NOTE

BATTLE OF THE REMEDIES: COPYRIGHT V. PLAGIARISM

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I. INTRODUCTION

The terms "plagiarism" and "copyright" are often used interchangeably when discussing copying. While there is significant overlap, the two topics are different.[1] Plagiarism is a moral or ethical violation, usually involving someone's failure to credit a work to its proper source.[2] Copyright, however, is a legal doctrine with legal remedies.[3] It focuses on unlawful copying without authorization, irrespective of proper attribution.[4]

Nevertheless, this does not mean that plagiarists are free from repercussions. For example, students are often expelled from school, academics and scholars are frequently terminated from their employments or have their articles rescinded, and authors' works are taken out of publication, leading to losses of publishing contracts.[5] Further, the public often shames plagiarists.[6] Therefore, while a copyright infringer may have to pay damages or attorney's fees or possibly face an injunction, a plagiarist is liable for another set of damages. In fact, this disapproval faced by plagiarists may be harsher than copyright's remedies.[7]

If copyright and plagiarism are both aspects of copying, why is one a legal doctrine and the other a moral offense? Largely, this distinction is due to the focus, or lack thereof, on proper attribution.[8] Plagiarism is mostly the failure to credit a work to the appropriate source or the failure to fully indicate the scope of indebtedness.[9] This involves attribution, which is the author's interest in being

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[1] Jonathan Band & Matt Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q. J. 1, 3 (2005).

[2] *Plagiarism*, DICTIONARY.COM, https://www.dictionary.com/browse/plagiarism [https://perma.cc/WJT7-9VWM].

[3] *See generally* 17 U.S.C. §§ 501-505 (2018).

[4] Roberta Kwall, *The Attribution Right in the United States*, 77 WASH. L. REV. 985, 996 (2002) (stating that copyright law affords economic protections).

[5] *See Consequences of Plagiarism*, ITHENTICATE, http://www.ithenticate.com/resources/6-consequences-of-plagiarism [https://perma.cc/T9T8-525X] (listing the most common repercussions of committing plagiarism).

[6] *See* THADIOUS M. DAVIS, NELLA LARSEN NOVELIST OF THE HARLEM RENAISSANCE: A WOMAN'S LIFE UNVEILED 349 (1994). Novelist Nella Larsen was publicly accused of plagiarism, leading to the end of her literary career. *See id*.

[7] Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L. J. 167, 196 (2002). Green uses the term "social stigma" when discussing the criticism and repercussions plagiarists face. *Id*. This note will likewise use the term as well as "social disapproval" for discussing those issues.

[8] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.03 (Matthew Bender Rev. Ed.).

[9] *Plagiarism*, UNIVERSITY OF OXFORD, https://www.ox.ac.uk/students/academic/guidance/skills/plagiarism?wssl=1 [https://perma.cc/V97T-N7VA] .

properly credited as a source of the work.[10] However, copyright does not recognize attribution outside of visual works.[11] Despite attribution's minimal relevance in copyright, there are communities that still require attribution, such as the academic and publishing communities.[12] In communities where attribution is expected, the cost of not adhering to this norm is quite high.[13] The public has formed its own, arguably harsher, response when dealing with a plagiarist.[14] Should copyright respond to this public disapproval by expanding the attribution right accorded to visual works in 17 U.S.C. § 106A, to literary works? Even if copyright recognized attribution outside of a 17 U.S.C. § 106A context, would that recognition have an effect on the social disapproval that plagiarists face?

This Note will ultimately compare plagiarism and copyright remedies, arguing that plagiarism's social or institutional disapproval can be harsher than copyright's legal ramifications in two ways: 1) plagiarism has a personal aspect that is absent from copyright's remedies, and 2) copyright's remedies afford certain abilities to accused infringers that are not available to accused plagiarists, for example the right to defend oneself in the court of law or for a court to provide discretion in its decision. After posing how social disapproval can be harsher than copyright's remedies, this Note will discuss whether copyright should recognize plagiarism to reduce the harshness of social disapproval.

However, there are a number of steps that precede this analysis. This Note begins with a discussion of plagiarism, its beginnings, and how it developed into a strong moral and ethical offense. It then discusses copyright as a legal doctrine. This Note subsequently examines attribution, how attribution serves as a distinction between plagiarism and copyright, and the reasons why it has yet to be fully embraced in copyright law. Then, it observes how attribution is a social norm and why social disapproval is a "remedy" for plagiarism, comparing plagiarism's and copyright's remedies to show how plagiarism norms can be harsher and more effective than copyright. It will then discuss the possibility of the attribution right, as described in 17 U.S.C. § 106A, resolving the discrepancy in social disapproval norms and copyright law.

Further, by examining the attribution right's effect on cases, this Note discusses the significance of expanding the legal notion of attribution to literary works. However, though an expansion of the legal notion of attribution would benefit those whose works are plagiarized, the expansion would not likely affect social disapproval, and would only serve to punish a plagiarist in an additional manner when he or she has already been punished by society. Thus, this Note

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[10] NIMMER & NIMMER, *supra* note 8.

[11] 17 U.S.C. § 106A (2018).

[12] *See* BOSTON UNIVERSITY'S ACADEMIC CONDUCT CODE, https://www.bu.edu/academics/policies/academic-conduct-code/ [https://perma.cc/RL2M-NPWH].

[13] Roland Benabou & Jean Tirole*, Law and Norms* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 17579, 2011); Green, *supra* note 7, at 196; Richard H. McAdams*, The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 366-67 (1997).

[14] *See* THOMAS MALLON, STOLEN WORDS: THE CLASSIC BOOK ON PLAGIARISM 8 (1989).

concludes that copyright law should not respond to plagiarism's social disapproval remedy by expanding the attribution right, and that having a copyright remedy for plagiarism would not decrease the social or institutional disapproval that follows non-attribution.

II. PLAGIARISM

A. Definition of Plagiarism

As explained previously, plagiarism is the use of someone else's work without crediting that someone as the source or not indicating the full scope of indebtedness (such as omissions).[15] For example, imagine that a scholar, Anna, published an academic study and authorized Caleb, another academic, to reproduce her study. While he had authorization, Caleb went on to publish his material without crediting Anna as a source. With this fact pattern, Caleb would have plagiarized Anna's work; however, he would not have infringed upon Anna's copyright because Caleb had authorization to reproduce.[16] However, while it stands as a doctrine of its own, plagiarism is "not…a legal doctrine."[17] Thus, Caleb would not have faced any legal repercussions under copyright law. One could presume that this problem could be resolved with Anna withholding her consent unless Caleb promises to attribute the work to her. Nonetheless, that type of negotiation would not be an actionable matter under copyright law.[18]

Nonetheless, while Caleb may not face any legal ramifications, he does not escape every form of liability. Society has developed its own form of remedy for those who plagiarize another's work.[19] Universities have strict punishments for students and faculty who take credit for work without crediting the source, and authors have faced severe backlash for the same.[20] These examples of social

[15] *Plagiarism*, *supra* note 2; NIMMER & NIMMER, *supra* note 8 (citing Dastar Corp. v. Twentieth Century Fox Film Corp. 539 U.S. 23, 36 (2003)).

[16] 17 U.S.C. § 106 (2018).

[17] Kindergartners Count, Inc. v. Demoulin, 249 F. Supp. 2d 1233, 1251-1252 (D. Kan. 2003) (concerning an alleged owner of copyrights over a children's book and its accompanying teacher's guide suing a publishing company of a competing book, stating plagiarism "is an ethical, not a legal offense and is enforceable by academic authorities, not courts").

[18] Copyright law does not recognize attribution for literary works. Therefore, Anna could possibly find support for such a condition under contract law. *See* 17 U.S.C. § 106A.

[19] NIMMER & NIMMER, *supra* note 8 (stating that although plagiarism is an ethical offense, instead of a legal offense, it "should not be taken to minimize plagiarism's gravity in those domains where it applies").

[20] Dinitia Smith, *Harvard Novelist Says Copying Was Unintentional*, N.Y. TIMES (Apr. 25, 2006), https://www.nytimes.com/2006/04/25/books/harvard-novelist-says-copying-was-unintentional.html [https://perma.cc/N529-DFS5]; BOSTON UNIVERSITY'S ACADEMIC CONDUCT CODE, *supra* note 12; BU SCHOOL OF LAW PLAGIARISM POLICY, https://www.bu.edu/law/current-students/llm-student-resources/plagiarism-policy/ [https://perma.cc/DM8R-PSS5].

and institutional disapproval can be just as effective as legal remedies.[21] Therefore, our Caleb might have been terminated from his employment, had his book discontinued, or faced other repercussions.[22]

B. Plagiarism's Beginnings

Some have traced plagiarism to the first century A.D., when a Roman poet, Martial, used the Latin word *plagiarius* to refer to another poet.[23] However, Martial used the term metaphorically.[24] At the time, a *plagiarius* "was someone who either stole someone else's slave or enslaved a free person."[25] Martial's metaphorical use of *plagiarius* led to the Romans' conception of plagiarism to be literary theft, which adopted the concept of word-for-word copying.[26]

The first complaints by writers that resemble the modern conception of plagiarism begin in the seventeenth century.[27] Judge Richard Posner describes how Shakespeare himself was accused of plagiarism by another writer named Robert Green.[28] Posner states the accusations did not "stick," although it was known that Shakespeare appropriated from other writers.[29] This is important because, during that time, Shakespeare's form of plagiarism, using previous work as a foundation for his own, was approved by society.[30]

Initially, literature involved the "admirable business of imitation," and the notion of following tradition.[31] To be a writer, imitating your predecessor was an understood convention.[32] In fact, "plagiarism didn't become a truly sore point with writers until they thought of writing as their trade."[33] Mallon notes that "plagiarism was more a matter for laughter than litigation."[34] As time passed,

[21] Green, *supra* note 7, at 196 (citing MALLON, *supra* note 14, at xi) ("[A] charge of plagiarism is enough to ruin a career, cast a permanent shadow of disgrace over the offender, or even merit a front-page article in the New York Times.").

[22] *See id*.

[23] RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 50 (2007).

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 51.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 54 (noting that as long the copying improved upon the previous literature, plagiarism was encouraged).

[31] MALLON, *supra* note 14, at 3. Writers would usually use a work that was already in circulation and expand upon or change it. The previous works were enormous sources of inspiration as there was a strong practice of following tradition. *Id*.

[32] *See id*.

[33] *Id*. at 3-4.

[34] *Id*. at 4.

each new generation imitated the previous in its writings.[35] When writing became recognizable as an occupation, the idea of "imitation" became a threat to the potential writer's capital and identity.[36]

During the seventeenth century, the need to "acquire, adapt and acknowledge" original authors grew as did criticizing writers who copied or used another's work without authorization.[37] Writers such as John Dryden were being accused publicly of taking another's works and having to defend themselves, and other writers such as John Milton and Robert Burton called for writers to properly acknowledge the writers from whom they borrow.[38] As this need to credit authors developed, accusations of plagiarism were swiftly followed by public apologies.[39] Thus, plagiarizing became a wrong that writers knew should *not* be committed.

The eighteenth century brought in an era of anti-plagiarism vigilantes and public crusaders.[40] Combatting this rise of vigilance led to authors such as Samuel Johnson publishing works that expressed a more concrete definition of plagiarism.[41] This was an effort to reduce confusion of who actually committed plagiarism so that writers would not needlessly be publicly ridiculed or shamed.[42] During this time, writers were relentless in the pursuit of revealing plagiarists.[43] "[T]he making of something really and truly new" became the standard of the eighteenth century, "and has never since gotten up;" in other words, writings had to be something new.[44] These actions (searching for and confronting those believed to be plagiarists) by writers during the eighteenth century were an early form of plagiarism's social disapproval that persists today.[45]

C. Social Disapproval's Purpose

Why did a strong sense of social disapproval of plagiarism develop? What exactly is the moral wrong behind plagiarizing another work if it is not known as copyright infringement? Copyright law only protects works of authorship,

[35] *Id*.

[36] *Id*. at 4-5.

[37] *Id*. at 7-8.

[38] *Id*.

[39] *Id*.

[40] *Id*. at 10 ("The eighteenth century was hot for attribution.").

[41] *Id*. at 10-12 (stating that Johnson found it credible that two authors could have independently created similar works and that works such as encyclopedias and dictionaries "must nearly be the same"); 3 SAMUEL JOHNSON, NO. 143 THE CRITERIONS OF PLAGIARISM, THE RAMBLER 192 (1751).

[42] MALLON, *supra* note 14, at 10-11.

[43] *Id*. at 18.

[44] *Id*. at 24.

[45] *Id*.

meaning it protects artistic expressions.[46] It does not protect the underlying idea behind these expressions.[47] For example, if Caleb wrote a book about two star-crossed lovers, the literal text of his book is protected. However, the idea of two star-crossed lovers romance would *not* be. Although copyright might not penalize copying another's idea, the public views taking another's idea, work, or argument while failing to credit it as a serious offense.[48] Plagiarism, specifically the idea of taking someone else's work and calling it your own, has been likened to theft, for which society's disapproval is deterring.[49] However, is this strong disapproval justified? Is taking an idea the same as taking the words? The need for intellectual, professional, and academic honesty is a driving force behind the strong disapproval of plagiarism.[50] Thus, society works to deny the plagiarist "the esteem of his peers and the benefits that flow from such esteem, such as academic credit, prestige, and financial reward."[51] Therefore, strong social disapproval instills integrity and decorum into a myriad of fields which lack legal enforcement.

III. COPYRIGHT

A. What is it?

Copyright protection is rooted in the U.S. Constitution.[52] Copyright law protects against the copying of expression and is the "principal means for protecting works of authorship."[53] For example: Anna is an artist who paints portraits; she paints an expressive and artistic portrait of her mother. Caleb, enamored by the realistic and detailed portrait, makes a copy of this portrait without permission, credits Anna as the source, and sells the copy to anyone who will purchase it. Caleb has reproduced and distributed Anna's work without authorization, and

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[46] 17 U.S.C. § 102(a) (2018).

[47] 17 U.S.C. § 102(b).

[48] David Nimmer, *The Moral Imperative Against Academic Plagiarism (without a moral right against reverse passing off)*, 54 DEPAUL L. REV. 1, 67-68 (2004).

[49] Green, *supra* note 7, at 169-70.

[50] Carol Bast & Linda Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U.L. REV. 777, 777 (2008); *see* Cooper J. Strickland, *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession*, N.C. L. REV. 920, 920-21 (2012) (discussing plagiarism and its effects in the legal profession); *see also* Jaime S. Dursht, *Judicial Plagiarism: It may be Fair Use but is it Ethical?*, 18 CARDOZO L. REV. 1253, 1253 (1996) (describing plagiarism and its role in judicial writing).

[51] Green, *supra* note 7, at 196.

[52] U.S. CONST. art. I, § 8, cl. 8; NIMMER & NIMMER, *supra* note 8.

[53] Kindergartners Count, Inc. v. Demoulin, 249 F. Supp. 2d 1233, 1251-52 (D. Kansas 2003); Kwall, *supra* note 4, at 989 (stating that copyright law affords "economic protection"); PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018, VOLUME II: COPYRIGHTS, TRADEMARKS AND STATE IP PROTECTION 492 (2018).

thus has become an infringer.[54] This is an example of copyright, but not plagiarism; while Caleb attributed the work to Anna in his reproduction, he violates copyright law because he still did not have authorization to reproduce and distribute her work.

B. Brief History of Copyright

The Intellectual Property Clause of 1790 grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[55] The Copyright Act of 1976, which is based on the Intellectual Property Clause, went into effect in 1978.[56] The 1976 Act supplanted the Copy Right Act of 1909 as a general revision although it has been modified several times since enactment.[57] The 1976 Act is the authority used for analysis in this note, and does not provide for the attribution right outside of 17 U.S.C. § 106A.

C. Copyright's Structure and Remedies

Copyright law protects "original works of authorships fixed in any tangible medium of expression."[58] It stops short of protecting ideas, processes, discoveries, principles, concepts, methods, systems, or procedures.[59] The text for 17 U.S.C. § 106 is as follows:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

[54] 17 U.S.C. § 106 (2018). This is a very basic example and does not account for the analysis required to determine if infringement has actually occurred. Further, attribution is not part of this section of the Copyright Act. *Id*.

[55] U.S. CONST. art. I, § 8, cl. 8.

[56] 17 U.S.C. § 106.

[57] NIMMER & NIMMER, *supra* note 8.

[58] 17 U.S.C. § 102 (2018).

[59] *Id*. at § 102 (b).

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[60]

Copyright owners whose work has been infringed benefit from civil and criminal legal remedies ranging from injunctions to damages.[61] These remedies reflect copyright's design "to provide an economic remedy when a work is copied, or otherwise used, in an unlawful capacity."[62] However, these remedies and the exclusive rights listed above reflect copyright law's concern with copying, not with giving proper credit.

D. Copyright's Purpose

Congress intended copyright protection to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[63] Thus in *Twentieth Century Music Corp. v. Aiken*, Justice Stewart stated, "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability to literature, music, and the other arts" and that "the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[64]

Simply put, copyright law encourages innovation and enrichment for the public. It goes beyond acknowledging the relationship between a work and its creator.[65] The temporary monopoly given to copyright owners is meant to incentivize "creative activities" and to stimulate the production of works for the public.[66]

IV. LAW AND NORMS

Copyright law does not consider attribution to literary works as relevant to most accusations of infringement.[67] How then does the need to attribute works to their proper authors arise? A look into how the law interacts with social norms provides a useful explanation of how the social disapproval of plagiarism developed.[68] Social norms also provide a way to understand why individuals attribute their work and how social disapproval has developed.

Social norms are "the informal rules that govern behavior in groups and societies."[69] They are a "single instance of [the] various kind[s] of social influences

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[60] 17 U.S.C. § 106.

[61] 17 U.S.C. §§ 502-506 (2018).

[62] Kwall, *supra* note 4, at 996.

[63] U.S. CONST. art. I, § 8, cl. 8.

[64] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[65] Except in certain circumstances not discussed in this note, like work made for hire.

[66] NIMMER & NIMMER, *supra* note 8, at § 1.03(A)(1).

[67] 17 U.S.C. § 106A (2018).

[68] Green, *supra* note 7, at 172.

[69] *Social Norms*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/social-norms/ [https://perma.cc/4MYS-WPXB].

we experience throughout social life."[70] Social norms explore how society shapes individuals' behavior[71] and are distinguishable from legal rules as they are not necessarily obligatory.[72] Furthermore, there is no set way of establishing a set of norms for society.[73] However, scholars suggest that an individual obeys a norm if the benefit of adhering to the norm outweighs the cost of ignoring the norm.[74] For example, McAdams describes a situation where an employee is legally required to disclose his fellow colleague's illegal activities, while social norms would encourage the employee to remain silent and to not "snitch" on his coworkers.[75] In this case, the benefit of camaraderie at work may cause the employee to believe it outweighs the cost of concealing certain activities from the authorities.

So, what do these social norms have to do with the law? The two can be thought to influence each other. There are arguments that social norms serve to sway the law, "the way in which people interact with law is mediated by group life"; and vice versa, "the law . . . plays an important role in expressing and shaping the values of society."[76] Group norms, what this Note refers to as group life, are the "unspoken and often unwritten set of informal rules that govern individual behaviors in a group."[77] Sometimes, the law and social norms reinforce each other by encouraging the same behavior, while at other times they undermine one another by encouraging inconsistent behavior.[78]

Plagiarism's social disapproval seems to fall into the latter category. This is because while copyright focuses on unauthorized copying, generally not considering attribution, plagiarism focuses on non-attribution more than unauthorized copying.[79] Then, what is the connection with attribution being a social norm and where is the inconsistency? Let's apply the cost-benefit analysis theory from earlier, which is when the benefits of obeying a norm outweighs the cost of non-

[70] Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 J. OF THE AM. BAR FOUND. 60, 61 (2017).

[71] Benabou & Tirole, *supra* note 13, at 1; McAdams, *supra* note 13, at 339.

[72] McAdams, *supra* note 13, at 350.

[73] Robert Cooter, *The Legal Construction of Norms: Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1580 (2000).

[74] *Id*. at 1587; Green, *supra* note 7, at 174 (noting that complying with the norm of attribution produces obvious benefits); McAdams, *supra* note 13, at 352.

[75] McAdams, *supra* note 13, at 348.

[76] Benabou & Tirole, *supra* note 13, at 1 (supporting the idea that law influences social norms); Nadler, *supra* note 70 (supporting the idea that group life and social norms influence the law).

[77] *Group Norms*, BUSINESSDICTIONARY, http://www.businessdictionary.com/definition/group-norms.html [https://perma.cc/7HU8-JTZG].

[78] *See* McAdams, *supra* note 13, at 349.

[79] *See* 17 U.S.C. § 106 (2018); POSNER, *supra* note 23, at 33 (stating that plagiarism is distinct from copyright infringement and is more of a "fraudulent copying" instead of "unauthorized copying").

compliance.[80] Caleb is a student at a prominent university where he is encouraged not to plagiarize. While there are no legal repercussions for committing plagiarism, the potential costs of failing the course, expulsion from the university, and wasting the money spent for that semester incentivize Caleb to comply with the social norm. However, an inconsistency exists in that there are no legal repercussions for not crediting the proper source, while the risk of social disapproval simultaneously encourages proper accreditation.[81]

A different theory of how society specifically develops the attribution norm assumes that individuals seek the esteem of their peers "by being recognized for one's originality, creativity, insight, knowledge, and technical skill."[82] This theory poses the concept that these individuals, particularly "writers, artist, and scholars," seek recognition for their works, and attribute sources to their appropriate authors because it "maximizes the author's chances of achieving esteem" for their original contributions with little cost for attributing what is copied to the proper author.[83] Therefore, in communities that strongly recognize the attribution norm, the norm becomes internalized, akin to a personal and moral obligation.[84] As an example, let's imagine that Caleb is now a noted History scholar. In his study on the Civil War, he borrows some analysis from a fellow scholar. Upon publication, Caleb's work is revered by his colleagues. However, when the fellow scholar, from whom Caleb borrowed, sees that Caleb borrowed from his analysis but did not credit him as the source, he publishes a harsh criticism revealing Caleb's plagiarism. Now, Caleb has lost some credit as a scholar and the "esteem" of his colleagues. Caleb lost his prominence in the History scholarly community when he could have simply credited the other scholar and avoided such social disapproval.[85] This example displays how individuals who seek the esteem of their peers avoid breaking from established norms to maintain their reputation and accreditation among them.

Those who support the attribution norm explain that the norm is both persistent and receives special importance in particular communities.[86] Therefore, communities influence social norms, which then affect individual behavior.[87] Additionally, this partly explains why academic and publishing communities

[80] McAdams, *supra* note 13, at 352.

[81] *See generally* 17 U.S.C. § 106A (2018).

[82] Green, *supra* note 7, at 174.

[83] *Id*.

[84] *Id*. at 175.

[85] *See id*.

[86] *See id*.

[87] *See* Nadler, *supra* note 70, at 71.

harshly punish plagiarism, while other communities often ignore it.[88] For example, plagiarism is a flexible and frequent occurrence in the legal community, and the standard for plagiarism varies significantly depending on many factors, including work product, author, and judicial setting.[89] Examining actors in different communities suggests that specific needs and values drives enforcement efforts of plagiarism consequences. In communities where the prestige of an actor is determined by their creativity and original thoughts as an author, attribution (and the threat of plagiarism) enforce social order.[90]

V. THE ATTRIBUTION RIGHT

A. What does it mean to attribute?

Copyright and plagiarism are two separate and distinct doctrines, the former preventing copying and the latter preventing lack of accreditation.[91] What is the distinction? A significant difference between the two doctrines is attribution.[92] Two factors define attribution: the author's right to have his or her name appear in connection with his or her work, and not crediting an author for a work he or she did not create without consent.[93] For example, let's revisit our friends Anna and Caleb. Imagine that Anna had written a wonderful study comparing apples to oranges. Caleb reads the study, and, with authorization, uses it as the basis for his own study that oranges are better than apples. With this authorization, he copies ideas verbatim from her work without crediting her as a source. By failing to credit Anna as the source of the study, he has failed to attribute the work to her even though she gave him authorization to use her study.

Caleb's failure to attribute his apple v. oranges study to Anna is an example of how someone could be found to have committed plagiarism, would not have violated any copyright law. This is because attribution is not a staple of copyright, as there is neither an obligation to credit a source to its rightful author, nor is it infringement if one fails to do so.[94] For literary, musical, dramatic and other

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[88] Green, *supra* note 7, at 197; James D. Peterson & Jennifer L. Gregor, *Attorneys at Work: A Flexible Notion of Plagiarism*, LAW360 (Oct. 7, 2011), https://www.law360.com/articles/271861/attorneys-at-work-a-flexible-notion-of-plagiarism [https://perma.cc/V6QR-DNMP].

[89] Peterson & Gregor, *supra* note 88 (stating that materials like judicial opinions are considered in part of the public domain and that other materials like pleadings or briefs are so concerned with factual matters that even if protected, they would receive thin copyright protection).

[90] *Id*.

[91] Band & Schruers, *supra* note 1, at 3-4.

[92] *Id.* at 4 ("While copyright does not concern itself with non-attribution, non-attribution is the essence of plagiarism.").

[93] NIMMER & NIMMER, *supra* note 8.

[94] *Id*.; *see* 17 U.S.C. § 106 (2018) (attribution not among five enumerated rights of copyright holder).

non-visual art works, copyright imposes no obligation to credit the work to its rightful creator. However, copyright provides a right of attribution narrowly for a subclass of visual works.[95]

B. Overview of the Attribution Right in the U.S.

The attribution right is a moral right, meaning it is one of the "recognized rights" that are "personal to authors."[96] While moral rights are recognized in countries in Continental Europe and elsewhere, they are markedly not a factor in U.S. copyright law outside of 17 U.S.C. § 106A.[97] This is because moral rights conflict with the economic aspects of copyright law and serve to inhibit the public's access to works.[98] Further, copyright law "seeks to vindicate the economic, rather than the personal, rights of authors."[99] Conversely, the author's personal wishes often conflict with the public, who want to implement their own interpretations, changes, and adaptions to the author's work.[100]

C. How Does the Attribution Right function in Copyright Law?

Presently, U.S. copyright law has only recognized the attribution right in the very narrow context provided by 17 U.S.C. § 106A.[101] The attribution right is only extended to a work of visual art, defined as "a painting, drawing, print, or sculpture, existing in a single copy . . . a still photographic image produced for exhibition purposes only."[102] A work including but not limited to a "poster, map, globe, chart, book, magazine, newspaper, periodical, work made for hire," and

[95] A visual work is specifically described as "(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." 17 U.S.C. § 106A (2018). It is specifically *not* "(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication." 17 U.S.C. § 101 (2018).

[96] NIMMER & NIMMER, *supra* note 8, at § 8D.01.

[97] *See* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 10-11 (2014).

[98] *Id*. at 15.

[99] NIMMER, *supra* note 48, at 16.

[100] *Id.* at 16-17.

[101] 17 U.S.C. § 106A. This narrowed regulation is in response to the United States' 1989 recognition of the Berne Convention which regulates foreign copyright interactions. *See* 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01 (Matthew Bender Rev. Ed.).

[102] 17 U.S.C. § 101 (2018).

any work not subject to copyright protection, is explicitly prohibited from receiving this type of protection.[103] 17 U.S.C. § 106A is described as the following:

> "(a) Rights of attribution and integrity. Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art –
>
> (1) shall have the right –
>
> (A) to claim authorship of that work, and
>
> (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
>
> (2) shall have the right to prevent he use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation. . . ."[104]

The attribution right has its own defined scope and duration, different from the other rights prescribed to copyright owners, allowing "the author of a work of visual art" to have "the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner."[105] Thus, the attribution right has a similar purpose to that of plagiarism, allowing the author to have rights in their work that extends beyond protection against copying.

VI. ANALYZING THE REMEDIES

A. Plagiarism

In their respective papers, academics such as Brian L. Frye and Jonathan Band and Matt Schruers study plagiarism's effective norms in different professional settings.[106] Some academics like Frye argue that plagiarism's norms are unnecessary; that if the issues that concern plagiarism mattered copyright law would consider them.[107] However, this is not necessarily true, as social disapproval seems to show that while plagiarism is not a consideration in copyright law, some form of remedy like public shaming is necessary to discourage it. Thus,

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[103] For a more comprehensive list of what is not considered a work of visual art, see *id*.

[104] 17 U.S.C. § 106A(a).

[105] *See* 17 § 106A(b); 17 U.S.C. § 106A(d). This Note will later discuss Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 23 (2003) which will provide a deeper analysis of the ideas raised in this section.

[106] Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133, 133 (2016) (discussing plagiarism norms in an academic and legal setting); Band & Schruers, *supra* note 1, at 1.

[107] Frye, *supra* note 106, at 157 ("It follows that the attribution right created by plagiarism norms is only necessary to prevent unauthorized uses of uncopyrightable elements of a work, such as short phrases, facts, and ideas. But copyright explicitly deems protection of those elements unnecessary and unjustified.").

these issues are of concern in certain communities.[108] In his book, Thomas Mallon describes how numerous authors were discouraged from copying other authors' work after being publicly accused and shamed for the act.[109] These accusations alone can be detrimental to the author's career. There have been several instances where the personal and moral facets of social disapproval have served as effective remedies, effectively deterring authors from this behavior.

i. Nella Larsen and Public Backlash

Nella Larsen's case shows the effect of public shaming once one has been accused of plagiarism. Larsen's writing career virtually ended after being accused of plagiarism, although she never faced a copyright infringement charge and she was not actually punished by the journal who published her short story.

Larsen was a prominent writer during the Harlem Renaissance, known for her semi-autobiographical novels, *Quicksand* and *Passing*.[110] In 1930, Larsen published her short story, *Sanctuary*, in *The Forum*, a popular magazine during the Harlem Renaissance.[111] *Sanctuary* characterizes a brief interaction of solidarity between two African Americans in a racially dichotomized, Southern society.[112] The story garnered much attention because Larsen wrote it in a style that was markedly different from her prior two novels and other short stories.[113] Author George Hutchinson, even stated that Larsen's short story *Sanctuary* was a significant change from her usual writing style as she had not previously written in such a blatant manner about race, nor had she used dialect prominently in her writings.[114]

Soon after publication, rumors began circulating in Harlem's literary communities that Larsen had stolen the idea for the story.[115] Larsen was accused of copying an English writer, Sheila Kaye-Smith, almost verbatim.[116] Kaye-Smith's short story, *Mrs. Adis*, had a similar plot of two people living in extreme poverty and engaging in a moment of solidarity in a dichotomized society.[117] Instead of race, however, the story centered on class differences, which resulted

[108] As mentioned in the Laws and Social Norms section of this note, plagiarism is especially important in academic and other writing communities. *See infra* "Law and Norms."

[109] MALLON, *supra* note 14, at 8.

[110] DAVIS, *supra* note 6, at 1-3.

[111] DAVIS, *supra* note 6, at 347; GEORGE HUTCHINSON, IN SEARCH OF NELLA LARSEN: A BIOGRAPHY OF THE COLOR LINE 343 (2006); CHARLES R. LARSON, NELLA LARSEN, MARITA GOLDEN, THE COMPLETE FICTION OF NELLA LARSEN xvii (2001).

[112] NELLA LARSEN, *Sanctuary*, *in* THE COMPLETE FICTION OF NELLA LARSEN 22-23 (Charles R. Larson ed., 2001).

[113] HUTCHINSON, *supra* note 111, at 343.

[114] *Id*.

[115] DAVIS, *supra* note 6, at 348.

[116] *Id*.; HUTCHINSON, *supra* note 111, at 344.

[117] *Id*.

in the differing dialects in each short story.[118] For example, a passage from Kaye-Smith's *Mrs. Adis* reads:

> "For a moment he made as if he would open the window; then he changed his mind and went to the door instead.
>
> He did not knock, but walked straight in. The woman at the fire turned quickly.
>
> 'What, you, Peter Crouch?' she said. 'I didn't hear you knock.'
>
> 'I didn't knock, ma'am. I didn't want anybody to hear.'
>
> 'How's that?'
>
> 'I'm in trouble.' His hands were shaking a little.
>
> 'What you done?'
>
> 'I shot a man, Mrs. Adis.'
>
> 'You?'
>
> 'Yes, I shot him.'
>
> "You killed him?'
>
> 'I dunno.'"[119]

Larsen's *Sanctuary* reads as follows:

> "He made a gesture as if to tap on the window, but turned away to the door instead. Without knowing he opened it and went in.
>
> The woman's brown gaze was immediately on him, though she did not move. She said, 'You ain't in no hurry, is you, Jim Hammer?' It wasn't, however, entirely a question.
>
> "Ah's in trubble, Mis' Poole,' the man explained, his voice shaking, his fingers twitching.
>
> 'W'at you done done now?'
>
> 'Shot a man, Mis' Poole.'
>
> 'Trufe?' The woman seemed calm. But the word was spat out.
>
> 'Yas'm. Shot 'im.' In the man's tone was something of wonder, as if he himself could not quite believe that he had really done this thing which he affirmed.
>
> 'Daid?'
>
> 'Dunno, Mis' Poole. Dunno.'"[120]

As a result of the plagiarism accusations, Larsen faced harsh criticism from her peers and noticed obvious differences in the ways in which the Harlem literary

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[118] *Id*.

[119] Sheila Kaye-Smith, *Mrs. Adis*, THE CENTURY MAGAZINE, 321-22 (Jan. 1922), http://www.unz.com/print/Century-1922jan-00321 [https://perma.cc/EX6Y].

[120] LARSEN, *supra* note 112, at 22.

circles treated her.[121] Writers such as Harold Jackman circulated letters calling Larsen's credibility into question.[122] Soon, the criticism grew so potent that both Larsen and *The Forum* publicly responded, insisting upon Larsen's credibility and honesty.[123] *The Forum* supported Larsen by printing *The Author's Explanation* in a supplemental issue, providing Larsen the opportunity to defend herself against her accusers.[124] Nonetheless, *Sanctuary*, which she published when she was around the age of forty, was Larsen's final published literary work.[125]

ii. Kaavya Viswanathan and Lost Business Deals

The story of Kaavya Viswanathan shows a different set of repercussions one can face as an author accused of plagiarism. At the age of nineteen, Viswanathan published her first novel, *How Opal Mehta Got Kissed, Got Wild and Got a Life*.[126] She received $500,000 as part of her publishing deal with Little, Brown and Company. While this publication deal came with a significant amount of publicity,[127] it was not all positive as she was accused of plagiarizing two works by Megan McCafferty, *Sloppy Firsts* and *Second Helpings*.[128] The New York Times article notes several similarities between the works.[129] Though she did not copy from McCafferty word-for-word, there are several instances of near identical passages.[130] As an example, Megan McCafferty's *Sloppy Firsts* reads:

"Bridget is my age and lives across the street. For the first twelve years of my life, these qualifications were all I needed in a best friend. But that was before Bridget's braces came off and her boyfriend, Burke, got on, before Hope and I met in our seventh-grade honors classes."[131]

Note the similarities with Kaavya Viswanathan's novel:

"Priscilla was my age and lived two blocks away. For the first fifteen years of my life, those were the only qualifications I needed in a best friend. We had first bonded over our mutual fascination with the abacus in a playgroup for gifted kids. But that was before freshman year, when Priscilla's glasses came off, and the first in a long string of boyfriends go on."[132]

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[121] DAVIS, *supra* note 6, at 349.

[122] *Id*. at 348-49.

[123] *Id*. at 353.

[124] HUTCHINSON, *supra* note 111, at 345-46.

[125] LARSON, *supra* note 111, at xvi –xvii, xix.

[126] Smith, *supra* note 20.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Harvard Student Accused of Plagiarizing Novel*, NATIONAL PUBLIC RADIO (Apr. 2, 2006), https://www.npr.org/templates/story/story.php?storyId=5362379 [https://perma.cc/7UC8-DYPV].

[131] MEGAN MCCAFFERTY, SLOPPY FIRSTS: A NOVEL 7 (2001).

[132] KAAVYA VISWANATHAN, OPAL MEHTA GOT KISSED, GOT WILD, AND GOT A LIFE 14 (2006).

Numerous articles were published about Viswanathan's alleged plagiarism. Little, Brown and Company later revoked its deal with Viswanathan and stopped publishing her book.[133]

iii. Kubilay Kaptan and Retracted Articles

The repercussions that Kubilay Kaptan faced after he was accused of plagiarism by other authors exemplifies society's disapproval of plagiarism in the professional academic setting.[134] Kaptan is an engineer who writes about his research, and has published in several different journals.[135] However, five of his articles were retracted in 2016 and 2017 after his plagiarism was discovered.[136] In fact, several of his articles once offered by various online publications now have a retraction notice to alert readers to Kubilay Kaptan's plagiarism.[137]

B. Copyright

Conversely, the remedies that copyright infringers endure are to an extent predetermined by the copyright statute. Although given legal backing, copyright

[133] POSNER, *supra* note 23, at 5; Jonathan Bailey, *5 Famous Plagiarists: Where are They Now?*, PLAGIARISM TODAY (Aug. 21, 2012), https://www.plagiarismtoday.com/2012/08/21/5-famous-plagiarists-where-are-they-now/ [https://perma.cc/CC2X-TVU2]; David Lat, *Summer Associate of the Day: Kaavya Viswanathan (Aka the Alleged Harvard Plagiarist)*, ABOVE THE LAW (May 13, 2010), https://abovethelaw.com/2010/05/summer-associate-of-the-day-kaavya-viswanathanaka-the-alleged-harvard-plagiarist/ [https://perma.cc/5C54-4ABN].

[134] Victoria Stern, *Plagiarism Costs Author Five Papers in Five Different Journals*, RETRACTION WATCH (June 28, 2017), https://retractionwatch.com/2017/06/28/plagiarism-costs-author-five-papers-five-different-journals/ [https://perma.cc/3R65-6VEW].

[135] *Id*.

[136] *Id*.

[137] *Journal of Refugee Studies*, https://academic.oup.com/jrs/article/30/1/157/3043826 [https://perma.cc/8YX3-Z6R5] (The retraction notice states: "The article entitled "Environmental conflict between internally displaced persons and host communities in Iraq", published online, has been retracted due to evidence of extensive plagiarism. Arguments, data and discussion were reproduced directly from a previously published article: "Environmental conflict between refugees and host communities", published in the Journal of Peace Research, 42(3):329-46. Readers are encouraged to refer to this article instead of the retracted item, which will not now be included in the print version of the Journal of Refugee Studies. We apologise to readers and to the author of the previously published article for this very serious oversight."); *Social Indicators Research*, https://link.springer.com/article/10.1007/s11205-016-1296-3 [https://perma.cc/L92L-UAWF] (stating "The Editor-in-Chief of *Social Indicators Research* retracts this article (Mar 2016) per the Committee on Publication Ethics (COPE) guidelines on plagiarism, due to unattributed use of substantial portions of text from the following article, by Dewilde, Individual and institutional determinants of multidimensional poverty: A European comparison (Social Indicators Research 2008; 86:233–256; Springer, DOI: 10.1007/s11205-007-9106-6). The Editor-in-Chief takes issues of research and publication misconduct seriously in order to preserve the integrity of the academic record. Our apologies are extended to the readers that this issue was not discovered before publication.").

law's remedies are subject to various restraints and discretions that limit the impact upon an infringer.[138] Additionally, an important aspect in copyright cases is that the accused can defend him/herself, for example through the "fair use" doctrine of copyright law.[139] While Larsen was given this opportunity through her magazine, *The Forum*, there is not an established mechanism, like the fair use doctrine, that allows accused plagiarists to defend themselves.[140] The following sections of the copyright statute detail what repercussions an infringer can face in contrast to those suffered by those accused of plagiarism.

i. 17 U.S.C. § 502 – Impact of Injunctions

This section of the copyright act allows courts to temporarily and/or permanently enjoin infringers, "(a) Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[141] In order for a copyright owner to receive a permanent injunction, she must show that she has (1) "suffered an irreparable injury" that (2) "remedies available at law, such as monetary damages are inadequate" to compensate for, (3) that, after "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted, and that (4) "the public interest would not be disserved by a permanent injunction."[142] This standard also applies to preliminary injunctions.[143]

If the infringement is not substantial a court will not issue an injunction.[144] Yet, injunctions remain powerful remedies for a copyright owner because they might ban an infringer from distributing the infringing work, as in *Castle Rock Entertainment v. Carol Rock Publishing Group*.[145] There, the defendants were enjoined from distributing their trivia book based on the plaintiff's show, *Seinfeld*.[146] The book drew from eighty-four of the eighty-six broadcasted episodes of *Seinfeld*, and prominently displayed the show's name on its cover.[147] The defendants lost because their work was quantitatively and qualitatively similar to the show, and they were ordered to stop production of their trivia book.[148] Here, the defendant lost the ability to produce their trivia book, although it was independent work based on the show, *Seinfeld*. Importantly, it was not a copy. This

[138] *See generally* 17 U.S.C. §§ 502-06 (2018).

[139] 17 U.S.C § 107 (2018).

[140] DAVIS, *supra* note 6, at 349.

[141] 17 U.S.C. § 502(a).

[142] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[143] Salinger v. Colting, 607 F.3d 68, 77 (2d Cir. 2010); *see* Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989, 997 (9th Cir. 2011).

[144] Dun v. Lumbermen's Credit Ass'n., 209 U.S. 20, 22 (1908).

[145] Castle Rock Entm't v. Carol Rock Publ'g Group, 150 F.3d 132 (2d Cir. 1998).

[146] *Id*. at 135.

[147] *Id*. at 135-36.

[148] *Id*. at 135, 137-39.

case shows how injunctions can be especially harmful for an infringer who may create something independent from another's work. If found to be an outgrowth, this remedy could potentially prevent someone from creating their own production, that may be inspired by previous works.

ii. 17 U.S.C. § 503 – Impoundment & Its Impact

Section 503 describes the situations where the court orders the impounding of an infringing work, which can include all copies or phonorecords produced.[149] This statute can go so far as to call for the actual destruction "or other reasonable disposition" of the infringing work.[150] This power is limited however, because it is usually given while a suit under the copyright act is pending, meaning that the court orders this to stop the production of an infringing work until a decision is reached.[151] Nonetheless, this is a powerful remedy that favors copyright owners.

However, the court has the discretion to order a remedy pursuant to 17 U.S.C. § 503. Having one's work impounded or destroyed may seem severe; however, one could argue that it is not harsh at all, considering the fact that it relies on the *discretion* of the court.[152] The discretionary nature of the remedy balances out it's severity. For example, imagine Anna has published a short story. Then Caleb, without authorization, makes an almost exact copy with crucial mistakes that reduces the value of Anna's short story, albeit with proper attribution as to avoid plagiarism accusations. Anna receives a preliminary injunction and now seeks an impoundment to get the incorrect books out of circulation until the case is decided. It is at the court's discretion on whether to impound Caleb's work. Social disapproval isn't a legal doctrine where "discretion" can be given towards an accused plagiarist and his or her actions.[153] For example, Kaptan's articles were removed after being accused of plagiarism.[154] While the journals could have exercised discretion, it is not expressly allowed like in this statute. Essentially, articles were removed for nothing more than a plagiarism accusation, while the courts have more leeway.

iii. 17 U.S.C. § 504 – Damages

This section outlines the kinds of damages for which an infringer of copyright is liable to the copyright owner. The statute reads in relevant part:

[149] 17 U.S.C. § 503 (2018).

[150] *Id*.

[151] *Id*.

[152] *See, e.g.*, Beijing Ciwen Film & TV Prod. Co. v. New Tang Dynasty, No. 2:13-CV-05978, 2014 U.S. Dist. LEXIS 199460, at *9 (C.D. Cal. June 11, 2014).

[153] However, the question remains if society could get an accused plagiarist's work destroyed in a parallel sense. *See* Stern, *supra* note 134.

[154] *Id.*

> (a) In general. – Except as otherwise provided by this title, an infringer of copyright is liable for either –
>
> (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
>
> (2) statutory damages, as provided by subsection (c) . . .
>
> (b) Actual Damages and Profits. – The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages . . .[155]
>
> (c) Statutory Damages. –
>
> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just."[156]

"[T]he burden is on [the] Plaintiff in the first instance to establish the causal connection between the actual damages and profits, and the infringement."[157] This connection is determined by the actual damages and additional profits that the plaintiff is able to prove, and the damages award could be substantial, depending on the amount of profits the copyright owner could have received if not for the infringement, or the profits that the defendant did receive because of the infringing use.[158] Further, if the plaintiff's work is registered, he or she could opt for sizeable statutory damages.[159] This copyright remedy is effective in a way that social disapproval of plagiarism is not: while authors like Viswanathan can lose their publishing deals,[160] that is quite different from a requirement to turn over profits and pay damages under court order.

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[155] 17 U.S.C. § 504(a)-(b) (2018). It is important to note that according to the language of the statute, the infringer could possibly keep some of the profits if not attributable to the infringement. This is likely similar to plagiarism. For example, Viswanathan lost her publishing deal, however she did not have to return any profits made from the sales. Bailey, *supra* note 133.

[156] 17 U.S.C. § 504(c).

[157] Motorvations Inc. v. M&M Inc., No. 2:99cv0824, 2001 U.S. Dist. LEXIS 18440, at *15 (D. Utah July 5, 2001).

[158] EMI Entm't World, Inc. v. Karen Records, Inc., 806 F. Supp. 2d 697, 701, 711 (S.D.N.Y. 2011) (awarding $100,000 of lost profits to plaintiff).

[159] Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 987 (9th Cir. 2009) (awarding $25,000 in statutory damages to the plaintiffs).

[160] Bailey, *supra* note 133.

iv. 17 U.S.C. § 505

This section gives the court discretion to "allow the recovery of full costs by or against any party other than the United State or an officer thereof."[161] In this manner the statute allows for the plaintiff's recovery of the defendant's profits if successful on the merits.[162] This discretion also permits the court to extend this award to cover reasonable attorney's fees to the prevailing party.[163] Attorney's fees are usually awarded to either deter copyright infringement for other would-be infringers or to penalize copyright owners who brought a "baseless, frivolous, or unreasonable suit, or one instituted in bad faith."[164] Thus, although courts have sizable discretion to determine these awards, infringers may still have to pay sizable attorney fees, in addition to actual or statutory damages, or an enjoinment.[165] In comparison, writers such as Larsen and Viswanathan lost the potential for future revenue, publishing deals, and the credibility to write other works, but they did *not* have to actually pay any fees.[166]

However, Section 505 provides the accused infringer with the opportunity to recover fees or lost profits.[167] Only copyright law provides this opportunity; it is not available for those accused of plagiarism.[168]

v. 17 U.S.C. § 506

Lastly, the copyright infringer could also face criminal liability.[169] An infringer is criminally liable when he has infringed:

> "for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution, including by electronic means, during any 180-day period . . . or by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution."[170]

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[161] 17 U.S.C. § 505 (2018).

[162] *Id*.

[163] *Id*.

[164] Breffort v. I Had A Ball Co., 271 F. Supp. 623, 627 (S.D.N.Y. 1967).

[165] *See* Silverman v. CBS, Inc., 675 F. Supp. 870, 871 (S.D.N.Y. 1988) (awarding defendants $10,000 in attorney's fees); *see also* Fonar Corp. v. Magnetic Resonance Plus, No. 93 Civ. 2220 (CBM), 1997 U.S. Dist. LEXIS 17108, at *6 (S.D.N.Y. October 28, 1997) (awarding defendants $471,129.51 in attorney's fees).

[166] Davis, *supra* note 6; Bailey, *supra* note 133.

[167] 17 U.S.C. § 505 (2018).

[168] *See generally id*. For clarity, the accused plagiarist's opportunity to recover lost profits or funds could be enjoyed if the academic or publishing institution, or any other institution, decides to do so. However, it is not an opportunity that is written in a statute, like it is for accused infringers. *Id*.

[169] 17 U.S.C. § 506(a)(1) (2018).

[170] *Id.*

An infringer that commits forfeiture, destruction, and restitution for fraudulent copyright notice, fraudulent removal of copyright notice, and false representation is also held liable for criminal offenses.[171] The infringer would be punished subject to 18 U.S.C. § 2319.[172] For example, in *United States v. Liu*, Liu faced up to four years in prison for infringement.[173] Although his sentence was later vacated, Liu's case highlights the potential of criminal liability for copyright infringement, though such penalty does not exist for plagiarism.[174]

C. Policy: Comparing Plagiarism and Copyright

The question remains, which of the two doctrines—copyright and plagiarism—has more effective remedies? Plagiarism has the potential effect of ruining one's career and reputation in their community.[175] However, a copyright infringer may lose the ability to produce work, have to pay substantial amounts in damages, or face criminal liability.[176] Essentially, deciding which is harsher depends on how the comparison is posed: the personal nature of social disapproval on the one hand, and the economic effect imposed by copyright, on the other. Yet, these effects are not mutually exclusive. A copyright infringer can be publicly shamed, and the plagiarist can also face economic effects such as losing a publishing deal. Well then, what could make one remedy harsher than the other?

Copyright litigation is substantially more expensive, and the accused defendant faces a direct economic effect in the form of fees, damages, injunction, and even criminal liability.[177] But then, a plagiarist cannot always travel in the same social circle after plagiarism accusations. Put simply, as copyright is a doctrine geared towards economic values, its remedies also reflect economic incentives to deter unconsented copying in an effort to promote creativity for the public.[178] Further, copyright gives the accused infringer the explicit opportunity to defend himself or herself, unlike plagiarism. Larsen had the opportunity to defend herself, but that is not an automatic and established occurrence.

In contrast to copyright's economic effect, plagiarism deals with attribution in certain communities that seek to enforce it, and social disapproval is more personally felt than copyright's legal repercussions.[179] This personal aspect of social disapproval does more than disapprove of copying or failing to assign proper credit to the source; this personal aspect is society filling in the area of what certain communities want to punish and what the legal community does

[171] 17 U.S.C. § 506(b)-(e).

[172] 18 U.S.C. § 2319 (2018) (punishing infringers with imprisonment or fines).

[173] United States v. Liu, 731 F.3d 982, 987 (9th Cir. 2013).

[174] *Id*. at 998.

[175] DAVIS, *supra* note 6, at 349.

[176] *See, e.g.*, 17 U.S.C. §§ 501-506.

[177] *Id*.

[178] Kwall, *supra* note 4, at 996.

[179] *See* NIMMER & NIMMER, *supra* note 8.

not.[180] Social disapproval can be harsher because it punishes individuals for acts that are not illegal; it chooses to punish for behavior that would otherwise be legal. This is shown in Larsen's ostracization from her literary circles, the retraction of Kaptan's articles, and Viswanathan's publishing deal revocation. None of these remedies were mandated by the law but were instead due to public outcry and shame and resulted in ruined careers and professional reputations. These punishments are harsher because the writer's community, the people the writer chose for his or her most valuable interactions, punish the writer for breaking from the community's established norm.

The harshness of community punishment stems from the strength of this public disapproval.[181] The strength of this disapproval is especially fierce if one adheres to an attribution norm for the purpose of seeking esteem from his or her own peers.[182] Disapproval is harsh because, disapproval "denies [the plagiarist] precisely the social good that he seeks – namely esteem."[183] For example, Larsen was part of the writing community in Harlem.[184] When she was accused of plagiarism, the Harlem writing community denied Larsen the respect and recognition of her peers, thus ending her writing career.[185] Further, there was nothing to limit the backlash Larsen received, despite providing proof that she originally created the short story.[186] Despite providing previous drafts showing how she developed the story in the magazine *The Forum*, Larsen could not combat the accusations and she ultimately failed to publish any future works.[187] Within copyright law, there is the opportunity to offer a defense, to have a day in court and potentially obtain a favorable judgment against infringement accusation.[188] As evidenced by Larsen, accused plagiarists do not get the same opportunity because they face "ostracism from . . . the relevant community."[189]

Overall, while neither of the remedies are mutually exclusive, as social disapproval can have an economic effect and copyright infringement can lead to public shaming, social disapproval is more personal because those who experience it receive it from members of the social communities in which the writer chooses to be part.

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[180] Band & Schruers, *supra* note 1, at 12.

[181] Green, *supra* note 7, at 175.

[182] *Id*.

[183] *Id*. at 175.

[184] DAVIS, *supra* note 6, at 1-3.

[185] LARSON, *supra* note 111, at xviii-xix (describing subsequent "rejections that thwarted her career").

[186] DAVIS, *supra* note 6, at 353.

[187] *Id*.

[188] *See* 17 U.S.C. § 501(b) (2018).

[189] Green, *supra* note 7, at 175.

D. The Attribution Right as a Potential Resolution

What impact would expanding 17 U.S.C. § 106A to include literary works have? This would essentially create a cause of action for plagiarism.[190] Such a cause of action would benefit defendants in a number of cases, outside of the opportunity for the accused to refuse the accusations. This section will first highlight the positives of having this cause of action, and then explore the negatives of that expansion.

One such case is *Wharton v. Columbia Pictures*[191] in which the plaintiff, Wharton, allegedly created an original screenplay entitled "Caught Out There."[192] He submitted the screenplay to the defendants, Columbia Pictures, who rejected it in 1991.[193] However, Wharton alleges that Columbia Pictures' film, "Higher Learning," which was released in 1995, plagiarized his screenplay, by using significant portions of it.[194] Wharton filed suit alleging misrepresentation through the fact that the defendants' movie was not only based on his screenplay, but that they also failed to properly credit him as a source.[195] *Wharton* was removed to federal court, which determined that the claims ultimately accused the defendants of preparing a derivative work, thus preempting the plaintiff's misrepresentation and other state claims under the Fourth Circuits' equivalency test.[196]

What would have happened if an attribution right had existed for this plaintiff? 17 U.S.C. § 106A states that "the author of a work of visual art shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[197] Expanding this to literary works would have given the plaintiff in *Wharton v. Columbia Pictures* the plagiarism cause of action he sought.[198] He would not have needed to file a misrepresentation claim in state court.[199] He would have had the ability to file a copyright infringement claim in federal court, alleging

[190] *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 25 (2003) (declining to expand of § 106A which would create plagiarism cause of action).

[191] Wharton v. Columbia Pictures Indus., 907 F. Supp. 144, 144 (D. MD 1995).

[192] *Id*. at 145.

[193] *Id*.

[194] *Id*. at 145-46.

[195] *Id*.

[196] *Id*. at 145. ("The Fourth Circuit Court of Appeals has interpreted the 'equivalency' test to mean that state law claims involving an act that would infringe rights under the Copyright Act are preempted unless they have elements that are 'qualitatively different.'").

[197] 17 U.S.C. § 106A(a)(1)(A)-(B) (2018).

[198] *See Wharton*, 907 F. Supp. at 144. Although the Court in Dastar stated these kinds of cases are to be avoided. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003).

[199] *See id*. at 145.

that the defendants infringed upon his right to be credited as source, as his screenplay served as a substantial basis for the defendant's film.[200]

Another relevant case is *Garcia v. Google, Inc.*[201] Here, Cindy Lee Garcia, an actress, participated in the film "Innocence of Muslims,"[202] and received death threats after her words were changed in the trailer that aired for the film.[203] Garcia asked Google to remove the trailer, alleging copyright infringement and that her privacy rights, including the right to control her likeness, were violated.[204] The Central District of California denied Garcia's motion for a preliminary injunction, and the Ninth Circuit ultimately affirmed.[205] How would a broader attribution right have affected this decision? Garcia may have been able to claim that she deserves to be credited as a source of the work, thus making it removable upon her request.[206]

Lastly, *Caldwell-Gadson v. Thomson Multimedia, S.A*. is another example of how expanding the attribution right to include literary works might have a positive effect for potential plaintiffs.[207] Here, Ms. Caldwell-Gadon claimed that the defendants used her written materials in their 1997 Inventors Award Ceremony and Banquet and did not attribute those materials to her.[208] The court dismissed her claims relating to plagiarism, and in doing so explained that attribution is not recognized in copyright law and is strictly preempted by the copyright act.[209] An expanded attribution right would have worked in Caldwell-Gadson's favor, allowing her to make this claim in court.

E. The Problem with the Attribution Right as a Solution

While a broader attribution right would benefit many plaintiffs, problems arise from expanding the right beyond its use for visual works. For example, copyright protection offers a limited economic monopoly to creators to serve the public interest in incentivizing and providing them access to the work.[210] However, the attribution right is a moral right, and generally serves to protect the

[200] *Id*.

[201] Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015).

[202] *Id*. at 736.

[203] *Id*. at 737. The film producer edited her performance to support anti-Muslim sentiments. *Id*.

[204] *Id*. at 738.

[205] *Id*. at 747.

[206] *Id*. at 737.

[207] Caldwell-Gadson v. Thomson Multimedia, S.A., No. IP 99-1734-C-T/G, 2001 U.S. Dist. LEXIS 18183 (S.D. Ind. Sept. 18, 2001).

[208] *Id*. at *12-13 (plaintiff sought state law plagiarism and passing off claims in addition to copyright infringement claims).

[209] *Id*. at *32-33.

[210] BALDWIN, *supra* note 97, at 16.

author regardless of any public benefit created.[211] Thus, authors have more control over both their work and how it can be used by others because of the attribution right.[212] In European countries that recognize the attribution right, authors "may decide how their works appear, whether others may make use of them for derivative creations, and if so, under what circumstances."[213] Further, these same authors may "prevent changes they do not like, and . . . can withdraw works they no longer agree with."[214] That is a substantial amount of control given to authors. This right can essentially be perpetual, "prevent[ing] the work from ever falling wholly into the public domain."[215] Thus, recognizing the attribution right could potentially limit the "progress of science and useful arts," going against copyright's purpose of providing a limited economic monopoly.[216] Such a view would have prevented the creation of several works that exist in the U.S. today, like the unapproved derivative work of Alice Randall, *The Wind Done Gone*, based on Margaret Mitchell's *Gone with the Wind*.

Other problems could possibly arise from recognizing the attribution right in copyright law. In *Dastar v. Twentieth Century Fox Film Corp.*, the respondent attempted to create a cause of action for the attribution right using trademark law.[217] In the opinion, Justice Scalia argued that it would not be proper to recognize such a right under trademark law because it would directly conflict with copyright law, stating that a "statutory interpretation that renders another statute superfluous is of course to be avoided."[218] However, Justice Scalia also discussed the problems the attribution right would create generally.[219] He first discussed issues tracing the "line of origin" of the work.[220] He then described how failing to credit the author could lead to possible liability, while crediting an author that implies "sponsorship or approval" could also lead to liability if the author does not want association with the new work.[221] Lastly, Justice Scalia recognized that "creating a cause of action for, in effect, plagiarism . . . would be hard to reconcile with our previous decisions."[222] Authors would have an almost perpetual right to control how their works are perceived by anyone who wishes to create a work connected to theirs, and recognizing the right after two centuries of expressly prohibiting it for literary works would create practical

[211] Kwall, *supra* note 4, at 988.

[212] BALDWIN, *supra* note 97, at 5.

[213] *Id*.

[214] *Id*.

[215] *Id*. at 30.

[216] U.S. Const. Art. 1. § 8, cl. 8; *see* BALDWIN, *supra* note 97, at 16; Kwall, *supra* note 4, at 995.

[217] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 25, 25 (2003).

[218] *Id.* at 35.

[219] *Id*.

[220] *Id.* at 36.

[221] *Id.*

[222] *Id*.

problems for courts and settled law.[223] Nonetheless, the ability to attribute works to their proper authors would be extremely beneficial to some writers. However, what would this expansion mean for those accused of plagiarism? What would be the effect?

From a policy view, should copyright law recognize a cause of action for the attribution right? The accused, if found liable, would be held legally accountable for failing to attribute the work to its proper author.[224] Additionally, the individual would be subject to the social disapproval that results from accusations of plagiarism, like Nella Larsen experienced. Larsen faced harsh criticism from her contemporaries that ultimately ended her career as a writer.[225] If the attribution right was expanded to include literary works, Larson would additionally be subjected to one of the many remedies available in copyright law.[226] Essentially, Larsen could be punished at two different levels for her actions; through copyright law and through public discourse.[227]

Overall, social disapproval can be a stronger remedy than those offered by copyright law. Therefore, enforcing a legal remedy would be wholly unnecessary, and would serve mainly as a punitive purpose that could create new issues for an already established area of law. However, depending on the context of the situation, it could be weaker. As copyright law did not recognize a cause of action for attribution in literary works, the development of certain social norms led to a strong disapproval for non-attribution in certain fields.[228] Specifically, these social norms are "internal regulations" that can govern individuals' behaviors that are not "addressed or described by the law."[229] Plagiarism has its own sufficient remedy recognized in the relevant social groups that rectify the behavior. If this remedy is recognized by copyright law, it would not only serve to punish the plagiarist instead of harmonizing the social disapproval with copyright's remedies, but it could also disrupt the settled body of copyright law.[230]

[223] .. *Id*. at 35-36. "[R]eading § 43(a) of the Lanham Act as creating a cause of action for, in effect, plagiarism – the use of otherwise unprotected works and inventions without attribution – would be hard to reconcile with our previous decisions." *Id*. at 36. Ultimately, the settled law is that copyright does not recognize a cause of action for plagiarism, and using the Lanham Act to circumvent or find a loophole would undermine copyright's settled law. *Id*. at 35-36.

[224] This means the plagiarist would be subject to any of the remedies in 17 U.S.C. §§ 502–506 (2018).

[225] LARSON, *supra* note 111, at xvii.

[226] 17 U.S.C. §§ 502–506 (2018).

[227] However, there is the possibility that a court order could satisfy the public.

[228] Band & Schruers, *supra* note 1, at 12.

[229] *Id*.

[230] *See id*. at 16.

VII. CONCLUSION

Consequently, as copyright law does not recognize the attribution right for literary works, certain communities like schools, scholarly communities, and commercial writing circles have used the attribution social norm to address behaviors they believe fall outside that norm.[231] Currently, there is no legal resolution for plagiarism,[232] yet the relevant communities strongly discourage its members from committing plagiarism by not attributing a work or piece of work to its proper source.[233] These community members attribute because, in the community, the benefits from adhering to the norm outweigh the cost of ignoring it.[234] For example, a student could be expelled or a professor's employment could be terminated.

The attribution social norm has led to strong social disapproval, which can result in less favorable consequences than the legal remedies provided by copyright law. While copyright is focused on the economic aspect of reproducing an authorized copy of someone's work, the social disapproval that is linked to accusations of plagiarism is more personal and informal.[235] Furthermore, most of the remedies offered by copyright law are at the discretion of the court, which can weaken the negative consequences the infringer must face.[236] However, as shown through the circumstances surrounding Viswanathan and Larsen, social disapproval can lead to public humiliation, the rescission of a book deal, and at its most extreme level, the destruction of a writing career.[237] Lastly, while those accused of copyright infringement are afforded the opportunity to defend themselves in court and could potentially defeat the infringement accusation, those accused of plagiarism must often fight the steep, commonly unsuccessful, battle against public disapproval. This struggle was evidenced by Nella Larsen whereby even though she successfully proved her work was an independent, original creation, public disapproval of her alleged action led to her inability to publish another work again.[238] Thus, plagiarism's social disapproval can pose a much harsher consequence than copyright.

Despite the likelihood that social disapproval creates a harsher or more lenient punishment than the legal remedies available for copyright infringement, and the benefits posed from expanding attribution to literary works, the law should not respond to this expansion. Social disapproval is only recognized in the relevant communities. For example, lawyers and judges in the legal system plagiarize often with no repercussions.[239] By contrast, communities such as academics,

[231] 17 U.S.C. § 106A (2018).

[232] 17 U.S.C. § 106.

[233] Green, *supra* note 7, at 174.

[234] McAdams, *supra* note 13.

[235] Kwall, *supra* note 4, at 996.

[236] 17 U.S.C. §§ 502–503, 505 (2018).

[237] LARSON, *supra* note 111, at xvii; Bailey, *supra* note 133; Lat, *supra* note 133.

[238] DAVIS, *supra* note 6, at 353.

[239] Dursht, *supra* note 50, at 1253, 1255 (arguing for a prohibition on plagiarism by judges).

students and writers developed the social norm in response to non-attribution.[240] While there are a significant number of cases where the result would have changed if there was a cause of action for non-attribution, such an acknowledgement would uproot much of copyright law.[241] There could be less access to works, which promotes creative progression, the purpose of copyright law. Essentially, recognizing a cause of action for non-attribution in literary works could go against the very essence of copyright law.

Furthermore, a cause of action for copyright would probably not affect the social disapproval that comes with the attribution norm. For example, Viswanathan and Larsen would probably have faced social disapproval, public humiliation, and more regardless of whether they also faced copyright liability. In a sense, writers like Larsen would have been twice punished for their actions, once by society and the next under the law. A copyright law cause of action for plagiarism would not lessen the effect of society's disapproval of plagiarism. Thus, copyright law should not expand the attribution right to include literary works.

[240] Academic codes provide examples of the norm in action. *See* BOSTON UNIVERSITY'S ACADEMIC CONDUCT CODE, *supra* note 12; BU SCHOOL OF LAW PLAGIARISM POLICY, *supra* note 20.

[241] Dastar Corp. v. Twentieth Century Fox Film Corp. 539 U.S. 23, 36 (2003).