Plagiarism of Ideas

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In *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985), the Supreme Court stated that “copyright's idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” (internal citation omitted). Additionally, in *Mazer v. Stein*, 347 U.S. 201, 217 (1954), the Supreme Court stated “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”

The verb “appropriate”

+ “Appropriation” due to non-attribution is a plagiarism concept.
  - Passing off the work of another as one’s own.
  - Passing off another’s words.
  - Passing off another’s ideas.

+ “Misappropriation” is an intellectual property concept based in the Uniform Trade Secrets Act. In IP terms, only confidential information can be “misappropriated.”
  - Unpublished research plans or in-progress research.
  - Unpublished scholarship.
  - Unpublished patent disclosures.

+ Failure to attribute a previously published work is plagiarism but not misappropriation.
  - Can there be theft of a previously published idea?
+ Failure to attribute an unpublished work can be both plagiarism and misappropriation. This is a core scenario for “plagiarism of ideas.”
Dear Plagiarist: A Letter to a Peer Reviewer Who Stole and Published Our Manuscript as His Own

http://annals.org/aim/fullarticle/2592773/dear-plagiarist-letter-peer-reviewer-who-stole-published-our-manuscript

“Dr. Doctor,
I am aware that you recently admitted to wrongly publishing, as your own, a scientific research paper that I had submitted to Annals of Internal Medicine. After serving as an external peer reviewer on our manuscript, you published that same manuscript in a different medical journal a few months later. You removed the names of the authors and the research site, replacing them with the names of your coauthors and your institution.”
“It took 5 years from conceptualization of the study to publication of the primary analysis (1). This study was my fellowship project and required a lot of work. It took effort to find the right research team, design the study, raise the funds, get approvals, recruit and create materials for study participants, run the diet classes, conduct the study visits, compile and analyze the study data, and write the initial report. The work was funded by the U.S. government and my academic institution. The secondary analysis that you reviewed for Annals used specialized methods that took my colleagues many years to develop and validate. In all, this body of research represents at least 4000 hours of work. When you published our work as your own (2), you were falsely claiming credit for all of this work and for the expertise gained by doing it.”

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the term “trade secret” means

• “all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes,

• “whether tangible or intangible . . . if—
  • (A) the owner thereof has taken reasonable measures to keep such information secret; and
  • (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

-18 USC 1839
"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

—Uniform Trade Secrets Act
the term “misappropriation” means—

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who—
   (i) used improper means to acquire knowledge of the trade secret;
   (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—
      (I) derived from or through a person who had used improper means to acquire the trade secret;
      (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret;
      (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; . . .

-18 USC 1839
Prospecting

“where the . . . acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found ‘not being readily ascertainable’ so as to qualify for protection” as a trade secret under the Uniform Trade Secrets Act.

*Amoco Product Co. v. Laird* (Indiana Supreme Court 1993)
Claim Jumping

• “Amoco asserts . . . Laird could have duplicated the reserve site information only by considerable expenditure of time, effort, and expense . . .”

• “While some tools leading to Amoco’s site discoveries were easily accessible within the public domain, such as U.S. Geological Survey data and the existence of microwave radar technology, we find that, taken together, the integration of pertinent site information and resultant projections as to potential oil reserves constitutes a unique compilation of information not previously known in the marketplace.”

  -Amoco Product Co. v. Laird (Indiana Supreme Court 1993)
Failure to Credit Originator of Idea

+ Plagiarism due to non-attribution

+ ORI “Plagiarism of Ideas” (https://ori.hhs.gov/plagiarism-4)

  • “Appropriating someone else’s idea (e.g., an explanation, a theory, a conclusion, a hypothesis, a metaphor) in whole or in part, or with superficial modifications without giving credit to its originator.”
  • “any ideas, data, and conclusions borrowed from others” must “be properly acknowledged”
  • Does this mean that unauthorized-but-attributed publication of someone else’s idea is not plagiarism?
Unauthorized Publication as “Theft”

+ Unauthorized publication of someone else’s confidential idea is misappropriation, regardless whether there is proper attribution to the source.

+ ORI: “The theft or misappropriation of intellectual property includes the unauthorized use of ideas or unique methods obtained by a privileged communication, such as a grant or manuscript review.” [https://ori.hhs.gov/ori-policy-plagiarism](https://ori.hhs.gov/ori-policy-plagiarism)
“Structural plagiarism involves paraphrasing another’s work as well as mimicking the original source’s organization, argument, or overall structure without appropriate citation . . . . This type of plagiarism can also be very difficult to detect, since it has more to do with the fundamental ideas being presented than the exact language used to convey them. This type of plagiarism is not uncommon in academic circles where writers or researchers may claim that others have ‘stolen their ideas’.”

+ An invention is only patentable if it is confidential at the time of the patent application.

+ Publication of the invention in a manuscript or patent application turns the invention into “published art” that is available for scholarly reference.

+ A patent restricts “practice of the invention” but does not restrict scholarly access to the published research.

+ Published art cannot be “misappropriated” (in IP law terms) but can be plagiarized (by lack of attribution).
While unpublished, a copyrighted work is a trade secret. Unauthorized publication of it would be misappropriation.

Whether or not previously published:
- Copyright protects expression of the idea but not the idea.
- Plagiarism applies to any unattributed usage of either the idea or the expression of the idea.

Unauthorized, unattributed publication of someone else’s unpublished idea would be misappropriation and plagiarism. It would not be copyright infringement unless it also published the author’s expression of the idea (such as by direct quote or paraphrase).
Right to Publish

Joint authors and joint inventors have a legal right to independently disclose collaborative work, unless they have a contrary agreement with each other.
“Many allegations of plagiarism involve disputes among former collaborators who participated jointly in the development or conduct of a research project, but who subsequently went their separate ways and made independent use of the jointly developed concepts, methods, descriptive language, or other product of the joint effort. The ownership of the intellectual property in many such situations is seldom clear, and the collaborative history among the scientists often supports a presumption of implied consent to use the products of the collaboration by any of the former collaborators. . . . ORI considers many such disputes to be authorship or credit disputes rather than plagiarism.” https://ori.hhs.gov/ori-policy-plagiarism