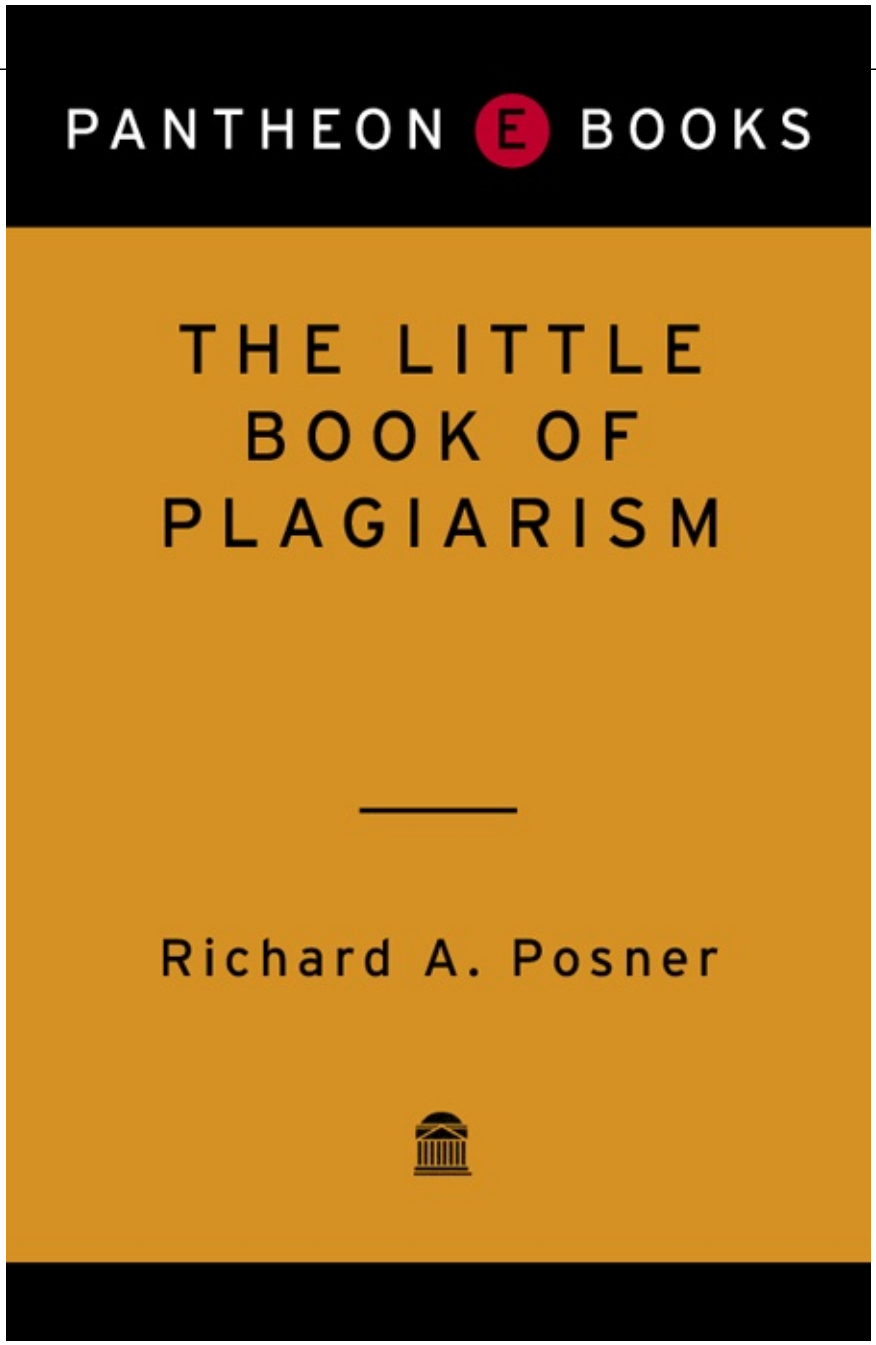
PANTHEON BOOKS

THE LITTLE BOOK OF PLAGIARISM

Richard A. Posner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Not a Suicide Pact

Uncertain Shield

Preventing Surprise Attacks

Catastrophe

Law, Pragmatism, and Democracy

Economic Analysis of Law

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The Little Book of Plagiarism

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Pantheon Books, New York

Perish those who said our good things before we did.

—Donatus

I

At age seventeen, Kaavya Viswanathan signed a two-book contract with Little, Brown. Th publisher agreed to give her an advance of $500,000 against royalties, and she sold mov rights to the books to Dreamworks for an undisclosed sum. By the time the first book, *Ho Opal Mehta Got Kissed, Got Wild, and Got a Life,* was published in April 2006, she was ninetee and a sophomore at Harvard. Within weeks the *Harvard Crimson* discovered and th mainstream media proclaimed far and wide that her book reproduced almost verbatim man passages from similar "chick-lit" novels by an established author, Megan McCafferty. company engaged in the heretofore obscure trade of "book packaging" had helpe Viswanathan to "conceptualize and plot" her book, but there is no indication that th company shares responsibility for her plagiarisms.

The *Crimson* listed thirteen plagiarized passages, such as the following. Viswanathan:

> Priscilla was my age and lived two blocks away. For the first fifteen years of my life, those were the only qualifications I needed in a best friend. We had first bonded over our mutual fascination with the abacus in a playgroup for gifted kids. But that was before freshman year, when Priscilla's glasses came off, and the first in a long string of boyfriends got on.

McCafferty:

> Bridget is my age and lives across the street. For the first twelve years of my life, these qualifications were all I needed in a best friend. But that was before Bridget's braces came off and her boyfriend Burke got on, before Hope and I met in our seventh-grade honors classes.

Viswanathan at first denied everything, then claimed that the copying was "unconscious"- that she had "internalized" McCafferty's novels (which she admitted having read). She had photographic memory, she said, though not for the copying itself. At first, Little, Brown sa it would republish the book without the offending passages. But after Viswanathan wa discovered to have copied material for her novel from other authors besides McCafferty including Salman Rushdie, the publisher recalled the book and canceled its contract with her

What was Viswanathan thinking when she plagiarized? The Associated Press has reveale that she had been "featured in a 2004 *Chronicle of Higher Education* article detailing how eve successful students are 'schmoozing' with [college] admissions officials to make themselv more memorable. Viswanathan was described as having visited nine exclusive college following up with phone calls and monthly e-mails to admissions officers to underscore h interest. 'I think a lot of applying to college is about strategy,' Viswanathan told th magazine. 'When they read my application, maybe they'll remember me.' " Apparentl Harvard did. Strategy made her, and in the end strategy undid her.

Here is a kindlier explanation. In an age of specialization (perhaps in any age, as Haro Bloom argued in *The Anxiety of Influence*), a creative person is apt to have a feeling belatedness—a feeling that though just as creative as his predecessors he has appeared on th

scene too late; the ship has sailed; the niche he might have filled has been filled already. O the unfairness, Viswana-than might have thought, of McCafferty's having picked the lov hanging “chick-lit” fruit rather than leaving some of it for her.

Newspaper readers might think plagiarism a Harvard specialty. Doris Kearns Goodwin, wh had taught part-time at Harvard for a decade and was a member of the university's Board Overseers, and three Harvard law professors— Laurence Tribe, Charles Ogletree, and Ala Dershowitz—had recently been accused, along with sophomore Viswanathan. Goodwin, we'll see, made an incomplete and misleading confession—and was quickly rehabilitate (though plagiarists, I shall argue, are never *completely* rehabilitated). Tribe confessed an received a mild reprimand from his dean. In Ogletree's case the plagiarism was by a researc assistant. His appears to have been a “managed book,” in which the (nominal) author mainly the editor of others' prose. Ogletree received undisclosed discipline, but was not fire Dershowitz, a prominent Zionist, was accused by anti-Zionists of citing primary source without acknowledging that he had found the references to them in secondary sources that h did not cite. He denied the accusation, and that was the end of the matter.

One doubts that plagiarism is actually more common at Harvard than elsewhere. It simply more conspicuous. Scandal at the nation's most famous university gratifies the natur human delight at discovering that giants, including giant institutions, have feet of clay.

Plagiarism, as the Viswanathan affair shows, can be a gaudy offense. It can also be fabricated one. The suit for copyright and trademark infringement that Nancy Stouffe brought against J. K. Rowling, the author of the Harry Potter books, was so lacking in mer —the suit was found to have been based in part on forged and altered documents—that th court imposed a $50,000 penalty on Stouffer. Plagiarism has sometimes a comical air, a when the University of Oregon plagiarized the section of Stan-ford's teaching-assistan handbook dealing with— plagiarism. Both Jonathan Swift and Laurence Sterne denounce plagiarism in words plagiarized from earlier writers.

It is also an offense regularly committed by celebrities, though most plagiarists are obscur — in fact most are students; an estimated one-third of all high-school and college studen have committed plagiarism or a closely related form of academic fraud, such as purchasing term paper from a “paper mill.” Still, a number of prominent, even illustrious, figures ar confessed or proven plagiarists, including—besides Sterne, Swift, Samuel Coleridge, an countless other literary authors—Martin Luther King Jr., Senator Joseph Biden, and Vladim Putin. Another Vladimir—Nabokov—has been accused of plagiarism, though, I shall argu unjustly.

Plagiarism is attracting increasing attention, though whether this is because it is becomin more common, or because its boundaries are becoming vague and contested, or because it being detected more often (digitization has made it at once easier to commit and easier detect) are among the many questions about it that call for investigation. What mak plagiarism a fascinating subject and the occasion for this book is the ambiguity of th concept, its complex relations to other disapproved practices of copying, including copyrig infringement, the variety of its applications, its historical and cultural relativity, its contested normative significance, the mysterious motives and curious excuses of its practitioners, th means of detection, and the forms of punishment and absolution. I shall analyze these issu

from a perspective shaped by my longstanding interest, both as a judge and as an academi
in the law and economics of intellectual property.

II

To get started, we need a definition. But “plagiarism” turns out to be difficult to define. typical dictionary definition is “literary theft.” The definition is incomplete because there ca be plagiarism of music, pictures, or ideas, as well as of verbal matter, though most of th time I'll assume that the plagiarist is a writer. The definition is also inaccurate; we'll see th there can be plagiarism without theft. And it is imprecise, because it is unclear what shou count as “theft” when one is not taking anything away from someone but simply making copy. When you “steal” a passage from a book, the author and his readers still have the boo unlike when you steal his car. The use of words such as *theft* and *piracy* to describ unauthorized copying is misleading. But “borrowing,” the term preferred by apologists fo plagiarism (and there are such apologists), is misleading, too, since the “borrowed” matter never returned.

Obviously, not all copying is plagiarism—not even all unlawful copying, that is, copyrig infringement. There is considerable overlap between plagiarism and copyright infringemen but not all plagiarism is copyright infringement and not all copyright infringement plagiarism.

Copyrights have limited terms; after a copyright expires, the work enters the public doma and can be copied by anyone, without legal liability. And not all expressive works a copyrighted in the first place; for example, the federal government is forbidden by statute claim copyright in the documents it produces. Had Megan McCafferty's copyrights expire Viswanathan would not have been guilty of infringing copyright— but she would still hav been a plagiarist because she concealed the copying.

Copyright law does not forbid the copying of ideas (broadly defined to include mar features of an expressive work besides its precise words or other expressive details, such genre, basic narrative structure, and theme or message), or of facts. Only the *form* in whic the ideas or the facts are expressed is protected. So Dan Brown, the author of *The Da Vin Code,* who was sued for copyright infringement by the authors of an earlier book on th grounds that he'd stolen their idea of Jesus Christ having married Mary Magdalene an fathered children by her, won the suit.

The line between idea and expression is often indistinct, however. How loose must paraphrase be to escape infringing? (That is also an issue with plagiarism.) Copying a gener plot or a stock character from a novelist, or historical facts from a historian, is not copyrig infringement. But copying details of plot, as Brown arguably did, and of character could we be. If, however, the plot clearly is generic, the character clearly a stock character, th historical facts already known, the arrangement of the work familiar or inevitable (fo example, a historical account arranged chronologically), and any scientific or other abstra ideas already familiar to the intended readership, there is no copyright infringement.

There is also no infringement if a coauthor licenses the reproduction of the copyrighte work without consulting the other author(s) of it, though he will have to split the license fe

with them. And subject to the same duty to share the profits, he can use the coauthored wor in his own future writings without his coauthors' permission. Yet there would be plagiarism the coauthored material that was copied into a new work without acknowledgment ha actually been written by one of the other authors.

There can likewise be plagiarism when non-copyrightable features of a work (whether not the work is copyrighted) are copied without acknowledgment, so that readers of the ne work are invited to think that those features are the invention or discovery of the plagiaris This kind of plagiarism can take quite subtle forms.

For example, a historian might cite a primary source that he had not found or read himse but rather had lifted from a citation in a secondary source that he does not mention, th appropriating the discovery made by the author of the secondary work. This is the form plagiarism of which Professor Dershowitz was accused. It is a common practice (as well as a old one— Ben Jonson was accused of it), especially in law review articles, because la professors are mad for citing and, as we'll see, originality is not highly prized in law. It is common practice because its consequences are too trivial to arouse much ire (Dershowitz accusers had ulterior motives) and because, unless the primary source is exceedingly obscu or downright inaccessible or the secondary source contains an error in citing the prima source that is carried over into the accused plagiarist's citation, it is almost impossible detect. But is it really plagiarism, or an example of the fuzziness of the concept? For it's n so much a matter of copying as of falsely implying that one did the drudge work (sometim more than drudge work) of digging up the primary sources.

Some commentators on the Viswanathan affair have pointed out that copyright law allow some unauthorized word-for-word copying of copyrighted works under the rubric of “fa use,” and they infer from this that some plagiarism, maybe even hers, might not be copyrig infringement. The fair-use doctrine permits quotation of brief passages from a copyrighte work without the copyright holder's permission. The reason is that such limited copying do the author no harm except to deprive him of the trivial fee that he might extract from th copier were there no right of fair use—a fee that would probably be smaller than the costs time and postage (or equivalent) of negotiating for the right.

But the fair user is assumed to use quotation marks and credit the source; he is not plagiarist. I thus disagree that there can be “fair use” when the copier is passing off th copied passage as his own. The fair-use right is an exception to copyright, which normal prohibits the unauthorized publication of copyrighted work, and why should the exceptio shelter plagiarists? The plagiarist does not play fair. Were there such an exception, one cou write a book consisting entirely of unacknowledged passages from other writers, provide one took only a small amount from each work; in fact it would be a case of both plagiaris and copyright infringement.

The law does not excuse copyright infringement, no matter how fulsome the infringer acknowledgment of his copying; but the acknowledgment will exonerate him of any charge plagiarism. Or at least should—because judges will sometimes call copyright infringe “plagiarists” though there is no concealment. This loose usage erases what is distinctive abo plagiarism, though it illustrates how the rise of copyright has made copying a suspicio activity.

Concealment is at the heart of plagiarism. But it must be carefully defined. It is not a me failure to acknowledge copying. Often copying is not acknowledged because it is known the intended readership. A parody may quote extensively from the work parodied, a always it will copy distinctive features of style and theme, yet often without mentioning t parodied work. But the parodist will plant clues so numerous and unmistakable that t reader will recognize the copying, for otherwise the parody will not be recognized as parody and the parodist's intentions will be thwarted. And often works that are not parodi nevertheless will allude to an earlier work, the allusion taking the form of a verbati quotation from the work without quotation marks. Allusion is not plagiarism, because t reader is expected to recognize the allusion.

Sometimes there is no acknowledgment, tacit or express, of the original author but reade are indifferent; they may be deceived, but the deception has no consequences. Textbooks a an obvious example. They do not cite the sources of most of the ideas expounded in the because there is no pretense of originality—rather the contrary: the most reliable textbook one that confines itself to ideas already well accepted by the experts in the field. And sin students have little or no interest in the origins of the ideas they are studying, sour references would merely clutter the exposition. Moreover, the originators of the ide expounded in a textbook seek recognition not from students but from their peers. Einste would not have been upset to learn that some high-school physics students thought the auth of their textbook had discovered the theory of relativity. Textbook authors are guilty plagiarism not when they copy ideas without acknowledgment, but only when they co verbal passages without acknowledgment.

A judgment of plagiarism requires that the copying, besides being deceitful in the sense misleading the intended readers, induce *reliance* by them. By this I mean that the reader do something because he thinks the plagiarizing work original that he would not have done h he known the truth. (Lawyers call this "detrimental" reliance, that is, relying to yo detriment on a falsehood.) He buys a book that he wouldn't have bought had he known contained large swatches of another writer's book; he would have bought that other write book instead. Or if he's a teacher he gives a bad student a good grade, to the prejudice other students in the class (if the students are graded on a curve), thinking the student's pap original.

The reader has to *care* about being deceived about authorial identity in order for the dece to cross the line to fraud and thus constitute plagiarism. More precisely, he has to ca enough that had he known he would have acted differently. There are innumerab intellectual deceits that do little or no harm because they engender little or no reliance. The arouse not even tepid moral indignation, and so they escape the plagiarism label. Mo nonlawyers probably think judges write their own opinions. Only a small minority of us nowadays; the others edit their law clerks' opinion drafts to a greater or lesser extent- sometimes so extensively that the judge deserves to be considered a coauthor or even t principal coauthor of the opinion, though not the sole author. Judges or their cler sometimes insert into their opinions, without attribution, verbatim passages from lawye briefs; and many orders, findings of fact, and other documents signed by judges are actual prepared entirely by the parties' lawyers, again without attribution. Yet judges sign the opinions and orders as if they were the sole authors, and they refer to one another's opinio

as if written by the judge named as the author. Judges would like people to believe the write their own opinions—which is the element of deceit, for judicial acknowledgment ghost authorship by law clerks is vanishingly rare.

Nevertheless the publishing of a law clerk's draft under the judge's name is not plagiarism Very few people who think judges write their own opinions would change their behavio (avoid litigation, oppose a judicial nominee, vote against a judge's retention, and so forth) they learned the truth. And the principal readers of judicial opinions are not an ignorant laity but legal professionals who know that most judicial opinions are largely written by law clerks. Since judges are not permitted to copyright their opinions and so obtain no royalties from them, the financial motive so perspicuous in Viswanathan's case is absent.

Then too, little value is ascribed to judicial originality—sometimes it is actually disapproved, on the grounds that it tends to destabilize law. Judges do not brag about the number of cases they have overruled, the doctrines they have slain, the doctrines they have created. They would rather be regarded as sound than as original, as appliers of law rather than inventors of it. Judges find it politic to pretend that they are the slaves of the law, never its masters and the competitors of legislators.

Law professors, too, are less than scrupulous about acknowledging the provenance of their ideas, because originality is not much prized by law professors either, though this is changing as disparagement of intellectual adventurousness on the part of judges is not. It is changing because law professors increasingly identify with other academics, who prize originality rather than with judges and lawyers. The transition is incomplete; many law professors continue, particularly in the legal treatises and textbooks they write, to publish without acknowledgment material drafted by their student research assistants. But the analogy between those professors and judges who publish law clerks' opinions under their own name is imperfect. Law clerks are hired on the clear understanding that they are writing for and in the name of their judge. This tends not to be the explicit understanding in the case of student research assistants. The research they do clearly belongs to the professor, but not their words.

I had thought the practice of textbook writers of incorporating without acknowledgment passages written by others a specialty of law professors until I read a recent article in the *New York Times* by Diana Schemo, which quotes a historian as saying that elementary and high school textbooks “were usually corporate-driven collaborative efforts, in which the publisher had extensive rights to hire additional writers, researchers and editors and to make major revisions without the authors' final approval.” Many textbooks appear under the names of long-dead authors whose contributions to the work have been diluted to the vanishing point by an army of unnamed freelancers, in-house writers, and editors. Some textbooks are entirely ghostwritten, the nominal author being regarded as strictly a marketing tool.

The situation regarding books nominally authored by politicians and celebrities but actually ghostwritten more resembles that of judicial opinions than that of textbooks. (Celebrity blogs are the latest example of ghosted celebrity writing.) There are no victims. The ghostwriter is compensated, and since there is no expectation of originality the public is not fooled. But the increasingly common practice of identifying the ghostwriter in the book may create the impression of celebrity authorship when no ghostwriter is mentioned, as in the case of Hillary Clinton's book *It Takes a Village,* where the contract with the ghostwriter forbade disclosure of

her role. Yet one cannot imagine the public caring.

In both cases, moreover, that of the judge and that of the politician or celebrity, there is defensible rationalization for any deceit involved in their use of ghostwriters. It is that in th case of a public figure what is important is not authorship but commitment. (This is anoth way of saying that the public is not really fooled.) The judge by signing "his" opinions an the politician by being identified as the author of "his" book—even the movie star whos celebrity persuades the credulous that he might have something worthwhile to say abo public issues—are affirming their commitment to the contents of the work. (Not so th posthumous textbook author.) Their assertion of authorship is the equivalent of a celebri endorsement of a product. Similarly, the solicitor general of the United States signs the brie that the federal government submits to the Supreme Court, though he does not write ther But he is not claiming authorship; he is merely making clear that he approves the brief. In th rare case in which he does not sign it, he creates a powerful signal of internal dissensio regarding the government's legal position.

Rembrandt may have been doing something similar when he signed his name to paintin done entirely by his assistants: certifying them as Rembrandt-quality paintings. Rembrandt corpus of work, like Coleridge's, has been shrinking as more and more of the paintings h signed are discovered to have been painted by other artists. But it would be odd to ca Rembrandt a "plagiarist," as he was a better artist than the painters whose work he signe What he did was fraud by modern standards because it enhanced value by means of a fals pretense. But we think of plagiarism as an offense designed to make the plagiarist look bett than he is, and Rembrandt was making the "plagiarized" works seem, or at least be thoug (for many of the faux Rembrandts are excellent paintings even though their value nosedive when they are discovered not to be genuine Rembrandts), better than *they* were. That is lik affixing a prestigious trademark to an inferior version of the trademarked product—th commonest form of trademark infringement.

Another curious example of authorship is that of the laboratory head who is listed as coauthor of all the scholarly papers written by his staff. As Richard Lewontin, a distinguishe scientist, dis-approvingly explains, "Regardless of the actual involvement of the laborator director in the intellectual and physical work of a research project, he or she ha unchallenged intellectual-property rights in the project, much as a lord had unchallenge property rights in the product of serfs or peasants occupying dependent lands." It is th modern equivalent of Rubens's workshop (see Part VI).

For "authored" in the cases I have been discussing we perhaps should substitu "authorized," as in the King James Version of the Bible, which members of the Church o England call "The Authorized Version." James I did not write the King James Version. O rather than saying that the solicitor general is not claiming authorship when he signs th government's brief, we might say with Michel Foucault and Roland Barthes that "writer" an "author" are not synonyms, that you can be the author of a work though you were not th writer. Moses did not write the five books of Moses (one of which describes his death an burial), King David did not write the psalms, and Saint Matthew did not write the Gosp According to Matthew. In ancient times it was a common convention to assign authorship no to the actual writer of a work but to someone whose identification with it would lend

authority. This is again celebrity endorsement. Of course it doesn't (or at least it shouldn' work when, as was probably the case with Moses (himself possibly a fictitious rather tha real person), King David, and Saint Matthew, the celebrity is unacquainted with the work. shouldn't work for General Omar Bradley's autobiography, almost all of which wa ghostwritten after his death. In all these cases, many readers are unaware of the embarrassin fact that the nominal author had nothing (or virtually nothing, in Bradley's case) to do wi the work.

Recall "book packaging," peripherally involved in the Viswanathan scandal? As explaine by Jenna Glatzer,

> Nancy Drew, Sweet Valley High, Goose-bumps, and many of the Complete Idiot's Guide and For Dummies series are packaged.... Edward Stratemeyer may have been the father of this sector of the industry. He formed a company, Stratemeyer Syndicates, to create books from his ideas. These became classic series, including The Bobbsey Twins, The Hardy Boys, and Nancy Drew. Stratemeyer hired ghostwriters to work from his outlines, paying them a flat fee and publishing them under several pseudonyms. He also established a policy that is still used by some packagers today: authors were not allowed to talk about the books they'd written. Stratemeyer wanted to keep up the illusion that each book in a series was written by a single author, so he didn't give byline credit to the ghostwriters. Speaking about their work would have been akin to telling a child there's no Santa Claus; it would ruin the fantasy he created.

Despite the last sentence, there is no significant deception in "book packaging" as long as th packager assures reasonable uniformity among the books in each series so that the reader the first book does not feel a jarring discontinuity when he picks up the second an subsequent volumes in the series. The pretense of a single author operates like a trademar which often functions as a warrant of uniform quality rather than an identifier of a uniqu source. Coca-Cola is produced in many different bottling plants, but the trademark warran that the product is nevertheless uniform.

Reliance and hence fraud and hence plagiarism are matters of expectation. In Europea countries it remains common and unexceptionable for professors to publish under their ow name books and articles written by their assistants, and since that is well known in academ circles there is no fraud. It is not the practice in the United States, however, so that whe Julius Kirshner, a historian at the University of Chicago, was discovered to have publishe under his own name a book review written by a graduate student, Kirshner was censured fo plagiarism. The censure took the curious form of barring him from teaching graduate studen for five years. (Undergraduates were indignant!) The *Chicago Tribune* reported Kirshner responding oddly to his punishment by saying "I feel exonerated. There was no finding academic fraud. I'm still teaching here."

We should try to be precise about the harm caused by Kirshner's appropriation of h student's work. The most direct harm was to the student, presumably an aspiring academ who would have derived a career benefit had his authorship been acknowledged—which ma be why he turned Kirshner in. Of course, it is possible that no journal would have published review written by a student, but this problem could have been overcome by Kirshner's listin the student as coauthor. Readers may have been harmed by according an authority to th review that they would not have done had they known a student had written the enti

review; this harm would not have been eliminated by a false attribution of coauthorship t
Kirshner.

Kirshner's academic competitors may have been harmed, though surely trivially, if h
plagiarism enabled him to publish more than they. In other cases, however, competitive har
is a significant consequence of plagiarism. The plagiarist by plagiarizing improves his wor
relative to that of his competitors and so increases his sales and his fame relative to theirs.

Solid rumor has it that the sort of thing that Kirshner did is not uncommon in academic la
or limited to the writers of legal treatises. This would be consistent with the low regard
which the legal profession holds originality.

The discussion to this point enables us to define plagiarism tentatively as “fraudule
copying,” which clearly distinguishes it from copyright infringement. But even this definitio
may not be quite right, because it is unclear that consensual copying, though it can be
fraud, should be classified as plagiarism. A student who buys his term paper from a pap
mill commits an academic fraud, and if he bought the paper from an online service, which
the norm nowadays, he “copied” the paper in a literal sense. But the copying is not any so
of wrong to the author of the paper, and so “plagiarism” doesn't seem quite right. It might b
better to confine the word to “nonconsensual fraudulent copying,” while emphasizing th
“plagiarism” does not exhaust intellectual fraud.

Fraud is a tort—a civil wrong for which damages or other legal relief can be obtained in
lawsuit—and often a crime. Plagiarism as such is neither, but the qualification in “as such”
important. Though there is no legal wrong named “plagiarism,” plagiarism can become th
basis of a lawsuit if it infringes copyright or breaks the contract between author an
publisher. Their contract will invariably require the author to warrant the originality of th
work— Little, Brown treated Viswanathan's plagiarism as a breach and canceled its contra
with her in response. Other common sanctions are expulsion or other formal discipline fo
plagiarism by students and faculty, sanctions that although outside the conventional leg
process are based ultimately on the violation of an implied contractual duty of students an
faculty to their school not to commit plagiarism. The most common sanction for plagiaris
by a journalist is to fire the journalist.

Plagiarism could probably be attacked in a civil lawsuit as fraud, by analogy to the tort
false advertising, if it diverted sales from competing publishers, though I am not aware
such a suit. In addition, the European doctrine of “moral rights,” now gaining a foothold
U.S. law (mainly in relation to visual art), entitles a writer or other artist to be credited fo
his original work, and this “attribution right,” as it is called, would give him a legal clai
against a plagiarist. (Clumsy paraphrasing, which defaced the original, would violate anoth
of the “moral rights”—the artist's right to insist that the integrity of his work be respected
Attribution is important to creators of intellectual work even when there is no direct financi
benefit. Authors who grant free “Creative Commons” copyright licenses for nonprofit us
often condition the grant on the licensees' acknowledging their licensors' authorship.

By far the most common punishments for plagiarism outside the school setting hav
nothing to do with law. They are disgrace, humiliation, ostracism, and other shamin
penalties imposed by public opinion on people who violate social norms whether or not the
are also legal norms. A striking example is the collapse of Senator Joseph Biden's campaig

for the Democratic nomination for president in 1988 after it was revealed that he had lifte the opening paragraph of one of his campaign speeches from a campaign speech by Ne Kinnock, the leader of the British Labour Party. The reaction to Biden's conduct may see odd, since there is no presumption that politicians write their own speeches any more tha there is a presumption that stand-up comedians write their own jokes. But although ghostwriter is not a victim of the plagiarist (if that is what one wants to call the nomin author) but his collaborator, Kinnock was not a collaborator of Biden's; he was not complic in the copying. Yet not being a competitor of Biden either, he was not hurt by the plagiaris —on the contrary, it was a tribute to his eloquence that an American politician should hav copied him and thus a true example of the adage that imitation is the sincerest form flattery—though for all one knows Kinnock's speech had been ghostwritten.

The reaction to Biden's plagiarism was probably as strong as it was because he ha introduced the plagiarized passage by saying he'd just thought of it on the way to give th speech, and because the paragraph he copied from Kinnock's speech was autobiographical, that he seemed to be appropriating Kinnock's life rather than just his words. Another facto was that other charges of plagiarism were quickly leveled against Biden.

Almost two decades after Biden plagiarized Kinnock, the incident has been largel forgotten— yet the fact that Biden is a plagiarist has not been. The stigma of plagiaris seems never to fade completely, not because it is an especially heinous offense but because is embarrassingly second rate; its practitioners are pathetic, almost ridiculous.

Speaking of plagiarism by politicians, Putin's plagiarism, unlike Biden's, was of the garde variety sort. Like Martin Luther King Jr., Putin incorporated plagiarized material in a academic dissertation.

Should plagiarism be a crime or a tort? It should not be. The harms it causes are too slig to warrant cranking up the costly and clumsy machinery of the criminal law. And plagiaris rarely have sufficient assets to make suing them worthwhile, even if such harm as plagiaris does in a particular case could be monetized, which usually it could not be. Plagiarism is thu the kind of wrongdoing best left to informal, private sanctions. Despite these sanctions, the is a good deal of plagiarism, so they must be less than totally effective. But the same is tru of formal legal sanctions; murder is heavily punished, but there are plenty of murders. An except in the student case, plagiarism can hardly be thought a social problem grave enough warrant draconian solutions. It may even be a diminishing problem, especially in the stude case. Although digitization has reduced the cost of committing plagiarism along on dimension—you don't have to go to a library and copy out passages by hand in order plagiarize if you have a computer and access to the Web—it has increased it along anothe For we shall see that the advent of powerful plagiarism-detection software is increasing th detectability, and hence the expected punishment cost, of plagiarism.

Curiously, most litigation over plagiarism is instituted by rather than against studen expelled or otherwise disciplined for committing plagiarism. The ingenious legal theori spun by the student litigants run the gamut from breach of contract to denial of due proce of law (if the school is a public institution). The threat of litigation makes some academ administrators gunshy about expelling students caught plagiarizing.

III

VIEWING PLAGIARISM as a form of fraud and hence as dependent on inducing reliance by readers o other audience for the plagiarizing work can help us distinguish plagiaristic fro nonplagiaristic copying. It can also help us grade the severity of the different forms o plagiarism, and thus design an appropriately graduated scale of punishments, though th amount and character of the reliance induced by the plagiarist are not the only thing relevant to judging the gravity of his offense. His state of mind is also important, an likewise detectability, which turns out to be related to state of mind.

Reliance is the key to evaluating "self-plagiarism." If you assign away your copyrig without reserving a right to republish the copyrighted work, you are guilty of copyrig infringement even though you're just copying yourself. But are you also guilty of plagiarism If so, the guilt is very widespread. William Landes and I, in our book *The Economic Structu of Intellectual Property Law,* give the following examples:

> Gilbert Stuart is reported to have painted some 75 substantially similar portraits of George Washington. Giorgio de Chirico made numerous copies of many of his best-known early Surrealist works.... Yeats and Auden revised their poems many years after original publication and published the revised versions in collections of their work. A recent review of a variorum edition of poems by Coleridge notes Coleridge's "revisionary obsession," which resulted for example in there being 18 different *published* versions of *The Ancient Mariner*.

Here is an example to test one's intuitions about self-plagiarism: Laurence Sterne, whos great novel *Tristram Shandy* copies extensively and without acknowledgment from oth authors, also sent letters to his mistress that he had copied years earlier from letters he written to his wife. That was gross behavior, but was it plagiarism? No harm was done, an there may have been value created: Sterne may have thought that the letters to his wi contained his most heart-felt and eloquent declarations of love; that he couldn't improve o them and if nevertheless he composed new letters to his mistress they would be inferior an thus fail to convey his ardor. Of course, wife and mistress would have been furious had the found out. They would have thought Sterne lazy, exploitive, and insincere. Yet it would n have been the copying that bothered them but what the copying revealed about his characte His plagiarism could do no harm to anybody; only the discovery of it could.

Even if we set so special a case to one side, it is hard to see how copying yourself hur anybody, except possibly yourself by undermining the market for your plagiarized work Self-copying becomes fraudulent and therefore plagiaristic only when the author represen his latest work to be newly composed when in fact it is a copy of an earlier work of his th readers may have read. (Suppose the only change he has made is in the title—or in th author's name.) It is like a shop that deliberately bills a customer twice for the same iten Yet readers should realize that authors repeat themselves; it is only wholesale and liter repetition that should disappoint.

Here is another curious, though unproven, example to test one's intuitions abo

plagiarism. Margaret Truman, President Truman's daughter, is widely believed to have so the use of her name to one or more professional mystery writers, who wrote and publishe mysteries "by Margaret Truman" without acknowledgment of their role. (The tennis play Martina Navratilova, the "author" of mystery novels about a female tennis player who solv crimes, has, in contrast, been open about the fact that the novels are ghost written.) Tho were more innocent times, and I imagine that virtually all readers believed that Margar Truman had actually written the mysteries attributed to her. Some readers would have bee indignant had they learned otherwise (another case where a harm results not from th plagiarism but from its discovery). Would that have been a justified reaction? Obviously M Truman was not harming the "plagiarized" authors— they consented to and we compensated for the deception. As for readers attracted to the books by the celebrity of th "author" and perhaps the oddness of presidential offspring writing mysteries (the wonder not that it is done well, but that it is done at all, as Samuel Johnson famously said in different context), they might have been angered had they discovered the deception. But it hard to see how they were hurt by the deception itself. Did they forgo reading bett mysteries? But they did not read the Truman books in expectation that these were superi mysteries by virtue of their authorship. Margaret Truman had no reputation as a writ except what the mysteries themselves created. No one could have thought that by virtue being the president's daughter she must be an expert judge of mysteries, who "endorsement" would therefore carry weight. (Though maybe they thought that as Washington insider she would bring something special to mystery writing.)

Yet there were victims of the deception, which was therefore (if it really occurred, whic as I said, has not been proved) fraudulent. They were neither the readers nor the writers her books. They were other mystery writers, who lost sales to readers attracted to th Truman books by the celebrity of the supposed author. The parallel is to textbooks who named authors did not write them, and to students who copy the papers of other studen with their consent. The harm in the first case is to the authors of competing textbooks, and the second case to other students in the class. But just as in the rumored case of Margar Truman, there is no "theft," no involuntary taking.

That is also true, by the way, of fabrication. It involves no copying, and no one would ca it plagiarism. But it is literary deceit, has consequences similar to those of plagiarism, an particularly in journalism and science, is frequently conjoined with plagiarism—the case Jayson Blair, the young *New York Times* reporter whose exposure as a fabricator-cu plagiarist rocked the newspaper and caused two of its senior executives, including th executive editor, Howell Raines, to be fired. The conjunction is not surprising. A journali who wants to spice up his articles can do so by making up colorful facts as well as by copyi from an abler writer, and a scientist can try to steal a march on his competitors b plagiarizing another scientist but also by cooking the results of his own experiments.

We should now be able to see that even when plagiarism and copyright infringeme overlap, they are different wrongs in the sense of injuring different interests of the victim Copyright infringement is the invasion of a property right. It is like joyriding, that i "renting" a car without paying any rent. It reduces the income of the owner of the copie work. Nothing like that is involved when a student plagiarizes, or when the plagiarized wo is not in copyright (so that anyone is free to copy it), or when that work, whether or not it

copyrighted, does not compete with the work that plagiarizes it. But competitors *of t* *plagiarist* may still be harmed in the last case, as also in the student case. And notice that th *talented* writer who plagiarizes, whether he is a professional writer or a student, may mak his work much better, and this will make the harm to his nonplagiarizing competitors, th other writers or students, even greater.

But couldn't the student plagiarist himself also be thought a victim? He derives n educational benefit from the assignment that he completed by copying another's work. N *educational benefit,* or at least no *direct* educational benefit. But if he gets a better grade tha he would have gotten had he not plagiarized, or if he uses the time saved by plagiarizing t do more work on another assignment that interests him more, he may derive in the first cas a career benefit and in the second case an actual educational benefit. If student plagiaris were irrational, there would be much less of it.

Although I have emphasized the differences between plagiarism and copyrigh infringement, plagiarism that also infringes copyright is more reprobated than plagiarism th does not. Plagiarism that infringes copyright adds a clear legal violation to an ethic violation and by invading a property right usually does more harm to the author of th copied work.

IV

With plagiarism understood as fraudulent copying and fraud tied to reliance and hence t expectations, it becomes easy to understand the extraordinary historical and cultur variability of the concept, and indeed its variability even within a specific historical ar cultural milieu. In modern America, as we know, publishing a judicial opinion under th name of the judge who did not write it is not plagiarism, but a professor's publishing a article actually written by his student research assistant is.

The concept of plagiarism is often thought to be modern, a product of the Romantic cult o originality. But this is inexact. The ancients had a concept of plagiarism, though it was no identical to ours. The Latin word *plagiarius,* from which the English *plagiarist* derives, was fir used (in a surviving document—the actual first use may have been much earlier) i something like its modern sense by the Roman poet Martial in the first century a.d. A *plagiarius* was someone who either stole someone else's slave or enslaved a free person. In h epigram number 52, Martial applied the term metaphorically to another poet, whom Marti accused of having claimed authorship of verses that Martial had written. It is unclea however, whether he meant that the other poet had passed off Martial's verses as his own o had claimed *sole* ownership (the verses were his slaves), precluding Martial's claimi authorship. Much clearer is epigram number 53, which applies not the word *plagiarius* but th word for thief *(fur)* to someone we would call a plagiarist. The Roman concept of plagiaris or literary theft seems, however, to have been limited to word-for-word copying with n pretense of creativity. Hence the extraordinary Roman genre (originally Greek) of the *cento*- a poem made up entirely of phrases from other poets' poems, rearranged to yield a meani different from that of any of the originals. That was not considered plagiarism.

The earliest complaints in England about what was soon being called “plagiarism” (th word became common in the seventeenth century) date from Shakespeare's time. Early in h career he himself may have been accused of plagiarism by Robert Greene, though if so (a unresolved issue) the accusation did not stick. Yet was not Shakespeare a plagiarist b modern standards? Thousands of lines in his plays are verbatim copies or close paraphrase from various sources, along with titles and plot details, all without acknowledgment. Mo members of his audiences would not have been aware of his appropriations from othe writers.

A splendid example of Shakespearean “plagiarism” is the description in *Antony an Cleopatra* of Cleopatra on her barge. This is a blank-verse paraphrase, witho acknowledgment, of the description in Sir Thomas North's translation of Plutarch's life o Marc Antony. Here is North:

> She disdained to set forward otherwise, but to take her barge in the river of Cydnus; the poope whereof was of gold, the sailes of purple, and the owers [oars] of silver, which kept stroke in rowing after the sounde of the musick of flutes, howboyes, citherns, viols, and such other instruments as they played upon in the barge. And now for the person of her selfe: she was layed under a pavilion of cloth of gold of tissue, apparelled and attired

like the goddesse Venus, commonly drawen in picture: and hard by her, on either hand of her, pretie faire boyes apparelled as painters doe set forth god Cupide, with litle fannes in their hands, with the which they fanned wind upon her.

And here Shakespeare:

The barge she sat in, like a burnished throne, Burnt on the water. The poop was beaten gold; Purple the sails, and so perfumèd that The winds were lovesick with them. The oars were silver,

Which to the tune of flutes kept stroke, and made

The water which they beat to follow faster, As amorous of their strokes. For her own person,

It beggared all description: she did lie

In her pavilion—cloth-of-gold of tissue—

O'erpicturing that Venus where we see

The fancy outwork nature. On each side her

Stood pretty dimpled boys, like smiling Cupids,

With divers-colored fans, whose wind did seem

To glow the delicate cheeks which they did cool,

And what they undid did.

If this is plagiarism, we need more plagiarism. The standard reason given for why it is n plagiarism is that in Shakespeare's time, unlike ours, creativity was understood to b improvement rather than originality—in other words, creative imitation. Milton said th "borrowing" from another author, only "if it be not bettered by the borrower, among goo authors is accounted Plagiarè." Harold Ogden White refers to "the classical doctrine that tru originality is achieved through an imitation which selects its models carefully, reinterpre them personally, and endeavors to surpass them gloriously." The creative imitator sounde variations on an existing theme that he did not attempt to disguise; anyone who knew h Plutarch (though this was not everyone) would have recognized it in the barge scene *Antony and Cleopatra.*

It is not true, however, that creative imitation is no longer an approved form of creativi and its practitioners are all considered plagiarists. *Tristram Shandy,* written a century and half after Shakespeare, by which time modern notions of plagiarism were emerging, copi extensively from Robert Burton's *Anatomy of Melancholy* without acknowledgment. Few Sterne's readers would have recognized the "theft," yet *Tristram Shandy* is a novel of gre distinction.

One of the supreme works of twentieth-century literature, T. S. Eliot's long poem "Th Waste Land," is a tissue of quotations (without quotation marks) from earlier literature, on imperfectly acknowledged in the notes that Eliot appended to the poem—and among h "borrowings" (he would say "thefts") is the opening of the barge scene from Plutarch-Nort Shakespeare:

The Chair she sat in, like a burnished throne,

Glowed on the marble, where the glass Held up by standards wrought with fruited vines

From which a golden Cupidon peeped out (Another hid his eyes behind his wing) Doubled the flames of sevenbranched candelabra

Reflecting light upon the table as

The glitter of her jewels rose to meet it.

Such appropriations (allusions, as far as the learned reader are concerned—and allusion is technique of creative imitation) are common in modern poetry. As Eliot explained in an essa on the Jacobean playwright Philip Massinger that describes Eliot's own practice in "Th Waste Land" and elsewhere,

> Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn; the bad poet throws it into something which has no cohesion. A good poet will usually borrow from authors remote in time, or alien in language, or diverse in interest.

Eliot's poetry is heavily indebted to poets like Browning, whom Eliot disparaged, in favor classical and metaphysical poets, whom he acknowledged as influences, thus throwing th reader off the scent.

Examples are of course not limited to literature. Classical musicians "plagiarize" fo melodies (think of Dvorak, Bartók, and Copland) and often "quote" (as musicians say) fro earlier classical works, without being accused of plagiarism. Musical variations on themes earlier composers further illustrate creative imitation, though there is often acknowledgme in the title (for example, Brahms's "Variations on a Theme by Haydn"). Rap artists "sampl (that is, quote) snatches of earlier songs without explicit acknowledgment, though most ra fans will recognize the quotation.

Édouard Manet's most famous painting, *Déjeuner sur l'Herbe,* contains unmistakable copyi of earlier paintings by Raphael, Titian, and Courbet, again without being considere plagiaristic, though only experts would recognize the copyings as allusions. (His second mo famous painting, *Olympia,* recasts Titian's *Venus d'Urbino* as a French prostitute.) And think "appropriation art," such as Jeff Koons's sculptural rendition of a photograph (not by him) a couple cradling eight puppies. The sculpture, which Koons titled *String of Puppies,* loo almost identical to the photograph, although it is much larger, and three-dimensional, course, and the puppies are colored blue.

Here is another example, from Landes's and my book on intellectual property:

> The Russian painter George Pusenkoff included in one of his paintings the outline of a nude from a Helmut Newton photograph, a distinctive bright blue background from an Yves Klein monochromatic painting, and a small yellow square from a painting by the late Russian artist Casimir Male-vich. Neither Klein nor Malevich's estate objected to Pusenkoff's borrowing, but Newton did and sought to have the painting destroyed. Pusenkoff 's defense was that he had created a unique work rather than made multiple copies, that he had borrowed only the outline of a photograph and not the entire photograph, and that he had transformed the photograph by adding public domain material and altering the medium. Yet he clearly had copied Newton's well-known image without paying for it and indeed his stated purpose was to copy recognizable elements from other artists—"to make canvases buzz with cultural associations by 'quoting' from other artists—a perfectly respectable post-modernist approach to picture-making."

Classics are constantly being reworked in new media—such as the novel *Emma* as th

movie *Clueless,* or the play *Pygmalion* (itself derived, though very loosely, from Ovid's tale o Pygmalion and Galatea) as the musical *My Fair Lady,* or, similarly, Voltaire's *Candide* a Leonard Bern-stein's musical *Candide,* or *Romeo and Juliet* as *West Side Story*—without a sens that plagiarism is being committed, even though much of the audience for the new work wi be ignorant of the copying. However, if the original is still in copyright, the derivative wor to avoid infringing, must be licensed by the copyright holder.

In many cases, pretty much the whole audience is expected to recognize the "quotation (without quotation marks or other acknowledgment). But that is not critical. In none is th copying "slavish" rather than creative. These are regarded as cases of allusion, even if most o the audience is unaware of the source, rather than of plagiarism.

To the extent that an imitator or copier produces something better than the origin (Shakespeare in his barge scene) or interestingly different from it (Eliot in his barge scene, o Manet in his redoing of Titian, among many other examples), the imitation is producin value. And when, as is often the case, the person whose work is copied is long dead and th work out of copyright, the copying does not harm him. There is rarely any fraud, moreove for either the readership or other audience is not fooled by the failure of explic acknowledgment or it doesn't care about provenance. Koons's sculpture may, as the court sa in the suit by the photographer for copyright infringement *(Rogers v. Koons),* have been species of "piracy" in the sense of a copyright infringement (though probably not, for copyin for purposes of parody is generally regarded as fair use), but it was not plagiarism. Th satirical intent of the sculpture, prepared for an exhibition called The Banality Show depended on the audience's realizing that the work was a copy of a sentimental photo rath than an expression of Koons's own taste. And while probably only a handful of the peop who saw the movie *Clueless* realized that it was a takeoff on a novel by Jane Austen, th others would not have thought less of the movie (or more of Jane Austen) had they known.

In Shakespeare's case still another factor was at work—the sheer impracticability of h publicly acknowledging his sources. His plays were not published until after his death, so a acknowledgment in the published texts of copying would not have reached his audiences. An it would have been awkward for one of the actors to have come on stage at the beginning o the play to read a list of the lines that the playwright had copied from other writers. C consider the following "plagiarism" of Dryden by Pope. Dryden: "For truth has such a fac and such a mien / As to be loved needs only to be seen." Pope: "Vice is a monster of s frightful mien / As to be hated needs but to be seen." Should Pope have dropped a footno acknowledging his close paraphrase of Dryden's couplet? Or listed all such paraphrases in a introduction? That would have been as unnecessary as it would have been awkward, for wh was the harm?

The "awkwardness of acknowledgment" may be a reason why it is not considere plagiarism for authors to use a copied phrase as a title: *The Sun Also Rises, The Sound and th Fury, For Whom the Bell Tolls,* and so on. Many readers will not recognize the allusion, but would rather spoil the mood that the author is trying to create if he had to note on the tit page that his title was a quotation. Furthermore, when as in the examples I gave the quote phrase is familiar to most readers, they might feel patronized by acknowledgment of th source. And the phrase is being used for a purpose so different from that of its author that w