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Raiders of the Lost Scrolls: The Right of Scholarly Access to the Content of Historic Documents

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RAIDERS OF THE LOST SCROLLS: THE RIGHT OF SCHOLARLY ACCESS TO THE CONTENT OF HISTORIC DOCUMENTS

Cindy Alberts Carson*

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This article is dedicated to the memory of Cindy A. Raisch.

INTRODUCTION

For forty-five years the Dead Sea Scrolls were in the exclusive possession of a small circle of scholars who jealously guarded the Scroll contents from the rest of academia. During the last five years, unknown sources began to leak tantalizing bits of information about the Scroll contents to academics around the world.¹ In 1991, the Huntington Library in San Marino, California, caused an international sensation by making photographs of the Scrolls public.² In 1993, an Israeli District Court found an American editor who had published an Israeli scholar's reconstruction of a Scroll guilty of copyright infringement.³ Later that same year, two American professors were threatened with a similar law suit when they announced their intention of doing original Scroll research which had the potential of being duplicative of portions of the reconstruction.⁴

While best illustrated by the Dead Sea Scrolls controversy,⁵ the fundamental question is broader: Should scholars have a right of access to items of historic importance, particularly where doing so does not impinge on the ownership right in the item itself?

In Section I of this article, I will describe the events that led to the current controversy. In Section II, I will discuss whether the content of historic documents can be classified as cultural property. In Section III, I will consider whether control of the content of these documents inter-

1. Charles Fenyvesi, *Washington Whispers*, U.S. NEWS & WORLD REP., Oct. 7, 1991, at 22.

2. Larry Witham, *The Scuffle Over the Scrolls*, WASH. TIMES, Apr. 21, 1993, at E1, E2.

3. *Qimron v. Shanks*, 3 [5753-1993] Pesakim shel Bete ha-Mishpat ha-Mehoziyim be Yisrael [Judgments of the District Courts of Israel] [P.M.] 10 (D. Jerusalem 1993) (copies of the official report and of an unofficial translation of the slip opinion on file with the *Michigan Journal of International Law*. The translation will be cited as a parallel source.). The decision is currently on appeal to the Israeli Supreme Court; the appeals will probably not be heard before 1996 or 1997. Letter from Shanah Glick, Clerk to Justice Dalia Dorner, Israeli Supreme Court, to Jeffrey Dine, Note Editor, *Michigan Journal of International Law* (received Mar. 15, 1995) (on file with the *Michigan Journal of International Law*).

4. Jonathan Groner, *Dispute Over Sacred Scrolls Lands in U.S. Court*, LEGAL TIMES, Sept. 20, 1993, at 2.

5.

[T]he suppression of academic information for the benefit of a few against the interests of the many is the norm — not the exception [in museums and libraries]. Ancient documents have remained in the iron grip of all sorts of "cartels" all over the world — in many cases far longer than the Dead Sea Scrolls.

Bruce Zuckerman, *Dead Sea Scrolls and the Future*, FOLIO (Ancient Biblical Manuscript Center for Preservation and Research, Claremont, Cal.), Fall 1991, at 5 (on file with the *Michigan Journal of International Law*).

feres with intellectual freedom. In Section IV, I will discuss the intellectual property arguments raised by owners and interpreters of the Scrolls. Finally, in Section V, I will propose standards for access to, and preservation of, historic documents.

I. THE HISTORY OF THE DEAD SEA SCROLLS CONTROVERSY

The story of the discovery and study of the Dead Sea Scrolls is high drama — rife with mystery, international intrigue, professional jealousy, political tension, conspiracy, and deceit.

A. *Discovering, Studying, and Publishing the Scrolls*

The desert caves of Judea have the perfect microclimate for the preservation of documents, a fact which may have been apparent to the ancient peoples who used the caves for scroll storage. Scrolls have been discovered in these caves throughout the centuries,⁶ and have generally ended up in the hands of private collectors.⁷

The documents known as the Dead Sea Scrolls consist of several hundred scrolls found over a period of years in caves near the Dead Sea.⁸ The Scrolls contain copies of Biblical text and of sectarian documents such as laws, community rules, letters, and commentaries.⁹ Many of these sectarian documents relate to people and events mentioned in the Bible.

The first of the Dead Sea Scrolls were discovered in 1947 in a cave in a West Bank cliff face overlooking the Jordan River and the Dead Sea, near the ruins of Qumran. This remote area between Jerusalem and Jericho was frequented only by Bedouin herdsmen, and it was one of these, Muhammad edh-Dibh, who discovered at least three leather

6. MICHAEL BAIGENT & RICHARD LEIGH, *THE DEAD SEA SCROLLS DECEPTION* 228–30 (1991).

7. For example, a 19th century antiquities dealer committed suicide when a scroll he had recovered from the Judean desert was declared a forgery by a rival. The scroll eventually was offered for sale to private collectors by a London bookseller. *Id.* at 230.

8. See generally ROBERT EISENMAN & MICHAEL WISE, *THE DEAD SEA SCROLLS UNCOVERED* (1992).

9. Every Book of the Hebrew Bible, except the Book of Esther, is represented in the Dead Sea Scrolls fragments. The sectarian material consists of psalms, hymns, legal texts, rules, letters, commentaries and pseudepigrapha. Hershel Shanks, *Of Caves and Scholars: An Overview*, in *UNDERSTANDING THE DEAD SEA SCROLLS* xv, xxi (Hershel Shanks ed., 1993) [hereinafter *UNDERSTANDING*].

Scrolls in a cave while he was searching for a lost goat.¹⁰ His tribesmen returned with him to the site and discovered perhaps four more intact Scrolls¹¹ and many fragments. The Bedouin contacted a Christian dealer in antiquities known as "Kando," who, in addition to trying to help the Bedouin sell their Scrolls to various Jewish, Syrian, and Jordanian parties, took the information on the cave location and did some clandestine excavations of his own, unearthing further fragments.¹² Under the laws of the British mandate in Palestine, private ownership of the Scrolls would have been prohibited, and it was perhaps this, in addition to doubts about the authenticity of the Scrolls, which made potential buyers hesitant.¹³ In any case, some of the Scrolls were taken to a perceived better market in the United States, where they were published, and were eventually offered for sale in a classified advertisement in the Wall Street Journal.¹⁴

Along the way, some Scrolls and Scroll fragments were purchased by private collectors,¹⁵ but in 1949 the Department of Antiquities for Transjordan and Arab Palestine, in concert with the École Biblique et Archéologique Française, a Roman Catholic center for Biblical scholarship located in Jordanian East Jerusalem, began the process of acquiring as many Scrolls and Scroll fragments for study as possible.¹⁶ To do so, they encouraged the Bedouin to explore more caves, and eventually forced the Bedouin to reveal the cave locations.¹⁷

10. BAIGENT & LEIGH, *supra* note 6, at 6 (noting that the tale "is probably not entirely accurate"); see also A. DUPONT-SOMMER, *THE DEAD SEA SCROLLS* 9 (E. Margaret Rowley trans., 1952); Harry T. Frank, *Discovering the Scrolls*, in UNDERSTANDING, *supra* note 9, at 3, 3-7; Geza Vermes, *The War Over the Scrolls*, N.Y. REV. OF BOOKS, Aug. 11, 1994, at 10.

11. The total number of Scrolls found and their final disposition is uncertain. See BAIGENT & LEIGH, *supra* note 6, at 7; Frank, *supra* note 10, at 7.

12. BAIGENT & LEIGH, *supra* note 6, at 7.

13. A. POWELL DAVIES, *THE MEANING OF THE DEAD SEA SCROLLS* 17 (1956).

14. The ad read:

**MISCELLANEOUS FOR SALE
THE FOUR DEAD SEA SCROLLS**

Biblical manuscripts dating back to at least 200 B.C. are for sale. This would be an ideal gift to an educational or religious institution by an individual or group.

Frank, *supra* note 10, at 18. These Scrolls were eventually purchased by Israeli interests and returned to Israel. See BAIGENT & LEIGH, *supra* note 6, at 24.

15. Some may still be in the hands of private collectors who have chosen to remain silent about their acquisitions rather than risk losing them under current UNESCO prohibitions of the private ownership of national cultural property.

16. G. LANKESTER HARDING, *THE ANTIQUITIES OF JORDAN* 187-89 (1959).

17. One author states that a Bedouin was forced to reveal the cave location after being kidnapped by the director of the Palestine Archaeological Museum. BAIGENT & LEIGH, *supra* note 6, at 18.

The information that was coerced from the Bedouin eventually led to the discovery of more, equally important, Scrolls in the caves at Wadi Murabba't, south of Qumran. In 1952, members of the *École Biblique* found an unusual scroll made of a rolled sheet of severely oxidized copper.¹⁸ The *École Biblique* scholars were eager to analyze what became known as the Copper Scroll, but since doing so would require slicing the Scroll open, the Jordanian government refused to allow analysis.¹⁹ Three years later, the Jordanian government relented and the Copper Scroll was opened in a laboratory in Britain.²⁰ The Copper Scroll was found to be a list of the locations of various items of hidden treasure, which some scholars believe were removed from the Temple of Jerusalem and secreted prior to the destruction of the Second Temple by Roman invaders.²¹ Vendyl "Texas" Jones, an American evangelist and Bible scholar (and the apparent model for Steven Spielberg's "Indiana Jones"), has spent years searching for the Copper Scroll treasure, which he believes also includes the Ark of the Covenant.²²

In 1952, a large number of other Scrolls were found near Qumran in a location now known as Cave Four.²³ These and other Scrolls were eventually turned over to the Palestine Archaeological Museum,²⁴ administered by the *École Biblique* and other international archaeological groups, who appointed an international group of scholars to work on the scrolls (hereafter, the "international team").²⁵ Jordan nationalized the Scrolls in 1961 and the Palestine Archaeological Museum in 1966.²⁶ As a result of the Six Day War in 1967, the Museum and its collection became the property of Israel.²⁷ Another Scroll, known as the Temple Scroll, was added to the collection in 1967 when Israeli authorities interrogated the antiquities dealer Kando for several days until he agreed to release to them a Scroll that he had hidden for many years.²⁸

18. JOHN M. ALLEGRO, *THE TREASURE OF THE COPPER SCROLL* 20 (1960).

19. *Id.* at 22.

20. *Id.* at 22–23.

21. Yitzhak Oked, *Unsung Texan Hero of Qumran*, JERUSALEM POST, Mar. 9, 1989, at 5.

22. Sarah Helm, *Vendyl Jones at Bay in the Temple of Gloom*, INDEPENDENT (London), May 24, 1992, at 12.

23. ANNE W. BRANSCOMBE, *WHO OWNS INFORMATION?* 123 (1994).

24. It is now the Rockefeller Museum. Shanks, *supra* note 9, at xxiv.

25. BRANSCOMBE, *supra* note 23, at 123–24.

26. *Id.* at 126.

27. *Id.*

28. Apparently, Kando had earlier been attempting to sell the Scroll on the black market for the equivalent of one million dollars. Witham, *supra* note 2, at E2.

The group of scholars from the École Biblique and other organizations that had administered the Palestine Archaeological Museum prior to the war continued to do so under Israeli government and continues to do so today.²⁹ The international team established a policy early on under which no outsiders would be allowed access to the Scroll materials. While under Jordanian rule, the international team consisted only of Christian scholars,³⁰ many of whom were clerics, and the leader of which was publicly anti-Semitic.³¹ Most of these same individuals made up the international team under Israeli rule, although the team eventually became slightly more ethnically and religiously diverse.³²

Those Scrolls in the possession of Israeli and American scholars who were not part of the international team were analyzed and published within a few years of their discovery.³³ According to some estimates, more than seventy-five percent of those Scrolls controlled by the international team, however, remained unpublished for almost forty years.³⁴ While the reason for this delay will probably never be known, theories abound — ranging from incompetence to conspiracy. Because the Scrolls represent the thinking of an era when Judaism and Christianity were diverging, some argued that the Scrolls might contain information that would threaten Christian orthodoxy and would be anathema to the Christian scholars who made up the international team.³⁵ Once the Scrolls were revealed, however, it became clear that they had little to do with Christianity.³⁶

29. When members of the team die or retire they usually name their own successors. Shanks, *supra* note 9, at xxvii.

30. The Jordanian agreement which formed the international team apparently stipulated that no Jews were to work on the project. Keith Botsford, *Scrolls Better Dead Than Read?*, INDEPENDENT (London), Oct. 12, 1991, at 29.

31. BAIGENT & LEIGH, *supra* note 6, at 26, 31.

32. However, the new team leader, John Strugnell, was also extremely critical of Judaism. In a November 9, 1990 interview he stated, "Judaism . . . is originally racist . . . it's a folk religion; it's not a higher religion." Avi Katzman, *Interview with Chief Scroll Editor John Strugnell*, in UNDERSTANDING, *supra* note 9, at 260.

In the same interview, Strugnell stated, "For me the answer [to the Jewish problem] is mass conversion." *Id.* Strugnell has also said, "What bothers me about Judaism is the very existence of Jews as a group." Abraham Rabinovich, *In the Name of the Law*, JERUSALEM POST, July 1, 1994 (Weekend), at 6.

While his interview in the Israeli newspaper *Ha'aretz* led to his removal as team leader, he was allowed to keep his Scroll assignment. Katzman, *supra*, at 259; James A. Sanders, *What Can Happen In a Year?*, BIBLICAL ARCHAEOLOGIST, Mar. 1992, at 37.

33. Shanks, *supra* note 9, at xxiii.

34. BAIGENT & LEIGH, *supra* note 6, at 37-38. See BRANSCOMBE, *supra* note 23, at 124 (98 of 500 texts had been published by the early 1990s).

35. See generally BAIGENT & LEIGH, *supra* note 6.

36. Vermes, *supra* note 10, at 12. There may be more Scrolls that have not been photo-

Kenneth and Elizabeth Bechtel, and the Bechtel Corporation, had, over the years, provided significant funding for Scroll acquisition projects. In 1980, Mrs. Bechtel persuaded the Israeli government to allow her to have the Scrolls photographed and the photographs stored as a precaution against deterioration or other harm coming to the Scrolls themselves.³⁷ Mrs. Bechtel financed the project and brought one set of photographs to the U.S., where they were deposited at the Ancient Biblical Manuscript Center in Claremont, California, of which Mrs. Bechtel was a founder.³⁸ Apparently, the Israeli authorities permitted the photography with the understanding that those photos depicting unpublished material would be placed in sequestered storage in the Center's underground vault.³⁹ It is now clear that a second set of photographs was made from the master set. When Mrs. Bechtel had a falling out with the Center in 1982, she entered into an agreement with the Huntington Library in San Marino, California, under which they were to store this second complete set of photographs.⁴⁰ According to the Library, there was no express confidentiality agreement; rather, Mrs. Bechtel and the Library had an "understanding that the photographs were to be released for scholarship."⁴¹

After the international team repeatedly rejected over the decades requests to view the Scrolls, in the 1980s Biblical scholars began to publicly criticize the international team's failure to publish and the Israeli government's failure to wrest control of the Scrolls from the team.⁴² At about the same time, "bootlegged" copies of a few Scroll fragments began to appear.

In 1989, Professor Robert Eisenman of California State University, Long Beach, and Professor Phillip Davies of Sheffield University, England, began the process of filing suit in the Israeli High Court in an attempt to prevent Israel from renewing the international team's contract, and to force the international team to make the Scrolls available to

graphed or revealed, however. For years, there have been rumors of clandestine purchases of black market scrolls by the international team. Hershel Shanks, *Ousted Chief Scroll Editor Makes His Case*, *BIBLICAL ARCHAEOLOGY REV.*, July-Aug. 1994, at 46.

37. Huntington Library, *The Huntington and the Dead Sea Scrolls* (1993) (library brochure; on file with the *Michigan Journal of International Law*).

38. James A. Sanders, *Dead Sea Scrolls Access: A New Reality*, *FOLIO* (Ancient Biblical Manuscript Center for Preservation and Research, Claremont, Cal.), Fall 1991, at 1.

39. *Id.* at 3.

40. Huntington Library, *supra* note 37.

41. Telephone Interview with Dr. William Moffett, Director of the Huntington Library, Aug. 18, 1994 (on file with the *Michigan Journal of International Law*) [hereinafter Moffet Interview].

42. *See, e.g., The Vanity of Scholars*, *N.Y. TIMES*, July 9, 1989, § 4, at 26.

other scholars.⁴³ Professors Eisenman and Davies were particularly concerned that, without an opportunity to analyze either the Scrolls themselves or photographs of the Scrolls, scholars would be forced to accept the "consensus" opinion of the international team when, and if, the team's analyses were finally published.⁴⁴ Subsequent release of Scroll material caused Professors Eisenman and Davies to abandon their suit.

In early 1991, the Israeli government gave a complete set of Scroll photographs to Oxford University for study, with the understanding that access should be restricted to members of the newly formed Oxford Scroll research group at the Oxford Centre for Postgraduate Hebrew Studies.⁴⁵

In September of that year, Professor Ben-Zion Wacholder and a graduate student, Martin Abegg, of Hebrew Union College in Ohio, created a computer-generated reconstruction of the Scrolls⁴⁶ by using a concordance created by the international team decades earlier.⁴⁷ This reconstruction was described as "intellectual thievery" by a member of the international team.⁴⁸

Two weeks later, the Huntington Library offered all scholars access to the Bechtel set of Scroll photographs.⁴⁹ Apparently, neither the international team nor Israel was aware of the existence of this set of photographs and promptly demanded that they be turned over to the team. The Library refused, and members of the Israel Antiquities Authority threatened suit.⁵⁰ Shortly after the photographs were made public, however, the Israeli government disavowed any intent to sue, and the Israel

43. BAIGENT & LEIGH, *supra* note 6, at 79.

44. *See id.* at 74-83.

45. *Id.* at 223; BRANSCOMBE, *supra* note 23, at 128.

46. A PRELIMINARY EDITION OF THE UNPUBLISHED DEAD SEA SCROLLS: THE HEBREW AND ARAMAIC TEXTS FROM CAVE FOUR (Ben-Zion Wacholder & Martin G. Abegg reconstructors & eds., 1991).

47. The concordance listed each word in the fragmentary text, along with the document and line in which it was found, and the words adjacent to it. Botsford, *supra* note 30, at 29.

48. Shanks, *supra* note 9, at xxxi.

49. "We took a political stand. We broke the protocols deliberately in the assurance that in a court of public opinion, if not of law, we would be found to have done the right thing." Moffett Interview, *supra* note 41.

50. Abraham Rabinovich, *Legal Action Threatened Over Scrolls Photos*, JERUSALEM POST, Sept. 24, 1991, available in LEXIS, News Library, Jpost File (microform never issued) (quoting the Director of the Israel Antiquities Authority as saying "[i]f they do this it would be a clear legal and ethical transgression. . . . We have informed them that if this occurs we will weigh action.").

Antiquities Authority retracted their demand for the photographs.⁵¹ The Israel Antiquities Authority attempted to retain some control over use of the photographs by insisting that the Library's release be conditioned on an understanding that the international team would be entitled to the *editio princeps*,⁵² a request which the Library ignored.⁵³

B. *The Copyright Suits*

Hershel Shanks, editor of the *Biblical Archaeology Review* and outspoken critic of the international team's handling of the Scrolls, published a two-volume facsimile edition of the Scrolls in November of 1991.⁵⁴ In Shanks's introduction to the facsimile edition, he reproduced 120 lines of a 132-line international team reconstruction of a portion of one of the Scrolls known as the MMT,⁵⁵ along with anti-international team invective.

Various members of the international team had worked on the MMT document for more than thirty years. Deciphering the 60 fragments of the MMT required expert knowledge of the *Halacha*.⁵⁶ Professor Elisha Qimron of Ben-Gurion University, a philologist who had acquired expertise in the *Halacha*, joined the group working on the MMT in 1980⁵⁷ and put together a composite text of the team's reconstruction and his analysis of the likely content of missing text.⁵⁸ Copies of portions of the 300 page composite text of the MMT (including parts of the 132-line reconstruction) had been distributed to other scholars and reproduced without permission in scholarly journals during the late 1980s.⁵⁹

51. Daniel Williams & Russell Chandler, *Israeli Panel Shifts Stand on Scrolls*, L.A. TIMES, Sept. 26, 1991, at A3, A32.

52. Right of first publication.

53. Shanks, *supra* note 9, at xxxii.

54. A FACSIMILE EDITION OF THE DEAD SEA SCROLLS (Robert Eisenman & James M. Robinson eds., 1991).

55. "Migsat Ma'aseh ha-Torah" or "Some Rulings Pertaining to the Torah." *Biblical Archaeology Soc'y v. Qimron*, [1992-1994] Copyright L. Dec. (CCH) ¶ 27,065, at 26,240 (E.D. Pa. 1993).

56. *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, 15-16, trans. at 3-4. (D. Jerusalem 1993). The *Halacha* ("way of life") is the corpus of Jewish law.

57. Professor Qimron was the first Jewish member of the team. Rabinovich, *supra* note 32, at 7.

58. Asher F. Landau, *The Dead Sea Scrolls and the Recognized Rules of Copyright*, JERUSALEM POST, Apr. 11, 1993, available in LEXIS, News Library, Jpost File (microform never issued).

59. [1992-1994] Copyright L. Dec. (CCH) ¶ 27,065, at 26,241. The full text is printed in ELISHA QIMRON & JOHN STRUGNELL, 10 DISCOVERIES IN THE JUDAEAN DESERT: QUMRAN CAVE 4 V, MIQSAT MA'ASE HA-TORAH 44-63 (1994). For an authorized reproduction of the

Less than ten weeks after the publication of the facsimile edition, Professor Qimron filed a copyright infringement suit in Israel against Hershel Shanks and the Biblical Archaeology Society for an injunction and damages.⁶⁰ Shanks and the Society brought a declaratory judgment action to decide the copyright infringement issue in the United States District Court for the Eastern District of Pennsylvania in September, 1992.⁶¹ Mr. Shanks eventually dropped the American suit.⁶²

On March 30, 1993, the Jerusalem District Court awarded Professor Qimron the equivalent of \$55,000 in statutory and mental anguish damages in his copyright infringement suit against Shanks.⁶³ Professor Qimron's request for the equivalent of \$250,000 in damages was reduced by the court when it found that Professor Qimron had failed to show that the unauthorized publication had caused him actual pecuniary loss.⁶⁴

Two months later, Shanks appealed to the Israeli Supreme Court.⁶⁵

In August of 1993, Professor Ben-Zion Wacholder of Hebrew Union College and Professor Martin Abegg of Grace Theological Seminary asked the United States District Court for the Eastern District of Pennsylvania for a declaratory judgment that a Scroll project they were working on would not infringe Professor Qimron's copyright.⁶⁶ The suit⁶⁷ was prompted by a letter that Professors Wacholder and Abegg received from Professor Qimron's attorneys in February of 1993, threatening suit if any use was made of Professor Qimron's reconstructed text. Professors Wacholder and Abegg have said that they do not intend to

full 132-line text, see *For This You Waited 35 Years: MMT as Reconstructed by Elisha Qimron and John Strugnell*, BIBLICAL ARCHAEOLOGY REV., Nov.-Dec. 1994, at 56 [hereinafter *For This You Waited 35 Years*].

60. *Qimron v. Shanks*, 3 [5753-1993] P.M. at 17, 19, trans. at 6, 14 (Shanks's book published in November, 1991; Qimron filed suit on January 14, 1992) (translation erroneously states publication date as November, 1990). The United States District Court apparently erred in stating that Qimron filed in Israel on November 14, 1991. [1992-1994] Copyright L. Dec. (CCH) ¶ 27,065, at 26,241.

61. [1992-1994] Copyright L. Dec. (CCH) ¶ 27,065, at 26,240.

62. *Dateline*, LEGAL INTELLIGENCER, July 16, 1993, at 5.

63. *Qimron is Author of MMT Reconstruction, Jerusalem Court Holds*, BIBLICAL ARCHAEOLOGY REV., May-June 1993, at 69.

64. Abraham Rabinovich, *Court Awards Dead Sea Scrolls Translator NIS 100,000*, JERUSALEM POST, Mar. 31, 1993, available in LEXIS, News Library, jpost File (microform never issued).

65. Abraham Rabinovich, *Dead Sea Scrolls Publisher Appeals Conviction for Copyright Violation*, JERUSALEM POST, June 4, 1993, at 16. Shanks's appeal is still pending. See *supra* note 3.

66. Groner, *supra* note 4, at 2; Wacholder v. Qimron, No. 93-4097 (E.D. Pa. filed July 29, 1993).

67. As of this writing, the parties are engaged in settlement negotiations.

reproduce Qimron's work, but rather intend to fill in the missing fragments of the MMT with their own original research.⁶⁸ However, they have seen Professor Qimron's work and do not believe that they can purge it from their minds.⁶⁹ Further, their work is likely to be similar since it will be driven by the context of the existing fragments.

II. HISTORIC DOCUMENTS AND THEIR CONTENTS AS CULTURAL PROPERTY

A. Who Owns the Scrolls?

The Dead Sea Scrolls themselves are the property of the state of Israel. Some of the Scrolls were found in Israeli-controlled areas, others were ultimately sold to the government of Israel, and some came to Israel as the spoils of war. Few today seriously dispute Israel's property right in the Scrolls themselves.⁷⁰ And yet, an argument can be made that the Scrolls have other, or additional, owners; specifically, that those with a cultural interest in the Scrolls are entitled to a property interest in them as well. In a politically turbulent, multicultural area like the Middle East, however, many groups may have some degree of cultural interest in the Scrolls.

Historically, entities with political power in any region have exercised that power by appropriating the region's cultural treasures. It is only when political power, or popular sentiment, shifts that repatriation becomes possible. Between 1801 and 1812, Thomas Bruce, 7th Earl of Elgin, removed what became known as the Elgin Marbles from the Parthenon in Greece.⁷¹ At the time, Greece was occupied by the Ottoman Turks, from whom Lord Elgin bought the Marbles for transport to England. For a century, the ownership of the Marbles was undisputed.⁷² In 1983, however, the Greek government, led by the then-Minister of Culture (the late Melina Mercouri), began a campaign for the return of

68. Groner, *supra* note 4, at 2.

69. *Id.*

70. The Jordanian antiquities authorities have argued over the years that the Scrolls should be returned to Jordan.

71. Richard Brilliant, *Making the Case for Britain's Claim to the Elgin Marbles*, N.Y. TIMES, Apr. 8, 1984, § 2, at 33.

72. During parliamentary debate on the question of purchasing the Marbles from Elgin in 1816, the British government determined that Lord Elgin held good title under British property law. *Id.*

the Marbles, on the theory that they are the cultural property of the Greek people.⁷³

Throughout the Napoleonic Wars, the British and French removed vast quantities of antiquities from Egypt.⁷⁴ The Egyptian government has since made a number of attempts to effect the repatriation of these objects as Egyptian cultural property.⁷⁵

In America, the white settlers who took the land of the Native American also took artifacts, ceremonial items, and human remains, many of which ended up in the nation's museums. While occasionally these items were purchased from willing Native American sellers, one view is that cultural property is, by definition, market inalienable.⁷⁶ Federal laws have been passed in recent years that mandate the repatriation of many Native American ceremonial items and most human remains.⁷⁷

When the state of Israel was formed and expanded, it supplanted local cultures and governments and came into the possession of many archaeological treasures. While these treasures may be viewed as the cultural property of the supplanted groups, the history of the region is such that the governance of Israel is only the latest in a long line of changes of control.⁷⁸ After the 1967 war, Israel argued that, because it was merely reasserting the ancient right of the Jewish people to their homeland, all cultural property gained by occupation was, in effect, being repatriated. This has only been found to be true with regard to property that cannot definitely be attributed to another extant culture.⁷⁹

73. Gregory Jensen, *Melina Mercouri's Demand for Elgin Marbles Opens Pandora's Box for World's Art Museums*, UPI, Jan. 29, 1984, available in LEXIS, News Library, UPI File.

74. See generally PETER FRANCE, *THE RAPE OF EGYPT* (1991).

75. E.g., *Egypt Seeks Return of Sphinx Remnants*, UPI, Oct. 31, 1981, available in LEXIS, News Library, UPI File; Andrew Evans, *Minister Dismisses Call to Return Rosetta Stone*, Press Ass'n Newsfile, Mar. 22, 1994, available in LEXIS, News Library, Panews file.

76. See, e.g., John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989).

77. See, e.g., Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (Supp. V 1994) [hereinafter Repatriation Act] (vesting ownership or control of "Native American cultural items" and human remains in descendants or tribes, and requiring Federal agencies and museums to inventory holdings and repatriate such items upon request).

78. For example, the government of Jordan, which probably has the second strongest argument (after Israel's) for Scroll ownership, occupied the West Bank under British mandate or suzerainty only from 1923 to 1946. See ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 43 (1978). Until 1967, Jordan's sovereignty over the area was recognized only by Great Britain and Pakistan. *Id.* at 78. See also DAVID FROMKIN, *A PEACE TO END ALL PEACE* (1989) (discussing history of region to 1922).

79. See generally Karen J. Detling, Note, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41 (1993); Adam Roberts, *Prolonged Military Occupation: the Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

The Hague Convention of 1954⁸⁰ defines cultural property as: "movable or immovable property⁸¹ of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular."⁸² While the Hague Convention assumes that cultural property is an absolute, the UNESCO Convention⁸³ is relativistic, allowing each government to determine which cultural objects it wishes to describe as cultural property.⁸⁴

While it would appear that the UNESCO standard simplifies the cultural property question by allowing self-designation, it is not always clear that a given state should have the right to control all cultural objects found within its borders. For example, under UNESCO, the United States might describe Hopi kachinas as American cultural property, even though the Hopi nation would, certainly, dispute that view.

If the term "cultural property" is meant to refer to the culture of a people as defined by its geopolitical borders, the question of the ownership of the Scrolls becomes less clear.

The ownership of the land on which the Scrolls were found has been in dispute for much of this century, and, at a deeper level, has been disputed for millenia.⁸⁵ The Bedouin of the Ta'amireh tribe have used this grazing land for centuries. Arguably, the Scrolls are the cultural property of the Bedouin people, having been found by them on their ancestral land.

80. Convention for the Protection of Cultural Property in the Event of Armed Conflict, done May 14, 1954, 249 U.N.T.S. 240 (1956) [hereinafter Hague Convention].

81. Under the Hague Convention, this property includes "manuscripts, books and other objects of artistic, historical or archaeological interest; as well as . . . reproductions of the property defined above." *Id.* art 1(a), at 242.

82. *Id.* The Hague Convention protects cultural property during wartime, prohibiting the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and also applies to peacetime trafficking in cultural property unlawfully seized during armed conflict. *Id.* arts. 2-14, at 242-52; Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 94 (1993).

Interestingly, the full protection of the Hague Convention has only been invoked once — when Israel occupied the archaeologically rich areas of Syria, Jordan, Lebanon, and Egypt during the 1967 war. See Detling, *supra* note 79, at 41.

83. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted Nov. 14, 1970, S. EXEC DOC. NO. 29, 92d Cong., 2d Sess. 27, 27-28 (1972), 823 U.N.T.S. 231, 234-36 [hereinafter UNESCO Convention] (defining cultural property as, *inter alia*, "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, . . . history . . . or science and which belongs to the following categories: . . . (c) products of archaeological excavations . . . (h) rare manuscripts and incunabula.").

84. UNESCO focuses on private conduct, principally during peacetime. Phelan, *supra* note 82, at 94-95.

85. See generally BARBARA W. TUCHMAN, *BIBLE AND SWORD* (1956).

When the Scrolls were discovered, the land on which they were discovered was Jordanian territory.⁸⁶ The international team was first formed under the auspices of the Jordanian government, and the Scrolls were under Jordan's control for twenty years. Shortly after the Huntington Library released the Scrolls, a representative of the Jordan Antiquities Department announced that the Scrolls should be considered the cultural property of Jordan and should only be released or analyzed with the permission of its government.⁸⁷

The recent Israeli-Palestinian accord has ceded the land on which the Scrolls were found to the Palestinian people, prompting a frantic, last-minute archeological search of the area by Israeli authorities.⁸⁸ If the accord recognizes a Palestinian right to the land that predates the creation of the state of Israel in 1948, the Scrolls may be the cultural property of the Palestinian people.⁸⁹ The Palestinians may have a claim to artifacts acquired by Israel during Israeli occupation, even though the artifacts are those of a non-Palestinian culture. Both the Geneva Convention and the Hague Convention prohibit an occupying power from removing art or antiquities from the territory it occupies. For example, under the 1979 Camp David accords, Israel agreed to return to Egypt artifacts excavated from the Sinai, after they had completed their scientific analysis (the first objects were returned in 1993).⁹⁰

If the term "cultural property" is meant to refer to the culture of a people as defined by traditions, language, and religion, the ownership of the Scrolls is again unclear, in that the Scrolls represent a watershed moment in the development of two cultures. The Scrolls document the development of a Jewish sect or sects.⁹¹ One or more of these sects may have eventually become the religion now known as Christianity.⁹² For

86. Shanks, *supra* note 9, at xxiv.

87. Randa Habib, *Jordan Claims Dead Sea Scrolls*, Agence France Presse, Oct. 1, 1991, available in LEXIS, News Library, AFP File. Interestingly, the Jordanian Antiquities Authority did not make a claim for the return of the Scrolls themselves. Rather, they seemed to be attempting to designate the Scroll contents as Jordanian cultural property. *Id.*

88. Tom Hundley, *Israeli Archeologists Dig Up Controversy*, CHI. TRIB., Nov. 20, 1993, at 2.

89. In 1983, the PLO demanded the return of the Lachish collection of antiquities from ancient Palestine, held by Britain since the 1930's. See Jensen, *supra* note 73. Lachish is in the modern state of Israel, approximately 30 miles west of Qumran.

90. Hundley, *supra* note 88, at 2.

91. "The . . . Qumran sect believed that the Temple had become venal and corrupt; they had withdrawn to live in separate communities, such as . . . beside the Dead Sea." KAREN ARMSTRONG, *A HISTORY OF GOD* 71 (1993).

92. The Qumran sect is probably not a direct religious ancestor of modern rabbinic Judaism, which finds its basis in the thinking of the Pharisees. While no one is sure who the members of the Qumran sect were, the leading theories are that they were either Sadducees or

this reason the Scrolls may represent significant events in both Jewish and Christian history, and in Jewish and Christian cultures.

If a culture is defined by ethnicity, Israel has the strongest claim to the Scrolls in that the Israeli population is more likely to contain a greater percentage of direct descendants of the ethnic group of which the Scroll authors were members than any other country. Nonetheless, between emigration, immigration, invasion, and intermarriage very few people may be able to claim close genetic ties to any one small ancient culture.⁹³

Geographic, political, ethnic, or linguistic boundaries are not necessarily the best indicator of who should have the right to cultural property, however.⁹⁴ The religious and historical significance of the Scrolls may call for a broader definition of the culture to which this cultural property belongs.⁹⁵ If the Scrolls are the cultural property of the Israeli people, perhaps they are also the cultural property of all who subscribe to Judeo-Christian-Islamic traditions.⁹⁶

While the composition of the international team, made up as it currently is of Roman Catholic and Talmudic scholars, attests to the state of Israel's recognition that the Scrolls have a cross-cultural importance, the ownership of the Scrolls themselves remains with Israel alone. Some scholars have argued that items from ancient cultures should, by virtue of their antiquity, be viewed as the cultural property of all humans rather than of one particular government.⁹⁷ The Hague Convention

Essenes. See Lawrence H. Schiffman, *The Sadducean Origins of the Dead Sea Scroll Sect*, in UNDERSTANDING, *supra* note 9, at 35 (discussing theories and arguing that members of the Qumran sect were Sadducees); James C. Vanderkam, *The People of the Dead Sea Scrolls: Essenes or Sadducees?*, in UNDERSTANDING, *supra* note 9, at 50 (disagreeing with Schiffman).

93. Cf. William St. Clair, *The Marbles: How Greek?*, FIN. TIMES (London), Jan. 21, 1984, at 25 (discussing the rise of Greek nationalism and the arguments for return of the Elgin Marbles).

94.

It is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government of a nation should have power over artifacts historically associated with its people or territory.

John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1912 (1985) (footnote omitted).

95. "[A] study of objects is really a study of man." John H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 353 (1989) (quoting Milton Glaser).

96. King Hussein of Jordan made a similar comment about the cross-cultural significance of Jerusalem when he said, "sovereignty of the Holy Places belongs to the Almighty." Michael Parks, *Israel Suggests Shared Control of Holy Sites*, L.A. TIMES, July 20, 1994, at 1.

97. See, e.g., John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80

echoes this view in its Preamble, which states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."⁹⁸

Under this theory, the religious significance of the Scrolls is less important than that they represent a stage in human development common to all cultures. Presumably, if the Scrolls belong to everyone, they can belong exclusively to no one, and any government that acts as their steward must give access to the Scrolls to all interested parties.

When the Scrolls belong to all of humanity rather than to one government, it also becomes more difficult to determine which government should act as their steward. If all peoples have a claim to antiquities as part of their common heritage, there is no reason, for example, to remove the Elgin Marbles or Egyptian artifacts from the British Museum and give them to the countries that now claim them, or to remove the Scrolls from Israel. Obviously, this approach favors politically or economically powerful nations that are in a position to acquire cultural property through commerce or conquest.

B. Proper Stewardship Requires Access and Preservation

A government that acquires antiquities through looting or oppression should not be entitled to stewardship,⁹⁹ but what of a government that has acquired antiquities legitimately and fails to care for them? For example, some Native American religious objects are designed to be ceremonially destroyed or allowed to degrade naturally. If returned to the stewardship of the Native American people, the objects will be used for their intended religious purpose and lost.¹⁰⁰ If given over to the

AM. J. INT'L L. 831 (1986); MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 74 (1985).

98. Hague Convention, *supra* note 80, at 240. UNESCO, however, takes the view that cultural property belongs to its source nation. The U.N. General Assembly, the Council of Europe, and UNESCO are dominated by nations which support cultural nationalism and, therefore, prefer the UNESCO description. Merryman, *supra* note 94, at 1893. Cultural nationalism can have unfortunate and even tragic consequences when cultural property is not well cared for because those countries that are rich in artifacts are often economically depressed or politically weak. On the other hand, those countries that are poor in cultural property but economically wealthy, such as the U.S., use the Hague approach to justify using their wealth to denude artifact-rich countries of their cultural property. The UNESCO approach makes it slightly more difficult for artifact-rich countries to bargain away their heritage, albeit, in some cases, at the expense of the preservation of that heritage.

99. See, e.g., Hague Convention art. 4(3), *supra* note 80, at 244.

100. Of course, there is the argument that if the object is not being used for its intended religious purpose, it is not, in fact, being properly preserved. See Bowen Blair, *Indian Rights: Native Americans Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 129 (1979).

stewardship of a museum, for example, the object will be preserved and studied.¹⁰¹

Because of the strong Western cultural bias in favor of science and logic, and the concomitant bias against religious mysticism and magic, Western nations seldom consider religious uses (particularly non-Western religious uses) to be superior to scientific uses or preservation. An interesting twist to the conflict between use and preservation occurred with regard to the Copper Scroll, where religion and preservation were allied against science. The Copper Scroll was so corroded that the only way that it could be read was to slice it into segments.¹⁰² From the standpoint of scholarship, there was no question but that the Scroll must be read. From a religious and curatorial standpoint, however, the Scroll was more significant as a whole artifact of the Second Temple.¹⁰³

In most instances, however, science and preservation are on the same side and are consistently viewed as more important than religious or cultural use. In the United States, for example, the moral and constitutional right of Native Americans to use objects or land for religious purposes has been overridden by what the courts perceive to be superior non-religious uses.¹⁰⁴

Similarly, one of the strongest arguments in favor of the British Museum's retention of the Elgin Marbles is that the Museum's superior ability to preserve the Marbles overrides the patriotic and emotional reasons for returning them to Greece.¹⁰⁵ The Elgin Marbles in the British Museum are in better condition than are the remaining marbles at the

101. For an analysis of this conflict between the goal of preservation and Native American religious and cultural interests, see Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

102. See generally ALLEGRO, *supra* note 18.

103. Similarly, in the controversy over the authenticity of the Shroud of Turin, scientific (and some religious) interests were willing to sacrifice a small fragment of the Shroud for carbon dating. Other religious interests argued for the preservation of the Shroud as found. See Thomas O'Toole, *Age Test Called Crucial to Shroud of Turin Study*, WASH. POST, Nov. 21, 1979, at A3.

104. "To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving the . . . resource from further decay and erosion . . . and in improving public access to this unique geological and historical landmark." *Crow v. Gullet*, 541 F. Supp. 785, 794 (D.S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983). See also *Dedman v. Board of Land and Natural Resources*, 740 P.2d 28 (Haw. 1987) (holding that geothermal tapping could continue despite objections from Pele worshippers), *cert. denied* 485 U.S. 1020 (1988).

105. Melina Mercouri was unimpressed, saying, "[t]he British say they have saved the Marbles. Well, thank you very much. Now give them back." Susan Crosland, *Melina and the Marbles*, SUN. TIMES (London), May 24, 1983, at 15.

Parthenon after years of exposure to air pollution and the elements.¹⁰⁶ Even today the Greek government could not afford to preserve the Marbles as well as they are being preserved in England.¹⁰⁷

If physical preservation is of paramount concern, Israel deserves stewardship of the Scrolls; few governments could have done a better job of protecting the Scrolls from damage than has the Israeli government. The Temple Scroll, for example, is housed in the purpose-built Shrine of the Book, in an environmentally controlled container designed to descend into a blast-proof chamber should Jerusalem be attacked. While under Jordanian control, however, the other Scrolls were not well cared for and suffered significant deterioration.¹⁰⁸

However, protection from physical harm is not the only criterion of good stewardship. If it were, Israel could not be condemned if it had discharged the international team and decided that no one would be permitted to see, study, or photograph the Scrolls, despite their importance to millions of people. Keeping the Scrolls from the world would be similar to allowing an important ceremonial object to degrade, in that the chief problem of physical destruction is that it makes the object unavailable for enjoyment or study.¹⁰⁹

Frequently, the value of cultural property is not intrinsic. An Iron Age tool has value, not because of its composition, but because of its rarity and because of what it tells us about its context. An artifact that cannot inform, either because of hoarding or destruction, is not an artifact, it is merely an object.¹¹⁰ Jordan's and Israel's failure to make the Scrolls accessible made the Scrolls' value only theoretical. For those forty-five years, from the perspective of the rest of the world, the Scrolls might as well have been so much ancient shoe leather.

106. Merryman, *supra* note 94, at 1907.

107. See Brilliant, *supra* note 71, at 33-34 (Parthenon suffering damage from air pollution); Merryman, *supra* note 94, at 1917 (Marbles have fared better in England than they would have in Greece); Phillip Spyropoulos, *Should Preservation Count for Everything?*, N.Y. TIMES, Apr. 10, 1994, § 4, at 18 (superior ability to preserve no justification for retaining possession).

108. See *infra* text accompanying notes 235-38.

109. "[Another] international interest [in cultural property] is distributional; a concern for an appropriate international distribution of the common cultural heritage, so that all of mankind has a reasonable opportunity for access to its own and other people's cultural achievements." Merryman, *supra* note 94, at 1919.

110. "Every lost opportunity for further discovery and study of cultural objects retards the growth of knowledge about ourselves." Merryman, *supra* note 95, at 359.

III. CONTROL OF THE CONTENT OF HISTORIC DOCUMENTS AS INTERFERENCE WITH INTELLECTUAL FREEDOM

Despite their significance to the great Western religions, the Dead Sea Scrolls probably provoke only mild interest in the practitioners of these religions. In the modern world, even among the religious, the Scrolls are not vitally important. It is easy, therefore, to forgive the international team's secretiveness and proprietariness. But what if the Scrolls related to something about which modern Western civilization cares deeply, for example, hitherto unknown physical laws that could make profound changes in cosmology or physics? We might then be inclined to be less sanguine about their control by one body for so many years with so little result. We might then feel that we had a "right" to have greater access to them.

Should one group or person be able to exert a proprietary interest in public information, or is such information everyone's birthright? Historically, controlling access to information has been a way to control people, socially and politically. When white slaveholders made it illegal to teach slaves to read or write, they were doing so because, with those skills, a slave gained the power to understand and change his position in the world. When a fundamentalist religious group today attempts to ban a book from a school library, it does so because it believes that reading the book will cause children to think in a way it finds offensive. Partial or biased access to information may be as misleading and damaging as no access at all. When the government of the Soviet Union restricted access to news of world events, they did so because that access might have given their citizens a basis for comparison with other cultures, which might have proven to be unfavorable. When our government understates casualty statistics in wartime, it does so because it fears that the truth will weaken its citizens' support for the war effort.

When governments have tried to limit access to information, academia has traditionally been a bastion of free access. From medieval monastic libraries preserving heretical knowledge in the face of societal fear and establishment distrust, to the academics who taught unpopular political theories and suffered in Soviet gulags or were blacklisted during the McCarthy era, there is a long tradition in the academy of safeguarding and promulgating knowledge.

A. *The Duty to Publish*

Academics live in a world that worships knowledge as its highest god. And because historical or scientific fact is the groundwork on which knowledge is built, academics also worship fact. It is traditional in academia to share factual information, and to share the knowledge gleaned from these facts; generally, the only thing given in exchange for the use of this information is attribution.¹¹¹ The multitude of scholarly journals in every discipline are testimony to the academic's belief that information, to be valuable, must be shared. No matter how astute one's personal or private observations are, in the academic world they only gain validity, and in fact the academic himself only gains validity, when these observations are made public.

The reasons behind the international team's secrecy and failure to publish are, at best, unclear. In the scientific community, similar behavior among academic researchers engaging in sponsored research has raised questions about the duty to publish.¹¹² When a corporation or the government sponsors scientific academic research with the understanding that the results will be kept secret, the researchers cease to be participants in what many would argue is the very essence of academia — critical thought and the dissemination of knowledge.¹¹³ Virtually all professional standards for professors indicate that research should be

111. See, e.g., Ron Grossman, *Copyright of Scrolls Text Ignites Court Fight*, CHI. TRIB., Aug. 2, 1993, at 2 (scholarship depends on fair use of preceding work).

112. See, e.g., American Association of University Professors, *Academic Freedom and Tenure: Corporate Funding of Academic Research*, ACADEME, Nov.–Dec. 1983, at 18a, 21a (academics found to withhold research in order to make a profit).

Of thirty-nine universities polled, all but six have some sort of policy against sponsor-imposed long-term delays of research publication. Sixteen of these universities had general policies against accepting nonpublishable research. Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1384, 1393 & n.88 (1988).

113.

A requirement that research results be kept secret . . . conflicts with traditional academic values favoring open dissemination of new knowledge. Moreover, by preventing universities from fulfilling their traditional role of expanding the storehouse of publicly held knowledge, secret research on campus calls into question the very purpose of academic research.

Long-term secrecy also cuts researchers off from the larger academic community. In the process, faculty members involved in secret research lose the benefits of critical feedback and acclaim from professional colleagues. . . . Secrecy also undermines critical objectivity in research by precluding criticism and challenges of claims that are never made public.

Eisenberg, *supra* note 112, at 1375.

published,¹¹⁴ and since publication is generally one of the criteria for promotion and tenure, to some degree, publication is required.

While international team members have published portions of their work and have stated their intent to publish all of their work eventually, their long delay has ensured that many other noted scholars in the field have not been able to use the Scrolls as the basis for their own work or to criticize the team's process or interpretation. Most scholarship requires that scholars build on the work of their predecessors. If one scholar claims the right to control access to his scholarship the process of intellectual accretion ceases with that scholar.

Disagreement is a fundamental characteristic of scholarship. It is through the analysis and synthesis of differing scholarly and judicial opinions, for example, that law is formed. Faced with only one view, law, or any other intellectual discipline, would not evolve. When there exists only received wisdom, with no room for intelligent debate, there can be no real scholarship and hence no real understanding. The international team has said that different scholars would each come to different conclusions in their collation and interpretation of the Scrolls.¹¹⁵ If this is true, then failure to make the Scrolls accessible ensures that there will be no view other than the team's view, because it would be impossible for anyone outside of the charmed circle to have an informed view.

A similar problem may exist in the world of art. In 1868, the British National Gallery purchased *The Entombment*, a painting attributed to Michelangelo. The provenance was uncertain, however, and from the outset the attribution was questioned by connoisseurs unaffiliated with the Gallery.¹¹⁶ Some have accused the Gallery of hampering opponents of its position by denying them free access to the Gallery's dossier on the painting:

114.

A basic responsibility of the community of higher education in the United States is to refine, extend and transmit knowledge.

... [L]aw professors have a responsibility to engage in their own research and publish their conclusions. In this way, law professors participate in an intellectual exchange that tests and improves their knowledge of the field, to the ultimate benefit of their students, the profession and society.

Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, § II, ASS'N AM. L. SCHS. NEWSL., Feb. 1990, at 14, 15-16; see also AM. ASS'N OF U. PROFESSORS, DECLARATION OF PRINCIPLES (1915), reprinted in ACADEMIC FREEDOM AND TENURE 157, 164 (Louis Joughin ed., 1969) ("[T]he first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results.").

115. See Abraham Rabinovich, *Court Hears Copyright Dispute on Dead Sea Scrolls*, JERUSALEM POST, Feb. 26, 1993, at 16.

116. Dalya Alberge, *Verdict on Entombment Divides the Art World*, TIMES (London), Sept. 15, 1994, at 8.

The danger comes when a small, tight world of official art refuses even to consider ["artistically incorrect"] opinions. . . . Too many British galleries are reluctant to release the dossiers about the provenance . . . of their paintings. They restrict access only to accepted scholarly publications which can be relied on to know what is good for them.¹¹⁷

By restricting access in this way, those who control objects of scholarly interest, whether paintings or scrolls, ensure that the only valuable scholarship about the object comes from those who participate in the cabal.

B. Intellectual Freedom as a Right Vested in the Public

The commodity to which scholars want access is information, not necessarily the physical manifestation of that information in the original document. With regard to the Scrolls, photographs or even transcriptions would have been sufficient. Academic freedom, the notion that academics should be free to teach without restriction as to content or subject, presupposes that academics have access to information in the first place.¹¹⁸ If that access is denied, academic freedom becomes an empty promise.¹¹⁹

If academic (the right to teach) and intellectual (the right to know) freedoms are viewed as protective of the academic's individual rights, secrecy, cartels, and information monopoly would be acceptable as long as the academic decides to engage in this behavior voluntarily. It is more accurate, however, to view both academic and intellectual freedom as protective of society, a protection which may not be waived by an individual academic, or for that matter, by an international team of academics.

After years of work it is easy for scholars to forget their obligation to contribute to the public store of knowledge and, instead, to begin to

117. *A Michelangelo? When Experts Collide, Let All the Information Be Out*, TIMES (London), Sept. 15, 1994, at 19.

118. "[T]he rationale of academic freedom has been endowed with certain fundamental values Such values as tolerance and honesty, publicity and testifiability" RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 365 (1955).

119. "Academic freedom can scarcely fulfill its role in contributing to the general welfare . . . if those professionals engaged in research are prevented from learning the results of investigations carried out by colleagues in this country and abroad." Am. Ass'n of U. Professors, *Federal Restrictions on Research: Academic Freedom and National Security*, ACADEME, Sept.-Oct. 1982, at 18a, 20a.

think of the object of their study as their property.¹²⁰ John Strugnell, former leader of the international team, admitted, “[i]n acquiring ‘our’ manuscripts, we all had the healthy appetite of youth — in youth natural, but in middle age that same appetite, whether it be for food or scrolls, others rightfully charge as gluttony.”¹²¹

When the Huntington Library released the Scroll photos, John Strugnell said that the Library’s act was an assault on “the intellectual investment of the individual scholars who are preparing [their] editions.”¹²² However, because the photographs were a legitimate gift to the Library and therefore part of its collection, William Moffett, the Director, treated the photos as he would have any other object in the collection. The purpose of a research library is, after all, to provide material for researchers. A similar ethic of free access, limited only by concern for preservation, exists among museum curators charged with preserving what scholars interpret.¹²³

Some scholars object that free access to the manuscripts will deplete the public store of knowledge by encouraging slipshod scholarship.¹²⁴ Opening up the Scrolls will “flood the market . . . with secondary productions. Instead of getting good stuff, we’ll be inundated with the third- and fourth-rate.”¹²⁵ In fact, breaking the cartel has allowed scholars from diverse disciplines to have access and make progress in ways that a small parochial group could never do. For example, scientists at the Rochester Institute of Technology have found a way to use infrared light to read hitherto unreadable blackened fragments of the Scrolls.¹²⁶

120. “The problem isn’t that scholars get to control items for a time, the problem is when they treat the items as private property.” Moffett Interview, *supra* note 41. “*Wissenschaft* [Scientific inquiry] knew no . . . absolute property right.” HOFSTADTER, *supra* note 118, at 387 (quoting Friedrich Paulsen).

121. John Strugnell, *Yigael Yadin: “Hoarder and Monopolist,”* BIBLICAL ARCHAEOLOGY REV., July–Aug. 1994, at 52.

122. William Safire, *Breaking the Cartel*, N.Y. TIMES, Sept. 26, 1991, at A27.

123. “The collection exists for the benefit of present and future generations; it should be as easily accessible as is consistent with the safety of the individual objects.” Malaro, *supra* note 97, at 294 (quoting AM. ASS’N OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS: REPORT OF THE ETHICS & STANDARDS COMMITTEE 10–11 (1981)). See also Joan Lester, *Code of Ethics*, MUSEUM NEWS, Feb. 1983, at 38 (“Whenever possible, legitimate requests for information and/or the examination of objects should be honored.”)

124. When one group of scholars attempted to establish guidelines encouraging open access, a leading Egyptologist stated, “I rather resent the kind of pressure this puts on scholarly publication.” He argued that deciphering hieroglyphics, for example, could take years and that the guidelines would force scholars doing that painstaking work to give copies of it to everyone before they were ready. Larry Witham, *Biblical Scholars Pass Rule to Open Access to Sources*, WASH. TIMES, Nov. 25, 1991, at A4.

125. Botsford, *supra* note 30, at 29 (quoting Magen Broshi).

126. *The Dead Sea Scrolls Come to Life Via Infrared*, BUS. WK., Mar. 1, 1993, at 95.

Access such as this is particularly important now, because the Scrolls continue to deteriorate. The Rochester Institute is planning to use a specially designed computer program to fill in gaps unreadable by infrared, and will make the reconstruction available on CD-ROM.¹²⁷ Brigham Young University is preparing "a comprehensive electronic database of the Scrolls and related materials on CD-ROM" as well.¹²⁸

The Dead Sea Scrolls situation is not the first instance of scholarly hoarding with regard to ancient manuscripts.¹²⁹ Extreme delays in publication have occurred with regard to the Samaritan Papyri¹³⁰ and the Nag Hammadi Library.¹³¹ For example, the Nag Hammadi Library was tied up by its translators for twenty years and only released by the intervention of UNESCO.¹³²

It is not just inadvertence, overwork, ego, or perfectionism that causes scholars to hoard materials. Control of important research confers power. A scholar who wishes to work on the Scrolls needs the approval of the international team. As the international team selects "approved" scholars, it is also selecting who will publish in the area. Ultimately, those who publish are the ones who will teach in the field, hold chairs, and edit reviews.¹³³ Scholars who challenge the established view will never have an opportunity to do the research necessary to confirm their hypotheses, and will never have a forum in which to publish their hypotheses. That the Dead Sea Scrolls delay became a controversy when it did and not earlier is probably because by the late 1980s the people

127. *Id.*

128. Bob Summer, *The Dead Sea Scrolls: A Publishing Gold Mine*, PUBLISHERS WKLY., Jan. 10, 1994, at 27, 30.

129. In my research for this article, two scholars, each of whom wished to remain anonymous, told me the same, possibly apocryphal, tale of scholarly hoarding spanning generations. A scholar discovered 5th Century B.C. Aramaic texts in the 1890s. He publicly promised to publish his translation, and allowed no one but a few hand-picked students to see the text. He died still not having published, bequeathing the rights in the manuscript to one of his students. The student also failed to publish in his lifetime, bequeathing the manuscript to his student. A few years ago, the third generation researcher retired, passing on his rights to his student. The fourth generation student has now promised that the entire manuscript will be published in four years. Telephone Interviews with Anonymous Sources, Aug. 19, 1994 and Aug. 21, 1994 (on file with the *Michigan Journal of International Law*) [hereinafter Anonymous Interviews].

130. See Daniel Wood, *Dead Sea Scrolls Stir Lively Debate*, CHRISTIAN SCI. MONITOR, Oct. 8, 1991, at 12, 13.

131. The Nag Hammadi Library consists of thirteen Coptic Gnostic codices. JOHN DART, *THE JESUS OF HERESY AND HISTORY: THE DISCOVERY AND THE MEANING OF THE NAG HAMMADI GNOSTIC LIBRARY* 14 (1988).

132. *Id.* at 33-36.

133. EISENMAN & WISE, *supra* note 8, at 5.

who were members of the original cartel had either died, been dismissed, or retired, and were no longer in a position to retaliate.¹³⁴

IV. INTELLECTUAL PROPERTY PROTECTION OF THE SCROLL RECONSTRUCTIONS

A. Copyright

In 1992, Professor Elisha Qimron sued Hershel Shanks¹³⁵ for reproducing 120 lines of a 132-line reconstruction of Dead Sea Scrolls material and, in 1993, threatened to sue two professors if they used the reconstruction as a basis for their own work.¹³⁶

Clearly, there is no longer any intellectual property interest in the content of the Scrolls as written by the Scroll authors.¹³⁷ If the Scroll authors had been able to avail themselves of a paleo-copyright lawyer two thousand years ago, they would have been able to copyright their expression of what, they would argue, is historical fact. Today, their expression is in the public domain, and the facts on which they based their expression are unprotectable.¹³⁸

There are three elements of the text that may be protectable, however. The first is the arrangement of the fragments into a coherent, if

134. A scholar who wished to remain anonymous told me, "[a]s the leading lights in the field, the original members of the team held life and death academic power over anyone who wanted to work in the field, since any potential entrant might find themselves blackballed by a negative recommendation by one of the team. While there is no indication that this actually happened, the fear that it might was enough to dampen criticism." Anonymous Interviews, *supra* note 129.

135. And others, including Professor Robert Eisenman and the Biblical Archaeology Society. *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, trans. at 1 (D. Jerusalem 1993).

136. See *supra* text accompanying notes 66-69.

137. The direct descendants of the Scroll authors could have an intellectual property interest in the Scrolls as unpublished manuscripts, but only if their property right in the Scrolls themselves could be shown.

138.

We have already seen the problems that have arisen in the distribution of the content of the Dead Sea Scrolls even without copyright protection, and presumably few people today advocate affording copyright protection to such discoveries. The short, technical answer is that recognizing copyright in the process of fixation . . . does not imply that we must afford copyright protection to new discoveries of old literary works, because the discovery does not result in any new fixation. *Translations* of such discoveries would presumably be protected, of course, just as any other translation, and . . . a new fixation that made the work more widely available would have limited protection against direct, mechanical copying. The content of the work, however, would not be protected.

incomplete, document. The second is the translation of the characters on the fragments, for the purpose both of arranging the fragments and of creating a document that can be read by those who are not Biblical scholars. The third is the interpolation of scholarly reconstructions of missing clauses.

1. Protectability of the Arrangement of the Fragments

The arrangement of the Scroll fragments may be copyrightable.¹³⁹ In some instances, the compilation of otherwise unprotectable facts¹⁴⁰ has been deemed copyrightable where the means of compilation itself is not obvious and is, at least to some degree, creative.¹⁴¹ For example, the names of the citizens of a town would not be protectable, nor would the arrangement of the names if simply placed in alphabetical order. However, if the names were categorized in a non-obvious or creative way, such as by the occupation of their owners, the arrangement may be protected.

If the length of time the Scroll scholars have spent in deciphering the Scrolls is any indication, the arrangement of the Scrolls is not obvious in the sense of being easy to determine. Nonetheless, the arrangement may be obvious if the fragments really only make sense if they are arranged in one particular order. The reason for the delay experienced by the Scroll scholars may not mean that they are selecting between several possible arrangements each of which makes sense; rather, the difficulty may simply lie in handling the large volume of Scroll fragments and dealing with missing fragments. For example, if some nefarious person were to run a Gutenberg Bible through a paper shredder, it might take years to piece the various strips together, but the very reason for the delay would be that there is only one correct way for the strips to go together. The delay is caused by the process of finding that one correct way through trial and error.

That the process is difficult, painstaking, and complex does not, in and of itself, make the result copyrightable. It would, no doubt, be

139. The Copyright Act of 1976 defines a "compilation" as a "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1988). Copyright in a compilation "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." 17 U.S.C. § 103 (1988). For a discussion suggesting that U.S. courts would not find reconstructions of ancient texts copyrightable, see Lisa M. Weinstein, *Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case*, 43 AM. U. L. REV. 1637, 1655-1670.

140. Facts are not protectable under copyright law. See 17 U.S.C. § 102(b) (1988).

141. 17 U.S.C. § 102(a) (1988 & Supp. II 1990).

extremely time consuming to alphabetically list the name of every American citizen, but the hard work of doing so does not change the fact that the names are unprotectable facts, and that the means of collation is obvious and available to anyone. American and Israeli courts¹⁴² have, since *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁴³ clearly and consistently rejected the "sweat of the brow" approach to copyright. The Court in *Feist* stated that the "sweat of the brow" doctrine arose from an ambiguity in the language of the 1909 Copyright Act.¹⁴⁴ The language of the 1976 Copyright Act is clear, however, and requires at least some minimal amount of intellectual creativity. In compilations, therefore, the 1976 Act virtually requires that the creativity come from the selection or arrangement of the otherwise unprotectable material. Physical or economic effort is not enough to transform unprotectable material into protectable material. The *Feist* Court stated that "[t]he 'sweat of the brow' doctrine flouted basic copyright principles," the net result of which was the "hand[ing] out of proprietary interests in facts."¹⁴⁵

In *Feist*, the Court held that originality is a Constitutional requirement of copyright and that to be original, a work must possess "at least some minimal degree of creativity."¹⁴⁶ Under this definition, bare facts are unprotectable, but the compilation of bare facts may be protectable if it meets the originality requirement.¹⁴⁷ This level of originality, however, need not be very high. The Court only required that "the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever."¹⁴⁸ Rural Telephone's alphabetical arrangement did not pass even this minimal test: "there is nothing remotely creative about arranging names alphabetically in a white pages directory. . . . It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution."¹⁴⁹ Similarly, the arrangement of

142. Israel's intellectual property law follows an Anglo-American model. For example, because the *Qimron* case was one of first impression, the Jerusalem District Court used American case law to support its decision. See *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, 22-23, trans. at 14-15 (D. Jerusalem 1993).

143. 111 S. Ct. 1282 (1991).

144. *Id.* at 1290.

145. *Id.* at 1292. For a strong pre-*Feist* argument in favor of the protectability of labor-intensive factual compilations, see Robert C. Denicola, *Copyright in Collections of Facts*, 81 COLUM. L. REV. 516 (1981).

146. 111 S. Ct. at 1287.

147. *Id.* at 1289.

148. *Id.* at 1296.

149. *Id.* at 1297.

documentary fragments into their original order is, while tedious, both mechanical and conventional.

When reconstructing the Biblical texts, the international team is guided by more modern versions of the same texts. With non-Biblical material, members of the team have had to match handwriting and compare the torn edges of fragments, frequently making educated guesses based on content.¹⁵⁰ One scholar has discovered a way to match fragments by following the patterns of damage likely to be inflicted by rodents, insects, and humidity on a rolled up Scroll. After the Scroll has deteriorated into fragments these patterns remain.¹⁵¹ Matching torn edges and damage patterns is purely mechanical. The matching based on suppositions about context are mechanical as well, in that, while they require specialized knowledge and high level applications of logic, they do not require any level of originality.

If the arrangement of the fragments is, as Mr. Shanks has argued, much like the completion of a jigsaw puzzle, the arrangement should not be protected.¹⁵² If there is only one correct solution to the puzzle, that solution is a fact, and is, therefore, unprotectable. If the fragments are small enough, irregular enough, or unrelated enough, their arrangement may be a matter of conjecture, but ultimately there is really only one correct answer.

2. Protectability of the Translation

Translations of public domain works are regarded as new works subject to copyright.¹⁵³ The protectability is only of the translation, however, and does not extend to the underlying work. The Scrolls are written in ancient Aramaic and Hebrew. Legible¹⁵⁴ Hebrew Scrolls do not require translation to be readable by anyone able to read modern Hebrew. While Professor Qimron may wish to protect his translations from Aramaic into Hebrew or from Hebrew into English, he is undoubtedly more interested in protecting the underlying work.

150. Hartmut Stegemann, *How to Connect Dead Sea Scrolls Fragments*, in UNDERSTANDING, *supra* note 9, at 245.

151. *Id.* at 249-53.

152. The analogy is apparently apt — one of the founding members of the international team called the Scrolls, “the world’s greatest jigsaw puzzle.” Botsford, *supra* note 30, at 29.

153. 17 U.S.C §§ 101, 103 (1988) (defining a translation as a derivative work and extending copyright in a derivative work only to author’s contribution).

154. Many of the Scrolls require transcription due to fading, soil, or damage. Stegemann, *supra* note 150, at 246-47.

3. Protectability of the Interpolations

It is a fact that the Scroll authors made certain statements in the Scrolls, even if the exact content of those statements is, given the condition of the Scrolls, unknowable in any absolute sense. The Scroll interpreters are seeking to reproduce these statements exactly, understanding, at the same time, that this goal may be unattainable. Professor Qimron's years of work on a small section of the Scrolls was ultimately about making his interpretation as accurate as possible under the circumstances. He sought, as have all Scroll interpreters, to restore the authors' statements to their original form. If he was successful, his work should not be protectable,¹⁵⁵ any more so than would be the work of a potter who glued together the pieces of a broken ancient vase, even if there were pieces missing which required the potter to extrapolate from the existing shape or pattern of the vase.¹⁵⁶

In general, protectability requires creativity. Creativity requires a degree of discretion, which permits the possibility of alternative outcomes. If there is no discretion in the act, if the actor must perform in only one way, with no opportunity for variance based on personality and preference, there is no creativity. If the potter follows the pattern of the vase, restores the shape, matches the color and decoration, and in every way exactly reproduces the original artist's work, then his work is no more copyrightable than that of any other workman.¹⁵⁷

Professor Qimron's work may have required some discretion. The lacunae that he filled made up, by his estimation, 40 percent of the text, and it was not always evident what the missing words would be in any given fragmented passage.¹⁵⁸ Based on his expertise in the *Halacha*, his

155. "However, it is unsettled whether or not, for example, the newly reconstructed emendations of the Dead Sea Scrolls are independently copyrightable." Kenneth L. Port, *Foreward: Symposium on Intellectual Property Law Theory*, 68 CHI.-KENT L. REV. 585, 590 n.25 (1993).

156. "The prevalent contemporary understanding identifies authorial subjectivity as the hallmark of original works of authorship: original works reflect the personalities of their authors or, at the very least, embody their creators' subjective choices in the selection or arrangement of material." Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1867 (1990).

157. See, e.g., *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987) (denying copyright protection for identical fine art reproductions of public domain book illustrations).

158. Even with his years of work, Professor Qimron was not able to fill all of the gaps in the MMT. All reconstruction decisions were based on evidence and in some places there was simply not enough evidence of what the missing words might be. The result is not particularly readable, for example:

Aaron should [... .. And]
[concerning] the hides of cattle [and sheep that they from]

knowledge of ancient Aramaic and Hebrew vocabulary and syntax, and his years of working with the original text, Professor Qimron was able to gauge the likely meaning of any given line, and the words that were most likely used in areas where the text fragments were insufficient. That other scholars might differ in this interpretation is evidenced by Professors Wacholder and Abegg's desire to create their own interpretation.¹⁵⁹ This difference, however, is not an effort to make an individual scholar's work distinctive or reflective of his personality, but rather is each scholar's attempt to make his interpretation of the fragments comport with the fact of the original author's statements.

4. Do the Creative Elements Confer Protectability on the Remainder of the Text?

Mr. Shanks's attorney asked the Jerusalem District Court whether an artist or workman restoring the Sistine Chapel should be entitled to copyright protection when his only "creative" contribution to the great painting was to fill in blank areas where the original paint had flaked off.¹⁶⁰ While the workman is entitled to protection for those areas that represent actual creative effort, if any, his small contribution should not allow him to protect the painting as a whole. Professor Qimron claimed copyright protection, not just for his suppositions where the text of the Scrolls was missing or for his contribution to the arrangement of the text fragments, but for the text as a whole.¹⁶¹

There is some point at which the quantity of the Sistine Chapel workman's effort might entitle him to protect the entire ceiling. If the original painting were gone and the workman sought to recreate it, his entire recreation may be protectable if sufficiently creative. If he recreated ninety percent of the ceiling, the whole ceiling may be similarly protected. At some point, however, the workman's contribution will become insufficient to support his claim for protection of the entire ceiling, although the exact location of that point is unclear. Professor

their [hides] vessels [... .. to]
[bring] them to the sanctuary [... ..]

QIMRON & STRUGNELL, *supra* note 59, at 49 (reconstructions appear in brackets).

159. Even John Strugnell and Elisha Qimron disagree on many of the MMT interpretations which they worked on together for ten years. Hershel Shanks, *MMT as the Maltese Falcon*, *BIBLICAL ARCHAEOLOGY REV.*, Nov.-Dec. 1994, at 48, 51.

160. Rabinovich, *supra* note 115.

161. *Biblical Archaeology Soc'y v. Qimron*, [1992-1994] Copyright L. Dec. (CCH) ¶ 27,065, at 26,240, 26,241 (E.D. Pa. Feb. 10, 1993) (Qimron claimed copyright in "the text of the deciphering.").

Qimron claims to have recreated 40 percent¹⁶² of the section of text in which he claims a copyright.¹⁶³

Some courts have used what has been called a "totality" approach to, in essence, convey copyrightability by association.¹⁶⁴ According to Professor Nimmer, copyright protection is "granted for the very reason that it may persuade authors to make their ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind."¹⁶⁵ For this reason, the limited monopoly granted by copyright applies only to the expression of ideas, not the ideas themselves. The totality doctrine protects otherwise unprotectable ideas merely because of their close association with the expression of the ideas, despite the fact that this conflicts with the goal of copyright law.¹⁶⁶

One version of the totality approach is the theory of "wholesale usurpation,"¹⁶⁷ according to which courts find infringement of copyright in factual works if the subsequent user appropriates "the total entity with its unique and protected mosaic, comprising the overall arrangement and selection of facts."¹⁶⁸ A similar result is reached under the Copyright Act with regard to sound recordings of public domain works.¹⁶⁹ While no protection is given to the underlying fact of the composition, the perfor-

162. Forty percent of Professor Qimron's reconstruction was interpolated material. *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, 16, trans. at 4 (D. Jerusalem 1993). It appears that at least twenty percent of the missing text remains unreconstructed.

163. Rabinovich, *supra* note 115.

164. "[The totality] approach may be defined as any legal theory that accords noncopyrightable facts some measure of copyright protection when these facts are somehow combined with copyrightable expression into a protectible totality." Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 522 (1986).

165. *Id.* at 538 (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03[A][1] (1985). The cited language does not appear in that location in the current edition.).

166.

The totality approach in any form fundamentally perverts the goal of copyright law to promote science and the useful arts through the production and dissemination of literary and artistic works. . . . It simply makes no sense to recognize that certain material is not capable of copyright protection because of "the basic purpose of copyright law," but then to allow the admittedly unprotectible material to receive protection.

Francione, *supra* note 164, at 552.

167. *Id.* at 522; see also *Hoehling v. Universal City Studios*, 618 F.2d 972, 979-980 (2d Cir. 1980), *cert. denied* 449 U.S. 841 (1980).

168. Francione, *supra* note 164, at 522; see also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

169. 17 U.S.C. § 114(b) (1988).

mance of that composition is protected from direct copying of the actual sounds fixed by the recording.¹⁷⁰

Wholesale usurpation adopts the philosophical tenets of the Berne Convention concept of *droit moral*, or moral right, that the author has a natural right to the fruits of his labor which must be protected.¹⁷¹ The concept of *droit moral* focuses not on incentive and free access, but rather on the integrity of the author's work and the unjust enrichment of the usurper. In Professor Qimron's suit in the Jerusalem District Court, Judge Dalia Dorner stated that Professor Qimron had a moral right "to have his name applied to the work in the accepted manner and to the accepted extent" and to object, *inter alia*, to "any derogatory action which may be prejudicial to his honor or reputation."¹⁷² The portion of the work reproduced was the MMT reconstruction, rather than any part of Professor Qimron's admittedly original 300-page commentary. The 120 lines of the reconstruction were reproduced exactly as written, having been taken from a Polish scholarly journal that had reproduced the translation without permission. Since no change was made in the work, the only possible "derogatory action" would be either the failure to acknowledge Professor Qimron or the failure to publish the complete 132-line reconstruction. The failure to publish the complete reconstruction did no damage to the integrity of the work since the 120-line segment represented a natural break in the work, recognized by Professor Qimron himself when he circulated the work to his associates.¹⁷³ The failure to give attribution to Professor Qimron specifically was not an attempt by Shanks to take credit for the work himself.¹⁷⁴ Instead, attribution was given to the international team as a whole (a degree of vilification regarding the delay was also directed at the team as a whole). While Professor Qimron's name was not mentioned individually, the MMT reconstruction included work by other members of the team, and

170. *Id.*

171. See generally Denicola, *supra* note 145.

172. Landau, *supra* note 58. Judge Dorner was quoting the Israeli moral rights law. *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, 31, trans. at 28 (D. Jerusalem 1993).

173. Since the Polish journal had also only published the 120-line segment, Shanks had no access to the complete version of the reconstruction in any case. See 3 [5753-1993] P.M. at 16-17, trans. at 4-5 (describing circulation by the *Qumran Chronicle*).

174. The issues to which Judge Dorner was referring are the Berne Convention's protection of an author's artistic integrity and paternity. Specifically, an author has a right to have a work published or exhibited in its complete, unadulterated form, and to have his name associated with the work. See generally Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?* 38 VAND. L. REV. 1 (1985) (discussing moral rights inside and outside the United States); Mayer Gabay, *Israel Adopts Moral Rights Law*, 29 J. COPYRIGHT SOC'Y 462 (1982) (providing text of the law).

Professor Qimron, as a member of the team, was included in any reference to the team as an entity.

The underlying theory of wholesale usurpation is that a subsequent author may not enjoy the fruits of the prior author's labor, by, for example, doing no independent research, and instead "bodily appropriat[ing]" the research of the prior author.¹⁷⁵ If this approach prohibits the "use of an author's research, then the doctrine is clearly a totality approach, because protection of research or labor is tantamount to protecting the facts found by that research or labor."¹⁷⁶ For example, the result of Professor Qimron's laborious reconstruction of the MMT is as close an approximation of the document as written two thousand years ago as Professor Qimron is capable of producing. There is no question but that, had the document been found intact, its content would not be protectable by its discoverer. If Professor Qimron is able to protect the reconstruction, he is, in effect, now able to protect the original document in a way he would never have been able to do otherwise:

The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable. There is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection.¹⁷⁷

An extreme approach would be the view taken by some scholars that factual information is no different from any other form of literature. This relativistic approach¹⁷⁸ argues that the selection of the events or items to be deemed fact (as opposed to myth, lies, etc.) is subject to the effect of the interpreter's personality, biases, and belief system; and that factual interpretation and selection therefore have the requisite creative or personality component to be authorship.¹⁷⁹ Congressional intent, however, was quite clear: "Copyright does not preclude others from

175. Francione, *supra* note 164, at 582.

176. *Id.*

177. *Id.* at 586 (quoting *Miller v. Universal City Studios*, 650 F.2d 1365, 1372 (5th Cir. 1981)).

178. See 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, 649-50 (1982); Ginsburg, *supra* note 156, at 1906.

179. "[T]he news element — the information respecting current events contained in the literary production — is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day." *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

using the ideas or information revealed by the author's work. It pertains to the literary [work] . . . in which the author expressed intellectual concepts."¹⁸⁰ That some selection, organization, and interpretation must occur with factual information is undeniable; that it confers upon the fact the status of protectable literature is not.¹⁸¹

Courts have been more willing to find wholesale usurpation when the unjust enrichment enjoyed by the copier is clear. For example, in an article about the life of a famous person each quote is an unprotectable fact; journalistic ethics would not permit the creation of quotes from whole cloth or the alteration of quotes. Therefore, it would seem that the portion of the article containing the quotes is unprotectable. But what if the quotes are particularly significant and were only discovered by the author through contacts or sources particular to him? In this case the copier is taking, with virtually no labor, a fact which only the author, through his labor or knowledge, could have acquired.¹⁸² While most courts reject the "sweat of the brow" approach to copyright which would protect otherwise unprotectable items simply because of the labor involved in acquiring them, they are much more willing to find these items to be protectable where the author, due to his efforts, is the only source of the item, and the copier appears to be getting a "free ride" by copying. However, in these cases there is generally competition between the author and the copier, and the copied item is something which contributes greatly to the marketability of the author's work.

For example, original survey maps have consistently received copyright protection, even though, since they are striving for accuracy, their arrangement of pre-existing data is almost certain to lack the "spark of creativity" demanded by *Feist*.¹⁸³ Courts have given copyright protection, at least against wholesale usurpation, more because they recognize that the social desirability of having accurate maps outweighs free access to the mapmaker's research, than because of the quantum of effort invested by the mapmaker in compiling his data. A person who takes the mapmaker's data is getting, at no cost to himself, the value of

180. HOUSE COMM. ON JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670.

181. In *Myers v. Mail & Express Co.*, 36 COPYRIGHT OFFICE BULL. 478, 479 (S.D.N.Y. 1919), Judge Learned Hand said that the selection of facts is not protectable even though "into that selection may go the highest genius of authorship, for indeed, history depends wholly upon a selection from the undifferentiated mass of recorded facts."

182. See generally *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985).

183. See *Karjala*, supra note 138, at 895.

the mapmaker's labor. The mapmaker, as a consequence, loses the incentive to expend the labor.

In the Dead Sea Scrolls situation, the international team is the only source of the factual component of the Scrolls, but this is so through their own design. The uncollated fragments are clearly unprotectable facts, because the team has, at that point, expended no effort which could be usurped. Scholars have been denied access to the uncollated fragments, however, and have had to rely on the team's work in progress for certain portions of the scrolls. Unlike a competing reporter who can attempt to get an interview from his own sources, or a would-be cartographer who can use his own resources to map an area mapped by a competitor, scholars have had no alternative method for gaining access to the Scrolls. At the point where collation has taken place, the team may be able to argue that they have expended enough energy to warrant protection (although they should also be able to show competition and damage to their own market), if it were not for the fact that their refusal to reveal the uncollated material is the reason for scholars having to use the collated material.

Copyright law grants a monopoly, but only for a limited time.¹⁸⁴ With regard to facts which are given protection because of their propinquity to protectable expression, that time limit should be reduced. In *INS*,¹⁸⁵ the Court found a "quasi-property" interest in the Associated Press' report of events (as distinguished from the reportage, which would, of course, be protected by copyright), but only while the news stories were "fresh."¹⁸⁶ The international team has controlled access to the Dead Sea Scrolls for almost forty-five years. The release of the contents of the fragments, as opposed to their collation, interpretation, or interpolation, could have occurred at any time in that period. In this case the factual information is still "fresh," in the sense of not being generally known, only because the international team has refused to reveal it.

One could argue that without the security of copyright protection, Professor Qimron and others would have no incentive to labor for decades over the Scrolls, and that, because it is socially desirable and unlikely to be remunerative, this sort of painstaking, exacting, but

184. "Limited times' [for the existence of copyright] were established precisely for the purpose of allowing material to pass rather quickly into the public domain." John S. Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction, in FAIR USE AND FREE INQUIRY* 3, 9 (John S. Lawrence & Bernard Timberg eds., 1980).

185. *INS* was decided under an unfair competition, rather than a copyright, theory. *International News Serv. v. Associated Press*, 248 U.S. 215, 234-35 (1918).

186. Richard A. Epstein, *International News Service v. Associated Press: Custom and Law As Sources of Property Rights in News*, 78 VA. L. REV. 85, 92 (1992).

uncreative work is as deserving of protection as is any creative, literary work.¹⁸⁷ In reality, however, it is unlikely that scholars engage in research with the hope of vast financial rewards (ah, for such a world!). Those financial rewards that there are come indirectly, as the result of an enhanced scholarly reputation. Other, more meaningful, rewards include the broadening of human knowledge (which goes to the dissemination goal of copyright) and the recognition of one's peers.¹⁸⁸ Certainly, nowhere is the tension between free access to knowledge and the copyright holder's proprietary interest more at odds than in an academic setting.¹⁸⁹

While it is possible that the failure to protect the noncreative components of research will result in the wholesale theft of hard-won intellectual effort by unscrupulous "scholars" and the abandonment of continued research by scholars unwilling to support "free riders," or to continue work without the economic incentive that copyright protection brings, this result is unlikely. Just as in Nature, it is unwise for a parasite to kill its host, and, generally, self-interest requires that equilibrium be maintained. Professor Epstein has pointed out that repeat players in an industry have a powerful incentive to respect the customary rules if they wish to stay in the game.¹⁹⁰ It is only when aberrational events occur, such as a long-term monopoly, that these players are likely to take the risks inherent in breaking the rules.¹⁹¹

Even if facts or factual interpretation were protectable, the "author" must still be able to prove that infringement occurred. Because there are only a very limited number of ways in which a fact can be expressed, Professor Francione argues that a different standard should be used in determining whether factual interpretation has been infringed.¹⁹² In wholesale usurpation cases that standard seems to be virtual identity.¹⁹³

187. Ginsburg, *supra* note 156, at 1908.

188. "Glory is the reward of science It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world" *Id.* at 1908 n.163 (quoting Lord Camden speaking before Parliament in 1774).

189. *But see* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare. . . .").

190. Epstein, *supra* note 186, at 101.

191. *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215 (1918). "In retaliation [for INS's pro-German positions], the British and French authorities cut INS personnel off from the front lines and barred them from using the entire European cable system." Epstein, *supra* note 186, at 92. If INS wanted to report from the front, it had little choice but to appropriate AP's stories. *See id.* 92-93.

192. *See* Francione, *supra* note 164, at 570-74.

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

In Shanks's case 120 lines were copied verbatim. With regard to Professors Wacholder and Abegg, there is no intent to copy, although it is likely that their work will be very similar if not virtually identical. To avoid infringement, then, Professors Wacholder and Abegg will need to ensure that their wording is at least slightly different from Professor Qimron's. However, if Professor Qimron's work is accurate, Professors Wacholder and Abegg will be forced to be less accurate merely to avoid infringement. Either the fact that the Scroll authors must have said a particular thing in a particular place in the Scrolls is protectable or it is not. If it is, only one person, the first person under all common law notions of property, can have a protectable interest in the interpolations.¹⁹⁴ If the first interpolator is allowed to obtain protection, the fear of rushed and haphazard scholarship voiced by those who object to open access may be realized in a different context.

5. Fair Use

There is no question but that Hershel Shanks copied, and that Professors Wacholder and Abegg are likely to copy, Professor Qimron's reconstruction of the MMT. Therefore, if any portion of Professor Qimron's work is copyrightable, they will have infringed, at least with regard to that portion. Despite this, the uses to which the Huntington Library, Hershel Shanks and Professors Wacholder and Abegg have put the Scrolls may be acceptable.

Up until the publication of the Scroll photos by the Huntington Library and the very limited release of a few "bootlegged" portions of the Scrolls, the international team had complete control over the Scrolls and denied access to all outsiders. This has meant that no other scholars were permitted to contribute their expertise to the deciphering of the Scrolls or to challenge the work of the international team. In the more than forty years the Scrolls were sequestered, experts in the field who could have contributed to Scroll knowledge have died or retired without being able to add to the understanding of the Scrolls. The stated purpose of American copyright law is "to promote the Progress of Science and useful Arts."¹⁹⁵ This is effected in two ways. First, a monopoly is given to authors to encourage authorship by allowing them to benefit commercially from their labor, and, second, the monopoly is strictly limited by time and by the doctrine of fair use to encourage others to use the

194. See generally Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

195. U.S. CONST. art. 1, § 8, cl. 8.

author's labor as a stepping stone for their own pursuits or to exploit the fruit of the author's labor when he has abandoned it. Ultimately, the goal is to encourage societal, intellectual, and technical development, and the protection of the author is secondary to that goal. This should particularly be the case where the author's monopoly restricts access not just to his creative effort, but to the facts on which his effort is based. Nothing would be more abhorrent to the underlying policy of copyright, and of all intellectual property law, than to restrict access to material that is, and should be, in the public domain.

The doctrine of fair use makes clear where the drafters' priorities lie. The author's power to control and exploit his work is limited where the copier infringes the copyright in order to increase the public store of knowledge.¹⁹⁶

Section 107 of the Copyright Act lists the factors for consideration when determining whether a given use is fair:

- 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.¹⁹⁷

These considerations apply to unpublished works as well.¹⁹⁸ In addition to the consideration of these factors, courts have found fair use where other compelling factors exist.¹⁹⁹

The Huntington Library's revelation of their photos of the Scrolls was noncommercial.²⁰⁰ The Library did not sell their photos or attempt

196. "[T]he fair use of a copyrighted work . . . for such purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1988, Supp. II 1990 & Supp. IV 1992).

197. *Id.*

198. *Id.*

199. Essentially, the fair use doctrine is "an equitable rule of reason." Harper and Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 560 (1985) (quoting H.R. REP. NO. 1476, *supra* note 180, at 65).

200. In the 1960s, President Warren G. Harding's love letters to a woman not his wife were donated to the Ohio Historical Society, over the objection of family members. After the letters were returned, it was discovered that the Historical Society had made a microfilm copy of them. "Whether the Society could photocopy the original letters and provide access to or lend [them] as a means of preserving the originals, is unclear . . . Such activities seem wholly unlikely to interfere with the basic economic interest secured by the copyright in the letters . . ." ROBERT COGSWELL, COPYRIGHT LAW FOR UNPUBLISHED MANUSCRIPTS AND

to use them to raise funds. If anything, the Library's revelation might have had a negative fiscal effect if individuals had become hesitant to loan or donate items to the Library as a result.²⁰¹ The Huntington Library's release of the Scroll photos does not interfere with the international team's commercial interests. It would be very unusual indeed if the international team had intended to sell photos of the Scrolls to interested academics. It is customary in academia to make purely factual material available to fellow scholars without any fee beyond the cost of reproduction. This is the approach that the Huntington Library took with their photos.

Professor Qimron stated in his suit that he intended to publish and sell a book²⁰² dealing with his analysis of the Scroll fragments he was given to study and that Mr. Shanks's work had, and Professors Wacholder and Abegg's work would, cause him to lose sales.²⁰³ The two-volume work which Mr. Shanks compiled on the Scrolls was intended for sale.²⁰⁴ However, Professor Qimron's work made up only one page of Mr. Shanks's two volumes, and appeared in the foreword rather than in the main body of the work. It is unlikely that anyone purchased Mr. Shanks's two-volume set for the opportunity of reading Professor Qimron's one page "contribution," or that they would choose not to purchase Professor Qimron's several hundred page book merely because one page of it was reproduced elsewhere.

Professors Wacholder and Abegg intend to use the same material Professor Qimron used as the base for their own analysis of the Scrolls, with, in all likelihood, similar results. Ultimately, their interpretation will be published and perhaps sold. While their alleged infringement

ARCHIVAL COLLECTIONS 59 (L. Libr. Info. Rep. No. 14, Roy M. Mersky ed., 1992) (quoting Professor James R. Treece).

201. The Huntington Library received approbation from many other libraries and research centers. See Daniel B. Wood, *Library That 'Freed' the Scrolls Hears a Jericho-like Blast of Support*, CHRISTIAN SCI. MONITOR, Oct. 8, 1991, at 12. Nonetheless, potential donors might have had second thoughts. One of the reasons the Library of Congress gave for its release of Justice Thurgood Marshall's papers shortly after his death, despite objections from his family and colleagues, was the importance of showing future donors that donative intent would be respected. See, e.g., *The Marshall Files: The Complaints and the Library's Response*, WASH. POST, May 27, 1993, at A20 (excerpting Justice Marshall's instrument of gift and statements by James Billington, Librarian of Congress; Chief Justice William Rehnquist; and former Chief Justice Warren Burger).

202. Qimron's book was finally published on June 30, 1994. See QIMRON & STRUGNELL, *supra* note 59.

203. However, Judge Dornier found that Professor Qimron had failed to prove this contention. Rabinovich, *supra* note 64.

204. The price of Shanks's book was \$200. Only 300 copies were sold. Shanks, *supra* note 159, at 49.

would be commercial to some degree, it is most likely that their main purpose in publishing will be academic rather than commercial.²⁰⁵

Neither Mr. Shanks's nor Professors Wacholder and Abegg's work is what might be termed "light reading"; it is likely that their work would only be of interest to a very narrow audience of people with a serious interest in Biblical history in general or the Scrolls in particular.²⁰⁶ Such readers are likely to purchase all available relevant material and to take the view that one scholar's opinion is not a perfect substitute for all other scholars' opinions on the same topic.

Fair use may occur when infringement cannot be avoided without putting unreasonable restraints on intellectual or technological progress. In *Sega Enterprises v. Accolade, Inc.*,²⁰⁷ Accolade, a maker of computer games compatible with Sega's Genesis system, disassembled a Sega computer game cartridge to determine how to construct the interface for their own games. In the process of disassembly, the Accolade engineers transformed the Sega game's machine-readable object code into a code readable by humans. In doing so, the Accolade engineers copied Sega's copyrighted object code. Their purpose was to understand that part of the object code which would allow their games to run on the Genesis system, not to copy any particular game or the specifics of any particular game. When Accolade constructed their own compatible games using the copied interface object code, they sold them under the Accolade label and made no attempt to pass them off as Sega games. The only portion of the Sega code that Accolade actually copied into their own game programs was the interface code.²⁰⁸

While Sega admitted that that portion of the object code which governed the interface was strictly functional or factual and not protected by copyright, they argued that Accolade's copying of the entire code in order to find the interface code was an infringement.²⁰⁹ The court agreed that Accolade's disassembly was "wholesale copying."²¹⁰ The court pointed out, however, that since the object code is virtually unreadable by humans, the only means for accessing the unprotected functional aspect of the program was through copying the protected

205. Fair use is more likely to be found when the copying is for scholarly purposes. *See, e.g., Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

206. However, there has been an exponential increase in the number of popular books on the Scrolls. Summer, *supra* note 128, at 27.

207. 977 F.2d 1510 (9th Cir. 1992).

208. *Id.* at 1516.

209. *Id.* at 1525.

210. *Id.* at 1527.

aspect of the program.²¹¹ Sega argued that Accolade admitted that humans could “read” the object code to some degree without the aid of computer disassembly. This is true in the sense that a human could, very slowly, transcribe the binary object code, but doing so is as much copying as is computer transcription of the binary object code. Whether done by a computer or by hand, the binary code must be transcribed before it can be translated, since no one is capable of memorizing the innumerable bits of binary information and translating it mentally.

The Court found that since Sega’s programs contained functional aspects that could not be examined without copying, they were entitled to a lower degree of protection than are the authors of other, more traditional, literary works, the factual or functional components of which are readily accessible.²¹² The court argued that a finding that disassembly was a *per se* unfair use would, in effect, give the copyright owner a *de facto* monopoly over the unprotectable functional aspects of his work.²¹³

Even if the international team’s collation or interpretation were protected by copyright, other scholars would need to copy the team’s copyrighted material in order to make their own analyses of the contents of the Scrolls. The most obvious reason for this is that the international team physically controls the fragments and will not allow others to engage in their own attempts to put the pieces of the “jigsaw puzzle” together. The only way that other scholars can engage in their own “from scratch” analysis is to “disassemble” the work that the international team has done. By reducing the team’s work to its component parts, the fragments, other scholars will have access to the unprotectable,

211. *Id.* at 1525–26.

212. *Id.* at 1514. The court found fair use in necessity:

Although the question is fairly debatable, we conclude based on the policies underlying the Copyright Act that disassembly of a copyrighted object code is, as a matter of law, a fair use . . . if [it] provides the only means of access to those elements of the code that are not protected by the copyright and the copier has a legitimate reason for seeking such access.

Id. at 1518.

213.

[T]hat computer programs are distributed for public use in object code form often precludes public access to the ideas and functional concepts contained in those programs, and thus confers on the copyright owner a *de facto* monopoly over those ideas and functional concepts. That result defeats the fundamental purpose of the Copyright Act — to encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on.

Id. at 1527.

factual aspect of the Scrolls. This cannot be done without copying. No scholar, no matter how brilliant, is capable of remembering the contents of thousands of fragments, mentally rearranging them and translating them. Any other result would permit copyright holders to deny access to unprotected factual information by ensuring that the factual information is only available in a copyrighted document.

While it was not discussed in any depth in *INS*, the apparent reason that *INS* violated news industry custom by taking AP news was that *INS* had been barred by British and French authorities from using the European cable system.²¹⁴ With no other access to information about events occurring on the front during World War I, *INS* was faced with the choice between financial ruin caused by not reporting the leading story of the day and professional malapprobrium for taking the facts of that story, although (usually) not its expression. Professor Epstein has argued that the property doctrine of necessity should have been applied to the quasi-property in *INS*, permitting *INS* to use AP's factual information when other access to that information had been blocked by AP's monopoly, as long as *INS* paid just compensation.²¹⁵ This argument for compulsory licensing is even more compelling when, as in the case of the Dead Sea Scrolls, the monopoly is caused by the potential licensor, rather than by outside events.²¹⁶

Even if the arrangements, translations, or interpolations of the international team should be protected, the factual basis of their work should be made available to other scholars to ensure that a complete picture of the Scroll contents, as seen by scholars of different disciplines, backgrounds, and perspectives, becomes clear. When one group controls access to the facts, the ability of others to add to the store of knowledge is stifled. An analogy can be drawn to patent law. One goal of patent law is the dissemination of information.²¹⁷ While the patent holder is given a monopoly on the manufacture, use, and sale of his invention, the public is given free access at a very early stage to the specifications and technology of the invention so that further innovation will be facilitated.

The courts' interpretation of the scope of each patent may also serve to encourage innovation; a narrow reading of the patent's scope permits

214. See Epstein, *supra* note 186, at 91-92.

215. *Id.* at 118-19.

216. See Ginsburg, *supra* note 156, at 1924-36 (arguing that works of "low authorship," for example compilations, should be subject to a compulsory license for derivative use).

217. See, e.g., 35 U.S.C. § 112 (1988) (setting forth disclosure requirements in patent specifications).

greater use of the patent's technology, while a broad reading limits use. Interestingly, some scholars believe that the monopoly given to patent holders is not limited or expanded based on balancing the desirability of encouraging innovation with the desirability of allowing others to exploit that innovation.²¹⁸ For example, Professors Grady and Alexander argue that patents are protected more strenuously by courts when they believe that the patent holder is in the best position to supervise the exploitation of the patent in a systematic and efficient way.²¹⁹ If the patent is for a threshold invention upon which other inventions will build, and the patent holder has the means to build on that invention quickly and efficiently, courts are more likely to consider the patent to be a broad one. If, on the other hand, the invention is complete and the patent holder is not likely to build on it, the patent will be narrowly construed.²²⁰

While patent law obviously does not apply, the international team's control of the Scrolls and refusal to allow others to participate in the process of collation is very similar to the monopoly control a patent holder tries to exercise over his invention. Like the patent holder, the international team wishes to control all new uses to which their find is put. If Professors Grady and Alexander's view is an accurate description of the reasoning behind modern patent decisions, a similar view could be applied to the Scrolls. The Scrolls are a work in progress, much like a threshold invention. The international team, having spent decades with the Scrolls themselves, and having amassed a constituency of Biblical scholars of excellent repute, appear to be in the best position to exploit and expand upon Scroll knowledge. Under the Grady-Alexander approach, the Scroll Committee's scope of protection should be broad, and others can, and should, be prevented from using the Scrolls until the Committee has done all it can with them. This argument fails, however, if, due to mismanagement, politics, ego, or conspiracy, the international team's monopoly is not the quickest or most efficient way to interpret the Scrolls. Even under the Grady-Alexander approach, a resource-rich patent holder for a threshold invention should not be granted broad patent protection if it does not use its resources to expand upon and exploit the invention.²²¹

218. See generally Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305 (1992).

219. See *id.* at 331.

220. *Id.* at 318.

221.

[T]here is a need to spur the creation of [information] But once the [information] is effectively developed, the information may well have greater value if it is used by many people simultaneously than if it is used and kept by one person alone (a new mathematical theorem may be a good illustration of this

B. Trade Secret

Israel claimed that the Huntington Library's publication amounted to the theft of a trade secret, but this is unlikely on several grounds. Even if it could be argued that there exists some form of economic competition between the international team and the rest of academia that warrants trade secret protection, the contents of the Scrolls only remain secret until the team publishes a translation. Most of the reconstructed portions had already been released in bootlegged or limited form, and so were not secret. Even photos of previously unreleased portions, while secret, represent the secret as it was in 1980, since much of the arrangement of fragments has since changed or been advanced.²²²

Trade secret protection is not generally held to give the possessor a property right in the secret itself.²²³ Rather, it protects the possessor against those who would obtain the trade secret improperly, or who would reveal the trade secret in violation of a duty of confidentiality.²²⁴ If a trade secret is obtained or revealed through legitimate means, the acquisition is not actionable, and once it is revealed through any means, legitimate or illegitimate, it ceases to be secret and, therefore, protectable.²²⁵ The Huntington Library's acquisition of the photographs was proper, in that they were presented to the Library by their owner, Mrs. Bechtel.²²⁶ The revelation of the photographs did not violate a confidentiality agreement between Mrs. Bechtel and the Library,²²⁷

phenomenon). Therefore, granting perpetual property rights in information creates, at the margin, small additional incentives to gather the information, but it reduces, no doubt to a far greater extent, the beneficial use of the information once it is made available.

Epstein, *supra* note 186, at 114-15.

222. Telephone Interview with William Moffett, Director of the Huntington Library, Dec. 2, 1992 (on file with the *Michigan Journal of International Law*).

223. RESTATEMENT OF TORTS § 757, cmts. a, b (1939). *But see* 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS [12 BUSINESS ORGANIZATIONS] § 2.01 (Nov. 1993) (property right is inherent in trade secret protection).

224. Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989).

225. *Id.* at 382.

226. In 1967, Elizabeth Hay Bechtel began vigorously lobbying the government of Israel to have a photographic record of the Scrolls made and removed from the war zone. In 1980, she entered into an arrangement with the Israel Antiquities Authority to photograph the Scrolls. Apparently, this arrangement required her to keep the photographs of the Scrolls confidential. Moffett Interview, *supra* note 41.

227. "Gifts [to museums, etc.] cannot be presumed to be conditional. Their conditions must be clearly set forth, as the memories of men do fade with time." MALARO, *supra* note 97, at 107 (quoting *Abrams v. Maryland Historical Society*, Equity No. A-58791 A-513 (Cir. Ct. Baltimore City Md. June 20, 1979)).

rather it appears that she intended that they be revealed.²²⁸ It may be, however, that Mrs. Bechtel violated a confidentiality agreement with Israel when she revealed the photographs to the Library. By revealing the photographs to the Library, Mrs. Bechtel simultaneously violated and destroyed the trade secret. Israel's right of action may have been against Mrs. Bechtel for revealing the secret to the Library,²²⁹ but once the secret was revealed, the Library was free to disseminate it.

The mechanism for translating or arranging the contents is probably not a trade secret since it may be available to all Biblical scholars. Even if the mechanism were a secret, however, only the content, and not the mechanism, was revealed in the publication.

The Israel Antiquities Authority also called Wacholder and Abegg's 1991 reconstruction of the text of some of the Scrolls from the international team's concordance the theft of a trade secret.²³⁰ This is specious, in that the concordance was not secret, having been published and distributed by the international team itself. The reconstruction was the original work of Wacholder and Abegg and, therefore, not theft.

C. *Unfair Competition*

If the parties were in economic competition,²³¹ the appropriation of the international team's labor, if not its words, would constitute unfair competition. In *INS*, the Court found unfair competition where INS used the substance, but not the expression, of news reports gathered by AP, even where INS acquired the information from public sources. The Court stated that:

[The defendant] is taking material that has been acquired by complainant as the result of organization and the expenditure of labor,

228. Moffett Interview, *supra* note 41.

229. According to the director of the Israel Antiquities Authority, agreements with foreign institutions stated that "those who received them were to be in charge of only their preservation, and are obviously not permitted to publish them or show them to the public without permission." *Dead Sea Scrolls Photos Made Public*, FACTS ON FILE WORLD NEWS DIG., Sept. 26, 1991, at 714 D3, available in LEXIS, News Library, Facts File.

230. See Vermes, *supra* note 10, at 11.

231.

[Unfair trade] means that . . . words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. . . . But the only reason why it is actionable . . . is that it tends to give the defendant an advantage in his competition. . . .

International News Service v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown.²³²

But the Court's concern was with the diversion of profits²³³ and the ill-gotten economic gain of the defendant:

[T]he view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news . . . but only postpones participation by complainant's competitor in the . . . reproduction of the news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure.²³⁴

The economic competition between members of the international team and the rest of the scholarly community is minimal at best, but, even if significant, their competition is not unfair. Access to the fragments themselves in no way impinges on the team's investment in the process of collation and interpretation. Where access to the fragments is impossible, scholars must rely on the team's work, a monopoly on which the team should be able to exercise for only a limited time.

V. PROPOSALS

A. *Preservation*

In the first few decades of Dead Sea Scrolls research, the international team kept the Scrolls in a large room called "the Scrollery" which was subject to extreme temperature and humidity fluctuations. The international team worked in the Scrollery with open windows and natural sunlight, amid cigarette smoke.²³⁵ At the outbreak of the 1956 Arab-Israeli war, the Jordanian government decided to hide the Scrolls in a basement in Amman, Jordan. By the time the Scrolls were removed, many were covered with mildew or otherwise damaged from the damp conditions.²³⁶ So much damage was done to the fragments by the uncontrolled conditions in the Scrollery, and the subsequent storage, that many fragments are now unreadable. While many of the Scrolls had been

232. *Id.* at 239.

233. *Id.* at 240.

234. *Id.* at 241.

235. Shanks, *supra* note 9, at xxv.

236. *Id.* at xxxiii.

photographed in the early 1950s in an effort to preserve them,²³⁷ Jordan took very poor care of the photographic slides and many of the only surviving records of damaged fragments have themselves become unreadable.²³⁸

Mrs. Bechtel's determined efforts to acquire an additional set of photographs of the remaining readable fragments, despite Israeli government and international team opposition, ultimately ensured that the content of the fragments would be protected from further deterioration or destruction due to war or natural disaster.

Obviously, many types of cultural property require some degree of preservation. Even objects as seemingly indestructible as the marble friezes on the Parthenon can be irreversibly damaged by the vagaries of modern life or the hazards of war. Cultural nationalism prompts countries that cannot afford adequate cultural property preservation to hold onto their national treasures even when they realize that by doing so, the treasures may deteriorate. Professor Merryman speaks of nations that hoard cultural property while at the same time not providing it with the protection and preservation it requires. He describes this "covetous neglect" as "a major threat to the cultural heritage of all mankind."²³⁹ Nonetheless, in a world where cultural nationalism is the norm, countries better equipped to preserve other nations' cultural property are in no diplomatic, political, or legal position to appropriate it, or to engage in uninvited preservation efforts in the object's country of origin. In addition, some preservation techniques require altering the cultural object itself or its environment. For example, preserving textiles may require treating them with chemicals; preserving the Parthenon marbles will require removing them from exposure to the open air. The controversy over the restoration of the Sistine Chapel ceiling is a good indicator of the fact that not everyone would agree on the appropriate measures that should be taken to protect cultural property.²⁴⁰

Preserving the content of historic documents is far simpler than preserving the documents themselves or any other type of cultural property. There is no need to wrest control of the documents from their owner or their country of origin; all that is required is a photographic record. Careful archival photography does no damage to even the most fragile documents.

237. *Id.*

238. *Id.*

239. Merryman, *supra* note 94, at 1920 n.123.

240. See Harriet Paterson, *Day of Judgment*, SUNDAY TELEGRAPH (London), Mar. 27, 1994, at 5, available in Lexis, News Library, Telegr File.

Responsible ownership of ephemera should entail photographic preservation. While it may be difficult to mandate such preservation through United Nations protocols, informal controls may be possible. For example, foundation funding, exhibition requests, and research participation by scholars from other nations could be tied to the existence of adequate photographic records.

B. Access

The international team took the view that they had absolute control over the Scrolls until the publication of each member's *editio princeps*. Some degree of control for a time by the discoverer of a document or the discoverer's assignee is understandable and probably beneficial. The difficulty arises when that control becomes a long-term monopoly.

In 1991, the American Schools of Oriental Research Ancient Manuscripts Committee issued a proposed statement of access to ancient documents, recommending that "those who own or control ancient manuscript materials" allow all scholars access to them.²⁴¹ Under the proposal, scholars who had been assigned to work on specific documents should be given a time limit to do so, and should permit access to those who request it; accessing scholars should be permitted to publish their own analyses before the official one, if they choose.²⁴² While some scholars may be willing to agree to such a proposal, to be effective it will be necessary for funding institutions to agree that funding will only be given to scholars willing to give access. The National Endowment for the Humanities, for example, is currently considering placing a publication time limit on some of its grants.²⁴³

Governments must also consider likelihood of publication when assigning documents to scholars. For example, the Israeli Antiquities Authority set a timetable for publication in reassigning Dead Sea Scrolls research.²⁴⁴ To date, the government of Israel has not enforced this provision against any member of the international team.

241. Sanders, *supra* note 32, at 38.

242. *Id.*

243. Telephone Interview, National Endowment for the Humanities representative, Aug. 24, 1994 (on file with the *Michigan Journal of International Law*).

244. Abraham Rabinovich, *New Wind in the Scrollerly*, JERUSALEM POST, Oct. 11, 1991, available in LEXIS, News library, Jpost File (microform never issued).

CONCLUSION

By controlling access to the fragments and to photos of the fragments, the international team has forced Biblical scholars to wait forty-five years for the opportunity to study and comment on one of the greatest manuscript discoveries of modern times. Biblical scholars have faced the Scylla and Charybdis of foregoing any opportunity to see the Scrolls²⁴⁵ or using the international team's work in progress without permission. By making the underlying factual information completely inaccessible in any form but in arguably protectable documents, the international team has sought to control scholarly access to facts, using intellectual property law as a shield. This, despite the fact that the purpose and goals of intellectual property law acknowledge the importance of free access to factual information.

In so doing, the international team has controlled Biblical scholarship and the careers of Biblical scholars for two generations. If the Huntington Library had not been given photos of the Scrolls or had not chosen to reveal them future generations of Biblical scholars would have had to rely on the international team's consensus opinion of the meaning of the Scrolls, perhaps never having an opportunity to examine the documents on which that opinion was based. Had the international team chosen to do so, its members could easily have molded that consensus opinion to reflect their biases and beliefs, a result which could never have been challenged by those outside of the charmed circle.

Secretiveness has no place in scholarship. By definition, scholarship should enlighten, not obfuscate. Even in the scientific community, where research results often represent a marketable commodity, scholars recognize the inherent contradiction, and ultimate destructiveness, of secret research.²⁴⁶

With scientific research, however, some secretiveness is understandable in that scientific research represents invention and creation, results which are personal to the researcher and a reflection of his creative genius. Secretiveness with regard to material already in existence and in the public domain is another matter. A scientific researcher has created

245. When Professor Robert Eisenman confronted the director of the Shrine of the Book, Magen Broshi, in 1987 about the international team's delay, he was told, "[y]ou will not see these things in your lifetime." BAIGENT & LEIGH, *supra* note 6, at 77.

246. "Scientists who once shared prepublication information freely . . . are now much more reluctant to do so The fragile network of informal communication that characterizes every especially active field is liable to rupture." Dorothy Nelkin, SCIENCE AS INTELLECTUAL PROPERTY: WHO CONTROLS RESEARCH? 12 (1984) (quoting Stanford University President Donald Kennedy).

an addition to scientific knowledge that, if he chooses to keep secret, at least results in no net loss to the public store of knowledge. With regard to the Scrolls, the international team has taken something from the public store of knowledge and secreted it, resulting in a net loss. Ultimately, they intend to return it to the public store of knowledge in a more useful form, but the public is forced to trust that they will return an unexpurgated, undistorted version.

Public access to the content of historic documents does nothing to diminish the owner's property interest in the documents themselves. If the content consists of public domain or purely factual information there is no intellectual property interest to be infringed. There may well be a cultural property interest in the content of such documents; but, because access to the content diminishes neither the document nor the content, there is no reason not to find that the cultural property interest belongs to all humans, and not just to those who have a cultural property interest in the document. Knowledge of human history and culture is not something that can or should be owned or controlled.