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Authorship and Originality'**

Martha Woodmansee

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# RESPONSE TO DAVID NIMMER

Martha Woodmansee\*

The *Qimron*<sup>1</sup> decision that is the subject of David Nimmer's essay<sup>2</sup> derives much of its force from its deployment of a rhetoric of entitlement that I have termed the rhetoric of "Romantic authorship" in recognition of its source in early nineteenth-century European cultural history.<sup>3</sup> In its deliberations, the Israeli Supreme Court determined that Qimron put an extraordinary amount of work into deciphering and reconstructing the ancient text in question.<sup>4</sup> Then it set about determining whether the work involved amounted only to "sweat of the brow" or rose to genuinely creative "authorial" work. The court writes:

Examination of the work, on all of its levels as a complete single work shows originality and creativity that are undoubtable. Qimron's work was not, therefore, technical work, "mechanical," like simple manual labor the results of which are known in advance. His "inspiration," the "added soul" that he gave to the Scroll fragments, that transfigured

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\* Professor of English, Case Western Reserve University. The "author" acknowledges with gratitude the decade-long collaboration with Peter Jaszi that has nourished these comments.

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

2. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 101 (2001).

3. See generally Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425, 425-48 (1984) [hereinafter Woodmansee, *The Genius and the Copyright*]; MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 36 (1994) [hereinafter WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET*]; Peter Jaszi & Martha Woodmansee, *Introduction to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 1, 2-3 (Peter Jaszi & Martha Woodmansee eds., 1994) [hereinafter *THE CONSTRUCTION OF AUTHORSHIP*].

4. *Qimron*, 54(3) P.D. at para. 14.

the fragments into a living text, were not only confined to the investment of human resources, like "sweat," in the sense of "The sweat of man's brows." These were the fruits of a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and chose between different alternatives.<sup>5</sup>

One of the unexpected pleasures of being in literary studies has involved participating in the dismantling of this opposition between "sweat of the brow" and truly creative "authorial" work. The conclusion that my discipline has reached over the past thirty years is that the distinction is specious—that it is arbitrary and frequently a source of serious harm. Empirical research into the nature of composition, and creative production generally, has shown that we are always already cutting and pasting;<sup>6</sup> and historical research has shown that the inclination to represent some creative productions as somehow more *truly* creative is rather recent. Not until the end of the eighteenth century do we find poets, publishers, and parliamentarians insisting on the originality of (some) creative work. The impetus for this Romantic (mis)representation of creative activity was the expansion—the first big expansion—in the market for printed books. In an effort to achieve visibility in a growing sea of printed matter, creative producers began to insist on the originality of their work: "My work is innovative; yours is merely hackwork."<sup>7</sup>

The arbitrary distinction between "sweat of the brow" and truly creative "authorial" work is the basis for the court's decision in *Qimron*, and the court empowers its decision rhetorically by invoking some of the more archaic tropes of this Romantic model—for example, when it notes in the passage quoted above that Qimron's reconstruction of the ancient text exhibited the requisite "originality and creativity" to lift it out of the sphere of "sweat of the brow" into that of genuine authorship *because*, by the "force of his work" in reconstructing and deciphering the

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5. *Id.*

6. See, e.g., ANDREA LUNSFORD & LISA EDE, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING (1990).

7. See Woodmansee, *The Genius and the Copyright*, *supra* note 3; WOODMANSEE, THE AUTHOR, ART, AND THE MARKET, *supra* note 3, at 50–51; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 3, at 15–28; Martha Woodmansee, *The Cultural Work of Copyright: Legislating Authorship in Britain, 1837–1842*, in LAW IN THE DOMAINS OF CULTURE 65, 65–96 (Austin Sarat & Thomas R. Kearns eds., 1998); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 Duke L.J. 455, 471, 475; Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 3, at 29, 29–56; see also MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 2, 6 (1993).

fragments, Qimron "inspired," or "imbued" them with "soul," and thereby "transfigured the fragments into a living text."<sup>8</sup> In this turn of phrase the court is casting Qimron's effort as one of giving new life and casting the creation of life not in terms of gestation in a woman's womb, but in masculine terms of insemination.<sup>9</sup>

The archaic—indeed, deeply patriarchal—roots of this way of representing the creative activities of Qimron surface even more vividly when the court turns from his economic rights to his moral rights. In the introduction to their purloined edition of the ancient text at issue, it will be recalled that Shanks and the other editors did not credit Qimron for the reconstruction they reproduced.<sup>10</sup> In the eyes of the court this is tantamount to a denial of Qimron's paternity. Figuring the deciphered text as his offspring, the court writes:

A man is entitled to have his name applied to the "children of his spirit." His spiritual connection to these is like, almost, his connection to those who come forth from his loins. Publication of a work without its being attributed to the name of its author "in the accepted manner and to the accepted extent" is a violation of the author's moral right.<sup>11</sup>

Such rhetoric produces—it empowers—the wrong decision, for it locks up, as the property of a single scholar, a text of extraordinary historical and religious significance that should be made widely available. In this I agree with Nimmer, but I cannot agree with the means by which he proposes to achieve a better outcome.

Nimmer believes that a better outcome will be achieved in *Qimron* if we simply attend to the plaintiff's intentions: Qimron intended to *reconstruct* with the greatest possible accuracy the meaning of an ancient author, not himself to *author*—to express his own subjectivity. In proposing his "rule of intentionality," however, Nimmer's aim is more ambitious than just to secure a different, better outcome in *Qimron*. He seeks thereby to articulate an autonomous, neutral principle—copyright principles generally—that will be independent of, and thus not

8. *Qimron*, 54(3) P.D. at para. 14.

9. On the gendering of creative production, see generally Richard G. Swartz, *Patrimony and the Figuration of Authorship in the Eighteenth-Century Literary Property Debates*, in 7 *WORKS AND DAYS* 29–54 (1989); CHRISTINE BATTERSBY, *GENDER AND GENIUS: TOWARDS A FEMINIST AESTHETICS* (1989).

10. *Qimron*, 54(3) P.D. at para. 20 ("Appellants published the Deciphered Text in its entirety, without noting Qimron's name . . .").

11. *Id.* at para. 23.

vulnerable to, criticism from outside the law, and in particular from literary criticism.

In the rule of intentionality Nimmer believes that he has found such a principle. I disagree. My aim in these brief comments is to reassert the relevance of literary criticism in contemporary copyright discourse. The enormous number of literary scholars Nimmer quotes in his running assault on literary theory makes it easy to lose sight of what has been the central insight of literary theory as it has been applied to copyright over the last decade, and that is that the vision of authorship at the center of this body of law operates to obscure the complexity of creative activity—to impede arbitrarily and mischievously our ability to understand whose contributions to a given cultural production can and should be recognized in disputes. I believe that this holds equally true of Nimmer's principle of intentionality. It does not succeed in escaping the force field of Romantic authorship. It *may* produce a more reasonable result in *Qimron*, but when we apply it in other contexts I believe we will see that it is not a neutral principle after all, but really just a strategic redeployment of the authorship test, and, accordingly, produces pretty much the same results as the vision of creative production that we have inherited from the nineteenth century. If I am right, I feel I will have defended the continuing relevance of literary studies in the discourse of copyright.

Take the recent case of *Aalmuhammed v. Lee*<sup>12</sup> in which the Court of Appeals for the Ninth Circuit adjudicated a claim to joint authorship in the making of the movie, *Malcolm X*.<sup>13</sup> Nimmer's intentionality rule is actually applied in this case, with the consequence that the exclusive copyright of Warner Brothers is affirmed<sup>14</sup> at the expense of a plaintiff whose contribution to the making of the film is agreed by all parties to have been "extensive."<sup>15</sup>

It seems that the plaintiff, Aalmuhammed, reviewed the shooting script, suggesting revisions—many of which were shot and some of which were included in the film ultimately released—and that he wrote entire scenes enacted in the film.<sup>16</sup> An expert on Islam and the life of Malcolm X, Aalmuhammed had himself "previously written, directed, and produced a

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12. 202 F.3d 1227 (9th Cir. 2000).

13. *Id.* at 1229.

14. *Id.* at 1236.

15. *Id.* at 1229, 1231.

16. *Id.* at 1229–30.

documentary film about Malcolm X.”<sup>17</sup> In addition to clearly copyrightable contributions, Aalmuhammed made other “substantial and valuable contributions to the movie,”<sup>18</sup> according to the court, including “direct[ing] Denzel Washington and other actors while on the set, . . . translat[ing] Arabic into English for subtitles, supply[ing] his own voice for voice-overs, select[ing] the proper prayers and religious practices for the characters, and edit[ing] parts of the movie during post production.”<sup>19</sup>

Substantial as this (partial) list of contributions may seem, it did not add up to co-authorship in the eyes of the court:

Aalmuhammed did not at any time have superintendence of the work. Warner Brothers and Spike Lee controlled it. Aalmuhammed was not the person “who . . . actually formed the picture by putting the persons in position, and arranging the place . . .” Spike Lee was, so far as we can tell from the record. Aalmuhammed. . . could make extremely helpful recommendations, but Spike Lee was not bound to accept any of them, and the work would not benefit in the slightest unless Spike Lee chose to accept them. Aalmuhammed lacked control over the work, and absence of control is strong evidence of the absence of coauthorship.<sup>20</sup>

Moreover—and apparently decisive—we are told that Warner Brothers could not “logically” have “intended to share ownership with individuals like Aalmuhammed” when it even required director Spike Lee to sign a “work for hire” agreement.<sup>21</sup>

We may or may not agree with the court’s decision in *Aalmuhammed*. My point is not that Aalmuhammed deserved a larger share of recognition and profit than he received, although it seems that a case could be made for it. The point is rather that meaningful deliberation about whose contributions can and ought to be recognized has been foreclosed upon prematurely by the court’s application of the intentionality test. The only way the intentionality principle can deal with Aalmuhammed is to erase him. This the principle shares with our standard authorship tests.

In other situations, application of the intentionality principle goes farther—producing clearly undesirable results. Consider the case of the Aboriginal artist whose design is reproduced without

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17. *Id.* at 1229.

18. *Id.* at 1231.

19. *Id.* at 1230.

20. *Id.* at 1235 (footnotes omitted).

21. *Id.*

authorization by a carpet or T-shirt manufacturer.<sup>22</sup> Fortunately, as I believe Nimmer would agree, cases like this are more and more frequently being decided in favor of the Aboriginal artists. But it is not clear that this would be the outcome if Australian courts applied the intentionality rule he is proposing. Could we say that the artists who created these designs intended to function as authors—to imbue the designs with their own subjectivity? Consciously? Even unconsciously? It is unlikely that they would describe their activity in this way, or, indeed, even accept such a description of it. That is because, like Qimron, they view the activity in which they are involved as one rather of transmission—transmission of the meanings of their forebears. Application of the intentionality rule would thus deny copyright to these creative producers—in the same way as have our standard authorship tests.<sup>23</sup>

David Nimmer's proposal would not, then, seem to advance the cause of more reasonable decisions. It seems, rather, to produce pretty much the same predictable winners and losers as does the traditional authorship test—which it extends the reach of. Like this test, it mystifies—it simplifies complex creative processes, obscuring understanding of whose contributions can and should be recognized.

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22. See *Bulun Bulun v. R & T Textiles PTY Ltd.* 157 A.L.R. 193, 195, 211–12 (1998) (finding that the copyright owner of an artistic work has a fiduciary obligation to enforce the copyright); *Milpurrru v. Indofurn* (1994) 30 I.P.R. 209 (holding that the carpet manufacturer infringed the copyrights of the Aboriginal artists by reproducing their artwork without license).

23. See generally Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 S. ATLANTIC Q. 947 (1996).