

# OOPS, I SAID IT AGAIN ... SELF-PLAGIARISM OR TEXT RE-USE: WHEN OR IS IT ACCEPTABLE?<sup>1</sup>

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## SUMMARY

This article looks at the issue of self-plagiarism. Self-plagiarism occurs when an author re-uses work, in another publication, which has already been published. This may be the recycling of an entire article or it may be that the author re-uses text of already published works. Sometimes this is a legal issue because the re-use of already published works may be contrary to copyright law. In other instances the issue may be an ethical one, regarded in the same light as plagiarism. It is not always unlawful or unethical to republish works, but the boundaries of acceptable behaviour are not always easy to establish. This article seeks to establish what constitutes self-plagiarism taking into consideration the concept of plagiarism as well as certain principles of copyright law. The article concludes by suggesting that universities and journals adopt codes of conduct which outline in more detail the boundaries of self-plagiarism.

## 1 INTRODUCTION

It is generally recognized that universities are assessed internationally in terms of their research output and their scholarship.<sup>2</sup> Hence the pressure on academics not only to engage in research but also to ensure that their research is published. This pressure to publish may lead academics to resort to conduct which may be regarded as plagiarism.<sup>3</sup> Plagiarism is universally regarded as a serious academic sin for which there can be severe

<sup>1</sup> This article is based on an oral presentation given at the Law Teachers' Conference, Stellenbosch University, 17-20 January 2011.

<sup>2</sup> See, eg, University of KwaZulu-Natal, "Research Policy Framework" <http://research.ukzn.ac.za/Policies.aspx> (accessed 2010-10-10).

<sup>3</sup> In dealing with an accusation of plagiarism, a Turkish scientist explained that he had resorted to using "beautiful sentences" from other studies on the same subject in his introduction because English was not his mother tongue (Yilmaz "Plagiarism? No We're Just Borrowing Better English" 2007 *Nature* 444 <http://www.nature/449/n7163/full/449658a.html> (accessed 2011-02-16)). He pointed out that non-English speaking scientists needed to write proper introductions to their research in order to get their research noticed. He argued that even though they had used similar introductions, their findings were original. See also Habibzadeh "On Stealing Words and Ideas" 2008 8(3) *Hepatitis Monthly* 171. Habibzadeh from the World Association of Medical Editors (WAME) points out that non-English speaking authors, who do not have strong language skills, may use words or sentences from previously published work because they may not want to sacrifice quality and accuracy.

consequences.<sup>4</sup> To be accused of plagiarism is probably every academic's worst nightmare. As will be discussed below, the boundaries of what constitutes plagiarism are not always easy to draw and now to add to the confusion, is a concept which is being referred to as "self-plagiarism".

On immediate reflection, the term self-plagiarism is an oxymoron. Plagiarism is defined as "taking over the ideas, methods, or written words of another, without acknowledgement and with the intention that they be taken as the work of the deceiver".<sup>5</sup> In other words, the deceiver uses someone else's words and passes them off as his own. So how can it be plagiarism, if one uses one's own words, ideas or results? However, this is a term which is emerging from research more and more frequently and so, instead of simply dismissing it as a absurd concept, it must be explored.<sup>6</sup> It is also important for academics to become familiar with the concept in order to defend themselves effectively should they face an accusation of self-plagiarism.<sup>7</sup> From an editor's perspective understanding the concept is important because such allegations levelled against their authors sometimes result in accusations of sloppiness of the part of editors or the retraction of publications.<sup>8</sup> A more serious problem is that editors may acquire a reputation of recycling old material, and established researchers may then shy away from publishing in their journals.<sup>9</sup>

From the outset it must be said that not all copying is unlawful or unethical, and so an author should not be accused of plagiarism just because he said something that was similar or even the same as something

<sup>4</sup> In November 2010 a high profile professor and deputy dean of the Royal Melbourne Institute of Technology resigned from his position because a colleague reported him for plagiarism. The professor also faces an inquiry to see whether the University should revoke his doctorate. See Moor "High Profile Australian Professor John Bondy Quits After Plagiarism Accusation" *Herald Sun* <http://www.couriermail.com.au/news> (accessed 2011-02-02). In Geyer "Plagiarism and Copyright Infringement: Defining the Common Ground" 2006 69 *THRHR* 573, the author relays the story of three promising Afrikaans writers whose careers were cut short in their infancy because they were accused of plagiarism.

<sup>5</sup> American Association of University Professors (September/October 1989) quoted by Roig "Avoiding Plagiarism, Self-plagiarism, and Other Questionable Writing Practices: A Guide to Ethical Writing" 2006 <http://facpub.stjohns.edu/~roigm/plagiarism/Index.html> (accessed 2010-11-10).

<sup>6</sup> Hexham argues that it is in fact incorrect to assume one cannot plagiarize from oneself (because it entails stealing from oneself) because there are instances in law when one is guilty of stealing from oneself such as embezzlement and insurance fraud (see "The Plague of Plagiarism: Academic Plagiarism Defined" 2005 <http://people.ucalgary.ca/~hexham/content/articles/plague-of-plagiarism.html> (accessed 2011-02-02)). He equates self-plagiarism to the sale of a car where the odometer has been altered. The seller creates the impression that the article for sale is much less used than it really is. In the case of self-plagiarism the author/seller is presenting his ideas as new when in fact they are already second-hand.

<sup>7</sup> In September 2010 a scientist from the E Phillips Saunders College of Business at Rochester Institute of Technology was confused when he found himself facing an accusation of plagiarizing his own work. An institutional committee formed to review his case eventually decided to dismiss the case, but the fact that the scientist had to defend himself against such an accusation must have been very distressing (see Akst "When is Self-plagiarism Ok?" *The Scientist: NewsBlog* <http://www.the-scientist.com/blog/print/57676/> (accessed 2010-10-26)).

<sup>8</sup> See, eg, Mason who points out that editors have a responsibility to discourage plagiarism and to be aware that this may affect the validity of the articles they publish ("Plagiarism in Scientific Journals" 2009 3(1) *The Journal of Infection in Developing Countries* 1 <http://www.jdc.org/index.php/journalarticleviewfile/19749442/46> (accessed 2011-02-09)).

<sup>9</sup> Samuelson "Self-plagiarism or Fair Use" 1994 34 *Communications of the ACM* 22 <http://portal.acm.org/citation.cfm?id=179731> (accessed 2010-11-10).

that was said before. In South Africa the courts have long held that people are entitled to learn from others unless there is some reason why they are restrained from doing so. As Van Dijkhorst pointed out in *Lorimer Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd*,<sup>10</sup> “from the cradle to the grave man imitates his fellow-men in speech and song, habits, fashions and fads”.<sup>11</sup> Samuelson concludes her article by arguing that “we should not forget that re-use of creative material is something humans have been doing for thousands of years and it is not always a bad thing”.<sup>12</sup>

Before someone can be accused of plagiarism there must be something more than just similar words. The author must act dishonestly, well knowing that he is deceiving his readers.<sup>13</sup> Yet there seems to be this notion that the moment an author uses similar phrases or even a certain number of words (such as three, five or seven) which are taken or could perhaps be seen to be taken from another work, a reference must be provided. The failure to provide a reference could lead to an accusation of plagiarism, and now self-plagiarism if the same author is involved.<sup>14</sup> This prospect is quite daunting and could mean that authors struggle to find other words to describe the same thing for fear of being labelled plagiarists. Authors writing in a limited, specialized field may be steeped in a particular language, such as the language of law, and so the re-use of terms and phrases and even short paragraphs may be quite inadvertent or unavoidable.<sup>15</sup> This begs the question: when is it unethical to re-use what was said before without providing a reference? Once this question is answered, the next issue to consider is whether all unethical conduct should be judged at the same level with the severe consequences which follow from being labelled a plagiarist. The purpose of this article is to provide some suggestions as to how these questions should be answered,<sup>16</sup> but, before this can be done, it is necessary to examine certain principles of copyright law as well as the concept of plagiarism. An understanding of these concepts will help to provide meaningful insight into what constitutes self-plagiarism. This article

<sup>10</sup> 1981 3 SA 1129 (T).

<sup>11</sup> *Lorimer Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd supra* 1140C.

<sup>12</sup> Samuelson 1994 34 *Communications of the ACM* 25.

<sup>13</sup> Samuelson 1994 34 *Communications of the ACM* 24; and Geyer 2006 69 *THRHR* 583.

<sup>14</sup> In his article Bouville “Plagiarism: Words and Ideas” 2008 14(3) *Science and Engineering Ethics* 311 gives the example of editors who specify that once a certain number of words from another article are used a reference must be provided.

<sup>15</sup> The word “cryptnesia” refers to a situation where a person experiences an idea (or other memory such as a song) which he honestly believes to be original but which is in fact a hidden memory. He was exposed to that idea some time in the past. Authors such as Lord Byron, Helen Keller and Robert Louis Stevenson are all said to have been victims of cryptnesia which some have interpreted as plagiarism. See Cooke “Cryptnesia – A Memory Best Left Forgotten” <http://www.ezinearticles.com> (accessed 2011-03-03).

<sup>16</sup> I am hoping to stimulate debate in South Africa around this issue because a review of the literature suggests that there is very little written in South Africa which actually examines the true nature of plagiarism (see Geyer 2006 69 *THRHR* 573; and Lehobye “Plagiarism: Misconduct Awareness and Novice Research Within the Cyberworld” 2010 13(3) *PELJ* 494). There are some studies which discuss the scourge of plagiarism especially since the advent of the internet but they do not focus on what actually constitutes plagiarism. Nothing could be found, in South Africa, which deals in any detail with the concept of self-plagiarism. There are some codes of practice or policy documents which make mention of the concept of self-plagiarism but this concept is not explained.

will commence with a discussion of certain basic principles of copyright law and plagiarism and then it will turn to a discussion of self-plagiarism.

Copyright problems, plagiarism and self-plagiarism are issues which are found across all academic disciplines,<sup>17</sup> however, for the purposes of this article, I am particularly concerned about academics in the legal field. For this reason, much of the discussion will focus on the kinds of activities in which legal academics are engaged.<sup>18</sup>

## 2 COPYRIGHT

Copyright law is a creature of statute in South Africa as all copyright is regulated by the Copyright Act.<sup>19</sup> Legal academics write books, articles and conference papers all of which fall under the definition of a literary work in the Act, provided the work is reduced to material form and is original.<sup>20</sup> For the purposes of understanding self-plagiarism there are several important copyright issues which warrant further discussion. These are:

- ownership of copyright in a literary work;
- the meaning of original; and
- the protection of ideas and facts.

### 2.1 Ownership of copyright in a literary work

Ownership of copyright in a particular work is not always as straightforward as it may seem and as copyright is a creature of statute, the owner of copyright in a particular work must be established by referring to the Act. Academics may be surprised to learn that they do not always own copyright in their own words and ideas. It is important to establish who owns copyright

<sup>17</sup> Copyright is a legal concept which is governed by the Copyright Act 98 of 1978 (hereinafter "the Act"). The penalties for copyright infringement are set out in the Act (s 24 (1)). These include damages or royalties, an interdict, the delivery of infringing copies and in the case where the infringement is flagrant, additional damages. Plagiarism on the other hand is an ethical issue and the penalties are academic in nature (see below for further discussion). The concepts are closely related, although not synonymous (see Geyer 2006 69 *THRHR* 573) and an understanding of both are extremely important in an academic environment.

<sup>18</sup> Much of the research considered for this article focused on plagiarism amongst scientists. The studies considered both text and data plagiarism. Data plagiarism is generally regarded as much more serious than text plagiarism especially when the impression is created that the author was responsible for the data because this amounts to falsification of data and creates the impression that more experiments have been conducted in a particular field than is actually the case (see Mason 2009 3(1) *The Journal of Infection in Developing Countries* 1). Most of the research published by lawyers do not involve data, so whilst the published articles on this topic are useful to establish certain general principles, the context in which lawyers and legal academics are working must also be considered. In addition, tools such as Turnitin, which is an electronic text-matching programme used to detect plagiarism (including self-plagiarism) have been created, but these tools must be used with caution. They can never replace a careful consideration of a publication in order to establish whether there has in fact been true plagiarism which involves an element of dishonesty.

<sup>19</sup> A full discussion of copyright principles is beyond the scope of this article so only those that relate specifically to this topic will be discussed. For further reading on copyright law see Dean *Handbook of South African Copyright Law* (as updated from 1987); and Pistorius "Copyright Law" in Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2011) 143.

<sup>20</sup> S 1(1) read with s 2(1) and (2).

in a particular work because it is the owner of copyright who is entitled to copy that work.<sup>21</sup> Making a copy includes the right to publish, adapt or translate the work.<sup>22</sup>

The first owner of copyright in a literary work is usually the author,<sup>23</sup> but the original author may assign his copyright to another. Assignment of copyright must be distinguished from granting a licence. The copyright owner who licenses another to make use of a particular work is merely giving that person permission to use the work whilst retaining ownership of copyright. When an author assigns copyright to another he transfers ownership of copyright in the work to that other person.<sup>24</sup> Authors sometimes assign copyright as part of the publication process.<sup>25</sup> This issue arose in *Galago Publishers v Erasmus*<sup>26</sup> which involved the publication of two books that told the story of the Rhodesian Selous Scouts. The first book consisted of 400 pages of typed manuscript. The second book was a pictorial account of the Selous Scouts and it consisted mainly of pictures and some accompanying text. The court found that the accompanying text was so similar to some of the text in the first book that the author must have written the second book with the first "at his elbow".<sup>27</sup> In fact, the author of the second book was a co-author of the first book, but because he had assigned copyright in the first publication to its publishers, he was in breach of copyright when he published the second book.

The question of ownership of copyright is also important when a number of people make a contribution to the writing of an article, something which happens frequently in an academic environment. The Act defines a work of joint ownership to be a work that "is produced by the collaboration of two or more authors in which the contribution of each is not separable from the

<sup>21</sup> S 6.

<sup>22</sup> Copyright includes the exclusive right to reproduce the work in any manner or form (s 6(a)) or to make an adaptation of the work (s 6(f)).

<sup>23</sup> See definition of an author of a literary work in s 1(1). When a work is produced in the course and scope of one's employment, the owner of copyright is the employer (s 21(1)(d)). See *King v SA Weather Service* 2009 3 SA 13 (SCA). This obviously has serious implications for academics who produce most of their work in the course and scope of their employment. This is an issue worthy of investigation on its own but due to space constraints it cannot be explored. In addition, it seems that universities do not claim ownership of copyright in the books, articles and conference papers which academics produce, or they may have specific policies in place indicating that they will not claim ownership of copyright in these works. See, eg, Pila "Who Owns the Intellectual Property Rights in Academic Work" [http://works.bepress.com/cgi/viewcontent.cgi?author=1019&content=justine\\_pila](http://works.bepress.com/cgi/viewcontent.cgi?author=1019&content=justine_pila) (accessed 2010-12-10). Blanchard suggests that in America "through *de facto* custom and court *dicta*, academics may enjoy a 'teacher exemption' that grants them copyright ownership of publications and course materials" ("The Teacher Exemption Under the Work for Hire Doctrine: Safeguard of Academic Freedom or Vehicle for Academic Free Enterprise" 2010 *Innov High Education* 35:61 <http://www.springerlink.com/contact/21319266g222r730/fulltext.pdf> (accessed 2011-02-04).

<sup>24</sup> As copyright consists of a bundle of rights the author may assign one or some of those rights only whilst retaining the other copyrights. Eg, the author of a book may assign the right to make an adaptation of the work to another who wishes to produce a screen play but he will retain the right to write a sequel.

<sup>25</sup> This problem is well known in the music industry, where young up-and-coming musicians sign away their copyright in their anxiety (or through lack of knowledge) to have their music produced.

<sup>26</sup> 1989 1 SA 276 (A).

<sup>27</sup> 286D.

contribution of the other author or authors".<sup>28</sup> In *Peter-Ross v Ramesar*<sup>29</sup> the court declined to grant an author's request for a declarator order that she be cited as the sole author of an academic article because the respondent had also contributed to the article. So, the court found, the final product was a collaboration between the two scientists. Although the applicant had written the final article, the respondent had reviewed the first draft and had made a number of suggestions. The court held that a contribution must not be trifling and must be more than *de minimis*<sup>30</sup> but it also held that the contributions of co-authors to the final product, "need not be equivalent or of the same kind".<sup>31</sup> An author who then seeks to write another article on the same topic using text from the first article, even if he was responsible for that text, may find that he is in breach of his co-author's copyright if he does so without permission.

## 2.2 The meaning of an original work

Copyright law protects original works,<sup>32</sup> but the word "original" has a special meaning in copyright law. The idea or thought, which is the "father to the deed" does not have to be original or truly inventive,<sup>33</sup> rather there must be original skill, judgment or labour in execution.<sup>34</sup> In *Appleton v Harnischfeger Corporation*<sup>35</sup> the Appellate Division explained this principle as follows:

"Originality in this context does not require that the work should embody a new or inventive thought or should express a thought in a new and inventive form. Originality refers to original skill and labour in execution: it demands that the work should emanate from the author himself and should not be copied. This does not mean that a work will be regarded as original only where it is made without reference to existing subject matter. An author may make use of existing material and yet achieve originality in respect of the work which he produces. In that event the produced work must be more than just a slavish copy: it must in some measure be due to the application of the author's own skill and labour. Precisely how much skill or labour he will need to contribute will depend on the facts of each particular case."<sup>36</sup>

The meaning of original in copyright law is particularly relevant when dealing with legal texts because academics draw on the works of others when analysing, criticizing or even developing a new train of thought in a particular field. The work of a legal academic is seldom something which is completely novel. Legal academics compose works which are compiled from texts which are available to everyone, for example, a textbook may be a compilation of what the law actually is, rather than a discussion of what the law should be. An article will frequently draw on the views of other authors

<sup>28</sup> S 1(1).

<sup>29</sup> 2008 4 SA 168 (C).

<sup>30</sup> The legal maxim is *de minimus non curat lex* or "the law does not concern itself with trivia".

<sup>31</sup> 175J.

<sup>32</sup> See s 2 which states that a work listed there is eligible for copyright, subject to the provisions of the Act, provided it is original.

<sup>33</sup> As per Marais J in *Northern Office Micro Computers v Rosenstein* 1981 4 SA 123 (C).

<sup>34</sup> See also *Sanders Valve Co Ltd v Klep Valves* 1985 1 SA 646 (T) 649E-H; and *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA) 473A-B.

<sup>35</sup> 1995 2 SA 247 (A).

<sup>36</sup> 262C-E.

and even the conclusion may simply endorse the views of another author or a judge, rather than be a suggestion of a completely novel approach to a legal question.<sup>37</sup> This does not mean that these authors are not creating new works. In each case a subjective value judgment will have to be made in order to decide whether the time and effort expended by the author in creating the work produced something that was original.<sup>38</sup> This also means that other authors will be equally free to make use of these other texts in order to create their works and so “knowledge can be built upon knowledge”.<sup>39</sup> The fact that there is some degree of similarity between two works does not necessarily mean that one work has been copied from another.<sup>40</sup> This point must be borne in mind when the focus is on the number of words or short phrases used rather than on the bigger picture painted by the article. It is suggested that this point may be lost if the examiner of an article is relying solely on the results produced by a tool such as Turnitin, rather than on their own critical examination of the article.

### 2.3 The use of ideas and facts

Copyright law only protects works once they have been reduced to material form. Therefore copyright does not protect ideas but rather the material expression of those ideas.<sup>41</sup> In addition there is no copyright over facts. This means that, in terms of copyright law, authors are free to copy the ideas of another author or make use of the same facts, provided they do not copy the material expression used by that author.<sup>42</sup> Once facts or ideas have been set out in a particular way, they become an integral part of that work. Therefore, if an author takes too much information from another or adopts a similar pattern for expressing ideas, or a series of facts, this may amount to

<sup>37</sup> In dealing with the work of the courts, Sachs J pointed out that in “mature supreme courts, legal debate tends to revolve not around the enunciation of new principles, but around expanding or contracting the outer frontiers of the court’s own precedent. Only rarely are there moments of great judicial advance when completely new principles are established” (Sachs *The Strange Alchemy of Life and Law* (2009) 52). In discussing the difficult question of developing the common law for the purpose of s 39(2) of the Constitution of South Africa, 1996, O’Regan J pointed out that “we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common law rule is changed altogether or a new rule is introduced and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule” (*K v Minister of Safety and Security* 2005 6 SA 419 (CC) par 16). Even though the introduction of the Constitution in South Africa in 1996 means that change will happen more quickly (as was pointed out by both O’Regan J and Sachs J) changes generally occur on an incremental basis rather than on a radical basis.

<sup>38</sup> Per Harms JA in *Waylite Diary CC v First National Bank Ltd* 1995 1 SA 645 A 649H-J.

<sup>39</sup> *Baigent & Leigh v Random House* [2006] EWHC719 (Ch) par 168, where the court quoted with approval from *Ravenscroft v Herbert* [1980] RPC 193. This matter involved a dispute where authors had made use of information presented as historical fact. The court pointed out that works dealing with historical facts cannot be judged in the same way that fictional works are judged. Authors cannot claim a monopoly over historical facts and other authors are free to make use of such facts even if it means that certain works are similar in nature, or deal with the same events as others. The same contents can be used, but what must be avoided, is “appropriating the literary labours of the original author” (par 175), that is, how those facts were presented and interpreted.

<sup>40</sup> Pistorius “Infringement of Copyright” in Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2011) 200.

<sup>41</sup> Pistorius 146.

<sup>42</sup> It is necessary, however, to consider the meaning of plagiarism which is discussed below.

infringement of copyright even though the second work is expressed slightly differently. This was highlighted in *Galago Publishers (Pty) Ltd v Erasmus* where the infringing work appeared to be quite different from the original work. The original work consisted mainly of text whilst the infringing book was a large coffee table book with lots of glossy pictures. A close examination of the text revealed that these differences were very superficial and that the infringing book was an abridged version of the first book. The court concluded that:

“*Pictorial Account* (the infringing work) could not have been written without continuous reference to *Top Secret War* and (that) the differences between the two in regard to content and language are mainly due to the fact that *Pictorial Account* was written as an abridgement of *Top Secret War* with, as regards language, a considerable amount of colourable alteration. In producing *Pictorial Account* the author availed himself unlawfully of a great deal of the skill and industry that went into the writing of *Top Secret War*.”<sup>43</sup>

An author is also entitled to make fair use of another’s work.<sup>44</sup> This means that an author can quote directly from another work provided he indicates this through the use of quotation marks and referencing. The amount of quoting that is allowed depends on the circumstances of each case. *Hubbard v Vosper*,<sup>45</sup> involved a book entitled *The Mind Benders* which was a criticism of the philosophy of Scientology. In this case the court allowed the author to quote extensively from the books, letters and bulletins produced by the founder of the Church of Scientology. The court pointed out that it is impossible to define what is “fair dealing” and therefore, each case must be decided on its own merits. The court stated:

“It is a matter of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair ... to take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair.”

Even though it is fair dealing to quote from another work, provided the source is mentioned as well as the name of the author as it appears on the work,<sup>46</sup> caution must be exercised because it may well constitute copyright infringement if the author makes use of substantial quotes, even if he does reference them correctly, because this may exceed the bounds of fair use.

<sup>43</sup> *Galago Publishers (Pty) Ltd v Erasmus supra* 294D-E.

<sup>44</sup> Article 9(2) of the Berne Convention allows member states to permit the reproduction of works in certain special cases provided the reproduction does not unreasonably prejudice the legitimate interests of the owner. (The Berne Convention for the Protection of Artistic and Literary Works of 1889 is an international convention which attempts to set international standards to protect copyright). South African copyright law is similar to British legislation and is based to a large extent on the provisions of the Berne Convention. Legislators, in member states, therefore provided for the fair use or, as in South Africa, the “fair dealing” of copyrighted works in circumstances where that work is needed for private study, research, criticism, review, reporting of current events, judicial proceedings and teaching (s 12).

<sup>45</sup> 1972 2 QB 84.

<sup>46</sup> S 12(1).



### 3 PLAGIARISM

As stated above plagiarism occurs when one person uses the ideas, methods, or written words of another and presents them as his own without acknowledging that someone else was the originator of those ideas, methods or words. From this definition, it can be seen that copyright infringement and plagiarism are closely related. Generally a person who is accused of copyright infringement is also guilty of plagiarism.<sup>47</sup> But sometimes an author may plagiarize without being guilty of copyright infringement. Copyright protects the actual words which an author uses, that is, the material form in which an idea is expressed, but it does not protect the idea behind those words and so other authors are free to express the same idea, provided they do so in their own words. However, plagiarism protects the idea contained in the words and therefore it would be plagiarism to copy an idea, even whilst using different words, without giving credit to the original author of that idea. It is arguably plagiarism to take another's ideas expressed verbally (such as ideas given as feed-back at a conference) and use them without referencing.<sup>48</sup> Plagiarism is an ethical issue, as opposed to a legal issue, and is regarded as an act of academic dishonesty. It has been described as "the worst of bad behaviour" and "academic high treason".<sup>49</sup> The penalties for plagiarism are of an academic nature including, for example, loss of prestige, embarrassment, loss of status, the retraction of an article or academic qualification or disciplinary proceedings.

There is, however, a distinction between plagiarism and merely using the same words as another.<sup>50</sup> Bouville criticizes the term "plagiarism" because it is used as a blanket term to bundle together deeds which may be very different in nature and importance. These deeds are then treated as the same simply because they have the same label.<sup>51</sup> He points out that copying a few sentences which do not contain an original idea is not the same as passing off some else's original ideas as one's own.<sup>52</sup> Using a similar sentence is not plagiarism unless it contains an original idea, and it may not be copyright infringement if it is simply a statement of fact. However, somewhere along the line, the boundaries may be traversed and setting these boundaries is no easy task. Therefore, in order to deal with the problem, some editors resort to setting specific numbers such as using two or three words, four words or seven words without referencing.<sup>53</sup> This is a

<sup>47</sup> Geyer, however, points out that one can be guilty of copyright infringement without being guilty of plagiarism because to be guilty of plagiarism there must be an intention to deceive whilst such an intention is not an element of copyright infringement (see Geyer 2006 69 *THRHR* 593). She argues that it is this intention to deceive which distinguishes the two.

<sup>48</sup> It would not be copyright infringement, because the ideas were given orally, therefore not reduced to material form.

<sup>49</sup> Bouville 2008 14(3) *Science and Engineering Ethics* 311.

<sup>50</sup> Bouville 2008 14(3) *Science and Engineering Ethics* 319.

<sup>51</sup> Bouville 2008 14(3) *Science and Engineering Ethics* 320.

<sup>52</sup> Bouville 2008 14(3) *Science and Engineering Ethics* 311.

<sup>53</sup> See examples given by Bouville 2008 14(3) *Science and Engineering Ethics* 311. See also Clarke "Plagiarism by Academics: More Complex than it seems" 2006 <http://www.rodger.clarke.com.sos.plag0602.html> (accessed 2011-02-08). In a survey conducted in 2004 amongst editors of economics journal 34% felt that using sentences without referencing

dubious practice because there appears to be no rationale for using these figures and instead of focusing on what the alleged plagiarist is actually doing, the accuser focuses merely on the act of writing down words. But, as pointed out by Samuelson and Geyer, the basis of plagiarism is misrepresentation. A plagiarist is someone who sets out to create the impression that he wrote something that was original, well knowing that he did not, and he is relying on the fact that readers will remain ignorant of who the true author is and so he (the plagiarist) will benefit from work which he has not done.<sup>54</sup> It is argued therefore that if someone writes an original contribution, taking into consideration the meaning of "original" as it is defined in the law of copyright, that is, he has contributed time, effort and skill to writing something which makes a contribution to legal knowledge, it is too harsh to label him a plagiarist just because some of the work may resemble something that was written before. Geyer cites the example of a young Afrikaans writer who was accused of plagiarising a short story. But when this story was later analysed it was shown that although there were similarities between the two stories, the texts were different and so the second story could be said to be "wholly new".<sup>55</sup> Sadly, this analysis came too late to save a promising career.

#### 4 SELF-PLAGIARISM

Self-plagiarism is a term which is used when an author uses material from a publication which he has already had published without acknowledging this.<sup>56</sup> Identifying self-plagiarism is often difficult because, as pointed out above, the limited re-use of material is both legally and ethically acceptable. In the case of legal academics it is highly probable that they will be writing and presenting on the same topics or on closely related topics time and time again. Legal academics specialize in limited fields and write for a variety of different publications, so the text maybe altered to suit the audience being addressed, but the essential message remains the same.

In order to understand how academics can be accused of self-plagiarism it is necessary to understand how academics present their research to the outside world. During the course and scope of their employment legal academics will do the following:

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amounted to plagiarism (quoted by Shahabuddin "Plagiarism in Academia" 2009 21(3) *International Journal of Teaching and Learning in Higher Education* 353.

<sup>54</sup> Samuelson 1994 34 *Communications of the ACM* 24; and Geyer 2006 69 *THRHR* 593.

<sup>55</sup> Geyer 2006 69 *THRHR* 585.

<sup>56</sup> Akst in fn 7 above; Berlin "Plagiarism, Salami Slicing, and Lobachevsky" <http://www.springerlink.com/content/0675046555412823/> (accessed 2010-11-10); Bietag and Mahmud "Self-plagiarism or Appropriate Text Re-use" 2009 7 *Journal of Academic Ethics* 193 (published online 9 September 2009 <http://Xa.ying.com/kq/groups/21666630/396218950/nameBietag-%26-Mahmud-2009-self-plagiarism-or-appropriate-textual-reUse.pdf>); Bird and Sivilotti "Self-Plagiarism, Recycling Fraud, and the Intent to Mislead" 2008 4 *Journal of Medical Toxicology* [www.springerlink.com/index/6172hn/44876513m4.pdf](http://www.springerlink.com/index/6172hn/44876513m4.pdf) (accessed 2010-11-10); Clarke "Journal of Self Citation XIX: Self-Plagiarism and Self Citation – A Practical Guide Based on Underlying Principles" 2009 25 *Communications of the Association of Information Systems* <http://aisel.aisnet.org/cais/vol25/iss1/19> (accessed 2010-11-10); Green "Reviewing the Scourge of Self-Plagiarism" 2005 8 *Media Culture Journal* <http://journal.media-culture.org.au/0510/07-green.php>; Samuelson 1994 34 *Communications of the ACM* 22; and Roig in fn 5 above.

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- Present a conference paper which is then published as a journal article.
  - Present two or more similar conference papers.
  - Write on two similar topics, for example, they may have already written an article on a particular topic and then a new case is decided which lends itself to the first article being updated or re-written.
  - Write a similar chapter for two different text books.
  - Write on the same topic for two different publications, one may be a watered down version of the first article.
  - Write an article and then include this as a chapter (or part of a chapter) in a text book.
  - Co-author an article or a text book and then write something similar with another author or on one's own.
  - Write an article for one publication and then translate it into another language for another publication.

From these examples three broad categories of possible problem areas can be established.<sup>57</sup> These include copyright, redundant publications and text recycling.

#### 4 1 Copyright

The first issue an author must settle before he republishes a work in another publication, even if in another form, is that he owns copyright in that work. If copyright has been assigned to another such as a publisher, or if the author co-wrote the article with someone else, he must be careful to obtain permission from the other owners before republishing that work, albeit in a revised form. The example in *Galago Publishers* illustrates this point clearly. It is suggested that any author who co-publishes with other authors should establish from them that they have not published similar articles elsewhere. Anecdotal reports published on the internet suggest that authors have been embarrassed when they have been accused of plagiarism or copyright infringement because one of their co-authors has taken his contribution to a publication from an already published article. Readers do not differentiate between authors when reading an article written by two or more authors and so all the authors will be tarred with the same brush when one author is not scrupulously honest about the work he has produced.

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<sup>57</sup> Roig identifies a fourth category which is referred to as "salami slicing". This occurs when someone divides a single study into a number of different articles when it would be more appropriate to publish this as a single study (see Roig in fn 5 above). This is unacceptable because it means the author gets double credit for the same work and often means that readers are deceived into thinking that more research into a particular problem has been conducted than is actually the case. This is a problem which is well recognized in scientific fields and usually involves data collection and experiments. It is suggested that such a problem is less likely to occur in cases of legal research and so the issue is not dealt with in this article.

## 4 2 Redundant publications

This occurs when an author publishes the same article or a very similar article in a number of different publications. This is also referred to as “double dipping”.<sup>58</sup> Republication is regarded as a “grievous breach of ethics”, unless the author informs the editor of the second publication that he is seeking republication, because, without disclosure, the author appears to be claiming that this is an original work.<sup>59</sup> Permission to republish should also be sought from the first publisher as this may involve copyright as the author may no longer own copyright in his material.

Republication is not always unethical because there may be very good reasons why the article should be published in a number of different journals. For example, a South African author may publish in an overseas journal which is not readily available in South Africa, or may publish in a very specialized journal and it is felt that this article is worthy of publication to a wider audience or different audience. In such circumstances, it is perfectly acceptable to publish the same article in two different journals provided the editors agree to this. What is not acceptable is to change the title and possibly the abstract, leave the basic article the same and try to claim credit for two articles which are essentially the same. It is also suggested that the author should note on his *curriculum vitae* that the articles are the same or very similar.

A more grey area is in the case of conference proceedings. Again there may be very good reasons why a person presents the same paper at different conferences. These are usually attended by different people and it may be important or interesting to get the message across to different audiences. One author suggests that the mere act of presenting the paper requires effort and skill and so it should not be seen as unethical behaviour when a presenter is presenting his paper at a number of different conferences.<sup>60</sup> This is particularly so when the presenter is not simply reading the paper but is presenting it slightly differently each time, and even building on feed-back which he receives from different audiences.

Presenting the same paper at different conferences is more problematic when conference proceedings are published. In order to avoid any problems it is suggested that presenters inform their audiences that they have presented a particular paper before and perhaps give a reason why they feel that it is important to repeat the paper at this particular conference. This could involve avoiding embarrassment when a member of that audience has already heard the paper.<sup>61</sup> Again it should be noted on a *curriculum vitae*

<sup>58</sup> See for example McCormick, “Plagiarism, Lack of Original Thought, Double Dipping and Student Drafts” <http://www.law.fsu.edu/library/database/pdf/plagiarism> (accessed on 2011-02-15).

<sup>59</sup> Clarke 2009 25 *Communications of the Association of Information Systems* <http://aisel.aisnet.org/cais/vol25/iss1/19> (accessed 2010-11-10).

<sup>60</sup> Guest “Double Dipping – Divergence Duty or Dubious Duplication” December 2010 [http://www.eltnews.com/columns/uni\\_files/2010/12/doubledipping\\_divergent\\_dutyo.html](http://www.eltnews.com/columns/uni_files/2010/12/doubledipping_divergent_dutyo.html) (accessed 2011-02-16).

<sup>61</sup> *Ibid.*

that the same or similar paper has been presented at a number of different conferences to avoid the impression that the academic is interested only in padding his *curriculum vitae*.

### 4 3 Text re-use

Text re-use is probably the most problematic area of self-plagiarism and where academics are most likely to encounter criticism. This occurs when text from already published material is re-used in a subsequent article or chapter. In the age of computers it is very easy to simply “cut and paste” a paragraph or two or even whole segments of previously published works. The rationale behind this is that it is already the author’s own work so there is no need to rework the sentences simply to come up with different wording for the sake of providing different wording. Even when an author does not resort to “cutting and pasting”, an author who writes, researches and lectures on a specialized topic may be so used to using certain words and sentences when discussing particular topics, that the words simply emerge during writing without his appreciating that he might have used the virtually identical words before.<sup>62</sup> When an author re-uses text his conduct could be interpreted in a number of different ways. He may intentionally wish to deceive his audience into believing that this is a new work when in fact it simply involves rehashing already published works, it could be academic laziness or it could be perfectly legitimate re-use.<sup>63</sup> In order to avoid an accusation of self-plagiarism it is necessary to establish the following:

- how much text re-use is permissible; and
- can this involve direct re-use without quotation marks or should the text at least to some extent be re-worked?

#### 4 3 1 *The amount of text used from a previous publication*

Authors differ on this point. Some authors suggest that only 10 per cent of previously published text may be re-used,<sup>64</sup> whereas others state that up to 30 per cent is acceptable.<sup>65</sup>

Instead of focusing on the amount of re-used text it is suggested that it is preferable to look at the publication as a whole. It should be quite easy to establish whether this is a new contribution to knowledge or whether it is

<sup>62</sup> This could be an example of cryptnesia or an author may appreciate that he has said it before but as they are his own words he does not feel the need to provide a reference.

<sup>63</sup> See, eg, the case study cited by Scalon “Song from Myself: An Anatomy of Self-Plagiarism” 2007 *Plagiarism: Cross Disciplinary Studies in Plagiarism, Fabrication and Falsification* 1 <http://www.plagiarism.org> (accessed 2011-03-16).

<sup>64</sup> Bietag and Mahmud 2009 7 *Journal of Academic Ethics* 193-205. Bietag and Mahmud conducted a study of authors in the field of social sciences and Humanities. They focused on a random study and used Turnitin. They found that 70 per cent of authors “cut and paste” sections of previously published works. They argued that if more than 10 per cent was re-used text this amounted to self-plagiarism as there would be insufficient original content in the new work.

<sup>65</sup> See discussion by Samuelson 1994 34 *Communications of the ACM* 22; and authors quoted by Bird and Sivilotti 2008 4 *Journal of Medical Toxicology* [www.springerlink.com/index/6172hn/44876513m4.pdf](http://www.springerlink.com/index/6172hn/44876513m4.pdf) (accessed 2010-11-11).

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simply a rehashing of old material in an attempt to mislead readers. Samuelson lists a number of instances when an author is permitted to re-use previous work.<sup>66</sup> Her suggestions include, when:

- the previous work must be restated to lay the foundation for the new contribution;
- new evidence or arguments arise which build on a previous work;
- the work is being presented to different audiences and this is useful or necessary in order to get the message across;
- it is an acceptable practice to republish such when a journal article is incorporated into a book or a conference paper is published;
- the author says something in a particular way because that is how he/she usually speaks or thinks about a particular issue;
- it makes no sense for the author to state the same thing in a different way.

Although, in this final example, an author may be accused of being lazy for not rewording something, it must be accepted that there are a limited number of ways in which an author can summarize a set of principles or the facts of a particular case. The same principles or facts may appear in a number of different articles and it is suggested that it is being very pedantic to expect an author to constantly rethink his own words.

In order to establish the exact boundaries of acceptable text re-use, the Association for Information Systems *Code of Research Conduct* provides useful guidelines. It advises authors that they “should not attempt to build a new article largely from the reworking of (their) previous publications”.<sup>67</sup> However, this advice is subject to the following exception: when an author “reweaves the threads of previous thought to reveal new patterns, perspectives or insights, or seeks to provide a comprehensive summary or ‘state of the art’ report on a particular research stream”. The Code clarifies this further by stating that there must be “a sufficient new contribution”.<sup>68</sup> Hexham points out that academics often develop different aspects of an argument over a period of time in a number of different publications and this may mean that they repeat certain portions of a previous paper. He argues that it is not self-plagiarism if the work develops new insights. But it is self-plagiarism if the “argument, examples, evidence and conclusion remain the same without the development of new ideas or presentation of additional evidence”.<sup>69</sup>

The question remains whether authors should reference that these portions have already been published. Samuelson admits that there are times when she has re-used portions of previously published works without providing references but she does acknowledge that it may be good

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<sup>66</sup> Samuelson 1994 34 *Communications of the ACM* 25.

<sup>67</sup> AIS Code quoted by Clarke 2009 25 *Communications of the Association of Information Systems* 161 <http://aisel.aisnet.org/cais/vol25/iss1/19> (accessed 2010-11-10).

<sup>68</sup> *Ibid.*

<sup>69</sup> Hexham in fn 6 above.

professional conduct to acknowledge that this work has been published before.<sup>70</sup> Clarke suggests that where there is re-use of a substantial portion, it is “unequivocally necessary” for a reference to be provided and that it should be made very clear to reviewers, the editor and the readers which portions have already been published.<sup>71</sup> Bird states that it is necessary to reference when authors use “large portions” from previously published works.<sup>72</sup> Clarke acknowledges that the term “substantial” is vague (as is the word “large”) and that there is a fine line between not referencing properly and referencing one’s own work so as to create the impression that the author is the acknowledged expert in the field. He refers to this as self-patronage.<sup>73</sup> He regards this as equally problematic because there may be more appropriate references.<sup>74</sup>

#### 4.3.2 The use of quotation marks

Again there is no uniform agreement on this point. Some authors suggest that when text re-use is essentially a quote from another article this should be referenced in exactly the same way that an author would reference another author’s work.<sup>75</sup> Therefore, the re-used portion should be in quotation marks. Other authors suggest that this would look clumsy.<sup>76</sup> It is suggested that, if an author is dealing with basic principles of law or the facts of a case, which Roig would probably call technical text, it is not necessary to use quotation marks.<sup>77</sup> However, if the author is presenting what looks like an original idea which he has presented before this should either be re-worded with an appropriate footnote or it should be set in quotation marks with a reference to the original work where his idea was first expounded.

## 5 CONCLUSION

The fact that the practice of re-using one’s own material is also referred to as plagiarism is an indication that this practice must be treated with extreme caution. At the root of the problem is the intention to mislead and to create the impression that the author is more productive than he actually is. However, a lack of intention to mislead may not always be so clear and any allegation of plagiarism is likely to cause serious academic harm. There is therefore a need for universities and journals to develop proper guidelines in codes of practice to provide guidance to authors. Writing guides often simply warn authors not to submit for publication work that has already been

<sup>70</sup> Samuelson 1994 34 *Communications of the ACM* 25.

<sup>71</sup> Clarke 2009 25 *Communications of the Association of Information Systems* 158 <http://aisel.aisnet.org/cais/vol25/iss1/19> (accessed 2010-11-10).

<sup>72</sup> Bird and Sivilotti 2008 4 *Journal of Medical Toxicology* 69 [www.springerlink.com/index/6172hn/44876513m4.pdf](http://www.springerlink.com/index/6172hn/44876513m4.pdf) (accessed 2010-11-11).

<sup>73</sup> Clarke 2009 25 *Communications of the Association of Information Systems* 159 <http://aisel.aisnet.org/cais/vol25/iss1/19> (accessed 2010-11-10).

<sup>74</sup> *Ibid.*

<sup>75</sup> Griffin “Don’t Plagiarise – Even From Yourself!” 1991 89 *Postgraduate Medicine* 15-16, quoted by Bietag and Mahmud 2009 7 *Journal of Academic Ethics* 195.

<sup>76</sup> Samuelson 1994 34 *Communications of the ACM* 25.

<sup>77</sup> Roig in fn 5 above.

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published, but they do not explain in sufficient detail exactly what is appropriate text re-use. Further, many authors are of the view that using their own words, phrases and sentences without providing referencing is unproblematic.<sup>78</sup> It is suggested that guidelines be developed which deal with the following:

- when text re-use becomes copyright infringement or self-plagiarism;
- how much text re-use is permissible;
- when references are necessary;
- the appropriate use of quotation marks.

However, ultimately it should always be borne in mind that a person is only guilty of plagiarism if he has the requisite intention to deceive, and therefore any hint of plagiarism should be carefully considered in order to evaluate the author's intention. Only when he intends to deceive his readers is he truly guilty of plagiarism with its serious academic consequences. Something less than this may not be acceptable, and may constitute some lesser form of unprofessional conduct which may warrant some form of sanction or mentoring.<sup>79</sup> However, it is suggested, that something less than true plagiarism does not warrant the severe consequences of loss of status, qualifications or employment which accompany a finding of plagiarism.

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<sup>78</sup> See research conducted by Bietag and Mahmud 2009 7 *Journal of Academic Ethics* 194.

<sup>79</sup> Geyer suggests that perpetrators of an indiscretion should not be alienated especially when this is at the beginning of a promising career. Rather they should be given an opportunity to vindicate themselves especially if this simply means adding a few inadvertently left-out footnotes or references (Geyer 2006 69 *THRHR* 584).