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Copyrighting the Dead Sea Scrolls: Qimron v. Shanks

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**COPYRIGHTING THE DEAD SEA SCROLLS: *QIMRON*
V. *SHANKS***

David L. Cohen

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COPYRIGHTING THE DEAD SEA SCROLLS: *QIMRON* *V. SHANKS**

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I. INTRODUCTION

In 2009, construction workers in Stratford-upon-Avon renovating a Tudor era building discovered a hidden cellar containing shredded manuscripts. Shakespeare scholars believed that the manuscripts were copies of a lost Shakespeare play. The play, only alluded to in contemporary documents, was apparently dedicated to a mysterious lady whose hand was unattainable. The play was written and published but never circulated. For some unknown reason, Shakespeare demanded that the publisher shred all copies of the play and destroy them. Historians were able to piece together this explanation of the manuscript find based on the accounts and correspondence of Shakespeare's known publishers. The surviving manuscripts were all shredded and contained approximately 20 different copies of the play, but no one copy was complete; indeed some copies contained only a few lines. A committee of scholars from Germany, who had outbid all other contenders for the manuscripts at auction, was assembled to try to piece together the play. At various academic conferences it emerged that the scholars were able to piece together two scenes. The play was considered very important because of its frankly autobiographical nature.

In the fall of 2010 the first scene was released to widespread excitement. However, by 2059 the second scene had yet to be released and the graduate students of the professors originally assigned to piece it together were now tenured professors and claimed still to be working on a perfected version of the text and accompanying commentary. In 2060 a working copy of the second scene began making the rounds at academic conferences, but with the proviso that it be shown only to those scholars expressly approved by the committee. The exclusivity requirements generated intense public outcry. One of the approved scholars passed on a copy of the reconstructed manuscript to a noted and somewhat publicity-seeking American literary magazine publisher. The publisher decided to publish the entire text of the play in his American magazine, without asking the committee's permission or attributing the reconstruction to the work of the committee. The committee subsequently sued the publisher in a German court. The judge found that the American publisher violated both the economic and moral rights of the committee and issued a worldwide injunction against the sale of copies of the play. Scholars around the world bemoaned this new assault on the freedom of academic and historical research.

* While in publication the case was affirmed on appeal to the Israeli Supreme Court. See POSTSCRIPT, *infra*.

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This hypothetical actually happened, and revolved around documents considered by many to be of far greater historical importance than a lost Shakespeare play—the Dead Sea Scrolls. In 1992, Professor Elisha Qimron of Ben Gurion University in Be'er Sheva, Israel, brought suit against the editors and publisher of *A Facsimile Edition of the Dead Sea Scrolls*, a complete set of photographs of the scrolls, for copyright infringement and the tort of mental anguish asking for approximately \$250,000 in damages.¹ The case centered on an appendix of the book which included a portion of a scroll text, *Misgat Ma'Aseh ha-Torah—Some Rulings Pertaining to the Torah* (MMT), reconstructed by Qimron. MMT consists of 121 lines of text, and Qimron's reconstruction—referred to in the suit as the Compiled Text (CT)—consisted of the MMT and 11 lines reconstructed by Qimron, for a total of 132 lines.² Qimron contended that the CT was his original work and its publication in the *Facsimile Edition* was an infringement of his copyright.³ Qimron won at trial in Israel and the case is pending before the Israeli Supreme Court.⁴ So striking was the trial court's ruling that for the first time in the history of the Israeli Supreme Court an amicus curiae brief was filed.⁵

Two things make this case remarkable. First, it was the first case in the world to recognize the copyrightability (including both economic and moral rights) of a scholarly reconstruction of an ancient text.⁶ Second, an American publisher was held liable by an Israeli court, applying Israeli copyright law as if it were American copyright law, for a copyright infringement that occurred in America.⁷ This Article argues that the Israeli district court was too quick in finding that reconstructed manuscripts are copyrightable. It ignored the inherent paradoxes of claiming, on the one hand, that a reconstruction was an historically accurate version of an ancient manuscript, and on the other hand, claiming that the reconstruction was a work of "originality." The court also brushed aside the grave danger that its ruling might pose for the freedom of scholarly inquiry and ignored the entire fifty-year context of recriminations and backbiting that surround the Dead Sea Scrolls. This Article also argues that the court was mistaken when it presumed that the United

1. See C.C. (Jm.) 41/92, *Qimron v. Shanks*, 1993 Teek Ezrahi (T.E.) 10. The defendants were Hershel Shanks, Robert Eiseman, James Robinson, and the Biblical Archaeology Society, publisher of the *Biblical Archaeology Review*. The Author's English translation is included as Appendix A. The reporter page numbers for *Qimron v. Shanks* are bracketed in the translation.

2. See *id.* at 16. The 121 lines of text were letters and phrases which could be identified with a very high degree of certainty, the remaining 11 lines were either attempts to figure out letters or words that were not clear or logical hypotheses of what letters or words were required to fill in the gaps between words that the scholars knew with greater certainty. See also 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, 330 (1995).

3. See John Noble Wilford, *Israelis Try, Again, To Limit Access to the Scrolls*, N.Y. TIMES, Jan. 23, 1992, at A7.

4. See Abraham Rabinovich, *The Case of the 2000 Year old Copyright*, JERUSALEM POST, Mar. 30, 1998, at 16. The case is being heard by Supreme Court President Aharon Barak and Associate Judges Dorit Beinisch and Yaakov Turkel. See *id.*

5. See *id.* The brief is by the American Committee of Concerned Intellectual Property Educators. As a common law system, the eventual Israeli ruling will be of some precedential value in American courts. See *id.*

6. See Joel Greenberg, *Court Supports Editor On Rights to Dead Sea Text*, N.Y. TIMES, Mar. 31, 1993, at A12.

7. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 17.03 n.11.1 (1999).

States provides moral rights protection. The court's conflicts of law analysis set a worrying precedent in this age of cross-border transactions by presuming that all legal systems protect intellectual property rights in the same fashion. Finally, after outlining and critiquing the district court's decision, this Article will offer some suggestions on how the Israeli Supreme Court should proceed to redress the balance between protecting an author's rights and freedom of inquiry.

II. THE SUBJECT MATTER

The vast majority of the facsimiles of scrolls in the *Facsimile Edition* came from the Huntington Library in California. In order to preserve knowledge of the scrolls in the event of their possible destruction, the Israeli government made facsimile copies of all the scrolls and sent them to selected libraries around the world for safe-keeping. The libraries were bound by an international agreement not to publish the scrolls.⁸ In 1980, Elizabeth Hay Bechtel, a philanthropist, arranged to have the scroll material in Jerusalem photographed with the full consent of the Israeli government, but apparently without being bound by any conditions on their use. Mrs. Bechtel decided to store the photographs at the Huntington Library in California. Upon Mrs. Bechtel's death, the photographs became the property of the Library with no restrictions on their use.⁹ In response to worldwide clamoring for scroll publication, in 1993 the Huntington Library decided to release the photographs, in microfiche form, of the material in its collection.¹⁰

Prior to 1993, only twenty percent of the scrolls were published.¹¹ What had not been published were fragments, some no larger than a couple of inches square, of various scrolls found, mostly, in cave four.¹² Herschel Shanks, publisher of *Biblical Archaeology Review*, and an advocate of greater access to the scrolls, was allowed to publish the Huntington photographs in book format.¹³ At the same time that the Huntington Library had released its photos, a noted Talmudic scholar and his graduate student, using their computer and a little known concordance made for the unpublished scrolls, recreated, with some imperfections, the contents of the unpublished works of the Dead Sea Scrolls.¹⁴ These two actions prompted a number of other libraries to release their scroll photographs.¹⁵ The Israeli Department of Antiquities condemned these actions and threatened to sue, but after tremendous public pressure, the Israeli government relented and granted free access to the photographs for "personal research only and not for the production of a text edition."¹⁶

8. See John Noble Wilford, *Monopoly on Dead Sea Scrolls is Ended*, N.Y. TIMES, Sept. 22, 1991, at A1.

9. See *id.*

10. See John Noble Wilford, *Open Dead Sea Scrolls Stir Up New Disputes*, N.Y. TIMES, Apr. 19, 1992, at A22.

11. *Academic Secrets Meet Clever Computers*, THE ECONOMIST, Sept. 14, 1991, at 106.

12. For more on the scrolls and what has and has not been published, see HERSHEL SHANKS, ET AL., *THE DEAD SEA SCROLLS AFTER FORTY YEARS* (1990) and GEZA VERMES, *THE COMPLETE DEAD SEA SCROLLS IN ENGLISH* (1997).

13. See Wilford, *supra* note 10.

14. See *Academic Secrets Meet Clever Computers*, THE ECONOMIST, Sept. 14, 1991, at 106.

15. See Clyde Haberman, *Israel to Revise Rules on Scrolls*, N. Y. TIMES, Oct. 28, 1991, at A3.

16. *Id.*

The MMT text came from scroll fragments found in Qumran. While a number of the “scrolls” found at Qumran were intact, the vast majority of the scrolls (there are over 800 distinct scroll “texts,” which come from over 15,000 fragments of scrolls) are shredded fragments.¹⁷ It requires painstaking work to try to fit any of the fragments together. Scholars must use forensic (e.g., were the scrolls made from the same animal, was the ink used the same kind of ink, and are the scroll leaves connected using the same weave patterns), linguistic (e.g., are the scrolls in the same language—Greek, Palestinian Aramaic, Babylonian Aramaic or Hebrew—and of what particular epoch), and substantive (e.g., to what Jewish ritual practices or objects might the scroll be referring or to what myths or concepts might the texts be referring) evidence in order to begin to piece together the various fragments.¹⁸ Furthermore, it is very hard to prove conclusively, or even beyond a reasonable doubt, that any particular reconstruction is the correct one.¹⁹

MMT was rather difficult to piece together. Archaeologists found sixty to seventy scroll fragments that seemed to be part of the same text.²⁰ Hampering the efforts of archaeologists trying to piece the text together was the fact that the fragments were apparently from a number of different versions of the same text written by different hands and at different times.²¹ In the end, the scholars working on MMT concluded that around forty percent of the MMT text was missing.²² The scholar in charge of that particular scroll, John Strugnell, was at an impasse. Strugnell knew little Hebrew and next to nothing about *Halacha* in Hasmonean Judah.²³ It was for this reason that after doing as much as he could to piece the scroll based on physical evidence, Strugnell invited Elisha Qimron to take control of the process of piecing together the scroll and trying to figure out what might be said in the missing fragments.²⁴ Qimron added invaluable assistance to the deciphering of the scrolls. His knowledge of the ancient sources enabled the scroll fragments to be pieced together much more intelligently.²⁵

17. See C.C. (Jm.) 41/92, Qimron v. Shanks, 1993 T.E. 10, 15.

18. See *id.* at 15, 24.

19. See SHANKS ET AL., *supra* note 12, at 31.

20. See Qimron v. Shanks, 1993 T.E. at 16.

21. See *id.* at 24.

22. See *id.* at 16.

23. See *id.*

24. See *id.* What the court did not mention, and what was a very powerful undercurrent behind many of Shanks's actions, was the overt anti-Semitism of the original scroll team. For example, the Jordanian government refused to allow any Jews to study the scrolls (which would explain why the scrolls team's knowledge of Hebrew and Jewish sources was lacking) and Strugnell himself was finally removed from the project by the Israeli government when he publicly declared that Judaism was an inferior religion. See SHANKS, ET AL., *supra* note 12, at 12.

25. For example, one paragraph in the MMT that was composed of six small fragments was put together based on the question of whether there was a need to complete the Hebrew letter *Aleph* (Strugnell's opinion) or *Ayin* (Qimron's opinion). If the letter that needed completion were *Aleph*, the resulting word would read *Orot* which means “light,” and if the letter were *Ayin*, the resulting word would mean “hides/skins.” This difference would, understandably, change the meaning of the resulting paragraph a great deal. See Qimron v. Shanks, 1993 T.E. at 24.

It should be noted that scholars consider the MMT to be a very important document. Qimron alleged that it was a letter from the "Teacher of Righteousness," the legendary founder of the Qumran sect, to Jonathan Maccabe, the first High Priest/Ruler of the Second Jewish Commonwealth.²⁶

By 1990, Qimron had created a working draft of a reconstruction of the CT. Qimron had circulated this (and previous attempts at reconstruction) to a small group of scholars.²⁷ One of those scholars apparently sent a copy to professor Norman Golb of the University of Chicago and a number of other scholars, including Dr. Zdzislaw Kapra of Cracow and Shanks.²⁸ Golb acknowledged that the scroll was of great significance but was unsure if it was a hoax.²⁹ Kapra printed the text with a Polish translation in 1990.³⁰ In the introduction, he requested that readers neither copy nor distribute the text to other people.³¹ Relatively soon after its publication in Polish, Qimron was notified that his reconstruction was published without his permission.³² Qimron then asked the Israeli Antiquities Authority to intervene, which it did on March 3, 1991.³³ The Authority sent a letter to Kapra asking him to cease the publication, informing him of Qimron's work on the

26. See *id.* at 15. Jonathan Maccabe was the brother of Judah Maccabe, who drove the Selucid Greeks from Jerusalem around the year 164 B.C.E. The holiday of Hanukkah celebrates this victory. Judah was killed in a subsequent battle, and Jonathan took command of the Jewish armies in his place. Once the Selucids were driven out of most of the areas around Judah, Jonathan, who was of the priestly caste, was anointed High Priest. To protest this anointment, the founder of the Qumran sect, in perhaps the first instance of a separation of powers argument in the historical record, labeled Jonathan a "Priest of Evil" and a defiler of the Temple, and left Jerusalem in disgust and retired to Qumran with a group of like-minded Priests. Therefore, the MMT, which appears to be a letter from the Teacher of Righteousness to Jonathan outlining the issues between them, is of profound importance in trying to determine who the Qumran sect were and what they were all about. See *id.*; see also GEZA VERMES, *UNDERSTANDING THE DEAD SEA SCROLLS* (1990).

Jonathan's brother Simeon was appointed by the Great Assembly in 140 B.C.E. as hereditary High Priest, ruler and commander of the Jewish people. Simeon's son, Aristobulus (104-103 B.C.E.) claimed the title king. Under Alexander Yannai (103-76 B.C.E.), Aristobulus' brother, the Hasmonean kingdom grew to encompass most of modern day Israel and Jordan. Pompey's annexation of Judah ended the Hasmonean hold on kingship, although they remained ruler and High Priest. Antigonus Mattathias's rebellious alliance with the Parthians against Rome, and his subsequent defeat in 37 B.C.E. ended the Hasmonean dynasty. The Romans appointed Herod (a descendant of Iudemeans forcibly converted by Alexander Jannai) as ruler of Judah after the rebellion. Herod, however, married a Hasmonean, Mariamne, the great-granddaughter of Alexander Yannai. (Great-great grandniece of Jonathan Maccabe). See MENAHEM STERN, *Hasmoneans*, in *ENCYCLOPEDIA JUDAICA, CD-ROM EDITION* (1996).

27. See *Qimron v. Shanks*, 1993 T.E. at 16.

28. See *id.* at 16-17. Golb is renowned for his opposition to most mainstream theses about Qumran and is a vocal critic (verging on paranoia) of the scroll monopoly. See Abraham Rabinovich, *The Battle of Qumran*, *THE JERUSALEM POST*, Mar. 31, 1995, at 24; Norman Hammond, *Dead Sea Scrolls 'A Closed Book Again,'* *THE TIMES (LONDON)*, Aug. 9, 1995; Brian Jackson, *Scholar Believes Israel Hiding Origin of the Dead Sea Scrolls*, *CHICAGO SUN-TIMES*, Mar. 30, 1996, at 17; but see Norman Golb, *Misleading Assertions*, *THE JERUSALEM POST*, May 5, 1995, at 2.

29. See *Qimron v. Shanks*, 1993 T.E. at 17-18.

30. See *id.* at 18.

31. See *id.* at 17.

32. See *id.*

33. See *id.*

CT, and informing him that Qimron intended to publish the CT himself, shortly.³⁴ Kapra ceased the publication and wrote a letter of apology to Qimron.³⁵

Shanks published the *Facsimile Edition* in November, 1991.³⁶ This two-volume work continued the CT but did not attribute or even mention Qimron in connection with it.³⁷ Shanks defended his publication of the CT and his failure to mention Qimron by denying the CT's copyrightability.³⁸ He claimed scholarly reconstructions of scroll texts cannot be copyrighted because a scholar cannot get a copyright in a text he did not write; if anyone owned copyright in the CT it was the Teacher of Righteousness.³⁹ Additionally, Shanks argued that other scholars besides Qimron had helped prepare the text (primarily Strugnell),⁴⁰ and the text already had been widely circulated among scholars and was published already in Polish translation. Not one to be intimidated by Qimron's suit, Shanks filed a countersuit in Federal District Court in Philadelphia.⁴¹ In the end, however, Shanks's arguments fell on deaf ears and Judge Dahlia Dorner, then of the Jerusalem District Court,⁴² found for Qimron and awarded him NIS 150,000 (around \$44,000) in damages as well as a worldwide injunction against publication of the CT.⁴³ Judge Dorner noted that: "Tens of fragments that were discovered related to the various copies. There was no physical fit between the majority of the pieces, and even after combining them, there was a void of close to half of what was written."⁴⁴ She continued, stating that it is clear "with putting all the pieces physically next to another, there is not necessarily originality; however, the composition of the Compiled Text, based upon philologic and *Halachic* research that the author conducted from the original, is an original work."⁴⁵ Once the court found that Qimron had copyright in the text, it found, with relative ease, that his moral rights were infringed.⁴⁶

III. ISRAELI COPYRIGHT LAW

Israel is a common law jurisdiction whose substantive law is based on English, Turkish, and Jewish sources.⁴⁷ Although there has always been a strong civil law influence in Israel—its academics and professionals have traditionally come from Germany and Poland—its courts still function very much as common law courts.⁴⁸ The English Copyright Act of 1911, as amended and supplemented,

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* at 19-20.

39. *See id.*

40. *See id.*

41. *See* John Noble Wilford, *New Access to Scrolls Fuels Scholars' Warfare*, N.Y. TIMES, Dec. 22, 1992, at C1.

42. Judge Dorner has been subsequently elevated to the Supreme Court. *See Supreme Court Gets 2 New Justices*, JERUSALEM POST, Mar. 14, 1994, at 2.

43. *See* Qimron v. Shanks, 1993 T.E. at 41.

44. *Id.* at 24.

45. *Id.*

46. *See id.* at 32-33.

47. Joshua Wiesman, *Israel*, in 2 MELVILLE B. NIMMER & PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE 5 (1996).

48. *See id.*

is the governing statute in Israel.⁴⁹ Israel joined the Berne Convention in 1952.⁵⁰ After the Foundations of the Law Act in 1980, English common law doctrines no longer serve as a source of law. This act provided that "the principles of freedom, justice, equity and peace of Israel's heritage" will replace English law as a supplementary source of law.⁵¹ Israel, like the United States and Britain, has an originality requirement for copyright. Under Israeli law, originality, at a minimum, requires that the work come from the author and is not the result of copying another's work.⁵² To be an original compilation, not being a copy of an earlier work is sufficient, provided there is a minimum level of creativity.⁵³ Confidential writings are accorded copyright protection, too.⁵⁴ Israel shares with the United States the common law doctrines of work for hire and joint works.⁵⁵ There are no formalities regarding registration of copyright, and publication requires the consent of the author.⁵⁶

Israel adopted a moral rights law in 1981. The law provides for the right of authors to have their names attached to their work, a right to relief for distortion or any modification of the work, and relief for acts done to the work that might be harmful to the author's reputation.⁵⁷ Due to a mistake in the drafting, it is a valid interpretation of Israeli moral rights law to argue that any modification of a work constitutes a "derogatory effect" on the reputation of the author, whether it is actually the case or not.⁵⁸ The Israeli Supreme Court declined to solve this problem

49. *See id.*

50. *See id.*

51. *Id.* at 5-6. Interestingly, Jewish law has one of the oldest systems of moral rights protection. *See, e.g., Jeremiah 23:30; Jerusalem Talmud, Sanhedrin 56b; Ethics of the Fathers 6:6.* It is a widespread legal maxim that "he who says something in the name of its sayer" brings deliverance to the world, *see, e.g., Midrash Tanhuma Numbers 22*, whereas someone who failed to attribute an idea or teaching to its originator was an "Apikores." *Babylonian Talmud, Sanhedrin 99b.* An Apikores, or Epicurean, is the worst pejorative known in Jewish law; they have no share in the world to come. *See, e.g., MOSES MAIMONIDES, MISHNE TORAH, Laws of Repentance §§ 3:6, 3:8.* Omission of the author's name when it is known is as great a sin as misattribution. In addition to the right of attribution, scholars under Jewish law, in limited instances, have the right to prevent the dissemination of their ideas, even after publication—this right, however, is subject to a forced licensing by the Rabbinical Court. The concept of economic copyright is of recent and controversial vintage in Jewish law. It is still a widely held opinion, that beyond lost sales on the particular edition in print, someone who pirates another's book inflicts no actionable damages on the copyright holder. It should be noted that the above applies to works of religious import; Jewish law is more willing to allow monopolistic copyright for secular subjects. *See, J. Bleich, Current Responsa, Decisions of Bet Din and Rabbinical Literature: Copyright*, 5 JEWISH LAW ANNUAL 71 (1985); David L. Cohen, *Intellectual Property, Halacha and the World Wide Web*, unpublished manuscript (on file with author).

52. *See Weisman, supra* note 47, at 7-8.

53. *See id.* In an interesting case, C.A. 665/87, *Peleg v. Medan Dephus Nazereth Ltd.*, P.M. 5751(2)49, the Israeli Supreme Court held that a scribe who copied a text (in the public domain) gained copyright in the resulting work because it was an artistic creation. *See Weisman, supra* note 47, at 7-8. For an American approach to this issue, see William Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COMM. & L. DEC. 37, 45 (1990).

54. *See Weisman, supra* note 47, at 15.

55. *See id.* at 17-18.

56. *See id.* at 20.

57. *See id.* at 23-24.

58. *Id.* at 24-25.

when presented with an opportunity to do so, but a district court in Haifa ruled that an objective reasonableness test should be applied to see if an author's reputation is harmed.⁵⁹

Israeli infringement analysis is similar to that in common law countries: similarity between the plaintiff's and defendant's work gives rise to a presumption of infringement; there exists a fundamental distinction between ideas and expressions; infringement requires taking a substantial part of the protected work; and the courts allow the defenses of fair use or "fair dealing"⁶⁰ and good faith.⁶¹ Monetary awards are also similar to American remedies in that the courts may award actual or statutory damages.⁶²

The court found that the CT was an original work of authorship and awarded Qimron the copyright because he expended years of effort and in order to reconstruct the text his *Halachic* and Biblical expertise were required. The court also ruled that Shanks violated Qimron's moral rights of integrity and paternity.⁶³ An unusual element in this case was the choice of law issues involved. Qimron did not seek protection in Israel for infringement in Israel of his rights in an American work, nor did he seek relief in the United States for infringement of an Israeli work in the United States. Rather, Qimron sought redress in Israel, for infringement that occurred in the United States by Americans, of a work that was *probably* Israeli⁶⁴— and he sought relief in an Israeli court. The Israeli district court applied local rules for the substantive issues of choice of law as well as to the procedural issues such as proof of foreign law.⁶⁵

59. *See id.*

60. *Id.* at 29-30. Fair use in Israel is similar in approach to American fair use doctrine. The court must look at the purpose and character of the use, the substantiality of the portion used in relation to the copyrighted work, and the effect of the use on the potential market for the copyrighted work. *See id.*

61. In Israel, good faith is a defense to all remedies in civil actions except injunctions. In this context, the defense requires that the alleged infringer be completely and objectively unaware of the existence of a copyright in the work at issue. Good faith can be used as a defense to contributory infringement, but the courts have found that the contributory infringer, such as theater or music retailer, has an affirmative duty to determine whether infringement will take place with his contribution. *See id.* at 31-32.

62. *See id.* at 34-36. The Israeli Supreme Court has ruled that damages should be awarded generously, but more with an aim at compensation than punishment or deterrence. *See id.* Although no legislative language specifies what considerations are necessary when determining damages, the Israeli Supreme Court has ruled that the mental condition of the infringer may be taken into account when deciding damages. *See id.* After the adoption of moral rights laws, it has become possible to tie a copyright case to the tort of intentional infliction of emotional distress, which is what was done in *Qimron v. Shanks*, and which opens the door to much larger judgments.

63. In 1982, Israel adopted moral rights legislation following a WIPO conference in 1980. Mayer Gabay, *Israel Adopts Moral Rights Law*, 29 J. OF THE COPYRIGHT SOC'Y 462, 462-63 (1982). What was strange about *Qimron v. Shanks* was that the Israeli court applied Israeli moral rights law (the forum law) when the infringing acts occurred entirely in the United States. *See Israeli Court Extends Protection to Reconstructed Document*, 1 No. 13 MEALEY'S LITIG. REP.: INTEL. PROP. 7 (1993).

64. The court skirts around the issue of who de jure owns the scrolls and whether someone can or does have copyright in the scrolls themselves (as opposed to reconstructions of them). *See C.C. (Jm.) 41/92, Qimron v. Shanks*, 1993 T.E. 10, 25-27. For a discussion of who owns the scrolls see Carson, *supra* note 2, at 309-17.

65. *See Qimron v. Shanks*, 1993 T.E. at 21.

Qimron argued that the court should apply Israeli copyright law because although the law of the place of infringement applies,⁶⁶ under the "presumption of equal laws," Israeli (forum) law is to be applied unless the foreign law were proved by the defendants to be different.⁶⁷ The 'presumption of equal laws' is an English doctrine which states that, subject to limited exceptions (Scottish law, E.U. law, and Irish law), and in the absence of proof in the form of expert testimony to the contrary, the court will assume that foreign law is the same as English law.⁶⁸ The Israeli version of this doctrine is slightly narrower than the English version—it includes exceptions for personal status that are not in the English version.⁶⁹

The defendants countered that because copyright is based on "localized" rights, the presumption should favor the laws of the jurisdiction of infringement, and the burden for proving "equal laws" should fall on the plaintiff and not on the defendant as is usually the case under Israeli law.⁷⁰ The defendants claimed that copyright is a property right created by national legislation and that property rights vary from place to place.⁷¹ Consequently, a fair determination of the rights of the parties in the case at hand requires application of the law where the right is contested rather than the law of the forum court.⁷²

66. See *id.* at 21-22.

67. See *id.* (the court calls it the "doctrine of equal laws"); but see FED. R. CIV. P. 44(a)(2) (allowing court discretion in questions of judicial notice and proof of foreign law).

68. See PRIVATE INTERNATIONAL LITIGATION 436 (Jack I.H. Jacob ed. 1988); 1 DICEY AND MORRIS THE CONFLICT OF LAWS 226-38 (Lawrence Collins ed., 12th ed. 1993); P.M. NORTH & JJ FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 107-12 (12th ed. 1992).

69. See *Qimron v. Shanks*, 1993 T.E. at 21. Perhaps Israeli law follows the jurisprudence of Friedrich Karl von Savigny, one of the pioneers of choice of law analysis, who argued that in certain cases the forum state must apply certain of its own laws based on moral grounds or reasons of public utility. However, when no such interests were at stake, the relationships of private individuals are subject to property, contract, and tort laws. It is preferable, Savigny argued, that courts not discriminate against foreign parties and that courts choose the same law in the same or similar categories of cases. Savigny correlated the relations between private parties, which include causes of action that arise under property and tort, with the territories to which these relations seemed by nature to be most appropriately connected. Thus, he concluded that property claims would be best adjudicated under the law of the state in whose territory the property lay. He made a similar conclusion for claims in tort. See Paul Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright in A Digitally Networked World*, 20 COLUM.-VLA J.L. & ARTS 571, 574 (1996) (citing FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS § 345 (W. Guthrie trans., 2d ed. 1990)).

70. See *Qimron v. Shanks*, 1993 T.E. at 21. The defendants based their arguments on the judicial theory that in Israel, in proprietary and status matters, the burden of proving foreign law falls on the plaintiff to prove the foreign laws. See Jeffery M. Dine, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT'L LAW 545, 571 n.184 (1995) (arguing that it is unclear under Israeli law whether Qimron, who is seeking to recover under U.S. law, should have to prove that U.S. law permits recovery, or Shanks, who is pleading based on the U.S. non-recognition of moral rights, should have to prove foreign law); see also Menashe Shava, *Proof of Foreign Law in Israel: A Comparative Study*, 16 N.Y.U. J. INT'L L. & POL. 211, 225-32 (1984) (criticizing the requirement of proof of foreign law in cases involving status and property, but noting that Israeli courts require proof of foreign law even as to status, but in general the burden of proof of foreign law should fall on the party pleading it).

71. See *Qimron v. Shanks*, 1993 T.E. at 21-22.

72. See *id.*

The district court rejected this argument and sided with the plaintiff.⁷³ Although it conceded that copyright is a proprietary (and thus to some extent localized) issue, it held that the presumption of equal laws applies to property as well.⁷⁴ Furthermore, the court noted that a claim for copyright infringement sounds in tort.⁷⁵ Qimron's cause of action for the tort of mental anguish is intimately tied to Qimron's expectations of moral rights protection. This protection is based on Israeli law, and therefore it is to Israeli law that the court must turn because it is universally accepted that the presumption of equal laws applies to actions in tort.⁷⁶

Defendant's arguments notwithstanding, the district court held that the "presumption of equal laws" is not fictitious in the case at hand because the English copyright law,⁷⁷ on which the Israeli law is based, also has been adopted in America.⁷⁸ The court then compared Israeli⁷⁹ and American copyright law on originality using *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁸⁰ and concluded that they are equivalent.⁸¹ The court also assumed that the moral rights law of Israel⁸² and the United States⁸³ are equivalent and that U.S. moral rights

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See generally* W.R. CORNISH, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* 249-50 (2d ed. 1989).

78. *See* Qimron v. Shanks, 1993 T.E. at 22.

79. *See* Arnan Gabrieli, *Law of Intellectual Property, in ISRAELI BUSINESS LAW* (Alon Kaplan ed., 1996) (providing a brief discussion of Israeli copyright law).

80. 499 U.S. 340 (1991).

81. *See* Qimron v. Shanks, 1993 T.E. at 22. This assumption is probably valid in many respects.

82. The Israeli Law on Moral Rights reads as follows:

(1) An author has the right to have his name applied to his work, in the accepted manner and extent.

(2) An author has the right to object to any distortion, mutilation, or other modification of his work, or other derogatory action in relation to such work, which is liable to be prejudicial to his honour or reputation.

(3) The violation of a right under this section creates a civil cause of action, and the provision of the Civil Wrongs Ordinance (New Version) apply hitherto.

(4) A right of an author under this section will not be dependent on the author's economic right in his work, and it shall be available to the author even after such right has been transferred to another, wholly or in part.

(5) In an action under this section, the author shall be entitled to damages determined by the court in all the circumstances of the case, even if no pecuniary damages have been proved; this provision shall not derogate from any other authority of the Court under Chapter V of the Civil Wrongs Ordinance (New Version).

Copyright Ordinance (Amendment no. 4) Law, 1981, K.T. 5741, *reprinted in New Brief: Israel Adopts Moral Rights Law*, 29 J. COPYRIGHT Soc'y 462, 463 (1982).

83. For many years the United States declined to sign on to the Berne Convention for the Protection of Literary and Artistic Works (as revised in Paris), but in 1988, President Reagan signed the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.), which was the enabling legislation for adherence to the convention. Interestingly, the United States joined Berne without making any changes in domestic law relating to the moral rights of authors, based on Congress' conclusion that American law already protected the moral rights of domestic and foreign authors. *See* 134 CONG. REC. 28,301 (1988); S. REP. NO. 100-352, at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714. *See also* Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1 (1988). Yet, before 1990, the moral right of attribution did not exist in the United

law conforms to the Berne Convention for the Protection of Literary and Artistic Works.⁸⁴ This assumption, however, was unfounded.⁸⁵

The court was unimpressed with the defendants' arguments that there are no moral rights under United States law.⁸⁶ The court dismissed the defendants' authorities as insufficient.⁸⁷ The court claimed that under Israeli law, foreign law is a fact that must be proven by expert testimony, and none was provided in the case at hand.⁸⁸ Furthermore, the texts the defendants provided did not show *conclusively* that the District of Columbia, the jurisdiction where the allegedly infringing work was published, has no moral rights law.⁸⁹ Therefore, because the defendants failed to prove otherwise to its satisfaction, the district court concluded that a principle that has been the subject of intense controversy since the middle of the century, and that the American governmental authorities have explicitly avoided applying, is law in the United States.⁹⁰

States unless specifically contracted for. *See, e.g.,* *Vargas v. Esquire, Inc.* 164 F.2d 522, 526 (7th Cir. 1947) (holding that because the author did not expressly contract for attribution of his photographs, the magazine could claim authorship). Furthermore, the courts in the United States generally do not prevent the use of an author's name in association with works the author did not create and endorse so long as the author's name is represented accurately. *See, e.g.,* *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968). Additionally, the right of integrity also is not generally protected in the United States unless it is contracted for. In 1990, the U.S. Congress passed the Visual Artists Rights Act (VARA), Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-22 (1990) (codified in scattered sections of 17 U.S.C.), which granted the creator of a qualifying "work of visual art" rights of attribution and integrity in their work. 17 U.S.C. § 106A(c) (1994). However, these rights are not accorded to written works. *See id.* *See also* *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 49 (S.D.N.Y. 1995) (holding that there is no moral rights cause of action for a student author of a law review comment edited by law review staff without the author's permission). Finally, even with visual works, the moral rights protected do not conform to 6bis of the Berne Convention in that VARA only protects works of "recognized stature," does not protect works produced for hire, does not protect anonymity and pseudonymity, and all of VARA's provisions are alienable. *See* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 947 (1990) (arguing that VARA "does not bring United States law into conformity with article 6bis"); Colleen Creamer Fielkow, *Clashing Rights under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made for Hire*, 7 J. ART & ENT. L. 218, 227 (1997).

84. *See generally* Damich, *supra* note 83.

85. There is no (federal) moral rights law for written works in the United States unless contracted for, although in Israel the moral rights of authors are inalienable. *See discussion supra* note 83.

86. *See* *Qimron v. Shanks*, 1993 T.E. at 22.

87. *See id.* It appears that the defendants presented a text from 1952 by a certain Prezenti (it is hard to figure out the English name and title of the work from the Hebrew transliteration), which noted that only six states had moral rights protection. *See id.*

88. *See id.*

89. *See id.* The treatise presented by the defendants merely stated that the United States had no federal moral rights law and that very few states had moral rights laws. *See id.* The text then detailed the laws of five jurisdictions, none of which had moral rights laws. *See id.* However, since Washington, D.C. was not one of the jurisdictions detailed, the treatise did not provide conclusive evidence that it lacked any moral rights laws. *See id.*

90. Judge Dorner felt confident in making the assumption that the United States has a moral rights law because it is a signatory to the Berne Convention and TRIPS. *See id.* at 20. However, the Berne Convention requires that the United States protect moral rights, but the treaty is not self-executing; TRIPS requires that the signatories abide by the Berne Convention, but specifically exempts them from moral rights provisions of the convention. *See* Dine, *supra* note 70, at 555-58.

IV. THE DISTRICT COURT ANALYZED: COPYRIGHT IN SCHOLARLY RECONSTRUCTIONS

The district court ultimately held that in certain circumstances the reconstruction of an ancient text is protected. This holding, however, was not due merely to the amount a scholar might have labored in his task because both Israeli and American courts have rejected the "sweat of the brow" theory of protectability.⁹¹ Much of the debate at trial, therefore, centered on whether matching up the scroll pieces was mechanical, like completing a jigsaw puzzle as Shanks argued,⁹² or whether it required creativity. The district court concluded that it required a large degree of creativity.⁹³ The court held that the 121-line MMT text is not copyrightable because its reconstruction was merely a mechanical operation.⁹⁴ However, the CT was a compilation of the MMT text and the reconstructions of Qimron.⁹⁵ Qimron's reconstructions met the minimum (and the court would argue, far exceeded) copyrightability requirements for originality and labor. Therefore the CT was copyrightable.⁹⁶

The court's conclusion raises the question of whether the creative elements in the reconstruction of a text confer protectability on the remainder of the text. It is plausible to argue that by conferring Qimron copyright in the CT he has thereby acquired *de facto* copyright in the MMT as well. Under the theory of "wholesale usurpation,"⁹⁷ common law courts have found infringement of copyright in factual works if the subsequent user appropriates "'the total entity with its unique and protected mosaic,' comprising the overall arrangement and selection of facts."⁹⁸ The end result of this doctrine is a very close association between the facts and their expression, making the facts to a very large extent copyrightable, despite the fact that this conflicts with the policy of copyright law.⁹⁹ In the case at hand, it is

91. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). The Court stated that "the 'sweat of the brow' doctrine flouted basic copyright principles," the net result of which was the "hand[ing] out [of] proprietary interests in facts . . ." *Id.* at 354. Under American copyright law, a work must possess "at least some minimal degree of creativity." *Id.* at 345. Bare facts are not protectable, but a compilation might be. The Court in *Feist* only required that "the selection and arrangement of facts not be so mechanical or routine as to require no creativity whatsoever." *Id.* at 362.

92. One of the founders of the Dead Sea Scroll team called the scrolls "the world's greatest jigsaw puzzle." Keith Botsford, *Scrolls Better Dead Than Read?*, *INDEPENDENT* (LONDON), October 12, 1991, at 29.

93. See *Qimron v. Shanks*, 1993 T.E. at 23-25.

94. See *id.* at 24.

95. See *id.*

96. See *id.*

97. The approach "may be defined as any legal theory that accords noncopyrightable facts some measure of copyright protection when these facts are somehow combined with copyrightable expression into a protectible totality." Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 522 (1986).

98. *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

99. An example of this can be seen with the copyrightability of sound recording of public domain works. For example, if Frank Sinatra made a very distinctive recording of an obscure public domain work never before recorded, that sold widely, any subsequent recording by other artists would very likely be influenced by Sinatra's performance style. How different would the second recording have to be for it not to infringe Sinatra's copyright in the initial recording?

plausible to argue that if Qimron can protect the CT because of his creative input, and if Qimron has the moral right to require any publication of the CT to be accompanied by the 300-page commentary that he intended to publish with the CT,¹⁰⁰ no one will want to publish the CT. Furthermore, if Qimron publishes only the CT without distinguishing his creative additions to the MMT, scholars will have no notice when they are infringing copyrighted work and when they are copying work in the public domain. Additionally, because it does not look like the fragments that make up the MMT will be released to a generalist audience, it will be very hard for anyone who wants to publish the MMT text to determine what were Qimron's additions and what was in the scrolls.¹⁰¹ Qimron thereby would have gained a *de facto* monopoly over MMT, which should be in the public domain. Indeed, a reviewer wrote of Qimron's book that:

[H]e shows a curious disregard for determining the connections *between* fragments, or in reconstructing, where feasible, the original scrolls. . . . The close reader . . . will be constantly irked by Qimron's failure to give any explanation of how he arrived at his readings. . . . It is important, when the process is not obvious, that the editor give some insight into his reasoning. Here we are too often given only the bare conclusions.¹⁰²

It would seem that Qimron was emboldened by his copyright to obscure the difference between his own work and what constituted the actual fragments and thus expanding, to all but the select few who have access to the original fragments, the scope of what was rightfully protectable.

The next question raised by the court's ruling is whether Qimron's reconstruction is an historical hypothesis. Generally speaking, courts in the United States do not grant copyright for historical hypotheses.¹⁰³ Indeed, because there are, generally speaking, a limited number of ways any given set of historical facts can be interpreted, allowing copyright in historical hypothesis would foreclose serious historical debate and criticism.

A third interesting question about the case is whether Qimron should have been denied copyright by estoppel. A compiling editor who represents the compilation to be completely factual, in the United States, at least, cannot subsequently sue for copyright infringement by claiming that part of the compilation is fictional or theoretical, and therefore, protectable.¹⁰⁴

100. See *Qimron v. Shanks*, 1993 T.E. at 16; *Miqsat M' Aase Ha-Torah* HQ 394-99 (Elisha Qimron and John Strugnell eds., 1994). The book that was eventually published was 262 pages long.

101. Even access for scholars has been very limited—and such access explicitly prohibits using the access for publication! See Haberman, *supra* note 15, at A3.

102. Phillip S. Alexander, *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translation, Volume I, 'Rule of the Community' and Related Documents*, 51 *INTERPRETATION* 309, 310 (1997) (book review). But see Joseph M. Baumgarten, *The "Halakha" in Misqat Ma Ase Ha-Torah*, 116 *J. AM. ORIENTAL SOC'Y* 512, 512 (1996) (book review) (praising Qimron's "creative efforts"). Baumgarten may be a compromised reviewer as he was given an advance copy for review. See *id.*

103. See, e.g., *Hoehling v. Universal Studios*, 618 F.2d 972, 980 (2d Cir. 1980).

104. See e.g., *Houts v. Universal City Studios*, 603 F. Supp. 26, 28 (C.D. Cal. 1984) (noting that once a work is held out to the public as factual, the plaintiff is estopped from claiming that same work is fiction and worthy of a higher degree of copyright protection). This estoppel doctrine holds authors who claim to present preexisting facts accountable for their initial representations. As the court in *Marshall v. Yates*, 223 U.S.P.Q. (BNA) 453, 455 (C.D. Cal. 1983) stated, "To permit otherwise would be to unduly chill authors seeking to write about historical issues or events." *Id.* at 455 n.3.

A fourth question raised, and one recognized by the court, is the danger its holding poses to the free flow of ideas. The court rejected the argument that granting copyright will stifle the free flow of ideas and cites as its sole proof of this proposition the censure given by the attendees of a conference in Spain in 1991 on the Dead Sea Scrolls to Kapra for publishing the CT without Qimron's permission and (the court imputes to the conferees who never explicitly mentioned it) in violation of Qimron's copyright.¹⁰⁵ This argument is disingenuous. The Spanish Dead Sea Scroll conference was organized by the official scroll editors who felt that the world was closing in on them; their monopoly about to be broken by the Huntington Library, computer reconstructed transcripts of the Scrolls were soon to be published, and there was a general worldwide condemnation of the editors' exclusivity.¹⁰⁶ Of course, the scroll 'establishment' would lash out at the 'barbarians at the gate,' especially relatively weak ones.¹⁰⁷ By 1997, however, the attitudes of the scroll scholarly community had changed radically. In 1997, there was a general conference on the Dead Sea Scrolls in Jerusalem where Shanks and the other defendants of the *Qimron v. Shanks* case were given positions of honor and asked to deliver papers. Qimron, who chaired a session at the conference, recorded his objection to allowing someone who infringed a copyright on one of the scrolls to give a paper and requested that others register their objections as well. Qimron's call went unheeded.¹⁰⁸

V. THE DISTRICT COURT ANALYZED: FAIR USE AND EMOTIONAL DISTRESS

The court did not accept any of the defenses offered by the defendants for their actions, including claims that even if there were a copyright in the CT, Qimron was not its owner.¹⁰⁹ The court sided with the plaintiff that there was no fair use, even though the defendants cited numerous authorities claiming that when a researcher gives a manuscript to a scientific journal, the manuscript becomes "public property" and every person is allowed to quote it for "scientific" purposes.¹¹⁰ The defendants also claimed that they received the CT anonymously and that it was published anonymously by Kapra (the court believed them on this point), and therefore they were free to publish the CT without citing the editor or author of the CT, since he was unknown to them.¹¹¹ Nevertheless, the court argued against fair

105. See *Qimron v. Shanks*, 1993 T.E. at 34.

106. See *BAR Editor Unwelcome in Madrid—Disinvited to the Dead Sea Scroll Congress*, *BIBLICAL ARCHAEOLOGY REVIEW*, May/June 1991, at 12.

107. See, e.g., *Ed Greenstein, Reader's Letters, Scholarly Copyright*, *JERUSALEM POST*, Mar. 27, 1998, at 8 (Professor of Bible at Tel Aviv University found Shanks's actions to be "a violation of the code of decency").

108. See *Golden Anniversary of the Scrolls*, *BIBLICAL ARCHAEOLOGY REV.*, Nov/Dec. 1997, at 65.

109. The court rejected the argument that the owner of the copyright in the CT is the Department of Antiquities under a work for hire theory and it also rejected that the copyright is owned jointly with Strugnell. See *Qimron v. Shanks*, 1993 T.E. at 24-25. The court noted that Strugnell had next to nothing to do with the work on the CT, and that the Department of Antiquities clearly understood the copyright to belong to Qimron and one cannot impute copyright to someone who does not want it. See *id.* at 25. Furthermore, Qimron worked as an independent contractor and not an employee. See *id.*

110. *Id.* at 26-27.

111. See *id.* at 16-17.

use by pointing out that Kapra, after receiving a threatening letter from the Israeli Department of Antiquities, withdrew his publication of the CT and apologized to Qimron for infringing his rights.¹¹²

For its understanding of the applicability of the fair use doctrine the court relied exclusively on Kapra's actions following the letter from the Antiquities Department as a basis for refuting the defendants' arguments. The court implied that once Kapra realized that the CT was a reconstruction and not a public domain work he realized that he infringed someone's copyright by publishing it and withdrew his publication—because *even Kapra* knew that academics do not publish reconstructions without permission of their copyright owner. In making this argument, the court ignored the politics of Kapra's situation as a scholar in post-communist Poland entirely. At that point in time, Polish scholars of Jewish and Semitic subjects' major source of funding and access to the greater academic world was Israel, and even academics do not bite the hand that feeds them.¹¹³ Yet, even if the use was fair, the court argued that the defendants had constructive knowledge of who the author/editor of the CT was,¹¹⁴ and thus under the customs of the academic community they were required to publish the author's name in order not to violate the author's moral rights.¹¹⁵ Indeed, the court went out of its way to point out how the defendants knew or should have known that they were infringing Qimron's copyright in the CT.¹¹⁶

The generally acknowledged purpose of the doctrine of fair use is to allow use of a copyrighted work in order to increase the public store of knowledge.¹¹⁷ For example, section 107 of the U.S. copyright law considers the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes; the nature of the copyrighted work; the amount of substance of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁸ In the case at hand, the Huntington Library's revelations and publication of the facsimiles of their scrolls was non-commercial. Shanks did not publish the *Fac-*

112. *See id.* at 27.

113. Kapra was a scholar of Hebrew in post-communist Poland, where academics made little or no money. In 1991, trips to Israel were a major source of income and knowledge about what the rest of the academic world was doing for Polish scholars of Jewish and Hebrew subjects. A threat to cut off this source by his ultimate benefactor, the Israeli Department of Antiquities, would, most likely, have made Kapra disavow any strongly held beliefs he might have had about proper scholarly inquiry. For a discussion concerning the relationship between post-communist Poland's academic community and Israel's, see Ruth Wisse, *Yiddish: Past, Perfect, Imperfect*, COMMENTARY, Nov. 1997, at 32-39.

114. *See Qimron v. Shanks*, 1993 T.E. at 29-30.

115. *See id.* at 27, 31-36.

116. *See id.* at 30, 34-36. The court also went out of its way to castigate Shanks and his lawyer, Gideon Hausner (a former Attorney General and prosecutor at the Eichman trial), for not knowing better. *See id.* at 30. Judge Dorner wrote that Shanks was a lawyer, from Harvard no less, who should have known better. *See id.* at 10, 29. Furthermore, the court seems particularly moved by a letter from Shanks to his co-defendants claiming that he did not believe Qimron had the backbone to sue, and proposing to threaten Qimron by speaking to the authorities at Ben Guiron University. *See id.* at 19.

117. *See, e.g.*, 17 U.S.C. § 107 (1994) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright.").

118. *See id.* Israeli law follows similar principles. *See Weisman, supra* note 47, at 29-30.

simile Edition for commercial gain; even the court recognized that Shanks was motivated more by political and ideological reasons than money.¹¹⁹ Qimron stated that he intended to publish and sell a book dealing with his analysis of the scroll fragments he was working on and that Shanks's work had caused him to lose potential sales. It seems odd, however, that Shanks's one page reproduction of some of Qimron's work would cause him to lose sales on a book of several hundred pages.¹²⁰ Neither book is light reading and both are aimed at a select audience which probably would buy all available books, because no single view will be considered final. The court did, however, provide strong evidence of Shanks's bad faith in not attributing the CT to Qimron.¹²¹ It would seem, therefore, that even if Shanks had a defense of fair use for his publication of the CT (assuming that the CT was indeed copyrightable), he did violate Qimron's moral rights—under Israeli law—by not attributing the CT to him, since he knew or should have known that Qimron was its author.

The court found Shanks to be an intentional infringer and therefore held him liable for the maximum statutory damages allowed.¹²² The court admitted that it was very hard to figure out actual damages and decided to apply statutory damages instead.¹²³ Additionally, the court found that Qimron suffered severe mental anguish (emotional distress) from Shanks's publication of his life's work without his permission (i.e., a violation of Qimron's moral rights): Qimron lost the opportunity of being the first, and having his ideas about the CT shape the scholarly debate.¹²⁴ The court found it very hard to fix a monetary value to these moral rights, and somehow came up with the figure of NIS 80,000.¹²⁵ Additionally, in light of Shanks's willful infringement, the court awarded Qimron court costs of NIS 50,000.¹²⁶

VI. CONCLUSION

The court in *Qimron v. Shanks*¹²⁷ made a strong argument for the copyrightability of the CT but failed to address many issues. One troubling issue is Qimron's *de facto* copyright in the MMT, especially in light of the secretiveness of the scroll editors, and the editors' constant renegeing of promises to release the

119. See *Qimron v. Shanks*, 1993 T.E. at 39.

120. Qimron's book is 262 pages long and has a retail price of \$85. The price of Shanks's book, the FACSIMILE EDITION, was \$200 and only 300 copies were sold. See Herschel Shanks, *MMT as the Maltese Falcon*, BIBLICAL ARCHAEOLOGY REVIEW, Nov./Dec. 1994, at 49.

121. See *Qimron v. Shanks*, 1993 T.E. at 29.

122. That is, NIS 20,000. See *id.* at 39.

123. See *id.* at 38.

124. See *id.* at 40.

125. See *id.* at 39, 40. The plaintiff requested lost profits of NIS 180,000 and damages for emotional and reputational loss of NIS 100,000. See *id.* at 38-39. In lieu of trying to make the plaintiff whole for the violation of his moral rights, the court tried to set a figure for damages that was in proportion to the severity of the infringement. See *id.* at 40. The court justified its reasoning based on the availability, in this case, of punitive damages. See *id.* ("In Israel, moral rights are compensated as a tort."). Without discussing how it determined the figure, the court arrived at NIS 80,000 as compensation for the embarrassment suffered through the violation of the plaintiff's moral rights. See *id.*

126. See *id.* at 41.

127. C.C. (Jm.) 41/92, *Qimron v. Shanks*, 1993 T.E. 10.

scrolls as soon as possible (in the first fifty years since the discovery of the scrolls, less than half of the scrolls were "officially" published).¹²⁸ Judge Dorner seems to have bought Qimron's arguments hook, line, and sinker. She was visibly put off by Shanks, and seems to have found against him almost as much for legal reasons as because she found him to be obnoxious, arrogant, and treading on the toes of official and vested interests. Judge Dorner made short shrift of Shanks's claims of good faith and fair use and totally ignored the fifty-year controversy behind scroll publication and the concomitant nastiness that has been going on in the scholarly community. Reading Judge Dorner's opinion, one gets the impression that the genteel and friendly world of the academy was invaded and betrayed by a money-grubbing, arrogant, and malicious American who stole the life-work of a complete innocent, who devoted his entire life to a noble and honest cause only to see it made worthless, and was now heartbroken and despondent. This is not a true reflection of what happened. It appears to this observer that Judge Dorner's indignation at Qimron's plight overwhelmed her good legal sense.

The Israeli Supreme Court, when reviewing Judge Dorner's decision, should consider the danger presented by the district court effectively granting Qimron *de facto* copyright over the MMT by not requiring notice of what portion of the CT was Qimron's work. On appeal, the court should also consider the question of estoppel. More important, the entire context of the controversy over the scrolls must be considered. It is disingenuous to base the court's understanding of the doctrine of fair use on the behavior of Dead Sea Scroll scholars when the tenor of much of those scholars' activity over the past fifty years has been precisely to prevent the fair use of the scroll documents. Furthermore, Qimron's anguish notwithstanding, reasonable people seem to think he has little cause to blame anyone but himself for what befell him.¹²⁹ Judge Dorner's strongest argument is that Shanks violated Qimron's moral rights by not attributing the CT to him when he knew that he was the person who composed most of the reconstruction of the MMT. However, this in itself raises another troubling question. The infringing act occurred in the United States, and the United States has no moral rights law for written works.

As the globalization of the economy increases and intellectual property becomes a greater percentage of the wealth in the world economy, more situations like this will arise. National courts will be called upon to adjudicate infringement suits where the infringement did not occur in the forum country. Indeed, it is possible, as on the world wide web, that the infringement will not take place anywhere, or will take place everywhere. What laws the forum courts will choose will become a very important issue. Despite the fact that many countries are signatories to the Berne convention, the copyright laws of those countries are not the same, and indeed, can differ very much. Even if the laws of the forum country and the country where the infringement took place are the same on their face, it is highly likely that the legal cultures of those countries will approach those laws

128. See *Academic Secrets Meet Clever Computers*, *supra* note 11.

129. See *supra* note 108.

differently.¹³⁰ Indeed, it is possible that cultural difference will create problems like the one Shanks faced before Judge Dorner: alleged infringers will face judges in other cultures who do not understand the motivation for the alleged infringers' actions, and will instead interpret the alleged infringers to be arrogant and willful infringers, and throw the book at them. One can only hope that the Israeli Supreme Court and the international community as a whole, with their rush to create treaties that create a worldwide minimum standard for copyright protection, will give some thought to issues of conflicts of law and cultural bias when "applying" laws from different jurisdictions.

VII. POSTSCRIPT

While this Article was in publication a three-member panel of the Israeli Supreme Court upheld the district court opinion.¹³¹ Judge Yaakov Turkel, writing for the panel, held that Israeli law applied to the controversy because three copies of *A Facsimile Edition of the Dead Sea Scrolls*, which contains the allegedly infringing work, were shipped to Israel by its publisher, the Biblical Archeology Society, one of the defendants. Because Israeli law applied in the first instance, Judge Turkel found there was no bar to finding Qimron's moral rights were violated. Moreover, the court noted that the American doctrine of merger had no counterpart in Israeli law.¹³²

In finding Qimron's work on the MMT to be copyrightable, Judge Turkel analogized the CT to a compilation work. Judge Turkel admitted that the MMT was not copyrightable, but argued that Qimron's efforts in reconstruction—that is, compiling and editing the various pieces of the MMT to form the CT—were creative work and hence copyrightable. Indeed, according to Judge Turkel, the fact that the MMT only makes sense after Qimron's reconstruction proved that Qimron's efforts were creative and copyrightable.

The court noted the controversy surrounding the delayed release of the Dead Sea Scrolls in passing but found it had no bearing on the case at hand, which concerned solely whether editing and compiling manuscripts was a copyrightable activity. The court dismissed all of the defenses raised by the defendants and found that its ruling posed no danger to the free flow of ideas. Additionally, the court found that its grant of copyright in the CT did not create the possibility (recognized under the theory of wholesale usurpation) of such a close association between the MMT and the CT that—exacerbated by the difficulty of access—it would effectively grant Qimron copyright on the MMT itself. Judge Turkel asserted that

130. Proof of this can be seen in the fact that the United States felt, when it first signed the Berne convention, that it did not need to add legislation to protect moral rights since the United States already adequately protected moral rights as required under the convention. *See supra* note 83. For an examination of how this problem relates to patents see David L. Cohen, *Article 69 and European Patent Integration*, 92 N.W. U. L. REV. 1082 (1998).

131. *See* C.A. 2790/93, 2811/93, *Qimron v. Shanks* (Aug. 30, 2000), available at <<http://www.court.gov.il>> (in Hebrew). *See also* Joel Greenberg, *Israeli Supreme Court Upholds Scholar's Rights to Dead Sea Scrolls Work*, N.Y. TIMES, Aug. 31, 2000, at A11.

132. In the rare circumstance where there are a limited number of ways of expressing an idea, the expression is said to 'merge' with the idea. There is no copyright in the merged expression because ideas are not copyrightable. *See* DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 4C[1][d][iii] (1992).

Qimron's copyright would not prevent anyone else from accessing the MMT and reconstructing it, however he or she chooses, without thereby violating Qimron's copyright in the CT.

The court found that Shanks purposefully violated Qimron's moral rights and upheld all damages. Additionally, the court required the defendants to hand over to Qimron all infringing works as well as the printing plates. Finally, the court declined to consider the amicus brief submitted by the Committee of Concerned Intellectual Property Educators, finding that the Committee had no connection to the case, its brief was untimely, and it was not proven that the author of the brief, David Nimmer,¹³³ was sufficiently qualified.

Although the Israeli Supreme Court's opinion stands on a much more sound doctrinal footing than the district court's, a number of issues remain. It appears to this Author that the Israeli Supreme Court was rather naive regarding the scrolls' accessibility when it held that Qimron's copyright would not prevent others from creating their own reconstructions of the MMT. Nor does it appear that the court addressed the possibility that Qimron may engage in nuisance litigation to protect 'his' interpretation of the MMT. As it currently stands, the primary (if not only) source through which most people can access the MMT is Qimron's reconstruction. Consequently, it appears it will be easy for Qimron to argue that any future reconstruction of the MMT was derived from the CT and thus infringes his copyright. While he may ultimately be unsuccessful, Qimron can easily make a prima facie case that the author of any future reconstruction had access to the CT and reconstruction is substantially similar to the CT.

Moreover, the court's blithe dismissal of both the merger doctrine and the argument that the CT is more appropriately considered a historical fact than a creative work, creates the impression that the court was eager to dispose of the case and failed to give the many paradoxes it raised due consideration. Finally, the fact that a shipment of three books to Israel was sufficient to trigger Israel's long-arm jurisdiction should, in this increasingly globalized world, raise alarm bells in corporate counsel's offices the world over.

133. David Nimmer is the current author of a casebook on copyright and entertainment law, see *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION: INCLUDING UNFAIR COMPETITION, DEFAMATION, & PRIVACY* (5th ed. 1998), and has assumed the responsibilities from his father, the late Melville B. Nimmer, for updating and revising *NIMMER ON COPYRIGHT*, the standard reference in the field. See Lexis-Nexis Group, *Meet the Experts* (visited Sept. 13, 2000) <<http://www.lexis-nexis.com/lnc/experts/Multiple/nimmer.html>>.

Appendix A

TRANSLATION OF *QIMRON V. SHANKS*¹

Teek Ezrahi Num. 41/92

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Elisha Qimron v.

1. Herschel Shanks
2. Robert H. Eisenman
3. James M. Robinson
4. The Biblical Archeology Society

Jerusalem District Court

March 30, 1993

Before Judge D. Dorner

[pages 10-14 are headnotes printed in the official reporter and a list of material cited which I did not translate. The term "Protocol" refers to the evidentiary record in the case.]

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Judge D. Dorner

OPINION

THE FACTUAL BACKGROUND

(1) This is a claim resulting from a violation of copyrights in the deciphering of one of the hidden [Dead Sea] scrolls.

(2) The plaintiff is Elisha Qimron. He is a professor of Hebrew Language in the Ben Gurion University in Beer Sheba. Prior to joining the faculty of the University in 1981, the plaintiff worked for 12 years in The Academy of Hebrew Language. He is engaged in philological research. His area of specialization is in the research of the old scrolls that were found in the Qumran cave in the Judean Desert.

(3) For eleven years the plaintiff researched and deciphered one of the most important scrolls found (hereinafter the scroll). He named it "a bit of Torah Work" (in foreign language, M.M.T.). He discovered that its language preceded the *Mishnaic* language and, as far as can be seen, it constitutes a letter from a Judean desert cult's leader (who is named in other scrolls "the Teacher of Righteousness") to the nation's leader in Jerusalem (who is named in other scrolls as the "priest of evil"). The prevailing opinion is that it refers to Jonathan the Hasmonean (Plaintiff, 174-75, Protocol). The plaintiff saw in this project his life's work. He gave up extra income coming from speaking fees that is acceptable among his colleagues. He focused all his efforts on the research of the scroll. Professor Jacob Sussman, a famous Talmud researcher, who the plaintiff consulted, testified:

¹ Translator's Note: To preserve the flavor and intent of the Hebrew opinion, this opinion strives for literalism, often at the expense of flow.

My impression was that on occasion he was possessed with it. Namely, during those years, it was the matter that interested him, occupied him, and it appeared to me that he did not read and was not interested in anything else, save what he believed . . . could make him come close to matters in the scroll. (63, Protocol).

The plaintiff expected that his name would be associated with the scroll. He would be its first editor and would enjoy a great deal of fame and academic recognition.

(4) The shredded scrolls were first found in the early fifties in one of the caves in Qumran (cave no. 4) in which 15,000 pieces of various scrolls were discovered. The government of Jordan, which had jurisdiction over the area, allowed access to the scrolls, which were held in the Rockefeller Museum in Jerusalem, to a small international faculty. Access to the scrolls was granted to a restricted group of researchers who were part of this faculty. Professor Strugnell, from Harvard University, was among these researchers. Strugnell, who was one of the younger members of the faculty, was in charge of identifying the scroll pieces and deciphering them. Two of his senior researchers, Millik and Gross, assisted him in identifying several pieces pertaining to the scroll; however, the bulk of the identification was done by Strugnell.

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During the fifties, Strugnell identified one hundred pieces, some small, which had one letter or parts of a letter. The pieces belonged to six copies of the scroll in several different manuscripts. Some were on parchment and some on papyrus. (Magen Broshi, *Guardian of the Hidden scrolls and the Manager of The Shrine of The Book in the Israel Museum*, 8, Protocol; Plaintiff, 163, Protocol). The researchers thought the scroll was written during the *Mishnaic* period and was labeled "*Mishnaic*." Strugnell edited copies of the pieces and combined them with one another according to their shape. As a result, the number of the separate pieces was reduced to between sixty and seventy (Plaintiff, 164-66, Protocol) and, at this stage, the deciphering process got stuck.

(5) The continuation of the deciphering required completing missing pieces in the scroll. This was impossible to accomplish without a thorough knowledge of Jewish *Halacha* [Jewish Law]. Strugnell, who was not Jewish, was a stranger to the *Halacha*; in the words of Broshi, "he reached an impenetrable wall."

In 1967, the scrolls passed to the jurisdiction of Israel; their care was given to the Antiquities Authority (then the 'Antiquity Branch'). The Authority did not change anything in the research procedure. It did not grant the international community as a whole access to the scrolls, and the same international faculty, save changes taking place due to death, continued its work.

(6) In 1980, Broshi established a contact between Strugnell and the plaintiff, who in addition to his knowledge in the hidden scrolls, was knowledgeable about the Talmudic literature. From that time the two cooperated. Strugnell, whose research involved many fields, was limited in his labor over the years to almost nothing, due to physical and mental reasons. He left most of the labor to the plaintiff, who was assisted by the counsel of Professor Sussman. Sussman refused Strugnell's offer to cooperate with him in the deciphering of the scroll, yet agreed to offer his consulting services. The plaintiff composed from the sixty to seventy pieces of the six copies, a compiled text of 121 lines (hereinafter the Compiled Text). Forty percent of this version was missing in the original (Plaintiff, 175,

Protocol). When matching the pieces, there was no physical fit. Filling the gaps necessitated linguistic and *Halachaic* research. The research lasted many years, and the version changed its form from time to time according to the progress of the research (Sussman, Plaintiff, 81, 171, Protocol).

(7) During these years, the plaintiff lectured about his findings in international conventions and also published several academic articles.

(8) The wide scope project was almost finished. In 1990, it was concluded in principle with "Oxford," the British publishing house that published several commentaries on other scrolls, that it would publish the joint labor of Strugnell and the plaintiff. It was agreed that the publication would include photographs of the scroll, the compiled text (in its final version), its English translation, and commentaries. Then, in December 1990, Dr. Zdzislaw Kapra, who lives in Cracow, Poland, published one of the drafts of the compiled text in the publication,

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The Qumran Chronicle (T/4), indicating that the source was anonymous. It appears as if one of the researchers who received the draft published it anonymously. One of the recipients, Professor Norman Nachum Golb, from the University of Chicago, testified that this was apparently the compiled text. As previously mentioned, Kapra printed it with an editorial qualification that the readers were asked not to copy or distribute it to additional people, that it was possible that the matter might be a hoax, and if so, "we will have a big laugh." Kapra sent a copy of the above-mentioned publication to the plaintiff. The plaintiff requested the involvement of the Antiquities Authority. On March 12, 1991, the Authority's Director, Amir Drori, sent a warning letter to Dr. Kapra (T/5), in which he emphasized that for the past few years Professor Strugnell and the plaintiff had been deciphering the scroll and its publication in the project—in which a great deal of labor was invested—was completed not long ago and was about to be published. He demanded that Kapra halt the publication's distribution. Also, in the international conference, which took place in Spain, the participants attacked Kapra for his infringement of the copyrights of the authors, the plaintiff and Strugnell. Kapra wrote an apology letter (T/6) in which he explained that he distributed only a few copies and promised to stop the distribution.

(9) Shanks, the editor of BAR, was among the recipients of Kapra's publication. BAR, a publication for archaeologists studying the biblical era, is published in the United States. Prior to his interest in archaeology, Shanks practiced law, and is a graduate of Harvard University's law school. BAR is known for the high prestige of its authors, as well as its wide popularity. According to Shanks, it sells more than 185,000 copies and reaches more than a half million readers in many countries, including Israel. (Shanks, 254, Protocol). For many years, Shanks conducted a controversial struggle in the pages of BAR to open the hidden scrolls to all interested parties for research and study. He testified that he was acting on behalf of all those who remain outside of the researching 'cartel.' He insisted that the pressure that was exerted on Kapra to halt the distribution of the compiled text was not legitimate, and he encouraged (T/13) all those who were interested in studying the scroll to buy Kapra's publication.

(10) In November of 1991, Shanks published, in the defendant's publication, four of the facsimile editions of the Dead Sea Scrolls (T/14). This was a book in

two volumes, which contained hundreds of pieces of the scroll that were previously opened only to authorized researchers. The book included one deciphered scroll, which was the Compiled Text that appeared in Kapra's book. The plaintiff's name was not mentioned. The photographs came to Shanks via Doctor Robert Eisenman, who is involved in research of the scrolls. Eisenman and an additional researcher, Doctor James Robinson, prepared an index for the photographs and wrote an introduction, in which the Compiled Text was not mentioned. Shanks added an introduction (Publisher's Foreword) written by the publisher, in which he attacked in a very harsh polemic, the Antiquities Authority. He particularly referred to the Compiled Text, which he defined as a transcript made by Strugnell, and did not mention the plaintiff's name.

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Before the publication of the books, he sent the foreword to Robinson and Eisenman without including the Compiled Text. They were against the publication of the foreword because of its acute polemics. However, Shanks did not listen to them, and the front page of the book reads:

A Facsimile Edition
of the
Dead Sea Scrolls
Prepared with an
Introduction and Index
By
Robert H. Eisenman
And
James M. Robinson

(11) A short time after publishing Shanks's book, the compiled text was published in two additional books. In neither one was the plaintiff's name mentioned. One mention that was made in Poland was by Dubrovnicz in Kapra's publishing house, (h/18) and the second was in the United States by Eisenman and a researcher named Michael Reizz. The introduction by Eisenman and Reizz gave sole credit for the deciphering to them. The introduction mentioned that the deciphering lasted only six weeks. (Page 9 to T/19.) In the version that was published in T/19, certain changes were incorporated. This version resembles, in principle, the Compiled Text, including errors that were made and the plaintiff's testimony (180-81, 188-89, Protocol). Norman Nachum Golb, a professor at the University of Chicago, who testified on behalf of Eisenman, admitted that the Compiled Text was in the possession of the authors (402, Protocol). According to him, however, they did not rely on it. He explained that the errors in the Compiled Text were fixated in their memory and they made the errors without copying from it. (384-85, Protocol). I do not accept this explanation. In any event, he did not have an explanation to the fact. While the deciphering in T/19 is identical in essence to the Compiled Text, other parts of the scroll (for example, a calendar) deciphered by the plaintiff and which were not published, are entirely different from the deciphering in T/19 (Golb, 414, Protocol).

(12) When the plaintiff learned of Shanks's publication he was shaken. His dream to become the first editor of the scroll evaporated. He felt that his life labor was robbed from him and his world was destroyed. He feared the defendants. He

saw them as rich and influential people, and a suit against them would saddle him with vast monetary expenses. Nonetheless, he came to the conclusion that he must commence suit "to protect his honor," (207, Protocol), and so he did.

(13) Even Shanks was amazed. It did not occur to him that the shy and reserved plaintiff would be against him. (336, Protocol). "He was quiet and shy . . . it was a total surprise, I was shocked."

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Shanks wrote Robert Arnold, the chairman of the Board of Trustees of Ben Gurion University, that the University might be harmed as a result of the suit (h/26). Concurrently, he wrote Eisenman and Robinson (N/B/A/A N/B 19), accepting full responsibility should they lose the trial. Moreover, he pointed out that in his opinion, pressure to settle should be applied on the plaintiff both by pressing suit against him in the United States and via the Ben Gurion University. In this regard Shanks wrote:

At some point, I think Qimron will be willing to talk to me. He is going to look very bad in the next BAR and the authorities at his school . . . cannot be very happy with him.

THE LEGAL PROCEDURES

(14) On January 14, 1992, the plaintiff brought a suit in this court against Shanks, the owner of BAR (The Biblical Archaeology Society), Eisenman, and Robinson, claiming infringement of monetary and moral copyrights. In the suit, he requested an injunction and monetary compensation of NIS 472,000.

(15) On January 21, 1992, a temporary injunction was issued in the presence of one side only, as well as an order permitting the service of the suit beyond the jurisdiction of the court. The request by the defendants to dismiss the "permit order" on technical grounds because the court in Israel is not the proper forum for handling the claim was rejected (238/92). The continuation of the trial was delayed by agreement so that the appeal on the matter would be resolved. However, the appeal was canceled and the defendants accepted the verdict. The only matter in dispute was the jurisdiction of this court.

THE CLAIMS

(16) Robinson and Eisenman did not appear in court and did not testify. Their defense, which was presented by their representatives, was that they were not responsible for the publication of the Compiled Text. They did not act as editors of the book and did not know that Shanks was about to publish the Compiled Text. They claimed that their participation was restricted to preparing the introduction and the index and that they were actually against the publication of Shanks's introduction.

Shanks, in his behalf, testified at length. The essence of his argument was that the copyrights belong to "the Teacher of Righteousness"; it was he who wrote the scroll. Its copying, even if it involves labor, does not acquire copyright for the copier. Additionally, he claimed that he did not know that the plaintiff participated in the preparation of the editing of the copy. He thought that the work was done mainly by Strugnell. In any event, he gave no consideration to that. In his own

words: "I just did not focus." (307, Protocol). In any event,

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the Compiled Text was in the hands of professionals. But later, he admitted that he would have published the Compiled Text even if he had known that the plaintiff had edited the reconstruction and had invested many years of work in it. (322, Protocol).

(17) On the basis of this version of the facts, the defendants claimed the following:

a) The claim falls under American jurisdiction, and it was not proven otherwise, since this case concerns a right dealing with torts, and also the doctrine of equal laws does not seem to apply.

b) The work that the plaintiff performed is not protected by the copyrights laws, for it is merely copying, which although difficult is not creative work. This work does not acquire moral rights as the law defines.

c) No damage was proven, as such, no statutory compensation can be assessed which is contingent on proving damage.

d) The copyrights do not belong to the plaintiff but to the Antiquities Authority who sold its rights to supervise the deciphering work and is considered an employer for the purpose of acquisition of copyrights. Although the right was given to the plaintiff and the latter possess a confirmation that the rights belong to him, a transfer of copyright is not valid when transferred after the commencement of litigation, thus copyright belongs to Strugnell and other researchers who perform the main deciphering.

e) When the text was published by Kapra, the defendants were permitted, according to the "custom among the academic community," to publish it without prior permission from the plaintiff.

f) Conversely, the text was published in good faith and in this matter Shanks's testimony is to be accepted. The defendants two and three claimed that they are not responsible for the publication at all. Conversely, Eisenman also claimed that in the distribution of responsibility between him and the defendants one and four, his share reaches zero.

THE LEGAL FRAME OF REFERENCE

(18) Copyright on literary and artistic creation is protected in Israel under the British Copyright Law of 1911 (hereinafter the law), which prevails in Israel by virtue of a Royal Decree regarding Copyright of 1911 (its imposition in the land of Israel) of 1924. That law, with the changes that took place in 1924, were incorporated (hereinafter the order) to fit with the local law. In 1949, the State of Israel joined the Berne Convention (proposed law, changed to the order for the Copyright 1953-h"n 38). The amendment modifying the order (amendment no. 4) of 1981 was integrated into the moral right of the Israeli copyright law (*droit moral*) imbedded in the Berne Convention, which is tied to the economic right of the creation, the addition of the 'moral right' that the work will be named after the creator and be published accurately with no changes or alterations. In addition, it was determined that violation of this right constitutes a civil violation in tort (new version). The amendment to the law also adopted the procedure as incorporated in the United States law

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(Copyright Act, 1976, sec. 504) allowing statutory compensation in cases where damages were not proven. (Proposed amendment to the order' of copyright no. 4).

(19) All are in agreement that it is incumbent that this claim be enforced under the law of the jurisdiction of its violation: namely, the laws of the United States. (Coinger and Stone, *On Copyright* 450 (London, 12th ed., 1980)). There is dispute that this law was not proven; the question presented is whether the doctrine of equal laws is in effect in this case thereby returning jurisdiction to the Israeli law. The doctrine of equal laws, which is recognized by private international law, is predicated upon the assumption that the law in developed nations is identical. (Page [1] 51/49 in page 767). This principle does not apply to all aspects of the law; thus, the judiciary tends to believe that in view of the uniqueness of marital status in Israel, there is no room to rely on the doctrine of equal law in matters relating to marital status. (Page A 37/49 [2], 647-648).

The defendants asked the Court to rely on a test devised by Professor Levontin that the rules of localization (status and acquisition) imbedded in a certain judicial system, it will be upon the plaintiff to prove his case. Thus, in transitory suits (contracts and torts) there is no room to deviate from the law of the locality which has jurisdiction unless the other side can prove its case based on the law of the foreign locality. (A. Levontin, *The Choice of Law in International Contracts*, 1959, third volume, 201, cmt. 238). The defendants claim that the suit against them is a tort claim, and therefore the plaintiff must prove their case under the foreign law.

(20) This ruling does not take a position on this particular test. Only recently the Supreme Court relied on the doctrine of the equality of laws in a tort claim. (Page A 755/85 [3] page 107). In any event, even under Professor Levontin's method, the doctrine of equality of laws holds in the case in front of me. First, even though the copyright is property, the claim of its violation sounds in tort. In the law it is said that a violation of moral rights constitutes a violation according to tort law (new version). The tort law completes the special instructions to copyright that were written into the copyright law. (Y. Weisman, *The Personal Rights [droit moral] in the law of copyrights, Research in Law* (1989) 54.51). Second, the test that Professor Levontin suggested is not based on the mechanical separation of the law into its branches; what is determinative is whether the law is unique to the jurisdiction or not. The laws of property and status were mentioned as examples, in passing, to indicate uniqueness. The copyright laws in Israel are not local and there are many which resemble them in the developed world.

In any event, in our matter, the doctrine of equality of laws is not fictitious law. As previously mentioned,

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the English law [of copyright] was adopted [in Israel], and from it the American law draws its sources in a particular matter (statutory compensation). Statutory compensation is missing in Israel and is following the spirit of American law. The entire ruling was made to fit the International Convention [Berne].

Finally, the ruling on the equality of law is effective and the defendants must show that they are protected for what they did and did not do, according to American law.

After the conclusion of the summations, the defendants presented additional

authorities in which they argued for the first time that there are no moral rights under American law, with the exception of six states. They did not rely upon American judicial sources, but on the book of [S. Prezenti, *The Laws of Copyright* (volume 2, 1952) pages 497-8, 504-7]. The Author indicates that moral right law is effective in only six states in the United States without detailing their names. Subsequently, she details the law that exists in five of the states, including New York, California, New Jersey, Maine, and Rhode Island.

For some reason, this was raised after the conclusion of the summations, which is unbelievable. First, and most important, [foreign] law is considered a fact which can be proven by use of experts in the matter. (A. Harnon, *The Laws of Proof* vol.2 (1967) pages 52-54). That is similar to what the defendants themselves claimed when they wanted to deny the claim because the plaintiff did not prove the state of American law. Second, it is beyond the requirement: the book, the subject of the claim (T/14), was published in Washington, D.C., as previously mentioned. According to this proof, the moral right is in effect in six states in the United States whose names were not mentioned. From this evidence, there is no proof that this right is not protected in the locality of the book publication. I shall add that from here one should not understand that moral rights are not protected in the states whose names were mentioned.

The conclusion is that we have to decide on the claim in its entirety, including the claim regarding moral rights, under the law existing in Israel.

THE SOURCE OF THE COMPILED TEXT

(21) The protected copyright defined in paragraph (1) to the law in which it was said "Copyright shall subsist throughout. . . . In every original, literary, dramatic and artistic work."

In the formal translation of the laws of Israel, the requirement for "originality" was omitted. However, what determines is the English version. Following the English and American rules, it was determined that one should not use the expression "originality" in its generally accepted meaning. That is to say, any sort of innovation. Rather,

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in the words of Justice Netanyahu, page 360/63 [4 page 346] "all that is required is that the work should not be copied from another work, and that its origin is with the author or its creator." Therefore there is no difference if the material that was used for the work was copied. It is sufficient, in any modest effort, no matter how small it is, connected to the collection, editing, and arrangement of material. (Page A 136/71 [5 Page 261] page 363/83 [4] *ibid.* page 347). So is the law in the United States. (M.B. Nimmer *On Copyright* (1963-85) 2-85). This ruling was clear in the American case of *Gelles Widmer Co. v. Milton Bradley Company* (1963), ". . . almost any ingenuity in selection, combination or expression no matter how crude, humble or obvious, will be sufficient."

From this it is established that there is a copyright on the gathering and editing of copied material. However, copying alone, even if a lot of work was invested in it, is not protected according to this test. The claim for copyright was rejected in the case of a regional telephone book where its material was copied from a country-wide telephone book. *See Feist Publications Inc. v. Rural Telephone Service*

Co., Inc. (1991). Similarly, it was decided that copied illustrations from antique illustrations whose colors faded were not protected in the law even if a great deal of work was invested in it to reconstruct the original color. See *Hern v. Meyer* (1987).

(22) In this case, Broshi and Sussman defined the deciphering work as "creative." (Broshi, 7, Protocol; Sussman, 65, Protocol). Strugnell, in a response to the "guided question" [interrogatory] of the proxy of the plaintiff agreed that we are referring to a creative work. (157, Protocol, Strugnell's testimony in the United States, hereinafter Sterngel's Protocol). However, subsequently in his testimony he refrained from this point. He explained that for the deciphering, inventiveness and talent to innovate is required. Therefore, it is plausible to describe it as a creative work. (165, Protocol). Nonetheless, for his part, he does not employ this expression. He prefers to define the reconstruction work as reconstruction, because what is done here gives meaning to the deciphered material. (161-62, 165 Strugnell's Protocol). Golb was even more extreme. According to him, the claim that the deciphering is creative work is ridiculous. (409, Protocol).

However, the question that stands to be determined does not rely on the definition of these experts on this work but rather, on the meaning of the expression "original" in the law. As it was explained in the law, the defendants contend that the rulings regarding the copying of the telephone and the illustrations are proper precedent, which befit the facts in this case. According to them, also in our matter we talk about a work of reconstruction of an original in which the reconstructor did not contribute a thing to its content.

Indeed, according to the measures that were defined in the law, there is no copyright if there is no originality, even if hard, difficult, complex, and requiring expertise. It is true also that in the case in front of us

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the goal of the decipherer was to reconstruct the original scroll, but the original scroll was not found in its entirety. Tens of fragments that were discovered related to the various copies. There was no physical fit between the majority of the pieces, and even after combining them, there was a void of close to half of what was written. As mentioned before, it was impossible to match the pieces one to the other and to fill the missing text without research in philology and *Halacha*. Therefore, there was no possibility of reaching a uniform reconstruction because the manner of reconstruction and filling the missing [pieces] depended upon the result of research, which in most part, was not uniform because there exist many controversies between scholars.

As an example, [in the area of] language, the plaintiff [points to] two controversies between him and Strugnell: (1) Strugnell thought that in certain pieces the sentences constitute nine lines, and therefore must be combined lengthwise. Plaintiff reached the conclusion, after research, that in the relevant paragraph, the sentence is eighteen lines and therefore the pieces have to be connected width-wise. Evidently, the difference in the combination influenced substantially the content for the scroll. (Plaintiff, 185-90, Protocol). (2) One paragraph was combined from six small pieces and the plaintiff explained that the manner of combination is speculative. (194, Protocol). It was contingent upon the question whether one should complete a missing letter with an "Aleph" [silent first letter of the Hebrew

alphabet] as Strugnell thought, so that the word will read "Orot" [lights], or whether the missing letter should be "Ayin", [silent (with slight guttural sound) 16th letter of the Hebrew alphabet] so the word will read "Orot" [hides]. After halachaic research regarding the purity of hides in that period, the plaintiff reached a conclusion that the subject matter refers to hides. (181, Protocol). He combined the paragraph on the basis of this assumption, and therefore the content is entirely different from the content that would have been reached were the pieces connected according to the understanding that the word in question is "lights."

Therefore, there is no parallel between the work of the plaintiff—that in his work there were elements of creativity and originality—and the facts that were spoken of in cases the defendants cited and relied upon which, as mentioned, dealt with the copying of the telephone book and illustrations.

From all that it appears, the editing of this copy together with putting all the pieces physically next to another, there is not necessarily originality; however, the composition of the Compiled Text based upon philological and Halachaic research that the author conducted from the original is an original work.

Based upon all this the Compiled Text is protected by the law.

THE OWNERSHIP OF COPYRIGHT IN THE COMPILED TEXT

(23) From the claims of the defendants during the proceedings, it appears that according to them the only one of all the people that were engaged in deciphering, who is not an owner of the copyright in the Compiled Text (if it is possible at all to acquire such right), is the plaintiff. According to their claim, the right should be given to Strugnell and Millik who conducted the main work of deciphering, to the government of Jordan who was the employer of these researchers, to Ben Gurion University and to the Antiquities Authority of Israel, who are the employers of plaintiff. This opinion was based in the summations on two claims (1) the Compiled Text is a "communal creation" [i.e., not a joint work with co-authorship] the large part [of the authorship] that is identifiable was composed by Strugnell and Millik. Therefore, the plaintiff has no copyright in the entire text.

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(2) the plaintiff worked for the Antiquities Authority who supervised the work of the decipherers and therefore the Authority is the proper owner of the copyright on the compiled text.

(24) These claims are not accepted by me. In general the author is the owner of the material and moral copyrights. (Paragraph 5(1) to the law). The moral right remains with the author forever, however, the transfer of the monetary right is possible in writing alone. (Paragraph 5(2) to the law). The law distinguishes between a joint work of several co-authors, in which it is impossible to distinguish between the parts of one author and the parts of other authors, (Paragraph 16 to the law) and a "communal creation" which was written parts at a time, and in which it is possible assign each portion to its proper author. (Paragraph 35 to the law). In a joint work each one of the authors is entitled to the copyright upon the entire creation. In contrast, in an communal creation each author has copyright on his part alone.

(25) As mentioned, the Compiled Text is in essence the fruit of the labor of the plaintiff. He composed it from various copies that Strugnell and Millik prepared.

The copies that these people prepared, as explained above, a priori are not protected. At the beginning of this labor, the plaintiff worked in cooperation with Strugnell, but this combined work is impossible to be separated. Strugnell and the plaintiff met often and discussed the plaintiff's various suggestions to decipher the text. (Plaintiff, 182, Protocol). So it appears also from Strugnell's words: he estimated that the portion of the plaintiff's work in the entire deciphering exceeds fifty percent even though he indicated that he cannot point out specifically his own work. (177, Strugnell's Protocol). It is worth noting that Sussman's impression was that from the very beginning of the 1980s, Strugnell disassociated himself from the labor of deciphering and most of the task fell on the shoulders of the plaintiff. (61, Protocol).

(26) In regard to the Antiquity Authority, it is clear that the State of Israel has the right of ownership over the scrolls. However, it does not own a copyright in the fruit of the labor of the plaintiff. And it was never his employer. Paragraph 5(1) does not apply in this matter. According to that paragraph, in the absence of any other agreement, the employer is the primary owner of copyright on any work that a worker performs during the process of this work for the employer according to the law of service. (With a contract of service [work for hire] in the law it has been determined that the only test that determines if we speak of service contract is the test of supervision and authority. (Page 568/71 [6 P 504])).

In the matter in front of me, no service contract was made to provide services between the plaintiff and the Antiquities Authority. The plaintiff did not engage in deciphering labor by the request of the Authority. But Strugnell requested his help as he asked for the help of Sussman. In this matter, the manager of the Antiquities Authority, Amir Drory, testified that his relations with the plaintiff regarding the deciphering of the scroll were restricted with the full knowledge of Drory to the fact that the plaintiff is taking care, together with Strugnell, of the research of the scroll. (99, Protocol). However, the principal factor is

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that between the authorized researcher and the Antiquity Authority there were no relations of authority or supervision. He explained that the researchers "were totally autonomous and nobody got involved in their work, they were the bosses of the work." (12, Protocol).

In the cross-examination, Drory confirmed that the Authority determined, according to the chief editor, a calendar of publication of the scrolls, and informed the authorized researchers that it reserved the right to remove from them their exclusivity in the research if they did not hold to the schedule. (113, Protocol). It is clear that this notification does not constitute supervision and imposition of authority upon the work of research. Even Strugnell confirmed that there was no supervision on the work of the researchers. (31, 65, 75, 77, Strugnell's Protocol).

(27) The Antiquities Authority was never considered the owner of the copyright in the labor of the researchers. A written confirmation in this matter (7/H), which was given at the request of the plaintiff after presentation of this claim in response to the defendants' claim that the plaintiff is not the owner of the copyright in the Compiled Text, does not constitute transfer of these rights after the fact, but is an expression of the existing legal relationship. And so it was said in 7/T that was shown to Qimron and Strugnell:

We wish to clarify that the Israel Antiquities Authority that you have full copyright in the decipherment and reconstruction of the 4 QMMT Dead Sea Scroll which is the product of your efforts.

In these circumstances the defendants cannot force on the Authority ownership in the copyright when the Authority itself did not dispute that these rights of scroll interpretation and decipherment, which it could possess, belong to the researcher who did the work.

In conclusion it was proven that the plaintiff has copyright on the scroll.

THE PROCEDURE OF PUBLICATION IN THE ACADEMIC COMMUNITY

(28) The defendants claimed that, while relying on the testimony of Magen Broshi, according to the "procedures accepted in the academic world" [i.e., fair use] which aspires to have free flow of information, there is no limitation in the publication of scientific matter that was already published, so long as the material was attributed to its author. Therefore, the publication of the Compiled Text, which turned to the public domain when it was published by Kapra—and even before that, distributed among the researchers—does not constitute a violation of the copyright of the plaintiff.

This claim cannot be accepted, for both legal and factual reasons. The distribution of the Compiled Text amongst the various researchers does not constitute a publication, not according to procedure, (Plaintiff, 37, Protocol),

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and not according to the law. In this matter it was said in the book of Copinger, (at 27) the following, "The writer of a literary work may permit his manuscript to be viewed or read by any number of persons without thereby publishing his work." (See also Nimmer at 4-18).

(29) Furthermore, according to the defendant's claim regarding the existing custom, there is no basis for it in the evidence. Even if such a custom were in existence, it had no basis in the law. Previous publication in and of itself does not cancel copyright, and the defendants did not refute that. It is understood that the law and customs do not allow the publication of material that was previously published while violating copyright. However, even proper publication does not grant the right to freely copy the fruits of the labor of the author, without his permission and without mentioning his name, as it was done in this case. The custom as it was explained by Broshi, allows one to rely, in a research framework, on material that was published in a quotation format, and so said Broshi in this matter:

The moment that the researcher submits a manuscript to a scientific publication, it turns into the public domain . . . from that moment on everyone is allowed to quote and cite it, certainly not as if he deciphered or actually did it as an example in an old article of Yadin he cites an article of Alegro while mentioning his name . . . one says "as we saw in the article of Simon Levi's son where it was said, or in our opinion so and so" (37-38, Protocol).

In the case in front of me in the book 14/T, the Compiled Text, which was published by Kapra, was printed; however, this publication was prohibited, and as was mentioned, Kapra himself apologized about his deeds, despite that he emphasized that within the prohibited publication he requested from the readers not to copy and not to distribute it to others. There is no basis, therefore, to the claim about the custom and it must be rejected.

THE DEFENSE OF "INNOCENCE"

(30) Paragraph 8 of the law states, "[I]nnocent infringement relieves one from the responsibility of paying damages."

If a claim was presented regarding a violation of the copyright of any work, and the defendant claims that he did not know of any copyright associated with this work, the plaintiff will not be entitled to any legal remedy, save the issuance of an injunction or a 'cease and desist' order regarding the violation if the defendant proved that on the date of the violation he did not know, and there was no basis for him to suspect, that there existed a copyright for that work.

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From here it appears that the burden of proof of innocent infringement is placed upon the publisher. His subjective mental state of innocence is not sufficient, but it is incumbent upon the publisher to present proof that will stand up to an objective test which will illustrate that there was no "suspicion" of the existence of copyright. (page A 241/55 and page 892). In the matter in front of me, not only did the defense fail to prove the claim of "innocence," but it was proven that the Compiled Text was published with full knowledge that the plaintiff owns the copyright in this work.

(31) From the three defendants the only one who claimed "innocence" in court was the one who indicated: (1) that he did not know that the plaintiff participated in the deciphering research, and he assumed that the deciphering was done by Strugnell (260, Protocol), and (2) that the Compiled Text is a copy of the scroll which was written by the "Righteous Teacher." (265, Protocol).

I reject this testimony.

(32) In regard to the share of the plaintiff in the composition of the Compiled Text, Shanks admits that he knew that the plaintiff assisted Strugnell in the research of the scroll (259, Protocol) and in the process of this assistance he participated in its reconstruction. It is apparently possible that the reconstruction included the completion of its missing pieces. (296, Protocol). Not only that, but also Shanks's testimony regarding the participation of the plaintiff in the deciphering, is refuted by an objective evaluation. Drori's letter to Kapra (T/5) reached Shanks's hands. He published it in his book. T/14 (Figure 9). As it was mentioned in this letter, Drori indicated that Strugnell and the plaintiff were engaged for many years in the decipherment of the scroll. In these circumstances Shanks's testimony regarding lack of knowledge was refuted, and I reject it.

Regarding the claim that Shanks thought that the Compiled Text was merely a copy of the scroll, Shanks knew that the scroll was not discovered in its entirety but in pieces of six copies which were not combined together to a complete version. Its reconstruction required completion of the missing pieces. He also knew that this work required a great deal of knowledge, professionalism, and talent all of which he admitted (291-92, Protocol). But he explained that he did not pay any mind to it as he stated, "I didn't focus on it. I really didn't think much about this then."

He further emphasized that at the time he did not know that what was dealt with here was with many pieces and that much more was missing. (292, Protocol).

(33) There is no need to mention that his paying no mind does not reconcile itself with the defense of objective innocence. But nonetheless, I do accept his

entire version of Shanks's knowledge regarding the numerous pieces and that the vast material was proven in objective evidence.

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(34) Regarding the pieces in an article A/12/3 that were published in the BAR, it was written that the six copies found were "all very fragmentary." Shanks himself, in the introduction of the article that he published in T/14 when he addresses all the photographs of the scrolls that he published including the scroll, (Photograph 213) wrote the following: "[A]nyone perusing these plates, however briefly, cannot help but see the difficulty of making any sense of them. The best are mere fragments. Many are simply unintelligible scraps." (emphasis is mine).

Even the dimension of the missing pieces was known. The completions were inserted into the text in parentheses. Shanks noticed these parentheses. His explanation, why he thought that what was written within the parentheses was written by the "Teacher of Righteousness," is very curious and I shall cite it as it was written: "In this case I believe some of the brackets did not end, there was a beginning but no end. So I knew that even if it's a reconstruction, it's a precise word of the ancient author." (292, Protocol).

To the essence of the matter, according to his claim, regarding the brackets that were not closed, there is no basis to his claim in the Compiled Text itself, but the complete paragraph consists of several lines. As mentioned, the parameters of the completion approximates half of the text, and it is easily observable.

In conclusion, it was proven that Shanks knew that the plaintiff participated in the composition of the Compiled Text, and that the Compiled Text is not a copy of the scroll, but was instead composed from many fragments of several copies, which even afterwards many wide "holes" remained which were filled by the researchers.

(35) Shanks is a lawyer by profession. Therefore, it is unlikely to think that before he published the Compiled Text he did not pay any mind to its copyright. Furthermore, he knew that there were claims regarding the copyright in the Compiled Text and that the Antiquities Authority halted the continuation of the publication by Kapra. In the publisher's introduction in T/14, Shanks addressed this matter when he cited Drori's letter (T/15), which saw in Kapra's Compiled Text publication "a violation in the rights of your colleagues." (Strugnell, Plaintiff, Protocols). Indeed, throughout his defense Shanks admitted that he weighed the possibility that there exist copyrights in the Compiled Text, but he explained that he reached the conclusion that such copyrights exist only in its translation into English. However, in its original form no one has any copyright. (294, Protocol). However, this is not a reasonable claim in view of all the facts that were known to him: that he innocently thought so. He also denied the knowledge of these facts as well.

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But as was previously mentioned, this refutation of his is not acceptable to me. From the sum of the evidence it is possible to conclude that Shanks, after consideration, reached a conclusion that it was possible to assume that he would not be sued for violation of copyrights by the ailing Strugnell (in that, he indeed was right) nor by the plaintiff, who was timid and shy. What's more, he lived in Israel. As Shanks said, he was scared when he heard of the suit.

(36) In regard to Robinson and Eisenman, as was said, they refrained from testifying, and there is no factual version in front of me which proves their innocence. The defense witness, the attorney William Cox, testified that Eisenman was indeed surprised and was angered by the inclusion of the Compiled Text in the book. (437, Protocol). However, in view of the sum of evidence, Eisenman's knowledge of Shanks's intentions to include the Compiled Text in the book were proven. Thus, the testimony by Cox of the surprise cannot be accepted.

Robinson's representative, Mr. Hausner, Esq., claims that his client could infer from the publisher's introductory usage of the word "copy" that he was dealing with a copied work which could not carry any copyrights.

It appears to me that the mere usage of the expression "copy" by Shanks is not a sufficient proof to evidence a defense of innocent infringement. In a paraphrased way, I shall comment that Shanks testified that after presentation of the suit, Eisenman claimed to him that he did not read in the publisher's introduction the portion that refers to the Compiled Text. (277, Protocol). However, the entire claim is contradicted by the objective evidence that Robinson and Eisenman edited the key to the plates in T/14. Therefore, they knew what the fragments of the scroll looked like. (Plate 213). It is enough in a plain look at this photograph [plate] to understand that it was impossible to decipher the scroll by copying alone. Furthermore, in the introduction it was written that in the book the text that Kapra published is being published, and that the two of them saw Kapra's publication (so testified Shanks) (278, Protocol). Therefore, they could have known from a look in the Compiled Text that it was not a mere copying labor. Finally, Eisenman used the Compiled Text in the book T/19. In the introduction to T/19 it was claimed that indeed, the decipherment work was done by the authors alone (Eisenman and Weiss) with no one's help. Golb confirmed that the Compiled Text was in their possession, yet the plaintiff and Broshi testified that in T/19 the Compiled Text was copied. (Broshi, 23, Protocol, Plaintiff, T/11, 179, Protocol).

Be it as it may, in the book T/19 the decipherment of the scroll was included, the copyright was reserved, and so it was written in the front page of the book:

all rights reserved
No part of this book may be
 reproduced or utilized in any form or by any means,
 electronic or mechanical, without permission in
 writing from the Publisher (emphasis added).

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All this proves that Eisenman knew that there existed a copyright in deciphering work on the scroll, and hence they contradict the claim that he was under the impression that the Compiled Text is a mere labor of copying, which has no copyright associated with it.

In conclusion of all these facts, the claim of innocent infringement is hereby rejected.

THE MORAL RIGHT AND ITS PARAMETERS.

(37) Paragraph 4A to the copyrights law states as follows:

(1) An author is entitled to have his name mentioned in his work in the customary and rightful measure. (2) An author is entitled that no falsification, damage or

any other alteration be made in his work, or any action which constitutes the diminution of the value of that creation which may injure or damage the name or honor of the author. (3) A violation of the rights according to this paragraph is a civil offense and all the laws regarding damages to the civil law (new version) will prevail here. (4) The rights of the author, according to this paragraph, will not depend upon his economic rights in that work, and it will be enforced even after the economic rights to that work were transferred, or assigned. (5) In a claim according to this paragraph, the author is entitled to compensation in an amount that will be determined by the court according to the circumstances of each case, even if he did not prove monetary damage, this law does not demean from any other authority the court may have according to chapter 5 to the laws of damages (new version).

Here, therefore, the moral right was integrated into the law of copyright; even its violation was defined as an offense according to the laws of damages (new version). However, it appears to me that the parameters of the enforcement of the laws of damages go beyond what was expressed in paragraph 4A above. The parameters as they are reflected from the changes in the above definition are identical, in my opinion, to the laws of copyright. In the matter regarding the definitions of protected works, the defense of innocent infringement and the consideration to provide assistance is apparent from the fact of the integration of the entitlement into copyright rights and from the judicial purpose of the amending law. There is a complementing special instruction according to the copyright law, which includes the defense of economic rights alone. A similar conclusion may be reached from the judicial history of paragraph 4A in the explanations to the amended law (F" H 1988 238) where it was so stated:

Two rights the author has in his creation. The first is economic; he is entitled to economic benefit from the fruit of his creation. The second is spiritual [moral]; his right is that his creation be named after his name and be published in a manner reflecting fidelity to the original, with no damage or falsification. In the legal framework of the state of Israel, in regard to the matter of acquiring moral rights, there exist protections only on the economic rights, yet the moral rights of the author did not get to be included. Thus, the law

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does not protect them. In the proposed law in front of us, it is proposed to correct the Israeli law in the spirit of the mentioned paragraph (paragraph 6A [Article 6bis] to the Berne Convention).

In this it is understood that the intention of the law was not to create a new law that is segregated from the existing copyrights, but to add the moral right to the economic rights. Thus the two rights, moral and economic, constitute the copyrights.

Professor Weissman wished to conclude from this amendment in paragraph 6A that the moral right constitutes a part of the copyrights. In the 1948 version of 6A, it was stated that the moral right prevails "independently of the author's copyright." However, in the later version from 1967, the prior version was corrected and it stated "independent of the author's economic rights." Professor Weissman said that the law of damages as it stands (new version) regarding moral copyrights does not contradict the assumption that the personal (moral) right is part of copyright. (Y. Weissman *ibid.* pages 53-54). Ms. Presanti reached the same conclu-

sion. (S. Presanti, at volume II, 467).

(38) The defendants' representatives one, three, and four took the liberty to add, after the conclusion of their argument, claims regarding the moral rights that were not included nor claimed in their summations. There is no substance to their claims, for they disregard entirely what is written in paragraph 4A to the copyright law, which is an Israeli law in origin. Nonetheless, to appease their minds, I shall address the substance of these claims.

Their first claim is that according to British law, "he who is defined as the author for the purpose of enforcement of the copyright law has no moral rights." This claim can not be accepted. According to paragraph 4A of the copyright law, the moral right is added to the economic right (Presanti, 467; Weissman, 53-54).

Their second claim is that the existence of moral right is conditioned upon explicit request by the author. This claim relies upon: (1) paragraph 6A of the Berne Convention, which states the right of the author to claim his rights in his creation as its author, and (2) the English law, which was instituted after the institution of the above paragraph 4A, and is the 1988 copyright in paragraph (1)77 to this law, it was stated that the realization of the moral right is contingent upon the author's assertion of the creation, in manners detailed in paragraph 79 of that law. In my opinion, one cannot interpret the words of paragraph 6A of the Berne Convention, which defines the author's rights "to claim authorship," as a precondition for these rights in a formal declaration. So it is concluded in the Israeli law before the institution of the above paragraph 4A, in which in its context was stated that the publication of any work which the author himself did not yet publish (and there is no need to say that he did not declare his identity in a formal

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declaration) and without referring it to its author constitutes a violation of the moral right as defined in paragraph 6A of the Berne Convention (page 528/73 [8] in pages 118-19 page 559/69 [9] page 829).

Professor Tedsy also defined the moral right with no precondition whatsoever: "the right to moral fatherhood of the author of his work which was recognized in paragraph 6A to the Berne Convention as a right which, when presented or mentioned his work in public will be mentioned as his work." (G. Tedsy, *The Moral Rights and Personal Rights Law* 393, 392 (1980)).

Be this matter as it may, the above paragraph 4A is an original Israeli law and it was instituted in the spirit of paragraph 6A to the Berne Convention, but the parliament did not adopt the law literally, but it was stated in paragraph 4A, a detailed process, in its frame of reference, the realization of the moral right was not contingent upon any condition.

Beyond the requirements, I shall comment that in the case in front of me the copyright was explicitly claimed in the letter to Kapra T/5.

The last claim of the defendants is that there is no room to set compensation for violation of the moral rights "only if a real damage or special damage was proven." This claim has to be rejected in view of paragraph 4A(5), under which, accordingly, the author is entitled to compensation even if no monetary damage was proven, because the violation of the moral right is an offense according to the law of damages (new version) and it is clear that nonmonetary damage is to be compensated according to this law. (Y. Engelrod, A. Barak M. Hashin, *Damage*

Laws: The Laws of General Damages Law 169 ("Magnes" publishing house, G. Tedsy ed., 2d (1977)).

With the fall of all the claims of the defense, the fact remains that the fruit of the author's labor is the Compiled Text, which was published without mentioning his name, and in doing so there was a violation of his moral rights. The claim that according to custom it is sufficient to mention Strugnell's name alone is refuted in view of the plaintiff's share in the composition of the Compiled Text, as I already mentioned (Paragraphs 23-25 of this verdict).

THE CLAIM REGARDING THE LEGAL PROCEDURES

(39) The defendants claimed that even if a law was violated, the claim has to be set aside due to reasons relating to legal procedures which supercede the laws of copyright in their rightful interpretation. In this case it is proper to observe a liberal legal procedure, which allows for the free flow of research work amongst the scientific community, without tying it up with severe copyrights laws.

This claim has to be rejected, for the defendants confused the right of the researcher to investigate the

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scrolls (which they struggled upon) and to rely in his research upon works that were published, and taking the work of another person without his permission and without mentioning his authorship. The sharp reaction of the participants of the scientific convention in Spain to Kapra's publication, which the plaintiff talked about (195-96, Protocol) illustrates the view of the scientific community of such an act.

Even a scientist has copyright for his work, and proper legal procedures are required to defend this right.

SHANKS'S RESPONSIBILITY AND THE FOURTH DEFENDANT.

(40) There is no dispute that the Compiled Text was published with Shanks's initiative and by the fourth defendant, the publishing house. From this, therefore, is to be inferred that both are responsible for violating the copyrights of the plaintiff.

THE RESPONSIBILITY OF EISENMAN AND ROBINSON

(41) The names of Robinson and Eisenman appear in the front page of the book as those who prepared it. Eisenman's representative, Attorney Hausner, offered his interpretation that the version was composed by Shanks and it is not to be read literally, but according to the spirit of the participants, which was clarified in the memorandum (n/a/11) which was agreed on September 9, 1991, between Shanks, Eisenman, and Robinson. In paragraph 2 to this memorandum the following is stated: "The title page of the edition is to report that it is introduced with an index by Robert H. Eisenman and James M. Robinson."

There is the need to view the word "prepared" only to the introduction and the index alone.

This claim may not be accepted. In the introduction, Robinson and Eisenman clarified that in addition to their work in preparing the book, they authored the

introduction and the index. I shall quote them literally, "Robert H. Eisenman . . . and James M. Robinson . . . were engaged *not only to help prepare* this edition, but also to provide an introduction and index. . . ." (emphasis added)

Indeed, the introduction predates the memorandum (N/A/11); however, the authors continued to update it up to its publication. So it appears from a footnote dated October 8, 1991, on the face of it the synonym for the book's preparation is its editing. And indeed that is the way that Broshi viewed it, which upon relying on the writing, he wrote that it is clear that Robinson and Eisenman are the book's editors T/14. And so he said,

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"I have no doubt that in the front page of the book (T/14) that it is written, that the book, its editors are Eisenman and Robinson." (58, Protocol).

So it appears from the questionnaire (N/A/10(1)) that was composed and presented to the plaintiff and Mr. Primer, Esq., who represented Robinson and Eisenman at that time. In question number 19, Mr. Primer defined the book T/1 as follows: "Facsimile edition of the dead sea scrolls Robert H. Eisenman and James M. Robinson (emphasis added) [Translator's note: I cannot determine from my copy what portion of the quote the judge is emphasizing].

(42) Therefore, in the book T/14, the names of Robinson and Eisenman appear in the front page. On the face of it is proof that the two of them are responsible for its content. The question that requires determination is: Was I presented with contradictory proof? As mentioned before, these defendants did not appear in court and did not provide any version, and they wished to base their defense upon testimony provided by Shanks and a witness for the defense who testified on behalf of Eisenman—the attorney Cox, Eisenman's representative. Mr. Hausner also claimed that his client presented his version in a letter that was published in the newspaper *Jerusalem Post*, following the submission of the suit against him (T/23/G). This letter was presented by the plaintiff, and its presentation consists of an admission of its content.

This claim must be rejected. The above mentioned T/23/1 was presented throughout the questioning of Shanks, as well as attached to a copy of an interview of Shanks in the Foreign Journal of *Kol Israel*. This copy was presented to prove that Shanks published the book T/14 in Israel. In the interview itself, publication in various newspapers was mentioned, as well as a publication in the *Jerusalem Post*. These newspaper articles and T23/G were attached to it. The defendants opposed the presentation of these articles. I rejected their opposition and I explained that I admitted these articles as part of "the counter investigation, so I will know what are they questioning him (Shanks) about." (336, Protocol).

In the claim regarding the admission of Eisenman's version in T23/G, there is nothing, and I reject it.

(43) In regard to Cox's and Shanks's testimony, Cox, who is an American attorney, represented the owner of the photographs that were published in T/14. This person wished to publish the photographs and Cox acted as coordinator between Shanks, Eisenman, and Robinson (Cox, 440, Protocol). Cox testified that, according to his understanding, the book T/14 had no editor (438, Protocol), and that he was supposed to include the photographs, the index, and the introduction only. (436, Protocol).

(44) Shanks claimed that he is responsible for the publication of the publisher's introduction. (761, Protocol). Nonetheless, he emphasized that Robinson and Eisenman did not oppose the introduction of the publication, but expressed reservations regarding its style (277, Protocol). Shanks rejected the version that was presented by Mr. Hausner that Eisenman was very angry when he was told of the inclusion of the Compiled Text in the introduction, and he repeated

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and explained that Eisenman knew about the publishing of the Compiled Text, for he (Shanks) sent him the Publisher's introduction and it was said that the Compiled Text that was previously published by Kapra would be included in the book. Shanks, however, did not include the text itself. But Eisenman knew of the text that Kapra published (278, Protocol; *see also* page XVI in T/14).

Shanks also confirmed that he transferred a draft of the suit to Eisenman (N/B/7), which he intended to present to the court, in which in it was written that Robinson and Eisenman were not the editors of the book. Nonetheless, he saw fit to emphasize that he did not write in this letter that the two were not the book's editors, but it refers to the passing of a draft of the claims only (280, Protocol).

Here, therefore, Shanks's position was not single-minded, although he agreed that the work of the couple was concentrated in practical classification of the photographs and in writing the index and introduction. However, Shanks was not ready to confirm lack of knowledge.

(45) Be this as it may, the question requiring decision is not how Cox and Shanks defined the duties of Robinson and Eisenman, but what their duties were in fact. In this matter it was proven by the registration in the front page and by the sum of all the evidence that Robinson and Eisenman were engaged in the work of editing, and the writing of the index is one of its distinguishing components. (*See* E. Ben Shoshan, *The New Dictionary* (Vol. 5, 1965), under the heading: "editing".)

Indeed, Shanks initiated the inclusion of the Compiled Text to T/14, but he informed the couple about his intentions by transmitting the publisher's introduction for their review. The mere fact of the notification points out their role as editors. The reservations that the couple had about the style of the introduction, which were not by themselves adamant, are not relevant, for the claim of the plaintiff refers to the publication of the Compiled Text itself, and Robinson and Eisenman did not express any reservation regarding the publishing of the text. The two, who are professional researchers, saw fit to place their names in the book, where the fruit of the labor of the plaintiff was included. And this was done without his consent or without mentioning his name as the author. By doing this they performed an act which violates the copyrights of the plaintiff, as was said in paragraph 2(1) to the law, as well as to his moral rights according to paragraph 4a(1) to the law.

THE DIVISION OF RESPONSIBILITY AMONGST THE DEFENDANTS

(46) The four defendants are responsible to the plaintiff jointly and severally. Each one of them is responsible for the full damage. However, within the relationship among the defendants there exists the principle of participation, and the share of each one is set by his part in the responsibility for the damage (the laws of

general damages, page 507 (A. Barak)). In the appropriate cases, it is possible to set the proportional share of the damage at 100%. (Barak, at 509).

In the case before me, Shanks decided to publish the Compiled Text, and in his testimony

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and in the letters that he wrote to Robinson and Eisenman, he took full responsibility upon himself. In view of his position, his proportional responsibility, as compared to the other two, is 100%.

THE INJUNCTION

(47) On January 21, 1992, a temporary injunction was issued prohibiting the defendants from continuing to distribute the Compiled Text. This injunction was adhered to and the Compiled Text was extracted from the second edition of the book T/14. The first edition constituted 413 units. Up to the issuance of the injunction two to three hundred units were sold (Shanks, 270, Protocol). Today, the defendants do not demand the right to publish the Compiled Text. Shanks testified clearly in this regard, (271, Protocol), and the representative of Eisenman claimed, as mentioned, that his client was opposed to the publishing of the Compiled Text a priori. The representatives of the defendants never did address the plaintiff's demand for an injunction in their summations.

In these circumstances, even given the defendants' position, it is possible that the injunction is not needed anymore. Nonetheless, in view of the lack of any objection it is proper to respond affirmatively to the plaintiff's request and issue a permanent injunction.

THE DAMAGES

(48) The plaintiff lost the right of being first to publish the Compiled Text, worse yet, because the Compiled Text was referred to as an unknown source, and subsequently published again without mentioning his name as the author, Broshi explained: "the text of M.M.T. [makes] no mention of the decipherer and renders the work into the public domain." (23, Protocol).

Even in a critique which referred to the scroll, the plaintiff's name was not mentioned (Broshi, 24-25, Protocol). Also, Professor Sussman already made mention of the severity of the loss of the right of being 'first.' Regarding Mr. Primer's question about whether the publication of the Compiled Text with commentaries by the plaintiff will not preclude the damage to his name and to his income, Professor Sussman replied:

It depends what will happen until the book appears. If this text will be known the world over and every one will begin treating it and everyone will write whatever [they] will write and the matter will enter the scientific information data bank, who knows what ramification [it will] have, that it may appear in another place. (85, Protocol).

By doing so the plaintiff suffered economic damage and embarrassment.

Monetary Damages

(49) In paragraph 20 of the plaintiff's claim, monetary damages were claimed

according to the following calculations:

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(A) the loss of profits and/or author's remuneration . . . according to an estimated price of the owners of a copyrighted book as NIS 350. The author's remuneration was set at 5% and the reduction in the book's distribution by 5,000 units as NIS 87,500, (B) the loss of future income at NIS 1,000 monthly for 20 years (capitalizing it at 3% per annum) as NIS 180,000.

The plaintiff's estimate was that the publication of the Compiled Text will cause a reduction in the sale of the book that he intended to publish as detailed in paragraph 20(B) to the plaintiff's claim.

The problem is these calculations have no proof in the evidence presented here, and none of the witnesses are capable of estimating the influence that the publication of the Compiled Text will have on the sale of the plaintiff's book and upon his income from lectures. It is impossible to estimate objectively how the publication of the text will impact the volume of sales of the plaintiff's and Strugnell's book and upon [plaintiff's] reputation, which is the basis for him being asked to lectures.

The plaintiff's representative, Mr. Molcho, claimed that the Court is permitted to set a compensation for a future monetary loss based upon an estimate relying on a lower probability than 50%. However, the question in front of me is not the level of proof, but the absence of minimal objective elements enabling the calculation of the damage by any probability. The matter of the plaintiff enters the realm of cases where the damages were not proven, and where the Court is empowered, by virtue of paragraph 3A to the law, to set statutory damages.

(50) In regard to this matter the defendants claimed that this authority is valid only when a damage was caused, but its parameters were not proven. This claim is not relevant in the matter before me, in which it was proven that the plaintiff suffered a damage. Beyond the requirement, I wish to comment, that according to the interpretation that was given to the above paragraph 3A in the law, a plaintiff that proved that his copyrights were violated is entitled to request statutory compensation with no need to prove real damage, regardless of whether he chose to bring proof and failed in proving the damages (page 592/88 [10], and in page 264-265).

(51) In the above mentioned paragraph 3A, the court was empowered to set statutory compensation, in a sum that will not be less than NIS 10,000 and not exceed NIS 20,000. In the above page 588/592 [10] it was stated that where there was no proof of damages, the compensation sum will be set according to compensation considerations of prevention, and it is stated (at 271):

[I]n choosing a sum for compensation with no proof of damages, it is encumbered on the court to view the two basic aims of copyright: the first compensates

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the owner of the rights and the second is deterrence. On the one hand, the first aim requires one not to be entirely remote from a real estimated damage and not to bring him improper windfall riches. On the other hand, the second aim justifies consideration of the state of mind of the violator when setting a sum of compensation, namely to be less severe with an innocent violator and more severe with one who does it with intention.

As previously mentioned, in the case in front of me the plaintiff lost the right to be

first in publishing a work to which he dedicated many years. The consideration of compensation in and of itself justifies the setting of a high sum. The case that Mr. Hausner relied upon in (T'A (T'A) 1143/83 [12] page 396), in which statutory damages of 250 NIS at the value on January 13, 1983, which is worth NIS 13,000 today, only exemplifies the proper amount in that case. The compensation was set because of a violation of a documentary movie where a grandchild of Eichman was interviewed. On the face of it, in view of the amount of work that was invested by the prosecutor and its content, it is clear that his [Qimron's] damage was greater than the damage suffered by the copyrighted owner of the movie.

(52) In as much as the view regarding deterrence the defendants knowingly published the Compiled Text. It appears as if Shanks, seen in the publication struggling against the system, allowed only a small number of researchers to investigate the scrolls. In the publisher's introduction he brags that, unlike Kapra, who submitted to the authorities and stopped the publication of the text, he is publishing it. In his struggle he did not refrain from violating the copyrights of the plaintiff who had no part in restricting the research of the scrolls. We find that even for the prevention consideration we need to set maximum compensation allowed under the statute, NIS 20,000.

The non-Tangible Damage

(53) In paragraph 20(B) to the plaintiff's claim, the plaintiff demanded compensation for the embarrassment and loss of reputation in the amount of NIS 100,000. Mr. Molcho explained that the Compiled Text was not ripe for publication. It was a draft only, therefore its publication hurt the reputation of the plaintiff amongst those researchers who were able to identify that it is his work.

As to the claim of damages to reputation there is no sufficient factual basis. It is reasonable to assume that researchers sufficiently familiar to know that the Compiled Text is the fruit of the plaintiff's labor understood that it is a draft only. It is possible to assume that they knew that the complete work will be published by Strugnell and the plaintiff with commentaries. Nonetheless, there is no doubt that the plaintiff suffered a great deal of embarrassment. In his testimony the plaintiff explained that he felt that his world collapsed and his dream to claim all the glory evaporated. I shall cite his words literally:

I was amazed, I can not describe such feeling, it is as if someone came and takes by force, says who are you? It belongs to me, the work which I created. I would not

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have accepted a text that was not published and work on it so many years if I was not promised that my right to have the right of being first was mine. Because in essence the scroll or any text that was always published will be named after the first person to work on it, no matter how many editions there will be always return to the first edition . . . throughout the years I worked on "some of the Torah deeds" I hardly worked on anything else . . . all my family lived very frugally if my spouse complained I told her look this [is] our lives, we shall eventually get all the glory, it may be more important than money . . . (207-208, Protocol).

As mentioned, the defendants violated the moral rights of the plaintiff, accordingly, they committed an offense according to the tort laws, new version . . . and

the plaintiff is entitled to a compensation for his embarrassment, the evaluation of this damage falls under the general rules of the law while considering the special principles of compensation according to the laws of copyright. As mentioned before in this matter, the court considers the principles of compensation and the publishers' behavior.

(54) The principle which is at the basis of the tort laws is "the return of the situation to its previous status" [making whole], bringing the damaged party to the position he could have had, had he not been damaged by the violator. In our matter it deals with a damage of the feelings that cannot be precisely measured. However, it is still possible to uphold the principle of returning the situation to status quo ante and this is accomplished by setting compensation relative to the severity of the injury. This was explained in the book *The Laws of Damages*, previously mentioned, in page 754 (Barak):

The monetary compensation given to the injured party comes to allow him to acquire happiness and merriment in the future which will be balanced with the injury he suffered in the past, in a manner that the balancing between them will uplift him, as much as possible, to a state he would have been had the violation not occurred.

Moreover, in the laws of tort the offender's behavior is considered. First, because in evaluating a non-tangible damage resulting from injury to his emotions, it is possible to impose accelerated compensations [punitive damages] when considering the severity of the violator's behavior (Barak, 578). And second, in appropriate cases, compensation is set to punish the violator for his behavior (compensation as an example) (Barak, 579; A 30/72 [11]). Even though the imposition of exemplary compensation is controversial (30/72 [11]), there was indicated that the discussion (because the version became academic, for the accelerated compensation includes almost all the principles of an exemplary compensation) regarding the amount of compensation that the plaintiff is entitled to may become influenced by the defendants' behavior. In as much as the violation of his moral rights is a tort violation, one cannot demean its importance.

In the case in front of me, considering the severity of the injury of the plaintiff's feelings, and the behavior of Shanks that was described earlier, it appears to me that the proper compensation for the embarrassment is NIS 80,000.

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(55) I hereby issue an injunction that prohibits the defendants from publishing the Compiled Text or distributing it in any way whatsoever. Similarly I require the defendants severally and jointly to pay the plaintiff NIS 100,000 together with all the adjustments for indexing of the money and the legal interest beginning from the day the suit was presented (Jan. 14, 1992) and up to the date of payment.

(56) Regarding the court's expenses, as a rule it is proper to set an amount commensurate with the level of assistance provided. However, the court is permitted in the appropriate cases to consider other considerations including the amount of labor invested in the trial. (Y. Sussman, *the Civil Law Procedures*, (6th edition S. Levine, editor, 1991) 513).

(57) The deliberations in this trial were extremely complex. The plaintiff's attorney was forced to travel to the United States to participate in the questioning of the defense witness, Strugnell. As mentioned before, the defendants are not

Israelis and the preparation labor was large. The trial itself lasted for numerous meetings, and the Protocol was over 600 pages.

In consideration of all of the above, I order the defendants to pay the plaintiff the legal fees in the amount of NIS 50,000 and all other legal expenses according to the determination of the court's registrant. This amount will be indexed and will carry interest as determined by law until the actual payment.

Was given today 5 Sivan, 1993 (Mar. 30, 1993).

