

# **Plagiarism in Colleges in USA**

## **legal aspects of plagiarism, academic policy**

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### Keywords

academic, college, copy, deceit, degree, diploma, fraud, fraudulent, intent, integrity, law, legal, misconduct, misrepresentation, paraphrase, paraphrasing, plagerism, plagiarism, plagiarist, plagiarise, plagiarize, plagiary, rescind, revoke, school, university

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## Introduction

Plagiarism by students is a serious problem in colleges in the USA. I wrote the original version of this essay in January 2000 and I was surprised to find that it quickly became the most popular essay at my professional website, as a result of links by many hundreds of professors, college librarians, and university administrators. This essay discusses plagiarism from a legal perspective, as well as commenting on academic policies about plagiarism.

The subject of plagiarism in colleges is rarely discussed in legal journals and law textbooks. For example, the excellent book by William A Kaplin and Barbara Lee, *THE LAW OF HIGHER EDUCATION*, third edition (1995), despite its length of 976 pages, mentions plagiarism in neither the index nor table of contents. Some colleges in the USA have posted a webpage about plagiarism, and I mention a few of these webpages at <http://www.rbs2.com/plaglink.htm>.

In May-June 2007 and October-November 2009, I did more legal research and wrote major revisions of this essay. Because I was then a consultant to plaintiff's attorney in a plagiarism case, I could *not* post these revisions at my website, because that could provide free legal research and analysis to the opposition. The most important parts of the new content (since my last HTML version of April 2001) include:

- detailed discussion of analogous parts of copyright law, beginning at page 13,
  - discussion of the U.S. Supreme Court decision in *Dastar*, in the section that begins at page 25 — critically important because *Dastar* ended litigation for plagiarism under a “false designation of origin” theory,
- and
- more judicial opinions from cases involving plagiarists in colleges, in the section that begins on page 39.

disclaimer

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm>.

Note that the definition of plagiarism, and particularly the exclusion of facts and ideas from plagiarism, in this essay are my personal views of what the rules should be. The rules that apply to a student are given in the regulations of the student's college, or in instructions from the student's professor.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

## 1. Plagiarism

What is plagiarism? In minor cases, it can be the quotation of a sentence or two, without quotation marks and without a citation (e.g., footnote) to the true author. In the most serious cases, a significant fraction of the entire work was written by someone else: the plagiarist removed the true author(s) names(s) and substituted the plagiarist's name, perhaps did some re-formatting of the text, then submitted the work for credit in a class (e.g., term paper or essay), as part of the requirements for a degree (e.g., thesis or dissertation), or as part of a published article or book.

### *Why plagiarism is wrong.*

Before beginning this detailed discussion of the legal aspects of plagiarism, it is worthwhile to take a moment to reflect on *why* plagiarism is wrong.

1. Reputations in academia are made on the basis of creating new knowledge: discoveries of new facts, new ways of looking at previously known facts, original analysis of old ideas, etc. A plagiarist receives credit for expression or analysis that was improperly taken from someone else. In this view, the plagiarist commits fraud, by claiming the work of other people as the plagiarist's own work.

Respect for these academic values is also reflected in licensing for professions (particularly law and medicine), employment on the basis of academic credentials, and esteem from one's professional colleagues.

2. Laws in civilized societies regard expression as property of its author. This is not only the law of the USA, but also the law of more than 130 different nations that have ratified the 1886 Berne Convention for the Protection of Literary and Artistic Works. Plagiarism — either by verbatim copying or paraphrasing of many paragraphs — can be infringement of a copyright, a kind of tort.
3. A fundamental goal of education is to produce students who can evaluate ideas — both analysis and synthesis — and who can produce significant original thoughts. Plagiarism is simply repeating words or thoughts of other people, without adding anything new. Therefore, a student who submits plagiarized text — in addition to the wrongful conduct — does not demonstrate the level of understanding and skill that an educated person is reasonably expected to have.
4. When a honest, diligent student writes an original paper and gets a lower grade than a plagiarist, the instructor effectively punishes the honest student and rewards the plagiarist. Thus plagiarism is an insidious process that affects the integrity of grades and academic degrees.

5. Furthermore, a professor who repeatedly detects plagiarism by his/her students can become cynical, and stop considering students as sincerely interested in learning to do scholarly research. Instead, the cynical professor sees students as willing to plagiarize in order to fulfill assignments. In this way, student-faculty relationships can become adversarial, as faculty spend more of their time detecting plagiarism and less of their time mentoring students.
6. Plagiarism is a violation of the Judaeo-Christian Commandment, “Thou shalt not steal.”<sup>1</sup> In modern language, stealing refers to theft of tangible property, which is distinct from theft of intellectual property (e.g., expression, ideas). However, the words in a terse moral code should be interpreted broadly, in the same way that “freedom of speech” in the First Amendment also includes the freedoms to write, to publish, and to read, not just speech.

In summary, there are three distinct wrongs in plagiarism:

1. the plagiarist fraudulently represents plagiarized material as the plagiarist’s own work, which invites the reader to give credit, reward, or some benefit to the plagiarist. In this way, the plagiarist is unjustly enriched.
2. the plagiarist denies the true author credit for his/her good work.
3. In addition to the above two wrongs, *if* the plagiarized text is copyrighted (i.e., not in the public domain), then the plagiarist may also have infringed the copyright on the copied text, because the plagiarist does not have the legal right to copy (or paraphrase) large amounts of some other author’s text.

In some academic discussions by people without an understanding of law, plagiarism is commonly — but erroneously — called “stealing words”. *Stealing* properly refers only to taking tangible property, thereby depriving the rightful owner the use of that tangible property. For example, a criminal who steals a car has possession of the car, and the rightful owner is deprived of the use of the car. Unauthorized copying of words is an infringement of intellectual property, *not* stealing. In copying text, the rightful owner of the copyright in the expression contained in the text continues to have use of the text. Unauthorized copying is a misappropriation of the original author’s work.

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<sup>1</sup> Harold C. Streibich, “The Moral Right of Ownership to Intellectual Property: Part I — From the Beginning to the Age of Printing,” 6 *Memphis State University Law Review* 1, 10-15 (Fall 1975).

### my definition of plagiarism

Plagiarism is failure to attribute a quotation or a close paraphrase (“close paraphrase” means either *substantial similarity* if the plagiarist is known to have had access to the plagiarized work, or *striking similarity*<sup>2</sup> in other situations) to the true author. Every quotation must have the indicia<sup>3</sup> of a quotation. Every paraphrase must have a citation to the source that was paraphrased. Intent of the plagiarist is irrelevant.

However, I emphasize that the definition of plagiarism that applies to an accused student is contained in the rules of that student’s college or university.

### indicia of a quotation

When using another person’s words, to avoid plagiarism one must *always* do **both** of the following:

1. provide a citation to the original author, either in the text or in a footnote, **and**
2. either enclose the quoted words (a) inside quotation marks or (b) put the quoted words in a block of indented, single-spaced text.

I define these two things as indicia of a quotation, for ease of reference in this essay. The act of quoting material without including the indicia of a quotation is a common form of plagiarism.

### intent

I believe that the intent of a plagiarist is irrelevant. The act of quoting material without including the indicia of a quotation should be sufficient to convict someone of plagiarism. That copyright infringement occurs without proof of intent by the infringer (see page 19, below) suggests that intent should also be irrelevant to determination of plagiarism. Several authors of law review articles agree that intent is irrelevant in determining whether plagiarism occurred.<sup>4</sup> It is no defense for the plagiarist to say either “I forgot.” or “It is only a rough draft.”

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<sup>2</sup> *Similarity* is defined below, at page 17.

<sup>3</sup> Defined below, at page 7.

<sup>4</sup> See, e.g., Robert D. Bills, “Plagiarism in Law School: Close Resemblance of the Worst Kind?,” 31 SANTA CLARA LAW REVIEW 103, 112, 114, 123, 138 (Winter 1990); Terri LeClercq, “Failure to Teach: Due Process and Law School Plagiarism,” 49 JOURNAL OF LEGAL EDUCATION 236, 246 (June 1999); Kevin J. Worthen, “Discipline: An Academic Dean’s Perspective on Dealing With Plagiarism,” 2004 BRIGHAM YOUNG UNIVERSITY EDUCATION AND LAW JOURNAL 441, 443 (2004).

If intent is a necessary element of plagiarism, then intent must be included in the definition of plagiarism. When a plagiarist in a college sues the college, the judge uses the definition of plagiarism that is found in the rules of the college.<sup>5</sup> A U.S. Court of Appeals in one case used the definition of plagiarism in the MODERN LANGUAGE ASSOCIATION HANDBOOK as authority for the university's determination that "one can plagiarize through negligence or recklessness without intent to deceive."<sup>6</sup>

Following the old maxim that "ignorance of the law is no excuse", we should *not* accept a plagiarist's excuse: "I did not know it was plagiarism." In my opinion, anyone who belongs in undergraduate college should understand *both* (1) how to quote material (i.e., the indicia of a quotation) *and* (2) how to write a citation. See page 76, below.

As for excuses that the plagiarism was accidental, one can adopt writing styles and methods that avoid such accidents. For example,

- when I am making a verbatim quotation of text, I enter the citation first, then enter either a pair of quotation marks or format a block of indented, single-spaced text. Last, I do a cut-and-paste of the quoted text or type the quoted text from a paper copy. This procedure avoids having quotations without citations, i.e., avoids plagiarism.<sup>7</sup>
- when I am composing a rough draft at the keyboard, and I do not want to interrupt my train of thought with adding footnotes to my sentences, I often type "CITE\_\_\_\_" into my manuscript to remind me to add a citation later. If the citation goes with a paraphrase, I typically add the author's name and page number to my note to myself in the text. I never use two or more consecutive underline characters in my finished writing, so it is convenient during subsequent revisions to use the search command in a wordprocessor to find the "\_" and then add a footnote containing the proper citation.

I think it is reckless to make verbatim quotations of text and intend to add a citation later.

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<sup>5</sup> *Chandamuri v. Georgetown University*, 274 F.Supp.2d 71, 79 (D.D.C. 2003) ("The rules governing the proceedings to adjudicate academic dishonesty cases are clearly set forth in the [Georgetown University's] Honor Code, as is the Honor Council's definition of plagiarism. The Honor Code prohibits plagiarism in any of its forms, whether it is intentional or unintentional,..."); *Viriyapanthu v. Regents of University of California*, Not Reported in Cal.Rptr.3d, 2003 WL 22120968, at \*3, n. 2 (Cal.App. 2003) ("Under this section of the [UCLA] Student Conduct Code, 'Plagiarism includes, but is not limited to, the use of another's words ... either with the intent to deceive or by the omission of the true source, ....' "Dean McMahan explained intent is not a necessary element of plagiarism under the Student Conduct Code.").

<sup>6</sup> *Newman v. Burgin*, 930 F.2d 955, 962 (1st Cir. 1991).

<sup>7</sup> If I am interrupted in the middle of this process and later do a sloppy job of proofreading, I will have a citation without a quotation, which is at least *not* plagiarism.



Consider a hypothetical case in which the plagiarist had no intent. In this hypothetical case, the plagiarist copies text from a source without the indicia of a quotation, which establishes plagiarism. But then this hypothetical plagiarist leaves the document on his wordprocessor, and never shows the plagiarized document to anyone. Without submitting the plagiarized document for some kind of benefit, reward, or credit, there is no intent to deceive. But recognize that this hypothetical case is one in which will never come to the attention of authorities in a university, because the existence of the plagiarized document is a secret known only to the plagiarist. In this way, this hypothetical case emphasizes that intent is automatically demonstrated by the plagiarist submitting the plagiarized document for some kind of benefit, reward, or credit. Because intent is automatically demonstrated in plagiarism cases, it is silly to argue over intent.

ideas too?

Conventional definitions of plagiarism in the USA include copying ideas without providing a citation to the original source. I argue below, beginning at page 82, that such deliberate copying of ideas — but expressing those ideas in original words — is misconduct that should be treated separately from plagiarism. Perhaps the authorities that include ideas in their definition of plagiarism really intended to say that a close paraphrase of another author's words is plagiarism.

paraphrasing without a citation is plagiarism

Suppose one reads a book by Smith and encounters the short sentence:

If the solution turns pink, it is worthless, and should be discarded.

I believe it is plagiarism to paraphrase this sentence as:

When the liquid becomes light red, it is spoiled, and should be poured down the sink.

Note that most of the words have been changed, yet the sentence — in a very real way — has been copied. Below, beginning at page 15, it is shown that paraphrasing, with either substantial similarity or striking similarity, can be copyright infringement. That is why I believe that such paraphrasing without a citation to the original source is also plagiarism. The proper way to avoid such plagiarism is to cite the source in the text, or in a footnote, as in:

Smith [citation/footnote number] has reported that when the liquid becomes light red, it is spoiled, and should be poured down the sink.

No quotation marks are needed, because these are not Smith's exact words, but only a paraphrase. But a citation to Smith is still required.

Note that the short sentence by Smith is just a terse, contrived example for this essay, not an actual instance from plagiarized text. In most cases of this type of plagiarism, many sentences — probably whole paragraphs — will have been paraphrased.

## fine points of paraphrasing

One might wish to concisely summarize a long passage, because a direct quotation would be too long. Hence, one paraphrases the original author. In my view, one can properly write one paragraph that summarizes a book, published paper, opinion of a court, etc. using a paraphrase of the publication, with just one citation to that source at either the beginning or end of one's paragraph. The context makes it clear to the reader that one is describing someone else's publication. One should be careful not to include one's original thought(s) in a paragraph that is summarizing another person's thoughts, as such mixing could mislead the reader about the scope of one's work.

Note that the amount of citations is a matter of style. Some scholarly journals, particularly law reviews, sometimes have a footnote for each consecutive sentence, maybe even two footnotes attached at different places in one sentence. In such writing, a printed page can easily contain more space devoted to fine-print footnotes than to text. If most of these footnotes are *Ibid.*, the footnotes seem excessive to me. If these copious footnotes are to different sources, the page can be difficult to read, as full understanding may require the reader to consider all of the citations. Such copious footnotes are sometimes seen as scholarship run amok. The appropriate style varies among different intellectual disciplines: professors of law tend to use more footnotes than either physicists or electrical engineers.

In my view, a proper paraphrase can even use a few isolated words from the original source without including quotation marks. When concisely summarizing a long passage, one also wants to summarize accurately, so using the identical — but isolated — words may be appropriate. In the above example, one might use Smith's word "pink" without quotation marks in the paraphrase. However, it is always essential to *both* (1) write text that makes clear that one is summarizing another's work *and* (2) cite the original source somewhere within the paragraph.

On the other hand, a string of several consecutive words copied verbatim from a source generally requires quotation marks. In making such judgments, one might consider the originality of the words. A common phrase (e.g., "obtained a writ of habeas corpus" in law, or "three degrees of freedom" in physics) is less deserving of quotation marks than genuinely original expression, since there may be few conventional alternatives for accurately expressing the same idea or fact.

These fine points may be dangerous for students, who would be well advised to use too many direct quotations, rather than paraphrasing. Again, I say that the actual rules that apply to a student are given in the regulations of the student's college, or in instructions from the student's professor, but not my personal opinions in this essay.

For more on the art of paraphrasing, with examples of acceptable and unacceptable paraphrases, use a search engine with a query:

paraphrase paraphrasing plagiarism  
to find numerous tutorials by professors in English departments.

### ghostwriting

Plagiarism and ghostwriting are related kinds of conduct, in which the true author's name is concealed. The distinction between plagiarism and ghostwriting is:

- (1) A plagiarist copies text without the permission of the true author.
- (2) A ghostwriter *knowingly* and *willingly* produces text to appear as someone else's speech or writing.

A plagiarist does *not* pay the true author for his/her services, while a ghostwriter is nearly always paid for his/her work.

A student who submits a ghostwritten term paper (i.e., from a commercial term-paper mill) should be treated similarly to a student who submits an allegedly "original" term paper that is mostly or substantially plagiarized from one or more sources. Indeed, the conventional rules in academia make no distinction between plagiarization and ghostwriting — either way, the name of the true author is fraudulently concealed by the student, and the student pretends to have written text that he/she did *not* write. If there is to be a distinction, ghostwriting is worse, because 100% of the text is from an anonymous author, while routine plagiarization involves *some* original writing and selection of sources by the student who submitted the work. Furthermore, the act of *purchasing* a ghostwritten term paper, thesis, etc. strongly demonstrates *intent* by a student to commit fraud on the professor or faculty who receives the ghostwritten document.

## 2. Sources for plagiarized text

Traditionally, a student either (1) copied paragraphs from various scholarly journals or books in the library, or (2) removed an old term paper from the files in his fraternity and copied some, or all, of it.

In the late 1960s, commercial services began to sell term papers to students, sometimes under the euphemistic name of "academic research services". These services are particularly repugnant, as these businessmen are making a profit from the fraudulent acts of students, as well as damaging the integrity of grades and degrees from schools and colleges. In some states, sale of term papers to students is unlawful (see below, at page 68), and a few companies have been prosecuted (see below, at page 69).

Since the mid-1990s, students can simply download material from the Internet, without the bother of retyping the text. While the Internet is a great resource for plagiarists, it can also be a great resource for professors who are suspicious and want to take a few minutes with search engines, in an attempt to find the true source. Further, some commercial anti-plagiarism services have begun to prepare databases of essays, term papers, etc. for comparison with a student's work submitted in a class, in a large-scale attempt to find plagiarism by students. Furthermore, the existence of free material on the Internet is likely to diminish, if not kill, the business of selling term papers from stock. However, there may continue to be a business for custom-prepared (i.e., ghostwritten) papers.

#### incidence of plagiarism

How common is plagiarization by students? No one really knows, because most plagiarization is either undetected or unreported.

In 1984, a history professor at Cornell University<sup>8</sup> surveyed 425 college students and found that 25% believed that plagiarism was acceptable, and an additional 38% knew plagiarism was wrong but would plagiarize nonetheless. The sum of these two groups shows that 63% of college students will admit to engaging in plagiarism, a result that is truly astounding.<sup>9</sup>

Julie Ryan, an instructor at George Washington University, "taught an introductory information security course" in Fall 1997. She wrote:

I discovered that seven of 42 students plagiarized most or all of their papers, and four others turned in papers with footnotes that could charitably be called substandard.

In the Spring 1998 semester I discovered that the same percentage of students — one out of every six — plagiarized their entire papers. Also, as in the previous semester, several students' papers had inadequate footnotes.

Julie J.C.H. Ryan, "Student Plagiarism in an Online World," American Society for Engineering Education Prism (Dec 1998). [http://www.prism-magazine.org/december/html/student\\_plagiarism\\_in\\_an\\_onlin.htm](http://www.prism-magazine.org/december/html/student_plagiarism_in_an_onlin.htm)

The 17 % of term papers that were plagiarized only represents the plagiarists that she caught by using the AltaVista search engine on the Internet, a method that will not find students who plagiarized from books, scholarly journals, old term papers by other students, material sold by term paper mills, etc. So the true incidence of plagiarism among students is higher than one in six. Still, one in six is unacceptably high and represents a serious erosion of quality and integrity in colleges in the USA.

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<sup>8</sup> Hawley, "The Thieves of Academe: Plagiarism in the University System," 32 IMPROVING COLLEGE UNIVERSITY TEACHING 35, 36-38 (1984).

<sup>9</sup> Robert D. Bills, "Plagiarism in Law School: Close Resemblance of the Worst Kind?," 31 SANTA CLARA LAW REVIEW 103, 104-105 (Winter 1990)

I urge that faculty make an effort to detect and to punish plagiarists, instead of trying to precisely determine the frequency of plagiarism.

Readers who are not interested in legal theories of plagiarism should skip to page 39, to see how judges have uniformly decided against plagiarists in colleges.

### 3. The Law of Plagiarism

Plagiarism is an academic offense or an ethical breach, *not* a legal issue. However, the act of plagiarism can also be addressed in a court of law as a tort, usually as copyright infringement, as discussed in detail below.

Judges, legislators, and copyright law scholars have worked for more than 150 years to build functional rules for copyright infringement litigation. Members of an academic committee who are writing or revising a plagiarism policy for use at one college should at least consider these legal rules as a basis for academic policy.

#### A. copyright law

Any work created in the USA after 1 Mar 1989 is automatically protected by copyright, even if there is no copyright notice attached to the work.<sup>10</sup> The owner of the copyright (i.e., in most cases, the true author) could sue the plagiarist in federal court for violation of the copyright, after obtaining a federally registered copyright.<sup>11</sup> See my separate essay on copyright law at <http://www.rbs2.com/copyr.htm>.

It is important to note that the addition of original material by the plagiarist in no way excuses the act of plagiarism. The focus is on what the plagiarist did wrong, not what the plagiarist did right.<sup>12</sup>

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<sup>10</sup> 17 U.S.C. §§ 102(a), 401, and 405.

<sup>11</sup> 17 U.S.C § 411(a).

<sup>12</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (“... no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”), *cert. den.*, 298 U.S. 669 (1936). Quoted with approval in *Williams v. Crichton*, 84 F.3d 581, 588 (2nd Cir. 1996) (“We also must recognize that *dissimilarity* between some aspects of the works will not automatically relieve the infringer of liability, for “no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated.” *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. [1992]), *cert. denied*, 506 U.S. 934 [...] (1992).” *Rogers v. Koons* cites *Sheldon*.)

## plagiarism distinguished from copyright infringement

Many judicial opinions have equated plagiarism with copyright infringement.<sup>13</sup> This identity is *incorrect* for at least the following three reasons.<sup>14</sup>

1. In copyright law, the doctrine of *fair use* allows an author to copy small amounts of text (sentences and even a whole paragraph) without the need for permission from the copyright owner.<sup>15</sup> Fair use is a defense to copyright infringement. However, in plagiarism it is always wrong to copy text without the indicia of a quotation. When small amounts of text are copied without the indicia of a quotation, the wrong is *not* copyright infringement, the wrong is failure to attribute the words to the true author. However, fair use will *not* protect the plagiarist who copies many pages from one work into the plagiarist's alleged work.
2. In copyright law, one can not infringe text that is in the public domain (e.g., copyright expired, author disclaimed copyright, works of the U.S. Government, etc.). However, in plagiarism it is always wrong to copy text — and wrong to copy *noncopyrighted* text — without the indicia of a quotation. When noncopyrighted text is copied without the indicia of a quotation, the wrong is *not* copyright infringement, the wrong is failure to attribute the words to the true author.

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<sup>13</sup> See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (copyright “cannot be limited literally to the text, else a plagiarist would escape by immaterial variations”); *Wilkie v. Santly Bros.*, 91 F.2d 978, 979 (2d Cir. 1937) (“In *Arnstein v. Marks Music Corporation*, 82 F.(2d) 275 [ , 275] (C.C.A. 2), this court pointed out the need for showing plagiarism in order to establish infringement of a copyright.”); *Ricker v. General Elec. Co.*, 162 F.2d 141, 142 (2d Cir. 1947) (“All her copyright gives her is the right to prevent plagiarism.”); *U.S. ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453, 1464 (4th Cir. 1997) (“Berge's charge of plagiarism and lack of attribution can only amount to, indeed, are tantamount to, a claim of copyright infringement, ....”).

<sup>14</sup> See, e.g., Debbie Papay-Carder, Comment, “Plagiarism in Legal Scholarship,” 15 UNIV. TOLEDO LAW REVIEW 233, 240-241 (Fall 1983); Ralph D. Mawdsley, “Plagiarism Problems in Higher Education,” 13 JOURNAL OF COLLEGE AND UNIVERSITY LAW 65, 87 (Summer 1986); Robert D. Bills, “Plagiarism in Law School: Close Resemblance of the Worst Kind?,” 31 SANTA CLARA LAW REVIEW 103, 108-109 (Winter 1990); Laurie Stearns, Comment, “Copy Wrong: Plagiarism, Process, Property, and the Law,” 80 CALIFORNIA LAW REVIEW 513, 524, 526 (March 1992).

<sup>15</sup> Ronald B. Standler, Fair Use: No Excuse for Wholesale Copyright Infringement in the USA, <http://www.rbs2.com/unfair.pdf> (2009).

3. Copyright law protects neither facts<sup>16</sup> nor ideas<sup>17</sup> in the copyrighted work. Copyright only protects the *expression* of ideas. While the definitions of plagiarism used by some universities and by some professional societies include copying ideas in their definition of plagiarism, I regard the copying of ideas as a separate kind of misconduct, as explained on page 82.

The above three examples show that plagiarism is sometimes *not* copyright infringement. It is common to have copyright infringement without plagiarization, for example, when someone makes or distributes copies of an entire article, an entire chapter in a book, or an entire webpage — including on each copy the original author’s name and copyright notice. The inclusion of the original author’s name and bibliographic data makes the copying not plagiarization, although such copying is copyright infringement.

Despite the fact that plagiarism is *not* identical to copyright infringement, many issues that are well-settled in copyright law (especially paraphrasing and intent) are useful in considering plagiarism.

#### paraphrasing is copyright infringement

Paraphrases — trivial changes in copied text — are considered equivalent to verbatim copying by law in the USA:

- *West Pub. Co. v. Edward Thompson Co.*, 169 F. 833, 852 (C.C.E.D.N.Y. 1909) (“A direct inference from the right itself is the [copyright] liability incurred where literal copying is avoided, and mere paraphrasing or avoidance of the appearance of copying is obtained, while an appropriation of the subject-matter is had. In the case of *Lawrence v. Dana*, 4 Cliff. 1, [15] Fed.Cas. [26], No. 8,136 [D.Mass. 1869], such paraphrasing was held within the provisions of the statute, and actionable the same as copying.”), *decree modified*, 176 F. 833, 838 (2dCir. 1910) (“Obviously it would not be fair for any publisher of reports of the same cases or of digests of them to copy lists of cases or to copy or paraphrase syllabi from the complainant's publications whether by so doing he merely saved mechanical labor or literary work.”),
- *Nutt v. National Inst. Inc. for the Imp. of Memory*, 31 F.2d 236, 237 (2dCir. 1929) (“The infringement need not be a complete or exact copy. Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two.”)

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<sup>16</sup> See, e.g., Standler, Copyright Protection for Nonfiction or Compilations of Facts in the USA, 87 pp., <http://www.rbs2.com/cfact.pdf>, Feb 2009.

<sup>17</sup> See, e.g., Standler, Ideas Not Copyrightable, 79 pp., <http://www.rbs2.com/cidea.pdf>, May 2009.

- *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Judge Learned Hand: “It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”).
- *Donald v. Zack Meyer's T. V. Sales and Service*, 426 F.2d 1027, 1029-30 (5th Cir. 1970) (“Moreover, the striking similarity in arrangement, order, and wording between plaintiff's 'Agreement' and the standard forms is sufficient to compel a finding that plaintiff used these earlier works.” “... in copyright law paraphrasing is equivalent to outright copying. [citations to 2 cases omitted]”), *cert. den.*, 400 U.S. 992 (1971).
- *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (“Use of copyrighted material without the owner's consent generally will not be considered reasonable if it extensively copies or paraphrases the original or bodily appropriates the research upon which the original was based. [citations to 4 cases omitted]”).
- *Salinger v. Random House*, 811 F.2d 90, 97-98 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).
- *Steinberg v. Columbia Pictures*, 663 F.Supp. 706, 711-713 (24 June 1987) (A Columbia Pictures' promotional poster for a movie infringed the copyright of an illustration on the cover of a *New Yorker* magazine, although the details in the movie poster had been changed from the magazine cover — only the words “Hudson River” were the same in both items. The judge ruled that the movie poster was “substantially similar” to the magazine cover.).
- *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991) (“Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”).
- *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 948 (10th Cir. 2002) (“... the Second Circuit has held close paraphrasing of unpublished letter in an historical biography violated copyright law. *Salinger v. Random House, Inc.*, 811 F.2d 90, 93, 96-97 (2d Cir. 1987). Nothing in our opinion would preclude the Tenth Circuit from adopting the Second Circuit's approach in the future.”), *cert. den.*, 537 U.S. 1066 (2002).



## substantially/strikingly similar

If D, the defendant accused of copyright infringements, is proven to have had access to V's original work at the time D wrote the allegedly plagiarized version, then the court will require proof that D's version is *substantially similar* to V's original work.<sup>18</sup>

However, if there is no proof that D had access to V's original work, then the court will require proof that D's version is *strikingly similar* to V's original work.<sup>19</sup> Without proof of access, the court will require more similarity, in order to infer that D copied or paraphrased V's work.

## cases on "access"

- *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5thCir. 1978) ("Access has been defined to include an opportunity to view the copyrighted work. 3 M. Nimmer, COPYRIGHT § 13.02(A) (1978).");
- *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1249 (11thCir. 1999) ("... some courts have defined access as the actual viewing and knowledge of plaintiff's work by the defendant. [citation to five cases omitted] This circuit, however, regards a 'reasonable opportunity to view' as access. *Ferguson*, 584 F.2d at 113.");
- *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9thCir. 2000) ("Proof of access requires 'an opportunity to view or to copy plaintiff's work.' *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)."), *cert. den.*, 531 U.S. 1126 (2001);
- *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 354-355 (4thCir. 2001) ("A copyright infringement plaintiff need not prove that the infringer actually saw the work in question; it is enough to prove that the infringer (or his intermediary) had the mere opportunity to see the work and that the subsequent material produced is substantially similar to the work."), *cert. den.*, 532 U.S. 1038 (2001). Quoted with approval in *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 55 (2dCir. 2003).

In copyright law, *access* means that D had the opportunity to view or read the text of V's copyrighted work, or the opportunity to hear V's copyrighted song. See the long discussion in *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482-485 (9thCir. 2000).

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<sup>18</sup> See cases cited, beginning at page 18, below.

<sup>19</sup> See cases cited beginning at page 18, below.

In the context of plagiarization in colleges, I suggest that any one of the following is strong evidence of access:

- citation of the plagiarized source in a footnote or bibliography prepared by the alleged plagiarist,
- an alleged plagiarist checked a plagiarized book out of a library, or
- a professor gave a copy of the plagiarized source to the alleged plagiarist.

#### cases on “substantially similar” test

- *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9thCir. 1976) (“If a plaintiff offers proof that the defendant had ‘access’ to his work and that the two works are substantially similar, then a presumption of copying by the defendant arises.”);
- *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2dCir. 1977) (“Since direct evidence of copying is rarely, if ever, available, a plaintiff may prove copying by showing access and ‘substantial similarity’ of the two works.”);
- *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9thCir. 1987) (“Because direct evidence of copying is rarely available, a plaintiff may establish copying by circumstantial evidence of: (1) defendant's access to the copyrighted work prior to the creation of defendant's work, and (2) substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work.”), *cert. den.*, 484 U.S. 954 (1987);
- *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), *cert. den.*, 531 U.S. 1126 (2001);

#### cases on “strikingly similar” test

- *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 87 (6thCir. 1928) (“In view of the great improbability of two workers finding the same needle in a wordy haystack, as well as other equally striking coincidences and some unmistakable improprieties, we conclude that defendant's annotator at the very least derived considerable assistance from the mental labors of his rival.”);
- *Wilkie v. Santly Bros.*, 91 F.2d 978, 979 (2dCir. 1937) (“Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident.”), *cert. den.*, 302 U.S. 735 (1937);
- *Arnstein v. Porter*, 154 F.2d 464, 468 (2dCir. 1946) (“If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.”);
- *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2dCir. 1946) (“The evidence by no means compels the conclusion that there was access .... Consequently, copying might still be proved by showing striking similarity.”);

- *Donald v. Zack Meyer's T. V. Sales and Service*, 426 F.2d 1027, 1029 (5th Cir. 1970) (“Moreover, the striking similarity in arrangement, order, and wording between plaintiff’s ‘Agreement’ and the standard forms is sufficient to compel a finding that plaintiff used these earlier works.”), *cert. den.*, 400 U.S. 992 (1971);
- *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978) (The higher standard of strikingly similar is intended “to preclude the possibility of independent creation”.);
- *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) (“If, however, the plaintiff does not have direct evidence of access, then an inference of access may still be established circumstantially by proof of similarity which is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.”);
- *Repp v. Webber*, 132 F.3d 882, 889 (2nd Cir. 1997), *cert. den.*, 525 U.S. 815 (1998);
- *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 316-317 (6th Cir. 2004), *cert. den.*, 543 U.S. 959 (2004);
- *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007);
- NIMMER ON COPYRIGHT, § 13.02 [B] and § 13.03 [D] (May 2006).

In passing, I note that the substantially/strikingly similar tests in copyright law are identical for text and music. Judges in copyright infringement cases routinely cite both music cases and text cases, without distinguishing the subject matter.

intent is irrelevant

The typical defendant in a plagiarism case whines that his/her plagiarism was *not* intentional. This so-called excuse is irrelevant. Intent is *not* an element of copyright infringement. If a defendant made a verbatim copy without the indicia of a quotation, then the defendant is guilty of plagiarism, and may also be guilty of copyright infringement. If a defendant made a close paraphrase (i.e., either substantial similarity or striking similarity) without a citing a source, then the defendant is guilty of plagiarism, and may also be guilty of copyright infringement.

- *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) (“Intention to infringe is not essential under the [copyright] act.”);
- *Sheldon v. Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 54 (2d Cir. 1936) (“With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate.” [3 citations omitted]), *cert. den.*, 298 U.S. 669 (1936);

- *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978) (“Indeed, even where the defendant believes in good faith that he is not infringing a copyright, he may be found liable. See *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966) (trial court’s determination that ‘lack of intent to infringe does not excuse legal liability upheld’).”);
- *Midway Mfg. Co. v. Dirkschneider*, 571 F.Supp. 282, 285 (D.Neb. 1983) (“Absence of scienter is not a valid defense to a charge of copyright infringement. *The Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F.Supp. 531, 537 (S.D.N.Y. 1977), *aff’d*, 592 F.2d 651 (2nd Cir. 1978); *Samet & Wells, Inc. v. Shalom Toy Co., Inc.*, 429 F.Supp. 895, 904 (S.D.N.Y. 1977), *aff’d*, 578 F.2d 1369 (2nd Cir. 1978); *Roy Morser v. Bengor Product Co., Inc.*, 283 F.Supp. 926, 928 (S.D.N.Y. 1968). The law is well settled that liability attaches to the so-called ‘innocent infringer’ regardless of intent.”);
- *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1113 (2nd Cir. 1986) (“Even an innocent infringer is liable for infringement. Under [17 U.S.C.] § 501(a) intent or knowledge is not an element of infringement. [citation to 2 cases omitted]”);
- *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (“The defendant’s intent is simply not relevant: The defendant is liable even for ‘innocent’ or ‘accidental’ infringements. [citation to 3 cases omitted]”);
- *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (“The fact that infringement is “subconscious” or “innocent” does not affect liability, although it may have some bearing on remedies. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998-99 & n. 12 (2d Cir. 1983).”, *cert. den.*, 525 U.S. 815 (1998);
- Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.08 (“In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.”). Cited with approval in *Williams Electronics, Inc. v. Artic Intern., Inc.*, 685 F.2d 870, 878 (3d Cir. 1982); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998-999 (2d Cir. 1983) (Quoting M. Nimmer: “Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personalty.”).

Defendants who mention intent are probably confusing criminal law, in which defendant’s intent is always an element, with civil law.<sup>20</sup>

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<sup>20</sup> Note that *criminal* copyright infringement, under 17 U.S.C. § 506 and 18 U.S.C. § 2319, does contain a scienter requirement. The criminal statute is commonly used for importation of large quantities of pirated books, sound recordings, computer programs, and other items with immense economic value. Plagiarism in an academic setting is *not* prosecuted as criminal copyright infringement.

### moral rights

In France, Germany, Italy, and other nations whose laws fully implement article 6<sup>bis</sup> of the Berne Convention, the true author could sue a plagiarist for violation of the right of attribution. In French law, this right is called “droit à la paternité” and is mentioned in Article 6 of the French Law No. 57-298 of 11 March 1957.

In my opinion, recognition of a moral right of attribution would be the best way for the law in the USA to address plagiarism. However — like the refusal of Americans to use the metric system of measurement — the USA often refuses to harmonize with international practice.

For various reasons, the law in the USA has never recognized the moral rights of authors.<sup>21</sup> The U.S. Copyright Act explicitly excludes “rights ... claimed by virtue of ... the Berne Convention.” 17 U.S.C. § 104(c) (enacted 1988, current Oct 2009). While the U.S. Congress *could* add the moral right of attribution, without adding any of the other moral rights from international law, Congress has shown no willingness to consider any of the moral rights.

In June 2003, the U.S. Supreme Court in *Dastar* further removed the author’s right of attribution from law in the USA, as explained below, at page 30.

### **B. Lanham Act**

In the USA during the 1980s and 1990s, the omission of the true author’s name by the plagiarist was sometimes litigated under the Lanham Act of 1946 (i.e., federal trademark statute) for “false designation of origin”, instead of — or in addition to — copyright infringement. The basic purpose of trademark law is to identify the *origin* of goods or services. The true author could sue the plagiarist in federal court for “false designation of origin” that “is likely to cause confusion, or to cause mistake, or to deceive as to the ... origin ... of his or her goods, services, or commercial activities”, a tort under the federal trademark statute 15 USC § 1125(a)(1).<sup>22</sup>

In trademark law, when D takes V’s product and markets it under D’s name, D is guilty of “reverse passing off” or “reverse palming off”. My search of the Westlaw federal case database for these two phrases in June 2007 returned more than three hundred cases, a substantial body of caselaw.

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<sup>21</sup> Ronald B. Standler, *Moral Rights of Authors in the USA*, <http://www.rbs2.com/moral.pdf> (1998, revised 2012).

<sup>22</sup> This federal statute is also known as § 43(a) of the Lanham Act of 1946, as amended.

Incidentally, the Sixth Edition of BLACK'S LAW DICTIONARY defines plagiarism as "the act of appropriating ... parts or passages of [another] ... and passing them off as the product of [the plagiarist's] own mind."<sup>23</sup> By using a phrase from trademark law, "passing off", it appears that the leading law dictionary in the USA considers plagiarism as a "false designation of origin".

Note that application of the federal trademark statute requires that the "false designation of origin" be "in commerce".<sup>24</sup> Therefore, trademark law affects plagiarists who write books or articles in archival journals — but not students who plagiarize in a term paper for a class.

There are at least two advantages to using trademark law instead of copyright law when suing plagiarists:

1. It is *not* necessary that plaintiff own the copyright in the text that was plagiarized. Therefore, the author can sue the plagiarist, after the author assigned his/her copyright to a publisher.
2. It is possible that an author can sue a plagiarist for copying ideas, laborious collection of facts, and/or other items that are *not* protectable by copyright law.

Litigation under "false designation of origin" accurately identifies the harm caused by a plagiarist: the plagiarist received credit for work actually done by the victim. Thus the plagiarist's reputation is unfairly enhanced, and the victim is denied credit for creative work.

The application of trademark law to punishing plagiarists is a recent development in law, with only a few reported cases in the USA at this time. My searches of Westlaw in June 2007 and Oct 2009 found the following cases:

- *Follett v. New American Library, Inc.*, 497 F.Supp. 304, 311-313 (S.D.N.Y. 1980) (Court ordered three pseudonymous French authors to be listed as principal authors, with Follett's name following theirs, to prevent consumer confusion about authorship.).
- *Marling v. Ellison*, 1982 WL 1163 at \*15, 218 U.S.P.Q. 702 (S.D.Fla. 1982) (*Ellison's German Menu Reader* partly copied from *The Marling Menu-Master for Germany*, but Ellison did not list Marling as amongst authors.).
- *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. 409, 416-17, 1982 WL 19198 at \*9-\*10 (7thCir. 1982) (Catholic Church in Chicago was printing hymnals that copied FEL's songs. FEL sued under § 1125(a), alleging that the Bishop has falsely identified himself or his parishes as the source or owner of the songs. Held defendant would be liable for false designation of origin *if* the users of the hymnals were likely to be confused as to the origin of the songs.).

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<sup>23</sup> BLACK'S LAW DICTIONARY at page 1150, West Publishing Co. (6th edition, 1990).

<sup>24</sup> 15 USC § 1125(a)(1).

- *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278 , 1284-85 (W.D.Ark. 1987) (Teacher and her junior high school students wrote a book, which was subsequently published by the school principal with someone else's name as author. The authors did not affix a copyright notice and did not register their copyright, as required for copyright protection at that time.).
- *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C.Cir. 1988) (Ruth Bader Ginsburg, J.) (“... *Smith v. Montoro*, 648 F.2d 602 (9thCir. 1981); *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278, 1284-85 (W.D.Ark. 1987); *Follett v. Arbor House Publishing Co.*, 497 F.Supp. 304, 311 (S.D.N.Y. 1980) (all three decisions concern correction under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), in attribution of authorship or representation of a creator's role.”), *aff'd*, 490 U.S. 730 (1989).
- *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1407 (9thCir. 1988) (“Had the defendants decided to attribute authorship to a fictitious person, to the group ‘RATT,’ or to some other person, this would be a false designation of origin. It seems to us no less ‘false’ to attribute authorship to only one of several co-authors.”).
- *Rosenfeld v. W.B. Saunders, a Div. of Harcourt Brace Jovanovich, Inc.*, 728 F.Supp. 236, 243 (S.D.N.Y. 1990) (“Any false attribution of principal authorship constitutes a section 43(a) violation if it misrepresents the contributions of the person designated as author. *Follett v. New American Library, Inc.*, 497 F.Supp. 304, 311 (S.D.N.Y. 1980). Thus, failure to attribute authorship to a co-author resulting in only a partially accurate designation of origin constitutes reverse palming off within the ambit of section 43(a).”), *aff'd without opinion*, 923 F.2d 845 (2nd Cir. 1990).
- *Debs v. Meliopoulos*, 1993 WL 566011 at \*3-\*15 (N.D.Ga. 1991), *aff'd without opinion*, 986 F.2d 507 (11th Cir. 1993) (Case involved two engineering professors at Georgia Tech, defendant copied parts of class notes created by plaintiff. Court held no likelihood of confusion.).
- *Waldman Pub. Corp. v. Landoll, Inc.*, 848 F.Supp. 498 (S.D.N.Y. 1994), *vacated in part by*, 43 F.3d 775, 780-782 (2dCir. 1994) (Dispute between two publishers of abbreviated versions of classic children's books. Court held that there was a false designation of origin.).
- *Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9thCir. 1994) (Editor of 1970 edition sued publisher because his name was not listed on the title page of the 1990 edition of the book. Author lost because “the 1990 edition is more than a slight modification of the 1970 edition”).
- *Weber v. Geffen Records, Inc.*, 63 F.Supp.2d 458, 463 (S.D.N.Y. 1999) (“For the Lanham Act to apply to a copyright-based claim, an aggrieved author must show more than a violation of the author's copyright-protected right to credit and profit from a creation. The author must make a greater showing that the designation of origin was false, was harmful, and stemmed from ‘some affirmative act whereby [defendant] falsely represented itself as the owner.’ *Lipton [v. The Nature Co.]*, 71 F.3d 464] at 473-474 ....”).

- *Madrid v. Chronicle Books*, 209 F.Supp.2d 1227 (D.Wyo. 2002) (Plaintiff lost summary judgment motion because her poem was not similar to Pixar's movie, *Monsters*. At page 1245, the court cited *Waldman v. Landoll*.)
- *Zito v. Steeplechase Films, Inc.*, 267 F.Supp.2d 1022, 1028-29 (N.D.Cal. 2003) (Copyright infringement case involving a photograph. Plaintiff also alleged Lanham Act violation for reverse passing off. Judge denied defendants' motion to dismiss.)
- *Kwan v. Schlein*, 441 F.Supp.2d 491, 502-503 (S.D.N.Y. 2006) (Author sued for unfair competition under New York State law because her name was omitted as co-author of book FIND IT ONLINE that she allegedly co-wrote. Court denied defendants' motion to dismiss. The statute of limitations had expired on her copyright claim.)

While trademark law is not commonly mentioned in copyright cases, the U.S. Court of Appeals in New York City has used false designation of origin when a plagiarist failed to mention the name of the original author:

It is fair to say that it would constitute a false designation of origin to publish without attribution to its author a work that is original enough to deserve copyright protection. *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2dCir. 1994). Quoted in *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 86, n.6 (2dCir. 2004), *cert. den.*, 543 U.S. 1039 (2004).

Two courts have cited Nimmer's treatise on copyright law on the issue of false designation of origin:

One well-known treatise has suggested that any author may claim a violation of section 43(a) of the Lanham Act if his work is published without his name. M. Nimmer, NIMMER ON COPYRIGHT § 8.21(e). *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278, 1285 (W.D.Ark. 1987). See also *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 781 (2nd Cir. 1994). Because Nimmer's treatise is in ringbinders with frequent revisions, it is not possible to read previous editions, because libraries only maintain the current edition. Therefore, I can not quote the editions that were current in 1987 or 1994. Sometime after the U.S. Supreme Court's June 2003 decision in *Dastar*,<sup>25</sup> David Nimmer, the son of the original author of NIMMER ON COPYRIGHT, reorganized the sections of the treatise so that § 8.21[E] now concerns an analog performance right in sound recordings.<sup>26</sup> Plagiarism is now discussed in § 8D.03 [A][2][c] of NIMMER ON COPYRIGHT, in which David Nimmer says that plagiarism is *not* a legal problem, but only an ethical problem for academics to solve inside schools and colleges.

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<sup>25</sup> *Dastar* is discussed below, beginning at page 25.

<sup>26</sup> Note that David Nimmer represented the plagiarist-defendant in *Dastar*.



Several cases have remarked that it is *not* necessary to have a federally registered trademark in order to apply the “false designation of origin” of the trademark statute:

- *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981).
- *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278 , 1284 (W.D.Ark. 1987) (“Initially, the court had some reservations concerning the applicability of the Lanham Act to a case where there was no trademark and no market competition involved. However, after a closer examination, the court has altered its position. .... In fact, the existence of a trademark is not necessary or controlling in an action brought under section 43(a). *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746 (8th Cir.1980); *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194 (9th Cir.1979); *Unital, Ltd. v. Sleepco Mfg., Ltd.*, 627 F.Supp. 285 (W.D.Wash.1985); *Potato Chip Institute v. General Mills, Inc.*, 333 F.Supp. 173 (D.Neb. 1971), *aff'd*, 461 F.2d 1088 (8th Cir. 1972).”).
- *Russell v. Turnbaugh*, 1991 WL 283837 at \*5 (D.Colo. 7 Feb 1991) (“Although the Lanham Act deals primarily with trademarks, liability can be imposed when no trademark is involved. *New West Corp. v. NYM Co.*, 595 F.2d 1194, 1198 (9th Cir.1979); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F.Supp. 1, 11 (E.D.Pa. 1974); *Glenn v. Advertising Publications, Inc.*, 251 F.Supp. 889, 902 (S.D.N.Y. 1966).”).
- *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 781 (2d Cir. 1994).
- *Zyla v. Wadsworth, Div. of Thomson Corp.*, 360 F.3d 243, 251 (1st Cir. 2004) (“The existence of a trademark is not a necessary prerequisite to a § 43(a) action.”).

This part of the Lanham Act is about unfair competition, not trademarks themselves. However, one could consider an author’s name as his/her trademark.<sup>27</sup>

### *Dastar*

The above line of cases involving false designation of origin came to a crashing halt when the U.S. Supreme Court decided the *Dastar* case in June 2003. The facts of this case are relatively simple.<sup>28</sup> After World War II, General Eisenhower wrote a book, *CRUSADE IN EUROPE*, that was published by Doubleday in 1948. Doubleday assigned the television rights to Twentieth Century Fox Film Corp. (hereinafter Fox). Fox then contracted with Time to produce 26 episodes for television, which were first broadcast in 1949. The Copyright Act of 1909 applies to this work, which permitted the copyright owner to register a copyright for a term of 28 years, with the

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<sup>27</sup> See, e.g., Jane C. Ginsburg, “The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of ‘Paternity’?” 23 *CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL* 379 (2005).

<sup>28</sup> *Dastar v. Fox*, 539 U.S. 23, 25-27 (2003).

copyright owner having an option to renew the copyright once for a second term of 28 years.<sup>29</sup> Doubleday copyrighted the book in 1948 and renewed the copyright in 1975. Fox copyrighted the television episodes in 1949, but failed to renew the copyright, so the episodes entered the public domain in 1977. In 1995, “Dastar purchased eight beta cam tapes of the *original* version of the CRUSADE television series, which is in the public domain, copied them, and then edited the series”<sup>30</sup> to produce Dastar’s videotapes, CAMPAIGNS IN EUROPE. Dastar’s CAMPAIGNS is “slightly more than half as long as” Fox’s CRUSADE IN EUROPE.<sup>31</sup> Dastar’s CAMPAIGNS makes no mention of either Eisenhower’s book or the Fox television series.<sup>32</sup> In short, Dastar plagiarized Fox’s CRUSADE IN EUROPE — not only was essentially all of the content in Dastar’s CAMPAIGNS copied from Fox’s CRUSADE, but also Dastar removed any credit to either Eisenhower or Fox.

In 1998, Fox and others sued Dastar for infringing the copyright to Eisenhower’s book, published by Doubleday. Plaintiffs later amended their Complaint to add counts for reverse passing off in violation of 15 U.S.C. § 1125(a) and California unfair competition law.<sup>33</sup> In an unpublished opinion, the U.S. District Court granted summary judgment to Plaintiffs on all three counts. The U.S. Court of Appeals affirmed the reverse passing off judgment, but remanded the copyright claim for trial, because of a factual dispute whether Eisenhower’s book was a “work for hire”, as claimed in Doubleday’s copyright renewal.<sup>34</sup> Dastar then appealed to the U.S. Supreme Court.

In a unanimous decision, the U.S. Supreme Court held that the *origin* in “false designation of origin” claims under 15 U.S.C. § 1125(a) referred to the producer of tangible goods, *not* to the creator of copyrightable expression or patented ideas:

In sum, reading the phrase “origin of goods” in the Lanham Act in accordance with the Act’s common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. Cf. 17 U.S.C. § 202 (distinguishing between a copyrighted work and “any material object in which the work is embodied”). To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent

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<sup>29</sup> Prior to the USA joining the Berne Convention in 1988, it was necessary to register a work with the Library of Congress before copyright became effective in the USA.

<sup>30</sup> *Dastar v. Fox*, 539 U.S. 23, 26 (2003).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 27.

<sup>33</sup> *Ibid.* at 27.

<sup>34</sup> *Fox v. Dastar*, 34 Fed.Appx. 312, 314 (9thCir. 2002), 539 U.S. at 28, n. 2 (2003).

and copyright, which Congress may not do. See *Eldred v. Ashcroft*, 537 U.S. 186, 208, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003).

*Dastar v. Twentieth Century Fox*, 539 U.S. 23, 37, 123 S.Ct. at 2050 (2003).

In my view, the Court's narrow definition of *origin* appears consistent with a view of tangible goods in an economy one hundred years ago that was dominated by manufacturing, but is anachronistic with the increasing importance of sales of information (i.e., intellectual property) in the 1980s and afterwards. The Court's narrow definition of *origin* kills any future use of "false designation of origin" in the Lanham Act against a plagiarist.

After the U.S. Supreme Court's decision in *Dastar*, the U.S. District Court ruled that *Dastar* had infringed the copyright of the book. The U.S. Court of Appeals affirmed. *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005), *cert. den.*, 548 U.S. 919 (2006). So, in the end, *Dastar* the plagiarist lost.

#### *Dastar* and limited times

Consider the last sentence in the previous indented quotation, the remark about the necessity of avoiding "perpetual ... copyright". The U.S. Constitution grants Congress the power to create copyrights and patents only "for limited times".<sup>35</sup> For this reason alone, in the USA there must be a time limit on copyright. However, the Copyright Act is silent on any obligation of a copier to attribute the quoted material to the true author.<sup>36</sup> If a legislature or judge in the USA were to create a legal right of attribution of authorship, it is not clear whether such a right would need to be limited in time. In the Berne Convention and in the law of many European countries, there is no expiration of the moral right of attribution. Note that there are *two* separate issues: (1) the duration of copyright and (2) the duration of any legal duty to properly attribute authorship.

The facts of the *Dastar* case is that the copyright on Fox's television episode had expired, placing those episodes in the public domain, which can be freely copied. But the legal right to *copy* works in the public domain does not necessarily also include the legal right to pretend that the work is an original creation of the copier. The U.S. Supreme Court in *Dastar* expressed concern over creating "a species of mutant copyright law that limits the public's 'federal right to copy and to use' expired copyrights."<sup>37</sup> The U.S. Supreme Court is concerned about making the

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<sup>35</sup> U.S. Constitution, Article I, § 8, clause 8. Strangely, the U.S. Supreme Court in *Dastar* neither quoted nor cited the U.S. Constitution, despite deciding not to allow the Lanham Act to maintain perpetual right against false designation of origin (i.e., authorship) on a work with an expired copyright. However, the Court quotes the Constitution in *Eldred v. Ashcroft*.

<sup>36</sup> The international Berne Convention includes an author's right of attribution in Article 6<sup>bis</sup>, but the law in the USA does not specifically include such a right.

<sup>37</sup> *Dastar*, 539 U.S. at 34, quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989).

Lanham Act a kind of perpetual intellectual property protection that might inhibit free use of works in the public domain. But this concern not only confused durations of (1) copyright and (2) attribution of authorship, but also the Court was wrong to say that their holding is the only possible holding that is consistent with the limited duration of copyright.<sup>38</sup> Alternatively, the Court *could* have held:

1. works in the public domain are free for copying, but the copier must always properly attribute the authorship (i.e., the right of attribution continues forever, to prevent misrepresentation about authorship).
2. works in the public domain may be freely plagiarized, *but* the Lanham Act would be available for a copyright owner against the plagiarist of any work with a valid copyright at the time of plagiarization.

In either of these two possible holdings, copyright is for limited times. The real issue that I see is that copyright is distinguishable from moral rights of an author, which include the right of attribution. If the U.S. Supreme Court had condemned *Dastar* for copying without attribution, such a holding would *not* inhibit copying with attribution. I see copying without attribution as wrong, regardless of whether the quotation is protected by copyright (and either used under the doctrine of fair use or used with permission of the copyright owner) or the quotation is *unprotected* by copyright (i.e., the source is in the public domain).

#### *Dastar* and plagiarism

There are two places in *Dastar* where the U.S. Supreme Court specifically addresses plagiarism. First:

The right to copy, and to copy without attribution, once a copyright has expired, like “the right to make [an article whose patent has expired]-including the right to make it in precisely the shape it carried when patented-passes to the public.” *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964); see also *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121-122, 59 S.Ct. 109, 83 L.Ed. 73 (1938). “In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.” *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29, 121 S.Ct. 1255, 149 L.Ed.2d 164 (2001).

*Dastar v. Fox*, 539 U.S. 23, 33 (2003).

Second, the Court noted in *Dastar*:

Finally, reading § 43(a) of the Lanham Act [15 U.S.C. § 1125(a)] as creating a cause of action for, in effect, plagiarism — the use of otherwise unprotected works and inventions without attribution — would be hard to reconcile with our previous decisions. For example,

....  
*Dastar*, 539 U.S. at 36.

Finally, Justice Scalia, writing the majority opinion, invented a “practical problem” that superficially appears to confuse the issue of whether quotations or copying *should* be attributed to the original author:

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<sup>38</sup> The Court said its decision was the only possible holding when it said “To hold otherwise....”

Reading “origin” in § 43(a) to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word “origin” has no discernable limits. A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Merimee (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of “origin” would be no simple task. .... We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.

*Dastar*, 539 U.S. at 35-36.

The short answer to Justice Scalia would be that attribution to *any* author is preferable to no attribution, since attribution to any legitimate author prevents the reader/viewer from being misled into believing that he is reading/viewing an original work. It is *not* a difficult task for an educated person to cite the source of a quotation in her/her work. The possibility that there might be an earlier source — which would be disclosed if one took the time to trace the history of an idea or concept — does *not* justify refusing to cite a known source.

There are two particularly memorable phrases in Justice Scalia’s opinion for the Court in *Dastar*: (1) “this search for the source of the Nile and all its tributaries” and (2) “species of mutant copyright law”. Each of these two phrases is plagiarized from a brief written by David Nimmer and submitted to the U.S. Supreme Court in *Dastar*.<sup>39</sup> I refrain from commenting on this irony.<sup>40</sup>

The U.S. Supreme Court decision in *Dastar* prohibits the use of the Lanham Act’s “false designation of origin” statute in plagiarism cases. Because I do not want to provide free legal research for plagiarists, I do *not* discuss in this essay plagiarism cases after *Dastar* in which plaintiff alleged violation of the Lanham Act.

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<sup>39</sup> David Nimmer, “The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off),” 54 DEPAUL LAW REVIEW 1, 59-60 (Fall 2004).

<sup>40</sup> People who write articles on plagiarism learn to be very careful about citation. In that spirit, I disclose that I originally wrote this paragraph in a draft here in 2009, but this paragraph was first publicly displayed in my companion essay, *Ghostwriting and Plagiarism by Attorneys and Judges in the USA*, <http://www.rbs2.com/ghost.pdf> (April 2011).

Several law review articles have criticized the U.S. Supreme Court's decision in *Dastar*.<sup>41</sup> Because "false designation of origin" under the Lanham Act is no longer available against plagiarists, then we need a new cause of action to fill the void. Below, at page 33, I suggest a new tort, as part of evolving common law.

#### U.S. failure to honor Berne Convention

There is another problem with *Dastar* ending false designation of origin claims for authorship. When the U.S. Congress passed the Berne Convention Implementation Act of 1988, the U.S. statute omitted the author's moral right of attribution, which is part of the Berne Convention. Congress reconciled the overall goal of joining the Berne Convention while excluding authors' moral right of attribution by saying that the Lanham Act and "common law principles such as ... misrepresentation, and unfair competition" adequately included these moral rights. Senate Report Nr. 100-352 at p. 9, 1988 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 3706, 3714.

The U.S. Supreme Court's decision in *Dastar* may have inadvertently weakened the U.S. honoring its obligations under the Berne Convention. See my remarks about moral rights of authors, above, at page 21. My search of Westlaw on 10 Nov 2009 found only one reported judicial opinion that noticed this problem.<sup>42</sup>

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<sup>41</sup> Jane C. Ginsburg, "The Right to Claim Authorship in U.S. Copyright and Trademarks Law," 41 HOUSTON LAW REVIEW 263 (Summer 2004) ("... few interests seems as fundamentally intuitive as that authorship credit should be given where credit is due."); Michael Landau, "*Dastar v. Twentieth Century Fox*: The Need for Stronger Protection of Attribution Rights in the United States," 61 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 273 (2005); Greg Lastowka, "The Trademark Function of Authorship," 85 BOSTON UNIVERSITY LAW REVIEW 1171 (Oct 2005).

<sup>42</sup> *Brainard v. Vassar*, 561 F.Supp.2d 922, 935, n.7 (M.D.Tenn. 2008) (Plaintiff's attorney raised Berne Convention argument, court replied: "This court is obligated to follow the directives of the Supreme Court, and in *Dastar*, the Supreme Court held that the Lanham Act does not apply to cases such as the plaintiffs' [alleging defendants created "an unauthorized derivative work from the plaintiffs' song"].").

A badly written preemption section in the Copyright Act of 1976, 17 U.S.C. § 301(a), was intended to end common-law copyright, but has been interpreted as also preempting state unfair competition law, as well as claims under state law for misrepresentation.<sup>43</sup> This broad preemption of state law has additionally weakened U.S. adherence to the Berne Convention.

### C. other causes of action

#### 1. unfair competition law

In cases of plagiarism in published books and magazines, one might also use a state's common law of "unfair competition", as a tort analogous to the federal trademark statute that was discussed above. See RESTATEMENT OF THE LAW (THIRD) UNFAIR COMPETITION §§ 2, 3(b), 5 (1995).<sup>44</sup> This cause of action might be alleged by the true author who is suing a plagiarist. For a discussion of injury to a professional whose work was plagiarized, see page 35, below.

Unfair competition law affects plagiarists who write books or articles in archival journals, or who copy proposals for funding of research — but not students who plagiarize in a term paper for a class. While a student who plagiarizes obviously unfairly competes with honest students who do not plagiarize, unfair competition law requires competitors in business.

#### 2. fraud

Beyond intellectual property issues (e.g., copyright and trademark), the plagiarist committed fraud. Courts have rarely mentioned the fraud aspect of plagiarism. The leading case on plagiarism as fraud is *In re Lamberis*, 443 N.E.2d 549, 552 (Ill. 1982) ("The essence of plagiarism is deceit."). Even the dissenting judges in the that case agreed that plagiarism was fraud.<sup>45</sup> Unlike trademark law and unfair competition law, which do not apply to students who plagiarize term papers, *all* plagiarists commit fraud.

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<sup>43</sup> *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (first endorsement of "extra element" test for preemption created by *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523, 1535 (S.D.N.Y. 1985)), overruled on other grounds, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). See also *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 785-86 (5th Cir. 1999); *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 713 (6th Cir. 2005); *Hudson v. Imagine Entertainment Corp.*, 128 Fed.Appx. 178 (2d Cir. 2005), *cert. den.*, 126 S.Ct. 1782 (2006).

<sup>44</sup> *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 780 (2d Cir. 1994) (cites RESTATEMENT THIRD UNFAIR COMPETITION §5), *cert. den.*

<sup>45</sup> *In re Lamberis*, 443 N.E.2d 549, 553 (Ill. 1982) (Underwood, J., dissenting) ("fraudulent misrepresentation").

A general definition of fraud includes three elements:

1. either a false statement, misrepresentation, or concealment of a material fact
2. perpetrator makes the false statement, etc. either
  - (a) knowingly or
  - (b) with a reckless indifference to truth
3. the false statement, etc. was intentionally made to induce the victim to give some benefit (i.e., money or property) to the perpetrator of the fraud, or the victim incurs some detriment in relying on the false statement.

See RESTATEMENT SECOND OF TORTS §§ 525, 526 (1977); BLACK'S LAW DICTIONARY.<sup>46</sup>

Note that a narrow definition of fraud is undesirable.<sup>47</sup>

Applying this definition to plagiarism, we see that:

1. the plagiarist makes a misrepresentation about the authorship of plagiarized text, thereby concealing the true author's name.
2. the plagiarist usually *knows* he copied or paraphrased the plagiarized text, but the plagiarist *might* have a reckless indifference to inclusion of quotations or citations to sources.
3. the plagiarist intends that the victim give him a benefit or reward (e.g., good grade on a plagiarized term paper, academic degree for a plagiarized thesis or dissertation, authorship of a published paper or book that increases the plagiarist's reputation, thereby obtaining salary increases, obtaining continued — or even increased — financial support for the plagiarist's work, and other rewards).

Note that fraud specifically includes an element of *intent* by the plagiarist. As explained above at page 19, copyright infringement does *not* require intent.

The intent element is easy to prove. When the plagiarist submits the term paper to an instructor, thesis to a university, or article to a publisher, the plagiarist *intends* that the plagiarized work be accepted and that the plagiarist receive some benefit that the plagiarist did *not* earn. If the plagiarist did not intend to receive the benefit, then the plagiarist would do nothing and receive no benefit.

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<sup>46</sup> See also *Cummings v. HPG Intern., Inc.*, 244 F.3d 16, 22-23 (1stCir. 2001) (deceit by manufacturer); *U.S. v. Kenrick*, 221 F.3d 19, 28 (1stCir. 2000) (bank fraud); *Tenneco Oil Co. v. Joiner*, 696 F.2d 768, 773 (10thCir. 1982) (fraud or deceit); *Martens Chevrolet, Inc. v. Seney*, 439 A.2d 534, 537 (Maryl. 1982) (fraudulent misrepresentation, tort of deceit).

<sup>47</sup> *Arizona v. Haas*, 675 P.2d 673, 684 (Ariz. 1983) ("The definition of 'fraud' must be broad enough to cover all of the varieties made possible by boundless human ingenuity."); *Pennsylvania v. Monumental Properties, Inc.*, 329 A.2d 812, 826, n.42 (Pa. 1974) ("... one reason articulated in favor of broad interpretations of fraud statutes is that to do otherwise [tortfeasors] ... would lie awake nights endeavoring to conceive some devious and shadowy way of evading the law. [citation omitted]").



Notice that the true author is *not* a victim of fraud by the plagiarist, because the true author was not deceived by the plagiarism. However, a professor who *unknowingly* receives a plagiarized term paper for grading is a victim of fraud by the plagiarist, a faculty committee that *unknowingly* receives a plagiarized thesis or dissertation is a victim of fraud, a college or university that *unknowingly* issues a passing grade or a diploma to a plagiarist is a victim of fraud by the plagiarist, a publisher who accepts a plagiarized manuscript is a victim of fraud by the plagiarist, and so on.

Law, which derives its principles from morality and ethics, regards intentional wrongful conduct as more serious, and more worthy of punishment, than accidental wrongful conduct (e.g., negligence). Using phrases like “academic misconduct” to describe plagiarism is too sterile, too kind. Plagiarism is fraud.

### 3. equity

The concept of plagiarism as an ethical matter raises the possibility that equity, not law, provides a more appropriate cause of action. The plagiarist was unjustly enriched. Therefore, the plagiarist should pay restitution to the true author, as well as the plagiarist forfeiting any credit, reward, benefit, or diploma that was “earned” with the plagiarized work.

### D. new tort

I first considered a tort of plagiarism in early Nov 2009, when I was frustrated by *Dastar* ending litigation under the Lanham Act for false designation of authorship, and also frustrated by federal judges finding that some causes of action under state law were preempted by § 301(a) of the Copyright Act of 1976. In doing legal research on 12 Nov 2009, I found a series of references to a tort of plagiarism in cases in California state courts.<sup>48</sup> Sometimes judges misuse the word “plagiarism” to refer to “copyright infringement”.<sup>49</sup> Judges can create new torts, as part of their

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<sup>48</sup> Beginning with *Italiani v. Metro-Goldwyn-Mayer Corp.*, 114 P.2d 370 (Cal.App. 1941) (alleged plagiarism of motion picture scenario held to be a tort); *Weitzenkorn v. Lesser*, 256 P.2d 947, 953 (Cal. 1953) (“... the definition consistently has been that the phrase ‘infringement of copyright’ connotes a tort.”) and most recently with *Klekas v. EMI Films, Inc.*, 198 Cal.Rptr. 296, 301 (Cal.App. 1984) (“Abstract ideas, however, are not entitled to protection by a tort action for plagiarism.”).

<sup>49</sup> *John W. Shaw Advertising, Inc. v. Ford Motor Co.*, 112 F.Supp. 121, 123 (N.D.Ill. 1953); *Herwitz v. National Broadcasting Co.*, 210 F.Supp. 231, 235 (S.D.N.Y. 1962) (“Infringement of a common law copyright is a tort, commonly called plagiarism.”).

role of continually modifying the common law to fit the needs of society.<sup>50</sup> Indeed, an Ohio appellate court did just that in *Bajpayee v. Rothermich*, 372 N.E.2d 817 (OhioApp. 1977).<sup>51</sup>

It is black-letter law that the tort of negligence has four elements:

1. duty
2. breach of that duty
3. causation: breach is legal cause of injury
4. injury

Citations to RESTATEMENT SECOND OF TORTS are found in <http://www.rbs2.com/torts.pdf> ; William L. Prosser & W. Page Keeton, TORTS, § 30 (5th edition, 1984).<sup>52</sup> These four elements are associated with negligence, which does not require proof of intent by defendant. An intentional tort of plagiarism could be litigated under existing tort law as a fraudulent misrepresentation about authorship (see page 31), or as a prima facie tort.

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<sup>50</sup> See, e.g., *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 631 (Ariz. 1993) (“All agree that the law of torts must evolve to meet contemporary conditions.”); *Moore v. Regents of University of California*, 793 P.2d 479, 495 (Cal. 1990) (“In deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society, such as research.”); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1169 (Cal. 1978) (“However, in this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis.”).

<sup>51</sup> This case was discussed at page 58, below. See also, Carolyn W. Davenport, Note, “Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights,” 29 CASE WESTERN RESERVE LAW REVIEW 735 (Spring 1979).

<sup>52</sup> See also *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 155 (Conn. 1994); *Schaefer v. Accardi*, 315 S.W.2d 230, 233 (Mo. 1958).

## duty

It is well recognized law that a custom in an industry, trade, or a community can create a legal duty for people to conform their conduct to some standard, in order to avoid injury to other people. RESTATEMENT SECOND OF TORTS, § 295A (1965).<sup>53</sup> In the case of plagiarism, such a custom is stated in (1) style manuals published for use by either college students or professionals, (2) rules of colleges and universities, (3) rules established by publishers or editors of professional journals for authors. Depending on the facts of the case, at least one of these three groups of rules should be relevant. All of these customary rules consistently condemn plagiarism. There is a justified expectation that an author wrote everything that is not a quotation. There should be a legal duty to accurately attribute authorship to everyone who has created ideas or expression contained in an article.

## injury

In cases involving plagiarism by a student, the university is harmed by giving unearned good grades — and unearned academic degrees — to plagiarists. See *U.S. v. Frost*, 125 F.3d 346, 367 (6th Cir. 1997), discussed below, beginning at page 47. Moreover, the university is forced to divert resources from teaching to investigating plagiarism.

Professors and research scientists are often hired, promoted, receive tenure, and are awarded salary increases for the number of their scholarly publications. To measure the significance of scholarly publications, many administrators in science and engineering departments look at SCIENCE CITATION INDEX to see how often a professor's work has been cited by others, as evidence of the significance or impact of the publication(s). Therefore, if D plagiarizes V's work — instead of D citing V's work — then V is harmed by having fewer citations to V's work. On the other hand, D is unjustly enriched by receiving credit for a publication that was plagiarized, so D builds D's reputation with V's work. Further, as a result of D's publication of V's work, D might receive a salary increase, or D might receive a future research contract or grant that should have gone to V.

There are similar words in another U.S. Court of Appeals case that involved the main actor in a movie. *Smith v. Montoro*, 648 F.2d 602, 606-607 (9th Cir. 1981) In that case, the defendant (1) deleted the main actor's name from the credits for a movie, and (2) substituted the name of another actor in the credits.

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<sup>53</sup> Cases on industry customs or community customs in torts include: *Wellenheider v. Rader*, 227 A.2d 329, 332 (N.J. 1967); *Wisconsin Elec. Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697, 703 (6th Cir. 1979); *Beals v. Walker*, 296 N.W.2d 828, 837 (Mich.App. 1980), *rev'd on other grounds*, 331 N.W.2d 700, 705 (Mich. 1982); *Brown v. City of Pinellas Park*, 557 So.2d 161, 167 (Fla.App. 1990); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1088, 1091 (Del.Super. 1994).

In litigation in the mid-1980s over the order of authors' names on a scholarly paper, the plaintiff (Weinstein) described the importance of authorship in the academic community.

Weinstein says that the listing of names is no small matter. He is seeking a topic on which to write a dissertation and believes that the clerkship program would have been suitable, but that Belsheim's being listed as first author precludes it. (The record does not contain an affidavit or other evidence confirming that his thesis adviser would take this view, and if things are as Weinstein portrays them it is hard to see why the adviser would, but given the procedural posture of the case we must accept Weinstein's allegations.) He also believes that because the principal author is listed first,**FN1** the appearance of his name in third place will diminish his accomplishments in the eyes of other professors — a significant problem because, as we discuss below, he is looking for a job. His attorney adds the point that academic departments sometimes use the number of citations to a scholar's work as one indication of the importance of that work in the profession. The principal citation services list articles by first author only, so that any citations to the Belsheim, Hutchinson & Weinstein article would be collected under Belsheim's name.**FN2**

**FN1.** We assume that the custom in Weinstein's profession is as he describes it. This is not universal. All three members of this panel have followed the custom in the legal profession of listing authors in alphabetical order. E.g., R.D. Cudahy & J.R. Malko, *Electric Peak-Load Pricing: Madison Gas and Beyond*, 1976 WISC.L.REV. 47; F.H. Easterbrook & D.R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); W.M. Landes & R.A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA.L.REV. 851 (1981). The listing "Belsheim, Hutchinson & Weinstein" is alphabetical. Of course, the practice in the legal profession is subject to exceptions. See, e.g., the listing of members of this panel at the beginning of the opinion, or the listing on any brief.

**FN2.** There will not necessarily be citations to it. Weinstein has published 13 articles other than the one in question. According to the Social Science Citation Index and the Science Citation Index, only two have been cited (once each) since 1969. If neither Index should report a citation to this article, the order in which the authors are listed would be academic. Even if there should be a citation, other professors know the Indexes' practice of collecting citations under the name of the first author, so with a list of Weinstein's articles they would know under what names to look; still, this is a pain, and perhaps putative employers would not bother.

*Weinstein v. University of Illinois*, 811 F.2d 1091, 1093 (7thCir. 1987).

Another case with similar observations by appellate judges is *Weissmann v. Freeman*, 868 F.2d 1313, 1324, 1326 (2dCir. 1989), *cert. den.*, 493 U.S. 883 (1989), which is quoted below, beginning at page 60. In *Weissmann*, both parties were professors in the same department.

Because the reputation of professionals is built on their receiving credit for their work, it is important to punish plagiarists who divert credit from the rightful author.

### **E. statutes prohibiting sale of term papers, etc.**

The list of statutes that was here in the original version of this essay has been moved to page 68.

### **F. circumstantial evidence of copying**

There is a long tradition in Anglo-American law for putting the burden of proof on the accuser. Such a burden makes sense, because — as a matter of philosophy and law<sup>54</sup> — the defendant is always unable to prove that he did not plagiarize.

need source document?

In litigation for infringement of copyright, one *always* has the source document to compare with the defendant's document. One then compares the two documents to determine whether there is verbatim copying, striking similarity (i.e., the standard of proof when there is no proof that defendant had access to the copyrighted original<sup>55</sup>), or substantial similarity (i.e., the standard when defendant had access to the copyrighted original<sup>56</sup>).

Circumstantial evidence of a plagiarist's access to a source document is acceptable. However, in copyright law, one must compare the source document with the allegedly copied document, to show verbatim copying or paraphrasing (i.e., similarity).

Was the plaintiff's material copied by the defendant? There will seldom be direct evidence of plagiarism, and necessarily the trier of fact must rely upon circumstantial evidence and the reasonable inferences which may be drawn from it to determine the issue. An inference of copying may arise when there is proof of access coupled with a showing of similarity. *Shipman v. R.K.O. Radio Pictures, Inc.*, 2 Cir., 100 F.2d 533, 538; *O'Rourke v. R.K.O. Radio Pictures, Inc.*, D.C., 44 F.Supp. 480, 482. Where there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the inference of copying may be indulged. *Golding v. R.K.O. Pictures*, 221 P.2d 95, 98 (Cal. 1950).

Quoted with approval by *Grepke v. General Electric Co.*, 280 F.2d 508, 511 (7th Cir. 1960).

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<sup>54</sup> *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 141 (Fed.Cir. 1986) (“cannot prove the negative”).

<sup>55</sup> See page 18, above.

<sup>56</sup> See page 18, above.

In contrast with copyright law, professors or other readers may *suspect* plagiarism, but be unable to find the source document(s) from which the allegedly plagiarized text was taken. There is no full-text database of old books and scholarly journals that can be searched to find source documents for plagiarism investigations, which impedes scholarly research, as well as often frustrates the proof of plagiarism. However, the difficulty of proof should not, in my opinion, motivate us to accept accusations of plagiarism without showing the source document(s). There seem to be few reported cases involving purely circumstantial evidence of plagiarism (i.e., absence of a source document), but one exception is *Katz*, which is quoted below, beginning at page 53.

Maybe there is a compromise position, in which a professor's suspicion of plagiarism *could* be an adequate basis for a failing grade in that professor's class, but *not* adequate to expel the student from the university, and *not* adequate to revoke an academic degree. I am uncomfortable with lower levels of proof for lesser punishments, but there is a long tradition in allowing professors autonomy and professional discretion in determining grades in a class that they teach.

#### level of proof

One must also determine the level of proof. In copyright litigation, the plaintiff must prove copying of copyrighted text by preponderance of evidence<sup>57</sup> — which means that plaintiff wins if it more likely than not that defendant copied. Similarly, when universities promulgate legal standards for academic misconduct hearings, preponderance of the evidence is a common standard.<sup>58</sup>

In plagiarism cases, I am concerned that the “preponderance of evidence” is too low a level. The stigma of being a plagiarist can end an academic career, which seems to call for a higher standard than the 51% probability of “preponderance of evidence”. I would prefer the “clear and convincing evidence” level, which is also used in law to prove fraud.

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<sup>57</sup> This is so well known that it is difficult to find an appellate opinions that explicitly says it. See, e.g., *Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd.*, 555 F.Supp.2d 537, 541 (E.D.Pa. 2008) (copyright law); *Webloyalty.com, Inc. v. Consumer Innovations*, 388 F.Supp.2d 435, 440 (D.Del. 2005).

<sup>58</sup> *Matter of Kalinsky v State Univ. of N.Y. at Binghamton*, 557 N.Y.S.2d 577, 579 (N.Y.A.D. 1990) (“... although we affirm Supreme Court's decision annulling [University's plagiarism] determination on due process grounds, we disagree with the court's ruling that [University] was required to prove the charge by clear and convincing evidence.”); *Coster v. Duquette*, Not Reported in A.2d, 2008 WL 5481263, \*1 (Conn.Super. 2008) (“In a civil case such as this the party asserting a claim has the burden of proving it by “preponderance of the evidence.” .... In order to satisfy the burden of proof by a preponderance of the evidence, all that one of them needed to show was that it was more likely than not that it was the other who took and plagiarized his or her final exam.”), *aff'd*, 990 A.2d 362 (Conn.App. 2010).

In cases where one can compare the source and plagiarized documents, and verbatim copying of at least several consecutive sentences is obvious, then there is no reasonable doubt that plagiarism occurred. In such cases, the plagiarist will be convicted under *any* minimum level of proof.

The problem of level of proof arises when either (1) the source document is not available, so the proof is by circumstantial evidence, or (2) the amount of copying/paraphrasing is small. If one is going to allow charges of plagiarism without the accuser providing the source document, then — in my opinion — one ought to increase the level of proof to at least “clear and convincing evidence”.

#### 4. Court Cases Against Plagiarists in Colleges

This section of this essay discusses the major court cases in each of three groups: (A) plagiarism by students, (B) plagiarism by law student as evidence of a lack of moral fitness to be an attorney, (C) plagiarism by professors. In each group, the cases are arranged in chronological order, with the earliest first.

In Dec 1999, I searched all state and federal court cases in the Westlaw database for the query:

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plagiar! /s (college university student professor)
```

I found 108 documents, of which the first relevant document was from the year 1972.

In Nov 2011, I searched again and found 160 documents after Nov 1999. Summarizing the frequency of cases that satisfy this query:

80 cases from May 1985 to Nov 1999	0.45 cases/month
80 cases from Nov 1999 to Sep 2007	0.85 cases/month
80 cases from Nov 2007 to Nov 2011	1.7 cases/month

Clearly, litigation mentioning plagiarism in colleges in the USA is rapidly becoming more common in the Westlaw database of judicial opinions.<sup>59</sup>

Rather than tediously include *all* relevant cases, I have included only those cases that are interesting or significant in some way. I concentrated on cases published in a reporter, and ignored unpublished slip opinions.

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<sup>59</sup> Is this truly an increase in plagiarism cases, or just an increase in the number of cases? To answer this question, I replaced `plagiar!` with `(theft larceny)` in the query. There were 278 documents in the 12 years before 1 Jan 2000, and 482 documents in the 12 years after 1 Jan 2000. So mentions of plagiarism appear to be increasing faster than mentions of theft or larceny.

## A. student-plagiarists

Joseph E. Hill

Joseph E. Hill committed plagiarism in two classes in graduate school at Indiana University. In May 1970, the professor gave Hill a failing grade in each class and referred the matter to the Dean of the Graduate School. “For reasons not apparent from the record, plaintiff did not avail himself of the university’s administrative procedure in order to challenge the plagiarism charge.[footnote omitted] Nor did plaintiff continue at Indiana University in the fall of 1970.”<sup>60</sup> Hill’s failure to appear before any college disciplinary committees could be seen as plaintiff’s voluntary failure to exhaust administrative remedies available to him before litigating.<sup>61</sup> In June 1972, Hill filed suit in U.S. District Court, alleging violation of his due process rights.<sup>62</sup> Note that the plaintiff’s claims may have been barred by a two-year statute of limitations, although this case was decided on other grounds.<sup>63</sup> The District Court dismissed the case in Oct 1974 and plaintiff appealed. In April 1976, The U.S. Court of Appeals affirmed the dismissal of the case:

The fact that Professor Garnier did not comply with section 3.2(3) of the Student Code of Conduct when he gave plaintiff failing grades does not, in itself, constitute a violation of the Fourteenth Amendment. Nor does the single fact that Indiana University adopted a grievance procedure which provides for a hearing before a plagiarism penalty may be imposed require a court to find that the procedure afforded plaintiff in the present case violated his right to due process. As the Supreme Court stated in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406, 415 (1974), “(d)ue process of law guarantees ‘no particular form of procedure; it protects substantial rights.’ *NLRB v. Mackay Co.*, 304 U.S. 333, 351 (58 S.Ct. 904, 913, 82 L.Ed. 1381) (1938).” Not only has the plaintiff failed to allege any facts to show that the remedy afforded him inadequately protected his rights, but our own review of the record indicates that the procedure which the university made available to plaintiff for the purpose of defending the plagiarism charge and failing grades guaranteed him procedural due process.

The record shows that after receipt of his failing grades, withdrawal from his courses, and notification of Professor Garnier's plagiarism charge, plaintiff was informed that all further action against him would be held in abeyance pending review of his case in accordance with the procedures set forth in the Student Code of Conduct. Plaintiff was neither expelled nor suspended from the university as a result of his grades. Nor did he incur any other form of disciplinary action. In fact, plaintiff remained a student in good standing with the full opportunity of enrolling in Indiana University during the fall of 1970. Plaintiff was even recommended when he changed his major to the political science department of the university. The university stayed any further consequence of the plagiarism charge and continued to offer

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<sup>60</sup> *Hill*, 537 F.2d at 251.

<sup>61</sup> *Hill*, 537 F.2d at 253, 256 (Kunzig, J. concurring in the result).

<sup>62</sup> *Hill*, 537 F.2d at 253 (Kunzig, J. concurring in the result).

<sup>63</sup> *Hill*, 537 F.2d at 254 (Kunzig, J. concurring in the result).



plaintiff an opportunity to defend the charge after plaintiff had discontinued his education at Indiana University and at least until the time of this lawsuit.

*Hill v. Trustees of Indiana University*, 537 F.2d 248, 252 (7thCir. 1976).

Students at state colleges who litigate over alleged due process violations are generally disappointed. For reasons explained in my separate essay at <http://www.rbs2.com/eatty.pdf> (Mar 2011), students at state colleges have fewer due process rights than people accused of minor crimes. And if a student wins due process litigation against a state college, all the student receives is more process, and the college typically punishes the student again after a second hearing.

My searches of Westlaw show that *Hill* is the first reported case of someone suing a college over sanctions for plagiarism. Judicial opinions of trial courts in the USA are generally unpublished, so there may be earlier cases in trial courts that were not appealed. Of course, plagiarism was common in colleges in the USA long before *Hill*. For example in 1972, New York State sued a term-paper mill, which case is discussed at page 69, below.

#### Gabrielle Napolitano

In January 1982, Gabrielle Napolitano, then in her senior year at Princeton University, plagiarized the majority of her 12-page term paper in a Spanish class from a book in the library. While she did cite the book in five footnotes, she did not include citations in the text for some paraphrased material and she did not include the indicia of quotations for “numerous” verbatim quotations. The professor was familiar with the book and immediately recognized the plagiarism. The Princeton University Committee on Discipline in February 1982 unanimously found Napolitano had plagiarized and recommended punishment of delaying her bachelor’s degree for one year. Napolitano sued and the judge recommended that Princeton give her a rehearing. The Committee on Discipline gave her a rehearing in May 1982 and again unanimously found her guilty of plagiarism and — with one abstention among the eight votes — again recommended that her degree be withheld for one year. The trial court held that the evidence supported Princeton’s finding that Napolitano had plagiarized, and the appellate court affirmed. *Napolitano v. Princeton Univ.*, 453 A.2d 279 (N.J.Super.Ch.Div. 1982), *aff’d*, 453 A.2d 263 (N.J.Super.A.D. 1982).

The judge in the trial court felt that Princeton’s punishment was too severe and he remarked:

As this court has noted in prior hearings and conferences, Princeton might have viewed the matter of the penalty with a greater measure of humanity and magnanimity, with a greater recognition of the human frailties [sic] of students under stress, as the university apparently has done in many cases in the past.

This court cannot mandate compassion, however, and will not, nor should not, engraft its own views on Princeton’s disciplinary processes, so long as the standard of good faith and fair dealing has been met and the contract between the student and the university has not otherwise been breached.

*Napolitano v. Princeton Univ.*, 453 A.2d 279, 283 (N.J.Super.Ch.Div. 1982).

The trial judge does not specifically say why he felt that Princeton's punishment was too severe, except for his cryptic remark about "human frailties of students under stress", alleged nonuniformity in penalties at Princeton for different plagiarists, and some irrelevant remarks about Napolitano's "previously spotless record", her cumulative grade point average of 3.7 out of 4.0, and her service to Princeton's athletic department after a knee injury in her first week of her first year prevented her from playing on the University's basketball team.

The trial judge's refusal to overturn the sanctions imposed by Princeton University may be an example of academic abstention, an obscure topic that I discussed in a separate essay at <http://www.rbs2.com/AcadAbst.pdf>. Napolitano then appealed to the next level of the New Jersey state court.

As for the trial judge's allegations of stress, the appellate court noted that:

[Napolitano] did not meet with Professor Molloy to seek approval of her topic until December 16, 1981, the last day of classes before Christmas recess. She was one of the last, if not the last, to seek such approval from Professor Molloy.

*Napolitano v. Princeton Univ.*, 453 A.2d 263, 267 (N.J.Super.A.D. 1982).

The term paper was due not later than 13 Jan 1982. In other words, any stress from waiting until the end of the semester to begin the term paper was solely Napolitano's decision, for which she should bear full responsibility.

The appellate court also noted that

... everyone involved in this action regarded plaintiff as a somewhat gifted[,] if not unusual student[,] of high achievement. .... Under those circumstances[,] should not the community of Princeton University have been entitled to expect more of plaintiff?

*Id.* at 278. The appellate court did not answer its rhetorical question, which may have been intended as a gentle rebuke of the judge of the trial court, who felt Princeton was too severe.

The appellate court quoted extensively from the 1980 edition of the Rights, Rules, Responsibilities of Princeton University, in the section titled General Requirements for the Acknowledgment of Sources in Academic Work:

The academic departments of the University have varying requirements for the acknowledgment of sources, but certain fundamental principles apply to all levels of work. In order to prevent any misunderstanding, students are expected to study and comply with the following basic requirements.

*Quotations.* Any quotations, however small, must be placed in quotation marks or clearly indented beyond the regular margin. Any quotation must be accompanied (either within the text or in a footnote) by a precise indication of the source—identifying the author, title, place and date of publication (where relevant), and page numbers. Any sentence or phrase which is not the original work of the student must be acknowledged.

*Paraphrasing.* Any material which is paraphrased or summarized must also be specifically acknowledged in a footnote or in the text. A thorough rewording or rearrangement of an author's text does not relieve one of this responsibility. Occasionally,

students maintain that they have read a source long before they wrote their papers and have unwittingly duplicated some of its phrases or ideas. This is not a valid excuse. The student is responsible for taking adequate notes so that debts of phrasing may be acknowledged where they are due.

*Ideas and Facts.* Any ideas or facts which are borrowed should be specifically acknowledged in a footnote or in the text, even if the idea or fact has been further elaborated by the student. Some ideas, facts, formulae, and other kinds of information which are widely known and considered to be in the “public domain” of common knowledge do not always require citation. The criteria for common knowledge vary among disciplines; students in doubt should consult a member of the faculty. Occasionally, a student in preparing an essay has consulted an essay or body of notes on a similar subject by another student. If the student has done so, he or she must state the fact and indicate clearly the nature and extent of his or her obligation. The name and class of the author of an essay or notes which are consulted should be given, and the student should be prepared to show the work consulted to the instructor, if requested to do so.

*Footnotes and Bibliography.* All the sources which have been consulted in the preparation of an essay or report should be listed in a bibliography, unless specific guidelines (from the academic department or instructor) request that only works cited be so included. However, the mere listing of a source in a bibliography shall not be considered a “proper acknowledgment” for specific use of that source within the essay or report.

....

With regard to essays, laboratory reports, or any other written work submitted to fulfill an official academic requirement, the following are considered academic fraud:

*Plagiarism.* The deliberate use of any outside source without proper acknowledgment. “Outside source” means any work, published or unpublished, by any person other than the student.

....

Please note that, while not all academic infractions involve fraud, all are violations of the University’s standards and will normally result in disciplinary penalties.

Because of the importance of original work in the Princeton academic community, each student is required to attest to the originality of the submitted work and its compliance with University regulations:

*Student Acknowledgment of Original Work*

At the end of an essay, laboratory report, or any other requirement, the student is to write the following sentence and sign his or her name: “*This paper represents my own work in accordance with University regulations.*” [Emphasis in original]

*Napolitano v. Princeton Univ.*, 453 A.2d 263, 265-266 (N.J.Super.A.D. 1982) (Quoting Rules at Princeton University). Therefore, Napolitano not only plagiarized, but also submitted a false statement claiming as her own work quotations from the book without the indicia of quotations.

Note that Princeton’s definition of plagiarism does *not* require an intent to deceive the reader. *Napolitano v. Princeton Univ.*, 453 A.2d 279, 281 (N.J.Super.Ch.Div. 1982).

Newsweek magazine reported the end of this story:

Napolitano has changed her career plans as a result of her mistake. Columbia, Fordham and the University of Pennsylvania law schools all turned down her applications, and she spent the summer working part time in the sales office of a ... real-estate firm. .... Napolitano has no plans to reapply to law school: "Right now I'm not ready to be under any academic stress."

Patrice Johnson, "Accused Plagiarist Gives Up The Law," NEWSWEEK, p. 17 (4 Oct 1982). Nine days after the NEWSWEEK article, a New Jersey appellate court affirmed the trial court's decision. For cases involving plagiarism during law school and subsequent rejection by the bar, see page 57.

### Anthony Lamberis

Anthony Lamberis, an attorney in Illinois, was enrolled in classes in an LL.M. program in Law at Northwestern University during 1970-71. In 1977, he submitted a thesis that was rejected as unsatisfactory. In 1978, he submitted a 93-page thesis, of which 47 pages were "substantially verbatim" from two sources that Lamberis did not cite. His professors detected the plagiarism in June 1979. Lamberis attempted to resign from the law school, but Northwestern University expelled him, then reported him to the Attorney Registration and Disciplinary Commission of the Illinois Bar.

In an attorney disciplinary proceeding based on this conduct the Hearing Board found that the respondent had "knowingly plagiarized" the two published works and that this plagiarism constituted "conduct involving dishonesty, fraud, deceit, or misrepresentation" violating the Illinois Code of Professional Responsibility DR 1-102(A)(4) (Illinois State Bar Association 1977). The Hearing Board recommended that the respondent be censured. The Review Board adopted the Hearing Board's findings of fact, but recommended in a closely divided vote that the respondent receive a suspension of six months.

*In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982).

The Illinois Supreme Court wrote:

The only factual finding that the respondent disputes is the Hearing Board's conclusion that he "knowingly plagiarized" the two published works. In reaching this finding the Board regarded as unworthy of belief respondent's explanation that his plagiarism was the result of academic laziness and did not reflect an intentional effort to deceive his thesis examiners. The Hearing Board found:

"Respondent engaged in conduct which clearly constituted plagiarism. Objectively considered, the facts demonstrate nothing else. Subjectively, it is inconceivable to us that a person who has completed undergraduate school and law school would not know that representing extensively copied material as one's own work constitutes plagiarism. Respondent's deception is compounded by his lack of candor in claiming that his efforts were not an intentional effort to deceive. We cannot accept an assertion that would require that we find such a naivete or a lack of intelligence on his part."

We agree with the Board's conclusions; given respondent's extensive academic background and the extent of the verbatim copying, any other finding would be untenable. *In re Lamberis*, 443 N.E.2d 549, 550-551 (Ill. 1982).

The Illinois Supreme Court spoke about why plagiarism is wrong and discussed the necessity of punishing plagiarists.

In cases of this type, fairness and justice require that discipline be imposed only "to protect members of the public, to maintain the integrity of the legal profession and to safeguard the administration of justice from reproach." (*In re Nowak* (1976), 62 Ill.2d 279, 283, 342 N.E.2d 25.) In this case, sanctions are appropriate and required because both the extent of the appropriated material and the purpose for which it was used evidence the respondent's complete disregard for values that are most fundamental in the legal profession.

The extent of the respondent's plagiarism displays an extreme cynicism towards the property rights of others. He incorporated verbatim the work of other authors as a substantial portion of his thesis and obtained no permission for this use. Moreover, this conduct amounted to at least a technical infringement of the publishers' federally protected copyrights. This fraudulent conversion of other people's property is similar to conduct that Illinois and other States have held warrants discipline. [citations to three cases omitted]

The purpose for which respondent used the appropriated material also displays a lack of honesty which cannot go undisciplined, especially because honesty is so fundamental to the functioning of the legal profession. [citations to three cases omitted]

At the time of respondent's conduct, this court considered the Illinois Code of Professional Responsibility adopted by the Illinois State Bar Association in 1977 as a safe guide for attorneys in their professional conduct. (Cf. *In re Krasner* [1965], 32 Ill.2d 121, 129, 204 N.E.2d 10.) DR 1-102(A)(4) of the ISBA code reflects the commitment to honesty that each lawyer must make when it states that "[a] lawyer shall not \* \* \* engage in conduct involving dishonesty, fraud, deceit, or misrepresentation" (Illinois State Bar Association 1977). This provision is identical to the comparable provision in the Code of Professional Responsibility subsequently adopted by this court (79 Ill.2d R. 1-102(a)(4)). The respondent violated this provision when he plagiarized the two sources. **The essence of plagiarism is deceit.**<sup>64</sup> In this case, the deceit is aggravated by the level on which it occurred. Academic forums have a long and well-known tradition of evaluating each individual on his own performance. The respondent attempted to exploit this tradition to his own benefit; the purpose of his deceitful conduct was to obtain a valuable consideration, an advanced law degree, that would have undoubtedly improved his prospects for employment, reputation and advancement in the legal profession.

*In re Lamberis*, 443 N.E.2d 549, 551-552 (Ill. 1982) (censuring attorney after he was expelled from law school).

Two dissenting justices wrote separately to suggest a stronger sanction of a three-month suspension from the practice of law.

Respondent's action constituted a purposeful violation of the bar's fundamental obligation of honesty, and cannot, in my judgment, be equated with the negligent commingling and conversion for which we censured the respondent in *In re McLennon* (1982), 93 Ill.2d 215, 66 Ill.Dec. 627, 443 N.E.2d 553. Rather, the character of respondent's misconduct more

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<sup>64</sup> Boldface added by Standler.

closely resembles a fraudulent misrepresentation which has customarily received a more severe sanction. See *In re Nowak* (1976), 62 Ill.2d 279, 342 N.E.2d 25; *In re March* (1978), 71 Ill.2d 382, 17 Ill.Dec. 214, 376 N.E.2d 213; *In re Sherre* (1977), 68 Ill.2d 56, 11 Ill.Dec. 304, 368 N.E.2d 912.

*In re Lamberis*, 443 N.E.2d 549, 553 (Ill. 1982) (Underwood, J., dissenting).

#### Alsabti

The license of a physician to practice medicine in Massachusetts was revoked, because — as a student in 1978, two years prior to earning his M.D. degree — he submitted four plagiarized articles for publication. The Board of Registration in Medicine found in 1988 that this plagiarism demonstrated a “lack of good moral character which is required to practice medicine.” The Supreme Court of Massachusetts affirmed this revocation. *Alsabti v. Board of Registration in Medicine*, 536 N.E.2d 357 (Mass. 1989).

The actual situation is much worse than what the reported court opinion indicates. Alsabti is reported to have plagiarized as many as sixty articles and he claimed both a medical degree and a Ph.D., neither of which he had earned.<sup>65</sup>

#### Paul Haugh

Paul G. Haugh was suspended from a private high school for plagiarism. The high school notified colleges that had accepted Haugh of the plagiarism. Haugh then sued in federal district court alleging breach of contract and libel. Haugh “failed to offer any evidence whatsoever to refute the charge of plagiarism. Furthermore, they did not, either in their pleadings or in their proof, ever assert that the charges of plagiarism or of lying were untrue.” *Haugh v. Bullis School*, 1990 WL 33945 at \*1 (4thCir. 1990) (per curiam). The district court granted the school’s motion for summary judgment. Haugh then filed an appeal in the U.S. Court of Appeals, which affirmed the district court, found the appeal to be both meritless and frivolous, and ordered Haugh to pay US\$ 7136 in attorney’s fees for the appeal to the school. *Id.* \*1-\*2.

#### Michael Hand

Michael Hand “earned” a Ph.D. in counseling psychology at New Mexico State University in 1982. In the Fall of 1987 an anonymous tipster sent to the University a copy two scholarly sources that Hand had plagiarized in his dissertation. In April 1988, the University rescinded the Ph.D. it had awarded to Hand. *Hand v. Matchett*, 957 F.2d 791 (10thCir. 1992). This case is discussed later in this essay, in the section on rescinding degrees, beginning at page 79.

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<sup>65</sup> William J. Broad, “Would-Be Academician Pirates Papers,” 208 SCIENCE 1438 (27 June 1980); William Broad and Nicholas Wade, BETRAYERS OF THE TRUTH: FRAUD AND DECEIT IN THE HALLS OF SCIENCE, at pages 38-52 (1982).

## Dennis Allen Faulkner

Faulkner was a Ph.D. candidate at the University of Tennessee in Knoxville. His faculty advisor, Walter Frost, apparently told Faulkner to copy significant amounts of material from research reports written by Frost into Faulkner's dissertation. It is noteworthy that Faulkner had *not* participated in the research described in Frost's reports that were copied into Faulkner's dissertation. Faulkner was awarded the Ph.D. degree in May 1990. Approximately one year later, the faculty voted 5 to 2 to begin procedures to revoke Faulkner's doctoral degree, because of Faulkner's plagiarism. Faulkner then argued that the University was estopped from rescinding his degree, because Frost — acting as an agent of the University — had told him to do the copying. *Faulkner v. Univ. of Tennessee*, 1994 WL 642765 (Tenn.Ct.App. 1994), *appeal denied*, (Tenn. 1995).

The intermediate appellate court considered

... whether or not the University can be estopped in this case by the conduct of Dr. Frost.

The conduct of Dr. Frost in this matter is, to say the least, unusual and to say the most, astonishing. He, in fact, told the Appellant to do exactly what the Appellant did and present the result as a doctoral dissertation. He sought other employment following the allegations in this case.

In view of the unmistakable dictates of the "Guide to the Preparation of Theses and Dissertations", it would be ludicrous to argue that Dr. Frost as agent of the University of Tennessee possessed the express authority to authorize Mr. Faulkner to plagiarize in his dissertation. Appellant must rely, as in fact he does, upon "apparent authority" and "agency by estoppel". [citation omitted]

*Faulkner v. Univ. of Tennessee*, 1994 WL 642765 at \*4 (Tenn.Ct.App. 1994).

The intermediate appellate court reviewed the facts and the law, then concluded:

The record in this case discloses no act of the University of Tennessee that could possibly be construed as providing authority for Dr. Frost to waive the prohibition against plagiarism, and clearly, Mr. Faulkner either knew or certainly should have known that Dr. Frost possessed no such authority.

*Id.* at \*5.

The intermediate appellate court concluded that the University "is not estopped to rescind the doctoral degree of Mr. Faulkner." Finally, in summing up the whole case, the court remarked:

Appellant appears before the bar of this Court pro se. If, in fact, his work since the Administrative Law hearing is pro se, Appellant is a person of remarkable intellect and ability. He does not appear to grasp the self-evident fact that he has not earned his doctorate. He continues to seek shelter under the shield of a professor who is more culpable in this case than is the Appellant. His confidence is ill-placed, and the regrettable failures of both Dr. Frost and the Appellant have borne bitter fruit.

*Id.* at \*6.

The U.S. Government brought mail fraud and other criminal charges against Dr. Frost, Mr. Faulkner, and three others. The Government proved that Frost operated a scheme to take tuition money paid by government for education of government's employees, where the employees submitted dissertations consisting of plagiarized material. *U.S. v. Frost*, 125 F.3d 346 (6thCir. 1997), *cert. denied*, 525 U.S. 810, 119 S.Ct. 40-41 (1998). The U.S. Court of Appeals noted that:

The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University of Tennessee therefore has a property right in its unissued degrees, and Frost and Turner had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student.

*Frost*, 125 F.3d at 367.

At least 92% of Faulkner's dissertation was plagiarized from work prepared by Frost.<sup>66</sup> See also a subsequent criminal appeal by Faulkner and co-defendant Peggy Potter, *U.S. v. Potter*, 2000 WL 1679567 (6thCir. 3 Nov 2000).

#### Michael Sanderson

Michael Sanderson was an undergraduate student in his final year at the University of Tennessee in Knoxville who plagiarized a paper that he submitted both for the requirements of a class and a research paper contest. "[M]uch of the first half of Sanderson's paper had come from" a textbook used in Sanderson's previous class. Further, Sanderson "used an unpublished master's thesis as a source[,] but that he failed to cite that source anywhere in the paper." The professor gave Sanderson a failing grade in the class and notified University authorities. An administrative law judge (ALJ) held a hearing. The ALJ could not find a definition of plagiarism in the University's rules, so the ALJ used the definition in BLACK'S LAW DICTIONARY. The ALJ concluded that BLACK'S required intent to pass off someone else's words or ideas as one's own, and the ALJ found that Sanderson had no such intent, hence the ALJ found no plagiarism.

The Chancellor of the University reviewed the record and reversed the decision of the ALJ, affirmed the failing grade, and suspended Sanderson for one year. Sanderson then sued in court. Both the chancery court and an appellate court affirmed the Chancellor's decision. The Chancellor and the two courts agreed that the appropriate definition of plagiarism was the one issued by Sanderson's professor at the beginning of the semester, not the definition in BLACK'S. The professor's definition was simply "using an author's words or ideas without giving credit", so intent of the plagiarist was properly not an issue. *Sanderson v. Univ. of Tennessee*, 1997 WL 718427 (Tenn.Ct.App. 1997).

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<sup>66</sup> *Frost*, 125 F.3d at 356.



## original vs. quotations

In a case involving a different issue than plagiarism, Judge Easterbrook of the U.S. Court of Appeals in Illinois wrote:

A student told to submit an essay about the nineteenth century Russian novel could not fulfill the obligation by assuring his teacher that he agrees with George Steiner's Tolstoy or Dostoevsky: *An Essay in the Old Criticism* (1959) — could not do so even if he turned in a brand new, store-bought copy, avoiding any charge of plagiarism or violation of the copyright laws. Learning how to express thoughts in your own words is an essential component of education, in part because exposition is a valuable skill and in part because of the tight link between the thought and its exposition. A person does not really understand an idea until he has experienced the process of translation, organization, and critique that is necessary to put the idea into his own words.

*Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) (Easterbrook, J.).

I agree with Judge Easterbrook that original writing by students is generally more valuable than paraphrasing or summarizing other people's opinions, because students need to learn to think for themselves, instead of agree/disagree with other people. For those reasons, students should be encouraged to do original writing.

On the other hand, documents prepared by litigators often collect quotations from judges, because a judge is *required* to follow binding precedent. When no binding precedent exists, a judge may be persuaded to do the same thing as a previous judge in a nonprecedential judicial opinion. So legal writing, such as this essay, is often a collection of quotations from authorities. Moreover, most professors and most students do not have convenient access to judicial opinions, so my collection of long quotations from judicial opinions gives readers of this essay convenient access to law.

## Zellman

During the 1997-98 school year, M.Z., a high school pupil, plagiarized in an American History assignment. When the teacher awarded a grade of zero, the parents of the pupil had several meetings with the teacher or principal, then "appealed the decision to the school district's superintendent, .... next appealed this decision to the school district's board", and applied for a writ of certiorari from an appellate court in Minnesota, and finally appealed to the Minnesota Supreme Court. The pupil admitted the verbatim copying without attribution (i.e., plagiarism) but claimed "the project instructions had not been clear." However, the other pupils apparently had no problem in following the teacher's instructions "to complete the assignment in their own words." *Zellman ex rel. M.Z. v. Independent School Dist. No. 2758*, 594 N.W.2d 216, 218-219 (Minn.App. 1999), *review denied* (Minn. July 28, 1999).

The appellate court concluded that “M.Z. is not entitled to a full evidentiary hearing or a hearing before an administrative law judge.” *Zellman*, 594 N.W.2d at 221.

The appellate court concluded:

The process was also fair and reasonable. The school's policy stated a student was to receive a zero grade for a first offense of plagiarism. In a description of the situation given to M.Z.'s principal, M.Z.'s parents state, “Students were instructed that copied text information would be considered plagiarism and result in a zero.” M.Z. admitted that he copied text verbatim for his assignment. M.Z.'s grade is fair and supported by the record.

The relationship between a teacher and a student should be one of mutual trust and confidence. The student has a duty to respond positively to the reasonable rules and regulations laid down by the teacher in conducting the class. Here the teacher acted in an eminently fair manner toward the student. M.Z. violated the rule set out by the teacher and must suffer the consequences. The record demonstrates the school district provided M.Z. with substantial due process and its decision to affirm M.Z.'s zero grade was fair and reasonable.

*Zellman*, 594 N.W.2d at 221-222.

My comment is that this case was a waste of time for the teacher, principal, superintendent, and appellate judges: is a grade of zero on one assignment in one high school class really worth such a legal dispute? The plagiarism is *undisputed*. The punishment — a grade of zero — was announced by the teacher in advance. M.Z. apparently defied the teacher and was apparently astounded to learn that the teacher was serious about the zero grade for plagiarists. This defiance is suggested by a factual remark in the judicial opinion:

When the teacher assigned the project, M.Z. and another student joked about photocopying pages of a book, stapling the copies, and turning it in. The teacher heard the joke and then discussed plagiarism with the class and stated students were to complete the assignment in their own words.

*Zellman*, 594 N.W.2d at 218. Plagiarism is no joke.

### Mechanical Engineering at Ohio University

In 2004 a graduate student who was reading masters theses and doctoral dissertations in the Mechanical Engineering Department at Ohio University noticed that some of these works were plagiarized from earlier theses or dissertations. In May 2006, an investigation commissioned by Ohio University

concluded that for over twenty years, graduate students had committed rampant and flagrant plagiarism in theses submitted to the Department of Mechanical Engineering for advanced degrees. The report singled out three faculty members, including Dr. Gunasekera [chairman of the ME Department for 15 years], for ignoring their ethical responsibilities and contributing to an atmosphere of negligence toward issues of academic misconduct.

*Gunasekera v. Irwin*, 517 F.Supp.2d 999, 1002 (S.D.Ohio 2007), *rev'd*, 551 F.3d 461, 464 (6th Cir. 2009).

My search of Westlaw in Nov 2011 found no judicial opinions that mention punishment of *students* who submitted plagiarized theses or dissertations. However, there are some documents on the Internet posted by Ohio University that describe the results of investigation and punishment.

Ohio University has taken a variety of measures to reaffirm its commitment to academic honesty after several dozen mechanical engineering theses and dissertations were alleged to contain plagiarized material. One degree has been revoked, 19 rewrites have been called for and eight cases have been dismissed.

Twelve cases are up for hearing, and about 17 remain to be reviewed. The university and the Russ College [of Engineering and Technology] have implemented a host of measures to guard against future plagiarism and cultivate academic honesty.

<http://www.ohio.edu/outlook/07-08/october/80n.cfm> (updated 1 Oct 2007, accessed 28 Nov 2011).

This October 2007 press release identifies a total of 57 theses or dissertations that have, or will be, examined. Of these 57, 28 cases (49%) have been resolved, 12 cases (21%) are scheduled for a hearing, 17 cases (30%) “remain to be reviewed”. Of the 28 cases that were resolved before Oct 2007, one master’s degree (4%) was revoked, 19 theses/dissertations (68%) were rewritten, and 8 cases (28%) found no sanctionable misconduct.

Ohio University’s initial response to the May 2006 report was to identify two Mechanical Engineering professors as blameworthy, and the University quickly punished those two professors with a blatant disregard for due process of law. In my view, the responsibility for plagiarism lies with the author of the document that contains plagiarized text. Moreover, at the time the plagiarism occurred, older theses and dissertations at Ohio University were *not* available in a full-text database that could be searched by professors. (*After* the scandal in 2006, Ohio University created a full-text database of all of its theses and dissertations, which would enable professors to easily check for plagiarism from older theses.) This essay is not the place to review litigation involving the alleged failure of a professor to supervise candidates for advanced degrees, but the following two paragraphs may be of interest.

The University punished Prof. Gunasekera by suspending him from the graduate faculty for three years, which prohibited him from advising or supervising graduate students during that suspension. Prof. Gunasekera sued the Dean of Engineering and the Provost of Ohio University for violating his civil rights by suspending him without notice and an opportunity to be heard, and demanding that Gunasekera be granted a name-clearing hearing. In addition to the two opinions cited above, this litigation produced the following opinions: *Gunasekera v. Irwin*, 678 F.Supp.2d 653 (S.D.Ohio 2010) (denying defendants’ motion for summary judgment), 748 F.Supp.2d 816 (S.D.Ohio 2010) (granting partial summary judgment to plaintiff), and 774 F.Supp.2d 882

(S.D.Ohio 2011) (awarding plaintiff \$111,815 in attorney's fees, plus \$6424 in costs). The final order in this case approved a settlement of \$32,500 paid to plaintiff.<sup>67</sup>

A nontenure-track professor in the Mechanical Engineering Department sued Ohio University for defamation from — among other items — the Dean's statement to a journalist that the professor "had contributed to a culture of academic dishonesty." The trial court found for defendants, but was reversed on appeal. *Mehta v. Ohio University*, 958 N.E.2d 598, 2011 OhioApp. 3484 (OhioApp. 2011).

#### Hanna Jaber

Hanna Jaber defended her doctoral dissertation in education on June 2008. Five months later, a professor accused her of plagiarization in part of her dissertation. An Assistant Dean in the College of Education submitted her dissertation to "Turn It In" and "Safe Assign" and "found numerous instances of 'blatant plagiarism.'" *Jaber*, 2010 WL 3385523, \*1 (E.D.Mich. 2010). After an investigation by Wayne State University, the Dean of the College of Education revoked Jaber's doctoral degree in March 2009, because of plagiarism in Jaber's dissertation. Jaber sued in federal court for due process violations and lost. *Jaber v. Wayne State University Bd. of Governors*, 788 F.Supp.2d 572 (E.D.Mich. 2011).

#### Elizabeth Nixon

Plaintiff earned a Ph.D. from UCLA in the year 2003, and published her dissertation in March 2004. While updating her dissertation in Dec 2009 for publication as a book by Utah State University Press, Plaintiff discovered that Elizabeth Nixon had plagiarized part of Plaintiff's dissertation in Nixon's Ph.D. dissertation at Ohio State University (OSU) in 2006. The Complaint contains more than 16 pages showing similar passages in the two works.<sup>68</sup> Plaintiff sued Nixon for copyright infringement and willful copyright infringement in Aug 2010.

Incidentally, OSU investigated the plagiarism in May 2010 and recommended that Nixon's Ph.D. degree be revoked.<sup>69</sup> The OSU Board of Trustees revoked the degree at their 17 Sep 2010 meeting.

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<sup>67</sup> Court dismissed case on payment to plaintiff of \$150,739. Of this total, \$118,239 was for reimbursement of attorney's fees and costs. Document 70 in case 2:06-cv-00732-ALM-NMK (S.D.Ohio 3 Mar 2011).

<sup>68</sup> Amended Complaint, Document 4 in case 2:10-cv-00759-JLG-EPD (S.D.Ohio 12 Nov 2010).

<sup>69</sup> Ex. D of Amended Complaint, Document 4 in case 2:10-cv-00759-JLG-EPD (S.D.Ohio 12 Nov 2010).

Nixon never filed an Answer to the Complaint, instead Nixon promptly settled the case by agreeing to pay \$15,000 to Plaintiff.<sup>70</sup> Nixon also agreed that her copying of Plaintiff's text was a "willful and malicious injury" that would make the payment nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(6).

#### Coster v. Duquette

There is a case in which two take-home exams in a history class were similar. The Central Connecticut State University concluded that Coster plagiarized from Duquette, and the University expelled Coster. But when Coster sued Duquette in a state court, Coster won \$100 nominal damages for conversion plus punitive damages of \$25793. The University appears to have used circumstantial evidence (i.e., the professor's opinion) to determine which was the original, and which was the plagiarized copy. In contrast, the court emphasized expert testimony about dates in the wordprocessor document file that showed when each file was created. The automatic time stamp on Coster's wordprocessing file showed it was created one day before the take-home exam was due, and printed about 90 minutes before the take-home exam was due, 15 May 2006. The automatic time stamp on Duquette's wordprocessing file showed it was created on 23 May 2006, the date the professor received her take-home exam. *Coster v. Duquette*, Not Reported in A.2d, 2008 WL 5481263 (Conn.Super. 2008), *aff'd*, 990 A.2d 362 (Conn.App. 2010). Coster apparently sued neither the University nor the professor.

#### Jonathan Katz

Katz submitted a draft of an apparently plagiarized paper in a history class at Binghamton University, formerly the State University of New York at Binghamton. I say "apparently", because the University never identified the source(s) from which Katz allegedly plagiarized. The University punished Katz by giving him a failing grade in the one class. Katz sued in New York State court. The trial court dismissed Katz's petition and Katz appealed. The appellate court summarized the facts of this case:

Petitioner attended respondent Harper College of Arts and Sciences (hereinafter the College) at respondent Binghamton University in the fall of 2008, and was enrolled in a history course, which required that he prepare a term paper that focused on a major historical event that occurred in Europe between 1900 and 1945. After petitioner submitted a polished draft of a paper entitled "Russian Intentions in Signing the Non Aggression Pact with Germany," his professor voiced concerns about the integrity of the document and, in particular, expressed skepticism about petitioner's claim that he did not use any secondary sources in his preparation of the paper. After the professor met with petitioner and discussed with him how he had composed the paper, she concluded that parts of it were not his own work and that he was guilty of plagiarism. She told petitioner that if he accepted a failing grade for the paper and admitted to plagiarism, she would not refer the matter to the College's

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<sup>70</sup> Document 7 in case 2:10-cv-00759-JLG-EPD (S.D.Ohio 14 Dec 2010).

Academic Honesty Committee (hereinafter the Committee). When petitioner refused this offer, FN1 the professor submitted a report to the Committee detailing her reasons for believing that petitioner was guilty of plagiarism and asked that it conduct a formal review of the matter. The Committee notified petitioner of the charges in writing and informed him that a hearing would be held at which he had the right to have someone present to advise and assist him. After hearing from both petitioner and the professor, the Committee unanimously concluded that petitioner was guilty of plagiarism and filed a recommendation with the Associate Dean of Academic Affairs that petitioner be suspended from the College for one semester. FN2 The Associate Dean reviewed the Committee's report, as well as other materials submitted at the hearing, and concurred with the finding that petitioner was guilty of plagiarism. In her decision, the Associate Dean found that the "blatant nature" of the plagiarism required that petitioner's penalty be altered to a six-month delay in the certification of his college degree.

FN1. According to the professor, petitioner ultimately offered to take a failing grade for the paper if she would not initiate plagiarism proceedings.

FN2. The Committee was composed of an Assistant Dean as chairperson, three faculty members and two members of the student body.

Petitioner filed an appeal with respondent Dean of Harpur College of Arts and Sciences. During his review of these proceedings, the Dean obtained an independent assessment of petitioner's paper from an expert in the field who concluded, after reviewing the document, that "[c]learly, some of the more felicitous phrases in this paper were lifted from a secondary source," and stated "[i]f [petitioner] is a plagiarist (which I suspect he probably is), he's really not very good at it." [footnote omitted] The Dean confirmed the finding of plagiarism noting that, while College authorities were unable "to identify additional sources from you which you took material used in your paper, the preponderance of the evidence indicates that other parts of the paper are not your own work," but modified petitioner's penalty to a failing grade in the course.

*Matter of Katz v Board of Regents of the Univ. of the State of N.Y.*, 924 N.Y.S.2d 210, 211-212 (N.Y.A.D. 2011).

The appellate court summarized the law and Katz's claim:

A university's disciplinary determination will be upheld and not be deemed arbitrary and capricious if it is based on a rational interpretation of the relevant evidence and the "university substantially adhered to its own published rules and guidelines" in arriving at the decision. [citations to 3 cases omitted] Here, petitioner does not deny that he was provided with notice of the charges and given a hearing during which he was able to present evidence, examine witnesses and make arguments contesting the allegation that portions of his paper had been plagiarized from other sources .... [citation to a case deleted] However, he claims that the College did not comply with its own rules and regulations and denied him due process because he was never "confronted with the source from which he was charged with plagiarizing."

*Katz*, 924 N.Y.S.2d at 212.

In my essay on academic abstention at <http://www.rbs2.com/AcadAbst.pdf>, I suggested the real rule of law is that the student always loses in litigation against a college or university, unless the student's claim is based on either the First Amendment to the U.S. Constitution or statutes

prohibiting gender/racial discrimination. In my essay on due process of law for college students at <http://www.rbs2.com/eatty.pdf>, I showed that due process in college discipline was weaker than due process for criminal suspects.

The appellate court discussed the definition of plagiarism in the rules of the University:

Initially, we note that the College's Student Academic Honesty Code (hereinafter the Code) does not define plagiarism to require that the source of the plagiarism be specifically identified. While the faculty handbook suggests that any plagiarism charge be accompanied by "a comparison of the source document with the plagiarized document," such a submission is not mandated by the College's rules and regulations and, while preferable, is not, in our view, an essential prerequisite for a plagiarism finding to be rationally based. In that regard, the Code characterizes plagiarism as a form of academic dishonesty involving the "misappropriation of academic or intellectual credit to oneself" and is committed when one presents the "work of another person as one's own." Conduct it classifies as plagiarism includes: the "quoting, paraphrasing or summarizing without acknowledgment, even a few phrases"; "failing to acknowledge the source of either a major idea or ordering a principle central to one's own paper"; "relying on another person's data, evidence or critical method without credit or permission"; "submitting another person's work as one's own"; or "using unacknowledged resource sources gathered by someone else." A finding that plagiarism has been committed using such a description can be based entirely on the content of the work and the circumstances under which the work has been prepared.

*Katz*, 924 N.Y.S.2d at 212.

The appellate court discussed the acceptability of circumstantial evidence of plagiarism, without the accuser needing to show the source document(s) from which the alleged plagiarism occurred.

Here, compelling circumstantial evidence exists, based on the paper's content and the timing of its preparation, that provided a rational basis for the conclusion reached by the Committee and affirmed during the administrative process that petitioner used secondary sources in the paper, which he failed to identify. In that regard, petitioner, according to his professor, was totally "unprepared" to discuss the paper, and had not even settled on a topic less than three weeks before it was due. Moreover, the draft in question was submitted by petitioner only 10 days after he had selected a topic and had begun the laborious process of analyzing the historical data upon which the paper would be based. As noted by the Dean in his decision confirming the finding of plagiarism, it was "highly unlikely that [petitioner] could have read and analyzed the documents contained in the two collections cited in [petitioner's] paper, digested them, and integrated them into a paper that included polished passages in such a short time. It would be a difficult task for a seasoned history graduate student to accomplish, and it is highly improbable that [petitioner] accomplished this on [his] own." In addition, the draft did not include a bibliography, made no reference to any secondary sources, and failed to contain proper page numbers for its citations and, yet, it set forth a detailed analysis of primary sources generated by these historical events that petitioner claimed as his own.<sup>71</sup> Also, the professor, in addition to questioning the uneven quality of the vocabulary and syntax in the draft, noted that "the level of research [petitioner] ostensibly conducted in complicated and copious primary documents is implausible in this amount of time. It is my professional opinion that he could not have ... read, assimilated, and placed in a

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<sup>71</sup> Note by Standler: This lack of citation to secondary sources in a term paper by an undergraduate history student is disturbing.

semi-coherent account this vast body of documents in this short amount of time; moreover, this work could not have been accomplished without the use of secondary sources. His ability to link a very disparate body of documents, when he does so successfully, suggests the analytical ability of a professional historian.”

The belief that petitioner was guilty of plagiarism was reinforced by his apparent inability to intelligently discuss many of the issues generated by these historical events, even though he had just completed the paper and finished his research. In addition, at the hearing, as noted by members of the Committee, petitioner was not able “to define key terms/concepts he used in his draft.” Moreover, petitioner's own expert, after examining the paper, stated that she could “appreciate how a suspicion of plagiarism could arise” and made pointed reference, as did other educators who examined this draft, to petitioner's ability to arrive at conclusions in the paper regarding “causality with no explicit scholarly support.”

*Katz*, 924 N.Y.S.2d at 213.

The five-judge panel unanimously concluded:

Based on our review of this record, we conclude that petitioner was provided with due process and the determination by respondents that he had in fact plagiarized this paper was supported by a rational basis [citation deleted]. As a result, the judgment dismissing this petition should be, in all respects, affirmed.

*Katz*, 924 N.Y.S.2d at 213. *Katz* then appealed to the highest court in New York State, which refused to hear the case. *Katz*, 958 N.E.2d 553 (N.Y. 2011). I am concerned about the accuser's failure to produce source document(s) from which the alleged plagiarism occurred, and instead relying on the professor's judgment that the student was not capable of writing such quality text (especially in only ten days).

Above, beginning at page 37, I argue that the prosecution should find the source document(s) from which an accused plagiarist allegedly copied or paraphrased. If the source document(s) can not be found, I would prefer to dismiss the plagiarism accusations, but at least the level of proof should be “clear and convincing evidence”.

I am writing this text in November 2011, when the decision in *Katz* is only six months old. When I revise this essay, perhaps in the year 2020, it will be interesting to see if courts in other states follow the rule in *Katz*. While the rule in *Katz* may seem unfair to accused students, attorneys for students need to be cautioned against applying rules for criminal cases to civil litigation involving student vs. college, not only because criminal law and civil law are different, but also because of academic abstention.



## B. plagiarists unfit to be a lawyer

Past plagiarism returns to haunt candidates for admission to practice of law in a state. During their last semester of law school, each law student typically submits a detailed personal history as part of his/her application to take the bar examination given during the last week of July. The application is routinely approved, except when the candidate indicates past criminal convictions, bankruptcy, plagiarism, or other instances of character defects that indicate moral unfitness to practice law. Candidates who are denied an opportunity to take the bar examination sometimes file litigation to force the state board of bar examiners to allow them to take the examination. The following is a list of state supreme court cases holding that past plagiarism in law school (perhaps with other misconduct, such as failure to disclose plagiarism on the application to take the bar exam) indicates unfitness to practice law.

- *In re Green*, 553 A.2d 1192 (Del. 1989) (“found guilty of plagiarism while in law school, and had been suspended for one semester” and submitted forged documents to board of bar examiners in an attempt to explain the plagiarism as a hoax);
- *Application of Widdison*, 539 N.W.2d 671 (S.Dak. 1995);
- *Barth v. Zimmer*, No. A-6632-93T2 (N.J.Super.Ct. App.Div. 24 Mar 1995), *certification denied*, 670 A.2d 1067 (N.J. 1996); *Matter of Anonymous v. Kaye*, Not Reported in F.Supp., 1995 WL 617795 (S.D.N.Y. 1995), *aff’d*, 1996 WL 734074 (2dCir. 1996), *cert. den.*, 522 U.S. 1048 (1998) (Michael S. Barth, a law student at Seton Hall University in New Jersey, plagiarized in a take-home examination in the summer of 1992 or 1993. The student sued the Associate Dean of the law school in New Jersey state court for defamation. The defendant was granted summary judgment, which was upheld on appeal. The former student then sued the New York Bar and Seton Hall University in federal court for denying his 1994 application to sit for the bar examination.);
- *In re K.S.L.*, 495 S.E.2d 276, 278 (Ga. 1998) (“... plagiarism is a serious matter which, if proved, would authorize a denial of K.S.L.’s application.”);
- *Radtke v. Board of Bar Examiners*, 601 N.W.2d 642 (Wisc. 1999);
- *In re Application of Valencia*, 757 N.E.2d 325, 2001-Ohio-1618 (Ohio 2001) (law student who plagiarized term paper in last semester of law school was denied opportunity to take bar exam);
- *Doe v. Connecticut Bar Examining Committee*, 818 A.2d 14 (Conn. 2003) (in 1994, while in law school, he plagiarized from a law review article in his term paper);
- *In re Hamm*, 123 P.3d 652, 661, ¶39 (Ariz. 2005) (Convicted murderer plagiarized from U.S. Supreme Court opinion in his petition to be admitted to the practice of law.), *cert. den.*, 547 U.S. 1149 (2006);

- *In re Application of Howard*, 855 N.E.2d 865, 2006-Ohio-5486 (Ohio 2006) (“the applicant was suspended for a semester from the University of Toledo College of Law because he plagiarized material for a writing assignment.” and “troubling criminal record of misdemeanor convictions”);
- *In re White*, 656 S.E.2d 527, 528 (Ga. 2008) (“... intentionally submitted a wholly plagiarized paper in his advanced torts class at the end of his second year of law school.”).

I note two conclusions. First, these candidates, by filing litigation, additionally tarnished their name by having their plagiarism permanently recorded in opinions of a court. Second, the first reported case of plagiarism disqualifying an applicant for admission to the bar is in the year 1989 — I wonder why there are no earlier cases.

### **C. professors who plagiarized**

By including the following cases in this essay, I do not wish to cast aspersions on university faculty. However, it is an acknowledged fact that a very few isolated professors have engaged in plagiarism. At some universities, the typical punishment is termination of their faculty appointment. Other universities, perhaps fearing a scandal, refuse to investigate allegations of plagiarism by faculty. Still other universities give mild reprimands to famous professors who plagiarize, perhaps because the university administration desires the continued glory (and grant/contract money) that the professor attracts.

#### Rothermich

There was a little-noticed appellate court case in Ohio in 1977. The intermediate appellate court in Ohio summarized the facts of this case:

Plaintiff was employed as a biochemist in charge of the research laboratory of Columbus Medical Center Foundation, of which defendant was president and medical director as well as a member of the board of trustees. While so employed, plaintiff made discoveries in the treatment of arthritis through use of radioactive indomethacin suppositories. Plaintiff set forth such discoveries in an article, which was not published, entitled “Studies on the Distribution of Radioactive Indomethacin in the Human.” Plaintiff contends that defendant later presented the discovery as his own before the American Society of Clinical Pharmacology and Therapeutics. Thus, plaintiff brings this action, contending that “the defendant took a scientific discovery of the plaintiff without the plaintiff’s permission and presented the discovery to a national scientific society as the defendant’s.”

*Bajpayee v. Rothermich*, 372 N.E.2d 817, 818 (Ohio App. 1977).

This case arose under the Copyright Act of 1909, in which the plaintiff’s unpublished manuscript was protected by state common law. However, this is *not* a copyright case, because the plaintiff was an employee, and therefore the employer owned the copyright in his work. Note

that plaintiff did not sue his employer, but sued a fellow employee.<sup>72</sup> The trial court granted summary judgment to the defendant. A unanimous three-judge panel of the intermediate appellate court reversed, holding that plaintiff had a legal right “to be recognized for his work product”.<sup>73</sup>

Clearly, when the evidence is construed most strongly in favor of plaintiff, there is no way that it could be reasonably concluded that plaintiff relinquished the right to have recognition for his own work and ideas by placing such work in the public domain or otherwise if such right exists in one who has relinquished the property interest in his work and ideas to his employer as between him and the employer, the employer having an irrevocable license to use the work product of the employee.

This appears to be a case of first impression, neither party having cited any authority directly in point upon the issues involved.

*Bajpayee*, 372 N.E.2d at 819.

The court failed to identify the precise cause of action that plaintiff should claim, but the court did give a list of possibilities: (1) plagiarism, (2) invasion of privacy (i.e., right of publicity), or (3) prima facie tort.<sup>74</sup> The court concluded:

This leads us right back to the basic issue in this case: is there a right in plaintiff to be recognized for his work product which was violated by defendant’s claiming that work product as his own? We conclude that there is such a right. Although such right may not be invaded by a failure to give recognition to another upon an authorized publication, it is invaded when one claims the other’s work product as his own.

*Bajpayee*, 372 N.E.2d at 821.

On remand to the trial court, the parties settled the case,<sup>75</sup> so there are no further reported judicial opinions in this case. My search of Westlaw on 6 Dec 2009 showed that this interesting case has not been cited by any court outside of Ohio during 32 years.

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<sup>72</sup> *Bajpayee*, 372 N.E.2d at 818, 820 (Defendant was president, medical director, and member of the board of trustees.).

<sup>73</sup> *Bajpayee*, 372 N.E.2d at 817. (Syllabus by the court.)

<sup>74</sup> *Bajpayee*, 372 N.E.2d at 820. See the list of six possible causes of action — omitting Lanham Act, fraud, and deceit — in Carolyn W. Davenport, Note, “Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights,” 29 CASE WESTERN RESERVE LAW REVIEW 735, 748-760 (Spring 1979).

<sup>75</sup> Carolyn W. Davenport, Note, “Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights,” 29 CASE WESTERN RESERVE LAW REVIEW 735, 736, n.10 (Spring 1979).

## Leonard M. Freeman

One of the leading cases in copyright infringement and/or plagiarism by a professor is *Weissmann v. Freeman*, 868 F.2d 1313 (2dCir. 1989), *cert. den.*, 493 U.S. 883 (1989). The parties were both professors of Radiology and Nuclear Medicine at Albert Einstein College of Medicine in New York City. Weissmann met Freeman in 1977, when Dr. Weissmann was a fourth-year resident and Dr. Freeman was chief of nuclear medicine. At the time of the litigation in 1987, Dr. Weissmann was an *untenured* Associate Professor and Dr. Freeman was a tenured Professor. *Id.* at 1315.

Dr. Weissmann was the sole author of a chapter (called Exhibit P-1 in the judicial opinion) that was published in 1985. Two years later, Freeman took Weissmann's chapter, deleted Weissmann as author and added Freeman's name as the new sole author, added three words to the title, and then Freeman prepared fifty copies of "his" article. When Weissmann objected, Freeman did not distribute the copies. Weissmann then sued Freeman for copyright infringement. *Id.* at 1316. Freeman won in the trial court, 684 F.Supp. 1248. Weissmann appealed, and the U.S. Court of Appeals reversed the trial court. Because the trial court was overruled by the Court of Appeals, I am ignoring the trial court's opinion here.

The U.S. Court of Appeals remarked on the "equitable considerations that exist" in this case:

In this case, it cannot be ignored that Dr. Freeman not only neglected to credit appellant [Weissmann] for her authorship of P-1, but actually attempted to pass off the work as his own, substituting his name as author in place of hers. Adding insult to this injury, he then distributed copies of her work, but modified the title slightly to one of his own devising. Even if, as Dr. Freeman claims, P-1 was a stock piece to be used by both parties to accompany their lectures, such use hardly justifies entirely appropriating another's work without crediting the author. Dr. Freeman's conduct severely undermines his right to claim the equitable defense of fair use. No case was cited — and we found none — that sustained such defense under circumstances where copying involved total deletion of the original author's name and substitution of the copier's. See [*Marcus v. Rowley*, 695 F.2d 1171 (9thCir. 1983)] at 1176 (failure to credit original author weighs against a finding of fair use). *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2dCir. 1989), *cert. den.*, 493 U.S. 883 (1989).

The U.S. Court of Appeals remarked on the importance of authorship in the academic and professional community.

Monetary gain is not the sole criterion. Dr. Freeman stood to gain recognition among his peers in the profession and authorship credit with his attempted use of Weissmann's article; he did so without paying the usual price that accompanies scientific research and writing, that is to say, by the sweat of his brow. Particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure. *Weissmann*, 868 F.2d at 1324.

The rewards that Congress planned for copyright holders of scientific works to reap arguably include promotion and advancement in academia, where tenure decisions are often

based on a “publish or perish” approach. In scholarly circles such as, for example, the small community of nuclear medicine specialists involved in this suit, recognition of one’s scientific achievements is a vital part of one’s professional life. The fact that Dr. Freeman’s planned use of P-1 was for the same intrinsic purpose as that intended by Dr. Weissmann not only undermines Dr. Weissmann’s ability to enjoy the fruits of her labor, but also creates a distinct disincentive for her to continue to research and publish in the field of nuclear medicine. Hence, to rule that this was a fair use would tend to disrupt the market for works of scientific research without conferring a commensurate public benefit. The district court’s error on this fourth factor was in focusing on sales or dollars received, rather than upon the realities of promotion and tenure in an academic setting.

*Weissmann*, 868 F.2d at 1326.

Strangely, the U.S. Court of Appeals did not mention words like *plagiarism* in its opinion in *Weissmann*. The attorney for Weissmann claimed only copyright infringement. Perhaps Weissmann’s attorney rejected a “false designation of origin” claim, because the article was not actually distributed, so there was no confusion about the origin.

Albert Einstein College of Medicine at Yeshiva University discharged Dr. Weissmann apparently partially in retaliation for filing the copyright infringement litigation, since the University took Weissman’s keys on the same day as the court hearing for a preliminary injunction against Freeman.

Again according to plaintiff, she came to her office at the hospital at about 8:00 a.m. on August 21, 1987, and was requested by a security officer to relinquish her keys to her office, with which request plaintiff complied. On August 24, 1987, plaintiff’s then counsel wrote to Jerold Jacobson, Montefiore’s outside counsel, objecting to the demand that plaintiff relinquish her keys, and stating that “[b]y the Hospital’s conduct, it has constructively discharged Dr. Weissmann. She will therefore not return to the Hospital without appropriate court order reinstating her to a proper position with safeguards against the retaliation, harassment and the bad faith that have been the conditions of her recent employment.”

*Weissmann v. Albert Einstein College of Medicine of Yeshiva University*, Not Reported in F.Supp., 1992 WL 276850 at \*2 (S.D.N.Y. 1992). Weissmann had filed a complaint with the Equal Employment Opportunity Commission (EEOC) in April 1987, before the copyright infringement incident. In January 1988, Weissmann filed gender-discrimination litigation against the University. This is not the place to discuss that discrimination litigation, but the University settled the discrimination litigation by paying \$ 900,000 to Weissmann.<sup>76</sup> This settlement was an extraordinarily large amount of money, but \$ 325,000 of the settlement went to Weissmann’s attorneys for more than six years of litigation. The bitter conclusion was that accusing a senior colleague of copyright infringement — and perhaps also her gender-discrimination litigation — made Weissmann unemployable even in 1994 and ended her career as a professor of medicine.

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<sup>76</sup> anonymous, “Settlement Reached In Sex-Bias Lawsuit,” *The New York Times*, p. B3, 18 March 1994.

## A.P. Sakis Meliopoulos

There is a complicated case of alleged plagiarism involving two electrical engineering professors at Georgia Tech. In 1972, Prof. Debs developed a new class on electrical power systems. During 1977-79, Debs distributed paper copies of his handwritten notes to students in this class. During 1980-83, Debs was on assignment in Kuwait, and a junior colleague, Prof. Meliopoulos, taught a class on the same subject as Debs' class. Meliopoulos also distributed paper copies of notes to students, and some of the pages were copied from notes created by Debs. When Debs returned from Kuwait, Debs tried to resolve the dispute at Georgia Tech during 1984-89. Finally, Debs sued Meliopoulos for copyright infringement, reverse passing off under the federal trademark statute, and unfair competition. *Debs v. Meliopoulos*, 1993 WL 566011 at \*1 and n.4 (N.D.Ga. 1991), *aff'd without opinion*, 986 F.2d 507 (11th Cir. 1993).

Debs also alleged that Meliopoulos had failed to give Debs credit for Debs' development of the class in two articles that Meliopoulos published. I ignore those claims, because the trial judge rejected Debs' claims. *Id.* at \*2, \*7-\*8.

Meliopoulos distributed 380 pages of notes in the year 1984, of which 6 pages (1.6%) were verbatim copies from Debs and 15 pages were "edited or somewhat similar" to Debs' notes. Meliopoulos distributed 621 pages of notes in the year 1984, of which 11 pages (1.8%) were verbatim copies from Debs, and 21 pages were "edited or somewhat similar" to Debs' notes. *Id.* at \*13.

The trial judge seems to have regarded the copying or paraphrasing by Meliopoulos as de minimis, although the judge found that slightly more than 5% of Meliopoulos' notes — 32 pages in 1984 — were taken from Debs' notes. *Id.* at \*13-\*14. I think the real issue is how many pages were copied by Meliopoulos, *not* how many pages Meliopoulos created — Meliopoulos was only accused of copying and failing to give credit to Debs.<sup>77</sup> Imagine a vicious criminal defendant who murdered 8 people and the judge observes that there are more than four million people in the Boston metropolitan area, and 99.9998% of those people were *not*

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<sup>77</sup> *Sheldon v. Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 56 (2dCir. 1936) (Learned Hand, J.) ("... it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate."), *cert. denied*, 298 U.S. 669 (1936). Quoted with approval in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985) ("... a taking may not be excused merely because it is insubstantial with respect to the infringing work. As Judge Learned Hand cogently remarked, 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.' *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (CA2) ...."). See also *Rogers v. Koons*, 960 F.2d 301, 308 (2dCir. 1992) ("Moreover, no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated."), *cert. denied*, 506 U.S. 934 (1992); *Peter Letterese And Associates, Inc. v. World Institute Scientology Enterprises*, 533 F.3d 1287, 1315 (11thCir. 2008).

murdered by the defendant — the judge in this hypothetical has missed the significance of the 8 victims.

Debs had not placed a copyright notice on his class notes in 1979 , and the distribution of class notes in the school bookstore was a publication, so Debs had forfeited his copyright on his notes. *Id.* at n.1. This rule of law was abolished by the U.S. Congress in the Berne Convention Implementation Act of 1988. Now, copyright automatically attaches to original expression the instant the expression is fixed in some medium. Both a copyright notice and registration of the copyright with the government are now optional. However, authors *should* put a copyright notice on everything original that they create, and register any significant work that they produce, for reasons given at <http://www.rbs2.com/copyr.htm> .

However, “the fact that Dr. Debs lost his copyright protection for his 1979 EE6502 class notes ... is not dispositive of his unfair competition claims.” *Id.* at \*5. The judge included the federal trademark claim in the “unfair competition claims”. The judge did *not* discuss pre-emption in the federal copyright statute.

Most of the judicial opinion is about the federal trademark claim. Ultimately, the trial court found that there was “no evidence of actual confusion” about the origin of the notes. *Id.* at 15. This conclusion seems strange to me, because Meliopoulos did not mention Debs’ name anywhere in the notes,<sup>78</sup> so the students would obviously conclude that Meliopoulos was the sole author of everything in the notes.

Debs’ claims under state law failed for the same reason as his claim under the federal trademark statute. *Id.* at \*15-\*16.

So Debs lost his case. The judicial opinion was *not* reported in the FEDERAL SUPPLEMENT and is not precedent anywhere. Nonetheless, the trial judge made a few remarks that may be quoted in future plagiarism cases.

First, the trial judge was apparently irritated that the administration at Georgia Institute of Technology did not resolve this technical dispute:

At trial, some of the evidence touched on Georgia Tech’s internal procedures for handling grievances such as Dr. Debs’. Although this evidence is not legally relevant to Dr. Debs’ legal claims, the court is troubled by Georgia Tech’s apparent lack of responsiveness to Dr. Debs’ professional dispute with Dr. Meliopoulos. The proper forum for handling a dispute regarding two professors’ class notes and the attribution of course developments would appear to be within an academic setting rather than in a courtroom. However, Georgia Tech’s reluctance to accord Dr. Debs a proper forum for airing his grievances seems to have necessitated this lawsuit. [footnote omitted]

*Debs v. Meliopoulos*, 1993 WL 566011 at \*3 (N.D.Ga. 1991).

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<sup>78</sup> *Id.* at \*8 (class notes “make no reference to Dr. Debs”).

I agree that professors, department heads, and deans *should* resolve their own problems. Apparently, the management of Georgia Tech did not want to irritate Prof. Meliopoulos, because he had \$ 700,000/year of research contracts. *Id.* at n.4. Many administrators in academia want to avoid a public scandal over plagiarism by faculty. But, despite what the trial judge said, the proper forum for copyright and “false designation of origin” claims is a federal court.

Second, the trial judge commented on the importance of Prof. Debs’ claims:

In this case, the court finds that Dr. Debs has a reasonable interest to be protected. His professional reputation and career opportunities depend on attribution given to him for work he has performed at Georgia Tech as a scholar and as a teacher; Dr. Meliopoulos allegedly has infringed this interest by describing himself as the sole developer of courses developed by Dr. Debs and the sole author of his EE6520 course notes, which contains material authored by Dr. Debs.

*Id.* at \*5.

Third, the trial judge made a conclusion of law that “a failure to attribute authorship” was a violation of the federal trademark statute. *Id.* at \*12.

Finally, the trial judge concluded the discussion of federal trademark law:

After careful consideration of the foregoing factors, the court finds that no likelihood of confusion exists between Dr. Debs’ 1979 EE6502 notes and Dr. Meliopoulos’ 1984 and 1985 EE6520 notes. Dr. Meliopoulos may have technically violated the Lanham Act under the *Rosenfeld* line of cases because he failed to attribute Dr. Debs’ contribution, albeit relatively small, to his EE6520 class notes. However, because the court finds that no likelihood of confusion exists between Dr. Debs’ 1979 EE6502 class notes and Dr. Meliopoulos 1984 and 1985 versions of his EE6520 class notes, the court finds that Dr. Debs is not entitled to injunctive relief under section 43(a). In addition, because there is no evidence of actual confusion, the court finds that Dr. Debs is not entitled to monetary damages under section 43(a). The fact that Dr. Debs cannot seek legal redress for Dr. Meliopoulos’ wrongful act of copying portions of Dr. Debs’ work is regrettable; however, without the requisite likelihood of confusion, the Lanham Act cannot provide a substitute vehicle for legal relief.

*Id.* at \*15.

Note that the judge appears to realize that Meliopoulos plagiarized: “may have technically violated” and “wrongful act of copying portions of Dr. Debs’ work is regrettable”. The only mention of words like *plagiarized* in the opinion is a quotation from testimony of Debs. *Id.* at n.4. The judge believed there was no legal remedy for such copying, because Debs had forfeited his copyright.

There is one issue that concerns me about this case that was *not* mentioned in the judicial opinion that takes 19 printed pages. There is a long tradition in academia that the copyright on scholarly papers and books belongs to the author(s), not to the college. However, the classes belong to the college. Prof. Debs was apparently paid a salary to develop the new classes in power engineering, and his notes for teaching that class *may* belong to the college. Georgia Tech’s policy manual on intellectual property *should* contain something about documents developed by faculty for teaching a class, as well as all writings by faculty for administrative purposes, are “works for



hire” as that term is used in the Copyright Act of 1976. In that way, instructors can legally continue to copy course materials, laboratory instructions, etc. that were developed by previous instructors — including legally using the previous versions as a source for revised versions. Of course, all of the accumulated names of authors should appear on the title page, and an instructor should be free to use any *original* contributions to instructional materials in works (books, journal articles, etc.) written by the instructor.

#### Jason Yu

Dr. Yu was a tenured professor of civil engineering at the University of Utah. The Academic Freedom and Tenure Committee at that University concluded that Yu had failed to give credit to a co-author, which was one instance of plagiarism. They also concluded that Yu had failed to give authorship credit to two former students at Virginia Polytechnic University, Yu’s previous employer, for two publications that “were 90% prepared” by the students, which were two other instances of plagiarism. The University of Utah Committee recommended that Yu be suspended for one year without pay. The president of the University accepted this recommendation, but Yu appealed to the internal grievance committee. The grievance committee remanded to the Academic Freedom and Tenure Committee, which on its second hearing recommended that Yu be permanently dismissed from the University, and the president accepted that recommendation.

Yu then filed suit in federal district court, which found that

there was ample evidence to support the charges of plagiarism and that termination was permissible under the university’s regulations. The court dismissed the action *sua sponte*. *Yu v. Peterson*, 13 F.3d 1413, 1415 (10thCir. 1993).

Yu appealed and the Court of Appeals affirmed the district court.

#### M. Jamil Hanifi

M. Jamil Hanifi plagiarized material from a book and an essay in his doctoral dissertation at Southern Illinois University in 1969. Hanifi later published “his” dissertation in a book, of which “three of the nine substantive chapters ... were plagiarized.” The author of the essay discovered the plagiarism in 1976, the author of the book discovered the plagiarism in 1977. Southern Illinois University learned of the plagiarism in 1981. At that time, Hanifi was a professor of anthropology at Northern Illinois University, who was being considered as a new chairman of the department. Tersely summarizing a long recital in the court’s opinion, Hanifi was given the choice of resigning or being fired. Hanifi chose to resign. Hanifi then filed litigation that alleged that his resignation had been coerced. *Hanifi v. Board of Regents*, 1994 WL 871887 (Ill.Ct.Cl. 1994).

The court said the following regarding plagiarism:

John LaTourette, the current president of Northern Illinois University, who was the vice-president and provost of that university in 1981, acknowledged that plagiarism is “probably the most serious charge against a faculty member that one could imagine.” The president of the university in 1981, William Monat, similarly acknowledged that plagiarism is “probably

one of the greatest offenses that can occur in the academic community.” Mr. Hanifi, himself, has written to others and admitted during his testimony that plagiarism involves

- “a complete lapse in professional judgment, moral sense and respect for academic ethics,”
- “a most serious violation with dishonor, shame and guilt,”
- “unethical conduct,”
- “dishonorable and unprofessional conduct,”
- “dishonorable act and reprehensible and condemnable,”
- “a violation of basic scholarly activity and serious misconduct,”
- “a despicable act and a serious mistake.”

Mr. Hanifi acknowledged that the plagiarism is not erasable.

*Hanifi v. Board of Regents*, 1994 WL 871887 at \*2 (Ill.Ct.Cl. 1994)

The court concluded that Hanifi had failed to prove that his resignation had been coerced. Note the court’s final sentence about the bad character of a plagiarist:

From a thorough review of the evidence in this case, we find that the Claimant has failed to prove that his resignation was involuntary, coerced or the product of duress. The testimony of Claimant and Respondent’s witnesses is at loggerheads. To believe Claimant’s testimony as to coercion, duress and involuntariness, we would have to disbelieve numerous other witnesses and find some grand conspiracy among the top officials at Northern Illinois University to injure Claimant, which would include mass perjury. Claimant has presented no compelling evidence to corroborate his testimony and therefore in light of the credible testimony disputing his claim, we find his testimony incredible. Frankly, we do not believe this admitted plagiarizer when he claims his will was overcome and he did not know what he was doing.

*Id.* at \*6.

#### **D. summary**

There are four general comments on these cases. First, litigation about plagiarism in colleges is a relatively recent phenomenon, which began in 1976. As long as term papers, theses, and dissertations are required of students — and as long as professionals submit articles to publishers — there has been, and will continue to be, incidents of plagiarism. I do *not* understand why litigation began so recently.

Second, most of the cases involve a plagiarist suing a college for (1) expulsion or suspension of a student, (2) termination of employment of a professor, or (3) some other allegedly unfair punishment. There are few cases in which the true author sued a student or professor because of plagiarism.<sup>79</sup> In nonacademic contexts (e.g., authorship of popular books, scripts for plays or television programs, songs, etc.) there are many cases in which the true author (or the true author’s publisher) sues an alleged plagiarist, but these nonacademic cases involve substantial monetary damages for loss of royalties.

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<sup>79</sup> See *Weissman v. Freeman* below at page 60 and *Debs v. Meliopoulos*, at page 62.

Third, in every plagiarism case that I have found involving a student or professor, the court upheld the punishment imposed by the college. Further, the court often makes a gratuitous, pejorative comments about the bad character of the plagiarist, which show that it is unwise for a plagiarist to complain about how he/she was treated.

A judge in a federal court, noted that one attorney had plagiarized the Brief of the opposing attorney, then commented that opposing counsel had failed to call this major breach of professional conduct to the Court's attention. The Court, however, cannot let it pass without condemnation. Plagiarism is unacceptable in any grammar school, college, or law school, and even in politics. It is wholly intolerable in the practice of law.

*DeWilde v. Gannett Publishing*, 797 F.Supp. 55, 56 (D.Maine 1992). I have posted a separate essay, Ghostwriting and Plagiarism by Attorneys and Judges in the USA, at: <http://www.rbs2.com/ghost.pdf> that collects citations to cases.

The *Alsabti* case, discussed above at page 46, shows how plagiarism can haunt a person's reputation, even ten years later. Similarly, plagiarism in law school can prevent a plagiarist from becoming licensed to practice law, as explained above at page 57.

In summary, a plagiarist should accept their punishment and humiliation for their reprehensible act, without also being permanently enshrined in a reported court opinion. In the *Napolitano* case that was discussed above, the trial court remarked:

Plaintiff had sought as additional relief an injunction against Princeton's giving notice of its plagiarism adjudication to any law school to which plaintiff had applied. The notoriety deriving from this case, however, marks plaintiff's record more permanently than anything that defendant might place upon her transcript. Therefore, her argument that there should be no such notification or notation is moot at this point.

*Napolitano v. Princeton Univ.*, 453 A.2d 279, 284, n.5 (N.J.Super.Ch.Div. 1982).

Fourth, there are two reasons why a professional accused of plagiarism is more likely to sue than a student accused of plagiarism: (1) greater effect on the career of the professional and (2) the professional can better afford litigation expenses than an impoverished student.

Students accused of plagiarism can usually find another college — probably a college of lesser reputation than their former college — that will admit them, particularly if the student waits a year or two and alleges he/she has learned not to plagiarize. College admission personnel understand that young people sometimes do stupid things and deserve a second chance. But a charge of plagiarism often ends a career for professionals with a doctoral degree who are engaged in scholarly research, because plagiarism is seen as a permanent character defect in a professional.

Moreover, professionals also have greater financial resources to hire attorneys than impoverished students, so professionals are better able to litigate a claim than a poor student. I often receive e-mails from students who want my services, but their total litigation budget is less

than \$ 500. In reality, evaluation of the evidence and representing the student in internal proceedings at the college would cost at least \$ 3000 and could exceed \$ 10,000. The cost of depositions, motions, briefs, expert witnesses, and trial in court would exceed \$ 100,000.

I think it makes sense for students or professionals to hire an attorney to guide them through internal investigation and disciplinary procedures at their college. However, once the college has concluded that there was plagiarism and decided on a punishment, litigation by a plagiarist is generally a waste of money, because the plagiarist nearly always loses in court.

## 5. Laws Prohibiting Sale of Term Papers

The following states have enacted statutes to make unlawful sales of a term paper, essay, report, thesis, or dissertation to students. I did a quick search of statutes in the WESTLAW database on 22 Jan 1999 — I make no representation that this list is either complete or current.

- California Education Code §§ 66400 – 66405
- Colorado § 23-4-101 – 106
- Connecticut § 53-392a – e
- Florida § 877.17
- Illinois ch. 110, § 5/0.01 – 5/1
- Maine 17-A § 705
- Massachusetts ch. 271, § 50
- Nevada 207.320
- New Jersey 18A:2-3
- New York Education Law § 213-b
- North Carolina § 14-118.2
- Pennsylvania title 18, § 7324
- Virginia § 18.2-505
- Washington 28B.10.580 – 584

Note that sales of term papers can be unlawful in states that have no specific statute on this subject. For example, the commercial enterprise might be charged with aiding and abetting fraud in obtaining a college degree, as in the *Saksniit* case that is discussed below.

The statutes in California, Illinois, and New York<sup>80</sup> were first enacted in 1972, other states enacted laws afterwards. The offense is a misdemeanor, with a typical maximum punishment between two and six months in jail or a fine not to exceed US\$ 1000. In theory, each act of selling a term paper is a separate offense, so a businessman who sells 1200 term papers could receive consecutive sentences to run for 200 years, at 2 months for each sale. In practice, the punishment

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<sup>80</sup> Leonard Price Stavisky, "Term Paper 'Mills,' Academic Plagiarism, and State Regulation," 88 POLITICAL SCIENCE QUARTERLY 445 (Sep 1973). Prof. Stavisky was the principal sponsor of the New York state statute prohibiting the sale of ghost-written term papers.

is likely to be not burdensome, as white-collar criminals in the USA generally receive light punishments compared to the harm that they do, a point that I also make in my essay on computer crime.

The statutes in a few states (e.g., Colorado, New Jersey, Virginia) explicitly give a college or university the right to request a court enjoin a business from selling term papers, etc. to its students. In some other states, only the Attorney General can apply for the injunction under the statute. Since the Attorney General is likely to be busy prosecuting “serious crimes” (e.g., homicide, rape, larceny, etc.), a statute that permits colleges or universities to apply for an injunction is a useful feature in the fight against sales of term papers. In states without a statute against sales of term papers, a college can apply for an injunction on the usual grounds of both:

1. “irreparable future injury”
2. “no adequate remedy at law” (i.e., award of money would be inadequate or difficult to calculate).

Even in states with a criminal statute on this subject, the common law of torts, as well as various other statutes, could still be invoked by a college who wishes to sue a business that sells term papers to its students. The statute making sale of term papers a misdemeanor may be useful in a tort case to demonstrate a duty.<sup>81</sup> However, a judge will need little persuasion before the judge finds plagiarism to be socially undesirable and harmful to both the university and its students.

#### cases

There are only a few reported cases against businesses that sell term papers to students.

In the first reported case, a trial court in New York State upheld a subpoena issued by the state attorney general as part of an investigation of sale of stolen or custom-made term papers to students. *Minuteman Research, Inc. v. Lefkowitz*, 329 N.Y.S.2d 969 (N.Y.Sup. 1972).

#### Saksniit

The second reported case is *State v. Saksniit*, 332 N.Y.S.2d 343 (N.Y.Sup. 1972), in which the New York State Attorney General filed litigation to dissolve a corporation whose only business was selling term papers to students.

The defendant’s advertisement states:

Do you have a term paper assignment that’s a little too much work? Are you cramped for time with a nightmarish deadline closing in? Let us help you. We have a team of professional writers who can handle any subject. Our papers are custom made, and

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<sup>81</sup> Restatement (Second) of Torts, § 286 (1965).

professionally typed. We offer the most economical work anywhere, at no sacrifice in quality or service to you.

This material is intended to be used for research and reference purposes only.  
*State v. Saksniit*, 332 N.Y.S.2d 343, 345 (N.Y.Sup. 1972).

In 1972, defendants were charging US\$ 1.90 per page for a term paper from their stock, or \$ 3.85/page for a custom-written paper. The court noted that there were three signs in the corporate office:

1. We don't guarantee grades
2. We don't condone plagiarism
3. No refunds

*Saksniit*, at 345.

The court noted that:

The termpapers are produced for defendants by free-lance writers who are college graduates with some expertise in the subject involved in the particular paper. The writers have signed a contract with defendants, promising "to submit research and writing that is commensurate [sic] in quality with Work sufficient to be accepted in a Graduate Program at an accredited University." Additionally — and ironically — each writer promises "that all work he produces and submits will be original and the products of his own research and writing, and the final product will not be work prepared for him by others."

*Saksniit*, 332 N.Y.S.2d at 345-346.

The basis of the prosecution was a New York State statute that says, in part:

No person shall ... attempt to obtain by fraudulent means any diploma, certificate or other instrument purporting to confer any literary, scientific, professional or other degree ....

N.Y. Education Law, § 224(2).

A violation of the section is a misdemeanor and "any person who aids or abets another ... to violate the provisions of this section" is "liable to the same penalties".

N.Y. Education Law, §224(3).

The court then declared:

Any student who submits a 'ghost-written' termpaper as his own, cheats. There is, conceptually, little difference between the 'ghost-written' termpaper and the copied examination paper or the hiring of another to take an examination in place of a student. Any student, therefore, who submits as his own work a termpaper bought from defendants, gets credit for a course through fraud, and thereby attempts to obtain his diploma or degree by 'fraudulent means'.

*Saksniit*, 332 N.Y.S.2d at 346.

Of course, defendants sanctimoniously proclaimed their innocence:

Defendants protest they did not know they were encouraging fraud. They point to their various disclaimers — "This material is intended to be used for research and reference purposes only;" "We don't condone plagiarism." Yet in the very same breath they boast of

the grades their former term papers have received. Their warning, “We don’t guarantee grades,” only accentuates their awareness that some students could be relying on defendants’ term papers for their grades.

*Saksniit*, 332 N.Y.S.2d at 348.

After evaluating this defense, the judge stated:

... the court is convinced that defendants are engaged in the business of selling term papers to students, thereby knowingly aiding and abetting them to attempt to obtain by fraudulent means a diploma, degree or certificate, in violation of Education Law, § 224 ....

The complaint seeks a dissolution of the corporate defendant on the ground that the ‘business activities of defendants,’ have the ‘direct capacity and tendency of subverting the process of learning and encouraging intellectual dishonesty and cheating,’ and are therefore contrary to the ‘public policy of this State in maintaining and preserving the integrity of the educational process.’

‘Education,’ wrote James Madison, ‘is the true foundation of civil liberty.’ Assisting and promoting plagiarism — the most serious academic offense—strikes at the core of the educational process, and thus at the very heart of a free society. Doing a student’s work for him not only deprives him of the valuable disciplines of the learning process, but tends to destroy his moral fibre by lending credence to the all too prevalent notion that anything, including a college degree, can be bought for a price.

*Saksniit*, 332 N.Y.S.2d at 349.

Then the court makes an observation that is not necessary to its opinion, but shows the selling term papers is a particularly reprehensible activity.

The damage which defendants’ business does to the fabric of the scholastic community is dramatically made clear in a plea from a young college student who writes to the Attorney General urging action:

I am in competition with many students for entrance into a medical school. Spaces are few and the many students make the competition fierce. Only one student will occupy a seat desired by many, and he will be the student with the best grades.

The situation is tight enough as is, but what chance do I stand if my independent work (term papers) must compete not with those of my peers but with those of professionals — people with Masters and even Doctorates in the areas in which they write? I am subtly being blackmailed into using their immoral services.

An ironic development is the distrust my instructors have developed toward an above-average term paper I submit.

Sir — can your office do anything to relieve this injustice? I do not believe I am exaggerating if I claim that my future and my integrity are at stake.

*Saksniit*, 332 N.Y.S.2d at 349-350.

The court continued:

The legislature of our state has enacted laws to prevent fraud in obtaining degrees or diplomas (Educ.Law, §224), and to guard the sanctity of the scholastic examinations (*id.*, §225). It has thus declared it to be the public policy of this state that the integrity of the educational process should be protected and preserved. Whenever ‘our courts are called upon to scrutinize a (business) ... which is clearly repugnant to sound morality and civic honesty, they need not look for a well fitting definition of public policy....’ [citation omitted]

The business defendants are conducting is morally wrong. It subverts the learning process and encourages intellectual dishonesty and cheating. It is directly opposed to the declared public policy of our State. It exceeds the purposes for which the corporate defendant was formed as set forth in its certificates of incorporation and is ultra vires.<sup>82</sup>  
[citation omitted]

*Saksniit*, 332 N.Y.S.2d at 350.

The court granted a preliminary injunction that prohibited the defendants from continuing to engage in their fraudulent acts of selling term papers and appointed a receiver to preserve the corporate assets, so any creditors could be paid. The final disposition of this case is not reported.

#### International Term Paper

The U.S. Government applied to court for an order permitting interception of all mail to four companies that sold term papers to students. The District Court dismissed the petition. *U.S. v. International Term Papers, Inc.*, 351 F.Supp. 76 (D.Mass. 1972). The Court of Appeals reversed, holding that the mail fraud statute applied to this situation, even though the fraudulent act was by the buyer (i.e., a student who submitted the purchased term paper to a college as the student’s own work), because the seller contemplated a “scheme which involves misrepresentation based on the materials which he sends.” *U.S. v. International Term Papers, Inc.*, 477 F.2d 1277, 1280 (1stCir. 1973). The final disposition of this case is not reported.

#### Magee

The following case is an action by the Attorney General of New York State to “shut down” a corporation that sold term papers to students. This is an entirely separate case from *Saksniit*, which was quoted and summarized above, except that the defendants in *Saksniit* employed John Magee as their “administrative assistant”. 332 N.Y.S.2d at 347. In the present case, Magee is the defendant.

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<sup>82</sup> Note added by Standler: “Ultra vires” is an act by a corporation that exceeds its authority under the articles of incorporation filed with the state.



A preliminary injunction issued on 3 Aug 1979, ordering Magee to stop selling papers to students. Magee “grossly flouted” the order and, on 12 Dec 1979, the judge fined Magee US\$ 1000. *People v. Magee*, 423 N.Y.S.2d 417, 419-421 (1979).

The issue of whether or not to shut down Magee’s business permanently was only slightly more difficult. There were no contested facts, so the judge ruled on summary judgment. The judge characterized the Defendant’s position:

His basic defense is that the Education Law prohibits the rendering of Assistance for hire, and his products were not “assistance” but rather publications entitled to First Amendment protection. He argues that his papers bear the same status as an encyclopedia article or bibliography, and that the warning on his catalogue of approximately 5000 subjects for sale[FN1] and the “conditions of sale”[FN2] signed by the purchasing student, are sufficient to raise an issue of fact as to his good faith..

[FN1] Our Company operates as a publisher and distributor of educational source material. It is not, and never has been, a writer of term papers or other academic work. The material we provide is intended to provide the reader with background and source material on a given topic, and not as a substitute for the reader’s own original research and writing. We do not support or condone plagiarism or academic fraud of any nature.

[FN2] I further agree and warrant that I shall not plagiarize or submit all, or any part of said material as my own in fulfillment of the requirements for a degree, diploma, certificate, courses of study, nor permit any other person or persons to do so.

*Magee*, 423 N.Y.S.2d at 419.

The court rejected this defense, calling the defense “plainly specious” and “a sanctimonious charade”:

These arguments are plainly specious. The papers purchased by the Attorney General’s agents and annexed to the motion are plainly designed to deceive and would have no other utility in the world of scholarship. Carefully tailored for submission as undergraduate work and keyed to the assignments in specific undergraduate and graduate courses, they were sold for that express purpose by defendant and his agents. These materials do not fall within the exception to the Education Law ( Sec. 213-b, subd. 4) provided for copyrighted materials.

The fact that the papers sold by defendant (at \$3.50 per page) could conceivably be put to a lawful use by a student of Aristotle or Shakespeare does not make the statute interdicting them unconstitutional. A gaming device which Could be played for sheer entertainment may be outlawed if the purpose to which it is put is gambling. [citations deleted] These typewritten papers, in a format designed for direct submission, and taken together with defendant’s seductive sales literature [footnote deleted], are full proof of unlawful intended use.

Nor is defendant saved by the pious disavowals of plagiaristic intent which the paper buyer ritualistically signs. This procedure is patently tongue-in-cheek, and executed with an obvious wink. Precisely the same subterfuge was easily brushed aside by the court in *State of New York v. Saksniit*, 69 Misc.2d 554, 332 N.Y.S.2d 343, a similar cheating mill case in which this very defendant is a named subordinate offender. Such a sanctimonious charade stands on the same footing as the closing paragraphs in *Fanny Hill* .... Undeniably Cleland’s heroine, after dozens of erotic bordello adventures, purports in the final paragraphs of her

narrative to discover the true value of domestic tranquility. That belated appreciation did not serve to convert this work into a moral tract, nor render it suitable for 18th Century Anglican curates in their parish rounds.

There is no genuine issue of fact. The People are now entitled to a permanent injunction. *Magee*, 423 N.Y.S.2d at 419-420.

#### A1 Termpaper, et al.

In 1998, Boston University (BU) sued five separate defendants who were engaged in the sale of term papers. BU alleged that defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1962, which was sufficient to give a federal court jurisdiction over the matter. Unfortunately, technical deficiencies in BU's pleadings caused the RICO complaint to be dismissed. *Boston Univ. v. ASM Communications*, 33 F.Supp.2d 66, 72-74 (D.Mass. 1998). The federal court then dismissed all of BU's claims under state law. In passing, the federal court noted that:

1. The Massachusetts criminal statute, ch. 271 §50 that makes the sale of term papers a misdemeanor gave no private right of action to BU. *Id.* at 74-76.
2. BU was not engaged in "trade or commerce" when its agents purchased term papers from defendants in a sting operation, thus BU could not bring a claim under Massachusetts statute ch. 93A §11 that prohibits unfair or deceptive business practices. *Id.* at 76-77.
3. BU was not likely to meet the US\$ 75,000 per defendant threshold for suing in federal court on various other claims under state law (e.g., tortious interference with university-student relationships, fraud, aiding and abetting fraud). *Id.* at 77.

The fact that Boston University lost this case in federal court does not mean that its legal theories were invalid, but only that the RICO claim must be pleaded more carefully. The various tort claims may be viable in a Massachusetts state court.

The federal court noted in passing that, in 1981, BU had obtained injunctions in state court prohibiting at least one of the present defendants from selling term papers to BU students. 33 F.Supp.2d at 71. This observation shows the remarkable persistence of businessmen who sell term papers to students, since the businesses were still selling term papers 17 years later.

## Rusty Carroll

Two plaintiffs from the Netherlands on 12 Oct 2006 filed a class-action litigation in Illinois against the owner of at least nine websites that sold termpapers to students. The Complaint alleged copyright infringement, violation of Section 43(a) of the Lanham Act, unfair competition under Illinois statutes and common law, violation of federal RICO statute, and unjust enrichment. The plaintiffs in the class were the true authors of papers that were being sold by defendant to students. The judge denied defendant's motion to dismiss, with the exception of the Lanham Act claim that had been killed by *Dastar*.<sup>83</sup> A month later, a magistrate judge recommended that the case proceed to a hearing on default judgment, because defendants "in bad faith and willful intent" repeatedly failed to provide discovery and because defendants failed to reimburse part of plaintiffs's attorneys fees as ordered by the judge.<sup>84</sup> Default judgment was granted, and the class action certified, by the judge on 31 March 2008.<sup>85</sup> Plaintiffs moved for a permanent injunction, which was granted on 21 Jan 2010. *Weidner v. Carroll*, Not Reported in F.Supp.2d, 2010 WL 310310 (S.D.Ill. 2010). The final disposition was a settlement and permanent injunction by consent on 21 Jan 2011.<sup>86</sup>

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<sup>83</sup> *Weidner v. Carroll*, Not Reported in F.Supp.2d, 2007 WL 2893637 (S.D.Ill. 2007).

<sup>84</sup> *Weidner v. Carroll*, Not in Westlaw, Document 57, Docket 3:06-CV-782-DRH-PMF (S.D.Ill. 2007).

<sup>85</sup> *Weidner v. Carroll*, Not in Westlaw, Document 63, Docket 3:06-CV-782-DRH-PMF (S.D.Ill. 2008).

<sup>86</sup> *Weidner v. Carroll*, Not in Westlaw, Document 155, Docket 3:06-CV-782-DRH-PMF (S.D.Ill. 2011). I have posted a copy of this settlement and permanent injunction at: <http://www.rbs2.com/WeidnerFinal110121.pdf> .

## 6. My Suggestions for Policy

Colleges should take an active stand against plagiarism. Professors should actively check for plagiarism. When possible plagiarism is detected, professors should report the case to the appropriate authorities on campus for investigation, hearing, and resolution.

### A. suggestions for teachers

Term papers should be assigned in high-school English, History, and Social Studies classes so that pupils in the college-preparatory track become familiar with basic citation skills, including the indicia of a quotation, format of a footnote, and format of a bibliography. Such requirements should be explicitly included in the syllabus for classes that is approved by state and local education officials.

If a student in college was not explicitly taught how to do such things, or the student does not remember how to do such things, then the student should refer to style manuals for academic writing, such as the MODERN LANGUAGE ASSOCIATION (MLA) STYLE MANUAL or the CHICAGO MANUAL OF STYLE. The previous sentence may sound harsh, but people who are capable of being educated can, and should, teach themselves on many occasions. Every college student, and every educated person, should own at least one dictionary and at least one academic style manual, in addition to reference books in their field of study or work. We expect educated people to write clearly, use an appropriate vocabulary, use an appropriate style of writing (including citing sources), and *not* plagiarize.

Some articles in educational journals about plagiarism advocate teaching how to cite sources in every class at the university level. I reject such a suggestion. Learning how to cite a source belongs in the high-school curriculum. If one includes remedial education in college classes, there will not be adequate time to cover the topics that genuinely belong in college-level classes. It is *not* difficult for a student to find and read an academic style manual, to teach themselves the rules. Further, as students routinely read academic journals in the university library, they see examples of how different authors cite sources, which is another way of learning the rules. I say again that all students should *both* (1) consult an academic style manual *and* (2) read scholarly journals. Those students who do neither do *not* belong in college.

Teachers should include a paragraph in the written syllabus, grading policy, and class rules that explains that plagiarism is not acceptable, and either (1) refers to the definition of plagiarism in the student handbook or (2) defines plagiarism. One should also tersely explain how to avoid plagiarism: (1) both the indicia of a quotation and the citation of a source for every verbatim quotation, and (2) a citation for every paraphrase. The major purpose of this notice is to defeat a

“I didn’t know” excuse by plagiarists, so make sure that the notice is clear and unambiguous.<sup>87</sup> Given the prevalence of the “I did not intend to plagiarize” excuse, one should also plainly state that intent is irrelevant,<sup>88</sup> to close the door on that excuse. Teachers may also want to include information on their preferred format of footnotes and bibliography in this section of the syllabus.

I suggest skipping the tirade about plagiarism during lecture on the first day of class. It’s both offensive and unnecessary to honest students, and plagiarists conventionally ignore it. For some students, the decision to plagiarize comes during the writing of the paper (i.e., near the due date), *not* at the beginning of the term. Students who, on the first day of class, intend to purchase or copy a term paper are probably beyond the influence of the instructor.

#### B. suggestion for college administrators

Every college administration should:

1. inform every student during a required orientation lecture, and also in the college handbook, of the definition of plagiarism and the range of punishments.
2. make available to every professor tools for detecting plagiarism (e.g., one or more commercial services in my collection of links at <http://www.rbs2.com/plaglink.htm> ).
3. periodically remind every professor of his/her duty to report suspected plagiarism or other misconduct by students. (Some specific suggestions for how to detect plagiarism are given below, beginning at page 78.)
4. use new topics for term papers or projects every semester. This requires more creativity by professors, but it defeats the utility of files in local fraternities for plagiarists or passing materials between successive years of students.
5. specially counsel foreign nationals that — regardless of the customs and practices in their native country — the college will strictly hold them to the American standard that plagiarism is forbidden.<sup>89</sup>

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<sup>87</sup> “Unambiguous” means that only an attorney would misunderstand the notice. <grin>

<sup>88</sup> See page 7, above.

<sup>89</sup> My experience both in reading reported court cases in the USA, as well as in my ten years as a professor in the USA, is that immigrants or foreign nationals — both students and faculty — are involved in a disproportionately large number of cases of plagiarism in the USA. I do not want to say anything offensive to honest people in other cultures or other countries, but the pattern is apparent and we need to defeat the defense that “Plagiarism is accepted in my home country.”

6. design procedures for investigation and hearings to be minimally burdensome for professors, so that reporting misconduct does not mean that the professor is volunteering for significant extra work. Instead, the burden of extra work should fall mainly on administrators and staff, or — alternatively — on consultants hired by the college.

This last point is important: if the college makes the misconduct investigations and hearings too cumbersome, professors will simply avoid reporting suspicions of misconduct to the appropriate authorities on campus. A professor might then simply give a suspected plagiarist a lower grade than they would have earned if they were honest (or simply giving the suspect a private reprimand in the professor's office), a "punishment" that the plagiarist might welcome, in contrast to having sanctions marked on their transcript, or even possible expulsion from college. This raises the possibility that a student could meander through college, plagiarizing here and there, without anyone being aware of the consistent pattern of misconduct that marks this student as unworthy of a college degree. While I have not seen this concern mentioned in any of the court opinions that have addressed the issue of proper procedure, it worries me.

Finally, because plagiarism is so widespread in American colleges, I believe that accrediting associations should require that every accredited college (1) have a formal policy that requires reporting and investigating every suspected instance of plagiarism and (2) makes available to every instructor at least one online plagiarism detection service.

### C. how to detect plagiarism

Whenever a professor sees a paper written with an unconventional style — or with word choice that reflects more advanced knowledge of the field than a typical student would have — the professor should suspect plagiarism. The professor can easily ask the suspected plagiarist to explain a particularly obscure point. A student who struggled honestly to understand the material will give a convincing explanation, while a plagiarist will be dumbfounded or mutter platitudes.

Professors should also be alert for styles that shift within the paper, as the student switches roles from plagiarist to author.

The following techniques for detecting plagiarism are from a list of 21 suggestions by Margaret Fain and Peggy Bates at Coastal Carolina University:<sup>90</sup>

- "Writing style, language, vocabulary, tone, grammar, etc." is different from "what the student usually produces. It doesn't sound like the student."
- "Essays are printed out from the student's web browser."

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<sup>90</sup> Margaret Fain & Peggy Bates, "Cheating 101: Paper Mills and You — Detecting Plagiarized Papers," <http://www.coastal.edu/library/presentations/plagiarz.html> (Mar 1999).

- “Web addresses left at the top or bottom of the page. Many free essays have a tag line at the end of the essay that students often miss.”
- “References to graphs, charts, or accompanying material that isn’t there.”
- “References to professors, classes or class numbers that are not taught at” the college.
- “Citations are to materials not owned by” local libraries to which students have access.
- Dead links, or inactive URLs, in student’s page. This is a symptom that the page was prepared many months ago and is now stale.
- “All citations are to materials that are older than five years.”
- Historical events are referred to in present tense.
- “Students can not identify citations or provide copies of the cited material.”

Once plagiarism is suspected, a professor can type a distinctive phrase from a student’s paper into a good search engine,<sup>91</sup> and see what material can be found. With some luck, a professor may be able to find the source of the student’s paper. In this type of search, one does not use typical key words that would retrieve information on the student’s topic. Instead, one uses a distinctive phrase that one hopes is unique, with the intent of retrieving one source for the plagiarized paper.

## 7. Colleges may rescind degrees

What happens if plagiarism, or other academic misconduct, is discovered after a degree has been awarded? The answer is simple: the college has the legal authority to revoke or rescind an academic degree. There are only a few reported cases in the USA concerning the ability of a college to rescind an academic degree:

1. *Waliga v. Board of Trustees*, 488 N.E.2d 850 (Ohio 1986) (Kent State University decided to rescind Waliga’s B.A. degree, 17 years after it was awarded, because of 28 discrepancies in the grades on the official transcript and the handwritten reports submitted by the instructors in Waliga’s classes.) There is not the slightest hint in the opinions available on WestLaw for how these discrepancies arose. The most comprehensive discussion is in an unpublished opinion: 1984 WL 6436, \*1 (Ohio.App. 1984).
2. *Crook v. Baker*, 813 F.2d 88 (6thCir. 1987) (University of Michigan rescinded a M.Sc. degree in geology, because of fraud in that thesis.).

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<sup>91</sup> Not only a search engine for the Internet (e.g., Google), but also search engines for full-text of scholarly articles.

3. *Hand v. Matchett*, 957 F.2d 791 (10th Cir. 1992) (New Mexico State University, by the Dean of the Graduate School, attempted to rescind a Ph.D. in counseling psychology that had been awarded to Hand for his dissertation that contained plagiarized material.). Both the District Court and the Court of Appeals held that, under New Mexico state statutes, only the Regents could award or rescind a degree, so the revocation was unlawful. The Court of Appeals cited *Waliga* and *Crook* and concluded, at 795, “The ability to revoke degrees obtained through fraudulent means is a necessary corollary to the Regent’s power to confer those degrees.” The U.S. Court of Appeals, at 795, stated that the University could withdraw Hand’s Ph.D. degree, but the Regents must do the withdrawing.
4. *Faulkner v. Univ. of Tennessee*, 1994 WL 642765 (Tenn.Ct.App. 1994) (“The University of Tennessee is not estopped to rescind the doctoral degree of Mr. Faulkner.” Mr. Faulkner “does not appear to grasp the self-evident fact that he has not earned his doctorate.”). See above, beginning at page 47.
5. *Brown v. State ex rel. State Bd. of Higher Educ.*, 711 N.W.2d 194, 2006 ND 60 (N.D. 2006) (“In August 2003, [Richard J.] Brown received a Ph.D. in Teaching and Learning from the University of North Dakota.”<sup>92</sup> Sometime between October 2004 and February 2005, “... Joseph Benoit, Dean of the UND Graduate School, sent Brown a letter outlining the initial findings that at least fourteen pages of Brown's dissertation were identical to Dr. Allison-Jones's dissertation and that other pages were identical to the dissertation of a person named Judith Scanlan. Based on these findings, Dean Benoit advised Brown the process for revoking Brown's doctoral degree would begin.”<sup>93</sup> In Feb 2005, “[t]he [Graduate] Committee voted unanimously, with one member abstaining, to revoke Brown's Ph.D. on the grounds of plagiarism. On February 11, 2005, the Graduate Committee notified Brown of its decision and informed Brown that further review of the matter was available to him through the Student Academic Standards Committee. Brown never exercised this right and made no appeal to the Student Academic Standards Committee.”<sup>94</sup> Brown filed litigation in North Dakota state court. The trial court, affirmed by the North Dakota Supreme Court, held that plaintiff’s failure to exhaust administrative remedies at the University precluded his litigation, and dismissed his Complaint. The North Dakota Supreme Court held that “The authority to award academic degrees naturally comes with the implied authority to revoke an improperly awarded degree upon good cause and a fair hearing.”<sup>95</sup>)

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<sup>92</sup> *Brown*, 711 N.W.2d at 195, 2006 ND 60 at ¶2.

<sup>93</sup> *Brown*, 711 N.W.2d at 196, 2006 ND 60 at ¶5.

<sup>94</sup> *Brown*, 711 N.W.2d at 196, 2006 ND 60 at ¶6.

<sup>95</sup> *Brown*, 711 N.W.2d at 198, 2006 ND 60 at ¶12.



A paragraph of the Ohio Supreme Court's opinion in *Waliga* is worth quoting here:

We consider it self-evident that a college or university acting through its board of trustees does have the inherent authority to revoke an improperly awarded degree where (1) good cause such as fraud, deceit, or error is shown, and (2) the degree-holder is afforded a fair hearing at which he can present evidence and protect his interest. Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.

*Waliga v. Board of Trustees*, 488 N.E.2d 850, 852 (Ohio 1986).

Quoted with approval in:

- *Hand v. Matchett*, 957 F.2d 791, 794 (10thCir. 1992);
- *Crook v. Baker*, 813 F.2d 88, 93 (6thCir. 1987);
- *Faulkner v. Univ. of Tennessee*, 1994 WL 642765 at \*6 (Tenn.Ct.App. 1994).

These cases all involved state universities. This is significant, because the ex-student often alleged that the degree was rescinded without “due process of law”, a legal right that only applies to people in their relations with government. Simply put, a private college can legally rescind a degree without bothering about “due process”. There may be other legal rights that a grieved ex-student could bring against a private college, but this is not the place to speculate on what those rights might be.

double jeopardy ?

Someone who knows a little about constitutional law might ask if the prohibition against double jeopardy (Fifth Amendment of the U.S. Constitution) acts to prevent punishment by both a college and a court. The answer is clearly no. Any punishment by a college is completely separate and independent of a punishment by a court. It is legally permissible for a plagiarist to be:

1. expelled by a college — or have their degree rescinded by a college —
2. sued in civil court by the owner of the copyright (e.g., the true author or his/her assignee) for copyright infringement,
3. tried in criminal court on charges of fraud, and
4. have a licensing board revoke or suspend their license to practice law, medicine, or some other profession.

This result is clearly just, because each punishment protects a different group of people from a different harm:

1. the college protects its good reputation and the integrity of its degrees,
2. copyright law protects the owner of the copyright,
3. criminal law expresses the outrage of civilized society at evil acts,

4. the licensing board protects an innocent public who reasonably trusts professionals to be honest, ethical, and competent.

The Fifth Amendment only prohibits multiple criminal trials by the same government. For more about double jeopardy, see my essay on the differences between civil and criminal law at <http://www.rbs2.com/cc.htm> .

A 1997 case in Oklahoma state court concerned a University of Oklahoma student who “falsely reported a car-jacking” to the University’s police department. “The University placed him on disciplinary probation for one year and ordered him to complete 100 hours of community service” at the University. The State of Oklahoma charged the student with a misdemeanor and the student’s attorney moved to dismiss the charge, arguing double jeopardy. The Court of Criminal Appeals of Oklahoma ruled that the criminal charge was not barred by double jeopardy.<sup>96</sup> The opinion of the Oklahoma court cites a number of federal and state cases.

### **8. No plagiarism for ideas ?**

Many conventional definitions of plagiarism include copying *ideas* without providing a citation to the original source. I agree that one should provide a citation for all substantial information — ideas or facts — that is taken from another source:

1. to give credit to the person who supplied the information or who first made the discovery,
2. to relieve the writer from the responsibility for the accuracy or truth of the information,
3. to lead the reader to a source of more detailed or complete information,
4. to give the reader a sense of the historical evolution of ideas in the field,
5. to give support for an assertion in text, thus enhancing the credibility of the work, or
6. to show the author’s knowledge and erudition, by showing the author’s familiarity with published sources.

However, an author properly does not provide a citation to facts or ideas that are part of the general knowledge in the subject area of the paper (e.g., Newton’s Laws of Motion, a commonly known mathematical theorem, etc.), unless the author is discussing the history of the subject. The key issue is whether the reader might mistakenly believe that the fact or idea was original with the author of the paper. When in doubt, provide a citation to the source.

Personally, I prefer to consider failure to cite sources of facts or ideas as something other than plagiarism. Such a failure to cite sources of facts or ideas might be:

- sloppy scholarship, making unsupported assertions
- negligent misrepresentation about the scope of the author’s work,
- if the author had intent to deceive the reader: fraudulent misrepresentation about the scope of the author’s work,

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<sup>96</sup> *State v. Kauble*, 948 P.2d 321 (Okla.Crim.App. 1997).

- in some cases: a matter of academic style that is a judgment call for an author, supervisor, reviewer, or editor.

In theses or dissertations, problems of whether to cite to a source of facts or ideas should be resolved when the student submits a draft to his/her faculty advisor. If a citation is desirable, the advisor simply scrawls “cite a source” or “cite your sources” in red ink on the draft.

Whether to cite facts or ideas can depend on the forum or audience. For example, a textbook, or a general essay to inform the reader, summarizes accepted knowledge without citations to primary sources. The same text published as a review article in a scholarly journal, or a dissertation submitted in partial fulfillment of the requirements of a doctoral degree, definitely needs citations to primary sources.

One of my reasons for considering a narrow definition of plagiarism is that I prefer that to have the academic offense of plagiarism and the legal wrong of copyright infringement overlap. It is well-established law that copyright protects only expression, *not* ideas,<sup>97</sup> and *not* facts.<sup>98</sup> However, copyright does protect *expression* of ideas.

Another of my reasons for considering a narrow definition of plagiarism is the difficulty of proof that an author copied an idea. Any intelligent, creative person routinely has “original” thoughts. A careful search of books and scholarly journals in a library will likely reveal that the same thought had been previously expressed by someone else. Even if an author spends days searching books and journals, diligently trying to find a previous expression of an idea, it is possible to overlook a relevant previous expression, particularly in older literature that is not indexed in online search engines. It is *not* appropriate to impose disciplinary sanctions on an author for an innocent mistake, such as overlooking some earlier source. We should be encouraging original thought and expression, without also demanding that every author cite a source for *every* known fact and *every* previously expressed idea in his/her paper.

Finally, including ideas and facts in a definition of plagiarism is overbroad, because it sweeps permissible conduct into the offense of plagiarism. As one law student noticed:

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<sup>97</sup> 17 USC §102(b). For the history and reasons for the rule that copyright does not protect ideas, see my essay at <http://www.rbs2.com/cidea.pdf>.

<sup>98</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (“The Second Circuit noted, correctly, that copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’ 723 F.2d at 203. No author may copyright his ideas or the facts he narrates.”). Cited with approval in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 344-345 (1991) (“The most fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas or the facts he narrates.’ ”).

For a history, reasons, and criticism of the rule that copyright does not protect facts, see my essay at <http://www.rbs2.com/cfact.pdf>.

While this [quotation from MODERN LANGUAGE ASSOCIATION HANDBOOK] is a comprehensive definition, and perhaps unworkable in seeming to require appending a footnote to virtually every sentence in a scholarly paper, it reflects the widespread understanding that plagiarism extends to ideas in addition to expression. Laurie Stearns, Comment, "Copy Wrong: Plagiarism, Process, Property, and the Law," 80 CALIFORNIA LAW REVIEW 513, 525 (March 1992).

In contrast to the sometimes discretionary nature of citations for facts or ideas, or the possibility of innocently overlooking an earlier expression of an idea, using someone else's words without the indicia of a quotation is *always* wrong. Further, there is a negligible probability that an author could independently create expression that consists of hundreds of — or even several dozen — identical words in the same sequence as an earlier author. And, as mentioned above, at page 15, copying another's words, then making a few "original" changes, does not defeat a charge of copyright infringement.

## 9. Self-Plagiarization

### students

For students self-plagiarization is taking a term paper or essay that was written for one class and submitting substantial parts of that work for credit in a second class, without informing the instructor. Self-plagiarization is wrong for students, because each class is supposed to represent acquisition of additional knowledge. Recycling an old term paper frustrates that goal.

### scholarly publications

In published scholarly journals, self-plagiarization is using part of one publication in a subsequent publication, without either (a) the indicia of a quotation or (b) citation to an earlier publication that is paraphrased. Self-plagiarization in publication is wrong for several different reasons:

1. The number of scholarly publications is an important credential for authors in academia. Repeating the same publication inflates the number of publications, giving the plagiarist an undeserved good reputation.
2. Most scholarly journals only accept new material for publication. Repeating large amounts of previously published text is a fraudulent misrepresentation by the author to the editor of the journal.
3. Publication of the same material more than once wastes space on library shelves, and wastes money in library budgets.

4. Moreover, someone doing a diligent search of the literature could order copies of two or three “different” scholarly papers, which, when read carefully, contain essentially the same information, thus wasting photocopy expense, interlibrary loan expense, etc.

On the other hand, it is not wrong for a professional to copy a few sentences or paragraphs from his/her previous work into a new work. Such de minimis copying is acceptable. For example, a research scientist might publish one paper on the design of an experiment, including the description of the experimental apparatus and methods. When the scientist later publishes another paper that reports the results of the experiment, the scientist is allowed to copy a few sentences or paragraphs from the earlier publication, provided that the earlier publication is cited. It would be needless labor to paraphrase the earlier work, and anything other than copying or paraphrase would be inaccurate.

### **10. Threat of Litigation Against Reporters of Plagiarism**

Within eight months after I posted the first version of my essay at my website, several faculty members sent e-mail that informed me that they suspected plagiarism by a student, and when they confronted the student, the student threatened to sue the professor, if professor reported the misconduct. I responded to these professors’ concern by adding this section to my essay.

The fear of litigation may coerce the professor into silence. Such silence not only allows the plagiarist to escape the consequences of his/her actions, but also allows the plagiarist to continue his/her misconduct in other classes and, after graduation, in other institutions. Such coerced silence reminds me of stories of New York City residents who sit in their office or apartment and watch someone being mugged on the street, but who do not call the police, because “they don’t want to get involved”.

While I suppose it is possible that a plagiarist could sue for damage to his reputation, the plagiarist would likely lose a summary judgment motion by the defendant. And, as a practical matter, the plagiarist is *unlikely* to sue, because:

- the publicity of the litigation would harm the plagiarist’s reputation more than any allegations that prompted the litigation,
- an ethical attorney would not file a groundless law suit on behalf of the plagiarist,
- the plagiarist probably is unable to afford the cost of litigation, while the university is likely to pay an attorney to defend a professor for any action arising from the professor’s official duties.

So the threat of litigation by a plagiarist is likely just an empty threat, made in an emotional moment when the plagiarist is scared of being punished. I don’t recommend being confrontational, but one could reply to threats of litigation with:

1. It is *never* defamation to make a true statement, even if the statement damages the plagiarist's reputation.
2. There is a privilege for good-faith reports of misconduct to the proper authorities.<sup>99</sup> Even if the authorities eventually conclude that there was neither plagiarism nor misconduct, good-faith reporting is *not* defamatory.
3. Reporting suspected plagiarism to colleagues in the department or to a college misconduct committee may not be "publication", as the term is used in the law of defamation.<sup>100</sup>
4. As mentioned above at page 66, judges have a low regard for plagiarists. A plagiarist has already damaged his/her own reputation by the act of plagiarization.
5. Plagiarists are tortfeasors, not victims. The real victims are (a) the true author whose work was plagiarized, (b) the professor who [almost] gave credit to the plagiarist for someone else's work, and (c) honest students who must compete with plagiarists.
6. One could threaten to counter-sue for malicious prosecution, including the value of one's time to respond to groundless accusations and reimbursement of attorney's fees.

Moreover, the college's policy manual may impose a duty on every professor to report plagiarism or other misconduct. With such a duty, the professor could get in more trouble for not reporting plagiarism than for reporting plagiarism.

## 11. Alternatives to Litigation for Plagiarism

As explained above,<sup>101</sup> copyright law in the USA may prohibit copying expression in text and figures. However, failure to attribute a quotation or paraphrase to the true author is currently *not* a legal wrong in the USA.<sup>102</sup> In an obscure case in a U.S. District Court in Kansas, the judge quoted BLACK'S LAW DICTIONARY:

Plagiarism, which many people commonly think has to do with copyright, is not in fact a legal doctrine. True plagiarism is an ethical, not a legal offense and is enforceable by academic authorities, not courts. Plagiarism occurs when someone — a hurried student, a neglectful professor, an unscrupulous writer — falsely claims someone else's words, whether

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<sup>99</sup> See, e.g., *Greenya v. George Washington University*, 512 F.2d 556, 563 (D.C.Cir. 1975) ("It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution."); *Newman v. Com. of Massachusetts*, 884 F.2d 19 (1st Cir. 1989) (qualified immunity), *cert. den.*, 493 U.S. 1078 (1990); *Singh v. Tong*, Not Reported in F.Supp.2d, 2006 WL 3063495 (D.Or. 25 Oct 2006) (Absolute privilege for reporting to Law School Honor Code Committee, which "was acting as a quasi-judicial body.").

<sup>100</sup> ; *Mercer v. Board of Trustees for University of Northern Colorado*, 17 Fed.Appx. 913, 915-916 (10th Cir. 2001).

<sup>101</sup> See the text beginning on page 13.

<sup>102</sup> See the text about *Dastar*, beginning on page 25, above.

copyrighted or not, as his own. Of course, if the plagiarized work is protected by copyright, the unauthorized reproduction is also a copyright infringement.

*Kindergartners Count, Inc. v. DeMoulin*, 249 F.Supp.2d 1233, 1251-52 (D.Kan. 2003) (quoting BLACK'S LAW DICTIONARY, p. 1170 (7<sup>th</sup>ed. 1999), which quoted Paul Goldstein, COPYRIGHT'S HIGHWAY, p. 12 (1994)). *Kindergartners Count* is quoted with approval by David Nimmer<sup>103</sup> in NIMMER ON COPYRIGHT § 8D.03[A][2][c] (Dec 2009), which says plagiarism "constitutes an ethical, rather than a legal, offense". The same quotation from BLACK'S LAW DICTIONARY also occurs in *Santilli v. Cardone*, Not Reported in F.Supp.2d, 2008 WL 2790242, n.2 (M.D.Fla. 2008).

It's a sad day for the USA when the leading law dictionary in the USA makes excuses for plagiarists (e.g., "a hurried student, a neglectful professor") and then refuses to recognize real harm from plagiarism. On the other hand, a trial judge *must* follow the law expressed in statutes and appellate opinions, which, as explained above, do not prohibit failure to attribute a quotation to the true author.

BLACK'S LAW DICTIONARY says that plagiarism is a matter for "academic authorities". That is too narrow a view. Plagiarism is *also* a matter for both professional societies and commercial publishers, who publish scholarly books and journals. An author who submits plagiarized text for publication is perpetrating a fraud on the editors or publisher of the journal or book, and probably breaching the contract between the author and publisher.

As explained above, plagiarism itself is *not* a legal wrong — not a violation of the true author's intellectual property rights, although copying large amounts of text might be copyright infringement. However, colleges and professional societies *can* include sanctions against plagiarists in their rules and contracts. As explained above, beginning at page 39, courts routinely uphold sanctions imposed by colleges against plagiarists. A publisher could sue the plagiarist for fraud or breach of contract. This is viable litigation, although I found no reported case in my search of Westlaw in Feb 2010.

There are several reasons why a professional society, publisher, or even a university, would not want to investigate allegations of plagiarism. First, a thorough investigation is expensive and diverts money from allegedly more worthy projects. Second, any publicity would expose a scandal that might damage the reputation of everyone involved, except the reputation of the true author whose work was plagiarized. Third, the investigation is unpleasant, particularly because the accused plagiarist commonly spews threats of expensive litigation, specious excuses, and irrelevant accusations. These are real reasons, but — in my opinion — they do *not* justify refusing to investigate allegations of plagiarism.

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<sup>103</sup> Note that David Nimmer represented the plagiarist in *Dastar* (see page 25, above).

For example, consider a contract between the publisher and the author who submits allegedly plagiarized work, as a condition of evaluating and editing the submitted manuscript for possible publication. After a credible complaint about plagiarism, the publisher would arrange for an investigation to be conducted by a neutral, third-party decisionmaker, such as a professional arbitrator or an attorney who is familiar with both (1) the technical subject matter of the allegedly plagiarized expression, (2) appropriate procedural rules (e.g., rules of evidence, due process), and (3) the concept of “substantially similar” in copyright law. My proposal here essentially takes alternative dispute resolution methods that are widely used in business and financial areas and uses the same nonlitigation methods to determine plagiarism.

Universities normally can investigate and determine plagiarism by undergraduate students without great difficulty. However, when one professor accuses another professor at the same university of plagiarism, then the investigation and determination really needs to be done by a neutral decisionmaker who is not affiliated with the university, in order to obtain a fair hearing. Professors should be free to make good-faith accusations of plagiarism inside their own university, without needing to pay for the cost of the investigation if the accusations prove unfounded.

By using alternative dispute resolution, instead of litigation in court, universities, professional societies, and publishers can enforce definitions of plagiarism in their own rules and contracts. Such a nonlitigation approach avoids the fact that the law in the USA currently does *not* recognize plagiarism itself as a legal wrong.

## Conclusion

Academic degrees represent a college’s public certification that a former student possesses at least some minimum amount of knowledge and intellectual skill. Such degrees are commonly used a minimum credential for being hired to fill a professional position: not only physicians, attorneys, engineers, scientists, teachers, but also managers. If academic degrees are to have any meaningful significance, then they must not be awarded to students who plagiarize material, cheat on examinations, commit fraud in reporting research results, and other kinds of serious misconduct. Plagiarizing, cheating, or fraud must not be an alternate route to a diploma. When a diligent student who writes an original paper gets a lower grade than a plagiarist, the instructor effectively punishes the honest student and rewards the wrongdoer.

In June 2003, the U.S. Supreme Court in *Dastar* held that the Lanham Act does *not* prohibit false designation of origin by plagiarists. That decision means that plagiarism is no longer a legal wrong in the USA, unless the plagiarist can be successfully sued for copyright infringement.<sup>104</sup>

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<sup>104</sup> Some examples of plagiarism are *not* copyright infringement, as explained above, beginning at page 14.



At page 33 above, I suggest a new tort of plagiarism. A better solution would be for the U.S. Congress to add the moral right of attribution to the Copyright Act.<sup>105</sup>

Colleges should take an active stand against plagiarism. Professors should be given access to full-text databases, so they can easily check for plagiarism. When possible plagiarism is detected, professors should report the case to the appropriate authorities on campus for investigation, hearing, and resolution. Plagiarism must *not* be an alternative route to a diploma in colleges.

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This document is at **www.rbs2.com/plag.pdf**

I searched Westlaw for court cases and statutes on this topic in Dec 1999 and Nov 2011.  
first posted as an HTML file on 10 Feb 2000, revised 16 Apr 2012

go to my collection of links at <http://www.rbs2.com/plaglink.htm> .

return to my homepage at <http://www.rbs2.com/>

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<sup>105</sup> Ronald B. Standler, *Moral Rights of Authors in the USA*, <http://www.rbs2.com/moral.pdf> (1998, revised 2012).