Whereas eligibility for copyright protection requires originality, that criterion is not normally applied to judicial opinions. Like other forms of legal prose, judgments are collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche. Yet the definition of originality in copyright law has important commonalities with the generic expectations associated with judicial decisions. One way in which judges show that they have considered all sides of a dispute is to explain the outcome by means of an independently produced rationale. Precisely because judicial prose typically includes a significant amount of copying, however, it is doubtful that any requirement concerning original prose is desirable or could be consistently applied. To explore that issue, this article considers the least demanding standard that might plausibly satisfy the parties—namely, a standard demanding that judges display their own skill and judgment in every part of the judgment that may determine the outcome. This requirement, it turns out, would be difficult to apply and would promote meritless appeals. The analysis shows why judicial copying is different from plagiarism, and this distinction sheds light on recent disputes over various forms of copying in trial judgments, involving copying from the pleadings (with or without attribution) and unattributed copying from law journal articles or from other judgments by the same judge or by others.

Keywords: copyright, originality, plagiarism, legal reasoning, judges

Judges are not selected and are only rarely valued because of their gift for original expression. Just as most lawyers would rather present their arguments as merely routine applications of settled doctrine, yielding the same legal results that other courts have delivered repeatedly, judges usually prefer to couch their innovations in familiar forms, borrowing well-worn phrases to help the new modifications go down smoothly. The
bland, repetitive, and often formulaic cadences of legal writing in general and judicial writing in particular can be explained in large part by a commitment to the neutral and consistent application of the law. Even-handed treatment of litigants may not require that judges restrict themselves to prosaic language, but the effort to demonstrate that similar cases are being treated alike often finds its rhetorical manifestation in a penchant for analyses that have a *déjà lu* quality – usually because the words *have been* read before. This tendency, though visible throughout the legal system, is most pronounced at the trial level. In trial courts, judges and litigants interact more closely and so perceptions of fairness (and opportunities for detecting its absence) are especially prominent. Again, because the appellate selection effect does not apply at the trial level, the disputes are more likely to take the routine form in which judges tend to cast them. Praise for judicial creativity is usually reserved for the appellate bench; a self-consciously creative effort by a trial judge, like a sharp-fanged bite from an apparently innocuous pet, is most likely to elicit a reaction of wounded surprise.2

Judicial opinions, and especially trial judgments, might thus appear to differ significantly from the kinds of works that typically attract the attention of copyright law, because eligibility for copyright protection requires originality. Whether judicial opinions even enjoy copyright protection is a matter of some disagreement,3 but in any case, like most other forms of

2 As John Morss observes, according to the ‘orthodox account’ of adjudication, ‘the license of legal novelty is restricted to those with highest status in the profession, in whom it is courageous and far-sighted, whereas the same exercise of initiative in a lowly magistrate would be anathema’; John R Morss, ‘On the Paradox of Originality in the Law: An Essay in Deconstructive Jurisprudence’ (2005) 1 Original Law Review 6 at 8. Similarly, Duncan Webb remarks that ‘originality in the law is viewed with scepticism. It is only the arrogant fool or the truly gifted who will depart entirely from the established template and reformulate an existing idea in the belief that in doing so they will improve it’; Duncan Webb, ‘Plagiarism: A Threat to Lawyers’ Integrity?’ (2009), online: International Bar Association <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=be2ef7cd-3207-43d6-9e87-16c3bc2be595>.
legal prose, they are usually collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche. Yet the definition of originality in the copyright context turns out to have important commonalities with the generic expectations associated with judicial decisions. In copyright law, one of the hallmarks of an original work is that the author created it independently — that is, that it was not directly copied from another source. *CCH Canadian Ltd v Law Society of Upper Canada* held that, for purposes of copyright, a work is not original and hence does not qualify for protection if it is ‘a mere copy of another work,’ but to be deemed original, the work ‘need not be . . . novel or unique’; rather, ‘[w]hat is required to attract copyright protection . . . is an exercise of skill and judgment.’ This exercise, *CCH* added, ‘will necessarily involve intellectual effort’ and ‘must not be so trivial that it could be characterized as . . . purely mechanical.’ Judicial opinions are also expected to exhibit skill, judgment, and intellectual effort. *United States v Forness*, one of the best-known US decisions concerning the judge’s authorial responsibilities, described the trial court’s fact-finding task in terms that closely match those in *CCH*, observing that ‘[t]o ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment.’ The US Supreme Court later held that, even when findings of fact are taken verbatim from a party’s pleadings, they must be treated as the judge’s and evaluated on that basis; but even if such wholesale copying is permissible, US courts often convey their dismay when it occurs. *Forness* represents a widely held view about the trial judge’s duty.


5 *CCH*, supra note 3.

6 Ibid at para 16. ‘For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work’; ibid. ‘Skill,’ in turn, is defined as ‘the use of one’s knowledge, developed aptitude or practised ability in producing the work,’ while ‘judgment’ is ‘the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work’; ibid.

7 *United States v Forness*, 125 F (2d) 928 (2d Cir 1942) (Frank, Circuit Judge).

8 *US v El Paso Natural Gas Co*, 376 U.S. 651 (1964) [*El Paso*].

9 *El Paso*, for example, held that, even though ‘mechanically adopted’ factual findings are reviewable on appeal, ‘[t]hose drawn with the insight of a disinterested mind are . . . more helpful to the appellate court’; ibid at 656 [internal quotation marks and footnote omitted].
Nevertheless, while there is some kinship between copyright’s originality requirement and the expository ability that we expect judges to display, the two are not congruent. In the context of intellectual property, the demand for independent creation is a way of ensuring that writers do not create market substitutes based on minor modifications of existing works. On the other hand, in the judicial context, independent creation is associated with the judge’s impartiality: in composing her own legal analysis, the judge is taken to show that she has considered the issues from a neutral perspective. If judicial copying provokes any concerns, then, it is generally not because of suspicions that the judge is arrogating credit for others’ ideas or phrases but because the copying raises questions about the judge’s attention to the dispute at hand. Too much cutting and pasting, without modification, may give the appearance of a ‘mechanical act’ with a canned solution that ignores the particularities of the parties’ conflict and lacks the disinterested perspective that the adjudicator should bring to bear. If a judge simply transfers large amounts of prose from another source – whether or not the source is acknowledged – a party might conclude that her own arguments never received proper attention. She might regard the judgment as facially deficient because it ignores material details or refers to facts that are not part of the case. Does she have any basis for objecting, however, if the judgment, despite extensive copying, accurately summarizes the facts and fully accounts for all issues in dispute? For example, what if the judge relies almost exclusively on language from a law journal article, a treatise, or another judgment that, with a little adaptation and additional prose, fairly and comprehensively addresses the parties’ claims? The


For an extended argument against judicial use of secondary sources without attribution, see Jaime S Dursht, ‘Judicial Plagiarism: It May Be Fair Use But Is It Ethical?’ (1996) 18 Cardozo L Rev 1253. Because of its nature and character, such use would probably not be deemed infringing, and hence Dursht considers its ethics rather than its legality. This is not, however, the view of Joyce George, who writes that, as a general matter, legal judgments are ‘exempted from a charge of plagiarism even if ideas, words or phrases from a law review article, novel thoughts published in a legal periodical or language from a party’s brief are used without giving attribution’ because ‘the judge is not writing a literary work and, more importantly, the purpose of the writing is to resolve a dispute’. Joyce C George, Judicial Opinion Writing Handbook (Buffalo, NY: William S Hein, 2007) at 725 [George]. George mistakenly assumes that dispute-resolution exhausts the function of the judicial opinion. Merely because the opinion serves
losing party might nevertheless conclude that the rote repetition of words from another source necessarily implies a failure to devote sufficient thought to her position, regardless of the merits of the judgment.

Yet if this objection has force, there must be some relatively low threshold at which the judge’s contributions are deemed substantial enough to shield the judgment from such criticism – else judicial writing habits would be required to undergo serious reform, and judges would find themselves asked to meet a standard aligned closely with copyright’s originality requirement. The same answer applies whether the objection results from the judge’s reliance on secondary sources, judgments, or – what is more common – the opposing party’s written arguments. While the losing party will doubtless be readier to detect implications of bias when the winning party is the source of the judge’s prose, the problem of explaining how much the judge must write to avoid the appearance of impropriety remains the same in all of these situations because they all raise the same question about how the judge is to show that she turned her own mind to the issues.

Indeed, a test for originality that begins and ends with pleadings filed by the opposing party would be so trivial and would represent such a feeble vindication of the values supposedly at stake that it hardly deserves the name of a test at all. The opportunities for the relevant forms of judicial irresponsibility include much more than the parroting of counsels’ arguments, and hence, a test meant to curb such conduct must apply more broadly. If skill and judgment are, indeed, the necessary ingredients, it would be implausible to insist that they are always present except when the judge cribs virtually all of her prose directly from one of the parties. Yet a test that strives to identify principles – and that takes seriously the proposition that judges might fail to devote sufficient thought to the dispute even when they do not simply cut and paste huge quantities of the lawyers’ prose – would present a frightening prospect to courts that spend much of their time repeating or paraphrasing what has been said before. The question, then, is whether there can be a test that appropriately protects the concerns motivating the demand for judicial originality without imposing requirements that are pointlessly arbitrary (such as a ban that goes no further than the party’s pleadings) or that

primarily to resolve a dispute, it does not follow that the judge may use it to take credit for an idea taken from another source and to hold herself out as an innovator. This role, though related to the judgment’s dispute-resolving function, exceeds that function. The original author might not have any legal grounds for challenging such conduct but would be justified in challenging it on ethical grounds and seeking due credit. For a pair of examples, see John Tehranian, *Infringement Nation: Copyright 2.0 and You* (New York: Oxford University Press, 2011) at 145–6; see also Catherine A MacKinnon, ‘Engaged Scholarship as Method and Vocation’ (2010) 22 Yale J.L. & Feminism 193 at 200.
are so burdensome as to make judges fearful that their routine practices of quotation and paraphrase will be rendered open to challenge.

In what follows, I argue that the search for such a standard must inevitably fail. Part II discusses the sort of requirement that must be imposed if excessive copying is taken to suggest a failure, on the judge’s part, to bestow independent thought on the dispute. This task cannot be specified in quantitative terms, but the essential basis for any such requirement is that the judge must contribute enough of her own analysis to show that the legal conclusions were not merely ‘mechanically’ derived. While at first glance this may sound like a satisfying and readily achievable standard, closer analysis shows that it would create an extremely onerous burden and would produce a rapid increase in meritless appeals. Part III takes up a number of recent controversies involving various forms of judicial copying and shows how the analysis here would address them.

The argument below is not a defence of judicial copying but an exploration of its permissibility. An implication of the argument is that the usual reasons for monitoring plagiarism do not readily apply in the judicial context, so that any rationale for prohibiting judges from engaging in unattributed copying must be distinguished from the conventional understanding of this prohibition. It is hardly news that legal writing is embedded in a network of precedent, formulas, and boilerplate, that it reflects a general preference for the tried and true over the novel, and that it routinely depends on practices – verbatim repetition of others’ words, adoption of others’ prose and arguments – that might trigger infringement claims in an intellectual property dispute. In the world of commercial publishing, copying (even if properly attributed) may lead to complaints that a work is unacceptably derivative. By contrast, judicial writing – especially at the trial level – seeks to produce derivative work. And whereas unattributed copying is normally equated with plagiarism and is seen as an attempt to claim undue credit, various forms of unattributed copying are taken for granted in judicial writing, where the authorship function is oriented not around credit so much as responsibility.

There is much to be said for an originality requirement in judicial opinion writing. By attempting to explain a path of reasoning in their own

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12 For a recent discussion, see Friedman, supra note 4.
13 Thus, the judicial authorship function differs from the one set out in Michel Foucault, ‘What is an Author?’ in Michel Foucault, Language, Counter-Memory, Practice, translated by Donald F Bouchard & Sherry Simon, ed by Donald F Bouchard (Ithaca: Cornell University Press, 1977) at 113–8.
words, writers clarify for themselves the contours of the argument and its implications, fashion the analysis so as to make it withstand their own critical objections, and satisfy themselves that the product is appropriate for the occasion – that is, that it serves the needs of their audience as they understand those needs. These aims dovetail with the concerns about transparency and consistency that drive the jurisprudence on sufficiency and with the concerns about integrity and impartiality underlying the jurisprudence on procedural fairness. Though it should not be taken for granted that the written product will necessarily reflect the author’s own reasoning process or will present a full account of the author’s premises, the process of writing helps to focus the author’s attention on the demands of the genre and to present explanations and justifications that satisfy those demands.

Commentators on writing and cognition have often noted that writers find, in the course of composing an argument, that they are not simply presenting a snapshot of their already formed ideas because the process of recording their analysis transforms their relation to the subject. Ronald Kellogg, a leading scholar in the field of writing and cognitive psychology, summarizes a widely held view when he observes, ‘Writing not only demands thinking; it is a means of thinking . . . . By writing about a subject, one learns what one thinks about the subject.’ Chad Oldfather makes a similar point, specifically with respect to judicial


15 There may well be inadvertent or deliberate gaps between the stated reasons and the basis for the decision; not least because the latter may not be fully capable of articulation. Judge Joseph Hutcheson long ago defended the legitimacy of a process by which a judge first decides according to his ‘intuitive sense,’ and then ‘having so decided, enlists his every faculty, and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics’; Joseph C Hutcheson, Jr, ‘The Judgment Intuitive: The Function of the “Hunch” in the Judicial Decision’ (1928) 14 Cornell Law Quarterly 274 at 285. Writing in a similar vein, Richard A Wasserstrom calls it a ‘curious feature[] of Anglo-American case law that regardless of the way in which a given decision is actually reached, the judge . . . . feels it necessary to make it appear that the decision was dictated by prior rules applied in accordance with canons of formal logic’; Richard A Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (Stanford, CA: Stanford University Press, 1961) at 17. The burden of both arguments is that judicial explanations do not necessarily explain why the judge ruled in a certain way, but we accept the explanation so long as it justifies the ruling according to professionally accepted protocols. See also Bruce Anderson, ‘Discovery’ in Legal Decision-Making (Norwell, MA: Kluwer Academic, 1996) at 1.

opinions: ‘[J]udges seem to agree that the process of creating a written justification for a decision will often alter the terms of the justification, and thus in an important sense the decision itself.’ Among the reasons for this dynamic, several are particularly significant in the legal context. Writing provides ‘resources . . . for organizing and thinking through new ideas . . . and for explicating the relationships among them,’ and it also provides ‘a medium for exploring implications entailed within otherwise unexamined assumptions.’ Given the role in legal analysis of unearthing tacit assumptions and discerning implicit connections among doctrines and principles, the importance of these observations is self-evident. Requiring judges to produce a fresh analysis of the issues in each case may not ensure that the judgment will always achieve the goals associated with independent writing and the commensurate benefits for judges, litigants, and lawyers, but would at least serve generally to promote these effects. To the extent that judges are required to give written reasons for their decisions, the goals underlying the demand seem to be better served when judges force themselves to produce their own explanation rather than relying on another source.

At the same time, the highly repetitive and precedent-oriented nature of common law judgments makes it impractical and undesirable to propose that judicial opinions in their entirety should generally be subject to an originality requirement, even if pitched very low. Judgments may consist largely of material taken from other sources – even material all taken from the same source – without raising any concerns at all. The very basis for establishing a judgment’s consistency with previous cases depends on deliberate copying from other sources. As Joyce George observes, ‘Requiring an original thought would be an affront to precedent and would be an invitation for each judge to decide the same case differently so that there would be no precedential value to

19 A note of caution is required because, as Chad Oldfather notes, in some contexts, ‘the verbalization involved in writing may lead the judge writing the opinion to focus her justification on the articulate aspects of the decision to the relative exclusion of its other, and perhaps more significant, components’; Oldfather, supra note 16 at 1392.
any decision.

No one would suggest that judges should strive throughout their opinions to produce fresh and distinctive prose. Any effort to advance the goals served by an originality requirement must proceed in a fashion that allows for the repetitive conventions of judicial writing.

As a practical matter, such a requirement could not plausibly be limited to judicial copying from the pleadings but would have to address copying more generally. If the underlying concern involves the need for a resolution that reflects the judge’s own views of the parties’ conflict, there is no principled basis for concluding that this concern inevitably arises when the judge adopts one of the party’s arguments (or only when the judge does so without attribution) but not when the judge undertakes other kinds of wholesale copying. What is required, rather, is a principle that explains, as a general matter, what counts as a sufficient contribution to avoid the sense that the judge has copied without exercising any critical judgment. Such a principle, though superficially appealing, would prove prohibitively demanding if applied consistently.

A JUDICIAL ORIGINALITY: A VIABLE STANDARD?

As noted earlier, concerns about judicial originality are associated with the need for independent analysis as a crucial aspect of the judge’s task. Lacking the judge’s independent contribution, a judgment may appear to reflect bias in favour of the party whose arguments were adopted, or may at least seem to show that the judge’s mind was not open to the arguments of the losing party. As the Court explained in Baker v Canada (Minister of Citizenship and Immigration), ‘[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.’ In Roberts v R, the Court elaborated on this standard, stating that the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is . . . the manifestation of a broader preoccupation about the image of justice.

Thus, in the context of judicial copying, the question is whether a judgment that depends primarily on unacknowledged use of others’ work would create the impression of bias, regardless of the judgment’s


23 Roberts v R, 2003 SCC 45 at para 66 [emphasis added].
sufficiency and its failure to suggest bias in any other respect. When a judge transcribes extensively from another source without giving credit, would a reasonable observer conclude that she did not exercise her independent judgment? And if so, what must the judge contribute to satisfy readers that she did conduct her own analysis?

To address these questions, it is useful to begin by asking whether extensive copying, even if properly attributed, would raise these concerns and then to consider the issue of acknowledgement. Courts in other common law jurisdictions do not object to wholesale judicial copying.\(^\text{24}\) Even when the issue is treated as a question of trial fairness, Canadian courts have asked whether the nature of the copying created the appearance of bias in the process or whether there were other aspects of the trial as a whole that would create this impression, rather than asking whether extensive copying \textit{per se} tarnishes the image of justice. For example, in \textit{Sorger v Bank of Nova Scotia},\(^\text{25}\) the court looked to the nature of the copied material. According to the Court of Appeal, the judge’s decision to reproduce both parties’ submissions had little effect on the optics of trial fairness. However, after the 125 pages that he copied from the pleadings, the trial judge selectively copied the defendants’ factual submissions while failing to acknowledge that they were disputed. The appellate court therefore concluded that a reasonable observer would have the impression that he had not ‘grappled fairly and impartially with the case . . . or decide[d] it independently.’\(^\text{26}\) It was the partiality reflected by the judgment’s presentation of the issues, and not the mere fact of copying, that raised concerns about bias.

In \textit{R v Gaudet},\(^\text{27}\) on the other hand, the Court of Appeal saw nothing in the copied material or in the trial as a whole that created the appearance of bias, and so the court refused to order a new trial in spite of extensive copying. According to \textit{Gaudet}, a judge’s decision to ‘accept one side’s submissions in total . . . in itself, does not compromise the appearance of fairness,’ but the practice may raise concerns when it strengthens an impression of bias produced by other features of ‘the trial as a whole.’\(^\text{28}\) \textit{Gaudet} does not explain why a reasonable observer would accept that the trial process is fair when the judge’s reasons simply reiterate one party’s position. Perhaps these cases were wrongly decided. Perhaps the better

\(^{24}\) See e.g. Meadowstone (Derbyshire) Ltd v Richard Kirk, Robert Hill (2006), UKEAT/0529/05/ZT at para 21; Wang v Wang, [2005] Part 4 Case 12 (HKCA) at paras 366–9, 377; James v Surf Road Nominees Pty Ltd, [2004] NSWCA 475 [James].

\(^{25}\) (1998), 39 OR (3d) 1 (CA) [Sorger].

\(^{26}\) Ibid at para 31.

\(^{27}\) (1998), 40 OR (3d) 1 (CA) [Gaudet].

\(^{28}\) Ibid at para 59.
view is that extensive copying raises fairness concerns even when the copying is acknowledged, and even in the absence of other factors that would cast doubt on the judge’s partiality.

Any rationale for requiring originality in judicial opinions, it would seem, must reflect the premise that some degree of originality is necessary to show that the judge exercised independent thought in resolving the dispute. Let us assume, then, that extensive copying would create a reasonable belief that the judge did not independently examine the aspect of the dispute covered by the copied material. In that case, when the issues resolved in that section are material to the result, the judgment appears to be the product of an unfair process. That premise might be taken to generate the appropriate standard: judges must show enough originality, must display enough of their own skill and judgment in every material part of their written reasons (that is, every part that significantly affects the outcome), to show that they have examined the issues independently.29

It is no help to answer that the process is fair so long as the judge contributes her own perspective somewhere in the judgment. If we take seriously the concern that the losing party must be able to see evidence of the judge’s own mind in the written product, it will hardly suffice to say that the litigant should be satisfied with any contribution the judge cares to make. Rather, the losing party will need to find evidence of the judge’s independent thought in every component of the judgment that matters to the result. Otherwise, the use of copied material might suggest a failure of independence in the very passage that determined the outcome, and the judgment could be appealed on that basis.

On this view, the quantity or ratio of copied material is beside the point, so long as judges add enough to show that the outcome is the product of their own thought. We may characterize this requirement as the ‘judicial originality’ standard – which is to say that it requires the minimum amount of originality needed to allow a reasonable observer to conclude that the judge has considered the issues herself and analysed them independently enough to yield a result that is the product of her own thought. If the standard is to be applied logically, then a party may challenge a judgment so long as any material part of it (any part that is dispositive for the outcome) fails to exhibit that minimum requisite.

At first glance, this standard might seem to comport well with the sufficiency doctrine. If reasons are a ‘mechanism by which judges account to

29 Notably, neither parties (when mounting an appeal) nor commentators (when considering the ingredients of judicial impartiality) argue that judges, in order to demonstrate their independence, must conduct their own search for case law that is not cited by the parties.
the parties and to the public for the decisions they render, then, arguably, the judge herself must furnish the explanation instead of merely adopting one supplied by another source. Similarly, if judges must ‘articulate the reasons for their actions,’ one might think that only the judge who took the action can articulate the reasons for it. In *R v M(RE)*, the Supreme Court made similar comments about the contents and effects of judgments, including the observation that, in her reasons, the trial judge should ‘articulate[] her understanding of the legal principles governing the outcome of the case.’ It might appear, then, that when judges repeat an explanation found elsewhere, they are choosing an unsuitable shortcut.

A moment’s reflection, however, shows that neither the sufficiency test nor the test for trial fairness requires judges to set out their understanding of the legal principles in distinctively phrased language in each case. It is permissible – and desirable – for judges to quote standard authorities for the gist of the analysis, followed by the bland observation, without any further steps in the reasoning, that the quoted language translates directly into the legal conclusions announced next. Canadian judgments are notable, in fact, for their tendency to feature lengthy quotations, extending to several pages at a time, with two or three levels of nested quotations, and with only a few lines added by the judge. No one has doubted that this routine practice satisfies the judge’s obligation to articulate her understanding of the principles and to account to the parties. Evidently, just a few sentences applying the facts to the law after extensive quotation from prior cases are enough to show that the judge is articulating her own view of the legal principles. But what applies to a judge’s use of language from prior decisions also applies to a judge’s use of material from the pleadings. That the judgment was issued by a court, while the pleadings were prepared by an interested party, does not automatically render the latter an unacceptable source. The pleadings might, in their own language, set out the legal standard accurately and cogently enough to persuade an objective reader – or might quote from the decided cases so extensively that, in effect, a judge who copies the submission is simply copying the cases and the party’s way of organizing them. Yet if the judge may adopt a party’s arguments in their entirety in this situation, then what does it take to fail the ‘judicial originality’ standard?

The easy but unhelpful answer is that a judgment falls short when, in a complex case involving disputed issues, the judge simply adopts the arguments of one party and evades the complications by endorsing that

30 Sheppard, supra note 14 at para 15.
31 Ibid.
32 *M(RE)*, supra note 14 at para 3.
party’s conclusions (as in Sorger). This answer tells us nothing because a judgment that takes this approach is substantively flawed and therefore flunks the sufficiency test (and probably the test for trial fairness as well). Even an independently written judgment creates the impression of bias if it presents the evidence selectively, making readers sceptical that the judge ‘attempted to grapple fairly and impartially with the case presented by [one of the parties].’ Whether copied or not, a judgment will be rejected on sufficiency grounds if it fails to ‘resolve confused and contradictory evidence on a key issue.’ Reasons that ignore material disputes raised at trial do not become sufficient or impartial merely because the judge describes a party’s arguments as fair, thorough, and compelling. The difficult case, which must be confronted if the proposed standard can be justified, arises when a judgment copies material that aptly resolves the issues in the case at hand and that is fair, thorough, and compelling in its presentation of the facts and its analysis of the legal issues. The ‘judicial originality’ standard would have to reject such a judgment if the judge made only trivial contributions that did not display independent thought in the analysis.

Canadian courts have implicitly rejected a ‘judicial originality’ requirement in numerous cases. Moreover, there are many appellate cases in which courts have noted, without any hint of surprise or dismay, that a trial judgment was fashioned from the submissions by one of the parties. In these cases, the courts do not show much concern about the trial judge’s failure to say so explicitly or to identify the source. So long as the trial judgment includes a sufficiently explained rationale, the appellate courts are rarely troubled merely because that rationale was supplied entirely by one of the parties. To take a recent example, in R v Bastien, the Ontario Court of Appeal observed that, while the trial court’s ‘reasons [were] extremely brief, it is clear that the sentencing judge adopted the Crown’s submissions. Those submissions, in addition to the sentencing judge’s explicit reference to the importance of public protection, mean that the sentence is sufficiently explained.’ Far from balking at a judge’s adoption of submissions, courts take it for granted that the practice is permissible. Gaudet’s observation in 1998 that the practice is ‘not infrequent’ and should inform ‘the litigants’ general

33 Sorger, supra note 25 at para 31.
34 MiRE), supra note 14 at para 44, citing Sheppard, supra note 14 at para 55.
35 In addition to Sorger, supra note 25, and Gaudet, supra note 27, see R v Dastous (2004), 181 OAC 398; R v Kendall (2005), 75 OR (3d) 765; Canada (Attorney General) v Ni-Met Resources Inc (2005), 74 OR (3d) 641; 2878852 Canada Inc v Jones Howard Investment Counsel Inc, 2007 CarswellOnt 90 (CA); Janssen-Ortho Inc v Apotex Inc, 2009 FCA 212 [Janssen-Ortho].
36 2011 ONCA 240 at para 5.
expectations\textsuperscript{37} might be offered with equal truth today. That judges engage in so much copying hardly justifies the practice, but it does help to illustrate the cost that even the modest ‘judicial originality’ requirement would impose.

Finally, there are also serious doubts as to whether such a requirement could be implemented effectively, as we may see by returning again to the copyright analogy. When litigation arises over a work’s originality, it is usually because a defendant charged with infringement argues that the plaintiff’s work belongs to a category that by definition involves no exercise of skill or judgment, such as an alphabetical arrangement of names in a phone book or – appropriately – a verbatim reprint of a judicial opinion.\textsuperscript{38} These are ‘mechanically’ created works that aspire to accuracy and do not even purport to reflect intellectual effort. No specialized training is required to see that neither skill nor judgment went into their creation. Judicial opinions, on the other hand, invariably present themselves as reflecting these traits: it is an essential feature of the genre. Hence, it would take an informed observer to tell when the judge failed to apply the requisite minimum of skill and judgment. In consequence, parties will often see unacceptable copying where an appellate court would not. Consider again Gaudet’s statement that litigants should expect that a trial court might adopt a party’s submissions. Crown counsel, as repeat players in litigation,\textsuperscript{39} may anticipate this possibility, but a criminal accused is unlikely to share that view. This mismatch raises problems if impartiality is to be determined from the perspective of an objective observer because the demand for procedural fairness is meant to protect parties (non-lawyers), whereas the objective observer, in this context, will likely be aligned with the perspective of an appellate judge.\textsuperscript{40}

\textsuperscript{37} Gaudet, supra note 27 at para 56.

\textsuperscript{38} Feist Publications, Inc v Rural Telephone Service Co, 499 US 340 (1991) (phone directories); CCH, supra note 3 (court reports).


\textsuperscript{40} The problem is a familiar one. See e.g. Suja A Thomas, ‘The Fallacy of Dispositive Procedure’ (2009) 50 BCL Rev 759 at 769; Jeffrey W Stempel, ‘In Praise of Procedurally Centered Judicial Disqualification’ (2011) 30 Rev Litig 733 at 745. A helpful discussion of the issue, in the British context, appears in Mark Elliott, ‘Case Comment: The Appearance of Bias, the Fair-Minded and Informed Observer, and the “Ordinary Person in Queen Square Market”’ (2012) 71 Cambridge LJ 247 (comment on Belize Bank Ltd v Attorney General of Belize, [2011] UKPC 36). As Elliott notes, the problem arises in Belize because Lord Kerr ‘held that the observer, once invested with knowledge of pertinent aspects of the appeal process, would perceive no real possibility of bias’; ibid at 248 [emphasis added]. Elliott suggests that either appellate courts should ‘determine whether there is in fact a real possibility of bias’ and hope that the public will ‘trust in the independence and objectivity of the reviewing court’ or else ‘the reviewing court
Given that parties are often inclined to see bias where judges do not, the disparity in this particular context may seem no great cause for concern; it is just one more instance in which the losing party’s apprehensions are unfounded. In this case, however, the change in perspective would consistently discount widely shared views among litigants and therefore would risk undermining the doctrine’s goals. If there is any reason for focusing on the appearance of bias, rather than investigating the actual operation of bias, it is to preserve faith in the legal system by eliminating those decisions that seem doubtful to members of the public even if bias cannot be demonstrated. Hence, the effort proves futile if the way to recognize that a trial judgment cannot support an apprehension of bias is to have the experience of an appellate judge.

B Attribution and Procedural Fairness
If ‘judicial originality’ demands too much, perhaps requiring attribution of copied material would offer an acceptable safeguard to ensure procedural fairness. If the aim is to ensure that the losing party sees the result as impartial and principled, however, an attribution requirement is unlikely to have any significant effect. If judicial copying, when properly acknowledged, raises no concerns about the judge’s application of independent thought to the issues, then unacknowledged copying is not a source of trouble. Attribution does nothing to enhance the appearance of independent inquiry. The lapse in judicial attention (if there is one) would be the same in either case.

1 The Ethics of Attribution
The issue of attribution has figured only occasionally in the case law on judicial copying.41 In Cojocaru v British Columbia Women’s Hospital and Health Center, the British Columbia Court of Appeal sought to assign significant weight to this criterion, noting that ‘in the majority of the cases . . . in which the trial judge adopted or reproduced a party’s submissions, the trial judge acknowledged that the analysis was taken from the submissions of one of the parties,’ whereas ‘[i]n the case at bar, the trial judge did not attribute any of the [copied] passages.’42 Yet prior to Cojocaru, no court had held that attribution is a factor in evaluating sufficiency; instead, the courts focused on facial or trial fairness and

(2013) 63 UTLJ © UNIVERSITY OF TORONTO PRESS DOI: 10.3138/utlj.63.3.231112
expressly based their decisions on those criteria. By implication, Cojocaru suggests that attribution helps to legitimate a trial judge’s use of material from other sources and hence that trial judges may be excused from meeting the ‘judicial originality’ standard so long as they state expressly that they have adopted a party’s submissions.

However, when considered in terms of the need for independent judicial analysis, attribution has no effect on the legitimacy of the judge’s method or on the losing party’s perception of its legitimacy. If the goals of the ‘judicial originality’ standard are satisfied when a judge includes copied material and attributes it, the implicit message is that the judge feels certain that writing independently would not have yielded any of the benefits that are said to flow from that requirement. But this assurance would be hollow because the very point of the requirement is that we cannot know in advance what the writing process will yield. Of course, if there were plausible grounds for imagining that the losing party would regard attribution as a means of converting an apparently biased procedure into a fair and impartial one, we might be content to have achieved the appearance of legitimacy even though the assurance actually has no bearing on the judgment’s legitimacy. But the attribution will do nothing to improve the optics of the process. A judge may be justified in adopting one party’s arguments, but if the opposing party sees this as evidence of bias, that perception will rarely, if ever, depend on whether the judge has credited the source and stated that copied language perfectly captures her own view.

Nor is there any reason why the losing party should find this solution satisfying. If the ‘judicial originality’ standard makes any sense, it is not because mere linguistic variation, of the kind produced by resort to a thesaurus, has some merit in itself but because of the values inherent in having a disinterested adjudicator who stands above the fray and evaluates the issues from that position. The necessary amount of independent prose is the minimum needed to show that the judge reviewed and considered the arguments. This contribution would show not only that the judge has conformed to the demands of her bureaucratic role but also that by doing so, the judge has used the writing process as ‘a means of thinking’ and has created a written product that has the potential to yield the benefits associated with that process. If writing independently helps to achieve the goals noted earlier – testing and revising the arguments so as to make them withstand the judge’s own critical objections and ensuring that the written product speaks appropriately to its various audiences – that is because we expect to find at least some subtle differences between a party’s view, and the judge’s, and because the writing process offers the chance of unanticipated realizations that may arrive only in the course of crafting the judgment. Of course, these results may
not follow in every single case, but without independent analysis, they
cannot occur. Consequently, it makes no difference whether the judge
copies without attribution or does so while noting, as in Gaudet, that one
party offered ‘model’ submissions that adequately addressed the issues.\(^43\)
In either case, the judge has opted not to find out where the path of
independent writing might lead. If that decision is acceptable, its validity
is not undermined by the judge’s failure to credit the source – particu-
larly, where the source is already apparent to the other party.\(^44\) Con-
versely, a party who sees that procedure as the reflection of a biased
mind will not find it more acceptable simply because the judge takes the
trouble to credit the one source whom the losing party considers to be
especially biased and unreliable.

This conclusion is borne out by recent research on conditions that
influence parties’ beliefs about fair treatment. According to the ‘group
value model,’ the most influential account of the considerations bearing
on perceptions of procedural fairness, litigants are especially sensitive to
procedures that ‘make [them] feel like valued . . . members of their
social groups.’\(^45\) This research suggests that parties want to feel assured
that the adjudicator has listened to them, and that their view of the litiga-

tion process is coloured by the role it affords for ‘voice’ – that is, the
sense that their own expression of their concerns matters to the process.
Hence, according to a recent summary of this line of research, ‘voice en-
hances fairness because of the symbolic message it conveys about one’s
within-group standing.’\(^46\) There are numerous points before the final
resolution where this observation applies, and the judgment may not
even be the most important means of registering the parties’ perspec-
tives in a way that bears on their sense of fairness. But insofar as the judg-
ment affects that perception, a litigant who finds traces of her voice
there will at least derive a measure of satisfaction. Conversely, the losing
party will probably see the judgment as biased if the text affords little
room for her arguments – even if the judgment was written indepen-
dently. That perception would be even stronger if the judgment were

\(^{43}\) Gaudet, supra note 27 at para 56.
\(^{44}\) As Charles Geyh observes, ‘In an adversarial system of justice . . . judges are expected
to crib from the [litigants’] arguments, ideas, and research . . . They mislead no one
into thinking they’ve done otherwise even if they don’t festoon their opinions with ci-
tations to the briefs. The point is for judges to get it right, not for them to get there on
Legal Affairs 17 [Geyh].
\(^{45}\) Larry Heuer & Diane Sivasubramaniam, ‘Procedural Justice: Theory and Method’ in
Barry Rosenfeld & Steven D Penrod, eds, Research Methods in Forensic Psychology (Hoboki-
\(^{46}\) Ibid.
drawn largely from other sources, showing that the judge, though willing to copy from available materials, was not willing to use the losing party’s pleadings. Whether this research yields any positive suggestions that judicial writers might adopt is a question for another day. On the question of attribution in particular, however, it is evident that, when the winning party’s pleadings have been repurposed to craft the judgment, the losing party will almost certainly feel ill-used, and the judge’s punctiliousness (or lack thereof) in explaining who supplied the arguments will do nothing to affect that assessment.

If attribution seems preferable when judges copy, it is not because the losing party will see the judgment as fairer but because, as commentators on legal writing have observed, the failure to attribute a source seems unethical. Though valid so far as it goes, however, this objection employs an academic standard in a context where it applies only weakly at best. Indeed, though commentators are eager to find fault with unattributed judicial copying, they are often imprecise or simply incorrect about the harm it entails, revealing a confusion about the real source of discomfort. If the need for acknowledgement seems to bear on the apprehension of the bias, that is because judicial opinions are being confused with forms of writing undertaken to enhance the author’s reputation. Attribution is an ethical issue when a writer seeks to be recognized for another’s contribution or discovery, usually because the recognition translates into prestige, preferment, or profit. In those cases, the copier must conceal her source if she hopes to gain the unearned credit. That is why, in the legal context, the cases and scholarship on ghost-writing involve either lawyers who transcribed others’ pleadings and billed their clients for the time that would have been needed to write the documents from scratch or litigants who purported to act pro se because of the liberalized standards that apply to parties acting in this capacity but who actually had

47 Except for the obvious implication that judges who are inclined to copy would be well-advised to draw mainly from the losing party’s factum, or failing that, to borrow in equal measure from the arguments of both sides.

48 On this point, see also Linda J Skitka & Elizabeth Mullen, ‘Moral Convictions Often Override Concerns about Procedural Fairness: A Reply to Napier and Tyler’ (2008) 21 Social Justice Research 529. According to Skitka & Mullen, when disputants have strong moral convictions about outcomes, whether they see the result as fair or not is primarily a function of whether the adjudicator reaches their preferred view.

49 See e.g. Janssen-Ortho, supra note 35 at para 77; James, supra note 24 at para 167; Fuller Western Rubber Linings Ltd v Spence Corrosion Services Ltd, 2012 CarswellAlta 777 at para 5; George, supra note 11 at 719.

50 For an excellent discussion of contemporary plagiaristic strategies and the contexts in which they occur, see Mario Biagioli, ‘Recycling Texts or Stealing Time? Plagiarism, Authorship, and Credit in Science’ (2012) 19 International Journal of Cultural Property 453.
their pleadings drafted by lawyers. In both instances, acknowledging the source would mean sacrificing the benefit that flows from the claim of sole authorship.

These kinds of unattributed copying might be seen as a form of fraud: the copyist presents the work as her own and receives something of value when others trust the claim and behave accordingly. The question of undeserved credit would raise ethical issues in the case of a judge who routinely issues judgments consisting primarily of material taken from pleadings (or largely transcribed from treatises or other judgments) because the judge is shirking one of her professional duties. While collecting a government salary for producing judgments, she is simply rehashing others’ prose. She resembles the lawyer who bills for ten hours of work for a factum that was copied in ten minutes from another source. A judge who covets the reputation of a luminary and who incorporates ideas from secondary sources as her own is committing an ethical violation of a different sort, by claiming a status she has not earned. But as these examples suggest, concerns about undue credit rarely arise in the judicial context because credit is not a significant consideration in the production of judicial opinions.

A judge’s signature on an opinion functions primarily as means of certification, not as a means of claiming credit. Credit involves a bid for recognition for one’s ideas or perhaps, among judges, an effort to establish a certain kind of reputation – for analytical innovation, plain-spoken pragmatism, or perhaps more modest judicial virtues such as craftsmanship, meticulousness, and precision. Few judges make a show of striving for


52 ‘As taxpayers, we have a right to expect judges to do the jobs we pay them to do. We pay appellate judges to write opinions that tell us what the law is”; Geyh, supra note 44 at 17.

53 Peter Friedman makes a related point in his observation that ‘[l]iteral, unattributed cutting-and-pasting, instinctively considered plagiarism in most contexts, is simply everyday professional practice [for lawyers and judges]”; Friedman, supra note 4 at 520. See also Bast & Samuels, supra note 51 at 802–3.

54 For an historical discussion of the emergence of these quintessentially judicial virtues, see Susanna Blumenthal, ‘Law and the Creative Mind’ (1998) 74 Chicago-Kent L Rev 151.
credit (hence, the paradigmatic judicial virtues are modest ones), and those who do are likely to insist on crafting their own judgments rather than looking out for pleadings that might advance their aims. In most cases, the primary or even exclusive function of the judge’s signature is to certify the document as an official product of the court – that is, to show who is responsible for the judgment. In effect, the signature warrants that the written product meets certain professional standards and that consequently the judgment’s audiences (the parties, the appellate courts, lawyers, other potential litigants) may rely on it. The sufficiency doctrine, in treating explanatory coherence as a demand shared by all of these audiences, designates an essential aspect of the judicial signature’s ‘quality assurance’ effect and therefore may be invoked to remind the judge of her responsibility.

As Mario Biagioli observes, when discussing authorship in the context of scientific research, ‘Saying that [researchers] are scientific authors because their papers reflect personal creativity and original expression . . . would disqualify them as scientists because it would place their work in the domain of artifacts and fiction, not truth.’ In judicial opinions, doctrinal accuracy and clarity play a similar role, one that also stands in contrast to creativity and originality (in the sense of novelty). Several of the consequences that Biagioli associates with scientific authors and their professional goals also follow for judges. Just as ‘[t]ruth, unlike private beliefs, is generally defined as something that ought to be public,’ judgments and the legal meanings they afford are regarded as belonging to the public. Few would say that legal principles exist objectively in the world, apart from the courts that develop them, but the persuasiveness of a judge’s conclusions gains point from its consistency with related doctrines, and in that sense, the judge, like a scientist, is often seen ‘not . . . as someone who transforms reality or produces original expression out of thin air, but as a researcher who, with much work, “detects”

55 Judges rarely make this point explicitly; for an unusual instance, see EEOC v Synchro-Start Prods, Inc 29 F Supp (2d) 911 at 915, n 10 (ND Ill 1999).
something specific’ that forms part of a larger fabric.\textsuperscript{59} Hence, insofar as credit does accrue to judges on the basis of their contributions, as with scientists it involves ‘rewards assigned through peer review’\textsuperscript{60} in recognition of their “disinterestedness,” . . . [which is] a professional value practitioners accept or develop by working in an economy that logically requires their credit to be nonmonetary.\textsuperscript{61} If judges, by analogy to scientists, gain professional credit for detecting doctrinal currents or exhibiting the virtues of a disinterested perspective, then recycling material from the parties’ pleadings will not usually do much good. Signing one’s name to another’s work raises serious ethical concerns when the signatory seeks to collect the professional rewards that accrue to authors; in the judicial context, however, responsibility looms larger than credit as the function of the signature.

The judicial signature’s function in allocating responsibility explains why no ethical problems are raised by the use of law clerks – an example often raised to show the prevalence of judicial plagiarism.\textsuperscript{62} That judges sign work done by their clerks surprises no one: lawyers generally understand the judge’s name to represent a collaborative effort including the work of clerks and other judges (and the many collaborative works they draw on), all subject to the judge’s final approval.\textsuperscript{63} Rather than taking credit for the clerk’s ideas, the judge is taking responsibility for the accuracy of their research and analysis. In effect, the judge is warranting that she has reviewed and approved the final product and is responsible for


\textsuperscript{60} Biagioli, ‘Instability,’ supra note 57 at 4. Biagioli specifies these, ibid at 4, as including ‘reputation, prizes, tenure, membership in societies, etc’ – a list that we might modify, for judges, as including elevation, awards from bar societies and universities, and conference invitations.

\textsuperscript{61} Ibid at 5.


\textsuperscript{63} However, Catherine Fisk has suggested that these judicial writing practices are not well known among members of the wider public and that “[t]he authority of judges might be doubted if it were commonly recognized that recent law school graduates do much of the work of providing reasons”; Catherine L Fisk, ‘Credit Where It’s Due: The Law and Norms of Attribution’ (2006) 95 Geo L J 49 at 96.
any errors. The practice would raise ethical concerns if the judge did not supervise her clerks and did not even participate in the crafting of the opinion except when she signed it. This point is well explained in a recent pharmaceutical dispute in which the defendant manufacturer was charged with manipulating the medical publication process by enticing established academic doctors to sign their names to journal articles created by a commercial writing company. The articles were submitted to prestigious journals without acknowledgement of the medical writers’ involvement. The defendant argued that it had simply followed the same kind of ‘well accepted practice’ that judges use when enlisting the help of law clerks. As the court explained, however, when judges use drafts prepared by a clerk, they are not trying to deceive the target audience for the purpose of influencing that audience’s interpretation of the . . . order. In this instance, it is just that which is occurring. Bayer wants the target audience to believe the words are those of a particular doctor or academic for the sake of influencing that audience with the name of the supposed author . . . It would be more honest if the consultant wrote the article and the ‘name’ doctor or academic . . . endor[ed] the concepts . . . rather than trying to make the audience believe he or she actually wrote the entire article.

Unlike ghost-written medical research articles, judicial opinions – even when they copy without acknowledgement – do not use the judge’s name to secure assent to a legal analysis that was created for an ulterior purpose. Perhaps because unattributed copying normally raises a host of ethical concerns – and normally has the aim of deceiving the audience – some courts have assumed, without analysis, that attribution is also important in the context of judicial copying. But as we have seen, judgments differ from most other forms of writing. They are not primarily designed to elevate the author’s prestige or to promote the virtues of a particular doctrine against a competing doctrine. Moreover, in the context that most often gives rise to objections about judicial copying – the transcription of material from pleadings – the parties are fully aware of the source. Unacknowledged copying bears all the hallmarks of plagiarism and inevitably appears, whenever it occurs, to raise the concerns that apply to the core examples of that concept. Judicial copying, however, is

64 In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and PMF Products Liability Litigation, 2011 WL 6740391 (SD Ill 2011).
65 Ibid.
66 Ibid at *9.
a peripheral example, usually directed not at basking in another writer’s spotlight but at completing a task with prefabricated tools.

2 attribution as a priming mechanism
If requiring attribution would not enhance procedural fairness, perhaps it would nevertheless serve a valuable function in reminding judges of the need for independent analysis.\(^67\) Social psychologists have found that the effects of cognitive biases (such as hindsight bias and self-serving bias) may be reduced when test subjects are prepared, or ‘primed,’ to anticipate these effects.\(^68\) By making us aware of the tendency to overestimate the likelihood of certain outcomes or to discount certain kinds of information, priming mechanisms can help us avoid errors. Perhaps an attribution requirement could serve a similar function. Even if judicial originality is not required and its absence is not a ground for doubting a judge’s impartiality, it is nevertheless preferable for judges to explain the analysis in their own words. If judges were required to identify their source whenever they engaged in extensive copying, they might worry about how their judgments would appear to others, when these many citations showed how often the judge had used the parties’ prose instead of her own. Reluctant to produce such obviously derivative judgments, judges might be motivated instead to present the analysis in their own words. The requirement might trigger an anxiety of influence, in this case an anxiety based on test subjects’ perceptions of influence, with the general result that judges would copy less and would produce more judgments reflecting the virtues described at the beginning of this section.

But while this requirement might encourage more judicial originality, it would be counter-productive if a judge’s failure to credit her source were analysed as itself a ground for adducing bias. The danger is that a clear, well-supported, and thorough judgment, produced after a fair trial, might nevertheless, by virtue of extensive and unacknowledged copying, prompt an appeal simply because of the lack of attribution. If the judgment is not open to attack on any other substantive or procedural grounds, permitting an appeal on this ground would serve no purpose. If the priming mechanism is aimed at deterring a practice that is acceptable (though undesirable), a judge’s failure to prime herself cannot logically result in a more serious penalty than the practice itself it would merit. Appellate courts have been known to chastise trial judges

\(^67\) Thanks to Audrey Macklin for suggesting this line of thought.
for excessive copying, while nevertheless upholding the trial judgment, and perhaps the same tactic might apply to judgments that copy extensively without crediting their source.

The Federal Court of Appeal took precisely this approach in *Es-Sayyed v Canada (Public Safety and Emergency Preparedness)*, a case in which an immigration judge had developed a reputation for copying material from the parties’ submissions. In this instance, the judge denied the plaintiff’s request for a stay from a removal order, rendering Es-Sayyed liable to be deported as a danger to the public. The written reasons ‘substantially copied 62 of 66 paragraphs of the Minister’s written submissions’ without acknowledgement. The appellate court analysed the issue as one of trial fairness. As in *Gaudet*, the court explained that the independently contributed material (in this case amounting to two paragraphs) was, by itself, sufficient and bias-free. Neither the other impugned conduct, nor the trial judge’s documented habit in other cases of ‘copying . . . part[ies’] submissions without attribution’ changed the analysis. The judge’s penchant for copying did not suggest bias because the other instances occurred ‘not just in cases involving the Minister and not just in cases involving criminality.’ The copying in this case did not suggest bias because “[o]n a fair construction of the judge’s reasons . . . any fully-informed, reasonable person would conclude that the judge considered the material before him and the parties’ submissions and decided the matter before him in an open-minded, independent and impartial way.”

Nevertheless, the court issued a strongly worded warning against the practice of unacknowledged copying, explaining that ‘[j]udges should draft their own prose’ and that ‘[a]dopting or incorporating into the reasons, with attribution, portions of the written submissions is permissible’ but ‘the reasons must always be, and be seen to be, the end product of the judge’s own assessment of the key issues raised in the case.’ As a general matter, the court concluded, unattributed copying ‘creates a cloud over those who engage in it and harms the reputation of the administration of justice. This practice must stop.’ As noted above, a judge who repeatedly engages in extensive and unattributed copying raises concerns about the administration of justice that are not

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69 2012 FCA 59.
70 Ibid at 51.
71 Ibid at para 54.
72 Ibid.
73 Ibid at para 58.
74 Ibid at para 59.
75 Ibid at para 62.
76 Ibid at para 63.
prompted by occasional resort to this method.\textsuperscript{77} The repeat copyist seems to be shirking her duties and comes to resemble the lawyer who uses others’ pleadings as a template while charging the same fee as if she had written the material herself. Yet in that case, if the judgment is free of any details that would give rise to an apprehension of bias, it is the public, not the losing party, that has suffered an injury. Thus, the Federal Court of Appeal chose precisely the right solution under these circumstances by ordering the trial judge to mend his ways without vacating the judgment or remanding the case. Judges should be encouraged to write their own prose, but appellate courts should not seek to achieve this goal by introducing an acknowledgement requirement that serves, in effect, to treat unacknowledged copying as if it creates the appearance of bias.

III

The analysis thus far has focused on judicial opinions that draw heavily from the pleadings, but as this account has emphasized, judicial copying might take various other forms that could also give rise to concerns about the judge’s failure to consider the issues diligently or about claiming credit that properly belongs to someone else. This section considers some of these scenarios, involving cases in which judges copy from other decisions of their own, from decisions by other courts, or from secondary sources. Of course, judges routinely draw on these materials without giving any cause for concern—when the source is duly cited. As for the use of these sources without acknowledgement, for obvious reasons, there are relatively few documented instances and, according to the analysis above, this mode of copying should meet with the same treatment that would apply to unattributed copying from the pleadings. That is, copying \textit{per se} should not afford the basis for a challenge based on sufficiency or procedural fairness, but instead, such challenges should be based on the content of the copied judgment. The limited evidence available suggests that cases of ‘self-plagiarism’ would be treated in precisely that fashion. As for judgments featuring unattributed copying from other decisions and secondary sources, a notable pattern emerges. While they have generated more controversy than the judgments featuring copying from the pleadings and have yielded significantly more trauma for the judges involved, courts have generally declined to revisit the cases that gave rise to the outrage. In keeping with the view set out in the previous section, the consequences have been visited on the judges rather than the litigants.

\textsuperscript{77} See text accompanying note 51.
Consider, first, the case of a judge who sees her role as akin to that of a licensing board that approves or denies the applicants’ requests and supplies largely generic reasons for the decision. Once she hits on a formula that nicely expresses her view on a factual or legal issue, she simply repeats it whenever the same issue arises. Whereas a judge who draws heavily on the pleadings will, at least, have her borrowings detected by the parties (if no one else), the judge who copies herself may pass unnoticed by anyone – at least, until a suspicious litigant decides to study her stylistic fingerprints with the aid of automated content analysis software.  

A recent Ontario case shows how a court might treat the results. *R v Punzo* involved an appeal from a conviction for driving while intoxicated. The appellate court, assessing the trial judgment for sufficiency, viewed many of the factual findings as mere ‘boilerplate, essentially meaningless and of no assistance in determining the actual reasoning of the trial judge.’ The court was even more dismayed by ‘the trial judge’s general statement that he [had] considered the “inconsistencies and conflicts” in the testimony of the witnesses’:

There were no inconsistencies or conflicts in the Crown’s case. Neither were there any conflicts or inconsistencies between the evidence of Mr Punzo and that of [his witness]. Further, there was no conflict between the evidence of the police officers and that of the defence. I am left with two possibilities: either the trial judge misapprehended the evidence and based his adverse credibility findings on inconsistencies that did not exist, or he did not consider inconsistencies, but merely said that he did because this is part of the boilerplate he uses in every case. Either alternative is problematic.

In light of the discrepancy between the trial judge’s findings and the evidence, the court concluded that ‘the reasons are so deficient as to preclude any meaningful appellate review.’ While the court did not actually seek to determine whether the same ‘general statement[s]’ were

79 (2004), 2 MVR (5th) 294 (Ont Sup Ct J).
80 Ibid at para 26.
81 Ibid at para 27.
82 Ibid at para 33. The court took the same view in *R v Akouros*, 2004 CarswellOnt 6625 (Sup Ct J), when explaining that it had no quarrel with ‘the trial judge’s use of certain boilerplate language’; rather, ‘[w]hat is of concern is the failure . . . to go beyond the boilerplate and to deal with inconsistencies and conflicts in the crown evidence and to
pervasive in the trial judge’s written output, the analysis here suggests that a self-plagiarizing judge, such as the one described above, would be tolerated so long as her legal clichés aptly fit the facts of the case. Indeed, the courts have made a point of insisting that boilerplate is perfectly acceptable when the generic language applies to the dispute at hand.83

A judge who recycles her own prose, like a judge whose decision incorporates a verbatim reproduction of the arguments of counsel, might be accused of ensuring that the writing process will not serve as ‘a means of thinking.’ Moreover, as suggested above, the self-plagiarizing judge is harder to spot than the one who relies heavily on the pleadings because the parties are less likely to become aware of the practice. It might therefore seem that judicial self-copying requires more emphatic deterrence than the kind of copying we have been considering up to this point. Puzon, however, suggests that such a response is not warranted. Self-copying, no less than the use of boilerplate reasons, will typically yield inapt explanations that are facially insufficient and will themselves justify remand, whether or not the copied prose is recognized as such. While its frequency is hard to determine, self-copying seems to occur much more rarely than copying from the pleadings. Finally, it would be hard to tell where to draw the line between permissible verbal tics and worrisome self-repetition – except on the already available ground that inapposite findings or characterizations will always justify an appellate court in questioning the judgment’s explanatory power and the judge’s care in evaluating the dispute. For all these reasons, there are no distinctive concerns about judicial self-copying, by contrast with copying from the pleadings, that require additional prohibitions or citation rules.

Consider, next, the judge who believes that, just as there are seven basic story plots (or perhaps thirty-one basic narrative components),84 there are only so many different kinds of disputes, all of which have by now been addressed by some court, so that giving reasons is merely a question of finding the right judgment and changing a few words. This disclose the reasoning process by which the inconsistencies and conflicts have been resolved; ibid at para 7.

83 See note 82; see also R v Singh, 2008 ABCA 347 at para 7: despite ‘the applicant’s argument that the trial judge “took a boilerplate approach to the reasons,”’ the appellate judge concluded that ‘the trial judge addressed what was important and . . . was . . . alive to the issues before him,’ and on further appeal, the court was ‘unable to find error of law . . . upon which leave can be granted.’

approach, presumably seldom practised and even more rarely discovered, led to disciplinary action and ultimately resignation in one of the few reported instances of such conduct, involving Jennifer Rimmer, a Federal Magistrate in Australia who was found in three published decisions to have transposed numerous paragraphs, without attribution and with little or no revision, from other judgments. Yet despite widespread criticism of the judge, the copied judgments were not reopened. It might seem obvious that behaviour objectionable enough to warrant resignation would also justify a reconsideration of the disputes, but the courts have apparently declined to take that step. The judgments remain on the books in the same form as originally rendered, with no indication of any further proceedings.

Precisely the same concerns that apply to the self-repeating judge could be invoked here with even more force. In particular, this form of

85 See Mary Wyburn, ‘Defining Plagiarism in Legal Education and Legal Practice in Australia’ (2009) 7 J Commonwealth Law & Legal Educ 37 at 57: ‘In 2001 Jennifer Rimmer was sworn in as a federal magistrate . . . In early March 2006 it was revealed in the press that one of her 2005 judgments (a sexual harassment case where the hearing had occurred in 2001) had copied parts (some 25 paragraphs) of an earlier judgment by another federal magistrate without attribution. A statement by the Chief Magistrate (on 23 March) indicated that Rimmer “accepts and regrets” the failure to make proper attribution and she had taken leave “so that she may be provided with additional training, counselling and appropriate mentoring” before her return, whereupon she was to “sit in family law” and not in general federal law matters. The next month the press revealed two other instances of unattributed copying in her judgments’ [citations omitted]. For the pair of judgments that first aroused suspicion, see Frith v Exchange Hotel, [2005] FMCA 402, Rimmer FM [Frith]; and Hughes v Car Buyers Pty Ltd, [2004] FMCA 526, Walters FM [Hughes]; see also the discussion in Ginger Snatch, ‘Court in the Act,’ Justinian: A Reasonable Doubt for a Reasonable Price (10 March 2006), online: Justinian <http://justiniarchive.com/580-article>. In a later newspaper article revealing evidence of similar copying by the same judge in another case, the author observed that ‘[i]ronically, the portions copied by Ms Rimmer . . . are related to procedural fairness and the “fair hearing doctrine”; Hedley Thomas, ‘Copycat Judge a Repeat Offender,’ Courier Mail [Australia] (30 March 2006) 1. For the other two cases that provoked criticism, see Percival v Barok Industries Pty Ltd, [2005] FMCA 157, Rimmer FM [Percival]; compare Reid v Hubbard and Esandee Pty, [2003] FMCA 407, Bryant CFM [Reid]; and Jacobson v Telstra Corporation Ltd, [2005] FMCA 994, Rimmer FM; compare Cook v ASP Ship Management Pty Ltd (no 2), [2004] FMCA 361, McInnis FM. On the judge’s resignation, see Melanie Christiansen, ‘Carbon Copy Judge Resigns: Plagiarism Scandal Leads to Nine Months on Sick Leave,’ Courier Mail [Australia] (19 December 2006) 1. The case is also discussed in Robert Nicholson, ‘Plagiarism and the Law’ (2009) 14 Angelaki: Journal of the Theoretical Humanities 21 at 24.’

86 See Frith, ibid; Percival, ibid; Reid, ibid; and Hedley Thomas, ‘Boss Lashes at Copycat,’ Courier Mail [Australia] (3 April 2006) 7. When Rimmer FM’s copying was first discovered, journalists speculated that the verdict in Frith might be quashed; see Hedley Thomas, ‘Call for Probe of Court Opinion,’ Courier Mail [Australia] (20 March 2006) 12 [Hedley Thomas, ‘Boss’].
copying will often pass unnoticed, as the Rimmer case itself suggests: out of her three copied judgments, the latter two would almost certainly have remained unidentified if it had not been for the increased scrutiny of her output prompted by the discovery of her copying in the first case. Yet in all three cases, the copied material was confined largely to the legal analysis and more specifically to the recitation of established law as commemorated in the precedents. Perhaps this feature explains why the courts have not disturbed these judgments – and indeed, why one of the copied judgments could later be cited (along with the case it drew from) as valid authority. Copied facts might raise serious questions about their place in another dispute, but copied law – even if copied verbatim without attribution – more closely resembles an extended block quotation of the sort that often appears in judgments. The lack of attribution suggests that the author was lax in investigating the jurisprudence herself and sought to give the appearance of having undertaken such research, but it does not throw the legal analysis into doubt. In conveying the false impression that she has studied the precedents carefully, the author looks less like the judge who copies from the pleadings and more like the plagiarist who seeks to take credit for another’s work. Though she is not seeking acclaim as an innovator or a creative thinker, this kind of judicial copyist is claiming credit for diligence, if nothing else, on the basis of others’ work. The legal analysis may be unassailable, but in passing it off as her own rather than attributing it, the author implies that she has taken the time and effort to examine the material herself. The strategy is one familiar to academic researchers who copy others’ footnotes without actually consulting the sources they document. Whereas the judge who reproduces the pleadings without acknowledgement cannot expect to conceal her copying from the parties, the judge who uses another’s decision is presumably hoping to do just that. This form of copying – at least when confined to the legal analysis – therefore raises little concern about sufficiency or fairness, even as it raises ethical questions about the judge’s personal integrity that may justify censure.

87 See e.g. Hedley Thomas, ‘Boss,’ ibid at 7.
88 Philip v New South Wales, [2011] FMCA 308 at para 267, citing Frith, supra note 85; Hughes, supra note 85.
Finally, and closest to the ordinary understanding of plagiarism, is the judge who uses material from secondary sources without citation. In 2011, Associate Justice Mariano Del Castillo, a member of the Supreme Court of the Philippines, came under heavy criticism for copying material from a book and a law journal article in *Vinuya v Romulo*, an opinion rejecting claims for reparations by former ‘comfort women’ against the Japanese government. The incident provoked extensive discussion and led to a series of attacks on the judgment, followed by an unsuccessful call for impeachment. A letter from the faculty of the University of Philippines College of Law accused Del Castillo of engaging in precisely the kind of conduct that typically constitutes academic plagiarism: seeking ‘deliberate[ly] . . . to appropriate the original authors’ work’ and committing ‘intellectual fraud by copying works in order to mislead and deceive.’ Del Castillo defended his omission as inadvertent, explaining that his assistant accidentally deleted the citations and formatting details that would have identified the sources. Most of his colleagues accepted this account and concluded that the omissions resulted from ‘inadvertence or pure oversight.’ They also defended him against the imputation that he sought to claim unearned credit, observing that he had no ‘motive or reason for omitting attribution for the lifted passages’ and that ‘[c]iting [the] authors as the sources of the lifted passages’ could only have ‘enhance[d] . . . [the judgment’s] informative value.’ A majority of the Court subsequently denied the petitioners’ motion for reconsideration, reasoning that ‘decisions of courts are not written to earn merit, accolade, or prize as an original piece of work’ but instead

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92 In the Matter of the Charges of Plagiarism, Etc, against Associate Justice Mariano C Del Castillo, AM no 10-7-17-SC, 632 SCRA 607 at 617 (12 Oct 2010) (Phil) (en banc) (per curiam), online: <http://sc.judiciary.gov.ph/jurisprudence/2010/october2010/10-7-17-SC.htm> [In the Matter of the Charges of Plagiarism, Etc, 2010] citing the Statement of the University of the Philippines College of Law Faculty, 27 July 2010.

93 In the Matter of the Charges of Plagiarism, Etc, 2010, ibid at 629.

94 Ibid.

95 In the Matter of the Charges of Plagiarism, Etc, against Associate Justice Mariano C Del Castillo, AM no 10-7-17-SC, 642 SCRA 11 at 20 (8 Feb 2011), online: <http://sc.judiciary.gov.ph/jurisprudence/2011/february2011/10-7-17-SC.htm> [In the Matter of the Charges of Plagiarism, Etc, 2011].
aim to be ‘fair and correct in the context of the particular disputes involved.’ Characterizing law as a collective enterprise, the majority added that a ‘community of lawyers have together contributed to this body of knowledge, language, and expression,’ and that consequently plagiarism, with its implication of credit-seeking, is the wrong term to use when ‘judges and practitioners . . . lift passages from . . . precedents and [other legal] writings,’ even if the attribution is omitted. This account, however, did not persuade one of Del Castillo’s colleagues, who estimated that roughly half of the portion of the judgment devoted to international law was taken directly and without attribution from secondary sources. She concluded that ‘the extent of copying . . . renders incredible the claim of mechanical failure, as well as the alleged lack of intent on the part of the researcher to not give proper attribution.’

In effect, the conflict between the majority and the dissent represents a conflict between two different views of the potential functions that a judgment may serve. On the majority’s view, a judgment can only be understood as performing a bureaucratic function and the judge’s signature can only be understand as a form of certification, testifying to the signatory’s approval. Even from that perspective, as we have seen, unattributed copying might be regarded as an illegitimate effort to appear industrious, although the majority does not entertain this possibility. According to the dissent, however, a judgment may do more, and a judge may properly be accused of plagiarism when the copying does not involve ‘precedents or parts of the pleadings of the parties to a case’ but instead involves ‘the peculiar situation of a judge who issues a decision that plagiarizes law review articles’ because, in that case, the judge is ‘venturing into using the original words of others’ and trying to ‘pass off the words of . . . others’ pioneering works as his own.’ This kind of copying, the dissent suggests, involves ‘falsely claiming authorship of someone else’s material’ and ‘directly assaults the author’s interest in receiving credit.’

97 In the Matter of the Charges of Plagiarism, Etc, 2011, supra note 95 at 21.
98 In the Matter of the Charges of Plagiarism, Etc, 2011, ibid at 95, Sereno J, dissenting, online: http://sc.judiciary.gov.ph/jurisprudence/2011/february2011/10-7-17-SC_sereno.htm. As the dissent explained, ibid at 94: ‘52.9% of the words used in the Vinuya Decision’s discussion on international law, which begins in page 24 and continues to the end (2,869 out of 5,419 words), are copied without attribution from other works.’
99 Ibid at 99.
100 Ibid at 96.
101 Ibid at 97.
Yet even if one accepts this view, it does not follow that the ethical lapse necessitates a reopening of the case that yielded the flawed judgment, as the dissenting justice herself acknowledged: ‘Findings of judicial plagiarism do not necessarily carry with them the imposition of sanctions, nor do they present unequivocal demands for rehearing or the reversal of rulings.’ 103 Indeed, the dissent’s proposed remedy did not entail a rehearing but instead would have provided for an apology, a corrected judgment with proper citations, a reminder to the Court’s staff about proper citation requirements, and a notification of the result to the authors of the copied material. 104 Thus, even on this analysis, targeting the ‘peculiar situation’ in which judicial copying is taken to correspond directly to the core understanding of plagiarism, it is the plagiarized author rather than the losing party who is seen as suffering a harm, and consequently, the solution is not to have a new trial, or even to rewrite the judgment in a fashion that requires more of the judge’s own words, but to supply the missing citations so as to ensure proper attribution.

Repetition of others’ words is such a familiar and essential habit in legal writing that the practice generally passes unnoticed unless it takes an unusual form. When that does occur, it is hardly surprising that a failure in attribution should be one of the first features to call attention to itself because citation is also a habitual reflex in legal writing and because unattributed copying seems to bring with it all of the problems normally associated with plagiarism. Closer scrutiny, however, shows that, in the context of judicial writing, the concern generally does not involve unmerited credit but rather a failure on the judge’s part to examine the parties’ arguments independently – and in that case, the concern arises to the same extent whether the copied material is attributed or not. A bid for unearned credit, in the rare instances that present this issue, is properly answered by a personal sanction rather than a reexamination of the dispute. As for the more usual kind of judicial copying, there are numerous reasons for preferring that judges strive to contribute their own prose. Indeed, a requirement of the sort considered above, 105 demanding textual evidence reflecting the judge’s own thought at each material step in the analysis would have much to recommend it, were it not for the radical increase in meritless appeals that this requirement would yield. In the face of that prospect, a willingness to permit extensive copying – whether attributed or not – proves to be the

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104 Ibid at 676–7.
105 See text accompanying notes 29–40.
lesser of two evils. Further, when copying leads to substantive flaws in the judgment, those defects will justify reversal or remand. Doubtless, that eventuality by itself effectively discourages judges from relying too heavily on other sources. While the litigants, and perhaps the jurisprudence as well, would fare better under an approach designed to satisfy all parties that judge has considered the issues independently, copyright’s originality standard has not previously served as a criterion in judicial writing and the cost of such a standard would be prohibitive.