

Texts, Lies, and Changed Positions: A Review of *The Little Book of Plagiarism*

By Richard A. Posner
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Reviewed by Judith D. Fischer

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With *The Little Book of Plagiarism*, Judge Richard Posner has weighed in on a subject of perennial interest to legal research and writing professors. Pocket-sized and only 116 pages, the book offers a “cool appraisal” (p. 108)¹ of what constitutes plagiarism and how it should be treated. The book’s criteria for identifying plagiarism are a useful addition to current analyses of the topic. And while Posner does cover some legal points, the book is accessible to a general audience and will be a helpful resource not only for lawyers but also for writers and teachers. Professors should be forewarned, however, that in parts of the book, Posner appears to take student copying less seriously than they may think appropriate.

Fajans and Falk have defined plagiarism as “the representation of the words or ideas of another as one’s own,”² and other legal research and writing professors have offered similar definitions.³ Posner adds nuance to such traditional definitions by pointing out that plagiarism is a vague concept with gray areas. (p. 108) He rejects descriptions of plagiarism as “literary theft” or “borrowing.” (p. 11)

¹ Parenthetical numbers refer to pages in Posner’s book.

² Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* 104 (3d ed. 2000).

³ E.g., Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 244 (1999) (defining plagiarism as “taking the literary property of another without attribution, passing it off as one’s own, and reaping from its use the unearned benefit from an academic institution.”); Mary Bernard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 296 (4th ed. 2005) (stating that “[p]lagiarism is copying someone else’s ideas or words and claiming them as your own.”).

It isn’t exactly theft, he maintains, because the copier carries nothing away from the original author. And it isn’t borrowing, because the copier returns nothing to the author. (pp. 11–12) Nor is it coextensive with copyright infringement, although the two may overlap.⁴ Posner defines plagiarism as “nonconsensual fraudulent copying” (p. 33), and states that it occurs when a writer who copies another’s language or ideas both conceals the copying (p. 17) and induces some sort of reliance by readers. (p. 19)

The “concealment” criterion has a specialized meaning. (pp. 17–19) Posner explains that it cannot be simple failure to acknowledge the source of copied material (p. 17), because that is acceptable in some circumstances. For example, we don’t expect acknowledgement that a clerk actually wrote a judge’s opinion. There are several reasons for this: judicial clerks are hired with the understanding that they will write opinions without acknowledgement; most of those who read opinions understand that clerks may have written them; and we ascribe little value to judicial originality. (pp. 20–23) This last reason also explains why we don’t object when a judicial opinion includes some unattributed language from the parties’ briefs or from another court’s opinion. (p. 21)

Lack of attribution of true authorship is accepted in other contexts as well, including textbooks, ghostwritten works, political speeches (pp. 23–38), and literary allusions. (p. 56) Indeed, part of the reader’s delight in an allusion derives from being

⁴ Some material may not be covered by copyright laws because, for example, the work has entered the public domain, but copying it without acknowledgement would be plagiarism. (pp. 12–13) On the other hand, a writer could commit copyright infringement but not plagiarism by copying a chapter from a copyrighted book and acknowledging its source. (p. 17)

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among the initiated who recognize the source without being told. And self-plagiarism—repeating one’s own already published words or ideas—is often necessary in order to disseminate an idea widely. (pp. 64–65) Posner believes it is usually a peccadillo at most. (pp. 41–42, 75, 108)

However, Posner finds it less acceptable for law professors to publish research assistants’ work as the professors’ own, partly because originality is valued in legal scholarship, and partly because the students are not hired with the understanding that their work will be copied. (p. 23) Exacerbating the problem is the poor role model the professor provides by the unacknowledged copying. (p. 90)

As an example of unacceptable concealment, Posner cites Kaavya Viswanathan, a Harvard student who copied extensive portions of her acclaimed first novel from several published authors. (pp. 1–5) He believes Viswanathan was properly subject to intense negative publicity because her copying was so flagrant. (pp. 80–81) “A mild punishment,” he writes, “would be unlikely to deter a person who had such a compulsion to plagiarize regardless of the consequences. . . .” (p. 81)

But Posner exonerates Shakespeare of plagiarism, despite his copying of plots and language, partly because originality as we understand it was not prized in Shakespeare’s time. (p. 65) However, Posner suggests that some current authors have been too easily absolved of plagiarism. (p. 107) Doris Kearns Goodwin failed to put sizeable amounts of quoted material in quotation marks, even though she cited its source (87–88), and Steven Ambrose’s “plagiarisms were very extensive.” (p. 91) But colleagues rushed to their defense. (p. 92) It may be, Posner theorizes, that the “seemingly gratuitous character of the offense” by an established writer makes peers more willing to defend him or her. (p. 92) Perhaps, Posner observes, part of Viswanathan’s problem was that she had not yet accumulated enough well-placed backers to defend her. (p. 92)

Viswanathan also fulfilled Posner’s second criterion, reliance (p. 91), which he analogizes to

the requirement of reliance for fraud claims. (p. 40) Examples of reliance are a buyer purchasing a book in the mistaken belief that it is original (p. 20) and a teacher awarding a high grade for a fraudulently copied paper. (p. 20) By contrast, the element of reliance is missing with judicial opinions, because those who read a judicial opinion would not change their behavior if they knew a clerk wrote it. (p. 21)

Posner stresses that plagiarism is neither a crime nor a tort (although other claims, like breach of contract, may be available). (p. 34) Plagiarism’s harms are “too slight to warrant cranking up the costly and clumsy machinery of the criminal law,” and plagiarists seldom have sufficient assets to justify a civil suit. (p. 38) Thus it is best dealt with through private sanctions. (p. 38) Posner further urges caution in “‘plagiarism denouncing’ as a device of professional self-promotion.” (p. 76)

The book offers three criteria for gauging the appropriate punishment for plagiarism. (p. 40) In addition to the extent of any reliance, the plagiarizer’s state of mind is relevant to the seriousness of the offense. (p. 40) For the intentional plagiarizer, ostracism and ridicule may be appropriate. But negligent copying, although it can be just as harmful as intentional copying, may warrant a lesser sanction. (p. 78) A third criterion is the ease of detecting the plagiarism. If it will be difficult to detect, a serious sanction may be needed to deter it. (p. 79) Posner also identifies an additional consequence of plagiarism that is outside the control of any tribunal: its “stigma . . . never seems to fade completely.” (p. 37)

The discussion of student plagiarism is scattered throughout the book. When a student turns in a paper bought from a paper mill, Posner says that act is not exactly plagiarism, because the copying does not harm the author, who intends the paper to be copied. (p. 33) But Posner also emphasizes that “‘plagiarism’ does not exhaust intellectual fraud,” thus suggesting that the student has committed some sort of wrong. (p. 33) He believes schools are naïve if they think they can effectively deal with the problem by preaching to students

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without checking for copying (pp. 82–83), and he counsels teachers to craft assignments whose answers are unlikely to exist in published form. (p. 83) Still, he thinks student plagiarism may be a lesser problem than in the past because we now have electronic means for detecting it. (pp. 38–39)

More troublesome is the statement that plagiarizing may be a rational decision for a student who derives benefits such as a better grade or time to work on another project. (p. 48) Posner also identifies the main victims of student plagiarism as the student and his or her peers. (pp. 47, 106–07) Certainly plagiarism harms both. But this analysis ignores wider harms that follow when students receive credit for copied work. Their degrees and entry into the professional world are based on fraud. Law students who have not learned their profession—which may well be the case if they plagiarized their student work—will unleash their inferior skills on clients. They may file incompetently written papers, clogging the courts with unclear documents that unnecessarily consume judicial time.⁵ Perhaps

worse, they will enter the legal profession having established a habit of misrepresentation, one that they may continue as lawyers. If they have committed plagiarism unscathed, they may be emboldened to commit more of it—with negative consequences for lawyers, courts, clients, and the legal system.⁶

Posner views plagiarism by published writers as “a chump’s crime, less likely to reflect a serious larcenous intent than a loose screw.” (p. 90) Perhaps. But law students’ plagiarism is serious because it short-circuits their training in both skills and professionalism,⁷ with consequences that reach beyond the classroom. I hope readers will note Posner’s suggestion that student plagiarism may deserve “draconian solutions” (pp. 38–39) instead of focusing on other parts of the book that seem to minimize the gravity of student copying.

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Another Perspective

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⁵ See Judith D. Fischer, *Pleasing the Court: Writing Ethical and Effective Briefs* 1–2 (2005) (citing cases where poor writing impeded courts’ work).

⁶ E.g., Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002) (suspending a lawyer whose brief contained extensive material copied from a book); see generally Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, the Minimalist Wizard, and Other Stories*, 9 Scribes J. Legal Writing 77, 101–105 (2003–04) (discussing consequences for lawyers’ plagiarism).

⁷ See LeClercq, *supra* note 3, at 237 and *passim* (describing student plagiarism as “reaching a crisis point” and proposing ways for law schools to deal with the problem).