NIMMER’S COPYRIGHT IN THE DEAD SEA SCROLLS: A COMMENT

L. Ray Patterson*

David Nimmer’s tour de force, Copyright in the Dead Sea Scrolls: Authorship and Originality,¹ is a major contribution to copyright literature. In particular, Nimmer’s identification of the unarticulated element of “intent” as part of copyright’s originality² mandated by the Constitution’s limitation of copyright to “Authors”³ deserves close scrutiny in terms of both copyright history and copyright fundamentals.

Clearly, Nimmer’s identification of intent as an element of constitutional authorship solves a number of problems. In Qimron v. Shanks,⁴ for example, it would dispose of the plaintiff’s unseemly overreaching, from what might have been a plausible moral rights claim for denial of the rights of attribution⁵ and right of first publication.⁶ But these clearly are not considerations under U.S. copyright law, and insofar as the Israeli courts, particularly the Qimron trial court, mistakenly concluded they were,⁷ Nimmer is right to dispel the error.

Likewise, Nimmer’s intent requirement would dispose of a certain number of embarrassments in U.S. copyright case law, including Judge Frank’s unsupported and unsupportable

* Pope Brock Professor of Law, University of Georgia School of Law.
2. Id. at 204–07.
4. C.F. (Jm.) 41/92, Qimron v. Shanks, 69 (iii) P.M. 10.
5. Id. at paras. 10–11 (explaining that Shanks failed to acknowledge Qimron as the scholar principally responsible for deciphering the MMT scroll).
6. Id. at para. 12 (noting that Shanks disclosed the fruits of Qimron’s labor earlier than, and by means not contemplated by Qimron).
7. Id. at para. 19 (concluding that moral rights are protected under U.S. law).
assertion in *Alfred Bell & Co. v. Catalda Fine Arts* that a jagged line resulting from the involuntary flinch of an artist’s musculature upon hearing a thunderclap produces a work protected by the Copyright Clause of the U.S. Constitution. The copyright monopoly is not appropriate for Judge Frank’s accidental author, and the judge’s gratuitous comment is an example of the piecemeal jurisprudence characteristic of the common law system. Nevertheless, this unfortunate comment remains on the books and provides the basis for an “author” to lay claim to the monopoly of a jagged line for life plus seventy years! The absurdity of this notion moves copyright jurisprudence into the Alice-in-Wonderland realm of logic, except that it can be seen as an example of unintended consequences and can be disregarded because the rule of precedent does not apply to obiter dicta.

One can assume that the judge’s concern was the subjective nature of deciding what is authorship and thus what is worthy of protection. Without direct evidence by the artist (unlikely) or an eyewitness (improbable), no judge can be sure that the jagged line resulting from the involuntary flinch of the author’s musculature was not in fact a creative act. Given the nature of modern art, the problem has important consequences. Does the placement of a urinal in an art museum provide the requisite intent for the creation of a work of art? And William Faulkner’s stream of consciousness style in *The Sound and the Fury*, to say nothing of James Joyce’s *Finnegan’s Wake*, would give many judges pause before deciding that the intent to create a work of authorship was present. But the difficulty of the task is no reason for shirking it. The question is not whether artists are entitled to classify mundane objects as works of art, but whether doing so entitles them to the copyright monopoly. There is, of course, protection in the copyright statute against many such

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8. 191 F.2d 99 (2d Cir. 1951).
9. Id. at 105 (asserting that a copyist reproducing a painting creates a copyrightable work even if his “substantial departure from the painting . . . [is] inadvertent,” that is, resulting from bad eyesight or defective musculature). The dictum was less inimical to the public welfare under the 1909 Copyright Act than it is under the 1976 Act. The former required publication with notice, while the latter provides copyright protection from the moment of fixation. Compare Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (Supp. 1909), with Copyright Act of 1976, 17 U.S.C. § 102 (1994). Does the Copyright Clause empower Congress to provide piecemeal copyright protection as a work is being fixed in a tangible medium of expression?
Is there any feature of a urinal that is not functional? But this approach can provide a tortuous path to different conclusions, and one of the values of the intent test is that it goes immediately to the heart of the matter.

The point is that intent as a test must be grounded in the copyright fundamentals contained in the Copyright Clause of the U.S. Constitution. There is, however, evidence that Congress considers these fundamentals passé because of the demise of the Copyright Clause as a major factor in copyright jurisprudence. Presumably, this is because of new communications technology, particularly computers. The premise of the Digital Millennium Copyright Act, for example, seems to be that an eighteenth-century document should not be allowed to retard the marvelous contributions of the computer to the advancement of knowledge. But the computer contributes no more to the advancement of knowledge in the twenty-first century United States than the printing press did in sixteenth-century England. Both are means, not ends, and the danger today is the same as it was in England, that the end of copyright will be profit—for the publishers then, entrepreneurs today—not the cause of learning for the public interest. The English found a solution to this problem by distinguishing the advancement of knowledge from the spread of information, a task that both the printing press and the computer perform so well. Similar problems merit similar solutions, and it is important to understand that the Framers of the Constitution adopted the English solution, which, because the speed and efficiency of the computer far exceeds that of the printing press, is more important today than when it evolved. The solution was the right of exclusive publication of an original writing for a limited time.

One part of the copyright solution that the English provided—the duty of publication as a condition for copyright—was discarded by Congress in the 1976 Act. Moreover, Congress reduced the other part—an original writing—to the status of legal fiction, apparently to create a transmission copyright in

13. E.g., 17 U.S.C. § 113(b) ("This title does not afford, to the owner of copyright in a work that portrays a useful article . . . any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law . . . ").
15. The computer is the modern analogue to the printing press. Both inventions facilitate the dissemination of information, the difference being in the mechanics: moveable type in one instance, a computer chip in the other.
addition to the publication and performance copyrights. Where is the writing that justifies copyright protection for the televised football game even if the electronic signals are fixed as they are being transmitted? Did Congress stray beyond the limits of the copyright power granted by the Copyright Clause of the U.S. Constitution when it rejected publication as a condition for copyright and extended copyright protection to the moment of fixation? Whether we are dealing here with cause or effect is not clear, but the need for a return to copyright fundamentals is.

I use the term “fundamental” to mean a proposition that serves as a premise from which rules are derived. Clearly, copyright rules must have a base, and the copyright fundamentals—the purpose of copyright, the meaning of copyright, and the nature of copyright—provide that base. For copyright, fundamentals are especially important because the concept must accommodate three groups: authors, publishers, and users. Lawmakers, legislative or judicial, simply cannot allocate rights between these groups in a reasonable way without common premises to provide the basis for the allocation. For example, whether copyright is viewed as a natural law property right of the author, or the statutory grant of a monopoly, to market a work will determine the rights of the three groups. If copyright is an example of natural law property, the rights will be weighted in favor of the copyright holder; if copyright is a marketing monopoly, the rights will be more evenly balanced among author, publisher, and user. And there is evidence that both Congress and the courts lack conviction as to whether copyright is a natural law property right to be liberally construed in favor of the copyright holder (note the panoply of rights in 17 U.S.C. § 106) or a statutory monopoly to be strictly construed in favor of the public (note the limitations on the rights in §§ 107–122).

The fundamentals would exist without a Copyright Clause, but not with the precision that the clause provides: “Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.” This language informs us that the purpose of copyright is the promotion of learning, that copyright is a right to which writings are subject for a limited time, and that the right granted is exclusive.

17. Compare 8 Ann., c. 19, § 1 (extending the copyright only to authors or copyright owners of “Books”), with 17 U.S.C. § 102 (extending copyright protection to “original works of authorship”).
The Framers did a remarkable job in making these points clear in the twenty-four words of the Copyright Clause, but they did not write on a clean slate.\textsuperscript{19} We can identify the precise source of the language used in 1787 as the title of the Statute of Anne, the first English copyright statute, which was enacted in 1709, less than eighty years earlier.\textsuperscript{20} The title of the Statute of Anne reads: “An Act for the Encouragement of Learning, by vesting the Copies [copyrights] of printed Books in the Authors or Purchasers of such Copies [copyrights], during the Times therein mentioned.”\textsuperscript{21} The core ideas—learning, authors, right,\textsuperscript{22} and limited times—are the same in both the English statute and the American Constitution. The major difference is that the Statute of Anne includes “the Purchasers” of copyright—that is, booksellers or publishers.\textsuperscript{23} The reason is the grandfather clause in the statute, which extended for twenty-one years the stationers’ copyright—that is, the copyright of the booksellers—that the new statutory copyright superseded, a provision not appropriate for a constitution.

The English statute, which Congress used as a model for the Copyright Act of 1790,\textsuperscript{25} can be read as an annotation of the Copyright Clause. In this we are fortunate, for the words are subject to interpretation, and the historical events in England from which the ideas evolved tell us why the purpose of copyright is to promote learning. The U.S. Supreme Court’s continual insistence that copyright is primarily to serve the public interest\textsuperscript{26} acknowledges by implication the promotion-of-learning purpose of copyright, but the language in the Copyright Clause has not received the attention it deserves. One concern seems to be that if copyright is to promote learning, the content of a work must advance knowledge. But a content-based copyright would

\textsuperscript{19} For a detailed history, see generally Lyman Ray Patterson, Copyright in Historical Perspective (1968).
\textsuperscript{20} Statute of Anne, 8 Ann., c. 19 (1709) (Eng.).
\textsuperscript{21} Id. (emphasis added).
\textsuperscript{22} Vesting the copies (copyrights) is the same as the grant of the “exclusive Right.”
\textsuperscript{23} 8 Ann., c. 19, § 1.
\textsuperscript{24} Id.
\textsuperscript{25} 1 Stat. 124 (1790).

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.” Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

\textit{Id.}
be contrary to the provisions of the First Amendment that prohibit Congress from enacting a law to regulate speech or the press.\textsuperscript{27} Rather than raise that specter, copyright scholars apparently prefer to accept the conclusion and stop there. History, however, provides abundant evidence that the purpose of the provision in the English statute was to prevent copyright from continuing to be used as an instrument of censorship and device of monopoly, and there is no reason to assume that the Framers rejected that purpose.

Reason tells us that the promotion of learning requires that copyright not be used to inhibit reasonable access to copyrighted works for either political or economic reasons, but history tells us that in origin copyright was used for both reasons. The earlier copyright was the stationers’ copyright, which publishers had created independently of the author. The stationers’ copyright was created by publishers to serve the book trade and the government—the former as a monopoly, the latter as an instrument of press control.\textsuperscript{28} This dual purpose reflected the dual genesis of copyright: the invention of the printing press and the religious controversy in England, created by Henry VIII’s break with Rome in order to divorce Catherine and marry Anne Boleyn. The controversy was a constant threat to the Crown, a threat that the new press enhanced for the obvious reason that it gave the opposition a voice. This explains why the stationers’ charter limited printing to members of the company and licensees of the sovereign, and gave the stationers the power to search for, to seize and to burn offending books.\textsuperscript{29} The anti-censorship (and anti-monopoly) policies reflected in the Statute of Anne were thus grounded in experience; given copyright’s checkered history, it would have been surprising had Parliament not provided protection against a perpetual copyright that publishers could continue to use as a means of censorship to support their monopoly rather than to protect the sovereign’s throne.

\textsuperscript{27} See U.S. CONST. amend. I.
\textsuperscript{29} See id. at xxvii–xxxi.  
[It shall be lawful for the Master and Keepers or Wardens [of the Company]... to make search whenever it shall please them in any place, ... whatever within our kingdom of England or the dominions of the same of or for any books or things printed, or to be printed, and to seize, take, hold, burn, or turn to the proper use of the foresaid community, all and several those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation, made or to be made . . . .

\textit{Id.}
In retrospect, it is easy for Americans to assume that the greater evil of copyright in England was its use as an instrument of press control. After all, the Licensing Act of 1662 that confirmed copyright’s use for this purpose is almost surely the reason for the free speech and free press clauses of the First Amendment of the U.S. Constitution. That this statute created concerns in this country about a state religion is suggested by the First Amendment’s protection of religious freedom as well as protection for a free press. The combination was surely not coincidental. The religious controversy in England was the reason for laws regulating the press.

Remember that the official policy of press control ended sixteen years before Parliament enacted the Statute of Anne; it is almost certain that in 1710 the concern was the booksellers’ use of copyright to monopolize the book trade. We see evidence of this concern in the fact that Parliament reduced the perpetual term of the stationers’ copyright to a term of fourteen years for the new statutory copyright, with an additional term of fourteen years available to the author, if living, at the end of the first term. Equally important was the fact that Parliament vested the initial ownership of copyright in the author. Accepted learning seems to be that in giving the author initial ownership of both the first and second copyright terms, Parliament was intent on rewarding the author as a means of encouraging further efforts. There are, however, good reasons to reject this notion.

One reason is that authorship did not have the romanticized status that it does today. Shakespeare, for example, was apparently an actor as well as a playwright, and which role gave him more prestige is not apparent. Another reason is that the Statute of Anne is best understood as a trade regulation statute intended to destroy the booksellers’ monopoly of the book trade. This was one reason for vesting the ownership of copyright in the author. Parliament’s purpose, however, is the little-noticed provision in the Statute of Anne for controlling the prices of books, a provision directed to the booksellers and patterned after the licensing provisions of the Licensing Act of 1662. Clearly, the drafters intended to avoid copyright’s past as a perpetual monopoly used to control the output of the press.

30. 13 & 14 Car. II, c. 33.
31. See U.S. CONST. amend. I.
32. Statute of Anne, 8 Ann., c. 19, § 11 (1709) (Eng.).
33. Id. § 1.
34. For example, the officials named as licensors in the Licensing Act were the same as the officials to whom complaint could be made under the Statute of Anne when the price of a book was too high. Compare 13 & 14 Car. II, with 8 Ann., c. 19, § 4.
Parliament’s use of the author to destroy the booksellers’ monopoly of the book trade gave the author a role in copyright more important than that of mere beneficiary. That role was to produce learned writings, and the grant of a limited monopoly to market the works was a reward in the form of a condition. The real author, in short, was the only person who could fulfill the condition for copyright, which today means that copyright is constitutionally reserved for the serious author, is not available for the accidental author, and, arguably, is not available for surrogate authors such as employers. This latter point is evidenced by the Continental Congress’s recommendation to the states in 1783 that they “secure to the authors or publishers . . . the copyright of . . . books.” This language was consistent with the title of the Statute of Anne, and it is difficult to believe that the Framers’ omission of “publishers” from the Copyright Clause four years later was accidental.

The value of copyright history is that it confirms what the Copyright Clause tells us. Copyright is the grant of a statutory monopoly for serious authors to the exclusion of surrogate authors (a category that seems to apply to Qimron). Thus, Parliament made three significant changes in the stationers’ copyright (under which the publisher can be seen as a surrogate author) to create the statutory copyright: 1) it made the publication of a new writing a condition for copyright; 2) it vested initial ownership of copyright in the author; and 3) it limited copyright to a term of years. The effect of the changes, all adopted by the Copyright Clause of the U.S. Constitution, was to create a copyright that protects the public domain and promotes learning by decreasing the publishers’ control of copyright. The reasons these changes, which altered a 150-year tradition, could be made in 1710 was that the government was no longer interested in controlling the press. The Glorious Revolution of 1688 had resolved the religious controversy, and the Licensing Act of 1662, which had been the mainstay of the stationers’ copyright for almost forty years, was allowed to lapse in 1694 for all time.

In retrospect, it seems clear that the key to censorship had been a perpetual copyright (without regard to authorship) for those works to which the stationers could obtain title (by whatever means) and secure their claim by registration of the

35. Copyright Office, Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright 1 (1963) (emphasis added). James Madison was a member of the committee that made the report recommending the resolution. Id.
work in the Stationers’ Register Book (analogous to granting copyright protection from the moment of fixation). And it may be that one reason for the delay in getting the Statute of Anne enacted was the problem of how to make the new statutory copyright both anti-monopoly and anti-censorship, in view of the fact that it vested the property of copyright in the author who created the work. Property is by definition monopolistic and gives the owner the right to control the use of the property. If the property is information and learning, the right to control its use is censorship, which creates a problem in a free society, even if the censorship is proprietary rather than political. Parliament’s solution to this problem had the simplicity of genius, which suggests that the legend that Jonathan Swift drafted the Statute of Anne may well be true. The solution was to provide copyright only for printed books and only for a limited term.37 The title of the Statute of Anne bears repeating: “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.”38 The copyright owner could not control access to the book after it had been printed and could not continue to monopolize its printing after a fourteen-year term39 (with an additional fourteen-year term granted to the author, if living at the end of the first term).40 For almost 200 years (1790 to 1978), until the 1976 Copyright Act, every copyright statute in the United States, with one minor exception, made publication a condition for copyright, and the longest term available was fifty-six years.41

From a contemporary perspective, the most convincing evidence that the statement of the purpose of copyright as the promotion of learning means what it says is that it is confirmed by the remaining provisions of the clause. Thus, “the exclusive Right” that Congress can grant to authors is the exclusive right to publish, or to market, their works.42 The fact that the monopoly is to be available only for a limited time and only for original works promotes learning in two ways. It requires that copyright be used to ensure public access, necessary for learning, and it requires that copyright protect and enlarge the public domain. Thus, copyright is not available for works in the public domain.

37. Id. (granting an exclusive copyright to the author of a “Book” for fourteen years).
38. Id. (emphasis added).
39. Id.
40. Id. § 11.
41. L. Ray Patterson, Understanding the Copyright Clause, 47 J. COPYRIGHT SOCY U.S.A. 365, 369–70 (2000).
42. Id. at 368.
domain, and all copyrighted works eventually go into the public domain.

The most important fundamental of copyright law that has been overlooked perhaps is that the Copyright Clause is based on the premise that there is a distinction between the copyright and the work.\textsuperscript{43} This is apparent from the fact that the “exclusive Right” that Congress can grant is only the exclusive right to publish a work. The importance of this distinction is that it is the key to the promotion of learning. If copyright is to promote learning, a learner must be able to use the work without using the copyright, which could bring forth a charge of infringement.\textsuperscript{44} (Given the draconian remedies available to copyright holders against infringers, this concern is not to be taken lightly.) This is why the failure to appreciate this point is the defect in copyright jurisprudence and most harmful to the public interest. The reason for the failure can be traced to the efforts of the publishers, known as the Battle of the Booksellers, in eighteenth-century England to override the Statute of Anne because of the threat the statutory copyright created for their monopoly. The publishers claimed that in addition to the statutory copyright, the author “as creator” had a common law copyright under the natural law, which was not conditioned on publication and which, in theory, lasted as long as the work.\textsuperscript{45} The booksellers almost succeeded. In one case, \textit{Millar v. Taylor},\textsuperscript{46} they persuaded the Court of King’s Bench to recognize the author’s perpetual common law copyright.\textsuperscript{47} But \textit{Millar} was not appealed, and five years later, the House of Lords, in \textit{Donaldson v. Beckett},\textsuperscript{48} overturned \textit{Millar} and limited the author’s common law copyright to unpublished works.\textsuperscript{49}

In a sense, the publishers lost the battle but won the war, because they introduced the natural law theory of copyright into Anglo-American copyright jurisprudence. This is not the place to argue the merits or demerits of the natural law copyright, but there are a couple of points to be made. Compared to the statutory copyright of the Statute of Anne (and the U.S. Constitution), the natural law copyright is a primitive concept. The statutory copyright allocates rights among authors,

\textsuperscript{43. Id. at 372.}
\textsuperscript{44. See id. at 368–69, 386–87.}
\textsuperscript{45. Id. at 380–81 n.37.}
\textsuperscript{46. 98 Eng. Rep. 201 (K.B. 1769).}
\textsuperscript{47. Id. at 202.}
\textsuperscript{48. 1 Eng. Rep. 837 (H.L. 1774).}
\textsuperscript{49. Id. at 837, 846–47.}
publishers, and users. The natural law copyright theoretically allocates rights only to the author, but this is an illusion—the true beneficiary is the author’s assignee, the publisher. The publisher as beneficiary of the copyright, however, seems to have been overlooked, and the appeal of author’s rights is such that it has led to the widespread fallacy that copyright is intended to encourage the author to create works. This, of course, is nonsense. Authors do not use the copyright law as a muse. The fact is that copyright is a monopoly that encourages publishers to distribute works. But publishers find it very convenient to use the author as the reason for persuading Congress to continually enlarge and enhance the copyright monopoly.

Against this background, the infirmities of Qimron v. Shanks emerge. The Israeli Supreme Court treated Qimron as if he were the only person entitled to use MMT and, therefore, entitled to control its use by others, a classic example of censorship. The surprising thing is that the Israeli Supreme Court in the twentieth century should use reasoning similar to that of England’s King’s Bench in the eighteenth century. The Israeli court’s decision is, as was Millar, essentially a decision founded on natural law copyright, which is based not on the creativity of authorship, but on the effort to create a work regardless of its intellectual content. The author of a telephone directory is entitled to a natural law copyright as much as the author of the great American novel. The point is that the Dead Sea Scrolls were a creative writing; however, this was not Qimron’s doing, but rather that of an ancient author: the Teacher of Righteousness. Qimron’s work was a sweat-of-the-brow effort to make the pre-existing writing accessible, analogous to the effort to produce the white pages of a telephone directory to make the telephone numbers accessible.

50. Statute of Anne, 8 Ann., c. 19, § 1 (1709) (Eng.) (noting that copyright is vested in both the authors and purchasers of printed books); see also Millar, 98 Eng. Rep. at 206 (“If the . . . book belonged to the author, there is no doubt that he might transfer it [to the publisher].”)

51. The point was recognized in the leading natural law copyright case in England, in which the court said:

If the copyright of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff [bookseller]. And if the plaintiff, by the transfer, is become the proprietor of the copyright, there is as little doubt that the defendant has done him an injury, and violated his right: for which, this action is the proper remedy.


52. C.A. 2790/93, 2811/93, Eisenman v. Qimron, 54(3) P.D. 817.

53. See id. at para. 24.
We can now see that Nimmer's intent test is well grounded in copyright history and the Copyright Clause. One of its primary values is that it provides a basis for distinguishing between works of authorship and sweat-of-the-brow works based on natural law ideas. The importance of the distinction is seen in the fact that the primitive nature of the natural law copyright—the exemplar of which is the common law copyright—is such that it protects only the interest of the author, who can be defined merely as one who originates a work.\footnote{54} Thus, it has no standard of authorship (a telephone directory is entitled to copyright protection the same as the great American novel);\footnote{55} it lasts in perpetuity (the common law copyright has no termination date); and access to it is at the wish of the copyright holder (the common law copyright does not require publication). In short, the common law copyright is the ideal device of censorship, as the stationers' copyright—a perfect example of the sweat-of-the-brow natural law copyright—demonstrates.

Arguably, the intent requirement has long existed in American copyright law without being identified as such. Thus, it can be found in cases preceding the publication of Nimmer's \textit{Dead Sea Scrolls} article,\footnote{56} the most notable of such cases being \textit{Baker v. Selden}\footnote{57} in 1879 and \textit{Feist Publications, Inc. v. Rural Telephone Service Co.}\footnote{58} in 1991. The unarticulated lesson to be gained from the earlier ruling is that there is a distinction between the intent to create a work (a bookkeeping ledger) and the intent to create a work of authorship. The lesson of \textit{Baker v. Selden}, that one does not copyright an idea,\footnote{59} was codified by Congress\footnote{60} and confirmed by the U.S. Supreme Court in \textit{Feist}.\footnote{61} Thus, while one can publish ideas—the names, addresses, and telephone numbers in the white pages of a directory—one is not entitled to a monopoly for doing so if the expression of such ideas is not original.\footnote{62} The corollary, of course, is that the copyright monopoly is available only for the expression of ideas that

\footnote{54. “An author . . . is ‘he to whom anything owes its origin; originator; maker . . . .” Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (emphasis added).}
\footnote{55. See id. at 59.}
\footnote{56. Nimmer, \textit{supra} note 1.}
\footnote{57. 101 U.S. 99 (1880).}
\footnote{58. 499 U.S. 340 (1991).}
\footnote{59. See 101 U.S. at 103.}
\footnote{60. 17 U.S.C. § 102(b) (1994) (“In no case does copyright protection for an original work of authorship extend to any idea . . . .”).}
\footnote{61. See 499 U.S. at 364.}
\footnote{62. See id.}
promote learning, and that copyright cannot be used to inhibit learning.

Both cases can be viewed as requiring that an author intend to create a work of authorship, and they demonstrate that the test of intent is motivation. Thus, in *Feist*, the motivation of Rural Telephone Company was not to create a work of authorship, but to create a work to enable its customers to use its telephones and to comply with the regulation of the utilities commission. The motivation in *Baker v. Selden* as to the forms was similar: the ruled lines enabled customers to use the author's bookkeeping system that was explained in the copyrightable text of the book. The intent test thus enables courts to evaluate the motive of the author without evaluating the content of a work, which would result in content-based copyright and make copyright a law regulating the press as in Elizabethan England.

*Baker* and *Feist* also demonstrate another important point. The intent test is a test of exclusion, not inclusion, for it is irrelevant when applied to a work of authorship (as opposed to a sweat-of-the-brow work). One does not have to be concerned with the intent of Margaret Mitchell in writing *Gone With the Wind* to determine the copyrightability of the novel. The problem arises with the work that is, so to speak, aberrant in terms of the authorship required by the Constitution: U.S. Supreme Court opinions in *Wheaton v. Peters*, a bookkeeping ledger in *Baker v. Selden*, and a telephone directory in *Feist*. Had the Court ruled differently in these cases, it would have trivialized the law of copyright and made copyright a monopoly for the dissemination of information, not for the dissemination of works of authorship.

*Qimron v. Shanks* makes my point. The Dead Sea Scrolls are an aberrant work in terms of copyright law. One will not find many 2000-year-old manuscripts at the center of a copyright controversy, especially one of overwhelming importance to world religions and culture. When the intent test is applied to Qimron, it seems clear that in compiling and translating the fragments he did not intend to create a work of authorship. He intended to convey what the Teacher of Righteousness wrote; indeed, creativity on his part would have defiled his reputation as well as his purpose. The only creativity he could employ with integrity was creativity as to how to decipher the fragments. And however difficult and meritorious, that effort was sweat-of-the-brow.

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63. *Id.* at 363.
64. *See* 101 U.S. at 99–100, 103–04.
65. 33 U.S. (8 Pet.) 591 (1834).
Presumably, Qimron’s primary motivation was personal fame and glory, not the enlightenment of the world. The clue is his efforts to control the use and dissemination of the manuscript by others, an act of personal censorship reminiscent of the stationers’ copyright. No doubt, he was entitled to a proper reward, including the recognition he received once *MMT* in fact became public. But Qimron’s reward did not have to be a copyright monopoly that enabled him to treat the *MMT* as his personal property. In sanctioning Qimron’s claims, the Israeli Supreme Court did a disservice to the law of copyright and the cause of learning. Nimmer’s test of intent as embedded in the copyright law of the United States, properly applied, would surely have led to a different conclusion.

66. See C.A. 2790/93, 2811/93, Eisenman v. Qimron, 54(3) P.D. 817 at para. 2.
67. See *id.* at para. 36.