

Plagiarism, Copyright, Academia and Commerce

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Introduction

The sweeping title of my talk “Plagiarism, Copyright, Academia and Commerce” reflects, I confess, not a successful attempt to weave these overlapping topics into a coherent half-hour discussion, but rather a retreat into generalities after a realization that the focus of much of my work that intersects with issues of plagiarism – namely music copyright infringement (which is oriented very much toward popular music, and the commercial sector) – is not readily accommodated within a discussion of academic ethics. And so, in an effort to hew to the subject of today’s discussion, I plan to bandy about the first three terms of my title for the balance of my talk, but the fourth, the commercial sphere, and specifically my interest in music copyright infringement we’ll need to postpone for another time.

The topic we consider today, academic honesty, is timely indeed, as evidenced by the spate of articles appearing recently in newspapers and elsewhere, on worrisome trends in the behavior and attitudes of students toward plagiarism and cheating in their academic work. Dire statistics, charting, for instance, changes over time in percentages of students who admit to cheating, suggest a sudden and serious decline in standards of morality and decency among undergraduates in particular. I’m skeptical of implications

of growing moral depravity among undergraduates, however, and believe that the “plagiarism epidemic” – to the extent it exists – is mainly a result of the simple fact that the web has made plagiarism much easier than it used to be in the print environment.

How so?

First, with the web it is almost impossible *not* to find something relevant to one’s topic. While the quality of the information may be abysmal, using skillful cutting and pasting, it is now possible to cobble together, over the course of an evening, a term paper, without even re-keying another’s text.

Second, because the quantity of information on the web is vast and promiscuous, and because most interactions on the web are anonymous and done in isolation, there has developed a general insouciance toward intellectual property rights associated with digitized information. Simultaneously, the fear of opprobrium for, or even detection of, inappropriate copying has considerably diminished with the advent of web research.

Copyright and Plagiarism

Now that I have broached the issue of intellectual property (and, for purposes of this discussion that means copyright) I should note that the question of academic plagiarism has spawned an overheated polemic not dissimilar to that evoked by the question of liability for copyright infringement in the digital era, especially with respect to filesharing. On this matter we hear, on one hand, from copyright anarchists like John Perry Barlow, touting shopworn hokum about information wanting to be free. We hear echoes of this attitude from a distant faction of the copyright anarchists’ camp where we

find literary deconstructionists waxing rhapsodic about hypertexts and appropriationist art. In her recent piece in Law & Critique, Daniela Carpi writes along these lines:

In a social context of trust in one's own progressive possibilities, 'plagiarism' is demonized as 'theft and robbery'. Differently, in an era where art is ontologically based on a competitive confrontation with preceding tradition, 'plagiarism' takes on a positive connotation of ability, erudite comparison, insistence upon style and form. 'Plagiarism' has lost its connotation as linguistic taboo and entered into the semantic field of "play, puzzle, creative revision, misprision. ["Misprision" is polysemous, and I'm not sure what Carpi is suggesting by it in this context.]

Elsewhere, however, and not exclusively from the commercial sector, we hear of the essential and still vital role of copyright in providing economic incentives to authors and creators. In an article discussing recent challenges to the efficacy and legitimacy of copyright, Jane Ginsburg of Columbia Law School notes:

Rhetoric has supplied a heavy cudgel in the battering... Consider "sharing." Before Napster, sharing meant giving something up so that others could enjoy the object with which the sharer parted... That is also why "sharing" was laudable; it implied the selfless improvement of the lot of others. But Napster brought us a new kind of "sharing," one in which recipients could enjoy the giver's munificence, while the giver never had to give anything up... Everyone benefited; everyone, that is, except the creators and owners of the copied works."¹

Plagiarism and copyright infringement both involve the appropriation of another's intellectual effort, but they are different concepts in many respects. To return to our overarching topic of academic honesty, and the specific problem of academic plagiarism, it might be useful to tease out the differences between these concepts before posing a few simple suggestions for mitigating academic plagiarism.

¹ Jane C. Ginsburg, "How Copyright Got a Bad Name for Itself," 26 *Columbia Journal of Law & the Arts* 61, 63 (2002).

Copyright infringement involves the unauthorized copying of copyrightable material – i.e. original expression, not facts. Copyright law does not require that the infringer attempt to pass the material off as his own – in fact, in cases of blatant piracy the infringer often hopes to pass the material off as that of another, i.e. the true author – as do those engaged in forgery.

Copyright vests automatically in works of authorship from the moment they are fixed in any tangible medium of expression, giving the author (and his heirs) the exclusive right to reproduce, adapt, distribute, perform, and display the work for their life plus 70 years following the death of the author. The U.S. copyright statute preempts any attempt by the states to regulate in this area, and all copyright disputes are handled by federal courts.

Plagiarism involves taking the product of another's intellectual work and misattributing it as one's own. That the original creator may have authorized such taking has no effect on whether it constitutes plagiarism. Plagiarism may involve copying factual or public domain material (e.g. out-of-copyright materials or federal government publications); it does not necessarily involve taking copyrighted material, and even when it does, the taking in many of cases involving academic work is not actionable as copyright infringement because fair use principles would apply. Plagiarism is neither a tort nor a crime -- it is an ethical, not a legal offense. Accordingly, courts never handle plagiarism disputes; academic authorities do so, typically by attempting to interpret and enforce wispy honor codes.

Let's suppose I am given an exercise in an Environmental Science course to compile a list of all the deciduous trees on the Colby campus. My list (assuming it is correct) contains purely factual, and not copyrightable, information. If my roommate copies my assignment and turns it in under his name, he has plagiarized my work, but he is not liable for copyright infringement. My assignment becomes copyrightable only after it loses its purely factual cast by my adding to it expressive material, like unsolicited poetic responses to the colors of particular trees, or an idiosyncratic approach to the organization and presentation of the information. If I grant my roommate permission to copy my expressive assignment and turn it in as his own, neither of us has violated the copyright law, although my roommate is responsible for plagiarism, and I have undoubtedly breached Colby's policy (I assume one exists) on impermissible collaboration.

Like my list of trees, which may have taken hours to compile, answers to statistics or physics problem sets, completed foreign language grammar worksheets, biology lab reports, and other factual and quantitative academic work products are offered no protection under copyright law. In other words, undergraduate work product that is arguably the most intellectually challenging to produce (it was for me) is provided the least copyright protection (e.g. lab reports and problem sets). Moreover, while it is the easiest information to copy, the plagiarism of it is the most difficult to detect.

A Commercial Response to Academic Plagiarism

Uncertainties about the legal status of plagiarism, and commonalities between plagiarism and copyright infringement, have been capitalized upon by those with a vested interest in promoting the notion of plagiarism as a rampant problem – in particular commercial ventures like turnitin.com, selling products that purport to detect and discourage plagiarism. Let's turn *them* in.

Borrowing officious terminology from law and medicine (e.g. “epidemic” of plagiarism; “crime” of plagiarism) profit-seeking enterprises like this conflate plagiarism with copyright infringement in a bid to add legal taint and a more threatening tone to academic plagiarism. The implication from such borrowing is that this is no longer a matter merely for dithering academic authorities, but also for federal judges and perhaps prison wardens as well! Astonishing too, at least with the turnitin product, is the fact that customers are not only charged to use it, but are also compelled in doing so to contribute to the product's development by submitting students' work (much of which *is* copyrightable) to the product's database, thereby making the product potentially more valuable (which means, in turn, that the merchant can capitalize on this network externality to charge more for it over time).

Let's consider a few of the inaccurate statements about plagiarism and copyright that one finds in the Frequently Asked Questions portion of the turnitin.com site.²

FAQ: What is plagiarism?

ANSWER: Any time you borrow from an original source and do not give proper credit, you have committed plagiarism and violated U.S. copyright laws

THE TRUTH: *False!* Copyright law has nothing to do with crediting sources; crediting an author in no way exonerates one of copyright infringement liability. At the same time, one can freely use great quantities of expressive material without permission, without attribution, and without liability for copyright infringement if the use involves a public domain source, or constitutes a fair use.

FAQ: Can facts be copyrighted?

ANSWER: Yes, in some situations. Any "facts" that have been published as the result of individual research are considered the intellectual property of the author.

THE TRUTH: *False!* Title 17 USC Sec102(b) on subject matter of copyright:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work. [In other words: copyright protects only an author's expression of an idea or arrangement of facts – but never the underlying ideas or facts themselves.]

² Last consulted October 10, 2003. See http://www.turnitin.com/research_site/e_faqs.html

FAQ: What are the punishments for plagiarism?

ANSWER: “Legal Punishments” Most cases of plagiarism are considered misdemeanors, punishable by fines of anywhere between \$100 and \$50,000 – and up to one year in jail...

If you can demonstrate...that you reasonably believed what you did was fair use, chances are that your sentence will be lessened substantially. [emphases added]

TRUTH: *False!* Plagiarism isn’t a crime of any sort. If turnitin is actually referring here to copyright infringement and not plagiarism, the possibility of criminal charges arises only when there is willful infringement and a clear intent to make money at the expense of the rightful copyright owner (or undermine the owner’s normal revenue stream) -- in other words, where systematic, large-scale piracy of profitable software or entertainment is involved. Jail sentences are an issue only in the most egregious cases, and are rarely imposed.

I consider products like turnitin.com nice examples of silicon snake oil – smoke and mirrors mechanical processes that hold the promise of relieving instructors of their responsibility to take reasonable measures to prevent plagiarism, and to know their fields and their students well enough to detect it when it occurs.

Recommendations

Permit me one parable. Last summer I attended Music at Marlboro concerts in Vermont (by the way, they are invariably superb). Driving the byways in the area around Marlboro I brought our '93 Ford Taurus (since, sadly, deceased) to a sudden stop in front of an unattended roadside stand stocked with fresh raspberries and a Mason jar with some cash and a little sign asking customers to help themselves and simply place money owed in the Mason jar. Not being Hansel, or my wife Gretel, it took little effort for us to conclude:

1. Someone invested effort to produce and package this product.
2. That person expected to keep the product or to be paid for their effort.
3. I had a moral and legal obligation to pay for any raspberries I took.
4. Those obligations would hold even if the stand had been placed on the Marlboro village green, and not on private property.

My point, of course, is that one can extrapolate from this vignette involving tangible property, a consensus as to appropriate modes of conduct involving intangible property, namely the intellectual work product of another, whether a recording of a performance by the Spice Girls, or answers to an undergraduate physics homework problem set. (I realize I'm stretching credulity in mentioning the Spice Girls as a producer of intellectual work product.) And, I'm confident that my conclusions in

Marlboro comport with those of law's "ordinary man" and in no way indicate a too finely calibrated moral compass.

About academic plagiarism I think most of us, undergraduates included, would subscribe to Justice Potter Stewart's oft-mentioned comment about pornography – "I know it when I see it," – and I would like to wrap up with a few suggestions as to how we might mitigate the potential for academic plagiarism, particularly by undergraduates, in the digital era:

1. Exams

For lecture courses give proctored, closed book exams. Proctors aren't demeaning, they're reassuring; and nothing inspires student panic more than open book exams. I would recommend that undergraduate instructors take their cue from legal education where exams are the norm in most courses, and where plagiarism and cheating is generally not a serious problem, in part because the stakes are so high – different grades mean different jobs and salaries – and tolerance for it so low.

2. Term Papers.

Reserve paper assignments for seminars where instructors can work on progressive drafts of students' work, and thereby become familiar with their students' styles. Incorporate oral presentations into seminars as much as possible. A piano teacher once rightly told me: "if you can sing it, you can play it; I've found that if you can speak

it, you can write it.” In any event, when you are on your feet, compelled to use your own words, plagiarism can’t help.

3. Pen and paper. (I realize that I am going out on a limb here...)

The low-tech solution. In the late ‘80s, when I worked in the Copyright Office, Daniel Boorstein, the Librarian of Congress at the time, mentioned in an informal presentation that he could always identify something written on a word processor because it was twice as long as it should have been. (I think he used a manual Smith Corona, but was spectacularly prolific). As recently as 10 years ago when I was a graduate student in musicology, fellow students, foreigners in particular, would turn in handwritten term papers. Requiring handwritten drafts won’t necessarily obviate plagiarism, but at a minimum it will ensure that those who do plagiarize will learn something in the process of hand copying – which they will not if they cut and paste electronic text. Handwritten documents have an aura of intimacy, immediacy and authenticity that is entirely lost in typeface.

Conclusion

Plagiarism by students may be a significant, and possibly growing, concern, but while we’re discussing academic honesty, it might be worth mentioning another ethical quandary in academia that shifts our attention from students to instructors – namely favoritism. When I was a graduate student I once met with a group of undergraduates seeking advice on academic careers in musicology. The only meaningful advice (other

than “get out while you can!”) came from a fellow graduate student whose dead-pan recommendation was: “sleep with the faculty.”

Her sensational suggestion had the ring of truth to it. My impression is that the covert advancement of students (graduate students mainly) based upon personal characteristics and extra-academic relationships (frequently sexual) is as demoralizing as is plagiarism to students who are not personally entangled with instructors while enrolled in college or university. (I recall reading years ago, from that literary treasure, Mad Magazine, a riff on “people not to trust,” that sagely included on the list “classmates who talk to the teacher after class.”) Anonymous grading at law schools addresses this problem, and I wish such policies were adopted by educators in other disciplines.

I was heartened to read of the University of California’s draconian “zero-tolerance” policy toward faculty-student romances, realizing that the greatest beneficiaries of it will not necessarily be those students whose romantic entanglements with faculty members have gone sour, but may be, in fact, the majority of students who do not become personally involved with their instructors.³ But, this is a matter for another conference, and so I’ll conclude with thanks to you for your kind attention, and to Michael Hanrahan in particular for his excellent work, and for inviting me to participate in the discussion today.

³ Sara Rimer, “Love on Campus: Trying to Set Rules for the Emotions,” New York Times, Sec. B, p. 8 (October 1, 2003).