A Memo on Plagiarism, Copyright, Privacy, and the Public Domain

December 2022

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This memo aims to clarify basic concepts concerning plagiarism, copyright, confidentiality, and the public domain. Its purpose is to enable GrubStreet to set its own boundaries to enable good work within its community.

Introduction

The definitions and explanations that follow derive from literary theory and law; they are generalized explanations. With regard to plagiarism, many communities draw from generalized principles to craft their own norms and explicit expectations that are specific to their past practices and the evolving nature of the community membership and its needs. For example, what counts as "plagiarism" within the community of folk singers may be different from what counts as "plagiarism" within the University academic community. With regard to law, rules are more standardized and generally applicable across all domains, but copyright law is considered by most people an externally imposed set of guidelines, and it is most often enforced when evoked by legal authorities (lawyers, administrators, or courts). In most creative communities, most "rules" about permissible copying or impermissible copying are in addition to or in contrast with the specific and external rules of law. I provide the full range below in order to inform your decisions.

As a preliminary matter, any creative community seeking to establish its own set of rules about permissible or impermissible copying should consider its goals. The community's purpose and mission will inform the rules established and assure their acceptability and durability to its members, even itinerant or part-time members. Many learning communities tolerate a lot of copying as a way to learn or as part of the field itself – e.g., musical groups, software developers, furniture makers, chefs, or many visual artists. Other communities may tolerate less copying because they are not explicitly engaging in training or educating, or because the nature of their creative work as they define it demands distinction from the outset (these fields may be harder to imagine, to be honest, but some communities describe themselves this way). The important point is that the nature of the creative work and the goals of the specific community (be it a school, a collaborative, or a company) affect the calibration of copying rules.

Also relevant to developing rules about anti-plagiarism and permissible copying is the place of the particular community in the larger creative field; a set of rules that is inconsistent or conflicts with a neighboring or similar community will lack credibility beyond the particular organization. For example, a university that allows its students to copy from textbooks without attribution in writing assignments and claim that work as their own in fulfillment of their degrees will lose the respect of other universities. But a musical conservatory that teaches students how to become contemporary virtuosos (and even to sound like some already established musicians) may be considered an excellent conservatory. These examples may sound incongruous, but as the concepts

below explain, they are not. What is important is for each community to reflect on their own goals, their place in the larger community of similar creative professionals, and the workability of the rules about permissible and impermissible copying in terms of sustaining a flourishing community of creative professionals. Flourishing in this context importantly includes considerations of inclusivity and diversity, social and economic equity, and individual self-determination.

Plagiarism

Plagiarism is copying of another's expressive work without attribution. The harm is not the copying per se; the harm is the false attribution of the origin of the expression. The most egregious form of plagiarism is when an author holds themself out as the originator of a paragraph or of pages of text when in fact those paragraphs or pages of text were copied from another. Plagiarism is, in this way, a kind of fraud. It is a misrepresentation of authorship, which misrepresentation consists of a material statement of fact (e.g., who is the author).

Importantly, "allusion is not plagiarism because a reader is expected to recognize allusion."[1] And, most obviously, quoting is not plagiarism because it most directly acknowledges the source of the work. As will be clear below in the discussion of copyright law, neither allusion nor quotation will absolve a second author of copyright liability. For that matter, attribution and explicit homage (as in "this book is inspired by…") does not absolve a second author of copyright liability either.

"Concealment is at the heart of plagiarism."[2] Pretense of the second author's originality has to exist for accusation of plagiarism to stick. And thus, the genre of the writing matters a lot for assessment of plagiarism. Some forms of writing – e.g., journalistic fact-based news accounts, some non-fiction writing, legal briefs and court decisions – will draw explicitly from other work and be expected to do so. Some will copy sentences and writing structure because there are few alternatives or because that is what is expected by authors and readers. These are not examples of plagiarism because the claim of originality is absent. When the genre demands intertextual references and/or common phrases, factual descriptions, and particular form, plagiarism allegations should be less frequent.

[1] Richard Posner, The Little Book of Plagiarism (Random House Books, 2007), p. 18.
[2] Id. at 17.

The kind of concealment that plagiarism condemns is not only of claims to originality but breach of the conventions of authorship. But authorship conventions vary and that variation is part of the context for assessing plagiarism. Signing one's name to a book manuscript when someone else wrote the manuscript may be a form of ghost writing, which has a rich history in literature. Signing another name to your book manuscript may be a form of pseudonymous authorship, which also has a rich history in literature. Ghost writing, all forms of work-for-hire writing, and pseudonymous writing are all acceptable forms of writing/reading relationships, even when readers are unaware of the misidentification of the "real" author until later, if ever. As with fraud, which is also a context-specific harm that assesses materiality in terms of the nature of the statement and the relationship of parties, the misrepresentation of authorship in the case of plagiarism is best assessed in a holistic way, considering the genre of the writing, the substance of the alleged plagiarism, and the relationship of the parties.

The question of how much needs to be copied to count as plagiarism often arises. This too is a matter of context and genre. Because the harm of plagiarism is holding yourself out as the author of the work, if parts of the work were copied from others, the proper assessment is whether those parts are claimed to be written by the named author or instead are understood to be borrowed from or alluding to another's written work. Alternatively, the second work can be inspired by or developed from a previous work but not so closely copied that the expression of the first author is not reproduced by the second author. Many famous cases of plagiarism were alleged by the accused plagiarist to be "unconscious" forms of copying.[3] In these cases, the line between creativity inspired by others and writing that too closely copies another's work is hard to draw. These are difficult cases because all writers are also readers and the nature of the subconscious is that it is often inaccessible to our consciousness. Plagiarism can arise from a few exact sentences or paragraphs or some paraphrased paragraphs or pages. But again, the claim of plagiarism lies in the false assertion of authorship, not the copying itself.

Sometimes, authors accuse others of plagiarism not when whole paragraphs or pages are copied, but when characters are similar or when stories share plot devices or specific details. These incidents are sometimes described as concerning "idea theft," and they are not usually considered plagiarism because what was "stolen" was not

[3] Kevin Young describes an alleged incident of subconscious plagiarism in his essay "Getting Inside the Mind of a Plagiarist," LitHub, Sept. 5, 2018 (about Kaavya Viswanathan's *How Opal Mehta Got Kissed, Got Wild) (*https://lithub.com/getting-inside-the-mind-of-a-plagiarist/)

original to the accusing author. The second author may have first encountered the idea, device, or character type from the accusing author, but the nature of ideas, plot devices, and character types is that they do not "belong" to or "originate" from any singular author. They are considered too insubstantial to be "authored" in the way we think of "authorship" for the purposes of condemning plagiarism. The reason for this is that if ideas, plot devices, and character types were to be "owned" and thus off-limits to all future writers except with permission, attribution, or payment, the harm to the art of writing and literature as generative and inevitably iterative endeavors would be substantial.[4]

Some recent examples of plagiarism to consider given the above explanation are included in bibliography below.

Copyright Law

Infringement. In many ways, copyright infringement is more straight-forward than plagiarism. Copyright protects original works of authorship from being misappropriated by others without permission and/or payment. What "misappropriation" means is that a "substantially similar" copy has been made. And what that means is an "ordinary observer" or the "reasonable audience" would consider the two works of authorship to be the same. The harm of copyright is market substitution. If the second work copied from the first could replace the first work in the marketplace, the second work has "misappropriated" the first and the first author has lost sales. Copyright law is an anti-competition scheme first; it is only secondarily an author-protective scheme. Author's "rights" are secondary to the interests of market fairness and diversity of expression, both of which copyright law also cares about and protects by allowing breathing room in its anti-copying rules (described below as fair use and other public domain doctrines).

This means that attributing copied work to the proper author does not absolve copyright infringement. If I copy pages of J.D. Salinger's *Catcher in the Rye* and post it on my personal website stating clearly that "this is from *Catcher in the Rye*" and they are some of my favorite pages of that book, I am still engaging in copyright infringement. It doesn't matter that I properly attribute the passages; it doesn't matter that I am not charging for access to my website. Copyright law asserts that to read

[4] For a creative essay that explores the idea of owning ideas and plot devices, as well as over-claiming copyright, see Spider Robinson's *Melancholy Elephants* (http://www.spiderrobinson.com/melancholyelephants.html).

Catcher in the Rye, at least substantial parts of it, one must be reading it from an authorized copy of the book – that is, authorized by the author or the author's publisher.

Copyright law extends beyond exact copying (as does plagiarism). "Substantial similarity" does not require identicality. Moreover, copyright protection extends to "derivative works," which includes foreign language translations, motion picture (and dramatic and musical) adaptations, sequels, and abridgements. When books are made into films, they are usually made with permission and payment to the book author, even if they are not market substitutes. This is part of copyright law because copyright law imagines itself as helping authors earn a living from their work when there are *foreseeable* markets for the *same story* in a different form. What "foreseeable" markets are and what counts as the "same" story are some of the hardest questions in copyright law. These are categories that evolve with trends in cultural production of aesthetic works and especially with literary genres.

A sequel is most typically within the author's right to prepare derivative works from the original work. But, a parodic or critical version of the original work is not typically within the author's right to prepare derivative works because copyright law does not consider parodies or critical versions something authors would foreseeably license or permit as part of their oeuvre. And because copyright cares more about encouraging the production of diverse works of authorship by many authors than it does giving existing authors total control over their authored works, copyright law provides "fair uses" of authored works, which includes parodic and critical versions, as well as other "transformed" versions of the prior story.

Fair Use and Other Exceptions to Copyright Infringement. Here is an example of copyright fair use. Alice Randall wrote a new version of *Gone with the Wind* that was not a continuation of the same story but instead a new story told from the perspective of minor characters that critiqued the original story's racism and sexism. Randall called her book *The Wind Done Gone*. It copied core characters, traits, and relationships. It also copied and paraphrased famous scenes from *Gone with the Wind*. And it copied verbatim certain dialogue and descriptions. But it was held to be copyright fair use in 2001 and is considered a paradigmatic case of fair use today.[5] It tells the same basic story but in a transformed way (instead of third person it is written in first person as a

[5] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

memoir), and creates from the old story a new meaning and a new message about the South, the plantation Tara, and the main characters of Scarlett and Rhett.[6]

Fair use has four factors to consider: (1) whether the character and purpose of the use is transformative, newsworthy, critical, or for the purposes of commentary, teaching, or scholarship; (2) whether what was taken is the core of copyright (highly creative as opposed to based in facts or is functional); (3) how much was taken; and (4) whether market substitution exists. Fair use depends on a consideration of all four factors, but typically the first and fourth factors matter most.

Other than fair use, copyright infringement does not exist when what was taken are ideas, facts, plot devices, stylistic features, short phrases, or titles. Because copyright only attaches to "original works of authorship," copyright law does not consider anything in the previous list "original" or "expressive" either because they did not originate from a human author (e.g., facts) or they are too brief to be "expressive" (titles). These bits of expression are considered "public domain" material and are free for all to use and build upon.

Other forms of public domain material are the works of copyrighted authorship that have expired; all copyrighted work is durationally limited. From 1790 to the mid-1800s, copyrighted work only lasted for between fourteen and twenty-eight years. Since 1998, when the most recent copyright extension was passed, copyright of authored works lasts seventy years after an author dies (heirs of the author inherit copyright upon the author's death). When works expire they do so on January 1. (Every January 1, the U.S. public domain grows.) When works expire, they are then no longer subject to copyright laws. All public domain material can be used without permission or payment under copyright law.[7]

Finally, copyright infringement does not occur when two authors independently create the same or similar works. If by chance two authors happen to write similar short stories or poems or use the same turns of phrase and develop similar characters in similar contexts, this "independent creation" is not a liability and is in fact encouraged by copyright law. Copyright law wants authors to be free to write from their own experience and draw from the world around them. Independent creation is a defense to infringement and must be proven by the alleged copier/defendant. But its

[6] This is also not a case of plagiarism because Alice Randall was not holding herself out as the "author" of the copied phrases. Randall claimed herself to be the author of a new story based on the old one using the old text but saying something new with it.

[7] But it might still be plagiarism if used without attribution in the way described above.

existence as legitimate defense means that copyright law anticipates the existence of multiple authored works that may be very similar.[8]

Confidentiality and Privacy

Some creative communities work best when members are comfortable sharing confidential and private details about themselves or their work. But confusion often arises when the rules around confidentiality and privacy are not made explicit. Making rules explicit is the most important way to avoid disagreements about confidentiality and privacy. This can be done by labeling drafts and being clear about what is "on the record" and what is "off the record," for example.

Most legal claims for breach of confidentiality and privacy arise when duties to keep details confidential are violated. Duties arise through implied or written agreements (e.g., circulating drafts labeled confidential and accepting those drafts to read with those labels affixed) or by virtue of fiduciary relationships (between doctors and patients, for example, or lawyers and clients). Teachers and adult students don't have a legally recognizable fiduciary relationship, even though hierarchical power exists between all teachers and students. Hierarchical power alone does not create fiduciary duties to maintain confidences.

A person can designate a fact or a draft "private" or "confidential," but if it is not in truth private or confidential (if the draft has otherwise circulated publicly or the facts it contains are otherwise public) the designation as "private" or "confidential" will not stick. For example, if I post on Facebook about an experience I had, and then I write about it and share that draft with my class and mark it "confidential," the facts I shared about the experience on Facebook cannot be redesignated "private." The draft itself may be private, but the facts it contains that are the same as in the Facebook post are not. This would be true if it wasn't a Facebook post but a chatroom or text thread with many participants. Generally, it is ill-advised to assume that anything on-line is private and confidential and will remain so unless it is clearly marked as such, is password protected, and its membership or participation is tightly controlled.

If I circulate a draft in class and mark it "private and confidential" but a classmate learns about its contents or gets access to the draft from a third party, the

[8] Remember, however, that copying is not a harm, misappropriation (copying too much of protected material) is the harm. So even if copying exists, the copying of protected material has to be substantial to be copyright infringement.

draft is no longer private and confidential as to classmate. The classmate can choose to keep it confidential as requested by me, and that might be the ethical thing to do within the scope of the learning community and to build trust among its members. But under the law there is likely no violation of confidence or privacy.

The hardest and most upsetting kinds of privacy violations occur when trust between people or among a group existed or is presumed to exist, and then there is an exposure or a presumed violation by one member that hurts another. This happens between romantic partners (e.g., the circulation of intimate photos without permission); it can often happen among co-workers (exposing secrets to a boss in order to cultivate favor). And it can arise among classmates and in educational settings when people work and learn intensely together. The public disclosure of a private fact or the intrusion into a person's seclusion or privacy are the primary ways personal injuries of this nature occur. But, both of these injuries at law depend on the existence of the fact being private or the seclusion or privacy being true. When a fact is not truly private or others shared in the confidential experience and share it themselves, there is no breach absent an explicit duty not to disclose, which would usually arise from a written agreement or a fiduciary relationship. What has occurred is a violation of trust, but that is not the same thing as a breach of confidence or privacy under law.

Trust, like plagiarism, is a social norm that arises within specific contexts and can be managed and enforced through social and institutional norms. Breach of confidence and privacy violations, like copyright law, incorporate other public interests, such as the importance of preserving the openness of the public domain and avoiding government censorship of truth. As legal actions, breach of confidence and privacy err on the side of the public interest in the disclosure of truth and seek to avoid the government (through laws) interfering in private expressive choices (to speak or not to speak). As such, the personal interests these legal claims may serve feel incompletely protected under law. Institutional and normative systems of trust can be more protective, but they are only privately enforced through community standards.

Some concluding thoughts on radical empathy

The history of writing is one of influence and borrowing despite behavior that might be considered plagiarism or copyright infringement by some people. Many people consider West Side Story is a remake of *Romeo and Juliet*. James Joyce's *Ulysses* is derivative of Homer's *The Odyssey*. The movie *Clueless* is inspired by the novel *Emma*. We might consider that there is nothing new under the sun.

The history of writing is also one based on revealing truths or facts about other people that the author themselves learned or witnessed and then remade into new stories. If authors could only tell "their own" stories, we'd be fighting the unwinnable fight about what counts as one's "own" story (as we inevitably live and share spaces together). We would also be mourning the loss of all the other stories created and told from alternative perspectives.

The history of writing is also filled with experiments on narrative authority (or the nature of "authorship" itself). The genres of imposter narrators, unreliable narrators, ghost writing, pseudonyms, and literary hoaxes are well-established and part of critical writing traditions. On this topic, I recommend *Imposters: Literary Hoaxes and Cultural Authenticity*, in which Christopher Miller writes that "In a good hoax, reality itself becomes a problem and we must ask questions about literature as the gatekeeper of truth."[9] He also says that "To write is to other yourself even when writing about yourself."[10]

To participate in this history of writing is to acquiesce in the kinds of transgressions that have historically challenged the notion of authorship, rendering more inclusive who is or can be an author and what can or should be authored. This shouldn't prevent GrubStreet from interrogating its internal norms and contemplating optimal ethical guidance for the writers within its community. But when doing so, communities like GrubStreet would take care to consider how defined norms and ethical guidelines may challenge or reproduce existing structures of unjust power and hierarchy. Questions to guide this norm development might include:

- What does radical empathy look like (as opposed to wrongful appropriation of another's perspective or experience)? What role does allyship play in writing about others?
- Does appropriation (of other's authorship or identity or private facts) depend on fixed categories (of gender, race, ethnicity, religion?) when we know these categories to be constructed, imposed, and performative (as well as adopted, celebrated, and chosen)? Is the assertion of misappropriation in this way a return to the oppressive framework of essentialism?
- Does the *quality* of the accused work ever matter in the assessment of the severity of the misappropriation or breach of confidence? E.g., does excellent work excuse the misappropriation? Should it? Why or why not?

[9] Christopher Miller, Imposters: Literary Hoaxes and Cultural Authenticity (Chicago University Press 2018), p. 5
[10] Id. at 7.

- Does the *success* of the accused work ever matter in the assessment of the severity of the misappropriation or breach of confidence? E.g., does a blockbuster or award-winning work excuse the misappropriation? Should it? Why or why not?

These last two questions challenge us to interrogate whether we are worried about the quality of work done (and want to in fact encourage good work) and/or whether we are worried about unjust enrichment (when one person benefits at the expense of another under circumstances that are deemed wrongful and therefore worthy of restitution).[11] Both attend to systemic concerns: the circumstances under which good work is produced and the distributional inequities that might undermine institutional wellbeing that would otherwise sustain good work. Moving from concerns rooted in radical individualism (about what is "mine") to consideration of systemic interconnectedness supports the collective focus on substantive forms of progress, which include institutional and community sustainability, minimizing individual precarity, and maximizing trust and mutual flourishing in the production of good work.

[11] Unjust enrichment requires naming the wrong, which raises the definitional problem of distinguishing between social norms and legal rules.

An Abbreviated Bibliography on Plagiarism, Fake Memoires and Literary Hoaxes

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