

Authors, Editors, Originality and Antiquity

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The Dead Sea Scrolls began to be discovered in 1947 in caves at Qumran on the West Bank, and were thereafter mostly held at a museum in East Jerusalem. In 1967 the museum came under Israeli control following the Six-Day War, but political changes left unaffected the work of an international team appointed in 1953/4 to transcribe, edit and publish the especially rich collections of fragments found in Cave 4 at Qumran. Work proceeded very slowly, and scholars outside the team were denied any access to the unpublished Scrolls, leading to increasingly hostile criticism from outsiders. One of the most important of all the texts to emerge from Cave 4 was the *Miqsat Ma‘aseh ha-Torah* (4QMMT), a Halakhic or legal writing which existed in six fragmentary versions, none complete. Editing this text for publication was assigned in 1954 to John Strugnell, joined around 1980 by an Israeli scholar Elisha Qimron, who rapidly became the main mover carrying the task towards completion. The text’s existence became public in 1984, copies circulating thereafter in the academic networks of Strugnell and Qimron. An unauthorised publication in 1990 by the Polish scholar Zdzislaw Kapera was subsequently rapidly withdrawn after challenge. No further publication or authorised wider circulation of the editors’ text had occurred when in November 1991 a book entitled *A Facsimile Edition of the Dead Sea Scrolls* and edited by Hershel Shanks with others was published in the USA. As well as photographs of large numbers of the Scroll fragments (including those worked upon by Strugnell and Qimron), the book included a ‘Publisher’s Foreword’ written by Shanks. The draft text of 4QMMT as edited by Strugnell and Qimron appeared in an appendix, but was attributed in Shanks’ foreword only to the former “with a colleague”. Neither Qimron or Strugnell had consented to this, and Qimron raised an action in the Jerusalem District Court against the *Facsimile Edition* participants for infringement of copyright and moral rights. In March 1993 this claim was upheld by the District Court (Justice Dalia Dorner), and over seven years later, in August 2000, that judgment was in turn upheld by a unanimous Supreme Court of Israel. As well as an injunction, Qimron was awarded damages for both pecuniary and non-material losses. In the meantime Oxford University Press had published 4QMMT with attribution of editorship to both Qimron and Strugnell but attributing copyright only to Qimron. This claim has no parallel in any other OUP edition of the Scrolls, where copyright is always claimed by the Press; it is doubtless to be explained by the need to avoid apparent concessions against Qimron’s interests in the context of ongoing litigation.

The whole saga led to debate, not only within the world of Scrolls scholarship, but also that of copyright law. For scholars the issues are essentially about academic freedom, access to unpublished sources, the exchange of knowledge and information ahead of publication, and even freedom to use source material once published. The judgments seem to place significant constraints upon all these customary forms of academic behaviour, with copyright law the principal means towards this end. Is copyright then incompatible with ordinary scholarly activity, at least in fields like those of the Dead Sea Scrolls? For copyright lawyers the case is yet another example with which to test fundamental principles: in particular, given that copyright protects and rewards authorship, what constitutes

authorship for these purposes? Even more fundamentally, should authorship, whatever it means, be the starting point for copyright?

Most of the published comment has, however, been from the perspective of US law. While at first sight surprising, given the Israeli location of the case, this perspective is entirely legitimate. The parties initially agreed that any infringing activity had been in the USA and that accordingly US law applied. But Justice Dorner was offered no evidence about US law; and so she took it to be the same as Israeli law, justifying this further on the basis that both laws sprang from the same root in English law. While Israeli copyright law at the time was indeed based on the British Copyright Act 1911, US law had not followed its UK counterpart for some 200 years; so it is not very surprising to find some US copyright lawyers differing from the judge's view of the case. The Supreme Court further clouded the issue by deciding to apply Israeli law directly, on the basis that the *Facsimile Edition* had been marketed and three copies sold in Israel, so that there were infringing acts in the country. On this somewhat tenuous basis US law became irrelevant to the decision-making process.

It is however not enough to damn the decision of the Israeli courts that a US court might have decided otherwise. After all, the judgment may well be correct as a matter of Israeli law, of which its courts may be taken to be the masters. But an international and comparative perspective may be preferable for examination of the general questions arising. US copyright law's special features may make it not the most reliable guide to how the 4QMMT dispute would or should have been resolved elsewhere. Thanks to Britain's imperial past, its copyright law has influenced that of Israel. I have noted elsewhere that the Israeli decision is unsurprising to one brought up in the British copyright tradition, while observing that a different result again might well have been reached in Continental European countries. There the general position is that the person who edits and publishes some pre-existing unpublished work is not deserving of author's rights of protection. What lies behind this apparent diversity of view and how, if at all, may it be resolved?

Copyright's minimum content has been shaped since the late nineteenth century by the Berne Convention and, more recently, by TRIPS and the WIPO Copyright Treaty 1996 (WCT). Most countries in the world are now members of Berne, with its stated aim of "protect[ing], in as effective and uniform a manner as possible, the rights of authors". In the Continental European systems, the right is named 'author right' – *droit d'auteur*, *Urheberrecht*, etc. Author protection is in the foreground of the development of the law internationally.

The core principles of copyright material to this lecture would generally include the following. The author is the first owner of the copyright in a work. The protection operates for the benefit of the authors of such works and their successors in title. The author's rights are a basis for decisions on whether to publish or not, or to permit others to do so, usually for financial return. Copyright is thus the means of converting the author's work into a marketable, revenue-earning product, but only should that be the author's wish; it may alternatively be a basis for maintaining the author's privacy, since there is no obligation to publish. Unlike patents, which are granted upon public disclosure of an invention, the existence of copyright is not dependent upon public access to the work.

Even if the author transfers the exclusive rights outright to another, however, she remains possessed of what are known as the moral rights, in particular the right to claim authorship of the work (attribution or paternity right). Here the rights protect the link between the author and the work. The underlying idea is that the work is an aspect of the author's personality. Hence also the inalienability of moral rights: they belong to the author or her heirs, no matter who owns the economic rights.

Within these parameters of principle national law-makers may elaborate the detail for local application. Moral rights are recognised only to a very slight degree in the USA, much more significantly so in the UK, and most vigorously in the Continental European tradition.

There is no doubt that historically, and indeed still today, copyright law gains much of its moral force and justification from the sense that it is for authors and supports their creative contribution to society's well-being. But despite this the Berne Convention – and, following it, most national laws - contain no explicit indication of what being an 'author' means. Most national legal systems require a further element before recognising an individual's work as having copyright, namely the "originality" of the person's contribution in the Anglo-American tradition, or its "intellectual creation" in the Continental European one. What this means in effect is that the work's expression can be attributed to the author rather than anyone or anything else – the causal link. In the Anglo-American tradition this is stated rather negatively – the expression is not copied from another source but is rather the result of the author's own effort – while in the Continental tradition it is given a more positive spin – the work reflects an individual's creativity to at least some minimal degree. The latter is usually seen as posing a slightly higher hurdle for authors to cross.

Article 9(2) of Berne openly invites the national law-maker to "permit reproduction of .. works in certain special cases, provided that such reproduction does not unreasonably prejudice the legitimate interests of the author". There is wide variation in national laws' responses: while the USA has a broad 'fair use' doctrine interpreted through court decisions, the UK allows 'fair dealing' only for specified purposes such as private study, non-commercial research, and (with regard to published works only) criticism and review, although this is supplemented a little by narrowly interpreted judicial notions of 'public interest' and 'public policy' as very occasional limits upon copyright enforcement.

The truth of the matter, however hackneyed it may be, seems to be that copyright law, like human rights, is indeed a matter of 'balance' between distinct, sometimes competing, interests; a balance that law-makers and courts must strive to maintain, however difficult finding it may be at any given moment or in any given case.

The application of Israeli copyright law to the dispute between Elisha Qimron and his American opponents was a matter of more or less complete agreement between the judges who considered the case. They were clear first that more than mere expenditure of effort and skill was needed for original authorship. Justice Dorner saw Qimron's work on 4QMMT as crossing the line once it got beyond transcribing the text (however difficult and complex that might be) or physically fitting together matching fragments, and began instead to draw upon the Halakhic and linguistic research which informed the fitting together of non-matching fragments and the reconstruction of large quantities of missing text. Different scholars could have taken other views on such matters, and the judge instanced Strugnell's disagreements with some of Qimron's conclusions. The Supreme Court agreed with Dorner's conclusion but took a less segmented view of a process which, looked at as a whole, amounted to authorship: "a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and chose between alternatives."

These conclusions of the Israeli courts have provoked the severest criticism from American commentators who take as their starting point Qimron's undoubted aim of reproducing exactly what had first been written down as the text of 4QMMT. From this perspective, Qimron had merely reproduced a fact: what someone else had written 2,000 years before. Qimron could claim no expression as subjectively his. Nimmer argues from Qimron's own published accounts that his method was not open subjective choice between alternatives but rather the application of objective criteria

derived from the surviving sources to determine what else the author of 4QMMT must have written. While not copying, it was equally not subjective expression by Qimron.

The disturbing feature of this powerful argument is, however, the strange conclusion to which it leads: that there will be copyright in a reconstruction only when the scholar can be shown to have erred (i.e. failed to achieve the fact of the original text), or to have decided on wholly personal or subjective grounds having no supporting objective scholarly criterion to introduce material into a work in a more than de minimis way. In Nimmer's own words:

Copyright law would ill serve its premises to the extent that it barred first-class scholars from shelter but accorded rights and remedies to inferior scholars. ... No sensible interpretation of the law can support such a pointless result.

For Nimmer, it seems, the answer to this conundrum lies in denying all reconstructive editorial work copyright unless the editor can demonstrate that as a result of the work's flaws and editorial weakness there is such a legal entitlement. With respect, this seems a roundabout way of providing support for scholarship. A better alternative, accepting that the Urtext content is a fact, might be to presume that all reconstructions, no matter the scholarship with which they are produced, fail to achieve what they pursue, and so have copyright. The presumption may be supported by the probability, or even certainty, that none of the surviving fragmentary copies is the manuscript first written down, so that the basic raw material upon which the scholar works is itself most likely not a perfect reproduction of that text.

Further points against Nimmer might be the lack of any bright line between objective criteria and subjective intent in matters of scholarship, while the objective criteria of editorial work have themselves emerged over time, indeed are probably still evolving. So the distinction may not be the most helpful way of defining the elusive element that carries effort into the realms of original authorship, with copyright in the results. Asking instead whether the work is purely mechanical in nature may be more useful. Simple transcription or photocopying of an entirely legible twentieth-century typescript might be a relevant editorial example of excluded matter to set alongside such instances from the copyright case law as tracing the outline of a drawing. If the input is more than the straightforward application of an established technique, and if it is relevant to the production of a written expression, then, it is suggested, we have authorship, not copying or the reproduction of a fact.

So, for example, copyright law generally accepts that a translator is an author, entitled to copyright in her translation, (even although, as previously noted, she must first seek the permission of the author of the translated work if still in copyright). A much more marginal example is the old English case of *Walter v Lane*, where the House of Lords held that a reporter who took shorthand notes of an otherwise unrecorded speech by Lord Rosebery and published a transcript from those notes exercised sufficient independent skill and labour to have copyright in his work. Palaeography as distinct from simple transcription raises other tricky questions. Some difficult issues have also been posed recently by the process of digitising manuscripts and images (including the Scrolls) for publication in CDs or on the websites of public and commercial libraries, archives, museums, and galleries, especially where the originals are out-of-copyright. Courts in Continental Europe and the USA have been divided over whether the skilled photographic processes involved in making high-quality reproductions of these originals have been enough to create a copyright in the digitised image. The position in the UK would seem to be that a digitised image has copyright in its own right, irrespective of the rights in the underlying subject-matter; but this is controversial.

Israeli law has since 1981 included a moral right of attribution for authors: that is, a right to be named in reproductions of their works. Having held Qimron an author, the courts then easily found the publication of his draft text in the *Facsimile Edition* without his name alongside infringed the attribution right. The reference in Shanks' foreword to a commentary on the text as the work of Strugnell "and another colleague" being inadequate. The Supreme Court took the view that since Shanks knew of Qimron's contribution this anonymous reference to him was "contempt and mockery of the poor"; but even if the court had accepted Shanks' claim that his target was Strugnell, and that he "did not want to be critical of a young untenured Israeli scholar", this would have made a difference only to the amount of damages payable, not to liability for moral rights infringement.

Nimmer's critique of this aspect of the case is based upon US law where, as already noted, moral rights are significantly weaker than anywhere else, and where, perhaps, Qimron would only have had a claim had the *Facsimile Edition* been guilty of a *misattribution* of the text to some other person. US law here is wide open to the charge of non-conformity with Berne's international norms. There may be scepticism about the Israeli court's colourful expressions of outrage on Qimron's behalf, but undoubtedly measurement of the damages for infringement of the attribution right must start with the impact upon the author's non-economic interests in the association between him and the work. In this assessment consideration of personality-based matters such as hurt to feelings and invasion of privacy is legitimate. The question of whether or not the work has already been published with an attribution, much discussed by Nimmer, is strictly irrelevant, however. As Ricketson and Ginsburg put it, one of the "major situations in which the author should be able to invoke [the attribution right]" is "where a licensee, assignee, or other party does not make any reference at all to the author on copies of the latter's work (these copies could be authorized or unauthorized)". The Israeli courts are not even unconsciously driven by any supposed academic convention regarding an *editio princeps*, but by a straightforward application of moral rights doctrine.

Only in the Supreme Court was the possible application of copyright exceptions to the *Facsimile Edition* publication considered. At the time Israeli law followed the UK model with a concept of 'fair dealing for purposes of private study, research, criticism, review or newspaper summary'. The Supreme Court held that the defendants' dealing with Qimron's work was unfair: the text was "swallowed among the appendices ... without comment, explanation, criticism or any reference to its content". Nor was the publication 'newspaper summary'; the publication was not presented as news for its readers, nor was there any summarising of the text. "[T]he primary purpose was to publish the Deciphered Text in defiance of the research 'monopoly' given to the international team of scholars".

Arguments for a different result under the US law of fair use are doubted by Nimmer – rightly so, it is submitted. The Israeli courts did consider as a question of 'judicial policy' whether the enforcement of Qimron's copyright ran unacceptably counter to the "unrestricted flow of research work amongst the scholarly community". Justice Dorner dismissed this as confusing the right to carry out research with the aid of published works, with taking another person's work without consent or due acknowledgement. In the Supreme Court the policy defence was argued on a still wider basis: Qimron's copyright gave him a monopoly over an element of Jewish cultural heritage and would deter scholarship on the text, thus harming the public interest. The court had little difficulty in rejecting the argument. The copyright was in Qimron's reconstruction, not the underlying raw materials, which continued to be available for others to research. On the restriction of scholarship, the court noted that legislation provided the fair dealing exceptions already discussed above, and concluded that "these exceptions in the [Copyright] Law are sufficient in order to ensure the freedom of academic research".

The courts' conclusion that Qimron's text of 4QMMT was his copyright work is one with important limitations. So for example the Supreme Court was clear that "the Scroll fragments are today in the public domain and may be used by all in the sense that anyone who wishes to attach them (*sic*) and to decipher them is permitted to do so". The Supreme Court was also clear that Qimron's text, once lawfully published, could be used by others for fair dealing purposes, of which perhaps private study, research, criticism and review are the most significant in the academic context. The decision therefore cannot reasonably be interpreted as making future 4QMMT scholarship subject to Qimron's sole control; nor does that seem to have been its effect in reality, other than perhaps to restrict translation or inclusion in anthologies of the whole of the published text. Of greater potential significance is the right (not Qimron's) to restrict access to the Scroll fragments themselves; but even this seems considerably diminished, if not entirely removed, by the publication of, first, photographic and, more recently, digital images of the entire corpus of documents, which have undoubtedly enabled Scrolls scholarship to progress far more rapidly in the last two decades than in the previous three.

Some aspects of the Supreme Court's view that the Scroll fragments are in the public domain so far as copyright law is concerned may however be challenged. At least in British and US law, an unpublished manuscript has a copyright which belongs to the author and her descendants. Until quite recently in both countries that copyright was of indefinite duration; but the most recent general legislation in each has set in motion timetables under which copyright in all unpublished material that existed at the time the statutes came into force would expire at particular future times. Unpublished material coming into existence later is subject to the ordinary rules on duration of copyright. Since Israeli law was until 2007 based upon the British Act of 1911 the earlier rules presumably applied to 4QMMT and all the other Scroll material. The new Israeli legislation has nothing to compare with the 1988 Act provisions in the UK but simply states that copyright subsists for the author's lifetime plus 70 years, leaving the position of the manuscript created before the law came into force unclear.

If there is a copyright in the original text, the problem arises of identifying its owner. The writer of 4QMMT has been identified by some as the "Teacher of Righteousness", but we have no idea of his identity or about his descendants or successors today. The Scrolls are therefore a classic example of what is nowadays often known as an "orphan work", ones where the current owner of a copyright cannot be identified. Copyright systems typically have rules to enable the otherwise unauthorised reproduction of such works in certain limited circumstances, usually involving at least reasonable inquiry in pursuit of a person entitled to give authorisation or to justify the conclusion that copyright has probably expired. The relevant laws are not very satisfactory, and are under review in many parts of the world to facilitate mass digitisation projects for older printed material. Part of the solution may be a clarification that documents written before copyright was invented are unequivocally in the public domain.

A final point mostly left implicit in the judicial discussion is the author's right to control public disclosure of her work, which takes different forms in the world's legal systems. In the UK, for example, publication generally needs the author's consent, and there is no obligation to publish. Following amendment in 2003, the fair dealing rules now also expressly prevent quotation for criticism and review unless the quoted work has previously been lawfully published. In France the law goes still further: the author has the right (*droit de divulgation*) to prevent disclosures going beyond publication, such as exhibitions or other public presentations, and to choose whether or not the work should ever be disclosed. The right, classified as moral, does not extend to enabling the author to compel the publication or other exploitation of her work by others. It survives the author but unless while alive she made clear that a work should never be disclosed, those who wish to publish it may be able to challenge her successors when their refusal to disclose amounts to *abus de droit*. Ricketson and

Ginsburg argue that the right of disclosure may be implied from the express provisions of the Berne Convention. Thus it seems that in general principles of copyright law enable those held to be authors, such as Qimron, the right to control when, if ever, their work may be first revealed to the world. French case law and juristic writing explores inconclusively whether the right extends to different types of disclosure or merely enables the author to control the first public disclosure of any kind. Nimmer argues that this might be relevant where, like Qimron and Strugnell, authors make disclosure of initial drafts to a limited circle of colleagues in order to obtain their comments on the work; but probably this is not public disclosure any more than it is publication.

Almost all the issues debated in *Qimron v Shanks* were re-ventilated in 2004/2005 in the English case of *Hyperion Records Ltd v Sawkins*, which was about Dr Lionel Sawkins' modern performing editions of seventeenth-century French baroque music by Michel-Richard de Lalande. Hyperion made recordings using the Sawkins editions but refused to pay copyright royalties for this reproduction, arguing that the editor had no copyright in his editorial work on an otherwise out-of-copyright work. Sawkins had constructed the editions from a range of manuscripts and printed sources, very little of which was directly from Lalande's own hand. His aim was "to reproduce faithfully Lalande's music" and "he had no intention of adding any new notes of music of his own", although he corrected some of the notes given by his sources and supplied parts missing from the versions available to him. Lalande was known to have revised much of his work, so Sawkins had also to decide which version to use. He had further to transform the notation into modern forms, supply figuring not in the source material, and work out scores for choral and individual orchestral parts for players. To do all this Sawkins used "his palaeographical and creative musical skills coupled with his knowledge of the period and the composer's style ... making informed assumptions". Although not mentioning *Qimron v Shanks*, the four judges who considered the case either at first instance or on appeal were unanimous in reaching the same result as their Israeli brethren: Sawkins was an author, his editions had copyright, and the making of the recordings without his consent was an infringement of those copyrights.

The analysis of the English judges focused not so much on the question of authorship as such, as on the originality (in the copyright sense) and nature of Sawkins' work as music. Originality existed inasmuch as he did not copy his reconstructive work from any other source, and a "high degree of skill and labour was involved". Lord Justice Jacob commented further:

He re-created Lalande's work using a considerable amount of personal judgment. His re-creative work was such as to create something really new using his own original (not merely copied) work.

The judge also observed:

[T]he true position is that one has to consider the extent to which the "copyist" is a mere copyist – merely performing an easy mechanical function. The more that is so, the less is his contribution likely to be taken as "original".

Since the sounds produced by performance of Sawkins' editions were affected by his editorial input, his original contribution was a musical one, and not merely writing a score.

Overall, these conclusions confirm the correctness of the argument that in the British copyright tradition reconstructive editorial work of the kind carried out by Elisha Qimron will be protected by copyright. The court also held that the controversial case of *Walter v Lane* was still good law, although Sawkins' claim of authorship seems anyway stronger than that of the shorthand reporter. The court

took passing note of Sawkins' success in litigation in France in defence of another Lalande edition against unauthorised recording. The Tribunal seems to have seen Sawkins' compositional work as transcending the usual Continental view denying the editor, as a mere imitator, the status of an author.

Unlike the parties in *Qimron v Shanks*, there was a pre-existing relationship between Sawkins and Hyperion such that the offending recordings were made with the former's knowledge. Their difficulties began during negotiation of the contract under which the recordings were to be made. The point in dispute was whether or not copyright royalties should be paid to an editor of an out-of-copyright work. The pre-existing relationship led to an echo of *Qimron v Shanks* on the question of the moral right of attribution. Hyperion issued the CD with the statement "With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording". Since this did not identify Sawkins as the author of a copyright work, the attribution right was held infringed. Moreover, Sawkins had previously 'asserted' his right (a requirement of the UK law of moral rights) with a letter during the negotiations in which he stated that the CD sleeve notes should bear the legend "© Copyright 2002 by Lionel Sawkins".

Finally, Hyperion ran an argument based on public policy: recognising editorial copyright in modern performance editions of ancient music would damage the public availability of performances and recordings of such music, since the cost of making them would increase, with adverse effects for the record industry, performers and orchestras. In rejecting this argument the Court of Appeal held that public policy actually favoured the editor. In the words again of Lord Justice Jacob:

[T]he sort of work done by Dr Sawkins should be encouraged. It saves others the time and trouble of re-creation of near-lost works, but in no sense creates monopoly in them.

Taken as a whole, the story of this case well illustrates how copyright gives the author something with which to bargain with publishers and performers, and is a means of providing financial rewards for work of relevant kinds. The publishers and performers can recoup the costs from sales of, respectively, the resulting publications and tickets to attend the performances. It is also worth noting at this point that although Sawkins had once been employed as a music lecturer at the Roehampton Institute, from 1985 he was an independent scholar, reliant for his living upon the ability to turn his Lalande expertise into remuneration.

The fundamental copyright issue in the Dead Sea Scrolls case was what constituted authorship. Nimmer argues eloquently that what he calls 'intent to author' is copyright law's ultimate test for protection, with the strongest example being "when an individual intends to produce subjective expression unconstrained by external determinants of that expression", but cases of "partial constraint" where the person still makes subjective choices (for example the translator of a foreign language text selecting the way in which best to convey the sense and meaning in another tongue) also being included. When there is intent to operate in uncopyrightable realms (Nimmer gives examples such as sporting events), or (as in the case of *Qimron*), no intent to introduce subjective expression at all, there is no authorship in the eyes of the law and, as a result, no copyright protection either.

The most profound response to this argument has been provided by Jane Ginsburg, another American scholar who however works from a broad comparative rather than the purely US perspective offered by Nimmer. (But note that Ginsburg disputes Nimmer's view as a matter of US law too.) She cites cases of 'accidental' authorship, listing inter alia images generated by bad eyesight or frustrated flinging of sponges (to which perhaps we might add texts resulting from bad or careless keyboard work, and Dadaist art). There are also cases of persons giving expression to matter while claiming that

it results from some form of spiritual or divinely inspired possession; in such cases both US and UK law have nonetheless firmly attributed authorship to the person physically responsible for the expression. Ginsburg argues that ‘intent to author’ is but one of many principles used to attribute authorship in copyright systems. Others include the idea that an author “conceives of the work and supervises or otherwise exercises control over its execution” but is not necessarily the person who writes it down; so for example an amanuensis is *not* an author. Again, a person using an implement or machine such as a camera or a word processor to create a work becomes less and less an author the greater the role played by the machine in the work’s production. Originality is synonymous with authorship, even if legal systems vary over what amounts to originality, and it follows that to be an author a person need not be creative but must exercise skill and labour that is more than negligible. This means that “reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are *copies* of pre-existing works”. She adds:

The proposition that skilled reproductions are works of authorship rests on a straightforward observation: if you or I could not create/execute this reproduction, it must be copyrightable, and its producer therefore must be an “author”.

The overall thrust of Ginsburg’s principles is clear, despite an absence of reference to *Qimron v Shanks*: reconstructive editorial work is that of an author.

I agree with this conclusion, and not merely as a matter of the correct application of UK copyright law. The editor’s contribution merits legal recognition. This does not extend to every element of editorial labour: the ‘banausic’ or pre-expressive aspects, such as the identification of potential sources, physical preparation of the source for use, basic transcription (although the claim of the palaeographer-editor to be exercising a more than mechanical skill should not be under-estimated) and, in the case of musical works at least, layout of notes on a page, clearly do and should fall outside the scope of copyright. The law is engaged with the end result, or the final expression – the editor’s literary text or musical score.

The argument for author’s protection for editors may be reinforced by consequentialist reasoning, always legitimate when considering issues at a policy level. Suppose that rights are denied to an editor doing her best to produce as accurate a version as possible of what some previous author actually wrote or intended to write. As already noted, the editor told that the more she strives for accuracy the less likely she is to enjoy the benefit of copyright may be incentivised thereby to introduce embellishment and error into her work, so undermining scholarship. Again, when it came to negotiating with publishers about publication, the editor’s only bargaining tool would be the present physical inaccessibility of the work. Thus the secreting rather than the sharing of work in progress would be advisable; while subsequent scholarship would lack incentive to improve upon any previously available edition through new work on the original sources. Across the negotiating table, the publisher who knew that the editor’s work was inevitably already in the public domain so far as copyright law was concerned might well feel disinclined to make significant investment of resources in producing and marketing a work with probably a very limited public appeal if a rival could step in at any time with an undercutting publication. Even subsidised publishers need some lead-time in the marketplace to recoup the outlay involved in making the work available. A final point might be that publication is important, not only to making the work available to anyone interested, but in helping others to acquire the skills that will enable them to become the next generation of textual editors.

It could of course be argued that all this over-emphasises the economic dimension, and that the scholar does not respond so much to economic incentives as to the disinterested pursuit of knowledge

and (just possibly) reputation and peer esteem. Be that as it may, it should be noted nevertheless that such scholars are usually operating from the relative comfort of a salaried position in a university or equivalent institution and so do not 'live by the pen' in quite the same way as the freelance author or independent scholar of the type exemplified for us by Lionel Sawkins. Again, the economics of academic publishing may be changing in the digital environment, where 'open access' and 'author pays' models are emerging and there may in consequence be less dependence on the ability to sell hard copies (whether books, CDs or some other medium) in the market place to ensure the viability of publication. But the author who pays to publish will still probably want the protection of copyright, to ensure that the publication for which she paid is the one to which readers must turn for the benefit of her work, whether or not any financial return is gained as a result. Certainly moral rights, both of attribution and integrity, will remain extremely important in this and the open access model, along with the right to determine the timing and nature of public disclosure of the work, whether that be seen as an economic or a moral right.

Lastly, the existence of copyright in an edited text does not enable the right-holder to 'lock up scholarship' or prevent access to the material. The very act of publication precludes this, since copyright law does not bar anyone from reading, and the work may be used for private study and research, or quoted from for purposes of criticism and review, so long as that amounts to fair dealing. There are however other possible threats to these liberties in the digital environment in particular, since commercial electronic publications are commonly protected against any unlicensed use (including perhaps that which might be fair dealing) with technological protection measures backed up by rights management information systems. But even these threats are regulated by law, although that regulation cries out for clarification and improvement. Scholarship is thus not endangered so much by copyright as by general ignorance and misunderstanding of its content, over-zealous attempts by government and right-holder interests to enforce what is taken too unquestioningly by others to be the law, and unnecessary law reform designed to bolster interests which in general are not those of the author other than in the most marginal sense.