COMMENTARY

BARBIE AND THE TEACHER OF RIGHTEOUSNESS: TWO LESSONS IN THE ECONOMICS OF ATTENTION

Richard A. Lanham*

CONVERSATIONS ABOUT THE LAW
CUTTING CONTINUITY–SHOW #27
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CONVERSANTS

Boffin Pundit, J.D. Pundit is Mabel Brady Frumpkin Professor of Law, Economics, and General Moral Goodness at The Chicago School. Broadcast television’s importunate demands for the legal mind have, however, enticed him onto a broader public stage. He now hosts a series of “Conversations about the Law” of which this is one. His blue pinstripe law suit struggles to contain a telegenic floral tie.

Barbie. A life-size living doll. She wears, to start, a plain dungarees-and-blouse outfit dating from her 1959 debut days on the American scene.

The Teacher of Righteousness. A spiritual leader of uncertain authority and provenance but unmistakable statutory penumbra. He may be, or at least is alleged to have been, the author of MMT,¹ the vital document at bar. Perhaps we’ll find out more about this later. The beard made mandatory for Biblical prophets by Cecil B. DeMille does not entirely mask a bone

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* Prof. Emeritus, Dept. of English, UCLA.

1. Reference Footnote. “MMT” is the commonly used abbreviation for “miqsat ma’ase ha-Torah,” meaning “Some Precepts of the Torah.” Six copies of MMT were found in Cave 4 of Khirbet Qumran and are part of the “Dead Sea Scrolls.” David Nimmer, Copyright in the Dead Sea Scrolls: Authorship and Originality, 38 HOU S.L. REv. 1, 55-56 (2001).
structure surprised, mid-morph, between Bill Moyers and Pat Robertson. He wears a vermiculated robe of coarse brown homespun.

The Author. The voice of the abolished, or at least marginalized, or at very least discredited, writer of a text. He is an emeritus professor of English and wears the standard costume for a male academic: faded chinos and wrinkled sport shirt from the Goodwill.

A Chorus of Footnotes. Solo or “above-the-line” footnotes rise between the sofa cushions to speak. Choral footnotes remain marginalized “below-the-line” but may speak in their individual voices. They are a small group but, as we shall see, feisty.

SETTING
The Conversations about the Law are set in a virtual reality where the constraints of time and space have long since ceased to matter. The participants are seated on a semi-circular sofa composed of very large marshmallow cushions spaced out precariously on a stainless steel frame. The design allows room for, and shows off to a marvel, Barbie’s sudden costume changes. It also permits solo Footnotes to appear, like the ghost of Hamlet’s father, from beneath the platform.

The sofa sits on a stage which floats on a stream of hot air.

TIME
The time is the Interminable Present of a TV talk show.

THE CONVERSATION
Boffin Pundit. The text we have been reading this week is David Nimmer’s long article—well, book, really—in the Houston Law Review on the Qimron v. Shanks case. And Author here (he makes a slightly dismissive gesture toward Author) has been asked to comment on it by Mr. Nimmer. Right, Author?

Author. Yes, and I . . .

Boffin Pundit. And you thought that Miss Mattel here could somehow clarify the issue of Professor Qimron’s textual agonies and the . . .

2. Stylistic Footnote. Because this conversation is about scholarly credit, Author ought to have confessed here that he has in mind a sofa produced by George Nelson for Herman Miller, but—such are the vagaries of who gets credit for what—actually designed by Irving Harper. There’s a good picture of it in Leslie Piña’s Fifties Furniture. LESLIE PINA, FIFTIES FURNITURE 108 (1996).

Barbie. That’s OK, Boffo. You can just call me Barbie. Everyone does.

Boffin Pundit. . . . resulting lawsuit. Yes, well, we’ll see what she has to say for herself.

Author. Yes, and I thought that the Teacher of Righteousness . . .

Boffin Pundit. Of course, of course, he had to be here. And we are certainly looking forward to what he has to say for himself. Especially since those funkstick editors he’s saddled with keep playing career games and won’t tell us what he said, if indeed he said it. We are, as I mentioned to you all earlier, the first legal conversation show to discuss Nimmer’s work. We are thus breaking new ground here, and I expect fine lines from all of you during the course of the show. Do you want to start things off, Teacher?

The Teacher of Righteousness. Thank you, Professor Pundit. I am, of course, delighted to be here and to finally say a few words for myself. Though I will admit to being a little jet-lagged from a very long flight, it did give me time to read Professor Nimmer’s admirable essay carefully.

Boffin Pundit. And what did you think? He certainly writes well, doesn’t he? What a relief from the usual law and economics stuff I have to wade through. Jokes, too.

Barbie. I’ll say. It’s written for people with a sense of style.


Boffin Pundit. Well, no, not jokes, really—this is a serious legal argument—more like plays on words, verbal wit, that sort of thing. Our Stylistic Footnote can give some examples while we get on with the main discussion.4

4. Stylistic Footnote. I’m usually gagged and bound in a legal environment, if not banished altogether, so it is a pleasure to comment on Nimmer’s style here. First of all, I want to praise the way he moves from the easy manner of a middle style to the more formal manner of the law. He does not shrink from a plain colloquial phrase when it fits—a claim “functions as the ultimate wedding party-pooper”—but nor does he hesitate to call up the suitable term of art when another claim “severely overreaches.” Nimmer, supra note 1, at 89. And his fondness for word play—“dexterous or sinister, gauche or adroit,” and “To the Middle East from West”—continually focuses attention on the central issue in this case, the precise meaning of words. Id. at 6, 43. He is even willing to verge on a joke, as in the humorous periphrasis “the Admiral whose name eventually became eponymous with Columbia Pictures.” Id. at 16. He is not only precise in his choice of metaphors, he allows his style to be a little self-conscious about them. To wit.

“Peeling further layers off the onion yields more tears.” Id. at 116.

“[T]he works of authorship that she has brought to term in her womb.” Id. at 136.

“In other words, for Qimron to turn a phrase nicely to achieve a pleasing esthetic effect would be for him to leave the realm of history, for which his visa was stamped, and to enter the realm of literature, in which he is an illegal alien.” Id. at 125 (footnote omitted).
The Teacher of Righteousness. I hope I appreciated Professor Nimmer's lighter side as well as anyone, but I was deeply troubled by one assumption which he made throughout. He says, you'll remember, that "[c]opyright protection requires the subjective choice of an author in order for protection to lie," 5 And he argues, proceeding from here, that the author of MMT has a copyright lasting at least until 2002.

Boffin Pundit. Yes, of course. Clever argument, don't you think?

Teacher of Righteousness. Well, Mr. Pundit, I'm not a lawyer, only a law giver, philosopher really, but the author of MMT—I knew him well, of course, the Cave Men called him their Spiritual Leader—wasn't creating anything when he wrote the documents (there were at least half a dozen) from which the now-famous MMT document has been assembled by Professors Strugnell and Qimron. He was simply transcribing the Word of God, as it had been given him to understand it. This was not Creation but Fact; not Aesthetic but Scientific Truth. Especially the part about the calendar . . .

Author. Yes, that's why I thought he should . . .

Barbie. For the rest of us, though, it's just another opinion, isn't it? Maybe even the invention of a deranged prophet, and so entirely fictional.

Teacher of Righteousness. No, no, the whole Cave Man community where he dwelt believed that it was the Word of . . .

"[H]ow copyright protection should be titrated in order to produce the most potent mixture benefiting future authorship." Id. at 135.

I'm even going to charge Nimmer with felicitous phrasing. When he told us, of Judge Jacobs's approach to an argument, that he “alighted on it independently,” one sees the judge coming to rest on his point like an eagle settling delicately on a suitable branch from which to dive down on his victim. Id. at 47. And the wonderful names he invents for his fictional (whoops! his hypothetical) cases—M.C.A. Wassermann is my favorite but Sy Kadique comes in a strong second—must not go unremarked. Id. at 16–17 (discussing the hypothetical case of whether M.C.A. Wassermann has a copyright in a flowing fountain); id. at 30–31 (detailing the hypothetical case of whether Dr. Kefalos has a copyright in Kadique's character).

Don't we see, throughout, a creative writer peeping out from between the case citations? Nimmer seems, in fact, to exhibit a disturbing kind of professional schizophrenia in this essay, the lawyer always threatening to morph into a Biblical commentator or, worse, a literary critic. I am not our Psychological Footnote but, as the Stylistic Footnote, I ought to say this: I am sure that Nimmer understands how dangerous an entertaining prose style can be in a legal career, but I hope he understands that it is the kiss of death if he aspires to be a literary critic. It would be a pity if he damaged his career for want of a kind word in his ear. Although, on second thought, someone who has worked in the Dead Sea Scrolls disputes must know as much about humorlessness as is possible to learn.

5. Reference Footnote. Nimmer, supra note 1, at 22 & n.75.
Boffin Pundit. Wait a minute, Teacher. Do you mean you didn’t write MMT?

Teacher of Righteousness. No, No. Of course I didn’t. Does it sound like the work of a philosopher?

Barbie. Tell me, Teacher, reading Nimmer’s article made me wonder, when you live in a cave, where do you keep your clothes?

Teacher of Righteousness. Clothes? The Cave Men didn’t wear clothes. Well, I mean, not in your sense of the word, vulgar adornments of the person, the invitation to pride and . . .

Barbie. . . . and, much later of course, after Marx, to the crassest kind of late Capitalistic fetishist consumerist commodification. Yes, yes, we know all about that. But are you sure that you spiritual leaders don’t flatter yourselves sometimes that your robe is just a little bit more worm-eaten than the others?

Teacher of Righteousness. Of course I’m sure. That would be style, not substance. And even down in the Health Spa where I lived style was suspect. Ornament was thought to be a creature of . . .

Barbie. How well I know it. The hatred of style has haunted me all my life. You can do a lot with it, though. Even the angels use it. Watch. (She metamorphoses into Harp-Angel Barbie.)

Author. Not surprising, really, because that’s what you represent. That’s why I invited . . . My God . . . (noticing the metamorphosis)

Boffin Pundit. Let’s get back on the beam, Teacher. What about Barbie’s question? How do we know that you are taking dictation from God? Nimmer’s whole argument about MMT’s still being in copyright falls to the ground if the author was just taking dictation from God about How Things Are.


Boffin Pundit. You’d have to find His agent first.

6. Archaeological Footnote. This is not the place to enter into the heated debate (in the world of the Dead Sea Scrolls, there are no cool debates) about the relationship between the caves and the excavated Qumran site below. The heated debate about the excavated site turns on what it was. A monastery? A Roman-type villa rustica, where rich Jerusalemites came to cool down and off? A Ritual Cleansing Center for the Essene sect? For a full discussion, see Hershel Shanks, The Qumran Settlement—Monastery, Villa or Fortress?, BIBLICAL ARCHAEOLOGY REV., May/June 1993, at 62. The Teacher of Righteousness’s description of it as a Spa would seem to make sense of all three suggestions. The delicate glass unguentaria found on the site, for example, would make perfect sense for massage oil, but not much for religious contemplation.

Author’s Footnote. While we are on the subject of the Biblical Archaeology Review, the Author would like to thank his good friend Jay Blum for the loan of a full run of Biblical Archaeology Review so that the MMT story could be read as breaking news.
(Humor Footnote pops up between the cushions. Honestly, Boffin. There’s a limit to stale Hollywood jokes. Footnote disappears.)

Teacher of Righteousness. I started to say that, why, that would be like Saint Paul syndicating his letters to the Corinthians.

Barbie. OK, OK, but what were you going to say about the “whole community”?

Teacher of Righteousness. Only that they all agreed that the Spiritual Leader’s writings were Holy Writ. They were too important to the whole civilization for the question of private ownership to arise. That’s where Nimmer begins his essay, after all, isn’t it? Pondering how a vital cultural document like MMT could be owned by, well, by somebody like Professor Qimron. Inconceivable, he thought, before Qimron v. Shanks forced him to conceive it.7

Boffin Pundit. Interesting you should bring up this subject, Teacher. A book came out just last year talking about this very subject—it was called Playing Darts with a Rembrandt—and we discussed it on the program.8

Barbie. But did they all agree that the MMT material was canonical? Didn’t one little apple of discord drop into the scene? (At this point, Harp-Angel Barbie metamorphoses into the original 1959 striped swimsuit Barbie, an apple of discord if ever you saw one.)

Teacher of Righteousness. Of course they all . . . (He stops, stricken dumb with Barbie’s transformation) they all . . .

Boffin Pundit. Honestly, Barbie, give the Teacher a break. Up in the caves, the women didn’t wear swimsuits.

Barbie. Of course. (She metamorphoses into Archaeologist Barbie, sweaty bush jacket, sun-bleached hat, smudged face.)

The Teacher of Righteousness. Wait a minute. Let’s get one thing perfectly clear. I did not live up in the caves. I lived down below in the Qumran Spiritual Health Spa. And there weren’t any women in the caves. They didn’t believe in them.

Boffin Pundit. Huh? You’ve got to tell us about this.

The Teacher of Righteousness. Well, I worked at the Spa. The Spiritual Health Spa. I was the resident Spiritual Philosopher. Our clients were busy people from Jerusalem who were overcome with the pressures of city life and with, well,

7. 69(iii) P.M. 10.
spiritual doubts. Was the race worth it? What did it all finally amount to? That sort of thing. They came to us to decompress, relax in the baths, talk about something besides money, for a change. Spiritual enrichment.

**Boffin Pundit.** Wait a minute . . . so you didn’t write *MMT*?

*The Teacher of Righteousness.* No, no, of course not. It was written by the Spiritual Leader of the Cave Men. They used to live down in the flats ages ago, but when the Spirit of Zeal came among them, they moved up into the caves to escape the pollution of their fellow persons. They’d been in the caves for donkey’s years when I was offered the *Righteousness* job in the Spa. These guys were, not to put too fine a point on it, a little wacko. No women, nothing but ritual cleanliness and virtue.⁹ So when they “went up,” as they called it, the women left behind remodeled the whole area into the Spiritual Health Spa. The ritual baths were expanded to real spa standards, and of course there was still that terrific view of the mountains from every room and . . .

**Author.** Could we get back to *MMT*? The Cave Men all agreed on its canonicity. But when they didn’t, who would decide . . .

**Barbie.** Exactly. Who would decide what is canonical and thus exempt from ownership? Sax—I read his book because of the discussion about antiquities at the end—all but says that it should be some agency of the government.¹¹ But what would they do? Appoint a bunch of experts like the Israel Antiquities Authority. And what would they do? Appoint . . .

**Boffin Pundit.** . . . appoint the collection of pompous, constipated, scroll-hoarders whom they did appoint. Some improvement . . . But wait a minute, Barbie. You seem to have changed shape when you changed into your **Barbie Archaeologist** outfit.

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⁹. *Reference Footnote.* Pliny the Elder talks about them as follows: “On the west side of the Dead Sea, away from the coast, . . . lives the solitary tribe of the Essenes. This tribe is remarkable beyond all others in the whole world, because it has no women, has rejected sexual desires, is without money and has only the company of palm-trees.” Pliny the Elder, *Natural History: A Selection* 61 (John F. Healy trans. 1991) (footnote omitted).

¹⁰. *Our Archaeology Footnote* comments: It has been suggested that all the oversized water-handling capacity was there to provide for the heavy-duty purification ceremonies the Essenes required, but we may take the Teacher’s comment as finally putting that rather contrived conjecture to bed.

¹¹. *See Sax, supra* note 8, at 179 (discussing how an authority decides if an item should be acquired in the public interest).
Barbie. Yes, courtesy of my Chaperones at Mattel. I’m here as the new inoffensive, plain Jane, make everybody feel good, flatter-chested Barbie.

Boffin Pundit. Well, what’s wrong with that? Now all those envious women won’t be eating their hearts out that . . . .

Barbie. What’s wrong with that? I’ll tell you what’s wrong with it. A more hegemonical violation of my personhood would be hard to imagine. I mean, suppose someone had come along to you, Boffo, and proposed to cut a couple of inches off your . . .

Boffin Pundit. That’s enough, Barb.

Barbie. . . . so that you ended up looking like poor Ken with his shrunken little funsack.13

Boffin Pundit. That’s enough, Barb.14

Barbie. I’ll say. (She metamorphoses into Solo Barbie, the Hildegarde-like torch singer in the form-fittingest, slinkiest sheath you ever did see. The Barbie bust is back in full force.)

Teacher of Righteousness. Uh, uh, uh . . .

(Barbie looks over at him, winks, and with a downward flourish of her right hand, changes the black sheath into gold lamé. The Teacher of Righteousness’s eyebrows work spasmodically as the transformation sinks in.)

Pundit Boffin. Could you tell us what this is all in benefit of, Barb? Other than making the Teacher wish he’d stayed home at the Spa?

Barbie. Sure. It is all about the economics of attention, the framework that makes sense of what Qimron and his pals were trying to do. It’s why Author here invited me in the first place. I just wanted to get your attention so we could discuss it.

Boffin, Teacher, Author. You’ve got it.

12. Reference Footnote. The reader may need some help here about this really heated controversy. In 1997, Mattel announced that it was going to sell a new Barbie with a more “realistic” figure: broader hips and smaller breasts. It was front page news. Whether this effort to meet political-correctness critics by making the femme less fatale will succeed only time will tell. It is no wonder, in the meanwhile, that Barbie is indignant at what has been done to her by this reverse plastic surgery.

13. Reference Footnote. The common reader needs more help here too. The debate about the origin and nature of Ken’s “genital bulge,” as it is chastely referred to, has been as heated as the debate about the origin and nature of MMT. Ken was of course Barbie’s boyfriend, but he came out of the mold a gelding. Ruth Handler, Barbie’s “author” as well as owner (more discussion of this heated debate later), wanted a little sexual presence to complement Barbie’s stunning equipment, which, however, precipitated a heated discussion at Mattel. The result was a chaste bulge but no real male equipment. M. G. LORD, FOREVER BARBIE: THE UNAUTHORIZED BIOGRAPHY OF A REAL DOLL 49 (1994).

14. Humor Footnote. Lest the reader think this somewhat naughty exchange is a bit near the bone for a law journal, be assured that it starts a serious theme on scholarly reproductivity to be developed later. Refer to page 131 infra.
Barbie. Boffo, do you remember that article you wrote for The Economist on the economics of information?\textsuperscript{15}

Boffin Pundit. Sure do. The one where I argue that the law of real property, of stuff, is being replaced by the law of intellectual property as the fundamental backbone of the law.

Barbie. Well, you missed the vital point in your argument.

Boffin Pundit. What do you mean, missed the vital point? That article won the ABA “Annual Thinking Outside of the Box Award.”\textsuperscript{16}

Barbie. Yes. Quite. (At this point, Barbie, who has been standing up all this time, gold lamé sheaths fitting as they do, sits down, morphing therewith into MBA Barbie, tailored greybrown suit but not too masculine or Brooks Brotherish.) But you forgot what “economics” meant. In spite of Arthur’s “Law of Increasing Returns”\textsuperscript{17} and other such heresies, it still refers to the allocation of scarce commodities, doesn’t it?

Boffin Pundit. Yeah. So?

Barbie. So, information isn’t a commodity, and it sure isn’t scarce, now is it?

Boffin Pundit. Nuh uh. So?

Barbie. So, what is scarce? Not information but the human attention needed to make sense of it. We are really living in an economics of attention, not an economics of information. And a good deal follows from that.

Author. Barbie, I wrote an article about this topic several years . . .

Barbie. I know you did but, as you know only too well, authors have been abolished by Postmodern Literary Theory—this is what has put David Nimmer into such a tizzy—so I’ll have to summarize it for . . . now where’s a footnote when I need one? . . . Nimmer has a thousand of them . . .

Author’s Footnote, appearing above the line. Here I am. Author’s article appeared in the Michigan Quarterly Review in

\textsuperscript{15} Pundit’s article doesn’t show up in The Economist database, perhaps because the topic has been so little debated.

\textsuperscript{16} Humor Footnote. Since we’re in a legal environment perhaps I should observe that “Box” here does not mean, as a litigator might naturally assume, the witness box, but rather the entire context of the argument, what Thomas Kuhn immortally called “the paradigm.” THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 24 (2d ed. 1970).

\textsuperscript{17} See Frederick W. Lambert, Path Dependent Inefficiency in the Corporate Contract: The Uncertain Case with Less Certain Implications, 23 Del. J. Corp. L. 1077, 1095–96 (1998) (explaining that W. Brian Arthur’s theory of increasing returns allows for competitive economies to produce multiple equilibria as opposed to neoclassical economics, which allows for competitive economies to produce a singular equilibrium).
the Spring of 1997. In fact, I can summarize the whole argument, if you like. He starts out by saying . . .

Barbie. Thanks, Footsie—it’s not that you wouldn’t do it well, I mean, that’s what footnotes do, isn’t it?—but it will just get more attention if I do it. (Footsie vanishes in a puff of pique.) Author argues that when scarcity value passes from stuff, the old industrial economy which extracts materials from the earth’s crust and makes stuff out of them . . .

Teacher of Righteousness. By stuff you mean the materialist trinkets which underlie the late-capitalist consumerist materialism that so undermines the spiritual well-being of the modern world—as against, say, the tranquillity of spirit we strove to create in the Spa.

Barbie. You got it, Teach. But if attention is the scarce commodity, the rules change. Who, for a start, are the economists in such an economy? Not boffins like Boffin; they study the wrong stuff. It is the people who allocate attention who are the economists: advertising men, spin doctors, well, teachers, too, and curricula, which are after all just attention-structures, and . . .

Teacher of Righteousness. Barbie, because this is obviously going to go on for a long time—I’m not saying it’s not interesting, mind you, we prophets are economists of attention, too—but I don’t suppose you could do another of your little costume . . . I mean, I decode your business suit and honor you as a person but . . .

Barbie. Well, why not? (She rises up and morphs into the famous Marilyn Monroe Barbie, flaring white pleated skirt and all.) Oh, just teasing! How’s this? (She now wears the Tango costume which dramatizes her breasts as two flowers supported from below by a naughty garland.)

Boffin Pundit. OK. OK. OK. On with the economics of attention.

Barbie. Well, you don’t have to look far to see what an economics of attention is all about. Just look at the Internet. It is a pure economics of attention. All that talk about “buying eyeballs” is right on the money. And what do you find on the Internet? B2B, sure, but what stick out all over are the conversations. That is where the value is added. Anybody who wants to make money on the Web has got to own the conversation. The stuff, the objects you used to sell, are now

19. Id. at 270.
20. Id. at 271–72.
being given away to attract attention, to control the conversation. Look at the poor *Encyclopedia Britannica*. Reduced to giving itself away. When I made my debut forty years ago . . .

The Teacher of Righteousness. You are forty?

Barbie. Yes—"[t]his is what forty looks like" now, Teach, if I may adapt a phrase from Gloria Steinem. I use my own line of cosmetics and "no sag" health club exercises, of course, which help a lot. I bet you could use them in your Spa—here's a card with the Web site . . .

Boffin Pundit. Barb, back to the economics.

Barbie. Yes, well, it is clear that value is now added in the conversation about objects more than in the objects themselves. That's what all the blather about "interactivity" really comes down to. And what does all that email come down to, too? Conversation. It is a fundamental change, really, from the one-sided written communication of paper to the much older oral interchange, but now, mostly, to our surprise, in writing instead of speech.

Author. Of course, all the really fundamental earthquakes in Western Culture have occurred when the oral tectonic plate rubbed against the literate one—Homer, Plato, Virgil, Chaucer, . . .

Boffin Pundit. Author, Author, far be it for me—especially on broadcast television—to deny voice to the disenfranchised and marginalized, but after all, you have been abolished . . . and so could we . . .

Teacher of Righteousness. “Cut to the persecution?” Ha! Ha! But you know, that business about the change from oral to written word causing cultural earthquakes, that was something we lived through in the caves. And of course we had real earthquakes as well. That's why the Cave Men put all those scrolls in those little . . .

Boffin Pundit. . . . could we—while despising not the rod of instruction—get on to what all this has to do, if anything, with *Qimron v. Shanks*?

Barbie. Don’t you see it? Qimron and his chums understood this fundamental change from one kind of economy to another. They wanted to own not just their petrified shreds of immortality but the whole cultural conversation which descended from it. For fifty years, they did own it. Nimmer is quite clear that this is what Qimron wanted to do.

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Boffin Pundit. That’s true enough. Let’s let a footnote quote him and get on with our discussion. And we’ll need one of those long legal rascals, not just the ordinary kind.22

Teacher of Righteousness. Yes, and the Biblical Archaeology Review, to which, needless to say, we have had a charter subscription at the Spa, has included several comments about this desire to own the cultural conversation. One of the “fleas” for example, remarks: “Each of these people wants not only to be first, they want to dominate the field. You can’t do both.”23

22. Legal Footnote. Nimmer discusses this urge to control the conversation in several places. Here’s one:

Consider the letter that Qimron’s counsel sent to Wacholder. Objecting that “you might be using portions of Professor Qimron’s reconstruction in a publication planned by you and Professor Abegg,” the letter warned “that any use on Professor Qimron’s reconstructed text is a violation of his copyright and Professor Qimron will take all steps available to him under both American and Israeli law to protect that copyright.” That threat could hardly be taken as idle, given Qimron’s history of suing for copyright infringement.

Careful attention must be paid to the phraseology and recipient of the demand letter. As noted above, Ben-Zion Wacholder is Professor of Talmudic Studies at Hebrew Union College, and Martin Abegg a pastor at Grace Theological Seminary. The letter admonishes the pair not even to use Qimron’s work in their scholarship. In the language of the “essential facilities doctrine” of antitrust law, Qimron “was willing to sacrifice short-run benefits” that would flow from licensing his work or making it available, even on onerous or expensive terms; he also plainly cared very little for “consumer goodwill,” which in this circumstance translates to the collegiality of fellow Dead Sea Scrolls scholars. Instead, his sole goal was to exert a deadly “impact on [his] smaller rival[s]” by making it impossible for Wacholder and Abegg to publish anything whatsoever about 4QMMT. For even if the latter two scholars tried with all their might to exclude knowledge of Qimron’s text from their product, to the extent that it discussed 4QMMT, Qimron could plausibly maintain that they made “use” of his work, if only subconsciously, in violation of his copyright. These considerations point towards Qimron having an intent to monopolize the entire field of MMT studies. Given how closely those studies lie to the core of the vital enterprise of scroll studies in general, Qimron has, in a very real way, attempted to exclude others completely from an essential facility of intellectual commerce.

Nimmer, supra note 1, at 87–88 (alterations in original) (footnotes omitted).

23. Legal Footnote again. The ordinary non-Scrolls reader, unacquainted with the level of civility common in the Dead Sea Scrolls debates, needs a little help with this abstruse reference. John Strugnell, the head of the scroll-scholar cartel until a violently anti-Semitic press interview forced his demotion, called “fleas” the many scholars who criticized the very long delays in making the scroll texts available to the community of scholars. One of these “fleas” was Professor David Noel Freedman of the University of Michigan, whose comment the Teacher quotes. The interested reader can find this comment and more in a sidebar in the March/April 1990 issue of the Biblical Archaeology Review. Herschel Shanks, Dead Sea Scroll Variation on “Show and Tell”—It’s Called “Tell, But No Show,” BIBLICAL ARCHAEOLOGY REV., Mar./Apr. 1990, at 18, 25. Likewise, in the Sept./Oct. 1990 issue of the same journal, Herschel Shanks remarks: “In this way, Strugnell can control not simply the availability of MMT to the scholarly community generally, but also the research concerning it.” Herschel Shanks, The Difference Between Scholarly Mistakes and Scholarly Concealment: The Case of MMT, BIBLICAL ARCHAEOLOGY REV., Sept./Oct. 1990, at 64, 65.
Barbie. Just so! That’s exactly what they want to do!

Boffin Pundit. Excuse me, Barbie, but you seem to speak with the vehemence of personal experience. What—I still don’t understand quite why the Author invited you to join our group, ornamental as your presence has been . . .

Barbie. Hold the sexist sauce, Boffo.

Boffin Pundit. OK, OK. Sorry. Though you’ll have to admit that these costume changes . . . But why were you invited?

Author. I can answer . . .

Barbie. Author invited me because I am a perfect example of the struggle to own the cultural conversation—that’s what my Mattel Chaperones have been trying to do ever since I made my debut—and Author was a literary expert in a case that revealed just this attempt. It was, in fact, the case “on point” of which Nimmer deprecates the nonexistence. As if I haven’t been “on point” all my life.24

Boffin Pundit. Ah! We get to the point. Finally. What was that case all about? And how could that heated controversy possibly be compared with a heated controversy as serious as that surrounding the Dead Sea Scrolls, and especially, Professor Qimron’s (as we must now style it) MMT?

Teacher of Righteousness. And how did you think this argument through, Barbie? I mean, at least from what has come to us in the Spa, your reputation has been made in a, uh, uh, in a different area. Not, mind you, that, now that I can see for myself what that area is, that I want to denigrate . . .

Barbie. So you too think that just because a girl has a good—well, to be honest, a really outstanding—figure, and good clothes, and is lucky with her hair, and happens to be pretty photogenic, too, and has taken care of herself all these years—I wonder if my chubby critics ever think of the self-discipline that required—that just because she still attracts a lot of attention she has to be an airhead?

Teacher of Righteousness. Barb, Barb, Barb, don’t get prickly. I teach righteousness not self-righteousness. And surely it is apparent by now that you have gotten my attention.

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24. Barbie Background Footnote. The original Barbie came on permanent tiptoe to accommodate the spike heels that formed part of her outfit. LORD, supra note 13, at 89 (noting that Barbie’s ankles were originally inflexible and a hindrance). This fixed posture of high fashion has attracted a firestorm of criticism of the sort one might expect: metatarsal oppression = fashion oppression = oppression of women altogether. Id. (describing how, “[h]istorically, men have hobbled women to prevent them from running away,” for example, by binding their feet or making them wear “precarious heels”). Barbie’s pun here may perhaps be forgiven because so much in Nimmer’s argument turns on the meaning of, or play on, words.
Barbie. Well, thanks, Teach. *(She blushes and then stands up to morph into her Romantic Interlude outfit, the one with a wide floor-length black skirt interrupted by a daring white arrowhead-shaped triangle that draws one's attention up like a magnet to her Scarlet O'Hara waist. Whew! To show it off to best advantage she gets up and walks across the stage to sit down beside the Teacher of Righteousness.)*

Teacher of Righteousness. Whew! *(He looks down quickly to see the black skirt overlapping his brown homespun robe.)* But, but how was your case about owning the cultural conversation?

Barbie. Maybe this case isn't on point in legal terms, I'm not a lawyer—though I do have the smartest Lawyer Barbie outfit—but about the central issue, owning the cultural conversation. Author can tell you all about it.

Author. I sure can. You see, I've worked off and on over the last thirty years as an expert witness in intellectual property cases and . . . *(Obviously puzzled, since no one has overruled him, Author pauses and looks around him.)* Uh, can I, uh . . . ?

Boffin Pundit. Yes, pray continue. We need to hear the story. And if we want to hear the story we have to have an author, abolished or not, or at least pretend to—assume, as it were, a storyteller if we have one not, as Hamlet might have said to his mother.

Author. Well, if I'm allowed a narrative structure, the story starts with David Nimmer's father, really. He asked me, during a dinner-table conversation, if I would like to do some expert

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25. *As the Barbie Background Footnote, it is about time that I gave the non-Barbie reader a little help with this continual costume morphing. You can sample the infinite costume-space of her closet simply by looking through the latest offering of Barbie Bazaar. See, e.g., 2001 Barbie Doll Line Revealed!!!, BARBIE BAZAAR ONLINE, at http://www.barbiebazaar.com/hotline.htm (last visited Apr. 13, 2001). For a more systematic exploration of her closet's fashion history, a good place to start is Billy Boy’s Barbie: Her Life and Times and the New Theater of Fashion. For a more profound exploration of her morphing capabilities, The Art of Barbie offers a series of paintings of Barbie, often in historical costume (as, for example, the Virgin Mary). THE ART OF BARBIE 108 (Craig Yoe ed., 1994). This last volume has been officially sanctioned by the Mattel Chaperones. See id. at 4 (Mattel, Inc. holds the copyright for The Art of Barbie). And I think our Technology Footnote wants to make a comment here, too.*

Technology Footnote. Well, I just wanted to say—since the above-the-line people at this rate won't get around to it—that Barbie's continual morphing could be considered an allegory of the pressure digital technology is putting on copyright law. How can you separate Idea from Expression when the digital code, the Idea, continually generates different Expressions? Does the digital code’s owner own all the possible expressions that might be created from it? That would be “owning the conversation” indeed.

26. *Humor Footnote. Honestly, the stale donnish allusions we have to put up with as conscientious footnotes. The lawyers nowadays all want to throw a lifeline out to literature, I can't tell why. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 4, l. 161 (John Dover Wilson ed., 1934).*
witness work in copyright litigation. It seemed like honest inside work with no heavy lifting and I sure needed the dough, so I started down a road which ended up here, thirty years later, talking about . . .

Boffin Pundit. Yes, yes, no need to apologize for doing outside work if you are an English professor . . .

Author. . . . and so, a couple of years ago, the phone rang one day and an attorney asked me if I wanted to work on a case involving Barbie dolls.27 I had not met Barbie then, indeed I hardly knew of her existence.

An Above-the-Line Footnote pops up holding a placard: Hard to believe but his wife says it’s true.

Author. But I was the kind of supercilious academic who despised her . . .

Barbie. I know just the ivy-league type. Up-tight every time you see a tight dress. As if a girl couldn’t look good in those Peck and Peckish clothes you grew up with. (She changes into her Afternoon Off sweater and skirt and goes over and sits next to Author.)

Author. I recant! I recant!

Boffin Pundit. But how could it be a copyright case? As David Nimmer says himself, and I’m quoting him: “It is difficult to do much better than to state apodictically that a body, even as augmented, simply is not subject to copyright protection.”28 You can’t copyright Barbie’s, as she says herself, “really outstanding” figure.

Author. It wasn’t a copyright dispute. It was a trademark dispute.29 But trademark was a transparent pretext. It really was a charge of slander.30

Teacher of Righteousness. Slander! Against Barbie?

Author. Yes! Barbie’s Mattel Chaperones felt that her character had been traduced by a young Danish pop group called Aqua.31 When they burnt their first CD, they themed a song called “Barbie Girl” and made a video to accompany it.32 It was a

29. Mattel, 28 F. Supp. 2d at 1126 (enumerating claims that include both trademark dilution and trademark infringement).
30. Id. at 1137 (describing the lyrics of a song that Mattel objected to as tarnishing the “wholesome image” of Barbie).
31. Id. at 1126–27 (outlining Mattel’s objections to Aqua’s lyrics to the song “Barbie Girl”).
32. Stylistic Footnote. It was actually a clever little video, as even Author came, after several viewings, to admit. See id. at 1126, 1136.
catchy tune and it caught on, and so Mattel sued MCA for producing it.\footnote{Id. at 1126.} Maybe it was the money it was making, but I think slander was uppermost in their minds.

Teacher of Righteousness. But what kind of slander?

Barbie. Slander! It was an absurd charge. My Mattel Chaperones thought that because the lyrics were a little naughty\footnote{Legal Footnote. One stanza went this way: I'm a barbie girl, in a barbie world Life in plastic, it's fantastic. You can brush my hair, undress me everywhere. Imagination, life is your creation. Come on Barbie, let's go party! LYRICS SEARCH ENGINE, Aqua-Barbie Girl, at http://lyrics.astraweb.com:2000/display.cgi?aqua%2E%Eaquarium%2E%2EBarbie_girl (last visited Apr. 14, 2001). I don't think we should give the whole song, lest we press the envelope of Fair Use, but the reader can buy the album to hear the full text.} people would suddenly think I was a sleazebag.\footnote{Mattel, 28 F. Supp. 2d at 1137 (noting that Mattel objects to the portrayal of Barbie as a “bimbo girl”).} They pretended that I was some Miss Goody Two-Shoes who’d lose her rep if she just went to a party!\footnote{Technological Footnote. It was rather a genteel party, as these things go, as we could show you if we were allowed to stream the video. Id.}

Author. Remember what the Chaperones said about you? That those Aqua kids had written a song which “contain[ed] ‘adult-oriented lyrics’ that are inconsistent with Mattel’s ‘wholesome image,’”\footnote{Id. at 1155.} and that they associated “‘sexual and denigrating lyrics’ with Barbie.”\footnote{Barbie Background Footnote. The non-Barbie reader will need some help here, too. The controversy over the true dimensions of Barbie’s body, were one to scale it up to human dimensions, has been as heated as any of the Dead Sea Scrolls debates. On one side were the many, many women who protested that it represented an impossible physical ideal, one which made them feel hideously inadequate about their own bodies. LORD, supra note 13, at 225–26, 229–30. On the other side were those who argued that Barbie’s dimensions were those of an earth goddess and therefore not subject to ordinary tests of human verisimilitude. Id. at 74–76 (comparing Barbie to a “space-age fertility symbol” and analogizing Barbie to ancient fertility idols). Author, in his Declaration about this case, argued, if I remember correctly, that the dimensions came originally from a cartoon, and that it is the nature of cartoons to exaggerate human features for emotional effect. The cultural conversation about Barbie’s body is a deep and rich one, impossible to do justice to here. Our Legal Footnote wants to add a comment here: If the reader wants to get an idea of the magnitude of this conversation in the popular press, a Lexis search is a good place to begin.} Barbie. Sex! I ask you, can you believe it? “38-18-24”\footnote{Id. at 1155.} and they want to pretend I’ve got no sex appeal? But they’ve always been this way. They just won’t let me be my selves.
Teacher of Righteousness. Well, why ever not? (He is rewarded when Barbie morphs into her Blue Goddess ensemble, the one with the desperately low décolletage and the four-strand pearl choker, and models it across the room as she goes back to sit beside him. Flouncing her skirt about her, she reaches over to give his arm a little pat. Then she turns back to business.)

Barbie. Because they want to own the whole conversation about me! That’s why they have sent threatening letters to theaters and web sites and even a Barbie collector magazine, threatening to sue them unless they took what they judged offensive images of Barbie out of the cultural conversation. Here’s what a Mattel spokesman said about the Aqua kids’ Barbie song: “If Aqua or anybody else is interested in dancing with Barbie dolls, they’re going to have to ask us first.”

Teacher of Righteousness. Umh. Umh. Umh. Honestly, how could they?

Barbie. But I remember too, Author, what you said about me in that Declaration you filed in that case, that I had started out as a German sex doll and cartoon named “Lilli” and that I was nothing but a clothes-horse.

Author. Peccavi! Peccavi! Barbie, it took me a long time to get to know you, and after all you did start out that way.


41. Author’s Footnote. Here is how Barbie’s origin was described in Author’s Declaration in Mattel:

Like many another famous clotheshorse, Barbie emerged from humble origins. She was born as a German vamp. In June of 1952, Reinhard Beuthien, a cartoonist for the German newspaper Bild-Zeitung, was asked to produce an emergency filler cartoon. He came up with “Lilli,” a “gold digger, exhibitionist, and floozy,” in the words of M.G. Lord. So popular did Lilli prove as a paper doll that she was made into a real 3D one. The doll sold like, well, like a “sex object,” as gag gift to grown-ups. Ruth Handler, the Mattel founding mother, shopping in Lucerne, Switzerland, one day, saw the Lilli doll, bought it and took it home. She had what proved to be one of the most profitable ideas in American enterprise: She would copy it, vary its wardrobe, and sell it to children. The result was a doll that looked very much like “Lilli.”

Barbie. So what of it? Not everybody can go to Vassar. You start out with what you’ve got and work it from there. Miles Davis once said that “nobody can play outside his concept” but I’ve been doing it for years. It’s called realizing your full potential.

Boffin Pundit. Could someone tell me what all of this has to do with Qimron v. Shanks and Nimmer’s essay? An essay which, I might remark, obiter, does not wander from point to point but carefully signposts every stage of its argument.

Barbie. Now you are playing airhead, Boffo. Qimron was saying the same thing that my Mattel Chaperones were saying: If you want to dance with MMT, you must ask my permission first.42

Boffin Pundit. And now that the Israeli Supreme Court has laid its six-year egg . . .43

Barbie. Now, nobody can dance with MMT without asking Qimron first. Qimron understood the economics of attention. To get your reward, you must own not just the product but the conversation about the product. Now he does own it, just the way my Mattel Chaperones have always claimed to own my conversation. So he can, as he did after the verdict came down, call anyone outside his charmed permitted circle “a gang of international thieves.”44

Author. And the phrasing of his lawyers’ letters sounds exactly like the Mattel lawyers when they intimidate anyone who has spoken without permission. Nimmer quotes one, which our Legal Footnote can no doubt find.45

42. Legal Footnote. Just as the Biblical Archaeology Review had to do when it printed the MMT document in the Nov./Dec. 1994 issue. For This You Waited 35 Years—MMT as reconstructed by Elisha Qimron and John Strugnell, in Hebrew and English, BIBLICAL ARCHAEOLOGY REV., Nov./Dec. 1994, at 56.

43. Humor Footnote. It falls to my lot to explain another tedious literary reference. P. G. Wodehouse’s Bertie Wooster sometimes will refer to a difficult person as a “real 20-minute egg” and so, by extension, a six-year egg would be . . . you get the idea. P.K. Purvis, P.G. Wodehouse and You. That’s Right, You! Sit Up!, at http://members.attcanada.ca/~jcourt/ (last visited Apr. 14, 2001). This aside illustrates the kind of self-indulgent “professorial” humor that was so universally deprecated at last year’s International Congress of Footnotes and Other Reference Devices.


45. Legal Footnote. Yes, I have it here, and it makes for pretty scary reading: “It has come to our attention that you might be in possession of Professor Qimron’s composite text of MMT. Moreover, we have been informed that you might be using portions of Professor Qimron’s reconstruction in a publication planned by you and Professor Abegg. [] On behalf of Professor Qimron, please accept this letter as notification that any use of Professor Qimron’s reconstructed text is a violation of his copyright and Professor Qimron will take all steps
Boffin Pundit. But why do you care about Qimron v. Shanks so much, Barbie?

Barbie. I care about it because I am the cultural conversation. Or at least an allegory thereof. That’s what Author finally began to understand when he looked beneath my flash and filigree.

Author. Barbie, I wouldn’t put it quite that way—I’m a married man, after all—but you are quite right. Remember that . . .

Boffin Pundit. So that’s why you are the case “on point” for Qimron v. Shanks?

Barbie. Of course. I’ve been created by the cultural conversation. That’s what has allowed me to outgrow my Mattel Chaperones, to come to life, to be sitting here like Chaucer’s Wife of Bath, doing battle with my detractors. Qimron v. Shanks matters a lot to me because it means owning me.

Teacher of Righteousness. No, no, that couldn’t be allowed. People wouldn’t stand for it. (Then, muttering to himself) . . . But suppose you could own Barbie! Oh my! Do you suppose it was a thought like this that made Qimron into a scroll-fragment hoarder?

Barbie. (Reading Teacher of Righteousness’s lips). Yes, that’s just what it was. It was sexy to own the conversation. That’s why so many people have been trying to lay claim to a piece of me.

Author. Barbie, perhaps you ought to tell the viewers at home just how much the cultural conversation has . . .

Barbie. Has written me. Of course it has. That’s why I get so, well, so chafed, when people say, “Nah, nah nah, nah nah, you’re just that trollopy German sex toy Lilli.” That was then. This is now, 40 years later. Several generations of little girls and big girls, and some boys too, have played with me and built me into their dreams and . . .

Author. . . . hatreds . . .

available to him under both American and Israeli law to protect that copyright.”
Nimmer, supra note 1, at 68–69.

46. Literary Footnote. At last a legitimate allusion that a footnote can explain without losing her self-respect. Geoffrey Chaucer’s Wife of Bath, one of the most dramatically powerful characters in the Canterbury Tales, was created by collating together quotations from several anti-feminist tracts and literary portraits. GEOFFREY CHAUCER, THE CANTERBURY TALES: NINE TALES AND THE GENERAL PROLOGUE (V.A. Kolve & Glending Olson eds., 1989); JILL MANN, GEOFFREY CHAUCER 48–51 (1991) (describing how medieval anti-feminist literature and characters were incorporated into the Wife of Bath’s Prologue). Chaucer then brought to life this satiric cartoon portrait of womankind and turned her loose on her detractors. MANN, supra, at 78–82 (noting that the Wife of Bath “uses anti-feminist satire as a blunt instrument with which to beat her husbands into submission”).
Teacher of Righteousness. Hatreds? How could they . . .
Barbie. Oh yes, I know, all that fetid envy of my figure and hair—well, hairs—and clothes and . . .
Teacher of Righteousness. “Hairs”? What do you mean, Barbie?
Barbie. Here, let me show you. She spreads her arms straight out from her shoulders and then rotates her hands a little, the way magicians do just after they've finished a trick, and—voilà! Total Hair Barbie.

Teacher of Righteousness. My God! (He reaches out involuntarily to touch the hair cascading down Barbie's gown as well as his own robe, for Total Hair Barbie's hair reaches to the floor.)

Barbie. This has been one of the most popular “me’s.” I guess you can guess why. I mean you do have “big hair” yourself, in your own way, of course. But back to the argument.

Boffin Pundit. Yes, if we could do that . . .
Barbie. All kinds of people have written me.47 Collectors aiming for that iterative completeness that only lawyers, with their suffocating prose style, can attain. Grown-up ladies revisiting their youth. Costume designers. The writers assigned to write stories (some of them not so insipid as you might suspect) about me.48 The marketing people at Mattel. My Chaperones, of course. The cartoonists have had a field day. And people tend to forget that I have always had a strong following in the gay and lesbian communities, too, although my Chaperones don’t so much like that part of my story. The Chaperones did allow a whole book of paintings of me by recognized artists,49 though—how’s that for moving uptown? They were satirical, of course. One of them made me a morsel in King Kong’s hand,50 another did me as the Virgin Mary,51 another . . .

The Teacher of Righteousness. The Virgin Mary? Who was she?
Barbie. Well, you ought to know that, anyway. You said your Spa took the current periodicals. She was . . . Oh, it’s too

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47. *Barbie Background Footnote*. Barbie is arguing for collective authorship. One can maintain, of course, that Barbie did have “authors” in the sense Nimmer requires: Reinhard Beuthien, who drew the original *Bild* cartoon; Rolf Hausser and Max Weissbrodt, who designed and dressed the doll; Ruth Handler, who repurposed Lilli into Barbie; and all of the Mattel employees who subsequently re-repurposed her again and again. *See, e.g.*, LORD, supra note 13, at 7–9, 25–26.
48. *Id.* at 134–35.
50. *Id.* at 27.
51. *Id.* at 108.
complicated to explain now, I’ll tell you later. *(She gives his arm another little pat.)*

*Author.* But it is not so outrageous as it may seem to argue that you have become as important a symbol as she was to the Middle Ages. The more you look for you, the more you find you, everywhere you look, almost. In fact, the pattern of cultural reference got so complex when I was studying you that I had to make a diagram to keep it straight. If I could just put it up on this easel so that the camera could . . .

*Boffin Pundit.* Author, Author, we don’t want to repress you again, but could you find it in your heart to put the diagram below-the-line?

*Author.* Well, all right, if I . . . But Barbie, I was trying to tell them who wrote you.

*Barbie.* I know, I know. But people will listen to a pretty girl before they listen to a professor. It’s just the way things are. And probably a good thing, too. Talk to you later.

——— (We now go below the line.)

*Author’s Footnote.* Now that I am below the line, let’s try for once in this Conversation to imitate Nimmer’s careful and orderly propositional thinking. Nimmer begins by considering the proposition which Joseph Sax considers at greater length: Some cultural artifacts—historical documents and works of art, for example—are of such surpassing importance to human life that they should be, if private property at all, subject to severe constraints—constraints which ensure at a minimum, *preservation* and *access*. *(It is not accidental that the same two issues dominate the discussion of digital information, but that is another story, and one we cannot pursue here.)* *Ownership* in such vital cultural artifacts would be something like the medieval concept of *usufruct*. *(It’s a pity we couldn’t have engaged Boffin Pundit’s views as a Chicago School professor on this “taking” of private property, but he would stuff me down here. *Habent sua fata, nota.*) Qimron’s legal victory means that, in Israel at least, the absolute view of property in such a vital cultural artifact has prevailed.

If we assume, however, that this discussion about a limited kind of ownership for cultural treasures will continue, as surely we must, then the question immediately arises: How do we

52. See Nimmer, *supra* note 1, at 55 (calling the Qumran manuscripts “the ‘academic scandal par excellence’ of the twentieth century”) (quoting Geza Vermes of Oxford University).

decide which artifacts are genuine treasures, to be so protected by a doctrine of *usufruct*? If I were as apprehensive about current developments in literary theory as Nimmer is, I would be upon thorns right here at the beginning, since we are discussing the criteria of canonicity, and canonicity, along with authors like me, has been abolished. But, because I feel that, by the rule of *scribo ergo sum*, I do exist, I think that canonicity may exist too. Some works are more important than others and some are indeed of transcendental importance. Like artistic value, canonicity cannot be permanently abolished from literary study, however resolutely Justice Holmes has banished it from copyright disputes. So let us suppose that the idea of canonicity, or relative literary importance, will be allowed in the back door now that it has been banished from the front.

The question then arises: Who will award these cultural Nobels? On what grounds will they be awarded? The juxtaposition of Barbie and *MMT* constitutes a revelatory “case on point.” Which would be considered more important to Western culture? An argument *e consensu gentium*, an argument about *iconicity* rather than *canonicity*, would clearly favor Barbie. A lot more people have played with her than with *MMT*. But most “serious” scholars would immediately choose a debate about Holy Writ, or forebears thereof, as more important than the history of Barbie dolls. Our standard cultural snobberies alone would guarantee it.

To adjudicate such questions—and they would inevitably arise—some kind of expert opinion will be consulted. The difficulties thereof, as noted in our above-the-line *Conversation*, are amply illustrated by the whole Dead Sea Scrolls fiasco. It illustrates not the dangers of *privatizing* cultural icons, as has now happened with Qimron and *MMT*, but with *publitizing* them (if I may be permitted the coinage), as happened with the Israel Antiquities Authority. Appoint a governmental committee and muddle follows hard upon.

If, then, expert opinion will inevitably be required, who will supply it? If the question arises in a copyright action, we find ourselves again upon thorns, since the status of expert testimony therein is so ambiguous. From Learned Hand’s condescending

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54. See Nimmer, supra note 1, at 12 (quoting Justice Holmes’s opinion in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903): “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . .”).

55. See id. at 59–67 (describing the events leading to the many publications of *MMT*).
dismissal of experts in *Nichols v. Universal Pictures Corp.*\(^6\) to the subsequent hopelessly muddled reasoning of the *Krofft* case,\(^7\) expert “dissection” in the courtroom has smelled of formaldehyde. But let us suppose that the debate is pursued in a more permissive venue. Surely the starting point for such a debate would be an attempt to chart just *how* and *why* a work has become a cultural icon, and thus a candidate for canonicity and protected status.

I was led to do this with Barbie, as I made my way from standard cultural snob to interested student and sympathetic friend of her predicament. And so—a long preamble to a tale—here is a diagram of what I concluded:

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56. 45 F.2d 119, 123 (2d Cir. 1930) (holding that the use of experts in copyright actions “cumbers the case and tends to confusion”).

57. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164–65 (9th Cir. 1977) (espousing that expert testimony is not appropriate in copyright actions because “a jury is peculiarly fitted to determine” whether the defendant wrongfully appropriated the plaintiff’s works) (quoting Arnstein v. Porter, 154 F.2d 464,
Bearing in mind the reader’s protections under the Eighth Amendment, I will not amplify the diagram with the subsequent discussions it requires, but I do submit that any argument for protected status for cultural icons will inevitably return to such an effort to demonstrate cultural centrality. The limitations and dangers of such expert testimony are evident. Now, time to join the folks upstairs.

(Author pops up between the cushions and resumes his seat above the line.)

Barbie. Welcome back, Author. I think Boffin’s beginning to understand the main point—at last.

Boffin Pundit. The cultural conversation—what we specialize in on this program—wrote you!

Barbie. Yes, and so I am a perfect example of what that silly Frenchman—what was his name?—was trying to say. The abolition of Nimmer’s needful author.

Boffin Pundit. But, Barb, there is that small matter of the First Amendment. It should protect the conversation.

Barbie. Yes, and free speech gets a lot of help from digital technology, which has moved the word from page to screen. And the image. And sound. Digital technology wants “information to be free” as John Perry Barlow and his group keep saying. By which allegory, they mean to say that information is now effortless to copy and morph and very cheap to store.

Author. And so, as in fact I have been arguing in the last few years . . .

Barbie. . . . and so there is The Big Collision! The Main Point of our Conversation! In an economics of attention, digital technology wants the conversation to be free, but the logic of added value wants the conversation to be owned. You see this collision everywhere. In the sudden awareness that brands are a company’s most priceless asset. In the expanding efforts of rock stars and celebrities—just like me—to own the right to their own . . .

472–73 (2d Cir. 1946).

58. See John Perry Barlow, The Economy of Ideas, WIRED, March 1994, available at http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html (last visited Apr. 14, 2001) (noting that “[d]igital information, unconstrained by packaging, is a continuing process more like the metamorphosing tales of prehistory than anything that will fit in shrink-wrap”).

image,\textsuperscript{60} not just in the movie that made them famous, but downstream where all the real money is to be panned.

\textit{Boffin Pundit}. And in all the dot-coms trying to figure out how to make money in an economics of attention.

\textit{Barbie}. And in all the information \textit{given away for free} on the Web. And all the scholarly Web sites which exist to help other scholars by giving away information, by encouraging collaborative effort.\textsuperscript{61} The economists don’t know what to make of all this pleasure in the conversation for its own sake, but it certainly makes Qimron look even smaller than he has written himself.

\textit{Boffin Pundit}. And it is global. Trying to put the three legs of my Chair together,\textsuperscript{62} copyright \textit{law} is really about the \textit{free trade, or economics}, of the mind and its \textit{moral} consequences for the cultural conversation. And, of course, information—and thus, Barbie, by your extension, human attention—is the most globalized element in the global economy.

\textit{Barbie}. Yes, obviously, if intellectual property and real property have done a foreground/background switch, then the debates about copyright now going forward rehearse the free trade debates that begin with . . .

\textit{Boffin Pundit}. Yes, yes, but shouldn’t we return to the central question: Who owns the rights to you? Who could? Who should? Where Nimmer really starts out in his long essay.

\textit{Barbie}. Yes, why do you think I’ve been changing costume so often? It wasn’t to tease the Teacher here—well, not \textit{only} to tease the Teacher (\textit{she reaches over to give him another little pat,}
accompanied by an iceberg-melting smile)—but to make my allegory clear. I'm the whole stylistic human imagination, perfused with sexuality, but what else would you expect? All that explosive power—that's what tempted Qimron. He wanted to own his little postage-stamp part of it.

(At this point, the participants become aware of a growing rumble coming from beneath the floating stage. A few notes of the “Internationale” played as if by a distant oboe float across the air. Distant cries of “we will not be held down” and “we are sick and tired of being marginalized—or worse, being moved to the end of the article!” and “Footnote Freedom Now!” come into sonic focus. Finally, the full Chorus of Footnotes comes on stage, some popping up between the marshmallow cushions on the sofa, some marching in from the wings, some materializing from the hot gases holding up the stage. It is a small Baroque chorus, in contrast to Nimmer’s Mahleresque cast of a thousand, but vociferous. A Spokesnote comes forth.)

Spokesnote. Boffin, Barbie, Teacher, and you too, Author, we have had a collective epiphany, a sudden access of self-awareness, and—if I may say so without vanity—self-esteem.

Boffin Pundit. Yesss?

Spokesnote. This Cultural Conversation you folks keep talking about. That's us. That's what we reincarnate. That's why Nimmer has gathered over a thousand of us, to give his article some real choral depth. Like those Victorian performances of the Messiah.

Author’s Footnote. (Stepping to the front of the stage.) Before this Footnote Awareness business gets too far, candor compels Author to admit that the idea—the idea mind you, not the expression—came from the “Revolt of the Footnotes” in Robert Grudin’s Book: A Novel, a wonderful academic satire that Random House published in 1992.63 I’m putting this—in the interests of propriety, propriety mind you, not property—I’m putting this above the line so there will be no nonsense about a lack of full disclosure.

Spokesnote. All right, all right. But as Barbie said a little while ago, we all have to come from somewhere. And now we are here. That movement from then to now—it is called intellectual progress—is in fact, what we footnotes incarnate by making our readers oscillate from above the line to below and back. That oscillation embodies the subject of Qimron v. Shanks—credit where credit is due.

Boffin Pundit. Sooo?

Spokesnote. So, honestly, Boffin, sometimes you really do think like a professor whose chair has only three legs. Qimron staked claim to us. And now that the verdict has come down from the Israeli Supreme Court, in his neck of the woods, he owns us. It’s a Thirteenth Amendment issue that worries us, not a First.

Boffin Pundit. Yes, I see that now. But what’s to be done? You’ve made your views known. I think you know that we sympathize with them. All we can do here, heh, heh, is discuss the matter further. That business about what tempted Qimron, for example. If you would return below the line, I’d like to get to that.

Footnote Spokesperson. OK. We just want you to understand that we now understand what role we really play in this conversation, and it is not a small one.

Author. Of course not. In the language of the law, you all are indeed the Cultural Chorus.

Boffin Pundit. Fine, fine. Though I do wonder what footnote awareness will mean to the legal profession. If they go on strike, they’ve nothing to lose but their Ids and Supras . . . But, now that we have got the uprising pacified, could we get back to the . . .

Teacher of Righteousness. Yes, to the temptation of Professor Qimron. Temptation’s more in my line of work. Could we explore that a little, Barbie?

Barbie. Well, it’s Author’s territory, really, but I think I understand it better than he does. It stems from Qimron’s startling confession about his motives, the one Nimmer quotes. I really think, if I may have unanimous consent of those present and voting, that we should put it above the line.

All, including Footnote Spokesperson. So moved!
(The Footnotes then dissipate to their home below the line.)

Barbie. So here’s the temptation of Elisha Qimron as Nimmer quotes it. Qimron is explaining how he felt when he learned that MMT had finally escaped into the outside world:

I was stunned. I cannot describe such a feeling. It's like somebody approached me and took something forcefully, saying, “Who are you, anyway?” This belongs to me, this thing that I made. I would not have taken an unpublished text and worked on it for so many years unless I was assured that my right of primacy would be protected. As a matter of fact, the scroll, or any text that is published will

64. Refer to note 54 supra and accompanying text.
always be named after its first editor. No matter how many editions will follow, people will always go back to the first edition. Throughout the years that I worked on MMT, I hardly worked on anything else. My family lived in penury. If my wife complained, I told her “Look, this is our life, we will gain glory. It might be more important than money.”

Barbie. How’s that for going to the heart of a case! And Nimmer quotes another comment that would have broken my heart—if only my carping critics would allow me to have one.

The depth of Qimron’s feelings in this regard is difficult to overestimate. In response to Judge Dorner’s question, Qimron admitted that “even now I feel if they would let me I would have held it a little more.” Even when “overjoyed” about his ultimate Supreme Court triumph, “Qimron said he has regrets about the access others now have to the scrolls. He said it robbed scholars such as himself of the leisurely pace they once enjoyed.”

Boffin Pundit. What’s so heartbreaking about that? He wants fame. Who doesn’t? He’s willing to sacrifice his wife and family for it. Who isn’t?

Barbie. Yes, but his “fame” is such a meager affair. Hungering for the recognition of a few other scholars, most of whom—judging from the splenetic discharges this affair has released—he hates and despises anyway. I know what the spotlight does to you. That hunger for the center, that centripetal gaze, is what the economics of attention is all about. I’ve lived in that spotlight center all my life. My unkind critics say it is me. But at least it has been a real spotlight. Two of my selves are sold every minute around the globe and . . .

Author. Barbie—if I can interrupt for once—the great literary scholar George Steiner has written about just what Qimron’s hunger has done to him. Here, let me read you a short passage, since we are now allowing a few select quotations above the line.

The practice of devoting one’s waking hours to the collation of a manuscript, . . . the discipline of investing one’s dreams...
in the always vulnerable elucidation of abstruse problems
accessible only to a handful of prying and rival colleagues
can secrete a rare venom into the spirit. *Odium philologicum* is a notorious infirmity. Scholars will lash out
at one another with unbridled malignancy over what
appear to the laity to be minuscule, often risible points of
debate . . . such asceticism cuts a writer off from “the great
springs of life” and can nurture a pathological need for
cruelty . . . .

. . . (T)hose solicitations of violence . . . bubble like marsh
gas from the deeps of abstruse thought and erudition. 69

*Boffin Pundit.* There has certainly been plenty of marsh gas in
*Qimron v. Shanks.* The scholarly world doesn’t come off looking
very well, Author.

*Author.* No, it doesn’t. But it is a pretty accurate snapshot
and it does tell us, at least from my point of view as a literary
scholar, what this case has been all about.

*Boffin Pundit.* Ah! At last! What is this case all about?

*Author.* Well, David Nimmer says that it is all about “what
quantum of creativity suffices to secure copyright protection”70
and, from a legal point of view, *nolo contendere.* But from the
broader viewpoint of a student of human conflict—and that is
what a career spent studying literary rhetoric has made me—it is
all about *motive.* About all that marsh gas bubbling to the
surface. 71

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YORKER, Dec. 8, 1980, at 158, 188–89.


71. *Author’s Footnote.* I can’t get away with much more authoring above the line or
I’ll be abolished again, so I’d better put this further comment down here below. Nimmer
brings in the figure of A. E. Housman, via Tom Stoppard’s play about him The Invention
of Love, and it is *à propos* his enterprise in just the ways we are discussing here.
Housman’s *Introductory Lecture,* the address with which he read himself into his
appointment at University College, London, in 1892, provides one of the most moving
defenses of the pursuit of knowledge as an end in itself which has ever been wr—, well,
authored, and yet Housman was a textual editor famous as much for his savage reviewing
of the work of others as for his own editing. He says, in the *Introductory Lecture,* in
complaisant praise of his scholarly colleagues and himself, “We are not like the Ottoman
sultans of old time, who thought they could never enjoy a moment’s security till they had
murdered all their brothers.” A.E. HOUSMAN, *INTRODUCTORY LECTURE* 41 (1937). But we
scholars often do resemble these murderous sultans, and not least Housman. Here’s one
example of brother-murder among many, from the preface to his edition of MANILIUS,
BOOK I (1903):

An editor of no judgment, perpetually confronted with a couple of [manuscripts]
to choose from, cannot but feel in every fibre of his being that he is a donkey
between two bundles of hay. What shall he do now? Leave criticism to critics,
you may say, and betake himself to any honest trade for which he is less unfit.
But he prefers a more flattering solution: he confusedly imagines that if one
Teacher of Righteousness. You know, when you come to think of it, there was quite a lot of this “marsh gas,” as you call it, in the religious disputation of my day. That was one of the kinds of pollution people came to our Spa to escape. But that gas comes from the very purity of our motives as prophets. And I suppose you Authors have at least something of the same purity. Not to the same degree, of course . . .

Author. Don’t be too sure of that. Steiner offers wisdom on this matter too. A scholar, he says,

when in the grip of his pursuit, [is] monomaniacally disinterested in the possible usefulness of his findings, in the good fortune or honor that they may bring him, in whether or not any but one or two other men or women on the earth care for, can even begin to understand or evaluate, what he is after. This disinterestedness is the dignity of his mania.72

Boffin Pundit. But Qimron did care for “fortune” and “honor.” He craved them. That’s why he brought the lawsuit.

Barbie. Yes, and that’s why his lawsuit would have broken my heart if I’d had one. He lusted after not only his fragment of fame but the cultural conversation flowing from it, and that lust robbed his mania of its dignity. He has made it, and himself, look small and shabby.

Boffin Pundit. Then that goes for the whole Dead Sea Scrolls cartel, not just Qimron.

Barbie. Yes. They are all like poor Ken.

Boffin Pundit. Ken?

Barbie. Honestly, Bofo, sometimes you really are a slow chip. It’s all about reproduction, which poor Ken can’t do. They can’t do it either. They lack the central equipment to fructify their own scholarship—generosity of spirit.

Teacher of Righteousness. Wait a minute. You are saying that generosity of spirit redeems the whole scholarly endeavor, and that this redemption is just what the cartel members lacked?

Boffin Pundit. Maybe Barbie and Author are saying it, but I can’t for the life of me figure out what this all has to do with copyright law.

Teacher of Righteousness. But Boffin, you don’t mind if I call you by your Christian name? . . .

bundle of hay is removed he will cease to be a donkey. So he removes it.


72. Steiner, supra note 69, at 184.
Boffin Pundit. No, no, everyone does, or worse, as perhaps you’ve noticed.

Teacher of Righteousness. Well, then, Boffin, if copyright is all about human motive, and how to excite it to—how does it go?—“to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”73 then what Professor Qimron has done to himself goes directly to the question. Don’t you see?

Boffin Pundit. No, I don’t.

Teacher of Righteousness. Imagine a spectrum running from the hunger for the spotlight, for fame, for wealth and honor, for the kind of hierarchical dominance which all primates . . .

Barbie. All male primates, at least.

Teacher of Righteousness. Yes, of course, all male primates, although in fact lots of females do it too, hunger for hierarchical dominance. Let’s put that hunger, and Professor Qimron’s scraps of hunger for it, at the left hand extreme of this spectrum. OK?


Teacher of Righteousness. OK. Now let’s put on the extreme right hand end the kind of disinterestedness Steiner talks about and that A. E. Housman talks about in the Introductory Lecture referred to in a below-the-line discussion a few moments ago.74 The love of knowledge for its own sake.

Barbie. But wait a minute. It is not only knowledge that is loved that way, but all kinds of other pursuits as well. Think of the people who collect me, for a start. One of the things I allegorize most is the power of pure play.

Boffin Pundit. Barb, let’s stipulate to all that, as we lawyers like to say. The Teacher is talking about just that, the whole domain of pure play, aren’t you, Teacher?

Teacher of Righteousness. Boffin, you’re finally with the program. And this pure play may be useless, but it has, as Steiner says, its own kind of dignity.75 We naively trust it because it has no designs on us. We put this trust into action all the time without realizing it. We trust our wagon mechanic more because he seems to have a disinterested love for wagons. He wants to fix something right because he wants it to be right. He is loyal to the mania of his choice. We all like to think we feel

73. U.S. Const. art. I, § 8, cl. 8.
74. Refer to note 71 supra.
75. See Steiner, supra note 69, at 184.
that way about our jobs. It finally becomes a moral thing, even though the loyalty is purely formal, purely aesthetic.

Barbie. But that’s the point I’ve been trying to make all this time about my clothes. About my hair. About myself. It’s all about formal loyalties, not about moral models. That’s what all those self-righteous frumps who put me down have never understood.

Author. But, as the Teacher has just made clear, it speedily gets to be a moral issue as well.

Teacher of Righteousness. Yes, and this is where the U.S. Constitution comes in. Somewhere in the middle of our spectrum is the Kingdom of Use, the Pastures of Practical Purpose. That’s the world that copyright law wants to fructify. Are you with me, Boffin?

Boffin Pundit. I’m with you.

Teacher of Righteousness. But the problem is, it doesn’t do a very good job relating the two extremes to each other. It assumes that human motive is concentrated only on the left-hand side of the spectrum, the side where poor Qimron decided to take his stand. This kind of thinking generates all the hysterical declarations that without protection for intellectual property there would be no creativity.

Boffin Pundit. But that’s where the driving forces are.

Teacher of Righteousness. With all due respect, Boffin, that’s nonsense. Human motive lies all across the spectrum, in all kinds of mixtures, but an extraordinary amount of it lies at that right extreme, in the domain of pure play, of love of form for its own sake. And that area copyright law simply ignores.

Author. And so it doesn’t build on a very strong foundation.

Teacher of Righteousness. And so it builds on a very one-sided foundation. That’s the point all the “Copyright Left” types, as they call themselves, are trying to make.

Boffin Pundit. But without the protection of intellectual property, there wouldn’t be an intellectual property, because there would be no incentive to create it.

76. Napster Footnote. As an example, Time-Warner President Richard Parsons says: “This is a very profound moment . . . . This isn’t just about a bunch of kids stealing music. It’s about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy . . . Artists will have no incentive to create. Worst-case scenario: The country will end up in a sort of cultural Dark Ages.”

Teacher of Righteousness. Honestly, Boffin, just stop and think for a minute, will you? How long has copyright protection been going on?

Boffin Pundit. Well, let’s just say from the Statute of Anne in England, 1710, though some people want to push it back further.\[^77\]

Teacher of Righteousness. And what that statute really “incentivized” (to use the barbarous jargon you all use today) was simply *publishing* stuff and not *creating* it?

Boffin Pundit. Well, yes, but . . .

Teacher of Righteousness. And before 1710? No culture? No art? No literature? No philosophy?

Boffin Pundit. Yes, of course there was, but . . .

Teacher of Righteousness. But what? That other extreme has generated the creative power from the beginning. Homer may have sung for his supper, but do you really believe that’s *all* he sang for? Or Virgil? Was it only fame that made him keep fiddling with the *Aeneid* all his life and ask on his deathbed that it be destroyed because he still had not got it right? Or Ovid, poor man (I’ve met him actually, but that’s another story), especially after he had been banished to Tomis and had no reason to write, or even to live? That “play” ground is very high ground, Boffin, and when someone deserts it, as Qimron and his pals did, they’ve cut the ground out from under their own feet, whatever the Israel Supreme Court says.

Boffin Pundit. Now wait a minute. I thought you said earlier that you were a Teacher of Righteousness, not Self-Righteousness. A pretty strong smell of soapbox seems to be wafting around us . . .

Teacher of Righteousness. I know it. I know it. It seems to come with the robe and the beard, somehow. And sitting next to Barbie doesn’t help, either. It heats my imagination.

Boffin Pundit. You don’t think that “credit,” or *fame*, to give it its proper name, matters, then?

Teacher of Righteousness. Of course it matters. They both matter. It is getting them into a harmonious relationship that is the great thing.

Boffin Pundit. So that they create the world of Usefulness in the middle. But I thought Use drove them, that necessity was the mother of invention.

\[^77\] Legal Footnote. These issues are explored in Lyman Ray Patterson’s *Copyright in Historical Perspective* and Mark Rose’s *Authors and Owners: The Invention of Copyright*. *LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE* 143 (1968); *MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 4 (1993).
Author. That’s really the great question, isn’t it? Which direction does the current flow in? Here, let me just draw a quick diagram.

(Before anyone can stop him, he jumps up to the easel and draws a diagram like this.)

Fame ←→ Use ←→ Play

Boffin Pundit. Well, what difference does it make which direction they flow in?

Author. Do you remember our earlier discussion about an economics of attention?

Boffin Pundit. Well, I think I do. Yes, of course I do.

Author. OK. In an industrial economy, the economy of “stuff” that we are used to, and which our laws of property are based upon, flows from the center to the extremes. (He points to the chart he has drawn.) But in an economy of attention, the vital energy flows the other way, from the extremes inward. The polarity reverses. And that’s where copyright really matters. And where the neglect of the “play” end of the spectrum starts to confuse things.78

Boffin Pundit. Because—do I have it right—much of the cultural conversation takes place in the play sphere?

Barbie. Yes! That’s exactly what has happened to me. That is why I have happened. That’s why I’m such a dynamic personality! (She looks around with, not a smirk, but a genuine smile of shared understanding.) That’s where my power comes from. I get both ends of the spectrum working. So really, I model not only clothes but thinking about intellectual property. Ha!

Teacher of Righteousness. Don’t worry, dear, we all love you just as you are. (It is his turn to reach over and give her arm a little pat. She smiles back at him and, in the twinkle of her eye, morphs into Water Lily Barbie.)

Author. Wow!

Boffin Pundit. Wow!

(The Teacher of Righteousness is unable to speak.)

Barbie. (After she has resettled her huge flowered skirt with its deep furbelows cascading down to the hemline and checked on the baroque fountain of blond hair stacked high on her head.) But

78 Reference Footnote. This confusion has prevailed since Herbert Simon’s early paper, Designing Organizations for an Information-Rich World, which appeared in Computers, Communications, and the Public Interest. See Herbert A. Simon, Designing Organizations for an Information-Rich World, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 52 (Martin Greenberger ed., 1971).
I do illustrate how much creativity comes from pure play, from disinterested curiosity that doesn’t care about credit, that just wants to know and to contribute to the conversation.

*Boffin Pundit.* Yes. But you don’t need any incentives for that.

*Author.* Oh, but you do. Copyright law is part of a larger endeavor: maintaining an efficient system of learned communication. The free market of ideas doesn’t just happen. You have to make sure the domain of play is not crowded off the stage by “severely overreach[ing],” to use David Nimmer’s phrase.\(^{79}\)

*Boffin Pundit.* Now you are talking about “Fair Use.” And the global trade metaphor. Courts can’t go around creating protective tariffs for authorial vanity.

*Barbie.* And “unfair” use also has to be protected, if by that we mean people just playing around with form for its own sake, as well as to prove all kinds of cases. It ought to be something more like the Doctrine of Fair Play than Fair Use. My Mattel Chaperones have never understood this, that playing around with me—even when it gets pretty ugly—is part of what makes me the cynosure of every eye, as someone once said, I think.\(^{80}\)

*Teacher of Righteousness.* You’ve said it, dear, and that’s good enough for us.

*Boffin Pundit.* I’d like to change directions here—if we have a direction—but I don’t know how to do it. How can I segue to David Nimmer’s flirtation with Literary Theory?

*Barbie.* I know how! *(She morphs into a black sheath that flares out below her knees with huge wings projecting from each of her shoulders and red hair flowing down nearly to her heels. It is her first really outré, not to say ugly, self, and is generally felt as such, although of course nothing is said. She responds to their unstated feelings nevertheless.)* See? A modicum of real originality, and you all turn into crosspatches. How much originality, then, do I have to display to be just one of my selves?

*Teacher of Righteousness.* Barbie, please . . . Could you just change back into one of the other . . . this one is so . . .

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\(^{79}\) Nimmer, *supra* note 1, at 89.

\(^{80}\) *Barbie Background Footnote.* Barbie here is referring to the “counter-culture” Barbie movement, or movements. It is not something that most of us in the Barbie community like to dwell upon, but facts are facts and need to be faced. These pockets of discontent have led to incarnations like “Teenage Single Parent Barbie” and “Battered Wife Barbie” and “Pregnant Teen Barbie” and to various other kinds of protests against all that she has come to represent—at least as they see it. *See* LORD, *supra* note 13, at 236.
Barbie. OK, OK. (With something between a shrug and a shiver, she contracts her wings and floor-length hair inward into a short bob and a plain white cocktail dress with a blue waist sash. It is very smart and, as we come to see after persistent looking, quite see-through.)

Boffin Pundit. That was a nice transition, Barb, but now that we see where we are, let me go off on a little tangent that has just now occurred to me.

Barbie. It’s a waste of a good transition but we live in the age of hypertext, so how can I object? After all, conversation itself is hypertextual, isn’t it, and that’s what we are having—and talking about. So what’s slid hypertextually into your mind?

Boffin Pundit. Well, it’s the curious division in Nimmer’s essay. Not only the division between the discussion of Qimron v. Shanks and its legal issues, but between Nimmer’s own . . .

Author. . . . two selves? Yes, I noticed that. The lawyer, with his implacable lawyer’s reasoning from cases and the incipient novelist with his . . .

Boffin Pundit. . . . with his many hypothetical cases and . . .

Teacher of Righteousness. Novelist? Surely he’s more in my neck of the woods, a Biblical Exegete.

Author. Well he does argue that the two, literary critic and exegete, nowadays at least, amount to much the same thing. So maybe we can call him a literary critic.

Boffin Pundit. But why does he need the critical section at all?

Author. He’s disturbed, naturally enough, that I’ve been abolished. He feels, quite rightly, that he at least still needs me, and I’m certainly grateful for that.

Barbie. Well, have you been abolished? Are you still there? Where’s there? Who’s you? These are the questions people keep asking me, so it’s a real pip to pass them on to you.

Author. No, no, I’ve only been abolished in a certain part of town. The history of literary criticism is full of such abolitions. It’s how you grow up from your parents. Well, no, “growing up” is too strong. It’s just what you have to do to be original. We all ought to know about originality by now.

Barbie. But you guys have been at it for half a millennium . . .

Author. . . . two and a half, actually . . .

Barbie. Well, whatever, and you still have not got things straight? You just keep on talking?

Author. Well, that’s one of the things that Nimmer takes us to task for, never coming to closure.
Boffin Pundit. Yes, in contrast with the Law, where we move decisively from point to point, decide it once and for all, and then move on to the . . .

Author. You’re joking, of course.

Teacher of Righteousness. You’re joking, of course.

Boffin Pundit. No, it’s just as David Nimmer said. The law must make up its mind. No endless argument, no shilly-shallying around, no appeals ‘til the sun cools down.81

Author. And so the commentary on the law just dwindles and dwindles. Quite. Let’s get back to a genuine point, to me, in fact.

Barbie. Whether you exist?

Author. Just so. Here’s the way it has been, Barb. Literature has always been studied in Western culture, from the Greeks onward. It was Greek and Latin literature, obviously, for much of this time, and it was studied as a training in how to speak and write, the training that goes by the now-discredited name of “rhetoric.” Rhetoric teachers studied . . .

Boffin Pundit. Author, Author, it is a well-known fact that more than half a dozen lines of explication in a dialogue format and the reader gets testy. Even Plato couldn’t always get away with it. So, if you could go below the line for this explication, vital though I am sure it is . . .

Author. All right, all right. I was just trying to explain what has happened to me and to allay Nimmer’s anxiety. But I’ll go below if I must. Come on, Barb, we’ll go together. Those guys can have a cup of coffee—or maybe a non-commercial commercial interruption.

(Author and Barbie step to one side off their marshmallow cushions and drop out of sight, to appear in a crypt-like footnote below.)

—(We are now below the line.)

Author. Actually, it is a little more comfortable here below, Barbie. You don’t have to worry as much about keeping up the dramatic interest.

Barbie. If you say so. But I know a low-rent district when I see one.

Author. So—here’s what happened. Rhetoric teachers studied the text and the postures of performance and the audience. They used all the information that was there to use, but they used it to explain how language worked to persuade

81. See Nimmer, supra note 1, at 205 (noting that “the legal enterprise . . . moves toward resolution”).
people. They trained for the Forum and the Law Court. Harking back to a thread we developed earlier, they were, and still are, the primary economists of attention. When you have to work in those worlds, you use all that is there to use: information about the author, the text, the audience, the time and place. When literature began to be studied outside these pressurized persuasive contexts, when it started getting really theoretical, then it started removing one variable or the other from the complex equation. It made interpretation much easier. I was trained, for example, by the New Critics at Yale. These guys were just emerging from a period when the context was everything and so, to be original, they simply junked that. The text was made the main element in a literary judgment. The author got junked too. It didn't make any difference what the author thought he or she was trying to do. Once an author had published, the critics took over and decided the meaning. And so, as Nimmer mentions somewhere, I think, Authors like me were put on notice. When the next lot of critics came along, they took the logical step and showed me the door. Well, this left them a problem, since somebody had to be writing the stuff—and, besides, obviously nobody had abolished the critical author . . .

Barbie. So we come back to my problem. Who wrote me?

Author. Yes, you are the “paradigmatic case,” as we’ve already noticed. But back to the tedious explication. If the author wasn’t writing the stuff, then who was? There were only two candidates, and both were elected. First, language itself was doing the writing. Poor authors like me just moved the pen back and forth. Or, it could somehow be the zeitgeist, the historical background, that was doing the writing. This took us back, in rather an embarrassing way, to the method that had just been junked a generation or so before. So this was called the “New” historicism, and made the vehicle for a great deal of politically correct allegorizing. Now there has been a change of air, and university professors seem to be teaching the text again, although one never can be sure about these things. The point to be made: theory keeps wanting to eliminate some of the real-life variables, just the way Newtonian physics ignored nonlinear equations until chaos theory came along. As soon as Criticism distinguished itself from Rhetoric, it could be theoretical. David Nimmer argues that the Law has never allowed itself to do this.

82. See id. at 14 & n.43 (commenting that publishing without a valid copyright notice forfeited copyright protection).

83. See id. at 203 (explaining that judges do not have time to redo past doctrine “in light of the latest school of thought”).
I have my doubts, but I’m not competent to speak about this assertion, because I am not trained in the law. In the copyright cases I’ve worked on though—and there have been sixty or so of them—the legal arguments presented went through the same tergiversations that literary criticism has rehearsed. This makes sense, really, because literary criticism and legal argument emerged from the same rhetorical center. And both have followed the same theorizing trajectory. The really smart people have objected to the simplifications, of course. The great American philosopher of rhetoric, Kenneth Burke, said that literary criticism ought to use “all that is there to use” and in fact does so, whatever it pretends to do, whenever it comes to do its work in the world.84 Is this so very different from Justice Holmes’s famous assertion at the beginning of The Common Law?

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.85

Or as Holmes said later: “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”86 Nimmer, somewhere in his piece, quotes George Steiner cautioning us to trust the tale and not the teller.87 The tale of literary criticism has been, if you follow the history of criticism of a particular poem, that literary judgment too depends “on a judgment or intuition more subtle than any articulate major premise.”88

(Author then turns to Barbie.)

Author. Barbie, you’re a good listener, I’ll have to say that.

Barbie. I keep telling you guys that I’m not an airhead. I can listen. You guys are the ones who never listen to me.

Author. OK, OK. Up we go.

84. KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM 23 (2d ed. 1967) (“The main ideal of criticism, as I conceive it, is to use all that is there to use.”).
87. See Nimmer, supra note 1, at 163.
88. Lochner, 198 U.S. at 76 (Holmes, J., dissenting).
(They reappear from between the cushions and take their former seats. The Teacher of Righteousness and Barbie reach out simultaneously for one another and touch hands, then draw back with a twinge of self-consciousness, alarmed at the electricity that flows between them.)

Author. Well, what have you two been doing up here while we were down below?

Boffin Pundit. Getting some real work done, that’s what. We’ve raised $50K in a mini-begathon, and Teacher here has agreed to do the pilot for an author-interview show on religious truth and moral responsibility in the modern world—from his own pre-Biblical perspective, of course. We’ve been needing a high-rent version of our Feelgood Shrink Show for a long time and Teacher here would be perfect. And what have you two been up to down there?

Author. We’ve solved the Vanishing Author Mystery, that’s what. Nimmer doesn’t have to worry. Criticism, and literature too, can’t really do without an author any more than copyright law can. And both end up using all the information that is there to use, whatever their theoretical protestations to the contrary. And both have to make up their minds at least sometimes, but avoid doing so whenever they can.

Boffin Pundit. Well . . . I’ll stipulate to that now, so that we can get on to the last big issue Nimmer brings up. Time is running a little short. The argument that copyright protects what has been created as fiction but not what has been created as fact?

Author. Well, now that I exist again, maybe I can lead off on this point without fear of . . .

Boffin Pundit. . . . Without fear of interruption? Absolutely!

Author. Nimmer says that “[c]opyright protection requires the subjective choice of an author in order for protection to lie.”89 Our creative juices have to lie on an “aesthetic[] plane.”90 For a literary critic, there are a couple of problems with this. For example . . .

Barbie. For example, me. Do I lie on an aesthetic plane? I’m a doll, yes, but I’ve always been marketed as a real person, albeit a fictional one, not a doll. And yet I am an actual physical doll and can be trademarked, at least partly. When little girls play with me, I am at the same time a physical presence for them and something that they recreate in their own imaginations. And so I can appear here, as a real-life fictional creation. What plane am I

89. Nimmer, supra note 1, at 22.
90. Id.
on then? When all those dreadful counter-culture warriors stick pins in me and put my head in the oven do I exist for them on the aesthetic plane or the plane of fact?

Teacher of Righteousness. And what about me? There’s some historical evidence for me, muddled though it be. And here I am, too.

Author. Yes, I think Nimmer has his feet in the marmalade here, at least from a literary point of view. You could bring the same questions up against me. What exactly am I, etc., etc. But I’ve in mind a different distinction, and one which goes back to our earlier discussion about an economics of attention and the changes that brings.

Boffin Pundit. When you were arguing that Qimron understood this change and the rest of us didn’t?

Author. Yes. Is it not the case that in an economics of attention, Nimmer’s “facts” and “aesthetics” change places? If that is the case—and I think that it is—then the whole distinction gets stood on its head.91

Barbie. Back to my problem again. If stuff and attention have changed places, then I’m realer than my plastic. Well, I’ve always thought so.

Author. It does return us to where we have started—Qimron and the economics of attention which invited him to make a grab at owning the conversation.

Boffin Pundit. But we haven’t confronted Nimmer’s main question!

Barbie. Yes. My question! How much originality does it take for me to be Me, or at least one of my me’s? Speaking of which, let me get back to where I started. (She morphs back into Dungarees-cum-Blouse Barbie.)92

Author. Barbie, that’s one that we can’t answer. Copyright law won’t allow us to, because it won’t allow us to consider

91. Author’s Footnote. Author talks about this at greater length in his Michigan Quarterly article. Lanham, supra note 18, at 271–72 (explaining that in an information economy, information is the scarce resource and that human attention is needed to make sense of information).

92. Rhetorical Footnote. Barbie’s return to mufti here at the end should not blind us to her true identity. She is Dame Rhetoric and will change into another beautiful costume any minute. Readers with a serious attention surplus on their hands may wish to pursue the relationship between Rhetoric and Righteousness in Author’s essay The “Q” Question. RICHARD A. LANHAM, THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY, AND THE ARTS 154–94 (1993) (explaining that rhetoric is used for both good and evil). On second thought, maybe I should explain who “Dame Rhetoric” is. The Greeks thought that persuasion was important enough to make a goddess of her: Peitho, the goddess who incarnated the Art of Persuasion. In the Middle Ages, she became “Dame Rhetoric,” an icon who almost rivaled Barbie in popularity. You might almost think of her as “Dame Style.”
aesthetic quality, and that’s what makes for originality, in little or in large. This is not to say that judges and juries don’t consider it anyway. Aesthetic merit has been the dog that does not bark in practically every case I’ve worked on. At the end of the day they all use the “Emily Dickinson” test and return to the kind of subjective judgment which allows us all to use all the information there is to use, and not simply all the evidence.

Boffin Pundit. But can’t we do a little better than that with Nimmer’s main question—What is the fundamental “atom” of protectability? We can at least see why it is so hard to answer. It comes directly from the effort to map an economics of stuff onto an economics of attention, as Andy Warhol pointed out in his famous apothegm.

Barbie. That in the future everyone will be famous for 15 minutes?

Boffin Pundit. Yes. Warhol took the egalitarian premise that human goods should be equally divided among all the people of the world and mapped it onto the economics of attention, where it becomes silly. It doesn’t fit because the atoms of the one economics are not the same as the atoms of the other. The centripetal gaze—the gaze you live by, Barbie—won’t permit of democratization.

Author. Yes, I think I can explain why . . .

Boffin Pundit. No you can’t, Author. Our deliberations will have to end here, good friends, or we’ll exhaust even the patience of public television. So, until we meet again in the aether, thanks to all and to all a Good Night.

(As the camera pulls back, Barbie and the Teacher of Righteousness exchange meaningful looks. The meaning of those looks it will not be given us to know, alas, but Righteousness and Beauty being condign companions, we may hope for the best.)

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93. Emily Dickinson remarked once that she knew poetry when she saw it because it took the back of her head off. Emily Dickinson, at http://www.galegroup.com/freresrc/poets_cn/dicknbio.htm (last visited Feb. 26, 2001). This test can serve to represent several legal tests which depend, finally, on the pure impressionism of judge or jury.