COMMENT

ANCIENT WORKS, MODERN DILEMMAS: THE DEAD SEA SCROLLS COPYRIGHT CASE*

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INTRODUCTION

In pursuing the future, it is always important to recognize the past. Occasionally, the modern world is lucky to discover archaeological artifacts that connect present-day humanity to its ancestry. The discovery of the Dead Sea Scrolls is one such valuable link.\(^1\) The Dead Sea Scrolls, named for the location of the caves where they were discovered, are considered by many scholars to be the single greatest biblical archaeological find.\(^2\) Many believe that the scrolls hold crucial information about the historical relationship between Judaism and early Christianity.\(^3\) Some further believe that the scrolls were

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2. Wendy Marston, Scribal Warfare, SCIENCES, Mar.-Apr. 1993, at 7, 7 (stating that discovery of Dead Sea Scrolls is greatest biblical archaeological event); Raiders of the Lost Scrolls, supra note 1, at 106 (describing scrolls as "one of the most momentous scholarly finds of the century"); Philip E. Ross, Overview: Dead Sea Scrolls, SCI. AM., Nov. 1990, at 36, 36 (calling Dead Sea Scrolls "greatest windfall"); Jeffery L. Sheler, Can Ideas Be Held Hostage?, U.S. NEWS & WORLD RPT., June 25, 1990, at 56, 56 (labeling Dead Sea Scrolls "the richest cache of documents ever discovered from the period that gave birth to Christianity and modern Judaism").
3. See Ayala Sussmann & Ruth Peled, Treasures from the Judean Desert, in SCROLLS FROM THE DEAD SEA 23, 23 (Ayala Sussmann & Ruth Peled eds., 1993) (stating that Dead Sea Scrolls cover period from 520 B.C. to A.D. 70, which was important time for development of monotheistic religions); Raiders of the Lost Scrolls, supra note 1, at 106 (sharing opinion that Dead Sea Scrolls reveal important information about early Christianity and Judaism); Ross, supra note 2, at 36 (stating that scrolls reflect Jewish thought while "Rabbinic Judaism and early Christianity were
written by a monastic Jewish sect known as the Essenes. The scrolls, comprised mainly of "religious writings, messianic prognostications, psalms and hymns, some of which anticipate ideas expressed in the New Testament," may provide answers to historians' and theologians' questions regarding a period in history about which they had only been able to speculate.

Since their discovery, the scrolls have been a constant source of controversy. They have been the subject of battles over accessibility, monopolization, and publication delays. Most recently, debate has focused on copyrightability of the reconstructed scrolls and copyright infringement.

One of the unfortunate realities about archaeological artifacts is that they are rarely preserved and often are fragmented. Fragmentation of documents makes it necessary for scientists and scholars to put the pieces back together, as if reassembling a jigsaw puzzle. Unfortunately, ancient document reconstruction is not as simple as solving a jigsaw puzzle. In many cases, indistinguishable fragments belong to unidentified documents. Unlike a puzzle, which has one answer, scholarly interpretation of reconstructed artifacts may yield different outcomes. A scholar or archaeologist must determine which

forming"; Edward Rothstein, Who Controls the Scrolls?, WORLD PRESS REV., Aug. 1991, at 50, 50 (asserting that scrolls were crafted during transformative period of Judaism and Christianity). 4. Sussmann & Peled, supra note 3, at 25; Marston, supra note 2, at 7; Rothstein, supra note 3, at 50; Sheler, supra note 2, at 56.

5. Marston, supra note 2, at 7.

6. See Ross, supra note 2, at 56 (stating that scrolls are practically "the only texts that reflect the thinking of Jews during the period when Rabbinic Judaism and early Christianity were forming"); Sussmann & Peled, supra note 3, at 23 (explaining that excitement over Dead Sea Scroll discovery is due to new information it provides on Second Temple Period).

7. See Michael W. Grunberger, Introduction to Scrolls from the Dead Sea, supra note 3, at 18 (maintaining that scrolls have been center of deep public interest and controversy); Ross, supra note 2, at 36 (reporting that delay in publication has been called "philological scandal of the century"); Sheler, supra note 2, at 56 (stating that "controversy has been brewing for years").

8. See Rothstein, supra note 3, at 50 (noting that "secrecy and delays in publication have enraged many in the academic world").

9. See David E. Anderson, Fight over Access to Dead Sea Scrolls Goes to Court, WASH. POST, Oct. 3, 1992, at G1 (reporting that Biblical Archaeology Society filed lawsuit seeking declaration that reconstruction of Dead Sea Scrolls cannot be copyrighted). Professor Elisha Qimron claims that the Biblical Archaeology Society has infringed his copyright by publishing a two-volume work containing his reconstructed text. Id.


11. See Sheler, supra note 2, at 56 (describing how reassembling fragments is "tedious and time-consuming").

12. See Emanuel Tov, Epilogue to Scrolls from the Dead Sea, supra note 3, at 136 (explaining that scrolls included many textual fragments belonging to unknown number of documents).
fragments belong together and how those pieces should be arranged to best recreate the original.\(^1\)

In pursuit of the correct combination, a scholar may devote his or her life to reassembly. One Israeli biblical scholar, Elisha Qimron, devoted eleven years of work to one of the Dead Sea Scrolls.\(^2\) In an effort to give free access to all of the scroll manuscripts, Hershel Shanks, founder and current director of the Biblical Archaeology Society,\(^3\) published a book that included an "unauthorized" facsimile of the document that Qimron had spent years reconstructing.\(^4\) Subsequently, Qimron brought suit against Shanks in Israel asserting a claim of copyright infringement.\(^5\) This suit set an international legal precedent.\(^6\) The Israeli decision, the first ruling of its kind in the world, found a copyright in the reconstruction of an ancient text.\(^7\)

The Israeli case and its ruling raise serious questions regarding the freedom to disseminate factual information and the consequences it may have on scholarly research. The past still contains many mysteries that may be solved only through continuous research and free exchange of ideas. Conferring a copyright on an artifact reconstruction presents a problem in this pursuit for answers because such a copyright may permit monopolization of ideas, thereby forestalling future research.\(^8\) Although legal issues similar to those decided in the Israeli case have yet to be fully litigated in the United States,\(^9\) the well-established U.S. system of copyright law makes the United States the logical forum for the continuation of this debate. In fact, two different scholars have filed a similar case against Qimron

\(^1\) Cf. id. (stating that scientists and scholars grouped fragments of Dead Sea Scrolls in effort "to assemble comprehensible texts").


\(^3\) Anderson, infra note 9, at Gl.


\(^5\) See infra notes 69-94 and accompanying text (discussing Qimron v. Shanks).

\(^6\) Abraham Rabinovich, Court Awards Dead Sea Scrolls Translator NIS 100,000, JERUSALEM POST, Mar. 31, 1993, at 14.

\(^7\) Id.


\(^9\) Hershel Shanks and the Biblical Archaeology Society filed a "companion" case in the United States against Elisha Qimron, immediately after Qimron filed the Israel case. See Biblical Archaeology Soc'y v. Qimron, No. 92-5590 (E.D. Pa. filed Sept. 22, 1992). These plaintiffs later dropped the suit after the Israeli decision was rendered. Notice of Voluntary Dismissal at 1, Biblical Archaeology Soc'y (No. 92-5590).
in the U.S. District Court for the Eastern District of Pennsylvania. In anticipation of this future litigation, this Comment analyzes Qimron v. Shanks and theorizes as to how U.S. copyright law might apply to reconstructed documents.

Part I of this Comment sets the stage for the Israeli case and for reconstruction of ancient documents in general by discussing in detail the discovery of the Dead Sea Scrolls. Part II discusses the background of Qimron v. Shanks, the Israeli court's decision, and the Israeli copyright law on which that decision was based. As a guide to understanding U.S. copyright law, Part III provides a brief history of the law and its fundamental themes. Finally, Part IV examines the doctrines and concepts of U.S. copyright law that may be involved in a case concerning the copyrightability of reconstructed documents. This Part addresses not only the applicable law, but also the policy implications that a decision such as Qimron v. Shanks might have on the academic community. In the end, it is unlikely that a U.S. court would follow the Israeli District Court's precedent.

I. HISTORICAL PERSPECTIVE ON THE DEAD SEA SCROLLS

A. Discovery

The first manuscripts from the Dead Sea Scrolls were accidentally discovered in a desert cave by a Bedouin shepherd boy in 1947.

22. Wacholder v. Qimron, No. 93-4097 (E.D. Pa. filed July 29, 1993). Ben Zion Wacholder and Martin Abegg are biblical scholars who have also been studying and reconstructing different Dead Sea Scroll texts, including the text that Qimron worked on, which is called Miq'at Ma'aseh ha-Torah (MMT). First Amended Complaint at 2-3, Wacholder, No. 93-4097. They wish to publish their rendition of MMT in their new book, but the substantial similarity to Qimron's MMT reconstruction and Qimron's threats to sue them for copyright infringement make them afraid to publish it. Id. at 8. In an effort to counter such threats, Wacholder and Abegg have filed a suit against Qimron in the United States. Id.; see Ron Grossman, Copyright of Scrolls Text Ignites Court Fight, CHI. TRIB., Aug. 2, 1993, at 2 (reporting that two American scholars, Ben Zion Wacholder and Martin Abegg, have petitioned court for declaratory judgment that would prevent Qimron from suing them for copyright infringement).


24. See Sussmann & Peled, supra note 3, at 23 (summarizing discovery of scrolls). The true story of the discovery of the Dead Sea Scrolls is unknown, but a commonly accepted sequence of events is as follows:

In 1947, Muhammad Adh-Dhib, a Bedouin shepherd boy searching for his lost goat, stumbled on one of the greatest archaeological finds of this century, the Dead Sea Scrolls. JOHN M. ALLEGRO, THE DEAD SEA SCROLLS 13 (1961). Muhammad, thinking that his goat was hiding in a cave, threw a rock inside hoping to scare out his animal. Id. at 14. Instead, he heard the rock hit something that sounded like pottery. Id. Out of curiosity, Muhammad pulled himself into the small cave and discovered several large pottery jars. Id. Fearful of his discovery, he left the cave and returned to his campsite to tell a friend about what he had found. Id. The next day, Muhammad and his friend returned to the cave and retrieved three scrolls. Id. at 15.
The first scrolls, found in what has come to be known as Cave 1 of the Qumran Excavation, were fairly intact. Once the significance of these scrolls had been recognized, archaeologists and opportunists initiated further excavation of the Judean desert. Between 1951 and 1956, excavations of the cliffs of Qumran uncovered ten more caves housing ancient manuscript materials. Cave 4, discovered in 1954, provided the richest source of ancient text, mostly in a fragmented state. The scrolls, comprised of approximately 800 manuscripts, now reside under the control of the Israel Antiquities Authority.

Although some of the scrolls have changed...
hands many times, their accessibility for purposes of study had been limited until recently.\textsuperscript{34}

\textbf{B. Scholarship on the Scrolls}

The majority of the manuscripts were originally controlled by the Jordanian Government.\textsuperscript{35} The Government gave these scrolls and fragment materials exclusively to a group comprised mostly of Catholic scholars for the purpose of study.\textsuperscript{36} Under the guidance of Father Roland de Vaux,\textsuperscript{37} an "international" team of eight scholars attempted to reconstruct and decipher the thousands of textual pieces.\textsuperscript{38} This team worked with the scrolls in the Rockefeller Museum in Old Jerusalem, in a room aptly named the "Scrollery."\textsuperscript{39}

Prior to 1967, on the other side of a partitioned Jerusalem, the intact scrolls from Cave 1 were studied under Israeli authority.\textsuperscript{40} During this period the international team working in the Rockefeller Museum refused to coordinate its studies with those that were taking place in Israel.\textsuperscript{41} During the Six Day War in 1967, Old Jerusalem fell under Israeli control,\textsuperscript{42} and with it, the Rockefeller Museum and the

\textsuperscript{34} See ROBERT EISENMAN & MICHAEL WISE, THE DEAD SEA SCROLLS UNCOVERED 2-3 (1992) (describing "long and arduous" task of gaining access to scrolls). As late as 1986, Israeli officials told one scholar, Robert Eisenman, that "[he] will not see the Scrolls in [his] lifetime[]." \textit{Id.} at 3.

\textsuperscript{35} See BAIGENT \& LEIGH, supra note 24, at 22. Initially, the Qumran caves located in the Judean desert were part of the British Mandate of Palestine. \textit{Id.} After Transjordan annexed Palestine and established Jordan in 1949, the caves came under the control of the Jordanian Government. \textit{Id.} In 1966, Jordan nationalized the Rockefeller Museum, which contained all of the scroll fragments. \textit{Id.}

\textsuperscript{36} Rothstein, supra note 3, at 50 (stating that group initially chosen to study scrolls was "largely Catholic and excluded Jewish and Israeli scholars").

\textsuperscript{37} Rothstein, supra note 3, at 50. Father Roland de Vaux was a French Dominican priest who came to Jerusalem in 1929 to teach at the École Biblique et Archéologique Française. \textit{Id.} Between 1945 and 1965, de Vaux served as the school's director. BAIGENT \& LEIGH, supra note 24, at 27. He was known to be charismatic and personable, but also "narrow-minded" and "bigoted." \textit{Id.} It was no secret that de Vaux was anti-Semitic. \textit{Id.} at 27-28.

\textsuperscript{38} See BAIGENT \& LEIGH, supra note 24, at 27-29. The eight original scholars chosen to study the scrolls were Father Roland de Vaux from France, \textit{id.} at 27, Professor Frank Cross and Monsignor Patrick Skehan from the United States, \textit{id.} at 28, Father Jean Starcky from France, \textit{id.}, Dr. Clause-Hunno Hunzinger from Germany, \textit{id.}, Father Josef Milik, originally from Poland and resettled in France, \textit{id.} at 29, and John Allegro and John Strugnell from Great Britain. \textit{Id.; see also ALLEGRO, supra note 24, at 42-43.}

\textsuperscript{39} See BAIGENT \& LEIGH, supra note 24, at 22 (noting that "Scrollery" was room in Rockefeller Museum housing most scroll fragments). It was in this room that the scholars worked to piece the manuscripts back together. ALLEGRO, supra note 24, at 42-46.

\textsuperscript{40} See ALLEGRO, supra note 24, at 41 (recounting that Hebrew University produced published manuscripts of one Isaiah scroll, War scroll, and some hymns).

\textsuperscript{41} See Rothstein, supra note 3, at 50 (reporting that de Vaux "steadfastly refused" to work jointly with Israelis on scrolls).

\textsuperscript{42} See ISRAEL: A COUNTRY STUDY 59-62 (Helen C. Metz ed., 1988) (describing Six Day War between Israel and Jordan, Syria, and Egypt). This war culminated in Israel's annexation of the West Bank of Jordan (including West Jerusalem), the Golan Heights, and the Gaza Strip. \textit{Id.}
remaining scrolls. In a decision made mostly for convenience, Israeli authorities allowed the original international team to continue its work on the scrolls, but on the sole condition that it include several Jewish scholars in the group. The Israeli Government also asked the scholars to speed up the publication process.

The Israeli Government continued to restrict access to the scrolls, and the original eight scholars retained a monopoly on scroll research. When one of the original scholars died or retired, he essentially devised his work on the scrolls to a chosen successor. Outside scholars could not work with the actual scrolls; not even photographs of the textual materials were released to the public. Several depositories around the world possessed copies of the scroll photographs, but the copies were never made available to outside scholars.

43. See Robert Alter, How Important Are the Dead Sea Scrolls?, COMMENTARY, Feb. 1992, at 34, 35 (stating that director of Israel Antiquities Department did not interfere with existing researchers out of fear of public outrage or international incident); Marston, supra note 2, at 7 (stating that scrolls remained under control of Jordanian Government's designates after Israel's victory in Six Day War).

44. See Alter, supra note 43, at 35 (stating that Israel decided not to interfere with original international team on condition that Jewish scholars be added to team). Avraham Biram, director of the Israel Antiquities Department, also insisted that the title of the publication series be changed from "Discoveries in the Judean Desert of Jordan" to "Discoveries in the Judean Desert." Id.; see also infra note 55 (noting that no Jewish scholars were selected for international team).

45. See Alter, supra note 43, at 35 (reporting that Israeli authorities have set firm deadlines for submission and publication of reconstructed texts); Rothstein, supra note 3, at 50 (stating that time limits will be set for publication of exclusive work on scrolls).

46. See BAIGENT & LEIGH, supra note 24, at 72 (alleging that during 1960s and 1970s, international team's monopoly over scrolls was "absolute"); Anderson, supra note 9, at G1 (noting that international team has controlled scrolls exclusively since 1950s); Hank Burchard, Unfettering the Scrolls, WASH. POST, Apr. 30, 1993, at N56 (confirming that monopolization of scrolls was "aided and abetted by both Jewish and anti-Jewish governments"); Scrolls Bootlegged, CHRISTIAN CENTURY, Sept. 18-25, 1991, at 840 (stating that scrolls have "remain[ed] closely guarded"); Sheler, supra note 2, at 56 ("They exercise the absolute right to exclude anyone else from seeing the documents.") (quoting Hershel Shanks).

47. See Raiders of the Lost Scrolls, supra note 1, at 106 (noting that favoritism has been shown in conveyance of scroll materials); Rothstein, supra note 3, at 50 (alleging that eight original members of international team have "passed on the 'rights' to certain scrolls to their chosen heirs").

48. See Sheler, supra note 2, at 56 (reporting that scholars at 1989 international conference in Poland found it unacceptable that photographs of fragments had not yet been published).

49. Ross, supra note 2, at 38; Hershel Shanks, Preserve the Dead Sea Scrolls, BIBLICAL ARCHAEOLOGY REV., Jan.-Feb. 1992, at 62, 62. The institutions that house facsimiles include the Huntington Library in San Marino, California, the Ancient Biblical Manuscript Center in Claremont, California, the Hebrew Union College in Cincinnati, Ohio, and the Oxford Centre for Post-Graduate Hebrew Studies in Yarnton, England. Id.

50. See Ross, supra note 2, at 38 (explaining that photographic archives were maintained to safeguard against destruction of original texts in Middle East wars rather than for independent research).
In 1988, John Strugnell of Harvard University became the official general editor of the scroll research group in Israel. Strugnell enlarged the research group’s number to sixty-five scholars and tried, unsuccessfully, to set more definite publication deadlines. Only about forty percent of the entire scroll material has been published since its discovery, and as of 1990, only twenty percent of the vast Cave 4 texts had been published. This continuing delay in publication, along with extreme restrictions on access to the scroll materials, has fueled a growing controversy.

C. The Campaign to Release the Scrolls

When only eight scholars were studying the scrolls and information was being released very slowly, many people questioned whether the original editors would die before publishing their closely guarded work. This concern, coupled with the fact that the original international team consisted mainly of Christian scholars, caused speculation that the interpretation of the scroll materials would be heavily biased when it finally was published. In fact, in 1991, amid rumors of anti-Semitism, Strugnell was dismissed from his post as general editor.

Because of such controversial issues, a movement to release the scrolls to the public grew in strength. One of its principal advocates, Hershel Shanks, waged a personal campaign against the scroll monopoly. Shanks is the founder and chief editor of the Biblical Archaeology Review.

51. See Ross, supra note 2, at 36 (explaining that Strugnell was one of original eight scholars on international team). Strugnell joined the team in 1953 and became the leader of the scroll project in 1988. Id. Strugnell's credentials for this post were questionable because he had yet to publish anything substantial on the Dead Sea Scrolls. Id.
52. See Ross, supra note 2, at 36 (observing that although Strugnell set strict deadlines for publication, he had already missed some of them in 1989 and would miss more in 1990).
53. See Sheler, supra note 2, at 56.
54. See Ross, supra note 2, at 36.
55. See Rothstein, supra note 3, at 51 (remarking that absence of Jewish scholars on editorial team for scrolls has had effect on interpretations of scrolls). Father Roland de Vaux once stated that his “faith has nothing to fear from [his] scholarship,” but critics question whether the reliability of his scholarship had anything to “fear from his faith?” Id.
56. See Alter, supra note 43, at 35. Strugnell stated in a 1990 interview that Judaism was a “horrible religion” and that all Jews should convert to Christianity. Id.; see also Marston, supra note 2, at 7 (noting interview of Strugnell in Israeli newspaper that revealed Strugnell’s anti-Semitic feelings); Rothstein, supra note 3, at 51 (stating that Strugnell had long been suspected of having prejudice against Jews).
57. Alter, supra note 43, at 35.
59. See id. at 21, 35 (explaining how Shanks founded Biblical Archaeology Review and used it to pressure Israeli Government and scroll scholars to make scrolls available to all researchers).
Archaeology Review, a publication that has served as a forum for the debate.\textsuperscript{60} It was Shanks' vocal criticism of the limited access to the scrolls\textsuperscript{61} and a published "bootleg" version of twenty-four manuscripts reconstructed by computer\textsuperscript{62} that finally helped to free the Dead Sea Scrolls. Once the computer reconstruction was released in 1991, the Huntington Library in California, one of the depositories for the Dead Sea Scrolls facsimile photographs, opened its collection to all scholars.\textsuperscript{63} With the veil of secrecy lifted, the Israel Antiquities Authority had no choice but to grant free access to its scroll materials.\textsuperscript{64}

This period of greater accessibility to the scrolls was not without its own controversy. The issue was no longer who had the right to study the scrolls, but rather, whose interpretation of individual documents was correct, and who would get credit for that interpretation.\textsuperscript{65} At a conference in New York, many biblical scholars criticized two of their peers for failing to give proper credit for work done in reconstructing the scroll texts.\textsuperscript{66} In the midst of such allegations, the Biblical Archaeology Society (BAS), another organization headed by Shanks,\textsuperscript{67} published \textit{A Facsimile Edition of the Dead Sea Scrolls}. This

\begin{itemize}
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id. at 21 (describing Shanks as "most visible, quotable, divisive figure" in Dead Sea Scrolls conflict).
  \item \textsuperscript{63} See Alter, supra note 43, at 36 (discussing announcement by Huntington Library that scroll photographs would be released to public); Burchard, supra note 46, at N56 (quoting Huntington Library spokesperson as saying that “no one has the right to keep this knowledge from the world”); Fried, supra note 58, at 36 (stating that Huntington Library opened its archives two weeks after computer simulated text was released); John N. Wilford, Open, Dead Sea Scrolls Stir Up New Disputes, N.Y. TIMES, Apr. 19, 1992, § 1 (National), at 22 (stating that monopoly on scrolls was broken when Huntington Library opened its collection).
  \item \textsuperscript{64} See Burchard, supra note 46, at N56 (stating that Huntington Library’s act of opening its files forced Israel Antiquities Authority to make its texts available).
  \item \textsuperscript{65} See Marston, supra note 2, at 8 (maintaining that new accessibility to scrolls has intensified debate over interpretation); Scroll Researchers Feud, Then Reconcile, CHRISTIAN CENTURY, Jan. 6-13, 1993, at 8, 9 (discussing controversy over book that supposedly failed to acknowledge other scholars’ work); Hershel Shanks, Light on 'New' Scrolls, WASH. POST, Apr. 19, 1992, at Cl, C4 (acknowledging that release of scrolls created new questions on interpretation); Wilford, supra note 63, at 22 (contending that controversies have not ended with access to scrolls).
  \item \textsuperscript{67} See Fried, supra note 58, at 36 (describing BAS as "nonprofit umbrella organization" that publishes books and markets slide sets, video tapes, board games, and various seminars).
\end{itemize}
book included in its foreword a facsimile of the reconstructed 121-line manuscript known as Miq’tsat Ma’aseh ha-Torah (MMT). 68

II. QIMRON V. SHANKS

The publication of the one-page MMT document resulted in Elisha Qimron’s lawsuit. 69 In the action, brought in Israel, Elisha Qimron claimed that the unauthorized publication of MMT had infringed upon his copyright. 70 The question at issue was whether a copyright could be granted for a reconstruction of an ancient text. 71 The Israeli court’s decision was the first of its kind in the world. 72

A. Factual Background

Elisha Qimron, a professor at Ben-Gurion University in Israel, brought a copyright infringement suit against Hershel Shanks and the BAS, the publishers of A Facsimile Edition of the Dead Sea Scrolls, and against Robert Eisenman and James Robinson, the editors of the book. 73 Qimron, who had spent eleven years working on the reconstruction of the MMT manuscript, 74 had created a 121-line text from the sixty to seventy existing scroll fragments, despite the fact that at least forty percent of the original manuscript was initially missing. 75 Qimron claimed that through his “linguistic and halachic research,” he was able to complete the missing text. 76 It was for this work that Qimron sought copyright protection.

68. A FACSIMILE EDITION OF THE DEAD SEA SCROLLS, supra note 16. The MMT is considered to be one of the most important scroll fragments. See Anderson, supra note 9, at G1 (describing importance of MMT); Jeffery L. Sheler, Dead Sea Scrolls Demystified, U.S. NEWS & WORLD RPT., Dec. 28, 1992, at 77 (noting significance of MMT and what mysteries it may solve); John N. Wilford, New Access to Scrolls Fuels Scholars’ Warfare, N.Y. TIMES, Dec. 22, 1992, at G1 (reporting that information from MMT may resolve disputes over sect’s identity). Its importance derives from the belief that it is a letter written by the leader of the Qumran community to a leader in Jerusalem. Sheler, supra, at 77. The letter is believed to describe the sect’s religious laws and its reasons for breaking away from the traditional Jewish establishment. Id. The MMT may provide scholars with the precise information that they need to identify the actual scribes of the scrolls. Scholars now believe that the scribes were members of a “radical” Jewish sect called the Essenes. Id. Other scholars had suggested that the scrolls belonged to an early pre-Christian sect or a mainstream Jewish community from Jerusalem. Id.


70. Qimron, slip op. at 1-2.

71. See id. at 10 (describing defendants’ claim that plaintiff’s work was not protected by copyright because it was not “creative work”).

72. Rabinovich, supra note 18, at 14 (observing that Qimron v. Shanks set universal precedent).

73. Qimron, slip op. at 1.

74. Id. at 1-2.

75. Id. at 4.

76. Id. Halachic research refers to the Halacha, or traditional Jewish doctrine. Id. at 3.
Qimron had given his preliminary transcription of MMT to a few scholars to examine. Shanks had published an unauthorized copy of this draft of MMT in the foreword to *A Facsimile Edition of the Dead Sea Scrolls*. Not only did Shanks reproduce a picture of the reconstructed MMT document without permission, but he also failed to credit Qimron for the reconstruction. According to the court, Qimron's "dream to be the first editor of the scroll vanished" when Shanks published the facsimile of MMT. In response to the publication, Qimron filed suit in the District Court of Jerusalem and immediately applied for an injunction to prevent further distribution of the book containing his reconstruction of the MMT manuscript.

**B. The Israeli Decision**

The main issue that the Israeli court decided was whether reconstruction of the ancient text constituted original authorship. The court determined that the creativity of the decipherment mattered less than how its originality was legally defined. The opinion addressed each affirmative defense put forth by Shanks and the BAS. The defendants relied partly on U.S. cases involving tele-

77. *Id.* at 4.
78. *Id.* at 6 (explaining how Shanks obtained copy of MMT that he subsequently published in foreword of his book).
79. *Id.* (quoting Shanks' description of MMT as "transcription" and his acknowledgment of work done by Professor John Strugnell of Harvard).
80. *Id.* at 8.
81. *Id.* at 9.
82. *Id.* at 16.
83. *Id.* at 10-11. The defendants pled as follows: American law applies to the action. The involvement of proprietary rights makes the presumption of equal laws also inapplicable in this case. The plaintiff's work is not protected under the copyright laws, because it is transcription work, which even though difficult is not creative work, and moral rights in the sense of the law are not thereby acquired. There are no proven damages. Even if a copyright does exist, it does not belong to the plaintiff, but to the Israel Antiquities Authority. Although the Authority had given plaintiff a testimonial stating that the copyright belonged to the plaintiff, such retroactive transfer is not binding. Alternatively, the copyright belongs to Strugnell and other researchers, who completed much of the reconstruction. As is the accepted practice in the academic community, once an initial publication has taken place, such as the Composite Text by Kapera, the defendants were entitled to publish the work without the plaintiff's permission. If the above defenses are rejected, publication was bona fide, and therefore there was no copyright infringement. *Id.*

The court rejected the argument that U.S. law applied and the alternate defense that if a copyright existed, it belonged to the Israel Antiquities Authority because it supervised Qimron's work. *Id.* at 18-21. Judge Dornier found that the Israel Antiquities Authority did not exert any control over the scroll scholars and that the Authority had admitted that any copyrights belonged to the scholars themselves. *Id.* In addition, the court did not accept the defense that Shanks and his colleagues were "bona fides" who did not know that a "copyright subsisted on the Scroll decipherment work." *Id.* at 23-28.
phone directories and illustrations. Judge Dorner rejected the "parallelism" that the defendants asserted existed between the U.S. cases and the case at issue. Instead, the court held that innovative elements existed in the MMT reconstruction because "assembling the Composite Text based on halachic and linguistic research from an original text . . . constitute[d] an original creation." The court thus found that by using his judgment to combine the fragmented pieces into a cohesive document, Qimron had produced a text that was protected by copyright law.

Judge Dorner suggested that objective evidence proved that Shanks knew the text was fragmentary and that it contained gaps that needed to be filled in. The court also noted that Shanks, formerly a lawyer, should have been aware of the copyright implications of his actions, especially because he knew that the Israel Antiquities Authority had blocked another publication of MMT. In light of this imputed knowledge, the Israeli court awarded NIS 20,000 in statutory damages and NIS 80,000 for mental anguish. Judge Dorner determined that Qimron's loss of "his right of priority in publishing" the MMT text had caused him tremendous "economic damage and moral distress." In addition to the damages awarded, the court granted a permanent injunction to prevent any further unauthorized publication of MMT by the defendants.

The defendants have appealed the Qimron decision. Whether the appeals court will sustain Judge Dorner's reasoning and analysis is

85. Id.
86. Id.
87. Id. at 16-17.
88. Id. at 24 (imputing knowledge to Shanks by suggesting he was aware that MMT was composed of pieces of six different copies of letter).
89. Id. at 26. The Israel Antiquities Authority had specifically intervened and prohibited Dr. Kapera, a Polish scholar, from making and distributing unauthorized copies of MMT. Id.
90. Id. at 41-42. In March 1993, NIS 20,000 was worth approximately $11,000. See David Hoffman, Israeli Judge Upholds Scrolls Copyright, WASH. POST, Mar. 31, 1993, at B4. NIS 20,000 is the maximum that can be granted for statutory damages when real damages are not available. Qimron, slip op. at 41.
91. Qimron, slip op. at 43-44 (granting high amount for mental anguish to compensate plaintiff's loss of dream). NIS 80,000 equals approximately $44,000. Joel Greenberg, Court Supports Editor on Rights to Dead Sea Texts, N.Y. TIMES, Mar. 31, 1993, at A12. Legal commentators point out that this was "by far the highest award for mental anguish in a copyright case ever granted by an Israeli court." Rabinovich, supra note 18, at 14.
92. Id. at 41.
93. Id. at 39.
94. Id. at 44.
unpredictable. To understand the main issues in the case and the rationale behind Judge Dorner's decision requires an examination of Israeli copyright law.

C. Israeli Copyright Law

As a relatively new nation-state, Israel borrowed much of its current legal system from nations with long-established laws, such as Great Britain. Israeli copyright law is an example of such borrowing. During the period from 1917 to 1948, Great Britain maintained a presence in what was then called Palestine. When Israel was created from the Palestinian territory, many of the laws established by the British Mandate remained in force. The British Copyright Act of 1911 was extended to Palestine in 1924. Although Israel has amended the Copyright Ordinance several times since 1948, the "outdated" 1911 law still provides the principal basis for copyright decisions.

Israeli copyright law generally imposes two standards: fixation and originality. Fixation requires that the work in question take some substantive form, such as a writing or a recording. Whether something that is neither written nor prepared in note form should still have to satisfy the fixation requirement is not clear. Despite concerns about the vagueness of the law, fixation is not a factor in text reconstruction cases. Because Elisha Qimron's MMT reconstruction was in writing, there was no question of its fixation.

Originality, however, is a major consideration in determining copyright eligibility for document reconstructions. The Copyright Act

98. Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46 (U.K.).
99. Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46, (Extension to Palestine) S.R. & O. 1924, No. 385 (U.K.) (extending Copyright Act of 1911 to Palestine by administrative rulemaking process).
100. See Weisman, supra note 97, § 1, at ISR-3 (noting that Copyright Ordinance was amended in 1953, 1968, 1971, and 1981, and that Performers' Rights Law was added in 1984).
101. See Weisman, supra note 97, § 1, at ISR-3 (stating that Minister of Justice had formed committee to draft more modern copyright statute).
102. Weisman, supra note 97, § 2, at ISR-4 to ISR-5.
103. See Weisman, supra note 97, at ISR-4 (discussing principle of fixation but noting that question whether fixation is prerequisite to Israeli copyright protection has not been decided).
104. Weisman, supra note 97, § 2, at ISR-4 to ISR-5.
of 1911 specifically requires a work to be original, yet it leaves "originality" undefined. Case law suggests that originality means that a work is a creation of the author and not merely a copy of a preexisting work.

For compilations, or works made up of a collection of preexisting materials, the originality prerequisite includes an additional requirement. A compiling author must show that the compilation was a result of "effort, labor or skill." Thus, Israel, unlike the United States, grants copyrights for hard work, even if the "raw material" on which the author based his work was in the public domain. Although it is not clear from the Qimron decision whether the court found the MMT reconstruction to be a compilation, it is clear that the court felt compelled to compensate Qimron for his effort and ingenuity. As Judge Dorner stated, "[i]t does not matter whether the material on which the work is based has been copied or not. The effort, however modest, involved in compiling, arranging and editing the material, is sufficient."

III. OVERVIEW OF U.S. COPYRIGHT LAW

To understand how U.S. and Israeli copyright law differ, it is necessary to become familiar with the origins and evolution of copyright in America. The fundamentals of U.S. copyright law find their roots in the British Statute of Anne. The statute was the first of its kind to confer copyrights to authors of publications. The concept of granting authors rights in their work was maintained in the newly independent United States by legislation drafted under

105. See Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46, § 1(1) (U.K.) (extending copyright throughout "His Majesty's dominions ... in every original literary dramatic musical and artistic work") (emphasis added).
106. Id. § 35(1) (providing definitions for various terms in Act, but not including definition of "original").
107. Weisman, supra note 97, § 2, at ISR-5.
108. Copyright Act, 1911, § 35(1) (defining "compilations" as type of "literary" work).
110. Id.
112. Id. at 15.
113. 8 Anne, c. 19 (1710). In response to a monopoly given to the publishing establishment, the statute granted copyright protection to new books in 14-year increments. Id.
the Articles of Confederation. By the time the U.S. Constitution was drafted in 1789, copyright protection was already a well-accepted principle. The framers of the Constitution deemed congressional power to establish copyrights to be reasonable and appropriate. Including a Copyright Clause in the Constitution served the dual purpose of benefiting the public pursuit of knowledge and benefiting authors by protecting their original creations.

The Copyright Clause gave Congress the power of legislating copyright, but provided few specific guidelines for exercising this power. It thus was up to Congress to define copyright law. With the power bestowed on it by the Constitution, Congress established the first Copyright Act in 1790. This Act followed the standard set by the Statute of Anne. The Act was generally satisfactory, but by the twentieth century, a major revision was necessary.

In 1905, President Theodore Roosevelt decided to modernize the copyright system. The resulting Copyright Act of 1909 created some new provisions. Although these changes were helpful, new media, such as film and sound recording, were outgrowing the law. In response, Congress made several amendments to the Act, but

115. See id. at 1172-74 (noting that Congress recommended to states that they grant copyright protection to both authors and publishers of new books).
116. See id. at 1174-75 (detailing how individual states had adopted copyright statutes prior to creation of Copyright Clause in Constitution).
117. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").
118. See Abrams, supra note 114, at 1174-75 (stating that framers adopted Copyright Clause without debate and confirmed principle of protection for authors).
119. CRAIG JOYCE ET AL., COPYRIGHT LAW 9 (2d ed. 1991) ("On the one hand, copyright was viewed as an instrument in the service of the public interest. On the other hand, it could be considered the natural due of those who engage in artistic creation.").
120. See Abrams, supra note 114, at 1175 (stating that Copyright Clause "leaves a number of questions open to resolution").
122. SeeJOYCE ET AL., supra note 119, at 10-11.
123. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. The new provisions covered "all the writings of an author," id. § 4, 35 Stat. at 1076, for a period of 28 years, with an option to extend protection for an additional 28 years. Id. § 25, 35 Stat. at 1080. Further, the new statute permitted an author to secure copyright protection merely by publishing the work with notice of the copyright. Id. §§ 9, 19, 35 Stat. at 1077, 1079; see alsoJOYCE ET AL., supra note 119, at 11 (comparing 1909 Act with previous copyright statutes).
these were only temporary solutions. By 1955, Congress realized that more extensive changes in the law were required.\(^{125}\)

In 1976, after twenty-one years of planning and research,\(^{127}\) Congress enacted a new copyright law.\(^{128}\) Although a few modifications have been made since 1976,\(^{129}\) the basic requirements for copyright protection remain. Essentially, the prerequisites for copyright protection are that the item in question be in a "tangible medium of expression" and be an "original work[] of authorship."\(^{130}\)

A. Fixation/Tangibility

The Copyright Act of 1976 requires that works be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."\(^{131}\) Fixation or tangibility is the first basic condition for copyright protection. Fixation is less vague than are the other requirements, and therefore is less flexible. In fact, Congress specifically defined "fixation."\(^{132}\) To be eligible for copyright protection, a work must take some tangible form that can be retrieved at a later time.\(^{133}\) By

\(^{125}\) Joyce ET AL., supra note 119, at 12.

\(^{126}\) Joyce ET AL., supra note 119, at 12.

\(^{127}\) Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. (1988 & Supp. V 1993)). The 1976 Act completely replaced title 17 of the U.S. Code. Id. § 101, 90 Stat. at 2541. Common-law copyright is preempted by federal law. 17 U.S.C. § 301(a) (1988). The duration of copyright protection is life plus 50 years. Id. Although formalities are still important, the statute places less emphasis on them. See id. §§ 411, 205. The Act also increased the number of compulsory licenses. Id. §§ 801-10. Finally, the Act permits the division of ownership. Id. § 201(d); see also Joyce ET AL., supra note 119, at 12-13 (listing in detail changes made by 1976 Act).

\(^{128}\) See Joyce ET AL., supra note 119, at 12-14 (noting that protections for computer programs, visual works of art, and architectural works, among others, have been added since passage of 1976 Act).

\(^{129}\) 17 U.S.C. § 102(a) (1988); see Dale P. Olson, Copyright Originality, 48 Mo. L. REV. 29, 29 (1983) (describing "tangible medium of expression" and "original work of authorship" as fundamental to copyright protection under 1976 Act).

\(^{130}\) Id.

\(^{131}\) Id. § 101. Section 101 provides:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

\(^{132}\) Id. § 101. Section 101 provides:

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\(^{133}\) Id.
narrowing the scope of works eligible to be copyrighted, the fixation requirement counterbalances the vagueness of the other two prerequisites, authorship and originality. Fixation is not an issue in the case of text reconstruction because the work is in written form. Whether a text reconstruction is a work of authorship and originality remains to be seen.

B. Authorship

The notion of works of "authorship" has remained vague. Congress clearly did not intend to limit "authorship" solely to that of writings. The Copyright Act divides works of authorship into eight categories. These categories, although clearly specified, are in no way absolute. The categories are adaptable as new forms of original expression are devised.

Congress was able to design flexible copyright legislation in part because the terms "writings" and "authors," mentioned in the Constitution, "have not been construed in their narrow literal sense, but rather, with the reach necessary to reflect the broad scope of constitutional principles." For works not included in the enumerated categories, courts have the power to choose whether such works may be protected by copyright. Despite the ambiguity surrounding the term "works of authorship," it is certain that works are not eligible for protection unless they are original.

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134. Cf. White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 15-18 (1908) (demonstrating how something not "fixed" according to statutory definition will not be copyrightable).
136. 17 U.S.C. § 102(a) (1988 & Supp. V 1993). The first seven categories include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings. Id. Architectural works were added as the eighth category through the Architectural Works Copyright Protection Act of 1990. Pub. L. No. 101-650, § 703, 104 Stat. 5133 (1990).
138. See 17 U.S.C. § 102(a) (1988) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible means of expression, now known or later developed . . . ") (emphasis added).
141. Nimmer & Nimmer, supra note 121, § 2.03[A], at 2-24 to 2-28 (summarizing what is implied by term "works of authorship" and noting that works are copyrightable even if they do not fit into established categories).
C. Originality

Section 102(a) of the Act specifies that copyright protection exists only for "original works."\(^{142}\) The Constitution also mandates originality.\(^{143}\) As stated in *Miller v. Universal City Studios*,\(^{144}\) originality is "the premise of copyright."\(^{145}\) Yet, "originality" is not expressly defined in the statute. In enacting § 102(a), Congress stated that it wanted to keep the common-law definition of originality that had been established under the 1909 Act.\(^{146}\) A definition of "originality" must come, therefore, from cases interpreting the copyright acts.\(^{147}\)

*Alfred Bell & Co. v. Catalda Fine Arts*\(^{148}\) is the leading case on the concept of originality.\(^{149}\) *Alfred Bell* involved the complex issue of how to treat a work that was a variation of another work already in the public domain.\(^{150}\) The U.S. Court of Appeals for the Second Circuit held that although the engravings in question were copies of other original paintings, they varied from the originals enough to be entitled to copyright protection.\(^{151}\) In fact, "[a]ll that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than 'merely trivial' variation, something recognizably 'his own.'"\(^{152}\)

*Feist Publications, Inc. v. Rural Telephone Service Co.*\(^{153}\) is a recent decision by the U.S. Supreme Court that considered the originality requirement closely. At issue was the copyrightability of telephone directory "white pages."\(^{154}\) The Court determined that, even in the case of a compilation,\(^{155}\) the basic concept of originality, as set forth

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144. 650 F.2d 1365 (5th Cir. 1981).
147. See Olson, supra note 130, at 30-31 (analyzing concept of originality through legislative history and case law). Although "originality" was not a requirement in the Act of 1909, it was a pervasive principle in the case law. Id.
148. 191 F.2d 99 (2d Cir. 1951).
149. Id. at 102-03 (citing Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945)); see also Goldstein v. California, 412 U.S. 546, 561 (1973) (recognizing author as someone from whom work originates); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (defining "author" as "he to whom anything owes its origins").
151. Alfred Bell, 191 F.2d at 104-05 (specifying that any amount of variation is sufficient to grant copyright).
152. Id. at 102-03 (citing Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945)); see infra notes 164-204 and accompanying text (discussing differences between facts and factual compilations, and difficulty in determining which category work falls into).
in *Alfred Bell*, was still a prerequisite to obtaining copyright protection.\textsuperscript{155}

Although the originality requirement remains an important element to obtaining a copyright, the requirement now has a fairly low threshold.\textsuperscript{157} Unlike patents, novelty is not necessary.\textsuperscript{158} Instead, originality simply requires "independent creation" by an author.\textsuperscript{159} While *Feist Publications* proposes that the originality test may be easily met, it also narrows the body of works that are entitled to copyright protection.\textsuperscript{160} The case explains that compilations are copyrightable, but the protection only extends to the original elements, such as arrangement of data, and not to the underlying facts themselves.\textsuperscript{161} In its interpretation of the Copyright Act, the Supreme Court makes clear that facts are not copyrightable.\textsuperscript{162} In following this principle strictly, the United States differs from other nations, including Israel.

\section*{IV. RECONSTRUCTION OF ANCIENT TEXT UNDER U.S. COPYRIGHT LAW}

The differences between Israeli and U.S. copyright law create uncertainties regarding how a U.S. court would decide a case like *Qimron v. Shanks*. As of yet, only Israel has explored the issues raised in *Qimron* about copyright and ancient text reconstruction. The Israeli case has caused alarm among archeologists and historians, however, and it is likely that similar issues will soon be tested in the United States.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{155} *Feist Publications*, 499 U.S. at 357.
  \item \textsuperscript{157} See, e.g., Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1213 (8th Cir. 1986) (stating that "[originality is a very low threshold"); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951) (contending that originality requirement has become "little more than a prohibition of actual copying") (citing Hosgue-Sprague Corp. v. Frank C. Meyer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929)); Olson, supra note 130, at 46 (stating that standards for originality have become less demanding over time).
  \item \textsuperscript{158} See 35 U.S.C. § 102 (1988) (requiring novelty as prerequisite to patent for invention). In contrast, originality is the basis of copyright protection. To show originality, one must show that no copying of the original took place. See JOYCE ET AL., supra note 119, at 26.
  \item \textsuperscript{159} NIMMER & NIMMER, supra note 121, § 2.01[A], at 2-7 (interpreting requirement of originality).
  \item \textsuperscript{160} See *Feist Publications*, 499 U.S. at 348-49 (holding that copyright protection has its limitations).
  \item \textsuperscript{161} See id. at 348 ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. . . . [P]rotection may extend only to those components of a work that are original to the author.").
  \item \textsuperscript{162} Id. at 358 (noting that for fact-based works to be copyrighted, facts must be selected, coordinated, or arranged in way as to make resultant product original).
  \item \textsuperscript{163} See, e.g., Wacholder v. Qimron, 93-4097 (E.D. Pa. filed July 29, 1993).
\end{itemize}
Whether a reconstruction of an ancient text would be copyrightable in the United States is unclear because the issues involved do not fit squarely into one aspect of the law. The fundamental themes of authorship and originality, as they apply to different copyright concepts, must be carefully considered in order to understand how the U.S. courts might arrive at a decision in an ancient text reconstruction case. The concepts overlap in many areas, but each can be considered individually. Because the Israeli court in *Qimron* analyzes the MMT reconstruction as an assembly of textual fragments, it is logical to begin an examination of U.S. copyright law with a discussion of compilations.

### A. Compilations

The Copyright Act of 1976 includes compilations and derivative works as works of authorship that may be afforded copyright protection. A compilation consists of a collection of factual or preexisting materials that are assembled and arranged to create a "new" work. In contrast, a derivative work is one that is based on a preexisting work, but which has transformed or modified the preexisting work in such a way that it creates an original work of authorship. Under § 103(b), copyright protection extends only to those expressions that are independent of the preexisting materials or facts.

As this Comment will discuss in greater detail, the reconstruction of the Dead Sea Scroll text may be described more appropriately as a type of compilation than as a derivative work. Because the

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164. 17 U.S.C. § 103(a) (1988) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

165. *Id.* § 101.

166. *Id.*

167. *Id.* § 103(b).

168. *Id.* Section 103(b) provides:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

*Id.*

169. The preexisting MMT material was in fragments and needed to be reassembled. See *Qimron v. Shanks*, C.C. No. 641/92, slip op. at 2-3 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*). The reconstruction did not transform or modify the fragments as would be necessary to qualify it as a derivative work. See 17 U.S.C. § 101 (1988) (defining "derivative works").
MMT text was originally authored by an unknown scribe thousands of years ago, any reconstruction of that text must borrow from the preexisting materials, namely the fragments of the original manuscript. In dealing with compilations, it is necessary to distinguish between fact and fiction to determine whether a compiling author has contributed enough original material to sustain copyright protection. Such distinctions have been clarified and refined through the evolution of case law.

1. Facts v. factual compilations

What is a fact? Although this question may seem to have an obvious and simple answer, the courts have not always been able to decide precisely what things or events qualify as facts for purposes of copyright. The courts have determined that facts are discovered, not created. Because facts cannot be created, they are not

170. See 17 U.S.C. § 101 (defining "compilation").
172. See BLACK'S LAW DICTIONARY 591 (6th ed. 1990) (defining "fact" as "[a] thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place").
173. See William Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 COMM. & L., Dec. 1990, at 37, 39 (stating that lower courts are divided as to what legal standard should be applied in determining copyright protection for factual compilations, and that such division has led to "disarray in an increasingly important area of intellectual property"); see also Robert C. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 COLUM. L. REV. 516, 517 (1981) (exploring "divergent and inconsistently applied rationales used to define property rights in factual works").
174. See Feist Publications, 499 U.S. at 347 (applying established principle that facts are not copyrightable because person who discovers fact did not originate it); Miller, 650 F.2d at 1369 (explaining that facts "do not owe their origin to any individual"); see also Nimmer & Nimmer, supra note 121, § 2.11[A], at 2-161 (discussing how discovery of fact does not automatically qualify as authorship); Jane C. Ginsburg, Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios, 29 J. COPYRIGHT SOC'Y 647, 657 (1982) (stating that facts "may be uncovered, but they cannot be
original expressions, and thus are not copyrightable.\textsuperscript{175}

Facts remain accessible to everyone as part of the public domain.\textsuperscript{176} The reasoning behind this policy is that factual information needs to remain open to the public so as not to impede subsequent scholars or researchers from building upon the existing base of knowledge.\textsuperscript{177} From this rationale, it follows that a collection of factual information also would not receive copyright protection. Yet, according to the Copyright Act of 1976, compilations of factual materials are subject to copyright.\textsuperscript{178}

As discussed previously, compilations are created by the selection and arrangement of preexisting materials or factual data. The best example of a factual compilation is a telephone directory. The individual names, addresses, and phone numbers in the directory are factual data that exist in the public domain. Although the independent existence of the facts precludes an expression of them from being original, the choice of which facts an author includes in a compiled work, and the order in which the facts are arranged, may constitute an original work of authorship.\textsuperscript{179} The creativity involved

\textsuperscript{175} See Feist Publications, 499 U.S. at 345 (stating that "sine qua non of copyright is originality"); Harper & Row, 471 U.S. at 544 (noting that "copyright attaches to expression, not facts or ideas"); Miller, 650 F.2d at 1368 (discussing how facts and their expression interrelate with fundamental copyright requirement of originality); see also Ginsburg, supra note 174, at 657 (asserting that originality is necessary in order to extend copyright protection to factual information).

\textsuperscript{176} See Miller, 650 F.2d at 1369 (stating that because facts may not be copyrighted, they belong to public); Hochling, 618 F.2d at 978-79 (determining that interpretation of historical facts is not protected by copyright and may be used by other authors); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966) (asserting that public interest in obtaining information is enormous factor in determining copyright), cert. denied, 385 U.S. 1009 (1967); Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 86 (2d Cir. 1939) (explaining that although expression of events is copyrightable, events themselves are not); Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688, 691 (2d Cir. 1938) (holding that book describing historical events that had been described previously in another book did not violate copyright of first author); Lake v. CBS, Inc., 140 F. Supp. 707, 708-09 (S.D. Cal. 1956) (recognizing that "historical fact and events in themselves are in the public domain" and thus are not protected by copyright).

\textsuperscript{177} See Denicola, supra note 173, at 525-26 (recognizing that preventing subsequent authors from using predecessor's factual information would limit later contributions on subject matter and would stifle further insight); Robert A. Gorman, Fact or Fancy? The Implications for Copyright, 29 J. COPYRIGHT SOC'y 560, 562 (1981-82) (noting that "[t]here is more of a public interest in access to facts about ourselves, the world about us, and our history and future").

\textsuperscript{178} 17 U.S.C. § 103(a) (1988).

\textsuperscript{179} See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348-49 (1991) (discussing how selection and arrangement of facts in compilation may qualify as original expression); Key Publications, Inc. v. Chinatown Today Publishing Enters., 945 F.2d 509, 515 (2d Cir. 1991) (suggesting that only original selection and arrangement will suffice for extension of copyright protection to compilations); Eckes v. Card Prices Update, 756 F.2d 859, 863 (2d Cir. 1984) (holding that publication merits copyright protection because it possessed requisite originality in selection, creativity, and author's evaluation of baseball cards); Miller v. Universal City Studios, 650 F.2d 1365, 1369 (5th Cir. 1981) (stating that "[a] copyright in a directory . .
in the selection and arrangement of facts, albeit slight, is the element of the compilation that merits copyright protection.\textsuperscript{180}

The Supreme Court has described copyright protection for compilations as "thin."\textsuperscript{181} This characterization refers to the statutory principle that the original expression such as the arrangement, rather than the underlying facts, is eligible for copyright protection.\textsuperscript{182} Often, the compiling author's creative work can be distinguished from the preexisting materials.\textsuperscript{183} Unfortunately, not all compilations are so simple in form.\textsuperscript{184}

2. Putting the pieces together: reconstructed texts and the question of fact

Whether the reconstruction of an ancient text can be considered a compilation is uncertain. When ancient texts are discovered in fragments, it is necessary to compile the fragments in order to recreate the original document. Each fragment may be considered a separate fact, and the piecing together of these fragments may therefore be seen as an arrangement by the compiling author.\textsuperscript{185} In contrast, some courts have followed the proposition that a compilation consists of "disparate facts which in nature occurred in isolation."\textsuperscript{186} Assuming that the fragments of an ancient text may be considered sufficiently disparate, the originality of the arrangement of those facts still remains a question in deciding whether copyright protection applies.
Factual selection is one of three elements that can satisfy the requisite for original authorship. Although an ancient document may consist of many fragments, the compiled and reconstructed document originates from a single source. In such a case, no true "selection" takes place because all of the discovered fragments known to belong to a given document are used in the arrangement. If no real selection has been made, one may argue that no original authorship exists.

3. "Sweat of the brow" theory

Thus far, this discussion ignores the possibility of premising copyright protection on the hard work that a compiling author may contribute. Such labor and expense do not go unnoticed by U.S. courts, but hard work alone will not merit a copyright. Although the Copyright Act of 1976 makes clear that originality, not

187. See supra note 164 (detailing requirements for compilation to qualify as "original work of authorship").

188. See Patry, supra note 173, at 58-59 (setting forth principle that where small selection of data is available or where all available data is selected, compilation will not be protected by copyright).

189. See Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir.) (holding that Scrabble system could not be copyrighted because it was logically derived and because ideas are not copyrightable), cert. denied, 469 U.S. 1037 (1984); Black's Guide, Inc. v. Mediamerica Inc., 16 U.S.P.Q.2d (BNA) 1769, 1773 (N.D. Cal. 1990) (stating that "where the possibilities for original selections of facts are limited, the copyright protection accorded any particular selection is correspondingly limited"); Consumers Union v. Hobart Mfg., 199 F. Supp. 860, 861 (S.D.N.Y. 1961) (holding that assembly of facts from prior study was not copyrightable); Ricker v. General Elec. Co., 68 U.S.P.Q. (BNA) 371, 371 (S.D.N.Y. 1946) (holding that assembly of scientific facts is by nature not copyrightable), aff'd, 162 F.2d 141 (2d Cir. 1947); Nimmer & Nimmer, supra note 121, § 2.11[B], at 2-164 (observing that where expression of facts must be presented in order, "word for word copying" may not infringe copyright).

190. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (noting potential for unfairness where compiler's work is used without compensation); Miller v. Universal City Studios, 650 F.2d 1365, 1369 (5th Cir. 1981) (noting that labor and expense are involved in compiling facts); Black's Guide, 16 U.S.P.Q.2d (BNA) at 1773 (noting that effort was required to gather facts).

191. See, e.g., Feist Publications, 499 U.S. at 352-54 (describing "sweat of the brow" theory and its "numerous flaws"); Applied Innovations, Inc. v. Regents of the Univ. of Minn., 876 F.2d 626, 636 (8th Cir. 1989) (stating that labor alone does not confer copyright); Worth v. Selchow & Righter Co., 827 F.2d 589, 590 (9th Cir. 1987) (holding that despite expense and effort plaintiff expended in compiling research for trivia book, makers of game Trivial Pursuit did not infringe on copyright by using some compiled facts); Eckes v. Card Prices Update, 736 F.2d 859, 862 (2d Cir. 1984) (stating that "fruits of another's labor in lieu of independent research obtained through the sweat of a researcher's brow, does not merit copyright protection"); Miller, 650 F.2d at 1370 (asserting that labor of research by author is not protected by copyright); Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir.) (disagreeing with courts that held research copyrightable), cert. denied, 449 U.S. 841 (1980); Black's Guide, 16 U.S.P.Q.2d (BNA) at 1772 (deciding that effort made by plaintiffs to compile listings did not render publication original); see also Patry, supra note 173, at 42-44 (detailing origins of "sweat of the brow" theory); Stimson, supra note 185, at 17 (concluding that "[a]bsent... originality, the hard work of the author is not enough to fulfill the statutory requirements" for copyright protection).
industriousness, earns protection, the 1909 Act did not make as clear a distinction.\textsuperscript{192}

The Copyright Act of 1909 referred to copyright protection for compilations,\textsuperscript{193} but it remained vague as to what requirements were necessary to qualify a work for such protection.\textsuperscript{194} Some courts that interpreted the 1909 Act believed that the absence of explicit instructions for compilations made compilations automatically copyrightable.\textsuperscript{195} In other words, the mere effort of collecting data was sufficient to gain exclusive copyrights, regardless of whether the author contributed any original thought.\textsuperscript{196} Facts themselves could be copyrighted, thereby prohibiting others from freely utilizing those facts.\textsuperscript{197} Such an interpretation goes against "the most fundamental axiom of copyright law—that no one may copyright facts or ideas."\textsuperscript{198}

In response to judicial approval of the "sweat of the brow" theory, Congress, upon recommendation by the Copyright Office, revised the Copyright Act to clarify which parts of a compilation were copyrightable.\textsuperscript{199} In addition to the revisions to the Copyright Act, several courts took the initiative by steering their decisions away from the principles set forth by the "sweat of the brow" courts.\textsuperscript{200}

The fact that the United States does not grant copyright protection simply for time and effort expended in collecting research or data

\textsuperscript{192} Compare 17 U.S.C. § 103 (1988) (extending copyright only to original works of authorship within compilation) with Act of Mar. 4, 1909, ch. 520, § 6, 35 Stat. 1075, 1077 (failing to delineate which parts of compilation copyright encompassed). \textit{See also Feist Publications,} 499 U.S. at 351-52, 355 (describing how Congress made explicit changes in forming Copyright Act of 1976 and how changes focused standard on originality rather than "sweat of the brow").


\textsuperscript{194} \textit{Feist Publications,} 499 U.S. at 352; Patry, \textit{supra} note 173, at 53 (noting that Register of Copyrights reported to Congress that section in 1909 Act referring to compilations "fails to make clear . . . the basic requirement that the new elements must themselves represent original creative authorship") (quoting \textit{REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW,} 87TH CONG., 1ST SESS. 9 (Comm. Print 1961)).

\textsuperscript{195} \textit{See, e.g.,} Leon v. Pacific Tel. & Tel., 91 F.2d 484, 486-87 (9th Cir. 1937) (holding that copying names and addresses out of directory infringed on initial compiler's copyrights); Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83, 88 (2d Cir. 1922) (putting forth classic formulation of "sweat of the brow" theory).

\textsuperscript{196} \textit{See Feist Publications,} 499 U.S. at 352 (stating that § 5 of 1909 Act "led some courts to infer erroneously that directories and the like were copyrightable per se").

\textsuperscript{197} \textit{See id.} at 353 (contending that greatest flaw of "sweat of the brow" doctrine was that "it extended copyright protection . . . to the facts themselves").

\textsuperscript{198} \textit{Id.; see also} Miller v. Universal City Studios, 650 F.2d 1365, 1372 (5th Cir. 1981) (maintaining that law clearly holds facts free from copyright protection).

\textsuperscript{199} \textit{See REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW,} 87TH CONG., 1ST SESS. 9 (Comm. Print 1961) (noting that Congress replaced words "all writings of an author" with "original works of authorship" in specific attempt to move away from "sweat of the brow" doctrine); \textit{see also} 17 U.S.C. § 103(b) (1988).

\textsuperscript{200} \textit{See generally supra} note 191 (discussing cases that have rejected "sweat of the brow" theory).
distinguishes it from other countries.\textsuperscript{201} Often, civil law countries such as Israel believe that hard work must be rewarded to provide incentives for scholarly research.\textsuperscript{202} In contrast, the United States believes that hard work alone is not enough and that some originality must be present to qualify for a copyright.\textsuperscript{203} The ultimate goal of U.S. copyright law is the advancement of knowledge.\textsuperscript{204} Even if ancient document reconstruction may be considered a compilation, it may not be copyrightable because the compiler's ideas may not always be distinguishable from the original expression.

\textbf{B. The Idea/Expression Dichotomy}

The principle known as the idea/expression dichotomy\textsuperscript{205} is perhaps the most complex and most important issue in determining the possible outcomes of a U.S. case on ancient text reconstruction. Although the dichotomy was recognized during the formative years of copyright law,\textsuperscript{206} it has never been fully resolved. The case that best exemplifies the basic principles of the idea/expression dichotomy is \textit{Baker v. Selden}.\textsuperscript{207}

In \textit{Baker}, the plaintiff claimed that he had a copyright on a book that explained accounting procedures and bookkeeping methods.\textsuperscript{208} The U.S. Supreme Court held in 1879 that no copyright could exist for works that are "utilitarian" in purpose.\textsuperscript{209} \textit{Baker v. Selden} set the groundwork for the idea/expression dichotomy, a doctrine that has been expanded and modified over the past century.\textsuperscript{210}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{201} See Patry, \textit{supra} note 173, at 45 (observing that English common law has embraced "sweat of the brow" theory and that other countries have adopted this view).
\item\textsuperscript{202} See Patry, \textit{supra} note 173, at 44-45 (noting that "sweat of the brow" theory has its roots in early 19th-century cases).
\item\textsuperscript{203} See \textit{supra} note 179 (listing cases that find originality necessary to copyright compilation).
\item\textsuperscript{204} See U.S. CONST. art. I, \S 8, cl. 8.
\item\textsuperscript{205} See \textit{Joyce ET AL.}, \textit{supra} note 119, at 90 (explaining general principle of idea/expression dichotomy).
\item\textsuperscript{206} See \textit{Baker v. Selden}, 101 U.S. 99, 104 (1879) (holding that ideas conveyed in bookkeeping book, as opposed to book itself, cannot be copyrighted).
\item\textsuperscript{207} 101 U.S. 99 (1879).
\item\textsuperscript{208} \textit{Baker v. Selden}, 101 U.S. 99, 100 (1879).
\item\textsuperscript{209} \textit{Id.} at 103-04 (asserting that one purpose of publishing is to disseminate knowledge); \textit{see also} Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992) (interpreting utilitarian nature by stating, "a narration of Humpty Dumpty's demise, which would clearly be a creative composition, does not serve the same ends as, say a recipe for scrambled eggs—which is more process oriented text"); \textit{Nimmer & Nimmer}, \textit{supra} note 121, \S 2.18[C][2], at 2-204 ("The doctrine of \textit{Baker v. Selden} rests upon the premise that the copyright laws may not be used to obtain a monopoly on a system or method for performing commercial or scientific functions.").
\item\textsuperscript{210} See \textit{Joyce ET AL.}, \textit{supra} note 119, at 90 (stating fact that part of \textit{Baker} idea/expression doctrine has been incorporated into Copyright Act of 1976); \textit{see also} 17 U.S.C. \S 102(b) (1988) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
\end{itemize}
\end{footnotesize}
1. **Historical representation**

The idea/expression dichotomy often arises in cases where a party seeks to copyright an interpretation of a historical event. In one of the more notable cases, *Hoehling v. Universal City Studios, Inc.*\(^{211}\) the court denied copyright protection for an author’s historical interpretation of the Hindenburg disaster.\(^{212}\) As a general rule, “the protection afforded the copyright holder had never extended to history, be it documented fact or explanatory hypothesis.”\(^{213}\) The policy argument underlying this rule is that the pursuit of knowledge is an important goal and that, to achieve this goal, scholars must have a “relatively free hand to build upon the work of their predecessors.”\(^{214}\)

The MMT document, while not a historical event, is a historical artifact.\(^{215}\) The pieced-together version of this text, whether it be truth or merely theory, should be available for use by the public. As noted in *Hoehling*, “the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past.”\(^{216}\)

2. **Doctrine of merger**

Often the idea and its expression cannot be easily separated. It is in this context that the doctrine of merger\(^ {217}\) has been utilized. Essentially, the merger doctrine recognizes that in some instances, only a limited number of ways exist to express a specific idea, making it difficult for one author to vary his or her expression of the idea from another author’s work.\(^ {218}\) Some courts have determined that a copyright will not apply to a work to which the merger doctrine applies.\(^ {219}\)

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\(^{211}\) 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

\(^{212}\) *Hoehling v. Universal City Studios*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

\(^{213}\) Id. at 974.

\(^{214}\) Id. at 980.

\(^{215}\) See supra note 68 and accompanying text (explaining importance of MMT manuscript).

\(^{216}\) *Hoehling*, 618 F.2d at 974.

\(^{217}\) See NIMMER & NIMMER, supra note 121, § 2.18[C], at 2-206. The merger doctrine applies when “conferring a monopoly over a given expression would in fact stymie others from expressing the idea embodied therein, such that the idea and its expression ‘merge’ into one.” *Id.; see also* Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir. 1990) (noting that “when the expression of an idea is inseparable from the idea itself, the expression and idea merge”).

\(^{218}\) *Kern River Gas*, 899 F.2d at 1463.

\(^{219}\) See id. (stating that conferring copyright where merger exists would create monopoly of idea); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967) (holding that some ideas can be expressed in limited number of ways, thus granting copyright would
A leading case on the merger doctrine and limited forms of expression is *Morrissey v. Proctor & Gamble Co.*\(^{220}\) In *Morrissey*, the First Circuit refused to find copyright infringement where the defendant created a set of contest rules that were identical to the plaintiff's rules.\(^{221}\) The court found that because only a "mere handful" of ways existed to express the ideas, "to permit copyrighting . . . could exhaust all possibilities of future use of the substance."\(^{222}\) The merger doctrine has extended the principles set forth by *Baker.*\(^{223}\)

The reconstruction of MMT is a perfect example to which the doctrine of merger should apply. The text, made up of factual fragments, are the "ideas," and the piecing together and filling of gaps are the "expression." Although parts of the original manuscript are missing, the many pieces that are available leave only a limited number of ways to put the text back together. As the First Circuit held in *Morrissey*, where only a "handful" of variations exist to express an idea, a copyright cannot be maintained.\(^{224}\) This concept of merger also extends to factual compilations.

3. *Merger and compilations*

In restored documents like MMT, preexisting facts and newly contributed components are not easily distinguishable.\(^{225}\) Under the doctrine of merger, when underlying facts cannot be separated from the newly formed expression, copyright protection should not apply.\(^{226}\)

An ancient text, although perhaps now in fragments, was originally created as a whole. In trying to return the text to its original form, only a limited number of ways exist to piece the fragments together so that the text is coherent. Granting a copyright to one scholar for

\(^{220}\) 379 F.2d 675 (1st Cir. 1967).
\(^{221}\) *Morrissey*, 379 F.2d at 678-79.
\(^{222}\) Id. at 678-79; see also Kern River Gas, 899 F.2d at 1468; Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (stating that line drawn between ideas and expressions is done so to preserve "balance between competition and protection reflected in the patent and copyright laws").
\(^{223}\) *Baker* v. *Selden*, 101 U.S. 99 (1879); see supra notes 205-10 and accompanying text (discussing *Baker* and idea/expression dichotomy).
\(^{224}\) *Morrissey*, 379 F.2d at 678.
\(^{225}\) See Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 203 (2d Cir.) (articulating how facts and expressions are not always easily separable), aff'd, 471 U.S. 537 (1984); Gorman, supra note 177, at 562 (stating that "in many fact works the literary or artistic expression is dictated by and inseparable from the underlying information").
\(^{226}\) See Herbert Rosenthal Jewelry Corp., 446 F.2d at 742 (holding that bee pin could be copied because idea and expression of such pin were inseparable); *Morrissey*, 379 F.2d at 678-79 (finding that facts of contest rules were inseparable from expression of those rules).
a particular arrangement would create the danger that no other scholars would be able to attempt a reconstruction for fear that the outcome would bear "substantial similarity" to the copyrighted version.\textsuperscript{228}

C. Doctrine of Estoppel

Often in the realm of ancient texts, fragments of archaeological documents are pieced together with the intent of restoring the document's original text.\textsuperscript{229} The compiling author who arranges the ancient fragments believes that her reconstruction mirrors the original document. She therefore represents that the reconstructed document is factually correct. Even if parts of the reconstruction are not accurate, it matters only that the compiling author suggests, implicitly or explicitly, that it is accurate.\textsuperscript{230} Because facts cannot be copyrighted,\textsuperscript{231} a work that is represented as the equivalent of the original, and therefore an authoritative version of the original, should be held uncopyrightable.\textsuperscript{232}

Accordingly, a compiling author who represents the compilation to be completely factual cannot subsequently sue for copyright infringement by claiming that part of the compilation is fictional or theoretical and, therefore, protectable.\textsuperscript{233} This estoppel doctrine essentially holds scholars, journalists, and all others who claim to reiterate preexisting facts accountable for their initial representations. As the court in \textit{Marshall v. Yates} stated, "To permit otherwise would be to

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\textsuperscript{227} See Business Trends Analysts, Inc. v. Freedonia Group, Inc., 887 F.2d 399, 402 (2d Cir. 1989) (stating that originality test for infringement of compilation is "substantial similarity"); Hoehling v. Universal City Studios, 618 F.2d 972, 977 (2d Cir.) (affirming grant of summary judgment because substantial similarity applied only to noncopyrightable material), cert. denied, 449 U.S. 841 (1980); Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1093 (2d Cir. 1977) (explaining that elements required to prove copying are access and substantial similarity); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (asserting that substantial similarity between disputed works helps prove misappropriation of copyrightable material), cert. denied, 282 U.S. 902 (1931).

\textsuperscript{228} See Hoehling, 618 F.2d at 978 ("To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors.").

\textsuperscript{229} See Complaint at 6, Biblical Archaeology Soc'y v. Qimron, No. 92-5590 (E.D. Pa. filed Sept. 22, 1992) (explaining that goal of reconstruction was to restore text to its original form).

\textsuperscript{230} See Houts v. Universal City Studios, 603 F. Supp. 26, 28 (C.D. Cal. 1984) (holding that express representation that work is factual will support estoppel argument even without actual statement that work is entirely factual).

\textsuperscript{231} See infra note 176 (listing cases holding that facts are not copyrightable).

\textsuperscript{232} See Houts, 603 F. Supp. at 28 (noting that once work is held out to public as factual, plaintiff is estopped from claiming that same work is fictional and worthy of higher degree of copyright protection).

unduly chill authors seeking to write about historical issues or events.\textsuperscript{234}

\textbf{D. Fair Use Defense}

The United States has always maintained some limitations on the exclusivity that copyright protection confers.\textsuperscript{235} One limitation on copyright protection is known as the doctrine of "fair use."\textsuperscript{236} The fair use doctrine, originally formulated under common law, was finally codified in the Copyright Act of 1976.\textsuperscript{237} The doctrine allows copying of protected works if the copying or use is fair. Fairness, as set forth by the statute, can be determined by considering four factors: the purpose of the use, the nature of the copied work, the amount of the work used, and the economic effects of such use.\textsuperscript{238}

Although the statute requires consideration of the four listed factors, they are by no means the only determinants.\textsuperscript{239} In fact, as the Supreme Court noted in \textit{Harper & Row, Publishers, Inc. v. Nation Enterprises},\textsuperscript{240} due to the equitable nature of the fair use doctrine, "no generally applicable definition is possible"; hence, each case must be decided individually on its facts.\textsuperscript{241} It is thus necessary to examine the individual elements of a particular case closely to determine whether fair use applies. As an example, this Comment will look to

\begin{itemize}
\item \textsuperscript{234} \text{Marshall, 223 U.S.P.Q. (BNA) at 455.}
\item \textsuperscript{235} \text{See Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) ("The fundamental justification for the privilege [of fair use] lies in the constitutional purpose in granting copyright protection."); \textit{cert. denied}, 385 U.S. 1009 (1967); American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 9-10 (S.D.N.Y. 1992) (explaining how courts created doctrines such as fair use in order to limit authors' exclusive rights and to foster knowledge and learning); see also 17 U.S.C. § 107 notes (1988) (Historical and Revision Notes) (stating that fair use doctrine is "one of the most important and well-established limitations on the exclusive right of copyright owners").}
\item \textsuperscript{236} \text{17 U.S.C. § 107.}
\item \textsuperscript{237} \text{The statute provides:}
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\item \textsuperscript{238} \text{Id. The statute provides:}
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\item \textsuperscript{239} \text{See \textit{Harper & Row, Publishers v. Nations Enters.}, 471 U.S. 539, 560 (1985) (stating that factors delineated in statute are "not meant to be exclusive").}
\item \textsuperscript{240} \text{471 U.S. 599 (1985).}
\item \textsuperscript{241} \text{Id. at 560.}
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the facts of *Qimron v. Shanks* to analyze how the doctrine of fair use may be applied as a defense in the copying of reconstructed documents, assuming that the documents already have been granted copyright protection.

1. *Purpose and character: commercial versus nonprofit*

   In determining the applicability of the fair use defense, courts generally look more favorably on copying for nonprofit reasons.\(^{242}\) Section 107 lists several purposes to demonstrate the kind of use it deems appropriate.\(^{243}\) These purposes include "criticism, comment, news reporting, teaching . . . , scholarship, or research."\(^{244}\) Although many courts historically have reasoned that only noncommercial use could be productive,\(^{245}\) most courts now realize that a profit motive is irrelevant to the social value the secondary user's work contributes.\(^{246}\)

   Public benefit seems to be a key factor in considering the purpose and character of the secondary use. Although the Biblical Archaeology Society is a nonprofit agency,\(^{247}\) the more important issue is that Hershel Shanks published *A Facsimile Edition of the Dead Sea Scrolls* to give scholars and the general public access to important textual materials that previously had been withheld from the outside world.\(^{248}\) This publication, of course, serves a great educational purpose by giving many more people the opportunity to research and make scholarly commentary on an important historical document. Greater efficiency may also be achieved in granting Shanks fair use of Qimron's work because one scholar can build on the efforts of a

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242. See id. at 562 (maintaining that secondary use for commercial purposes "tends to weigh against a finding of fair use").
244. Id.
245. See American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 12 (S.D.N.Y. 1992) (explaining that productive uses were historically favored); see also Jarotech, Inc. v. Clanay, 666 F.2d 403, 407 (9th Cir. 1982) (holding that fair use defense could be sustained because use was not "commercially exploitative"); Key Maps, Inc. v. Pruitt, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (determining that use of maps was not commercial in nature).
2. Nature of the copyrighted work

Reconstructions of historical documents, especially ancient documents, are of great interest and importance to society. The MMT manuscript exemplifies the significance attributed to this genre of documents. Because the original text of MMT was found in fragments, as are many ancient documents, it was necessary for scholars to spend an enormous amount of time piecing the work back together. Although labor and effort expended in creating compilations are not, by themselves, reason to grant a copyright, there is always the possibility that enough original authorship has been contributed.

Indeed, factual works may receive protection, but, because of the importance of their subject matter to the general public, the fair use doctrine is applied more often to these kinds of works. The intensely factual nature of reconstructed documents such as MMT make such reconstructed works prime candidates for fair use copying. For this reason, defendants in a reconstruction case would enjoy "greater license" to copy a compilation without risk of infringing on its copyright.

3. Amount and substantiality of the use

Judicial decisions regarding the amount and substantiality of the use vary widely. In the past, some courts have found copyright infringement for the copying of only a few sentences, while other
courts have allowed the copying of a whole work. Yet, the general rule, as acknowledged by the U.S. Supreme Court, states that the copying of an entire work usually will not constitute fair use.

If the general rule were narrowly interpreted and enforced, it would be virtually impossible to find fair use in the copying of reconstructed documents. Due to the factual nature of a work such as MMT, however, only the new materials contributed by the compiling author qualify for copyright protection. Because the majority of a reconstructed document is composed of uncopyrightable factual fragments, the amount of protected text within a work that is copied is relatively insubstantial when compared to the entire work. Technically, one could require that only the uncopyrighted pieces of the reconstructed document be copied, but, as discussed previously, the doctrine of merger often would make such separation difficult. In addition, a few courts and legal commentators have noted that some copying is permissible, if for no other reason than the pursuit of factual accuracy.

4. Effect on the market for the copyrighted work

A powerful argument against fair use is that it may be a detriment to the economic success of a copyrighted work. Such an argument is useful when examining creative, fictional works, but it loses strength when applied to factual works. Instead, in dealing with factual works, courts have found that "in balancing the equities . . . the public interest should prevail over the possible damage to the copyright owner." In the Dead Sea Scrolls case, Qimron asserted that because he

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257. See Sony Corp., 464 U.S. at 450 (acknowledging that reproduction of complete work usually "militates against a finding of fair use").

258. See supra notes 164-71 and accompanying text (discussing reconstructions as compilations).

259. See supra notes 225-28 and accompanying text (discussing merger doctrine).

260. See, e.g., New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 592 (2d Cir. 1989) ("The law recognizes that words themselves may be facts to be proven.") (Oakes, C.J., concurring), cert. denied, 493 U.S. 1094 (1990); Jon O. Newman, Not the End of History: The Second Circuit Struggles with Fair Use, 37 J. COPYRIGHT SOC'Y 12, 15 (1990) (maintaining that authority exists that indicates that "fair and accurate reporting of factual information may justify some verbatim copying of the expressive content of unpublished writings").

could not be the first to publish MMT, the value of his work had been decreased substantially. Yet, the defendants had published only a facsimile of the reconstructed MMT, not Qimron’s research or conclusions. Indeed, the defendants’ use of the facsimile did not lessen the market value of Qimron’s 300-page commentary detailing his findings and conclusions. The availability of the MMT facsimile may even have increased the commentary’s market value because other scholars would want to know the reasoning behind Qimron’s contributions to the reconstruction of the fragments. Additionally, several scholars already had access to copies of the reconstructed MMT prior to its unauthorized publication. Instead of harming the potential market for the copyrighted work (the reconstructed text together with Qimron’s commentary), it appears that the copy of the one-page MMT may have had “the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information.” The greater the freedom in the exchange of ideas, the greater the success scholars will have in their quest for the answers to the mysteries of the past.

CONCLUSION

Academicians strive to solve the enigmas of the past, but in so doing, they often must rely on the work of their colleagues. It has been said that “[a] dwarf standing on the shoulders of a giant can see farther than the giant himself.” This oft-cited quote suggests that certain types of scholarly works must remain freely accessible so that the truth may be more easily discovered. The Israeli court’s decision in Qimron v. Shanks, therefore, is disheartening. By conferring a copyright on the reconstruction of an ancient text, the court essentially has granted legal power to monopolize important scholarly works. This decision presents a serious obstacle to intellectu-

263. Id. at 4.
264. Id.; Complaint at 6, Biblical Archaeology Soc’y v. Qimron, No. 92-5590 (E.D. Pa. filed Sept. 22, 1992) (discussing Qimron’s contributions to MMT reconstruction project and stating that Qimron’s “principal contribution” was his 300-page analysis).
266. Qimron, slip op. at 4; Complaint at 7, Biblical Archaeology Soc’y.
268. See Denicola, supra note 173, at 525 (asserting that practical reasons exist for refusing copyright protection for facts).
al freedom and may even have a chilling effect on the academic community.

Although a case similar to the one in Israel has been brought in the United States, reconstruction of the Dead Sea Scrolls is not the only context in which a legal analysis of scholarly reconstruction may apply. A reconstruction need not only be of ancient text. Instead, any artifact, such as a piece of pottery, that needs to be reassembled in order to produce a likeness to the original may be subject to the same fundamentals of U.S. copyright law explored by this Comment. Many of the world's scholars are U.S. citizens, and U.S. institutions fund many of that community's research projects. The United States, therefore, is a likely forum for future copyright cases similar to Qimron.

The pursuit of progress is the basis for U.S. copyright law. Under the U.S. system, ideas are considered too fundamental and, therefore, too important to be appropriated by any one person. Section 102(b) of the Copyright Act codifies this concept and the courts have gone out of their way to protect this basic premise, whether it be through the idea/expression dichotomy, the doctrine of merger, or the fair use defense.

The decision in Qimron to grant a copyright to the reconstruction of a historical artifact eclipses all notions of intellectual freedom. Congress has sought to protect this pursuit of knowledge through copyright law. Indeed, the United States has taken great pains to ensure that facts and other materials in the public domain remain accessible. It is unlikely that a pro-Qimron outcome would have resulted had this case been tried in the United States. Indeed, one can only wonder how much more constructive research would have occurred had the Dead Sea Scrolls been discovered in this country. One would hope that all future scholarly endeavors, especially those involving ancient history, will never again be subjected to such obstruction and restriction.

271. Hoffman, supra note 90, at B4 ("Suppose Abraham Lincoln wrote six copies of a letter, and he decided he didn't want them published, and tore them up and threw them into a fire, and a wind blew out 10 or 15 percent . . . . Someone found them in a box and put them together and put in the missing parts. Would Lincoln's heirs own that? Or would the scholar?"") (quoting Hershel Shanks).
272. See Denicola, supra note 173, at 525 ("The impairment of scientific and artistic progress and damage to basic first amendment rights present too high a price for increased incentive.").
273. See Gorman, supra note 177, at 560 (noting that copyright laws are only meant to protect "author's expression, or word sequence, and not the underlying ideas, facts, or systems").