Copyright and plagiarism

words as property
There’s a mismatch between the law and social norms:

We don’t steal books from bookstores but we freely copy and paste someone else’s words into our own writing.

We don’t steal CD’s from a music store, but we often download pirated mp3s.

We don’t rip art from the walls of museums but we think nothing of ripping an image from the web and posting it in our own blog.

Does that make us criminals?

What are we to make of the fact that so many otherwise law-abiding people regularly engage in flagrant violations of the intellectual property laws?
If most intellectual property is not as valuable as real property, do penalties for plagiarism and copyright infringement need to be revised?

If not, how can we get the public to respect intellectual property the same way they respect private property?
Is plagiarism a crime?

Plagiarism in school
Plagiarism by professional writers
Plagiarism by educators

Greene:

Most often, plagiarism is dealt with through an informal, though robust, system of social disapproval. In other cases, it is addressed through formal disciplinary proceedings administered by academic and professional institutions.
A most ingenious paradox:

There are no laws forbidding plagiarism; many laws protect intellectual property.

Plagiarism is often referred to as a crime, when it is not.

Violations of intellectual property laws, which are crimes, are often not considered criminal.

Rules against plagiarism have no legal status, yet we think of them as binding.

We think of copyright as somehow non-binding.

Who steals my words steals trash.

Greene: Aristotle, Virgil, Shakespeare, Montaigne, Coleridge, Dryden, and Sterne regularly engaged in practices that, today, might well lead to charges of plagiarism.
Does plagiarism have to be *mens rea*, a conscious, knowing, intentional act?

Ask the experts...

Left to right: Jonah Lehrer, NPR science commentator, self-plagiarist and quote fabricator, has appeared on the Colbert Report; Fareed Zakaria, Harvard alum, gave the graduation address in 2012, also a plagiarizing commentator for news magazines and frequent guest on the Daily Show; Jayson Blair, plagiarist for the *New York Times* (now a life coach); Kaavya Viswanathan, novelistic plagiarist, finished Harvard and went on to Georgetown Law School; Doris Kearns Goodwin, presidential historian and frequent guest on the Daily Show.
Goodwin defended her plagiarism by saying she thought she had written the words herself: a mistake of fact (like mistakenly taking someone’s raincoat from the cloakroom thinking it’s yours because you have the same one).

In some cultures, imitation is both a way to flatter your sources, and your audience, and to demonstrate authority. Claiming that you didn’t know plagiarism was bad is called a mistake of law (not a valid defense in court, where ignorance is no excuse).

Is ghost writing plagiarism?

What about self-plagiarism?

Plagiarism as a term for theft of intellectual property goes back to Roman times: the poet Martial accused an imitator of stealing his words, calling him a *plagiarus*. The word meant someone who stole slaves or children.

In the later 18th century, a new sense arises in England that one can own one’s words or artistic creations, and the concept of intellectual property starts to be asserted alongside real property.
In plain sight: In the internet age, a common assumption is that if something is online, it’s free for the taking.

Greene says,

Many students apparently believe that because a text appears on the Internet, it is somehow in the “public domain,” and therefore need not be attributed. Moreover, . . . the fact that many people believe there is nothing wrong with pirating computer software or MP3 files may make them less inclined to believe that plagiarism itself is morally wrong.
Plagiarism and Copyright

**Copyright law** protects a primarily economic interest that a copyright owner has in her work (as well as a broader public interest in the free flow of ideas), whereas the rule against plagiarism protects a personal, or moral, interest.

Copyright demands that one obtain formal permission from the copyright owner in order to copy the work.

The rule against plagiarism assumes that the writer implicitly gives permission to copy the work, provided that the copier make proper attribution. (Greene: the rule of attribution).

The rule against plagiarism departs from the fundamental concept in copyright law that only the “expression” and not the “idea” or “facts” that underlie such expression is protected.

Standler argues that plagiarism has been viewed criminally as a violation of the Lanham Act, a trademark protection bill, for “false designation of origin,” though the decision is making that difficult. *Dastar v. Fox* 539 U.S. 23 (2003).
Greene’s example of *Atonement*:

My ownership of this particular volume means that I have the right to exclude others from using it, to transfer ownership to someone else, whether by sale or gift, or even to destroy it.

If I loan it to a friend and it comes back with the pages torn and dog-eared, my copy is worth less than when it was new.

If I give it away or sell it, I no longer own it.

We can say that my rights are in “tangible property” because the copy of the book that I own is a tangible thing.
The property rights that McEwan himself has as a result of copyright law are very different.

That body of law gives McEwan (or his publisher) the right to make copies of the book or have it turned into a film.

The thing in which McEwan’s rights inhere—presumably, the words that comprise his novel—is much less tangible than my copy of his book.

So we say that his rights are in property that is “intangible.”

Is there any reason we should prefer to protect property rights that inhere in a physical object over property rights that inhere in something that is intangible?
• If you steal my copy of *Atonement*, you now possess it; there is a physical taking that can be proved; the theft is, in Fletcher’s term, “manifest.”

• But if I make unauthorized copies, there is no physical loss to point to.

• Copyright infringement and TM infringement are now criminalized.

• Criminalization of devices to break copyright protection (CDs, DVDs, software).

• As intellectual property rights proliferate, and as intellectual property plays a growing part in our economy, legislators increase the legal protections, and both broaden and increase criminal penalties.

• Pirating, illegal software use, etc. is rampant in schools, businesses.

• A gap exists between social norms and legal penalties re: intellectual property infringement.

• We refrain from murder, theft, arson because we feel they are morally wrong; we don’t have the same strong moral inhibition to rip intellectual property.

• So, is this like marijuana? speed limits?
Piracy is not a victimless crime.

For more information on how digital theft harms the economy, please visit

www.iprcenter.gov
An author of a copyrighted work has the following exclusive rights conferred by 17 USC §106:

- to reproduce the work (e.g., to make copies)
- to prepare derivative works (e.g., translation, abridgment, condensation, adaptation)
- to distribute copies to the public (e.g., publish, sell, rent, lease, or lend)
- to perform the work publicly
- to display the work publicly

Term of copyright: originally 12 years, it has been gradually extended; the most recent law designates copyright for the lifetime of the author + 70 years.
Fair use:

Sec. 107 of 17 USC 1 (the Copyright Act) on fair use:

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
Question: should an email or a papal missive have copyright?

A federal judge is using a Shakespeare put-down in rejecting a lawyer’s claim of copyright infringement for a copied sentence.

U.S. District Judge Dolly Gee said lawyer Kenneth M. Stern may have to pay attorney fees for pursuing “such folderol”—a claim of copyright in a forwarded sentence-long message, the Volokh Conspiracy reports. The sentence, posted on an email discussion group for consumer attorneys, asked whether anyone had ever had billing problems with a forensic accounting firm. The defendant, a lawyer, had forwarded the message to his sister, also a lawyer, who forwarded it to the forensic accountants, according to Stern's complaint.

In a footnote, Gee made her point with Shakespeare, the Volokh Conspiracy reports in a separate post. “Plaintiff begins his argument rhetorically, querying whether the following sentence is copyrightable: ‘To be, or not to be, that is the question’ ” the judge wrote. “Perhaps, a more appropriate play from which to draw quotations would be Much Ado About Nothing.”
On March 26, 2007, Plaintiff [Stern] sent an e-mail to the Consumer Attorneys Association of Los Angeles (“CAALA”) listserv, which stated in its entirety as follows:

Has anyone had a problem with White, Zuckerman . . . cpas including their economist employee Venita McMorris over billing or trying to churn the file?
§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.
Necessity for originality:

FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO., 499 U.S. 340 (1991) —opinion by J. O’Connor:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.... Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity....To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be.

Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.
Judge Dolly Gee found that the plaintiff’s email does not qualify for copyright protection because it is not original:

The opening sentence of the poem *Jabberwocky* contains, coincidentally, the same number of words—23—as plaintiff’s Listserv post: ‘Twas brillig, and the slithy toves / Did gyre and gimble in the wabe; / All mimsy were the borogoves, / And the mome raths outgrabe.’

The utter creativity of this ‘greatest of all nonsense poems in English’ prompted one court to suggest that even its first line would be entitled to copyright protection.

Plaintiff’s Listserv post, in contrast, displays no creativity whatsoever.
Kenneth Stern announced that he would appeal Judge Gee’s negative decision.

QUESTIONS: Assume that Stern does appeal Judge Gee’s decision. Answer 1 or 2:

1. Craft an argument showing that Stern’s original email is creative within the meaning of the act.

2. Craft an argument supporting Judge Gee’s contention that the Stern email is not creative and therefore not covered by copyright.
The Smith Brothers: Trade and Mark
Bayer-Tablets of Aspirin
5 grs. each

DOSE: 1 to 2 Tablets with water
Full Directions Inside

The Bayer Company Inc.
170 Varick St. New York.

Aspirin is the trade-mark of Bayer manufacture of monoaacetic acid ester of salicylate.

The Bayer Company Inc.
170 Varick St. New York.
Bayer trademarked Heroin in 1895, marketing it as a "non-addictive morphine substitute" for use as a cough suppressant and as a cure for morphine addiction. In 1914 the US made it a controlled substance and in 1924 its sale was banned.
Trademark

• What’s the difference between a word and a name? What’s in a name? How do people’s names work in terms of specificity? You may have the same name as other people. How does your name function as a brand, rather than a generic?

• What must you do to assert ownership over a word? To claim it as a mark?

• Most TM disputes are wrangles over whether a mark is, or has become, generic. Trademarks that have lost the protection of TM status include: aspirin, zipper, linoleum, shredded wheat (ruled generic but protected by patent which then expired, allowing other brands of shredded wheat to be marketed). Argue for or against the generic nature of kleenex, xerox, bandaid.
What about *google* or *xerox*?

Here’s the entry from Merriam-Webster’s online dictionary.

Butters argues that users still recognize them as TMs, even if used for competitors’ products. Is he correct?
Merriam-Webster’s entry for *xerox*.
Butters notes that trademark issues hinge on three criteria:

- likelihood of confusion
  - is the mark too similar to an existing one?
  - Aventis / Advancis
  - The Webster’s Dictionary cases (both confusion and copyright)

- strength of the mark
  - arbitrary
  - fanciful
  - suggestive
  - descriptive
  - generic

What if Disney wanted to TM *theme park*? What about *yo-yo* and *cellophane*?
• propriety of the mark
• dilution of the mark: whether the mark is no longer a TM but has become diluted to a generic, even in the absence of competition or likelihood of confusion, mistake or deception
• What must a corporation demonstrate to obtain a TM on a common word (Word, Windows, Face)?

• In the Apple *app store* trademark dispute, how do Leonard and Butters prove their claims?

• Is the app store dispute simply corporate maneuvering, as Zimmer charges? Or are there real intellectual property issues at stake? Are corporations encroaching on the common language by labeling more and more ordinary words as marks?