

Articles

Plagiarism in Academia and Beyond: What Is the Role of the Courts?¹

By ROGER BILLINGS*

THOMAS MALLON, AUTHOR of the modern classic on plagiarism, “Stolen Words,” wrote, “In 2001 the professoriate remains more inclined to pieties than to policing its own”² If cases involving plagiarism are any guide as to the veracity of this statement, Mallon is mistaken. Careers are ruined because plagiarism is fiercely policed in universities as if it is one of the seven deadly sins. Reacting to the dishonest nature of plagiarism, university administrators drum both student and teacher plagiarizers out of the academy. Practitioners of law and medicine are similarly intolerant of plagiarism.

Disgraced plagiarizers in the academy, the professions, and the research laboratory increasingly seek redress in court based on theo-

* Roger Billings has taught at the Salmon P. Chase College of Law, Northern Kentucky University, since 1972. For seven years prior to that he was Field Editor and Assistant Sales Manager in the College Department of the publisher Charles Scribner's Sons, New York. From March through June of 2004 he was a Fulbright Distinguished Professor in International Public Law at the University of Salzburg, Austria.

1. A number of law reviews were consulted during the writing of this Article. They are listed here at the beginning with a warranty that none was plagiarized. See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999); John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996); Patsy W. Thomley, *In Search of a Plagiarism Policy*, 16 N. KY. L. REV. 501 (1989); Larry A. DiMatteo & Don Wiesner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 S. ILL. U. L.J. 49 (1994); Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 (1992); Scott R. Sinson, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195 (1997); Bill L. Williamson, *Using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029 (1994); Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use BUT Is It Ethical?*, 18 CARDOZO L. REV. 1253 (1996); Jesse A. Goldner, *The Unending Saga of Legal Controls Over Scientific Misconduct: A Clash of Cultures Needing Resolution*, 24 AM. J.L. & MED. 293 (1998).

2. Thomas Mallon, *How Academics Responded to My Book About Plagiarism*, HIST. NEWS NETWORK, Mar. 11, 2002, at <http://hnn.us/articles/616.html> (last accessed Apr. 20, 2004).

ries of due process, breach of contract, and defamation. This article argues that judges overseeing this type of litigation should not employ *de novo* review where universities and other institutions have previously found that plagiarism was committed. Although most courts do not use *de novo* review in these cases, those that do review findings of plagiarism *de novo* wrongly substitute their findings for those of the institutions.

Part I of this Article provides a background for the topic, defining plagiarism, discussing the common-place nature of the offense, and giving an overview of how plagiarism is handled in various academic and professional contexts. Part II sets forth the framework of a typical plagiarism investigation, using a plagiarism investigation at Northern Kentucky University as an example. Part III discusses the approaches courts use when handling plagiarism cases. Part IV argues for limited judicial review of administrative findings of plagiarism.

I. Background

A. The Definition and Scope of Plagiarism

Plagiarism is an ancient tort that has managed to remain independent of the Federal Copyright Act³ (“Act”). The word “plagiarism” is often used interchangeably with “copyright infringement,” but the two terms are not synonymous. Instead, plagiarism is a state-based tort that has survived as a remnant of the nearly extinct field of common law copyright. Common law copyright is simply that which is not preempted by the Act. Since the Act broadly defines copyright as an expression in fixed form, from which the creator of such expression derives certain rights, “plagiarism” is not always covered by the Act.⁴

Plagiarism is the borrowing of someone else’s work without attribution.⁵ Engaging in plagiarism can result in both copyright infringement under the Act and plagiarism, but plagiarism by itself remains subject to state law. It is most often used in academia, as the alleged or actual reason for the dismissal of students and professors, but it has also served as the basis for disciplining doctors, lawyers, journalists, and researchers. Actions for plagiarism are rarely brought. Rather, adjudication of plagiarism typically occurs administratively, in universi-

3. See 17 U.S.C. § 101 (2001) (defining subject matter and scope of copyright, which does not include plagiaristic activities).

4. See *id.*

5. See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 840 (6th ed. 2002).

ties and professional organizations. Courts do discuss the infraction, however, when students and professors sue universities for reinstatement based on some alleged defect in the universities' dismissal processes or for defamation.

Exactly what is plagiarism? The meaning is not clear because even courts use the term interchangeably with copyright infringement. The essence of plagiarism is the passing off of another's idea as one's own.⁶ Law professors Robert Gorman and Jane Ginsburg call this, more precisely, the "tort of misappropriation."⁷

One of the most famous cases in intellectual property law dealt with a commercial form of misappropriation. In *International News Service v. Associated Press*,⁸ the Associated Press ("AP") news provider service gathered and published news stories on the East Coast, and its rival, International News Service ("INS"), republished the same stories on the West Coast, passing the stories off as its own.⁹ AP conceded that news was not capable of being copyrighted,¹⁰ but nevertheless convinced the Supreme Court that INS was misappropriating AP's property.¹¹ The Court's solution to the problem was to enjoin INS from using AP's stories for a specified time after AP's publication date.¹² This finding of "misappropriation" of verbal property seemed to be the court's attempt to pronounce that something separate from copyright infringement exists, namely plagiarism, to deal with this type of "stealing."

More recently, an Ohio court decided *Bajpayee v. Rothermich*,¹³ which also involved plagiarism. While at a professional meeting, the president of a research laboratory had presented a paper that was based on a former employee's unpublished article.¹⁴ The president had received no authorization to use the article and he did not give attribution to the former employee.¹⁵ The court held that the former employee stated a claim for relief for plagiarism.¹⁶ The court deter-

6. *See id.*

7. *See id.*

8. 248 U.S. 211 (1918). In a similar case, a Pennsylvania court enjoined a radio station from using newspaper stories as a basis for its broadcast news programs. *See generally* Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963).

9. *See Int'l News Serv.*, 248 U.S. at 216-17.

10. *See id.* at 218.

11. *See id.* at 222.

12. *See id.* at 223.

13. 372 N.E.2d 817 (Ohio Ct. App. 1977).

14. *See id.* at 818.

15. *See id.*

16. *See id.* at 821.

mined that copyright infringement was not an appropriate cause of action because the president had not copied the article verbatim; he had only borrowed its ideas without attribution.¹⁷

The *Bajpayee* case was unusual because courts rarely make initial findings of plagiarism. When an academic allegedly commits plagiarism, the university, not a court, makes an initial finding of plagiarism and the offender is often consequently dismissed. The alleged plagiarizer sometimes contests this dismissal on grounds of breach of employment contract or because the accused believes that the institution violated his or her due process rights.¹⁸ Sometimes the accused also sues for defamation.

Universities articulate their own precise definitions of plagiarism. When universities make initial findings of plagiarism, they base their decisions on these definitions. Princeton University adopted the following definition of plagiarism. This definition was set forth in its student booklet and was quoted in *Napolitano v. Trustees of Princeton University*.¹⁹

General Requirements for the Acknowledgment of Sources in Academic Work

The academic departments of the University have varying requirements for the acknowledgement of sources, but certain fundamental principles apply to all levels of work. In order to prevent any misunderstanding, students are expected to study and comply with the following basic requirements.

Quotations. Any quotations, however small, must be placed in quotation marks or clearly indented beyond the regular margin. Any quotation must be accompanied (either within the text or in a footnote) by a precise indication of the source—identifying the author, title, place and date of publication (where relevant), and page numbers. Any sentence or phrase which is not the original work of the student must be acknowledged.

Paraphrasing. Any material which is paraphrased or summarized must also be specifically acknowledged in a footnote or in the text. A thorough rewording or rearrangement of an author's text does not relieve one of this responsibility. 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

17. *See id.*

18. *See generally* Kalinsky v. State Univ. of N.Y. at Binghamton, 591 N.Y.S.2d 242 (App. Div. 1992) (dealing with the due process rights a public school must afford a student when conducting a plagiarism investigation); Tacka v. Georgetown Univ., 193 F. Supp. 2d 43 (D.D.C. 2001) (dealing with a professor's breach of contract claim against his former employer in connection with a plagiarism investigation surrounding the professor).

19. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

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. The criteria for common knowledge vary among disciplines; students in doubt should consult a member of the faculty.

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.

Footnotes and Bibliography. All the sources which have been consulted in the preparation of an essay or report should be listed in a bibliography, unless specific guidelines (from the academic department or instructor) request that only works cited be so included. However, the mere listing of a source in a bibliography shall not be considered a "proper acknowledgment" for specific use of that source within the essay or report.²⁰

As this excerpt evidences, academic institutions make certain to define plagiarism meticulously and completely.

B. Everyday Plagiarism

Almost everyone plagiarizes. Nearly every time a joke is told it is borrowed without attribution. Abraham Lincoln routinely retold jokes he borrowed from magazines.²¹ Ministers and pastors borrow sermons from each other without attribution; easily available collections of sermons all but invite plagiarism. William E. Cain wrote that Martin Luther King, Jr.'s famous sermon, "Drum Major Instinct," was taken almost entirely from another pastor.²²

Perhaps the greatest wordsmiths of all, lawyers and judges, are the biggest plagiarizers. Though they exceed all others in footnoting

20. *Id.* at 265-66 (quoting FACULTY-STUDENT COMM. ON DISCIPLINE, PRINCETON, RIGHTS, RULES, RESPONSIBILITIES (1980)).

21. See generally ABRAHAM LINCOLN, LINCOLN ON LINCOLN (Paul M. Zall ed., 1999) (containing various extracts from Lincoln's speeches, interviews, and other public and private correspondences and proclamations).

22. See William E. Cain, *Martin Luther King's "Borrowed" Language*, IN THESE TIMES, July 8-21, 1992, at 20; see also Marilyn V. Yarbrough, *Do As I Say Not As I Do: Mixed Messages for Law Students*, 100 DICK. L. REV. 677, 680 (1996).

what they use, they are sometimes caught not footnoting when they should have. In failing to footnote, they pass off someone else's ideas as their own. A plaintiff's lawyer in a class action suit might borrow a complaint from another attorney and use it successfully in another state's courts. A judge might use materials written by law clerks to prepare opinions. A law professor might appropriate material that students wrote for academic credit.²³

Plagiarizers commit a moral infraction by passing off others' intellectual production as their own, thereby inflating their own abilities, distorting their credentials, and hiding their inadequacies. They pay no penalty in court, however, except in the court of popular opinion. The noted historian Doris Kearns Goodwin was so hounded by the press on account of her alleged plagiarism that she resigned from the Pulitzer Prize Board, despite never having been found guilty of plagiarism in a court of law.²⁴

C. Plagiarism in Universities and Beyond

Plagiarism is not a crime, but its consequences are nevertheless serious. Loss of an academic career or inability to become a lawyer may result if a student or professional is found to have plagiarized. Arguably, these consequences are worse than those for copyright infringement, which often ends quickly with a demand to cease and desist. Plagiarizers do not have the option to cease and desist—they cannot simply promise not to plagiarize anymore. They often lose their credibility as scholars and researchers and, not surprisingly, feel that they must fight to keep their positive reputations alive. That is why alleged plagiarizers are usually the plaintiffs in litigation, appealing their dismissals from jobs by retaliating against the institutions that dismissed or censured them.

1. Undergraduate Students

At a minimum, a college student who plagiarizes will probably receive a failing grade in the course in which he or she plagiarized; at a maximum, the student may face expulsion or even have his or her

23. See generally Williamson, *supra* note 1.

24. See Timothy Noah, *Doris Kearns Goodwin, Liar: First She Plagiarized. Then She Claimed It Wasn't Plagiarism*, SLATE, Jan. 22, 2002, at <http://slate.msn.com/?id+2061056> (last accessed Apr. 2, 2004); see also *Doris Kearns Goodwin Leaves Pulitzer Prize Board*, COLUM. NEWS, Sept. 18, 2002, at http://www.columbia.edu/cu/news/02/06/doriskGoodwin_pulitzer.html (last accessed Apr. 2, 2004).

doctoral degree revoked.²⁵ Various forms of plagiarism have resulted in the minimum penalty of a failing grade. One college student received a failing grade for copying verbatim from reference works without using quotation marks,²⁶ while another suffered the same fate for submitting a paper in which she copied the work of another student who had previously submitted a paper on the same subject.²⁷ A high school student received a failing grade for copying significant portions of his American history paper from reference sources.²⁸

In other cases, failing grades were followed by one-semester expulsions. In one instance where this occurred, a student had copied extensively from the paper of a roommate who had been enrolled in the same course as the plagiarizer.²⁹ In another instance, a student had copied from a textbook that had been used in a class that the student had taken previously.³⁰ In the final instance, a student had copied heavily from "secondary" sources.³¹

When the following situations occurred, indefinite expulsion was the penalty: two students submitted identical papers;³² a student turned in, as his own work, a "resource guide" for a school psychology practicum;³³ a student submitted a paper on juvenile justice reform that was substantially identical to a paper the student had submitted previously to a different professor;³⁴ and a student submitted a play as an original work for the class, "Nature of Theatrical Experience," which had been taken verbatim from a play on the shelves of the Dallas Public Library.³⁵ Students who cheated by collaborating on a take-home exam where collaboration was not permitted were also expelled

25. See *Faulkner v. Univ. of Tenn.*, No. 01-A-01-9405-CH-00237, 1994 Tenn. App. LEXIS 651, at *2 (Nov. 16, 1994) (involving revocation of a Ph.D. in Engineering Science and Mechanics for plagiarism); see also *Napolitano*, 453 A.2d 263 (involving withholding of undergraduate degree for one year).

26. See *Smith v. Gettysburg Coll.*, 22 Pa. D. & C.3d 607, 608-09 (1982).

27. See *Flannery v. Bd. of Trs.*, No. 96-C50148, 1996 U.S. Dist. LEXIS 17049, at *2 (D.C. Ill. Nov. 4, 1996).

28. See *Zellman v. Indep. School Dist.*, 594 N.W.2d 216, 218-19 (Minn. Ct. App. 1999).

29. See *Kalinsky v. State Univ. of N.Y. at Binghamton*, 557 N.Y.S.2d 577, 578 (App. Div. 1992).

30. See *Sanderson v. Univ. of Tenn.*, No. 01A01-9607-CH-00289, 1997 Tenn. App. LEXIS 825, at *3 (Nov. 19, 1997).

31. See *Morris v. Brandeis Univ.*, No. 00-2161, 2001 Mass. Super. LEXIS 518, at *3 (Aug. 30, 2001).

32. See *Trahms v. Trs. of Columbia Univ.*, 666 N.Y.S.2d 150 (App. Div. 1997).

33. See *Mercer v. Bd. of Trs.*, 17 Fed.Appx. 913, 915-16 (10th Cir. 2001).

34. See *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998).

35. See *Nreh v. Univ. of Tex. at Dallas*, No. 05-99-01165-CV, 2000 Tex. App. LEXIS 5228, at *2 (Aug. 7, 2000).

when the students' professor noticed that the two students had submitted papers that contained identical wrong answers.³⁶

It is difficult to determine why similar instances of plagiarism have given rise to penalties that have varied so greatly in severity; differences in universities' policies may be a contributing factor. Only one case has involved exceptional circumstances that have justified the severest penalty. In *Faulkner v. University of Tennessee*,³⁷ the University of Tennessee revoked a Ph.D. from a student who was found to have plagiarized his doctoral dissertation, where the student had been a doctoral candidate in the university's department of engineering science and mechanics.³⁸ The circumstances were considered exceptional in this case because the plagiarism had occurred at the highest level of academia. Even at a lower level, however, most universities regard plagiarism as so serious a form of cheating that its penalty is more severe than just a failing grade.

2. Professors

After students have been dismissed for plagiarism, they may pick up the pieces and perhaps enroll in other schools. Professors, on the other hand, are drummed out of their chosen profession. The usual penalty for a non-tenured professor is simply that his or her contract is not renewed at the end of the academic year.³⁹ Tenured professors may be dismissed, too, although such a dismissal may only flow from an administrative finding of plagiarism and the suspected professor has to have received an opportunity to be heard in accordance with the school's faculty manual.

Professor Sam P. Agarwal, of the University of Minnesota, was found to have committed plagiarism in the preparation of three physics laboratory manuals, and, although tenured, the administration determined that his plagiarism was grounds for termination.⁴⁰ Similarly, when tenured professor Peter Klinge was found to have plagiarized the work of another author, Klinge was dismissed from Ithaca College.⁴¹ And when tenured professor Jason Yu, of the University of Utah, represented that two publications were his own works, when in

36. See *Tatum v. Univ. of Tenn.*, No. 01A01-9707-CH-00326, 1998 Tenn. App. LEXIS 490, at *1 (July 29, 1998).

37. No. 01-A-01-9405-CH-00237, 1994 Tenn. App. LEXIS 651 (Nov. 16, 1994).

38. See *id.* at *3.

39. See *Heyliger v. State Univ. & Cmty. Coll. Sys.*, 126 F.3d 849, 851 (6th Cir. 1997).

40. See *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 505-06 (8th Cir. 1986).

41. See *Klinge v. Ithaca Coll.*, 663 N.Y.S.2d 735, 736 (App. Div. 1997).

fact ninety percent of the works was prepared by two of his students, he was terminated.⁴²

Occasionally a professor escapes termination but is nevertheless severely disciplined. The University of Massachusetts at Boston censured Professor Amy Newman, a Russian language professor who plagiarized a German book about a Croatian poet.⁴³ The university carried out the censure by making its findings of plagiarism public and barring Newman from participating on certain academic committees or holding administrative office for five years.⁴⁴

3. Law Students

Legal research can be tedious because numerous citations are required and students may be tempted to take shortcuts. Unlike the situation of undergraduates, however, the penalty for plagiarism in law school is seldom dismissal. Rather, law schools tend to allow a student who has plagiarized to graduate, knowing that their respective state's board of bar examiners ("Board") will receive a record of the plagiarism incident.⁴⁵ It is then the Board's responsibility to decide whether to certify the applicant to take the bar exam, exercising the authority delegated to it by its state supreme court.

An appeal from a Board's decision not to certify an applicant is made directly to the state supreme court, which has the ultimate authority over whether to admit lawyers to practice law in that jurisdiction. Some applicants attempt to appeal to United States courts, but those courts decline to take jurisdiction unless the applicant states a case alleging that his or her statutory or constitutional rights have been violated.⁴⁶

As part of this process of certification, law school deans must forward certain information to the Board in order for an applicant to be certified. However a dean may refuse to do so, making certification impossible for the applicant. When a Seton Hall University College of

42. See *Yu v. Peterson*, 13 F.3d 1413, 1414 (10th Cir. 1993).

43. See *Newman v. Burgin*, 930 F.2d 955, 957 (1st Cir. 1991).

44. See *id.* at 959.

45. See generally *In re Zbiegien*, 433 N.W.2d 871 (Minn. 1988) (regarding student who was denied admission to the bar because of his plagiarism, despite his school's having allowed him to graduate and even though he had already passed the bar).

46. See *Anonymous v. Kaye*, No. 95-9295, 1996 U.S. App. LEXIS 33498, at *6 (2d Cir. Dec. 23, 1996) (denying personal jurisdiction where case originated in a New Jersey superior court). See generally *Easley v. Univ. of Mich. Bd. of Regents*, 632 F. Supp. 1539 (E.D. Mich. 1986) (accepting jurisdiction over the case, where plaintiff alleged race discrimination and asserted that his constitutional rights had been violated).

Law student plagiarized a Supreme Court brief in his answer on a take-home exam, he was allowed to graduate but the dean of his school refused to forward a certificate of attendance or a certified sample of the student's handwriting to the New York Board of Law Examiners.⁴⁷ The refusal made it impossible for the student to take the bar exam or to become a lawyer. Of course, a student dismissed from law school for plagiarism also has no chance of becoming a lawyer.⁴⁸

Some law schools send the Board the requisite information, letting the chips fall where they may. In one case, the law school itself had exonerated the applicant from the charge of plagiarism.⁴⁹ The Board was not bound by the school's decision, however, and it proceeded to make its own determination that the applicant had committed plagiarism in a research paper.⁵⁰ The Board refused to certify the applicant to take the bar exam.⁵¹ Similarly, a law school graduate and plagiarizer was denied Board certification after sustaining the minimal penalty of suspension for one semester at his law school.⁵²

Another law graduate was not certified for reasons relating to his having plagiarized, even though his plagiarism had occurred outside the law school.⁵³ Prior to his graduation from Marquette University School of Law, this student had been a lecturer in history at the University of Wisconsin-Milwaukee, which dismissed him for plagiarism.⁵⁴ On his bar admission application, he listed his reasons for leaving as low pay and no possibility of promotion, neglecting to mention the plagiarism incident.⁵⁵ The Board refused to certify him as a lawyer for his having omitted a material fact as to his plagiarism.⁵⁶

The Board of Commissioners on Character and Fitness of the Supreme Court of Ohio recommended denial of one law school graduate's bar application based on plagiarism issues.⁵⁷ Although the student was found to have plagiarized in a seminar course and subsequently was publicly reprimanded, suspended for a minimum of one

47. See *Kaye*, 1996 U.S. App. LEXIS 33498, at *2.

48. See generally *Easley*, 632 F. Supp. 1539 (involving a situation where the law school refused to grant a student his J.D. degree).

49. *In re K.S.L.*, 495 S.E.2d 276, 277 (Ga. 1998).

50. See *id.* at 278.

51. See *id.* at 277.

52. See *In re Green*, 553 A.2d 1192, 1192 (Del. 1989).

53. See *Radtke v. Bd. of Bar Exam'rs*, 601 N.W.2d 642, 643-44 (Wis. 1999).

54. See *id.* at 644.

55. See *id.*

56. See *id.* at 645.

57. See *In re Valencia*, 757 N.E.2d 325, 327 (Ohio 2001).

semester, and received an "F" in the course, he was still allowed to graduate in December 1996.⁵⁸ In March of 2000, however, the Board of Commissioners "concluded that the applicant should not be permitted to take the examination for admission to the bar of Ohio until February 2000 and should be required to file a new registration application."⁵⁹ After reviewing the evidence, the Supreme Court of Ohio adopted the Board's conclusions and agreed that the applicant should be barred from taking the bar exam until February 2002.⁶⁰

Occasionally, a rejected applicant survives the stigma attached to having committed plagiarism and becomes a lawyer. One such applicant, from William Mitchell College of Law, graduated, passed the bar exam, and was then denied admission to the bar.⁶¹ The Minnesota Board of Law Examiners ruled that because of his law school plagiarism, he had failed to prove that he possessed the requisite character and fitness to be admitted to the bar.⁶² The Supreme Court of Minnesota overruled the Board, however, and directed it to recommend the student's admission.⁶³

The record in that case revealed that Associate Dean Matthew Downs had found that the part time student had been facing new job pressures, his wife had become totally disabled in an auto accident, and he had been unaware of computer problems, which were causing text and endnoting problems, during the time the offense had taken place.⁶⁴ He had received an "F" in the course but was permitted to stay in law school.⁶⁵ The court agreed with Dean Downs's determination that the paper deficiencies that had resulted in plagiarism were ones of omission rather than intent and so did not involve the requisite level of culpability to justify automatic bar membership denial.⁶⁶

4. Lawyers, Judges, and Physicians

Penalties assessed against legal professionals for plagiarism have varied from censure⁶⁷ to a six-month license suspension.⁶⁸ One law-

58. *Id.* at 326.

59. *Id.* at 327.

60. *Id.*

61. *See In re Zbiegien*, 433 N.W.2d 871, 872-73 (Minn. 1988).

62. *See id.* at 872.

63. *See id.* at 877.

64. *See id.* at 872.

65. *See id.*

66. *See id.* at 877.

67. *See generally In re Brennan*, 447 N.W.2d 712 (Mich. 1989) (involving a plagiarism charge against a judge); *In re Lamberis*, 443 N.E.2d 549 (Ill. 1982) (involving a plagiarism charge against a lawyer).

yer, an LL.M. student at Northwestern University School of Law, plagiarized in his masters thesis by including uncited verbatim excerpts from two published works.⁶⁹ Consequently, he was suspended from Northwestern and censured by the Illinois Supreme Court.⁷⁰ The court said that his plagiarism displayed “an extreme cynicism towards the property rights of others,”⁷¹ and found that his wrongful purpose was to obtain an advanced law degree “that would have undoubtedly improved his prospects for employment”⁷² Another lawyer submitted a post-trial brief to a court, which consisted of eighteen pages of text and footnotes from a treatise he did not cite.⁷³ This direct fraud on the court resulted in a six-month license suspension.⁷⁴ Finally, the Michigan Supreme Court censured a judge for including unattributed passages from other authors in a law review article the judge had written.⁷⁵ The court declared that this was “conduct clearly prejudicial to the administration of justice.”⁷⁶

The harshest penalty—revocation of one’s license to practice medicine—was assessed against one physician in a rare case involving plagiarism committed by a medical professional.⁷⁷ The physician in *Alsabti v. Board of Registration in Medicine*⁷⁸ claimed authorship for three articles that had actually been authored by other physicians. He also arbitrarily changed statistical and experimental data found in the original articles.⁷⁹ The rationale for the penalty was that the physician used plagiarism to enhance his credentials and to deceive those in the medical community who might have offered him a physician’s position based on these inflated credentials.⁸⁰ Noting the potentially harmful behavior of the physician, the court said, “Along the way, other more qualified individuals are deprived of an opportunity to fairly compete. In the end, the quality of medical care may suffer.”⁸¹

68. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 302 (Iowa 2002).

69. See *In re Lamberis*, 443 N.E.2d at 550.

70. See *id.* at 553.

71. *Id.* at 551.

72. *Id.* at 552.

73. See *Lane*, 642 N.W.2d at 300.

74. See *id.* at 302.

75. *In re Brennan*, 447 N.W.2d 712, 713–14 (Mich. 1989).

76. *Id.* at 714.

77. See generally *Alsabti v. Bd. of Registration in Med.*, 536 N.E.2d 357 (Mass. 1989).

78. 536 N.E.2d 537 (Mass. 1989).

79. See *id.* at 357.

80. See *id.* at 359.

81. See *id.*

5. Journalists and Research Scientists

Other professions, often with less clearly-defined ethics rules than the legal, academic, or medical communities, have also been troubled by instances of plagiarism. For example, *The Washington Post* discharged a reporter for submitting plagiarized material for publication.⁸² The reporter unsuccessfully attempted to minimize the offense by claiming that the replicated material had been copied from historical sources that existed in the public domain and so were not required to have been credited.⁸³

In another case, a government employee was terminated during her probationary period with the Office of the Comptroller of the Currency ("OCC").⁸⁴ After her termination, the OCC learned that she had plagiarized a book and other materials in preparing a training video script.⁸⁵ As a result of this finding, all copies of the videos were pulled and all managers were instructed not to use it.⁸⁶ When the employee successfully sued the OCC for sex discrimination, the OCC effectively asserted that the plagiarism should serve as grounds for reducing her back pay award.⁸⁷

In a third case, a biochemist in charge of Columbus Medical Center Foundation's research laboratory had made discoveries regarding the treatment of arthritis. He alleged that the Foundation's president and medical director had presented these discoveries as his own in a presentation before the American Society of Clinical Pharmacology and Therapeutics.⁸⁸ The court ruled that the biochemist had a right in tort to be recognized for his work product and so could sue on the basis that such work product was plagiarized.⁸⁹ This case, which gave a researcher the right to sue because another had not given attribution to his or her work product, is the only one found where the tort of plagiarism, clearly distinguished from copyright infringement, successfully served as the basis for a legal cause of action.

82. See Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Post Co., 442 F.2d 1234, 1236 (D.C. Cir. 1971).

83. See *id.* at 1239.

84. See *Castle v. Rubin*, 78 F.3d 654, 656 (D.C. Cir. 1996).

85. See *id.*

86. See *Castle v. Bentsen*, 867 F. Supp. 4, 6 (D.D.C. 1994).

87. See *id.* at 659.

88. See *Bajpayee v. Rothermich*, 372 N.E.2d 817, 818 (Ohio Ct. App. 1977).

89. See *id.* at 821.

II. The Anatomy of a Plagiarism Investigation: Tenured Professors at Northern Kentucky University

It is important to examine an example of a typical university plagiarism investigation in order to shed light on this issue and to provide compelling support for the argument that courts should not review plagiarism findings *de novo*.

A plagiarism investigation that concerns professorial conduct involves a complex, quasi-judicial hearing. It is unlike an investigation of student plagiarism, which carries the potential of expulsion and is usually governed by an honor code. Professorial plagiarism is investigated under procedures set out in faculty handbooks and it carries the potential for loss of employment. Provisions in handbooks have been held to create enforceable contracts between professors and universities.⁹⁰

When five professors in a single department at Northern Kentucky University (“NKU”) were investigated in 2002, NKU Faculty Handbook (“Handbook”) procedures were invoked. They were typical of procedures found in other universities’ faculty handbooks in that they required faculty and administrators to conduct a time-consuming investigation. The following “Chronology,” which sets forth the handbook procedures that were followed during the investigation at NKU, reflects the lengths to which universities often go to afford accused professors due process.⁹¹ See Appendix “Chronology: NKU Plagiarism Investigation.”

The investigation at NKU began, as most plagiarism investigations do, because of a whistleblower. On February 6, 2002, Professor Nancy Lang, who had just replaced Professor Anju Ramjee as Chair of the Department of Economics, Finance and Information Systems in the College of Business, sent a memorandum to Dean Michael Carrell, which said, “There appears to be the possibility of research misconduct in the attached research papers. According to the . . . Handbook, I am forwarding them to you for your review.”⁹²

The research papers listed Professor Ramjee, whom Professor Lang had just replaced, as an author.⁹³ Dean Carrell reviewed the pa-

90. See *McConnell v. Howard Univ.*, 818 F.2d 58, 62–63 (D.C. Cir. 1987).

91. See THOMAS KEARNS, ROBERT KEMPTON & MATTHEW SHANK, AD HOC INVESTIGATIVE COMM. ON RESEARCH MISCONDUCT, N. KY. UNIV., INVESTIGATIVE REPORT: GENERAL FINDINGS OF THE INVESTIGATION INTO PAPERS BY SHAILENDRA VERMA, BALASUBRAMANI RAMJEE, ANJU RAMJEE, LOUIS NOYD, RICHARD SNYDER, 1995–2001, at 1 (2002) [hereinafter *Report*].

92. *Id.*

93. See *id.*

pers and appointed a preliminary inquiry committee of three, including himself. On March 7, 2002, the committee officially reported its findings to the professors involved in the allegations. It was the first official notice the professors had received that alerted them to the fact that they had been accused of research misconduct and that sufficient grounds existed for a formal investigation to ensue.⁹⁴

Subsequently, Dean Carrell appointed an ad hoc committee to begin the formal investigation. The university's ultimate decision to dismiss professors involved numerous administrative reviews. But in the end, the decision was based on the report of the Ad Hoc Committee—a committee that consisted of three of the most respected professors in the university who devoted hundreds of hours to the investigation.⁹⁵

The investigation covered more than mere plagiarism. It included the related misconduct of falsification of data and of recycling former research as new. Following the Handbook, the Ad Hoc Committee focused on three areas of possible research misconduct: 1) fabrication or falsification of research results; 2) serious deviations from accepted practices, in the form of redundant or duplicative publications and the failure to cite previous papers; and 3) plagiarism in the form of falsely claimed authorship or plagiarized material.⁹⁶

The Ad Hoc Committee found that plagiarism had occurred in two forms. The first was publication of “material closely approximating or copied verbatim, without citation, from another source,”⁹⁷ a form of plagiarism that could also be considered copyright infringement. The Ad Hoc Committee's Report (“Report”) presented detailed analyses of the papers in question, showing, in parallel columns, collections of sentences duplicated exactly from one paper to the next

94. The preliminary report was issued in accordance with the Handbook. See N. KY. UNIV., FACULTY POLICIES & PROCEDURES HANDBOOK 125–127 (2002) [hereinafter *Handbook*].

95. Interview with Thomas J. Kearns, Professor of Mathematics, Committee Chair, and Robert J. Kempton, Regents Professor of Chemistry, Northern Kentucky University, Salmon P. Chase School of Law, in Highland Heights, Ky. (Nov. 10, 2003) [hereinafter *Kearns, Kempton Interview*]. The third member of the committee was Matthew D. Shank, Professor of Marketing and Chair of the Department of Management and Marketing, who was unavailable for an interview. Kearns said that he worked more than 700 hours on the investigation, working “six or seven days a week.” *Id.* Kempton said, “There wasn’t a day when I wasn’t thinking about it.” *Id.*

96. See *Handbook*, *supra* note 94, at 125.

97. *Report*, *supra* note 91, at 6–7.

and “collections of sentences that [were] a paraphrasing of each other.”⁹⁸

The second form of plagiarism discovered was false attribution of guest authorship. In this form of plagiarism, a guest author passes off, as his own, the work done by the principal author, falsely claiming to have contributed to a group project.⁹⁹ The faculty members under investigation at NKU admitted that they had never met with most of the listed authors to discuss “who would assume what responsibilities in carrying out the research; to discuss the work in progress; or to review the manuscript to be submitted.”¹⁰⁰ In many instances, the principal author himself had plagiarized the work in which guest authors claimed co-authorship. Thus, the guest authors plagiarized in a work that was itself plagiarized. False co-authorship of this kind is especially egregious when, as here, the co-author lends his name to a group project, knowing in advance that the project itself has no independent merit. The Report cited ethical guidelines published by various organizations that require that co-authors take full responsibility for the quality of a group effort:

While there may be varied opinions about what constitutes authorship, there is considerable consensus about the responsibility that authorship entails: persons who claim credit for authorship also bear the responsibility for the quality and validity of the published work. The National Academy of Science puts it this way []: “an author who is willing to take credit for a paper must also bear responsibility for its contents.”^[101] National Institute of Health guidelines [] include “As such, [authorship] potentially conveys great benefit, as well as responsibility . . . Each author should be willing to support the general conclusions of the study.”^[102] The American Chemical Society’s *Ethical Guidelines to the Publication of Chemical Research* [] includes this definition of *co-author*: “The co-authors of a paper should be all those persons who have made significant scientific contributions to the work and who share respon-

98. *See id.* at 7.

99. Such plagiarism was illustrated in *Yu v. Peterson*, a 1993 case in which the court upheld the termination of a tenured professor at the University of Utah who had failed to give credit to his co-author. *See Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993).

100. *Report, supra* note 91, at 18.

101. *Id.* at 16–17 (quoting COMM. ON SCI., ENG’G, & PUB. POLICY, NAT’L ACAD. OF SCI., ON BEING A SCIENTIST: RESPONSIBLE CONDUCT IN RESEARCH 14–15 (2d ed. 1995), <http://www.nap.edu/readingroom/books/obas/contents/authorship.html> (last accessed Mar. 7, 2004)).

102. *Report, supra* note 91, at 17 (quoting COMM. ON SCI. CONDUCT & ETHICS, NAT’L INST. ON HEALTH, GUIDELINES FOR THE CONDUCT OF RESEARCH IN THE INTRAMURAL RESEARCH PROGRAMS AT NIH (3d ed. 1997), <http://www.nih.gov/news/irnews/guidelines.htm> (last accessed Mar. 7, 2004)).

sibility and accountability for the results.”^[103] The American Psychology Association has published ethical standards for that profession since 1958. Its latest *Ethical Principles of Psychologists And Code of Conduct*[]—widely utilized in other behavioral and social sciences policies—includes this statement under the heading “Publication Credit” (Section 6.23): “Psychologists take responsibility and credit, including authorship credit, only for work they have actually performed or to which they have contributed.”^[104] Another phrasing comes from Columbia University[]: “[J]oint authorship requires joint responsibility; each author claiming credit for the entire work must also be aware of joint discredit.”^[105]

False co-authorship is the cheapest way to get professional recognition because no work need be done to be able to claim authorship. In contrast, at least some work must be done in garden variety individual plagiarism. The Report noted that “[t]he integrity of the academic reward system depends on an accurate assessment of the role a listed author has played in the development of scholarly work.”¹⁰⁶ It also pointed out that at NKU’s College of Business, scholarly work influenced “performance reviews (and, therefore, salary determination), reappointment and tenure reviews, and promotion reviews.”¹⁰⁷ Benefits of scholarly work included formal designation as an “Active Scholar” and a reduced teaching load.¹⁰⁸ These appear to have been the motivations behind the academic misconduct at NKU.

The NKU investigation dragged on for most of 2002, as the lawyers for all five professors under investigation “stonewalled” the Ad Hoc Committee and the number of papers to be examined kept growing. The members of the Ad Hoc Committee worked six or seven days a week, continuously, from April to December.

From time to time, the Handbook needed interpretation. For example, it provided that the accused professors could be represented by attorneys.¹⁰⁹ However, in interpreting this provision, the Ad Hoc

103. *Report, supra* note 91, at 18 (quoting EDITORS OF THE PUBL’NS DIV. OF THE AM. CHEM. SOC’Y, AM. CHEM. SOC’Y, ETHICAL GUIDELINES TO PUBLICATION OF CHEMICAL RESEARCH (2000), <http://pubs.acs.org/instruct/ethic.html> (last accessed Mar. 7, 2004)).

104. *Report, supra* note 91, at 18 (quoting AM. PSYCHOLOGICAL ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (1992), <http://www.apa.org/ethics/code1992.html> (last accessed Mar. 7, 2004)).

105. *Report, supra* note 91, at 18 (quoting FACULTY HANDBOOK, COLUM. UNIV., APPENDIX E: STATEMENT ON PROFESSIONAL ETHICS AND FACULTY OBLIGATIONS AND GUIDELINES FOR REVIEW OF PROFESSIONAL MISCONDUCT (1986), http://www.columbia.edu/cu/vpaa/fhb/app/app_e.html (last accessed Mar. 7, 2004)).

106. *Report, supra* note 91, at 16.

107. *Id.*

108. *Id.*

109. *Handbook, supra* note 94, at 70.

Committee relegated the attorneys to a role of advising their clients. Altogether, seven attorneys represented the five accused professors. These attorneys were not permitted to cross examine witnesses at a hearing or subpoena witnesses to a hearing, but they could require that all committee requests for documents be directed to them through the Office of University Counsel.¹¹⁰ This cumbersome procedure greatly prolonged the investigation.¹¹¹

When the investigation came to a close on December 23, 2002, the Report was referred to the Provost, in accord with Handbook procedures.¹¹² If the Provost accepted the Report as accurate, as this Provost did, he was bound to refer it to the Peer Review Advisory Committee ("Advisory Committee").¹¹³ This committee's usual function is to hear grievances stemming from issues such as promotion or tenure denials and to refer the grievances to the Peer Review Hearing Committee ("Hearing Committee") if it finds that a prima facie case has been presented.¹¹⁴ If the Advisory Committee decides that the Provost's decision as to denial of tenure or promotion was justified, then no referral to the Hearing Committee is made and the Advisory Committee's decision is final. In cases involving termination of faculty, however, the terminated faculty member always has a right to a hearing before the Hearing Committee.

In this instance, even though this right existed automatically, the Handbook was painstakingly followed and it took over two months for the Advisory Committee to perform its "preliminary hearing" function. The two peer review committees, the university's president, and the school's Board of Regents were at work during most of 2003, reviewing and approving the Ad Hoc Committee's finding of research misconduct and the Provost's recommendation of termination for cause. By the time the Board of Regents decided to terminate the professors in August of 2003, almost two years had been spent on the investigation, thousands of work-hours by over twenty university personnel had been consumed, and \$15,000 had been expended on the printing costs for copies of documents and reports.¹¹⁵

In light of the foregoing, it can hardly be said that due process requirements of notice and a hearing were not met. Still, the Ad Hoc

110. *Kearns, Kempton Interview, supra* note 95.

111. *See id.*

112. *See Handbook, supra* note 94, at 127.

113. *See id.* at 69.

114. *See id.* at 97.

115. Interview with Sara Sidebottom, Legal Counsel, NKU, in Highland Heights, Ky. (Nov. 19, 2003) [hereinafter *Sidebottom Interview*].

Committee members' greatest concern throughout the process was whether they were correctly following the Handbook.¹¹⁶

The members were also concerned about confidentiality. Dean Carrell, on advice from University Legal Counsel, required that the members sign a confidentiality agreement upon appointment to the Ad Hoc Committee in March of 2002. Astonishingly, the investigation was indeed kept confidential until the Provost placed the professors on leave in February, 2003. Committee members were permitted to inform only their spouses about the investigation and they made only a few discrete inquiries of an outside economist and a "finance guy."¹¹⁷ The printing of documents and the Report was done only after normal business hours, in NKU's own print shop, by only a few personnel who had been sworn to secrecy.¹¹⁸ These precautions were designed to protect the school from any potential lawsuits in the future, including suits for breach of contract (for failure to afford rights prescribed in the Handbook), defamation (for publishing defamatory statements about plagiarism, etc.), and violation of the Due Process Clause of the Fourteenth Amendment (for failure to follow Handbook procedures or for inadequacy of investigative or termination procedures). These concerns were real, for they have served as the bases for numerous lawsuits against universities, as the following discussion reveals.

III. How Plagiarism Has Manifested Itself in the Legal System

As mentioned above, the "offense" of plagiarism is almost never itself the subject of a lawsuit. With the exception of the *Bajpayee* case,¹¹⁹ the alleged victims of plagiarism do not usually file actions for the tort of plagiarism. Rather, plagiarism is an offense that is dealt with by universities or by professional licensing organizations; it is an administrative matter. Dismissed offenders seldom attack administrative findings of plagiarism. Instead, they might seek damages from their former employers based on allegations that they were denied due process or that their employers defamed them by publicizing information about the alleged plagiarism. In addition, they sometimes

116. *Kearns, Kempton Interview, supra* note 95. Committee members did not want the accused professors to "wiggle out of it." *Id.*

117. *Id.*

118. *Sidebottom Interview, supra* note 115.

119. *Bajpayee v. Rothermich*, 372 N.E.2d 817 (Ohio Ct. App. 1977).

seek to overturn their dismissals based on claims of breach of contract or discrimination.

A. Denial of Due Process

Non-academic employees who plagiarize are terminated under different procedures from academic employees. Non-academic employees may be at-will employees who can be terminated for no reason at all,¹²⁰ employees under contract who are terminated for cause, or union employees who may be terminated only after an arbitration hearing has been conducted and plagiarism has been established.¹²¹

In the academic setting, however, dismissal of students is normally governed by procedures found in student honor codes and termination of professors is governed by procedures found in faculty handbooks. Both procedures typically call for redundant administrative reviews of a plagiarism finding, as if the procedures were written with one eye on a possible lawsuit for Fourteenth Amendment violations. Reflecting the thoroughness of the procedures followed in the NKU investigation, one court described a University of Massachusetts at Boston's plagiarism investigation and the action the school eventually decided to take as follows:

a. In late 1983, members of the personnel committee told the Dean of the College of Arts and Sciences about their suspicions. The Dean then met with Professor Newman and promised to take no action until he received her written response. She submitted her response in March 1984.

b. The Dean asked two Slavic-language scholars at other universities to review the article for plagiarism. After doing so, one wrote back that the article contained "exemplary instances of plagiarism." The other said that the work was "indebted to Dr. Setschkareff's major work considerably more than formally acknowledged," but that it would be difficult to show "conscious, deliberate and outright plagiarism," as the author might have suffered simply from "lapses in awareness." The Dean asked Professor Newman if she wished to respond. (She did not do so.)

c. The Dean formed an ad hoc committee of senior Arts and Sciences faculty (the "Knight Committee," after its chairman) to investigate further and recommend punishment if warranted. The committee held hearings on May 7 and 10, 1985. It permitted Professor Newman to challenge for cause any of the committee members. It permitted her to present evidence, to call witnesses, to cross-examine witnesses, and to bring a colleague to help her. Pro-

120. See *Matikas v. Univ. of Dayton*, 788 N.E.2d 1108, 1114 (Ohio Ct. App. 2003).

121. See *Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Post Co.*, 442 F.2d 1234, 1237 (D.C. Cir. 1971).

fessor Newman submitted letters from six outside scholars of her choice, all of whom concluded that she did not plagiarize.

d. On May 23, 1985, the Knight Committee submitted its report to the Dean. It found that Newman had had no "conscious intent to deceive," but that her scholarship had been "negligent," and contained "an objective instance of plagiarism." It recommended "censure" and "no further action." Subsequently, the Dean met with the committee members and discussed what the committee meant by "censure." The Chairman then wrote to the Dean that the "Committee did not mean to specify the particular form that the action of censure should take," but it should not include reduction of salary, demotion or termination.

e. The Dean asked Professor Newman to respond to the Knight Committee report. She submitted a response on June 7.

f. On July 1, the Dean recommended to the University Provost that the University "censure" Professor Newman, in essence, by adopting and making public the Knight Committee's findings, and by barring her from participating on certain academic committees (or holding administrative office) for five years. The Dean asked Professor Newman to respond. She did so, sending a letter to the Provost on July 19. The Provost, in effect, adopted the Dean's recommendations and repeated them to the Chancellor. Professor Newman repeated her side of the story to the Chancellor. And, the Chancellor then adopted, and ordered implemented, the Provost's recommendations.¹²²

The NKU process, which is not described in any judicial proceeding, is very similar to the University of Massachusetts process. It is striking that in each process the protection of the accused professors' Fourteenth Amendment rights seems more than adequate, if not even excessive.

Although the Fourteenth Amendment's Due Process Clause has been held to be inapplicable to private schools,¹²³ it does apply to public schools. The seminal case on procedural due process is *Goss v. Lopez*.¹²⁴ In *Goss*, the Supreme Court ruled that students who had been expelled from a school in the Ohio public school system for a mere ten days should have been given notice and a hearing.¹²⁵ The Court further determined that without notice or an opportunity to be heard,

122. *Newman v. Burgin*, 930 F.2d 955, 959 (1st Cir. 1991).

123. See generally *Tedeschi v. Wagner Coll.*, 417 N.Y.S.2d 521 (App. Div. 1971); *Swanson v. Wesley Coll., Inc.*, 402 A.2d 401 (Del. Super. Ct. 1979); *Smith v. Gettysburg Coll.*, 22 Pa. D. & C.3d 607 (1982); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (holding that relationship between university and student is contractual in nature, and not subject to the Fourteenth Amendment). But see *Clayton v. Trs. of Princeton Univ.*, 608 F. Supp. 413 (D.C.N.J. 1985).

124. 419 U.S. 565 (1975).

125. See *id.* at 584.

the ten-day suspension had impinged upon the liberty of the students because of its potential for limiting their employment opportunities.¹²⁶

Although academic institutions are not courtrooms or hearing rooms,¹²⁷ there are certain procedural due process requirements they must follow when executing academic disciplinary dismissals. The Eighth Circuit has formulated its own set of requirements for academic institutions to follow regarding professorial dismissals. It requires that the school provide the professor with: 1) clear and actual notice of the reasons for termination, which contains details sufficient to enable the professor to present evidence relating to the stated reasons; 2) notice of both the names of those who have made allegations against the professor and the specific nature and factual bases for the charges; 3) reasonable time and an opportunity to present testimony in his or her own defense; and 4) a hearing before an impartial board or tribunal.¹²⁸

When professors and students have filed suits challenging their termination on due process grounds, universities have had little trouble sustaining the termination. Their best defense is simply to show that they had reasonable written notice and hearing procedures, which they followed. In *Newman v. Diana Burgin*,¹²⁹ the First Circuit applied the Eighth Circuit's guidelines and concluded the following:

[A]t each stage of the proceedings, the University afforded Professor Newman an opportunity to present her side of the story, it permitted her to challenge decision makers for bias, it permitted her to call witnesses, it permitted her to see, and to criticize, the evidence against her, and it permitted her to see all tentative recommendations, and to argue against them, before they became final. In short, it provided Professor Newman with an impressive array of due process safeguards—notice of proposed action, a trial-type hearing in which she was given an opportunity to present proofs and arguments and to challenge the proofs and arguments of others, all before neutral decision makers, who prepared written findings of fact and reasons for their decision.¹³⁰

Some courts focus only on whether school procedures satisfied particular aspects of due process. In *Trahms v. Trustees of Columbia University*,¹³¹ the court concluded that a student who had been dismissed

126. *See id.* at 575.

127. *See* Bd. of Curators v. Horowitz, 435 U.S. 78, 88 (1978).

128. *See* King v. Univ. of Minn., 774 F.2d 224, 228 (8th Cir. 1975).

129. 930 F.2d 955 (1st Cir. 1991).

130. *Id.* at 960.

131. 666 N.Y.S.2d 150 (App. Div. 1997).

had received adequate notice of the charges against him and an adequate hearing before being dismissed.¹³² Different courts set forth different due process requirements regarding school dismissals. One court concluded that a public college's failure to follow its own rules in disciplining a student did not, by itself, constitute a denial of due process.¹³³ Another court held, however, that due process was denied when an associate dean who found a student guilty of plagiarism and subsequently disallowed her from registering for fall classes failed to reveal the evidence upon which he had relied for his decision and failed to state the reasons for the penalty imposed.¹³⁴

Substantive due process protects teachers and students from public universities' taking arbitrary action against them.¹³⁵ Such due process challenges are rare in cases involving plagiarism. However, in one such case, a tenured professor filed suit against the university that dismissed him, asserting that the reviewing committee's finding of plagiarism had not been based on substantial evidence.¹³⁶ The United States Court of Appeals for the Tenth Circuit concluded that the committee had, indeed, based its finding on substantial evidence.¹³⁷ The meticulous analysis conducted in the NKU investigation described above suggests that it will be difficult for a professor to challenge a finding of plagiarism, made by a committee of his or her peers, on substantive due process grounds.

B. Defamation

An accusation of plagiarism can serve as the basis for defamation liability provided that the accused can prove that the accusation was false.¹³⁸ For example, in *Abdelsayed v. Narumanchi*,¹³⁹ a Southern Connecticut State University Accounting Department professor allegedly

132. See *id.* at 151.

133. See *Hill v. Trs. of Ind. Univ.*, 537 F.2d 248, 252 (7th Cir. 1976). Cf. *Flannery v. Bd. of Trs.*, No. 96-C50148, 1996 U.S. Dist. LEXIS 17049, at *4 (N.D. Ill. Nov. 4, 1996).

134. See *Kalinsky v. State Univ. of N.Y. at Binghamton*, 591 N.Y.S.2d 242 (App. Div. 1992).

135. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 477 (10th Cir. 1978) (allowing a professor to claim that the state college he had worked for had violated his substantive due process rights, and stating, "'Substantive' due process requires only that termination of [a property] interest [such as tenure] not be arbitrary, capricious, or without a rational basis.").

136. See *Yu v. Peterson*, 13 F.3d 1413, 1415 (10th Cir. 1993).

137. See *id.* at 1417.

138. See RESTATEMENT (SECOND) OF TORTS § 581A cmt. a (1977).

139. 668 A.2d 378 (Conn. App. Ct. 1995).

defamed a colleague by writing a memorandum to the members of his department, charging his colleague with plagiarizing the accuser's idea for a new financial analysis course.¹⁴⁰ The accuser requested that the president investigate the matter, but the request backfired. The university's vice president for academic affairs found that the accused had not plagiarized because the idea for the course had not originated with the accuser.¹⁴¹ Thus, the accusation was proved false.

The colleague sued his accuser for defamation, alleging that he had damaged him in his professional capacity by accusing him of plagiarism.¹⁴² As a plaintiff, the state school teacher was deemed a public official for defamation purposes.¹⁴³ Accordingly, he had to prove by clear and convincing evidence that his accuser had acted with actual malice.¹⁴⁴ The court easily found that the defendant had acted with malice because he had known that the accusation was false when he made the accusatory statements.¹⁴⁵ In addition, the record reflected evidence of ill will between the professors, and the defendant had refused to retract his statement.¹⁴⁶ The court further ruled that the plaintiff did not have to prove that his reputation had been injured as a result of the accusation.¹⁴⁷ When defamatory words are actionable per se, injury to the plaintiff's reputation is presumed,¹⁴⁸ and false accusations of plagiarism are per se defamatory under Connecticut law because they are likely to cause injury to one's business and profession.¹⁴⁹

Apart from *Abdelsayed*, most plagiarism defamation suits against universities are unsuccessful because of the defenses available to a university and its personnel. The foremost defense is truth,¹⁵⁰ which is

140. *See id.* at 379.

141. *See id.* at 381.

142. *See id.* at 379.

143. *See id.* at 380.

144. *See id.*

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

145. *See Abdelsayed*, 668 A.2d at 380.

146. *See id.* at 381.

147. *See id.*

148. *See id.* at 382 n.2.

149. *See Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440, 444 (Conn. 1955); *see also* RESTATEMENT (SECOND) OF TORTS § 573 (1977).

150. *See* RESTATEMENT (SECOND) OF TORTS § 581A.

often available because the truth of an allegation of plagiarism has typically already been established by a university committee.¹⁵¹

A second common defense is that a privileged publication to third parties existed.¹⁵² The allegation that plagiarism was committed must not be published excessively, however. In academia, publication is privileged only if its readership is limited to persons who are responsible for ascertaining the truth of the allegation.¹⁵³ Graduate students and professors frequently attempt to base their defamation cases on the argument that publication wrongfully extended to persons in the university who did not have a reason to know about the allegation.

In *Mercer v. Board of Trustees*,¹⁵⁴ the accusation of plagiarism had not been circulated beyond the psychology faculty, of which the accuser was a member.¹⁵⁵ The *Mercer* court upheld the district court's finding that circulation of a statement within an institution or agency does not, by itself, constitute publication, and that in this case the university had not "published" the accusation within the meaning of the law of defamation.¹⁵⁶

Publication within a department is not the outer limit of the qualified privilege of publication. In general, members of the entire faculty are ethically obliged to report incidents of a professor's academic dishonesty to their superiors.¹⁵⁷ After the initial accusation is made, a superior, usually an academic department head or dean, makes a determination as to the accusation's merits, and forwards the accusation on to a higher official, such as the vice-president for academic affairs, who then conducts an investigation.¹⁵⁸ After conducting the investigation, the higher official, in turn, might convene an advisory committee.¹⁵⁹ Publication regarding such an investigation or regarding the details of an advisory committee's findings is likely to be privileged.¹⁶⁰

151. See *Childress v. Clement*, 44 Va. Cir. 169, 173 (1997); see also *Mercer v. Bd. of Trs.*, 17 Fed.Appx. 913, 917 n.1 (10th Cir. 2001).

152. RESTATEMENT (SECOND) OF TORTS § 558. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." *Id.* § 577(1).

153. See generally *Mercer*, 17 Fed.Appx. at 915-16.

154. 17 Fed.Appx. 913 (10th Cir. 2001).

155. See *id.* at 916.

156. See *id.* at 915-16.

157. See *Klinge v. Ithaca Coll.*, 652 N.Y.S.2d 377, 380 (App. Div. 1997).

158. See, e.g., *Newman v. Burgin*, 930 F.2d 955, 959 (1st Cir. 1991) (describing University of Massachusetts at Boston's plagiarism investigation process).

159. See, e.g., *id.*

160. See *Klinge v. Ithaca Coll.*, 634 N.Y.S.2d 1000, 1004 (App. Div. 1997).

If a graduate student, instead of a professor, is accused of plagiarism, a more structured investigative procedure, based on the student honor code, probably exists. In *Childress v. Clement*,¹⁶¹ the Academic Campus Honor Council at Virginia Commonwealth University ("VCU") found a student guilty of plagiarism.¹⁶² The University Appeal Board rejected the student's appeal and recommended to President Eugene P. Trani that he sustain the Honor Council's decision.¹⁶³ President Trani was required by the guidelines of the VCU Honor System and the Rules and Procedures of VCU to publicize penalties that had been assessed by the Council. Such publication was to be reviewed by the Dean of the College of Humanities and Sciences, the Assistant Vice Provost and Dean of Student Affairs, and the Dean of Student Affairs.¹⁶⁴ Trani abided by this requirement and, as a result, the accused student sued the president and two professors, alleging that this final publication was excessive.¹⁶⁵ The court held for the defendants, however, because the president had only allowed persons in the university who had an interest in the allegation to be privy to the publication.¹⁶⁶

A special situation arises in the context of tenure review. During Philip Tacka's tenure evaluation process at Georgetown University, Dr. Jill Trinka, a source outside the University, charged music professor Tacka with plagiarism.¹⁶⁷ Trinka had been retained by the department chair, on behalf of the departmental rank and tenure committee, to provide an external review of Tacka's scholarly work.¹⁶⁸ Trinka accused Tacka of plagiarizing portions of an article he had written by copying certain passages from a book that had been written by a colleague at another university.¹⁶⁹ As a result of Trinka's accusation, both the departmental and university tenure committees voted to deny Tacka tenure.¹⁷⁰ Nevertheless, the Research Integrity Committee exonerated Tacka of plagiarism and Tacka was granted tenure the following year.¹⁷¹

161. 44 Va. Cir. 169 (1997).

162. *See id.* at 169-70 (1997).

163. *See id.* at 170.

164. *See id.*

165. *See id.* at 170-71.

166. *See id.* at 175.

167. *See Tacka v. Georgetown Univ.*, 193 F. Supp. 2d 43, 45 (D.D.C. 2001).

168. *See id.* at 46.

169. *See id.*

170. *See id.*

171. *See id.*

After these events had come to pass, Tacka sued Georgetown, alleging that Elizabeth Prelinger, his department chair, had defamed him by publishing Trinkka's accusation to the rank and tenure committee and others.¹⁷² The court denied Georgetown's motion for summary judgment, in part because there were questions as to whether the publication exceeded the need to evaluate Tacka's qualifications for tenure, and the University's qualified privilege was waived.¹⁷³

Schools sometimes argue that they have an absolute privilege to discuss a student or professor's plagiarism within academia. This argument always fails. In *Feldman v. Bahn*,¹⁷⁴ the plaintiff assistant professor actually used this defense affirmatively, where his teaching contract had not been renewed because he had made an allegation of plagiarism against a colleague.¹⁷⁵ When the Southern Illinois University mathematics professor accused a colleague of plagiarism, the chairman of the department recommended that the accuser be dismissed because the charge of plagiarism was unsubstantiated.¹⁷⁶ After the accuser was dismissed, he sued the university and individual faculty members for damages and reinstatement with tenure.¹⁷⁷ The basis of his suit was that the allegation he had made against his colleague was protected speech under the First Amendment of the Constitution and so it could not serve as grounds for dismissal. The Seventh Circuit court rejected this claim and dismissed the case. The court stated, "[T]here is no right . . . to defame a fellow member of the faculty," and "[n]o one these days believes that penalizing defamation violates the first amendment."¹⁷⁸

C. Breach of Contract

Claims of breach of contract usually arise after professors or students have been dismissed from private universities, which are not covered by the Due Process Clause according to the weight of the authority.¹⁷⁹ Faculty handbooks and honor codes have been held to cre-

172. *See id.* at 45.

173. *Id.* at 46.

174. 12 F.3d 730 (7th Cir. 1993).

175. *See id.* at 731.

176. *See id.*

177. *See id.*

178. *Id.* at 733.

179. *See generally* *Tedeschi v. Wagner Coll.*, 417 N.Y.S.2d 521, 523 (App. Div. 1979) (denying a suspended student's breach of contract action and due process claim); *Swanson v. Wesley Coll., Inc.*, 402 A.2d 401, 403 (Del. Super. Ct. 1979) (finding a student's due process claim to be deficient because of insufficient state action and finding the student had been accorded procedural fairness as required under a contractual relationship).

ate contracts between faculty and universities, and between students and universities.¹⁸⁰ A dismissed student or professor who is unable to successfully assert that he or she was denied adequate notice and a fair hearing may look into the specific rules set forth in a handbook or conduct code to determine if there were instances where the university may have violated provisions of such policy booklets in carrying out its investigation.

The guidelines prescribed in these handbooks usually contain procedures that would parallel the due process requirements imposed on public universities. However, instead of making constitutionally-based arguments to support their legal claims, students and professors argue that universities breached their contracts with them. The outcome of the case might be the same as it would be in cases involving public universities, except that in the context of private school dismissals, the plaintiff (the accused student or professor) must allege that a specific handbook provision was breached instead of that the procedures were constitutionally unfair.

In order for a faculty member to challenge his or her termination, he or she must prove that a contract existed in the first place. Untenured faculty members are on short-term, often year-to-year contracts, and their dismissals can be achieved by universities' mere refusal to offer the members new contracts.¹⁸¹ In *Matikas v. University of Dayton*,¹⁸² the plaintiff, a research scientist without tenure, had plagiarized and was subsequently terminated as an at-will employee.¹⁸³ Under Ohio law, at-will employees can be dismissed for any reason.¹⁸⁴ Apparently unwilling to rely on the sufficiency of the at-will doctrine alone, the university afforded the researcher notice and an opportunity to be heard. It was clear, however, as the court concluded, that the dismissal would have been proper even if the university had not afforded him a due process hearing.¹⁸⁵

In *Klinge v. Ithaca College*,¹⁸⁶ a different court yielded the same result by using different reasoning. In *Klinge*, a New York court found

180. See *McConnell v. Howard Univ.*, 818 F.2d 58, 62-63 (D.C. Cir. 1987) (regarding contractual significance of faculty handbook); *Slaughter v. BYU*, 514 F.2d 622, 626 (10th Cir. 1975) (regarding contractual significance of student honor code).

181. See generally *Heyliger v. State Univ. & Cmty. Coll. Sys.*, 126 F.3d 849, 851 (6th Cir. 1997) (non-tenured professor's contract was not renewed for various reasons).

182. 788 N.E.2d 1108 (Ohio Ct. App. 2003).

183. *Id.* at 1110-11.

184. See *id.* at 1113-14.

185. See *id.* at 1114.

186. 663 N.Y.S.2d 735 (App. Div. 1997).

that the college involved had made an express contract with the plaintiff, a professor it had dismissed, which guaranteed that the professor would be employed by the school for one year.¹⁸⁷ By accepting the contract, the professor had agreed that he could be terminated with essentially no prior notice if he engaged in plagiarism.¹⁸⁸ In exchange for this forgoing of security, the professor obtained the right to have a neutral committee review his termination.¹⁸⁹ The college followed handbook procedures and the court found that it had not breached its contract with the professor.¹⁹⁰ The court noted that “in certain cases involving a flagrant and egregious abuse of position by the professor, immediate dismissal without a prior letter of warning was an authorized course of action.”¹⁹¹

In contrast, in *Tacka v. Georgetown University*,¹⁹² discussed previously, the district court for the District of Columbia ruled for the plaintiff professor.¹⁹³ The professor in that case alleged that Georgetown University had breached its contract with him by failing to follow its faculty handbook. The alleged breach was in connection with an allegation of plagiarism that arose against the professor while his application for tenure was pending.¹⁹⁴ In denying the university’s motion for summary judgment, the court determined that further evidence of Georgetown’s customs and practices was needed.¹⁹⁵ This was because the handbook had not explicitly set forth whether the tenure review process had to be suspended while an allegation of plagiarism was being reviewed by the Research and Integrity Committee.¹⁹⁶

Honor codes are rules of behavior that student bodies write and agree to follow. They are promulgated to all students with the university’s approval and with the understanding that code violations can be reported to a committee of students who can recommend penalties. Whether or not a student can readily rely on an honor code as a contract, as compared to a professor’s ability to rely on a handbook as a contract, is unclear.

187. *See id.* at 736.

188. *See id.* at 737.

189. *See id.*

190. *See id.*

191. *Id.* at 736.

192. 193 F. Supp. 2d 43 (D.D.C. 2001).

193. *Id.* at 54.

194. *See id.* at 45–46.

195. *See id.* at 48.

196. *See id.*

The "contract" created by the honor code could be called an "adhesion contract," since it is not bargained for and is buried in a blizzard of paperwork the student receives upon matriculation.¹⁹⁷ An "adhesion contract" is a contract in which one of the parties has been given little opportunity to speak up about the contract's terms but is nevertheless bound by them. Such contracts arise when one party is in an unequal bargaining position. Courts closely scrutinize adhesion contracts to determine whether the results of enforcement would be unfair. Since the student-university relationship is not one of employee-employer, it is not immediately apparent that university catalogues and honor codes are binding on either students or universities. The argument seems sound that they are adhesion contracts, however, and subject to requirements of good faith and fair dealing.

The argument that the student honor code may be treated as an adhesion contract is illustrated in the case of *Napolitano v. Trustees of Princeton University*.¹⁹⁸ After a senior was charged with plagiarizing a twelve-page term paper, Princeton's Committee on Discipline found that plagiarism had occurred and the university sanctioned the student by withholding her degree for a year.¹⁹⁹ The student reacted by filing an action to compel Princeton to issue her a bachelor of arts degree.²⁰⁰ Relying on contract principles, the student alleged that the university had failed to follow its own procedures and, in any event, it had assessed a penalty that was overly harsh for an otherwise exemplary student.²⁰¹

At an initial hearing regarding the *Napolitano* matter, the court found that Princeton had indeed failed to follow its procedures because, although the student handbook provided that students had the right to cross-examine witnesses, the reviewing committee had not notified her of this right.²⁰² Due to this finding, the court remanded the matter for an additional academic hearing, in which the student would be given the right to cross-examine witnesses.²⁰³

197. See Berger & Berger, *supra* note 1, at 322. *But see* Eisele v. Ayers, 381 N.E.2d 21, 27 (Ill. App. Ct. 1978) (stating that plaintiff students created no cause of action based upon contract of adhesion because university defendant had not taken unfair advantage of plaintiffs).

198. See generally *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982).

199. See *id.* at 280.

200. See *id.*

201. See *id.* at 281.

202. See *id.*

203. See *id.* at 281-82.

After the initial court hearing, the committee and university re-reviewed the allegation per the court's instructions and affirmed their initial decision that the student had plagiarized.²⁰⁴ Next, the court addressed the severity of the penalty. It applied the Supreme Court of New Jersey's good faith and fair dealing standard for cases involving allegations of university conduct regarding breach of contract claims.²⁰⁵ However, the court then abruptly decided that it should cease to intrude into Princeton's affairs, determining that the penalty was not so egregious as to constitute a breach of the parties' agreement as laid out in the student handbook.²⁰⁶ It added that "the proper role of the court is to permit private organizations to govern their own affairs" unless a breach of contract has occurred.²⁰⁷

In a case similar to *Napolitano*, a student at Brandeis University was suspended for plagiarism.²⁰⁸ Upon initiating a suit against the school, the student claimed that, based on the severity of the sanction he received from the school, Brandeis had breached its contract and an implied covenant of good faith and fair dealing with him. He asserted that both of these were implicit in the student handbook.²⁰⁹ The court ruled that Brandeis had conducted the entire disciplinary appeals process with fundamental fairness.²¹⁰ In so ruling, the court almost equated fundamental fairness with the due process requirements of reasonable notice and a fair hearing. Indeed, notice and hearing requirements in private school honor codes reflect a desire to give students the benefits of due process, in terms of how the concept has been defined judicially.²¹¹ Clearly, the trend is to impose traditional notice and hearing obligations on private universities so long as their handbooks contain procedures for determining plagiarism. Without written fairness standards in handbooks, however, fairness is

204. See *id.* at 282.

205. See *id.* at 283.

206. See *id.* at 284.

207. See *id.*

208. See *Morris v. Brandeis Univ.*, No. 00-2161, 2001 Mass. Super. LEXIS 518, at *1 (Aug. 30, 2001).

209. See *id.* at *1.

210. See *id.* at *13-*16.

211. In another case, a court noted with approval that the Gettysburg College Honor Code procedure was "reasonably designed to give one notice and an opportunity to be heard in a meaningful manner," suggesting, just as the *Napolitano* court had, that university-designed safeguards for termination procedures should share a strong affinity to court-made standards of due process. *Smith v. Gettysburg Coll.*, 22 Pa. D. & C.3d 607, 617 (1982).

determined entirely on the basis of the common law contract requirement that parties to a contract must act in good faith.

D. Discrimination

Discrimination is sometimes alleged in a final effort to avoid the onus of plagiarism. Such an allegation usually fails, unless the finding of plagiarism was itself flawed. In *Easley v. University of Michigan Board of Regents*,²¹² the court found that an African American law student who claimed he had been denied a J.D. degree because he was black had in fact turned in a paper in which substantial portions of it had been copied verbatim from several authors.²¹³ The Michigan district court determined that this served as a proper basis for the student's having been denied a degree.²¹⁴ The student sought a new law school trial on the plagiarism charge. He argued that the professor who had adjudicated the administrative matter had been biased and the law school was liable for race discrimination because it had violated his rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution.²¹⁵ The court found the claim "facially incredible"²¹⁶ because the person who presided over the law school trials was Professor Wade McCree, a former judge of the United States Court of Appeals for the Sixth Circuit who was himself a black man.²¹⁷ As a parting remark the court observed, "Easley has attempted to conceal his academic shortcomings in allegations of constitutional violations."²¹⁸

Other plaintiffs who have alleged discrimination have also failed in their attempts to have their sanctions for plagiarism lifted. A student of Indian origin, who had immigrated to and become a citizen of the United States, alleged that his school had discriminated against him in violation of the Civil Rights Act of 1964 when it sanctioned him for plagiarism.²¹⁹ Again, a court affirmed a university's finding of plagiarism. The court here even remarked that the student had been treated leniently in that his original one-semester suspension had been cancelled and his penalty had been reduced to a notation that

212. 632 F. Supp. 1539 (E.D. Mich. 1986).

213. *See id.* at 1540-41.

214. *See id.*

215. *See id.* at 1542-44.

216. *Id.* at 1541 n.3.

217. *See id.*

218. *Id.* at 1546.

219. *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 75 (D.D.C. 2003).

read "Honor Council Violation" on his Georgetown University transcript.²²⁰

In a similar case, a student who was a native of the former British Guiana and a United States citizen filed a discrimination suit under Tennessee law when a Tennessee college did not renew his teaching contract after it found him guilty of plagiarism.²²¹ The court affirmed the school's finding of plagiarism, which had been made by the department chair and the Dean of the College of Business.²²²

As mentioned above, allegations of discrimination are usually unsuccessful unless they are brought in connection with a successful attack on the plagiarism finding. In *Shepard v. Irving*,²²³ a handicapped student argued that an instructor who had denied the student's request for extra time on her final exam had retaliated against her for making the request by giving her an "F" on the exam.²²⁴ The student also alleged that the teacher had concocted a plagiarism charge against her when she complained about her grade.²²⁵ In the ensuing hearing, the school found the student guilty of plagiarism.²²⁶ The school's Honor Committee, which had conducted the hearing, had not allowed the accused to have either her lawyer or her mother represent her during the hearing. The student alleged that this denial of representation violated the Americans with Disabilities Act²²⁷ ("ADA"). The court ruled that she did have a right to a trial on her ADA claim.²²⁸

Litigation surrounding plagiarism typically does not involve issues of whether plagiarism actually occurred or whether an institution's finding of plagiarism was substantively correct. Few courts even allow offenders to challenge institutional findings that they committed plagiarism. Instead, plagiarism usually only becomes a legal matter in terms of issues such as whether investigations included procedural safeguards or whether offenders were wrongfully terminated based on contractual or discriminatory claims. Courts that have restricted plagiarism litigation to such issues have been correct in doing so.

220. *See id.* at 79.

221. *See Heyliger v. State Univ. and Cmty. Coll. Sys.*, 126 F.3d 849 (6th Cir. 1997).

222. *See id.* at 856.

223. 77 Fed.Appx. 615 (4th Cir. 2003).

224. *Id.* at 617.

225. *Id.*

226. *Id.*

227. *See id.* at 623; *see also* 42 U.S.C. § 12132 (2000).

228. *Shepard*, 77 Fed.Appx. at 623.

IV. An Argument for Limited Judicial Review of Plagiarism Findings

The meaning of plagiarism is well understood in academia. Even so, universities take great care to define plagiarism in writing and to warn students and professors that it is a serious form of academic cheating. Some student honor codes offer a brief standard definition (having to do with that plagiarism involves the use of any outside source without proper acknowledgment), while others give elaborate definitions of plagiarism and its meaning in different contexts (as did Princeton University, *supra* Part I.A.).

Considering that the meaning of plagiarism is so well-defined by universities and so well-understood in academia, it would seem inappropriate for a court to review an academic institution's definition; yet, that is exactly what one court did. In *Faulkner v. University of Tennessee*, Dennis Allen Faulkner, a doctoral candidate in the department of engineering science and mechanics, had successfully defended his dissertation and was awarded his doctoral degree only to be accused later of plagiarizing his dissertation by not referencing an earlier work.²²⁹ The faculty voted five-to-two to initiate proceedings to rescind his Ph.D. degree.²³⁰

At the University of Tennessee, revocation proceedings are conducted under Tennessee's Uniform Administrative Procedures Act ("UAPA").²³¹ Guided by the UAPA, an administrative law judge found that the dissertation at issue contained extensive plagiarized material.²³² In reaction to the finding, Faulkner filed an administrative appeal with the Senior Vice President of the university.²³³ The appeal resulted in a thirty-one page "Final Order and Final Agency Decision."²³⁴ But the order was not "final" because Faulkner had filed a petition for review in the chancery court.

When the chancery court affirmed the school's finding, Faulkner filed a notice of appeal with the court of appeals under the UAPA. The court of appeals declared, "[T]his Court does not review fact issues de novo and, therefore, cannot substitute its own judgment for

229. See *Faulkner v. Univ. of Tenn.*, No. 01-A-01-9405-CH-00237, 1994 Tenn. App. LEXIS 651, at *1-*2 (Nov. 16, 1994).

230. See *id.* at *2.

231. See *id.*

232. See *id.* at *2-*3.

233. See *id.* at *3.

234. See *id.*

that of the agency as to the weight of the evidence even when the evidence could support a different result."²³⁵

Having duly recited the constraints on its authority to review administrative charges of plagiarism, the court nevertheless addressed an issue that it probably should have ignored. It reviewed Faulkner's assertion that although his dissertation was in large part copied verbatim, such copying did not constitute plagiarism. The crucial question, the court said, was whether Faulkner's admitted acts constituted plagiarism.²³⁶ By agreeing to address this question, the court was drawn inevitably into a controversy over the meaning of plagiarism, and it would have to choose between Faulkner's definition and the definition in the university's "Guide to the Preparation of Theses and Dissertations" ("Guide").²³⁷

The court first proclaimed that "plagiarism is not an ambiguous word,"²³⁸ and then, somewhat contradictorily, recited definitions of the word from Black's Law Dictionary, Fifth Edition: "The act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same, and passing them off as the product of one's own mind;"²³⁹ and from Webster's Ninth New Collegiate Dictionary: "To steal and pass off (the ideas or words of another) as one's own: use (a created production) without credit-

235. *Id.* at *4. The Administrative Procedures Act describes the narrow scope of review as follows:

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

TENN. CODE ANN. § 4-5-322(h) (2002).

236. *Faulkner*, 1994 Tenn. App. LEXIS 651, at *9.

237. *Id.* at *10.

238. *Id.* at *9.

239. *Id.* (citation omitted).

ing the source—: to commit literary theft: present as new and original an idea or product derived from an existing source.’”²⁴⁰

These were apparently quoted in order to establish a baseline definition upon which the court could build. The court noted that Faulkner had plagiarized according to the Guide’s definition, which read as follows:

In writing a thesis, the student must take care not to plagiarize, either intentionally or inadvertently, the ideas of others. Whatever material is borrowed from another source must be documented, and in no case should one present another’s work as one’s own.²⁴¹

The court proceeded to find that Faulkner’s definition, proffered to the administrative law judge by Dr. Walter Frost, Faulkner’s major faculty advisor, was wrong. The court quoted Dr. Frost’s “peculiar definition of plagiarism”²⁴² as follows:

Plagiarism, in my mind, is where material is taken from the open literature without the writer’s consent or reference to his work. The dictionary says “stolen.” If the individual’s consent is given to use his material, it is no longer plagiarism. Of course, you must acknowledge this permission.²⁴³

The court opined that Frost’s definition would destroy the integrity of the dissertation process by allowing a doctoral candidate to simply obtain his advisor’s permission to copy endlessly from the advisor’s research work without ever bothering to learn the subject.²⁴⁴ It is not clear, however, that the court was correct in dismissing Dr. Frost’s “peculiar definition,” for if Faulkner had copied from Dr. Frost’s research with permission and had acknowledged the permission in his thesis he would not have been copying without attribution. Such conduct might be a form of academic fraud but it would not necessarily be plagiarism. Regardless, the court should not have been concerned with definitions of plagiarism in the first place. Other courts routinely defer to honor code and faculty handbook definitions of plagiarism without discussing the correctness of such definitions.²⁴⁵

When professors challenge their dismissals they seldom ask a court to review the meaning of plagiarism or to decide whether the facts adduced in an academic hearing for a charge of plagiarism meet that definition. Most professors merely challenge the fairness of the

240. *Id.* at *9–*10 (citation omitted).

241. *Id.* at *10.

242. *Id.*

243. *Id.*

244. *Id.* at *10–*11.

245. See *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279, 281 (N.J. Super. Ct. App. Div. 1982).

hearing the school afforded them and, indeed, the great majority of courts limit their reviews to issues of fairness. They acknowledge that judicial intervention in “university” cases is limited because of the special skills and sensitivities managing an academic institution requires. Due to this consideration, courts limit judicial scrutiny regarding university personnel matters to determining whether an institution’s actions were arbitrary or irrational.²⁴⁶ One court, after reviewing the procedures under which a student was found to have plagiarized, simply declared that because the student had been warned about plagiarism and because the school’s Honor Council had properly found him in violation of the honor code, the court was precluded from reviewing the Honor Council and Appeal Board’s findings.²⁴⁷

In contrast, courts such as the *Faulkner* court, which stray from such a “hands-off” policy, do not seem content with merely determining whether an accused professor or student has been afforded adequate notice and an opportunity to be heard by his or her school. These courts do not explicitly say that they are reviewing the evidence de novo, but they nevertheless proceed to perform a detailed analysis of the facts giving rise to the alleged plagiarism.²⁴⁸

In general, the more a court discusses the details of a university’s finding of plagiarism, the more doubtful it becomes that the court is merely enforcing the Fourteenth Amendment’s requirement of adequate notice and a hearing or, in the case of private institutions, the fairness of the proceedings. Courts’ involvement in plagiarism cases should be limited to deciding only two issues: 1) whether the aggrieved party was given an opportunity to present his or her evidence, and 2) whether the evidence before the hearing examiner was minimally sufficient for the university to have found the suspect guilty of plagiarism under the university’s own definition of the offense.

University plagiarism proceedings are quasi-judicial and their results, like administrative decisions of government agencies, include findings of fact. Review of government agencies’ findings is limited to review of procedure. In the same way, review of arbitration decisions

246. See *Klinge v. Ithaca Coll.*, 663 N.Y.S.2d 735, 736–37 (App. Div. 1997); *Tedeschi v. Wagner College*, 404 N.E.2d 1302, 1304 (N.Y. 1980). Cf. *Zellman v. Indep. Sch. Dist.* No. 2758, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999) (noting that judicial intervention in the public school system requires restraint).

247. *Childress v. Clement*, 5 F. Supp. 2d 384, 392 (E.D. Va. 1998).

248. See generally *Ntneh v. Univ. of Tex. at Dallas*, No. 05-99-01165-CV, 2000 Tex. App. LEXIS 5228 (Aug. 7, 2000); *Sanderson v. Univ. of Tenn.*, No. 01-A01-9607-CH-00289, 1997 Tenn. App. LEXIS 825 (Nov. 19, 1997); *Tatum v. Univ. of Tenn.*, 01A01-9707-CH-00326, 1998 Tenn. App. LEXIS 490 (July 29, 1998).

are typically limited to procedural and fairness issues. Review of university findings of plagiarism should similarly be limited to review of procedure. With regard to fact-finding, university hearings on plagiarism, when carried out according to carefully trustee-drafted and promulgated procedures, are arguably as reliable as quasi-judicial government agency proceedings and arbitration hearings. Accordingly, university findings of plagiarism should not be reviewed by courts *de novo*.

Conclusion

Thirty years ago, it would have been difficult to find a case involving academic plagiarism. Plagiarism was still confused with copyright infringement and courts used the terms interchangeably. It is unclear whether the rash of recent cases involving plagiarism is the result of increased plagiarism or simply reflects the general increase in litigation. Plagiarism might have been a severe problem for many years before honor codes and peer review procedures brought the problem to light. The courts, however, now play a role in the review of plagiarism findings that they did not play thirty years ago.

On the one hand, most courts have refrained from addressing the underlying question: did plagiarism really occur? Even the Supreme Court recently exercised restraint in finding that section 43(a) of the Lanham Act does not create a cause of action for plagiarism.²⁴⁹ On the other hand, some courts delve into the controversy more than necessary, as if the subject of plagiarism holds a peculiar fascination for them. They interpret university hearing panels' findings instead of limiting themselves to an examination of the fairness of schools' hearing procedures. The question remains, then, whether the government or the judiciary should become involved in the process of determining the existence of plagiarism. Should the Department of Education promulgate rules on plagiarism and make federal funding for universities contingent upon adoption of them? Should courts attempt to fashion rules for the policing of plagiarism? The answers are "no," because codes of ethics in the teaching, legal, medical, and other professions, promulgated privately, are perfectly capable of independently addressing the problem of plagiarism.

249. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32 (2003). The Lanham Act codified federal trademark law. 15 U.S.C. § 1125 (1998).

Appendix

Chronology: NKU Plagiarism Investigation

Time Frame	Actor	Action	Result
February 6, 2002	TENURED CHAIR ↓	Files Complaint	
February, 2002	DEAN ↓	Reviews Complaint	Appoints Preliminary Investigative Committee
February, 2002	PRELIMINARY INQUIRY COMMITTEE—3 Tenured Faculty Members ↓	Performs Preliminary Investigation	Finds Evidence of Research Misconduct
March–December 2003	AD HOC COMMITTEE—3 Tenured Faculty Members ↓	Performs Ad Hoc Investigation	Make Multiple Findings of Research Misconduct
January, 2003	PROVOST—Chief Academic Officer ↓	Reviews Ad Hoc Committee's Findings	Denies Appeal—Recommends Leave and Termination
April–May, 2003	PEER REVIEW ADVISORY COMMITTEE—5 Tenured Faculty Members ↓	Reviews Provost's Recommendation	Offers Unanimous Support for Leave and Termination for Cause Recommendation
June, 2003	UNIVERSITY PRESIDENT ↓	Receives and Reviews Investigatory Materials	Charges Accused with Neglect of Duty
June–July, 2003	PEER REVIEW HEARING COMMITTEE—5 Tenured Faculty Members ↓	Reviews Investigatory Materials and President's Charge	Offers Unanimous Support for All Actions to Date
August, 2003	UNIVERSITY PRESIDENT ↓	Makes Recommendation to Board of Regents	Recommends Termination for Cause
August, 2003	BOARD OF REGENTS		Terminates Accused

