Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights

by
STUART P. GREEN*

Table of Contents

* Professor of Law, Louisiana State University; Fulbright Distinguished Scholar to the United Kingdom, University of Glasgow School of Law (2002–03). One can hardly begin to write about plagiarism without experiencing a heightened awareness of one's intellectual debts. In addition to all of the authorities cited in the notes below, I would also like to express my thanks to Mike Carroll, Bill Corbett, Daniel Gervais, Stephen Higginson, Craig Joyce, Jason Kilborn, Michael Landau, Mark Lemley, Paul Marcus, Gerry Moohr, Catherine Rogers, and Lloyd Weinreb for their help on earlier drafts; and to Lohr Miller and Victor Mukete for their research assistance. My title "echoes" that of Sanford H. Kadish's influential article, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). To all of my sources I give credit (but none of the blame) for this work.

Introduction

In September 1990, the poet Neal Bowers published a poem in the journal *Poetry,* entitled "Tenth-Year Elegy." It began like this:

> Careless man, my father,
> always leaving me at rest-stops,
> coffee shops, some wide spot in the road.
> I come out, rubbing my hands on my pants
> or levitating two foam cups of coffee,
> and can't find him anywhere,
> those banged-up fenders gone.[1]

A year later, a man named David Sumner published a poem in the *Mankato Poetry Review*, entitled "Someone Forgotten." Sumner's poem began like this:

> He is too heavy and careless, my father,
> always leaving me at rest-stops, coffee shops,
> some wide spot in the road. I come out,
> rubbing my hands on my pants or levitating
> two foam cups of coffee, and I can't find him
> anywhere, that beat-up Ford gone.[2]

Sumner, of course, had copied Bowers's poem—line for line, practically word for word—and published it under his own name (actually, his own pseudonym), with a different title.[3] In a fascinating and eloquent memoir, entitled *Words for the Taking*, Bowers describes his reaction to discovering Sumner's "crime" and his quest for retribution. "I was convinced," Bowers says, that "something had to be done to rectify my . . . situation, though I wasn't sure what that something was. I spent languid afternoons at home, when I should have been writing poems, fantasizing about how my thief would react if he opened his door and found me there, with accusations and evidence."[4]

Like many writers on plagiarism, Bowers characterizes the "offense" that has been committed in the language of criminal law. Again and again, plagiarists are referred to as "thieves"[5] or

1. NEAL BOWERS, WORDS FOR THE TAKING 27 (1997).

2. *Id.*

3. Bowers's investigations revealed that Sumner's real name was probably David Jones. *Id.* at 59.

4. *Id.* at 37–38.

5. Christopher S. Hawley, *The Thieves of Academe: Plagiarism in the University System*, 32 IMPROVING C. & U. TEACHING 35 (1984); Jacob Neusner, *Foreword to First Edition*, *in* THEODORE PAPPAS, PLAGIARISM AND THE CULTURE WAR 11 (1998).

"criminals,"[6] and plagiarism as a "crime,"[7] "stealing,"[8] "robbery,"[9] "piracy,"[10] or "larceny."[11] Even some dictionaries define plagiarism as "literary theft"[12]—a definition that is consistent with the term's etymological origin, the Latin word *plagium* (which, at Roman law, referred to the stealing of a slave or child).[13]

Yet, despite such talk, the fact is that no plagiarist has ever been prosecuted for theft. We might well wonder: Is the notion of "plagiarism as theft" anything more than a recurring metaphor, like saying that a real estate developer "raped" the land or that a lawyer's fees constituted "highway robbery"? Does plagiarism satisfy the legal definition of theft, and if so, why isn't it prosecuted as such? Does it have the same moral weight as other forms of theft? And if plagiarism fails to meet the legal or moral definition of theft, what, if anything, might we learn from that fact?

Plagiarism itself is a complex and interesting concept, one that lies at the very foundation of academic and literary culture. As the recent controversies over unattributed copying by historians Doris

6. James R. Kincaid, *Purloined Letters,* NEW YORKER, Jan. 20, 1997, at 95. Kincaid's article also begins by quoting from Bowers's and Sumner's poems.

7. SKIDMORE COLLEGE DEPARTMENT OF CLASSICS, STUDY SKILLS/ WRITING IN CLASSICS/ RESEARCH PAPERS, *at* http://www.skidmore.edu/academics/classics/plagiarism.html.

8. BOWERS, *supra* note 1, *passim*. *See generally* JUDY ANDERSON, PLAGIARISM, COPYRIGHT VIOLATION, AND OTHER THEFTS OF INTELLECTUAL PROPERTY: AN ANNOTATED BIBLIOGRAPHY WITH A LENGTHY INTRODUCTION (1998); MARCEL C. LAFOLLETTE, STEALING INTO PRINT: FRAUD, PLAGIARISM, AND MISCONDUCT IN SCIENTIFIC PUBLISHING (1992); THOMAS MALLON, STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM (1989); JUNE & WILLIAM NOBLE, STEAL THIS PLOT: A WRITER'S GUIDE TO STORY STRUCTURE AND PLAGIARISM (1985); MAURICE SALZMAN, PLAGIARISM: THE "ART" OF STEALING LITERARY MATERIAL (1931). In Jewish tradition, according to Joseph Telushkin, plagiarism is viewed as a kind of "double thievery: You steal the credit due to the person who first enunciated the idea, and then you engage in what Jewish ethics calls *g'neivat d'at* ('stealing the mind'): you deceive your listeners into thinking that you are smarter or more knowledgeable and insightful than you really are." JOSEPH TELUSHKIN, THE BOOK OF JEWISH VALUES: A DAY-BY-DAY GUIDE TO ETHICAL LIVING 93–94 (2000).

9. Jamie McKenzie, *The New Plagiarism: Seven Antidotes to Prevent Highway Robbery in an Electronic Age*, FROM NOW ON: EDUC. TECH. J. (May 1998), *at* http://www.fno.org/may98/cov98may.html.

10. ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 3 (1952).

11. *Id. See also* Kincaid, *supra* note 6, at 97; K.R. ST. ONGE, THE MELANCHOLY ANATOMY OF PLAGIARISM 1 (1988); PAPPAS, *supra* note 5, at 30.

12. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 888 (10th ed. 1998) [hereinafter MERRIAM-WEBSTER] (to plagiarize is "to commit literary theft").

13. *See* discussion *infra* notes 32–35 and accompanying text. Interestingly, under Scottish law today, the crime of *plagium* or "theft of a child" involves the unauthorized taking of a child from the control of a person who is legally entitled to that child's care or custody. Hamilton v. Wilson, 1994 S.L.T. 431 (H.C.J. 1992); Hamilton v. Mooney, 1990 S.L.T. 105 (Sh. Ct. 1989).

Kearns Goodwin and the late Stephen Ambrose suggest, it is a subject that continues to excite passions and evoke puzzlement.[14] Because it is not, strictly speaking, a legal concept, it has mostly been ignored by legal commentators.[15] Yet, by applying the tools of legal analysis, it is possible to elucidate puzzling cases such as failures to attribute that are inadvertent, use of a ghostwriter, and plagiarism of one's self. Thinking about plagiarism as theft should also yield insights into the important question of what kinds of "property" (particularly, intangible property) can be stolen. Finally, thinking about the application of theft law to plagiarism is useful as a starting point for thinking more broadly about the ever increasing use of criminal sanctions in the enforcement of intellectual property law.

* * * * *

We begin our analysis, in Part I, by considering the rule against plagiarism as a corollary to a complex social norm I refer to as the "norm of attribution." Under this norm, one is permitted to copy another's words or ideas if and only if he attributes them to their original author. One who violates the norm of attribution commits plagiarism, and, if discovered, faces a range of possible sanctions. While the rule against plagiarism has considerable normative strength (most especially in particular sub-communities), however, it is not without ambiguities. Among other things, it is not always easy to distinguish between writing that is copied with the intent of being passed off as the plagiarist's own and writing that is merely subject to the inadvertent "influence" of earlier work.

14. *See* discussion *infra* notes 54–63 and accompanying text.

15. What little legal scholarship there is on plagiarism is addressed either to the relationship between plagiarism and intellectual property law, *see* CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK?: BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 77–80 (2001); Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 525–34 (1992), or to the ethics of plagiarism as committed by law students, lawyers, law professors, and judges. *See, e.g.*, Robert D. Bills, *Plagiarism in Law School: Close Resemblance of the Worst Kind?*, 31 SANTA CLARA L. REV. 103 (1990); Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 237 (1999); Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467 (2001); Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253 (1996); Matthew C. Mirow, *Plagiarism: A Workshop for Law Students*, *in* LEXIS-NEXIS Legal Research and Writing Course Kit (1996); LEXIS-NEXIS Law Student Survival Kit (1997). I am aware of only two other works that even raise the question "Is plagiarism theft?": LLOYD L. WEINREB, CRIMINAL LAW 409 (6th ed. 1998); and Jamie Moulton & George Robinson, *Plagiarism, in* 2 ENCYCLOPEDIA OF ETHICS 969 (Lawrence C. Becker & Charlotte B. Becker eds., 1992).

Part II considers the elaborate system of non-legal, quasi-legal, and legal sanctions through which the rule against plagiarism is enforced. Most often, plagiarism is dealt with through an informal, though robust, system of social disapproval. In other cases, it is addressed through formal disciplinary proceedings administered by academic and professional institutions. There are also a number of legal doctrines—such as copyright infringement, unfair competition, and "moral rights"—that apply to what amounts to plagiarism, even if such conduct is not labeled as such.

Part III asks whether plagiarism satisfies the elements of theft, and whether its prosecution as such would be preempted by federal copyright law. Theft law, as we shall see, prohibits the misappropriation of "anything of value"—a term that refers, in its expansive, modern form, to both tangible and intangible property. I shall argue that something is a "thing of value" for purposes of theft law if and only if it is "commodifiable," which I define as "capable of being bought or sold." What is "stolen" by the plagiarist, I suggest, is not (as is sometimes assumed) the author's words or ideas, but rather the "credit" for those words or ideas. The question we need to consider, then, is whether credit of this sort is capable of being bought or sold.

Part IV looks at the possibility of prosecuting plagiarism as theft from the perspective of public policy and the general underlying purposes of criminal law. To what extent, I ask, would the prosecution of plagiarism as theft be consistent with the criminal law's dual interest in retribution and deterrence? Does the apparent rise in the incidence of plagiarism suggest that traditional means are inadequate and that other alternatives, including criminal sanctions, should be considered? What is to prevent such prosecutions from overdeterring, or chilling, otherwise socially productive activities? How would we distinguish between those cases worth prosecuting (if any) and those not?

Finally, in Part V, I consider the implications of the foregoing analysis for the criminal prosecution of intellectual property offenses more generally. Despite an explosion in recent years in the use of criminal sanctions for intellectual property offenses, the question of when, why, and how to criminalize intellectual property law has mostly fallen between the cracks of analysis, generally being ignored, at least until very recently,[16] by both intellectual property and criminal

16. The January 2002 meeting of the Association of American Law Schools, in New Orleans, featured a panel entitled "The Role of Criminal Law in Regulating Use of

law scholars. Rather than attempting to canvas the entire field, I focus on a small number of issues implicit in the preceding discussion of plagiarism. While powerful social norms prevent most people from even thinking of, say, walking into a bookstore and stealing a book, many people have no qualms at all about downloading pirated music or software from the Internet. Unlike legislation that makes theft of other kinds of property a crime, legislation that makes it a crime to misappropriate various forms of intellectual property seems to lack the firm foundation of social norms that is generally needed to be effective. Such legislation thereby presents a kind of paradox: Whereas the mostly non-legalized rule against plagiarism is regarded as having something very much like the force of law (hence, the repeated reference to plagiarism as "theft," "larceny," "stealing," and so forth), many intellectual property laws (which, after all, *are* laws) are regarded as illegitimate and nonbinding. The question posed is what lessons, if any, might be learned from this paradox.

I. The Meaning of Plagiarism

Plagiarism has been variously defined as the act of "steal[ing] and pass[ing] off (the ideas or words of another) as one's own," "us[ing] (another's created production) without crediting the source," or "present[ing] as new and original an idea or product derived from an existing source."[17] Plagiarism thus seems to involve, in the language of the criminal law, two, or possibly three, basic "elements": two actus reus elements and a possible mens rea element. The actus reus elements are copying a work (an act) and failing to attribute such work to its author (an omission) where one has a duty to do so.[18] The mens rea element is less clear. As we shall see below, there is a good deal of confusion over whether copying or failure to attribute must be "intentional" or "knowing," or whether plagiarism is committed even when such acts are inadvertent.[19]

Intellectual Property and Information." The panelists were Judge Jed S. Rakoff and Professors John Coffee, Jr., Mark Lemley, Geraldine Szott Moohr, and Alfred Chueh-Chin Yen. Other sources, mostly on specific intellectual property offenses, are referred to *infra* notes 143, 182, 188, 192, 268–69, 274, and accompanying text.

17. MERRIAM-WEBSTER, *supra* note 12, at 888. Alexander Lindey defines plagiarism as "the false assumption of authorship . . . taking the product of another person's mind, and presenting it as one's own." LINDEY, *supra* note 10, at 2.

18. Typically, but not always, the work copied is that of "another." The special case of "self-plagiarism," in which the plagiarist presents as new work he himself previously published, is considered *infra* note 92 and accompanying text.

19. *See infra* notes 50–53 and accompanying text.

In minor cases, plagiarism can involve the copying of even a small number of words or ideas without citation to their real author. In the most serious cases, a significant portion of an entire work (a poem, story, article, or book) is presented, without attribution, as if it were the plagiarist's own. Although plagiarism can involve the copying of written, oral, visual, or musical ideas, our focus here will be on those cases in which the plagiarist copies, and fails to attribute, words or ideas that have been written.

A. Plagiarism and the Norm of Attribution

The concept of plagiarism is embedded within the context of a complex set of social norms.[20] To see how this set of norms functions, we begin with the proposition that people generally value the esteem of others, particularly their peers.[21] Among the ways one can earn the esteem of one's peers is by being recognized for one's originality, creativity, insight, knowledge, and technical skill. This is particularly so among writers, artists, and scholars, who, in addition to achieving satisfaction through the creative act itself, usually wish to see those acts recognized by others.

This desire for esteem produces a norm that I shall refer to as the "norm of attribution." According to this norm, words and ideas may be copied if and only if the copier attributes them to their originator or author.[22] This norm leads to a form of social cooperation with obvious benefits. It maximizes the author's chances of achieving esteem by providing, at relatively low cost to author, copier, and society generally, opportunities for both wide dissemination of, and credit for, the author's words and ideas, without which there would be fewer incentives to create new work.[23] In modern Western societies, the attribution norm is disseminated quite formally in schools, starting at an early age. As a student's education proceeds, the apparatus of attribution can become elaborate, as can be seen, for example, in history, law, and literary scholarship.

20. On norms and the law generally, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); and Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

21. McAdams, *supra* note 20, at 355–58.

22. The "if and only if" relation entails a prohibition not only on copying without attribution but also on attribution without copying, a practice that I refer to *infra* note 149 as "reverse plagiarism."

23. *Cf.* McAdams, *supra* note 20, at 393–94 (on low cost of informal sanctioning).

For most people within the relevant community, the attribution norm becomes internalized. Such people view attribution as being, or closely akin to being, a moral obligation, rather like showing respect to one's elders. People who have internalized the norm of attribution would regard credit earned for someone else's work as illegitimate. Indeed, such people can achieve satisfaction only if they know that the work they are being recognized for is in fact their own.

The problem is potential cheaters—those who fail to internalize the norm. The fact is that thinking of, and articulating, worthwhile original ideas is a time consuming and labor intensive activity. Those who have not internalized the norm may be tempted to seek esteem through "free-riding" on the work of others—that is, by representing another person's words or ideas as their own. It is this form of "deviance" that we refer to as "plagiarism."

Many potential plagiarists are deterred, in the first instance, by the risk that they will be discovered and exposed, thereby suffering disesteem within, even ostracism from, the relevant community. Such stigma is a particularly fitting penalty for the plagiarist, because it denies him precisely the social good that he seeks—namely, esteem.

As we shall see, however, informal, reputational stigma is not the only possible sanction that plagiarists face. There is also a complex range of more formal means by which society deals with this particular form of cheating. Many academic and professional institutions impose on plagiarism a range of quasi-legal sanctions, such as firing, suspension, expulsion, and revocation of licensing. Moreover, there are a number of specifically legal sanctions—including copyright infringement, unfair competition, and the primarily European tort of moral rights—that apply to conduct virtually indistinguishable from what we otherwise refer to as plagiarism.

B. The Construction of Authorship and the History of Plagiarism

When and how did the rule against plagiarism develop? In recent years, the evolution of plagiarism has come to be a subject of considerable interest among scholars in fields such as literary theory, intellectual history, and education. The prevailing account of plagiarism goes something like this: In the classical world, "imitation" reigned as a preferred method of composition. Classical writing and oratory were:

> to a considerable extent a pastiche, or piecing together of commonplaces, long or short. . . . The student memorized passages as he would letters and made up a speech out of these elements as

> he would words out of letters. . . . In the Middle Ages handbooks of letter-writing often contained formulae, such as openings and closes, which the student could insert into a letter, and a whole series of formulary rhetoric existed in the Renaissance.[24]

Classical rhetoricians and their medieval descendants expected these models to be recognized and accepted for what they were—homages to the masters that lent beauty and authority to their work.[25] Unlike modern plagiarists, these authors almost never intended to pass off the genius of others as their own. Indeed, it is striking that so many great writers of an earlier time—including Aristotle, Virgil, Shakespeare, Montaigne, Coleridge, Dryden, and Sterne—regularly engaged in practices that, today, might well lead to charges of plagiarism.[26]

It was not, according to this account, until the Romantic Era of the eighteenth century—when the notion of "authorship" and "originality" emerged as significant cultural values—that the norm of attribution and the taboo of plagiarism came to the fore. As art and literature became viewed as the expression of the unique and autonomous personality of the artist or writer, the crediting of literary sources became an increasingly important concern.[27] Nor was this change merely aesthetic in its origins. As Benjamin Kaplan,[28] Mark Rose,[29] and other scholars[30] have explained, the emergence of the

24. PAPPAS, *supra* note 5, at 48 (quoting GEORGE KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES (1980)).

25. *Id.*

26. *See* MALLON, *supra* note 8, at 3; A.B. MCKILLOP, THE SPINSTER & THE PROPHET: A TALE OF H.G. WELLS, PLAGIARISM, AND THE HISTORY OF THE WORLD *passim* (2000); PETER W. MORGAN & GLENN H. REYNOLDS, THE APPEARANCE OF IMPROPRIETY 140–42 (1997); LAURA J. ROSENTHAL, PLAYWRIGHTS AND PLAGIARISTS IN EARLY MODERN ENGLAND: GENDER, AUTHORSHIP, LITERARY PROPERTY (1996); HAROLD OGDEN WHITE, PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE *passim* (Octagon Books 1965) (1935); Kincaid, *supra* note 6, at 96.

27. *See* MALLON, *supra* note 8, at 1–40. *See generally* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001).

28. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 22–23 (1966).

29. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT *passim* (1993).

30. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 52–59 (1996); Peter Jaszi & Martha Woodmansee, *Introduction* to THE CONSTRUCTION OF AUTHORSHIP, *supra* note 27 at 2–8; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 473; David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS.,

Romantic view of the "author" was driven by changes in the law of copyright, which in turn were fueled by the economic interests of publishers, booksellers, and authors, and various technological changes that made such interests pressing. In other words, these scholars claim, it was not until words and ideas could be viewed as "property"—typically, through publication—that "originality" became a significant cultural value, and plagiarism a powerful cultural taboo.[31]

My intention here is not to offer anything like a full-blown critique of this account. Instead, I merely want to suggest that (1) there is evidence that the idea of plagiarism existed well before the Romantic Era of the eighteenth century, and (2) the norm of attribution does not necessarily presuppose the strong concept of "authorship" that is suggested by the foregoing account.

Perhaps the most obvious evidence that the concept of plagiarism existed well before the eighteenth century is etymological. The first person to use the term "plagiarism" in connection with literary works was the Roman poet Martial, who lived in the first century C.E. Under Roman law, the term *plagiori* (from *plaga*, Latin for "trap" or "snare") referred to the stealing of a slave or child.[32] Martial's rival, Fidentius, had apparently recited Martial's works to the crowd, as if they were his own.[33] In excoriating Fidentius, "Martial compared [Fidentius] to the worst thing he could think of—a slave stealer, a *plagiario*."[34] The label stuck and would eventually be used for the first time in English by Bishop Richard Montagu, in 1621.[35]

The concept of plagiarism (or at least the idea that one has a duty to attribute one's sources) has at least as long a history in Jewish tradition. For example, *Pirke Avot* (usually translated as *Ethics of the Fathers*), a Mishnaic tract compiled between approximately 500 B.C.E. and 300 C.E., states that, "who reports something in the name

Spring 1992, at 139; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1983).

31. For a discussion of the development of modern, Western attitudes towards plagiarism, see MALLON, *supra* note 8, at 1–40; *see generally* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 27.

32. *See* O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 32–35 (1995).

33. F.J. McCormick, *The* Plagiario *and the Professor in Our Peculiar Institution*, 8 J. TEACHING WRITING 133, 133 (1989); LINDEY, *supra* note 10, at 95.

34. McCormick, *supra* note 33, at 133.

35. OXFORD ENGLISH DICTIONARY (2d ed. 1989) (entry on "plagiarism").

of the one who said it brings redemption into the world."[36] Although the theory behind this conception of attribution undoubtedly differs from both the Roman and modern conception, it is clear that the Mishnah views the citing of one's sources as a moral obligation.[37] Indeed, in the fifteenth century, plagiarism was widely alleged to have been committed by the prominent Talmudic scholar, Isaac Abarbanel.[38]

My claim, of course, is not that the Roman, Mishnaic, eighteenth century, and modern day conceptions of plagiarism are identical. Rather, I merely want to suggest that the idea of plagiarism is much older than is often assumed and to question the assumption that the obligation to attribute one's sources necessarily presupposes either a strong notion of "authorship" and "originality" or the existence of a legal regime of the sort that was first developed in the eighteenth century.

C. The Fuzzy Line Between Plagiarism and "Mere Influence"

Many of the scholars who trace the ideas of authorship and attribution to the eighteenth century also believe, to one extent or another, that those ideas have become outmoded.[39] Their interest is in breaking away from the supposedly antiquated notion that words and ideas can or should be "owned" and loosening up the legal controls on information and intellectual property that now exist.[40]

36. PIRKE AVOT, A MODERN COMMENTARY ON JEWISH ETHICS 6:6 (Leonard Kravitz & Kerry M. Olitzky eds. & trans., 1993).

37. Why did the Rabbis credit the act of acknowledging someone else as "bring[ing] redemption into the world"? According to Joseph Telushkin:

> If a person presents as her own an intelligent observation that she learned from another, then it would seem that she did so only to impress everyone with how "bright" she is. But if she cites the source from whom she learned this information, then it would seem that her motive was to deepen everyone's understanding. And a world in which people share information and insights to advance understanding, and not just to advance themselves, is one well on its way to redemption.

TELUSHKIN, *supra* note 8, at 94.

38. *See* Eric Lawee, *Isaac Abarbanel's Intellectual Achievement and Literary Legacy in Modern Scholarship: A Retrospective and Opportunity, in* STUDIES IN MEDIEVAL JEWISH HISTORY AND LITERATURE III 213 (Isadore Twersky & Jay M. Harris eds., 2000).

39. *See, e.g.*, LISE BURANEN & ALICE M. ROY, PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, at xviii, xx–xxi (1999); NICK GROOM, THE FORGER'S SHADOW: HOW FORGERY CHANGED THE COURSE OF LITERATURE *passim* (2002); ANDREA LUNDSFORD & LISA EDE, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING *passim* (1990); K.K. RUTHVEN, FAKING LITERATURE 121–45 (2001).

40. *See, e.g.*, BOYLE, *supra* note 30, at x (arguing that the urge "to confer property rights in information on those who come closest to the image of the romantic author . . . .

In arguing that the legal controls on intellectual property are obsolete, some scholars have argued that the rule against plagiarism itself is obsolete. One point emphasized by scholars in the post-modernist tradition is that the line between plagiarism and acceptable forms of copying is not always easy to discern. Such theorists have tended to recast conduct that might otherwise be stigmatized as plagiarism with morally neutral, even morally favorable, terms such as "voice merging," "echoing," "intertextualizing," "synthesizing," "textual appropriation," "resonance," and "patchwriting."[41] Some have even gone so far as to suggest that the idea of the "author" or "artist" as lone "genius" is most appropriately viewed as an artifact of capitalist, colonialist, even racist and sexist ideology,[42] and that plagiarism should be thought of as "a mode of guerilla warfare directed against an oppressive hegemony."[43]

Although I confess to more than a little skepticism about this approach,[44] I will nevertheless concede that the post-modernist critique has contributed a useful perspective on the inevitability of "borrowing" and the difficulties of distinguishing between permissible influence and impermissible copying. For there is truth to the claim

is a bad thing for reasons of both efficiency and justice"); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW *passim* (1998).

41. *E.g.*, PAPPAS, *supra* note 5 at *passim* (criticizing such an approach); Alex Beam, *Narrative of a Slave Tale*, BOSTON GLOBE, June 6, 2002, at D1 (Henry Louis Gates, Jr., defending his role in having *The New Yorker* publish excerpts of the first-ever novel written by a female African-American slave, which allegedly contained unattributed passages copied from *Bleak House*, wrote that Hannah Crafts (the author of the novel) "was seeking a relation to a canonical tradition, finding in Dickens a language and rhetoric that she sometimes assimilated and sometimes appropriated"; according to Gates, Crafts hadn't plagiarized; she had "emptied out a rhetorical template and filled it with particulars of her own.").

42. *E.g.*, REBECCA MOORE HOWARD, STANDING IN THE SHADOW OF GIANTS: PLAGIARISTS, AUTHORS, COLLABORATORS xxi (1999) ("The educational system can appear to be a meritocracy, facilitating students' entry to power, while the criminalizing of [plagiarism] surreptitiously blocks that entry and maintains the hierarchical status quo . . . .").

43. MARILYN RANDALL, PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER xiii (2001).

44. Among other things, I believe it is an error (usually termed a "genetic fallacy") to equate the historical roots of a doctrine with its contemporary meaning. Even assuming that the rule against plagiarism does owe its origin to the selfish motives of publishers, booksellers, and authors in the eighteenth century, there is no reason to suppose that the notion of "authorship" has not transcended such historical roots. Most writers, artists, and scholars who have internalized the attribution norm value attribution for its own sake. To the extent that such internalization serves as a spur to significant works of art, literature, and scholarship, the norm of attribution should be viewed as one that is socially valuable; it should not be too hastily abandoned.

that few, if any, artists or writers or scholars always achieve originality. None of us wholly invents the stories we tell, the metaphors we use, or the arguments we espouse. We all work within a cultural tradition, and, to some degree, we all absorb those cultural traditions by copying. In a field like law, for example, much of the most interesting scholarship consists in combining insights gained in other fields (such as philosophy, history, and economics) in new ways and in new contexts. Virtually every creative artist and scholar suffers from what Harold Bloom has called (in a somewhat different context) the "anxiety of influence."[45] Many influences are unconscious. An idea, phrase, argument, melody, or insight read or heard long ago can lodge in the unconscious.[46] Writers with an unusually retentive mind, such as those with a photographic memory, are particularly at risk of failing to attribute.[47]

Moreover, if one were to attempt to attribute each and every source of one's ideas, one's work would likely suffer. Excessive concern with one's sources can thwart the creative process and lead to pedantry. (Certainly, one cannot write on the subject of plagiarism without a certain nagging sense of paranoia about the originality of one's ideas and the scrupulousness of one's citations!) Indeed, it may at times seem pointless to use new language to describe a fact or phenomenon that has become part of our common culture.[48] What is the point of finding new words to describe Einstein's Theory of

45. HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY *passim* (2d ed. 1997); *see also* BOWERS, *supra* note 1, at 106 ("One person's research builds upon everyone else's, and footnotes don't always itemize the total debt. Virtually every scholar believes himself to have been plagiarized and, conversely, worries that his neighbors will find their work unattested in his."); John H. Timmerman, *The Shameless Magpie: John Steinbeck, Plagiarism, and the Ear of the Artist*, *in* THE STEINBECK QUESTION: NEW ESSAYS IN CRITICISM 260 (Donald R. Noble ed., 1993).

46. For examples of "unconscious plagiarism" in the copyright context, see *infra* note 143.

47. As K.R. St. Onge relates: In 1951, the newly inaugurated president of Cornell University, Dean Malott, faced the prospect of dismissal for plagiarism after it was discovered that his inaugural address contained a few hundred words taken from an unattributed source. ST. ONGE, *supra* note 11, at 6–7. As legend has it, Malott invited the Cornell Board of Trustees to his study, pointed to a wall of books he claimed to have read and asked the Board Chairman to pick one at random and read from it. *Id.* The Chairman barely began reading when Malott proceeded to recite verbatim some of the paragraphs that followed. *Id.* Malott then said, "[y]ou see my problem gentlemen. I have a photographic memory and I simply cannot recall with confidence whether what I am writing is or isn't original." *Id.* As a result of this demonstration, Malott was allowed to keep his job. *Id.*

48. *Cf.* Newman v. Burgin, 930 F.2d 955, 958 (1st Cir. 1991) (alleged plagiarist argued that work "reflected general knowledge among scholars in the field and did not require attribution").

Relativity, the holding in *Miranda v. Arizona*, or the fact that the Yankees won the game on a home run in the bottom of the ninth? Ultimately, the existence of plagiarism may best be judged not by looking at individual instances of verbal similarities between two works but by comparing the works in their entirety.[49]

Notwithstanding these complications, however, it seems obvious that there is a legitimate distinction to be made between mere influence, unconscious imitation, and inadvertent failure to attribute (on the one hand), and extensive copying that is intended to convey the impression that the copier is the original author (on the other). However forgiving we may be of the student who, as a result of sloppy note taking, neglects to put quotation marks around a sentence copied from one of his sources, most of us would not hesitate to condemn David Sumner, the plagiarist who submitted Neal Bowers's poems under his own name.

D. Plagiarism and the Question of "Mens Rea"

Perhaps some of the confusion about the moral status of plagiarism can be attributed to a deeper confusion about the mental element, if any, necessary for its commission. Some ethical codes prohibit only "intentional" or "knowing" plagiarism.[50] Others prohibit plagiarism that is either "intentional" or "unintentional"[51]—that is, they treat plagiarism as a kind of "strict liability" offense. Finally, a large number of codes (surely, a majority) prohibit unattributed copying without specifying what, if any, form of mens rea is required.[52] Moreover, as we shall see, most newspapers and

49. Alexander Lindey makes a similar point in his influential study of plagiarism. *See* LINDEY, *supra* note 10, at 60–61.

50. *E.g.*, UNIVERSITY OF MARYLAND CODE OF ACADEMIC INTEGRITY, *available at* http://www.inform.umd.edu/CampusInfo/Departments/PRES/policies/iii100a.html.

51. *E.g.*, LOUISIANA STATE UNIVERSITY, UNDERSTANDING AND AVOIDING PLAGIARISM, *in* JUDICIAL AFFAIRS, *available at* http://appl003.lsu.edu/slas/judicialaffairs.nsf/$Content/Understanding+and+Avoiding+Plagiarism?OpenDocument ("Plagiarism, strictly speaking, is not a question of intent. [sic] Any use of the content or style of another's intellectual product without proper attribution constitutes plagiarism."); UNIVERSITY OF MINNESOTA STUDENT CONDUCT CODE, *available at* http://www1.umn.edu/regents/policies/academic/StudentConduct.html.

52. *E.g.*, BRANDEIS UNIVERSITY POLICY REGARDING ACADEMIC HONESTY & PLAGIARISM, *available at* http://people.brandeis.edu/~teuber/usemacadpol.html; BRIGHAM YOUNG UNIVERSITY, CHURCH EDUCATIONAL SYSTEM HONOR CODE, *available at* http://www.byu.edu/honorcode/honor_code.htm#HONESTY; CALIFORNIA INSTITUTE OF TECHNOLOGY, THE HONOR SYSTEM, *available at* http://www.its.caltech.edu/grb/HonorSystem.pdf; DUKE UNIVERSITY CENTER FOR TEACHING, LEARNING, AND WRITING, GUIDELINES FOR ACKNOWLEDGING SOURCES & AVOIDING PLAGIARISM, *available at* http://www.ctlw.duke.edu/programs_uwp_plagiarism.htm;

magazines do not even have a written code of conduct.[53] Thus, when some people think about plagiarism, they are assuming that it requires an intentional or knowing act. Others are thinking about conduct that is inadvertent, though perhaps recklessly or negligently so.

Should plagiarism require an intent to deceive or some other mental element, or should it be viewed as a strict liability offense? I would argue that, just as morality informs law, so too should law inform morality. If theft requires intent, and plagiarism derives much of its meaning from theft law, it seems to follow that plagiarism should also require intent. At the same time, I would modify this requirement to say that the element of intent can be satisfied by "deliberate indifference" to the obligation to attribute. That is, if the reason a person was unaware that he was copying or failing to attribute is that he was deliberately indifferent to the requirements of attribution, he should be viewed as having committed plagiarism.

Consider the recent cases involving the noted historians, Doris Kearns Goodwin and the late Stephen Ambrose. Beginning in January 2002, Ambrose was accused of failing to properly attribute works quoted in his books *The Wild Blue*,[54] *Crazy Horse and Custer*,[55] *Nothing Like it in the World*,[56] and *Citizen Soldiers*.[57] Shortly thereafter, Goodwin was accused of copying up to fifty improperly attributed passages from the work of Lynne McTaggart, in her book

FLORIDA STATE UNIVERSITY ACADEMIC HONOR SYSTEM, *available at* http://www.fsu.edu/%7Eunion/honor.htm#code; ACADEMIC INTEGRITY, *in* NORTHWESTERN UNIVERSITY STUDENT HANDBOOK, *available at* http://www.stuaff.northwestern.edu/parent/studenth/academics/grades.html; UNIVERSITY OF SOUTH CAROLINA ACADEMIC HONOR CODE, *available at* http://www.uscs.edu/catalog/wstudentaffairs.pdf; WESTERN MICHIGAN UNIVERSITY STUDENT CODE, *available at* http://www.studentworld.wmich.edu/sja/studentcode.html#dishonesty. The American Historical Association's influential "Statement on Plagiarism" also does not specify whether plagiarism requires intent. *See* AMERICAN HISTORICAL ASSOC., 2002 STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT, *available at* http://www.theaha.org/standard_02.htm.

53. *See infra* note 134.

54. Fred Barnes, *Stephen Ambrose, Copycat*, THE DAILY STANDARD, Jan. 14, 2002, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/000/738lfddv.asp.

55. Hillel Italie, *Ambrose Plagiarism Claimed: Noted Historian Faces Second Allegation*, THE ADVOCATE (Stamford, Conn.), Jan. 9, 2002, at 4-B.

56. Mark Lewis, *Ambrose Controversy: Nothing Like It in the World? Hardly,* FORBES, Jan. 17, 2002, *available at* http://www.forbes.com/2002/01/17/0117ambrose.html

57. Julia Kamysz Lane, *A Brief History of the "P" Word*, POETS & WRITERS, May–June 2002, at 6.

The Fitzgeralds and the Kennedys.[58] Both Ambrose[59] and Goodwin[60] acknowledged their unattributed copying (or at least some of it), which they blamed on sloppy note taking rather than any intentional or knowing deception, and promised to include proper attribution in future editions of their books.[61]

Under a strict liability regime, both would be guilty of plagiarism, despite their supposed lack of mens rea. Under a code that required intent, knowledge, or perhaps deliberate indifference, the question would be much more difficult. While there is no evidence that either Ambrose or Goodwin actually intended to plagiarize, it seems quite possible that both were deliberately indifferent to the requirements of attribution.

According to newspaper accounts, Ambrose, in order to maintain his prolific, and lucrative, output of recent years, used his son, Hugh, as a collaborator, with additional research help from his four other children.[62] The result seems to have been a loss of control over his own books. It may well be—and one can only speculate about such things—that Ambrose essentially stuck his head in the sand, purposely avoiding the possibility that he might become aware of plagiarism in his work. As for Goodwin, it seems hard to imagine

58. David D. Kirkpatrick, *Historian Says Publisher Quickly Settled Copying Dispute*, N.Y. TIMES, Jan. 22, 2002, at A10; David D. Kirkpatrick, *Historian Says Borrowing Was Wider Than Known*, N.Y. TIMES, Feb. 23, 2002, at A10.

59. Italie, *supra* note 55. Ambrose offered his response to charges that he had plagiarized on his website:

> When I'm using the words of an interview—which is what I rely on, mostly—I always use quotation marks around the phrases or sentences. When I'm using information or description from books by scholars, I always cite the source.
>
> But if I have already named a praised [sic] and quoted the author in my book, I don't name him or her again, and sometimes I have failed to put quotation marks around their words. I'm not trying to hide anything. Indeed, I want people to read their books.

Stephen Ambrose, *Statement on My Writing Methods, available at* http://www.publishersmarketplace.com/lunch/archives/week_2002_05_05.html.

60. Oliver Burkeman, *Plagiarism Row Topples Pulitzer Judge*, GUARDIAN, Mar. 6, 2002, at 18; Lane, *supra* note 57. Goodwin explained the circumstances that led her to fail to attribute several quotes in a brief essay. Doris Kearns Goodwin, *How I Caused That Story: A Historian Explains How Someone Else's Writing Wound Up in Her Book*, TIME, Feb. 4, 2002.

61. Marilyn Randall has referred to a "notebook syndrome," "in which sloppy and/or obsessive note-taking on the part of the author is blamed for the fact that, somehow, unacknowledged passages taken from writers end up without quotation marks in a new context." RANDALL, *supra* note 43, at 132.

62. David D. Kirkpatrick, *As Historian's Fame Grows, So Does Attention to Sources*, N.Y. TIMES, Jan. 11, 2002, *available at* http://www.nytimes.com/2002/01/11/national/11AMBR.html.

how a writer could have included as many as fifty improperly attributed passages in a single book without being deliberately indifferent to the rules of attribution. Accordingly, we might say (following the Model Penal Code's formulation of the willful blindness instruction), that both Ambrose and Goodwin possessed the "knowledge" necessary to commit plagiarism because they were "aware of a high probability" that their sources had been inadequately acknowledged.[63]

A closely related issue is that of mistake. Ambrose and Goodwin seem to have argued that they failed to attribute certain passages in their books because they mistakenly believed that they themselves had written them. The argument is that their mistake essentially "negated" any intent to commit plagiarism. The criminal law refers to this kind of mistake as a "mistake of fact." It is analogous to the kind of mistake made by the defendant who takes another man's raincoat, identical to one he owns, in the mistaken belief that it is his own.[64] The basic rule in most jurisdictions is that a mistake of fact will negate the intent to commit theft, provided that it is reasonable.[65] It seems to me that an analogous rule should apply in the case of plagiarism.

Finally, we need to consider those circumstances in which a person accused of plagiarism argues that he was unaware of the requirement of attribution itself. For example, I recently sat on a university disciplinary committee before which the respondent, a foreign graduate student, argued that he was unaware of the obligation to use footnotes and quotation marks.[66] This kind of

63. *See* MODEL PENAL CODE § 2.02(7) (1962). For a discussion of the law concerning willful ignorance, see, for example, Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29; Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).

64. *See* Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 696 (1996); *see also* People v. Navarro, 160 Cal. Rptr. 692, 697–98 (Cal. Ct. App. 1979) (defendant who took wooden beams from construction site in mistaken belief that they had been abandoned had defense to charge of theft).

65. *See, e.g.*, *Navarro*, 160 Cal. Rptr. at 697–98. On the mistake of fact defense generally, see Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 WAKE FOREST L. REV. 707 (1990); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447 (1990); and Richard Singer, *The Resurgence of Mens Rea: II—Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459 (1987).

66. According to one source, "[s]tudents from Middle Eastern, Asian, and African cultures are baffled by the notion that one can 'own' ideas." Given such cultural specificity, it is not surprising that students and writers from non-Western cultures

mistake is analogous to what the criminal law refers to as a "mistake (or ignorance) of the law." Traditionally, the criminal law has been less likely to recognize a defense of mistake of law than mistake of fact. According to the common law maxim *ignorantia legis neminem excusat* (ignorance of the law excuses no one), a defendant who was either unaware of the existence of a statute proscribing her conduct or who mistakenly concluded that the relevant statute did not reach her conduct has no defense, except in certain narrow circumstances, such as that she relied on an authoritative statement of the law, later determined to be invalid or erroneous.[67]

An analogous rule should apply in the context of plagiarism. A writer who fails to give credit to his sources as a result of ignorance or mistake about the rules of attribution should be regarded as having no defense. Allowing a plagiarist to argue that he was unfamiliar with the rules of attribution themselves would seem to encourage ignorance of such rules and lead to confusion and uncertainty in the community generally, just as ignorance of the law is said to do in the broader context.[68] On the other hand, a writer who fails to credit his sources as a result of a reasonable mistake of fact about the

sometimes encounter culture shock when dealing with Western requirements regarding attribution. C. Jan Swearingen, *Originality, Authenticity, Imitation, and Plagiarism: Augustine's Chinese Cousins*, *in* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 39, at 19, 21 (quoting Susan H. McLeod, *Responding to Plagiarism: The Role of the WPA*, *in* WPA, WRITING PROGRAM ADMINISTRATION 7, 15 (1992)). For more on attitudes towards plagiarism in non-Western cultures, see, for example, WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995); L.M. Dryden, *A Distant Mirror or Through the Looking Glass?: Plagiarism and Intellectual Property in Japanese Education*, *in* PERSPECTIVES ON PLAGIARISM, *supra* note 39, at 75.

67. Under the modern rule, mistake of law can be asserted as a defense only in several narrow circumstances, such as when the offender

> acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

MODEL PENAL CODE § 2.04(3)(b) (1962). *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1881); Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128, 135 (1997); Simons, *supra* note 65; Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law in* ACTION AND VALUE IN CRIMINAL LAW 157–74 (Stephen Shute et al. eds., 1993).

68. On the justifications for the narrowness of the mistake of law defense, see sources cited *supra* note 67.

provenance of such words should not be regarded as a plagiarist.[69] Indeed, to treat such cases as plagiarism might well create a chilling effect, by causing would-be writers to be hyper-cautious and pedantic in their scholarly practices, or worse, refrain from producing creative works altogether.

E. The Psychology of Plagiarism

Why do people plagiarize, and how does plagiarism feel to the plagiarist and to his victims? If the Ambrose and Goodwin cases are any indication, it would appear that a good deal of plagiarism is inadvertent. Indeed, psychologists have described a particular psychological condition—dubbed "cryptomnesia"—in which people mistakenly believe that they have produced a new idea when they have actually retrieved an old one from memory.[70] Other plagiarists act out of a deeper and more complex set of psychological motives. Peter Shaw observes an identifiable pattern: The plagiarist is talented in his own right and has no need to steal.[71] He leaves clues that are easy to detect and is frequently a repeat offender. He acts out of an unconscious desire to be caught, rather like a kleptomaniac. Secretly, he intends to cause his own destruction.[72] (Perhaps it was demons like these that drove David Sumner to pass off Neal Bowers's poems as his own.)

In some cases, the plagiarist might engage in an elaborate form of self-deception. In Terence Blacker's novel, *Kill Your Darlings*, for example, an aging creative writing teacher named Gregory Keays turns to plagiarism when one of his students, Peter Gibson, dies and

69. Of course, it is not always easy to distinguish between mistakes of fact and mistakes of law. For example, consider the observation of Terri LeClercq that many law students

> believe that changing every third (or fifth or tenth) word in the original keeps them honest. Many cannot imagine that it is dishonest to ignore footnotes and quotation marks when they are merely turning in a draft, not a final paper. Others download cases and discussions from the Internet and believe that, because they have no real source, they do not need to identify one.

LeClercq, *supra* note 15, at 239 (footnote omitted). Which, if any, of these mistakes is analogous to a "mistake of law"? Which, if any, is analogous to a "mistake of fact"? It seems to me that the answer to these questions is not at all obvious.

70. Martin L. Bink et al., *The Credibility of a Source Influences the Rate of Unconscious Plagiarism*, 7 MEMORY 293 (1999); Alan S. Brown & Hildy E. Halliday, *Cryptomnesia and Source Memory Difficulties*, 104 AM. J. PSYCH. 475, 475–76 (1991); C. Neil Macrae et al., *Contexts of Cryptomnesia: May the Source Be With You,* 17 SOC. COGNITION 273 (1999); Patricia L. Tenpenny, *Can Plagiarism Occur Inadvertently?*, 30 BULL. OF THE PSYCHONOMIC SOC. 456 (1992).

71. Peter Shaw, *Plagiary*, 51 AM. SCHOLAR 325, 332 (1982).

72. *Id.* at 329–32.

leaves behind an untraceable manuscript of obvious brilliance.[73] Blacker describes Gregory's process of rationalization: Although he is copying Peter's work practically verbatim, Gregory deceives himself into believing that it is merely a source of "research," a kind of "rough ore."[74] He becomes "aware of a new energy, a sense of direction that [he] had all but forgotten was within [his] gift."[75] He convinces himself that he is merely "reordering, compressing, honing, expanding, bringing life to the dry, arid path of [Peter's] narrative with [his] own dashes of colour."[76] In the end, Gregory believes that he has somehow transformed Peter's words into his own.

A similar plot line unfolds in John Colapinto's engaging novel, *About the Author*.[77] Colapinto's protagonist, Cal Cunningham, is a hapless bookstore clerk who has always fantasized about being a novelist, but never manages to write anything. When his roommate Stewart Church dies in mysterious circumstances, Cal decides to publish Stewart's just completed novel (also brilliant, also apparently untraceable) under his own name. While retyping the novel (which, in fact, does contain descriptions of many of Cal's own exploits), Cal explains, "I felt convinced that I truly *was* the author of the freshly minted typescript that lay on my desk. Stewart's specter, which had seemed to hover in the shadows above my pecking keys, was finally gone. Gone!"[78] Like Blacker's Gregory Keays, Colapinto's Cal Cunningham manages to convince himself—at least for the moment—that the work he is plagiarizing is really his own.

Finally, there is undoubtedly a significant amount of plagiarism that is conscious and deliberate, the result of rational, if perverse, cost-benefit calculation. A desperate student knows that he will not pass a particular course unless he produces an acceptable term paper. He is too short of time, imagination, or initiative to create a work of his own, so he buys a pre-written term paper from an Internet "cheat site"[79] and puts his name on it, or copies substantial passages from a book he finds in the library and fails to credit it. He weighs the likelihood that he will be caught, and the penalty that would be imposed, against the benefit of passing a course or obtaining a degree with minimal effort. His psychology is similar to a thief who obtains

73. TERENCE BLACKER, KILL YOUR DARLINGS 154–59 (2000).
74. *Id.* at 158.
75. *Id.*
76. *Id.*
77. JOHN COLAPINTO, ABOUT THE AUTHOR (2001).
78. *Id.* at 40 (emphasis in original).
79. *See infra* note 114.

money or goods from others by theft or fraud, rather than by earning an honest living.

As for the psychological effects on the *victim* of plagiarism, again we must rely primarily on anecdote. In *Words for the Taking*, Bowers describes what it feels like to discover that a plagiarist has published several of his poems under his own name. "When a poem is stolen," Bowers says, "the creative process itself is mocked, and the victim must defend not only his individual poem but also the very ground from which that poem arises."[80] Those who hear the victim's complaints "become the plagiarist's accomplices after the fact, robbing the victim of his sense of worth. Faced with this further deprivation, the poet must first declare that his work has been stolen and then argue that it matters."[81]

F. The Harms Caused by, and Victims of, Plagiarism

Exactly what harms does plagiarism cause, and who are its victims? The first kind of victim that plagiarism affects is the person whose words or ideas are copied and who fails to receive credit. For example, the most obvious victim of David Sumner's plagiarism was Neal Bowers, the poet whose work he plagiarized. The harm suffered by such victims can be significant, as is evidenced by the anguish felt by Joe Balkoski, the author of a modestly successful World War II history, who discovered that his work had been plagiarized by Stephen Ambrose. "I agonized over every word in my book," Balkoski says. "It was a labor of love. [Ambrose] obviously had my book open at his computer and just typed in the words, changing a pronoun or a comma here and there. What took me 20 years took him 15 minutes. If that."[82]

Moreover, in the academic context, citation to one's work can contribute, directly or indirectly, not only to psychic rewards (the satisfaction that comes from being esteemed by one's peers) but also to monetary rewards, including grants and scholarships, tenure and promotion, and other forms of career advancement and compensation. One who is denied the recognition to which he is entitled suffers a potentially serious harm. Indeed, it may be helpful

80. BOWERS, *supra* note 1, at 14.

81. *Id.* at 14–15. For further discussion of the psychology of plagiarism, see RANDALL, *supra* note 43, *passim*.

82. Jonathan Pitts, *A Twice Told Tale: Joe Balkoski Heard the Story First-Hand, From an Eyewitness to History. Stephen Ambrose Used It in One of His Best-Selling Books. For the Baltimore Historian, More Than Words Were Stolen. So Were Time, Toil, and a Soldier's Sacred Trust*, BALT. SUN, Mar. 10, 2002, at 7E.

to think of plagiarism as, in some sense, the flip side of defamation. Whereas defamation involves damage to a person's reputation through some affirmative act (a defamatory statement),[83] plagiarism involves damage to a person's reputation through an omission (namely, the failure to attribute).

A second kind of harm is that done to the reader who is deceived into believing that the plagiarist was the original source of such words or ideas.[84] A good example is the harm done to readers of the *Mankato Poetry Review*, who were deceived into thinking that "Someone Forgotten" was the work of Sumner himself.[85]

A third, closely related, kind of harm is that done to the institution within which the plagiarism is committed. For example, the reputation of the *Mankato Poetry Review*, which published Sumner's work, presumably suffered as a result of his plagiarism. And had Sumner submitted Bowers's poem under his own name for academic credit (say, as a degree requirement for an MFA program), then his instructor, the academic institution in which such plagiarism occurred, and other students in his class all would have been injured.[86] As the Sixth Circuit stated in *United States v. Frost* (a case in which the University of Tennessee rescinded its grant of a Ph.D. degree after discovering that the degree candidate had committed plagiarism): "Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby

83. *See, e.g.*, Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996). *But cf.* Sharratt v. Housing Innovations, Inc., 310 N.E.2d 343 (Mass. Sup. Jud. Ct. 1974) (failure to credit architect for design of housing project could constitute defamation).

84. This and several other kinds of harm caused by plagiarism are discussed in Lerman, *supra* note 15, at 477.

85. A somewhat more complex variation is provided by Edmond Rostand's play, *Cyrano de Bergerac*. Consider the harm caused to Roxane, the play's heroine, who is misled into believing that the love letters actually written by the eloquent, but physically unattractive, Cyrano were written by Christian, the handsome but tongue-tied cadet whose name Cyrano has allowed to be signed to them. *See* EDMOND ROSTAND, CYRANO DE BERGERAC (Anthony Burgess trans., Alfred A. Knopf, Inc. 1984) (1897). Whether what Christian did actually qualifies as plagiarism is a separate issue; as I argue below, the fact that the first comer "consents" to the act, even encourages the second comer to take credit, does not necessarily relieve the second comer of liability. *See infra* note 89 and accompanying text.

86. A student who submits plagiarized work for academic credit gains an unfair advantage over his classmates, similar to the kind of unfair advantage gained by a student who steals the answer key to an exam or collaborates on an assignment that is supposed to be done independently.

impair its ability to attract other students willing to pay tuition, as well as its ability to raise money."[87]

G. Ghostwriters and Self-Plagiarists

What should we make of politicians and corporate executives who use unnamed speech writers to write their speeches, movie stars and other celebrities who use unacknowledged ghostwriters to write their memoirs, and federal and state judges who rely on anonymous law clerks to write their judicial opinions?[88] Does the fact that such people present work written by others as their own mean that they are guilty of plagiarism?

The first thing to note is that, in each of these cases, the actual author consents to the second comer's non-attribution.[89] I would argue, however, that the author's consent should not be a defense to plagiarism (although consent is of course a defense to charges of theft). If a student copies a term paper from an Internet cheat site or fraternity file, the actual author has consented, but the student has nevertheless committed plagiarism, because the student has intentionally passed off another's work as his own.

The real question is whether anyone is, or could be, harmed by such conduct. When a student submits an Internet-purchased term paper as her own, she causes no harm to the original author, but she is likely to cause harm to her institution, instructor, and fellow students. By contrast, when a politician, celebrity, or judge uses language written by an unacknowledged ghostwriter, no one is harmed because—unlike students and professors[90]—there is no cultural expectation that such people write their own copy. To put it another way, we can say that the norm of attribution does not apply to the use of ghostwriters. And because the norm of attribution does not apply, the rule against plagiarism does not apply either.[91]

87. 125 F.3d 346, 367 (6th Cir. 1997).

88. *See* Gregory Baruch, *Artful Deception: If Ghostwriters Are Indispensable, Why Are They So Invisible?*, WASH. POST, Mar. 31, 2002, at B1 (describing recent instances of ghostwriting).

89. *See* Lerman, *supra* note 15, at 476 ("Ghostwriting is different from plagiarism in that the 'ghost' is voluntarily writing for another, rather than having his written work taken by another.").

90. On the ethics of professors publishing a research assistant's work under their own name, see Bill L. Williamson, *(Ab)using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029 (1994) (proposing new ethical rules to prevent faculty misuse of student work).

91. In this context, it is interesting that Judge Posner, who apparently is one of a "handful of judges who today still write their own opinions," RICHARD A. POSNER,

Focusing on harm rather than consent is also helpful in evaluating those cases in which a writer quotes his own work without acknowledging that such words have previously been published.[92] I would argue that such unacknowledged self-quotation is a genuine form of plagiarism. Once again, the fact that the actual author (i.e., the plagiarist herself) "consents" to her own copying is not relevant to determining whether there is plagiarism. What does matter is that third parties, such as the self-plagiarist's readers, are deceived into believing that her work is original.

H. The Incidence of Plagiarism

Although there have been many studies concerning the incidence of academic dishonesty generally, there are relatively few data on the incidence of plagiarism specifically. Those studies that have been conducted nevertheless suggest that a significant minority of students at both the high school and college level engage in the practice. For example, in a study of 2,294 high school juniors at twenty-five schools around the country (fourteen public and eleven private) conducted by Donald McCabe in 2001, thirty-four percent admitted to having copied almost word for word from a source and submitting it as their own work, and sixteen percent admitted having turned in a paper obtained in large part from a term paper mill or Web site.[93] Another recent study, conducted on nine college campuses by Patrick Scanlon and David Neumann, found that nineteen percent of students sometimes copy text from the Internet without citation, eight percent often copy text, and six percent sometimes purchased a paper.[94] At

OVERCOMING LAW 122 (1995), has focused not on judges' failure to credit their law clerks, but, rather, on their failure to cite their colleagues. According to Posner, the latter is not culpable plagiarism. Richard A. Posner, *On Plagiarism*, ATLANTIC, Apr. 2002, at 23 ("Plagiarism is also innocent when no value is attached to originality; so judges, who try to conceal originality and pretend that their decisions are foreordained, 'steal' freely from one another without attribution or any ill will.").

92. *See, e.g.*, MALLON, *supra* note 8, at 141–42 (describing case of self-plagiarism by writer Nancy Lemman); Judith Shulevitz, *A Wolfe in Hack's Clothing*, SLATE, Oct. 12, 2000, *at* http://slate.msn.com/?id=1006260 (describing self-plagiarism by Tom Wolfe). So as to avoid even the faintest appearance of self-plagiarism, I herewith cite a brief op-ed piece I wrote on the Stephen Ambrose case: Stuart P. Green, *Historian Broke the Rules, But Is That So Bad?*, L.A. TIMES, Jan. 13, 2002, at M5.

93. Donald McCabe, *Cheating: Why Students Do It and How We Can Help Them Stop*, AM. EDUCATOR, Winter 2001, at 38, 41.

94. Patrick M. Scanlon & David R. Neumann, *Internet Plagiarism Among College Students*, 43 J. C. STUDENT DEV. 374, 379 (May–June 2002). Older studies include Donald L. McCabe & William J. Bowers, *Academic Dishonesty Among Males in College: A Thirty Year Perspective*, 35 J. C. STUDENT DEV. 5, 7 (1994) (in a 1993 study, twenty-six percent of male college students questioned admitted that they had plagiarized written

least as compelling, moreover, is the anecdotal evidence concerning the commission of plagiarism—whether by historians,[95] students,[96] college professors and administrators,[97] scientists,[98] biographers,[99] novelists,[100] poets,[101] journalists,[102] cookbook authors,[103] screenwriters,[104]

work); Fred Schab, *Schooling Without Learning: Thirty Years of Cheating in High School*, 26 ADOLESCENCE 839, 843 (1991) (in 1989 study of high school students, 76.1 percent admitted to copying something "word for word, out of a book"). *See generally* ANN LATHROP & KATHLEEN FOSS, STUDENT CHEATING AND PLAGIARISM IN THE INTERNET ERA: A WAKE-UP CALL 37, 44 (2000). *See also* McCabe, *supra* note 93, at 40–41 (explaining why plagiarism rates tend to be higher among high school students than college students).

95. *See supra* notes 54–65 and accompanying text. It should be noted, however, that since the inception of its Professional Division about ten years ago, the American Historical Association has heard only fourteen charges of plagiarism and that the rate of such charges does not seem to be increasing. Samar Farah, *Taking a Page Out of Another's Book*, CHRISTIAN SCI. MONITOR, Jan. 31, 2002, *available at* http://www.csmonitor.com/2002/0131/ p11s02-idgn.html.

96. Jacques Billeaud, *UT Professor: 4 Athletes Punished for Plagiarism*, KNOXVILLE NEWS-SENTINEL, Aug. 9, 2000, at A1 (plagiarism by students at University of Tennessee); Angela Cortez, *DU Accuses Glendale Councilman of Plagiarism*, DENVER POST, Apr. 16, 1999, at B3 (alleged plagiarism by University of Denver student); Glenn Guilbeau, *Attorneys Won't Turn Over Any More Documents in LSU Probe*, ADVOC. (Baton Rogue, LA), May 10, 2002, at 1A (college kinesiology instructor under pressure from university officials after failing college football players for alleged plagiarism); John Moone, *College Trying to Stop Man Selling Term Papers Out of His Car: Rampant Plagiarism Leads New Jersey School to Ask Attorney General for Help*, MILWAUKEE J. SENTINEL, Feb. 14, 1999, at 26; Julie J.C.H. Ryan, *Student Plagiarism in an Online World*, PRISM ONLINE (Dec. 1998), *at* http://www.asee.org/prism/December/html/student_plagiarism_in_an_onlin.htm (instructor at George Washington University reported that she was able to confirm that seventeen percent of her students plagiarized most or all of their papers); Benjamin Wallace-Wells & David Abel, *63 Face Charges in DC Scandal: Plagiarism Is Alleged on Dartmouth Campus*, BOSTON GLOBE, Mar. 3, 2000, at B1 (sixty-three students in introductory computer science class at Dartmouth charged with plagiarism on homework assignment).

97. Julianne Basinger, *The Similarities of 2 Presidents's Papers: Chief of Wesley College Took Credit for Words That Are Almost Identical to Those of a Peer*, CHRON. HIGHER EDUC., May 19, 2000, at A50; Jim Rasmussen, *Hastings Chief Retires, Citing Plagiarism Flap*, OMAHA WORLD-HERALD, Feb. 25, 2000, at 1 (plagiarism in speech by president of Hastings College in Nebraska); Kate Zernike, *Plagiarism Charge Splits BU Academics; Lecture's Unattributed Words Cause Professor to Quit Administrative Post*, BOSTON GLOBE, Dec. 8, 1999, at B1 (alleged plagiarism by media professor).

98. LAFOLLETTE, *supra* note 8, *passim*; Courtney Leatherman, *At Texas A&M, Conflicting Charges of Misconduct Tear a Program Apart*, CHRON. HIGHER EDUC., Nov. 5, 1999, at A18.

99. Ralph Blumenthal, *Copies of Book Destroyed After Plagiarism Allegation*, N.Y. TIMES, Sept. 30, 1999, at 12E (reporting on alleged plagiarism by prolific Scottish biographer, James Mackay); Teresa Malcolm, *Scholar Accuses Priest of Plagiarism*, NAT'L. CATH. REP., Jan. 5, 2001, at 6 (plagiarism in biography of Archbishop Fulton J. Sheen).

100. Doreen Carvajal, *So Whose Words Are They, Anyway? A New Sontag Novel Creates a Stir by Not Crediting Quotes from Other Books*, N.Y. TIMES, May 27, 2000, at

translators,[105] clergy,[106] mathematicians,[107] economists,[108] lawyers,[109] fashion designers,[110] or others.[111] Indeed, anyone who looks at such

B9; Anne Stephenson, *Janet Dailey Back in Saddle After Plagiarism Episode: Romance Writer Undaunted, Remains True to Genre*, ARIZ. REPUBLIC, Aug. 29, 1999, at E13.

101. Nancy Green, *Plagiarism Alert! It's Just Plain Wrong*, ST. PETERSBURG TIMES, Oct. 18, 1999, at 6D, *available at* 1999 WL 27322974 (reporting on submission of plagiarized poems to newspaper poetry contest).

102. David Daley, *Plagiarism, Ethics Issues Still Dogging Journalism,* PLAIN DEALER, Sept. 18, 1999, at 1F, 1999 WL 2381969 (reporting on alleged plagiarism by *Indianapolis Star* TV columnist Steve Hall and Fox News Channel commentator Monica Crowley); Howard Kurtz, *Business Week Fires Writer for Plagiarism; Story On Computer Privacy Was Similar to Post Article*, WASH. POST, Feb. 10, 2001, at C3; Trudy Lieberman, *Plagiarize, Plagiarize, Plagiarize . . . Only Be Sure to Always Call It Research*, COLUM. JOURNALISM REV. July–Aug. 1995, at 21 (describing nine recent cases of journalistic plagiarism); Chuck Squatriglia, *Mercury News Fires Intern for Plagiarism; Washington Post, Chronicle Stories Copied*, S.F. CHRON., Jan. 3, 2001, at A13 (plagiarism by reporter at *San Jose Mercury News*); Chuck Squatriglia, *Sacramento Reporter Fired for Plagiarism, Phony Sources*, S.F. CHRON., Nov. 22, 2000, at A3 (reporter at *Sacramento Bee* fired for plagiarism); Morley Walker, *This Column Contains My Own Ideas . . . Mostly*, WINNIPEG FREE PRESS, Apr. 6, 2002, at C1, 2002 *available at* WL 15393844 (describing several recent instances of plagiarism by Canadian journalists).

103. Mimi Sheraton, *Twice Cooked*, BRILL'S CONTENT, Sept. 2000, at 42 (reporting on alleged plagiarism by celebrity chef/cookbook author David Ruggerio).

104. Hillary Frey, *Purloined Piano?*, LINGUA FRANCA, Sept. 2000, at 8 (alleging plagiarism by screenwriter and director Jane Campion in connection with film, *The Piano*).

105. Karen W. Arenson, *Classics Chairman at SUNY-Albany Steps Down Amid Plagiarism Charges*, N.Y. TIMES, Feb. 22, 2002, at A24.

106. Duncan Campbell, *Web of Revelations Brings Judgment Day for Vicar*, GUARDIAN (London), Mar. 14, 2002, at 17 (Michigan clergyman accused of plagiarizing sermons from Internet); Ken Garfield, *Internet Inspiration for Preachers*, CHARLOTTE OBSERVER Apr. 13, 2002, at 1F.

107. Edward Rothstein, *Plagiarism That Doesn't Add Up*, N.Y. TIMES, Mar. 9, 2002, at B9.

108. *A&M President Opts Not to Fire Faculty Member*, HOUS. CHRON., Apr. 16, 2002, (Texas A&M University president reversed decision by college provost to dismiss agricultural economics professor accused of plagiarism).

109. *In re* Hinden, 654 A.2d 864, 865–66 (D.C. 1995); *Plagiarizing Lawyer's License is Suspended*, SAN DIEGO UNION-TRIBUNE, Apr. 4, 2002, at A6.

110. Cathy Horyn, *Is Copying Really a Part of the Creative Process?*, N.Y. TIMES, Apr. 19, 2002, at B10.

111. *See* Dwight Garner, *While Plagiarism Accusations Fly, the Crime Gets Harder to Define*, SALON, *at* http://archive.salon.com/weekly/plagiarism960722.html.

> Cases of alleged plagiarism have been sprouting up so rapidly that it would probably take an entire SWAT team of agile reporters to keep tabs on them all. Among those recently accused—of very different forms and levels of theft—are such disparate talents as Deepak Chopra, novelist/editor Jay Parini, [journalist Ruth] Shalit, David Leavitt, Julio Iglesias, and . . . Jay McInerney.

Id.

reports cannot help but come away with the impression that the incidence of plagiarism in the United States today is on the rise.[112]

Why should this be so? One reason is simply that copying is easier than ever to do, owing to widespread access to computer technologies (including, of course, the Internet and "cut and paste" features of word processing programs).[113] Amazing as it seems, there are said to be more than six hundred Internet businesses specifically designed for students who are looking for sources to copy.[114] Somewhat more difficult to document are apparently changing attitudes about what constitutes academic and authorial integrity. Of particular interest here is the effect of attitudes towards the misappropriation of intellectual property. Many students apparently believe that because a text appears on the Internet, it is somehow in the "public domain," and therefore need not be attributed.[115] Moreover, as we shall see below, the fact that many people believe there is nothing wrong with pirating computer software or MP3 files may make them less inclined to believe that plagiarism itself is morally wrong.[116]

In addition, not only is more plagiarism apparently being *committed*, new technologies and services have made it easier for such conduct to be *detected*. Indeed, it is now possible for a school teacher or college professor to run a suspicious piece of student work through a plagiarism-detection program or website and, almost

112. *See* Scott Powers, *Internet Plagiarism Is Growing Problem: Experts at a National Student Morality Conference in Tallahassee Warned That Cheating Is an Epidemic*, ORLANDO SENTINEL, Feb. 10, 2001, at B1 (quoting Pace University expert in technology morality, Patricia Ann Brock); *see also* LeClercq, *supra* note 15, at 237 (referring to "alarming trends" of plagiarism among law students).

113. Susan Campbell, *To Catch a Writing Cheat: Internet Makes Plagiarism a Lot Easier*, HARTFORD COURANT, Oct. 23, 1999, at D1; Mark Fritz, *Redefining Research, Plagiarism; Going Online to Get Homework Isn't a Novel Thing. To Some Students, It's Not Even Cheating. It's Just Evolved into an Institution; a Big Study Group of Sorts,* L.A. TIMES, Feb. 25, 1999, at A1, *available at* 1999 WL 2133444; Philip Meyer, *New Era Brings New Diligence on Plagiarism*, USA TODAY, May 10, 1999, at 15A.

114. LATHROP & FOSS, *supra* note 94, at 213–25 (listing Internet sites that offer online reports and research); *Web Sites, Software Are Best Sources of Detecting Student Online Plagiarism*, EDUC. TECH. NEWS, Nov. 8, 2000, (citing Thomas Atkins, of TurnItIn.com, web-based service devoted to detecting plagiarists). For examples of such sites, see http://www.cheathouse.com; http://www.research-assistance.com; http://www.ezwrite.com; http://www.schoolsucks.com; http://www.customessays.com; http://www.cheater.com. *See also* Seth Stevenson, *Adventures in Cheating: A Guide to Buying Term Papers Online*, SLATE, Dec. 11, 2001, *at* http://slate.msn.com/?id=2059540.

115. *All Things Considered* (NPR broadcast, May 21, 2002), *available at* http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=05/21/2002&PrgID=2 (John Ydstie report on "Internet & College Cheating"); McCabe, *supra* note 93, at 41.

116. *See infra* notes 275–78 and accompanying text.

instantaneously, determine that it has been plagiarized.[117] (Of course, the fact that it is now easier to detect might also mean that at least some plagiarism that otherwise would be committed is being deterred.)

I. Summary

Despite some apparent fraying around the edges, the rule of attribution and its corollary, the rule against plagiarism, remain a powerful pair of social norms. To be sure, there are cases in which it is difficult to distinguish between copying and mere influence, new technologies have made plagiarism easier to commit, and the very idea of "authorship" is under attack in some quarters. Nevertheless, within the relevant literary and academic communities, the ideas of originality and creative individuality remain a potent force, and the fear of being discovered and exposed as a plagiarist persists as a strikingly effective deterrent.

II. Non-Legal, Quasi-Legal, and Civil Legal Sanctions for Acts That Constitute Plagiarism

In this section, I briefly consider a number of ways in which the acts that constitute plagiarism (whether or not referred to as such) can be sanctioned. The first is informal, non-legal, social stigma. The second is formal, quasi-legal, academic and professional disciplinary proceedings, through which the vast majority of plagiarism cases are resolved. Third is a collection of overlapping legal remedies: copyright infringement, unfair competition, and "moral rights." What I hope to demonstrate is the remarkably wide range of contexts in which the moral wrong of plagiarism can theoretically be played out.

117. LATHROP & FOSS, *supra* note 94, at 52–55 (listing Internet and other resources for combating plagiarism); Emily Eakin, *Stop, Historians! Don't Copy That Passage! Computers Are Watching*, N.Y. TIMES, Jan. 26, 2002, at B9; Jeff Gottlieb, *As Web Enables Plagiarism, It Also May Help Prevent It*, MILWAUKEE J. SENTINEL, Jan. 30, 2000, at 10A; Katie Hafner, *Lessons in the School of Cut and Paste: E-Mail and the Web Make Plagiarism a Plague. Will Computers Be the Cure, Too?*, N.Y. TIMES, June 28, 2001, at G1; Verne G. Kopytoff, *Brilliant or Plagiarized? Colleges Use Sites to Expose Cheaters*, N.Y. TIMES, Jan. 20, 2000, at G7 (reporting on website businesses which help teachers identify student plagiarists); Sherry Parmet & Jill Spielvogel, *Teachers Enlist the Internet as Their Primary Weapon in the Fight Against Plagiarism*, PEORIA J. STAR, Mar. 27, 2001, at C12, *available at* 2001 WL 7619094; Julie J.C.H. Ryan, *supra* note 96 (offering various strategies for detecting and dealing with student plagiarism). Among the Internet services that help teachers catch plagiarism are http://www.turnitin.com, http://www.plagiarism.com, http://www.plagiarism.org, and http://www.integriguard.com. *See also* http://www.canexus.com/eve/index.shtml (offering Essay Verification Engine plagiarism detection software).

A. The Treatment of Plagiarism Through Informal Social Stigma

The prohibition on plagiarism, as described above, provides a kind of a paradigm of social norms. Those who violate what I have called the norm of attribution by committing plagiarism risk, in the first instance, the disesteem of their peers. A poet, scholar, historian, novelist, or filmmaker who is exposed as a plagiarist will suffer the disapprobation of precisely those colleagues whose opinion he most values. Such a sanction is particularly appropriate because the plagiarist is denied exactly the social good that his unattributed copying is intended to elicit—namely, the esteem of his peers and the benefits that flow from such esteem, such as academic credit, prestige, and financial reward.

There is, however, a good deal of inconsistency in both the reaction plagiarism elicits and the manner in which it is treated within and across sub-communities. In some circumstances, a well-substantiated charge of plagiarism is enough to ruin a career, cast a permanent shadow of disgrace over the offender, or even merit a front page article in the *New York Times*.[118] Other times, plagiarism is viewed as a mere foible, a slight faux pas, a momentary lapse of judgment. In some such cases, as Bowers has observed,[119] the plagiarized accuser is viewed as paranoid and desperate, and the alleged plagiarist becomes the victim—a dynamic that is sometimes played out in the form of defamation suits brought by alleged plagiarists against their accusers.[120]

There is, of course, a significant normative difference between passing off as one's own an entire short story, poem, or scholarly article, and failing to attribute an occasional phrase or sentence in an otherwise original book. Copying another's words verbatim, moreover, may be more objectionable than merely paraphrasing them. Another factor that explains such disparate treatment may be the prominence of the plagiarist or his victim. As we have seen, plagiarism involving best-selling historians and novelists, for example, is more likely to elicit attention than plagiarism committed by unknowns.

---

118. *Cf.* MALLON, *supra* note 8, at xi:

> Each day, citizens bludgeon other citizens with ballpeen hammers, or set fire to seniors, or whatever, and in return often receive the most modest of penalties, or sometimes none at all—and rarely, in any event, have their faces plastered on the front page of the *New York Times.*

119. *See* BOWERS, *supra* note 1, *passim*.

120. *E.g.*, Feldman v. Bahn, 12 F.3d 730 (7th Cir. 1993); Haugh v. Bullis Sch., 900 F.2d 252 (4th Cir. 1990); Abdelsayed v. Narumanchi, 668 A.2d 378 (Conn. App. Ct. 1995).

The identity of the community within which the plagiarism occurs is also significant. The scientific community, for example, tends to have little tolerance for those who plagiarize,[121] as can be seen in the case of Yale researcher Vijay Soman, who was forced to resign after it was discovered that he had plagiarized a mere sixty words in a medical paper.[122] Historians who plagiarize also tend to be dealt with harshly. Doris Kearns Goodwin has been vilified by her peers and in the media, forced to withdraw as a Pulitzer Prize judge, dismissed from her regular stint on PBS's *NewsHour With Jim Lehrer*, disinvited from various college speaking engagements, and subject to pressure that she be removed from the Harvard Board of Overseers.[123]

The treatment of journalists and newspaper editors, by contrast, tends to be more lenient. Trudy Lieberman conducted a survey for the *Columbia Journalism Review*, which documented a number of cases involving prominent journalists such as Michael Kramer (now chief political correspondent of *Time*), Fox Butterfield (of the *New York Times*), and Nina Totenberg (then a writer for the *National Observer*, now the legal affairs correspondent for NPR), who survived apparently well-substantiated charges of plagiarism with little, if any, punishment or dishonor.[124] Indeed, Lieberman has described a "journalistic culture that has come to rely heavily on borrowing and quoting from other publications as a substitute for original research."[125]

Attitudes toward plagiarism in law scholarship present a particular puzzle.[126] On the one hand, citation to sources is something of a fetish in the law reviews, which feature elaborate cite checking rituals into which student editors are initiated. These procedures would seem designed at least to ensure attribution, if not prevent copying. On the other hand, unlike every other academic discipline,

121. *See generally* LAFOLLETTE, *supra* note 8.

122. Shaw, *supra* note 71, at 325–26.

123. Burkeman, *supra* note 60; David Mehegan, *When Words Collide as the Plagiarism Charges Settle In, Historians Say Doris Kearns Goodwin Remains a Serious Author—But That Doesn't Mean They Excuse Her Methods*, BOSTON GLOBE, Mar. 24, 2002, at E1; William Powers, *Off With Her Head*, ATLANTIC, Mar. 12, 2002, *available at* http:www.theatlantic.com/politics/nj/powers2002-03-12.htm.

124. Lieberman, *supra* note 102, at 22–25 (According to Lieberman, "[P]unishment is uneven, ranging from severe to virtually nothing even for major offenses. The sin itself carries neither public humiliation nor the mark of Cain. Some editors will keep a plagiarist on staff or will knowingly hire one if talent outweighs the infraction.").

125. *Id.* at 24.

126. *See* Note, *Originality*, 115 HARV. L. REV. 1988, 2004–09 (2002) (noting supposed tension in legal scholarship between demands of citation and avoidance of "preemption").

legal scholarship in the United States is generally not subject to peer review, with the result that the usual guardians of originality are absent. Indeed, anyone who reads the law review literature regularly cannot help but be struck by the derivativeness of much of what is published.

Perhaps the most striking inconsistencies occur in the world of literature. For example, while charges of plagiarism against novelist Jacob Epstein were enough to permanently derail an otherwise promising literary career,[127] they seem to have had little, if any, impact on Susan Sontag, whose novel *In America* received a National Book Award despite apparently well-substantiated allegations that passages in it had been plagiarized.[128]

One can only speculate as to the cause of such disparities. Presumably, the farther from "copying" and the closer to mere "inspiration," the less opprobrium is likely to be evoked. Another factor may be the identity of the victim. For example, Epstein had the bad judgment to take language and plot elements from a novel by Martin Amis, who defended himself in a famously scathing rebuttal,[129] whereas Sontag was prudent enough to copy from long-dead writers.[130] Finally, one needs to consider the dynamics of the discipline in which the plagiarism occurs. The reason scientists may be less tolerant of plagiarism than those in other disciplines is that only original research can further the goal of the sciences.[131] Unlike academic historians, popular historians like Stephen Ambrose and Doris Kearns Goodwin are not necessarily expected to plow new ground. The dynamics of journalism also differ from the sciences. Multiple journalists cover the same stories, often on a short deadline,

127. *See* MALLON, *supra* note 8, at 89–143.

128. Carvajal, *supra* note 100, at B9.

129. *See generally* MALLON, *supra* note 8, at 103–13.

130. Carvajal, *supra* note 100, at B9. Among the writers Sontag is alleged to have copied is Willa Cather. David D. Kirkpatrick, *2 Say Stephen Ambrose, Popular Historian, Copied Passages*, N.Y. TIMES, Jan. 5, 2002, at A8. Sontag admitted that numerous passages in her novel, *In America*, had been taken word-for-word from other writers, but claimed that this was not plagiarism because "her writing was a 'work of art' that didn't necessitate attribution." Dennis Loy Johnson, *Of Plagiarized "Art" and a Hungry Caterpillar*, MILWAUKEE J. SENTINEL, Dec. 31, 2000, at 6E, *available at* http://www.jsonline.com/Enter/books/dec00/bk.col31122900.asp. Apparently, this was not the first time Sontag had run into problems with alleged plagiarism. *See, e.g.*, Letter from Susan Sontag to the *New York Review of Books* (Mar. 6, 1975) (regarding her review of Leni Riefenstahl's *The Last of the Nuba*), *available at* http://www.nybooks.com/articles/9253.

131. LAFOLLETTE, *supra* note 8.

relying on a limited number of similar sources.[132] Originality just isn't that important. Under the circumstances, it is almost inevitable (and perhaps even forgivable) that some journalists engage in unattributed duplication of words and ideas.

B. Plagiarism as a Formally Sanctioned, Institutionally Enforced, Ethical Violation

One of the most striking characteristics of plagiarism is that its investigation, adjudication, and punishment are typically committed to educational and professional institutions that resolve the charges, essentially, in private. Plagiarism is prohibited by various codes of academic and professional ethics[133] (though, curiously, most news organizations have no such written rules).[134] Violation of such codes can lead to a student's being failed, suspended, or expelled; professors and other employees being dismissed; and lawyers and other professionals being censured or having licenses revoked.[135] What little litigation there is concerning plagiarism of this sort almost always involves due process-type claims brought by alleged plagiarists who challenge the procedures under which they have been institutionally sanctioned,[136] or, in a few cases, defamation suits brought by alleged plagiarists against their accusers.[137]

How is this "private justice" paradigm maintained? One of its distinguishing features is that students (at least at the college level

132. *See* Lieberman, *supra* note 102, at 24–25.

133. *See supra* notes 50–52 and accompanying text. For a useful database of university honor code provisions concerning plagiarism and other academic integrity issues, see http://www.academicintegrity.org (website of Duke University's Center for Academic Integrity). On the deterrent effect of such codes, see Donald L. McCabe & Linda Klebe Trevino, *What We Know About Cheating in College*, 28 CHANGE, Jan.–Feb. 1996, at 29, 33; Donald L. McCabe et al., *Cheating in Academic Institutions: A Decade of Research*, 11 ETHICS & BEHAV. 219, 226 (2001).

134. Roy Peter Clark, *The Unoriginal Sin* (July 28, 2000), *at* http://www.poynter.org/centerpiece/072800rpcessay.htm.

135. DeWilde v. Gannett Publ'g, 797 F. Supp. 55 (D. Me. 1992); Dursht, *supra* note 15, at 1254.

136. *See, e.g.*, Yu v. Peterson, 13 F.3d 1413 (10th Cir. 1993); Hand v. Matchett, 957 F.2d 791 (10th Cir. 1992); Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991); Crook v. Baker, 813 F.2d 88 (6th Cir. 1987); Hill v. Trs. of Ind. Univ., 537 F.2d 248 (7th Cir. 1976); *In re* Lamberis, 443 N.E.2d 549 (Ill. 1982); Hanifi v. Bd. of Regents, Ill. Ct. Cl. 131 (1994); Alsabti v. Bd. of Registration in Med., 536 N.E.2d 357 (Mass. 1989); Napolitano v. Trs. of Princeton Univ., 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982), *aff'd*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982); Waliga v. Bd. of Trs., 488 N.E.2d 850 (Ohio 1986); Sanderson v. Univ. of Tenn., 1997 WL 718427 (Tenn. Ct. App. 1997); Faulkner v. Univ. of Tenn., 1994 WL 642765 (Tenn. Ct. App. 1994). *See generally* RALPH MAWDSLEY, ACADEMIC MISCONDUCT: CHEATING AND PLAGIARISM (1994).

137. *See* cases cited *supra* note 120.

and beyond), employees, and members of professional associations have subjected themselves, voluntarily, to the "jurisdiction" of the adjudicating institution; they agree, explicitly or implicitly, to abide by the rules of the guild. Such institutions tend to have special expertise in detecting and dealing with plagiarism. The teacher who is familiar with the literature from which her student has copied is probably in the best position to uncover the plagiarist's acts and to be most sensitive to the particularities of the plagiarist's circumstances. The institution is also likely to have the most direct interest in preserving the values that plagiarism most directly threatens.

C. Civil Legal Remedies for Acts That Constitute Plagiarism

Although plagiarism is most often treated as an ethical, rather than legal, matter, unattributed copying can also constitute one or more of a variety of legal wrongs. In this section, we briefly consider the circumstances under which unattributed copying might constitute copyright infringement, unfair competition, or a violation of moral rights.

(1) Plagiarism as Copyright Infringement

Although there is a significant overlap between plagiarism and copyright infringement (indeed, copyright infringement is sometimes loosely referred to by courts as "plagiarism"),[138] the two concepts are obviously distinct: there are cases of plagiarism that do not constitute copyright infringement, and vice versa.

When might plagiarism fail to constitute copyright infringement? Under the Federal Copyright Act, there is no infringement when copying involves work that has an expired copyright, is in the public domain, or was written by a U.S. government employee.[139] The rule against plagiarism has no such limitations. Moreover, whereas plagiarism can occur when a writer fails to acknowledge the source of facts, ideas, or specific language, copyright infringement occurs only

138. *E.g.*, Ellis v. Diffie, 177 F.3d 503, 505 (6th Cir. 1999); Kepner, Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 534–35 (5th Cir. 1994).

139. 17 U.S.C. §§ 103, 105, 203 (1996). Some of the differences between plagiarism and copyright infringement are discussed in Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 525–34 (1992), although it should be noted that the law regarding copyright infringement has changed significantly since that piece was published. *See also* Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications (article 2)*, 1995 J. ONLINE L. art. 2, ¶ 1, *at* http://www.wm.edu/law/publications/jol/95_96/lemley.html.

when specific language is copied or used in a derivative work.[140] To put it another way, the rule against plagiarism departs from the fundamental concept in copyright law that only the "expression" and not the "idea" or "facts" that underlie such expression is protected.[141] In addition, whereas certain limited uses of copyrighted material are exempt from infringement claims under the "fair use" doctrine,[142] plagiarism has no analogous exception; it can occur whenever a writer uses even a small excerpt of someone else's work. Accordingly, one who intentionally copied (and failed to attribute) a mere idea, a work that was not under copyright, or only a small excerpt of someone else's work would be guilty of plagiarism but not copyright infringement.

Conversely, there are cases of copyright infringement that do not constitute plagiarism. Recall that plagiarism involves not just copying, but also passing off. Therefore, one who copied a copyrighted literary or artistic work without an intent to pass the work off as his own would not be plagiarizing. But a person who reproduced all or part of a copyrighted work without permission would be committing copyright infringement even if he attributes. For example, a person who produced or marketed bootleg copies of a Richard Russo novel, Steven Soderbergh film, or Alison Krauss & Union Station CD generally would not intend to pass their work off as his own. Indeed, such bootleggers profit precisely because consumers believe that what they are buying is the work of these popular artists. Moreover, there are some cases of copyright infringement in which the defendant is not even aware that he is copying. But unlike plagiarism (or at least plagiarism as I have defined it above), lack of intent is no defense to a (civil) claim of copyright infringement.[143] Unconscious infringement is still infringement.

140. *See* 17 U.S.C. § 106 (1996); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1], at 13–30 (2001).

141. The idea-expression dichotomy is discussed, among other places, in NIMMER ON COPYRIGHT, *supra* note 140. The leading case is *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 499 U.S. 340 (1991), holding that a compilation of alphabetical entries in a telephone book is not subject to copyright protection.

142. *See* 17 U.S.C. § 107 (1996) ("fair use" exception to copyright).

143. Goldberg v. Parton, 924 F.2d 1062 (9th Cir. 1991); Twentieth-Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (Learned Hand, J.); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983); Whitney v. Ross Jungnickel, Inc., 179 F. Supp. 751 (S.D.N.Y. 1960); Francis Day & Hunter, Ltd. v. Bron, 2 All E.R. 16 (C.A. 1963); Joel S. Hollingsworth, *Stop Me If You've Heard This Already: The Temporal*

Why do plagiarism and the law of copyright diverge in this manner? We will talk more about this question below,[144] but at the moment, it is worth noting simply that copyright law and the rule against plagiarism protect different kinds of interests. Copyright law protects a primarily economic interest that a copyright owner has in her work (as well as a broader public interest in the free flow of ideas), whereas the rule against plagiarism protects a personal, or moral, interest. Copyright demands that one obtain formal permission from the copyright owner in order to copy the work. The rule against plagiarism assumes that the writer implicitly gives permission to copy the work, provided that the copier make proper attribution.

(2) Plagiarism as Unfair Competition

Among the collection of doctrines that comprise the area of tort law known as unfair competition law are two doctrines that bear an obvious resemblance to the rule against plagiarism: reverse palming (or passing) off, and misappropriation.

Palming off is the selling of goods under the name of another, typically better known, competitor.[145] For example, a restaurant that substitutes a similar (usually cheaper) product in response to a request for Coca-Cola, or which refills genuine Coke bottles with a different brand, has committed the tort of palming off.[146] Reverse palming off involves the selling of another's product under one's own name.[147] For example, if Wal-Mart purchased Coca-Cola, removed the Coke name, and advertised the product as "Sam's Cola," its actions would constitute reverse palming off. Reverse palming off may take either of two forms, express or implied. Express reverse palming off involves selling a competitor's product under one's own

Remoteness Aspect of the Subconscious Copying Doctrine, 23 HASTINGS COMM. & ENT. L.J. 457 (2001).

Criminal copyright infringement, of course, does require a showing of "willful" infringement. 18 U.S.C. § 506(a) (2000); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q 835, 871–99 (1999).

144. *See infra* notes 195–204 and accompanying text.

145. In addition to the kind of "palming (or passing) off" referred to in the text, the terms are also used to refer to a kind of trademark infringement that results in a likelihood of confusion among buyers but which is not directly relevant to the discussion here. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:1, at 25-5 (4th ed. 2000).

146. *E.g.*, Coca-Cola Co. v. Dorris, 311 F. Supp. 287, 289 (E.D. Ark. 1970).

147. *See* Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968) (defendant sold its perfume as a duplicate of Chanel No. 5 but under a different name).

name or another name. Implied reverse palming off involves selling a competitor's product unlabeled. Both direct and reverse palming off are actionable under Section 43(a) of the Lanham Act.[148]

The analogy between reverse palming off and plagiarism should be clear. Like reverse palming off, plagiarism consists of taking another's words or ideas, "removing" the other party's name, and representing the words or ideas as one's own.[149] And, indeed, the rationale for prohibiting reverse palming is precisely analogous to the rationale for prohibiting plagiarism. Consider the case of *Smith v. Montoro*.[150] Plaintiff starred in a film which was produced by defendant film company in Europe. When the defendant distributed the film in the United States, however, it removed plaintiff's name and substituted the name of another actor in both the film credits and advertising materials. The plaintiff sued, alleging reverse palming off. In holding that the plaintiff had stated a valid cause of action, the court noted that "[s]ince actors' fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their 'services' . . . ."[151]

Another body of unfair competition law that is theoretically applicable to cases of plagiarism is the misappropriation doctrine recognized by the Supreme Court in *International News Service v.*

148. 15 U.S.C. § 1125 (1998) ("false designation of origin"). *See also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 2, 3(b), 5 (1995).

149. *See, e.g.*, Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys. Inc., 7 F.3d 1434, 1443 (9th Cir. 1993). One can also imagine a case of what we might call "reverse plagiarism," in which a writer represents his own idea as the idea of another, presumably more prominent, writer, perhaps for the purpose of creating an impression of erudition or to give an otherwise suspect idea greater respectability. A similar phenomenon occurs in a legal brief in which the attorney cites a leading case or authority for a proposition it does not actually stand for. For more on the idea of reverse plagiarism, see *infra* note 172.

150. 648 F.2d 602 (9th Cir. 1981).

151. *Id.* at 607. *See also* Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775 (2d Cir. 1994) (defendant publisher violated the Lanham Act by copying a series of non-copyrighted children's books originally published by plaintiff publisher and selling them under its own brand name); Lamothe v. Atl. Recording Corp., 847 F.2d 1403 (9th Cir. 1988) (defendant music publisher could be sued under Lanham Act for publishing sheet music without making proper attribution to plaintiff, one of song's co-authors). *Cf.* Cleary v. News Corp., 30 F.3d 1255 (9th Cir. 1994) (affirming dismissal of Lanham Act case brought by revisor of *Robert's Rules of Order*, whose name was removed from title page in subsequent edition, the preparation of which he was not involved.).

Associated Press.[152] The misappropriation doctrine establishes tort protection for various kinds of intangible "quasi-property," such as ideas, information, formulas, designs, and artistic creations. The doctrine is premised on the notion that a commercial rival should not be allowed to profit unfairly from the costly investment and labor of one who produces information.

International News Service (INS) and Associated Press (AP) were rival syndicates which sold news reportage to their respective newspaper members for a fee. During World War I, INS correspondents were prevented by British censors from sending dispatches to the U.S. In response, INS copied and rewrote in its own words, without attribution, news items that had been published in AP member newspapers and on an AP bulletin board. The AP brought suit, alleging that INS had unlawfully pirated AP stories.[153] The alleged appropriation did not involve theft of trade secrets or confidential information, since the information was readily available to the public. Nor did it constitute copyright infringement, since, as noted above, infringement requires that the defendant copy plaintiff's actual words, as opposed to simply his ideas. Instead, the Court held that INS's action constituted a new kind of unfair competition which it called "misappropriation." The Court held that INS had what it called a "quasi-property right" against competitors in the news gathering field. By appropriating this property without compensating the plaintiff, defendant had "endeavor[ed] to reap where it has not sown . . . ."[154]

As precedent, *International News* is not without serious problems. First, it was decided prior to *Erie Railroad Co. v. Tompkins*[155] as a matter of federal common law and is therefore no longer binding.[156] Second, the majority opinion itself was subject to

152. 248 U.S. 215 (1918). The Court's decision in *International News* is discussed in Maya Alexandri, *The International News Quasi-Property Paradigm and Trademark Incontestability: A Call for Rewriting the Lanham Act*, 13 HARV. J.L. & TECH. 303 (2000); Douglas G. Baird, *Common Law Intellectual Property & the Legacy of* International News Service v. Associated Press, 50 U. CHI. L. REV. 411 (1983); Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992); Dale P. Olson, *Common Law Misappropriation in the Digital Era*, 64 MO. L. REV. 837 (1999); Rex Y. Fujichaku, Note, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421 (1998).

153. 248 U.S. at 231.

154. *Id.* at 239.

155. 304 U.S. 64 (1938).

156. *See, e.g.*, Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 788 n.59 (5th Cir. 1999); *see also* 17 U.S.C. § 301(a) (1996) (preemption of state law by 1976 Copyright Act).

strong dissents by Justice Holmes and especially Justice Brandeis.[157] Third, the misappropriation doctrine has been strongly criticized by the Restatement (Third) of Unfair Competition, other judges, and various academic commentators.[158] Fourth, as the doctrine has developed in subsequent case law, a suit for misappropriation is exceedingly difficult to win. A plaintiff must show that: (1) he invested a substantial amount of time, effort, and money in the thing misappropriated, (2) the defendant appropriated the thing at little or no cost, and the court can characterize defendant's action as "reaping where it has not sown," and (3) defendant was injured by the misappropriation, typically by a direct diversion of royalties or other profits from plaintiff to defendant.[159] In the usual case of plagiarism, the most difficult element to satisfy would be the last. In many such cases, there are simply no profits to be diverted from plaintiff to defendant. Nevertheless, despite the practical difficulties of bringing a misappropriation case, the point remains that the metaphor of "reaping where one has not sown" has obvious resonance in the context of plagiarism.

In summary, there are at least two kinds of unfair competition that track the pattern of plagiarism. This is not to say that every, or even most, cases of plagiarism could be prosecuted as such. Rather, I have sought to show simply that, in certain circumstances, the law is specifically concerned with cases in which a defendant passes off another's work as his own.

(3) Plagiarism as a Violation of the European Doctrine of Moral Rights

Although there is considerable variation in the exact contours of the doctrine as it applies in various jurisdictions, the primarily European doctrine of moral rights is usually said to consist of three basic parts: the right of integrity, the right of disclosure, and the right of attribution (or paternity, as it is sometimes called).[160] The right of integrity prevents others from destroying or altering an artist's work without the artist's permission.[161] The right of disclosure allows the

157. *Int'l News*, 248 U.S. at 246 (Holmes, J., dissenting); *id.* at 248 (Brandeis, J., dissenting).

158. RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 148, § 38 cmts. b & c (1995). *See also* sources cited *supra* note 152.

159. 2 MCCARTHY ON TRADEMARKS, *supra* note 145, § 10:51, at 10–95.

160. For a helpful summary, see 3 NIMMER ON COPYRIGHT, *supra* note 140, § 8D.01[A].

161. For example, imagine that the Museum of Modern Art decided to paint its own logo over Jasper Johns' 1954–55 painting, *Flag*. Under the right of integrity, Johns would be entitled to prevent the Museum from doing so, even though MOMA, and not Johns,

artist the right to decide when a given work is completed and when, if ever, it will be displayed, performed, or published.[162] As its name would suggest, the right of attribution is most relevant in the context of plagiarism. The right is both positive and negative. An author or artist has the right both to be identified as the author of any work that she has created and to prevent the use of her name as the author of a work she did not create.[163]

The doctrine of moral rights is well established and expansive in Europe and elsewhere. For example, in Britain, a provision concerning false attribution "confers a right not to have a literary, dramatic, musical or artistic work or a film falsely attributed to a person as author or director."[164] The various moral rights are recognized most prominently in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Rights, which currently has more than one hundred signatories and which expressly recognizes the "right to claim authorship of the work."[165]

In the United States, the doctrine of moral rights is much more limited. Indeed, it has virtually no application to literary works.[166] Although the U.S. became a party to the Berne Convention in 1989, Congress chose not to expand the scope of existing American law. Nevertheless, in 1990, Congress did pass the Visual Artists' Rights Act, which provides, in the context of visual works of art, more limited rights of integrity and attribution than are available under the

actually owns the painting. Perhaps the most famous such case is that involving Bernard Buffet, who was awarded damages after one of six panels of a unified work was sold off and separated from the other five panels. *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

162. For example, following the hypothetical in note 161, if Johns had been commissioned to paint a painting for MOMA, but felt that the painting was not yet ready for display, he would have the right to prevent the museum from showing the painting to the public.

163. *See* Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33 (1997); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998); Roberta Rosenthal Kwall, *"Author Stories": Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001); Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?*, 27 J.C. & U.L. 53 (2000).

164. Copyright, Designs and Patents Act (CDPA) §§ 77–89, 94–95, 103 (Engl.); Dworkin, *supra* note 163, at 246.

165. Berne Convention (Paris text), art. 6*bis*(1).

166. *See* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795 (2001).

Berne Convention.[167] In addition, a number of states, including New York and California, have enacted legislation that is directly analogous to European moral rights, again usually in the context of visual artworks.[168]

My purpose here is not to suggest that American jurisdictions should allow plaintiffs to bring tort-like actions for violation of moral rights in the context of literary works.[169] Rather, my interest is in showing the relationship between plagiarism and the theory that underlies the moral right of attribution. Moral rights are often described as "personality-based" rights. They cannot be bought or sold, generally do not extend much beyond the artist's life, and, under French law, are viewed as "inalienable and imprescriptible."[170] They are intended to protect interests that transcend the marketplace, such as those in reputation and honor. They are said to protect an artist's work as an "outgrowth of his soul."[171] As such, the interests protected by the doctrine of moral rights are much closer to the interests protected by the rule against plagiarism than they are to those protected by either intellectual property or unfair competition law.[172]

167. 17 U.S.C. § 106A(a)(2) (1986).

168. *E.g.*, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1996).

169. For an argument to that effect, see Carolyn W. Davenport, Note, *Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights*, 29 CASE W. RES. L. REV. 735 (1979).

170. 3 NIMMER ON COPYRIGHT, *supra* note 140, § 8D-6.

171. *Id.*

172. On the difference between moral rights and intellectual property rights, see Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601 (2001).

There are several other possible legal remedies beyond those discussed in the text that deserve mention here. To the extent that a defendant submits plagiarized work in return for consideration, such as a college degree, he could conceivably be prosecuted for mail or wire fraud. *Cf.* United States v. Frost, 125 F.3d 346 (6th Cir. 1997), *cert. denied*, 525 U.S. 810. There are also cases in which a defendant has been prosecuted for fraud for attempting to pass off *his own work* as the product of *someone else*—a practice that we might think of as a kind of "reverse plagiarism." *See, e.g.*, Leonard Weintraub, Note, *Crime of the Century: Use of the Mail Fraud Statute Against Authors*, 67 B.U. L. REV. 507, 508 n.14 (1987) (describing prosecution of Clifford Irving for his notorious 1971 Howard Hughes autobiography hoax). The harm to the community in such cases is similar to the harm caused in cases of plagiarism. The public is deceived into believing that the source of the work is different from what it actually is.

Finally, it should be mentioned that a number of states have enacted legislation that expressly prohibits the unlawful sale (though not the purchase) of term papers, essays, reports, and dissertations to student plagiarists. *See* CAL. EDUC. CODE §§ 66400–66405 (West 1989); COLO. REV. STAT. ANN. §§ 23-4-101-106 (West 1998); CONN. GEN. STAT. ANN. §§ 53-392a-e (West 2002); FLA. STAT. ANN. § 877.17 (West 2000); 110 ILL. COMP. STAT. ANN. 5/0.01 (1998); ME. REV. STAT. ANN. tit. 17-A § 705 (West 2002); MASS. GEN.

III. Plagiarism and the Law of Theft

One of my purposes in the previous section was to demonstrate that, notwithstanding the fact that plagiarism is usually viewed as an ethical concept, the acts that constitute plagiarism are potentially subject to a variety of legal doctrines. I now turn to the possibility of treating plagiarism as a form of theft. My immediate focus is on doctrine. I defer until Part IV a discussion of the policy questions that the criminalization of plagiarism would raise.

As noted at the outset, colloquially, plagiarism is often referred to as a form of "theft."[173] In order to determine if this is literally true, it is important to consider the three basic elements that comprise the modern offense of theft: (1) unlawful taking or exercising unlawful control over, (2) movable property of another, (3) with the intent of depriving the owner of such property.[174] After having considered the elements of theft, we briefly consider, near the end of this section, the possibility that the prosecution of plagiarism as theft might be preempted by federal copyright law.

A. Does Plagiarism Involve the Taking of "Property"?

Surely the most difficult doctrinal issue to be faced in determining whether plagiarism constitutes theft is whether it involves the taking of "property." To answer this question, we will need to determine what, if anything, the plagiarist steals, and whether this is the sort of thing that is the proper concern of theft law.

(1) What Kinds of Things Are "Property" for Purposes of Theft Law?

Whether something will be regarded as "property" is nothing more, and nothing less, than a conclusion of law. As Stephen Carter

LAWS ch. 271, § 50 (2000); NEV. REV. STAT. ANN. 207.320 (Michie 2001); N.J. STAT. ANN. § 18A:2-3 (West 2002); N.Y. EDUC. LAW § 213-B (McKinney 2000); N.C. GEN. STAT. § 14-118.2 (2001); 18 PA. CONS. STAT. ANN. § 7324 (West 2000); VA. CODE ANN. § 18.2-505 (Michie 2000); WASH. REV. CODE ANN. §§ 28B.10.580–84 (West 1997); United States v. Int'l Term Papers, Inc., 477 F.2d 1277, 1280 (1st Cir. 1973); Trs. of Boston Univ. v. ASM Communications, Inc., 33 F. Supp. 2d 66 (D. Mass. 1998); People v. Magee, 423 N.Y.S.2d 343 (N.Y. App. Div. 1979); State v. Saksniit, 332 N.Y.S.2d 343 (N.Y. Sup. Ct. 1972). Note, however, that none of these statutes provides a cause of action against student plagiarists themselves.

173. *See supra* notes 7–12 and accompanying text.

174. *See, e.g.*, MODEL PENAL CODE § 223.2(1) (1985) (Theft by Unlawful Taking or Disposition—Movable Property) (person is guilty of theft of movable property if he "unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof"). The modern crime of theft reflects the consolidation of the traditional common law offenses of larceny, false pretenses, and embezzlement.

has put it, "the term does not refer to any object or to any necessary set of legal rights that always inheres in a property relationship. Instead, the term refers to a bundle of rights that define, singly or collectively, the relationship of an individual to a resource."[175] Hence, simply because some resource is considered "property" for purposes of, say, mail fraud, copyright, or constitutional law, does not necessarily mean that it will be regarded as property for purposes of theft law, and vice versa. Our task here is to understand what property means in the limited context of theft law.

a. Theft Law in Historical Perspective

The history of theft law reflects an "expansion on two axes": "the types of interference that constitute theft" and the kinds of property that can be stolen.[176] At early common law, the means by which theft could be effected were very limited. The earliest offenses consisted of theft by force (robbery) and theft by stealth (larceny). It was only later that English (and subsequently, American) law criminalized theft by breach of trust (embezzlement) and theft by deception (common law cheat, larceny by deception, false pretenses, and fraud).[177] Early theft law reflected a concern with preserving social order and preventing violence. "In the traditional view," according to George Fletcher, "the thief upset the social order . . . by violating the general sense of security and well-being of the community."[178] "It was assumed . . . that the criminality of the deed had to become manifest in a single brief moment of force or stealth."[179] As theft law developed, the requirement of manifestness waned. Takings that were outwardly innocent (such as false

175. Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715, 715–16 (1993). Numerous other commentators have made a similar point. *See generally* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711 (1996).

176. Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 687 (2000). *See also* Kathleen F. Brickey, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis*, 33 VAND. L. REV. 1101 (1980); Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443 (1984).

177. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 291, 353–54, 363–65 (3d ed. 1982); WAYNE R. LAFAVE, CRIMINAL LAW § 8.5, at 810 (3d ed. 2000); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 182–87 (2001).

178. George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 474 (1976). *But see* Lloyd L. Weinreb, *Manifest Criminality, Criminal Intent, and the "Metamorphosis of Larceny,"* 90 YALE L.J. 294 (1980) (disputing Fletcher's account).

179. Fletcher, *Metamorphosis of Larceny*, *supra* note 178, at 498.

pretenses and embezzlement) began to be criminalized. Physical possession was no longer relevant. The criminal law shifted from a focus on forceful or stealthy conduct to the intentional acquisition of property by virtually any dishonest means.

Meanwhile, the definition of what constitutes "property" subject to theft was experiencing a parallel expansion. Under early English criminal law, the only kinds of property that could be stolen were tangible and movable—i.e., goods and chattel, such as cash, jewelry, furniture, vehicles, and other merchandise.[180] Real property and intangible property (e.g., a ride on a train, a room at a hotel, a deed to land, stocks and securities) were not subject to larceny or other forms of theft.[181] According to one commentator:

> The common law conception of property at the [time of Blackstone] saw property as an absolute dominion over things. Property was "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." This was a "physicalist" concept of property that required some external thing to serve as the object of property rights . . . .[182]

By the nineteenth century, however, the definition of what constitutes "property" for purposes of theft law had begun to expand. Old statutes were interpreted more broadly and new, specialized statutes were enacted to deal with the misappropriation of intangible property. For the first time, legal property rights were found in business goodwill, and eventually in trademarks, trade secrets, and a host of other kinds of intangible things.[183]

Why did such changes occur? According to Jerome Hall's study of the history of theft law:

> Increase in the complexity of social and economic organization was accompanied by the transformation of free goods (those existing in nature independently of any human effort, *and* not appropriated by

180. JEROME HALL, THEFT, LAW AND SOCIETY 6, 84–85 (2d ed. 1952).

181. PERKINS & BOYCE, *supra* note 177, at 292-96.

182. Deborah Fisch Nigri, *Theft of Information and the Concept of Property in the Information Age*, *in* PROPERTY PROBLEMS: FROM GENES TO PENSION FUNDS 48, 50 (J.W. Harris ed., 1997) (quoting Blackstone).

183. *Id.* at 51. Perhaps the most influential thinker in expanding the scope of the definition of "property," as in many other areas of criminal law, was James Fitzjames Stephen, who, as early as 1865, proposed that theft law should encompass the misappropriation of "any property whatever, real or personal, in possession, or in action, so as to deprive any other person of the advantage of any beneficial interest at law, or in equity, which he may have therein." JAMES FITZJAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW 129 (1865).

> anyone) into economic goods. This transformation represented effort and acquisition. Goods so far as thus acquired and transformed become valuable and recognized as the "property" of the individuals who got them or had them.[184]

As intangible property such as licenses, franchises, and interests in stock began to occupy an increasingly important place in the economy, it was not surprising that society would look to the criminal law as a means of protection.

b. Theft Law and Property Today

What should count as "property" for purposes of theft law today? In particular, to what extent should the law of theft apply to the misappropriation of "intangibles" such as information, goodwill, ideas, words, pictures, designs, music, and know-how? One of the difficulties in answering this question is that different jurisdictions define or interpret the word "property" in different ways. In addition, the question of whether certain intangibles are "property" arises in a host of other (non-theft, but related) areas of the law, such as mail fraud, receiving stolen property, and copyright. Indeed, the extent to which ideas and information can, or should, be "owned" is in some sense the central question of intellectual property law. We will not be able to resolve the issue definitively here. My purpose is simply to offer some general principles for thinking about the problem in the context of theft law.

i. Theft Law and "Intangibles"

Probably the most influential definition of what constitutes "property" for purposes of theft law is that found in the Model Penal Code (MPC), which refers to "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power."[185] Given its obvious circularity (i.e., defining "property" as "tangible or intangible personal property"), however, this definition is of limited value. Somewhat more useful, perhaps, is the MPC Commentary, which defines "property" as "anything that is part of one person's wealth and that another person can appropriate."[186]

184. HALL, *supra* note 180, at 100.
185. MODEL PENAL CODE § 223.0(6) (1985).
186. MODEL PENAL CODE Cmts. § 223.2, at 166–67 (1985).

Despite the breadth of such definitions, however, some courts have been reluctant to treat at least certain kinds of intangibles as a "thing of value."[187] For example, in a leading Canadian case, *Stewart v. The Queen*, the court was called upon to interpret Section 283(1) of the Criminal Code, which makes it a crime to take or convert "anything whether animate or inanimate" with the requisite intent.[188] While acknowledging that the term "anything" should be construed broadly to refer to intangible things such as bank credit, the court declined to apply the statute in a case in which a defendant was prosecuted for attempting to obtain confidential payroll information about a hotel's employees by paying one of the employees to copy the information without actually taking any physical object. The court reasoned that rights to confidential information should not be regarded as property for purposes of Section 283(1) because such rights are more akin to fiduciary obligations than proprietary interests.[189]

Why are courts reluctant to treat intangibles as property for purposes of theft law? In a very important sense, all "property" is intangible, since, as noted above, the term denotes nothing more than a bundle of rights, a legal construct. Yet, at an intuitive level, people do distinguish between property rights that inhere in physical objects and those that inhere in intangibles.

Consider Ian McEwan's marvelous novel, *Atonement*, of which I happen to own a copy. My ownership of this particular volume means that I have the right to exclude others from using it, to transfer ownership to someone else, whether by sale or gift, or even to destroy it. If I loan it to a friend and it comes back with the pages torn and dog-eared, my copy is worth less than when it was new. If I give it away or sell it, I no longer own it. We can say that my rights are in

187. *See, e.g.*, Stewart v. Queen, [1988] 1 S.C.R. 963, discussed *infra* note 188 and accompanying text. Of course, not every jurisdiction has adopted an MPC-type definition of property. Some continue to define property as it was defined at common law. *See, e.g.*, People v. Davis, 561 N.E.2d 165 (Ill. App. Ct. 1990); Commonwealth v. Rivers, 583 N.E.2d 867 (Mass. App. Ct. 1991); Bruhn v. Commonwealth, 544 S.E.2d 895 (Va. Ct. App. 1986).

188. 1 S.C.R. 963, 967 (Can. 1988). For commentary on the *Stewart* case as it worked its way up the appellate process, see R. Grant Hammond, *Theft of Information*, 100 LAW Q. REV. 252 (1984); Franklin R. Moskoff, *The Theft of Thoughts: The Realities of 1984*, 27 CRIM. L. Q. 226 (1984–85); Arnold S. Weinrib, *Information and Property*, 38 U. TORONTO L.J. 117 (1988).

189. The question, what is a "thing of value," also arises in the context of bribery law. *See* 18 U.S.C. § 201 (2000); 1 SARAH N. WELLING ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO §7.3, at 206–09 (1998).

"tangible property" because the copy of the book that I own is a tangible thing.

The property rights that McEwan himself has as a result of copyright law are very different. That body of law gives McEwan (or his publisher) the right to make copies of the book or have it turned into a film. The thing in which McEwan's rights inhere—presumably, the words that comprise his novel—is much less tangible than my copy of his book. So we say that his rights are in property that is "intangible."[190]

Is there any reason we should prefer to protect property rights that inhere in a physical object over property rights that inhere in something that is intangible?[191] Some commentators have suggested that only the owner of tangible goods suffers a loss because only the owner of tangible goods loses actual use of a good.[192] But this is clearly wrong. If I make unauthorized copies of McEwan's book, it seems obvious that I am depriving McEwan of royalties that he otherwise would have earned.

A better argument may be that, in some cases, the theft of intangible property will be harder to prove than the theft of tangible property. If you steal my copy of *Atonement*, you now possess it; there is a physical taking that can be proved; the theft is, in Fletcher's

190. For a discussion of possible differences between tangible and intangible property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1548–49 (1993); I. Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes*, 26 U. DAYTON L. REV. 211 (2001); Moohr, *supra* note 176, at 693; Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 104–06 (1992).

191. In fact, there may be an argument that there is even more reason to apply property rights to intangibles than to tangibles. Certain kinds of intangibles, such as information, suffer from what has been called a "collective goods" problem. Collective goods are goods from which it is difficult to exclude consumption by non-purchasers. Because of such difficulties, producers of such goods are prevented from obtaining the full benefits of production. Decreased incentives to produce are likely to result in underproduction of the resource. Granting producers of intangibles such as information property-like legal rights in their product is one means of ensuring that incentives to produce such goods are preserved. *See* Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 451–58 (2001).

192. *See, e.g.*, Neel Chatterjee, *Should Trade Secret Appropriation Be Criminalized?*, 19 HASTINGS COMM. & ENT. L.J. 853, 867–68 (1997) ("[B]ecause of the intangible nature of trade secrets, the taking of a trade secret does not necessarily resemble the taking of a computer or other tangible item and does not require the same overt acts. No actual physical taking is necessary for the taking of a trade secret. . . . In a sense, the owner of the trade secret has lost nothing.").

term, "manifest."[193] But if I make unauthorized copies, there is no physical loss to point to. Moreover, it could be argued that, because there is "uncertainty over the boundaries of property rights" in intangibles, violations are more likely to be "unwitting."[194]

In the end, rather than asking what kinds of property theft law protects, it might be more useful to ask what kinds of rights or interests theft law is meant to protect. Indeed, this is exactly the approach followed by courts in determining whether something is "property" for purposes of various non-theft statutes. For example, in the recent case of *Cleveland v. United States*,[195] the Supreme Court had to decide whether state video poker machine licenses constitute "property" for purposes of the federal mail fraud statute, which makes it a crime to use the mails in furtherance of any scheme or artifice to obtain "money or property by means of false or fraudulent pretenses."[196] The Court held that a state does not relinquish "property" for purposes of Section 1341 when it issues a permit or license of this sort. The interest the state has in such licenses, the Court said, was primarily "regulatory," rather than "economic." The state's primary interest in such licenses is in deciding which applicants are suitable to run video poker operations, rather than in deriving revenue. Because the mail fraud statute is intended to protect economic rather than regulatory interests, the Court concluded that defendants did not obtain or attempt to obtain any "property" from the state.[197]

Similarly, in *Ruckelshaus v. Monsanto*, the Court had to decide whether research data submitted to a federal agency documenting the safety of the submitter's product should be considered "property" within the meaning of the Fifth Amendment's Takings Clause.[198] The Court held that the agency's use of the data in evaluating another firm's product could, in certain circumstances, constitute a taking for which compensation was required. Citing Blackstone and Locke, the Court adhered to a broad conception of property that "extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'"[199]

193. Fletcher, *supra* note 178, *passim*.
194. Moohr, *supra* note 176, at 731.
195. 531 U.S. 12 (2000).
196. 8 U.S.C. § 1341 (2000).
197. *Id.* at 26–27.
198. 467 U.S. 986, 1000 (1984); U.S. Const. art. I, § 8, cl. 8.
199. 467 U.S. at 1003.

What these cases suggest is that the existence of property rights can only be determined with reference to the interests or rights a particular body of law is intended to protect. So what interests and rights does the law of theft protect? According to Pamela Samuelson:

> Depending on the nature of the subject and on the nature of the person's interest in it, the bundle [of rights that characterize a property interest] may be thicker or thinner, but need not have a particular thickness to rise to the status of property. While it is difficult to define with precision what we mean by property, it is still possible to make some generalizations about the most important kinds of rights that tend to be found in the property bundle: (1) rights of possession, use, and enjoyment; (2) rights of transfer; and (3) rights to exclude others.[200]

In contrast to the relatively "thin" property rights protected by copyright law, on the one hand, and the doctrine of moral rights, on the other, the rights of property protected by theft law are "thick." Copyright gives creators a limited monopoly on works of authorship; it is intended to provide economic incentives to create information and a shelter to develop and protect it, and it is limited in time and scope by doctrines such as idea/expression, originality, and fair use.[201] Moral rights are thin in a different way: such rights are primarily personal, artistic, and non-economic.[202]

The rights protected by theft law are, by comparison, quite thick. Unlike copyright law, with its exclusion for fair use, theft law has no de minimis exception.[203] Unlike the doctrine of moral rights, with its

200. Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 370 (1989).

201. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 13 (1995); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

202. *See* discussion *supra* notes 160–72 and accompanying text. Indeed, there is a good argument that the doctrine of moral rights is not really a property scheme at all. Rather, it is a kind of liability scheme. For a discussion of the difference between property-based and liability-based schemes in a related context, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992).

203. As Judge Posner put it (in a civil rights case involving the alleged theft by police of three soda cans):

> The law does not excuse crimes . . . merely because the harm inflicted is small. You are not privileged to kill a person because he has only one minute to live, or to steal a penny from a Rockefeller. The size of the loss is relevant sometimes to jurisdiction, often to punishment, and always to damages, but rarely if ever to the existence of a legal wrong. It would be a strange doctrine that theft is permissible so long as the amount taken is small—that police who conduct searches can with impunity steal, say, $10 of the owner's property, but not more.

focus on the individual artist, theft law is intended to protect the general interests of society in seeing that property is secure.[204] Theft law, in its modern form, provides a broadly sweeping, general purpose, safety net. It applies even when other, more specialized, doctrines of law do not.

ii. Theft Law and "Commodification"

Despite the breadth of rights and interests theft law protects, it is nevertheless clear that not every "thing of value" can be the subject of theft. For example, imagine that *X* and *Y* have a dispute over the custody of a child, and that *Y* breaks into *X*'s house and "steals" the child away with the intent of depriving *X* permanently of her custody. Certainly, *Y* can be prosecuted for the child's kidnapping. But even though a child is obviously a "thing of value," it seems improbable that *Y* could be prosecuted for the child's *theft*, since our law (thank goodness) no longer recognizes the possibility that persons can be regarded as "property" or as capable of being "owned."[205] Similarly, it is clear that though terrorists can "steal" one's sense of security, they cannot be prosecuted for theft. Although we may be willing to pay a great deal of money to protect it, a sense of security is not the sort of thing that is subject to being bought or sold.

These points suggest a generalizable limitation on what constitutes a "thing of value" for purposes of theft law. I shall now argue that something is a "thing of value" for purposes of theft law if and only if it is "commodifiable."

I must first explain what I mean by "commodifiable." The term usually arises in the context of debates over whether to permit the sale of things such as sex (in the form of prostitution), reproductive

Hessel v. O'Hearn, 977 F.2d 299, 303 (7th Cir. 1992).

204. For further discussion, see *infra* note 259 and accompanying text.

205. In antebellum days, by contrast, stealing a slave could result in a prosecution for larceny. *See, e.g.*, 1779 N.C. Sess. Laws ch. 142, §29:

> [A]ny person or persons, who shall here after steal or shall by violence, seduction or any other means, take or convey away any slave or slaves the property of another, with an intention to sell or dispose of to another, or appropriate to their own use, such slave or slaves . . . and being thereof legally convicted . . . shall be judged guilty of felony, and shall suffer death without benefit of clergy.

State v. Hardin, 19 N.C. (2 Dev. & Bat.) 407, 412 (1837). *See generally* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1289-1326 (1993) (considering various forms of "property in people," such as slavery, surrogacy, body parts, human genes, frozen embryos, and human remains); CURTIS J. BERGER & JOAN WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 1111–73 (4th. ed. 1997) (similar). Note, however, that Scottish law still refers to the abduction of a child as a "theft" or *plagium*. *See* cases cited *supra* note 13.

capacity (in the form of surrogacy), and bodily organs (such as kidneys for transplant). Law and economics and libertarian scholars tend to argue that, the broader we commodify, the better for society, because markets offer an efficient means of distributing scarce resources.[206] Liberal theorists, in opposition, tend to argue that while markets do have their uses, too much commodification tends to undermine other important social values, such as personal dignity and social justice.[207] The question of "commodifiability" is also raised in the literature on intellectual property law, in which scholars seek to explain what kinds of information, if any, should be subject to legal protection.[208]

Rather than using the term "commodifiable" in a prescriptive sense (i.e., whether something *should* be allowed to be bought or sold), I intend to use it descriptively (i.e., whether something *can* be bought or sold). For purposes of this discussion, we can distinguish among three different kinds of non-commodifiability: (1) things that are illegal to possess (such as illegal drugs and weapons); (2) things that are not illegal to possess but are illegal to buy or sell (such as human organs); and (3) things that are not illegal to buy or sell or possess, but are simply not the sort of thing that is capable of being bought or sold (such as love, admiration, and respect).

When I say that a thing is not "property" for purposes of theft law unless it is "commodifiable," I shall be using the third sense of the term. My claim, therefore, is that a thing is not subject to theft unless it is the sort of thing that can be bought or sold. Thus, if *A* steals *B*'s stash of illegal drugs, *A* has committed theft, regardless of the fact that *A*'s drugs cannot be sold or possessed legally, since illegal drugs are the sort of thing that are regularly bought and sold.[209] On the other hand, if *A* "steals" *B*'s affection for *C*, *A* is not guilty of theft,

206. *E.g.*, Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978).

207. *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 154–63 (2001); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

208. Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, Boston University School of Law Working Paper Series, No. 01–22; *see also* THE COMMODIFICATION OF INFORMATION: SOCIAL, POLITICAL AND CULTURAL RAMIFICATIONS (Niva Elkin-Koren & Neil Weinstock Netanel, eds., forthcoming 2002); Wendy J. Gordon & Sam Postbrief, *On Commodifying Intangibles*, 10 YALE. J.L. & HUMAN 135 (1998); Nigri, *supra* note 182, at 50.

209. *See, e.g.*, State v. Pocinwong, 1997 WL 435708 (Wash. App. Div. I Aug. 4, 1997) (stealing of illegal drugs constitutes theft); State v. Donovan, 183 P. 127, 129 (Wash. 1919) (illegal liquor subject to larceny). *But see* HALL, *supra* note 180, at 102 (during Prohibition, some cases held that bootleg liquor was not subject to theft).

since, despite our metaphorical use of the term "steal" in this context, affection is not the sort of thing that can be effectively bought or sold (though there is of course no law that prevents such transactions).[210]

(2) What, if Anything, Does the Plagiarist Steal?

In the previous subsection, I concluded that a thing should be regarded as "property" for purposes of theft law if and only if it is commodifiable—i.e., if and only if it is capable of being bought or sold. The question now is whether plagiarism involves the taking of something that is commodifiable.

Consider again the dynamic of plagiarism. An author offers her work to the world by publishing it in a book or magazine. Under the widely accepted academic, literary, and journalistic norms and practices described above,[211] the author's presentation of her ideas constitutes a conditional offer to the effect that anyone may read the work and quote it or take ideas from it, *provided that such person makes attribution to their originator.*[212] Under this model, *A* pays for the privilege of copying *B*'s words or ideas by giving *B* credit for having been their author.[213] Plagiarism, of course, occurs when *A* uses words or ideas originated by *B* but fails to pay *B* proper credit.

210. *Cf.* WEINREB, *supra* note 15, at 409 n.55. (quoting C. VON FURER-HAIMENDORF, MORALS AND MERIT 27 (1967)) ("[A]mong the Andamanese, a tribal society of semi-nomadic food-gatherers who live on the Andaman Islands in the Bay of Bengal, 'adultery, apparently is considered as a kind of theft, but society does not assist the duped husband in punishing his rival.'").

211. *See supra* notes 22–23 and accompanying text.

212. Note the difference between this "conditional offer" paradigm and the "gift" paradigm described by Corynne McSherry. MCSHERRY, *supra* note 15, at 75–76. McSherry describes "an academic system of exchange" which involves "the reciprocal and personalized exchange of gifts rather than the impersonal selling of private property." According to McSherry, an author sends a work out into the world with the hope of receiving certain gifts in exchange—honor, recognition, esteem. *Id.* at 76. Note that McSherry, mistakenly in my view, ignores the conditional nature of the gift. Under her gift model, plagiarism could never constitute theft, since the second comer takes something that is, by definition, free for the taking. Under my model, the second comer may take the "gift" only on the condition that he gives something back—namely, credit to the author. In that sense, what the author gives is not really a gift after all. This is not to deny, of course, that gifts are often given with the expectation of receiving something in return. *Cf.* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (1925) (W.D. Hall trans., 1990). Rather, it is to say simply that the binding nature of the rule of attribution is sufficient to distinguish the "academic system of exchange" from other kinds of "gift giving."

213. According to publisher Eugene Garfield, "[c]itations are the currency by which we repay the intellectual debt we owe our predecessors." LAFOLLETTE, *supra* note 8, at 51–52 (quoting Eugene Garfield, *More on the Ethics of Scientific Publication: Abuses of Authorship Attribution and Citation Amnesia Undermine the Reward System of Science*, 30 CURRENT CONTENTS 8 (1982)).

So what, if anything, has *A* stolen? As noted at the beginning of this article, plagiarism is often characterized as the theft of "words,"[214] "language,"[215] or "plot."[216] Such characterizations seem to me mistaken, however. The better view is that what is stolen is not the author's words or ideas (since they are essentially there for the taking), but rather the "credit" to which the author is entitled.

As in the case of cable television transmissions, business know-how, and confidential information, we are dealing with an intangible. *A*'s *use* of *B*'s words or ideas itself deprives *B* of nothing. *B*'s "assets" are in no way diminished or diminishable (except possibly in the sense that words or ideas might become trite or clichéd through overuse). What *B* does deprive *A* of is the credit on which the right to use such words or ideas is implicitly conditioned, and to which *B* is entitled. In other words, plagiarism involves what Leo Katz has referred to as the "misappropriation of glory."[217] The question, of course, is whether "credit" of this type should be viewed as "property" for purposes of theft law.

(3) Is "Credit" for Authorship a "Thing of Value" Within the Meaning of Theft Law?

As suggested above, a thing should be regarded as "valuable" for purposes of theft law if and only if it is "commodifiable"—i.e., if and only if it is the sort of thing that is capable of being bought or sold. Thus, we can reformulate the question as whether "credit" for being the author or originator of words or ideas is commodifiable.

The first thing to note is that, although there are surely exceptions (one thinks, for example, of writers of instruction manuals,[218] ghostwriters, copywriters, and people who write under pseudonyms), most writers do have an interest in receiving public credit for their work. Indeed, for many literary and academic writers,

214. MALLON, *supra* note 8.

215. SHELLEY ANGELIL-CARTER, STOLEN LANGUAGE: PLAGIARISM IN WRITING (2000).

216. NOBLE, *supra* note 8.

217. LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 197–201 (1996). Katz begins by noting the importance that writers and scholars attach to the receipt of recognition, and the grave resentment that is felt when such recognition is unfairly denied or "misappropriated." Katz then offers the interesting conjecture that the rules governing the apportionment of blame in the criminal law and elsewhere in some way mirror, or are symmetrical with, the rules governing the apportionment of praise. For more on Katz's views on this question, see *infra* note 222.

218. For a humorous take on this point, see *Toaster-Instruction Booklet Author Enraged That Editor Betrayed His Vision,* THE ONION (last modified Sept. 12, 2001), *reprinted at* http://www.pairlist.net/pipermail/toast-list/2001-September/000004.html.

garnering recognition is at least as, if not more, important than receiving financial compensation. Receiving credit for one's ideas offers psychic rewards that, for novelists, poets, playwrights, and scholars, are quite significant.

Moreover, recognition of one's work and the development of a reputation as a creative scholar or artist in a given field often do result, even if indirectly, in significant tangible rewards, such as tenure and promotion, bonuses, pay increases, grants and scholarships, publishing contracts, job offers, invitations to conferences, client referrals, appointment to political or judicial office, and other forms of career advancement and compensation.[219] Indeed, the number and prestige of citations received is regarded by some academics as a means of "keeping score." In the absence of universally accepted criteria for determining academic and scholarly achievement, faculties and individual professors are often ranked by the frequency with which their work is cited.[220] Such rankings, in turn, may be relevant to important judgments about status and reputation.

But simply because a thing is valuable is not enough to make it a "thing of value" for purposes of theft law; it must also be "commodifiable." Love, truth, loyalty, beauty, and friendship are all things of great value, and the loss of any of them can be a great blow. But it is doubtful that any of these things is "property" within the meaning of theft law, because none of them is the sort of thing that can be bought or sold. The question, then, is whether "credit" for authorship is such a commodity.

The answer, I believe, is yes, although it is admittedly a close question. When a politician or corporate executive pays a ghostwriter to write a speech, she is typically buying not just the ghostwriter's creative efforts, but also the right to claim the speech as her own. It would seem very odd, indeed, if the speaker were required to preface her remarks by saying, "I am now going to read a speech written for me by my ghostwriter."[221] The ghostwriter gives up whatever claim to credit she might have had. Listeners regard the speech as the

219. *Cf.* Howard P. Tuckman & Jack Leahey, *What Is an Article Worth?*, 83 J. POL. ECON. 951, 951–52 (1975).

220. *See, e.g.*, Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851 (1999); James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 CHI.-KENT L. REV. 781 (1996); David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249 (1997).

221. *Cf.* Elisabeth Bumiller, *A New Washington Whodunit: The Speechwriter Vanishes*, N.Y. TIMES, Mar. 4, 2002 at A16 ("It is a no-no in any White House to take credit for the president's words.").

speaker's own, and it is the speaker, rather than the real author, who is seemingly entitled to the honor (or blame) that follows.[222]

Moreover, there are some circumstances in which we might say that credit can actually be stolen. Suppose that ABC Corporation holds a competition in which it offers a cash prize to the employee who develops the best new design for a widget. If *X* develops the prize-winning idea which *Y* "steals" and submits to the competition as his own, *X* has been deprived of the credit for the idea and, indirectly, the prize to which he is entitled. In such circumstances, we might well say that *Y*'s stealing of credit constitutes theft.

In summary, there is a reasonable argument that "credit" for authorship should be regarded as "property" for purposes of theft law. Nevertheless, it needs to be acknowledged that, as far as different forms of property go, this is a rather elusive one. Most people have probably had the unpleasant experience of having someone else claim credit for an idea that was theirs. Do we really want to say that such an act constitutes a crime? As genuinely aggrieved as one might feel, it is doubtful that we should want to apply society's most coercive mechanism—the criminal law—to a loss that is ultimately so ephemeral.

B. Does Plagiarism Involve an "Intent to Deprive Another Permanently" of Property?

Even if one were convinced that plagiarism did involve the misappropriation of "property" within the meaning of theft law, it would still be necessary to ask whether it satisfies the other requirements of theft law as well. The general rule is that a defendant is not guilty of larceny (or theft) unless he takes another's property with the intent to deprive the person permanently of that property—an intent referred to at common law as *animus furandi* (intent to deprive).[223] Assuming that plagiarism itself requires intent, would such intent be sufficient to satisfy the law of theft?

222. A contrary view is expressed by Leo Katz in KATZ, *supra* note 216, at 87:

> Although copyrights and patents, the law's formal rewards for intellectual achievement, are traded, donated, bequeathed, mortgaged, and rented out all the time, the less formal rewards of intellectual achievement—the honors, the prizes, the trophies, the laurels, the tokens of glory—these are not, or at least are not supposed to be alienable. Fortunes may be given away, fame may not. A wag writing for the op-ed page of the *Wall Street Journal* once speculated that the reason academics are so free and easy about advocating redistribution of wealth is that the good they care most about—prestige—cannot be redistributed.

See also Moulton & Robinson, *supra* note 15, quoted *infra* note 232.

223. LAFAVE, *supra* note 177; PERKINS & BOYCE, *supra* note 177, at 326.

Merely because a plagiarist has intentionally copied another's words and failed to attribute the source does not necessarily mean that the plagiarist has had an "intent to deprive another permanently of property." There are numerous cases in which *D* has been held incapable of committing theft because his intent was simply to "borrow" *V*'s property—i.e., he did not intend to deprive *V* of his property *permanently*.[224] Could a similar argument be made in the context of plagiarism? Could a defendant argue that he intended merely to "borrow" something of *V*'s, rather than deprive *V* of his property interests permanently? The answer, I believe, is no. As I argued above, what the plagiarist takes is not the author's words or ideas, but rather the "credit" for those words or ideas.[225] Even if the plagiarist is merely borrowing the author's words or ideas,[226] the deprivation of credit is permanent and ongoing. In such cases, it seems appropriate to say that the plagiarist had the intent necessary to commit theft.

On the other hand, there is at least one set of circumstances in which intentional plagiarism might not entail larcenous intent. Consider the plagiarism described in the novels of Terence Blacker and John Colapinto, discussed earlier.[227] In both cases, the person whose credit is stolen is dead. Although the protagonists in each book clearly committed plagiarism, a good argument could be made that they did not commit theft, since—as can be seen in cases involving theft of property from a grave—it is impossible to commit theft of property that does not belong to anyone.[228]

224. For example, if *D* takes *V*'s car with the intent to return the car to *V* later in the day, *D* lacks the intent to commit theft; at most, he has the intent to commit the offense of joyriding. *Cf.* MODEL PENAL CODE § 223.9 (1962) (Unauthorized Use of Automobiles and Other Vehicles). For a useful discussion of the "borrowing" defense in theft law, see Louis B. Schwartz & Dan M. Kahan, *Theft*, 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1562 (Joshua Dressler ed., 2d ed. 2002).

For this reason, the term "identity theft" (in which an offender uses another's identity to obtain property) is a misnomer. *See* Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028 (Supp. 2000). The victim's identity is merely "borrowed." What is "stolen" is his money.

225. *See supra* text accompanying notes 216–17.

226. *Cf.* George Johnson, *Lost in Cyberspace: If You Can't Touch It, Can You Steal It?*, N.Y. TIMES, Dec. 16, 2001, at 4:5 ("[S]ome argue, since a [computer] program is just a recipe for getting a computer to carry out a task, copying it is like borrowing a recipe for chocolate cake.").

227. *See supra* text accompanying notes 73–78.

228. *See* BRENT FISSE, CRIMINAL LAW 282 & n.98 (5th ed. 1990) (at common law, no larceny of a corpse because it cannot be said to belong to anyone).

In this context, we can see at least one sense in which plagiarism is broader than theft. Plagiarism is concerned not only with harm to the actual author but also with harm to the reader and to various institutions. Theft law, by contrast, focuses solely on the deprivation of the owner's property. Thus, the fact that other parties might be harmed by defendant's plagiarism is irrelevant for purposes of theft law. (Whether the plagiarist has deprived the author's estate of property or defrauded his publisher, of course, is another matter.)

C. Does Plagiarism Involve an "Unlawful Taking" or Exercise of "Unlawful Control" over Property "of Another"?

The third and final element of theft is that the defendant "unlawfully take or exercise unlawful control" over property "of another." This formulation replaces the common law larceny requirements of "caption" (securing dominion over the property of another) and "asportation" (carrying away of the other's property).[229] The term "exercises unlawful control" over property refers to "the moment the custodian of property begins to use it in a manner beyond his authority."[230] "Unlawfulness" implies a lack of consent or authority on the part of the owner.[231]

It seems reasonable to say that, in many cases, a plagiarist does exercise unlawful authority over an author's property. The author publishes his work with the implicit understanding that it will not be quoted without attribution. At the moment the plagiarist publishes the unattributed language or ideas, he unlawfully takes credit for such words or ideas. The fact that the author's words are still available for quotation and attribution by others does not change the fact that the plagiarist has taken credit that rightfully belongs to the author.

A more difficult issue, however, arises in those cases in which the person whose work is copied without attribution "consents" to that act. Earlier, we considered cases in which the second comer copies from: (1) a fraternity file or Internet term paper mill; (2) a ghostwriter; or (3) her own earlier work. In each case, the actual "author" expects no credit for her work. Indeed, the work is made available to the second comer with the precise understanding that the actual author will *not* be identified. Does the fact that the original author consents to the alleged plagiarist's copying and non-attribution mean that the taking is not "unlawful" for purposes of theft law?

229. MODEL PENAL CODE § 223.2 cmt. at 163–64, 166 (1962).
230. *Id.* at 166.
231. *Id.*

I would say yes. The cases make clear that a defendant who takes property with the owner's consent has not committed theft. In the case of fraternity file plagiarism and use of a ghostwriter, there can be no theft, because the original author has "abandoned" any claim to credit that he might otherwise have had.[232] Moreover, in the case of self-plagiarism, there is *a fortiori* no theft, because the defendant has failed even to take property "from another."[233]

D. Would Prosecution of Plagiarism as Theft Be Preempted by Federal Copyright Law?

Even if we were confident that plagiarism did satisfy the elements of theft law, we would still need to ask whether such prosecutions would be preempted by federal copyright law. Obviously, there would be no bar to prosecuting those acts of plagiarism that do *not* constitute copyright infringement, whether because they involve works that are not copyrighted,[234] or because they fall into some exception to copyright law, such as fair use. The harder, and more interesting, question is whether prosecution for acts of plagiarism that *do* constitute copyright infringement would be preempted.

Section 301 of the Copyright Act preempts state legal and equitable remedies that are "equivalent to any of the exclusive rights within the general scope of copyright" and "come within the subject matter of copyright."[235] In order to avoid being "equivalent," a state-based right must entail an "extra element" "which changes the nature of the action so that it is qualitatively different from a copyright

232. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 109(c), at 546–47 (1984) (discussing consent as a defense to theft). *Cf.* Moulton & Robinson, *supra* note 15, at 969:

> If words and ideas were merely property, and plagiarism merely a form of theft, then there would be nothing wrong with buying the rights to authorship from another, as in the case of term-paper services. The original authors sell their claim to authorship for money. The plagiarist who uses these services is not stealing the credit from another person because the original author does not want the credit. But credit for authorship is not something that can be sold or given away.

233. *See* PERKINS & BOYCE, *supra* note 177, at 297. Of course, to the extent that the author receives money for work that has been misrepresented as original, it may well be that he has committed fraud.

234. *See* Corcoran v. Sullivan, 112 F.3d 836, 838 (7th Cir. 1997) (Posner, J.) ("*Of course* federal copyright law does not preempt state criminal prosecutions for destroying noncopyrighted property that is commingled with a copyrighted work.") (emphasis in original).

235. 17 U.S.C. § 301(b)(1), (3) (1996).

infringement claim."[236] The question, then, is whether a state law prosecution for plagiarism as theft would involve an "extra element" that would change the nature of the action so that it would be "qualitatively different" from a copyright infringement action.

At first glance, there seems to be a good argument that the state law prosecution of plagiarism as theft would not be preempted by the Copyright Act. As noted earlier, such prosecutions would require proof of at least two basic "elements": that the plagiarist (1) copied someone's work, and (2) claimed that work as his own. Copyright infringement also involves copying. Therefore, in cases in which the work plagiarized is copyrighted, there will be at least a partial equivalence between state law theft prosecution and copyright. However, the equivalence will be incomplete, since even plagiarism involving copyrighted work will entail an "extra element" not present in copyright law—namely, passing off someone else's work as one's own (or, as I characterized it above, stealing credit for someone else's work). A good argument could thus be made that a state law prosecution for plagiarism as theft would be analogous to a state law unfair competition suit based on a claim of "passing off," a claim which has been held to involve an assertion of rights not equivalent to those protected by copyright, and therefore not preempted by federal law.[237]

On the other hand, it should be noted that the preemptive effect of Section 301 has been interpreted very broadly.[238] The mere fact that a state right is broader than, or complementary to, its federal counterpart is not sufficient to avoid preemption. For example, while

236. Harper & Row Publishers, Inc. v. Nat'l Enters., 723 F.2d 195, 200 (2d Cir. 1983) ("When a right defined by state law may be abridged by an act which, in and of itself, would infringe one of the exclusive rights, the state law in question must be deemed preempted. Conversely, when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur.") (citations omitted), *rev'd on other grounds*, 471 U.S. 539 (1985).

237. *See* Warner Bros., Inc. v. Am. Broad. Co., 720 F.2d 231, 247 (2d Cir. 1983) ("[T]o the extent that plaintiffs are relying on state unfair competition law to allege a tort of 'passing off,' they are not asserting rights equivalent to those protected by copyright and therefore do not encounter preemption."). *But cf.* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (narrowing scope of "hot news" misappropriation claim that survives Copyright Act preemption).

238. *See* Notes of the Committee on the Judiciary, H.R. Rep. No. 94-1476, at 130–31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746 (preemption provisions of Section 301 of the Copyright Act are "stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection").

the performance right under Section 106(4) of the Copyright Act is limited to *public* performances, a state law that required an author's consent for both public and private performances would not, according to *Nimmer on Copyright*, be exempt from preemption.[239] Similarly, the mere fact that a state law required *mens rea* as a condition of liability, while the Copyright Act does not, would not preclude preemption.[240]

Unfortunately, the small body of case law concerning the preemption of state criminal prosecutions is not, for our purposes, particularly instructive.[241] More helpful, perhaps, are two cases involving Copyright Act preclusion not of state prosecutions, but of federal ones. *Dowling v. United States* involved the unauthorized copying of copyrighted musical recordings.[242] The government sought to prosecute under Section 2314 of the National Stolen Property Act, which makes it a crime to transport in interstate commerce property that has been "stolen, converted or taken by fraud."[243] The Court agreed with defendant that the Act did not apply to the unauthorized copying of copyrighted material. According to the Court, Congress saw no need for "supplemental federal action" with respect to copyright infringement "for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area."[244] "Given that power," the Court said, "it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government" (namely, prosecution under the National Stolen Property Act).[245]

The influential District Court opinion in *United States v. LaMacchia* follows similar reasoning.[246] The defendant was a twenty-one year-old MIT-educated computer hacker who created a bulletin board system that allowed Internet users around the world to illegally upload and download various commercial software programs.

239. 1 NIMMER ON COPYRIGHT, *supra* note 140, §1.01[B][1], at 1-11.

240. *Id.* at 1-12 to -13.

241. The only two cases reported involve fairly routine prosecutions for copying of computer programs, where it was hard to discern any plausible "extra element." Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 230 (4th Cir. 1993) (federal Copyright Act preempts Virginia Computer Crimes Act because "the core of both causes of action, in the context of [plaintiff's] claim, is the unauthorized copying of a computer program"); State v. Perry, 697 N.E.2d 624 (Ohio 1998) (federal Copyright Act preempts Ohio law prohibiting unauthorized use of computer program).

242. 473 U.S. 207 (1985).

243. 18 U.S.C. § 2314 (1996).

244. 473 U.S. at 220.

245. *Id.* at 220–21.

246. 871 F. Supp. 535 (D. Mass. 1994).

Because he had received no payment for any of the software, and because the then-applicable provisions of the Copyright Act required a showing that infringement be undertaken for "commercial advantage or private financial gain,"[247] LaMacchia could not be charged with criminal copyright infringement.[248] Instead, he was charged with violating the federal wire fraud statute, a generic criminal statute that requires no proof of a personal profit motive.[249] In dismissing the charges, the *LaMacchia* court interpreted *Dowling* as standing for the proposition that, absent a clear indication from Congress, generic criminal laws should not be used to undermine the "finely calibrated" reach of criminal liability under the Copyright Act.[250]

Under the reasoning of *Dowling* and *LaMacchia*, then, a good argument could be made that a state law prosecution for plagiarism as theft would be preempted by federal law, if only to the extent that such plagiarism involved copyrighted materials.

E. Summary

In order to prove the modern offense of theft, the state must demonstrate that a defendant has satisfied three elements: (1) unlawful taking or exercise of unlawful control over, (2) movable property, (3) with the intent to deprive the owner of such property. As I have argued, most, though not all, cases of plagiarism involve both an unlawful taking and intent to deprive. The harder issue is

247. 17 U.S.C. § 506 (1996).

248. The statute has since been amended to allow such prosecutions. *See* No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997), referred to *infra* note 287.

249. 18 U.S.C. § 1343 (2000).

250. 871 F. Supp. at 545. Another case that deserves mention here is United States *ex rel.* Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453 (4th Cir. 1997), *cert. denied*, 522 U.S. 916 (1997). Plaintiff, a doctoral candidate in nutritional science, brought a claim for, among other things, state law conversion, alleging that the University of Alabama had copied her work without attribution in progress reports made to the National Institutes of Health in connection with a grant application. The plaintiff had argued that her claim was not preempted by the Copyright Act because it involved "ideas and methods," rather than specific words. The Fourth Circuit rejected her argument, holding that a state law action for conversion will escape preemption only if a plaintiff can prove that defendant unlawfully retained the physical object embodying plaintiff's work, not if defendant, as here, had merely copied something as intangible as words or ideas. Although a state law charge of theft is obviously distinguishable from a civil claim for conversion, see, for example, Robyn L. Meadows, *Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. § 9-504: Has the Pendulum Swung Too Far?*, 65 FORDHAM L. REV. 2419, 2464 n.50 (1997), the *Berge* case nevertheless provides good analogical support for the view that such a charge would be preempted by federal law.

whether the "credit" that the plagiarist steals is the kind of property that is properly subject to theft. Based on my analysis of what constitutes property for purposes of theft law, I concluded that there is a credible, though admittedly less than airtight, argument that credit for one's words or ideas is a "thing of value" within the meaning of theft law. Assuming that such prosecutions would not be preempted by federal copyright law, it appears that at least some cases of plagiarism could be prosecuted as theft. The question to be considered next is whether such prosecutions could be justified from the perspective of criminal law policy.

IV. Prosecuting Plagiarism as Theft as a Matter of Public Policy and Broader Criminal Law Principles

In considering whether it would make sense to prosecute plagiarism as theft, we need to address two basic issues. First, to what extent would such prosecutions constitute a wasteful and ill-advised use of prosecutorial, judicial, and penal resources? Second, to what extent would such prosecutions be consistent with the larger aims of the criminal law, such as deterrence and retribution?

A. Would the Criminal Prosecution of Plagiarism Constitute an Unwise Use of Government Resources?

On the face of it, the idea of putting people behind bars for committing plagiarism is a bit silly. In a world riven by terrorism, poverty, environmental degradation, the AIDS epidemic, and gun violence (to name just a few of our most pressing social ills), the suggestion that we use scarce governmental resources to investigate, prosecute, and incarcerate (or even fine) people for failing to use footnotes undoubtedly seems like overkill.

To be sure, plagiarism probably is more common today than it was a generation ago.[251] But is such an increase sufficient to justify the use of criminal sanctions? Criminal law is supposed to be a last resort. There are numerous other means for fighting plagiarism that could be tried first: Educational institutions and media companies could make more of an effort to inform their constituents of the rules of attribution; professors and editors could be more aggressive in pursuing suspected offenders; and disciplinary committees could increase the seriousness of penalties imposed.[252] Even court-issued

251. *See supra* notes 93–112 and accompanying text.

252. Indeed, there is some evidence that at least some academic institutions are already heading in this direction. *See* LATHROP & FOSS, *supra* note 94.

civil sanctions could be ratcheted up to increase deterrence. To use society's weightiest sanctioning device—the criminal law—to deal with a problem that seems only minimally harmful to society, and which has traditionally been dealt with through extra-legal means, would lead to an unjustified over-application, and dilution, of the sanction.[253] Moreover, given the problem of distinguishing between intentional and unintentional plagiarism, the prosecution of plagiarism as theft might present insuperable problems in the administration of justice and inevitably lead to arbitrary and unprincipled enforcement. Finally, unlike the theft of tangible property with concrete, physical boundaries, the theft of something as ephemeral and disembodied as "credit" raises questions of legality and overbreadth.[254] Potential defendants might be left with genuine questions about which conduct is legal and which is not.

Several arguments might be made in response. First, it should be emphasized that what we have been talking about is not the possibility of prosecuting plagiarism by means of newly enacted legislation. Rather, we have been considering the possibility of using already existing legislation in a new way. The real question, therefore, is not whether there is justification for prosecuting plagiarism as theft, but whether there is justification for *not* prosecuting an entire range of conduct that arguably does satisfy the elements of theft.

Second, the fact is that at least some acts of plagiarism are quite harmful, or at least no less harmful than other cases of theft that are regularly prosecuted. Court dockets are full of cases involving (recidivist) defendants who were given lengthy prison terms for stealing, for example, a screwdriver and map from the K-Mart; a meat slicer and mixer from the International House of Pancakes; three videotapes from a music and video store; a $25 steering wheel alarm from a Walgreens; or four chocolate chip cookies from a restaurant.[255] Who is to say that the harm caused by the recidivist plagiarist David Sumner was less harmful than the harm caused by any of these

253. *Cf.* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1535 (1997).

254. *Cf.* Moohr, *supra* note 176, at 731.

255. Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002) (defendants convicted of stealing three videotapes and a steering wheel alarm, respectively, each sentenced to life in prison); Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001) (defendant sentenced to life for stealing a total of nine videotapes); Greg Winter, *California Appellate Ruling Aids Foes of 3-Strikes Law*, N.Y. TIMES, Dec. 10, 2001, at A14.

offenders? At least according to its most likely victims—writers and artists—plagiarism does indeed entail a serious and traumatic insult. Given the choice between being plagiarized and having one's wallet stolen, many potential victims would probably choose the latter. Indeed, there are numerous cases in the criminal law in which prosecutors must distinguish between conduct that is worth prosecuting and that which is not. For example, the lines between fraud and merely aggressive business conduct, and between bribery and legitimate political fund raising, are not always clear, yet we would hardly think of decriminalizing either offense.[256] The mere fact that some (presumably, all but a handful of) cases of plagiarism would be too trivial to prosecute cannot mean that all cases of plagiarism should necessarily be exempt from prosecution.

Third, the fact that there are already private institutional mechanisms and even civil sanctions in place to deal with workplace and academic misconduct should not necessarily be viewed as a basis for barring criminal prosecution. An employee or student who uses drugs or commits some other crime while on the job or at school will rarely escape criminal prosecution simply because she is also subject to private disciplinary proceedings. Similarly, a driver who injures or kills a pedestrian will not escape criminal prosecution merely because he can also be sued in tort. Criminal punishment, civil damage awards, and disciplinary sanctions are not equivalent. Criminal punishment entails expressive values that are not entailed by other kinds of sanctions.[257] If it were determined that certain cases of plagiarism were deserving of such characteristic stigma—and that of course is a big "if"—then neither civil nor non-legal administrative sanctions would be adequate to the task.

What I am suggesting is not that we *should* prosecute plagiarism as theft, but simply that the question is more complicated than it may

256. On theft, see Schwartz & Kahan, *supra* note 224, at 1556:

> One problem that dogs the law of theft . . . is that in a commercial society no clear line can be drawn between greedy anti-social acquisitive behavior on the one hand and, on the other hand, aggressive selling, advertising, and other entrepreneurial activity that is highly regarded or at least commonly tolerated.

On bribery, see Stuart P. Green, *Broadening the Scope of Criminal Law Scholarship*, 21 CRIM. J. ETHICS 55, 59 (Summer/Fall 2001) (reviewing PETER ALLDRIDGE, RELOCATING CRIMINAL LAW (2000)) ("Perhaps the most vexing problem in the law of corruption is that of distinguishing between lawful forms of political activity, such as campaign contributions and legislative 'logrolling,' on the one hand, and unlawful acts of bribery, on the other.").

257. *See* JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95 (1970).

at first appear. Allowing prosecutors the discretion to decide which cases to prosecute is an appropriate means of distinguishing among individual *cases* of theft, but it will not do for distinguishing between whole *categories*. It's one thing for a prosecutor to exercise her discretion not to bring a theft prosecution against a defendant who has stolen a baguette to feed his starving children. It is quite another thing to decide that there should never be any prosecutions involving the theft of bread. Such categorical determinations should be made, if at all, by the legislature.

As we saw above, modern theft law sweeps widely, applying to the wrongful taking of "anything of value." Assuming for the moment both that plagiarism does satisfy the elements of theft and that we want to continue avoiding its prosecution as such, we face a dilemma. Either we need to find a principled reason to read plagiarism out of theft law, or theft law itself needs to be rewritten more narrowly. As the Supreme Court's opinion in *Brogan v. United States* suggests, courts should not, as a matter of judicial fiat, decide to read criminal statutes more narrowly than they are written.[258] If theft law as currently written really is too broad, then it is up to the legislature to reign it in.

B. Would the Prosecution of Plagiarism as Theft Be Consistent with the Underlying Goals of Theft Law?

In thinking about whether plagiarism should be criminalized, it is appropriate to ask an even deeper question, which is why theft itself is a crime. Only if we know the rationale for theft law more generally can we determine whether it makes sense to apply that law to the special case of plagiarism. Unfortunately, divining the purposes of theft law is a complicated matter, one that would provide a subject large enough for another article entirely. All I can hope to do here is to identify several of the most prominent features on the landscape.

258. 522 U.S. 398 (1998). In *Brogan*, the Court rejected a judicially created "exculpatory no" exception to the false statements statute. In response to the suggestion that the Court should read 18 U.S.C. § 1001 more narrowly than the text suggests, Justice Scalia responded:

> It is one thing to acknowledge and accept such well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions. The problem with adopting such an expansive, user-friendly judicial rule, is that there is no way of knowing when, or how, the rule is to be invoked.

Id. at 406–07. The case is discussed further in Green, *supra* note 177, at 198–201.

(1) Deterrence

According to Louis Schwartz and Dan Kahan:

> The purpose of theft law is to promote security of property by threatening aggressors with punishment. Property security is valued as part of the individual's enjoyment of his belongings and because the community wishes to encourage saving and economic planning, which would be jeopardized if accumulated property could be plundered with impunity. Another function of the law of theft is to divert the powerful acquisitive instinct from preying on others to productive activity.[259]

Inasmuch as this explanation refers to "belongings," "accumulated property," and the "acquisitive instinct," it may at first be thought to reflect a rather traditional, tangible property-based view of theft law. But such concerns are not without relevance to intangible property as well. For example, a cable television provider that invests millions of dollars in building an infrastructure for transmission of its product has an interest not only in preventing its trucks, cable wire, and transmitters from being "plundered" but also in seeing that its television programs themselves are not used without payment. Moreover, society clearly does have an interest in "divert[ing] the powerful acquisitive instinct" from, say, finding ingenious new means for "pirating" cable television transmissions to genuinely productive activity (such as the creation of new programming).[260]

Also relevant here is another fundamental question: if *X* steals from *Y*, why impose punishment rather than simply requiring *X* to pay *Y* the value of the good stolen (assuming that such value could be satisfactorily determined)? One reason for imposing criminal, rather than tort-like remedies in cases of theft is simply that many thieves are judgment proof.[261] Another, more far-reaching explanation

259. Schwartz & Kahan, *supra* note 224, at 1556.

260. Preventing people from finding ways to circumvent technological protection measures is, essentially, the purpose of the Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (relevant provisions codified at 17 U.S.C. §§ 1203-04 (Supp. V 1999)).

261. *See, e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985). According to Posner, "[t]he major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the 'market,' explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange." Much market bypassing cannot be adequately deterred by tort law because optimal damages frequently exceed the tortfeasor's ability to pay. Therefore, public enforcement and nonmonetary sanctions like imprisonment are needed. In the case of "acquisitive crimes" such as fraud, false pretenses, and embezzlement,

reflects the fact that not every thief will be apprehended on every occasion. Thus, the only way to achieve adequate deterrence is to discount the potential costs to the thief by the probability that he will actually be apprehended, prosecuted, and convicted.[262] Stephen Garvey offers a concise summary of the argument:

> For the economist, theft is a crime because it consists of my taking something of yours, say your car, without your consent, when I could have—and should have—bargained to get it from you within the free market. Getting-by-taking, as compared to getting-by-bargaining, is inefficient. If I really wanted your car, I should have bargained with you to get it. Moreover, even if I am required to compensate you ex post, I have still not acted efficiently because, again, I could have bargained with you ex ante. I thus commit a crime when I bypass an existing market—here the market in used cars—and secure possession of an entitlement outside that market. Economic analysis, therefore, treats punishment as a form of supracompensatory damages, or "kicker," that I must pay on top of compensation. Its purpose is to give me an incentive to get what I want through a market transaction, at least when the relevant market exists.[263]

In other words, we impose criminal sanctions on potential thieves (those who have not internalized the norm against stealing) in order to raise their potential costs to some level above the value of the goods stolen.

Would this paradigm apply to the treatment of plagiarism as theft? The plagiarist bypasses the "market" for words and ideas by failing to pay the price required—namely, the giving of credit in return. Imposing the "kicker" of criminal sanctions would presumably raise the plagiarist's potential costs to a level above the value of credit stolen (though we should recognize that the author and plagiarist are likely to value such credit differently), thereby creating significant incentives to second comers to abide by the rules of attribution.

But even if such a scheme would be effective as a means of deterrence, we would still need to ask if it would make sense as a

Posner says, the "market-bypassing approach provides a straightforward economic rationale" for criminalization.

262. The *locus classicus* for this argument is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125 (1972).

263. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1832–33 (1999) (footnotes omitted). For a critical assessment of the law and economics approach to criminal law, see Jules L. Coleman, *Crime, Kickers, and Transaction Structures*, *in* NOMOS XXVII: CRIMINAL JUSTICE 313 (J. Pennock & J. Chapman eds., 1985).

matter of broader social policy. Is plagiarism really so harmful that we should want to use the criminal law to deter it? Does it threaten the sense of "property security" described by Schwartz and Kahan in the same manner as other forms of theft? The answer is probably not. While rampant plagiarism would certainly tend to destabilize the narrow world of the intelligentsia, it would likely have only an indirect impact on the larger community.[264] This, it seems, is yet another reason for leaving intellectual and academic institutions to police themselves.

Another concern is the potential for overdeterrence. Like various forms of "white collar" crime (e.g., fraud and bribery), plagiarism involves behavior that it is not always easy to distinguish from lawful, even socially productive, conduct.[265] If writers and scholars who failed to make proper attribution were faced not only with the prospect of social stigma, but also possible imprisonment or criminal fines, some might decide not only to cut back on their creative endeavors, but to forgo them entirely. Thus, using the criminal law to combat plagiarism would present a real risk of chilling important, socially beneficial activity.

(2) Retribution

An alternative rationale for criminal sanctions is retribution. Why exactly, from a retributivist perspective, is theft a crime? According to Kahan again, "[e]conomic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as *wrongful* . . . is that against the background of social norms theft expresses disrespect for the injured party's moral worth whereas competition (at least ordinarily) does not."[266] The question for us, then, is whether plagiarism is deserving of moral condemnation in the same way as other forms of theft.

As described above, the concept of plagiarism exists within a complicated system of social norms. To those who are within the relevant community, like Neal Bowers and other creative writers and scholars, the act of plagiarism conveys extreme disrespect. The reactive emotions plagiarism elicits are much like the emotions

264. Though indirect, the degree of the harm might well be significant. If plagiarism were rampant, scientists might do less basic science, novelists might write fewer novels, and historians might write less history. Eventually, the quality of our cultural life would suffer.

265. *See supra* note 256.

266. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (footnote omitted).

elicited by other forms of theft—a feeling of having been invaded, ripped off, exploited, even brutalized. The fact that so many writers on plagiarism have used the language of theft is revealing; it is more than just a metaphor. To its victims, plagiarism is no less harmful than fraud or embezzlement.

To those who are outside the relevant community, however, the moral content of plagiarism is less clear. Some may think of attribution, footnotes, and quotation marks as something they heard about in the ninth grade and haven't thought much about since. The rather abstract idea that *X* can "steal" credit owed to *Y* seems far removed from the familiar notion that *X* can steal *Y's* car or television set. To be sure, almost everyone has had the experience of having someone else take credit for an idea that one has thought of. But the notion that such conduct is deserving of *criminal* sanctions is a troubling one.

In this dichotomy, plagiarism presents a peculiar problem. The criminal law is supposed to protect the interests of a society as a whole. Yet plagiarism seems to be of concern primarily to a relatively small segment of society. Once again, we seem headed towards the conclusion that plagiarism may best be dealt with internally by academic and professional institutions that should be capable of policing themselves.

V. Plagiarism as Theft and the Criminalization of Intellectual Property Law

Probably no area of criminal law has experienced more growth in recent years than intellectual property, at least in terms of legislative enactments.[267] In the last two decades alone, Congress has criminalized both trademark infringement[268] and theft of trade secrets;[269] broadened the scope of criminal liability for copyright

267. The actual number of intellectual property crime cases prosecuted is a different matter. It does not appear that such statistics are currently compiled.

268. Trademark Counterfeiting Act, Pub. L. No. 103-322, 108 Stat. 2110, 2148 (1994) (codified at 18 U.S.C. § 2320 (1994)); *see also* Craig O. Correll, *Using Criminal Sanctions to Combat Trademark Counterfeiting*, 14 AIPLA Q.J. 278, 290–317 (1986) (listing state criminal provisions); David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1 (1998).

269. Economic Espionage Act, Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–39 (Supp. V 1999)); *see also* Eli Lederman, *Criminal Liability for Breach of Confidential Commercial Information*, 38 EMORY L.J. 921 (1989); Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853 (2002); James H.A. Pooley et al.,

infringement;[270] imposed criminal liability for the manufacture and sale of devices that can be used to circumvent technological protection measures;[271] and made trademark counterfeiting, theft of trade secrets, and copyright violation predicate acts under both the money laundering[272] and RICO[273] statutes.

On its face, none of this is surprising. Intellectual property plays an increasingly significant role in our economy. As intellectual property rights proliferate, it is reasonable to think that legislators will seek ways to protect those rights through various means, including criminal sanctions. Indeed, of the handful of commentators who have addressed the propriety of using criminal sanctions for intellectual property violations, most have simply assumed that the more prevalent the violation of intellectual property rights, the stronger the case for imposing criminal sanctions.[274]

The problem with this approach, however, is that there is a remarkable degree of resistance to such laws. Recent studies have shown that: more than half of all college students in the United States use illegal software[275]; between fifty and ninety percent of all

Understanding the Economic Espionage Act of 1996, 5 TEX. INTELL. PROP. L.J. 177 (1997).

270. Copyright Felony Act, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified as amended at 18 U.S.C. § 2319 (1994)); *see also* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (amending 17 U.S.C. § 506(a) (1994)); Loren, *supra* note 143.

271. Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (relevant provisions codified at 17 U.S.C. §§ 1203–04 (Supp. V 1999)); *see also Charges Dropped Against Russian Programmer*, WALL ST. J., Dec. 14, 2001, at A12 (federal prosecutors announced that they had dropped charges against Russian programmer Dmitry Sklyarov in first criminal case brought under DMCA after Sklyarov agreed to testify against his employer, ElcomSoft Co., in case involving design of device used to circumvent security features in Adobe's Acrobat Ebook Reader).

272. Pub. L. No. 103-325, 108 Stat. 2111 (1994) (amending 18 U.S.C. § 1956 (1994)).

273. Anti-Counterfeiting Consumer Protection Act of 1986, Pub. L. No. 104-153, 110 Stat. 1386 (1996) (amending 18 U.S.C. §§ 1961–68(1994)).

274. *E.g.*, Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 972 (2001) (asserting that criminal sanctions are necessary to deter intellectual property violations because "the possibility of civil sanctions alone is insufficient to deter violators"). *See also* Peter J.G. Toren, *The Prosecution of Trade Secrets Thefts Under Federal Law*, 22 PEPP. L. REV. 59 (1994); Goldstone & Toren, *supra* note 268. *But see* Loren, *supra* note 143; Moohr, *supra* note 176; Moohr, *supra* note 269.

275. Tom R. Tyler, *Compliance With Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 219–20 (Fall 1996–Winter 1997) (citing Susan L. Solomon & James A. O'Brien, *The Effect of Demographic Factors on Attitudes Toward Software Piracy*, *in* ETHICAL ISSUES IN INFORMATION SYSTEMS 168, 172 (Roy Dejoie et al. eds., 1981)).

computer software used is unauthorized[276]; more than a third of all business software used is pirated[277]; and unauthorized taping of music CDs and video tapes is widely regarded as acceptable.[278] These facts are certainly striking. One can only shudder to think what our society would be like if less than half the population complied with laws concerning robbery, burglary, or rape.

Whether and when criminal sanctions should be used for intellectual property violations is, of course, a large and difficult question. Rather than attempting to survey the field, I want to focus on two issues implicated by the foregoing discussion of plagiarism and the limits of theft law. The first issue relates to the apparent gap between the criminal law and norms concerning the misappropriation of intellectual property. The second issue is whether, and to what extent, the appropriate paradigm for intellectual property crime is "theft," rather than some alternative paradigm such as "infringement," "false marking," "counterfeiting," "forgery," or "regulatory violation."

A. The Gap Between Social Norms and Intellectual Property Crime Legislation

What are we to make of the fact that so many otherwise law-abiding people regularly engage in flagrant violations of the intellectual property laws? According to studies conducted by Tom Tyler, the primary factor in shaping law-related behavior is morality.[279] People avoid engaging in conduct they might otherwise engage in because they believe it is morally wrong to do so. A second

276. Tyler, *supra* note 275, at 219–20 (citing G. Stephen Taylor & J.P. Shim, *A Comparative Examination of Attitudes Toward Software Piracy Among Business Professionals and Executives*, 46 HUM. REL. 419, 430 (1993)).

277. John Schwartz, *Trying to Keep Young Internet Users From a Life of Piracy*, N.Y. TIMES, Dec. 25, 2001, at C1 (but noting that this figure is lower than it was in 1995).

278. Tyler, *supra* note 275, at 219–20 (citing Scott J. Vitell & Donald L. Davis, *Ethical Beliefs of MIS Professionals: The Frequency and Opportunity for Unethical Behavior*, 9 J. Bus. Ethics 63 (1990)). *See also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); JOHN ALDERMAN, SONIC BOOM: NAPSTER, MP3, AND THE NEW PIONEERS OF MUSIC (2001); Aaron M. Bailey, Comment, *A Nation of Felons?: Napster, The NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 482 n.53 (2000) (citing data regarding demographics of "copyright bandits"). *Cf. The Simpsons: Homer vs. Lisa and the 8th Commandment* (Fox television broadcast, Feb. 7, 1991) (Homer gets illegal cable TV hook-up and invites friends to his house to watch upcoming boxing match; Lisa fears that her family will go to hell for stealing).

279. Tyler, *supra* note 275, at 225; PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 201–03 (1995); Green, *supra* note 253, at 1591–93.

important factor is the perceived legitimacy of a given law. People need to respect the institutions that create and enforce the laws by which they are bound; they need to feel that such institutions are fair and can be trusted.[280]

Thus, the vast majority of people refrain from committing criminal acts such as murder, rape, and even theft not because they fear sanctions if caught, but because they have internalized the norms against such acts. Simply put, they believe that such acts are morally wrong and that the government is justified in making them criminal. With respect to such acts, we can say that the prohibitive norms are "robust."

In the case of intellectual property, however, these norms are anything but robust. As the above mentioned studies indicate, a large portion of the public apparently believes that violating intellectual property laws of various sorts is not wrong. People whose internal moral codes would never allow them to walk into a store and steal a piece of merchandise apparently think there is nothing wrong with making an unauthorized copy of a videotape or downloading a bootlegged computer program.

Why is the gap between norms and law in this area so wide? Why are such norms so "sticky"?[281] The fact that people think it is morally permissible to download an unauthorized computer program, but not to steal a book from a bookstore, cannot, I think, be attributed solely to the intangibility of such goods.[282] Nothing is more

280. *See* sources cited *supra* note 279. *See also* Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980).

281. Dan Kahan has described a phenomenon he refers to as the "sticky norms problem." Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000). The problem is as follows: in order to change the behavior of people who engage in certain forms of anti-social behavior which have undergone a change in public perception (such as date rape, domestic violence, and drunk driving), legislators sometimes "overreach" by enacting new legislation which treats such behavior harshly. *Id.* at 607–08. But because the prevailing social norms have not yet caught up to the legislation, police become less likely to arrest, prosecutors to charge, jurors to convict, and judges to sentence. *Id.* In such cases, says Kahan, the more severe the penalty, the more likely decision makers will be to resist its enforcement. *Id.* When norms are "sticky" in this way, argues Kahan, rather than proceeding with more condemnatory laws (he calls them "hard shoves"), it is more effective to proceed through "gentle nudges"—procedures that are less condemnatory, such as shaming sanctions, non-criminal regulation, private or quasi-private disciplinary proceedings, and the like. *Id.* at 609. Of course, in the case of plagiarism, comparatively gentle nudges are already the prevailing approach. The question here is whether hard shoves might also be justified.

282. *See, e.g.*, Johnson, *supra* note 226, at 4:5:

intangible than the "credit" stolen by the plagiarist, and yet, as we have seen, the norms associated with plagiarism remain relatively robust, at least within the relevant communities. Indeed, the difference in people's attitudes towards the norms of attribution and against plagiarism, on the one hand, and intellectual property law, on the other, suggests something of a paradox: Whereas intellectual property law (which, after all, *is* law) is regarded by the public as insufficiently grounded in norms, the mostly non-legalized norm of attribution and its corollary, the rule against plagiarism, are (at least within the relevant sub-communities) regarded as having something very closely approximating the force of law (hence, the repeated references to plagiarism as "theft," "larceny," "stealing," and so forth). Thus, if we are to find an explanation for why levels of intellectual property lawbreaking are so high, we need to look at least as much to the problem of perceived illegitimacy—i.e., the perception that many intellectual property laws are intended primarily "to create profits for special interest groups, such as [movie studios, record companies, television networks, and book publishers]"[283]—as to the problem of intangibility.

At the same time, the relative robustness of the rule against plagiarism suggests a partial solution to the problem of resistance to intellectual property crimes legislation. If the state is serious about enforcing intellectual property laws, it cannot simply expect to impose harsh criminal sanctions, stand back, and wait for compliance. It needs to convince the public that misappropriation of intellectual property is morally wrong (if in fact it is) and that the laws prohibiting such misappropriation are legitimate.

One of the reasons the attribution norm is so powerful is that people can relate to the potential victims of plagiarism. If I plagiarize your work today, you may turn around and plagiarize my work tomorrow. If people were convinced that the unauthorized downloading of MP3 files over Napster and similar websites was likely to hurt the artists who created the music, rather than simply the

> Seeing themselves as more Robin Hood than Captain Hook, the loose confederation of students, university employees and software company insiders was apparently motivated primarily by ideology—a belief that products consisting purely of information are somehow different from those you can hold in your hand. Like thoughts, they should be allowed to run free.

283. Tyler, *supra* note 275, at 233; Johnson, *supra* note 226, at 5 ("Software liberationists contend that the crime [of software misappropriation] is victimless—the people who use pirated software couldn't afford to buy it anyway. Or that freeing software is a blow against an Evil Empire whose Darth Vader is Bill Gates.").

multi-national media conglomerates that own the rights to that music, they might be less likely to persist in violating those copyrights. If the general public, perhaps as a result of re-education, began to feel about intellectual property violations the way writers and artists feel about plagiarism, then the prospects for compliance would be much better than they appear today.

B. Intellectual Property Crime and the Paradigm of Theft

If one surveys the range of intellectual property offenses made criminal, one cannot help but be struck by the central role played by the paradigm of theft and its closely related corollary, receiving stolen property. The idea that intangible property should be protected by theft law seems to crop up all over. For example, the Economic Espionage Act (EEA) imposes criminal penalties on anyone who "steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains" any trade secret related to a product in interstate commerce.[284] The National Stolen Property Act, which has often been applied to cases involving intellectual property,[285] imposes criminal penalties on anyone who "transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."[286] And the No Electronic Theft Act imposes enhanced criminal penalties for various violations of the copyright law.[287] What each of these enactments has in common is at least a literal commitment to the idea that intellectual property of various sorts might be subject to "theft" or to being "stolen."

What is important to note, however, is that theft is far from the only paradigm that applies in the context of intellectual property crime. Criminal statutes making it a crime to violate various rights in copyright,[288] patent,[289] and trademark[290] regularly rely on paradigms

284. 18 U.S.C. § 1832(a) (Supp. V 1999).

285. *See* Toren, *supra* note 274.

286. 18 U.S.C. § 2314 (1994).

287. No Electronic Theft Act, Pub. L. No. 105-147, § 2(b), 111 Stat. 2678 (1997) (codified at 17 U.S.C. §§ 101, 506, 507 (1994 & Supp. V 2000) and 18 U.S.C. §§ 2319, 2319A, 2320 (Supp. V 2000)); *see also* The Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028 (1994 & Supp. V 1999) (making it a crime to "steal" a person's identity).

288. 18 U.S.C. § 2319 (1994).

289. 35 U.S.C. § 292 (1994) (providing misdemeanor criminal penalties for false marking of patent).

other than theft—including "infringement," "false marking," "counterfeiting," "forgery," and "regulatory violation." (This is not even to mention the paradigm of "fraud," which plays a large role in intellectual property crime, and which seems to exist somewhere on the borders of the theft paradigm.)[291]

Despite the significance—both moral and doctrinal—of such paradigms, it is often difficult to determine why Congress chose to use one rather than another. From the perspective of intellectual property law, to refer to what are essentially copyright or patent violations as "theft" may seem inconsistent with the idea of "infringement" and "false marking" as *sui generis*.[292] From the perspective of criminal law, moreover, words like "theft" and "stealing" have particular expressive and moral resonances that are unlikely to find easy equivalence in the law of intellectual property. How exactly we should resolve these tensions is, of course, a project for another day. For the moment, I am content merely to raise the issue.

Conclusion

Plagiarism never has been, and probably never should be, prosecuted as theft. Why, then, should it be of interest to those who concern themselves with the criminal law? What I hope to have demonstrated is not only that criminal law can elucidate our understanding of plagiarism (through the use of concepts such as intent, willful ignorance, consent, harm, and the distinction between mistake of law and mistake of fact), but also that the concept of plagiarism can help us to understand important issues in criminal law itself (including the question of what kinds of "property" can be subject to theft).

Nor is the interest of plagiarism limited to purely criminal law. Although it is most commonly dealt with as an ethical, rather than legal, breach, the basic paradigm of unattributed copying is addressed by a remarkably broad range of civil remedies, including copyright, unfair competition, and moral rights. What this analysis has been intended to illustrate is both the ubiquity of the social norms that underlie the rule against plagiarism and the breadth of means through which such norms are enforced.

290. Trademark Counterfeiting Act, Pub. L. No. 103-322, 108 Stat. 2110, 2148 (1994) (codified at 18 U.S.C. § 2320 (1994)). *See also* Correll, *supra* note 268, at 290–317 (listing state criminal provisions).

291. *See* Moohr, *supra* note 176.

292. *See, e.g.*, J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994).

Effective law is, above all, the product of effective norms. As the gap broadens between what the law is and what people think it should be, intellectual property law faces a growing crisis, one which manifests itself in the widespread and flagrant violation of its constraints. By contrast, the norm-based rule of attribution—despite some fraying around the edges—is still viewed, at least by those within the relevant communities, as imposing a powerful moral imperative. As we seek ways to make our intellectual property law more robust, we would do well to look to the normative structures surrounding plagiarism for guidance.