

Australian Legal Document

Turnitin has engaged the services of the renowned Australian law firm Blake Dawson Waldron to insure that our use of student work complies with Australian copyright and privacy laws. This is the legal opinion that was provided to Turnitin on April 20, 2004.

Summary of conclusions

1. Based on our understanding of the background to this matter, and for the reasons discussed below, we consider that it is highly unlikely (although not completely inconceivable) that a Court would consider that the use of the Turnitin system by a subscriber to the service in Australia would infringe a student's copyright in their research papers.
2. The likelihood of a copyright owner taking action in respect of an infringement is similarly remote (although not completely inconceivable), especially if an express license were granted by each student, by each student being required to sign an assignment cover sheet which granted such license.

Background – Plagiarism Service

3. Using the Turnitin products and services, a subscriber can implement the following process:
 - a) a student essay (which may be received electronically but which otherwise will be scanned into digital format) is transmitted to a database maintained by Turnitin on a server located in Oakland, California;
 - b) the database comprise academic materials sourced from the internet worldwide and electronic books and journals, together with previous student material submitted by subscribers for assessment;
 - c) a subscriber will generally submit a class batch of papers for assessment;
 - d) by comparing each paper in the subscriber's batch against the material stored in its database, Turnitin can generate a report which, through a color coding system, identifies the level of replication in each student's work compared with pre-existing

work contained within the database; and

- e) if the subscriber, prompted by the relevant color code, is alerted to the possibility of significant plagiarism by a student, it can generate the full text of the student's paper in which the replicated wording will be highlighted.

Copyright Implications

Relevant copyright principles

4. A student will be the owner of copyright in his or her original research paper: section 35(2) Copyright Act 1968(Cth) (the Act). For the purposes of the Act, a student research paper will be a "literary work".
5. Copyright gives the owner certain exclusive rights. In particular, section 31(1)(a) of the Act gives the copyright owner the exclusive right (among the other things) to:
 - i) reproduce the work in a material form;
 - iv) communicate the work to the public;
6. Reproduction in a material form can occur in different ways. A straightforward reproduction in a material form would be to photocopy a printed literary work. However, under section 21(1A) of the Act reproduction in a material form can also take place by:
 - Converting a work into or from a digital or other electronic machine-readable form. This includes the first digitisation of a work.
 - Storing a work in digital form on floppy disk or in a computer. This is because the definition in the Act of "material form" includes any visible or non-visible form of storage from which the work or a substantial part of the work can be reproduced.
7. Communication of a work to the public occurs if a work is made available online or electronically transmitted (whether over a path, or a combination of paths, provided by a material substance or otherwise).
8. Section 36 of the Act provides that copyright is infringed by a person who, not being the owner and without the license of the owner, does in Australia or authorizes the doing in Australia of any act which would

fall within the exclusive rights conferred by copyright.

9. Section 10(1) of the Act requires exclusive licenses of the copyright to be in writing, but non-exclusive licenses may be given orally or may be implied by conduct. It is a question of fact in each instance as to the extent to which a student may have granted an implied license for reproduction or communication of his or her work when submitting it for assessment.
10. An express license to a university to reproduce a student assignment and communicate it to the Turnitin server would be granted by a student who signs a cover sheet for an assignment which contains the following acknowledgement (for example):

I declare that this assignment is original and has not been submitted for assessment elsewhere, and acknowledge that the assessor of this assignment may, for the purpose of assessing this assignment:

- Reproduce this assignment and provide a copy to another member of faculty; and/or
- Communicate a copy of this assignment to a plagiarism checking service (which may then retain a copy of the assignment on its database for the purpose of future plagiarism checking).

11. Where an assignment is submitted electronically (for example, via WebCT or Blackboard), the words set out in the above cover sheet should be required to be added to the assignment by the student before electronic submission.
12. However, assuming that all assignments submitted to Turnitin do not contain a cover sheet to the effect of that suggested in paragraph 10, the issues under the Act are:
 - a) What is the extent of any implied license?
 - b) Does the transmission of the work to the Turnitin server in Oakland involve an unauthorized “communication to the public” by the subscriber?
 - c) Do the activities of Turnitin constitute an infringement of a student’s copyright?

What is the extent of any implied license?

13. A threshold issue to address is the extent to which a student has by implication (if not expressly in writing, for example, by university rules or by-laws which bind the student) consented to the reproduction or communication of his or her work when submitting it for assessment.
14. By submitting a work in digital form for assessment, and in the absence of any express arrangement to the contrary, a student is likely to be impliedly consenting to any activity normally incidental to the process of assessment. This could include creating a hardcopy and, perhaps, communication (whether by the provision of a second hardcopy or by electronic transmission) of the work to another lecturer for a second opinion.
15. Similarly, it seems reasonable for a student to expect that a work submitted in hardcopy might be digitized to ensure a consistency of process in the evaluation of all papers.
16. It is somewhat speculative as to whether a typical student would expect the papers to be subjected to a service of the nature provided by Turnitin. Nevertheless, a Court would probably accept that a student would expect assessors to take reasonable measure to satisfy themselves as to the originality of the work. Logically, this should extend to the utilization of modern techniques for this purpose. It may be worthwhile checking some examples of plagiarism “warnings” given to students (such as those in the universities’ rules or by-laws or those commonly found in faculty guides distributed to students) to assess the extent to which students are informed of the measures that might be taken to detect plagiarism.
17. On balance we consider a court would hold that an implied license exists for assessors to utilize a plagiarism service such as the one conducted by Turnitin.
18. Turnitin’s use of past student papers as a source of material against which it makes subsequent plagiarism checks confers a commercial advantage on Turnitin without any compensation being made by Turnitin to the owners of copyright in those works. While a license to a subscriber university may be readily implied in relation to any use of the copyright work made during the process of the plagiarism check, the relationship between the student and Turnitin is more remote. For example, it is difficult to identify any consideration passing from Turnitin to the student for the subsequent use of the student’s work by Turnitin in providing its plagiarism detection service. Turnitin is purely deriving a commercial benefit by using the student’s work.

19. Any doubt could, of course, be removed by informing the students in advance that their submitted work might be subjected to the plagiarism detection process and that copies of their works would be retained by Turnitin and used as source material for conducting future plagiarism checks (as suggested in paragraph 10 above). In such circumstances, a student would, by submitting his or her assessable work, be deemed to be consenting to the process and the retention of a copy to Turnitin (although it would be wise to leave students in this situation with an ability to withhold their consent, leaving open the question of how the subscriber should deal with the consequences of an individual student refusing to allow his or her paper to be submitted to the service).
20. If, however, there is no express or implied consent by the student to a plagiarism detection check and subsequent retention of a copy of their work by Turnitin, then it is necessary to consider whether the subscribers' use of the Turnitin service would infringe a student's copyright in his or her work submitted for assessment.

Does the transmission of the work to the Turnitin server in Oakland involve an unauthorized “communication to the public” by the subscriber?

21. The transmission of the paper to the Turnitin server certainly falls within the term “communicate” as defined by the section 10(1) of the Act (see paragraph 7 above). It is unlikely, however, that the communication would be regarded as having been made “to the public” if the papers are simply sent to the Turnitin server for the purpose of being subjected to the process of plagiarism checking. While the Courts have interpreted the term “to the public” so that it does not necessarily mean the “public at large”, the term nevertheless contemplates a form of public expression, albeit to a restricted audience. A discrete communication by the subscriber to the Turnitin server is unlikely to fall within this definition.

Do the activities of Turnitin constitute an infringement of a student's copyright?

22. Although the processing of the student paper for the purpose of undertaking the plagiarism checking process may constitute a reproduction if it is stored on the Turnitin server while it is subjected to the checking process, given that reproduction does not take place in Australia, Turnitin will not be liable for the infringement in Australia as there is no direct infringement in Australia.

23. We have not considered whether Turnitin infringes, under US law, copyright subsisting in the student papers in processes. We note that this is the subject of a legal analysis dated 28 October 2002 provided by Turnitin and Turnitin is satisfied that its plagiarism detection service does not give to infringement of copyright under US law.
24. We understand that Turnitin stores previous student papers submitted for assessment and that when a plagiarism check is made by a subscriber, the Turnitin software will identify any previous paper that has been plagiarized on an anonymous basis as (for example) “submitted to Smith College on 2003-02-17”. We understand that Turnitin does not display the text of the previous paper and an assessor wishing to see that paper must contact the copyright owner (ie, the student) through the institution in possession of the matching paper. Accordingly, Turnitin will not infringe copyright in previous student papers submitted for assessment as Turnitin will not be communicating those papers to the public.
25. We understand that the Turnitin User Manual states that “[t]his system is in place to protect the work of the students using Turnitin – we never disclose the text of papers in our database”.
26. For further assurance, a university could require Turnitin to delete assignments from its database after the current originality check (although this would remove the advantage of checking successive years’ submissions). This would avoid inadvertent communication of assignments by Turnitin.

SUPPLEMENTARY ADVICE

Introduction

1. You have also asked us to advise you on some further issues related to the potential liability of subscribers to the Turnitin.com (**Turnitin**) plagiarism detection database under the *Copyright Act 1968* (Cth) (**the Act**). Specifically, you have asked us to address:
 - a) Lachlan Williams’s [*Lachlan Williams is the president of the University of Melbourne Postgraduate Association. – ed.*] comment in the *Australian HE Supplement* (31 March 2004) (**the Lachlan Williams letter**) that “the definition of an adaptation under the *Copyright Act 1968* (Cth) points to a clear intellectual property infringement”; and

- b) subscriber concerns about the commercial value Turnitin obtains from retaining a digital fingerprint of a student's work on the database for the purpose of future plagiarism detection activities.

Summary of Conclusions

- 2. Based on our understanding of the background of this matter, and for the reasons discussed below, it is highly unlikely that the ordinary activities undertaken by subscribers or Turnitin could constitute an "adaptation" for the purposes of the Act.
- 3. It is also highly unlikely that subscribers to Turnitin could be exposed to any liability arising from the fact that Turnitin derives a commercial benefit from student work by retaining essays on their database subsequent to the plagiarism detection process.

Copyright and "Adaptations"

- 4. The Lachlan Williams letter claims that the definition of "adaptation" under the Act points to a clear intellectual property infringement on behalf of either or both of subscribers and Turnitin when processing student research papers through the Turnitin plagiarism detection database.
- 5. A student is the owner of the copyright in his or her original research paper and therefore has the exclusive rights comprised in the copyright. In addition to the rights discussed in our original advice, a further right enjoyed by a student under section 31(1)(a)(vi) of the Act is the exclusive right to "make an adaptation" of a research paper. Any subscriber who was to make an "adaptation" of a student's work in the course of submitting an essay for plagiarism assessment would therefore infringe the student's copyright.
- 6. Section 10(1) of the Act provides an exclusive definition of those acts which constitute making and "adaptation" in relation to a literary work. Specifically, the following activities are capable of constituting an "adaptation" of a literary work:
 - a) re-creating a non-dramatic literary work in a dramatic form (**dramatization**); or
 - b) re-creating a dramatic literary work in a non-dramatic form (**transformation**); or

- ba) in relationship to a literary work *being a computer program* – creating a version of it which is not a reproduction of the work (**computer version**); or
- c) translating the literary work (**translating**), or creating a version of it in which the story or action is conveyed by pictures (**picturisation**).

We noted in our original advice that a subscriber might undertake a number of arguably infringing activities when preparing an essay for submission to the plagiarism detection database including:

- downloading a version of the essay from an e-mail or disk provided by a student;
 - digitizing the essay so that it can be uploaded onto the Turnitin database;
 - storing the essay in digital form on a university computer;
 - uploading the document to Turnitin for assessment; or
 - downloading a student’s paper in highlighted form when returned from Turnitin.
7. Notwithstanding Lachlan Williams’s assertions to the contrary, we consider that none of these activities can be characterized as “adaptations” within the meaning of the Act. The subscriber is clearly not creating a dramatization, transformation, linguistic translation or picturisation of the student’s work for the purpose of legislative definitions (a), (b) and (c) above. Further, in relation to legislative definition (ba) above, even if an electronically submitted essay were to be regarded as a “computer program” (see [9] below), the activities of a subscriber in downloading the essay for storage or uploading it to Turnitin would in any case represent a *reproduction* of the work rather than an adaptation, and most likely be covered by an express or implied license as discussed in our original advice. Accordingly, it is difficult to see how a subscriber could be said to create an “adaptation” of the student’s literary work in the course of submitting a student’s work for Turnitin plagiarism assessment.
8. It is unnecessary to consider whether the actions of Turnitin in the United States might constitute the creation of an “adaptation” of the student’s work. This is because any activities undertaken by Turnitin which might constitute an “adaptation” would take place in Oakland,

California, and infringement under the Act only extends to acts which take place *within Australia*. Accordingly, subscribers would not be liable under Australian law for authorizing the creation of an “adaptation” by Turnitin as any such adaptation takes place in the United States.

9. In any case, we note that even if the detection database was operating within Australia, it would be highly unlikely that any of Turnitin’s activities would constitute an “adaptation” within the meaning of the Act as set out above. Turnitin does not create dramatizations, fictionalizations, transformations or translations of student essays in the course of its plagiarism detection or essay retention activities. Further, an electronically submitted essay is unlikely to be constructed as a “computer program” within the meaning of the Act for the purposes of definition (ba) above. Computer programs are defined under the Act as a “set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result”. The original work of the student protected under the Act (ie, written research paper itself) could not be construed in this manner.

Implications of commercial benefit obtained by Turnitin

Background

10. It is our understanding that the Turnitin system evaluates the originality of a student essay by applying mathematical algorithms to produce a digital “code” or fingerprint of the written material in an electronically submitted research paper. Turnitin then retains this digital fingerprint for the purposes of future plagiarism detection activities.
11. The issue of Turnitin retaining student research papers in this manner has been subject to recent media debate (see, eg, Jim Buckell, “Plagiarism Risk Irks Students” *The Australian HE Supplement*, 17 March 2004). The main concern of student interest groups is that Turnitin’s retention and use of past student papers confers a commercial advantage on Turnitin (in the sense that the database is made more attractive to subscribers) without any consideration (ie, royalties) passing to the student copyright owners.

Legal Position

12. While a license to a subscriber university may be readily implied in relation to any use of the copyright work during the process of the plagiarism check, we reiterate our reservations as to whether any

implied license would extend to permit Turnitin to retain research paper for this purpose.

13. As we originally advised, any doubt in relation to this issue can easily be resolved by having students sign an express license before submitting work acknowledging that their work might be subjected to the plagiarism detection process and that it may be retained by the Turnitin database for the purposes of future plagiarism checks. Paragraph [10] of our original advice provides an example of how such a license could be contained in an assignment cover sheet.
14. However, even in the absence of an express or implied license to deal with student papers in this manner, we remain of the opinion that subscribers are highly unlikely to be exposed to any liability under the Act as a result of Turnitin obtaining this commercial advantage. Because the Turnitin software only identifies previous papers that have been plagiarized on an anonymous basis and an assessor wanting to see the research paper must contact the copyright owner student before he or she is able to gain access to the original paper, subscribers are most unlikely to be held liable for authorizing Turnitin to communicate copyright works to the public. As we noted in our original advice, any risk of inadvertent communication of assignments on behalf of Turnitin could also be reduced by requiring Turnitin to delete assignments from its database after the current originality check.
15. Furthermore, incidental reproductions of research papers by Turnitin in the course of including essays on the database (ie, the making of a digital copy) do not expose subscribers to any further liability under the Act because those activities take place outside Australia.
16. For these reasons, we consider that although Turnitin obtains a commercial benefit from retaining research papers for future plagiarism detection activities, the obtaining of this benefit is not an infringement of the student's copyright under the Act. Accordingly, in the absence of any breach of the Act, neither subscribers nor Turnitin are exposed to any legal obligation to pay royalties to students.

Blake Dawson Waldron
20 April 2004