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Plagiarism and the law

Joss SAUNDERS
Publishing Law Team,
Blake Lapthorn Solicitors

ABSTRACT. Plagiarism is a much older concept than copyright. In this article we consider the distinction between the two and the various types of plagiarism. There are not always legal implications from an act of plagiarism, but there can be, and they can range much wider than copyright law. There are clearly risks for publishers in dealing with alleged or actual plagiarism, but most of these can be managed with prudent forethought. We illustrate some ways in which this can be achieved.

Introduction

> There's just one page of yours in my little book, Fidentinus,
> But stamped with the sure image of its master,
> And it exposes your poems as an obvious theft…
> My book needs no informer, no judge:
> Your page stands out against you and says 'You are a thief'.
> Martial, *Epigram* 1.53[1]

Plagiarism has a far longer history than copyright, but the two are often confused. While copyright has a well-documented 300-year history and is clearly based on law, plagiarism is as old as literature itself, and is perhaps more subjective. Classical literature has some marvellous literary feuds, such as that between Aristophanes and Eupolis, who traded insults and allegations of plagiarism.[2] Martial in the first century Roman epigram cited above went on to describe the plagiarist as a black raven compared to Leda's swans, a common magpie compared to tuneful nightingales.

While the opportunities that the Internet offers for copying have been the subject of extensive legal debate in relation to copyright infringement and the remedies for it, largely thanks to the music industry, the debate on plagiarism has focused more on the ethical and disciplinary than the legal aspects. Copyright infringement, and its cousins, trade mark and design infringement, receive regular and weighty review in the law courts, where judges are often renowned intellectual property lawyers. But plagiarism is a more nuanced and complex area, involving consideration of academic integrity, professional disciplinary rules, and fraud. Intent becomes a key consideration for those called to determine whether or not there is plagiarism, and the professional dis-

ciplinary aspects call into play human rights considerations and the need for due process.

Software can help to identify some kinds of plagiarism, and applies an element of science, but is not able to spot other kinds of plagiarism.

Plagiarism does not respect geographical borders. The law, however, must, as it is based on the concept of jurisdiction, or territory. This has two facets. First, copyright law varies from country to country. The underlying principles are the same, but the details vary. Even in the European Union, where there has been extensive harmonisation of the copyright law of the 27 Member States,[3] differences remain. Between Europe and the US there are bigger differences, particularly in relation to copyright defences and to moral rights. The second facet is that any dispute falls to be adjudicated in a court or tribunal that not only has to apply a particular substantive law, but has to follow a law of procedure. Thus a dispute adjudicated in London may produce a different result than a dispute on identical facts adjudicated in New York, or Frankfurt, or New Delhi. The present author writes from the perspective of a lawyer qualified in England and Wales (Scotland is a different jurisdiction; although it shares the same substantive copyright law, its procedural rules are different). However, as a lawyer advising international publishing houses, whose books and journals may be first published in different states, he must of necessity consider the international perspective on copyright and plagiarism disputes. This article is based on English law, but makes respectful nods to other legal systems.

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Plagiarism may be defined as unacknowledged copying. Copyright is the right to authorise, or to prevent, the making of any copies, so an infringement of copyright involves an unauthorised copy. In this article we shall explain the difference between a failure to acknowledge and a failure to obtain authorisation.

After exploring the types of plagiarism, we will consider four propositions.

The typology of plagiarism

There appears to be no standard typology of plagiarism, but the experience of issues that academic publishers have to deal with would suggest the following:

- self-plagiarism (including salami-slicing);
- minor plagiarism;
- literal, or word-for-word plagiarism;
- image plagiarism;
- ideas plagiarism;
- scattergun plagiarism;
- citation plagiarism (or citation amnesia);
- wholesale plagiarism (or piracy).

These types of plagiarism vary in seriousness and legal impact. From a copyright lawyer's perspective minor plagiarism, involving borrowing a few words or lines, with or without knowledge, will usually not amount to copyright infringement at all. On the other hand wholesale piracy, the copying of articles, or whole books or journals for profit, will lead to a prompt lawyer's letter and usually a fairly open-and-shut case, leading sometimes to substantial damages claims, and the pulping of books.

Self-plagiarism arises when an author reuses her or his own material, usually without acknowledgement. This can include salami-slicing, where the author submits several articles with slightly different interpretations of the same subject matter or based on the same research.

Literal, or word-for-word plagiarism, involves the reuse of whole sections of text, usually without acknowledgement. The most obvious and flagrant example is when a contributor to a journal changes only the name of the author, and perhaps the abstract and first paragraph. Such plagiarism is also tantamount to academic fraud. But literal plagiarism can also involve intentional or unintentional recycling of comments from other sources, perhaps intermediated by notebooks of collected ideas, where the author transgresses the law by borrowing more than is permitted.

Image plagiarism is a sub-species in itself, ranging from tables and diagrams to artwork and photographs. Copyright law distinguishes text from images. The reproduction of a photograph, perhaps with some editing, is achieved by electronic reproduction. By contrast, a table, diagram, or artwork is often recreated, without a physical (or digi-

tal) reprographic process. Here intention becomes important, as it is easier to prove copyright infringement of a photograph than of a table. Note, however, that even a photograph can be recreated, by assembling the same scene and re-photographing it, and this can still amount to copyright infringement, although the law here is somewhat obscure.

Ideas plagiarism is the kind that copyright lawyers are least comfortable with, although it can be immensely important to a lawyer with a professional disciplinary practice. Here the author reuses the ideas of another author, without acknowledgement.

Scattergun plagiarism involves a selective plundering, whereby the author borrows words, ideas or other context, from a variety of other originators. Interestingly, because of the legal test of substantiality, such plagiarism, however blatant, may well not amount to copyright infringement.

Citation plagiarism (or amnesia) involves a cavalier approach to acknowledging in references, either not giving credit for sources, or lifting someone else's citations as a shortcut.[4]

Wholesale plagiarism, or piracy, involves the copying of a whole book, or journal, or multiple articles from multiple journals. This is usually done for financial reasons, on a commercial scale, and is not further considered in this article.

This typology is not exhaustive (unfortunately), and the author welcomes feedback and ideas of other types of plagiarism.[5]

We shall use this typology to examine four propositions.

Proposition 1: plagiarism is often, but by no means always, illegal

What is the difference between plagiarism and copyright infringement? As we have seen, plagiarism covers a spectrum from word-for-word textual copying, through changing some words but retaining the basic structure, through to copying ideas and arguments. The common thread is that the copying is dishonest because it is unacknowledged. If you quote from another author, and provide the citation, then in general you are not a plagiarist.

Copyright, by contrast, involves two steps. The first is to establish whether or not the new text involves any copying of the old. The second is to determine whether the copying is substantial. By and large the question of acknowledgement is irrelevant. An acknowledgement can be called in aid as part of a defence when the infringer argues that the copying was for a permitted use, such as non-commercial research, or criticism or review.[6] Even with an acknowledgement, an author is not free to copy as much as he likes, and there are plenty of cases where there has been an acknowledgement, but the aggrieved publisher has succeeded in a legal action because the infringer has used material of economic value. As the judge put it in the 1916 case of *University of London Press Ltd v University Tutorial Press Ltd*, 'what is worth copying is prima facie worth protecting'.[7] But the point for us is not whether or not there is a defence, but whether there is copying of a substantial part in the first place, and for this acknowledgement is irrelevant. So we reach the odd situation that an author may be a plagiarist, but not an infringer of copyright, while another author may infringe copyright, even though he is not a plagiarist, because he or she has provided an acknowledgement.

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So when does plagiarism amount to copyright infringement?

The fair dealing (or fair use in the US) defence does provide some interesting insights into how much copying is permitted. Neither English nor US copyright law have an absolute prohibition on copying. The US concept of fair dealing goes back to an 1841 case involving the copying of George Washington's letters. Justice Story said:

> If so much is taken, that the value of the original is sensibly diminished, or the labours of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto . . .[8]

Let us now consider the spectrum of plagiarism, by reference to our typology.

Self-plagiarism

We need to distinguish the concepts of copyright ownership and acknowledgement. An author is free to copy his or her own work only to the extent that the author has not transferred rights to a third party. Double-dipping, i.e. the practice of submitting the same or a substantially similar (in terms of text or illustrations) article to more than one journal, becomes a copyright infringement if the author has signed a copyright assignment form or exclusive licence with a publisher, regardless of the issue of acknowledgement. By contrast, submission of two articles based on the same scientific experiment, but using different words, would not generally amount to a copyright infringement, even if there is no acknowledgement. Thus copyright law would not assist the publisher. The publisher would instead have to rely on a clearly communicated plagiarism policy, generally in the 'Notes to Authors' in the case of a journal, or a contract clause in a book. Most standard book contracts do contain an originality clause.

Word-for-word copying

Textual copying of a significant proportion of a text is likely to amount to copyright infringement. Most of the plagiarism cases the current author has advised publishers on turn on textual copying. In the case of one book, 13 pages of a 100-page book were word-for-word copies.

In other cases I have come across what is obviously word-for-word copying, but in isolated phrases. In one example, in an eight-page article the peer reviewer came across ten incidents of copying from a book. Of these the reviewer felt that four may be capable of harmless explanation, and six were close copying of particular words and phrases. The four included subheadings. The six included some word-for-word copying, and some included phrases that were slightly changed. In this example, it may well have been that the author had copied, and indeed my reading of the article side by side with the book led me to that view, but nevertheless there was no infringement of copyright, because what was taken was plainly not a substantial part of the book, either in terms of numbers of words or in terms of the importance of those words.

Adaptation of a text, with some words being changed but the general thrust being the same

A copy is no less an infringement because the author has made a few minor changes. But the test is whether there is a substantial copy. Shakespeare may have got the idea for *Macbeth* from Holinshed, but his treatment of it produced an entirely different work. The law will be slow to prevent the same ideas being reworked, particularly if the order of the work is dictated by the theme, as in a chronological history. In history, there may be similarities with previous works because many of the facts and arguments are now well known. But if even the paragraphs of an article are in the same order, with the same subheadings, and just the words being changed, there is likely to be infringement. The American Historical Association has discussed the difficulties in its Statement of Standards of Professional Conduct, approved in 2004.[9]

if the second author merely reuses ideas, there is no infringement

Ideas plagiarism, taking of the ideas from a text, but substantially (or entirely) changing the words used

If the second author merely reuses ideas, there is no infringement. However, if the second author borrows the first author's exact words, or borrows the details of the way the first author has expressed the ideas, then there is likely to be copyright infringement.

English law makes the nice distinction between an idea, in which there is no copyright, and the way that idea is expressed. Many of the allegations of plagiarism I see coming out of the US argue that there is plagiarism when an academic has taken the *ideas* of another academic without acknowledgement, and seem to think that this is enough to establish a legal liability. That may be plagiarism, but it is not case of copyright infringement, at least in English law. In the landmark 1980 case of *Ravenscroft v Herbert*,[10] the author of a non-fiction book sued James Herbert, the author of the fictional *The Spear of Destiny*, claiming that the work

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included nearly 50 examples of significant textual copying out of a whole book, but also that it used a significant number of ideas which obviously were derived from the first book. The judge concluded that there was copyright infringement, affirming an earlier statement of the law that

> the true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the results of another man's labour or, in other words, his property.

The line for ideas copyright is a very narrow one. Lord Hoffmann in the leading English copyright infringement case of *The Designers Guild*[11] showed that if the second author does not just borrow ideas, but also the way they are used, then there is infringement:

the judge expressed some surprise that Leigh and Teabing were suing rather than being flattered

> [T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea *expressed* in the copyright work.

He also memorably said:

> 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.

The English-speaking lawyer is often reminded that Shakespeare borrowed heavily and without acknowledgement. But Holinshed would have had no case, as the language of *Macbeth* is so far above the original that it cannot be said that Shakespeare abused Holinshed in the way he expressed the story.

The most celebrated recent case is undoubtedly the 2006 case involving an allegation of infringement in Dan Brown's book, *The Da Vinci Code*.[12] This case was originally heard by Mr Justice Peter Smith in the High Court in London, and the result was upheld in the Court of Appeal. Apparently enjoying himself hugely (he inserted a secret code of his own into his lengthy judgment), Mr Justice Peter Smith analysed the previous cases (including *Ravenscroft v Herbert* and *The Designers Guild*), and affirmed the clear position in English law when he said (at paragraph 171):

> First it seems to me that it is accepted that an author has no copyright in his facts nor in his ideas but only in his original expression of such facts or ideas.

For this reason, few lawyers found any surprise when he found in favour of Dan Brown, or could fault the reasoning. The *Da Vinci Code* case did not involve any textual copying. Dan Brown expressly acknowledged the authors of the *Holy Blood and the Holy Grail* (*HBHG*), in referring to their book within his novel, and indeed making a main character, Leigh Teabing, out of an acronym of the *HBHG* authors, Leigh and Baigent. The judge expressed some surprise that Leigh and Teabing were suing rather than being flattered. At the end of the day, the *HBHG* authors' case turned on an argument that not only their ideas but also the central architecture of their book had been misappropriated. They claimed that there were 15 themes in their book, which they said had been copied, the central theme being the Merovingian bloodline. Dan Brown was successful in his defence because the judge decided that there was no 'central' theme, that Dan Brown was indeed using ideas from *HBHG*, but that the architecture of the book which was argued for was simply made up as a convenience for the trial, and did not reflect the nature of *HBHG* at all.

The difference between plagiarism and copyright infringement is illustrated by the judge's comment: 'An acknowledgement is an irrelevance from the point of view of infringement of copyright save in limited perhaps statutory defences which are not raised in this case.'

So it is clear that an academic who takes the ideas of another, and expresses them in an original way in a new article is not infringing copyright, even if the conduct be thought to be unethical and a plagiarism. That does not mean, however, that the plagiarism is without legal effect.

Proposition 2: publishing law and university law make unhappy bedfellows

Publishers often face a tension in dealing with allegations of plagiarism by academics and other professionals. First, this is because a finding of plagiarism can ruin an academic or professional career, and so the author protagonists, and their institutions, approach the issue with a different objective to the publisher. In a case where the plagiarism is disputed, the publisher can find itself as piggy-in-the-middle in a sometimes vicious academic dispute in which the parties threaten the publisher with legal action, and a decision to retract or not to retract can give rise to a complaint by both sides.

Second, the publisher is concerned to preserve its reputation and the integrity of its editorial independence, but the resolution of the case may depend on a judgement on academic or professional matters. For example, whether or not one article plagiarises another may turn on a judgement of the originality of the interpretation of scientific experiment or a data set.

The editor is likely to refer the matter to the author's head of department, and disciplinary sanctions may follow. *The Times Higher Education Supplement* frequently carries plagiarism stories (see for example the front-page publishing and disciplinary story in April 2005, when a professor was alleged to have used up to five pages of a US article in a monograph. The book's publisher pulped the work and the university disciplined the professor).[13]

There are many more cases in the US, where Jon Wiener has published *Historians in Trouble*, a book devoted to cases of plagiarism and other academic fraud by historians.[14] Harcourt in 2004 published a book by David Callahan called *The Cheating Culture*, which tackles the wider cultural issues.[15]

Plagiarism can lead to other consequences, and unexpected litigation. In an unreported case, an English student whose university planned to withhold a degree because of cheating threatened to sue the university for negligence in not telling him that cutting and pasting was not allowed.

In extreme cases, there is plainly fraud, such as where an academic article is submitted under the 'author's' name, only for the publisher to find that it is actually an exact copy of an article by another author previously published by another publisher. Such copying is with an intention to deceive, and may give rise to claims of fraud and misrepresentation by the author's institution, especially if the article does make it through the peer-review process (and I have come across this) and is used in a Research Assessment Exercise. This then becomes a disciplinary matter, and, if the author is an employee, part of employment law. If the author is a member of a professional institution, these cases can also lead to expulsion from a professional body. My law firm carries out investigations and advocacy on professional regulatory matters, and some of these cases turn on allegations of plagiarism. As the academic and professional bodies are usually public law bodies, the institutions are generally also subject to the Human Rights Act if they are UK bodies, and due process becomes a crucial issue. (Note the Human Rights Act applies the European Convention on Human Rights, and so the position may be similar in many other European countries.) By contrast, most publishers are private and not public bodies, and the Human Rights Act does not apply to them. Decisions of editors and editorial boards that seem perfectly reasonable in a publishing context may not lead to the same consequence as decisions of a public law body.

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Even not-for-profit and learned society publishers are not generally subject to the Human Rights Act, because public law (of which the Human Rights Act is a part) only applies to organs of the state. However, most universities are subject to the Human Rights Act and so if their presses are not separate legal entities, they may be subject to the Human Rights Act as well.

Many publishers have adopted the practice of referring all cases of plagiarism that they consider to be reasonably founded to the author's institution. The Committee on Publishing Ethics (COPE)[16] has very clear and useful guidance and flowcharts, including flowcharts on what to do if you suspect plagiarism in (a) a submitted manuscript or (b) a published article. The guidelines sug-

gest that good editors will have systems to detect plagiarism, will support authors who are victims of plagiarism, and pursue offenders. The flowcharts suggest that the issue is referred to the author's institution, or regulatory body if the institution's response is unsatisfactory. This approach will work well in the majority of situations, although timing can be a problem if the investigation takes a long time and the author or institution whose work has been plagiarized is calling for action. But there are cases where the adherence to the flowcharts is difficult, or where the result is inconclusive. This can be particularly difficult where the author has changed institution, and the dispute is between the author and another author who was in the same research team. Such cases are distressingly familiar. In the worst cases, the publisher finds itself in the middle of a war of words and threats or actual litigation.

As we have seen above, plagiarism and copyright infringement are related but different, and so an academic or professional disciplinary panel may reach a fundamentally different conclusion on the same factual nexus than a court or tribunal that is looking at the legal rights and wrongs of action by a publisher, where copyright is king.

To make the picture more nuanced, the disciplinary tribunal or the legal forum are designed to adjudicate on the issues of plagiarism and copyright, respectively, but the publisher is concerned also to protect its reputation and to behave fairly with respect both to the author the subject of the complaint, and the author or institution raising the complaint. Publishers have a close relationship to their communities, and so the choice of whether or not to retract and make an apology will be analysed by other members of that community who may not be in possession of all the facts.

One way in which I have found myself called to assist in the process is to provide the publisher with a legal view on the questions both of copyright and of plagiarism. While the legal advice is confidential, the publisher can state that it has taken legal advice, and use this to demonstrate its due diligence in dealing with the more complex cases.

Proposition 3: copyright is not the only relevant law – plan in advance to stay on the right side of the law

Other legal areas that plagiarism can draw the unsuspecting publisher into include:

- database rights in the European Union (where research data is copied), as the database right is a separate intellectual property right to copyright;
- misrepresentation and fraud: where the author induces another person to enter a contract based on the false representation that he or she is the author, or fraud, where results are falsified or the author gains promotion based on another's work
- libel: where an allegation of plagiarism is made and published, and the author claims his or her reputation is unjustly damaged;
- breach of moral rights, under the Copyright Designs and Patents Act. Although these cases are rare in the UK, they are more common in France and other countries in the civil law tradition that is influenced by the Napoleonic codes, where moral rights are afforded a high status;
- breach of contract by the publisher to licensees and distributors, where a warranty has been given that there is no infringement of copyright or other third-party rights;
- authors when a complaint is made may ask to see the underlying correspondence citing the Data Protection Act 1998 (also relevant in other EU countries, as the legislation is based on European Directive 95/46/EC);
- freedom of information legislation may lead to a piece of information about plagiarism becoming public if it is held by a public body (for which organisations are public, see under proposition 2 above).

If there is a copyright infringement, then the consequences can include an injunction to prevent further publication, damages, and an account of profits, whereby the infringer has to hand over any profits from his or her wrongdoing, such as the royalties from a book in the case of an author and the profit from the book in the case of a publisher.

the publisher can state that it has taken legal advice, and use this to demonstrate its due diligence

In this section I focus on the peril of libel. Some of the other areas are addressed under my fourth proposition.

If you make an allegation of plagiarism, as with any other wrongdoing, and it affects the author's reputation adversely, then the allegation may be defamatory. Under the English law of libel the burden of proof is on the defendant in a libel action to establish the truth of the statement he makes. Justification is a defence, but only if it can be proved. This puts the publisher in the invidious position of having to make the call, and then justify it. In the case of lifting of complete pages of a work, this is not a difficult task, but in the more subtle forms of plagiarism this can be onerous, and the publisher and editor find themselves caught between the Scylla of the wrath of the 'plagiarized' author, her department, and her publisher, and the Charybdis of the aggrieved 'innocent' author, whose reputation is threatened by your revelations.

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If you try to satisfy the plagiarized victim, you risk turning your own author into a victim, so the threat of legal action lurks on both sides.

Libel law does contain safeguards which you can use with care. First, libel involves a 'publication'. If the allegation is put directly to the author, without being circulated to the editorial board, or a wider group, then it is likely that there is no publication. Distributing a copy to the entire editorial board would in my view amount to publication, as they are not in the position of needing to know. A confidential letter to one or two reviewers who are in a good position to comment on whether the allegation is true or not falls somewhere in between. A letter to the author's department, and even more strongly a retraction in the journal, would be publication.

A second safeguard is in the fair comment defence. This applies to statements of opinion, not of fact. Hence, a statement that the work is an infringement of copyright and the author has acted illegally is a statement of fact and libellous (if the defence of justification does not apply). But a statement that in your opinion the amount of ideas taken and the failure to acknowledge is professionally unacceptable is an opinion. Note, however, that the defence of fair comment is defeated if the author can show that the comment was made maliciously, which is not beyond possibility in the context of academic rivalry.

The laws concerning data protection and freedom of information may lead to an allegation of defamation which was intended as private and confidential becoming public. It is important to safeguard the confidentiality of the peer-review process, but it is difficult to guarantee that comments will never leak out.

Finally in this section we should note that the tools that editors and publishers employ to deal with plagiarism are themselves subject to the regulation of law. Plagiarism detection software involves automatic processing of personal data, and decisions should not be taken only by automated means. The use of such software needs to be covered by your notification to the Information Commission. The process by which disputes are resolved also calls to mind principles of due process and fairness which are particularly important for public bodies hearing disciplinary complaints.

Proposition 4: dealing with plagiarism is a cost that can be managed

I suggest seven steps that we can take to manage the risk of legal action. These involve:

- our author contracts, whether licence or assignment;
- our contracts with others in the supply chain, particularly online aggregators and other distributors, and our subscribers, particularly institutional subscribers;
- the guidance notes we produce for authors, for editors, and for reviewers;
- our plagiarism and fraud policy;
- our data protection policy;
- insurance;
- what we do in the event of litigation.

1. It will be absolutely normal for author contracts, whether for books or journals, to contain a warranty that the work is original and does not infringe the copyright or other rights of any other person. However, we should also decide whether or not to include protection against claims of infringement.

The distinction is subtle but important. If we only provide for actual infringement, and then we settle a claim against us, the author may argue that the infringement is unproven, or that there is a defence, and that we should not have settled the claim. As the legal costs often far outweigh the damages, this is unrealistic, but if we get it wrong, then there can be three consequences. In almost 20 years of legal practice I have found it rare indeed that an author is sued by their publisher, but I do have experience of royalties being withheld, and the author agreeing to pay some of the damages. If we settle a claim prematurely, then:

- we may have no remedy against the author, as the infringement is unproven;
- we may be in breach of our duty to the author to publish (more likely in the case of a book than a journal article);
- we may find ourselves threatened with a libel action by the author.

So the warranty should entitle us to not publish, or to withdraw material, in the event of either a claim, or if we reasonably consider that the work may infringe. Sometimes this will refer to a decision on the basis of legal advice, as authors may be reluctant to allow the publishers complete freedom not to publish.

2. We should also protect ourselves in our contracts with others in the supply chain. Online aggregators and other distributors will generally require a tight warranty from us and also an indemnity. While we may ask our authors for a warranty that there will be no claims, we should resist giving the equivalent indemnity down the line. Indemnities are particularly tricky, and often require us to pay someone else's lawyers, who have no incentive to keep the costs down. We should try to make sure that we only have to pay if a claim is proven. We will probably also want a control of claims clause. Equally, we will want the right to remove material that we consider may be infringing, without being in breach to our distributors if we do so. The same points will apply to our subscribers, particularly institutional subscribers, who may also in the firing line from irate academics. Of course these contractual points also apply to other problems, such as libel and patient permissions. We then need to be able to justify these clauses to licensees. There is both art and science in getting this right.

3. The guidance notes we produce for authors are important, as a two-page copyright licence or assignment is not enough to detail all the rules we want to apply. Ideally the two-page document will refer to the guidance notes and say the author shall comply.

The 'Notes for Editors' needs to contain guidance as to how to handle hostile reviews, and allegations of plagiarism. The editors do need to know that if there are any allegations of plagiarism, these need to be handled carefully to avoid the problem of libel and of breach of the author's and reviewers' rights under data protection legislation. See also point 5 below.

The notes for reviewers should ideally make clear how the reviewers should avoid libel and personal comments and focus on the text and the arguments.

I have found it rare indeed that an author is sued by their publisher

4. Plagiarism and fraud policy. There needs to be transparency concerning the process the publisher will follow if there are allegations of plagiarism or other academic fraud. As I have said, plagiarism is not in itself illegal; it is only illegal if it also breaches an established legal right, such as copyright, or offends against the law of misrepresentation or other legal rules. An author has a contract with the publisher, in which the publisher agrees to publish the work. This does not give the publisher the right unilaterally to decide not to publish, or to report unethical behaviour or suspicions of the same to the author's employer. Reporting suspicions could leave the author open to disciplinary action and financial loss, and it is possible that the author could sue the publisher for libel if the allegations are untrue, or for breach of contract in refusing to publish the work. The contract can go a long way to resolving these points, but it is also advisable for the publisher to have clear guidelines on these matters, and for them to be drawn to the attention of intending authors, usually by reference in the instruc-

tions to authors on submitting papers. The guidance itself can be on a website.

5. Data protection policy. It is fair to say that publishers' eyes do not light up when data protection is mentioned. Data protection is a European not a US issue, stemming as it does from a European Directive,[17] and with equivalents in force in most Member States, and in some other Commonwealth jurisdictions. In one recent case I asked for confirmation of what a publisher's data protection registration with the Information Commission said, which led to the rather embarrassing discovery that the registration had lapsed and the publisher might in consequence be acting illegally in processing most of its data, including its subscriber base. If the publisher uses software to identify plagiarism, such as iParadigm or one of the other solutions on the market, then the publisher must comply with additional rules about the use of automated processes.

The key point for us is that the policy should set out clearly what use will be made of personal data, how it is collected, and with whom it is shared. There are special rules which restrict the transfer of personal data outside the European Economic Area, and about keeping data secure. Authors are entitled to access to most information that a publisher, or indeed editor, holds about him or her. If there are hostile reviews which allege plagiarism, then there is a risk that the author will ask to see them.

I usually use this to protect the confidentiality and anonymity of the peer-review process

There are rules in the Data Protection Act to protect some classes of confidential information, and if you have the right data protection policy, and provide suitable guidance to authors, editors, and reviewers, then you may be able to rely on the confidentiality of the peer-review process. Section 7 of the Act contains a four-step process for subject access requests where there is confidentiality. I usually use this to protect the confidentiality and anonymity of the peer-review process, but I have not seen the point proven in court.[18]

Data protection is a complex area, usually dealt with by your Finance or Marketing Departments, and they need to be brought in the loop to ensure that you are also covered for your editorial and peer-review processes.

Freedom of Information Act (FOIA). Where the publisher or the editor is a public body (e.g. where the editor is editing in his capacity as a member of the academic staff of a university, which is subject to FOIA), it should make clear in the policy that certain kinds of information may cease to be confidential if a request for access is made under the Act. As with the Data Protection Act, there are some exceptions for confidential information, but this is a complex area and specific advice should be sought.

6. Insurance. Many publishers have a general policy of insurance which deals with libel, and may also address copyright infringement and actions by other publishers. It is worth checking this point, probably with the finance department, who usually manage the insurance portfolio. In the event of any claim, the terms of insurance usually require the insurer to be notified immediately, and that the publisher makes no admissions of liability without first consulting the insurer.

7. Litigation. The good news if you are threatened with a copyright infringement action is that, under UK law at least, innocent infringement of copyright does not give rise to substantial damages, and these days the courts are very keen to ensure that legal costs are kept in proportion by discouraging unnecessary litigation. This means that if you have made reasonable efforts to avoid infringement, and you take prompt action when you are notified that a book or article you have published is an infringing copy, then you can manage the downside. The downside is likely to be far worse with a book than an article, as another author can argue that she has lost sales. Indeed in one case my client was able to demonstrate loss of sales to a directly competing first-year undergraduate textbook, which contained substantial infringing material, and the publisher who had published the offending book did end up paying substantial damages to both the author and his publisher. In the case of an article, as the author is unlikely to have been paid, and the sales attributable to any indi-

vidual copy are probably modest, the damages are not usually going to be such a problem.

One risk inherent in publishing globally through the Internet is that copyright can be infringed in any country in the world. The most frequent times I am asked to advise on journal plagiarism arise when a US author or institution claims its rights have been infringed, and demands retractions, apologies, and disciplinary action under ethical codes. Publishers are naturally unwilling to be embroiled in academic disputes, hence my suspicion that I am sometimes brought in to bring an authoritative reason why a publisher cannot get involved.

What are the legal consequences of plagiarism?

The academic may be in breach of his or her contract with the publisher, if either the contract or the clearly expressed rules for submissions forbid such conduct. The consequence of such breach is likely to be that the publisher can stop publication. Depending on the publishers' guidelines and whether or not they were made available to the author, there may also be a banning from future publication for a time (I suggest five years), a withdrawal of the article from an archive, and a published retraction.

Coda: academic discipline

This article has referred to the different perspectives of the publisher and the author's employing institution. While copyright infringement can give rise to legal liability by a publisher, the author who infringes the copyright, or who plagiarizes, may also be in breach of his or her employment contract and also professional or academic disciplinary rules. A problem sometimes arises when the timescale for the publisher and the timescale for the author to resolve allegations of copyright infringement and plagiarism are different, and when the two bodies have to apply different standards.

A publisher involved in a legal dispute will generally be held to the standard of proof applied by the civil courts. In the UK this standard is that the wrongful act (in our case copyright infringement) is found on the balance of profitability. This means it is more likely than not that there was an infringement. This is sometimes referred to as the 51% test. By contrast, an academic or professional tribunal may well have to apply a higher standard. To complicate matters further, if the alleged infringer is employed by a public body, and the Human Rights Act (or its equivalent in other countries) applies, then the infringer also has a right to have procedural fairness followed. There are cases where professional or academic complaint is not upheld, because the employer had not taken the correct procedural steps under its own disciplinary code. This means that a publisher who waits patiently for an academic or professional process to take its course may still not have a clear decision on the merits of the question of whether or not there has been an infringement of copyright or any plagiarism.

the legal risks can be managed

Conclusions

To conclude, plagiarism is not going to go away, though detection rates may improve. The transatlantic tide of litigation on plagiarism will produce wash in Europe, and we will see more copyright infringement claims and academic disputes. The *Da Vinci Code* case in the UK has raised awareness of plagiarism, even though it did not raise any new areas of law. Publishers will continue to have to grapple with the issues, but if they handle the allegations with care, and act promptly but not precipitously, then the legal risks can be managed.

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4. Wikipedia provides these and other examples of plagiarism, with useful references.
5. For example, ghost authorship is not addressed in this article.
6. In the UK, sections 29 and 30 Copyright Designs and Patents Act 1988
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16. www.publicationethics.org
17. European Directive 95/46/EC
18. See section 7(6) Data Protection Act 1998, in which regard shall be had to (a) any duty of confidentiality to another person, (b) steps taken to obtain that person's consent, (c) whether that person is capable of giving consent, and (d) any express refusal of consent by that other individual.

Joss Saunders
Publishing Law Team
Blake Lapthorn Solicitors
Email: joss.saunders@bllaw.co.uk