



Sacred Heart
UNIVERSITY

Sacred Heart University
DigitalCommons@SHU

Library Publications

University Library

2010

Plagiarism: The Legal Landscape

Robert Berry

Sacred Heart University, berryr@sacredheart.edu

Follow this and additional works at: http://digitalcommons.sacredheart.edu/library_staff



Part of the [Higher Education Administration Commons](#), [Intellectual Property Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Social and Philosophical Foundations of Education Commons](#)

Recommended Citation

Berry, Robert, "Plagiarism: The Legal Landscape" (2010). *Library Publications*. Paper 24.
http://digitalcommons.sacredheart.edu/library_staff/24

This Book Chapter is brought to you for free and open access by the University Library at DigitalCommons@SHU. It has been accepted for inclusion in Library Publications by an authorized administrator of DigitalCommons@SHU. For more information, please contact ferribyp@sacredheart.edu.

10

Plagiarism: The Legal Landscape

Robert Berry

Introduction

Colleges and universities with plagiarism policies that are fundamentally fair—and that are applied consistently—enjoy three significant advantages over those that do not. First, these schools enjoy greater legitimacy in the eyes of the people who must live with their decisions. They exercise genuine moral authority in their decision making, which is much more consistent with the goals of education, and they avoid the exercise of raw power that often accompanies ad hoc decision making. Second, educational institutions with fair policies are less likely to be sued and, if sued, are less likely to lose. Third, the same procedures that ensure fairness also promote the effectiveness of university prohibitions against plagiarism by creating an educational milieu where a school's response to plagiarism is predictable and reliable.

A fair university plagiarism policy is one that (1) accords students or faculty accused of plagiarism basic procedural protections, such as notice and an opportunity to be heard; (2) ensures that decisions to impose discipline, as well as determinations of the severity of discipline to be imposed, are reasonably consistent and are not rooted in a motive to retaliate or engage in invidious discrimination; (3) ensures that decisions to impose discipline are supported by reliable evidence of plagiarism; (4) protects the privacy and reputational interests of persons accused of plagiarism by refraining from publicizing accusations; and (5) clarifies precisely what conduct is prohibited. If these qualities seem to resonate strongly with common sense, it is most likely because common sense draws from political traditions in which procedural fairness is of paramount importance and accusations are expected to be accompanied by reliable evidence. Examining the legal landscape of plagiarism will, of course, ensure that common sense judgments are appropriately connected to the law.

This chapter will examine some of the major types of legal challenges that can be brought against schools that impose discipline for plagiarism. These are challenges to the procedures an institution relies on in imposing academic discipline, challenges based on claims of illegal discrimination, and challenges based on claims of defamation. The claims are not mutually exclusive, of course, and all three categories of allegations can be brought in the same lawsuit. This chapter also explores some of the defenses and justifications students, and instructors, have relied on when they are accused of plagiarism. The definition of plagiarism will also be considered with reference to both court cases and state statutes prohibiting the sale of term papers to see how best to draw the line between plagiarism and conduct that is permissible, such as receiving tutorial or research assistance.

Claims against Educational Institutions Alleging Procedural Deficiencies: Due Process and Breach of Contract Claims

As a general proposition, courts will accord deference to the internal procedures employed by a college, university, law school, or other educational institution. Courts will review the procedures a school has employed for fundamental fairness but will not usurp a school's authority to administer discipline, even where the court may disagree with a particular outcome. One court, which clearly believed the discipline a university imposed, withholding the student's degree for one year, was too harsh under the circumstances and lacked consistency with prior impositions of discipline for plagiarism—expressed this concept as follows:

As this court has noted in prior hearings and conferences, Princeton might have viewed the matter of the penalty with a greater measure of humanity and magnanimity, with a greater recognition of the human frailties of students under stress, as the university apparently has done in many cases in the past. This court cannot mandate compassion, however, and will not, nor should not, engraft its own views on Princeton's disciplinary processes, so long as the standard of good faith and fair dealing has been met and the contract between the student and the university has not otherwise been breached. (*Napolitano v. Trustees of Princeton University (Napolitano I)*, 1982: 584–85; 283)

Greater judicial deference is accorded private institutions than public institutions (*Rom v. Fairfield University*, 2006), greater judicial deference is accorded academic decisions than disciplinary decisions (*Napolitano v. Trustees of Princeton University (Napolitano II)* 1982: 569; 274), and greater judicial deference is accorded disciplinary decisions by military academies than their civilian counterparts (*Tully v. Orr*, 1985: 1226). Notwithstanding this judicial deference, however, courts will occasionally review university procedures for violations of

Fourteenth Amendment Due Process protections, where tax-supported schools are concerned, and for breaches of contract—including the implied covenants of good faith and fair dealing—where private educational institutions are concerned.

Persons who have been found to have committed plagiarism often face substantial disciplinary sanctions that can include expulsion or dismissal as well as the loss of professional opportunities. In one case, for instance, a law student submitted a paper for an independent study that had been partially written by another person and that had included unattributed text taken from an article in a law journal. The law school suspended the student for three semesters. After graduation, the Connecticut Bar Examining Committee recommended that the student not be admitted to the Bar, based, in part, on the plagiarized paper (*Doe v. Connecticut Examining Committee*, 2003: 39; 14). Disciplinary-sanctions imposed for plagiarism thus often create a powerful incentive to sue. Claims alleging deficiencies in disciplinary procedures are the most prevalent type of legal challenge to discipline imposed for plagiarism at educational institutions. In the case of private universities and colleges, these challenges to procedures will take the form of claims for breach of contract, breach of implied contract, and, occasionally, violation of “a common law duty to provide . . . due process” by failing to provide “appropriate notice and an opportunity to be heard” (*Edward Waters College v. Southern Association of Colleges and Schools, Inc.*, 2005).

The obligation of state universities to provide students fair procedures was recognized in the nineteenth century. As one Pennsylvania judge wrote:

To those who have charge of the culture of our youth, is conceded the power of making needful rules and regulations for their government and control, and these may be enforced, if done in a due manner without external interference, even though at times hardships may seemingly be done and innocence suffer, but the reasonableness of such rules and regulations, as well as the regularity of the proceedings under them, have been decided, not infrequently, to be a proper subject for judicial inquiry. (*Commonwealth v. McCauley*, 1887: 459; 77)

At a minimum, Due Process requires notice and a hearing. A crucial case for expounding this principle was *Dixon v. Alabama State Board of Education*. Students from Alabama State College had organized a sit-in at a courthouse lunch grill to protest segregation. Twenty-nine student leaders of these protests were identified and either expelled or placed on probation. A federal court found that, whereas the “minimum procedural requirements” required by the Constitution would “depend upon the circumstances and the interests of the parties involved,” students facing expulsion were entitled to notice and an opportunity to be heard (*Dixon v. Alabama State Board of Education*, 1961: 157, 158–59).

The relationship between private colleges, or universities, and their students is primarily contractual. Thus students at private educational institutions, “who are being disciplined are entitled only to those procedural safeguards which the school specifically provides,” provided, however, that the “disciplinary

procedures established by the institution must be fundamentally fair" (*Psi Upsilon of Philadelphia v. University of Pennsylvania*, 1991: 609–10; 758). A private university's decision to impose discipline must not be arbitrary or capricious. Courts have held that notice and a hearing are sufficient protections (*Morris v. Brandeis University*, 2001).

Students and instructors who have been disciplined for plagiarism have claimed a right to procedural protections in addition to notice and an opportunity to be heard. These claims have included, for instance, a right to a second hearing, a right to institutional review of a disciplinary finding (e.g., *Chandamuri v. Georgetown University*, 2003: 76), the right to have the assistance of an advisor from the university or college (*Morris v. Brandeis University*), and the right to counsel (*Tully v. Orr*).

Courts have refrained from imposing additional procedural burdens on colleges, or universities, beyond the basic protections of notice and an opportunity to be heard. Where a school has instituted additional procedural protections, however, courts will examine whether there has been compliance with these procedures. In *Cho v. University of Southern California*, a student was expelled after being found to have plagiarized portions of textbooks in a doctoral qualifying examination administered in a take-home format. A California appellate court carefully reviewed the University of Southern California's procedures to evaluate, and ultimately reject, the plaintiff's contention that "she was entitled to have her case heard by a University Review Panel composed of two faculty members and one student." The court found that the university had complied with its procedures (*Cho v. University of Southern California*, 2006).

In determining what specific procedural protections should be afforded to students, or professors, who are accused of plagiarism, it is helpful to identify the underlying purposes of these protections. Notice and an opportunity to be heard protect against the arbitrary imposition of discipline by ensuring that the person responding to the charges has an opportunity to prepare, to present evidence, and to test the evidence presented against her or him. Notice should set forth the specific charges, identify the specific rules violated, identify the sanctions that might be imposed, and identify the procedures that will be followed. A hearing should afford a person responding to the charges an opportunity to present evidence, including witnesses, and an opportunity to cross-examine witnesses against her or him. These procedural protections ensure that discipline is imposed only where adequate evidence supports the charges. Consistency with established procedures protects against ad hoc decision making.

In *Dixon v. Alabama State Board of Education*, discussed earlier, a U.S. District Court provided its view "on the nature of the notice and hearing required by due process prior to expulsion from a state college or university":

The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. . . . By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the

charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled. (*Dixon v. Alabama State Board of Education*)

It should be noted that where "at will" employees of an educational institution are involved, a university, or college, dismissing an employee for plagiarism might, in good faith, make the argument that, because the employee is "at will" and without the protection of an employment contract, she or he can be dismissed for any reason at all and is thus entitled to neither notice nor a hearing. Even in these situations, however, courts in some states have reviewed the dismissal of an employee under implied contract theories to determine if the dismissal was arbitrary and capricious. In these instances educational institutions that have afforded the discharged employee some type of hearing are in a better position to rebut allegations that the dismissal was arbitrary and capricious. (See, e.g., *Matikas v. University of Dayton*, 2003: 1114, for the view that at-will employees are not entitled to notice or a hearing.)

Claims against Educational Institutions Alleging Illegal Discrimination

Students and instructors who have been subjected to academic or professional discipline for plagiarism also frequently claim they were the victims of invidious discrimination. These claims may allege violations of the federal or state constitutional provisions, violations of federal civil rights statutes—such as the 1964 Civil Rights Act or Americans with Disabilities Act (ADA)—and violations of state civil rights statutes. Where a state educational institution is involved, claims may be brought pursuant to 42 U.S.C. § 1983, which codifies a right to sue where civil rights were violated by a state actor, acting under the color of law, that originated in the Civil Rights Act of 1871. Additionally, federal and state civil rights statutes often contain provisions that prohibit retaliation against an employee or student undertaken in response to complaints of discrimination or harassment.

Discrimination claims involve a wide range of situations. In one case involving plagiarism on a conference paper, and a consequent denial for tenure, for instance, an assistant professor sued alleging discrimination on the basis of race and national origin under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2; the Civil Rights Act of 1866, 42 U.S.C. § 1981; and 42 U.S.C. § 1983. In that case the plaintiff, a Sunni Muslim from Jordan, claimed, ultimately unsuccessfully, that he was discriminated against by a dean who was a Shia Muslim from Iran (*Amr v. Virginia State University*, 2009). In another case, *Childress v. Cement*, the plaintiff alleged violations of the ADA and the Rehabilitation Act to challenge his expulsion from Virginia Commonwealth University for plagiarism and for cheating by submitting the paper in question in more than one course. Childress claimed the university failed to accommodate his learning disabilities, which included dysgraphia and other disorders of written expression (*Childress v. Cement*, 1998: 390).

One of the key issues in discrimination cases is whether the reasons discipline was imposed were proper or whether they were discriminatory. For instance, in *Gilbert v. Des Moines Area Community College* a college provost alleged violations of Title VII of the 1964 Civil Rights Act and the Iowa Civil Rights Act after he applied for the position of college president but was not selected for an interview. In investigating the complaint, filed with the Equal Opportunity Employment Commission and the Iowa Civil Rights Commission, it was discovered that the provost had committed plagiarism in preparing the essay portions of his application. He was then demoted. He claimed the demotion was done in retaliation for the civil rights complaints. In reviewing the case, a United States Court of Appeals found that whereas the college could "articulate a legitimate, nondiscriminatory reason" for each of the actions it took, the plaintiff was unable to produce evidence that the college's explanations for its decisions were merely a "pretext for unlawful discrimination" (*Gilbert v. Des Moines Area Community College*, 2007: 906).

Where the ADA is concerned, successful plaintiffs must show that they have a disability as defined by the ADA, that with or without reasonable accommodation they are able to meet an educational program's requirements, and that an adverse action was taken against them by the educational institutions based on their disability. In *Childress* the court found that the plaintiff could not show that the university did not provide reasonable accommodations where he had been encouraged by two different professors to visit the university's English Lab to get assistance with composing citations, but found the lab closed on his first visit there and never returned (*Childress v. Cement*, at 392).

In another case alleging discrimination based on a disability, *Dixon v. Pomeroy School District*, a high school senior had admitted committing plagiarism in preparing a term paper for an English class. As a consequence Dixon failed the class and, although he submitted a revised term paper, was unable to graduate with his cohort. Dixon's parents filed a complaint alleging that the school district "denied Justin an education by failing to identify a temporary disability due to stress related to his father's illness or provide adequate services" (*Dixon v. Pomeroy School District*, 2000 WL 155290 [Wash. App. Div. 3 2000]). The case,

ultimately dismissed, illustrates the wide range of theories that have arisen in discrimination cases.

Federal and state statutes make it unlawful to retaliate against a person for exercising rights protected by law. For example, a student in a distance education program sued for retaliation in violation of the First Amendment when he was accused of plagiarism and expelled. The case was ultimately dismissed for lack of personal jurisdiction over the school (*Martin v. Godwin*, 2007: 299). The *Gilbert* court set forth the elements of a *prima facie* retaliation claim:

To establish a *prima facie* case of retaliation, Gilbert must demonstrate (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) a causal connection exists between the two. (*Gilbert v. Des Moines Area Community College*, 2007: 917)

Where a legitimate rationale exists for an adverse action retaliation claims will be dismissed.

Claims against Educational Institutions Alleging Defamation

Defamation claims also follow situations where students, or instructors, have been found by universities to have committed plagiarism. To prove that a communication is defamatory, a plaintiff must show that the nature of the communication would tend to cause injury to a person's reputation and that the communication was published.

Defamation traditionally has included both slander, involving oral communications, and libel, involving written communications. To prove that a communication is defamatory, a plaintiff must establish that the defendant published a defamatory communication to a third party, that the defendant asserted facts about the plaintiff, and that the communication was a proximate cause of injury to the plaintiff. Some communications are defamation *per se*, meaning that a plaintiff does not have to prove "special," or quantifiable, damages, such as lost earnings. As one New Mexico court wrote:

A statement is deemed to be defamatory *per se*, if, without reference to extrinsic evidence and viewed in its plain and obvious meaning, the statement imputes to plaintiff: the commission of some criminal offense involving moral turpitude; affliction with some loathsome disease, which would tend to exclude the person from society; unfitness to perform duties of office or employment for profit, or the want of integrity in discharge of the duties of such office or employment; some falsity which prejudices plaintiff in his or her profession or trade; or unchastity of a woman. (*Newberry v. Allied Stores, Inc.*, 1989: 28; 1235)

Defendants can raise the truth of the communication as an affirmative defense.

Where a public figure, such as a university professor, is concerned, a plaintiff alleging defamation must also show there was actual malice by clear and convincing evidence. Thus, where one professor had formally accused another of plagiarizing his idea for a course, where a university investigation had concluded that there was in fact no plagiarism, and where the accusing professor refused to retract his allegations, a jury properly found that there was actual malice (*Abdelsayed v. Narumanchi*, 1995: 381).

Other theories related to defamation violations include claims that a liberty interest protected by the Due Process Clause was infringed and false light invasion of privacy claims. With regard to the former:

In order to prevail on a claim for a violation of this type of liberty interest under the Due Process Clause of the Fourteenth Amendment, a plaintiff must prove that the charges against him: "(1) placed a stigma on his reputation; (2) were made public by the employer; (3) were made in conjunction with his termination or demotion; and (4) were false." (*Amr v. Virginia State University*, 2009; quoting *Sciolino v. City of Newport News*, 480 F.3d 642, 646 [4th Cir. 2007])

With regard to false light invasion of privacy:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. (*Grigorenko v. Pauls*, 2003: 446, 448)

Not surprisingly, two central concerns in resolving any defamation claim where plagiarism is concerned are whether the allegations of plagiarism were true and whether the allegations were disseminated to a sufficiently large audience to cause reputational damage. False light invasion of privacy claims require an injurious communication to be disseminated widely. Thus, in *Grigorenko*, where only "nine persons at Yale and three persons outside the Yale community" knew about allegations of plagiarism, the claim was dismissed (*Grigorenko v. Pauls*). On the other hand, this threshold was clearly met in *Gunasekera* where the plaintiff was suing for defamation, which requires less dissemination of the communication, and the university held a press conference to announce a report that was highly critical of him. The report concluded that rampant plagiarism existed "in mechanical-engineering graduate-student theses" and accused Gunasekera, a professor, of neglecting his responsibilities, contributing to an academic atmosphere where plagiarism was tolerated (*Gunasekera v. Irwin*, 2009: 464).

Defenses and Justifications Voiced in Response to Allegations of Plagiarism

Students, or instructors, who have been accused of committing plagiarism produce a wide assortment of defenses and justifications, beyond the challenges to procedure and other claims discussed earlier. These defenses and justifications include contentions that no plagiarism was committed, that the plagiarism was unintentional, or that the plagiarism was permitted.

Some persons accused of plagiarism contend that the university or college policy on academic integrity does not cover the situation in question. In *Cho v. University of Southern California*, for example, the plaintiff claimed that she did not need to provide attribution for passages from textbooks inserted verbatim into essays prepared for her doctoral qualifying examination because the information contained therein was “common knowledge” to the persons who would grade her essays. Cho also claimed that the university’s prohibitions against plagiarism did not apply to take-home examinations. The court reviewing the university’s policies and procedures found both arguments unavailing, inasmuch as the university plagiarism policy had no exception for common knowledge and the university’s conduct code prohibiting “[i]mproper acknowledgement of sources in essays or papers” would indeed apply to take-home examinations (*Cho v. University of Southern California*, 2006).

Persons accused of plagiarism will often argue that the plagiarism was unintentional. As discussed later, some plagiarism policies require that the conduct prohibited be deliberate, and others do not. In either situation, however, the claim will fall flat where the plagiarism is blatant, as, for example, where text from the plagiarized source is copied verbatim. For example, in *Sanderson v. University of Tennessee* an undergraduate student plagiarized verbatim from several sources in preparing the first draft of a term paper. Pleased with the “84” he received on the draft, he submitted the paper in a campuswide writing competition where his breaches of academic integrity came to light. An administrative law judge, focusing narrowly on the definition of plagiarism in Black’s law dictionary, found Sanderson had not intended to plagiarize and was therefore not guilty of it. This decision was reversed by the University Chancellor, and the Chancellor’s findings were upheld on appeal. In light of the definition of plagiarism provided to the class Sanderson attended (“using an author’s words or ideas without giving credit”) and the numerous instances where Sanderson appropriated text verbatim from other sources without attribution, it was clear to the court that he was guilty of plagiarism (*Sanderson v. University of Tennessee*, 1997).

Perhaps the most bizarre justifications for plagiarism are those that attempt to shift the blame to a third party who, it is argued, actually prepared the paper and committed the plagiarism. These persons are saying, in other words, that they did not plagiarize, but the person they got to write their paper for them did. This was the argument in *Gilbert* where a provost applying for the position of president of Des Moines Area Community College (DMACC) was not interviewed and subsequently complained of discrimination. In investigating

the complaint it was discovered that the essay accompanying his application plagiarized other sources. When asked about this, Gilbert attempted to shift blame to a consultant he had hired to write his essay for him:

Gilbert acknowledged his application contained plagiarized materials, but Gilbert denied having knowledge of or being involved in the actual act of plagiarism. Gilbert stated (1) he had hired a consultant to assist him in completing his application, (2) the consultant prepared the essay answers for Gilbert and apparently committed the act of plagiarism, and (3) he was unaware any plagiarism had occurred.

DMACC officials interviewed Gilbert again on December 22, 2004, and Gilbert again claimed the consultant, whom Gilbert stated he had paid about one thousand dollars in cash (with no receipt from the consultant), had prepared the essay answers. However, Gilbert could not recall the consultant's name, the number of times he met with the consultant, or the length of their meetings. Gilbert was unable to provide a description of the consultant. When asked whether the consultant was male or female, Gilbert replied, "Both." Gilbert then said, "I met with more than one sex." When asked how many people he consulted, Gilbert stated, "It would be one or two, because I think there was [*sic*] two, but I'm not sure." (*Gilbert v. Des Moines Area Community College*, 2007: 912)

Defining Plagiarism

Courts will occasionally look to university, or college, definitions of plagiarism in evaluating claims against colleges and universities. In *Chandamuri v. Georgetown University*, a U.S. District Court examined Georgetown University's definition to evaluate a claim that the Honor Code was improperly applied because Chandamuri "did not *intend* to pass off the work of others as his own." The argument was unavailing inasmuch as university's rules prohibited "plagiarism in any of its forms, whether it is intentional or unintentional" (*Chandamuri v. Georgetown University*, 2003: 78–79).

Similarly in *Napolitano II* a New Jersey Superior Court quoted at length from Princeton's "General Requirements for the Acknowledgment of Sources in Academic Work." The university's rules identified and clarified fundamental principles of academic integrity regarding the acknowledgment of sources relied on. In addition to requiring the "precise indication of the source—identifying the author, title, place and date of publication (where relevant), and page numbers" when sources are quoted from or paraphrased, the General Requirements specifically require attribution where a source was consulted long before the paper was prepared, where the source contains facts and ideas that the student then elaborates on, or where a student consults an essay or notes prepared by another student:

Occasionally, students maintain that they have read a source long before they wrote their papers and have unwittingly duplicated some of its phrases or ideas. This is not a valid excuse. The student is responsible for taking adequate notes so that debts of phrasing may be acknowledged where they are due.

Ideas and Facts. Any ideas or facts which are borrowed should be specifically acknowledged in a footnote or in the text, even if the idea or fact has been further elaborated by the student. Some ideas, facts, formulae, and other kinds of information which are widely known and considered to be in the "public domain" of common knowledge do not always require citation. . . .

Occasionally, a student in preparing an essay has consulted an essay or body of notes on a similar subject by another student. If the student has done so, he or she must state the fact and indicate clearly the nature and extent of his or her obligation. The name and class of the author of an essay or notes which are consulted should be given, and the student should be prepared to show the work consulted to the instructor, if requested to do so. (*Napolitano II*, 1982: 266–67)

A central consideration in defining plagiarism where students are concerned is whether the conduct prohibited must be deliberate and whether there must be some intention to represent the writing as one's own work. Prohibitions against plagiarism should, of course, state clearly whether the misconduct must be deliberate or not. Policies that impose discipline even where the conduct was not deliberate may be appealing insofar as they promise to streamline disciplinary hearings. There are, nonetheless, some advantages to requiring conduct warranting punishment to be deliberate and to reflect an intention to improperly pass work off as one's own. This approach is more consistent with a tradition where the imposition of punishment is associated with an intentional act. Defining plagiarism as a form of academic fraud requiring that intent to deceive be found also preserves flexibility in dealing with individual circumstances. Where sources have been used without attribution, but make up only a small portion of an academic writing and can be attributed to carelessness, a poor grade, warning, or effort to remediate a student's understanding of citation principles may better serve an institution's educational mission than a failing grade, a notation on a student's transcript, suspension, or expulsion.

A Florida state appellate court expressed criticism of one plagiarism policy that did not require a finding of intentional plagiarism on the grounds that it promoted unlimited university discretion and the possibility of disparate punishments for similar conduct. The case involved a student who had referred to the Posse Comitatus Act in her paper, included language directly from the act in quotation marks, but had failed to supply a citation to the Act. The court wrote:

An overbroad reading of the University's definition of plagiarism, coupled with the University's position that intent to plagiarize is not required to constitute a violation of the academic code, arguably

results in almost unlimited discretion afforded to faculty to determine whether a student plagiarized a paper. . . . The hearing board upheld the professor's charge that A.K. had committed plagiarism but also concluded that she had no intent to do so. However, that concession is of little benefit to A.K. Neither this conclusion nor the University's definition of plagiarism will appear on A.K.'s transcript. It is this transcript which will be reviewed by postgraduate and professional schools to which A.K. may apply. . . .

Several procedural issues plagued the proceedings between A.K. and the University. Following the Academic Integrity Hearing Board's decision upholding the professor's finding of plagiarism, A.K. sought an appeal she believed was authorized by the University's rules. The University informed A.K. that the hearing board's decision was final and nonappealable, a position it maintained throughout most of the proceedings in the circuit court below. A.K. disagreed, citing a version of the University's Student Handbook. Eventually the trial court determined that the University's position was incorrect—an appeal from the hearing board was authorized and permitted. . . .

Finally, the record suggests that another student committed similar citation errors in his paper as A.K. committed in hers. Professor LaRose graded his paper with a "C" and made no accusation of plagiarism, while A.K. received the substantial punishments already described. If this reference is accurate, the academic treatment of the two students appears to be disparate. (*LaRose v. AK*, 2009)

Another challenge in defining plagiarism is determining how to explicitly prohibit some conduct—such as representing writing prepared by another as one's own work—while permitting conduct such as receiving the assistance of a writing tutor or a reference librarian. Some state legislatures that have drafted laws prohibiting term paper sales have wrestled with this problem, and the statutes they arrived at are instructive.

State governments have recognized the destructive potential of plagiarism in laws prohibiting the sale of term papers and other materials. Colorado's statute, for instance, declares that "practice of trafficking in academic materials, commonly referred to as ghostwriting, serves no legitimate purpose and tends to undermine the academic process to the detriment of students, the academic community, and the public . . ." (C.R.S.A. § 23-4-101).

Educators who examine state statutes designed to ban the sale of term papers, like those who survey relevant case law, are better prepared to draft plagiarism policies with precision than their colleagues who rely solely on experience and their knowledge of existing university policies. Some provisions in these statutes—such as, in some instances, criminal penalties and prohibitions on advertising—have little relevance to academic plagiarism policies. Other provisions, however, are highly relevant. These statutes were drafted by legislators who strove to define prohibited conduct carefully. They also worked to distinguish conduct that would be prohibited from permissible activities. These are the same

issues that educators will confront in creating and using university plagiarism policies. The statutes were carefully drafted to reduce ambiguity and vagueness. These statutes are therefore useful aids to drafters of university policies who seek to clearly prohibit some conduct, clearly permit other conduct, and reduce to a reasonable minimum the types of conduct for which their policy provides no clear guidance.

California, Colorado, Connecticut, Florida, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Virginia, and Washington all have enacted statutes banning the sale of term papers. Relevant sections of these statutes can be found in the following state codes:

California	West's Ann. Cal. Educ. Code §§ 66400-405 (<i>Prohibition concerning Preparation, Sale and Distribution of Term Papers, Theses, etc.</i>)
Colorado	C.R.S.A. §§ 23-4-101-105 (<i>Preparation, Sale, and Distribution of Academic Materials—Advertising</i>)
Connecticut	C.G.S.A. §§ 53-392a-e (<i>Preparation of Assignments for Students Attending Educational Institutions Prohibited</i>)
Florida	West's F.S.A. § 877.17 (<i>Works to Be Submitted by Students without Substantial Alteration</i>)
Illinois	110 IL. C.S. §§ 5/0.01-5/1 (<i>Academic Plagiarism Act</i>)
Maine	17-A M.R.S.A. § 705 (<i>Criminal Simulation</i>)
Maryland	MD Code, Education, §§ 26-201 (<i>Sales Prohibited</i>)
Massachusetts	M.G.L.A. 271 § 50 (<i>Sale of Research Papers, etc.; Taking of Examinations for Another at Educational Institutions</i>)
Nevada	N.R.S. 207.320 (<i>Preparation or Sale of Academic Writings</i>)
New Jersey	N.J.S.A. 18A:2-3 (<i>Sale of Term Papers or other Assignments; Penalties; Actions for Injunction</i>)
New York	McKinney's Education Law § 213-b (<i>Unlawful Sale of Dissertations, Theses and Term Papers</i>)
North Carolina	N.C.G.S.A. § 14-118.2 (<i>Assisting, etc., in Obtaining Academic Credit by Fraudulent Means</i>)
Oregon	O.R.S. § 164.114 (<i>Sale of Educational Assignments</i>)
Pennsylvania	18 Pa. C.S.A. § 7324 (<i>Unlawful Sale of Dissertations, Theses and Term Papers</i>)
Texas	V.T.C.A., Penal Code § 32.50 (<i>Deceptive Preparation and Marketing of Academic Product</i>)
Virginia	Va. Code Ann. §§ 18.2-505-508 (<i>Preparation, etc., of Papers to be Submitted for Academic Credit</i>)
Washington	West's RCWA 28B.10.580-584 (<i>Term Papers, Theses, Dissertations, Sale of Prohibited—Legislative Findings—Purpose</i>)

The basic approach these statutes take is to (1) prohibit the sale of term papers, theses, and other materials submitted for academic credit; (2) specifi-

cally exempt certain types of activities, such as providing tutorial and research assistance; and (3) provide for remedies and sanctions.

California, like most other states with statutes banning the sale of term papers, prohibits the sale of materials that will be submitted for academic credit:

No person shall prepare, offer to prepare, cause to be prepared, sell, or otherwise distribute any term paper, thesis, dissertation, or other written material for another person, for a fee or other compensation, with the knowledge, or under circumstances in which he should reasonably have known, that such term paper, thesis, dissertation, or other written material is to be submitted by any other person for academic credit at any public or private college, university, or other institution of higher learning in this state. (*Prohibition concerning Preparation, Sale and Distribution of Term Papers, Theses, etc.*, West's Ann. Cal. Educ. Code § 66400)

Some states provide a broader definition of the types of materials covered. Connecticut, for instance, prohibits preparing or offering to prepare "any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment" in "return for pecuniary benefit" (*Preparation of Assignments for Students Attending Educational Institutions Prohibited*, C.G.S.A. §§ 53-392b[A]). Maine specifically prohibits taking "an examination for another person" in "return for pecuniary benefit" (*Criminal Simulation*, 17-A M.R.S.A. § 705). Some states, such as Florida, also slightly broaden their prohibitions beyond materials submitted for academic credit to include materials submitted "in fulfillment of the requirements for a degree, diploma, or course of study . . ." (*Works to Be Submitted by Students without Substantial Alteration*, West's F.S.A. § 877.17).

Academic writings that are not clearly covered by these acts would include essays written to accompany applications for admission, writings submitted for writing competitions, writings by student journalists, and other not-for-credit, nonrequired materials that nonetheless benefit students by helping them gain admission, win honors, and gain success at extracurricular activities. Accordingly, educators should consider whether university plagiarism policies should specifically prohibit plagiarism in connection with various types of not-for-credit writings. They should also consider whether it is desirable to specifically enumerate various types of noncredit writings or to instead include general language such as "submitted for academic credit or other academic benefit."

Many of the statutes explicitly recognize that some types of assistance given to students preparing academic writings are appropriate and desirable. These include typing or assembling term papers, furnishing research or information, and providing tutorial assistance, editing assistance, and so forth. Pennsylvania's statute, for instance, specifically authorizes these activities:

Nothing herein contained shall prevent such educational institution or any member of its faculty or staff from offering courses,

instruction, counseling or tutoring for research or writing as part of a curriculum or other program conducted by such educational institution. Nor shall this section prevent any educational institution or any member of its faculty or staff from authorizing students to use statistical, computer, or any other services which may be required or permitted by such educational institution in the preparation, research or writing of a dissertation, thesis, term paper, essay, report or other written assignment. Nor shall this section prevent tutorial assistance rendered by other persons which does not include the preparation, research or writing of a dissertation, thesis, term paper, essay, report or other written assignment knowing, or under the circumstances having reason to know, that said assignment is intended for submission either in whole or substantial part under said student's name to such educational institution in fulfillment of the requirements for a degree, diploma, certificate or course of study. Nor shall any person be prevented by the provisions of this section from rendering services for a fee which shall be limited to the typing, transcription or reproduction of a manuscript. (*Unlawful Sale of Dissertations, Theses and Term Papers*, 18 Pa. C.S.A. § 7324e)

It is possible, of course, for tutorial, editorial, or research assistance to exceed reasonable bounds, such that an academic writing is no longer substantially the work of the person submitting it. One approach, taken by Oregon, to forestall this is to specify that the assistance cannot make up a substantial part of the assignment:

(3) Nothing in this section prohibits a person from rendering for a monetary fee:

(a) Tutorial assistance if the assistance is not intended to be submitted in whole or in substantial part as an assignment; or

(b) Service in the form of typing, transcribing, assembling, reproducing or editing an assignment if this service is not intended to make substantive changes in the assignment. (*Sale of Educational Assignments*, O.R.S. § 164.114)

In defining plagiarism it may be desirable to distinguish it from copyright infringement because the two concepts are often confused and conflated. Copyright refers to rights based in federal statutes enacted pursuant to Article I, Section 8 of the Constitution. Two key differences between copyright infringement and plagiarism are whether lack of permission or lack of attribution renders the use of another's work improper. In regard to plagiarism, using a source to quote small passages and to support contentions is fine, so long as accurate citations are employed to provide attribution on a use-by-use basis. No permission to use the material is required.

Copyright, on the other hand, refers to transferable statute-based rights to reproduce and distribute a creative work. Here uses of material must either be by

permission from the copyright owner or pursuant to some statutory exception, such as works that have entered the domain or fall under fair use. University, or college, copyright policy typically works to facilitate (1) acquiring (and paying for) permissions; (2) educating people about fair use under 17 U.S.C. § 107; (3) imposing nonstatutory guidelines reflecting the university's understanding of the parameters of fair use; (4) ensuring the college, or university, complies with, and gets the full benefit of, statutory provisions under the TEACH Act and the Digital Millennium Copyrights, which provisions protect universities and colleges from liability if they comply with statutory procedures; and (5) ensuring that the provisions of 17 U.S.C. § 108, allowing limited copying for preservation purposes, are properly utilized.

Plagiarism, on the other hand, although it occasionally involves copying sections of a work without permission, is a breach of academic integrity. Prohibitions against it are enforced by university disciplinary proceedings. Some universities and colleges may, of course, want to prohibit copyright infringement and impose discipline in appropriate circumstances. Given the importance of clarity in university plagiarism policies, however, copyright infringement should be dealt with under separate provisions.

Conclusion

While reviewing the law of plagiarism will not always provide educators with specific answers, it should give them a basic set of questions to ask when reviewing and revising their plagiarism policy. These questions might be stated, for example, as follows:

1. How does the college or university define plagiarism?
2. Is the definition consistent across all divisions of the university?
3. Does the disciplinary policy provide persons accused of plagiarism with effective notice of the charges against them and an opportunity to be heard?
4. What additional procedural protections exist or would be desirable to institute?
5. Is the text of the policy clear, and is it published prominently?
6. Is the policy supported with adequate training and education to ensure it is enforced fairly and consistently?
7. What counts as evidence of plagiarism?
8. What evidence could be produced that would rebut a charge of plagiarism?
9. What type of record of the proceedings should be prepared and preserved?
10. When should failures to properly cite works be grounds for a poor grade, as opposed to grounds for academic discipline?
11. What are appropriate punishments for plagiarism?
12. What procedures will be in place to preserve the confidentiality of disciplinary proceedings?

References

- Abdelsayed v. Narumanchi*, 668 A.2d 378, 381 (1995).
- Amr v. Virginia State University*, 2009 WL 112829 (E.D. Va., 2009).
- Chandamuri v. Georgetown University*, 274 F. Supp. 2d 71, 76 (D.C. 2003).
- Childress v. Cement*, 5 F. Supp. 2d 384, 390, 392 (D.C. E.D. Va. 1998).
- Cho v. University of Southern California*, 2006 WL 1476911 (Cal. Ct. App. 2006) (unpublished opinion).
- Commonwealth v. McCauley*, 2 Pa. C. C. 459, 3 Pa. C. C. 77, 1887 WL 4879, 4 Lanc. L. R. 50 (Pa. Ct. Com. Pl. 1887).
- Criminal Simulation*, 17-A M.R.S.A. § 705 (Maine).
- Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157, 158–59 (5th Cir. 1961).
- Dixon v. Pomeroy School District*, 2000 WL 155290 (Wash. Ct. App. 2000).
- Doe v. Connecticut Examining Committee*, 263 Conn. 39, 818 A.2d 14 (Conn. 2003).
- Edward Waters College v. Southern Association of Colleges and Schools, Inc.*, 2005 WL 6218035 (M.D. Fla. 2005).
- Gilbert v. Des Moines Area Community College*, 495 F.3d 906, 907, 912, 917 (8th Cir. 2007).
- Grigorenko v. Pauls*, 297 F. Supp. 2d 446, 448 (2003).
- Gunasekera v. Irwin*, 551 F.3d 461, 464 (6th Cir. 2009).
- LaRose v. AK*, 2009 WL 2194509 (Fla. 2009) (unpublished opinion demarked as not yet released and subject to revision or withdrawal).
- Martin v. Godwin*, 499 F.3d 290, 299 (3d Cir. 2007).
- Matikas v. University of Dayton*, 788 N.E.2d 1108, 1114 (Ct. App. Ohio 2003).
- Morris v. Brandeis University*, 2001 WL 1470357 (Mass. Super. 2001).
- Napolitano v. Trustees of Princeton University (Napolitano I)*, 186 N.J. Super. 576, 584–85, 453 A.2d 279, 283 (Super. Ct. N.J. Chanc. Div. 1982).
- Napolitano v. Trustees of Princeton University (Napolitano II)*, 186 N.J. Super. 548, 569, 453 A.2d 263, 274 (Super. Ct. N.J. 1982).
- Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 428, 773 P.2d 1231, 1235 (Sup. Ct. N.M. 1989).
- Preparation of Assignments for Students Attending Educational Institutions Prohibited* C.G.S.A. §§ 53-392a–e (Connecticut).
- Prohibition concerning Preparation, Sale and Distribution of Term Papers, Theses, etc.*, West's Ann. Cal. Educ. Code § 66400 (California).
- Psi Upsilon of Philadelphia v. University of Pennsylvania*, 404 Pa. Super. 604, 591 A.2d 755 (Pa. Super. 1991).
- Rom v. Fairfield University*, 2006 WL 390448 (Super. Ct. CT 2006) (unpublished opinion).
- Sale of Educational Assignments*, O.R.S. § 164.114 (Oregon).
- Sanderson v. University of Tennessee*, 1997 WL 18427 (Tenn. Ct. App. 1997) (unpublished opinion).
- Tully v. Orr*, 608 F. Supp. 1222, 1226 (E.D.N.Y. 1985).
- Unlawful Sale of Dissertations, Theses and Term Papers*, 18 Pa. C.S.A. § 7324e (Pennsylvania).
- Works to Be Submitted by Students without Substantial Alteration*, West's F.S.A. § 877.17 (Florida).