Open Content?
Ancient Thinking on Copyright

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Abstract: This paper investigates whether societies of classical antiquity offered any protection against literary plagiarism which could be regarded as a root of modern copyright law. Legal avenues were barred by the lack of a conceptual distinction between the intellectual creation and its material expression. Despite frequent accusations of plagiarism in ancient literature, authors could not appeal to a universal moral standard, but only to a narrow professional 'code of honour'. This low level of protection can be explained by two connected causes: On the one hand, writing had no commercial value, since manual reproduction made publishing unprofitable. On the other, it was technically impossible to secure a monopoly on a work if indistinguishable copies could be produced at almost the same cost. While a certain need for protection had begun to be felt, it remained impossible to enforce until the advent of printing. However, modern copyright could not have developed without a decisive foundation laid in antiquity : The elegist Theognis of Megara (6th c. BC) provides the earliest evidence of the equation between plagiarism and theft. Thus, the claim that authors 'own' their literary creations emerged from a genre in which anonymous oral poetry clashed with the culture of individual competition in the symposion. It was this paradigmatic change which introduced the idea of intellectual property.

The term 'plagiarism' is by no means a coinage of the modern age. Its inventor was Martial, who first applied the metaphor of the *plagiarius* – a slave-robber or, translated into the contemporary world, a kidnapper – to Fidentinus, who had recited Martial's satires as if

they were his own[1]. An inquiry into the ancient roots of copyright is therefore more worthwhile than legal historians tend to assume, not least against the background of the current controversy over the future of intellectual property rights. However, while a small number of studies on this issue have been published by philologists[2] and lawyers[3], as well as historians[4], they have — in contrast to the vivid discussion on early modern printing privileges as forerunners of copyright law — not succeeded in starting an interdisciplinary debate which could move beyond a description of the available evidence.

Copyright as an intellectual property right relating to creative works is nowadays recognised by all major legal systems and enshrined in international law, most notably the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It protects 'works' which meet a certain standard of originality, described as "skill, labour and judgement" in Common Law or as a "personal intellectual creation" in German Law, as opposed to mere ideas or pieces of information. The author of such a work has the exclusive right to produce and sell copies of it and its parts, to perform, display, transmit it, and so forth. These rights can also be transferred, licensed, and bequeathed to others, until they expire after a defined period of time *post mortem auctoris* (usually 50 or 70 years). The copyright holder can obtain a restrictive injunction against infringements or claim damages in a civil court. Some jurisdictions also provide for criminal sanctions. In continental law, in marked contrast to Anglo-Saxon legal tradition, copyright extends

[1] Martial, *Epigrams* 1.52. As other characters in Martial, of course, Fidentinus and his case may well have been fictional.

[2] K.DZIATZKO, *Autor - und Verlagsrecht im Alterthum*, *Rheinisches Museum für Philologie* 49 (1894), pp.559-576; E.STEMPLINGER, *Das Plagiat in der griechischen Literatur*, Leipzig/Berlin 1912; K.ZIEGLER, *Plagiat*, in *Paulys Realenyclopädie der classischen Altertumswissenschaft* XX, 2, Munich 1950, col.1956-1997; R.FROHNE, *Wider die papierene Weisheit, oder: das Gespür für so etwas wie 'geistiges Eigentum'*, *Archiv für Urheber- und Medienrecht* 129 (1995), pp.53-68.

[3] K.VISKY, *Geistiges Eigentum der Verfasser im antiken Rom*, *Archiv für Urheber- und Medienrecht* 106 (1987), pp.17-40; A.EGGERT, *Der Rechtsschutz der Urheber in der römischen Antike*, *Archiv für Urheber- und Medienrecht* 138 (1999), pp.183-217; K.SCHICKERT, *Der Schutz literarischer Urheberschaft im Rom der klassischen Antike*, Tübingen 2005.

[4] P.O.LONG, *Openness, Secrecy, Authorship: Technical Arts and the Culture of Knowledge from Antiquity to the Renaissance*, Baltimore 2001, pp.16-71.

beyond a mere property right to include moral rights such as the right of attribution and the right to the integrity of the work. Since these latter rights do not protect the impersonal interest in exploiting the commercial value of a work, but the personal connection between the author and his creation, they cannot be assigned to others.

Has any period of classical antiquity offered writers a similar kind of legal protection? If we begin by looking at the penal aspect of copyright law, only one reference to a criminal case can be cited[5]: Vitruvius[6] tells the story of Aristophanes of Byzantium, whose wide reading enables him to expose all but one of the participants in a poetic *agōn* as plagiarists of older works. On discovering this, king Ptolemy has them tried for theft and sentenced to *ignominia,* which Vitruvius presents as an historical *exemplum* worthy of imitation:

> *... qui eorum scripta furantes pro suis praedicant, sunt vituperandi, quique non propriis cogitationibus scriptorum nituntur, sed invidis moribus aliena violantes gloriantur, non modo sunt reprehendendi, sed etiam, quia impio more vixerunt, poena condemnandi.*
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> Those who steal their [sc. the ancient authors'] writings and sell them off as their own, should be rebuked, and those writers who do not rely on their own thoughts, but show off by violating the property of others in their jealous ways, ought not only to be criticised, but also sentenced to punishment for their dishonest behaviour.

The point of this anecdote is to illustrate Aristophanes' unparalleled knowledge of literature, describing him as he "pulled out countless volumes from the right shelves, relying on his memory" *(fretus memoria e certis armariis infinita volumina eduxit)* to

[5] An anecdote recounted by *Suda,* s.v. Diagoras, seems to imply that the plagiarised author took legal action, but leaves it unclear whether a criminal accusation was involved: ἐπεκλήθη Ἄθεος διότι τοῦτο ἐδόξαζεν, ἀφ' οὗ τις ὁμότεχνος αἰτιαθεὶς ὑπ' αὐτοῦ ὡς δὴ παιᾶνα ἀφελόμενος, ὃν αὐτὸς ἐπεποιήκει, ἐξωμόσατο μὴ κεκλοφέναι τοῦτον, μικρὸν δὲ ὕστερον ἐπιδειξάμενος αὐτὸν εὐημέρησεν. ἐντεῦθεν οὖν ὁ Διαγόρας λυπηθεὶς ἔγραψε τοὺς καλουμένας Ἀποπυργίζοντας λόγους, ἀναχώρησιν αὐτοῦ καὶ ἔκπτωσιν ἔχοντας τῆς περὶ τὸ θεῖον δόξης ("He was nicknamed the Atheist because he held this view ever since a colleague, whom he had accused of stealing a paean he had composed, swore under oath that he had not stolen it, and had a good time performing it only a little later. Frustrated, Diagoras then wrote the so-called *Speeches of Tower-Defense,* which contain his retreat and the expulsion of the belief in the Divine.") As an *aition* for Diagoras' famous atheism, the story obviously has little historical credence.

[6] Vitruvius, *De architectura* 7 praef. 5.

demonstrate his accusation — a feat difficult to visualise in the setting of a public contest. Thus, it manages to translate Aristophanes' best-known attribute — someone who distinguished genuine works from forgery — into a memorable narrative and to provide an *aítion* for his position: In the end, Ptolemy "honoured Aristophanes with generous gifts and put him in charge of the library" *(Aristophanen vero amplissimis muneribus ornavit et supra bybliothecam constituit)*. Beyond the philistine gibe at the majority of poets, who fool their audiences without doing any proper work, the question of general sanctions against plagiarists is not part of the story's message. While Vitruvius introduces this link, his words leave no doubt that, at least in classical Rome, plagiarism was not a penal offence, irrespective of the questionable historical value of the anecdote itself[7].

While no legal historian has ever suggested that plagiarism could have been prosecuted using an *actio furti*[8], some have wondered whether perhaps the *actio iniuriarum ex generali edicto* might at least theoretically have offered protection under Roman penal law[9]. There is, however, no indication that this recourse was ever attempted, and it seems very doubtful whether a Roman judge would have considered literary plagiarism on a par with physical assault or the singing of songs of personal mockery[10].

Turning to civil law, we are faced with the fundamental question of whether intellectual property was actually considered property; in other words, whether it had a legally recognised commercial value. In principle, the concept of immaterial possessions was not alien to Roman law; usufruct, for example, was classified as a *res*

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[7] ZIEGLER, *Plagiat*, p.1967 deems it doubtful, but possible that the story has an historical foundation. L.COHN, *Aristophanes von Byzanz*, in *Paulys Realenyclopädie der classischen Altertumswissenschaft* II, 1, Stuttgart 1895, col.994 calls it a "merkwürdige Fabelei".

[8] Cf. EGGERT, Der Rechtsschutz der Urheber, p.213.

[9] DZIATZKO, *Autor- und Verlagsrecht*, pp.565-566; A.ELSTER, *Gewerblicher Rechtsschutz*, Berlin 1921, p.12; VISKY, *Geistiges Eigentum*, p.28.

[10] Cf. Ulpianus, D.47.10.15.27: *Generaliter vetuit praetor quid ad infamiam alicuius fieri. proinde quodcumque quis fecerit vel dixerit, ut alium infamet, erit actio iniuriarum. haec autem fere sunt, quae ad infamiam alicuius fiunt: ut puta ad invidiam alicuius veste lugubri utitur aut squalida, aut si barbam demittat vel capillos submittat, aut si carmen conscribat vel proponat vel cantet aliquod, quod pudorem alicuius laedat.*

incorporalis[11]. What was lacking in the case of works of art, however, was the distinction between the intellectual creation and its material expression[12]. According to the teaching of Gaius, if someone writes on parchment that does not belong to him, "and be it with golden letters", it does not become his property; he can only counter the owner's restitution claim with the *exceptio doli* for reimbursement of the "expense of the writing" (*impensam scripturae*)[13]. Based as it is on a comparison of the values of the parchment and of the "writing" — denoting the substance of the letters, golden or otherwise, not the thoughts expressed by them — Gaius' argument demonstrates that the attribution of an economically relevant value to the act of intellectual creation was not a conventional concept at the time.

This is evident even in the cases when authors were actually paid. Roman comic playwrights sold their comedies to theatres (or rather to the *aediles* who commissioned the theatre to stage the piece) — not because the ink or the handwriting, but because their content was prized. However, the necessary transaction was the handover of the manuscript, since the right of performance or other uses could not be separated from ownership of its material expression[14]. Likewise, publishers could not secure a monopoly on selling a book. Their actual control over the manuscript only gave them a headstart in being the first to publish it. Once it was on the market, anyone was allowed to make further copies and, if he so pleased, sell them on. Indeed, had it not been for such private copies, ancient literature would have

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[11] Gaius, D.1.8.1.1. According to ELSTER, *Gewerblicher Rechtsschutz*: p.11, the intellectual creation embodied in a literary work could have been regarded as a *res extra commercium*. The silence of the sources, however, rather favours the assumption that the legal value of intellectual creations was beyond the scope of ancient jurisprudence.

[12] Cf. EGGERT, *Der Rechtsschutz der Urheber*, pp.194-195.

[13] Gaius D.1.1.9.1: *Litterae quoque, licet aureae sint, perinde chartis membranisque cedunt, acsi solo cedere solent ea quae inaedificantur aut inseruntur: ideoque si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, huius corporis non Titius, sed tu dominus esse iudiceris. sed si a Titio petas tuos libros tuasve membranas esse nec impensam scripturae solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumve possessionem nanctus est*. Interestingly there seems to have been a dispute as to whether this principle would also apply to a painting on a wooden panel, cf. D.6.1.23.3, VISKY, *Geistiges Eigentum*, p.21.

[14] Cf. VISKY, *Geistiges Eigentum*, p.31; EGGERT, *Der Rechtsschutz der Urheber*, p.205.

neither spread geographically nor survived over time. This correspondence of factual and legal control over works of literature is reflected by the term used for publication: *publici iuris facere,* "make public property"[15]. The author held no legal title to decide on the distribution of his work, nor could the publisher obtain an exclusive right of distribution[16].

While there seems to be consensus on the absence of formal copyright protection under ancient civil laws, it has been argued that authors could nonetheless rely on an equivalent protection afforded by a universally accepted moral rule[17]. Another Aristophanes, the comedian, provides the oldest attestation of a moral condemnation of plagiarism. In the *Clouds,* first performed in 423 BC, he accuses Eupolis of having composed his *Marikas* by "badly distorting my *Knights*, bad as he is, by adding the drunken old woman for dancing the *kórdax*, whom Phrynichus had invented earlier" (Εὔπολις μὲν τὸν Μαρικᾶν πρώτιστον παρείλκυσεν | ἐκστρέψας τοὺς ἡμετέρους Ἱππέας κακὸς κακῶς, | προσθεὶς αὐτῷ γραῦν μεθύσην τοῦ κόρδακος οὕνεχ', ἣν | Φρύνιχος πάλαι πεπόηχ')[18]. Others, meanwhile, are "imitating my simile of the eels" (ἄλλοι τ' ἤδη πάντες ἐρείδουσιν εἰς Ὑπέρβολον, | τὰς εἰκοὺς τῶν ἐγχέλεων τὰς ἐμὰς μιμούμενοι)[19]. According to Koutsouradis, this attitude, expressed in the popular genre of comedy, reflects "what the average citizen perceived as injustice"[20].

If the ancient scholia on Aristophanes are to be trusted, Old Comedy was full of mutual allegations of plagiarism[21]. Why is it that this notion made its first appearance so forcefully in comic drama? On the one hand, it served the popular cliché of intellectuals, whose so-

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[15] Cf. Martial's metaphor *manu missi* (*Epigrams* 1.52.7) for published poems.
[16] This is the conclusion reached by DZIATZKO, *Autor - und Verlagsrecht*, p.561.
[17] W.BAPPERT, *Wege zum Urheberrecht. Die geschichtliche Entwicklung des Urheberrechtsgedankens*, Frankfurt 1962, p.18 (plagiarism met „allgemeines Aufsehen und generelle sittliche Ablehnung"); EGGERT, *Der Rechtsschutz der Urheber*, pp.197-198.
[18] Aristophanes, *Clouds*, 553-556. These lines belong to a section which was added after 421 BC (performance of the *Marikas*).
[19] Aristophanes, *Clouds*, 559-560.
[20] A.G.KOUTSOURADIS, *Die Entwicklung des Urheberrechts in Griechenland*, *Archiv für Urheber- und Medienrecht* 118 (1992), p.9.
[21] Collected by STEMPLINGLER, *Das Plagiat*, pp.12-14. In a comparable manner, modern hip-hop music abounds with topical reproaches of plagiarism.

called art was in fact mere trickery, "money for nothin' and cheques for free" — a concept equally palpable in the anecdote cited by Vitruvius. On the other hand, it was a personal attack of the sort more vital to comedy than to any other genre. That said, it is important to note that the attack was not launched on moral grounds: Eupolis is belittled for failing to create a plot of his own and, even more importantly, for spoiling the excellent subject-matter borrowed from Aristophanes[22], but he takes no moral blame for the unauthorised re-use of another's invention.

The next group of claims of plagiarism in Greek literary history appear in works on philosophy[23]. A typical example can be found in Athenaeus' quote from a treatise *On the Teaching of Plato* by Theopompus[24]:

> τοὺς πολλούς, φησί, τῶν διαλόγων αὐτοῦ ἀχρείους καὶ ψευδεῖς ἄν τις εὕροι· ἀλλοτρίους δὲ τοὺς πλείους, ὄντας ἐκ τῶν Ἀριστίππου διατριβῶν, ἐνίους δὲ κἀκ τῶν Ἀντισθένους, πολλοὺς δὲ κἀκ τῶν Βρύσωνος τοῦ Ἡρακλεώτου.
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> Most of his dialogues could be said to be worthless and full of lies; and to a large extent they belong to others, being taken from the lectures of Aristippus, some from those of Antisthenes, many from those of Bryson of Herakleia.

Theopompus, it seems, did not expect his readers to wonder why Plato would have chosen to take the credit for another's "worthless and false" texts instead of stealing something more accomplished. This array of conflicting criticism, culminating in the allegation that 'they are not even his own', was not meant to be taken too literally. Lack of originality functioned as one of the attributes liberally awarded to the other side in polemics between competing schools. It served to denigrate the value of their teachings without relying on any specifically moral reproach of plagiarism.

It is hardly coincidental that the earliest accusations of literary theft are concentrated in genres which were particularly indulgent to

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[22] Cf. the parallel case of Aretades criticising Antimachus for spoiling Homer (Eusebius, *Praeparatio Evangelica* 10.3.20): ὁ δ' Ἀντίμαχος τὰ Ὁμήρου κλέπτων παραδιορθοῖ ("Antimachus steals Homer's verses and improves them for the worse").

[23] More examples cited by STEMPLINGER, *Das Plagiat*, pp.14-20; ZIEGLER, *Plagiat*, pp.1970-1974.

[24] Athenaeus, *Deipnosophists* 11.118 = 508c.

personal invective: Attic comedy, philosophical doxography, influenced by the cynical movement, and rhetoric. This suggests that the assessment depended to a large degree on the good or bad intentions of the one who made it. Even much later, in Hellenistic monographs *On plagiarism* (Περὶ κλοπῆς), protests are usually voiced by a victim or an enemy of the plagiarist rather than by the general public or another more indifferent party[25]. When Martial or Theognis invoked the solidarity of the audience[26], suggesting that it would be in the reader's own interest to outlaw plagiarists, this could be nothing more than a wish, about as reliable as the admonition "Don't steal music" on today's I-Pods.

On the one hand then, there was no generally accepted moral rule to respect literary property[27]. On the other, it seems impossible to deny that some sort of a pertinent standard could indeed be invoked if needed. Perhaps this standard should be described as a convention or customary code of honour which was only applied among writers[28]. Such, at least, is the impression given by Pliny the Elder[29]:

> *Est enim benignum, ut arbitror, et plenum ingenui pudoris fateri per quos profeceris, non ut plerique ex iis, quos attigi, fecerunt. scito enim conferentem auctores me deprehendisse a iuratissimis ex proximis veteres transcriptos ad verbum neque nominatos, non illa Vergiliana virtute, ut certarent, non Tulliana simplicitate, qui de re publica Platonis se comitem profitetur, in consolatione filiae Crantorem, inquit, sequor, item Panaetium de officiis, quae volumina ediscenda, non modo in manibus cotidie habenda, nosti. obnoxii profecto animi et infelicis ingenii est*

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[25] Clement of Alexandria, *Stromata* 6 seeks to prove the posteriority of pagan literature to Jewish sources. For the sources of Porphyry (cited by Eusebius, *Praeparatio Evangelica* 10.3), cf. ZIEGLER, *Plagiat*, col.1979-1984.

[26] *Theognidea* 19-26; Martial, *Epigrams* 1.52; for the former cf. H.SELLE, *Theognis und die Theognidea*, Berlin/New York 2008, pp.310-311.

[27] Of course, plagiarism did have a moral dimension to the degree that it involved an act of intentional deception or betrayal. Thus Martial can hope that the plagiarist will be put to shame by being exposed (*Epigrams* 1.52.9: *inpones plagiario pudorem*), because he had publicly recited entire poems by Martial as his own, which implied a manifest lie. This was not the case when mere segments of a work were used by another author, because ancient writing did not conventionally imply the claim that the work was in all its parts the author's original creation.

[28] STEMPLINGER, *Das Plagiat*, p.80 speaks about "ungeschriebene Gesetze der ästhetischen Moral".

[29] Pliny the Elder, *Naturalis Historia* praef, pp.20-23.

deprehendi in furto malle quam mutuum reddere, cum praesertim sors fiat ex usura.

For it is, I believe, kind and full of sophisticated respect, to acknowledge from whom you have benefited, unlike what most of those I have encountered have done. For you should know that, while comparing authors, I have come across older ones who have been copied word by word by the most reliable modern authors without being named: not out of that Virgilian virtue of competition, nor that Ciceronian ingenuousness, who admits to being an emulator of Plato's Republic, and who says in the Consolation for the Death of his Daughter 'I follow Crantor', and 'Panaetius' in On Duties -- volumes which, as you know, should be learnt by heart, not only read every day. It is really a sign of a base mind and an unfortunate character if one would rather be caught embezzling than return the loan, especially if one has received interest on the capital.

The rule on mentioning sources, which Pliny presents as a voluntary choice of individual "attitude" *(huius stomachi mei)*, is limited by a number of important exceptions: first it only targets verbatim quotation, not paraphrase. Secondly, it excludes poetry, exemplified by Virgil's use of Homeric epic, and probably belletristic literature in general, thus only applying to non-fiction such as Pliny's own encyclopaedic *Naturalis Historia*. Thirdly, the ironic reference to Cicero's excessive citations implies that naming the authors of well-known works was considered redundant or even pretentious.

What attracted criticism, was outright intentional deception. Hence Cicero's tongue-in-cheek remark to Brutus: "You have either taken a lot from Naevius, if you admit it, or stolen a lot, if you deny it" (*qui a Naevio sumpsisti multa, si fateris, vel, si negas, surripuisti*)[30]. In most cases, the models of imitation were expected to be recognized without explicit mention. This conscious use of intertextuality was contingent on a familiarity of the educated classes with the literary canon which may appear astonishing from today's perspective. Under these circumstances, a plagiarist could only hope to go unnoticed if he was either writing for an audience which was no longer so well read, or if he was using rare or unpublished sources.

It was only this last kind of behaviour that was banned by literary convention[31]. The weak protection afforded by such a rule, however,

[30] Cicero, *Brutus* 76.

[31] Another conventional rule is implied by the recurring complaint of authors that works had been published against their will (e.g. Cicero, *Ad Atticum* 13.21a; Ovid,

was by no means effective. This explains why authors so often found themselves compelled to use techniques of self-defence: whether by weaving their names into their works, through acrostics[32], or by restricting their dissemination to a limited circle, or conversely by trying to ensure a universal circulation[33]. None of those techniques, however, could be relied upon to prevent violations of literary property.

Why was it, then, that the ancients took so little interest in protecting and even acknowledging a right which, however much maligned, is so central to modern legal culture? It has been suggested that the emergence of authorship was handicapped by the belief that the artistic process was driven by the divine inspiration of the Muses rather than the poet himself[34]. However, this concept has been treated as topical from the very beginning of written literature; the term employed by the Greeks to denote literary creation, *poiéō*, is purely technological, nor did metaphysics play a major role in their literary theory.

Another difference between ancient and modern literature has left more tangible traces: the culture of literary imitation, which had become fundamental to writing by the days of the Alexandrians. With education structured in order to impress on the student the approximation of earlier works rather than originality as the ultimate goal of literary creation, the classics turned into a treasure trove that

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Tristia 3.1.23; Quintilian 1.pr.; Arrian, *Epicteti Dissertationes* pr.; Galenus, *De ordine librorum suorum* 19 p. 51; Priscian, *Institutiones* GL 2.2.16). In most cases, however, the contradiction between the alleged absence of authorial involvement in the publication on the one hand and the ability of the author to include his comment on this procedure in the published work on the other suggests a *tópos* of *captatio benevolentiae*. On Arrian cf. H.SELLE, *Dichtung oder Wahrheit — Der Autor der Epiktetischen Predigten*, *Philologus* 145 (2001), pp.271-272.

[32] Preventing plagiarism, however, seems to have been secondary to the function of preventing changes to the text, since many acrostics did not contain the author's name.

[33] Cf. Martial, *Epigrams* 1.66: *Mutare dominum non potest liber notus*. Likewise, Theognis hopes to be protected from plagiarism by the fact that he is πάντας δὲ κατ' ἀνθρώπους ὀνομαστός ("famous among all people", *Theognidea* 23).

[34] BAPPERT, *Wege zum Urheberrecht*, p.22 and pp.26-29; SCHICKERT, *Der Schutz literarischer Urheberschaft* pp.11-34, cf. the review by R.FROHNE, *Urheberrecht in der römischen Antike?*, *Archiv für Urheber- und Medienrecht* (2005 III), pp.807-808.

writers were not forbidden, but, rather, encouraged to use.[35] However, while this culture of *mímēsis* certainly played a crucial rule in relation to the weakness of literary property, it is perhaps better considered the reverse side of the same coin, than its cause or result.

In fact, the principal explanation seems to lie elsewhere: writing books did not pay off in antiquity. Hence Tacitus' rhetorical warning to would-be authors[36]:

> *Carmina et versus, quibus totam vitam Maternus insumere optat ..., neque dignitatem ullam auctoribus suis conciliant neque utilitates alunt; voluptatem autem brevem, laudem inanem et infructuosam consequuntur… quorum tamen hic exitus est, ut cum toto anno, per omnes dies, magna noctium parte unum librum excudit et elucubravit, rogare ultro et ambire cogatur, ut sint qui dignentur audire, et ne id quidem gratis; nam et domum mutuatur et auditorium exstruit et subsellia conducit et libellos dispergit.*
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> Songs and verse, to which Maternus wishes to devote his whole life..., do not win their authors any position nor do they add to their benefit; all they achieve is brief exaltation, vain and fruitless praise. ... And the end of it is that he, who has during every day of a whole year and for a great part of the night penned down and produced a single book by candlelight, is then forced to ask and beg people to agree to listen to him, and not even for free, for he rents the house, equips the hall, rents benches and distributes invitations.

To earn a living, a writer was usually obliged to rely on their family fortune or the support of a wealthy patron, who was rewarded by dedications. Few were those who were in a position to sell their books to publishers, and even their profit would rarely have been substantial. An apparent exception to this rule was the case of orators and playwrights. However, they made a living from performing or enabling others to perform their works, irrespective of whether they had been or would be published elsewhere. All other remuneration authors received took the form of voluntary contributions to which

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[35] Still instructive on *mímēsis* in Roman literature W.KROLL, *Studien zum Verständnis der römischen Literatur*, Stuttgart 1924, pp.139-178. Since this culture of imitation naturally fostered falsifications, which posed the risk of following a false model, it was concomitant with an increased concern for authenticity. However, Alexandrian criticism was focused on the attribution of inferior works to famous authors, not plagiarism as the reverse process.

[36] Tacitus, *Dialogus de oratoribus* 8-10.

they held no legal right, such as prizes paid to writers of choral lyric or Attic comedy.

Thus, surprisingly and in contrast to other forms of labour, literary creativity seems not to have possessed a commercial value throughout antiquity. What could have been the root cause of this distinction? It has been argued that the so-called liberal arts could not constitute a contractual obligation under Roman Law[37]. The canon of *artes liberales*, however, is a relatively late notion, and never explicitly included poetry[38]. There is no evidence for a rule that prohibited the sale of intellectual productivity.

What weighed much more heavily than conservative prejudice against paid labour was, I would argue, the fact that until the advent of the printing-press, wholesale publication and sale of books was simply not economically attractive. The cost of reproduction was high, the profit margin was narrow, and above all, it was technically impossible for anyone — be it the author, the publisher, or public authorities — to secure a monopoly on selling a particular work. In contrast to the printed book, a manuscript could be reproduced by anyone at almost the same cost and with a result that was indistinguishable from an authorised copy. Quite irrespective of the legal or moral values prevalent at the time, it was the practical difficulty of preventing unwanted copying which made the production and distribution of literature an unprofitable pursuit.

The birth of copyright, like that of any legal principle, was contingent on two conditions: the need for protection and the enforceability of that protection. While the need for protection had already begun to make itself heard in antiquity, its voice was stifled as long as it remained impossible to enforce[39]. How vital this practical aspect is for the entire notion and validity of copyright can be

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[37] E.g. by EGGERT, *Der Rechtsschutz der Urheber*, pp.207-209; VISKY, *Geistiges Eigentum*, pp.36-38.

[38] The canon of the seven *artes liberales*, which contained rhetoric but not poetry, is first found in the 5th c. AD (Martianus Capella). Ulpianus, *D*. 50.13.1 praef. only mentions rhetoric, grammar, and geometry; elsewhere the *Digesta* refer to philosophy and jurisprudence as liberal arts. Even for these occupations, no provision can be cited which explicitly excluded their sale.

[39] It is worth noting, however, that copyright law in a strict sense did not emerge before the 18th century, driven by the interests of publishers rather than authors. Only the capitalist expansion of production and markets, it seems, rendered the legal vacuum, which had already been perceptible for a long time, ultimately intolerable.

observed again today, when photocopiers and the digitalisation of literature have made the perfect reproduction and dissemination of texts easier and cheaper than it has ever been.

If it turns out then that the efficient protection of intellectual property is an entirely modern achievement, why should any credit for it be given to antiquity? This question can perhaps be countered most convincingly by pointing to an author who has hitherto been strangely neglected by students of the history of intellectual property: the elegist Theognis of Megara[40]. His most famous poem reads[41]:

Κύρνε, σοφιζομένῳ μὲν ἐμοὶ σφρηγὶς ἐπικείσθω
τοῖσδ' ἔπεσιν, λήσει δ' οὔποτε κλεπτόμενα,
οὐδέ τις ἀλλάξει κάκιον τοὐσθλοῦ παρεόντος·
ὧδε δὲ πᾶς τις ἐρεῖ· " Θεύγνιδός ἐστιν ἔπη
τοῦ Μεγαρέως· πάντας δὲ κατ' ἀνθρώπους ὀνομαστός. "
ἀστοῖσιν δ' οὔπω πᾶσιν ἀδεῖν δύναμαι·
οὐδὲν θαυμαστόν, Πολυπαΐδη· οὐδὲ γὰρ ὁ Ζεὺς
οὔθ' ὕων πάντεσσ' ἀνδάνει οὔτ' ἀνέχων.

Cyrnus, for me, as I am telling wisdom, a seal shall be placed
upon these verses, and it will never go unnoticed if they are stolen.
Nor will anyone accept a worse thing in exchange when the good thing is there,
but everyone will say thus: 'By Theognis are the verses,
the Megarian; he is famous among all people.'
However, I cannot please all the citizens:
No wonder, Polypaides, for not even Zeus
pleases everybody, neither when he makes it rain nor when he stops.

In these lines, probably composed around the end of the sixth century BC, the poet gives his own name and hometown, thus stamping them as his production in much the same way as contemporary vase-painters had begun to sign their works. Though in itself a marked progress from the Homeric poems, which do not present themselves, nor indeed can be considered, as the creation of an

[40] An exception to this neglect is R.FROHNE, *Der Gedanke des Geistigen Eigentums bei Theognis und Cicero*, *Archiv für Urheber- und Medienrecht* (2004 II), pp.399-402.

[41] *Theognidea* 19-26. For the interpretation of this poem cf. SELLE, *Theognis und die Theognidea*, pp.289-311, including further references.

individual mortal, similar manifestations of authorial self-consciousness can be found in other seventh and sixth century texts.[42] This was certainly a necessary condition for the emergence of the concept of intellectual property, but alone it was not sufficient. The mere claim to the praise earned by the exercise of one's talent still falls short of the notion that the literary work is 'owned' by its author in a way that principally confers the right to control its use exclusively.

This is what sets Theognis apart from other poets of his time: the reference to plagiarism as a form of 'theft', against which the poem ought to be protected by an equally metaphorical seal[43]. This concept implied a two-step analogy: first, the poet is like a craftsman who produces material works (a comparison assisted by the spread of the alphabet, which could turn an utterance into a fixed possession), and secondly, the producer is linked to the thing he has made in the same way as an owner. Here we find, for the first time in the history of European civilisation, the claim that the poet should be recognised as the owner of the literary text he has created[44]. In my view, the decisive conceptual progress in the development of literary property was neither the metaphor of the slave-robber introduced by Martial nor the legal instruments invented to protect publishers of printed books during early capitalism, but this designation of plagiarism as 'theft' by Theognis of Megara.

It is not surprising that this new understanding of literary activity left its earliest traces in elegy, a century before the next explicit reference to plagiarism can be found in Aristophanes. More than any

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[42] Hesiod, *Theogony* 22-3; Alcman fr. 39 Page; Timotheus, *Persae* 241; Sappho S259.1, S260.7, S275.1, S276(1).col2.20, S276(2).col3.44, S277.1 Page; Alcaeus S280.4, S280.23, S282.9, S283.7 Page; Hipponax fr. 32.4, 36.2, 37.1, 79.9, 117.4, 148b.3 West.

[43] VISKY, *Geistiges Eigentum*, p.25, e. g., cites several sources for the use of *furtum* for plagiarism without mentioning the original Greek usage.

[44] A.L.FORD, *The Seal of Theognis*, in *Thomas J. Figueira/Gregory Nagy (ed.)*, *Theognis of Megara*, Baltimore 1985, p.86, and L.EDMUNDS, *The Seal of Theognis*, in *Lowell Edmunds /Robert W. Wallace (ed.)*, *Poet, Public, and Performance in Ancient Greece*, Baltimore/London 1997, p.33, contend that Theognis only claimed 'ownership' in the sense of authorising the content of the poems, but not 'authorship' in an effort to ensure their future attribution to him, because this would have been "anachronistic and futile". But the imperative in v. 19 does not claim success, it only expresses a wish — a wish implying not the realisation, but the idea of literary property.

other, the elegiac genre was shaped by oral extemporation, which thrived on the recycling of material composed by others, including not only particular formulæ, but entire lines and poems. While the epic poet was continuing a tradition which consisted of countless partial contributions by anonymous predecessors, the elegist could relate to entire compositions delivered at the same or an earlier symposion, in front of an audience of other potential 'poets' who would usually know each other personally. In this context, where the structural re-use of others' poems encountered an atmosphere of individual competition, it was natural that talented artists such as Theognis would discover the desire to claim their creations for themselves and prohibit others from reciting them without mentioning their author.

The motive for this claim is clearly stated in the quoted lines (v. 22 f.): to link the poem to the author's name so inseparably that it will be recognised by whoever hears it. Without any evident interest in exposing or punishing the plagiarist, Theognis' only concern seems to have been with safeguarding his authorship and thus winning a fame that would transcend his own existence in time and space[45]. The audacious way in which he compares himself with Zeus, father of gods and men, (v. 25 f.) is testimony to his exceptional pride. For a poet of this character, the sympotic practise of using unacknowledged earlier texts as a quarry for extempore contributions must have seemed rather hard to bear. This attitude is also reflected in another short poem contained in the Theognidean collection, the similarity of which to v. 19-26 makes it appear authentic[46]:

Οὐ δύναμαι γνῶναι νόον ἀστῶν ὄντιν' ἔχοθσιν·
οὔτε γὰρ εὖ ἔρδων ἀνδάνω οὔτε κακῶς·
μωμεῦνται δέ με πολλοί, ὁμῶς κακοὶ ἠδὲ καὶ ἐσθλοί·
μιμεῖσθαι δ' οὐδεὶς τῶν ἀσόφων δύναται.

I cannot understand the mind which the citizens have,
for I do not please them, whether I treat them well or badly.
Many criticise me, common as well as noble,
but none of the unwise can match me.

[45] See also *Theognidea* 239-54.
[46] *Theognidea* 367-370. On this poem, cf. B.A.VAN GRONINGEN, *Théognis. Le premier livre*, Amsterdam 1966, ad loc.; SELLE, *Theognis und die Theognidea*, pp.286-287.

The author regarded his own *sophía* — his wisdom and talent — as the most important quality of his work, something which he believed could be stolen, but never rivaled by others. Judging by modern standards, what we find here is the foundation not of the material or commercial aspect of copyright, but of its personal aspect. Antiquity has not moved far beyond this pioneering achievement of Theognis'.