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"Ideas can be freely used" : a victim of plagiarism reflects on a legal maxim and other legal usages

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13.

‘IDEAS CAN BE FREELY USED’: A VICTIM OF PLAGIARISM REFLECTS ON A LEGAL MAXIM AND OTHER LEGAL USAGES

Béatrice Durand

Abstract

When French academics take plagiarizing colleagues to Court, they often are disappointed by the reluctance of the judges to acknowledge the full dimension of the plunder. Often the judges refuse to qualify many of the alleged text passages as counterfeiting. Two main principles guide them: “Ideas are free” and can therefore not be protected as intellectual property; only “the form” (the wording) may be. Since scholarly work aims to produce intellectual contents – ideas –, its productions would be, as a matter of principle, excluded from legal protection. In addition, the first work must also be “original” in order to be protected. Scholarly work always includes a more or less important empirical part. Since primary sources are regarded as belonging to the public domain, empirical (data based) work cannot be protected.

Based on a personal trial experience this paper explores the semantic misunderstanding (“ideas”) and the inappropriate conception of empirical data as “public”, which lead to legal decisions unfavorable to the protection of research work.*

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1. Introduction

The following reflections are a result of a legal action I took against a colleague who had plagiarized parts of my *Habilitation* (German tenure work) in comparative literature. I had defended it at the Martin Luther-Universität in Halle, Germany, in 2003. The dishonest French scholar was convicted by French courts first time around as well as at appeal; a final appeal to the *Cour de Cassation* (the French Supreme Court) was eventually rejected.³¹⁵ Justice had been done and I had every reason to be satisfied.

However, when the initial judgment was made, I was surprised and a little disappointed that only seven passages (at first instance) and then nine (at appeal) were considered to be infringing. This represented less than 20% of the fifty-five alleged passages.

My lawyer comforted me: the infringement had been recognized. Given the small number of copies recognized in court, the fine—2,000 euros—was substantial. This proved that the judges had taken the offence seriously. But for me, it was as if they recognized it in principle but were still reluctant to identify it concretely.

My second surprise as a non-lawyer was that the judges did not dispute the fact that many passages were taken from my work. However, a substantial proportion of them were not considered infringing, including examples of identical or almost identical copies. It is therefore possible to copy, even verbatim, without it being illegal.

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³¹⁵ *Tribunal de Grande Instance*, Paris, 12 May 2016; *Cour d'appel*, Paris, 27 March 2018; *Cour de Cassation*, Paris, 20 May 2020. The offending colleague was condemned both for plagiarism infringement and for the unauthorized disclosure of an unpublished text. The following remarks concern only the judges' assessment of the plagiarism.

Judges have two main criteria for establishing (or refusing) plagiarism infringement:

- Copies must be *identical or quasi-identical*, for only the form (i.e. the expression or wording) can be protected. *Ideas* are not protectable as such; according to Henri Desbois's maxim, they are 'free to be used' (*de libre parcours*), meaning unprotectable or free of rights.³¹⁶
- The wording must not be *commonplace*; it has to be *original*. In order to be infringing, the passage must not express *common knowledge* or be a matter of *redactional necessity*.

Combining these two principles—the free circulation of ideas and the requirement of originality (in the legal sense of the term)—it was possible to deem that even literal copies were not plagiarism, or so it seemed to me. Thus, any scholarly work, expository writing, or essayistic literature (what is called in French *littérature d'idées*), as opposed to narrative and/or fictional literature, would, as *a matter of principle*, be excluded from the protection due to intellectual property. This disturbing paradox is likely to shock anyone whose job consists precisely in producing *ideas*—or indeed any type of analyses, commentaries, hypotheses, theories, etc.

I will therefore try to show why, in my opinion, the criteria judges use in order to assess plagiarism in scholarly work lead to too few verdicts of liability. These criteria—or rather the way they are applied—lead to court verdicts that plagiarized scholars consistently find arbitrary.³¹⁷

³¹⁶ This maxim summarizes the legal principle that 'ideas' are excluded from legal protection. Henri Desbois (1902–1985), a French lawyer specializing in intellectual property, formulated this maxim in a book that remains an authority: *Le droit d'auteur en France* (Paris: Dalloz, 1978).

³¹⁷ This feeling of injustice and arbitrariness is shared by researchers and the authors of documentary works, as Hélène Maurel-Indart notes in her book: H.

2. Why would ideas not be protectable?

In my appeal judgment, five passages were not considered as infringing on the grounds that ideas are ‘unprotectable in themselves’, for example:³¹⁸

5	p. 13: Isolation must be as absolute as possible. The experiment, real or fictitious, is conducted for the purpose of empirical verification. What is to be verified varies from one text to another: is there a natural or Adamic language? [...] What is the ‘natural’, innate potential of the human mind?	p. 101: The isolation of the child must allow the revelation of knowledge about an original state of man, by definition inaccessible to historical investigation. What is to be verified varies from one text to another: is there an original language? Is there a natural aptitude for language or thought, are moral or religious ideas innate, is the first infidelity male or female...
6	p. 14: The experimental intention allows us to oppose Psammatic’s children to ‘real’ foundlings. The former [...] were the products of an experimental will, the latter of an accident (or even a crime).	p. 101: We will therefore only consider fictions where the isolation of the child is deliberate and clearly part of an experimental process, excluding those where the isolation is accidental or criminal.
15	p. 21: ... using various narrative strategies in order to feign authenticity [...] and gain the reader’s trust	p. 107: ... these philosophical fictions try to gain the reader’s trust through various narrative devices

The appeal judges commented that ‘copying ideas is not objectionable’ and ‘even if the ideas are similar, which is not objectionable, the form is neither identical nor nearly identical’.

Maurel-Indart, *Plagiats, les coulisses de l’écriture* (Paris: Éditions de la Différence, 2007), in the chapter ‘Les chercheurs de l’ombre’.

³¹⁸ All passages from both works have been translated from French.

This is the first difficulty with the obsession with *form* over content (ideas): it focuses on something that is not essential to scholarly work, at least in the narrow sense of *form* as style or wording (which is how the judges use the word). Style is admittedly an issue in scholarly writing, and everyone has found that some academics write better than others, but the true purpose of scholarly work is not beautiful style: it is the production of new ideas.

It is as if judges assess (or refuse to assess) plagiarism in scholarly work using criteria that are relevant to literature but not to academic work. Textual fetishists who define literature as the output of the poetic function of language (to use Jakobson's famous categories) would certainly enjoy the attention judges pay to wording and style. However, judges are obviously not interested in the literalness of copies for aesthetic reasons but rather for practical reasons. They hope to find in 'form' some solid evidence of plagiarism. But in doing so, they miss what, in academics' view, should be protected: the content.

Moreover, the implicit definition of form as a combination of words is restrictive. In order to decide whether a copy is infringing or not, judges simply *compare sentences*, which plaintiffs and defendants, anticipating the judge's argumentation, have already isolated from their context and listed in a two-column comparative chart. The notion of 'form' should include structure—for example lines of argument, whether local (at the level of the paragraph or page) or global (at the scale of larger sections or the whole work).

The worst thing about the refusal to protect ideas as such and to require (almost) formal identity between plagiarized and plagiarizing texts leads to a dramatic paradox: it prevents the punishment of cosmetic operations. The obsession with formal identity could even be interpreted as an encouragement to cleverly disguise theft: take the ideas, for they are not protectable, reformulate them, say things differently in an *original, unnecessary* way, and you are within your rights. The fact that

the plagiarist could receive some kind of compliment for his so-called stylistic originality infuriated me as the plagiarized party!

On the other hand, anyone can understand why ideas are ‘excluded’ from protection, as Henri Desbois puts it. To protect ideas (in the legal sense of the word: to condemn their reproduction) would impede freedom of thought and therefore research freedom. You would be prevented from having an idea if someone had got it before you. That is why ideas are free.

The problem with the word *idea* is that it can have several meanings: it can mean an intuition, a mental illumination, but also the result of intellectual work, which is a set of articulated propositions, not only put into words but integrated into an argumentation process.

However, the French Intellectual Property Code (CPI) does not use the word *idea*—nor does it use the word *form*.³¹⁹ The law speaks of *conception* and *realization*: ‘The work is regarded as created, independently of any public disclosure, by the sole fact of the *realization*, even if unfinished, of the author’s *conception*’ (CPI, article L111-2, emphasis added).³²⁰

If Henri Desbois’s adage is to make any sense, the word ‘idea’ can only mean a *conception* that is not yet realized, since, if the conception were *realized* in the work—and if it were original—it would be protectable. One can easily understand why the legislator protects the *realization* but not the *conception*: you cannot protect conceptions that exist only in the mind of their author. The *conception* (the design, the project) must be *realized* in order to be communicated and disclosed.

³¹⁹ Légifrance, *Code de la propriété intellectuelle*, 2021.

³²⁰ The same applies to the German *Urheberrechtsgesetz*. With one exception in both cases: the term *ideas* appear in Article L 122-6-1 of the French CPI and in § 69a and § 69d of the German *Urheberrechtsgesetz* in relation to ‘ideas’ underlying a computer program. But these articles do not exclude ideas from protection; they allow authorized users to access these ideas in order to understand the functioning of the software and correct possible errors.

Hence the importance attributed to its formal (i.e. material) realization, whatever the nature of its materiality.

However, when judges exclude a passage from a research work from protection on the sole grounds that 'it is only an idea and ideas are not protectable', they mistake the idea as *conception* for the *realized* idea (in fact the formulated and structured set of ideas that constitute the work). For 'ideas' produced by scholars are not pure mental intuitions. They are realized ideas; they are the output of intellectual work. Intellectual work does not consist only in giving a discursive (verbal) form to immanent ideas, nor in simply remembering or capturing ideas in eternal flight in a Platonic firmament of ideas.

The problem with Henri Desbois's adage is that the word it uses, as opposed to the words used by the Intellectual Property Code, is confusing. And it is the misfortune of any kind of expository writing—especially scholarly writing—that the word *idea* can be used ambiguously to mean two things that ought to be distinguished (and that are distinguished in law as such).

When judges reduce the protectable part of intellectual work to the originality of its formulations, not only do they retain a criterion that is inessential to scholarly activity but they misunderstand the true nature of the ideas scholars produces. These are not mere *conceptions*, but genuine intellectual achievements, that is, what the law calls *realizations*.

The distinction between *the idea as conception* and *the idea as realization* would solve this legal paradox, at least at an abstract level: the problem that scholarly works and the whole 'literature of ideas' is not protected as a body of ideas.

Indeed, the case law is not monolithic. Some judgments consider that analyses are an element of the *realization* of the author's *conceptions* and, as such, are protectable. This makes it possible to interpret changes in form as counterfeit: of disguising the act of borrowing rather than as a

manifestation of stylistic originality. Hélène Maurel-Indart quotes a judgment establishing a typology of what is likely to be considered *original*: ‘simple repetitions of expression’, ‘borrowings, which, without being mere copying nevertheless bear the mark of their origin’, ‘typical words, assembled or not’, ‘19 quotations [...] in the same order’.³²¹ This kind of legal decision does not completely dissociate ‘content’ from ‘form’.

3. The *commonplace* criterion

I had accepted the principle that contents (ideas) are not protectable and that copies must be identical or almost identical to be considered infringing. It was therefore a source of great irritation to me when I learned that the criterion of textual identity, which seemed to me both overrated and inadequate, was a necessary but not sufficient condition for considering repetitions as infringing.

In the appeal judgment, the *commonplace nature* of the expression was the reason given for not considering thirteen fairly literal copies as infringing. This argument was often combined with the *unprotectability of ideas* and/or the notion of *redactional necessity*.

3.1 *Commonplace terms and redactional necessity*

Commonplace, in the legal sense of the term, means that a formulation is not new, as opposed to an *original* formulation, which has no precedent. *Redactional necessity* acknowledges that there are only so many ways of referring to facts, *especially if they are commonly known facts*.

Unless you artificially manipulate the order of words like Molière’s Mr. Jourdain in the *Bourgeois gentilhomme* (who tries to be original

³²¹ TGI de La Rochelle, 23 April 2002, Michel Le Bris vs. Mickaël Augeron concerning their two books on piracy, quoted by Maurel-Indart, p. 87. She describes this judgment as ‘courageous’.

when he writes his note to the Marquise), there is only one way to say 'water boils at 100 °C'. Redactional necessity is therefore a factor in the commonplace or a special case of the commonplace. And the copying of anything commonplace is lawful. According to the judges, who accepted my opponent's argumentation in this case, most of my sentences were *necessary* because of their factuality and were therefore *commonplace*. Even knowing that the legal meaning of the words *original/commonplace* is slightly different from their common meaning, I ended up wondering why my opponent had been so eager to copy so many commonplace expressions from my work. The image of literary research in his argumentation and in the judgments at first instance and appeal were not flattering ones, as if scholarly work was merely an eternal repetition of the same things.

It is understandable that judges look at the vocabulary used to assess whether infringement has occurred. However, this often leads to establishing the *commonplace usage* of the first author by isolating expressions or even single words out of their context. The commentary on the alleged copies in the appeal judgment provides a good example of how you can dilute meaning—and therefore infringement—by *breaking the sentence down into smaller units*:

26	p. 186: there is nothing, however, in Arnobius' text to indicate that the conjecture was based on empirical observations. On the contrary, Arnobius insisted on the power of imagination needed in order to imagine the scene and on the fact that the premises of the conjecture—the conditions for the feasibility of the experiment—must be admitted. [...] The place described by La Mettrie is slightly more artificial than Arnobius' cave [...] The rewriting suppressed the appeals to the reader's power to imagine a situation. It insists more clearly on the manmade character of the experimental device, trying to substantiate its feasibility.	p. 122: ... nothing in the original text allows one to guess that the rhetor draws on any observations. Arnobius, on the contrary, insists on the purely speculative nature of fiction and even appeals to the reader's benevolence to imagine a situation, which is certainly possible in theory, but cannot be based on any facts [...] Moreover, the realism effect is combined with certain modifications that mainly concern the experimental device: more artificial than in Arnobius' work, the isolation imagined by La Mettrie insidiously suggests to the reader that it would, in fact, be quite easy to conduct the experiment.
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The judges commented on this copying as follows: '[1] cannot reproach [2] for using in his commentary the expressions "nothing in the text", "any observations", "Arnobius, on the contrary, insists on", "more artificial than in Arnobius' work", which are commonplace; [...] there is no unlawful reproduction' (concerning passage no. 26, appeal, p. 18).³²²

The *commonplace nature* of the terms was also the reason given for no longer considering as infringing on appeal a passage (no. 44) that had been considered infringing in the court of first instance:

³²² For the sake of anonymity, the first author is referred to as [1] and the second one as [2].

44	p. 272: Ariste's inner language, this 'mentalese', whose development is presented by the text as innate, has one more property traditionally attributed to the Adamic language (or aimed at by the creators of artificial languages) [...] It would make designation superfluous	p. 276: The student of nature possesses an inner language, Adamic and universal, which would give him direct access to things and make designation superfluous
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'... [2]'s wording [...] does not indicate unlawful copying since [2] shows that the notion of "Adamic language" can be found in Umberto Eco's book *The Search for the Perfect Language (The Making of Europe)* published in 1993 and that [2] himself used it in a book published in 2005...'. Umberto Eco did indeed write a book (*The Search for the Perfect Language – The making of Europe*, 1992) in which the expression 'Adamic language' appears on every page, but he did not comment on the linguistic dimension of eighteenth-century fiction about feral children. The judgment also considered the words or expressions 'collective isolation', 'isolating device', 'ensuring survival', 'contradictory', 'accreditation', 'fiction', 'non-intervention', 'sacrifice', 'guinea pig', 'the skills of normally socialized beings', etc., used by both authors as 'commonplace in the humanities'. Yet language is the best example of a common good and no word is original in itself.

This is especially true of the technical terms specific to a particular research field. The fact that *a term is common in a given discipline does not mean that it can no longer be used in an original way*. Originality can only be appreciated in a context, which is necessarily a context of ideas. The idea (the content) comes back like a boomerang...

3.2 Common knowledge and public domain: Are primary sources public?

The argument that the quotations borrowed by the dishonest scholar were *common knowledge*, that is, they belonged to a common fund, was used to avoid qualifying the copying of a series of quotations from primary sources as infringement. The notion of *common knowledge* includes historical facts and facts in general, and in my case also quotations from primary sources.

Three copied passages (29 to 31, corresponding to about three pages of text in both works) contained quotations whose selection and order the second author had reproduced. The judges did not accept the first two (29 and 30) as infringement on the grounds that primary sources are *common knowledge*, as in passage 30:

30	p. 304: He wonders how to provide the test children for the experiment, stressing ironically that, if philosophers had children themselves, none of them would be 'philosopher enough' to use them for the experiment (p. 396). He satirically weighs different possibilities: 'use orphans or abandoned illegitimate children, Caribbean, Eskimo, Californian, or Patagonian children (provided that they are not as huge as Bluebeard), or breed children for this sole purpose '[Ich] glaube nicht, daß man werde vermeiden können, eine eigene Fabrik zu diesem Zwecke anzulegen' (p. 396).	p. 144: The next problem is where to find the test children: how many of these so-called philosophers would be philosopher enough to have the experiment performed on their own children [...]?' Will one use orphans, Caribbean, Eskimo, or Californian children? Given the problems with these options, there is only one solution left: organize a child factory for this specific purpose
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By contrast, passage no. 31 was considered as infringement, probably because the quotation from the primary source was only paraphrased and not identifiable as such:

31	p. 305: Wieland nevertheless ironically suggests going further with the speculation: the children should be grouped in different ways to enable comparisons: children of both sexes who are totally isolated; couples; children of both sexes who are isolated but close enough to meet; and finally two mixed groups with unequal proportions of boys and girl (twenty boys and six or eight girls and vice versa).	p. 145: Wieland nevertheless develops the virtual and ironical fiction of this enterprise, elaborating a complex experimentation program based on methodically constituted groups of children: children of both sexes who are totally isolated from each other children in couples children of both sexes who are close enough to meet; and finally two mixed groups with unequal proportions of boys and girl ...
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Since the texts on which literary historians work are in the public domain, it is permissible to use a set of quotations in the same order.³²³

The *publicity of sources* argument is sometimes combined with the *redactional necessity* argument. In my case, the other author had also copied sentences introducing quotations, that is, the portion of the

³²³ Several alleged passages at appeal (no. 21, 22, 34, 49) gave rise to similar argumentation: '... [1] and [2] deal with the same subject [...] *it is therefore not in itself unlawful to comment on the same passages of works written in the eighteenth century that evoked this same subject, as long as the formulations are not identical or quasi-identical*' (concerning passage no. 21, p. 10 of the judgment at first instance, p. 18 of the judgment on appeal). The commentary on passage no. 34 states: 'Considering that both academics are interested [...] in the same subject and that a comparison of the formulations does not reveal any identity or quasi-identity, [1] cannot reproach [2] for having commented on the same passages of W... 's text in his work and for having included quotations in footnotes that she herself introduced in the body of her thesis' (p. 20, similar arguments on p. 21 for passage no. 34 and p. 22 for passage no. 49).

commentary that is in between paraphrase and commentary but is nevertheless necessary in introducing primary texts, especially when dealing with little-known literature. The judges considered these passages as *redactional necessity* and therefore *commonplace*: ‘... that, dealing with the same subjects, [1] and [2] are led to address identical topics; that, in this case, the similarities in the terms are made *necessary* by the topics addressed; that the unlawful nature of the references will therefore not be assessed’ (concerning passage no. 9, p. 16 of the appeal judgment, emphasis added). In other words: the same sources (by definition public) would *necessarily* call for the same paraphrastic presentation, which must therefore be *commonplace*. Note the circularity of this argumentation.

It is therefore not only the result of research work (the ideas produced) that is unprotectable but all work on empirical material: the collection and processing of data or primary sources—texts, quotations, utterances (in linguistics), narratives or observations (in ethnology), archives (in history), statistical or otherwise quantified data, laboratory experiments, etc.—cannot be protected. In fact, the processing of empirical data includes selection, classification, comparison, identification of regularities or patterns—depending on the hypothesis one hopes to prove. Should all these operations be excluded from protection as a matter of principle?

Here again, the case law may vary. Hélène Maurel-Indart quotes judgments that refuse to sanction the plagiarism of the documentary part of a work. But Maurel-Indart also quotes the spectacular reversal at appeal of a first instance judgment that was highly unfavorable to the two authors of a biography of Juliette Drouet (Victor Hugo’s mistress). The two biographers had sued the writer Henri Troyat for plagiarism. The first instance judgment followed the classic argumentation pattern: the unprotectable nature of sources, historical facts, and quotations; the *necessity* in the chronological composition of the work (which followed

the stages of Juliette Drouet's life), redactional necessity, and the commonplace nature of expression in text passages that merely recounted known facts. The appeal judgment, on the opposite, interpreted the law differently and recognized the originality of the work done on the sources: 'According to the law, there is plagiarism of a biographical work when *the borrowings from the first author who has carried out research, selection, and classification of data belonging to the public domain according to a logic specific to him* go beyond a mere reminder of the earlier work and bear the mark of the first biographer'. This allowed the judge to conclude that '... Gérard Pouchain and Robert Sabourin's *Juliette Drouet* has all the characteristics of an original work', even though it refers to facts that are known or familiar to everyone.³²⁴ Hélène Maurel-Indart quotes from another judgment recognizing that the work on sources is protectable: '... the selection of excerpts and their arrangement in the development bear the personal mark of the researcher, whose work is consequently protected by the Intellectual Property Code'.³²⁵

One can understand the concern of law and judges when they consider that primary sources belong to the *common fund* or *public domain*. Everyone has a legitimate right to work on any author. You cannot patent a subject or a disciplinary field, nor can you prohibit people from researching documents, phenomena, or problems that have already been worked on.

But when judges automatically rule that the copying of passages containing quotations or paraphrases from primary sources is lawful because primary texts are in the public domain, they ignore the work involved in processing those data and sources, whatever the nature of

³²⁴ Appeal judgment, 19 February 2003, quoted by Maurel-Indart, p. 101.

³²⁵ TGI (Tribunal de Grande Instance) de La Rochelle, 23 April 2002, finding in favor of Mickaël Augeron against Michel Le Bris, quoted by Maurel-Indart (2007), p. 86.

this work may be. It is even an epistemological truism that you get the facts that you elaborate on, whether in the natural sciences or in the humanities and social sciences. In other words, even before the researcher's creativity manifests itself in their discoveries, their original intellectual achievement consists in elaborating on specific empirical data.

Sources or facts are certainly available to everyone. But making them speak requires time, prior knowledge, and specific skills—such as being able to decipher handwritten texts or texts written in ancient or rare languages, mastering certain techniques or software, etc. The empirical domains researchers work on are not what is commonly thought of as the *public domain*.

4. Conclusion

Of course we can understand the perplexity of judges in the face of the extreme specialization of the disputed works submitted to them, the material impossibility of reading them in full, and their desire to rely on objective criteria. Yet the two main criteria used—or rather how they are used—do not allow for appropriate protection of the intellectual work: first, because intellectual work uses specific or technical terms common to those working in the same field—which are therefore *commonplace* in the legal sense of the term. Second, because it deals with empirical data (of whatever nature) that judges are tempted to consider freely available in the *public domain* and whose description is spontaneously considered *redactional necessity*. Above all, because the purpose of intellectual work is to produce intellectual content, that is, ideas.

The feeling of arbitrariness provoked by court decisions—and the judicial uncertainty that is its corollary—is not caused by judges' individual preferences. It has structural causes: the ambiguity of the term *ideas* and the illusion that the empirical matters academics work on are common goods in the public domain.

I therefore would like to make a case for the better *protection of work that deals with primary sources*. In accordance with the terms of the law, I would also advocate for a *distinction between ideas as conceptions*, which are not protectable, *and ideas as realizations*, which should be protectable.

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