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## New Paradigms for Instruction: Impact on Collective Bargaining, Intellectual Property Rights

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- Panelist, “New Technology: New Paradigms for Instruction. Impact on Collective Bargaining, Intellectual Property Rights,” 35<sup>th</sup> Annual National Conference on Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 8, 2008.

**Introductory Remarks**

“The concept of intellectual property is almost dead thanks to the Internet” (Khanna, 2004). That grim statement can not be ignored. The Internet has changed our world enormously, opening new doors of communication and access to knowledge. Such privilege does not come without responsibility, as the degree to which it can be taken advantage of is enormous. The idea of intellectual property is to treat knowledge like private property, using copyrights, trademarks and patents to enforce the notion.

Some see turning intellectual property into private property as an “enclosure of the commons” hindering the advancement of science and democracy (Monaghan, 2005). On the other hand, one of the first statements of fair use dates back to the Talmud. It is written that a person “who reports something in the name of the one who said it brings redemption into the world” (McLemee, 2004). As interpreted by Rabbi Joseph Telushkin, the statement means that when a person fails to accredit a piece of information, he/she uses it for personal gain. When properly accredited, the information expands everyone’s knowledge (McLemee, 2004).

This is one of the main arguments behind the ethical issue of plagiarism. Unlike copyright infringement, plagiarism includes more than directly copying a passage—it involves appropriating another person’s idea as one’s own. Copyright law enforces economic interest, the violation of which can result in judicial punishment; plagiarism enforces personal and ethical interest and will rarely go beyond the dean’s office. While one may not go to court for plagiarism, it can be punished severely at the higher education level. (McLemee, 2004)

In the past, one associated bootlegged films with poor sound quality, off-center images and the occasional silhouette of a fellow moviegoer coming in late. Today, movies still in theaters can be found and downloaded online. The quality is high and the cost low. It is all a part of the

relatively new wave of digital piracy making entertainment industry CEOs sweat. The potential loss of profit has demanded the involvement of the government, which has gone to great lengths to crack down on illegal downloading. (Recording Industry Association of America, 2006)

The first online file-sharing program to receive significant attention from the Recording Industry Association of America (RIAA) was Napster, in 1999 ("Filesharing", 2005). Created by college dropout Shawn Fanning, it was a peer-to-peer program. Peer-to-peer file sharing services are especially fast and efficient for downloading audio and video files because they depend on the computing power of users, not the server. Multiple files can be downloaded from multiple locations without the large amount of traffic slowing the server down. ("Peer-to-peer", 2007)

The legal battle that ensued between Napster and the RIAA resulted in Napster 2.0 and the current Napster To Go. Napster To Go offers over 3 million downloadable songs for a monthly rate. ("Filesharing", 2005) The compromise was a victory for the RIAA. Grokster, a similar peer-to-peer program, was shut down after a Supreme Court decision in June 2005. The case was reminiscent of Sony Corporation of America v. Universal City Studios, Inc. in which the Supreme Court's decision ensured that VCRs, CD burners, iPods and all other technology capable of copyright infringement may be produced and sold by their respective companies without facing lawsuits. With the Grokster decision came not a negation of the former verdict but a new set of guidelines based on the idea of 'inducement':

"[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." (***MGM v. Grokster***, 125 S. Ct. 2764 (U.S. Supreme Court, June 2005))

The recent Internet file-sharing cases have created a lot of grey areas. For higher education institutions, this is an important issue because universities have been heavily targeted by the RIAA and the MPAA (Motion Picture Association of America). These organizations have found that a large percentage of illegal downloading takes place on college campuses. Schools with high-bandwidth networks can be especially popular targets; lawsuits have been filed against

hundreds of students for copyright infringement, and the pressure on colleges to police their own campuses is great. (Brock and Young, 2006; Morris, 2006)

It is not hard to imagine that many university IT administrators are becoming frustrated and overwhelmed by the RIAA/MPAA's demands. The task of monitoring an entire campus network is no small one, and not necessarily associated with the normal responsibilities of university administration. There have even been complaints against the RIAA/MPAA and the overly extreme measures they've gone to, such as the prosecution of what in the past would have been deemed fair use. (Read, 2006) Nonetheless, with the government behind them, these ultimatums must be honored to a reasonable degree, no matter how unclear the notion of 'reasonable' may be.

### **Intellectual Property, Distance Education and Collective Bargaining:**

#### **Rider University and the AAUP**

The Rider University-AAUP 2007-2011 Collective Bargaining Agreement contains the following provisions on intellectual property and distance education:

#### **ARTICLE XXXII**

##### **INTELLECTUAL PROPERTY AND DISTANCE LEARNING**

###### **A. Scope**

This Article sets forth the rights and obligations of the parties hereto as to intellectual property rights of the University and of the members of the bargaining unit, such rights to include, but not to be limited to, rights in intellectual property that can be trademarked, copyrighted, or patented. This Article also sets forth the terms and conditions which shall pertain to courses delivered by the University in those modes which collectively have come to be called "distance learning."

###### **B. Definitions**

###### **1. Copyright/Copyrightable**

Original works of authorship, including computer programs, fixed in any tangible medium of expression, now known or later developed, from which such works can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include but are not limited to the following categories:

- a. musical works, including any accompanying words;
- b. dramatic works, including any accompanying music;
- c. pantomimes and choreographic works;
- d. pictorial, graphic, and sculptural works;
- e. motion picture and other audiovisual works;

- f. sound recordings;
- g. architectural works; and
- h. literary works

## 2. Intellectual Property

Any trademarkable, copyrightable, or patentable matter or any intellectually created tangible thing or matter, including, but not limited to:

- a. books, texts, articles, monographs, glossaries, bibliographies, study guides, laboratory manuals, syllabi, tests and work papers;
- b. lectures, musical and/or dramatic compositions, unpublished scripts, films, filmstrips, charts, transparencies, other visual aids;
- c. video and audio tapes and cassettes;
- d. computer programs; live video and audio broadcasts;
- e. programmed instruction materials;
- f. drawings, paintings, sculptures, photographs, and other works of art.

## 3. Patent/Patentable

- a. Utility inventions or discoveries which constitute any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, as such is further defined in 35 USC sections 100, 101.
- b. Ornamental designs, being new, original, and ornamental designs for an article made, as such is further defined in 35 USC section 171, et seq;
- c. Plant patents, being for the asexual reproduction of a distinct and new variety of plant, including cultivated spores, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or plant found in an uncultivated state as such is further defined in 35 USC 161, et seq.

## 4. Trademark/Trademarkable

Any work, name, symbol, or device or combination thereof adopted and used by a bargaining unit member to identify his/her goods and distinguish them from those made, manufactured, or sold by others.

## C. Allocation of Ownership

The parties are committed to providing an environment that supports the teaching and scholarly activities of the members of the bargaining unit. As a matter of principle, the University encourages the members of the bargaining unit, and all members of the University community, to publish without restriction their papers, books, and other forms of communication in order to share openly and fully their findings and knowledge with colleagues and the public. This allocation of ownership provision is intended to promote and encourage excellence and innovation in teaching and scholarship by identifying and protecting the rights of the University and the bargaining unit members.

Ownership of intellectual property created by members of the bargaining unit shall vest in the creator except under any of the following circumstances:

### 1. Subordination to Other Agreements

Intellectual property that is developed in the course of or pursuant to a third-party agreement to which the University is a party shall be determined in accordance with the terms of that third-party agreement. In the absence of terms specifically assigning ownership, the intellectual property shall become the sole property of the University only if such ownership is conferred upon the University by operation of another provision of this Article, or shall become the joint property of the University only if the terms of such agreement directly or indirectly create significant University monetary obligations as to the intellectual property developed thereunder, in which event the specific division of ownership will be worked out on a case-by-

case basis.

## 2. Negotiated Agreements

The intellectual property shall belong to the University, or to the bargaining unit member and the University jointly, when such intellectual property is created by a bargaining unit member under an express agreement negotiated between the bargaining unit member and the University, which agreement specifies the intellectual property to be created thereunder, allocates ownership interests, and specifies the nature and amount of remuneration to be received by the bargaining unit member in return for the work negotiated.

## 3. Substantial Use of University Resources

Where the substantial use of University resources occurs, the University and the bargaining unit member shall be joint owners of the intellectual property, and the creator and the University shall negotiate the allocation of specific ownership interests, amounts of remuneration, respective obligations, etc. "Substantial use" includes projects undertaken by the bargaining unit member with the benefit of substantial or unusual funds, facilities, or opportunities which the bargaining unit member would not ordinarily be entitled to have for any chosen project. Examples of such support include special funding and release time from other duties. "Substantial use" ordinarily does not include the use of office space, a desktop computer, supplies, customary secretarial and student assistance, access to libraries and other information sources, or other such support. (See Appendix B.)

Ownership of the names "Rider University" and "Rider Broncos/Broncs" and their related logos are the registered trademarks and servicemarks of Rider University. While a member of the bargaining unit may normally identify him- or herself as affiliated with Rider University when engaged in personal consulting, the use of the University's name, trademarks, and servicemarks may not be used in personal publicity, press releases, advertising, or product promotion without the prior written approval of the Provost.

## 4. Obtaining Copyrights, Patents, and Trademarks

Unless otherwise expressly agreed, the University assumes no obligation for assisting or assuring the acquisition of copyrights, patents, and trademarks for intellectual property created by bargaining unit members.

## D. Distance Learning Courses

The term "Distance Learning Course," as used in this Agreement, refers to any course in which communication at a distance between teacher and student(s) substitutes in part or in whole for the normal face-to-face classroom contact mandated by the regular classroom schedule as approved by the appropriate APC. Such communication at a distance may be accomplished by any one or more media, including but not limited to television, radio, Internet, compact disc, video or audio tapes, film, or print.

### 1. Review and Approval of Distance Learning Courses

All aspects of distance learning courses (or modifications thereof) shall comport with all of the standard practices, procedures, and criteria which have been established for traditional in-the-classroom courses. This includes but is not limited to departmental review and recommendation of such courses to the appropriate APC which will have oversight of all such courses in order to ensure conformity with previously established traditions of course quality and relevance. The above review shall occur even when the proposed distance learning course is a section of an already existing and approved course.

After an initial favorable review by the department and before the department submits the proposed course to the appropriate APC, proposed courses which involve distance learning will be reviewed by the Distance Learning Advisory Committee (DLAC). Departments must receive a written recommendation from the DLAC before the course is presented to the appropriate APC. The department shall consider the recommendations of the DLAC and make modifications to the course proposal based on those recommendations, as it sees fit. The department shall include a copy of the DLAC's written recommendation with its proposal to the appropriate APC.

The DLAC shall comprise three full-time bargaining unit members, one department chairs' representative, and the Provost or his/her designee, and the Associate VP for Information Technology and the Dean of University Libraries or their designees. The bargaining unit members serving on the DLAC shall, preferably, have prior experience teaching distance learning courses and shall be elected to two-year terms (utilizing the process already in place for APC elections).

The purpose of this committee shall be to: i) disseminate best practices in online teaching, ii) ensure that best practices in online teaching are present in all online course proposals, and iii) ensure that all online course proposals can be supported by information technologies and library resources.

## 2. No Workload Requirement

No faculty member shall be required to develop or teach a distance learning course.

## 3. Faculty Responsibilities

Faculty will have the same responsibility for the selection and presentation of materials and points of view in a distance learning course as they have in a traditional in-the-classroom course,

## 4. Enrollment Maximums

Enrollment maximums for distance learning courses shall be no greater than for the same or similar level in-the-classroom courses offered by that department or program. Specific enrollment limits shall be set by the department offering the course. Departments are encouraged to seek the advice of the DLAC when setting enrollment maximums.

## 5. Workload Credit

A distance learning course will be credited as a separate preparation such that a faculty member teaching two sections of a course, one using a traditional classroom modality and the other being taught as a distance learning course, shall be credited with two separate preparations.

## 6. Recording of Distance Learning Courses

Any recording of a distance learning course will occur only with the permission of the instructor and will remain the property of the instructor. Neither the instructor nor the University shall sell the recording to a third party for use outside the University's academic curriculum.

### **Turnitin.com: the Case of A.V. v. iParadigms**

I have a new hero: Attorney Robert A. Vanderhye of McLean, Virginia. He's not my idol because he's taking on corporate higher education on a *pro bono* (for free) basis. He's my new role model because at 61 he's made enough money to leave his law firm and devote his time to causes about which he really cares. This may be every practicing attorney's dream; I know it's mine.

When I reached Vanderhye by phone on a Saturday morning in March, he explained, "I got tired of doing things other people wanted me to do. I wanted to do what I want to do." So far,

that includes inventing a vertical-axis wind turbine and “a mechanism for removing greenhouse gases from the atmosphere.” (Did I mention that this patent attorney holds a B.S. in mechanical engineering?)

During the past year or so, another thing Vanderhye has wanted to do is represent a group of high school students in a copyright infringement case aimed at iParadigms, LLC, the California company that markets the “plagiarism detection instrument” (PDI) called Turnitin.com. The corporation’s web site claims, “In the academic market, iParadigms represents more than 10,000,000 user-students (in over 100 countries) and adds another new user once every ten seconds.” Current clients claimed by the company include Georgetown, Miami Dade Community College, West Point, Dartmouth, Lehigh, Rutgers, UCLA and the Cal State System.

Unfortunately, not all of those ten million student-users desire to participate in iParadigms’ program. Turnitin works this way: a college professor or K-12 teacher sets up an account. Students in her class then are required to turn in their term papers and essays electronically via Turnitin, which in turn compares each student’s submission to countless documents available out on the Internet, as well as to the millions more student works which iParadigms archives. The instructor is provided the paper with possible plagiarism highlighted in bright red. It’s a slick system by which many English composition teachers swear.

Ah, but here’s the rub: By archiving all those student papers, says Attorney Vanderhye, iParadigms violates federal copyright law. Continues this courthouse crusader, “I litigated intellectual property cases for 35 years. I live near McLean High School. Several students asked me whether the high school had the right to require them to participate in Turnitin. The problem presented some interesting twists. I analyzed it and concluded the students were in the right.”

In a December 21, 2006, letter to the school’s parent-teacher association executive board, Principal Paul Wardinski explained that the Fairfax County Public Schools signed a contract with iParadigms in 2003. He continued, “A few students and parents... are concerned about MHS’s participation in the contract. The students... formed a group called the McLean Committee on Student Rights and retained an attorney, Robert Vanderhye (who) sent several letters threatening to bring a lawsuit... if it did not withdraw the students’ papers from the Turnitin database.”



Wardinski's letter adds that the committee and the corporation engaged in settlement discussions. According to iParadigms' CEO John Barrie. "We put our new technology on hold and came back to them with a number of proposed technical adjustments. The plaintiffs then turned back to their original position of insisting that the student papers be removed." On April 9, 2007, Vanderhye filed an action on behalf of two McLean High School students and two others attending Tempe Union High School in Arizona. (Vanderhye declined to explain how the two Arizona plaintiffs came into the case, claiming attorney work-product privilege.) Muses Barrie, "We tried everything. God would have to have appeared on earth to get them to settle."

The gist of Vanderhye's complaint is contained in paragraph 9 of his amended complaint: "In addition to archiving student unpublished manuscripts without their permission, iParadigms may send a full and complete copy of a student's unpublished manuscript to an iParadigm client anywhere in the world at the request of the client, and without the student's permission." To give his clients' claims some legal teeth, Vanderhye had them register copyrights on their compositions before turning them in. This simple \$30 act raised the ante, as it enabled the students to demand statutory damages to the tune of \$900,000 and their ostensibly *pro bono* attorney to request a handsome fee, should he ultimately prevail.

iParadigms for its part threw up a plethora of counterclaims and affirmative defenses, contending, "This action arises from a deliberate abuse and orchestrated manipulation of Turnitin to manufacture this lawsuit...." Among other allegations, the defendant claimed that Vanderhye not only assisted his plaintiffs with filing for copyright protection, but also copyrighted and submitted a number of papers under the bogus names "Quigley Vanderhye," "Rube Goldberg" and "Perpetual Motion."

More on point, iParadigms contended that by clicking the "I Agree" button on the Turnitin web site, the students waived any right to sue the company later. Or, more interestingly, the plaintiffs agreed by pressing the button to "indemnify and defend iParadigms from any claim," presumably including their own lawsuit.

In December 2007 both sides filed motions for summary judgment, meaning that they believed the federal district judge could decide the dispute on its undisputed facts without resort

to a trial. In mid-January, the judge issued an order indicating his intent to dismiss all of iParadigm's counterclaims against the plaintiffs as well as all their claims against the corporation. His Honor promised an opinion would be issued at some unspecified time in the future.

According to Vanderhye, "I've litigated dozens of cases in the Eastern District of Virginia federal court. It used to be the fastest federal court. The judge was always very diligent. But since he retired and became a senior judge he's had a different attitude." Added the crusading lawyer, "The case was set for trial on January 23<sup>rd</sup>. Then on January 10<sup>th</sup> or so, he issued this one-paragraph order. He granted our motion on the counterclaims. That much is clear. His decision on their motion is totally confusing. We have a breach of contract claim; if he ruled against us on that, I'm not sure what I'll do next."

But, he vows, "If he granted their motion on the copyright infringement count, I will appeal, I will win and there will be a trial."

On March 11<sup>th</sup>, Vanderhye's threat was finally put to the test. Judge Claude M. Hilton released his 24-page opinion in which he explains his decision to dismiss all of the plaintiffs' claims. Regarding the copyright case so near and dear to Vanderhye's heart, His Honor writes, "This Court finds the 'purpose and character' of iParadigms' use of Plaintiffs' written works to be highly transformative. Plaintiffs originally created and produced their works for the purpose of education and creative expression. iParadigms, through Turnitin, used the papers for an extremely different purpose, namely, to prevent plagiarism."

Thus, Judge Hilton concludes, "a finding of fair use" militates against Vanderhye's copyright-infringement claim. Furthermore, continues the District Judge, if the essays have any market value (a doubtful assertion at best), iParadigms' use doesn't diminish their value at all. Case dismissed.

So what of Vanderhye's threat? Says John Barrie ruefully, "I see a 100% probability that he will appeal. He seems to have as many reasons to sue as there are grains in the Sahara Desert. He's an unreasonable and wholly unpleasant person."

Barrie goes on to gripe, "This is the first lawsuit ever in my life and it is an unpleasant experience. We are a company of 70 people with families. We all believe we are improving

society. You can trace a lot of our society's problems back to our educational system. We are working to improve the system by teaching students to be honest."

He adds, "Then to have Vanderhye come along and drag us through the mud... it's hard to have all you worked for called into question."

What, if anything, has John Barrie learned so far from this litigation? "Our on-line click-through agreement has been made even stronger. We realized that locating our usage policy off to the side, where no one had to agree to it, was a mistake. We've now incorporated it into the click-through."

He continues, "We're also making a better effort to educate people about how we are making a transformative fair use of students' work." Then, proving the lawsuit hasn't robbed him of his sense of humor, he concludes tongue firmly in cheek, "We're making sure we pay our liability insurance premiums on time."

On the bright side, the CEO tells me, "We have a full R&D roadmap this year." The company, too, is moving into more countries with its new products. With 8400 institutional clients in the corporate stable, asserts Barrie, "We were right before we started the company, and I don't know how we could have won this suit in a much stronger way. We knew the day would come when somebody was going to sue us no matter how good our technology and how legally right we were."

Retorts Robert Vanderhye, the crusader on the fringe of intellectual-property-law reform, "Corporations are taking advantage of people more in the first eight years of the new century than they did before. In this particular case, there is a real interest by the students in not conforming."

As Vanderhye and Barrie gird their loins for round two of their courtroom clash, societal interest in student cheating increases. On May 1<sup>st</sup>, ABC's "Primetime Thursday" featured iParadigms in an examination of cheating trends that some say threaten the American educational system.

Clearly, Robert Vanderhye sees a very different threat, one leveled at students' privacy rights and individual citizens' intellectual-property interests.

Such titanic competing claims cannot be reconciled in our college classrooms or in the marketplace. Only the courts are equipped to do that job. Robert Vanderhye, who also tilts at wind turbines, is the knight-errant determined to joist with big business in that arena. Whether he wins or loses, I envy his freedom to be a legal freebooter. Clearly, iParadigm's Mr. Barrie feels a rather different suite of emotions where Attorney Vanderhye is concerned.