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COMMENTS

“Originality” After the Dead Sea Scrolls Decision: Implications for the American Law of Copyright

I. INTRODUCTION

On August 31, 2000, Israel’s Supreme Court ruled on a case that had unnerved legal and scholarly communities worldwide for almost a decade: the Dead Sea Scrolls (DSS) reconstruction copyright infringement case.¹

In this final Dead Sea Scrolls decision (DSS Decision),² the Court upheld Elisha Qimron’s copyright in the reconstruction of an ancient letter from fragments found in a cave near the Dead Sea.³ The American defendants were held to have infringed the copyright by publishing some of the reconstructed letter without Qimron’s permission and without mentioning his name.⁴ Although the ruling ended the infringement dispute between scholars Qimron and Shanks,⁵

1. For an unofficial translation of the decision by Professor Michael Birnhack of the University of Haifa, see http://lawatch.haifa.ac.il/heb/month/dead_sea.htm (last visited Mar. 26, 2002) (translating C.A. 2790,2811/93, Eisenman v. Qimron, 54(3) P.D. 817) [hereinafter DSS Decision].

2. See *infra* Part III for more facts about the discovery and reconstruction process.

3. DSS Decision, *supra* note 1, ¶ 36. This final DSS Decision affirmed an earlier decision appealed by the defendant American scholars who had published the reconstruction without Qimron’s authorization. See David L. Cohen, *Copyrighting the Dead Sea Scrolls: Qimron v. Shanks*, 52 ME. L. REV. 379, 399 (2000) (an English translation of the earlier decision, C.C. (JM.) 641/92, Qimron v. Shanks, 1993 (Isr.)). I hereby follow the citation format provided by Cohen and cite to the page numbers he provides. Cohen’s was the only translation available to me during the work on this Comment. An official English translation of the decision has since appeared in TIMOTHY H. LIM, ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY 26-62 (Hector L. MacQueen & Calum M. Carmichael, eds., Sheffield Academic Press 2001).

4. DSS Decision, *supra* note 1 ¶¶ 1, 2, 36.

5. For years, Shanks had criticized the monopolization of the DSS fragments by the team of scholars entrusted with the job of studying them. See Cindy Alberts Carson, *The Dead Sea Scrolls Copyright Cases*, 22 WHITTIER L. REV. 47, 49 (2000). Shank’s publication of 120 lines of the reconstruction made a portion of the closely held text of the Scrolls available to the scholarly community. *Id.* In his original infringement action, Qimron sued a scholarly society and two American scholars associated with the publication. *Id.* Professor Michael Birnhack, of the University of Haifa, has opined that, after the DSS Decision,

it did not end controversies about the propriety of copyright protection for reconstructions of ancient texts and the possible repercussions of such protection. Neither did it ease the legal debates about the appropriateness of extending copyright protection to the results of Qimron's "research" and about the originality, or lack thereof, of the reconstructed text.⁶

This Comment reexamines these legal debates. Part II reviews the key precepts of the copyrightability doctrine and recent critiques of its misapplications. Part III describes the reconstruction process that yielded the text whose copyrightability was at issue in the DSS Decision. Part IV summarizes the legal battles that culminated in the DSS Decision. Parts V and VI examine the two prevailing arguments in the case: the one opposing copyright protection for Qimron's reconstruction; and the much less vocal argument favoring such protection.⁷

Part VII contains the following conclusions: (1) the arguments opposing copyright protection fail because they gloss over the facts of the reconstruction process and because they disregard the originality analysis for copyrightability required under United States law; (2) the

"legally, it's over," because, although one of the American scholars named as a defendant "petitioned the court to rehear the case," he later withdrew the petition, and because Shanks reportedly has complied with the order of Israel's Supreme Court. Email from Michael Birnhack, Professor, University of Haifa, to Urszula Tempska, Author (Jan 15, 2001) (on file with author). I wish to thank Professor Birnhack for the valuable input and comments he generously provided as I worked on this Comment.

6. That the legal debates continue is clear from the fact that in March 2001, the University of Haifa hosted an international conference of scholars and jurists, including David Nimmer and Peter Jaszi from the United States. The conference was cast on the Internet and participants worldwide posed questions to the Haifa panel that included Justice Dorner, who authored the decision ultimately upheld by the Supreme Court of Israel. The conference webcast is available at <http://video.haifa.ac.il/HTML/HTMLEng/4.1.html> (last visited May 30, 2002). Also, the fact that the Spring 2001 issue of the *Houston Law Review* is devoted entirely to the DSS issues, and includes David Nimmer's monograph-length study of the DSS decisions, proves the currency and urgency of the issues posed by the case.

7. In examining the arguments for extending copyright protection to the reconstructed text, I focus on the copyrightability analysis performed by the Israeli courts. For the purpose of this discussion, I accept as true the underlying facts of the controversy as stated in the court opinions. Nevertheless, it must be noted that scholars differ considerably regarding such issues as the scholarly and political implications of the prolonged withholding of the DSS materials from the wider academic community, the authorship of the letter Qimron reconstructed, the amount of the reconstruction contributed by Qimron, and the motivation of the Israeli courts in managing the proceedings and wording the opinions. Telephone Interview with Norman Golb, Scrolls Scholar and Professor, University of Chicago (Mar. 14, 2002). I wish to thank Professor Golb for making me aware of these aspects of the DSS reconstruction controversy.

Israeli courts' copyrightability analyses adequately account for the creative process, the author-work relationship, and the categorical classification of the work resulting from that relationship; and, consequently, (3) the DSS Decision and its district court predecessor exemplify a reformed copyrightability analysis that avoids the pitfalls of a positivist generic analysis, of a New Critical reification of the work, and of a post-Romantic elevation of authorial originality.⁸ If judicial decisions indeed shape the ground on which we carry out our legal analyses,⁹ the Israeli decisions in the DSS copyright infringement controversy can be much-needed catalysts for an updating and a refocusing of our copyrightability jurisprudence.

II. THE COPYRIGHTABILITY ANALYSIS

A. Originality and Authorship

The overarching objective of copyright law in the United States is to "promote the Progress of Science and useful Arts."¹⁰ This objective is pursued by motivating authors to produce scientific and artistic works.¹¹ Thus, matter that is an "original work of authorship"¹² receives

8. Concerning the meaning of "positivist," see *infra* note 32 and accompanying text. On the issue of the New Criticism, see Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 301, 313 (1990) (stating that a rigid focus on the work itself as an autonomous object, stemming from the poetics and critical method of the New Criticism, makes copyright "uncomprehending" of certain types of works and unable to protect them). For more on the Romantic idea of authorship, see *infra* note 19 and accompanying text. For more on the work seen as an object, and on the relationship between the New Criticism, empiricism, positivism, and Romanticism, see ART BERMAN, *FROM THE NEW CRITICISM TO DECONSTRUCTION* 26-30 (U. of IL. Press 1988).

9. Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls*, 38 HOUS. L. REV. 445, 462 (2001) (noting that judicial opinions, even if narrowly stated, have wider implications for the direction of the legal discourse and for human conduct; the DSS Decision will affect more than just the defendants and the plaintiff, possibly limiting scholarly freedoms).

10. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . 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.").

11. See JACQUELINE M. B. SEIGNETTE, *CHALLENGES TO THE CREATOR DOCTRINE: AUTHORSHIP, COPYRIGHT OWNERSHIP AND THE EXPLOITATION OF CREATIVE WORKS IN THE NETHERLANDS, GERMANY, AND THE UNITED STATES* 36 (Kluwer Law and Taxation Publishers 1994) (stating that "the United States has maintained [the] incentive rationale as the primary reason for copyright protection to this very day").

12. 17 U.S.C. § 102(a) (2001) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known

protection to encourage more such authorship in the future, which should yield the desired progress in intellectual production.¹³ Copyrightable are “works of original authorship,”¹⁴ i.e. works authored by, or deriving from, the person claiming protection.¹⁵

“Authorship” here denotes the required link between the producer and the work: the work must take its origin from the author, to some minimal required degree.¹⁶ It cannot be copied.¹⁷ There is no authorship, no originality, and no protection, when the claimant acts as merely a conduit through which the matter—such as a verifiable fact or a preexisting textual fragment—passes from another source that is its proper origin.¹⁸

So defined, “originality” and “authorship” prescribe what *process* of origination and what author-work *relationship* trigger copyrightability. Protected are works “founded in the creative powers of the mind . . . [and that] *are the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.”¹⁹ Generally, a small degree of originality constitutes authorship and triggers protection.²⁰ The law expressly requires only a minimum quantum of originality for copyright to subsist: “it is enough if [the work] be [the author’s] own.”²¹ The law

or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . .”).

13. See Kenneth L. Port, *Foreword: Symposium on Intellectual Property Law Theory*, 68 CHI-KENT L. REV. 585, 587 (1993).

14. *Id.*

15. See PAUL EDWARD GELLER, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?*, OF AUTHORS AND ORIGINS. ESSAYS ON COPYRIGHT LAW 159, 172-73 (Brad Sherman & Alan Stowell eds., 1994) (discussing the “author” and “work,” the subject and object of copyrights).

16. *Id.* at 188; Port, *supra* note 13, at 599-600.

17. Port, *supra* note 13, at 590 (noting that “[s]ome define originality as merely not copying”) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976)); GELLER, *supra* note 15, at 188. See also Carson, *supra* note 5, at 55 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) to state that only matter compiled through a process so “mechanical or routine as to require no creativity whatsoever” is not original and thus not protectable).

18. See Port, *supra* note 13, at 599-600.

19. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

20. JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE, ¶ 2.02(1)(b) (rev. ed. 1999) (noting that courts require only a “low threshold” of originality for copyright to subsist and stating that “a polka-dot design for fabric is copyrightable”).

21. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (stating that Mezzotint reproductions of public domain paintings were copyrightable as exhibiting the required level of originality: they had been independently arrived at and owed their origin to

thereby separates non-copyrightable, objectively verifiable scholarship from copyrightable, original production with little more than a “trivial variation”²² to set it apart. Some courts, however, have demanded a more substantial degree of originality to find copyright-cognizable authorship. Such analysis is said to posit a Romantic concept of the author.²³ The rhetoric of *Feist Publications, Inc. v. Rural Telephone Service Co.*,²⁴ for instance, has been ascribed to the “unreconstructed faith in the gospel of Romantic ‘authorship.’”²⁵

A copyrightability analysis focusing on the author, her process of producing the work, and her relationship with the work, heeds to what Paul Edward Geller calls “authorship norms” underlying copyright jurisprudence.²⁶ Those norms “dictate rules to empower authors to control the use by others of their self-expression.”²⁷ This control is the means of accomplishing the goal of copyright—intellectual progress.

B. The “Work” and Copyrightability

The obverse of originality- and author-focused copyrightability analysis is work-focused analysis. Copyrightable works “of original authorship,”²⁸ i.e. works that originate from the claimant of protection, fall into certain genres or categories.²⁹ So do non-copyrightable works

the author, who contributed more than merely trivial variations in comparison to the paintings).

22. *Id.*

23. See GELLER, *supra* note 15, at 166-169 (discussing the Romantic roots of the authorship paradigm in copyright, a paradigm presupposing “a special view of creativity” and emphasizing the author’s personal self-expression). See also Jaszi, *supra* note 8, at 299-300 (“Recent copyright decisions show that even as scholars in literary studies elaborate a far-reaching critique of the received Romantic concept of ‘authorship,’ American lawyers are reaching out to embrace the full range of its implications.”). See also Keith Aoki, *Adrift in the Intertext: Authorship and Audience ‘Recording’ Rights—Comment on Robert H. Roistein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,”* 68 CHI.-KENT L. REV. 805, 811-820 (discussing the re-ascendance of the Romantic concept of the author in American copyright law and jurisprudence).

24. 499 U.S. 340 (1991).

25. Jaszi, *supra* note 8, at 302.

26. GELLER, *supra* note 15, at 159-201, *passim*.

27. *Id.* at 159.

28. See Port, *supra* note 13, at 587.

29. 17 U.S.C. §102(a) (2001) offers a non-exclusive list of categories of works covered by copyright protection:

Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;

that do not derive from "authors." One such category is commonly referred to as "research."³⁰ Note, however, that the categories of copyrightable and non-copyrightable works emerge from the process-focused originality analysis.³¹ So-called "research" is non-copyrightable only when it originates from outside of the claimant.³² Nevertheless, a generic copyrightability analysis can easily deteriorate into a mechanical exercise, whereby the work is placed into this or that category and ruled copyrightable or not copyrightable based on the label that has been applied.

A work-centered analysis also tends to objectify the work as an autonomous object by ignoring the creation process and author-work relationship.³³ This approach may derive from the poetics and critical method of the New Criticism,³⁴ which entered literary study and literary education around the 1940s.³⁵ It may also stem from a positivist vision of

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- (4) pantomimes and choreographic works;
 - (5) pictorial, graphic, and sculptural works;
 - (6) motion pictures and other audiovisual works;
 - (7) sound recordings; and
 - (8) architectural works.

Id.

The list of copyrightable categories is always expanding, which bespeaks the popularity of the categorical approach. See Port, *supra* note 13, at 589.

30. See, e.g., *Miller v. Universal City Studios Inc.*, 650 F.2d 1365 *passim* (5th Cir. 1981) (describing a case in which the defendant made a movie using plaintiff's description of a real-life crime; presuming a distinction between facts and their expression, and assuming that a researcher discovers "facts" existing objectively and independently, the court held that research is not copyrightable because those "facts" do not owe their origin to the researcher; the court held that the manner in which facts are reported could be copyrighted).

31. BRAD SHERMAN, *From the Non-original to the Ab-original: A History*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW III, 127 (Brad Sherman & Alan Stowel eds., 1994) (noting that the "subject-artifact relationship" determines whether categories are copyrightable).

32. See generally *Miller*, 650 F.2d 1365.

33. GELLER, *supra* note 15, at 186 (noting that the author-work framework of copyright analysis "leads to oversimplifying the processes of creation and communication that copyright is supposed to enhance").

34. Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 734-35, 742, 746-50 (noting that the New Criticism replaced "author" with "autonomous work," and this transition, assimilated into American copyright law, prevents an effective analysis of such copyright issues as copyrightability, similarity, and fair use).

35. For a brief explanation of the New Criticism, see JOHN CARLOS ROWE, *Structure*, in CRITICAL TERMS FOR LITERARY STUDY 23, 32-33 (2d ed. 1995) (noting that the New Criticism propounded the study of the internal structure of the work, away from any empirical experience, but as a verbal model of such experience).

an objective scholar-producer who harvests scientific truths to release them as object-commodities for a consumer to take in.³⁶

Because the United States Constitution does not grant primacy to any of these modes of testing for copyrightability, the author-focused analysis and the work-focused analysis represent two intertwined aspects of the copyrightability doctrine, and should be applied conjointly. Since protection presupposes originality, "originality has an important bearing upon *initial* decisions as to whether or not a class or category of works can be protected by copyright law."³⁷ The correct analysis implied in the Constitution requires that we (1) first assess whether the work involves sufficient originality, and (2) then conclude whether the work is protectable or not.³⁸ We should ask not "whether granting copyright protection to an author's research would be desirable or beneficial, but whether such protection is intended under the copyright law."³⁹

C. Calls for Reform

The above-summarized copyrightability doctrine, however, does not lend itself to easy, consistent application. "Whether a particular work constitutes copyrightable subject matter is difficult to conceptualize and difficult to apply.... [T]he parameters of copyrightability are extremely flexible. This unpredictable nature of copyright law gives some courts as well as commentators fits."⁴⁰ The doctrines of copyright law are in a state of flux: "since the 1960s... the traditional legal paradigm [of copyrights] has become unsettled and uncertain. Although legislators, practitioners and scholars do not speak with one coherent voice, they do all deviate in some way... from the nineteenth-century

36. See GELLER, *supra* note 15, at 161-166 (discussing the Enlightenment roots of the work-focused "marketplace paradigm" in copyright, positing epistemological objectivism and favoring the maximization of society's informational resources). Positivism was the philosophy of Auguste Comte, which presumptively elevated empirical scientific knowledge, as accumulated and organized by an presumptively objective scholar, over other forms of cognition. See THE HARPER DICTIONARY OF MODERN THOUGHT 488 (Alan Bullock & Oliver Stallybrass eds., 1977). I use "positivist" to denote the dogmatic acceptance of a distinction between scientific and non-scientific discourse, and of a scholar's ability objectively to perceive and process independent phenomena popularly known as facts.

37. SHERMAN, *supra* note 31, at 127.

38. See U.S. CONST. Art. I, § 8, cl. 8.

39. *Miller*, 650 F.2d at 1369.

40. Port, *supra* note 13, at 589.

paradigm.”⁴¹ Calls for reform—to ensure consistency and adequate protection for new kinds of works—abound. For example, several commentators have recently criticized the indebtedness of the American copyright regime to dated positivist, Romantic, and Modernist/New Critical concepts of originality and the creative process. They find this indebtedness highly problematic.

Martha Woodmansee argues forcefully that the Romantic concept of authorship, which persists in the American copyright regime, fails to account for the realities of the writing process.⁴² Peter Jaszi agrees with Woodmansee, demonstrating additionally that the same concept leads to dubious copyrightability rulings⁴³ and undermines the possibility “of any new legal synthesis, which would focus on the reality of collective creativity.”⁴⁴

Keith Aoki also criticizes copyright law’s over-reliance on the concept of Romantic authorship, but suggests that instead of disposing of the concept of “author” as, according to Aoki, Jaszi suggests,⁴⁵ we should overhaul it.⁴⁶ Aoki recommends that only a “more expansive vision of authorship would be able to more coherently account for the increasingly common multiple, collective, and serial forms of authorship which already exist.”⁴⁷

Elton Fukumoto persuasively argues that the same Romantic concept of authorship harms postmodern artists, whose works do not fit the Romantic creative paradigm.⁴⁸ Offering the *Rogers v. Koons* case⁴⁹ as an example, Fukumoto shows that judges attached to the Romantic concepts of creativity and originality fail to protect artistic works

41. F. WILLEM GROSHEIDE, *Paradigms in Copyright Law*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 203, 222-23 (Brad Sherman & Alan Stowel eds., 1994).

42. See generally Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

43. See Jaszi, *supra* note 8, at 302-303.

44. *Id.* at 295, 302-03 (noting that the persistence of the Romantic concept of authorship in American copyright law makes certain works invisible to that law, as works of authorship).

45. See Aoki, *supra* note 23, at 811.

46. *Id.*

47. *Id.* at 824.

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

49. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding that Koons’ postmodern sculpture, which reproduced the content of a photograph by Rogers, infringed the latter despite the fact that it used an entirely different medium, sizes and colors, and that it treated the photograph’s content sarcastically or ironically).

recognized by the artistic community and wrought in a widely-recognized (except by judges) aesthetic, in effect suppressing the entire postmodern artistic movement.⁵⁰ To begin again to promote artistic creativity instead of suppressing it, Fukumoto suggests that “judges should either be better educated in art or more open to consulting experts.”⁵¹

Robert Rotstein argues that current American copyright jurisprudence cannot adequately account for the instability and contextual dependency of works of authorship,⁵² which leads to “wrongheaded reasoning and unsatisfactory decision making.”⁵³ The ossified concept of the work as an autonomous object gives judges and juries a false confidence that they can make sound decisions after finding the one “single valid interpretation” presumed by the positivist doctrine.⁵⁴ This post-New Critical legacy has “engendered serious problems in resolving the central issues relating to entitlement to and scope of protection, substantial similarity, and fair use.”⁵⁵ A few lessons are in order: American copyright lawyers and judges must learn about the current, valid concepts of the communicative and creative process, and about currently accepted artistic practices before they can make intelligent arguments and decisions about works of authorship.⁵⁶

All of these critics agree that copyright lawyers and judges are conceptually and methodologically ill-prepared to analyze works of authorship because they do not know how those works are really produced and how they function in society; and because the analytical tools of copyright are too often applied in an anachronistic and overly simplistic manner,⁵⁷ copyright lawyers need better “models [and] exemplars” than those at their disposal.⁵⁸ This need is evidenced by some of the copyrightability analyses of the DSS cases that are described below.

50. See Fukumoto, *supra* note 48, at 927-29.

51. *Id.* at 927.

52. See Rotstein, *supra* note 34, at 727.

53. *Id.* at 727-28.

54. *Id.* at 728.

55. See *id.* at 742.

56. *Id.* at 725.

57. GELLER, *supra* note 15, at 186 (stating that traditional copyright analysis, relying on the conceptual banality of the author as the subject of rights and the work as the object of rights, “leads to oversimplifying the processes of creation and communication,” and pointing out the tendency of such analysis to “consider [the work] as a static thing”).

58. *Id.* at 161.

III. THE MAKING OF THE COMPILED TEXT: THE PROCESS OF TEXTUAL RECONSTRUCTION

A. Key Facts of Scholarly Labor

The ancient Scrolls, most of them in fragments, were discovered in 1947 in several hidden caves near the Dead Sea.⁵⁹ Written on papyrus and animal skins, they contain some of the oldest versions of most of the Hebrew Bible and other early Judaic texts in several ancient languages.⁶⁰ Over more than a decade, Israeli biblical scholar Elisha Qimron labored with scores of fragments of several copies of a certain letter found in one of the caves.⁶¹ Qimron sought to produce a composite text of a letter believed to have been written by a Judaic sect leader to a Jewish leader in Jerusalem.⁶² Building upon the forensic, physical, and linguistic research of others,⁶³ Qimron assembled sixty percent of the letter from the material found in the cave.⁶⁴ This reconstructed text came to be known in English as "Rulings Pertaining to the Torah"⁶⁵ and in Hebrew as Misgat Ma'Aseh ha-Torah (MMT).⁶⁶ Qimron then hypothesized the remaining forty percent of the letter, mostly based on his unique expertise in linguistics, the law of Halachah, and of the daily life of ancient Jewish communities.⁶⁷ Thus came into being the totality of the reconstructed letter, referred to as the Compiled Text (CT).⁶⁸

59. Scores of sources discuss the discovery of the Scrolls, their later plight, as well as the scholarly and legal struggles that followed. See generally Philip E. Ross, *Overview: Dead Sea Scrolls: Will Their Editors Perish Before Publishing?*, SCI. AM., Nov. 1990, at 36; *Raiders of the Lost Scrolls*, ECONOMIST, Sept. 14, 1991, at 106; 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 (1995); Lisa Michelle Weinstein, Comment: *Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case*, 43 AM. U. L. REV. 1637 (1994).

60. See Weinstein, *supra* note 59, at 1637-38, 1640-41; Carson, *supra* note 59, at 301-302; Carson, *supra* note 5, at 47; Cohen, *supra* note 3, at 400. Unless otherwise noted, historical and other data concerning the research process and its results derive from the two Israeli court opinions. *Id.*; DSS Decision, *supra* note 1. The inferences are mine, unless otherwise stated.

61. DSS Decision, *supra* note 1, §1; Weinstein, *supra* note 59, at 1639.

62. DSS Decision, *supra* note 1, §1.

63. See Carson, *supra* note 5, at 55-56.

64. See *id.*; DSS Decision, *supra* note 1, § 1; Weinstein, *supra* note 59, at 1646.

65. DSS Decision, *supra* note 1, § 1.

66. Cohen, *supra* note 3, at 381. Note that others would transcribe the Hebrew name of the scroll text as "Misqat Ma'Aseh ha-Torah." Email from Professor Michael Birnhack, University of Haifa, to Urszula Tempaska, Author (May 13, 2002) (on file with author).

67. See *id.*; Weinstein, *supra* note 59, at 1646; DSS Decision, *supra* note 1, §1.

68. Cohen, *supra* note 3, at 381. Qimron also prepared an extensive analysis of what the remaining text of the letter could have contained. Carson, *supra* note 5, at 49.

To reconstruct the sixty percent of the letter, Qimron decided how fragments would be placed on the page, for example which way was down and which was up for each fragment, and how the fragments would be placed relative to each other in groups that made words and clauses.⁶⁹ He also decided how many syllables, made up of which fragments, should be in a line and a sentence, and which way the script would run on the page.⁷⁰ These were not all mechanical decisions dictated by objective physical evidence.⁷¹ Differences of opinion surfaced, evidencing the discretionary nature of some of these choices.⁷² Qimron was guided by his scholarly expertise, but also by his own hunch, imagination, and intuition.⁷³ Some of the choices were thus unique to Qimron alone.

B. The Results of the Labor

In this painstaking process, each decision concerning the placement and orientation of every fragment, whether it contained a letter fragment or several letters, affected the form as well as the content of the letter. Every such decision shaped the tangible form of the emerging text, and was also, inevitably, a decision about the ideas the reconstructed text would convey.⁷⁴ Consequently, both expression and idea originated from individual decisions concerning the placement and orientation of the fragments. These decisions were guided by objective physical evidence and scientific expertise, but also by sensibility, intuition, and opinion about how the ancient author might have expressed himself and what his messages might have been.⁷⁵ Over one half of the letter was reconstructed in this manner, and less than one half was composed by Qimron based on such opinions and intuitions, some scientifically-based, but some merely scientifically-supported.⁷⁶

In this process, Qimron wove a patchwork of linguistic material together.⁷⁷ Qimron's educated guesses and personal hunches provided

69. See Cohen, *supra* note 3, at 407-408; DSS Decision, *supra* note 1, § 14;

70. See DSS Decision, *supra* note 1, § 14.

71. *Id.*

72. *Id.*

73. *Id.*

74. See *id.*

75. See DSS Decision, *supra* note 1, § 14.

76. See *id.* §§ 1, 14.

77. Fukumoto, *supra* note 48, at 914 (describing the process of the weaving or tangling together of linguistic matter).

the “hocus pocus”⁷⁸ that completed the letter’s missing portion. The composite text constitutes Qimron’s highly educated opinion as to what the words of the ancient author might have been.⁷⁹ It does not, in any verifiable, confirmed or even agreed way, present the words of any ancient author.⁸⁰ At best, it is the best available twentieth-century personal guess as to the letter’s form and content.⁸¹

Because Qimron did leave his imprint on the CT—in deciding on controversial arrangement of fragments, and in filling in textual lacunae, for example—the CT evinces more than a measure of originality, and copyright properly subsists: after all, “[t]he level of originality required for copyrightability is quite minimal.”⁸² The reconstruction is also protectable because it did not “represent the only way or form, or one of a few available mechanical or rote ways or forms”⁸³ of reconstituting the lost text.

The CT and the MMT give access only to the ideas evoked, in the mind, by the particular transliterations, assemblages of letters, wording and syntax of scholarly reconstructions.⁸⁴ These ideas may or may not mirror those the ancient author may have wished to convey⁸⁵ or those his contemporaries actualized while reading the letter.⁸⁶ These ideas are, however, undeniably shaped by scholars’ decisions regarding what each fragment spells and how to arrange the fragments relative to each other.

78. *But cf.* Elkin-Koren, *supra* note 9, at 458 (stating that the reconstructed letter did not come into being by virtue of some “hocus pocus”).

79. *See id.*

80. *But cf.* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 96 (stating that the MMT “represents, pure and simple, the facts as to how TR [Teacher of Righteousness, the presumed author of the letter] expressed himself 2,000 years ago, reproduced as faithfully as Qimron was capable of achieving”).

81. *See* Elkin-Koren, *supra* note 9, at 458, 460.

82. Port, *supra* note 13, at 590.

83. GELLER, *supra* note 15, at 180 (stating that copyright does not protect works “to the extent they represent the only way or form, or one of a few available mechanical or rote ways or forms, of expressing a given idea”).

84. *See id.* at 187 (stating that under a semiotic analysis, which recognizes that a work comes into being dynamically as it is being received by the audience, “authors create works out of sign materials that they receive in communicating with others, and works indeed take on significance when introduced into a communication network”).

85. *Id.* at 161 (stating that “it is . . . not possible automatically [to assume] that [the author] originally had the [work] fully in mind”).

86. *See id.* at 180-81 (noting that the naive notion of self-expression, presuming that ideas “originate in . . . author’s consciousness on the way to being expressed in works,” has long been debunked).

The meanings, or ideas, of the CT are shaped in the process of (re)creation as well as in the process of reception.⁸⁷

IV. THE LEGAL BATTLES OVER THE RECONSTRUCTION

A. *The Controversy*

In 1991, American Hershel Shanks, editor of the *Biblical Archaeology Review*, a lawyer, and himself an antiquities aficionado, published a substantial fragment of the reconstructed letter, 120 lines out of 132, without Qimron's permission and without attributing it properly.⁸⁸ Qimron sued for copyright infringement in a Jerusalem District Court, and won in 1993.⁸⁹ The defendants—Shanks and two American scholars who acted as editors of the publication—appealed to the Israeli Supreme Court.⁹⁰ It is the ruling on their appeal, handed down in August 2000, that we refer to as the DSS Decision.

Qimron's infringement action and the events that led to it caused uncommonly heated controversies. The fights over scholarly access to the scrolls, which catalyzed the unauthorized publication of Qimron's reconstruction, had been rancorous, passionate, and framed in a romantic rhetoric.⁹¹ The depth and force of the convictions, ambitions, and passions—professional, political, and ethnic-cultural—that had plagued the research of the Scrolls was striking.⁹² The infringement action incited similarly powerful responses. Scholars saw Qimron's action as endangering the free flow of information: the copyrighting of "research" seemed to threaten the exchange of scholarly material and limit academic freedoms.⁹³

87. See *id.* at 187.

88. DSS Decision, *supra* note 1, §1; Carson, *supra* note 5, at 49.

89. Cohen, *supra* note 3, at 422, ¶ 56.

90. *Id.* at 50; DSS Decision, *supra* note 1, § 4.

91. See, e.g., Abraham Rabinovich, *The Race to Reconstruct History*, JERUSALEM POST, (Oct. 22, 2000), available at <http://www.jpost.com/Editions/2000/09/08/Features/Features.11933.html> (last visited Mar. 26, 2002) (reviewing the controversies over access to the scrolls); see also DSS Decision, *supra* note 1, § 9.

92. See Weinstein, *supra* note 59, at 1644-46.

93. See, e.g., Nimmer, *supra* note 80, at 135-36. In March 2002, Israeli legal scholar Michael Birnhack, who has studied the DSS cases extensively, was not aware of any research projects that might have been chilled by the DSS Decision, but stated that it is difficult to assess what projects have been abandoned that may have been pursued otherwise: "we can never know which research has not been conducted due to the decision." E-mail from Michael Birnhack, Professor, University of Haifa, to Urszula Tempka, Author (Mar. 8, 2002) (on file with author). Prominent Scrolls scholar Norman Golb suggested that the fact that

Qimron's action also electrified lawyers and jurists. The case posed the controversial question of the copyrightability of scholarly reconstructions of ancient texts.⁹⁴ It occasioned an amicus brief, a highly uncommon occurrence in the history of the Israeli Supreme Court.⁹⁵ It was a very high-profile international copyright case involving two different systems of intellectual property protection, copyright and moral rights, and possibly additionally complicated by an underlying third system of law, Jewish rabbinical law.⁹⁶

The Israeli Copyright Ordinance incorporates British common law and adopts the British Copyright Act of 1911.⁹⁷ The Ordinance also rests on the conceptual and cultural foundations of the rabbinical law⁹⁸ and incorporates moral right protections by virtue of Israel's membership in the Berne Convention.⁹⁹ Yet overlaps with the American law of copyright abound. Israel's requirements for copyrightability, namely the originality of a work of authorship, the doctrine of merger, and exceptions to copyright protection, such as fair use, all closely approximate American copyright law.¹⁰⁰ Neither Israel nor the United States subscribes to the "sweat of the brow" doctrine.¹⁰¹

second and third editions of reconstructed texts are not coming out may be a result of the chilling effect of the DSS Decision. Telephone Interview with Norman Golb, Professor, University of Chicago (Mar. 14, 2002).

94. See 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, 569 (1995).

95. Cohen, *supra* note 3, at 381 (stating that the amicus brief was authored by David Nimmer).

96. See *id.* at 385-87 (illustrating that Israeli law of copyright constitutes an amalgam of diverse intellectual property paradigms). See also *infra* note 98.

97. Cohen, *supra* note 3, at 385-86, 404-05.

98. See Samuel J. Petuchowski, *Toward a Conceptual Basis for the Protection of Literary Product in a Post-Printing Era: Precedents in Jewish Law*, 3 BALT. INTEL. PROP. L. J. 47, 69-70 (stating that "[w]hen modern Israeli copyright legislation incorporated the notion of 'droit moral,' the prefatory language recognized the precedent of halachah"); see also Cohen, *supra* note 3, at 20 (noting that British Copyright Law was harmonized to "fit with the local law"). Petuchowski reveals that traditional Jewish law provided several reasons to freely disseminate Qimron's work. In that law, scholars had the duty to spread the teachings and learning of the Torah and could not monopolize holy teachings. The result of scholarly work was considered factual and non-creative. Scholars were believed to have found the original deep meaning in the text or amongst its fragments. Scholars were merely conduits of the Divine wisdom. See Petuchowski, *supra* at 59.

99. Cohen, *supra* note 3, at 386.

100. See *id.* at 386-90 (discussing the similarities between Israeli and American copyright protection).

101. *Id.* at 391.

*B. The District Court: Qimron v. Shanks, C.C.
(Jm.) 641/92, 1993 (T.E.) 10.¹⁰²*

In 1993 the Jerusalem District Court held that the compiled text was copyrightable because the “composition of the [CT] on philological and Halachaic research that the author conducted from the original [was] an original work.”¹⁰³ In finding that copyright rested in Qimron,¹⁰⁴ the court rejected defendants’ arguments that, if the CT was at all copyrightable, the copyright could only rest with the Israel Antiquities Authority, as Qimron’s alleged employer, or with Strugnell, the American scholar who worked on the MMT before Qimron.¹⁰⁵ Similarly, the court rejected the defense that the CT was in the public domain due to prior publication by Qimron,¹⁰⁶ the defense of fair use, and the defense of innocent infringement.¹⁰⁷ It also rejected defendants’ argument that Qimron should be estopped from obtaining copyright protection after he claimed that the CT is a reconstruction of an original work in the public domain.¹⁰⁸

*C. The DSS Decision by the Israeli Supreme Court:
C.A. 2790, 2811/93 Eisenman v. Qimron, 54(3) P.D. 817.*

Seven years after the appeal was filed, the Israeli Supreme Court upheld the District Court’s procedural rulings¹⁰⁹ and refined its holding.¹¹⁰ The court affirmed that the excavated fragments of the scrolls, the physical pieces that scholars arranged and deciphered, are in the public domain and available to any scholar to study and

102. I adopt the citation format used by Cohen, *supra* note 3, n.1. Cohen’s Article contains an English translation of the decision, by Cohen himself, as its Appendix A. *Id.*

103. Cohen, *supra* note 3, at 408. Cohen takes this to mean that the court found copyrightability because it saw the CT as a compilation of the MMT (60%) and a text resulting from Qimron’s creativity (40%), supported by his unique expertise in linguistics, halachaic law, and so forth. *See id.* at 391.

104. *Id.* at 410.

105. *Id.* at 407-10.

106. *Id.* at 410.

107. Cohen, *supra* note 3, at 411.

108. *Id.* at 419. The court found that Qimron suffered no actual monetary loss, but that his moral rights, an additional set of rights protected by “paragraph 4A to the copyright law” and guaranteed by paragraph 6A of the Berne Convention, suffered damage: loss of his dream to be known to the world as the first editor of the MMT. *Id.* at 415-16, 419-23.

109. DSS Decision, *supra* note 1, § 8.

110. *Id.* at § 14. The court also noted that the ruling stemmed from the particular facts of the case and should be read narrowly. *Id.* For the timeline of the cases, see Carson, *supra* note 5, at 49-51 (citing, for example, ABRAHAM RABINOVICH, *Scholar to Share Copyright with 2,000 Year Old Author*, in JERUSALEM POST 1 (Aug. 31, 2001)).

reconstruct.¹¹¹ Drawing on Israeli and American case law, the Supreme Court found sufficient originality in the reconstruction process to merit protection.¹¹² Qimron was found to have *given* meaning and “soul”¹¹³ to the fragments, as opposed to having *found* meaning in them, in ways that were not mechanical, technical, or leading to an unavoidable result.¹¹⁴ Qimron’s skills, knowledge, discretion,¹¹⁵ creativity, and imagination provided the required originality.¹¹⁶

As long as the fair use exception is an available defense, the court held, scholars could freely use Qimron’s work for legitimate scholarly purposes.¹¹⁷ The court did not believe that Qimron could abuse his limited monopoly over the reconstructed text.¹¹⁸ The court saw no public policy weighing heavily against extending protection to the reconstruction.¹¹⁹ Rather, it opined that scholars would not invest the massive energies, time and resources in similar labor if copyright protection were withheld.¹²⁰ Commentators read this to mean that Qimron holds no copyright in the individual fragments, the haphazard jumble of textual pieces, nor in the sequences of fragments collocated through objective forensic tests and evidence garnered largely by others, especially Strugnell.¹²¹

Both courts reached their rulings by applying American and Israeli case law and Israeli legal doctrines. Under the doctrine of presumed “equality of laws,” the District Court presumed the laws of Israel and

111. DSS Decision, *supra* note 1, § 10.

112. *Id.* at §§ 10, 11 (citing *Feist Publications, Inc. v. Rural Telephone Service Co. Inc.*, 499 U.S. 340 (1991) and such Israeli cases as *C.A. 360/83 Strosky Inc. v. Vitman Inc.*, P.D. 40(3) 340, and *C.A. 513/89 Interlego A/S v. Exin Lines Bros. S.A.*, P.D. 48(4) 133).

113. *Id.* at § 14.

114. *Id.*

115. American scholars also recognize that Qimron’s discretion guided some of his choices. *See, e.g.*, Carson, *supra* note 5, at 55 (stating that Qimron relied on “educated guesses” to compose the CT).

116. DSS Decision, *supra* note 1, §§ 10-11.

117. *Id.* at § 15.

118. *Id.*

119. *Id.*

120. *See id.*

121. According to Professor Timothy Lim of the University of Edinburgh, unprotected are contiguous fragments, “namely, those fragments that physically match one another.” E-mail from Timothy Lim, Professor of Law, University of Edinburgh, to Urszula Tempka, Author (Mar. 10, 2002) (on file with the author). Professor Lim offers a more detailed discussion of the practical implications of the Israeli DSS decisions in his article *Intellectual Property and the Dead Sea Scrolls*, due to appear in *DEAD SEA DISCOVERIES* 9.2 (2002). I wish to thank Professor Lim for the valuable input he generously provided as I worked on this Comment. *See also* Cohen, *supra* note 3, at 383.

the United States to be equivalent unless proven otherwise by expert evidence put forth by the proponents of the application of foreign (i.e. American) law, the defendants.¹²² Thus, the courts relied on authorities from both countries.¹²³ Outside of the moral rights argument, both the defendants and the plaintiff based their argument on the axiom that originality is a prerequisite for and trigger of copyrightability. The Israeli Supreme Court's analysis of the originality of Qimron's reconstruction, based on American case law,¹²⁴ proves that the same prerequisite applies in Israel.¹²⁵ The courts agreed with the plaintiff's argument that the CT met the minimum originality standard required for protection.¹²⁶ As the following sections argue, their decisions also pass muster under American copyright law.

V. ARGUMENTS AGAINST COPYRIGHTING THE RECONSTRUCTED TEXT

Most of the opposing arguments rest on a generic approach to the work as "research," a commodity,¹²⁷ or an independent, self-contained object, as posited by the poetics of New Criticism.¹²⁸ Some deny copyrightability because they believe the reconstructing scholar did not meet the relatively high standard of originality required in the Romantic concept of authorship. All denials—positivist, New Critical, and post-Romantic—are ostensibly driven by the policy of maintaining free

122. See Cohen, *supra* note 3, at 405-06. Defendants did not provide expert testimony, required under Israeli law, to prove that Washington D.C., where the allegedly infringing actions occurred, did not protect authors' moral rights. *Id.* at 390, 405-06.

123. See *id.* at 406-07. The opinion cites to MELVILLE B. NIMMER, NIMMER ON COPYRIGHT 2-85 (1963-85) and *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The case also cites to the Israeli Scholars Y. Weissman and G. Tedsy. Cohen, *supra* note 3, at 405-06.

124. See Cohen, *supra* note 3, at 406-07 (quoting *Feist Publications*, 499 U.S. at 363-64) (plaintiff Rural's white pages, "limited to basic subscriber information and arranged alphabetically, fall short of the mark 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality") (emphasis added).

125. See also Elkin-Koren, *supra* note 9, at 452-453 (discussing the Israeli legal tradition of protecting expression, not ideas; of seeking to balance public interest with private incentive; and of relying on the originality test for copyrightability).

126. See Cohen, *supra* note 3, at 408.

127. Geller persuasively argues for finding a correlation between focusing on the work and the commodity-focused, market-based approach to copyright. See generally GELLER, *supra* note 15.

128. Rotstein adroitly traces the work-focused copyright analysis to the method and theory of the New Criticism, which dominated the American literary scene in the 1950s and 60s. See Rotstein, *supra* note 34, at 743-749.

access to scholarship and “research.” In so promoting free access to “research,” they all disregard key realities of the reconstruction process, discount the binding precedent that grants protection to works of even minimal originality, and ignore the fact that the “Progress of Science”¹²⁹ may be better served by rewarding scholars like Qimron. The post-Romantic arguments also engender an intent theory of copyrightability as grounds for denial, but the theory’s usefulness and doctrinal soundness remain questionable.

A. *Misconstruing the Nature of the “Reconstruction” Process*

Some opponents focus on a work-centered, categorical analysis to the point of ignoring the process of production and misconstruing the relationship between the work and the claimant.

Opponents of copyrighting the reconstruction characterize it as “research,” but also liken it to a “jigsaw puzzle”¹³⁰ and a compilation.¹³¹ They call the choices that govern the arrangement of the scroll fragments “mechanical” and “conventional.”¹³² Despite evidence to the contrary,¹³³ they state that there was only one solution to the challenge¹³⁴ and that the work involved merely a mechanical placing of the fragments in their original order.¹³⁵ From the assumption that “there is really only one correct answer”¹³⁶ to the scholar’s enterprise, opponents leap to the conclusion that the resulting text does in fact provide that correct answer. This is a highly suspect conclusion, considering the stacking of hypotheses and guesses that guide a scholar in the reconstruction process. Because it is also unverifiable, the so-called “reconstruction” cannot be treated as scientific fact.¹³⁷

The MMT or the CT do not in any reliable sense constitute the original they attempt to approximate. Until the original is found and a comparison reveals that the MMT or the CT do successfully reproduce

129. U.S. Const. art. I, § 8, cl. 8.

130. Carson, *supra* note 5, at 56.

131. *Id.* at 54-55.

132. *Id.* at 55.

133. See DSS Decision, *supra* note 1, § 14 (summarizing the scholarly disagreements as to the correct way of assembling the fragments).

134. Carson, *supra* note 5, at 56.

135. *Id.* at 55.

136. *Id.* at 56.

137. HERBERT L. SEARLES, LOGIC AND SCIENTIFIC METHOD 210 (1948) (stating that to be considered a scientific fact, a claim must be established by accepted methodology, and then verified, i.e. accepted or rejected by the application of that methodology).

it, both “reconstructed” texts are not facts but opinions, and “at least to some degree . . . creative,”¹³⁸ as to “the likely meaning of any given line, and the words that were most likely used in areas where the text fragments were insufficient.”¹³⁹

Casting the scholar as a decoder or decipherer who merely makes the text intelligible by putting it in usable form¹⁴⁰ also disregards the fact that, under the facts of the case, the text does not exist to begin with. There is no original text to be decoded. The reconstructing scholar must first make, or encode, the text for it to be intelligible, so that the *only* text to decode, by readers, will be the scholar’s, not some ancient leader’s.

The above-listed characterizations—a puzzle, a decoder—greatly understate the level of idiosyncrasy and discretion involved in the reconstructive work. A copyrightability analysis based predominantly on such mischaracterization is neither persuasive nor doctrinally correct.

B. Over-Reliance on a Categorical Label: “Research”

Narrowly generic arguments also lead to a misunderstanding of the realities of re-creating a textual composition from few preexisting fragments of language.

Focused on the fact that the reconstruction represents itself as a scholarly endeavor, and that it is called “research,” opponents become de-sensitized to its creative aspects.¹⁴¹ This insensitivity results in the denial or downplaying of the fact that the MMT and the CT are opinions about the ancient letter’s language and message.¹⁴² It allows for a characterization of the MMT as representing, “pure and simple, *the facts* as to how TR [Teacher of Righteousness, the presumed author of the letter] expressed himself 2,000 years ago,”¹⁴³ albeit “reproduced as faithfully as Qimron was capable of achieving.”¹⁴⁴ Similarly, the MMT becomes “what the Teacher of Righteousness actually said,”¹⁴⁵ although represented “to the best of Qimron’s ability.”¹⁴⁶ Although the MMT is recognized as “an *attempt* at objectivity,” it is denied to be—according

138. Carson, *supra* note 5, at 53.

139. *Id.* at 57.

140. Elkin-Koren, *supra* note 9, at 455.

141. Rotstein, *supra* note 34, at 751-52.

142. Nimmer, *supra* note 80, at 101.

143. *Id.* at 96 (emphasis added).

144. *Id.*

145. *Id.* at 101.

146. *Id.*

to this illogic—"simply an 'expression of subjective opinion' as to what TR might have said."¹⁴⁷

In a logical non sequitur, attempted objectivity makes the resulting text worthy of being treated as objective. Because Qimron "has posited" the resulting text as "the reconstruction of TR's words,"¹⁴⁸ opponents are willing to treat it as such, accept the "research" label, and rule it uncopyrightable information. The text that merely makes a "scientific claim,"¹⁴⁹ namely that it closely resembles a certain letter by an ancient author, thereby de facto functions as "scientific information,"¹⁵⁰ i.e. as an accurate replica of the letter. Because they believe that the MMT "claims that it is identical to the original text,"¹⁵¹ opponents agree to treat its aspiration to copy the original as fulfilled, despite the fact that the CT admittedly embodies elective, not rule-governed, unpredictable choices by Qimron.¹⁵²

Questionable categorizations, such as "research" or a "compilation," and metaphors, such as "a jigsaw puzzle," prevent a fact-attentive originality analysis of the production process. The adoption of the "research" label also results in a doctrinally flawed analysis, one ignoring the creation process and the author-work relationship. Additionally, defendants' stance belies the rule that *even minimal* originality suffices for protection.¹⁵³ The categorical analysis overshadows an originality analysis, perhaps typically for the American market-based, commodifying approach to intellectual products.¹⁵⁴

C. *Setting the Bar Too High: The Requirement of Intent*

Some argue for a denial of copyright protection for Qimron's reconstruction on the grounds that Qimron did not intend the reconstruction to be an original work of authorship. This incipient intent doctrine of copyrightability harkens back to the Romantic

147. *Id.* (quoting CCC Info. Servs. Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 71 n.22) (emphasis added).

148. Nimmer, *supra* note 80, at 101.

149. Elkin-Koren, *supra* note 9, at 456.

150. *Id.* at 462.

151. *Id.* at 456.

152. Carson, *supra* note 5, at 53. The compilation involved choices that were not obvious, but somewhat creative. *Id.*

153. Port, *supra* note 13, at 590.

154. See GELLER, *supra* note 15, at 159 (reviewing the two systems of copyright law, one based on marketplace norms (the Anglo-American one) and one based on authorship norms (the Continental-European one)). Note that Geller's use of the term "authorship" refers to phenomena different than those discussed in this article. *Id.*

concept of authorship debunked by commentators¹⁵⁵ and implicitly rejected by case law.¹⁵⁶

Although the proponent of the intent theory, David Nimmer, concedes that "copyright law has always seemed antipathetic to any notion of intentionality,"¹⁵⁷ he asserts, without sufficient support, that "intent is a necessary element of the act of authorship."¹⁵⁸ Nimmer would define an author as one who generates the work not only physically, and not only mentally, but also through a deliberate act of will to create not just a work, but a work of authorship, i.e. a work of originality.¹⁵⁹ "no copyright can lie when one does not even intend to author original materials at all."¹⁶⁰ The originality standard necessary before copyright can subsist is hereby raised higher than ever: not only must the work be original, but also its producer must desire to make it so.¹⁶¹

This concept of authorship evokes Romanticism's idealization of an artist¹⁶² as a superior, self-aware creator of value.¹⁶³ Although the "intent" component may be meant as a useful gauge of the distinction between "sweat of the brow" hack work and copyrightable "works of authorship,"¹⁶⁴ we should note that an ambitious, or fatuous, yet failed intent to create an original work will not elevate a sweat of the brow effort to the level of copyrightable matter. Patterson correctly notes

155. See the critiques of the Romantic concept of authorship by Jaszi, Woodmansee, and others, discussed *supra* Part II.C.

156. For example, the ruling in *Feist* that compilations are copyrightable if the selection and arrangement of elements is more than minimally original sets a low requirement of originality, rejecting the requirement of a highly creative, individual, self-expressive Romantic author. 499 U.S. 340.

157. Nimmer, *supra* note 80, at 204.

158. *Id.*

159. *See id.* at 209-210.

160. *Id.* at 208.

161. Doctrinal and evidentiary issues related to the precise intensity of such intent, and the indexes of its presence or absence, pose serious difficulties too.

162. Patterson, in his response to Nimmer's article, notes the persistence, albeit latent, of the Romantic conception of an artist in American copyright law. L. Ray Patterson, *Nimmer's Copyright in the Dead Sea Scrolls*, 38 HOUS. L. REV. 431, 442 (2001).

163. *See* MARTHA WOODMANSEE & PETER JASZI, *Introduction*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE*, 4-6 (Martha Woodmansee & Peter Jaszi, eds., 1994) (asserting that the Romantic author self-consciously molded public tastes and differed from a hack in that he desired to add something new, expressive of his genius, to already existing discourse; something that would set his works apart from others and thus benefit the public).

164. Patterson, *supra* note 162, at 442.

that Nimmer's intent test can only serve as a "test of exclusion."¹⁶⁵ Namely, when a creator claims to have no intent to create a work of original authorship, she may not claim copyright. This, however, merely restates the well-known estoppel principle. The usefulness of the intent theory seems dubious, if the law already has a legal rule or doctrine that yields the same result.

Additionally, because Nimmer allows an author to become one *post factum*, by adopting a previously created work as original,¹⁶⁶ he further undermines the usefulness of the intent theory to the case at hand. After all, Qimron adopted the originality of his reconstruction the moment he sued for copyright infringement.

*D. Misusing the Expression/Idea Dichotomy:
"Literary Work vs. Material Object"*¹⁶⁷

Opponents argue that the reconstructing scholar primarily assembles the physical pieces of the scrolls.¹⁶⁸ They see such material construction of a physical piece of text, which they dub "sleuth work," as a pursuit entirely different and divorced from "literary work," which alone is properly copyrightable.¹⁶⁹

This argument fails to account for the fact that the physical arrangement of parchment fragments does not substantially differ from arranging words into a limerick or terminal syllables into the rhyme pattern of a Shakespearean sonnet, both of which are copyrightable. It also fails to recognize that such assembling, the shaping of "a material embodiment"¹⁷⁰ of the reconstructed text, constitutes fixing expression in a material form, which triggers copyright protection.

More importantly, this argument ignores the fact that the assembling itself stems from both such physical evidence as the fragments' edges or their material, and from linguistic considerations, such as the dictates of rhetorical conventions, the impossibility of certain letter collocations, or the improbability of finding certain words in a text by a spiritual leader. Clearly, a scholar's linguistic "sleuth work"¹⁷¹ melds, indivisibly, the

165. *Id.* at 443.

166. Nimmer, *supra* note 80, at 208 (stating that "even if [the would-be author's] inspiration came from uncopyrightable garbage, his adoption of it imbues it with protection, because of the magical infusion of intent.").

167. *Id.* at 98.

168. *Id.* at 100.

169. *Id.*

170. *Id.*

171. Nimmer, *supra* note 80, at 100.

material construction of the text with the conceptual construction of its meaning. The “literary work” and the “material object”¹⁷² evolve inseparably, as *decisions about the physical placement of fragments determine meaning and are determined by the meanings the placement might evoke.*

On the other hand, the idea-expression merger is invoked to justify denial of protection. Some insist that because Qimron’s contribution to the MMT consists of both expression, i.e. the physical assemblage of signs, and ideas carried by these signs,¹⁷³ an examination of the MMT under the “idea/expression standard” would preclude copyrightability.¹⁷⁴ This “policy-oriented approach” is said better to serve the purpose of copyrights by ensuring that no proprietary rights are recognized that “would hinder progress.”¹⁷⁵ Fearing that copyrighting the MMT would “prevent alternative access to ideas,”¹⁷⁶ opponents invoke the expression/idea dichotomy as a “metaphoric test . . . authorizing the court to exclude from copyright protection those aspects of the work in which proprietary rights would hinder progress.”¹⁷⁷

This argument fails to account for the fact that the purpose of copyrights may be better served by protecting the reconstructed text than by placing it in the public domain. Because the United States is more (than moral rights jurisdictions) “open to the argument that producers’ interests must be taken into consideration in order to promote the production and dissemination of creative works,”¹⁷⁸ copyrighting the MMT should be the preferred mode of promoting the intellectual progress the United States Constitution seeks to ensure.

E. Cultural Bias

Perhaps the opposition to extending copyright protection to Qimron’s reconstruction also stems partially from a certain cultural bias of our Western civilization, and a reluctance to recognize alternative philosophies and ways of thinking. In Western reactions to attempts at copyrighting aboriginal art, Sherman identifies a “disciplinal,” pro-scientific, and terminology-tied¹⁷⁹ bias, whose obverse is treating

172. *Id.* at 98.

173. Elkin-Koren, *supra* note 9, at 453.

174. *Id.*

175. *Id.* at 452.

176. *Id.* at 453.

177. *Id.* at 452.

178. SEIGNETTE, *supra* note 11, at 36.

179. SHERMAN, *supra* note 31, at 124, 127.

protectable creative expression as the opposite of unprotectable scientific discourse.¹⁸⁰ The claim to scientific accuracy, the context of Qimron's work—at the museum and in the scholarly milieu—and the labeling of Qimron's enterprise as a scholarly "reconstruction," may all have promoted the conclusion that Qimron was merely a transparent, non-refracting conduit through which the words of an ancient author would pass.¹⁸¹ The binary assumption of scientific accuracy and objectivity on the one hand and creative expression's originality¹⁸² on the other hand is perceivably positivist,¹⁸³ and has long been debunked.¹⁸⁴

Another bias that may have prompted the denial of copyright may have been the archaic, neo-positivist conception of the writing process at large.¹⁸⁵ The attractive simplicity of that concept of writing prejudices believers against more complex and less wieldy, yet more accurate, representations of the process of composing in language.¹⁸⁶

VI. ARGUMENTS FOR EXTENDING COPYRIGHT PROTECTION TO THE RECONSTRUCTED TEXT

The preceding pages have already identified the following reasons for copyrighting the reconstructed text: it does not spring from copying; it originated from scholars who assembled the pieces and filled in the lacunae, based on procedures and factors, some of them discretionary, that were far from "obvious,"¹⁸⁷ and that were "at least to some

180. *Id.* at 129.

181. *See id.* at 122, 126 (asserting that the label ascribed to a given text may determine whether the text will or will not be copyrighted).

182. *Id.* at 129.

183. *Id.* at 123, 128.

184. *See, e.g.,* P. BERNT HUGENHOLZ, *Protection of Compilations of Facts in Germany and The Netherlands*, in PROTECTING WORKS OF FACT. COPYRIGHT, FREEDOM OF EXPRESSION AND INFORMATION LAW 59-61 (Egbert J. Dommering & P. Bernt Hugenholtz eds., 1991) (invoking the work of American legal scholar Jane Ginsburg to argue that the once widely accepted assumption that facts are discovered rather than created quarrels with the contemporary methodology and philosophy of science). *See also* LEE PATTERSON, *Literary History*, in CRITICAL TERMS FOR LITERARY STUDY 250, 259 (F. Lentricchia and T. McLaughlin, eds., 1995) (quoting FREDRIC JAMESON, *The Ideology of the Text*, in SALAMAGUNDI, 31-32 (1976), to illustrate the waning of the old assumption that the objects of human sciences, such as historical "facts," exist independently of observing humans and can be known through "objective" observation; rather, they are always "deciphered" and "interpreted" as the texts that they are).

185. *See* SHERMAN, *supra* note 31, at 126. *See also* Jaszi, *supra* note 8, *passim*.

186. *See* Jaszi, *supra* note 8, at 303-304 (discussing how the naive and "entirely fictitious" positivist distinction between "uncreated 'facts' and created 'works'" can undermine copyrightability analysis).

187. Carson, *supra* note 5, at 53.

degree . . . creative.”¹⁸⁸ Thus, we have no means of verifying the adequacy of the reconstruction, and we cannot treat it as scientific fact. More reasons are given below.

A doctrinally correct, fact-attentive copyrightability analysis, like that of the two Israeli DSS decisions, leads to an unorthodox conclusion: that the “research” done by a language archeologist-cum-restorer does not necessarily constitute fact and that it does not always “discover” public domain matter, but rather generates, for public benefit, an idiosyncratic composition original enough to merit protection. This fact-grounded analysis does not allow the Court to classify the MMT as a reconstruction, resulting in a completed, perfect version of the original.¹⁸⁹ Thereby, the two DSS decisions offer the first judicial recognition of the fact that sometimes “the distinction between uncreated ‘facts’ and created ‘works’ is purely fictitious.”¹⁹⁰ Qimron’s Phryrrhic victory—the law’s recognition that the reconstruction is partially his own original work—may have freed copyright law from its positivist scientific bias.

Scholars do not plainly proclaim that their reconstructions are not identical to unrecovered originals. Neither do they proclaim that they are. Rhetorical conventions of scholarship prohibit the former statement as self-subverting, while the latter as false. But Scrolls scholars recognize that there is no guarantee of arriving at “the correct” solution.¹⁹¹ The metaphoric statement that the MMT is “reliably good orange juice”¹⁹² merely asserts that the reconstructing scholars have applied their tools and their personalities to the materials they found in the best way they could. Other scholars, with their respective tools and personalities, may arrive at different reconstructions. Thus, every

188. *Id.*

189. Perhaps the most adequate description of the MMT would be as a serial or corporate collaboration. Jaszi, *supra* note 8, at 318-19. However, the DSS court does not go so far as to humor Jaszi and other critics of a copyright jurisprudence that fails to comprehend the realities of corporate creativity.

190. Jaszi, *supra* note 8, at 303 (invoking the work of prominent literary scholars who argue that “no so-called ‘fact’ is interpretation-free—ultimately [facts] are products rather than predicates of interpretation” and calling “naïve” the “distinction between the pre-existent and the ‘original’”).

191. Carson, *supra* note 5, at 56. Scholars themselves realized that the goal of arriving at the original may be unattainable. *Id.*

192. Nimmer, *supra* note 80, at 101 (quoting the testimony of Strugnell, the U.S. scholar who worked on the MMT before and alongside Qimron, regarding the closeness of the reconstructed text to the elusive original).

reconstruction is unavoidably the creation of those who work on it.¹⁹³ The fact that new scholars want to make new reconstructions proves that their reconstructions would differ from the ones already available.¹⁹⁴ This possibility would not exist if fragments in fact “only ma[de] sense when arranged in one particular order,”¹⁹⁵ or if none of the pieces of the “puzzle” were missing.¹⁹⁶

Evidently, although the resulting reconstruction does not “require and should not demonstrate . . . originality,”¹⁹⁷ it nevertheless does demonstrate originality, because it results from choices, some of them subjective or individual. Whether scholars themselves are ready to recognize the original nature of their labor, and whether they choose to seek protection, is a separate matter entirely.¹⁹⁸ But they need not cringe at the thought of having their work dubbed “original.” If scholars do not seek protection for their “research,” that research will not be held original. Scholars themselves—by either invoking or not invoking copyright protection in their reconstructions—can determine how the legal recasting of their labor as original, accomplished in the DSS cases, will serve them.

VII. CONCLUSION: LESSONS FROM THE JURISPRUDENCE OF THE DSS CASES

Although narrowly written, the DSS cases bring an updated originality jurisprudence to copyrightability cases, one attending to the facts of linguistic creation and free from the lapses of jurisprudence-by-category. Henceforth, a linguistic composition, even one based on public domain matter and customarily labeled as “research,” enjoys protection if it originates at least in part from an author’s discretionary, intuitive, or imaginative choices as to form or expression. Protected will be only the original contributions.

The DSS Decision restores the actual *process of authoring*—a prerequisite to and trigger of protection—to its proper place in the copyrightability analysis required under the United States Constitution

193. The MMT and the CT may be excellent examples of corporate or serial authorship. See Jaszi, *supra* note 8, at 315-18.

194. Carson, *supra* note 5, at 57-58 (scholars’ eagerness to make new reconstructions evidences their different interpretations of the found material).

195. *Id.* at 57.

196. Weinstein, *supra* note 59, at 1638.

197. Carson, *supra* note 5, at 56.

198. See Cohen, *supra* note 3, at 406-07 (Professor Golb testified that calling such archeological reconstructive work “creative” is ridiculous).

and statutory law. The key question is not *what* the claimant seeks to protect or *what* she claims to have produced, but *how* the product came to be. Based on the process of creation and the relationship between the work and the author, the work can be categorized as fully copyrightable, partially copyrightable, or not copyrightable. Analysis that proceeds in the opposite direction thwarts the incentive rationale underlying American copyright law¹⁹⁹ and counters valid precedent.²⁰⁰

The DSS Decision guides us in a new direction. Other guidance²⁰¹ can come from humanities scholars employed as experts,²⁰² much like in patent cases. It can also come via *judicial notice* from educated judges. It may come from college-level composition classes to which new lawyers and judges are being exposed, where Romantic and New Critical methods have given way to rhetorical, post-structuralist, or semiotic approaches to texts and communication.²⁰³ And it can also come from self-education: copyright lawyers should study contemporary theories of knowledge, communication, language, and composition. Without such self-education, they may be unable to adequately understand or analyze authorship or make informed, fact-attentive arguments that will educate the judiciary.

The United States Constitution seeks to ensure the social benefits of robust intellectual production by protecting originally authored works. "Original works of authorship" are those intellectual products that derive from authors through discretion, election, imagination, preference, and taste. Although many intellectual products should not be protected, those that fulfill the Constitutional definition should be. The originality jurisprudence of the Israeli Dead Sea Scrolls decisions ensures that such protection applies. Hershel Shanks' publication of Qimron's Compiled Text has helped in this respect, by exposing some

199. SEIGNETTE, *supra* note 11, at 36.

200. *See, e.g.,* Bell v. Catalda, 191 F.2d 99 (1951) (stating that when the author contributes something more than a merely trivial variation, when she does not copy, and when the author's addition is her own, the work is sufficiently original to be copyrighted); Feist Publications, Inc. v. Rural Telephone Service Co. Inc., 499 U.S. 340 (1991) (stating that even fact compilations are copyrightable when the facts are selected and arranged in less than mechanically obvious ways).

201. GELLER, *supra* note 15, at 161 (stating that "copyright lawmakers need models or exemplars of how works are actually created and communicated"); *see also* Groscheide, *supra* note 41, at 222-23 (noting that as early as the 1960s commentators sought a more liberal and unorthodox approach to copyright law in America).

202. Fukumoto, *supra* note 48, at 927.

203. *See generally* LINDA BRODKEY, WRITING PERMITTED IN DESIGNATED AREAS ONLY (1996) (including essays on writing pedagogy informed by rhetorical and postmodern theories of discourse).

weak points in the application of the doctrine, and in jurisprudence-by-category in particular.²⁰⁴ It also indirectly invigorated originality jurisprudence, helping authors to control their output, which should ultimately promote intellectual production.

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204. SHERMAN, *supra* note 31, at 129.