

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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1. See *Raiders of the Lost Scrolls*, ECONOMIST, Sept. 14, 1991, at 106, 106 (stating that scrolls give insight into Judaic and Christian history).

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.⁴ The scrolls, comprised mainly of "religious writings, messianic prognostications, psalms and hymns, some of which anticipate ideas expressed in the New Testament,"⁵ may provide answers to historians' and theologians' questions regarding a period in history about which they had only been able to speculate.⁶

Since their discovery, the scrolls have been a constant source of controversy.⁷ They have been the subject of battles over accessibility, monopolization, and publication delays.⁸ Most recently, debate has focused on copyrightability of the reconstructed scrolls and copyright infringement.⁹

One of the unfortunate realities about archaeological artifacts is that they are rarely preserved and often are fragmented.¹⁰ Fragmentation of documents makes it necessary for scientists and scholars to put the pieces back together, as if reassembling a jigsaw puzzle.¹¹ Unfortunately, ancient document reconstruction is not as simple as solving a jigsaw puzzle. In many cases, indistinguishable fragments belong to unidentified documents.¹² 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 36 (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.*

10. Cf. Leonard Cottrell, *What is Archaeology?*, in THE CONCISE ENCYCLOPEDIA OF ARCHAEOLOGY 17, 22 (Leonard Cottrell ed., 1960) (explaining that archaeology usually involves sorting and classifying hundreds of artifact fragments).

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.¹³

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.¹⁴ In an effort to give free access to all of the scroll manuscripts, Hershel Shanks, founder and current director of the Biblical Archaeology Society,¹⁵ published a book that included an "unauthorized" facsimile of the document that Qimron had spent years reconstructing.¹⁶ Subsequently, Qimron brought suit against Shanks in Israel asserting a claim of copyright infringement.¹⁷ This suit set an international legal precedent.¹⁸ The Israeli decision, the first ruling of its kind in the world, found a copyright in the reconstruction of an ancient text.¹⁹

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.²⁰ Although legal issues similar to those decided in the Israeli case have yet to be fully litigated in the United States,²¹ 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

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

14. *Qimron v. Shanks*, C.C. No. 641/92, slip op. at 1 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*) (stating that Qimron spent 11 years researching and deciphering Dead Sea Scroll).

15. Anderson, *supra* note 9, at G1.

16. A FACSIMILE EDITION OF THE DEAD SEA SCROLLS (Robert H. Eisenman & James M. Robinson eds., 1991). This edition is out of print because of an Israeli injunction.

17. See *infra* notes 69-94 and accompanying text (discussing *Qimron v. Shanks*).

18. Abraham Rabinovich, *Court Awards Dead Sea Scrolls Translator NIS 100,000*, JERUSALEM POST, Mar. 31, 1993, at 14.

19. *Id.*

20. *Why Professor Qimron's Lawsuit Is a Threat to Intellectual Freedom*, BIBLICAL ARCHAEOLOGY REV., Sept.-Oct. 1992, at 67, 70.

21. 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.²² In anticipation of this future litigation, this Comment analyzes *Qimron v. Shanks*²³ 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 1947.²⁴

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'usat 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).

23. C.C. No. 641/92, slip op. at 1 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*).

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,²⁵ were fairly intact.²⁶ Once the significance of these scrolls had been recognized, archaeologists and opportunists²⁷ initiated further excavation of the Judean desert.²⁸ Between 1951 and 1956, excavations of the cliffs of Qumran uncovered ten more caves²⁹ housing ancient manuscript materials. Cave 4, discovered in 1954, provided the richest source of ancient text,³⁰ mostly in a fragmented state.³¹ The scrolls, comprised of approximately 800 manuscripts,³² now reside under the control of the Israel Antiquities Authority.³³ Although some of the scrolls have changed

Not knowing the importance or the meaning of the scrolls, the two boys took them to an Assyrian Christian dealer known as Kando. *Id.* at 16. Kando did not know what to make of the scrolls, but decided to take them to the Syrian Jacobite Monastery of St. Mark in Jerusalem. MICHAEL BAIGENT & RICHARD LEIGH, *THE DEAD SEA SCROLLS DECEPTION* 7 (1991). It was there that Mar Athanasius Yeshua Samuel acquired the first three scrolls. *Id.* at 9. Mar Samuel would later obtain an additional scroll. *Id.* at 24; Sussmann & Peled, *supra* note 3, at 23.

At approximately the same time, Professor E.L. Sukenik of the Hebrew University was able to purchase three scrolls that had been discovered subsequently. ALLEGRO, *supra*, at 24. When the State of Israel was established, a museum known as The Shrine of the Book was built specifically to house Professor Sukenik's three scrolls. *Id.* Mar Samuel subsequently took his four scrolls to the United States and sold them to Professor Sukenik's son. Sussmann & Peled, *supra* note 3, at 23.

25. See Sussmann & Peled, *supra* note 3, at 23 (maintaining that total of seven scrolls were found within Cave 1). These scrolls have been named Isaiah A, Isaiah B, the Habakkuk Commentary, the Thanksgiving Scroll, the Community Rule (or the Manual of Discipline), the War Rule, and the Genesis Apocryphon. *Id.*; see also BAIGENT & LEIGH, *supra* note 24, at 4. A total of 11 caves contained manuscript materials of the Dead Sea Scrolls. Sussmann & Peled, *supra* note 3, at 23. These caves were located in the Qumran region on the cliffs overlooking the Dead Sea near the ruins of Khirbet Qumran. BAIGENT & LEIGH, *supra* note 24, at 4.

26. ALLEGRO, *supra* note 24, at 41-42 (noting that first seven scrolls found were largely intact).

27. See Sussmann & Peled, *supra* note 3, at 24 (discussing search for scrolls by Bedouins seeking payment and archaeologists seeking history).

28. See ALLEGRO, *supra* note 24, at 75-76 (explaining that official excavations of Cave 1 began in 1949 under direction of Lankester Harding, director of Jordanian Antiquities Department, and Father Roland de Vaux, French priest and head of French School of Archaeology in Jerusalem). By 1952, the excavations expanded throughout the area. *Id.* at 90-93.

29. See Sussmann & Peled, *supra* note 3, at 24 (stating that 11 caves were discovered during excavations of Qumran area).

30. Sussmann & Peled, *supra* note 3, at 24; see Sheler, *supra* note 2, at 56 (stating that many experts theorize that large amount of textual material discovered in Cave 4 was from "library" of monastic Essenes sect). This library contained manuscripts from most of the Torah, the Jewish Scripture. Sheler, *supra* note 2, at 56. The textual materials located in the cave included "religious writings, messianic prognostications, psalms and hymns." Marston, *supra* note 2, at 7.

31. See Sussmann & Peled, *supra* note 3, at 24 (estimating that at least 15,000 fragments were found which make up minimum of approximately 600 texts); cf. ALLEGRO, *supra* note 24, at 42-49 (describing editing procedures for fragments of scroll texts).

32. Tov, *supra* note 12, at 136.

33. Grunberger, *supra* note 7, at 18. The Israel Antiquities Authority, formerly the Israel Department of Antiquities, is the governing body that controls the Dead Sea Scrolls and other artifacts in the possession of the State of Israel. *Id.* at 18-20.

hands many times, their accessibility for purposes of study had been limited until recently.³⁴

B. *Scholarship on the Scrolls*

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

Prior to 1967, on the other side of a partitioned Jerusalem, the intact scrolls from Cave 1 were studied under Israeli authority.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.⁴¹ During the Six Day War in 1967, Old Jerusalem fell under Israeli control,⁴² and with it, the Rockefeller Museum and the

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[]." *Id.* at 3.

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. *Id.* After Transjordan annexed Palestine and established Jordan in 1949, the caves came under the control of the Jordanian Government. *Id.* In 1966, Jordan nationalized the Rockefeller Museum, which contained all of the scroll fragments. *Id.*

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

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. *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." *Id.* It was no secret that de Vaux was anti-Semitic. *Id.* at 27-28.

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, *id.* at 27, Professor Frank Cross and Monsignor Patrick Skehan from the United States, *id.* at 28, Father Jean Starcky from France, *id.*, Dr. Clause-Hunno Hunzinger from Germany, *id.*, Father Josef Milik, originally from Poland and resettled in France, *id.* at 29, and John Allegro and John Strugnell from Great Britain. *Id.*; see also ALLEGRO, *supra* note 24, at 42-43.

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 45-46.

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

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

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. *Id.*

remaining scrolls. In a decision made mostly for convenience, Israeli authorities allowed the original international team to continue its work on the scrolls,⁴³ but on the sole condition that it include several Jewish scholars in the group.⁴⁴ The Israeli Government also asked the scholars to speed up the publication process.⁴⁵

The Israeli Government continued to restrict access to the scrolls, and the original eight scholars retained a monopoly on scroll research.⁴⁶ When one of the original scholars died or retired, he essentially devised his work on the scrolls to a chosen successor.⁴⁷ Outside scholars could not work with the actual scrolls; not even photographs of the textual materials were released to the public.⁴⁸ Several depositories around the world possessed copies of the scroll photographs,⁴⁹ but the copies were never made available to outside scholars.⁵⁰

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.⁵¹ Strugnell enlarged the research group's number to sixty-five scholars and tried, unsuccessfully, to set more definite publication deadlines.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵ In fact, in 1991, amid rumors of anti-Semitism,⁵⁶ Strugnell was dismissed from his post as general editor.⁵⁷

Because of such controversial issues, a movement to release the scrolls to the public grew in strength. One of its principal advocates, Hershel Shanks,⁵⁸ waged a personal campaign against the scroll monopoly.⁵⁹ Shanks is the founder and chief editor of the *Biblical*

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.

58. See generally Stephen Fried, *Scroll Man*, WASH. POST, May 10, 1992, Magazine, at 21 (profiling Hershel Shanks and relating his mission to make Dead Sea Scrolls accessible to public).

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.⁶⁰ It was Shanks' vocal criticism of the limited access to the scrolls⁶¹ and a published "bootleg" version of twenty-four manuscripts reconstructed by computer⁶² 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.⁶³ With the veil of secrecy lifted, the Israel Antiquities Authority had no choice but to grant free access to its scroll materials.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.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.⁶⁶ In the midst of such allegations, the Biblical Archaeology Society (BAS), another organization headed by Shanks,⁶⁷ published *A Facsimile Edition of the Dead Sea Scrolls*. This

60. *Id.*

61. *Id.* at 21 (describing Shanks as "most visible, quotable, divisive figure" in Dead Sea Scrolls conflict).

62. See *Raiders of the Lost Scrolls*, *supra* note 1, at 106 (describing use of computers by scholars Ben-Zion Wacholder and Martin Abegg to publish Dead Sea Scrolls transcripts in 1991 book); *Scrolls Bootlegged*, *supra* note 46, at 840 (publicizing Wacholder and Abegg's book, which created version of scroll texts by computer). See generally BEN-ZION WACHOLDER & MARTIN ABEGG, A PRELIMINARY EDITION OF THE UNPUBLISHED DEAD SEA SCROLLS (1991).

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).

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).

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 C1, 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).

66. See Marston, *supra* note 2, at 8 (detailing "raging debate" at conference over book, ROBERT EISENMAN & MICHAEL WISE, *THE DEAD SEA SCROLLS UNCOVERED: THE FIRST COMPLETE TRANSLATION AND INTERPRETATION OF 50 KEY DOCUMENTS WITHHELD FOR OVER 35 YEARS* (1992)); *Scroll Researchers Feud, Then Reconcile*, *supra* note 65, at 9 (describing authors' apology for book at conference); John N. Wilford, *New Accusations Erupt over the Dead Sea Scrolls*, N.Y. TIMES, Dec. 13, 1992, at 28 (detailing dispute at New York conference).

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).

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 C1 (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.*

69. Qimron v. Shanks, C.C. No. 641/92 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*).

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.⁷⁷ Shanks had published an unauthorized copy of this draft of MMT in the foreword to *A Facsimile Edition of the Dead Sea Scrolls*.⁷⁸ Not only did Shanks reproduce a picture of the reconstructed MMT document without permission, but he also failed to credit Qimron for the reconstruction.⁷⁹ According to the court, Qimron's "dream to be the first editor of the scroll vanished" when Shanks published the facsimile of MMT.⁸⁰ 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.⁸¹

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.⁸² The opinion addressed each affirmative defense put forth by Shanks and the BAS.⁸³ 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 Dorner 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.⁸⁴ Judge Dorner rejected the "parallelism" that the defendants asserted existed between the U.S. cases and the case at issue.⁸⁵ 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."⁸⁶ 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.⁸⁷

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.⁸⁸ 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.⁸⁹ In light of this imputed knowledge, the Israeli court awarded NIS 20,000 in statutory damages⁹⁰ and NIS 80,000 for mental anguish.⁹¹ Judge Dorner determined that Qimron's loss of "his right of priority in publishing"⁹² the MMT text had caused him tremendous "economic damage and moral distress."⁹³ In addition to the damages awarded, the court granted a permanent injunction to prevent any further unauthorized publication of MMT by the defendants.⁹⁴

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

84. *Id.* at 15. One U.S. case held that copyright protection does not extend "to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991). Another case held that pictures copied from original ancient illustrations were not copyrightable. *Hearn v. Meyer*, 664 F. Supp. 832, 836 (S.D.N.Y. 1987).

85. *Qimron*, slip op. at 17.

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 Text*, 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. *Qimron*, slip op. 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.⁹⁵ 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.⁹⁶ When Israel was created from the Palestinian territory, many of the laws established by the British Mandate remained in force.⁹⁷ The British Copyright Act of 1911⁹⁸ was extended to Palestine in 1924.⁹⁹ Although Israel has amended the Copyright Ordinance several times since 1948,¹⁰⁰ the "outdated" 1911 law still provides the principal basis for copyright decisions.¹⁰¹

Israeli copyright law generally imposes two standards: fixation and originality.¹⁰² Fixation requires that the work in question take some substantive form, such as a writing or a recording.¹⁰³ Whether something that is neither written nor prepared in note form should still have to satisfy the fixation requirement is not clear.¹⁰⁴ 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

95. Cf. *Israel Law Digest*, in MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST ISR-3 to ISR-4 (1993) (summarizing Israeli contract and copyright law and noting that both incorporate English law).

96. See NORMAN BENTWICH, *THE MANDATE SYSTEM* 11-14 (1930) (describing British Mandate in Palestine).

97. Joshua Weisman, *Israel*, in INTERNATIONAL COPYRIGHT LAW § 1, at ISR-3 (M. Nimmer & P. Geller eds., 1991).

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,¹⁰⁵ yet it leaves "originality" undefined.¹⁰⁶ Case law suggests that originality means that a work is a creation of the author and not merely a copy of a preexisting work.¹⁰⁷

For compilations,¹⁰⁸ 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."¹⁰⁹ 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."¹¹⁰ 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.¹¹¹ 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."¹¹²

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.¹¹³ The statute was the first of its kind to confer copyrights to authors of publications.¹¹⁴ 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).

109. Israel v. Akhiman, C.A. 136/71, 26 P.D.(2) 259 (1971), cited in Weisman, *supra* note 97, § 2, at ISR-5.

110. *Id.*

111. Qimron v. Shanks, C.C. No. 641/92, slip op. at 14-17 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*).

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.*

114. See Howard D. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1139-40 (1983) (emphasizing that Statute of Anne was first law to entitle authors instead of publishers copyright protection).

the Articles of Confederation.¹¹⁵ By the time the U.S. Constitution was drafted in 1789, copyright protection was already a well-accepted principle.¹¹⁶ The framers of the Constitution deemed congressional power to establish copyrights¹¹⁷ to be reasonable and appropriate.¹¹⁸ 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.¹¹⁹

The Copyright Clause gave Congress the power of legislating copyright, but provided few specific guidelines for exercising this power.¹²⁰ 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 1790.¹²¹ This Act followed the standard set by the Statute of Anne.¹²² 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.¹²³ The resulting Copyright Act of 1909 created some new provisions.¹²⁴ 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,¹²⁵ 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").

121. Act of May 31, 1790, ch. 15, 1 Stat. 124; see 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, OV-1 (1992) (explaining structure of copyright law in United States).

122. See JOYCE ET AL., *supra* note 119, at 10.

123. See JOYCE ET AL., *supra* note 119, at 10-11.

124. 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.* § 23, 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 also JOYCE ET AL., *supra* note 119, at 11 (comparing 1909 Act with previous copyright statutes).

125. See NIMMER & NIMMER, *supra* note 121, at OV-1 n.6, OV-2 (discussing amendments made to the 1909 Act). The amendments included protection for motion pictures, see Act of Aug. 24, 1912, ch. 356, 37 Stat. 488; protection for prints and labels in 1939, see Act of July 31, 1939, ch. 396, 53 Stat. 1142; and the Sound Recording Amendment Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

these were only temporary solutions. By 1955, Congress realized that more extensive changes in the law were required.¹²⁶

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

126. JOYCE ET AL., *supra* note 119, at 12.

127. JOYCE ET AL., *supra* note 119, at 12.

128. 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 copyright ownership. *Id.* § 201(d); *see also* JOYCE ET AL., *supra* note 119, at 12-13 (listing in detail changes made by 1976 Act).

129. *See* JOYCE ET AL., *supra* note 119, at 13-14 (noting that protections for computer programs, visual works of art, and architectural works, among others, have been added since passage of 1976 Act).

130. 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).

131. *Id.*

132. *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.

Id.

133. *See* JOYCE ET AL., *supra* note 119, at 38-39 (discussing notion of "fixation" and providing example of how live radio broadcasts are not protected by copyright unless they are recorded at time of broadcast).

narrowing the scope of works eligible to be copyrighted,¹³⁴ 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.¹³⁵ The Copyright Act divides works of authorship into eight categories.¹³⁶ These categories, although clearly specified, are in no way absolute.¹³⁷ The categories are adaptable as new forms of original expression are devised.¹³⁸

Congress was able to design flexible copyright legislation in part because the terms "writings" and "authors," mentioned in the Constitution,¹³⁹ "have not been construed in their narrow literal sense, but rather, with the reach necessary to reflect the broad scope of constitutional principles."¹⁴⁰ For works not included in the enumerated categories, courts have the power to choose whether such works may be protected by copyright.¹⁴¹ Despite the ambiguity surrounding the term "works of authorship," it is certain that works are not eligible for protection unless they are original.

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).

135. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 (stating that range of copyrightable works is intentionally broad).

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).

137. See H.R. REP. NO. 1476, *supra* note 135, at 52, 1976 U.S.C.C.A.N. at 5665.

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).

139. U.S. CONST. art. I, § 8, cl. 8.

140. *Goldstein v. California*, 412 U.S. 546, 561 (1973).

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

142. 17 U.S.C. § 102(a) (1988).

143. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991) (stating that "originality is a constitutionally mandated prerequisite for copyright protection").

144. 650 F.2d 1365 (5th Cir. 1981).

145. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981).

146. H.R. REP. NO. 1476, *supra* note 135, at 51, 1976 U.S.C.C.A.N. at 5664.

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. See Olson, *supra* note 130, at 50-51 (noting importance of *Alfred Bell* case in analyzing issue of variation of public domain work).

150. *Alfred Bell & Co. v. Catalda Fine Arts*, 74 F. Supp. 973, 974-75 (S.D.N.Y. 1947).

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 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").

153. 499 U.S. 340 (1991).

154. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991).

155. 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.¹⁵⁶

Although the originality requirement remains an important element to obtaining a copyright, the requirement now has a fairly low threshold.¹⁵⁷ Unlike patents, novelty is not necessary.¹⁵⁸ Instead, originality simply requires "independent creation" by an author.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.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.¹⁶¹ In its interpretation of the Copyright Act, the Supreme Court makes clear that facts are not copyrightable.¹⁶² In following this principle strictly, the United States differs from other nations, including Israel.

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.¹⁶³

156. *Feist Publications*, 499 U.S. at 357.

157. See, e.g., *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1986) (stating that "[o]riginality 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 *Hoague-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).

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.

159. NIMMER & NIMMER, *supra* note 121, § 2.01[A], at 2-7 (interpreting requirement of originality).

160. See *Feist Publications*, 499 U.S. at 348-49 (holding that copyright protection has its limitations).

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.").

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).

163. See, e.g., *Wacholder v. Qimron*, 93-4097 (E.D. Pa. filed July 29, 1993).

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.¹⁶⁴ A compilation consists of a collection of factual or preexisting materials that are assembled and arranged to create a "new" work.¹⁶⁵ 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.¹⁶⁶ Under § 103(b),¹⁶⁷ copyright protection extends only to those expressions that are independent of the preexisting materials or facts.¹⁶⁸

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.¹⁶⁹ Because the

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.¹⁷⁰ Such distinctions have been clarified and refined through the evolution of case law.¹⁷¹

1. *Facts v. factual compilations*

What is a fact? Although this question may seem to have an obvious and simple answer,¹⁷² the courts have not always been able to decide precisely what things or events qualify as facts for purposes of copyright.¹⁷³ The courts have determined that facts are discovered, not created.¹⁷⁴ Because facts cannot be created, they are not

170. See 17 U.S.C. § 101 (defining "compilation").

171. See generally *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363-64 (1991) (holding that because plaintiff's compilation lacked sufficient originality to make it copyrightable, defendant's use was permissible); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 569 (1985) (finding that unpublished work depicting President Ford's life had been infringed by verbatim copying of excerpts); *Key Publications, Inc. v. Chinatown Today Publishing Enters.*, 945 F.2d 509, 514 (2d Cir. 1991) (concluding that although compilations are copyrightable, individual components of compilation within public domain may be copied); *Eckes v. Card Prices Update*, 736 F.2d 859, 864 (2d Cir. 1984) (finding that author of baseball card pricing guide infringed copyrights of original collecting guide); *Miller v. Universal City Studios*, 650 F.2d 1365, 1368-72 (5th Cir. 1981) (holding that effort applied to research is not copyrightable); *Hoehling v. Universal City Studios*, 618 F.2d 972, 980 (2d Cir.) (contending that historical works "may make significant use of prior work"), *cert. denied*, 449 U.S. 841 (1980); *Black's Guide Inc. v. Mediamerica Inc.*, 16 U.S.P.Q.2d (BNA) 1769, 1773 (N.D. Cal. 1990) (maintaining that facts, especially those "confined to a 'narrow range of expression,'" are not copyrightable) (quoting *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984)); *Financial Info., Inc. v. Moody's Investors Serv.*, 599 F. Supp. 994, 997 (S.D.N.Y. 1983) (holding that compilation of daily bond data sufficiently satisfies requirements of assembling and arranging factual materials to qualify for copyright protection).

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.¹⁷⁵

Facts remain accessible to everyone as part of the public domain.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.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.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.¹⁷⁹ The creativity involved

created").

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).

176. See *Miller*, 650 F.2d at 1369 (stating that because facts may not be copyrighted, they belong to public); *Hoehling*, 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).

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").

178. 17 U.S.C. § 103(a) (1988).

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, 513 (2d Cir. 1991) (suggesting that only original selection and arrangement will suffice for extension of copyright protection to compilations); *Eckes v. Card Prices Update*, 736 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.¹⁸⁰

The Supreme Court has described copyright protection for compilations as "thin."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.¹⁸² Often, the compiling author's creative work can be distinguished from the preexisting materials.¹⁸³ Unfortunately, not all compilations are so simple in form.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.¹⁸⁵ In contrast, some courts have followed the proposition that a compilation consists of "disparate facts which in nature occurred in isolation."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.

is properly viewed as resting on the originality of the selection and arrangement of the factual material"); *Financial Info., Inc. v. Moody's Investors Serv.*, 599 F. Supp. 994, 997-98 (S.D.N.Y. 1983) (holding that compilation of information about calls of municipal bonds was sufficiently original to merit copyright protection).

180. See *Feist Publications*, 499 U.S. at 348 (characterizing originality needed to copyright compilation as "a minimal degree of creativity"); see also *NIMMER & NIMMER*, *supra* note 121, § 2.11[D], at 2-164 (noting that "a very slight degree of original contribution to [the] form will suffice" to meet requirements for copyright protection).

181. *Feist Publications*, 499 U.S. at 349.

182. See 17 U.S.C. § 103(b) (1988).

183. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990) (asserting that "facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas").

184. See *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983) (stating that "distinction between fact and expression is not always easy to draw"), *aff'd*, 471 U.S. 539 (1985).

185. See David C. Stimson, Note, *Factual Compilations—Copyright Protection for Compilation Depends on Degree of Originality Involved in Assembling Facts*, 33 J. COPYRIGHT SOC'Y 1, 5 (1985) (describing case in which court concluded that publishing of index cards containing information about bonds was "unquestionably assembling, connecting and characterizing disparate facts in a copyrightable fashion").

186. *Financial Info., Inc. v. Moody's Investors Serv.*, 599 F. Supp. 994, 997 (S.D.N.Y. 1983) (quoting *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198, 201 (D. Mass. 1942)).

Factual selection is one of three elements that can satisfy the requisite for original authorship.¹⁸⁷ 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"¹⁸⁸ 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.¹⁸⁹

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,¹⁹⁰ but hard work alone will not merit a copyright.¹⁹¹ 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 569, 573 (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 same 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.¹⁹²

The Copyright Act of 1909 referred to copyright protection for compilations,¹⁹³ but it remained vague as to what requirements were necessary to qualify a work for such protection.¹⁹⁴ Some courts that interpreted the 1909 Act believed that the absence of explicit instructions for compilations made compilations automatically copyrightable.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.¹⁹⁶ Facts themselves could be copyrighted, thereby prohibiting others from freely utilizing those facts.¹⁹⁷ Such an interpretation goes against "the most fundamental axiom of copyright law—that no one may copyright facts or ideas."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.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.²⁰⁰

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

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. 320, § 6, 35 Stat. 1075, 1077 (failing to delineate which parts of compilation copyright encompassed). 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").

193. Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076-77.

194. *Feist Publications*, 499 U.S. at 352; Patry, *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 REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS. 9 (Comm. Print 1961)).

195. 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); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir. 1922) (putting forth classic formulation of "sweat of the brow" theory).

196. 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").

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

198. *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).

199. 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); see also 17 U.S.C. § 103(b) (1988).

200. See generally *supra* note 191 (discussing cases that have rejected "sweat of the brow" theory).

distinguishes it from other countries.²⁰¹ Often, civil law countries such as Israel believe that hard work must be rewarded to provide incentives for scholarly research.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.²⁰³ The ultimate goal of U.S. copyright law is the advancement of knowledge.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.

B. *The Idea/Expression Dichotomy*

The principle known as the idea/expression dichotomy²⁰⁵ 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,²⁰⁶ it has never been fully resolved. The case that best exemplifies the basic principles of the idea/expression dichotomy is *Baker v. Selden*.²⁰⁷

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

201. See Patry, *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).

202. See Patry, *supra* note 173, at 44-45 (noting that "sweat of the brow" theory has its roots in early 19th-century cases).

203. See *supra* note 179 (listing cases that find originality necessary to copyright compilation).

204. See U.S. CONST. art. I, § 8, cl. 8.

205. See JOYCE ET AL., *supra* note 119, at 90 (explaining general principle of idea/expression dichotomy).

206. See *Baker v. Selden*, 101 U.S. 99, 104 (1879) (holding that ideas conveyed in bookkeeping book, as opposed to book itself, cannot be copyrighted).

207. 101 U.S. 99 (1879).

208. *Baker v. Selden*, 101 U.S. 99, 100 (1879).

209. *Id.* at 103-04 (asserting that one purpose of publishing is to disseminate knowledge); 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"); NIMMER & NIMMER, *supra* note 121, § 2.18[C][2], at 2-204 ("The doctrine of *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.").

210. See JOYCE ET AL., *supra* note 119, at 90 (stating fact that part of *Baker* idea/expression doctrine has been incorporated into Copyright Act of 1976); see also 17 U.S.C. § 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.").

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 merger²¹⁷ 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

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

essentially grant monopoly over that idea).

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 1463; *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"²²⁷ to the copyrighted version.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.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.²³⁰ Because facts cannot be copyrighted,²³¹ a work that is represented as the equivalent of the original, and therefore an authoritative version of the original, should be held uncopyrightable.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.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 *Marshall v. Yates* stated, "To permit otherwise would be to

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).

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.").

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).

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).

231. See *supra* note 176 (listing cases holding that facts are not copyrightable).

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).

233. *Id.*; see *Marshall v. Yates*, 223 U.S.P.Q. (BNA) 453, 455 (C.D. Cal. 1983) (noting that once work is claimed to be fact, plaintiff is estopped from claiming fictional elements in effort to obtain copyright); *Huie v. NBC*, 184 F. Supp. 198, 199-200 (S.D.N.Y. 1960); *Oliver v. St. Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941).

unduly chill authors seeking to write about historical issues or events."²³⁴

D. Fair Use Defense

The United States has always maintained some limitations on the exclusivity that copyright protection confers.²³⁵ One limitation on copyright protection is known as the doctrine of "fair use."²³⁶ The fair use doctrine, originally formulated under common law, was finally codified in the Copyright Act of 1976.²³⁷ 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.²³⁸

Although the statute requires consideration of the four listed factors, they are by no means the only determinants.²³⁹ In fact, as the Supreme Court noted in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,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.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

234. *Marshall*, 223 U.S.P.Q. (BNA) at 455.

235. 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."), *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").

236. See 17 U.S.C. § 107; *American Geophysical Union*, 802 F. Supp. at 10; *New York Times, Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977).

237. 17 U.S.C. § 107.

238. *Id.* The statute provides:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

239. See *Harper & Row, Publishers v. Nations Enters.*, 471 U.S. 539, 560 (1985) (stating that factors delineated in statute are "not meant to be exclusive").

240. 471 U.S. 539 (1985).

241. *Id.* at 560.

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

242. See *id.* at 562 (maintaining that secondary use for commercial purposes "tends to weigh against a finding of fair use").

243. 17 U.S.C. § 107 (1988).

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 *Jartech, Inc. v. Clancy*, 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).

246. *American Geophysical Union*, 802 F. Supp. at 10; see also *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307-08 (2d Cir. 1966) (stating that publisher's profit motive had no bearing on whether use of copyrighted material offered social benefit), *cert. denied*, 385 U.S. 1009 (1967); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977) (determining that defendant's purpose was "twofold" because it sought financial gain as well as public service).

247. Complaint at 2, *Biblical Archaeology Soc'y v. Qimron*, No. 92-5590 (E.D. Pa. filed Sept. 22, 1992).

248. *The Dead Sea Scrolls Are Now Available to All*, *BIBLICAL ARCHAEOLOGY REV.*, Jan.-Feb., 1992, at 63.

predecessor.²⁴⁹

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,²⁵⁰ there is always the possibility that enough original authorship has been contributed.²⁵¹

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.²⁵² The intensely factual nature of reconstructed documents such as MMT make such reconstructed works prime candidates for fair use copying.²⁵³ For this reason, defendants in a reconstruction case would enjoy "greater license" to copy a compilation without risk of infringing on its copyright.²⁵⁴

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,²⁵⁵ while other

249. Cf. *Rosemont Enters.*, 366 F.2d at 310 (disagreeing with view that "author is absolutely precluded from saving time and effort by referring to and relying upon prior published material").

250. See discussion *supra* Part IV.A.3 (discussing "sweat of the brow" theory).

251. See *supra* notes 185-89 and accompanying text (discussing notion that original authorship can be found in piecing together many separate facts).

252. See *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.) (noting that court will find fair use more often with factual works than with nonfactual works), *cert. denied*, 498 U.S. 921 (1990); *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1992) ("[I]t is unquestionably true that fair use is more easily found where the copyrighted material is of a factual nature rather than a fictional type.").

253. Cf. *American Geophysical Union*, 802 F. Supp. at 16-17 (finding that scientific nature of copyrighted material favored fair use because of need for public dissemination of such information); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977) (stating that if nature of compilation is factual, court will favor fair use because it is "work more of diligence than of originality").

254. *New York Times*, 434 F. Supp. at 221.

255. See, e.g., *Perkins Marine Lab & Hardware Co. v. Goodwin Stanley Co.*, 86 F. Supp. 630, 631 (E.D.N.Y. 1949) ("In order to constitute and [sic] infringement of the copyright of a book it is not necessary that the whole or even a large portion of the book shall have been copied.") (quoting *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302, 303 (E.D. Pa.

courts have allowed the copying of a whole work.²⁵⁶ 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.²⁵⁷

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.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰

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."²⁶¹

In the Dead Sea Scrolls case, Qimron asserted that because he

1938) (holding that copying of three sentences constituted infringement)).

256. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (holding that copying of complete movie for private use fell under fair use doctrine); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1348 (Ct. Cl. 1973) (holding that copying of entire copyrighted work was not infringement), *aff'd*, 420 U.S. 376 (1978).

257. See *Sony Corp.*, 464 U.S. at 450 (acknowledging that reproduction of complete work usually "militat[es] 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").

261. *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

could not be the first to publish MMT, the value of his work had been decreased substantially.²⁶² Yet, the defendants had published only a facsimile of the reconstructed MMT, not Qimron's research or conclusions.²⁶³ Indeed, the defendants' use of the facsimile did not lessen the market value of Qimron's 300-page commentary detailing his findings and conclusions.²⁶⁴ 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.²⁶⁵ Additionally, several scholars already had access to copies of the reconstructed MMT prior to its unauthorized publication.²⁶⁶ 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."²⁶⁷ 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.²⁶⁸ It has been said that "[a] dwarf standing on the shoulders of a giant can see farther than the giant himself."²⁶⁹ 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-

262. *Qimron v. Shanks*, C.C. No. 641/92, slip op. at 40 (D. Jerusalem Mar. 30, 1993) (Isr.) (unofficial translation on file with *The American University Law Review*).

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).

265. *Cf.* *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 223-24 (D.N.J. 1977) (noting that copying of work does not necessarily lead to damages when works are not in direct competition).

266. *Qimron*, slip op. at 4; Complaint at 7, *Biblical Archaeology Soc'y*.

267. *New York Times*, 434 F. Supp. at 221.

268. *See* Denicola, *supra* note 173, at 525 (asserting that practical reasons exist for refusing copyright protection for facts).

269. Zachariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

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,²⁷⁰ 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.²⁷¹ 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.²⁷² Section 102(b) of the Copyright Act codifies this concept and the courts have gone out of their way to protect this basic premise,²⁷³ 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.

270. Wacholder v. Qimron, No. 93-4097 (E.D. Pa. filed July 29, 1993).

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").

