Concepts of Intellectual Property in the Roman Tradition

Erin Guldiken
Marianina Demetri Olcott, San Jose State University

Available at: https://works.bepress.com/ipinrome/1/
Abstract

The current study concerns concepts of intellectual property in the Roman tradition first century BCE through fourth century CE. It complements a previous study published in the Journal of the Copyright Society of the USA (Summer 2002, vol.49, No.4) which dealt with ancient Athenian concepts of intellectual property. The current study as in the earlier study of the Athenian tradition shows that ancient concepts of intellectual property are remarkably similar to modern concepts, as embodied in American case law (Title 17) and guidelines on plagiarism formulated by the modern academic establishment.

Our plan of investigation is as follows: First we examine Roman charges of plagiarism or intellectual theft and then compare the grounds on which the charges are made with case law from landmark decisions in American copyright law. Further we discuss these charges in light of the Modern Language Association guidelines on what constitutes plagiarism or literary theft.

Modern studies on the construction of authorship prominent in the last quarter of the 20th century (notably Derrida and more recently Woodmansee) use as points of departure charges of plagiarism contemporary to their first cited example as evidence of a self-conscious authorial presence sometime in 18th century Europe. Lately, a study restricted to the ancient Athenian testimonia (fifth and fourth centuries BCE) revealed surprising similarity to both modern American case law (Title 17) and definitions of plagiarism developed in the academic establishment.
establishment. As we might expect, a further consideration of testimonia from the Roman tradition reveals attitudes similar to those of ancient Athens and our modern world.

A. Citation of Sources

Cicero in the *Brutus* 76 (c. 46 BCE) reveals traces of Roman attitudes on intellectual property. In that work he comments on the Roman poet Ennius (239 - 169 BCE) and his borrowings from an earlier contemporary poet, Naevius (fl. 235 BCE).

If you will acknowledge [it], then you have taken many things from Naevius, but if you deny [it], you have stolen [many things].

qui a Naevio vel sumpsisti multa, si fateris, vel, si negas, surripuisti.  

In this passage the verb *surripio*, used here in the perfect active *surripuisti*, has as one of its meanings to steal or purloin. In fact, the authoritative Oxford Latin Dictionary cites this passage as meaning “to plagiarize.” Incidentally Cicero’s use of the future indicative—*si fateris*—in a conditional clause indicates emphasis while the present indicative—*si negas*—coupled with the perfect *surripuisti* indicates a generalized conditional statement. Thus, we may interpret the grammatical construction as follows: any denial (*si negas*) constitutes theft or in this case plagiarism (*surripuisti*). This passage suggests that acknowledging one’s source exonerates the borrower from any taint of literary misappropriation. Thus, we offer Cicero’s *si fateris* as meaning “to acknowledge” or “to cite.”

This understanding of the concept—viz. by citing the source one obviates any taint of plagiarism—appears to be a fairly common opinion in the ancient Roman tradition. For example,

---

Seneca (55 BCE - c. 41 CE) comments on Ovid’s frequent borrowings from Vergil. He concludes that Ovid committed the “quotations” “... not for the purpose of theft (Lat. *surripiendi*) but for the purpose of a public borrowing, and consequently with this motivation, he wished to acknowledge [the borrowing].”

[non] surripiendi causa sed palam mutuandi, hoc animo ut vellet agnoscì

Here again the use of the verb *surripio* is associated with literary theft. However, as we have seen before (Cicero *Brutus* 76) when there is an open declaration of such, the borrowing is considered legitimate or acceptable. Here, the Latin *palam* meaning “open” or “public” is significant.

Further our modern academic guidelines on plagiarism may be interpreted to mean that literary borrowing is permissible provided there is a complete disclosure of sources.

Paraphrasing someone else’s argument as your own, introducing another’s line of thinking as your own development and failing to cite the source for a borrowed thesis or approach [constitutes plagiarism]

In conformity with this citation from the Modern Language Association guidelines we find further evidence from antiquity of similar attitudes. Cicero in the *De Finibus* V 74 accuses some contemporaries of plagiarism on grounds that we today would find equally persuasive.

But these men had taken not merely one idea [Lat. *rem*] or another but rather our entire philosophy for themselves. [Perhaps his use of the word *philosophia* means here “sequence of ideas.”] And just as the remaining thieves change the attribution [Lat. *signa*] of those ideas which they take, the others, in order to use our opinions for their own, changed the nouns [Lat. *nomina*] as though they were changing the identifying marks.

Ei quidem non aliquam aut alteram rem a nobis, sed totam ad se nostram philosophiam transtulerant; atque ut reliqui fures earum

---


rerum quas ceperunt [edd. cleperunt = steal], signa commutant, sic illi, ut sententiis nostri pro suis uterentur, nomina tamquam rerum notas mutaverunt.\footnote{10}

In Latin the word \emph{nota} (here \emph{notas}) has as one of its meanings “a mark used to identify physical property.”\footnote{11} Earlier editors of the \emph{De Finibus}, among them the famous Orellius, corrected “. . . quas (res) ceperunt . . .” (lit. “which ideas they have taken”) to \emph{cleperunt}, a Graecism found elsewhere in Cicero with the meaning as in Greek of “to steal.” (cf. Cicero, \emph{Leg.} 2.22, \emph{Rep.} 4.3).

These constructions of intellectual property and its misuse are, as we maintain, also consistent with modern American law. Note that Cicero appears to claim ownership of both his ideas (\emph{philosophia}) and his expression of those ideas (\emph{notas}, the “identifying marks”). Modern copyright law would grant Cicero a property interest in his expression, but not in the ideas themselves.\footnote{12} Nonetheless, we find that certain 20th century state laws recognized a property interest in ideas. For example, the California Civil Code Section 980 provided, as originally enacted:

The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.\footnote{13}

The recognition of “exclusive ownership” of “any product of the mind” resounds with Cicero’s

\footnote{10}{\sc M. Tullius Cicero, 13 De Finibus Bonorum et Malorum} (Th. Schiche trans., B. G. Teubner, 1915).
\footnote{12}{Title 17 provides, in part: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). However, section 102(b) specifies: “In no case does copyright protection for an original work of authorship extend to any idea . . . concept, [or] principle . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b).}
\footnote{13}{\sc Cal. Civ. Code} § 980 (1872) (amended 1947) (West 2011). The statute was later amended to remove protection for “any product of the mind.” \sc Cal. Civ. Code} § 980 (West 2011). For another example of state protection of ideas, see \emph{Belt v. Hamilton Nat’l Bank}, 108 F. Supp. 689, 691 (D.D.C. 1952) (“The law now gives effect to a property right in an idea even though the idea may be neither patentable nor subject to copyright”). However, like California, the District of Columbia later abandoned such protection. \emph{See Curtis v. Time, Inc.}, 147 F. Supp. 505 (D.D.C. 1957); \emph{Noble v. Columbia Broad, Sys.}, 270 F.2d 938 (D.C. Cir. 1959). \emph{See also} Melville B. Nimmer and David Nimmer, 4 \sc NIMMER ON COPYRIGHT, § 19D.01 (Matthew Bender, Rev. Ed).}
conceptions of ownership.

Roman constructions of authorship are also comparable to the moral right of attribution, i.e. the right to be credited as the author of a work. While many international jurisdictions expressly recognize this right, it has yet to be developed in U.S. copyright law.

B. Substantially Similarity: “The certain image of its master”

Copyright infringement is a violation any of the exclusive rights of a copyright owner. To prove infringement, a plaintiff must demonstrate that the defendant copied a copyrighted work and that the copying constitutes improper appropriation. A finding of improper appropriation turns on the principle of substantial similarity.

Substantial similarity is a vague standard. Generally, courts find substantial similarity between the works in question when the allegedly infringing work contains a significant amount of the protected expression in the original work. The Lapsley decision formulated the standard as follows: “Though to constitute infringement . . . of copyright there need not have been verbatim copying . . . [the] alleged copy must come so near to the original as to give every person seeing it the idea created by the original.”

This very issue of substantial similarity seems to be raised in the Roman poet Martial’s (c. 40 -104 CE) accusation against a rival, Fidentinus. In a rather witty convolution he charges:

Una est in nostris tua, Fidentine, libellis

---

14 See generally Melville B. Nimmer and David Nimmer, 3 NIMMER ON COPYRIGHT, § 8D.03.
15 Id. at § 8D.02 (Matthew Bender, Rev. Ed).
17 Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
18 See Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (“The test for infringement of a copyright is of necessity vague”). See also Melville B. Nimmer and David Nimmer, 4 NIMMER ON COPYRIGHT, § 13.03.
pagina, sed certa domini signata figura
quae tua traducit manifesto carmina furto.

A page of yours is in my books, Fidentinus, but it is distinguished [Lat. signata] by the
certain image [Lat. figura] of its master and it betrays your poetry in its manifest
thievery.20

Compare Martial’s “the certain image of its master” with the language of the Lapsley decision:
“there need not have been verbatim copying . . . [the] alleged copy must come so near to the
original as to give every person seeing it the idea created by the original.”

C. Political Motivations for Accusations of Misappropriation

In other instances, the accusation of literary theft seems motivated more by political
animosity than by any clear-cut and objective principle of intellectual property. Suetonius (c. 69 -
c. 140 CE) in the De Grammaticis (15) cites an accusation made against the historian Sallust by
the writer Lenaeus. The latter was incensed at Sallust for besmirching his (Lenaeus’) master and
patron Pompey. According to Suetonius who relies on his source, Quintillian, Sallust had written
that Pompey hid his shameless character (inverecundo animo) behind an honest face (probi oris).
Lenaeus, in retort, charged Sallust with a variety of crimes ending with the statement that he,
Sallust, was a most uneducated thief (ineruditissimum furem) of Cato’s archaic diction (Catonis
priscorum verborum).

. . . Sallustium historicum, quod eum [Pompey] oris probi animo
inverecundo scripsisset appellans . . . praeterea priscorum Catonis
verborum ineruditissimum furem.21

In Latin, the noun phrase, priscorum verborum, is redolent with normative content. To the first
century BCE Romans, their ancestors, considered morally superior, were generally termed prisci,
which has the sense of “august” as well as “ancient.” In modern definitions of plagiarism the

20 MARTIAL, 1 EPIGRAMS I. 53. vv. 1-3 (Walter C.A. Ker trans., Harvard University Press, William Heinemann Ltd.
1947).
mere use of archaic vocabulary and diction would not constitute literary theft. The borrowing must be more substantial than mere isolated words drawn from the lexicon of a bygone age. Lenaeus, on the other hand, was probably influenced by political animosity. We know that Sallust was a close confederate of Julius Caesar who in turn was first, Pompey’s opponent and then, eventually, victor over Pompey in the Civil Wars (49 - 46 BCE).

D. Passages, Plot Elements, and Perspectives

By far, however, the most interesting testimonia concerning intellectual property are preserved in Macrobius (fl. 400 CE). In his work, the *Saturnalia*, we find a series of dialogues divided into seven books. The topics range from calendars in Book I to Vergil as a poet and comments on ancient rhetoric in Books V and VI. In spite of Macrobius' obvious bias in favor of Vergil, scholars believe that this work, the *Saturnalia*, preserves material from a much earlier body of work attributed to the so-called *obtrectatores Vergilii*22 (lit. “detractors of Vergil”). These *obtrectatores* were the subject of a lost oration by the orator Asconius Pedianus (9 BCE - 76 CE) who is mentioned in Suetonius' *De Poetis*.23 This lost collection of criticism generated by the *obtrectatores* was supposedly directed towards Vergil and was definitely not favorable. In fact, so damaging was their critique that, as Suetonius tells us, Asconius sought to defend Vergil from these so-called *obtrectatores*. Unfortunately, Asconius’ defense of Vergil has been lost but scholars conclude that the questionable passages have been preserved in the lengthy discussions of Vergil's poetry found in Macrobius’ *Saturnalia*, Books V and VI.24 Thus, any examination of the *Saturnalia* provides some vestiges, however convoluted, of ancient Roman theories of intellectual property (first century BCE - second century CE).

In the beginning of Book 5, Macrobius summarizes the topic of conversation as

---

23 SUÉTONE, supra note 19, 18 ¶ 15.2.
24 SUETONIO, supra note 20.
concerning the fact that

the entire work of Vergil has been composed
as though from a certain mirror of the Homeric work.

omne opus Vergilianum velut de quodam Homerici operis speculo
formatum est.\textsuperscript{25}

And since this is the case, namely that Vergil relied rather heavily on Homer, the discussants propose to investigate everything which Vergil has appropriated from Homer; for, as they conclude:

what is more pleasant than to hear two exceptional poets say the same thing.

quid enim suavius quam duos praecipuos vates
audire idem loquentes.\textsuperscript{26}

Please note that the discussants state that both poets “say the same thing,” in Latin \textit{loquentes idem}.

What follows in Macrobius’ \textit{Saturnalia} is a long series of Vergilian passages which Macrobius says are taken from Homer. The catalog of close quotations amounts to over seventy pages in the Teubner edition of the \textit{Saturnalia}. Even a cursory examination of the cited passages would support whatever criticism these shadowy \textit{obrectatores}, mentioned by Suetonius and others, may have made.

To cite a typical example from the many instances presented in the \textit{Saturnalia}, we offer the following: \textit{Aeneid} 12.206 and \textit{Iliad} 1.234. The following translations clearly reveal the similarity in the two passages. In \textit{Aeneid} 12.206, Latinus is swearing a truce to Aeneas:

\begin{quote}
Just as this scepter will never spread shadows with its leafy frond since the time when in the forest it was once cut at its root. And so lacking the mother tree it has lost its leaves and branches to the blade. Once a tree this now an artist’s hand has encased in bronze
\end{quote}

\textsuperscript{25} \textsc{Ambrosii Theodossii Macrobi}, \textit{Saturnalia} 5.2.13 (J. Willis, ed. B.G. Teubner 1970).

\textsuperscript{26} \textit{Id.} 5.3.16.
and given to Latin elders to wave.

ut sceptrum hoc . . .
nunquam fronde levi fundet virgulta nec umbras
cum semel in silvis imo de stirpe recisum
mater caret posuitque comas et brachia ferro
olim arbos, nunc artificis manus aere decoro
inclusit patribusque dedit gestare Latinis.\textsuperscript{27}

The Homeric passage is remarkably close as the translation reveals. Achilles, who has withdrawn from battle because of his fight with Agamemnon, swears that one day the Greeks will miss his considerable talents on the battlefield:

Yea by this scepter. For it will never grow leaves and shoots since it first has left behind in the mountains the stroke [of the blade]. Nor will it bloom again, for all around it the bronze blade has peeled away the leaves and bark. And now the sons of the Achaeans as judges carry it.

These quotations are typical of the seventy plus pages of parallel passages cited in Macrobius Book 5 to prove that “…the entire work of Vergil is fashioned from a Homeric model.”

. . . omne opus Vergilianum . . . de Homero . . . formatum est.\textsuperscript{29}

The sheer bulk of instances and the obvious closeness of Vergil’s translation of the Homeric Greek passages argue in favor of a deliberate and conscious borrowing.

We may surmise another variety of literary misappropriation charged against Vergil by his so-called obiectatores concerns the close modeling of plot elements. An example typical of this type of literary misappropriation concerns the Trojan Horse episode in \textit{Aeneid} 2.31 and

\textsuperscript{29} Supra note 23.
Odyssey 8.505. Once again, the sequence of plot elements proves telling.

Some gazed at the fatal offering to the goddess Minerva and marveled at the huge size of the horse. Thymoetes was the first to urge them to drag it inside their walls and set it on the citadel, whether it was treachery that made him speak, or whether the Fates of Troy were already moving towards that end. But Capys and those of sounder judgment did not trust this offering. They thought it was some trick of the Greeks and should be thrown into the sea or set fire to and burned, or they should bore holes in its hollow belly and probe for hiding places.30

..the horse, tall on the assembly ground of Troy.
For when the Trojans pulled it in, themselves up to the citadel, they sat nearby
with long drawn out and hapless argument—
favoring in the end, one course of three:
either to stave the vault with brazen axes,
or haul it to a cliff and pitch it down,
or else to save it for the gods, a votive glory—
the plan that could not but prevail.
For Troy must perish as ordained, that day . . . 31

One might argue that in the Vergilian instance we view the scene from the Trojan perspective and that this shift of perspective mitigates against any potential charge of plagiarism. However, a modern example involving alleged literary misappropriation indicates that once again ancient and modern practice is in accord. Hereto, even a shift in point of view does not differentiate a text enough to escape accusations of literary misconduct.

In Suntrust Bank v. Houghton Mifflin, the plaintiffs argued that Alice Randall’s appropriation in The Wind Done Gone “is so extensive that the work represents a retelling and an unauthorized sequel.” They contended that Randall’s work was an infringement of copyright in that it came too close to the original, Margaret Mitchell’s Gone with the Wind. Compare the language of the Lapsley decision above: “. . . there need not have been verbatim copying . . .

[the] alleged copy must come so near to the original as to give every person seeing it the idea

created by the original.” By the way, we have read *The Wind Done Gone* and in our opinion there is no way that Randall’s work at any point replicates *Gone with the Wind* in the sense that the *Lapsley* decision intends it. The lawyers for the plaintiff contended in a variety of court documents that *The Wind Done Gone* was a retelling and in others a sequel to the original *Gone with the Wind* and therefore strayed into the area of literary misconduct. The district court concluded that the publication of *The Wind Done Gone* would constitute copyright infringement, and therefore enjoined publication.33

Just as with the Trojan horse episode quoted above, Randall’s work presented its narrative from a completely different perspective—that of Scarlett’s mulatto half-sister, Cynara, introduced by Randall as an original creation. Nonetheless, this shift of perspective and the construction of a completely new character (Cynara) did not prove to be completely exculpatory. The district court dismissed the relevance of both elements in consideration of the fact that Randall duplicated the original setting and characters of *Gone with the Wind*:

> The fact that the two works may present polar viewpoints of the same fictional world fails to mitigate the fact that it is the same fictional world, described in the same way and inhabited by the same people, who are doing the same thing. 34

In fact, the court found that Randall's shift of perspective and creation of a new character contributed to the classification of *The Wind Done Gone* as an unauthorized sequel:

> If the work is intended to supply the missing story of the earlier work and takes up where the former work left off, then it is a sequel. If the work tells the same story through different eyes, then it infringes on the copyright owner's right to create and control derivative works. In the court's estimation *The Wind Done Gone* achieves exactly what it bills it self as, a sequel to *Gone with the Wind* told from the perspective of Scarlett's mulatto half-sister, Cynara, who gives the reader an abbreviated account of the earlier work from her perspective through plot summaries of the earlier work and by revisiting the most famous scenes as seen or

34 *Id.* at 1369.
This is exactly the issue with the numerous passages cited by Macrobius, which must have their origins in the criticisms of those obtrectatores mentioned by Suetonius. Even a cursory glance at the *Aeneid*'s plot elements reveals that it is a fusion of Homer's *Iliad* and *Odyssey* where the *Odyssey* is the source for Vergil's *Aeneid* 1-6 and the *Iliad* is the source for Vergil's *Aeneid* 7-12. Indeed, we might even use language from the *SunTrust* decision just quoted to refer to Vergil's *Aeneid*:

If the work is intended to supply the missing story of the earlier work and takes up where the former work left off, then it is a sequel. If the work tells the same story through different eyes, then it infringes on the copyright owner's right to create and control derivative works.

To continue in our use of the language of the *SunTrust* decision, Aeneas gives the reader an abbreviated account of the earlier work, i.e. the fall of Troy, from his perspective in Book 2 of the *Aeneid*.

As we continue our comparison with the *SunTrust* case and Vergil's *Aeneid*, we note that publication of *The Wind Done Gone* was only allowed after the author and Houghton Mifflin called the novel a parody. The paperback edition of *The Wind Done Gone* reiterates the fact that the text is a parody by quoting in caps from the San Antonio Express News review of the book the phrase “In this daring and provocative literary parody.” The paperback cover of the text further underscores its parodic nature by putting in a red balloon on the cover the phrase “The Unauthorized Parody.” In its first attempt at publication, Houghton Mifflin had put on the cover the phrase “The Unauthorized Sequel.” A further disclaimer appears on the copyright page and indicates that “This novel is the author's critique of and reaction to the world described in

---

35*Id.*
37*Id.*
Margaret Mitchell's *Gone with the Wind*. It is not authorized by the Stephens Mitchell Trusts and no sponsorship or endorsement . . . is implied."\(^{38}\)

After extensive discussion, the appellate court determined that Mitchell had a viable defense: that *The Wind Done Gone* qualified as a parody protected by the fair use doctrine.\(^{39}\)

As the district court noted: ‘The earlier work is a third-person epic, whereas the new work is told in the first-person as an intimate diary of the life of Cynara. Thematically, the new work provides a different viewpoint of the antebellum world’ . . . While told from a different perspective, more critically, the story is transformed into a very different tale, albeit much more abbreviated. Cynara's very language is a departure from Mitchell's original prose; she acts as the voice of Randall's inversion of [*Gone with the Wind*]. She is the vehicle of parody; she is its means—not its end. It is clear within the first fifty pages of Cynara's fictional diary that Randall's work flips [*Gone with the Wind*]'s traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify [*Gone with the Wind*] and strip the romanticism from Mitchell's specific account of this period of our history. Approximately the last half of [*The Wind Done Gone*] tells a completely new story that, although involving characters based on [*Gone with the Wind*] characters, features plot elements found nowhere within the covers of [*Gone with the Wind*].\(^{40}\)

Thus, while the shift of perspective was not sufficient to absolve Randall from charges of infringement (or plagiarism), her parodic transformation of Mitchell's original story constituted a viable defense.

When the author and Houghton Mifflin were able to prove to the satisfaction of the court that the work was intended as a parody, indeed in their words “a transformative satire,” publication was allowed to proceed. The insistence by lawyers for the defendant that the word “parody” was used in initial negotiations with the author finally proved persuasive:

For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work. Under this definition, the parodic character of [*The Wind Done Gone*]is clear. [*The Wind Done Gone*] is not a general commentary upon the Civil-War-era

---

\(^{38}\) Id. copyright page.

\(^{39}\) *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001).

\(^{40}\) *SunTrust Bank*, 268 F.3d at 1270.
American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in [Gone with the Wind]. The fact that Randall chose to convey her criticisms of [Gone with the Wind] through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive [The Wind Done Gone] of fair-use protection.41

We have cited extensively from the appellate court decision which allowed the publication of The Wind Done Gone because the court felt it had been proven sufficiently that the new work was a parody and not a sequel. Can the same argument be used to rescue Vergil from charges of literary misappropriation as we are suggesting he is guilty of? Can we call the Aeneid a parody? Or, to use the language of the court in The Wind Done Gone decision, can we classify it as a work that seeks “to comment upon or criticize another work by appropriating elements of the original?” Does indeed the Aeneid reflect “transformative value because it can provide social benefit by shedding light on an earlier work and in the process creating a new one?”42

Thus, the courts’ extensive analysis of The Wind Done Gone reveals the problematic nature of a shifted perspective in reusing plot elements from a previous work unless there is a parodic twist involved. A shift of perspective will not exempt one from an accusation of plagiarism.

However, let us return to the ancient world and the body of evidence preserved in Macrobius. More damning, however, than these 70 odd pages of close translation from Homer and others which we briefly examined, the Saturnalia offers a rich portfolio of actual quotations made by Vergil among others, without attribution, of course. That these appropriations were viewed as problematic in antiquity by the so-called obtrectatores is attested by their sheer number, some 30 pages worth of close quotation where both poetic diction and heightened imagery have been borrowed.

41 Id. at 1269.
42 Id.
One typical example of many from Book VI of the *Saturnalia* reveals the closeness of the appropriations. Macrobius quotes a line from Book 2 of Lucretius’ poem, *De Rerum Natura*:

\[\text{cum primum aurora respergit lumine terras.}^{43}\]

(When first Dawn besprinkles the lands with light.)

Both language and image are closely echoed by Vergil’s lines in the *Aeneid* 4. 584-585.

\[\text{et iam prima novo spargebat lumine terras . . . aurora.}^{44}\]

(And now first Dawn was sprinkling the lands with new light.)

Given that Latin is an inflected language where word order and syntax allow remarkable flexibility and variety, the closeness of syntax in addition to identical vocabulary between Vergil and his source clearly raised issues in antiquity. We note that Latin *respergit* is merely a compound of *spargo*.

Let us emphasize our point with a particularly clear-cut passage from Macrobius where he seeks to exonerate Vergil from the unstated but easily inferred criticisms of the *obrectatores*. In Book VI of the *Saturnalia*, passages from other authors which have been inserted into Vergil’s works are examined. The imagined interlocutors of Macrobius’ *Saturnalia* offer rather specious reasons for considering this fulsome catalog of literary indiscretions. They clearly acknowledge that the material has been borrowed when they state “. . . that Vergil and others have said the same thing.”\(^45\) Nonetheless, these borrowings are worthy of discussion since “. . . in this way we shall keep alive Latin poetry.”\(^46\) They continue in this vein:

\[\ldots [\text{for}] \text{ it is just in this way that Vergil took } [\text{traxerit}] \text{ many things from ancient Roman authors and he did so in order that the memory of these ancient writers would not vanish.}^{47}\]

In fact, according to the discussants,

\(^{43}\) *Supra* note 23, 6.1.20.


\(^{45}\) *Supra* note 23, 6.1.1.

\(^{46}\) *Id.*, 6.1.5.

\(^{47}\) *Id.*
... we owe Vergil a debt of gratitude because now the work of older poets will last for eternity enshrined in [Vergil’s] own work . . . [Thus] works which, heretofore, were in danger of neglect, or, because of the archaic language, were liable to derision [would be spared those fates . . . ]

quid idem Maro de antquis Romanis scriptoribus traxerit....
cui etiam gratia hoc nomine est quod non nulla ab illis in opus suum, quod aeterno mansurum est, transferendo fecit ne memoria veterum deleretur, quos, sicut praesens sensus ostendit non solum neglectui verum etiam risui habere coepimus.48

Are we to assume that Lucretius who was so generously preserved for posterity in Vergil’s works would have been appreciative of Vergil’s efforts? One doubts it.

It is clear from the long discussion by Praetextatus, one of the interlocutors of Book 6 of the *Saturnalia*, that Macrobius feels some uneasiness with the number of close citations which Vergil has incorporated into his own works. These citations form the bulk of Book 6, some 50 pages. Interestingly enough, he seeks to excuse Vergil by using an argument which we find repeated in modern case law. Macrobius states in 6.1.8:

I shall show that he did not take them from Homer, but others had taken them from Homer first and he [Vergil] from them. No doubt, he had read these writers.

... ostendam non ipsum ab Homero tulisse, sed prius alios inde sumpsisse, et hunc ab illis, quos sine dubio legerat, transtulisse.49

Then, at the end of Book 6 of the *Saturnalia*, he quotes numerous instances where other writers have taken lines from Homer, translated them into Latin, and Vergil has taken the text from them (*Saturnalia* 6.3.7-9, 6.3.2-5).50 In the pertinent sections of the *Saturnalia*, Macrobius is arguing that Vergil did not copy from Homer but was adapting the work of Roman poets who had closely followed in the Latin language Homer's Greek. His attempt at excusing Vergil is

48 *Id.*
49 *Supra* note 23, 6.1.8.
50 *Id.*, 6.3.7-9, 6.3.2-5.
clearly specious because Vergil has clearly quoted the Roman authors without attribution. So even if he is excused from plagiarizing Homer, he is by no means excused from plagiarizing his own countrymen.

**E. Ownership of Characters**

As we close our discussion, one of the principles in modern case law with reference to copyright that resonates with ancient Roman concepts is the notion that once the originary author has created a character or characters, those characters become like a child—his or her own creation—and take on a life of their own. But that life is controlled and dominated by the originary author through copyright. Thus, a second author cannot appropriate “the child” because the child is seen as the creation of the first author. However, in *Nichols v. Universal Pictures Corporation*, Learned Hand cautioned that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” Thus, under modern law, an author cannot claim ownership of stock characters; he or she must produce “distinctively delineated” characters to control their future. Hand explained further:

> If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.

This has pertinence for sequels and was certainly one of the cruxes of *The Wind Done Gone* case. And it seems to underlie all of the law concerning sequels. Several cases have extended copyright protection to characters, and thus allowed the authors to control subsequent uses of

---

51 This concept also appears in the Greek poet Aristophanes’ accusation of plagiarism against his rival Eupolis. *Supra* note 2, 1050.
52 *Nichols v. Universal Pictures Corporation*, 45 F.2d 119, 121 (2d Cir. 1930).
54 *Nichols*, 45 F.2d at 122.
those characters. For example, in Metro-Goldwyn-Mayer v. American Honda Motor Co., Inc., the court held that James Bond is a copyrightable character with certain character traits developed over time.\(^{55}\) Courts have also accorded copyright protection to the Disney, Batman, and Godzilla characters.\(^{56}\)

An interesting side note in this vein is Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., where the parties litigated Dashiell Hammet’s grants of rights in his story “The Maltese Falcon” to Warner Brothers Pictures.\(^{57}\) Hammett had subsequently granted the right to use the name of a character, Sam Spade, to a third party, prompting Warner Brothers to bring suit for unfair competition and copyright infringement.\(^{58}\) The Ninth Circuit rejected Warner Brothers’ arguments and concluded as a matter of contract interpretation that Hammett’s grants to Warner Brothers did not include the exclusive rights to the characters and their names.\(^{59}\) The court proceeded to consider whether the copyright statute protects characters with their names.\(^{60}\) It concluded that copyright protection extends to a character that “really constitutes the story being told,” not a character that is only “the chessman in the game of telling the story.”\(^{61}\) With almost minimal discussion, the court determined that Hammett’s characters fit the latter category and, therefore, did not qualify for copyright protection.\(^{62}\) Thus, interestingly, Hammett was allowed to reuse his characters because the court held they were not protected by


\[^{56}\] See respectively Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) (court recognized “property in the Batman character”); Toho Co., Ltd. V. William Morrow & Co., 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998) (“Godzilla is always a pre-historic, fire-breathing gigantic dinosaur alive and well in the modern world . . . This Court finds that Toho’s Godzilla is a well-defined character with highly delineated consistent traits”). It is significant that recent cases have tended to afford more protection to characters depicted in visual, as opposed to literary works. See supra note 51.

\[^{57}\] Warner Brothers, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945, 946-48 (9th Cir. 1954).

\[^{58}\] Id. at 948-49.

\[^{59}\] Id. at 949.

\[^{60}\] Id. at 950. The Ninth Circuit subsequently recognized it is unclear whether this discussion was dicta or an alternate holding. Olson v. National Broadcasting Co., Inc., 855 F.2d 1446, 1452 n.6 (9th Cir. 1988).

\[^{61}\] Id.

\[^{62}\] Id. The court’s holding has been criticized as too restrictive a standard for character protection. See supra note 51.
One judge construed the decision as follows: “In the wake of this watershed case, the copyright bar was on notice that there was the strongest presumption that even when an author transferred the copyright in a work in which a character was fully delineated, the author retained the right to use the character in sequels or other works.”

These modern decisions have pertinence for the etymology of the word “plagiarism,” which is at the core of all intellectual property law relating to literature. The word “plagiarism” derives from the Latin word *plagium* which means the netting or snaring of game. From that perspective it is used in Latin texts to mean kidnapping. (See *Oxford Latin Dictionary* sub: *plaga* 2 and *plagium*). A cursory glance might suggest that this etymology seems to have little pertinence for our understanding of intellectual property law. However, the word has had a curious history. The *lex Julia de plagis* refers to the theft of a slave from its owner or the kidnapping of a child. It is important to note that children were considered property in Roman culture as certainly slaves were property. Thus, the *lex Julia de plagis* grouped children and slaves as property. One of the more interesting uses of a word derived from *plagia*, *plagiator* occurs in the Roman poet Martial. In his first book of *Epigrams* number 52 at line 9, Martial requests his friend Quintianus to protect his works from being misappropriated by some unnamed poet/client of Quintianus. He requests Quintianus to champion (*assertor in libertatem*) them when this unnamed poet calls these verses his own as owner (*dominum*). If Quintianus is to assert Martial's ownership, then he will shame or put shame upon the unnamed

---

63 Judge Posner has said of this case, "That decision is wrong, though perhaps understandable on the 'legal realist' ground that Hammett was not claiming copyright in Sam Spade—on the contrary, he wanted to reuse his own character but to be able to do so he had to overcome Warner Brothers' claim to own the copyright." *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004). This view supports our proposition that ancient and modern practice accords an author the right to control the futures of his or her characters.


66 When a slave was manumitted, a Roman citizen would take on the position of an *assertor in libertatem*. Thus he would put the “infant” freed man under his protection.
poet as plagiarist.

and, when that man will call himself the master (owner of my books) you would say that they are mine and sent forth by my hand and if you shall shout this three or four times, you will put shame upon the plagiarist.

et, cum se dominum vocabit ille,
dicas esse meos manuque missos.
hoc si terque quaterque clamitaris,
impones plagiario pudorem. 67

The epigram is an extended metaphor in which Martial by entrusting his verses to Quintianus manumits them as though they were slaves and thus his property. Nonetheless, although he “manumits” them, he still denies that the unnamed poet will be able to call himself their lord, their dominus. He closes the poem with a very clear injunction to Quintianus to assert constantly Martial's proprietorship through the use of a future more vivid condition: "hoc si terque quaterque clamitaris, impones plagiario pudorem" (Martial 1.52.6-9). 68 The force of the future more vivid condition emphasizes the close connection between protasis and apodosis (the conclusion) while it enjoins Quintianus in no uncertain terms (future more vivid) to do so (i.e. assert Martial’s ownership of the “little books”). A literal translation of the Latin might be as follows: “if you (Quintianus) shall shout this (i.e. my ownership, that these poems are mine), you will place shame to the plagiarist (lit. kidnapper).”

There is a second epigram that is of interest. In the following epigram, 1.53, Martial accuses Findentinus with literary misappropriation. He uses the phrase “the clear image of its master” (in Latin, certa domini signata figura). 69 At this point in the poem, since we are talking about literary creation, we have a metaphor once again of the master-slave relationship. However, in line 3, the words manifesto furto clearly indicate the direction in which Martial is

67 Supra note 18, 1.52.6-9.
68 Id.
69 Supra note 18, 1.53.2.
going when he mentions the word theft and its association with Findentinus’ work. He closes the epigram with the statement:

There is no need for my books to have a title or judge. Your page [understood “which you stole from me”] stands against you and says you are a thief.70

Indice non opus est nostris nec iudice libris;
Stat contra dicitque tibi tua pagina “Fur es.”

The use of language in both epigrams 1.52 and 1.53 clearly alludes to the law courts and further to the relationship of master and slave. Thus, in Martial's opinion his work is perceived as the owned object of the master, i.e. Martial, and its misappropriation falls under the purview of kidnapping or theft as with the lex Julia. Indeed, literary theft is likened to kidnapping or the property theft of a person. In addition, we see how a literary text and its characters take on a life of their own and achieve a form of anthropomorphism.

In our opinion, this seems similar to the way an originary author claims ownership of his or her characters as though their imaginary futures after the originary author's text has ended is still the originary author's property. And further, this “child” is always perceived of as a “minor” under the direct protection and domination of the originary author. Modern case law supports this position of the ancient poet Martial. It is obvious from the decisions in SunTrust, the variety of cases concerning visually depicted characters, and even the Warner Brothers case, that it was felt that the originary authors still retained the right to their characters and the right to use them in subsequent new creations.71

70 Id., 1.53.3.
71 SunTrust, 136 F.Supp 2d at 1367 (“The characters of Gone with the Wind are copyrightable, apart from the story they inhabit, and cannot be used in a new work without the permission of the copyright owner”).