafeAssign (www.safeassign.com, USA), and URKUND (www.arkund.com, Sweden). The first of them is considered as one of the most popular ones, having thousands of schools and universities worldwide among its memberships⁴. All these services work as outsources creating worry-free environments for professors and students.

Students, who are supposed to submit their papers to the service, can do it either through the Learning Management System (LMS) or directly to the service itself; professors will therefore get the results as soon as they are ready. Figure 1 outlines the general process of plagiarism detection by external PDS. The arrows indicate the sequence of actions in case a similarity is discovered between submission B and submission A, the latter being submitted earlier. PDS never charges anyone with plagiarism; it simply provides a student or a professor with the similarity score along with the side by side comparison.

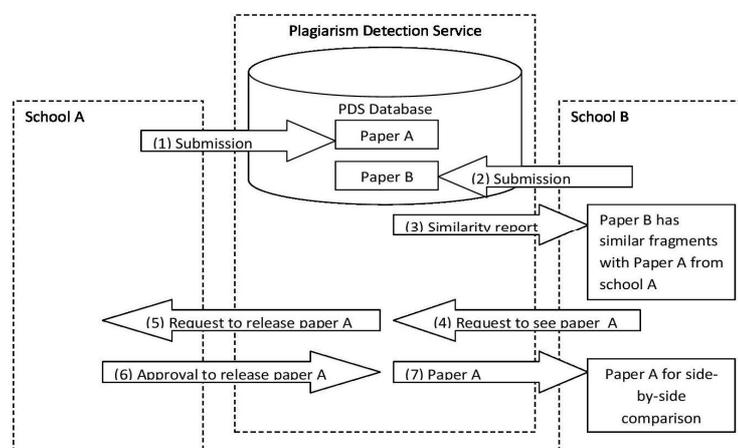


Figure 1: General process of plagiarism detection

In order to find the potential plagiarism, PDS typically rely on the following sources: a) student papers submitted to the service earlier; b) open segment of the internet; c) subscription based e-libraries; d) “special” sources including paper mills and cheat sites. The first category of the sources can actually cause problems in relation to intellectual property (IP) protection, especially for copyrights. In particular, students might complain that companies store their papers without their consent, hence profiting from other people works.

This is actually what happened recently with iParadigms which was sued for copyright infringement by four high school students. The District and Appellate Court of Virginia maintained that the archival and use made by the company constituted fair use. As iParadigms and other PDS are expected to strongly rely on this precedent, possible judicial changes of direction might seriously impair their businesses.

This paper, therefore, discusses the possibilities that forthcoming case-law will depart from iParadigms decision and will opt for a stricter interpretation of fair rule doctrine Paragraph 2 introduces some key elements of the US *stare decisis* principle in order to measure the extent to which in this jurisdiction judges are generally expected to follow the precedent. Paragraph 3 and paragraph 4 deal with the philosophies backing IP and Copyright law respectively. The task is to appreciate which are the conceptions of justice to be referred when interpreting the fair use rule. Paragraph 5 analyzes iParadigms’ opinion and takes into consideration the coexistence of utilitarian, labour and personhood theories behind the fair use provision. Paragraph 6 introduces a new PDS model designed to interfere with authors’ rights the least possible. Paragraph 7 provides conclusions.

2. Binding Force of iParadigms Decision

⁴ iParadigms, LLC. "Turnitin Home Page." Turnitin : Leading Plagiarism Checker, Online Grading and Peer Review.

There are three decisions concerning iParadigms' use and archival of students' papers. Two of them deal directly with copyright law and, more specifically, with fair use doctrine⁵; the remaining one, the last in chronological order, deals with copyright law only indirectly⁶.

The second in chronological is a decision issued by the Court of Appeal of Virginia confirming the outcome before the lower Court: the use made by iParadigms falls within the fair use exception and, as such, it does not constitute copyright infringement.

In an attempt to appreciate the possibilities that forthcoming similar cases will be decided not in conformity with this iParadigms precedent, it is necessary to frame the discussion into the peculiarities of the US principle of *stare decisis*. To begin with, iParadigms case represents a state court of appeal's authority on a federal law issue. As such, it is likely going to happen that all the district courts will abide by this decision. The same cannot be said by the other state courts of appeal which might well overturn the lower court's sentences and, hence, overrule iParadigms. In fact, it must be reminded that in the US the binding precedent has a more flexible value than in UK. Therefore, generally speaking, the hypothesis of overruling is not just a textbook exercise⁷: it is something that can happen!

It is true that judges can overrule the precedent on the basis of an especially compelling reason or set of reasons⁸. According to Vincenti, such compelling reason or set of reasons are variously identified by legal literature. In the opinion of this Italian Supreme Court judge, by the way, overruling might take in two cases: (1) when the precedent is clearly incorrect and (2) when the precedent is unjust⁹. A precedent which is not correct is a precedent that did not follow the precedent supposed to be followed¹⁰. It happens, therefore, when the judge did not apply the law. Vincenti maintains that it is not complicated for a court to defend itself when the latter has departed from a precedent thought to be clearly incorrect¹¹. On the contrary, it is pretty hard to justify the break of a precedent when this is regarded as unjust¹².

In the US, the judge considers several factors to evaluate the justness of a precedent: its consistency with the facts, its meeting with natural justice principles, with contemporaneous ethical conceptions, with established public policies as well as conditions of economic development¹³.

It is noteworthy to underscore that, anyway, the unjustness of a precedent is a necessary but not sufficient reason to depart from it. The unjustness must be balanced with the reliance that parties have meanwhile placed in the precedent. In particular, the respect of precedent should be stricter in relation to natural rights, as for example property rights, or to commercial practices which are very well established, for the protection of these rights is fundamental for the conservation of the state¹⁴. In general, The US principle is that it is more important to have stable and settled law than correct law¹⁵.

Two preliminary observations can be drawn from the foregoing discussion. The first is that the decisions of the courts from Virginia are not to be regarded as clearly incorrect. This can be demonstrated by the fact that legal literature has both supported¹⁶ and criticized¹⁷ the decisions themselves. If the

⁵ *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473; 2008 U.S. Dist. and *A.V. v. iParadigms, LLC*, 562 F.3d 630; 2009 U.S. App

⁶ *Christen v. iParadigms, LLC*, 2010

⁷ See Zwigert, K. and Koetz, H. (1998). *Introduzione al Diritto Comparato*. Oxford University Press.

⁸ Neil-Duxbury. (No Date). *The Authority of Precedent: Two Problems*. McGill Paper. Available at <http://www.mcgill.ca/files/legal-theory-workshop/Neil-Duxbury-McGill-paper.pdf> (last retrieved 01/10/2013).

⁹ See Vincenti, E. (2011). *L'Overruling Giudiziale in Materia di Processo Civile*, p. 11 Available at http://www.cortedicassazione.it/Documenti/Relazione%20civile%2031_11.pdf (last retrieved 01/10/2013)

¹⁰ See Brenner, S. (1992). *Precedent Inflation*. Transaction Publishers, New Jersey, p. 10

¹¹ Vincenti, Op. Cit. p. 11

¹² *Ibid*

¹³ *Ibid* p. 12

¹⁴ *Ibid* p. 12

¹⁵ Standler, R. (2009). *Overruled: Stare Decisis in the US Supreme Court*.

Available at <http://www.rbs2.com/overrule.pdf> (last retrieved 01/10/2013)

¹⁶ Gingerich writes: "the Fourth Circuit (...) will improve the quality and quantity of expressive activity by making the contours of fair use more certain..."

See Gingerich, J. (2010). *A.V. Ex. Rel. Vanderhye v. Iparadigms, LLC.: Electronic Databases and the Compartmentalization of Fair Use*. *Idea – The Intellectual Property Law Review*, Volume 50 (Issue 2), p. 346

Similarly, Bennett speaks in terms of "reduced degree of uncertainty". See Bennet, G. M. (2009). *The Edge of Ethics in iParadigms*. Boston College Intellectual Property and Technology Forum. Available at <http://bcipf.org/wp-content/uploads/2011/07/12-iptf-Bennett.pdf> (last retrieved 01/10/2013)

decisions were manifestly incorrect, in fact, there would have been only critic. Therefore, those decisions are better appreciated in terms of justness. But most importantly, if a clearly incorrect decision is a decision that does not follow a precedent, it follows that iParadigms hardly can be found clearly incorrect for their facts are distinguished from their precedents. The second observation is that the possibility to depart from iParadigms is expected to be diminished by the fact that the overturning would destroy the very well rooted commercial activity carried on by the company. In fact, judges may take a different direction only when they realize unjustness outweighs the need of certainty¹⁸, the same certainty on which iParadigms has built and continued to develop its business.

Now, the concept of justice is an aged one. It basically expresses the criteria according to which a society should be organized. As these criteria are shaped by factors connected to the human experience, it is very logical to maintain that justice is a relative concept¹⁹. Though, this should not be taken as an ease for the judge to depart from a precedent simply by applying his own standards of justice. As mentioned earlier, in fact, the judge should follow the conceptions of justice which are dominant by the time that the case has to be decided. If the precedent is an old one, it is easier for the judge to defend possible reasons for departing. In fact, he could argue that the decisions rendered justice to the parties by the time it was issued, but it would not do so now. If the precedent is a very recent one, then the judge has to demonstrate that the contemporaneous conceptions of justice have been wrongly determined.

The likelihood of the existence of a very recent precedent which is at the same time technically correct but unjust in terms of result assumes the acceptance of the Legal Political Realism school of thought. In fact, according to these scholars, all the law is political²⁰. What they mean is that the provision does not prescribe a single norm, but a set of them, all potentially correct; the judges will choose among them on the ground of what they think the current conceptions of justice are.

Ironically, the iParadigms case is not only a very recent one, but actually a case whose resolution has strongly depended on a rule which by its nature implies a dramatically unusual – for common law traditions²¹ – and uncountable number of possible norms: the fair use rule.

The peculiarity of such provision renders the judge more vulnerable against attacks aimed at spotting flawed interpretations of current conceptions of justice.

It is true, the task of checking whether the iParadigms' judge has chosen the norm that best represents the current conceptions of justice, requires a three steps analysis. In fact, even though the conceptions of justice are supposed to be embedded in the statutory provision, the mere and isolated reading of the latter

¹⁷ Sharon writes: "Turnitin was successful in asserting this defense in one case, but may face a different outcome if it is sued again in the future." See Sharon, S. (2010). Do Students Turn Over Their Rights When They Turn in Their Papers? A Case Study of Turnitin.com. *Touro Law Review* Volume 26, p. 222

¹⁸ The unjustness of a decision does not depend exclusively on the judge's failure to properly consider the socio-political trends of the moment, consistency with the fact, etc. As remarked by Shapiro, the unjustness might dwell in the law itself. On this respect he writes:

"Yet the pre-existing law may have been created by the government and designed to advance the interests of the class to which one of the parties belongs".

See Shapiro, M. (1976). *Judicial Independence: the English Experience*. *North Carolina Law Review*, Volume 55, p. 581.

Available at

<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2200&context=facpubs>

(last retrieved 01/10/2013).

¹⁹ Bentivoglio, F. (2013). *L' Idea di Giustizia in Platone*.

Available at http://www.montesquieu.it/biblioteca/Testi/Bentivoglio_platone.pdf

(last retrieved 01/10/2013).

²⁰ For a clearer understanding of Legal Realism it is useful a comparison with the opposite school of thought, the Legal Formalism. This school, in fact, maintains that the provision dictates only one exact norm. The comparison of the mentioned school can be checked in Marshall, W. (2011). *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*. *Duke Journal of Constitutional Law & Public Policy*. Volume 6, (Issue 1), pp. 1 - 35.

²¹ Fair use is a statutory rule which has codified the common law. It is untypical because, in common law tradition, legislation normally intervenes to overrule, correct or clarify the common law, rather than merely recognizing it and, therefore, keeping its broad character. For a more detailed discussion on this topic see Turcotte, K. (2005). *Why Legal Flexibility is not a Threat to either the Common Law System of England and Australia or the Civil Law System of France in the Twenty-first Century*. *Hansel Law Review*, Volume 1 (Issue 2).

Available at <http://www.hanselawreview.org/pdf2/Vol1No2Art5.pdf> (last retrieved 01/10/2013).

Also see Hugenoltz, B. and Senftleben, M. (2011). *Fair Use in Europe*. In *Search of Flexibilities*. Ivir.

Available at <http://www.ivir.nl/publications/hugenoltz/Fair%20Use%20Report%20PUB.pdf> (last retrieved 01/10/2013).

does not disclose that much. In order to fully understand the norm that the statutory provision is meant to express, it is crucial to move back on higher categories of sources of law and to accomplish at top-down investigation. In other words, the study shall firstly focus on the conceptions of justice that characterizes IP law in general, secondly those that characterize Copyright law and, finally, those expected to be applied through the fair use rule.

3. First Step: Justice and IP Law

IP law is actually itself the result of the application of theories of justice that, with a different degree, have been affecting the US and Western culture in general. As literature casts many theories of justice, for the sake of convenience this analysis begins dealing with the most popular, as they are identified by Sandel: Utilitarianism, Libertarianism, Personhood and Egalitarianism²².

Utilitarianism is considered to be the theory that has mostly affected the common law IP school of thought. The general utilitarian approach is that “lawmakers’ beacon, when shaping property rights, should be the maximization of net social welfare²³”. Such strong influence can be easily demonstrated by many sources, including the iParadigms precedent: in the Appeal, Justice Trexler, before beginning the discussion of the four factors, reminds that the very purpose of copyright law is to promote the Progress of Science and useful Arts²⁴.

In Bentham terms, for the public, it is more convenient to acknowledge authors with a bundle of exclusive rights than the free and full enjoyment of other people works. Considered as whole, in fact, the second approach would result in a minor output of intellectual contribution which, in turn, would reduce the aggregate good: authors would be discouraged by the fear of not recovering the “costs of expression”²⁵.

Concerning the relationship between Libertarianism and IP law, it can be said that this is rather puzzling as there is no pacific agreement about how libertarian theories would deal with IP law²⁶. Libertarian theories hinge on the principle that individuals matter not just as instruments to be used for a larger social purpose; individuals are separate beings, with separate lives, worthy of respect²⁷. Libertarians assume that the fundamental human right is the right of liberty, right to choose freely to live one’s life as one pleases, provided that others can do the same²⁸.

Moving from this perspective, one would expect libertarians not to see IP with favour; IP, in fact, assumes a right to exclude the others, whose liberty to trade in the market would be therefore jeopardized. To put it differently, this stream of thought sees the IP as a *fictio juris*, as an invention of the State, restraining the freedom to act in the market.

Among the libertarians there are those stressing the importance of labour. These are known as Labour Theory theorists and the most representative is John Locke. Supported also by Nozick²⁹, the philosopher thinks that an individual who “labours upon resources that are either not owned or ‘held in common’ has a natural property right to the fruits of his or her efforts”³⁰, therefore the State must protect such right. The main difference between Locke and the other libertarians lies therefore in the belief whether IP is or not a natural right. In terms of influence on IP law, the Labour Theory is thought to be almost as important as the Utilitarian.

²² Sandel, M. (2010). Justice. What’s the Right Thing to Do? Ferrar, Sraus and Giroux

²³ Fisher, W. (No Date). Theories of Intellectual Property. Available at <http://www.law.harvard.edu/faculty/ffisher/iptheory.html> (last retrieved 01/10/2013).

²⁴ *A.V. v. iParadigms, LLC*, 562 F.3d 630; 2009 U.S. App

²⁵ Fisher *Op. Cit.*

²⁶ This observation is well shared in literature, so it is very easy to find essays explaining this issue. Just to mention a recent discussion, see Hughes, J. (2009). Are Libertarians for Intellectual Property? Institute of Ethics and Emerging Technology.

Available at <http://ieet.org/index.php/IEET/more/3351> (last retrieved 01/10/2013).

²⁷ This explains why they are also labeled as Strong Theories of Individual Rights. Sandel *Op. Cit.*

²⁸ *Ibid*

²⁹ Nozick, R. (1974). Anarchy, State and Utopia, pp. 178-182

Available at <http://cyber.law.harvard.edu/bridge/Philosophy/74nozick.htm> (last retrieved 01/10/2013).

³⁰ See Nozick *Op. Cit.* discussing the Lockean Proviso.

The Personhood Theory has been conceived by Kant and Hegel. For these philosophers property rights are “crucial to the satisfaction of some fundamental human needs”³¹. It is a human need to defend from misappropriation or exploitation one’s own property such as the expression of creativity or technological invention; it is also a human need to have a vibrant intellectual society, and only property rights can guarantee the economic conditions to achieve this.³² While similar to Labour and Utilitarian Theories, the Personhood Theory favours the operation of IP Law differently from the former; the latter has had less influence on Anglo-American legal tradition. It has rather influenced civil law systems, such as Germany and France.

With regards to Egalitarianism, the way one must think about justice is to ask what principles people would agree to an initial situation of equality³³. The situation of equality presupposes the “veil of ignorance”, that is people do not know whether they will be rich or poor, Catholic or Muslim, etc. People would make their choice without any moral preconception. As far as IP law is concerned, it is hard to guess what people would choose. Yet, the preoccupation of egalitarians with the distributive justice, expressed through the application Rawl’s difference principle, *would suggest that the best option is to “not handicap the best runners; let them run and do their best. Simply acknowledge in advance that the winnings don’t belong to them alone, but should be shared with those who lack similar gifts”*³⁴. Therefore, put it very blandly, according to egalitarians, IP law should reward inventors and authors as long as they will redistribute what have earned.

Other than these moral and justice theories, the US and Western society is also interested by other theories that, despite their less general focus, still have an influence on IP law. These are the Democratic Theories, Radical Theories, Social Planning Theories³⁵, Unjust Enrichment Theory³⁶ and Ecological Theories.

4. Second Step: Copyright Philosophy

Following up on the previous paragraph, the second step is an attempt to measure the extent to which the mentioned theories have affected US Copyright Law.

A cursory look at history suggests that the first Copyright legislation – the so called Statute of Anne – in common law jurisdictions presented a rather strong utilitarian touch. This is remarkable whereas one considers that in the beginning of the XVIII century, Locke’s labour theory was the dominant one³⁷. The dualism natural right – utilitarian approach was actually paralleled even in case law. In fact, in *Millar v. Taylor*, the judge – despite the Statute of Anne was already in force – maintained that author’s rights were perpetual.

Seven years later (1774), in *Donaldson v. Becket*, the House of Lords overruled the mentioned precedent deciding that Copyright was not a natural right, but a positive right created and limited by the Statute of Anne, whose purpose was the “Encouragement of Learning” or, more specifically, “the

³¹ Fisher, *Op. Cit.*

³² Ibid

³³ Sandel, *Op. Cit.* p. 140

³⁴ Sandel, *Op. Cit.* p. 156

³⁵ This is a minor theory which assumes that it is possible to define property rights in such a manner that fostering a just and attractive culture. Although it might remind utilitarianism for the accent on the final consequence, the Social Planning Theory differs from the first in relation to the consequence itself. The just and attractive culture is a concept which is richer than the social welfare, the former stressing the importance of everybody’s participation and contribution. This theory is supported by Fisher *Op. Cit.*

³⁶ As concerns this “minor” theory it is interesting to remark how in *Christen v. iParadigms, LLC*, 2010, plaintiff Diana Christen, a university student, also sought relief for the unauthorized archival and use of papers done by iParadigms. Being assisted by the same counsel of the four high school students, Robert Arthur Vanderhye, she did not make a complaint for copyright infringement. Rather, maintaining that iParadigms unlawfully detained her property, she asserted claims of replevin, conversion and unjust enrichment. The outcome was that Justice Hilton applied Congress’ rule according to which all state-law rights that are equivalent to those protected under federal copyright law are preempted.

³⁷ Kretschmer, M. and Kawohl, F. (2004). *The History and Philosophy of Copyright. Music and Copyright*. Editors Frith, S., & Marshall, L, Edinburgh, p. 25-26

Encouragement of Learned Man to Compose and Write Useful Books”³⁸. Such collective interest justified the 14 years term within which authors and purchasers could benefit of the monopoly³⁹.

It can be maintained that the English utilitarian approach was received in the US colony, but it cannot be said it was received fully. In fact, just after the revolution, states began to adopt their own legislations including, of course, also Copyright. The Preamble of the majority of Copyright Acts regarded it both as a right of the author and as a policy benefiting the public⁴⁰.

Differently from these single state laws, the 1789 Constitution showed a rather pure utilitarian approach, for it stated that Congress should be empowered “To promote the Progress of Science and Useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writing and Discoveries”⁴¹.

Accordingly, the first Copyright Act (1790 and its revision in 1831) adopted by the US Congress actually implemented a utilitarian approach as per the Constitution. This spirit was confirmed by the very famous case *Wheaton v. Peters* as well as the Congress report accompanying the 1909 Copyright act⁴².

Though, after a while, the application of the Act began to be affected by a new interpretation of the old English case *Donaldson*. This interpretation did not deny the public purpose of the Statute of Anne, but it added that the act did not cancel the common law right of the author⁴³. In other words, the Statute of Anne and, hence, the subsequent acts, including the US ones, had to be construed and designed so as to balance the authors’ and public’s rights. This reinterpretation was dramatically supported by the affirmation of both Locke’s labour theory and the romantic Kant-Hegel personhood theories⁴⁴, especially the latter which saw in the artistic and literary expression a strong involvement of personal interests of the creator⁴⁵.

The legacy of the reinterpretation has been spotted by some legal scholars in the current 1976 Copyright Act⁴⁶. On this respect, Gordon remarks that on side the “elements of the plaintiff’s cause of action largely follow the tort of trespass to land: volitional entry (for land) or volitional copying (for copyright) gives rise to liability regardless of proof of harm and without any need for the plaintiff to prove that defendant acted unreasonably”⁴⁷; on the other side, the Copyright Act still preserve an utilitarian foundation resting in fair use doctrine⁴⁸.

A wonderful judicial example of the coexistence of the Utilitarian and Labour-Personhood theories can be tracked in the not very old *Harper & Row* case, where the Supreme Court wrote:

“We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original

³⁸ Ibid

³⁹ The hypothesis of the existence of a term for the monopoly wonderfully recalls the opposite tendencies within libertarians. In fact, in the opinion of Rand, even though IP are moral and natural rights, these cannot be eternal. She writes that if they were held in perpetuity, they would lead to the opposite of the very principle on which they are based: it would lead, not to the earned reward of achievement, but to the unearned support of parasitism. Rand’s approach is quoted by Palmer, T. (1990). Are Patents and Copyrights Morally Justified? *The Philosophy of Property Rights and Ideal Objects*. Harvard Journal of Law & Public Policy, Volume 13 (Issue 3), p. 825.

⁴⁰ See Abrams, H.B. (1983). The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright. *Wayne Law Review*, Volume 29 (Issue 3), p. 1174

The Preamble of the New York Copyright provided:

“Whereas learning tends to the embellishment of human nature, the honour of the nation, and the general good of mankind; and as it is perfectly agreeable to the principles of equity, that men of learning who devote their time and talents to the preparing of treatises for publication, should have the profits that may arise from the sale of their works secured to them...”

⁴¹ Art. I, s. 8, cl. 8

⁴² Kretschmer, M. and Kawohl, F. *Op. Cit.* p. 30

⁴³ The existence of cases applying the common law right of the owner can be spotted in Patry, W. (1985). *The Fair Use Privilege in Copyright Law*. Bureau of National Affairs, p. 439-441

⁴⁴ Deazley, R. (2003). *The Myth of Copyright at Common Law*. Cambridge Law Journal, 62(1).

⁴⁵ See Menell, S.P. (2000). *Intellectual Property: General Theories*. Encyclopedia of Law & Economics: Volume II (Boudewijn Bouckaert and Gerrit de Geest (eds)) Edward Elgar: Cheltenham, UK, p. 130

⁴⁶ Gordon, W. (2009). *Trespass-Copyright Parallels and the Harm-Benefit Distinction*. Harvard Law Review Forum, p. 62

⁴⁷ Ibid

⁴⁸ Other than Gordon, See also Senftleben, M. (2010). Bridging the Differences Between Copyrights Legal Traditions – The Emerging EC Fair Use Doctrine. *Journal, Copyright Society of U.S.A.*, p. 524

works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labours⁴⁹”.

5. Third Step: Fair Use in iParadigms

The peculiarity of the Copyright Act is that the way it has been drafted does not disclose a clear conception of justice or it does not purely reflect one theory rather than another. Amazingly enough, all the burden relies on the interpretation and application of the fair use rule⁵⁰: the stricter is the interpretation, the more the Copyright Act expresses a labour or personhood theory background; the more liberal is the interpretation, the more the Copyright Act reflects a utilitarian approach. It is not a chance that the rule has been defined as a gigantic mess⁵¹ or the “most troublesome in the whole copyright law”⁵².

As they could not refer to any similar case, the District and Appellate Courts of Virginia referred to apparently similar cases abstracting away the relevant *ratio decidendi* and coming up with what they thought the current conceptions of justice were at the moment the case was decided.

In an attempt to appreciate the smoothness of their findings, it is of course required to study their opinions. As the Court of Appeal’s opinion can be regarded as a more prolix version of the lower court one, the attention is focused on the former and quotations of the latter are made when necessary. The decision issued by the Court of Appeal is structured as the one of the lower Court: after a short summary of procedural posture and an explanation of how Turnitin System works, it deals with three sections: contractual issue, fair use doctrine analysis and iParadigms counterclaims⁵³.

As concerns the analysis of the fair use doctrine, the writer of the opinion, Justice Trexler, before considering the four factors directly as Justice Hilton did, provides an overview of the common law copyright tradition.

To begin with, he reminds that the copyright owner enjoys a “bundle of exclusive rights” which are not absolute and subject to several exceptions. In this part of the opinion, therefore, the judge introduces the Copyright as a right very similar to that of property. In particular, the “exclusivity” recalls the liability for trespassing: in property law, trespassing is allowed only in case of necessity whereas in copyright law, the case of necessity is represented by the fair use doctrine. In common law tradition, therefore, infringement is the rule while fair use is the exception. Thus, the judge moves on explaining that fair use exists to fulfil the very purpose of Copyright: “to promote the Progress of Science and useful Arts”.

This introductory overview does not do anything more than confirming the existence of different philosophies behind the copyright act. With a great margin of error, one can maintain that the judge puts a stronger accent on the utilitarian philosophy when he quotes the Constitution. Such remark, in fact, had been overlooked by the lower Court. The discussion then proceeds with the analysis of the four factors to be considered for the determining fair use.

⁴⁹ Harper & Row v. Nation Enterprises, 471 U.S. 539, 545-46 (1985).

⁵⁰ See Basler, W. (2003) Technological Protection Measures in the United States, the European Union and Germany: How Much Fair Use Do We Need in the “Digital World”? Virginia Journal of Law and Technology, Vol. 8, (Issue 13), p. 9

⁵¹ Gingerich, J. *Op. Cit*

⁵² Ellis, H. (1991). Fair Use of Unpublished Works: An Interim Report and a Modest Proposal. Washington Law Review, 69(4). P. 1321

⁵³ Even though very important and crucial, the contractual issue is a state law problem. This explains why the District Court, after finding that Plaintiff had expressed a valid consent for the archival and use of their papers, did not finish its legal opinion and moves on facing the copyright issue. It is interesting to note, moreover, how differently from the lower court, the Court of Appeal dedicates to the contractual issue only few lines. As observed by Hakimi, the decision to decline addressing that issue should be grounded on the fact the turnitin.com was protected under fair use. See Hakimi, S. (2009). To Students’ Dismay, Plagiarism Detection Website Protected by “Fair Use”. Harvard Journal of Law and Technology.

Available at <http://jolt.law.harvard.edu/digest/copyright/av-v-iparadigms-llc> (last retrieved 01/10/2013).

As concerns the counterclaims, iParadigms sought relief complaining that Plaintiff A.V., one of the minor student, accessed unlawfully the company’s website violating the CFAA and VCCA. As both the legislations require the existence of an economic damage which iParadigms was not able to prove, the counterclaims were rejected.

As concerns factor 1– the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes – the Court begins with separately analyzing the concepts of purpose⁵⁴ and character.

Regarding the former, Justice Trexler simply recalls the rule for which a use of the copyrighted material that has a commercial purpose “tends to weigh against a fair use” and specifies that “the crux of the profit/ nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”⁵⁵.

The first of the two norms, which can be regarded as the general one, is a clear manifestation of the personhood theory. In fact, it indicates that it is not fair a situation where somebody is enjoying the fruits of other people efforts, even though these fruits were not planned or foreseen by the original author.

The second of the two norms, which can be regarded as the exception, is actually a confirmation of the personhood theory. This surprises a little bit, for one would expect the exception to bring a more utilitarian result. As it will be seen, there is a second and new exception tailored for the utilitarian cause.

The second norm actually surprised Nation Enterprise, a Defendant sued by Harper & Row. In fact, in this case law, Nation Enterprise attempted to defend itself from a copyright infringement action maintaining that even though it was using Plaintiff’s material for profit purposes, it was also pursuing the public interest in the free flow of ideas and information.

Nation Enterprise relied on *Rosemont Enterprises, Inc. v. Random House, Inc.*, where the judge clearly stated that the fact “that profit was involved is, without more, legally irrelevant where the work in which the use appears offers some benefit to the public”⁵⁶.

Nation Enterprise was successful in Appeal, but not before the Supreme Court where the judges maintained that the point was not to check if the profit was the sole motive of the use. If that was the rule, in fact, many firms dealing with news reporting, education, criticism could easily find in the fair use doctrine a safe harbour. Rather, the judges basically explained that the attention had to be focused on how profits were made: if profits were the result of exploitation (in other words: freeloading) of the substance of an original work, then this factor should not favour finding of fair use.

As mentioned in the beginning of the paragraph, Justice Trexler does not elaborate the two norms. He merely reports the texts. The reasons of this choice are clearly found in the discussion of the concept of character, developed immediately after the quotation of the two norms. Judge Trexler sets forth the analysis clarifying that the character has to be considered in the light of the examples listed in the preamble of section 107.

Theoretically, if the use made by the defendant reflects one of those examples, then this factor should favour finding of fair use unless, as just mentioned, the defendant makes the use without paying the customary price. In practice, all the defendants do not pay the customary price (if they did, they would not be sued⁵⁷) and, hence, all the defendants are presumed to exploit the substance of the original work.

Judge Trexler suggests how it has been this way until *Campbell v. Acuff-Rose Music, Inc.* when the Supreme Court realized that said presumption was too strong and would have rendered the application of

⁵⁴ It should be noted that the term “purpose” is apparently adopted in an odd way: the first sentence of the 17 U.S.C. § 107 suggests that as long as the purpose of the unauthorized use is one of those mentioned by the list, then fair use protection applies; though, at the same time, the second sentence mandates to consider the purpose in order to decide about fair use protection.

The unclearness of the statutory text is such that in *Harper & Row* justice O’Connor dedicates one paragraph of his opinion to this point.

He explains that the list of the purposes in the first paragraph of the opinion is not meant to be exhaustive, as suggested by terms like “including” and “such as”.

In fact, he elucidates that the drafters structured the provision as an affirmative defense requiring a case-by-case analysis; in other words, if defendants prove that their use reflected one of the mentioned purposes, this is not enough to avoid liability; he writes: “whether a use referred to in the first sentence of section 107 is a fair use or not will depend upon the application of the determinative factors, including those mentioned in the second sentence”.

So, in brief, purpose is either one of those included on the list or any other thought to be covered by section 107. Moreover, according to factor I, when dealing with purpose one has to consider also whether profits are involved or not.

⁵⁵ Standler, in *Op. Cit.*, remarks that this rule has actually been always controversial.

⁵⁶ *Harper & Row v. Nation Enterprise*, 723 F.2d 195; 1983 U.S. App.

⁵⁷ Dratler, J. (1988). *Distilling the Witches’ Brew of Fair Use in Copyright Law*. University of Miami Law Review. Volume 43 (Issue 233).

fair use almost impossible. After all, many of the possible fair uses of a work listed in [section 107's preamble](#), such as commentary, criticism, and news reporting, are conducted for profit⁵⁸.

In particular, in *Campbell* the Court established a new approach according to which the strength of the presumption varies according to the context in which it arises, and that the presumption disappears entirely where the challenged use is one that transforms the original work into a new artistic creation⁵⁹.

Put differently, the Supreme Court introduced the concept of “transformative work”, meaning that if the second use was found highly transformative, different, from the original, then the factor would have favoured finding of fair use, no matter the purpose of the second use itself involved also profits.

To sum up and to clarify, purpose and character are not synonymous. The first is directly connected to both the list of examples provided by section 107 and to the commercial or non-profit finalities; the second is indirectly connected in the sense that what has to be checked is whether the purposes accomplished by the second use are different from those pursued by the original author.

It is true, this new approach, representing a utilitarian refresh after years mostly influenced by the personhood theories, deserves deeper attention for Justice Trexler will hinge on it a lot when analyzing other factors, especially factor IV.

It might be thought, in fact, that in *Campbell and iParadigms*, the Courts made a big jump. The reasons are the following.

The purpose for which the students submit their papers is to get a grade or to pass the exam. All the creativity, efforts and intelligence they put in their work aim definitely at completing their curriculum of courses. Potentially, though, those papers are apt to many other purposes that students themselves cannot even think about at the moment of the creation. For example, somebody could enter in possession of one paper and perform the relevant drama in a theatre, charging for tickets. Such second use's purpose is completely different from the original, for the former is to entertain audience. According to the new approach, thus, the first factor would favour finding of fair use as per the combination of different and transformative as well as socially valuable purpose. Though, in this case, the transformative character of the second use would not win against the prescription of factor IV, according to which the objective existence of potential market (such as performing the drama at the theatre) would render the second use unlawful.

In relation to factor II, the Court of Appeal provides a more complete description of the creativity rule than what the lower Court did. Basically, Justice Trexler set out from the idea that copyright law protects a specific component of a work, known as “core”. The core is represented by the degree of creativity. Since works might involve different degrees of creativity, it follows that some works are more protectable than others. In particular, Justice Trexler recalls how “fair use doctrine is more likely to be found in factual works than in fictional works”.

Keeping in mind this observation, by the way, the Court explains that the crucial point to be considered is whether the second use negatively affects the creativity of the authors. Actually, the use made by *iParadigms* has just the opposite function of incentivizing creativity by detaching plagiarism.

A closer analysis of the factor actually can lead to different conclusions. On the one hand, one can maintain that the protection of creativity perfectly reflects the Kant and Hegel personhood theory. On the other, protecting creativity can be seen as a way to achieve a better condition for the society as a whole. No matter what one thinks is the theory behind factor II, it is important to assess whether the second use protects and fosters creativity. In this case it cannot be denied that *iParadigms* protects and fosters creativity not only for the case a student writing the paper for the grade, but also for the student glancing at the potential market of high quality papers.

In relation to *iParadigms* case, hence, factor II implies a harmonic coexistence of utilitarian, labour and personhood theories so that the finding of fair use does not really determine where the balance is tipped.

Moreover, it is interesting to take a brief look at the two objections advanced by the Plaintiffs. The first is concerned with the failure of the lower court to consider that students' works were not published.

⁵⁸ Bayard, S. (2009). Do Ads in Google News Search Change the Fair Use Analysis? Available at <http://www.dmlp.org/blog/2009/sam-bayard/do-ads-google-news-search-change-fair-use-analysis> (last retrieved 01/10/2013).

⁵⁹ *Princeton v Michigan Document Serv 99*, 855 F. Supp. 905; 1996 U.S. App. Available at <http://fairuse.stanford.edu/michigan/decision/> (last retrieved 01/10/2013).

The principle to be reasoned on is that if authors have chosen to not disseminate their works, they should enjoy an absolute right of property, including that of first publication of their intellectual creation. The Court observes that this objection is not really connected with the nature and, hence, with the creativity of the work. Moreover, no first right of publication has been violated by iParadigms, as no director any staff of the company ever reads the papers.

The second objection advanced by Plaintiff relies on the principle mentioned earlier that fictional works are harder to find fair doctrine application. On this respect the Court of Appeal underscores that the lower Court had already been very clear: the fundamental point is not represented by the degree of creativity implied by a certain kind of works, but by how the use made by iParadigms could interfere with the creativity itself. So also in this case, fair use is favoured by the assumption that iParadigms' use is very transformative.

As concerns factor III, the important specification made by the Court of Appeal is that the copy of the whole work does not preclude finding of fair use and that the extent of permissible copying varies with the purpose and character of the use.

Justice Trexler agrees with the lower Court that the use made by iParadigms is different in purpose and scope, so that the entire copy of the work could be covered by the fair use doctrine.

The objection made by the students actually is that the District Court based the discussion on the concept of purpose/scope, which they claim it is covered by factor I and not by factor III. The Court of Appeal explains that "overlap exists between the fair use factors", especially factor I and III take into account to some degree the purpose of the disputed use. Just like factor II, also factor III might be backed by utilitarian, personhood and labour theories at the same time. In fact, one might think that it is not fair to copy an entire work because otherwise no one would have incentives to do that and the whole society would result impaired. At the same time, to copy an entire work is not fair because it is like stealing the personality of somebody else or efforts of somebody else.

It is evident how the Court of Appeal, leveraging on the transformative aspects of the second use, opted for the utilitarian reasoning. The Court of Appeal's discussion of factor IV follows the reasoning of the District Court: in order to decide if the second use impairs the marketability or the value of the original work it is necessary to check whether the second use acts as a substitute of the original work and to measure the extent of the market harm.

As concerns the first task, Justice Trexler provides an important standard to be referred. In particular, he maintains that substituting does not mean suppressing or destroying the original work market, rather it means usurping it. He explains this concept mentioning the example of literary works: a second user who is meant to heavily criticize an original work might well impair the marketability of the product itself. Customers in fact might be influenced by the second user criticism and decide to not buy the original work. Copyright law is not concerned with this. The original author cannot ask protection. In fact, the second user is not usurping and, hence, substituting the original author market. Even though the marketability is impaired, no protection can be claimed.

The same second user might heavily criticize the original work disclosing a very big portion of the plot. In this case, customers might decide to not buy the original work not because of the negative review, but because they do not want to buy something that they have already read.

By purchasing the secondary work, customers will not need to buy the original work, whose market will result therefore usurped. To sum up, where the copy does not compete in any way with the original, the concern with the market harm is absent.

Within this mindset, the Court of Appeal explicates that the higher is the transformative character of the second use, the higher is the chance that the second use itself is not usurping the original work market. Agreeing with the District Court on the highly transformative use made by iParadigms, the Court of Appeal concludes that no market substitution had taken place.

The identification of market substitution is a key element to evaluate the harm to the market; still a complete appreciation of the IV factor requires more analysis. This is the reason why Justice Trexler moves on measuring the extent of the harms possibly caused by the use made by iParadigms.

Concerning the impairments student could experience when submitting their papers to third deliverers such as magazines or academic counsellors, the Court of Appeal finds no flaws in the analysis done by the District Court.

In relation to Plaintiffs' objection according to which the District Court only considered actual damages ignoring those arising from potential markets, Justice Trexler observes that no potential market were predictable. Indeed, the sale of the papers to other students was admittedly opted out by the

Plaintiffs and disrepute following up on a submission to third recipients is just a speculative guessing, as third recipients know very well how iParadigms works

Now, it is the proper moment to make a comparison between factor I and factor IV as it is clear they have much in common.

While, as seen earlier, the first purports a personhood theory approach, the second reflects rather a labour theory approach for it aims at avoiding that second users (mis) appropriate profit that could actually be made by the original authors. They share the same utilitarian exception, which is the transformative work test.

The judges, in Campbell and iParadigms, have considered the *ratio decidendi* of apparently similar cases, and have adapted them to the new conceptions of justice. It looks like that these new conceptions of justice assume that technological progress has created the opportunity to use creative works in many other ways that were unthinkable at the time the works themselves were accomplished.

As these opportunities are just “one click” away and, moreover, can be very beneficial for the society, the judges decided to give a greater voice to the constitutional clause demanding the progress of science and useful arts.

In the specific case of iParadigms, as potential markets for students’ papers do not exist, the moral dilemma should concern factor I: the company is making money that would not do if students did not send the papers. From a Kantian perspective, it is easy to spot the categorical imperative and, hence, to hold the unfairness of the second use. Kant is not a trend among the US judges now, but it is very popular in civil law countries like Germany and France, where iParadigms also provide its service. A great prosecution of this research would be to check whether iParadigms would survive a copyright infringement action in Europe.

For the sake of safety and low risk lovers, next paragraph will introduce a model which could relief many PDS firms from headaches.

6. Proposed Solution To Improve IP Protection

As it can be seen from the detailed analysis of Turnitin cases, as well as from the analysis of copyright law, one of the major problems in the current approaches to plagiarism detection is the fact that schools allow to transfer the entire paper to the third party. One of the purposes of such a transfer is to have a collection of student papers on the PDS side. The existence of this collection is aimed to prevent cross-school plagiarism. Cross-school plagiarism means that if student S1 from school A submits a paper then this paper will be transferred to and kept in the PDS database. If student S1 gives this paper to student S2 from school B on a flash drive – so that paper never appears on the web - then it will not really help student S2 to plagiarize because this paper is already in the database. But on another hand, it is really doubtful that cross-school plagiarism is the most “popular” way to plagiarize. The scale of this peer-to-peer copying can be assessed by some studies that have been done before. Scanlon & Neumann indicated that the Internet is indeed the main source of plagiarized texts⁶⁰. Another study also indicates that about half of the surveyed students know someone who plagiarized from the Internet⁶¹. It also indicates that in many cases the “deep” web could be a source of the plagiarized paper as majority of the students feel that academic papers on library databases is a reliable source of information. But again this is not about peer-to-peer copying. Also, it’s a well-known fact that users start the information search by using the search engine of their choice and they do not follow the “long tail”, e.g. are very likely to select links from the first page of results provided by the search engine⁶². All these factors support the point that having a cross-school database is not the most essential feature for a PDS.

In this case the overall process can be transformed as follows:

- Student sends a paper through university LMS.
- LMS extracts some information required for plagiarism detection and sends it to PDS.

⁶⁰ Butakov, S., Dyagilev, V., & Tskhay, A. (2012). Protecting Student Intellectual Property in Web Plagiarism Detection Process. *The International Review of Research in Open and Distance Learning*, Volume 13 (Issue 5).

⁶¹ *Ibid*

⁶² Hsieh-Yee, I. (2001). Research on Web search behavior. *Library and Information Science Research*, Volume 23(Issue 2), p. 167-185

- PDS performs the search, prepares the list of the potential sources from the web, and sends these sources back to the LMS.
- LMS performs detailed comparisons and prepares similarity reports if noticeable matches have been found.

Note that the process does not require a PDS to store the original student paper. If a PDS can omit maintaining its own database of the assignments then it actually creates great advantages to it in terms of student IP protection. If a university can send only limited portion of student submission to the PDS therefore protecting student's IP. In this case the external service will be able to do the preliminary search by only suggesting the potential sources from the web. Detailed comparison will be done by the university information system. In this case the balance should be maintained between the amount of information transferred and the quality of the search because obviously the less information that goes to the third party the less chances it has to locate the potential sources on the web.

Some studies show that even one properly selected six word phrase could be enough to locate the source of plagiarism⁶³. Other studies indicate that as low as 5% to 15% of the original text is required to locate the potential source of information if a significant portion of it was plagiarized⁶⁴. Based on this, it can be stated that potentially effective PDS can be built without transferring student work to the third party as well as without raising IP violation concerns.

7. Conclusions

The interpretation of the current conceptions of justice made by the Virginia's courts sounds correct. The danger of a precedent-break exists but it is very low. iParadigms, though, has a lot of business in Europe where the Copyright culture is supposed to be less liberal. The recommendation for worldwide PDS providers is to develop models less concerned with authors' rights, warding off copyright infringement actions at their scratch.

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⁶³ Culwin, F, & Child, M. (2010). Optimizing and Automating the Choice of Search Strings when Investigating Possible Plagiarism, 4th International Plagiarism Conference, Newcastle.
Available at <http://www.plagiarismadvice.org/>
(last retrieved 01/10/2013).

⁶⁴ See Butakov *Op. Cit.*