

from The New Yorker

November 22, 2004
ANNALS OF CULTURE

The Picture Problem

Should a charge of plagiarism ruin your life?

by Malcolm Gladwell

1.

One day this spring, a psychiatrist named Dorothy Lewis got a call from her friend Betty, who works in New York City. Betty had just seen a Broadway play called "Frozen," written by the British playwright Bryony Lavery. "She said, 'Somehow it reminded me of you. You really ought to see it,'" Lewis recalled. Lewis asked Betty what the play was about, and Betty said that one of the characters was a psychiatrist who studied serial killers. "And I told her, 'I need to see that as much as I need to go to the moon.'"

Lewis has studied serial killers for the past twenty-five years. With her collaborator, the neurologist Jonathan Pincus, she has published a great many research papers, showing that serial killers tend to suffer from predictable patterns of psychological, physical, and neurological

dysfunction: that they were almost all the victims of harrowing physical and sexual abuse as children, and that almost all of them have suffered some kind of brain injury or mental illness. In 1998, she published a memoir of her life and work entitled "Guilty by Reason of Insanity." She was the last person to visit Ted Bundy before he went to the electric chair. Few people in the world have spent as much time thinking about serial killers as Dorothy Lewis, so when her friend Betty told her that she needed to see "Frozen" it struck her as a busman's holiday.

But the calls kept coming. "Frozen" was winning raves on Broadway, and it had been nominated for a Tony. Whenever someone who knew Dorothy Lewis saw it, they would tell her that she really ought to see it, too. In June, she got a call from a woman at the theatre where "Frozen" was playing. "She said she'd heard that I work in this field,

and that I see murderers, and she was wondering if I would do a talk-back after the show," Lewis said. "I had done that once before, and it was a delight, so I said sure. And I said, would you please send me the script, because I wanted to read the play."

The script came, and Lewis sat down to read it. Early in the play, something caught her eye, a phrase: "it was one of those days." One of the murderers Lewis had written about in her book had used that same expression. But she thought it was just a coincidence. "Then, there's a scene of a woman on an airplane, typing away to her friend. Her name is Agnetha Gottmundsdottir. I read that she's writing to her colleague, a neurologist called David Nabkus. And with that I realized that more was going on, and I realized as well why all these people had been telling me to see the play."

Lewis began underlining line after line. She had worked at New York University School of Medicine. The psychiatrist in "Frozen" worked at New York School of Medicine. Lewis and Pincus did a study of brain injuries among fifteen death-row inmates. Gottmundsdottir and Nabkus did a study of brain injuries among fifteen death-row inmates. Once, while Lewis was examining the serial killer Joseph Franklin, he sniffed her, in a grotesque, sexual way. Gottmundsdottir is sniffed by the play's serial killer, Ralph. Once, while Lewis was examining Ted Bundy, she kissed him on the cheek. Gottmundsdottir, in some productions of "Frozen," kisses Ralph. "The whole thing was right there," Lewis went on. "I was sitting at home reading the play, and I realized that it was I. I felt robbed and violated in some peculiar way. It was as if someone had stolen--I don't believe in the soul, but, if there was such a thing, it was as if someone had stolen my essence."

Lewis never did the talk-back. She hired a lawyer. And she came down from New Haven to see "Frozen." "In my book," she said, "I talk about where I rush out of the house with my black carry-on, and I have two black pocketbooks,

and the play opens with her"--Agnetha--"with one big black bag and a carry-on, rushing out to do a lecture." Lewis had written about biting her sister on the stomach as a child. Onstage, Agnetha fantasized out loud about attacking a stewardess on an airplane and "biting out her throat." After the play was over, the cast came onstage and took questions from the audience. "Somebody in the audience said, 'Where did Bryony Lavery get the idea for the psychiatrist?'" Lewis recounted. "And one of the cast members, the male lead, said, 'Oh, she said that she read it in an English medical magazine.'" Lewis is a tiny woman, with enormous, childlike eyes, and they were wide open now with the memory. "I wouldn't have cared if she did a play about a shrink who's interested in the frontal lobe and the limbic system. That's out there to do. I see things week after week on television, on 'Law & Order' or 'C.S.I.,' and I see that they are using material that Jonathan and I brought to light. And it's wonderful. That would have been acceptable. But she did more than that. She took things about my own life, and that is the part that made me feel violated."

At the request of her lawyer, Lewis sat down and made up a chart detailing what she felt were the questionable parts of

Lavery's play. The chart was fifteen pages long. The first part was devoted to thematic similarities between "Frozen" and Lewis's book "Guilty by Reason of Insanity." The other, more damning section listed twelve instances of almost verbatim similarities--totalling perhaps six hundred and seventy-five words--between passages from "Frozen" and passages from a 1997 magazine profile of Lewis. The profile was called "Damaged." It appeared in the February 24, 1997, issue of The New Yorker. It was written by me.

2.

Words belong to the person who wrote them. There are few simpler ethical notions than this one, particularly as society directs more and more energy and resources toward the creation of intellectual property. In the past thirty years, copyright laws have been strengthened. Courts have become more willing to grant intellectual-property protections. Fighting piracy has become an obsession with Hollywood and the recording industry, and, in the worlds of academia and publishing, plagiarism has gone from being bad literary manners to something much closer to a crime. When, two years ago, Doris Kearns

Goodwin was found to have lifted passages from several other historians, she was asked to resign from the board of the Pulitzer Prize committee. And why not? If she had robbed a bank, she would have been fired the next day.

I'd worked on "Damaged" through the fall of 1996. I would visit Dorothy Lewis in her office at Bellevue Hospital, and watch the videotapes of her interviews with serial killers. At one point, I met up with her in Missouri. Lewis was testifying at the trial of Joseph Franklin, who claims responsibility for shooting, among others, the civil-rights leader Vernon Jordan and the pornographer Larry Flynt. In the trial, a videotape was shown of an interview that Franklin once gave to a television station. He was asked whether he felt any remorse. I wrote:

"I can't say that I do," he said. He paused again, then added, "The only thing I'm sorry about is that it's not legal."

"What's not legal?"

Franklin answered as if he'd been asked the time of day: "Killing Jews."

That exchange, almost to the word, was reproduced in "Frozen."

Lewis, the article continued, didn't feel that Franklin was fully responsible for his actions. She viewed him as a victim of neurological dysfunction and childhood physical abuse. "The difference between a crime of evil and a crime of illness," I wrote, "is the difference between a sin and a symptom." That line was in "Frozen," too--not once but twice. I faxed Bryony Lavery a letter:

I am happy to be the source of inspiration for other writers, and had you asked for my permission to quote--even liberally--from my piece, I would have been delighted to oblige. But to lift material, without my approval, is theft.

Almost as soon as I'd sent the letter, though, I began to have second thoughts. The truth was that, although I said I'd been robbed, I didn't feel that way. Nor did I feel particularly angry. One of the first things I had said to a friend after hearing about the echoes of my article in "Frozen" was that this was the only way I was ever going to get to Broadway--and I was only half joking. On some level, I considered Lavery's borrowing to be a

compliment. A savvy writer would have changed all those references to Lewis, and rewritten the quotes from me, so that their origin was no longer recognizable. But how would I have been better off if Lavery had disguised the source of her inspiration?

Dorothy Lewis, for her part, was understandably upset. She was considering a lawsuit. And, to increase her odds of success, she asked me to assign her the copyright to my article. I agreed, but then I changed my mind. Lewis had told me that she "wanted her life back." Yet in order to get her life back, it appeared, she first had to acquire it from me. That seemed a little strange.

Then I got a copy of the script for "Frozen." I found it breathtaking. I realize that this isn't supposed to be a relevant consideration. And yet it was: instead of feeling that my words had been taken from me, I felt that they had become part of some grander cause. In late September, the story broke. The Times, the Observer in England, and the Associated Press all ran stories about Lavery's alleged plagiarism, and the articles were picked up by newspapers around the world. Bryony Lavery had seen one of my articles, responded to what she read,

and used it as she constructed a work of art. And now her reputation was in tatters. Something about that didn't seem right.

3.

In 1992, the Beastie Boys released a song called "Pass the Mic," which begins with a six-second sample taken from the 1976 composition "Choir," by the jazz flutist James Newton. The sample was an exercise in what is called multiphonics, where the flutist "overblows" into the instrument while simultaneously singing in a falsetto. In the case of "Choir," Newton played a C on the flute, then sang C, D-flat, C--and the distortion of the overblown C, combined with his vocalizing, created a surprisingly complex and haunting sound. In "Pass the Mic," the Beastie Boys repeated the Newton sample more than forty times. The effect was riveting.

In the world of music, copyrighted works fall into two categories--the recorded performance and the composition underlying that performance. If you write a rap song, and want to sample the chorus from Billy Joel's "Piano Man," you first have to get permission from the record label to use the "Piano Man" recording, and then get permission from Billy Joel (or whoever owns

his music) to use the underlying composition. In the case of "Pass the Mic," the Beastie Boys got the first kind of permission--the rights to use the recording of "Choir"--but not the second. Newton sued, and he lost--and the reason he lost serves as a useful introduction to how to think about intellectual property.

At issue in the case wasn't the distinctiveness of Newton's performance. The Beastie Boys, everyone agreed, had properly licensed Newton's performance when they paid the copyright recording fee. And there was no question about whether they had copied the underlying music to the sample. At issue was simply whether the Beastie Boys were required to ask for that secondary permission: was the composition underneath those six seconds so distinctive and original that Newton could be said to own it? The court said that it wasn't.

The chief expert witness for the Beastie Boys in the "Choir" case was Lawrence Ferrara, who is a professor of music at New York University, and when I asked him to explain the court's ruling he walked over to the piano in the corner of his office and played those three notes: C, D-flat, C. "That's it!" he shouted. "There ain't nothing else! That's what was used.

You know what this is? It's no more than a mordent, a turn. It's been done thousands upon thousands of times. No one can say they own that."

Ferrara then played the most famous four-note sequence in classical music, the opening of Beethoven's Fifth: G, G, G, E-flat. This was unmistakably Beethoven. But was it original? "That's a harder case," Ferrara said. "Actually, though, other composers wrote that. Beethoven himself wrote that in a piano sonata, and you can find figures like that in composers who predate Beethoven. It's one thing if you're talking about da-da-da dummm, da-da-da dummm--those notes, with those durations. But just the four pitches, G, G, G, E-flat? Nobody owns those."

Ferrara once served as an expert witness for Andrew Lloyd Webber, who was being sued by Ray Repp, a composer of Catholic folk music. Repp said that the opening few bars of Lloyd Webber's 1984 "Phantom Song," from "The Phantom of the Opera," bore an overwhelming resemblance to his composition "Till You," written six years earlier, in 1978. As Ferrara told the story, he sat down at the piano again and played the beginning of both songs,

one after the other; sure enough, they sounded strikingly similar. "Here's Lloyd Webber," he said, calling out each note as he played it. "Here's Repp. Same sequence. The only difference is that Andrew writes a perfect fourth and Repp writes a sixth."

But Ferrara wasn't quite finished. "I said, let me have everything Andrew Lloyd Webber wrote prior to 1978--'Jesus Christ Superstar,' 'Joseph,' 'Evita.'" He combed through every score, and in "Joseph and the Amazing Technicolor Dreamcoat" he found what he was looking for. "It's the song 'Benjamin Calypso.'" Ferrara started playing it. It was immediately familiar. "It's the first phrase of 'Phantom Song.' It's even using the same notes. But wait--it gets better. Here's 'Close Every Door,' from a 1969 concert performance of 'Joseph.'" Ferrara is a dapper, animated man, with a thin, well-manicured mustache, and thinking about the Lloyd Webber case was almost enough to make him jump up and down. He began to play again. It was the second phrase of ""The first half of 'Phantom' is in 'Benjamin Calypso.' The second half is in 'Close Every Door.' They are identical. On the button. In the case of the first theme, in fact, 'Benjamin Calypso' is closer

to the first half of the theme at issue than the plaintiff's song. Lloyd Webber writes something in 1984, and he borrows from himself."

In the "Choir" case, the Beastie Boys' copying didn't amount to theft because it was too trivial. In the "Phantom" case, what Lloyd Webber was alleged to have copied didn't amount to theft because the material in question wasn't original to his accuser. Under copyright law, what matters is not that you copied someone else's work. What matters is what you copied, and how much you copied. Intellectual-property doctrine isn't a straightforward application of the ethical principle "Thou shalt not steal." At its core is the notion that there are certain situations where you can steal. The protections of copyright, for instance, are time-limited; once something passes into the public domain, anyone can copy it without restriction. Or suppose that you invented a cure for breast cancer in your basement lab. Any patent you received would protect your intellectual property for twenty years, but after that anyone could take your invention. You get an initial monopoly on your creation because we want to provide economic incentives for people to invent things like cancer drugs. But everyone gets to steal your breast-cancer cure--after a decent

interval--because it is also in society's interest to let as many people as possible copy your invention; only then can others learn from it, and build on it, and come up with better and cheaper alternatives. This balance between the protecting and the limiting of intellectual property is, in fact, enshrined in the Constitution: "Congress shall have the power to promote the Progress of Science and useful Arts, by securing for limited"--note that specification, limited--"Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

4.

So is it true that words belong to the person who wrote them, just as other kinds of property belong to their owners? Actually, no. As the Stanford law professor Lawrence Lessig argues in his new book "Free Culture":

In ordinary language, to call a copyright a "property" right is a bit misleading, for the property of copyright is an odd kind of property. . . . I understand what I am taking when I take the picnic table you put in your backyard. I am taking a thing, the

picnic table, and after I take it, you don't have it. But what am I taking when I take the good idea you had to put a picnic table in the backyard--by, for example, going to Sears, buying a table, and putting it in my backyard? What is the thing that I am taking then?

The point is not just about the thingness of picnic tables versus ideas, though that is an important difference. The point instead is that in the ordinary case--indeed, in practically every case except for a narrow range of exceptions--ideas released to the world are free. I don't take anything from you when I copy the way you dress--though I might seem weird if I do it every day. . . . Instead, as Thomas Jefferson said (and this is especially true when I copy the way someone dresses), "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

Lessig argues that, when it comes to drawing this line between private interests and public interests in intellectual property, the courts and Congress have, in recent years, swung much too far in the direction of private interests. He writes, for instance, about the fight by some developing countries to get access to inexpensive versions of Western drugs through what is called "parallel importation"--buying drugs from another developing country that has been licensed to produce patented medicines. The move would save countless lives. But it has been opposed by the United States not on the ground that it would cut into the profits of Western pharmaceutical companies (they don't sell that many patented drugs in developing countries anyway) but on the ground that it violates the sanctity of intellectual property. "We as a culture have lost this sense of balance," Lessig writes. "A certain property fundamentalism, having no connection to our tradition, now reigns in this culture."

Even what Lessig decries as intellectual-property extremism, however, acknowledges that intellectual property has its limits. The United States didn't say that developing countries could never get access to cheap versions of American drugs. It

said only that they would have to wait until the patents on those drugs expired. The arguments that Lessig has with the hardcore proponents of intellectual property are almost all arguments about where and when the line should be drawn between the right to copy and the right to protection from copying, not whether a line should be drawn.

But plagiarism is different, and that's what's so strange about it. The ethical rules that govern when it's acceptable for one writer to copy another are even more extreme than the most extreme position of the intellectual-property crowd: when it comes to literature, we have somehow decided that copying is never acceptable. Not long ago, the Harvard law professor Laurence Tribe was accused of lifting material from the historian Henry Abraham for his 1985 book, "God Save This Honorable Court." What did the charge amount to? In an exposé that appeared in the conservative publication *The Weekly Standard*, Joseph Bottum produced a number of examples of close paraphrasing, but his smoking gun was this one borrowed sentence: "Taft publicly pronounced Pitney to be a 'weak member' of the Court to whom he could not

assign cases." That's it. Nineteen words.

Not long after I learned about "Frozen," I went to see a friend of mine who works in the music industry. We sat in his living room on the Upper East Side, facing each other in easy chairs, as he worked his way through a mountain of CDs. He played "Angel," by the reggae singer Shaggy, and then "The Joker," by the Steve Miller Band, and told me to listen very carefully to the similarity in bass lines. He played Led Zeppelin's "Whole Lotta Love" and then Muddy Waters's "You Need Love," to show the extent to which Led Zeppelin had mined the blues for inspiration. He played "Twice My Age," by Shabba Ranks and Krystal, and then the saccharine seventies pop standard "Seasons in the Sun," until I could hear the echoes of the second song in the first. He played "Last Christmas," by Wham!, followed by Barry Manilow's "Can't Smile Without You" to explain why Manilow might have been startled when he first heard that song, and then "Joanna," by Kool and the Gang, because, in a different way, "Last Christmas" was an homage to Kool and the Gang as well. "That sound you hear in Nirvana," my friend said at one point, "that soft and then loud,

kind of exploding thing, a lot of that was inspired by the Pixies. Yet Kurt Cobain"--Nirvana's lead singer and songwriter--"was such a genius that he managed to make it his own. And 'Smells Like Teen Spirit'?"--here he was referring to perhaps the best-known Nirvana song. "That's Boston's 'More Than a Feeling.'" He began to hum the riff of the Boston hit, and said, "The first time I heard 'Teen Spirit,' I said, 'That guitar lick is from 'More Than a Feeling.'" But it was different--it was urgent and brilliant and new."

He played another CD. It was Rod Stewart's "Do Ya Think I'm Sexy," a huge hit from the nineteen-seventies. The chorus has a distinctive, catchy hook--the kind of tune that millions of Americans probably hummed in the shower the year it came out. Then he put on "Taj Mahal," by the Brazilian artist Jorge Ben Jor, which was recorded several years before the Rod Stewart song. In his twenties, my friend was a d.j. at various downtown clubs, and at some point he'd become interested in world music. "I caught it back then," he said. A small, sly smile spread across his face. The opening bars of "Taj Mahal" were very South American, a world away from what we had just listened to. And then I heard it. It was so obvious and unambiguous that I laughed out loud;

virtually note for note, it was the hook from "Do Ya Think I'm Sexy." It was possible that Rod Stewart had independently come up with that riff, because resemblance is not proof of influence. It was also possible that he'd been in Brazil, listened to some local music, and liked what he heard.

My friend had hundreds of these examples. We could have sat in his living room playing at musical genealogy for hours. Did the examples upset him? Of course not, because he knew enough about music to know that these patterns of influence--cribbing, tweaking, transforming--were at the very heart of the creative process. True, copying could go too far. There were times when one artist was simply replicating the work of another, and to let that pass inhibited true creativity. But it was equally dangerous to be overly vigilant in policing creative expression, because if Led Zeppelin hadn't been free to mine the blues for inspiration we wouldn't have got "Whole Lotta Love," and if Kurt Cobain couldn't listen to "More Than a Feeling" and pick out and transform the part he really liked we wouldn't have "Smells Like Teen Spirit"--and, in the evolution of rock, "Smells Like Teen Spirit" was a real step forward from "More

Than a Feeling." A successful music executive has to understand the distinction between borrowing that is transformative and borrowing that is merely derivative, and that distinction, I realized, was what was missing from the discussion of Bryony Lavery's borrowings. Yes, she had copied my work. But no one was asking why she had copied it, or what she had copied, or whether her copying served some larger purpose.

5.

Bryony Lavery came to see me in early October. It was a beautiful Saturday afternoon, and we met at my apartment. She is in her fifties, with short tousled blond hair and pale-blue eyes, and was wearing jeans and a loose green shirt and clogs. There was something rugged and raw about her. In the Times the previous day, the theatre critic Ben Brantley had not been kind to her new play, "Last Easter." This was supposed to be her moment of triumph. "Frozen" had been nominated for a Tony. "'Last Easter" had opened Off Broadway. And now? She sat down heavily at my kitchen table. "I've had the absolute gamut of emotions," she said, playing nervously with her hands as

she spoke, as if she needed a cigarette. "I think when one's working, one works between absolute confidence and absolute doubt, and I got a huge dollop of each. I was terribly confident that I could write well after 'Frozen,' and then this opened a chasm of doubt." She looked up at me. "I'm terribly sorry," she said.

Lavery began to explain: "What happens when I write is that I find that I'm somehow zoning on a number of things. I find that I've cut things out of newspapers because the story or something in them is interesting to me, and seems to me to have a place onstage. Then it starts coagulating. It's like the soup starts thickening. And then a story, which is also a structure, starts emerging. I'd been reading thrillers like 'The Silence of the Lambs,' about fiendishly clever serial killers. I'd also seen a documentary of the victims of the Yorkshire killers, Myra Hindley and Ian Brady, who were called the Moors Murderers. They spirited away several children. It seemed to me that killing somehow wasn't fiendishly clever. It was the opposite of clever. It was as banal and stupid and destructive as it could be. There are these interviews with the survivors, and what struck me was that they appeared to be frozen in time. And one of them said, 'If that man was out now, I'm a

forgiving man but I couldn't forgive him. I'd kill him.' That's in 'Frozen.' I was thinking about that. Then my mother went into hospital for a very simple operation, and the surgeon punctured her womb, and therefore her intestine, and she got peritonitis and died."

When Lavery started talking about her mother, she stopped, and had to collect herself. "She was seventy-four, and what occurred to me is that I utterly forgave him. I thought it was an honest mistake. I'm very sorry it happened to my mother, but it's an honest mistake." Lavery's feelings confused her, though, because she could think of people in her own life whom she had held grudges against for years, for the most trivial of reasons. "In a lot of ways, 'Frozen' was an attempt to understand the nature of forgiveness," she said.

Lavery settled, in the end, on a play with three characters. The first is a serial killer named Ralph, who kidnaps and murders a young girl. The second is the murdered girl's mother, Nancy. The third is a psychiatrist from New York, Agnetha, who goes to England to examine Ralph. In the course of the play, the three lives slowly intersect--and the characters gradually change and become

"unfrozen" as they come to terms with the idea of forgiveness. For the character of Ralph, Lavery says that she drew on a book about a serial killer titled "The Murder of Childhood," by Ray Wyre and Tim Tate. For the character of Nancy, she drew on an article written in the Guardian by a woman named Marian Partington, whose sister had been murdered by the serial killers Frederick and Rosemary West. And, for the character of Agnetha, Lavery drew on a reprint of my article that she had read in a British publication. "I wanted a scientist who would understand," Lavery said--a scientist who could explain how it was possible to forgive a man who had killed your daughter, who could explain that a serial killing was not a crime of evil but a crime of illness. "I wanted it to be accurate," she added.

So why didn't she credit me and Lewis? How could she have been so meticulous about accuracy but not about attribution? Lavery didn't have an answer. "I thought it was O.K. to use it," she said with an embarrassed shrug. "It never occurred to me to ask you. I thought it was news."

She was aware of how hopelessly inadequate that sounded, and when she went

on to say that my article had been in a big folder of source material that she had used in the writing of the play, and that the folder had got lost during the play's initial run, in Birmingham, she was aware of how inadequate that sounded, too.

But then Lavery began to talk about Marian Partington, her other important inspiration, and her story became more complicated. While she was writing "Frozen," Lavery said, she wrote to Partington to inform her of how much she was relying on Partington's experiences. And when "Frozen" opened in London she and Partington met and talked. In reading through articles on Lavery in the British press, I found this, from the Guardian two years ago, long before the accusations of plagiarism surfaced:

Lavery is aware of the debt she owes to Partington's writing and is eager to acknowledge it.

"I always mention it, because I am aware of the enormous debt that I owe to the generosity of Marian Partington's piece You have to be hugely careful when writing something like this, because it touches on people's shattered lives and you wouldn't

want them to come across it unawares."

Lavery wasn't indifferent to other people's intellectual property, then; she was just indifferent to my intellectual property. That's because, in her eyes, what she took from me was different. It was, as she put it, "news." She copied my description of Dorothy Lewis's collaborator, Jonathan Pincus, conducting a neurological examination. She copied the description of the disruptive neurological effects of prolonged periods of high stress. She copied my transcription of the television interview with Franklin. She reproduced a quote that I had taken from a study of abused children, and she copied a quotation from Lewis on the nature of evil. She didn't copy my musings, or conclusions, or structure. She lifted sentences like "It is the function of the cortex--and, in particular, those parts of the cortex beneath the forehead, known as the frontal lobes--to modify the impulses that surge up from within the brain, to provide judgment, to organize behavior and decision-making, to learn and adhere to rules of everyday life." It is difficult to have pride of authorship in a sentence like that. My guess is that it's a reworked version of

something I read in a textbook. Lavery knew that failing to credit Partington would have been wrong. Borrowing the personal story of a woman whose sister was murdered by a serial killer matters because that story has real emotional value to its owner. As Lavery put it, it touches on someone's shattered life. Are boilerplate descriptions of physiological functions in the same league?

It also matters how Lavery chose to use my words. Borrowing crosses the line when it is used for a derivative work. It's one thing if you're writing a history of the Kennedys, like Doris Kearns Goodwin, and borrow, without attribution, from another history of the Kennedys. But Lavery wasn't writing another profile of Dorothy Lewis. She was writing a play about something entirely new--about what would happen if a mother met the man who killed her daughter. And she used my descriptions of Lewis's work and the outline of Lewis's life as a building block in making that confrontation plausible. Isn't that the way creativity is supposed to work? Old words in the service of a new idea aren't the problem. What inhibits creativity is new words in the service of an old idea.

And this is the second problem with plagiarism. It is not merely extremist. It has also become disconnected from the broader question of what does and does not inhibit creativity. We accept the right of one writer to engage in a full-scale knockoff of another--think how many serial-killer novels have been cloned from "The Silence of the Lambs." Yet, when Kathy Acker incorporated parts of a Harold Robbins sex scene verbatim in a satiric novel, she was denounced as a plagiarist (and threatened with a lawsuit). When I worked at a newspaper, we were routinely dispatched to "match" a story from the Times: to do a new version of someone else's idea. But had we "matched" any of the Times' words--even the most banal of phrases--it could have been a firing offense. The ethics of plagiarism have turned into the narcissism of small differences: because journalism cannot own up to its heavily derivative nature, it must enforce originality on the level of the sentence.

Dorothy Lewis says that one of the things that hurt her most about "Frozen" was that Agnetha turns out to have had an affair with her collaborator, David Nabkus. Lewis feared that people would think she had had an affair with her collaborator, Jonathan Pincus. "That's slander," Lewis told me. "I'm

recognizable in that. Enough people have called me and said, 'Dorothy, it's about you,' and if everything up to that point is true, then the affair becomes true in the mind. So that is another reason that I feel violated. If you are going to take the life of somebody, and make them absolutely identifiable, you don't create an affair, and you certainly don't have that as a climax of the play."

It is easy to understand how shocking it must have been for Lewis to sit in the audience and see her "character" admit to that indiscretion. But the truth is that Lavery has every right to create an affair for Agnetha, because Agnetha is not Dorothy Lewis. She is a fictional character, drawn from Lewis's life but endowed with a completely imaginary set of circumstances and actions. In real life, Lewis kissed Ted Bundy on the cheek, and in some versions of "Frozen" Agnetha kisses Ralph. But Lewis kissed Bundy only because he kissed her first, and there's a big difference between responding to a kiss from a killer and initiating one. When we first see Agnetha, she's rushing out of the house and thinking murderous thoughts on the airplane. Dorothy Lewis also charges out of her house and thinks murderous thoughts. But the dramatic function of

that scene is to make us think, in that moment, that Agnetha is crazy. And the one inescapable fact about Lewis is that she is not crazy: she has helped get people to rethink their notions of criminality because of her unshakable command of herself and her work. Lewis is upset not just about how Lavery copied her life story, in other words, but about how Lavery changed her life story. She's not merely upset about plagiarism. She's upset about art--about the use of old words in the service of a new idea--and her feelings are perfectly understandable, because the alterations of art can be every bit as unsettling and hurtful as the thievery of plagiarism. It's just that art is not a breach of ethics.

When I read the original reviews of "Frozen," I noticed that time and again critics would use, without attribution, some version of the sentence "The difference between a crime of evil and a crime of illness is the difference between a sin and a symptom." That's my phrase, of course. I wrote it. Lavery borrowed it from me, and now the critics were borrowing it from her. The plagiarist was being plagiarized. In this case, there is no "art" defense: nothing new was being done with that line. And this was

not "news." Yet do I really own "sins and symptoms"? There is a quote by Gandhi, it turns out, using the same two words, and I'm sure that if I were to plow through the body of English literature I would find the path littered with crimes of evil and crimes of illness. The central fact about the "Phantom" case is that Ray Repp, if he was borrowing from Andrew Lloyd Webber, certainly didn't realize it, and Andrew Lloyd Webber didn't realize that he was borrowing from himself. Creative property, Lessig reminds us, has many lives--the newspaper arrives at our door, it becomes part of the archive of human knowledge, then it wraps fish. And, by the time ideas pass into their third and fourth lives, we lose track of where they came from, and we lose control of where they are going. The final dishonesty of the plagiarism fundamentalists is to encourage us to pretend that these chains of influence and evolution do not exist, and that a writer's words have a virgin birth and an eternal life. I suppose that I could get upset about what happened to my words. I could also simply acknowledge that I had a good, long ride with that line--and let it go.

"It's been absolutely bloody, really, because it attacks my own notion of my character," Lavery said, sitting at my kitchen table. A bouquet of

flowers she had brought were on the counter behind her. "It feels absolutely terrible. I've had to go through the pain for being careless. I'd like to repair what happened, and I don't know how to do that. I just didn't think I was doing the wrong thing . . . and then the article comes out in the New York Times and every continent in the world." There was a long silence. She was heartbroken. But, more than that, she was confused, because she didn't understand how six hundred and seventy-five rather ordinary words could bring the walls tumbling down. "It's been horrible and bloody." She began to cry. "I'm still composting what happened. It will be for a purpose . . . whatever that purpose is.

© 2004 Malcolm Gladwell