The Zapruder Film: "No" to Copyright Protection

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Introduction

This essay aims to show that copyright protection should not generally apply to the Zapruder film ("Z-film") record of the 22 November 1963 assassination of President John F. Kennedy. The predominant reason is 1990s federal legislation popularly known as the JFK Act that was a direct countermand to the veil of secrecy pervading the subject-matter (arguably placing the film in the public domain), but also because of language contained in judicial case law.

As shown below, while one 1968 federal district court case called it copyrightable, it is doubtful, based on subsequent case law, that even its own federal Second appellate circuit would agree. More significantly, it is doubtful that the U.S. Supreme Court would agree. Arguably, it was never properly copyrightable to begin with, both because of its great public interest as a news event, and, even more importantly, in that the assassination cannot be properly understood without public access to this source *in toto*. The idea of the event and its precise Z-film depiction cannot be properly treated separately.

More targetedly, copyright is especially inappropriate where the Z-film's very authenticity as an accurate record of the JFK assassination is impeached as it is in the Fetzer treatment by resort to the very Z-film itself. Hence, even if for some applications it could be considered copyrightable, the scope of its protection should not extend to the Fetzer treatment. This principle also illustrates that copyrightability of subject-matter and scope of copyright protection can be two distinctly different factors. In this case, however, it seems that the Fetzer treatment wins in both arenas.

While arguments can be made for Z-film and frame copyright "waiver" or "abandonment" based on either selective enforcement or perhaps even abuse of copyright, given the strength of the supporting arguments otherwise militating toward free First Amendment use of it, that thread has not been pursued here.

Finally, "fair use" is not addressed because of this writer's conviction toward non-copyrightability. Historically, that element expands the actionability issue even where technical infringement might exist. But the virtual wholesale use of the Z-film frames in the Fetzer treatment almost hinges on non-copyrightability

rather than "fair use" (since extent of use is one of the statutory factors and case law considerations for "fair use"), though not necessarily because of the uniqueness of his application. While a source for interesting debate, it is not considered necessary for purposes of this essay.

The Economic Market Effect—Copyrightability vs. Actionability

Regardless of infringement or not, once the inevitable "fair use" defense enters the fray, there must be an adverse impact on the marketability of the infringed product, be it directly through the film itself or indirectly through impairment of derivative rights [1]. On its surface, an attack such as Fetzer's on the very integrity of the film as an historical document would probably promote interest in the film for the alteration ramifications of such a finding. While for reasons discussed below, copyrightability should be adversely impacted should his thesis find acceptance, lack of detrimental market effect is an element that must be considered if it does not.

Z-Film Lineage and Exposure

While by no means exhaustive, a tracing of official Z-film disposition and other relevant facts of historical interest appears in order. Circa 24 November 1963, Zapruder agreed to a $150,000 purchase price for television and movie rights plus royalties. The first $25,000 was donated to Dallas police officer J. D. Tippit's widow. Tippit had been murdered on the same day as JFK, and allegedly by Oswald [2].

Interestingly, actual copyright of the original Z-film itself was not registered until 15 May 1967, by Time, Inc., the parent company of *Life* magazine [3]. On 6 March 1975, Geraldo Rivera showed Groden's Z-film version for the first time on national television on his *Good Night America* talk show [4]. In April of 1975, Time transferred the copyright back to the Zapruder family [5], purportedly through assignment that reserved to Time unlimited non-exclusive print rights to Zapruder frames [6]. On 13 July 1998, a digitized Z-film produced by MPI Home Video debuted as a documentary [7].

On 1 August 1998, Z-film ownership was officially transferred to NARA [8]. On 3 August 1999, a Department of Justice special arbitration panel headed by Philadelphia lawyer and former federal judge Arlin Adams and also composed of former Department of Justice official Walter Dellinger and Kenneth Feinberg, a Washington DC lawyer and law professor, announced that it had determined eminent domain compensation to the Zapruder family (without copyright purchase) to be $16 million plus interest, describing the film as "a unique historical item of unprecedented worth" [9].

While the Arbitration Agreement states that "[n]othing in this Arbitration Agreement alters LMH's right to fully enforce its Copyright" [10], that does not in itself imbue by law a valid copyright if none existed by law at the time of said Agreement, which it is argued herein that it did not. The provision might just as

well have more artfully read, "nothing in this Arbitration Agreement alters LMH's right, be there any, to fully enforce whatever copyright enforcement rights it may have". Eminent domain rights were at issue and nothing more. As will be described later, the Archivist no longer treats the Z-film as though there were copyright rights that remain to be respected.

Dellinger disagreed with the settlement figure, saying it was "simply too large an amount". He purportedly would have assigned its value between $3 million and $5 million [11]. While the panel said it reached its decision on 6 July 1999, that was coincidentally the same tragic day that the airplane carrying JFK Jr. and his wife crashed off Martha's Vineyard in Massachusetts, killing them both, so the announcement had been postponed in deference to the Kennedy family [12].

Jeff West, director of the Sixth Floor Museum (converted from the infamous Texas School Book Depository in Dealey Plaza in Dallas, the assassination situs), was quoted as saying the $16 million purchase price, plus interest, was a "good, fair price for the family and the government" [13].

On 30 December 1999, the copyright to the Z-film was donated by the Zapruder family, along with various artifacts, to the Sixth Floor Museum [14].

Constitutional Significance of Copyright

Copyright is not a matter of right but of statutory privilege as Congress has been enabled to enunciate it through Art. I, Section 8 of the U.S. Constitution. Therefore, the extent to which it has addressed both the assassination itself and the general goals of copyright law is paramount to ascertaining the scope of copyright protection toward that subject.

Congress Speaks

That statement was dramatically made with the passage of The President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act" or "Act"). Its need was perceived by Congress as urgent. Otherwise, Congressional records would not be disclosable until at least 2029 [15]. The government's secrecy in treating assassination records had undermined public confidence in its very integrity. As the Assassination Records Review Board ("ARRB", but hereafter "Review Board" or "Board") that was created by Congress to help implement the Act wrote in its Final Report, the removal of secrecy was the *sine qua non* of its existence. It explained: "Numerous records of previous investigatory bodies such as the Warren Commission, the Church Committee, and the HSCA were *secret*. Yet members of these commissions reached conclusions based on the investigatory records. *The American public lost faith* when it could not see the very documents whose contents led to these conclusions." [16] (Emphasis added.)

The Act is designed to specifically address the shortcomings of both the Freedom of Information Act ("FOIA") and Executive Order #12356 as applied by the

executive branch so as to favor disclosure of JFK assassination records ("records") [17]. It recognizes that "legislation is *necessary* to create an *enforceable*, *independent*, and *accountable* process for the public disclosure of such records." [18] (Emphasis added.)

It seeks to place *all* records into the National Archives [more formally, the National Archives and Records Administration ("NARA")] and requires their "*expeditious* public transmission to the Archivist." [19] (Emphasis added.) To satisfy a "compelling" public interest [20], each record bears a "presumption of immediate disclosure" [21] only rebuttable by "clear and convincing evidence" [22], a standard above the normal civil one of "preponderance of the evidence" (more likely than not).

To exclude for security, privacy or other overriding purposes, each applicant has to present written reasons to obtain a "Postponement of Disclosure" subject to periodic review to sustain its status and only specifically enforceable as to those portions of a record reflecting the exclusionary purpose. Even then, paraphrasing has to be made of the deleted areas. The Board was specifically empowered to "direct Government offices to transmit to the Archivist assassination records as required under this Act, *including segregable portions of assassination records*, and *substitutes and summaries of assassination records* that can be publicly disclosed to the fullest extent" [23]. (Emphasis added.) Even sealed court records are petitionable by the U.S. Attorney General [24].

So as to preserve the truthfulness and reliability of the collection, it is the duty of the Archivist to "ensure the physical integrity and original provenance of all records" [25]. In general, "no assassination record shall be destroyed, *altered*, or mutilated in any way" [26] and "no assassination record created *by a person* or entity outside government … shall be *withheld, redacted, postponed for public disclosure*, or reclassified" [27]. (Emphasis added.) The Act is not sunseted until the Archivist certifies to the President and Congress that all records have been made available to the public. The Review Board considered this pivotal. ("This provision is significant because it underscores the continuing obligation of federal agencies on the assassination after the Review Board's term expires." [28])

So as to remove all doubt as to its predominance over the JFK assassination subject, the JFK Act contains a Supremacy Clause at Section 11(a) [29]. When time threatened the Review Board's task, The President John F. Kennedy Assassination Collection Extension Act of 1994 was passed, with yet a final extension granted the Board until 30 Setpember 1998 through the passage of Public Law 10525.29 [30]. Congress never expressed doubts as to the primacy of its initial task.

The scope of "assassination record" is treated at section 1400.1(a) of 36 CFR (Code of Federal Regulations) 1400 (which the Review Board itself formulated)—Guidance for Interpretation and Implementation of the President John F. Kennedy Assassination Records Collection Act of 1992 [31] and entails "… all records, public and *private*, regardless of how labeled or identified …". (Emphasis added.) Section 1400.4(b) and (c) specifically identifies "photographs" and "mo-

tion pictures" [32]. Subject to availability, Section 1400.6(4) calls for storage of the original camera and 1400.6(5) of the original video recordings [33].

Of significance is the release of records in their entirety. In pertinent part, Section 1400.5 states "… no portion of any assassination record shall be withheld from public disclosure solely on grounds of non-relevance …" [34]. Also of seminal importance is Section 1400.8(c), which states: "In determining such designation of records as assassination records, the Review Board must determine that the record or group of records will more likely than not *enhance*, *enrich*, and *broaden* the historical record of the assassination." [35] (Emphasis added.)

With the Z-film being the most complete photographic record, its prominence escaped neither the Review Board nor Congress. In Chapter 6, Part 11 of its Final Report, the Board said: "The Zapruder film, which records the moments when President Kennedy was assassinated, is perhaps the single most important assassination record." [36] In a policy statement, the Board strove to transfer the original to the archives on 1 August 1998 and to work with Congress to achieve this [37]. In a letter to Frank W. Hungar, Assistant Attorney General for the Civil Division of the Department of Justice ("DOJ") dated 5 June 1998, Congressman Dan Burton, Chairman of the House Committee on Government Reform and Oversight, a Review Board watchdog, wrote that Congress supported the "Board's commitment to ensuring that the original Zapruder film *remains* in the custody of the American people *as the most important assassination record*" [38]. (Emphasis added.)

As a corollary, the Board vowed to establish tests for film authenticity. In short, assurances of the integrity of the film were important before it was to be transferred to the Archives, as is all evidence becoming part of the official record. Again, in Chapter 6, Part II of its Final Report, the Board highlighted the significance it placed on JFK students' concerns over three major evidentiary areas: (1) the medical evidence; (2) the ballistics evidence; and (3) assassination film recordings taken at Dealey Plaza. It wrote: "The Review Board believed that, *in order to truly address the public's concern relating to possible conspiracy and cover-ups relating to the assassination*, it would need to gather some additional information on all three of these topics. The pages that follow detail the Review Board's efforts to develop additional information on *these highly relevant and interesting topics*." [39] (Emphasis added.)

In a letter to James Moore dated 10 July 1978, Zapruder's son Henry G., while retaining legal ownership, deposited the original Z-film with the National Archives for safekeeping. After passage of the Act, separate attempts for its return were unsuccessfully made, in March of 1993 by Henry personally and in October of 1994 through his counsel. The Board noted, "NARA declined to return the original film, knowing that the JFK Act may have affected the legal ownership status of the film." [40]

Joint efforts between NARA, the Board, and the DOJ were undertaken to "clarify the status of the original film under the JFK Act, including whether the U.S. government could legally acquire the original film and what the value of compensation to the Zapruder family would be under the takings clause of the Fifth

Amendment [eminent domain]. In addition, the U.S. government had numerous discussions with legal counsel for the Zapruder family regarding a legal 'taking' of the film, the compensation to be accorded the family, and the copyright issues regarding the film." [41]

By 1997, the Board concluded that the Zapruder film had to become an official Government document. It wrote: "In 1997, the Review Board deliberated, and ultimately asserted, its authority under the JFK Act to acquire legal ownership of the original Zapruder film. ... The Review Board also had to consider how to acquire the film *for the American people,* whether through the exercise of a takings power or through negotiations with the Zapruder family." [42] (Emphasis added.)

Returning to their "Statement of Policy and Intent with Regard to the Zapruder Film", its third resolution was "that the Board would work cooperatively with the Zapruder family to *produce the best possible copy for scholarly and research purposes,* establishing a base reference for the film through digitization ..." [43].

It was hence expected that scholarship would be stimulated by the Board's work and the Archival Collection. In fact, that would be the barometer of whether or not the Act was an overall success. As the Board stated: "Ultimately, it will be years before the JFK Collection at NARA can be judged properly. *The test will be in the scholarship that is generated by historians and other researchers* who study the extensive documentation of the event and its aftermath. ... Will the mass of documentary evidence answer the questions posed by historians and others? ... *What do the records tell us about the 1960s and the Cold War context of the assassination?"* (Emphasis added.) The Board added: "The creation of the JFK Collection at NARA establishes a large records collection *undergoing intense use by researchers."* [44] (Emphasis added.)

Regarding agency reviewers, it was noted that not only did the Republic withstand the scrutiny, but "... perhaps, they will also note that openness is itself a good thing and that *careful scrutiny of government actions* can strengthen agencies and the provisions of government, not weaken it." [45] (Emphasis added.)

Perhaps most ringingly, the Board commented: "Formation of a historical record that can augment understanding of important events is central not only to openness and accountability, *but to democracy itself.*" (Emphasis added.) That it was legislation that empowered it to act played a critical role, as "standards set through agency recommendation and presidential inclusion in an executive order would have limited the Board's ability to compel disclosure." [46]

The Final Report at Review Board Recommendations, no. 8, emphasizes that government accountability should be a continuing concern. *"The public stake is clear* in creating a mechanism such as the Review Board to inform American citizens of the details of some of the most controversial events in American history. *Moreover, the release of documents enables citizens to form their own views of events, to evaluate the actions of elected and appointed officials, and to hold them to account.* There will not be a large number of such events, but there must be procedures grounded in experience that might be used to uncover the

truth when these events, tragic as they are, occur. The provisions of the JFK Act have fostered the release of such documents, and the Board's experience demonstrates that similar legislation would be successful in the future." [47] (Emphasis added.)

The Board definitively concluded at Review Board Recommendations, no. 10, that government suppression of records had been overreaching in the JFK controversy. "The Review Board's experience leaves little doubt that the federal government needlessly and wastefully classified and then withheld from public access countless important records that did not require such treatment. Consequently, there is little doubt that an *aggressive policy* is necessary to address the significant problem of lack of accountability and an uninformed citizenry that are created by the current practice of excessive classification and obstacles to releasing such information." It added: "Change is long overdue and the Review Board's experience amply demonstrates the value of sharing important information with the American public. *It is a matter of trust.*" [48] (Emphasis added.)

Court Rulings

A. Deference to Congress

As to the overall copyright scheme and other copyright legislation enacted by Congress, the U.S. Supreme Court has overall deferred to that body's judgment. In *Sony Corp. of America v. Universal City Studios, Inc.* [49], the Court said: "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be assigned authors … in order to give the public appropriate access to their work product."

In analyzing the constitutionality of the Sonny Bono 1998 Copyright Term Extension Act ("CTEA"), the Court noted in *Eldred v. Ashcroft* [50]: "… we turn now to whether it [the CTEA] is a *rational* exercise of the legislative authority conferred by the Copyright Clause. *On that point, we defer substantially to Congress.*" [51] (Emphasis added.) The Court elaborated: "We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. See *Stewart v. Abend,* 495 U.S. [207] at 230 [(1990)] ('Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces …. [I]t is not our role to alter the delicate balance Congress has labored to achieve.'); *Sony,* 464 U.S., at 429 ('[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order *to give the public appropriate access to their work product.*') [emphasis added]; *Graham [v. John Deere Co. of Kansas City]*, 383 U.S. [1] at 6 ('Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.')." [52]

Precisely what scope the Constitutional Copyright Clause should have in its overall application, both generally and specifically, is subject only to rational

scrutiny by the courts due to its Art. I, Section 8 deferential derivation. "The Copyright Clause," said *Eldred*, empowers Congress to *define* [emphasis original] the scope of the substantive right. See *Sony,* 464 U.S., at 429. Judicial deference to such congressional definition is '*but a corollary* to the *grant to Congress of any Article I power*.' *Graham*, 383 U.S., at 6." (Emphasis added.) The Court wrapped this theme up by saying, "As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. See *Graham,* 383 U.S., at 6 (Congress may 'implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim.' " [53] (Emphasis added by *Eldred* to *Graham*.)

Almost all 1976 Copyright Act terms for both existing and future copyrights were extended 20 years by the CTEA, which the petitioners to the Court derided as "very bad policy". Weighing such factors as the historical analysis by Congress indicating that extended terms favored greater public dissemination by private copyright holders than shorter ones, that the CTEA established parity with international copyrights assigned by the European Union, and that the greater durations were still within "limited Times" allowances prescribed by Art. I, section 8, the Court upheld the CTEA time extensions. As to the "very bad policy" charges of the petitioners, the Court returned, "*The wisdom of Congress' action, however, is not within our province to second guess.* Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch [Congress], we affirm the judgment of the Court of Appeals [which also upheld the CTEA]." [54] (Emphasis added.)

Therefore, how Congress treats the Z-film copyright issue bears great weight with the courts, who are loathe to interfere with its implementation of its Constitutionally-based mandate.

B. Judicial Postures Toward the Z-Film

The only court to make an official ruling as to the Z-film's copyright status found in the affirmative; but for reasons to be submitted below, the vitality of that designation is open to serious question, not only in terms of the age of the opinion but also as to other expressions that have come from the appellate courts in the same Second Circuit as that District Court sits, as well as from other federal circuits and the United States Supreme Court itself.

In 1968 (and, among other things, *long* before the JFK Act), the Southern District Court of New York found in *Time. Inc. v. Bernard Geis Assocs* [55] that the Z-film was indeed entitled to copyright protection. No liability was imposed, however, because to the degree that unauthorized frames and sketches of frames were used by Josiah Thompson and his publisher Geiss in *Six Seconds in Dallas*, District Judge Wyatt upheld the defense of "fair use" and awarded summary judgment to the defendants.

The creative requirement for copyright protection was found in the decisions Zapruder made as to the type of camera he used (movie rather than still), the type of film (color rather than black and white), his use of a telephoto lens, his

determination of the time they would be taken, and his selection of the general area and specific location for the filming (choosing among several experimental positions) [56]. The court also correctly found that photographs generally are subject to copyright.

The distinction made by the Court in differentiating this from non-copyrightable news events is itself pivotal. "All that *Life* claims is a copyright is the particular *form of expression* of the Zapruder film." Notably, *Nimmer on Copyright* is referenced to establish that sketches may be a form of infringement. Yet, he (this is before son David assisted father Melville) is curiously and *importantly not* referenced re his specific comments as to the Zapruder film as they are discussed below.

Even *Geis* acknowledged public interest in the assassination: "There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained with sketches of the type used at p. 87 of the Book [*Six Seconds in Dallas*] and in *The Saturday Evening Post*, the explanations actually made in the Book with copies is easier to understand. The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the theory of Thompson and its explanation, supported by Zapruder pictures." [58] Fair use here also was based on non-comparable markets. Time does not sell Zapruder pictures [59]. This is not a categorization that would necessarily receive universal acclamation, even within its own federal Circuit.

Before turning to the Second Circuit, however, also of interest is the statement made by *Geis* itself in articulating why defense claims of oligopoly cannot be considered by it: "All that *Life* claims is a copyright on the particular form of expression of the Zapruder film. If this be 'oligopoly', it is specifically conferred by the Copyright Act and for any relief address must be to the Congress and not to this Court." [60] How well it could be argued that since the government's secrecy and concealment of documents prompted passage of the JFK Act and the fact that now the Z-film is government property for disclosure to the public also because of said Act, that Congress has indeed addressed and retaliated against the very oligopolic practices the defense presented in *Geis*. Logically, it seems that even that court would have considered copyrightability in a different light with that input.

While the federal Second Circuit appellate court [covering New York, Vermont and Connecticut] would have probably upheld the end result of non-liability in *Geis*, it is unlikely they would have arrived at it under the same premise. The Court noted in *Iowa State University Research Foundation. Inc. v. American Broadcasting Cos., Inc.* [61] that in the "almost unique instance" of the Zapruder film "it is at least arguable that the informational value of that film cannot be separated from the photographer's expression." Therefore, while in dicta, an argument for the Z-film falling outside of the scope of copyright protection altogether was alluded to.

More recently, the Z-film appeared in further dicta while the Second Circuit factually distinguished the case before it in *Twin Peaks Productions. Inc. v. Publications Internat., Ltd.* [62] by saying that its instant case was not the "extraordinary" situation overcoming the principle that fair use encompasses all First Amendment arguments. "Whatever non-protectable information PIL [defendant] seeks to disseminate is hardly inseparable from TPP's [Plaintiff's] copyrighted expression, *as perhaps is the case with the Zapruder film of the Kennedy assassination.*" [63] (Emphasis added.) The supporting cite of *Roy Export Co. v. Central Broadcasting System. Inc.* [64] was also made by the court [65].

There is language in *Geis* that is useful in evaluating the effect of the JFK Act on the copyright issue. During the 1968 period in which its decision was rendered, the court said that the Archivist's practice was to instruct anyone requesting a copy of the complete Z-film as deposited by the Warren Commission that it could not comply. It would instead respond with the statement: "*Life* Magazine has advised us that while it will permit the film to be shown to qualified researchers, it cannot permit the reproduction of the film." [66]

The Archives' posture has now changed considerably. A person is allowed to copy the Z-film for free if he has his own equipment. Otherwise, he must rent out Archives equipment for $9.95 for two hours usage. If one cannot directly access the Archives, an outside vendor is required. The copying of the film, however, is not restricted in any manner. This is highly probative evidence that the government no longer regards copyright as a viable issue.

Interesting dicta emanates from the federal Ninth Circuit (covering Washington, Oregon, Idaho, Montana, California, Nevada, Arizona, Alaska, Hawaii, Northern Mariana Islands, and Guam) case of *Los Angeles News Service v. Tullo* [67] as well. Therein, the court noted that the Fair Use doctrine itself, which normally encompasses all First Amendment considerations, can be inadequate to protect First Amendment issues and Nimmer treatise's examples of the My Lai massacre and Kennedy assassination were referenced regarding times when the demands for a *democratic dialogue* dictate less stringency in copyright application. The court said in pertinent part: "... where the 'idea' of a work contributes almost nothing to the democratic dialogue, *and it is only its expression which is meaningful*, copyright protection should be limited in the interest of public access to information *necessary to effective public dialogue*. (1 Nimmer §1.10[C][2] at 1-82–1-84.)" [68] (Emphasis added.)

The court quoted Nimmer as to the treatise's Z-film posture at 1-83–1-84: "Similarly, in the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility. Again, *it was only the expression, not the idea alone,* that could adequately serve the needs of an *enlightened democratic dialogue*." [55] (Emphasis added.) In such instances, the expression and idea are not dichotomous at all but essentially a "unity", inseparable from one another.

While *Tullo* acknowledged that no court referencing Nimmer in this capacity had ever applied the treatise's premise to the particular matter before them, it is im-

portant to realize that the facts before them were never on point. Nimmer's prominence and influence in the copyright area, however, is undeniable, as attested by the numerous references to the Nimmer treatises.

U.S. Supreme Court Posture

Even the U.S. Supreme Court, again in dicta, has given some indication it would entertain the Z-film as outside copyright protection even on the basis of the copyright statute itself and the idea–expression unity principle. In *Harper & Row, Publishers, Inc. v. Nation Enterprises* [69], the court said, in recognizing a possible qualification for some of the minor extractions *The Nation* made from Gerald Ford's yet-unpublished memoirs (although imposing liability overall): "Some of the briefer quotes from the memoirs are arguably necessarily adequate to convey the facts; e.g., Mr. Ford's characterization of the White House tapes as the 'smoking gun' is *perhaps so integral to the idea expressed as to be inseparable from it.* Cf. 1 Nimmer Section 1.10[C]." (Emphasis added.)

If the U.S. Supreme Court were indeed convinced that the expression and idea as conveyed by the Z-film were so inseparable, it would probably rule for no copyright infringement. This would apply regardless of the extent of usage as long as some form of analysis could be reasonably associated with the respective footage.

While the Supreme Court reversed the Second Circuit in *Harper & Row* and found infringement without an adequate "fair use" defense re the Ford memoirs, it agreed with some of the copyright principles espoused therein. It, too, recognized "that copyright is intended to increase and not to impede the *harvest of knowledge* … The rights conferred by copyright *are designed to assure contributors to the store of knowledge a fair return for their labors. Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)." [70] (Emphasis added.)

In quoting from the dissenting opinion in its earlier case of *Sony Corp. of America v. Universal City Studios, Inc.* [71], the court said: "*The monopoly created by copyright thus rewards the individual author in order to benefit the public.*" [72] (Emphasis added.). It also quoted from p. 429 of *Sony*: "[This] limited grant is a means by which *an important public purpose may be achieved.* It is *intended to motivate the creative activity of authors* and inventors by the provision of a special reward, and to allow the public access to the product of their gains after the limited period of exclusive control has expired." [73] (Emphasis added.).

It also wrote: "By establishing a marketable right to the use of one's expression, copyright supplied the economic incentive to create and disseminate ideas." While the freedom of thought and expression includes the right *not* to speak, it also stated: "We do not suggest the right not to speak *would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts.*" [74] (Emphasis added.) The implications of this last statement are monumental.

Suppression of facts is something Z-film copyright holders might well be challenged on. There have been licensing fees for Z-film use of $15,000 on up for a

26-second film that have been staggering in comparison to what would be ordinarily considered reasonable by industry standards. As of the time that the Declaratory Relief petition was filed by the Assassination Archives & Research Center and Passage Productions, L.L.P. against The LMH Company and the DOJ on 23 November 1998 with the Washington, DC District Court, the NBC News standard rate card, if the petition was accurate, called for a licensing fee of $73 per second, for a respective fee of 26 x $73 or $1898. [75] Even adjusting for not readily apparent other extraneous factors reveals an outrageous and arguably abusive and suppressive sum for Z-film usage.

Supreme Court rulings in other areas of copyright also strongly suggest other bases for holding that various Z-film analyses, including Fetzer's, would be considered outside the ambit of copyright protection. E.g., most recently, the majority in the *Eldred v. Ashcroft* opinion decided 15 January 2003 stated that, in distinguishing some of the features of patent and copyright, "… copyright gives the holder no monopoly on any knowledge. A reader of an author's writing *may make full use of any fact or idea she acquires from her reading.* See [17 U.S.C.] §102(b); [1976 Copyright Act]." [76] (Emphasis added.) That opinion also states: "Due to this distinction [the idea–expression dichotomy], every *idea*, *theory*, and *fact* in a copyrighted work becomes instantly available for public exploitation at the moment of publication. See *Feist* [*Publications. Inc. v. Rural Telephone Service Co.*, 499 U.S. 340], at 349–350 [(1991)]." [77]

The reader may recall the court's language in *Geis:* "The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the *theory* of Thompson and its explanation, *supported by Zapruder pictures*." [78] (Emphasis added.) Thompson's theory was derived from the evidence *ascertained specifically from the Z-film itself*. It would seem for that reason alone that the U.S. Supreme Court would conclude Thompson's usage outside of the scope of copyright protection for the Z-film.

In the Fetzer treatment, it can be amply argued that the knowledge, idea, theory or fact of alteration is observable and hence emanates from the many oddities appearing internally within the Z-film itself. Just a few of the examples convincingly cited and readily observable on their face are Presidential limo driver William Greer's impossibly fast backward head-turn in Z-frames 302–303; his equally impossible forward head-turn in Z-frames 315–317; the too rapidly dissipating blood spray in Z-frame 313 and thereafter; the absence of blood and other debris on the limo's trunk, even though the President's brains were blown out to the back and left; and spectators such as the Franzens who are not responding at all to the horrific event that is unfolding before them. (See Z-frame 369—JFK's head has already exploded but that reality is totally undetectable judging from the lack of reaction by the Franzens and the other spectator in view in the frame.)

For that matter, there is a row of spectators who are unresponsive to JFK's presence around the proximity of the Stemmons Freeway sign, which is best explicable by his not being present when this portion was filmed and for which he was introduced only later using a "floating matte" technique. These observations are elicited from a close visual inspection of the film itself and comprise a

far different and more expansive argument than "scholarship" or "criticism" encompassed within the "Fair Use" doctrine.

Fetzer goes even further than the patently observable by applying advanced photographic technology to show Stemmons sign anomalies that are also symptomatic of alteration in terms of correction for pincushion distortion that results in the "twitching" of the sign because the sign was introduced prior to said correction. Z-frame lamppost verticality anomalies are also revealed by comparing their verticality to Dallas Police Department photographs of Dealey Plaza. All of these and *many more* research findings were initially prompted by the plethora of patently pronounced peculiarities replete in the Z-film, again transcending "Fair Use" boundaries.

Feist also stars in another capacity, of in part defining that which is copyrightable. 499 U.S. at 345 states that the "*sine qua non* of copyright is originality". At p. 359, it goes on to say that copyright protection is lacking for "a narrow category of works in which the *creative spark* is utterly lacking or so trivial as to be virtually nonexistent". (Emphasis added.) From this, it may be legitimately queried, "How can a fraud of an historical document (which would be the case if it is altered) present any 'creative spark' at all that would be recognized by any court of law?" By implication from *Feist*, such a debauchery is devoid of copyright protection.

Put another way by Copinger [79] as presented in *Eldred*, "… the reader of a book is not by the copyright laws prevented *from making any full use of any information* he may acquire from his reading." [80] Arguably, the "information" leading one to conclude the Z-film has been altered is self-contained in the Z-film. From there, further research procedures were prompted and utilized to both reinforce and expand upon this basic premise. This appears entirely consistent with a reader or viewer's right to make "full use" of the "information" elicited from the work under review.

Conclusion

A. Generally

There are powerful reasons for concluding that the Z-film is not now subject to copyright protection, if, indeed, it ever was. The one court case that found that it was, *Geis*, is questionable in its rationale. Even in its own Second Appellate circuit, there are reasonable expectations that the circuit would follow the Nimmer premise that idea and expression are inseparable (or a "unity" as this writer prefers to say it) and that crucial public debate is impermissibly quenched contrary to the design of the copyright statute if such protection is extended. Further, its own explanation of how Thompson's theory is promoted by using the Z-frames themselves suggests that under today's standards, such a use is not copyright protectable at all even if the Z-film itself would be otherwise protectable.

While, to date, no case at any level has directly applied the Nimmer unity principle to the Z-film, it has received strong mention in dicta that certainly suggests that only the proper fact scenario awaits its implementation. The U.S. Supreme Court has shown a recognition that there are circumstances wherein idea and expression are inseparable. It has also indicated that the right not to publish would not be allowed to suppress the truth and has recognized the general need to disseminate news information. It seems inevitable that it would find the JFK assassination idea and its expression on the Z-film to be First Amendment protectable to the outweighing of copyright monopoly restraints.

Arguably, the truth has been suppressed in this instance in a number of ways, but for the narrow purposes of this particular thread, it has been in the sense that the copyright holder, save for when the Zapruder family licensed the film to MPI Home Video in 1998, *thirty-five years after* that fateful event, has never aggressively tried to market the Z-film, but simply has acted, when it has at all, to contain its usage.

Even if the judicial presumption espoused above is successfully rebutted, there remains the virtual Congressional declaration that copyright is no longer a viable position re the Z-film based on the JFK Act. One of the Board's pronounced purposes is to make Government actors accountable for any questionable conduct concerning the assassination.

Even the Archivist's handling of the Z-film has changed. Anyone for reasonable copying costs can now obtain a copy of the original. It no longer can be withheld. The value of this expansion of public access cannot be underestimated. Even the Zapruder family could not claim repossession of it. It is now an official Archival and hence government document. Government documents do not enjoy copyright protection and would not in this case anyway and remain consonant with the goal of stimulating public debate and scholarship in this field. On 3 August 1999, a DOJ special arbitration panel pursuant to eminent domain provisions awarded the Zapruder family $16 million plus interest for the taking. While the purchase price did not include the copyright transfer, the point appears moot.

Still further, the original copyright holder no longer owns the copyright. The Zapruder family donated it along with certain artifacts to the sixth Floor Museum on 30 December 1999. While it would seem ludicrous that an institution so self-professedly dedicated to preserving the JFK legacy would wish to also suppress the Z-film, they would have little to no practical right to assert such anyway. The newsworthiness of the event (as recognized by *all* courts that have addressed the issue), public interest in the item (now recognized as "compelling" by Congress), the unity of idea and expression, and the fact that any creativity was exercised by their predecessor Zapruder (for whom he and his family have been, under seemingly *any* measure, enriched enough), rather than themselves, would appear to be a fatal combination working against them. While it is possible to transfer legal ownership in a work without also conveying copyright ownership, the dynamics of such a transaction to this specific set of facts would not favor the Museum.

As aforementioned, one of the pronounced purposes of the JFK Act, as emanating from the very mouths of its appointed Board, is to enhance scholarship re the JFK scenario and to put it in its proper context as to the 1960s and the Cold War. The Board itself recognized the Z-film as probably the single-most prominent piece of evidence in the case. The inability to utilize Z-film frames (as well as the film itself) to discuss whatever elements of the assassination are consistent with these targets, regardless of extent, would defeat these purposes. Public dissemination of scholarly findings is the only practical way these goals are accomplishable. There cannot be public debate without public exposure, a hallowed purpose for NARA's creation. As the Review Board stated at Chapter 1 of its Final Report, page 9 of 15, "The JFK Collection's purpose would be to make records available to the public."

Otherwise, in essence, the Zapruder family would have received a $16 million windfall with nothing accomplished. Researchers have always had their own access to the film through the Archives. A number of books have, without garnering a license, already shown many frames of the film as it is, far beyond anything exercised by *Six Seconds in Dallas*. Numbered among them are *Assassination Science*, *Murder in Dealey Plaza* and *The Great Zapruder Film Hoax*, as well as Stewart Galanor's *Cover-Up* (which includes 40 Z-frames) and Fetzer's video, *JFK: The Assassination, The Cover-Up, and Beyond* (which includes the entire film three times). Official confiscation by the government only makes sense if it is done for all aspects and purposes, where it makes a difference not only as to formal status but in practical usage as well. In this manner, eminent domain should equate with public domain, taking the film (and constituent frames) outside of the ambit of copyright protection.

That copyright not extend in this instance is also consonant with the principle that Congress controls copyright and may exercise all rights "corollary" to it. It is incongruous and oxymoronic to enable it to force relinquishment of possession of the original for total public access and then allow the copyright holder to have a stranglehold on usage. That would render nugatory the Statute's very declaration that it was necessary to create "enforceable" legislation for public disclosure and then make the public (researchers and scholars among them, but the public at large as well) impotent thereafter to share its findings.

Even more tellingly, it would divest Congress of the powers ordained it by the U.S. Constitution. The Supremacy Clause of the Act, well within Congress's powers to enact, resolves all potential conflicts with the Copyright Act. The JFK Act prevails. The Archives have treated the copying of the film as having disposed of copyright as an issue. During the time of *Geis* and for years afterward, the copyright holder had controlled that aspect. This changed government posture therefore has powerful probative value.

B. As To the Fetzer Treatment Specifically

Applied to the Fetzer treatment, exposure of the Z-film as altered and a fraud even accomplishes specific JFK Act goals. The Archivist cannot certify its pedigree as one of his duties under the Act. But this is not to say that this frustrates the Act. On the contrary, it accomplishes accountability. The provenance

(chain of custody) aspect inevitably leads to Government actors, be they individuals, agencies, or a combination thereof. This is important on more than one level.

Foremost, it becomes a government document for copyright purposes *ab initio*. There is nothing to protect for Zapruder (or any other copyright holder) because the film purported to be his is not his—it is not a true depiction of what he filmed. It is not his creation. As *Feist* would describe it, it does not demonstrate his originality and thus lacks his "creative spark". As the federal Seventh Circuit court (covering Wisconsin, Illinois and Indiana) in *Baltimore Orioles v. MLB* [81] put it at p. 668, footnote 6, "A work is original if it is the *independent* creation of its author." (Emphasis added.) Government tampering has caused the Z-film to lose its "independent" creation. Hence, being a government document to begin with, it is not entitled to copyright protection.

Second, it conclusively shows, in and of itself, that the JFK assassination was the result of a conspiracy that the government actively participated in, especially in terms of, though not necessarily confined to, the cover-up. Minimally, it also lends credibility to the other elements of the conspiracy claimed by some researchers—that some of the X-rays and autopsy pictures were faked. If the Z-film was altered, why not the rest of the evidence as well? Again, government actors become primary suspects. This is the exact kind of accountability striven for by the JFK Act and as enunciated by the Board. The Board raised serious questions with how the medical evidence was treated by the Warren Commission.

Put another way, this is an "enhance[ment], enrich[ment], broaden[ing] of the historical record of the assassination". The realization of the doctoring of the Z-film tells *volumes* more than mere words could describe about the dynamics of politics in the 1960s, and comparing the conditions for this event from then to today. In essence, the Z-film becomes more important in its *il*legitimacy than it even was in its legitimacy.

Due to the foregoing, it seems conclusive that, concerning the Fetzer treatment, at worst, First Amendment concerns would prevail over copyright protection even outside of "fair use" doctrine. At best, a fraudulent historical document is not entitled to copyright protection. The public does not benefit directly from authors perpetrating a fraud. Copyright allows for creativity to flourish and rewards honest effort. It is not intended to reward dishonest effort. The "information well" espoused by the U.S. Supreme Court in *Harper & Row* has been irrevocably polluted.

If the Z-film is a fraud as Fetzer proposes, it is not a contribution to the "store of knowledge" as contemplated by copyright law and recognized by the U.S. Supreme Court. Nor does one "motivate the creative activity of authors" within the meaning of the copyright statute and as interpreted by the courts by perpetrating a fraud. While it would frankly seem impossible to envision any court in the land at this point in time, especially in light of the JFK Act and its goals and ramifications, ruling for a copyright infringement with any use of the Z-film, this is particularly so in the case of the Fetzer treatment. To impose copyright

obstacles in such instance with such a revolutionary finding "would [particularly] sanction abuse of the copyright owner's monopoly as an instrument to suppress facts", especially as to a work described as "a unique historical item of unprecedented worth".

C. The Tragic and Resounding Theme

As to the overall message to be pondered in the JFK Aftermath, never have the words of James Madison written in a letter to W. T. Barry dated 4 August 1822 played more powerfully: "A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power that knowledge gives." [82]

How true. How *sadly* true! The JFK Act reflects not only the imperatives of Congress but also of our Constitutional forebears. For it to supercede copyright for all of its collection—not the least of which is the Z-film—is more than just a matter of trust; it hits, as the Review Board itself asserted, at the very core of a democratic republic.

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[3] *Id.*, at p. 6 of 12.

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[5] *Id.*, pp. 7–8 of 12.

[6] Mark Zaid, James Lesar, and Charles Sanders, "Zapruder Film Civil Suit Filed," *Assassination Research* Vol. 2, No. 2 (2003).

[7] *Ibid.*, Sixth Floor Museum, at p. 11 of 12.

[8] *Id.*, at p. 11 of 12

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[14] *Ibid.*, Sixth Floor Museum, at p. 11 of 12.

[15] *Final Report of the Assassination Records Review Board*, Chapter 1: "The Problem of Secrecy and the Solution of the JFK Act," http://www.fas.-org/sgp/advisory/arrb98/part03.htm. at p. 12 of 15.

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[40] *Id.*, at p. 5 of 9.

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[58] *Id.*, at p. 17 of 18.

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