
COMMENTARY

COPYRIGHT, MORAL RIGHTS AND THE CHOICE OF LAW: WHERE DID THE *DEAD SEA SCROLLS* COURT GO WRONG?

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I. INTRODUCTION

The primary focus of attention on the *Qimron v. Shanks* case¹ has been on the substantive issue of copyright regarding the reconstruction of the *MMT* text (“the Consolidated Text”).² However, the decisions of both the district court and the Supreme Court also raise a series of troubling questions regarding the choice of Israeli law as governing in the case.³

The district court, based upon the presumption of the identity of laws (“the Presumption”), chose to apply Israeli copyright law to adjudicate alleged acts of infringement that the court found to have taken place in the United States, not in Israel.⁴ On appeal, the Israeli Supreme Court declined to rule on whether the Presumption had been properly invoked and applied.⁵ Instead, the Supreme Court found that there had been direct publication and distribution of the infringing books in Israel.⁶ On that basis, it affirmed the choice of Israeli law with respect to the copyright and moral rights claims.⁷

The decision by the Supreme Court raises two fundamental questions in connection with choice of law in the context of copyright and moral rights. First, there is the issue of what constitutes “publication” with respect to the allegation of unauthorized publication of an unpublished work. The Supreme Court ruled, on the basis of the dispatch to Israel of three copies of the infringing book ordered and paid for in the United States,

1. C.F. (Jm.) 41/92, *Qimron v. Shanks*, 69(iii) P.M. 10 (unofficial translation of district court decision by Timothy H. Lim) [hereinafter District Court Opinion]; C.A. 2790/93, 2811/93, *Eisenman v. Qimron*, 54(3) P.D. 817 [hereinafter Supreme Court Opinion] (translations on file with the *Houston Law Review*). See generally David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001) [hereinafter Nimmer, *Authorship and Originality*]; Michael Birnhak, *The Dead Sea Scrolls Case: Who is the Author?*, EUR. INTELL. PROP. REV. (forthcoming 2001).

2. See Nimmer, *Authorship and Originality*, *supra* note 1, at Part IV.A–B, for a discussion of the substantive issues of copyright. See *id.* at Part V.A.2 for a discussion of the background to the creation of the *MMT* text. See also District Court Opinion, *supra* note 1, at paras. 1, 3; Supreme Court Opinion, *supra* note 1, at paras. 1–2; Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001); see generally Birnhak, *supra* note 1.

3. A translation into English of the relevant portions of the district court and the Supreme Court opinions are attached as Appendices A and B respectively. The entire English translations are on file with the *Houston Law Review*.

4. District Court Opinion, *supra* note 1, at paras. 19–20. The identity of laws is based upon the principle that the laws of “enlightened states” are the same and, thus, it is irrelevant which law is applied. *Id.* at para. 19.

5. Supreme Court Opinion, *supra* note 1, at para. 8 (declining, albeit on different grounds, to overturn the district court’s decision to apply Israeli law).

6. *Id.* (noting that the sale of copies of the book containing *Qimron*’s *MMT* to Israeli readers was sufficient to justify applying Israeli law).

7. *Id.*

that there had been unauthorized publication of the Consolidated Text in Israel.⁸ However, the Supreme Court cited no standard for determining whether “publication” had taken place.⁹ The Supreme Court neither referred to any finding of fact by the district court nor, with one exception,¹⁰ did it point to any evidence in the record to support its conclusion.¹¹ Thus, the issue is raised: What amounts to “publication” with respect to an unpublished work for the purpose of asserting Israeli law over the claims of infringement?¹²

The second fundamental question is: What act must occur to give rise to the application of Israeli law with respect to the plaintiff’s claim of violation of his paternity right under the moral rights regime? The paternity right requires that the name of the author be indicated on the work in the customary way.¹³ The Supreme Court appears to treat the act required for the application of Israeli law with respect to the violation of the paternity right for an unpublished work as identical to that required by copyright. However, unlike the statutory provisions governing the paternity right in several other common law jurisdictions,¹⁴ the Israeli Copyright Ordinance is silent on the

8. *Id.* The plaintiff also alleged there had been unspecified sales promotion activities for the infringing book in Israel, but the Supreme Court made no reference to this allegation in reaching its conclusion regarding choice of law. *Id.*

9. *Id.* (concluding only that the three books ordered by Israeli readers were sufficient to apply Israeli law despite the fact that they were ordered and paid for in the United States).

10. *Id.* (referring to oral testimony given by defendant Hershel Shanks, together with copies of unidentified orders submitted as evidence, in support of the finding of fact that three copies of the allegedly infringing book had been ordered in Israel).

11. *Id.* (giving very brief consideration to the choice of law issue without reference to evidence in the record).

12. Refer to the discussion in Part II *infra*.

13. See Jeffrey M. Dine, Note, *Authors’ Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT’L L. 545, 574 (1995) (“Israeli law protects the rights of integrity and paternity; violation is expressly made a tort.”). Israeli Copyright legislation is comprised of the U.K. Copyright Act of 1911 and the Copyright Ordinance, both of which were made applicable to Palestine in 1924 as the Copyright Act of 1924 and were made part of the law of Israel in 1948. District Court Opinion, *supra* note 1, at para. 8 (discussing the legal framework of the Israeli Ordinance); Copyright Act, 1911, 1 & 2 Geo. 5, c. 46 [hereinafter Copyright Act]. The moral rights provisions were added in 1981 as an amendment to the Copyright Ordinance. District Court Opinion, *supra* note 1, at para. 8. Section 4a(1) of the Copyright Ordinance provides in pertinent part that “[a]n author has the right to have his name applied to his work, in the accepted manner and extent.” Israeli Copyright Ordinance § 4a(1) [hereinafter Copyright Ordinance]. The paternity right is more literally translated under the Copyright Ordinance as “the right of attribution,” but the more common phrase “right of paternity” is used herein.

14. Refer to notes 125–31 *infra* and accompanying text for further discussion of how other common law jurisdictions address the paternity right.

issue of what act is required.¹⁵ Even assuming that publication occurred in Israel with respect to the alleged copyright infringement, there is no necessary reason to assume that the same standard applies for alleged violation of the paternity right. As argued below, the decision by each of the courts to apply Israeli law was in error.

The choice of law discussion in this Comment is divided into three parts. Part II discusses the basis upon which the district court used to rely upon the Presumption to apply Israeli law in order to adjudicate alleged acts of infringement in the United States. Part III argues that the Supreme Court erred in ruling that there had been publication of the Consolidated Text in Israel, thereby giving rise to direct application of Israeli law. Part IV argues that the Supreme Court erred in failing to treat separately the questions of the act required to apply Israeli law with respect to a violation of the plaintiff's paternity right and the act required for infringement of copyright.

II. APPLICATION OF ISRAELI LAW TO U.S. COPYRIGHT INFRINGEMENT

The central issue of the choice of Israeli law emerged from the peculiar circumstances by which the Israeli district court took jurisdiction over extra-territorial acts of infringement. At an initial stage of the case, the district court issued an *ex parte* injunction that enjoined the defendants from engaging in infringing acts both in Israel and abroad.¹⁶ The district court then granted the plaintiff's request to effect extra-territorial service on the defendants.¹⁷ In fact, it is questionable whether the injunction had any direct effect in Israel because, as the district court later stated in its full decision, the parties agreed that all the allegedly infringing acts had taken place in the United States.¹⁸ Nevertheless, the result of the interim injunction and withdrawal of the appeal was that the defendants

15. See District Court Opinion, *supra* note 1, at para. 37 (citing to the Copyright Ordinance, § 4a(1)). The court rejects the defendant's contention that in order to have a moral right to a work, the individual must explicitly assert his identity as author of the work. *Id.* at para. 38. The court notes that Israeli case law has determined that publication of a work that has not been yet published or asserted by the author is still considered an infringement of moral rights. *Id.*

16. *Id.* at para. 14.

17. *Id.* In fact, one of the defendants had been served while visiting Israel. The defendants appealed the decision, but later withdrew their appeal. *Id.*

18. *Id.* at para. 19. Refer to note 21 *infra* and accompanying text (referencing *Kolbe v. Trudel*, 945 F. Supp. 1268, 1270 (D. Ariz. 1996), which distinguishes choice of law and choice of forum issues from subject matter jurisdiction).

were asked to defend alleged acts of infringement that appeared to have taken place wholly outside of Israel.¹⁹

Once the district court asserted jurisdiction over infringing acts that took place outside the jurisdiction, it was compelled to deal with the question of choice of law.²⁰ It did so in its full opinion, but in a highly unusual fashion. The district court stated that since the allegedly infringing acts took place in the United States, the governing law would appear to be U.S. law because it was the law of the place of infringement.²¹ On this basis, the district court would in effect adjudicate a claim for copyright infringement for events that took place outside of Israel under the law of the foreign jurisdiction.

However, no proof of the relevant foreign law—U.S. law—had been introduced by any of the parties.²² Accordingly, the question was whether the district court had any alternative but to allocate the burden of proof to the plaintiff with respect to U.S. law (and thereby presumably to hold that the plaintiff had not met its burden).²³ The answer was that the district court did indeed find an alternative—namely, application of the Presumption.²⁴

Under the Presumption, in the absence of proof of foreign law, it is presumed that Israeli law is identical to the foreign law.²⁵ On the basis of the application of the Presumption to the

19. See Nimmer, *Authorship and Originality*, *supra* note 1, at 70 (indicating that, even though the district judge acknowledged that all infringement took place in the United States, she still applied Israeli law based upon the identity of law principle because U.S. law had not been proven by the defendants); Birnhak, *supra* note 1.

20. See District Court Opinion, *supra* note 1, at paras. 19, 20.

21. *Id.* at para. 19. The district court opinion states that “all agree” that the place of infringement is the United States and hence U.S. law applies. *Id.* To the extent that this statement can be construed as referring to the agreement by the parties regarding subject matter jurisdiction over U.S. infringements, compare *Kolbe*, 945 F. Supp. at 1270, which holds that either subject matter jurisdiction exists or it does not; parties can never agree to confer subject matter jurisdiction on the court.

22. District Court Opinion, *supra* note 1, at para. 19 (“It is also undisputed that this [U.S.] law has not been proved.”). Under Israeli law, proof of foreign law under such circumstances must be proven.

23. *Id.* at paras. 19–20 (considering whether the plaintiff or defendants had the burden of proof, and concluding that, because the presumption of identity of laws applied, the defendants had the burden to prove a defense under U.S. law).

24. *Id.* at para. 20.

25. *Id.* at para. 19. The court explains the presumption as the recognition that laws of “enlightened states are identical” under certain circumstances. *Id.* The presumption applies to matters not considered local or unique, but to transitoral matters such as contract and tort suits that are not “anchored in a specific legal system.” *Id.* If one can show that a suit is transitoral in nature, then there should be no deviation in the laws. *Id.* See also 4 MELVILLE B NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.03, at 17–23 (2000) [hereinafter NIMMER ON COPYRIGHT] (summarizing cases dealing with identity of laws in copyright infringement).

circumstances of the case, the district court held that the plaintiff was relieved of its burden to prove U.S. copyright law. Further, the district court held that, in the absence of such proof by the defendants, it would apply the domestic law of Israel.²⁶ As a result of the application of the Presumption, the defendants were called upon to defend alleged acts of infringement that took place in the United States, but which would be adjudicated before an Israeli court under local Israeli law.²⁷

The route by which the district court reached this result is noteworthy. The defendants argued that there exist two basic types of causes of action with respect to the question of governing law.²⁸ The first type of cause of action is based upon a question that is local in nature (for example, personal status or property) and which is uniquely anchored in a particular legal system.²⁹ If the local law to adjudicate such a dispute is other than the law of the place of jurisdiction, the plaintiff has the burden of proving such law and no reliance can be made on the Presumption.³⁰ The second type of cause of action is a transitory cause of action (for example, contract or torts), where the applicable law is the law of the place of jurisdiction, unless a defense is raised that is based upon a law other than the law of the place of jurisdiction.³¹

According to the defendants, a claim of infringement of copyright and moral rights is local in nature.³² Since the parties agreed that the infringement had taken place in the United States, the burden was on the plaintiff to prove U.S. law to the Israeli court.³³ The district court, however, rejected this argument, holding that the allegations of infringement were

26. District Court Opinion, *supra* note 1, at paras. 19, 20.

27. *Id.* Because Israeli law applies, the plaintiff could rely on the paternity right under the Israeli Copyright Ordinance. *Id.* at para. 37. Refer to note 13 *supra* and accompanying text. If decided under U.S. law, the plaintiff could not rely on a paternity right because the U.S. Copyright Act contains no similar provision for the protection of an author's paternity right. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96 (1997) (noting that the United States has not only failed to explicitly provide for this paternity right, but also failed to enforce such rights).

28. District Court Opinion, *supra* note 1, at para. 19 (noting that the defendants attempted to rely upon a test suggested by Professor Levontin that characterizes causes of action as either local or transitory for choice of law determinations).

29. *Id.* (referring to Professor Levontin's choice of law test).

30. *Id.*

31. *Id.*

32. *Id.* (arguing that the basis of the copyright suit was proprietary, and thus was more akin to a local status or property interest issue).

33. *Id.* at paras. 19, 20 (rejecting the defendant's argument that, because the plaintiffs failed to prove U.S. law, the suit should be dismissed).

transitory rather than local.³⁴ Based on the application of the Presumption and the absence of proof of U.S. law, Israeli law applied.³⁵

The district court reasoned that while copyright is a property right, the violation of copyright or moral rights³⁶ is by its nature a tort.³⁷ As argued by the defendants themselves, a tort is a transitory cause of action.³⁸ Unlike matters of property and personal status, copyright is not local in nature, inasmuch as copyright law is similar from country to country throughout most of the world. Indeed, in the particular situation of Israel, the Israeli copyright law is taken directly from the 1911 U.K. law, and additional portions derive from U.S. copyright law (notably with respect to statutory damages).³⁹ Further, Israeli copyright law purports to comport with applicable international agreements.⁴⁰

Based upon the foregoing, the district court placed on the defendants the burden of proving U.S. law, which the defendants failed to prove.⁴¹ Accordingly, under the Presumption, the district court concluded that the case, in its entirety—including the claim of violation of moral rights—was to be adjudicated under Israeli law.⁴²

34. *Id.* (concluding a suit for infringement is tortious by nature, and that copyright laws in Israel are not local). *See also* NIMMER ON COPYRIGHT, *supra* note 25, § 17.03, at 17–23 (elaborating on the theory that one can bring a copyright infringement suit in a foreign state other than the state in which the cause of action arose because it is transitory in nature); 3 PAUL GOLDSTEIN, COPYRIGHT § 16.2, at 16:7–8 (2d ed. Supp. 2000) (summarizing the territoriality issues surrounding copyright law and concluding that actions in copyright are transitory and thus may be brought in another sovereign's court where there is jurisdiction over the defendant).

35. District Court Opinion, *supra* note 1, at paras. 19, 20.

36. *Id.* at para. 20. The district court is unclear on whether its discussion refers to both copyright and moral rights claims. This is because the district court uses the terms “copyright” and “moral right” interchangeably to describe the rights under consideration. *Id.* The court later clarifies this position by explaining that the Israeli Copyright Ordinance covers both copyright and moral rights. *Id.* at para. 37.

37. *Id.* at para. 37 (stating that “Article 4a of the Copyright Ordinance lays down . . . [that a] violation . . . constitutes a civil wrong, and the directives of the Torts Ordinance” apply). *See also* Dine, *supra* note 13, at 574 (explaining how a violation of moral rights is treated like a tort).

38. District Court Opinion, *supra* note 1, at para. 19 (relying on a test for identity of laws that characterizes tort suits as transitorial in nature).

39. *Id.* at para. 18 (providing the framework for the Israeli law and its origins).

40. *Id.* (noting that Israel adopted the main requirements of the Berne Convention to protect literary and artistic works).

41. *Id.* at para. 20.

42. *Id.* As noted above, the Presumption is a form of legal fiction. The district court's position was not altered by the defendants' post-trial submission of additional legal authority demonstrating that U.S. copyright law does not recognize moral rights, at least with respect to paternity, and that only six (unspecified) states in the United States

No decision was cited by the district court to support the application of the domestic copyright law of the court seized with jurisdiction to adjudicate alleged acts of extra-territorial infringement.⁴³ In addition, there does not appear to be any such result under either U.S. or U.K. law, the two jurisdictions whose judgments have most persuasive weight in Israeli courts.⁴⁴ Thus, the result here seems without precedent in these jurisdictions as well, and this case can be distinguished from two other types of situations where the result has been recognized by the courts.

The first situation is an exception to the rule that domestic copyright law cannot be used to adjudicate extra-territorial infringement.⁴⁵ The general principle, under U.S. law, is that infringing acts that take place totally outside of the United States are not actionable under the U.S. copyright laws.⁴⁶ The main exceptions to this principle are situations in which the extra-territorial activity is authorized, or put into motion by the commission of a predicate act of infringement within the United States,⁴⁷ or where there is a claim of vicarious or contributory infringement by an extra-territorial act that is based upon an act of direct infringement within the United States.⁴⁸ However, the district court made no finding of any predicate act in Israel that could have supported the application of the exception in order to apply Israeli law.⁴⁹

provide a form of moral rights protection under their respective state laws. *Id.* The district court noted that these materials were not submitted as evidence of proof of the applicable foreign law. *Id.* Further, it was not established that moral rights were not protected in Washington, D.C., the place where the infringing copies were allegedly published. *Id.*

43. See generally *id.*

44. S. Ginossar, *Israel Law: Components and Trends*, 1 *ISR. L. REV.* 380, 391 (1966) (noting that "Israel decisions are, as a matter of course, studded with references to English . . . and American precedents on an equal footing with local authorities") (footnote omitted).

45. See GOLDSTEIN, *supra* note 34, § 16.2, at 16:6 (providing an excellent discussion of the territoriality principle).

46. See, e.g., *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 634 (S.D.N.Y. 2000) ("[I]t is not seriously disputed that United States copyright laws do not have extraterritorial effect, and that infringing acts that take place entirely outside of the United States are not actionable under our copyright laws.")

47. *Id.* But see *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1091 (9th Cir. 1994) (stating that mere domestic authorization of extraterritorial acts of infringement does not state a claim under the U.S. Copyright Act) (citing *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986)).

48. *Armstrong*, 91 F. Supp. 2d at 635.

49. See generally District Court Opinion, *supra* note 1. The concept of contributory or vicarious liability has not been recognized judicially in Israel. But see Copyright Ordinance, *supra* note 13, § 3(1)(a)-(f) (providing explicit provisions for secondary infringement).

The second situation involves the exercise of subject matter jurisdiction over claims asserted under foreign copyright law. The precise issue here is not the application of foreign law *per se*, but the exercise of subject-matter jurisdiction over a matter that will be adjudicated under foreign copyright law. As a general matter, courts should be reluctant to engage in a determination of foreign law under such circumstances.⁵⁰ This is especially so when a claim of copyright infringement is involved in which the principle of territoriality provides that the law of the place of the infringement governs.⁵¹

Nevertheless, one can find support for the possible application of foreign copyright law to adjudicate a claim of infringement in a U.S. court.⁵² The circumstances in which foreign law has been applied appear to be rare.⁵³ In any event,

50. See, e.g., *ITSI T.V. Prods., Inc. v. Cal. Auth. of Racing Fairs*, 785 F. Supp. 854, 866 (E.D. Cal. 1992), *aff'd in part, rev'd in part*, 3 F.3d 1289 (9th Cir. 1993) (“[C]ourts should be reluctant to enter the bramble bush of ascertaining and applying foreign law without an urgent reason to do so.”).

51. Refer to note 45 *supra*; see also *Def Lepp Music v. Stuart-Brown*, [1986] RPC 273 (ruling under U.K. law).

52. Thus, Nimmer has written as follows:

Even if the United States Copyright Act is clearly inoperative with respect to acts occurring outside of its jurisdiction, it does not necessarily follow that American courts are without jurisdiction in such a case. If the plaintiff has a valid cause of action under the copyright laws of a foreign country, and if personal jurisdiction of the defendant can be obtained in an American court, it is arguable that an action may be brought in such court for infringement of a foreign copyright law. This would be on the theory that copyright infringement constitutes a transitory cause of action, and hence, may be adjudicated in the courts of a sovereign other than the one in which the cause of action arose.

NIMMER ON COPYRIGHT, *supra* note 25, § 17.03, at 17-23 (footnotes omitted).

See also the words of Goldstein in this regard:

Causes of action for copyright infringement are transitory and may be brought in any court that has jurisdiction over the defendant. Subject to jurisdictional requirements, a copyright owner may sue an infringer in United States courts even though the only alleged infringement occurred in another country. Under the territoriality principle, the copyright law of the other country, and not United States copyright law, will govern the action in the United States.

GOLDSTEIN, *supra* note 34, § 16.2, at 16:7 (footnote omitted).

Arguably, the foregoing refers only to choice of law regarding adjudication of the infringement issue. The situation may be different regarding the governing law with respect to the question of ownership, where at least one court of appeals has held that evidence of foreign law may be appropriate under choice of law principles. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) (“Since the works at issue were created by Russian nationals and first published in Russia, Russian law is the appropriate source of law to determine issues of ownership of rights.”). See also William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 412-21 (2000) (discussing the choice of law aspects of the *Itar-Tass* case).

53. The oft-cited example is *London Film Productions, Ltd. v. Intercontinental Communications*, 580 F. Supp. 47, 48-50 (S.D.N.Y. 1984), in which a British company brought an infringement action against a U.S. company for alleged infringements of

there does not appear to be any judgment in which the court took jurisdiction based solely on acts of extra-territorial infringement in the absence of any predicate act, and then adjudicated the matter under the domestic copyright law of the forum court (whether by relying on the Presumption or on some other basis).⁵⁴

The district court's decision in regard to the application of the Presumption and the choice of Israeli law may be criticized on a variety of grounds. First, the district court should have demonstrated greater reluctance in making use of the Presumption, because the Presumption has the result of altering the burden of proof—based upon the operation of a questionable legal fiction. A court should be especially wary of relying on the Presumption when the effect is to relieve the plaintiff of the burden of proof with respect to his case in chief. This concern appears particularly apt when, as in this case, the district court had taken the unusual step of granting an injunction with extra-territorial effect,⁵⁵ and where (according to the district court) the parties had agreed that the infringing acts took place only in the United States and that U.S. law therefore applied.⁵⁶ Indeed, it is questionable whether reliance on the Presumption is ever appropriate with respect to a copyright infringement case.

Instead of relying on the Presumption, the district court should have ordered the parties to submit expert testimony on the applicable U.S. law. As a matter of Israeli law, the district court had the authority to so order the parties if it had it so chosen.⁵⁷ Courts in Israel make frequent reference in their judgments to foreign decisions (and in particular, U.S.

copyright occurring in certain South American countries. See also NIMMERON COPYRIGHT, *supra* note 25, § 17.03, at 17–24 (noting that only “one lone district court has . . . sustained subject matter jurisdiction in [the United States]”) (footnote omitted). It is questionable whether there is any other judicial authority reaching a similar result.

54. See generally Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 4 (1999); see also Jane C. Ginsburg, *Ownership of Electronic Rights and the Private International Law of Copyright*, 22 COLUM.-VLA J.L. & ARTS 165, 175 (1998) (stating that while the law of the source country should be the starting point for determining the choice of law, a strongly pro-author host country would likely “decline to give effect to . . . otherwise applicable law”). See generally Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000).

55. District Court Opinion, *supra* note 1, at para. 14.

56. *Id.* at para. 19.

57. The order could have been subject, perhaps, to an order for costs with respect to the need to submit expert testimony on U.S. law. The issue is not, however, free from doubt. Because evidence about U.S. law is a question of fact, the Supreme Court may be constrained by the absence of such proof in the record of the district court.

judgments).⁵⁸ In this regard, the decision of the district court in this case was no exception.⁵⁹ Accordingly, the district court would not have been required to immerse itself in a new legal system or a new body of law, had it ordered expert testimony on U.S. copyright law.

Second, the refusal of the district court to recognize the difference between U.S. and Israeli law with respect to the scope of moral rights in general, and the paternity right in particular, is especially odd. With all due respect to the district court, there is clearly no right of paternity under U.S. copyright law, and sources are legion in support of that fact.⁶⁰ If the plaintiff had wished to support his claim for a violation of paternity right or the equivalent under U.S. law, the district court should have put the plaintiff to the test of proof. As it stands, the application of the Presumption by the district court stands in contrast to hornbook law on the status of the paternity right under U.S. law.⁶¹

III. THE MEANING OF "PUBLICATION"

The district court placed the Supreme Court in a challenging position with respect to the issue of choice of law. Based upon the opinion of the district court, the parties agreed that the alleged infringements had all taken place in the United States, yet the district court applied Israeli law by virtue of the Presumption.⁶² On appeal, the Supreme Court had two basic choices: either enter into a review of the district court's ruling on the Presumption, or take some other tack regarding the issue of choice of law.⁶³ The

58. See Ginossar, *supra* note 44.

59. No fewer than three U.S. decisions were referred to in the District Court Opinion. See Supreme Court Opinion, *supra* note 1, at para. 21.

60. Hansmann & Santilli, *supra* note 27, at 96 (noting that not only has the United States failed to protect authors' moral rights, but the legal regime renders unenforceable an author's efforts to create such protection).

61. The district court's suggestion that there might be protection of moral rights under the law of the District of Columbia is particularly astonishing under the circumstances.

62. Refer to notes 21–42 *supra* and accompanying text

63. If the Supreme Court had ruled directly on the district court's holding regarding the applicability of Israeli law on the basis of the Presumption, the Supreme Court presumably then could have either affirmed the reliance on the Presumption, and thereby affirmed the application of Israeli law, or reversed the district court on the application of the Presumption. If it took the latter route, the Supreme Court would then have had to confront the claim that the plaintiff had seemingly not met its burden of proof with respect to U.S. law. In such a situation, it is not unreasonable to imagine that the Supreme Court could have ruled in favor of the defendants based on the plaintiff's failure to prove U.S. law. Alternatively, it might have been possible for the Supreme Court to order the parties to submit evidence on U.S. law, after which the Supreme Court would

Supreme Court chose the second course, declining to rule on whether reliance by the district court on the Presumption was correct.⁶⁴ Instead, the Supreme Court held that Israeli copyright law applied directly because certain acts in conjunction with the alleged infringing book had taken place in Israel.⁶⁵ These acts constituted both “publication” and “distribution” of the infringing work in Israel and gave rise to the application of Israeli law.⁶⁶

Stated otherwise, whereas the district court relied on the legal fiction of the Presumption to apply Israeli law to acts of alleged infringement that the parties agreed took place outside of Israel,⁶⁷ the Supreme Court found that certain infringing acts had occurred within Israel itself. In so doing, it would appear that the Supreme Court overruled the district court’s finding that the alleged acts had taken place only in the United States without ruling directly on the validity of the district court’s reliance on the Presumption.⁶⁸

Once the Supreme Court ruled that there had been publication of the Consolidated Text in Israel, the relevant choice of law principle led to the conclusion that Israeli law governed.⁶⁹ The governing principle is the doctrine applied generally to torts, namely *lex loci delicti*.⁷⁰ In the copyright context, this principle holds that Israeli copyright law will govern with respect to

have considered the claims of copyright infringement and violation of moral rights under U.S. rather than Israeli law.

64. Supreme Court Opinion, *supra* note 1, at para. 8 (“I am unable to accept the Appellant’s argument [disputing the application of the presumption of identity], and I agree with Qimron’s claim that Israeli law applies to this matter without resorting to the presumption of the equality of the laws.”). But refer to note 21 *supra*.

65. Supreme Court Opinion, *supra* note 1, at para. 8. The Supreme Court stated that three copies of the infringing book, while ordered and paid for in the United States, were ultimately sent to readers of *BAS* in Israel. *Id.* As well, the plaintiff alleged that certain unspecified sales promotion activities on behalf of the infringing book took place in Israel. *Id.*

66. *Id.*

67. Refer to text accompanying notes 22–42 *supra*.

68. The evidentiary basis for the Supreme Court’s ruling merits comment. The district court decision does not appear to have made any finding regarding these relevant facts, nor does the Supreme Court point to any such findings of fact by the district court. Moreover, the Supreme Court makes reference to only one item of evidence from the trial record. This reference was the testimony given by one of the defendants regarding orders of the infringing book by recipients of the infringing book in Israel, although, as noted, the orders and payment therefore were made in the United States. Supreme Court Opinion, *supra* note 1, at para. 8.

69. *Id.*

70. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998) (noting that the doctrine of *lex loci delicti* even allows application of U.S. law where the work “was unprotected in its country of origin”); see also *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (providing an early discussion of the doctrine in the international context).

alleged acts of infringement that take place within the jurisdiction. Since alleged acts of infringement took place in Israel, the law of Israel would govern (at least with respect to those alleged acts).⁷¹

While the Supreme Court did not make explicit reference to a claim of unauthorized publication of the Consolidated Text in its discussion on choice of law, it subsequently did so in the opinion's brief discussion on copyright infringement.⁷² As to infringement, the Supreme Court summarily disposed of this issue as follows:

The act of publication of the work before the copyright owner published it and without his consent is an infringement of the right as mentioned in Section 2(1) of the law. . . . As aforementioned, the Deciphered Text was published in the book before Qimron, the copyright owner, published it and without obtaining his consent. On this point there is no dispute. In this his copyright was infringed.⁷³

The Supreme Court's discussion of choice of law is therefore integrally related to its later brief discussion on infringement.⁷⁴ The Supreme Court's ruling on choice of law and infringement turned on whether there had been publication of the Consolidated Text in Israel.

To analyze whether the Consolidated Text was published in Israel, as the court held, attention is first directed to the meaning of "published works" under Article 3 of the Berne Convention,⁷⁵

71. This is also consistent with the dictates of the Berne Convention. As summarized by Ginsburg, the Berne Convention "provides that the law of the country where protection is claimed defines what rights are protected, the scope of protection, and the available remedies." Ginsburg, *supra* note 54, at 167.

72. Supreme Court Opinion, *supra* note 1, at para. 16 (referring to the plaintiff's right of first publication of an unpublished work under the Copyright Act and holding that the defendants had infringed the plaintiff's copyright therein).

73. *Id.* The Supreme Court does not address, in its brief discussion on infringement, whether unauthorized publication had taken place in Israel, presumably relying on its discussion of publication in the context of the choice of law in paragraph eight. *Id.*

74. *Id.* at paras. 8, 22. See also Twentieth Century Fox Film Corp. v. iCrave TV, No. 00-121 (W.D. Pa. Jan. 20, 2000), Proposed Findings of Fact and Conclusions of Law With Respect to Issuance of Preliminary Injunction, Feb. 8, 2000, available at http://www.mpa.org/Press/iCrave_Findings.htm.

Accordingly, when an allegedly infringing act occurring without the United States is publicly performed within the United States, the Copyright Act is implicated The evidence was set forth above and other evidence in the record shows that the plaintiffs are likely to succeed in showing that defendants are unlawfully publicly performing plaintiff's copyrighted works in the United States.

Id.

75. Berne Convention for the Protection of Literary and Artistic Works, Paris Act,

with respect to what qualifies as a first publication of a work in the country of origin.⁷⁶ While the term “published works” is not identical to “publication,” it is presumed that the two refer to the same subject matter. Article 3(3) of the Berne Convention defines “published works” as follows: “The expression ‘published works’ means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public”⁷⁷

It has been observed that this definition means that there must be both the actual making of copies within the country, as well as some type of distribution of the copies.⁷⁸ Based upon this observation, it has been argued that the better understanding of the term does not include the mere receipt of mail order from abroad.⁷⁹ Under such a test, the activities relied upon by the Supreme Court to support the occurrence of publication in Israel must fail. Based upon the Supreme Court’s own findings of fact, the infringing text was not manufactured or distributed in Israel.⁸⁰ At most, acts had occurred that were analogous to receipt of orders processed abroad. Such acts do not satisfy the requirements of the term “published works.”⁸¹

July 24, 1971, 25 U.S.T. 1341 [hereinafter Berne Convention].

76. Under the Berne Convention, a foreign work is accorded protection if there has been first publication of the work in the country of origin. Berne Convention, *supra* note 75, art. 5(1) (“The country of origin shall be considered . . . in the case of works first published in a country of the Union, that country.”) *Id.* art. 5(4)(a).

77. *Id.* art. 3(3).

78. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at para. 5.39 (1987).

79. *Id.* at para. 5.39.

80. Supreme Court Opinion, *supra* note 1, at para. 8.

81. Consider, nevertheless, the following: The Supreme Court held that “the act of publication of the work before the copyright owner published it and without his consent is an infringement of the right as mentioned in Section 2(1) of the Law.” *Id.* at para. 16. However, the definition of “published works” under the Berne Convention is “works published with the consent of their authors.” Refer to note 77 *supra* and accompanying text. Because the defendants (more particularly Shanks) did not publish *MMT* with the consent of Qimron, it can be argued that the work does not qualify as a “published work” within the meaning of the Berne Convention, with the result that Shanks cannot be said to have engaged in a prohibited act of publication. If so, the Supreme Court’s reference to an act of publication of a work without authorization before the copyright owner publishes the work would be rendered meaningless, since an unauthorized publication cannot constitute a publication within the meaning of the Berne Convention. Personal communication with David Nimmer (on file with author). The most direct way out of this conundrum is to ignore the definition of “publication” under the Berne Convention, but such a step is unsatisfactory. More promising is an attempt to distinguish between the meaning of “published works” under the Berne Convention and the notion of “publication” under the Copyright Act. However, the metes and bounds for this distinction are far from clear. Refer to note 82 *infra* and accompanying text.

It may be argued, however, that the meaning of “published works” is different from the meaning of “publication” under the Copyright Act. As a starting point to this line of argument, it is observed that “publication” under the Copyright Act serves two quite different purposes. The first is associated with the question of whether a work of foreign origin may qualify for protection under the Berne Convention.⁸² The issue is whether first publication occurred within the country of origin, thereby enabling foreign protection on the basis of the national treatment principle under the Berne Convention or other such treaty.

The second purpose relates to the exclusive right of first publication. The Copyright Ordinance gives the author of an unpublished work, who is a citizen or resident of Israel at the time that the work was created,⁸³ the exclusive right to publish the work or any substantial part thereof.⁸⁴ It is this right of publication that is the subject of the Supreme Court’s discussion of the term.⁸⁵ Thus, the Supreme Court refers to publication in the context of the claim of infringement for unauthorized publication of the Consolidated Text.

While not stated explicitly in the Supreme Court’s discussion of choice of law, it is presumed⁸⁶ that the Court’s understanding of the term “publication” was based upon Section 1(3) of the Copyright Act, which states that publication means, “[f]or the purposes of this Act, . . . the issue of copies of the work to the public.”⁸⁷ There does not appear to be any judgment in Israel construing the meaning of publication under Section 1(3) of the Copyright Act. Inasmuch as the Copyright Law is based on the U.K. Copyright Law of 1911, we refer to the meaning of the term “publication” under the identical provisions of Section 1(3) of the 1911 U.K. Act and the judicial construction thereof.

The position under U.K. law with respect to “publication” has been summarized as follows:

[I]t can hardly be the law that a work is considered to be published if no copies are made, none are acquired by the

82. The Copyright Order (Berne Convention), 1953, provides in Section 2 that “a work [that is] first published in the Union shall be protected in Israel as if it were first published in Israel.” Israeli Copyright (Berne Convention) Order, s. 2, 5713-1953. *See also* LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* 276 (2d ed. 1995); NIMMER ON COPYRIGHT, *supra* note 25, § 4.01[c][2], at 4-10. Refer to note 28 *supra* and accompanying text.

83. Copyright Ordinance, *supra* note 13, § 4.

84. Copyright Act, *supra* note 13, § 1(2).

85. Supreme Court Opinion, *supra* note 1, at para. 16.

86. *Id.* (presuming the Supreme Court relied on Section 1(3) because the Court quotes that section before discussing Qimron’s infringement claim).

87. Copyright Act, *supra* note 13, § 1(3).

public, the work is not advertised, and all that happens is that the proprietor has a private intent to run off photocopies if telepathic members of the public should chance to come into his office and ask for one At the very least the copies must be put on offer and, what is more, the transaction must be unfeigned and more than nominal.⁸⁸

It is observed that this characterization of “publication” entails more than mere copying or reproduction of the text. There obviously must be a reproduction of the text, but there must be an offer to the public as well. The leading treatise construing the 1911 Copyright Act observed that the place of manufacture of the text is not dispositive.⁸⁹ A more recent treatise on U.K. copyright law argues that it is enough that copies are offered and that there are sufficient stocks on hand to meet reasonable demand.⁹⁰ It has been observed that publication occurs where copies are put for offer, not where they are received.⁹¹

In light of the foregoing, it would appear that the meaning of “publication” argues squarely against the result reached by the Supreme Court, which found publication based upon the receipt within Israel of the infringing books—which were ordered and paid for in the United States.⁹² To hold that these acts constitute publication means the focus is on subsidiary acts within Israel rather than on the predicate acts of publication—the printing, order and sale of the books—that all occurred in the United States. This is the inverse of the line of cases holding that the occurrence of the predicate acts in the United States forms the basis for applying U.S. law to extraterritorial subsidiary acts.⁹³

Still, can “publication” be construed more favorably for the author in connection with infringement than with qualification as the country of origin? On its face, such a result is precluded by the language of the Copyright Act, inasmuch as the term

88. LADDIE ET AL., *supra* note 82, at para. 4.37 (footnote omitted).

89. SKONE JAMES ET AL., *COPINGER AND SKONE JAMES ON COPYRIGHT* 29 (9th ed. 1958).

90. LADDIE ET AL., *supra* note 82, at para. 4.35. Note, however, that the treatise qualified this observation by noting that under the 1988 enactment of the U.K. copyright law, the maintenance of stocks may not even be required, provided that copies can be made in advance of receipt or orders. *Id.*

91. *Id.* at para. 4.39 (citing *British Northrop Ltd. v. Texteam Blackburn Ltd.*, [1974] RPC 57) (holding that sending reproductions of drawings all over the world from England was publication in England).

92. Supreme Court Opinion, *supra* note 1, at para. 8.

93. Refer to notes 46–54 *supra* and accompanying text (discussing exceptions to the “general rule” when infringing extra-territorial acts are subsidiary to a predicate act of publication within the United States).

“publication” is apparently intended to be understood in a like manner with respect to all parts of the Act.⁹⁴ On that basis, publication should be construed consistently both for purposes of qualification and infringement. Stated otherwise, what if the question is asked in reverse; namely, would the acts of publication described by the Supreme Court constitute first publication of the work for the purposes of qualification? It is difficult to imagine any court finding in favor of first publication based upon the facts of the Supreme Court opinion. If so, the same (negative) result should obtain with respect to publication for the purposes of infringement as well.⁹⁵

Nevertheless, is there any policy justification for treating publication for qualification differently than publication for infringement? It can be suggested that there may be justification for such a distinction.⁹⁶ With respect to qualification, first publication can both create and destroy certain rights of the author.⁹⁷ There is no reason to adopt a pro-author position with respect to the construction of publication from the view of qualification because publication is neutral with respect to such potential rights. Moreover, first publication in principle refers to a single act; either the work has or has not been published.⁹⁸

94. Section 1(3) of the Copyright Act provides that “[f]or the purposes of this Act, publication, in relation to any work, means the issues of copies to the public.” As noted above, “publication” arises both with respect to qualification of the country of origin and infringement of a published work. Refer to notes 82–84 *supra* and accompanying text. Both are presumed to be “purposes” under the Copyright Act. The Copyright Order was issued by virtue of Section 6 to the Copyright Ordinance. Refer to note 82 *supra*. It is further presumed that the Copyright Ordinance is to be construed similarly to the Copyright Act as the Copyright Ordinance was intended to constitute the legislative vehicle for amending the Copyright Act, and the two enactments should be construed together. Based on the plain meaning of Section 1(3), therefore, the same construction for the term “publication” is to be applied to both situations.

95. In response to a rhetorical question: Might a court “be tempted to stretch a point in an author’s favor by holding that such-and-such a work was published even though the alleged act of publication did not serve to give to the public the whole benefit of the work sought to be protected[,]” Laddie (a judge) replied in the negative. LADDIE ET AL., *supra* note 82, at para. 4.29. Depending upon the country in which first publication took place, publication could either create or destroy rights. *See id.* Thus, “[t]here cannot be two rules about what activities constitute ‘publication,’ one for when authors gain copyright and the other for when they lose it.” *Id.* Be that as it may, one may still argue that the purpose of “publication” with respect to qualification of the country of origin is fundamentally different than that of infringement—the former being primarily evidentiary while the latter is substantial. To the extent that this distinction—with respect to the purpose of “publication” in the two situations—is supportable, it does not mandate a different answer to the rhetorical question raised above. Refer to note 97 *infra* and accompanying text.

96. See NIMMER ON COPYRIGHT, *supra* note 25, § 4.13[c], at 4-75, for a discussion of U.S. attempts to postulate two distinct meanings for “publication.”

97. LADDIE ET AL., *supra* note 82, at para. 4.29.

98. The only exception is the “simultaneous publication” rule, which enables

Under such circumstances, a tendency to set a more rigorous standard for the occurrence of publication is perhaps understandable.⁹⁹

The same considerations do not necessarily exist with respect to publication as a ground for infringement. When infringement is the issue, the author's interest in enforcing her rights is clear and unequivocal.¹⁰⁰ Judicial policy that seeks to give primacy to the author's interest understandably "might be tempted" (in Laddie's phrase)¹⁰¹ to lean over backwards in favor of a broad definition of "publication."

Such a view could well result in the uncoupling of the test for publication for qualification from that for infringement.¹⁰² While such a result does not comport with the plain language of the Copyright Act with respect to the meaning of "publication," it may be grounded in broader jurisprudential concerns regarding the scope of the creator's rights within the copyright regime. In such a case, the understanding of "publication"—with respect to infringement—could, in effect, set a lower threshold than that required for qualification. This having been said, the finding of the Supreme Court would not satisfy even a less demanding standard for "publication" with respect to infringement.

In its discussion on choice of law, the Supreme Court also

qualification to occur if publication takes place in a qualifying country within a fixed number of days from earlier publication in a non-qualifying country. Berne Convention, *supra* note 75, art. 5(4)(b). See also NIMMER ON COPYRIGHT, *supra* note 25, § 17.01[C][1][b] & n.68, at 17-14 (commenting that U.S. copyright owners who desired the broader protections afforded by the Berne convention could publish their works simultaneously in the U.S. and in Canada or another Berne country, thereby securing dual protection via a "back door" approach).

99. *But see* Francis Day & Hunter, Ltd. v. Feldman & Co., [1914] 2 Ch 728 CA (holding that exposing six copies for sale amounted to issuing copies to the public for the purposes of qualification). This result has been questioned by Laddie: "[I]f anything, this ought to have made publication harder, not easier to establish . . ." LADDIE ET AL., *supra* note 82, at para. 2.126, at 109 n.8. See also Section 7(2) of the Copyright Ordinance, which provides as follows: "A work which has been published simultaneously in Israel and in other countries . . . shall be considered as having been first published in Israel... [unless] the publication in Israel was colourable only." It is submitted that this unresolved difference of opinion, on whether there should be a greater or lesser standard with respect to publication for qualification, supports the conclusion that there is no principled reason to apply a different test for qualification and infringement, respectively. Moreover, even if such a distinction could be sustained, there is no evidentiary support for "publication" even under the minimum standard set by the court in *Francis Day*.

100. This is subject, however, to the competing interests of the public and the parties seeking to commercialize the copyrighted work. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 37-56 (1994); GOLDSTEIN, *supra* note 34, § 16.3, at 16:10-11.

101. LADDIE ET AL., *supra* note 82, at para. 4.29, at 277.

102. This is especially so in the current context of Israeli copyright jurisprudence, which can be characterized as highly protectionist.

refers to acts of “distribution” by the defendants.¹⁰³ No distinction is here made between the meaning of “publication” and “distribution,” nor does the Supreme Court make any distinction between the factual basis for publication and that for distribution. Assuming, arguendo, that no unauthorized publication took place in Israel,¹⁰⁴ it might still be possible to claim that the defendants engaged in unauthorized distribution of the Consolidated Text in Israel. As shown below, however, this position must ultimately fail.

It is noted that “distribution” is actionable under the Copyright Act as a secondary infringement because it is infringement to distribute “either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright . . . if to the knowledge of the importer the making of that article constituted an infringement of that copyright or would have constituted such an infringement.”¹⁰⁵ As noted, however, the Supreme Court does not make any reference to a cause of action under this heading separate and apart from a claim of unauthorized publication.¹⁰⁶ It would appear, therefore, the reference to “distribution” in the Supreme Court’s discussion on choice of law should be read as part of the conclusion that there had been publication in Israel.

Moreover, even if such a claim had been alleged, there is no factual basis in the Supreme Court’s opinion for the claim that unauthorized distribution had taken place in Israel. Unlike the term “publication,” “distribution” is not defined in the Copyright Act. Further, “distribution” per se is not prohibited; only “distribution” with respect to certain further qualifying features is prohibited.¹⁰⁷ With respect to the first heading (“to distribute . . . for the purposes of trade”), the term can be understood as buying and selling a commodity on one’s own account (as distinguished from “commercial agency”).¹⁰⁸ As such,

103. Supreme Court Opinion, *supra* note 1, at para. 8.

104. *Id.* (finding sufficient justification for Qimron’s “publication” claim in acts of “distribution” within Israel). Secondary infringements have been described thusly:

[I]n all cases of indirect infringement, it is necessary to prove knowledge on the part of the defendant that the making of the article in question infringed copyright. This distinguishes indirect infringements from direct infringements, where innocence on the part of the defendant is no defense to the claim

SKONE JAMES ET AL., *supra* note 89, at 168.

105. Copyright Act, *supra* note 13, § 2(2)(b).

106. Supreme Court Opinion, *supra* note 1, at para. 8 (stating that because Qimron’s cause of action was for infringement of his right of first publication, the few copies distributed in Israel provided sufficient justification for applying Israeli law).

107. Refer to note 105 *supra* and accompanying text.

108. Copyright Act, *supra* note 13, § 2(2)(b). It has also been suggested that

there is no evidence that distribution took place in Israel. The allegedly infringing books were made, ordered, and paid for in the United States.¹⁰⁹ None of these acts, individually or collectively, amounts to buying and selling the allegedly infringing book in Israel. Accordingly, just as there was no publication of the book in Israel, no distribution took place in Israel.

As to the second heading (“to such an extent as to affect prejudicially the owner of the copyright”), the emphasis is on the “extent” of the alleged distribution, such that it is the scope of the distribution that causes prejudice to the copyright owner. Based on this understanding, even if it could be held that distribution per se had taken place, the small number of books involved¹¹⁰ supports the conclusion that the limited scope thereof has not caused any prejudice to the copyright owner.¹¹¹

The upshot of the Supreme Court’s ruling with respect to “publication” is that it seems to create a situation in which a plaintiff has two potential options to claim rights under Israel’s copyright laws. First, by not directly overruling the district court on the Presumption, it can be argued that reliance on the Presumption may be appropriate under certain defined alleged extra-territorial acts of infringement under Israeli law in an Israeli court. Second, even if reliance on the Presumption is unavailable, the Supreme Court’s construction of “publication” creates a low threshold for the establishment of the predicate act required to find publication. The result of this composite judicial gloss on the issue of choice of law is that forum shopping might lead to more actions in Israel alleging copyright infringement of an unpublished work than would be expected under a plain reading of the Copyright Act.

IV. CHOICE OF LAW: THE MORAL RIGHTS DIMENSION

The *Qimron* case involved claims for both copyright infringement and violation of moral rights.¹¹² Accordingly, to answer the question of whether Israeli law applies to the plaintiff’s claims, separate attention should have been given to

“distribution” can be viewed similarly to “publication.” SKONE JAMES ET AL., *supra* note 89, at 157, 168.

109. Refer to note 92 *supra* and accompanying text.

110. Supreme Court Opinion, *supra* note 1, at para. 8.

111. The emphasis on the extent the prejudice would also seem to distinguish this claim from an action for the violation of an author’s moral right of paternity. Refer to Part IV *infra*.

112. Refer to notes 7–13 *supra* and accompanying text; Supreme Court Opinion, *supra* note 1, at para. 3.

the alleged infringement of copyright and violation of moral rights, respectively.

As seen above, the Supreme Court focused on the question of whether the alleged acts took place in Israel in determining whether Israeli law applies.¹¹³ Based on this approach, there are four possibilities with respect to the choice of law for copyright and moral rights, respectively: (1) Both the alleged infringement of copyright and violation of moral rights took place in Israel; (2) the alleged infringement of copyright took place in Israel, but the alleged violation of moral rights occurred outside of Israel; (3) the alleged infringement of copyright took place outside of Israel, but the alleged violation of moral rights took place in Israel; (4) both the alleged infringement of copyright and the alleged violation of moral rights took place outside of Israel. A ruling on the choice of law with respect to copyright infringement does not provide a resolution of the question regarding a violation of moral rights. They are separate and distinct inquiries.

The ruling of the Supreme Court on choice of law with respect to the alleged acts of publication and distribution appears to refer only to the claim of copyright infringement of the plaintiff's right of first publication of the Consolidated Text.¹¹⁴ In the view of the Supreme Court, the alleged acts of publication and distribution within Israel were sufficient to apply Israeli law to the matter. It has been argued above that this ruling was in error.¹¹⁵ Be that result as it may, the Supreme Court made no explicit ruling with respect to the choice of law for the claim of violation of the plaintiff's right of paternity.¹¹⁶

The crucial question of the choice of law in this connection is whether the same point of attachment with Israel¹¹⁷ that the

113. Refer to notes 6–7 *supra* and accompanying text; Supreme Court Opinion, *supra* note 1, at para. 8.

114. Thus, the decision states that the plaintiff's cause of action is based on the fact that he was deprived of his right to publish the Consolidated Text. Supreme Court Opinion, *supra* note 1, at para. 8.

115. Refer to notes 80–94 *supra* and accompanying text.

116. Compare District Court Opinion, *supra* note 1, at para. 20 (ruling on the choice of law with respect to the moral rights claim), with Supreme Court Opinion, *supra* note 1, at para. 8 (finding no reason to interfere with the district court's conclusion on choice of law); see generally William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 561–63 (1939–1940) (explaining that the moral right protects the creator at all times from unauthorized denial and from future imputation of paternity).

117. With respect to the notion of point of attachment, see Ginsburg, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks (2000 Update)*, WIPO FORUM ON PRIVATE INTERNATIONAL LAW AND INTELLECTUAL PROPERTY, WIPO/PIL/01/2 Dec. 18, 2000, at

Supreme Court applied to copyright infringement—publication of the allegedly infringing book—should also be applied to an alleged violation of moral rights. The question arises because of the difference in the nature of the two causes of action.

As to the claim of copyright infringement, the predicate act of infringement is the (unauthorized) publication of the protected work. Under the result reached by the Supreme Court, because it found there had been publication of the work within Israel, it held that Israeli law would apply.¹¹⁸ However, with respect to the right of paternity, the issue is less clear. The violation of the right of paternity is, in effect, an act of omission occurring when there is an absence of attribution to the author of the work.¹¹⁹ Under such circumstances—when the infringing act is one of omission rather than commission—what is the act that gives rise to the choice of law? The Supreme Court opinion does not explicitly address this question.

One could argue that the Supreme Court implicitly held the act of publication to be the point of attachment for the choice of law with respect to the moral rights claim as well. As seen below,¹²⁰ such a conclusion is not necessarily mandated by either the language or structure of the Copyright Act and Copyright Ordinance. Moreover, to reach this conclusion based on the Supreme Court's reasoning with respect to the choice of law for copyright infringement, one has to account for the fact that publication (or any other act found to be the point of attachment) is at best a proxy for the violation itself which, as noted, is an act of omission. This still leaves unanswered the question of how the court should go about determining the proxy act on which to rely.

The answer to this question is not merely of theoretical interest. If the triggering act for the choice of law, with respect to violation of the right of paternity, is held to be identical to that required for the infringement of copyright, then, as in the case of *Qimron*, the fate of both rests on the court's interpretation of the meaning of "publication."¹²¹ However, if the triggering act for a

para. 10.

118. Refer to note 8 *supra* and accompanying text; Supreme Court Opinion, *supra* note 1, at para. 8

119. Note, however, that U.K. law treats the violation as breach of a statutory duty providing that "[a]n infringement of a right conferred by Chapter IV (moral rights) is actionable as a breach of statutory duty owed to the person entitled to the right" Copyright, Designs and Patent Act, 1988, c. 48, § 103(1) (Eng.) [hereinafter U.K. Copyright Statute]; see also R.F.V. HEUSTON & R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS, ch. 10 (21st ed. 1996); W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT, ch. 7 (15th ed. 1998) (discussing breach of statutory duty under U.K. law).

120. Refer to notes 128–34 *infra* and accompanying text.

121. Refer to notes 7–8 *supra* and accompanying text.

violation of the right of paternity is not held to be linked necessarily to the corresponding act prohibited by copyright, then the basis for determining an alleged violation of the right of paternity is far from clear. Under such circumstances, one could posit either a lower standard (for example, the mere presence of a single copy of the work without attribution in the absence of either publication or distribution¹²²) or a higher standard (for example, commercial publication plus written assertion by the author regarding her right of paternity¹²³) for determining whether to apply the moral rights provisions of the Copyright Ordinance.¹²⁴

As to the right of paternity, a survey of common-law jurisdictions indicates that two approaches have been adopted in legislation. The first approach, as in Israel, is to be silent on the issue of what event gives rise to the application of the domestic law.¹²⁵ The other approach, represented by the United Kingdom, is to legislatively specify the triggering event.¹²⁶

Given the statutory silence of the Copyright Ordinance, the starting point for furnishing an answer to the question—what is the triggering act for applying Israeli law to an alleged violation of the right of paternity—is the distinction made between economic rights and moral rights in the Berne Convention. This is enshrined in Article 6^{bis} of the Paris Act of the Berne Convention, which carves out protection for the right of paternity (the right to be acknowledged as the author of a work) and the right of integrity (the right to prevent unauthorized modifications or changes to the work) independent of the author's economic rights in his work.¹²⁷ “Moral rights” have been

122. Refer to text accompanying note 155 *infra*.

123. Refer to notes 157–61 *infra* and accompanying text.

124. Assuming that, in the *Qimron* case, the Supreme Court had not found that there had been publication with respect to copyright, then if a lower standard for the point of attachment were to be applied to the moral rights claim, the mere presence of three copies of the book in Israel may nevertheless have been sufficient to apply the Copyright Ordinance, including the general remedy provisions of the Israeli Torts Law incorporated therein. As noted, the Supreme Court relied on these provisions to find a violation of the plaintiff's right of paternity and to award sizeable damages for mental anguish. Refer to notes 70–72 *supra* and accompanying text.

125. Thus, Section 4a(1) of the Copyright Ordinance provides that “an author is entitled to be identified as the author of his work in the common manner and scope.” Similar provisions are also contained in the copyright law of Canada. Copyright Act, R.S.C., ch. C-42, § 14(1), (4) (1985), *amended by* ch. 10, 1988 (4th Supp.) (Can.).

126. Section 77(2) of the Copyright, Designs and Patents Act provides that “[t]he author of a literary work . . . has the right to be identified whenever . . . the work is published commercially.” Copyright, Designs and Patent Act, 1988, c. 48, § 77(2) (Eng.).

127. (1) Independently of the author's economic rights, and even after transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other

described as “the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.”¹²⁸

However, the distinction between economic and moral rights within the copyright scheme does not resolve the question of whether to view the two sets of rights as part of one overarching system for the purpose of determining the triggering act for choice of law. Stated otherwise, should one view the relationship between economic and moral rights, within the copyright scheme, from a monist or a dualist point of view? The monist position holds that the two sets of rights constitute a single, intertwined system, while the dualist position maintains that each is to be treated as a separate and distinct set of rights.¹²⁹ No single answer to the monist/dualist controversy has emerged. In Continental European countries with a lengthy tradition of moral rights, both positions have historically been found.¹³⁰ Similar to other countries with a common-law tradition, Israel only recently added explicit protection for moral rights to its long-existing copyright laws.¹³¹ These provisions, in their Hebrew text, are similar, but not identical, to the corresponding provisions of Article 6^{bis} of the Berne Convention.¹³²

Neither the amendments themselves, nor any of the background material to the legislation, provide any guidance as to whether a monist or dualist approach was intended. Nor has the issue been considered by the Israeli Supreme Court. However, the subject was addressed in two different instances by the Tel-Aviv District Court in the case of *Atiya v. The Municipality of Tel-Aviv*,¹³³ reaching a different result in each

derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention, *supra* note 75, art. 6^{bis}(1).

128. RICKETSON, *supra* note 78, at para. 8.93. It is interesting to note that the author's right to disclose his work to the public was historically also seen as a form of moral right. *Id.* To the extent that this right is identical to the author's right of first publication under the Copyright Act, all of Qimron's claims can be viewed as having a moral rights dimension within the broad meaning of the term.

129. *Id.* at para. 8.95.

130. It has been said that Austria and Germany historically tended to favor the monist view, while France, and other countries influenced by France, tended to favor the dualist approach. *Id.*

131. This occurred in 1981, when Section 4a was added as an amendment to the Copyright Ordinance.

132. See JOSHUA WEISMAN, *Moral Rights in the Law of Copyright*, in 7 MECHARI MISHPAT 51 (1989) (discussing in Hebrew the differences between the text of the Copyright Ordinance and the corresponding text in Art. 6^{bis} of the Berne Convention).

133. Originating Pet. 1380/95, Mt. 9016/95, Tel-Aviv District Court, [hereinafter Originating Petition]. The issue was considered on September 28, 1995 [hereinafter First Decision] and April 18, 1996 [hereinafter Second Decision] .

instance.¹³⁴ The *Atiya* case considered a claim by an architect that proposed changes to his architectural plans constituted a violation of his moral right of integrity under the Copyright Ordinance.¹³⁵ The plaintiff sought injunctive relief to which the defendant objected, pointing to a provision of the Copyright Act that limited relief in claims involving works of architecture to monetary recovery only.¹³⁶ By contrast, the moral rights provisions of the Copyright Ordinance explicitly incorporated the remedy provisions of the Israeli Torts Law, including, presumably, the right to injunctive relief.¹³⁷

The first court, ruling on the motion for interim relief, adopted a dualist view of the relationship between economic rights and moral rights in this context.¹³⁸ Its reasoning was based in large measure on its interpretation of the Berne Convention. First, noting that the Copyright Act was enacted in 1911, before moral rights were given recognition by the Berne Convention in 1928, the court reasoned that the limitation to monetary relief in Section 9 of the Copyright Act could not have been intended to apply to a violation of moral rights in connection with the same subject matter.¹³⁹ Second, the court noted that copyright was deemed to mandate both economic rights and moral rights only in 1967, as part of the Stockholm Act of the Berne Convention, with the result that any statutory reference to copyright prior to that time was to be narrowly construed—so as to exclude moral rights.¹⁴⁰ Third, the court chose to adopt an originalist view of construction, rather than the current meaning of the statute, as to the meaning of the 1911 U.K. Copyright Act.¹⁴¹ Under such a view, the term “copyright”

134. See Neil Wilkof, *Can Architects Obtain Injunctive Relief for Infringement of Their Moral Rights?*, 7 ENT. L. REV. 245, 245 (1996). No reference was made by the Supreme Court to this case, although it was cited in a defendant's brief submitted to the Supreme Court.

135. See Originating Petition, *supra* note 133.

136. *Id.* Section 9(1) of the Copyright Act provides as follows:

Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

Id.

137. Section 4a(3) of the Copyright Ordinance provides that “violation of a right under this paragraph is a tort, and the provisions of the Torts Ordinance [New Version] will apply.”

138. See First Decision, *supra* note 133.

139. *Id.*

140. *Id.*

141. See *id.*

could not be held to refer to moral rights which, as noted above, came into acceptance at the international level only after that date.¹⁴²

By contrast, the court that subsequently ruled on the case in chief adopted a monist position with respect to a violation of the right of paternity.¹⁴³ The court was of the view that the previous court had asked the wrong question.¹⁴⁴ The issue was not whether the British Parliament had intended to include moral rights within the ambit of the Copyright Act of 1911, but whether the Israeli Legislature, by virtue of the legislative amendments, had intended to make moral rights a full part of the Copyright Act and the Copyright Ordinance.¹⁴⁵ The court had no doubt that the answer was “yes.”¹⁴⁶ This meant that the restriction to monetary relief under Section 9 of the Copyright Act applied equally to an infringement of copyright and violation of an architect’s moral right of integrity with respect to his architectural work.¹⁴⁷

How would the monist/dualist controversy, as played out in the *Atiya* case, be applied to the issue of determining the triggering event for choice of law for a violation of right of paternity?¹⁴⁸ A monist view suggests that, even though the moral right is to be distinguished from the economic right in the work, the choice of law with respect to both is to be associated with the

142. Refer to notes 130–31, *supra* and accompanying text.

143. See Second Decision, *supra* note 133.

144. *Id.* at 147.

145. *Id.*

146. *Id.* See also WEISMAN, *supra* note 132 (suggesting that the court was not troubled by the explicit reference to the remedy provisions of the Tort Law and that the court reasoned that these remedy provisions merely complemented the scheme of relief for moral rights, but did not thereby create a right distinct from that of copyright).

147. WEISMAN, *supra* note 132. It is noted that the approach taken in *Atiya* emphasized the structure of the copyright law and the preferred relationship between the economic and moral rights in respect of that structure. *Id.* It could be argued that the better approach is to argue on the basis of “norms” of copyright. Geller describes the norms thusly: “On the one hand, *market-place norms* require rules to maintain a reliable market in products of the mind. On the other, *authorship norms* dictate rules to empower authors to control the use by others of their self-expression.” Paul Edward Geller, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms*, in OF AUTHORS AND ORIGINS 159 (Brad Sherman & Alain Strowel eds., 1994) (arguing that it may be possible to identify an overarching norm that bridges the two). Thus, while the basis for Geller’s discussion is on the distinction between economic rights and moral rights, the thesis advanced is that it may be possible to reconcile the two. Whether a norm-based approach might lead to considerations different from those proposed herein, with respect to choice of law for a violation of the right of paternity, merits further attention.

148. The foregoing discussion assumes that there is no specific legislation that could be applied to the issue. Refer to 159 *infra*.

occurrence of an act restricted by copyright.¹⁴⁹ A dualist view would allow for the uncoupling of the triggering event for a violation of moral rights from that required for an infringement of copyright.

It would appear that the monist view fares better in providing an answer to the question of what is the triggering event with respect to choice of law for a violation of the paternity right. Based on the view that both economic rights and moral rights are part of one overarching system, it provides the framework for associating the two rights on the basis of the same occurrence; both rights arising from an act restricted by copyright.¹⁵⁰ This is especially true with respect to jurisdictions of the common-law tradition where explicit provisions providing protection for moral rights were added to well-established copyright legislation. By contrast, the dualist view suggests no standard for fixing the triggering act other than by reference to the violation of the right of paternity itself. Because this violation is an act of omission, reference to the occurrence of a further act would be required to determine the choice of law issue. However, there is no principled way to fix what this act should be.

Applying the monist view is perhaps easiest when the corresponding alleged infringement of copyright is, as in the *Qimron* case, based upon unauthorized publication of a work.¹⁵¹

149. This result is further mandated by a concern for constitutionalism, and in particular, those jurisdictions in which a copyright clause of constitutional authority or the like may be relied up to justify the enactment of moral rights provisions.

150. Note Section 194 of the recently enacted moral rights amendments to the Australian copyright law, which provides in part:

- (1) If the work is a literary, dramatic or musical work, the *attributable acts* are the following:
 - (a) to reproduce the work in a material form;
 - (b) to publish the work;
 - (c) to perform the work in public;
 - (d) to transmit the work;
 - (e) to make an adaptation of the work.

Copyright Amendment (Moral Rights) Act, 2000, § 194 (Austl.) (emphasis added).

The Act continues in section 195AZE by providing:

In an action brought under this Part for an infringement of a moral right in respect of a work, if copyright is presumed or proved to have subsisted in the work when the infringement is alleged to have occurred, the moral right is presumed to have subsisted in the work at that time.

Id. § 195AZE.

The structure of the Australian law supports the conclusion that the triggering event for the choice of law is presumed to be identical for both an infringement of copyright and a violation of the right of paternity.

151. See Supreme Court Opinion, *supra* note 1, at para. 16. Note also that the corresponding infringement for unauthorized publication of an unpublished work can itself be seen as having derived from the moral rights tradition itself. See *id.* at para. 23

In such a case, there is a discernible nexus between the infringement of copyright and violation of the right of paternity. It is the unauthorized act of publication that brings the work to the public against the will of the author, and the same unauthorized publication draws attention to absence of attribution to the author. In effect, there can be direct control over both the infringement of copyright and violation of moral rights by the same wrongdoer.

Even when the act that triggers the application of domestic law is an act of secondary infringement of copyright, the monist view still provides a reasonable justification; although the basis for control is less straightforward. Take, for example, the secondary infringement of distribution.¹⁵² Here, while there must be knowledge that the work being distributed is an infringement of copyright, the secondary infringer does not generally have any direct control over the omission of attribution to the author. Nevertheless, the knowledge requirement with respect to copyright infringement would appear to be sufficient to provide the basis for the application of the domestic law of moral rights.

Query, nevertheless, from the dualist view, whether there exists a principled basis to set the triggering event on some act other than a corresponding act of copyright infringement? Thus, by supporting a lesser standard than publication or distribution by giving effect to the distinction between the economic right and moral right in a work, one could seek to identify the minimal act necessary to constitute the requisite point of attachment with respect to the alleged occurrence of a violation of the right of paternity.

It is suggested that this minimalist standard is satisfied by the presence in the jurisdiction of a copy of the work without the required attribution of authorship. The violation of the right lies in the very omission of the author's name on the work. From this perspective, it hardly matters whether the infringing copy is present in the jurisdiction by virtue of unauthorized publication, distribution, or some other act—whether or not that act is itself unauthorized under the copyright laws. What is crucial is that a harm to the author's personality as creator has taken place. This is another way of saying that the violation to the author's personality has done harm to her moral, as distinguished from economic, right in the work.

The difficulty with this position derives more from the

("Publication of a work without its having 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.").

152. See *id.*

vantage of relief than from any intrinsic flaw in the claim of point of attachment *per se*. First, there is the problem of identifying the wrongdoer in such a situation. The mere presence of a copy of the work in violation of the author's right of paternity cannot reasonably render the possessor of such a copy liable for the injury so caused. As a result, it would appear that some act, other than mere possession of the infringing copy, should be required to impose liability for violation of the right of paternity. If this were the case, then, harkening back to the issue of control discussed previously, the best test for the requisite act would seem to be a corresponding act of copyright infringement.

Second, the fixing of such a lesser standard may have the effect of encouraging forum shopping, allowing the point of attachment for choice of law to be interpreted to apply the local law and the relief available for violation of the right of paternity to be construed in a highly protectionist manner. Such a situation might create a series of "copyright havens" (from the vantage of the author seeking to enforce her right of paternity), resulting in either "a race to the bottom"¹⁵³ or "a race to the top,"¹⁵⁴ depending upon one's vantage. Whether the race is upward or downward, however, there is no principled reason that such forum shopping for an alleged violation of the right of paternity should be encouraged.¹⁵⁵ Accordingly, the dualist view would not appear to provide a rationale for setting a lesser standard with respect to the occurrence giving rise to the choice of law for the violation of the paternity right.

With respect to a more stringent standard than that set by reference to the corresponding act of copyright infringement, reference is made to the requirement in the U.K. that the right of attribution¹⁵⁶ only applies if the work is "published

153. Ginsburg, *supra*, note 117, at para. 20 (suggesting that a "race to the bottom" might result if a country of origin approach is applied to a copyright infringement action for Internet commerce and the country of origin is underprotective vis-à-vis other countries in which infringing signals are received).

154. Private communication with David Nimmer (on file with author).

155. Consider the result if multiple countries followed the lead of the Israeli court in awarding damages for mental anguish based not upon publication of the work in the jurisdiction, but merely upon the presence of a single book without attribution. In truth, this concern over the race to the bottom (or to the top) seems more acute in situations in which the court sets a low standard for publication, as was done in the *Qimron* case. Refer to text accompanying notes 6-9 *supra*. In the absence of publication, it is difficult to imagine how a court could hold a party liable for damages for a violation of the paternity right.

156. More precisely, "the right to be identified as author." See U.K. Copyright Statute, *supra* note 119, § 77(1).

commercially.”¹⁵⁷ Following the reasoning of the Supreme Court, the reference to commercial publication would mean that the local law is to be applied only if this requirement is met. It has been argued that this requirement is more stringent than mere “publication,” since the publication must be commercial.¹⁵⁸ Be the construction of the term “commercial” as it may, it would appear that here, as well, the requirement of (commercial) publication links the right of paternity to the right of publication. Only when the author is prepared to disclose his work by means of (commercial) publication is recognition given to a right of paternity under copyright law.¹⁵⁹

That having been said, it still may be possible to explain the requirement that the publication be “commercial” by reference to the connection between the act of publication and omission of attribution of authorship. Given that nexus, there may be a danger of dual recovery unless the violation of the right of paternity is clearly distinguished from copyright infringement. The requirement that the publication be “commercial” may lessen this danger by strengthening the distinction between the act of publication, under the copyright law,¹⁶⁰ and “commercial publication,” under the right of paternity. This tendency is also seen in the requirement, under U.K. law, that the right of paternity must be asserted by the author.¹⁶¹

V. CONCLUSION

It was long the accepted view that issues of choice of law in copyright disputes “rarely proved troublesome in the law of copyright.”¹⁶² This is no longer the situation. Perhaps no

157. *Id.* § 77(2). The author must assert his right of paternity as well. *See id.* §§ 77(1), 78. A similar result is provided under § 94 of the New Zealand Copyright Law. *See* Copyright Act, 1994, §§ 94(2)(a), 96(1) (N.Z.).

158. *See* LADDIE ET AL., *supra* note 82, at para. 4.36. But, having regard to the traditional definition of “publication”—namely, that publication, in relation to any work, means “the issue of copies of the work to the public”—the distinction between “publication” and “commercial publication” may be immaterial. *See* Copyright Act, *supra* note 13, § 1(3).

159. Note, however, that while the rationale for the requirement of “commercial publication” appears similar to the rationale for requiring “publication,” there is no reason for this to be so. In principle, the legislature could fix any required act that it so chooses in connection with the existence of the right of paternity.

160. *See* U.K. Copyright Statute, *supra* note 119, § 18(1) (“The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.”). Refer to text accompanying note 88 *supra* regarding the definition of “publication” under the 1911 Copyright Act as the issue to the public of copies of the work.

161. *See* U.K. Copyright Statute, *supra* note 119, § 78(1).

162. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998) (quoting NIMMER ON COPYRIGHT § 17.05 (1998)).

decision in recent times has underscored the extent and scope of this development than has the *Qimron* case wherein the readiness of the court to apply Israeli law was crucial in enabling the plaintiff to enforce its claim for violation of his moral rights. But in so doing, the court has left in its wake serious questions about the underpinnings of choice of law, particularly with respect to the meaning of "publication" and the basis for determining the governing law with respect to moral rights. The degree to which the approach taken by the *Qimron* court will influence future decisions in this respect merits close attention.

APPENDIX A

19. All agree that the suit is governed by the law of the place of infringement, that is, the laws of the USA [E.P. SKONE JAMES ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT 450 (12th ed. 1980)]. It is also undisputed that this law has not been proved. The question is whether the presumption of the equivalence of laws applies to the suit, bringing us back to Israeli law.

The presumption of identity of the laws, recognized by international private law, is based upon the premise that the laws of enlightened states are identical [citation omitted]. This presumption does not apply to all branches of the law. So, case law tends toward the view that, in face of the uniqueness of laws concerning personal status in Israel, there is no place for relying on the presumption of equivalence of the laws in matters of personal status [citation omitted].

The Defendants sought to rely upon a test that was suggested by Professor Levontin: on questions concerning local issues (status and property) that are anchored in a specific legal system, it behoves [sic] the Plaintiff to prove the foreign law, whereas in transitorial suits (contracts and torts) there should be no deviation from the laws of the place of jurisdiction, except if the other party raises a defence [sic] based upon the foreign law [citation omitted]. According to the Defendants, the suit against them was proprietary, and therefore the Plaintiff should have proved the foreign law.

20. The case law has not taken a stance in relation to this test. Only lately has the Supreme Court depended upon the presumption of the equivalence of the laws with regard to a suit concerning property rights of partners [citation omitted].

In any event, it is important that, again according to Prof. Levontin, the presumption of equivalence of the laws applies to the issue before me.

First, even though copyright is proprietary, a suit for infringement is tortious by nature. In the Act it has been established that the infringement of moral rights is a tort according to the Torts Ordinance [New Version]. The Torts Ordinance complements the special instructions for copyright which are established in the Copyright Act [Y. Weisman, *The*

Personal Right (Droit Moral) in Copyright Law, 7 LEGAL STUD. 51, 54 (1989)].

Second, the test which Prof. Levontin suggested is not based upon a mechanical classification of the law into branches. The determining factor is whether the said issue is or is not implicated in the local law, specific to the place of jurisdiction. Property law and status were mentioned as examples of such locality. The Copyright laws in Israel are not local, and laws comparable to them are accepted in the enlightened world.

In any case, in our subject the presumption of equivalence of the laws is not fictitious at all. As was previously said, in Israel, the English law was absorbed, from which also American law has developed. On a particular matter (statutory damages) the procedure in Israel follows the procedure adopted in the written American law. The entire legislation has been adapted to an international treaty.

Finally, the presumption of equivalence of laws applies, and upon the Defendants lies the burden to prove that they have a defense according to American law. This they have not done.

After the completion of argument, the Defendants brought in additional authorities. In this context they charged for the first time that 'there is no *droit moral* according to the laws of the USA (apart from six states)....' They have not depended upon American judicial sources but upon S. Presanty's book, [2 COPYRIGHT LAWS 497-98, 504-07 (1992)]. The author points out that *droit moral* applies in six states in the USA, without detailing their names. Later on, she adds that the law exists in five states in the USA: New York, California, New Jersey, Maine and Rhode Island.

This argument which, for whatever reason, was raised after the completion of the debate, is insubstantial. First, the principle is this: a foreign law is considered as a fact, for which proof by means of experts is necessary [citation omitted]. The Defendants have so argued themselves when they sought to have the suit dismissed on the grounds that the Plaintiff has not proved American law. Second, going beyond what was argued, the book in question in the suit (P/14) was published in Washington, D.C. As was previously said, according to the aforesaid authority, moral rights apply in six states in the USA whose names have not been detailed. Therefore, this authority has not proved that

the said right is not protected in the place of the book's publication. In addition, I will say that it is not understandable, in a positive reasoning, [to conclude] that moral rights are not protected by the laws of the states whose names have been detailed.

The result is that the whole suit, including the suit dependent upon moral rights, has to be decided by the law operative in Israel.

APPENDIX B

Application of Israeli Law

8. The District Court decided the lawsuit according to prevailing Israeli law, after it ruled that the presumption of the equality of laws applies to the matter. As it noted, “everyone agrees that the law of the place of infringement applies to the complaint, in other words the laws of the United States --- there is also no-one who disputes that this law was not proven”. The Appellants dispute the application of the presumption of the equality of laws in the case before us and argue that since Qimron did not prove the law that applies in the place of the alleged infringement “so he did not prove the facts that establish his cause of action”.

I am unable to accept the Appellants’ argument and I agree with Qimron’s claim that Israeli law applies to this matter without resorting to the presumption of the equality of laws. In this matter he relies upon the fact that copies of the Book were sent to readers in Israel and on the fact that a portion of the marketing efforts of the Book were done in Israel. In fact, from Shanks’ testimony [citation omitted] and the order forms that were submitted as evidence it appears that three copies of the Book were sent by BAS to readers in Israel. These copies were, it is true, ordered in the United States, and the consideration for them was paid there, but the fact that BAS sent them directly to readers in Israel is enough to find that it published the Deciphered Text in Israel. Since Qimron’s cause of action is based upon the fact that his right to be the first to publish the Deciphered Text was denied, the copies distributed in Israel until the issuance of the injunction that brought about the cessation of the distribution — even if they were few — are sufficient for the application of Israeli law to this matter.

There are, therefore, no grounds for intervening in the court’s conclusion according to which this matter must be decided according to prevailing Israeli law.