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COMMENTARY ON "THE CONCEPT OF AUTHORSHIP IN COMPARATIVE COPYRIGHT LAW": A BRIEF ILLUSTRATION

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In her inspiring Niro Distinguished Lecture, Professor Jane Ginsburg advocates a reformulation of copyright law that is more author-centered. She claims that such an approach would be more true to copyright's goal of "stimulating the efforts and imaginations of private creative actors" and cautions that "[b]ecause copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert."[1] Further, in attempting to stimulate discussion of "who is an author in copyright law,"[2] Professor Ginsburg posits Six Principles based on her extensive knowledge of the copyright landscape both here and abroad. I find her multi-faceted approach to be an extremely useful way of contemplating the authorship issue, an issue that I agree has been largely overlooked in both the copyright jurisprudence and literature in the United States and elsewhere.[3] Today, more than ever, the "macroscopic" aspects of copyright law are commanding center stage in the legal, political and social arenas.[4] Professor Ginsburg's article is a welcome reminder that, despite all of the attention copyright law receives in connection with issues involving high technology, some fundamentally important basics such as the characteristics of authorship still warrant extensive attention.[5]

In her article, Professor Ginsburg refers to David Nimmer's tour de force analysis of authorship[6] written to explicate, and critique, the

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1. Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1068 (2003).

2. *Id.* at 1066.

3. *Id.*

4. Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123 (2002).

5. *Id.* at 183 ("Intent, originality, creativity, joint authorship and the relationships among them are foundational building blocks that call for careful examination.").

6. Ginsburg, *supra* note 1, at 1085.

Dead Sea Scrolls case recently decided by the Israeli Supreme Court.[7] Nimmer endorses the "intent to be an author" standard (Principle 5), a standard Ginsburg criticizes on the ground that "as a principle of authorship decoupled from ownership . . . [it] obscures more than it enlightens."[8] Professor Ginsburg's observation is significant in that she evidences an appropriate sensitivity to the critical distinction between authorship and ownership, and the consequences each entail. The sole focus of copyright ownership is economic; in contrast, authorship contemplates not only the receipt of compensation but also the ability to exercise important non-economic (moral) rights such as the right to prevent the mutilation of the work, and the right to command attribution.[9] Although the distinction between the economic rights exercisable by copyright owners and the moral rights enjoyed solely by authors often is blurred, the Dead Sea Scrolls litigation is an important reminder of a salient point: the answer to the question of "who constitutes an author" may depend upon the context in which the question is being raised.

In order to elaborate more fully on this issue, it is necessary to provide a brief background about the facts of this fascinating case, which involved the defendants' unauthorized publication in the United States of the deciphered reconstructed text of a particular Dead Sea Scroll.[10] Harvard professor John Strugnell was among those scholars who were initially allowed access to the scrolls pursuant to a policy of exclusivity promulgated first by Jordan and subsequently by the Antiquities Authority of Israel. At first, Strugnell worked alone, but eventually he required the assistance of someone with greater knowledge of linguistics and Jewish law. Professor Elisha Qimron joined Strugnell in 1981 and spent eleven years deciphering the scroll. From the 60 to 70 fragments Qimron received from Strugnell, Qimron compiled a text of about 120 lines, referred to in the court's opinion as "the deciphered text."[11] In 1990, Qimron and Strugnell reached an agreement with the English Oxford Press regarding publication of the deciphered text, along with photographs of the scroll's fragments and interpretation.[12] Prior to the appearance of this publication, however,

7. Qimron v. Shanks, Unofficial Translation of Case, Aug. 30, 2000 (Michael Birnhack trans., 2000) (on file with author).

8. Ginsburg, *supra* note 1, at 1088.

9. *Id.* at 1068, n.16, 1092.

10. For a more detailed recitation of the facts, see Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985, 991-94 (2002).

11. *Id.* at 992.

12. *Id.*

defendant Hershel Shanks published in the United States a book called *Facsimile Edition of the Dead Sea Scrolls*. This book contained the 120-line deciphered reconstructed text of the scroll and a set of nearly 1800 photos of unpublished scroll fragments.[13] Shanks gave the credit for the reconstruction and decipherment to Professor Strugnell, working "with a colleague." The unnamed colleague was Professor Qimron, who at the time was a junior untenured academic.[14]

Professor Qimron filed suit in an Israeli court, alleging both copyright infringement and violation of his moral right of attribution based on the defendants' failure to attribute partial authorship of the reconstructed text to Qimron. The trial court ruled in his favor on both counts, and this verdict was upheld by the Israeli Supreme Court. Qimron's complaint raises two fascinating intellectual property issues: first, whether Qimron has a copyright in the deciphered text; and second, whether the defendants violated Qimron's right of attribution by publishing the text without mentioning his name.[15]

Resolution of the copyright issue in this litigation was dependent on whether Qimron's reconstruction of the Dead Sea Scroll was considered a sufficiently original work of authorship to merit copyright protection. In addressing the copyright infringement issue, the court concluded that the phases of Qimron's work must be viewed in the aggregate, rather than in isolation. The court referenced several phases of creation, which included matching the scroll fragments based on their physical compatibility; arranging the fragments in their appropriate places; and filling in necessary gaps between fragments. Upon such an examination of the work as a whole, the court concluded that it revealed originality and creativity, so that "the additional soul" Qimron poured into the fragments converted them into a living text capable of copyright protection.[16] Thus, because the defendants engaged in an unauthorized publication of the scroll, they committed copyright infringement under Israeli law.[17] In contrast, the defendants argued that Qimron act of supplementing the text was simply a reconstruction of an existing work, and therefore the text was not protected by copyright law.[18] Nimmer and other members of the academy[19] have adopted this view, thereby severely criticizing the Israeli courts' opinions in this litigation. Commentators have pointed

13. *Id.*
14. *Id.* at 991.
15. *Id.* at 992-93.
16. Kwall, *supra* note 10, at 993.
17. *Id.*
18. *Id.* at 995 n.61.
19. *See* VerSteeg, *supra* note 4, at 130.

out that if all Professor Qimron did in reconstructing the text was to decipher and track with precision a pre-existing document, he should not enjoy copyright protection for his final product, because that work would not constitute an original work of authorship. The only originality would be in mistakes.[20]

Under the multi-faceted approach to authorship endorsed by Professor Ginsburg, Qimron's authorship claim would likely be validated. She posits that in all of the jurisdictions under examination, there appears to be agreement that "an author is a human being who exercises subjective judgment in composing the work and who controls its execution."[21] By all accounts, the enormity of the task of deciphering the scroll required a high degree of intellectual conceptualization and direction, absent undue reliance on mechanical assistance (Principles 1 and 2). Insofar as the requirement of "originality" is concerned (Principle 3), Professor Ginsburg notes that in the United States, *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[22] embodies the operative legal standard. Under *Feist*, the standard for originality, requiring independent creation plus a modicum of creativity, is quite modest despite *Feist's* interpretation of this standard as constitutionally mandated. Indeed, Qimron's actions in crafting the reconstructed text seem analogous to producing a translation, and copyright law historically has extended protection to translations.[23] Just as a translator must exercise judgment about word choices in the translation process, so did Qimron make certain judgments regarding the reconstructed fragments.

In his comprehensive analysis of the litigation, Nimmer notes numerous examples of the types of judgments Qimron made in his reconstruction of the scroll.[24] Although Nimmer ultimately concludes that none of Qimron's specific choices supports a conclusion of originality, and hence, copyrightability, of the reconstruction,[25] I believe the reconstruction process might be construed otherwise. For example, Qimron made judgments regarding the length of the sentences in

20. See Kwall, *supra* note 10, at 995 n.61, for a more complete discussion of this point.

21. Ginsburg, *supra* note 1, at 1066.

22. 499 U.S. 340 (1991).

23. *See, e.g.*, Merkos L'inyonei Chinuch, Inc. v. Ostar Sifrei Lubavitch, Inc., 2002 U.S. App. LEXIS 24139 (2d Cir. Nov. 26, 2002); Grove Press, Inc. v. Greenleaf Publ'g Co., 247 F. Supp. 518, 524 (E.D.N.Y. 1965).

24. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 5, 118-32 (2001).

25. In this regard, David Nimmer is not alone. *See, e.g.*, Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001) (contending that Qimron's reconstruction should not be copyrightable); *see also supra* notes 19-20 and accompanying text.

parts of the scroll, resulting in a decision to assemble the fragments widthwise rather than lengthwise.[26] Additionally, based on research, he selected a missing letter for a particular word in the text, resulting in one particular interpretation of the text over a different interpretation.[27] Qimron and Stugnell, in fact, disagreed over these decisions,[28] thus further supporting Qimron's exercise of "choice as to the contents and presentation of his work."[29] Although *Feist* clearly condemns all "sweat of the brow" works as uncopyrightable, the operative question is whether Qimron did more than sweat in reconstructing the fragments of the Dead Sea Scrolls. Clearly Qimron's endeavor was far more intellectually, emotionally and spiritually driven than one undertaken by someone who alphabetizes listings in a telephone directory.[30] Based on the various descriptions of what Quimron actually did, it seems as though he should be able to command some type of authorship recognition for his work on the ground that, as a human creator, he exercised "minimal personal autonomy" in fashioning his work, "notwithstanding the constraints of [his] task."[31] Professor Ginsburg's authorship analysis suggests a way in which we might begin to contemplate the authorship construct that would indeed allow this type of flexibility.

Equally significant under Professor Ginsburg's formulation is the idea that an author should enjoy not only economic compensation, but also the ability to "exert some artistic control" over her work.[32] The Dead Sea Scrolls litigation raises the issue whether the right of attribution should attach to works whose originality is debatable on some levels. The Israeli court did not have to face this issue directly, in light of its holding that the reconstructed scroll was subject to copyright protection under Israeli law. Because under Israeli law, as elsewhere, moral rights attach to copyrightable works,[33] it was not remarkable for the court to dispose of the copyright issue in the affirmative, and then conclude that Shanks's failure to mention Qimron's name constituted a violation of Qimron's moral right of attribution. A far more interesting question, however, would have arisen had the court concluded

26. Nimmer, *supra* note 24, at 118.

27. *Id.*

28. *Id.* at 118, 122.

29. Ginsburg, *supra* note 1, at 1077.

30. Kwall, *supra* note 10, at 1031 n.259.

31. Ginsburg, *supra* note 1, at 1092.

32. *Id.*

33. Kwall, *supra* note 10, at 994.

that there was nothing copyrightable about Qimron's work product.[34] Might the court still have concluded that, even absent originality in the typical sense, a right of attribution nonetheless should attach? Certainly such a scenario seems plausible in light of Professor Ginsburg's Principle 4 ("the author need not be creative, so long as she perspires"). Indeed, an exploration of this issue requires an examination of the essence of an individual's moral claim to her work products.

Indeed, the more I contemplate the issues with which Professor Ginsburg grapples in her Article, the more I am inclined toward the view that part of deconstructing the nature of authorship, and reconfiguring the relevant legal protections for works that are deemed to possess "authorship," lies in further exploration of the psychological and spiritual dimensions of the creative process.[35] Authorship should recognize that creative works are indeed the "children of creative spirits" and that many creators make an enormous psychological investment in these children, just as parents of offspring do.[36] In my view, Professor Ginsburg's analysis appropriately points toward the conclusion that copyright law probably needs to recognize these interests much more explicitly than it currently does.

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34. I have argued elsewhere that in the United States, a judicial ruling in favor of Qimron on the copyright issue would not have insured Qimron's right of attribution given the lack of explicit protection for this interest in this country. *See* Kwall, *supra* note 10, at 995.

35. Some non-legal works have explored these relationships. For an insightful analysis of the relationship between gift exchange theory and artistic creativity, see LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY (1983).

36. *See* Roberta Rosenthal Kwall, *"Author-Stories": Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 61-62 (2001). For a further discussion of the "paternity" metaphor, see Mark Rose, *Copyright and its Metaphors*, 50 UCLA L. REV. 11 (2002).