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## The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues

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# THE TANGLED WEB OF PLAGIARISM LITIGATION: SORTING OUT THE LEGAL ISSUES

*Ralph D. Mawdsley\**

## I. INTRODUCTION

A charge of plagiarism—the failure to provide adequate attribution for borrowed ideas or words<sup>1</sup>—can have a devastating impact on those found guilty of plagiarizing another’s work.<sup>2</sup> Much of the increased attention to plagiarism reflects the ready availability of specialized computer programs that can check for unattributed copying.<sup>3</sup> A recent trend has seen numerous instructors take advantage of these programs by requiring students to submit a report verifying the work’s originality in addition to submitting the written assignment. As one federal district court observed about one of these computer programs, Turnitin, the numbers are staggering: “Over 7,000 educational institutions worldwide use Turnitin, resulting in the daily submission of over 100,000 works to Turnitin.”<sup>4</sup> This widespread use of database comparison programs has enhanced the likelihood that unattributed

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1. See STEPHEN WEIDENBORNER & DOMENICK CARUSO, *WRITING RESEARCH PAPERS: A GUIDE TO THE PROCESS* 97 (1982) (defining plagiarism as “a kind of theft [whereby] one writer steals the ideas or even the exact words of another writer without giving credit where it is due.”). For examples of academic institutions’ varied definitions of plagiarism, see RALPH MAWDSLEY, *ACADEMIC MISCONDUCT: CHEATING AND PLAGIARISM* 14 (1994).

2. See Kim Lanegran, *Fending Off a Plagiarist*, *CHRON. OF HIGHER EDUC.*, July 2, 2004, at C1, available at <http://chronicle.com/free/v50/i43/43c00101.htm> (providing the powerful account of a U.S. faculty member’s confrontation with a plagiarizing faculty member at a South African university. As a result, the South African faculty member’s U.S. university-granted Ph.D. was revoked and he was terminated from his faculty position.).

3. See, e.g., the computer programs advertised at <http://www.plagiarismscanner.com> and <http://www.turnitin.com> (last visited 9/4/2008).

4. *A.V. v. iParadigms, Ltd. Liab. Co.*, 544 F. Supp. 2d 473, 478 (E.D. Va. 2008).

copying will be discovered. Additionally, the same vulnerability that students experience in terms of discovery of plagiarism applies to faculty as well.<sup>5</sup>

The enforcement of academic penalties against plagiarists has resulted in an increasing number of lawsuits with a surprisingly wide range of legal claims. From the obvious challenges by students or faculty to an educational institution's efforts to impose discipline on those that plagiarize,<sup>6</sup> plagiarism litigation has also extended to damage claims by persons charged with plagiarism against those who have published allegations of plagiarism,<sup>7</sup> as well as claims for damages and injunctive relief by those persons whose work has been plagiarized.<sup>8</sup>

The purpose of this article is to explore the increasing complexity of plagiarism litigation in the United States. A determination as to when attribution is necessary in order to avoid a charge of plagiarism raises questions of intent and subject matter specific questions of general knowledge, as well as constitutional and contractual questions of fairness, tort questions of defamation, and questions of fair use under copyright law or misrepresentation under the Lanham Act. Most of the reported cases still involve students who contest discipline from their respective academic institutions—discipline that can range from a course penalty to expulsion from the institution.<sup>9</sup> Student plagiarism issues tend to focus

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5. See Thomas Bartlett, *Columbia U. Fires Teachers College Professor Accused of Rampant Plagiarism*, CHRON. OF HIGHER EDUC., June 23, 2008.

6. See, e.g., *McCawley v. Universidad Carlos Albizu, Inc.*, 461 F. Supp. 2d 1251 (S.D. Fla. 2006) (refusing to overturn the school's revocation of student's Ph.D. for plagiarism); *Boateng v. Inter Am. Univ.*, 190 F.R.D. 29 (D.P.R. 1999) (upholding decision of university not to grant tenure to faculty member found to have plagiarized); *Agarwal v. Regents of Univ. of Minn.*, 788 F.2d 504 (8th Cir. 1986) (upholding termination of tenured faculty member in part because of plagiarism of laboratory manuals).

7. See *Slack v. Stream*, 988 So.2d 516 (Ala. 2008) (upholding \$200,000 judgment for mental anguish and \$450,000 punitive damages award by a former state university professor who brought action against university and department chairman stemming from chairman's dissemination of a reprimand letter accusing professor of plagiarism).

8. See *Dodd v. Ft. Smith Special Sch. Dist. No. 100*, 666 F. Supp. 1278 (W.D. Ark. 1987) (granting injunctive relief under Lanham Trademark Act to prohibit school district from publishing and distributing book that had been researched and written by a prior teacher and her students, but without acknowledgement as authors in the school district's version).

9. See, e.g., Denise Magner, *Historian Charged With Plagiarism Despite Critics' Definition of Term*, CHRON. OF HIGHER EDUC., May 12, 1993, at A16 (reporting plagiarism charge against eminent scholar for using hundreds of short, descriptive

on the definition of plagiarism, the authority of the institution to act, and the extent to which students have been accorded sufficient procedural rights.<sup>10</sup> Increasingly though, charges of plagiarism by faculty have found their way into court. Faculty responses to these charges reflect the heightened concern about the effect that plagiarism charges can have on their employability. Because faculty are expected to make written contributions to the body of knowledge in their respective disciplines, plagiarism charges can reflect both faculty members' inability to make an original contribution to their discipline as well as their lack of integrity in providing accurate acknowledgment of the contributions of others.<sup>11</sup> The content of this article progresses from a discussion of the elements of plagiarism and related questions to constitutional and contractual fairness and defamation tort issues, and from there to interpretative issues concerning protection of one's work product under the copyright act.

## II. THE ELEMENTS OF PLAGIARISM

The threshold issue in plagiarism is constructing an appropriate and generally acceptable definition. Legal authorities agree that plagiarism involves the "misappropriat[ion of] another's words as their own without acknowledging the contribution or source,"<sup>12</sup> but disagree as to

phrases from other sources without attribution); *Leo A. Paquette, OSU Professor, Faces Discipline in Wake of Plagiarism Finding*, THE PLAIN DEALER, Aug. 9, 1993, at E5 (reporting a finding of plagiarism by faculty committee of a senior professor's use of material without attribution); *Plagiarism Investigation Ends at Virginia*, N.Y. TIMES, Nov. 26, 2002, at A24 (reporting a plagiarism scandal at the University of Virginia brought to light by one faculty member's creation of his own database that led to the dismissal of forty-five students and the revocation of three graduate degrees); Kelly Simmons, *Student Cheating Taking New Tack; Some May Be Honest Mistakes*, ATLANTA J.-CONST., Jan. 20, 2002, at C1 (describing a plagiarism investigation at Georgia Tech involving 187 students); Robert Tomsho, *Familiar Words: Student Plagiarism Stirs Controversy at Ohio University*, WALL ST. J., Aug. 15, 2006, at A1 (reporting a plagiarism scandal at Ohio University).

10. See *Trahms v. Tr. of Columbia Univ.*, 666 N.Y.S.2d 150 (N.Y. App. Div. 1997) (upholding student's expulsion for plagiarism).

11. See *Agarwal*, 788 F.2d at 506 (reporting faculty panel recommendation of termination of faculty member who had plagiarized with the observation "that the demonstrated plagiarism with the intent to deceive ha[d] ended Professor Agarwal's usefulness to the University and, in and of itself, [was] grounds for termination.").

12. Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 780 (2008) (citing RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 11 (2007)

whether plagiarism requires some degree of mental culpability.<sup>13</sup> Although not developed in this article because of the absence of case law, an emerging controversy is developing as to whether self-plagiarism, “[b]orrowing from one’s own prior publications without acknowledging the source,”<sup>14</sup> should also constitute plagiarism.

Thus, while the broadest definition of plagiarism is the unattributed copying of another’s work, a finding that a person has in fact plagiarized involves both objective and subjective analyses. An objective analysis considers only whether copying without appropriate attribution has occurred without regard to a person’s intent to plagiarize, which is considered in a subjective analysis. However, in terms of this objective analysis, plagiarism does not apply to “matters of general knowledge,” although it will apply to the undocumented use of “ideas and expressions” from another source.<sup>15</sup> As a rule of thumb, “a piece of information that occurs in five or more sources may be considered general knowledge,”<sup>16</sup> but the line between general knowledge and attributable material is not always easy to determine. In *Newman v. Burgin*, a tenured professor’s defense to a charge of plagiarism was that her

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(plagiarism is “literary theft”); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 173 (2002) (plagiarism is “stealing”); David A. Thomas, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic*, 2004 BYU EDUC. & L.J. 421, 422 (plagiarism is “wrongful appropriation or purloining and publication as one’s own, of the ideas, or the expression of the ideas . . . of another.”) (quoting OXFORD ENGLISH DICTIONARY 932 (James A.H. Murray, ed., vol. 7, Oxford U. Press 1970)).

13. See Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 73–74 (2008) (indicating no clear consensus as to whether plagiarism requires some level of mental culpability such as intent or negligence).

14. Bast & Samuels, *supra* note 12, at 784. Self plagiarism as a form of plagiarism has its strongest supporters in funded research fields such as the sciences and generally where copyright issues are involved. Cf. POSNER, *supra* note 12, at 108 (2007) (self-plagiarism is “a distinct practice and rarely an objectionable one”) with Christian Collberg & Stephen Kohourov, *Self-Plagiarism in Computer Science*, COMM. OF THE ACM, April 2005, at 88, 90 (“It can give the public the idea that research dollars are spent on rehashing old results rather than on original research, simply to further the careers of researchers”) and Patrick M. Scanlon, *Song from Myself: An Anatomy of Self-Plagiarism*, 2 PLAGIARY: CROSS-DISCIPLINARY STUDIES IN PLAGIARISM, FABRICATION, AND FALSIFICATION 56, 59 (2007) (self-plagiarism can involve copyright infringement since when an article is published in a professional journal, the author customarily assigns the copyright in the article to the journal).

15. ANTHONY C. WINKLER & JO RAY MCCUEN, *WRITING THE RESEARCH PAPER: A HANDBOOK WITH BOTH THE MLA AND APA DOCUMENTATION STYLES* 40 (2d ed. 1985).

16. *Id.*

paraphrases of German poetry from another source “simply reflected general knowledge among scholars in the field and did not require attribution.”<sup>17</sup> *Newman* involved a thirteen-page article published in 1983, which translated into German a Croatian poem that had been previously translated and published in a 1952 book by another author.<sup>18</sup> The university committee investigating the charge of plagiarism against the tenured professor, Newman, found the following similar content between Newman’s 1983 article and the 1952 book to be an example of plagiarism that permeated seven pages of the article:<sup>19</sup>

[1952 book:] The earthly beauty is the cloud which bars us from seeing the highest “Ti si oblak, ki zastupaFalse” It throws a shadow on the pure longing for heaven (II, 11): . . . and consequently the sun is the image of heavenly truth (III, 10), which through the ray of self-recognition (II, 18) allows the sinner to perceive its image without cloudsFalse Whatever the world values and holds dear is wax in the fire, smoke in the wind, snow before the sunFalse an arrow shot by a strong hand, and it (the world) itself is only a burning sea, and a ship in the stormFalse Man, however, after his enlightenment by heavenly grace, is a dry staff, which begins to green (III, 9), a phoenix rising from the ashes.

[1983 article:] This image of earthly beauty bars the sight of the supreme Good, throwing a shadow of depravity on the clean longing for Heaven: [quote]False Consequently, Gundulić paints us a picture reflecting his mystic train of thought; the sun as Divine Majesty illuminates all mankind, and His ray points to truth and heavenly justice: [quote] . . . revealing itself to the sinner cloudlessly through the ray of self-recognition: [quote]False Thus the repentant sinner sees heaven’s brilliant aura in contrast to earth’s darkness: [quote]False A father’s welcome symbolizing God’s everlasting grace: [quote]False The world is superficial; the objects it admires most are like wax in the fire, smoke in the wind, snow under the sun, an arrow shot by a strong hand from a bow: [quote]False Life itself is nothing but agitated seas, a storm-tossed ship. [quote]False Man is a ‘dried-up twig’, whose salvation lies only in his humble penitence. Heaven’s grace will make it bloom again, like a Phoenix rising from the

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17. 930 F.2d 955, 958 (1st Cir. 1991).

18. *Id.* at 957–58.

19. For another comparison between the article and the book, *see id.* at 958.

ashes: [quote]False<sup>20</sup>

In *Newman*, the First Circuit upheld the university's plagiarism decision and the attendant discipline of Newman,<sup>21</sup> agreeing not only that the unattributed portions from the book constituted plagiarism, but that Newman's three references in her article to the 1952 book were not adequate attribution, considering the professor's extensive use of the book's translations.<sup>22</sup> In effect, the court of appeals indicated that a "general knowledge" exemption from plagiarism involves a consideration of the nature of the academic discipline involved.<sup>23</sup> In the case of poetry, the exemption did not extend to unattributed use of another person's poetry translations. An example from U.S. history illustrates the difference between applying general knowledge and committing plagiarism—it is general knowledge that Thomas Jefferson was inaugurated as the third president of the United States on Wednesday, March 4, 1801, replacing the second president, John Adams. However, one would likely face a charge of plagiarism to quote or paraphrase without attribution David McCullough's eloquent description of this presidential succession:

John Adams made his exit from the President's House and the capital at four in the morning, traveling by public stage under clear skies lit by a quarter moon. He departed eight hours before Thomas Jefferson took the oath of office at the Capitol, and even more inconspicuously than he had arrived, rolling through the empty streets past darkened houses.<sup>24</sup>

Clarification of the meaning of plagiarism has led many educational institutions to include samples of acceptable and unacceptable uses.<sup>25</sup> While such examples can be very useful in

20. *Id.*

21. Newman was barred from serving on certain academic committees or holding administrative office for five years. *Id.* at 959.

22. *Id.* at 962.

23. *Id.*

24. DAVID MCCULLOUGH, JOHN ADAMS 564 (2001).

25. See e.g., *Writing Tutorial Services, Indiana University*, Plagiarism: What It Is and How to Recognize and Avoid It, (Apr. 27, 2004) <http://www.indiana.edu/~wts/pamphlets/plagiarism.shtml> (last visited Apr. 12, 2009) (portion reproduced below).

**How to Recognize Unacceptable and Acceptable Paraphrases**

Here's the ORIGINAL text, from page 1 of *Lizzie Borden: A Case Book of Family and Crime in the 1890s* by Joyce Williams et al.:

The rise of industry, the growth of cities, and the expansion of the population were the three great developments of late nineteenth century American

determining when appropriate attribution is required, they tend—in the absence of express language to the contrary—to obviate the need to prove subjective intent to plagiarize.<sup>26</sup> The First Circuit, in *Newman*, declared that intent to plagiarize was not a necessary requirement for a finding of plagiarism since “one can plagiarize through negligence or recklessness without intent to deceive.”<sup>27</sup> In *Newman*, during the investigation of Newman’s alleged plagiarism, the faculty committee investigating the charge ignored Newman’s claim that plagiarism requires intent by refusing to consider “Professor Newman’s subjective state of mind” and finding her guilty of “objective plagiarism” and “seriously negligent

history. As new, larger, steam-powered factories became a feature of the American landscape in the East, they transformed farm hands into industrial laborers, and provided jobs for a rising tide of immigrants. With industry came urbanization the growth of large cities (like Fall River, Massachusetts, where the Bordens lived) which became the centers of production as well as of commerce and trade.

**Here’s an UNACCEPTABLE paraphrase that is plagiarism:**

The increase of industry, the growth of cities, and the explosion of the population were three large factors of nineteenth century America. As steam-driven companies became more visible in the eastern part of the country, they changed farm hands into factory workers and provided jobs for the large wave of immigrants. With industry came the growth of large cities like Fall River where the Bordens lived which turned into centers of commerce and trade as well as production.

**What makes this passage plagiarism?**

The preceding passage is considered plagiarism for two reasons:

- the writer has only changed around a few words and phrases, or changed the order of the original’s sentences.
- the writer has failed to cite a source for any of the ideas or facts.

**If you do either or both of these things, you are plagiarizing.**

**Here’s an ACCEPTABLE paraphrase:**

Fall River, where the Borden family lived, was typical of northeastern industrial cities of the nineteenth century. Steam-powered production had shifted labor from agriculture to manufacturing, and as immigrants arrived in the US, they found work in these new factories. As a result, populations grew, and large urban areas arose. Fall River was one of these manufacturing and commercial centers (Williams 1).

**Why is this passage acceptable?**

This is acceptable paraphrasing because the writer:

- accurately relays the information in the original uses her own words.
- lets her reader know the source of her information.

26. See MAWDSLEY, *supra* note 1, app. at 100–121, for the extraordinarily well-designed examples containing no reference to subjective intent developed by Dartmouth College for the 1962 and 1992 editions of *Sources: Their Use and Acknowledgement*, reproduced by the author with written permission of the College’s Dean of Students.

27. *Newman*, 930 F.2d at 962.

scholarship.”<sup>28</sup>

However, intent can become an issue if it is part of an educational institution’s definition of plagiarism.<sup>29</sup> Unfortunately, the use of intent in a definition of plagiarism creates interpretative problems for faculty committees and administrators who are called upon to interpret their institutions’ definitions. In *Napolitano v. Trustees of Princeton University*, a New Jersey appeals court upheld a one-year postponement of a student’s diploma after the university found that the student had plagiarized a senior paper.<sup>30</sup> Prior to the plagiarism incident, but during the student’s time at the university, the university had changed its definition of plagiarism. In its 1978 student handbook, the university had stated that intent was not a defense to a charge of plagiarism, but in the 1980 iteration, plagiarism was defined as “[t]he deliberate use of any outside source without proper acknowledgement.”<sup>31</sup> The university officials investigating the plagiarism charge determined that the new language, “deliberate use,” had been satisfied in that plaintiff had “committed the offense with the intention to pass off the quoted material as her own.”<sup>32</sup> However, although rejecting the student’s claim that six footnote references to the copied source demonstrated a lack of intent to plagiarize,<sup>33</sup> university

28. *Id.*

29. See e.g., University of Maryland, University of Maryland Code of Academic Integrity (May 5, 2005), <http://www.president.umd.edu/policies/docs/III-100A.pdf> (“PLAGIARISM: intentionally or knowingly representing the words or ideas of another as one’s own in any academic exercise”); Duke University, Bulletin of Duke University, The Duke Community in Practice: A Guide for Undergraduates (2008-09), <http://registrar.duke.edu/bulletins/communitystandard/2008-09/commstandbulletin2008-09.pdf>, at 16 (“Plagiarism occurs when a student, with intent to deceive or with reckless disregard for proper scholarly procedures, presents any information, ideas or phrasing of another as if they were his/her own and/or does not give appropriate credit to the original source. Proper scholarly procedures require that all quoted material be identified by quotation marks or indentation on the page, and the source of information and ideas, if from another, must be identified and be attributed to that source. Students are responsible for learning proper scholarly procedures.”)

30. 453 A.2d 263 (App. Div. 1982), *aff’g* 453 A.2d 279 (Ch. Div. 1982).

31. *Napolitano*, 453 A.2d at 266.

32. *Id.* at 270.

33. Failure to adequately cite to borrowed sources can have unanticipated results. See Michael Harvey, *The Nuts and Bolts of College Writing* (2003), <http://nutsandbolts.washcoll.edu/plagiarism.html> (Sen. Biden forced to withdraw in 1987 from possible consideration as 1988 presidential candidate because twenty years earlier, he failed a law school course for plagiarizing a legal article—he’d provided a single footnote while lifting five full pages from the article).

officials determined that the following objective “mosaic” of unattributed uses supported a finding of plagiarism without regard to the question of intent: the use of quotation marks in only a few instances; the use of such introductory phrases as “it is evident that,” “it is important to note that,” and “one can assume that” to suggest that conclusions were those of the student when, in fact, they were those of the copied source; changing tenses from the copied source; and, deleting words and phrases that would have seemed too technical or awkward.<sup>34</sup>

The court’s conclusion in *Napolitano* suggests that, where an educational institution has not referred to mental state as a requirement for plagiarism, a determination of plagiarism can be an objective one without regard to a student’s or faculty member’s subjective intent. This interpretation, as reflected in *A.V. v. iParadigms, Ltd. Liability Co.*,<sup>35</sup> is certainly consistent with the practice of many instructors who require that students submit a report of a plagiarism database search (such as Turnitin) with each course paper.<sup>36</sup> However, in the end, the extent to which a person’s subjective intent will be an element in determining plagiarism will depend on whether an educational institution’s definition of plagiarism includes intent as part of its definition.<sup>37</sup>

As a cautionary note, if intent is an essential element of plagiarism, one must consider that “ideas, terms, characterizations, story plots and even exact phrases may remain in a writer’s consciousness long after the course or book, or perhaps even the knowledge that there was a prior source, has been lost from memory.”<sup>38</sup> Referring to this phenomenon as “unconscious plagiarism,” one author has suggested that “implicit memory can bring knowledge or memories to mind, but explicit recollection can fail to identify

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34. *Napolitano*, 453 A.2d at 270, 276.

35. 544 F. Supp. 2d at 478.

36. The focus of this article is not to examine the merits of using Turnitin technology. For a comprehensive discussion of Turnitin, see Samuel J. Horovitz, *Two Wrongs Don't Negate A Copyright: Don't Make Students Turnitin If You Won't Give It Back*, 60 FLA. L. REV. 229 (2008).

37. For a comprehensive discussion of the role of intent in plagiarism, see Bast & Samuels, *supra* note 12, at 780–84 (2008) (comparing the definitions of plagiarism of the Legal Writing Institute, which encompasses both intentional and nonintentional copying as plagiarism, with the definition of Judge Posner of the Seventh Circuit, which applies only to “nonconsensual fraudulent copying”).

38. MAWDSLEY, *supra* note 1, at 11.

the source of the memory.”<sup>39</sup> While this “unconscious plagiarism” is less likely to occur where the research and writing of assignments occur in a compressed time frame (as is generally the case with students), the requirement of intent invites, at least theoretically, a student defense that the student’s creative outcome under consideration was not the product of intent to plagiarize, but rather the result of “cognitive illusions . . . [of] unconscious plagiarism.”<sup>40</sup>

### III. ISSUES OF CONSTITUTIONAL AND CONTRACTUAL FAIRNESS IN PLAGIARISM CASES

Educational institutions that interpret and enforce their plagiarism policies are expected to do so in accordance with procedures established in student and faculty handbooks and, for public institutions, in conformity with the requirements of constitutional due process.<sup>41</sup> Thus, the school official’s investigation of academic violations such as plagiarism can present both a contract claim regarding adherence to handbook or catalog language and a constitutional claim as to the minimal rights required under the liberty and property provisions of the Due Process Clause.

The challenge in addressing academic penalties assessed for academic misconduct is that suspensions, expulsions, or degree revocations assessed for plagiarism violations<sup>42</sup> are exactly the same kinds of penalties assessed for disciplinary violations,<sup>43</sup> yet U.S. courts have tended to accord greater deference to academic institutions in making decisions

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39. Steven M. Smith, *Invisible Assumptions and the Unintentional Use of Knowledge and Experiences in Creative Cognition*, 12 LEWIS & CLARK L. REV. 509, 514 (2008).

40. *Id.* at 525. Worth noting is that, in copyright law, subconscious copying is not a defense to an action for damages under the Copyright Act. See Carissa L. Alden, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729, 1731 (2008).

41. For a comprehensive discussion of constitutional due process and contractual fairness, see RALPH MAWDSLEY, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 6–8, 15–33 (5th ed. 2006).

42. See *e.g.*, *Kerr v. Bd. of Regents of Univ. of Neb.*, 739 N.W.2d 224 (Neb. Ct. App. 2007) (upholding dismissal of student from law school for four instances of plagiarism).

43. See *e.g.*, *Goodreau v. Rector and Visitors of Univ. of Va.*, 116 F. Supp. 2d 694, 703 (W.D. Va. 2000) (holding that the university had implied authority to revoke the degree of a graduate who had embezzled funds from a student organization while a student at the university).

involving academic misconduct than decisions involving disciplinary violations. One court has reasoned that “[a]cademic judgments are subjective—they are made in an educational, not adversarial environment [and t]he courts . . . have reserved those judgments to educators, not judges and juries.”<sup>44</sup> In its decision in *Board of Curators of University of Missouri v. Horowitz*, the Supreme Court acknowledged a sharp line between academic and disciplinary misconduct<sup>45</sup> by holding that “[t]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”<sup>46</sup> The Court added that “[c]ourts are particularly ill-equipped to evaluate academic performance.”<sup>47</sup>

However, in *Horowitz*, the Supreme Court upheld the dismissal of a medical student in her last semester for poor faculty evaluations; the Court, nonetheless, exercised caution and “assum[ed] the existence [under the Fourteenth Amendment’s Due Process Clause] of a liberty or property interest.”<sup>48</sup> Property interests are essentially entitlements (such as faculty tenure appointments) grounded in “an independent source such as state statutes or rules [or contracts] entitling the citizen to certain benefits.”<sup>49</sup> Generally, students or faculty with such a property right who face penalties for academic misconduct fail in their property interest claims as long as they have received notice of charges,

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44. *Samper v. Univ. of Rochester*, 528 N.Y.S.2d 958, 962 (N.Y. Sup. Ct. 1987), *aff’d as modified*, 535 N.Y.S.2d 281 (N.Y. App. Div. 1988) (rejecting medical resident’s due process claim that she was entitled to meet with clinical competency committee after receiving unsatisfactory reviews).

45. 435 U.S. 78 (1978) (denying due process claims of student dismissed in her last year of medical school for academic deficiencies). For a discussion of case law related to academic and disciplinary penalties, see 14A C.J.S. *Colleges and Universities* § 41 (1991) (Expulsion, dismissal, suspension, or other discipline—Review and reinstatement); 15A AM. JUR. 2D *Colleges and Universities* § 29 (2000) (Promotions; graduation; conferring of degrees and diplomas).

46. *Horowitz*, 435 U.S. at 90.

47. *Id.* at 92.

48. *Id.* at 97. U.S. CONST., amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

49. *Goss v. Lopez*, 419 U.S. 565, 572–73 (1975). See also *Bd. of Regents v. Roth*, 408 U.S. 564, 568–71 (1972) (faculty member with one-year contract had no entitlement to contract renewal); *Zelman v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999) (student’s attendance in public schools pursuant to state compulsory attendance statute is an entitlement).

a hearing at which they can present their position, and a careful and deliberate consideration of the information by the appropriate education officials.<sup>50</sup> Liberty clause claims involve the stigmatizing of a person's reputation,<sup>51</sup> but as reflected by the Supreme Court in *Horowitz*, "the mere fact of dismissal, absent some publication of the reasons for the action"<sup>52</sup> does not represent the kind of stigma protected under the liberty clause.<sup>53</sup> Even where courts have found that the imposition of academic penalties could harm a person's reputation and, thus, require a name-clearing hearing,<sup>54</sup> courts have generally found that the process provided by an educational institution satisfies minimal constitutional requirements.<sup>55</sup>

However, the control by educational institutions over academic misconduct generally, and plagiarism specifically, can be affected by factors other than constitutional constraints. Most educational institutions have their own procedural rights spelled out in student and faculty handbooks, but courts generally have been fairly generous in holding that only

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50. See *Rogers v. Tenn. Bd. of Regents*, 273 Fed. App'x 458 (6th Cir. 2008) (upholding dismissal of nursing student after receiving a failing grade in a clinical nursing course where the student had received the minimal level of constitutional due process).

51. However, the Supreme Court has asserted that a claimant has no liberty or property interest in their reputation alone. See *Paul v. Davis*, 424 U.S. 693, 693 (1976) (reputation alone, "apart from some more tangible interest such as employment," is neither a "liberty" nor "property" interest by itself sufficient to invoke the procedural protection of the Due Process Clause). See also, *Dodd v. Fort Smith Special Sch. Dist. No. 100*, 666 F. Supp. 1278, (W.D. Ark. 197) (finding no liberty or property claims as to a teacher whose book had been copied by school district without attribution).

52. *Horowitz*, 435 U.S. at 97.

53. See *Zellman*, 594 N.W.2d 216 (student who received zero on plagiarized history assignment had no protected liberty or property right).

54. See *Gunasekera v. Irwin*, 517 F. Supp. 2d 999, 1013 (S.D. Ohio 2007) *aff'd in part, rev'd in part*, 551 F.3d 461 (6th Cir. 2009) (holding that name-clearing hearing offered by state university would have satisfied due process, in which professor, who had been suspended from graduate faculty status for failing to monitor graduate theses for plagiarism, would be permitted to produce witnesses, to submit documentary evidence, to testify on his own behalf, and to be represented by counsel).

55. See *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987) (holding that student whose masters degree was revoked for fabrication of research was granted notice and a hearing that satisfied procedural due process); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984) (upholding as providing adequate procedural rights under liberty clause where student suspended a semester for cheating on a final exam had six-week notice or hearing and a hearing where he presented his case); *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984) (dismissal of student for academic dishonesty on exams satisfied due process where he had notice of charges and a hearing where he presented his case; student not entitled to all due process rights such as right to counsel).

substantial compliance with the handbooks is required, as long as the process received by a student or faculty member appears to satisfy at least the constitutional minimum requirements.<sup>56</sup>

Common law tort claims are also possible remedies, whether or not a plaintiff has a viable liberty or property claim. In *Slack v. Stream*, the Supreme Court of Alabama let stand a \$200,000 damages award for mental anguish and a \$450,000 punitive damages award on behalf of a former state university faculty member against the university and the department chair for dissemination of a letter accusing the professor of plagiarism in violation of the university's plagiarism policy.<sup>57</sup> In rejecting state-agency immunity for the department chair who alleged that the dean of his school had not instructed him regarding the plagiarism policy, the court "decline[d] to extend State-agent immunity to individuals who are ignorant of the rules and regulations of the State agency with which they are employed."<sup>58</sup>

However, before courts can address the merits of a student's or faculty member's constitutional or common law claims associated with plagiarism, those bringing plagiarism charges must have complied with jurisdictional requirements. In *Hand v. Matchett*, the Tenth Circuit reversed a university's revocation of a Ph.D. for plagiarism where the court of appeals held that the university's governing body, the Board of Regents, had violated New Mexico law by delegating final authority to revoke degree to a subordinate body.<sup>59</sup> In *Hand*,

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56. See *Trahms*, 666 N.Y.S.2d at 151 (upholding expulsion of student for plagiarism where student received four days notice of a hearing and the hearing substantially complied with the student handbook where the student was able to present evidence; reversing trial court order for a new hearing where no verbatim transcript of the original had been made because such a record was not necessary); *Lawrence v. St. Augustine High Sch.*, 955 So. 2d 183 (La. Ct. App. 2007) (upholding school's suspension of student from extracurricular activities for plagiarism where school in its investigation substantially complied with its student handbook even though it did not secure written reports from students and administrators as specified in the handbook).

57. 988 So.2d at 534.

58. *Id.* at 529.

59. 957 F.2d 791 (10th Cir. 1992). See also N.M. STAT. ANN. § 21-8-7 (LexisNexis 2008).

The immediate government of the several departments shall be entrusted to their respective faculties, but the regents shall have the power to regulate the course of instruction and prescribe, under the advice of the faculty, the books and authorities to be used in the several departments, and also to confer such degrees and grant such diplomas as are usually conferred and granted by other agricultural colleges.

the university had no procedures in place to address a plagiarism charge that could result in degree revocation, so the university constructed a set of procedures that was approved by its Board of Regents.<sup>60</sup> However, the procedures left the investigation of the plagiarism charges and the determination of the penalty to university officials.<sup>61</sup> In granting to the student the injunctive relief which served to reverse the university's degree revocation decision, the Tenth Circuit observed that, since state law conferred the authority to confer academic degrees on the Board of Regents, the authority to revoke degrees rested only with the Board and could not be delegated to university officials.<sup>62</sup> Nonetheless, in the absence of specific state requirements like those in *Hand*, courts generally recognize that university officials have the inherent authority to revoke an improperly awarded degree where the university is acting pursuant to granted authority to confer degrees and to take any action necessary to maintain the university.<sup>63</sup>

Other state jurisdictional issues have plagued the claimants disciplined for plagiarism violations. In *Brown v. State Board of Higher Education*, the Supreme Court of North Dakota rejected a student's claim against the State Board of Higher Education that it lacked authority to act upon the recommendation of a university's graduate committee to revoke his Ph.D. based on his partially plagiarized dissertation.<sup>64</sup> The North Dakota Supreme Court refused to address the merits of the student's claim because the student had failed to exhaust his administrative remedies under the student handbook and had not appealed the Graduate Committee's decision to the university's Student Graduate Studies Committee before

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60. *Hand v. Matchett*, 957 F.2d 791, 793 (10th Cir. 1992).

61. *Id.* at 792–93.

62. *See id.* at 795.

The statute at issue gives the Board of Regents exclusive power to confer degrees. Conversely, it is appropriate to assume that to the extent a power to revoke degrees is recognized, it too is vested exclusively in the Regents. None of the statutes governing the university expressly allow the Regents to delegate this, or any other, power.

63. *See Waliga v. Bd. of Tr. of Kent State Univ.*, 488 N.E.2d 850 (Ohio 1986) (upholding revocation of undergraduate degrees for grade discrepancies where state statutes conferred on the university the authority to “confer such . . . academic degrees as are customarily conferred by colleges and universities in the United States [and to] do all things necessary for the proper maintenance and successful and continuous operation of such universities.”) (citing OHIO REV. CODE §§ 3341.04, 3301.05).

64. 711 N.W.2d 194 (N.D. 2006).

seeking a judicial remedy.<sup>65</sup> In essence, the state supreme court held that, unless plaintiff has exhausted his administrative remedies, the State Board of Higher Education had the authority under the state's constitution to revoke degrees.<sup>66</sup> In *Kerr v. Board of Regents of University of Nebraska*, a state appeals court rejected the claim of a law student brought under the state's Administrative Procedure Act (APA).<sup>67</sup> In upholding the law school Honor Committee's and dean's decisions to dismiss plaintiff for four plagiarism violations, the Nebraska appeals court held that both the committee and the dean had authority to make dismissal decisions, but neither were "agencies" under the APA so as to give state courts jurisdiction over them.<sup>68</sup> Thus, in effect, the student's procedural rights were determined by the university catalog and not by the more comprehensive APA. In *Martin v. Godwin*, the Third Circuit rejected the claim of a Pennsylvania student, dismissed from the University of Kansas' School of Pharmacy distance learning program, that university officials had defamed him by dismissing him from the program for two instances of plagiarism.<sup>69</sup> The Third Circuit held that the Kansas school lacked sufficient contacts with Pennsylvania<sup>70</sup> so as to give a Pennsylvania Federal District Court either general<sup>71</sup> or

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65. *Id.* at 197.

66. *See* N.D. CONST. Art. 8, § 6(b), where the state constitution grants broad authority to the State Board of Higher Education to "to prescribe, limit, or modify the courses offered at the several institutions" and "to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and every thing necessary and proper for the efficient and economic administration of said state educational institutions."

67. 739 N.W.2d 224 (Neb. Ct. App. 2007). *See also* NEB. REV. STAT. §§ 84-901(1), 84-917(1) (while the state statute assures that "[a]ny person aggrieved by a final decision in a contested case . . . shall be entitled to judicial review under the Administrative Procedure Act," that assurance applies only to a "board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations").

68. *Id.* at 913.

69. 499 F.3d 290, 294 (3rd Cir. 2007) (one instance involved copying directly from a website without attribution; the second instance involved copying passages from a reference book word-for-word).

70. *See id.* at 295, n. 2. Although the Third Circuit upheld the district court's summary judgment for the university, it struggled as to whether the district court should have only dismissed plaintiff's complaint under Rule 12(b)(2) of Federal Rules of Civil Procedure for failure to state general or personal jurisdiction, as opposed to reaching the merits of the case and granting summary judgment under Rule 56.

71. General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (rejecting personal jurisdiction claim by a claimant in

specific<sup>72</sup> jurisdiction over the school or its employees.<sup>73</sup> In an era where much of higher education is delivered electronically to students who “communicate with their professors, who [may be] primarily located in [another state], by phone and email,”<sup>74</sup> *Martin* is a sobering dose of reality. Students may find that their electronic convenience of access to instruction does not necessarily come with a concomitant convenience of process.<sup>75</sup>

#### IV. PROTECTION OF WORK PRODUCT

At its broadest, the definition of plagiarism concerns the issue of originality and whether a person has provided appropriate attribution for material that owes its origin to another source.<sup>76</sup> While plagiarism can extend to public domain material,<sup>77</sup> the core of plagiarism litigation involves material in which an originator can be identified and the originator has

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Texas against a Columbia corporation where only contact with Texas had been sending its chief executive officer to Houston to negotiate the contract with the consortium, accepting into its New York bank account checks drawn by the consortium on a Texas bank, purchasing helicopters, equipment, and training services from a Texas manufacturer, and sending personnel to that manufacturer's facilities for training, none of which was sufficient under the Due Process Clause of the Fourteenth Amendment to assert personal jurisdiction).

72. See *Martin*, 499 F.3d at 296. Specific jurisdiction exists when the claim arises from or relates to conduct purposely directed at the forum state and requires a three-part inquiry: (1) whether the defendant has “‘purposefully directed’ his activities” at the forum; (2) whether the plaintiff's claim “arise[s] out of or relate[s] to” at least one of those specific activities; and, (3) whether other factors are present to ensure that the assertion of jurisdiction otherwise “comport[s] with ‘fair play and substantial justice.’”

73. *Id.* at 293–94 (plaintiff learned of the School's program through the University's website, but none of the individual defendant instructors in the program had ever recruited plaintiff or visited Pennsylvania; all communications were accomplished by phone or email).

74. *Id.* at 293.

75. See *id.* at 294. An interesting aspect of *Martin* is that the Third Circuit decision suggests that the school's investigation of the charges of plagiarism and the decision to expel plaintiff were made without any direct involvement by plaintiff in the process. In any case, the plaintiff in *Martin* could still bring his claim, but would have to do so in Kansas and that, presumably, would be considerably less convenient.

76. See *McDonald v. DuMaurier*, 144 F.2d 696 (2d Cir. 1944) (discussing whether Daphne Du Maurier's *Rebecca* represented a copyright infringement of plaintiff's article, “I Planned to Murder My Husband,” and novel, *Blind Windows*, under an archaic tortious plagiarism) (reversing district court's summary judgment for defendant, DuMaurier, and finding that a triable issue existed as to whether defendant's book represented an infringement of plaintiff's copyright).

77. See Horovitz, *supra* note 36, at 260, n. 184 (“student B, by plagiarizing only the non-copyrightable quote already in the public domain, is again guilty of plagiarism but not copyright infringement”).

ownership under copyright law. This section explores a variety of claims that may be brought by the owners of material against those who have plagiarized their work.

The most common vehicle used by owners of material to challenge plagiarism is the Copyright Act.<sup>78</sup> However, “the law and plagiarism intersect only imperfectly. Plagiarism is not a legal term, and though an instance of plagiarism might seem to be the quintessential act of wrongful copying, it does not necessarily constitute a violation of copyright law.”<sup>79</sup> Copyright protection applies only to “original works of authorship fixed in any tangible medium of expression,”<sup>80</sup> subject to the Act’s “fair use” provision that permits an exemption from copyright infringement “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.”<sup>81</sup> Fair use, though, is a slippery concept that requires a consideration of four factors<sup>82</sup>:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;<sup>83</sup>
- (2) the nature of the copyrighted work;<sup>84</sup>
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;<sup>85</sup>

78. Copyright Act, 17 U.S.C. § 101.

79. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 514 (1992).

80. 17 U.S.C. § 102(a). The test for originality is not substantial. See *West Publishing Co. v. Mead Data Cent.*, 799 F.2d 1219, 1223 (8th Cir. 1986) (granting injunctive relief to West Publishing Company as to its arrangement and pagination of legal reports):

To be the original work of an author, a work must be the product of some “creative intellectual or aesthetic labor.” However, “a very slight degree of such labor[,] ... almost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient” to make the work copyrightable. (citations omitted)

81. 17 U.S.C. § 107.

82. *Id.*

83. See *Educ. Testing Serv. v. Katzman*, 793 F.2d 533, 543 (2nd Cir. 1986) (defendant’s use of plaintiff’s testing materials in a business to assist students to score higher on the SAT violated the Copyright Act because defendant operated a business and the exemption favors noncommercial use).

84. See *Wright v. Warner Books*, 953 F.2d 731 (2nd Cir. 1991) (unpublished letters and journals are entitled to greater copyright protection over claim that they were subjects of fair use).

85. *Compare New Era Publ’ns v. Carol Publ’g*, 904 F.2d 152, 158 (2nd Cir. 1990) (finding no copyright violation as to copying of 5-6% of 12 works and 8% of 11 works with “each of the 11 being only a few pages in length”) with *Harper & Row, Publishers v. Nation Enter.*, 471 U.S. 539, 565 (1985) (finding that copying of 300 works was a

and

- (4) the effect of the use upon the potential market for, or value of, the copyrighted work.<sup>86</sup>

The basic aspect of copyright in protecting against copying<sup>87</sup> extends only to the copyrightable portions of the author's output,<sup>88</sup> to the form in which ideas are expressed,<sup>89</sup> and to substantial similarity in copying.<sup>90</sup> Thus, the threshold question under the Copyright Act is always whether the copied material was copyrightable. In *Clark v. Crues*, the Federal Circuit held that a teacher who had developed a hall pass system did not have a copyrightable interest in that system for purposes of an infringement action against the school's development of a similar system because plaintiff had only a "business idea," which is excluded from Copyright Act protection.<sup>91</sup>

The classic infringement case is *Marcus v. Rowley*, where a high school teacher who had developed a 35-page booklet, "Cake Decorating Made Easy," found herself in the awkward position of being charged with plagiarism by her own students after another teacher had copied portions of her booklet without attribution and distributed them to students.<sup>92</sup> Worth

copyright violation because "the heart" of the copied book had been used).

86. See *Ass'n of Am. Med. Coll. v. Cuomo*, 928 F.2d 519 (2nd Cir. 1991) (holding that disclosure and distribution of MCAT questions and answers pursuant to state law would prevent them from being reused and thus temporary injunctive relief was appropriate).

87. See *Mazer v. Stein*, 347 U.S. 201, 218 (1954) ("Absent copying there can be no infringement of copyright.").

88. The distinction between original and nonoriginal author contributions is recognized in the Copyright Act and in court decisions. See 17 U.S.C. § 103(b); *Musto v. Meyer*, 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd mem.*, 598 F.2d 609 (2nd Cir. 1979) (holding that copying an "idea" as opposed to "the expression of an idea" was not protected).

89. The Copyright Act protects only the medium of expression; protection does not extend to "any idea, procedure, process, method of operation, concept, principle, or discovery." 17 U.S.C. § 102(b).

90. See *Twentieth-Century Fox v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983) (finding a triable issue precluding summary judgment regarding whether plaintiffs' alleged 13 points of similarity between plaintiffs' "Star Wars" and defendant's "Battlestar Galactica" represented a copying of the idea of plaintiffs' motion picture or expression of that idea).

91. 260 Fed. Appx. 292, 293 (Fed. Cir. 2008); see also 17 U.S.C. § 102(b) ("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 work.").

92. 695 F.2d 1171 (9th Cir. 1983).

noting is that plaintiff Marcus had placed in each booklet the copyright symbol (©) followed by “1973 Eloise Marcus.”<sup>93</sup> In plaintiff’s subsequent Copyright Act lawsuit, resulting from defendant’s plagiarism, the Ninth Circuit found a copyright violation and remanded for damages.<sup>94</sup> Regarding the four fair-use factors, the court of appeals found a violation of the first because defendant’s use had been “for the same intrinsic purpose for which the copyright owner intended;”<sup>95</sup> it found a violation of the third because “it [was] not conceivable that the copying of all, or substantially all, of a copyrighted [item] can be held to be a fair use.”<sup>96</sup>

However, original ideas can be excluded from copyright protection for the creator where they constitute “works for hire.”<sup>97</sup> Works that are created as part of an employment relationship are considered “works for hire,” and under the Copyright Act “the employer or other person for whom the work was prepared is considered the author . . . [and,] unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”<sup>98</sup> In *Pavlica v. Behr*, a federal district court found that a triable question of fact existed as to whether a manual that a high school teacher had developed to teach a new course to high school students represented a work for hire.<sup>99</sup> The legal theory in *Pavlica* is interesting in that the work-for-hire claim was raised by the defendant whose argument was essentially that, because the manual had been developed for use in plaintiff’s high school teaching, it was a work for hire and precluded plaintiff’s infringement claim. Plaintiff eventually prevailed in part and was awarded some damages for copyright infringement,<sup>100</sup> but the case is a troublesome reminder that materials developed and used by teachers for classes can be subject to “work for hire” challenges to copyright protection.<sup>101</sup>

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93. *Id.* at 1173.

94. *Id.* at 1179.

95. *Id.* at 1175.

96. *Id.* at 1176 (quoting *Wihitol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962)).

97. 17 U.S.C. § 201(b).

98. *Id.*

99. 397 F. Supp. 2d 519 (S.D.N.Y. 2005).

100. *Pavlica v. Behr*, 2006 WL 1596763 (S.D.N.Y. Jun 12, 2006).

101. See *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2nd Cir. 2004) (holding that tests, quizzes, and homework problems prepared by a

Four high school students in Virginia launched a novel, but eventually abortive, claim in *A.V. v. iParadigms, Ltd. Liability Co.*, against the company that owned Turnitin.<sup>102</sup> The students claimed that the company's keeping student papers submitted for plagiarism checks and adding them to the Turnitin database was not a fair use under the Copyright Act.<sup>103</sup> Finding that the students had entered into an enforceable contract with iParadigms when they "clicked 'I Agree' to acknowledge their acceptance of the terms of the Clickwrap Agreement,"<sup>104</sup> the court held that the students accepted the company's limitation that "Turnitin and its services . . . are offered to you, the user ['User'], *conditioned on your acceptance without modification* of the terms, conditions, and notices contained herein."<sup>105</sup>

Thus, "[b]ecause a limitation of liability clause was among the terms of the Agreement, the Court [found] that iParadigms [could] not be held liable for any damages arising out of Plaintiffs' use of the Turnitin web site, which include[d] the submission and archiving of their written works."<sup>106</sup> The court rejected plaintiffs' use of a disclaimer on their papers objecting to the archiving of their papers because iParadigms offered only two choices, "Agree" and "Disagree," with no third option.<sup>107</sup> In addition, the court rejected plaintiffs' infancy defense as to their formation of the contract because the students could not lay claim to the benefit of "receiv[ing] a grade from their teachers, allowing them the opportunity to maintain good standing in the classes in which they were enrolled" and, at the same time, attempt "to void their

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teacher for classroom use were works for hire and, thus, once the teacher had been discharged by the school could not be recovered via a subpoena). *But see* Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987) (recognizing that work for hire does not apply to faculty publications in higher education even though faculty are required to publish).

102. 544 F. Supp. 2d 473 (E.D. Va. 2008).

103. Because plagiarism had become a problem at the high school that plaintiffs attended, school officials had contracted with iParadigms for

utiliz[ing] iParadigms' Turnitin technology system and . . . authoriz[ing] Turnitin to archive student-submitted work. . . . [The school] required their students to use Turnitin to submit their written works [and, if] a student chose not to submit his or her work via Turnitin, that student would receive a zero on the assignment.

*Id.* at 478.

104. *Id.* at 480.

105. *Id.*

106. *Id.*

107. *Id.*

contractual obligations.”<sup>108</sup> Finally, the court found iParadigm’s archiving of student papers to constitute fair use under all four fair-use factors.<sup>109</sup> The archiving accomplished a different “purpose and character” from plaintiffs’ creative expression: “namely, to prevent plagiarism and protect the students’ written works from plagiarism.”<sup>110</sup> The court found no problem with “the nature of the copyrighted work” because “the allegedly infringing use [made] no use of any creative aspect of the student works.”<sup>111</sup> No impermissible use of “the amount and substantiality of the portion used” had occurred since iParadigm’s “use was highly transformative.”<sup>112</sup> As to the fourth factor, the court found it “clear that iParadigm’s use of Plaintiffs’ works [had] caused no harm to the market value of those works.”<sup>113</sup> The *A.V. v. iParadigm* court granted summary judgment for iParadigm on both contract and Copyright Act theories; this has served to preserve one of the most viable instruments for addressing plagiarism in education.

Where the Copyright Act is not a viable theory because claimants are unsuccessful in registering their work with the Copyright Office,<sup>114</sup> at least one federal court, in *Dodd v. Ft. Smith Social School District*,<sup>115</sup> has recognized a claim under the Lanham Trade-Mark Act<sup>116</sup> on the theory of reverse palming off. In *Dodd*, a school district had published a book under another teacher’s name, but the book had been researched and written by plaintiff teacher and her students

108. *Id.* at 481. See 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2007) (“If an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations.”).

109. For the four fair use factors, see 17 U.S.C. § 107.

110. *A.V.*, 544 F. Supp. 2d at 482.

111. *Id.* at 483.

112. *Id.*

113. *Id.*

114. While persons do not have to register their works with the Copyright Office to have copyright protection, 17 U.S.C. § 408(a), they must register their work before they can sue under the Act to protect that work. 17 U.S.C. § 411(a).

115. 666 F. Supp. 1278 (W.D. Ark. 1987).

116. 15 U.S.C. § 1125(a)(1) (permits civil actions for damages and injunctive relief against any person who uses “any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”).

with no acknowledgement of their work.<sup>117</sup> Using the Lanham Act, the federal district court granted injunctive relief to the plaintiffs that prohibited the school from distributing or further advertising the book that had been substantially copied from plaintiffs' work. The court observed that "[t]he confusion here [was] not caused by a comparison of two products both in the public domain, [but rather] . . . [was] the result of the alleged false representation of [defendant teacher] as the preparer and editor of the work in question."<sup>118</sup> While the Lanham Act is seldom used in plagiarism cases, presumably because plaintiffs are able to bring their claims under the Copyright Act, the element of misrepresentation under Lanham is an accurate reflection of what plagiarism is.

#### IV. CONCLUSION

Plagiarism has become a complex litigation field in the United States. In drafting academic misconduct policies, educational institutions have not always been clear whether intent should be a prerequisite to a finding of plagiarism. Where intent to plagiarize is not clearly required as part of the definition, courts have tended to apply only an objective analysis that requires no intent.

Issues of fairness in investigating claims of plagiarism and disciplining those found guilty reach constitutional questions under the Liberty and Property Clauses, as well as compliance with procedural rights ensconced in institutional catalogs and handbooks. Courts seem willing to defer to the judgment of educators as to whether plagiarism has occurred, and as long as investigation and discipline accords with minimal constitutional due process requirements, courts are not likely to intervene. The irony is that this deference applies even though the penalties for plagiarism can be as severe as those for disciplinary infractions.

Those charged with plagiarism and those whose works have been plagiarized have demonstrated a propensity to fight back. Although the case law is not extensive, those investigating charges of plagiarism need to be conscious of the emotional harm and damage to reputation that is at stake for those

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117. 666 F. Supp. at 1284.

118. *Id.* at 1285.

alleged to have plagiarized and, thus, of possible lawsuits by those so charged where established procedures have been ignored. In addition, courts have shown a willingness to enjoin the publication of materials that are the work product of another.

In short, plagiarism litigation has taken on such multiple variations because it speaks to the core of education which is the search for new knowledge. Those who take shortcuts and steal the work of others without appropriate attribution should expect to face condemnation and attendant penalties that come with the finding of such theft. The Internet has made the rich reservoir of knowledge more accessible, but has also raised the level of responsibility of producers of new knowledge to respect the milestones of those who have preceded them by acknowledging their contributions. Plagiarism steals from everyone because it serves to erase the benchmarks that let us know that new knowledge is being created.

