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K.K. DuVivier

University of Denver, kkdvvivier@law.du.edu

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THE SCRIVENER: MODERN LEGAL WRITING

Nothing New Under the Sun¹—Plagiarism in Practice

by K.K. DuVivier

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Cole Porter borrowed his idea for the musical *Kiss Me Kate* from Shakespeare's *The Taming of the Shrew*.² A recent movie, "10 Things I Hate About You,"³ also is based on *The Taming of the Shrew*. In fact, Shakespeare himself may have borrowed *The Taming of the Shrew* from another author's work entitled *The Tamyng of a Shrowe*.⁴ Is all of this borrowing considered plagiarism?

The word "plagiarism" comes from the Latin word "*plagiarius*," meaning kidnapper,⁵ and has been defined as the "purloining of ideas or language from another source."⁶ Some law schools have strict tests: if students borrow a unique phrase of two or three words, a string of seven words or more, or a single idea, these students may be guilty of plagiarism.⁷

Practitioner Borrowing

The legal profession was built on borrowing. One reason legal language is reminiscent of early English is because attorneys repeat wording verbatim, time after time, to avoid inconsistency or variation in interpretations.⁸ Consequently, the concept of plagiarism is more blurred in legal practice than in law school. In practice, borrowing not only is tolerated, but also often encouraged for the sake of consistency and efficiency.

Practitioners frequently borrow legal forms. The Federal Rules of Civil Procedure endorse this practice in Rule 84 and include an Appendix of Forms for practitioners to use in drafting pleadings. Likewise, the Colorado Revised Statutes contain some sample forms approved by the Colorado legislature.⁹ Several practice books also are premised on the expectation that lawyers will borrow their forms—for example, the looseleaf volume of *Colorado Real Estate Forms Practice*,¹⁰ the sixteen-volume set of *Bender's Forms of Discovery*,¹¹ or the twenty-five-volume set of *AmJur Pleading & Practice Forms*.¹² Lawyers frequently pick and choose language from these formbooks and include them in their documents, without attribution to the source.

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.

Filed legal documents become public records, and traditionally have not been considered privately owned intellectual property.¹³ If a rival's form is strong, a good attorney can learn by trying to emulate its better qualities. A New York-based securities class-action law firm is challenging this practice and has sent cease and desist letters to more than a dozen law firms claiming they have unfairly copied language from its complaints.¹⁴

Lawyers frequently borrow ideas as well as the language in forms. Our precedent-based system emphasizes consistency over originality and bases ideas on those of others in the past. If the goal is to convince a court of the merit of an argument, and the idea comes from another court or an influential source, attributing the idea to that source bolsters the argument. However, if the source does not add weight, citing to it actually may distract from the goal of persuading the court. Instead, it may be more effective to build the argument in the same way as the source, without specifically referencing the creator of this particular construction. Is this ethical?

Unethical Borrowing

Plagiarism encompasses more than the simple borrowing of language, ideas, or thoughts of another. It becomes unethical when it "involve[s] an element of deceit"¹⁵ and the borrowers gain from representing another's material as their original work.¹⁶ Law schools attempt to evaluate student work to award grades. Consequently, submitting others' ideas as one's own is deceitful because it distorts the evaluation.



K.K. DuVivier is an Assistant Professor and Director of the Lawyering Process Program at the University of Denver College of Law.

Similarly, courts have sanctioned attorneys when one of the objectives of submitting another's work was deception or financial gain. In Colorado, a federal district court declared that attorneys might be violating ethical rules when they ghostwrite documents for *pro se* litigants who then submit them as their own work.¹⁷

Just last year, the Iowa Supreme Court suspended an attorney who borrowed, verbatim, eighteen pages of his brief from a treatise.¹⁸ The court found the attorney's lack of "any independent labor or thought in the legal argument"¹⁹ troublesome. What troubled the court more, however, was the attorney's intentional deception: he requested attorney fees and submitted eighty hours of his time for preparing the brief, which was borrowed word-for-word from the treatise.

The court concluded that by "knowingly submit[ting] a fee application to the court and thereby attempt[ing] to misrepresent the amount of time [he] spent working on a case, [the attorney had] committed serious ethical violations."²⁰ Consequently, that attorney's borrowing seemed to involve both elements of deceit and personal financial gain.

The efforts of a New York securities law firm to stop infringement of its complaints are based on a similar rationale of stopping deceit and financial gain. The firm's objection is not only that other firms are copying its complaints verbatim, but also that those firms are posting the material on the Internet and trying "to defraud potential class members into thinking this is their work product and that they have the legal expertise to handle these kinds of cases."²¹

Legitimate Borrowing

In contrast, there is no reason to sanction attorneys who borrow language or ideas in developing a form or an argument for the benefit of others. It is efficient for attorneys to use formbooks or other sources as a starting point. These attorneys are then responsible for understanding the source in the context of the client's situation and customizing the form or argument accordingly. The client has nothing to gain from paying an attorney to start from scratch with each new document. By using these sources, attorneys can pass on the time savings to clients.

Likewise, if a court is more interested in how an argument is constructed than which secondary author thought of that formulation, there is no reason to take up valuable space in a brief to cite every secondary source. However, using verbatim quotes of multiple pages from a source is not advisable because long quotations create a distracting shift of tone, and readers tend to skip or skim them.²² A better course is to selectively quote and cite to key sources that add to the weight of the argument and then paraphrase and rework less significant sources. Authors of some secondary pieces may lose a bit of fame, but generally the focus of a brief is not on the brilliance of its author. Instead, the objective is for the court to achieve a fair result for the litigants based on the best legal reasoning available.

Conclusion

The legal profession was built on borrowing, and to the extent it forwards the goals of the court and saves clients money, there is no reason to discourage it. Shakespeare gained fame by borrowing, but his primary goal was to entertain. Similarly,

attorneys may borrow when their primary goals are to develop thoughtful and comprehensive arguments. If sharing ideas is for the gain of the legal profession, rather than for personal gain, borrowing can promote not deceit, but enlightenment.

NOTES

1. *Ecclesiastes* 1:9.
2. Cole Porter, *Kiss Me Kate*. Porter hints at his source in the musical by casting his characters as actors in Shakespeare's play and using a quote from Shakespeare as his title. See Shakespeare, *The Taming of the Shrew*, Act V, Scene II, l.180.
3. Touchstone Pictures, *10 Things I Hate About You* (March 31, 1999) (Writers: Karen McKullah Lutz and Kirsten Smith; Director: Gil Junger). The movie also suggests its source by using the names of some of Shakespeare's characters, such as Katarina and Bianca.
4. Harrison, *Shakespeare: The Complete Works* 328 (New York, NY: Harcourt, Brace & World, Inc., 1968).
5. Silverman, "It's a Bird, It's a Plane, It's Plagiarism Buster," *Newsweek* (July 15, 2002) at 12.
6. *Id.*
7. Jones, *Plagiarism and Effective Legal Writing: Distinguishing the Two and Understanding the Difference*, Orientation Handout, Writing Resource Center, University of Iowa College of Law (2002) at 12.
8. Mellinkoff, *The Language of the Law* (Boston, MA: Little, Brown & Co., 1963 and 7th printing, 1990) at 439. See also Wydick, *Plain English for Lawyers*, 4th ed. (Durham, NC: Carolina Academic Press, 1998) at 21.
9. See, e.g., *Colorado Probate Code Forms*, App. A, Chap. 27, CRS Vol. 12 (2001).
10. Quail, *Colorado Real Estate Forms Practice* (Newark, N.J.: Matthew Bender & Co., Inc., LexisNexis™ Group, 2002).
11. *Bender's Forms of Discovery* (Newark, N.J.: Matthew Bender & Co., Inc., LexisNexis™ Group, 2002).
12. *American Jurisprudence Pleading & Practice Forms Annotated* (St. Paul, MN: West Group, 1999 Rev.).
13. McDonough, "Hey! They Copied My Complaint!" *ABA Journal e-Report* (Dec. 6, 2002), available at: <http://www.abanet.org/journal/ereport/d6plag.html> (law firm argues that even if filed documents are public documents, no court has found they are free for public use) (*hereafter*, "ABA Journal e-Report"). See also <http://www.plagiarism.org/plagiarism.html> for information about the public nature of online documents and plagiarism detection services.
14. *ABA Journal e-Report*, *supra*, note 13. The law firm of Milberg, Weiss, Bershad, Hynes & Lerach is a securities class-action firm that is trying to prevent the unfair copying of the language from its complaints.
15. *In re Zbiegien*, 433 N.W.2d 871, 875 (Minn. 1988).
16. See *Law Student Plagiarism* (Legal Writing Institute brochure defining plagiarism as "taking the literary property of another, passing it off as one's own without appropriate attribution, and reaping from its use any benefit from an academic institution" (*emphasis added*)).
17. See *Johnson v. Bd. of Cty. Comm'rs*, 868 F.Supp. 1226, 1232 (D.Colo. 1994), *aff'd in part and disapproved in part*, 85 F.3d 489 (10th Cir.), *cert. denied sub nom.*, *Greer v. Kane*, 519 U.S. 1042 (1996) (citing potential violations of Model Code of Professional Responsibility DR 1-102(A)(4)); ABA Comm. on Ethics and Prof. Resp., Informal Op. 1414 (1978); and Colo.RPC 1.2(d).
18. *Iowa Supreme Ct. Bd. of Prof. Ethics v. Lane*, 642 N.W.2d 296 (Iowa 2002).
19. *Id.* at 300.
20. *Id.* at 301.
21. *ABA Journal e-Report*, *supra*, note 13.
22. DuVivier, "Quotations—Part II: Block Quotes," 22 *The Colorado Lawyer* 1887 (Sept. 1993). ■