

PLAGIARIZE THIS PAPER

BRIAN L. FRYE*



Phil May, *Oscar Wilde and Whistler* (1894)

“That was an awfully [witty remark] good joke you made last / night.

I wish I [had made it.] could say it was mine.’ / ‘You will my boy. You will.”

* Spears-Gilbert Associate Professor of Law, University of Kentucky School of Law. This essay is licensed CC0/public domain, and I specifically authorize plagiarism. Thanks to Luce Nguyen for invaluable research assistance and to the many people who made helpful comments.

It is meet and just that I write this essay while toiling in the salt mines of academia. We academics devote our works and days to scouring those mines for ideas in the rough. Some of us discover a rich vein, but others must comb through the tailings. Whatever we find, we cut and polish until it glistens and shines. Of course, some ideas prove to be diamonds while others remain mere pebbles. But then a diamond is just a pebble that many people admire, and one person's diamond is another's pebble. Regardless, academics strive to find the scholarly diamond hidden in every pebble of an idea. But we are curiously indifferent to the commercial value of what we discover. On the contrary, we participate in an academic gift economy. We labor to produce knowledge and share it with everyone, whether or not they asked.

Of course, academics aren't really altruists. We just expect compensation in a non-monetary form. We demand attribution, the coin of the scholarly realm. We fill our purse with citations, and dole them out liberally, in the hope they are fruitful and multiply, and return tenfold. Every cite is sacred, every cite is great, and if a cite is wasted, we get quite irate. We encourage copying, so long as we get credit, but if someone copies without giving credit, we consider that person a thief. Or rather, we call that person a "plagiarist," a "kidnapper" of ideas.¹

Everyone wants to own the form of capital he or she happens to value. Academics value intellectual capital, so we want to own ideas. And we use plagiarism norms to create the kind of property we want to own. Copyright says you can't own an idea, which is a bummer. But plagiarism

¹ The word "plagiarism" is derived from the Latin word "plagium," which means "a kidnapping."

norms mean never having to say you're sorry. Whatever the law says, we say otherwise.

Plagiarism is not a crime, or even a cause of action.² But it is the “academic equivalent of the mark of Cain,” a curse that cannot be undone.³ 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.

Why is plagiarism anathema, especially to academics? After all, until relatively recently, academic attribution was the unusual exception to the rule of unattributed copying. The glory of the Renaissance was not the novelty of the ideas it produced, but the profundity of the ideas it rediscovered. When did we invent the concept of plagiarism, and what was it supposed to accomplish?

The apostles of academic plagiarism norms—the “plagiarism police”—insist that they reflect the fundamental ethical values of the profession. Plagiarism is wrong because it is “dishonest.” Readers are entitled to know who created an expression or idea, and authors are entitled to recognition for the expressions and ideas they

² See Brian L. Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133 (2016).

³ K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 61 (1988).

create. But more importantly, the plagiarism police are entitled to define plagiarism, investigate offenses, prosecute charges, and punish offenders. Who are the plagiarism police? Members of the profession, of course, eager to perform fealty to its values.

I disagree. Plagiarism norms are primarily an extra-legal, inefficient, and illegitimate way for academics to claim property rights in the public domain. Copyright cannot and should not protect ideas, and plagiarism norms are simply copyright by other means. Attributing ideas should be voluntary, not mandatory. Academics should provide citations because they are helpful to readers, not because they are an obligatory form of obeisance. We should encourage people to attribute ideas whenever helpful and appropriate, but we should refuse to recognize the self-interested and unreasonable claims of those who seek to enforce plagiarism norms for their own sake and in their own interests.

I. STEAL THIS BOOK

In 1971, Abbie Hoffman self-published his notorious Yippie manifesto, *Steal This Book*, which he wrote in 1970, supposedly while he was in jail for his role in the 1968 Democratic National Convention protests.⁴ The book is essentially an instruction manual for counterculture activists, in three parts: Survive!, Fight!, and Liberate! The first part explains how to get free stuff, the second part explains how to agitate, and the third part is a directory. While some of the information in the book is of dubious accuracy and safety (please don't make the pipe bombs), it was timely and provocative. Above all, it

⁴ ABBIE HOFFMAN, *STEAL THIS BOOK* (1st ed. 1971).

lamponed “square” America and gleefully encouraged its youthful audience to “fuck the rules.”

At least thirty commercial publishers rejected the book, because they found its premise appalling and its contents seditious. So, Hoffman created “Pirate Editions” to publish the book, which was distributed by Grove Press. And it was a hit. The mainstream media refused to review the book and Hoffman didn’t run any advertisements, but word of mouth and the alternative press made the book a bestseller.⁵

Ironically, what the title of Hoffman’s book promised, the copyright page took away. Just like any commercial publisher, he included a copyright notice, claiming copyright in the contents of his book for the corporation he formed in order to publish it, Pirate Editions, Inc.⁶

*Copyright © 1971 by PIRATE EDITIONS, Inc.
640 Broadway, New York, N.Y. 10012*

Apparently, Hoffman was fine with people stealing from bookstores, so long as they didn’t steal from him. Oddly, he didn’t register *Steal This Book* with the Copyright Office, even though he registered many of his other books.⁷ But his failure to register didn’t affect the

⁵ Dotson Rader, *Steal This Book*, N.Y TIMES, July 18, 1971, at BR19.

⁶ It is unclear whether Hoffman actually created a corporation. The New York State Department of State Division of Corporations Corporation and Business Entity Database does not include any record of a business entity named “Pirate Editions, Inc.”

⁷ The first copyright registration on record for *Steal This Book* is from 2009, when Hoffman’s daughter Johanna Lawrenson registered a 2002 edition of the book, with a new foreword and introduction. Registration No. TX0007099834.

copyright status of *Steal This Book*, because he published it with a copyright notice.⁸ In fairness, Hoffman and his estate seem to have turned a blind eye to copyright infringement. But still, *Steal This Book* is protected by copyright and unauthorized uses are prohibited.⁹

Even more ironically, Hoffman may have “stolen” *Steal This Book*. Hoffman prominently credited “Izack Haber” as his “co-conspirator” and acknowledged that Haber did most of the research.¹⁰ But Haber claimed that he wrote the book and Hoffman took the credit.¹¹ In other words, Haber accused Hoffman of plagiarism.

Should we care? I think not. After all, it doesn't matter. While Haber was disappointed by Hoffman's betrayal, he didn't really care about getting credit for writing the book. And if Haber didn't care about Hoffman taking credit for the book, why should we? Sure, it changes the meaning of the book, but probably for the better. At the very least, it makes the distasteful hypocrisy of Hoffman's copyright claim much funnier.

But I am a lonely dissenter. Everyone hates a plagiarist. Or rather, authors hate plagiarists with a

⁸ *Steal This Book* is a corporate work, so the copyright term is ninety-five years from publication, and the book will enter the public domain on January 1, 2067. If Pirate Editions, Inc. did not actually exist, then the copyright term is the life of the author plus seventy years. Hoffman died in 1989, so the book would enter the public domain on January 1, 2060.

⁹ Cf. Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (observing that pure copying can promote free speech values).

¹⁰ Haber's first name was actually spelled “Izak.”

¹¹ Izak Haber, *An Amerika Dream: A True Yippie's Sentimental Education or How Abbie Hoffman Won My Heart and Stole “Steal This Book,”* ROLLING STONE, Sept. 30, 1971, at 32–33.

passion, and their audiences love to agree. There is no presumption of innocence for plagiarists. On the contrary, the accusation alone is enough to make out the crime. And anyone can raise the hue and cry. Indeed, more often than not, it isn't the "victim" who complains of plagiarism, but the plagiarism police, ever vigilant in enforcing the rules against copying they accept as gospel, immune from criticism or question. In other words, authors own an attribution right and their guild will enforce it, whether they like it or not.

II. REIFY!

In capitalist countries like the United States, it's always easy to convince people that property rights are justified. Indeed, even self-professed communists will happily endorse property rights, so long as you carefully define them as moral obligations.¹² Plagiarism norms are the quintessential example. After all, the attribution rights created by plagiarism norms are just property by other means. And yet, people who generally oppose property rights—even copyright skeptics—still find plagiarism appalling, because they consider attribution a sacrosanct moral obligation.

Of course, we've been transmogrifying expressions into property for centuries. We created the concept of authorship in order to reify works and deeds previously attributed to everyone and no one in particular. And we created copyright in order to transform reproducible works of authorship into property we could buy and sell. Over time, we gradually extended copyright protection to anything and everything we create, no matter how trivial or

¹² See Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L.J. 547 (2019).

banal. Today, copyright protects everything but telephone directories and shovels.¹³

The only thing copyright doesn't protect is attribution. Or rather, copyright protects attribution only when it doesn't matter.¹⁴ In practice, copyright often makes attribution obligatory, as copyright owners can make attribution a condition of a license or transfer. But copyright owners can publish a work anonymously or pseudonymously and can even effectively "license" attribution. After all, ghostwritten "memoirs" are common, if not the norm. And at least in theory, the fair use doctrine doesn't require attribution, although many judges read attribution into the statute, and it certainly seems to help with juries as well.¹⁵

But copyright can't protect attribution if copyright doesn't apply. Copyright can only protect the "original" elements of a work. Accordingly, it can't protect the elements of a work that are too simple, banal, or abstract to be original. So, copyright can't protect short phrases, because they are too simple. It can't protect common expressions, because they are too banal. And it can't protect ideas, because they are too abstract. In addition, the copyright term is limited, and copyright can't protect

¹³ See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S.Ct. 1002 (2017); *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁴ The Visual Artists Rights Act of 1990 granted a limited attribution right to certain authors of "works of visual art," but made it waivable. Accordingly, buyers can insist on a waiver in the unusual event they would find attribution undesirable. See 17 U.S.C. § 106A. Typically, the owners of works of visual art want to attribute the work to its author, because attribution is what makes the work valuable. Attribution disputes tend to arise when artists disclaim authorship of a work.

¹⁵ 17 U.S.C. § 107 (1992).

attribution after it expires, and a formerly copyrighted work falls into the public domain.¹⁶

Accordingly, social groups use plagiarism norms to create attribution rights when copyright cannot. Different groups create different norms for different reasons. Comedians want to own their jokes.¹⁷ Journalists want to own the news.¹⁸ And academics want to own ideas.¹⁹ Copyright is useless to them, because it can't protect what they want to own. So they create plagiarism norms that give them what they want, when copyright can't provide.

Plagiarism norms are far from novel. Indeed, they long predate copyright and have always existed in tandem with it. The concept of plagiarism may have been created in ancient Greece and classical Rome. At the very least, they gave us the word, derived from “kidnapping.” It expressed the outrage of an author denied the honor of attribution. Authorship and plagiarism became less important in medieval Europe, with certain exceptions, tied to specific literary economies.²⁰ But as the invention of printing led to the creation of copyright, the concept of plagiarism shaped its development, and persisted as a

¹⁶ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

¹⁷ 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 VA. L. REV. 1787 (2008).

¹⁸ WILL SLAUTER, *WHO OWNS THE NEWS? A HISTORY OF COPYRIGHT* (2019).

¹⁹ Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133 (2016); Steve Fuller, *Against Academic Rentiership: A Radical Critique of the Knowledge Economy*, POSTDIGITAL SCIENCE AND EDUCATION, Oct. 2019.

²⁰ Brian L. Frye, *The Stolen Poem of Saint Moling*, in FORGOTTEN INTELLECTUAL PROPERTY LORE (Shubha Ghosh ed. Edward Elgar 2020).

parallel form of extra-legal right, expressing itself in a constellation of different ways, depending on who wanted to claim it and why.

Gradually, different social groups settled on different sets of plagiarism norms. But the norms were always fluid, changing in response to social and economic circumstances. For example, journalistic plagiarism norms were quite minimal in the early nineteenth century but became much more rigid as competition increased in the late nineteenth century. Initially, copying was encouraged. Newspapers mailed copies to each other, and editors used scissors to compose newspapers under their own byline. But later, as newspapers consolidated and information became more valuable, editors began to demand attribution and object to copying.²¹

Similarly, novelists and playwrights expected and demanded more and broader protection as their works became increasingly valuable. They wanted to prevent competition, by any means necessary. Where unattributed copying had once been the norm, plagiarism norms began to emerge.

Of course, academics also developed a set of plagiarism norms, designed to reflect the market in which they distribute their work and their own interest in that market. Among other things, the academic gift economy differs from the market for other kinds of works of authorship, because it primarily values reputation. Accordingly, academics largely ignored copyright, which focuses on the commercial value of a work of authorship and directed their attention to creating and enforcing ever

²¹ WILL SLAUTER, *WHO OWNS THE NEWS? A HISTORY OF COPYRIGHT* (2019).

more robust plagiarism norms, which focus on attribution and control, rather than economic returns.

III. CREATING ACADEMIC PLAGIARISM NORMS

As Sayre’s Law wryly observes, “Academic politics is the most vicious and bitter form of politics, because the stakes are so low.”²² The academic politics of plagiarism are the most vicious and bitter of all, because the stakes are at their very lowest. The only thing at stake is kudos, and only among an esoteric community of peers unlikely to be fooled by dissembling. The archetypal victim of plagiarism is outraged that a peer has failed to adequately recognize his or her contribution to the field, a wrong easily remedied by a citation to the aggrieved scholar’s work. One is rather reminded of the notorious “Reviewer 2,” always recommending references to him or herself.

Of course, there is another kind of plagiarism, which is both insidious and cruel, but almost always goes unspoken. Certain scholars make a habit of taking ideas shared in confidence and claiming them as their own. Typically, this kind of plagiarism is effective only when the thief outranks the victim and is “beyond reproach.” But it is also inexplicable, or rather, has only a pathological explanation. After all, why steal an idea from a junior scholar, other than to humiliate that person?

In order to better understand both the seen and unseen varieties of plagiarism, let us reflect on why academic plagiarism norms took their unique form. Unlike many other authors, most academics not only permit copying, but also actively encourage it. Nothing could

²² Sayre’s Law is the namesake of Wallace Stanley Sayre (1905-1972), a professor of political science at Columbia University. This version of Sayre’s quip is from the *Wall Street Journal*, Dec. 20, 1973.

make them happier than to see their scholarship copied and distributed, so long as they receive attribution. While academics typically own the copyright in the works of authorship they create, they don't really care about it. After all, individual scholarly works rarely have any commercial value, so the exclusive right to reproduce and distribute them isn't particularly valuable. The academic's dilemma isn't protecting the market for his or her work, but generating any interest in it at all. Free, open-access publication is increasingly common among scholars, but most open-access scholarship still attracts few readers.

The only kind of literary ownership academics really care about is attribution. The currency of the academic realm is citations, so academics jealously hoard them. If you copy an expression or idea from a scholarly work, academic plagiarism norms obligate you to provide a citation. And the author of the work, not to mention other academics, will object vociferously if he or she discovers that you have ignored your obligation. But that isn't the half of it. Academics will also object if you use an expression or idea without attribution, whether or not you copied it. They will object if you copy a factual claim found in an academic work without attribution. And they will even object if you copy a list of cited authorities from a footnote in an academic work without attribution.

What academics want to own, more than anything else, are the ideas they invested so much time and energy mining, and the labor they invested in shining and polishing those ideas. Sadly, copyright does not and cannot protect ideas or labor. But academic plagiarism norms can. Indeed, protecting ideas is the primary reason academics created plagiarism norms.

Essentially, the purpose of academic plagiarism norms is to create an extra-legal attribution right, by imposing an obligation to provide attribution that wouldn't otherwise exist. In other words, if copyright creates property rights in works of authorship, then plagiarism norms create a kind of quasi-property right in attribution. Copyright gives authors certain exclusive rights in the works of authorship they create, but not necessarily the rights they actually want. Plagiarism norms are how authors claim the rights they want to own that copyright doesn't give them.

IV. DEFINING ACADEMIC PLAGIARISM NORMS

The essence of plagiarism is unattributed copying.²³ Under the Modern Language Association's ubiquitous definition: "Plagiarism is presenting another person's ideas, information, expressions, or entire work as one's own."²⁴ While copyright infringement and plagiarism often overlap, and are often used as synonyms, they are conceptually distinct. Copyright is created by federal law and gives authors certain exclusive rights to reproduce and distribute the works of authorship they create. By contrast, plagiarism norms are created by social groups and give authors certain attribution rights.

Sometimes, plagiarism is also copyright infringement. For example, if someone copies most or all of a copyrighted work and publishes it under his or her own

²³ Andrew M. Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 532 (2019) (defining a "plagiarist" as "someone who copies the written work of another without giving attribution to the original author").

²⁴ *Plagiarism and Academic Dishonesty*, THE MLA STYLE CENTER, <https://style.mla.org/plagiarism-and-academic-dishonesty> [<https://perm.a.cc/5HBR-JPZ4>] (last visited Nov. 19, 2019).

name, it is both plagiarism and copyright infringement. In practice, the copyright owner of the original work could use an infringement action to prevent both infringement and plagiarism. However, the cause of action for copyright infringement would only cover the reproduction and distribution of the original work, not the misattribution. In addition, only the copyright owner can assert an infringement claim. If the copyright owner doesn't object, no one else can intervene.

But usually, plagiarism is not copyright infringement and is perfectly legal. For example, copyright does not and cannot protect ideas, prohibit fair uses, or regulate the public domain. Accordingly, there is no legal obligation to attribute ideas, short phrases, or public domain works. If I wrote an article arguing that we should evaluate political decisions from “behind the veil of ignorance,” without attributing the idea to John Rawls, his estate would have no cause of action because copyright can't protect ideas. If I ran a political campaign arguing that “all you need is love,” the John Lennon estate would have no cause of action because copyright can't protect short phrases. And if I published Mark Twain's novel “Huckleberry Finn” under my own name, no one could stop me, because it is in the public domain.

As a result, a plagiarism charge is usually not a legal cause of action, but an ethical complaint. Sometimes, aggrieved authors object to someone copying their ideas without attribution. Other times, the plagiarism police identify transgressions and object on the author's behalf. Regardless, the courts are rarely involved. Plagiarism complaints are typically “litigated” within institutions or in the media. Effectively, plagiarism norms create a de facto extra-legal attribution right. If you create a work of authorship, then plagiarism norms apply, and entitle you to

attribution whenever any element of the work is copied, whether or not that element is protected by copyright. Indeed, plagiarism enforcement focuses primarily on ideas and short phrases, which copyright cannot protect.

Notably, anyone can enforce plagiarism norms. Unlike copyright, which is exclusive to the author of the copied work, plagiarism norms belong to everyone. Often, authors make plagiarism accusations themselves. But just as often, others make accusations for them, sometimes without the author's knowledge or approval. It doesn't affect the gravity of the complaint. No matter who invokes plagiarism norms, the knives come out.

And yet, despite their importance, plagiarism norms are notoriously ambiguous and contextual. The awkward truth is that, as St. Onge ruefully observed, plagiarism norms inevitably reduce to Justice Stewart's famously circular standard for pornography: "I know it when I see it."²⁵ The undeniable virtue of honesty is offset by the vice of arbitrariness. Perhaps the definition of pornography can tolerate a certain amount of arbitrariness. After all, the suppression of pornography is already premised on denying people pleasure for their own benefit. But the legitimacy of plagiarism norms depends on their predictability. Enforcers must believe the norms are just, and violators must acknowledge their guilt. Accordingly, an arbitrary norm is tantamount to no norm at all.

Accordingly, the tragicomedy of plagiarism norms is their ambiguity, which often slides into incoherence.²⁶

²⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* (1988).

²⁶ See, e.g., Seth Barrett Tillman, *Some Thoughts on Plagiarism, Plagiarists, Fools, and Legal Fools*, NEW REFORM CLUB (Apr. 6, 2016),

Innumerable articles try to define plagiarism and tell people how to avoid it.²⁷ But “plagiarism” is a notoriously slippery concept. While it’s typically defined as copying an expression or idea without attribution, that deceptively simple definition is remarkably difficult to apply. To begin with, it is unclear what counts as an “expression” for the purpose of plagiarism. While “I am” is an expression, surely it can’t require attribution. But what about, “I think, therefore I am”? Inevitably, social practice converges on a rigid attribution norm, under which every expression colorably copied from a previously existing work must be attributed, no matter how trivial.

While plagiarism norms inevitably reflect the preferences of the social group that created and developed them, there is a powerful incentive to codify them. After all, codification provides at least the illusion of coherence and legitimacy. If an institution adopts a plagiarism policy, it can enforce that policy, without the specter of mob justice that haunts any punitive social norm.²⁸

Unfortunately, institutional plagiarism rules rarely improve on their popular counterparts. For example, determining whether an expression must be attributed under any set of plagiarism norms inescapably requires an exercise of judgment. Many definitions of plagiarism try to avoid this subjectivity by adopting simple, bright-line rules, like “attribution is required if you copy five or more

2:11 PM), at <https://reformclub.blogspot.com/2016/04/some-thoughts-on-plagiarism-plagiarists.html> [<https://perma.cc/LVV7-P8A5>] (reflecting on the ambiguity of plagiarism norms).

²⁷ For an especially thoughtful entry on these topics, see, for example, Deborah R. Gerhardt, *Plagiarism in Cyberspace: Learning the Rules of Recycling Content with a View Towards Nurturing Academic Trust in an Electronic World*, 12 *Richmond J. L. & Tech.* 1 (2006).

²⁸ See, e.g., Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 *U. ILL. L. REV.* 59 (2015).

words in a row.” But applying those rules immediately exposes their absurdity. Maybe the sentence, “I am not a crook” requires attribution, but “I am a human being” can’t possibly. In practice, institutional plagiarism rules converge on the same “always attribute” requirement imposed by all other plagiarism norms.

Ultimately, policing the plagiarism of expressions either collapses into a copyright analysis or devolves into ridiculousness. The only sensible approach requires attribution only if an expression is sufficiently “original” to qualify for copyright protection. Of course, copyright protection is limited by the fair use doctrine, which arguably doesn’t require attribution. But many courts read an attribution requirement into fair use, and as a practical matter, attribution certainly affects the fair use analysis.²⁹ In practice, copyright seems more than adequate to protect an author’s interest in a particular expression. If copyright can’t protect an expression, plagiarism norms probably shouldn’t either.

The problem is even worse when it comes to ideas. Academic plagiarism norms invariably require the attribution of ideas. In theory, it sounds simple. But in practice it is impossible to know when attribution is required and when it isn’t. For one thing, ideas exist only as expressions, and different expressions necessarily state different ideas. Similar expressions may state similar ideas, but they are not the same. For another, similar ideas expressed in different contexts can mean very different things. After all, given a sufficient level of abstraction, most philosophical ideas trace back to the ancients, but our

²⁹ See, e.g., RICHARD POSNER, *THE LITTLE BOOK OF PLAGIARISM* (2015) (assuming fair use requires attribution).

understanding of those ideas is surely wildly different from theirs.

A bare allegation of “idea plagiarism” is just an assertion that someone said something similar to someone else without attribution. Without more, it is hard to see why anyone should care. An argument that lacks novelty may be dull, and readers may benefit from attribution. But there is no reason to consider tedium and redundancy academic crimes. After all, if multiple works express similar ideas, readers can judge for themselves who expressed the idea first and best. Even if scholars deliberately fail to cite a prior work that anticipates or preempts their ideas, the existence of the work itself refutes any claim to novelty. They aren’t fooling anyone who cares.

But many idea plagiarism offenses include much more. Specifically, they often involve senior scholars taking advantage of information provided to them in confidence by junior scholars. In that case, the objection is not only, or even primarily, the lack of attribution, but the breach of trust, and the senior scholar’s abuse of authority. Unfortunately, these allegations often go unspoken, or only whispered, not because they fail to state a plagiarism claim, but because power protects the powerful. Rather than lodge plagiarism complaints, junior scholars learn to avoid abusive senior scholars, and warn their peers to avoid them as well.³⁰

V. JUSTIFYING ACADEMIC PLAGIARISM NORMS

At least in theory, the purpose of plagiarism norms is to protect readers from being “defrauded.” As the

³⁰ Thanks to Ashley T. Rubin for these observations, as well as other scholars who wish to remain anonymous.

argument goes, readers are entitled to know the original source of the expressions and ideas in the articles they read. Without plagiarism norms, authors could defraud readers by using expressions and ideas without attribution. So, plagiarism norms protect readers by forcing authors to provide proper attribution.

But the plagiarism police never ask when and why readers want and expect authors to attribute expressions and ideas. They don't care. They enforce plagiarism norms because they consider plagiarism a cardinal sin. Readers are irrelevant. The plagiarism police enforce plagiarism norms for their own sake, because they cannot and must not be questioned.

Of course, many readers do care about plagiarism, expect authors to respect plagiarism norms, and object to violations of plagiarism norms. But they object to violations of plagiarism norms because they have internalized those norms, not because they actually care about the attribution of the expressions and ideas in question. Plagiarism norms have acquired independent moral significance, irrespective of their consequences. Readers are horrified when authors violate those norms and feel defrauded, not because they care about attribution for its own sake, but because the author has violated a moral norm they have come to accept as legitimate.

Obviously, the real purpose of plagiarism norms is not to protect readers, but to benefit authors, by enabling them to demand attribution. In the absence of plagiarism norms, authors could copy short expressions and ideas with impunity. Indeed, in many contexts, copying without attribution is routine and unobjectionable. As lawyers commonly observe, "if you aren't plagiarizing, you're committing malpractice." When authors don't care about

attribution, plagiarism norms are ignored. But when authors do care about attribution, they are enforced. And the more authors care about attribution, the more rigorously they are enforced. Unsurprisingly, academic plagiarism norms are enforced more rigidly than any others, because attribution is paramount.

In other words, the purpose of plagiarism norms is to create an extra-legal attribution right that authors can assert in order to compel others to attribute expressions or ideas to themselves. Or rather, plagiarism norms create a quasi-property right in attribution that applies when copyright cannot. Plagiarism norms enable authors to demand attribution and claim the associated benefits. To put it in economic terms, plagiarism norms give authors the right to claim the surplus they generate in the scholarly gift economy, and then some. After all, who is to say when the use of an expression or idea requires attribution, other than the author who alleges plagiarism?

Unsurprisingly, hypocrisy runs rampant. For example, artists plagiarize from popular culture with impunity, as art world plagiarism norms consider such unattributed copying unobjectionable. Commercial authorship is irrelevant to art world plagiarism norms. But it is verboten for one artist to plagiarize another, unless the plagiarism is itself part of the artwork, in which case it stops being plagiarism, as the attribution is implicit in the work itself.

VI. RIDICULE!

The only thing the plagiarism police hate more than a plagiarist is someone who questions the legitimacy of plagiarism norms. Previously, I have questioned the legitimacy of academic plagiarism norms prohibiting non-

copyright-infringing plagiarism and the wisdom of applying plagiarism norms to students.³¹ Among other things, I observed that academic plagiarism norms effectively enable scholars to claim an extra-legal property interest in the form of attribution rights in uncopyrightable expressions and ideas. Accordingly, I argued that academic plagiarism norms are primarily an inefficient and illegitimate form of extra-legal academic rent-seeking that should be ignored.

But why do things by half-measures? If academic plagiarism norms are largely inefficient and illegitimate, their enforcement is even worse. The plagiarism police are always on the prowl for anyone they suspect of violating the plagiarism norms they themselves create, interpret, and enforce. Indeed, the plagiarism police are the self-appointed judges, juries, and executioners of “plagiarism law.” They decide what plagiarism norms require, they determine whether those norms have been violated, and they impose whatever punishment they deem fit. Albeit, usually “cancellation.”

Where is the author in all of this? Sometimes an enthusiastic member of the braying mob, clamoring for the plagiarist’s head. But sometimes not. Indeed, sometimes the allegedly wronged author couldn’t care less about plagiarism. And yet, no one actually seems to care what the author thinks. Plagiarism norms appear to grant authors an extra-legal property right in attribution. But unusually, it is a property right that anyone can enforce, even if its nominal owner is indifferent to infringement or objects to enforcement.

³¹ Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133 (2016).

VII. PLAGIARIZE THIS PAPER

I object. I wrote this article. Accordingly, I own it. Under the Copyright Act, I own the copyright in every work of authorship I create, including this article, whether I like it or not. Accordingly, no one can reproduce, distribute, perform, display, or adapt this article without my permission, with certain limited exceptions, of course. If someone does, I can file a copyright infringement action to make that person stop and force that person to pay damages.

That's not all. Plagiarism norms effectively ensure that I also own an extra-legal attribution right in this article. No one can copy expressions or ideas from this article without attributing them to me, on pain of punishment from the plagiarism police. And they can punish offenders without even asking my permission.

But I don't want to own any property rights in any of the works of authorship I create, including this article. While I cheerfully admit that I wrote this article, I don't want to own the copyright, and I don't want anyone else to own it either.

Accordingly, I place this article in the public domain. I explicitly disclaim my ownership of the copyright in this article. And I authorize anyone to use this article in any way they like. I believe that these statements are sufficient to eliminate any copyright in this article and place it in the public domain, at least insofar as the law permits me to disclaim copyright.³²

³² See, e.g., Dave Fagundes & Aaron Perzanowski, *Abandoning Copyrights*, 61 WM. & MARY L. REV. (forthcoming 2020).

And I don't want anyone else to enforce any property rights in this article on my behalf. Specifically, I don't want to own an attribution right, and I don't want anyone else to enforce my attribution right. I explicitly disclaim any and all attribution rights created by academic plagiarism norms, and I object to anyone attempting to exercise those rights on my behalf. I do not want or expect attribution, and I do not want anyone to claim it for me.

Accordingly, I explicitly authorize plagiarism of this article. I permit and encourage people to copy this article and republish it under their own names. 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.

Of course, I don't object to attribution. If someone wants to publish this article under my name, that is fine. If someone wants to copy expressions from this article and attribute them to me, that is also fine. And if someone wants to use the ideas expressed in this article and attribute them to me, that is fine, too. But I don't want to impose any obligation on anyone to attribute anything in this article to me. If people choose to attribute elements of this article to me, I endorse their decision. But if they use elements of this article and do not attribute them to me, that is fine, too.

However, I do object to anyone enforcing my rights without my permission. After all, I have placed this article in the public domain and explicitly authorized anyone to use any element of this article in any way they like. Among other things, I have explicitly authorized plagiarism of this article. And I object to anyone exercising my attribution right without my permission. I explicitly permit anyone to plagiarize my work. And I object to the officious

busybodies who want me to claim ownership of the work I create and make it my property.

Can I do this? Can I consent to plagiarism? Or rather, do academic plagiarism norms permit me to consent to plagiarism? If not, why not? And if not, what if anything does it say about the legitimacy of academic plagiarism norms and the plagiarism police who enforce them?

Under the Copyright Act, I can probably abandon my copyright in this article and place it in the public domain, although there may be some difficulties and exceptions.³³ In any case, I can certainly disclaim copyright ownership and offer a unilateral license to anyone who wants to use the article. For example, Creative Commons offers a CC0/Public Domain license designed to accomplish that goal, albeit with disclaimers as to whether it is possible.³⁴ And as a practical matter, I can certainly refuse to enforce my copyright in this article, even if the law still considers me the copyright owner.

But can I disclaim the extra-legal right of attribution created by academic plagiarism norms? At least superficially, academic plagiarism norms seem to give me a quasi-property right. No one can use the expressions or ideas in my article without attributing them to me, and if someone infringes my attribution right, I can object.

If academic plagiarism norms give me a property right in attribution, then surely I can disclaim that right. After all, property is just a bundle of sticks, and if I want to sell those sticks, give them away, break them in half, use

³³ *See, e.g., id.*

³⁴ CREATIVE COMMONS, <https://creativecommons.org/publicdomain/zero/1.0> [<https://perma.cc/5WSN-2VX6>] (last visited Nov. 19, 2019).

them for kindling, or play pick-up sticks, it is my choice, and no one can tell me otherwise. The essence of property is ownership, and the essence of ownership is alienation. If I own the right of attribution created by plagiarism norms, I can do whatever I like with it, including disclaim it.

And yet, it is unclear whether I can effectively disclaim the right of attribution created by academic plagiarism norms. I can certainly state that I disclaim the right of attribution and permit plagiarism. Indeed, I have explicitly done so, in a statement on my SSRN page.³⁵

“ All of my articles are licensed CC0/public domain. Please feel free to use them in any way that you like. I specifically authorize you to plagiarize my articles. ”

But can I effectively disclaim the attribution rights given to me by plagiarism norms? Maybe not. While I can refuse to enforce my attribution rights, I can't stop others from enforcing them in my name. And enforce them they will, whether I like it or not.

Indeed, a peculiar quality of plagiarism norms is that anyone can enforce them. Obviously, authors can enforce plagiarism norms against people who copy their expressions or ideas without attribution. But others can also enforce those norms on their behalf, with or without the plagiarized author's consent or even knowledge. The plagiarism police are every bit as eager to enforce the attribution rights of the dead as the living. They enforce attribution rights associated with works that are in the public domain. And presumably they would also enforce the attribution right of authors who are indifferent to attribution, or even object to it. After all, the plagiarism

³⁵ *Author Page - Brian L. Frye*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=646621 [<https://perma.cc/9M33-RQB9>] (last visited Nov. 19, 2019) .

police are beholden to the moral imperative of plagiarism norms, not the idiosyncratic wishes of individual authors.

In short, while the attribution right created by plagiarism norms superficially resembles an extra-legal form of copyright protection, it is actually something else entirely. Unlike copyright, the attribution right created by plagiarism norms isn't a property right belonging to the author of a work, but an extra-legal regulatory requirement created and enforced by a discursive community. In other words, authors can't disclaim attribution, because it isn't a right that belongs to them individually, but an obligation they impose on themselves collectively. In other words, plagiarism norms don't create extra-legal property rights, but codify extra-legal cartel rules.

VIII. PLAGIARISM NORMS AS CARTEL RULES

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.

Copyright is supposed to benefit the public by solving market failures in works of authorship caused by free-riding. In theory, copyright encourages marginal authors to produce works of authorship by giving them certain exclusive rights to use the works of authorship they create. But copyright doesn't necessarily give authors what

they want. It focuses on protecting the commercial value of works of authorship, ignores attribution, and explicitly excludes ideas from protection. For some authors, that is plenty. But other authors care about things copyright ignores and find other means to get what they want.

Specifically, many authors want attribution that copyright does not require, and develop plagiarism norms in order to compel the attribution they desire. For example, scholars want attribution of their ideas more than anything else. But copyright doesn't require the attribution of ideas, which are constitutionally excluded from copyright protection. Accordingly, scholars created academic plagiarism norms which require the attribution of ideas, even though copyright does not, and in fact explicitly permits the use of ideas without attribution.

While academic plagiarism norms create an obligation to attribute ideas, the government will not and cannot enforce that obligation. It is a truism that “there is no right without a remedy.”³⁶ Accordingly, scholars had to put teeth in their plagiarism norms, and created their own plagiarism police, a kind of posse comitatus consisting of any scholar alerted to a violation. The law of plagiarism is always and only mob justice, ruled by the norms the mob has internalized and punished as the mob sees fit. If someone raises a hue and cry, all must assemble to investigate and judge the offender according to the norms they have internalized.

Social norms tend to converge on rules that are economically efficient for the members of the group that creates the norms. Left to their own devices, property

³⁶ SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 156 (1898).

owners will adopt social norms that efficiently resolve disputes and maximize the value of their property. Academics are no exception. Academic plagiarism norms are de facto property rules that efficiently resolve attribution disputes among academics and maximize their right to claim attribution.

Of course, social norms are defined and shaped by the members of the social group that create and enforce them. Insiders get to create social norms; outsiders get to observe social norms. Or rather, academics create plagiarism norms that benefit themselves, and everyone else gets to observe them.³⁷

But plagiarism norms aren't just self-interested, they are also hypocritical. After all, plagiarism norms prohibit the misattribution of a work of authorship. And yet, they apparently permit ghostwriting, which is literally the misattribution of a work of authorship. Of course, many authors sneer at ghostwriters, but they aren't considered transgressors, just menials. Apparently, plagiarism is a crime only when it harms the economic interests of authors but is fine when it benefits them.

As a rule, social norms are strictly enforced and severely punished.³⁸ Laws are backed by the power of the state, which cannot be ignored. The state can afford to be charitable, because it holds a monopoly over the use of force. But social norms are backed by nothing other than the social group that enforces them. When censure and ostracism are your only tools, you must deploy them reliably and mercilessly. A mild sanction will only

³⁷ STEVE FULLER, *AGAINST ACADEMIC RENTIERSHIP, POSTDIGITAL SCIENCE AND EDUCATION* (2019).

³⁸ See, e.g., Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59 (2015).

encourage defectors. Only the most vicious and cruel punishments can be effective.

Academic plagiarism norms are no different. In a nutshell, they are just a way for scholars to claim rents the law refuses to recognize. Scholars want an attribution right, but copyright sadly doesn't provide one, probably because it effectively values commerce rather than knowledge. So scholars use plagiarism norms to create an extra-legal attribution right, which provides that if you use an idea previously advanced by another scholar, you are obligated to provide a citation to that scholar, whether or not it is helpful to the reader. Of course, whether such an obligation exists effectively depends on the opinion of the senior scholar, and most scholars are inclined to believe that a citation to their work is always a good idea. After all, "Reviewer 2" is both a wry joke and a reality.

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. And of course, because senior scholars are still overwhelmingly white men, there are distributional effects as well. In practice, plagiarism norms quietly enforce the hegemony of the academy, in the name of protecting readers. Let us now praise famous men?

IX. SUB ROSA PLAGIARISM

But there is another form of plagiarism that is far more troubling, not only because it is actually harmful, but also because it goes almost entirely unpunished. It is an

open secret that certain senior scholars make a habit of using information and ideas shared with them in confidence by junior scholars as the basis for their own work, without crediting the junior scholars. Under academic plagiarism norms, this is clearly plagiarism. But victims typically just bite their tongues and learn to avoid the duplicitous senior scholar. More often than not, they have more to lose than to gain by making a plagiarism allegation, especially if the plagiarist is their mentor or advisor.

This “sub rosa” plagiarism is reprehensible in a way other forms of plagiarism are not, because it is not only duplicitous and actually harmful, but also expresses and reinforces the toxic power dynamics of the academic hierarchy. Junior scholars are robbed of credit for their ideas and often find themselves obligated to abandon entire research projects, which suddenly “belong” to the plagiaristic senior scholar. Moreover, sub rosa plagiarism reflects a profound betrayal of trust and abuse of academic authority. Scholars must be able to trust one another in order to share ideas. Senior scholars who abuse the confidence of junior scholars make it harder and riskier for junior scholars to share their ideas and research with senior scholars. In other words, there are real costs associated with this kind of plagiarism, which fall primarily on junior scholars.

“Traditional” plagiarism sounds primarily in quasi-copyright. Plagiarism norms give authors or their proxies the right to compel the attribution of expressions and ideas copied from a published work. Effectively, it is a regulation masquerading as a property right, and the regulator can just point to the prior publication to substantiate the claim.

By contrast, sub rosa plagiarism sounds primarily in trade secret law. A junior scholar provides valuable information in confidence, and a senior scholar betrays that confidence, using the valuable information without permission, to the detriment of the junior scholar. More often than not, the junior scholar has no recourse. After all, alleging a betrayal of confidence is risky and proving it is hard, especially when the plagiarist is a respected senior scholar. And even vindication may be a Pyrrhic victory, if it comes at the cost of the plagiarist's favor, and perhaps that of others who know they are themselves liable for similar transgressions.

Perhaps the most distressing aspect of sub rosa plagiarism is the way in which it reflects and reinforces academic hierarchies. After all, it is largely pointless. There is no reason for senior scholars to betray the confidence of junior scholars. Indeed, senior scholars already receive effective credit for the contributions of the junior scholars they advise. Senior scholars abuse the confidence of junior scholars only in order to humiliate and assert dominance over them. Sub rosa plagiarism is not really about stealing credit for ideas and discoveries. It is about denying credit to a junior scholar in order to emphasize his or her subordination.

Unfortunately, plagiarism norms do little or nothing to prevent sub rosa plagiarism. After all, academic plagiarism norms have existed for a long time. If they were going to prevent sub rosa plagiarism, surely we would see some results by now. But anecdotal evidence suggests the contrary. If anything, the problem is only getting worse, as technology makes both sharing and copying easier. Indeed, academic plagiarism norms probably make sub rosa plagiarism possible in the first place. Only plagiarism norms enable senior scholars to claim ownership of work

shared with them in confidence by junior scholars. And only the rigor and rigidity of plagiarism norms induce junior scholars to keep their peace. Rather than complain, they tend to become more cautious about sharing their work and warn their peers about the duplicitous senior scholar.

Sub rosa plagiarism is legitimately objectionable and should be discouraged. But it provides no justification for academic plagiarism norms in their current form, because the legitimate reasons for objecting to sub rosa plagiarism do not apply to other kinds of plagiarism. Academic plagiarism norms are ill-suited to preventing sub rosa plagiarism, because they rely on the very disciplinary authority that makes sub rosa plagiarism possible. And academic plagiarism norms may even make sub rosa plagiarism easier by cementing the plagiarist's duplicitous claim to authorship and making it harder to challenge.

Or to put it another way, the answer to the question, "how can we most effectively promote equality and prevent discrimination" is rarely "more property rights." Academic plagiarism norms effectively create property rights in attribution, albeit regulatory rights enforced as cartel rules, rather than true property rights enforced by the state. Like all other property rights, attribution rights tend to redound to the benefit of the powerful at the expense of the weak. Better to weaken the powerful and encourage junior scholars to name and shame the duplicitous senior scholars who have done them wrong.

X. RELAX!

So, how should we respond to the demands imposed on us by academic plagiarism norms? We should ignore them. Or rather, we should take the supposed justification

for academic plagiarism norms seriously and proceed accordingly. In theory, academic plagiarism norms require attribution of expressions and ideas for the benefit of readers, even though in practice, they require attribution when no reasonable reader would actually care. We should be responsible to our readers. We should provide citations when reasonable readers will find attribution helpful and omit citations when they will not.

As I have previously observed, plagiarism is not a crime, although many academics wish it were. It should not be an academic crime either. Obviously, scholarship should be “open access.” Scholars participate in an academic gift economy, and the gifts they offer to each other and the public should always be free. But ideas should also be open access. While scholars want to own ideas, you can’t always get what you want, and copyright is supposed to ensure that you only get what you need.

Of course, there is nothing wrong with attribution. Indeed, we should encourage attribution, when it is helpful. But we shouldn’t make attribution a property right, and we shouldn’t allow others to enforce attribution as if it were a property right. On the contrary, we should be thoughtful and respectful to our predecessors and our readers alike. We should attribute expressions and ideas when we believe attribution is deserved and will be beneficial. And we should be circumspect about the choices others make about whether and when to attribute.

Academic plagiarism norms are illegitimate, because they depend on the illusion of novelty. Originality is but a chimera. After all, “The thing that hath been, it is that which shall be; and that which is done is that which

shall be done: and there is no new thing under the sun.”³⁹
Or rather, “originality is not a claim one can make, given that one can only say what the system allows one to say; one can say only what has been said already.”⁴⁰

I will be blunt. Scholarship is rarely—if ever—original. At best, it is occasionally pithy enough to be quotable, or thoughtful enough to be worth a citation. Even on those rare occasions when a scholarly work actually introduces a novel idea, scholars do not and should not own those ideas, not even to the limited extent of a right to compel attribution. We should be humble. Scholarship is the gift we provide to each other and the public. More often than not, it is a gift better loved by the giver than the recipient. Attribution is also a gift. We should accept it graciously and thankfully when provided. But we should never demand it or expect others to demand it on our behalf. After all, good scholars copy, but great scholars steal.

*I forgot all my songs. The words now are wrong. And I burned my guitar in a rage. But the fire came to rest in your white velvet breast, so somehow I just know that it's safe.*⁴¹

³⁹ *Ecclesiastes* 1:9 (King James).

⁴⁰ STANLEY FISH, *WINNING ARGUMENTS: WHAT WORKS AND DOESN'T WORK IN POLITICS, THE BEDROOM, THE COURTROOM, AND THE CLASSROOM* 163 (2016).

⁴¹ LOW, *Death of a Salesman, on THE GREAT DESTROYER* (2005).