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**Who Moved My Intellectual Property?
The Intersection of Historiography, Jealousy, and Litigation**

by

Susan L. Schramm-Pate & Katherine Reynolds Chaddock
University of South Carolina

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If he only knew a little of law, he would know a little of everything.

Author Anonymous

Historians and politicians may be strange bedfellows but, they represent two groups where frequent charges of intellectual property theft, plagiarism, and copyright infringement occur. Perhaps historians and politicians work in arenas where ideas and their expression crowd together and overlap—leaving copying from one another more possible for these two types than for others. Or, perhaps they work in arenas more prone to jealousy and ill will among colleagues and competitors eager to annoy and accuse with or without actual evidence. In any case, as historians, we should not have been surprised that our history concerning southern women educators of the progressive era—*A Separate Sisterhood: Women Who Shaped Southern Education in the Progressive Era*—became the source for accusations of intellectual property theft from an aggressive and jealous historian at another institution. For the purposes of this paper, we will call that individual Dr. Berle Doe. The drama that began with defamatory letters from Dr. Doe's lawyer—accusing us of numerous counts of intellectual property theft—ended with the meager evidence that we had paraphrased two sentences of an

earlier work. Ironically, these two sentences were, in fact, originally written by Katherine Reynolds Chaddock for a conference presentation to be delivered in partnership with Dr. Doe.

As a result of our experience with Dr. Doe, we believe that even spurious accusations can be if not devastating, at least extremely annoying; and our dispute is worth a cautionary note to all historians as they navigate among immoral colleagues who may be angry, jealous, or desirous of personal aggrandizement.

First, some definitions: An overview of literature in the area of literary intellectual property demonstrates that there are two relevant concepts that fall under the broad umbrella of "Intellectual Property Theft." One is plagiarism; the other is copyright infringement. *Plagiarism* is a broad, variously defined CONCEPTUAL issue that can, according to the Modern Language Association (MLA), include repeating a phrase as brief as two words, or even a fact, from somewhere else, leaving the impression that it is your own. For example, Franklin D. Roosevelt plagiarized his famous words, "The only thing we have to fear is fear itself." French philosopher Montaigne had much earlier penned, "The thing of which I have to fear is fear." In another example, Thomas Jefferson plagiarized his famous line in the *Declaration of Independence*, "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." English philosopher, John Locke had prior concluded in his essay, *Human Nature and God's Purposes*, that we were the Creator's property and as such we had "Rights to life, health, liberty, and possessions." According to the MLA manual, no matter how many years have passed since a phrase is repeated elsewhere, the concept of *plagiarism* still applies.

Copyright infringement is a narrowly defined LEGAL issue. Here, the impact of copied words on the original work makes a difference. Therefore, if the work is old or in the public domain, or if the amount copied is too small to create a problem, there is no copyright infringement. Laws concerning copyright infringement do not cover "ideas" or "facts"—only "expression." However, copyright infringement can happen with or without proper attribution of sources. Copyright is defined as a property right attached to an original work of art or literature. Copyright laws grant the author or creator "exclusive rights to reproduce, distribute, adapt, perform, or display the protected work"

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(Newsome, 1997, para 3). For literary works—both fiction and nonfiction—copyright laws do not extend to facts and ideas. In other words, underlying concepts or "truths" cannot be owned. Thus, a biography about a woman educator might qualify for a copyright since it is "in a fixed or tangible form of expression" (para 3), but the *events and facts* of the woman educator's life do not.

For historians, working with great volumes of primary and secondary sources, plagiarism happens all the time. Six months after you read something, a particular two or three word phrase pops into your mind and seems like your own. You use it, and you've plagiarized. Or, you just get sloppy and accidentally drop a footnote you meant to include—you've plagiarized. But, you have to be much more inclusive and deliberate to infringe copyright.

The history of plagiarism—using others' phrases or ideas—goes back at least to sixteenth century England and, some historians say, to the classical works of Aristophanes. However, it was for centuries seen as simply what writers and speakers do—a source of amusement, an echo of past expressions, an interesting reminder of earlier ideas.

As an indicator of literary theft, plagiarism is a much more recent idea. Thomas Mallon, in his book *Stolen Words*, notes that "Originality set itself down as a cardinal literary virtue sometime in the middle of the eighteenth century and has never gotten up again" (1989, p. 24). Current definitions of plagiarism are the legacy of the eighteenth century Romantic literary tradition. Tennyson was shocked by the trend, exclaiming that phrases such as "the ocean roars" and "ring the bell" could no longer be used because they might be found in Homer or Horace (Pappas, 1994, p. 31).

As the idea of plagiarism jumped the pond to land on U.S. soil, it grew in the twentieth century to become an offense subject to threatened litigation. Channing Pollock, writing in 1945, noted that the litigation frenzy started in 1908 when a court found that a popular play by Paul Armstrong was based on a short story by Henry J. W. Dam, whose estate was then awarded all royalties and profits (p. 613). As a result of the continuing frenzy, Pollock notes, "Only the innocent suffered, since establishing their innocence was expensive in money and time, while attorneys for the plaintiffs usually worked for a contingent fee" (p. 614).

Michel Foucault (1979) played around with the concept of intellectual property in his paper, *What is an Author?* In this work, he investigated the notion of a person even being able to "own" ideas noting,

The problem is both theoretical and technical. When undertaking the publication of Nietzsche's works, for example, where should one stop? Surely everything must be published, but what is 'everything'? Everything that Nietzsche himself published, certainly. And what about the rough drafts for his works? Obviously. The plans for his aphorisms? Yes. The deleted passages and the notes at the bottom of the page? Yes. What if, within a notebook filled with aphorisms, one finds a reference, the notation of a meeting or of an address, or a laundry list: Is it a work, or not? Why not? And so on, ad infinitum (cited in Rabinow, 1984, pp. 103-104).

Foucault goes on in this essay to isolate four different characteristic traits of what he calls the "author function" to a book or to a text. First, "the author function is linked to the juridical and institutionalized system that encompasses, determines, and articulates the universe of discourses" (p. 113). For him, the very idea of "owning a text" became codified in our culture at the end of the eighteenth century and at the beginning of the nineteenth century when a "system of strict rules concerning author's rights, author publisher relations, rights of reproduction, and related matters were enacted" (p. 108). Prior to this, discourse was an *act*, not a product or thing that could be owned. Once the goods got "caught up in a circuit of ownership" (p. 108) things changed—and, for Foucault, not for the better.

Second, "the author function does not affect all discourses in the same way and at all times and in all types of civilization" (p. 113). For Foucault, literary autonomy is not tolerable in our culture if a work is to be granted status. Whereas, ancient Western texts such as narrative, stories, epics, tragedies, and comedies, were put into circulation and "valorized without question about the identity of their author" (p. 109) a reversal occurred in the seventeenth or eighteenth century. People started to ask "From where does it come, who wrote it, when, under what circumstances, or beginning with what design?" (p. 109).

Third, Foucault argues, that the author function is "not defined by the spontaneous attribution of a discourse to its producer, but rather by a series of specific and complex operations" (p. 113). In other words, authors are constructed by time and place and they do not develop spontaneously. They work within a particular textual tradition or discourse and "the text always contains a certain number of signs referring to the author" (p. 112). Finally, the author function "does not refer purely and simply to a real individual, since it can give rise simultaneously to several selves, to several subjects—positions that can be occupied by different classes of individuals (p. 113). By "class" Foucault does not mean socioeconomic status but personal pronouns, adverbs of time and place, and verb conjugation. Authors continually shift around in a space that Foucault calls the "spatio-temporal coordinates" (p. 112) from being the "real" speaker (i.e., first person singular) to the alter ego whose distance from the author often varies and changes throughout the course of the work. The point is that some authors can be what Foucault calls "transdiscursive" with discourses in theories, traditions, or disciplines in which other authors find their place. Karl Marx and Sigmund Freud are examples of what Foucault calls, "founders of discursivity" (p. 114). He writes:

Freud is not just the author of *The Interpretation of Dreams* or *Jokes and Their Relation to the Unconscious*; Marx is not just the author of the *Communist Manifesto* or *Das Kapital*: they both have established an endless possibility of discourse. (p. 114).

In historical discourses, if we speak of Anne Firor Scott in a Foucaultian sense as a "founder of discursivity," we mean that she made possible characteristic signs, figures, relationships, and structures that can and have been reused by others. In other words, to say that Anne Firor Scott (1970) was instrumental in founding contemporary feminist interpretations of southern social progressivism," by challenging the "southern lady image" means that in contemporary historical works one will find, as in Scott's works, the examinations of southern women as they struggled for identity and agency, southern women's entry into roles of activists and professionals, southern women's challenge of racial issues, southern women's battles for educational attainment, civic activism among southern women, and all the rest of it. Scott made possible not only a number of analogies, but also (and equally important) a certain number of differences. She created

a possibility for something other than her discourse, yet something belonging to what she founded. To say that Scott founded the notion that southern women's coalitions and powers of association had its own inner dynamic does not (simply) mean that we find the a re-conceptualization of female civic activism during the progressive era or the notion of "the lady" in the later works of Anastasia Sims (1997) and Joseph F. Kett (1985) and Robyn Muncy (1991) and Katherine C. Reynolds & Susan L. Schramm (2002); it means that Anne Fiore Scott made possible a certain number of divergences—with respect to her own texts, concepts, and hypotheses—that all arise from the feminist discourse itself.

This all, of course, presents a new difficulty—although Scott may have introduced some important transformations into historical discourses, today's lawyers can seek to find in plagiarism a crack in the "discursive" door toward copyright infringement. Dr. Doe claims to "own" the concept of southern women activism during the progressive era. These claims are manifested in the accusations made in our case which started with a three-page letter from a lawyer hired by Dr. Doe to accuse us of: 1) Stealing from Dr. Doe's dissertation—a study that was a biography of a woman never mentioned in *A Separate Sisterhood* and not relevant to our area of study; 2) Failing to include Dr. Doe as a co-author of *A Separate Sisterhood*, a position supposedly earned by the fact that Dr. Chaddock conducted some of her book research and writing during the same year she and Dr. Doe made a conference presentation together; and 3) copying one and one half sentences from a supposed "article" co-authored by Drs. Chaddock and Doe—which turned out to be sentences written by Dr. Chaddock for an unpublished conference paper that she and Dr. Doe jointly presented.

Unfortunately for us, Dr. Doe has deep pockets and was able to keep those lawyer's letters coming to us and to our publisher, Peter Lang, threatening time and time again to also expose us to our University and to drag us into court. We each, with shallow pockets, managed to hire lawyers to examine the charges and the evidence and to demonstrate absolutely nothing of plagiarism or copyright infringement. However, it was a intimidating and expensive experience.

Beyond the legal aspects of intellectual property law lies an important issue—*Ethics*. Clearly, unscrupulous attorneys who are willing to provide persons with

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great reservoirs of dollars ready access to a legal system by taking on non-meritus cases would seem to be unethical. On paper, a lawyer has a duty to use legal procedure for his or her client's case, but he or she also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed, but it is important to note that the law is not always clear and is never static. It may seem to a layperson reasonable to expect lawyers to have a moral obligation to practice integrity and trustworthiness—just as they expect other attorneys to present "evidence," they too should honor the law when it comes to taking on a case without "grounds" for the claims that their potential clients make. It may also seem logical that lawyers should not only protect themselves from legal liability, but that they should also model honesty and truthfulness by knowing when and what qualifies as a merit case. According to Rule 3.1 of the South Carolina Bar Association's *Professional Rules of Conduct*, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (www.scbbar.org, para 1). Unfortunately for innocently accused victims, what this means is that a lawyer can file a case without fully substantiated facts "because the lawyer expects to develop vital evidence [as he or she goes along] only by discovery" (para 3). Even if a lawyer believes his or her client's position ultimately will not prevail, it is permissible for her or him to file an action. The only time a lawyer's action is deemed "frivolous" is when he or she takes a case knowing that his or her client aims to have the action taken "primarily for the purpose of harassing or maliciously injuring a person" (para 3). However, it would clearly be difficult, if not impossible, to prove what that lawyer knew or did not know, which is why lawyers such as Dr. Doe's get away with what they get away with.

Intellectual property law is confusing, ambiguous, unclear and continually changing. There are potentially thousands of historians in academe who may be working under a false sense of security or lack of awareness since this topic receives little public attention. Plus, most historians working in academe are not researching and writing in a way that is going to pay off in dollars and cents and so they may not think that this type of litigation applies to them. After all, large damages are rare in most cases of

intellectual property theft. But academics should be aware of spurious charges by jealous colleagues who may be seeking damages other than the monetary type. The ambulance chasing attorney does not merely exist in the area of medicine anymore; these eager beavers have expanded their hunt for clients to the woodlands of academe.

If Foucault is correct in his analysis of "texts" as "modes of circulation, valorization, attribution, and appropriation" (as cited in Rabinow, 1984, p. 117), then the social relationships of angry persons hiring attorneys to write threatening letters, seek out sympathetic judges, and search for endless loopholes that might push that paraphrased sentence in an unpublished draft to the level of copyright infringement, then we believe that it is time to re-examine the notion of "intellectual property." The repeated phrase or dropped footnote have become venues for legal work in the same manner as have the length of your neighbor's lawn and the wording of your post tenure review. And as such they raise questions: How can one reduce the great peril, the great danger with which litigation threatens our world? The answer is one can reduce it with exposure in a public forum such as this. Silence breeds a limitation of the cancerous and dangerous proliferation of scandal within a world where one is prudent not only with one's resources but also with one's discourses and significations. Foucault, in an attempt to entirely reverse the traditional idea of the author, raises some key questions that are significant to historical texts: How should historical texts be used? How should they circulate? Who can appropriate particular historical discourses for himself or herself? What are the places in these historical texts where there is room for variations in persons, places, and things?

As we seek to find answers to these bigger theoretical questions, it is a fact that on the practical side, there are many lawyers who are more than happy to try to find any form of intellectual property theft for clients willing to pay them. So, be careful who you associate with—collaboration, peer exchange, and collegiality are great concepts of the academy but they are increasingly being eroded by jealousy, ill will, and the possibility of litigation.

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Susan L. Schramm-Pate is Assistant Professor in the College of Education at the University of South Carolina specializing in curriculum studies. She received her Ph.D. in educational administration (curriculum studies) from Miami University. Her books include: *A Separate Sisterhood: Women Who Shaped Southern Educational Reform in the Progressive Era* co-authored with Katherine Reynolds and *Transforming the Curriculum: Thinking Outside the Box*. Her research appears in *High School Journal*, *Journal of Curriculum Theorizing*, *International Journal of Educational Research*, *Journal of Communications and Minority Issues*, *Art Education Journal*, and *Journal of Secondary Education*. Her email address is sschramm@gwm.sc.edu

Katherine C. Reynolds Chaddock is Associate Professor in the College of Education at the University of South Carolina specializing in higher education history and policy. She received her Ph.D. in educational administration (higher education) at the University of Utah. Her books include: *A Separate Sisterhood: Women Who Shaped Southern Educational Reform in the Progressive Era* co-authored with Susan Schramm; *Visions and Vanities: John Andrew Rice of Black Mountain College*; *Park City: A History*; and *Carolina Voices: 200 Years of Student Experiences* co-authored with Carolyn Matalene. Her email address is chaddock@gwm.sc.edu