

THE DEAD SEA SCROLLS CASE

PLEASE NOTE:

This is an unofficial translation of the Dead Sea Scrolls case, decided by the Israeli Supreme Court on August 30, 2000. I omitted few paragraphs that deal with procedural matters. The footnotes explain the holding in those paragraphs. As a general guideline, I preferred accuracy to style, with the cost that the grammar might sound a bit strange to English readers. The division of paragraphs follows the court's text. All footnotes were added by the translator. I updated the footnotes in Sep. 2007, and added a list of articles and books which addressed the case.

I hope you will find this case interesting and the translation useful. I will be happy to clarify any matter regarding Israeli copyright law, or other procedures.

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Legal Literature on the case:

- Michael D. Birnhack, [The Dead Sea Scrolls Case: Who Is an Author?](#) 23 (3) EIPR 128 (2001)
- Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001)
- Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul* 81 NOTRE DAME L. REV. 1945 (2006)
- Neil W. Netanel, *From the Dead Sea Scrolls to the Digital Millennium*, 9 TEXAS INTELLECTUAL PROPERTY LAW JOURNAL 19 (2001)
- David Nimmer, *Authorship and Originality*, 38 HOUSTON L. REV. 1, 159 (2001)
- Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1 (2001)
- Urszula Tempuska, *Originality" after the Dead Sea Scrolls Decision: Implications for the American Law of Copyright*, 6 MARQ. INTELL. PROP. L. REV. 119 (2002)
- Neil Wilkof, *Copyright, Moral Rights and the Choice of Law: Where Did the Dead Sea Scrolls Court Go Wrong?* 38 HOUSTON L. REV. 463 (2001)

In the Supreme Court, sitting as a Court of Appeals

C.A. 2790/93, 2811/93¹

President: Aharon Barak²

Justice Yaakov Tirkel³

Justice Dorit Beinisch⁴

Robert E. Eisenman

(Appellant in C.A. 2790/93, and respondent in the counter-appeal)

1. Hershel Shanks

2. James M. Robinson

3. Biblical Archaeology Society

(Appellants in C.A. 2811/93, and respondents in the counter-appeal)

v.

Elisha Qimron

(Respondent, and appellant in counter appeal)

An appeal on the Decision of the District Court in Jerusalem, civil case 41/92 of
3.30.93, by Judge Dalia Dorner⁵

Argued March 3, 1998

Decided August 30, 2000

Adv. A. Hausner, argued the case for the appellant in C.A. 2790/93

Adv. D. Frimer and Y. Hoffman argued the case for the appellants in C.A. 2811/93

Adv. J. Melcer, argued the case for respondent.

ALL FOOTNOTES ARE OF THE TRANSLATOR, AND ARE NOT PART OF THE COURT'S
DECISION - M.D.B. The footnotes were updated in 2007.

¹ C.A.= Civil Appeal. The case has been published in Hebrew: 54(3) P.D. 817 (2000).

² Chief Justice Barak retired in 2006.

³ Justice Tirkel retired in 2005.

⁴ Justice Beinisch is now Chief Justice of the Supreme Court.

⁵ The District Court is usually the Court of Appeals for Magistrate courts, but has original jurisdiction over some issues, this being one. Judge Dorner was later appointed to be a Justice of the Supreme Court. She retired in 2005. The District case number is incorrectly stated by the Supreme Court as 641/92.

A DECISION

Justice Y. Tirkel:

Background:

1. The Scroll,⁶ “Rulings Pertaining to the Torah”⁷ (hereinafter: “the scroll”), is one of the concealed scrolls⁸ found in the Caves of Qumran in the Judaean Desert.⁹ The scroll is written in a language prior to the language of the Mishna, and is, probably, a letter¹⁰ of the leader of the Sect of the Judaean Desert to the leader of the People in Jerusalem. The fragments of the scroll were first found in the 1950s in “cave number 4” in Qumran, in which 15,000 fragments of different scrolls were found. Professor John Strugnell of Harvard University (hereinafter: “Strugnell”) was the first researcher to engage in compiling the fragments into one scroll, and he managed to identify about a hundred fragments of the scroll, match them – according to their shapes – into sixty – seventy fragments. The task of deciphering the scroll required supplementing the missing parts with linguistic and Halakhic¹¹ knowledge that Strugnell lacked. On this background, Professor Elisha Qimron – the respondent in the appeals and the appellant in the counter-appeal – joined Strugnell in 1981, to complete the deciphering of the scroll. Qimron is a Professor of Hebrew Language at Ben-Gurion University in Be’er Sheva, engages in philological research and specializes in studying the scrolls found at the Qumran Caves. During eleven years thereafter, Qimron engaged in deciphering the scroll. Most of the work was done by him, and he was the one to name it “Rulings Pertaining to the Torah” (in short, in English: MMT).¹² Of the sixty – seventy fragments he received from Strugnell, he managed to compile a text of 121 lines (hereinafter: “the deciphered text”), 40% of which are supplementing the lacuna that was not found in the text on the fragments.

During the period deciphering, Qimron and Strugnell passed a few copies of the draft of the text to a few researchers, asking for their comments. In 1990, towards the completion of the deciphering, an agreement¹³ between Qimron and Strugnell and the English Oxford Press regarding a publication of the deciphered text accompanied with photographs of the fragments of the scroll and interpretation, has been reached.

Mr. Hershel Shanks (hereinafter: “Shanks”) – the appellant No. 1 in C.A. 2811/93 and respondent in the counter-appeal – is an attorney, and the editor of an archaeological

⁶ In Hebrew: Megillah.

⁷ I borrow the translation of the name of the scroll from Joseph L. Sax, *PLAYING DARTS WITH REMBRANDT – PUBLIC AND PRIVATE RIGHTS IN TREASURES* 159 (Ann Arbor, 1999). Later on the Court refers to the scroll as either “the scroll” or MMT.

⁸ “The Concealed Scrolls” is the Hebrew name of the Dead Sea Scrolls.

⁹ This is the desert just west of the Jordan river, and east of Jerusalem. The Qumran Caves are close to the Dead Sea.

¹⁰ Or proclamation.

¹¹ Of the “Halakhah”, which is Jewish law.

¹² See supra note 7.

¹³ The Court says “a principled agreement”, meaning that it was an understanding, not yet formalized.

review called Biblical Archaeology Review (hereinafter: “BAR”), which reached the hands of over half a million readers in many countries, Israel among them. The Biblical Archaeology Society (hereinafter: “BAS”) publishes the BAR. BAS is incorporated as a company in the United States, and is the appellant number 3 in C.A. 2811/93 and respondent in the counter-appeal. In November 1991, before Strugnell and Qimron published the deciphered text, and without their consent, Shanks published in the United States, by BAS, a book called “Facsimile Edition of the Dead Sea Scrolls” (hereinafter: “the book”), which contained photographs of hundreds of fragments of the concealed scrolls, including photos of fragments of the scroll.¹⁴ The editors of the book were Dr. James Robinson (hereinafter: “Robinson”) – the appellant number 2 in C.A. 2811/93 and respondent in the counter appeal, and Dr. Robert Eisenman (hereinafter: “Eisenman”) – the appellant in C.A. 2790/93 and respondent in the counter-appeal (hereinafter: “the editors”). The editors wrote an introduction to the book and made an index of the photographs included in it. The book also has “an introduction by the publisher”, written by Shanks. To this Introduction there are a few appendixes, one of which is a copy of the draft of the deciphered text, without mentioning Qimron’s name on the text (for purpose of brevity, the “draft of the deciphered text” will be referred to hereinafter as “the deciphered text”).

2. On 1.14.92, Qimron filed suit in the Jerusalem District Court, in which he petitioned the court to order Shanks and the editors (hereinafter: “appellants”) to avoid distributing the book as long as it includes the deciphered text of the scroll, and to compensate him for the harm to his copyright.¹⁵ He also petitioned for an interlocutory remedy, until final decision. The District Court (Her Honor, Judge D. Dorner), in its decision of 2.21.92; accorded Qimron’s petition and ordered appellants to avoid publication or distribution of the book in Israel or outside Israel as long as it includes the deciphered text. In addition, the Court allowed Qimron to serve appellants with the complaint, outside the jurisdiction. Appellants petition to cancel the permission of service was rejected. Until the temporary injunction, 200-300 copies of the book were sold, mostly in the United States, and a few in Israel.

The District Court’s Decision:

3. The District Court, in its decision of 3.30.93, found that appellants infringed Qimron’s copyright according to the Copyright Act of 1911 (hereinafter: “the Act”),¹⁶ ordered a permanent injunction as requested and ordered appellants to pay Qimron the sum of 100,000 NIS; 20,000 out of which as statutory damages without proving damages, and 80,000 for the grief brought upon him.¹⁷ It also ordered attorneys’ fees to Qimron, in the amount of 50,000 NIS.

¹⁴ “The scroll” – i.e., of MMT.

¹⁵ This is of course a literal translation. Note, however, that “copyright” in Israeli law is translated in the European manner, as “author’s right”.

¹⁶ The Copyright law in Israel is based on the 1911 English Copyright Act, supplemented by another Act in 1924, incorporated into Israeli law in 1948. The 1911 Act has been amended a few times since then, most recently in 1999, to comply with TRIPS.

¹⁷ In the values of the U.S. Dollar in March 1993, this was about \$36,000 (\$1=2.764 NIS).

The Court found that the infringement took place in the United States. Nevertheless, it reached the decision based on Israeli law, after finding that the matter is under the presumption [that the law in the foreign jurisdiction is the same as the law of the forum absent evidence to the contrary].¹⁸ In its decision, the Court found that Qimron has copyright in the deciphered text; that Qimron's moral right was infringed by publishing the text without mentioning his name;¹⁹ that under the circumstances in which appellants published the deciphered text, they do not enjoy the "good faith" defense and that there are no policy considerations which could have exempt appellants of liability. It also found that all appellants are jointly liable to Qimron for infringing his copyright and moral right; but, because Shanks is the one who had decided to publish the deciphered text and undertook full responsibility to the results [of the publication], the Court found that "his relative liability in relation to the two [the editors – Y.T.] is a 100%".

4. In C.A. 2811/93, Shanks, Robinson and BAS request the annulment of the District Court's decision, including its remedies. In C.A. 2790/93, Eisenman's petition is to cancel the parts of the decision referring to him. In his counter-appeal, Qimron asks the court to find that he is entitled to remedy also for pecuniary damages, which he argues have been proved, and extend the amount of damages he was awarded. The discussion of the appeals was conjoined.

During the appeals, a body called the "Committee of Concerned Intellectual Property Educators" petitioned to allow it to join the procedure as *Amicus Curiae*, and file a brief. In our decision of 8.24.99 we refused the request, and later on (section 31) we provide our reasons.²⁰

The Arguments of the Parties:

5. Appellants argue that there was no infringement of Qimron's rights in Israel, and thus he has no cause of action according to Israeli Law; that there were no circumstances for applying the [Israeli law];²¹ that Qimron's acts of supplementing the text is none other than a reconstruction of an existing work and thus the deciphered text is not protected by copyright law; that protecting Qimron's reconstruction harms scholarly research, accords Qimron a property right in "part of the cultural heritage of the Jewish People" and does not fit desired legal policy; that publishing the deciphered text, in the manner done, is in line with "scholarly convention", customary in the academia, and thus protected as "fair dealing" of a work, or as a publication done according to an implied consent by Qimron, even though Qimron had not actually provided his consent to the publication; that the deciphered text had been distributed by Qimron himself among researchers in the academia without mentioning his name; and thus, there is no basis for finding that

¹⁸ The literal translation of the bracketed term is "the presumption of identity of the laws".

¹⁹ Moral rights are part of Israeli law as of 1981.

²⁰ This is David Nimmer's brief. The procedure of *Amicus Curiae* is both new and rare in Israeli law.

²¹ See *supra* note 18.

publishing it without Qimron's name infringed his moral right. In any case, in the circumstances of the matter, the appellants have [acted sufficiently] by pointing that the deciphered text was made by Strugnell "together with another person"; that Qimron has suffered no pecuniary damages worthy of compensation; that the amount ordered to Qimron for grief and attorney fees are overrated.

The editors add that their editorial jurisdiction did not extend to the part of the book that includes the Introduction written by Shanks and the copy of the deciphered text, and that they did not have control over its addition to the book; that they have objected to adding an introduction to the book but Shanks ignored their objection; that they did not know in advance that the copy of the deciphered text will be added to the book; and that, whatever else, they have not done anything that constitutes copyright infringement.

6. In his counter-appeal, Qimron argues that harming his right to be the first publisher of the deciphered text has caused him pecuniary damages and non-pecuniary damages, and thus the Court should have awarded him substantial pecuniary damages and not settle for statutory damages; that despite the difficulty to measure his pecuniary damages, there were enough evidence to do so; that, alternatively, he should have been awarded global pecuniary damages, and that the Court ignored his petition to order a remedy of delivering-up the infringing copies of the book, remaining in the hands of the appellants, according to section 7 of the Act.

Petitions to Allow Further Evidence:

7. The parties have requested adding further evidence in this appeal. These are evidence that did not exist when the complaint was discussed in the District Court, namely books and articles, the most important of which are Qimron and Strugnell's book, published in 1994, other books about the same scroll, a journalistic article and articles published later on, and decisions in legal proceedings conducted in the United States against Qimron, and that could not have been provided beforehand.

Since this evidence pours some light over the picture in front of the court – without prejudice over the result – I agreed to accept them, for this purpose alone.

Discussion:

Applying Israeli Law:

8. The District Court decided the case according to Israeli Law, after finding that this is the law to be applied. As it noted, "all agree that the suit should be decided according to the law of the place of infringement, i.e., the law of the United States... it is undisputed that this law has not been proven." Appellants dispute the application of the presumption of identical laws in this case, and argue that once Qimron did not prove which is the law of the place of the alleged infringement, "thus he did not prove the facts which constitute the cause of his action."

I cannot accept appellants' argument, and I do accept Qimron's argument that the matter is under Israeli law, without turning to the presumption of the identity of the laws. He relies on the fact that copies of the book were sent to readers in Israel, and on the fact that part of the sale efforts were made in Israel. Indeed, from Shanks' testimony (pp. 271-272 of the protocol) and the forms of order submitted as evidence, it is apparent that three copies of the book were sent by BAS to readers in Israel. These copies were, however, ordered in the United States, and paid for there, but it is sufficient that BAS sent them directly to Israel, to reach the finding that it has published the deciphered text in Israel. Since Qimron's cause of action is that his right of first publication of the deciphered text has been infringed, the copies distributed in Israel until the issuance of the injunction, which halted the distribution – even if few – are a sufficient reason to apply Israeli law on this matter.

It is submitted that there is no reason to interfere with the [District] Court's conclusion, that the matter should be decided upon Israeli Law.

[Omitted]²²

Did Qimron have Copyright in the Deciphered Text?

A Preliminary Comment:

9. Before we reach the question, of whether Qimron has copyright in the deciphered text, it is desired to pay attention to the research of the concealed scrolls found in the Qumran Caves. The first scroll was found by accident in 1947. In the years thereafter, a few caves were discovered in the Qumran, and many more scrolls were found. The government of Jordan, under which jurisdiction the Qumran area was in those days, authorized a limited international team of researchers to study the scrolls, held in the Rockefeller Museum in Jerusalem. Only they were allowed to study the scrolls. Following the Six Day War,²³ the scrolls have been transferred to the State of Israel, and the Antiquities Authority²⁴ maintained the policy according to which the scrolls were studied only by a limited international team of researchers, which has expanded in the course of time. Qimron is part of the team since 1980.

In appellants' brief there is a bitter complaint regarding the "monopoly" given to the international team of researchers, that has prevented many researchers of studying the scrolls. In their opinion, publishing the book has "greatly contributed to the study of the concealed scrolls – if only in that it broke the monopoly that has been up to that point". The District Court responded, saying that "Shanks conducted for years, on the pages of the BAR, a persistent and polemic campaign to open the access and research of the concealed scrolls to all interested. He testified that he has been a voice to all those who remained outside the "research cartel". Shanks wrote similar things in the Introduction of the book:

²² This paragraph explains why it is the Israeli law that is applied, rather than American law.

²³ June 1967.

²⁴ This is a statutory agency, the Director of which is appointed with the approval of the government.

“Surely we must admire the dedicated people who have devoted their professional lives to arranging and deciphering these seemingly impenetrable pieces of our common past. For the most part, the people who do this are not only dedicated but brilliant experts in what they are doing, conscientious to the nuances of their work. For this, all honor to them. But for their pride and greed – their unbending determination to keep exclusive control of these treasures for themselves, their heirs and their students – they must bear the shame.”²⁵

I will say right now that this dispute is not here for our resolution, and neither is the rightness of the reasons according to which Qimron has given the right to take part in the research of the scroll and deciphering it or the rightness of the reasons according to which others have not won this right. The rightness of Shanks’ public campaign – even if he considered the publication of the book as part of this campaign – is none of our business,²⁶ to the extent that this issue goes beyond the frame of the discussion of the copyright rights in the deciphered text.

What is the Subject Matter of the Right?

10. In order to decide whether Qimron has copyright in the deciphered text, we must define what is the subject matter of Qimron’s right – what is the “work” that Qimron has created during eleven years of work? Here, we should distinguish between the two main components of the deciphered text. One, is the physical, the tangible, “raw material”: the fragments of the scroll, created about 2000 years ago and found in Qumran; the second component is what made the collection of the fragments a deciphered text by physically adding them together, arranging them, deciphering what is written on them to the extent it required deciphering it, and filling the gaps between the fragments. In other words, the art of providing soul and spirit in the fragments that made them a meaningful and living text. Indeed, the fragments of the scroll are today in the public domain in the sense that anyone who wishes to aggregate them and decipher them is permitted to do so. But, the fact that the “building blocks”, the material in the hands of the creator in his work,²⁷ are in the public domain, is irrelevant to the question of whether he²⁸ has copyright in his work. This Court has made this point, saying:

“It does not matter that the “raw material” of compiling the boards is in the public domain... the question, whether respondent’s boards are an original work, due to thought, labor or skill invested therein, should be decided according to examining the author’s work in its entirety” – C.A. 136/71 *The State v. Achiman*, P.D. 26(2) 259, 261 (hereinafter: *Achiman*).²⁹

²⁵ The court quoted this in English.

²⁶ Can also be translated as “none of our interest”.

²⁷ This is “creator” in the meaning of “author”, not God.

²⁸ The author.

²⁹ P.D. stand for “Piskey Din” which is the Israeli Case Report.

The question here is whether Qimron has copyright in the deciphered text as a result of one or more of the things he did: the physical aggregating of the fragments, their arrangement, deciphering what is written on them, and supplementing the lacuna between them. Does that “spirit”, that “soul”, that he placed in the fragments of the scroll, with the power of his knowledge and talent – that I propose should be called “SH’AR RU’ACH” (in the sense of one of the interpretations of the words in Malachi, Ch. 2, s. 15)³⁰ – make the deciphered text in its entirety a work protected by the Act?

When Does the Copyright Subsist?

11. In section 35(1) of the Act it is determined that a “literary work”, that can be subject to copyright, includes, inter alia, also compilations. As said, according to this instruction, “copyright can subsist in a unique editing or design” as long as it has “an original work, due to thought, labor or skill invested therein” (*Achiman*, at 261). Thus, a “literary work”, as this term is used in the Act, will enjoy copyright protection only if it is an original work. (See paragraph 13 of my decision in C.A. 8393/96 *The Lottery Company v. The Roy Export Establishment Company*,³¹ and T. Greenman, *The Rights of Authors, Artists and Producers* (1998) at 25 – 26). As said:

“The requirement of originality has for some reason been left out of the official Hebrew translation in the Statutes of the Land of Israel, but it appears in section 1 of the English version of the Act, which is the authoritative one: “every original literary, dramatic, musical and artistic work”. Copyright protection is not accorded for an abstract idea but for the tangible expression of the idea. Such an expression must be original ... The work need not be an expression of a thought or an original invention. All that is required is that the work is not copied from another work, but that its origin is in its creator, its author. ... In order to examine whether the work is worthy of protection, it should be seen in its entirety, as one entity. If, despite the use that the author has made of an existing matter, [he] invested in it enough independent effort and talent of his own, that originates from him, the work will be protected.” (Justice S. Netanyahu, in C.A. 360/83 *Strosky Inc. v. Vitman Inc.*, P.D. 40(3) 340, 346)(my emphasis, Y.T.).

Originality is the substance, and it is not enough to invest effort, time or talent to justify copyright protection. As said:

“According to the goals of copyright law... it is clear that the conclusion is that labor is not sufficient to justify according copyright protection to an expression. This conclusion is supported both by that copyright law consists a

³⁰ “Sh’ar Ru’ach” has been translated as “the residue of the spirit” (King James Version); “A Remnant of the spirit” (New American Standard Bible; also in The Darby Translation and in Young’s Literal translation). I will be using the Hebrew expression.

³¹ This is a recent case in which the Roy Export Co. won a suit regarding the usage of Charlie Chaplin’s character in an advertising campaign of the Israeli national lottery company.

balance between competing social needs and in the scope of the protection. The balancing role of the Act stems from [the fact that] according copyright protection over a particular expression limits potential future expressions. A view that understands the right as deriving from the labor itself is not sensitive enough to this important balance, which lies at the basis of copyright law. True, the “investment” approach is generally accepted as justifying real property, and thus there are those who view it as suitable for intellectual property as well ... but it seems that the differences between the two fields does not allow its adoption to intellectual property.” (President M. Shamgar in C.A. 513/89 *Interlego A/S v. Exin Lines Bros. S.A.*, P.D. 48(4) 133, 165; and M. Deutch, *Property* (Vol. I, 1997) at 78-79. Compare to *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 (1991).

However, it is important to point that there are those who hold that investment of effort, time or talent, in itself, by the author, can indicate the existence of creativity (See *Interlego*, at 164). As for the extent of investment and creativity, it has been said that:

“It is worth noting that according to all views these are only minimal tests, both as to the issue of investment and as for the level of creativity required. ... The investment is apparent in investing some human resource: time, effort, talent, money, knowledge, judgment, development, pain or personal preference ... it is required that the creator’s investment will pass a certain minimum, though this minimum is very low. It is required that ‘it is possible to distinguish the independent contribution of the author’, or ‘that the product is distinguishable from its building blocks’” (*Interlego*, at 170).

At this point, we have to pay attention also to the process of crystallizing the work in its final form, and the extent of the author’s own original contribution to this process:

“In examining originality, there is no place for comparing the ultimate work with other works, and the focus should be on the phase of making the work. ... The proper test will focus on examining the considerations in the phase of making the work, and will examine if these are taken from existing components or existing works, or whether there is something more, of the original contribution of the author. In other words, the original contribution is not examined in light of the ultimate product but according to its origin: is the origin found in the author, or alternatively, in someone else who is known. Thus, the purpose of copyright law is achieved.” (*Interlego*, at 171).

12. We have seen that compiling and editing might fall within the definition of “literary work”, in the meaning of this term in the Act, and that the question, whether copyright subsists in the work, is examined according to the level of originality it includes. We have further seen that it is not enough that the author has invested his

human skills, but a [certain] level of originality is required – not only in the work itself but also in the process of creating it – for the work to enjoy protection.

From the Scroll of Copyright to the MMT Scroll:

13. The District Court found that Qimron has copyright in the deciphered text, after finding that the transcription of the text and filling the gaps between the fragments were done based on original Halakhic and linguistic research. As it stated:

“Indeed, according to the criteria set in the case law, copying the original, even if it is complicated and requires skill, does not create copyright. It is true that also in this case, the decipherer’s intent was to reconstruct the original scroll. But, the original scroll has not all been discovered. The dozens of fragments that were discovered referred to various copies,³² there was no physical compatibility between most of the fragments and even after matching them, there remained a gap of about half the text. As mentioned, it was impossible to match the fragments to each other and fill the gaps without a linguistic and Halakhic research. ... Thus, there is no place for an analogy between the work of the plaintiff, which had creative and original elements, and the cases discussed in the case law, on which the defendants relied, which dealt, as said, with copying a phonebook and drawings. The result of the above is that editing the transcription and compiling the fragments that match physically to each other is not the required originality. In contrast, compiling the text based on a Halakhic and linguistic research, conducted by plaintiff, is an original work”.

Appellants reject the Court’s conclusions. They argue that the filling of the gaps by Qimron is not an original work, but is a discovery and exposition of parts of the original text, as written 2000 years ago. Thus, there was only discovery of facts, in the framework of a research of the historical and scientific research, and as such, it is not protected by copyright law. Even if Qimron has invested effort, time, knowledge and talent, there is no originality in the deciphered text that awards him with copyright. Indeed, the original, complete and “true”, text of the scroll is not in our hands so we cannot compare it to the deciphered text, but this, as they state, does not turn the deciphered text “from a factual work which is not worthy of the law’s protection, to a fictional work”. Since Qimron presented the work as reflecting the “real” text of the scroll, he cannot argue that it is an original work.³³ Filling the gaps, too, is none other than writing ideas down, and even if the ideas are original, they are not an original expression worthy of protection. Furthermore, since the “idea” expressed in the text of the original scroll can be expressed only in one way – as Qimron has expressed it in the deciphered text – no copyright subsists in the idea, and it cannot be protected. This view is based on the “merger doctrine”, which source is in American law. Appellants also brought some examples of situations where copyright protection is not awarded,

³² *I.e.*, to various copies of MMT, found in the cave.

³³ “Cannot” in the sense of estoppel.

which, in their opinion, the proper result in our case can be inferred. I cannot accept these arguments.

14. We have seen above that one who has compiled and arranged “raw material”, created by others a long time ago, will enjoy copyright protection in the fruit of his labor, as long as it has the characteristics of originality. (See *Achimán*, cited above). Appellants try to create rules like, “it is impossible to acquire copyright in a reconstructed scroll” or “it is impossible to acquire copyright in the product of a scientific-historical research”, and apply them to this case, but this cannot assist them. The decision in this dispute, more than it is based upon rules, is based upon the particular circumstances of this case, and the principles which we have examined. The following is appropriate:

“In my opinion, there is no need to predetermine whether we face an idea or its application. It all depends on the circumstances: the same set of facts can be considered for one matter an idea, and for another matter the application of the idea. Taking a wider perspective, there is nothing original, but any invention or “idea” are a development of a prior invention or “idea”; the question should be whether, in practice, one added something original of his own to the prior “idea” or “application” (and then, the work will be protected even though the basis of the original work are derived from another source), or whether he copied, in disguise, what another has done without in fact creating something original of his own.” (Justice S. Levin, in C.A. 23/81 *Hershko v. Aourbuch*, P.D. 42(3) 749, 759).

The District Court closely examined Qimron’s process of work, with the intention of examining the level of originality in the process, and not because it thought that a large investment is sufficient to acquire copyright. This process, at the end of which the collection of fragments became a complete text, that bears content and meaning, included several phases of creation:³⁴ matching the fragments based on their physical compatibility, arranging the matching “islands” of fragments and placing them in the putative place in the scroll, deciphering the written text on the fragments, to the extent that such deciphering is required and filling the gaps between the fragments. In the creation of any of these phases there has been a different level of originality and creativity, but nevertheless, there is no place for examining each phase on its own. In this case, the various phases of the work are tied together, interdependent and have mutual influence upon each other. Deciphering the text dictates, to some extent, the arrangement of the “islands” of fragments; the arrangement influences the possible meaning of the text, its construction and content, and the way of filling the gaps in it. The different phases of the work should not be separated from each other, and should be considered as one work. Examining the work, with its various phases, as one whole work, reveals undoubted originality and creativity. Qimron’s work was not technical, “mechanical”, like simple labor which result is pre-known. His SH’AR RU’ACH,³⁵ “the additional soul” he put in the fragments of the scroll, that turned the fragments to

³⁴ *I.e.*, of authorship.

³⁵ The literary translation is: “the additional spirit.”

a living text, were not just the investment of human resources, in the meaning of “the sweat of man’s brow”. It was the fruit of a process in which Qimron applied his knowledge, skill, imagination; in which he applied discretion and chose among various options. The District Court has well illustrated Qimron’s discretion and creativity:

“There was no way to reach a single reconstruction, since the manner of reconstruction and filling the gaps depend on the results of the research. These, for the most, are not identical, for there is a dispute among scholars. As an example for this difference, plaintiff has brought two disputed between himself and Strugnell:

- (1) Strugnell thought that in some fragments the sentences are of 9 lines, and their arrangement is thus vertical. The plaintiff, after a study, has concluded that in the relevant portion, the sentence is of 18 lines, and thus it should be arranged horizontally. Of course, the difference in the arrangement influenced the content of the scroll.
- (2) Another fragment was compiled from 6 tiny fragments, and plaintiff explained that this way of arranging them is entirely a speculation. It depended on whether to add a missing letter with an “O” as Strugnell thought, so the word would read “Orot”,³⁶ or with the letter “O’”, so the word is read “O’ROT”.³⁷ After a Halakhic study of the purification of skins in those days, plaintiff has concluded that it is “O’ROT”. He compiled the portion based on this assumption, and of course the content was completely different from the content that would have been found had the fragments been compiled based on the assumption that the word was “orot”.”

From here, a clear picture of Qimron’s original contribution is apparent. From here derives the conclusion that the “SH’AR RU’ACH”, the “additional soul” he inspired in the fragments of the scroll, with his labor, make him the owner of the copyright in the deciphered text.

Does proper legal policy justify negating the copyright?

15. Appellants further argue that proper legal policy requires the conclusion that the deciphered text is not an original work and is not protected by copyright law. In their opinion, the finding that Qimron has copyright in the deciphered text accords Qimron with the position of a monopoly in a document of historical value, which is part of the cultural heritage of the Jewish people. This position might deter other scholars from examining and criticizing the text’s reconstruction, harm the study of the concealed scrolls in the future and the public interest. They argue, that even if there is a feeling that respondent has suffered injustice,³⁸ copyright law is not the proper place to

³⁶ Orot = lights.

³⁷ O’rot = skins.

³⁸ Can also be translated as “wrong”, or “evil”. In any case, the meaning is a “moral” wrong, rather than a legally actionable one.

correct it. Based on these reasons, appellants petition the court to find that it is impossible to accord copyright in the deciphered text, and thus, that Qimron has no copyright.

These arguments, made by appellants, are rather empty. We clarified above that Qimron does not have a right in the “raw material” – the actual fragments of the scroll – and neither does he demand it. His copyright in the deciphered text does not prevent anyone the possibility to study the fragments, to arrange them, to decipher the text and fill the gaps between them, in a different way than Qimron has chosen, and publish the results of the work and even enjoy copyright protection. In a sense, what we have here is a “multi-factor” equation, which anyone who attempts to solve it can try and place different “values” in their place. Appellants further argue that the copyright owner will try to silence his critics, arguing that they infringe his copyright, and thus the freedom of academic research will suffer severe harm. We should not dismiss these contentions easily. In the past, I have emphasized the importance of academic freedom, and pointed that “unfettered research, study and teaching in all humanities, elevate the individual in the society and with him society at large. This is also realization of a fundamental human need” (Criminal Appeal 2831/95 *Elba v. The State*, P.D. 50(5) 221, 335). Indeed, this is a struggle among interests, which sometimes face each other – the individual’s right to protection of the fruit of his labor versus the society’s right to flourish, based on the fertile grounds of the past – and these interests should be balanced. But in this case, we need not discuss the proper balance, since there is no basis for fear. As said:

“... the legislature did not ignore the meaning of the scope of the use and its purpose, when shaping the right; some uses, under some circumstances, have been excluded from the ambit of copyright protection for reasons of public policy. But, this is possible only as an exception to the right” (Justice Y. Malz, in A.L.A. 2687/92 *Geva v. Walt Disney Inc.*, P.D. 48(1) 251 at 268-269; hereinafter *Geva*; and see also paragraph 21 in my opinion in *The Lottery Co.*).

In my opinion, these exceptions embedded in the law, are sufficient to assure the freedom of academic research, despite Qimron’s copyright in the deciphered scroll. An example to such an exception is found in section 2(1) of the Act:

“Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do, which is by this Act conferred on the owner of the copyright: provided that the following acts shall not constitute an infringement of copyright –

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;”³⁹

³⁹ The translation is taken from the English text of the 1911 Copyright Act.

Thus, a researcher that will study the deciphered text or its creation, for the purposes mentioned in the section, will be entitled to the defense that his dealing with the work was “fair dealing”, as well as other defenses, as we shall see further on. The conclusion is that that these considerations, which appellants argue for, do not negate Qimron’s copyright in the deciphered text.

Did Appellants infringe Qimron’s copyright?

The Infringement:

16. Section 1 of the Act states:

“1. Copyright:

- (1) ...
- (2) For the purposes of this Act, “copyright” means ... if the work is unpublished – to publish the work or any substantial part thereof
- (3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public...”⁴⁰

The act of publication of a work before published by its owner and without his consent is an infringement of the right, as stated in section 2(1) of the Act, cited above. As mentioned, the deciphered text was published in the book, before Qimron, the copyright owner, published it and without his consent. This is not disputed. By this, his copyright has been infringed.

Do Appellants enjoy the defense of “scholarly convention”?

17. It has been mentioned above that Qimron and Strugnell passed a few copies of the deciphered text, before published, to several scholars, asking for their comments (see paragraph 1, *supra*). One of the scholars has probably passed the copy he received to others, and in this way a copy has reached the hands of Dr. Zdzislaw Kapera (hereinafter: “Kapera”), a Polish researcher from Krakow. In December 1990, before the book was published,⁴¹ Kapera published the deciphered text in a review called “The Qumran Chronicle”. Along the text, he mentioned that the source of the text is anonymous, and that the readers are requested not to copy it or further transfer it to other people. Upon Qimron’s request, the Director of the Antiquities Authority sent, on 3.12.91, a warning letter to Kapera, in which he pointed that the publication infringes the legal, moral and ethical rights of Strugnell and Qimron, and insisted that the publication of the review be halted. Kapera responded with an apology, in which he explained that he distributed only few copies of the review and promised to halt distribution. Appellants thus argue that when the book was published in November 1991, the deciphered text has already been in the hands of scholars, and was thus a “published” text, according to the “scholarly convention”. Thus, the publication of the

⁴⁰ The translation is taken from the English text of the 1911 Copyright Act.

⁴¹ *I.e.*, the infringing book.

deciphered text in the book should be considered as if made upon Qimron's implied consent; for scholars who find a text published in an academic review, should not be forced to check whether the publication has been made with the consent of the copyright owner.

18. Appellants' arguments do not withstand. Firstly, in the current case, one should not rely on a "scholarly convention" regarding the use of research material published by its author. As mentioned, appellants have used published material which has not mentioned the name of the author, accompanied with the explicit statement of the editor⁴² not to copy it and not to transfer it further. This is sufficient to dismiss the argument. Secondly, from Shanks' words himself, in the Introduction he wrote for the book, it is clear that he knew about the letter written by the Director of the Antiquities Authority to Kapera, which Shanks attached as an appendix to the Introduction, and that he knew that Kapera has decided to halt the distribution of his review and destroy the copies. Under these circumstances, it should be determined that Shanks published the deciphered text despite his knowledge that Qimron opposed it. Furthermore, the District Court found as a finding of fact that:

"Shanks, after consideration, formed the opinion that it is unlikely that he will be sued for copyright infringement, not by the ailing Strugnell (and he was correct in this), and not by the quiet and shy plaintiff (Qimron – Y.T.), who lives in Israel".

Thus, the argument that the publication of the deciphered text was made according to a "scholarly convention" or according to Qimron's implied consent should be rejected.

As a footnote to this, I will comment that according to section 8 of the Act, an "innocent infringer" is exempt from liability to pay damages:

"Exemption of innocent infringer from liability to pay damages:

Where proceedings are taken in respect to the infringement of the copyright in any work and the defendant in his defense alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsists in the work."⁴³

Shanks is not such an innocent infringer. (cf. Deutch, at 191).

⁴² *I.e.* Kapera.

⁴³ The translation is taken from the English text of the 1911 Copyright Act.

Do Appellants enjoy the defense of “fair dealing” of the work?

19. We have seen that “Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;” is not considered copyright infringement (section 2(1) of the Act). The question of whether there was “fair dealing” of the work should pass two tests: whether the use was fair? Was the use for one of the enumerated purposes mentioned in section 2(1) of the Act? (see *Geva*, at 270, and paragraph 22 of my Opinion in the *Lottery Co.*). According to appellants, publishing the deciphered text “enabled researchers all over the world to access the text, to study it for their needs, and to criticize, at their will, respondent’s arguments and conclusions, as expressed in articles he has published in the course of the years regarding the MMT scroll.” They argue that the publication of the book, including the deciphered text, is “fair dealing” for the purpose of research and criticism. They further argue that the publication is a “newspaper summary”, that has brought “news” to the public. In sum, the publication of the deciphered text had been undertaken to promote the public interest, and impeding the publication by Qimron has harmed the public interest.

20. I cannot accept this argument. Appellants published the deciphered text in its entirety, without mentioning Qimron’s name, and by this they knowingly infringed his right to be the first to publish the deciphered text. In addition, it is apparent that the publication was not “fair dealing” of the work and was not meant for the purposes enumerated in section 2(1) of the Act. This is apparent in that the text has been included among the appendixes to the Introduction, which included also letters, without comment, interpretation, criticism or any reference to its content. In addition, it is apparent from Shanks’ introduction to the book, as quoted *supra* (paragraph 9) that his main purpose in publishing the deciphered text was defiance against the research “monopoly” given to the international team of researchers.

The argument that the text has been published as a “newspaper summary” is baseless. Even had the term “newspaper summary” borne the meaning that appellants wish to attribute to it – and I do not state a position as to this – the argument has no anchor in the evidence. There is no statement or a hint in the book that the deciphered text included in it is “news”, brought to the public, or that there is an intention of so doing, as such. Furthermore, publishing the deciphered text in its **entirety**, as it was, is not “summary”, and is not “journalistic”. Either way, even had it been a “newspaper summary”, the use of the deciphered text was not at all “fair”, for Qimron’s name was absent.

Hence, appellants do not enjoy the defense of “fair dealing” of the work.

Did the editors infringe Qimron’s right?

21. The question, whether the **editors** have infringed Qimron’s copyright, requires a separate discussion.

The editors' names are mentioned at the beginning of the book. The District Court found that they have infringed Qimron's copyright. But it also found that "[Shanks' – Y.T.] liability, relative to the two, is 100%", for Shanks was the one who has decided to publish the deciphered text in the book, and for the reason that Shanks has taken responsibility⁴⁴ for so doing. The editors appeal the Court's finding. They argue that their role was only to receive and classify the photographs of the fragments of the undeciphered scrolls, editing an index of the photographs of the fragments, and writing an introduction to the book. They did not control the publisher's introduction, written by Shanks, and its inclusion in the book with appendixes, one of which was the deciphered text – and thus they are not liable for infringing Qimron's copyright.

I will say right away that after examining the book and the evidence presented to the District Court, I have reached the conclusion that the editors' argument should be rejected.

22. The front page of the book says that the book was prepared by the editors with an introduction and an index:

**A Facsimile Edition
of the
Dead Sea Scrolls**
Prepared with
an Introduction
and Index
by
Robert H. Eisenman
and
James M. Robinson

Indeed, Shanks' Introduction, included in the book, was not mentioned in the front page, but, from the evidence presented to the District Court it is evident that the editors knew in advance about Shanks' intention to include the introduction he wrote in the book, and he also provided the introduction to the editor's review. The introduction also explicitly stated that the text of the scroll, published in 1990 by Kapera, is the deciphered text – attached as an appendix to the introduction. Furthermore, the introduction indicates that Shanks – and thus the editors too – were aware that the publication of the deciphered text infringed Qimron's copyright. As said above, the introduction describes the events that halted the distribution of the deciphered text by Kapera, including a quote of the above mentioned letter, sent by the Director of the Antiquities Authority to Kapera, in which he stated that the

⁴⁴ Can also be translated "liability".

publication infringes Strugnell and Qimron's rights. It was also mentioned that this letter is also attached as an appendix to the introduction (page xvi in the book). Nevertheless, the editors sufficed in expressing reservation concerning the **style** of the introduction, and did not object to publishing the deciphered text in the book. Once they have agreed, in these circumstances, that their name be read on the book as its editors – without reserving the contents of the introduction or the appendixes thereof – this can be understood as an implied consent to the copyright infringement.

Further more, I will note that the editors' liability to Qimron, could have been based on further grounds. In my opinion, mentioning the name of the editor on the cover of the book, in itself creates a presumption that all that is published in the book is done with their consent; unless it is explicitly written otherwise on the cover. The editor can rebut this presumption, by presenting evidence. In this case, the cover of the book states that it has been prepared by the editors with an introduction and an index. This phrasing, describing the editors' work, does not exclude Shanks' introduction and its appendixes, from their liability. Furthermore, in the introduction to their book, the editors pointed that not only did they assist in preparing the edition, but that they **also** prepared the introduction and index (page xi). These words reinforce the above mentioned conclusion.

As said, the editors could have rebutted this presumption by presenting evidence to the contrary, but they have not done so. The protocol of the argument in the District Court shows that they mentioned this claim in their briefs, but did not show up in court to testify. Shank's testimony, that he bares all the responsibility to the introduction he has written as well as the testimony of attorney William Cox, who coordinated between the editors and Shanks, are irrelevant in respect to Qimron, and bare, at the most, upon their relationship with Shanks.

Thus, the editors are presumed to have agreed to the publication of all that is published in the book.

The Moral Right:

23. Other than the material rights that a copyright owner holds, he has also the personal-moral right (see J. Weisman, "The Personal Right (Droit Moral) in Copyright Law", 7 *Bar Ilan L. Stud.* 51, 55 (1989)). Section 4A to the Copyright Ordinance⁴⁵ reads:

"4A.

(1) An author is entitled that his name be attributed to his work in the scope and extent customary;

⁴⁵ This is the second major legislation in this filed, dated to 1924. The section quoted in the text was added in a 1981 amendment.

(3) infringement of this right is a civil tort, and the Ordinance on Torts shall govern it.

(4) the right of an author according to this section is independent of his material rights in that work, and will subsist even after this right, all or part thereof, has been transferred to another.

---”.

A person is entitled that his name be attributed to the “children of his spirit”. His spiritual relationship to these is akin, almost, to his relationship to his offspring. Publication of a work without baring his name in “the reasonable scope and to the extent” infringes the moral right of the author. The roots of this important principle are found also in Jewish sources....⁴⁶

As the District Court found, “the fruit of plaintiff’s labor, i.e., the aggregated text, was published without mentioning his name, and thus infringed his moral right”. appellants argue that under the circumstances, which we have mentioned, where Qimron’s name was not mentioned on the deciphered text that Kapera published, the next publisher should not be required to check who is the copyright owner in the work. Furthermore, appellants argue that they have fulfilled the requirement by attributing the deciphered text to Strugnell - who was, according to their argument the head of the researchers team – and to another “colleague”.

24. These arguments, too, should be rejected. The Court found in an unequivocal manner that Shanks knew that Qimron participated in creating the deciphered text:

“As for plaintiff’s part [Qimron – Y.T.] in constructing the aggregated text, Shanks admitted he knew that plaintiff assisted Strugnell in the study of the scroll... that he participated in its reconstruction... and that the reconstruction was likely to include filling the gaps in it... not only so, Shanks’ testimony re his lack of knowledge as for plaintiff’s part in the deciphering is contradicted by an objective evidence – Drori’s letter [the Director of the Antiquities Authority – Y.T.] to Kapera reached Shanks’ hands, and he published it in the book ... in this letter Drori mentioned that Strugnell and the plaintiff engaged for years in deciphering the scroll.”

Shanks deliberately avoided mentioning Qimron’s name. It was not an absentminded omission, or as a result of not knowing the identity of the author. Hence, there is no relevance to the question, whether there is place for imposing a duty to check the identity of the author, in a publication of a work that is copied from a prior publication, in which the work had been published without the author’s name.

⁴⁶ I omitted this paragraph.

As for the argument that appellants have done enough by mentioning Strugnell's name "together with another colleague" - it should be wholly rejected. In the introduction to the book it is said that –

“with a colleague, Strugnell proceeded to write a 500 page commentary on this 120 line text. The commentary is still not published and no one knows when it will be.”

Mentioning a “colleague” without mentioning his name, and without mentioning that there was a work of deciphering the text is contemptuous and a mockery. Such an “attribution” – including the argument that it is sufficient to comply with the above mentioned Ordinance – if not the human – moral duty – is even more insulting than no mentioning at all. There is no need to add further words, that the two lines, hidden in an eleven page introduction, separated from the page on which the deciphered text was published, without mentioning the name – does not fulfill the requirement of attribution "in the scope and extent customary."

The conclusion is that appellants have infringed Qimron's moral right.

The Remedies:

25. – 28. [Omitted]⁴⁷

29. In his suit and in his arguments in the District Court, Qimron requested also a remedy of recovery, according to section 7 of the Act:

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion itself.

In its decision, the District Court did not address this remedy and did not award it to Qimron. Appellants did not address this in their briefs. In these circumstances, after it has been found that Qimron copyright in the deciphered scroll has been infringed, Qimron is entitled to the remedy of recovery, as requested".

30. [Omitted].⁴⁸

⁴⁷ Affirming the order of damages.

⁴⁸ Affirming the award of NIS 50,000 as attorney fees.

Amicus Curiae:

31. In the course of the appeal, a body called the “Committee of Concerned Intellectual Property Educators” (hereinafter: “the petitioner”) requested to join to this procedure as Amicus Curiae, and submit a brief. In our decision of 8.24.99 we refused, and we set forth our reasons for so doing (see paragraph 4, *supra*).

In its petition, petitioner describes itself as “an independent organization, the members of which are a distinguished group of professors and lecturers in Law Schools, mainly in the United States, in the field of copyright law. The organization includes 60 members. The members of the organization have a professional interest in achieving a proper balance between the property right on the one hand, and the user’s interest on the other hand, in the field of Intellectual Property... This organization is active not only in the United States but anywhere in the world where there is a fear of harming or narrowing to copyright.” Petitioner’s attorney has presented an authorization, by Mr. David Nimmer, who declared himself to act on behalf of petitioner. In addition, he has presented a letter, listing names of ten jurists who are affiliated with American universities, who, so he claims, “join the petition.”

Petitioner argues that “the basic question of this appeal is whether copyright is limited to the territorial borders of a country, or whether it is entitled to international protection. The Supreme Court’s decision in this question might carry significant implications on the understanding of copyright and its protection even beyond Israel... Due to the many implications of the appeal... petitioner petitions for the Court’s permission to present it with as wide as possible information, so to present a wide and complete picture in the matter of copyright, from its international aspects. Thus, to provide information that might assist the Court to reach the best decision that would suit the international understanding in this field.”

Furthermore, petitioner lists the guiding considerations that instruct courts in the United States in deciding whether to allow a status of Amicus Curiae, such as the benefit to the Court of the brief, the existence of a public interest that petitioner may present, the parties’ ability to present their position to the Court, an objection of the parties, the timing of the petition, and petitioner’s ability to present legal matters in an objective manner.

32. Qimron objects to this petition, and relies on procedural arguments as well as substantive ones. The crux of his procedural argument is: petitioner is not a legal entity, and thus the authorization it presented is invalid; the petition has been submitted too late, and after the parties have already submitted their concluding briefs; petitioner has not acted in good faith, by not revealing facts that might indicate its affiliation with some of the appellants and regarding the identity of some of those who support its petition; petitioner did not support its petition with an affidavit, even though its petition is based on facts, such as the identity of its members, their occupation, its goals and activity.

33. In several cases in the past, this Court has discussed the question of whether to allow bodies which are not parties to join as Amicus Curiae (see C.C. 876/50 *A.B. v. M.B.*, 3 PS”M, 263, 287; C.A. 173/84 *Ben Zion v. Gorni*, 39 P.D. 757, 765; A.L.A. 2652/94 *Tendler v. Le Club Mediterrane (Israel)*(not yet published); A.L.A. 1185/97 *Estate of Milgrom Hinda v. Merkaz Mishan* (not yet published)). In one case, in which the Court allowed the Public Defender to join a procedure of a petition for retrial as Amicus Curiae, the considerations that guide the Court have been outlined:

“Indeed, before according a body or a person the right to make its case in a procedure in which it is not an original party, the potential contribution of the proposed position should be examined. The expertise, experience, and the presentation of the interest in the name of which it requests to join the procedure, should be examined. The kind of the procedure and its rules should be examined. The parties and the stage at which the request has been submitted should be considered. The merits of the issue at stake should also be considered. These criteria are inconclusive. They do not predetermine when a party should be allowed to join as Amicus Curiae, and when it should be refused. At the same time, these considerations should be taken into account when deciding upon such a request. (President Barak, in 7929/96 *Kozali v. The State* (not yet published)).

(See also Cr.A. 111/99 *Arnold Schwartz v. The State*, 54(2) P.D. 241, 251-252, in which it was decided to allow the Public Defender to join, as Amicus Curiae, a procedure which dealt with criteria of examining a petition to suspend imprisonment; and see also the dissenting opinion of Justice Kedmi, at p. 287-288).

34. We do not accept the petition, due to its procedural flaws, and thus we do not need to discuss the petition on its merits.

As stated, petitioner has not supported its petition with an affidavit. As a result, the existence of the petitioner and its nature have not been proved. Furthermore, it was not proved that Mr. David Nimmer is authorized to represent petitioner. The petition also lacks sufficient factual basis, according to which the potential utility of its brief, the interest it represents and its ability to properly present the legal matters at stake, could have been considered. It should also be mentioned that the attorneys of the parties have presented a wide array of arguments, and it seems that additional briefs would not have contributed to the judgment.

35. We have thus decided to refuse the petition to be allowed to join as Amicus Curiae.

Conclusion:

36. Appellants infringed Qimron’s copyright in the deciphered text and infringed his moral right. Thus, their appeals are rejected. Qimron’s counter appeal is partially

accepted, in the sense that it is so ordered that appellants should turn over to Qimron all the copies of the book in which the deciphered text is included and all the plates that are used, or so intended to be used, to make copies.

Shanks and BAS will pay Qimron attorney fees in the amount of NIS 40,000; each of the editors will pay him attorney fees in the amount of NIS 10,000.⁴⁹

Justice Y. Tirkel

President A. Barak: I agree.

Justice D. Beinisch: I agree.

⁴⁹ 40,000 NIS was about \$10,000.