

District Court HyperLaw Text Decision:  
Matthew Bender v. West, No. 94 Civ. 0589, 1997 WL 266972 (S.D.N.Y. May 19, 1997)  
Second Circuit HyperLaw Text Opinion:  
Matthew Bender v. West, 158 F. 3d 674 (2nd Cir. 1998)  
Supreme Court Denial of Certiorari for HyperLaw Text Opinion  
West v. Hyperlaw, 526 U.S. 1154 (1999)  
  
Second Circuit Text Decision: Matthew Bender v. West, 158 F. 3d 674 (2nd Cir. 1998), aff'g, No. 94 Civ. 0589, 1997 WL 266972 (S.D.N.Y. May 19, 1997), cert. denied sub. nom. West v. Hyperlaw, 526 U.S. 1154 (1999).

## HOUSTON LAW REVIEW

### ADDRESS

References to HyperLaw Text  
Issue highlighted in yellow.  
158 F.3d 674

References to Citation Issue  
Highlighted in Pink  
158 F.3d 693

# COPYRIGHT IN THE DEAD SEA SCROLLS

## AUTHORSHIP AND ORIGINALITY

*David Nimmer\**

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

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

Second Circuit Citation Opinion  
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Supreme Court Denial of Certiorari Citation Opinion:  
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IV.  
TO THE MIDDLE EAST FROM WEST

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

Judge Dennis Jacobs<sup>163</sup>

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

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

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

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

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

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

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

166. Refer to Chapter V *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

Citation Case #2

Text Case #2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

178. *Id.* at 674, 693.

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

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

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

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

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

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

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

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

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

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

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

184. *Id.*

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

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

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

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

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

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

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

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

VII.  
MIND BENDER

The study of the Dead Sea Scrolls is and has always been neither theology nor science but an exercise in almost pure religious metaphor.

Neil Silberman<sup>471</sup>

There are many levels on which to confront the copyright lessons of *Qimron v. Shanks*. The previous chapter looked at some of the particulars animating that controversy, leading to case-specific applications of such doctrines as fair use and unclean hands. The present chapter, by contrast, proceeds on a more universal level. As a way of examining authorship and the proper bounds of copyright protection, this chapter takes lessons from the Second Circuit's *Bender v. West* case, applying them to the general enterprise of scholars seeking copyright protection in their reconstruction of ancient scrolls. These considerations thus apply not only to Elisha Qimron himself, but across the board to all who seek to reconstruct old texts, regardless of the circumstances.

A. *Fact/Expression Dichotomy*

West, like the scholars of the Dead Sea Scrolls, labored in a domain in which "faithfulness to the public-domain original is the dominant editorial value."<sup>472</sup> The same considerations that doomed West's copyright likewise forestall Qimron's claim. The Supreme Court's standard in *Feist* (the "telephone book white pages" case) governs here: "[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship."<sup>473</sup>

In *Bender v. West*, the Second Circuit invoked the fact/expression dichotomy to find such copying as occurred on the

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<sup>471</sup>. THE HIDDEN SCROLLS, *supra* note 190, at 50.

<sup>472</sup>. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 (2d Cir. 1998).

<sup>473</sup>. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

*Id.*



safe side of the line.<sup>474</sup> Star pagination merely conveys unprotected information.<sup>475</sup> By the same token, any copying of Qimron's manuscript reconstruction, as opposed to his translation of *MMT* or his commentary thereon, is similarly nonactionable. For it represents, pure and simple, the facts as to how TR expressed himself 2,000 years ago, reproduced as faithfully as Qimron was capable of achieving.

### 1. Originality

#### a. Quantum of Originality

At the outset, a distinction must be acknowledged. *Bender v. West* held that the page numbers at issue there contained no copyrightable expression whatsoever, having been rotely inserted by a computer.<sup>476</sup> Qimron, by contrast, labored for eleven years to reproduce *4QMMT*. Thus, the factors that animated the court in *Bender v. West* could be argued to actually safeguard Qimron's protection.

Moreover, it may be conceded that Qimron reconstructed *4QMMT* differently than any other would have done. What greater proof of originality could there be than the distinctiveness of his contribution?

We turn first to that last consideration. Then, the discussion winds back to whether, in the ultimate analysis, *Bender v. West* favors Qimron's position.

#### b. "Distinctive" Does Not Translate to "Original"

Does copyrightable originality follow from the fact that Qimron's reconstruction was unique to him—that no other human being on earth would have put the bits and pieces of manuscript together in exactly the same way (assuming that to be the case)? Properly construed, distinctiveness does not equate to copyrightable expression.

Both *Bender v. West* and *Feist* bear out that proposition. In the former case, there is no doubt that the particular case

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474. In a profound sense, there is a subjective element even in the most "objective" fact. "Nature states no 'facts': these come only within statements devised by human beings to refer to the seamless web of actuality around them." ORALITY AND LITERACY, *supra* note 1, at 68. Facts themselves "have no necessary stable existence, but are themselves texts." Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 769 (1993). However true in the noumenal realm, these considerations are too metaphysical for the pragmatic concerns animating the law. Refer to Part Two *infra*.

475. *Bender*, 158 F.3d at 701.

476. Refer to Case 17 (The Bingo Cards) *supra*.

Citation Case #3

reporters produced by West were unique to it. No other competitor, left to its own devices, would ever develop a single volume, let alone a whole series, identical to any book of the *Federal Reporter* (i.e., containing the same page number divisions, the same citation methodology, the same attorney names presented in the same format, etc.). Yet the Second Circuit ruled that those factors, despite their distinctiveness, lie outside copyright protection.

An even stronger application of this principle emerges from the Supreme Court's ruling that copyright protection is lacking in the white pages of a telephone book.<sup>477</sup> In the first place, a telephone company must assign a unique phone number to each user (just as West must assign a unique page number to each page). That process itself can be complex.<sup>478</sup> Moreover, that phone number, like West's page numbers, is not an "antecedent fact"; it springs into existence only by virtue of the putative property owner's labor.<sup>479</sup> Yet those circumstances by themselves do not confer copyright status.

Moreover, each phone book directory containing alphabetized white pages itself represents a profoundly unique compilation, reflecting innumerable choices by its creator. Consider a simple thought experiment.

??In a town live 1,000 individuals whose names have been collected from time immemorial in standard alphabetical order. To the town now move ten strangers—Axel aus der Mühlen,<sup>480</sup> Sharon Ben Shachar,<sup>481</sup> Chou En Lai,<sup>482</sup> the artist formerly known as Prince,<sup>483</sup> and diverse

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477. Refer to Case 5 (The Phonebook) *supra*.

478. See WHO OWNS INFORMATION?, *supra* note 283, at 39.

479. "A telephone number is not like a mathematical algorithm or law of nature that lies waiting to be discovered . . ." *Id.*

480. Which name should be treated as his surname? Should it go by capitalization? Or by order?

481. As an initial matter, should the letter *chet* in her name be transliterated as "Shachar" or "Shahar." Next, should this entry come after surnames such as Benshein? Or does the space mean that it should come before?

482. Axel, the German's first name, is also his given name; but Chou, the Chinese's first name, is his family name, not his given name. (Using the appellation "Christian name" instead of "given name" even more starkly highlights the value judgments at play here.)

483. That individual has been no stranger to copyright litigation. See *Paisley Park Enters., Inc. v. Uptown Prods.*, 54 F. Supp. 2d 347, 348–49 (S.D.N.Y. 1999) (issuing an order preventing Prince's videotaped deposition from being exploited on defendants' Web site). In *Pickett v. Prince*, 52 F. Supp. 2d 893, 896 (N.D. Ill. 1999), *aff'd*, 207 F.3d 402 (7th Cir. 2000), a fan created a guitar in the shape of Prince's symbol/name. Because the fan appropriated that copyrighted image without authorization, he was denied copyright in his product, by application of the rule confronted above that is relevant to Qimron as well.

members of the same Irish clan (who were split up upon entry to Ellis Island and who therefore spell their names differently): McCormick, MacCormick, M'Cormick, McOrmick, MacOrmick, Maccormick, and Mac Cormick. A hundred employees of the telephone company produce a hundred distinctive lists when attempting to integrate just those ten names.<sup>484</sup>

??Of course, the chore of compiling a phone book does not end there. In addition to deciding how to alphabetize “nonstandard” names, a value judgment also must be made as to where to draw the boundaries. One could chose the municipality of Beverly Hills; or the entire region of West Los Angeles, including Beverly Hills (or excluding it!); or South Beverly Hills alone; or South Beverly Hills together with Beverlywood; or South Beverly Hills, Beverlywood, and the Pico-Robertson neighborhood; or South Beverly Hills, extending all the way to Century City; or South Beverly Hills extending to Century City, but stopping at Century Park East; etc.

From these considerations, it should be evident that almost limitless patterns are available. Indeed, one could imagine the possibility of producing as many different white-pages directories for communities of the United States as there are theoretically permutations for bingo cards.<sup>485</sup> The fact that any phone directory produced by a given individual is unique and distinctive to her and would match the phone directory produced by no other individual does not by itself vouchsafe the existence of copyright protection. For Justice O'Connor, speaking on behalf of a unanimous Supreme Court, has told us that all alphabetized white-page directories stand outside copyright protection.

## 2. *Literary Work vs. Material Object*

We return to the argument that *Bender v. West*, by excluding from protection the page breaks rotely inserted by computer, favors copyright for *4QMMT*, which required eleven years of Qimron's painstaking labor to produce. For this purpose, it is

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Refer to Chapter VI, section (B)(2) *supra*. The district court's discussion of the doctrine of unauthorized exploitation is one of the most elaborate of any case. *Pickett*, 52 F. Supp. 2d at 901-09 & n.17 (relying on NIMMER ON COPYRIGHT, the “treatise[] cited ubiquitously as authority in copyright cases”).

484. Humans quite obviously work according to different criteria than the mechanistic ones programmed into a computer, as anyone trying to access a ponderously named Web site can attest. See David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 450 n.236 (1999).

485. Refer to Case 17 (Bingo Cards) *supra*.

necessary to advert to a more evanescent facet of *Bender v. West*.

This particular aspect did not even occur to me throughout preparing and replying to the cross-motions for summary judgment in the district court. In fact, we had already prevailed in a final judgment below and were brain-storming about the appellate brief before becoming aware that we had been ignoring the fact that West's whole claim to pagination copyright rested on conflating a "fundamental distinction" of copyright law. We therefore argued this new basis to the Second Circuit, which adopted it as an alternative basis.<sup>486</sup> (West, meanwhile, did not even try to address our new theory, directly or obliquely, in its reply brief—from which we inferred that no answer was possible.)

Turning to that "fundamental distinction," the legislative history tells us that it pertains between a copyright and the material object in which it is embodied.<sup>487</sup> Thus, a "literary work" can consist of the letters<sup>488</sup> and words that form it, whereas a "book" is the tangible object that contains that literary work.<sup>489</sup> Page numbers are an incident solely of a book, not of a literary work. To appreciate this phenomenon, imagine that West kept the same paper size and margins in alternative volumes designed for the visually impaired. In these large-type editions, the cases would manifestly occupy more pages, therefore producing different page breaks. Accordingly, the pagination would be wholly different, notwithstanding that the implicated literary work would be identical.<sup>490</sup> By claiming a copyright in pagination,

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486. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 699 n.9 (1998).

487. As the House Report expresses it, there is a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

488. The distinction here is ancient, and provides the basis for a joke that is older than the United States. *See The Author as Proprietor*, *supra* note 19, at 24 ("Having been reprimanded for stealing an old woman's gingerbread cakes baked in the form of letters, a cheeky schoolboy . . . defended himself by explaining that 'the supreme Judicature of Great Britain had lately determined that lettered Property was common.'").

489. The Torah is a literary work that, besides being made into a book, could equally be embodied on papyri; on parchment scrolls in a cave at Qumran; on a CD-ROM; on a server attached to the Internet; or, as the Torah itself commands, on stone monuments set up atop Mt. Eival. *See Deuteronomy* 27:8.

490. To the extent that West attempted to file a separate registration certificate for its large-type edition, the Copyright Office would deny separate registration for the identical "literary work." *See* 37 C.F.R. § 202.1 (2000) (listing "mere variations of

West was trying to import copyright protection into a domain where it plays no role, namely to protect the manner in which a material object is formatted.

In a sense, Judge Dorner's finding of copyright protection for Qimron massively replicates West's error. For Qimron was attempting to put together the physical pieces that he found in the Judean desert, and then to fill in the gaps. How he fit those pieces together reflects a material object.<sup>491</sup> Consider, most obviously, the finding that Qimron decided to reassemble various manuscript segments horizontally rather than vertically.<sup>492</sup> Without doubting that Qimron might have cogitated long and hard on the problem and essayed numerous variants, this type of sleuth work relates not to matters subject to copyright protection (a literary work), but instead to arrangement of the parchment scraps on which it chanced to be written (a material object). To the extent that Qimron engaged in creativity in this domain, it related to *MMT's* material embodiment. It conflates legal categories to grant that type of activity copyright protection.

But, of course, even after arranging the fragments horizontally or vertically, lacunae remained, which Qimron filled in. Do those matters represent protected expression? To evaluate this aspect of the matter, we must turn to the merger doctrine.

### B. Merger of Expression with Nonprotected Material

In *Bender v. West*, another argument advanced to bar copyright protection for West's alteration to judicial opinions came in the merger doctrine.

The fundamental copyright principle that only the expression of an idea and not the idea itself is protectable has produced a corollary maxim that even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.<sup>493</sup>

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typographic ornamentation" among examples of "Material not subject to copyright").

491. As a scholar in the field notes, one strategy to employ in text reconstruction is to reconstruct "the text of a scroll"; but an alternative strategy that is often efficacious is to "reconstruct the scroll itself, the patterned shapes of the holes and breaks [that] are a reliable aid in arriving at the original order of what remains of the scroll fragments." *How to Connect Dead Sea Scroll Fragments*, *supra* note 210, at 250 (emphasis in original). See *Laser Bones*, *supra* note 56, at 287 n.40 (discussing how DNA analysis is used on the Dead Sea Scrolls to analyze fragments according to animal skin used; sometimes even by individual animal).

492. Refer to Chapter V, section (B)(2) *supra*.

493. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 n.12 (quoting *Kregos v. Associated Press*, 937 F.2d 700, 704 (2d Cir. 1991)). The next sentence from the

The Second Circuit declined to invoke the merger doctrine, based on its antecedent holding that copyright protection was unavailable for West's case reporters.<sup>494</sup> In addition, the Second Circuit noted that the emendations that West made to judicial opinions do not constitute "building blocks of understanding," for which application of the merger doctrine would have been ripe.<sup>495</sup>

### 1. *Building Blocks of Understanding*

West's emendations to judicial opinions—such matters as inserting an escort citation or italicizing a case name—are plainly not "building blocks of understanding." Turning to manuscript reconstruction, by contrast, the opposite dynamic pertains.

The reconstruction of TR's words do not represent "approximative statements of opinion"<sup>496</sup> by Qimron. Instead, they represent, to the best of Qimron's ability, what the Teacher of Righteousness actually said. Insofar as Qimron's philological, historical, archaeological and other skills permit, they represent an attempt at objectivity,<sup>497</sup> not simply an "expression of subjective opinion" as to what TR might have said.<sup>498</sup> Strugnell captures the matter metaphorically:

A. [I]n the case here of MMT and Qimron, having then done our joint work, we have squeezed the orange as hard as we can, we have got as much as we can out of it, and what we have got is, we're pretty sure is reliable, it's not lemon juice.

Q. It's reliably what?

A. It's reliably good orange juice.<sup>499</sup>

"The vitality of the scholarly life depends upon a scholar's ability to freely state his agreements and disagreements with

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quoted opinion states, "Our Circuit has considered this so-called 'merger' doctrine in determining whether actionable infringement has occurred, rather than whether a copyright is valid, an approach the Nimmer treatise regards as the 'better view.'" 937 F.2d at 705 (citations omitted). Plainly, although the current thoughts approach the matter generally, it would be best to evaluate the merger doctrine in the context of a particular infringement claim—an enterprise distinct from that of the present chapter.

494. *Bender*, 158 F.3d at 688 n.12.

495. *Id.* (citing *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 71 (2d Cir. 1994)).

496. *CCC Info. Servs., Inc.*, 44 F.3d at 72.

497. See Strugnell Testimony at 101.

498. "This dichotomy between types of ideas is supported by the wording of various legislative pronouncements, which seem uniformly to contemplate denying protection to building-block ideas explaining processes or discoveries, and do not refer to expressions of subjective opinion." *CCC Info. Servs., Inc.*, 44 F.3d at 71 n.22.

499. Strugnell Testimony at 102–03.

putting the fragments together and filling in the lacunae in a manner that she perceives to be correct.<sup>516</sup> Over the course of eleven years, Qimron had many ideas about what TR was saying.<sup>517</sup> One was to substitute an *ayin* for an *aleph*. Another was to assemble fragments widthwise rather than lengthwise. The only way to express each of those ideas is through the text that Qimron proposed. In these and every other instance of manuscript reconstruction, the expression merges with the idea. Even more than a map is the most effective way to convey the idea of where to locate a suggested pipeline route, a reconstructed manuscript is the *only* effective way to convey the ideas regarding how to reconstruct that manuscript.<sup>518</sup> It is impossible to imagine that Congress intended to foreclose competition in *ideas* about how to assemble ancient manuscripts via copyright law. Qimron's proposed reconstruction, which merges idea with expression, therefore stands outside copyright protection.

### C. Enemy of the True

**Bender v. West** states that “the creative is the enemy of the true.”<sup>519</sup> That *aperçu* carries great force as applied to the chore of manuscript reconstruction.

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516. As long as selections of facts involve matters of taste and personal opinion, there is no serious risk that withholding the merger doctrine will extend protection to an idea. . . . However, where a selection of data is the first step in an analysis that yields . . . even a better-than-average probability of some result, protecting the “expression” of the selection would clearly risk protecting the idea of the analysis.

*Kregos v. Associated Press*, 937 F.2d 700, 707 (2d Cir. 1991).

517. The amount of effort invested in conceiving the idea does not confer protection. In *Kern River*, the court found that the plaintiff “conducted expensive and detailed field work to acquire the information needed to formulate . . . the precise location of their pipeline.” 899 F.3d at 1464. This factor did not change the conclusion that the idea of the location of the pipeline and the maps in which it was embodied were inseparable. Similarly, the years that Qimron put into the reconstruction of the manuscript are immaterial to the fact that his reconstructed manuscript is the only effective expression of his ideas.

518. The amount of cogitation, number of permutations considered, and other intellectual labor that goes into manuscript reproduction makes it no more subject to copyright protection than do the equivalent factors that underlie preparation of a pipeline map.

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

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### 1. Copyright Estoppel<sup>520</sup>

Vindication of the fact/expression dichotomy discussed above<sup>521</sup> comes as well in a different doctrine of law, copyright estoppel. This doctrine arises when an author disavows the seemingly creative nature of her work to claim that it actually portrays objective factual material.<sup>522</sup>

Care must be taken to apply the estoppel doctrine with real-world sensitivities. In other words, simply because a work's packaging would fool the ingenuous (or humorless) into believing it a work of fact is no reason to blinker common sense when it screams the opposite.<sup>523</sup> Examples are legion:

??In *A Study in Scarlet*, *The Sign of the Four*, and innumerable adventures, Sir Arthur Conan Doyle presented what seemed to be the real-world adventures of a Victorian detective named Sherlock Holmes as recounted by his faithful amanuensis, Dr. Watson. Nonetheless, there can be no question but that the good knight engaged in copyrightable expression to produce the tales.<sup>524</sup> By the same token, *I Claudius* was authored

520. It should be noted that a question of copyright estoppel did not remain at the end of the day in the *Bender v. West* opinions, for West early on abandoned the argument that its factual reporters contain its own creative expression rather than the judge's words. *Id.* at 681 n.4.

521. Refer to Chapter VII, section (A) *supra*.

522. In *Oliver v. Saint Germain Foundation*, 41 F. Supp. 296 (S.D. Cal. 1941), the plaintiff's book, *A Dweller on Two Planets*, related that the manuscript was a factual account entirely dictated to him by a spirit from another planet known as Phyllos, the Thibetan. *Id.* at 297. In finding for the defendant, the court held that "equity and good morals will not permit one who asserts something as a fact which he insists his readers believe as the real foundation for its appeal to those who may buy and read his work, to change that position for profit in a law suit." *Id.* at 299. In *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992), the plaintiff claimed that its author had "discovered" the ego fixations [of the human spirit], which are scientifically verifiable 'facts' of human nature"; it was therefore estopped to claim copyright protection. *Id.* at 1075.

By contrast, in *Cummins v. Bond*, 1 Ch. 167 (1926), the plaintiff medium produced an account of the Apostles, purportedly written contemporaneously with them, by engaging in "automatic writing" from a 1900-year-old spirit. *Id.* at 168-69, 173. Noting that "I have no jurisdiction extending to the sphere in which [the dead spirit] moves," *id.* at 173, the Chancery judge declined to hold that "authorship and copyright rest with some one already domiciled on the other side of the inevitable river," *id.* at 175, and thus held for plaintiff. *Id.* at 176. See Peter H. Karlen, *Death and Copyright*, COPYRIGHT WORLD, Apr. 1994, at 43, 46-47.

523. Readers have long looked to novels as the guideposts for their own lives. See *Introduction to A HISTORY OF READING*, *supra* note 146, at 25. But those who fail to realize the fictitious intent here belong "in the same category as the people who send cheques to radio stations for the relief of suffering heroines in soap operas." ANATOMY OF CRITICISM, *supra* note 159, at 76.

524. 1 NIMMER ON COPYRIGHT § 2.11[C].

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For the poet, perhaps,<sup>547</sup> it may be accurate that “that is all Ye know on earth, and all ye need to know.”<sup>548</sup> But in this sublunary sphere, at least, without contesting that there is a “higher truth” in works of fiction,<sup>549</sup> there is a sharp break between the creative and the true,<sup>550</sup> which for these purposes we can denominate the subjective and the objective.<sup>551</sup> To reiterate, “the creative is the enemy of the true.” **Simply stated, copyright protects subjective expression, as recognized by *Bender v. West*<sup>552</sup> and countless other cases.**<sup>553</sup>

Qimron presents himself to the world as an objective historian, not as the “sylvan historian” immortalized in Keats’s well-wrought *Ode*.<sup>554</sup> Having elected to proceed in the objective sphere insofar as manuscript reconstruction is concerned, Qimron lacks copyright protection for that labor. He is estopped to claim otherwise.

### 3. *Intermingled Material*

There is a third facet to the estoppel doctrine, this one with a

547. It did not, however, convince T.S. Eliot and other critics of the *Ode*. See CLEANTH BROOKS, *THE WELL WROUGHT URN* 124–25 (1947). Brooks’s whole book can be taken as defending Keats’s insight against his detractors. See also LIONEL TRILLING, *The Poet as Hero: Keats in His Letters*, in *THE OPPOSING SELF: NINE ESSAYS IN CRITICISM* 32 (1955).

548. *Ode on a Grecian Urn*, line 59. On one reading, this interplay undergirds even *The Law*, whose “solemn guardians . . . strove for beauty and by their very beauty for truth.” *THE READER*, *supra* note 84, at 181.

549. Manifestly, people would soon stop reading literature if they did not find applications therein to their own life. See *THE PLEASURES OF READING*, *supra* note 527, at 49; Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 *IND. L.J.* 175, 184–86 (1990). The Bible itself attempts “to realize through the medium of literature an order of truth that utterly transcends literature.” *THE WORLD OF BIBLICAL LITERATURE*, *supra* note 155, at 46.

550. “History makes particular statements, and is therefore subject to external criteria of truth and falsehood; poetry makes no particular statements and is not so subject.” NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* 46 (1982).

551. One commentator identifies “authorial subjectivity as the hallmark of original works of authorship.” Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *COLUM. L. REV.* 1865, 1867 (1990). See *Figures of the Author*, *supra* note 194, at 15; *The Law’s Eye*, *supra* note 113, at 83. But see *Dropping the Subject*, *supra* note 25, at 108, 109 (postulating that it distorts to view “authorship and its law as a transparent adjunct of human subjectivity”; “historiography of authorship and copyright need not be subsumed in the analysis of subjectivity”).

**552. 158 F.3d 674, 689 (2d Cir. 1996), cert. denied, 526 U.S. 1154 (1999).**

553. See *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 206–08 (2d Cir. 1986) (holding that the “simple clerical task” of collecting the most straightforward information about bonds, with no subjectivity or variation whatsoever, was not copyrightable).

554. *Ode on a Grecian Urn*, line 3. As noted above, Qimron’s copyright case, insofar as it unfolded in the United States, did so in the courts of Pennsylvania. Refer to Chapter V, section (B)(1) *supra*.

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twist. When a putative copyright holder has mingled his purportedly protected expression inextricably with public domain material, there is reason to deny copyright protection. This lesson derives equally from *Bender v. West* and *Qimron v. Shanks*. For in both cases, the claimant took a legal text that was not subject to copyright protection, and claimed copyright based on its intermingled additions.<sup>555</sup>

a. *West*

The early correspondence between West and rival publishers leaves no doubt that West adopted a conscious policy of relying on its emendations to judicial opinions as the basis for asserting copyright protection in its reporters. West banked on the fact that it would be impossible for newcomers to separate out those emendations in attempting to engage in rival presentations of public domain judicial opinions. Instead, as West well knew, the intermingling of the “chaff” of West additions would make the entire “wheat” of the judicial opinions indigestible to all competitors.<sup>556</sup>

Arguing the illegitimacy of that practice, we cited to the district court a section of the Copyright Act that not only had never been relied upon in any published opinion but, to the best of my knowledge, had never even been previously cited to any court. The section in question provides that a published work reproducing works of the United States government must bear a copyright notice identifying, “either affirmatively or negatively, those portions of the copies . . . embodying any work or works protected under this title.”<sup>557</sup> That provision, as illustrated by its legislative history,

is aimed at a publishing practice that, while technically justified under the [1909 Act], has been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been

555. For these purposes, we discard the specialized argument postulated above that *4QMMT* remains subject to copyright through 2002. Refer to Chapter VI, section (B)(1) *supra*.

556. In a letter to HyperLaw dated October 9, 1991, West advised that “you should carefully compare the enclosed copy of the public domain *slip opinion* in *Mendell v. Gollust*, 909 F.2d 724 (2d Cir. 1990)] to the West *case report* of the same case,” claiming that “you will see that the slip opinion and case report vary *substantially* in their selection, coordination, and arrangement of material included.” Exhibit 13 to Intervenor Complaint, *HyperLaw, Inc. v. West Publ’g Co.*, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997) (emphases in original). In fact, comparison of the opinion portion of West’s report of *Mendell v. Gollust* shows it to be letter-for-letter identical to the slip opinion, except for the addition of parallel citations. Declaration of Michelle Kramer, dated July 31, 1996, filed in support of Matthew Bender’s motion for Summary Judgment, Ex., 1 at 1, *Hyperlaw v. West*, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997).

557. 17 U.S.C. § 403 (1994).

Text Case #17  
This was the case appealed to the 2nd Circuit and the appellate decision is cited 20 times in this article - but under the name *Bender v. West*!

Text Case #18  
This was the case appealed to the 2nd Circuit

Text Case #19

the practice to add some “new matter” in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.<sup>558</sup>

Based on West’s failure to follow that provision, Bender argued that West had committed copyright misuse,<sup>559</sup> thereby invalidating protection over its reporters published during the pendency of that provision.<sup>560</sup> As we pointed out to the district court, West always had the option of including its emendations [in brackets] or in a special **type font**, or otherwise distinctively segregated from the public domain judicial opinions. West, however, availed itself of no such option. Instead, it consciously mixed its emendations into the text on a seamless basis, so that it would be impossible to separate it out absent the commercially unfeasible activity of parsing West’s reporters line-by-line.<sup>561</sup>

The district court agreed. Thus, *Bender v. West* became the only judicial opinion in U.S. history that I know of to cite that section of the Copyright Act as part of its rationale.<sup>562</sup>

*b. Qimron*

At first blush, Qimron’s activity stands at the opposite end of the spectrum from West’s. First, the provision noted above applies solely to works of the United States Government, thus excluding *MMT*. Second, Qimron’s reconstruction of *4QMMT* includes within brackets the materials that he has posited as part of his reconstruction.<sup>563</sup> In other words, he apparently adopted the very methodology that we criticized West for omitting. It would seem, therefore, that Qimron is immune from the criticism that we leveled at West.

Further examination undermines that conclusion. It is necessary to revert here to the realization that Qimron can lay claim to copyright protection solely for the mistakes that he committed, rather than for accurate re-creation of the words authored by the Teacher of Righteousness.<sup>564</sup> Such brackets as

This is HyperLaw's attorney's fee district court case I.

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558. H. R. REP. NO. 94-1476, at 145 (1976).

559. Refer to Chapter VI, section (A)(2) *supra*.

560. That version of 17 U.S.C. § 403 was in operation from January 1, 1978, through March 1, 1989.

561. See Declaration of Michelle Kramer, *supra* note 556.

562. *Bender v. West*, 53 U.S.P.Q.2d 1436, 1438 (S.D.N.Y. 1999).

563. The material not in brackets, in turn, represents the matter that he simply transcribed from the ancient documents. See FACSIMILE EDITION, *supra* note 259, at Plate 8.

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

IX.  
INCENTIVES TO CREATE

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Justice Potter Stewart<sup>658</sup>

Copyright is redolent of public policy.<sup>659</sup> The issues arise in *Qimron v. Shanks* no less than in *Bender v. West*.

A. *Incentives and Access*

A Lockean<sup>660</sup> view would posit that natural law<sup>661</sup> confers on authors the right to exploit their artistic progeny.<sup>662</sup> Whatever the philosophical merits of that<sup>663</sup> point of view,<sup>664</sup> “the [U.S.]

658. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

659. As the Supreme Court has stated, “The monopoly privileges that Congress may authorize are [not] primarily designed to provide a special private benefit.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

The point is not merely that the individual rights of authors must be *balanced* against the social good. The Constitution stipulates that authors’ rights are created to serve the social good, so any balancing must be done *within* the overall context of the public good, i.e. between the specific aspect of the public good that is served by intellectual property . . . and other aspects of the public good such as the progressive effects of the free circulation of ideas.

Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 848–49 (1993) (footnotes omitted).

660. For a taxonomy of intellectual property into its Lockean and Hegelian justifications, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–300, 330–32 (1988).

661. “On the one hand, although the official line about copyright is that it is a matter of social policy, judicial and scholarly rhetoric on the subject retains many of the characteristics of natural rights talk.” *From Authors to Copiers*, *supra* note 659, at 848.

662. All of these cultural developments — the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism — occurred in the same period as the long legal and commercial struggle over copyright. Indeed, it was in the course of that struggle, under the particular pressures of the requirements of legal argumentation, that the blending of the Lockean discourse and the aesthetic discourse of originality occurred and the modern representation of the author as proprietor was formed.

*The Author as Proprietor*, *supra* note 19, at 30. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–50 (1993); *Figures of the Author*, *supra* note 194, at 13.

663. Of course, things are not as simple as all that. The Lockean view actually blends natural law with an instrumentalist rationale about increasing utility. See *The Philosophy of Intellectual Property*, *supra* note 660, at 296–97.

664. A simple view contrasts the Continental *droit d’auteur*, derived from a natural-

society that will benefit in the long-run through the encouragement of authorship by affording a temporary “personal gain” during the term of copyright protection.<sup>683</sup> It is instructive to bring that purpose to bear against the claims advanced by Qimron, reverting to *Bender v. West* as well in this context.

*B. Should Copyright Provide an Incentive to Secretly Alter Judicial Opinions?*

From a strictly pragmatic standpoint, it strikes me that West ultimately lost its copyright case for one major reason. This reason finds no reflection in the various opinions issued by the courts. Nonetheless, it underlies, perhaps, the sensibilities that were brought to bear on the dispute.

For over a century, West has been in business to sell case reporters. Undoubtedly reaping billions of dollars during that time,<sup>684</sup> it has established a premier—and, in my opinion, deserved—reputation for accuracy and reliability. When West sells a volume of case reporters, it represents to the public that the volume in question accurately sets forth the words of the judges as contained in the opinions collected therein. Given that those opinions constitute “the law” in a common-law system, West achieves its sterling reputation for accurately purveying “the law.” (In fact, West had always professed such fidelity to the judges’ words that it once defeated a libel charge on the basis that the words contained in the *Federal Reporter* reflected those of the judge whose opinion was reproduced, West Publishing Company being merely the conduit for conveying those words to the public.<sup>685</sup>)

When it came time, however, to litigate the copyright issue, West made an abrupt *volte-face*. By laying claim to protection over the emendations that it inserted into its reporters, West claimed copyright over matters that judges did *not* write. In other words, West, which had always prided itself on accuracy and the ability of lawyers and judges to quote “the law” out of its reporters without fear of error, was now claiming that those same reporters were replete with material of West’s own invention, unratiﬁed by the judges into whose opinions they were

683. See *The End of Copyright*, *supra* note 443, at 1416.

684. As a privately held corporation, its revenues were always secret, but the \$3.43 billion that Thompson paid to purchase West in 1996 surely reveals the company’s worth as of that time. See Yolanda Jones, *You Can’t Get Where you are Going Unless You Know Where You Have Been: A Timeline of Vendor-Neutral Citation Developments*, at <http://vls.law.vill.edu/staff/yjones/citation>.

685. See *Lowenschuss v. West Publ’g Co.*, 402 F. Supp. 1212, 1216–17 (E.D. Pa. 1975), *aff’d*, 542 F.2d 180 (3d Cir. 1976).

inserted and unbeknownst to its customers who thought that they were reading the judges' words, not West's.

No one, I dare say, has ever thought to purchase a West reporter in order to obtain West's emendations. Instead, practitioners and judges alike have always sought West volumes because of the fidelity with which they report the words of the judges themselves. Thus, West was, in effect, claiming copyright protection over deformations that it had inserted into the law.<sup>686</sup>

As a matter of incentives, there is little reason to encourage purveyors of judicial opinions to secretly alter them. To the extent that West can ensure punctilious replication of what the judges intended, then its editors are to be applauded. On the other hand, to the extent that those editors have injected subjective expression into case reporters that are sold under the pretense of accurately portraying the law, then their activity becomes less than socially compelling. In this larger sense, therefore, it is wholly to be expected that West's copyright claims failed.

### C. *Should Copyright Provide an Incentive for Bad Scholarship?*

*Qimron v. Shanks* arises at the intersection of two interests: copyright protection and scholarly protection. When viewed through the former lens, the various doctrines canvassed herein demonstrate why the plaintiff's interest failed to measure up. Yet one must also advert to the other interests that *Qimron* brought to bear—those of a scholar. The discussion below attempts to untangle those threads, beginning with the latter doctrine.

#### 1. *Scholarly Convention*

The Israel Antiquities Authority vested exclusive control over 4QMMT first in Strugnell, and then later in *Qimron*.<sup>687</sup> By a scholarly convention known as *editio princeps*, that status guaranteed *Qimron* priority in publishing the document— notwithstanding that the doctrine of *editio princeps* itself nominally enjoys no legal standing.<sup>688</sup> Yet along came *Shanks*, iconoclast of scholarly convention. In the battle between, on the

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<sup>686.</sup> West actually had the audacity to advance this claim explicitly at an early stage in the litigation. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 681 n.4 (1998), cert. denied, 526 U.S. 1154 (1999) (“West initially claimed some creativity in its corrections to the text of opinions, but it has abandoned this claim . . .”).

<sup>687.</sup> Refer to Chapter V, section (A)(2) *supra*.

<sup>688.</sup> See *PLAYING DARTS WITH A REMBRANDT*, *supra* note 228, at 164. For a further discussion of this doctrine, refer to Chapter X, section (B)(1) *infra*.

X.  
MORAL

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.

Judge Joseph Edward Lumbard<sup>709</sup>

In addition to analyzing Qimron's complaint for copyright infringement, it is necessary to address the other cause of action joined in his complaint—for violation of his moral rights. Although the case made copyright headlines,<sup>710</sup> it is actually in the domain of moral rights that Qimron felt injured, and that moved the judge to rule in his favor.

A. *Chronology*

The chronology at issue in *Qimron v. Shanks* was such that Shanks's publication preceded Qimron's own. A table illustrates:

<b>DATE</b>	<b>DESCRIPTION</b>
1952	Cave 4 excavated.
1954	<i>MMT</i> assigned to Strugnell.
1960s through 1970s	Tantalizing fragments revealed to the public about the existence of <i>MMT</i> .
1984	Strugnell and Qimron openly discuss <i>MMT</i> at a scholarly conference.
1991	Biblical Archaeology Society publishes <i>A Facsimile Edition of the Dead Sea Scrolls</i> .
1992	Qimron files suit against Shanks.
1993	Judge Dorner issues district court ruling.
1994	Oxford University Press publishes <i>DJD X</i> about <i>MMT</i> .
2000	Israeli Supreme Court affirms.

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<sup>709</sup>. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).

<sup>710</sup>. See, e.g., Abraham Rabinovich, *Scholar: Reconstruction of Dead Sea Scroll Pirated*, WASH. TIMES: NAT'L WKLY. EDITION, Apr. 12, 1998, at 26, 26 cited in *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 688 n.13 (2d Cir. 1998), cert. denied, 526 U.S. 1154 (1999).