

# A PROPOSAL TO REPLACE THE SUBCONSCIOUS COPYING DOCTRINE

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## INTRODUCTION

On April 23, 2006, *The Harvard Crimson* broke the story that a recently-published novel written by a Harvard undergraduate had been found to contain substantial similarities to two existing books by another author.<sup>1</sup> During the ensuing days and months, the story spread rapidly through the world-wide press.<sup>2</sup> Numerous individuals also felt the need to comment on the situation online.<sup>3</sup> In response, the student,

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\* Articles Editor, *Cardozo Law Review*. J.D. Candidate (2008) Benjamin N. Cardozo School of Law; A.B. (2000) Dartmouth College. I would like to thank Professor Justin Hughes for introducing me to the subconscious copying doctrine and Professor Stewart Sterk for guiding me through the process of writing this Note. The members of the *Cardozo Law Review* have helped me greatly in developing and revising my Note, and I would like to thank Michael Mellin in particular for his superb editing. Finally, I would like to express my love and gratitude to my family and friends, particularly my parents, Evelyn and Steven, and my brothers, Bram and Darym, who give me their constant encouragement, support, and praise in everything that I do.

<sup>1</sup> David Zhou, *Student's Novel Faces Plagiarism Controversy*, *HARVARD CRIMSON*, Apr. 23, 2006, available at <http://www.thecrimson.com/article.aspx?ref=512948>.

<sup>2</sup> See, e.g., Dinitia Smith, *Harvard Novelist Says Copying Was Unintentional*, *N.Y. TIMES*, Apr. 25, 2006, at A14; James Poniewozik, *An F for Originality*, *TIME*, Apr. 30, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1189282,00.html>; Marina Budhos, *Commentary: Scandal Points to Real Teenage Story of Mimicry*, *STAR TRIB.*, May 29, 2006, at 2E; Saritha Prabhu, *A Need to Achieve Overwhelms a Teen Caught in Scandal*, *TENNESSEAN*, May 29, 2006, at 17A; Aengus Collins, *A New Taste for Copy and Paste*, *IRISH TIMES*, May 26, 2006, at 15; Harun ur Rashid, *Column: Plagiarism and a Young Writer*, *DHAKA COURIER*, May 26, 2006.

<sup>3</sup> Some of the comments were sympathetic to the student's plight. E.g., Posting of Bill Poser to Language Log, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003068.html> (Apr. 25, 2006, 18:18 EST) ("Could Viswanathan have unconsciously remembered such little snatches from another novel? Why not? This is easily within the range of human memory . . . . I find it entirely plausible that Viswanathan's use of a tiny bit of material from McCafferty's book was unconscious and blameless . . . . I'm writing [sic] about this partly because I think that an innocent young woman is being unfairly condemned . . ."). Most writers, however, used her situation to indulge in quite extensive displays of schadenfreude. E.g., Posting of Geoffrey K. Pullum to Language Log, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003066.html> (Apr. 25, 2006, 15:25 EST) ("This is a sorry case of fraud, lying, copyright infringement, and abdication of the writer's intellectual responsibility. It's sickening."); Posting of Abhi to Sepia Mutiny, <http://www.sepiamutiny.com/sepia/archives/003294.html> (Apr. 24, 2006, 12:35 EST) ("It appears VERY likely that young author Kaavya Viswanathan is a cheat . . . . Her literary