PART I

Introduction

1

Inspiration or infringement: the plagiarist in court*

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In Maurice Shadbolt's novel, *The House of Strife*, the protagonist Ferdinand Wildblood finds himself fleeing London for Blackguard Beach in New Zealand, in the year 1840. Wildblood's crime was plagiarism and the destination is more than ironic. As a hack writer, Wildblood had been asked to edit a manuscript by a man called James Dinwiddie which tells a blood-curdling tale of murder, mayhem, battle and bravery, lust and lasciviousness in the far-flung colony of New Zealand. Finding the writing style impenetrable and the storyline highly improbable, Wildblood rewrites the work, under the pseudonym of Henry Youngman. The story is a runaway success and Youngman becomes the toast of London. But Dinwiddie catches up with Wildblood and, in fear for his life, Wildblood jumps aboard the first ship for New Zealand. While in New Zealand, Wildblood becomes caught up in the Maori wars initiated by the young Maori chief, John, or Hone, Heke. After numerous hair-raising adventures, Wildblood returns to spend his twilight years in London. But at the point of finishing his first-hand, original, account of what will become known as the 'Flagstaff Wars', he is tracked down in his gentleman's club by Dinwiddie and meets his mysterious, uncertain, fate at the hands of his nemesis.

Wildblood has perpetrated a literary 'crime' against the 'original author', for which he pays dearly. In fiction, then, a rough justice is meted out against literary offenders. In real life too, plagiarists may be

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punished by institutional sanctions or social stigma.[1] But what are their crimes precisely and, most pertinently for present purposes, can these wronged authors find redress in the law of copyright or, indeed, elsewhere in the law? The recent, high-profile case involving Dan Brown's bestselling novel *The Da Vinci Code*, shows that this will not always be possible.[2] This is because the law of copyright infringement does not map precisely onto the literary offence of plagiarism, despite the fact that both share a concern with 'originality'. However, while there has recently been valuable and fascinating interdisciplinary work on the relationship between originality in literature and law, less has been done on copyright infringement. This chapter sets out to examine the overlap and the lacunae between the plagiarism and infringement, as well as briefly considering two alternative legal actions that may also address some elements of the problem of plagiarism: the tort of passing off and the criminal offence of fraud. First, however, it is necessary to attempt the difficult task of pinning down the meaning of 'plagiarism'.

In her book *Pragmatic Plagiarism*, Marilyn Randall identifies plagiarism as a pragmatic, rather than a textual category, meaning it is 'principally determined by a wide variety of extra-textual criteria that constitute the aesthetic, institutional and cultural contexts of production and reception of the work'.[3] Thus, plagiarism is a judgement, made by a reader and, as such, works of plagiarism remain objects of controversy. Notwithstanding the difficulties inherent in identifying plagiarism, Randall argues that there is considerable historical consistency among definitions of plagiarism.[4] Taking her two exemplary definitions, one from the eighteenth century and one from the twentieth century, we can identify the following elements commonly considered to form the criteria of plagiarism: fraud, bad faith or covertness; copying, sometimes expressed as theft of another's property; claiming the work of another as one's own and thereby obtaining an unearned advantage (in the eighteenth-century definition characterized as claiming the honour due to another); and, making only small alterations, or not enhancing or improving the materials taken in any way. A further element in the

[1] See the examples of Raj Persaud and Jacob Epstein in Nick Groom's contribution to this volume (Chapter 14).
[2] *Baigent and Leigh* v. *Random House Group* [2007] EWCA Civ 247.
[3] Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit and Power* (University of Toronto Press, 2001), p. 4.
[4] *Ibid*., pp. 15–16, 189.

eighteenth-century definition was lack of the talent to become an author.[5]

As Laurie Sterns has noted, 'The framework in which the law has found plagiarism to be most conveniently located is intellectual property law'.[6] In the United Kingdom, it is most usually found in the subcategory of copyright law. Indeed, in some cases, particularly older ones, the words 'plagiarism' and 'infringement' appear to be used interchangeably.[7] It is not surprising that copyright and plagiarism share certain characteristics. As discussed further below, plagiarism is frequently described in terms of theft, and the existence of theft presupposes the existence of property. Copyright law is that statutory instrument that creates a property in creative products, and so the two are closely related. However, it is important to bear in mind that concepts of plagiarism predated the first copyright law in 1710. Moreover, the elements of copyright that developed following that first statutory enactment owed a considerable debt to practices relating to the regulation of the book trade in the seventeenth century and earlier.[8] Thus, while copyright law picks up some of the elements of plagiarism, it leaves others unaddressed and, at the same time, contains criteria that may make it difficult for those who believe they have been plagiarized to achieve legal outcomes with which they are satisfied.

The key similarity between the two concepts is the criteria of copying. A work that is identical or similar to an existing work, but was created without any knowledge of that work – in other words, the similarities are completely coincidental – will be neither a plagiarism nor a copyright infringement. However, in both cases, copying alone is not enough. In copyright, the copying must be done in relation to the whole work, or to a substantial part of it.[9] The question of what amounts to a 'substantial' part is not always straightforward; since 1836 the test has been one of not just quantity but also quality.[10] A court must therefore look not only at the amount that has been copied, but also at how important that part is to the work from which it was taken. A second core copyright doctrine is that the copying must occur in relation to expression, rather than ideas.

[5] *Ibid.*, pp. 17–18.
[6] Laurie Sterns, 'Copy Wrong: Plagiarism, Process, Property, and the Law', Cal. L. Rev., 80 (1992), 513, 522.
[7] E.g. *Tate* v. *Fullbrook* [1908] 1 KB 821; *Chatterton* v. *Cave* (1874–5) LR 10 CP 572.
[8] See Alexander in this volume, Chapter 15.
[9] Copyright, Designs and Patents Act 1988, s. 16(3).
[10] *Bramwell* v. *Halcomb* (1836) 3 My. & Cr. 737.

In the UK, this principle emerges from the common law but has also been adopted in a number of international and European instruments.[11] The devil of such a principle lies in its application to the details of particular cases and it is not always clear where 'idea' stops and 'expression' begins. As Judge Learned Hand famously said, 'nobody has ever been able to fix that boundary, and nobody ever can'.[12] The courts have accepted that 'non-literal copying', as it is called, may be infringement. Consequently, infringement is possible when the plot, incidents or themes of a story are copied, even if none of the same words are used, and also theoretically possible when a computer program is structured in a similar manner to another program (probably with a view to achieving a similar function), but no actual code is copied.[13]

Different courts have said different things about how to ascertain whether a case of non-literal copying amounts to infringement. In the most recent House of Lords' decision on the subject, *Designers' Guild* v. *Russell Williams*,[14] Lord Hoffmann attempted to bring some clarity to the idea–expression dichotomy by noting: 'Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects foxes better than hedgehogs.'[15] Mark Chacksfield points out that it makes more sense to see this not as a direct reference to the Greek poet Archilocus' well-known quote – 'the fox knows many things but the hedgehog knows one big thing', but to Isaiah Berlin's essay on different types of historian.[16] Whatever the allusion, it may not get us much closer to clarifying the border between idea and expression. Indeed, it was upon this point that the two authors, Baigent and Leigh, failed in their legal action against Dan Brown in respect of their allegations that he had plagiarized their historical work, *Holy Blood Holy Grail*, in his bestselling novel *The Da Vinci Code*. Upholding the judgment of the court below,

[11] *Hollinrake* v. *Truswell* [1894] 3 Ch. 420. Agreement on Trade-Related Aspects of Intellectual Property 1994 (TRIPS Agreement), Art. 9(2) and WIPO Copyright Treaty 1996, Art. 2. See also European Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Art.1(2).
[12] *Nichols* v. *Universal Pictures* 45 F (2d) 119 (1930).
[13] See *John Richardson Computers Limited* v. *Flanders* [1993] FSR 497.
[14] [2001] 1 WLR 2416. [15] *Ibid*., 2423.
[16] M. Chacksfield, 'The Hedgehog and the Fox: A Substantial Part of the Law of Copyright', EIPR, 23(5) (2001), 259.

the Court of Appeal in this case held that although some elements had been copied they were 'of too high a level of generality and abstraction to qualify for copyright protection: they were ideas and not the expression of ideas'.[17]

The substantial-part rule and the idea–expression dichotomy are both indispensable elements of copyright infringement doctrine. However, the extent to which they are relevant to an assessment of plagiarism is less straightforward. Randall points out that the substantial-part rule might be inverted in cases of plagiarism: 'Since plagiarism depends on the reader's recognition of repeated discourse, the copying of a little known or obscure, that is, insignificant, source rather implies that the perpetrator counted on not being found out, which goes a long way to establishing fraudulent intent.'[18] For others, plagiarism is not a matter of degree and even the smallest copying counts as plagiarism.[19] In the case of the idea–expression dichotomy, plagiarist-hunters and accusers find themselves in similar difficulties to copyright claimants. While the various definitions of plagiarism, and its discourse as found in accusations and judgments, contains no such strictures on the copying of ideas, it will invariably be harder to prove plagiarism of an idea and, as Randall points out, 'many non-legal accusations of plagiarism have fallen into ridicule for the misapprehension of the fine distinction between an "idea" and its "expression"'.[20] In literary terms, some ideas are so well known, or commonplace, that they are incapable of being plagiarized, or so defenders against plagiarism argue.

Three further points of distinction between plagiarism and infringement also need to be made. First, there can be no copyright infringement of a work that is itself not protected by copyright. Works in which copyright has expired cannot be infringed but can be plagiarized. Second, some judgments of plagiarism make a distinction between, on the one hand, copying that improves or transforms the work, and, on the other hand, copying that involves no improvement. This differentiation is expressed by T. S. Eliot's famous claim: 'Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different.'[21] While

[17] *Baigent and Leigh* v. *Random House Group* [2007] EWCA Civ 247, para. 92.
[18] Randall, *Pragmatic Plagiarism*, p. 151.
[19] See *ibid*., 150; Stearns, 'Copy Wrong', 528.
[20] Randall, *Pragmatic Plagiarism*, p. 147.
[21] T. S. Eliot, 'Philip Massinger', *The Sacred Wood: Essays on Poetry and Criticism* (4th edn, London: Methuen & Co., 1934).

such considerations did play a role in UK copyright law in the late eighteenth and early nineteenth centuries, it is no longer any defence to an infringement action to claim that a new or different work has been created.[22]

Third, the question of intention is irrelevant to a charge of copyright infringement, but its role in relation to plagiarism is less clear. Copyright infringement, in its civil form, is a strict liability offence. Despite some historical references to *animus furandi*,[23] the Copyright, Designs and Patents Act 1998 (CDPA), makes it clear that intention is not required.[24] Indeed, copyright infringement can even be carried out subconsciously, as long as there is a causal connection between the two works. While the defendant's denials that he consciously copied may be evidence which could rebut the suggestion of a causal connection, if there is sufficient objective similarity between the works then the court may draw the inference of a causal connection.[25] In the case of plagiarism, by contrast, Randall asserts, 'Identifying plagiarism entails ascribing to an agent a series of guilty or fraudulent intentions, the necessity to show intent, in order to establish guilt, or at least degrees of it, is by far the most important of all criteria for establishing plagiarism.'[26] Intention is relevant not just in the sense that the copying is deliberate, but also in terms of a further intention, sometimes referred to in the criminal law as an ulterior intent, to claim the credit by passing the work off as one's own. While some institutional statements explicitly include unintentional copying and non-attribution within their definition of plagiarism,[27] the centrality of the element of deceit or bad faith suggests that, at least outside the academic sphere (where, as Groom observes,[28] the concern is really with cheating rather than plagiarism in its literary or artistic context), intention should be key to a charge of plagiarism.

This brings us to a further element of plagiarism, that of incorrect attribution. This is something that can be recognized in copyright law, although not through the action for infringement of economic rights we have been discussing so far. The CDPA 1988 recognized several moral rights, giving effect to Article 6*bis* of the Berne Convention which

[22] See Chapter 15, also by Alexander, in this volume.
[23] E.g. *Cary* v. *Kearsley* (1802) 4 Esp. 168; *Lewis* v. *Fullarton* (1839) 2 Beav. 6.
[24] CDPA 1988, s. 16. See also *Baigent* v. *Random House* [2007] EWCA Civ 247, para. 95.
[25] *Francis Day & Hunter* v. *Bron* [1963] Ch. 587.
[26] Randall, *Pragmatic Plagiarism*, p. 126.
[27] See Groom, Chapter 14, and response of Alexander, Chapter 15, n. 41, in this volume.
[28] See Chapter 15, n. 42.

required member states to protect authors' rights of attribution and integrity. Thus, section 77 of the Act confers upon authors the right to be identified as the author of a work. This section could therefore be invoked by an author (or composer or artist) whose work has been plagiarized under the name of another author and this would be appropriate. Moral rights, despite their name, are not about morality but about protecting the non-economic interests of authors and other creators. The language of moral rights emerged in the copyright regimes of Continental Europe as an expression of the belief that an author's personality is an integral aspect of his work and that misuse of his work causes him personal, non-financial harm.[29] In this concern with the psychological aspects of the relationship between the author and his work, moral rights share a close affinity with the category of plagiarism. However, again, the right is hedged with numerous restrictions that mean it will not always be useful to punish plagiarists, the main restrictions being that the work in question must be published commercially and copies issued to the public, the author must have asserted the right before she or he can bring an action, and the right does not apply to anything done with the authority of the copyright owner if the work was produced in the course of employment.[30] The right also applies only so long as the work remains in copyright.

A final point to be made about the interaction between copyright and plagiarism is to note the existence of certain 'permitted acts' that will not amount to copyright infringement. Chapter 3 of the CDPA 1988 contains an extensive list of acts that are allowed by the statute, ranging from concessions to the visually impaired, through exceptions allowed for educational institutions and libraries to specific exceptions in relation to folksongs. The permitted acts are commonly referred to as exceptions or defences, and the most flexible of them are known as the fair dealing defences, and must be distinguished from the broader US defence of 'fair use'. In order to take advantage of one of the UK fair dealing defences, the use of the work must fall into a particular category. These are research or private study, reporting current events

[29] See J. Ginsburg, 'Moral Rights in a Common Law System', Ent. LR (1990), 121, 122. In Britain, the Fine Arts Copyright Act of 1862 protected artists against misrepresentations of a work's authorship, as well as protection against works being altered and resold, but these rights were not discussed or presented in the context of moral rights theory: see Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006), pp. 371–2.

[30] CDPA 1988, ss. 77, 78, 79.

and criticism or review.[31] This means that, unlike in the US, there is no room for a defence of parody, or satire, in UK copyright law. Instead, these works will fall to be judged by the usual question of whether a substantial part has been taken and, if so, whether the criticism and review exception will apply.[32]

All three of the fair dealing categories have the same threshold requirement of 'fairness' – another somewhat vague concept in copyright law. Once again, different courts have said different things about what will count as 'fair' and, again, the decision is largely a matter of impression. Some relevant matters include the extent and number of quotations, the length or amount of what is taken, the purpose for which the extracts are used, particularly whether they are used in competition with the original work, and how the material was obtained. The statute specifically states that in order to take advantage of it, the work in question must be accompanied by a sufficient acknowledgement and, as noted above, one of the essential criteria of plagiarism is non-revelation of the original author. Thus, fair dealing could only be available as a defence to a plagiarist of anonymous works. However, even in such a case the element of 'fairness' is likely to prove a stumbling block to a would-be plagiarist, as the covert and deceptive act of a plagiarist in claiming authorship of such a work is unlikely to be considered 'fair'. In such a situation, it seems highly likely that the legal notion of fairness would give expression to the literary norms against plagiarism. A fourth defence is one that has been developed through the common law, and this is the power of the judges to refuse to enforce copyright on public policy grounds.[33] The existence and scope of this defence has been the subject of debate and contradictory judicial decisions in recent years, but most recently, in *Ashdown* v. *Telegraph Group*, the Court of Appeal affirmed the existence of the public interest defence.[34] Little guidance was given, however, as to when such a defence would operate. The Court noted that the circumstances in which it might operate are not capable of precise categorization, but indicated that it would succeed only in rare cases. Thus, this defence is similarly unlikely to be relevant in a case involving plagiarism.

This comparison between copyright infringement and plagiarism reveals that copyright law addresses only two aspects of plagiarism:

[31] *Ibid.*, ss. 29, 30.
[32] See Robert Burrell and Alison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005), p. 50.
[33] CDPA 1988, s. 171(3) [34] [2001] EWCA Civ 1142.

copying and failure to attribute authorship. And even in these areas the overlap is far from complete. As noted above, the regime of moral rights is in some ways a better fit for plagiarism, with its central concern for the relationship between author and work, but the limited way in which moral rights have been implemented in the UK means they may not always assist in bringing plagiarists to 'justice'. Although Randall refers to copyright as a 'subset' of plagiarism,[35] copyright and plagiarism are more like intersecting sets. Some acts will be copyright infringement or moral rights breaches but not plagiarism and vice versa.

Having looked at the advantages and disadvantages that copyright law offers for authors who believe they have been plagiarized, it is worth considering whether any other areas of intellectual property law can step into the breach. One possible candidate is the tort of passing off. The elements of this action are threefold: there must be goodwill, misrepresentation and damage.[36] The first criterion, goodwill, relates to trading goodwill and professional writers and other authors have been found by the courts to qualify in this respect.[37] The second criterion, misrepresentation, in its traditional formulation states that it must be such that it is likely to lead the public to believe that the goods or services offered by the claimant are those of the defendant. However, the courts have also recognized 'reverse passing off', that is, the misrepresentation that the goods of the defendant are those of the claimant.[38] This form of the action, although rarely used in practice, would be the most relevant to an author complaining of plagiarism. This point was made obliquely in the 1892 case of *Walter* v. *Steinkopf*,[39] which arose from *The Times*' complaint that the *St James' Gazette* was publishing a number of extracts from its articles. The allegation was one of copyright infringement, and the *Gazette* had identified the sources of its material but North J. observed, 'A man cannot justify the taking of what he has no right to take by stating whence he has taken it, though he may thereby avoid the additional dishonesty of passing off as the product of his own labour what is really cribbed from another.'[40] The third criterion is that the claimant must demonstrate that he has suffered, or is likely to suffer,

[35] Randall, *Pragmatic Plagiarism*, p. 16.
[36] *Reckitt & Colman Products Ltd* v. *Borden* [1990] 1 WLR, 491.
[37] See *Landa* v. *Greenberg* (1908) 24 TLR 441 (pen-name of Aunt Naomi), *Sweeney* v. *Macmillan Publishers Ltd* [2002] RPC 35 (James Joyce); *Archbold* v. *Sweet* (1832) 1 M. & Rob. 162; 5 Car. & P. 219 (barrister writing a legal textbook).
[38] *Bristol Conservatories* v. *Custom Built* [1989] RPC 455.
[39] [1892] 3 Ch. 489. [40] *Ibid.*, 497.