

## Plagiarize This Jot

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Brian L. Frye, *Plagiarize This Paper*, **IDEA: The IP Law Review** (forthcoming 2020), available at [SSRN](#).

Oscar Wilde: "That was an awfully good joke you made last night. I wish I could say it was mine.

James Whistler: "You will my boy. You will."

Melvin Helitzer: One day Milton Berle and Henny Youngman were listening to Joey Bishop tell a particularly funny gag. "Gee, I wish I said that," Berle whispered. "Don't worry, Milton, [said Henny,] you will."



Plagiarism is not a crime, or even a cause of action. But it is the “academic equivalent of the mark of Cain,” a curse that cannot be undone. Even an unsubstantiated accusation leaves an indelible stain, and a credible complaint cannot be countered. A plagiarist is an academic pariah, a transgressor of the highest law of the profession, the embodiment of the “great deceiver,” who leads everyone astray. Anything else can be forgiven, for the sake of the scholarship. Plagiarism tarnishes the scholarship itself, and leaves it forever suspect. If the purpose of scholarship is dowsing for truth, then the plagiarist is a liar who poisons the well from which everyone draws.

This is a jot recommending Brian Frye’s short, lively, and incisive article about plagiarism, [Plagiarize This Paper](#). And, fittingly, everything you’ve read before this paragraph I’ve plagiarized from Brian’s work.<sup>1</sup>

Or have I?

Brian wants others to copy his words, and even his ideas, and he doesn’t care whether we attribute them to him. He tells us that very clearly in his paper:

I explicitly authorize plagiarism of this article. I permit and encourage people to copy this article and republish it under their own name. I permit and encourage people to copy expressions from this article and use them without attributing them to me. And I permit and encourage people to use the ideas expressed in this article without attributing them to me.

Brian's attempt to license plagiarism raises a fascinating question – what are norms against plagiarism really about? There are two, often entwined, interests that are usually identified as being protected by norms against plagiarism. First, it is often said that norms prohibiting plagiarism are there to protect *authors' interest in attribution*. So, for example, anti-plagiarism norms would protect a junior academic against unacknowledged taking of her ideas by a senior academic who might otherwise have the power to get away with it. That seems like an interest worth protecting, though, of course, figuring out the origin of ideas with any precision is often difficult in reality. And second, anti-plagiarism norms are often characterized as protecting *readers' interest in not being defrauded* – i.e., preventing a writer from fooling readers into thinking that a penetrating idea or a felicitous sentence is his when in fact it was invented by another. As a law professor who grades papers, this justification rings true to me – I want to know that the brilliant things that my students say in their papers are actually the product of their minds.

With respect to authors' attribution interest, Brian has made clear that he doesn't care about attribution, and that raises the question whether it's fair to condemn as a "plagiarist" someone who denies to Brian what he doesn't want. Brian is engaging in a provocation here: He thinks that people are likely to resist the notion of licensed plagiarism, which suggests that anti-plagiarism norms aren't actually about protecting authors or readers, but about something else:

Ultimately, plagiarism norms are just cartel rules dressed up as moral obligations. Different discursive communities have adopted different plagiarism norms because they have different economic interests. And the plagiarism norms adopted by a community reflect the economic interests of its members. As those economic interests are contested and shift, the community's plagiarism norms also are contested and shift. Accordingly, the plagiarism norms of any particular discursive community typically reflect the consensus interests of that community at that point in time.

I think Brian is on to something: If you look closely at institutional anti-plagiarism policies in the real world, it's difficult to explain their actual content purely by reference to the interest of authors in attribution, or of readers in not being lied to. As an example of how anti-plagiarism norms tend to over-run both of these justifications, take my own institution, NYU. Its standard of "[academic integrity](#)" begins with a general definition of plagiarism as "presenting others' work without adequate acknowledgement of its source, as though it were one's own." "Plagiarism," the general definition continues, "is a form of fraud. We all stand on the shoulders of others, and we must give credit to the creators of the works that we incorporate into products that we call our own."

This general definition that seems to focus precisely on the two justifications discussed earlier: (1) the interest of readers in not being lied to and (2) the interest of writers in receiving attribution when others are "standing on their shoulders." These are valid justifications for anti-plagiarism norms, so all seems fair enough so far. But then the NYU plagiarism statement gets down to some examples of use by one writer of the work of another that would count as plagiarism:

- a sequence of words incorporated without quotation marks
- an unacknowledged passage paraphrased from another's work
- the use of ideas, sound recordings, computer data or images created by others as though it were one's own

These examples don't mesh well with the two justifications. Take the first, "a sequence of words incorporated without quotation marks," or the second, which bars unacknowledged paraphrasing. If you think about whether taking a

“sequence of words” or paraphrasing without acknowledgment should count as either fraud on readers or unacknowledged shoulder-standing that hurts writers, you will realize rather quickly that the answer depends entirely on the particular words involved.

Let’s first imagine a student who takes these words: *And then the day came, when the risk to remain tight in a bud was more painful than the risk it took to blossom.*

Some people might recognize that these words comprise the entirety of Anais Nin’s short poem “Risk.” But some people won’t. If the student uses the words without acknowledgment, she will have defrauded readers who don’t recognize the source. We recognize the unacknowledged taking here as fraud on readers because of the effect of the specific words. They are lovely, insightful, richly metaphoric. Someone who doesn’t have Nin’s poetic oeuvre committed to memory might think that the genius of the words is the student’s genius, which it is not. And that gets to the other justification – the attribution interest of writers. Nin has a legitimate attribution interest here, precisely because this particular sequence of words is so highly creative. The student is standing on a giant’s shoulders, but unless she says so, not everyone is going to see that. If anyone qualifies as a plagiarist, this student qualifies.

Now let’s imagine a second student who takes these words: *When he lived in Chicago, Mojica sang in punk bands, ran a record label, and owned the Jinx Café and a video rental shop called Big Brother.*

I doubt you will recognize these words, and there’s no reason anyone should. They comprise a sentence of workmanlike journalistic prose, reporting basic facts about an actual person. These words, and others like them, were the subject of a recent public plagiarism scandal involving former *New York Times* editor Jill Abramson, who was accused of copying (actually, mostly paraphrasing) [in a book she wrote](#) short passages from articles written by a number of less-well-known journalists. In fact, Abramson cited (in the book’s endnotes) virtually all of the articles she used. But in several places she failed to put language that she copied or paraphrased in quotations. For that, she was publicly flayed.

Did Abramson deserve to be labeled as a plagiarist? She did not commit fraud in the same sense as did the student who took Anais Nin’s words without acknowledgment. The words Abramson took are certainly useful to her narrative, but no one is going to give Abramson any credit tied to the particular words. As literary composition they are utterly banal. The words do report facts, but the facts are of little or no value in themselves. Abramson is not making off with someone else’s diamonds, nor is she standing on another writer’s shoulders – the words comprise, at most, a very small foot-stool. At bottom, Abramson is simply reproducing a sequence of words without telling you where they originated.

In the end, that’s what many plagiarism disputes are largely about. Not fraud on readers, or failing to acknowledge that one is “standing on the shoulders” of another writer, as the NYU general definition of “plagiarism” claims, but the mere reproduction of words. That is also what copyright law is about, and one might ask why we extend plagiarism norms beyond their core when we have copyright to police mere word-taking. Brian has an explanation:

Essentially, academic plagiarism norms are the equivalent of a tax imposed on junior scholars, for the benefit of senior scholars. Junior scholars must err on the side of attributing ideas to senior scholars, whether or not attribution is accurate or helpful, on pain of suffering a plagiarism accusation. As a consequence, senior scholars collect “interest” on the intellectual capital of junior scholars.

That’s a big idea, one that extends beyond ideas to works, and also beyond academia to journalism and other places where enforcement of anti-plagiarism norms is particularly fierce. And Brian deserves full credit for this idea. Even if he doesn’t want it.

1. Except for the Henny Youngman joke, which I re-purposed from a paper of my own to make a point about the ubiquity of plagiarism. See Dotan Oliar & Christopher Jon Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 **Virginia L. Rev.** 1787 (2008).

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