

# A.V.V. Iparidigms, LLC: 562 F.3D 630(4th Cir. 2009)

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## **A.V. V. IPARADIGMS, LLC**

### **562 F.3D 630 (4TH CIR. 2009)**

#### I. INTRODUCTION

In *A.V. v. iParadigms, LLC*, four high school students who submitted written assignments to the online plagiarism detective service, Turnitin.com, brought a copyright infringement action against iParadigms, the operators of the service.<sup>1</sup> iParadigms brought counterclaims alleging one of the plaintiffs accessed its online database without authorization in violation of the Computer Fraud and Abuse Act (“CFAC”) and the Virginia Computer Crimes Act (“VCCA”).<sup>2</sup> The United States District Court for the Eastern District of Virginia granted summary judgment in favor of iParadigms on the copyright claim based on the doctrine of fair use, and granted summary judgment in favor of the plaintiffs on iParadigms’ counterclaims, concluding that iParadigms did not provide enough evidence to support actual economic damages.<sup>3</sup> The parties cross-appealed and the Fourth Circuit affirmed the summary judgment order on the copyright infringement claim, but reversed and remanded the summary judgment order regarding iParadigms’ counterclaims.<sup>4</sup>

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1. *A.V. v. iParadigms, LLC*, 562 F.3d 630, 634 (4th Cir. 2009).

2. *Id.*

3. *Id.*

4. *Id.*

## II. BACKGROUND

iParadigms owned and operated “Turnitin Plagiarism Detection Service,” an online system to analyze written works to detect and prevent plagiarism.<sup>5</sup> The service provided high school and college educators verification of their students’ original work.<sup>6</sup> Typically, students submitted their work through *www.turnitin.com* or through their school’s computer system.<sup>7</sup> In order to submit papers, students entered a password supplied by their instructor.<sup>8</sup>

The Turnitin system compared the students’ work against other student submissions and a database of journal articles and periodicals.<sup>9</sup> The system generated an “Originality Report” for the instructor suggesting whether a percentage of the work may not be original.<sup>10</sup> Participating schools also had the option of archiving the students’ work within the Turnitin system. If participating schools chose to do so, the students’ work was archived and became part of the database that Turnitin used to determine originality of other students’ work.<sup>11</sup> In order for students to register and submit their work to the Turnitin system, they had to create a profile and click “I Agree” to the Turnitin terms of service, which contained language absolving iParadigms of any liability related to the use of the system.<sup>12</sup>

At the time of litigation, the four plaintiffs were students of high schools that required submission of written work to Turnitin in order to receive credit.<sup>13</sup> The schools also elected to use the archiving option.<sup>14</sup> Three plaintiffs submitted their work to Turnitin with a disclaimer objecting to the archiving of their works, but the works were archived despite the disclaimer.<sup>15</sup> The

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5. *Id.*

6. *Id.*

7. *A.V.*, 563 F.3d at 634.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 634.

12. *Id.* at 635.

13. *A.V.*, 563 F.3d at 635.

14. *Id.*

15. *Id.*

fourth plaintiff, A.V., submitted his work to Turnitin using a password designated for students enrolled in the University of California, San Diego (UCSD) with a password provided by counsel.<sup>16</sup>

The district court granted summary judgment to iParadigms based on the fact that the students clicked on “I Agree” when enrolling in the Turnitin system, thereby agreeing to the terms of service and effectively shielding iParadigms from any liability.<sup>17</sup> Further, the district court found that the disclaimers attached to the students’ submission did not alter the agreement.<sup>18</sup> Additionally, the district court found that iParadigms’ actions qualified as “fair use” under 17 U.S.C § 107.<sup>19</sup> The district court based its finding on the determination that the comparative nature of iParadigms’ usage was transformative and did not impair the market value of the work.<sup>20</sup>

The district court dismissed both of iParadigms’ counterclaims based on the determination that there was no evidence to support actual economic damages arising from the alleged violations of the CFAA and VCCA.<sup>21</sup> Plaintiffs and defendants cross-appealed the district court’s holding to the Fourth Circuit.<sup>22</sup>

### III. LEGAL ANALYSIS

#### *A. Plaintiff’s Appeal – Copyright Infringement Claim*

The Fourth Circuit first considered the district court’s summary judgment order as to the plaintiffs’ copyright infringement claim.<sup>23</sup> The court outlined the statutory basis of copyright law and the doctrine of fair use through the four-factor test enumerated in section 107 of the Copyright Act.<sup>24</sup>

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16. *Id.*

17. *Id.*

18. *Id.* at 636.

19. *A.V.*, 563 F.3d at 636.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 17 U.S.C. § 107 (2006).

The court, explaining the basis of copyright law, pointed to the exclusive rights enumerated in section 106 of the Copyright Act including “the right to copy, the right to publish and the right to distribute an author’s works.”<sup>25</sup> Also, included in these rights is the ability to display, perform, and prepare derivative works.<sup>26</sup> Importantly, the court noted these rights become those of the author’s from the time of creation.<sup>27</sup> Further, “[a]nyone who violates any of the exclusive rights of the copyright owner, that is anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work . . . is an infringer of the copyright.”<sup>28</sup>

The court noted that there were several exceptions to these rights as enumerated in section 107 through section 122 of the Copyright Act.<sup>29</sup> Of these exceptions, the court focused its analysis on section 107, which codified the doctrine of fair use.<sup>30</sup> Fair use “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”<sup>31</sup> The preamble of section 107 states “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.”<sup>32</sup> Section 107 lists the following four nonexclusive factors for courts to consider when determining fair use:

- (1) the purpose and character of the use, including whether such use is of a 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

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25. *A.V.*, 563 F.3d at 636 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); 17 U.S.C. § 106).

26. *Id.* (citing 17 U.S.C. § 106).

27. *Id.* (citing *Harper & Row*, 471 U.S. at 547).

28. *Id.* (quoting *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 433 (1984)) (internal quotation marks omitted).

29. *Id.* at 637.

30. *Id.* at 637-45.

31. *A.V.*, 563 F.3d at 637 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

32. *Id.* (quoting 17 U.S.C § 107).

copyrighted work as a whole; and  
 (4) the effect of the use upon the potential market  
 for or value of the copyrighted work.<sup>33</sup>

The court emphasized that the question of whether a work would be considered fair use required a case-by-case analysis and that the statutory factors should not be “treated in isolation” but “weighed together, in light of the purposes of copyright.”<sup>34</sup>

### *1. First Factor – Purpose and Character of the Use*

The Court first applied the plaintiff’s claim to the first factor of the fair use test: “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>35</sup> The court noted that using copyrighted material for commercial purposes “tends to weigh against a finding of fair use.”<sup>36</sup> Further, “[t]he crux of the profit/nonprofit distinction [was] not whether the sole motive of the use [was] monetary gain, but whether the user [stood] to profit from exploitation of the copyrighted material without paying the customary price.”<sup>37</sup>

In considering the character of iParadigms’ use, the court stated that the goal of an analysis of the first factor should be to determine whether the use “merely supersed[ed] the objects of the original creation, or instead add[ed] something new, with a further purpose or different character.”<sup>38</sup>

Plaintiffs argued that the district court’s analysis was flawed for not recognizing the commercial nature of iParadigms’ usage of the copyrighted material.<sup>39</sup> The plaintiffs emphasized that iParadigms

33. *Id.* (quoting 17 U.S.C § 107).

34. *Id.* at 638 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

35. *Id.* (quoting 17 U.S.C § 107(1)).

36. *Id.* (quoting *Harper & Row*, 471 U.S. at 562).

37. *A.V.*, 563 F.3d at 638 (quoting *Harper & Row*, 471 U.S. at 562).

38. *Id.* (quoting *Campbell*, 510 U.S. at 578-79).

39. *Id.* The district court analyzed this factor with a focus on whether the use was transformative, and found that iParadigms used the students’ work for an entirely different purpose by preventing plagiarism and provided a “substantial public benefit,” thus becoming “highly transformative” and weighing in favor of fair use. *Id.*

generated millions of dollars in revenue while accumulating an ever-growing database of students' work.<sup>40</sup> To emphasize the importance of this point, the plaintiffs looked to the Supreme Court's language that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belong to the owner of the copyright."<sup>41</sup> For these reasons, the plaintiff's contended that iParadigms' usage could not constitute fair use as outlined by section 107.<sup>42</sup>

In response, the court noted that the district court did recognize that iParadigms' use was commercial and relied on the Supreme Court case, *Sony Corp. v. Universal Studios, Inc.*, which held that commercial use of copyrighted material does not in itself preclude a finding of fair use.<sup>43</sup> However, the court noted that *Sony* also found that, though commercial use generally does weigh against a finding of fair use, it must "be weighed along with [the] other factors in fair use decisions."<sup>44</sup> The court concluded that the district court correctly recognized the commercial nature of iParadigms' usage and appropriately weighed it against the other factors in accordance with Supreme Court precedent.<sup>45</sup>

Plaintiffs further argued that iParadigms' use could not be considered transformative because they merely archived the work without adding anything new.<sup>46</sup> The court dismissed this argument, stating that a work does not need to be altered to be considered transformative and can be considered transformative if the purpose or function is altered.<sup>47</sup> Therefore, the fact that the students' work was not altered did not preclude it from being deemed transformative.<sup>48</sup>

Finally, plaintiffs argued that even if iParadigms had a transformative purpose in archiving the students' work, it could not be considered transformative because iParadigms did not

40. *Id.*

41. *Id.* (quoting *Sony*, 464 U.S. at 451).

42. *Id.*

43. *A.V.*, 563 F.3d at 639 (citing *Sony*, 464 U.S. at 448).

44. *Id.* (quoting *Sony* 464 U.S. at 449 n.32).

45. *Id.*

46. *Id.*

47. *Id.* (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007)).

48. *Id.*

achieve its intended effect.<sup>49</sup> Because iParadigms' system could be circumvented by paraphrasing works in its database, it failed to achieve its intended purpose and could not be considered transformative.<sup>50</sup> The court dismissed this argument, stating that a fair use determination is not made solely on whether or not a copyright use "perfectly achieves its intended purpose."<sup>51</sup> According to the court, such a determination is outside the scope of its analysis.<sup>52</sup>

As such, the Fourth Circuit affirmed the district court's ruling that iParadigms' archiving of the students' work was transformative and "completely unrelated to the expressive content" of the work.<sup>53</sup>

## 2. *Second Factor – Nature of Copyrighted Work*

The court next considered the second factor, pointing to the Supreme Court's statement that "fair use is more likely to be found in factual works than in fictional works."<sup>54</sup>

Plaintiffs argued the district court misapplied this factor by failing to consider that the students' works were unpublished.<sup>55</sup> They argued that because an author has "the right to control the first public appearance of his undissemated expression," a fair use consideration should be narrower in scope.<sup>56</sup> Plaintiffs contended that because this fact was omitted from the district court's order, its analysis of the second factor was invalid.<sup>57</sup>

In response, the Fourth Circuit dismissed Plaintiffs argument by noting that the Supreme Court has instructed lower courts to resist weighing each factor in isolation.<sup>58</sup> Further, it noted that the Copyright Act specifically states that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding

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49. *A.V.*, 563 F.3d at 639.

50. *Id.* at 639-40.

51. *Id.* at 640.

52. *Id.*

53. *Id.*

54. *Id.* (quoting *Stewart v. Abend*, 495 U.S. 207, 237 (1990)).

55. *A.V.*, 563 F.3d at 640.

56. *Id.* (quoting *Harper* 471 U.S. at 555).

57. *Id.*

58. *Id.* (citing *Campbell* 510 U.S. at 578).

is made upon consideration of all above factors.”<sup>59</sup>

### 3. *Third Factor – Amount and Substantiality of the Portion Used*

In weighing the third factor, the court considered “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>60</sup> It noted that generally “as the amount of the copyrighted material that is used increases, the likelihood that the use will constitute a ‘fair use’ decreases.”<sup>61</sup> Given that, the court also noted that although “[c]opying an entire work weighs against finding a fair use . . . it does not preclude a finding of fair use,” and the amount of allowed copying is related to the purpose and character of the use.<sup>62</sup>

Plaintiffs contended that the district court, by referring to the transformative nature of the work, erred in its analysis of the third factor, effectively merging the analysis of the first and third factors.<sup>63</sup> The Court noted the overlap between the first and third factors in that both considered the intended purpose of the use; nevertheless, it found no error in the district court’s analysis.<sup>64</sup>

### 4. *Fourth Factor – Effect on Potential Market*

The Court finally considered the fourth factor to determine “the effect of the use upon the potential market for or the value of the copyrighted work.”<sup>65</sup> The Court emphasized that “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted material need not be prohibited in order to protect the author’s incentive to create.”<sup>66</sup>

The court began its analysis by noting the overlap of this factor and the first factor, specifically that transformative works do not

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59. *Id.* (quoting 17 U.S.C. § 107).

60. *Id.* at 642 (quoting 17 U.S.C. § 107(3)).

61. *A.V.*, 563 F.3d at 642 (quoting *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003)).

62. *Id.* (quoting *Sundeman v. The Seajay Soc’y, Inc.*, 142 F.3d 194, 205-06 (4th Cir. 1998)).

63. *Id.*

64. *Id.*

65. *Id.* (quoting 17 U.S.C. § 107(4)).

66. *Id.* at 642-43 (quoting *Sony* 464 U.S. at 450).

supplant the copyrighted work in the marketplace and are protected, even when the effect is harm to the market for original work.<sup>67</sup>

Plaintiffs argued that the district court did not consider the “potential market” for their works in determining that there was no adverse effect.<sup>68</sup> The court disagreed, noting that the district court considered the potential market for the students’ work too speculative and that plaintiffs themselves stated that they would not engage in the selling of their work to other students.<sup>69</sup> Additionally, the court reasoned that because the use was transformative and the Turnitin system merely suppressed demand for the market of student created work, no market substitute was created.<sup>70</sup> The court noted that such an economic harm is not the type protected by copyright law.<sup>71</sup>

The Fourth Circuit concluded that in light of the above analysis, iParadigms’ use of the student’s copyrighted work constituted “fair use” and the district court properly issued summary judgment on the copyright infringement claim.<sup>72</sup>

### *B. Defendant’s Counterclaims*

The court next considered the appeal of the counterclaim by iParadigms against plaintiff A.V. under the Computer Fraud and Abuse Act (“CFAA”).<sup>73</sup>

iParadigms alleged that A.V., by accessing Turnitin through a

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67. *A.V.*, 563 F.3d at 643. See Sundeman, 142 F.3d at 207; Davis v. The Gap, Inc., 246 F.3d 152, 176 (2d Cir. 2001).

68. *Id.* The district court based its determination that there was no adverse market effect on (1) the plaintiffs’ own testimony that the marketability of their works had not been harmed; (2) the lack of the plaintiffs’ intention to sell their works to other students; and (3) the fact that the archiving of the plaintiffs’ work would not cause any harm to them in the college admissions process. *Id.* at 643-44.

69. *Id.* at 643-44.

70. *Id.* at 644.

71. *Id.*

72. *Id.* at 645.

73. *A.V.*, 563 F.3d at 645. The CFAA, primarily a criminal statute, allows for a private party who “suffers damage or loss by reason of violation of this section . . . to obtain compensatory damages and injunctive relief or other equitable relief.” 18 U.S.C. § 1030 (2006).

password intended for UCSD students, violated section 1030(a)(5)(A)(iii) prohibiting any person from “intentionally access[ing] a protected computer without authorization, and as a result of such conduct, caus[ing] damage.”<sup>74</sup> iParadigms submitted evidence to support its claim that once it determined that a user was able to access Turnitin as a student of a university that he did not attend, it expended numerous man hours to determine the source of the glitch.<sup>75</sup>

iParadigms argued and the court agreed that the ordinary meaning of “economic damages” should be used in the application of section 1030(g) and that the district court considered the provision too narrowly.<sup>76</sup> The court determined that the broad language of section 1030 (e)(11) included the costs incurred by iParadigms in response to a suspected violation of the CFAA.<sup>77</sup> In light of this finding, the court remanded the counterclaim without expressing an opinion as to whether the costs incurred by iParadigms were reasonable, adequately proven, or indirectly linked to the alleged CFAA violation.<sup>78</sup>

In its second counterclaim, iParadigms asserted that A.V. violated the Virginia Computer Crimes Act (“VCCA”).<sup>79</sup> The VCCA states that “[a]ny person who uses a computer or computer network, without authority and . . . [o]btains property or services by false pretenses . . . is guilty of the crime of computer fraud.”<sup>80</sup> The VCCA entitles anyone who is injured by a violation of the statute to “sue . . . and recover for any damages sustained and the

74. *Id.* (quoting 18 U.S.C. § 1030(a)(5)(A)(iii)).

75. *Id.*

76. *Id.* at 646. The district court found that as a matter of law, the iParadigms counterclaim was insufficient because § 1030(g) limits violations of the CFAA to economic damages. Here, iParadigms’ labor expenses to find the unauthorized access were merely consequential damages. The district court implied in its analysis that the scope of “economic damages” under § 1030(g) does not cover consequential damages. *A.V.*, 563 F.3d at 646.

77. *Id.* Under the CFAA, “loss” is defined as “any reasonable cost to the victim, including the cost of responding to an offense . . . .” 18 U.S.C. § 1030(e)(11).

78. *A.V.*, 563 F.3d at 646.

79. *A.V.*, 563 F.3d at 645.

80. VA. CODE ANN. § 18.2-152.3 (2009).

costs of the suit.”<sup>81</sup>

iParadigms contended that the district court incorrectly interpreted the VCCA to exclude consequential damages from the phrase “any damages” contained in the statute.<sup>82</sup> The court, finding that nothing in the Virginia statute excluded consequential damages, agreed with iParadigms and remanded the claim for further consideration without expressing any opinion as to whether actual damages were caused by the alleged violation.<sup>83</sup>

#### IV. CONCLUSION

The Fourth Circuit affirmed the district court’s summary judgment in favor of iParadigms as to the plaintiffs’ copyright infringement claim.<sup>84</sup> The court upheld the district court’s finding that iParadigms’ archiving of students’ work for the purposes of plagiarism detection was fair use, reasoning that it was transformative, and although used commercial purposes, did not harm the market value of the works.<sup>85</sup> As to iParadigms’ counterclaims, the court reversed the district court’s grant of summary judgment to the plaintiffs.<sup>86</sup> The court determined that the district court did not properly consider damages to iParadigms under the CFAA and VCCA and remanded for further consideration.<sup>87</sup>

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81. VA. CODE ANN. § 18.2-152.6 (2009).

82. *A.V.*, 563 F.3d at 647. The district court granted summary judgment to A.V. on the counterclaim, based on the reasoning that iParadigms did not sufficiently present evidence of actual damages. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 638-45.

86. *Id.* at 646-47.

87. *Id.* at 647.

