

Legal Document

Turnitin has engaged the services of the law firm [Foley & Lardner](#) to insure that our use of student work complies with FERPA, COPPA and copyright laws and requirements. The following are answers provided by Foley & Lardner to some of the most commonly asked legal questions concerning Turnitin.

Foley & Lardner is one of America's top law firms, with offices across the United States, experience with clients around the world, and a team of nearly 1,000 attorneys. Another 1,500 personnel provide support ranging from research to supplying first-hand industry and business trend knowledge. Over the past 160 years they have contributed to the success of many thousands of organizations, from startups to multinationals and government entities.

In forming its legal opinion that Turnitin's use of student work complies with FERPA, COPPA and copyright laws, Foley & Lardner represents that it reviewed information available at Turnitin in July 2002 and laws and regulations applicable at that time.

1. Does Turnitin infringe on student's copyrights to their work?

Determining whether a copyright exists in a particular work or is infringed by a particular use of the work is difficult. The analysis is so fact-specific that relatively minor variations between the facts of superficially similar cases often lead to diametrically different conclusions.

As such, casual analysis of these issues will not suffice, especially when the use in question is novel, as is the TURNITIN system for plagiarism detection. For that reason, iParadigms, the owner of the Turnitin system, and its sister site, Plagiarism.org, sought expert legal advice before launching the TURNITIN system, and have continued to do so during its operation. Based on extensive analysis of all aspects of the TURNITIN system, we have concluded that its use does not pose a significant risk of infringement of any copyright in written works submitted to Turnitin for evaluation.

For a further explanation, see the following:

[*Document Submission and Copyright*](#)

[*Fingerprinting and Copyright*](#)

[*Originality Evaluation and Copyright*](#)

[*Archiving and Copyright*](#)

[*Peer Review and Copyright*](#)

2. Does Turnitin comply with FERPA (Family Educational Rights and Privacy Act)

FERPA generally prohibits schools and educational agencies from releasing personally identifiable information from a student's education record without consent. When analyzing whether the TURNITIN system implicates any issues under FERPA, the focus is not on the content of a student's work, but on the student author's personally identifiable information (e.g., name, email address) that is submitted with the content, and to whom that information is released. Assuming school assignments do not elicit papers containing information that would make the student's identity easily traceable (such as family member names or address, or social security numbers), the content of student work alone does not implicate FERPA.

Here, FERPA applies to the use of the TURNITIN system at only two stages: (1) release of the student identity to TURNITIN for review and/or archival and (2) release of information to other TURNITIN registrants when the student's work "matches" a newly submitted work. At the first stage, the work is not considered to be part of the student's education record because the work has not been graded. Thus, FERPA does not apply under the recent Supreme Court ruling *Owasso Independent School District v. Falvo*. At the second stage, the work likely would be considered to be part of the education record at that time, but because Turnitin never divulges any personally identifiable personal information, there is no disclosure under FERPA. Turnitin may give one instructor the name and e-mail address of another instructor, and the paper ID# of the paper with matching material, but only the original instructor will be able to link that paper ID# to the student's personal information.

Moreover, schools may allow the release of directory information such as student names and addresses to certain groups by providing an annual notice to students.

For a further explanation, see the following:

[*Document Submission and Copyright*](#)

[*Fingerprinting and Copyright*](#)

[*Originality Evaluation and Copyright*](#)

[*Archiving and Copyright*](#)

[*Peer Review and Copyright*](#)

3. Is Turnitin's use of student work ethical?

We have also considered ethical and practical issues presented by an institution's use of the TURNITIN system. We are sensitive to the possibility that students may perceive a request or requirement to submit written work to Turnitin as being coercive, or that refusal to make a submission could imperil the student's ability to obtain a good grade on the work. Also, for these reasons, or based on other unresolved concerns about use of the TURNITIN system, faculty members may be

uncomfortable about asking students to submit work to Turnitin.

To the extent possible, the TURNITIN system was designed to accommodate individual preferences, such as by restricting public access to the entire text of a work until and unless the author expressly consents to its disclosure (such as in a TURNITIN Digital Portfolio). Ultimately, however, each faculty user of the TURNITIN system must decide whether the advantages of detecting plagiarism quickly and efficiently, coupled with the ability for peers to efficiently and anonymously review each others' work, is outweighed by any reservations the faculty user may have about how TURNITIN accomplishes those goals.

In that respect, we believe it helpful to bear in mind that academic institutions and their teachers are not only entitled, but obliged, to award grades to student work based on the student's input, rather than the intellectual contributions of others. Students should know that not only the content, but also the integrity of their work is subject to evaluation.

With that context, it is clear that no valid objection could be made to a copy of a student work being provided to, for example, a school librarian for confirmation of its source material. If institutions had the resources to engage in such hands-on evaluation of student work, then there would be less need for a system like TURNITIN. However, in the absence of human resources for extensive manual corroboration of student work, Turnitin provides a technological tool to achieve the same objective--confirmation that student work is the student's work.

4. What are the legal implications of Certain Aspects of the TURNITIN System?

Different legal considerations apply to different aspects of the TURNITIN system. For that reason, it is important to analyze the legal implications of each aspect separately. These aspects are: (a) submission of a work to Turnitin for originality evaluation; (b) creation by the TURNITIN system of a "fingerprint" of the work, which does not include text from the work; (c) comparison of the fingerprint to source materials, and rendering of an "originality" report; (d) storage of submitted material in a database; and (e) storage of submitted material for peer review, as requested.

Note that copyright issues are only raised with respect to any aspect of the TURNITIN system if the work submitted qualifies for copyright protection. See, 17 U.S.C. §§102 and 106 (copyright provides the holder with the right to exclude others from reproducing, preparing derivative works from, distributing copies of, performing or displaying a work of original authorship). A student's contribution to a test paper on which selections have been made among answers to multiple choice questions clearly falls well short of the "original authorship" necessary to give the student a copyright in the completed test paper. 17 U.S.C. §102(a). Even short essays may, if primarily consisting of factual recitations, be free of any

copyright interest. 17 U.S.C. §102(b). Therefore, this discussion pertains primarily to more extensive compositions in which a putative copyright interest may be present in some or all of the work.

a. Document Submission for Originality Evaluation

Copyright Law

If copyright is present in a particular student's work, the submission of the work to a teacher as part of the student's coursework necessarily carries with it the expectation that the teacher will use the work in certain ways, consistent with the goal of evaluating and grading the student's work. Specifically, by submitting the work, the student implicitly agrees that the teacher may comment on, criticize and otherwise evaluate the academic quality of the work, an evaluation that should include consideration of both the work's content and integrity. *Foad Consulting Group v. Musil Govan Azzalino, et al.*, 270 F.3d 821 (9th Cir. 2001)(development of site plan for a construction project carries with it an implied license for the developer's use of the plan to build the project, including display of the plan to third parties, and modification of it to suit the project; otherwise, presentation of the site plan would have been pointless); *Lulirama, Ltd., Inc. v. Axxcess Broadcast Services, Inc.*, 128 F.3d 872, 879 (5th Cir. 1997)(a copyright holder grants a non-exclusive license for use of a work to another "when the totality of the parties' conduct indicates an intent to grant such permission"; quoting, 3 *Nimmer on Copyright*, § 10.03[A], at page 10-41 (1997), now § 10.03[A][7], at 10-42 (2000)); in accord, *Effects Associates v. Cohen*, 908 F.2d 555 (9th Cir. 1990), cert. denied, 121 S.Ct. 173 (2000)(transfer of video footage with knowledge of the recipient's intent to use in a film creates implied license for such use); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 772 (7th Cir. 1996)(house plans obviously intended to be used in designing home, because drawings had no other use, except as "placemats"); and *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharmaceuticals, Inc.* 211 F.3d 21 (2d Cir. 2000)(implied license is created to facilitate the intended purpose of the work).

In some institutions, school policy reduces this "implied license" to use a work for academic evaluation to writing by, for example, specifying that teachers may receive, copy or distribute student works. Whether written or implied, such evaluation licenses carry with them certain collateral rights, to the extent necessary to the enjoyment of the right granted to perform the evaluation. See, legal authorities referenced above. Such collateral rights might include, for example, the right to make a copy of the work to enable others to evaluate it (e.g., a teaching assistant), the right to image the work for computerized grading (e.g., tests written on scannable test forms) or, as is true of dissertations and theses, the right to archive the work in a publicly accessible collection.

The question of whether the scope of such collateral rights extends to electronic

submission of a written work to a computer database for purposes of review, “fingerprinting”, and/or archiving has not been tested in the courts, nor is it addressed explicitly by statute. However, legal precedent in other contexts strongly suggests that student submission of a work for grading provides the teacher with the right to utilize available technologies and tools to accomplish the grading task. Such a right necessarily encompasses the ability to transfer the work to other media (e.g., by scanning the work), where such transfer is required for the teacher’s personal use of a particular grading tool. See, e.g., Foad Consulting Group, *supra* at 828-831 (copying, distribution and modification of a work to make it usable for the intended purpose necessarily a part of the implied license to use the work); as well as Recording Industries Ass’n of Am. V. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)(transfer of a work, such as music, into another media, such as an MP3 file, for personal use of the person making the transfer is a fair use), and Sony Corp.v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984)(copying of broadcast productions onto videotape for the later viewing using a VCR is a fair use); compare, A&M Records, Inc., et al. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001)(copying of a work for personal use not fair when coupled to simultaneous distribution of the entire work to the general public).

Hence, by itself, teacher submission of a student work to Turnitin is within the scope of the evaluation license provided by the student to the teacher on submission of the work for grading. The implied license may not extend to other aspects of the TURNITIN system, such as archiving, however, such aspects are allowable as “fair uses” of the copyrighted material.

FERPA

At the time that a student or instructor submits a work to Turnitin, that document would not be considered a student record that is governed by FERPA. The recent Supreme Court ruling, *Owasso Independent School District v. Falvo* found that a work that has not been recorded in the school’s official registrar or grade book is not part of the student’s education record under FERPA. With the TURNITIN system, the student or instructor submits the work in order to be graded or recorded in the student’s official record. Thus, it is not considered an education record at that time, and FERPA does not apply.

Moreover, even if the work is submitted after a grade is recorded with the registrar, personally identifiable information is not necessarily released at that stage. Instructors have the option of allowing the submission of student work through a code or other identification number known only to the instructor, rather than by student name. And if that option is not chosen, and a student name is released, FERPA still would not necessarily be violated. Release of student names is allowed under FERPA through a school’s directory information policy. Such policies are required under FERPA and authorizes schools to release names of students after providing an annual notice of such release.

b. Fingerprinting a Submitted Work for Originality Evaluation

Copyright Law

To enable a work submitted to Turnitin to be evaluated for originality, the proprietary TURNITIN system makes a “fingerprint” of the work by applying mathematical algorithms to its content. The fingerprint is merely a digital code, which relays the unprotectable factual information that certain pre-defined content is present in the work. 17 U.S.C. §§106 and 501(c)(copyright infringement only occurs if the copyright holder’s enumerated rights in the work have been violated); and *Veeck v. Southern Building Code Congress Int’l, Inc.*, 293 F.3d 791 (9th Cir., June 7, 2002)(copyright interest extends to control over original and derivative works, not facts or ideas embodied in, or relating to, those works);

The fingerprint does not include any of the work’s actual contents, and is therefore neither a copy nor a true derivative of the original text; i.e., a work based on another, which includes material from the pre-existing work. 17 U.S.C. §§101 and 103(b). Furthermore, the purpose of the fingerprint (to enable evaluation of works for plagiarism) differs from the purpose of the work itself (to express an idea or information for academic purposes). *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)(use of a work to prepare another is more likely to be considered fair when the new work has a different purpose or character than the one from which it was derived).

As such, because the fingerprint is a work that contains none of the copyrighted material, and is developed for a different purpose, the act of fingerprinting does not impinge on any copyright that may be present in the fingerprinted work.

FERPA

Again, because a student’s work when submitted is not part of the education record, the act of “fingerprinting” the work does not implicate FERPA. Moreover, even if the work is part of the education record when fingerprinted, this stage does not cause any release of personally identifiable information.

c. Conducting the Originality Evaluation

Copyright

The originality evaluation performed using the TURNITIN system is substantively the same evaluation that a teacher or assistant might make, if he or she had the resources needed to compare student works against an array of original source materials. The difference is merely technical--using TURNITIN, the comparison is done electronically, using the fingerprint made by Turnitin of the student’s work, not the work itself.

In most circumstances, an integrity check of a student’s work is a necessary part

of the grading process, such that an implied license to conduct the evaluation is granted on submission of a work for grading.

It is possible, albeit unlikely, that institutional or class policy may negate such an implied license by explicitly prohibiting all third party use of student works, absent student consent. Even then, a teacher's use of Turnitin would likely still be considered fair use, as the purpose of the evaluation is to provide personal assistance to the teacher for his or her educational, non-commercial use, and the work itself is not released to the public until and unless the author consents to its publication. Recording Industries Ass'n of Am. V. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)(copying of digital music files for personal use) and Sony Corp.v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984)(copying of broadcast productions for personal use); compare, A&M Records, et al. v. Napster, at 1015 and 1019 (copying for individual use may be fair, but simultaneous distribution of the copy to "millions of other individuals", who then "get something for free that they would ordinarily have to buy" is not).

Archival of the work by Turnitin is also for educational purposes, albeit commercial ones, in that a charge is made for access to the system. As such, the archival step raises copyright questions requiring a somewhat different analysis, provided elsewhere below.

FERPA

Again, because a student's work when submitted is not an education record, FERPA does not apply to conducting an originality evaluation. Moreover, even if the work is part of the education record when the originality review is conducted, this stage does not cause any release of personally identifiable information.

d. Archiving a Submitted Work for Later Reference in Originality Evaluations of Others' Work

Copyright

The archival of a submitted work is perhaps the most legally sensitive aspect of the TURNITIN system. If a student submits a work for evaluation and archival, or clearly agrees to the archival of a work, there is no issue. Otherwise, the archival raises the issue of whether the conversion of a work to electronic form, and maintenance of it in a database, constitutes a "fair use" of the work.

Use of a work for non-profit educational purposes is presumptively fair, under most circumstances. 17 U.S.C. § 107. However, although the overall purpose of creating a database of student works is to increase the efficacy of the TURNITIN plagiarism detection system, the system is provided to institutions on a for-profit basis, and is therefore commercial in nature.

Commercial use of a work may still be "fair use" under U.S. Copyright Law (17

U.S.C. §107), especially when less than the entire work is being used, and/or the use does not “materially impair the marketability of the work which is copied.” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-67 (1985). Here, the actual work is used by the TURNITIN system only as a reference, for purposes of creating a separate work, the digital “fingerprint”. If there is a match between a submitted work and fingerprinted portions of an archived student work, only that matching text is highlighted in the originality report.

The identification of a textual match between documents relays a fact, which is not protected from disclosure by the Copyright laws. 17 U.S.C. § 102(b). Where there is no way to express the fact in question except by copying of the underlying material, the fact and the portion of the material representing it are said to have “merged”, excluding the material itself from the ambit of copyright protection. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991); Harper & Row Publishers, supra at 556; Veeck v. Southern Building Code Congress Int’l, Inc., 293 F.3d 791 (9th Cir., June 7, 2002). Because one cannot identify a passage as having been copied without matching it to the material that was putatively copied from, display of the matching material is not prohibited by copyright.

No other portions of the archived work are displayed, used, published, distributed or further copied without prior author consent. Compare, A&M Records, et al. v. Napster, at 1015 and 1019 (distribution of a copied work to the public without the copyright holder’s consent implies that the copyright in the copied material may have been infringed). As such, the archival does not publish the work as a whole, or otherwise impinge on the author’s ability to exploit the work commercially. Because the “primary objective of copyright is not to reward the labor of authors but ‘[to] promote the Progress of Science and the useful Arts’” (Veeck, supra as reported at 2002 U.S. App.LEXIS 10963, *25), the minimal use of a student’s work to ferret out plagiarism in others works, without making the work itself available to the public, is a fair use that does not infringe any copyright which may be present in the archived work.

FERPA

Since the paper is not part of the education record and no personally identifiable information is released when a paper is archived, FERPA does not restrict this aspect. If there is a match to another submitted student paper, only the e-mail address and name of the instructor whose student submitted the first paper will be given to the instructor of the matching paper, along with a paper ID #. Only the instructor of the originally submitted paper would be able to use this ID# to determine the student’s personal information, and they already have access to such information.

e. Peer Review Using the TURNITIN System

Copyright

The peer review process differs from the originality evaluation in that it necessarily entails release of the student's work product to others for review. If the policy of the institution or instructor is to utilize peer review as a component of the learning experience, then the TURNITIN system provides an efficient method to distribute work to peers, and collect their comments. Only the designated reviewer receives a copy of the work (which may or may not be archived, depending on whether the submitting student requests that no archive copy be maintained).

From a legal perspective, use of the TURNITIN system in this context is more efficient, but not substantively different, than distributing hard copies of a work to peers for review. Indeed, TURNITIN provides a greater level of confidentiality for the work and the peer comments than does off-line distribution and review of the work. If the policy of the institution or instructor does not allow for peer review of student work, then the TURNITIN system will not be used to that end.

FERPA

The peer review process allows students to submit their work for review and comment by other students prior to the author's submittal for review by the instructor. It necessarily requires the release of personally identifiable information because fellow students' comments are returned to the student author. However, because the student work has not yet been graded or even submitted to the instructor for grading, it is not part of the student's education record. Thus, FERPA is not implicated in this aspect of the TURNITIN system. The Supreme Court recently decided this issue in *Owasso Independent School District v. Falvo*.

5. Does Turnitin comply with COPPA (Child Online Privacy Protection Act)?

Turnitin complies with COPPA, in that it is explicitly not directed to children under age 13, and is not designed to collect personally identifiable information from such children.

COPPA is designed to prevent websites from targeting children under 13 and collecting personal information from them. At Turnitin, student personal information is used for upload identification, market research or statistical purposes only. No information relating to age is transmitted to Turnitin and the service is only intended for use by individuals over the age of 13.