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# Copyright and Heritage: Relation, Origin, Temporality

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From generation to generation, the continuum of human time has held over centuries of centuries without rupture or break. We readily believe that this succession is given, through nature or life; we discover that it must be built. Cultures and religions are useful for the construction of that sequence, for the pursuit of time, for the collective immortality of the groups that...create their time, for their continued creation, for the production of their history or their own reproduction in that history.<sup>1</sup>

## Preface

*Romulus kills Remus and Rome was founded.*

In recent years there has been a growing scholarly engagement with the relation between the broader area of intellectual property rights and cultural heritage.<sup>2</sup> A swift overlook of their subject matter – creation of cultural objects and goods, recognition of cultural values, dissemination of knowledge and creativity – demonstrates a similar purpose to protect and promote human expressions, which in turn bring to the fore the notions of culture, ownership, and rights. Thus, it is not surprising that the relationship between copyright law and cultural heritage has often been considered through the prism of proprietary notions and the distinctions they entail: private/public, individual/collective. The relevance and the extent to which intellectual property rights provide an appropriate framework for achieving such protection has been an ongoing question.<sup>3</sup> For right reasons, while there has been some successful protection of cultural heritage through the IP instruments, the focus has predominately been directed towards questioning the commodifying techniques and the processes of propertization that IP, and in particular copyright, entail in that regard. The questions about the way and extent to which they contrast, or for that matter overlap, have been pertinent when contextualising their subject matter and somewhat equivocal relation.

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<sup>1</sup> Michel Serres, *Statues: The Second Book of Foundations* (Bloomsbury 2015) 7.

<sup>2</sup> Estelle Derclaye (ed), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (Edward Elgar 2010) Laetitia La Follette (ed), *Negotiating Culture: Heritage, Ownership, and Intellectual Property* (University of Massachusetts Press 2013); Helle Porsdam (ed), *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and System of Intellectual Property* (Ashgate 2015).

<sup>3</sup> See eg Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013) Ch 6; Janet Blake, *International Cultural Heritage Law* (OUP 2015) Ch 7.

It is this relation between copyright and heritage that this paper takes as a starting point of investigation.<sup>4</sup> With that difference, it does not engage with questions about whether IP instruments are effective or not for safeguarding cultural heritage, or how heritage artefacts and practices become subjected to the ever-present commodifying impulse of IP rights.<sup>5</sup> Although implicated, neither it pursues commenting on the critical cultural, economic, and political issues and effects that copyright and heritage as instruments precipitate. Instead, it engages with another trajectory that does not approach cultural heritage as an object of observation, subjected to the objectifying gaze of copyright law, or for that matter discourse, but approaches heritage as a means through which to think of copyright. Situating the investigation alongside heritage and its aspects allows not only to identify their similar foundation and purpose, but more specifically, it also provides passages through which copyright's subject matter and its edifice can be differently perceived.

The paper begins by considering relation as a preceding element that informs the systems of copyright and heritage both in terms of their subject matter and function. Since these relations imply beginnings and ends, the notion of origin appears not only as a feature that pertains their normative conceptualisation and narratives, but also as a critical point that both copyright and heritage are inherently dependent upon. Through interpretative reading, the second part, approaches origin as a technique of division that frames their systems of relations. However, the origin is not reduced only to a principle that gives rise to ownership and rights, but more importantly it is recognised as a temporal quality. From here, the discussion acknowledges this quality that fundamentally embodies the existence of both copyright and cultural heritage, and which gives rise to their narratives, histories, memories, preservation (of their subject matter and themselves). This temporal aspect is not only related to the (temporary) conservation of cultural expressions and manifestations, but also to recognising time (past, present and future) as a quality that informs systems of knowledge, culture, legal practice or mode of thinking. While such a temporal investigation of copyright is relevant on its own, considering it through the notion of heritage appears to be apposite.

With this in view, the ending focuses only on copyright and its times. The reasons for this are both space and time constraining. The discussion continues beyond cultural heritage, and aims to open up a passage to questioning copyright (law) as a temporal category. The aim here is not to reduce the agency of time as an element that serves the pragmatics of its functioning, but to approach time as an embodiment of copyright's normative and conceptual formation. To this end, in contrast to the spatial conceptions that have framed copyright and its discourse ever since, this paper proposes to study copyright law temporally.

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<sup>4</sup> In this paper, the terms cultural heritage and heritage are used interchangeably.

<sup>5</sup> Also, the terms safeguarding and protection are used interchangeably. Blake argues that the former is more encompassing concerning cultural heritage. Blake (n 3) 11-12.

Finally, this paper approaches these notions by engaging with the work by the French philosopher of science Michel Serres, for whom relations as a manifold quality constitute structures and precedes any system formations, understood here in its broadest sense such as knowledge, society, culture and law. His thought and writing disperse and bridge disparate categories of discipline and knowledge, by drawing on mathematics, religion, myths, philosophy, sciences, literature and law.<sup>6</sup> Moreover, questions of origin and time in construction of social relations, cultures, and knowledge are instances he constantly refers to in his expansive scholarship. Following his writing, as well as having heritage as a means through which we traverse spaces and times, the discussion here is similarly spread across, with an intention to pose questions rather than to produce a conclusive reading.

## Relation

*In Roman mythology, Janus is god of beginnings and ends. His name etymologically is related to the Latin word ianua, which designates a door, or arched passageway. Janus built an enclosure with gates at each end joined by a passageway, which were only closed when Rome was not in war. Peace was a rear occasion. Depicted as a bearded god with two heads, he is a god of duality, able to see forwards and backwards, thus personifies change and transformation which essentially is actualised by the passing of time. He is also patron of division of time and the month of January is associated with him.<sup>7</sup> Janus is a god of time.*

Law, or *ius*, etymologically designates ‘that which is binding’, and shares the same root with *iungere*, meaning ‘to join’. Law joins two positions by binding them together in order to regulate their relation. On the condition of having recognised the end points as legal subjects, and their object of interaction, law validates itself in the relation, and thus this positioning is what fundamentally underpins law and sustains its edifice.<sup>8</sup>

Copyright law finds its normativity on the basis of being a property right, which law defines as a *relation* between subjects towards an object. Such a relational right presupposes a division of two end positions: an author that creates and the public that uses the copyright work. This proprietary ordering establishes the dichotomous axis around which copyright law and its discourse revolve. The communication of the object (a copyright work) between these subjects

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<sup>6</sup> See eg Michel Serres, *Hermes: Literature, Science, Philosophy* (Josué V Harari and David F Bell eds, John Hopkins University Press 1982); Bruno Latour, ‘The Enlightenment Without the Critique: A Word on Michel Serres’ Philosophy’ in Allen P Griffiths (ed), *Contemporary French Philosophy* (CUP 1987); Niran Abbas (ed), *Mapping Michel Serres* (The University of Michigan Press 2005).

<sup>7</sup> Calian Davenport, ‘Who was Janus, the Roman God of Beginnings and Endings?’ (*The Conversation*, 31 December 2017) <<https://theconversation.com/who-was-janus-the-roman-god-of-beginnings-and-endings-86853>> accessed 25 May 2018.

<sup>8</sup> ‘Relations spawn objects, beings and acts, not vice versa.’ Michel Serres with Bruno Latour, *Conversations on Science, Culture, and Time* (University of Michigan Press 1995) 107.

is instrumentalised through ownership as a central ‘legal technique of personification and reification’.<sup>9</sup> As such, copyright law *prescribes* the principles according to which an author (owner) is recognised, their rights are granted, the criteria according to which a copyright subsists in a work, its duration, and the way in which the public can use and access those works of creation.<sup>10</sup> To put it another way, the law manifests itself as the instrument that both informs and enables the relation and sets the rules and principles according to which this communication can be achieved.<sup>11</sup> In such ordering, now internationally recognised, and on the basis of its justifications, it is generally held that copyright law actively partakes in the protection and promotion of creativity and knowledge of the human civilisation.<sup>12</sup>

Comparably, the notion of heritage, as its etymological root designates, fundamentally concerns the recognition and transmission of cultural expressions, skills, practices and their manifestations.<sup>13</sup> It signifies a body of tangible and intangible manifestations and expressions (objects) which value becomes apparent only through, or as a result of, their communication between subjects. For these reasons, heritage is considered a crucial instrument for recognising and preserving the links between communities and their identities, which are manifested in different forms of cultural expression.<sup>14</sup> In considering this transmission by which heritage becomes an ‘act of communication’, therefore, it can be contended that heritage manifests itself as a relation through which subjects and objects assemble, and the moment in which its value is actualised.<sup>15</sup> This value, however, is subject to procedural instruments of affirmation, classification and categorisation as conditions according to which they can be claimed as heritage.<sup>16</sup> While its meaning, significance, and regulatory techniques may be debated, heritage

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<sup>9</sup> Alain Pottage, ‘Introduction: The Fabrication of Persons and Things’ in Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (CUP 2004) 6.

<sup>10</sup> Copyright, Designs and Patents Act 1988 c 48.

<sup>11</sup> This approach draws on Serres’s multifaceted notion of parasite (social, biological, static) which both precedes and establishes systems of relations. Michel Serres, *The Parasite* (University of Minnesota Press 2007); For a detailed explanation see Danilo Mandic, ‘Copyright and Technology: Hearing the Dissonance’ (PhD thesis, University of Westminster 2014) Ch 3.

<sup>12</sup> The ‘solemn declaration’ for the celebration of the centenary of the Berne Convention states: ‘that the law of copyright has enriched and will continue to enrich mankind by encouraging intellectual creativity and by serving as an incentive for the dissemination throughout the world of expressions of the arts, learning and information for the benefit of all people’. Adopted by the Assembly of the Berne Union on 9 September 1986, as reproduced in WIPO, (1986) 11 *Copyright* 373.

<sup>13</sup> From Latin *hereditare* ‘heir, heredity’; also, *patrimonium* ‘an inheritance from a father’. See eg Marilena Vecco, ‘A Definition of Cultural Heritage: From the Tangible to the Intangible’ (2010) 11 *Journal of Cultural Heritage* 321.

<sup>14</sup> See eg UNESCO, Convention concerning the protection of the World Cultural and Natural Heritage 1972

<sup>15</sup> Dicks contends that heritage is a cultural communicative practice and argues that this communication is not only between subjects, but between subject and an object of heritage. Bella Dicks, ‘Encoding and Decoding the People: Circuits of Communication at a Local Heritage Museum’ (2000) 15 (1) *European Journal of Communication* 61.

<sup>16</sup> Smith states ‘there is no such thing as heritage’, suggesting that what is recognised as heritage and their value is only a construction of the Western ‘authorised heritage discourse’ which frames, thus limits, the subject matter of heritage. Laurajane Smith, *Uses of Heritage* (Routledge 2006) 11; Harrison considers categorisation as the central process that creates heritage. Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2013) 29-

can be considered a connector of people, places and things, but also a link between the past, present and future.

Having a similar object of attention, which is subjected to claims of ownership, the relation between copyright and heritage has continuously been both affirmed and challenged. While the concept of cultural heritage has arguably been comparable to the notion of ‘cultural property’, this nevertheless indicates that ‘heritage’ still negotiates its status within the various discourses that enclose and view cultural expressions, resources, artefacts through the perspectives of property and ownership – the principles associated with the very legal tradition that copyright law originates from.<sup>17</sup> Despite their different origination, the extent to which IP rights are able to provide the necessary framework for safeguarding of cultural heritage has been part of the instruments and discourses surrounding these two areas, or more precisely disciplines.<sup>18</sup> Their ambiguous relation, as Fiona Macmillan observes, might be located in ‘their competing invocation of intangibility’. Whereas intellectual property rights are ‘claims to intangible rights (albeit claims that often implicate tangible object)’, the cultural heritage rights are claims to (in)tangible properties. However, Macmillan continues, ‘what makes a tangible thing into cultural heritage is its intangible or symbolic association’, that is, a value that these objects carry beyond their material manifestation.<sup>19</sup> On the basis of this fundamental distinction, another appropriate objection against overlapping their subject matter concerns their different understanding of authorship, and subsequently ownership. Copyright protects an individual expression, whereas cultural heritage ‘protects the expression of community beliefs, practices, values,’ monuments and sites.<sup>20</sup> As such it is part of the cultural commons in which cultural heritage resides and thus fundamentally differs from the division between private and public domain that copyright’s circumscribing line entails. In line with this, finally, the third main objection concerns the duration of copyright protection, which is not compatible with protection of traditionally held heritage ‘which is by definition a practice passed across generations’, for which reasons it should arguably be safeguarded in perpetuity.<sup>21</sup>

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30; See also the selection criteria in the UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention WHC 17/01 12 July 2017.

<sup>17</sup> It is ‘strange to employ a legal concept that usually relates to ownership rights and then to state that it is being used without implying such rights, when alternative terms exist that are free of this historical baggage’ Blake (n 3) 8; See also Lyndel V Prott and Patrick J O’Keefe, ““Cultural Heritage” or “Cultural Property”” (1992) 1(2) *International Journal of Cultural Property* 307; Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative LQ* 61; Fiona Macmillan, ‘The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural ‘Patrimony’ or Private Property? (2013) 64(3) *Northern Ireland LQ* 351.

<sup>18</sup> On a discussion of heritage as discipline see generally Harrison (n 16).

<sup>19</sup> Fiona Macmillan, ‘The Problematic Relationship between Traditional Knowledge and the Commons’ in Simona Pinton and Lauso Zagato (eds), *Cultural Heritage: Scenarios 2015-2017* (University Ca’ Foscari Press, 2017) 679, <DOI 10.14277/6969-052-5/SE-4-42> accessed 25 May 2018; See also Blake (n 3) 10.

<sup>20</sup> Lixinski (n 3) 176.

<sup>21</sup> On heritage and IP more generally see Blake (n 3). On protection of intangible cultural heritage see Lixinski (n 3).

For both copyright and cultural heritage, the main focus of consideration is thus the protection and promotion of an object that has a cultural significance. This object, while it metamorphoses in different forms and manifestations, is essentially infused with a meaning and value of culture and the worthiness it has for the history of human expression.<sup>22</sup> From creation of cultural goods to dissemination of knowledge and creativity and their use, both copyright and cultural heritage refer to this quality of culture, which has framed their normative and discursive developments. More specifically, while not necessarily part of the declaratory acts and treaties, culture does appear to be both a cause and purpose for and to their existence. Accordingly, while in the copyright discourse it is associated with creativity, knowledge and learning, for cultural heritage it is the adjective that nominally designates and encompasses its essence. If for copyright culture is that what results from a system of *circumscription*, for heritage it is that what comes with *ascription*.

## Origin

*Ab urbe condita (...) What is said here is the foundation of the city and designates the book that follows the foundation. Yet the city is never completely founded; the thing is never assured. It's the same for us, I mean for knowledge. Everything said here is said at a distance from the founded city, everything only has existence through this distance, through the length of this separation. The essential thing is the ab, or the from, which are, in fact, a starting from. A reference point, a point of departure, a bursting place (...) Rome never ceases being founded; its history or its time is simply what happens between two occurrences of the founding gesture (...) Rome is the city of beginnings. The beginning that we know is simply the time in which many beginnings accumulate.*<sup>23</sup>

Culture implies an existence of an origin. Origin has a meaning of source, that which gives rise to something.<sup>24</sup> Culture is predicated upon origin that gives rise to something which needs to be cultivated. As the root of this word indicates, it can mean 'to inhabit', 'cultivate', 'protect', 'honour with worship'.<sup>25</sup> The cultural theorist Raymond Williams suggests that the initial uses of origin implied a retrospective view of a static point in time 'from which subsequent things and conditions have arisen', while its later usage as 'originality' was associated with 'authenticity' and 'the description of something that is new.'<sup>26</sup> The systems of copyright and

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<sup>22</sup> Culture is an overburden notion that carries various meanings and serves different justifications and agendas, but for our purposes here it should be understood in its broadest sense (as an object of accumulation, process, and what distinguishes groups and localities). For an interesting discussion about the Cartesian dualism translated into the distinction between cultural and natural heritage, see Harrison (n 16) 63-64.

<sup>23</sup> Michel Serres, *Rome: The First Book of Foundations* (Bloomsbury 2015) 96-97. *Ab Urbe Condita* refers to the book by Titus Livius, or Livy, about the monumental history of ancient Rome. It is written in Latin between 27 and 9 BC.

<sup>24</sup> From Latin *originem* 'rise', 'beginning' or 'source'.

<sup>25</sup> From Latin *colere* or *cultus*.

<sup>26</sup> 'As originality settled into the language it lost virtually all contact with origin; indeed the point is that it has no origin but itself.' Raymond Williams, *Keywords* (Fontana 1983) 230-31.

cultural heritage and the discourses they engender incorporate these two meanings of origin. Whereas for copyright law the origin is the first instance for its actualisation and therefore carries a *prospective* quality, for the cultural heritage the origin is that what is referred back to, and is thus *retrospective*. Nonetheless, the origin remains to be an active instance that continuously engenders, delineates and sustains culture, which in turn informs normative frameworks.<sup>27</sup>

But what is the source of the origin? In his pursuance to contemplate the origin of our sciences, culture and knowledge, Serres notes that ‘Before the foundation, the inauguration takes place (...) The origin refers to another origin, the beginning demands a beginning (...) the foundation requires preliminaries.’<sup>28</sup> There is always a white space that precedes the act of appropriation, sacrifice, killing. Animals indicate territorial rights with their droppings and markings. The stones and statues are the initial markers of corpses, which then marked a territory, which then became a *pagus*, field, dwelling.<sup>29</sup> Serres refers to the myth of Romulus who killed and buried his rival brother Remus, and above his grave founded the city of Rome, thus becoming its proprietor and master. Bodily discharges and leaving marks appropriate places, and it is in this act of soiling the land, pollution, violence where we see the origins of our cultures, knowledge, nations, and the ‘forgotten foundation of property rights.’<sup>30</sup> Indeed, ‘the original method of acquiring property, whether in lands or movables, was that of preoccupancy (prior of first occupancy), which the Romans denominated *occupatio*.’<sup>31</sup> With this in view, origin should be understood as the original act of establishing boundaries and differentiation that gives rise to an object or culture.<sup>32</sup> The philosopher Elizabeth Grosz observes origin as ‘a function of language’ and what constitutes it depends on ‘where we (...) decide to draw a line between one group and another that resembles it,’ or in this context one form of expression from another.<sup>33</sup> What constitutes our cultures is the act of making these divisions, which are supported by the very act of claiming an origin. This bifurcating nature of origin is also implicated in the notion

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<sup>27</sup> This is certainly a political issue. Gibson, for instance, aptly points out that IP ‘is arguably the *de facto* author of legitimate “Culture” in Western society.’ She continues, it ‘purports to document the progress and civilisation of society, through the simplification and demarcation of Culture, while at the same time disguising the very selective process of that registration of Culture’. Johanna Gibson, ‘Freedoms of Knowledge, Access and Silence: Traditional Knowledge and Freedom of Speech’ in Fiona Macmillan (ed), *New Directions in Copyright Law, Vol. 2* (Edward Elgar 2006) 202.

<sup>28</sup> Serres, *Rome* (n 23) 33.

<sup>29</sup> From Latin *habere*, ‘to inhabit’ has the same origin as ‘to have’.

<sup>30</sup> Michel Serres, *Malfeasance: Appropriation Through Pollution?* (Stanford University Press 2011) 34. See also, Danilo Mandic, ‘Listening to the World: Sounding Out the Surroundings of Environmental Law with Michel Serres’ in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2017) 514-18.

<sup>31</sup> Although the term ‘occupancy’ was used in English law, Briggs for the purposes of avoiding ambiguity between the original and derivative acquirement employs the term of ‘preoccupancy’. William Briggs, *The Law of Literary Property* (WB Clive 1900) 7-8.

<sup>32</sup> ‘For decision about boundaries and borders appears to be original.’ Michel Serres, *Geometry: The Third Book of Foundations* (Bloomsbury 2017) 194.

<sup>33</sup> Elizabeth Grosz, *The Nick of Time: Politics, Evolution and the Untimely* (Allen & Unwin 2004) 21-23.

of inheritance. For the common legal conception, as Pottage comments, ‘inheritance connotes a kind of social order and a mode of social action that is predicated upon an order of divisions’, and it indicates a conservation of this division as a ‘form of geometry through time’.<sup>34</sup> What informs an origin is the initial cut or decision, the prime objectifying act.<sup>35</sup> Origin, the ultimate circumstance.

Accordingly, if there is one feature that frames the conceptual and normative foundations for both copyright law and cultural heritage it is the principle of origin. For a copyright to subsist the law requires an original expression that establishes the origin upon which it recognises the author and subsequently actualises the existence of property rights over that expression. It serves as an orienting principle according to which copyright subsists in a work or as a place of origin according to which law applies. Indeed, identifying the source is required to mark, to circumscribe, or for that matter, to initiate the legal gesture of property right protection. Copyright law refers to its literal meaning and it situates the act of originality as a source rather than quality: the ‘original’ does not imply that copyright law is ‘concerned with originality of ideas, but with the expression of thought (...) that it should originate from the author.’<sup>36</sup> The originality thus is ‘culturally and historically determined’ that refers not to the object per se but the relationship established between the work and its creator.<sup>37</sup> For the cultural heritage, similarly, the origin of in/tangible manifestations and expressions is not only the principle according to which belonging, identity and tradition are recognised and established; but it is the very binding link, bond, material thread that is crucial element for recognition.<sup>38</sup> It serves to locate the object of manifestation ‘with its source of production’ that serves the individuals and communities related to that heritage.<sup>39</sup> In that sense, the origin becomes a reference point for both copyright and heritage to be recognised, even when this origin is a subject of construction.

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<sup>34</sup> Alain Pottage, ‘Our Original Inheritance’ in Pottage and Mundy (n 9) 251-2.

<sup>35</sup> Serres contends the emergence of an object in the juridical (political and critical) gesture of cutting, deciding on a case. *Cause* ‘case’ designates the origin of the word *chose* ‘thing’. Serres, *Statues* (n 1) 59.

<sup>36</sup> *University of London Press v University Tutorial Press* [1916] 2 Ch 601, 608-609.

<sup>37</sup> Brad Sherman, ‘From the Non-original to the Ab-original: A History’ in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press 1994) 119-20; Smyth argues that ‘originality enters into the basic structure of human relations, which are objectively constituted by judgments about it.’ John V Smyth, ‘Originality in the Enlightenment and Beyond’ in Reginald McGinnis (ed), *Originality and Intellectual Property in the French and English Enlightenment* (Routledge 2009) 199.

<sup>38</sup> Authenticity is understood as ‘original’ and as ‘having been frozen in time’. Sophia Labadi, ‘World Heritage, Authenticity and Post-authenticity: International and National Perspectives’ in Sophia Labadi and Colin Long (eds) *Heritage and Globalisation: Key Issues in Cultural Heritage* (Routledge 2010) 74; See also ICOMOS, Nara Document of Authenticity (1994) <<https://www.icomos.org/charters/nara-e.pdf>> accessed 25 May 2018.

<sup>39</sup> Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, UN Doc A/HRC/17/38, para 2 (21 March 2011).

‘First of all,’ the first copyright statute does not mention origin.<sup>40</sup> The inclusion of original as a doctrinal requirement can be traced with the emergence of the Romantic authorship by which the origin became an orienting principle for recognising legal claim, thus reinforcing the pre-given distinction that the notion of property rights entails.<sup>41</sup> The ongoing criticism against the idea of a sole individual author who creates *ab nihilo* and the legal principle of origin has been discussed at length elsewhere.<sup>42</sup> For our purposes here, it suffices to acknowledge, as Jessica Silbey rightly points out, that ‘the origin story serves ontological and epistemological functions’.<sup>43</sup> Commenting on the beginnings of intellectual property, Silbey considers origin as a myth, by identifying its manifestations ‘as a heuristic [in the formation] of an individual and community’, as a ‘measure of authenticity to legitimate hierarchy’ and as a crucial element to reinforce political and social arrangements and consent.<sup>44</sup> Indeed, copyright scholarship often returns and refers back to copyright’s origin.<sup>45</sup> It engages with historical accounts and historicity, to trace the origins in order to not only historically situate copyright law but also to understand its legal development, enrich the investigation of its subject matter and better comprehend the present.<sup>46</sup> While these historical investigations are telling and informing the corpus of copyright law discourse, as Kathy Bowrey aptly observes, the theoretical works of copyright history ‘dwell too much on reading copyright law with reference to its historically contingent origins, thus we need to view it from different perspectives,’ we need new narratives.<sup>47</sup> This becomes even more crucial when these historical explorations engage with

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<sup>40</sup> *Iam premium omnium* is the opening line of Livy’s *Ab Urbe Condita*. Serres, *Rome* (n 23) 33; Statute of Anne 1710, 8 Anne, c 19.

<sup>41</sup> Martha Woodmansee, ‘On the Author Effect: Recovering Collectivity’ (1992) 10 *Cardozo Arts & Entertainment Law Journal* 279; Peter Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’ (1992) 10 *Cardozo Arts & Entertainment Law Journal* 293; cf Oren Bracha, ‘The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright’ (2008) 18(2) *Yale Law Journal* 186.

<sup>42</sup> ‘The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress’. Hugh Laddie, ‘Copyright: Over-Strength, Over-Regulated, Over-Rated’ (1996) 18(5) *EIPR* 253, 259; See eg Jeremy Waldron, ‘From Authors to Copiers: Individual Rights and Social Values in intellectual Property’ (1993) 68 *Chicago-Kent Law Review* 841; Jessica Litman ‘Copyright as Myth’ (1991) 53 *University of Pittsburgh Law Review* 235, 248; Marcus Boon, *In Praise of Copying* (Harvard University Press 2010).

<sup>43</sup> Jessica Silbey, ‘The Mythical Beginnings of Intellectual Property’ (2008) 15 *George Mason Law Review* 319, 320.

<sup>44</sup> *ibid* 323-327, 342-359.

<sup>45</sup> Sherman and Strowel (n 37); Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (CUP 1999); Ronan Deazley, *On the Origin of the Right to Copy* (Hart Publishing 2004); See also Carla Hesse ‘The Rise of Intellectual Property, 700 B.C. - A.D. 2000: An Idea in the Balance’ (2002) 131(2) *Daedalus* 26.

<sup>46</sup> Lyman R Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 222-23; Sherman and Bently (n 45) 219-220.

<sup>47</sup> Kathy Bowrey, ‘Who’s Painting Copyright’s History?’ in Daniel McClean and Karsten Schubert (eds), *Dear Images: Art, Copyright and Culture* (ICA and Ridinghouse 2002) 269; Sherman and Bently (n 45) 220; Deazley attempts to rethink copyright by acknowledging the fact that the authoritative and objective commentaries upon copyright are polemical as they not only record and comment but ‘they seek to determine the conceptual parameters within which copyright is to be understood.’ Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 8.

copyright legal principles that, as Patterson comments, are not clearly defined and set in stone, that is, ‘Our ideas of copyright are a heritage of history.’<sup>48</sup> Strongly imbedded in the various justifications that support its subsistence, copyright not only has cultural heritage as its object of protection and promotion, but manifests itself as a heritage of the Western thought that has evolved alongside various societal and political conditions and disruptions.<sup>49</sup> Copyright, as well as cultural heritage, overlaps with origin: the origin becomes a self-referential quality.<sup>50</sup> Although a contingent phenomenon, subject to constant change, copyright nevertheless remains a static legal formation that is dependent on its origin to validate its objective and purpose. It is in this opposition that copyright law histories develop, where its tradition is inscribed, and what informs copyright as heritage.

Comparably, heritage as continuously reflective on its past it initially served the ‘the role of the state in using particular objects to tell particular kinds of stories about its origins and to establish a series of norms with which to govern its citizens.’<sup>51</sup> The origin is therefore not only about identifying object’s beginning but also about telling stories about the origins of the states and cultures, knowledge and law, about identifying foundations, inscriptions and rituals, embodied with and by time, which testify to both the fragility and stoniness of the human civilisation. Heritage, as well as copyright law, implies memories and informs the inheritance of values that need to be transferred and maintained. It is in this process when, Serres observes, ‘Groups produce themselves by means of their culture and language, which develop and preserve them...against death and disappearance.’<sup>52</sup> In this way, Serres contends that death precedes origin; the corpse is not only the first object to the human, but we are born from death.<sup>53</sup> In legal terms, inheritance actualises only upon the death of an individual when property, titles, rights and obligations are passed on. In view of the opening quote, the impending decay (death) becomes rather a creative force, with which time is founded, in which time is continuously constructed: culture is our technology ‘of this time of engendering centuries by means of centuries.’<sup>54</sup> The creation of our culture is thus a reminder of our ‘undiminished capability to construct “collective immortality”’.<sup>55</sup> It is this continuation, this temporal

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<sup>48</sup> Patterson (n 46) 222-23.

<sup>49</sup> For a discussion on the distinction and principles of premodern and modern IP see Sherman and Bently (n 45) 43-49; On the relation between heritage and modernity see Harrison (n 16) 23-30.

<sup>50</sup> In reading Darwin’s *Origin of the Species*, Grosz comments that Darwin does not provide any factual explanation of the origin of the species, but only an analysis of genealogy, progress and historical movement, which ‘presupposes an origin’ but ‘which is not an origin except in retrospect.’ Grosz (n 33) 21-23.

<sup>51</sup> Peter Howard, *Heritage: Management, Interpretation, Identity* (Continuum 2003) 42.

<sup>52</sup> Serres, *Statues* (n 1) 6.

<sup>53</sup> *ibid* 19-20; Serres, *Geometry* (n 32) xxxiii.

<sup>54</sup> *ibid* 7-8; Serres, *Geometry* (n 32) li.

<sup>55</sup> Maria L Assad, *Reading with Michel Serres: An Encounter with Time* (SUNY Press 1994) 114; Howard notes: ‘Apart from delaying death, heritage commemorates its failure to do so (...) Commemoration is often the alternative to conservation, and many heritage debates are between these two options.’ Howard (n 51) 96.

formation that informs heritage's value.<sup>56</sup> What makes it more significant, nonetheless, is that the subject matter of protection is capable of establishing relations through which communication can traverse spatial and temporal scales, extending our comprehension of communication and its reach in building our collective culture.<sup>57</sup>

We should, however, be cautious of heritage's dissonant nature in which 'the present selects an inheritance from an imagined past for current use and decides what should be passed on to an imagined future'.<sup>58</sup> For these reasons, the heritage should not be approached (only) as a product, but referring to David Harvey's account of heritage, also as a process.<sup>59</sup> Although Harvey's purpose is different in nature to ours, he aims to unlock the restricted view on heritage from the present, and calls for a historical approach that recognises the 'heritage of heritage' that temporally encompasses both present and future but also the processes that construct it.<sup>60</sup> From here, the source which gives rise to a particular cultural heritage marks the temporal beginning which presents itself as historical, or even pre-historical, gesture that frames or sets a particular duration of existence. 'What makes certain activities "heritage",' Smith observes, 'are those activities that actively engage with thinking about and acting out not only "where we have come from" in terms of the past, but also "where we are going" in terms of the present and the future.'<sup>61</sup> Thus, it is in this Janus's two-faced direction of the durational process where heritage (both as a product and a process) actualises, where the origin is continuously re-constituted, and becomes a subject matter to preservation for future use.<sup>62</sup> This reference point seen from a distance, this movement of and across time, is what allows for the cultural heritage to manifest itself and continuously endure. As Serres observes, 'Time moves forward by returning (...) along a line of origin (...) [which] is not a point, [but] 'a long sequence of founding circumstances.'<sup>63</sup>

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<sup>56</sup> In the famous essay of 1903 Alois Riegl proposes the criteria of age-value: 'The category of monuments of age-value, embraces every artifact without regard to its original significance and purpose, as long as it reveals the passage of considerable amount of time.' Alois Riegl 'The Modern Cult of Monuments: Its Character and its Origin' (1982) 25 *Oppositions* 21 in Michele Lamprakos, 'The Idea of the Historic City' (2014) 4(1) *Change Over Time* 8.

<sup>57</sup> For a discussion on the ambiguous notion of common heritage of humanity see Macmillan, *Protection* (n 17).

<sup>58</sup> John E Tunbridge and Gregory J Ashworth, *Dissonant Heritage: The Management of the Past as a Resource in Conflict* (John Wiley 1996) 6.

<sup>59</sup> Harvey considers heritage as verb and not a noun. David C Harvey, 'Heritage Pasts and Heritage Presents: Temporality, Meaning and the Scope of Heritage Studies' (2001) 7(4) *International Journal of Heritage Studies* 7 (4) 319.

<sup>60</sup> David C Harvey, 'The History of Heritage' in Brian Graham and Peter Howard (eds), *Ashgate Research Companion to Heritage and Identity* (Ashgate 2008) 19-36. Heritage is 'not a thing or a place, but an intangible process in which social and cultural values are identified, negotiated, rejected or affirmed.' Laurajane Smith and Emma Waterton, *Heritage, Communities and Archaeology* (Duckworth 2009) 44.

<sup>61</sup> Smith, *Uses of Heritage* (n 16) 84.

<sup>62</sup> Bakhtin uses the image of two-faced Janus to explicate two worlds: a world of culture as an objective unity, and 'never-repeatable uniqueness of actually lived and experienced life.' Mikhail M Bakhtin, *Toward a Philosophy of the Act* (University of Texas Press 1993) 2.

<sup>63</sup> Serres, *Rome* (n 23) 220.

On that account, such disruption of the traditional view of origin as a point in time not only challenges copyright and heritage's notion of origin as their organising principle, but confirms the temporal quality of an origin as a continuous founding circumstance to both their subject matter and themselves as institutions. Moreover, by referring back to copyright and heritage as relations, through which transmission of notions, ideas, skills, knowledge, principles and artefacts take place, the temporal aspect manifests itself as fundamental to such an ordering.

## Temporality

*According to Ab urbe condita this is a year of 2771.*<sup>64</sup>

Having extracted temporality as an intrinsic feature of inheritance/heritage, here we start to think with and through time. Time is a complex phenomenon. Whereas time can be understood as universal or a clock time, temporality 'is time insofar as it manifests itself in human existence'.<sup>65</sup> In contrast to circular time, which is recurring, linear time implies beginning and an end. The latter, at least in the Western conception, signifies unidirectional progress that instils the dominating forms of organising social life and becomes a 'central symbol of their legitimacy'.<sup>66</sup> This understanding of time associated with progress is nowhere more implicitly or explicitly stated than in the purposes of intellectual property.<sup>67</sup> Underpinned by the tradition of Enlightenment, the idea of progress has been moulding copyright's shape ever since. The inclusion of time within the working of intellectual property law, more specifically copyright law, confirms how cultural conceptions of time have informed the principles of its legal institution.<sup>68</sup> The focus here is not to trace the development of normative orders over time, but to think about 'time' as an inherent function of copyright law. But also of recognising time as 'integral to the ontology and epistemology of law.'<sup>69</sup>

The discussion continues by considering how copyright law organises and produces time, but also, parallel to that to heritage, considers the temporality of its subject matter, objects of protection, and its subjects. If Henri Bergson is right then 'Questions relating to subject and

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<sup>64</sup> In the Gregorian Calendar this is the year of 753 BC. According to the same calendar this is the year of 2018, a year designated as European Year of Culture Heritage.

<sup>65</sup> David C Hoy, *The Time of Our Lives: A Critical History of Temporality* (The MIT Press 2012) xii.

<sup>66</sup> Carol J Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' 98 (1989) *The Yale Law Journal* 1631, 1633-637; For Durkheim, time is a social category in origin, and that its organisation is essentially collective. Emile Durkheim, *Elementary Forms of Religious Life* (The Free Press 1995) 9-10.

<sup>67</sup> As given, for instance, in the US Constitution (Article I, Section 8, Clause 8) 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'

<sup>68</sup> Greenhouse (n 65) 1631.

<sup>69</sup> Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4 *UC Irvine Law Review* 65, 71

object, to their distinction and their union, should be put in terms of time rather than of space.<sup>70</sup> However, the inclusion of time here is cautious not to engage, as Mariana Valverde points out, with the ‘old fallacy’ of the division between time and space within legal scholarship, but it has a purpose to recognise time as a quality to the scope, normative construction, and the narrative that law comes from and informs.<sup>71</sup> Similarly to heritage, time and space are intrinsically intertwined and essentially constitute copyright law’s actualisation and permanence, however its temporal quality is foregrounded here.

Similar to the two different meanings of *chronos* and *kairos*, Serres refers to other set of contradictory Greek verbs that the word ‘time’ derives from.<sup>72</sup> *Temno* ‘to cut’, ‘from which we no doubt draw our measures and datings,’ and the other is *teino* ‘to stretch’ which signifies its continuous flow.<sup>73</sup> We arrive at the point where the three aspects – relation, origin, temporality – come together, overlap and ‘superimpose’. As similarly applicable to cultural heritage, it is precisely here, with this final distinction of time, that the qualities of relation, origin and temporality demonstrate their resemblance by carrying the simultaneous qualities of divisions and extensions, which give rise to both copyright’s subject matter and its edifice. It is from this position that copyright and its law is to be considered.

Copyright law is 308 hundred years old. The historic point in time in which the origination of copyright is located can be traced back to the invention of printing press and the necessity to control the trading, that is censor the content, of printed books. But as the historical investigation has shown, such single origin is difficult to trace, as copyright is rather a result of multiple processes that had coincided at that time.<sup>74</sup> For our purposes here, it is important to state that in the process of formulating and framing what would become the world’s first copyright act, the inclusion of time as a measure for protecting author’s copyrights was the main gesture in serving the purpose of limiting one’s rights in favour of what this new act, as given in its long title, aimed to achieve: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*<sup>75</sup> Authors of books and their assignees, were granted protection for 14 years, which was subject to renewal, and a single 21-year term for works which had already been published. The question of time, however, was essential to the unsettled debate that

<sup>70</sup> Henri Bergson, *Matter and Memory* (Zone Books 2002) 71.

<sup>71</sup> Drawing on Mikhail Bakhtin’s concept ‘chronotope’ that merges time and space. Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015); See also John Bender and David E Wellbery (eds), *Chronotypes: The Construction of Time* (Stanford University Press 1991).

<sup>72</sup> *Chornos* refers to chronological, recurrent and sequential time, whereas *kairos* means an indeterminate time in which events take place.

<sup>73</sup> Serres, *Geometry* (n 32) xxxiii.

<sup>74</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 142.

<sup>75</sup> In the fifteenth century Venice the Printing Privileges, which precede copyright, were also exclusive rights granted for limited periods of time. For a discussion about the proposals and amendments preceding Statue of Anne, see *ibid* 10, 42-46.

followed the enactment of the bill, that is, of whether common law literary property is perpetual. The function of time was underlying feature in the conceptualisation of this right, mainly manifested between two opposite views but similar in their interest to protect the subject matter of literary property: those who viewed this right as a monopoly thus contended for a very short period, and those who aimed to prevent multiplying copies hence upheld perpetuity of the right.<sup>76</sup> While there were two cases earlier that recognised the perpetual right in literary property, in 1774 with the case of *Donaldson v Beckett* the House of Lords overturned the previous decisions and recognised copyright as a statutory right, acknowledging the necessity of public domain, leaving the belief in a (common law) perpetual right, as a natural right, behind. While the purposes for a limited duration were intended to control the booksellers, and benefit the authors and public interest, the recognition of copyright law as a statutory right interrupted the time immemorial, the preliminary founding, the origin from where the booksellers derived their right.<sup>77</sup> The notion ‘preoccupancy’ manifests itself in the temporal dimension of the time immemorial which denominates time ‘before legal history and beyond legal memory’, or as Blackstone refers to, a ‘time out of mind.’<sup>78</sup> With the erection of the first copyright statute a new time begins.<sup>79</sup>

This brief overview demonstrates time’s role not only in what preceded, but also in what constructed the body of copyright law. Time was integrated as a function to validate and materialise its property conception. Expanding over centuries, the copyright duration remains a chronic principle that is either identified as an instrument of regulation or as subject through which copyright’s detrimental expansion is being challenged.<sup>80</sup> Legislative acts, as well as processes of internationalisation and harmonisation of copyright law further institutionalise and use time as a means of control.<sup>81</sup> However, what essentially lies at the heart of this

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<sup>76</sup> *ibid* 67-91.

<sup>77</sup> For an in-depth analysis of this period see Deazley, *On the Origin* (n 45); The role of duration also played an important role in the processes of separating intellectual property law into its different categories. Sherman and Bently (n 45) 141.

<sup>78</sup> Time *immemoralis* designates ‘a forgotten origin’, which is law’s preliminary gesture to occupy the place of origin. Peter Goodrich, ‘Melancholegalism: Black Letter Theory and Temporality of Law’ 2016 3(2) *Crisis & Critique* 185, 198-99 <<http://crisiscritique.org/special09/peter.pdf>> accessed 15 May 2018; Fitzpatrick observes: ‘What is originated is thus established, given, the same, constant, eternally present. Sustained in the force of the origin, law remains what it is in its beginning, enduring in a ‘time out of mind’, a permanent rule.’ Peter Fitzpatrick, *Modernism and the Grounds of Law* (CUP 2011) 89 Referring to Blackstone (omitted citation).

<sup>79</sup> Statute and statue share the same etymological root. From Proto-Indo-European root *stā-* ‘to stand, set down, make or be firm’. Also, in Latin *statuere* ‘enact, establish’, *status* ‘position’, and *stare* ‘to stand’.

<sup>80</sup> See eg Andrew Gilden, ‘Life, Death, Public Domain’ (2014) 22(1) *George Mason Law Review* 13; Craig Chamberlain, ‘Tailoring Copyright Duration’ (2016) 20 *Lewis & Clark Law Review* 303; William M Landes and Richard A Posner, ‘Indefinitely Renewable Copyright’ (2003) 70 *University of Chicago Law Review* 471; Jiabo Liu, *Copyright Industries and the Impact of Destruction: Copyright Expansion and the Publishing Industry* (Routledge 2013) 10-65. Justin Hughes, ‘Fair Use Across Time’ (2003) 50 *UCLA Law Review* 775.

<sup>81</sup> Eg Sonny Bono Copyright Term Extension Act 1998 PL 105-298 112 Stat 2827.

justification, at least rhetorically, is the principle of inheritance.<sup>82</sup> And while copyright discourse continuously returns to its inevitable history to write the time of copyright, time as a feature is presupposed of simply being there, almost ‘exterior’ to law’s existence.<sup>83</sup> Considered as a temporal limitation to the existence of that very ‘intangible’ object that is subject matter of copyright’s protection, the temporal element is put only in the pragmatics of law’s functioning. This leads us to acknowledge, what Grosz finely points out, that ‘Time’s capacity to hide within objects, through and as things in time, means that to the extent that we focus on the nature of objects, we obscure the nature of temporality.’<sup>84</sup> With this in view, the ending fleetingly touches upon different copyright times.

### *The Cut and Stretch of Copyright Times: Materialising the Intangible*

Copyright law’s object is of a peculiar kind. A conceptual construction that concurrently applies to the intangible, mental activity, labour of the mind, expressed in a material form by which we can perceive it.<sup>85</sup> In order to materialise this intangibility copyright law requires for the idea that is essentially *timeless* and no one’s property to be expressed, to leave a material trace and mark the origin. More specifically, what law does is attaching a temporal quality to these ideas in order to materialise them into property rights and instantaneously delineate their spatiality. Time, while ‘more intangible than any other “thing”,’ thus performs the function of concretisation of the very abstraction of copyright as a property right, regardless of the material nature in which its creations subsist.<sup>86</sup> Thus it can be contended that time is not only a quality that complements justifications of copyright as property right, but acts as an embodiment, a quality that materialises the intangible, an all-encompassing matter essential to the functioning of copyright.

Copyright law uses two different instances for measuring duration. First, it emerges at the moment of expression, which sets the beginning of something that ‘never’ existed before. The meaning of original implies origination. The initial expression becomes a function of property right, but also of time – more precisely, an instant that actualises the existence of property rights over that expression, when time as a measure gives copyright system its normative value.

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<sup>82</sup> Recital 6: ‘The minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations.’ Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights OJ L 372/12.

<sup>83</sup> Mawani (n 68) 71.

<sup>84</sup> Grosz (n 33) 243.

<sup>85</sup> The distinction between the corporeal and incorporeal property is that the former is the ‘actual possession of some substance’ and for the incorporeal is ‘a right relating to some substance’. *Donaldson v Beckett* [1774] 1 ER 837, 839

<sup>86</sup> Elizabeth Grosz, ‘Becoming...An Introduction’ Elizabeth Grosz (ed), *Becomings: Explorations in Time, Memory, and Futures* (Cornell University Press 1999) 1.

The birth of the author, a personification of origin.<sup>87</sup> Second, it takes the end of a human life (*post mortem auctoris*) as an additional measure according to which copyright's end is determined. Death asserts itself as 'a function of time', a positive principle by which the natural time of human's lifetime, although accidental, becomes a crucial instant for measuring copyright's duration.<sup>88</sup> Despite the economic justifications for prolonging duration, it seems copyright law is one of the only laws that by protecting one's rights after their death engages in activity to extend human life and through the protection of their rights legally recognise them posthumously.<sup>89</sup> Indeed, copyright law has ever been 'posthuman'.<sup>90</sup>

Once expired, the duration obliterates the circumscribing fence and copyright works fall into public domain, the space without form or clearly defined boundaries, a reservoir of works outside protection.<sup>91</sup> But this is not a space outside copyright, but a space that copyright gives rise to, encloses and reserves, by which copyright (pro)claims the realisation of its higher goal to further culture and knowledge.<sup>92</sup> Copyright pursues towards the future, ascribing itself a futural significance by embodying heritage towards 'collective immortality.' As David Nimmer notes, 'works are relegated to the public domain to become the heritage of all humanity and copyright is simply a temporary way station to reward authors on the road to the greater good.'<sup>93</sup> Once copyright's duration expires, the public domain becomes a container of works from the past transferred into the future. However, the *prescription* of copyright duration once elapsed, introduces another time that goes beyond the linear time: 'Time passes and does not simply flow by passively; on the contrary, it forgets or effaces deeds and rights.'<sup>94</sup> In this

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<sup>87</sup> On a discussion about the Renaissance concept of literary creation as inheritance, and authorship as paternity see Mark Rose, 'Copyright and Its Metaphors' (2002) 50 *UCLA Law Review* 1, 3-6.

<sup>88</sup> The insistence on death of the author is not just a practical measure for copyright law, but it carries yet additional meaning. As Assad, drawing on Michel Serres, notes: 'our culture is focused on death and forms a concept of *death as a function of time* in an entropic equation that thermodynamics formalized into a science'. Assad (n 55) 55.

<sup>89</sup> The moral rights, as an integral part of copyright that protect the relation between the author and their work, also promote this extension of human life. Moreover, while perpetual copyright had been consigned to history, the moral rights in some legal systems still validate this perpetuity (France), in contrast to other legal systems in which they generally expire together with copyright's duration.

<sup>90</sup> The use of the term is rather a wordplay referring to Bruno Latour's 'We have never been modern', who draws on Michel Serres's thought, and challenges the distinctions between nature/culture, subject/objects, past/present that modernity entails. It should not be associated with the philosophical concept of posthumanism, it only suggests that copyright is a temporal instrument that aims and is able to prolong human life by extending their right.

<sup>91</sup> Deazley, *Rethinking* (n 47) 103.

<sup>92</sup> It is therefore argued that the ever-present trend of extending copyright duration is a temporal regulative instrument which is damaging to creativity and knowledge – cultural heritage – that copyright law aims, or for that matter purports, to protect. See Neil W Natanel, *Copyright's Paradox* (OUP 2008) 53-58; William Patry, *How to Fix Copyright* (OUP 2011) 189-201; Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall, *What if We Could Reimagine Copyright?* (ANU Press 2017) 177-211.

<sup>93</sup> David Nimmer, 'The End of Copyright' (1995) 48 *Vanderbilt Law Review* 1385, 1416; For a critical recognition of public domain drawing on Roman Law see Carol M Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age' (2003) *Law and Contemporary Problems* 89.

<sup>94</sup> Assad (n 55) 139; This reading reverses the legal notion of (acquisitive and extinctive) prescription where the effect of lapse of time is essential in creating or eliminating rights. Serres contends that prescription 'admits the

way copyright law from using time as to order a relation and control the existence of a copyright work, it suddenly forgets the right in order to immortalise the work.<sup>95</sup> Copyright's prescribed lapse of time forgets the right and in that moment as if it reverses the meaning and direction of 'time immemorial'.<sup>96</sup> In a paradoxical way, however, only up to a point in time when another 'cut' takes place and institutes a new origin, a new time. This leads us to recognise that while linear time as a measure serves the normative function for the institution of copyright, an attendance of another time embodies copyright law. For Serres, 'Time does not always flow according to a line (...) rather, according to an extraordinarily complex mixture.'<sup>97</sup> He takes the example of a handkerchief, which if flatten out shows points as 'fixed distances and proximities'. Once crumpled 'Two distant points suddenly are close, even superimposed' indicating time is not linear.<sup>98</sup> As such, events and objects that seem far from each other act contemporaneous, thus become 'polychronic, multitemporal.'<sup>99</sup> In other words, for Serres time 'passes and it does not pass', thus it 'percolates.'<sup>100</sup> From this stance, it can be contended that copyright law (as well as cultural heritage) is capable to comprehend this topological time which simultaneously transcends and connects different temporal and spatial instances, and that goes beyond the linear time which copyright law normatively supports.

Accordingly, copyright law is indeed a binding device, securing the continuance of its object of protection, its subject matter and its principles, but also of past, present and future. Serres considers that law institutes historical time and 'it is therefore a cultural phenomenon (...) a stable invariant what we call "history or civilization."<sup>101</sup> In that sense, 'Through its codes and its texts,' Serres notes, 'law is an integral part of the memory of social computer.'<sup>102</sup> The common law's inherent feature of a precedent as a temporal instrument is an appropriate example for confirmation of this continuance and connection. As Gerald Postema notes, the precedent represents law's memory of the past which also is 'always bent to the present in

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essential action of time' – more precisely, it works between non-law and law, between time of nature and culture, between universal/unwritten/unprescriptible and time of history. Michel Serres, *The Troubadour of Knowledge* (The University of Michigan Press 1997) 139-42.

<sup>95</sup> Augé, for instance, argues that what remains as memory is a product of oblivion and that by forgetting the present or the recent past is what allows returning to ancient pasts: 'We must forget in order to remain present, forget in order not to die'. Marc Augé, *Oblivion* (University of Minnesota Press 2004) 89.

<sup>96</sup> However, copyright law does not always forget. Although Peter Pan's ability to forget makes him immortal, it is however paradoxical, that under CDPA 1988 s301, JM Barrie's *Petar Pan* remains to be potentially perpetual. See Catherine Seville, 'Petar Pan's Rights: To Die Will Be An Awfully Big Adventure' (2003) 51 *J Copyright Society USA* 1.

<sup>97</sup> Serres and Latour (n 8) 57; See generally Bernd Herzogenrath (ed), *Time and History in Deleuze and Serres* (Continuum 2012).

<sup>98</sup> *ibid* 58, 60-61.

<sup>99</sup> *ibid* 60.

<sup>100</sup> *ibid* 58; Michel Serres, *Genesis* (The University of Michigan Press 1995) 115.

<sup>101</sup> Assad (55) 139-40.

<sup>102</sup> *ibid* 140; See also Jonathan Crowe and Constance Y Lee, 'Law and Memory' (2015) 26 *Law and Critique* 251.

anticipation of the future,' thus the two-faced Janus is indeed the patron of precedent.<sup>103</sup> However, in contrast to this ordered historical time, there is also a discontinuous, unexpected, disordered time that is devoid of unties, and which law also embodies. In his book *Genesis*, Serres uses the notion of noise to comprehend the multiple, to grasp time that cannot be represented, background noise, a turbulence that gives rise to forms, an emergent phenomenon, the ultimate origin: 'Time is a pure multiplicity.'<sup>104</sup> Law emerges from this timeless resonance, primordial reverberation: 'Just as it creates our acts, real time creates law, and if it creates it, it dismantles it just as easily, and that is what the natural is – what keeps being born or risks not being born. Time creates the law, forms it, transforms it, and thus founds it.'<sup>105</sup>

## Postface

### *Rome, the Eternal City.*

Generalising, descriptive and at times speculative in nature, this paper aimed to temporarily interrupt the common thread by which copyright is discussed. In reading with and through heritage it identified similarities that provide a different starting position from which to discuss and problematise copyright and its law. In contrast to approaching copyright through its pre-given organising principles of originality, authorship, property rights and ownership, here they remain in the background and the discussion focused on the aspects of relation, origin and temporality that both copyright and cultural heritage inherently embody and are dependent upon. By following their features, the discussion traversed different points, notions, meanings not to provide a conclusive study but instead in an open-ended manner to explore how relation, origin and temporality as qualities precede and inform the subject matter of copyright and its normative edifice. To put it another way, relation, origin, and temporality are not only essential to the formation and maintenance of cultural values, but they are also an integral part to the system of copyright, its conceptions, justifications, and higher goals. It is from this position, in rather idealistic manner, by which copyright has been approached. Copyright law is primarily a hereditary practice. It manifests itself a medium, link, a bridge that makes these connections of communication and dissemination of cultures; it establishes the origin, it carves the path, builds the infrastructural support of its system, and by doing so it not only preserves the objects of its attention but also itself. While implied throughout the paper, it held that all these

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<sup>103</sup> Gerald J Postema, 'Melody and Law's Mindfulness of Time' (2004) 17(2) *Ratio Juris* 203, 214; See also Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016) 167. On legal precedents in intellectual property see eg Jose Bellido (ed), *Landmarks in Intellectual Property* (Hart Publishing 2017).

<sup>104</sup> Serres, *Genesis* (n 100) 6.

<sup>105</sup> Serres, *Troubadour* (n 94) 142.

processes, intentions and gestures are inherently temporal in nature; hence, it proposes approaching copyright as a temporal category.

Time is subsumed into copyright's normative conceptions, and it is used to regulate and impose, to give rise to property rights, and inform narratives and their 'timelessness'. This not only concerns copyright's subject matter of transferring creativity and knowledge, but also law's temporal existence, which allows considering copyright law and its functioning as a form of heritage. Time manifests itself as being a function to copyright's binding nature. While copyright law takes time as a parameter or as a linear process where history and its instances are written,<sup>106</sup> at the same time in order for it to produce order it seems it must maintain its image as a 'guarantor of stability' by stopping time,<sup>107</sup> or rather present itself as timeless. This timelessness should not be confused with the apt criticism towards viewing copyright as 'timeless, almost ahistorical, area of law that has always existed.'<sup>108</sup> But rather, in the understanding of time as a quality that embodies and informs copyright law. As Postema observes, 'Law exists in and persists through time, subject to forces, both rational and irrational, that operate in and through time.'<sup>109</sup> This tracing of aspects, articulations and conceptualisations of times that copyright law engages with, embodies, and maintains, also calls attention to a quality that, although already pragmatically considered, has evaded copyright scholarship. At the end, this discussion is just preliminary.<sup>110</sup>

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<sup>106</sup> Serres considers the way in which we view time is based on the idea of progress: 'We conceive time as an irreversible line...of acquisitions and inventions.' Serres and Latour (n 8) 48.

<sup>107</sup> JV Harari and DF Bell, 'Introduction: Journal à plusieurs voies' in Serres, *Hermes* (n 6) xvii.

<sup>108</sup> Sherman and Bently (n 45) 95.

<sup>109</sup> Postema, for instance, proposes in contrast to the models of normativity that are based on reason/principles (*nomos*) and command/rules (*thesmos*) he proposes a third model, that of melody (*melos*) that emphasises 'the temporal dimensions of law's normativity', which can be only grasped by the comprehensive mindfulness of past, present and future. Postema (n 103) 204, 206-09.

<sup>110</sup> 'As the term indicates, and as it is signified in Roman law, prescription is written at the top, as a preamble or preliminary, as an epigraph to every text. When you write in the morning, once the hour strikes, of theory or literature, of law, science, mathematics or love, know that before the blank page, in its top margin, prescription always precedes you. By definition, it alone exists before. Written at the top of the page but rubbed out and leaving the page intact, free, virgin, white and innocent.' Serres, *Troubadour* (n 94) 142.

\* This paper is written in Times New Roman. 'Roman type has some roots in Italian (and other European) printing of the late 15th and early 16th centuries, but Times New Roman's design has no connection to Rome or the Romans.' (*Wikipedia* 29 May 2018) <[https://en.wikipedia.org/wiki/Times\\_New\\_Roman](https://en.wikipedia.org/wiki/Times_New_Roman)> accessed 6 June 2018.