

PANTHEON  BOOKS

THE LITTLE
BOOK OF
PLAGIARISM



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An Affair of State

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Sex and Reason

The Problems of Jurisprudence

The Economics of Justice

The Little Book of Plagiarism

RICHARD A. POSNER



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Pereant qui ante nos nostra dixerent.

Perish those who said our good things before we did.

—Donatus

AT AGE SEVENTEEN, Kaavya Viswanathan signed a two-book contract with Little, Brown. The publisher agreed to give her an advance of \$500,000 against royalties, and she sold movie rights to the books to Dreamworks for an undisclosed sum. By the time the first book, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, was published in April 2006, she was nineteen and a sophomore at Harvard. Within weeks the *Harvard Crimson* discovered and the mainstream media proclaimed far and wide that her book reproduced almost verbatim many passages from similar “chick-lit” novels by an established author, Megan McCafferty. The publishing company engaged in the heretofore obscure trade of “book packaging” had helped Viswanathan to “conceptualize and plot” her book, but there is no indication that the publishing 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 said it would republish the book without the offending passages. But after Viswanathan was 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 revealed that she had been “featured in a 2004 *Chronicle of Higher Education* article detailing how even successful students are ‘schmoozing’ with [college] admissions officials to make themselves more memorable. Viswanathan was described as having visited nine exclusive colleges following up with phone calls and monthly e-mails to admissions officers to underscore her interest. ‘I think a lot of applying to college is about strategy,’ Viswanathan told the magazine. ‘When they read my application, maybe they'll remember me.’ ” Apparently 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 Harold Bloom argued in *The Anxiety of Influence*), a creative person is apt to have a feeling of belatedness—a feeling that though just as creative as his predecessors he has appeared on the

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

Newspaper readers might think plagiarism a Harvard specialty. Doris Kearns Goodwin, who had taught part-time at Harvard for a decade and was a member of the university's Board of Overseers, and three Harvard law professors— Laurence Tribe, Charles Ogletree, and Alan Dershowitz—had recently been accused, along with sophomore Viswanathan. Goodwin, as we'll see, made an incomplete and misleading confession—and was quickly rehabilitated (though plagiarists, I shall argue, are never *completely* rehabilitated). Tribe confessed and received a mild reprimand from his dean. In Ogletree's case the plagiarism was by a research assistant. His appears to have been a "managed book," in which the (nominal) author is mainly the editor of others' prose. Ogletree received undisclosed discipline, but was not fired. Dershowitz, a prominent Zionist, was accused by anti-Zionists of citing primary sources without acknowledging that he had found the references to them in secondary sources that he 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 is simply more conspicuous. Scandal at the nation's most famous university gratifies the natural 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 a fabricated one. The suit for copyright and trademark infringement that Nancy Stouffer brought against J. K. Rowling, the author of the Harry Potter books, was so lacking in merit—the suit was found to have been based in part on forged and altered documents—that the court imposed a \$50,000 penalty on Stouffer. Plagiarism has sometimes a comical air, as when the University of Oregon plagiarized the section of Stanford's teaching-assistant handbook dealing with— plagiarism. Both Jonathan Swift and Laurence Sterne denounced plagiarism in words plagiarized from earlier writers.

It is also an offense regularly committed by celebrities, though most plagiarists are obscure—in fact most are students; an estimated one-third of all high-school and college students 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 are confessed or proven plagiarists, including—besides Sterne, Swift, Samuel Coleridge, and countless other literary authors—Martin Luther King Jr., Senator Joseph Biden, and Vladimir Putin. Another Vladimir—Nabokov—has been accused of plagiarism, though, I shall argue, unjustly.

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

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

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

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

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

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

The line between idea and expression is often indistinct, however. How loose must a paraphrase be to escape infringing? (That is also an issue with plagiarism.) Copying a general plot or a stock character from a novelist, or historical facts from a historian, is not copyright infringement. But copying details of plot, as Brown arguably did, and of character could well be. If, however, the plot clearly is generic, the character clearly a stock character, the historical facts already known, the arrangement of the work familiar or inevitable (for example, a historical account arranged chronologically), and any scientific or other abstract 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 copyrighted work without consulting the other author(s) of it, though he will have to split the license fee

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

There can likewise be plagiarism when non-copyrightable features of a work (whether or not the work is copyrighted) are copied without acknowledgment, so that readers of the new work are invited to think that those features are the invention or discovery of the plagiarist. 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 himself but rather had lifted from a citation in a secondary source that he does not mention, thus appropriating the discovery made by the author of the secondary work. This is the form of plagiarism of which Professor Dershowitz was accused. It is a common practice (as well as an old one— Ben Jonson was accused of it), especially in law review articles, because law professors are mad for citing and, as we'll see, originality is not highly prized in law. It is a common practice because its consequences are too trivial to arouse much ire (Dershowitz's accusers had ulterior motives) and because, unless the primary source is exceedingly obscure or downright inaccessible or the secondary source contains an error in citing the primary source that is carried over into the accused plagiarist's citation, it is almost impossible to detect. But is it really plagiarism, or an example of the fuzziness of the concept? For it's not so much a matter of copying as of falsely implying that one did the drudge work (sometimes more than drudge work) of digging up the primary sources.

Some commentators on the Viswanathan affair have pointed out that copyright law allows some unauthorized word-for-word copying of copyrighted works under the rubric of “fair use,” and they infer from this that some plagiarism, maybe even hers, might not be copyright infringement. The fair-use doctrine permits quotation of brief passages from a copyrighted work without the copyright holder's permission. The reason is that such limited copying does the author no harm except to deprive him of the trivial fee that he might extract from the copier were there no right of fair use—a fee that would probably be smaller than the costs of 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 a plagiarist. I thus disagree that there can be “fair use” when the copier is passing off the copied passage as his own. The fair-use right is an exception to copyright, which normally prohibits the unauthorized publication of copyrighted work, and why should the exception shelter plagiarists? The plagiarist does not play fair. Were there such an exception, one could write a book consisting entirely of unacknowledged passages from other writers, provided one took only a small amount from each work; in fact it would be a case of both plagiarism and copyright infringement.

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

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

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

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

The reader has to *care* about being deceived about authorial identity in order for the deception to cross the line to fraud and thus constitute plagiarism. More precisely, he has to care enough that had he known he would have acted differently. There are innumerable intellectual deceits that do little or no harm because they engender little or no reliance. They arouse not even tepid moral indignation, and so they escape the plagiarism label. Most nonlawyers probably think judges write their own opinions. Only a small minority of us do 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 the principal coauthor of the opinion, though not the sole author. Judges or their clerks sometimes insert into their opinions, without attribution, verbatim passages from lawyer briefs; and many orders, findings of fact, and other documents signed by judges are actually 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 opinions

as if written by the judge named as the author. Judges would like people to believe they write their own opinions—which is the element of deceit, for judicial acknowledgment of 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 behavior (avoid litigation, oppose a judicial nominee, vote against a judge's retention, and so forth) if 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 names is imperfect. Law clerks are hired on the clear understanding that they are writing for and under 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

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

Rembrandt may have been doing something similar when he signed his name to paintings done entirely by his assistants: certifying them as Rembrandt-quality paintings. Rembrandt's corpus of work, like Coleridge's, has been shrinking as more and more of the paintings he signed are discovered to have been painted by other artists. But it would be odd to call Rembrandt a “plagiarist,” as he was a better artist than the painters whose work he signed. What he did was fraud by modern standards because it enhanced value by means of a false pretense. But we think of plagiarism as an offense designed to make the plagiarist look better than he is, and Rembrandt was making the “plagiarized” works seem, or at least be thought of (for many of the faux Rembrandts are excellent paintings even though their value nosedived when they are discovered not to be genuine Rembrandts), better than *they* were. That is like affixing a prestigious trademark to an inferior version of the trademarked product—the 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 distinguished scientist, dis-approvingly explains, “Regardless of the actual involvement of the laboratory director in the intellectual and physical work of a research project, he or she has unchallenged intellectual-property rights in the project, much as a lord had unchallenged property rights in the product of serfs or peasants occupying dependent lands.” It is the modern equivalent of Rubens's workshop (see Part VI).

For “authored” in the cases I have been discussing we perhaps should substitute “authorized,” as in the King James Version of the Bible, which members of the Church of England call “The Authorized Version.” James I did not write the King James Version. Or rather than saying that the solicitor general is not claiming authorship when he signs the government's brief, we might say with Michel Foucault and Roland Barthes that “writer” and “author” are not synonyms, that you can be the author of a work though you were not the writer. Moses did not write the five books of Moses (one of which describes his death and burial), King David did not write the psalms, and Saint Matthew did not write the Gospel According to Matthew. In ancient times it was a common convention to assign authorship not 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't) work when, as was probably the case with Moses (himself possibly a fictitious rather than a real person), King David, and Saint Matthew, the celebrity is unacquainted with the work. It shouldn't work for General Omar Bradley's autobiography, almost all of which was ghostwritten after his death. In all these cases, many readers are unaware of the embarrassing fact that the nominal author had nothing (or virtually nothing, in Bradley's case) to do with the work.

Recall “book packaging,” peripherally involved in the Viswanathan scandal? As explained 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 the packager assures reasonable uniformity among the books in each series so that the reader of the first book does not feel a jarring discontinuity when he picks up the second and subsequent volumes in the series. The pretense of a single author operates like a trademark, which often functions as a warrant of uniform quality rather than an identifier of a unique source. Coca-Cola is produced in many different bottling plants, but the trademark warrants that the product is nevertheless uniform.

Reliance and hence fraud and hence plagiarism are matters of expectation. In European countries it remains common and unexceptionable for professors to publish under their own name books and articles written by their assistants, and since that is well known in academic circles there is no fraud. It is not the practice in the United States, however, so that when Julius Kirshner, a historian at the University of Chicago, was discovered to have published under his own name a book review written by a graduate student, Kirshner was censured for plagiarism. The censure took the curious form of barring him from teaching graduate students 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 of academic fraud. I'm still teaching here.”

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

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

Kirshner's academic competitors may have been harmed, though surely trivially, if his plagiarism enabled him to publish more than they. In other cases, however, competitive harm is a significant consequence of plagiarism. The plagiarist by plagiarizing improves his work 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 law 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 “fraudulent copying,” which clearly distinguishes it from copyright infringement. But even this definition 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 paper mill commits an academic fraud, and if he bought the paper from an online service, which is the norm nowadays, he “copied” the paper in a literal sense. But the copying is not any sort of wrong to the author of the paper, and so “plagiarism” doesn't seem quite right. It might be better to confine the word to “nonconsensual fraudulent copying,” while emphasizing that “plagiarism” does not exhaust intellectual fraud.

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

Plagiarism could probably be attacked in a civil lawsuit as fraud, by analogy to the tort of false advertising, if it diverted sales from competing publishers, though I am not aware of such a suit. In addition, the European doctrine of “moral rights,” now gaining a foothold in U.S. law (mainly in relation to visual art), entitles a writer or other artist to be credited for his original work, and this “attribution right,” as it is called, would give him a legal claim against a plagiarist. (Clumsy paraphrasing, which defaced the original, would violate another 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 financial benefit. Authors who grant free “Creative Commons” copyright licenses for nonprofit use often condition the grant on the licensees' acknowledging their licensors' authorship.

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

for the Democratic nomination for president in 1988 after it was revealed that he had lifted the opening paragraph of one of his campaign speeches from a campaign speech by Neil Kinnock, the leader of the British Labour Party. The reaction to Biden's conduct may seem odd, since there is no presumption that politicians write their own speeches any more than there is a presumption that stand-up comedians write their own jokes. But although a ghostwriter is not a victim of the plagiarist (if that is what one wants to call the nominating author) but his collaborator, Kinnock was not a collaborator of Biden's; he was not complicit in the copying. Yet not being a competitor of Biden either, he was not hurt by the plagiarism—on the contrary, it was a tribute to his eloquence that an American politician should have copied him and thus a true example of the adage that imitation is the sincerest form of 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 had introduced the plagiarized passage by saying he'd just thought of it on the way to give the speech, and because the paragraph he copied from Kinnock's speech was autobiographical, so that he seemed to be appropriating Kinnock's life rather than just his words. Another factor was that other charges of plagiarism were quickly leveled against Biden.

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

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

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

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

VIEWING PLAGIARISM as a form of fraud and hence as dependent on inducing reliance by readers of one audience for the plagiarizing work can help us distinguish plagiaristic from nonplagiaristic copying. It can also help us grade the severity of the different forms of plagiarism, and thus design an appropriately graduated scale of punishments, though the amount and character of the reliance induced by the plagiarist are not the only things relevant to judging the gravity of his offense. His state of mind is also important, and 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 copyright without reserving a right to republish the copyrighted work, you are guilty of copyright 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 Structure 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, whose great novel *Tristram Shandy* copies extensively and without acknowledgment from other authors, also sent letters to his mistress that he had copied years earlier from letters he had written to his wife. That was gross behavior, but was it plagiarism? No harm was done, and there may have been value created: Sterne may have thought that the letters to his wife contained his most heart-felt and eloquent declarations of love; that he couldn't improve on them and if nevertheless he composed new letters to his mistress they would be inferior and thus fail to convey his ardor. Of course, wife and mistress would have been furious had they found out. They would have thought Sterne lazy, exploitive, and insincere. Yet it would not have been the copying that bothered them but what the copying revealed about his character. 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 hurts anybody, except possibly yourself by undermining the market for your plagiarized work. Self-copying becomes fraudulent and therefore plagiaristic only when the author represents his latest work to be newly composed when in fact it is a copy of an earlier work of his that readers may have read. (Suppose the only change he has made is in the title—or in the author's name.) It is like a shop that deliberately bills a customer twice for the same item. Yet readers should realize that authors repeat themselves; it is only wholesale and literary repetition that should disappoint.

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

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

Yet there were victims of the deception, which was therefore (if it really occurred, which as I said, has not been proved) fraudulent. They were neither the readers nor the writers of her books. They were other mystery writers, who lost sales to readers attracted to the Truman books by the celebrity of the supposed author. The parallel is to textbooks whose named authors did not write them, and to students who copy the papers of other students with their consent. The harm in the first case is to the authors of competing textbooks, and in the second case to other students in the class. But just as in the rumored case of Margaret 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 call it plagiarism. But it is literary deceit, has consequences similar to those of plagiarism, and particularly in journalism and science, is frequently conjoined with plagiarism—the case of Jayson Blair, the young *New York Times* reporter whose exposure as a fabricator-cum-plagiarist rocked the newspaper and caused two of its senior executives, including the executive editor, Howell Raines, to be fired. The conjunction is not surprising. A journalist who wants to spice up his articles can do so by making up colorful facts as well as by copying from an abler writer, and a scientist can try to steal a march on his competitors by 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 infringement 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 is, "renting" a car without paying any rent. It reduces the income of the owner of the copied work. Nothing like that is involved when a student plagiarizes, or when the plagiarized work 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 the plagiarist may still be harmed in the last case, as also in the student case. And notice that the talented writer who plagiarizes, whether he is a professional writer or a student, may make his work much better, and this will make the harm to his nonplagiarizing competitors, the other writers or students, even greater.

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

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

WITH PLAGIARISM UNDERSTOOD as fraudulent copying and fraud tied to reliance and hence to high expectations, it becomes easy to understand the extraordinary historical and cultural variability of the concept, and indeed its variability even within a specific historical and cultural milieu. In modern America, as we know, publishing a judicial opinion under the name of the judge who did not write it is not plagiarism, but a professor's publishing an 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 of originality. But this is inexact. The ancients had a concept of plagiarism, though it was not identical to ours. The Latin word *plagiarius*, from which the English *plagiarist* derives, was first used (in a surviving document—the actual first use may have been much earlier) in something like its modern sense by the Roman poet Martial in the first century a.d. *plagiarius* was someone who either stole someone else's slave or enslaved a free person. In his epigram number 52, Martial applied the term metaphorically to another poet, whom Martial accused of having claimed authorship of verses that Martial had written. It is unclear, however, whether he meant that the other poet had passed off Martial's verses as his own or had claimed *sole* ownership (the verses were his slaves), precluding Martial's claiming authorship. Much clearer is epigram number 53, which applies not the word *plagiarius* but the word for thief (*fur*) to someone we would call a plagiarist. The Roman concept of plagiarism or literary theft seems, however, to have been limited to word-for-word copying with no 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 meaning 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” (the word became common in the seventeenth century) date from Shakespeare's time. Early in his career he himself may have been accused of plagiarism by Robert Greene, though if so (a long unresolved issue) the accusation did not stick. Yet was not Shakespeare a plagiarist by modern standards? Thousands of lines in his plays are verbatim copies or close paraphrases from various sources, along with titles and plot details, all without acknowledgment. Most members of his audiences would not have been aware of his appropriations from other writers.

A splendid example of Shakespearean “plagiarism” is the description in *Antony and Cleopatra* of Cleopatra on her barge. This is a blank-verse paraphrase, without acknowledgment, of the description in Sir Thomas North's translation of Plutarch's life of Marc Antony. Here is North:

She disdained to set forward otherwise, but to take her barge in the river of Cydnus; the poepe 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, violls, 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 goddess Venus, commonly drawn in picture: and hard by her, on either hand of her, pretie faire boyes appparelled 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 not plagiarism is that in Shakespeare's time, unlike ours, creativity was understood to be improvement rather than originality—in other words, creative imitation. Milton said that “borrowing” from another author, only “if it be not bettered by the borrower, among good authors is accounted Plagiare.” Harold Ogden White refers to “the classical doctrine that true originality is achieved through an imitation which selects its models carefully, reinterprets them personally, and endeavors to surpass them gloriously.” The creative imitator sounds variations on an existing theme that he did not attempt to disguise; anyone who knew his Plutarch (though this was not everyone) would have recognized it in the barge scene in *Antony and Cleopatra*.

It is not true, however, that creative imitation is no longer an approved form of creativity 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, copied extensively from Robert Burton's *Anatomy of Melancholy* without acknowledgment. Few of Sterne's readers would have recognized the “theft,” yet *Tristram Shandy* is a novel of great distinction.

One of the supreme works of twentieth-century literature, T. S. Eliot's long poem “The Waste Land,” is a tissue of quotations (without quotation marks) from earlier literature, only imperfectly acknowledged in the notes that Eliot appended to the poem—and among his “borrowings” (he would say “thefts”) is the opening of the barge scene from Plutarch-North 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

Such appropriations (allusions, as far as the learned reader are concerned—and allusion is a technique of creative imitation) are common in modern poetry. As Eliot explained in an essay on the Jacobean playwright Philip Massinger that describes Eliot's own practice in “The 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 of classical and metaphysical poets, whom he acknowledged as influences, thus throwing the reader off the scent.

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

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

movie *Clueless*, or the play *Pygmalion* (itself derived, though very loosely, from Ovid's tale of Pygmalion and Galatea) as the musical *My Fair Lady*, or, similarly, Voltaire's *Candide* as Leonard Bernstein's musical *Candide*, or *Romeo and Juliet* as *West Side Story*—without a sense that plagiarism is being committed, even though much of the audience for the new work would be ignorant of the copying. However, if the original is still in copyright, the derivative work, 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 the copying “slavish” rather than creative. These are regarded as cases of allusion, even if most of the audience is unaware of the source, rather than of plagiarism.

To the extent that an imitator or copier produces something better than the original (Shakespeare in his barge scene) or interestingly different from it (Eliot in his barge scene, or Manet in his redoing of Titian, among many other examples), the imitation is producing value. And when, as is often the case, the person whose work is copied is long dead and the work out of copyright, the copying does not harm him. There is rarely any fraud, moreover, for either the readership or other audience is not fooled by the failure of explicit acknowledgment or it doesn't care about provenance. Koons's sculpture may, as the court said in the suit by the photographer for copyright infringement (*Rogers v. Koons*), have been a species of “piracy” in the sense of a copyright infringement (though probably not, for copying for purposes of parody is generally regarded as fair use), but it was not plagiarism. The 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 rather than an expression of Koons's own taste. And while probably only a handful of the people who saw the movie *Clueless* realized that it was a takeoff on a novel by Jane Austen, the 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 his publicly acknowledging his sources. His plays were not published until after his death, so any acknowledgment in the published texts of copying would not have reached his audiences. And it would have been awkward for one of the actors to have come on stage at the beginning of the play to read a list of the lines that the playwright had copied from other writers. Consider the following “plagiarism” of Dryden by Pope. Dryden: “For truth has such a face / and such a mien / As to be loved needs only to be seen.” Pope: “Vice is a monster of so frightful mien / As to be hated needs but to be seen.” Should Pope have dropped a footnote acknowledging his close paraphrase of Dryden's couplet? Or listed all such paraphrases in an introduction? That would have been as unnecessary as it would have been awkward, for what was the harm?

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

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