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# Plagiarism, Kinship and Slavery

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## Abstract

In conversation with Marilyn Strathern's work on kinship and especially on metaphors of intellectual and reproductive creativity, this paper provides an analysis of plagiarism not as a violation of intellectual property but of the kinship relationships between author, work, and readers. It also analyzes the role of figures of kidnapped slaves and children in the genealogy of the modern concept of plagiarism.

## Keywords

authorship, kinship, plagiarism

In the same breath, English-speakers find it possible to talk about practices to do with making kinship and practices to do with making knowledge. (Marilyn Strathern, 2005: 57)

Everybody agrees that the loss of children brings the deepest of pains. But if you consider it carefully, what else does he lose who is deprived of his children but that which is not only the faculty of all men but of wild animals as well, namely, the righteous power [*podestà*] to generate and reproduce? (Galilei, 1607: 2)

Like a rapacious vulture . . . moved by nefarious drives, he trespasses into the nests of others and, crashing the eggs of the yet-unborn chicks, rips apart their little bodies whose tender limbs (to make sure they would be properly formed, strengthened, and solidified) were still being hatched by the loving heat of the patient father. (Galilei, 1607: 4v)

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Apparently a reflection on the devastating pain parents experience when their children die, the first quote by Galileo is in fact a metaphorical and heavily gendered description of the alleged effects of plagiarism on his honor and professional reputation. The children whose death is discussed are, it turns out, a calculating device similar to a slide ruler and a brief user manual for the same instrument, which a plagiarist had translated from Italian into Latin and reprinted under his name. Galileo feared that readers would have assumed that the compass and booklet were not his children but the plagiarist's.

Galileo uses the term *podestà* to designate that which he was about to lose to the plagiarist's actions. Given the context, *podestà* is a likely reference to *patria potestas*, 'the power which a Roman father had over the persons of his children, grandchildren, and other descendants'.<sup>1</sup> Because that power was not actualized in a married Roman man without children, taking the children away deprived the *paterfamilias* not only of his offspring but of his ability to exercise power. Galileo seemed to experience plagiarism in similar terms: as a reduction of personhood, not just property – that is, of his capacity of being an author not only *of* his works but *through* his works.

Plagiarism is a very specific form of appropriation that is often confused with copyright violation. Plagiarism may involve the unauthorized copying of a work (so-called piracy), but also its displacement. Playing on Galileo's metaphor, the work/child is forcibly moved from one author's family to another where, willing or not, it starts a new life. That could take place in a very different geographical location, with a very different set of readers, by means of a translation into another language. Galileo's instruction booklet could have become somebody else's progeny – disconnected from him or, as he says, dead for him (Biagioli, 2012: 453–76).

The second of Galileo's quotes is not a description of avian infanticide but a dramatization of the deleterious effects of the unauthorized publication of some preliminary thoughts on a nova he observed in 1604. While Galileo (the papa bird) was carefully nurturing his tender unpublished thoughts (the yet-unborn chicks), a scheming student (the vulture) made them public through print (breaking their eggs). This effectively killed them because, not fully formed yet, they were unable to fend for themselves – they could not convince the readers of their truth and thus of their 'father's' philosophical skills.<sup>2</sup> Their inability to survive was lethal for them, but reflected poorly on their father as well.

This second scenario seems closer to unauthorized printing than to plagiarism – Galileo's unfinished thoughts were published against his will and may have been improperly reported, but were not misattributed. Still, the passage articulates themes closely related to the first quote: the author as the lawful and caring father of the work/progeny; the injury that the loss of the work inflicts on the author not just as biological

father but as *paterfamilias*; and the ‘death’ of the work (to the author and to the world) resulting from the premature severance of its nurturing relation with the author/father. In both cases the author is not simply deprived of an object of property but ‘loses control’ of the child, with a subsequent reduction of his personhood.<sup>3</sup>

Mark Rose has shown that metaphorical associations between authors and fathers and between works and children are already found in antiquity but became much more common and energized in 18th-century English copyright debates over the possibility of protecting books not as material property but as carriers of a unique immaterial feature impressed on them by their authors.<sup>4</sup> Parental metaphors helped to conceptualize a unique causal relation between author and work – a relation that could then provide the basis for rights of the former in the latter. But even in this new context – a proactive one as opposed to the scenarios of authorial victimhood described by Galileo – the connection between fathers and works was presented as fragile and always threatened. The establishment of literary property and copyright law was thus cast as a means to curb crimes against both the integrity and patrimony of the authorial ‘family’. Writing just before the introduction of the Statute of Anne (the first English copyright law) in 1710, Daniel Defoe claimed that:

A Book is the Author’s Property, ‘tis the Child of his Inventions, the Brat of His Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, ‘tis as much his own, as his Wife and Children are his own – But behold in this Christian Nation, these Children of our Heads are seiz’d, captivated, spirited away, and carry’d into Captivity, and there is none to redeem them. (Rose, 1993: 39)

Analogies between authors as fathers and works as children were obviously not precise, nor could they be. Their deployment provided a space in which a new kind of property could be imagined, but did not offer a clear articulation of that concept. Defoe, for instance, is not yet thinking in terms of intangible property when he presents his book (or perhaps his manuscript?) as a material object he can either keep or sell to a publisher. But then he could not be fully thinking in terms of tangible property either because, if that were the case, laws against theft were already available, thus rendering the introduction of a new notion of literary property unnecessary. These metaphors, therefore, are more interesting for the range of relations they make thinkable (including those that backfire on the metaphor itself) than for those they may actually establish.

There is a bit of a puzzle, however. Having engaged these metaphors as they move across very different discourses – from literary works to surrogacy cases – Marilyn Strathern has asked why, in the case of literary

works, figures of paternity that played a central role in early debates seemed to vanish after the introduction of copyright and intangible property:

At the very moment when a creational concept of author was taking shape, that particular kinship idiom, with its emphasis on inheritance and descent, seems to disappear from view. Works might continue to be referred to as offspring, but the vivid vision of paternity fades. (Strathern, 2005: 39)<sup>5</sup>

I will return to Strathern's observation after going over some of the material she reviewed herself, but should prepare that discussion by sketching out some of the possible factors in the eclipsing of these metaphors.

The most obvious is that copyright construes the work as the property of the author, but the form of control that parents now exercise over young children does not amount to property (though that was the case in early Roman Law) (Long, 1875: 873). Property in people is called slavery. Conversely, parents cannot release underage children into the 'public domain' either, as that would amount to abandonment. Authors have rights in works but parents have responsibilities for their children.<sup>6</sup> A less evident but important mismatch between parental metaphors of cultural production and the codification of that same process by copyright law is that works do change but do not grow like children. Works are always modified by human actors – authors, editors, commentators, and plagiarists who revise, copy, quote, abridge, or give them new names. They do not, however, grow through a process internal to themselves, like children, animals, or plants.

Nor is it clear how a work can be said to become an adult. Metaphors of authorship as fatherhood imply that the works will survive their fathers, thus intimating some kind of adulthood to come. And yet those scenarios are left undeveloped beyond the observation that the works will preserve the author's name and memory, suggesting that their future life will be not one of persons but of monuments to their fathers. The work is either a child or a thing or both, but never an adult – either in need of constant parental guidance and protection or sharing in the permanence and fixity of statues.

If the metaphor of the author as father has virtually disappeared from Anglophone copyright law, it lingers on, instead, in the Continental legal doctrine of moral rights of authors, where the right of attribution – the link between a work and its author – is still referred to as *droit a la paternité* or *droit au respect du nom*, and where the work remains tethered to the author (and vice versa) even after copyright is sold and property relations are ended (Bently and Sherman, 2008: 249–60). But Galileo's quotes indicate that there is a place in which the metaphor has thrived

and continues to thrive independently of developments within the law: the discourse on plagiarism.

### Unauthorized Fathering, not Unauthorized Copying

As melodramatic as Galileo's representation of plagiarism as the taking and killing of an author's children may be, it is remarkably well aligned with the genealogy of the concept.<sup>7</sup> Whether or not he was aware of it, Galileo's images replayed analogies between plagiarism and kidnapping inscribed in the very etymology of the term: *plagiarius* is Latin for kidnapper – especially the kidnapper of children and freemen to sell them as slaves (Merriam-Webster, 1991: 367).

The figure of the kidnapper encapsulates a key feature of plagiarism, namely, that it involves appropriation but also displacement.<sup>8</sup> It also highlights the specificity of its form of appropriation. Plagiarism is conceptually very different from copyright violation despite the fact that some of its specific expressions may overlap with those of piracy (when plagiarism amounts or is close to verbatim copying) and may be thus prohibited by copyright law. Piracy may hurt the author financially, but does not take away her authorship. Pirated Lady Gaga music is still attributed to her because keeping that association intact is crucial to maintaining the market value of the copies. Plagiarism, instead, severs the link between the work and the name of the original author, and then reconnects it to somebody else's name.<sup>9</sup> It concerns unauthorized fathering, not unauthorized copying.<sup>10</sup> Copying may be an effect of plagiarism, but not its goal. Unlike piracy, plagiarism is unrelated to technologies of reproduction. The concept emerged in antiquity (not after Gutenberg) and could apply to works that were not reproduced through writing but simply delivered orally. Today, any misrepresentation of the work-author kinship counts as plagiarism, no matter the medium or technology through which it happens.

The definition of plagiarizable subject matter is equally capacious, and for the same reason. Because it focuses on the relation between author and work rather than on the work itself, plagiarism may apply to anything an author has 'conceived'. This is by no means limited to the objects of intellectual property (personal expression, inventive step, etc.) but may include abstract ideas, techniques, instruments, information, and data.<sup>11</sup> And, like children, the objects of plagiarism do not need to be fully actualized or stabilized yet. Hypotheses, insights, and other embryonic works may be claimed to have been plagiarized too.

Copyright's notion of copy and plagiarism's notion of appropriation are significantly different, and not only because the former concerns objects while the latter focuses on relations. The difference may in fact be traceable to the specific location where the plagiarist inserts himself in the chain of authorial agency. Piracy operates downstream, affecting the

production, circulation, and sale of *some copies* of the work. Instead, because the author is construed as the origin of the work, the name swap performed by the plagiarist has the effect of appropriating the *whole work*. (Galileo lamented the complete loss or ‘death’ of his work, not its copying.) Perhaps it is the scale of the appropriation resulting from the name swap that makes plagiarism feel ‘personal’: not so much the symbolic affront of seeing your name erased and substituted with that of somebody else, but the fact that, through that simple elision, you have indeed lost your whole work.<sup>12</sup> Plagiarism may thus be seen as the most upstream form of piracy – so upstream that it ends up becoming something qualitatively different from piracy.

This has an intriguing effect on the distinction between tangibility and intangibility as construed by copyright law. Because plagiarism concerns the whole work, not its copies, it makes metaphorical sense to talk about the work as *one*, that is, not as the name of a species made up of various individuals or copies but as a single unique individual – a ‘child’ with a first and last name, the first being the title of the work and the last being the name of its author. The plagiarist, then, does not kidnap a copy of the author’s intangible ‘personal expression’ that is or may be replicated in various other material embodiments of the work. That would be a non-rivalrous good: if you copy my intangible idea or personal expression I still have it. Plagiarism, instead, treats the work as a tangible and thus rivalrous entity: if you kidnap my child I don’t have that child anymore. In this view the work is one, and he who takes it takes it all. But being one and not intangible does not mean being tangible. Copyright law introduces the tangible/intangible dichotomy so as to construe copies as containing the same immaterial authorial form as the work, and thus infringing on the author’s right in it. But because that concept of ‘copy’ has no structural role within the discourse of plagiarism, the tangible/intangible dichotomy is deactivated altogether. The work is neither tangible nor intangible, or both.

### Children and Slaves

The first reported use of the term plagiarism (as distinct from theft) is in an epigram by Martial, the first-century Latin poet.<sup>13</sup> In it, Martial asks for a friend’s<sup>14</sup> help to reclaim the authorship of some of his works appropriated by Fidentinus, another poet:

To your charge I entrust, Quintianus, my works if, after all, I can call those mine which that poet of yours [Fidentinus] recites. If they complain of their grievous servitude, come forward as their champion and give bail for them; and when that fellow calls himself their owner, say that they are mine, sent forth from my hand. If thrice



and four times you shout this, you will shame the plagiarist.  
(Martial, 1919: 63)<sup>15</sup>

Fidentinus' public recitation of Martial's poems as if they were his own was not an actionable offense. But Martial, drawing from laws concerning freed slaves, produces some creative legal bricolage to claim that Fidentinus' actions were unlawful, or at least immoral. Martial's key point is that his works were *not objects but persons*: slaves he owned but had freed, only to see them unlawfully re-enslaved by Fidentinus. As surprising as Martial's analogy between works and freed slaves may seem, it does support the construction of plagiarism as an appropriation of something that is not property.<sup>16</sup>

Martial equates the writer's act of lifting his hand from the page upon the completion of the poem to the master lifting his hand from the slave's shoulder in the praetorial court to signify the slave's release to freedom. His poems are literally manumitted – 'sent forth from my hand'. The legal analogy is confirmed in Martial's call on his friend Quintianus to 'come forward as their champion' and free these texts from Fidentinus' unlawful re-enslavement. The Latin term rendered as 'champion' is *assertor* – that is, *assertor in libertatem* or *assertor libertatis* – the official who testified to the master's act of manumission and could therefore assert the free status of the former slaves.<sup>17</sup>

Martial's narrative is thoroughly framed by the topos of property – the work/slave as property of the author/master – but mobilizes it to achieve the exact opposite effect. Martial no longer asserts his work as his property – 'if, after all, I can call those mine' – but claims to retain some link to his former works/slaves like the Roman ex-masters who typically became the patrons of 'their' *liberti*.<sup>18</sup> It is as their custodian, not owner, that he speaks on their behalf and in their interest. Actually, if we were to take Martial's argument literally, his works were never his property because they became free the same moment they became a work. They were freed by their very birth, by the act of manumission performed by Martial's hand when it delivered them from his mind to the page – a surface that Martial casts as a public and non-proprietary space. Similarly, his last line – 'If thrice and four times you shout this, you will shame the plagiarist' – indicates an awareness that he can only shame Fidentinus.<sup>19</sup> He cannot press theft charges because, according to his own argument, Fidentinus has not appropriated something that was Martial's property. The real victims are the poems themselves, as persons.

While *freed*, the works were not *free*. They had never been captive (except when confined to Martial's mind in their 'gestational' stage) and yet, like freed slaves, they maintained patronage ties and other obligations with their former master – ties that could be quasi-parental in nature (Bradley, 1984: 81). Martial expected his works to continue to be



associated with him through his name – not as the name of their owner but as that of the person who made them free. The poems were no longer *his*, and yet Martial remained their origin – the origin of the work as a free entity, like the father who is the origin of a child who will grow into a free individual.<sup>20</sup> That is why Fidentinus was a kidnapper rather than a thief: he had appropriated a free person, not someone's property. Still, Martial's claims suggest that while the kidnapped person is first and foremost the victim of kidnapping, his/her kin are affected as well. (That's of course the point of most kidnapping – to extract a ransom.) But what is it that allows an author or former slave master to have some kind of claim in the thing or person s/he made free?

One possibility is that, despite the freedom it received from Martial, a poem is rendered powerless by the specific consequences of plagiarism. Sequestered by Fidentinus, it cannot speak up, testify to its freedom, and regain it. The work needs to be saved because it cannot save itself.<sup>21</sup> A second, related point is that the figure of the work as freed slave overlaps with that of the work as child in that both stand for an individual who is free but only potentially or incompletely so and that, therefore, has only limited powers to resist its appropriation.<sup>22</sup> Freed slaves, for example, did not necessarily hold all unrestricted rights of Roman citizens.<sup>23</sup> Works and *liberti* need a parent, an *adsertor libertatis*, or a patron *even when they are not kidnapped*. They are always already dependent.

It is this relation of dependence that allows, or even mandates, Martial's intervention, not just out of quasi-parental responsibility or liability but also in the sense that an injury to the work also injures the person the work is related with.<sup>24</sup> In this specific case, Martial's intervention may be also motivated by the fact that Fidentinus violated Martial's dignity by undoing what was in his power to do: to free his slaves. Like the plagiarist who took not only Galileo's children but his 'righteous power to generate and reproduce' (Galilei, 1607: 2), Fidentinus deprived Martial of a faculty, not just a thing.

While this casts plagiarism more as a crime of kinship than one of property, it also destabilizes the divide between kinship and property as construed in European culture, as Marilyn Strathern has suggested we do. Plagiarism is not about property, but also questions what non-property is, and their relation. The child and the freed slave are not figured as property but as free persons, and yet only potentially or incompletely so. Plagiarism always casts the work as a child, not a spouse, friend, sister, or brother. The work is always a person of limited agency who needs a parent or a 'champion' to look after it so that its personhood and freedom may be achieved or maintained. And the person to properly occupy that caretaking role is, according to Martial and Galileo, the father or former master – the person who does not own the work/slaves and yet remains their 'point of origin' as 'free' works or 'free individuals'.

The work sits uneasily between property and kinship, but also between object and person. It is cast as a child and yet one that cannot communicate in any manner.<sup>25</sup> Martial's plea to Quintianus to intervene and free his works 'if they complain of their grievous servitude' is, I believe, a tongue-in-cheek acknowledgment that they will not complain. Not only is it the case that the works cannot report that they have been plagiarized, but it is not even clear that they could be easily recognized as Martial's if somebody were to investigate their allegations. Martial wants to say that 'his' work carries some mark of being 'his', but in fact ends up making a rather different argument:

There is one page of yours, Fidentinus, in a book of mine a page, too, stamped by the distinct likeness of its master which convicts your poems of palpable theft. So, when set among them . . . a black raven, perchance wandering on Cayster's banks, is laughed at among Leda's swans; so, when a sacred grove is afire with the varied notes of the Athenian nightingale, an impudent jay jars on those Attic notes of woe. My books need no title or judge to prove them; your page stares you in the face, and calls you 'thief'. (Martial, 1919: 64)

Opening with a reference to the 'distinct likeness of its master' (the different styles and quality of their poems, which make Fidentinus' plagiarism allegedly self-evident), Martial concludes that when Fidentinus reads the poem he has plagiarized from Martial and included in his own book, that page 'stares you in the face and calls you "thief".' This seems to acknowledge that the plagiarized page does not and cannot make a *public* statement that Fidentinus is a thief, which instead should have been the case if the page did indeed contain evidence that anyone could read as proof that the poem was Martial's. Martial is in fact saying that Fidentinus' page stares *only into Fidentinus' face*, calling him a thief, and that, I think, is because Fidentinus *already* knows full well that he has plagiarized Martial.<sup>26</sup> Actually, the page does not even 'stare' at Fidentinus, nor does it 'call' him anything. All it does is function as a mirror in which Fidentinus sees himself as a thief because he knows he is one. More a private memory device than a piece of public evidence, all the page can do is to enable a moment of criminal self-recognition within Fidentinus' mind, not his conviction in a public court.<sup>27</sup>

The plagiarized status of the page remains a matter of judgment, not self-evidence. Modern textual similarity algorithms map correlations, but even the existence of two identical works does not automatically mean that one is a plagiarized copy. Even copyright law allows for the infinitesimal probability of two works being identical and yet original to two different authors, thus requiring further evidence about access or motive to be brought in to establish the copying (Merges et al., 2009: 367). Two thousand years ago Martial was in no better position. He states

that ‘my books need no title or judge to prove them’ but stops there, most likely because he does not have the reliable judges or titles he claims not to need.<sup>28</sup>

Martial wants us to believe that his works carry his ‘distinct likeness’, but in fact the only robust empirical claim he can make is about time of delivery, not form and style. Unlike modern copyright and its logocentric assumptions, Martial’s notion of authorship hinges less on *conception* (the emergence of an intangible form) than on *delivery* (the production of the tangible work).<sup>29</sup> Consequently, the appropriate evidence for Martial’s authorship claims is that he did physically write those poems on a page, or that he delivered them with his voice.<sup>30</sup> That evidence, however, is not inscribed in the work itself but can only be produced through an act of witnessing – third party witnessing.<sup>31</sup> By itself, Martial’s word that he wrote or delivered the poems would not suffice against the alleged plagiarist’s response that he, not Martial, did. By opening the epigram with a call to Quintianus, and then casting him as the *adsertor libertatis*, Martial implies that his friend could testify to the fact that those works were Martial’s not on stylistic grounds but because Quintianus had been, so to speak, just outside the delivery room.<sup>32</sup> He probably did not see those poems come out of Martial’s pen, but saw them right after ‘birth’, presented directly to him by Martial well before Fidentinus started claiming them as his own. What mattered was evidence of delivery, not whether the little poems did or did not look like Martial.

### ‘A Most Dreadful Pun’

Kinship metaphors about authors and children have also been played the other way around, mobilizing the discourse of authorship to conceptualize surrogacy disputes and decide who can lawfully give his or her name to the child – a child who, like a work or a slave, cannot speak for him/herself.

Early in 1990 Mark and Crispina Calvert entered into a contract with Anna Johnson who, for a \$10,000 fee and a \$200,000 life insurance policy, agreed to have a zygote from Crispina’s egg and Mark’s sperm implanted in her uterus and to carry to term what was stipulated to be their baby.<sup>33</sup> But things soured up between Johnson and the Calverts later in the pregnancy, leading to suits and countersuits over who was the mother of the baby born on 19 September 1990. This was a complex question because both Crispina Calvert and Anna Johnson met the legal definition of ‘natural’ mother – one by virtue of consanguinity with the baby, the other by having given birth to that same baby. A technologically-enabled baby was born to two natural mothers.

When the case reached the California Supreme Court in 1993, the justices did not try to move beyond notions of ‘natural mother’ or

‘natural parent’ to entertain an openly collaborative model that acknowledged a variety of parental functions associated with different individual contributors, each with different rights and responsibilities.<sup>34</sup> They sought, instead, to hold on to a unitary notion of parent and break the ‘tie’ that the intersection of reproductive technology and California law had set up between Anna Johnson and Crispina Calvert. Calvert won.

If the justices resisted more collaborative and extended notions of ‘parent’, their decision was also forward-looking (perhaps unintentionally so) in its attempt to bypass the opposition between nature and nurture or genetics and gestation – an opposition that had framed the dispute between Johnson and the Calverts as it moved through the lower courts. Those courts had already ruled against Johnson, deeming her gestational role secondary to that of the genetic mother.<sup>35</sup> The California Supreme Court did agree with the lower courts that Crispina Calvert was the natural mother, but not because of her genetic link to the baby: she was the mother because the baby would have not come to exist without her acted-upon intention to become a mother.<sup>36</sup>

Although the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother under California law.<sup>37</sup>

The ‘intentionality test’ effectively introduced by the Court concerns the intent to procreate the child and to care for him/her after birth. These commitments can overrule both nature and nurture, as shown by the invocation of *Johnson v. Calvert* in a later case involving a woman who had neither genetic nor surrogacy relations with the child she produced (in the film industry sense of the term) and became the mother of.<sup>38</sup> And because either a woman or a man could meet the intentionality test, the Court decision effectively worked around both gender- and sex-based dichotomies as well.<sup>39</sup>

One may be puzzled by the tension between the justices’ apparently progressive attempt to bypass all sorts of fundamentally traditional dichotomies and the distinctly traditional manner in which they did so, that is, by invoking good old human intentionality.<sup>40</sup> The surprise only increases when we see that the Court framed and specified its ‘intentionality test’ by drawing from the logic of intellectual property. A law review article cited approvingly in the Court’s decision argued that:<sup>41</sup>

[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as

conceivers. The mental concept must be recognized as independently valuable...<sup>42</sup>

The intended conflation of the two meanings of 'conception' – a conflation that Marilyn Strathern has dubbed 'a most dreadful pun' (Strathern, 2003: 56) – was even clearer in a footnote:

Patent and copyright protection extends to embodied ideas. ... Analogously, thoughts of initiating parents which become embodied in the creation of a child parallel the mental element at the root of intellectual property protection. Paradoxically, the first judicial pronouncement credited with founding copyright in English-speaking countries analogized protections for creations of the mind with protections for creations of the body. Legend has it that in 567 A.D., ecclesiast Columbia copied his teacher Finnian's psalter. The adjudicating King Diarmud settled the controversy in favor of Finnian, and said, 'To every cow her calf.' It is ironic that the notion of literary property should have been birthed by a notion of motherhood as construed by biology. (Stumpf, 1986: 195)

### **Martial Meets Calvert**

Metaphors of authors as fathers of works were mobilized in 18th-century debates over the changing relationship between work and author brought about by the printing press. The reverse metaphor about mothers and fathers as authors of children found in *Johnson v. Calvert* emerged in reproductive scenarios reshaped by technologies that complicated the definition of the relationship between child and mother and, to a lesser extent, father.<sup>43</sup> IVF and the printing press have nothing in common as technologies, but have some specifically comparable legal effects relative to their areas of application.

Before IVF and surrogacy, the mother was taken to be the woman who delivered the child, with her own body. Before the printing press, what characterized the author was the physical act of writing, with one's own hand, a work on a piece of paper, parchment, or papyrus. (At least that is Martial's view, which differentiates the original act of authorial writing from subsequent scribal copies for commercial purposes.)<sup>44</sup> Mothers and authors were defined by the fact that they materially delivered children and works by themselves and *from* themselves. These acts could be witnessed, thus connecting mother to children and authors to works without the need of further blood and DNA tests, or literary or bibliographical analyses.

Surrogacy disputes – *Johnson v. Calvert* being one of them – emerge from the fact that reproductive technologies have rendered delivery

inconclusive to the definition of mother. Witnessing a delivery still means witnessing the birth of a child, but not necessarily witnessing that child being delivered by his/her mother. The presence of an uninterrupted chain of bodily production – one body emerging from another – is no longer sufficient to link mother and child. In the case of literary works, the printing press had separated the producer of the physical printed text from the author of that text. The printer delivers the work, but she is not necessarily its author.

Several people contributed to the production of a printed text (papermakers, font designers and cutters, typesetters, proofreaders, etc.) and several people (egg donors, sperm donors, gestational mothers, doctors, nurses, etc.) may now be involved in baby-making. Both the materials and the products are different, but what is comparable are the discursive moves to construct the author or parent in these differently collaborative settings in which the material act of authorial/maternal delivery of the work/child has ceased, for various reasons, to determine the relationship between work/child and author/mother.

In *Johnson v. Calvert*, the Court, on its way toward making an explicit analogy between reproductive and intellectual conception, stated that:

While all of the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship.<sup>45</sup>

This is conceptually analogous to traditional definitions of authorship based on the differentiation between contributors to a work and the author who is instead cast as the *sine qua non* condition for the work. While there would be no book without the papermaker (thus making the papermaker's contribution a necessary one), several people can provide paper for that book (thus making the identity of the specific papermaker irrelevant). The author, instead, is cast as irreplaceable. The work would not be that work without that author. It would be a different work, by a different author. Only the author is attributed that unique 'personal expression' that gives the work its specific identity.

Both the Court of *Johnson v. Calvert* and copyright law define the crucial feature of parenthood and authorship in immaterial terms – intention and personal expression or originality. Paradoxically, these *immaterial* parameters of identification are invoked or introduced in response to the arrival of new *material* technologies that change the rules of the game, redefining both authorship and motherhood. The Court developed the 'immaterial' intentionality test because other material tests (blood, DNA) or material evidence about the birth (who delivered the baby) no longer sufficed to define 'mother' in the age of IVF



and surrogacy. Similarly, the modern copyright notion of the author as the person who contributes an intangible ‘personal expression’ to the work emerged, I suggest, in response to the problem of identifying the literary work in the age of mechanical reproduction, where the material act of writing the manuscript no longer sufficed, by itself, to link the author to the printed copies of the work.

### Parallel Universes of Authorship

Marilyn Strathern has looked at early modern patriarchal metaphors of authorship and at *Johnson v. Calvert* as discursive clusters articulating analogies between reproductive and intellectual creativity, sketching out how these analogies fed each other in a discontinuous and partial fashion, and may continue to do so in other forms in the future. Metaphors of fathers generating works helped the articulation of modern notions of intellectual creativity, which were then fed back, a few centuries later, into the conceptualization of new forms of reproductive creativity.

By the time the constellation of reproductive metaphors reaches *Johnson v. Calvert*, however, the initial figure of the author as father has virtually disappeared from copyright law – the law it arguably helped conceptualize. One possibility, Strathern argues, is that the tangibility of the figure of the work as child no longer matches the logic of copyright law and the crucial role it confers on intangibility. In particular, the new post-copyright rhetoric of immaterial conception may have ‘allow[ed] one to take the child’s view’ (Strathern, 2003: 60):

If ‘conception’ and ‘creation’ retain kinship echoes, they seemingly displace the idea of an interpersonal relationship with more immediate but at the same time more abstract evidence of connection: the work itself informs one about the author. Does creation become a kind of procreation without parenthood? If so, this would be consonant not only with the emerging originality of the author but also with the emerging uniqueness of the literary text. (Strathern, 2003: 61)

The point about a shift toward the ‘child’s view’ is intriguing. What I take her to suggest is that, since the 18th century, the development of the book market and various practices and discourses of literary appreciation have had the effect of shifting our perspective from the author to the work. The author is neither dead nor erased, but we now focus our attention on the work first (thus enhancing its apparent originality) and treat it as a window on the author, rather than the other way around. The kinship relation between author and work is still recognized, but the new point of view (which is effectively that of the reader/consumer) reverses the direction of the relation – an optical effect that also de-emphasizes the



tangibility of the work, to the point of turning it into a non-issue. Metaphors can migrate, mix, and both open and eclipse the possibility of certain associations in different scenarios, but they can also be read in different directions. Going from son to father has different effects than going from father to son, though the relation is still between the same two figures.

I believe that Strathern's hypothesis about the *disappearance* of figures of authorship based on inheritance and descent can help to explain the simultaneous and conspicuous *permanence* of these figures in a parallel universe of authorship: plagiarism. The discourse of plagiarism has never experienced (and, I would argue, cannot experience) a shift to 'the child's view'. It is not written from the point of the view of the work but from that of the author or, more precisely, the injured author. Focused on the severing of the kinship between author and work, plagiarism is not a discourse of appreciation but of grievance and accusation – a discourse whose focus on kinship is constantly renewed because that's where the 'crime' has happened, or may happen.<sup>46</sup>

Post-copyright discourse of authorship has indeed come to privilege immateriality of creation and the immaterial aspects of the material work, but there has been no such change in the discourse of plagiarism, whose logic has remained unchanged at least since Martial. That is because, unlike copyright-based authorship, plagiarism has never moved into an intellectual property framework. In this discursive regime, the author remains a father and the work remains a child, never to become property. Also, because the work never really grows up, it also never dies. It never goes back into the public domain, from where it could be eventually lawfully appropriated. You can be called a plagiarist even if you copy an ancient author.

But what can we say that is taken by the plagiarist if property is not it? In the *Symposium*, Plato has Diotima claim that, 'to the mortal creature, generation is a sort of eternity and immortality', but that literary works may be an even better means to immortality than flesh-and-blood children:

Who, when he thinks of Homer and Hesiod and other great poets, would not rather have their children than ordinary human ones? Who would not emulate them in the creation of children such as theirs, which have preserved their memory and given them everlasting glory? (Plato, 1994: 32)<sup>47</sup>

Without getting carried away with talk of eternity, immortality, and glory, there is indeed something about plagiarism that has to do with time. Works and children are cast as beings in a state of becoming, pointing to futures that are left unspecified except for the fact that they are the spaces in which the author's name will be propagated. In Galileo's

quote, plagiarism ‘kills’ the work and, by doing that, forecloses the author’s future – not all futures, but some.

This is not merely metaphorical talk. Data by the Office of Research Integrity in charge of misconduct investigations at the US Department of Health and Human Services shows that the majority of cases of plagiarism in US biomedicine between 1992 and 2006 involved manuscripts and grant applications, not printed articles (Price, 2006: 1–11). A report by the NSF’s Office of Inspector General describes a typical scenario:

Our inquiry into a significant allegation of plagiarism confirmed that a proposal by a professor at an Oregon university contained extensive sections of text and multiple figures duplicated from an earlier proposal that NSF had asked the professor to review. (National Science Foundation, 2007: 29)

If the reviewer-plagiarist is a competitor (which is likely to be the case, given that direct competitors have the most expertise in the application’s specific field), s/he might give it a poor rating to have the grant denied and the project delayed or stalled. That gives the plagiarist time to put together a competing application or, if s/he has the necessary resources already, pursue the plagiarized research project right away. Because scientific credit is tied to priority, the plagiarist is likely to be the first to publish what would have likely ‘grown to be’ the work of the plagiarized researcher.

What is taken, therefore, is not a work but the *potential* of making one (or the potential to actualize the proposal’s potential). *What the plagiarized researcher loses is time, not property.* Had it not been for the plagiarist’s intervention, s/he would have probably received the grant, done the research, published it, and would have had a professional (and perhaps personal) life different from the one s/he had after missing the grant and seeing his/her project credited to the plagiarist. In metaphors of authorship as fatherhood, time does not affect the work as it is cast either as an eternal child or a permanent monument to the father. But the appropriation of time does affect the flesh-and-blood author who, unlike the work, does have the possibility of a life and a career.

### **Conclusion: What if the Work Was a Girl?**

The authorship metaphors discussed here are openly patriarchal in nature, reify the figure of the individual author, and are strongly committed to a discourse of authorial victimhood and a corresponding criminalization of the borrower. Those are not agendas I share. I hope to have shown, however, that these metaphors provide important windows on fundamental and perhaps unsolvable tensions between person-based and property-based constructs of authorship. As a conclusion, I want to

further probe the heuristic potential of these metaphors by developing them in a direction that they do not seem to have been articulated before, for reasons that I hope will become apparent as my little kinship experiment unfolds.

Rooted in the figure of the father, these parental metaphors cast the author as male, no matter what the sex of the actual author may be. They are also quite general, perhaps suggesting that a finer articulation might produce tensions rather than strength. When the work's conception and gestation is described with additional detail, the metaphors do in fact get substantially tangled up. The Aristotelian model of reproduction involving form and matter (a template that continues to structure, in different ways, both copyright and patent law; Pottage and Sherman, 2011: 271–4) is traditionally gendered: form is male and matter female. But metaphors of authorship as fatherhood reconfigure Aristotle's model into a single-gender scheme in which both form and matter are rendered male, though never quite completely. For instance, gestation is typically reframed as a male activity by casting the female womb as the male authorial brain. In *Love's Labor's Lost*, Shakespeare has Holofernes claim:

This is a gift that I have . . . a foolish extravagant spirit, full of forms, figures, shapes, objects, ideas, apprehensions, motions, revolutions: these are begot in the ventricle of memory, nourished in the womb of pia mater, and delivered upon the mellowing of occasion. (Rose, 1996: 621)

Or:

Writing to Nora Barnacle, [James Joyce] described the still-unpublished *Dubliners* as this 'child which I have carried for years and years in the womb of the imagination as you carried in your womb the children you love.' (Rose, 1996: 622)<sup>48</sup>

Although all aspects of authorship are relocated into a masculine mind, these metaphors continue to mobilize traditional images of heterosexual reproduction, not cloning. The conception and gestation of the child/work involves a womb that keeps playing the gestational role it had in heterosexual reproduction, and one that remains attached to traditionally female traits like providing for the work's material growth, rather than for its form. Now, however, that womb has been relocated to the author's male body and, in Holofernes's case, made to identify with the *pia mater*.

Displacing a heterosexual reproductive framework into a male body ends up producing an assemblage that, for lack of better terms, may be labeled a 'mental male hermaphrodite'. The author is explicitly cast as male (not hermaphrodite) through its identification with the figure of the father and yet it has both organs of mental/sexual reproduction (thus a

hermaphrodite). Further ambiguity is then added to the author's hermaphroditic features – the fact that it carries both the male imagination/form and the female womb/matter – because these are no longer coded heterosexually but recast as male.<sup>49</sup> This complex arrangement strives to achieve male autogenesis – boys producing boys – through a process 'in which the [male] author impregnates the womb of his brain with an emanation of his own spirit' (Rose, 2002: 4).<sup>50</sup>

What is then left unmentioned in these metaphors, but emerges very clearly if one follows their logic, is that the work is not simply a child *but a son*.<sup>51</sup> But what would happen if one were to play these reproductive metaphors more literally and thus contemplate the very serious possibility that the work could be a girl? And why has the possibility of the work/daughter been obscured through intricate figurations that start by analogizing authorship to heterosexual biological conception but then proceed to erase anything that those processes cast as female and thus produce works through something resembling male cloning?<sup>52</sup>

The patriarchal nature of these narratives does not, I believe, account for the erasure of the daughter/work. Patriarchy subordinates and objectifies women and daughters but does not typically pretend they are not born and do not exist. So why do patriarchal metaphors of authorship go the extra distance? For argument's sake, although these narratives are single-mindedly concerned with the patrilineal propagation of the name of the author (fathers/authors passing their name to sons/works, grandsons/works, etc.), what would prevent them from positing, for example, that the author's name is transmitted only through sons/works, not daughters/works? They could, as many patriarchal kinship systems do, treat sons and daughters differently and yet acknowledge the existence of both.

Stepping back for a moment and considering the features that have been attributed to the author before and after the emergence of copyright may help to clarify what may be played out through the exclusion of the girl/work. Obviously what is being erased is sexual difference, but that may be a symptom of a broader attempt to suppress difference in general.

These metaphors promote and try to naturalize a male mono-gender view of authorial creation and, therefore, a homogeneous and mono-causal view of the work's production. In the traditional 'romantic' discourse of authorship the author is figured as one, according to several meanings of the term.<sup>53</sup> Not only is the author an individual entity (the work has only one father, or at least does not need more than one) but also – and this is what I think is most at stake here – an entity that has no differences or multiplicities within itself. The author is cast as one unitary cause, not an assemblage of agencies. The author may use a variety of cultural inputs to produce the work, but those are cast as materials, not agencies – matter, not form. What matters to copyright law is that the author, by applying one specific expressive form unique to him/her – the

so-called ‘personal expression’ – reshapes those various materials into a work that is one and as original as its author.<sup>54</sup>

At times there is an attempt to convey the author’s unity and singularity through figures of spatial and temporal compression, as by reducing authorship to a creative *flash* or by presenting the author as the work’s *point* of origin. One effect of such compressions to an infinitesimal scale is to make difference and multiplicity invisible. There is much heterogeneity in a map of a given area, but none of that is left if, after an extreme change of scale, the map is collapsed into a point. Similarly, while there is much heterogeneity of agency in the protracted process of cultural production, none of that is left visible when compressed into the so-called flash of genius. In sum, what the flash of genius or the author’s representation as the work’s unique cause or point of origin share with the exclusive maleness of authorship celebrated in these metaphors is that they are all forms of essentialization aimed at stabilizing the construct of ‘work’ by stabilizing and purifying the construct of ‘author’.

But such essentializations quickly come apart once we recognize some of the obvious implications of these metaphors. For instance, if works are produced like children, there should be, then, a 50–50 probability that the work will be a girl. What immediately follows from that acknowledgment is the presence of a mother, and her role in the production of the work. More than simply adding some ‘gender balance’ to the picture, the presence and role of a mother inserts a disruptive difference in an otherwise purely male line of descent (so linear, in fact, that it would be a misnomer to call it a family tree). The existence of a mother and/or daughter would refute the male gendering of the author, but it would also make the more important point that the author *cannot be one*. Authorship can only be co-authorship – an inherently collaborative process requiring at least two authors, and often, as *Johnson v. Calvert* shows us, more than two.

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### Notes

1. See George Long (1875: 873).
2. Galileo makes a pun on the two meanings of *penna* – Italian for both ‘pen’ and ‘feather’ – suggesting that his work died when it was removed from underneath the fatherly feathers that kept it warm and growing, which also refers to the fatherly pen that was still writing the unfinished work (Galilei, 1607: 4v).

3. The damage to the author's reputation from the work's loss of integrity points to the interesting overlap between plagiarism and the moral rights of authors doctrine – rights that, unlike copyrights, are focused on the relationship between author and work rather than on the work as property (see note 34).
4. 'Sir Philip Sidney, for example, opens his sonnet sequence *Astrophil and Stella* by representing himself as "great with child to speake"... Likewise, in the prelude to *Don Quixote* Cervantes explains that although his book is not "the handsomest, the liveliest, and the wisest" child that might be, nevertheless as an author he "could not violate Nature's ordinance whereby like engenders like." Thus, he continues, "what could my sterile and uncouth genius beget but the tale of a dry, shriveled, whimsical offspring, full of odd fancies such as never entered another's brain' (Rose, 1996: 622; see also Rose, 1993, 2002).
5. See also Strathern (1995, 1999, 2003).
6. There are, however, at least two cases in which authorship is connected to responsibility, not just credit or property. In 'What Is an Author', Foucault discusses that, before the introduction of copyright law, the author was construed as liable for his/her publication (Foucault, 1977: 108). The same link continues (and is strongly emphasized) today in scientific authorship, where the author is deemed responsible for the epistemic reliability of his/her claims (Biagioli, 2000: 86). Both examples involve regimes of authorship that are *external* to copyright law. There is a relevant difference, however: while the authorial responsibility implied by the kinship between author and work is cast as a relation of care for the work, in these other two cases the authors are seen as liable for the work if it does not meet certain standards.
7. Although Galileo described the taking and killing of the work (not just its kidnapping), the two actions describe the same kind of loss, from the author's point of view. Although obviously the plagiarist did not kill the work, Galileo represented it as dead because his kinship relation with the work had indeed ended as a result of the 'kidnapping'.
8. It is a displacement that can be both relational and spatial. Plagiarized works, like kidnapped and enslaved people, are cut off from their kinship relations and forcibly entered into new ones, but they may also be displaced spatially and, in the case of texts, linguistically, through translations.
9. Forgery produces the opposite scenario, one in which the forger attributes to a well-known author a work that is not his or her 'child' but the forger's. While plagiarism ends the kinship relation between work and author, forgery credits the author with a new, if unwanted, relation.
10. I thank Marilyn Strathern for suggesting this distinction between piracy and plagiarism. Another main difference is that plagiarism is cast as something that a single person (not a corporation) does to another person (not to a corporation). We do not hear of 'patent plagiarism' but only of patent infringement – patented inventions being conceived of as useful (and thus economically valuable) innovations rather than the inventor's expressive works (whose economic value is not crucial to their protection). Appropriating a patented invention is not seen as an act that takes away something that is personal to the inventor or that could affect



his/her personhood. Nor do we hear about ‘trademark plagiarism’ – trademarks being associated with businesses, not persons. Finally, while the boundary between work and person is often blurred in the context of plagiarism – ‘I have been plagiarized!’ – such statements would sound quite strange in patent litigation where the object of infringement is unambiguously construed as a thing, not a person.

11. See Biagioli (2012: 458–9). The very broad definition of plagiarizable matter seems a recent development, though. In antiquity, plagiarism was considered as affecting texts only, not ideas or content (McGill, 2012: 3).
12. This would be in the eyes of those who come to know your work under someone else’s name. Those who first associated that work with your name are likely to continue to see it as yours, unless they also were exposed to the plagiarized version of your work and start thinking that perhaps *you* are the plagiarist. This kind of confusion would not happen in the case of flesh-and-blood children. Unlike a text, a kidnapped child could not be with the original parents and the kidnapper at the same time, thus precluding the doubt that the original parents are the kidnappers. What occurs with flesh-and-blood children are paternity or maternity disputes.
13. The most comprehensive and insightful treatment of plagiarism in antiquity is Scott McGill (2012). I thank Chris Kelty for this reference.
14. Quintianus appears to be a patron of Fidentius, the alleged plagiarist, but also a patron of Martial himself.
15. There is a more recent edition (Martial, 1993), but here I have chosen Ker’s older translation because, being more literal, it brings out more clearly the legal references of Martial’s arguments against Fidentinus.
16. Connections between intellectual property and slavery are rare, or at least rarely discussed. In her *American Women Authors and Literary Property, 1822–1869* (2005), Melissa Homestead discusses some intriguing intersections between the emergent US copyright doctrine and legal discussions of slavery in *Stowe v. Thomas* (1853). See also Best (2004).
17. ‘As asaertor in libertatem, who takes up their claim to freedom, not allowing the plagiarist to claim them when manumitted by M[artial]’ (Martial, 1919: 62, in note). This role is also known as *adsaertor libertatis*. The specific form of manumission Martial is referring to is the one ‘by rod’ described in Gaius (1904: 23–4, note 17). See also Smith (1891: 122).
18. Martial’s logic may be compared to that of Stallman’s General Public License, whereby the copyright owner uses his/her rights in the work to make it freely available to everyone, while also prohibiting anyone other than the author from attributing it to himself/herself.
19. Martial took his own advice, writing several epigrams trying to shame Fidentinus. In addition to those discussed here, see epigrams 29, 38, 72 (Martial, 1919).
20. The delivery (both textual and personal manumission) makes one free but also establishes itself as a point of transition from unfree to free status. The manumission cannot not ‘taint’ the freedom it confers by reminding us of the free’s previously unfree status. (The case of freeborns is different because, represented as being born of free parents, they are free rather than freed.) The ambiguity of Martial’s relation to the works he has freed hinges on the tension inherent in manumission itself. They don’t belong to



him, but he is simultaneously the cause of the end of their enslavement and a reminder (or perhaps even the cause) of their previous unfree status. One could say that there is no longer a relation between Martial and his works due to the fact that he does not own them any longer. But in fact he still remains related – related both because he had a relation with them, and because he is the one that severed that relation, making them free. The property relation may have ended, but there is now a new relation based on having terminated the property relation. This is different from the relation between a free person and his/her free parents because, for them, having a child entails passing their own freedom along, rather than enabling the child's transition from unfree to free. A freeborn child is delivered while a *libertus* is delivered from slavery to freedom.

21. Anybody who has knowledge of the kidnapping can report it, but only Martial and perhaps Quintianus can also attest to the identity of the re-enslaved freedmen/works.
22. Martial brings together the figures of the child, the slave, and the work in another epigram unrelated to Fidentinus, where he accuses an unnamed Jewish poet of plagiarizing his poems and sodomizing his boy slave – two acts that Martial analogizes (McGill, 2012: 88–9).
23. Not all freed slaves were rendered Roman citizens by the act of manumission. Liberty and citizenship were different matters. Some freedmen became Roman citizens but others gained only Latin citizenship (a second-tier status that did not give them *patria potestas*), while more were put in the 'capitulated aliens' category that granted no citizenship rights at all (Gaius, 1904: 18–23).
24. This resonates with the moral rights of authors doctrine: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, *which would be prejudicial to his honor or reputation*' (emphasis mine; see *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act of 24 July 1971, as amended on 28 September 1979), Article 6bis). The author's responsibility to the work (rather than the impact of the work's vicissitudes on the author's reputation) is also central to the moral rights doctrine, but especially to those versions that represent the author as the vector or deliverer of the work rather than its maker, like Kwall (2006).
25. As Plato put it in the *Phaedrus*, engraved in the soul rather than on paper, oral arguments have agency in that they deliver arguments and reasons to specific people. Writing, instead, can neither speak to a specific person nor control who reads it and how: '*Socrates*: "when they have been once written down they are tumbled about anywhere among those who may or may not understand them, and know not to whom they should reply, to whom not: and, if they are maltreated or abused, they have no parent to protect them; and they cannot protect or defend themselves"' (Plato, 1994: 88).
26. Also relevant is the specific pointing to Fidentinus – 'convicts you' – without saying in front of whom. Nobody seems to hear the indictment, suggesting that only Fidentinus does, because he is indicting himself. While Martial's discourse mimics court proceedings, what he describes is a completely silent,

speech-free process. The page does not speak, nor does anybody else. Everything happens (if it happens at all) only in Fidentinus' mind.

27. If instead, as one translator puts it, the referent of Martial's 'likeness' was not the author's personal stylistic trace left on the poem but the poets' actual portraits included in each of their respective books, the meaning of this epigram would still be the same, albeit delivered in a simpler manner, namely that when Fidentinus sees his portrait, he will recognize it as the face of a thief (Martial, 1993: 79, note 67).
28. I agree with Scott McGill that Martial tries to claim that the allegedly conspicuous quality differential between his poems and Fidentinus' is direct evidence of the latter's plagiarism – evidence amounting to *manifestum furtum* (McGill, 2012: 95). I think, however, that Martial is effectively bluffing. Textual dissimilarity (or similarity) is indeed evidence, but does not amount to *manifestum furtum* as McGill argues. That, I believe, would have been catching Fidentinus in the act of materially copying down Martial's poems into his – Fidentinus' – own volume. At best, the difference in quality and style of the poems within Fidentinus' volume would have indicated that he may have lifted some poems from somebody else, but not necessarily from Martial.
29. This conceptualization of the work made sense before the introduction of the printing press and the subsequent expansion of the book market. With few incentives for 'pirates' to copy and sell his works, Martial could simply control the circulation and authenticity of his poems by directing his readers to authorized book dealers: 'You who want my little books to keep you company . . . buy these, that parchment compresses in small pages . . . But in case you do not know where I am on sale and stray wandering all over town, you will be sure of your way under my guidance. Look for Secundus, freedman of lettered Lucensis, behind Peace's entrance and Pallas' Forum' (Martial, 1919: 43). The authenticity of the work was thus folded with the 'authenticity of dealers', without the need for the legal tools of modern intellectual property law. If authorship was defined by who 'delivered' the work, it was equally important who then 'delivered' its copies to the readers.
30. Modern copyright draws a distinction between a text fixed in a medium and the reading or performance of such a text, but Martial seems to see both text and performance as conceptually equivalent. Martial delivered the poems by hand, but Fidentinus (at least in one instance) seems to have simply recited them in public as his own. Both Martial and Fidentinus 'deliver' the work (albeit by different means) and their authorship may be established by witnessing the delivery and who delivered it first. This is conceptually radically different from modern copyright, which, while requiring the fixation of the author's personal expression in a fixed medium, casts that material inscription as subsequent and thus secondary to the moment of conception – which is cast as immaterial.
31. Adding a signature to a text does not solve this problem, because the signature is also a piece of writing whose writing has to be witnessed to make sure it is the signature of the person who inscribed both the text and the signature. The signature's forensic value stems from the possibility of comparing it calligraphically with other signatures by the same person.

- So, again, the evidence of the signature is external, or at least requires going outside of the text in order to assess its value.
32. Such scenarios were in fact codified in Roman law (see Watson, 1985: 740–2).
  33. *Johnson v. Calvert* (1993) 5 Cal. 4th 87.
  34. Traditionally, paternity tends to be the contested issue, and also one associated less with nature and more with culture and behavior (Dolgin, 1992–3: 647–73). But in *Johnson v. Calvert* reproductive technologies destabilized maternity more than paternity because of the presence of a surrogate mother, and her claims. Mark Calvert was frequently mentioned in the proceedings and was party to previous suits, but his paternity was unchallenged by Anna Johnson (see note 42).
  35. This opposition was central to the lower courts' decisions in favor of the Calverts. They were granted parent status because they had direct genetic ties to the child while Anna Johnson had none.
  36. 'But for their [Crispina's and Mark's] acted-on intention, the child would not exist' (5 Cal. 4th 93).
  37. 'Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genes but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother' (5 Cal. 4th 93).
  38. In the *Buzzanca* case, where *Johnson v. Calvert* was invoked to determine that a woman who implanted and gestated in her uterus a zygote produced from an egg donated by another woman was the mother of the baby despite the fact that she was not in any way genetically related to the baby (Strathern, 2005: 52, 55).
  39. Rose (1993: 619, citing Shultz, 1990).
  40. See Dolgin (1994) for a critique of the intentionality test.
  41. 'Professor Hill, arguing that the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context, notes that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship" (Hill, op. cit. supra, at p. 415, italics in original)' (95 Cal. 4th 94; see also Hill, 1991).

42. 5 Cal. 4th 94, citing Stumpf (1986: 196).
43. The new reproductive technologies have been less destabilizing to the definition of fatherhood because that definition has been traditionally less stable to begin with – not only more difficult to establish empirically, but also connected to the establishment of a parental relation rather than to mere consanguinity (Dolgin, 1994).
44. Compare Martial's description of his 'manumission' of his poems – 'sent forth from my hand' – with the epigram in note 29, advertising the bookstore where good scribal copies of his books may be purchased (Martial, 1993).
45. 5 Cal. 4th 94, citing Hill (1991: 415, italics in original).
46. Even when the accusation of plagiarism does not come from the plagiarized author but from a third party, the goal is typically that of casting the plagiarist as unethical or immoral. The point is not to 'save the work' but to impeach the plagiarist as a person.
47. Plato repeats the point right before this passage, adding that the children of authors are 'fairer and more immortal' than those of the common type.
48. Joyce continues: '... fed it [*Dubliners*] day after day from my brain and memory', thus showing the same metaphorical move found in Shakespeare, namely, the brain as nurturing womb.
49. This seems to be captured also by Joyce's reference to 'the womb of the imagination', which collapses the womb (female matter) and the imagination (male form) into one notion.
50. It also reminds us of the Futurists' later dreams of male autogenesis through the male insemination of a male 'unused ovary', which conveniently happens to be also the 'male spirit' (Spackman, 1994: 90).
51. The only scholar I know to have noticed this is Rosemary Coombe: 'A father's child is his own, not because he owns it or has invested in it, but because this child will carry the father's name and likeness. The child is the means by which the father's immortality is to be realized' (Coombe, 1994: 404).
52. Metaphors of authorship as fatherhood seem to work better when describing the loss of an already existing child/work, that is, plagiarism scenarios. In those cases, the metaphors do not need to deal with authorship – how a work is 'conceived' and 'gestated' – but only with the loss of the work.
53. This early legitimizing discourse of authorship and copyright does not fully overlap with modern copyright law. Not only is co-authorship a legally recognized notion but, at least in the US, corporations can be authors too, not just holders of copyrights.

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