Intellectual Property in Early Buddhism

A Legal and Cultural Perspective[*]

Ven. Pandita (Burma)[†]

University of Kelaniya[‡]

Copyright Notice Digital copies of this work may be made and distributed provided no change is made and no alteration is made to the content. Reproduction in any other format, with the exception of a single copy for private study, requires the written permission of the author (🖂 ashinpan@gmail.com).

[*]This is an extended and revised version of a paper presented at the *International Buddhist Conference* (2012 Feb.), Buddhasravaka Bhiksu University, Anuradhapura, Sri Lanka.

[†]Email: ashinpan@gmail.com

[‡]Postgraduate Institute of Pali and Buddhist Studies, University of Kelaniya, Sri Lanka

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. A trademark infringement involves telling a deliberate lie, so entails an offense of expiation (*pācittiya*), but I cannot find any Vinaya rule which is transgressed by copyright and patent infringements.
3. The Buddha did recognize the right to intellectual credit, but owing to the commentarial interpretations, some traditional circles have come to maintain that intellectual credit can be transferred to someone else.

Keywords: Vinaya, law, monastic law, Burmese monasticism, intellectual property, copyright, patents, trademark

1 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:

Right to monopoly Owners of copyrights and patents enjoy a time-limited monopoly of these for the sake of some financial prospects.

Right to identity 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.

Right to credit The creators of ideas or expressions and the discoverers of information must be acknowledged whenever someone else makes use of their idea, etc. A failure to give proper credit results in plagiarism.

Although these IP rights, probably except the last one, did not exist when the monastic law was formed, it is about 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 infringement 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. So this matter needs serious investigation.

I have tried to explore this matter in this paper, and 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. A trademark infringement involves telling a deliberate lie, so entails an offense of expiation (*pācittiya*), but I cannot find any Vinaya rule which is transgressed by copyright and patent infringements.

3. The Buddha did recognize the right to intellectual credit, but owing to the commentarial interpretations, some traditional circles have come 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.

2 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; the purpose is clearly 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 *paraparigganhita* Vin III 54.14ff), and (2) of some financial value.[1] 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?

[1] Provided other conditions are equal, the different values of stolen property result in different types of Vinaya offenses (Vin III 54ff; Horner 1: 90ff):

1. If the object is worth five *māsaka*s or more its theft results in Defeat (*pārājika*).
2. If it is worth more than one *māsaka* but less than five *māsaka*s, its theft results in Grave Offense (*thullaccaya*).
3. If it is worth one *māsaka* or less, its theft results in Wrong Doing (*dukkaṭa*).

We do not know the exact value of *māsaka* but at least anything worth of five *māsaka*s 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).

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 $20 apiece in Sri Lanka for one year. Thorough market research tells me that I can sell at least (5000) 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 the pirated copies of the movie so that no informed customer would be willing to pay more than $3 for an authentic copy. Yet I refuse to reduce the price, so when the license period expires, I have managed to sell only (100) copies for $20 apiece to customers too dumb to be aware that pirated copies are available for $1 apiece only.

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)

So in our scenario, before the pirated copies appear, the market value of a movie copy is $20, exactly my market price, because I hold the exclusive rights to distribute the movie and customers have no cheaper alternatives to choose from. Then the market value of my business asset based on the distribution of this movie is worth ($20 x 5000 [the projected sale figure] =) $100,000. After the movie has got widely pirated, however, the market value of each authentic copy is reduced to $3 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 comes to be ($3 x 5000 =) $15,000 only. Therefore, the piracy has caused a loss of (100,000 - 15,000 =) $85,000 to me.

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)

Then in our scenario, I would have been able to make $100,000 from the distribution of the movie but for the piracy. Thanks to the piracy, however, I manage to make only ($20 x 100 =) $2000. So I have lost ($100,000 - $2000 =) $98,000 in sales. After deducting from that amount the cost of buying the rights to distribute the movie plus other expenses, the amount of lost profits can be calculated.

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 bank, or of cash in one's purse. Then 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 away.

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 in negative. Why?

There are two other Vinaya rules 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.[2]
>
> *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.[3]

[2] 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)

[3] Cf.: "If any bhikkhu should knowingly apportion to an individual an apportioned property belonging to the sangha, 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. Why? Because, 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.

(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 have come to know about his work only after the first draft of my paper is completed.)

The background stories of the rules cited above are as follows: the first rule was prescribed because the notorious members of the Six 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).[4]

Now what I wish to point out is: the so-called "acquisition belonging to the Order" (*saṃghikaṃ 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' "), so 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:

> saṅghikan *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.

So, 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 the 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 look at another scenario. Suppose a monk needs a particular book for his studies, and some donors tell him

[4]The first offense belongs to the class of *nissagiya 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." (2: 3).

that they can buy the book from a particular store and donate to him. Suppose the monk replies that at that store, the book would cost $50 per copy but they can get a (pirated) copy for $5 only at a place so-and-so. Through this suggestion, the monk is practically diverting the potential gains of the copyright holders into the pirates' 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?

My answer is again in negative because: (1) The context of these rules seemingly covers giving and taking gifts only, not business transactions. (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 donors have expressly promised (… *vācā bhinnā hoti* [Vin III 266; IV 156]) to the copyright holders. The donors' 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 arguing that the donors' expression of their original plan to buy a genuine book means the potential gain from the sale of a genuine copy is already reserved (*pariṇata*) for the copyright holders, so the monk should be deemed guilty for changing their mind.

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, suppose, 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 customers' 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 we have yet to find out 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 times. However, excepting the case of potential gifts which are already promised to someone else (the Order itself or otherwise),[5] 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. Then, 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. It means it would become very difficult for two or more monks to live together at the same place.

This is the reason why such an attitude is not only legally unrecognized but also actively discouraged by terming it *kulamacchariya/-macchera*,[6] one of the five types of "meanness."[7] Commentators define it thus: *Kule macchariyaṃ kulamacchariyaṃ* (Sv III 1026 "Begrudging as regards a (supportive) family is *kulamacchariya*."), and describe it rather disparagingly as follows:

> *Kulanti upaṭṭhākakulampi ñātikulampi. Tattha aññassa upasaṅkamanaṃ 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.

> *Kulamacchariyena tasmiṃ kule aññesaṃ dānādīni karonte disvā "bhinnaṃ vatidaṃ kulaṃ mamā"ti cintayato lohitampi mukhato uggacchati, kucchivirecanampi hoti, antānipi 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.

[5]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).

[6]"selfishness, meanness with regard to (supportive) families" (Cone *kula* s.v.)

[7]DN III 234; Walshe 495; AN III 272; Woodward and Hare 3: 197–198.

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.[8]

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

3 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—suppose he is 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 upaṭṭhākakulaṃ gantvā ayyā icchati tekaṭulayāguṃ pātun ti pacāpetvā haritvā attanā paribhuñji. … tassā kukkuccaṃ 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 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

---

[8]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)

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; 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).

> 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 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.[9]

2. And the donor family, the real proprietor of that rice-gruel, willingly gave it to the cheating nun. So 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 as regards using 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

---

[9] Cf.: another case:

> *tena kho pana samayena aññataro bhikkhu saṃghassa cīvare bhājiyamāne theyyacitto kusaṃ saṅkāmetvā cīvaraṃ aggahesi. tassa kukkuccaṃ ahosi: … pārājikan 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 shown at p. 3, 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 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 even did not know that the robes were his own. This is why the latter's act was defined as theft.

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.

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.

4 Right to Credit

Nowadays it is taken for granted that we are obliged to acknowledge others' work whenever we make use of their ideas, information, or expressions. Failure to do so will result in 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 of their secretaries or speechwriters to use the latter's work, but why do we not call the former frauds even though 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 liabilities, not to the secretaries and speechwriters, but to the signatories and speakers. If this answer is correct, one of its implications is that in a society in which intellectual or artistic creations are viewed as liabilities to their creators, it would be quite natural to transfer the intellectual credit to those seemingly proper to carry the burden.

Keeping the reasoning above in mind, we should examine what the early Buddhism has to say about the intellectual right to credit. Then we can see that the

Buddha had the same aversion towards plagiarism as ours, for he dubbed any monk who has learned his teachings yet fails to pay due credit to him as one of the Five Great Thieves:

> *puna ca paraṃ bhikkhave idh' ekacco pāpabhikkhu tathāgatappaveditaṃ dhammavinayaṃ pariyāpuṇitvā attano harati. ayaṃ bhikkhave dutiyo mahācoro santo saṃvijjamāno 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 what a serious crime plagiarism is. Legally speaking, it is only a deliberate lie entailing expiation (See p. 10).

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. (Ñāṇamoḷi 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 sāvakabhāsito. Yathā hi rājayuttehi likhitaṃ paṇṇaṃ yāva rājamuddikāya na lañchitaṃ hoti, na tāva rājapaṇṇanti saṅkhyaṃ 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."

Now what Buddhaghosa has practically done is to attribute 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 a liability to their creators so that he thought it actually serves Dhammadinnā to have her work attributed to the Buddha himself against whom no disciple would dare argue? We can never be sure, but we at least know that the early Buddhist community is one which views 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 vyasanāya: evam eva kho bhikkhave Makkhali moghapuriso manussa-khipaṃ maññe loke uppanno bahunnaṃ sattānaṃ ahitāya dukkhāya anayāya byasanāyāti.* (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,[10] 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)

In such a context, I think it is really probable that Buddhaghosa and the like may view 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 for. Then it is not surprising if Buddhaghosa chose to think that it is right to attribute Dhammadinnā's work to the Buddha instead, releasing her from the burden of the responsibility for her work.

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., Toṅ'phīlā Sarāto' went on pilgrimage to the Pagoda of Man'"cak'to'rā, and on the way back, visited the town of Pukhan'"krī" and conferred with Rvheumaṅ' Sarāto'. At the time, (the former) asked to see the Vinaya translation written by Rvheumaṅ Sarāto', and thought: "My own translation is too elaborate yet his version is concise and reliable enough for the

[10]*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")

> 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 *Piṭakasamuiṅ'"* says that the former had a pagoda built, with his translation buried in it, on the hill of Toṅ'phīlā, Cac'kuiṅ'" 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.

Next, we can go into our times. The following is of 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.[11] On the other hand, B was a scholar who had devoted his life to Vinaya studies. However, he was not interested in publishing, so he was a nameless person outside a small circle of students and peers. Anyhow he did write an annotated translation of *Vinayasaṅgaha*, the most comprehensive manual of Vinaya, when he was more than seventy years old. 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) *Vinayasaṅgaha* is not part of the regular curriculum in the traditional Buddhist studies in Burma, so there would be only a few publishers who would seriously consider the publication of its translation. As a nameless person outside the small circle of friends, B had no leverage to persuade a publisher to publish his work. Even if he had got 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 enough to persuade any publisher to publish the manuscript. And his name on the title page would make all potential buyers to take notice quickly.[12]

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

[11] 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 Pali texts.

[12] I do not mean that A's fame would bring profits off the book. 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 reprint 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.

better writer, and B knew it. And 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.

5 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. It means: a monk or nun infringing copyrights and patents is guilty in secular law but innocent in monastic law. This seems to defeat the purpose of 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?[13] Who would have respect for a community that gives free rein to its members for infringing IP rights in a modern world?

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 infringe-

[13] *appasannānaṃ pasādāya, pasannānaṃ bhiyyobhāvāya* (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 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 … " (*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)

ments. On the contrary, I only argue that 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,

2. If a monk transgresses against the copyright and patent laws in his country of residence, he may get sued, fined, or even thrown 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.[14]

---

[14]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 slighty 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.

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 a guilt in the secular law of those times, accepting these fruits would not have harmed the monastic morality of those monks.

But why the need for such an autonomy? Because, without such independence, the monastic law will wind up as a hostage at the mercy of secular law, a situation which is very dangerous for the Order and which the Buddha would not certainly have desired.

To understand the danger involved, let us consider a scenario. The Vinaya says that if there is a royal decree to demand tax from those traveling through a particular place, and yet if a monk passes through the place without paying the due tax, he is guilty of theft (Vin III 52; Horner 1: 86–87).[15] Now suppose a country with a small population of Buddhist monks 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 $1 for each time he breathes in and out. In such a situation, if monks choose to breathe without paying the tax, does it mean that they are guilty of theft and consequently lose their monkhood?

If the Order were to defer to secular law unconditionally, there would be no choice but to answer yes; this will be exactly what I would like to call a case of the Vinaya taken hostage by secular law.[16] 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

[15]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.

[16]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 offense for a monks perceiving [the thing to be taken] as his own"). Previous to that unreasonable law coming into effect in our scenario, the air to breathe has always been the common property of mankind, and the particular portion of air one breathes is 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).

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)."

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 on accepting mangoes from the garden guards, discussed above, is one instance of the Buddha ignoring the secular law of his times.

Works Cited

Primary Sources

(The Pali text titles are abbreviated per the *Critical Pali Dictionary* system.)

AN Richard Morris and A. K. Warder, eds. *Aṅguttara-Nikāya*. 6 vols. London: The Pali Text Society, 1958-1976.

As Edward Müller, ed. *Aṭṭhasālinī: Buddhaghosa's Commentary on the Dhammasaṅghanī*. Text Series 12. London: The Pali Text Society, 1979.

DN T. W. Rhys Davids and J. Estlin Carpenter, eds. *The Dīgha Nikāya*. 3 vols. London: The Pali Text Society, 1966-1976.

MN V. Trenckner and Robert Chalmers, eds. *Majjhima-Nikāya*. 3 vols. London: The Pali Text Society, 1977-1979.

Pāt William Pruitt, ed. *The Pātimokkha*. Trans. K. R. Norman. Oxford: The Pali Text Society, 2001.

Ps J. H Woods, D. Kosambi, and I. B Horner, eds. *Papañcasūdanī: Majjhima-Nikāyaṭṭhakathā of Buddhaghosācariya*. 4 vols. London: The Pali Text Society, 1976-1979.

Sp J. Takakusu and M. Nagai, eds. *Samantapāsādikā: Buddhaghosa's Commentary on the Vinaya Piṭaka*. 7 vols. London: The Pali Text Society, 1966-1982.

Sv T. W. Rhys Davids, J. Estlin Carpenter, and W. Stede, eds. *Sumaṅgalavilāsinī: Buddhaghosa's Commentary on the Dīgha Nikāya*. 3 vols. London: The Pali Text Society, 1968-1971.

Vin Hermann Oldenberg, ed. *Vinaya Piṭaka*. 5 vols. Oxford: The Pali Text Society, 1982-1997.

Secondary Sources

Apte, Vaman Shivram, comp. *A Practical Sanskrit-English Dictionary*. 2nd ed. Delhi: Sri Satguru, 1989.

Cone, Magaret, comp. *A Dictionary of Pali: Part I*. Oxford: The Pali Text Society, 2001.

"Grudge." *Merriam-Webster Dictionary*. Merriam-Webster. `http://www.merriam-webster.com/dictionary/grudge`. 15 June 2012.

Horner, I. B., trans. *The Book of the Discipline (Vinaya Piṭaka)*. 6 vols. Oxford: The Pali Text Society, 1938-66.

Kieffer-Pülz, Petra. "The Law of Theft: Regulations in the Theravāda Vinaya and the Law Commentaries." *The Journal of the Pali Text Society* 31 (2011): 1–54.

Malalasekara, G. P., comp. *Dictionary of Pāli Proper Names*. 2 vols. New Delhi, IN: Asian Educational Services, 2003.

"Market Value." *Wikipedia*. Wikimedia Foundation, 27 Sept. 2011. `http://en.wikipedia.org/wiki/Market_value`. 28 Feb. 2012.

MLA Handbook for Writers of Research Papers. 7th ed. New York: The Modern Language Association of America, 2009.

Ñāṇamoḷi, Bhikkhu and Bhikkhu Bodhi, trans. *The Middle Length Discourses of the Buddha: A New Translation of the Majjhima Nikāya*. Kandy, SL: Buddhist Publication Society, 1995.

Ross, Terence P. *Intellectual Property Law: Damages and Remedies*. New York, NY: Law Journal Press, 2005.

"Speechwriter." *Wikipedia*. Wikimedia Foundation, 3 Oct. 2011. `http://en.wikipedia.org/wiki/Speech_writer`. 15 Oct. 2011.

Varado, Ven. "Copyright Infringement and Vinaya." *Articles*. Sasanarakkha Buddhist Sanctuary, Apr. 2007. `http://sasanarakkha.org/articles/2007/04/copyright-infringement-and-vinaya.html`. 17 June 2012.

Walshe, Maurice, trans. *The Long Discourses of the Buddha: A Translation of the Dīghanikaya*. 2nd ed. Somerville: Wisdom Publications, 1995.

Wan, Ū. "Mran'mānuiṅ'ṅaṃ Rhe"khet' Bhāsāpran'samuiṅ'"akhyup'." A Concise History of Ancient Translations in the Nation of Burma. *Mranmā' Sataṅ'"chak'svay're" Naññ'"paññā Aphvai'*. `https://www.myanmarisp.com/History/General_Hsitory/GH0011/`. 1 Nov. 2011.

"What is Intellectual Property?" *WIPO: Encouraging Creativity and Innovation*. `http://www.wipo.int/about-ip/en/`. 20 Sept. 2011.

Woodward, F. L. and E. M. Hare, trans. *The Book of the Gradual Sayings*. 5 vols. Melksham, UK: The Pali Text Society, 1994-1995.