

Journal of Buddhist Ethics

ISSN 1076-9005

<http://blogs.dickinson.edu/buddhistethics/>

Volume 19, 2012

## Intellectual Property in Early Buddhism: A Legal and Cultural Perspective

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# Intellectual Property in Early Buddhism: A Legal and Cultural Perspective

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## Abstract

In this paper, I examine the modern concepts of intellectual property and account for their significance in monastic law and culture of early Buddhism. As a result, I have come to the following conclusions: (1) the infringement of copyrights, patents, and trademarks does not amount to theft as far as Theravadin *Vinaya* is concerned; (2) because a trademark infringement involves telling a deliberate lie, it entails an offense of expiation (*pācittiya*), but I cannot find any *Vinaya* rule which is transgressed by copyright and patent infringements; and (3) although the Buddha

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I express my sincere thanks to Dr. Kieffer-Pülz, who has kindly sent me an electronic copy of her paper "The Law of Theft" published in the JPTS Vol. (31), and also to Mr. Jim Anderson (Admin., Yahoo! Palistudy Group), through the courtesy of whom I have been able to contact Dr. Kieffer-Pülz. Without their help, this paper would not yet have seen daylight. As it happens, only one point in Dr. Kieffer-Pülz's paper is related to my topic, and regarding this, I differ from her, unfortunately (See the footnote 17), but this is not surprising, given that her work has been of the pioneering kind whereas the law of theft is, as deemed by the tradition itself, one of the most difficult *Vinaya* concepts."

recognized the right to intellectual credit, commentarial interpretations have led some traditional circles to maintain that intellectual credit can be transferred to someone else.

### Introduction

“Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce” (“What is Intellectual Property?”). Depending on the type of a given piece of intellectual property, its owners usually expect from it one or more out of the three kinds of rights:

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|--------------------------|---|
| <i>Right to monopoly</i> | Owners of copyrights and patents enjoy a time-limited monopoly of these for the sake of some financial prospects.   |
| <i>Right to identity</i> | A business uses trademarks and brands to create and reinforce its presence and identity in the business world. By having a valid and well-protected trademark, a business can ensure that customers willing to buy its products will not be tricked into paying someone else. |
| <i>Right to credit</i>   | The creators of ideas or expressions and the discoverers of information must be acknowledged whenever someone else makes use of their work. A failure to give proper credit results in plagiarism.  |

Although these IP rights, except the last one, probably did not exist when monastic law was formed, it is time for Buddhist monks and nuns to look at these in the light of the *Vinaya*. Why? If the *Vinaya* has to accept the popular opinion, as it is, on these matters (i.e., that the in-

fringement of copyrights, patents, and trademarks is a kind of theft), every monk or nun committing such an infringement would certainly lose his monkhood or her nunhood, for theft is an ultimate *Vinaya* offense that definitely results in such a devastating effect. Hence, this matter needs serious investigation.

As a result of my analysis, I have come to the following conclusions:

1. The infringement of copyrights, patents, and trademarks *does not* amount to *theft* as far as Theravadin *Vinaya* is concerned.
2. Because a trademark infringement involves telling a deliberate lie, it entails an offense of expiation (*pācittiya*), but I cannot find any *Vinaya* rule which is transgressed by copyright and patent infringements.
3. Although the Buddha did recognize the right to intellectual credit, commentarial interpretations have led some traditional circles to maintain that intellectual credit can be transferred; that is, the original author or contributor of an intellectual creation can transfer the due credits for the work to someone else.

### Right to Monopoly

Copyrights and patents are means to permit creators and contributors to have a control of the distribution and usage of their work within a specific period, obviously for the sake of financial benefits. The infringement of copyrights or patents is a civil offense and, for many people, this is a sort of theft. But can it be termed a theft in monastic law?

To be a valid theft in *Vinaya*, the object of theft must be: (1) “the possession of another” (Horner 1: 90ff *parapariggahita Vin* 54.14ff), and

(2) of some financial value.<sup>2</sup> Therefore, the infringement of copyrights and/or patents can be termed legally equivalent to theft in the *Vinaya* only if the original IP owner loses, on account of such an infringement, something of financial value that he or she *possesses*. Accordingly, the question we need to ask is: what does the original IP owner lose in financial terms on account of such an infringement?

According to the US IP law, the financial loss resulting from IP infringement can be measured in two ways: the market value measure and the lost opportunity measure (Ross 1–12), which I will demonstrate using a scenario for the sake of those readers who are *Vinaya* experts yet not familiar with the secular IP law.

*Calculating damages incurred by IP infringement: A scenario*

Suppose I am a businessman who has bought exclusive rights to distribute a particular movie in DVD format for twenty dollars apiece in Sri Lanka for one year. Thorough market research tells me that I can sell at least 5,000 copies of the movie, if properly marketed, within the period of license. However, as soon as I start to distribute the movie, the market is flooded with pirated copies of the movie, so that no informed customer would be willing to pay more than three dollars for an authentic copy. Because I refuse to reduce the price, when the license period expires, I have managed to sell only one hundred copies for twenty dollars apiece

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<sup>2</sup> Provided other conditions are equal, the different values of stolen property result in different types of *Vinaya* offenses (Vin III 54ff; Horner 1: 90ff):

If the object is worth five *māsakas* or more its theft results in Defeat (*pārājika*).

If it is worth more than one *māsaka* but less than five *māsakas*, its theft results in Grave Offense (*thullaccaya*).

If it is worth one *māsaka* or less, its theft results in Wrong Doing (*dukkāṭa*).

We do not know the exact value of *māsaka* but at least anything worth of five *māsakas* was valuable enough for the king of Māgadha during the Buddha's times to have the thief severely punished (Vin III 45, 47; Horner 1: 71, 75).

to customers unaware that pirated copies are available for only one dollar.

How would a secular court calculate my financial loss in that scenario? The first method is, as mentioned above, the market value measure:

International Valuation Standards defines market value as “the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.” (“Market Value”)

The market value measure determines the market value of an asset prior to a defendant’s wrongful act and the market value of that same asset after the wrongful act. The difference between the two values is the damage that the defendant’s wrongful act inflicted upon the plaintiff owner of the asset. Such an asset can be tangible or intangible. (Ross, 1-12-1-13)

In our scenario, before the pirated copies appear, the market value of a movie copy is twenty dollars, exactly my market price, because I hold the exclusive rights to distribute the movie and customers have no cheaper alternatives. Thus, the market value of my business asset based on the distribution of this movie is \$100,000 ( $\$20 \times 5,000$  [the projected sale figure]). After the movie has been widely pirated, however, the market value of each authentic copy is reduced to three dollars because knowledgeable customers are not willing to pay more than that for an authentic copy. Even though I refuse to reduce the price, the real market

value of my business asset has dropped to just \$15,000 ( $\$3 \times 5,000$ ). Therefore, the piracy has caused me a loss of \$85,000 ( $100,000 - 15,000$ ).

Alternatively, the lost opportunity measure:

In some instances, damage to an asset will not only diminish the market value of the asset, but also deprive the owner of the opportunity to derive some gain from use of the asset. This lost opportunity is referred to as special or consequential damages. (Ross, 1-14)

In our scenario, I would have been able to make \$100,000 from the distribution of the movie but for the piracy. Due to the piracy, however, I manage to make only \$2,000 ( $\$20 \times 100$ ). Thus, I have lost \$98,000 ( $\$100,000 - \$2,000$ ) in sales. The amount of lost profits can be calculated by deducting from that amount the cost of buying the rights to distribute the movie plus other expenses.

As demonstrated above, the so-called financial losses that are legally recognized as entailed by IP infringements are only loss of potential gains. The market value, or targeted sales figure, of an IP asset is not equivalent to the same amount of money in a bank or of cash in one's purse. The loss of market value or of sale opportunities is also different from the loss of money by having one's bank account hacked or by having one's purse snatched.

*Can potential property be an object of theft in Vinaya?*

Now the question is: can such acts of making away with potential properties be legally termed *adinnādāna* ("theft") in *Vinaya*? My answer is no. Why?

There are two *Vinaya* rules<sup>3</sup> that clearly show it does not amount to theft when one makes away with the *potential* property of others:

*yo pana bhikkhu jānaṃ saṃghikaṃ lābhaṃ pariṇataṃ attano pariṇāmeyya, nissaggiyaṃ pācittiyaṃ.* (Vin III 265)

If any monk should knowingly have turned to himself an acquisition belonging to the Order, [that is] one turned [originally towards the Order], there is an offense entailing expiation with forfeiture.<sup>4</sup>

*yo pana bhikkhu jānaṃ saṃghikaṃ lābhaṃ pariṇataṃ puggalassa pariṇāmeyya, pācittiyaṃ.* (Vin IV 156)

If any monk should knowingly have turned to an individual an acquisition belonging to the Order, [that is] one turned [originally towards the Order], there is an offense entailing expiation.<sup>5</sup>

The background stories of the rules cited above are as follows: the first rule was prescribed because the notorious members of the Six

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<sup>3</sup> I am not the first to discover the relevance of these two rules to the matter of IP infringement. In fact, Ven. Varado suggested, in one of his papers, their relevance as early as 2007 (Varado), but I learned of his work only after the first draft of my paper was completed.)

<sup>4</sup> Cf.: “If any bhikkhu should knowingly have apportioned to himself an apportioned possession belonging to the saṅgha, there is an offence entailing expiation with forfeiture.” (Pāt 45)

<sup>5</sup> Cf.: “If any bhikkhu should knowingly apportion to an individual an apportioned property belonging to the saṅgha, there is an offence entailing expiation.” (Pāt 79)

In both translations of Norman, as cited here and in the previous note, he renders *pariṇata* and *pariṇāmeyya* as “apportioned” and “should have apportioned (should apportion)” respectively, both of which I think are misleading in this context. As the background stories clearly show in both cases, the property (*lābha*) is only something promised, not yet actually transferred, to the Order. This is why I have chosen to give my own renditions of these rules in the text body.



Monks group (*chabbaggiya*) approached some donors before their donation ceremony and pressed the latter to donate the robes *already reserved for the Order* to themselves (Vin III 265; Horner 2: 160–161), whereas the second rule was made because the same group did the same thing again, but to profit some other monks (Vin IV 155–156; Horner 3: 67–68).<sup>6</sup>

Now what I wish to point out is: the so-called “acquisition belonging to the Order” (*saṅghikaṃ lābhaṃ*) is actually a potential, not yet realized, gain for it. Why? The canonical commentary explains the term *pariṇataṃ* (“turned”) thus: *pariṇataṃ nāma dassāma karissāmā ’ti vācā bhinnā hoti* (Vin III 266; IV 156 “The term *pariṇata* means: It has already been expressed, ‘We will offer, we will do’ ”). This is only a gain *promised*, not actually offered yet. This interpretation is seemingly supported by the background stories in both cases, and Buddhaghosa also appears of the same opinion:

*saṅghikaṃ ti saṅghassa santakaṃ, so hi saṅghassa pariṇattā  
hatthaṃ anārūḷho ’pi ekena pariyāyena saṅghassa santako hoti .  
.. (Sp III 732)*

The term *saṅghikaṃ* means the property of the Order. Even though it has not come into the hands (of the Order), it is, in a way, the property of the Order because it is already turned to the Order.

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<sup>6</sup> The first offense belongs to the class of *nissaggiya pācittiya* (“those entailing expiation with forfeiture”) because any monk committing it is obliged to give up whatever property he has received by changing the donors’ minds: “The name of this class of offence, Nissaggiya Pācittiya, means that, besides confessing the offence, there is an object wrongfully acquired which has to be forfeited.” (Horner 2:3). On the other hand, the second offense belongs to the class of *suddhapācittiya* (“pure expiation”) because anyone committing it gains nothing for himself but only for others, so has nothing to forfeit: “In the next class of offence, Pācittiya, there is no such object which needs to be forfeited.” (Horner 2:3).

If making away with such potential gains were equivalent to theft, these should not have been separate rules but only specific cases of the Second Defeat, the rule on stealing. The very fact that such acts happen to be described separately as lesser offenses of “expiation with forfeiture” and “(pure) expiation” shows that potential properties are not recognized in *Vinaya* as *parapariggahita* (“others’s property”), and that making off with these properties does not amount to a legal act of theft.

But does it mean that these minor rules are applicable to IP infringement? Varado thinks they are, but I think they are not.

For the sake of demonstrating my argument, let us consider another scenario. Suppose a monk needs a particular book for his studies, and some donors tell him that they can buy the book from a particular store and donate it to him. Suppose the monk replies that at that store, the book would cost fifty dollars per copy but they can get a (pirated) copy for only five dollars at another place. Through this suggestion, the monk is practically diverting the potential gains of the copyright holders into the pirates’s pockets instead. This act is similar to that of the Six Monks group, who pressured the donors to donate robes already reserved for the Order to some other monks. Therefore, can we say that the monk in our scenario has transgressed the second rule of expiation discussed above?

The answer is again negative because: (1) the context of these rules seemingly covers giving and taking gifts only, not business transactions, and (2) even if we interpret the rules to cover business transactions as well, we still cannot say that the monk in our scenario is guilty. Why? Because any potential profit that copyright holders can gain from the sale of that book is not *pariṇata*, that is, not something expressly promised (. . . *vācā bhinnā hoti* [Vin III 266; IV 156]) to the copyright holders.

The donors's purpose is obviously to benefit the monk, not the copyright holders, and if the book were available free, they would have never thought to buy it. Therefore, there is no transgression on the monk's part: *apariṇate apariṇatasaññī, anāpatti* (Vin III 266; IV 157: "If he thinks of [the potential donation] not [yet] turned [towards somebody] as not [yet] turned [towards somebody], there is no offense").

Here, we may object that because the donors's expression of their original plan to buy a genuine book means that the potential gain from the sale of a genuine copy is already reserved (*pariṇata*) for the copyright holders, the monk should be deemed guilty for changing their minds.

My answer is thus: if a monk is guilty because he persuades others to choose a pirated copy over a genuine one and thereby makes the copyright holders lose profit, he must also be deemed guilty when, for instance, he convinces others to choose a particular brand of products over others, for he is effectively diverting the potential gains of other companies into the coffers of the particular company whose brand he recommends. It means monks do not have the customer's right to choose or recommend—an absurd conclusion. Alternatively, if he has the right to recommend or choose any brand just like any other customers, there is no plausible reason why he should be deemed guilty when he has his donors choose a pirated book over a genuine one.

To sum up, *Vinaya* does not recognize potential gains of others as their "real" properties (*parapariggahita*), so making away with such gains is not a legal theft, and I have yet to find a *Vinaya* rule which is transgressed by such an act.

*The rationale*

From the two rules of expiation discussed above, it is clear that the concept of potential gains/properties already existed during the Buddha's time. However, except for the case of potential gifts which are already promised to someone else (the Order itself or otherwise),<sup>7</sup> the monastic law does not recognize any proprietary claim to potential gains/properties. Why?

It is because, I argue, such a recognition would have seriously disrupted the unity of the Order. I will demonstrate this through a scenario to see what would happen if proprietary claims to potential properties were to be legally recognized.

Suppose a monk is living at a small Buddhist village where there is no other resident monk. Any donation coming from the village people for Buddhist monks is *potentially* his property. If he can legally maintain a proprietary attitude towards all such potential donations, he has the right to view any other monk visiting the village and accepting the donations of villagers as a thief of his rightful property. As a result, it would become very difficult for two or more monks to live together at the same place.

This problem is why such an attitude is not only legally unrecognized but also actively discouraged by terming it *kulamacchariya/macchera*,<sup>8</sup> one of the five types of "meanness."<sup>9</sup> Commentators define it thus: *Kule macchariyaṃ kulamacchariyaṃ* (Sv III 1026 "Begrudging as regards a [supportive] family is *kulamacchariya*"), and describes it rather disparagingly as follows:

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<sup>7</sup> The seriousness of such offenses can vary depending on the type of a potential recipient—the Order, a shrine (*cetiya*), or an individual—for which a donation has been promised (Vin III 266, IV 156; Horner 2: 162, 3: 68-69).

<sup>8</sup> "Selfishness, meanness with regard to families" (Cone *kula* s.v.)

<sup>9</sup> DN III 234; Walshe 495; AN III 272; F. L. Woodward and Hare 3: 197-198.

*Kulanti upatthākakulampi ñātikulampi. Tattha aññassa upasaṅkamaṇaṃ anicchato kulamacchariyaṃ hoti. (As 374)*  
 Family means: a family of supporters and that of relatives. When one does not like others' approaching there (i.e., such families), there is selfishness of his regarding (supportive) families.

*Kulamaccariyena tasmiṃ kule aññesaṃ dānādāni karonte disvā “bhinnaṃ vatidaṃ kulaṃ mamā”ti cintayato lohitampi mukhato uggacchati, kucchivirecanaṃ hoti, antāni khaṇḍākhaṇḍāni hutvā nikkhamanti . . . Kulamacchariyena appalābho hoti. (Sv III 719)*

When one sees such a family doing acts of donations, etc., to others, and thinks on account of family-related selfishness, “This family of mine is indeed broken,” blood comes out of the mouth, the stomach is also purged, intestines also come out in pieces. . . . One becomes of little gain because of (the karma of) grudging (supportive) families.

There is even an explicit rule against it in the *Vinaya* for nuns:

*yā pana bhikkhunī kulamaccharinī assa, pācittiyaṃ (Vin IV 312; Pāt 180)*

If any bhikkhunī should begrudge a family/families (being supportive to others), there is an offense entailing expiation.<sup>10</sup>

<sup>10</sup> Cf.:

Whatever nun should be one who is grudging as to families, there is an offence of expiation. (Horner 3: 350)

If any bhikkhunī should be grudging to a family, there is an offence entailing expiation. (Pāt 181)

In such circumstances, it is not surprising that the concept of potential property has been taboo in the Buddhist Order.

### Right to Identity

Businesses create and reinforce their presence and identities using trademarks and brands. A valid and well-protected trademark or brand serves its owner by ensuring that customers willing to buy its products will not be tricked into paying someone else. It also protects consumers by ensuring that they get what they are paying for.

The interesting question is: what will happen to a monk's monastic morality if he commits trademark infringement? What if he were running a business that manufactures products with the trademark of another company? Even though there was no concept of trademarks at the Buddha's time, there is a case that we can use for the sake of analogy:

*tena kho pana samayena Campāyaṃ Thullanandāya bhikkhuniyā antevāsibhikkhunī Thullanandāya bhikkhuniyā upatṭhākakulaṃ gantvā ayyā icchati tekaṭulayāguṃ pātun ti pacāpetvā haritvā attanā paribhuñji. . . tassā kukkucçaṃ ahosi. . . bhikkhū bhagavato etam atthaṃ ārocesuṃ. anāpatti bhikkhave pārājikassa, āpatti sampajānamusāvāde pācittiyassā 'ti.*  
(Vin III 66)

At one time at Campā, the nun who was the pupil of the

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I think the translations above are ambiguous, for “to grudge” usually means “to be unwilling to give or admit” (“Grudge”), so “be grudging (as) to a family (families)” can also mean: this nun was not willing to give some help to that family (families), a sense contextually out of place. Therefore, a revised version is given in the text body.

According to the background story and the canonical commentary (Vin IV 312; I. B. Horner 3: 350–351), just a begrudging feeling is not an offense but an offense is incurred only when one feels grudging enough to speak ill of the family(-ies) to other *bhikkhunīs*, or of other *bhikkhunīs* to the family(-ies).

nun Thullanandā went to the family who supported the nun Thullanandā, and said: “The lady wants to drink rice-gruel containing the three pungent ingredients,” and having had this cooked, she took it away with her and enjoyed it herself. . . . She was remorseful. . . . The monks told this matter to the lord. “Monks, there is no offence involving defeat; in the deliberate lie there is an offence involving expiation.” (Horner 1: 110-111)

Why was that nun not judged as guilty of stealing? Arguably, it was due to the following reasons:

1. Without the deceptive request of the pupil, Thullanandā’s supportive family would not have made and donated the rice-gruel. Therefore, the aforesaid rice-gruel was only the property of the donor family, not Thullanandā’s, before it came into the cheating nun’s possession.<sup>11</sup>

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<sup>11</sup>Cf.: another case

*:tena kho pana samayena aññataro bhikkhu saṃghassa cīvare bhājiyamāne theyyacitto kusaṃ saṅkāmetvā cīvaraṃ aggahesi. tassa kukkucaṃ ahoṣi: . . . pārājikaṃ ti.* (Vin III 58)

At one time, when the robes belonging to the Order were being distributed, a certain monk, having a mind to steal, changed the lot marker and took a robe. He was remorseful . . . “involving defeat.”

If items of various types and qualities are to be distributed among monks, it is very difficult to make fair and equal shares. In such circumstances, it is customary to have monks draw lots and to have each monk accept whatever his lot shows. This case arose because, on such an occasion, a monk stealthily changed his lot marker with another’s.

Now the question in this case is: what did the guilty monk physically steal? Another monk’s lot marker. A lot marker might be a mere piece of wood or a blade of grass, so its value did not justify the Ultimate Defeat that the monk had to face. (As discussed at p. 221, the object stolen must have a value of five *māsakas* or more to entail the offense of Ultimate Defeat [*pārājika*].)

It is clear, therefore, that his act was interpreted as the theft of those robes. However, he might not exactly take the robes without being given to, for these might

2. Because the donor family, the real proprietor of that rice-gruel, willingly gave it to the cheating nun, she was innocent of theft. (In fact, the Pali term for theft is *adinnādāna* [“Taking something not given”].)
3. However, she did lie to the donor family by asking for rice-gruel in the name of the nun Thullanandā. This is why she was termed guilty of an offense entailing expiation: *sampajānamusāvāde pācittiyaṃ* (Vin IV 2; Pāt 46) (“In (uttering) a conscious lie there is an offence entailing expiation.” [Pāt 47]).

We can reason in a similar manner regarding the use of false trademarks:

1. Whatever profit the business monk makes by means of trademark infringement is, before he receives it, the property of customers. Even though the trademark owners may claim that if fake products were unavailable at all, customers would have bought the genuine products instead, there is no absolute certainty that every fake product sold does put a genuine product out of sale. As mentioned in the previous section, a sale target is only a potential gain and not the same as the money in the bank.
2. The customers willingly pay the business monk for these fake products, letting him free from the guilt of theft.

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have been handed to him by the monk in charge, who was not aware of the stealthy change of lot markers. But his act still constituted theft. Why?

Because the monk who originally drew the lot showing these robes, not the one in charge, was the real owner of the robes in question. And the real owner did not willingly give these robes to the cheating monk; in fact, the former did not even know that the robes were his own. This is why the latter’s act was defined as theft.



3. Just like the nun cheating for gruel, the business monk is also guilty of lying when he uses false trademarks to trick his customers.

To sum up, trademark infringement of a monk or nun does not involve theft but only an offense of lying which entails expiation.

### **Right to Credit**

Nowadays, it is taken for granted that we are obliged to acknowledge the work of others whenever we make use of their ideas, information, or expressions. Failure to do so is plagiarism, described clearly as follows:

Plagiarism involves two kinds of wrongs. Using another person's ideas, information, or expressions without acknowledging that person's work constitutes intellectual theft. Passing off another person's ideas, information, or expressions as your own to get a better grade or gain some other advantage constitutes fraud. (*MLA* 52)

However, we cannot say that we insist on avoiding plagiarism on a universal scale, for public or enterprise officials who sign the documents prepared by their secretaries, or those giving speeches prepared by speechwriters ("Speechwriter"), are not accused of plagiarism. Those officials may not be guilty of intellectual theft because they may have full permission from their secretaries or speechwriters to use the latter's work, but why do we not call the former frauds when they fail to give public credit to the latter?

The apparent answer is; it is because such official documents and public speeches are not laurels to rest upon but rather are responsibilities, not to the secretaries and speechwriters, but to the signatories and speakers, for it is they who must answer to shareholders or to the public

for any errors. One of the implications, then, is that in a society in which intellectual or artistic creations are viewed as a responsibility, it would be quite natural to transfer the intellectual credit to those seemingly proper to carry that burden.

Keeping the reasoning above in mind, we should examine what early Buddhism has to say about the intellectual right to credit. We can see that the Buddha had the same aversion towards plagiarism as we do, for he dubbed any monk who has learned his teachings yet fails to pay due credit as one of the Five Great Thieves:

*puna ca paraṃ bhikkhave idh' ekacco pāpabhikkhu tathāgata-paveditaṃ dhammavinayaṃ pariyāpuṇitvā attano harati. ayaṃ bhikkhave dutiyo mahācoro santo saṃvijjamaṇo lokasmiṃ.*  
(Vin III 89)

Again, monks, here a certain depraved monk, having mastered thoroughly dhamma and the discipline made known by the tathāgata, takes it for his own. This, monks, is the second great thief found existing in the world. (Horner 1: 156)

Even though the text cited above can be found in the *Vinaya* canon, we should not take it as referring to “real theft,” the scope of the Second Defeat, simply because plagiarism does not involve any financial loss of the original creator/contributor and there can be no legal theft without any financial loss. Rather, we should treat it only as a figurative speech describing plagiarism as a serious crime. Legally speaking, it is only a deliberate lie entailing expiation (see 610).

Now let us see another aspect of the concept. In MN, the Buddha, after listening to one lay devotee Visākha, who related to him the

Dhamma discourse delivered by the nun Dhammadinnā, remarked as follows:

*Paṇḍitā Visākha Dhammadinnā bhikkhunī, mahāpaññā Visākha Dhammadinnā bhikkhunī. Mamañ cepi tvaṃ Visākha etam-atthaṃ puccheyyāsi, aham-pi taṃ evam-evaṃ byākareyyaṃ yathā taṃ dhammadinnāya bhikkhuniyā byākataṃ. Eso c' ev' etassa attho, evam-etaṃ dhārehīti. (MN I 304–305)*

The bhikkhunī Dhammadinnā is wise, Visākha, the bhikkhunī Dhammadinnā has great wisdom. If you had asked me the meaning of this, I would have explained it to you in the same way that the bhikkhunī Dhammadinnā has explained it. Such is its meaning, and so you should remember it. (Ñāṇamoḷī and Bodhi 403–404)

Then Buddhaghosa expounded the significance of the Buddha's remark as follows:

*Ettāvatā ca pana ayaṃ suttanto jinabhāsito nāma jāto, na sāvabhāsito. Yathā hi rājayuttehi likhitaṃ paṇṇaṃ yāva rājamuddikāya na lañchitaṃ hoti, na tāva rājapaṇṇanti saṅkhyāṃ gacchati; lañchitamattaṃ pana rājapaṇṇaṃ nāma hoti, tathā, “ahampi taṃ evameva byākareyyan”ti imāya jinavacanamuddikāya lañchitattā ayaṃ suttanto āhaccavacanena jinabhāsito nāma jāto. (Ps II 370)*

With this much (statement), this *sutta* becomes the Buddha's own teaching, no longer a disciple's. Just as a letter written by royal servants is not called a royal letter before getting stamped by the royal seal, yet it becomes a royal letter just after getting stamped by the royal seal, so also

becomes this *sutta* the Buddha's own teaching by virtue of the Buddha's own statement, on account of getting stamped by the seal of the Buddha's statement, "I would have explained it in the same way."

Buddhaghosa has virtually attributed Dhammadinnā's doctrinal exposition to the Buddha based on an analogy of her work with a royal document. Is it because Buddhaghosa was living in an atmosphere in which intellectual creations were viewed as the burden of those to whom they are attributed? Did he think that it actually served Dhammadinnā to have her work attributed to the Buddha himself so that no disciple would dare argue against it? We can never be sure, but we at least know that the early Buddhist community is one which viewed other contemporary philosophers not as mere rivals in an intellectual game, but as "man-traps" (*manussakhipa*):

*Seyyathāpi bhikkhave nadī-mukhe khipaṃ uḍḍeyya bahunnaṃ macchānaṃ ahitāya dukkhāya anayāya vyaśāyā: evaṃ eva kho bhikkhave Makkhali moghapuriso manussa-khipaṃ maññe loke uppanno bahunnaṃ sattānaṃ ahitāya dukkhāya anayāya byaśāyāti. (AN I 33)*

Just as, monks, at a river-mouth one sets a fish-trap, to the discomfort, suffering, distress and destruction of many fish: even so Makkhali,<sup>12</sup> that infatuated man, was born into the world, methinks, to be a man-trap, for the discomfort, suffering, distress and destruction of many beings. (Woodward and Hare 1: 30)

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<sup>12</sup>*Makkhali-Gosāla*.—One of the six heretical teachers contemporaneous with the Buddha. He held that there is no cause, either ultimate or remote, for the depravity or for their rectitude. (Malalasekara "Makkhali-Gosāla")

In such a context, I think it is really probable that Buddhaghosa and other commentators may have viewed any mistake in doctrinal expositions not as mere academic errors but as serious blunders which may confuse and mislead beings away from the true path to liberation, and for which the speakers or authors must answer. In that case it is not surprising that Buddhaghosa thought it right to attribute Dhammadinnā's work to the Buddha, releasing her from the burden of the responsibility for her work.

Let us now flash forward into the history of ancient Burmese monasticism, of which the following is a well-known anecdote:

In the year 1638 A.D., Tonphīlā Sarāto went on pilgrimage to the Pagoda of Mancaktorā, and on the way back, visited the town of Pukhan"krī" and conferred with Rvheumañ Sarāto. At the time, (the former) asked to see the *Vinaya* translation written by Rvheumañ Sarāto', and thought: "My own translation is too elaborate yet his version is concise and reliable enough for the posterity. The existence of two (translated) versions would be detrimental, just like the simultaneous appearance of two Buddhas would have been, leading beings to a controversy of whose Buddha is better," and had his own version burnt at the pagoda as homage to the Buddha. This is according to the text of *Sīlavisodhanī* (87). But *Piṭakasamuiñ*" says that the former had a pagoda built, with his translation buried in it, on the hill of Tonphīlā, Cackuiñ" city. (Wan)

In this story, the author of an inferior work felt that he must have his own work eliminated to avoid a future controversy over the relative merits of his own work and a superior one. This is typical of how ancient Burmese monasticism viewed intellectual works as burdens for their creators.

Let us consider a more recent example. The following is from my own experience.

As a junior monk in Burma, I studied under two great monk scholars, whom I will call A and B. At the time, A was a famous scholar and author, who had published several books that eventually become common manuals for many students of *Abhidhamma*.<sup>13</sup> On the other hand, B was a scholar who had devoted his life to *Vinaya* studies. However, because he was not interested in publishing, he was a nameless person outside a small circle of students and peers. He did write an annotated translation of *Vinayaṅgaha*, the most comprehensive manual of *Vinaya*, when he was more than seventy years old; however, after completing his work, he turned over the manuscript to A to be published as the latter's work!

Why? The reason seems as follows: (1) because *Vinayaṅgaha* is not part of the regular curriculum in the traditional Buddhist studies in Burma, only a few publishers would seriously consider the publication of its translation. As a nameless person outside a small circle of friends, B had no leverage to persuade a publisher to publish his work. Even if he managed to get it published, it would have taken a long time before many temple librarians would have come to notice his work. (2) On the other hand, being an already famous author, A had the leverage to persuade any publisher to publish the manuscript, and his name on the title page would make all potential buyers to take notice quickly.<sup>14</sup>

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<sup>13</sup> Readers should not see him as a textbook author. In Burmese monastic circles, there has never been a trend of scholars writing for scholars. On the contrary, monk scholars usually put their insights into books supposed to be for students, walking a tightrope between presenting the research findings in their works and making them accessible to students at the same time. But they do not always succeed; I have seen many translated works definitely more difficult than the original Pāli texts.

<sup>14</sup> I do not mean that A's fame would make the book profitable. On the contrary, the publisher would certainly have to bear the financial loss for having to publish a book that would appeal only to bigger temple libraries. However, he would get rights to re-

This is why B decided to turn over his work to A. The former also granted the latter the right to revise the work as the latter saw fit; after all, A was a much better writer, and B knew it. Moreover, I should note that B did not ask for any cursory acknowledgment nor material benefits.

Such transfers of intellectual credits are not uncommon in Burma. Even though people usually take care to keep those events out of print, no one thinks such transfers of intellectual credits are ethical mistakes; both those personally involved and others feel free to talk about such events.

### Conclusion: *Vinaya* vs. secular law

As shown above, there seems to be no *Vinaya* rule that is applicable to a case of infringing copyrights and patents. Therefore, although a monk or nun infringing copyrights and patents is guilty in secular law, he or she would be innocent in monastic law. This seems to defeat the purpose of the *Vinaya* itself: did not the Buddha himself say that he had to prescribe the *Vinaya* rules to gain the respect of those having no respect yet for the Teaching, and to increase the respect of those who already have respect for it?<sup>15</sup> Who would have respect for a community that gives free rein to its members for infringing IP rights in a modern world?

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print the more popular books of A as a deal; this is how famous authors usually get to publish books that they certainly know will not be popular.

<sup>15</sup> *appasannānaṃ pasādāya, pasannānaṃ bhīyyobhāvāya* (Vin III 21; AN I 98). This phrase has been misinterpreted in prior works, so a detailed analysis is necessary.

Here both the terms *pasanna* and *pasāda* are derived from *pa+√sad*, of which the Skt. counterpart *pra+√sad* means, beside others, “to be pleased . . . to be appeased or soothed, be satisfied” (Apte *prasad* s.v.), but the former is a past participle with the suffix *na* yet the latter is a primary derivative with the suffix *a*. Therefore *pasanna* means, “those who have already been satisfied (with the Teaching),” and *pasāda* means, “being pleased, or satisfaction, (with the Teaching).” The term *appasanna*, on the other hand, is a compound of the negative participle *na* and *pasanna*, so it should mean, “those who

I answer thus: I am not arguing that it is ethically correct to infringe copyrights, patents, or trademarks, or that the Buddha would have supported such infringements.<sup>16</sup> On the contrary, I only argue that

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have not yet been pleased/satisfied (with the Teaching).” Then, the phrase *appasannānaṃ pasādāya* means, “for the sake of (gaining) satisfaction of those who are not satisfied with (the Teaching) yet.”

On the other hand, *bhiyyobhāvāya* is a compound of *bhiyyo* and *bhāva*. Of these two, the former has the Skt. counterpart *bhūyas*, which means, beside others, “1. More, more numerous or abundant.-2. Greater, larger . . . “ (Apte *bhūyas* s.v.) whereas *bhāva* means “2. Becoming, occurring, taking place.-3. State, condition, state of being . . . “ (*bhāva* s.v.). Therefore, *bhiyyobhāva* means “becoming greater” or “state of being greater.” But “greater” in which sense? In quantity or quality? If it is quantity-wise, *pasannānaṃ bhiyyobhāvāya* will mean “for a greater number of those who are satisfied with the Teaching,” whereas if it is quality-wise, it will mean “for the greater satisfaction of those who are already satisfied with the Teaching.” Out of those two, the former overlaps with the previous phrase *appasannānaṃ pasādāya*, which essentially means raising the number of the people satisfied with the Teaching; therefore the latter sense is more appropriate in this context.

Cf.:

. . . for the benefit of non-believers, for the increase in the number of believers  
. . . (Horner 1: 38)

To give confidence to believers, and for the betterment of believers. (Woodward and Hare 1: 84)

<sup>16</sup> Neither do I admit that such infringements are unethical, for the private property status of copyrights/patents is still a gray area in ethics. These IP rights are relatively modern additions to the list of properties that can be privately owned (*Britannica* “copyright”; *Britannica* “patent”); most countries still treat copyright/patent infringements as civil offenses even though they view other kinds of theft as crimes. Besides, some stakeholders have already raised doubts whether these IP concepts still work for society (Graham), and have thereby led us to doubt if these concepts will remain the same in future.

On the other hand, as we have seen above, the sin of theft in Buddhist ethics is based upon the concept of private property. If we are not sure if something is private property, we cannot be sure if taking it away without permission amounts to theft. As long as there is no universal agreement on the private property status of copyrights/patents, Buddhist ethics will not be able to answer whether such infringements amount to stealing.

Furthermore, given the penalties that secular laws can bring against monks and nuns who dare infringe copyrights/patents, there is reason to believe that, if the Buddha were living now, he would have prescribed specific rules against such infringements whether such deeds are ethical or not. But he is no longer among us now. Should we therefore make a more liberal interpretation of the extant *Vinaya* rules to make these more relevant to the modern world? This is a question for practitioners, not for academics, so I will not attempt to touch on it here.



even if we think such infringements are more serious than their analogous counterparts found in the *Vinaya* texts, we should not be carried away by our secular ways of thinking when we attempt to judge these ethical issues in the light of the monastic law. In other words, even though we all know that (1) every monk is not only a monk but also a resident of a certain country and subject to its laws and regulations, and (2) if a monk transgresses against the copyright and patent laws in his country of residence, he may get sued, fined, or even put into jail; we should not let such legal causes and consequences reflect on his monastic morality more than the extent allowed by the *Vinaya* rules. I call this *the legal autonomy of the Order*, the foundation of which, I argue, the Buddha himself laid down in one of the cases he judged.

In an account recorded at (Vin III 65; Horner 1: 108–109), several monks were offered mangoes by the guards of a mango garden. The monks thought that those guards had the right only to protect the garden, not to give mangoes away, so they scrupulously refused to accept. When they told the Buddha about it afterward, the Buddha did not bother to check if the guards really had the legal right to donate in secular law but simply stated, “It is no offense as far as the guardian’s offering is concerned.” By virtue of that simple statement, I argue, the Buddha laid down the two basic conditions of the legal autonomy of the Order:

1. Monastic jurisdiction should not extend into the secular society. In the present case, whether these guards had the authority to give away these mangoes was not the business of the monks, but rather a problem between the former and the garden owner, and accordingly beyond the monastic jurisdiction. Therefore, there was no legal need to judge their conduct, nor to

inquire whether the secular law of these times allowed them to offer mangoes.<sup>17</sup>

2. The secular law should not affect the monastic morality. In the present case, even if these guards really had no right to offer these fruits and accordingly if accepting the fruits was an offense according to the secular law of those times, accepting these fruits still would not have harmed the monastic morality of those monks.

But what is the need for such autonomy? Because, without such independence, the monastic law will become a hostage to the secular law, a situation which is very dangerous for the Order and which the Buddha would not have desired.

To understand the danger involved, let us consider a scenario. The *Vinaya* says that if there is a royal decree to demand a tax from those traveling through a particular place, a monk passing through the place without paying the due tax is guilty of theft (Vin III 52; Horner 1: 86-87).<sup>18</sup> Now suppose a country with a small population of Buddhist monks

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<sup>17</sup> Kieffer-Pülz, on the contrary, seemingly thinks that the Buddha's judgment in this case was not being consistent with that in another case:

In the second case, theft by a keeper of the entrusted goods (case 28 ; Vin III 53,1-3), the keeper himself steals goods entrusted to him. This slightly deviates from case thirty-nine of the *Vinītavatthu*, where it is explicitly allowed that keepers give fruits from gardens they watch over to monks (Vin III 65,12-18). (8-9)

I do not agree with her, however, for she has failed to notice a very important difference between these two cases—the fact that the keeper in the former case was a monk whose misconduct must be judged by the monastic law, whereas the keepers in the latter case were lay persons, whose conduct was outside the monastic jurisdiction. Therefore, I believe that the Buddha in the latter case just *refused* to judge the keepers when they gave away fruits, simply because it was not his business to allow or prohibit their conduct.

<sup>18</sup> It means monks are not above tax after all; the tax-free state of Buddhist monks in certain Buddhist countries is not a right but a privilege conferred on Buddhist monks by the Buddhist public.

comes to be governed by a non-Buddhist government, which also happens to hate Buddhist monks. Suppose that government makes a law that every Buddhist monk should pay an “air tax” of one dollar for each time he breathes. If monks choose to breathe without paying the tax, does it mean that they are guilty of theft and consequently should lose their monkhood?

If the Order were to defer to secular law unconditionally, there would be no choice but to answer yes; this would be exactly what I would like to call a case of the *Vinaya* taken hostage by secular law.<sup>19</sup> It is against such subservience to secular law that, I argue, the Buddha has protected the Order by establishing a legal autonomy for it.

Here, I must note that there are admittedly many cases where the *Vinaya* has accepted legal concepts from secular law; for instance, in the rule on theft itself, the stolen object, to incur the Ultimate Defeat, must be a valuable worth at least five *māsakas*, an amount corresponding to the royal law of the Māgadha country (Vin III 45, 47; Horner 1: 71, 75). Perhaps this is why Varado states: “So, for monks, vinaya [sic.] is not a replacement for law, but an addition to it, a fact established in vinaya [sic.], where the Buddha, referring to the legislative system of the day, said, ‘I allow you, monks, to obey kings’ (Vin 1.138).”

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<sup>19</sup> If we ignore the secular law and think only in terms of the *Vinaya* rules, those monks are innocent. Why? The *Vinaya* canon says: *anāpatti sakasaññissa* (Vin III 55) (“There is no offence for a monk perceiving [the thing to be taken] as his own”). Previous to that unreasonable law coming into effect in our scenario, the air to breathe had always been the common property of mankind, and the particular portion of air one breathed was one’s own. Therefore, as long as those monks sincerely maintain that they have the right to breathe without having to pay any tax, they are not guilty of theft despite any law to the contrary.

Cf. Horner renders *anāpatti sakasaññissa* as “There is no offence if he knows it is his own.” (1: 92). The term “knows” implies that it “is” really his own, which seems not meant here. Why? There is one case recorded about Venerable Ānanda mistakenly taking the inner garment of another monk in the bathroom, which the Buddha judged using the same term: *anāpatti bhikkhave sakasaññissa* (Vin III 58), which Horner herself translates correctly: “There is no offence, monks, as he thought it was his own.” (1: 98).

However, “using” secular law when it is convenient to do so and subservience to it are different things. The Buddha might choose to use secular law when it was helpful to his mission, but might choose to differ in other occasions. The case of accepting mangoes from the garden guards, discussed above, is one instance of the Buddha ignoring secular law.

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