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# Plagiarism is Not a Crime

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# Plagiarism is Not a Crime

Brian L. Frye\*

## ABSTRACT

*Copyright infringement and plagiarism are related but distinct concepts. Copyright prohibits certain uses of original works of authorship without permission. Plagiarism norms prohibit copying certain expressions, facts, and ideas without attribution. The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it is economically efficient. This article considers whether academic plagiarism norms are economically efficient. It concludes that academic plagiarism norms prohibiting non-copyright infringing plagiarism are not efficient and should be ignored.*

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## I. INTRODUCTION

"If we steal thoughts from the moderns, it will be cried down as plagiarism; if, from the ancients, it will be cried up as erudition."<sup>1</sup>

"I am reminded of the man who was asked what plagiarism was. He said: 'It is plagiarism when you take something out of a book and use it as your own. If you take it out of several books then it is research.'"<sup>2</sup>

"As Wilson Mizner says, 'When you take stuff from one writer it's plagiarism, but when you take from many writers it's called research.'"<sup>3</sup>

"On the title page of most of the books on Art should be printed, 'If you steal from one person it's plagiarism: if you steal from three persons it's research.'"<sup>4</sup>

"The moral is, in literature, not to steal from one author, but to learn from many. Plagiarism is not only a crime, but a mark of stupidity, like robbing a country bank."<sup>5</sup>

"Asa G. Baker quotes a librarian's distinction between plagiarism and research: 'If you wrote a paper and quoted without credit from a single book, it would be plagiarism; but if you quoted from three or four, it would be research.'"<sup>6</sup>

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1. CHARLES CALEB COLTON, LACON: OR, MANY THINGS IN FEW WORDS: ADDRESSED TO THOSE WHO THINK 229 (1820).

2. Ralph Foss, *Cooperation Between Special Libraries and Publishers*, in SPECIAL LIBRARIES 281 (1932).

3. FRANK CASE, TALES OF A WAYWARD INN 248 (1938).

4. Joseph Cummings Chase, *Do You Call THAT Art?*, THE COMMENTATOR, Oct. 1938, at 26.

5. WALTER S. CAMPBELL, PROFESSIONAL WRITING 88-89 (1946).

6. QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2010/09/20/plagiarism/> (last visited Mar. 7, 2016).

"If you get information from one source,' said Leslie Henson in his recent London show, 'it's called plagiarism; if you get it from two or more sources, it's called research.'"<sup>7</sup>

"Bob Oliver suggests a simple rule-of-thumb for would-be movie scenarists. 'Just remember,' says he, 'if you steal from one man, it's plagiarism. If you steal from several, it's research.'"<sup>8</sup>

"If you steal from one author, it's plagiarism; if you steal from many, it's research."<sup>9</sup>

"Remember why the good Lord made your eyes,

So don't shade your eyes,

But plagiarize, plagiarize, plagiarize –

Only be sure always to call it please 'research'."<sup>10</sup>

"To steal ideas from one person is plagiarism. To steal from many people is research."<sup>11</sup>

In the 1980s California of my youth, a popular bumper sticker proclaimed: "Skateboarding is Not a Crime." It was ubiquitous, appearing on bathroom walls, storefront windows, park benches, and occasionally even bumpers. While the origin of the slogan is unclear, it became popular when Santa Cruz Skateboards and TransWorld SKATEboarding magazine passed out hundreds of thousands of bumper stickers, in response to a wave of municipal regulations prohibiting skateboarding.<sup>12</sup>

The slogan resonated with skateboarders because it expressed two related but distinct ideas. It not only observed that skate-

7. Henry King, *New Problems in Advertising and Steps Towards Their Solution*, in *CANADIAN MARKETING PROBLEMS: TEN ESSAYS* 80 (H.R. Kemp ed., 1939).

8. Jimmie Fidler, *Jimmie Fidler in Hollywood, March 17, 1941*, L.A. TIMES (Mar. 17, 2011), <http://latimesblogs.latimes.com/thedailymirror/2011/03/jimmie-fidler-in-hollywood-march-17-1941.html>.

9. Alva Johnston, *Legend of a Sport—I*, NEW YORKER, Oct. 10, 1942, at 21 (attributed to Wilson Mizner).

10. TOM LEHRER, *LOBACHEVSKY* (Lehrer Records 1953).

11. EMERY A. WILSON ET AL., *PEARLS: FOR LEADERS IN ACADEMIC MEDICINE* 28 (2008) (attributed to Steven Wright).

12. See, e.g., Barbara Metzler, *Cities Fed Up, 'Making Criminals' Out of Skateboarders*, L.A. TIMES (Nov. 20, 1988), [http://articles.latimes.com/1988-11-20/news/mn-575\\_1\\_transworld-skateboarding](http://articles.latimes.com/1988-11-20/news/mn-575_1_transworld-skateboarding) ("All the bad press prompted Santa Cruz Skateboards, among the largest manufacturers of skateboarding equipment, and Transworld Skateboarding magazine to give out hundreds of thousands of bumper stickers with the message: 'Skateboarding Is Not a Crime.'").

boarding was a *prima facie* lawful activity, but also implied that regulations prohibiting skateboarding were illegitimate because they merely reflected and reinforced negative social meanings associated with skateboarding.<sup>13</sup> The literal observation that skateboarding was not generally prohibited reinforced the implicit assertion that skateboarding should not be prohibited.

The sociologist Howard Becker famously argued “social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders.”<sup>14</sup> As a consequence, deviance is a relational concept, defined only in relation to the rules created and enforced by various social groups: “[O]utsiders, from the point of view of the person who is labeled deviant, may be the people who make the rules he had been found guilty of breaking.”<sup>15</sup>

For example, Becker observed that in the 1960s, mainstream society viewed marijuana users as “outsiders” because marijuana use was prohibited, but marijuana users viewed non-marijuana users as “outsiders” because they observed prohibitions on marijuana use.<sup>16</sup> Likewise, in the 1980s, mainstream society viewed skateboarders as “outsiders” because skateboarding was prohibited, but skateboarders viewed non-skateboarders as “outsiders” because they observed prohibitions on skateboarding. In both cases, mainstream society defined an activity as “deviant” by prohibiting it, thereby creating a group of “outsiders,” and the “outsiders” questioned the legitimacy of the prohibition by arguing that it was not justified.

But Becker’s dialectical theory of deviance is not limited to formal legal rules. Social groups routinely define certain activities as “deviant” by creating and enforcing social norms that prohibit those activities, and labeling people who engage in those activities as “outsiders.”<sup>17</sup> Legal scholars have observed that stand-up co-

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13. Cf. William Hubbard, *Competitive Patent Law*, 65 FLA. L. REV. 341, 381 n.264 (2013) (“This understanding of the social meaning of crime perhaps explains why some people assert that activities that are not crimes in fact are not crimes.”). Ironically, while skateboarding is not a crime, saying so might be. In 1998, the USPTO registered three trademarks for the phrase “SKATEBOARDING IS NOT A CRIME.” See SKATEBOARDING IS NOT A CRIME, Registration No. 2134679 (“75286938 (clothing, namely, T-shirts, sweatshirts, [sweatpants, jackets,] hats, [and swimwear]”)); SKATEBOARDING IS NOT A CRIME, Registration No. 2134680 (“75286939 (skateboards and skateboard decks”)); SKATEBOARDING IS NOT A CRIME, Registration No. 2137534 (“75286940 (decalcomanias, decals, [paper flags] and paper banners”).

14. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (emphasis omitted).

15. *Id.* at 15.

16. See generally *id.* at 41–78.

17. *Id.* at 1–4.

medians prohibit “joke-stealing,” roller derby skaters prohibit “pseudonym-stealing,” and tattoo artists prohibit “tattoo-stealing.”<sup>18</sup> These social norms effectively create extra-legal property rights in jokes, pseudonyms, and tattoos.

Likewise, many social groups define “plagiarism” as “deviant” by creating and enforcing social norms that prohibit copying certain expressions, facts, and ideas without attribution.<sup>19</sup> These plagiarism norms effectively create extra-legal “attribution rights” in expressions, facts, and ideas. Different social groups have adopted different plagiarism norms. Academic plagiarism norms create some of the most expansive “attribution rights,” by prohibiting the use of any expression, fact, or idea without attribution.

While copyright and plagiarism norms often overlap, they are analytically distinct and protect substantively different rights. Copyright prohibits certain uses of original works of authorship without permission, irrespective of attribution; plagiarism norms prohibit copying certain expressions, facts, and ideas without attribution, irrespective of copyright protection. Notably, copyright does not and cannot protect facts or ideas, or require their attribution, but plagiarism norms typically require the attribution of both facts and ideas. As a result, copying with attribution may be copyright infringement, but cannot be plagiarism, and copying without attribution is plagiarism, but may not be copyright infringement.

The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship caused by free riding by giving marginal authors an incentive to invest in the creation of works of authorship.<sup>20</sup> In other words, copyright is justified because it increases net social welfare: the social cost of providing copyright protection is exceeded by the social benefit of additional works of authorship. By implication, copyright is justified when it increases net social welfare, and not justified when it reduces net social welfare.

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18. See, e.g., Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1787–88 (2008); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511, 541–60 (2013).

19. See, e.g., Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 175 (2002).

20. See generally RONALD A. CASS & KEITH N. HYLTON, *LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* (2013).

Of course, just as legal rules may or may not be justified, social norms also may or may not be justified. Scholars have previously questioned the legitimacy of the informal property rights created by social norms by asking whether they are justified on welfarist grounds.<sup>21</sup> Plagiarism norms effectively create an extra-legal form of copyright protection by giving authors a *de facto* “attribution right” in certain expressions, facts, and ideas. Under the economic theory of copyright, plagiarism norms are justified if they increase social welfare, and are not justified if they decrease social welfare.

This article argues that academic plagiarism norms that prohibit non-copyright infringing copying are not justified under the economic theory of copyright because they require attribution even when it reduces public welfare. When applied to scholars, they reduce public welfare by requiring inefficient attribution and creating inefficient incentives. When applied to students, they reduce public welfare by prohibiting efficient pedagogical techniques, including “patch writing,” or the use of imitation as a method of developing writing skills.<sup>22</sup>

## II. THE SUBJECT MATTER OF COPYRIGHT

The Intellectual Property Clause of the Constitution empowers Congress “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . .”<sup>23</sup> The Copyright Act uses that power to give authors certain exclusive rights to use the original elements of their works of authorship for a limited period of time, subject to certain exceptions, including “fair use.”<sup>24</sup>

The Intellectual Property Clause also limits the potential scope of copyright protection.<sup>25</sup> It provides that Congress can only afford copyright protection for “limited times,” a limitation observed

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21. See, e.g., Katherine J. Strandburg, *Who's in the Club?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 1 (2009); Henry E. Smith, *Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 9 (2009); Jennifer E. Rothman, *Custom, Comedy, and the Value of Dissent*, 95 VA. L. REV. IN BRIEF 19 (2009). But see Dotan Oliar & Christopher Sprigman, *From Corn to Norms: How IP Entitlements Affect What Stand-up Comedians Create*, 95 VA. L. REV. IN BRIEF 57 (2009). See also Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59.

22. See generally REBECCA MOORE HOWARD, *STANDING ON THE SHOULDERS OF GIANTS: PLAGIARISTS, AUTHORS, COLLABORATORS* (1999).

23. U.S. CONST. art. I, § 8, cl. 8.

24. 17 U.S.C. §§ 101–122 (2012 & Supp. 2014).

25. U.S. CONST. art. I, § 8, cl. 8.

largely in the breach.<sup>26</sup> But it also provides that copyright can only protect the “original elements” of a work of authorship, which must be “independently created by the author” and reflect “at least some minimal degree of creativity.”<sup>27</sup> The “independent creation” requirement provides that an element of a work is original only if it is not a copy of something that already exists, so copyright cannot protect an element of a work that is copied from a previously existing work.<sup>28</sup> Likewise, copyright cannot protect facts, because they are not created, but discovered: “The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”<sup>29</sup> While the “creativity” requirement provides that an element of a work is original only if it reflects a “modicum of creativity,” it is effectively meaningless, because the Supreme Court has not defined “creativity” or explained how to measure it.<sup>30</sup>

In addition, copyright does not and cannot protect ideas. The Copyright Act provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>31</sup> As the Supreme Court has observed, the “idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by

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26. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (reviewing Congress’s decision to extend the copyright term under the rational basis test); see also Brian L. Frye, *Eldred & the New Rationality*, 104 KY. L.J. ONLINE 1 n.44 (July 17, 2015), <http://www.kentuckylawjournal.org/index.php/2015/07/17/eldred-new-rationality/#more-177> (asking whether the Supreme Court should revisit *Eldred* and related cases given apparent changes in the rational basis test).

27. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

28. *Id.* As Justice Holmes famously explained, “Others are free to copy the original. They are not free to copy the copy.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903) (citing *Blunt v. Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828)). In theory, copyright can protect an element of a work that is identical to an element of a pre-existing work, if it was not copied from the pre-existing work. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936). But in practice, most courts would assume “unconscious copying.” See, for example, *Bright Tunes Music Corporation v. Harrisongs Music, Limited*:

Did Harrison deliberately use the music of He’s So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He’s So Fine with different words, and Harrison had access to He’s So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.

420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

29. *Feist Publ’ns, Inc.*, 499 U.S. at 347

30. *Id.* at 362.

31. 17 U.S.C. § 102(b) (2012).

permitting free communication of facts while still protecting an author's expression."<sup>32</sup>

### III. COPYRIGHT INFRINGEMENT

Copyright infringement is a tort, and intentional copyright infringement for commercial purposes is a crime.<sup>33</sup> If an original element of a copyrighted work is used without permission, the copyright owner may file an infringement action.<sup>34</sup> In order to make out a *prima facie* case of copyright infringement, a copyright owner must show that the defendant actually copied one or more original elements of the copyrighted work, and that copying the original elements made the works substantially similar.<sup>35</sup>

Copyright may also protect certain moral rights. For example, the Berne Convention requires its signatories to grant authors a right of attribution and a right of integrity.<sup>36</sup> The right of attribution gives authors the right to require attribution to their works of authorship, while the right of integrity gives authors the right to prevent the alteration or destruction of their works of authorship.<sup>37</sup> In conjunction, the rights of attribution and integrity may also provide authors with the right to disclaim authorship of a work, under certain circumstances.

In general, United States copyright law does not protect moral rights. While the Copyright Act does provide limited rights of attribution and integrity to the authors of certain works of visual art, these are the exception that proves the rule.<sup>38</sup> The Copyright Act does not provide a general attribution right, and at least in theory, attribution is largely irrelevant to copyright infringe-

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32. *Eldred*, 537 U.S. at 219 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985)).

33. 17 U.S.C. §§ 501–513 (2012 & Supp. 2014).

34. *Id.*

35. *Feist Publ'ns, Inc.*, 499 U.S. at 361 (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”).

36. The Berne Convention for the Protection of Literary and Artistic Works, art. 6bis., Sept. 9, 1886, 828 U.N.T.S. 222.

37. *Id.*

38. See The Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A (2012).

ment.<sup>39</sup> Non-attribution is not an element of an infringement action, and attribution is not a defense to infringement action.<sup>40</sup>

#### IV. PLAGIARISM

Plagiarism is not a legal wrong. There is no cause of action for plagiarism. It is neither a tort, nor a crime. Plagiarism is a social wrong, defined and enforced extra-legally by different social groups in different ways.

But plagiarism is punished no less severely than copyright infringement. Indeed, the social sanctions associated with plagiarism are arguably even more severe than the legal sanctions associated with copyright infringement, because they preclude expiation. “Plagiarism is considered by most writers, teachers, journalists, scholars, and even members of the general public to be the capital intellectual crime.”<sup>41</sup> Tortfeasors must pay damages, and criminals must endure punishment, but plagiarism is forever: “The label is the academic equivalent of the mark of Cain.”<sup>42</sup> A student “convicted” of plagiarism may be expelled, and a scholar may be fired. At least in theory, plagiarists may have “second acts” in their lives, but not in their academic careers.<sup>43</sup>

Plagiarism is typically defined as copying without attribution. For example, Black’s Law Dictionary defines plagiarism as, “The deliberate and knowing presentation of another person’s original ideas or creative expression as one’s own.”<sup>44</sup> Chafee distinguished copyright infringement and plagiarism by observing, “In piracy, unlicensed persons still give the author credit; in plagiarism they take the credit themselves.”<sup>45</sup>

In other words, the essence of plagiarism is misattribution, and plagiarism norms typically prohibit copying certain expressions and ideas without attribution. And yet, there is no uniform definition of plagiarism. As St. Onge observed, “Plagiarism shares a curious semantic feature with the term *pornography*. Even

39. Jonathan Band & Matt Schruers, Dastar, *Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 2 (2005) (“In *Dastar*, Fox attempted to impose legal liability on Dastar for non-attribution. It attempted to convert plagiarism, which violates the moral standards of many professions and communities, into a legal violation. The Supreme Court rejected this effort emphatically.”) (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 27, 38 (2003)).

40. *Id.*

41. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 107 (2007).

42. K. R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 61 (1988).

43. *Cf.* F. SCOTT FITZGERALD, *THE LAST TYCOON* (1941).

44. BLACK’S LAW DICTIONARY 1187 (8th ed. 2004).

45. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513 (1945).

though we cannot agree on specifics, “[w]e know it when we see it.”<sup>46</sup>

The meaning of the term “plagiarism” is indeterminate in part because it depends on social context. Different social groups define plagiarism differently by adopting various plagiarism norms.<sup>47</sup> In practice, journalistic plagiarism norms typically require the attribution of copied expressions, but do not require the attribution of copied facts and ideas.<sup>48</sup> However, many plagiarism norms *do not* require the attribution of certain expressions. For example, most social groups do not require the attribution of jokes and anecdotes.<sup>49</sup>

The definition of the term “plagiarism” is also indeterminate because plagiarism norms typically fail to adequately define plagiarism. Plagiarism norms often fail to specify exactly what they protect, how they protect it, and when they apply. As a consequence, it can be difficult to determine whether particular uses of works of authorship require attribution. This difficulty encourages a “culture of attribution,” or a social norm of attributing all copied expressions, facts, and ideas, whether or not attribution is helpful or justified. The stronger the plagiarism norms adopted by a social group, the greater the incentive to attribute in all cases to avoid potential violations.

### A. Academic Plagiarism Norms

In the interest of brevity and clarity, this article’s analysis will focus on academic plagiarism norms because they are both expansive and paradigmatic. Academic plagiarism norms typically require the attribution of expressions, facts, and ideas. The Modern Language Association (“MLA”) has promulgated the following widely accepted definition of academic plagiarism: “Plagiarism is

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46. ST. ONGE, *supra* note 42, at 51.

47. See, e.g., Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 15–18 (2010) (“A review of the literature suggests that no universal understanding exists with respect to plagiarism; rather, it is a term that encompasses a variety of permutations that extend beyond the mere appropriation of another’s specific language.”).

48. Compare NYU JOURNALISM HANDBOOK FOR STUDENTS, available at <http://journalism.nyu.edu/wp-content/uploads/document-nyu-journalism-handbook-for-students.pdf> (last visited Mar. 10, 2016) (defining plagiarism as the unattributed copying of expressions, ideas, or facts) with Trudy Lieberman, *Plagiarize, Plagiarize, Plagiarize . . . only be sure to call it research*, 34 COLUM. JOURNALISM REV. 21 (1995) (observing that in practice journalistic plagiarism norms typically only require the attribution of expressions).

49. But see Oliar & Sprigman, *supra* note 18, at 1787.

the use of another person's ideas or expressions in your writing without acknowledging the source."<sup>50</sup>

The MLA plagiarism policy explicitly prohibits the unattributed copying of expressions and ideas, defining both terms quite broadly. Specifically, it prohibits unattributed copying of "expressions," including "sentences" and "apt phrases."<sup>51</sup> By contrast, copyright law typically does not protect individual sentences, and cannot protect short phrases.<sup>52</sup> In addition, the MLA policy prohibits the unattributed copying of "ideas," including an "argument," "line of thinking," or "thesis."<sup>53</sup> By contrast, copyright law does not and cannot protect "ideas," which would include all of these examples.<sup>54</sup>

In addition, the MLA definition of plagiarism is remarkably vague. Academic plagiarism norms effectively create an "attribution right" in certain expressions and ideas, but it is unclear when such a right exists. When do "sentences" and "apt phrases" belong to someone? What if a sentence is conventional, factual, trivial, or banal? When is a phrase "apt"? Are inapt phrases unprotected? Who decides whether a sentence or phrase is entitled to protection? When does an "argument," "line of thinking," or "thesis" belong to someone? What if it is not unique to the copied work?

Educational institutions typically adopt plagiarism policies governing student work, which provide various definitions of plagiarism. For example, the University of Kentucky's plagiarism policy provides:

All academic work, written or otherwise, submitted by students to their instructors or other academic supervisors, is expected to be the result of their own thought, research, or

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50. WALTER S. ACHTERT & JOSEPH GIBALDI, *THE MLA STYLE MANUAL* 4 (1985). The MLA also provides that:

The most blatant form of plagiarism is reproducing someone else's sentences, more or less verbatim, and presenting them as your own. Other forms include repeating another's particularly apt phrase without appropriate acknowledgement, paraphrasing someone else's argument as your own, introducing another's line of thinking as your own development of an idea, and failing to cite the source for a borrowed thesis or approach.

*Id.*

51. *Id.*

52. U.S. COPYRIGHT OFFICE, *COPYRIGHT OFFICE CIRCULAR 34, COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES*, (2015), available at <http://copyright.gov/circs/circ34.pdf> (last visited Mar. 10, 2016).

53. See ACHTERT & GIBALDI, *supra* note 50, at 4.

54. See 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

self-expression. In cases where students feel unsure about a question of plagiarism involving their work, they are obliged to consult their instructors on the matter before submission.

When students submit work purporting to be their own, but which in any way borrows ideas, organization, wording or anything else from another source without appropriate acknowledgment of the fact, the students are guilty of plagiarism.

Plagiarism includes reproducing someone else's work, whether it be published article, chapter of a book, a paper from a friend or some file, or whatever. Plagiarism also includes the practice of employing or allowing another person to alter or revise the work which a student submits as his/her own, whoever that other person may be. Students may discuss assignments among themselves or with an instructor or tutor, but when the actual work is done, it must be done by the student, and the student alone.

When a student's assignment involves research in outside sources or information, the student must carefully acknowledge exactly what, where and how he/she has employed them. If the words of someone else are used, the student must put quotation marks around the passage in question and add an appropriate indication of its origin. Making simple changes while leaving the organization, content and phraseology intact is plagiaristic. However, nothing in these *Rules* shall apply to those ideas which are so generally and freely circulated as to be a part of the public domain.<sup>55</sup>

The vagueness and overbreadth of this plagiarism policy is obvious and impressive, and worth reviewing line by line:

- “When students submit work purporting to be their own, but which in any way borrows ideas, organization, wording or *anything else* from another source without appropriate acknowledgment of the fact, the students are guilty of plagiarism.”<sup>56</sup> The policy prohibits students from copying “anything” without attribu-

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55. UNIVERSITY OF KENTUCKY, UNIVERSITY SENATE RULES, 6.3.1 PLAGIARISM (Feb. 2012), *available at* [http://www.uky.edu/Faculty/Senate/rules\\_regulations/Rules%20Versions/MASTER%20RULES%20from%20February%202012\\_clean.pdf](http://www.uky.edu/Faculty/Senate/rules_regulations/Rules%20Versions/MASTER%20RULES%20from%20February%202012_clean.pdf).

56. *Id.*

tion, which presumably includes expressions, facts, and ideas, no matter how generic or trivial.

- “Plagiarism includes reproducing someone else’s work, whether it be published article, chapter of a book, a paper from a friend or some file, or whatever.”<sup>57</sup> Presumably, this is a mistake, because it appears to prohibit copying with attribution, which is typically not considered plagiarism.
- “Plagiarism also includes the practice of employing or allowing another person to alter or revise the work which a student submits as his/her own, whoever that other person may be. Students may discuss assignments among themselves or with an instructor or tutor, but when the actual work is done, it must be done by the student, and the student alone.”<sup>58</sup> Apparently, students may discuss their work with professors and other students, but may not incorporate any advice they receive.
- “When a student’s assignment involves research in outside sources or information, the student must carefully acknowledge exactly what, where and how he/she has employed them.”<sup>59</sup> The policy requires attribution of any use of “outside sources or information,” but does not define either term, or explain what counts as use.
- “If the words of someone else are used, the student must put quotation marks around the passage in question and add an appropriate indication of its origin.”<sup>60</sup> While the policy states the “words of someone else,” it does not explain when words belong to someone else and when they do not.
- “Making simple changes while leaving the organization, content and phraseology intact is plagiaristic.” The policy prohibits copying the “organization, content

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

and phraseology” of a work, without providing any definition of those terms or what they might include.<sup>61</sup>

- “However, nothing in these Rules shall apply to those ideas which are so generally and freely circulated as to be a part of the public domain.”<sup>62</sup> The policy does not require attribution of “those ideas which are so generally and freely circulated as to be a part of the public domain,” but does not describe how to determine whether an idea is “in the public domain,” an especially infelicitous term in this context given that under copyright law, all ideas are in the public domain by definition. Moreover, the policy specifically prohibits unattributed copying of many public domain elements, like facts, ideas, and organization.

Finally, the policy helpfully advises: “In cases where students feel unsure about a question of plagiarism involving their work, they are obliged to consult their instructors on the matter before submission.”<sup>63</sup> Hopefully, there are an awful lot of such consultations, because it is hard to imagine how any student attempting to follow this policy could possibly be anything but “unsure” about any “question of plagiarism.” In any case, I am certainly confused.

The vagueness of academic plagiarism norms is troubling because laws and social norms should not be arbitrary. As St. Onge observed: “Either there are rules and laws pertaining to the term or the term itself is a useless, even pernicious, entity.”<sup>64</sup> Social norms are, by their very nature, typically less formal and well defined than laws. However, the academic plagiarism norms governing both scholars and students were codified long ago. It is rather surprising that such norms remain inchoate.<sup>65</sup>

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61. UNIVERSITY OF KENTUCKY, *supra* note 55, at 6.3.1.

62. *Id.*

63. *Id.*

64. ST. ONGE, *supra* note 42, at x.

65. For example, Professor Steven Dutch states:

It is certainly true that colleges and universities are seeing an epidemic of plagiarism, fueled by easy electronic access to resources, including “research papers.” Back in the days before the Internet, students at least had to put out the effort to type out their stolen work by hand; now they need merely cut and paste. It is equally true that we are seeing an epidemic of faulty definitions of plagiarism, including high-profile but inaccurate and unsupportable claims of plagiarism lodged against prominent authors and filmmakers. Bad definitions of plagiarism confuse students and simultaneously trivialize the problem. The examples cited in style manuals are commonly so pedantic that students might be pardoned if they conclude the whole issue is a matter of academic nit-picking.

The arbitrariness of plagiarism norms has long provoked criticism and satire. As Voltaire observed: “It is chiefly in poetry that plagiarism is allowed to pass; and certainly, of all larcenies, it is that which is least dangerous to society.”<sup>66</sup> Many have noted the formidable risk of hypocrisy, given that many complainants have themselves copied without attribution. The notable satirist Ambrose Bierce defined plagiarism as, “[a] literary coincidence compounded of a discreditable priority and an honorable subsequence,” and, “[t]o take the thought or style of another writer whom one has never, never read.”<sup>67</sup> And a popular online dictionary even uses an unattributed quip to illustrate the use of the term: “It is said that he plagiarized Thoreau’s plagiarism of a line written by Montaigne.”<sup>68</sup>

Regardless, plagiarism norms are at least nominally observed and enforced, effectively creating an extra-legal attribution right in works of authorship by using social sanctions to punish the unattributed copying of expressions, facts, and ideas under certain circumstances. The scope of the attribution right depends on the social group that creates and enforces the plagiarism norm. In the case of academic plagiarism norms this right is broad indeed, extending, at least theoretically, to every expression, fact, or idea in a work of authorship, no matter how pedestrian.

## V. COMPARING COPYRIGHT INFRINGEMENT & PLAGIARISM

Copyright infringement and plagiarism are often mistakenly used as synonyms. For example, journalists often refer to copyright infringement actions as “plagiarism” claims, probably because they are more familiar with plagiarism norms than copyright law.<sup>69</sup> But judges also make this mistake, especially when considering copyright infringement actions that make claims on the fringes of copyright protection. In one copyright infringement action, *Sheldon v. Metro-Goldwyn Pictures Corporation*,<sup>70</sup> Judge

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Steven Dutch, *Sense and Nonsense About Plagiarism*, UNIVERSITY OF WISCONSIN-GREEN BAY (last updated June 2, 2010), <https://www.uwgb.edu/dutchs/PSEUDOSC/PlagiarNonsense.HTM>.

66. VOLTAIRE, *PHILOSOPHICAL DICTIONARY* 205 (William F. Fleming trans. 1901).

67. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY, TALES, AND MEMOIRS* 581 (S.T. Joshi ed., 2011).

68. *Plagiarism* *Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/plagiarism> (last visited Feb. 3, 2016).

69. See, e.g., Lauren Moraski, *Led Zeppelin loses first round in “Stairway to Heaven” plagiarism lawsuit*, CBS NEWS, (Oct. 21, 2014 11:21 AM), <http://www.cbsnews.com/news/led-zeppelin-loses-first-round-in-stairway-to-heaven-plagiarism-lawsuit/>.

70. *Sheldon*, 81 F.2d 49.

Learned Hand observed “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>71</sup>

Copyright infringement and plagiarism do share one essential requirement: copying. Without copying, there is neither copyright infringement, nor plagiarism. Conflating copyright infringement and plagiarism, Judge Learned Hand famously observed:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an ‘author’; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.<sup>72</sup>

However, while copyright infringement and plagiarism often overlap, they are not synonymous. Copyright infringement may not be plagiarism, and plagiarism may not be copyright infringement. Reproducing—with attribution—a protected element of a copyrighted work can be an infringing use, but cannot be plagiarism. By contrast, reproducing a public domain work and attributing it to oneself cannot be a copyright infringement, but is a textbook example of plagiarism.<sup>73</sup> As David Nimmer observed:

Copyright infringement never occurs, for instance, when one copies another’s idea or even a brief phrase of expression from a work still subject to copyright protection. Furthermore, even copying the entirety of another’s public domain expression—for example, Oliver Wendell Holmes, Jr.’s *The Path of the Law*, published in 1897—is analytically incapable of falling afoul of copyright law. By contrast, a professor who published under his own name all or part of *The Path of the Law* would be guilty of the most serious academic breach, potentially deserving termination. Indeed, if he purloined only an uncredited phrase or even idea, he would find himself culpable for plagiarism under the definition just quoted. By the same token, a student who submitted to her professor a paper

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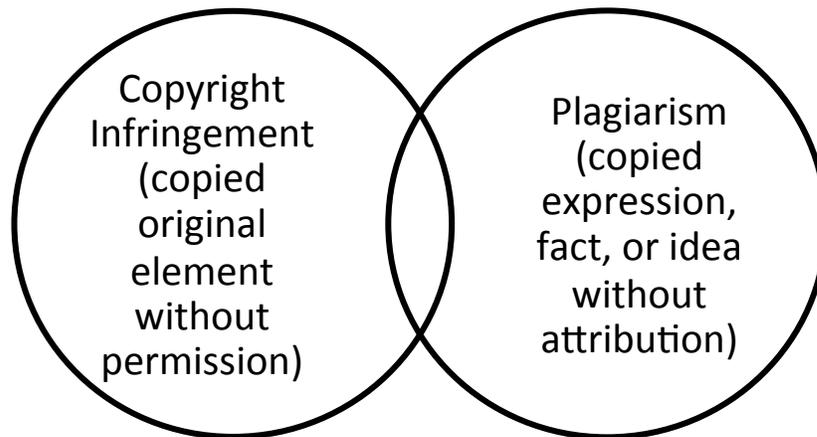
71. *Id.* at 56. See also *Mayimba Music, Inc. v. Sony Corp. of Am.*, No. 12 Civ. 1094(AKH), 2014 WL 5334698, at \*18 (S.D.N.Y. Aug. 19, 2014) (“Both songs are also structured around a long verse, which are not similar. However, plagiarism cannot be excused by showing that not everything has been pirated.”) (citing *Sheldon*, 81 F.2d at 56).

72. *Sheldon*, 81 F.2d at 54 (citing *Bleistein*, 188 U.S. at 249); *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927).

73. See, e.g., *UMG Recordings, Inc. v. Disco Azteca Distributions, Inc.*, 446 F. Supp. 2d 1164 (E.D. Cal. 2006) (observing that the Copyright Act does not create a general attribution right).

setting forth verbatim, but under her own name, paragraphs from *The Path of the Law*, would be subject to the full disciplinary weight that the school could bring to bear.<sup>74</sup>

In other words, copyright infringement and plagiarism overlap, but are not co-extensive. Copyright law prohibits certain unauthorized uses of copyrighted works, irrespective of attribution, and plagiarism norms prohibit unattributed copying of certain expressions, facts, and ideas, irrespective of copyright protection. Using an original element of a copyrighted work with attribution may be copyright infringement, but cannot be plagiarism, and copying a fact or idea without attribution may be plagiarism, but cannot be copyright infringement.



## VI. THEORIES OF COPYRIGHT

### A. Economic Theory

The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it increases economic efficiency by solving market failures in works of authorship caused by

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74. David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without A Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1 67–68 (2004).

free riding.<sup>75</sup> Classical economics predicts that free riding will cause market failures in non-rivalrous or “public” goods because rational economic actors will underinvest in the production of public goods if they cannot recover the fixed and opportunity costs of production. Works of authorship are quintessential public goods because they are perfectly non-rivalrous; so classical economics predicts that free riding will cause market failures in works of authorship.<sup>76</sup>

Under the economic theory, copyright solves market failures in works of authorship by making them partially excludable.<sup>77</sup> The exclusive rights provided by copyright enable authors to recover their fixed and opportunity costs, by giving them certain exclusive rights to use works of authorship for a certain period of time. As a result, authors can internalize some of the positive externalities or “spillovers” generated by the creation of a work of authorship by charging consumers more than the marginal cost of production.<sup>78</sup> In other words, copyright increases economic efficiency by indirectly subsidizing authors; thereby providing an incentive for marginal authors to invest in the production of works of authorship.

The utilitarian theory resembles the economic theory, but holds that copyright is justified because it increases social welfare, which includes both economic and non-economic goods.<sup>79</sup> Under the utilitarian theory, economically inefficient copyright protection is justified if it causes the production of non-economic goods that increase net social welfare.<sup>80</sup>

### B. “Moral Rights” Theories

By contrast, “moral rights” theories of copyright rely on deontological justifications.<sup>81</sup> The Lockean “labor theory” holds that cop-

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75. A “market failure” is an economic inefficiency in the allocation of a good, and “free riding” is the ability to consume a good without paying the marginal cost of production.

76. See generally CASS & HYLTON, *supra* note 20.

77. *Id.* at 78.

78. See generally Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

79. See, e.g., Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 229 (2014); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141; Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1443–44 (2010).

80. See, e.g., Bracha & Syed, *supra* note 79, at 229; Fromer, *supra* note 79, at 1443–44.

81. See generally, Peter S. Menell, *Intellectual Property: General Theories*, in 2 ENCYCLOPEDIA L. & ECON. 129 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000), available at <http://encyclo.findlaw.com/1600book.pdf>; William W. Fisher III, *Theories of Intellec-*

right is justified because people have a natural right to own the fruits of their labor.<sup>82</sup> By contrast, the Hegelian and Kantian “personality theories” hold that copyright is justified because a work of authorship is an expression of the personality of its author, and people are entitled to exercise control over themselves by exercising control over their expressions.<sup>83</sup>

### C. *Assumptions of This Article*

This article makes three assumptions. First, it assumes that consequentialism is a true moral theory. In other words, it accepts that an act or omission is justified if it produces a good outcome, and not justified if it produces a bad outcome.<sup>84</sup> By extension, it assumes that the deontological moral theories are not true moral theories.

While the prevailing theories of copyright are the consequentialist economic and utilitarian theories, some scholars advocate versions of the deontological “moral rights” theories.<sup>85</sup> Scholars disagree about whether the consequentialist and deontological theories are compatible. Some assume that they are.<sup>86</sup> But others disagree. Notably, some consequentialists have argued that the “moral rights” theories of copyright are incompatible with consequentialism and reduce to question begging.<sup>87</sup> And some deontologists have adopted “moral rights” theories at least in part be-

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*tual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* (Stephen Munzer ed., 2001).

82. See generally Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1540–83 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296–330 (1988).

83. See Menell, *supra* note 81, at 156–63 (outlining the labor and personhood theories, among others); see generally ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (providing a more detailed account of the Lockean and Kantian theories of intellectual property).

84. See Walter Sinnott-Armstrong, *Consequentialism in STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward Zalta ed., 2003).

85. See, e.g., MERGES, *supra* note 83.

<sup>86</sup> See generally CASS & HYLTON, *supra* note 20.

87. See, e.g., Mark A. Lemley, *Faith-Based Intellectual Property*, 62 *UCLA L. REV.* 1328 (2015) (arguing that consequentialist and deontological theories are incompatible). *But see* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 *VA. L. REV.* 1745, 1746 (2012) (arguing that the incentives provided by economic and moral rights are complementary); Brian L. Frye, *Machiavellian Intellectual Property*, 78 *U. PITT. L. REV.* (forthcoming 2016) (arguing that the consequentialist and deontological theories of intellectual property are incompatible, but can be harmonized by adopting a consequentialist public theory and a deontological private theory).

cause they believe that the current scope and duration of copyright is inconsistent with consequentialism.<sup>88</sup>

Second, this article assumes that the economic theory of copyright is correct and explains the justification for copyright. In any case, it is strongly implied by the Intellectual Property Clause, which authorizes Congress to create copyright protection in order to “promote the [p]rogress of [s]cience.”<sup>89</sup> The Supreme Court has uniformly held that the Intellectual Property Clause relies on an economic theory of justification: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>90</sup>

Third, this article accepts that copyright is currently consistent with the economic theory. This proposition is considerably more controversial. Many scholars have argued that the duration of copyright protection is inconsistent with the economic theory because it continues long after most works of authorship have lost all economic value.<sup>91</sup> Others have argued that the scope of copyright protection is too broad because it covers many uses of copyrighted works that do not affect the incentives or legitimate economic interests of their owners.<sup>92</sup> Still others have argued that copyright protection is broadly unjustified because it does not provide a salient incentive to many authors.<sup>93</sup>

In light of these empirical criticisms of the justification of copyright protection under the economic theory, we should be chary of further expanding the scope of intellectual property rights in works of authorship. In particular, we should consider whether social norms that effectively create additional extra-legal intellectual property rights in works of authorship are justified under the economic theory, before endorsing their legitimacy.

Essentially, this article assumes that the economic theory of copyright is true, and asks whether plagiarism norms that prohibit non-copyright infringing plagiarism are justified under the economic theory. If you reject the economic theory of copyright, and in particular if you accept a “moral rights” theory of copyright, you reject the premises of this article, and consequently will not find

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88. See generally MERGES, *supra* note 83.

89. U.S. CONST. art. I, § 8, cl. 8.

90. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

91. See, e.g., *Eldred*, 537 U.S. at 242–45 (Breyer, J. dissenting).

92. See generally WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2012).

93. See generally JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

its conclusions compelling. But if you accept the economic theory of copyright, this article argues that you should reject plagiarism norms that prohibit non-copyright infringing plagiarism.

## VII. THEORIES OF PLAGIARISM

Surprisingly, there is no prevailing theory of plagiarism. While innumerable scholars have studied plagiarism, the overwhelming majority has focused on its prevention. Passing few have asked whether and why plagiarism norms are justified. As a consequence, plagiarism is woefully under-theorized, and the justification for plagiarism norms is unclear.

This article surveys the various theories of plagiarism. In the interest of brevity and clarity, it focuses on academic plagiarism norms, which are both expansive and paradigmatic. It begins by identifying the inchoate theory of plagiarism embedded in academic plagiarism norms. Of necessity, it takes a forensic, or “trouble-case” approach to this inquiry, considering a series of examples and identifying the rationale for their resolution.<sup>94</sup> Next, it considers the handful of theories of plagiarism advanced by scholars. Finally, it asks whether any of those theories of plagiarism are consistent with the economic theory of copyright.

### A. Colloquial Theories of Plagiarism

Colloquial theories of plagiarism typically define it as a form of “literary theft.”<sup>95</sup> From this definition, it follows inexorably that plagiarism norms are justified as a method of preventing such “theft”:

The synonyms that usually accompany the term *plagiarism* are both many and lurid: larceny, piracy, pilfering, stealing, purloining, robbery, thievery, even kleptomania. The term acts as an adhesive incendiary that spreads a poisonous mist. There is almost no end to the inventory of felonious parallels that the literary and scholarly worlds have fashioned to protect their interests.<sup>96</sup>

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94. Cf. KARL NICKERSON LLEWELLYN & EDWARD ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

95. See, e.g., POSNER, *supra* note 41, at 11; ST. ONGE, *supra* note 42, at 51, 61; THOMAS MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* 99 (1989).

96. ST. ONGE, *supra* note 42, at 61.

But we should be wary of such intellectual property metaphors, as they are prone to lead us astray.<sup>97</sup> We should “not permit analogical reasoning to allow guilt by metaphor.”<sup>98</sup> What does the plagiarist “steal”? What is the nature of the “property” that plagiarism norms protect? It is not physical property. A plagiarist does not steal books; or rather, stealing books does not make one a plagiarist:

This lexicon of loaded words is intended to inhibit the timid, intimidate the brash, and punish the perpetrators. In fact, the intellectual world has itself purloined the entire vocabulary of theft to characterize literary stealing, which is the ultimate in intellectual laziness. It is disconcerting that so little effort has been made to get behind the surface features of plagiarism.<sup>99</sup>

Plagiarism is “theft” only in the sense that the plagiarist copies something from a work of authorship created by someone else. But a plagiarist’s copying may be quite attenuated. A plagiarist need not copy an entire work, or even a single word from a work. Academic plagiarism norms prohibit copying even ideas.

The essence of plagiarism is copying without attribution. The plagiarist “steals” an author’s attribution right by using some element of a work of authorship without attribution. But why is the attribution right justified, when is an attribution right justified, and how is an attribution right “stolen”?

Plagiarism norms typically take the justification of the attribution right for granted. Today, the overwhelming majority of people simply assume that authors are entitled to an attribution right. Thomas Mallon’s best-selling “history of plagiarism,” *Stolen Words*, exemplifies this attitude:

I was, through my research, eventually, and much more than I expected to be, appalled: by the victims I learned of, by the audacity of their predators, by the excuses made for the latter. The inability of the literary and academic worlds adequately to define, much less reasonably punish, instances of plagiarism was something I observed again and again. Our thinking on the subject, I realized, is primitive, and our fear of dealing with plagiarism when it’s just been discovered—as

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97. See generally Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735 (2015).

98. ST. ONGE, *supra* note 42, at 62.

99. ST. ONGE, *supra* note 42, at 61.

opposed to recollected from schooldays or literary history—leads us into bungling and injustice.<sup>100</sup>

So, Mallon is “appalled” by plagiarism and “appalled” that anyone would question the legitimacy of plagiarism norms.<sup>101</sup> Never mind that his own book documents the emergence of modern plagiarism norms in the early 19th century, prior to which imitation was not merely tolerated, but expected—if not required.<sup>102</sup>

Many of the anecdotes favored by colloquial accounts of plagiarism illustrate the incoherence of academic plagiarism norms. For example, Mallon rather gleefully recounts an incident in which the plagiarism policy in the University of Oregon student handbook was copied verbatim from a Stanford University student handbook.<sup>103</sup>

Initially, the irony of a plagiarized plagiarism policy is delicious. But on reflection, the objection seems insubstantial, or even absurd. The purpose of a plagiarism policy is to define plagiarism and explain how to avoid it. Plagiarism policies are not intended to present original ideas or expressions. In fact, they affirmatively should not present original ideas or expressions. If the Stanford plagiarism policy accurately defined plagiarism and correctly explained how to avoid it, there was no reason for the University of Oregon to change it. Indeed, the only good reason for the University of Oregon to change the Stanford policy would be to improve its clarity or correct an error. In other words, putative criticisms of the University of Oregon’s supposed plagiarism ultimately expose the incoherence of the very plagiarism norms it allegedly violated.

By way of analogy, a plagiarism policy is like a statute. When a legislature adopts a uniform statute or copies a statute enacted in another jurisdiction, plagiarism is not a coherent objection. The authorship of a statute is irrelevant to its purpose, so attribution is pointless and meaningless. Statutes are meant to be copied. Indeed, people typically object to unnecessary changes or amendments, because they reduce uniformity across jurisdictions.

What explains this reflexive extension of plagiarism norms to circumstances where they make no sense, even on their own terms? Perhaps it is a function of their ubiquity, the stigma attached to their violation, and the taboo against questioning their

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100. MALLON, *supra* note 95, at xii.

101. *Id.*

102. *See id.* at 1–40.

103. *Id.* at 100.

justification.<sup>104</sup> Regardless, it is somewhat surprising, given that the attribution right created by plagiarism norms is a rather novel development, and even today is observed largely in the breach. While some social groups adopt strong plagiarism norms, many adopt none at all. Presumably, the “decision” whether to adopt plagiarism norms is driven by game theoretical considerations intrinsic to a social group: If the members of a social group value attribution, then the group is likely to adopt internal plagiarism norms.<sup>105</sup> However, that does not necessarily mean that the plagiarism norms adopted are justified under the economic theory.<sup>106</sup>

At the very end of his book, Mallon does offer a cursory economic justification of plagiarism norms:

So why don't we give up worrying about an offense that leaves many of us feeling amused or ambivalent? Because ceasing to care about plagiarism would not mean that writers had experienced a rise in wisdom and generosity; it would mean that they had permitted themselves a loss of self-respect. And if ego stopped mattering, then, very likely, writers would stop writing—or at least stop writing so frequently and well. Which means that, finally, plagiarism would be a crime against the reader.<sup>107</sup>

David Nimmer has offered a similar, but slightly narrower economic justification of academic plagiarism norms:

At base, the different currency of the Academy accounts for the different regime that should govern it. The laws of the marketplace are ill served by allowing authors who no longer enjoy copyright protection to assert ersatz ownership through the vehicle of reverse passing off. The marketplace operates through the lifeblood of sales volume and mass circulation. The Academy operates on a different currency, namely proper attribution. Scholarly articles are not composed in order to generate author royalties and thereby amortize costs over the projected life of the copyright with an allowance for the necessary profits in order to warrant the initial investment in publishing them. Rather, the entire incentive for their creation is

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104. See generally POSNER, *supra* note 41; ST. ONGE, *supra* note 42; MALLON, *supra* note 95.

105. Cf. Oliar & Sprigman, *supra* note 18.

106. Cf. Strandburg, *supra* note 21; Smith, *supra* note 21; Rothman, *supra* note 21; Clowney, *supra* note 21.

107. MALLON, *supra* note 95, at 237–38.

(from the celestial perspective) to advance the frontiers of human knowledge and (from the earthly vantage) to win their authors recognition. The right of attribution here is not an afterthought that threatens to skew the basic incentives; in the academic context, it IS the incentive (or a large part of it), which therefore must enjoy protection for the enterprise to continue sensibly. “Citing is paying” in this environment. Here, derogation of moral rights, which elsewhere mean something other than morality, attests to a defect in moral character.<sup>108</sup>

Both Mallon and Nimmer argue that plagiarism norms are justified under the economic theory because the attribution right provides an incentive that encourages marginal authors to invest in the production of works of authorship, and suggest that copyright incentives are inadequate. Of course, that is an empirical hypothesis based entirely on speculation. Moreover, even if one assumes that the attribution right is necessary in order to solve market failures in works of authorship, there is no reason to think that the *de facto* attribution right created by copyright is not entirely adequate.

While copyright creates only very limited and contingent explicit attribution rights, in practice it enables authors to exert an attribution right over the original elements of their works of authorship, by enabling them to refuse permission to use those elements without attribution. Copyright implicitly assumes that authors are rational economic actors, and that attribution has an economic value. Indeed, the “work-made-for-hire” doctrine explicitly provides that authors can contract away their rights, including the implied right to claim attribution. Moreover, the *de facto* attribution right created by copyright lasts for the entire copyright term, typically the life of the author and for 70 years after the author’s death.<sup>109</sup>

It follows that the attribution right created by plagiarism norms is only necessary to prevent unattributed uses of the uncopyrightable elements of a work, such as short phrases, facts, and ideas. But copyright explicitly deems protection of those elements unnecessary and unjustified.

Moreover, in *Dastar Corporation v. Twentieth Century Fox Film Corporation*,<sup>110</sup> the Supreme Court unanimously and explicitly

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108. Nimmer, *supra* note 74, at 74–76.

109. 17 U.S.C. § 302(a)

110. 539 U.S. 23 (2003).

held that trademark law cannot prevent “reverse passing off” of a public domain work—a euphemism for unattributed copying or “plagiarism”—because the Copyright Act does not require attribution of public domain works.<sup>111</sup> The Court held that “reading § 43(a) of the Lanham Act 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.”<sup>112</sup> In other words, plagiarism is not a crime, at least if the plagiarized elements are in the public domain and not protected by copyright.

Colloquial theories of plagiarism implicitly claim that plagiarism norms are justified under the economic theory because authors would choose not to produce works of authorship if they could not insist on the attribution of facts and ideas, as well as original expressions. But this proposition is both implausible and never meaningfully defended. Indeed, most non-academic authors correctly assume that facts and ideas are free to use, and yet the discovery of facts and generation of ideas continues apace. Presumably, authors would relish attribution rights in facts and ideas, but colloquial theories of plagiarism provide no credible economic justification for creating such rights.

Of course, colloquial theories of plagiarism actually rely on deontological justifications, primarily some version of the Hegelian or Kantian personality theories. For example, Mallon observes:

No, it isn't murder. But like murder it intrigues us at a comfortable remove, when we're out of the line of fire and have been excused from the jury. Think how often, after all, a writer's books are called his or her children. To see the writer's words kidnapped, to find them imprisoned, like changelings, on someone else's equally permanent page, is to become vicariously absorbed by violation.<sup>113</sup>

This congeries of metaphors illuminates only the extent to which Mallon channels the popular understanding of works of authorship as an author's progeny.<sup>114</sup> Parents are proud of their children and want to be associated with them. All the more so in the case of metaphorical children-like works of authorship, which are so much more malleable and tractable. Likewise, Nimmer

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111. *Id.* at 36.

112. *Id.*

113. MALLON, *supra* note 95, at xiii–xiv.

114. See, e.g., Brian L. Frye, *Scenes from the Copyright Office*, 32 *TOURO L. REV.* (forthcoming 2016).

immediately follows his nominal economic justification for academic plagiarism with a moral justification, replete with intellectual property metaphors:

This distinction also explains why the academic tort of plagiarism arises independently of copyright subsistence. Whether a scholar in 2004 dishonestly attaches his name to writings of the distant past or of last week, the offense does not differ in kind. In either event, he is polluting the cognitive well and disgracing his professional obligations by claiming credit where it is not due. Plagiarism goes to the heart of the academic enterprise in a way that reverse passing off cannot affect the commercial marketplace. For that reason, plagiarism is and should remain a serious dereliction pursuant to the “House Rules” that govern in the university setting.<sup>115</sup>

Colloquial theories of copyright typically assume that the attribution right created by plagiarism norms is justified because a work of authorship is an expression of the personality of its author, and authors have a right to claim ownership of expressions of their personality. This personality-based right does not extend only to the elements of a work that are protected by copyright, but to any element of a work valued by its author. Accordingly, if colloquial theories of plagiarism present an accurate account of the rationale for the development of plagiarism norms, they suggest that plagiarism norms express moral sentiments relating to the ownership of ideas, rather than an effort to increase economic efficiency.

### *B. Fraud Theories of Plagiarism*

Alternative theories of plagiarism hold that plagiarism norms are justified because they prohibit a form of “academic fraud.” For example, St. Onge argues that academic plagiarism norms are vague and overbroad, and offers a narrower definition of culpable plagiarism:

Plagiarism is an intentional verbal fraud committed by the psychologically competent that consists of copying significant and substantial uncredited written materials for unearned

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115. Nimmer, *supra* note 74, at 76.

advantages with no significant enhancement of the materials copied.<sup>116</sup>

If “fraud” means “illicit gains by illicit methods,” then we must distinguish between “plagiarism pure,” which reflects an intention to commit fraud, and “plagiarism impure, mitigated, extenuated, marginal, hapless, ignorant, careless, etc.”<sup>117</sup> The culpable plagiarist intends to deceive in order to obtain an improper benefit; the innocent plagiarist does not.

Notably, St. Onge’s fraud theory of plagiarism seems to exclude many forms of unattributed copying prohibited by academic plagiarism norms. On its face, it appears to permit unattributed copying of ideas, which are not “written materials,” but abstractions. And it arguably permits unattributed copying of facts.

But if plagiarism is defined as “copying significant and substantial uncredited written materials,” plagiarism becomes almost indistinguishable from copyright infringement.<sup>118</sup> Further, this fraud theory of plagiarism even seems to include a “fair use” exception, by requiring “unearned advantages with no significant enhancement of the materials copied.”<sup>119</sup> By implication, “copying significant and substantial uncredited written materials” is not culpable plagiarism if the copier earns any advantage by significantly enhancing the materials copied. This proposition seems like a rephrasing of the copyright doctrine of transformative fair use, which permits otherwise infringing uses that add value to the original.<sup>120</sup> Indeed, under this this fraud theory of plagiarism, the only difference between copyright infringement and plagiarism is that copyright effectively prohibits unattributed copying for the life of the artist plus seventy years, and plagiarism norms prohibit unattributed copying forever.

### *C. Economic Theories of Plagiarism*

As discussed above, colloquial theories of plagiarism have occasionally advanced cursory economic justifications for plagiarism

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116. ST. ONGE, *supra* note 42, at 101.

117. *Id.*

118. *Id.*

119. *Id.*

120. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990). But see, e.g., Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L. REV. 355 (2015) (arguing that the transformative fair use doctrine reflects embedded social hierarchies); Brian L. Frye, *Aesthetic Nondiscrimination & Transformative Fair Use*, 3 BELMONT L. REV. (forthcoming 2016) (arguing that the aesthetic nondiscrimination doctrine should apply to the transformative fair use analysis).

norms. But those putative economic justifications merely obscure the fact that colloquial theories of plagiarism are really moral theories, in a Hegelian or Kantian mold. While colloquial theories of plagiarism may advance nominal economic justifications for plagiarism norms derived from copyright, their force depends on moral arguments.

However, Judge Posner, rather unsurprisingly, advanced an explicitly economic theory of plagiarism in his amusing 2007 best seller *The Little Book of Plagiarism*.<sup>121</sup> Essentially, he argues that academic plagiarism norms are justified because they prevent “academic fraud” and encourage the production of original works of authorship.

Posner begins by arguing that plagiarism is a form of concealed copying and that plagiarism norms are justified because plagiarism is a form of academic fraud that harms both consumers and producers:

Plagiarism is a species of intellectual fraud. It consists of unauthorized copying that the copier claims (whether explicitly or implicitly, and whether deliberately or carelessly) is original with him and the claim causes the copier’s audience to behave otherwise than it would if it knew the truth. This change in behavior, as when it takes the form of readers’ buying the copier’s book under the misapprehension that it is original, can harm both the person who is copied and the competitors of the copier.<sup>122</sup>

In other words, Posner argues that plagiarism defrauds consumers by inducing detrimental reliance, and defrauds producers by enabling unfair competition. But are either of these claims correct? Does plagiarism induce detrimental reliance, and if so, why is it detrimental? Does plagiarism enable unfair competition, and if so, why is it unfair? Or rather, is Posner correct that plagiarism is a form of fraud?

#### VIII. DETRIMENTAL RELIANCE

Posner argues that academic plagiarism norms are justified because plagiarism defrauds consumers by inducing detrimental reliance: “A judgment of plagiarism requires that the copying, besides being deceitful in the sense of misleading the intended read-

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121. See generally POSNER, *supra* note 41.

122. *Id.* at 106.

ers, induce *reliance* by them.”<sup>123</sup> In other words, plagiarism defrauds consumers by inducing them to rely on the representation that a work is original and not plagiarized. One illustration of this theory provides that “[h]e buys a book that he wouldn’t have bought had he known it contained large swatches of another writer’s book; he would have bought that other writer’s book instead.”<sup>124</sup>

Nevertheless, Posner’s argument that plagiarism defrauds consumers by inducing detrimental reliance is entirely circular. Consumers assume that an unattributed work is original and not copied only because academic plagiarism norms prohibit unattributed copying. It is passing strange to argue that academic plagiarism norms are justified because they induce consumer reliance. In the absence of plagiarism norms inducing reliance, there is no reason to assume that consumers would care about attribution. On the contrary, consumers would presumably not expect attribution, and would not be misled by a lack of attribution.

Indeed, when social groups adopt different plagiarism norms, consumers make different assumptions. For example, in practice journalistic plagiarism norms typically prohibit copying expressions without attribution, but permit copying ideas without attribution.<sup>125</sup> As a consequence, consumers assume the unattributed expressions in a journalistic work originated with the author, but do not assume the unattributed ideas originated with the author. In other words, plagiarism is “detrimental” to consumers only because and to the extent that plagiarism norms induce consumer reliance in the first place.

Moreover, in the absence of academic plagiarism norms, plagiarism may benefit consumers. Copying expressions and ideas is cheaper than creating new expressions and ideas. Accordingly, copying enables authors to produce new works of authorship more cheaply, by investing their resources in the creation of new expressions and ideas, rather than recasting existing expressions and ideas.

In addition, the attribution of expressions and ideas does not necessarily benefit consumers. In some cases, attribution provides valuable information, but in many cases it does not. Law reviews typically require the attribution of every non-original claim in an

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123. *Id.* at 19.

124. *Id.* at 20.

125. See, e.g., David Uberti, *Journalism has a plagiarism problem. But it's not the one you'd expect*, COLUM. JOURNALISM REV. (Nov. 18, 2014), [http://www.cjr.org/watchdog/journalism\\_has\\_a\\_plagiarism\\_pr.php](http://www.cjr.org/watchdog/journalism_has_a_plagiarism_pr.php).

article.<sup>126</sup> All too often, the claims in question are trivial, common sense, or common knowledge in the field.<sup>127</sup> Attribution of such claims burdens consumers by encouraging them to consult unhelpful sources. One might just as well argue that academic plagiarism norms are unjustified because they induce consumer reliance without benefiting consumers.

#### IX. UNFAIR COMPETITION

Posner also argues that academic plagiarism norms are justified because plagiarism defrauds producers by enabling unfair competition: “[C]ompetitive harm is a significant consequence of plagiarism. The plagiarist by plagiarizing improves his work relative to that of his competitors and so increases his sales and fame relative to theirs.”<sup>128</sup> In other words, plagiarism harms producers by enabling plagiarists to unfairly compete with non-plagiarists. Further, Posner explicitly analogizes plagiarism to trademark infringement: “Trademark infringement in the market for ordinary goods corresponds to plagiarism in the market for expressive goods.”<sup>129</sup>

However, Posner’s analogy fails because non-infringing plagiarism does not correspond to trademark infringement in any way. Trademark law prevents consumer confusion regarding the origin of a product by prohibiting the use of protected marks, but it does not prevent competitors from producing similar products. Likewise, copyright law effectively prevents consumer confusion about the origin of a work of authorship by prohibiting competitors from copying certain original elements of a work of authorship in certain circumstances, but it does not prevent competitors from producing similar products.

Thus, plagiarism corresponds to trademark infringement only to the extent that plagiarism norms prohibit illegitimate copying of certain elements of a work. Conversely, plagiarism norms that prohibit non-infringing plagiarism explicitly prohibit legitimate

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126. Indeed, law review editors all too frequently expect authors to attribute original ideas as well.

127. For example, Orin S. Kerr notes:

It is a common practice among law review editors to demand that authors support every claim with a citation. These demands can cause major headaches for legal scholars. Some claims are so obvious or obscure that they have not been made before. Other claims are made up or false, making them more difficult to support using references to the existing literature.

Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

128. POSNER, *supra* note 41, at 32.

129. *Id.* at 69.

copying of facts and ideas, a kind of copying that is expressly permitted by the Copyright Act and protected by the Constitution.<sup>130</sup> Indeed, Posner himself recognizes that academic plagiarism norms that prohibit the “plagiarism of ideas” may harm the public interest by reducing the dissemination of ideas.<sup>131</sup>

In other words, plagiarism norms that prohibit non-infringing plagiarism prevent competition. But it is important to note that these norms prohibit fair competition, not unfair competition. Copyright law and the Constitution expressly exclude facts and ideas from copyright protection because such protection is contrary to public interest. Or, rather, copyright law expressly permits the copying of facts and ideas, with or without attribution, because it promotes competition and the public interest.

#### X. UNCONSCIOUS MORAL OBJECTIONS

Tellingly, even Posner’s ostensibly economic justification of academic plagiarism norms frequently lapses into moral justifications. To illustrate, Posner’s primary example is the case of Kaavya Viswanathan, a Harvard student who was accused of plagiarism when it was discovered that many passages from her young adult novel, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, closely resembled passages from Megan McCafferty’s popular young adult novels, *Sloppy Firsts* and *Second Helpings*, among other books.<sup>132</sup> In the wake of the ensuing scandal, Viswanathan’s publisher recalled her novel and cancelled her contract.

Posner condemns Viswanathan’s plagiarism as the equivalent of trademark infringement: “What Viswanathan did was no less—though maybe no more—reprehensible than what a manufacturer of toothpaste would be doing if he slapped the name of a better-known brand on his toothpaste, even if his toothpaste was equal in quality to that of the other brand.”<sup>133</sup> A person who intentionally creates and sells counterfeit goods violates criminal trademark

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130. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). See also *Feist Publ’ns, Inc.*, 499 U.S. at 344–45 (“The most fundamental axiom of copyright law is that [n]o author may copyright his ideas or the facts he narrates.”) (quoting *Harper & Row Publishers*, 471 U.S. at 556).

131. POSNER, *supra* note 41, at 75–76.

132. Paras D. Bhayani & David Zhou, ‘Opal’ Similar to More Books, THE HARVARD CRIMSON (May 2, 2006) <http://www.thecrimson.com/article/2006/5/2/opal-similar-to-more-books-kaavya/>; David Zhou, Student’s Novel Faces Plagiarism Controversy, THE HARVARD CRIMSON (April 23, 2006) <http://www.thecrimson.com/article/2006/4/23/students-novel-faces-plagiarism-controversy-beditors/>.

133. POSNER, *supra* note 41, at 95–96.

law by intentionally misleading consumers about the source of the goods. By contrast, Viswanathan did not violate any criminal law, and her conduct probably did not even amount to copyright infringement. Yes, she copied ideas and short phrases without attribution, but copyright law expressly permits that. If her actions were “reprehensible,” it is only because they violate academic plagiarism norms, not because they were crimes or torts. But if her acts were neither crimes nor torts, why are they “reprehensible”? Only because Posner believes that violating academic plagiarism norms is a moral wrong.

Even more telling is Posner’s claim that copying without attribution cannot be a fair use:

But the fair user is assumed to use quotation marks and credit the source; he is not a plagiarist. I thus disagree that there can be “fair use” when the copier is passing off the copied passage as his own. The fair-use right is an exception to copyright, which normally prohibits the unauthorized publication of copyrighted work, and why should the exception shelter plagiarists? The plagiarist does not play fair. Were there such an exception, one could write a book consisting entirely of unacknowledged passages from other writers, provided one only took a small amount from each work; in fact it would be a case of both plagiarism and copyright infringement.<sup>134</sup>

This passage is remarkable because Posner’s assertion is plainly wrong. The Copyright Act protects the original elements of a work of authorship, and the fair use doctrine permits the unauthorized use of original elements of a copyrighted work under certain circumstances.<sup>135</sup> But neither requires attribution. In fact, the Copyright Act only mentions attribution in relation to certain works of visual art.<sup>136</sup> In other words, attribution is irrelevant to fair use. Posner objects to his hypothetical quote-novel not because it infringes, but because it plagiarizes; or, rather, because the copying novelist “does not play fair.” This is not an economic objection, but a moral one. An author who creates a new work of authorship composed entirely out of quotes increases economic welfare by creating a social benefit with no social harm. Any objection is necessarily based on an attribution right that copyright does not provide.

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134. *Id.* at 16–17.

135. 17 U.S.C. §§ 106–107.

136. *Id.* at § 106A.

Notably, Posner's "hypothetical" is not hypothetical at all. The celebrated post-modernist Kenneth Goldsmith has created many works by copying pre-existing works, in part or in whole, often without explicit attribution.<sup>137</sup> The Austrian–American author Walter Abish's book *99: The New Meaning* is a collection of stories that consist entirely of unattributed quotations.<sup>138</sup> And Jonathan Lethem's brilliant essay *The Ecstasy of Influence: A Plagiarism*, consists largely of unattributed quotations, albeit with an accompanying key.<sup>139</sup>

Significantly, while Posner defends the legitimacy of academic plagiarism norms, he opposes their enforcement through the legal system, favoring informal sanctions for an assortment of reasons.<sup>140</sup> As he observes: "Plagiarism is thus the kind of wrongdoing best left to informal, private sanctions."<sup>141</sup> One might wonder whether many forms of so-called "plagiarism" are a kind of "wrongdoing" at all.

#### XI. THE JUSTIFICATION OF ACADEMIC PLAGIARISM NORMS

In light of these observations, I conclude that academic plagiarism norms prohibiting non-copyright infringing plagiarism are not justified under the economic theory of copyright. Academic plagiarism norms prohibit unattributed copying of expressions, facts, and ideas. To the extent that they prohibit non-copyright infringing copying, they create an extra-legal attribution right in expressions, facts, and ideas. In other words, academic plagiarism norms reflect the desire of a particular social group to create an extra-legal attribution right in expressions, facts, and ideas that the Supreme Court has expressly held unconstitutional.<sup>142</sup>

##### A. Academic Plagiarism Norms Affecting Scholars

Defenders of academic plagiarism norms have offered many explicit and implicit theoretical justifications for the attribution right they create. As explained above, the moral justifications for academic plagiarism norms are non-responsive to the economic theory of copyright, and the putative economic justifications are

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137. See generally KENNETH GOLDSMITH, UNCREATIVE WRITING: MANAGING LANGUAGE IN THE DIGITAL AGE (2011).

138. WALTER ABISH, 99: THE NEW MEANING (1990).

139. Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAGAZINE (Feb. 2007), <http://harpers.org/archive/2007/02/the-ecstasy-of-influence/>.

140. POSNER, *supra* note 41, at 33–37.

141. *Id.* at 38.

142. *Feist Publ'ns, Inc.*, 499 U.S. at 340.

not compelling. To the extent that the attribution right created by academic plagiarism norms exceeds the constitutional scope of copyright protection, it is unlikely to provide a salient incentive to marginal authors. If the public feels “defrauded” by non-copyright infringing plagiarism at all, it is only because academic plagiarism norms exist in the first place. And non-copyright infringing plagiarism is “unfair” only because academic plagiarism norms say it is.

The only plausible economic justification for academic plagiarism norms that prohibit non-copyright infringing plagiarism is that attribution benefits the public by substantiating factual claims and providing bibliographical references. Clearly, attribution often provides valuable information and thereby increases public welfare. But not always. Sometimes, the attribution of expressions, facts, or ideas is cumbersome and unhelpful. Attribution of clichéd phrases, popular expressions, or formulaic statements is often unhelpful. As the copyright merger doctrine recognizes, when an idea can only be expressed in a limited number of ways, the expression of that idea cannot and should not be protected by copyright.<sup>143</sup> Attribution of facts is often unhelpful, especially when they are attributed to secondary sources that neither meaningfully substantiate the facts in question, nor provide any additional information. And attribution of ideas is often unhelpful, especially when the original expression of the idea was poorly executed or the idea itself has become commonplace.

Of course, it does not follow that the attribution of expressions, facts, and ideas is wrong. On the contrary, authors should feel an obligation to attribute any expressions, facts, and ideas they copy, to the extent that doing so provides a public benefit. But, at least on their face, academic plagiarism norms not only create a moral obligation to attribute expressions, facts, and ideas when it provides a public benefit, but also when it does not. Or, to put it another way, academic plagiarism norms implicitly create an extra-legal right to require the attribution of expressions, facts, and ideas, which is effectively enforced by the academy irrespective of the original author’s wishes.

In other words, academic plagiarism norms do not just encourage socially beneficial attribution, they require attribution irrespective of its effect on social welfare. Often, the mandatory attribution of expressions, facts, and ideas imposes costs that exceed

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143. See, e.g., *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

any social benefit. As observed above, while attribution is often helpful, sometimes it is unhelpful. When a mandatory but unhelpful attribution causes a reader to obtain and review the unhelpful source, it imposes a social cost.

Mandatory attribution may also create inefficient incentives for authors. Given the choice between investigating an idea that requires an unhelpful attribution and an idea that requires no attribution, authors have an incentive to pursue the latter, even if the former would provide a larger public benefit. To put it another way, academic plagiarism norms create an incentive for scholars to choose novelty over value. At least in theory, it is better to be the first to express an idea than the first to express it well.

Moreover, even if the net social cost imposed by academic plagiarism norms is low, the individual cost is high. A scholar accused of plagiarism incurs substantial personal and reputational costs, even if the charge is not proven. And if a plagiarism charge is proven, a scholar may be punished, or even pushed out of the academy, even if the plagiarism in question consists of as dubious a wrong as copying facts or ideas without attribution.

In addition, the social value generated by the mandatory attribution right created by academic plagiarism norms may have been superseded by technology. Historically, the mandatory attribution right ensured that scholars would provide references for all of their non-original claims. But it did not create any guarantee that scholars would provide the most helpful reference, or that references would be helpful at all. Today, “digital humanities” databases can automatically provide suggested references for any text, obviating the need for burdensome and often unhelpful citations.<sup>144</sup> Automatically generated references should be preferable to the attribution mandated by academic plagiarism norms, because they will prioritize impact over novelty. In other words, readers are directed to the most useful source addressing an idea, rather than the first source to address the idea.

The preceding observations suggest that academic plagiarism norms are intended to solve the academy’s internal coordination problems, not in order to benefit the public. “People despise plagiarism not because it results in inferior works—by drawing from others plagiarists may produce better works than they could by themselves—but because it is a form of cheating that allows the plagiarist an unearned benefit.”<sup>145</sup>

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144. I thank Jacob Rooksby for this observation.

145. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 51819 (1992).

Of course, one might believe that social groups ought to be entitled to enforce internal social norms, so long as they do not violate any legal prohibitions.<sup>146</sup> As many scholars have shown, customary property rules sometimes provide an efficient way of managing scarcity and solving the tragedy of the commons.<sup>147</sup> But there is no *prima facie* reason to believe that customary property rules, developed to manage public goods, also correlate with efficiency. On the contrary, they are often associated with cartelization and rent-seeking.<sup>148</sup>

Scholars typically participate in an academic gift economy. Typically, they do not expect to receive direct compensation for the production of scholarship, but, rather, receive indirect compensation in the form of promotion and prestige.<sup>149</sup> But that does not mean that we should respect plagiarism norms as in the public interest. Essentially, academic plagiarism norms are a form of private ordering intended to benefit insiders at the expense of outsiders. As Sayre observed: “Academic politics is the most vicious and bitter form of politics, because the stakes are so low.”<sup>150</sup> Likewise, plagiarism is pursued and punished most vigorously in the academic world because the economic stakes are so low. The lower the economic value of a work of authorship, the more important the right of attribution.

In sum, academic plagiarism norms are effectively a form of extra-legal rent-seeking. Academics want comprehensive protection of the expressions, facts, and ideas they produce, which copyright law does not and cannot provide. As a consequence, they rely on extra-legal, quasi-property interests created by academic plagiarism norms. These interests are not justified under the economic theory because they benefit academics, rather than the public. Accordingly, they should not be respected.

Notably, in practice, academic plagiarism norms are observed largely in the breach. Studies of plagiarism routinely complain that prominent scholars accused of plagiarism typically receive only a slap on the wrist.<sup>151</sup> When Stephen Ambrose, Doris Kearns

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146. See, e.g., Oliar & Sprigman, *supra* note 18.

147. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

148. See, e.g., Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59.

149. See, e.g., Brian L. Frye, *The Gray Lady's Guide to Avant-Garde Cinema*, 3 INCITE J. EXPERIMENTAL MEDIA 54 (2011) (citing Tyler Cowen & Alexander Tabarrok, *An Economic Theory of Avant-Garde and Popular Art, or High and Low Culture*, 67 SO. ECON. J. 232 (2000)); DAVID J. CHEAL, *THE GIFT ECONOMY* (1988).

150. Alan L. Otten, *Politics and People*, WALL ST. J., Dec. 20, 1973, at 14.

151. See generally MALLON, *supra* note 95; see also POSNER, *supra* note 41, at 89.

Goodwin, Charles Ogletree, Laurence Tribe and others were accused of plagiarism, they pleaded inadvertent error, and ultimately paid little or no cost.<sup>152</sup> They were publicly embarrassed, but did not lose their jobs or careers. Notably, they were accused of copying particular expressions without attribution, not just ideas. Less prominent scholars are typically less fortunate. They may be dismissed, denied tenure, or even fired from tenured positions.

Moreover, it is an open secret in the academy that certain prominent academics are notorious “idea-stealers.” When they attend conference and workshops, they collect interesting ideas expressed by others and quickly write their own articles addressing those ideas, without crediting the originator of the idea. Scholars typically react to these idea-stealers in much the same way as stand-up comedians react to joke-stealers: they avoid expressing novel ideas in the presence of known idea-stealers and use informal social sanctions like gossip to undermine the idea-stealers.<sup>153</sup>

However, prominent idea-stealers are rarely, if ever, formally accused of plagiarism. This suggests that the ostensible scope of academic plagiarism norms is exaggerated for effect, and that their actual scope is considerably narrower. While academic plagiarism norms claim to prohibit the unattributed copying of ideas, in practice, it is difficult or impossible to make out a plagiarism claim for copying an idea, especially if the alleged plagiarist is a prominent scholar. Nor is it consistent with academic freedom to permit such claims.<sup>154</sup> Taken to the extreme, if academic plagiarism norms actually required the attribution of all previously expressed ideas, it would encourage scholars to publish lists of half-baked ideas on the Internet, in order to claim ownership of them, rather than engage in actual scholarship. In practice, scholars do not feel obligated to attribute unelaborated ideas, unless doing so is helpful to the reader, which suggests that the scope of academic plagiarism norms is narrower than claimed.

### *B. Academic Plagiarism Norms Affecting Students*

While academic plagiarism norms that prohibit non-copyright infringing plagiarism are largely toothless when applied to schol-

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152. See, e.g., Sara Rimer, *When Plagiarism's Shadow Falls on Admired Scholars*, N.Y. TIMES (Nov. 24, 2004), [http://www.nytimes.com/2004/11/24/nyregion/when-plagiarisms-shadow-falls-on-admired-scholars.html?\\_r=0](http://www.nytimes.com/2004/11/24/nyregion/when-plagiarisms-shadow-falls-on-admired-scholars.html?_r=0).

153. Olliar & Sprigman, *supra* note 18, at 1791. I am not aware of any scholars using the more vigorous physical sanctions deployed by comedians, but would not be surprised if it has happened.

154. See, e.g., Dutch, *supra* note 65.

ars, they have profound consequences when applied to students. Students accused of plagiarism may receive a failing grade, be suspended from academic study, or even expelled. As Posner observes, this probably reflects the comparative difficulty of identifying plagiarism in published versus unpublished works, although automated plagiarism-detection services make the task considerably easier.<sup>155</sup>

However, even if one accepts the legitimacy of academic plagiarism norms as applied to scholars, it is not all clear that it makes sense to extend them to students. Ultimately, the public purpose and ostensible justification of academic plagiarism norms is to ensure that the public receives complete and accurate information about the attribution of expressions, facts, and ideas. To the extent that students are producing scholarship for public consumption, it makes some sense that it should satisfy the same standards as work produced by professional scholars.

But the overwhelming majority of students are not producing scholarship for public consumption. They are completing assignments that will be read by a professor or teaching assistant and then forgotten. It makes no sense to apply academic plagiarism norms to such assignments, unless doing so will provide a pedagogical benefit. And the evidence suggests the opposite.

As Rebecca Moore Howard has observed, academic plagiarism norms prohibit certain forms of imitation that promote learning.<sup>156</sup> In particular, many students most effectively learn how to write by engaging in what Howard calls “patch writing,” or “copying from a source text and then deleting some words, altering grammatical structures, or plugging in one synonym for another.”<sup>157</sup> As Howard observes, patch writing is a form of learning, not a form of cheating.<sup>158</sup> And to the extent that academic plagiarism norms prohibit and punish patch writing by students, they impose substantial social costs, by preventing students from engaging in pedagogically productive activities.

It makes no sense to impose academic plagiarism norms on students. The purpose is learning, not the production of scholarship. The rules governing student work ought to be designed to prohibit cheating, not “plagiarism.” In other words, students should be prohibited from engaging in practices that do not promote learning, and encouraged to engage in practices that do promote learn-

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155. POSNER, *supra* note 41, at 89.

156. See HOWARD, *supra* note 22.

157. *Id.* at xvii.

158. *Id.*

ing. When academic plagiarism norms are invoked to prohibit students from engaging in pedagogically productive activities like patch writing, they are misused on their own terms. Moreover, they promote a deep cynicism in students, who are keenly attuned to the coherence and fairness of the rules that govern their actions. Unthinkingly applying academic plagiarism norms to students may even have the unintended effect of causing them to discount the legitimacy of rules intended to prevent cheating, as well as irrelevant rules intended to prevent plagiarism.

## XII. CONCLUSION

Copyright infringement and plagiarism are related but distinct concepts. Copyright prohibits certain uses of original works of authorship without permission, and plagiarism norms prohibit copying certain expressions, facts, and ideas without attribution. The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it is economically efficient. Likewise, plagiarism norms are justified only if they are economically efficient. It appears that academic plagiarism norms prohibiting non-copyright infringing plagiarism are not efficient because they decrease social welfare, especially in relation to students. Accordingly, they are not justified.