Originality and Creator's Intent in Anglo-American and Israeli Copyright Law

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Abstract

This article proposes that the attempt to determine whether a work withstands the originality requirement in copyright law may be aided by investigating the creator's intent with respect to the nature of her creation. Such objective or subjective intent may be derived from the nature and circumstances of the creation. Courts should examine how creators themselves, view their creations and how they intended them to be received by the broader public. Absent a known subjective intention with regard to the nature of the work, the objective intention test should examine objective evidence relating to the work and determine how the work is viewed by the public. By means of the discussion of a unique test-case regarding the modern reconstruction of ancient texts, we will demonstrate how the adoption of the creator's intent test may assist in precisely classifying the nature of many works in cases to be discussed by future courts.

Introduction

Copyright law inevitably focuses on an author's original contribution to a copyrighted work. The originality requirement is a threshold test, indicating that a work is not required to be novel or unique in every way, but it must include a creative spark in order to merit protection. The determination of the originality threshold holds significant consequences for the copyright system. Originality is primarily determined by the level of creativity and original expression contained in a copyrighted work. The originality of a work is evaluated based on objective criteria, demonstrated in the work's expression, composition, or arrangement. Generally, the intention of the creator—that is, the purpose or goal that the creator had in mind when creating the work—is not considered a crucial factor in establishing originality in copyright law. Rather, the originality of a work is evaluated based on its creative expression and not on the creator's intention.

This Article proposes that the creator's intent should receive a more central role in the establishment of copyright protection as part of the originality requirement. The requirement of originality is not codified in legislation but is a subject of jurisprudential analysis in many systems of law. A fascinating example that contributes to our understanding of the originality requirement emerged in a unique Israeli case that concerned the reconstruction of the Dead Sea Scrolls, written in the first century in the land of Israel, discovered in 1948 by a Bedouin shepherd, and reconstructed by contemporary scholar Elisha Qimron.[1] The case concerned the deciphering of the original text of one of the scrolls, which was written by a sect that lived in caves near the Dead Sea in the first century CE. Elisha Qimron, a professor of Hebrew language, obtained fragments of the scroll and spent 11 years deciphering and reconstructing them. During that time, the text of the fragments, together with the reconstruction of the original text, was leaked and published by another scholar. Qimron sued, and the subsequent case raised extremely thorny questions regarding the nature of the original text and the significance of Qimron's labour in attempting to reconstruct a text written two thousand years earlier. The judgment in the *Qimron* appeal presents an important analysis of the requirement of originality. By focusing on this unique case by the Israeli Supreme Court, we demonstrate the importance of considering author intention and discuss how the intention requirement can be applied in many cases of United States (US) copyright law.

The first part of the article begins by presenting the requirement of originality in comparative law, American and English law. The following section then examines the *Qimron* case and the remarkable questions it raises regarding the originality requirement. In the next section, we present the creator's intent test in copyright law and demonstrate how its application to the *Qimron* case and to judgements from other legal systems may create greater precision in identifying original work to be protected by copyright. The final part then addresses challenges to the creator's intent test, followed by a conclusion.

The originality requirement in Anglo-American law

Originality is a prerequisite to copyright protection. The originality requirement has changed over the years and reflects different copyright theories and justifications for copyright protection in each legal system.[2] The prevailing justifications for copyright protection in the

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[1] CA 2790/93 *Eisenman v. Qimron* 54(3) PD, 817 (2000) (Isra.).
[2] Guy Pessach, "Justifying Copyright Law" (2000) 31 *Hebrew University Law Review-Mishpatim* 359–413 (in Hebrew).

Anglo-American legal tradition have ranged over the years from an incentive-based economic theory to a theory focused on a creator's labour. The labour theory is a widespread justification for copyright protection in many legal regimes. According to this theory, copyright protection for a work is justified by the effort the creator invested in creating it. In this view, the purpose of copyright is to reward creators for their work.[3]

For many years, the labour theory was the prevailing justification for copyright in some American courts.[4] According to this theory, the creator's labour was a sufficient basis for the protection of copyright.[5] Early American law reflects this conception, protecting works based on the labour invested by the creator. For example, many informative crafts such as maps, databases, and other informative products benefited from copyright protection based on the labour theory.[6] At the same time, other courts in the United States required an additional element of creativity to warrant copyright protection, although the degree of creativity needed was not precisely defined.[7] Under this approach, the creator's labour alone did not justify copyright protection; the work was also required to reflect a degree of originality.[8] According to this view, factual databases, for example, while the product of the creator's labour, did not warrant copyright protection.[9]

These competing approaches were reconciled in 1991, when the United States Supreme Court decided *Feist*.[10] This decision marked the court's first attempt to establish order in a complex issue: the definition of the originality requirement and the scope of the protection of factual collections. The plaintiff-respondent, the Rural Telephone Service Company, held a monopoly that allowed it to provide telephone services to several communities in Kansas. Pursuant to state law, the company produced a telephone directory every year that included the usual information—private subscribers' first and last names, telephone numbers, and addresses—arranged in alphabetical order.[11] The defendant-appellant, the Feist Company, was an advertising company that produced telephone directories for large areas. The telephone directory at issue in the case included more than 46 thousand phone subscribers in 11 phone service areas,[12] partially overlapping the area covered by Rural's directory. While preparing their directory, Feist obtained licenses to use the telephone directories of 10 out of 11 companies whose data Feist requested for inclusion in its own directory.[13] Rural was the only company that declined to to use the information in its telephone directory.[14] Feist nevertheless used Rural's information anyway, thus incorporating it into its work.[15] Rural sued for copyright infringement.[16] The district court held that Feist violated Rural's copyright in the telephone directory, and the Tenth Circuit Court of Appeals affirmed.[17] The Supreme Court granted certiorari, perceiving the need for clear guidelines regarding the protection of copyright in factual works.

The court confronted a circuit split concerning the requirements for copyright. Some appellate courts—including the Tenth Circuit—embraced the doctrine of "sweat of the brow" or "industrious collection", under which Rural's phone directory was entitled to copyright protection based on the work Rural invested in creating it. In fact, the approach expressed by these doctrines holds investment to be a sufficient basis for granting copyright to a telephone book and rejects the view that originality and creativity are required for copyright protection.[18] But under the law of circuits that construed the Supreme Court's decisions in *Burrow Giles Lithographic and Bleistein*[19] to require creativity in the selection and arrangement of data, Rural would not be entitled to copyright protection against competitors such as Feist.[20]

The Supreme Court adopted the latter view, holding that originality and creativity are required as a condition for copyright protection and concluding that investment alone is insufficient to support copyright protection.[21] The court examined the history of copyright protection and the development of the doctrines establishing investment-based protection, and it concluded that these doctrines have no validity in modern copyright law.[22] The court explained that the originality requirement comprises

[3] Michael Dan Birnhack, "Originality in Copyright Law and Cultural Control" (2000) 1 *Aley Mishpat* 347–408 (in Hebrew).
[4] Miriam Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 134, 141.
[5] Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 148–151.
[6] Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 128.
[7] Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 161–167.
[8] Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 161–167.
[9] Bitton, "Trends in Protection for Informational Works Under Copy-right Law During the 19th and 20th Centuries" (2006) 13 Mich Telecomm. & Tech. L.Rev. 115, 161–167.
[10] *Feist Publications Inc v Rural Telephone Service Company Inc* 499 U.S. 340 (1991).
[11] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 342.
[12] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 343.
[13] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 343.
[14] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 342.
[15] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 343–344.
[16] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 344.
[17] *Rural Tel Serv Co v Feist Publ'ns Inc* 663 F. Supp. 214 (D. Kan. 1987); *Rural Tel Serv Co v Feist Publ'ns Inc* 916 F.2d 718 (10th Cir. 1990).
[18] *Feist Publications Inc v Rural Telephone Service Company Inc* 499 U.S. 340 (1991), 351.
[19] *Burrow-Giles Lithographic Co v Sarony* 111 U.S. 53 (1884).
[20] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 360.
[21] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 359–360.
[22] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 346.

Two sub-requirements: first, that the origin of the work must be in its creator, and second, that there must be at least a hint of creativity in the work. The court emphasised:

> "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[23]

The court made clear that Congress, in enacting the Copyright Act of 1976, intended to abolish the doctrines recognising investment as the basis of copyright protection. The court derived this intention from the legal definition of a compilation.[24] The court also clarified what the protected components are in a work of compilation and identified the selection and arrangement of a compilation's raw materials as elements that may be entitled to copyright protection.[25] The court also emphasised that applying this approach to factual compilations leads inevitably to the conclusion that copyright protection of compilations is weak. Regardless of the existence of a copyright for the compilation, a later creator of a compilation can use the facts and data contained in an earlier compilation at will, simply by rearranging the data or using a different selection of facts in an original manner.[26] In fact, in this decision, the court completely invalidated the decisions of appellate courts that had held that taking a substantial part of a collection work protected by copyright constituted a copyright violation.[27] Those courts also prevented the use of the information contained in the protected collection and required independent collection of the information by the creator of the later collection based on theories of investment that, in their view, justified copyright protection.[28]

Moreover, the Supreme Court held that the originality requirement stems from the Constitution.[29] The court reached this conclusion based on the terms used in the Constitution's intellectual property clause naming "writings" and "authors."[30] The court assumed that the choice of these terms indicates that the framers intended for a certain level of originality to be a condition for copyright protection.[31] The court recognised the unfairness involved in declining to protect the work of the creator of a non-original compilation, but it made it clear that

this result is not a flaw in the copyright laws but stems from their core principles, which do not reward every creation.[32] The court thus endorsed an approach that favours and promotes the public good rather than only the rights of creators.

Applying these principles, the court held that the Feist company did not copy protected elements of Rural's compilation but merely used factual information not protected by copyright. Accordingly, Feist's use did not constitute a copyright violation.[33] The court went on to examine the question of protecting the selection and arrangement of the information used in the collection. The court assumed that Feist copied the arrangement and selection of the data and determined that although it was not original, Feist's decision to organise the data alphabetically was a self-evident way of arranging the information, and was in fact inevitable.[34] Therefore, Rural's arrangement did not meet the minimum requirement of creative originality required for copyright protection.[35] The court also recognised that this was an extreme case of a collection work that is not protected and noted that most collections will receive protection through an original arrangement and selection entitling the work to copyright protection.[36]

In summary, in *Feist,* the court determined that a phone directory of private subscribers is not protected by copyright and ruled that the basis for copyright protection is original creativity.[37] In this decision, the court brought to an end the validity of the labour doctrine as a basis for copyright protection for factual compilations. In fact, the court changed the meaning of the originality requirement from one based on work and effort to one that emphasises the creator and her place in the creation and the creative process.

The originality requirement in Israeli law

In Israeli law, a work is protected by copyright if it meets the requirements of s.4 of the Copyright Law, 2007.[38] This section requires that the work be original, established, and one of these four types of works: literary, artistic, dramatic, or musical. The law's main threshold requirement is the originality requirement. This requirement also existed in a previous copyright law from

[23] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 345.
[24] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 354–356.
[25] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 356–357.
[26] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 349.
[27] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 349.
[28] See, *Rural Tel Serv Co v Feist Publ's Inc* 663 F. Supp. 214, 219 (D. Kan. 1987).
[29] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 346.
[30] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 346.
[31] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 346.
[32] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 349.
[33] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 343–344.
[34] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 362–363.
[35] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 362.
[36] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 359.
[37] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 340.
[38] The Copyright Law 5768-2007, § 4(Isra.)

1911. Nevertheless, originality has not been defined in either the earlier or the most recent Israeli legislation. Instead, it has been subject to jurisprudential development.

Few Israeli court rulings have clarified the originality requirement, however. In the country's early years, Israeli law seems to have been influenced by trends in English law. Accordingly, the originality requirement was interpreted as requiring that the origin of the work be in its creator (i.e., that it was not a copy). This understanding reflects a focus on the investment of some human resource (time, effort, work, etc.), mirroring the labour theory in the Anglo-American tradition. Examples of this approach can be found in early Israeli judgments, such as the *Ahiman* case[39] and the *Strusky* case.[40]

In *Ahiman*, the accountant Ahiman found a way to simplify the calculation of tax liability and compiled tax calculation tables.[41] Ahiman bound the tables in a booklet and sold it on the market. Not long after, the Income Tax Division also began distributing a booklet for calculating tax liability, this time for free.[42] Ahiman identified substantial similarities between his booklet and the government's and sued the State of Israel for copyright violation.[43] The district court ruled in his favour, and the State of Israel appealed. The question on appeal was whether Ahiman's tax calculation tables were entitled to copyright protection.[44] The state argued that the tables could not be considered works, and that even if considered works, they were not original.[45] The Supreme Court of Israel rejected the first argument outright[46] and turned to the question of originality.[47] The court held that although there is no copyright protection for mere ideas, if review of the creator's work in its entirety establishes that the creator invested special efforts of thought, labour, or skill in the work's method of editing or special design, it may be protected.[48]

After comparing Ahiman's tax calculation tables with the government's, the court determined that Ahiman's tables displayed considerable improvements that made them original.[49] The ruling did not mention (and did not require) that the creator be the source of the work. It seems that the court viewed the originality requirement as established by the creator's investment alone.[50] Nevertheless, the court held that the state did not violate Ahiman's copyright, reasoning that although Ahiman's tables were protectable original works, government employees assembled the government's tables independently and not on the basis of Ahiman's work.[51]

In the case of *Strosky v Whitman*, the Whitman company, an ice cream manufacturer, ordered an advertising sign from the Strosky company, a provider of graphic services.[52] The business relationship between the two firms later ended, and Whitman ordered the same signs from another company.[53] Strosky claimed that the sign it made was a protected work and that it owned all rights to it.[54] The Supreme Court of Israel identified three components of the originality requirement: 1) the source component: that the source of the work be in its creator; 2) the investment component: that the work reflect an investment of some resource; and 3) the creativity component, which has a very low threshold.[55] The court explained that copyright protection is granted to the original expression of ideas; the expression need not be of an original thought or invention. All that is required is that the work not be copied from another work.[56]

The court thus held that the test for originality is the independence of the work, not its innovation, and is satisfied even where the author's degree of effort, talent, and creative is small, provided that the work holds a character different from that of the materials from which it was designed.[57] The court ruled that it was the connection and design of the elements into one sign that constituted the protected work, and that Strosky was the source of the finished sign, since its employees invested both labour and talent in designing it.[58] In conclusion, both *Strosky* and *Ahiman* reflect the Israeli Supreme Court's endorsement of the investment theory as a basis for copyright protection. This approach dominated Israeli law until the early 90s.

The first sign of a real change in Israeli law regarding the originality requirement was the Supreme Court's ruling in the *Interlego* case from 1994.[59] This decision is among the most important with respect to the originality requirement in Israeli copyright law. The ruling concerned a manufacturer of Duplo cubes that sought to protect the cubes through copyright laws, even though the classification of the cubes was more suited to design law.

[39] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259 (1972) (Isra.).
[40] CA 360/83 *Strusky v Whitman Ice Cream Ltd*, 40(3) PD 340 (1985) (Isra.).
[41] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.).
[42] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.).
[43] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.).
[44] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 261.
[45] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 260–261.
[46] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 261.
[47] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 261.
[48] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 261.
[49] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 261.
[50] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 266.
[51] CA 136/71 *State of Israel v Ahiman*, 26(2) PD 259, 260 (1972) (Isra.), 264.
[52] CA 360/83 *Strusky v Whitman Ice Cream Ltd*, 40(3) PD 340, 344-345 (1985) (Isra.).
[53] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 345.
[54] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 344–345.
[55] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 348.
[56] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 346.
[57] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 246.
[58] CA 360/83 *Strusky v Whitman Ice Cream*, 40(3) PD 340, 348.
[59] CA 513/89 *Interlego A/S v Exin-Lines Bros SA*, 48(4) PD 133 (1994) (Isra.).

The court explained explicitly, for the first time, that the dominant copyright theory in Israeli law is based on the economic approach—specifically, the incentive argument (also known as the regulatory public approach)—according to which copyright protection is essential to encourage creators to create works, and that without it, "free riders" can use the work without participating in the costs of its production, which are borne by the creator alone.[60] The court explained further that copyright is intended to avoid this result by granting exclusivity to creators, allowing them to earn a return on their investment and preventing free-riders from harming the creators' incentive to create works. Against this backdrop, the court reiterated the standard it articulated in Strosky with respect to the components of the originality requirement: (1) the origin of the work must be in the creator; (2) the work must embody an investment of some human resource; and (3) the work must meet the standard of creativity, reflecting the spiritual labour of the creator (the creator's choices).[61] While the *Interlego* decision did not clarify the substance of the creativity requirement, the court did refer to decisions discussing the same requirement in American law, such as the *Feist* rule.[62] In this rule,[63] as noted above, the United States Supreme Court stated that originality requires only a hint of creative originality, and that while the threshold was not crossed in *Feist*, it was nevertheless very low.

The Qimron Appeal[64]

The *Qimron* appeal dealt with the fascinating question of copyright protection for the reconstitution of an ancient scroll. In 1948, a Bedouin shepherd unearthed a large number of sealed clay vessels from caves in the Judean desert near the Dead Sea. Upon examination, the vessels revealed ancient scrolls written by a Jewish sect that had escaped the city of Jerusalem in the first century BCE and lived in the Dead Sea caves awaiting the apocalypse until the first century CE. Professor Elisha Qimron of Ben Gurion University was given the task of deciphering one of the scrolls buried in the Qumran area, which he called "The Halakhic Letter" (also known as 4QMMT, or "Some Precepts of the Torah"),[65] composed of fragments written in ancient Hebrew.[66] The scroll belongs to a group of the "communal texts" and today is considered one of the most important scrolls, as it constitutes a direct testimony to the customs of the community living in the area.[67] The initial work of sorting the fragments was carried out by Professor John Strugnell, who passed on the project to his student at the time, Elisha Qimron.[68] For approximately 11 years, Qimron worked on deciphering the scroll,[69] sorting the fragments, determining their initial physical arrangement, engaging in physical and interpretive decoding of the text in the fragments, and ultimately completing the gaps between the fragments. In the final publication, 40% of the text consists of Qimron's reconstruction based on his legal and linguistic knowledge of the scrolls.[70] This knowledge aided *Qimron* in making a series of decisions on how to arrange the text, how to complete it, and how to interpret it. In 1990, *Qimron* distributed a draft of the deciphered text among several colleagues around the world. The draft was leaked and came into the hands of a Polish researcher who published the text, without knowing its source or reliability, in a journal he edited.[71] At a later stage, Herschel Shanks (one of the leaders of the battle against the research monopoly of the Israel Antiquities Authority) included photographs of the fragmented scrolls in a book he published, attached the deciphered draft of the scroll as an appendix, and noted that the deciphering was performed by Prof. Strugnell and his colleague.[72]

Qimron filed a lawsuit against Shanks and the two other editors of the published book. The district court, relying on *Strosky*, focused on the originality requirement and addressed only the element of the source, concluding that originality required only that the source of the work be with its creator.[73] The court maintained that the source element was essential to originality and could not be compromised. Investment alone, the court explained, was not sufficient for the work to be protected by copyright.

The court emphasised that in cases where the source element is not clear, investment may serve as a proxy for source, but this should only be assumed after ruling out the possibility that the creator is not, in fact, the originator of the work.[74] In the case before it, the court added, the source of the original work is the person who composed the scroll more than 2000 years ago, and any copyright he had on the scroll has long since expired, such that the original component needs to be clarified.[75] It bears noting that there was no dispute that no copyright laws existed

[60] CA 513/89 *Interlego A/S v Exin-Lines Bros SA*, 48(4) PD 133, 162–163.
[61] CA 513/89 *Interlego A/S v Exin-Lines Bros SA*, 48(4) PD 133, 172–173.
[62] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 342.
[63] *Feist Publications v Rural Telephone* 499 U.S. 340 (1991), 342.
[64] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817.
[65] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 822–823.
[66] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 822.
[67] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817.
[68] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 822–823.
[69] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 823.
[70] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 823.
[71] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 823.
[72] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 823.
[73] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993) (Isra.).
[74] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993).
[75] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993).

at the time the scroll was created, so the scroll itself was always in the public domain; but the judges did not clarify this point in their opinion.

In any case, the court examined the nature of Qimron's work and characterised it as an attempt to restore the original scroll. Justice Dorner, who wrote the court's opinion, determined that to the extent the decipherer's purpose was to restore the original scroll, the acts of sorting and physical assembly did not merit copyright protection.[76] On the other hand, she determined that Qimron was entitled to protection for editing the complex text and filling in the gaps himself.[77] The implicit assumption in this holding is that originality exists only with respect to the missing text, and because there is no way to know what the full text of the scroll was, it can be assumed that in connection with these additions Qimron deserved copyright protection.[78]

The defendants appealed. Their main argument was that Qimron's work amounted to the completion of the scroll's text and was merely a reconstruction of the ancient text. Accordingly, the defendants reasoned, piecing together the fragments of the scroll and reconstructing the missing parts did not yield an original text protectable by copyright.[79] The Supreme Court rejected this argument and held that Qimron held a copyright in the deciphered scroll.[80]

The Supreme Court's decision in this appeal is remarkable for its thoroughness and great caution in relation to its previous decisions concerning the requirement of originality. The court referred to its previous rulings in examining and analysing each of Qimron's contributions. At every step, the court clarified that it would not deviate from its jurisprudence in the field of copyrights. This caution was noteworthy due to the importance of consistency with respect to such an important threshold requirement in copyright law, the nature of which remains murky.

The court addressed the source element articulated in *Strosky* and reaffirmed—based on a review of *Interlego*—that a creator's investment alone is not sufficient to establish eligibility for copyright protection. The court noted that originality is a threshold condition and that the source component, the investment component, and the creativity component are all required for copyright protection.[81] In other words, the court held that originality is necessary but not sufficient for copyright protection, nor is it enough that the creator invested his human resources, as a degree of originality is required both in the creation itself and in the creative process. Nevertheless, the court acknowledged the view that the investment of time and/or talent may testify to the existence of creativity. This means that if the investment requirement (time, effort, or any human resource) is met, it is likely that the creativity requirement is also met.[82] This bold statement has withstood criticism, since the requirement of originality in copyright law is satisfied at a very low threshold, which most works exceed.[83] It is also important to note that the court took pains to clarify that its observation did not suggest a change in the law or imply that investment or talent alone would suffice for copyright protection.[84]

In the court's view, expressed by Justice Turkel, it was the investment of Qimron's efforts that entitled him to the protection of copyright.[85] In addition, the court observed that *Qimron* not only uncovered facts, which are not protected by copyright, but also performed the labour of reconstruction, which required a considerable degree of originality.[86] Therefore, all aspects of the work of deciphering should be considered part of the same work: all the tasks that Qimron performed were dependent on one another and influenced each other. That is, it was a complex process that involved more than the disclosure of facts alone.[87] The reconstruction was the fruit of a process in which Qimron used his knowledge, expertise, imagination, and judgment when selecting between alternatives, all of which illustrated Qimron's originality and creativity.[88] The court emphasised that these labours were not equivalent to ministerial tasks lacking a basis for protection but were something far broader than that.[89] The court stated that the various stages of deciphering should not be examined individually but rather considered as parts of one complete work. The physical assembly of the fragments, their arrangement, the deciphering of the script, and the completion of gaps in the text are "woven and interwoven, dependent on one other and influencing each other."[90] While Justice Dorner's opinion focused on the creative process and the relationship between the creator and the text, Justice Turkel focused on the creator himself. In his ruling, Turkel used spiritual imagery to describe Qimron's work:

> "Qimron's work was not a technical, "mechanical" craft, like simple manual labor whose results are known in advance. His inspiration, the "lofty soul," that he breathed into the fragments of the scroll,

[76] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993).
[77] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993).
[78] CA (Jerusalem Dist) 41/92 *Qimron v Shanks*,5753 (3) PM 10,23-24 (1993).
[79] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 831.
[80] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 849.
[81] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 829–830.
[82] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 829–830.
[83] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 829–830.
[84] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 830–831.
[85] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[86] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[87] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[88] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[89] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[90] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.

> which turned these fragments into a living text, were not merely an investment of human resources, in terms of "sweat" in the meaning of "the sweat of man's brow." Rather, these were the fruits of a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and selected between different alternatives."[91]

In conclusion, the decision was based not only on Qimron's investment but also on the knowledge, expertise, imagination, and discretion he brought to bear on his creation. These additional components were held to meet the creativity requirement of copyright law. Although it was the labour approach that led the verdict, and sweat, toil, and investment were its recurring themes, Justice Turkel made an effort to explain that this is not the sole approach, and therefore emphasised the soul and spirit as significant components of the process. Turkel emphasised that his analysis did not deviate from *Interlego*, although in fact, the ruling underscores Qimron's great investment in deciphering the text.

The creator's intent test

The creator's intent test and the requirement of originality

Many legal scholars have critiqued *Qimron*. The main criticism revolves around Justice Turkel's apparent deviation from the originality tests accepted in the case law and the emphasis on investment as the basis for copyright protection.[92] In addition, scholars have argued that the assertion that Qimron's reconstruction is an original work is simply wrong, since it is a mere reproduction of an ancient text—an activity analogous to merely revealing facts, which cannot be protected by copyright. Another major criticism of the decision is that it did not take into account the public interest in preserving works that represent cultural assets in the public domain and preserving free access to them.[93]

We believe that Justice Turkel's analysis withstands these criticisms. We do not mean to go into these critiques in detail but to focus on one aspect of the originality requirement and the creator's intent test. In our opinion, Justice Turkel's decision in *Qimron* provides an excellent opportunity to appreciate the benefits of examining the creator's intention in creating his work and to determine the proper relationship between this intention and the threshold requirement of originality.

We maintain that the view that Qimron's work lacks the required element of originality does not stand on firm ground, first and foremost because the originality requirement has not been sufficiently clarified in Israeli copyright jurisprudence. The three elements that courts have identified have not been properly clarified, nor have the rationales for recognising these components been sufficiently presented. Accordingly, different interpretations of the originality requirement are possible, and guidance regarding how to satisfy it is scarce.[94]

Moreover, the *Qimron* court could have examined the question of originality through the lens of the creator's intention, which could be derived from the circumstances of the work's creation and its presentation to the public.[95] The proposed creator's intent test is an auxiliary test that can help the court to determine whether a work meets the originality requirement. We should mention in this context that David Nimmer addresses Qimron's intent and its significance in connection with the originality requirement; however, he does not discuss the essential question of whether intention can serve as an auxiliary test for examining a work's originality. The creator's intent test examines how the creator perceived the nature of her work and traces the creator's intention both during creation and after the work's completion. The creator's intention can be examined on a subjective basis by examining the circumstances of the work's creation and ascertaining whether the creator expressed an explicit view as to the nature of her work. Thus, for example, a creator can declare that she is providing the public with information that is factual in nature and thus not subject to copyright at all, since facts are not original. The creator's subjective intention can also be derived indirectly from data such as the advertising and marketing materials of a product that the creator offers for sale, which may contain statements from which the nature of the work can be deduced. Similarly, the creator can include statements in her work that implicitly reveal her understanding of its nature. For example, the author of an academic article revealing new historical facts regarding an important historical event may include statements that indicate that the facts he reveals reflect the true historical state of affairs. Such statements imply that the creator does not view his work as protected by copyright.

Alternatively, the creator's intent can be examined on an objective basis. For instance, it is possible to examine whether there is unanimity among the creator's colleagues and public consumers of the work regarding the work's originality, even without specific evidence of the creator's

[91] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 832–833.
[92] See Birnhack, "Originality in Copyright Law and Cultural Control" (2000) 1 *Aley Mishpat* 347, 408.
[93] Birnhack, "Originality in Copyright Law and Cultural Control" (2000) 1 *Aley Mishpat* 347, 398; also see Jeffrey M. Dine, Student Note: "Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhan dari, and the Dead Sea Scrolls" (1995) 16 *Mich. J. Int'l L.* 545; Cindy Alberts Carson, "The Dead Sea Scrolls Copyright Cases" (2000) 22 Whittier L. Rev. 47; Neil Wilkof, "Copyright, Moral Rights and the Choice of Law: Where Did the Dead Sea Scrolls Court Go Wrong?" (2001) 38 Hous. L. Rev. 463; Urszula Tempska, Comment: "'Originality' After the Dead Sea Scrolls Decision: Implications for the American Law of Copyright" (2002) 6 Marq. Intell. Prop. L. Rev. 119; Michael D. Birnhack, "The Dead Sea Scrolls Case: Who Is an Author?" (2001) 23 Eur. Intell. Prop. Rev. 128; Cindy Alberts Carson, "Raiders of the Lost Scrolls: The Right of Scholarly Access to the Content of Historic Documents" (1995) 16 *Mich. J. Int'l L.* 299; Lisa Michelle Weinstein, Comment: "Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case" (1994) 43 Am. U. L. Rev. 1637.
[94] Ethan R. York, Note: "Warren Publishing, Inc. v MicrodosData Corp.: Continuing the Stable Uncertainty of Copyright in Factual Compilations" (1999) 74 Notre. Dame L. Rev. 565, 585.
[95] Birnhack, "Originality in Copyright Law and Cultural Control" (2000) 1 *Aley Mishpat* 347, 402.

Intent. Let us say, for example, that the creator created a phone book that includes names and personal contact information. An objective assessment would require courts to investigate whether others in the industry and consumers in the market consider works subject to copyright. It would not be difficult to derive the creator's intent in such situations if there is unanimity among creators and consumers in the field. There is no dispute that it will sometimes be impossible to find clear indications of the creator's intention, subjective or objective. In such situations, other tests for originality must be invoked.

It should be emphasised that the creator's intent test does not aspire to replace other distinctions or doctrines in copyright law but merely offers an additional consideration to help determine whether the originality requirement has been fulfilled. Thus, for instance, the statement that facts and data are protected by copyright does not make the intent test redundant, as the determination of facts and data also requires examination and analysis. The creator's intent may also assist in classifying parts of a work as facts or data that are not eligible for copyright protection. The scope of the facts and data exception is not clearly defined, and is, at the end of the day, a policy decision. The creator's intention test can be helpful to this process, as described above. The proposed auxiliary test may be particularly valuable to works of a scientific or historical nature, works reflecting the valuation of assets (such as used car price lists), and more.

To be sure, there may be instances in which the creator's intent is to create an original work, but the result is a perfect reconstruction of historical facts and thus, not protectable. In such circumstances, the objective nature of the work will prevail over the creator's subjective evaluation. In other words, in the event of a conflict between the creator's intent and an objective test of originality, the latter will prevail in determining the classification of the work.

It is important to clarify that although the intent test has never been explicitly by courts in the United States or elsewhere, there are some rulings from which it can be implied from the court's invocation of the doctrine of estoppel. One example is the case of *Arica Inst. Inc v Palmer*.[96] Arica is an organisation that offers guidance to people in finding their inner balance.[97] The founder of the organisation had written extensively about the subject and claimed that the defendant copied his work, "Interviews with Oscar Ichazo."[98] The work discussed seven factors related to the ego, and Ichazo—the founder of the organisation—claimed that he had discovered these factors, which were scientific facts about human nature.[99] The Court of Appeals for the Second Circuit held that Ichazo's characterisation of the work barred him from asserting copyright, since facts are not protected by copyright. Having presented the seven factors to the world as scientific discoveries, Ichazo could not then seek copyright protection for them as his original work.[100]

Returning to the *Qimron* case, as explained above, to decide the question of originality, the Supreme Court first defined the work for which Qimron asserted copyright protection. The court distinguished between two central components of the restored text: one, the raw physical materials of which the scroll was composed—the fragments of the scroll, which was created approximately two thousand years ago and was discovered in Qumran; and the other, the act of joining the fragments of the scroll to form the restored text—the physical joining of the fragments, their organisation, decoding and completion.[101] In other words, the court distinguished between the fragments themselves and the arrangement and interpretation of these fragments into a cohesive text, which resulted in the creation of an original text.

The court noted that because the fragments of the scroll were in the public domain, anyone who wanted to organise them, rearrange them, and decipher them was free to do so.[102] The court observed, however, that the fact that the scroll fragments were in the public domain was not dispositive of whether the creator of a work that organises, arranges, and deciphers them holds a copyright to his work. The court held that the important question was whether the cohesive reconstitution of the scroll, combined with Qimron's academic knowledge and talent, transform the reconstructed text into a work protected by copyright.[103] The court stated that the restoration of the scroll and its reconstruction included the level of originality and creativity required by copyright law. Qimron's work was not technical or mechanical, reflecting labour alone, but rather it was an original creation, since through the work of reconstruction and decipherment, Qimron turned the fragments of the scroll into a living and breathing text, using historical, legal, philological and linguistic knowledge, as well as his own imagination and judgment, in choosing from among several options the one most suitable for the work of deciphering and the restoration.[104]

The court could have strengthened its conclusion that Qimron's work was original and entitled to copyright protection by analysing the creator's intent. Indeed, such an analysis might have headed off many of the criticisms that Justice Turkel's opinion has generated. As noted

[96] *Arica Inst Inc v Palmer*, 970 F.2d 1067 (2d Cir. 1992).
[97] *Arica Inst Inc v Palmer*, 970 F.2d 1067 (2d Cir. 1992), 1069–1070.
[98] *Arica Inst Inc v Palmer*, 970 F.2d 1067 (2d Cir. 1992), 1070–1071.
[99] *Arica Inst Inc v Palmer*, 970 F.2d 1067 (2d Cir. 1992), 1075–1076.
[100] *Arica Inst Inc v Palmer*, 970 F.2d 1067 (2d Cir. 1992), 1075.
[101] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 828.
[102] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 828.
[103] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 828–829.
[104] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 831.

Above, the appellants' primary argument was that Qimron's work was essentially the discovery and publication of an original text that had been written two thousand years earlier. By these lights, Qimron's work amounted to historical research and publication of facts, and as such, was not protected by copyright, regardless of Qimron's investment of time, knowledge, and talent.[105] Hence, the lack of a full text of the scroll prior to the restoration work did not transform the restored text from an unprotected text into a copyrighted text. In fact, since Qimron presented the reconstructed text as reflecting the original text of the scroll as it was written more than two thousand years ago, he cannot claim that it is his original work. The Supreme Court's rejected this argument by stating that Qimron not only restored the scroll but actually provided his assessment of the original text of the scroll by deciphering and completing the text.[106] As a result of this reasoning, the court determined that Qimron created a literary work and did not engage in a mere reproduction of the original text of the scroll.

The court's analysis could have been strengthened by a discussion of Qimron's intent. Did he claim to create an original work, or did he seek merely to reproduce historical text? That is, did Qimron intend to reproduce and publish an original text written more than two thousand years ago, parts of which were unknown? Or did he intend to restore the text, filling in gaps where necessary, and to offer a complete text without purporting to create a perfectly accurate reconstruction, but with the intention of presenting his own subjective understanding of the full text? Evidence that Qimron meant to create an exact reconstruction might have led to the conclusion that the product of his restoration was not an original work. A scholar's intention to engage solely in exposure of historical facts, even if those facts cannot be gleaned directly from an external source, suggests that he did not intend to be the source of the work. If Qimron's stated purpose was merely to decipher the scroll, restore it, and present it to the public, he would be ill-placed to seek copyright protection on the basis that his work was original. As a scholar of history, the label of originality would have run counter to the aim of disclosing the historical record. On this view, the decoded text could not merit copyright.

If, on the other hand, Qimron's intent was not to reveal a historical "truth" but rather to interpret and reconstruct the scroll fragments based on his understanding and knowledge, then the case for originality and creativity is much stronger. In this alternative, Qimron is without question the source of the completed text; indeed, he exercised judgment, talent, imagination, and knowledge when completing the text, all of which support the creativity component. In this scenario, it is not difficult to conclude that Qimron is entitled to assert copyright in the decoded text.[107]

The fact that Qimron filed a claim for copyright infringement does not necessarily mean that he intended the second alternative, as he may not have understood the meaning of copyright laws. Examining Qimron's intent could have aided the court in assessing the nature of the work. Even when the creator does not explicitly state his intention, it may be possible to infer intent from the circumstances surrounding the work of decoding. For example, the court could have examined the article Qimron published about the work of reconstruction and ascertained which of the above two alternatives more faithfully represented his intention. Even in the absence of an explicit intention, certain assumptions can be made regarding academic research. If we believe that the purpose of academic research is to reveal the truth, then the first alternative may be fitting. Qimron, might, as an academic, have intended to reproduce the original text as it was written two thousand years ago by the original creator of the scroll. If so, he presumably had no interest in creating a reconstruction that reflected his own work but rather in reproducing an ancient text in its original form, without adding his own expression.

To the extent a creator's intention is known, it should be credited over a presumed intent. But in *Qimron*, absent either a clear indication of the creator's subjective intent or information from which the court could infer his intent, it may have been appropriate to remand the case to the district court to clarify these factual questions before drawing conclusions about originality.

In conclusion, granting adequate weight to Qimron's intention regarding the nature of his work could have helped the court reach a more accurate decision regarding the nature of his work. This could have strengthened the court's conclusion, assuming that evidence would have confirmed that Qimron intended to create an original work that did not merely reproduce the original text of the scroll. Of course, the evidence might have gone in the other direction and led the court to reach opposite result if it suggested that Qimron's intent was to make an exact reproduction of the scroll rather than an original work eligible for copyright protection. Absent this type of factual development regarding Qimron's subjective intention, it is difficult to say with certainty that the court's view of Qimron's reconstruction as an original work is either correct or incorrect.

Applications of the creator's intent requirement

Our analysis of what the creator's intent requirement would have added in *Qimron* can serve to illuminate many other decisions that have received significant criticism. The question of whether a work is original may arise in a variety of additional contexts, for instance: a booklet with price lists for used cars; a form compiling baseball

[105] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 831.
[106] CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817, 831, 833.
[107] The investment element would be fulfilled according to both alternatives, as there is no doubt that Qimron invested tremendous work in the task of completing the text, and therefore the investment component was present in both scenarios.

Pitching statistics; code cards for key cutting machines with data concerning the requisite depth and volume; and settlement prices of futures contracts and options traded on the stock exchange. The creator's intent test described above can serve as an additional inquiry in the cases discussed in these judgments to help determine the originality of works. The analysis below discusses a number of decisions that raise questions like those in *Qimron* and illustrates the expected benefit of using the creator's intent test in their circumstances.

In *CCC Information Services Inc v Maclean Hunter Market Repotrts Inc*,[108] the Second Circuit Court of Appeals made important statements regarding works that are collections of facts or data and established complex tests regarding the application of the merger doctrine, which provides that when there are limited ways of expressing an idea, the different forms of expression are not protected by copyright.[109] The decision concerned the issue of copyright protection for pricing forecasts for used cars in different regions of the United States, which Maclean Hunter Market Reports published eight times a year in the *Automobile Red Book—Official Used Car Valuations* (the "The Red Book").[110] The CCC company, which provided computer services, copied significant parts of the Red Book into its computer network and gave its customers information from the book in various ways.[111] CCC sought a license from Maclean to use this information, without success. Nevertheless, CCC continued to use the vehicle values published in the Red Book and even used the various updates to the Red Book as updates to the vehicle values published in the book. CCC filed a claim for a declaratory judgment that its actions did not constitute copyright infringement. Maclean counterclaimed for copyright infringement.[112]

The district court ruled in favour of CCC on the ground that the Red Book was not entitled to copyright protection. The court held that the Red Book did not meet the minimal originality requirement based on the selection and arrangement of data it contained and thus was not subject to copyright. Accordingly, others could use the information contained in the Red Book freely.[113] The court explained that the estimates published in the Red Book were merely facts or interpretations of facts, which are outside the scope of copyright protection.[114] The court went on to hold that even if the entries in the Red Book were not considered "facts," the merger doctrine barred copyright protection. In this connection, the court determined that vehicle valuations are ideas that can be expressed in only one way: a dollar figure, such as those that appear in the Red Book.[115]

The Second Circuit reversed. It held that the Red Book satisfied the originality requirement for copyright protection as a compilation.[116] Further, the court implied that even if the Red Book were not seen as an original compilation, it would be protected by copyright because the information it contained reflected the creative judgments of the book's editors, not merely objective facts.[117] The court deemed the following elements original: (1) the division of the national market of used cars into several regions; (2) determining the mileage criteria based on units per 5,000 miles; (3) the selection of different features of the used cars to be included in the Red Book; (4) using the concept of the "average" vehicle to value the used cars in each category; and (5) the selection of the number of car models to be included in the compilation each year.[118] The court explained further that the Red Book's valuations were based on the professional opinions of Maclean's valuation experts rather than on historical reports or algorithms based on historical prices, both of which would be considered facts.[119] The court thus created a practical distinction between "original" facts eligible for copyright protection, and historical facts, which are considered to be in the public domain.

The court concluded that the information in the Red Book fell into the former category and that Maclean thus had a protectable copyright interest that CCC had infringed.[120]

The court's determination that the Red Book was a protected compilation based on its specific arrangement and selections stands on solid ground. But its conclusion that the Red Book's specific valuations were original works is shakier. Furthermore, the court's distinction between strong and weak ideas begets numerous difficulties. Defining an idea as 'strong' or 'soft' on the basis of the social benefit it presents is problematic, as it does not provide effective guidance to the public vis-à-vis the copyright status of some ideas as opposed to others. Moreover, the establishment of such statuses are, by their very nature, subject to subjective judicial discretion, which is exceedingly problematic. One could, for example, argue against the assertion that the ideas presented in the Red Book are not ideas that advance

[108] *CCC Info Servs Inc v Maclean Hunter MKt Reports Inc* 44 F.3d 61 (2d Cir 1994).
[109] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[110] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 63–64.
[111] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[112] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[113] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[114] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[115] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994).
[116] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 67.
[117] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 67.
[118] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 67.
[119] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 70–73.
[120] *CCC v Maclean Hunter* 44 F.3d 61 (2d Cir 1994), 72. The court further held that the merger doctrine did not bar copyright protection. The court expressed concern about applying the merger doctrine to compilations, which American copyright law expressly protects. In this connection, the court distinguished between "strong" and "weak" ideas and held that the merger doctrine should apply to the former. The court held that the entries of the Red Book reflect the opinions of the evaluators and are not ideas which advance the understanding of phenomena or the solution of problems. Therefore, the court ruled that the damages to the policies of copyright law which ensure public access to the evaluations contained within the Red Book are negligible in comparison to the damages of applying the merger doctrine in this case thereby denying copyright protections from the creators of the Red Book.

the understanding of phenomena, and claim that these are highly important ideas which should be left in the public domain. As scholar Jane Ginsburg argues, the judges are effectively making value judgements about the social value of ideas every time the court is compelled to distinguish between an expression and an idea, or between an expression and a fact, or with regards to the application of the merger doctrine.[121] The approach adopted by the court in this decision is problematic precisely because it presents a subjective test that creates an opening for expanding the protection of ideas and facts. Indeed, Justice Sweet, in the *Krego* case, which will be further analysed below, asserted that judgment based upon the social benefit of ideas cannot be the basis for assigning rights under copyright law.[122]

Consideration of the creator's intent in *CCC v Maclean* might have yielded a more precise answer to whether the Red Book's valuations of used vehicles were protected original works or rather facts outside the scope of copyright protection. The creators of the Red Book spent substantial time promoting the book on the market and sought to establish themselves as the premier market authority on used vehicle valuations. They presumably hoped that consumers would perceive their valuations as accurate factual representation of the vehicles' value and wanted consumers to rely on their valuations for a number of different purposes, including the purchase and sale of used cars. Thus, the creators of the Red Book wanted their valuations to be perceived as facts, not as expressions of personal opinion. That the creators did not divulge their methods, procedures, or formulas does not make their valuations less factual in nature.

Similarly, in *Kregos v Associated Press*,[123] the claimants created "pitcher forms"—forms that provided information about the past performances of baseball pitchers scheduled to start each day's games—and distributed them to newspapers.[124] The pitcher forms contained nine data points about each pitcher's performance, which were intended to help readers predict upcoming results.[125] The claimants argued that their forms offered a selection of statistical results that were the most important for predicting game results.[126] The district court ruled in favour of the defendant on the grounds that the statistical data in the forms lacked the originality required for copyright protection and that there are limited ways to select statistical data about the performance of baseball players. Therefore, the court concluded, the idea of the form was "merged" (per the merger doctrine) with its expression, and there was no copyrightable interest in the expression.[127]

The Second Circuit reversed, rejecting the lower court's conclusion that a collection of statistical data was not protected due to lack of originality or creativity.[128] The court also concluded that there were various ways to express the performance of baseball players—indeed, the company had considered and rejected alternative proposals for a player performance form—so the merger doctrine was inapplicable.[129]

The court conveyed that the merger doctrine should be applied with the utmost caution, noting that an overly broad application would result in the denial of protections to diverse forms of expression, while an overly restrictive application may result in granting protection to ideas.[130] The court explained that the merger doctrine should apply proportionately to the level of abstraction of the idea at issue.[131] The court added that special caution should be exercised when dealing with a compilation of facts, as one is always able to define the idea that is the basis of such a compilation as merely a methodological collection of data and facts, and therefore one can argue that the doctrine must always apply. Thus, the more abstract the idea underlying the compilation, the less chance that the merger doctrine will be applied.[132]

To prevent this outcome, the court offered an alternative approach regarding the merger doctrine. The court made a distinction between selecting data based on personal opinion or position and selecting information as part of a process of establishing a precise result.[133] With respect to the former, there is some concern that we may end up creating protections for ideas, whereas regarding the latter, there is significant concern that we may provide protections for facts.[134] Examples of compilations of facts entitled to protection include selections of premium baseball cards, or a selection of influential families to be included in a company database. By contrast, a compilation that would not merit protection would be a list of symptoms consistent with a particular illness.[135] In the *Kregos* court's view, when dealing with a system or method that yields an accurate result (e.g., the diagnosis of a disease), we should consider the idea underlying the compilation to be very low on the scale of abstraction.[136] Hence, a doctor's idea about the symptoms characterising a certain disease is the idea underlying the compilation. In these circumstances, because there is no other way to

[121] Jane C. Ginsburg, "No 'Sweat'? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone" (1992) 92 Colum. L. Rev. 338, 346.
[122] *Kregos v. Associated Press*, 937 F.2d 700, 711-716 (2d Cir. 1991).
[123] *Kregos* 937 F.2d 700 (2d Cir. 1991).
[124] *Kregos* 937 F.2d 700 (2d Cir. 1991), 702.
[125] *Kregos* 937 F.2d 700 (2d Cir. 1991).
[126] *Kregos* 937 F.2d 700 (2d Cir. 1991).
[127] *Kregos* 937 F.2d 700 (2d Cir. 1991), 703.
[128] *Kregos* 937 F.2d 700 (2d Cir. 1991), 704–705.
[129] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[130] *Kregos* 937 F.2d 700 (2d Cir. 1991), 705.
[131] *Kregos* 937 F.2d 700 (2d Cir. 1991), 706.
[132] *Kregos* 937 F.2d 700 (2d Cir. 1991).
[133] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[134] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[135] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[136] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.

express the combination of symptoms typically experienced with the disease than through a list; accordingly, the merger doctrine would appropriately apply to preclude copyright protection for the doctor's work. By contrast, when the selection of items on a list is based on personal taste or opinion, the court should define the idea behind the compilation more generally so that alternative expressions remain possible, and the merger doctrine will not apply.[137]

Based on the above analysis, the court determined that the statistical data in the compilation that was made by the Kregos company is on the spectrum between personal opinion and predictive analysis. As such, the court decided that the system Kregos created was a less-than-perfect way to measure pitcher performance in baseball games, and thus it is not a method or process for making predictions about game results—even though there is more to the method than personal opinion.[138] Against the backdrop of this analysis, the court did not apply the merger doctrine, and the pitcher form was established as an original work, meriting copyright protection.[139]

Upon examination of the *Kregos* decision, we find that in this case, too, an inquiry into the creator's intent could have yielded more precise conclusions. The creators of the pitcher form perceived the form as providing consumers with useful information for betting on the results of baseball games. Although the creators did not disclose their specific method, process, or formula or provide a precise breakdown of the information contained in the form, they perceived the form as providing a prediction of accurate results, and thus, as a matter of practical reality, factual information. Viewed in this light, it appears that the compilations provided merely non-protectable facts.

In *Continental Micro*,[140] a court in the Northern District of Illinois considered whether code cards providing data about the space and depth required for key cutting machines is protected by copyright.[141] The plaintiff claimed that like the vehicle valuations in *CCC Information Services*, the information in the code cards was an expression of his professional opinion regarding the proper use of the machinery used to cut keys and as such was protected under copyright law.[142]

In rejecting the plaintiff's argument, the court likened the code card to a recipe book that the Seventh Circuit concluded was not copyrightable. The court explained that recipes represent instructions by which readers can create food items, and are thus unprotected. Like recipes, the code cards identified "a specific means for achieving a specific end."[143] This distinguished them from the valuations at issue in *CCC*. Accordingly, the court concluded that despite reflecting originality and professional judgment, the code cards were not eligible for copyright protection.[144] It bears noting that the court did not consider whether the facts reflected personal tastes or opinions, but instead focused on the existence of functional instructions to conclude that the code cards were an uncopyrightable compilation of facts.

Here, too, the creator's intention test could have been employed to arrive at a more precise result, as the creator's words themselves stated his view that he provided the best conditions for key cutting. Therefore, it seems that he intended to provide factual data.

The Second Circuit's decision in *New York Mercantile Exchange v Intercontinental Exchange Inc* (*NYMEX*),[145] which addressed similar questions to those raised in *CCC v Maclean*, offers a different analysis that is instructive for our purposes. The New York Mercantile Exchange is an exchange for trading in options and futures contracts in the energy market.[146] At the end of each day, the Exchange calculated the "settlement prices",[147] defined as "the value, at the end of trading each day, of a particular futures contract for a particular commodity for future delivery at a particular time."[148] In determining these settlement prices the Exchange divided the futures contracts into two groups: contracts executed during periods of intense activity ("high-volume" months) and contracts executed during periods of limited activity ("low-volume" months).[149] In high-volume months, the settlement prices were determined based on a formula. In low-volume months, because the information was more limited, the calculation of settlement prices required more in-depth analysis and professional discretion.[150] The Exchange posted settlement prices on its website. The defendant—a subscriber to NYMEX publications—published the settlement prices on its own website, either exactly as they appeared on the NYMEX website or slightly modified based on the defendant's own formula.[151] The defendants' clients used the services

[137] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[138] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[139] *Kregos* 937 F.2d 700 (2d Cir. 1991), 707.
[140] *Continental Micro Inc v HPC Inc* No.95 C 3829, 1997 WL 102541.
[141] *Continental Micro Inc v HPC Inc* No.95 C 3829, 1–2.
[142] *Continental Micro Inc v HPC Inc* No.95 C 3829, 3.
[143] *Continental Micro Inc v HPC Inc* No.95 C 3829, 4.
[144] *Continental Micro Inc v HPC Inc* No.95 C 3829.
[145] *NY Mercantile Exch Inc v Intercontinental Exch Inc*, 497 F.3d 109 (2d Cir. 2007).
[146] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 110.
[147] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 110.
[148] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 111.
[149] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 111.
[150] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 111.
[151] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 111.

of a London company to complete transactions in commodities in the energy market. The Exchange sued, claiming that the defendant's use of the settlement prices published on its website amounted to copyright infringement.

The Second Circuit's majority opinion did not resolve whether the values of future contracts are "facts" for purposes of copyright protection. The majority relied instead on the merger doctrine to hold that the settlement values were not protected by copyright.[152] The court drew a distinction between facts that were "created" by a particular creator and facts that were "revealed" by the creator.[153] On the basis of this distinction, the court held that the relevant question was whether the Exchange created the settlement prices or whether it merely revealed these prices.[154] The court observed that the Exchange did not produce the settlement prices but only revealed them and suggested that the settlement prices, therefore, were not entitled to copyright protection.[155] Nevertheless, the court held that even assuming, *arguendo*, that valuations of futures contracts can be considered original works, the merger doctrine barred protection for the settlement prices.[156] The court explained that with regard to both high-volume and low-volume contracts, the Exchange intended to calculate the real market value of the contracts, not to suggest what the value should be according to its own valuation methods.[157] Because the idea of valuation (determining the fair market price of a future contract) merged with the only way of expressing that valuation (the price), the merger doctrine precluded copyright protection for the Exchange's settlement prices.[158]

Judge Hall's concurrence took a different approach. Although he agreed with the majority's result, he viewed its suggestion that settlement prices were not original works as heightening the standard for originality and creativity.[159] Judge Hall expressed three reasons for his departure from his colleagues' suggestion that settlement prices were not original creations:[160] First, the majority's view was at odds with *CCC Information Services*.[161] Second, the majority's rationale is circular: "settlement prices are facts, and therefore unoriginal; they are unoriginal because they are facts." Third, one of the predicates for the majority's tautology is questionable in any event—the notion that settlement prices are "facts."[162] The majority opinion, as well as Justice Hall's opinion, offer a problematic analysis of the originality requirement as well as the facts are not eligible for copyright protection. The court's approach stating that the nature of a work should be determined based on the amount of information used in determining settlement prices is unconvincing. Settlement prices are very similar to assessments of car prices. The creator proposes settlement prices in an attempt to determine the value of options and future contracts. The values, determined on the basis of information and formulas, are intended to precisely predict the value of these future contracts. Similarly to the value of used cars discussed in *CCC v Maclean*, the values discussed in *NYMEX* too should be considered facts, regardless of the amount of information required for their calculation. Furthermore, creating distinctions between future assessments and past prices cannot be a valid way to determine which values are protected by copyright. The assessments aimed to evaluate the future value of options and futures contracts. The fact that these assessments had not yet been approved as precise at the time of their creation does not make them less factual in character according to the intention of the creator. Similarly, the fact that different institutions provide distinct evaluations of the value of identical products does not change the factual nature of these distinct values. We suggest that application of the creator's intent test might have resolved the tension between the majority and concurring opinions in *NYMEX*, as it could have provided an evidentiary basis on which to examine whether the Exchange's valuations were factual in nature or whether they contain original material subject to copyright.

In sum, the cases we have discussed demonstrate that examination of the creator's intent can serve as a useful auxiliary test for determining the nature of a work and deciding whether it satisfies the originality requirement of copyright law. The value of this test lies in its capacity to lead to more precise classification of works, assuming that objective or subjective information exists that can clarify the intent of the creator. Precise classification aims to achieve the rationales of copyright laws and to advance the protection of original works, while ensuring that informative works containing objective facts and data will remain in the public domain.

Challenges to the creator's intent requirement?

The creator's intent test may be critiqued based on several arguments. One challenge that may be raised is that the test is not anchored in the laws of copyright, which require originality regardless of the creator's intent. A second argument is courts might find it difficult to examine the creator's objective or subjective intent, since evidence of intent does not always exist, and it may be difficult or impossible to infer intent circumstantially. Third, one

[152] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 114–116.
[153] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 116–117.
[154] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 116–117.
[155] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 116–117.
[156] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 116–117.
[157] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 116.
[158] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 118.
[159] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 119.
[160] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 120.
[161] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 121.
[162] *NY Mercantile Exch*, 497 F.3d 109 (2d Cir. 2007), 121.

might argue that raising the question of the creator's intent may encourage creators to manipulate the law by expressing their subjective intent to create an original work, if work appears objectively factual. This argument raises an additional concern that a creator's view of his creation may never be objective, so it is inappropriate to examine the creator's subjective intent. A fourth difficulty raised by the creator's intent test relates to the issue of incentivisation. The argument that a creator's intent to reconstruct historical works cuts against copyright protection may discourage the creation of important historical works. As discussed above, in the *Qimron* case, the scholar clearly aimed to reconstruct the ancient scroll, but since so many gaps existed in the fragmented material, a significant creative reconstruction was required. If Qimron were not assured of copyright protection for the fruits of his reconstructive labours, he may not have dedicated 11 years to such demanding work. Fifth, one might argue that applying the creator's intent test to works not characterised by a scientific-historical nature raises a number of difficulties. To illustrate, let us assume an art student who wishes to paint a picture intending—both objectively and subjectively—to create an original work. Let us further assume that the final painting is extremely similar to that of a well-known painter whose work the student studied. Can we maintain that the student's final painting is original merely due to her intent to create an original work?

We offer responses to each of these objections. To begin, recall that our proposed test is an auxiliary one and is not intended to supplant existing standards for determining originality. The framework for determining originality is jurisprudential, not statutory one; there is no reason to reject the creator's intent test on the basis that it is not grounded in legislation.

Second, we expect that in most cases, some evidence of the creator's intent will be available, as creators generally tout the value of their creations when they offer them to consumers. Thus, for example, a vendor who publishes a used car price list will likely present her product as offering consumers accurate valuations rather than subjective assessments. It is therefore likely that in the course of marketing her products, the creator's authentic intent will be clarified. This explanation also provides a fitting response to the third critique, as the market incentivises accurate reporting with regard to the real nature of works. It is important to note that in cases where there is a concern that the nature of the work is falsely portrayed, courts can turn to other evidence to clarify the intent of the creator objectively. Thus, for instance, a historian who uncovers new historical information will not be able to claim that the facts she revealed are protected by copyright, as facts are clearly not protected information. At the end of the day, in the case of works reaching litigation, the court will be able to determine the nature of the work and its originality based on multiple tests, which may include but are not limited to the creator's intention test.

Fourth, it is important to underscore that concerns about the incentive structure are likely exaggerated. Qimron's academic work, for example, while requiring lengthy and exerted labours, enjoys a broad array of incentives. Scholars can publish their findings as academic publications that will themselves benefit from copyright protection, and as academics, they are driven by additional incentives such as professional recognition, prizes, and scientific publications. Indeed, Qimron himself won the Israel Prize—the country's most prestigious award—and there is no doubt that the prize was granted in large part for his achievements in reconstructing the Dead Sea Scrolls. Moreover, Qimron's lawsuit was undoubtedly motivated by the defendants' failure to attribute the scroll's reconstruction to him. The financial remuneration was likely of marginal significance in this case.[163]

It is important to emphasise, too, that not every historical reconstruction will be protected under the proposed test. For instance, the reconstruction of a historical building documented in photographs will remain outside the scope of copyright. This result is consistent with other copyright tests that require originality (in contrast to innovation). Lacking originality, it is difficult to justify protection under the law. One may dispute the justifications of the originality requirement, but so long as this requirement exists as a threshold requirement in copyright law, it is difficult to regard the lack of protection for the reconstruction of historical buildings as an improper lack of incentivisation, as this kind of activity lacks significant creativity.[164]

Finally, the proposed intention test does not replace or contradict the originality requirement. Even if a creator intends to produce an original work, it is clear that this intention does not justify protection in and of itself when it is obvious that the work is a reproduction of another's work, as illustrated above in the example of the art student and her painting.

Conclusion

This article introduced the creator's intent test and demonstrated how its application can assist courts in determining the classification of works. The *Qimron* case, with its fascinating historical backstory, served as an intriguing test-case for demonstrating how courts can employ the test of intent to clarify the nature of a work with increased precision. The article discussed the types of cases that could benefit from the creator's intent test

[163] The statutory compensation Qimron received was 20,000 NIS and the compensation he received for the lack of credit was 80,000 NIS. CA 2790/93 *Eisenman v Qimron* 54(3) PD, 817 (2000), 824.

[164] Niva Elkin-Koren, "Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case" (2001) 38 Hous. L. Rev. 445, 455–456 ("The purpose of Qimron's project was to discover and ascertain the original ancient text as it was. A translation is never identical to the original work, although it is a derivative work based on the original … The laborious work invested by Qimron in reconstructing the scroll was indeed creative, reflecting scholarly analysis, discretion, and choices. But so was the work of the scientists who engaged in mapping the human genome, and so was the work of Albert Einstein and Sigmund Freud who were never accorded any copyrights in their groundbreaking. theses. Creativity cannot distinguish expression from unprotected ideas").

in determining the originality of the work and demonstrated how its application can help courts to determine the nature of the work. It is important to emphasise that this test does not replace established copyright doctrines or requirements but is intended only as an additional criterion to assist in the originality analysis. The article also presented the main challenges to employing the intention test and responded to these challenges, using this discussion to sharpen the ways in which courts can manage and respond to potential manipulations by creators. The article emphasised the value of the intent test compared to other copyright doctrines that do not contain guidance or instructions for application, particularly with regard to the distinction between unprotected data and facts and protected expression.