Plagiarism Within the Legal Profession and Academe

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I. PREFACE

Plagiarism is a complex concept. It is multi-faceted and its effects are far-reaching. It intersects with such areas as morals, ethics, arts, science, and the law. In this jurisdiction, where it has stayed behind the scenes (surprisingly, even within the academe), recent events have put this concept into the spotlight — so much so, in fact, that there is now a move to criminalize the act of plagiarizing.[1]

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Perhaps, it is important to point out at this juncture that this Essay is not an attempt to discredit the soundness of the Supreme Court's decision[2] concerning allegations of plagiarism on the part of one of its own Justices. Neither is this an effort to question the reason behind the bold dissent[3] to the said decision. It is also not the purpose of this Essay to criticize the Supreme Court's lambasting[4] of the 37 University of the Philippines (U.P.) College of Law Professors, the statement[5] made by such members of the U.P. Law Faculty and those of other critics, and yet another accusation of plagiarism, this time involving the Dean of the said College of Law.[6]

Instead, this Essay can more accurately be described as a crack at dissecting the many nuances that come hand-in-hand with plagiarism, research, attribution, ethics, and the legal profession. Its purpose is to provide perspective, rather than to put forward opinion or judgment.

This Essay ultimately aims to provide the legal academe with a more vivid picture of plagiarism, specifically as it relates to the legal profession. It seeks to initiate an in-depth academic debate on the matter, rather than utilizing the broader, more informal channels of media and the press. After all, there should be no better forum to adequately tackle the menace of plagiarism than the academe itself. Moreover, the Essay does not only delve into general cases of plagiarism or the more particular *judicial plagiarism.* Tackled also are potential cases of plagiarism within the legal profession and

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1. Lira Dalangin-Fernandez, *House Bill Seeks to Criminalize Plagiarism*, PHIL. DAILY INQ., Nov. 25, 2010, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20101125-305275/House-bill-seeks-to-criminalize-plagiarism (last accessed Nov. 7, 2010).
2. In the Matter of the Charges of Plagiarism, Etc., Against Associate Justice Mariano C. del Castillo, A.M. No. 10-7-17-SC, Oct. 12, 2010 [hereinafter In Re: Plagiarism].
3. *Id.* (J. Sereno, dissenting opinion) [hereinafter Sereno Dissent].
4. *See* Marlon Ramos, *Explain, SC Orders UP Profs*, PHIL. DAILY INQ., Oct. 21, 2010, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20101021-298871/Explain-SC-orders-UP-profs (last accessed Nov. 7, 2010).
5. UP College of Law Faculty, Restoring Integrity: A Statement by the Faculty of the University of the Philippines College of Law on the Allegations of Plagiarism and Misrepresentation in the Supreme Court, *available at* http://www.abs-cbnnews.com/insights/08/09/10/plagiarism-supreme-court (last accessed Nov. 7, 2010).
6. Sophia M. Dedace, UP law dean Leonen Faces Up to His Own 'Plagiarism' Issue, *available at* http://www.gmanews.tv/story/207845/up-law-dean-leonen-faces-up-to-his-own-39plagiarism39-issue (last accessed Nov. 7, 2010).

the widespread but seemingly rarely noticed student plagiarism, especially in law schools.

With the recent media bombardment directed at the issue of plagiarism, there is little doubt that the matter will even more increasingly become an issue of law. For one, plagiarism litigation is expected by this Author to rise. With the advent of the Supreme Court's plagiarism decision, there is an apparent recognition that, indeed, the issue of plagiarism or improper attribution touches upon the legal realm.[7] Thus, those in the legal academe and profession should be better prepared and equipped with the necessary framework in order to deal with the matter in a way most beneficial to society in general and the academe and profession in particular.

II. ZOOM IN: ACCUSATIONS OF PLAGIARISM IN THE SUPREME COURT AND LEGAL ACADEME

A. The Allegations

Justice Mariano C. Del Castillo was accused of plagiarizing some portions of his *ponencia* in *Vinuya v. Romulo*.[8] After the decision on the said case was promulgated, Petitioners[9] filed for reconsideration.[10] Prior to the resolution of such motion, petitioners this time filed a supplemental petition alleging plagiarism on the part of the Court.[11] From then on, the issue was all over news and the media.

One report quoted the petitioners' counsel as saying that "[a] careful examination of the stylistics of the pertinent portions of the judgment will show the clever way in which the arguments lifted from the plagiarized article were employed."[12] Petitioners' counsel accused Justice Del Castillo of "manifest intellectual theft and outright plagiarism."[13] He was also accused of "twisting the true intents of the plagiarized sources … to suit the arguments of the assailed Judgment."[14] Thus, instead of just questioning the merits

7. *See generally* In Re: Plagiarism, *supra* note 2.

8. Vinuya v. Romulo, 619 SCRA 533 (2010).

9. The petitioners consist of Isabelita C. Vinuya, et al., who are members of the Malaya Lolas Organization.

10. *See Vinuya*, 619 SCRA 533.

11. *See Vinuya*, 619 SCRA 533.

12. Norman Bordadora & Tetch Torres, *Comfort Women Appeal Case for Japan's Apology, Accuse SC of Plagiarism*, PHIL. DAILY INQ., July 19, 2010, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20100719-282023/Comfort-women-appeal-case-for-Japans-apology-accuse-SC-of-plagiarism (last accessed Nov. 7, 2010).

13. In Re: Plagiarism, *supra* note 2.

14. *Id.*

upon which the decision was based, the integrity and capability of the Court was also challenged.[15] The charges were then referred by the Court *En Banc* to its Committee on Ethics and Ethical Standards for investigation and recommendation.[16]

Justice Del Castillo responded by circulating a letter to his colleagues which stated that he had every intention to properly attribute all the sources used in the decision.[17] He defended himself by saying that there was no malicious intent on his part and that there was no deliberate purpose to appropriate for himself the work of another.[18] He added that the drafting of the decision was properly deliberated upon,[19] responding to the fact that the accusations put into question the manner by which the case was handled.[20]

An outrage of sorts ensued with the U.P. College of Law publishing a faculty statement tagging the *Vinuya* decision as an "extraordinary act of injustice"[21] and a "singularly reprehensible act of dishonesty and misrepresentation."[22] The statement alleged that Justice Del Castillo deliberately intended to appropriate for himself the works of the authors who were either not cited, or whose citations were made improperly.[23] The Justice was even asked to resign his position.[24]

B. The Court's Decision

In resolving the supplemental petition, the Court faced two issues: (1) whether Justice Del Castillo committed plagiarism; and (2) whether he twisted the works of authors in order to support the Court's decision.[25]

On the first count, referring to one of the passages in the *Vinuya* decision alleged to have been plagiarized, the Court said that it was more a

15. Artemio V. Panganiban, *Plagiarism in the Supreme Court?*, PHIL. DAILY INQ., Aug. 7, 2010, *available at* http: //opinion .inquirer .net/ inquirer opinion / columns /view /20100807 - 285530/ Plagiarism – in -the -Supreme- Court (last accessed Nov. 7, 2010).

16. *Id.*

17. In Re: Plagiarism, *supra* note 2.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. In Re: Plagiarism, *supra* note 2.

24. UP College of Law Faculty, *supra* note 5.

25. *See* In Re: Plagiarism, *supra* note 2.

matter concerning clarity of writing rather than ethics.[26] The Court called it "a case of bad footnoting rather than one of theft or deceit."[27] Interestingly, the Court added that "[i]f it were otherwise, many would be target of abuse for every editorial error, for every mistake in citing pagination, and for every technical detail of form."[28]

The other two alleged plagiarized passages involved total non-attribution.[29] The Court said these could be construed as plagiarism "[u]nless amply explained."[30] An explanation, of course, was offered: one of Justice Del Castillo's researchers (a Court Attorney) accidentally deleted the missing attributions from her report (which is essentially the draft of the decision). The said researcher did her research and drafting electronically. The very familiar "cut and paste" scheme was, of course, and inevitably, one may say, employed. In the course of the drafting, the researcher accidentally deleted the attributions.[31] The result was catastrophic.

The explanation, as it turned out, was ample. The Court said that the resulting non-attribution was brought about by mere excusable negligence.[32] The Court held in the process that plagiarism is "essentially a form of fraud where intent to deceive is inherent."[33] It even called petitioners' position as "unrealistic,"[34] saying that hardly any written work is free of any mistake.[35] It also said that the alleged plagiarized passages did not give the impression that Justice Del Castillo intended to pass off the words and ideas as his own.[36] It said that this is seen through the fact that the said Justice still

26. In Re: Plagiarism, *supra* note 2. The Court said that the passages lifted from Christian Tams' book *Enforcing Erga Omnes Obligations in International Law* (2006) were properly attributed and the fact that the *ponencia* used the introductory signal "see" rather than "cited in" was due to mere inadvertence. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* Mark Ellis' article in the Case Western Reserve Journal of International Law entitled *Breaking the Silence: Rape As An International Crime* (2006) and the article of Evan Criddle and Evan Fox-Descent in the Yale Journal of International Law entitled *A Fiduciary Theory of Jus Cogens* (2006) were not properly given credit despite the fact that passages therefrom were copied essentially verbatim.

30. *Id.*

31. In Re: Plagiarism, *supra* note 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

"imputed the passages to the sources from which [the authors] borrowed them in the first place."[37]

As to the allegations of twisting, the Court decreed that there was none.[38] According to the Court, there was no implication in the questioned *ponencia* that, based on the lifted passages, the authors' works supported the Court's conclusion.[39]

Ultimately, the Court concluded that there was no misconduct on the part of Justice Del Castillo which may warrant the imposition of disciplinary sanctions.[40] It said that "[o]nly errors tainted with fraud, corruption, or malice are subject [to] disciplinary action."[41] There was also no finding of inexcusable negligence.[42] The Court proclaimed that Del Castillo was "in control of the writing of the [decision]"[43] while also noting one's inescapable vulnerability to human errors.[44]

C. The Dissent

Justice Maria Lourdes A. Sereno's dissent is nothing short of enlightening. The dissenting opinion's argument was most fundamental: a finding of plagiarism must be distinguished from a finding of liability resulting from such plagiarism.[45] The Opinion criticized the majority's holding that malicious intent is essential in the determination of the existence of plagiarism.[46] The Dissent also touched upon copyright infringement, observing that since the Court's decision excused Del Castillo based on mere editorial errors and lack of malicious intent, "lack of intent to infringe copyright in the case of lack of attribution may now also become a defense, rendering [Section 184 (b) of R.A. No. 8293][47] meaningless."[48] The Dissent

37. In Re: Plagiarism, *supra* note 2.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (citing Quinto v. Vios, 429 SCRA 1 (2004) & Tolentino v. Camano, Jr., 322 SCRA 559 (2000)).

42. *Id.*

43. In Re: Plagiarism, *supra* note 2.

44. *Id.*

45. Sereno Dissent, *supra* note 3.

46. *Id.*

47. An Act Describing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes, Republic Act No. 8293 [INTELLECTUAL PROPERTY CODE], § 184 (b) (1998). The Provision provides that there is no copyright infringement in —

also extensively tabularized the instances of alleged plagiarism in the text of the *Vinuya* decision side by side with the original sources.[49] It also listed down the supposed violations of rules against plagiarism committed by the *ponente*.[50]

The dissent ultimately held that Justice Del Castillo committed plagiarism in the drafting of the *Vinuya* decision by noting that such may be committed "through negligence or recklessness without intent to deceive."[51]

Sereno also remarked that "[t]he best guarantee for works of high intellectual integrity is consistent[ ] ethical practice in the writing habits of court researchers and judges."[52] Also worthy of note is the observation that "[i]n order to determine whether the acts committed would have warranted [disciplinary action], the Court should have laid down the standard of diligence and responsibility that a judge has over his actions, as well as the disciplinary measures that are available and appropriate."[53]

D. Accusations Anew

New accusations of plagiarism surfaced, this time involving U.P. College of Law Dean Marvic F. Leonen.[54] Leonen was accused of having failed to supply at least two attributions in his article published in 2004, entitled *Weaving Worldviews: Implications of Constitutional Challenges to the Indigenous Peoples Rights Act of 1997*.[55] The sources alleged to have been plagiarized were from a court brief co-written by Owen J. Lynch, a visiting professor at the U.P Law, and Romina Picolotti.[56] Lynch, however, exonerated Leonen by saying that the Dean "committed no act of intellectual dishonesty in

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(b) the making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: Provided that the source and the name of the author, if appearing on the work, are mentioned.

Id.

48. Sereno Dissent, *supra* note 3.

49. *Id.*

50. *Id.*

51. *Id.* (citing Newman v. Burgin, 930 F.2d 955, 962 (1st Cir. 1991) (U.S.)).

52. *Id.*

53. *Id.*

54. Dedace, *supra* note 6.

55. *Id. See* Marvic F. Leonen, *Weaving Worldviews: Implications of Constitutional Challenges to the Indigenous Peoples Rights Act of 1997*, 10 PHIL. NAT. RESOURCES L.J. 3-44 (2000).

56. Dedace, *supra* note 6.

relation to [his] works."[57] Leonen tendered his resignation to the Chancellor of U.P. Diliman, who endorsed the same to the U.P. Board of Regents.[58] In another news report, Harry L. Roque, Jr., also a law professor in U.P. was similarly charged.[59] Roque quickly responded, however, saying that the article alleged to have contained plagiarized passages was only a rough draft and that the final article was published in a journal.[60]

III. ZOOM OUT: PLAGIARISM IN GENERAL

A. Some History and Etymology

Plagiarism comes from the word *plagiarius* which literally means "kidnapper."[61] To plagiarize is thus likened to theft or stealing; the difference, of course, is that in theft, tangible property is involved, whereas in plagiarizing, one deals with an intangible which is usually an idea.[62]

A noted author is of the opinion that "plagiarism has always been a part of human society."[63] In fact, there is evidence of plagiarism from early periods B.C.E. An intricate study of Classical Greek culture, for instance, shows "frequent accusations of literary misappropriation."[64] We thus trace, at the very least, the notion of intellectual property and, consequently, plagiarism to this early period.[65]

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57. *Id.*

58. Jerrie M. Abella, Law Dean Leonen Resignation Endorsed to the UP Board of Regents, *available at* http://www.gmanews.tv/story/208056/leonen-resignation-endorsed-to-the-up-board-of-regents (last accessed Nov. 7, 2010).

59. Nikko Dizon, *2 UP Lawyers Also Accused of Plagiarism*, PHIL. DAILY INQ., Dec. 10, 2010, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20101210-308105/2-UP-lawyers-also-accused-of-plagiarism (last accessed Nov. 7, 2010).

60. *Id.* The Article which allegedly contained plagiarized texts is entitled *The Proposed Philippine Anti-Terror Bill: An Act Legitimizing the President as Chief Execution Officer*, which appeared in the website of the activist group *Bayan Muna* in 2007.

61. Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use But is it Ethical?*, 18 CARDOZO L. REV. 1253, 1262 (1996). *See also* Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 517 (1992) (citing 11 THE OXFORD ENGLISH DICTIONARY 947 (1989)).

62. *Id.* (citing WEBSTER'S NEW DICTIONARY OF THE LANGUAGE 803 (1966)).

63. David A. Thomas, *How Educators Can More Effectively Understand and Combat The Plagiarism Epidemic*, 2004 B.Y.U. EDUC. & L.J. 421, 421 (2004).

64. Marianina Olcott, *Ancient and Modern Notions of Plagiarism: A Study of Concepts of Intellectual Property in Classical Greece*, 49 J. COPYRIGHT SOC'Y U.S.A. 1047, 1047 (2002).

65. *Id.* at 1048.

Meanwhile, one account tells that the first known use of the term goes back to the first century C.E..[66] The poet Martial used the term in disapproving of another poet's act of copying his work.[67]

B. Defining Plagiarism

Plagiarism can involve oral, visual, auditory, or written work.[68] This Essay is, however, mainly concerned with the copying of written work.

It is possibly most important to note at this point that there is no standard and universally-accepted definition of the term plagiarism.[69] Perhaps the lack of a uniformly accepted definition can be attributed to the contention that the word plagiarism is not easy to define.[70]

For this Essay's purpose, however, it can simply be defined as the "passing off of another person's words or ideas as one's own."[71] The said definition is by far the most widely used. Similarly, our Supreme Court, adopting Merriam Webster's words, said that to plagiarize is "to take (ideas, writings, etc.) from (another) and pass them off as one's own."[72] The act of "passing off" was considered by the Court as indispensable in determining the existence of plagiarism. Thus, holding that plagiarism is in essence an act of fraud, intent to deceive was said to be an inherent element thereof.[73]

Another author, David A. Thomas, is of the opinion that the above straightforward definition, and its permutations, might be too simplistic.[74] In his words —

66. 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 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, 170 & 177-78 (2002) & Ellen Gamerman, *Legalized 'Cheating,'* WALL ST. J. 1 (2006)).

67. Bast & Samuels, *supra* note 66, at 780.

68. Green, *supra* note 66, at 174.

69. Bast & Samuels, *supra* note 66, at 780. The Authors quite cryptically hold that although there is no exact definition of the term, "there is general agreement as to what is meant by [it]." *Id.* (citing Thomas, *supra* note 63, at 422). To the Author's mind, however, such general agreement appears to be hazy at best.

70. David E. Sorkin, *Practicing Plagiarism*, 81 ILL. B.J. 487, 487 (1993).

71. *Id.*

72. In Re: Plagiarism, *supra* note 2 (citing WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1031 (3d ed.)).

73. *Id.*

74. Thomas, *supra* note 63, at 422.

> [A]uthors of professional and scholarly research and writing are constantly seeking out and reflecting on the words, ideas, and data from other sources and other authors in an effort to form their own words and ideas. In ordinary research and writing activities, writers cite to sources for elements of thoughts and expressions they know they could not have created on their own, and also for support or confirmation of their own thoughts and expressions. It is also common for writers to subconsciously repeat catchy or common phrases that came to their attention from other sources. They almost never think of their own thoughts and expressions as having been borrowed or copied, even though they are obviously composites of their reading, conversations, observation, and experience. If one considers these common practices in light of the short and simple definitions of plagiarism just quoted, then almost everyone is guilty of plagiarism all the time.[75]

This shows that people, indeed, "do not shape their words and ideas in a vacuum."[76] This fact warrants that any definition of the term plagiarism must account for normal human behavior, with emphasis perhaps on the propensity for error, which cannot generally be considered as unethical.[77]

The Sereno Dissent,[78] meanwhile, adopts the view that there are several forms of plagiarism. Particularly, there are four: "(a) uncited data or information; (b) an uncited idea, whether a specific claim or general concept; (c) an unquoted but verbatim phrase or passage; and (d) an uncited structure or organizing strategy."[79] This view would seem to dispense with intent or malice.

To add, the term plagiarism is sometimes used interchangeably with "intellectual theft."[80] However, it is more accurate to use the latter with reference to the pilfering of ideas as opposed to the former, which is generally made to refer to the stealing of written material.[81] It may also be correct, nevertheless, to refer to intellectual theft as a subset of plagiarism since there are those who consider the latter as being wider in scope.[82]

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75. *Id.*

76. *Id.*

77. *See* Thomas, *supra* note 63, at 423.

78. Sereno Dissent, *supra* note 3.

79. *Id.* (citing GORDON HARVEY, WRITING WITH SOURCES: A GUIDE FOR HARVARD STUDENTS 32-35 (2d ed. 2008)).

80. Debra Parrish, *Scientific Misconduct and the Plagiarism Cases*, 21 J.C. & U.L. 517, 522 (1995).

81. *Id.*

82. *Id.* (citing United States Public Health Service, Office of Research Integrity, Ori's *Working Definition of Plagiarism*, ORI NEWSLETTER, Dec. 1944, at 3).

It might also be said that the determination of the existence of plagiarism does not take into account the personalities involved, particularly, their status.[83] The duty to cite remains whether one is lifting words or ideas from an unassuming student paper or an article published in a prestigious law review.[84]

Also, the volume of the copying may differ from case to case. Minor plagiarism exists when a small number of words or ideas are involved.[85] There are also serious cases where the copying involves a significant portion or an entirety of another's original work.[86]

No matter the divergences in defining the word, to be certain, plagiarism is an act of academic dishonesty.[87] More importantly, it strikes at the "very heart of higher education,"[88] touching upon "not only on the matter of originality and thoroughness in research and scholarship but on the matter of integrity of those producing [such] works of scholarship."[89]

The difficulty of defining could perhaps also be attributed to the fact that "[i]nstitutional approaches to plagiarism are varied and confusing."[90] This should account for differing definitions from institution to institution, college to college, and field to field. With reference to educational institutions, for example, "the issue of whether intent will be part of academic dishonesty is not so much a separate judicial doctrine as a judicial interpretation of the institution's own handbook."[91] Ralph D. Mawdsley thus opines that the nature of intent that is to be accounted for in a finding of plagiarism must be clearly provided for in the student handbook.[92]

Thomas also observes that perhaps the best way is to give the word a simple definition, especially when the aim is to educate students and the public in general.[93] This is, of course, in light of the fact that the term is not,

83. Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting and Authorship*, 42 S. TEX. L. REV. 467, 475 (2001).

84. *Id.*

85. Green, *supra* note 66, at 174.

86. *Id.*

87. Ralph D. Mawdsley, *Plagiarism Problems in Higher Education*, 13 J.C. & U.L. 65, 65 (1986).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 69.

92. *Id.* at 70.

93. Thomas, *supra* note 63, at 423.

in the strictest sense, a legal concept.[94] A legalistic and precise definition is, however, far from unappealing. If proper liability were to be determined for cases of plagiarism, a legal definition is of necessity.

C. Plagiarism and the 'Norm of Attribution'

Plagiarism, as a concept, has social underpinnings. Stuart P. Green tells us that it is embedded "within the context of a complex set of social norms."[95] He gives us some background with clarity, thus —

> To see how this set of norms functions, we begin with the proposition that people generally value the esteem of others, particularly their peers. Among the ways one can earn the esteem of one's peers is by being recognized for one's originality, creativity, insight, knowledge, and technical skill. This is particularly so among writers, artists, and scholars, who, in addition to achieving satisfaction through the creative act itself, usually wish to see those acts recognized by others.[96]

Unfortunately, there are those who fail to live up to this "norm of attribution."[97] These aberrations, however, are deterred by the risk of discovery, disesteem, and ostracism — resulting in a so-called stigma.[98] This stigma can be considered a particularly fitting penalty "because it denies [the plagiarist] precisely the social good that he seeks — namely, esteem."[99] This stigma should be coupled with any liability or penalty which may attach to the act. These other penalties will be expounded on below.

D. Plagiarism and Copyright Infringement

It is not difficult to recognize that plagiarism involves the transgression of intellectual property rights.[100] There is thus some significant overlap between plagiarism and copyright infringement.[101] The two are, however, distinct in the sense that "there are cases of plagiarism that do not constitute copyright infringement, and vice versa."[102] For example, certain limited uses of

94. Green, *supra* note 66, at 171.

95. *Id.* at 174.

96. *Id.* (citing Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997)).

97. *Id.* at 175.

98. *Id.*

99. *Id.*

100. Alan Collins, et al., *On the Economics of Plagiarism*, E.J.L. & E. 2007, 24(2), 93-107 (2007).

101. Green, *supra* note 66, at 200.

102. *Id.*

copyright material can be excused under the Fair Use Doctrine,[103] whereas plagiarism allows no such exemption.[104]

Moreover, plagiarism "may or may not give rise to a criminal or civil action under the copyright law."[105] If in case one was to be held liable for plagiarism under copyright law, the pretext would be that the original author has property interest in the copied text.[106] Consequently, there can be situations where the copying would not be a violation of any copyright law.[107] This fact, however, does not mean that there was no plagiarism committed.[108]

Carol M. Bast and Linda B. Samuels give an adequate summary of the distinctions between the two concepts: plagiarism is (generally) an ethical issue while copyright infringement is a legal issue; as to definition, the former is defined by research misconduct policies while the latter is governed by (copyright) law; the former includes material within the public domain while the latter does not; liability under the former (generally) results in job dismissals, besmirched reputations, and the like while liability under the latter results in an award of damages; liability under the former is also said to be incapable of expiring while that of under the latter expires upon the death of the author.[109]

E. Ghostwriting as Plagiarism

Ghostwriting is not exactly the same as plagiarism. A ghostwriter is someone who writes about a certain topic in behalf of someone else, with their consent.[110] Many do not regard this practice as a significant ethical issue.[111] Lisa G. Lerman argues that perhaps, an explicit ghostwriting arrangement resolves any issue of ethics in the following scheme: "the professor explains upon hiring the research assistant that part of his work is to act as a ghostwriter for the professor. The student will get paid, will get to see his words in print, and will get a good recommendation for his next job."[112]

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103. INTELLECTUAL PROPERTY CODE, § 185.

104. *Id.*

105. Bast & Samuels, *supra* note 66, at 790.

106. *Id.* (citing 17 U.S.C. § 504 (U.S.)).

107. *Id.* at 792.

108. *Id.*

109. *See* Bast & Samuels, *supra* note 66, at 792.

110. *See* Gary McLaren, What Is A Ghostwriter?, *available at* http://www.worldwidefreelance.com/freelance-writing/ghostwriting/28-what-is-a-ghostwriter (last accessed Nov. 7, 2010).

111. Lerman, *supra* note 83, at 476.

112. *Id.*

However, an ethical issue could still haunt this kind of arrangement, specifically where there exists any disparity in bargaining power between the "ghost" and the "author."[113]

As to the question of whether this kind of arrangement falls under the definition of plagiarism, the answer appears to be in the affirmative. Green is of the position that the real author's consent should not be a defense to plagiarism.[114] This is particularly pervasive in the case of students who can simply search the internet for sources that offer written works for a fee or otherwise commission persons (who may even be said to be engaged in the "business" of ghostwriting) to write a paper for them. For example, when a student copies the work of another with the latter's consent, the act of "passing off" is still present. However, in the said example, the clinching factor appears to be the element of deception. In some cases, and as will be discussed below, such element may be entirely absent.

F. Plagiarism in Action

Justice Harold A. Blackmun, albeit in an infringement case with little relevance to this Essay, succinctly put it: "Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him."[115] Borrowing from the revolutionary Sir Isaac Newton: If we see farther, it is because we stand on the shoulders of giants. The academe thrives on the appropriate borrowing and transformation of ideas. This borrowing and transformation is, of course, facilitated by research.

Research and scholarly writing, however, can be very tedious and taxing. They require time, effort, patience, and attention to intricate details. Academicians and people who value ingenuity and the proliferation of ideas appreciate not only a well-written work but, more importantly, a well-researched, well backed-up paper.[116] Moreover, the persuasiveness and soundness of a particular written work depends heavily on the authorities

113. *Id.*

114. Green, *supra* note 66, at 190 (citing Lerman, *supra* note 83, at 476).

115. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (U.S.) (citing Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945)). Zechariah Chafee, Jr. also puts it well too — "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Chafee, *supra* note 115.

116. *See* Natalie C. Cotton, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 964-65 (2006).

used and cited.[117] That is why attribution weighs significantly when it comes to such writings.[118]

Not all writers and researchers, however, possess the skills required when it comes to scholarship. Not all have the patience to go over piles upon piles of materials, take note of relevant authorities, and come up with something that is, although dependent on the sources rummaged through, delectably original.

Conformably, Joe Mirarchi observes that "other people may not cope with the demands [of research and writing] as well."[119] A big part of the reason for this would be the need to meet deadlines and assignments,[120] which may cause writers to take shortcuts — intentionally or unintentionally — in order to finish their works on time.[121] Compare these writers with those who would go to greater lengths just to be more precise and detailed, working for painstakingly long hours and going through a myriad of relevant sources, and you have the evil of plagiarism in action. Mirarchi depicts a picture of disaster —

> [i]magine that the people who overly depended on the sources received the same or better grade as the person who gave the extra effort. Their allegedly own points of view then become referred to by others. All of a sudden many unknowing readers are premising their own beliefs on the overly dependent person's mis-referenced beliefs. As a result, the unknowing readers are not giving the truly originating author his or her credit for expressing the initiating point of view.[122]

Such is definitely unfair, not to mention precarious for the academe. And, as will be discussed below, several parties may be prejudiced in any one act of plagiarism.

G. *Effects of Plagiarism*

Aside from being an act of academic dishonesty, plagiarism is said to be a form of moral infraction.[123] The plagiarizer uses to his end the work and/or ideas of another. Thus, a violation of the "moral rights"[124] (also referred to as

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117. *See* Cotton, *supra* note 116, at 964-65.

118. *See generally* Cotton, *supra* note 116, at 964-65.

119. Joe Mirarchi, *Plagiarism: What is it? How to Avoid it? And Why?*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 381, 381-82 (2001).

120. *See* Mirarchi, *supra* note 119, at 381-82.

121. *Id.*

122. *Id.*

123. Roger Billings, *Plagiarism in Academia and Beyond: What is the Role of the Courts?*, 38 U.S.F. L. REV. 391, 396 (2004).

124. Dursht, *supra* note 61, at 1279.

the right to attribution)[125] of the aggrieved author results, making such author the first and primary victim in a case of plagiarism. The violation of the said right is considered an offense on the reputation of the original author which may be likened to the flip side of defamation.[126] While defamation entails damage to a person's reputation through some positive act (a defamatory statement), plagiarism involves injury to a person's reputation through an exclusion (the failure to attribute).[127]

A second victim is the reader who suffers the deception, having been led to believe "that the plagiarist was the original source of [the copied] words or ideas."[128] This deception may have disastrous consequences for scholarship and research. Readers may be deprived of notice of otherwise available authority and sources. This is fatal to the market of ideas.

The institution within which the plagiarism was committed may be considered as a third victim.[129] For example, a law review which publishes, knowingly or unknowingly, a plagiarized article could receive criticism and lose prestige and credibility. The school of a student guilty of plagiarism may also suffer. The reputation of the school may be affected and its ability to attract tuition-paying students may be impaired.[130] The same effect on reputation and credibility may also be said with respect to the profession or association to which a plagiarist may belong, especially if a different degree of diligence and ethics is expected of any such profession or association.[131] Consider, for instance, the allegations of plagiarism within the Supreme Court which was discussed above. Much criticism was directed at said Court the moment the issue erupted. Involving as it does different and widespread sectors of society, the effects of plagiarism can thus be significant.[132]

Though its effects are felt in no minuscule terms, plagiarism is nevertheless not considered criminal.[133] It is more properly considered as a tort.[134] The act is also sometimes considered as copyright infringement. However, as shown above, they are not synonymous.[135] In any case, the act

125. *Id.* (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8D.01(A), at 8D-5 (1991)).

126. Green, *supra* note 66, at 188-89.

127. *Id.* at 189.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Green, *supra* note 66, at 189-90.

133. Billings, *supra* note 123, at 396.

134. *Id.* at 392-93.

135. *Id.*

of plagiarism "is almost never itself the subject of a lawsuit."[136] Aggrieved parties do not usually commence actions against plagiarizers. It is mostly an administrative matter.[137] At the very least, penalty is paid in the court of popular opinion.[138]

Thus, what is most crucially at stake is credibility and career, the loss of which is deemed as even worse than the penalties which are prescribed for infringement.[139] Professionals may be censured, suspended, or even dismissed.[140] Students may be penalized, suspended, or dismissed, too.[141] Inevitably, and perhaps most damagingly, people who plagiarize carry with them the stigma (often contained in accessible records) which goes along with the offense. In some cases, a presumption of bad character may even arise.[142] The "denial of certification or recognition of achievement"[143] may also operate as effects of the offense.[144] In the legal profession, including law students, the surfacing of serious questions on "character or fitness to practice law"[145] may prove fatal.[146] But perhaps the most excruciating penalty, especially for offenders who thrive within the boundaries of scholarship and academe, is the so-called "academic death."[147]

It is thus not surprising that plagiarism raises concerns for many professionals, scholars, and organizations.[148] Thus, plagiarism is most often

136. *Id.* at 409.

137. *Id.*

138. *Id.* at 396.

139. Billings, *supra* note 123, at 396.

140. *Id.* at 401.

141. The Ateneo de Manila School of Law, for instance, provides for a prohibition against plagiarism and academic dishonesty in any form whatsoever. Consequently, it provides for penalties and sanctions in case a student commits plagiarism. Such penalties, according to the extent of the copying, include a failing mark in the assignment or course, honorable dismissal (in case proof is ample and the student admits guilt), or expulsion (in case proof is ample but the student refuses to admit guilt). Ateneo de Manila School of Law, Plagiarism Policies and Disciplinary Procedures (Nov. 24, 2010).

142. James Mawdsley, *Plagiarism, Perception, and Practice*, 252 ED. LAW. REP. 16, 18 (2010) (citing Alsabti v. Board of Registration in Medicine, 536 N.E.2d 357 (Mass. 1989)).

143. Sereno Dissent, *supra* note 3 (citing Dursht, *supra* note 61, at 5).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (citing Rebecca Moore Howard, *Plagiarisms, Authorships, and the Academic Death Penalty*, 57 COLLEGE ENGLISH 7, 788-806 (1995)).

148. Mirarchi, *supra* note 119, at 384.

included in the honor codes of organizations and professions, which may sometimes come within the purview of general terms such as plain "academic dishonesty."[149] This allows organizations and professional boards to enforce measures against the offense, often resulting in disciplinary action.[150] Plagiarism can thus be characterized also as a violation of professional responsibility, grounded on ethical violation.[151]

H. Plagiarism and Computer Research

David J. Shakow is of the opinion that "computer research may encourage plagiarism."[152] The advent of computer technology has made copying extremely easy.[153] Whereas before, a writer would at least be required to retype material from his source, today, one need only to toggle with computer controls and commands to copy then paste material into his electronic draft.

The accessibility of information has added more to this growing concern. Researching skills have, to some extent, been replaced by internet surfing and searching skills. Probably every type of information is available online. Materials that facilitate legal research can be accessed through internet programs such as Westlaw and Lexis.[154]

However, it can also be said that the same advancement of technology has made it easier to detect plagiarism.[155] The same searching technique described above applies in case of detection. Perhaps one intending to counter-check the originality of a submitted work needs only to re-trace the online researching steps the author may have taken. There are also other softwares or programs (so-called plagiarism checkers) that can detect possible cases of plagiarism on their own. In the case of student plagiarism, teachers can take advantage of the use of these kinds of programs by requiring their students to submit plagiarism checker reports aside from the written work itself.[156]

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149. *See* Mawdsley, *supra* note 87, at 65.

150. *Id.*

151. Dursht, *supra* note 61, at 1268.

152. David J. Shakow, *Computers and Plagiarism*, 42 J. LEGAL EDUC. 458, 458 (1992).

153. *Id.*

154. Westlaw International and LexisNexis are online research databases that provide a collection of legal materials primarily used by law students, lawyers, and other legal scholars.

155. *See* Shakow, *supra* note 152, at 458.

156. Media Advertising, Ways to Avoid Plagiarism, *available at* http://cfpnyc.com/search/plagiarism-check (last accessed Nov. 7, 2010).

IV. LAW STUDENT PLAGIARISM

In the United States (U.S.), cases of student plagiarism are by no means minute. Interestingly enough, much material has centered upon plagiarism by no less than law students.

Kristin B. Gerdy observes that "[a]lthough research shows that nearly 90[%] of college students acknowledge that plagiarism is wrong, students persist in plagiarizing either because they think they can get away with it, 'or because in today's ethical climate they consider plagiarism trivial compared to well-publicized instances of political and corporate dishonesty.'"[157] Other reasons put forward include getting or maintaining high grades[158] (which is said to be particularly true in law school where competition is intense)[159]; sloppiness,[160] which is usually caused by carelessness and imprecision; procrastination or poor time management;[161] ignorance of citation rules and of what plagiarism is;[162] and the belief of the unlikelihood of getting caught.[163]

Another author says that law schools fail in adequately educating students about plagiarism and how it can be avoided.[164] Perhaps law schools, being graduate schools, presume that their students already have adequate background on proper research and writing.[165] Many law schools simply give out a blanket prohibition in a student manual, which is often forgotten after the first day of class.[166] Indeed, even when a law school has a clear definition of what constitutes plagiarism, the sincerity of actually enforcing any real prohibition of it may remain hazy.[167] Maybe some faculty members are reluctant to report cases of plagiarism.[168] Probably, a good number of law

157. Kristin B. Gerdy, *Law Student Plagiarism: Why It Happens, Where It's Found, and How To Find It*, 2004 B.Y.U. EDUC. & L.J. 431, 432 (2004) (citing The Pennsylvania State University, Cyberplagiarism: Detection and Prevention, *available at* http://tlt.its.psu.edu/suggestions/cyberplag/ (last accessed Nov. 7, 2010)).

158. *Id.* at 433.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Gerdy, *supra* note 157, at 434.

164. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism,* 49 J. LEGAL EDUC. 236, 236 (1999).

165. *See* LeClercq, *supra* note 164, at 236.

166. *Id.*

167. *Id.* at 237.

168. *Id.* at 238.

schools would also turn a blind eye on it.[169] To the Author's mind, reasons for this may range from lack of resources to monitor to lack of interest to formulate and/or enforce plagiarism rules.

V. PLAGIARISM AND THE LEGAL PROFESSION

The practice of law is greatly founded on written work. "Most law professors, judges, and practicing lawyers devote considerable effort to researching the law and composing a variety of legal writings, including law journal articles, client memoranda, appellate briefs, and legal opinions."[170] Plagiarism by law practitioners involving legal works thus presents a real and alarming issue.

There is no scarcity of materials dealing with plagiarism within the legal profession. In a field where research and writing occupy places of utmost significance, the issue of plagiarism should, indeed, factor. Despite this, Roger Billings, noting the satire, says that "[p]erhaps the greatest wordsmiths of all, lawyers and judges, are the biggest plagiarizers."[171] He notes that although those in the legal profession may exceed all others when it comes to footnoting and citation, there are still instances when they fail to cite and get caught in the process.[172] True enough, the nature and character of a lawyer's work put the legal profession continually under doubt of plagiarism.[173] For instance, lawyers may borrow complaints from one another to use them for their own particular cases.[174] There can also be instances when senior lawyers pass off the work of junior lawyers as their own.[175] Incidentally, it is also recognized that a judge may use materials written by law clerks to draft decisions.[176] Such also is the admitted practice in our Supreme Courts when it comes to the drafting of court decisions.[177] Lerman probably best captures the scheme in the proceeding example —

> A law school graduate who becomes a judicial clerk probably will spend a year or two ghostwriting for a judge. Some judges write their own opinions, but many delegate part or all of the drafting work to the clerks. Some judges supervise and edit their clerks' work on the draft opinions; some judges do not. There are judges who delegate to the clerks the decisions as to what results should be reached in particular cases, others [ ]

169. *See* LeClercq, *supra* note 164, at 238-39.

170. Bast & Samuels, *supra* note 66, at 793.

171. Billings, *supra* note 123, at 395.

172. *Id.* at 395-96.

173. *See generally* Sorkin, *supra* note 70.

174. Billings, *supra* note 123, at 396.

175. Lerman, *supra* note 83, at 468.

176. Billings, *supra* note 123, at 396.

177. *See* In Re: Plagiarism, *supra* note 2.

> direct the result but delegate the research and analysis of the legal grounds for the decisions, and still others delegate only the drafting of the opinions. Some judges sign off on their clerks' opinions with little or no supervisory or editorial input. Regardless of the extent of the clerks' responsibility for drafting opinions, judges publish opinions under their own names. The work of law clerks is almost never acknowledged. Law clerks generally feel privileged to have the opportunity to work for judges and accept the ghostwriting role without question. Many clerks regard it as unethical even to identify which opinions they drafted.[178]

The above illustration is also prevalent in firms, as mentioned in one of the examples above.[179] This includes the writing of briefs.[180] Lerman even adds that pleasure (calling it the "highest form of intellectual flattery")[181] may even be drawn in favor of an otherwise unacknowledged author of a brief in case the judge incorporates a portion of such brief in the drafting of the opinion in the case involved.[182]

One author goes to the extent of saying that the profession "was built on borrowing,"[183] obviously pertaining to legal practitioners' inevitable practice of relying on precedents and laid-down legal doctrines. This reliance, in turn, not merely tolerates but even encourages borrowing in the name of reliability and consistency.[184] True enough, more weight is given to consistency rather than originality.[185] Katharine K. DuVivier points out that

> there is no reason to sanction attorneys who borrow language or ideas in developing a form or an argument for the benefit of others. It is *efficient* for attorneys to use form-books or other sources as a starting point. These attorneys are then responsible for understanding the source in the context of the client's situation and customizing the form or argument accordingly. The client has nothing to gain from paying an attorney to start from scratch with each new document. By using these sources, attorneys can pass on the time savings to clients.

178. Lerman, *supra* note 83, at 468-69 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 103 (1985) & Dursht, *supra* note 61, at 1253).

179. *Id.* at 469.

180. *Id.*

181. *Id.* at 470.

182. *Id.*

183. Katharine K. DuVivier, *Nothing New Under the Sun — Plagiarism in Practice*, 32 COLO. LAW. 53, 53 (2003).

184. *Id.*

185. *Id.*

> Likewise, if a court is *more interested in how an argument is constructed than which secondary author thought of that formulation*, there is no reason to take up valuable space in a brief to cite every secondary source.[186]

Seemingly, and perhaps sadly, there is thus reason to argue that in some cases falling within the ambit of the profession, plagiarizing without deceit would not be unethical. Quite to the contrary, such may even supposedly help carry-out more efficiently and effectively the administration of court justice.[187]

This, however, may be said to cover only a portion of what makes up the legal profession at large. One finds hope in the finding that the deliberate misappropriation of the works of others is somewhat not as common in the legal academe as it is in the practice of law.[188] To the Author, plagiarism is definitely still frowned upon by legal practitioners and scholars alike. The obvious reason is that, as agents of the law, those in the legal profession are expected not only to have the required know-how of citation but also, and more importantly, to know the legal consequences of plagiarizing.

Aside from this, there is, of course, a practical aspect. Fresh ideas also serve as the foundation of the development of laws and legal theories.[189] These ideas find fortress in legal publications and works. Upon this said foundation of ideas, "precedence is built to promote the all familiar concept of *stare decisis*."[190] Thus, and as recognized also by Mirarchi, plagiarism, through misrepresentation, can have serious consequences in the construction of sound legal structures.[191]

Ultimately, one cannot but agree with David E. Sorkin that the ethical responsibilities imposed upon lawyers require that plagiarism is recognized, understood, and avoided.[192] Thus, those in the profession, in particular, must be cautious so as to elude even just a semblance of plagiarism.[193] Our lawyers' very own Code of Professional Responsibility obligates them not to "engage in unlawful, dishonest, immoral or deceitful conduct."[194] Rule 10.01 also sanctions the doing, or consent to the doing, of any falsehood in court, and the misleading of any court by any artifice.[195] Rule 10.02,

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186. *Id.* at 54 (emphasis supplied).

187. *See* DuVivier, *supra* note 183, at 54.

188. Lerman, *supra* note 83, at 471.

189. *See* Mirarchi, *supra* note 119, at 383.

190. *Id.* (emphasis supplied).

191. *See* Mirarchi, *supra* note 119, at 383.

192. Sorkin, *supra* note 70, at 487.

193. *Id.*

194. CODE OF PROFESSIONAL RESPONSIBILITY, canon 1, rule 1.01.

195. *Id.* rule 10.01.

meanwhile, prohibits any misquotation or misrepresentation of the contents of a paper or the text of a court decision or legal provision.[196] There is thus no insufficiency of rules in the profession that sanction any act of plagiarism. This is primarily because plagiarism is always within the purview of academic dishonesty — something that is frowned upon in all fields and institutions.

VI. INTENT AS AN ELEMENT

It was said above that the term "plagiarism" has no universally accepted definition. There are institutions whose definitions require intent inasmuch as there are those whose definitions do not. There are even those that offer no definition at all. This Section looks into the plausibility of requiring intent or dispensing with it altogether.

A. In Light of the Creative Process

Creativity is said to be a "uniquely human characteristic."[197] This characteristic largely differentiates us humans from other creatures. This may be why society in general puts much premium on individual creativity and originality. Creativity, however, is a process. It is "one of change, both for the creators, who[,] while transforming their raw materials into new, finished works find themselves transformed, and for their audiences, who in seeking knowledge and enlightenment assimilate and transform those works as part of their own creative process."[198]

On this theoretical basis, Laurie Stearns thus argues that "plagiarism is a failure of the creative process, not a flaw in its result."[199] This is how said author differentiates plagiarism from copyright infringement; the latter being mostly concerned with the creative result. Although both imply an element of wrongful copying, plagiarism is said to consist "not in the resulting duplication of a particular mode of expression but in the process of copying."[200] On this proposition, although perhaps stretching Stearns' discussion, it seems that intent is not at all dispensed with. A focus on the *process* would entail a focus on the act of plagiarizing itself. A focus on the *result* would, in turn, mean a focus on the plagiarized material. If one concerns himself with the result, the process takes a backseat, and thus the *how* and *why* of plagiarizing becomes irrelevant. On the other hand, focus on the process would constrain us to look into *how* and *why* the copying was done, seemingly entailing a peek into the plagiarizer's intention.

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196. *Id.* rule 10.02.

197. Stearns, *supra* note 61, at 515 (citing SILVANO ARIETI, CREATIVITY: THE MAGIC SYNTHESIS 4 (1976)).

198. *Id.* at 515-16.

199. *Id.* at 520.

200. *Id.* at 525.

The requirement of intent may thus depend on whether focus will be on the result or whether it will be on the process itself. The focus on result would make the act subject to some form of strict liability, as in some tortuous conducts. Such will require no examination of any subjective intent. Another option is to bring such act within the ambit of the doctrine of *res ipsa.*

B. Elements of the Definition

Analyzing the widely accepted definition of plagiarism ("stealing and passing off the ideas or words of another as one's own")[201] using the language of criminal law, Green observes that there are "two, or possibly three, basic 'elements:' two *actus reus* elements and a possible *mens rea* element."[202] The definition involves an act (copying a work) and an omission (failing to attribute such work to its author).[203] The requirement of a third (*mens rea*) element is, however, less clear.[204] Some codes of ethics sanction only intentional or "knowing" plagiarism.[205] Others proscribe either intentional or unintentional plagiarism — which, as posited above, may be considered as a strict liability offense in torts.[206] But quite a number of codes do not specify any form or standard of *mens rea*, if any at all is required.[207] Some institutions may even totally omit any definition or indeed, lack any written code of ethics.[208]

This only shows the various ways by which plagiarism is viewed. What is overwhelming is perhaps the fact that plagiarism is an act of "academic dishonesty." Any act of dishonesty would seem to require intent. But if plagiarism would be considered as merely an act of academic impropriety, then perhaps looking into intent may be dispensed with. As has been said, any effective definition would largely depend on a particular institutional approach.

VII. LOCAL JURISPRUDENCE ON PLAGIARISM

There are very few Philippine cases that touch upon the concept of plagiarism. It is safe to say that none of these few is of any significant doctrinal value.

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201. Green, *supra* note 66, at 173.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 181.

206. *Id.*

207. Green, *supra* note 66, at 181.

208. *Id.* at 181–82.

In *U.P. Board of Board of Regents v. CA*,[209] the Court upheld the freedom of U.P. as an institution of higher learning to revoke a distinction or honor conferred upon its student where there was a showing that such conferment was procured through fraud, which was, in this case, plagiarism of the student's dissertation.[210] The case mainly dealt with due process.[211] There was nary a categorical finding that malice or intent is or is not required in a finding of plagiarism. Perhaps the best we can glean from this case is that the Court will not question any such finding of an academic institution provided investigation was conducted and due process was observed.[212]

In *Habana v. Robles*,[213] the Court had occasion to rule on an incident where plagiarism coincided with copyright infringement.[214] Petitioners there alleged that the respondents infringed their rights to an English grammar textbook by publishing another book substantially and obviously copied from the former.[215] One of the defenses of the respondents included the allegation that "their similarity in style can be attributed to the fact that both of them were exposed to the [same] syllabus and [that] their respective academic experience, teaching approach[,] and methodology [were] almost identical because they were of the same background."[216] The Court brushed this defense aside by saying that such is not an excuse and that the similarities in material contents were too obvious.[217] Worthy of note also is the holding that in cases of infringement, "[t]he copying must produce an 'injurious effect.'"[218] Thus, copying *per se* is not what is prohibited.[219] The Court said that in the instant case, "the injury consists in that respondent Robles lifted from petitioners' book materials that were the result of the latter's research work and compilation and misrepresented them as her own. She circulated the book DEP for commercial use [but] did not acknowledge petitioners as her source."[220]

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209. University of the Philippines Board of Regents v. Court of Appeals, 313 SCRA 404 (1999).

210. *Id.* at 424.

211. *See University of the Philippines Board of Regents*, 313 SCRA 404.

212. *See University of the Philippines Board of Regents*, 313 SCRA 404.

213. Habana v. Robles, 310 SCRA 511 (1999).

214. *Id.* at 517.

215. *Id.*

216. *Id.* at 526.

217. *Id.* at 526-27.

218. *Id.* at 527.

219. *Habana*, 310 SCRA at 527.

220. *Id.*

Cruz v. Iturralde[221] involved a complaint against a trial judge charged with gross misconduct, dishonesty, gross ignorance of the law, and partiality.[222] One of the allegations was plagiarism.[223] The judge allegedly copied several paragraphs from an article in a daily broadsheet and used them in drafting his Order.[224] The judge argued that there was nothing wrong with adopting the views in the newspaper article.[225] Interestingly, the judge also argued that the complainant was not the proper party to assert a cause of action based on the allegation of plagiarism.[226] Even more interestingly, the Court ruled rather scantly on the matter, saying that "[t]he allegation of plagiarism does not contain a cause of action. Neither has complainant shown his legal standing to pursue this accusation."[227]

In *Pascual v. Ramos*,[228] the Court, in an obiter dictum, castigated Ramos' counsel for reproducing in a memorandum, without proper citation, a Supreme Court ruling.[229] The counsel was warned that a repetition of such would be dealt with accordingly.[230]

VIII. ANALYSIS

If one thinks about it, people do, indeed, plagiarize every day.[231] We wittingly or unwittingly copy words and ideas here and there and in turn utilize these in our everyday action and speech.[232] Take for example the fact that we do not attribute jokes we crack to people we may have heard them from first.[233] Even "ministers or pastors borrow sermons from each other without attribution."[234] No one wholly crafts the things he says, the stories that he tells, and the narratives he conveys to others.[235] We use expressions and even novel ideas without even bothering to ascertain their origin. Green

221. Cruz v. Iturralde, 402 SCRA 65 (2003).

222. *Id.* at 68.

223. *Id.* at 69.

224. *Id.*

225. *Id.* at 70.

226. *Id.*

227. *Cruz*, 402 SCRA at 73.

228. Pascual v. Ramos, 384 SCRA 105 (2002).

229. *Id.* at 116.

230. *Id.*

231. *See* Dursht, *supra* note 61, at 1263. *See also* Billings, *supra* note 122, at 395.

232. *See* Dursht, *supra* note 61, at 1264.

233. *See* Billings, *supra* note 123, at 395.

234. Billings, *supra* note 123, at 395.

235. Green, *supra* note 66, at 180.

traces these to the fact that everyone works within a *cultural tradition*, wherein we engage by copying.[236]

This fact, however, does not really excuse us from the duty to attribute ideas and acknowledge originality.[237] There is a line that separates allowable — and, indeed, inevitable — copying from inexcusable copying.[238] Copying in the publication of written works should come within the purview of the latter. This is perhaps most true when it comes to those within the legal profession.

Nevertheless, applying the same plagiarism rules to actual legal practice may be impractical.[239] For example, in the use of forms, it is more practicable and fair to a lawyer's client if such lawyer uses pre-used forms as opposed to drafting an original document every time they are needed.[240] A lawyer may also borrow arguments from previous cases, or even cases of another colleague, without attribution to the latter. Such practice could not be considered to be unethical or wrong, provided, of course, that the original source of the arguments consented to the borrowing. No harm, after all, is caused by such a scheme since the concerned court could not be said to have been misled or injured. On the contrary, it might be quite confusing to a court if a pleading cites the person from whom arguments may have been originally sourced. A court would only concern itself with binding or persuasive authorities which may include court decisions, laws, and annotations or treatises.

The same could also be said when it comes to the drafting of legal opinions where the primary consideration is the satisfaction of a client's query. A client would generally not be concerned where his lawyer directly lifted his legal arguments for as long as such arguments are based on sound legal precedents and principles.

But we should strike a difference with respect to the legal academe. This sphere includes the publication of legal writings such as books, annotations, treatises, articles, notes, essays, comments, and even student theses. Plagiarism rules should apply to this sphere of the legal profession, probably even more strictly than normal. This is not only because lawyers are expected to be knowledgeable of citation rules and styles but also because the written works within this academe serve not only the legal profession but also the public domain in general. This is unlike the case in legal practice

236. *Id.*

237. *Id.* at 181.

238. *Id.*

239. Sorkin, *supra* note 70, at 487 (citing Philip Crennan, *Plagiarism and Legal Practice*, 67 LAW INST. J. 128, 129 (1993)).

240. *See* Sorkin, *supra* note 70, at 487.

where most written works are intended to be for the benefit of particular parties. Moreover, it is agreeable that legal scholars "experience little of the time pressure or economic pressure that burdens lawyers in practice."[241]

In the legal academe, a strict application of plagiarism rules is in order so that the proliferation of ideas is unhampered by misrepresentation and misdirection. Fortunately, law reviews and journals provide a battery of editors who take on the tedious job of checking sources and making sure that citation rules are followed.

Student plagiarism in law schools raises a different set of concerns. It is, of course, a primary duty of law schools to form and shape ethical, diligent, and competent future law practitioners and scholars. To ensure this, law students should be able to learn the technicalities involved in legal writing and research with a view towards efficient and ethical written outputs. The initial step is the adoption of a clear and disseminated policy on plagiarism and research writing. The next logical step is the proper enforcement of these policies. Ultimately, students should understand the school's rules on citation and recognize the fact that non-observance of such rules would entail disciplinary sanctions, even including dismissal. Moreover, "[l]egal academics must serve as models of professional behavior for law students."[242] Thus, law schools should adopt substantially the same plagiarism rules with respect to its faculty. Law reviews and journals should also see to it that plagiarized articles, even those authored by faculty, do not get published.

It is a matter of practicality to note that when it comes to student plagiarism in general, what must be noted are the nuances that may be brought about by due process considerations in the disciplining or dismissal of students found to have plagiarized.[243]

With respect to the seemingly wide practice of ghostwriting within the legal profession, some important observations can be said. Unlike in ghostwriting in the case of students for example, the harm that results from ghostwriting within the profession, specifically in practice, is minimal, if not altogether nil. To an extent, although judges or justices may rely on law clerks or court attorneys for the drafting of decisions and lawyers may utilize the work of other consenting lawyers for paperwork, no one is harmed by such practice.[244]

With regard to ghostwriting within legal practice, the ethical underpinnings are less alarming. In firm practice, perhaps the best to do is

241. Lerman, *supra* note 83, at 471.

242. Marilyn V. Yarbrough, *Do As I Say, Not As I Do: Mixed Messages for Law Students*, 100 DICK. L. REV. 677, 682 (1996).

243. *See generally* LeClercq, *supra* note 164.

244. *See* Green, *supra* note 66, at 190.

acknowledge all lawyers who worked on a specific memorandum or pleading by indicating their names in such written works. This is actually already the practice in most firms.

When it comes to legal scholarship the ethical dimension is more alarming. However, there is no indication that ghostwriting herein is prevalent. The usual practice is that lawyers who publish articles recognize the help of others (usually law students) through an arrangement of co-authorship. At the very least, authors should acknowledge those who helped in the research part of writing any work.

The complexities are more apparent when it comes to judicial plagiarism. Dursht says that judicial plagiarism "arises when judges author opinions that employ materials from copyrighted sources such as law journals or books, but neglect to give credit to the author."[245] However, judicial writing need not be original for so long as it is in accordance with precedent and law.[246]

In the judiciary, ghostwriting schemes appear to be pervasive. In some instances, a judge may even ask a party's counsel to draft an order for the court's promulgation.[247] In one U.S. case where a lower court adopted the findings of law and fact of the prevailing party as its own,[248] it was held that the findings, even if authored by one of the contending parties, were also the court's findings.[249] There was emphasis on the fact that the trial judge exercised independent discretion.[250] Such same argument can also be said with respect to the practice of judges adopting in entirety a draft written by a law clerk in the promulgation of court decisions, as illustrated above. Thus, there should be no ethical issue with respect to such practices, for so long as the concerned judge exercised control and independent judgment over the writing. Deception, if any, is wholly irrelevant in these practices because of the mentioned belief that judicial writings are not expected to be original. This position is in consideration of the fact that ground realities render it difficult for magistrates to draft opinions, wholly and by themselves, without the help of clerks and researchers. Thus, for as long as the judge, under whose name a decision is rendered, exercises control and discretion in the drafting of the opinion, no ethical issues are in view.

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245. Dursht, *supra* note 61, at 1253.

246. Bast & Samuels, *supra* note 66, at 800 (citing RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 22 (2007)).

247. *Id.*

248. *See* Anderson v. City of Bessemer, 470 U. S. 564 (1985) (U.S.).

249. Bast & Samuels, *supra* note 66, at 801 (citing *Anderson*, 470 U.S. at 572-73).

250. *Id.*

With respect to plagiarism by failing to recognize sources in a court decision, the issue is more difficult. However, it is argued that this kind of plagiarism should not be excused. This is because any failure to acknowledge goes into the very value of the decision itself. A decision depends heavily on authorities cited.[251] These authorities must be capable of verification in order that readers may understand the logic and wisdom behind the decision.[252] Thus, any failure to cite may result in the misleading of the contending parties and their counsels or the appellate court exercising review functions.[253] Even the public in general, especially those within the legal profession (including students and practitioners) may be misled in light of the doctrinal value of decisions, specifically of those decisions promulgated by the Supreme Court.

Going now to plagiarism in general, some observations are in order. For one, the problem is not as much the determination of penalty as is the determination of the existence of plagiarism itself. Much of this problem is brought about by the difficulty of defining. The question on the need to look at intent or a subjective phase is at the heart of this difficulty.

Although some members of the legal academe may take the position that intent is absolutely unnecessary for a finding of plagiarism, a good deal of material at the very least establishes that such notion is unsettled. On the foundation that plagiarism derives much of its meaning from theft law, Green is of the position that plagiarism should also require intent.[254] Posner, in turn, defines the word as "nonconsensual fraudulent copying."[255] Fraudulent conduct "requires intent to deceive or at least recklessness by the plagiarist and would not include inadvertent or innocent instances of copying."[256] There is also indication to the effect that defining plagiarism (whether to consider intent or not) is largely a prerogative of institutions with regard to its respective subjects.

However, a compromise between intentional and unintentional plagiarism may be available. Green resourcefully says that the element of intent can be satisfied by "deliberate indifference" to the obligation to attribute.[257] This means that if a person becomes allegedly oblivious of the fact that he is using another's work without attribution by reason of his

251. *See* Dursht, *supra* note 61, at 1257.

252. Dursht, *supra* note 61, at 1257.

253. *Id.*

254. Green, *supra* note 66, at 182.

255. Bast & Samuels, *supra* note 66, at 781.

256. *Id.*

257. Green, *supra* note 66, at 182.

indifference and nonchalance to the citation requirements, then he should be considered guilty of plagiarism.[258]

As can be seen, and perhaps unfortunately, no one can claim a monopoly on the definition of plagiarism. Although it is the Author's position that the judiciary should be held to higher standards of scholarship and writing to the effect that a finding of plagiarism involving its members should not take into account intent, the Supreme Court concededly has the prerogative to adopt its own definition. The Supreme Court's holding that intent is indispensable[259] may be wrong but there is scant legal and persuasive basis to say so with absolute certainty.

IX. CONCLUSION

Laurie Stearns' words are enlightening —

> Given that our opinions about plagiarism are contradictory — sometimes we find it difficult to forgive, at other times we find it difficult to condemn; sometimes we react with embarrassment, at other times with malicious pleasure; sometimes we despise plagiarists, at other times we empathize with the pressures that led to their actions; sometimes we greet accusations of plagiarism with credence, at other times with suspicion — we should not try to obliterate these human contradictions by turning to legal reasoning's illusion of predictability.[260]

It is sad that recent issues of plagiarism have plagued the legal profession. A sort of purging or witch-hunting has ensued. Accusations of plagiarism have been thrown around rather recklessly one may say. This is harmful to the profession in general. A continuation of this would result in disaster for the profession.

Perhaps the best solution to the problem of plagiarism within the legal profession is to re-educate legal practitioners and students alike on the harmful effects of plagiarism and the proper rules of attribution and citation. Recognizing that plagiarism is a very complex concept should be a start. A legal definition of plagiarism could also be adopted — which is rather a long shot. Another effective step may be to strengthen compliance with institutional honor and ethics codes. After all, there is reason to argue that there is "no precise principle of determination available"[261] in order to conclude of the existence of plagiarism. Perhaps, too, it cannot be finally settled even by judicial pronouncement or by positive enactment of law.[262]

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258. *Id.*

259. In Re: Plagiarism, *supra* note 2.

260. Stearns, *supra* note 61, at 551.

261. *Id.* (citing GEORG W. F. HEGEL, PHILOSOPHY OF RIGHT 56 (1952 ed.)).

262. *Id.*

As is hopefully shown by this Essay, the fact is that plagiarism intersects only imperfectly with the law.[263] In the end, the answers to the difficult issues concerning it, including those within the legal profession and academe, may actually be found outside of the legal system.[264]

263. *Id.* at 514.

264. Stearns, *supra* note 61, at 551.