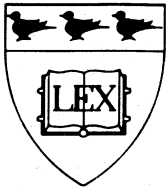


VOLUME 38

SPRING 2001

NUMBER 1



# HOUSTON LAW REVIEW

**THE FIFTH ANNUAL FRANKEL LECTURE**

**ADDRESS**

**COPYRIGHT  
IN THE DEAD SEA SCROLLS  
AUTHORSHIP AND ORIGINALITY**

*David Nimmer*

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HOUSTON LAW REVIEW  
ADDRESS

COPYRIGHT IN  
THE DEAD SEA SCROLLS

AUTHORSHIP AND ORIGINALITY

*David Nimmer\**

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\* © 2001 by David Nimmer, Of Counsel, Irell & Manella, Los Angeles, California; Distinguished Scholar, Berkeley Center of Law and Technology. This work was delivered as the Fifth Annual Houston Law Review Lecture Series Frankel Lecture. A number of people were kind enough to react to portions of this work. I thank especially those who offered comments on the whole presentation: Craig Joyce, Dick Lanham, James Oakes, Tim Lim, Michael Birnhack, Mark Rose, Talia Einhorn, Craig Joyce, Peter Jaszi, Ariel Goldstein, Bob Rotstein, Yoni Hoffman, Craig Joyce (his third reading, this time) and Gloria Nimmer (a/k/a “Mom”). Sharon Ben-Shachar and Russell Chorush provided wonderful research assistance.

Unless otherwise noted, all translations from ancient and medieval Hebrew are mine. Yonina Hoffman and Sharon Ben-Shachar translated the modern Hebrew from the Israeli judicial opinions. In general, I transliterate the letter *qof* herein with a “q”—except where a “k” is generally used, such as “Akiva.”

The citation form used in this address conforms to the author’s preferences.

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# PART ONE

## DOCTRINE

### I.

#### FOREWORD: FIRST SPEECH

You think *this* is trouble? I was four months into production on *The Song of Solomon* and found out I didn't have the rights!

Producer Stanley Motss in *Wag the Dog*

The first speech of my copyright career came at the invitation of the assembled lawyers of Columbia Pictures in 1987. In the segment devoted to exceptional cases of U.S. copyright duration, Jared Jussim asked a question about an actual case confronting the studio (this was at the time that Jared practiced copyright law exclusively, before he lent his acting talents to portray the legendary Dickey Fox in *Jerry Maguire*)—is it possible to have copyright protection in the United States for a fairy tale by the Brothers Grimm, allegedly written in the 1850s and never published.<sup>1</sup>

I explained the statutory rule then extant—protection would last for 50 years past the death of the last Grimm brother.<sup>2</sup> But even if the grim reaper took the Grimm brother over a century

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1. The Grimm Brothers actually had a role to play in early literary theory. See WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 16–17 (1982).

2. 17 U.S.C. §302(a) (1982). Subsequently, the term was extended another 20 years. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.10[A][1] [hereinafter NIMMER ON COPYRIGHT].

ago, copyright would still subsist at least until December 31, 2002.<sup>3</sup>

Against that statutory provision, I maintained that a rule of reason had to be juxtaposed. Summoning up the most extreme situation that I could imagine, I posited that even if a shepherd in the Judean desert were to discover today a hitherto unknown manuscript of Biblical provenance—say, the third chapter to the Book of Obadiah—and even if the shepherd could prove himself to the court’s satisfaction to be Obadiah’s lineal descendent and hence inheritor of any copyright interest, still no court would ever recognize copyright protection for such a work. The reason, I brazenly concluded,<sup>4</sup> is that copyright protection must co-exist in our constitutional system with First Amendment rights of expression, and it would be inconceivable that a monopoly over expressive content of any text of Biblical import could be subject to private ownership.<sup>5</sup>

Fate evidently abhors such categorical pronouncements; it found a way to disprove them in relatively short order. The certitude that I expressed in 1987 reflected simply absence of imagination, a constricted breadth of vision.

The chapters that follow pursue the question: What quantum of creativity suffices to secure copyright protection? Can one who reconstructs an ancient text out of manuscript fragments secure copyright in the assemblage? Can a publisher of judicial opinions that emends miscellaneous textual matters and paginates the result lay claim to copyright in its work product? Whether the exercise proves dexterous or sinister, gauche or adroit, is left to that ultimate arbiter of all literary efforts, the reader.

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3. 17 U.S.C. § 303(a) (Supp. IV 1999). See 3 NIMMER ON COPYRIGHT § 9.09[A].

4. My awareness, even as I spoke, that no case law validated that supremacy of First Amendment values over copyright protection—indeed, that the authorities were in fact almost uniformly to the contrary—did not disturb my certitude that, in the extreme circumstances posited, copyright protection would surely lose. Moreover, I had little fear of ever being proven wrong; for even if a judge were to be so unmoored from sound principles as to want to reach an opposite result, the factual circumstances of such a case were surely a physical impossibility, I quickly calculated.

5. See generally Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

II.  
IN PURSUIT OF THE ORIGINATOR

Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

Justice Oliver Wendell Holmes, Jr.<sup>6</sup>

The succeeding chapters explore in elaborate detail how scholars were assigned and reconstructed the archaeological remains of various pieces of multiple copies of an ancient Hebrew manuscript; how their failure to publish that reconstruction for decades sparked resentment, leading to an unauthorized publication; and how copyright litigation ensued.

To frame the inquiry, we need to inquire into the copyright status under U.S. law of the reconstruction of an ancient text. Because this fact pattern falls so far afield of any reported case, it is helpful to let the mind roam free and posit other hypotheticals. Therefore, before the chapters below directly explore the facts and analysis of *Qimron v. Shanks*, the next chapter propounds different fact patterns to probe the outer limits of copyright protection. Each pattern is designed to shed light on a different aspect of the curious conundrums underlying the reconstruction of the text at issue in that case, which goes by the name *MMT*.

But before reaching that matter, the instant chapter offers a few words about authorship. The United States Constitution authorizes Congress "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>7</sup> What is meant by the reference to "authors"? Western civilization has had a good deal to say on the subject; the goal here is emphatically not to rehearse that history.

??Reaching back to the fountainhead brings us to the original blind bard, who stitched together songs to make the world's first rhapsody. But Homer was a singer, not a commentator.<sup>8</sup>

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6. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

7. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

8. On Homer, see generally ORALITY AND LITERACY, *supra* note 1.



??Aristotle, of course, qualifies as “the principal theoretician of classic narrative.”<sup>9</sup> His *Poetics*, as its name implies, concentrates on the production of poetry, not on what a poet must do to qualify for that title. For that reason, its exceptions are all the more striking:

[I]t is not the function of the poet to relate what has happened, but what may happen—what is possible according to the law of probability or necessity. The poet and the historian differ not by writing in verse or in prose. The work of Herodotus might be put into verse, and it would still be a species of history, with meter no less than without it. The true difference is that one relates what has happened, the other what may happen.<sup>10</sup>

??In general, ancient Greece articulated no category of “fiction,” fountainhead of modern conceptions of authorship.<sup>11</sup> Instead, it gave us the concept of *sophos*—the *sophoi* (plural) encompass

a range of practitioners from the poet through the politician to the pot-maker. There is, otherwise, no regular term that corresponds to ‘author’ in the sense of a discrete category of those who produce literature, who write. The product of the *sophos* is *sophia*, “authoritative knowledge,” or “wisdom,” which is constantly and inevitably associated with the production of poetry in ancient Greece. Indeed, *sophia* is the normal term for what poets offer to the public. It is precisely because of this claim of authoritative knowledge for poetry and for other spheres of action that Plato coins his new term *philosophia* . . . .<sup>12</sup>

??In ancient Israel, the “genius” to be praised was one who obliterated his own will in favor of exactly carrying out the divine ordinance. The individual whom the Torah invokes as the epitome of artistry is Betzalel, builder of the Tabernacle in the wilderness.<sup>13</sup> The Talmud relates that God commanded Moses to direct Betzalel to build the

9. ROLAND BARTHES, *The Struggle with the Angel*, in IMAGE\_\_\_\_MUSIC\_\_\_\_TEXT, 125, 129 (1977) (analyzing *Genesis* 32:22–32).

10. ARISTOTLE’S *POETICS* 68 (S.H. Butcher trans., 1999). “And even if he chances to take an historical subject, he is none the less a poet . . . .” *Id.* at 69.

11. Simon Goldhill, *The Sirens’ song: authorship, authority and citation*, in *WHAT IS AN AUTHOR?* 137, 138–39 (Maurice Biriotti & Nicola Miller eds., 1993).

12. *Id.* at 138.

13. See *Exodus* 38:22.

tabernacle in a specified way. When Moses relayed the commandment to Betzalel, he changed the order. Betzalel, however, remained true to the original order that God had given.<sup>14</sup> In response, Moses exclaimed in wonder how Betzalel knew—perhaps he was lurking “in the shadow of God.”<sup>15</sup>

??Not only was Homer a collector of past traditions as opposed to an innovator, but the same sensibility continued long into the future. The troubadours and *trouvères* of medieval lore, along with *Il Trovatore* of Verdi fame, derive their name from the verb meaning “to find.”<sup>16</sup> Like Homer before them, those minstrels can claim celebrity not by the originality of their compositions, but by virtue of the fact that they have “found” ancient truth and transmitted it faithfully.<sup>17</sup>

??Writing a half century before the first copyright statute, Thomas Hobbes makes reference to those who originate books as “Writers.”<sup>18</sup> But insofar as he refers to an “author,”<sup>19</sup> it is to the wholly different category derived from its cognate: one who has “authority” to act: “Likewise Children, Fooles, and Mad-men that have no use of Reason, may be Personated by Guardians, or Curators; but can be no Authors (during that time) of any

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14. Although Betzalel is the archetype of genius-through-avoiding-originality, he is far from alone. Another example comes in God’s detailed command to Aaron to light the menorah in a certain fashion, after which the Torah duly records, “And he did thus.” *Numbers* 8:3. What is the point of that fillip? The preeminent commentator explains that it shows the praise of Aaron, by highlighting that he changed none of the divine order. Rashi *ad loc.*, quoting Sifri.

15. BABYLONIAN TALMUD TRACTATE BRACHOT 55a. The name Betzalel can be divided into two and revocalized as “betzel el,” which translates as “in the shadow of God.” This sort of Hebrew wordplay underlies much of what follows. Refer to Chapter VIII *infra*.

16. In French it is *trouver*, THE CONCISE OXFORD FRENCH DICTIONARY 97 (1942), in Italian *trovare*, CASSELL’S ITALIAN DICTIONARY 730 (1978).

17. “[T]he terms plagiarism and copyright did not exist for the minstrel. It was only after the invention of printing . . . that these terms began to hold significance for the author.” ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE 121 (1979), quoting 4 MICHAEL B. KLINE, RABELAIS AND THE AGE OF PRINTING 54–55 (1963).

18. THOMAS HOBBS, LEVIATHAN 91 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). Refer to note 841 *infra*.

19. By contrast, two years earlier John Milton had invoked the natural-law right that “every author should have the property of his own work,” in the context of condemning King Charles I for appropriating a prayer from *Arcadia* “as his personal meditation on the eve of his execution.” Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 23, 28–29 (Brad Sherman & Alain Strowel eds., 1994). Milton’s concern was rooted both in religion and copyright. *Id.*

action done by them. . . .”<sup>20</sup>

??Somewhere between the Renaissance and the Romantic era, humanist ideas gave birth to a “notion of the modern artist—the creative genius, the free and autonomous human being who creates unique works of art unhindered by external influences.”<sup>21</sup>

??When England passed the first Copyright Act in 1709,<sup>22</sup> many claim that it was part of a process that also produced a new conception of “author” as Romantic genius, creating in the proto-Wordsworthian sense<sup>23</sup> something wholly new under the sun. In this way, the claim goes, Parliament conferred rights on a class (authors) put forward as a stalking horse on behalf of the true beneficiaries—booksellers<sup>24</sup> and other masters of the printing press.<sup>25</sup>

The Constitution, with its attendant Copyright Clause quoted above, was adopted in 1789. In contrast to the lofty lineage of the scattered sources cited above, U.S. copyright doctrine has led a life remarkably free of their influence—indeed,

20. LEVIATHAN, *supra* note 18, at 85.

21. Marjut Salokannel, *Film Authorship in the Changing Audio-visual Environment*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 57. Under this scheme, Betzalel would be a mere artisan, as opposed to a true artist. *Id.* at 57–58.

22. Statute of Anne, 1709, 8 Ann., c. 19 (Eng.). By contrast, Eisenstein traces early copyright back to Venice in 1464. THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17, at 240. *See also id.* at 231 n.193 (Venice in 1567).

23. *See* Elton Fukumoto, Comment, *The Author Effect After the “Death of the Author”*: Copyright in a PostModern Age, 72 WASH. L. REV. 903, 907 (1997).

24. *Id.* at 906–07. For a comprehensive catalog of the changes effectuated by the advent of printing, see generally THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17. For a dissent from Eisenstein, claiming that stationers and *cartolai* of Renaissance Italy anticipated almost all the printers’ innovations, see Anthony Grafton, *The Humanist as Reader*, in A HISTORY OF READING IN THE WEST 179, 189–90 (Guglielmo Cavallo & Roger Chartier eds., Lydia G. Cochrane trans., Univ. of Mass. Press 1999) (1995). A much lengthier refutation of Eisenstein is set forth in ADRIAN JOHNS, THE NATURE OF THE BOOK (1998). Another scholar notes with amusement that the same revolutionary changes that Eisenstein ascribes to printing are attributed by others to the advent of writing over two millennia earlier. *See* ROSALIND THOMAS, LITERACY AND ORALITY IN ANCIENT GREECE 19 (1992).

25. *See* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425, 437 (1984); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 468–69 (1991); *The Author as Proprietor*, *supra* note 19, at 25, 30–31. *See also* David Saunders, *Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 93, 96 (“[S]ubject-centred history . . . can be identified as Romantic historicism.”). For an earlier instantiation of the same phenomenon, see Robert Bonfil, *Reading in the Jewish Communities of Western Europe in the Middle Ages*, in A HISTORY OF READING, *supra* note 24, at 149, 158.

of any theory whatsoever. Far from moving the courts to invoke Aristotle<sup>26</sup> or the *Poetics*,<sup>27</sup> prophets of God or troubadours, Romantic poets or stalking horses, the constitutional reference to “authors” went wholly unconstrued for over a century. When the moment came, the Court simply recited from the dictionary. The case involved a pensive pose of Oscar Wilde photographed by Napoleon Sarony. Can a photographer<sup>28</sup> qualify as a constitutional “author”?<sup>29</sup> The Court’s treatment, in full, is as follows:

An author in that sense is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” Worcester.<sup>30</sup>

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26. It was not until 1898 that the United States Supreme Court first invoked the Master. *Beley v. Naphtaly*, 169 U.S. 353, 360 (1898) (quoting Aristotle in the context of determining the effect of the Act of 1866 to Quiet Land Titles in California on the patent for land there in suit). Scattered references appear before then in state courts. *Bryan v. Walton*, 14 Ga. 185, 200 (1853) (citing Aristotle, “the prince of logicians and philosophers,” to justify the institution of slavery as “indispensable in any well-ordered State”); *Lemmon v. People*, 20 N.Y. 562, 585 (1860) (citing Aristotle for the proposition that slavery is contrary to nature).

27. The first reference in any reported U.S. case came only a few years ago, when Judge Zagel cited “the tragedy of an attorney who could not keep a confidence” as fulfilling the “perfect tragic figure” described in *Poetics*. *Grove Fresh Distrib., Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1430 (N.D. Ill. 1995). The next year, the same judge cited the same work in a copyright dispute. *American Dental Ass’n v. Delta Dental Plans Ass’n*, 39 U.S.P.Q.2d 1715 (N.D. Ill. 1996), points out that it was a fact that Marilyn Monroe had blonde hair, but queries whether that “information take[s] on some creative dimension if a critic refers to Monroe’s hair as ‘platinum cotton candy?’” He then goes on to note: “But while all metaphors are descriptive, all descriptions are not metaphors; the literal is not metaphoric, since there is no imaginative deviation from the ordinary, and hence no creativity. See *POETICS*, *supra* note 10, at 254. “And no creativity means no copyright protection.” *Id.* at 1724.

28. What about Oscar Wilde himself, who plainly had to pose in order to permit the photographer to snap the shutter—does he, too, qualify as an “author?” See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000). The Supreme Court focused on the “master mind” rather than on the poser. *Id.* at 1234. Refer to Chapter XIV, section C *infra*.

29. For an extended treatment of the background of this case, see JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW* (1991), a work whose opening line promises, “In this book, Melville Nimmer meets Bernard Edelman.” *Id.* at 1. For myself, I thought the book’s portrait of the former underdeveloped, but I am prejudiced. Turning to the latter, his book on the subject of how the *droit d’auteur* system reacted to the advent of photography, *Le droit saisi par le photographie*, would have been loved by the former, as its punning title, Gaines notes, conveys flavors as various as Ownership of the Image, Perceptions of the Law Through the Medium of Photography, Law Captured by Photography, New Technology Catching the Law Off Balance, or Photography Issues a Writ of Attachment on the Law. *Id.* at 45–46.

30. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884). Worcester knew his Latin. *Auctor* means “originator, founder, creator.” *The Genius and the Copyright*, *supra* note 25, at 429.

Having quoted that definition from Worcester's wordbook,<sup>31</sup> the Court felt the need for no further inquiry.<sup>32</sup>

Two decades later, the question reached the Supreme Court whether a poster advertising a circus performance qualified for copyright protection. Justice Holmes thereupon enunciated the epigraph which opens this chapter. Again, the efforts to trace authorship to its roots were nil. Instead, the philosophy at work here was market-driven:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.<sup>33</sup>

Much more recently, in the context of sound recordings, the Court noted that the terms "Writings" and "Authors" have "not

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31. See *Scott v. Sandford*, 60 U.S. 393, 541 (1857) (McLean, J., dissenting) ("The word 'territory,' according to Worcester, 'means land, country, a district of country under a temporary Government.'").

32. A further question remained whether a photograph itself could qualify for protection as a work of authorship. Without pretending to rule with respect to all photos, the Court noted evidence as to Sarony's

mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.

*Burrow-Giles*, 111 U.S. at 60. "These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author . . ." *Id.*

33. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903). Returning to these considerations, refer to note 1012 *infra*.

been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an ‘author’ may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’”<sup>34</sup>

All the old cases above share the attribute that they upheld the claim to authorship—whether the subject matter at hand was a photo, a poster, or a recording. By contrast, within the past decade, the Court ruled the intellectual contribution of alphabetizing names too minimal to qualify for authorship. That *Feist* case, involving the white pages of the telephone book, will be discussed at length below.<sup>35</sup>

For present purposes, therefore, the lesson is that U.S. copyright law adopts a concept of authorship that is remarkably broad, albeit not completely unbounded. Its roots lie not in theory, but in an uncritical inquiry into whether the work in question owes its origin to the putative author.

The chapters that follow track the progression of “authors,” who create works that the Constitution treats as advancing “science.” It remains to note that in contrast to its contemporary meaning in 1789,<sup>36</sup> “science” today refers not to literature and the like but rather to the domain of inventions, which is regulated by patent law. Thus, the very terminology underlying copyright doctrine has shifted over the course of the past two centuries. As we shall see, this switch is no isolated phenomenon.<sup>37</sup>

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34. *Goldstein v. California*, 412 U.S. 546, 561 (1973), quoting *Burrow-Giles*, 111 U.S. at 58.

35. Refer to Chapters III, VII *infra*.

36. “That noun is used presciently and conscientiously in its eighteenth century sense, as opposed to today’s usage in contrast to the humanities.” David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680 n.34 (2000).

37. Refer to Chapter XV *infra*.

III.  
EXTREME COPYRIGHT

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an “author”; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.

Judge Learned Hand<sup>38</sup>

A copyright case alleging infringement of an ancient text seems extreme, indeed. But within the theoretical space of all copyright cases, it does not necessarily occupy the omega point.<sup>39</sup> To explore the terrain, it is useful to posit a series of hypotheticals, designed to highlight different aspects of copyright doctrine.

A. *Minimal Requirements*

It has been said repeatedly that the threshold for copyright protection is low.<sup>40</sup> Pedestrian works routinely qualify for copyright, so long as animated by a spark of creativity.<sup>41</sup> To illustrate, consider some examples of works that plainly qualify for statutory copyright.<sup>42</sup>

The succeeding discussion assumes that all formal prerequisites for U.S. protection have been satisfied.<sup>43</sup> It thereby focuses on the core issues of originality and creativity. In brief, “originality” means that the work derives from the copyright

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38. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *aff’d*, 309 U.S. 390 (1940).

39. *Cf.* Jorge Luis Borges, *The Library of Babel*, in *THE MIRROR OF INFINITY: A CRITIC’S ANTHOLOGY OF SCIENCE FICTION* 309, 318 (Robert Silverberg ed., 1970).

40. *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

41. *See Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975) (“[A] modicum of creativity may suffice for a work to be protected.”).

42. It should be emphasized at the outset that the inquiry is limited to federal statutory protection under Title 17 of the United States Code. The present work does not venture into the territory of copyright laws of other nations, or (with the exception of Chapter XIV, section A *infra*) of the individual states of the United States. *See generally* 1 NIMMER ON COPYRIGHT § 2.02; 4 NIMMER ON COPYRIGHT § 17.01.

43. At various times in the past, works published without a valid copyright notice forfeited copyright protection. *See* 2 NIMMER ON COPYRIGHT § 7.01[A]. Published works by nationals of countries with which the U.S. lacks copyright protection likewise fall outside of protection. *See* 1 NIMMER ON COPYRIGHT § 5.05[2].

owner, as opposed to that individual having copied it from a previous source, while “creativity” refers to a spark above the level of the banal.<sup>44</sup> Thus, a complex geometrical drawing, if copied from an existing work, lacks originality, whereas a simple circle, even if drawn without reference to prior forms, lacks creativity.<sup>45</sup>

Consider the following three situations:

### **CASE 1: The Inspiration**

Even though Karen Hai-Sod dropped out of archaeology grad school, she could not stay away from digs. When the shards of an ancient document called *MMT* were pulled out from cave 4 at Qumran, she thought that they were the most beautiful thing that she had ever seen. Without pausing a beat, she went to her tent and started to compose the story that they had inspired in her head: “Her hair was dark as night. The wine she brought from Damascus was stronger than any he had ever tasted. Limbs intertwined, they realized together that their destiny was to . . . .”

### **CASE 2: Psalm of the Tunnel Builder**<sup>46</sup>

James Michener wrote an epic novel centered on life in the land of Israel. Included in his book is a new psalm, of which an excerpt reads:

Jabaal of Makor built this David Tunnel. Using six flags he found the secret. Using white cords he probed the earth. Using iron from Accho he cut the rock. But without Meshab the Moabite nothing.<sup>47</sup>

### **CASE 3: The Translation**

Poet Ted Hughes<sup>48</sup> takes an interest in Dead Sea Scrolls studies. He finds the extant translation of *MMT* almost impenetrable. Going back to the original Hebrew sources,

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44. Warren Publ'g, Inc. v. Microdos Data Corp., 115 F.3d 1509, 1523 n.2 (11th Cir. 1997) (en banc) (Godbold, Hatchett, & Barkett, JJ., dissenting).

45. See 1 NIMMER ON COPYRIGHT § 2.01[B].

46. See JAMES A. MICHENER, *THE SOURCE* 273 (1965).

47. *Id.*

48. A time for confession: The inspiration for David Nimmer, Elliot Brown & Gary Frischling, *The Metamorphosis of Contract Into Expand*, 87 CAL. L. REV. 17 (1999), came not from Ovid's original Latin; instead, it was from the Ted Hughes translation. See also *BEOWULF* v (Seamus Heaney trans., 2000).



he derives his own, much more lyrical rendition.

It is clear that Karen's short story, Michener's psalm, and Hughes's translations all fall within the scope of copyright.<sup>49</sup> Each is a literary work, fixed in a tangible medium of expression, originally composed by Karen, Michener, and Hughes respectively.<sup>50</sup> Assuming satisfaction of appropriate national and formal requirements, these works achieve the full term of copyright.<sup>51</sup>

#### B. Six Case Studies in Search of an Author

Of the uncounted myriads of literary, musical, audiovisual, and graphic works created every year, all but a tiny fraction resemble the foregoing three cases in terms of falling without question into the subject matter of copyright protection. There is no point in multiplying those straight-forward applications. Instead, we learn about the ingredients of authorship by positing cases at or past the borderline of protection. Let us start with six.

#### **CASE 4: The Fountain**<sup>52</sup>

In 1492, King Ferdinand and Queen Isabella sent from Spain not only the Admiral whose name eventually became eponymous with Columbia Pictures, but also all Moslem and Jewish subjects of al-Andalus. Following the *reconquista*, Christian troops overran the Hall of the Caliphs outside Almodóvar del Rio, and confronted its wondrous waters. The warlord commanded his engineers to disassemble the incredible machinery, in order to learn its secrets. They succeeded on the first count, but not on the second. In fact, they could not even restore the fountain to operation. For centuries, it languishes dry.

Along comes legendary hydrologist M.C.A. Wassermann in 2010 and, puttering with some of the ancient remains still *in situ*, succeeds where no one else has before. The fountain now flows smoothly. A steady stream of tourists

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49. For different considerations in the context of an interlinear translation, refer to Case 20 (The Pedant) *infra*.

50. Lurking here is a question as to whether the circumstance of the creation of Hughes's translation divests it of copyright protection. Refer to Chapter XI *infra*.

51. At present, that term runs until 70 years past the death of Karen, Michener, and Hughes respectively. 17 U.S.C. § 302(a) (Supp. IV 1999).

52. I once read something resembling this story. See RICHARD FLETCHER, *THE QUEST FOR EL CID* (1989). But when I searched for it, I came up blank—a common affliction of The Reader. See JAMES J. O'DONNELL, *AVATARS OF THE WORD: FROM PAPYRUS TO CYBERSPACE* 62 (1998).

comes to admire the fountain's steady stream.

Does Wassermann have a copyright in the flowing fountain?

#### **CASE 5: The Phone Book**

A local phone company executive decides to put together the finest white-pages directory that his company has ever produced. After elaborate surveys, he demarcates the communities to be included within the service areas of the five white-page directories produced by his company in a new and innovative way. He also devotes a great deal of study to the alphabetization of surnames — including patronymics, hyphenated names, and other unorthodox combinations that his predecessors had never confronted. The resulting phone book is, in his own estimation, “a work of art.”

Does this telephone book deserve copyright protection?

#### **CASE 6: The Atom**

Sir Ernest Rutherford developed the model of an atom as a solid nucleus around which circle electrons in fixed orbits (one for hydrogen, two for helium, etc.). The theory was revolutionary.<sup>53</sup> Not only did it overturn the works of prior theorists from Democritus and Epicurus to Dalton and Geiger, but it also changed the very notion of what an atom (from the Greek *atomos*, meaning “not capable of being broken down”) means.

The depiction of an atom as a “miniature solar system,”<sup>54</sup> familiar to every schoolchild, is Rutherford's handiwork.<sup>55</sup>

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53. By 1911, Ernest Rutherford's experiments with  $\alpha$  particles (helium nuclei) allowed him to posit that the atom consisted largely of empty space with a dense, heavy nucleus. See THEODORE L. BROWN & H. EUGENE LEMAY, JR., CHEMISTRY: THE CENTRAL SCIENCE 41–43 (1977).

54. There was actually an elaboration a few years later. “[I]n 1913, Niels Bohr proposed that an atom resembled a small scale model of the solar system, in which even smaller, negatively charged particles called electrons orbited the nucleus at high speeds in the same way that the planets revolve around the sun.” JOHN E. BETTS, ELEMENTS OF APPLIED PHYSICS 394 (1983).

55. It also happens to be displaced. Bohr later developed a theory of “complementarity,” whereby the electron is seen not only as an orbiting particle but as a wave as well. For that contribution (as well as for a mysterious encounter between the Jewish Bohr and chief Nazi physicist Werner Heisenberg in occupied Denmark), he is the subject of the hit London play, *Copenhagen*.

Does Rutherford have copyright over every depiction of the atom?

**CASE 7: The Skeleton**<sup>56</sup>

Dina Sauer, an eccentric but gifted paleontologist, has had the good fortune to excavate the most complete skeleton ever found of an apatosaurus. She assembles the skeleton into an innovative and new configuration.

A cast had been made of each bone. Sauer's bitter rival, Terry Ductile, in turn mounts a rival exhibition, in which he has assembled the bones slightly differently.

Can Sauer prevail for copyright infringement against Ductile for having created a derivative work infringing the copyright in her sculptural creation?

**CASE 8: The Veer Option**

The Houston Cougars football team was performing poorly and Coach Bill Yeoman was in danger of losing his job.<sup>57</sup> As a desperation measure, he implemented the "veer option." "We knew we were on our way out, and I wanted a chance to see if the darned thing worked."<sup>58</sup> By the next year, the veer and its triple option attack led the Houston Cougars to an 8-2 record and the first of three straight college offensive titles.<sup>59</sup>

Taking note, other coaches instructed their players to emulate the play. Coach Yeoman claims a violation of his original contribution to football.<sup>60</sup>

Is the veer option copyrightable?

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56. See Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archaeology*, 10 HARV. J. L. & TECH. 281 (1997).

57. See JERRY WIZIG, *Bill Yeoman, Father of the Year*, in EAT 'EM UP, COUGARS: HOUSTON FOOTBALL 235 (1977).

58. *Id.* at 237. See also HOMER RICE, HOMER RICE ON TRIPLE OPTION FOOTBALL 17 (1973).

59. See *Bill Yeoman*, *supra* note 57, at 237. By 1983, Bill Yeoman had achieved an exceptional 148-86-8 record that included ten bowl teams and three conference titles. ROBERT M. OURS, COLLEGE FOOTBALL ALMANAC 71 (1984).

60. This paragraph, unlike the previous one, is fictitious.

**CASE 9: The Shivviti**<sup>61</sup>

Reb Chaim briskly toured Czechoslovakia, in the company of his wife, Doreen. The pair visited the Jewish Museum in Prague, repository of Jewish artifacts ransacked from throughout Bohemia and beyond by the Nazis, to serve as a shrine to “the extinct race.” In a forgotten corner, the pair’s eyes alighted upon a crumbling *shivviti*.<sup>62</sup> Doreen made a mental note to herself that perhaps she should “liberate” that artifact before it crumbled further. However, when she came back after the perfunctory tour with their guide, she noted that it had already mysteriously disappeared. Back at her hotel room, the mystery cleared up—her husband had taken it upon himself to lay hold of the document. “It just didn’t belong in a museum founded by the Nazis, where it was languishing, untended, under Communist control. I returned it to the use of the Jewish people.”

Does Reb Chaim have a copyright in the text of the *shivviti*?

The distinctive feature of each of the six cases set forth above is that copyright protection is lacking in each. Indeed, that proposition strikes me as so self-evident that I would be surprised to see any commentator argue to the contrary under current U.S. copyright doctrine.<sup>63</sup>

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Case 4 posits fixing a fountain. No doubt Wassermann had to exert considerable ingenuity in the fields of hydrology, Islamic architecture, history, and archaeology in order to perform his feat of legerdemain. He is unique in that regard, having succeeded where all others failed before him. The result of his handiwork is a great boon to the advancement of knowledge.<sup>64</sup> Nonetheless,

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61. The rabbi who officiated at my wedding consented to my inclusion of this bit of his autobiography. (He says that I have mangled the details, though I claim to have improved them.)

62. A *shivviti* is an ornamental scroll to be placed on the eastern wall, towards which direction observant Jews focus concentration in prayer (assuming that one is located to the west of Jerusalem). It derives from *Psalms* 16:8, *shivviti Hashem lenegdi tamid* (“I have placed the LORD before me always.”).

63. Of course, the losing parties in *Feist* felt differently about Case 5. Nonetheless, a unanimous Supreme Court has spoken. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 341 (1991). By the same token, U.S. law could have developed differently in many particulars that might have given rise to arguments under the other cases. The point is that under current U.S. copyright doctrine, an argument in favor of copyright protection in these six cases strikes me as bordering on the frivolous.

64. See generally FRANCES & JOSEPH GIES, *CATHEDRAL, FORGE, AND WATERWHEEL: TECHNOLOGY AND INVENTION IN THE MIDDLE AGES* (1994).

those circumstances hardly afford Wassermann copyright protection. To repair a machine is not the writing of an author in which copyright could conceivably inhere.<sup>65</sup>

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Case 5 represents the facts of *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>66</sup> Justice O'Connor, writing for a unanimous Supreme Court, held there that although a telephone book could contain copyrightable material (in its preface and yellow pages, for example), insofar as the alphabetized white pages are concerned, no copyright protection lies. Accordingly, Case 5 represents the one case among the half-dozen currently under consideration that was litigated to completion and subject to binding precedent.

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Case 6 illuminates another aspect of the matter. Clearly, Rutherford made original, creative, and valuable contributions to science.<sup>67</sup> But that alone cannot secure him copyright protection.<sup>68</sup>

Also clear is that Rutherford can claim copyright protection in the precise drawing he has made of, say, a barium atom with fifty-six rotating electrons. He could even secure copyright protection over a drawing of a simple hydrogen atom with but one revolving electron, insofar as the precise shading of the nucleus, angle of the orbit, and other incidents of graphic art are presented. But the further question arises whether anyone who produces her own rival drawing of the type of atom that Rutherford discovered thereby incurs infringement liability.

The answer to that question must be "no." Those who take a photograph or make a drawing are entitled to protection of their handiwork—but only of the artistic features, not of the

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65. *Cf.* *Gemel Precision Tool Co. v. Pharma Tool Corp.*, 35 U.S.P.Q.2d 1019, 1022 (E.D. Pa. 1995). Moreover, Wasserman fails to qualify as a sculptor, given that he left the external configuration of the fountain unaffected.

66. 499 U.S. 340 (1991).

67. *See* Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885, 897 (1992) ("Einstein's theory of relativity represents one of the high points in the history of human intellectual creativity, but neither patent nor copyright would protect it."). *See also* *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 979 (7th Cir. 1997) ("Einstein's articles laying out the special and general theories of relativity were original works even though many of the core equations, such as the famous  $E = mc^2$ , express 'facts' and therefore are not copyrightable.").

68. Though scientists surely employ creativity and originality to develop ideas and obtain facts and thereafter to convey the ideas and facts in scholarly articles, it is primarily the ideas and facts themselves that are of value to other scientists in their research. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925 n.11 (2d Cir. 1994).

underlying work itself. Thus, the copyright in a plush poodle (more colloquially known as a “stuffed animal doll”)<sup>69</sup> cannot prevent anyone else from merchandising his own poodle;<sup>70</sup> a drawing of a haystack conveys no rights whatsoever to prevent others from drawing the same haystack;<sup>71</sup> and a photograph of Oscar Wilde prevents no one else from taking a different shot of the celebrated dramatist.<sup>72</sup>

To the extent that copyright protection were recognized in Rutherford’s atom, an entirely different dynamic would unfold. Instead of protection lying for the particular angle, scale, shape, perspective, or shading chosen by the artist, the copyright monopoly would ratchet up to protect the item itself. No sensible interpretation of copyright law could abide such a result. Physics would stop dead in its tracks as even attempts to disprove the validity of the Rutherford model would be deemed infringing to the extent that they were illustrated with graphic representations. The atom stands outside copyright protection.

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In Case 7, similar considerations doom Sauer’s attempt to vindicate copyright protection. Although sculptural works plainly fall within the scope of copyright protection,<sup>73</sup> and although the sculptor might choose whatever material she likes for her handiwork, including bones,<sup>74</sup> a paleontologist’s three-dimensional depiction of prehistoric articulation plainly fails to qualify for copyright protection.

At this point, a question rises to the fore: Why is it that drawings (such as Rutherford’s) and sculptures (such as Sauer’s) are categories that lie within copyright, and yet protection is denied to the particular drawing and sculpture in Cases 3 and 4?

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69. See, e.g., *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 505 (7th Cir. 1994).

70. See *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co.*, 378 F. Supp. 485, 490 (S.D.N.Y. 1974), *aff’d*, 509 F.2d 64 (2d Cir. 1974) (where only similarity was physical likeness of a turtle, “each designer was merely representing nature”).

71. See *Brown v. McCormick*, 23 F. Supp. 2d 594, 604 (D. Md. 1998) (quilt design of black bird flying over man and woman holding hands does not prevent others from producing rival quilts with that image); *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1376 n.3 (S.D. Ga. 1998) (copyright in plaintiff’s photograph of sculpture in Savannah’s Bonaventure Cemetery, used on the cover of the book *Midnight in the Garden of Good and Evil*, accorded no rights to prevent defendants from commissioning an original, rival photo of the same subject matter, to use in advertising the movie based on that book), *aff’d in part*, 212 F.3d 1210 (11th Cir. 2000).

72. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

73. 17 U.S.C. § 102(a)(5) (1994).

74. See *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 491 (4th Cir. 1996).

The answer, it would seem, lies in the fundamental enterprise in which the putative author is engaging. If Rutherford were an artist attempting to give vent to his Blakean vision, no less than if Sauer were a sculptor trying to make an aesthetic point, each would obtain copyright. But Rutherford is a physicist attempting to portray the underlying substance of matter, and Sauer a paleontologist attempting to show the way an apatosaurus actually walked. Their contributions, in short, lie along the objective, rather than the aesthetic, plane. Copyright protection requires the subjective choice of an author in order for protection to lie.<sup>75</sup> Cases 6 and 7 fail that test.

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Copyright extends to dances and other choreographic works.<sup>76</sup> Turning to Case 8, the players on a sports field, no less than the performers on a stage, move their bodies for the entertainment and delight of the audience.<sup>77</sup> In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*,<sup>78</sup> the court held a baseball game to be a work of authorship subject to copyright protection.<sup>79</sup> But review of the court's opinion shows that it conflated the creativity that went into filming the activity of the players on the field with the game itself.<sup>80</sup> Accordingly, subsequent cases have uniformly rejected the theory that sporting events can obtain copyright protection.<sup>81</sup>

Were the situation otherwise, monstrous results would follow. Monday-morning quarterbacking would be converted into *post hoc* litigating as the losing team filed suit against the winners for purloining a copyrighted play. It takes little imagination to conjure up a parade of horrors here such that copyright protection for sporting events should not even be

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75. This point is the key that unlocks much of the discussion that follows. Refer to Chapter VII *infra*.

76. 17 U.S.C. § 102(a)(4) (1994).

77. If remuneration were the key here, then professional football players would be much more dear to the copyright core than is the ballet corps.

78. 805 F.2d 663 (7th Cir. 1986).

79. *Id.* at 668.

80. See the criticism of this case in 1 NIMMER ON COPYRIGHT § 2.09[F].

81. "In fact, *Nimmer on Copyright*, the oft-cited treatise which the Supreme Court recently characterized as the work of a '[l]eading scholar[ ]', specifically and resoundingly rejects the analysis and conclusion of the Court in *Baltimore Orioles* regarding the protectibility of an athletic event." Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1091 (S.D.N.Y. 1996) (citation omitted). Although the Second Circuit reversed the holding of that case on other grounds, it agreed with the quoted language by also citing *Nimmer on Copyright* for the proposition that *Baltimore Orioles* is to be disapproved. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846-47 (2d Cir. 1997).

considered.

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Very little needs to be said about Case 9. By converting the ancient document to his control, Reb Chaim either committed an act of petty theft or of cultural liberation, depending upon one's perspective.<sup>82</sup> Opinions can differ on that score.<sup>83</sup> But there can be no claim that Reb Chaim thereby achieves copyright protection for words that he did not even colorably author.

#### C. Le Chanson de Roland

##### **CASE 10: The Reader**<sup>84</sup>

You are reading this article. Do you have a copyright in it?

This case is, if possible, even more straightforward than its predecessor. You cannot possibly claim to have authored the piece that I wrote. Accordingly, any claim that you advance to copyright protection over it is baseless.

#### D. More Works Lacking Authorship

##### **CASE 11: The Doppelgänger**<sup>85</sup>

A stranger comes to Green Town, Illinois. He checks into the local hotel as "Charlie Dickens." Taking a yellow Ticonderoga No. 2 pencil out of his knapsack, he starts to write out in longhand *A Tale of Two Cities*. He is smitten

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82. "We cannot resolve cultural policy questions on rational grounds alone." John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 340-41 (1989). Who would not applaud Dutch art forger Han Van Meegeren when he sold a forged Vermeer to Nazi overlord Hermann Goering? See *id.* at 360. Refer to note 783 *infra*. On the other hand, when Michelangelo himself forged a sculpture to look like a Roman antique, a different dynamic operates. DAVID QUINT, ORIGIN AND ORIGINALITY IN RENAISSANCE LITERATURE 1-4 (1983). Refer to note 959 *infra*.

83. See Cindy Alberts Carson, *Raiders of the Lost Scrolls: The Right of Scholarly Access to the Content of Historic Documents*, 16 MICH. J. INT'L L. 299, 309-14 (1995).

84. See BERNHARD SCHLINK, *THE READER* (Carol Brown Janeway trans., Pantheon Books 1997) (1995). As George Steiner comments, "The reviewer's sole and privileged function is to say as loudly as he is able, 'Read this' and 'Read it again.'" *Id.* at back cover.

85. This case derives from RAY BRADBURY, *Any Friend of Nicholas Nickleby's Is a Friend of Mine*, in *I SING THE BODY ELECTRIC!* 200 (1987). A different vector shoots out from François Truffaut's filming of Ray Bradbury's *Fahrenheit 451*: "Each exile from the book-burning state adopts the name of a text he has learnt by heart and which he represents: one person is now called *David Copperfield*, another *Emil*, or even *Paradise Lost*." GEOFFREY H. HARTMAN, *THE FATE OF READING* 255 (1975), quoted by Thomas Docherty, *Authority, history and the question of postmodernism*, in *WHAT IS AN AUTHOR?*, *supra* note 11, at 53, 56.



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with the local librarian who calls herself “Emily Dickinson.” The lovebirds run off, where Charlie sharpens his pencil to write *Bleak House*.

Does Charlie have copyright protection for the works that he copies?

This case is just about as patent as the two that have come before. It is Charles Dickens who wrote the great classic, not the man who calls himself “Charlie.” Dickens alone can claim copyright protection over his handiwork; Charlie is a mere interloper. There is therefore no possibility of copyright protection here.

**CASE 12: The Forgery**<sup>86</sup>

Marklund, the picture framer, invested all his life savings (and then some!) into buying *The Madonna with the Dagger*, a triptych executed by Sweden’s most famous painter, Nils Dardel. After a series of escapades in which, *inter alia*, thieves amputated his hand (that at the time happened to be manacled to a “tamper-proof” briefcase containing the painting), Marklund realized that the only effective way to retain the painting was to copy it. Because he had spent most of his adult life gazing at it, he was able to produce an exact copy.

The copy was in fact identical right down to the most minute brush stroke. As Marklund explained to the insurance adjusters, “There are two copies of her. . . . She’s unique in that respect too. She’s two and yet only one. A bit like the Trinity.”<sup>87</sup>

Does Marklund own a copyright in his rendition of *The Madonna with the Dagger*?

Marklund is in some respects similar to Charlie, and in some respects different. Insofar as artistic technique is concerned, Marklund is a genius. For whereas any schmo can take out a pencil and copy words in longhand, fewer than one in a million could paint *The Madonna with the Dagger* indistinguishably from

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86. This example derives from TORGNÝ LINDGREN, IN PRAISE OF TRUTH (Tom Geddes trans., Harper Collins Publishers 1994) (1991).

87. *Id.* at 141.

Dardel's original.<sup>88</sup> To that extent, Marklund markedly differs from Charlie.<sup>89</sup>

Yet there is still a physical difference between the original and the copy. Looking at Marklund's reproduction instead of the Dardel original, no matter how close the two may be, is simply unsatisfying.

In part we resent having been fooled, but there is more: The magic that only the authentic object can work is dissipated. There seems to be something paradoxical about a reproduction of a genuine, unique artifact, whether it is a painting, a manuscript, or a funerary figure. The truth, the certainty, the authenticity, seem to inhere in the original.<sup>90</sup>

Notwithstanding any differences from the standpoint of artifacts, insofar as copyrightable authorship is concerned, Marklund stands in the same category with Charlie. For whatever artistic originality went into *The Madonna with the Dagger* was imbued by Nils Dardel, no less than Charles Dickens imbued artistry into *A Tale of Two Cities*. Marklund is simply a copier, no less than Charlie.<sup>91</sup> As a matter of authorship,

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88. What about photographing a piece of art? Is the product independently copyrightable? The labor involved seems, if anything, even less than writing out a literary text in longhand, albeit more significant than photocopying the same text. In any event, the earlier statute applicable in the United States explicitly extended protection to "Reproductions of a work of art." Act of Mar. 4, 1909, ch. 320, § 5(h), 35 Stat. 1075 (1909). But the most recent decision on point denies protection under the current Act. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 430 (S.D.N.Y. 1998), *amended by*, 36 F. Supp. 2d 191, 200 (S.D.N.Y. 1999) (reaching the same conclusion under British copyright law). See Kathleen Connolly Butler, *Keeping the World Safe From Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM. & ENT. L.J. 55, 107-26 (1998).

89. "The best readings of art are art. This is, most literally, the case where painters and sculptors copy previous masters." GEORGE STEINER, *REAL PRESENCES* 17 (1989).

90. *The Public Interest in Cultural Property*, *supra* note 82, at 346. The same sensibility would animate us if Bill Gates acted like a "Robber Baron" by buying a unique Da Vinci manuscript, placing it on the Internet and then inviting party guests to "puff away on cigarettes rolled [from the original]." Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 291-92 (1999). For the original contains something ineffable, the loss of which is felt even if widescale access to a copy is guaranteed. Hence the legitimate mourning currently underway over the Taliban's destruction of ancient Buddhas.

91. One case would rule to the contrary, at least where "through the use of special techniques, skills and judgment" the claimant is able to produce a complex three-dimensional sculpture in a smaller scale. *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 266 (S.D.N.Y. 1959) (involving Rodin's *Hand of God*, "one of the most intricate pieces of sculpture ever created," and embodying "[i]nnumerable planes, lines and geometric patterns"). But in that case, the court also "relied on substantial differences in the appearance between the reproduction and the original," insofar as the plaintiff's base differed from Rodin's public domain original. *Hearn v. Meyer*, 664 F. Supp. 832, 839

therefore, there is none here.<sup>92</sup> Accordingly, any claim of copyright protection fails.<sup>93</sup>

### **CASE 13: The Dirigible**

A. A. Hoehling published *Who Destroyed the Hindenburg?*<sup>94</sup> That book “tapped Hoehling’s investigation, including personal interviews and historical research, into the luxury zeppelin, which punctually floated its wealthy passengers from the Third Reich to the United States [and] exploded into flames and disintegrated in 35 seconds as it hovered above the Lakehurst, New Jersey Naval Air Station at 7:25 p.m. on May 6, 1937.”<sup>95</sup> Hoehling’s book “is presented as a factual account, written in an objective, reportorial style.”<sup>96</sup> Based on his detailed investigations, Hoehling rejected all previously proffered explanations for the explosion. He concluded that Eric Spehl, a rigger on the Hindenburg’s crew, planted an explosive device on the dirigible, “constructed of dry-cell batteries and a flashbulb.”<sup>97</sup>

A later author capitalizes on the endless fascination with Nazis and disasters to write his own book on the great explosion. He lifts Hoehling’s “Spehl as saboteur” theory. Of course, an epic Hollywood “disaster” movie follows.

Has Hoehling suffered infringement of his copyright?

This “hypothetical” is not. Instead, when the Second Circuit ruled on the matter, it denied Hoehling any copyright in facts, even those presented in the work that he admittedly authored.<sup>98</sup>

But the riposte could immediately arise that the “facts” were

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(S.D.N.Y. 1987).

92. See *Peker v. Masters Collection*, 96 F. Supp. 2d 216, 218, 221 (E.D.N.Y. 2000) (creating works of “fine art” out of a poster by “attempting to match the color and style of the original painting” as much as possible, “though their creation may require special skills, they do not possess any originality that would warrant an independent copyright”).

93. One must distinguish here between the artifact and the conceptual category of the artwork. Traditional copyright law protects art in general (whether literature, fine art, music, etc.). By contrast, the Visual Artists Rights Act of 1990, an amendment to the Copyright Act, protects artifacts. See 3 NIMMER ON COPYRIGHT § 8D.06[A][2]. Refer to note 922 *infra*.

94. The facts here are drawn from *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980).

95. *Id.*

96. *Id.* at 975.

97. *Id.*

98. *Id.* at 980.

wrong—in other words, Hoehling could have been laughably mistaken in blaming Eric Spehl; subsequent investigation might cause his theory regarding the dry-cell batteries in the flashbulb to go up in smoke.

Those circumstances did not detain the Second Circuit. All facts are in some sense provisional. Tomorrow's truth might (and very likely will) displace today's. Nonetheless, having presented the fruits of his research as factual, Hoehling cannot succeed to copyright protection over them. For that reason, his claim fails.

#### **CASE 14: Fermat**<sup>99</sup>

In 1637, Pierre de Fermat annotated his copy of Diophantus' *Arithmetika* with a statement relating to the Pythagorean theorem.<sup>100</sup> He then wrote "I've found a remarkable proof of this fact, but there is not enough space in the margin to write it."<sup>101</sup>

Over hundreds of years, some of the greatest minds in mathematics turned to the solution. None could find it. Some even concluded that there was no solution, and the world had been victimized by Fermat's Practical Joke.

Prof. Andrew Wiles had a lifelong fascination with this problem. For seven years, he worked on it in secrecy. "Perhaps I could best describe my experience of doing mathematics in terms of entering a dark mansion. One goes into the first room, and it's dark, completely dark. One stumbles around bumping into the furniture, and then gradually, you learn where each piece of furniture is, and finally, after six months or so, you find the light switch. You turn it on and suddenly it's all illuminated. You can see exactly where you were."<sup>102</sup>

On October 25, 1994, Wiles published papers solving this conundrum.<sup>103</sup> His solution electrified the mathematical world. What had baffled theorists for three centuries was

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99. See generally PAUL HOFFMAN, *THE MAN WHO LOVED ONLY NUMBERS* 183–201 (1998).

100. Although there are solutions for  $x^n + y^n = z^n$  when  $n = 2$ , Fermat theorized that there would be no solutions when  $n > 2$ . See TOM STOPPARD, *ARCADIA*, act 1, sc. 1 (1993).

101. <http://www.cs.unb.ca/profs/alopez-o/math-faq/mathtext/node9.html>.

102. <http://personal.att.bellsouth.net/att/s/p/spud52/andrewwilesbio.htm>. Strange *sequelae* followed. See *THE MAN WHO LOVED ONLY NUMBERS*, *supra* note 99, at 184 (noting that The Gap offered to pay Wiles to model jeans).

103. Andrew Wiles, *Modular Elliptic Curves and Fermat's Last Theorem and Ring Theoretic Properties of Certain Hecke Algebras*, cited in <http://www.cs.unb.ca/profs/alopez-o/math-faq/mathtext/node9.html>.

now no longer an unsolved mystery.

Does Wiles have a copyright to his solution to Fermat's Last Theorem?

Wiles would seem to have as weak a case as Hoehling's. What he has laboriously come up with is simply a series of mathematical equations.<sup>104</sup> Individually and collectively, they stand unambiguously outside of copyright protection.<sup>105</sup>

Careful distinctions must be drawn here. Insofar as Wiles wishes to protect the copyright in his article analyzing the problem, *Modular Elliptic Curves and Fermat's Last Theorem*, he is on solid ground. Yet that article may consist largely of the mathematical equations by which Wiles proved Fermat's Last Theorem. In that regard, it seems that Wiles' essay, like Marklund's painting, lies both within and without copyright protection.

The answer to this riddle is to approach the matter sequentially. In the first analysis, Wiles has no protection in the proof of Fermat's Last Theorem. If that proof occupies 90% of his article, so be it—the result is that 90% of the article lies outside copyright protection and can be freely copied. (At the limiting case in which it occupies 100%, the whole article is in the public domain.) Whatever original expression (matters apart from equations and the like) Wiles composed is subject to copyright.<sup>106</sup>

Copyright is not an all-or-nothing proposition. Many works are partially protected, and partially not. For instance, consider a movie dramatizing *The Odyssey*. Those elements of the film are protected that owe their origin to the filmmakers, whereas other elements—notably, the underlying story—simultaneously lie in the public domain.

#### **CASE 15: The Cosmetologist**<sup>107</sup>

Jane Plane's acting career is in the toilet and heading south. After sitting through a performance of *A Chorus Line*, the T&A number emboldens her to forsake thespian exercises in favor of plastic surgery.

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104. Wiles' equations presumably do not match those that Fermat lacked room to scribble in the margin. But "distinctive" does not translate to copyrightable. Refer to Chapter VII, section (A)(1)(b) *infra*.

105. See *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir. 1926).

106. In fact, the initial solution contained minor holes, which Wiles later plugged. See *THE MAN WHO LOVED ONLY NUMBERS*, *supra* note 99, at 198–99. We thus revert to "provisional truths," such as encountered above in Case 13 (The Dirigible).

107. These facts draw inspiration again from *IN PRAISE OF TRUTH*, *supra* note 86.

Entrusting her fate—not to mention her body—to the Cosmetic Surgeon to the Stars, she emerges at the end as a new person (on the physical plane). Her doctor even bestows upon her a new name: Tzili Coen. Soon, Tzili's photograph adorns the covers of *Cosmopolitan*, *Elle*, and *Vanity Fair*. Having been burned in previous cases, each publication is punctilious to secure full permission from Coen and from the photographers in question. But they are blindsided by the Surgeon's claim of copyright infringement.

Can the Surgeon claim a copyright in Tzili's body?

I earnestly pray that such a case never comes to pass. For the "sculptor in the medium of flesh and bone" is He Who fashioned Eve, not some wannabe with a medical degree.<sup>108</sup> Yet in an era epitomized by *Who Wants to Marry a Multimillionaire?*,<sup>109</sup> one must be prepared.<sup>110</sup> Hopefully, any court presented with such an obscene claim would dismiss it summarily, if on no other basis than the constitutional prohibition on involuntary servitude and other badges of slavery.<sup>111</sup>

Nonetheless, the doctrinal question remains: What aspect of copyright law prevents the Surgeon from prevailing?

It is not enough simply to point out that bodies are not enumerated among the works of authorship contained in the Copyright Act, notwithstanding that they hardly constitute new forms of expression not extant as of its passage in 1976. For the same consideration applies to clothing—it too is not enumerated among the works of authorship, notwithstanding that clothes, like bodies, have been around for a long time. Nonetheless, the Ninth Circuit has held that an article of clothing developed for other than utilitarian purposes, such as for purposes of display, could obtain copyright protection.<sup>112</sup> The same argument, so the Surgeon asserts, vouchsafes his copyright protection for Tzili's body.

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108. ROBERT ALTER, *THE ART OF BIBLICAL NARRATIVE* 29 (1981) (explicating *Genesis* 2:21). Perhaps some of the same considerations weigh against protection for the apatosaurus bone "sculpture." Refer to Case 7 (The Skeleton) *supra*.

109. As a counterweight, perhaps one can take hope from the record-breaking publication of the latest Harry Potter book, on July 8, 2000.

110. The recent decoding of the human genome may bring these problems to the fore sooner rather than later. Refer to note 757 *infra*.

111. U.S. CONST. amend. XIII.

112. See *Poe v. Missing Persons*, 745 F.2d 1238, 1243 (9th Cir. 1984) (holding that the district court erred by not determining whether a swimsuit displayed in a museum was a work of art subject to copyright protection).

It is difficult to do much better than to state apodictically that a body, even as augmented,<sup>113</sup> simply is not subject to copyright protection.<sup>114</sup> The Surgeon should be denied copyright protection on that basis.

### **CASE 16: The Shrink**

Although Dr. Kefalos is a brilliant analyst, his skills are taxed to the utmost by the curious case of Sy Kadique. After many years of five-day-a-week therapy with the patient and countless hours spent ruminating, Kefalos finally comes up with the grand unified theory explaining the strange deformations in Kadique's personality: The patient is simultaneously afflicted with Multiple Personality Disorder and three other maladies never before combined in one individual.

Kefalos' commentary on this strange case becomes a runaway bestseller.<sup>115</sup> A reader of the book decides to write a play whose protagonist is modeled on Kadique. Absolutely no dialogue, plot, perspective, or unfolding of events is taken from the Kefalos book. Nonetheless, the main character in the play is unmistakably the Sy whose personality Kefalos has painstakingly unmasked. The playwright successfully rebuffs a right of publicity suit brought by the court-appointed guardian of Kadique's affairs.<sup>116</sup>

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113. Deriving "author" from *augere* (to augment), one commentator moves to "the female body: one can either adorn it with make-up, tattoos, or scarification, 'which aim at transforming the woman into a walking work of art' . . ." Bernard Edelman, *The Law's Eye: Nature and Copyright*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 79, 85.

114. See *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 715 (Cal. Dist. Ct. App. 2000) ("We conclude that . . . a human likeness is not copyrightable, even if captured in a copyrighted photograph . . ."). *But cf.* *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000) (parties both agree that seven layers of makeup for *Cats* is copyrightable).

115. *Cf.* OLIVER W. SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* (1987) (studying individuals afflicted with psychological disorders by examining patient studies, case histories, and illustrative stories); FLORA RHETA SCHREIBER, *SYBIL* (1973) (detailing the true-life story of a woman possessing sixteen separate personalities as a result of a severe psychological disorder); IRVIN D. YALOM, *LOVE'S EXECUTIONER* (1990) (recounting stories of a psychotherapist's interactions and subsequent therapeutic treatment of his patients).

116. *Cf.* *Hampton v. Guare*, 195 A.D.2d 366, 366 (N.Y. App. Div. 1993) (denying relief to plaintiff against producers of *Six Degrees of Separation*, a play "inspired in part by a widely reported criminal scam in which the plaintiff had convinced several affluent New Yorkers to allow him into their homes and to give him money and other things of value by pretending that he knew their children from college, and that he was the son of the actor Sidney Poitier").

Does Dr. Kefalos have a copyright in the character of Kadique?

Many a mystery novel obtains its vitality (not to mention its readership) based on a keen psychological profile of a deviant personality. Those novels plainly fall within copyright protection.<sup>117</sup> Does parallel logic provide protection for Dr. Kefalos?

The answer is “no.” For Kefalos, like Hoehling, is not attempting to engage in an aesthetic exercise. Instead, he is attempting to ascertain a fact. That fact happens to concern the psychology of his analysand. But Kefalos no more owns Kadique than does the Surgeon Tzili’s body. For these reasons, copyright protection should be deemed lacking here, as well.<sup>118</sup>

Moreover, this conclusion does not change to the extent that Kefalos turns out to be in error. In other words, if Kadique subsequently displays behavior that proves his pathology to be other than what Kefalos had diagnosed, the result is not to yank the psychological profile contained in the bestseller out of the public domain and clothe it anew with copyright protection. Instead, the result is the same as if further historical research debunks Hoehling’s thesis as to the end of *The Hindenburg*. In both cases, the work might now stand discredited—but it does not thereby secure copyright protection. Were the matter otherwise, one would have to subscribe to the latest issue of historical (and psychological) journals to learn if the works of Hoehling (and Kefalos) are protected by copyright this month, or not.

#### **CASE 17: Bingo Cards**<sup>119</sup>

David Wilbur, a computer scientist, designed a computer program to fill in numbers on bingo cards. Pursuant to the rules of bingo, each of the five columns on such a card must contain five numbers, except that the center number is blank. In addition, tradition mandates that the numbers under “B” run from 1 through 15, under “I,” from 16

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117. See 1 NIMMER ON COPYRIGHT § 2.04.

118. See *The Law’s Eye*, *supra* note 113, at 81 (“human nature cannot be appropriated”).

119. This case telescopes *Stuart Entertainment Inc. v. American Games Inc.*, Civil Action No. 1-96-CV-70036 (S.D. Iowa Mar. 19, 1998). I submitted an expert report on behalf of the defendant in that case. In my report, I cited, *inter alia*, Ralph D. Clifford, *Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?*, 71 TUL. L. REV. 1675 (1997). The other side retained Clifford as its expert witness.



through 30, under "N," from 31 through 45, under "G," from 46 through 60, and under "O," from 61 through 75.

Wilbur's program generated 9000 cards meeting the above criteria. Each card in the series was different, so as to avoid multiple winners of any particular round of bingo. The key to the computer programming was that number sequences were random. According to a statistician, there are "roughly 111 quadrillion" potentially compliant bingo cards.<sup>120</sup> Thus, the 9000 cards generated by Wilbur's computer program scarcely threatened to monopolize the field.

Are Wilbur's bingo cards subject to copyright protection?

Bingo cards furnish a useful contrast with the white pages of the phone book—they occupy opposite extremes of the spectrum, one being absolutely determined and the other not determined at all.

Something will be considered "creative" only when it appears to come from neither a purely mechanical process, nor a purely random one. We identify this process that navigates between determinism and randomness—this process that produces the "non-mechanical new"—as something that goes on inside the individual person.<sup>121</sup>

Note that an elephant at the Phoenix Zoo paints canvases "with a striking combination of colors and forms."<sup>122</sup> Nonetheless, copyright does not inhere in such a work, either because "we do not believe a non-human is capable of making choices, or . . . we have made a policy decision that only human-generated work is protectable."<sup>123</sup> Instead, copyright protection exists to protect subjective human choices.<sup>124</sup> It is not there to protect random numbers generated by a computer.<sup>125</sup> For that reason, when this actual case arose, the court properly denied copyright protection to Wilbur's bingo cards.<sup>126</sup>

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120. See *Stuart Entm't*, Aff. of Stuart Klugman ¶ 8, Nov. 6, 1996.

121. Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 114 (1998).

122. *Laser Bones*, *supra* note 56, at 300. In fact, without being told who the "artist" was, Willem De Kooning gave one of the paintings a favorable review! *Id.* at 300 n.111.

123. *Id.* at 300.

124. Refer to Chapter VII *infra*.

125. "In order to be entitled to copyright registration, a work must be the product of human authorship. Works produced by mechanical processes or random selection without any contribution by a human author are not registrable." *COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES* § 503.03(a) (1984).

126. Citing both the Nimmer and Clifford reports, refer to note 119 *supra*, the judge

**CASE 18: The Sistine Chapel**<sup>127</sup>

The vaulted interior of the Sistine Chapel is widely recognized as one of the greatest artworks of civilization. Crowning its ceiling is *The Last Judgment*, unveiled on October 31, 1541.

Smoke, oils, and glue have conspired in the intervening centuries to obscure the Master's rich colors.<sup>128</sup> Even worse, when Counter-Reformation modesty gained sway, later censors added loincloths to several of the naked figures.<sup>129</sup>

Nippon Television Network (NTN) put up \$4.2 million to restore the masterpiece, and another \$7 million in return for exclusive reproduction and film rights for three years.<sup>130</sup> The result, laboriously undertaken, is a newly restored *capolavoro*, with a brightness of hue that has not been experienced for the better part of a millennium.

Even after its three-year exclusive window expires, does NTN have copyright protection over the Sistine Chapel?

Painters deserve copyright for their product. The NTN crew indisputably painted.<sup>131</sup> Does it follow that they fall inside copyright protection?

Restorers of the Sistine Chapel do not engage in copyrightable authorship. Instead, their brush strokes are

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ultimately granted summary judgment to the defendant. *Stuart Entm't v. Am. Games, Inc.*, No. 1-96-CV-70036, Memorandum and Ruling on Both Parties' Motions for Summary Judgment (S.D. Iowa Mar. 19, 1998).

127. This example was inspired by oral argument on behalf of Shanks before the district court. See *Raiders of the Lost Scrolls*, *supra* note 83, at 328.

128. See Loren Partridge, *Michelangelo's Last Judgment: An Interpretation*, in MICHELANGELO THE LAST JUDGMENT: A GLORIOUS RESTORATION 10 (Elaine B. Stainton ed., 1997).

129. In fact, calls for censoring the work began before Michelangelo even completed it. See Fabrizio Mancinelli, *Michelangelo's Last Judgment: Technique and Restoration*, in MICHELANGELO THE LAST JUDGMENT, *supra* note 128, at 172. In 1564, the Council of Trent ordered that obscene parts of the work be censored. See *id.* Daniele da Volterra, a longtime friend of Michelangelo's, undertook the project in 1565, the year after Michelangelo died. See *id.* Subsequent centuries witnessed additional modifications. See *id.* at 172–80.

130. William D. Montalbano, *Judgment Day for Michelangelo's Sistine Chapel Ceiling: Most Critics Applaud the Restoration of His Vatican Masterpiece, But a Minority Terms It a Rewriting of Art History That Is Nothing Less Than a Monumental Disaster*, L.A. TIMES, Apr. 2, 1990, at F1; Gerald Renner, *Expert Extols Sistine Chapel Restoration*, THE HARTFORD COURANT, Oct. 18, 1994, at A4.

131. For current purposes, it is assumed that all concerned worked as employees for hire of Nippon Television Network, and that U.S. law governs all aspects of restoration of the ceiling. Refer to note 42 *supra*.

constrained by the exercise of attempting to determine what authorship Michelangelo undertook and to replicate it in plaster and pigment.

The activity of those restorers in some measure resembles that of Marklund (The Forgery). Like him, the restorers are trying to duplicate as exactly as possible the artistic genius of their predecessor.<sup>132</sup>

In other respects, however, the restorers are acting like Dr. Kefalos (The Shrink). For they are attempting, based on historical evidence and the best of their ability, to enter into the psyche of another and to replicate the strokes that Michelangelo himself actually undertook. That activity cannot constitute original authorship. As such, it stands outside copyright protection.

This case might give pause for the following reasons: (1) the NTN crew seems to have created a copyrightable work, that is, a painting, unlike the cases above regarding fountains, human bodies, football plays, and other works which do not fall under the copyright umbrella, and (2) they did so not simply by mechanically copying, unlike the cases of Charlie (The Dopelgänger), Marklund, (The Forgery) and others above who also were dealing with copyrightable works. Yet upon consideration, this case is not materially different from the Charlie and Marklund examples.

Admittedly, restoration of the Sistine Chapel required extensive laboratory testing, complex experiments, and computer simulations and calculations.<sup>133</sup> (For instance, removal of foreign materials from the ceiling was accomplished through application of a gelatinous substance called AB-57 to the frescoes, which was wiped off using distilled water after three minutes,<sup>134</sup> the whole process being repeated twenty-four hours later.<sup>135</sup>) The entire

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132. Such technologies as xray photography, strobos and polarizing filter can recover faded and obscured images. *Laser Bones*, *supra* note 56, at 288.

133. See *Michelangelo's Last Judgment: Technique and Restoration*, *supra* note 129, at 180–83. For example, laboratory techniques included high performance liquid chromatography, infrared spectroscopy, Fourier transform infrared spectroscopy, atomic absorption spectroscopy, and a battery of microbiological tests for fungi, bacteria and yeast. See *id.* at 183.

134. See Suzanne Muchnic, *Crying in the Chapel: Is the Cleaning of the Sistine Chapel a Glorious Restoration or a Monumental Sacrilege?*, L.A. TIMES, Apr. 5, 1987, at 89.

135. *Id.* Then, the surface was sealed with a resin named B-72. *Id.* The restorers also removed seventeen of the loincloths that later popes had ordered but left others that might damage the frescoes if removed. See *Expert Extols Sistine Chapel Restoration*, *supra* note 130, at A4.

process required creativity of a sort, and was not without controversy.<sup>136</sup> But what difference do these distinctions import? Only that the NTN crew had to exercise its ingenuity to recreate Michaelangelo's works, in contrast to Charlie, who had the template immediately available to him. But Marklund too had to exercise technical skills, yet those did not suffice to make him an author. Kefalos, Wiles, and others encountered above had to exercise great creativity to reach their results, yet they too were denied copyright protection.

In sum, it is merely adventitious that the resulting product of NTN's work happens to be a painting, which is a category defined as copyrightable. The type of creativity that NTN exerted was in the goal of a scientific project, as was the labor of Kefalos (The Shrink), Wiles (Fermat), and Wassermann (The Fountain). Copyright protection should be denied for the wizardry of restoring someone else's work. The next scenario reinforces that conclusion.

#### **CASE 19: Chicken Little**

"Deciphering ancient inscriptions and manuscripts would be easy if archaeologists found them completely whole and intact. All that would have to be done then would be to figure out the language and the script. Unfortunately, most inscriptions are found in fragmentary condition. When that happens, an epigrapher has to not only figure out what the surviving pieces say, but also what the missing pieces might have said. Scholars call this process 'reconstruction.' We invite you to try the process yourself with the story of Chicken Little.

"Below is part of the story of Chicken Little. Part of it has been torn off. It is your job to fill in the rest of the story, one letter per square. Download the image onto your own computer, print it out, and go to work. Send your solution to West Semitic Research, 12 Empty Saddle Road, Rolling Hills Estates, CA 90274, and we'll send you the access code to the real solution (include your email address). By the way, no one has ever gotten it 100% right!"<sup>137</sup>

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136. Critics of the project argued that although the Last Judgment was painted a *fresco*—in wet plaster—Michelangelo made several subsequent *a secco* additions after the plaster dried, which would be removed by the cleaning process. See *Crying in the Chapel*, *supra* note 134. Proponents of the project asserted that the work was done almost entirely *a fresco* and that most subsequent paint, glue, varnish and dirt are the product of later times. *Id.*

137. WEST SEMITIC RESEARCH PROJECT, DO IT YOURSELF EPIGRAPHY: CHICKEN

Hugh Rica solves the mystery! Does he have a copyright in “his” text of *Chicken Little*?

It should be plain that Rica does not obtain copyright ownership over his solution. For his solution simply represents the authorship that Web site designers have imbued into *Chicken Little*. In fact, to the extent that copyright ownership lies here, it is only in those who, unlike Rica, have failed to meet the test.<sup>138</sup>

### **CASE 20: The Pedant**

Lex Icahn decides that by the time kids reach the Great Books Program at St. John’s University, it is too late. He therefore produces, for the elementary-school market, an interlineal edition of The Bible, with English translation inserted directly beneath every Hebrew word. Thus, in his version, the opening line of the 23rd Psalm appears in Hebrew, *Hashem ro’i lo echzar*, underneath which is the corresponding translation for each word taken from the standard dictionary:<sup>139</sup> “LORD, shepherd (mine), not, I will lack.” Of course, given that the Hebrew is printed right to left, the translation looks to the casual eye like “I will lack not shepherd (mine) LORD.” (No one has accused Icahn of replicating the lyricism of the King James version.)

Can Icahn copyright his interlineal translation?

This case study demonstrates that the lessons from the *Feist* case regarding phonebook white pages are not altogether pellucid. On the one hand, Icahn can justly maintain that his preparation required more than passing knowledge of Hebrew grammatical constructs, pointing to such facts as that the final verb in that verse begins with the letter *aleph* but must be looked up in the dictionary under the letter *cheth*.<sup>140</sup> In addition, he had to choose between many English meanings for Hebrew words that are spelled identically.<sup>141</sup>

As we will see below, compiling a phonebook also entails a good

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LITTLE, at [http://www.usc.edu/dept/LAS/wsrp/educational\\_site/yourself/chicken.shtml](http://www.usc.edu/dept/LAS/wsrp/educational_site/yourself/chicken.shtml) (last visited Jan. 7, 2001). I did not make this up (notwithstanding that my wife admittedly grew up on Empty Saddle in Rolling Hills; life’s coincidences exceed those of fiction).

138. Those individuals could conceivably gain copyright in their mistakes. As we will see below, Qimron, in effect, is claiming copyright protection for his own mistakes.

139. See, e.g., WILLIAM L. HOLLADAY, A CONCISE HEBREW AND ARAMAIC LEXICON OF THE OLD TESTAMENT (1971).

140. *Id.* at 112.

141. Examples are legion; one occurs later on the same page: The verb *chafetz* can mean *desire* or *let tail hang* (some posit: *hold stiff*). *Id.*

deal of “subjective” judgment.<sup>142</sup> Although reasonable minds could differ, I tend to view Icahn’s contribution as being just as “mechanical” as those who compiled the white pages of the telephone book.<sup>143</sup> Inasmuch as the resulting product more closely resembles a phone book’s sweat of the brow than a subjective exercise in interlingual communication, I would locate it outside copyright protection.

### *E. Special Cases*

The various exceptional cases posited above all lack copyrightable authorship. Thus far, we see a Procrustean bed between the vast majority of works that easily qualify for copyright protection<sup>144</sup> and those exceptional ones laboriously plotted above.<sup>145</sup> But the matter is not, of course, as simple as that. Other cases exist at intermediate points along the spectrum. Those cases afford a more rounded understanding of authorship.

#### **CASE 21: The Channel Surfer**

Batata Divã sits all day glued to the television, remote control in hand, zapping between the channels. One day, his VCR running, he switches perfunctorily between *The Young and the Restless*, *Headline News*, and Ascanio in *Lo Frate ’nnamorato*, with *Malcolm* in the middle. He decides to offer the product for sale, to prove that there is indeed a market for a product that has no “meaning” but is instead “transverse, desultory, interrupted” and, in general, “deculturated.”<sup>146</sup>

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142. Refer to Chapter VII, section (A)(1)(b) *infra*.

143. The *Feist* Court ruled that for copyright to subsist, “the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

144. Refer to Cases 1–3 *supra*.

145. Refer to Cases 4–19 *supra*. Case 20, as just noted, is less clear.

146. Armando Petrucci, *Reading to Read: A Future for Reading*, in A HISTORY OF READING, *supra* note 24, at 345, 362. Critics lament the fact that viewers can no longer meaningfully distinguish between their own lives and what they see on television. See JERRY MANDER, IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS 25–36 (1991). But a history of reading shows that books too have functioned as a “narcotic” (J.G. Fichte’s term!), “a derangement of the imagination and the senses.” Guglielmo Cavallo & Roger Chartier, *Introduction*, in A HISTORY OF READING, *supra* note 24, at 1, 26. Indeed, Mander’s critique is mild compared to the 1796 denunciation by a German cleric. Reinhard Wittmann, *Was There a Reading Revolution at the End of the Eighteenth Century?*, in A HISTORY OF READING, *supra* note 24, at 284, 285. The fact that a wave of suicides followed publication of Goethe’s *The Sorrows of Young Werther* places the tribulations of today’s teenage rock listeners in perspective. *Id.* at 297. See also Guglielmo Cavallo, *Between Volumen and Codex: Reading*

Does Divã enjoy copyright protection for his tape?

In principle, Divã has engaged in a minimal act of authorship. For that reason, his pastiche might acquire copyright protection, all other things being equal.

However, all other things are not equal. The work that Divã prepared is strictly derivative. Moreover, it was prepared without the authorization of the underlying authors whose works were incorporated into it. A special provision of the Copyright Act denies protection to derivative works created by unlawful use of underlying material.<sup>147</sup> That provision dooms Divã.<sup>148</sup>

### **CASE 22: The Surf Channeler**

At rosy-fingered dawn, Thal Lahsa goes down to the wine-dark sea, which is her Muse. After listening to wave upon crashing wave, her mind empties until finally the disembodied spirit of the Teacher of Righteousness speaks through her mouth into the voice-activated Dictaphone that she has strapped on for such occasions.

Does Lahsa own a copyright in the literary work recorded on the tape?

Lahsa can copyright her inspirations no less than can Karen (The Inspiration).<sup>149</sup> But copyright does not extend to works authored by another. If Lahsa is credited in the method of composition, then it is not she, but the Muse, who qualifies as that author. On that basis, her copyright claim fails.<sup>150</sup>

### **CASE 23: The Magician**<sup>151</sup>

“Why is my best student resorting to plagiarism?” demanded the Professor, holding the poem submitted in response to yesterday’s homework assignment.

“Wh-what do you mean?” stammered Shelly.

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*in the Roman World*, in A HISTORY OF READING, *supra* note 24, at 64, 80 (recounting ancient booksellers who peddled rolls of pornography); Paul Saenger, *Reading in the Later Middle Ages*, in A HISTORY OF READING, *supra* note 24, at 120, 146 (occurrence of the same in fifteenth century France).

147. 17 U.S.C. § 103(a) (1994).

148. Note that it likewise consigns Hughes’s translation of *MMT* to perdition, to the extent that the underlying work that was translated is deemed to be subject to a subsisting copyright. Refer to Chapter XI *infra*.

149. Refer to Case 1 (The Inspiration) *supra*.

150. Refer to Chapter VII, section C *infra*.

151. Refer to the epigraph to this chapter.

“Look at this!” the professor showed her a copy of Keats’s “Ode on a Grecian Urn.” Upon inspection, Shelly had to concede that it was word-for-word identical to “her” poem.

“I never saw that poem before,” swore Shelly firmly.

Slowly, “I believe you,” came the reply.

Does Shelly have a copyright in the poem that she submitted yesterday?

Judge Hand’s chestnut, quoted in the epigraph, reveals a valuable lesson about copyright subsistence—protection lies in words that are original, even if they are not novel. In other words, one who reaches into the subjective range of interiority, thereby producing words (or music, images, etc.) fixed in a tangible medium of expression, gains copyright protection over the product—even if that product happens adventitiously to match something that another has previously produced through a similar process of interiority.

By clothing Hand’s aphorism in the garb of concrete characters, an interesting realization follows: There is no possible way to believe that Shelly deserves a copyright in “her” poem. Indeed, the professor in the above tale was a besotted fool to credit her claim.<sup>152</sup>

But Hand realized as much. His labeling the repetition process as “magic” betokens his awareness that, sorcery aside, people do not adventitiously come up with original works mimicking the full text of great Romantic poems. Outside the realm of make-believe, therefore, Shelly can claim no copyright in her work product.

\* \* \*

One can, however, imagine a somewhat less far-fetched example to vindicate Hand’s principle. Consider that copyright protection subsists in a list that is prepared not by rote application of a banal principle (such as the white pages at issue in *Feist*), but instead through subjective considerations. Thus, if someone were to draw up a list of her fifty favorite restaurants in Southern

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152. It should have been obvious, if not from the first line, then from the opening quatrain:

Thou still unravish’d bride of quietness,  
 Thou foster-child of silence and slow time,  
 Sylvan historian, who canst thus express  
 A flowery tale more sweetly than our rhyme . . . .

JOHN KEATS, *Ode on a Grecian Urn*, in *THE ODES OF JOHN KEATS* 111, 114 (Helen Vendler ed., 1983). Anyone who believes that those words could have been created independently—without reference to Keats—is in need of a conservator (or, as Hobbes would say, to be “Personated by Guardians”).



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California, that list would be subject to copyright protection. By contrast, lists produced through objective means stand outside copyright.

Let us imagine an objective list of the fifty service stations that sell the most gasoline in Southern California. A compiler could derive that list through the clever insight that tax revenue is a surrogate for the number of gallons sold. Thus, one need merely apply to the South Coast Air Quality Management District for a list of all gasoline tax revenues in order to compile the desired list.

There is no such district-wide agency that monitors restaurants. Therefore, determining the establishments that sell the most food would require a lot of gumshoe work—separate trips to Arcadia, Bellflower, Cucamonga, Dana Point, Eagle Rock, and all the other communities in Southern California to gather the relevant data. Moreover, even that exercise would be far from straightforward. In one city, the application would need to be to the controller; in another, to the mayor's office; in a third, to the City Clerk; etc. In other words, obtaining the relevant restaurant-taxation records would require a great deal of legwork, mixed with not a little ingenuity.

Nonetheless, copyright protection does not lie for the sweat of the brow and shoe leather expended in compiling such a list, regardless of how valuable it may be. It does not apply even if one had to be innovative and creative to compile the subject list.<sup>153</sup> No matter how difficult it may be to compile a list of the fifty restaurants that sell the most food in Southern California, being based on objective circumstances, the list simply lies outside of copyright protection.

We now reach our conundrum.

#### **CASE 24: The Gourmand**

Connie Sewer convinces herself that quantity is the best *indicium* of quality and that she “should” prefer restaurants that operate on the highest volume. On that

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153. Suppose a scholar were to painstakingly explore the stacks of the British Museum for a number of years, and finally, after much effort, find that which he was seeking, *i.e.*, a forgotten Shakespeare manuscript. The scholar may well have exercised much skill, training, knowledge and judgment, but should this entitle him to a copyright in the manuscript? Clearly not, because he did not engage in any act of authorship.

1 NIMMER ON COPYRIGHT § 2.01[A]. That scenario distinguishes creativity in the *process* from creativity in the *product*. Refer to notes 456, 566 *infra*. The latter alone warrants copyright protection.

basis, she convinces herself that her 50 favorite restaurants happen to correspond exactly to the list just compiled.

At this juncture, her subjective list is exactly equivalent to the objective list previously compiled. Is it protected by copyright?

The distinctions here are sometimes elusive. It would seem that one may simultaneously maintain that Sewer can protect the copyright in “her” list, notwithstanding that the original list, identical to hers,<sup>154</sup> may be freely copied by all.<sup>155</sup>

Putting aside his dictum explored above, Judge Hand even earlier commented that the selection of facts is not subject to copyright protection, notwithstanding that “into that selection may go the highest genius of authorship, for indeed, history depends wholly upon a selection from the undifferentiated mass of recorded facts.”<sup>156</sup> Although Judge Hand’s formulation would seem to point towards copyright protection—“the highest genius of authorship”—in the end he reaches the opposite conclusion. As will be explored below, copyright theory does not cohere perfectly.<sup>157</sup>

\* \* \*

The contrast between the subjective and objective lists offers a valuable lesson: The subjective list cannot be copied without infringing Sewer’s copyright, whereas the objective list is free for all to copy.<sup>158</sup> What underlying rationale is at work here?

154. One is placed in mind here of the famous fable in which a person relives episodes out of *Don Quixote*. The passages therefore constitute fiction (from Cervantes’ perspective) and, simultaneously, factual biography (from that individual’s perspective). See Jorge L. Borges, *Pierre Menard, Author of the Quixote*, in *LABYRINTHS: SELECTED STORIES & OTHER WRITINGS* 36–44 (Donald Yates & James E. Irby eds., 1964). See *The Author as Proprietor*, *supra* note 19, at 54.

155. Another example would be as follows: It is doubtful in the extreme that a dry cleaning shop could obtain copyright in a list of garments brought in from 11:00 a.m. to noon on a given day. On the other hand, a novelist could insert a laundry list into a narrative that would reveal a good deal about the protagonist(s)—he is a transvestite, she is a slob, they are tango aficionados, etc. That product of the novelist’s invention should obtain copyright. Yet the unprotected and the copyrighted laundry lists might be identical. See Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141, 143–44 (Josué V. Harari ed., 1979) (even after someone “has been accepted as an author, we must still ask whether everything that he wrote . . . is part of his work. . . . a laundry list: is it a work, or not?”); ROBERT ALTER, *THE WORLD OF BIBLICAL LITERATURE* 56 (1992) (“[T]he coldest catalog and the driest etiology may be an effective subsidiary instrument of literary expression.”).

156. *Myers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919).

157. Refer to Part Two *infra*.

158. A subjective compilation of data can be copyrightable. See *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501, 509 (2d Cir. 1984) (recognizing protection, but giving greater latitude to “a songwriter or playwright to copy from a compilation of

Copyright vindicates an important rationale by making subjective works the exclusive property of their originators (subject to applicable defenses) and objective works free to all. To the extent that a third party wishes to copy Sewer's preferences, she may not do so absent permission. On the other hand, to the extent that the same third party wishes to apprise the world of the volume of food served by Southern California restaurants, she may do so without compensation to those who gathered the underlying data. The result is that the progress of "science" marches on. Those who are engaged in dissemination of knowledge may act unrestrained by copyright laws. Those who wish to build on a predecessor's subjective expression may not do so.

This lesson emerges organically from the two dozen cases confronted above. To give a few examples, it explains why the insights that Kefalos brings to bear in sketching Sy Kadique's character stand outside copyright protection, whereas the depravities that Thomas Harris created in Hannibal Lecter<sup>159</sup> are protected by copyright.<sup>160</sup> It explains why Hoehling's speculations about Eric Spehl can be freely copied by others, whereas historical romances lie within the scope of copyright protection.<sup>161</sup> As will be seen below, this principle undergirds the essential feature of copyrightable authorship.<sup>162</sup>

The chapters that follow derive that lesson from multiple perspectives. The next one departs the realm of the hypothetical to trace the development of *Bender v. West*, an actual copyright case decided by a prestigious court of appeals. With that dose of realism in hand, the chapter after it sets forth the facts underlying *Qimron v. Shanks*. The succeeding chapters proceed to analyze the copyright issues presented by that case, both in light of *Bender v. West* and other aspects of copyright doctrine.

From there, the enterprise takes a different tack. Copyright

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information regarding municipal bond redemptions in order to, say, enhance the verisimilitude of his art").

159. On the one hand, "we read murder stories with a strong sense of the unreality of the villainy involved." NORTHROP FRYE, *ANATOMY OF CRITICISM* 47 (1957). On the other hand, there is an identification with the fictional character; after all, every Reader is a Lector!

160. To the extent that it develops that Lecter is based on a true-life individual, then author Harris's protection would be, to that extent, circumscribed. See RICHARD GLYN JONES, *LAMBS TO THE SLAUGHTER: THE REAL-LIFE KILLERS WHO INSPIRED PSYCHO, HENRY, AND THE SILENCE OF THE LAMBS* (1994).

161. See, e.g., *Burgess v. Chase-Riboud*, 765 F. Supp. 233 (E.D. Pa. 1991) (noting that the novel *Sally Hemmings* was based on Thomas Jefferson's slave and concubine).

162. Refer to Chapter XVI *infra*.

theory in general is juxtaposed against literary theory, to see what conclusions emerge. As developed below, the overlap is tenuous, perhaps deliberately so. The lessons to be drawn are therefore minimal. But there is one lesson that applies to archaeologists—works presented to the public as factual enjoy no protection as to the elements presented as facts therein, even if those “facts” in fact emerge from the author’s creativity.

IV.  
TO THE MIDDLE EAST FROM WEST

[F]aithfulness to the public-domain original is the dominant editorial value, so that the creative is the enemy of the true.

Judge Dennis Jacobs<sup>163</sup>

The Dead Sea Scrolls, although frequently invoked as an emblem for ancient revelation,<sup>164</sup> actually show up in only one U.S. copyright case. The case is *Bender v. West*.<sup>165</sup> Although it treats copyright in the context of CD-ROMs containing judicial opinions, this opinion actually evinces a good deal of overlap with the case of the Dead Sea Scrolls, *Qimron v. Shanks*.<sup>166</sup>

For over a century, West has been the premier reporter of judicial decisions within the United States. Though it serves as official reporter of only a few jurisdictions, for most of the twentieth century it constituted the *de facto* reporter for all federal court decisions, and those of many states as well.<sup>167</sup> In a common law system, the law of the land is contained in judicial systems. Those judicial opinions themselves, according to ancient authority, are not subject to copyright,<sup>168</sup> no matter how creative the judges might

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163. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).

164. Previous references in U.S. case law to the scrolls used them as an archetype for a blockbuster revelation:

Since 1983, no new information has come to light that would make this court better informed about the intent of the 1871 Congress than the Supreme Court was informed in 1983. The legislative-history equivalent of the Dead Sea Scrolls has not been discovered or called to our attention.

*Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1352–53 (11th Cir. 1999) (footnote omitted) (en banc) (Edmondson, J., concurring in part and dissenting in part). See also Joel D. Berg, *The Troubled Constitutionality of Anti Gang Loitering Laws*, 69 *CHI-KENT L. REV.* 461, 469 n.61 (1993) (“[M]any laws are incomprehensible to many lawyers; laypersons may just as well try and translate the Dead Sea Scrolls rather than waste their time trying to figure out what the law either commands or forbids.”).

165. 158 F.3d 693 (1998), *cert. denied*, 526 U.S. 1154 (1999). Along with my colleagues Morgan Chu, Elliot Brown, and Perry Goldberg, I represented Matthew Bender against West Publishing Company at all three court levels.

166. Refer to Chapter V *infra*.

167. See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 *UCLAL REV.* 719, 727 n.21 (1989). See also 1 F. Cas. iii (1894) (West refers to itself as “the official reporter of the federal courts”); *Garfield v. Palmieri*, 193 F. Supp. 137, 143 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 526, 527–28 (2d Cir. 1962) (holding a judge’s forwarding of the court’s opinion to West for publication immune from liability as part of the judge’s *official* duties).

168. *Callaghan v. Myers*, 128 U.S. 617, 661–62 (1888); *Banks Law Publ'g Co. v.*

have been in crafting their words.<sup>169</sup> Thus, a researcher in, say, 1985, although free under copyright law to access judicial opinions anywhere, as a practical matter could do so only through the instrumentality of West's reporters. West's product as of that date was not only *nonpareil* but also effectively unchallenged by any competitor.

West successfully excluded competitors from the field via an early skirmish held in 1986.<sup>170</sup> Despite the harsh criticism that that decision attracted,<sup>171</sup> it provided West with a litigation juggernaut that lasted for over a decade. Then, legal publisher Matthew Bender & Company decided to take on West by publishing on CD-ROM its own rival compilation of cases, some indirectly derived from West's reporters. Bender included references to West pagination in its CD-ROM, inasmuch as that pagination is required to cite cases to courts and in legal scholarship. In addition, Bender included what can be termed "the *textus receptus* of judicial opinions," which is the manner in which West publishes them in its quasi-official reporters. Bender filed for declaratory relief that it did not violate West's copyright in the process.<sup>172</sup>

At base, *Bender v. West* presented two copyright issues for resolution. First, conceding that the judges' opinions themselves were not subject to protection, West claimed copyright in the pagination of its case reporters.<sup>173</sup> Second, West claimed copyright in emendations to the opinions themselves.<sup>174</sup> If

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Lawyers' Coop. Publ'g Co., 169 F. 386, 390–91 (2d Cir. 1909), *appeal dismissed*, 223 U.S. 738 (1911). *Cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 613 (1834) (finding law reports "objects of literary property"). *See also* West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1239 (8th Cir. 1986) (Oliver, J., dissenting in part). On the early practices in the United States of judicial reporting, leading up to *Wheaton v. Peters*, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985).

169. From the beginning, judges have expended tremendous creativity in the task of judicial interpretation. *See generally* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998). Nonetheless, that type of creativity, like the creativity that goes into a scientific breakthrough, has never warranted copyright protection. Refer to Case 6 (The Atom) *supra*; Case 14 (Fermat) *supra*.

170. *West Publ'g Co.*, 799 F.2d at 1222.

171. *See, e.g., Monopolizing the Law*, *supra* note 167, upon which the Supreme Court repeatedly relies in *Feist*.

172. Another legal publisher, HyperLaw, intervened as a party plaintiff to vindicate a similar claim. The companion cases discussed below arose from West's losses to Bender and HyperLaw, respectively.

173. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 695 (2d Cir. 1988), *cert. denied*, 526 U.S. 1154 (1999). Note that the custom of pagination goes back to antiquity. *Between Volumen and Codex*, *supra* note 146, at 88. Use of Arabic numerals for this purpose dates back to 1516. THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17, at 106 n.202.

174. *Bender*, 158 F.3d at 677.

accepted, West's copyright claim would prevent Bender and others from producing usable case compilations on CD-ROM.

Before explicating the legal issues, it is necessary to exclude from consideration the uncontroversial aspects of West's copyright. All parties admitted for purposes of the litigation that West enjoyed copyright protection over its case reporters as a whole, insofar as those volumes include syllabi authored by West, summarizing the holdings of each case; key numbers, by which West categorized individual components of those cases; headnotes that West generated, encapsulating each holding represented by a key number; and other ancillary material, such as tributes and prefaces at the beginning of individual volumes and indices at the end of those volumes. The nub of the disagreement between the parties concerned the following:

??*Pagination.* Except for very short opinions, the text of any given case begins on one page and then continues, from page to page, across the reporter. Citations to opinions, by practice and individual court order,<sup>175</sup> must be to the particular page in which the cited proposition occurs; for example: 171 F.2d 318, 320. West contended that reprinting public domain judicial opinions, along with a notation as to where the subject break occurred in the West reporters—in the foregoing example, of the form “\*320”—violated West's pagination copyright.

??*Emendations.* Before publishing opinions, West “massages” those opinions in various ways. Thus, the final text of an opinion as it appears might contain numerous differences from the way that the judge authored it. For instance, the judge might refer to “Feist Pub. v. Rural Tele. Co., 499 U.S. 340 (1990).” When the reference appears in a West case reporter, it could be printed in the following format: “*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1990).” Again, by practice and individual court order, quotations to opinions must be in the latter formulation.<sup>176</sup>

In addition, courts do not collect names of attorneys. West includes information as to attorney names. Of necessity, West chooses, among various options, how to present the names of

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175. See, e.g., 3D CIR. R. 28.3(a). For a catalog of many such local rules, see *Monopolizing the Law*, *supra* note 167, at 727 n.21.

176. It is for that reason that West's emendations effectively constitute the “*textus receptus* of judicial opinions,” as claimed above.

counsel. In terms of subsequent history of cases and in other allied respects, West also adds features to its reporters.<sup>177</sup>

The Second Circuit denied West's claims in two companion opinions.<sup>178</sup> Those opinions explicate copyright's standard for "originality" as requiring "that the work result from 'independent creation' *and* that the author demonstrate that such creation entails a 'modicum of creativity.'"<sup>179</sup> The former simply means that the work was not copied from a prior source.<sup>180</sup> The latter means that certain works, notwithstanding the absence of copying, are too banal to warrant copyright protection.<sup>181</sup>

As to star page numbers corresponding to the breaks in pagination in West's reporters, the Second Circuit relied on West's concession that the page breaks in its reporters were inserted by computer, applying rote methodology, rather than through the exercise of any human creativity. The court also cited an alternative rationale, discussed below.<sup>182</sup>

As to the various alterations that West imbued into the judicial opinions, the court conceded that the threshold for creativity is low in order to achieve copyright protection, "even in works involving selection from among facts."<sup>183</sup> Nonetheless, even

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177. The emendations are slightly more complicated than the foregoing summary. As summarized by the Second Circuit, West claims originality in the following enhancements:

??The format of the party names—the "caption"—is standardized by capitalizing the first named plaintiff and defendant to derive a "West digest title," and sometimes the party names are shortened (for example, when one of the parties is a union, with its local and national affiliations, West might give only the local chapter number, and then insert "etc.>").

??The name of the deciding court is restyled. For example, West changes the slip opinion title of "United States Court of Appeals for the Second Circuit" to "United States Court of Appeals, Second Circuit."

??The dates the case was argued and decided are restyled. For example, when the slip opinion gives the date on which the opinion was "filed," West changes the word "filed" to "decided."

??The caption, court, docket number, and date are presented in a particular order, and other information provided at the beginning of some slip opinions is deleted (such as the lower court information, which appears in the West case syllabus).

*Bender*, 158 F.3d at 683 (footnote omitted).

178. *Id.* at 674, 693.

179. *Id.* at 681 (emphasis in original).

180. *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters.*, 945 F.2d 509, 512–13 (2d Cir. 1991). Illustrative here would be Marklund's forgery and Charlie's copying of *A Tale of Two Cities*. Refer to Cases 11–12 (*Doppelgänger, Forgery*) *supra*.

181. *Feist* itself exemplifies that phenomenon. Note that these two ingredients are labeled *originality* and *creativity* in Chapter II *in fine supra*.

182. Refer to Chapter VII, section (A)(2) *infra*.

183. *Bender*, 158 F.3d at 689.



in those cases, the Second Circuit limited copyright protection to “evaluative and creative” works, in which the compiler exercises “subjective judgments relating to taste and value that were not obvious and that were not dictated by industry convention.”<sup>184</sup>

These considerations neither deny the value of West’s case reporters nor the praise due their compilers. The court concluded as follows:

West’s editorial work entails considerable scholarly labor and care, and is of distinct usefulness to legal practitioners. Unfortunately for West, however, creativity in the task of creating a useful case report can only proceed in a narrow groove. Doubtless, that is because for West or any other editor of judicial opinions for legal research, faithfulness to the public-domain original is the dominant editorial value, so that the creative is the enemy of the true.<sup>185</sup>

The Second Circuit drops a footnote at this point containing two citations. The first is to a case that counsel for Bender cited both to the district court and Second Circuit.<sup>186</sup> The second did not come from any brief submitted by the parties;<sup>187</sup> instead, Judge Jacobs alighted on it independently:

On the other hand, preparing an edition from multiple prior editions, or creating an accurate version of the missing parts of an ancient document by using conjecture to determine the probable content of the document may take a high amount of creativity. See, e.g., Abraham Rabinovich, *Scholar: Reconstruction of Dead Sea Scroll Pirated*, Wash. Times: Nat’l Wkly. Edition, Apr. 12, 1998, at 26 (discussing scholar’s copyright infringement claim in Israeli Supreme Court relating to his reconstruction of the missing parts of a “Dead Sea Scroll” through the use of “educated guesswork” based on knowledge of the sect that authored work).<sup>188</sup>

Of course, the remark constitutes obiter dictum. Nonetheless, it is interesting that the sole reference in any reported decision in the United States to *Qimron v. Shanks* occurs in this context.

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184. *Id.*

185. *Id.* at 688. The quotation should be recalled in the context of Qimron’s claim to protection by virtue of the extent of scholarly labor that he expended on *4QMMT*. Refer to Chapter VIII *infra*.

186. *Bender*, 158 F.3d at 688 n.13, citing *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967) (holding that even 40,000 changes made to a work, in the form of correcting punctuation and typographical errors and the like, stand outside copyright protection).

187. As noted above, this writer represented Bender. Refer to note 165 *supra*.

188. *Bender*, 158 F.3d at 688 n.13.

In any event, West applied to the Supreme Court for a writ of certiorari.<sup>189</sup> The denial of that petition means that *Bender v. West* now stands as res judicata.

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189. West filed its petition for certiorari while I was living in Jerusalem. Elliot Brown finished drafts of our opposition every night, which was morning my time when he e-mailed it to me, where I worked on the draft while he slept, only to continue the process the next day.

While we were preparing the opposition, our client made a surprising decision—to join in the certiorari petition, asking the Supreme Court to affirm summarily and thereby end once and for all West’s “scarecrow copyright” by which it had chased competitors out of the field. Thus, the “opposition” that we ultimately filed with the Supreme Court actually joined in West’s request for review.

Completing the surrealism, West vitriolically attacked our non-opposition. But the matter ended when the Supreme Court refused to hear the matter.

## V.

## QUMRAN AND QIMRON'S COPYRIGHT CASE

Biblical manuscripts dating back to at least 200 BC are for sale. This would be an ideal gift to an educational or religious institution . . . . Box F 206

Ad placed by Archbishop Samuel, in *The Wall Street Journal*, June 1, 1954.<sup>190</sup>

The time arrives once again to tell the oft'-told tale<sup>191</sup> of the Dead Sea Scrolls.<sup>192</sup> Not only is this matter one of "high drama—rife with mystery, international intrigue, professional jealousy, political tension, conspiracy, and deceit,"<sup>193</sup> but it led to a copyright case of biblical proportions,<sup>194</sup> *Qimron v. Shanks, et al.*<sup>195</sup>

190. NEIL ASHER SILBERMAN, *THE HIDDEN SCROLLS: CHRISTIANITY, JUDAISM & THE WAR FOR THE DEAD SEA SCROLLS* 50 (1994).

191. Even within the realm of law reviews, other articles have plowed this field. See *Raiders of the Lost Scrolls*, *supra* note 83, at 301; Lisa Michelle Weinstein, Comment, *Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case*, 43 AM. U. L. REV. 1637 (1994); Jeffrey M. Dine, Note, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics*, Mannu Bhandari, and the *Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545, 549, 566–69 (1995). The number of books on the subject is legion. For a highly readable account of the Scrolls from their discovery through the trial of *Qimron v. Shanks*, see generally *THE HIDDEN SCROLLS*, *supra* note 190.

192. One of the more idiosyncratic versions recounts, "Inside the jars were discovered six parchment scrolls with ancient incomprehensible writings which the shepherd, in his ignorance, sold to the museum for \$750,000 apiece." WOODY ALLEN, *WITHOUT FEATHERS* 21 (1975). Though those figures are invented, it remains true that the Arabs who found the scroll fragments "nine times out of ten outwitted their professional rivals . . ." GEZA VERMES, *THE DEAD SEA SCROLLS IN ENGLISH* xvi. (4th ed. 1995). There would appear, however, to be little substance to the further claim, "The authenticity of the scrolls is currently in great doubt, particularly since the word 'Oldsmobile' appears several times in the text . . ." *WITHOUT FEATHERS*, *supra*, at 21.

193. *Raiders of the Lost Scrolls*, *supra* note 83, at 301.

194. The pages that follow engage in much analysis of copyright issues from their religious context, a project that I continue from previous writings. See, e.g., David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219 (1998). But I am not the only individual haunted by the cross-over between religion and copyright. Judge Posner was moved in a recent copyright case to characterize "Jesus Christ [as] a heterodox Jew." *Seshadri v. Kasraian*, 130 F.3d 798, 800 (7th Cir. 1997). Another case alleged that defendant's projection of the Golden Mean Spiral onto a torus infringed plaintiff's sculpture that generates "flame letters" comprising the entire sacred Hebrew alphabet by shadowgrams of a single object placed inside a tetrahedron. *Tenen v. Winter*, 15 F. Supp. 2d 270 (W.D.N.Y. 1998).

More fundamentally, if the printing press engendered copyright as its

With such a plethora of secondary literature extant, the question becomes how to present this matter anew. A wise litigator once commented that cases are won not based on the facts, but based on the evidence.<sup>196</sup> In other words, it matters less what actually happened in real life than what version is recounted to the trier of fact, whether jury or judge. In that spirit, the discussion that follows draws liberally from the testimony of John Strugnell, whom we shall meet anon.<sup>197</sup>

## A. *The Scrolls*

### 1. *Discovery*

Muhammad edh-Dhib's stone hit something.<sup>198</sup> In 1947, the young Ta'amireh shepherd was tending his flock in the unusually arid area near the Dead Sea.<sup>199</sup> But instead of finding the errant goat, he had found a cave, into which he threw the stone.<sup>200</sup> He

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bastard child, then religion is its heir apparent. *See generally* THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17. The early notion, "Every word of the LORD written by the scribe is a wound inflicted on Satan," *id.* at 373, only multiplied with the advent of print. From the Gutenberg bible to Martin Luther's encomium, "Printing is the ultimate gift of God and the greatest one," Jean-François Gilmont, *Protestant Reformations and Reading*, in A HISTORY OF READING, *supra* note 24, at 213, to the *Index of Prohibited Books* in reaction to the excesses of the press, Dominique Julia, *Reading and the Counter-Reformation*, in A HISTORY OF READING, *supra* note 24, at 238, 239, the history of printing and of religious writings have been inseparable. *See* Roger Chartier, *Figures of the Author*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 7, 19 ("The author-function thus constituted an essential weapon in the struggle waged against the spread and distribution of texts which were thought to be heterodox.").

195. Elisha Qimron v. Hershel Shanks and 3 others (1993) 69 (iii) P.M. 10 (District Court of Jerusalem) [hereinafter "Trial Opin."]. Note that there is no official English translation of this opinion.

196. *See* CBS Broad. Inc. v. PrimeTime 24 Joint Venture, 48 F. Supp. 2d 1342, 1347 (S.D. Fla. 1998) ("As in all issues before the judiciary, the Court must resolve the action before it in light of what has been presented by the parties.").

197. Transcript of Recorded Testimony of John Strugnell, taken at Boston, Massachusetts, January 21, 1993, made by order of Jerusalem District Court [hereinafter "Strugnell Testimony"]. Note that, alone among the primary material in *Qimron v. Shanks*, this material is quoted herein in its English original, rather than in an English translation of a Hebrew original.

As is perennially the danger in relying on a deposition transcript, sometimes the full meaning does not come through, as in the following answer: "Oh, yes, no, that's for certain." Strugnell Testimony at 129. *See also id.* at 208 ("I was the governor of Arkansas."). But in most instances quoted below, the meaning shines through. I have smoothed over the oral language in the interest of readability where indicated below.

198. GEZA VERMES, THE DEAD SEA SCROLLS: QUMRAN IN PERSPECTIVE xiii (1994).

199. LIBRARY OF CONGRESS, SCROLLS FROM THE DEAD SEA 23 (1993). Note that aridity is "favorable for the preservation of materials like the Dead Sea Scrolls." *See* <http://lcweb.loc.gov/exhibits/scrolls/dsmmap.gif>

200. One commentator dismisses this whole story as just so much "Arabian nights"

returned later with some rope. Entering the cave, he discovered large sealed pots. The first two were empty. But the third contained scrolls wrapped in linen. Disappointed not to have found treasure, he went back to his tent. Children played with the tattered fragments, many of which broke into pieces. “[W]e threw it in the garbage pile. Later, we found that the wind had blown all the pieces away.”<sup>201</sup> But a number of the scrolls were saved.<sup>202</sup>

The first discoveries came to the attention of scholars in 1948, when seven of the scrolls were sold by the Bedouin to a cobbler and antiquities dealer called Kando. He in turn sold three of the scrolls to Eleazar L. Sukenik of Hebrew University, and four to Metropolitan Mar Athanasius Yeshue Samuel of the Syrian Orthodox monastery of St. Mark.<sup>203</sup> Mar Athanasius in turn brought his four to the American School of Oriental Research, where they came to the attention of American and European scholars.

It was not until 1949 that the site of the find was identified as the cave now known as Qumran Cave 1. It was that identification that led to further explorations and excavations of the area of Khirbet Qumran. Further search of Cave 1 revealed archaeological finds of pottery, cloth and wood, as well as a number of additional manuscript fragments. It was these discoveries that proved decisively that the scrolls were indeed ancient and authentic.

Between 1949 and 1956, in what became a race between the Bedouin and the archaeologists, ten additional caves were found in the hills around Qumran, caves that yielded several more scrolls, as well as thousands of fragments of scrolls: the remnants of approximately 800 manuscripts dating from approximately 200 B.C.E. to 68 C.E.

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myth accreted onto the scrolls. Noting that “edh-Dhib” means “the wolf,” he describes the Bedouin mission as having been all along seeking the discovery of artifacts to sell to archaeologists. See THE HIDDEN SCROLLS, *supra* note 190, at 30–32.

201. This version of the story comes from *LDS Perspective on the Dead Sea Scrolls*, at [http://www.kbyu.byu.edu/deadsea/where\\_janmagstory.asp](http://www.kbyu.byu.edu/deadsea/where_janmagstory.asp). (last visited Jan. 13, 2001).

202. Through the translator, Mohammed was asked if he knew the contents of the scrolls. “The story of the trouble between the Jews and the Arabs?” he offered. The translator corrected him as he shared that the scrolls contained the oldest copy of the Hebrew Bible. ‘Hurmph . . . If I had known that, I would have let them all blow away.’

*Id.*

203. The Archbishop’s gift of the scrolls, following his relocation to New York, generated a decision before the Tax Court. See *Samuel v. Comm’r*, 306 F.2d 682, 687–89 (1st Cir. 1962) (rejecting Samuel’s argument that the payments to him should be regarded as “annuity” payments on his “sale” of the scrolls to the trust).

The manuscripts of the Qumran caves include early copies of biblical books in Hebrew and Aramaic, hymns, prayers, Jewish writings known as pseudepigrapha (because they are attributed to ancient biblical characters such as Enoch or the patriarchs), and texts that seem to represent the beliefs of a particular Jewish group that may have lived at the site of Qumran. Most scholars believe that the Qumran community was very similar to the Essenes, one of four Jewish “philosophies” described by Josephus, a first century C.E. Jewish historian. Some have pointed to similarities with other Jewish groups mentioned by Josephus: the Sadducees, Pharisees, and Zealots.<sup>204</sup>

As the Librarian of Congress has noted, almost “from the moment of their discovery in 1947, these manuscripts have ignited the imagination of specialists and non-specialists alike. Hidden for almost two thousand years in remote caves, the Dead Sea Scrolls are regarded by many as the greatest manuscript find of the twentieth century.”<sup>205</sup> Based on historical, paleographic, and linguistic evidence, as well as carbon-14 dating, the scrolls and surrounding Qumran ruin date from the third century B.C.E. to 68 C.E., shortly before the fall of Jerusalem to the Romans.<sup>206</sup> Of course, that time span includes the period when Jesus of Nazareth lived.

We do not know precisely who wrote those sectarian scrolls, but we can say that the authors seemed to be connected to the priesthood, were led by priests, disapproved of the Jerusalem priesthood, encouraged a strict and pious way of life, and expected an imminent confrontation between the forces of good and evil.<sup>207</sup>

“For scholars they represent an invaluable source for exploring the nature of post-biblical times and probing the sources of two of the world’s great religions. For the public, they are artifacts of great significance, mystery, and drama.”<sup>208</sup>

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204. WEST SEMITIC RESEARCH PROJECT, THE DISCOVERY OF THE DEAD SEA SCROLLS, at [http://www.usc.edu/dept/LAS/wsrp/educational\\_site/dead\\_sea Scrolls/discovery.shtml](http://www.usc.edu/dept/LAS/wsrp/educational_site/dead_sea Scrolls/discovery.shtml) (last visited Mar. 1, 2001).

205. Remarks of James H. Billington, SCROLLS FROM THE DEAD SEA, *supra* note 199, at 6.

206. THE WORLD OF THE SCROLLS, *in* SCROLLS FROM THE DEAD SEA: THE ANCIENT LIBRARY OF QUMRAN AND MODERN SCHOLARSHIP, at <http://lcweb.loc.gov/exhibits/scrolls/intr.html> (last visited Dec. 26, 2000).

207. DISCOVERY OF THE DEAD SEA SCROLLS, *supra* note 204.

208. TWO THOUSAND YEARS LATER, *in* SCROLLS FROM THE DEAD SEA, *supra* note 199, at <http://lcweb.loc.gov/exhibits/scrolls/today.html> (last visited Mar. 4, 2001).

Interest in the scrolls has, if anything, intensified in recent years. Media coverage has given prominence to scholarly debates over the meaning of the scrolls,

It is important to realize not only that portions of every book of The Bible<sup>209</sup> (apart from *Esther*)<sup>210</sup> were found among the scrolls, but that those represent versions almost one thousand years older than any manuscript previously known. "Today's standard *Biblia Hebraica* is based largely on the so-called St. Petersburg codex which can be dated AD 1009.<sup>211</sup> The *Biblia Hebraica Stuttgartensia* of 1977 notes the variants to the canonic version found at Qumran."<sup>212</sup>

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By 1949, the Scrolls came under the jurisdiction of the Department of Antiquities for Transjordan and Arab Palestine.<sup>213</sup> The Hashemite Kingdom, in turn, passed day-to-day concern over the Scrolls to the École Biblique et Archéologique Française, located in East Jerusalem.<sup>214</sup> Eventually, custody for the Scrolls passed to the Palestine Archaeological Museum administered by the École Biblique.<sup>215</sup> Jordan nationalized that museum and its collection in 1966.<sup>216</sup>

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the Qumran ruin, as well as particular scroll fragments, raising questions destined to increase attention and heighten the Dead Sea Scrolls mystery. Did the scrolls come from the library of the Second Temple or other libraries and were they hidden to prevent their destruction by the Romans? Was the Qumran site a winter villa for a wealthy Jerusalem family or was it a Roman fortress? Was it a monastery not for Essenes but for a Sadducean sect? Does this mean we need to revise our view of Jewish religious beliefs during the last centuries of the Second Temple? Do the Dead Sea Scrolls provide clues to hidden treasures? Does the "War Rule Scroll" refer to a pierced or piercing messiah?

*Id.*

209. As used herein, all references to the "Bible" are to the Hebrew Bible. In this regard, I follow the usage and rationale of THE ART OF BIBLICAL NARRATIVE, *supra* note 108, at ix.

210. Hartmut Stegemann, *How to Connect Dead Sea Scroll Fragments*, in UNDERSTANDING THE DEAD SEA SCROLLS 245, 248 (Hershel Shanks ed., 1992). But as Vermes points out, it is possible that some of the tiny fragments from Qumran might indeed represent portions of the book of *Esther*, so its exclusion should not be viewed as absolute. QUMRAN IN PERSPECTIVE, *supra* note 198, at 177-78.

211. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 133. For general background on manuscripts of the Hebrew Bible, see HERSHEL SHANKS, THE MYSTERY AND MEANING OF THE DEAD SEA SCROLLS 147 (1998).

212. GEORGE STEINER, *A Preface to the Hebrew Bible*, in NO PASSION SPENT 40, 46-47 (1996). Refer to note 638 *infra*.

213. *Raiders of the Lost Scrolls*, *supra* note 83, at 302.

214. QUMRAN IN PERSPECTIVE, *supra* note 198, at xiv.

215. *Raiders of the Lost Scrolls*, *supra* note 83, at 303. In this abbreviated account, I omit the role played by Vendyl Jones, evangelist, bible scholar, and seeker of the Ark of the Covenant, who evidently formed the real-life model for Indiana Jones. *Id.*

216. *Id.*

The next year, Israel captured East Jerusalem in the Six-Day War.<sup>217</sup> The museum passed into Israeli control, resuming its former name as the Rockefeller Museum.<sup>218</sup>

Notwithstanding the war that changed everything else in the Middle East, the status of the Scrolls remained static. While under Jordanian rule, the international team consisted only of Christian scholars, many of whom were clerics, and whose leader, Roland de Vaux, was publicly anti-Semitic.<sup>219</sup> Nonetheless, Père de Vaux not only remained at the helm during the transition but successfully lobbied the Israel government to retain his team's original composition and mandate.<sup>220</sup> "Most of these same individuals made up the international team under Israeli rule, although the team eventually became slightly more ethnically and religiously diverse."<sup>221</sup>

Meanwhile, the initial flurry of Scrolls publication dried to a trickle. An insider describes how the early optimism faded:

[T]hey were all going to be published by '62 or '63, well, you can look at the series of promises, it shows how virtuous and optimistic we were, but, you know, the trouble was we really didn't have much idea of how long it would take virtually on publishing, so the first two or three volumes were quite easy to get out, but after that it got much more difficult, and also we ran out of money, so we couldn't get our editors to come out to work.<sup>222</sup>

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217. In the 1956 war, Jordan removed the scrolls to Amman for safekeeping. While in storage there, they suffered great damage from mildew. MYSTERY AND MEANING, *supra* note 211, at 44–45. In 1967, Jordan again made contingency plans to transfer the scrolls to Amman in the event of hostilities. But due to a miscommunication, the truck driver never arrived. THE HIDDEN SCROLLS, *supra* note 190, at 152.

218. See Strugnell Testimony at 33.

219. De Vaux was a member of the fascist Action Française during his youth. Robert Alter, *How Important Are the Dead Sea Scrolls?*, COMMENTARY, Feb. 1992, at 34, 35.

220. Melissa Leventon, *The Access Controversy*, in THE MYSTERY OF THE DEAD SEA SCROLLS (Fine Arts Museums of San Francisco 1994) (unpaginated).

221. *Raiders of the Lost Scrolls*, *supra* note 83, at 304. Strugnell explains how the game worked: "For all of that period until the retirement of Benoit, the role of the Israeli department was very much like that of the Jordanian government, not doing much. We were left to do our work, but at the one point when we needed a signature to get our volumes to the printer, we took the signature that was offered to us." Strugnell Testimony at 65. "One hardly saw the Israeli Department of Antiquities from one end of the year to the other." *Id.* at 63. "Benoit went to see the Israeli director of antiquities and said, I want to resign now, and I want to get the nomination of my group for a successor ratified in the same way that I was ratified." *Id.* at 45.

222. Strugnell Testimony at 46.



The international team early on established a policy under which no outsiders would be allowed access to the scroll materials.<sup>223</sup> Problems arose early in that the scholars in control hoarded the documents that had been entrusted to their possession. Thus, anyone wishing to consult one of the fragments had to secure permission from the approved scholar to whom it had been assigned.<sup>224</sup> “Some such requests were certainly granted, but many were denied.”<sup>225</sup>

Excluded scholars became increasingly resentful as the decades passed, fearing that information germane to their work was being withheld. Several of the authorized scholars, perhaps hoping to speed things up, parceled out fragments to their graduate students. Unfortunately, this further infuriated many established scholars, who resented that fledgling scholars had been granted privileges they had been denied. At least two of the original team members bequeathed their scroll assignments to specific colleagues, who continued to keep the scrolls under wraps.<sup>226</sup>

So great was the secrecy in which de Vaux and his successors shrouded the Qumran finds that even a list of unpublished texts was withheld. “‘Outsiders’ were not only denied access to them but were not even allowed to know what exactly they were not permitted to see!”<sup>227</sup> Geza Vermes of Oxford University was moved as far back as 1977 to call the (non) publication schedule for Qumran manuscripts the “Academic Scandal *Par Excellence*” of the twentieth century.<sup>228</sup>

Thus built pressure until something inevitably had to happen. But before reviewing how the caldron boiled over, it is necessary to focus on one particular scroll.

## 2. *MMT*

Out of Cave 4 of Khirbet Qumran emerged six copies (none complete) of a unique document: *miqsat ma'ase ha-Torah*,

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223. Vermes condemns them as “reactionaries opposed to free inquiry and to quick exchange of information.” QUMRAN IN PERSPECTIVE, *supra* note 198, at ix.

224. *The Access Controversy*, *supra* note 220.

225. *Id.*

226. *Id.* Geza Vermes elaborates on that subject. See QUMRAN IN PERSPECTIVE, *supra* note 198, at 7–8. Strugnell cites the case of dying Scrolls scholars who “passed their manuscripts to their students as a whole block, you know, all seventy manuscripts.” Strugnell Testimony at 207.

227. QUMRAN IN PERSPECTIVE, *supra* note 198, at xxxvi.

228. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 153–64 (1999).

meaning "Some Precepts of the Torah,"<sup>229</sup> and abbreviated as "MMT."<sup>230</sup> (Given its provenance from Cave 4<sup>231</sup> at Qumran, its full appellation is 4QMMT.<sup>232</sup>) The editor assigned to it frankly admits its difficulties: "This work is written in a peculiar form of Hebrew, and in the early days when we didn't have all of this together, some of my reconstructions were completely wrong because I didn't know about this."<sup>233</sup>

In *MMT*, the Teacher of Righteousness<sup>234</sup> (TR) addresses the Wicked Priest.<sup>235</sup> As Prof. Ya'akov Sussmann, one of the doyens of Dead Sea Scroll studies, notes, the scroll itself is only about 150 lines, of which approximately 120 have been reconstructed "from countless minute bits and pieces belonging

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229. ELISHA QIMRON & JOHN STRUGNELL, DISCOVERIES IN JUDEAN DESERT X: QUMRAN CAVE 4 V (MIQSAT MA'ASE HA-TORAH) 1 (1994) [hereinafter DJD X]. It has been variously translated as "some legal rulings pertaining to the Torah," LAWRENCE H. SCHIFFMAN, RECLAIMING THE DEAD SEA SCROLLS: THEIR TRUE MEANING FOR JUDAISM AND CHRISTIANITY 83 (1994), "Some of the Acts of Torah," NORMAN GOLB, WHO WROTE THE DEAD SEA SCROLLS? 178 (1995), "Some Torah Precepts," SCROLLS FROM THE DEAD SEA, *supra* note 199, at 64, "Some Precepts of the Law," JONATHAN G. CAMPBELL, DEAD SEA SCROLLS: THE COMPLETE STORY 79 (1998), "Some Observances of the Law," QUMRAN IN PERSPECTIVE, *supra* note 198, at 181, "Some Works of the Torah," THE HIDDEN SCROLLS, *supra* note 190, at 174, "Some of our words concerning the Torah of God," ROBERT EISENMAN & MICHAEL WISE, THE DEAD SEA SCROLLS UNCOVERED 182 (1992), and "some of the works of the Torah," James C. VanderKam, *The People of the Dead Sea Scrolls: Essenes or Sadducees?*, in UNDERSTANDING THE DEAD SEA SCROLLS, *supra* note 210, at 50, 51 n.\*.

230. Originally, this document was an anonymous part of the horde, called "Strugnell 32." Strugnell Testimony at 88, 131. Later, Strugnell's collaborator, Elisha Qimron, gave the scroll its name. Trial Opin., *supra* note 195, at 15, § 3, referring to the Transcribed Protocol of the Trial in the Jerusalem District Court, February 1–2, 1993 [hereinafter "Protocol"] at 174–75.

231. Cave 4 contained the "motherlode" of Qumran documents. MYSTERY AND MEANING, *supra* note 211, at 31. See Raphael Levy, "First Dead Sea Scroll" Found in Egypt Fifty Years Before Qumran Discoveries, in UNDERSTANDING THE DEAD SEA SCROLLS, *supra* note 210, at 63, 65 (15,000 scroll fragments, from 500 manuscripts).

232. *The People of the Dead Sea Scrolls*, *supra* note 229, at 51.

233. Strugnell Testimony at 98.

234. The Teacher "was the early leader and revered teacher of the Qumran group . . ." *The People of the Dead Sea Scrolls*, *supra* note 229, at 58 n.\*. The Damascus document of the Dead Sea Scrolls characterizes the Teacher of Righteousness as follows:

And God appraised their deeds, because they sought him with a perfect heart and raised up for them a Teacher of Righteousness, in order to direct them in the path of his heart. And he made known to the last generations what he had done for the last generation, the congregation of traitors.

THE SCROLLS ON THE TEACHER OF RIGHTEOUSNESS, at <http://www.geocities.com/Paris/LeftBank/5210/tr.htm> (last visited Mar. 4, 2001). His mortal enemy is sometimes called the "Man of Scoffing." "First Dead Sea Scroll," *supra* note 231, at 65.

235. Vermes reserves final judgment as to whether the author of *MMT* is the Teacher of Righteousness and whether its addressee is indeed the Wicked Priest. QUMRAN IN PERSPECTIVE, *supra* note 198, at 181–82. DJD X identifies the recipient as Jonathan Maccabeus, then High Priest in Jerusalem.

to six different copies of the work, some on parchment and others on papyrus.”<sup>236</sup>

John Strugnell, who eventually became Professor of Christian Origins at Harvard University,<sup>237</sup> places *MMT* among the “top five” of all the Dead Sea Scrolls.<sup>238</sup> It

is unique in language, style, and content. Using linguistic and theological analysis, the original text has been dated as one of the earliest works of the Qumran sect. . . . Together the six fragments [of this sectarian polemical document] provide a composite text of about 130 lines, which probably cover about two-thirds of the original. The initial part of the text is completely missing.<sup>239</sup>

Apparently it consisted of four sections: (1) the opening formula, now lost; (2) a calendar of 364 days; (3) a list of more than twenty rulings in religious law (*Halakhot*), most of which are peculiar to the sect; and (4) an epilogue that deals with the separation of the sect from the multitude of the people and attempts to persuade the addressee to adopt the sect’s legal views. The “*halakhot*,” or religious laws, form the core of the letter; the remainder of the text is merely the framework. The calendar, although a separate section, was probably also related to the sphere of “*halakhah*.” These “*halakhot*” deal chiefly with the Temple and its ritual. The author states that disagreement on these matters caused the sect to secede from Israel.<sup>240</sup>

Strugnell was assigned to work on *MMT* the very first day that he entered the scrollerly<sup>241</sup> in August 1954.<sup>242</sup> Already by 1959, “the six manuscripts of *MMT* had been identified, transcribed, materially reconstructed and partly combined into a

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236. Ya’akov Sussmann, *Forty Years of Qumran Research*, *TARBIZ* 59 (1989). Note that Prof. Sussmann testified on behalf of Qimron at the trial.

237. Strugnell started as the epigraphist of the Palestine Archaeological Museum, supported by donations from Mr. Rockefeller. Strugnell Testimony at 41–42.

238. *Id.* at 202.

239. SOME TORAH PRECEPTS, at <http://www.ibiblio.org/expo/deadsea.scrolls.exhibit/Library/torah.html> (last visited Mar. 4, 2001). Apparently, a full text of *MMT* would include some many more lines at the beginning, in addition to the 130 lines that have come to us.

240. *Id.*

241. In mock tribute to Winnie the Pooh, the team coined this neologism for the place where they stowed their scrolls. See *THE HIDDEN SCROLLS*, *supra* note 190, at 83.

242. When asked about the time it was assigned to him, Strugnell replied, “I was never formally assigned. I took it into my hands the first day I got there, and never have let it go.” Strugnell Testimony at 86. See *id.* at 81–82 (“It was part of this group of texts that Milik had set aside for me to try my hand at, but not very many of them had yet been identified.”).

common text.”<sup>243</sup> Over the next few decades, despite intermittent work by other scrolls scholars,<sup>244</sup> very little public discussion of *MMT* took place.<sup>245</sup>

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In 1979, Strugnell found his efforts reinvigorated by Elisha Qimron,<sup>246</sup> a professor of linguistics at Ben Gurion University.<sup>247</sup> Strugnell gives the history.

Fragments of [*MMT*] began to be discovered in 1953, . . . we were piecing things together up until 1958, when the last fragment came into the museum. It was not . . . immediately clear that it was the sort of document that we now see it to be, it seemed to us to be of another character, this was especially a thesis of Milik, but we worked on it from '54 till 1959 when a complete copy of our transcript is left in the records, and then from '59 we made, we entered it into our concordance. From that time onwards I continued working on it to 1990. The main point in that intervening period was when Mr. Qimron came along and volunteered to help initially with certain parts of the work, but later on with the whole.<sup>248</sup>

As Strugnell describes it, the two collaborated by 1981 “in renewed earnest.”<sup>249</sup> They finished the material descriptions of the manuscripts “and also came to an agreement on the outlines of the historical understanding of the work.”<sup>250</sup> As early as 1987, Sussmann commented that *MMT*, despite its secrecy, had already become recognized as a scroll that “will undoubtedly stand in the centre of all future discussion of the halakha [Jewish law] and identity of the sect and history of the halakha in general.”<sup>251</sup>

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243. *Foreword* to DJD X, *supra* note 229, at vii (by Strugnell).

244. Frank Cross used *MMT* in the context of his famous article on the history of the Hebrew alphabets at Qumran. Strugnell Testimony at 85. Josef Milik also discussed it. *Id.* at 80–90.

245. Strugnell references a paragraph in 1956 and another passing reference in M. BAILLET, J. T. MILIK & R. DE VAUX, LES “PETITES GROTTES” DE QUMRAN (1962). See DJD X, *supra* note 229, at viii.

246. Strugnell comments on “the seemingly predestined name of Qimron.” DJD X, *supra* note 229, at viii.

247. *Id.* at flyleaf.

248. Strugnell Testimony at 79–80. Strugnell is unstinting in his praise of Qimron: “He was growing, as it were, from being the linguistic expert, writing the appendix on language, to being the equal partner, and then to be the larger partner in the whole.” *Id.* at 120.

249. DJD X, *supra* note 229, at vii.

250. *Id.*

251. *Forty Years of Qumran Research*, *supra* note 236, pp. 11–76, reproduced in DJD X, *supra* note 229, at 185.

Significantly for current purposes, Sussmann was able to state in 1987—many years before the lawsuit that will be discussed presently—that, *MMT* “has been skillfully reconstructed by Profs. J. Strugnell and E. Qimron” from its highly fragmentary form.<sup>252</sup> Even more telling is that as early as 1982, when Sussmann first viewed *MMT* at Strugnell’s request, he “was astonished by its similarity to an affinity with Rabbinic literature.”<sup>253</sup> That chronology bears recollection—insiders had been viewing the reconstruction of *MMT* for a decade before Shanks’s publication in 1991 that led to the lawsuit that will be discussed below, and were already able to characterize many of its features.

The world first learned of the existence of *MMT* at a public lecture in 1984.<sup>254</sup> It is worth quoting at length from Lawrence Schiffman, an NYU professor who records being among the 1200 Dead Sea Scrolls scholars in attendance:<sup>255</sup>

It is hard to describe the audience’s shock. We now realized that for forty years, this text, holding the key to many mysteries of the Dead Sea scrolls, had been hidden from us in the recesses of the Rockefeller Museum’s scrollery. As Qimron continued his presentation, we took

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252. To give an idea as to the content of some portion of *MMT*, Strugnell and Qimron translate a portion of it as follows:

until sunset on the eighth day. And concerning [the impurity] of the [dead] person we are of the opinion that every bone, whether it has its flesh on it or not— should be (treated) according to the law of the dead or the slain. And concerning the mixed marriages that are being performed among the people, and they are sons of holy [seed], as is written, Israel is holy. And concerning his [Israel’s] [clean] animal it is written that one must not let it mate with another species, and concerning his clothes [it is written that they should not] be of mixed stuff; and one must not sow his field and vineyard with mixed species. Because they [Israel] are holy, and the sons of Aaron are [most holy.] But you know that some of the priests and [the laity intermingle.] [And they] adhere to each other and pollute the holy seed as well as their (i.e. the priests’) own [seed] with corrupt women. Since [the sons of Aaron should . . .]

SCROLLS FROM THE DEAD SEA, *supra* note 199, at 65.

253. *Id.* On that basis, it may be wondered just how subjective was the task that Qimron performed or the material that he added. Refer to Chapter VII *infra*.

254. Elisha Qimron, *The Nature of the Reconstructed Composite Text of 4QMMT*, in *READING 4QMMT: NEW PERSPECTIVES ON QUMRAN LAW AND HISTORY* 9, 10–11 (John Kampen & Moshe J. Bernstein eds., 1996). Strugnell explains the background:

[W]e were asked to come to a, give a paper in Jerusalem at the Congress of the Israeli Archaeological Society, and my reaction was no, it’s not yet ready for the public announcement, and I got an eager or pressing telephone call from Yadin saying, please, we must have it, and I said, well, you know, if we put this out at this stage of the game, we’ll be surrounded by all of the fools and nitwits in the world, and he said, don’t worry, I’ll take care of that, and, well, unfortunately he died and he was unable to maintain his promise.

Strugnell Testimony at 110–11.

255. RECLAIMING THE DEAD SEA SCROLLS, *supra* note 229, at xvii–xviii.

frantic notes on the passages he quoted, so that we could bring home at least a fragment of this scroll to study even before publication of the full text.

What was so extraordinary about Qimron's revelation?

Certainly not the fact that this text had been kept from us—we all knew that much of what was in the cave 4 lot was still unpublished by the official editorial team. No, what galvanized us was the unexpected *significance* of this particular scroll. For years we in scrolls research had grudgingly accepted the status quo of withheld information and limited access for those outside the editorial team. Our hands tied, we had contented ourselves with studying the available corpus of Dead Sea Scroll texts — admittedly impressive — published in the initial years after the discovery.

But Qimron's revelation of this extraordinary scroll shattered our customary complacency. When we realized that a document so central to the history of the Qumran sect and, indeed, of Second Temple Judaism, had been withheld from the academic community for so long, we were outraged. Qimron's disclosure made us acutely aware of the unfair distribution of texts, of the existence of haves and have-nots among Dead Sea Scrolls scholars.

For the rest of the conference, all we could talk about was this amazing document. On our bus tours of archaeological sites and in the halls of the conference, those of us for whom the scrolls were our major subject of research found it impossible to talk about anything else.

Yet even we insiders did not appreciate how much this revelation would change the field of Qumran studies.<sup>256</sup>

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256. *Id.* (emphasis in original). Schiffman, who writes about the scrolls from a Jewish perspective unlike the Christian focus of many of his colleagues, continues:

I now realize that the disclosure of even this small part of the *Halakhic* Letter [his name for *MMT*] played a major role in triggering the release of the entire scrolls corpus to scholars and to the public. But its greatest effect on me was to recast in a radical manner the work I had already been doing for years on the Dead Sea Scrolls and, in particular, on their relevance to the history of Jewish law. In many ways, the book that follows is strongly influenced by this text. The recent release of the entire corpus, spurred in large part by this text's disclosure, has made possible the publication of this volume. Indeed, now that the entire Qumran corpus has become available to us, we can appreciate how much the scrolls tell us about the history of ancient Judaism. Here for the first time is this vital chapter of the scrolls' story.

*Id.*

The year after that blockbuster revelation, a second paper followed.<sup>257</sup> But delay after delay ensued.<sup>258</sup> Thus, apart from the tantalizing hints offered in 1984, *MMT* remained unavailable to the scholarly community. Although it was rumored, even at that time, that Strugnell and Qimron had authored a 500-page commentary on *MMT*, they continued to refuse to generally release its 120-line text.<sup>259</sup> But Qimron simultaneously shared his reconstruction with favored colleagues.<sup>260</sup>

### 3. *The End of Secrecy*

As previously mentioned, the pressure to release the long-secret scrolls had been building for decades. The blow-up, when it came, centered on *MMT*.<sup>261</sup> The key player here was Hershel Shanks, editor of *Biblical Archaeology Review*. Shanks used his position at the Biblical Archaeology Society (BAS, the publisher of *BAR*) to rail against “the charmed circle” of Qumran scholars in countless editorials, making the question of public access to the Dead Sea Scrolls in general, and to *MMT* in particular, one of “intense public scrutiny.”<sup>262</sup>

“In the late 1980s Shanks began a crusade to make the scrolls universally accessible at once. *BAR*’s provocative articles portrayed the editors as excluding scholars and general public from access to the precious documents that rightfully belong to all. Framed in this way, the issue attracted the attention and support of the American news media.”<sup>263</sup>

Indeed, the *New York Times* ran an editorial in favor of

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257. DJD X, *supra* note 229, at viii–ix.

258. *Id.* at viii.

259. 1 FACSIMILE EDITION OF THE DEAD SEA SCROLLS xvi (Biblical Archaeology Society 1991).

260. Strugnell Testimony at 112–13 (“[T]he sending of the copies fell into Qimron’s area, and these were being sent to scholars in the States and in Israel and Germany.”).

261. See THE HIDDEN SCROLLS, *supra* note 190, at 82.

262. *The Access Controversy*, *supra* note 220. Shanks’s efforts to dislodge the cartel have turned him into a fixture in books and articles about the Dead Sea Scrolls. See, e.g., THE COMPLETE STORY, *supra* note 229, at 20 (“Goaded by ongoing pressure from Hershel Shanks, editor of the widely read *Biblical Archaeology Review*, this alone would probably have speeded up the process of publication to an acceptable rate.”); John Kampen & Moshe J. Bernstein, *Introduction to READING 4QMMT*, *supra* note 254, at 1 (calling Shanks “one of the key . . . players in the controversy concerning access to the unpublished material from Qumran in general and *MMT* in particular”); *How Important Are the Dead Sea Scrolls?*, *supra* note 219, at 35 (“The leather-lunged cheerleader of the outcry is Hershel Shanks . . .”); THE HIDDEN SCROLLS, *supra* note 190, at 14 (“Crusading publisher . . . hailed in the press and on television as a champion of intellectual freedom.”); *id.* at 213 (calling Shanks “a force to be reckoned with”).

263. *The Access Controversy*, *supra* note 220.

“breaking the scroll cartel.”<sup>264</sup> The editorial condemned the “clannish”<sup>265</sup> team in charge of the scrolls for “rebuffing inquiries from scholars who feared they would finish their careers without seeing the most important biblical discovery of their lifetime — and what it might reveal about the origins of Christianity and Rabbinic Judaism.”<sup>266</sup>

On the same day, the *Washington Post* joined with a similar editorial of its own.<sup>267</sup> The editorial quoted Hershel Shanks’s condemnation: “If you’re a graduate student at Harvard, you can publish a Dead Sea Scroll for your dissertation. But not if you go to Yale or Princeton or Columbia.”<sup>268</sup>

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Despite his academic credentials, Strugnell’s main claim to fame during this whole interval seemed to be that, in 33 years, he “failed to produce a single volume of text.”<sup>269</sup> But he managed to shed that obscurity in 1990.<sup>270</sup> While still being the Israel Antiquities Authority’s editor-in-chief for the entire Dead Sea Scrolls repository, Strugnell took it upon himself to grant an interview with a leading Israeli newspaper, in which he proclaimed himself an “anti-Judaist,” meanwhile describing Judaism as “a horrible religion.”<sup>271</sup>

I think Judaism is a racist religion. Something very primitive. What bothers me about Judaism is the very

264. *Breaking the Scroll Cartel*, N.Y. TIMES, Sept. 7, 1991, at 22L.

265. *Id.* (“The arrogance of team members toward scholars with whom they chose not to share the treasure that had been entrusted to them is almost incomprehensible.”); PLAYING DARTS WITH A REMBRANDT, *supra* note 228, at 160.

266. *Breaking the Scroll Cartel*, *supra* note 264. “Not only was the public deprived of important information for a very long time, but scholars who had been denied access to material literally spent their entire lives and died without having an opportunity to study the documents in question.” PLAYING DARTS WITH A REMBRANDT, *supra* note 228, at 164.

267. *The Dead Sea Printouts*, WASH. POST, Sept. 7, 1991, at A20.

268. *Id.* The pro-Qimron editors of a later book on the subject of 4QMMT likewise concede, “In the meantime a photocopy of the editors’ handwritten reconstruction of the text began to circulate, so that it became known to many Qumran scholars prior to its official publication.” *Introduction in* READING 4QMMT, *supra* note 262, at 3. Those scholars in possession of “unofficial copies” were reluctant to publish material concerning it. *Id.* at 3.

269. QUMRAN IN PERSPECTIVE, *supra* note 198, at xx. Strugnell blamed “a ten-year slowdown . . . in my studies” on “the 1967 war, . . . its consequences for the work of editing the documents that had been entrusted to the *DJD X* team, and . . . the most critical lack of funds to support their study.” *DJD X*, *supra* note 229, at viii. Sometime later, Strugnell did seem to do partial repentance. See John Strugnell, *MMT: Second Thoughts on a Forthcoming Edition*, in THE COMMUNITY OF THE RENEWED COVENANT: THE NOTRE DAME SYMPOSIUM ON THE DEAD SEA SCROLLS 56–60 (1994).

270. Strugnell had become the official general editor of the Scroll Research Group in Israel only in 1988. *Ancient Works, Modern Dilemmas*, *supra* note 191, at 1644.

271. See “Anti-Judaist” Editor of Dead Sea Scrolls Ousted, LA. TIMES, Dec. 22, 1990, at 52.



existence of Jews as a group,<sup>272</sup> as members of the Jewish religion . . . . When I look at details in the Halakha, including sex, I think — that’s amusing. It’s not religion. These people act according to what I call folklore.<sup>273</sup>

Strugnell maintained that his opinions regarding Judaism did not affect his work on the Scrolls.<sup>274</sup> Nonetheless, a three-member international editorial team recommended his removal from the project.<sup>275</sup> About one month later, the Israel Antiquities Authority dismissed the Harvard<sup>276</sup> professor for “health reasons.”<sup>277</sup>

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Both the newspaper editorials quoted above pay tribute to the efforts of two scholars at Hebrew Union College in Cincinnati. In particular, Ben-Zion Wacholder, Professor of Talmudic Studies, and his graduate student, Martin Abegg,<sup>278</sup> were able to take an old concordance of the Dead Sea Scrolls prepared by Strugnell on index cards<sup>279</sup> and “reverse engineer”<sup>280</sup> it into a semblance of the full text

272. Cf. DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (rev. ed. 1981).

273. See William Tuohy, *Israel Fires Controversial Editor of Dead Sea Scrolls*, LA TIMES, Jan. 1, 1991, at A1.

274. *Id.* Stranger things are possible. During the entire brouhaha over liberating the scrolls, “Strugnell took increasing delight in ridiculing Shanks and his friends.” THE HIDDEN SCROLLS, *supra* note 190, at 221. On *Good Morning America*, he called them “a bunch of fleas.” *Id.* Shanks reciprocated the feeling: “John was the chief devil. It was he who was withholding MMT.” Hershel Shanks, *Intellectual Property Law and the Scholar—Cases I Have Known*, in ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY (Timothy H. Lim, Hector L. MacQueen, Calum M. Carmichael, eds.) (Sheffield Academic Press forthcoming 2001). Yet today, the two are friends, a fact that the Jewish Shanks attributes to the fact that, although an anti-Semite, Strugnell is “the consummate gentleman.” *Id.*

That experience is not unique. Notwithstanding Strugnell’s infamous anti-Semitic outburst, Shank’s lawyer—who is ordained as an Orthodox rabbi—finished his examination with no little praise:

MR. FRIMER: Professor Strugnell, I have to say that it was truly an honor to meet you, and to have found your testimony fascinating and informative way beyond the legal implications of what you had to say, and I would like to once again encourage you to publish your memoirs.

Strugnell Testimony at 124.

275. See Tuohy, *supra* note 273, at A1.

276. Strugnell’s sensibilities seem a throw-back to an earlier era. See John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 494 (1993) (In 1922, Harvard University President A. Lawrence Lowell proposed a quota to limit the number of Jews admitted each year.).

277. He was soon institutionalized for manic-depression and alcoholism, and wound up on “indefinite sabbatical.” See THE HIDDEN SCROLLS, *supra* note 190, at 14, 68, 171.

278. Abegg, though collaborating with Wacholder at HUC, was then serving as a professor of Old Testament Studies at Grace Theological Seminary; he is now at Trinity Western University in British Columbia. On his interpretations of MMT from a Christian perspective, refer to note 368 *infra*.

279. QUMRAN IN PERSPECTIVE, *supra* note 198, at xvii.

which had been denied to the public.<sup>281</sup> That concordance, Strugnell testified, was “a huge card file in which every word in the Dead Sea Scrolls is entered separately in alphabetical order together with its context, the word beforehand, the word afterward, sometimes enough words to make up a sentence.”<sup>282</sup>

Thanks to the efforts of that pair,<sup>283</sup> abetted by “Rabbi Computer,”<sup>284</sup> the cartel’s wall of secrecy seemed to be crumbling.<sup>285</sup> *The New York Times*, for one, applauded that turn of affairs.

Some on the committee might be tempted to charge the Cincinnati scholars with piracy. On the contrary, Mr. Wacholder and Mr. Abegg are to be applauded for their work—and for sifting through layer upon layer of obfuscation. The committee, with its obsessive secrecy and cloak and dagger scholarship, long ago exhausted its credibility with scholars and laymen alike.

The two Cincinnatians seem to know what the scroll committee forgot: that the scrolls and what they say about the common roots of Christianity and Rabbinic Judaism belong to civilization, not to a few sequestered professors.<sup>286</sup>

It remains only to add that the Wacholder/Abegg volume, *A Preliminary Edition of the Unpublished Dead Sea Scrolls*, emerged under the imprint of Hershel Shanks’s BAS.<sup>287</sup> Thus did the hermetic barrier protecting the scrolls begin to buckle.<sup>288</sup>

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280. Cf. 4 NIMMER ON COPYRIGHT § 13.05[D][4].

281. The concordance cites “not merely single words but the complete clause in which they appear.” *How Important Are the Dead Sea Scrolls?*, *supra* note 219, at 36.

282. Strugnell Testimony at 81.

283. For background, see ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION?: FROM PRIVACY TO PUBLIC ACCESS 130–32 (1994). For instance, given the state of computer art then extant, Abegg had to enter all the Hebrew text backwards! *Id.* at 131.

284. See MYSTERY AND MEANING, *supra* note 211, at 56.

285. As Robert Alter observes, “[T]he barn door had been kicked open, and everything that had been locked inside rapidly galloped out.” *How Important Are the Dead Sea Scrolls?*, *supra* note 219, at 36.

286. *Breaking the Scroll Cartel*, *supra* note 264.

287. THE HIDDEN SCROLLS, *supra* note 190, at 236.

288. In the opinion of Vermes, the protective dam erected around the fragments by the international team collapsed in the autumn of 1991 under the growing pressure of public opinion, mobilized in particular by Hershel Shanks, in the columns of the widely read *Biblical Archaeology Review* (*BAR*). The first landmark event leaning towards full freedom was the publication in early September by *BAR*’s parent body, the *Biblical Archaeology Society*, of seventeen Cave 4 manuscripts reconstructed with the help of a computer by Ben Zion Wacholder and Martin Abegg . . . . QUMRAN IN PERSPECTIVE, *supra* note 198, at xx.

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Simultaneously, pressure from other sources caused the walls of secrecy to come tumbling down. Some decades earlier, as a safeguard against the Six-Day War and concomitant damage that bombing could cause to the Scrolls, philanthropist Elizabeth Hay Bechtel had persuaded the Israeli government to allow her to have the scrolls photographed and the photographs safely stored.<sup>289</sup> Mrs. Bechtel proved so obstreperous that her own trustees kicked her off the board of directors of her foundation.

They did not reckon on the fury of a philanthropist scorned. She kept her own separate copy on two small spools, which museum officials refer to informally as her “scroll in the hole.” In 1980, she slipped them to the Huntington [Library in San Marino, California], with a hundred G’s to build an air-conditioned vault. When that indomitable old lady died in 1987, title to her private set passed to the library.<sup>290</sup>

The rest is history. While the Wacholder/Abegg volume was nearing publication and Shanks’s campaign for openness had reached its crescendo, the Huntington Library offered scholars free access to the Bechtel set of scroll photographs.<sup>291</sup> The Israel Antiquities Authority, although raising strenuous objection and threatening to sue, ultimately retreated.<sup>292</sup>

At around the same time that the Israel Antiquities Authorities’ policy of secrecy was crumbling, Shanks published a two-volume *Facsimile Edition of the Dead Sea Scrolls* consisting

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289. WHO OWNS INFORMATION?, *supra* note 283, at 128–29. See William Safire, *Breaking the Cartel*, N.Y. TIMES, Sept. 26, 1991, at A27.

290. *Id.*

291. “Later in the same month came the announcement by William A. Moffat that the Huntington Library of San Marino, California, renowned research institution, would bring to an end the 40-year-old close shop by opening its complete photographic archive with the Qumran scrolls to all qualified scholars.” QUMRAN IN PERSPECTIVE, *supra* note 198, at xxi.

292. *Raiders of the Lost Scrolls*, *supra* note 83, at 306–07.

Since the late 1980s, no controversy has been more heated than that surrounding access to the scrolls and the movement to accelerate their publication. The push by scholars to gain what the “Biblical Archaeology Review” characterized as “intellectual freedom and the right to scholarly access” has had significant results. In 1988, the administration for scroll research, the Israel Antiquities Authority, began to expand the number of scroll assignments. By 1992, they included more than fifty scholars. In 1991, a computer-generated version as well as a two-volume edition of the scroll photographs were published by the Biblical Archaeology Society. Late in the same year, the Huntington Library of California made available to all scholars the photographic security copies of the scrolls on deposit in its vault. Closing the circle, the Israel Antiquities Authority announced that it too would be issuing an authorized microfiche edition, complete with detailed indices.

*Two Thousand Years Later*, at <http://www.lcweb.loc.gov/exhibits/scrolls/today.html> (last visited Mar. 4, 2001).

of 1785 photographic plates of the Dead Sea Scrolls.<sup>293</sup> The provenance of those photographs has never been revealed.<sup>294</sup>

The *Facsimile Edition* begins with a brief introduction by Professors Robert Eisenman<sup>295</sup> and James Robinson, followed by a longer foreword by Shanks. Recounting at length his efforts to break the cartel, Shanks there expresses admiration for “the dedicated people who devoted their professional lives to arranging and deciphering the seemingly impenetrable pieces of our common past.”<sup>296</sup> But Shanks’s peroration, at base, is hardly laudatory: “for their pride and greed — their unbending determination to keep exclusive control of these treasures for themselves, their heirs and their students — they must bear the shame.”<sup>297</sup>

The two-volume *Facsimile Edition* is a weighty scholarly tome, of interest only to the most dedicated specialists in the field. Nonetheless, it contains 22 excerpts following the Foreword detailing efforts by the Israel Antiquities Authority to placate, muzzle, or deflect Shanks (along with the Huntington Library), as well as the editorials from the *Washington Post* and the *New York Times* quoted above.

But the *Facsimile Edition* also contains something else—the 120-line reconstruction of *MMT*, produced in ancient Hebrew without commentary or explanation. Shanks’s own explanation of his decision to reproduce that excerpt as Figure 8 deserves quotation in full:

Eventually the cartel descended to what can only be described as bullying.

The effort to prevent disclosure of the important text known as *MMT* (*miqsat ma’aseh ha-torah*) is illustrative. The text was assigned to John Strugnell for publication nearly 40 years ago. However, he did not even disclose its existence until 1984.

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293. Funding for publication of the *Facsimile Edition* came from the Moskowitz Family Foundation, which is funded by Irving Moskowitz, a Florida dentist and California land developer who has bankrolled numerous settlements in Judea. See 1 FACSIMILE EDITION, *supra* note 259, at v.

294. QUMRAN IN PERSPECTIVE, *supra* note 198, at xxi.

295. It was Eisenman who brought the project to Shanks. See THE HIDDEN SCROLLS, *supra* note 190, at 230–34. In a 1993 interview, Eisenman refused to divulge the source, but promised to reveal it in four or five years. *Id.* at 230. I called Eisenman on February 18, 2000, and asked him to finally spill the beans. Laughing, he replied that he is still “not ready” to make that particular revelation. To get ahead of the story, I doubt that either Eisenman or anyone else could have imagined in 1993 that the case would still be pending before the Israel Supreme Court in 2000. But it still was, until resolved later that year. Refer to section (B)(2) *infra*.

296. 1 FACSIMILE EDITION, *supra* note 259, at xii.

297. *Id.*

Then, with a colleague, Strugnell proceeded to write a 500-page commentary on this 120-line text. The commentary is still not published and no one knows when it will be. But Strugnell won't release the 120-line text until the commentary is published. He has, however, given copies of his transcription to friends and colleagues.<sup>298</sup> Many of them teach classes on it. Several have written important articles on it (as of this writing, over 30 articles about MMT have appeared; that is how we know of its importance). It will, we are told, revolutionize Qumran studies. But no one outside the charmed circle can see it.

In mid-1990 a Polish scholar named Zdzislaw J. Kapera received an anonymous copy of Strugnell's transcription of MMT (Figure 8). Kapera is editor of a journal called *The Qumran Chronicle*; he decided to print the transcription in his journal. BAR announced that scholars could obtain a copy of MMT by subscribing to *The Qumran Chronicle*. Kapera was swamped with orders. But before he could fulfill them, he was cornered by the cartel at a scholarly conference in Madrid; one outside scholar (Philip R. Davies of Sheffield University, England) has described what ensued in Madrid as a 20<sup>th</sup>-century version of the Spanish Inquisition. Antiquities director General Amir Drori then wrote Kapera a letter, pointedly sending a copy to the president of the Polish Academy of Sciences (Cracow Section).<sup>299</sup> In the letter Drori accused Kapera of "a violation of all legal, moral and ethical conventions and an infringement on the rights and efforts of your colleagues. I am very dismayed . . . . We are awaiting your immediate reply prior to further action." Kapera promptly decided to discontinue distributing MMT and to destroy all copies. Outsiders must still await publication of the commentary if they want to see the text (unless they look at Figure 8). Kapera wrote his would-be subscribers that "unfortunately, after the Madrid congress I am no longer able to supply people with a copy. I am very sorry because of that." He described his publication of MMT as "a desperate act" for which he apologized.<sup>300</sup>

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298. See Moshe J. Bernstein, *The Employment and Interpretation of Scripture in 4QMMT: Preliminary Observations*, in *READING 4QMMT*, *supra* note 254, at 29, 32 (recalling a time when copies of 4QMMT "circulated only in *samizdat* copies"). By 1990, "the *samizdat* version of the manuscript fragments had come to be widely circulated among scholars." *WHO WROTE THE DEAD SEA SCROLLS?*, *supra* note 229, at 207. For instance, Schiffman thanked Strugnell and Qimron "for graciously making available" to him their "soon to be published edition and commentary of this text." *Id.* at 208.

299. Kapera is a professor at Jagiellonian University in Cracow. *WHO WROTE THE DEAD SEA SCROLLS?*, *supra* note 229, at 320.

300. 1 FACSIMILE EDITION, *supra* note 259, at xv-xvi.

B. Qimron v. Shanks

1. *The Cases*

The next chapter unfolded in the courts of law. Qimron fired the first salvo, by filing suit. As defendants, he targeted not only Shanks, but everyone else associated with the *Facsimile Edition*, including BAS, Eisenman and Robinson.<sup>301</sup> Qimron filed in the Jerusalem district court. But the gravamen of his claim was for violation of U.S. copyright law,<sup>302</sup> notwithstanding the Israeli forum.<sup>303</sup> In fact, copies of the book were not sold in Israel.<sup>304</sup>

Shanks responded by filing his own declaratory relief lawsuit in the Eastern District of Pennsylvania against Qimron, who was then serving as scholar-in-residence at the Annenberg Research Institute in Philadelphia.<sup>305</sup> The judge refused to dismiss that suit on the ground of *forum non conveniens*.<sup>306</sup>

More litigation ensued in that district. Qimron retained Philadelphia counsel to send a demand to Wacholder:

It has come to our attention that you might be in possession of Professor Qimron's composite text of MMT. Moreover, we have been informed that you might be using portions of Professor Qimron's reconstruction in a publication planned by you and Professor Abegg. [¶ ] On behalf of Professor Qimron, please accept this letter as notification that any use of Professor Qimron's reconstructed text is a violation of his copyright and

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301. Professors Robert Eisenman and James Robinson wrote the brief introduction to the *Facsimile Edition*. To get ahead of the story, in order to dispose of the claim against them, Judge Dorner essentially held them liable because their names appear on the book's title page. But, in addition, she evidently construed the trial testimony as establishing that the pair knew of and approved *MMT*'s inclusion in the *Facsimile Edition*. Trial Opin., *supra* note 195, at 34.

302. Notwithstanding an allegation of infringement under Israeli law as well, Complaint filed by Plaintiff on January 14, 1992, Civil Case No. 41/92, para. 13, Judge Dorner did not find evidence of infringement in Israel. See Trial Opin., *supra* note 195, at 21, § 19 ("All agree that the suit is governed by the law of the place of infringement, that is, the laws of the USA.").

303. This case therefore represents the Israeli analogue to *London Film Productions Ltd. v. Intercontinental Communications Inc.*, 580 F. Supp. 47 (S.D.N.Y. 1984), in which the court exercised jurisdiction to adjudicate claims of violation of Chilean copyright through performances undertaken in Chile. See David Nimmer, *An Odyssey Through Copyright's Vicarious Defenses*, 73 N.Y.U. L. REV. 162, 164 (1998). The present study does not tackle the interesting issues of international comity and choice of law that thereby arise. Refer to note 419 *infra*.

304. Biblical Archaeology Soc'y v. Qimron, Copyright L. Dec. (CCH) ¶ 27,065 (E.D. Pa. Feb. 10, 1993).

305. *Id.*

306. *Id.*

Professor Qimron will take all steps available to him under both American and Israeli law to protect that copyright.<sup>307</sup>

Wacholder and Abegg responded by filing their own suit for declaratory relief against Qimron, before the same judge in the Eastern District of Pennsylvania.<sup>308</sup>

The results of the two pieces of Philadelphia litigation proved inconclusive. Shanks could not use the Pennsylvania action to forestall responding to the Israeli case;<sup>309</sup> he therefore dropped his own prosecution to focus his attention on preparing his Jerusalem defense. Wacholder and Abegg soon tired of the litigation process and similarly dropped their case.<sup>310</sup>

## 2. *The District Court Opinion*

Qimron filed his suit against Shanks on January 14, 1992.<sup>311</sup> A more colorful cast of characters would be hard for any novelist to conjure up. Qimron retained Isaac Molcho, whose spirit of accommodation can be gauged by the fact that Binyamin Netanyahu later appointed him as chief negotiator with the Palestinians.<sup>312</sup> Shanks retained Dov Frimer, an American-born lawyer who is also an ordained rabbi.<sup>313</sup> Meanwhile, Amos Hausner (son of famed Adolf Eichmann-prosecutor Gideon Hausner) represented Eisenman.

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307. Letter dated Feb. 16, 1993, from Zachary L. Grayson of Wolf, Block, Schorr and Solis-Cohen to B.Z. Wacholder, attached as Exhibit 1 to Complaint in Case No. 93-CV-4097 (filed July 29, 1993) (on file with the *Houston Law Review*).

308. *Id.* My name appears on the pleadings as an advisor to Wacholder and Abegg. I served in that role without compensation.

309. Shanks attempted to cancel the Jerusalem District Court order given *ex parte* on January 21, 1992, Motion 139/92, granting permission for service of the Complaint outside of Israel, in accordance with Israeli civil procedure rules. Motion 238/92. The motion was denied and Shanks appealed. In the end, the appeal was withdrawn. See Trial Opin., *supra* note 195, at 19, § 15.

310. See Offer of Judgment, filed Sept. 2, 1993. According to Shanks, the pair “withdrew their lawsuit because they became confident that Qimron would not sue them.” *Intellectual Property Law and the Scholar*, *supra* note 274.

311. *Authors’ Moral Rights in Non-European Nations*, *supra* note 191, at 568.

312. During Strugnell’s testimony, Shanks was amused by the tales of the eminent Harvard professor as a young pup at Cambridge University. The following colloquy ensued:

MR. MOLCHO: I ask you please, do not laugh when I cross-examine, it disturbs me very much.

MR. SHANKS: I’m sorry if it disturbs you. If something’s funny, it’s hard not to laugh.

Strugnell Testimony at 146.

313. See Aryeh A. Frimer & Dov I. Frimer, *Women’s Prayer Services—Theory and Practice*, TRADITION, Winter 1998, at 5, 5.

The case went to trial before Judge Dalia Dorner on February 1, and 2, 1993.<sup>314</sup> Judge Dorner held that American copyright law should be applied in this case, as the alleged infringement took place in the U.S.<sup>315</sup> However, in light of the fact that the American law had not been proved to her satisfaction,<sup>316</sup> in order to determine its contours, she invoked the “presumption of identity of laws”<sup>317</sup> and consulted Israeli copyright law.<sup>318</sup> After dealing with the normative framework of the case, Judge Dorner proceeded to discuss the substance of Israeli copyright law, beginning with the originality standard and its application to reconstructed texts.

As more fully set forth below, Judge Dorner cited as examples of Qimron’s creativity (1) the fact that he read a given word with the letter *ayin* instead of the letter *aleph*, so that it referred to leather hides rather than to lights; and (2) that he put some fragments together widthwise rather than, as Strugnell had urged, lengthwise.<sup>319</sup> In her ruling, the judge credited Qimron’s claims that he had spent eleven years working on reconstruction of the *MMT* manuscript.<sup>320</sup> She accepted his crestfallen conclusion that publication of the *Facsimile Edition* meant that Qimron’s “dream to be the first editor of the scroll vanished.”<sup>321</sup> “Judge Dorner determined that Qimron’s loss of ‘his right of priority in publishing’ the *MMT* text had caused him tremendous ‘economic damage and moral distress.’”<sup>322</sup> As a

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314. *Authors’ Moral Rights in Non-European Nations*, *supra* note 191, at 568. Subsequently, Judge Dorner was elevated to the Supreme Court. *Id.* n.165. Because that body hears cases in panels instead of *en banc*, she played no overt role on the appeal. One should avoid the suspicion that her fellow Supreme Court jurists subconsciously considered the author of the decision below when deliberating the case—in the celebrated case against accused Nazi war criminal Ivan Demjanjuk, the Supreme Court reversed the conviction, despite then-District Judge Dorner’s vote to sentence him to death.

315. Not all commentators have been sensitive to the distinction. See *Ancient Works, Modern Dilemmas*, *supra* note 191, at 1647 n.83.

316. It was open to defendants to prove that the content of U.S. copyright law differed from applicable Israeli law. Evidently, Judge Dorner considered their evidence in that regard deficient. *Authors’ Moral Rights in Non-European Nations*, *supra* note 191, at 574.

317. Nonetheless, the discussion below focuses on U.S. copyright law and investigates its balance between competing interests in this sphere.

318. Once she made the decision to apply the presumption, Judge Dorner tried the case as if it were a purely local, Israeli matter, with no foreign elements or laws involved. See Trial Opin., *supra* note 195, at 22, end of § 20.

319. Refer to Chapter VIII, section (A)(1) *infra* (discussing Trial Opin., *supra* note 195, at 24).

320. *Ancient Works, Modern Dilemmas*, *supra* note 191, at 1646.

321. *Id.* at 1647.

322. *Id.* at 1648.



result,<sup>323</sup> she awarded statutory damages of 20,000 New Israeli Shekels (NIS), damages for mental distress in the amount of 80,000 NIS, and attorney's fees in the amount of 50,000 NIS.<sup>324</sup> "This was the largest amount ever awarded for mental distress and costs in a copyright case in an Israeli court."<sup>325</sup>

### 3. *The Supreme Court Opinion*

The case was presented on appeal to the Supreme Court of Israel in March 1998. I happened to be resident in Israel during 1998–99. Israeli counsel filed a petition with the Supreme Court on my behalf, seeking to have me appear as *amicus curiae*.<sup>326</sup> The application was, to our knowledge, unprecedented,<sup>327</sup> inasmuch as that Court does not allow individuals not admitted to the Israeli bar to appear before it. Nonetheless, given that Judge Dorner in some sense treated the case as one arising under Title 17 of the United States Code,<sup>328</sup> we hoped to break new ground here.<sup>329</sup>

Nonetheless, the Supreme Court denied my request after it had been pending for some twenty months.<sup>330</sup> It stated at the time that the reasons for denial would be included in the Court's resolution of the appeal itself.

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323. In a bit of result-oriented logic, Judge Dorner noted that Shanks was an attorney, that he knew that the Israel Antiquities Authority had blocked the attempted Polish publication of *MMT*, that he should have been aware of the copyright implications of his actions, and, therefore, that his activities were not undertaken in "good faith." See Trial Opin., *supra* note 195, at 29, § 35. By the same token, she concluded that Shanks exhibited a blatant disregard for Qimron's "rights" in his zeal to "free the scrolls" and that therefore a large award against him was indicated. *Id.* at 39, § 51. The flaw in that logic is that, even with all that knowledge, Shanks could have concluded in good faith that his action in publishing the reconstructed manuscript violated no copyright belonging to Qimron or anyone else. Indeed, such is the considered conclusion herein.

324. *Authors' Moral Rights in Non-European Nations*, *supra* note 191, at 568. The exchange rate at the time was approximately 3 NIS to the dollar.

325. *Id.* That statement, albeit true, may have little more substance than referring to "the largest copyright award in the history of South Dakota." See *Dakotah, Inc. v. Tomelleri*, 21 F. Supp. 2d 1066, 1072 (D.S.D. 1998) ("There are few, if any, lawyers practicing in South Dakota with any significant experience in intellectual property law.").

326. See Abraham Rabinovich, *The Case of the 2,000-Year-Old Copyright*, JERUSALEM POST, Mar. 20, 1998, at 16. That petition had been filed on December 10, 1997, in the name of the "Committee of Concerned Intellectual Property Educators." Counsel represented me without compensation.

327. The motion to file an *amicus* brief mentions references by the Israeli courts to the procedure of *amicus curiae* briefs and even *obiter dicta* by justices regarding their authority to accept such briefs, such as *A.B. v. A.B.*, 3 P.M. 263, at 287.

328. Refer to note 302 *supra*.

329. Making further disclosure, I received no compensation in connection with this matter.

330. Order dated August 24, 1999.

That day arrived on August 30, 2000. Some seven years after trial, a panel of the Supreme Court, sitting as the Court of Appeals for Civil Matters, affirmed the opinion below.<sup>331</sup> In doing so, Justice Türkel's opinion<sup>332</sup> took the case on several interesting turns. First, the Court's opinion begins by disclaiming a desire to draw principles on a large canvass: "A decision on the issue before us is based on the specific circumstances of the case, rather than general principles."<sup>333</sup> Accordingly, the self-conscious intent appears to limit the force of the Court's pronouncement, rather than establishing it as the general scheme to govern copyright in scholarly works, or even in archaeological reconstructions.

Second, although the Supreme Court begins by quoting Judge Dorner's finding that "everyone agrees that the law of the place of infringement applies to the complaint, in other words the laws of the United States,"<sup>334</sup> it nonetheless takes the case out of its U.S. framework and introduces a new governing law into the mix:

I am unable to accept the Appellants' argument and I agree with Qimron's claim that Israeli law applies to this matter without resorting to the presumption of the equality of laws. In this matter he relies upon the fact that copies of the Book were sent to readers in Israel and on the fact that a portion of the marketing efforts of the Book were done in Israel. In fact, from Shanks' testimony (pp. 271–272 of the Protocol) and the order forms that were submitted as evidence it appears that three copies of the Book were sent by BAS to readers in Israel. These copies were, it is true, ordered in the United States, and the consideration for them was paid there, but the fact that BAS sent them directly to readers in Israel is enough to find that it publicized the Deciphered Text in Israel. Since Qimron's cause of action is based upon the fact that his right to be the first to publish the Deciphered Text was denied, the copies distributed in Israel until the issuance of the injunction that brought about the cessation of the distribution — even if they were few — are sufficient for the application of Israeli law to this matter.<sup>335</sup>

Given that determination, the rationale for my petition evaporated—though I might have something useful to tell an

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331. Eisenman v. Qimron, C.A. 2790/93, 2811/93, 54(3) P.D. 817 [hereinafter "App. Opin."] There is no official English translation of the opinion.

332. The panel consisted of Associate Justices Ya'akov Türkel and Dorit Beinisch and Chief Justice Aharon Barak. The latter two simply appended "I agree" to the former's opinion. *Id.* following para. 36.

333. *Id.* at para. 14.

334. *Id.* at para. 8.

335. *Id.* at para. 8.

Israeli court about Title 17 of the United States Code, I certainly cannot offer unique assistance about application of Israeli copyright law. In any event, citing both procedural<sup>336</sup> and substantive bases, including the expansive briefing already furnished by the parties,<sup>337</sup> the Court denied my *amicus* application.<sup>338</sup>

In one other respect, however, Justice Türkel broke no new ground—the sole concrete exemplars of Qimron’s creativity that he cites are the same two that figure in Judge Dorner’s opinion,<sup>339</sup> *viz.* the horizontal vs. vertical joins and the *aleph* vs. *ayin*.<sup>340</sup>

In sum, the Court affirmed the full award of damages and other recovery against Shanks. Not only that—it added an additional award of 60,000 NIS in attorney’s fees to Qimron,<sup>341</sup> and granted Qimron’s cross-appeal by entering relief that Judge Dorner had not ordered: a “return order”<sup>342</sup> instructing the defendants “to deliver to Qimron all copies of the Book in which the Deciphered Text is included and all printing blocks and stencils in their hands used, or intended to be used, for the creation of copies.”<sup>343</sup>

### C. *The Larger Picture*

What has happened since the Israel Antiquities Authority lost its stranglehold on scroll publication in 1991? Has the market been “inundated with third- and fourth- and fifth-rate productions,” as

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336. Although I did submit a notarized power of attorney to the Court, it evidently was not enough. For the opinion comments that Petitioner, Committee of Concerned Intellectual Property Educators, “did not support its petition with an affidavit. As a result of this the existence of the Petitioner and its nature were not proven. Likewise it was not proven that Mr. David Nimmer is authorized to represent the Petitioner.” *Id.* at para. 34.

337. “It should be further said that the attorneys for the litigants spread a wide list of arguments before us and it seems that the submission of additional briefs by the Petitioner would not be able to contribute to the decision.” *Id.* at para. 34.

338. Notably missing from the Court’s rationale was the obvious proposition that, although I offered to address U.S. law, which all parties at the time conceded to govern, the Supreme Court took the case outside that body of law, and hence outside my competence. Hausner (Eisenman’s counsel) told me that as soon as the Court declined to hear from me in August 1999, he knew that affirmance was a foregone conclusion.

339. Refer to section (B)(2) *supra*.

340. App. Opin., *supra* note 331, at para. 14.

341. *Id.* at para. 36.

342. *Id.* at para. 29. This relief stems from Section 7 of the Copyright Act, 1911 from the United Kingdom, which was applicable in Israel from the period of the British Mandate. See E.P. SKONE JAMES ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT 1139 (13th ed. 1991). In U.S. terminology, the parallel terms would be impoundment and forfeiture. See NIMMER ON COPYRIGHT §§ 14.07–14.08.

343. App. Opin., *supra* note 331, at para. 36.

one insider predicted at the time?<sup>344</sup> To the contrary. Oxford's Geza Vermes affirms, "This new policy has had an essentially beneficial effect on Qumran studies. Since vested interests are no longer protected, the rate of publication has noticeably accelerated and learned periodicals are flooded with short papers by scholars claiming fresh discoveries. Free competition is likely to expedite the official edition itself. . . . Scholarship and the general public are the beneficiaries of the new era of liberty. Only the selfish and the procrastinators stand to lose."<sup>345</sup> Vermes himself exemplifies the phenomenon that he cites: Given the 1991 "revolution,"<sup>346</sup> with its "consequent 'liberation' of the previously inaccessible material" Vermes had to compile another substantial revision of his perennially popular work bringing the scrolls in translation to the English-speaking world.<sup>347</sup> NYU's Schiffman adds, "The publication of the Scrolls has been a complete success . . . scholarship is at a level never seen before."<sup>348</sup>

### 1. Qimron v. Shanks *in Context*

Regardless of how the various court in fact ruled, Shanks would appear to be the winner in the grand sense.<sup>349</sup> His attack on the cartel has succeeded. By 1992—the year after the Huntington Library granted access to the photographs to interested scholars and Shanks published both the *Facsimile Edition* and the Wacholder/Abegg reverse engineered text—the Israel Antiquities Authority finally capitulated.<sup>350</sup> Initially, "the IAA granted access to their scroll photographs to interested scholars."<sup>351</sup> By the next year, the IAA, through the instrumentality of a Dutch publisher, issued an authorized complete edition of the photographs on microfiche.<sup>352</sup> Almost immediately, Oxford opened up its previously restricted scroll

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344. WHO WROTE THE DEAD SEA SCROLLS?, *supra* note 229, at 229–30 (quoting Magen Broshi).

345. QUMRAN IN PERSPECTIVE, *supra* note 198, at xxi.

346. *Id.* at ix.

347. *Id.*

348. PLAYING DARTS WITH A REMBRANDT, *supra* note 228, at 164.

349. Although the case was fought "meanly and bitterly"—even to the extent of barring Shanks from leaving the country until posting a bond equal to the judgment, *Intellectual Property Law and the Scholar*, *supra* note 274; MYSTERY AND MEANING, *supra* note 211, at 60—the litigation as a whole was always part of a larger battle. See THE HIDDEN SCROLLS, *supra* note 190, at 246–53.

350. *The Access Controversy*, *supra* note 220; QUMRAN IN PERSPECTIVE, *supra* note 198, at xxi.

351. *The Access Controversy*, *supra* note 220.

352. *Id.*

photographic archives to all competent research scholars.<sup>353</sup>

“Of course, far from clearing up mysteries attendant to the Scrolls, their authors, and their meaning, contention in those realms has only proliferated.”<sup>354</sup> One does not need to look far in Dead Sea Scrolls studies to discover that contention.<sup>355</sup> For instance, Magen Broshi,<sup>356</sup> then serving as director of the Shrine of the Book,<sup>357</sup> declared in an interview that Norman Golb, a professor at the University of Chicago’s Oriental Institute and author of numerous Dead Sea Scroll commentaries, is “a revolting argumentalist, a polemist, an opinionated trouble-maker [who had] filled the world with his filth . . . . When will we be free of [him]? When he dies.”<sup>358</sup> When Eisenman, a professor at California State University, Long Beach,<sup>359</sup> previously complained about exclusion from the Scrolls and asked when he would get access to them, Broshi reportedly responded, “You will not see these things in your lifetime.”<sup>360</sup> And so it goes.<sup>361</sup> Not even the Supreme Court’s ultimate resolution of the case could end the invective.<sup>362</sup>

353. QUMRAN IN PERSPECTIVE, *supra* note 198, at xxi.

354. *Id.*

355. For a catalogue of invective bandied among Dead Sea Scrolls scholars, see PLAYING DARTS WITH A REMBRANDT, *supra* note 228, at 161 (quoting Magen Broshi describing “non-scroll-team scholars who wanted access to the material as ‘slime,’ ‘fleas,’ ‘gang-snatchers,’ and ‘manure’”).

356. Strugnell describes Broshi as “pragmatic, he was the man who was going to find money, photography and things like that.” Strugnell Testimony at 63.

357. Note that that institution, which houses the scrolls purchased by the nascent country on the very day of its founding, figures prominently in the “secular religion” of the rebirth of the State of Israel. See THE HIDDEN SCROLLS, *supra* note 190, at 43, (“as much political symbol as Rome’s Colosseum or Philadelphia’s Liberty Bell”). For dark ruminations on the Shrine of the Book, see *id.* at 52, 160. For even darker ruminations on it, see *Our Homeland, the Text*, in NO PASSION SPENT, *supra* note 212, at 304, 326–27.

358. WHO WROTE THE DEAD SEA SCROLLS?, *supra* note 229, at 230. *Cf.* HOW TO WIN FRIENDS, *supra* note 272.

359. It is not only Broshi who has stiff-armed Eisenman. One outsider notes that in scholarly circles, “bringing up [Eisenman’s] name without the requisite disavowal was usually regarded as . . . a symptom of emotional distress.” THE HIDDEN SCROLLS, *supra* note 190, at 21. Yet after canvassing the literature, that outsider largely adopts Eisenman’s interpretation, and presents it in convincing fashion. See *id.*

360. MICHAEL BAIGENT & RICHARD LEIGH, THE DEAD SEA SCROLLS DECEPTION 77 (1991). The comment was also directed at Prof. Philip Davies of Sheffield University. *Id.* at 76–77. Note that Eisenman was, of course, a co-defendant in *Qimron v. Shanks*. Broshi testified in favor of the plaintiff, Golb for the defendants. See THE HIDDEN SCROLLS, *supra* note 190, at 246.

361. I myself met Broshi once at the UCLA Faculty Center. When I told him that I was providing occasional *pro bono* advice to the defense team in Jerusalem, he had one sentence for me: “You should be ashamed from yourself!”

362. Commenting on the appellate resolution, Eisenman concluded that “After the way we were treated, young scholars now will not stand against the establishment.” Ron

At the time that the Jerusalem district court ruled, Qimron's long-secret manuscript commenting on *MMT* remained unpublished. In the interim, it has finally seen the light of day. Qimron and Strugnell have published their commentary as volume 10 in Oxford's series on *Discoveries in the Judean Desert*.<sup>363</sup> This 1994 publication of *DJD X* by the Clarendon Press contains 235 oversize pages. Its copyright notice is in Qimron's name alone, with no mention of Strugnell, but "without derogating from any rights vested in the Israel Antiquities Authority with regard to the Scrolls' fragments."<sup>364</sup>

## 2. *The Released Scrolls in Context*

The publication of *DJD X* has produced an efflorescence of *MMT* studies. In fact, it has led not only to a wealth of articles but a full-length book: *Reading 4QMMT*.<sup>365</sup> In that book, eight scholars—Elisha Qimron among them—share their perspectives on how *MMT* sheds light on the Old Testament, the New Testament, Rabbinic tradition, the Hasmonean period, and the remainder of the Dead Sea Scrolls. From the "scholarly hullabaloo which accompanied both its nonpublication and its subsequent release to the public," the editors rank *4QMMT* as "one of the most significant documents to be reconstructed from the thousands of fragments found in

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Kampeas, *In Latest Dead Sea Scroll Battle, Scholar's Copyright is Upheld*, Aug. 1, 2000, available at 2000 WL 24508410. The Israel Antiquities Authority "dismissed the claim as 'outrageous' and not worthy of further comment." *Id.* Even after winning before the Supreme Court, Qimron continued to label Shanks's use of his work "theft," and went on to proclaim, "This is a gang of international thieves who decided that the easiest way to wage a political struggle is through publishing the works of others." Moshe Reinfeld, *Scholar Wins Battle Over Dead Sea Scrolls*, HA'ARETZ, Aug. 31, 2000, at <http://www.3haaretz.co.il/eng/scripts/print.asp?id=91222>. Only Shanks took the high road: He said that "he 'respectfully' disagreed with the decision but would abide by it." Kampeas, *supra*.

363. Early works in the series are entitled *Discoveries in the Judean Desert of Jordan*. The only clearcut change made by virtue of the transfer to Israeli control was to eliminate the indication as to geographical origin. See THE HIDDEN SCROLLS, *supra* note 190, at 155.

364. *DJD X*, *supra* note 229, at iv. After Qimron's trial victory, Shanks audaciously asked Oxford University Press for reprint permission for *Biblical Archeological Review*. Oxford assented. Qimron's lawyer thereupon complained to Oxford about its unethical conduct. See Hershel Shanks, *When Scholars Call in the Lawyers*, BAR, Sept./Oct. 1999, at 71. Qimron's lawyers have subsequently complained to the organizers of scholarly conferences about the scrolls and the case. *Id.*

365. READING 4QMMT, *supra* note 254. "The impetus for this collection of essays was the long-awaited appearance of the official edition of 4QMMT by Elisha Qimron and John Strugnell." *Id.* at xi.

Cave 4 at Qumran.”<sup>366</sup> To cite but one example, Martin Abegg, the Christian scholar who co-produced the early reverse engineered text that Shanks published,<sup>367</sup> maintains that “MMT . . . provides the ‘smoking gun’ for which students have been searching for generations.”<sup>368</sup>

One of the contributors to that volume comments, “Scholarship is just beginning to scratch the surface of this fragmentary document.”<sup>369</sup> Another, characterizing *MMT* as one of the most fascinating documents of the Second Temple Period, comments that “now that it has escaped the custody of both caring fathers [Qimron and Strugnell, it] will keep us very busy for a long, long time.”<sup>370</sup> A bibliography of scholarly books, articles, and monographs dedicated to *4QMMT* contains well over 100 entries.<sup>371</sup>

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Before winding up the tale, it is worthwhile to close on the impact of the Dead Sea Scrolls in general.<sup>372</sup> They have been cited as the key to our understanding of Judaism,<sup>373</sup>

366. Introduction to *READING 4QMMT*, *supra* note 262, at 1.

367. Refer to note 288 *supra*.

368. Martin Abegg, Paul, “Works of the Law” and *MMT*, *BAR*, Nov.–Dec. 1994, at 52, 55.

369. The *Employment and Interpretation of Scripture in 4QMMT*, *supra* note 298, at 50.

370. Florentino García Martínez, *4QMMT in a Qumran Context*, in *READING 4QMMT*, *supra* note 254, at 15, 27.

371. *READING 4QMMT*, *supra* note 254, at 145–56. Without too much exaggeration, *MMT* seems to function as something of a modern Rorschach test reflected back onto the beginnings of Judeo-Christian civilization. Talmudists see in it echoes to Rabbinic Judaism, Christians to the Pauline Letters and to the Sermon on the Mount, Mormons to Joseph Smith’s revelations, etc. See generally *id.*

372. Ownership of the Dead Sea Scrolls even has the potential for creating a snag in the Middle East peace talks. David Briggs, *Ancient Artifacts Haunt Modern Peace Talks: Israel, Palestinians Vie for Treasures*, *HOUS. POST*, Mar. 19, 1994, at E4. Indeed, one soon enters a morass by inquiring into ownership of the original antiquities, discovered in British mandatory territory, later annexed by Trans-Jordan, and now under Israeli control. See Wojciech Kowalski, *Legal Aspects of Recent History of the Qumran Scrolls: Access, Ownership, Title and Copyright*, in *ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY*, *supra* note 274.

373. The Dead Sea Scrolls include a range of contemporary documents that serve as a window on a turbulent and critical period in the history of Judaism. In addition to the three groups identified by Josephus (Pharisees, Sadducees, and Essenes), Judaism was further divided into numerous religious sects and political parties. With the destruction of the Temple and the commonwealth in 70 C.E., all that came to an end. Only the Judaism of the Pharisees — Rabbinic Judaism — survived. Reflected in Qumran literature is a Judaism in transition: moving from the religion of Israel as described in the Bible to the Judaism of the rabbis as expounded in the Mishnah (a third-century compilation of Jewish laws and customs which forms the basis of modern Jewish practice).

JUDAISM AND CHRISTIANITY AND THE DEAD SEA SCROLLS, in *SCROLLS FROM THE DEAD SEA: THE ANCIENT LIBRARY OF QIMRON AND MODERN SCHOLARSHIP*, at <http://lcweb.loc.gov/>

Christianity,<sup>374</sup> esoteric, and other<sup>375</sup> phenomena.<sup>376</sup> No one concerned with the fields of Jewish studies or New Testament research “can now traverse safely the paths of the inter-Testamental world without being well acquainted with the Dead Sea Scrolls.”<sup>377</sup> Books about the Dead Sea Scrolls abound.<sup>378</sup>

exhibits/scrolls/juda.html.

374. The Dead Sea Scrolls, which date back to the events described in the New Testament, have added to our understanding of the Jewish background of Christianity. Scholars have pointed to similarities between beliefs and practices outlined in the Qumran literature and those of early Christians. These parallels include comparable rituals of baptism, communal meals, and property.

*Id.* In one case, pretrial detainees at the Brooklyn House of Detention for Men challenged the lack of due process in assigning them to “administrative segregation.” *Wilson v. Beame*, 380 F. Supp. 1232, 1238–42 (E.D.N.Y. 1974). Judge Weinstein engaged in an extensive review to determine whether depriving inmates of the ability to participate in communal religious services abridged the free exercise of their religious rights. In that context, he investigated Judaism, Christianity, and Islam—“the three major Western faiths whose adherents constitute almost all the faithful at the” subject institution. *Id.* at 1239. Interestingly, his analysis treats the Dead Sea Scrolls as part of the Christian tradition, rather than under the Jewish rubric. *Id.* at 1240.

375. Harold Bloom characterizes Mormonism as the religion of the Western United States. See HAROLD BLOOM, *THE AMERICAN RELIGION* 85–87 (1992). Regardless of whether it should be categorized with Christianity or separately, it too derives nourishment from the Dead Sea Scrolls.

It should hardly be surprising to Latter-day Saints that previously unknown ancient texts, long buried in the ground, were discovered at Qumran in the middle part of the twentieth century. Joseph Smith’s experience gave us a pattern of how new things might come forth from the ground, preserved from a previous age (see Joseph Smith—History 1:51–2). Restoration scripture not only speaks of God sending forth truth (the Book of Mormon) out of the earth (see Moses 7:62), but it has primed us to expect additional ancient records—both biblical and nonbiblical—“springing from the ground,” to quote Psalms 85:11.

*New Documents from the Earth*, at <http://www.kbyu.byu.edu/deadsea/book/chapter1/sec1.html> (last visited Dec. 21, 2000).

376. It has shown up in some fairly unexpected quarters, as well.

Bumgardner and Donna Clifton, the victim, met at Wright State University where he was an instructor and she was a student, and they began dating. By several accounts, Bumgardner began to behave bizarrely in the fall of 1993. He slept very little but was always energized. He had paranoid thoughts related to the Vatican and the importance of the Dead Sea Scrolls in solving the world’s problems, and he discussed his plan to receive martial arts training to effectuate a rescue of the Dead Sea Scrolls and thereby solve these problems. Bumgardner also had strong paranoid thoughts focused on law enforcement personnel. He believed that he was being followed, that his phones and vehicles had been bugged, and that he and Clifton were in danger.

*State v. Bumgardner*, No. 97 CA 103, 1998 Ohio Ct. App. LEXIS 3856, at \*2 (Aug. 21, 1998).

377. QUMRAN IN PERSPECTIVE, *supra* note 198, at xi.

378. When word spread that I had taken an interest in these issues, five of the authors whose works are cited in this chapter made contact with me. An interesting disconnect developed: My interest was from the copyright angle to vindicate questions of authorship and ownership. My interlocutors, on the other hand, were interested in pursuing their own scholarly agendas (e.g., forcing a public museum to alter its putatively erroneous displays in a



Among the wide variety of theses<sup>379</sup> they advance are the following:

- ??Qumran represented an Essene splinter group battling six wicked priests.<sup>380</sup>
- ??Qumran represented a bastion of zealots.<sup>381</sup>
- ??The Qumran cache simply represents a library transplanted from Jerusalem for safekeeping; Qumran is totally unrelated to the Essenes.<sup>382</sup>
- ??The Dead Sea Scrolls prove that a hallucinogenic mushroom lies at the foundation of the Christian church.<sup>383</sup>
- ??The Teacher of Righteousness is John the Baptist, whereas Jesus fathered four children, divorced, remarried, and is cast in a role of the Wicked Priest.<sup>384</sup>
- ??Jesus' brother, James, was TR, whereas Paul was the Wicked Priest; Jesus himself, meanwhile, was shuffled off into the Roman Empire's precursor to today's "witness protection program."<sup>385</sup>

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Dead Sea Scrolls exhibition). As a result, nothing substantive eventuated.

379. For those of us in the legal profession, the image arises of "the dry rustle of the Dead Sea scrolls." William Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court*, 72 IOWA L. REV. 1281, 1298 n.45 (1987). But to those initiated in Scroll studies, the image is more akin to the hot breath of animated debate. Refer to section (C)(1) *supra*.

380. F. Garcia Martinez & A. S. van der Woude, *A "Groningen" Hypothesis of Qumran Origins and Early History*, REVUE DE QUMRÂN 521, 538-41 (1989-1990), cited in THE DEAD SEA SCROLLS IN ENGLISH, *supra* note 192, at xxix-xx. Though the consensus of opinion identifies Qumran with the Essenes described by the writers of antiquity, debate rages endlessly. See Abraham Rabinovich, *Dead Sea Scrolls' Authorship Debated*, WASH. TIMES, Jan. 30, 1998, at A15 (arguing that the new discovery of the Essene site at Ein Gedi, matching the Latin description by Pliny the Elder, knocks Qumran out as the place he was describing).

381. G. R. DRIVER, *THE JUDEAN SCROLLS: THE PROBLEM AND A SOLUTION* 587 (1965); CECIL ROTH, *THE DEAD SEA SCROLLS: A NEW HISTORICAL APPROACH* xiv-xv (W.W. Norton & Co. 1965) (1958).

382. Norman Golb, *The Problem of Origin and Identification of the Dead Sea Scrolls*, PROC. AM. PHIL. SOC'Y, Feb. 1980, at 1, 1, 11.

383. JOHN M. ALLEGRO, *THE SACRED MUSHROOM AND THE CROSS* (1970). Basically, Allegro "destroyed his academic credibility with the publication of [t]his infamous book." THE COMPLETE STORY, *supra* note 229, at 181. He was not the last scholar in this field to commit "scholarly suicide." THE HIDDEN SCROLLS, *supra* note 190, at 227. Refer to note 277 *supra*.

384. BARBARA THIERING, *JESUS THE MAN: A NEW INTERPRETATION FROM THE DEAD SEA SCROLLS* (1992); BARBARA THIERING, *JESUS AND THE RIDDLE OF THE DEAD SEA SCROLLS* 19, 146, 148 (1992).

385. THE DEAD SEA SCROLLS DECEPTION, *supra* note 360. That thesis, remarkable though it might seem on the surface, is positively tame compared to the same authors' tracing of a 2000-year-old conspiracy underlying most of western history. See MICHAEL

??The theory espoused by the previous book is utter bunk.<sup>386</sup>

??Qumran was an apocalyptic community awaiting the end of days, in the spirit of Daniel, Enoch, and Crypto-Zoroastrian influences.<sup>387</sup>

??The sectarians at Qumran were political revolutionaries, giving vent to “the rage-filled voice calling for resistance to the innovations and to the influence of the Great Satan from the West.”<sup>388</sup>

??Perhaps most shocking of all:<sup>389</sup> the Dead Sea Scrolls contain no deathless message to the modern age.<sup>390</sup>

One publishing house, aiming to offer fresh insights into “the importance of the scrolls for emerging forms of Judaism and for nascent Christianity,”<sup>391</sup> has launched a six-volume series as an outgrowth of the revelation of the unpublished manuscripts in 1991.<sup>392</sup> An exhibition at the Library of Congress in 1993 noted that the Dead Sea Scrolls have been translated into scores of

BAIGENT, RICHARD LEIGH & HENRY LINCOLN, *HOLY BLOOD, HOLY GRAIL* (1982), cited in David Nimmer, *Time and Space*, 38 IDEA 501, 503 n.9 (1998).

386. KLAUS BERGER, *THE TRUTH UNDER LOCK AND KEY? JESUS AND THE DEAD SEA SCROLLS* (James S. Currie trans., 1995) (1993). Berger is particularly unamused by Baigent and Leigh’s anti-Vatican rantings and their conclusion that the Scrolls are “the spiritual and religious equivalent of dynamite — something that might just conceivably demolish the entire edifice of Christian teaching and belief.” *Id.* at 43. For more debunking of Baigent and Leigh, see *THE COMPLETE STORY*, *supra* note 229, at 167–70. Though it may be bunk as history, the Baigent and Leigh book was a rollicking good read, at least in this observer’s estimation. (Note, however, that I do not claim any copyright in the book by virtue of having read it.) Refer to Case 10 (The Reader) *supra*.

387. JOHN J. COLLINS, *APOCALYPTICISM IN THE DEAD SEA SCROLLS* 29, 41, 61 (1997). In this capacity, *4QMMT* plays a significant role as it is the only text from the Qumran corpus to explicitly state that the End of Days has already begun. *Id.* at 61.

388. *THE HIDDEN SCROLLS*, *supra* note 190, at 4. See generally *THE DEAD SEA SCROLLS UNCOVERED*, *supra* note 229.

389. As to the theory that the Dead Sea Scrolls emanate from “bulb headed” extraterrestrials in UFOs who “landed on the earth 2,500 years ago,” the less said the better. See *WHO OWNS INFORMATION?*, *supra* note 283, at 134.

390. *How Important Are the Dead Sea Scrolls?*, *supra* note 219, at 37. Yet the same writer himself adduces the scrolls in the context of other philological advances that make the text of the Bible “more accessible to understanding than it has been for the past two thousand years.” *THE WORLD OF BIBLICAL LITERATURE*, *supra* note 155, at 71.

391. In recent years there has been a growing appreciation of the common interests shared by the Dead Sea sect and the rabbis in issues of purity and halakah. Since the document *4QMMT* was made public in 1984, it has been clear that matters of religious law were at the root of the quarrel between this sect and its Jewish contemporaries.

*APOCALYPTICISM IN THE DEAD SEA SCROLLS*, *supra* note 387, at 164.

392. Series Editor’s Preface, in *APOCALYPTICISM IN THE DEAD SEA SCROLLS*, *supra* note 387, at vi.

languages; the exhibition included translations into Yiddish, Russian, Serbo-Croatian, Arabic, Japanese, and Indonesian.<sup>393</sup> The aftershocks of unlocking the scrolls in 1991 seem destined to roil well into the future.

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393. LC COLLECTIONS ENRICH DEAD SEA SCROLLS EXHIBIT, *in* SCROLLS FROM THE DEAD SEA: THE ANCIENT LIBRARY OF QIMRON AND MODERN SCHOLARSHIP, at <http://www.lcweb.loc.gov/exhibits/scrolls/article.html>.

VI.  
COPYRIGHT USAGE

Dramatically, the discovery of the Qumran scrolls or of the library of inscribed tablets at Ebla, have led to a reconsideration of biblical languages, chronology and imagery.

George Steiner<sup>394</sup>

Now that the case has been sketched, the first step is to weigh Qimron's claim to copyright protection over his reconstruction of *4QMMT* based on the various doctrines that copyright law has developed to mediate between the interest of those who assert copyright and those who defend against a charge of its infringement. When examined in the precise contours in which *Qimron v. Shanks* arose, there are several reasons that the claim of copyright infringement cannot succeed. This chapter addresses those considerations. In addition, from a deeper perspective, there is reason to posit that sound copyright doctrine should always doom the claim of any scholar to copyright over the reconstruction of an antecedent manuscript. The succeeding chapters turn to those aspects of the matter.<sup>395</sup>

It bears emphasis at the outset that this examination takes place under the copyright law of the United States—the goal here is not to explicate *halacha*, Israeli law or the *régimes* of any other nation. For that reason, the focus throughout remains on Judge Dorner's application of U.S. law,<sup>396</sup> rather than on the Supreme Court's affirmance, which evaluated the matter under Israeli law.<sup>397</sup>

Before entering the copyright thicket, it is useful to address one perennial question. In any case arising under U.S. copyright law, it is always possible to interpose a defense of fair use.

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394. *A Preface to the Hebrew Bible*, *supra* note 212, at 43.

395. From an even deeper point of view, one may well conclude that, putting aside doctrinal points, the activity of manuscript reconstruction does not even qualify as an act of authorship so as to trigger copyright protection. Part Two below takes up that question.

396. As previously set forth, the matter is more complicated: Judge Dorner wanted to apply the law of the *situs* of infringement, *i.e.*, the United States; but to determine the content of U.S. law, she consulted Israeli law, under the presumption of identify of laws. Refer to note 302 *supra*.

397. Refer to section (A)(1) *infra*. Among the many strange turns of *Qimron v. Shanks*, another bears mention. The Supreme Court's opinion recounts the analysis from an earlier case, explaining that the *originality* requirement for copyright subsistence "was deleted for some reason from the official Hebrew translation of *The Laws of Israel*, but it appears in Section 1 of the English version of the law, which is the determinative version"! App. Opin., *supra* note 331, at para. 11.

*Qimron v. Shanks* is no exception. Application of the fair use doctrine calls for a case-by-case analysis.<sup>398</sup> Accordingly, though it may be of inestimable interest to the parties, it is of limited interest to the future of copyright doctrine how those factors apply to the facts of *Qimron v. Shanks*.<sup>399</sup> Previous commentators have set forth the view that that defense should have prevailed.<sup>400</sup> There is reason, however, to be less than sanguine about that conclusion. The exercise here is to apply the four statutory fair use factors,<sup>401</sup> based on the assumption that Shanks appropriated copyrighted material belonging to Qimron.<sup>402</sup>

??*Purpose of use.* The facts that the *Facsimile Edition* is a work for sale on the open marketplace,<sup>403</sup> and that it copies Qimron's efforts verbatim instead of using them as a springboard for further analysis,<sup>404</sup> weigh the first factor against Shanks.

??*Nature of copyrighted work.* The fact that Qimron had not previously published his work offers more fodder to him on the second factor.<sup>405</sup>

??*Amount of use.* The fact that the *Facsimile Edition* incorporates the full text of Qimron's work,<sup>406</sup> rather

398. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

399. "Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns." Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990). Judge Leval should know, having made as much fair-use law as any other jurist. See Pierre N. Leval, *Fair Use or Foul*, 36 J. COPYRIGHT SOC'Y 167, 168 (1989) ("It has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami."). See also Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997).

400. *Raiders of the Lost Scrolls*, *supra* note 83, at 335; *Ancient Works, Modern Dilemmas*, *supra* note 191, at 1666-70.

401. 17 U.S.C. § 107 (1994). Fair use cases sometimes proceed independently of those factors. As set forth below, there are cases denominated "fair use" that support Shanks. Those are discussed below. Refer to notes 444-60 *infra*.

402. That assumption is essential to even reach the fair use defense; for in the absence of a subsisting copyright that has been the subject of a prima facie infringement, the affirmative defense does not even rise to the fore. Because the discussion below concludes that Qimron does not have copyright in his reconstruction of *MMT*, it is necessary for current purposes of the fair use issue to treat the case as if the *Facsimile Edition* had reprinted something other than an uncopyrightable reconstruction.

403. See 4 NIMMER ON COPYRIGHT § 13.05[A][1][c].

404. See 4 NIMMER ON COPYRIGHT § 13.05[A][1][b].

405. See 4 NIMMER ON COPYRIGHT § 13.05[A][2][b]. In this context, though, the fact that Qimron did not hold the materials confidentially may overbear that inclination of this second factor. Refer to Chapter X, section (B)(2) *infra*.

406. A definitional issue lurks here—what is the "full" work? Is it the 120 lines that Shanks reproduced? Or all of *MMT* itself, including the now-lost lines? Or the full volume of *DJD X* analyzing *MMT*? Refer to Chapter V, section (A)(2) *supra*.

than excerpting it,<sup>407</sup> weighs the third factor against Shanks.<sup>408</sup>

??*Effect of use.* As to the fourth factor, it is difficult indeed to imagine an appreciable impact on the market for *4QMMT*.<sup>409</sup> Accordingly, this factor would seem to favor Shanks.<sup>410</sup>

In sum, though the issue is open to infinite debate, the thumbnail sketch set forth above offers reason to suspect that fair use does not constitute the silver bullet against a claim of copyright infringement.

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The discussion below ventilates two fatal flaws in Qimron's copyright infringement claim. The succeeding chapter adduces additional reasons why, putting aside the specific facts of *Qimron v. Shanks*, those who reconstruct manuscripts should always be denied copyright protection in the fruit of their labors.

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407. See 4 NIMMER ON COPYRIGHT § 13.05[A][3].

408. The contrary argument would be that the *Facsimile Edition* reproduced no more of *4QMMT* than was necessary to obtain its laudable object of securing public access to the work. It did not, for instance, reproduce, either exactly or in paraphrase, so much as one sentence from the original work of analysis that Strugnell and Qimron composed about *4QMMT*. Instead, the world had to wait until the publication of *DJD X* to see that expression in print. Viewed from this perspective, the third factor does not disfavor Shanks.

Moreover, perhaps one can analogize here from the aspect of fair use concerned with parodies:

Although normally the third factor disfavors a defendant who copies the "heart" of plaintiff's work, "the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim."

4 NIMMER ON COPYRIGHT § 13.05[C][2], quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (footnotes omitted).

409. Those interested in reviewing the full reconstruction of the text in its ancient Hebrew idiom can scarcely number more than some dozens throughout the entire world. As to that class of scholars, it is impossible to believe that their purchase of the *Facsimile Edition* would satiate their curiosity and that, on that basis, they would decline to purchase *DJD X*.

In the light of hindsight, that argument becomes only stronger. If one peruses the text of *4QMMT* in *DJD X*, one sees that there are numerous differences in the way Qimron presents his work as compared to the Kapera recension that occupies the *Facsimile Edition*. More fundamentally, scholars in the field, whether followers or detractors of Qimron, must of necessity familiarize themselves with his hundreds of pages of analysis. On that basis, of course, they will all need access to *DJD X*. The effect on the market, in short, appears to be nil.

This conclusion is only strengthened when one realizes that the list price for the *Facsimile Edition* was \$200. Amateurs and dabblers would scarcely pay that freight for 1,785 photographic plates of the Dead Sea Scrolls, merely to get Qimron's reconstruction.

410. Although a former view treated this factor as the most important one, see 4 NIMMER ON COPYRIGHT § 13.05[A][4], the Supreme Court has directed that this factor not be deemed decisive, standing alone. *Campbell*, 510 U.S. at 590–94.

A. *Public Access and Unclean Hands*

As we have seen, the constitutional authorization for copyright protection is to “promote the Progress of Science and useful Arts.”<sup>411</sup> Though it is not necessary to decide every litigated case in the manner that best serves that preamble,<sup>412</sup> surely it may inform the analysis.<sup>413</sup> (In the Digital Millennium Copyright Act,<sup>414</sup> Congress recognized the danger that copyright protection could be twisted away from serving its constitutional end into a means of removing vital areas of public discourse from popular access. Accordingly, it crafted an elaborate structure aimed at safeguarding public access when copyrights are abused.<sup>415</sup> Admittedly, *Qimron v. Shanks* falls outside the structure of that particular enactment.<sup>416</sup> Nonetheless, any just resolution of its legal issues requires a court to recognize a profound need to reconcile the claim of copyright protection with the public’s inextinguishable right of access to materials of great public and scholarly value.)<sup>417</sup>

1. *The Israeli Opinions*

U.S. copyright law is the one that all parties before the trial court acknowledged to furnish the governing law.<sup>418</sup> Accordingly, the strange turn taken by the Supreme Court of Israel—using the three copies sent to Israel as the basis for applying Israeli

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411. U.S. CONST. art. 1, § 8, cl. 8.

412. See *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1498–99 (11th Cir. 1984) (holding that Congress must pass laws that in general serve the constitutional purpose of copyright, but need not guarantee that result in every instance).

413. See 1 NIMMER ON COPYRIGHT § 1.03[B].

414. Act of Oct. 28, 1998, Pub. L. No. 105–304, 112 Stat. 2860, § 1 (short title). Perhaps no one in Congress deliberately aggregated digits, millenarianism, and legislative enactments by consciously modeling the law’s short title on *Exodus* 31:18 (“After he finished speaking God gave to Moses on Mount Sinai two tablets of testimony, tablets of stone written with the digit of God”). But unconsciously? Refer to note 439 *infra*.

415. See generally *A Riff on Fair Use in the Digital Millennium Copyright Act*, *supra* note 36.

416. Nonetheless, Qimron’s counsel, Isaac Molcho, used the occasion of his victory before the Israeli Supreme Court to meditate on the *Napster* case, one of the most celebrated early suits brought under the Digital Millennium Copyright Act. See Abraham Rabinovich, *Scholar to Share Copyright With 2,000-Year-Old Author*, JERUSALEM POST, Aug. 31, 2000, at 1.

417. See generally *PLAYING DARTS WITH A REMBRANDT*, *supra* note 228.

418. Refer to note 302 *supra*.

law to the case<sup>419</sup>—renders its decision askew from the matter here under examination.<sup>420</sup>

Nonetheless, one aspect of the Supreme Court's rationale bears mention. As previously noted, its opinion begins by noting: "A decision on the issue before us is based on the specific circumstances of the case, rather than general principles."<sup>421</sup> Moreover, in the course of his reasoning, Justice Türkel quotes his own prior solicitude for "the protection of academic freedom."<sup>422</sup> Yet, oddly, the Court concludes as follows:

We have made clear above that Qimron does not have a right in the "raw material" — the fragments of the scrolls themselves — and he does not even request this. His copyright in the Deciphered Text does not prevent anyone from the possibility of researching the scroll fragments, organizing them, deciphering the writing upon them and completing the missing portions between the fragments, in a manner different from that taken by Qimron, and to publish the results of his work and even receive copyright protection.<sup>423</sup>

That language is scarcely consonant with the peculiar circumstances under which *Qimron v. Shanks* arose. For before Hershel Shanks published the *Facsimile Edition* in an attempt to wrest control away from the Israel Antiquities Authority's cartel, there was no way for any scholar to get ahold of the fragments of *MMT*.<sup>424</sup> Instead, Strugnell and Qimron, under the IAA's authority, enjoyed exclusive access to those physical products, as Strugnell himself testified:

Q. To what extent is it possible or even probable for other scholars who had the same knowledge as Professor Qimron as to the other documents to have produced the same

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419. Analytically, two debatable steps occur here (both being beyond the scope of the current treatment). The first is to use the three copies sent to Israel as a basis for applying Israeli law to the dispute. See Neil Wilkof, *Copyright, Moral Rights, and the Choice of Law: Where Did the Qimron Court Go Wrong?*, 38 HOUS. L. REV. (forthcoming June 2001). The second, given the application of Israeli law, is to look to the substance of Israeli copyright doctrine rather than that of the country of origin to determine the scope of copyright protection. See Paul Torremans, *Choice of Law Regarding Copyright and the Dead Sea Scrolls Controversy*, in ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY, *supra* note 274.

420. Refer to Chapter V, section (B)(3) *supra*.

421. Refer to text accompanying note 333 *supra*.

422. "[R]esearch, study and instruction in all areas of the human spirit, that do not have handcuffs on them, raise the individual within society and with him society as a whole [and are] the exercise of a basic human need." App. Opin., *supra* note 331, at para.15 (quoting Cr.A. 2831/95, Elba v. The State of Israel, 50(5) P.D. 221, 335).

423. *Id.*

424. See Strugnell Testimony at 219–21, *quoted in* Chapter XI *infra*.



reconstructions as Professor Qimron?

A. Up to recently it was impossible because they didn't have the photographs, which you also need. Now [that the materials have been made public] I imagine that certain good scholars will either be able to support Qimron's readings or even suggest occasionally alternatives.<sup>425</sup>

Therefore, the freedom that the Court is citing, although in theory applicable to a large body of circumstances, is chimerical with respect to the precise facts at bar (which is all that the Court purported to address).

Yet one could interpret the Court's conclusion as giving scholars freedom in the future to review photographs of *MMT* (to which the world now has access thanks to Shanks's juggernaut) and to posit readings divergent from Qimron's. The problem is that even as so limited, that language threatens to choke future scholars. For to the extent that philologists in years to come conclude that Qimron was *correct* in the deliberate conclusions that he drew over the decades, then copyright law, interpreted as does the Israeli Supreme Court, prevents them from presenting those readings systematically.<sup>426</sup> Instead, it means that future scholars can present to the public different readings from the correct ones.<sup>427</sup> That result, which bars dissemination of accurate readings,<sup>428</sup> encourages dissemination of only bad scholarship, a matter to which we return below.<sup>429</sup>

## 2. Misuse

The Dead Sea Scrolls are of incalculable public interest in recounting the early history of Judaism and Christianity.<sup>430</sup> As such, they form part of the cultural patrimony of all mankind. Providing access to *4QMMT*, viewed from that perspective,

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425. *Id.* at 219–21 (edited).

426. An individual utilization might escape liability as fair use. *See* App. Opin., *supra* note 331, at para. 15. But it is perilous to rely on that doctrine unless one can be sure of its bounds in advance, which is notoriously difficult. Refer to section (A)(3) *infra*. *See also* App. Opin., *supra* note 331, at paras. 19–20.

427. Refer to section (B)(1) *infra*.

428. Shortly after the Supreme Court ruled, I received a call from an anguished scholar under contract with an Israeli publisher for a forthcoming scrolls book, which he felt the recent ruling placed in jeopardy. The problem arose precisely because my interlocutor intended to *agree* in large part with Qimron's interpretation. Thus, the fact that the Supreme Court held out the prospect for copyright protection had the professor intended to posit readings diverse from Qimron's provided only cold comfort.

429. Refer to Chapter IX, section (C)(2) *infra*.

430. Refer to Chapter V, section (C)(2) *supra*.

serves a laudable public function.<sup>431</sup>

Qimron's suit constitutes an attempt to use copyright law not to promote the progress of science, but as an engine of suppression.<sup>432</sup> One doctrine of copyright law applicable here is unclean hands.<sup>433</sup> That amorphous defense comes into play when a plaintiff has committed a serious transgression relating directly to the subject matter of the infringement claim, such as misusing the process of the courts or violating the antitrust laws.<sup>434</sup> Neither is obviously present here. But more reflection is required before simply dismissing the defense.

Consider the letter that Qimron's counsel sent to Wacholder. Objecting that "you might be *using* portions of Professor Qimron's reconstruction in a publication planned by you and Professor Abegg," the letter warned "that any *use* of Professor Qimron's reconstructed text is a violation of his copyright and Professor Qimron will take all steps available to him under both American and Israeli law to protect that copyright."<sup>435</sup> That threat could hardly be taken as idle, given Qimron's history of suing for copyright infringement.

Careful attention must be paid to the phraseology and recipient of the demand letter. As noted above, Ben-Zion Wacholder is Professor of Talmudic Studies at Hebrew Union College, and Martin Abegg a pastor at Grace Theological Seminary. The letter admonishes the pair not even to *use* Qimron's work in their scholarship. In the language of the "essential facilities doctrine"<sup>436</sup> of antitrust law,<sup>437</sup> Qimron "was willing to sacrifice short-run benefits" that would flow from licensing his work or making it

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431. *Raiders of the Lost Scrolls*, *supra* note 83, at 347–48.

432. Refer to note 445 *infra* (quoting Complaint, para. 16(b)(3)).

433. See 4 NIMMER ON COPYRIGHT § 13.09[B].

434. The classic case here is *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). See also 4 NIMMER ON COPYRIGHT § 13.09[A].

435. Refer to Chapter V, section (B)(1) *supra* (emphasis added).

436. See *Telecomm. Technical Servs., Inc. v. Siemens Rolm Communications, Inc.*, 66 F. Supp. 2d 1306, 1318–19 (N.D. Ga. 1998) (discussing the interplay between the essential facilities doctrine and intellectual property law in a case charging the copyright owner with an antitrust violation for refusal to deal).

437. The United States Supreme Court has broadened the "essential facility of commerce" doctrine to embrace matters not crucial to survival, holding, for example, that access to a community-wide ski pass can constitute an essential facility. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–11 (1985) (owner of three major skiing facilities violated antitrust law by excluding a competitor from participation in a community-wide skiing pass). The Court held that the fact that "Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival" placed it in violation of Section 2 of the Sherman Act. *Id.* at 610–11.

available, even on onerous or expensive terms; he also plainly cared very little for “consumer goodwill,” which in this circumstance translates to the collegiality of fellow Dead Sea Scrolls scholars. Instead, his sole goal was to exert a deadly “impact on [his] smaller rival[s]” by making it impossible for Wacholder and Abegg to publish anything whatsoever about *4QMMT*.<sup>438</sup> For even if the latter two scholars tried with all their might to exclude knowledge of Qimron’s text from their product, to the extent that it discussed *4QMMT*, Qimron could plausibly maintain that they made “use” of his work, if only subconsciously,<sup>439</sup> in violation of his copyright.<sup>440</sup> These considerations point towards Qimron having an intent to monopolize the entire field of *MMT* studies.<sup>441</sup> Given how closely those studies lie to the core of the vital enterprise of scroll studies in general, Qimron has, in a very real way, attempted to exclude others completely from an essential facility of intellectual commerce.<sup>442</sup> Until that misuse is purged, Qimron’s copyright becomes unenforceable.<sup>443</sup>

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438. As noted by the dissent in the *Sony* case, “When the scholar foregoes [sic] the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar’s work, in other words, produces external benefits from which everyone profits.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 477–78 (1984) (Blackmun, J., dissenting).

439. Unconscious copying can nonetheless constitute infringement, as Beatle George Harrison learned to his peril regarding *My Sweet Lord*. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976), *aff’d sub nom. Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983). Even more pointedly, the Ninth Circuit recently upheld a “twenty-five-years-after-the-fact-subconscious copying claim” against singer Michael Bolton based on an obscure tune by the Isley Brothers. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 484–85 (9th Cir. 2000).

440. See *Raiders of the Lost Scrolls*, *supra* note 83, at 309. “Further, their work is likely to be similar since it will be driven by the context of the existing fragments.” *Id.*

441. The point is made later that copyright should not be abused as “a vehicle to ensure orthodoxy in Scrolls scholarship.” Refer to Chapter XI *infra*. It should be borne in mind that a monopoly to ensure public order—that scholar X be assured sufficient time to study an artifact before it is made available to others—albeit itself problematic, is at least easier to justify than a monopoly for the sake of thought control.

442. Refer to Chapter V, section (A)(3) *supra*. Another aspect of copyright misuse should be considered as well. In the pathbreaking case that established this doctrine, the court held that misuse occurred when a copyright owner attempted, in its standard licensing agreement, to forbid the licensee from (1) developing any kind of software competitive with its own application, (2) for a period past expiration of the copyright. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (1990). Qimron’s letter stands on a similar footing. It likewise (1) purports to bar any competitive activity by fellow scholars. Moreover, it too goes well beyond the statutory scope of copyright protection, not in terms of duration, but (2) in terms of barring any “use” whatsoever, notwithstanding that Congress has declared “fair use” during the term of copyright to be as non-infringing as is post-expiration utilization. See 17 U.S.C. § 107 (1994). Attempts to bar even fair uses are suspect. See *The Metamorphosis of Contract Into Expand*, *supra* note 48, at 64–68.

443. Another aspect of the matter: The events under examination here are such that the government entrusted a scholar with a unique artifact, available to no one else. In

### 3. Scattered Cases

Moving away from antitrust law and misuse to more general doctrine, Qimron's efforts to prevent access to *MMT* remain troubling as well under traditional copyright jurisprudence. Given that Qimron discussed *MMT* publicly in 1984, refused to consent to its disclosure as late as 1993 when the trial in *Qimron v. Shanks* arose, and wrote a demand letter to other Dead Sea scholars not even to "use" his reconstructed text, there can be no conclusion other than that Qimron wanted to stifle discussion of *MMT* by others, at least until such time as he chose to present *DJD X* to the world.<sup>444</sup> Far from trying to prevent irresponsible and wild popularization of his work, far from trying to preserve solely the right to publish his entire reconstruction of *4QMMT* intact, Qimron's actions seemed designed to retard serious scholarship in the field.<sup>445</sup> In short, his conduct constituted an attempt to squelch the progress of science through invocation of copyright laws, towards which end he has used the courts.<sup>446</sup>

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that circumstance, the scholar should make the artifact available to the public within a reasonable time. To the extent that the scholar delays years and decades in even disclosing the contours of the artifact to the public, while he perfects his analysis, all the while threatening fellow scholars if they even make any use of his work, then he comes to court with unclean hands. Moreover, not only did Qimron receive an exclusive government grant (from the Israel Antiquities Authority) over the physical materials discovered in Qumran, but he now claims an exclusive governmental monopoly (via copyright law) over the product of research that he performed based on his exclusive access to those materials; finally, he is invoking the judiciary (his case before Judge Dorner), which is but another arm of the government, to clamp down on those whom he sees as trespassing on his domain. See David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1414–15 (1995) (recalling the dismissal of a criminal case in which the Ninth Circuit stated that the judiciary is part of the "government"). (This presentation sidesteps the intractable issue of the identity of that government—Israeli or American?)

444. That time could be far into the future. Refer to note 715 *infra* and accompanying text.

445. Qimron's Complaint includes the following language:

It should be emphasized that the right of the authors of the reconstruction is, *inter alia*, to prevent publication of the reconstruction for so long as they did not publish their extensive research with respect to the scroll in its entirety — research which will be credited to them alone in the academic world. In this other researchers are also prevented from basing themselves on the reconstruction and from 'competing' with the copyright owners in supplementary research.

Complaint, para. 16(b)(3).

446. Consider the state of affairs that Qimron engendered. Before the Complaint in *Qimron v. Shanks* was filed, a book was published about the scrolls. UNDERSTANDING THE DEAD SEA SCROLLS, *supra* note 210. One of the contributors explains that Strugnell and Qimron "were kind enough to make available to me this text [*MMT* along with their unpublished] commentary on it." Lawrence H. Schiffman, *The Sadducean Origins of the Dead Sea Scroll Sect*, in UNDERSTANDING THE DEAD SEA SCROLLS, *supra* note 210, at 35, 41. He comments that the "as-yet-unpublished *MMT*" is a key text that "revolutionizes" our understanding of Qumran origins. *Id.* at 42. In that context, he dismisses Norman Golb's contrary theory. *Id.* at 45. Yet Golb (a professor at the University of Chicago) "in

That conduct severely overreaches.

Admittedly, there is no case directly on point. In fact, research has disclosed no case even remotely similar. For guidance, we need to invoke copyright cases that vindicate allied concerns:

??The only record of the tragic events in Dallas on November 22, 1963, was a home movie shot by Abraham Zapruder.<sup>447</sup> Movies are protected by copyright.<sup>448</sup> Nonetheless, given the “public interest in having the fullest information available on the murder of President Kennedy,”<sup>449</sup> the court denied that copyright infringement occurred via unauthorized reproduction of frames from the Zapruder film.<sup>450</sup>

??Howard Hughes detested publicity. When profiled in a series of articles in *Look* magazine, the reclusive billionaire responded by buying the copyright.<sup>451</sup> He then attempted to wield his copyright to prevent Random House from publishing an unauthorized biography of him, based on those articles.<sup>452</sup> The Second Circuit reversed entry of a preliminary injunction:

By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents . . . .

‘Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual’s desire for privacy.’

. . . .

Thus, in balancing the equities at this time in our opinion the public interest should prevail over the

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fairness, at best [has been able to view] only a pirated copy of the unpublished texts of MMT.” *Id.* at 45. Is that any way for science to progress?

447. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968).

448. See 17 U.S.C. § 102(a)(6) (1994). The previous law, under which *Time, Inc. v. Bernard Geis* arose, was to the same effect. See Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075.

449. *Time*, 293 F. Supp. at 146.

450. *Id.* The court invoked the fair use doctrine for that purpose. *Id.* Note that, at that time, the judicially created fair use factors had not yet been codified. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (indicating that the 1976 Copyright Act codified the common-law doctrine of fair use).

451. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 304–05 (2d Cir. 1966).

452. *Id.*

possible damage to the copyright owner.<sup>453</sup>

??In order to engage in reverse engineering of Sega's computer code to examine the underlying public domain materials incorporated in the Sega game cartridge, a rival first needed to make a copy of the whole, thereby implicating the copyright owner's reproduction right.<sup>454</sup> In sustaining a fair use defense, the Ninth Circuit noted that "an attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression . . . ."<sup>455</sup>

??One pre-*Feist* district court ruling upheld protection for a scale reduction of the famous *Hand of God* sculpture.<sup>456</sup> Its *en banc* circuit later explained the rationale at work there: "Rodin's sculpture is, furthermore, so unique and rare, and adequate public access to it such a problem that a significant public benefit accrues from its precise, artistic reproduction."<sup>457</sup> The same considerations that inclined in favor of the plaintiff in that case militate towards defendant in *Qimron v. Shanks*, in which the whole battle arose via Shanks's efforts to wrest control away from the Scrolls cartel and make it available to the public.<sup>458</sup>

These cases do not imply that authors may never hold their materials confidential. If a scholar of Byzantium, for example, wishes to spend a whole career polishing her thesis, not publishing until forty years have elapsed, there is no basis to allege violation of the antitrust laws and to seek to forfeit her copyright on that basis.<sup>459</sup> Nonetheless, they do imply that

453. *Id.* at 309.

454. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1517-20 (9th Cir. 1992).

455. *Id.* at 1523-24, 1527. See also David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 21-25 (1996).

456. *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959). As to whether that case remains good law, refer to note 91 *supra*. It can be faulted, *inter alia*, for failing to distinguish creativity in the process from creativity in the product. Refer to note 153 *supra*.

457. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (*en banc*).

458. *Batlin* aimed to neutralize "a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work." *Id.* That *desideratum* also weighs against *Qimron*.

459. The question arises how far to extend these considerations, for example, to a scholar who did not create the subject work, but rather owned the physical property in which it is embodied: "If I am the private owner of valuable historical material, am I really obliged to set up facilities required to fulfil a public right to access?" Hector MacQueen, *Principles of Intellectual Property Rights and Copyright Laws*, in ONSCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY, *supra* note 274. For a consideration of this theme within the Polish context, see *Legal Aspects of Recent History of the Qumran*

copyright has its limits. When used to prevent access to the sole material weighing on a matter of great public interest (Zapruder), as a vehicle to suppress information (Howard Hughes), or to prevent even initial access to unprotected material (Sega), copyright protection collapses in the face of the greater good of access.<sup>460</sup> Those circumstances are present *a fortiori* with respect to Qimron's attempts to prevent any access to 4QMMT.

### B. Unauthorized Adaptation

Qimron's basic argument for copyright protection is that 4QMMT constitutes a literary work. Accepting him at his own word, his reconstruction must stand outside copyright protection because of the circumstances of its composition.<sup>461</sup>

#### 1. Underlying and Derivative Works

Accepting that 4QMMT deserves protection as a literary work, the first question arises as to who was its initial author. Here, there can be no doubt but that the long-dead Teacher of Righteousness qualifies. Qimron does not claim to have composed some precepts of Torah out of whole cloth. Instead, he claims to have reassembled them out of tiny bits of flaking parchment.

Accepting the proposition that TR composed 4QMMT in the Judean desert about two millennia ago, the next question to arise concerns its copyright subsistence at present. As previously observed about Grimm's fairy tales,<sup>462</sup> the 1976 Act protects works extant as of 1978 but not yet then published,<sup>463</sup> for the life of the author and further term of years or until December 31, 2002, whichever expires later. On the assumption that the Teacher of Righteousness died well before 1923 C.E., protection for the Scrolls lasts at least through 2002.<sup>464</sup>

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*Scrolls, supra* note 372.

460. Each of the cases canvassed above in some measure invokes an offshoot of the fair use doctrine. In that respect, it could be said that a fair use defense lies in *Qimron v. Shanks*, notwithstanding that the four statutory factors do not facially favor the defense. Refer to the beginning of this chapter.

461. Credit for originating this legal argument belongs to Elliot Brown.

462. Refer to Chapter I *supra*.

463. Do the six copies of MMT found in 4Q mean that it in fact was "published?" It is difficult to say. Certainly, it was disseminated in the manner that, in antiquity, corresponded to our current notions of "publication." See ERIC A. HAVELOCK, *THE MUSE LEARNS TO WRITE: REFLECTIONS ON ORALITY AND LITERACY FROM ANTIQUITY TO THE PRESENT* 77-78 (1986). But proof of the ingredients of "publication" under U.S. copyright law would seem lacking. See 1 NIMMER ON COPYRIGHT § 4.04.

464. If published with authorization between today and December 31, 2002, protection can subsist until 2047. 17 U.S.C. § 303(a) (Supp. IV 1999). See 3 NIMMER ON COPYRIGHT § 9.11[B][2]. But it would seem impossible for TR to convey authorization at

The curious consequence is that Qimron is actually dealing with an underlying text subject to U.S. copyright protection. What has he done to that text? Analytically, there are two possibilities:

??From the various manuscript shards entrusted to his custody, Qimron reassembled *MMT* perfectly.

??He reassembled *MMT* imperfectly.

On the assumption that Qimron reassembled the text perfectly, then the authorship that he contributed to it is naught. Instead, through a heroic scholarly contribution, through his expertise in fields as diverse as paleography, philology, archaeology, history, etc., Qimron has achieved a wondrous feat—the resurrection, phoenix-like, of a hitherto lost text. The world, in that case, owes him a great debt of gratitude. But it cannot possibly be said that he can secure copyright protection in words that he did not author.

Therefore, from the starting gate, only inaccuracy is eligible for further discussion. If Qimron erred, if he failed to convey the ancient teachings from the Judean desert, then our debt to him is that much less. Of course, we may forgive him his mangling of TR's words even as we acknowledge our gratitude for the portion he got right. But the further question arises—does the copyright monopoly attach to Qimron's errors? We return to that question below.<sup>465</sup>

## 2. *No Protection for Unlawful Utilizations*

Given that Qimron's copyright fails abjectly to the extent that he achieved 100% accuracy in reconstruction, let us adopt the supposition in his favor that a small portion, say 14%, of the material that appears in his "reconstruction" of *4QMMT* is in fact original to Qimron.<sup>466</sup> What consequence follows?

A work that incorporates 86% of another work, with 14% additions, is called a "derivative work."<sup>467</sup> Therefore, the current assumption is that Qimron prepared a derivative work of *MMT*, a work which, it has just been noted, is still subject to copyright protection. In this regard, an explicit provision of the Copyright Act applies to Qimron's conduct: "[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has

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present, so that circumstance appears moot.

465. Refer to Chapter IX, section (C)(2) *infra*.

466. The basis for the calculation is set forth below. Refer to Chapter VII, section (C)(3)(b) *infra*.

467. See 17 U.S.C. § 101 (Supp. IV 1999).



been used unlawfully.”<sup>468</sup>

Qimron’s scholarship falls squarely within that provision. Without any claim of authorization from the Teacher of Righteousness (or his heirs, successors, or assigns), Qimron has seized upon the fact of access to manuscripts containing a work still protected by copyright as a basis for adapting them.<sup>469</sup> His interstitial contributions, moreover, are interwoven throughout the copyrightable text. As such, Qimron falls squarely within the statutory provision disallowing protection to derivative works created through the unauthorized adaptation of a protected work, in which the new ingredients are inextricably mixed with the underlying text.<sup>470</sup> For these reasons, Qimron is debarred from asserting any copyright ownership over his reconstructions of *MMT*.

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468. See 17 U.S.C. § 103(a) (1994).

469. Could Qimron rebuff this analysis by pointing to his authorization from the State of Israel, successor to ownership of the scroll fragments recovered from the Judean desert? The Copyright Act explicitly distinguishes ownership of the material in which a work may be embodied from copyright ownership. 17 U.S.C. § 202 (1994). Accordingly, the IAA’s ownership of the Qumran scrolls (physical goods) is of no moment to the copyright analysis (intangible rights).

470. The same conclusion follows here as in Case 21 (*The Channel Surfer*) *supra*.

VII.  
MIND BENDER

The study of the Dead Sea Scrolls is and has always been neither theology nor science but an exercise in almost pure religious metaphor.

Neil Silberman<sup>471</sup>

There are many levels on which to confront the copyright lessons of *Qimron v. Shanks*. The previous chapter looked at some of the particulars animating that controversy, leading to case-specific applications of such doctrines as fair use and unclean hands. The present chapter, by contrast, proceeds on a more universal level. As a way of examining authorship and the proper bounds of copyright protection, this chapter takes lessons from the Second Circuit's *Bender v. West* case, applying them to the general enterprise of scholars seeking copyright protection in their reconstruction of ancient scrolls. These considerations thus apply not only to Elisha Qimron himself, but across the board to all who seek to reconstruct old texts, regardless of the circumstances.

A. *Fact/Expression Dichotomy*

West, like the scholars of the Dead Sea Scrolls, labored in a domain in which "faithfulness to the public-domain original is the dominant editorial value."<sup>472</sup> The same considerations that doomed West's copyright likewise forestall Qimron's claim. The Supreme Court's standard in *Feist* (the "telephone book white pages" case) governs here: "[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship."<sup>473</sup>

In *Bender v. West*, the Second Circuit invoked the fact/expression dichotomy to find such copying as occurred on the

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471. THE HIDDEN SCROLLS, *supra* note 190, at 50.

472. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 (2d Cir. 1998).

473. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

*Id.*

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safe side of the line.<sup>474</sup> Star pagination merely conveys unprotected information.<sup>475</sup> By the same token, any copying of Qimron's manuscript reconstruction, as opposed to his translation of *MMT* or his commentary thereon, is similarly nonactionable. For it represents, pure and simple, the facts as to how TR expressed himself 2,000 years ago, reproduced as faithfully as Qimron was capable of achieving.

1. *Originality*

a. *Quantum of Originality*

At the outset, a distinction must be acknowledged. *Bender v. West* held that the page numbers at issue there contained no copyrightable expression whatsoever, having been rotely inserted by a computer.<sup>476</sup> Qimron, by contrast, labored for eleven years to reproduce *4QMMT*. Thus, the factors that animated the court in *Bender v. West* could be argued to actually safeguard Qimron's protection.

Moreover, it may be conceded that Qimron reconstructed *4QMMT* differently than any other would have done. What greater proof of originality could there be than the distinctiveness of his contribution?

We turn first to that last consideration. Then, the discussion winds back to whether, in the ultimate analysis, *Bender v. West* favors Qimron's position.

b. *"Distinctive" Does Not Translate to "Original"*

Does copyrightable originality follow from the fact that Qimron's reconstruction was unique to him—that no other human being on earth would have put the bits and pieces of manuscript together in exactly the same way (assuming that to be the case)? Properly construed, distinctiveness does not equate to copyrightable expression.

Both *Bender v. West* and *Feist* bear out that proposition. In the former case, there is no doubt that the particular case

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474. In a profound sense, there is a subjective element even in the most "objective" fact. "Nature states no 'facts': these come only within statements devised by human beings to refer to the seamless web of actuality around them." ORALITY AND LITERACY, *supra* note 1, at 68. Facts themselves "have no necessary stable existence, but are themselves texts." Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 769 (1993). However true in the noumenal realm, these considerations are too metaphysical for the pragmatic concerns animating the law. Refer to Part Two *infra*.

475. *Bender*, 158 F.3d at 701.

476. Refer to Case 17 (The Bingo Cards) *supra*.

reporters produced by West were unique to it. No other competitor, left to its own devices, would ever develop a single volume, let alone a whole series, identical to any book of the *Federal Reporter* (i.e., containing the same page number divisions, the same citation methodology, the same attorney names presented in the same format, etc.). Yet the Second Circuit ruled that those factors, despite their distinctiveness, lie outside copyright protection.

An even stronger application of this principle emerges from the Supreme Court's ruling that copyright protection is lacking in the white pages of a telephone book.<sup>477</sup> In the first place, a telephone company must assign a unique phone number to each user (just as West must assign a unique page number to each page). That process itself can be complex.<sup>478</sup> Moreover, that phone number, like West's page numbers, is not an "antecedent fact"; it springs into existence only by virtue of the putative property owner's labor.<sup>479</sup> Yet those circumstances by themselves do not confer copyright status.

Moreover, each phone book directory containing alphabetized white pages itself represents a profoundly unique compilation, reflecting innumerable choices by its creator. Consider a simple thought experiment.

??In a town live 1,000 individuals whose names have been collected from time immemorial in standard alphabetical order. To the town now move ten strangers—Axel aus der Mühlen,<sup>480</sup> Sharon Ben Shachar,<sup>481</sup> Chou En Lai,<sup>482</sup> the artist formerly known as Prince,<sup>483</sup> and diverse

477. Refer to Case 5 (The Phonebook) *supra*.

478. See WHO OWNS INFORMATION?, *supra* note 283, at 39.

479. "A telephone number is not like a mathematical algorithm or law of nature that lies waiting to be discovered . . ." *Id.*

480. Which name should be treated as his surname? Should it go by capitalization? Or by order?

481. As an initial matter, should the letter *chet* in her name be transliterated as "Shachar" or "Shahar." Next, should this entry come after surnames such as Benshein? Or does the space mean that it should come before?

482. Axel, the German's first name, is also his given name; but Chou, the Chinese's first name, is his family name, not his given name. (Using the appellation "Christian name" instead of "given name" even more starkly highlights the value judgments at play here.)

483. That individual has been no stranger to copyright litigation. See *Paisley Park Enters., Inc. v. Uptown Prods.*, 54 F. Supp. 2d 347, 348–49 (S.D.N.Y. 1999) (issuing an order preventing Prince's videotaped deposition from being exploited on defendants' Web site). In *Pickett v. Prince*, 52 F. Supp. 2d 893, 896 (N.D. Ill. 1999), *aff'd*, 207 F.3d 402 (7th Cir. 2000), a fan created a guitar in the shape of Prince's symbol/name. Because the fan appropriated that copyrighted image without authorization, he was denied copyright in his product, by application of the rule confronted above that is relevant to Qimron as well.

members of the same Irish clan (who were split up upon entry to Ellis Island and who therefore spell their names differently): McCormick, MacCormick, M'Cormick, McOrmick, MacOrmick, Maccormick, and Mac Cormick. A hundred employees of the telephone company produce a hundred distinctive lists when attempting to integrate just those ten names.<sup>484</sup>

Of course, the chore of compiling a phone book does not end there. In addition to deciding how to alphabetize “nonstandard” names, a value judgment also must be made as to where to draw the boundaries. One could chose the municipality of Beverly Hills; or the entire region of West Los Angeles, including Beverly Hills (or excluding it!); or South Beverly Hills alone; or South Beverly Hills together with Beverlywood; or South Beverly Hills, Beverlywood, and the Pico-Robertson neighborhood; or South Beverly Hills, extending all the way to Century City; or South Beverly Hills extending to Century City, but stopping at Century Park East; etc.

From these considerations, it should be evident that almost limitless patterns are available. Indeed, one could imagine the possibility of producing as many different white-pages directories for communities of the United States as there are theoretically permutations for bingo cards.<sup>485</sup> The fact that any phone directory produced by a given individual is unique and distinctive to her and would match the phone directory produced by no other individual does not by itself vouchsafe the existence of copyright protection. For Justice O'Connor, speaking on behalf of a unanimous Supreme Court, has told us that all alphabetized white-page directories stand outside copyright protection.

## 2. *Literary Work vs. Material Object*

We return to the argument that *Bender v. West*, by excluding from protection the page breaks rotely inserted by computer, favors copyright for *4QMMT*, which required eleven years of Qimron's painstaking labor to produce. For this purpose, it is

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Refer to Chapter VI, section (B)(2) *supra*. The district court's discussion of the doctrine of unauthorized exploitation is one of the most elaborate of any case. *Pickett*, 52 F. Supp. 2d at 901-09 & n.17 (relying on NIMMER ON COPYRIGHT, the “treatise[] cited ubiquitously as authority in copyright cases”).

484. Humans quite obviously work according to different criteria than the mechanistic ones programmed into a computer, as anyone trying to access a ponderously named Web site can attest. See David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 450 n.236 (1999).

485. Refer to Case 17 (Bingo Cards) *supra*.

necessary to advert to a more evanescent facet of *Bender v. West*.

This particular aspect did not even occur to me throughout preparing and replying to the cross-motions for summary judgment in the district court. In fact, we had already prevailed in a final judgment below and were brain-storming about the appellate brief before becoming aware that we had been ignoring the fact that West's whole claim to pagination copyright rested on conflating a "fundamental distinction" of copyright law. We therefore argued this new basis to the Second Circuit, which adopted it as an alternative basis.<sup>486</sup> (West, meanwhile, did not even try to address our new theory, directly or obliquely, in its reply brief—from which we inferred that no answer was possible.)

Turning to that "fundamental distinction," the legislative history tells us that it pertains between a copyright and the material object in which it is embodied.<sup>487</sup> Thus, a "literary work" can consist of the letters<sup>488</sup> and words that form it, whereas a "book" is the tangible object that contains that literary work.<sup>489</sup> Page numbers are an incident solely of a book, not of a literary work. To appreciate this phenomenon, imagine that West kept the same paper size and margins in alternative volumes designed for the visually impaired. In these large-type editions, the cases would manifestly occupy more pages, therefore producing different page breaks. Accordingly, the pagination would be wholly different, notwithstanding that the implicated literary work would be identical.<sup>490</sup> By claiming a copyright in pagination,

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486. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 699 n.9 (1998).

487. As the House Report expresses it, there is a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

488. The distinction here is ancient, and provides the basis for a joke that is older than the United States. *See The Author as Proprietor*, *supra* note 19, at 24 ("Having been reprimanded for stealing an old woman's gingerbread cakes baked in the form of letters, a cheeky schoolboy . . . defended himself by explaining that 'the supreme Judicature of Great Britain had lately determined that lettered Property was common.'").

489. The Torah is a literary work that, besides being made into a book, could equally be embodied on papyri; on parchment scrolls in a cave at Qumran; on a CD-ROM; on a server attached to the Internet; or, as the Torah itself commands, on stone monuments set up atop Mt. Eival. *See Deuteronomy 27:8*.

490. To the extent that West attempted to file a separate registration certificate for its large-type edition, the Copyright Office would deny separate registration for the identical "literary work." *See* 37 C.F.R. § 202.1 (2000) (listing "mere variations of

West was trying to import copyright protection into a domain where it plays no role, namely to protect the manner in which a material object is formatted.

In a sense, Judge Dorner's finding of copyright protection for Qimron massively replicates West's error. For Qimron was attempting to put together the physical pieces that he found in the Judean desert, and then to fill in the gaps. How he fit those pieces together reflects a material object.<sup>491</sup> Consider, most obviously, the finding that Qimron decided to reassemble various manuscript segments horizontally rather than vertically.<sup>492</sup> Without doubting that Qimron might have cogitated long and hard on the problem and essayed numerous variants, this type of sleuth work relates not to matters subject to copyright protection (a literary work), but instead to arrangement of the parchment scraps on which it chanced to be written (a material object). To the extent that Qimron engaged in creativity in this domain, it related to *MMT's* material embodiment. It conflates legal categories to grant that type of activity copyright protection.

But, of course, even after arranging the fragments horizontally or vertically, lacunae remained, which Qimron filled in. Do those matters represent protected expression? To evaluate this aspect of the matter, we must turn to the merger doctrine.

### *B. Merger of Expression with Nonprotected Material*

In *Bender v. West*, another argument advanced to bar copyright protection for West's alteration to judicial opinions came in the merger doctrine.

The fundamental copyright principle that only the expression of an idea and not the idea itself is protectable has produced a corollary maxim that even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.<sup>493</sup>

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typographic ornamentation" among examples of "Material not subject to copyright").

491. As a scholar in the field notes, one strategy to employ in text reconstruction is to reconstruct "the text of a scroll"; but an alternative strategy that is often efficacious is to "reconstruct the scroll itself, the patterned shapes of the holes and breaks [that] are a reliable aid in arriving at the original order of what remains of the scroll fragments." *How to Connect Dead Sea Scroll Fragments*, *supra* note 210, at 250 (emphasis in original). See *Laser Bones*, *supra* note 56, at 287 n.40 (discussing how DNA analysis is used on the Dead Sea Scrolls to analyze fragments according to animal skin used; sometimes even by individual animal).

492. Refer to Chapter V, section (B)(2) *supra*.

493. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 n.12 (quoting *Kregos v. Associated Press*, 937 F.2d 700, 704 (2d Cir. 1991)). The next sentence from the

The Second Circuit declined to invoke the merger doctrine, based on its antecedent holding that copyright protection was unavailable for West's case reporters.<sup>494</sup> In addition, the Second Circuit noted that the emendations that West made to judicial opinions do not constitute "building blocks of understanding," for which application of the merger doctrine would have been ripe.<sup>495</sup>

### 1. *Building Blocks of Understanding*

West's emendations to judicial opinions—such matters as inserting an escort citation or italicizing a case name—are plainly not "building blocks of understanding." Turning to manuscript reconstruction, by contrast, the opposite dynamic pertains.

The reconstruction of TR's words do not represent "approximative statements of opinion"<sup>496</sup> by Qimron. Instead, they represent, to the best of Qimron's ability, what the Teacher of Righteousness actually said. Insofar as Qimron's philological, historical, archaeological and other skills permit, they represent an attempt at objectivity,<sup>497</sup> not simply an "expression of subjective opinion" as to what TR might have said.<sup>498</sup> Strugnell captures the matter metaphorically:

A. [I]n the case here of MMT and Qimron, having then done our joint work, we have squeezed the orange as hard as we can, we have got as much as we can out of it, and what we have got is, we're pretty sure is reliable, it's not lemon juice.

Q. It's reliably what?

A. It's reliably good orange juice.<sup>499</sup>

"The vitality of the scholarly life depends upon a scholar's ability to freely state his agreements and disagreements with

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quoted opinion states, "Our Circuit has considered this so-called 'merger' doctrine in determining whether actionable infringement has occurred, rather than whether a copyright is valid, an approach the Nimmer treatise regards as the 'better view.'" 937 F.2d at 705 (citations omitted). Plainly, although the current thoughts approach the matter generally, it would be best to evaluate the merger doctrine in the context of a particular infringement claim—an enterprise distinct from that of the present chapter.

494. *Bender*, 158 F.3d at 688 n.12.

495. *Id.* (citing *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 71 (2d Cir. 1994)).

496. *CCC Info. Servs., Inc.*, 44 F.3d at 72.

497. *See* Strugnell Testimony at 101.

498. "This dichotomy between types of ideas is supported by the wording of various legislative pronouncements, which seem uniformly to contemplate denying protection to building-block ideas explaining processes or discoveries, and do not refer to expressions of subjective opinion." *CCC Info. Servs., Inc.*, 44 F.3d at 71 n.22.

499. Strugnell Testimony at 102–03.



those who came before him. That's how the life of the mind and the human condition improves."<sup>500</sup> For Dead Sea Scroll studies to progress, it is essential to deny Qimron a copyright in the text that he has posited as the reconstruction of TR's words. Those words—the orange juice—are nothing other than the building blocks “to promote the progress of science” in the field.<sup>501</sup>

## 2. *Wedding of Idea and Expression*

A separate application of the merger doctrine comes in *Harper & Row v. Nation*. The Supreme Court there vindicated copyright protection for President Ford's memoirs.<sup>502</sup> But in that context, the Court further noted, “Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the ‘smoking gun’ is perhaps so integral to the idea expressed as to be inseparable from it. Cf. 1 Nimmer at § 1.10[C].”<sup>503</sup>

The section from *Nimmer on Copyright* that the Court cites contains a discussion captioned, “The Wedding of Idea and Expression.”<sup>504</sup> That concept bears heavily on the process of manuscript reconstruction.

Echoing the Supreme Court's very phraseology, one Christian theologian characterizes *MMT* as “the ‘smoking gun’ for which students have been searching for generations.”<sup>505</sup> A Jewish scholar avers that this amazing document “hold[s] the key to many mysteries of the Dead Sea scrolls.”<sup>506</sup> One cannot do justice to the epochal pronouncements of *MMT* by skirting around its edges or paraphrasing its content. For the precise words that TR used are “so integral to the idea expressed as to be inseparable from it.”

A social critic or historian can sensibly talk about President Ford's role in the Nixon impeachment and pardon, even if limited to approaching the domain periphrastically. In other words, the precise locutions by which Ford described his thoughts and conduct are not themselves the issue for scholarly debate. In

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500. WHO WROTE THE DEAD SEA SCROLLS?, *supra* note 229, at 326 (quoting Bill Ziobro, Secretary-Treasurer of the American Philological Association).

501. U.S. CONST. art. I, § 8, cl. 8.

502. 471 U.S. 539 (1985).

503. *Id.* at 563.

504. 1 NIMMER ON COPYRIGHT § 1.10[C][2]. To express the matter biblically, merger arises when idea cleaves to expression such that they share one flesh. See *Genesis 2:24*.

505. Refer to note 368 *supra* and accompanying text.

506. Refer to note 256 *supra* and accompanying text.

sharp contrast, one cannot talk about the specific *halachic* standards that *MMT* imposed without quoting its text verbatim.<sup>507</sup> Once one does so, Qimron claims violation of his copyright. But that claim functions as the ultimate wedding party-popper.

Given the marriage between Qimron's reconstruction and the ideas that he is propounding in the mouth of one of the key figures in the history of Western religion, the copyright monopoly plays no role here. For this reason as well, the infringement claim fails.

### 3. *No Other Way to Express Unprotected Ideas*

In *Kern River Gas Transmission Co. v. Coastal Corp.*,<sup>508</sup> the plaintiff drafted maps depicting its proposed route of a natural gas pipeline. The defendant, plaintiff's competitor, copied the maps and consequently prevailed in a competition for government approval of pipeline construction based on its plans. The plaintiff responded by suing for copyright infringement.

Drawing a map to locate a gas pipeline presents a task as complex (and potentially creative) as reconstructing an ancient text. One does not simply plot the shortest distance from point A to point B.<sup>509</sup> Instead, a host of issues must be subjectively juggled:

1. Shortest distance between two points;
2. Reasonable cost;
3. Future pipeline security;
4. Good constructability;

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507. Imagine that after arranging a given fragment horizontally rather than vertically, there remain spaces on either side of it, a centimeter before it and two centimeters after. If Qimron were to determine that the scribe in question generally fit seven letters into a centimeter—except that the letters *yod* and *vav* occupied only a half-space—then he would have made room for seven letters and fourteen letters respectively (or more letters, given the requisite appearance of *yods* and *vavs*). As to such matters, Qimron has the greatest expertise, as he literally wrote the book on the subject. See ELISHA QIMRON, *THE HEBREW OF THE DEAD SEA SCROLLS* 31–33 (1986) (assimilation of *yod* and *vav*).

Let us posit further that Qimron developed a certain Hebrew formulation that fit into that domain, consisting of the appropriate number of letters—say, *asher diber* [that he spoke], which has seven letters (including the intermediate space between the words). The only adequate way to formulate Qimron's reconstruction of the lacuna as consisting of *asher diber* is to quote it; any other method falls painfully short. But this does not mean that *asher diber* now becomes protected expression. It is merged with the idea that into a space capable of sustaining seven letters, TR in this instance chose to express himself with the locution *asher diber*.

508. 899 F.2d 1458 (5th Cir. 1990).

509. Robert A. Martin, Jr., "On the Ground" *Aspects of Pipeline Routing*, in PROCEEDINGS OF THE 1991 API PIPELINE CONFERENCE 460–61 (1991).

5. Environmental and governmental permit requirements;
6. Possibility of being constructed in a timely manner.<sup>510</sup>

Each of these considerations in turn engenders subfactors.<sup>511</sup> In addition, other *desiderata* must be weighed in the calculus, such as choosing an area of low population; following existing property lines and highway corridors; avoiding high value acreage; and circumventing areas of known property owner resistance groups.<sup>512</sup> Consequently, the best route represents a composite of many considerations.<sup>513</sup>

Notwithstanding any creativity that went into the choice of where to locate the pipeline, the Fifth Circuit dismissed the copyright claim pursuant to the merger doctrine. The court held the idea of the location of the pipeline and its expression embodied in the maps inseparable, and thus not subject to protection.<sup>514</sup> To extend protection to the maps would be to grant plaintiff a monopoly of the idea for locating a proposed pipeline at a given location, “a foreclosure of competition that Congress could not have intended to sanction through copyright law.”<sup>515</sup>

The only way an archaeologist or philologist can give shape to her idea about how an ancient author expressed himself is by

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510. *Id.* at 461.

511. As to the environment, for example, thought must be given along the following lines:

1. Watch out for environmental impacts such as
  - a. wet lands
  - b. other bodies of water
  - c. threatened and endangered species
  - d. historical areas such as burial grounds
2. Meet with involved agencies to find out their concerns
3. Identify hazardous waste-superfund areas

See *id.* at 462. As to constructability, the factors include:

1. avoid rocky areas, areas of rough terrain and wooded areas
2. river and water way crossings can be expensive and time consuming
3. try to use the shoulder of roadways since compaction and asphalt replacement can be very expensive

See *id.* at 463. As to engineering, again multiple concerns intervene:

1. how costly will the route be?
2. hydraulics concerns—don’t go over mountains
3. can pump stations be acquired and is there access
4. can you conform to DOT requirements?

See *id.*

512. *Id.* As a subspecies of the last consideration, “crossing of Indian lines can be very expensive and require a very long process time.” *Id.* at 462.

513. *Id.* at 464.

514. *Kern River Gas Transmissions Co. v. Coastal Corp.*, 899 F.2d 1458, 1463–64 (5th Cir. 1990).

515. *Id.* at 1464.

putting the fragments together and filling in the lacunae in a manner that she perceives to be correct.<sup>516</sup> Over the course of eleven years, Qimron had many ideas about what TR was saying.<sup>517</sup> One was to substitute an *ayin* for an *aleph*. Another was to assemble fragments widthwise rather than lengthwise. The only way to express each of those ideas is through the text that Qimron proposed. In these and every other instance of manuscript reconstruction, the expression merges with the idea. Even more than a map is the most effective way to convey the idea of where to locate a suggested pipeline route, a reconstructed manuscript is the *only* effective way to convey the ideas regarding how to reconstruct that manuscript.<sup>518</sup> It is impossible to imagine that Congress intended to foreclose competition in *ideas* about how to assemble ancient manuscripts via copyright law. Qimron's proposed reconstruction, which merges idea with expression, therefore stands outside copyright protection.

### C. *Enemy of the True*

*Bender v. West* states that "the creative is the enemy of the true."<sup>519</sup> That *aperçu* carries great force as applied to the chore of manuscript reconstruction.

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516. As long as selections of facts involve matters of taste and personal opinion, there is no serious risk that withholding the merger doctrine will extend protection to an idea. . . . However, where a selection of data is the first step in an analysis that yields . . . even a better-than-average probability of some result, protecting the "expression" of the selection would clearly risk protecting the idea of the analysis.

*Kregos v. Associated Press*, 937 F.2d 700, 707 (2d Cir. 1991).

517. The amount of effort invested in conceiving the idea does not confer protection. In *Kern River*, the court found that the plaintiff "conducted expensive and detailed field work to acquire the information needed to formulate . . . the precise location of their pipeline." 899 F.3d at 1464. This factor did not change the conclusion that the idea of the location of the pipeline and the maps in which it was embodied were inseparable. Similarly, the years that Qimron put into the reconstruction of the manuscript are immaterial to the fact that his reconstructed manuscript is the only effective expression of his ideas.

518. The amount of cogitation, number of permutations considered, and other intellectual labor that goes into manuscript reproduction makes it no more subject to copyright protection than do the equivalent factors that underlie preparation of a pipeline map.

519. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).

1. *Copyright Estoppel*<sup>520</sup>

Vindication of the fact/expression dichotomy discussed above<sup>521</sup> comes as well in a different doctrine of law, copyright estoppel. This doctrine arises when an author disavows the seemingly creative nature of her work to claim that it actually portrays objective factual material.<sup>522</sup>

Care must be taken to apply the estoppel doctrine with real-world sensitivities. In other words, simply because a work's packaging would fool the ingenuous (or humorless) into believing it a work of fact is no reason to blinker common sense when it screams the opposite.<sup>523</sup> Examples are legion:

??In *A Study in Scarlet*, *The Sign of the Four*, and innumerable adventures, Sir Arthur Conan Doyle presented what seemed to be the real-world adventures of a Victorian detective named Sherlock Holmes as recounted by his faithful amanuensis, Dr. Watson. Nonetheless, there can be no question but that the good knight engaged in copyrightable expression to produce the tales.<sup>524</sup> By the same token, *I Claudius* was authored

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520. It should be noted that a question of copyright estoppel did not remain at the end of the day in the *Bender v. West* opinions, for West early on abandoned the argument that its factual reporters contain its own creative expression rather than the judge's words. *Id.* at 681 n.4.

521. Refer to Chapter VII, section (A) *supra*.

522. In *Oliver v. Saint Germain Foundation*, 41 F. Supp. 296 (S.D. Cal. 1941), the plaintiff's book, *A Dweller on Two Planets*, related that the manuscript was a factual account entirely dictated to him by a spirit from another planet known as Phyllos, the Thibetan. *Id.* at 297. In finding for the defendant, the court held that "equity and good morals will not permit one who asserts something as a fact which he insists his readers believe as the real foundation for its appeal to those who may buy and read his work, to change that position for profit in a law suit." *Id.* at 299. In *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992), the plaintiff claimed that its author had "discovered" the ego fixations [of the human spirit], which are scientifically verifiable 'facts' of human nature"; it was therefore estopped to claim copyright protection. *Id.* at 1075.

By contrast, in *Cummins v. Bond*, 1 Ch. 167 (1926), the plaintiff medium produced an account of the Apostles, purportedly written contemporaneously with them, by engaging in "automatic writing" from a 1900-year-old spirit. *Id.* at 168-69, 173. Noting that "I have no jurisdiction extending to the sphere in which [the dead spirit] moves," *id.* at 173, the Chancery judge declined to hold that "authorship and copyright rest with some one already domiciled on the other side of the inevitable river," *id.* at 175, and thus held for plaintiff. *Id.* at 176. See Peter H. Karlen, *Death and Copyright*, COPYRIGHT WORLD, Apr. 1994, at 43, 46-47.

523. Readers have long looked to novels as the guideposts for their own lives. See *Introduction to A HISTORY OF READING*, *supra* note 146, at 25. But those who fail to realize the fictitious intent here belong "in the same category as the people who send cheques to radio stations for the relief of suffering heroines in soap operas." ANATOMY OF CRITICISM, *supra* note 159, at 76.

524. 1 NIMMER ON COPYRIGHT § 2.11[C].

by Robert Graves,<sup>525</sup> notwithstanding that it appears to be the diary of an early Roman emperor; *The Name of the Rose* was composed by Umberto Eco, notwithstanding that the prologue recounts the tale of its ancient manuscript being discovered on a visit to Prague; and on and on.

??Even in the context of law review articles, the purported archaeological “find” of an ancient opinion by Tiberius, J., with an affirmance per Hades, C.J.,<sup>526</sup> cannot be taken at face value by anyone possessing the slightest modicum of sophistication.

??Indeed, almost any novel, approached uncritically, could be taken as portraying itself as a recitation of “true events.”<sup>527</sup> Thus, *Moby Dick* recounts the unfortunate events that befell a man named Ishmael when he got on Captain Ahab’s ship; *Vanity Fair*, the occurrences befalling various people after the carriage pulled up to Miss Pinkerton’s Academy for Young Ladies on Chiswick Mall, etc. Indeed, it is only those “hypermodern” books in which the narrator portrays himself as the narrator of a work of fiction that fall outside this framework.<sup>528</sup>

The question arises where, along that spectrum, lies Qimron’s reconstruction of 4QMMT. It is submitted that its factual nature amply warrants application of the estoppel doctrine.

At the time *Qimron v. Shanks* was tried, Qimron had not yet published his manuscript. Accordingly, it may have been difficult at that time to pinpoint *indicia* that unambiguously reveal its factual nature. Still, Qimron’s testimony would seem to suffice in this regard.<sup>529</sup> Moreover, the fact that it was widely circulated in

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525. Graves also produced a two-volume translation entitled *THE GREEK MYTHS* (1955). It is fascinating to note that the very first entry, the archaic *Pelasgian Creation Myth*, contains a reference to “the author of the Universe.” *Id.* at 27.

526. See *An Odyssey Through Copyright’s Vicarious Defenses*, *supra* note 303, at 163, 183.

527. “[U]nless a reader is delusional in a clinical sense, he or she never actually imagines that Emma Bovary or Isabel Archer or Huckleberry Finn is a real person.” ROBERT ALTER, *THE PLEASURES OF READING IN AN IDEOLOGICAL AGE* 50 (1989). See *What Is an Author?*, *supra* note 155, at 152. Of course, there have been occasional hoaxes, in which works of fiction were widely accepted as true. *ANATOMY OF CRITICISM*, *supra* note 159, at 135 (stating that such hoaxes “correspond to *trompe l’oeil* illusions in painting”).

528. Cf. JOHN BARTH, *ON WITH THE STORY* 71 (1996) (character in novel rips page out of the book, which corresponds to an actual page printed in the book that the readers hold in their own hands). For the perspective that the Bible itself might qualify as “hypermodern,” see *THE ART OF BIBLICAL NARRATIVE*, *supra* note 108, at 71.

529. In other words, what we wanted to do is to take all of the manuscripts and

the academic community and formed the subject matter for graduate seminars in archaeology, history, and religious studies—rather than in creative writing—leaves little doubt but that its purveyor offered it to the world based on its factual character rather than its fabulous properties.

To the extent that there were any doubts on that score as of the 1993 trial, uncertainty has since evaporated. For in the interim, *DJD X* has been published.<sup>530</sup> Oxford's Clarendon Press trumpets *DJD X* as the text that was discovered at Qumran, rather than as a fanciful reconstruction, an idiosyncratic version<sup>531</sup> or any other type of creation of literature.<sup>532</sup> That characterization begins in the flyleaf with the following words—"This book . . . is the first edition . . . of one of the most important documents found at Qumran: a letter from one of the leaders of the Dead Sea sect . . . to one of the leaders of Israel. . . . The letter is a unique and exceptionally interesting legal document from the first century AD . . . ." Notably absent from that characterization are disclaimers as to "educated guesses," "speculations," "personal version," "meditation" and the like. Throughout, the volume repeatedly cites to characteristics of "the letter" written by TR, not to "one possible way to read the letter, given the manifold hazards of reconstruction" or the like.

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to try to reconstruct the original work to the extent that we can reconstruct it . . . . In other words the result is in effect the maximum that we were able to do to arrive at an arrangement of the text that the author wrote to the extent possible. . . . Without understanding the work in depth it is not possible to produce an authentic text.

Protocol at 170–74.

530. See *DJD X*, *supra* note 229. That book came out in 1994, a half-dozen years before the Supreme Court ruled. Justice Türkel acknowledged that this post-trial book "can shed light on the picture of matters before the Court." App. Opin., *supra* note 331, at para. 7.

531. Had Qimron advertised himself as presenting an abridgement or epitome of TR's words, the situation would have been a bit different. In that case, he would more closely resemble—albeit still fall short of—the individual who produced a scale-reduced version of Rodin's sculpture. "In a work of sculpture, this reduction requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude." *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 266–67 (S.D.N.Y. 1959). Refer to note 91 *supra*.

532. How could it be otherwise? By its own charter, Oxford University Press was founded so that "sordid and vulgar artizans may not pervert the indulgence of that most clement prince to their own private lucre . . . [by] thrust[ing] into publication any words, however rude and incorrect." *THE NATURE OF THE BOOK*, *supra* note 24, at 39 n.60.

## 2. *Subjective Expression*

### a. *The Esthetic Impulse*

What would result if Qimron, instead of presenting a scholarly book like *DJD X* to the world, had taken it upon himself to wax metaphorical? For instance, let us imagine that in the context of heavy reflection concerning leather and its status within the regulation of *halacha*, Qimron devised an apt ground for comparison in a well-honed metaphor, whether an unfavorable comparison (“a rotting carcass”) or a pleasant one (“sweet as myrrh”). What would the reaction be if Qimron inserted that metaphor of his own device into his reconstruction of *MMT* in the context of *DJD X*?<sup>533</sup> The very accusation is defamatory.<sup>534</sup>

The job of the philologist, in short, is distinct from that of the poet. If TR wanted to draw an appropriate metaphor, he was free to do so. If a modern writer inspired by the Scrolls chooses multiple rhetorical devices, that also is perfectly appropriate.<sup>535</sup> But for an archaeologist to present his own original musings as the product of antiquity fundamentally betrays the *métier* that he has chosen.

Again, we revert to Dr. Kefalos.<sup>536</sup> There is nothing inappropriate about Qimron attempting to divine through intense study and immersion those metaphors, alliterations, allusions, and other rhetorical devices that TR imbued into the text. But to the extent that Qimron is thinking in terms of metaphors, allusions, and the rest, it is strictly at the second level, akin to psychoanalysis; in other words, the job of reconstruction might be benefited by placing oneself in the original author’s shoes, but that is a far cry from exercising one’s own subjectivity to produce new and original material.

### b. *Scholar or Artist?*

Norman Golb appeared as an expert witness at the trial of

533. “Poetical feelings are a peril to scholarship. . . . [It requires] repression of self-will. . . . To be a scholar, the first thing you have to learn is that scholarship is nothing to do with taste . . . .” TOM STOPPARD, *THE INVENTION OF LOVE* 36, 38, 69 (1997). Stoppard places these thoughts in the mouth of A.E. Housman, meditating on the fragility of efforts to reconstruct ancient manuscripts, and encountering Oscar Wilde (albeit not Napoleon Sarony) in the process. *Id.* Refer to note 28 and accompanying text *supra*.

534. “[T]he historian selects his facts, but to suggest that he had manipulated them to produce a more symmetrical structure would be grounds for libel.” ANATOMY OF CRITICISM, *supra* note 159, at 75.

535. Refer to Case 1 (The Inspiration) *supra*.

536. Refer to Case 16 (The Shrink) *supra*.



*Qimron v. Shanks* on behalf of co-defendant Eisenman.<sup>537</sup> In response to a question from Qimron's attorney, he "answered that any manuscript scholar who, in a lecture, defined his work of reconstruction as an act of creation would be laughed off the stage by his peers."<sup>538</sup>

Qimron could have been moved by *MMT*, like Karen Hai-Sod, to write, "Her hair was dark as night," or other literature of his own inspiration.<sup>539</sup> Had he elected to do so, the product of his composition would have been protected by copyright.<sup>540</sup> In the process, though, he probably would have committed "scholarly suicide" no less than the Dead Sea Scrolls scholar who postulated that Christianity began amidst orgiastic rites induced by psychedelic mushrooms.<sup>541</sup>

In actuality, Qimron soberly chose otherwise. Instead of writing a historical romance, he purported to create a scholarly reproduction of the text.<sup>542</sup> Having pursued the objective route, he cannot now turn around to claim the protection that clothes subjective works.<sup>543</sup>

An aesthete might reject the Procrustean bed between scholar and artist, riposting: is there not truth in beauty?<sup>544</sup> The works of artists, in other words, themselves display timeless truths, yet they do not thereby forfeit copyright protection. That postulate does indeed rest on an accurate perception. At the culmination of his *Ode on a Grecian Urn*,<sup>545</sup> Keats proposes, "Beauty is truth, truth beauty."<sup>546</sup>

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537. WHO WROTE THE DEAD SEA SCROLLS?, *supra* note 229, at 324. When I visited the Shrine of the Book on May 28, 2000, this book was the only one among all those cited herein on sale at the gift shop.

538. *Id.*

539. Refer to Case 1 (The Inspiration) *supra*.

540. For instance, Rabbi Milton Steinberg took off his objective yarmulke and put on the beret of a novelist when writing *As a Driven Leaf*. The book's dramatization of the life of Talmudic sage (and later apostate) Elisha Ben Abuya for that reason lies within copyright protection.

541. Refer to note 383 *supra*.

542. See generally Steve Woolgar, *What is a scientific author?*, in WHAT IS AN AUTHOR?, *supra* note 11, at 175–86.

543. We reach here "[o]ne of the most familiar and important features of literature[:] the absence of a controlling aim of descriptive accuracy." ANATOMY OF CRITICISM, *supra* note 159, at 75. If Qimron was trying to recapture TR's words through the most accurate description, then he was not creating literature.

544. A 1744 copyright case labels a literary composition as "an Assemblage of Ideas so judiciously arranged as to enforce some one Truth." *The Author as Proprietor*, *supra* note 19, at 35 (quoting *Donaldson v. Becket*). But Blackstone replied, "Style and sentiment are the essentials of a literary composition." *Id.* at 36.

545. Refer to Case 23 (The Magician) *supra*.

546. *Ode on a Grecian Urn*, line 59.

For the poet, perhaps,<sup>547</sup> it may be accurate that “that is all Ye know on earth, and all ye need to know.”<sup>548</sup> But in this sublunary sphere, at least, without contesting that there is a “higher truth” in works of fiction,<sup>549</sup> there is a sharp break between the creative and the true,<sup>550</sup> which for these purposes we can denominate the subjective and the objective.<sup>551</sup> To reiterate, “the creative is the enemy of the true.” Simply stated, copyright protects subjective expression, as recognized by *Bender v. West*<sup>552</sup> and countless other cases.<sup>553</sup>

Qimron presents himself to the world as an objective historian, not as the “sylvan historian” immortalized in Keats’s well-wrought *Ode*.<sup>554</sup> Having elected to proceed in the objective sphere insofar as manuscript reconstruction is concerned, Qimron lacks copyright protection for that labor. He is estopped to claim otherwise.

### 3. *Intermingled Material*

There is a third facet to the estoppel doctrine, this one with a

547. It did not, however, convince T.S. Eliot and other critics of the *Ode*. See CLEANTH BROOKS, *THE WELL WROUGHT URN* 124–25 (1947). Brooks’s whole book can be taken as defending Keats’s insight against his detractors. See also LIONEL TRILLING, *The Poet as Hero: Keats in His Letters*, in *THE OPPOSING SELF: NINE ESSAYS IN CRITICISM* 32 (1955).

548. *Ode on a Grecian Urn*, line 59. On one reading, this interplay undergirds even *The Law*, whose “solemn guardians . . . strove for beauty and by their very beauty for truth.” *THE READER*, *supra* note 84, at 181.

549. Manifestly, people would soon stop reading literature if they did not find applications therein to their own life. See *THE PLEASURES OF READING*, *supra* note 527, at 49; Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 *IND. L.J.* 175, 184–86 (1990). The Bible itself attempts “to realize through the medium of literature an order of truth that utterly transcends literature.” *THE WORLD OF BIBLICAL LITERATURE*, *supra* note 155, at 46.

550. “History makes particular statements, and is therefore subject to external criteria of truth and falsehood; poetry makes no particular statements and is not so subject.” NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* 46 (1982).

551. One commentator identifies “authorial subjectivity as the hallmark of original works of authorship.” Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *COLUM. L. REV.* 1865, 1867 (1990). See *Figures of the Author*, *supra* note 194, at 15; *The Law’s Eye*, *supra* note 113, at 83. But see *Dropping the Subject*, *supra* note 25, at 108, 109 (postulating that it distorts to view “authorship and its law as a transparent adjunct of human subjectivity”; “historiography of authorship and copyright need not be subsumed in the analysis of subjectivity”).

552. 158 F.3d 674, 689 (2d Cir. 1996), *cert. denied*, 526 U.S. 1154 (1999).

553. See *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 206–08 (2d Cir. 1986) (holding that the “simple clerical task” of collecting the most straightforward information about bonds, with no subjectivity or variation whatsoever, was not copyrightable).

554. *Ode on a Grecian Urn*, line 3. As noted above, Qimron’s copyright case, insofar as it unfolded in the United States, did so in the courts of Pennsylvania. Refer to Chapter V, section (B)(1) *supra*.

twist. When a putative copyright holder has mingled his purportedly protected expression inextricably with public domain material, there is reason to deny copyright protection. This lesson derives equally from *Bender v. West* and *Qimron v. Shanks*. For in both cases, the claimant took a legal text that was not subject to copyright protection, and claimed copyright based on its intermingled additions.<sup>555</sup>

a. *West*

The early correspondence between West and rival publishers leaves no doubt that West adopted a conscious policy of relying on its emendations to judicial opinions as the basis for asserting copyright protection in its reporters. West banked on the fact that it would be impossible for newcomers to separate out those emendations in attempting to engage in rival presentations of public domain judicial opinions. Instead, as West well knew, the intermingling of the “chaff” of West additions would make the entire “wheat” of the judicial opinions indigestible to all competitors.<sup>556</sup>

Arguing the illegitimacy of that practice, we cited to the district court a section of the Copyright Act that not only had never been relied upon in any published opinion but, to the best of my knowledge, had never even been previously cited to any court. The section in question provides that a published work reproducing works of the United States government must bear a copyright notice identifying, “either affirmatively or negatively, those portions of the copies . . . embodying any work or works protected under this title.”<sup>557</sup> That provision, as illustrated by its legislative history,

is aimed at a publishing practice that, while technically justified under the [1909 Act], has been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been

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555. For these purposes, we discard the specialized argument postulated above that *4QMMT* remains subject to copyright through 2002. Refer to Chapter VI, section (B)(1) *supra*.

556. In a letter to HyperLaw dated October 9, 1991, West advised that “you should carefully compare the enclosed copy of the public domain *slip opinion* in *Mendell v. Gollust*, 909 F.2d 724 (2d Cir. 1990) to the West *case report* of the same case,” claiming that “you will see that the slip opinion and case report vary *substantially* in their selection, coordination, and arrangement of material included.” Exhibit 13 to Intervenor Complaint, *HyperLaw, Inc. v. West Publ'g Co.*, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997) (emphases in original). In fact, comparison of the opinion portion of West’s report of *Mendell v. Gollust* shows it to be letter-for-letter identical to the slip opinion, except for the addition of parallel citations. Declaration of Michelle Kramer, dated July 31, 1996, filed in support of Matthew Bender’s motion for Summary Judgment, Ex., 1 at 1, *Hyperlaw v. West*, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997).

557. 17 U.S.C. § 403 (1994).

the practice to add some “new matter” in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.<sup>558</sup>

Based on West’s failure to follow that provision, Bender argued that West had committed copyright misuse,<sup>559</sup> thereby invalidating protection over its reporters published during the pendency of that provision.<sup>560</sup> As we pointed out to the district court, West always had the option of including its emendations [in brackets] or in a special **type font**, or otherwise distinctively segregated from the public domain judicial opinions. West, however, availed itself of no such option. Instead, it consciously mixed its emendations into the text on a seamless basis, so that it would be impossible to separate it out absent the commercially unfeasible activity of parsing West’s reporters line-by-line.<sup>561</sup>

The district court agreed. Thus, *Bender v. West* became the only judicial opinion in U.S. history that I know of to cite that section of the Copyright Act as part of its rationale.<sup>562</sup>

*b. Qimron*

At first blush, Qimron’s activity stands at the opposite end of the spectrum from West’s. First, the provision noted above applies solely to works of the United States Government, thus excluding *MMT*. Second, Qimron’s reconstruction of *4QMMT* includes within brackets the materials that he has posited as part of his reconstruction.<sup>563</sup> In other words, he apparently adopted the very methodology that we criticized West for omitting. It would seem, therefore, that Qimron is immune from the criticism that we leveled at West.

Further examination undermines that conclusion. It is necessary to revert here to the realization that Qimron can lay claim to copyright protection solely for the mistakes that he committed, rather than for accurate re-creation of the words authored by the Teacher of Righteousness.<sup>564</sup> Such brackets as

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558. H. R. REP. NO. 94-1476, at 145 (1976).

559. Refer to Chapter VI, section (A)(2) *supra*.

560. That version of 17 U.S.C. § 403 was in operation from January 1, 1978, through March 1, 1989.

561. See Declaration of Michelle Kramer, *supra* note 556.

562. *Bender v. West*, 53 U.S.P.Q.2d 1436, 1438 (S.D.N.Y. 1999).

563. The material not in brackets, in turn, represents the matter that he simply transcribed from the ancient documents. See FACSIMILE EDITION, *supra* note 259, at Plate 8.

564. Refer to Chapter IX, (C)(2) *infra*.

Qimron inserted into his reconstruction of *MMT* do not distinguish the accurate from the mistaken. To appreciate how that factor plays out, we need to garb Qimron's choices with some approximate numerical figures.

??Let us imagine that, during the 11 years that he spent reconstructing *MMT*, Qimron was able to re-create TR's words 65% of the time.

??Although 65% would not be a laudable grade in coursework, let us further posit that a 65%-accurate reconstruction from an ancient manuscript represents a signal achievement.

??On the foregoing assumptions, the material representing Qimron's mistakes—the "original" expression included in his reconstruction not traceable back to the Teacher of Righteousness—is 35% of the 40% portion of the work that he claims to have regenerated.

??On that basis, 14% of the material that Shanks published in the offending exhibit represents Qimron's original authorship and, hence, could give rise to a claim of copyright infringement.

When one reviews Qimron's reconstruction, there is no way to segregate the 14% of putatively copyrightable expression from the 86% of manifestly uncopyrightable material. For, as previously noted, the brackets give no indication as to which contain accurate reconstructions and which contain mistakes. Accordingly, the estoppel doctrine applies to Qimron's reconstruction in the same way that it does to West's case reporters. In neither event can a newcomer promote the progress of science by extracting out the massively uncopyrightable materials without risking infringement of the small quantum of copyrightable materials interspersed throughout. Qimron's claims fail on this basis as well.

#### 4. *Of Authors and Authorities*

Stemming from its constitutional authorization, copyright law has always concerned itself with the *author*. That term, however, is fraught with the potential for confusion. For it bears connotations resonant of *authority*.<sup>565</sup> Indeed, it seems to be precisely those connotations that led Judge Dorner astray.

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<sup>565</sup>. See *Our Homeland, the Text*, *supra* note 357, at 308 (discussing "the *auctoritas* of authorship").

Consider whether Qimron can be said to be the *author* of the text on which he premised suit. Judge Dorner's fixation on the depth of Qimron's knowledge of philology and *halacha* and the time that he spent expending intellectual labor into the process of reconstruction led her to answer the authorship question in the affirmative.<sup>566</sup>

If the question were one of *authority*, it is submitted that Judge Dorner ruled correctly. Qimron is, one may readily concede, an authority on the Qumran sect, the Dead Sea Scrolls, the philology of the language used in the Judean desert in millennia past, and related disciplines. His authority in such matters is what brings value to his reconstruction.

But one needs to go all the way back to Hobbes in 1651 to encounter the archaic construction of "author" as the individual who wields "authority."<sup>567</sup> By contrast, the *author* in whom copyright vests is the one who has injected subjective expression into the mix.<sup>568</sup> An *authority*, by virtue of his expertise, is able to construct the true. But the true is the enemy of the creative and, hence, of copyrightable expression.<sup>569</sup> For all these reasons, Judge Dorner misses the mark by conflating "author" with its cognates.

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566. One should recall here the distinction between creativity in the process and creativity in the product. Refer to note 153 *supra*. The former Qimron possessed in abundance; the latter, none—at least to the extent he hit the bull's eye of his effort to reconstruct TR's words.

567. Refer to Chapter II *supra*.

568. One can switch the discourse to "the author of a theory, tradition, or discipline." *What Is an Author?*, *supra* note 155, at 153. But such usages as calling Freud "the author of psychoanalysis," though not an abuse of authorial terminology, plainly depart from the copyright realm. *Id.* at 155. See JON D. LEVENSON, *THE DEATH AND RESURRECTION OF THE BELOVED SON* 74–75 (1993) (posing God as "author" of the struggle between Cain and Abel); ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* 250 (2000) (postulating God as "author" of the process of evolution itself). See also *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991) ("The 'author' of an uncopyrightable idea is nonetheless its author even though, for entirely valid reasons, the law properly denies him a copyright on the result of his creativity.")

569. Refer to Chapter IV *supra*.

VIII.  
*SIN ORIGINAL*

“The writing was the writing of God engraved upon the tablets.” Rabbi Joshua Ben Levi says: “Do not read ‘engraved’ (*charut*) but rather ‘freedom’ (*cheyrut*). For you are not free unless you engage in study of Torah.”

*Pirkei Avot* 6:2

Peeling further layers off the onion yields more tears. Moving from general considerations underlying manuscript reconstruction to Qimron’s particular acts of authorship, the question arises whether Qimron’s work is copyrightable as an original composition. There is reason to doubt that it is.

A. *Evaluating the Quantum of Originality*

What did Qimron do to reconstruct *MMT*? His contributions formed the basis for winning his copyright claim. Thus, to appreciate the core of his case against Shanks, careful attention must be paid to the originality that purportedly undergirds Qimron’s acts of authorship.

1. *The Opinions*

In seeking to determine whether Qimron’s work contains the requisite originality to qualify for copyright protection, Judge Dorner acknowledges at the outset that if a particular work is a mere duplication of another work, the “duplicator” is not entitled to copyright protection, no matter how much effort has been put into that work.<sup>570</sup> But Qimron is not a duplicator, she reasons, inasmuch as the original scroll for *MMT* has never been fully recovered; the dozens of fragments found relate to more than one scroll; the majority of the fragments did not physically match; and almost half a scroll was still missing even after assembling the fragments.<sup>571</sup> Qimron needed to engage in research in

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570. Trial Opin., *supra* note 195, at 23, end of § 21. In this regard, it is instructive to revert to Cases 11 and 12 (The Doppelgänger and The Forgery) *supra*. Note that despite her invocation of the presumption of identity of laws, Judge Dorner’s opinion cites to both the U.S. Supreme Court’s *Feist* case and to *Nimmer on Copyright* in reaching her determination.

571. Trial Opin., *supra* note 195, at 24, § 22.

philology and in *halacha*<sup>572</sup> in order to fill in the missing parts, an effort upon which he expended eleven years.<sup>573</sup>

These circumstances amply demonstrate that the task of restoration was complex. But Judge Dorner herself realizes that the amount of work put into copying an original work of art is irrelevant when it comes to the originality required to establish copyright protection.<sup>574</sup> Therefore, the sweat that Qimron produced to solve the jigsaw puzzle cannot serve as the basis for copyright protection.<sup>575</sup>

Paradoxically, Qimron's philological expertise and painstaking labor over the decades, if anything, diminish the scope of any copyright protection that he can urge. Consider that one inspired to compose a stream of consciousness ode based on glimpsing the scrolls undeniably obtains copyright protection for her work product.<sup>576</sup> The farther that Qimron stands from the poet—the closer his painstaking research and analysis bring him to reconstructing TR's words—the less is his protection. At the limiting case in which he is exactly right, he manifestly can claim zero originality. Accordingly, Judge Dorner's ruminations, rooted in an inchoate sense that hard and valuable labor deserves reward, incline in exactly the wrong direction from the copyright standpoint.

Indeed, her conclusion actually matches an earlier view of copyright law, exemplified by *Toksvig v. Bruce Publishing Co.*<sup>577</sup> That case declared that a biography of Hans Christian Andersen, in which the author personally unearthed various facts and engaged in her own research into the original Danish sources, deserved protection against copying. *Toksvig* posed the question as “not whether [defendant] could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research?”<sup>578</sup> That

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572. That word refers to the system of Jewish law, the way to “walk” (the word comes from that verb) down the path prescribed by Torah.

573. Trial Opin., *supra* note 195, at 15, § 3.

574. *Id.* at 23, § 22.

575. Judge Dorner specifically rejects protection for fitting together any pieces that physically “matched.” Rather, her goal is to protect placing of pieces that were not physically connected and filling in lacunae. *Id.* at 24, § 22 (“composition of the composite text on the basis of halakhic and linguistic research of the author”).

576. Refer to Case 1 (The Inspiration) *supra*. Pristine ignorance of *halacha*, history, and every other scholarly discipline, and spending as little time as possible on the project stand our hypothetical poet at the far end of the spectrum from Qimron. Yet it is she who has engaged in the type of subjective act of authorship that finds protection under the copyright rubric.

577. 181 F.2d 664 (7th Cir. 1950).

578. *Id.* at 667.



requirement of “independent research” has now been discarded by a unanimous Supreme Court.<sup>579</sup>

It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>580</sup>

But let us look more deeply into the particular circumstances that Judge Dorner adduced as a basis for finding Qimron to have engaged in authorship. Her opinion details two examples.

?Strugnell believed that the sentences in some parts of the scroll are nine lines long, and therefore the fragments should be assembled lengthwise. By contrast, Qimron’s research led him to conclude that the relevant sentence is eighteen lines long, and therefore the fragments should be assembled widthwise. That conclusion changed dramatically the content of the recovered scroll.<sup>581</sup>

?Another part of the scroll was constructed of six tiny fragments in a way that Qimron testified to be speculative. The whole meaning of the paragraph depended on the question whether a missing letter in the text of the word *’orot* was the Hebrew letter *aleph* as Strugnell supposed, so that the reconstructed word would mean “lights,” or whether the missing letter was the letter *ayin*, to reconstruct a Hebrew

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579. Adverting to *Toksvig’s* subject matter regarding the fables of Hans Christian Andersen, “*Feist* has sung the swan song for *Toksvig*, a case that has been long derided in any event as a judicial ugly duckling.” 1 NIMMER ON COPYRIGHT § 2.11[E]. The courts have subsequently joined the treatise in disavowing *Toksvig*. See *Nash v. CBS, Inc.*, 899 F.2d 1537, 1542 (7th Cir. 1990).

580. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (alteration in original) (citations omitted).

581. Trial Opin., *supra* note 195, at 24, § 22.

word that means “[animal] hides.”<sup>582</sup> Following research of the contemporary *halacha* regarding the purity of leather, Qimron concluded that the text should be assembled so that the word at stake would mean “hides.”<sup>583</sup> The content of the text is far different from the meaning it would have held had the missing word been completed as “lights.”

When the Supreme Court affirmed, it relied solely on those two examples.<sup>584</sup> Although likewise eschewing reliance on the “sweat of the brow” doctrine,<sup>585</sup> the opinion’s terminology is telling—it refers throughout to Qimron’s reconstruction of *MMT* as the “Deciphered Text.”<sup>586</sup> That language only highlights the objective nature of the task facing Qimron and his absence of subjective expression.<sup>587</sup>

In any event, how do the two contributions cited by both courts lie within the realm of copyright? One who takes a work of nonrepresentational art that has traditionally been exhibited lengthwise, and convincingly demonstrates that it is to be rehung widthwise, has not engaged in any copyrightable act of authorship.<sup>588</sup> It is hard to credit the first contribution

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582. To elaborate, Hebrew contains a word *or* (plural, *orot*) spelled *aleph-vav-resh*, which means “light.” Hebrew contains a separate word *’or* (plural, *’orot*) spelled *ayin-vav-resh*, which means “leather.” Herein, the first plural will be translated “lights,” the second as “hides.” Although the pronunciation is identical, the word with an *aleph* will be transliterated as *orot*, the one with an *ayin* as *’orot* to signal the difference.

583. For a rough analogy to Qimron’s task here, compare the emendation of Thomas Nashe’s line from “brightness fell from the air” to “brightness fell from her hair.” See *The Uncommon Reader*, in *NO PASSION SPENT*, *supra* note 212, at 7.

584. App. Opin., *supra* note 331, at para. 14.

585. Introducing Judge Dorner’s famous two examples, the appellate opinion comments as follows:

Qimron’s work was not, therefore, technical work, “mechanical,” like simple manual labor the results of which are known in advance. His “inspiration,” the “added soul” that he gave to the Scroll fragments, that transfigured the fragments into a living text, were not only confined to the investment of human resources, like “sweat,” in the sense of “the sweat of a man’s brow.” These were the fruits of a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and chose between different alternatives.

*Id.* at para. 14. Earlier, the Court referenced “‘inspiration’ in the sense of *yitron haruach* [literally, ‘advantage of the spirit’] according to one of the interpretations of the words in *Malachi 2:15*.” *Id.* at para. 10.

586. Throughout, the opinion refers to it as *hatext hamephu’anach*. Some of those passages including this phrase have already appeared above.

587. Refer to Case 19 (Chicken Little) *supra*.

588. *Lee v. A.R.T. Co.*, 125 F.3d 580, 581 (7th Cir. 1997).

differently. Moving to the second, it is impossible to maintain that a single letter<sup>589</sup> can a copyrightable composition make.<sup>590</sup>

But these considerations are not conclusive. Perhaps the trial judge simply cited insufficient examples of the evidence adduced to her, and the appellate court had nothing further in the record upon which to rely.<sup>591</sup> It is, therefore, necessary to look more broadly before drawing any conclusions as to Qimron's originality.

## 2. *Qimron's Own Explanation*

For this purpose, developments since trial afford an excellent vehicle to judge the nature of Qimron's contributions. Nine scholarly essays fill the book *Reading 4QMMT*.<sup>592</sup> One of the contributions is by Qimron himself. The philologist-plaintiff there details "three passages which demonstrate the nature of the text and the way in which it was reconstructed."<sup>593</sup> Given that the book is aimed at specialists rather than a general audience—and given that Qimron ends his own contribution by noting how he "anxiously await[s] the critical judgement of my esteemed colleagues"<sup>594</sup>—this work furnishes the perfect vehicle to gauge the originality of Qimron's contributions.<sup>595</sup>

Qimron begins by claiming that his reconstruction of *MMT* "probably constitutes 40% of the composite text."<sup>596</sup> (Strugnell, by contrast, estimates that "we have about two-thirds, or it depends, between two-thirds and three-quarters of the whole theoretically existent text.")<sup>597</sup> On several occasions, Qimron claims that reconstruction "is no more than an educated guess on the basis of the scholar's knowledge and intuition."<sup>598</sup> These claims, if credited,

589. Moreover, even the letter that Qimron changed in the text was not the product of his original authorship. The suggested letter was authored by TR, and recovered by Qimron, who literally saw it "on several tiny fragments." Refer to text accompanying notes 609, 653 *infra*.

590. Even a single word would not suffice, and a single line is dubious. Judge Frank suggested that copyright protection should be accorded only to extraordinarily fanciful lines, such as "Euclid alone has looked on Beauty bare." *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 n.8 (2d Cir. 1946). For the mathematical justification regarding Euclid, see *THE MAN WHO LOVED ONLY NUMBERS*, *supra* note 99, at 32–33.

591. The latter proposition is dubious. Refer to note 530 *supra*.

592. Refer to note 254 *supra*.

593. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 10.

594. *Id.* at 13.

595. Moreover, it can scarcely be contended that Qimron's views were edited against his interest. The editors single out Qimron for their especial thanks. *READING 4QMMT*, *supra* note 254, at xi.

596. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 9.

597. Strugnell Testimony at 190.

598. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254,

would seem to demonstrate original contributions. Yet it is interesting to juxtapose Qimron's own examples of reconstruction against that standard. Qimron offers three particulars.

As to the first, Qimron explains what he did with a fragment that read simply, "it from one day to the following one." He noticed the similarity of this fragment to materials found on another scroll.<sup>599</sup> Qimron suspected that these sources were explicating a biblical controversy arising out of *Leviticus 7:15*. That commandment contains the imperative of the verb "to leave." Qimron further notes as follows: "Fortunately, I succeeded in finding the word *she-manichim* ("that they leave") on a tiny fragment containing parts of several letters that belong to lines 9 and 11. *These letters establish the placement of this fragment as certain.*"<sup>600</sup>

Taking Qimron at his word, this example does not deserve copyright protection. Far from being subjective, an educated guess, a locution for which many variant expressions are possible, the placement is certain. There would appear to be nothing copyrightable here.<sup>601</sup>

The second example comes from a different fragment of *MMT*. Qimron modestly notes, "It was Menachem Kister who first suggested the present placement of this fragment."<sup>602</sup> Though Strugnell and others disagreed with Kister, Qimron further notes that "Bezalel Porten believes that papyrology in fact supports Kister's placement of this fragment."<sup>603</sup> If credited, these circumstances could support a claim by Kister to copyright protection.<sup>604</sup> But they do not support Qimron's claim.

The final example that Qimron adduces is the very one that Judge Dorner adduced in her ruling. It comes from the most

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at 9. By contrast, Sussmann, whilst conceding that there are "quite a few lacunae," opines that "the work itself — its aim, significance and the remnants of most of its paragraphs are quite clear." *DJD X*, *supra* note 229, at 185.

599. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 10, referencing *11QT 20:12–13*.

600. *Id.* (emphasis added; transliteration substituted in place of Hebrew characters).

601. Of course, even if an educated guess were at issue, it would stand outside of copyright protection based on many of the doctrines discussed above.

602. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 12. Elsewhere, Qimron concedes that Kister suggested the order adopted for the entire composite text of *MMT*. *DJD X*, *supra* note 229, at 201.

603. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 13.

604. Of course, a separate inquiry would need to unfold to determine whether Kister had an original idea; whether he clothed it in concrete terms; whether he set it down in a tangible medium of expression; and whether the balance of prerequisites for copyright protection are also present.

extensively reconstructed area of the text.<sup>605</sup> Proceeding based on the homophone of the words “hides” and “lights,”<sup>606</sup> Strugnell had suggested the reading “lights.”<sup>607</sup> Qimron posited the alternative reading of “hides.”<sup>608</sup> His methodology is worth quoting:

I discovered that parts of the words 'orot and 'or (“hide” in the singular) are also found on several tiny fragments. I assumed that this word must be the basis of some controversial law. The placement, then, of these tiny fragments in the composite text and the restoration of the missing portions was based on the controversial laws found in the Temple Scroll concerning the hides of ritually pure animals. . . . The fact that the fragments which contain the word 'orot were derived from two separate manuscripts of 4QMMT provides further confirmation for this suggested arrangement. Since this reconstruction is based on the temple Scroll, it contributes very little which is new to our understanding of this actual law from Qumran.<sup>609</sup>

That passage could support diverse propositions—that Qimron is punctilious, that he is broad in his knowledge, that he is painstaking in his reconstruction, that he is loath to oversell the significance of the matter entrusted to his care. Yet it would seem equally to refute the claim that Qimron injected into this aspect of his reconstruction of 4QMMT any subjective original expression of the sort that must underlie copyright protection.

But let us dig more deeply before drawing any final conclusions as to Qimron’s inclusion of subjective elements in his reconstruction. To do so requires examination of the process of Hebrew manuscript reconstruction.

## B. *Manuscript Reconstruction*

### 1. *In General*

Strugnell set forth the essence of the general exercise here:

Q. For us laymen, could you describe for us the process of transcribing a fragment?

A. Yes, well, the process is trying to give as rough a

605. *Id.* at 11.

606. Both words can be transliterated into English as 'orot. The first letter of “lights” is an *aleph*. The first letter of “hides” is an *ayin*. Refer to note 582 *supra*.

607. Strugnell was later a convert to Qimron’s view. Strugnell Testimony at 159.

608. *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 11.

609. *Id.* at 11–12 (footnote omitted).

facsimile as you can on a piece of paper to a piece of leather, not copying the exact style of the script, the copy giving you a copy of what is said there, following the same shape exactly so you can then see what we need, two words to fit in that space and then things like this. . . . And the reconstruction must fit the material data. In other words, if the gap is that large, you must put in that number of words.

Q. What are joins?

A. Joins are when, when, what I talked about as the work of the jigsaw puzzle — When you fit together two fragments and you see the traces where the lameds [*lamed* is the Hebrew letter corresponding to Greek *lamda* and our “L”] from the bottom one fit with the tops of lameds, etc. As I say, these are less, from my impression overall in the work at Qumran is that there are less, they’re not so frequent as the long distance joins, but they’re important, obviously.

Q. In order to give us the proper terminology, what’s the overall process called? I know it’s of the transcription and the reconstruction and the joins. Is there a term for the overall process?

A. I suppose it would be reconstruction. Transcription is part of it, but what I want is a reconstruction of the whole.

Q. What’s the object of the reconstruction process?

A. Well, to recover a book that otherwise is hopelessly lost.

Q. Well, how do you know if a reconstruction is a good reconstruction or a bad reconstruction, how does one objectively determine the success or the quality of the reconstruction?

A. That’s what you employ critics for. I could read you pages of A.E. Housman on the subject. Good scholars immediately recognize it, and bad scholars don’t understand what’s happening.<sup>610</sup>

Moreover, turning to *4QMMT* itself, Strugnell further elaborates on Qimron’s task:

Q. Imagine ten scholars and each scholar producing a different version even of a line or of a word. Is the version — is each of the ten versions a correct version?

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610. Strugnell Testimony at 95–97 (edited). For more on A.E. Housman, refer to the epigraph to Chapter XIV *infra*.

A. No, in general they're all dubious, some more dubious than the other.

Q. How many correct versions —

A. Oh, there's only one, I mean, the correct version is the one of the original composer of MMT, which we can't always get at, but in where we have manuscripts, we can get near to it. . . . It's the same problem as with classical, texts of classical antiquity, and the restoring of the original text of Aeschylus or Homer is a very tricky business, but still the consensus of scholars is that that is a correct reading, that is a correct emendation and the like. . . . That is what Qimron is trying to get at in his reconstructed text. He doesn't do it completely because there are large holes left in that text, but where we have any evidence, we can assess whether his reading or someone else's is likely to be either the original reading or near [it].<sup>611</sup>

Reconstructing text is always a delicate operation, as even the simple example of Chicken Little demonstrates.<sup>612</sup> Attempts to reconstruct Hebrew pose even more delicate considerations.<sup>613</sup>

The consonantal foundation of all Hebrew writing — numerous words grow out of a radical of three consonants — is crucial. It allows, indeed makes unavoidable, a polysemic plurality and richness of possible readings probably unmatched by any other written tongue. The same consonantal cluster can, with different vocalizations, be interpreted in wholly different senses.<sup>614</sup>

As such, Hebrew stands in contrast to truly alphabetic scripts, such as Greek.<sup>615</sup>

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611. Strugnell Testimony at 219–21 (edited).

612. Refer to Case 19 (Chicken Little) *supra*.

613. My Honors Thesis as an undergraduate at Stanford University was based on deciphering medieval Hebrew manuscripts translating (a now lost intermediate Arab translation of) Aristotle's *Nichomachean Ethics*. Those kindergarten efforts serve only to sensitize me to the delicacy of the task faced by serious Scrolls scholars.

614. *A Preface to the Hebrew Bible*, *supra* note 212, at 57. See JOSÉ FAUR, GOLDEN DOVES WITH SILVER DOTS: SEMIOTICS AND TEXTUALITY IN RABBINIC TRADITION 121 (1986) ("It is hardly possible to conceive a more 'unreadable' text than one made exclusively of consonants!"). In an earlier age, mastery of Hebrew's polysemic plurality was viewed as a ticket to necromancy. THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17, at 277. The advent of the printing press promised access to the hidden secrets encoded into the Hebrew text; piecemeal publication of works appeared part of a cosmic unfolding, as "fragments [were] drawn from some vast Ur-book of Knowledge." *Id.* at 279.

615. THE MUSE LEARNS TO WRITE, *supra* note 463, at 9, 91. Havelock throws out the intriguing suggestion that the difference stemmed from an ancient "arms race" in a locale where Greek and Semitic languages co-existed, such as Cyprus or Crete. *Id.* at 85.

Already by the compilation of the *Mishna* in the second century, the rabbis took advantage of Hebrew's "polysemic plurality . . . of possible readings" to make homilectical points. An example comes in *Exodus 32:16*: "And the tablets were the work of God and the writing was the writing of God engraved upon the tablets." In the tractate *Pirkei Avot*,<sup>616</sup> Rabbi Joshua Ben Levi explicates that verse: "Do not read *charut* ("engraved") but rather *cheyrut* ("freedom"). For you are not free unless you engage in study of Torah."<sup>617</sup>

When Qimron read an *ayin* rather than an *aleph*, what was he doing? Was he trying to achieve alliteration, or to recall to the reader's mind an apropos biblical verse? Although those strategies would be valid from the quill of any author of a literary text,<sup>618</sup> they should form no part of Qimron's vocation—except in a derivative sense to be discussed in a moment. In other words, for Qimron to turn a phrase nicely to achieve a pleasing esthetic effect would be for him to leave the realm of history, for which his visa was stamped,<sup>619</sup> and to enter the realm of literature, in which he is an illegal alien.<sup>620</sup>

Yet in a derivative sense, as just mentioned, Qimron could have chosen those tactics. This realm is limited to recapture of what TR desired. In other words, to the extent that Qimron's studies led him to conclude that TR habitually followed two words beginning with *ayin* with a third, then he could have

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616. Why, in an essay on copyright law as the efflorescence of Romanticism, are we turning to *Pirkei Avot*? "My drift I fear/Is scarcely obvious," as Wordsworth said in *The Prelude*. For the juxtaposition of that first Romantic poet with the sensibilities of *Pirkei Avot*, see *Wordsworth and the Rabbis*, in *THE OPPOSING SELF*, *supra* note 547, at 101, 104–32.

617. *Pirkei Avot* 6:2. The theme has appeared often since in Western literature. See, e.g., John Donne, *Batter My Heart, Three-Person'd God*, lines 12–13 (1633) ("for I/Except you entrall me, never shall be free"). It is to be doubted that Donne violated R' Joshua's copyright.

618. One commentator invokes the "creative contract—to synthesize information obtained from many sources into a fluid, coherent whole." Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 547 (1992). Cf. *THE PLEASURES OF READING*, *supra* note 527, at 33 (recognizing that all languages use certain mechanisms of literature such as "strategic selection of vocabulary, shifts in level of diction, juggling of syntax, repetition, [and] metaphorical substitution"). Refer to note 1054 *infra*.

619. It is to be recalled the Israel Antiquities Authority conveyed exclusive rights over 4QMMT first to Strugnell, and later to Strugnell and Qimron. The quid pro quo for that arrangement was that the two scholars were to prepare a definitive text—not that they would be inspired to esthetic creations by virtue of their proximity to the scrolls. Refer to Case 1 (The Inspiration) *supra*.

620. See *THE WELL WROUGHT URN*, *supra* note 547, at 5–7 (observing that Wordsworth creates a literary paradox by describing ordinary experiences and places in an unusual way).



posited the corresponding reading of *'orot* as “hides” rather than “lights,” in the event that it occurred following two other words initiated by an *ayin*. Likewise, to the extent that Qimron had learned that TR invariably quoted to the 54th chapter of *Isaiah*, then he could have brought that knowledge to bear in inserting a citation to that chapter into his reconstruction of *MMT*.<sup>621</sup>

But to the extent that Qimron inserted either of those hypothetical features into his reconstruction of *4QMMT*, it is vital to realize that Qimron was not acting as the author of a literary text. Instead, he was acting akin to the psychiatrist who could unravel his patient’s thought processes.<sup>622</sup> He no more deserves copyright protection for his insight into the psyche of another than did Dr. Kefalos, posited above.<sup>623</sup> Indeed, to the extent that he succeeded, Qimron simply recaptured words that TR had written millennia ago.<sup>624</sup>

## 2. “Read Rather Thus”

Consider an ancient precursor to the task of textual rectification. This example is probably the most celebrated occurrence<sup>625</sup> of a famous Hebrew locution, *Al tikrei . . . elah*, “Do not read [thus] but rather [so]!” The first tractate of the Talmud ends with the following pericope: “Said Rabbi Elazar in the name of Rabbi Chanina: Sages increase the peace of the world, as it is written ‘and all your children are learned of God and great is the peace of your children.’ Do not read (*al tikrei*) ‘your children’ but rather ‘your builders.’”<sup>626</sup>

To unpack R’ Chanina’s insight requires a bit of Hebrew background. The verse cited is *Isaiah* 54:13. The word in that verse for “your children” is *bana’ich*. By revocalizing it, that word becomes *bona’ich*, which means “your builders.” The question

621. Gauged by the number of manuscripts recovered, *Isaiah* was the most popular prophet at Qumran. MYSTERY AND MEANING, *supra* note 211, at 161. In addition, Qumran yielded some of the most complete manuscripts for that particular book of the Bible. Notwithstanding minor textual variants, nothing substantive emerges from the scrolls affecting meaning. See QUMRAN IN PERSPECTIVE, *supra* note 198, at 180–81, 203.

622. Of two proposed reconstructions from an ancient manuscript, “one of them always makes the better sense if you can get into the writer’s mind, without prejudices.” THE INVENTION OF LOVE, *supra* note 533, at 67–68.

623. Refer to Case 16 (The Shrink) *supra*.

624. Note that Dr. Kefalos does not achieve copyright protection simply because his analysis of his patient proves inaccurate. By the same token, mistakes on Qimron’s part are precisely that—mistakes, not copyrightable expression. Refer to Chapter IX, section (C)(2) *infra*.

625. The passage about to be quoted forms part of the weekly Sabbath liturgy. See ARTSCROLL PRAYER BOOK 328 (1988).

626. BRACHOT, *supra* note 15, at 64a.

arises why the subject verse repeats the word “children” instead of omitting it the second time and using a substitute (“and great is *their* peace”). R’ Chanina concludes that this repetition signifies an alternate reading for the repeated word, thereby deriving from the verse itself the lesson that our *children* are those who *build* our legacy after we are gone.

There are two ways to take R’ Chanina’s enterprise: inventive or informative.

??*Inventive*. Perhaps R’ Chanina woke up one morning with the juices flowing and wanted to share his original insight with posterity.<sup>627</sup> In that event, he was an author, in the copyright sense, of the insight that has come down to us in his name.

??*Informative*. On the other hand, perhaps R’ Chanina wished to transmit a tradition he had heard from his master (and perchance he from his, in a great chain),<sup>628</sup> whereby the holy tongue of Hebrew<sup>629</sup> has encoded within it certain correspondences, the unraveling of which is essential to appreciating the full meaning of the text in *Isaiah*. Under this view, there is no copyright to R’ Chanina’s insight. To the contrary, attached to it comes something that might be called “copy obligation.”<sup>630</sup>

Normative Judaism posits that the sage was not then assuming the modern role of author or critic<sup>631</sup> to show how clever he was.<sup>632</sup> Even setting aside what some might dismiss as mere folklore,<sup>633</sup> there is concrete evidence to bolster that claim.

627. The word “inventive” is not used to conjure up the patent standard of novelty. It might be that others before R’ Chanina had already independently alighted on the same insight. It is enough for copyright that he came up with the insight from his own head, rather than copying it.

628. See ISAIAH HOROWITZ, SHNEI LUCHOT HA-BRIT (1649), *quoted in* 2 HA-ENCYCLOPEDIA HA-TALMUDIT 1 n.7 (1987) (“[I]t is passed down, from one person to another.”).

629. As recently as 1640, an inquisitor, refining the *Index of Prohibited Books*, considered “vulgar” all tongues save Hebrew and a few select others. *Reading and the Counter-Reformation*, *supra* note 194, at 243–44 (citing Greek, Latin, Chaldean, Syriac, Ethiopic, Persian, and Arabic as “the other non-vulgar languages”).

630. *Adams and Bits*, *supra* note 194, at 229–32.

631. He was not trying to change the Masoretic text. See ARTSCROLL PRAYER BOOK, *supra* note 625, at 329; JACOB TZVI OF MECKLENBURG, HA-KTAV VEHA-QABBALAH (1839), commenting on *Exodus* 12:17.

632. Epitomizing one view, Abraham Ibn Daud comments, “Never did the sages . . . of the Mishnah [] teach anything, however trivial, of their own invention.” MOSHE HALBERTAL, PEOPLE OF THE BOOK 55 (1997).

633. Refer to note 273 *supra* and accompanying text.

The text itself quotes the insight to “Rabbi Elazar in the name of Rabbi Chanina.” That internal evidence gives rise to an inference that we are dealing here with a tradent in the chain of tradition,<sup>634</sup> rather than a lighting bolt.<sup>635</sup>

From the external standpoint, my original<sup>636</sup> research<sup>637</sup> reveals an even more fascinating phenomenon. The Dead Sea Scrolls themselves, for the first time in history, allow us to go behind the *textus receptus* of the Bible handed down by the Masoretes almost a thousand years ago, to investigate whether R’ Chanina may indeed have been privy to a different recension of the holy text. The result is startling: The version of *Isaiah* 54:13 contained in the Dead Sea Scroll of St. Marks Monastery<sup>638</sup> reads: “And all your children are learned of God and great is the peace of your *builders*.”<sup>639</sup>

It would seem, therefore, that R’ Chanina was being informative—he was telling us about a variant text that he read. It should go without saying that one whose contribution is only to inform the world that he has read a textual variant cannot achieve any copyright protection in the process.<sup>640</sup> As a result, R’ Chanina’s insight stands outside copyright as being informative, not inventive.

At a higher level, my own original work<sup>641</sup> in this field is but another example of a “Read rather thus.” In other words, the mere fact that I have unearthed a variant text does not confer a

634. Admittedly, the reference to Rabbi Chanina furnishes only one explicit link of that chain.

635. Some commentators view *midrash* as an exercise in “creative philology,” by which the ancient rabbis imposed their own meanings onto the biblical text. See Itamar Gruenwald, *Midrash and the “Midrashic Condition”: Preliminary Considerations*, in *THE MIDRASHIC IMAGINATION: JEWISH EXEGESIS, THOUGHT, AND HISTORY* 8–10 (Michael Fishbane ed., 1993). As previously noted, to accuse Qimron of “creative philology” in that sense borders on the defamatory. Refer to note 534 *supra*.

636. As to the content of my “originality,” however, refer to note 641 *infra*.

637. I hasten to add that this “research” consisted solely of pulling down volumes of printed books from my living room shelf.

638. *BIBLIA HEBRAICA STUTTGARTENSIA* at XLVII (Rudi Kittel ed., 1937) (*Isaiah* manuscript discovered in Cave 1 at Qumran).

639. *Id.* at 761 n.13a (emphasis added by my translation). Actually, the reading there is *bona’ichi*, with an extraneous *yod* at end of the word, as compared to how R’ Chanina is quoted in the Talmud.

640. Some pregnant cases above vouchsafe that conclusion. Refer to Cases 9–10 (The Shivviti and The Reader) *supra*.

641. It reflects *original* research to the extent that I developed it on my own, rather than copying it from Frank Cross, James VanderKam, or any other scholar in the field. However, this is not to remotely imply that this particular insight is *novel*. In other words, among the 6000 items published in Dead Sea Scroll studies that I have not read, see MYSTERY AND MEANING, *supra* note 211, at 199, my guess is that the point is made, perhaps even often.

copyright on me to prevent future commentators from copying this insight, even in the context of R' Chanina as quoted in the Talmud, juxtaposed against the Dead Sea Scrolls.

### 3. *Qimron's Reading*

We return now to the famous *aleph* that Qimron transposed to an *ayin*. What role does "Read rather thus" play here? First, it must be forthrightly acknowledged that Qimron was not overtly engaging in the same type of activity as occupied the rabbis who bequeathed *al tikrei* to posterity.<sup>642</sup> For Qimron was trying to reconstruct a previous writing, rather than attempting to make the type of homiletical point which largely concerned the sages of yore. But given that at least one aspect of *al tikrei*, as described above,<sup>643</sup> inheres in preserving a tradition of textual variation, the tasks are not altogether dissimilar.<sup>644</sup>

Second, a preliminary question arises whether Qimron's reading was banal. As Strugnell commented, "the transcriptions differ according to the difficulty of the manuscript. The reconstruction differs according to what part of the manuscript the wretched worm has eaten away. Sometimes it's very easy to postulate a missing reading, sometimes it's very difficult."<sup>645</sup> Imagine that one comes upon a moth-eaten text that reads, "Oh, say can you see, By . . . early light, What so . . . last gleaming" (the ellipses representing two large lacunae). If the first one had room for ten letters (including punctuation and spaces) and the second for thirty-five letters, then it would evince essentially no creativity to fill in the two with "the dawn's" and "proudly we hailed by the twilight's," respectively.<sup>646</sup> How do Qimron's efforts

642. Qimron neither claims that "hides" is a variant of "lights" nor that the text he is reconstructing means to preserve two simultaneous readings.

643. Refer to section (B)(2) *supra*.

644. Dr. Lim of the Edinburgh Faculty of Divinity, although partially resisting my typology, concedes that *al tikrei* represents "an exegetical/scrubal method already found in double readings among the Qumran scrolls, . . . indicative of the 'polysemic' or 'polyvalent' nature of the biblical texts [that some] would regard . . . as a technique of variant preservation." E-mail from Timothy H. Lim to David Nimmer (Sept. 22, 2000) (on file with the *Houston Law Review*).

645. Strugnell Testimony at 103–04. Later, he expressed himself more forcefully regarding the less complex passages: "It's a work which a halfwit could reconstruct." *Id.* at 176.

646. "When you have something about Adonai El Moshe ['God to Moses'], that's what makes me think to put a va'yedaver ['and he spoke'] there isn't that difficult." Strugnell Testimony at 104 (translations added).

In extended testimony, Strugnell opined that for manuscript reconstruction in general, and for *MMT* in particular, "it is relatively easy to decipher, let's say ninety, eighty percent, ninety percent of a text of a given scroll, but the last ten percent may take up a lot of work." Nonetheless, as to the last ten percent, "it could have still taken a lot of

stack up against that hypothetical? We can assume for current purposes that at least some of his reconstructions were not so pedestrian. Therefore, Qimron can be presumed to have vaulted the hurdle of banality.<sup>647</sup>

With those preliminaries out of the way, it is time to turn to substance. Strugnell read *orot* as “lights,” but Qimron’s substitution of a single letter transposed it into “hides.” It is instructive to compare that transformation against a celebrated predecessor. *Genesis* 3:21 records that, after the expulsion of Adam and Eve from the Garden of Eden, “the LORD God clothed [them] with garments of leather.” Of course, the final word of that verse, *’or*, is spelled with an *ayin*. But a *midrash* from over 1500 years<sup>648</sup> ago recounts that in the Torah<sup>649</sup> of Rabbi Meir, the word *’or* in *Genesis* 3:21 was spelled with an *aleph*, meaning that God clothed them with “garments of light.”<sup>650</sup>

Although great symbolism obviously attends Rabbi Meir’s textual variant—indeed the very name “Meir” derives from *or*, and means “one who enlightens”—that is not the focus here. Instead, what the *midrash* just quoted tells us is that, many centuries before Qimron, the “light/leather” homonym was established as a recognized form of textual variation. For Qimron to take Strugnell’s “lights” and to decipher it as “hides,” in short, is a form of reading, not inspiration.<sup>651</sup>

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time and a lot of work to make the necessary improvements, and these improvements could be very significant scientifically for the understanding of the scroll.” See Strugnell Testimony at 155–56. That passage supports the notion that Qimron expended vast sweat of the brow. *Id.* (“Yes, that’s his reading.”)

647. *Stop the Presses!* On the eve of publication, I learned that one of the giants of Scrolls studies at Groningen University in the Netherlands has just published an analysis of *DJD X* purportedly demonstrating that essentially all the reconstruction of 4QMMT was undertaken by John Strugnell by 1961, decades before Qimron’s involvement. *Giving Credit Where Credit is Due: New Study Shows that John Strugnell Substantially Reconstructed and Deciphered MMT*, BAR Mar./Apr. 2001 at 49, 50, citing Florentino Garcia Martinez, *Discoveries in the Judean Desert: Textes légaux (I)*, 32 J. STUD. JUDAISM 71–89 (2001). Not having seen the underlying article yet, I simply cabin that intriguing supposition into this footnote. The future promises no less controversy swirling around this issue than the past.

648. THE ART OF BIBLICAL NARRATIVE, *supra* note 108, at 10–11.

649. *Torato shel R. Meir* could refer to a Torah scroll. But the Mirkin Hebrew edition of *Breishit Rabbah* suggests the interpretation that it refers simply to a collection of R’ Meir’s thoughts and interpretations of various verses.

650. “And the LORD God made for Adam and his wife garments of skin (*or*), and clothed them.” In R’ Meir’s Torah it was found written, “garments of light” (*or*). This refers to Adam’s garments, which were like a torch [shedding radiance], broad at the bottom and narrow at the top.”

BREISHIT RABBAH, 20:12 (English translation from Soncino Edition).

651. Qimron’s co-author would seem to support this interpretation. For Strugnell himself volunteered that it is a “reading” that is at issue here:

But, more basically, what Qimron did amounts to one species of “Read rather thus.”<sup>652</sup> We have previously noted that R’ Chanina cannot claim copyright protection by virtue of revealing the fact that he has seen a different version with a textual variant. Of course, Qimron likewise cannot claim copyright protection over the variants that he has seen by virtue of his unique access to the Qumran stash.

Qimron would attempt to differentiate his situation from that of R’ Chanina by pointing out that he did not actually see the text that he is positing. Instead, he applied his scholastic talents to posit a potential reconstruction, based on similar matters that he discerned in the Temple Scroll, a wholly different document found in Qumran. On that basis, he concludes that he does indeed deserve copyright protection.

But that logic is flawed. Qimron himself admits that *’orot* with an *ayin* is “found on several tiny fragments”<sup>653</sup> of 4QMMT. Qimron, therefore, actually did see the variant text upon which he posits copyright protection.<sup>654</sup> The additional feature that he brought to the table was to associate those isolated fragments with the same word appearing elsewhere. That correspondence allowed him to draw the inference that the same material belonged in the place under examination.

An inference is merely a way of “seeing” something at a higher level. A witness who testifies to seeing something is recounting a fact.<sup>655</sup> A witness who infers something is also

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Q. Let’s assume that ten scholars were given the same manuscript and would have approximately the same knowledge in the necessary fields and each of them would sit separately in a different room. Is it possible that they would come up with the identical work?

A. (Pause). They would come with the identical reading, yes, I think quite possible, you know, and there are only two letters that are difficult as far as I remember them.

Strugnell Testimony at 163–64.

652. *Breishit Rabbah* does not present it with that formula. But the claim here is that, functionally, it amounts to the same thing for copyright purposes.

653. See *The Nature of the Reconstructed Composite Text of 4QMMT*, *supra* note 254, at 11.

654. As to *’orot*, Qimron at one point claims, “Only the top part of the letters has survived.” *Id.* at 11–12. The Hebrew spelling of that word is *ayin-vav-resh-vav-tav*. One would therefore expect to see the top portions of five letters. Yet, as Dr. Lim points out, the last *vav* and *tav* are clearly and wholly preserved and part of *resh* also. There is no sign of any tops of an *ayin* or [the first] *vav*. In other words the first two letters have been reconstructed from the readings of *other* fragments, despite the way that it has been described by Qimron.

E-mail from Timothy H. Lim, *supra* note 644.

655. E.g., “I saw a man in a white coat walk past me.”

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testifying to a fact,<sup>656</sup> albeit she subjects herself to cross-examination, not only about her vision, but also about her reasoning process.<sup>657</sup> A scholar who observes something cannot obtain copyright protection over his observations. A scholar who infers something is in the same category—he simply opens his conclusions to reinterpretation based not merely on the strength of his powers of observations, but of his inference as well.

In sum, it would seem that Qimron's entire copyright claim is premised on the faulty foundation that the textual variants that he indirectly observed entitle him to copyright protection. That conclusion cannot stand.

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656. E.g., "I saw a doctor walk past me."

657. E.g., Q: "Why do you conclude that the man was a doctor?"

A: "Because we were at Ichilov Hospital at the time; my colleagues, Nurses Buzaglo and Smith, were addressing him as 'Dr. Rofeh'; he was ministering to a patient on a gurney; he was giving instructions to Nurses Buzaglo and Smith, about the necessary dosage to give that patient;" etc.

IX.  
INCENTIVES TO CREATE

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Justice Potter Stewart<sup>658</sup>

Copyright is redolent of public policy.<sup>659</sup> The issues arise in *Qimron v. Shanks* no less than in *Bender v. West*.

A. *Incentives and Access*

A Lockean<sup>660</sup> view would posit that natural law<sup>661</sup> confers on authors the right to exploit their artistic progeny.<sup>662</sup> Whatever the philosophical merits of that<sup>663</sup> point of view,<sup>664</sup> “the [U.S.]

658. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

659. As the Supreme Court has stated, “The monopoly privileges that Congress may authorize are [not] primarily designed to provide a special private benefit.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

The point is not merely that the individual rights of authors must be *balanced* against the social good. The Constitution stipulates that authors’ rights are created to serve the social good, so any balancing must be done *within* the overall context of the public good, i.e. between the specific aspect of the public good that is served by intellectual property . . . and other aspects of the public good such as the progressive effects of the free circulation of ideas.

Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 848–49 (1993) (footnotes omitted).

660. For a taxonomy of intellectual property into its Lockean and Hegelian justifications, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–300, 330–32 (1988).

661. “On the one hand, although the official line about copyright is that it is a matter of social policy, judicial and scholarly rhetoric on the subject retains many of the characteristics of natural rights talk.” *From Authors to Copiers*, *supra* note 659, at 848.

662. All of these cultural developments — the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism — occurred in the same period as the long legal and commercial struggle over copyright. Indeed, it was in the course of that struggle, under the particular pressures of the requirements of legal argumentation, that the blending of the Lockean discourse and the aesthetic discourse of originality occurred and the modern representation of the author as proprietor was formed.

*The Author as Proprietor*, *supra* note 19, at 30. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–50 (1993); *Figures of the Author*, *supra* note 194, at 13.

663. Of course, things are not as simple as all that. The Lockean view actually blends natural law with an instrumentalist rationale about increasing utility. See *The Philosophy of Intellectual Property*, *supra* note 660, at 296–97.

664. A simple view contrasts the Continental *droit d’auteur*, derived from a natural-



Supreme Court has explicitly rejected natural law copyright arguments.”<sup>665</sup>

Instead, it takes a more instrumentalist approach:<sup>666</sup> Copyright protection is granted “for the very reason that it may persuade authors to make their ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind.”<sup>667</sup> The discussion above has referred on many occasions to copyright’s need to foster public access to materials of popular concern.<sup>668</sup> We turn now to the flip side of public access: namely, the incentives on the author to create.<sup>669</sup> For if “access” looks to the interests of a potential copyright defendant in relying on a previous work, then “incentives” looks to the interest of a potential copyright plaintiff in developing a new work. Generalizing from the insight, “Poetry can only be made

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law focus on the author’s personality, with the Anglo-American copyright, a purely instrumentalist construct. See Alain Strowel, *Droit d’auteur and Copyright: Between History and Nature*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 235–36. But Strowel sets forth a much more nuanced view, *id.*, as does Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 131–36. See also F. Willem Grosheide, *Paradigms in Copyright Law*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 203–09.

665. Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 425–26 (1992). Nonetheless, Yen contends that the roots of copyright in this country lie in both economics and natural law. *Id.* at 425–30. See also *Droit d’auteur and Copyright*, *supra* note 664, at 243–44.

666. An empirical question looms here—what real-world incentives actually move authors? There is no shortage of pronouncements on the subject. See, for example, Chuck Philips, *Music Giants Miss a Beat on the Web*, L.A. TIMES, July 17, 2000, at A1, quoting Time Warner President Richard Parsons:

This isn’t just about a bunch of kids stealing music. It’s about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won’t be the only ones hurt. Artists will have no incentive to create.

Worst-case scenario: The country will end up in a sort of cultural Dark Ages.

*Id.* But no longitudinal study definitively answers the empirical question. See *The Personality Interest of Artists and Inventors*, *supra* note 121, at 81–83, 180. As we shall see in Part Two, perhaps the strength of the law is its refusal to seesaw based on conflicting answers to such basic questions from one era to another.

667. 4 NIMMER ON COPYRIGHT § 13.03[B][2][a]; Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 538 (1986) (quoting same).

668. Refer to Chapter VII *supra*.

669. The foregoing discussion has already confronted the economic rationale for copyright protection, as well as a potential Lockean foundation in natural law. However, those perspectives should not be viewed as exhaustive. Commentators champion the role of copyright in fields as diverse as promulgating democratic discourse, safeguarding privacy, and serving the interests of personhood. See *Copyright and a Democratic Society*, *supra* note 5; Stephen B. Thau, *Copyright, Privacy, and Fair Use*, 24 HOFSTRA L. REV. 179, 180–82, 235 (1995); *The Personality Interest of Artists and Inventors*, *supra* note 121.

out of other poems; novels out of other novels”<sup>670</sup> (just as this work is composed out of umpteen previous works),<sup>671</sup> the question arises how copyright protection should be titrated in order to produce the most potent mixture benefiting future authorship.<sup>672</sup>

The public needs access to objective works free of private blockades, but has no corresponding need for unconsented access to subjective expression. Correlatively, copyright law should provide an incentive to create subjective expression, but the impetus behind objective scholarship lies in other domains<sup>673</sup>—university posts, research grants, scholarships founded on the commonweal, fame, recognition, and attribution.<sup>674</sup> (As Strugnell himself characterized Qimron, “I think like the rest of us, he worked for the glory.”)<sup>675</sup> Those domains stand distinct from copyright.

Consider the need to quote various material verbatim. As applied to a psalm newly composed by James Michener<sup>676</sup> or a story inspired in the mind of Karen Hai-Sod by viewing 4QMMT,<sup>677</sup> the need is extremely small. For the precise locutions

670. ANATOMY OF CRITICISM, *supra* note 159, at 97. See JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS 96 (1991); *The Author as Proprietor*, *supra* note 19, at 55 (revealing that “current literary thought emphasizes . . . that texts permeate and enable each other”); JULIA KRISTEVA, SEMIOTIKE 146 (1969) (“[E]very text builds itself as a mosaic of quotations, every text is absorption and transformation of another text.”). As Judge Easterbrook has observed, “Every work uses scraps of thought from thousands of predecessors, far too many to compensate even if the legal system were frictionless, which it isn’t.” *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990).

671. Writers from biblical time forward have been “compelled in one way or another to make their text out of antecedent texts (oral or written) because it would not occur to them in the first place to do anything so unnatural as to compose a hymn or a love poem or a story unless they had some model to emulate.” THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 50. The contrary supposition would be akin to attempting “speech in a language one has not yet learned.” *Id.* at 107–08.

672. The legislative history for the 1909 Act, after reciting that enactment of copyright legislation “is not based upon any natural right that the author has in his writing,” goes on to note that Congress must balance “[f]irst, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public?” H.R. REP. NO. 60-2222, at 7 (1909). See Lord Mansfield’s 1785 encapsulation of the same balance, quoted in *The Metamorphosis of Contract Into Expand*, *supra* note 48, at 77.

673. As Lord Camden stated in 1774, “Glory is the Reward of Science, and those who deserve it, scorn all meaner Views.” *Figures of the Author*, *supra* note 194, at 16. As previously noted, the eighteenth century sense of “science” refers to the domain of literature. Refer to note 36 *supra*.

674. Rewards for scholarship include an enhanced reputation and recognition of one’s peers—as well as the more ethereal satisfaction that comes from “the broadening of human knowledge.” *Raiders of the Lost Scrolls*, *supra* note 83, at 334. See *Legal Aspects of Recent History of the Qumran Scrolls*, *supra* note 372 (“This view deserves full acceptance.”).

675. Strugnell Testimony at 123.

676. Refer to Case 2 (Psalm of the Tunnel Builder) *supra*.

677. Refer to Case 1 (The Inspiration) *supra*.

used in those sources will only illuminate the thought processes of Michener and Hai Sod; general scholarship itself has no need to quote their works in order to march on in its investigation of the ancient Middle East. To the contrary, only those who are interested in the artistry of Michener or Hai Sod have the “need” to quote their words. There is every reason to compensate those authors in exchange for satisfying that particular need.

The status of *4QMMT* is completely different. When the precise wording of a text is at stake, then, to quote Cleanth Brooks, “to paraphrase is heresy.”<sup>678</sup> In order for Scroll scholarship to progress, it is absolutely vital to quote the Teacher of Righteousness verbatim, exactly, and comprehensively. To the extent that the exercise inevitably leeches into copying the expression of Qimron, then copyright’s greater good posits the choice of keeping the idea free rather than locking up the expression. In this way, the doctrine discussed above serves the copyright goal of promoting the progress of science.<sup>679</sup>

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Moving more deeply, what is the purpose upon which copyright protection is founded? In contrast to justifying copyright based upon natural law considerations, in which an author “deserves” to benefit from the works of authorship that she has brought to term in her womb,<sup>680</sup> the United States Supreme Court takes the instrumentalist view:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.”<sup>681</sup>

Under this view, the purpose of copyright is to provide an incentive for individuals to create.<sup>682</sup> Therefore, it is not the author who enjoys a “natural” right to the fruits of her labor, but

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678. Actually, I am paraphrasing Brooks. See *THE WELL WROUGHT URN*, *supra* note 547, at 165–66.

679. Refer to Chapter VII, section (B) *supra*.

680. Refer to note 661 *supra* and accompanying text.

681. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). It remains to be seen how Justice Breyer would confront that issue at present. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 *HARV. L. REV.* 281, 321 (1970).

682. Justin Hughes skillfully shows how the Court promptly slips from instrumentalist goals to normative evaluations, when the opinion continues: “Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Mazer*, 347 U.S. at 219 (emphasis added), *quoted in The Philosophy of Intellectual Property*, *supra* note 660, at 303.

society that will benefit in the long-run through the encouragement of authorship by affording a temporary “personal gain” during the term of copyright protection.<sup>683</sup> It is instructive to bring that purpose to bear against the claims advanced by Qimron, reverting to *Bender v. West* as well in this context.

*B. Should Copyright Provide an Incentive to Secretly Alter Judicial Opinions?*

From a strictly pragmatic standpoint, it strikes me that West ultimately lost its copyright case for one major reason. This reason finds no reflection in the various opinions issued by the courts. Nonetheless, it underlies, perhaps, the sensibilities that were brought to bear on the dispute.

For over a century, West has been in business to sell case reporters. Undoubtedly reaping billions of dollars during that time,<sup>684</sup> it has established a premier—and, in my opinion, deserved—reputation for accuracy and reliability. When West sells a volume of case reporters, it represents to the public that the volume in question accurately sets forth the words of the judges as contained in the opinions collected therein. Given that those opinions constitute “the law” in a common-law system, West achieves its sterling reputation for accurately purveying “the law.” (In fact, West had always professed such fidelity to the judges’ words that it once defeated a libel charge on the basis that the words contained in the *Federal Reporter* reflected those of the judge whose opinion was reproduced, West Publishing Company being merely the conduit for conveying those words to the public.<sup>685</sup>)

When it came time, however, to litigate the copyright issue, West made an abrupt *volte-face*. By laying claim to protection over the emendations that it inserted into its reporters, West claimed copyright over matters that judges did *not* write. In other words, West, which had always prided itself on accuracy and the ability of lawyers and judges to quote “the law” out of its reporters without fear of error, was now claiming that those same reporters were replete with material of West’s own invention, unratiﬁed by the judges into whose opinions they were

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683. See *The End of Copyright*, *supra* note 443, at 1416.

684. As a privately held corporation, its revenues were always secret, but the \$3.43 billion that Thompson paid to purchase West in 1996 surely reveals the company’s worth as of that time. See Yolanda Jones, *You Can’t Get Where you are Going Unless You Know Where You Have Been: A Timeline of Vendor-Neutral Citation Developments*, at <http://vls.law.vill.edu/staff/yjones/citation>.

685. See *Lowenschuss v. West Publ’g Co.*, 402 F. Supp. 1212, 1216–17 (E.D. Pa. 1975), *aff’d*, 542 F.2d 180 (3d Cir. 1976).

inserted and unbeknownst to its customers who thought that they were reading the judges' words, not West's.

No one, I dare say, has ever thought to purchase a West reporter in order to obtain West's emendations. Instead, practitioners and judges alike have always sought West volumes because of the fidelity with which they report the words of the judges themselves. Thus, West was, in effect, claiming copyright protection over deformations that it had inserted into the law.<sup>686</sup>

As a matter of incentives, there is little reason to encourage purveyors of judicial opinions to secretly alter them. To the extent that West can ensure punctilious replication of what the judges intended, then its editors are to be applauded. On the other hand, to the extent that those editors have injected subjective expression into case reporters that are sold under the pretense of accurately portraying the law, then their activity becomes less than socially compelling. In this larger sense, therefore, it is wholly to be expected that West's copyright claims failed.

### C. *Should Copyright Provide an Incentive for Bad Scholarship?*

*Qimron v. Shanks* arises at the intersection of two interests: copyright protection and scholarly protection. When viewed through the former lens, the various doctrines canvassed herein demonstrate why the plaintiff's interest failed to measure up. Yet one must also advert to the other interests that *Qimron* brought to bear—those of a scholar. The discussion below attempts to untangle those threads, beginning with the latter doctrine.

#### 1. *Scholarly Convention*

The Israel Antiquities Authority vested exclusive control over *4QMMT* first in Strugnell, and then later in *Qimron*.<sup>687</sup> By a scholarly convention known as *editio princeps*, that status guaranteed *Qimron* priority in publishing the document— notwithstanding that the doctrine of *editio princeps* itself nominally enjoys no legal standing.<sup>688</sup> Yet along came *Shanks*, iconoclast of scholarly convention. In the battle between, on the

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686. West actually had the audacity to advance this claim explicitly at an early stage in the litigation. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 681 n.4 (1998), cert. denied, 526 U.S. 1154 (1999) ("West initially claimed some creativity in its corrections to the text of opinions, but it has abandoned this claim . . .").

687. Refer to Chapter V, section (A)(2) *supra*.

688. See *PLAYING DARTS WITH A REMBRANDT*, *supra* note 228, at 164. For a further discussion of this doctrine, refer to Chapter X, section (B)(1) *infra*.

one hand, an Israeli, a member of the university community, an individual who had been given official imprimatur by the IAA, someone who was scrupulously conforming his affairs to scholarly convention and, on the other, a foreigner, a non-academic, a profit-seeker, a critic of the IAA (and hence of the Israeli government), someone who was waging his own war against a worldwide academic “cartel,” it is not altogether surprising that the Israeli courts favored the former. Telling here is a finding that Judge Dorner made, which the Supreme Court quoted in full:

Shanks quite deliberately reached the conclusion that he would not be sued for copyright infringement, not by Strugnell, who was ailing (and in this he was correct), and not by the shy and retiring claimant (Qimron), who moreover lived in Israel.<sup>689</sup>

David cuts a more inviting figure than Goliath. One view of the courts is that they should protect the interests of the dispossessed—the noble but impecunious (and, moreover, ill!) over the powerful and uncaring.<sup>690</sup> Indeed, the reference to Qimron as “shy and retiring”<sup>691</sup> virtually trumpets the moral inequality, with his residency in “the home court” of Israel furnishing the *coup de grace*.<sup>692</sup> The Israeli courts put a righteous end to the alien bull’s rampage through the china shop.

But hard cases make bad law.<sup>693</sup> When the battle is not seen as an archetype of good vs. evil, but rather as a legal matter requiring resolution, different considerations rise to the fore. It is those copyright interests that are the focus of concern throughout the various chapters of the instant work.

Nonetheless, having mentioned the perceived equities of the parties, that aspect requires further attention. Accordingly, the

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689. App. Opin., *supra* note 331, at para. 18 (the second parenthetical was added by Justice Türkel).

690. One must hasten to add that sources as far back as *Leviticus* 19:15 and *Exodus* 23:3 warn against that temptation to equalize matters by favoring the poor over the powerful. See CALUM CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* 44–45, 151–52 (1996).

691. The Hebrew *ha-shaket veba-ba'ishan* literally means “quiet and bashful.” On March 5, 2001, I participated in a live webcast, emanating from the Haifa University Faculty of Law, entitled *The Dead Sea Scrolls: Copyright and the Future of Academic Research*. See [http://weblaw.haifa.ac.il/dss/main\\_eng.htm](http://weblaw.haifa.ac.il/dss/main_eng.htm). Justice Dorner, who also participated, used the English locution “diffident and modest” to translate this Hebrew phrase.

692. “It’s a hometown court,” Eisenman remarked to the press. *Scholar’s Copyright Upheld*, *supra* note 362, at \*3.

693. See *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

next chapter treats fully Qimron's claim to trespass on his moral interests, reverting in that context to the doctrine of *editio princeps*.<sup>694</sup>

Moreover, the clash of values described above that moved the Israeli courts to rule against Shanks is itself not entirely foreign to the history of how copyright law has developed. In the seventeenth century, long before there was any formal copyright statute, printers—who, rather than authors themselves, were typically in control of works of authorship—obtained rights to works by marking their territory in the register contained at Stationers Hall.<sup>695</sup> At that time, there was no such thing as intellectual “property.” Rather, the term “propriety” defined the state of mind of all concerned.<sup>696</sup> The upshot is that those who usurped<sup>697</sup> the priority contained in the official registry were guilty of a gross breach of propriety.

The facts of *Qimron v. Shanks* rehearse the events of four centuries past. Qimron—who, rather than the author of *MMT*, was in control of the text—“registered” his exclusive claim with the Israel Antiquities Authority. Shanks unilaterally usurped priority by publishing the text. That deliberate course of conduct constituted the type of flagrant contravention of *propriety* that earns the disdain of those who uphold these particular standards. Indeed, although the Israeli Supreme Court at first disclaimed any inquiry into the morality of the underlying positions of the parties,<sup>698</sup> it later equivocated,<sup>699</sup> and ended up slamming Shanks repeatedly,<sup>700</sup> in particular for arrogating

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694. Refer to Chapter X *infra*.

695. THE NATURE OF THE BOOK, *supra* note 24, at 213–14.

696. *Id.* at 187–90.

697. During this interval, “the most common term used to describe an offense against literary property seems to have been not ‘piracy’ nor even ‘plagiarism,’ but ‘usurpation.’” *Id.* at 461 & n.31 (stating that “plagiarism” was defined first to mean slave trading and second book stealing). See *Copy Wrong*, *supra* note 618, at 516–17.

698. “[T]he justice of Shanks’s public struggle — even if he saw publication of the Book as a part of this struggle — is not our concern, inasmuch as this matter deviates from the framework of the discussion of the copyright in the Deciphered Text.” App. Opin., *supra* note 331, at para. 9.

699. “It is true, we are dealing with a struggle between interests, that stand sometimes one against the other — the right of the individual to protection of the fruits of his creation against the right of society to continue to flourish upon the fertile ground of the past — between them one must balance.” *Id.* at para. 15.

700. Besides the contrast quoted above between the brash Shanks and the “shy and retiring” Qimron, see the quotation below regarding “contempt and mockery of the poor” in note 726 *infra*. Towards the end of the opinion, the Supreme Court offers that the district “court was correct, therefore, when it used the full force of the law against the Appellants and awarded Qimron the highest amount set forth in the law.” App. Opin., *supra* note 331, at para. 27. The Supreme Court also hammered Shanks on remedies.

priority to himself.<sup>701</sup> It may be for precisely this reason that Shanks lost before the Israeli courts.

## 2. Copyright Law

Putting aside scholarly convention and sticking close to copyright doctrine, a deep question underlies *Qimron v. Shanks*: Should copyright law provide incentives to produce bad scholarship? It would be difficult to imagine any basis on which to posit an affirmative answer.

Copyright law, of course, protects scholarship regardless of quality. Thus, a textbook, article, or monograph is protected—insofar as its expression is concerned—regardless of whether colleagues in the field consider it a breakthrough, a solid advance, pedestrian—or even plain wrong. “Bad poetry, box office failures, and redundant scholarly articles are not denied copyright protection because they are worthless or, arguably, a net loss to society.”<sup>702</sup> To this extent, copyright provides an incentive for scholarship, whether good or bad. But Qimron, at base, advanced an unprecedented variant—that copyright draws a distinction between good scholarship and bad, protecting only the latter. This claim cannot stand.

It should be reiterated that the matter under discussion in *Qimron v. Shanks* is not copyright protection over the 235-page analysis of *4QMMT* contained in *DJD X*. Instead, the question is posed whether copyright protects a reconstruction of an ancient manuscript. As previously noted, Qimron can claim no copyright in that reconstruction to the extent that he has succeeded.<sup>703</sup> For any recreation of the Teacher of Righteousness’s words means that the copyright, by definition, does not belong to Qimron. Instead, it is only over errors that Qimron can claim protection.

We were forced to conclude previously that Qimron’s creativity, if any, inheres only in his mistakes.<sup>704</sup> Very well, then—let us posit that such mistakes deserve copyright protection. After all, George Steiner points out that “misunderstanding can yield the more urgent reading, the more compelling attention.”<sup>705</sup> Judge Frank

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Refer to Chapter V, section (B)(3) *supra*.

701. In contrast to what the court saw as “not our concern” in the excerpt quoted above (refer to note 698 *supra*), it decided to deny Shanks’s defense of “fair dealing” because his “primary purpose was to publish the Deciphered Text in defiance of the research ‘monopoly’ given to the international team of scholars.” App. Opin., *supra* note 331, at paras. 19–20.

702. *The Philosophy of Intellectual Property*, *supra* note 660, at 309.

703. Refer to Chapter VI § (B)(1) *supra*.

704. *Id.*

705. *Our Homeland, the Text*, *supra*, note 357, at 304. See REAL PRESENCES, *supra*



ruled to the same effect in an early copyright case: “A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”<sup>706</sup>

In this regard, we must ask what Qimron was doing? If he was acting like R’ Chanina in an inventive mode, who chances upon variations and then adopts them as his own, then he can indeed copyright his “mistakes.” Except, at that juncture, they are no longer mistakes—they are consciously adopted variations, that is, *post facto* products of choice.<sup>707</sup> So copyright for mistakes, pure and simple, is still not a viable option.

But what Qimron did was in no way to adopt mistakes consciously. Instead, he offered to the world his best efforts, painstakingly undertaken, of reconstructing 4QMMT as accurately as scholarship permitted.

At this point, copyright’s incentives come into focus. To the extent that Qimron has produced first-class scholarship and has been able to exercise his philological skills to fruition by recreating TR’s words, then he does not have copyright protection. Correlatively, protection arises only to the extent that he has failed.

It would be a perverse scheme indeed that provided an incentive to fail. Copyright law would ill serve its premises to the extent that it barred first-class scholars from shelter but accorded rights and remedies to inferior scholars. Were that the law, then Magen Broshi’s fear would indeed be realized: The world of Dead Sea Scrolls could be “inundated with third- and

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note 89, at 126 (describing “work that is worth successive misreadings”).

706. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951) (footnote omitted) (quoting Plutarch: “A painter, enraged because he could not depict the foam that filled a horse’s mouth from champing at the bit, threw a sponge at his painting; the sponge splashed against the wall — and achieved the desired result.”). See Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 49–56 (1982) (discussing how even accidental departures made during a painting’s restoration can be sufficient to establish copyright).

Robert Alter remarks that “every literary text is the handiwork of an artificer who seeks to give it purposeful shape.” THE PLEASURES OF READING, *supra* note 527, at 142. Of course, the poet may fail in his efforts and simply rationalize after the fact. ANATOMY OF CRITICISM, *supra* note 159, at 87 (featuring a cartoon depicting a sculptor gazing at his work and remarking, “Yes, the head is too large. When I put it on exhibition I shall call it, ‘The Woman with the Large Head.’”).

707. My secretary once erroneously transcribed a portion of my speech containing a reference to “meatspace” as “meetSPACE.” Given that physical space is the realm in which our meat in fact meets, I “adopted” the transcription and incorporated it into *Brains and Other Paraphernalia*, *supra* note 455, at 3.

fourth- and fifth-rate productions”<sup>708</sup> commanding legal protection, while the most sparkling breakthroughs went unprotected. No sensible interpretation of the law can support such a pointless result.

These considerations, at base, furnish the ultimate answer why Qimron’s copyright claim is fatally flawed. Nonetheless, it is hard to believe that even Qimron himself would be the loser, in the greater sense, by confining copyright to its proper bounds. As a philologist, his work and advancement in the field is dependent on his ability to quote and build upon the philological advancements of his predecessors. He is clothed with complete protection for his book-length review of *MMT* and for his other articles on the subject. The denial of copyright to his reconstruction of *MMT* simply affords successor philologists the same elbow-room that allowed Qimron himself to achieve his own accomplishments.

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708. Refer to text accompanying note 344 *supra*.

X.  
MORAL

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.

Judge Joseph Edward Lumbard<sup>709</sup>

In addition to analyzing Qimron's complaint for copyright infringement, it is necessary to address the other cause of action joined in his complaint—for violation of his moral rights. Although the case made copyright headlines,<sup>710</sup> it is actually in the domain of moral rights that Qimron felt injured, and that moved the judge to rule in his favor.

A. *Chronology*

The chronology at issue in *Qimron v. Shanks* was such that Shanks's publication preceded Qimron's own. A table illustrates:

| <b>DATE</b>            | <b>DESCRIPTION</b>  |
|------------------------|---|
| 1952                   | Cave 4 excavated.   |
| 1954                   | <i>MMT</i> assigned to Strugnell.   |
| 1960s through<br>1970s | Tantalizing fragments revealed to the public about the existence of <i>MMT</i> .            |
| 1984                   | Strugnell and Qimron openly discuss <i>MMT</i> at a scholarly conference.                   |
| 1991                   | Biblical Archaeology Society publishes <i>A Facsimile Edition of the Dead Sea Scrolls</i> . |
| 1992                   | Qimron files suit against Shanks.   |
| 1993                   | Judge Dorner issues district court ruling.  |
| 1994                   | Oxford University Press publishes <i>DJD X</i> about <i>MMT</i> .                           |
| 2000                   | Israeli Supreme Court affirms.  |

709. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).

710. See, e.g., Abraham Rabinovich, *Scholar: Reconstruction of Dead Sea Scroll Pirated*, WASH. TIMES: NAT'L WKLY. EDITION, Apr. 12, 1998, at 26, 26 cited in Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 688 n.13 (2d Cir. 1998), cert. denied, 526 U.S. 1154 (1999).

**TABLE 1**

Imagine instead that the case had arisen in an inverted timeline:

| <b>DATE</b> | <b>DESCRIPTION</b>  |
|-------------|---|
| 1954        | <i>MMT</i> assigned to Strugnell.   |
| 1990        | Qimron and Strugnell release best effort reconstruction of <i>4QMMT</i> but not their attendant commentary. |
| 1991        | Biblical Archaeology Society publishes <i>A Facsimile Edition of the Dead Sea Scrolls</i> .                 |

**TABLE 2**

The remarkable fact about Table 2 is that it almost certainly would have resulted in no lawsuit. For in that alternative universe, Qimron would never be able to say that his “dream to be the first editor of the scroll vanished.”<sup>711</sup> Indeed, Judge Dorner grounded her holding of mental distress as follows:

There is no doubt that the plaintiff suffered grief. He explained in his testimony that he felt his whole world collapsed, and his dream of gaining glory vanished. Here are his exact words:

I was stunned. I cannot describe such a feeling. It's like somebody approached me and took something forcefully, saying, “Who are you, anyway?” This belongs to me, this thing that I made. I would not have taken an unpublished text and worked on it for so many years unless I was assured that my right of primacy<sup>712</sup> would be protected. As a matter of fact, the scroll, or any text that is published will always be named after its first editor. No matter how many editions will follow, people will always go back to the first edition. Throughout the years that I worked on *MMT*, I hardly worked on anything else. My family lived in penury. If my wife complained, I told her “Look, this is our life, we will gain glory. It might be more important than money.”<sup>713</sup>

711. Refer to note 321 *supra*.

712. The Hebrew here is *z'chut ha-rishoni'ut*. That term is loaded, inasmuch as the same word *rishoni'ut*, translated above as “primacy” comes from the word *rishon*, which can also mean “original.”

713. Protocol at 207–08. Another source quotes Qimron as stating that the

Given that Table 2 would not have produced litigation<sup>714</sup> but Table 1 actually did, it is pertinent to inquire at the outset: Who is responsible for the timeline unfolding according to Table 1 rather than Table 2? Certainly, not defendant Shanks—his whole crusade was to pry open an early publication for *MMT*. Indeed, had that text seen an early publication, it would have pre-empted any inclusion of it in the *Facsimile Edition*. Although Strugnell might be a worthy runner-up, it is Qimron himself who, notwithstanding Shanks's efforts at openness, chose to delay publication of his "baby."<sup>715</sup> To the extent that Qimron felt scooped by publication of the *Facsimile Edition* and hence aggrieved, his ire, in fact, should have been directed inward.

### B. Moral Rights Claims

Let us imagine, however, that Qimron's doppelgänger in the parallel universe of Table 2 in fact would have filed suit.<sup>716</sup> Notwithstanding the alteration in chronology, the two cases are identical as a matter of copyright law. In other words, whether or not Qimron owns a copyright to the reconstruction of the *4QMMT*, and whether or not Shanks has violated that copyright, is not dependent on order of publication.<sup>717</sup> The essence of

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uncredited publication of *MMT* "has caused me and my family a great deal of suffering. . . . A major achievement of my career has been stolen from me." THE HIDDEN SCROLLS, *supra* note 190, at 240.

714. After the Israel Supreme Court ruled, a Jerusalem reporter from the *Chronicle of Higher Education* interviewed me. He told me that he had talked to Qimron immediately after the court ruling, during the latter's victory celebration. In response to the question "Would you have brought this case if Shanks had listed your name?" Qimron paused to consider (as the reporter later told me) and then speculated that he probably would not have.

715. The depth of Qimron's feelings in this regard is difficult to overestimate. In response to Judge Dorner's question, Qimron admitted that "even now I feel if they would let me I would have held it a little more." Protocol at 184. Even when "overjoyed" about his ultimate Supreme Court triumph, "Qimron said he has regrets about the access others now have to the scrolls. He said it robbed scholars such as himself of the leisurely pace they once enjoyed." *Scholar's Copyright Upheld*, *supra* note 362, at \*3.

716. It is doubtful that Qimron would even be allowed to file such a suit. For after the publication of *DJD X*, that right belonged to the publisher. Letter dated Dec. 5, 1994, from Oxford University Press to Hershel Shanks 1 (on file with the *Houston Law Review*) ("We are responsible for handling permission requests: our contract for the book allows us this exclusive right and states that Professor Qimron will refer any enquiries to us."). When Shanks applied to the copyright owner—namely Oxford University Press, not Qimron—for permission to reproduce 135 lines of *4QMMT*, in Hebrew and English, in a forthcoming issue of *Biblical Archaeology Review*, the publisher freely granted that license. *Id.* ("As far as we are concerned, you properly obtained permission" notwithstanding the contrary claim by Qimron's lawyers).

717. *Compare* *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1262 (9th Cir. 1999) (holding defendant liable for reproducing book based on previously published sources), *with*

Qimron's complaint, properly viewed, is, therefore, not copyright infringement *simpliciter*. Indeed, his complaint so reflects. For bundled with Qimron's claim for copyright infringement is another cause of action for violation of his moral rights. What are those moral rights? There are several candidates.

### 1. Droit à la paternité

Qimron sued for violation of his attribution right. Though it was not clear to Judge Dorner wherein that cause of action is localized as a matter of U.S. law,<sup>718</sup> the answer is relatively straightforward: Section 43(a) of the Lanham Act.<sup>719</sup> That statutory section has given rise to a large body of case law for failing to attribute properly.<sup>720</sup>

The Israeli courts held that publication of the *Facsimile Edition* violated Qimron's moral rights for failure to credit his name.<sup>721</sup> Instead, as will be recalled, Shanks's introduction references *MMT* as follows:

The text was assigned to John Strugnell for publication nearly 40 years ago. However, he did not even disclose its existence until 1984. Then, *with a colleague*, Strugnell proceeded to write a 500-page commentary on this 120-line text.<sup>722</sup>

Immediately, the question arises why Shanks chose that formulation. He has explained that he did not know the extent of Qimron's contributions and wished to avoid being critical of "a young untenured Israeli scholar."<sup>723</sup> That explanation is eminently believable.<sup>724</sup> But let us adopt for current purposes the

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Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987) (holding defendant liable for reproducing a book based on previously unpublished sources).

718. Because Judge Dorner had decided to apply Israeli law to the case based on the "presumption of identity of laws," she did not need to establish whether, and where, the attribution right (or moral rights in general) is protected under U.S. law. See Trial Opin., *supra* note 195, at 22, § 20 (focusing on state, as opposed to federal, law).

719. 15 U.S.C. § 1125(a) (1994).

720. See 3 NIMMER ON COPYRIGHT § 8D.03.

721. At work here is a sensibility arising out of natural law. Refer to Chapter IX, section (A) *supra*. "A man is entitled to have his name applied to the 'children of his spirit.' His spiritual connection to these is, almost, like his connection to those who spring from his loins." App. Opin., *supra* note 331, at para. 23.

722. Refer to text accompanying note 301 *supra* (emphasis added).

723. *Intellectual Property Law and the Scholar*, *supra* note 274. "I wanted to save Qimron from the criticism I was heaping on John Strugnell, but I ended up offending Qimron beyond redemption." *Id.*

724. When a noted critic wanted to cite three examples of atrocious writing to which jargon-prone academics had fallen prey (with the "diagesis," "foregrounding," "signifieds" and the rest), he noted that, "for reasons of simple decency, I will not cite the sources or the authors' names." THE PLEASURES OF READING, *supra* note 527, at 16. No lawsuit

cynical interpretation that Shanks, through animus, harbored the subjective intent to deprive Qimron of the glory.<sup>725</sup> The question nonetheless remains whether Shanks's words achieved that putatively nefarious end.<sup>726</sup>

Had Shanks simply omitted attribution altogether, then he would have been on the safe side of the law.<sup>727</sup> For no case holds the failure to list *any* author as a violation of Section 43(a).<sup>728</sup>

Nonetheless, that statute has been construed to require speakers who volunteer to identify authors to do so accurately. Cases hold actionable the "failure to attribute authorship to a co-author resulting in only a partially accurate designation of origin constitut[ing] reverse palming off."<sup>729</sup> At first blush, Qimron would therefore seem to state a valid cause of action under that provision.

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eventuated, Robert Alter assured me. E-mail from Robert Alter to David Nimmer (July 11, 2000) (on file with the *Houston Law Review*).

725. As a matter of law, whether the intent is to praise or criticize Qimron should play no role in the analysis. As a practical matter, however, that factor is probably decisive. It is instructive to compare Qimron's outrage against Shanks with a contemporaneous usage in a book about authorship. One of the commentators there quotes a poem "just in from Bangladesh." She explains in the footnote, "I quote Mazhar's poem in full because I doubt that the present readership would otherwise have access to the work of [t]his considerable poet-activist." Gayatri C. Spivak, *Reading The Satanic Verses*, in *WHAT IS AN AUTHOR?*, *supra* note 11, at 104. Again, to my knowledge, no lawsuit eventuated.

726. The Supreme Court of Israel was particularly virulent in its rejection of Shanks's defense here:

The mention of a "colleague" without noting his name, and without noting that here was an act of creation of the Deciphered Text is contempt and mockery of the poor. Such "mention," including the argument that it is enough to fulfill the commandment of the Ordinance — if not the human-moral obligation — is more insulting than no mention at all. There is no need to add words with respect to the fact that the words that were quoted — that are two lines swallowed up within a forward of eleven pages, and far from the page on which the Deciphered Text was published, without the mention of a name — cannot fulfill the obligation to attribute the work to the author "in the scope and to the extent that is accepted."

App. Opin., *supra* note 331, at para. 24.

727. Lest one lapse into believing that authors enjoy a God-given right to be identified with their artistic progeny, consider: The first playbill that ever identified the author of a play performed in England "dates from March 1699, a full century after Shakespeare was at the height of his powers." *MULTIPLE AUTHORSHIP*, *supra* note 670, at 164. Evidently at work here was an earlier "courtly tradition of anonymity." *Figures of the Author*, *supra* note 194, at 17.

728. The concern here is separate from potential copyright liability, which has been discussed above. (*Nota bene* that Israeli moral rights law, which hews more closely to the Berne Convention, may entitle the author to attribution, rather than only having protection against misattribution.)

729. *Rosenfeld v. W.B. Saunders*, 728 F. Supp. 236, 243 (S.D.N.Y.), *aff'd mem.*, 923 F.2d 845 (2d Cir. 1990); *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1406-07 (9th Cir. 1988).

On deeper analysis, however, there are insuperable problems with that construction.<sup>730</sup> First, Shanks did not commit a “partially accurate designation of origin.” Most precisely, his reference to Strugnell and a colleague should be labeled a “partially explicit and partially oblique, yet nonetheless wholly accurate, designation of origin.”<sup>731</sup> Unlike the cases articulating the standard quoted in the previous paragraph, Shanks fooled no one into thinking that one individual deserved full credit for a work in fact authored by two. Instead, Shanks honestly apprised the world that *4QMMT* had two fathers, although he listed only one by name (in order to excoriate him, sparing the unnamed one his wrath). The gravamen of the offense would appear to be absent here.

Second, by way of comparison, Larry Lessig in a recent book cites to an article co-authored by David Nimmer, Elliot Brown, and Gary Frischling<sup>732</sup> with the following formulation: “David Nimmer et al.”<sup>733</sup> By omitting the latter two contributors’ names, has Lessig transgressed their rights? Is the standard manual on legal citation, which counsels that course of action,<sup>734</sup> to be held vicariously liable?

In this context, it is useful to distinguish between a *citation*, which can legitimately be to the primary author “and colleagues,” and a *reproduction* of the work itself,<sup>735</sup> which could commit the

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730. In support of Qimron, Shanks’s locution—“with a colleague, Strugnell proceeded to write a 500-page commentary on this 120-line text”—could be taken to refer to the commentary alone, not to the reconstruction. Combined with the later reference to “Strugnell’s transcription of MMT (Figure 8)” in the *Facsimile Edition* (which does not mention Qimron), readers might have been confused as to who authored the reconstruction. If the evidence showed that a fair reading leads to that misconception, then the case against Shanks grows stronger. But Judge Dorner found that Scrolls *cognoscenti* knew of Qimron’s contribution. See Trial Opin., *supra* note 195, at 39, § 52 (“It is reasonable to assume that the scholars that were involved enough to know that the reconstructed text was the work of the plaintiff, also understood that we are dealing with a draft.”). Refer to note 751 *infra*.

731. Most readers today associate *The Rime of the Ancient Mariner* as Samuel Taylor Coleridge’s most memorable work. But when it first appeared in print, it appeared solely under the name of William Wordsworth. In the preface to the 1800 edition, however, Wordsworth did mention—shades of “Strugnell and a colleague!”—“the assistance of a Friend . . .” MULTIPLE AUTHORSHIP, *supra* note 670, at 69–70.

732. *The Metamorphosis of Contract Into Expand*, *supra* note 48, at 17.

733. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 267 (1999).

734. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.1.1, at 108 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000) (“If a work has more than two authors, use the first author’s name followed by ‘ET AL.’”).

735. In other words, had the *California Law Review* presented *The Metamorphosis of Contract Into Expand* listing “David Nimmer, et al.,” there would have been a sensible diminution of Messrs. Brown’s and Frischling’s rights.



tort of misattribution by omitting the co-authors' names.<sup>736</sup> The question thereupon arises whether the *Facsimile Edition* contains Qimron's "whole work" or simply referenced his whole work. Qimron could argue that his "full work" was thereby published without his name, positing that his reconstruction of *4QMMT* constitutes "the work" in question. Given that *DJD X* was not yet in print at the time the *Facsimile Edition* appeared, that argument would appear cognizable.<sup>737</sup> Yet given that the bulk of Qimron's authorship actually went into that 235-page book, not the 120-line reconstruction of *MMT*, it would seem that Qimron should not prevail on this basis. Shanks no more violated Qimron's attribution right than did Lessig the comparable right of Brown and Frischling.

Third, right-of-attribution cases should always be judged based upon their real-world impact on the intended audience rather than by incantation of the magic formula of the author's name. To give a simple example, a footnote above cites the book *Holy Blood, Holy Grail* to "Michael Baigent, Richard Leigh & Henry Lincoln."<sup>738</sup> What if, instead of listing the first two authors, it simply referenced "the authors of *The Dead Sea Scrolls Deception* cited above and Henry Lincoln?" Given that Baigent and Leigh wrote the latter and, therefore, that the posited formulation is equivalent to full enumeration of all three pertinent names, the conclusion should follow that it is nonactionable.<sup>739</sup>

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736. In the cases cited above, refer to note 729 *supra*, the tort was committed by omitting the authors' names in the context of reproducing their works as a whole. See, e.g., *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405:

In both versions (album and sheet music), authorship of the music and lyrics of 'I'm Insane' was attributed solely to Robinson Crosby and the music and lyrics of 'Scene of the Crime' were attributed to Robinson Crosby and Juan Croucier. Neither Robert Lamothe nor Ronald Jones received credit for their roles in the writing of these songs.

*Id.*

737. Further support for Qimron emerges from *Cleary v. News Corp.*, 30 F.3d 1255, 1262 n.4 (9th Cir. 1994):

We note that where the plaintiff complains of misattribution of a work that consists solely of revisions to a previous work, the more appropriate approach might be to consider whether the revisions written by the plaintiff were bodily appropriated, instead of whether the work as a whole was a bodily appropriation. Under this approach, the plaintiff would prevail if he could establish that his part of the book was included in the new edition in verbatim or near verbatim form.

*Id.*

738. Refer to note 385 *supra*. Refer also to note 360 *supra*.

739. See *Cleary*, 30 F.3d at 1260 ("[T]he case law does suggest that the Lanham Act does not create a duty of express attribution, but does protect against misattribution.").

At this juncture, the factual question rises to the fore whether the *Facsimile Edition* properly invoked Qimron to its target audience? An empirical question thereby presents itself: How many readers of the *Facsimile Edition* knew exactly who the unnamed “colleague” was?

It does not seem an undue stretch to maintain that the few hundred readers<sup>740</sup> who were willing to shell out \$200<sup>741</sup> for a two-volume series of 1785 photographic plates would have more than passing familiarity with the goings-on in Qumran circles. Among that population, there can be few or none who were ignorant of Qimron’s role in the reconstruction of *4QMMT*. Although these ruminations are *dehors* the record, it strikes this observer as overwhelmingly likely that thorough ventilation of the issues would prove that Elisha Qimron suffered no sensible diminution of his publicity or notoriety via the omission in the *Facsimile Edition* of his name being explicitly spelled out.<sup>742</sup> If these suspicions are correct, they furnish an additional basis why Qimron should have lost this branch of his moral rights case.<sup>743</sup>

Finally, it is worth reverting to Qimron’s grief-stricken fear that the *editio princeps*<sup>744</sup> for *MMT* would be forever in Shanks’s

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The case law can be read as providing elliptical support for the proposition set forward in the text. For instance, when an advertisement was directed at the audience of racecar aficionados, the portrayal of Car No. 11 was deemed sufficient to conjure up the identity of its perennial driver, Lothar Motschenbacher. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974). When copyright law required a notice in the proprietor’s name, it allowed as a variant the proprietor’s “initials, monogram, mark, or symbol” by which it is known in the target market. 17 U.S.C. § 19 (1909). See 2 NIMMER ON COPYRIGHT § 7.07[A].

740. Three hundred copies of the *Facsimile Edition* were sold. *Raiders of the Lost Scrolls*, *supra* note 83, at 337 n.204.

741. MYSTERY AND MEANING, *supra* note 211, at 58. Evidently, Robert Alter obtained the volumes on sale. See *How Important Are the Dead Sea Scrolls?*, *supra* note 219, at 36 (stating a purchase price of \$195).

742. They find support in another aspect of Judge Dorner’s ruling. Refer to notes 730 *supra* and 751 *infra* (citing Trial Opin., *supra* note 195, at 39, § 52).

743. Only if Qimron’s “marketability” was damaged would he be entitled to invoke Section 43(a) of the Lanham Act. See *Omiogui v. W.B. Saunders Co.*, 30 U.S.P.Q.2d 1716, 1717 (E.D. Pa. 1994) (concluding that diminution of *curriculum vitae* could impair a professor’s marketability); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926–27 (2d Cir. 1994); *Wojnarowicz v. Am. Family Ass’n*, 745 F. Supp. 130, 142 (S.D.N.Y. 1990) (“Every instance of the Lanham Act’s far-reaching application has been to practices commercial in nature, involving imitation, misrepresentation, or misappropriation in connection with the sale of goods or services by the defendant.”). See also *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 784–86 (2d Cir. 1994) (vacating a preliminary injunction absent a showing of continuing economic harm, as standing is limited to a “purely commercial class” of plaintiffs); *Berni v. Int’l Gourmet Rest. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988) (“[A]t a minimum, standing to bring a section 43 claim requires the potential for a commercial or competitive injury.”).

744. Refer to Chapter IX section (C)(1) *supra*.

name.<sup>745</sup> Hindsight dispels that worry. When *DJD X* came out, it was under Qimron's name as primary author. That work, rather than Shanks's, is now universally credited as the primary source in discussions of *MMT*. The editors of *Reading 4QMMT* mention Shanks only in a tone of masked condescension,<sup>746</sup> while heaping honor on Qimron.<sup>747</sup> There can be no doubt that the scholarly community credits Qimron (along with Strugnell) for paternity of *MMT*, and that any imputation of moral loss he might have suffered from publication of the *Facsimile Edition* has since evanesced.<sup>748</sup> From his lofty perch in academia, Strugnell captures the matter pungently: "When I've looked at the quality of the use being made of this work, of the transcriptions, of the Pole and so on of various people of the translations, I don't think Qimron has anything to worry about, the quality is so poor."<sup>749</sup>

## 2. Droit de divulgation

Given that the injury at issue was in fact not to Qimron's right of attribution, is there another theory at work here? If we dig more deeply, we can excavate another theory, in actuality, more responsive to the injury that Qimron believes he suffered. To the extent that his "dream to be the first editor of the scroll vanished," Qimron suffered a violation of his *droit de divulgation*, the right to be the first to publish a work. As a group of scholars said in support

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745. For criticism of the scholarly institution of *editio princeps*, see PLAYING DARTS WITH A REMBRANDT, *supra* note 228, at 164–65. One observer concedes that "the team appointed by Fr. R. de Vaux could exclusively take advantage of the scrolls for a certain limited period of time." But as properly confined to "the period indispensable for sound scientific evaluation," it is hard to imagine that the Strugnell/Qimron delay over the decades falls within the limitations period. See *Legal Aspects of Recent History of the Qumran Scrolls*, *supra* note 372 ("The period of time could last several years — say two to five, or even eight — if we take into account the complexity of the task entrusted to them. . . . Almost five decades of restricted access seems unacceptable in light of established international standards.").

746. *Introduction*, in *READING 4QMMT*, *supra* note 262, at 1 (calling Shanks "one of the key *non-academic* players") (emphasis added).

747. They single out Qimron (but not Strugnell) for their especial thanks. *READING 4QMMT*, *supra* note 254, at xi.

748. One commentator notes that *DJD X* leaves him

with the impression of being witness to the quarrels of a couple who, after the love has become sour, are fighting for the custody of the only child. The judge has assigned the custody of this child to Qimron (he is the only owner of the copyright of the book!) but Strugnell has cared longer for the child and at the end he knows better.

*4QMMT in the Qumran Context*, *supra* note 370, at 15. Note that the only debate in that writer's mind is whether Strugnell or Qimron deserve the honor; Shanks does not even register. *Id.*

749. Strugnell Testimony at 198. "The Pole" is undoubtedly Kapera. Refer to note 299 *supra*.

of Qimron, “all scholars have a right to see their work appear in print for the first time under their own name.”<sup>750</sup> The question arises whether that point is well-taken.<sup>751</sup>

It must be emphasized that this inquiry takes place outside the domain of copyright infringement. Strugnell hits the nail on the head. Professing that “I don’t know what copyright is, but I know what publishing is,” he shares his perspective on the matter:

My experience here has been that every time that we published the document in the form that we wanted, it then fell into the public domain, and if another person wanted to discuss it, produce a new translation or the like, that was what publishing was about. . . . Our rights were to be, to have our work cited. If someone wanted to discuss it, they discussed it, and if they wanted to cite the text, I had no objection to anyone doing this, we published it, so long as the, so long as it was published by us in the form that we wanted.<sup>752</sup>

. . . .

My own opinion is so long as they print the text as we publish it and make changes and announce them and so on, this is all right, but the main thing is so that we should have, that we decide where it should be published in what form the first time.<sup>753</sup>

So the question remains whether Qimron had the right to control the first publication of the reconstruction of *4QMMT*. Again, a superficial examination inclines in Qimron’s favor. U.S.

750. WHO OWNS INFORMATION?, *supra* note 283, at 135. That “right” lacks legal substance. Refer to text accompanying note 688 *supra*.

751. The tenor of the opinion, taken as a whole, looks to the attribution right. *See, e.g.*, Trial Opin., *supra* note 195, at 33, end of § 38 (“*pursam lelo izkur shmo, uvechach hufra z’chuto hamusarit*”; English translation: “published without mentioning his name, and in this way his moral rights have been violated”). Yet it also contains references to the breach occurring by virtue of publication of a work prior to its publication by the author, which would correspond to a breach of the *droit de divulgation*. *Id.* at 39.

Another branch of moral rights is the *droit au respect de l’oeuvre*. *See* 3 NIMMER ON COPYRIGHT § 8D.04. Qimron argued that he had suffered a violation of that right, too, given *MMT*’s publication in the *Facsimile Edition* between letters authored by others. Protocol at 541. That strained theory finds no reflection in Judge Dorner’s opinion. Qimron further argued a violation inasmuch as the reconstruction as published by Shanks was only a draft. Judge Dorner likewise rejects that argument, inasmuch as insiders knew that it was Qimron’s work and that it was a draft, preparatory to the official version to be published by him along with Strugnell, together with commentary. Trial Opin., *supra* note 195, at 39, §52. That rationale actually undermines any conclusion that Qimron’s attribution right had been violated. Refer to notes 730, 742 *supra*.

752. Strugnell Testimony at 224–25.

753. *Id.* at 227.

law recognizes a type of *droit de divulgation*, as exemplified in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>754</sup> The U.S. Supreme Court in that case vindicated President Ford's efforts to protect his own memoirs under copyright law, and rebuffed a fair use defense for their premature publication.<sup>755</sup> A host of other cases likewise stand for the proposition that an incident of copyright ownership includes first publication rights.<sup>756</sup>

Nonetheless, the facts of *Qimron v. Shanks* afford a very poor candidate for vindication of the *droit de divulgation*. The problems are several. First, U.S. law recognizes no separate right of divulgation; it is only a *copyright* owner who can protect her bundle of rights under copyright law by demanding special solicitude for first publication. By contrast, one who does not own a copyright simply has no interest to vindicate in this regard.<sup>757</sup> As the above discussion has demonstrated at length,<sup>758</sup> Qimron enjoys no copyright over *4QMMT*. As such, he is facially ineligible to pursue any claim for violation of his *droit de divulgation*.

Even if the reconstructed manuscript were copyrightable, moreover, Qimron's case would still present a weak posture for vindication of this branch of moral rights. In *Harper & Row*, the Supreme Court limited its solicitude for unpublished texts as follows: "[T]he scope of the fair use doctrine is considerably narrower with respect to unpublished works *which are held*

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754. 471 U.S. 539 (1985). Does the equation hold? After all, the *droit de divulgation*, as a species of *droit moral*, is personal; whereas *Harper & Row v. Nation* recognized the existence of an economic right (*droit patrimonial*). Under skillful cross-examining, a luminary of the Continental system confessed to me that, putting aside issues of duration and transferability, any distinction is evanescent, even under French law. Conversation with André LUCAS, Université de Nantes, in the office of Ysolde GENDREAU, Université de Montréal, (Oct. 26, 2000).

755. Crucial in this context is the second fair use factor. Refer to Chapter VI *supra*.

756. See 4 NIMMER ON COPYRIGHT § 13.05[A][2][b].

757. That particular aspect stands this case at the vortex of issues likely to be hotly contested in the future. *Feist* commands that comprehensive databases stand outside copyright protection. As a consequence, various industries are attempting to convince Congress, in essence, to overrule that case by adopting legislation modeled on the European Union's database directive. J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 126–30 (1997). A database of tremendous commercial value—the recently decoded full human genome—presents issues paralleling those in *Qimron v. Shanks*, both of attribution and pseudo-copyright protection for research. Paul Jacobs, *Who'll Get Credit Is Issue Even Before Code Is Broken*, L.A. TIMES, May 7, 2000, at A41 (reporting that a company spokesman told Congress, "The only protection that we have indicated that we would seek is a database protection, as exists in Europe.").

758. Refer to Chapters VI–IX *supra*.

*confidential by their copyright owners.*”<sup>759</sup> That quotation derives from *Nimmer on Copyright*—except that the Court added its own emphasis by italicizing the phrase just quoted (which appears in plain text in the treatise). Elsewhere, the same opinion notes that in “a given case, factors such as implied consent through de facto publication on performance or dissemination of a work may tip the balance of equities in favor of prepublication use.”<sup>760</sup> These considerations leave little doubt that, to the extent that U.S. law affords authors a *droit de divulgation*, it has little application to works that, although technically unpublished, are nonetheless not maintained confidentially by their authors.<sup>761</sup>

How do those factors apply to 4 *QMMT*? Had Qimron chosen to lock his reconstruction of 4*QMMT* in his file cabinet, Shanks would have had scant basis to justify sending in a second story man to purloin it.<sup>762</sup> In fact, however, Qimron did not maintain his version confidentially. Rather, he shared it with his friends in the academy and deprived access to it for those who were outside the “charmed circle.”<sup>763</sup> Qimron’s own activities of circulating his reconstructed text to scholars at other universities, in order to teach undergraduate and graduate seminars in its subject matter, opened the way for availability of his manuscript. Qimron’s moral rights claim fails.

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759. 471 U.S. at 597 (emphasis added by Court) (quoting 3 NIMMER ON COPYRIGHT § 13.05).

760. *Id.* at 551.

761. See, e.g., *Rotbart v. J.R. O’Dwyer Co.*, 34 U.S.P.Q.2d 1085, 1088 (S.D.N.Y. 1995) (finding that unfixed, undissemated talk, delivered publicly, is *de facto* published); *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 147–48 (2d Cir. 1984).

762. The facts of *Qimron v. Shanks* lie at the opposite extreme from *Harper & Row v. Nation*. In the latter case, *Time Magazine* published excerpts from President Ford’s unpublished memoirs that he made every effort to maintain confidential pending imminent publication. *The Nation Magazine*, in fact, relied on a purloined copy of the memoirs in order to scoop *Time Magazine*. See 471 U.S. at 542 (“[A]n undisclosed source provided *The Nation Magazine* with the unpublished manuscript of ‘A Time to Heal: The Autobiography of Gerald R. Ford.’ Working directly from the purloined manuscript, an editor of *The Nation* produced [the work that resulted in suit].”).

763. As Shanks complained, “If you’re a graduate student at Harvard, you can publish a Dead Sea Scroll for your dissertation. But not if you go to Yale or Princeton or Columbia.” *The Dead Sea Printouts*, *supra* note 267.

XI.  
AFTERWORD

Textual criticism is a science whose subject is literature, as botany is the science of flowers and zoology of animals and geology of rocks.

Tom Stoppard<sup>764</sup>

For the wealth of reasons posited above, Qimron lacks copyright over his reconstruction. Besides all the affirmative reasons just canvassed, consider the negative rationalization for the same conclusion—what would flow from a construction that he did indeed own a copyright in his reconstruction of *MMT*?

??A scholar who derived new insights into TR's meaning in *4QMMT*, deeply rooted in the language of the text, would be allowed to quote TR's words only at Qimron's sufferance.

??A scholar who found Qimron's reconstruction implausible on linguistic grounds would not be able to quote those words as a prelude for positing her own alternative text.

By themselves, these two points show the danger of allowing Qimron copyright protection. For Qimron could use his copyright to authorize scholars to produce works agreeing with his scholarly view, and to effectively prevent other scholars from taking a contrary position. As thus abused, copyright would become a vehicle to ensure orthodoxy in Scrolls scholarship.

Is it an adequate answer that those utilizations would plainly find shelter as fair use? Clearly not. For, although a fair use determination might eventuate, it is not a foregone conclusion; only after slogging through lengthy court proceedings would that resolution emerge, if then.<sup>765</sup> The specter of needing to fight a copyright battle, which might ultimately be lost, is enough to deter all but the most hardy litigants from entering the fray.<sup>766</sup>

Consider additional ramifications:

??To the extent that Ted Hughes were dissatisfied with the

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764. THE INVENTION OF LOVE, *supra* note 533, at 38.

765. "The malleability of fair use emerges starkly from the fact that all three [fair use cases to reach the highest court] were overturned at each level of review, two of them by split opinions at the Supreme Court level." 4 NIMMER ON COPYRIGHT § 13.05.

766. It should be recalled that even though Carson and I agree that Shanks should have prevailed at trial, not even we see eye-to-eye as to application of the fair use doctrine to the facts of *Qimron v. Shanks*. Refer to Chapter VI *supra*.

Strugnell/Qimron translation and went back to the original Hebrew reconstruction to produce a new English translation, he would be infringing.<sup>767</sup> Copyright law would allow Qimron to enjoin further dissemination of that translation.<sup>768</sup>

Wacholder and Abegg, to the extent that they discussed *MMT*, would open themselves up to the charge that they were likewise preparing an unauthorized derivative work.<sup>769</sup>

A defender of Qimron could maintain that the specter of the above cases is simply the price we pay to encourage Qimron to engage in the labor of reconstructing *MMT* and presenting it to the public—until such time as the work is published, Qimron should not face the risk of being pre-empted. To that point of view there are two answers. First, the encouragement to Qimron lies in the unquestioned copyright he enjoys over the 235 pages of *DJD X*. It is both unnecessary and counterproductive to ratchet up his protection to include, as well, the ancient words of TR as he has reconstructed them.

Second, and even more fundamentally, each of the disabilities noted in the bullet points above would apply not simply to the period of time prior to publication of *DJD X*—they would apply instead throughout the twenty-first century. Only in the twenty-second century would progress on *MMT* be allowed to proceed, unimpeded by the copyright claim of Qimron and his heirs.<sup>770</sup> That result turns the constitutional purpose of copyright on its head.

At the end, myriad copyright paths converge on one conclusion: There is no protection for a reconstruction of an old manuscript of an uncopyrighted work. Any one rationale is sufficient by itself. As *MMT* itself teaches righteously, “you will rejoice in the end when you find some of our words correct.”<sup>771</sup>

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767. Refer to Case 3 (The Translation) *supra*.

768. 17 U.S.C. § 101 (1994) (defining “derivative work”).

769. Refer to Chapter VI *supra*.

770. As of this writing, Qimron’s copyrights will continue until at least 2071. On the assumption that Elisha Qimron—may he live to 120—is still alive in 2031, then the copyright in his writings will endure until 2101. See 17 U.S.C. § 302(a) (1994) (providing that copyright lasts for the life of the author plus seventy years).

771. THE HIDDEN SCROLLS, *supra* note 190, at 173 (translating portion of *MMT*).



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## PART TWO

# THEORY

Part One has approached the copyright issues of the Dead Sea Scrolls through the lens of doctrine. Part Two now changes the perspective to theory. It moves, moreover, from the specifics of *Qimron v. Shanks* to general considerations.

When a philologist reconstructs an ancient text, the product consists of an alphanumeric writing that looks, at first blush, indistinguishable from a copyrightable composition. Exactly the same applies to the notations made by the mathematician to solve Fermat's theorem; similar considerations arise with respect to the drawing made by a physicist probing the atom, the sculpture produced by the hydrologist restoring a medieval fountain, and the various products of other -ologists in their own respective fields.<sup>772</sup>

Is there a razor that can, in fact, etch a distinction, labeling the vast bulk of writings (as well as sculptures, drawings, etc.) works of "authorship," while simultaneously disqualifying some few at their birth from that appellation of origin?<sup>773</sup>

The reader will hopefully forgive me my trespass in an alien domain,<sup>774</sup> if she accepts the thesis that I attempt to demonstrate, *viz.*, that copyright law proceeds from a theory of

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772. Refer to Chapter II *supra*.

773. "What constitutes a literary work? How is a literary composition different from any other form of invention, such as a clock or an orrery? What is the relationship between literature and ideas?" Mark Rose traces "the trajectory of this debate" in the eighteenth century copyright cases. *The Author as Proprietor*, *supra* note 19, at 33.

774. "Literature . . . is too important to be turned over to literature professors. Literature's importance to judges, lawyers, and law professors follows from its importance to human beings in general." James Seaton, *Law And Literature: Works, Criticism, and Theory*, 11 YALE J.L. & HUMAN. 479, 505 (1999).

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*authorship* wholly at odds with that underlying any literary theory.<sup>775</sup>

More precisely, the thesis animating the discussion in this Part is that copyright law is remarkably unconcerned with any theory at all about what constitutes authorship—with one single exception: intentionality. Copyright protection arises only for works that reflect an intent to produce something personal or subjective. By contrast, works that are objective, whether in fact or as presented, fail to qualify as works of “authorship” in the copyright sense.

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775. My ignorance will come back to haunt me only in the event that someone can demonstrate that there is a literary theory of *authorship* that comports with the utilitarian doctrines underlying copyright protection. Though I believe that no such theory exists, I look forward to monitoring the responses, to determine whether I have been obliterated.

## XII.

## AUTHORSHIP AND LITERARY THEORY

Roland Barthes announced the 'Death of the Author' in 1968. . . . [T]he declaration became arguably the most famous slogan for the fast-growing field of 'theory.' . . . [T]he path was clear for the proliferation of questions about the process of reading. A revolution in thought had begun.

Maurice Biriotti<sup>776</sup>

It is time to explore the figure of the *author* as he (historically, it has largely been a masculine domain)<sup>777</sup> has developed in literary theory,<sup>778</sup> before reverting to the *author* that copyright law protects.

Of course, authors never labor in a vacuum. "In theory, it takes a human being — an author at one end or a reader at the other — to register meaning; there is no meaning possible without a human being to *think* it."<sup>779</sup> Imagine a triangle, the vertices of which represent the *author*, the *text*, and the *reader*.<sup>780</sup> During the Romantic era, the author reigned supreme.<sup>781</sup> In the 1920s, the New Critical school replaced him with the new concept of an autonomous "text in itself."<sup>782</sup> In more recent decades, as we shall soon see, the reader has come into her own.<sup>783</sup>

A. *Myth of the Romantic Genius*

Two centuries ago, art was conceptualized as the product of

776. Maurice Biriotti, *Introduction: authorship, authority, authorisation, in WHAT IS AN AUTHOR?*, *supra* note 11, at 1.

777. See REAL PRESENCES, *supra* note 89, at 207.

778. Besides literary theory, other types of theories, as germane, are encountered anon.

779. JACK STILLINGER, *READING THE EVE OF ST. AGNES* 6 (1999).

780. This image, and the rest of this paragraph, emerge from *READING THE EVE OF ST. AGNES*. *Id.* at 3–15.

781. "The biographical study of authors . . . quickly became the principal method of writing about literature during the Romantic period, when the personalities of the poets and the essayists were thought to be central in their works and there was widespread discussion of such topics as inspiration, originality, creativity, and genius." MULTIPLE AUTHORSHIP, *supra* note 670, at 6–7.

782. *READING THE EVE OF ST. AGNES*, *supra* note 779, at 6.

783. The same is true of viewer, spectator, listener, and other recipients of the artistic experience. "It's not the painting that is Catholic or Protestant but the people who look at it, [said Vermeer] and what they expect to see." TRACY CHEVALIER, *GIRL WITH A PEARL EARRING* 139–40 (1999).

a wholly new inspiration under the sun, courtesy of the God-given efforts of a Romantic genius.<sup>784</sup> Culminating with the efforts of Martha Woodmansee,<sup>785</sup> that view survives today primarily as the target of attack.<sup>786</sup> So contends Northrop Frye:

All art is equally conventionalized, but we do not ordinarily notice this fact unless we are unaccustomed to the convention. In our day the conventional element in literature is elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented.<sup>787</sup> Hence the conventionalizing forces of modern literature — the way, for instance, that an editor's policy and the expectation of his readers combine to conventionalize what appears in a magazine — often go unrecognized. Demonstrating the debt of A to B is merely scholarship if A is dead, but a proof of moral delinquency if A is alive. This state of things makes it difficult to appraise a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others; Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible. It is not only the inexperienced reader who looks for a *residual* originality in such works. Most of us tend to think of a poet's real achievement as distinct from, or even contrasted with, the achievement present in what he stole, and we are thus apt to concentrate on peripheral rather than on central critical facts. For instance, the central greatness of *Paradise Regained*, as a poem, is not the greatness of the rhetorical decorations that Milton added to his source, but the greatness of the theme itself, which Milton *passes on* to

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784. "Whoever creates is God," says Ralph Waldo Emerson, in the epigraph quoted in *Law and the Creative Mind*, *supra* note 169, at 152.

785. Refer to note 25 *supra*.

786. See Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 150–51 (1998); Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 263–64 (1996).

787. Frye is not alone in blaming copyright law for being part of the problem. The "proprietary author" has been condemned as "nothing but an ideological misrepresentation sustained by legal buttressing." *Dropping the Subject*, *supra* note 25, at 99. Another perspective holds,

In order to be an author in modernity, one must do something avowedly 'new'; in order to be new, it must be in contradistinction to prevailing norms. Three things follow. Firstly, authority depends upon distinction. Secondly, to be an author one must hypothesize a prior system of law in the area in which one wants authority. Thirdly, once this hypothetical system is in place, one must intervene with some violation or transgression of its norms or laws.

*Authority, history and the question of postmodernism*, *supra* note 85, at 63–64.

the reader from his source. This conception of the great poet's being entrusted with the great theme was elementary enough to Milton, but violates most of the low mimetic prejudices about creation that most of us are educated in.

The underestimating of convention appears to be a result of, may even be a part of, the tendency, marked from Romantic times on, to think of the individual as ideally prior to his society. The view opposed to this, that the new baby is conditioned by a hereditary and environmental kinship to a society which already exists, has, whatever doctrines may be inferred from it, the initial advantage of being closer to the facts it deals with. The literary consequence of the second view is that the new poem, like the new baby, is born into an already existing order of words, and is typical of the structure of poetry to which it is attached. The new baby *is* his own society appearing once again as a unit of individuality, and the new poem has a similar relation to its poetic society.

It is hardly possible to accept a critical view which confuses the original with the aboriginal, and imagines that a "creative" poet sits down with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*. Human beings do not create in that way. Just as a new scientific discovery manifests something that was already latent in the order of nature, and at the same time is logically related to the total structure of the existing science, so the new poem manifests something that was already latent in the order of words.<sup>788</sup> Literature may have life, reality, experience, nature, imaginative truth, social conditions, or what you will for its *content*; but literature itself is not made out of these things. Poetry can only be made out of other poems; novels out of other novels. Literature shapes itself, and is not shaped externally: the *forms* of literature can no more exist outside literature than the forms of sonata and fugue and rondo can exist outside music.<sup>789</sup>

### B. *Apotheosis of the Text*

Over the course of the twentieth century, the *author* has become increasingly incapable of maintaining a magisterial presence. For the author can live up neither to being a fount of

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788. To switch to George Steiner, "The poet's language takes us home to that which we did not know." *What Is Comparative Literature?* in *NO PASSION SPENT*, *supra* note 212, at 142, 144.

789. *ANATOMY OF CRITICISM*, *supra* note 159, at 96-97.

wholly new inspiration nor even a being whose intent is graspable. “[T]he author’s intention ceases to exist as a separate factor as soon as he has finished revising.”<sup>790</sup> George Steiner has said it well:

The notion that we can grasp an author’s intentionality, that we should attend to what he would tell us of his own purpose in or understanding of his text, is utterly naïve. What does he know of the meanings hidden by or projected from the interplay of semantic potentialities which he has momentarily circumscribed and formalized? Why should we trust in his own self-delusions, in the suppressions of the psychic impulses, which most likely have impelled him to produce a “textuality” in the first place? The adage had it: Do not trust the teller but the tale.<sup>791</sup>

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No sentence spoken or composed in any intelligible language is, in the rigorous sense of the concept, original. It is merely one among the formally unbounded set of transformational possibilities within a rule-bound grammar. The poem or play or novel is strictly considered, anonymous. It belongs to the topological space of the underlying grammatical and lexical structures and availabilities.<sup>792</sup>

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Given language, it cannot be otherwise. Each word<sup>793</sup> in either an oral or written communication reaches us charged with the potential of its entire history.<sup>794</sup>

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At best, the major writer adds graffiti to the walls of the already extant house of language.<sup>795</sup>

The cumulative wisdom that follows is that we cannot isolate the genius of *authorship* as the basis on which to build theory. That way lies madness. Jack Stillinger encapsulates the matter perfectly:

[A]cademic critics . . . tend to write their interpretations as

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790. *Id.* at 73.

791. *Real Presences in NO PASSION SPENT*, *supra* note 212, at 20, 29.

792. *Id.* at 28.

793. An additional point: “Languages without traditions of literacy do not have a word for ‘word.’” *Reading in the Later Middle Ages*, *supra* note 146, at 130.

794. *What is Comparative Literature?*, *supra* note 788, at 143. “Cognition is recognition.” *Id.* at 142.

795. *Id.* at 144.

if the texts under scrutiny existed in some fixed, definitive form from the very beginning. The lesson is that, because the product comes to us as a whole entity, we have mistakenly assumed that it was created whole in the first place. In other words, the mythic author is a projection from the text that we see or read, rather than a historical reality. To the extent that we wish to focus only on the formal whole, therefore, we should probably omit references to the author altogether!<sup>796</sup>

But the notion of text is itself unstable. Even classics have been obsessively revised by their authors: Samuel Taylor Coleridge's *Rime of the Ancient Mariner* exists in no fewer than eighteen distinct versions,<sup>797</sup> and the history of literature is replete with like examples.<sup>798</sup> A new move is necessary. We therefore reach the reader.<sup>799</sup>

### C. Birth of the Reader

Focus on the text in itself already prefigures the desacrilization<sup>800</sup> of the author.<sup>801</sup> The seminal piece in new critical studies is Roland Barthes's essay, *The Death of the Author*,<sup>802</sup> ubiquitously cited in the literature.<sup>803</sup> Its auctoricide unfolds in a remarkably short seven pages.<sup>804</sup>

796. MULTIPLE AUTHORSHIP, *supra* note 670, at 173–74.

797. READING *THE EVE OF ST. AGNES*, *supra* note 779, at 8.

798. See generally JACK STILLINGER, COLERIDGE AND TEXTUAL INSTABILITY: THE MULTIPLE VERSIONS OF THE MAJOR POEMS (1994).

799. "The text now has a life of its own and an endless series of possible meanings, which are no longer subject to control either by the author's actions, decision, and intentions, or by the rules and conventions of language. Textuality replaces the author with the reader." Graham McCann, *Distant voices, real lives: authorship, criticism, responsibility*, in WHAT IS AN AUTHOR?, *supra* note 11, at 72, 73–74.

800. It is *de rigueur* in this domain to invoke the *de-* prefix and the *-ize* infix. THE PLEASURES OF READING, *supra* note 527, at 15–16.

801. The full quotation is, "The desacrilization of the image of the Author . . ." *The Death of the Author*, in IMAGE \_\_\_\_ MUSIC \_\_\_\_ TEXT, *supra* note 9, at 142, 144.

802. *Id.* at 142. The essay takes off from Balzac's *Sarrasine*, as does Barthes's book, *SZ* (1975).

803. Unremarked, however, is that the title *Le Mort d'Auteur* carries an unmistakable invocation of the *Le Morte* [sic] *d'Arthur*, thus winding our way back to the realm of the troubadours. Refer to Chapter II *supra*. Refer also to note 1081 *infra*. Note that Sir Thomas Malory's *Book of King Arthur and of his Noble Knights of the Round Table* was "fitly enough, the last important English book written before the introduction of printing into [England], and since no manuscript of it has come down to us it is also the first English classic for our knowledge of which we are entirely dependent on a printed text." See *Bibliographic Note*, at <http://etext.lib.virginia.edu/cgi-bin/browse-mixed?id=Mal1Mor&tag=public&images=images/modeng&data=/lv1/Archive/eng-parsed> (1999).

804. One appreciates the terseness of the essay when its background is clarified. Barthes wrote *The Death of the Author* for an American magazine or, more precisely,

The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* “confiding” in us.<sup>805</sup>

Though that statement might have been simply “a polemical overstatement” when uttered, it has now matured into “entrenched academic dogma.”<sup>806</sup>

Basically, Barthes’s position<sup>807</sup> is that no longer should we believe in the “fetish”<sup>808</sup> of an antecedent Author who nourishes the book and gives it its meaning. Instead, the text itself, being “eternally written *here and now*,” becomes a performative act, hearkening back to the *I Sing* of the ancient troubadours.<sup>809</sup> The text is no longer to be viewed as containing a single “theological” meaning corresponding to “the ‘message’ of the Author-God,”<sup>810</sup> but instead becomes “a multi-dimensional space in which a variety of writings, none of them original, blend and clash.”<sup>811</sup>

Having dethroned the author, what fills the breach? It is the Reader, who occupies “the space on which all the quotations that make up a writing are inscribed without any of them being lost.”<sup>812</sup> Barthes’s final words are widely quoted:<sup>813</sup>

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early multimedia effort, which was kept in a white box. “Barthes’s essay is boxed in, one of twenty-eight pieces, nothing more than a pamphlet stuck between movies, records, diagrams, cardboard cut-outs, and advertisements.” Molly Nesbit, *What Was an Author?*, 73 *YALE FRENCH STUD.* 229, 241 (1987).

805. *The Death of the Author*, *supra* note 801, at 143.

806. *Distant voices, real lives*, *supra* note 799, at 72.

807. Barthes’s own philosophy evolved, as a bit of history dramatically illuminates. In a paper first published only two years before his *Death of the Author*, Roland Barthes enumerated three standard concepts of a narrator—including the historical author who created the work! *MULTIPLE AUTHORSHIP*, *supra* note 670, at 5.

808. ROLAND BARTHES, *THE PLEASURE OF THE TEXT* 27 (Doubleday 1975) (1973).

809. *The Death of the Author*, *supra* note 801, at 145–46. Further denying originality, Barthes continues that “the writer can only imitate a gesture that is always anterior, never original.” *Id.* at 146.

810. *Id.* The history of the book is itself intimately tied to the quest to gain knowledge of God. *Introduction to A HISTORY OF READING*, *supra* note 146, at 17; M. B. Parkes, *Reading, Copying and Interpreting a Text in the Early Middle Ages*, in *A HISTORY OF READING*, *supra* note 24, at 90, 91. Along the line of these *topoi*, reading is “mastication of the Word.” Jacqueline Hamesse, *The Scholastic Model of Reading*, in *A HISTORY OF READING*, *supra* note 24, at 103, 104.

811. *The Death of the Author*, *supra* note 801, at 146.

812. *Id.* at 148 (“[A] text’s unity lies not in its origin but in its destination.”).

813. Indeed, this perspective has become dominant in the English-speaking world. *Figures of the Author*, *supra* note 194, at 7.



[W]e know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death<sup>814</sup> of the Author.<sup>815</sup>

What went into this move? “Perhaps the earliest theoretical impulse to remove the Author was based on a discrediting of the concept of intentionality.”<sup>816</sup> “The notion of a single intending psyche which exists before and beyond language now seems hopelessly inadequate.”<sup>817</sup> Indeed, decades earlier, an influential piece tried to demonstrate the fallacy of interpreting a literary work in light of its intent.<sup>818</sup>

(It should go without saying that writers are not expected to literally vanish; they are merely taken off any pedestal of being given “a privileged position as a category of interpretation.”<sup>819</sup> In other words, Barthes’s call for the death of the author certainly was not an appeal for the death of the writer. Yet the *fatwa*<sup>820</sup> issued two decades later against Salman Rushdie gave his words an eerie twang.<sup>821</sup>)

We are now deeply in the realm of “theory.”<sup>822</sup> Inevitably, reference must now branch off into such delicate questions of current concern as the literary canon<sup>823</sup> and imperialism of the

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814. Besides “death,” theoretical writings of the last two decades have subjected the author to “disappearance,” “absence,” “removal,” and “banishment.” MULTIPLE AUTHORSHIP, *supra* note 670, at 3. “[I]t only remains for jurists to sign off on the death certificate.” *The Personality Interest of Artists and Inventors*, *supra* note 121, at 91.

815. *The Death of the Author*, *supra* note 801, at 148. The next stage following death of the author and birth of the reader is, of course, the death of reading itself. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 8.

816. *Introduction: authorship, authority, authorisation*, *supra* note 776, at 2.

817. *Id.* at 5.

818. MONROE C. BEARDSLEY & W.K. WIMSATT, JR., *The Intentional Fallacy*, in W.K. WIMSATT, JR., THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 3 (1954). (One authority traces publication of the piece eight years earlier, back to 1946. MULTIPLE AUTHORSHIP, *supra* note 670, at 8 & n.9.). For a discussion of the disparate views taken of the intentional fallacy, see *id.* at 188–202. See also ANATOMY OF CRITICISM, *supra* note 159, at 86, 88–94, 113.

819. *Film Authorship in the Changing Audio-visual Environment*, *supra* note 21, at 58.

820. For ruminations on that device within Islamic law, we must turn back to one of the Dead Sea Scroll scholars quoted above. See ROBERT H. EISENMAN, ISLAMIC LAW IN PALESTINE AND ISRAEL 56 (1978).

821. *Reading The Satanic Verses*, *supra* note 725, at 104. As Foucault put it, “The work, which once had the duty of providing immortality, now possesses the right to kill, to be its author’s murderer.” *What Is an Author?*, *supra* note 155, at 142.

822. To a Marxist, for example, any theory of *authorship* is inextricably linked to questions of political power. Cf. *Introduction: authorship, authority, authorisation*, *supra* note 776, at 7 (discussing Terry Eagleton).

823. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 198.

dead white male.<sup>824</sup>

Understanding—as we understand it—is fundamentally an act of intellectual appropriation. There is a phenomenological situation in which a Subject of consciousness comes to inhabit a position from which the text makes sense, and thus he or she gains an “authoritative” understanding of the text. ‘Under-standing’ is, of course, in these terms, ‘over-coming’, mastering a text.<sup>825</sup>

The death of the author, as summarized above, has given birth to the reader. Literary theory has moved beyond the revelation from on-high of “authority (the *auctoritas* of authorship)”<sup>826</sup> to a realm in which it is the interpretive community that constitutes the text, and the reader reigns supreme.<sup>827</sup> At the end of the day, where do these considerations leave the authors whom the Copyright Act clothes with protection? We return to these considerations presently.

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824. See *Reading to Read*, *supra* note 146, at 357–58. Given that the current work was commissioned for the *Houston Law Review*, it is not amiss to note that the Italian commentator of that piece deems Houston “the most future-oriented city in the United States today.” *Id.* at 359. How the contest was held is not revealed.

825. *Authority, history and the question of postmodernism*, *supra* note 85, at 61.

826. *Our Homeland, the Text*, *supra* note 357, at 308.

827. See STANLEY FISH, *Literature in the Reader*, in *IS THERE A TEXT IN THIS CLASS?* 21, 21–67 (1980). Of course, this domain is as volatile as the study of Dead Sea Scrolls; thus a citation to Fish is to what he believed at one particular point, which may be a proposition that he subsequently disavowed. See *Introduction, or How I Stopped Worrying and Learned to Love Interpretation*, in *IS THERE A TEXT IN THIS CLASS?* 1, 1–3 (“[T]he reader’s response is not *to* the meaning; *it is* the meaning, . . . or so I claimed.”).

XIII.  
BIBLICAL EXCURSUS

[M]odern biblical scholarship is the particularly urgent turn given by revealed religion to the quest for origins initiated by European romanticism.

Robert Alter<sup>828</sup>

The last chapter exits the boundaries of copyright proper to explore some of its roots in the neighboring domain of literary theory. This chapter ventures farther still, testing some of those literary theory notions. The instant test unfolds in a domain that would be familiar to the Teacher of Righteousness, namely through adducing biblical texts and commentaries. The next chapter then reverts back to the more familiar moorings of copyright. Thereafter, the discussion tries to integrate all these strands into a unified whole.<sup>829</sup>

A. *God is Strong*

From the quest for origins initiated by Romanticism insofar as it relates to the book,<sup>830</sup> it is fitting to turn to the same question vis-à-vis The Book.<sup>831</sup> The Bible (from the Greek word meaning “the book”)<sup>832</sup> undoubtedly stands as the paradigm for Barthes’s criticism, the work most in need of “desacrilization of the image of the Author,”<sup>833</sup> or more pungently, of the single

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828. THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 193. Alter follows that formulation immediately with ruminations on Hershel Shanks, and the cultural phenomenon represented by his *Biblical Archaeology Review*. *Id.* at 193–94 (noting that the magazine has “more than 125,000 subscribers, a figure I find astonishing”).

829. “The primary intellectual encounter between Judaism and modern culture has been precisely in a mutual preoccupation with the historicity of things.” JOSEPH CHAIM YERUSHALMI, ZACHOR 81 (1982).

830. Refer to Chapter XII *supra*.

831. This investigation is essentially continuous with what has come before. “The disciplines of reading, the very idea of close commentary and interpretation, textual criticism as we know it, derive from the study of Holy Scripture . . . .” *Real Presences*, *supra* note 791, at 36. Jewish scholars have played a “preponderant role in the development of comparative literature.” *What Is Comparative Literature?*, *supra* note 788, at 148. George Steiner characterizes as “Judaic derivatives” both Freudian psychoanalysis and Derridean deconstruction. *A Note on Kafka’s “Trial,”* in NO PASSION SPENT, *supra* note 212, at 239, 240–41. He further characterizes Marxism as “Judaism grown impatient.” *Through That Glass Darkly* in NO PASSION SPENT, *supra* note 212, at 328, 341.

832. More precisely, *ta biblia* refers to “the books.” THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 48.

833. Refer to note 801 *supra*.

meaning (Barthes calls it “theological”) corresponding to “the ‘message’ of the Author-God.”<sup>834</sup> It goes without saying that *The Death of the Author* carries with it “an anti-theological activity, an activity that is truly revolutionary since to refuse to fix meaning is, in the end, to refuse God and his [sic] hypostases — reason, science, law.”<sup>835</sup>

I quarrel with Barthes’s theology. Is his enterprise “truly revolutionary”? The birth of the reader as a focus of attention scarcely resulted from parthenogenesis in 1968.<sup>836</sup> As early as 1912, Charles Péguy commented that the real achievement of a text and of a work of literature itself is to acquire “une lecture bien fait,” that is, an attentive reading.<sup>837</sup> At around the same time, Kafka observed, “If the book we are reading does not wake us, as with a fist hammering on the skull, then why do we read it?”<sup>838</sup> A hundred years earlier, Keats himself anticipated the current focus in literary studies, under one view at least, as “an early advocate of some fundamental ideas of twentieth-century reception theorists.”<sup>839</sup> Emily Dickinson said it too, without the jargon: “If I feel physically as if the top of my head were taken off, . . . I know this is poetry.”<sup>840</sup>

The Bible itself disclaims the intent to present a single meaning corresponding to “the ‘message’ of the Author-God.”<sup>841</sup> As first proof-text for this proposition, consider *Jeremiah 23:29*: “Is not my word thus like a fire, says the Lord, and like a hammer that shatters a rock?” That last image of a hammer causing a single rock to fly off in multiple pebbles<sup>842</sup> moves the

834. Refer to text accompanying note 810 *supra*.

835. *The Death of the Author*, *supra* note 801, at 147.

836. See ANATOMY OF CRITICISM, *supra* note 159, at 66.

837. *The Uncommon Reader*, *supra* note 583, at 17–18. In the context of orality and writing, it is an interesting phenomenon that “lecture” connotes the former in English, the latter in French.

838. Franz Kafka, *In Front of the Law* (quoted in *Our Homeland, the Text*, *supra* note 357, at 315).

839. READING *THE EVE OF ST. AGNES*, *supra* note 779, at 87.

840. ANATOMY OF CRITICISM, *supra* note 159, at 27. The same point is made non-verbally in Dennis W. Arrow, *Pomobabble: Post-Modern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 MICH. L. REV. 461, 689 (1997).

841. Indeed, one view is that the Bible does not even support the notion of God as Author of all the world; contrary to the traditional notion of *creatio ex nihilo*, this view posits that certain forces are primordial—in existence independent of God’s creation. See JON D. LEVENSON, *CREATION AND THE PERSISTENCE OF EVIL: A JEWISH DRAMA OF DIVINE OMNIPOTENCE* (1988) (citing example of the Leviathan).

842. A more nuanced reading is that it is the sparks that fly off from the collision: “My word, says God, is like fire; but what sort of fire? Like those fiery sparks produced by a hammer when it strikes rock—and like the many senses that every verse in Scripture holds ready to let fly at the strike of the interpretive hammer.” DAVID STERN, *MIDRASH*

rabbinic sages to comment, “[L]ikewise does one text yield several flavors.”<sup>843</sup> Even more explicit is *Psalms* 62:12: “God spoke once; I heard it twice: for God is strong.”<sup>844</sup> Again, the rabbis interpret the verse’s plain meaning<sup>845</sup> as being that “one text yield several flavors.”<sup>846</sup>

To pigeonhole the LORD into the equation of one utterance = one meaning represents utter foolishness. Given their realization that a single text can convey a wealth of readings, for theoreticians to maintain that the Almighty Himself lacks the power to take advantage of those polysemous possibilities betrays bad theology. The Bible itself rejects that formulation: “God is strong”—so of course He can (and does) compress multiple readings into a single pronouncement.<sup>847</sup>

It is precisely that sensibility that moves the rabbis to invoke the repercussive category of *al tikrei*, “Read rather thus.”<sup>848</sup> Thus, *Minchat Shai*, “the most famous of all the works of Masorah,”<sup>849</sup> invokes the two biblical texts cited above and explicates *al tikrei* as bringing two readings such that both intentions are included within Scripture; it further maintains that the sages are justified in invoking all tools of interpretation, based on the maxim that “one text yields many flavors.”<sup>850</sup>

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AND THEORY: ANCIENT JEWISH EXEGESIS AND CONTEMPORARY LITERARY STUDIES 18 (1996).

843. BABYLONIAN TALMUD TRACTATE SANHEDRIN 34a. My translation of *af miqra echad yotze lekama t’amim* is perhaps overly literal, although taking the word *miqra* even more literally would produce “likewise from one reading do several flavors emerge.” See THE WORLD OF BIBLICAL LITERATURE *supra* note 155, at 49. Usage of *flavors* might also be overly literal (but I like it). Certainly, the sense is “one verse yields many teachings.” ARTSCROLL TALMUD TRACTATE SANHEDRIN 34a<sup>3</sup>.

844. Given its shortage of adjectives, the Hebrew expresses the second half of the verse as “for strength [is] to God.”

845. But forfend that it be represented as the one and only literal meaning! Unless, that is, one admits that “it is virtually impossible to assign to literal meaning a significance any more definite than the first or most obvious meaning of a passage as apprehended by one familiar with the language and context.” WALTER J. ONG S. J., THE PRESENCE OF THE WORD: SOME PROLEGOMENA FOR CULTURAL AND RELIGIOUS HISTORY 46 (1967).

846. SANHEDRIN, *supra* note 843, at 34a.

847. In fact, it is doubtful that there is such a thing as one and only one reading. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 88. Alter characterizes Barthes’s attempt “to rescue the absolute literal” as “a particularly instructive failure.” *Id.* at 89. See *id.* at 165 (giving Harold Bloom, who otherwise missed the boat in his *Book of J*, credit for resisting Barthes).

848. Refer to Chapter VIII, section (B)(2) *supra*.

849. 16 ENCYCLOPEDIA JUDAICA 1478 (1972).

850. JEDEDIAH SOLOMON RAPHAEL BEN ABRAHAM OF NORZI, MINCHAT SHAI (1626), explicating *Zephaniah* 1:12.

Another sage<sup>851</sup> likewise brings down the existence of *al tikrei* as permitting different readings of the unvocalized Biblical text, given that “both interpretations are contained within the text.”<sup>852</sup> In that context, he cites the illustrious *dictum*, “there are seventy faces to the Torah.”<sup>853</sup> (Of course, “seventy” is not an attempt at quantification; it represents manifold, unbounded possibilities.)<sup>854</sup>

### B. Unheard Melodies

In his poem of Romantic genius, Keats teaches that “Heard melodies are sweet, but those unheard/Are sweeter.”<sup>855</sup> That insight opens a window into an additional dimension.<sup>856</sup> Call it “meta-intention.” As James Seaton notes:

Authors normally intend that readers should go beyond the authors’ explicit intentions. Aware that their writing will be read by strangers distant in space and time, authors want their meanings to go beyond their own conscious intentions and the constraints on meaning that are imposed by what they and their contemporaries can conceive in their own time and place.<sup>857</sup>

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851. It should be conceded that unanimity on this construction is lacking. The great Maimonides dismisses *al tikrei* as homiletic: “in the way that poets use poetical devices,” “beautiful poetic interpretation.” GUIDE TO THE PERPLEXED, translated from Arabic to Hebrew by Joseph David Qapach, at page *shin-ayin-vav*. Note that Maimonides’ reflections on this matter launch a whole book on the subject of *midrash*. See DANIEL BOYARIN, INTERTEXTUALITY AND THE READING OF MIDRASH 1 (1990).

852. 2 HA-ENZYCLOPEDIA HA-TALMUDIT, *supra* note 628, at 1 n.12, citing *responsa* of the Radbaz (b. Spain 1480).

853. *Id.* Though the “70 faces” phrase is as famous in observant Jewish circles as, say, “with liberty and justice for all” would be to an educated American audience, its roots actually lead back to an obscure book called *Otiyot d’Rabbi Akiva*, “a semimystical tract of the early post-Talmudic period.” MIDRASH AND THEORY, *supra* note 842, at 18. See GOLDEN DOVES WITH SILVER DOTS, *supra* note 614, at 120.

854. There are 25,000 commentaries on *Hamlet*, “sepulchred in the decent dust of deposit libraries.” REAL PRESENCES, *supra* note 89, at 23, 25. But interpretation of the Pentateuch dwarfs even that number. *Id.* at 40–41.

855. *Ode on a Grecian Urn*, lines 11–12.

856. See Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, 1400 (1998) (citing Marshall Brown, *Unheard Melodies: The Force of Form*, 107 PMLA 465, 477 (1992)).

857. *Law And Literature*, *supra* note 774, at 497. This move is familiar to constitutional interpreters, on both the left and right.

That realization shows how simplistic it is to attribute one fixed meaning to the Bible, most enduring of all mankind's literature.<sup>858</sup> Almost two millennia ago, an entire corpus of rabbinic literature known as *midrash*<sup>859</sup> developed to interpret scripture based on the recognition that "there is often a gap between authorial intent and reader reception."<sup>860</sup> Not only does *midrash* recognize the role played by the reader in determining textual meaning,<sup>861</sup> but it "encourages multiple and even contradictory meanings to be discovered in the text, while the intention of its author(s) is perceived as elusive."<sup>862</sup> It thus comes as no surprise that literary critics have begun to appreciate the affinity between

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While privileged to serve in the Chambers of Judge Oakes, I worked on a case brought against Representative Elizabeth Holtzman, seeking to disqualify her from taking her seat in Congress based on the Constitution's unambiguous limitation to the male gender in defining the qualifications for Congressional office. U.S. CONST. Art. I, § 2, cl. 2 ("State in which he shall be chosen"). The Second Circuit had little problem rebuffing that claim. See *Sharrow v. Holtzman*, 614 F.2d 1290 (2d Cir. 1979) (mem.).

Those on the political right are usually credited with hewing most closely to original intent. See Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 759–60 (1987). Yet no one has questioned the extension of the constitutional power "to make Rules for the Government and Regulation of the land and naval forces" to embrace as well an air force—something that the eighteenth century framers could not possibly have had in mind. See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 21–22 (1990).

858. I originally attributed this simplistic view to Barthes, but found myself rightfully reproved:

But any such attribution of fixed meaning would be very un-Barthes-like: for him all texts, including the bible I suppose, are polysemic and multiple. What Barthes is objecting to is that kind of hermeneutic—literary or theological—which would attribute a single true, final, and fixed point of meaning and authority to any text and call it the "author" or call it "God." In the context in which Barthes was writing such a position really was "revolutionary," which was why there was such an angry response to the new French criticism in the 1970s.

E-mail from Mark Rose to David Nimmer (December 17, 2000) (on file with the *Houston Law Review*).

859. Refer to Chapter VIII, section (B)(3) *supra*.

860. David Weiss Halivni, *From Midrash to Mishnah: Theological Repercussions and Further Clarifications of "Chate'u Yisrael,"* in THE MIDRASHIC IMAGINATION, *supra* note 635, at 23, 29. See generally GOLDEN DOVES WITH SILVER DOTS, *supra* note 614.

861. See David Stern, *The Rabbinic Parable and the Narrative of Interpretation*, in THE MIDRASHIC IMAGINATION, *supra* note 635, at 90–91.

862. Robert Bonfil, *Can Medieval Storytelling Help Understanding Midrash? The Story of Paltiel: A Preliminary Study on History and Midrash*, in THE MIDRASHIC IMAGINATION, *supra* note 635, at 228, 244. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 142–44 ("[M]ultiple and contradictory solutions . . . might be the very hallmark of its greatness.").

their “modern” theories and the ancient *midrashic* mode of interpretation.<sup>863</sup>

Irresistible to recount here is the famous<sup>864</sup> story of God leading Moses after death back to the study hall,

R. Judah said in the name of Rav: When Moses ascended on high, he found the Holy One affixing crowns to letters. Moses asked, “LORD of the universe, [why use crowns to intimate what You wish]? Who hinders Your hand [from writing out in full all of Torah’s precepts]? God replied, “At the end of many generations there will arise a man, Akiva ben Joseph by name, who will infer heaps and heaps of laws from each tittle on these crowns.”<sup>865</sup> “LORD of the universe,” said Moses, “permit me to see him.” God replied, “Turn around.” Moses went and sat down behind eight rows [of R. Akiva’s disciples and listened to their discourses on law]. Not being able to follow what they were saying, he was so distressed that he grew faint. But when they came to a certain subject and the disciples asked R. Akiva, “Master, where did you learn this?” and R. Akiva replied, “It is a law given to Moses at Sinai,” Moses was reassured. He returned to the Holy One and said, “LORD of the Universe, You have such a man, yet You give the Torah [not by his hand] but by mine?” God replied, “Be silent — thus has it come to My mind.”<sup>866</sup>

863. Moshe Idel, *Midrashic Versus Other Forms of Jewish Hermeneutics: Some Comparative Reflections*, in *THE MIDRASHIC IMAGINATION*, *supra* note 635, at 45, 45. See Suzanne Last Stone, *Judaism and PostModernism*, 14 *CARDOZO L. REV.* 1681, 1685, 1696 (1993); *THE WORLD OF BIBLICAL LITERATURE*, *supra* note 155, at 86. See generally *INTERTEXTUALITY AND THE READING OF MIDRASH*, *supra* note 851. David Stern traces the infatuation of literary critics with *midrash*, and their subsequent disappointment that polysemy does not equate to indeterminacy. *MIDRASH AND THEORY*, *supra* note 842, at 1–13.

864. See, e.g., Calum Carmichael, *THE SPIRIT OF BIBLICAL LAW* 12 (1996). The other Talmudic saying that naturally fits into this profile is the one that ends “Both these and those are the words of the living God,” which has been called “a metamidrashic comment which marks the indeterminacy of the biblical text as inherent in it.” *INTERTEXTUALITY AND THE READING OF MIDRASH*, *supra* note 851, at 141 n.23. See *MIDRASH AND THEORY*, *supra* note 842, at 21.

865. Hence the title of the work cited earlier, *OTIYOT D’RABBI AKIVA*, *supra* note 853, which means “the letters of Rabbi Akiva.”

866. HAYIM NAHMAN BIALIK & YEHOASHUA HANA RAVNITZKY, *THE BOOK OF LEGENDS SEFER HA-AGGADAH: LEGENDS FROM THE TALMUD AND MIDRASH* 232 (William G. Braude trans., 1992) (quoting *BABYLONIAN TALMUD TRACTATE MENACHOT* 29b). The end of the story turns grim:

Then Moses said, LORD of the universe, You have shown me his Torah — now show me his reward.” “Turn around,” said God. Moses turned and saw R. Akiva’s flesh being weighed out in a meat market. “LORD of the universe,” Moses cried out in protest, “such Torah, and such its reward?” God replied, “Be silent — thus has it come to My mind.

*Id.* That last segment portraying God in an inexplicable light goes beyond current concerns, as it raises a problem of theodicy (as opposed to *The Odyssey*, which would



There can be no ambiguity from this tale that the later rabbis were acutely conscious that God's words to Moses contained an intent of being unpacked long later. In other words, "[T]he author may well have implanted ambiguity in the text in order to authorize later interpreters to choose between a range of legitimate options."<sup>867</sup>

The Romantic notion is that a poet creates *ex nihilo*, acting ideally like God Himself.<sup>868</sup> Barthes is the archetype of the anti-Romantic.<sup>869</sup> Yet his bad theology, as wooden as the Teacher of Righteousness's,<sup>870</sup> moves him to replicate the error that he wishes to condemn.<sup>871</sup> In other words, Barthes rejects the notion that the single meaning of the author, imbued God-like, serves as the basis for interpreting the text. When one realizes that God can express seventy or more thoughts in each word of His text, the need for deicide as a hermeneutic tool evaporates.

At the opposite end of Barthes's claim that literature must be liberated from the author-God lies George Steiner's perspective that all true art gains its meaning from God's presence.<sup>872</sup> Regardless of whether one wishes to go that far, the

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return us to Homer).

867. *Judaism and PostModernism*, *supra* note 863, at 1699. Indeed, this matter can be pushed even further:

Judicial interpretation is not based on uncovering the mind of the divine author or determining the meaning the author would have assigned to the work. Instead, as in reader-response theory, the rabbis generate their own meaning. Finally, as in deconstructionism, rabbinic hermeneutics engages in the self-referential "play of the signifiers."

*Id.* at 1685.

868. ORALITY AND LITERACY, *supra* note 1, at 22. The trope actually traces back to the Renaissance. See REAL PRESENCES, *supra* note 89, at 208; ORIGIN AND ORIGINALITY IN RENAISSANCE LITERATURE, *supra* note 82, at 4.

869. Yet elsewhere, Barthes himself seems to fall prey to a Romantic recrudescence. "[B]liss may come only with the *absolutely new*, for only the new disturbs (weakens) consciousness (easy? not at all: nine times out of ten, the new is only the stereotype of novelty) . . . (Freud: 'In the adult, novelty always constitutes the condition for orgasm')." THE PLEASURE OF THE TEXT, *supra* note 808, at 40–41.

870. With particular reference to the Habakkuk Peshar (another one of the Dead Sea Scrolls), TR takes scripture as a code with a one-to-one correspondence to contemporary events. MIDRASH AND THEORY, *supra* note 842, at 22–23.

871. The passage from Maimonides discussed above, refer to note 851 *supra*, accuses Kara'ites of ignorance for attacking the alternative meaning posited in an *al tikrei*; that alternative meaning is not proposed as the essence of the text. Maimonides equally attacks the foes of the Kara'ites, the Rabbanites, for defending the value of the insight contained in an *al tikrei*; they should simply realize that it comes as a homiletic commentary. In like manner, Barthes falls prey to the Romantic vision he wishes to condemn.

872. REAL PRESENCES, *supra* note 89, at 120, 216–32. As Ronsard observed, "les vers viennent de Dieu/Non de l'humaine puissance." ORIGIN AND ORIGINALITY IN RENAISSANCE LITERATURE, *supra* note 82, at 26. Note that Quint's entire book traces the Renaissance adherence to, and development beyond, Ronsard's claim that "poetry comes from God, not

defects in Barthes's formulation should be apparent. As the foregoing excursion into the Bible reveals, his theory is theoretically flawed.

## XIV.

## AUTHORSHIP UNDER THE COPYRIGHT ACT

The recovery of ancient texts is the highest task of all. . . . When you consider the ocean of bilge brought forth by the invention of printing, it does make you wonder about this boon of civilization. I wonder about it every time I open the *Journal of Philology*.

A.E. Housman<sup>873</sup>

The move from author to text explained above finds some echo in the law. Although, as explained previously, U.S. case law has devoted virtually no celebration to what is an “author,”<sup>874</sup> consideration as to what constitutes a copyrightable text is far from uncommon.<sup>875</sup> One commentator identifies

a twin birth, the simultaneous emergence in the discourse of the law of the proprietary author and the literary work. The two concepts are bound to each other. To assert one is to imply the other, and together, like the twin suns of a binary star locked into orbit about each other, they define the centre of the modern literary system.<sup>876</sup>

Just as early copyright statutes in the United States provided no attempt to give definition to who constitutes an “author,” the governing act at present, passed in 1976, is similarly laconic.<sup>877</sup> Yet the 1976 Act did introduce several innovations, compared to the previously regnant 1909 Act, with respect to “works of authorship.” It is here that attention must therefore be directed.

A. *Release of “Works of Authorship” From Physical Constraints*

As passed in 1791, the first copyright statute protected physical items, viz., “any map, chart, book or books.”<sup>878</sup> The 1909 Act, which governed for most of the twentieth century, was largely the same, applying to such productions as “books,”

873. THE INVENTION OF LOVE, *supra* note 533, at 71, 73.

874. Refer to Chapter II *supra*.

875. *Toward a Theory of Copyright*, *supra* note 25, at 472–74.

876. *The Author as Proprietor*, *supra* note 19, at 39. Ultimately, the “work” becomes as problematic a concept as the “author” who created it. *What Is an Author?*, *supra* note 155, at 143–44.

877. That Act took effect on January 1, 1978.

878. Act of May 31, 1790, § 2, 1 Stat. 124 (1790).

“periodicals, including newspapers,” “maps,” “photographs,” “motion-picture photoplays,” and the like.<sup>879</sup>

The 1976 Act introduced an innovation here. Essentially, the copyrightable took wing, as protection was liberated from physical instantiations to cover idealized types.<sup>880</sup> We revert here to the “fundamental distinction” confronted earlier<sup>881</sup> between a copyright and the material object in which it is embodied.<sup>882</sup> Instead of protecting “books” or “newspapers,” the current Act protects “literary works” regardless of the form in which they might be concretized.<sup>883</sup>

Which is the superior mechanism, from the theoretical point of view: the approach of the 1976 Act or of the 1909 Act? One can fault the approach of that earlier law as outmoded:

Whatever they may do, authors do *not* write books. Books are not written at all. They are manufactured by scribes and other artisans, by mechanics and other engineers, and by the printing presses and other machines.<sup>884</sup>

So does that mean that the new methodology is free from reproach? Such a conclusion is far from automatic. According to literary theory, “the form in which a text is presented for reading also plays a part in the construction of the meaning. Versions of the ‘same’ literal text are not the ‘same’ when the physical support that transmits it to readers . . . varies.”<sup>885</sup> Indeed, texts have no real existence on the ethereal plane; “even in their most rarefied form

879. 17 U.S.C. § 5 (1909).

880. “The statement cannot be identified with a fragment of matter; but its identity varies with a complex set of material institutions.” MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 103 (1972).

881. Refer to Chapter VII, section (A)(2) *supra*.

882. As quoted above, the House Report posits a fundamental distinction between the “original work” which is the product of “authorship” and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a “book” is not a work of authorship, but is a particular kind of “copy.” Instead, the author may write a “literary work,” which in turn can be embodied in a wide range of “copies” and “phonorecords,” including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

H.R. REP. NO. 94-1476, at 53 (1976). Refer to note 487 *supra*.

883. As previously noted, it could even be fixed in gigantic stone monuments set up atop Mt. Eival. Refer to note 489 *supra*.

884. *Introduction* to A HISTORY OF READING, *supra* note 146, at 5.

885. Roger Chartier, *Reading Matter and ‘Popular’ Reading: From the Renaissance to the Seventeenth Century*, in A HISTORY OF READING, *supra* note 24, at 269, 275. To illustrate the point, one commentator claims that the Simon and Garfunkel song *The Boxer*, as performed in 1969, was a different “text” from the same song performed by the same singers in 1981, given divergences in audience reaction. See *Beyond Metaphor*, *supra* note 474, at 727.

[they] are always enmeshed in circumstance, place, and society—in short, they are in the world, and hence are worldly.”<sup>886</sup>

*Textus* comes from the Latin for “woven cloth.”<sup>887</sup> A text is made of a warp of words, as woven into a woof of cloth, paper, and binding.<sup>888</sup> Yet the current Copyright Act equates novels and poems with training manuals,<sup>889</sup> along with e-mails and laundry lists, in an omnibus category called “literary works.” Moreover, that same category of “literary works” equally embraces the computer programs of every description that increasingly dominate copyright jurisprudence,<sup>890</sup> from microcode<sup>891</sup> to Microsoft<sup>892</sup> to macro-applications<sup>893</sup> such as those that automate a dental laboratory.<sup>894</sup> Copyright law thereby runs roughshod over some important distinctions.

*B. On the Incommensurate Vastness of “Works of Authorship” Under the Statute*

But those above considerations are only the warm-up. No sooner does the attempt to reconcile literary theory with copyright doctrine begin than a vast disconnect looms: Copyright protection applies equally to works of “high authorship” and to works of emphatically “low authorship.” For every novel like *The Handyman* that a Caroline See lovingly crafts, it is no exaggeration to recognize the existence of 10,000 works along the following lines:

- ??Watercolors and finger-paintings created by first graders,
- ??Love letters and other missives,<sup>895</sup>

886. Edward W. Said, *The Text, the World, the Critic*, in *TEXTUAL STRATEGIES*, *supra* note 155, at 161, 165.

887. Moving from Latin to Greek, *rhapsody* has the same etymology. ORALITY AND LITERACY, *supra* note 1, at 13 (“to stitch songs together”).

888. These thoughts are modeled on Jesper Svenbro, *Archaic and Classical Greece: The Invention of Silent Reading*, in *A HISTORY OF READING*, *supra* note 24, at 37, 44.

889. *Koontz v. Jaffarian*, 787 F.2d 906, 910 (4th Cir. 1986).

890. Anyone who thinks that the roots of U.S. copyright law derive from the Romantic Era should ponder—the same category that applies to poetry is the one that protects “hard drive prefailure warnings”! See *Compaq Computer Corp. v. Procom Tech., Inc.*, 908 F. Supp. 1409 (S.D. Tex. 1995). See generally 4 NIMMER ON COPYRIGHT § 13.03[F].

891. *E.F. Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485, 1497 (D. Minn. 1985).

892. *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 214 (E.D.N.Y. 1994).

893. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 698 (2d Cir. 1992).

894. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1225 (3d Cir. 1986).

895. For Foucault, “A private letter may well have a signer—it does not have an author; a contract may well have a guarantor—it does not have an author.” *What Is an Author?*, *supra* note 155, at 148. The law draws no such distinctions. See *Salinger v.*

- ??Wish lists and meditations doodled on paper,
- ??Manager's directives to their subordinates as to the earnings goals for the upcoming quarter,
- ??Endless compositions and recordings<sup>896</sup> by "wannabe" songwriters,<sup>897</sup>
- ??Labels for goods from shampoo<sup>898</sup> to automobile packaging<sup>899</sup> and everything between,
- ??E-mails,<sup>900</sup>
- ??Photographs<sup>901</sup> and videos<sup>902</sup> of the family vacation,<sup>903</sup>

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Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987) (holding that private letters are protected by copyright); *Continental Cas. Co. v. Beardsley*, 253 F.2d 702, 705 (2d Cir. 1958) (granting insurance policy copyright protection).

896. Note that this category is doubled: A separate copyright inheres in musical works and in the sound recordings rendering those works. See 1 NIMMER ON COPYRIGHT §§ 2.05, 2.10.

897. Occasionally, this category results in litigation. See *Ellis v. Diffie*, 177 F.3d 503, 505 (6th Cir. 1999) (declining to find striking similarity between defendant's lyrics, "Prop Me Up Beside the Jukebox (If I Die)" and plaintiff's, "Lay Me Out By the Jukebox When I Die").

898. *Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 138 (1998).

899. *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 980 (D. Minn. 1986).

900. Letters, missives, and e-mails are plainly subject to copyright protection, as long as they reflect a sufficient spark of creativity. See *Diamond v. Am-Law Corp.*, 745 F.2d 142 (2d Cir. 1984) (letter to editor copyrightable). Although some briefer ones—such as "Thanks," "Got it," or "See you Thursday"—may admittedly fail protection, uncounted numbers of e-mail qualify. For instance, when the *Houston Law Review* assigned Russell Chorush to assist me in this project, he sent me an e-mail: "I would enjoy the opportunity to introduce myself briefly over the telephone and to glean some idea of the scope of the research project. If this is acceptable, would you please let me know your telephone number as well as an appropriate time to call. I very much look forward to working for you." That material is a literary work. 17 U.S.C. § 102(a)(1) (1994). It is fixed in a tangible medium of expression. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517–18 (9th Cir. 1993). It contains a modicum of creativity in expression. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). It is therefore copyrightable.

901. Since the days of Napoleon Sarony, photography has posed peculiar problems to copyright doctrine. Refer to Chapter II *supra*. Right up to today, "the recognition of the photographer as an author in the full meaning of author's rights is still a problematic issue in many countries." *Film Authorship in the Changing Audio-visual Environment*, *supra* note 21, at 61. The matter is sufficiently complicated as to have generated an entire comparative study. See COPYRIGHT AND PHOTOGRAPHS: AN INTERNATIONAL SURVEY (Ysolde Gendreau, Axel Nordemann & Rainer Oesch eds., 1999).

902. More conceptual problems lurk here. A movie is a series of photos, thereby implicating the issues of the previous note. In addition, that series is effectuated by countless individuals (authors? technicians? others?). We thereby enter a *politique des auteurs*, at the end of which emerges a construct of "film author." *Film Authorship in the Changing Audio-visual Environment*, *supra* note 21, at 65, 77. Like the subject covered in the previous note, the instant subject matter is also most complicated, and has likewise generated a literature unto its own. See NIKOLAS REBER, FILM COPYRIGHT, CONTRACTS AND PROFIT PARTICIPATION (2000).

??And on and on.

As a matter of copyright doctrine, there is no categorical distinction between works of *high authorship* and the vastly more numerous<sup>904</sup> works of *low authorship*.<sup>905</sup> One provision of the statute accords protection to each.<sup>906</sup> Another provision sets forth the guidelines for fair use of each of them;<sup>907</sup> others, the guidelines for infringement actions<sup>908</sup> and remedies.<sup>909</sup> Though the law is not blind to the distinction,<sup>910</sup> neither does it crop up much.

At the outset then, we must investigate why copyright casts its net so widely as to encompass the mundane more often than the ethereal.<sup>911</sup> Consider the following chart, which catalogs

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903. According to one source, Americans took over 17 billion photographs in 1996. See Robert Monaghan, *Photography Industry Statistics*, (Nov. 1999), at <http://www.smu.edu/~rmonagha/mf/photostats.html>. Virtually all would seem to be nominally subject to copyright protection. See 1 NIMMER ON COPYRIGHT § 2.08[E][2] (suggesting that protection would be lacking only for copies of prior photos). Compared to that magnitude, the combined output of all the publishing houses in the U.S., whether high-brow or low, bound or in periodical form, of general interest or niche, is derisory.

904. To be a bit more explicit, albeit at the risk of attempting precision without the benefit of the slightest bit of empirical research (beyond that set forth in the previous note), my claim is as follows: One can aggregate *The Handyman* with all of the works cited herein, and every book published and distributed by a publisher in 2000, every motion picture released on screen or on video that year, every sculptural work exhibited in every museum and gallery in the same period, etc., to come up with all the works of "high authorship." Against those, can be juxtaposed all of the kid's drawings, memos, lists, and other works of low *authorship* created during the same interval. The former constitute but a tiny fraction of the latter, much less than 1% of 1%, I would bet.

905. Given how much more often a kid writes a homework essay or a clerk sends an e-mail message than someone snaps a photograph, one may posit that a hundred other copyrightable works are created for every photo taken. Generalizing from 17 billion photos, the total number exceeds a trillion annually.

906. See 17 U.S.C § 102 (1994).

907. *Id.* § 107.

908. *Id.* § 501.

909. *Id.* §§ 502–505.

910. As a "proof-text," consider *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090 (S.D.N.Y. 1992). The court held that a magazine's reproduction of excerpts of bombastic prose from an unpublished letter sent to students in a noted writer's workshop constituted copyright infringement, but computed damages as zero. *Id.* at 1111.

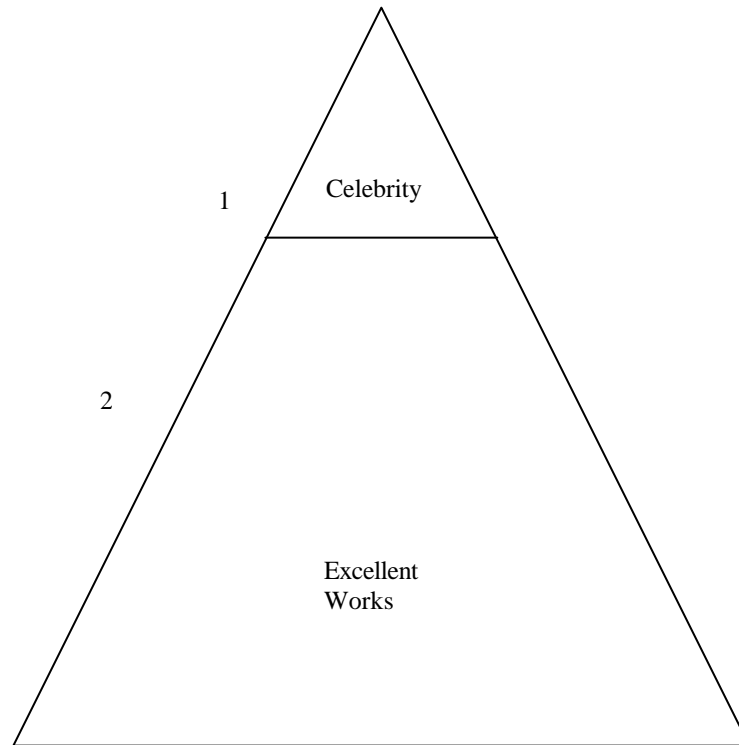
911. There is an additional dimension here. The overwhelming concern above has been with literary works, and corresponding attention has been paid to the readers of those literary texts and to literary theory. But given that copyright extends so broadly, it is equally incumbent upon theorists to describe music, listeners, and auditory theory; audiovisual works, viewers, and film theory; sculpture, observers, and theory of the plastic arts; etc. It is, in short, necessary "to challenge the notion of a single, universal and monolithic 'Theory of Authorship' covering all practices, and to propose instead the need to understand authorship in relation to specific practices, and within the constraints of specific institutional operations." JOHN CAUGHIE, *introduction to Pam Cook, The Point of Self-Expression in Avant-Garde Film*, in THEORIES OF AUTHORSHIP 271 (John Caughie ed., 1981). See Pam Cook, *The Point of Self-Expression in Avant-Garde Film*, in THEORIES OF AUTHORSHIP, *supra*, at 276

works of high authorship.

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(commenting about the film *Remedial Reading Comprehension*). The instant study cannot aspire to that comprehensive goal.





### A. Works of great artistry

At the apex of this pyramid stand those few works by “household name” authors. In those instances, it is the celebrity of the author that sells the work.<sup>912</sup>

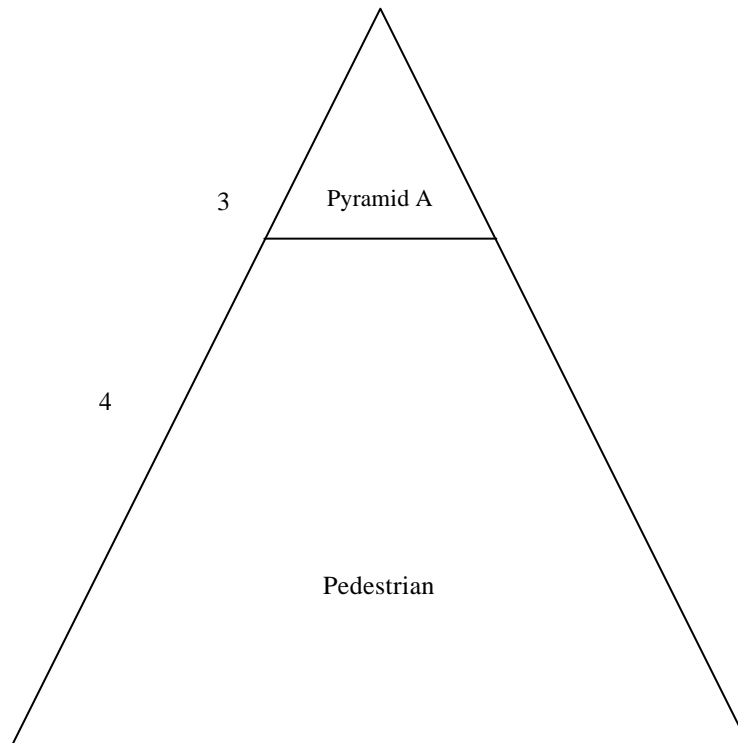
More common, even for works of great artistry, is category 2. Into here fall first-class works of literature (as well as films, paintings, music, and other copyrightable expression). But,

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912. Based upon the *bon mot* that “[t]he business of newspapers, in fact, is not so much to sell newspapers as to sell advertising space,” one commentator has noted that when even a “prestigious” periodical such as the *New York Times* runs a book review of recluse Thomas Pynchon by author-in-hiding Salman Rushdie, the story becomes an “event” by which the author cements his reputation as “author” while the newspaper sells newspapers. As the trope goes, “the author authors the ‘author’, even as he or she writes.” Andrew Wernick, *Authorship and the supplement of promotion*, in *WHAT IS AN AUTHOR?*, *supra* note 11, 85, 87, 91. See *The Author as Proprietor*, *supra* note 19, at 24 (urging that copyright law itself “produces and affirms the very identity of the author as author”). Moreover, “with the industrialisation of print . . . published writing became, in itself, a ‘device for advertising advertising.’” *Authorship and the supplement of promotion*, *supra*, at 87, 91.

unlike category 1, those works prosper on their own merit rather than on the fame of their creators.

Of course, works of great artistry, taken as a whole, comprise only a small fraction of well-wrought literature (and films and the rest). The next pyramid portrays the category of works of high authorship, taken as a whole.



### **B. Works of high authorship**

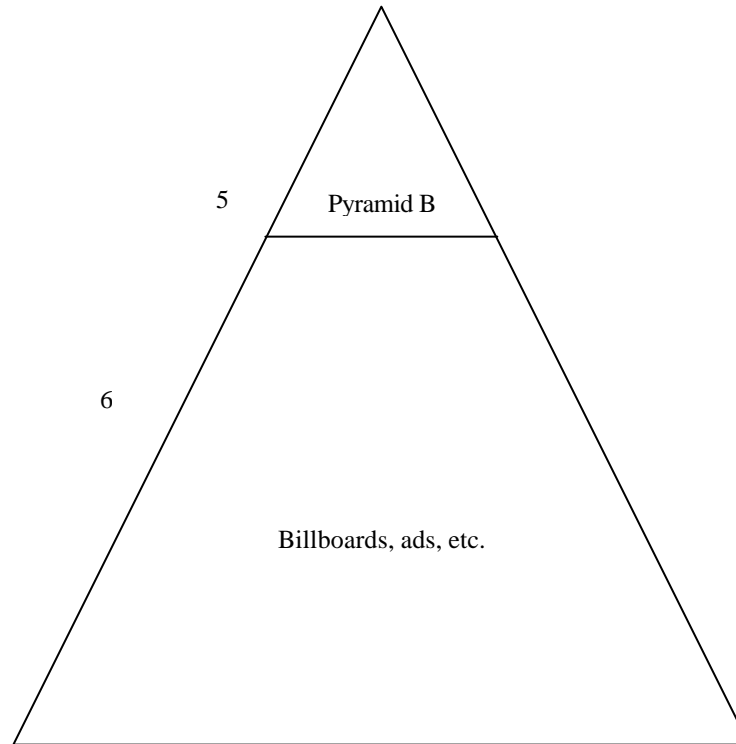
It will be observed that the apex of this pyramid contains the entirety of the pyramid showing works of great artistry. For every *Middlemarch* that a publisher includes in its catalog, there are dozens or hundreds of more middling entries.<sup>913</sup> Yet even the “pedestrian” works in category 4 represent finished products,

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913. Long ago, Justice Story observed, “In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. . . . [and] literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

often lavishly advertised and packaged to the public.

Moving on, there are many works that do not even qualify as works of high authorship. The next pyramid illustrates.



### C. Published Works

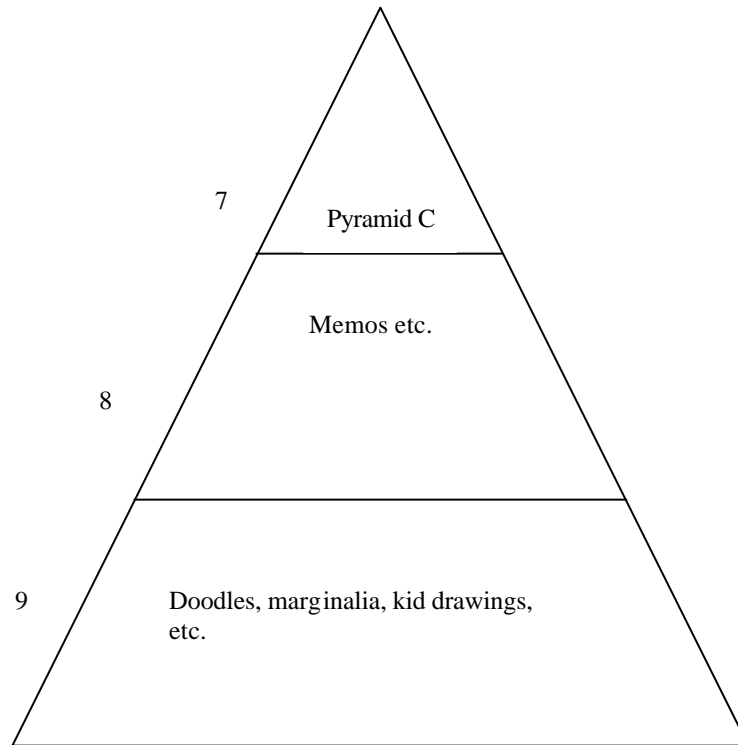
Again, the preceding pyramid (category 5) represents only a small fraction of published works. Even the total number of books offered by the combined publishers in the United States (to focus on the literary side of the equation) is but a small number when compared to the totality of otherwise published works.<sup>914</sup> For that reason, category 6 extends to catalogs, billboards, instruction sheets, packaging labels, and countless other similar products.

One is tempted to conclude that, at this point, we have reached the end of the copyright line. But that conclusion would

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914. In *Millar v. Taylor*, one of the Lords commented: "I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash." MARGARET J. M. EZELL, *SOCIAL AUTHORSHIP AND THE ADVENT OF PRINT* 126-27 (1999). As we shall see, the category of perishable trash digs much deeper still.

be entirely erroneous, as the last pyramid demonstrates.



#### D. “Works of authorship”

Continuing the progression, the top of this pyramid contains all the previous ones. Through this process of embedding, it can be appreciated that even the “oceans of bilge” to emerge from the printing press represent but the tiniest fraction of works that fall under the copyright umbrella.

Underneath all published works comes category 8. Here fall such matters as a “Memorandum to All Personnel Regarding Procedures to be Followed During Friday’s Fire Drill”; a posting seeking information from fellow denizens of a particular website regarding a pet item of interest; the sign at the corner describing and seeking the return of a lost cat; and countless other such ephemera.<sup>915</sup> On reflection, one realizes that this category

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915. One of the problems with our existing literary histories is that our current modes of analyzing authorship do not deal with this type of author who had no desire to publish or to “go public,” except to form theories to explain the motivation behind what we see as authorial self-destruction.

inevitably comprises even more items than all the preceding pyramids combined.<sup>916</sup>

The preceding category, although not of any lasting import, at least represents what can be called “deliberate works.” But copyright extends even more broadly than that. In category 9, we reach the nadir. Here fall, for example, the eighty drawings that my children produce atop the kitchen table on any given Sunday. Each falls within the scope of copyright protection<sup>917</sup>—notwithstanding that they all find a common fate in the trashcan when the “artists” tire and move onto the next project. It takes little imagination to realize how vast is this category at the base of the pyramid.<sup>918</sup>

\* \* \*

If works of high authorship occupy the apex of the pyramid and postmodernism has recently begun to take cognizance of billboards and airport paperbacks, those still occupy only the middle rung of the pyramid. At its base, the pyramid contains works of low authorship whose profusion dwarfs both the upper categories. At issue here are the innumerable notes, memoranda, doodlings, sketches, and other effluvia that flood the theoretical portholes for federal copyright protection.

The copyright on these innumerable works of low authorship attracts little attention<sup>919</sup>—inasmuch as no one bothers to copy the marginalia<sup>920</sup> and memoranda invoked above, those matters seldom devolve into litigation.<sup>921</sup> However, their theoretical inclusion within copyright protection cannot be doubted. Indeed, when Congress gingerly extended moral rights protection to

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SOCIAL AUTHORSHIP, *supra* note 914, at 42–43 (emphasis original).

916. One writer invokes examples of “subliterary works—comic strips, James Bond novels, exchanges with waiters in restaurants.” MULTIPLE AUTHORSHIP, *supra* note 670, at 16.

917. Refer to note 922 *infra*.

918. Photographs are but one species of copyrightable compositions, and they alone number in the billions. Refer to note 903 *supra*.

919. Indeed, the “authors” of these works are not always recognized as such outside of copyright doctrine—following the French dictionaries, some commentators define the term “author” as “not to be applied to anyone who writes a work; the term distinguishes among all ‘writers’ only those who have cared to have their compositions published.” SOCIAL AUTHORSHIP, *supra* note 914, at 16.

920. The practice of annotating margins goes back at least to Petrarch. *The Humanist as Reader*, *supra* note 24, at 207. It provided the venue for someone’s celebrated Last Theorem. Refer to Case 14 (Fermat) *supra*.

921. Even when litigation results, the court often does not bother to issue a published opinion. For an exceptional instance, involving an unpublished case arising over a record company’s letters, legal documents, press releases, and a bumper sticker, see *Copyright, Privacy and Fair Use*, *supra* note 669, at 235.

works of visual art, it expressed concern lest the janitors' cleaning up after the kindergarten class give rise to a new cause of action. For exactly that reason, it limited the right against destruction thereby conferred to "works of recognized stature."<sup>922</sup>

Where are the lines here? On the one hand, clearly drawing the line between "creative or literary" work and mere "popular fare" is impossible, either from a practical or theoretical standpoint.<sup>923</sup> Yet that does not mean that there is no distinction between the two. To revert to Oscar Wilde, whose photograph set the stage for a consideration of authorship in the United States,<sup>924</sup> "only an auctioneer could be equally appreciative of all kinds of art."<sup>925</sup>

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As set forth above, Northrop Frye debunks the notion of genius wholly disconnected from past creations.<sup>926</sup> Though the basic point seems sound,<sup>927</sup> it goes a bit far to deny that genius ever exists. Artists do, at times, exceed conventions, and new things occasionally arise. Yet, the point here is that copyright law does not require genius as the foundation for protection.

It is sometimes said that copyright law is an edifice built on the Myth of the Romantic Genius.<sup>928</sup> Regardless of whether one holds that such genius is always a myth or that the occasional Keats or Stoppard qualify as (at least partial) genii,<sup>929</sup> the scheme set forth above shows just how far the Copyright Act of 1976 departs from that model. It operates on something that, instead, might be called the Actuality of the Gothic Zhlob or the

922. 17 U.S.C. § 106A(a)(3)(B) (1994). Originally, the entire integrity right applied only to works of recognized stature. The House discarded that standard, given "the fact that, throughout history, many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created." H.R. REP. NO. 101-514, at 15 (1990). Nonetheless, it was restored at enactment, but solely with respect to the anti-destruction right. Accordingly, "a doting mother [cannot] sue her child's kindergarten teacher for throwing out her child's finger-painting." L.A. TIMES, Mar. 8, 1990, at B10, col. 1 (quoting Hirshhorn Museum deputy director).

923. MULTIPLE AUTHORSHIP, *supra* note 670, at 183.

924. Refer to Chapter II *supra*.

925. ANATOMY OF CRITICISM, *supra* note 159 at 25.

926. Refer to Chapter XII, section (A) *supra*.

927. See *From Authors to Copiers*, *supra* note 659, at 881 ("That an author's work should be completely original rather than derivative . . . would strike most sensible observers as supererogatory.")

928. See *The Several Futures of Property*, *supra* note 786, at 151.

929. I admit to adhering to the latter camp, in contrast to the dominant trend in the law reviews. See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 279 (1992); *Metamorphoses of "Authorship," supra* note 25. For a collection of such citations, see Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, 7 n.13 (1999).

Reality of the Pedestrian Scribbler.<sup>930</sup> For the works that the Act, in fact, protects, consist in overwhelming measure of the latter's products.

C. "Authorship" Solitary and Joint

The works in category 9 result, probably with few exceptions, from individual efforts. In other words, there is one, and only one, author who creates the doodle or drawing there at issue. By contrast, works in categories 1–5 probably almost never result entirely from individual authorship.<sup>931</sup> Instead, innumerable editors,<sup>932</sup> friends, colleagues, and kibbitzers contribute to the end product,<sup>933</sup> although the listed author is seldom gracious enough to credit them.<sup>934</sup> Even Keats's poetry demonstrably qualifies as a work of joint authorship.<sup>935</sup> The title of a wonderful book says it all: *Multiple Authorship and the Myth of Solitary Genius*.<sup>936</sup>

What happens when one of the uncredited collaborators has the bad taste to go public and demand a piece of the action? The first U.S. copyright case to present that scenario did not arise until 1991, when a researcher on a play about legendary Black comedienne Jackie "Moms" Mabley claimed a share of the

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930. Lest one suspect that this result is inadvertent, Congress explicitly stated that its standard for copyright protection did not include any requirement of "aesthetic merit." H.R. REP. NO. 94-1476, at 51 (1976). It also specified that the "term 'literary works' does not connote any criterion of literary merit or qualitative value." See *Copyright Law and the Myth of Objectivity*, *supra* note 549, at 181.

931. The phenomenon applies to the Dead Sea Scrolls, as everywhere else. "Our whole work was a collaborative venture, and there are bits of me in the articles of Milik, bits of Milik in the articles by me and so on." Strugnell Testimony at 17.

932. "Editors of printed works do what their title of editor has come to suggest: they 'edit,' that is alter, that expression that passes through their hands. (Yale's editor altered the foregoing sentence!)" THE PRESENCE OF THE WORD, *supra* note 845, at 116.

933. For a book-length treatment of this phenomenon, see MULTIPLE AUTHORSHIP, *supra* note 670.

934. General acknowledgments are universal. See, e.g., BEOWULF, *supra* note 48, at 219. But specifically barring the author's process as to individual elements is rare. See THE INVENTION OF LOVE, *supra* note 533, at 17 n.\*; THE ART OF BIBLICAL NARRATIVE, *supra* note 108, at 81 n.7. The current effort emphatically reflects many helpers, on both the general and specific planes. For example, refer to note 461 *supra*.

935. MULTIPLE AUTHORSHIP, *supra* note 670, at 25–49 (crediting "Keats and His Helpers").

936. MULTIPLE AUTHORSHIP, *supra* note 670. Robert Alter frequently invokes the uniqueness of the Bible, as a work that lacks a single artificer. See THE WORLD OF BIBLICAL LITERATURE, *supra* note 155, at 2, 4, 15, 154. But in light of Stillinger, perhaps the Redactor of yore is not wholly distinct from more modern poetasters and others who bear the moniker "author." See *id.* at 69 (acknowledging collaborative authorship, such as in films), at 202 (adducing an irresistible urge to compare Psalmist to Keats).



copyright, as a joint author.<sup>937</sup> Although past doctrine supported the researcher's claim, Judge Newman (writing for the Second Circuit) simply devised a new doctrinal ingredient to reject it: All of the participants in the venture must regard themselves as joint authors.<sup>938</sup> Inasmuch as that intent to share authorship status<sup>939</sup> was lacking in the case under consideration, the court rejected the researcher's claim to be a joint author.<sup>940</sup> Other courts have unhesitatingly followed suit.<sup>941</sup> As a result, researchers, editors and other contributors do not qualify as a "joint author" with the named principal.

But that holding leaves open the possibility that the editor or collaborator, with respect to her own contributions, still qualifies as an individual author. On that reading, the work would be locked up under conflicting controls. When the first case to present that wrinkle arose in 1998, the court again simply invented new doctrine to reject it.<sup>942</sup>

In sum, the "author" in copyright law represents a construct.<sup>943</sup> Regardless of the facts, the courts invoke doctrines,

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937. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). See generally *New Wine Bursting From Old Bottles*, *supra* note 786.

938. 945 F.2d at 508–09. See generally 1 NIMMER ON COPYRIGHT § 6.07.

939. A later section will explore the intent to author. Refer to Chapter XVI, section (E) *infra*. Note that the instant intent to share authorship status lies at a further point down the intentionality spectrum. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) ("[P]utative coauthors make objective manifestations of a shared intent to be coauthors.").

940. *Childress*, 945 F.2d at 509.

941. *Id.* at 507; *Clogston v. Am. Acad. of Orthopaedic Surgeons*, 930 F. Supp. 1156, 1159 (W.D. Tex. 1996); *Rubloff Inc. v. Donahue*, 31 U.S.P.Q.2d 1046, 1050 (N.D. Ill. 1994); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994); *Respect, Inc. v. Comm. on Status of Women*, 815 F. Supp. 1112, 1120 (N.D. Ill. 1993).

942. The case raised the issue whether a dramaturg who added more than *de minimis* contributions to the play *Rent* thereupon qualified as its co-author. *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). Given that the author "retained and intended to retain at all times sole decision-making authority as to what went into" the play, his billing of himself as sole author (albeit listing his contributor on the script's final page as "dramaturg"), and other evidence indicative of his intent, the court had no hesitation in denying the contributor co-author status.

But that conclusion raises a further conundrum. Her contributions to the play of more than *de minimis* content qualified the dramaturg as an author of copyrightable material; given denial of her status as a co-author, the dramaturg thereupon argued that "she must have all of the rights of a sole author with respect to her own contribution." In that particular case, the court was able to duck the issue on procedural grounds. For a general proposal on how to avoid difficulties here, see 1 NIMMER ON COPYRIGHT § 6.07 (invoking doctrine of implied licenses).

943. As Emily Dickinson stated, "When I state myself as the Representative of the Verse — it does not mean — me — but a supposed person." MULTIPLE AUTHORSHIP, *supra* note 670, at 6.

as necessary, to focus the target on the author whom the law regards as the person in control.<sup>944</sup>

*D. Evaluation of Changes*

The foregoing innovations of the 1976 Act appear monumental. But appearances can be deceptive. For, in reality, that enactment changes very little about how U.S. law, considered as a whole, treats authors and their works.

(1) Consider first the abstraction from concrete to idealized types.<sup>945</sup> Before the effective date of the current Act in 1978, novelists, newspaper reporters, and poets secured copyright protection for their products. Since 1978, those same individuals obtain protection for their “literary works.” But even at present, such protection arises only if their efforts are fixed in a tangible medium of expression. In other words, a poet who composes in her head and only declaims orally has not obtained federal statutory protection for her works.<sup>946</sup>

So where is the difference? In short, there is little. The nomenclature has changed from “book,” “newspaper,” and “poem” to the omnibus category of “literary work.” But the protection remains the same.<sup>947</sup>

(2) Let us move next to the innovations described above as to joint authors.<sup>948</sup> The important point to realize here is that when the issue first arose in 1991, the court simply created new doctrine, untethered to the statutory text. In other words, the novelty here is not a function of a difference between congressional drafting of the 1976 versus the 1909 Act. Instead, it reflects the need to do justice at a time when a party urges an argument that, albeit technically correct, is viewed by the court as subverting justice. The change in doctrine reflects evolution in fact patterns presented for resolution, not a break imposed by passage of the 1976 Act.

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944. Otherwise stated, “the ‘fiction’ of the author enables us to locate an *author of the fiction*.” Geoffrey Nowell-Smith, *Six Authors in Pursuit of The Searchers*, in *THEORIES OF AUTHORSHIP*, *supra* note 911, at 221, 223.

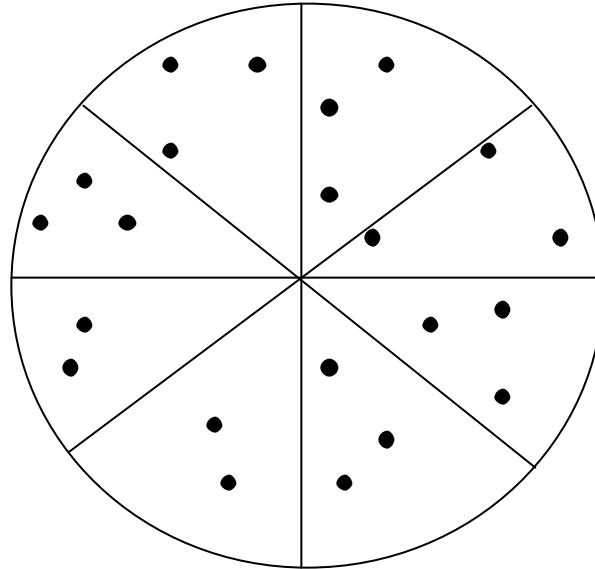
945. Refer to section (A) *supra*.

946. By contrast, a poet who writes down her work may still be able to vindicate protection after the last exemplar of it burns up. See *Adams and Bits*, *supra* note 194, at 223.

947. By a 1980 amendment to the 1976 Act, computer software was unambiguously brought into protection as a species of “literary work.” Until that time, it was unclear whether such products could achieve copyright protection, under either the 1909 or 1976 Acts. See 1 NIMMER ON COPYRIGHT § 2.04[C].

948. Refer to section (C) *supra*.

(3) Finally, consider the incommensurate vastness of works under the 1909 Act.<sup>949</sup> It must be conceded that this innovation incomparably widened the reach of federal statutory copyright



protection in the United States. Surely here, therefore, it stands to reason that a massive change must have occurred. A graph illustrates. Shown below is the universe of works of authorship, as protected by the 1909 Act:

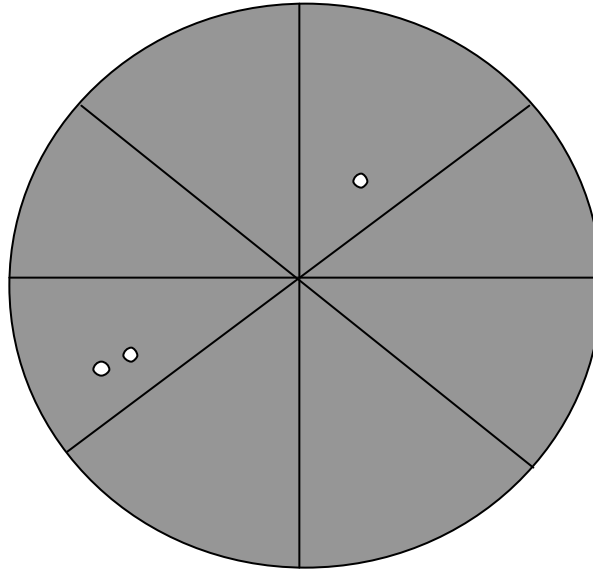
### **E. Works of authorship protected by 1909 Act**

Each slice of the pie set forth in Figure E represents a distinct category of authorship: books, motion picture photoplays, photographs, etc. Given that the 1909 Act conferred protection only on published works,<sup>950</sup> it is only the small black areas within each wedge that represent works covered by statutory copyright

949. Refer to section (B) *supra*.

950. See *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 287–88 (2d Cir. 1999) (“Under the 1909 Act, an unpublished expression was protected only by a common law copyright.”). There was also a limited exception, relating to unpublished works registered for protection. See 2 NIMMER ON COPYRIGHT § 7.16[A][2][c]. Registrations under that category never amounted to more than a trickle. Cf. William S. Strauss, COPYRIGHT OFFICE STUDY NO. 29: PROTECTION OF UNPUBLISHED WORKS 6 n.53 (1957) (quoting 1938 letter from Register of Copyrights characterizing this provision as “a departure from the normal process of securing copyright”). Accordingly, it would not even rise to the level of “registering” on the above graph.

prior to 1978. Manifestly, those shaded areas cover only a tiny



fraction of the entire universe.<sup>951</sup>

By contrast, statutory protection under the 1976 Act covers the field. A separate chart illustrates:

#### **F. Works of authorship protected by 1976 Act**

As a glance at Chart F readily reveals, the field is now reversed. Almost the entire field of works of authorship is now subject to statutory protection.<sup>952</sup> The few remaining unshaded areas represent the residual areas of common law copyright that remain, even after passage of the 1976 Act. Included here are sound recordings produced before February 15, 1972,<sup>953</sup> and unfixed works, such as jazz improvisations and oral sermons.<sup>954</sup> Even collectively, those categories constitute but a small percentage of works of authorship.

951. One could quibble about some particulars on the chart. For instance, perhaps the wedge representing the class of “newspapers” should be almost entirely darkened, on the assumption that few unpublished newspapers were produced prior to 1978. But the point remains the same—the universe of the published was dwarfed by the unpublished.

952. Given the conceptual focus of this inquiry, it does not focus on practical details, such as expiration of term. Were a wedge to be included for novels published in the nineteenth century, for example, it would be entirely blank.

953. See 2 NIMMER ON COPYRIGHT § 8C.03.

954. See 1 NIMMER ON COPYRIGHT § 2.02.

At first blush, the juxtaposition of Charts E and F demonstrate that a radical shift has occurred. Nonetheless, deeper inspection reveals that the 1976 Act, in some sense, changed very little in this realm. Consider the perspective of a foreigner trying to discover the scope of copyright protection in the United States. As of 1970, Chart E reveals that very few works fell within the scope of statutory copyright. Does it follow that unshaded areas were without any protection?

It does not. For from the inception of the United States through the pendency of the 1909 Act, another doctrine of copyright law pertained: common law copyright.<sup>955</sup> Under that doctrine, the laws of the several states conferred protection on works of authorship that had not achieved statutory protection. U.S. copyright law, in short, occupied two parallel tracks.<sup>956</sup>

When those two tracks converged in 1978, the *corpus* of works of authorship subject to legal protection within the United States basically remained constant. Thus, the innovation of the 1976 Act was not to *recognize* new species of copyright protection. Instead, it was to *federalize* the field. Before 1978, copying most works would lead to redress in state courts; since that day, federal courts have had exclusive jurisdiction over the infringement realm. From the perspective of our mythical foreigner, the distinction between being hauled before the Superior Court for Los Angeles County, as opposed to the United

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955. The terminology is inaccurate, inasmuch as such protection is typically statutory. See, e.g., CAL. CIV. CODE § 980 (West 1982). Indeed, a convincing argument maintains that there never was such a beast as common law copyright. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1129–34 (1983). Accord DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 128 (Univ. of Chicago Press 1996) (1941) (quoting Blackstone).

956. Alongside but wholly apart from the Copyright Clause and statutory enactments, various states of the United States have accorded copyright protection as an outgrowth of their British common law patrimony. Thus, copyright law in the United States has developed along two parallel tracks: federal statute and state common law. For example, a manuscript of a novel completed in 1970 would, at creation, have automatically been protected by the common law of the state in which it was composed, either in perpetuity if it remained unpublished or until publication when such protection would have been forfeited. However, if the statutory formalities in effect at the time of publication were satisfied, federal protection would then begin for a set term of years. This scheme persisted through the end of 1977, after which the current Copyright Act went into effect.

David Nimmer, *United States*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 1[1] (1999) (footnotes omitted).

States District Court for the Central District of California, whilst significant, is not decisive.<sup>957</sup>

In sum, Chart F, which shows works protected by statutory copyright since 1978, is equally descriptive of works protected before that date, as long as one aggregates both statutory and common law copyright into the mix. Copyrightable works of authorship, considered as a whole, underwent no massive enlargement by virtue of passage of the 1976 Act.

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In conclusion, the law in the United States regulating works of authorship has lumbered steadily along over the centuries. Even aspects that appear innovative are, on inspection, simply preservative. These considerations must underlie any attempt to map the geography of “authors” under copyright law.

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957. Litigants may have strong reasons to prefer one court over another. Generally, a plaintiff with a strong case prefers the greater speed and flexibility of federal court, with defendants concomitantly favoring a state forum. But there are wide divergences in both systems, thus precluding a blanket rule.

## XV.

## THE INSTABILITY OF TERMS

When Michelangelo turns his imitation into a forgery,<sup>958</sup> the ancient originals he imitates may be perceived as *forged* in another sense of the word—they are something made or wrought by men.

David Quint<sup>959</sup>

The epigraph is hardly needed to make the point that a single word, no less than a text, can manifestly bear multiple meanings. Copyright law, it seems, is constructed out of such polymorphism—as demonstrated by its purpose to foster the progress of “science,” a term that bears the opposite meaning today from when the Constitution was formulated.<sup>960</sup> As previously noted, even the term “intellectual property” shades into considerations of intellectual “propriety.”<sup>961</sup> The same phenomenon extends to copyright’s fundamental terms, not excluding its “copy” component.

Consider a *copy*, by which we mean the antithesis of an *original*. Whereas an “original Van Gogh” might fetch \$20 million, a “copy” of the identical work could go for a few bucks.<sup>962</sup> The etymology here is historically transverse: When printer Jacob Tonson defended himself against charges of corrupting the manuscript for Milton’s *Paradise Lost*, he averred:

the several places he affirms were altered by y<sup>e</sup> printer, are exactly true to the cobby.<sup>963</sup>

Because what we call the “original” used to be known as the “copy,” the very root of the word *copyright* means the antithesis today of its historical meaning.<sup>964</sup>

The same applies to our concern, noted above, that copyright

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958. “In a sense, plagiarism (presenting another’s work as one’s own) is the inverse of forgery (presenting one’s own work as another’s).” *Copy Wrong*, *supra* note 618, at 511.

959. ORIGIN AND ORIGINALITY IN RENAISSANCE LITERATURE, *supra* note 82, at 4. Quint recounts the delightful tale of how Pierfrancesco de’ Medici induced Michaelangelo to trick up some marble that the young master had just carved to look like an ancient find. Cardinal San Giorgio was too “smart” to accept delivery of the “forgery.” *Id.* at 1.

960. Refer to Chapter II *in fine supra*.

961. Refer to Chapter IX, section (C)(1) *supra*.

962. See 2 NIMMER ON COPYRIGHT § 8D.06[A][2].

963. THE NATURE OF THE BOOK, *supra* note 24, at 127.

964. See *id.* at 105. For good measure, the same applies to “private.” *Id.* at 129.

exists to protect works bearing a subjective flair.<sup>965</sup> Father Ong demonstrates that the word *subjective* formerly meant “pertaining to the subject as that in which attributes inhere,” which corresponds to our current word *objective*. Correlatively, *objective* used to mean “existing as an object of consciousness,” which corresponds to none other than our current word *subjective*!<sup>966</sup>

With such semantic confusion rife, is it any wonder that errors proliferate? As a judge who has made much copyright doctrine recently noted:

My view that juries have a difficult time understanding the principles of such unfamiliar fields of law as copyright and trademark is based on the fact that judges, including myself, have difficulty fully grasping the subtleties of these doctrines, even though we deal with them far more often than do juries.<sup>967</sup>

\* \* \*

Following the above examination of the progression of the word “copy” in the copy/original dichotomy, it is time to look to the latter half of the equation. Even more movement characterizes “original.” Consider by way of prelude the conflation that occurs in popular language:

MARY: I’m so glad that you got rid of that clunky ten-year-old van you were driving and bought yourself a new car.

JOHN: Yup — a ‘51 T-Bird. Ain’t she a beaut?

The “new” car that John purchased is actually a half-century old—far more aged, indeed, than the “old” one that he discarded. Yet the speakers are not confused.

Had they been born in Troyes or Avignon, their language arguably would have been more precise. Thus, if Jean were to sell his current car and buy a Citroën straight off the factory assembly line, Marie might call it *neuf*. By contrast, if Jean purchased a used Renault from Pierre, it would be *nouveau* to Jean, albeit not *neuf*.

These considerations help untangle *originality* as it exists in

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965. Refer to Chapter III *supra*.

966. See THE PRESENCE OF THE WORD, *supra* note 845, at 225–26.

967. *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 136 n.5 (2d Cir. 1998) (Newman, J., dissenting in part), *rev’d*, 529 U.S. 205 (2000). We last met Judge Newman as the author of *Childress v. Taylor*. Refer to note 937 *supra*. For an example of his scholarly writing on the subject, see Jon Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC’Y 12 (1989).



U.S. copyright law. To acquire protection, a work of authorship need not be *neuf*, in the sense of something brand new to the world. That province, instead, is the domain of patent law, which contains a requirement of *novelty*.<sup>968</sup> Instead, copyright protection requires only that a work of authorship be *nouveau*, i.e., new to its creator or, in the jargon of the field, “independently created,” as opposed to being copied from prior sources.<sup>969</sup> It is for that reason that Learned Hand conjured up the theoretical possibility of a “new” *Ode on a Grecian Urn*.<sup>970</sup>

The previous part has commented on the wobbliness of *author*—the term can fluctuate between an originator and an expert.<sup>971</sup> The related term *original* in the copyright lexicon betrays even greater instability. Consider the following formulation: “A recent article by John Meikle sheds strikingly original insight onto that long-simmering controversy over the Constitutional Framers’ original intent.”<sup>972</sup> The first usage of *original* in that sentence connotes “new”; the second, “old.”<sup>973</sup> Thus, the identical term points in two antithetical directions.<sup>974</sup>

As Elizabeth Eisenstein<sup>975</sup> notes, the old meaning of *original* is “closest to divine inspiration,” whereas its new meaning is “to break with precedent.”<sup>976</sup> This transvaluation carries ultimate significance for copyright purposes. An original work—in its original sense—would be one that reaches back to origins. Thus,

968. 35 U.S.C. § 102 (1994).

969. 3 NIMMER ON COPYRIGHT § 12.10[B][2][b].

970. Refer to Case 23 (The Magician) *supra*.

971. Refer to Chapter II *supra*.

972. The quote is invented, given that I could not find an actual example of such obvious conflation. Most commentators keep the word consistent—in the same sentence, at least. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985). But Ralph Waldo Emerson might come close: “The originals are not original.” *The Author Effect After The “Death of the Author,” supra* note 23, at 917.

973. English, Hebrew, and many other languages all contain words that denote antonymic meanings. See ROBERT ALTER, *THE DAVID STORY* 288 n.30 (1999). In Jewish exegetical circles, there is likewise a word that means “old” simultaneously with its etymology connoting “new.” See Yaakov Elman, *Love in the Afterlife*, in RABBINIC FANTASIES 239, 251 n.8 (David Stern & Mark J. Marsky eds., 1990) (commenting on the word *hiddushim*).

974. What of the related term *creative*? Etymologically, “the words’ roots do nothing to help distinguish ‘creating’ from ‘originating,’ or being the source of something.” *The Personality Interest of Artists and Inventors, supra* note 121, at 101. In music, a way to *augment* a passage is through a *crescendo*, at least in terms of volume. Both words derive from Latin roots meaning *to increase*. In turn, those words beget (Latin *creo*) the English words *author* and *creator*.

975. George Steiner makes a similar point. See REAL PRESENCES, *supra* note 89, at 27–28.

976. THE PRINTING PRESS AS AN AGENT OF CHANGE, *supra* note 17, at 192.

Charlie's copying of *A Tale of Two Cities*, Shelley's plagiarizing of Keats, and Marklund's aping of Dardel are all *original* in this strict sense.<sup>977</sup> The apotheosis of originality in this old sense would be Homer, who stitched together fragments not of his own creation to yield the epic reaching farthest back to the origins of literature.<sup>978</sup>

By contrast, copyright law emphatically rejects protection for the likes of Charlie, Shelley, and Marklund. Their creations are each poster children for works lacking *originality*, in the new sense,<sup>979</sup> as none reached into the interiority of consciousness to produce a *subjective* work (as we define "subjective" today). Yet who could deny that Charlie's copying of Dickens—or, better, the Bard of Stratford-upon-Avon;<sup>980</sup> best, Homer<sup>981</sup>—yields a product of far greater *originality* than the scrivener would produce if confined to the product of his own unskilled mind?<sup>982</sup>

The change in *originality* that Eisenstein underlines mirrors the progression of *author* from the Hobbesian to its Romantic sense.<sup>983</sup> Judge Dorner, as noted above, conflated *author* with *authority*. The same confusion intrudes here. Qimron deserves copyright protection if his work was *original* (1) but not if it was *original* (2)—in other words, if (1) it came independently from his head, as opposed to (2) being a recapture of an original text. Though Qimron's work may be celebrated in scholarly circles as (2), its failure to qualify as (1) forfeits copyright protection.

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977. Refer to Cases 11, 12, and 23 (The Doppelgänger, The Forgery, and The Magician) *supra*.

978. Homer was not writing as the result of his own personal "genius." ORALITY AND LITERACY, *supra* note 1, at 21. His *rhapsody*, as previously remarked, literally represents a *stitching together* of songs that had been handed down to him through tradition. *Id.* at 23, 131, 145–46. See generally THE PRESENCE OF THE WORD, *supra* note 845.

979. One commentator urges that copyright forsake its traditional "originality" inquiry in favor of an evaluation of the "effect on the broader culture through modulation of existing convention and audience interaction with the text." *Beyond Metaphor*, *supra* note 474, at 752.

980. I refer to William Shakespeare, or the Earl of Oxford, or Francis Bacon, or Queen Elizabeth I, or Alistair Cooke, or whoever else he/she/they might be. See Peter Jaszi, *Who Cares Who Wrote "Shakespeare?"* 37 AM. U. L. REV. 617, 618 (1988).

981. But at the dawn of writing, Homer was viewed as a threat. For a wonderful explanation, see generally ERIC A. HAVELOCK, PREFACE TO PLATO (1963). For a Derridean twist, see AVATARS OF THE WORD, *supra* note 52, at 14–28.

982. Perhaps this sensibility underwrites Harold Bloom's sentiment: "[O]nly one moral attitude toward plagiarism is possible in a literary context. This is that only great writers should be plagiarized. To copy second-rate authors indeed is immoral." *Plagiarism—A Symposium*, N.Y. TIMES LITERARY SUPP., Apr. 9, 1982, at 413, 413 *quoted in Beyond Metaphor*, *supra* note 474, at 757 n.138 (alteration in original).

983. Refer to Chapter II *supra*.

XVI.  
INTENTIONAL STEP TOWARDS THE “AUTHOR”

[Let us not fall into] the Archimedes fallacy: the notion that if we plant our feet solidly enough in Christian or democratic or Marxist values we shall be able to lift the whole of criticism at once with a dialectic crowbar.

Northrop Frye<sup>984</sup>

The moment arrives to attempt a reconciliation between copyright theory and literary theory. More broadly, previous chapters have adduced a wealth of copyright decisions, initiated by “extreme copyright” hypotheticals, juxtaposed against literary theory and theological considerations, all framed by the Scrolls controversy. How do the various pieces cohere? Where can we turn to find some overarching considerations that help ground these notions? This chapter proposes a standard looking to an “intent to author” as the missing link.

A. *First Step Towards Harmonization*

A previous chapter has set forth paradigmatic Case Studies of non-authorship. The single example that presents the least possibility of contrary argument is *The Reader*.<sup>985</sup> No one should claim that by virtue of reading a literary work, the lector gains a copyright interest over it. It is equally undisputed that in the case of *The Translation*, a copyrightable text does emerge.<sup>986</sup> One need only consult the numerous ways that a three-word phrase—*miqsat ma’ase ha-Torah*—has been translated into English<sup>987</sup> to reflect that myriad possibilities exist to translate any appreciable text from one language to another.<sup>988</sup>

Yet from the perspective of literary theory, there is more than simply an affinity between the task of reading and of translating. Indeed, George Steiner, quoting from Posthumus’s monologue in *Cymbeline*, demonstrates at great length (not to

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984. ANATOMY OF CRITICISM, *supra* note 159, at 12.

985. Refer to Case 10 (*The Reader*) *supra*.

986. Refer to Case 3 (*The Translation*) *supra*. But for a doctrinal glitch that could doom *The Translator*, refer to Chapter VI, section (B)(2) *supra*.

987. For no less than nine translations of that phrase, refer to note 229 *supra* and accompanying text. Refer also to note 691 *supra*.

988. Of course, at issue here is a literate translation, not a stilted matter such as an interlinear translation. Refer to Case 20 (*The Pedant*) *supra*.

mention with consummate virtuosity) that any reader's act of understanding the text is isomorphic with translating it.<sup>989</sup>

So which is it? Is the operative act here one of reading (uncopyrightable) or of translating (copyrightable)? Even though literary theory might construe it as the latter, copyright theory affords no basis for construing the task as anything but the former. For whatever cogitation occurs in the reader's mind, and no matter how indistinguishable it might be from the activity in which a translator engages, that cerebration is not fixed within a tangible medium of expression, and hence falls outside the realm of copyright regulation.<sup>990</sup>

Our first step towards harmonization, accordingly, has already landed us in the soup.

### B. *Perils of Grand Theories of Unification*

Many of the current models that physicists invoke to describe subatomic particles are so complex, seemingly *ad hoc*, and weighed down in contradictory details that they strike observers as, in a word, "ugly."<sup>991</sup> It is felt that they cannot be "true" if they have insufficient "beauty."<sup>992</sup> Is that perspective accurate? Does Keats's equation—beauty is truth, truth beauty<sup>993</sup>—apply to science as well as poetry? (Or, to state the matter differently, is the *Ode on a Grecian Urn* a poem about science, or about the statute that fulfills the constitutional purpose of promoting "the progress of science"?)

It would be nice to be able to reformulate "copyright law as an expression of an overarching grand theory"<sup>994</sup> in order to reconcile the various domains canvassed above. The inability to alight on such a theory threatens to cause a permanent discontinuity between the theory of literature and the law governing literature. A certain sensibility rebels at that state of affairs.<sup>995</sup>

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989. GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 1–50 (3d ed. 1998).

990. For a playful suggestion to the contrary, see *Brains and Other Paraphernalia of the Digital Age*, *supra* note 455. Note the benefits of non-fixation—"fixity brings with it rapid obsolescence." *AVATARS OF THE WORD*, *supra* note 52, at 41.

991. See *THE MAN WHO LOVED ONLY NUMBERS*, *supra* note 99, at 25.

992. Refer to Chapter VII, section (C)(2)(b) *supra*.

993. In the ultimate analysis, that equation reaches to the realm of theology. See *REAL PRESENCES*, *supra* note 89, at 216.

994. Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 235 (1991).

995. See Timothy Ferris, *Grand Unification Theories: Faith in Ultimate Simplicity*, in *NEXT: THE COMING ERA IN SCIENCE* 160, 170–71 (Holcomb B. Noble ed., 1988).

Notwithstanding that sensibility, the faith that a theory exists out there, unifying copyright law and literary theory, would seem to fall squarely within the “Archimedes fallacy.” In other words, a faith in the existence of a Grand Unified Theory of Copyright might exalt rationalism to an irrational extent.<sup>996</sup> The reach of copyright protection is simply too broad for such theories to work. Instead, we must open ourselves to “the fact that the law of copyright has emerged as an instrument able to regulate and protect more than one form of authorship and more than one kind of work.”<sup>997</sup>

Molly Nesbit captures the matter nicely. Though her words are directed at French copyright law, they apply with equal force to the U.S. situation:

Authors of all kinds have for a long time been flatly equated in the law, though the equation is not made using the familiar terms like creativity, genius, and ancient lyric breath. It is instead an equation of rights. The legal definition of the author is windless, dry, and plain: the author is given rights to a cultural space over which he or she may range and work; all authors share the same cultural space; they are defined by their presence there as well as by their rights to it. Through the law, then, we can gauge the author and the work. But let us not look to the law for the easy answer: the same law that defines the author is responsible for much of the confusion about what authors were and are.<sup>998</sup>

It remains to add only that we cannot look to theory, either, for the easy answer. Theoreticians debate endlessly about the validity of their respective interpretations,<sup>999</sup> and even champions of the death-of-the-author school demand punctilious recognition for their own authorial contributions.<sup>1000</sup>

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996. That problem afflicted Frazer in composing *The Golden Bough*; he acted as a “Biblical scholar who thought that he was a scientist . . . and hence was subject to fits of rationalism, which seem to have attacked him like a disease.” THE GREAT CODE, *supra* note 550, at 35, 38.

997. *Dropping the Subject*, *supra* note 25, at 110 n.32. Copyright protection itself is not an historical inevitability; it is simply a contingent response to a web of stimuli that took shape starting in the eighteenth century. See *Paradigms in Copyright Law*, *supra* note 664, at 205–09.

998. *What Was an Author?*, *supra* note 804, at 230.

999. See REAL PRESENCES, *supra* note 89, at 75–79.

1000. “The cult of the author, perhaps especially the cult of the poststructuralist authors themselves, persists.” WHAT IS AN AUTHOR?, *supra* note 11, at i. Note that one magazine contained an ad for contributions “from such *authors* as Stanley Cavell, Jacques Derrida, Stanley Fish.” MULTIPLE AUTHORSHIP, *supra* note 670, at 186–87 (emphasis added). See *The Personality Interest of Artists and Inventors*, *supra* note 121,

C. *High Culture and Low*

Those last considerations provide entrée to the world of culture. Again, Molly Nesbit:

The law did not even try to draw lines between good and bad work in these media and it did not presume to erect criteria for aesthetic quality. Slipshod failures and drawn reproductions were covered by the same rights as the masterpiece: a hack and a Mallarmé<sup>1001</sup> would both be called authors; an engraver of Salon paintings had just as much claim to the title as an Ingres. The cultural field is broad, said the law. It covered kitsch, avant-garde, low, high, and middle brow work with equal justice. Authors were not necessarily artists.

The law did not divide culture into states. It set out a single field where standards were blurred and the different hierarchies of the arts eroded, irrelevant. Others in academies and newspaper columns and university lectures could and did quibble, insisting on other definitions of culture with genres, standards, traditions, and rules. The law let these storms erupt around it. It held like bedrock, content to make only basic distinctions. . . . The law had already leveled the academic distinctions; in its very practical, authoritative terms, culture was flat.<sup>1002</sup>

An obvious contrast exists between “high or elite culture against the surrounding environment of philistinism, of schlock and kitsch, of TV series and *Reader’s Digest* culture . . . . But many of the newer postmodernisms have been fascinated precisely by that whole landscape of advertising and motels, of the Las Vegas strip, of the late show and Grade-B Hollywood film, of so-called paraliterature with its airport paperback categories of the gothic and the romance, the popular biography, the murder mystery and the science fiction or fantasy novel.”<sup>1003</sup>

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at 94.

1001. George Steiner divides literary history into two periods: (1) from the Bible to Mallarmé; and (2) thereafter. See REAL PRESENCES, *supra* note 89, at 96.

1002. *What Was an Author?*, *supra* note 804, at 233–34.

1003. *Authority, history and the question of postmodernism*, *supra* note 85, at 66, quoting FREDRIC JAMESON, POSTMODERNISM AND CONSUMER SOCIETY 112 (1984). See Paul de Man, *Semiology and Rhetoric*, in TEXTUAL STRATEGIES, *supra* note 155, at 121, 128–29 (“[S]ubliteration of the mass media” yields “a de-bunker of the *arché* (origin), an ‘Archie Debunker.’”). Note that de Man’s early biography matches de Vaux’, refer to note 219 *supra*, although colleagues managed to forgive him his Nazi past. See Jacques Derrida, *Like the Sound of the Sea Deep Within a Shell: Paul De Man’s War*, in CRITICAL INQUIRY, at 560, 561 (1988) (“To judge, to condemn the work or the man on the basis of what was a brief episode, to call for closing, that is to say, at least figuratively, for

Literary theory places great demands on us to jettison authors.<sup>1004</sup> As a reaction against the reductionism of the post-structuralists, in which the reader's role reigns supreme, there has been a counter-revolutionary attempt to restore literature to the privileged status that it used to enjoy over "newspapers, . . . advertisements, sex manuals" and other like texts.<sup>1005</sup> But that move goes too far to rescue the copyrightable from the un-. For no matter how fervently most judges would subscribe to the esthetic privilege of *Tristram Shandy* over "Factory Blow-out Sale on Toilets!," it is a fact of copyright life that the same infinitely capacious category in the statute, "literary works,"<sup>1006</sup> applies not only to novels<sup>1007</sup> but also to newspapers,<sup>1008</sup> advertisements,<sup>1009</sup> and, yes, sex manuals.<sup>1010</sup>

Indeed, starting with Holmes's *diktat* quoted above—which was enunciated in the context of vindicating copyright for an advertisement!—received gospel has held, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>1011</sup> Judges simply have traditionally eschewed esthetic judgments in copyright cases.<sup>1012</sup>

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censuring or burning his books is to reproduce the exterminating gesture against which one accuses de Man of not having armed himself sooner with the necessary vigilance.").

1004. The task of a criticism which would be historical is to reveal these displaced authorities which enable the constitution of specific individuals at specific moments as "authors." It is only in this way that knowledge . . . will produce an authority which is divorced from the totalising pretensions of a modernist knowledge with its drive to power and mastery, a mastery which requires slavery and which requires one individual to be recognised and identified as an essentially aristocratic master, an "author."

*Authority, history and the question of postmodernism, supra* note 85, at 69.

1005. THE PLEASURES OF READING, *supra* note 527, at 23.

1006. 17 U.S.C. § 102(a)(1) (1994).

1007. Refer to note 161 *supra* (discussing copyright protection for *Sally Hemmings*).

1008. *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 226–27 (D.N.J. 1977).

1009. *Canfield v. Ponchatoula Times*, 759 F.2d 493, 497 (5th Cir. 1985).

1010. *Respect Inc. v. Comm. on the Status of Women*, 781 F. Supp. 1358 (N.D. Ill. 1992). On the other hand, although I have declined to include an illustrative Case, refer to Chapter III *supra*, the category of manual sex lies outside copyright protection. *But see* *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 830–31 (C.D. Cal. 1998) (holding that the unauthorized dissemination over the Internet of a videotape depicting sex between Poison's Bret Michaels and actor Pamela Anderson Lee violated their public distribution right in the copyrighted material).

1011. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Refer to Chapter II *supra*. For an entire article attempting to debunk Holmes's observation, see *Copyright Law and the Myth of Objectivity, supra* note 549.

1012. A recent case begins by proclaiming, "We are not art critics, do not pretend to be and do not need to be to decide this case." *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999).

Therefore, high or low, cultural considerations have played very little overt roles in shaping the law that governs the cultural industries.

#### D. *The Legal Enterprise*

From the copyright standpoint, philosophy seems to represent a dead end: No theory encapsulates the whole.<sup>1013</sup> The law has been written by lawyers, whose bent, in the common law system at least, “is more pragmatic than metaphysical.”<sup>1014</sup> (Introducing a work by Roland Barthes, Susan Sontag calls law “an insatiable project, endlessly producing and consuming ‘systems,’ metaphor-haunted classifications of an ultimately opaque reality.”<sup>1015</sup>)

Part One observed that cases are won not based on the *facts*, but based on the *evidence*.<sup>1016</sup> In parallel fashion, the evidence is applied to *doctrine* evolved out of previous copyright cases, not to *theory* abstracted out of the latest scholarly journal.

It may be for precisely this reason that copyright law “singularly fails to depend on the (supposed) attributes of individual subjects for the foundations of its provisions and persists in treating of legal subjects with indifference to any formal doctrine of subject.”<sup>1017</sup> Instead of lofty theory, the life of copyright law has been a continuous search for how best to effectuate “consequential positivities.”<sup>1018</sup> When we “lower our gaze from the heights of dialectical history and the principle of critical linguistic theory,” we can “glimpse a crucial possibility: perhaps book and text, print and discourse, author and subject

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1013. Philosophical reticence need not be viewed with disdain; it has been the source of flexibility. “Adopting a theory means living with its consequences.” *Distant voices, real lives*, *supra* note 799, at 75.

1014. David Vaver, *Moral Rights Yesterday, Today and Tomorrow*, 7 INT’L J.L. & INFO. TECH. 270, 276 (1999). To turn from my friend, David Vaver, to my teacher, Arthur Leff, law represents “an attempt to create and maintain a coherent species of ‘logic’ that would not too ridiculously fail to reflect, or even refract, experience.” Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 989 (1978).

One commentator takes the matter further. Noting that most nineteenth century doctrine about copyright originality was made by Justice Miller, he researches that jurist’s biography, concluding: “Neither his tastes nor the exigencies of a busy life were conducive to theoretical reflections.” Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 835 (1993) (quoting CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 248 (1939)).

1015. Susan Sontag, *Preface* to ROLAND BARTHES, *WRITING DEGREE ZERO* xx (1968), *cited in The Personality Interest of Artists and Inventors*, *supra* note 121, at 180 & n.367.

1016. Refer to Chapter V *supra*.

1017. *Dropping the Subject*, *supra* note 25, at 102, quoting P.Q. Hirst.

1018. Brad Sherman, *From the Non-original to the Ab-original: A History*, in OF AUTHORS AND ORIGINS, *supra* note 19, at 111, 116.



do not meet in some final point of synthesis in the subject but occupy irreducibly different historical and theoretical domains.”<sup>1019</sup>

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On reflection, the matter should not be otherwise. We can applaud courts for applying the latest advances in DNA research to free the innocent from criminal charges, and even for taking cognizance of scientific advances in patent cases, without simultaneously following those who urge courts to make parallel strides into literary theory in copyright cases.<sup>1020</sup> George Steiner makes a convincing case that “theory” legitimately applies to those former realms where subsequent investigation can confirm or disprove (as with Darwinian evolution and Freudian psychoanalysis, respectively), but that it is incoherent to speak of “literary theory,”<sup>1021</sup> for which there can be no empirical testing whatsoever.<sup>1022</sup>

It would be not only bizarre if the Fourth Circuit allied itself with Derrida, the Federal Circuit went Foucauldian, and the Second embraced Steiner/Stillinger while the Ninth adopted Alter or Frye.<sup>1023</sup> Literary theory is never-ending, and subject to constant revision. Judges have neither the institutional competence to resolve the critics’ disputes, nor the time to redo all past doctrine in light of the latest school of thought. More profoundly, it would be entering the realm of the theological—tantamount to proclaiming the truth of

1019. *Dropping the Subject*, *supra* note 25, at 106–07.

1020. One view is that in *Beyond Metaphor*, *supra* note 474, Rotstein “argues that courts should look to literary criticism in interpreting written, copyrighted works when making determinations of infringement.” Kenneth L. Port, *Foreword: Symposium on Intellectual Property Law Theory*, 68 CHI.-KENT L. REV. 585, 603–04 (1993). But Rotstein himself demures:

I did not mean to suggest that judges and juries should consciously attempt to apply literary theory in deciding cases (though I’ve been interpreted that way by some, and I understand why). I’m a practitioner, and it’s hard enough to get a judge to apply the straightforward cases. Rather, my point really is that, because copyright law governs expressive works (and these works include both works of high and low authors), judges and juries necessarily engage in an activity analogous to what literary critics do when they consider works.

E-mail from Bob Rotstein to David Nimmer (October 30, 2000) (on file with the *Houston Law Review*). *Cf.* O’Neill v. Dell Publ’g Co., 630 F.2d 685, 687 (1st Cir. 1980) (“Although we may not be qualified literary critics, we are fitted by training and experience to compare literary works and determine whether they evidence substantial similarity.”).

1021. *Theorein* comes from the Greek verb “to investigate.” See THE MUSE LEARNS TO WRITE, *supra* note 463, at 111.

1022. See REAL PRESENCES, *supra* note 89, at 75–79.

1023. Even more dire would be falling prey to an Arrowneous weltanschauung. *Grok deeply Pomobabble*, *supra* note 840, at 491, 674 (“It’s not ‘our’ f(ouc)ault! WHEEEEEEE!”) [sic] [sic] [sic].

dialectical materialism or of the insights of the Buddha—for a court to put its imprimatur on any of those schools of thought.<sup>1024</sup> Let a thousand theories bloom—but not inside the courtroom, please!

Accordingly, even though a philosopher with all the time in the world might find it impossible to disentangle “aesthetic judgement on the one hand, and the alleged decision-procedures available to the philologist,”<sup>1025</sup> on the other, judges lack that luxury of cogitation. They face a docket.<sup>1026</sup> Those exigencies impose a pragmatic spin.

*E. On the Intent to Author*

How does praxis operate? It has already been noted that “the earliest theoretical impulse to remove the Author was based on a discrediting of the concept of intentionality.”<sup>1027</sup> What is at stake for the literary critics is whether an act that took place at a given historical moment—attaching quill to paper as the result of the conscious movement of the writer’s hand, fingers gliding over the keyboard, and so on—is decisive for subsequent interpretations of the text. The law confronts a different question altogether—whether the work thereby originated falls within the parameters of Title 17 of the United States Code.

For that reason, copyright law has always seemed antipathetic to any notion of intentionality.<sup>1028</sup> An unconscious copier can be held an infringer.<sup>1029</sup> Further, even an entirely innocent party—say, one who owns a cinema in which a film is screened that is adjudged substantially similar to an antecedent novel—can be held accountable for the infringement that occurs in his establishment, despite his best efforts never to allow illegitimate material across the transom.<sup>1030</sup> In short, for a defendant to be held an infringer, intent is not a necessary ingredient.<sup>1031</sup>

1024. Wise words from a copyright case: “If I were to declare *The Urantia Book* to be a divine revelation dictated by divine beings, I would be trampling upon someone’s religious faith. If I declared the opposite, I would be trampling upon someone else’s religious faith. I shall do neither.” *Urantia Found. v. Maaherra*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995).

1025. REAL PRESENCES, *supra* note 89, at 124.

1026. “Enough theories, I’d like some facts. Give me some facts.” LUIGI PIRANDELLO, *SIX CHARACTERS IN SEARCH OF AN AUTHOR* 63 (Eric Bentley trans., 1998) (1921).

1027. Refer to text accompanying note 816 *supra*.

1028. Well, perhaps not always: Invoking ancient forebears to copyright law, one commentator notes that “in Roman *societas*, intent was the *sine qua non*.” Russ VerSteege, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 546 (2000).

1029. Refer to note 439 *supra*.

1030. See 4 NIMMER ON COPYRIGHT § 13.08.

1031. *Id.* Nonetheless, even here there are limits. Although intent is not required, volition is. “Although copyright is a strict liability statute, there should still be some

Nonetheless, it would seem that intent *is* a necessary element of the act of authorship. Thus, although the *defendant* need not copy intentionally to be held liable, the *plaintiff* must intend to author in order for a work of authorship to emerge. Intentionalism hereby creeps back as a *sine qua non* for copyright protection, even as we simultaneously acknowledge that literary critics have debunked “the ideological character of assuming that authorial intentionality is always and everywhere the *dominant* determinant of textual signification, or of imagining that any such intention, deferred and refracted as it is by the play of signs, could ever be fully present to itself.”<sup>1032</sup> (Of course, a focus on “intention” does not bring resolution in and of itself.<sup>1033</sup> Instead, it opens the door to yet more philosophical inquiry, centering on such elusive concepts as “purpose,” “motive,” “causes,” “desire,” and the like.<sup>1034</sup> But as already noted, the legal enterprise does not entertain endless excavation—it moves towards resolution, damn the theoretical torpedoes!)

Consider a publisher that puts out a new edition of *To The Lighthouse* from which, by sheer accident, fifteen adjacent pages were omitted. In all respects, the publisher presents it to the public as an accurate portrayal of Virginia Woolf’s book. Can it be said that the work is actually copyrightable as an “abridgement” of the great classic?<sup>1035</sup> Arguably not. But a version of *War and Peace* shortened to attract the attention of the MTV-generation is, beyond dispute, subject to protection. We thus return to the conundrum of intentionality.

It is submitted that the lack of intent to abridge the big Woolf (the bad Woolf having sprung adventitiously) prevents a copyrightable abridgement from resulting. But let us take this further.<sup>1036</sup> Consider several antipodes:

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element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1369–70 (N.D. Cal. 1995). Note that Congress singled out this case for its benediction in the Digital Millennium Copyright Act. See H.R. REP. NO. 105-551, pt. 1, at 11 (1998).

1032. Terry Eagleton, *Self-authoring subjects*, in *WHAT IS AN AUTHOR?*, *supra* note 11, at 42, 42. For Eagleton’s philosophical examination into what is subjectivity, see *id.* at 43–46.

1033. “Modern western philosophy has devoted considerable energy to the idea of ‘intention’ and what it means to intend something . . . .” *The Personality Interest of Artists and Inventors*, *supra* note 121, at 138–39.

1034. *Id.* at 139.

1035. See 17 U.S.C. § 101 (Supp. IV 1999) (defining “derivative work” to include an “abridgement”).

1036. The discussion here vacillates between a plaintiff’s “work” and a defendant’s

??After her careless brother breaks an old Barbie doll, Little Jane throws it into the garbage heap. There it sits, amidst bananas and other detritus of the household. By no stretch of the imagination has a copyrightable event occurred.

??Christo, the magnificent performance artist,<sup>1037</sup> decides to go the field of “readymades”<sup>1038</sup> one better: he buys a Barbie doll, smashes it with a hammer, perches it amidst banana peels and other household garbage, and displays the product at the newly refurbished Tate Gallery. Has a derivative work been created? It would seem so. The differing intent underlying Little Jane’s and Christo’s conduct would seem to vouchsafe their completely different treatment.

Let us move to an even more obvious case. A doctor is rushing to the emergency room to perform surgery. A child veers into her path. With some deft driving, she leaves behind only a screech of brakes and wild skid marks, instead of an accident. Has she thereby created an audiovisual work? Of course not. Yet there is both sound and image to what occurred,<sup>1039</sup> nominally leading one to conclude that the elements for a copyrightable composition have been satisfied.<sup>1040</sup>

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“work.” In other words, to secure copyright protection, a plaintiff must create a work. By the same token, to infringe the adaptation right, the defendant must create a “derivative work.” For current purposes, the distinction between the two is unimportant. See 2 NIMMER ON COPYRIGHT § 8.09[A], *criticizing dictum in* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968 (9th Cir. 1992).

1037. My hypothetical artist pays homage to Christo. See RICHARD A. LANHAM, THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY AND THE ARTS 48–49 (1993) (contending that Christo’s *Running Fence* serves as model for the shift that personal computer technology will wreak to printed books).

1038. See J. Alex Ward, *Copyrighting Context: Law for Plumbing’s Sake*, 17 COLUM.-VLA J.L. & ARTS 159, 159 (1993) (“readymades” is a trend inaugurated in 1917, when Marcel Duchamp rescued a discarded urinal and exhibited it under the title *Fountain*). Some advocate extending even further the law’s solicitude for “appropriation art.” See Niels B. Schaumann, *An Artist’s Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249 (1997).

1039. Even the most pedestrian of sounds can be interpreted musically. Thus, when a romantic genius took the train from New York to Boston, the clickity-clack of the tracks became in his mind a theme which germinated from an “unheard melody” to become *Rhapsody in Blue*. See JOAN PEYSER, THE MEMORY OF ALL THAT 80 (1993) (“It was on that train, with its steely rhythms, its rattlety-bang that is so often stimulating to a composer—I frequently hear music in the heart of noise—I suddenly heard—and even saw on paper—the complete construction of the rhapsody from beginning to end.”); *hear* HERSHEY FELDER, GEORGE GERSHWIN ALONE (Tiffany Theater, Los Angeles, June 25, 2000).

1040. We can assume, for purposes of the hypothetical, that the whole is recorded on video. As to the cameraman, it may be conceded that he gains copyright protection for his contribution. But the question remains whether the underlying material that is filmed more closely resembles a dance concert (independently copyrightable) or a sporting event (not independently copyrightable). See 1 NIMMER ON COPYRIGHT § 2.09[F].

??By the same token, when a pedestrian rushes past a perambulator that careens into his path on the sidewalk at Broadway and Forty-seventh, the resulting footwork is not copyrightable.

??Yet if those same steps unfold on the stage inside the Palace Theater at Broadway and Forty-seventh, copyright protection applies.<sup>1041</sup>

The case law itself gives some tenuous recognition to these phenomena.

??*Brandir International, Inc. v. Cascade Pacific Lumber Co.*<sup>1042</sup> recognized that a large wire sculpture could command copyright protection, even if put to the utilitarian end of supporting bicycles.

??However, to the extent that one leaves the realm of the esthetic and enters into the constraints of manufacturing, adaptations of the wire sculpture for the sake of industrial design forfeit that protection.<sup>1043</sup>

Why the difference in the various situations just considered? Again, intent to author seems to furnish the missing ingredient here. Avoiding prams and careless kids, throwing away garbage, negligently leaving out a signature when printing a book, manufacturing a utilitarian item—those activities fall outside copyright protection. But identical products, if produced as intentional works of authorship, can fall inside the statute.

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1041. See 17 U.S.C. § 102(a)(4) (1994) (accordng protection to “pantomimes and choreographic works”). See also *Horgan v. MacMillan, Inc.*, 789 F.2d 157 (2d Cir. 1986) (George Balanchine’s *The Nutcracker*). As in the previous footnote, a further question of fixation lies here. Again, to avoid metaphysical questions, we will assume that the steps are somehow recorded, whether on videotape or through appropriate notation. See David Vaver, *Intellectual Property: The State of the Art*, L. Q. REV. 621, 625 (2000) (addressing whether *tableaux vivants* constitute copyright infringement of paintings that they depict).

1042. 834 F.2d 1142, 1147 (2d Cir. 1987).

1043. *Id.* at 1146–47. That determination engenders its own problems:

The problem with this formulation is that it hinges copyright protection on the historical accident of whether or not changes take place in the industrial design process. For had the creator of the wire sculpture in *Brandir* simply chosen, in his initial artistic freedom, to widen the upper loops, straighten the vertical elements, and otherwise create the rack in line with its ultimate design, then the result would have been to accord, rather than to deny, copyright protection. In this fashion, the fortuitous or accidental choice of one design will lead to copyright protection, while a slight variation will go unprotected. It is not apparent why either the policy underlying the Copyright Act, or the Act’s language itself, should lead to that result. Thus, this formulation, like every other essayed in this field, leaves room for further refinement.

1 NIMMER ON COPYRIGHT § 2.08[B][3] (footnotes omitted).

*F. G-rounding the Extremes*

All flights must end, even those of fancy; it is time to bring this one back to earth. To do so, we revert to the “extreme copyright” hypotheticals that launched our imagination.<sup>1044</sup> Let us start with Connie Sewer, the gourmet turned gourmand who convinced herself to subjectively rate establishments according to the number of burgers flipped.<sup>1045</sup> As portrayed in Case 24, she first introduced us to the notion that the identical product can be copyrightable or not, depending on one’s perspective.

By the same token, to revert to Judge Frank, a “copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder,” may each cause something undesired to creep into a text. By itself, no copyright thereby arises. Yet there is another step.<sup>1046</sup> “Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”<sup>1047</sup> Indeed, even if Christu’s inspiration came from uncopyrightable garbage, his adoption of it imbues it with protection, because of the magical infusion of intent.<sup>1048</sup>

These considerations ground some of the copyright doctrines set forth above. When an individual intends to produce subjective expression unconstrained by external determinants of that expression—such as in Case 1 (The Inspiration) and Case 2 (Psalm of the Tunnel Builder), then protection may be complete. Of course, even the existence of partial constraints does not doom copyright. Thus, when one can subjectively choose among a wealth of English expressions to find the *mot juste* that conveys a fixed text in another language, as in Case 3 (The Translation), there is still ample room for copyright to subsist. But by the time one reaches the limiting case in which there is only one option, which must be plugged in mechanically, such as purportedly occurs in Case 20 (The Pedant), then intention evaporates and protection can no longer lie. By like measure, copyright is denied when the intent is to operate in purely uncopyrightable realms, such as machinery in Case 4 (The Fountain), facts in Case 5 (The Phone Book), scientific building blocks in Case 6 (The Atom) and

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1044. Refer to Chapter III *supra*.

1045. Refer to Case 24 (The Gourmand) *supra*.

1046. “[O]ne must not only be empowered to take advantage of random occurrences, but one must take advantage of them.” *The Personality Interest of Artists and Inventors*, *supra* note 121, at 144. For an extended discussion of this theme, see *id.* at 161–63.

1047. Refer to the quotation preceding note 706 *supra*.

1048. Foucault calls the author “the principle of thrift in the proliferation of meaning.” *What Is an Author?*, *supra* note 155, at 159. The intent to author, on the theory set forth above, imbues significance amidst a profusion of unintended “lookalike” products.

Case 7 (The Skeleton), mathematical expressions in Case 14 (Fermat), or sporting events in Case 8 (The Veer Option).

*A fortiori*, no copyright can lie when one does not even intend to author original materials at all, as in Case 9 (The Shivviti) or Case 10 (The Reader). In neither case is there an intent to imbue subjective expression into the mix. The same applies to Case 17 (Bingo Cards), created by a wholly random program. Likewise, the mere act of copying one's predecessors, such as in Case 11 (The Doppelgänger) or Case 12 (The Forgery) confers no protection.

When a work is presented to the public as being factual, then copyright protection is likewise lacking. Case 13 (The Dirigible) is applicable here. To the extent that its account of *The Hindenburg's* crash is portrayed as factual—even if further investigation debunks the claim—then protection must be denied. For in those instances, the intent to author—to imbue subjectivity into the mix—was represented as absent, even if it turns out that the author was mistaken (whether deliberately or accidentally).

Likewise, when the subjective expression is wholly subordinated to a higher intent to conform to external factors, protection may be denied. Illustrative here is Case 15 (The Cosmetologist), wherein considerations of biology, surgical techniques, and the patient's desires overbore any Picasso-like instincts that the wielder of the scalpel might have otherwise possessed. By the same token, the creativity in Case 16 (The Shrink) was entirely subservient to constructing an accurate psychological portrait of the individual at issue. Case 18 (The Sistine Chapel) is cut from the same cloth—it resulted from the intent to match a prior artifact, rather than out of the desire to imbue new subjective insights onto the fresco.

It is profitable to juxtapose Case 22 (The Surf Channeler) against Case 23 (The Magician). If the intent of The Channeler to portray the words of others rather than her own subjective expression is credited, then she cannot obtain copyright protection. (Of course, common sense may so incline in the opposite direction that her claim not be credited. The point, however, is that if the claim in fact is credited, she loses copyright protection.) The flip side here is The Magician. If Shelly is indeed believed that she subjectively created a "new" work that just happened to match Keats's, then she does enjoy copyright protection in the product. (Again, common sense may rebel against that construction sufficiently to overbear her profession of intent. But the point is that if her intent is credited, then copyright protection does lie.)

To revert to the discussion above, the work does not need to be *neuf* to warrant protection; it is enough if it is *nouveau*.<sup>1049</sup> Thus, Shelly's poem, to the extent that it matches Keats's, is emphatically not objectively new. But if it is genuinely subjectively new, copyright protection subsists over it.

The final Case 21 (The Channel Surfer) falls into a similar category with Case 3 (The Translation). In principal, the resulting products are new and therefore copyrightable, resulting from a conscious desire to imbue some new and subjective expression into the mix. Those creators accordingly enjoy copyright, unless protection is overborne by the doctrine that forbids protection, as a matter of public policy, to one who has unlawfully incorporated subsisting elements inextricably into the mix.

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That run-through will undoubtedly leave some unsatisfied. Certainly, it can be picked apart *ad infinitum* in terms of how it fails to correspond to various "theories of authorship" or those theories denying the very existence of authorship.

But copyright law needs an author<sup>1050</sup>—or, rather, a certain notion of "authorship" as its principle of thrift.<sup>1051</sup> The economy in which that thrift is bartered, it is submitted, falls into the framework offered above.<sup>1052</sup> Moreover, that structure is so durable as to apply regardless of which statute Congress has implemented. Whether gauged by nineteenth century law, the 1909 Act, or the current 1976 Act, the considerations remain the same.<sup>1053</sup> For that reason, the discussion above has freely cited U.S. copyright cases handed down from 1834 to the present. For the authorship construct, being timeless, is impervious to such trifles as Congress's wholesale overhauling of the governing statute.

We thus wind back finally to the Dead Sea Scrolls—of which Case 19 (Chicken Little) can be taken as emblematic. The touchstone of intent again applies. Qimron's reconstruction of *4QMMT* can be either copyrightable or not, depending on which side of the Sewer he falls. If he intended to wear the artist's beret while reconstructing the text, imbuing it with wonderful rhetorical figures of his own device,

1049. Refer to Chapter XV *supra*.

1050. Evidently, constitutional theorists do, too. See James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. L. REV. 625, 626–27 (1988).

1051. Refer to note 1048 *supra*.

1052. Literary theorists need their theory of the author as well, to preserve thrift in their discipline. Reports of the author's death have been greatly exaggerated—even votaries of that sect continue to beatify him/her. Refer to note 1000 *supra*.

1053. Refer to Chapter XIV, section (D) *supra*.



then he deserves copyright in the product. On the other hand, if his intent under the scholar's cap and gown was to present the words of an ancient author, then the product falls outside copyright protection.<sup>1054</sup>

The judge facing the pressure of the docket must decide. Which resolution is correct? Let us begin by recalling that no one alive today can claim authorship of a manuscript written by Shakespeare<sup>1055</sup> or by a biblical prophet:<sup>1056</sup> For the author of those texts is manifestly someone other than the claimant.

What about the activity of "finding" that other person's text as a basis for premising protection? That conduct, as socially valuable as it might be, plainly fails the test for copyrightability.<sup>1057</sup> Qimron can vindicate no copyright precisely because he qualifies as a modern-day "troubadour"<sup>1058</sup>—he *found* the ancient text written by the Teacher of Righteousness. Admittedly, his act of "finding" was far from mechanical, requiring greater archaeological creativity than even Indiana Jones's<sup>1059</sup> (albeit of a musty, rather than swashbuckling, nature). Moreover, given that the shards discovered in the Judean desert were themselves tattered, Qimron could accomplish his "finding" only via a great deal of ingenuity along the plain of decipherment.<sup>1060</sup> One may readily concede that such decipherment manifests a certain type of creativity, just as interpreting the data from a particle accelerator to posit atomic and subatomic structure manifests scientific creativity.<sup>1061</sup> Plus, unlike the physicist at CERN or SLAC, the medium in which Qimron recorded his own creativity—in alphabetic characters—is superficially identical to the medium in which wordsmiths exercise their copyrightable skills.

Nonetheless, at the end of the day, Qimron lacked the intent to author original expression, whether gauged at the first level of intent or that of "meta-intention."<sup>1062</sup> Starting with the latter, Qimron's labor lacked the ingredient of meta-intent. Unlike those

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1054. It matters little whether, in the process, he was wearing the believer's skullcap, or the skeptic's miter, as in either event he lacked "that authorial claim to be speaking in his/her own voice." INTERTEXTUALITY AND THE READING OF MIDRASH, *supra* note 851, at 23. Refer to note 618 *supra*.

1055. Refer to note 153 *supra*.

1056. Refer to Chapter I *supra*.

1057. Refer to note 153 *supra*.

1058. On the etymology of that term, refer to note 16 *supra*.

1059. Refer to note 215 *supra*.

1060. As previously noted, the Supreme Court of Israel refers to *MMT* as "the Deciphered Text." Refer to note 586 *supra*.

1061. Refer to Case 6 (The Atom) *supra*.

1062. Refer to Chapter XIII, section (B) *supra*.

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who choose words today concededly uncertain of their future reception, but with the conscious desire to create a work of expression that will be interpreted differently as time unfolds,<sup>1063</sup> Qimron's efforts were backwards-oriented. In other words, Qimron aimed to reconstruct a text that had already been composed in the past, instead of imbuing some of his own subjectivity onto the new creation of a literary text with an open-ended future.

Unlike a Philip Roth or Cynthia Ozick, Qimron did not string together words with the intent to author them. He therefore lacked "intent to author" even at the most simple level. By definition, the act of *decipherment* eschews "original intent"—the intention to create a work of original ("new") expression<sup>1064</sup>—rather, it seeks recovery of the (old) creativity previously exhibited by another. His aim was not only to avoid the *neuf*, but even the *nouveau*.<sup>1065</sup> It was to summon up the *ancien*. In that task, as noble as it may be, there can be no copyright protection.

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1063. *Id.*

1064. Refer to Chapter XV *supra*.

1065. Refer to Chapter XV *supra*. If Qimron aimed to compose a text that this planet had never been seen before, the result would be *neuf*. If, like Learned Hand's magician, he independently conjured up a "new" text that (unknown to him) just happened to match TR's, then the result would be *nouveau*. But by consciously setting his sights on recreating a previously existing text, he avoided both *neuf* and *nouveau*.

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# CODA

## CODEX AND OTHER LAWS OF CYBERTIME

*Eaton S. Drone\*\**

The pleasure of the text is that moment when my  
body pursues its own ideas for my body does not  
have the same ideas I do.

Roland Barthes<sup>1066</sup>

Discovery of the Dead Sea Scrolls in the Judean desert caused quite a stir; at least on Earth (a murmur was heard even in these parts!). Indeed, it has launched a new scientific discipline: codicology.<sup>1067</sup>

I happened to run into the Teacher of Righteousness recently (in 1955) at a lecture given by Joseph Story about the deep background to *Bender v. West*. I remarked to him that with the assignment of Strugnell to *MMT*, the world at last would soon see its contours—unless, I puckishly added, copyright protection got in the way.

“Weren’t you listening to Story’s story?” demanded the rebarbative Teacher. “He just finished explaining that all the major cases to reach the U.S. Supreme Court involving copyright in the nineteenth century established the proposition that ‘the law of the land’ (as embodied in case reports) stands outside

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\*\* Mr. Drone authored the standard treatise on nineteenth century U.S. copyright law. Sadly, he died in 1917. In the intervening decades, he has been gathering his thoughts and, inter alia, studying Hebrew as an amateur philologist (that is, a “lover of lover of the word”). Recently, he was kind enough to submit an introduction to Paul Marcus & David Nimmer, *Forum on Attorney’s Fees in Copyright Cases: Are We Running Through the Jungle Now or is the Old Man Still Stuck Down the Road?*, 39 WM. & MARY L. REV. 65 (1997). He posted the instant chapter, responsive to the onto-theological ruminations that precede it, on his website (no URL is provided, as it is contained on the ultimate Secure Server; access to it from this realm is emphatically discouraged).

1066. THE PLEASURE OF THE TEXT, *supra* note 808, at 17.

1067. QUMRAN IN PERSPECTIVE, *supra* note 198, at 198.

copyright protection.<sup>1068</sup> Based on that authority, *miqsat ma'aseh haTorah*—he placed particular emphasis on the word *haTorah*—“stands *ipso facto* outside of copyright protection. And it’s a good thing too—the Sons of Darkness have only multiplied geometrically in the interim, and they could sure use some straightening out!”

“What do you mean that *MMT* is a legal code?” I meekly demurred. “It was never codified, was it?”

“I tell you, Man of Scoffing, it was the governing text of our community, *Yachad*,” shouted TR. “As ‘law,’ it stands outside of copyright protection.”<sup>1069</sup>

“Oh, right,” I replied, and then added, “And just who were the good folks at *Yachad*? Essenes? Sadducees? Zealots? Zadokites? Crypto-Christians? Sicarii? Therapeutae? Boetheusians? Rastafarians?”

But he did not bite the bait. Instead, he smiled and ran through a few knee-slappers that Pliny the Elder had recounted to him a while back. “Walk softly and carry a big shtick!” admonished TR, as he shuffled away.

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I returned to reading *Code and Other Laws of Cyberspace*, written by Larry Lessig of Harvard Law School. Happy to see that the School has kept up standards since my graduation in 1866,<sup>1070</sup> I was interested to read how this book limns an entire exposition of the Internet, founded on the homologue between “code” as governing law and “code” as the language in which computer programs are written. I got to thinking about that phenomenon in the light of *MMT*.

What is missing from Lessig’s masterful exploration of current issues, copyright and otherwise, facing the Internet is the diachronic inquiry into how the cross-over of terms that so fascinates him arose in the first instance.<sup>1071</sup> My investigation into the etymology here has led me to conclude that something

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1068. Refer to note 168 *supra*.

1069. Bldg. Officials & Code Adm’rs Int’l, Inc. v. Code Tech., Inc., 628 F.2d 730, 734–35 (1st Cir. 1980).

1070. See Obituary of Eaton S. Drone, N.Y. TIMES, Feb. 2, 1917.

1071. Needless to add, whatever Lessig’s deficiencies may be, they are less than Nimmer’s. For instance, why does Nimmer deliberately and repeatedly note that the Torah is commanded to be set up in stone monuments atop Mt. Eival, refer to notes 489, 883 *supra*, without telling us the significance? Obviously, it is a function of how new the institution of writing was at that juncture. I will draw these thoughts together more elaborately elsewhere, in the piece that I describe at the end of these remarks.

rather profound is going on.<sup>1072</sup>

Why is it that computer “code” bears that name, rather than “recipe” or “instruction set” or some other term? Was the selection accidental?

In turn, the further inquiry arises as to where this term derives. “Code” itself is cognate with the word for a “book” that is neatly packaged between covers: a codex. Production of that artifact takes us back almost 2000 years:

In the world of late antiquity all authority was founded on those written texts, hence on the book and on reading. This was true at the summits of power, among the church hierarchy, in lay society and within the nucleus of the family. Only the codex could represent that authority.<sup>1073</sup>

I would like to trace the phenomenon back even further. The very practice of authoring text is inherently bound up with handing down laws, as my chance encounter with the Teacher of Righteousness brought me to realize. Let’s start with Rome. There, the law was known as *lex*. That word derives from *legere*, which is the familiar Latin verb that means “to read.”<sup>1074</sup> (For that reason, a text susceptible to being read qualifies as *legible*. Cicero goes further, and links the roots of *religion* itself to the act of rereading: *relegere*).<sup>1075</sup> The Greek *nomos* might have similar roots.<sup>1076</sup>

In fact, Hebrew also contains the same affinity. The “ten commandments” is a poor translation from the Hebrew for the ten *dibrot*. The root for that last word is *dbr*, meaning nothing other than “to speak.”<sup>1077</sup> Speaking = commanding = supreme law. Q.E.D.

The same phenomenon plays itself out, albeit on a slightly

1072. See THE MUSE LEARNS TO WRITE, *supra* note 463, at 56.

1073. *Between Volumen and Codex*, *supra* note 146, at 89.

1074. *Archaic and Classical Greece*, *supra* note 888, at 41. “Writing is supposed to need the *legein* or the *logos* that the reader adds; without the reader, writing would remain a dead letter. Reading is thus added to writing as an ‘epi-logue.’” *Id.* at 42.

1075. CICERO, DE NATURA DEORUM ACADEMICA 193 (G.P. Goold, Ph.D. ed., H. Rackham, M.A. trans., 1979) (1933).

1076. *Archaic and Classical Greece*, *supra* note 888, at 40 (*nomos* derived from *nemein*, which might mean “to read”). The Greek words *hypocrite* and *prophet* likewise weave into the tapestry here. *Id.* at 54. Having invoked both *logos* and *nomos* here, it is not amiss to reference “the antithetical constructs of the Word-Christ-Logos (for Christians) and the Torah-Writing-Nomos (for Jews).” *Reading in the Jewish Communities of Western Europe*, *supra* note 25, at 161.

1077. “Decalogue” is therefore a good English translation. Without the spoken text, the written text cannot exist. “[T]he text is not a static object but the name given to a dynamic relationship between writing and voice and between the person writing and the reader.” *Archaic and Classical Greece*, *supra* note 888, at 44–45.

higher plane, with the word *Torah*, the apotheosis of law to a Hebraic mindset. In this case, the root verb is *yrh*, which means “to teach,”<sup>1078</sup> a meaning found, let us say, adjacent to the cluster of “to speak.”<sup>1079</sup> (Indeed, to look up the word *Torah* and all its variants in the standard concordance requires that one locate that verb *yrh*.<sup>1080</sup>) Lecturing = legislating.

As Roland Barthes reiterated at last year’s Pan-Troubadour Heavenly Hootenanny,<sup>1081</sup> “[a]ll *speech is on the side of the Law*.”<sup>1082</sup> Indeed, when our speech coheres enough to “pronounce a sentence,” are we not assuming the role of judge upon a condemned criminal?<sup>1083</sup> In this reading, “the Law appears *not in what is said but in the very act of speech*.”<sup>1084</sup>

Code is code, according to Lessig’s *Code*.<sup>1085</sup> I raise the ante on Lessig: Not only does the tautology apply in the Internet context from the 1990s onward, but all deliberate acts of authorship create their own code.

Decoding, of course, must therefore loom large in our consciousness. Lawyers decode legal codes. Readers decode the codes of literature. Archaeologists decode history.

What role does copyright play in all this? A novel or creative interpretation of a statute cannot be subject to copyright protection.<sup>1086</sup> A reader’s creative reading of a text likewise falls

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1078. See A CONCISE HEBREW AND ARAMAIC LEXICON OF THE OLD TESTAMENT, *supra* note 139, at 144.

1079. “[T]here is a fundamental tie between teaching and speech.” *Writers, Intellectuals, Teachers*, in IMAGE\_\_\_\_MUSIC\_\_\_\_TEXT \_\_\_\_, *supra* note 9, at 190. John of Salisbury made a similar point in the *Metalogicon* early in the twelfth century. See *The Scholastic Model of Reading*, *supra* note 810, at 105 (in Classical Latin, *legere* is both “teaching” and “reading”).

1080. See SOLOMON MANDELKERN, VETERIS TESTAMENTI CONCORDANTIAE 509–10 (1896).

1081. Naturally, he hung out at the cocktail party given by Roland (the original Roland, that is) and spent most of the evening munching veal with Roland de Vaux.

1082. *Writers, Intellectuals, Teachers*, *supra* note 1079, at 191 (emphasis original). It is worth adding that the history of writing as well is intimately bound with the need to record legal texts. See LITERACY AND ORALITY IN ANCIENT GREECE, *supra* note 24, at 65–73.

1083. *Writers, Intellectuals, Teachers*, *supra* note 1079, at 191. Hebrew is even broader: *mishpat* means both a grammatical sentence and a court decision, whether in the criminal or civil sphere (unlike English, in which a “sentence” applies to the criminal, but not civil context). The Italian *sentenza* largely jibes with the usage of *mishpat*.

1084. *Id.* at 192 (emphasis original).

1085. See CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 733.

1086. *E.g.*, Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 96 (1985) (“[T]he law does not normally offer intellectual property rights to lawyers who develop novel arguments and establish precedents.”). The precise wording of the article or brief in which it is encapsulated is, of course, another matter.

without copyright.<sup>1087</sup> And as to the archaeologist—need you ask?<sup>1088</sup>

I have actually encoded a formula to prove all of this mathematically, and just put the finishing touches on the accompanying essay. (It promises to be the greatest blockbuster since the solution to Fermat's Last Theorem.) Once I finish proofreading it in the near future—no later than, say, winter 2600—I plan to publish the results here.

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1087. Refer to Case 10 (The Reader) *supra*. "We know that the violinist, however gifted and penetrating, 'interprets' the Beethoven Sonata; he does not compose it." *Real Presences*, *supra* note 791, at 32. Of course, if one defines "reading" as an essay about a piece of literature, then copyright unambiguously applies. See, e.g., *READING 4QMMT*, *supra* note 254; *READING THE EVE OF ST. AGNES*, *supra* note 779.

1088. Qimron, it seems to me, has fallen prey to a peculiar linguistic fallacy. The Hebrew word for "author" is *mechaber*. That noun comes from the verb *ch'br*, which means "to join, connect, compose." Thus, another equally valid translation of *mechaber* would be "a composer." (In English, we see the same transformation in the word "composition," used in the sense of "essay.")

Why Hebrew alighted on that word is a mystery to me. Given the Kabbalistic fascination with the act of creation, the Hebrew language had previously developed a detailed vocabulary for different aspects of the creative process—*atzilut*, *beri'a*, *yetzira*, and *asi'a*. Nonetheless, the language chose a different route when assigning the word "author." I must make further inquiry.