

**Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism**

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## I. Introduction

When the itinerant tinkerer known as Johannes Gensfleisch or Gutenberg introduced his moveable-type printing press to Germany sometime in the mid-fifteenth century,<sup>1</sup> he no doubt had little reason to foresee some of the remote consequences of his invention--among them, the Protestant Reformation and the invention of copyright law. As for the first, printing made possible for the first time the mass distribution of books and pamphlets expressing views that dissented from the religious orthodoxy of the day, much to the chagrin of the Roman Catholic Church and, later, of the established or more "orthodox" Protestant churches.<sup>2</sup> It also made possible the mass

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<sup>1</sup>For biographies of Gutenberg, see, e.g., GUY BECHTEL, *GUTENBERG ET L'INVENTION DE L'IMPRIMERIE: UNE ENQUÊTE* (1992); ALBERT KAPR, *JOHANN GUTENBERG: THE MAN AND HIS INVENTION* (Douglas Martin tr. 1996). Inventors in Korea, China, and Japan--and perhaps in other places as well--had discovered a variety of printing techniques long before the appearance of these techniques in the West. See BECHTEL, *supra*, at 84-86; KAPR, *supra*, at 109-22. There is, however, no evidence of anyone prior to Gutenberg having invented a moveable-type printing *press*, which enables the publication of printed material on a much more efficient scale than does any earlier method. See BECHTEL, *supra*, at 86; KAPR, *supra*, at 114, 119-20, 132. There is also no evidence that Gutenberg was influenced by Eastern printing techniques, although some speculative possibilities exist. See BECHTEL, *supra*, at 87-89; KAPR, *supra*, at 115-16, 121-22.

<sup>2</sup>There appears to be a fairly widespread consensus that the invention of the printing press played a significant role in causing the Reformation to occur when and where it did. For discussions, see A.G. DICKENS, *THE GERMAN NATION AND LUTHER* chs. 5, 6 (1974); MARK U. EDWARDS, *PRINTING, PROPAGANDA, AND MARTIN LUTHER* 2-3, 172 (1994); ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 148-55 (1983); John L. Flood, *The Book in Reformation Germany*, in *THE REFORMATION AND THE BOOK* 21, 25-26, 82 (Jean-François Gilmont ed., Karin Maag tr. 1990). Inevitably, publishers began to produce works that were more radical than even the followers of Luther and Calvin were willing to tolerate. See, e.g., Peter G. Bietenholz, *Printing and the Basle Reformation, 1517-65*, in *THE REFORMATION AND THE BOOK* 235, 255-59 (discussing publication of Anabaptist and Unitarian works); Miriam Usher Chrisman, *Reformation Printing in Strasbourg, 1519-60*, in *THE REFORMATION AND THE BOOK* 214, 223-28; Flood, *supra*, at 32-33, 64-66. For discussion of Catholic writers' use of the press to respond to the Protestant challenge, see, e.g., EDWARDS, *supra*, at 28-37, 57-82; EISENSTEIN, *supra*, at 155, 159-60.

distribution of vernacular translations of the Bible,<sup>3</sup> the laity's reading of which many Catholic leaders at that time discouraged.<sup>4</sup> Not surprisingly, both Church and State, Catholic and Protestant, often reacted by attempting to censor the dissemination of the dangerous new ideas.<sup>5</sup>

A second, not unrelated, consequence of the invention of printing was the development of copyright law.<sup>6</sup> Prior to the invention of the printing press, authors had to rely upon manual copyists to reproduce their works,<sup>7</sup> and this technological limitation had two consequences. First, it

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<sup>3</sup>The text of the Gutenberg Bible is that of St. Jerome's Latin Vulgate, the Biblical text most commonly used by the Roman Catholic Church at that time. See JAMES THORPE, *THE GUTENBERG BIBLE: LANDMARK IN LEARNING* 26 (1999). But the invention of printing soon made possible the wide dissemination of vernacular translations, which appear to have reached a wide audience, notwithstanding literacy rates that were low in comparison with the present day. See EDWARDS, *supra* note 2, at 123-30; see also several of the essays in *THE REFORMATION AND THE BOOK*, *supra* note 2, including Flood, *supra* note 2, at 68-72, 85, 88-90; Francis M. Higman, *French-Speaking Regions, 1520-62*, at 104, 142-43; Andrew G. Johnston, *Printing and the Reformation in the Low Countries, 1520-c.1555*, at 154, 171-76; and David Loades, *Books and the English Reformation Prior to 1558*, at 264, 272.

<sup>4</sup>See, e.g., EISENSTEIN, *supra* note 2, at 162, 167-68; Flood, *supra* note 2, at 92; Higman, *supra* note 3, at 107; Jean-François Gilmont, *Conclusion*, in *THE REFORMATION AND THE BOOK*, *supra* note 2, at 469, 470-74.

<sup>5</sup>See EISENSTEIN, *supra* note 2, at 173-77; Flood, *supra* note 2, at 91-96; Higman, *supra* note 3, at 149-52; Bietenholz, *supra* note 2, at 259-61; see also Michael J. Walsh, *Church Censorship in the 19<sup>th</sup> Century: The Index of Leo XIII*, in *CENSORSHIP AND THE CONTROL OF PRINT IN ENGLAND AND FRANCE 1600-1910* (Robin Myers & Michael Harris eds.), at 111, 115-17. For discussions of censorship within the Protestant community, see, e.g., JEAN-FRANÇOIS GILMONT, *JEAN CALVIN ET LE LIVRE IMPRIMÉ* ch. 6 (1997); Chrisman, *supra* note 2, at 228; see also *infra* notes 13-21 and accompanying text (discussing censorship in England).

<sup>6</sup>There are, to be sure, some apocryphal accounts of rights in work of authorship prior to the invention of printing, but scholars do not view these stories as evidence of early copyright norms. See, e.g., AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 41-42 (1899); HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710* 31 n.1 (1956).

<sup>7</sup>Again, some forms of block printing existed in the Far East and, by Gutenberg's day, even in Europe, but these methods were considerably less efficient than the printing press. See *supra* note 1.

substantially limited the number of copies that could be made within a given time, which in turn made it virtually impossible for authors to earn a living from the commercial sales of their works.<sup>8</sup> Second, it meant that unauthorized copying was unlikely to harm authors, since (1) authors themselves made little if any profit from commercial sales, and (2) unauthorized copies were just as laborious to produce as were authorized ones. Such free riding as existed therefore would have had little upon authors' incentives to create,<sup>9</sup> and would have had the beneficial effect of disseminating those works to a broader audience. By radically lowering the cost of mass copying, however, the printing press increased not only the potential economic opportunities to be gained from writing and publishing but also the potential return from free-riding.<sup>10</sup> As a general matter,

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<sup>8</sup>As literacy rates and the demand for relatively inexpensive books increased during the late Middle Ages, the number of people employed as hand copyists also appears to have increased. See DONALD JACKSON, *THE STORY OF WRITING* 76 (1981); Hellmut Lehmann-Haupt, *The Heritage of the Manuscript*, in *READER IN THE HISTORY OF BOOKS AND PRINTING* (Paul A. Winckler ed. 1978), at 179, 228. Production nevertheless was limited to, at most, a few pages per person per day. See DORIS H. BANKS, *MEDIEVAL MANUSCRIPT BOOKMAKING: A BIBLIOGRAPHIC GUIDE* 17 (1989); CARLO BOZZOLO & EZIO ORNATO, *POUR UNE HISTOIRE DU LIVRE MANUSCRIT AU MOYEN AGE* 46-48 (1983); THORPE, *supra* note 3, at 9. Moreover, although the historical record is incomplete, it appears that, at the dawn of the printing era, buyers typically commissioned the production of copies, and that bookshops selling multiple copies of already-existing works were relatively uncommon. See BANKS, *supra*, at 15-18; 1 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 46-49 (1979); Derek Pearsall, *Introduction*, in *BOOK PRODUCTION AND PUBLISHING IN BRITAIN, 1375-1475* (Jeremy Griffiths & Derek Pearsall eds. 1989), at 1, 6-7. See also 1 EISENSTEIN, *supra*, at 11-14, 45 (noting the difficulties of generalizing about practices of pre-printing copying enterprises).

<sup>9</sup>Nor is it very likely that free-riding would have substantially decreased publishers' incentives to market rival editions of the same work, given the relative insignificance of commercial bookselling. See *supra* note 8.

<sup>10</sup>See, e.g., BOZZOLO & ORNATO, *supra* note 8, at 48-49 (discussing reduction in cost of production); 1 EISENSTEIN, *supra* note 8, at 44-46; THORPE, *supra* note 3, at 13 (stating that 10,000,000 books, embodying 40,000 works of authorship, were printed from 1455 to 1501, and that "[i]t would have taken all the copyists in Europe at least a thousand years to have turned out" such a number); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 330 (1989) (stating that "because modern technology has reduced the time it takes to make copies as well as enabled more perfect copies to be made at low cost, the need for

printers were swifter than authors in sizing up the situation and seeking relief from the state<sup>11</sup>—although a few authors, among them Martin Luther, did grumble about unauthorized copying.<sup>12</sup>

In England, the interests of Church and State, on the one hand, in censoring dangerous ideas, and of printers and publishers, on the other, in suppressing competition, coalesced in the development of a quasi-copyright regime that would persist until the beginning of the eighteenth century.<sup>13</sup> In 1529, Henry VIII issued a proclamation forbidding the possession of certain works deemed heretical.<sup>14</sup> Succeeding years witnessed a series of royal proclamations, decrees, and Acts of Parliament forbidding the printing and publication of books until they had been licensed (approved), typically by a panel of governmental or ecclesiastical officials; religious works in particular were subjected to close scrutiny.<sup>15</sup> Although the enforcement of censorship laws

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copyright protection has increased over time”).

<sup>11</sup>See, e.g., CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959* 32 (1960) (discussing early grants of exclusive rights to printers); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 9-12 (1993) (similar).

<sup>12</sup>See Flood, *supra* note 2, at 53.

<sup>13</sup>Although some form of copyright protection eventually would have emerged regardless of this coalition of interests, see LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 21, 114 (1968), understanding the way in which the process actually played out illuminates some troubling features of the present copyright system. See *infra* notes 31-39 and accompanying text.

<sup>14</sup>See Proclamation Enforcing Statutes Against Heresy; Prohibiting Unlicensed Preaching, Heretical Books, 1529, 20 Hen. VIII (Eng.), *reprinted in* 1 *TUDOR ROYAL PROCLAMATIONS* (Paul L. Hughes & James F. Larkin, eds.), at 181,185-86.

<sup>15</sup>For overviews, see, e.g., BIRRELL, *supra* note 6, at 59-68; BLAGDEN, *supra* note 11, at 29-31, 70-73, 117-25, 145-47, 153-59; PATTERSON, *supra* note 13, at 23-27, 36-47, 116-39; RANSOM, *supra* note 6, chs. 3-6; ROSE, *supra* note 11, at 12-13, 31; Sheila Lambert, *State Control of the Press in Theory and Practice: The Role of the Stationers' Company Before 1640*, in *CENSORSHIP AND THE CONTROL OF PRINT IN ENGLAND AND FRANCE 1600-1910*, *supra* note 5, at 1-32.

ultimately rested with the courts (including, during its tenure, the Court of Star Chamber),<sup>16</sup> the Crown entrusted the everyday task of policing printers' compliance with the licensing laws to the Stationers' Company, a guild comprising printers, bookbinders, and booksellers.<sup>17</sup> In exchange for its services—which could include, among other things, the search of printers' workshops and destruction of offending works,<sup>18</sup> as well as the general advocacy of censorship laws<sup>19</sup>—the Company was granted the exclusive right, which it delegated to individual members, to print and publish licensed works.<sup>20</sup> This cozy relationship among Church, State, and Stationers persisted until 1694 when, in a demonstration of its increasing independence from the Crown, Parliament allowed the last Licensing Act to expire.<sup>21</sup>

The abolition of licensing having deprived the stationers of their authority to seize and destroy unauthorized works, the Company sought to place its exclusive publication rights on a more secure basis by lobbying Parliament for statutory relief.<sup>22</sup> After several defeats, the Company

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<sup>16</sup>See, e.g., JOHN MILTON, AREOPAGITICA xviii-xxiv (John W. Hales ed. 1875).

<sup>17</sup>See ROSE, *supra* note 11, at 12-13; PATTERSON, *supra* note 13, at 29, 36-41.

<sup>18</sup>See BLAGDEN, *supra* note 11, at 20, 65-66; PATTERSON, *supra* note 13, at 32 (citing 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554-1640 A.D. xxxi (Edward Arber ed. 1875-94)).

<sup>19</sup>See PATTERSON, *supra* note 13, at 115; ROSE, *supra* note 11, at 15, 34.

<sup>20</sup>See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 41-42 (1994); PATTERSON, *supra* note 13, chs. 4, 6; ROSE, *supra* note 11, at 12-13. This is not to suggest, however, that the Company's actions always satisfied the censors. See Lambert, *supra* note 15, at 15-16 (discussing Company's underenforcement of censorship laws).

<sup>21</sup>See BIRRELL, *supra* note 6, at 91; PATTERSON, *supra* note 13, at 139; ROSE, *supra* note 11, at 32-34. The Crown nevertheless continued to prosecute seditious and blasphemous speech after publication. See GOLDSTEIN, *supra* note 20, at 42; LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 232-37 (1993).

<sup>22</sup>See BLAGDEN, *supra* note 11, at 125-26; RANSOM, *supra* note 6, at 89-92.

prevailed when Parliament in 1710 enacted the first modern copyright law, the Statute of Anne.<sup>23</sup> Unlike the earlier rights granted to the Stationers' Company, however, the rights conferred under the Statute of Anne vested in authors, rather than printers or publishers, of works of authorship.<sup>24</sup> More importantly, the Statute did not condition the enjoyment of copyright rights upon collaboration with church- or state-sponsored censorship schemes.<sup>25</sup> By the end of the century, the United States had enacted similar copyright legislation,<sup>26</sup> the principal features of which (including the investment of rights in authors and independence from censorship) persist to the present day.<sup>27</sup> And while there has always been a certain tension between First Amendment freedoms and the exclusive rights

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<sup>23</sup>See An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1710) (Eng.).

<sup>24</sup>See *id.* § 1. The reasons for this change are unclear, although some scholars speculate that it was a strategic move after the first few efforts to enact a copyright statute failed. In other words, the printers may have concluded that it would be easier to enact a statute that, on its face, empowered authors, but that the printers themselves would be able to control matters by acquiring copyright rights from the authors they published. See, e.g., ROSE, *supra* note 11, at 35; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship"*, 1991 DUKE L.J. 455, 468-69.

<sup>25</sup>See ROSE, *supra* note 11, at 48 (noting "divorce of copyright from censorship"). This is not to say that copyright necessarily subsists in works that embody unlawful speech, however, such as obscene, libelous, or seditious matter. Although the majority view in the United States today is that copyright subsists in obscene works, see 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 127 & n.28 (1994) (collecting cases), this was not always the case, see *id.* at 126-27 & nn. 26, 27, and may not be the case even today in the United Kingdom, see *id.* at 128 n.28 (citing Dworkin, *United Kingdom*, in STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* (2d ed. 1989), at 490); *Hyde Park Residence Ltd. v. Yelland*, [2000] R.P.C. 604, 619 (Ct. App. 2000) (U.K.) (noting "a number of cases where the courts have refused to enforce copyright as the works in question were considered libellous, immoral, obscene, scandalous, or irreligious"). For further discussion of this issue, see *infra* note 123 and accompanying text.

<sup>26</sup>See An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned (1790), ch. 15, 1 Stat. 124 (current version in scattered sections of 17 U.S.C.).

<sup>27</sup>See 17 U.S.C. § 201 (vesting copyright in authors); see also *supra* note 25 (discussing whether copyright subsists in works that embody unlawful speech).

granted authors under copyright law, until fairly recently the predominant view among courts and commentators was that the conflict was largely illusory.<sup>28</sup> As late as 1985, a majority of the United States Supreme Court concluded that copyright and the First Amendment both serve the purpose of promoting freedom of expression, albeit in different ways: the First Amendment, by forbidding improper restraints and other penalties; the Copyright Act, by providing an economic incentive to write and publish and by safeguarding the author's right *not* to publish.<sup>29</sup> On this view, any potential conflict between the two can be resolved by applying the expression/idea dichotomy and the doctrine of fair use.<sup>30</sup>

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<sup>28</sup>*See, e.g.,* *New York Times v. United States*, 403 U.S. 713, 726 n.\* (1971) (Brennan, J. concurring) (distinguishing injunctions issued in copyright cases from prior restraints on the ground that copyright “protect[s] only the form of expression and not the ideas expressed”); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-304 (1979); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970) (similar); Lionel S. Sobel, *Copyright and the First Amendment*, 19 COPYRIGHT L. SYMP. 43, 67-79 (1971); *but see* PATTERSON, *supra* note 13, at 225 (doubting whether the idea-expression dichotomy resolves the conflict); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. \_\_\_, \_\_ (2001) (forthcoming) (arguing that courts have continued to cite Nimmer's article without considering the significant changes in copyright law that have occurred since its publication).

<sup>29</sup>*See* *Harper & Row v. Nation Enters.*, 471 U.S. 539, 556-60 (1985).

<sup>30</sup>*See id.* The expression/idea dichotomy recognizes that copyright may subsist in an author's original expression (or selection or arrangement), but not in ideas or facts. *See* 17 U.S.C. § 103; *Mazer v. Stein*, 347 U.S. 210, 217 (1954). As long as there are alternative ways of expressing an idea, so the argument goes, copyright does not impinge upon freedom of expression by conferring exclusive rights upon one author's choice of how to express that idea. *See* Nimmer, *supra* note 28, at 1189-93. When there are only a small number of ways of expressing a given idea, however, the idea is said to “merge” with the expression, and there is no copyright in the resulting work; this principle is sometimes referred to as the “merger doctrine.” *See* *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991). The doctrine of fair use exempts certain uses (including at least some uses for purposes such as teaching, news reporting, and criticism) from the scope of liability. *See* 17 U.S.C. § 107; *see also infra* notes 249-363 and accompanying text (discussing fair use). Nimmer also cited the fact that the copyright term is limited in duration as a reason for treating copyright differently from other speech restrictions, *see* Nimmer, *supra* note 28, at 1193-96, but since the publication of his article the copyright term has expanded significantly. *See* Netanel, *supra* note 28,

As a result of the steady expansion of copyright rights over the years, however, it is no longer quite so easy to shrug off the inherent tension between the copyright owner's exclusive rights, on the one hand, and the First Amendment rights to freedom of expression, on the other. Attempts to use copyright law to censor speech have become depressingly familiar, ranging from the recent controversy over an unauthorized retelling of the novel *Gone with the Wind*<sup>31</sup> to refusals to allow comic book scholars to support their thesis of a Batman-Robin gay liaison with panels from the original books.<sup>32</sup> Among other reasons for the reemergence of copyright as a tool of censorship are the expansion of the copyright owner's right to prepare derivative works,<sup>33</sup> a shrinking doctrine of

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at \_\_; see also Nimmer, *supra* note 28, at 1194-96 (arguing that retroactive extension of the copyright term—which has since occurred—would be unconstitutional).

<sup>31</sup>See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11<sup>th</sup> Cir. 2001) (vacating preliminary injunction against publication of *The Wind Done Gone*, a retelling of *Gone with the Wind* from the standpoint of a plantation slave).

<sup>32</sup>See Jeet Heer, *Pow! Wham! Permission Denied!*, LINGUA FRANCA, Mar. 2001, at 21-22. For other troubling examples, see, e.g., *Castle Rock Enter., Inc. v. Carol Publ. Group*, 150 F.3d 132, 146 (2d Cir. 1998) (affirming injunction against publication of book of trivia questions concerning the television program *Seinfeld*); *Twin Peaks Prods. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1383-84 (2d Cir. 1993) (affirming injunction against publication of book about television program *Twin Peaks*); *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397-1403 (9<sup>th</sup> Cir. 1997) (affirming preliminary injunction against publication of book using images drawn from Dr. Seuss's "The Cat in the Hat" as a vehicle for satirizing the O.J. Simpson trial, and specifically rejecting argument that injunction would constitute prior restraint on speech); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 343-44 (S.D.N.Y. 2000) (enjoining publication of decryption software pursuant to Digital Millennium Copyright Act (DMCA)), *aff'd*, \_\_ F.3d \_\_ (2d Cir. 2001); *Ty, Inc. v. Publications Int'l, Ltd.*, 81 F. Supp. 2d 899, 902-06 (N.D. Ill. 2000) (preliminarily enjoining publication of unauthorized book about Beanie Babies, and specifically rejecting argument that injunction would constitute prior restraint on speech); Fred S. McChesney, *Just Let Me Read Some of That Rock 'n Roll Music*, 1 GREEN BAG 2D 149 (1998) (recounting a book publisher's refusal to permit the author to reproduce snippets from song lyrics in his book, despite the fact that fair use almost certainly would have applied).

<sup>33</sup>See 17 U.S.C. § 106(2) (conferring upon copyright owners the exclusive right to prepare derivative works); *id.* § 101 (defining a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other

fair use,<sup>34</sup> and the courts' willingness to enter preliminary injunctions against alleged copyright

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form in which a work may be recast, transformed, or adapted"). Originally there was no such right; only verbatim or near-verbatim copying was actionable. *See, e.g.,* Jaszi, *supra* note 24, at 471-77 (discussing doctrinal development); L. Ray Patterson, *Folsom v. March and its Legacy*, 5 J. INTELL. PROP. 431, 431-32 (1998). As late as the mid-nineteenth century, for example, a U.S. court held that Harriet Beecher Stowe had no right to prevent an unauthorized German translation of *Uncle Tom's Cabin*. *See* *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

<sup>34</sup>*See* Ruth Okediji, *Givers, Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 124-26 (2000) (noting that, as the scope of the right to prepare derivative works increases, the scope of fair use decreases). With respect to fair use in particular, three developments merit attention. First, in recent years courts considering the fair use defense have focused much of their attention upon the fourth statutory factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107. *See Harper & Row*, 471 U.S. at 566 (characterizing this factor as "undoubtedly the single most important element of fair use"). Although the Court arguably has backed away from this characterization to some extent, *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994), courts nevertheless remain hesitant to find fair use in cases in which the defendant could have obtained permission to use the work in exchange for a fee. *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926-31 (2d Cir. 1995); *Princeton Univ. Press v. Michigan Doc. Servs.*, 99 F.3d 1381, 1386-88 (6<sup>th</sup> Cir. 1996) (en banc). Some commentators therefore conclude that the internet, which promises to reduce transaction costs between copyright owners and users, will contribute to an erosion of the fair use doctrine. *See* NATIONAL INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 82 (1995); Tom W. Bell, *Fair Use or Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 567-73 (1998); *but see* Edmund W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880, 886-90 (1999) (arguing that the internet may not significantly reduce the scope of fair use). A second factor that could lead to the erosion of fair use is the alteration of copyright protection by private agreement. *See ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7<sup>th</sup> Cir. 1996) (holding that a shrinkwrap license, which forbade the copying of an uncopyrightable database, was enforceable); James R. Maxeiner, *The New Commercial Law and Public Information Policy: The Libraries and UCITA*, 649 PLL/Pat 219, 234 (2001) (noting concern that freedom-of-contract approach may displace fair use). Third, the DMCA arguably prohibits the circumvention of technological measures designed to control access to digital works, even in some cases in which the access otherwise would constitute fair use. *See Reimerdes*, 111 F. Supp. 2d at 321-24; Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTEL. PROP. L. REV. 236, \_\_\_ (1999); *see also* Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES, July 29, 2001, at A\_ (discussing United States' prosecution of Russian computer programmer for creating a program that can be used to disable restrictions on access to electronic books).

infringers upon a minimal showing of irreparable harm.<sup>35</sup>

One consequence of the copyright-owner-as-censor phenomenon that nevertheless has gone largely unnoticed is the effect of an expansive copyright system upon religious practice.<sup>36</sup> A growing number of cases involve variations upon a common fact pattern: Sect 2 breaks off from Sect 1; Sect 2 then reproduces, adapts, or distributes Sect 1's religious texts, either for use in religious practice or for purposes of critique; and Sect 1 files suit for copyright infringement.<sup>37</sup> In several

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<sup>35</sup>See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 158-65 (1998).

<sup>36</sup>To date, very little scholarship has addressed this issue. See Jed Michael Silversmith & Jack Achiezer Guggenheim, *Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467 (2001); Note, *Copyright Law—Fair Use—Ninth Circuit Holds that Breakaway Church Cannot Invoke Fair Use to Reprint Copyrighted Book Suppressed by Parent Church—Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9<sup>th</sup> Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3557 (U.S. Feb. 7, 2001) (No. 00-1276), 114 HARV. L. REV. 1807 (2001). A recent Israeli decision involving the assertion of copyright in a reconstruction of a fragment of the Dead Sea Scrolls also has inspired some excellent scholarship. See C.F. (Jm.) 41/92, *Qimron v. Shanks* (affirming judgment of copyright infringement); see also David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001) (discussing *Qimron*). Most of the issues in *Qimron*, however, could arise in connection with the reconstruction of any text, religious or secular, such as a musicologist's reconstruction of the definitive version of a Beethoven symphony.

<sup>37</sup>Cases in which defendants have claimed a need to reproduce, adapt, or distribute texts for purposes of religious practice include *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9<sup>th</sup> Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001); *Self-Realization Fellowship v. Ananda Church of Self-Realization*, 206 F.3d 1322 (9<sup>th</sup> Cir. 2000), *cert. denied*, 121 S. Ct. 881 (2001); *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9<sup>th</sup> Cir. 1997); *F.E.L. Publ., Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. (BNA) 409 (7<sup>th</sup> Cir. 1982); *Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd.*, 55 U.S.P.Q.2d (BNA) 1680 (S.D.N.Y. July 25, 2000); and *Bridge Publ. Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993); see also *Garman v. Sterling Publ. Co.*, No. C-91-0882 SBA (ENE), 1992 U.S. Dist. LEXIS 21932 (N.D. Cal. Nov. 5, 1992); *Oliver v. St. German Found.*, 41 F. Supp. 296 (S.D. Cal. 1941). Cases involving use of religious texts for purposes of critique include *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *Religious Tech. Center v. Lerma*, 40 U.S.P.Q.2d (BNA) 1569 (E.D. Va. Oct. 4, 1996); *Religious Tech. Center v. Netcom On-Line Comm. Servs.*, 923 F. Supp. 1231 (N.D. Cal. 1995); and *Religious Tech. Center v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995).

instances, Sect 1 has been successful in enjoining Sect 2's use.<sup>38</sup> Some of these cases may have been correctly decided, given their unique facts. But they all raise the troubling issue of whether copyright can become a tool for censoring religious dissent or inhibiting religious practice--and this issue is not likely to go away anytime soon, given both the increase in religious diversity and the growth of new religions in recent years in the United States.<sup>39</sup> I shall argue that in at least some of these cases courts have taken on the role of the Stationers' Company, by facilitating a system of religious censorship, and that the potential for future harm to minority religions is significant.

The remainder of this article is divided into two parts. In Part II, I discuss some to the problems that can arise in connection with the recognition of copyright in religious works.<sup>40</sup> Although virtually all courts and commentators would rightly reject the view that government conferral of copyright in religious works violates the Establishment Clause of the First Amendment, copyright law itself presents some interesting issues, principally with respect to works that purport

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<sup>38</sup>See *World Wide Church of God*, 227 F.3d at 1121; *Penguin Books*, 55 U.S.P.Q.2d at 1698; *Bridge Publ.*, 827 F. Supp. at 636; *Netcom*, 923 F. Supp. at 1265-66; see also *Lerma*, 40 U.S.P.Q.2d at 1581 (granting summary judgment in favor of plaintiff).

<sup>39</sup>See, e.g., CONTEMPORARY AMERICAN RELIGION, *New Religious Movements*, at 491-94 (Wade Clark Roof ed. 2000) (discussing research on new religious movements); Diana L. Eck, *Religious Pluralism: America in the Year 2000*, in YEARBOOK OF AMERICAN & CANADIAN CHURCHES 2000 14-16 (Eileen W. Lindner ed. 2000) (discussing religious pluralism).

<sup>40</sup>The issue of whether copyright may subsist in religious works is relevant to the copyright-as-censorship thesis because, on occasion, the assertion of copyright may make it more difficult for believers to access works that are central to their religious practice. See *infra* Part III.

For purposes of this essay, I will use the term "religious works" to include not only (1) works that a religious body claims are central to its practice (e.g., scriptures, prayers, rituals, and the like), but also (2) works that advance a religious message (e.g., sermons, devotional tracts, and so on). There are nevertheless some obvious definitional problems. Is *The Chronicles of Narnia* a religious work? What about the novels of Evelyn Waugh and Graham Greene? A philosophical treatise on Spinoza? This difficulty of determining what constitutes a religious work is relevant to the issue of whether courts can draw meaningful distinctions between these works and other works. See *infra* note 78.

to be divinely inspired. Among these issues are whether a work that claims supernatural authorship, through the intermediation of a human being, satisfies copyright's originality requirement; and whether the "merger" doctrine renders uncopyrightable works that, from the standpoint of a believer, may not be susceptible of adequate paraphrase. I shall argue that the courts' resolution of these issues in favor of copyrightability provides some support for the thesis that American law and politics often fail to take religion seriously.<sup>41</sup> In Part III, I discuss the accommodation problem. Although the Supreme Court's decision in *Employment Division v. Smith*<sup>42</sup> probably renders moot any argument in favor of religious believers' rights, under the Free Exercise Clause, to an exemption from copyright liability for the unauthorized use of copyrighted religious works, I shall argue that the fair use doctrine is sufficiently flexible to support a somewhat broader right of access to some of these works. I also shall argue that this application of the doctrine would be more consistent with both the policy of copyright law and with one reading of the Establishment and Free Exercise Clauses, namely that which interprets them as a vehicle for encouraging religious pluralism.<sup>43</sup> Finally, I shall argue that § 110(3) of the Copyright Act, which provides an exemption for the *public performance* of works during the course of religious services, may go *too* far along the accommodationist path, to the point of conflict with the principle of government neutrality toward religion.

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<sup>41</sup>One of the most articulate advocates of this thesis is Professor Stephen Carter, who has defended it in a series of books. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) [hereinafter CARTER, *THE CULTURE OF DISBELIEF*]; see also STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 7-13 (1998) [hereinafter CARTER, *THE DISSENT OF THE GOVERNED*]; STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 179, 190-92 (2000) [hereinafter CARTER, *GOD'S NAME IN VAIN*].

<sup>42</sup>485 U.S. 660 (1988).

<sup>43</sup>For more on religious pluralism, see *infra* notes 45-46 and accompanying text.

One last cautionary note may be appropriate. Every author brings to his or her work a variety of preconceptions, so I may as well confess one of my own up front. I side with those scholars who argue that the state should accommodate religious belief whenever possible—for example, by exempting religious believers from generally applicable laws that incidentally conflict with the practice of their religion—either pursuant to the Free Exercise Clause or through legislative action.<sup>44</sup> In my view, accommodation promotes religious pluralism or diversity, which has both intrinsic and instrumental value. As for the latter, religious groups are one of many intermediate institutions within which citizens learn and practice the values of community, self-definition, and self-governance that are crucial to the development of civil society and republican civic virtue; in addition, religious groups can provide a source of sometimes prophetic resistance to the values of the dominant culture and the state.<sup>45</sup> Other arguments both for and against accommodation can be

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<sup>44</sup>For leading works on accommodationism, *see, e.g.*, CARTER, *THE CULTURE OF DISBELIEF*, *supra* note 41; James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Michael McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685 (1992) [hereinafter McConnell, *Update*]; Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 [hereinafter McConnell, *Accommodation*]; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

<sup>45</sup>For works developing these themes, *see, e.g.*, CARTER, *THE CULTURE OF DISBELIEF*, *supra* note 41, ch. 7; CARTER, *DISSENT OF THE GOVERNED*, *supra* note 41, at 54-89, 123-24; CARTER, *GOD’S NAME IN VAIN*, *supra* note 41, at 166; BETTE NOVIT EVANS, *INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM* ch. 9 (1997); Michael McConnell, *Religious Freedom at the Crossroads*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 115, 169 (1992); Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1630-31 (1995); McConnell, *Accommodation*, *supra* note 44, at 14-24; *cf.* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE WESTERN RES. L. REV. 357, 380-82 (1989-90) (arguing that the pluralism theory “fails to establish why only religious groups, and not secular groups that share the same characteristics, merit special treatment”). The Establishment Clause as well can be interpreted as supporting the pluralist position. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 27.6, at 678-79 (4<sup>th</sup> ed. 1992) (arguing that separation of church and state encourages a proliferation of religious denominations); Michael McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (similar). The basic idea has a long pedigree. *See* THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961)

found at greater length elsewhere,<sup>46</sup> and I do not intend to rehash or debate them here. What I do hope to offer is a fresh perspective on how a respect for religious diversity might inform our reading of the Copyright Act as applied in certain cases. I also trust that much of what I have to say about copyright will be relevant regardless of one's stance on accommodation.

## **II. On the Copyrightability of Religious Works**

In this Part, I discuss two sets of problems relating to the copyrightability of religious works. The first, which is relatively easy to dismiss, is that government recognition of copyright in religious works violates the Establishment Clause of the First Amendment. The second, more substantial argument is that copyright in at least some works that are central to the religious practice of a person

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(arguing that the existence of a “multiplicity of sects” makes religious oppression difficult); 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 319-20 (Henry Reeve, Francis Bowen & Phillips Bradley tr. 1945) (arguing that separation of church and state encourages religious commitment).

<sup>46</sup>Putting aside those arguments that focus primarily on the supposed intent, or lack thereof, of the Framers, *see, e.g.*, Philip A. Hamburger, *A Constitutional Rights of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that the Framers were not accommodationists); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (arguing that they were), other arguments in favor of accommodationism are that it promotes liberty of conscience, which is a good in and of itself, *see, e.g.*, MICHAEL PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 28 (1997); Laycock, *supra* note 44, at 317, 347; McConnell, *Update, supra* note 44, at 691-92; and that it promotes equality among believers and nonbelievers, or between majority and minority sects, *see, e.g.*, Gordon, *supra* note 44, at 112; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1640 (1993); McConnell, *Update, supra* note 44, at 693. Among the principal arguments against accommodation are that it bestows special favors upon religious practice, in violation of the neutrality required by the Establishment Clause, *see, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452-60 (1994); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 600 (1990); that it violates the principle of equality by conferring greater rights upon the religious (or perhaps only religious majorities), *see* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991); Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2381-83 (1997); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 129-38; and that it threatens to entangle government and religion, *see, e.g.*, Ellis, *supra*, at 609-11; Marshall, *supra* note 45, at 386-88.

or group of persons may run afoul of certain copyright doctrines, including the merger doctrine. I shall argue that a commitment to take religious belief seriously requires courts to show greater sensitivity to this latter argument than they have demonstrated in some recent cases.

### **A. Copyright and the Establishment Clause**

The first argument, that the recognition of copyright in religious works violates the Establishment Clause of the First Amendment, may seem at first blush trivial, even absurd. After all, religious organizations can own personal and real property, including houses of worship, and virtually no one thinks that government recognition of these property rights constitutes an establishment of religion; so why not ownership of intellectual property rights in religious works? The argument is not quite as bad as it might initially seem, however, in light of the instrumental rhetoric that surrounds much of American copyright law: namely, that copyright is necessary to induce the optimal creation and distribution of works of authorship. More precisely, the instrumental theory posits that, in the absence of copyright protection, authors and publishers would have less than an optimal incentive to create and publish, given the relative ease with which free-riders—those who have not themselves invested in creation and publication—otherwise could copy and compete against the original authors and publishers.<sup>47</sup> In this respect, copyright is a mechanism

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<sup>47</sup>See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 344-47 (1989); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 308-11 (1996). Other theories of copyright also abound. Many countries adhere more closely to a natural law theory derived from the writings of Kant and Hegel. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 7-10 (1997). An alternative natural law theory, based upon the author's supposed moral entitlement to the fruit of her labor, can be derived from the writings of John Locke. See, e.g., Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-83 (1993). More recently, some scholars have attempted to justify and delimit copyright in light of its role in encouraging the development of civil society. See Netanel, *supra*, at 341-85. See also William W. Fisher III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY \_\_, \_\_ (Stephen Munzer ed. 2001) (forthcoming) (discussing various theories of copyright). On the other hand, public choice

by which government indirectly subsidizes authors and publishers of creative works.<sup>48</sup> For purposes of the Establishment Clause, however, this may create a problem, insofar as copyright therefore becomes an indirect state subsidy of, among other things, religious speech.

It is nevertheless extremely unlikely that any court today would characterize the recognition of copyright in religious works as an establishment of religion, for several reasons. The first is historical. On other occasions, the Supreme Court has invoked history as a reason for rejecting Establishment Clause challenges, in particular to the practices of opening a legislative session with a prayer conducted by a state-paid chaplain<sup>49</sup> and of conferring tax exemptions upon religious

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theory suggests that much of the actual, as opposed to ideal, content of copyright law is attributable to the influence of concentrated interest groups. *See, e.g.,* Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244-46 (1996). Advocates of these other theories point to several weaknesses in the instrumental theory; for example, the unresolved question of how much of encouragement the state must provide in order to encourage the optimal creation and publication of new works, or whether certain rights (such as the right to prepare derivative works) are necessary at all. *See* Fisher, *supra*, at \_\_\_; Sterk, *supra*, at 1215-17. Nevertheless, the theory almost certainly explains *something* about copyright—copyright’s emergence after the development of printing technology was not merely a coincidence—and, for better or worse, it remains the principal theory upon which many American courts and commentators, especially those with a law-and-economics bent, almost instinctively rely for purposes of interpreting the actual or ideal content of modern copyright law.

<sup>48</sup>As others have noted, commentators (especially those of a conservative or libertarian bent) sometimes lose sight of the fact that intellectual property rights are a form of government intervention in the marketplace. *See, e.g.,* Okediji, *supra* note 34, at 116 (making this point). Authors may possess a common-law right to prevent the publication of their unpublished manuscripts, but the common law does not confer a right to prevent the reproduction of published works. *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1129-30 (1983). The existence of federal statutory copyright protection is, of course, discretionary; the Constitution authorizes, but does not require, Congress to enact copyright laws. *See* U.S. CONST. art. I, § 8, cl. 8.

<sup>49</sup>*See* *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983). In *Marsh*, the majority opinion made no pretense of applying what was then the standard three-part test for determining whether a state practice violated the Establishment Clause. *See id.*; *see also id.* at 796-801 (Brennan, J., dissenting) (noting this point). Instead, the Court relied exclusively upon historical practice, in particular the fact that the First Congress authorized the payment of a federal chaplain only three days after reaching agreement on the text of the Bill of Rights. *See id.* at 788.

organizations.<sup>50</sup> Long-standing historical practice also would weigh heavily in favor of the copyrightability of religious works. As we have seen, religion was one of the most common subjects of works of authorship leading up to the creation of the modern copyright system.<sup>51</sup> In the United States, religious works have constituted a significant portion of the works registered by copyright owners from the creation of federal copyright system in 1790.<sup>52</sup> More recently, the 1909 Copyright Act, which continued in force until the last major copyright revision took effect in 1978, expressly included “sermons” within the list of copyrightable works of authorship.<sup>53</sup> While not necessarily dispositive, the antiquity of the practice of conferring copyright upon religious works would create a strong presumption in favor of its constitutionality.

Second, because copyright subsists in all original fixed works of authorship, regardless of content, it is similar to a variety of other benefits—including tax exemptions for nonprofit organizations<sup>54</sup> and at least some government aid for students and educational institutions<sup>55</sup>—that

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<sup>50</sup>*See* *Walz v. Tax Commission*, 397 U.S. 664, 676-80 (1970); *but see* *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 30-38 (1989) (Scalia, J., dissenting) (arguing that the majority holding, that a Texas statute exempting religious periodicals from state sales tax violated the Establishment Clause, calls into question analogous long-standing exemptions conferred under both state and federal law).

<sup>51</sup>*See supra* notes 13-21 and accompanying text.

<sup>52</sup>*See, e.g.*, FEDERAL COPYRIGHT RECORDS 1790-1800 2-23 (James Gilreath, ed., Elizabeth Carter Wills, compiler, 1987) (listing, among the 81 works copyrighted from 1790 to 1794, an edition of the Episcopal Book of Common Prayer, a German psalm-book, a compilation of Catholic hymns, and several theological works).

<sup>53</sup>*See* Copyright Act of 1909, ch. 320, § 5(c), 35 Stat. 1075 (repealed 1976).

<sup>54</sup>*See* *Walz*, 397 U.S. at 680; *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that provision of tax deduction for expenses incurred in sending children to elementary and secondary schools, including parochial schools, did not violate Establishment Clause); *cf.* *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 787-94 (1973) (holding that New York statute providing tax benefits to parents of children attending nonpublic schools violated the Establishment Clause, where benefits were calculated not on the basis of money actually expended on tuition, but

government may provide on a neutral basis to both religious and secular recipients. The most common method for evaluating such a program is to consider whether it has a legitimate secular purpose, and whether it has the primary effect of promoting or inhibiting religion.<sup>56</sup> With regard to purpose, as we have seen the mainstream view within the United States has been that, consistent with the First Amendment, the conferral of exclusive rights in original, fixed works of authorship

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rather on the basis of a formula designed to ensure that each family would receive a net benefit comparable to a tuition grant, also held unconstitutional, offered to lower-income families); *Texas Monthly*, 489 U.S. 1 (holding that Texas statute exempting only religious periodicals from state sales tax violated the Establishment Clause).

<sup>55</sup>*See Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (holding that state provision of educational materials and equipment to both public and private schools does not violate the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that provision of public employees to teach remedial classes in both public and private schools does not violate the Establishment Clause); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (holding that provision of sign-language interpreters for students attending both public and private schools does not violate the Establishment Clause); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986) (holding that provision of vocational rehabilitation assistance benefits to a blind student studying at a Christian college, who planned to become a minister, did not violate the Establishment Clause); *see also Everson v. Board of Educ.*, 330 U.S. 1 (1947) (holding that reimbursement to parents of monies expended by them for bus transportation of their children to public and nonpublic schools did not violate the Establishment Clause).

<sup>56</sup>*See, e.g., Mitchell*, 120 S. Ct. at 2540 (plurality opinion); *Walz*, 397 U.S. 674. “Purposes” and “effects” are the first two parts of the famous three-part “test” of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The third part of the test—whether the government program under scrutiny “foster[s] an excessive entanglement with religion,” *id.* at 613 (quoting *Walz*, 397 U.S. at 674), is now often subsumed under the “effects” prong. *See infra* note 78. The Court has also noted from time to time that *Lemon* is not dispositive of every type of Establishment Clause challenge, *see, e.g., Hunt v. McNair*, 413 U.S. 734, 741 (1973) (referring to the three prongs as “no more than helpful signposts”); *Nyquist*, 413 U.S. at 773 n.31 (referring to them as “guidelines”) (quoting *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971)); and some members of the Court have begun to distance themselves from it, *see, e.g., Board of Educ. v. Grumet*, 512 U.S. 687, 721 (1994) (O’Connor, J., concurring) (urging evolution away from *Lemon*’s “rigid influence”); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (comparing *Lemon* to a “ghoul . . . that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,” and noting instances in which the Court has declined to apply it).

for a limited time encourages the dissemination of expression.<sup>57</sup> Given that the related purposes of encouraging knowledge and education are usually deemed sufficient with respect to other government programs that benefit religious groups,<sup>58</sup> and given the courts' general "reluctance to attribute unconstitutional motives . . . particularly when a plausible secular purpose for the . . . program may be discerned from the fact of the statute,"<sup>59</sup> the purpose of affording copyright protection to all original works of authorship, regardless of content, is almost certainly constitutionally adequate.<sup>60</sup>

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<sup>57</sup>See *supra* notes 28-30 and accompanying text; see also U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

<sup>58</sup>See, e.g., *Mueller*, 463 U.S. 388, 395 (1983) (stating that "[a]n educated populace is essential to the political and economic health of any community"); *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (holding that making limited public forum available to student religious organization would be consistent with purpose of "provid[ing] a forum in which students can exchange ideas"); *Nyquist*, 413 U.S. at 773 (stating that "interest in preserving a healthy and safe educational environment" and "in promoting pluralism and diversity among . . . schools" constituted a legitimate secular purpose); *Walz*, 397 U.S. at 672-73 (finding that tax exemption offered to religious, educational, and charitable institutions served legitimate secular purpose of fostering "moral and mental improvement"); cf. *Edwards v. Aguillard*, 482 U.S. 578, 586-88 (1987) (holding that state law requiring teaching of "creation science" along with evolution did not advance stated goal of academic freedom).

<sup>59</sup>*Mueller*, 463 U.S. 388, 394-95 (1983).

<sup>60</sup>See also *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (stating that Establishment Clause challenge may succeed only if, *inter alia*, the statute in question "is motivated wholly by an impermissible purpose") (citations omitted); *Edwards*, 482 U.S. at 586-87 (stating that "the Court is normally deferential to a State's articulation of a secular purpose," as long as it is "sincere and not a sham"). Indeed, the *exclusion* of religious but not secular works from the scope of copyright protection would raise serious questions under the Free Exercise, Free Speech, and Equal Protection Clauses. See *infra* notes \_\_\_ and accompanying text. The desire to avoid such a result would itself probably qualify as a legitimate, secular purpose for purposes of the Establishment Clause. See *Board of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990) (plurality opinion) (stating that federal statute's "prohibition of discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech is a sufficient basis for meeting the secular purpose prong;" the purpose of preventing of such discrimination "is undeniably secular") (citations omitted); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)

With regard to the effects of a government program upon religious practice, several factors may be relevant, although the most important under current law appears to be whether the program is offered on a neutral basis--that is, to any person who furthers the secular purpose at issue, regardless of his or her religious beliefs.<sup>61</sup> In the tax cases, for example, courts have upheld exemptions for religious organizations, as long as they are made available to a wide variety of nonprofit entities.<sup>62</sup> In the school funding cases, courts consider, among other things, whether the program at issue will result in religious indoctrination that can reasonably be attributed to the government<sup>63</sup> and whether the program defines its beneficiaries by reference to their religion by, for example, providing a financial incentive for the beneficiaries to choose a sectarian over a public school.<sup>64</sup> The provision of a benefit on a neutral basis to both religious and secular recipients, however, is strong evidence that the program will not result in government-sponsored indoctrination or define beneficiaries by their religion--particularly when the allocation of benefits depends upon the individual choices of private individuals, rather than government.<sup>65</sup> In the present context, the

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(stating that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

<sup>61</sup>*See Mitchell*, 120 S. Ct. at 2541-44 (plurality opinion); *Agostini*, 521 U.S. at 231; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 398-99; *Zobrest*, 509 U.S. at 8-10; *Walz*, 397 U.S. at 672-74.

<sup>62</sup>*See Walz*, 397 U.S. at 692-93; *Mueller*, 463 U.S. at 396; *cf. Texas Monthly*, 489 U.S. at 14-15 (plurality opinion); *Nyquist*, 413 U.S. at 789-94.

<sup>63</sup>*See Mitchell*, 120 S. Ct. at 2540 (plurality opinion) (citing *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

<sup>64</sup>*See id.* (citing *Agostini*, 521 U.S. at 234).

<sup>65</sup>*See id.* at 2541-44; *Agostini*, 521 U.S. at 231; *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 8-10. In *Mitchell*, for example, the plurality concluded that the state's provision of educational materials and equipment to both public and sectarian schools did not result in religious indoctrination that could reasonably be attributed to the state, given that (1) the state provided the benefit on a neutral, secular basis, and (2) any aid that flowed to the sectarian schools did so as a consequence of individual parents' choices to send their children to these schools. *See Mitchell*, 120

provision of copyright on a neutral basis, regardless of the secular or religious character of the work, goes a long way toward refuting any potential Establishment Clause challenge. The fact that the state confers copyright protection even upon works that denounce the United States government (for example, *The Turner Diaries*)<sup>66</sup> makes it unlikely that observers would equate copyright protection with government endorsement of the message of any individual work, religious or otherwise; nor is it likely that anyone would attribute to the United States government a reader's decision to convert to, say, Zen Buddhism after having read the copyrighted works of Thich Nhat Hanh.<sup>67</sup> Finally, the copyrightability of religious works does not provide authors with any incentive to choose religious over other subject matter, and thus does not define copyright owners by reference to their religion.<sup>68</sup>

A second factor that may be relevant in assessing the effect of governmental programs that

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S. Ct. at 2541-42. The state's provision of benefits on a neutral basis also meant that the state did not define the aid beneficiaries by reference to their religion; that is, the criteria used to allocate the benefit did not create any financial incentive for the recipients to choose a sectarian over a public school. *See id.* at 2543-44. In a concurring opinion, however, Justice O'Connor, joined by Justice Breyer, accused the plurality of focusing too heavily on neutrality and too little on other potentially relevant factors, including whether the aid has been diverted to religious indoctrination, whether the benefit supplements or supplants funds otherwise available to sectarian schools, and whether the state provides monetary or only in-kind assistance. *See id.* at 2556-62 (O'Connor, J., concurring).

<sup>66</sup>*See* ANDREW MACDONALD, *THE TURNER DIARIES* (2d ed. 1996).

<sup>67</sup>*See, e.g.*, THICH NHAT HANH, *THE HEART OF THE BUDDHA'S TEACHING: TRANSFORMING SUFFERING INTO PEACE, JOY, AND LIBERATION* (1998). *Cf. Mergens*, 496 U.S. at 252 (plurality opinion) (stating that "a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message or state approval or endorsement of the particular religion").

<sup>68</sup>*See supra* text accompanying note 64; *see also* *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 863 (1995) (Thomas, J., concurring) (citing copyright protection as an example of a government benefit "traditionally . . . available to religious adherents on neutral terms").

benefit religion is the nature of the benefit itself.<sup>69</sup> In this regard, the provision of cash subsidies to religious organizations remains suspect<sup>70</sup> (as would of course the provision of in-kind religious equipment, such as Bibles or menorahs).<sup>71</sup> Other types of direct in-kind benefits now appear to be permissible, however, as long as they do not run afoul of the purposes-and-effects test.<sup>72</sup> Perhaps most directly on point is the provision of tax benefits for religious organizations, which too appears to be permissible as long as the benefits are provided on a neutral basis.<sup>73</sup> Of course, as a matter of economics, there is no meaningful distinction between a direct cash subsidy and a tax benefit, which is simply an indirect subsidy; receiving a \$10 payment is economically equivalent to receiving a right not to pay a \$10 tax, or any other right worth \$10.<sup>74</sup> Courts nevertheless tend to view the indirect subsidy as less of an endorsement of religion, for two reasons. The first is that, by not collecting revenue, the state plays a more passive role than it would if it were providing a direct subsidy<sup>75</sup> (although surely the state plays something more than a passive role in deciding

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<sup>69</sup>See *Mitchell*, 120 S. Ct. at 2547 (plurality opinion); *Agostini*, 521 U.S. at 232 (citing *Lemon*, 403 U.S. at 615).

<sup>70</sup>See *Mitchell*, 120 S. Ct. at 2546-47 (plurality opinion) (citations omitted).

<sup>71</sup>See *id.* at 2584 (Souter, J., dissenting) (noting bar on “aid with actual religious content”) (citations omitted).

<sup>72</sup>See *supra* notes 54-55.

<sup>73</sup>See *supra* note 62 and accompanying text.

<sup>74</sup>See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 859 (1995) (Thomas, J., concurring) (recognizing this principle). In general, at least, this principle holds true. Experimental evidence nevertheless suggests that in some cases people tend to place more value upon retaining an existing endowment than upon acquiring an alternative endowment of equal value. See *Cotter*, *supra* note 47, at 58-62 (discussing endowment effects). To the extent this is true, a \$10 tax savings may be slightly more valuable than a \$10 cash subsidy, even though the latter is less likely to survive constitutional scrutiny.

<sup>75</sup>See *Walz*, 397 U.S. at 674-76; *id.* at 691 (Brennan, J., concurring).

whether to enact the benefit in the first place!). The second is that the provision of a tax benefit does not compel people to pay taxes for the benefit of religious institutions with which they may disagree<sup>76</sup> (although it surely does allow religious organizations to keep a greater share of their revenue, and compels taxpayers to share a greater burden of the cost of other government programs).<sup>77</sup> In any event, since the copyright subsidy, if we wish to characterize it as such, involves no monetary payment from the government, but rather is merely a right to exclude others from something that did not exist before (and that may have no market value whatsoever), it is much more likely to survive an Establishment Clause challenge than would the provision of a more direct stipend.<sup>78</sup>

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<sup>76</sup>See *Texas Monthly*, 489 U.S. at 914 (plurality opinion) (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 553 (1968)).

<sup>77</sup>See *Texas Monthly*, 489 U.S. at 14-15 (plurality opinion) (noting that “[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become ‘indirect and vicarious “donors,”” but that the conferral of a benefit “upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end . . . does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause”) (citations omitted); *id.* at 18 n.8.

<sup>78</sup>Another relevant factor is whether the program creates an excessive governmental entanglement with religion. See, e.g., *Agostini*, 521 U.S. at 232 (stating that, “to assess entanglement, we have looked to ‘the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority’”) (quoting *Lemon*, 403 U.S. at 615); see also *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 447 (1969) (stating that civil courts may not determine ecclesiastical questions in the course of resolving property disputes). Given the overlap between these criteria and the criteria that are relevant to the program’s effects, see *supra* notes 61-78 and accompanying text, the Court now tends to view evidence of excessive entanglement as being relevant to effects, and not as a separate factor in a three-part purpose/effects/entanglement test. See *Mitchell*, 120 S. Ct. at 2540; *Agostini*, 521 U.S. at 232-33 (same). In any event, entanglement seems an unlikely basis for successfully challenging the copyrightability of religious works. Entanglement would be vastly greater if the government had to determine, on a case-by-case, precisely how much religious content (10%? 50% 90%) a work could have before it qualified for federal copyright protection. Cf. *Mergens*, 496 U.S. at 253 (plurality opinion) (stating that “a denial of equal access to religious speech might well create

Finally, and perhaps most importantly, a series of recent Supreme Court decisions, including its decision this past term in *Good News Club v. Milford Central School*,<sup>79</sup> would appear to make it unconstitutional to *exclude* religious subject matter from the scope of copyright protection, as long as copyright may subsist in all other qualifying subject matter.<sup>80</sup> The guiding principle of these cases is that the state's refusal to permit religious speech on permissible subject matter, within a limited public forum, constitutes viewpoint discrimination in violation of the Free Speech Clause.<sup>81</sup>

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greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *Widmar*, 454 U.S. at 272 n.11 (same); *Texas Monthly*, 489 U.S. at 902 (plurality opinion) (stating that sales tax exemption for religious periodicals would "appear to produce greater state entanglement with religion than the denial of an exemption," given the need to determine which periodicals qualify for exemption); *Walz*, 397 U.S. at 674-75 (noting that both taxation and exemption of churches could entangle government, to some extent, with religious organizations).

The continued relevance of yet other factors, such as the nature of the recipients, the divertibility of the aid for religious use, and the substantiality of the aid provided, is uncertain. Compare *Mitchell*, 120 S. Ct. at 2542 n.6, 2544 n.7, 2547-52 (plurality opinion) (discounting these factors) with *id.* at 2556-62 (O'Connor, J., concurring) (arguing that divertibility remains relevant) and *id.* at 2581-97 (Souter, J., dissenting) (arguing that other factors remain relevant). In any event, their relevance in the present context nevertheless is probably minimal. It is doubtful that the benefits of copyright accrue disproportionately to the authors of religious works. And whatever financial benefits the authors of religious works derive from the copyright system clearly can be "diverted" for the benefit of religious organizations, but even if this factor remains relevant it is not dispositive, see *Mitchell*, 120 S. Ct. at 2558 (O'Connor, J., concurring), and probably would be analogous to the federal government's payment of a weekly salary check to an employee, knowing that he will give part of it to a religious group, see *Witters*, 474 U.S. at 486-87.

<sup>79</sup>121 S. Ct. 2093 (2001).

<sup>80</sup>See also *Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384; *Mergens*, 496 U.S. 226; and *Widmar*, 454 U.S. 263.

<sup>81</sup>See *Good News Club*, 121 S. Ct. at 2100-02; *Rosenberger*, 515 U.S. at 829-37; *Lamb's Chapel*, 508 U.S. at 392-94; *Widmar*, 454 U.S. at 273-77; cf. *Mergens*, 496 U.S. at 237-47 (holding that federal statute required school district to permit religious club to meet on school premises during noninstructional time, to the extent that it permitted other noncurriculum-related clubs to do so, without reaching First Amendment issue). To be more precise, with respect to traditional public fora such as public streets or parks, the state may not restrict speech on the basis of subject matter or speaker identity except as necessary to serve a compelling state interest, and even then only if the

This is so even in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*, in which the state's provision of funding for the speech at issue might otherwise seem to constitute an Establishment Clause violation.<sup>82</sup> By analogy, the denial of a generally-available government benefit, in this case copyright, to authors who advance a religious perspective would also constitute

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restriction is narrowly tailored to serve that interest. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When the state creates a public forum for a limited purpose, however, "such as use by certain groups . . . or for the discussion of certain subjects," *Perry*, 460 U.S. at 45 n.7, it may not "exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 804-06 (1985)); see also *Good News Club*, 121 S. Ct. at 2100. The same rule applies to so-called "nonpublic fora"--for example, government-owned or controlled property the principal function of which would be disrupted by expressive activity. See *Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius*, 473 U.S. at 803-06; *Perry*, 460 U.S. at 46. In each of the cases at issue, the Court concluded that the state had impermissibly prohibited religious speech relating to otherwise permissible subject matter, such as "the moral and character development of children," *Good News Club*, 121 S. Ct. at 2101; "student news, information, opinion, entertainment, or academic communications media groups," *Rosenberger*, 515 U.S. at 824; "social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," *Lamb's Chapel*, 508 U.S. at 386; and the general exchange of ideas, *Widmar*, 454 U.S. at 271 n.10. To be sure, the distinction between public, limited public, and nonpublic fora can be slippery--as can the distinction between subject matter and viewpoint discrimination, see *Rosenberger*, 515 U.S. at 830-31, as well as the determination whether particular conduct is "speech" or something else. See *Good News Club*, 121 S. Ct. at 2114 (Stevens, J., dissenting) (characterizing the conduct at issue as proselytization, rather than speech on a religious topic); 121 S. Ct. at 2117 (Souter, J., dissenting) (characterizing the conduct at issue as a religious service). For present purposes, however, these distinctions are of little concern. Having chosen to confer copyright upon all original, fixed works of authorship, on all varieties of subject matter (including ethics, the meaning of life, and so on), the government cannot exclude works that express a religious viewpoint on these topics in the absence of a compelling interest. See *Rosenberger*, 515 U.S. at 836-37 (stating that university guidelines denying funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality" would, if taken literally, "bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes," as well as Karl Marx, Bertrand Russell, and Jean-Paul Sartre); but see *id.* at 895-97 (Souter, J., dissenting) (construing university guidelines as denying funding only for "religious apologetics," and arguing that this restriction constitutes subject matter, not viewpoint, discrimination).

<sup>82</sup>See *Rosenberger*, 515 U.S. at 838-45 (distinguishing the student activity fee at issue in *Rosenberg* from a tax levied for the support of religion); *id.* at 873-76 (Souter, J., dissenting) (characterizing the fee as public funding for religious speech).

viewpoint discrimination. And while the cases leave open the possibility that the state's interest in avoiding an Establishment Clause violation may in some circumstances permit even viewpoint discrimination,<sup>83</sup> any argument that the extension of copyright protection to religious works constitutes an establishment of religion is, as discussed above, quite weak.<sup>84</sup>

### **B. Some Copyright Law Problems**

The argument that copyright law itself sometimes precludes the assertion of a copyright interest in some religious works stands on a much firmer footing than does the constitutional argument; indeed, one might say that the constitutional principle of treating religious speech the same as any other, *but no better*, justifies considerable skepticism over the copyright status of some types of religious works. Two reasons in particular merit discussion: first, an argument relating to the authorship of alleged revelations; and second, the merger doctrine.<sup>85</sup>

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<sup>83</sup>See *Good News Club*, 121 S. Ct. at 2109; *Rosenberger*, 515 U.S. at 837-38; *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 271.

<sup>84</sup>See *supra* notes 50-78 and accompanying text. Indeed, if the desire to avoid the direct subsidy at issue in *Rosenberger* was not a sufficiently compelling interest to sustain viewpoint discrimination, see *supra* note 82 and accompanying text, it is difficult to see why the more indirect subsidy provided by the copyright system would fare any differently.

Nothing in the text above suggests that it would be lawful for the government to single out religious works for *enhanced* copyright protection, such as a longer copyright term. On the one occasion in which Congress actually attempted to do this, a court (not surprisingly) held the resulting legislation unconstitutional. See *United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152 (D.C. Cir. 1987) (holding that private bill extending the copyright in all editions of Mary Baker Eddy's *Science and Health, with Key to the Scriptures*, including editions that had fallen into the public domain, violated the Establishment Clause), *aff'g* 616 F. Supp. 476 (D.D.C. 1985); *but see* *Silversmith & Guggenheim*, *supra* note 36, at 498-503 (arguing that *Rosenberger* casts into doubt the holding in *United Christian Scientists*) (!).

<sup>85</sup>One argument that on its face may seem appealing, but which I reject, is that the copyright incentive is unnecessary for the creation and dissemination of at least some religious works, particularly those that claim to be divinely inspired. While this observation may be true, at least in some cases—all of the world's leading religions, after all, came into existence long before copyright was a glimmer in Queen Anne's eye--there is nothing in copyright law itself that limits protection

## 1. Authorship

We may now lay it down as certain that in the distinctively religious sphere of experience, many persons (how many we cannot tell) possess the objects of their belief, not in the form of conceptions which their intellect accepts as true, but rather in the form of quasi-sensible realities directly apprehended. As his sense of the real presence of these objects fluctuates, so the believer alternates between warmth and coldness in his faith.

--WILLIAM JAMES<sup>86</sup>

With respect to authorship, both the Copyright Act and the Constitution are, on their face, clear: copyright initially vests in the author of the work.<sup>87</sup> Although this clarity dispels somewhat once we realize that neither text defines the word “author,”<sup>88</sup> for present purposes I wish to focus on a different issue. Suppose that a human being represents that God or some other supernatural

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only to works that would not have been created or published absent the copyright incentive. Moreover, even if one were to accept the utilitarian theory of copyright *in toto*, *see supra* notes 47-48 and accompanying text, such a rule would, I suspect, be unworkable in practice. (For example, would law review articles exist in the absence of the copyright system? Writers might still have an incentive to write them (tenure, fame, the hope of influencing courts) and law review editors might still have an incentive to publish them (to gain editorial experience, to pad their résumés), but who knows?) Limiting such a rule to religious works only, on the other hand, would raise problems of viewpoint discrimination, as outlined above. *See supra* notes 79-84 and accompanying text. The relative unimportance of the copyright incentive may nevertheless be important in the context of certain copyright doctrines, including the merger doctrine. *See infra* note 210 and accompanying text.

<sup>86</sup> THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 65-66 (New American Library ed. 1958) (1902). The quotation is taken from the book’s third lecture, titled *The Reality of the Unseen*.

<sup>87</sup>*See* U.S. CONST. art. I, § 8, cl.8; 17 U.S.C. § 201(a).

<sup>88</sup>To be more precise, the Copyright Act defines an employer or commissioning party as the author of a work prepared by an employee or independent contractor under some circumstances. *See* 17 U.S.C. § 201(b) (defining the person for whom a work made for hire was made as the author of the work); *id.* § 101 (defining “work made for hire”). It also sets forth, in somewhat oblique fashion, some of the requirements for qualifying as the author of a joint work. *See id.* (defining a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”). Subject to these qualifications, the Act does not define the term “author.”

being is the author of a particular text, and that the human being was merely the instrument chosen to convey the author's message to the public. In such a case, it would seem a bit awkward for that same human being to claim a copyright interest in the work,<sup>89</sup> and yet in a handful of cases a human being has done precisely that. The way in which courts have handled this issue tells us something about their ability to take religion, particularly minority religions, seriously.

The way in which some courts have handled this problem is to ignore it. In one recent case, for example, *Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd.*,<sup>90</sup> the plaintiffs claimed to be the proprietors of copyright in a literary work titled *A Course in Miracles*.<sup>91</sup> According to the parties, in 1965 a Voice began speaking to Dr. Helen Schucman, a Columbia University professor, telling her to take notes on "a course in miracles."<sup>92</sup> Over the next seven years, Schucman took dictation from the Voice, whom she identified as Jesus.<sup>93</sup> Eventually the material

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<sup>89</sup>The structure of the Copyright Act strongly suggests that supernatural beings cannot qualify as "authors" for purposes of the Copyright Act. For example, the current copyright term consists of the life of the author plus seventy years. See 17 U.S.C. § 302(a). An immortal author's copyright therefore would last forever, in apparent violation of Article I, Section 8, Clause 8 of the Constitution, which authorizes Congress to grant copyrights only for "limited terms." Moreover, any transfer of copyright from the supernatural author to the human intermediary would have to be in writing to be effective. See 17 U.S.C. § 204(a). A purported oral transfer constitutes at most only a nonexclusive license, see Roger D. Blair & Thomas F. Cotter, *The Elusive Logic of Standing Doctrine in Intellectual Property Law*, 74 TULANE L. REV. 1323, 1367 & n.203 (2000), and a nonexclusive licensee lacks standing to sue for infringement, see *id.* at 1369.

Similar problems arise with respect to determining the author of works "written" by artificial intelligence. See Ralph D. Clifford, *Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?*, 71 TUL. L. REV. 1675, 1682-86 (1997) (arguing that the Copyright Act contemplates a human author).

<sup>90</sup>55 U.S.P.Q.2d (BNA) 1680 (S.D.N.Y. 2000).

<sup>91</sup>See *id.* at 1683.

<sup>92</sup>See *id.* at 1683-84.

<sup>93</sup>See *id.* at 1684.

formed the corpus of a book, and Schucman's assignee, in accordance with Jesus's wishes as reported by Schucman, registered the copyright, listing as author "Anonymous (Helen Schucman)".<sup>94</sup> In 1995, the defendant New Christian Church of Full Endeavor, described as "one of the many organizations dedicated to spreading the message of the Course,"<sup>95</sup> began copying, distributing, and translating substantial portions of the work, without authorization, its stated goal being "to achieve as widespread a distribution of the Course and its message as possible."<sup>96</sup> The plaintiffs filed suit for copyright infringement; the church moved for summary judgment on the ground, *inter alia*, that the plaintiffs lacked a valid copyright.<sup>97</sup>

The court cited two reasons for denying the motion. The first ground, that the plaintiffs held copyright in the work by virtue of Schucman's editorial revisions and arrangement of Jesus's text, is one that I return to below.<sup>98</sup> For now, I would like to concentrate on the court's second ground for denying the motion: namely, that "dictation from a non-human source should not be a bar to copyright."<sup>99</sup> In this regard, the court relied on two earlier cases, *Urantia Foundation v. Maaherra*<sup>100</sup> and *Cummins v. Bond*,<sup>101</sup> both of which involved similar allegations of dictation from the spirit

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<sup>94</sup>*See id.* at 1684-86.

<sup>95</sup>*Id.* at 1687.

<sup>96</sup>*Id.* at 1688.

<sup>97</sup>*See id.* at 1689.

<sup>98</sup>*See infra* notes 185-90 and accompanying text.

<sup>99</sup>*Id.* at 1691.

<sup>100</sup>895 F. Supp. 1337 (W.D. Ariz. 1995), *rev'd on other grounds*, 114 F.3d 955 (9<sup>th</sup> Cir. 1997).

<sup>101</sup>[1927] 1 Ch. 167 (U.K.).

realm.<sup>102</sup> In both cases, the trial court had declared irrelevant for purposes of copyright the fact that the plaintiff claimed the work to be a divine revelation,<sup>103</sup> and the court in *Penguin Books* agreed:

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<sup>102</sup>See *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1690-91.

<sup>103</sup>See *id.* At issue in *Urantia Foundation* was *The Urantia Book*, a work that both the defendant and the plaintiff Urantia Foundation believe to have been authored, or at least inspired, by spiritual beings. See *Urantia Foundation v. Maaherra*, 114 F.3d 955, 957 (9<sup>th</sup> Cir. 1997) (stating that “[b]oth parties believe that the words in the Book were ‘authored’ by non-human spiritual beings” and “delivered . . . ‘through’ a patient of a Chicago psychiatrist, Dr. Sadler”); *Urantia Foundation v. Maaherra*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995); *cf.* *Urantia Foundation v. Burton*, 210 U.S.P.Q. (BNA) 217, 219 (W.D. Mich. 1980) (noting “in both written and oral arguments . . . some discussion as to whether Dr. Sadler’s patient was the author of the book or was merely a conduit for some spiritual author”). In order to disseminate the book’s message, the defendant made and distributed verbatim copies of the book. See *Urantia Foundation v. Maaherra*, 895 F. Supp. 1329, 1332 (D. Ariz. 1995). The defendant argued, among other things, that the Foundation lacked a copyright in the book due to its celestial authorship. See *Urantia Foundation v. Maaherra*, 895 F. Supp. 1337, 1337-38 (W.D. Ariz. 1995). The district court rejected this argument, stating:

Nor is it necessary that the authorship stem from human effort. Whether *The Urantia Book* is a divine revelation dictated by divine beings is a matter of faith, not of proof in a court of law. As a judge, I cannot—I must not—declare for anyone the truth or nontruth of an article of faith. If I were to declare *The Urantia Book* to be a divine revelation dictated by divine beings, I would be trampling upon someone’s religious faith. If I declared the opposite, I would be trampling upon someone else’s religious faith. I shall do neither. Whether *The Urantia Book* is a divine revelation dictated by divine beings is irrelevant to the issue of whether the book is a literary work within the meaning of 17 U.S.C. § 102.

*Id.* at 1338; see also *Urantia Foundation v. Burton*, 210 U.S.P.Q. (BNA) 217, 219 (W.D. Mich. 1980) (stating that “[i]llegally . . . the source of the [human author’s] inspiration is irrelevant”). The Court of Appeals affirmed the district court’s holding that the work was a copyrightable work, albeit on a different ground, namely that Dr. Sadler and his followers had created an original compilation of the alleged revelations. See *Urantia Foundation v. Maaherra*, 114 F.3d at 959; see also *infra* notes 174-84 and accompanying text (discussing the compilation issue). The Court of Appeals agreed with the defendant, however, “it is not creations of divine beings that the copyright laws were intended to protect, and . . . in this case some element of human creativity must have occurred in order for the Book to be copyrightable.” *Id.* at 958.

At issue in *Cummins v. Bond* was an automatic writing, *The Chronicle of Cleophas*, which the plaintiff allegedly wrote “at high speed under the alleged influence of an external psychic agent, and in archaic language without stops, and not in the ordinary handwriting of the plaintiff.” [1927] 1 Ch. 167, 167 (U.K.). After the defendant published an extract of the text, the plaintiff filed suit to establish her ownership of copyright and to enjoin any further publication. See *id.* at 169-70.

As a matter of law, it is irrelevant for copyright purposes whether Jesus wrote the Course. There is no question, of course, that if Schucman had been a scribe for [her colleague] Thetford (for example), she would lack the requisite originality for copyright protection. But she was not a scribe for any human creator. She was a scribe for a voice she heard in her own mind. While she identified this voice as “Jesus,” and Plaintiffs, Defendants, and countless other people have apparently chosen to believe this, beliefs are not substitutes for facts. They cannot be verified in a court of law according to the rules of evidence.<sup>104</sup>

To see why this reasoning is problematic, it may be helpful to consider the two possible alternatives presented by Schucman’s claim that Jesus authored *A Course in Miracles*: either the claim is true (or at least she thinks it is true), or it isn’t (she doesn’t). Of course, as the courts in the above cases have recognized, they cannot decide, as a matter of fact, whether the claim is true or not without violating the Establishment Clause.<sup>105</sup> This might seem to present a dilemma, since the

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Noting both parties’ honest belief “that the true originator of all that is to be found these documents is some being no longer inhabiting this world,” *id.* at 172, namely Cleophas, the court compared the plaintiff to a translator “from the language in which [the communications] were communicated to her into something more intelligible to persons of the present day.” *Id.* at 173. The court nevertheless rejected the idea that the plaintiff and Cleophas were joint authors, doubting its jurisdiction over “the sphere in which [the latter] moves.” *Id.*; *see also id.* at 175 (rejecting argument that copyright rested with Cleophas). For similar conclusions, *see Garman v. Sterling Publ. Co.*, No. C-91-0882 SBA (ENE), 1992 U.S. Dist. LEXIS 21932, at \*7 (Nov. 5, 1992) (finding “no legal relevance to the assertions by both parties that the information was provided by spiritual guides”); *Leah v. Two Worlds Publ. Co.*, [1951] Ch. 393, 398 (U.K.) (following *Cummins*).

<sup>104</sup>*Id.* at 1692.

<sup>105</sup>*See supra* note 99. A court might conceivably pass judgment on whether the human intermediary sincerely believes that the claim is true. *Cf. Kikumura v. Hurley*, 242 F.3d 950, 960 (10<sup>th</sup> Cir. 2001) (holding that a plaintiff makes out a prima facie case under the RFRA when she proves that the federal government has substantially burdened a sincere exercise of religion); *but see infra* n.149 (questioning whether even this inquiry would be permissible). As the text above will demonstrate, however, I do not think that such an inquiry is necessary to the proper resolution of the problem.

Perhaps if there were compelling evidence that the revelations were fictional (for example, an admission on the part of the human intermediary), a court could make such a finding. As a general matter, however, for courts to pass judgment on the truth or falsity of revelations would tend to entangle them in religious controversies, in violation of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) (stating that the government may not prefer one denomination

court ultimately has to determine whether the work is copyrightable or not, and this decision seems to turn on whether the work has a human author.<sup>106</sup> I shall argue, however, that the correct result is that words *allegedly* spoken by supernatural entities are not copyrightable, regardless of whether the claim of celestial authorship is true or false. A court therefore can avoid passing judgment on the truth of claims of this nature, since the practical effect in either instance should be a lack of copyright. This is precisely opposite to the conclusion reached in *Penguin Books* and the other cases noted above.<sup>107</sup>

To illustrate, consider first the possibility that Schucman's claim of Jesus's authorship is true. Personally, I think this is a longshot, and so, I suspect, do most readers of this article.<sup>108</sup> Two observations nevertheless are important. The first is that, while Schuchman's claim may strike the average person as outré, in form it is no different from the claims of many popular religions. The Catholic Church, for example, encourages the faithful to accept as authentic the revelations allegedly made by the Virgin Mary to a group of children in Fatima, Portugal, in 1917.<sup>109</sup> Mormons believe

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over another); *Presbyterian Church*, 393 U.S. at 447.

<sup>106</sup>*See supra* note 89.

<sup>107</sup>*See supra* notes 99-104 and accompanying text.

<sup>108</sup>If we were to reformulate the query, however, from whether the claim is true to whether Schucman sincerely believes it to be true, I suspect that most people would agree that the probability would be somewhat higher.

<sup>109</sup>*See* Garry Wills, *Fatima: 'The Third Secret'*, N.Y. REV. OF BOOKS, Aug. 10, 2000, at 51. As Wills explains, in May 2000 Pope John Paul II revealed the third Fatima secret—a description of an apocalyptic vision—which had been the subject of speculation for many years. *See id.* Altering the facts slightly creates an interesting hypothetical. Suppose that someone with access to the third secret had published it, without authorization, prior to May 2000. Would this unauthorized publication constitute copyright infringement? Although the author of the work is a human being (Lucia dos Santos, the surviving child witness who is now an elderly nun), not a supernatural entity, problems might arise under the merger doctrine, *see infra* notes 192-211 and accompanying text. The publisher also might have a valid fair use defense, but some of the relevant factors—including the unpublished nature of the work and any bad faith shown in obtaining a copy—would weigh

that in 1823 a glorified being named Moroni guided Joseph Smith to discover gold plates bearing the text of *The Book of Mormon*, which Smith miraculously translated into English.<sup>110</sup> Muslims believe that the Angel Gabriel dictated the Koran to Muhammed, and some (though not all) devout Jews and Christians take a similar position with respect to at least some portions of the Hebrew Scriptures and, in the latter case, the New Testament.<sup>111</sup> But it is hard to imagine a court today referring to the beliefs of Catholics, Mormons, Muslims, or Jews in quite the same condescending tone the court used in discussing *A Course in Miracles*, referring to Schucman as “a scribe for a voice she heard in her own mind”<sup>112</sup> (schizophrenia, anyone?) and to the beliefs of “countless . . . people” that the voice Schucman heard was that of Jesus as “not substitutes for facts.”<sup>113</sup> More importantly, if we take seriously the state’s obligation to remain neutral with respect to all such claims of supernatural inspiration, then it is inappropriate for a court to base its decision regarding the copyrightable status of a work upon the judge’s belief *or* disbelief in the author’s claim. The court nevertheless transparently betrays its own skepticism in the quotation above; and while I share that skepticism, I am troubled by the court’s reliance upon it to decide a case. In other contexts, Professor Stephen Carter has written of the state’s failure to take religion seriously, that is, to give individual claims of conscience priority over the dominant views of society as reflected in state

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against fair use. *See infra* notes 272-74, 318 and accompanying text.

<sup>110</sup>*See* THE BOOK OF MORMON: ANOTHER TESTAMENT OF JESUS CHRIST, *Introduction*, at i (1981). For a skeptical account, *see* DAVID PERSUITTE, JOSEPH SMITH AND THE ORIGINS OF *THE BOOK OF MORMON* (2d ed. 2000).

<sup>111</sup>*See infra* note 195 and accompanying text.

<sup>112</sup>*Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1692.

<sup>113</sup>*Id.*

action.<sup>114</sup> Although others have questioned the strength of Carter's thesis as a general matter—pointing, for example, to the efforts of recent presidential candidates to outdo each other in public expressions of piety<sup>115</sup>—the *Penguin Books* decision is consistent with it.<sup>116</sup> When push comes to shove, the state knows better than to take seriously a claim of divine inspiration and its consequences—which in this instance would be the absence of copyright protection, since Schucman cannot claim copyright in a work she did not author—and must protect the religious adherent from her own bad judgment. Taking Schucman's claim seriously, on the other hand, would entail a willingness neutrally to entertain the *possibility* that Jesus authored the work, as long as there is a way to accommodate that belief without passing judgment on its truth or falsity. As described below, the accommodationist path is feasible, because the end result is the same even if Schucman's claim of Jesus's authorship is false; the court need not indulge in any theological speculation in

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<sup>114</sup>See *supra* note 41.

<sup>115</sup>See Ronald J. Krotoszynski, Jr., Book Review, *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1667-68 (2000); see also WENDY KAMINER, *SLEEPING WITH EXTRA-TERRESTRIALS: THE RISE OF IRRATIONALISM AND THE PERILS OF PIETY* (1999) (arguing that the religious, including New Age adherents, exercise a disproportionate influence over American society).

<sup>116</sup>For purposes of the present analysis, probably not much hangs on the issue of whether, as a general matter, Carter or Kaminer has the better of the argument. For what it's worth, I suspect that both viewpoints are correct in certain contexts. In American society today, the highly educated tend to be less religious than the less educated. See MICHAEL SHERMER, *HOW WE BELIEVE: THE SEARCH FOR GOD IN AN AGE OF SCIENCE* 79-80, 246 (2000). One might expect, then, that in some contexts the educated elite would display a condescending attitude toward religious faith, as Carter charges. On the other hand, given the relatively strong beliefs of a majority of the American population, it is equally predictable that many of our elected officials compete with one another in making public affirmations of piety; and neither group can necessarily be counted on to show much sympathy for the rights and interests of religious minorities. To the extent that these rights and interests are worth protecting—even when the beliefs themselves may appear foolish to most of us, as many of the beliefs discussed in this article undoubtedly do—the problems discussed in this article are important ones.

order to determine the copyright status of the work.<sup>117</sup>

From a doctrinal standpoint, the defenses of unclean hands and of “copyright estoppel” may have a bearing on whether a person can assert copyright in a work that she actually authored, but which she represents to the public as having been authored by someone else (although, as we shall see, the copyright estoppel argument is the stronger of the two).<sup>118</sup> As applied in copyright cases, the unclean hands doctrine prevents a copyright owner from enforcing her rights when she has engaged in serious misconduct that “directly relate[s] to the merits of the controversy between the

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<sup>117</sup>I recognize that refusing to confer copyright in expression that purports to be divine inspiration might, at the margin, make it more difficult for people like Schucman to find a publisher; and if so, that this consequence might defeat the goal of encouraging religious pluralism. There are three responses to this argument. The first is that this possibility is not limited to the religious context. The fact that copyright does not subsist in unoriginal works might, at the margin, deter the creation and publication of socially useful works such as unoriginal but labor-intensive databases. *See, e.g.,* Paula Baron, *Back to the Future: Learning from the Past in the Database Debate*, 62 OHIO ST. L.J. 879, 881-93 (2001) (reviewing the database debate). If the originality requirement is suboptimal, however, we should consider overhauling it across the board, rather than creating an exception to it in the present context. Second, because copyright may inhere in the original selection or arrangement of unoriginal expression, or in an original work based upon an unoriginal source, there would still be some incentive for publishers to disseminate these works, even if the expression is the public domain. *See infra* notes 163-70 and accompanying text. Third, the copyright incentive might be less significant as a motivating factor for the creation and dissemination of at least some religious works. *See infra* text accompanying note 210.

<sup>118</sup>Other doctrines that might conceivably have a bearing on the problem include fraud on the Copyright Office and copyright misuse. Fraud on the Copyright Office, which occurs when a person procures a copyright registration by making materially false statements to the Copyright Office, is a variant of the unclean hands doctrine. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 7.20[B], at 7-208 to -209 (2001) [hereinafter NIMMER & NIMMER]; 4 NIMMER & NIMMER, *supra*, § 13.09[B], at 13-294. The court in *Penguin Books* rejected a claim of fraud on the Copyright Office on the ground, *inter alia*, that for reasons already discussed Jesus was not the author of the subject work for purposes of the Copyright Act. *See Penguin Books*, 55 U.S.P.Q.2s at 1692-93. Copyright misuse is yet another a variant of the doctrine of unclean hands, typically invoked when the defendant alleges that the plaintiff has used her copyright in a manner that violates the antitrust laws. *See* 7 NIMMER & NIMMER, *supra*, § 13.09[A].

parties.”<sup>119</sup> At first blush, this doctrine might seem a likely candidate for precluding the enforcement of copyright in a work that the author has attempted to pass off as the work of a supernatural being, at least in cases in which the defendant has reproduced or distributed the work in the good faith belief that the work is indeed of supernatural origin, and therefore not subject to copyright protection; in such a case, the fraud is apparent and would appear to relate directly to the controversy between the parties. The application of the doctrine to fraudulent works nevertheless appears to have fallen into disfavor, although the case law is scant. To be sure, a few older cases have held that copyrights do not subsist in false or fraudulent material, such as misleading advertisements,<sup>120</sup> or in works which can only be used for an illegal purpose, such as an illegal lottery.<sup>121</sup> The more recent case law and commentary tends to reject this view, however, out of concern that, in the absence of an appropriate limiting principle, the proposition that copyright does not subsist in fraudulent statements would potentially require courts to pass judgment on the truth or falsity of virtually every statement in every litigated work.<sup>122</sup> Concerns over the potential chilling

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<sup>119</sup>*Saxon v. Blann*, 968 F.2d 676 (8<sup>th</sup> Cir. 1992) (quoting *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5<sup>th</sup> Cir. 1979)); *see also* 4 NIMMER & NIMMER, *supra* note 118, § 13.09[B], at 13-293 (discussing unclean hands).

<sup>120</sup>*See Stone & McCarrick v. Dugan Piano Co.*, 220 F. 837, 841-43 (5<sup>th</sup> Cir. 1915) (holding that copyright in deceptive advertising was unenforceable); *International Biotical Corp.*, 239 F. Supp. 511, 514 (N.D. Ill. 1964) (similar); *Slingsby v. Bradford Patent Truck & Trolley Co.*, [1905] W.N. 122, 1221 (Ch. Div.) (U.K.) (similar); *cf. Advisers, Inc. v. Wiesen-Hart, Inc.*, 161 F. Supp. 831, 834 (S.D. Ohio 1958) (enjoining defendant from infringing fraudulent work, but discerning congressional intent to award minimal statutory damages in such a case).

<sup>121</sup>*See Kessler v. Schreiber*, 39 F. Supp. 655, 656 (S.D.N.Y. 1941).

<sup>122</sup>*See Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9<sup>th</sup> Cir. 1973) (stating that “[t]here is nothing in the Copyright Act to suggest that courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work,” and expressing concern over “[t]he gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view were adopted”); *Deutsch v. Felton*, 27 F. Supp. 895, 896 (E.D.N.Y. 1939) (enforcing copyright in graphology charts having no “scientific value or any basis in fact . . . sold . . . to the gullible and . . . to others for amusement purposes”); 1 NIMMER &

effect of self-censorship also have led other courts to conclude that copyright may subsist in obscene works,<sup>123</sup> and the same concern would no doubt arise with respect to at least those allegedly fraudulent works that fall outside the realm of commercial speech.<sup>124</sup> With respect to those that fall within, other bodies of law, such as the law of false advertising, are often available to redress the

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NIMMER, § 2.17, at 2-199.

In an aside, the *Belcher* court also stated that, since “copyright protection restricts permissible publication,” public policy would not “be served by eliminating this restriction in the case of fraudulent matter and permitting it to be reprinted and circulated freely.” *Id.* at 1088 n.3. Perhaps unwittingly, the court seems to embrace a view of copyright as a tool of censorship, rather than as a means for inducing creation and dissemination; viewed from the latter perspective, lack of copyright in fraudulent works might in some cases tend to retard their creation and dissemination. *Cf. Mitchell Bros.*, 604 F.2d at 856 (noting that recognition of copyright in obscene works might induce their creation and dissemination, or might impede dissemination by restricting free access). I shall return to this issue shortly. *See infra* note 153.

<sup>123</sup>*See Jartech, Inc. v. Clancy*, 666 F.2d 403, 405-06 (9<sup>th</sup> Cir. 1982); *Mitchell Bros.*, 604 F.2d at 856-58, 861-65. The *Mitchell Bros.* court also concluded that Congress’s omission of any express limitations upon copyrightable subject matter was probably deliberate, *see id.* at 854-56; and that implementation of an obscenity limitation would create practical difficulties, by virtue of the fact that the definition of obscenity may differ from one community to another, *see id.* at 858; *see also Jartech*, 666 F.2d at 406. Both courts also rejected an argument that the conferral of copyright on obscene works is unconstitutional, in light of the constitutional authorization for the granting of copyrights for the promotion of science and the useful arts, reasoning that a broad grant of copyright generally serves this purpose even though some individual copyrighted works do not. *See Jartech*, 666 F.2d at 405-06; *Mitchell Bros.*, 604 F.2d at 858-60. *But see Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998) (doubting whether “Congress intended to extend the protection of the copyright law to contraband”); Note, *Can Intellectual Property Law Regulate Behavior? A “Modest Proposal” for Weakening Unclean Hands*, 113 HARV.L.REV. 1503, 1510-20 (2000) (arguing that author should forfeit copyright upon conviction for criminal violation proximately tied to creation of work).

<sup>124</sup>For example, would the doctrine of unclean hands preclude the author of a book that some people read for amusement, such as a book of horoscopes, from asserting copyright in the book, on the ground that other people take horoscopes seriously? *Cf. Pasickniak v. Dojacek*, [1928] 1 W.W.R. 865, 873-75 (Manitoba Ct. App. 1928) (Can.) (Dennistoun, J.A., concurring) (holding that copyright subsisted in book of dream interpretations). Even raising this question might be problematic, if the author were to claim that astrology is a component of her religion.

problem of false and deceptive marketing.<sup>125</sup> On balance, then, while the unclean hands doctrine offers some support for the notion that a false claim of a work's divine origin strips the work of copyright protection, that support is relatively weak.

A more promising tool for limiting the assertion of copyright in cases such as *Penguin Books* is that of "copyright estoppel" or "factual estoppel." A standard definition of the doctrine is that "one who represents his work to be completely factual may not in a subsequent infringement action prove that part of the work was fictional . . . even if most readers would not believe the representation."<sup>126</sup> Since the scope of copyright protection is greater for fictional than for factual works, a plaintiff who is bound by her representation as to the factual nature of the work may find it more difficult to prevent others from reproducing some aspects of her work.<sup>127</sup> For example, in

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<sup>125</sup>1 NIMMER & NIMMER, *supra* note 118, § 2.17, at 2-199; *cf. Mitchell Bros.*, 604 F.2d at 858 n.12, 862 (suggesting that the denial of copyright in obscene works might not materially decrease the incentive to create and disseminate these works, given the existence of other laws penalizing obscenity) (citations omitted). Citing similar concerns, the Court of Appeals for the Federal Circuit recently held that the fact that an invention can be used only for fraudulent or other "immoral" purposes is not a sufficient reason to invalidate a patent. *See Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1366-68 (Fed. Cir. 1999). The United States Patent and Trademark Office, on the other hand, adheres to the view that lack of "moral utility" can be a reason for rejecting a patent application. *See Jenna Greene, He's Not Just Monkeying Around*, LEGAL TIMES, Aug. 16, 1999, at \_\_\_ (noting rejection of patent application for a chimera). This view is shared by many other countries' patent systems. *See, e.g., EUROPEAN PATENT CONVENTION* art. 53 (stating that, under the European Patent Convention, "inventions the publication or exploitation of which would be contrary to 'ordre public' or morality" are not patentable subject matter).

<sup>126</sup>1 NIMMER & NIMMER, *supra* note 118, § 2.11[C], at 2-172.21-172.22 (footnotes omitted). Copyright estoppel differs from equitable estoppel, which in copyright cases may preclude an owner who has encouraged another to reproduce her work from subsequently enforcing her copyright. *See, e.g., Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9<sup>th</sup> Cir. 1960) (setting forth elements of equitable estoppel).

<sup>127</sup>To be more precise, copyright does not subsist in facts. *See* 17 U.S.C. § 103(a); *Feist v. Rural Tel. Servs.*, 499 U.S. 340, 344-45 (1991). The author of a factual work therefore may prevent others copying her original expression, selection, or arrangement of facts, but not the facts themselves. *See Feist*, 499 U.S. at 348-49; *Hoehling v. Universal City Studios*, 618 F.2d 972, 979 (2d Cir. 1980). Moreover, in some contexts there may be so few ways of expressing, selecting, or

yet another case with a New Age cast, *Arista Institute, Inc. v. Palmer*,<sup>128</sup> the plaintiff claimed copyrights to a series of books expounding the Arica system, “a body of practical and theoretical knowledge in the form of a nine-level hierarchy of training programs aimed at the total development of the human being.”<sup>129</sup> Central to the Arica system is the concept of “ego fixations,” which Oscar Ichazo, the author of the Arica books, had represented in seven enneagrams; each enneagram includes a sequence of nine words, with each word corresponding to one of nine points of the enneagram.<sup>130</sup> The defendant allegedly copied some of the plaintiff’s materials, including the enneagrams.<sup>131</sup> The court agreed with the defendant that the words used in connection with the enneagrams were noncopyrightable facts, pointing to Ichazo’s earlier representations that he had “‘discovered’ the ego fixations, which are scientifically verifiable ‘facts’ of human nature.”<sup>132</sup> Invoking the doctrine of copyright estoppel, the court rejected Arica’s argument that Ichazo’s out-of-court statements concerning the factual nature of the ego fixations were “only metaphoric claims

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arranging facts, that no copyright inheres at all. *See Feist*, 499 U.S. at 359; *Arica*, 970 F.2d at 1075 (noting that chronological presentation of historical events may be “inevitable”); *see also* *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) (discussing the merger doctrine). Finally, the defense of fair use is somewhat more likely to succeed with respect to factual works. *See Harper & Row v. Nation Enters.*, 471 U.S. 539, 563 (1981). The bottom line is that, while it may be an act of infringement to copy the plot of a fictional work, it normally would not be an act of infringement to copy the “plot” of a historical or factual work (e.g., the chronological sequence of events as they actually happened).

<sup>128</sup>970 F.2d 1067 (2d Cir. 1992).

<sup>129</sup>*Id.* at 1069-70.

<sup>130</sup>*See id.* at 1070. I have appended a copy of one of the enneagrams as Figure 1.

<sup>131</sup>*See id.* at 1070-71, 1074-76.

<sup>132</sup>*See id.* at 1074-76. The court went on to conclude, however, that the representation of the ego fixations as points on an enneagram was copyrightable expression; but that the defendant’s reproduction of the enneagrams nevertheless constituted fair use. *See id.* at 1076-79.

of philosophical truth,”<sup>133</sup> stating that “[h]aving expressly represented to the world that Ichazo’s theories are factual . . . Arica is not now permitted to make an inconsistent claim so as to better serve its position in litigation.”<sup>134</sup>

The court in *Penguin Books* distinguished *Arica* on four grounds. First, the court stated that, unlike Ichazo, who had represented his discovery of ego fixations to be scientifically verifiable, Schucman had “never claimed it to be scientifically verifiable fact that the Voice who spoke to [her] was the voice of Jesus.”<sup>135</sup> Second, the court stated that much of *A Course in Miracles* is not factual in nature, but rather prescriptive, as in a portion the court quoted that directs the reader to visualize a room.<sup>136</sup> Third, the court noted that the alleged infringements in *Arica* related to individual words, phrases, and conceptual titles, whereas the defendants’ reproductions of *A Course in Miracles* were much more substantial.<sup>137</sup> Finally, the court cited with approval selections from the Nimmer copyright treatise and from an article by Professor Robert Denicola that question the validity of the copyright estoppel doctrine as applied to works that most people recognize as fiction.<sup>138</sup> In doing

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<sup>133</sup>*Id.* at 1075; *see also id.* at 1076 (stating that “we take *Arica* at its word and assume that the sequence of the fixations, like the fixations themselves, is an unalterable fact, the product of discovery and not creativity”).

<sup>134</sup>*Id.*

<sup>135</sup>*Penguins Books*, 55 U.S.P.Q.2d (BNA) at 1691.

<sup>136</sup>*See id.* Clearly the “prescriptive” portion of the text is informational, however, and it is doubtful whether any significant distinction exists between factual and informational works. *See infra* notes 277-78 and accompanying text.

<sup>137</sup>*See id.*

<sup>138</sup>*See id.* at 1692 (citing 1 NIMMER, *supra* note 118, § 2.11[C], at 2-172.22, and Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 526 n.52 (1981)).

so, both the Nimmers and Denicola make fun of yet another spirit case, *Oliver v. St. Germain*,<sup>139</sup> in which the court estopped the plaintiff from asserting copyright in a work that purported to have been dictated to him by Phylos the Thibetan, a spirit.<sup>140</sup> The Nimmers in particular ask “whether the *Oliver* court would have invoked the same defense against Sir Arthur Conan Doyle on the grounds his *Sherlock Holmes* stories are presented as factual accounts by Dr. Watson.”<sup>141</sup> For these reasons, the court concluded that *A Course in Miracles* was Schucman’s original literary work.<sup>142</sup>

To assess when, if ever, the doctrine of copyright estoppel ought to apply, it may be helpful to consider in some detail the consequences to which the doctrine is likely to give rise. One consequence, which copyright estoppel shares with the doctrine of unclean hands, is that the doctrine increases the cost of making false representations of fact and therefore may have some marginal deterrent effect upon the making of those representations. (Presumably, the deterrence of false

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<sup>139</sup>41 F. Supp. 296 (S.D. Cal. 1941).

<sup>140</sup>*See id.* at 297-99. The court in *Oliver* compared the purported origins of the book at issue, *A Dweller on Two Planets*, “to that claimed by the followers of Joseph Smith in the Book of Mormons, the Koran by the followers of Mohammed, and to some extent the Bible . . . .” *Id.* at 299.

<sup>141</sup>1 NIMMER, *supra* note 118, § 2.11[C], at 2-172.22 (quoted in *Penguins Books*, 55 U.S.P.Q.2d at 1692). The Nimmers’ objection is not new. *See* *Wright v. Tallis*, 1 C.B. 893, 899 (1845) (U.K.) (questioning whether rule precluding copyright in fraudulently-marketed work would result in forfeiture of copyright in *Robinson Crusoe*, because the book is “represented to have been the work of the adventurer himself”). Denicola’s comment, also quoted in full, is that:

The *Oliver* case is particularly bizarre, even under California’s expansive view of the normal. The defendant was permitted to appropriate material appearing in plaintiff’s work because it had been represented as the actual revelations of a deceased entity from another world. It would appear, however, that the interests of society would not suffer greatly if this position were tempered by the adoption of an objective measure of the reasonable expectations of the copier.

Denicola, *supra* note 138, at 526 n.52. Denicola’s suggestion seems to be that courts should focus on whether the copier believes she is copying factual or fictional material.

<sup>142</sup>*See Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1692.

statements is a positive consequence, for both deontological and utilitarian reasons; allowing the plaintiff to gain an advantage in litigation by contradicting her earlier false representations about her work almost seems to implicate the copyright court in a scheme to take advantage of the gullible.)<sup>143</sup> A second possible consequence of the doctrine is that it may encourage *subsequent* writers to appropriate material that an earlier author has presented as factual.<sup>144</sup> To illustrate, suppose that the author of a purportedly factual work subsequently reveals that the work is fictional, and then sues a second author who has appropriated the “plot” of that work, on the ground that the plot of the fictional work constitutes copyrightable expression. Absent a copyright estoppel doctrine, secondary authors who prefer not to incur this risk might be chilled from freely appropriating what appear to be historical facts, and the resulting inhibition in the production such secondary works would be a social loss.

There are also some possible negative consequences, however. One is that an expansive application of copyright estoppel might decrease the *first* author’s expected reward from producing certain genres such as historical fiction and fiction that purports to be a factual account written by one of the characters.<sup>145</sup> A second is that the doctrine may actually *increase*, rather than decrease,

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<sup>143</sup>See *Oliver*, 41 F. Supp. at 299 (justifying application of the doctrine to enforce “equity and good morals”).

<sup>144</sup>See *Marshall v. Yates*, 223 U.S.P.Q. (BNA) 453, 455 n.3 (C.D. Cal. 1983) (justifying the doctrine on this ground).

<sup>145</sup>Indeed, many contemporary writers blend fact and fiction into their works in ways that go beyond the traditional genre of historical fiction. For some interesting observations on what is sometimes described as “creative nonfiction” see, e.g., Witold Rybczynski, *The Writing Life*, WASH. POST, Jan. 14, 2001, at T8 (noting that writers “resist[ ] categorization,” and discussing works by Tom Wolfe, Truman Capote, Norman Mailer, Bruce Chatwin, and others that have “depicted actual events in novelistic fashion”); Caroline Abels, *Getting to the Truth: Less Gutkind Hails the Artistry, but Others Approach It with Distrust*, PITTSBURGH POST-GAZETTE, Dec. 26, 1999, at G-3 (discussing the controversy over creative nonfiction such as Wolfe’s “New Journalism,” that purports to “get[ ] inside the inner world of [its] subjects and writ[e] in a voice that reflected those

the dissemination of false statements.<sup>146</sup> Once the first author falsely represents her fictional work as factual, subsequent authors may repeat the first author’s “facts” without incurring liability for copyright infringement; in addition, the doctrine provides the first author with no incentive to recant and tell the truth, because the scope of copyright protection will remain the same as if the work really were factual. Nevertheless, by providing the first author with an incentive to tell the truth *ab initio*, on balance the rule may encourage more truth than falsity.<sup>147</sup> Moreover, a decision *not* to apply copyright estoppel, specifically to facilitate the first author’s ability to prevent others from freely disseminating her “facts,” would almost seem to return us to the seventeenth-century view of copyright as a tool of censorship. Perhaps in this context, as in others, the better remedy for

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subjects’ thoughts and feelings”).

<sup>146</sup>See *supra* note \_\_ and accompanying text.

<sup>147</sup>To illustrate, suppose that, under a regime in which copyright estoppel does not exist, the first author will obtain a payoff of \$10 if she falsely represents her work as factual unless and until she sues another for infringement, and of only \$8 if she represents it truthfully as fiction *ab initio*. The public obtains a payoff of \$100 in the first instance and of \$120 in the second. (The payoffs are represented in the table below.) The result under this regime is a Nash equilibrium in which the aggregate social value is only \$110, as opposed to a potential \$128. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 19-23 (1994) (discussing Nash equilibria). Alternatively, under a regime in which copyright estoppel applies, the author will obtain a lower payoff if she falsely represents the work as factual. Suppose, for example, that her payoff falls to \$5 under these circumstances. Assume further that the public’s payoff also falls under these circumstances, due to greater harm from further dissemination, from \$100 to \$80. A rational author will choose to represent the work as fictional, leading to the greater social payoff.

	Author falsely represents the work as factual.	Author represents the work as fictional.
No copyright estoppel	(10, 100)	(8, 120)
Copyright estoppel	(5, 80)	(8, 120)

harmful speech is not censorship, but rather more speech.<sup>148</sup> Third, the dissemination of falsehood for the purpose of defrauding others remains unlawful, and perhaps this provides sufficient protection against the widespread dissemination of false statements by secondary authors.<sup>149</sup>

Ideally, courts should apply the doctrine so as to maximize the surplus of positive over negative consequences, and in a rough way perhaps this is what are trying to do.<sup>150</sup> As long as a

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<sup>148</sup>One might respond that, if it is permissible to consider applying copyright estoppel so as to encourage authors to be truthful, it is equally permissible to consider not applying it if, on balance, the likely effect is to increase, rather than decrease, the dissemination of falsehood. The text above, however, suggests that there may be a difference. *Not* applying copyright estoppel, in the hope that the author will use her expansive copyright to reduce the dissemination of her work, is in effect a use of copyright for the purpose of censoring a work that has already been created.

<sup>149</sup>As a general matter, fraudulent misrepresentations are actionable only when, among other things, the defendant knew or should have known that the plaintiff would rely upon the misrepresentation to his financial detriment, *see* RESTATEMENT (SECOND) OF TORTS, §§ 525, 531 (1959), and the falsity of the statement was not obvious to the plaintiff, *see id.* § 541. Similarly, under the law of unfair competition, a misrepresentation relating to one's goods or services is actionable when, for example, the misrepresentation is likely to induce a substantial portion of consumers to switch their allegiance from the plaintiff to the defendant. *See* 15 U.S.C. § 1125(a) (stating that "[a]ny person who, in connection with any goods or services . . . uses in commerce . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographical origin or his or her or another's goods, services, or commercial activities, shall be liable in a civil action"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (1995) (stating that "[o]ne who, in connection with the marketing of goods or services, make a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another . . . is subject to liability"); *id.* § 2 cmt. d (stating that a person is liable only if, *inter alia*, the misrepresentation "is likely to deceive or mislead a significant portion of the audience," and that if the statement would not have misled a "reasonably prudent purchaser," the defendant is not liable absent "other evidence indicating that the representation is nevertheless likely to deceive or mislead a significant portion of its audience"); *id.* § 3 (stating that "[a] representation is to the likely commercial detriment of another" if it is "material, in that it is likely to affect the conduct of prospective purchasers," and "has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will"); UNIF. DECEPTIVE TRADE PRACTICES ACT, PART I (1966 rev.) § 2(5), 7A U.L.A. 286 (1999). In the context of false statements of supernatural revelations, however, neither body of law would be likely to provide a remedy to someone who relies upon a fake revelation to his detriment, because courts would normally not be in a position to judge the truth or falsity of alleged revelations, among other things.

fictional or semifictional work provides the reader with sufficient clues to distinguish between that which is presented as historical fact and that which is fictional,<sup>151</sup> courts sensibly do not apply copyright estoppel so as to accommodate the small number of readers who might nevertheless confuse fiction with fact.<sup>152</sup> On the other hand, when these clues are missing or insufficient, copyright estoppel may apply even though neither a majority of readers nor the defendant himself

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<sup>151</sup>In the case of some recent works of “creative nonfiction,” the author specifically informs the readers to assume that all or most of the text *is* fictional. *See, e.g.*, GEOFF DYER, *BUT BEAUTIFUL: A BOOK ABOUT JAZZ* viii (1996) (warning the reader to assume that the author’s vignettes about famous jazz musicians have “been invented or altered rather than quoted”); PAUL THEROUX, *MY OTHER LIFE* (1996) (author’s note at the beginning of the book describes the work as “an imaginary memoir”). In other instances, however, authors are not so explicit. *See, e.g.*, EDMUND MORRIS, *DUTCH: A MEMOIR OF RONALD REAGAN* (1999) (not warning the reader that the narrator of the book is not the same person as the real Edmund Morris).

<sup>152</sup>*See* *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp. 729, 733 (E.D.N.Y. 1992) (estopping plaintiff from denying factual nature of “false facts” included in its street address guide); *Nash v. CBS, Inc.*, 691 F. Supp. 140, (N.D. Ill. 1988) (estopping plaintiff from denying factual nature of incidents represented as factual, where defendants allegedly used similar incidents in television program); *Houts v. Universal City Studios*, 603 F. Supp. 26, 28-31 (C.D. Cal. 1984) (estopping plaintiff from denying factual nature of incidents represented as factual, where defendant allegedly used similar incidents in television programs); *Marshall v. Yates*, 223 U.S.P.Q. 453, 455 (C.D. Cal. 1983) (estopping plaintiff from denying factual nature of biographical incidents represented as factual, where defendant had included these incidents in its film); *Mosley v. Follett*, 209 U.S.P.Q. 1109, 1112 (S.D.N.Y. 1980) (estopping plaintiff from denying factual nature of characters and incidents represented as factual, where defendant allegedly used similar characters and incidents in his book); *Huie v. National Broad. Co.*, 184 F. Supp. 198, 199-200 (S.D.N.Y. 1960) (estopping plaintiff from denying factual nature of biographical episodes represented as factual, where defendant had included these episodes in its television program); *Davies*, 209 F. at 56, *aff’d on other grounds*, 219 F. 178 (2d Cir. 1914); *cf. Garman*, 1992 U.S. Dist. LEXIS 21932, at \*9 (in yet another case involving alleged “channeling,” in this case from St. John the Apostle, declining to apply the doctrine of copyright estoppel, and suggesting that an expansive application of the doctrine would chill the production of historical fiction).

That there are people who do confuse fiction with fact, despite what would appear to be ample clues to the contrary, is evidenced by the phenomenon of viewers sending letters of advice or condolence to soap opera characters (as opposed to the actors who play them). *See* KAMINER, *supra* note \_\_, at \_\_ (remarking upon this phenomenon); Sara Maitland, *Reality and Dreams*, COMMONWEAL, May 9, 1997, at 23 (reviewing MURIEL SPARK, *REALITY AND DREAMS* (1997)) (same). Or is this just an urban legend?

was actually misled,<sup>153</sup> and this too may make sense. If a small but nevertheless significant number of people are likely to rely upon the author's presentation of the work as factual, the social interest in allowing these readers to use these "facts" without fear of copyright liability may be substantial.<sup>154</sup> At the same time, estoppel is a relatively mild "penalty" for the misrepresenting author, who still retains a copyright in her precise expression of purportedly factual material; thus the risk of overdetering authors from creating experimental fiction may be minimal. In light of these concerns, perhaps a fair restatement of the rule is that an author will be estopped from denying the factual nature of her work whenever a substantial portion—not necessarily a majority, but more than a de minimis number—of the intended audience for that work is likely to rely upon its factual nature. The definition is necessarily imprecise, however, and what counts as a "substantial portion" may well vary from one case—and one court—to another.

Assuming that courts can sensibly apply the doctrine of copyright estoppel in cases in which the author initially represents her work as factual, there remains the question whether the doctrine ought to apply in cases in which an author initially represents that another person—whether natural or supernatural—has written the work. Applying the doctrine under these circumstances might preclude someone like Schucman from denying that Jesus really authored *A Course in Miracles*, or Oliver from denying that Phylos authored his theosophical tract, assuming that a substantial portion of the readers of these books (if not the public at large) would believe these representations. Is this a sensible result?

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<sup>153</sup>See *Houts v. Universal City Studios*, 603 F. Supp. 26, 31 (C.D. Cal. 1984) (noting the absence of the element of reasonable reliance on the part of the defendant, despite the fact that this element normally is required for other types of estoppel).

<sup>154</sup>See, e.g., *Davies v. Bowes*, 209 F. 53, 56 (S.D.N.Y. 1913) (estopping plaintiff from denying the factual nature of an account published in newspaper, which then defendant used as the basis for a play), *aff'd on other grounds*, 219 F. 178 (2d Cir. 1914).

One way of attempting to discern whether it makes sense to extend the doctrine to cases such as these is to consider the impact that such an extension would have upon other cases that involve misattribution. Two common forms of misattribution are ghostwriting (by which I mean an arrangement under which a person, often a celebrity, authorizes another to create a work and attribute it the authorizing party, and not as in the spiritualist cases authorship by actual ghosts),<sup>155</sup> and literary and artistic hoaxes, such as Thomas Chatterton's *Rowley* poems<sup>156</sup> or Hans van Meegeren's faux Vermeers.<sup>157</sup> Under the reformulation of the doctrine of copyright estoppel suggested above, the real author of a ghostwritten or forged work would be estopped from asserting her authorship, if a substantial portion of the intended audience for the work is likely to rely upon the misattribution. In the case of ghostwriting, copyright estoppel arguably makes sense, because

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<sup>155</sup>Ghostwriting probably does not constitute actionable fraud, because most readers of ghostwritten works either assume that the celebrity author had assistance, or do not care one way or another. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 136 (1997) (noting that ghostwritten works are often attributed to celebrities, who are unlikely to trade on their reputations as "authors" by publishing subsequent works); see also Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENTER. L.J. 1, 18 n.87 (1994) (suggesting that the ghostwriter's client might be estopped from withdrawing his consent that the ghostwriter use his name). In some circumstances, however, people may reasonably rely upon the purported author being the real author, and for this reason copyright estoppel probably should apply. See *infra* notes \_\_\_ and accompanying text.

<sup>156</sup>For a time, Chatterton, a teenage writer and playwright who committed suicide at age 17, succeeded in fooling the author Horace Walpole with his supposed discovery of the works of a mythical fifteenth century monk, Thomas Rowley. See IAN HAYWOOD, *THE MAKING OF HISTORY: A STUDY OF THE LITERARY FORGERIES OF JAMES MACPHERSON AND THOMAS CHATTERTON IN RELATION TO EIGHTEENTH-CENTURY IDEAS OF HISTORY AND FICTION* 150-51 (1986); *THE ROWLEY POEMS OF THOMAS CHATTERTON* ix-xxvi (Maurice Evan Hare ed., 1911).

<sup>157</sup>Accused after World War II of collaborating with the Nazis by selling a Vermeer painting to Hermann Goering, van Meegeren defended himself by asserting that the painting sold to Goering—as well as others he had sold to other collectors—were his own forgeries. To prove his defense, he painted his last fake Vermeer in the presence of witnesses. For discussions of van Meegeren's career, see, e.g., IAN HAYWOOD, *FAKING IT: ART AND THE POLITICS OF FORGERY* 113-17 (1987); SÁNDOR RADNÓTI, *THE FAKE: FORGERY AND ITS PLACE IN ART* 21-23 (1999).

it allows the public to rely upon the purported attribution for purposes of determining when the copyright term, which is measured by the life of the author, expires.<sup>158</sup> It also allows the public to rely upon the attribution for purposes of determining whom to negotiate with during the term of copyright, assuming that the law would recognize the purported author as possessing the rights of the real author.<sup>159</sup>

With respect to hoaxes, the issues may be more complex.<sup>160</sup> If the real author of a fake—whether it be a fake Vermeer or a fake revelation—is estopped from asserting authorship of her work, the practical effect may be to render the copyright unenforceable, because the purported author also may be unable to assert a copyright interest in the work. The purported author is not the real author of the work, in whom copyright is supposed to vest,<sup>161</sup> and (unlike the commissioner of a ghostwritten work) she is not likely to be an assignee of the real author’s rights, either, unless courts were to fashion some novel doctrine of equitable assignment to cover cases of this nature. Moreover, even if the purported author could somehow lay claim to a copyright interest in the work

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<sup>158</sup>See 17 U.S.C. § 302(a).

<sup>159</sup>This could be a tricky point, though. Copyright initially vests in the author of a work, *see id.* § 201(a), and absent an assignment in writing it remains there, *see id.* § 204(a). (I assume that most ghostwritten works are not works made for hire under the definition of the term in § 101 of the Copyright Act.) Presumably in most instances of ghostwriting the real author assigns her copyright to the purported author, but what if she does not? And even if she does assign the copyright, would copyright estoppel preclude the real author or her statutory heirs from terminating the transfer after 35 years, a right otherwise permitted under Copyright Act § 203? Would it constitute fraud on the Copyright Office to register the work in the name of the purported author?

<sup>160</sup>In the only case I am aware of involving an assertion of copyright in a literary forgery, an English court precluded the real author of a book, falsely purporting to be a translation from the German of a book of devotions written by a well-known German author of the time, from asserting a copyright in the work. *See Wright v. Tallis*, 1 C.B. 893, 906-07 (1845) (U.K.); *cf. Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191, 197 (S.D.N.Y. 1943) (estopping plaintiffs from denying publicist’s status as author of lyrics to song).

<sup>161</sup>See 17 U.S.C. § 201(a).

in some cases, in others he clearly could not a variety of other reasons. As suggested above, otherworldly beings cannot be copyright owners,<sup>162</sup> and the same is true for at least some terrestrial aliens<sup>163</sup> and deceased authors as well<sup>164</sup>—to say nothing of totally fictional “authors,” such as Rowley (or Sherlock Holmes’s Dr. Watson). In this regard, the result of applying copyright estoppel in the case of a literary or artistic hoax is no different from applying the doctrine of unclean hands, and thus there may be the same concern that a draconian sanction could overdeter legitimate behavior; we wouldn’t want to deter Robert Graves from writing *I, Claudius* in the form of a memoir of a first-century Roman emperor. As suggested above, however, courts should be capable of distinguishing historical fiction from hoaxes; and copyright estoppel arguably serves a legitimate social interest in inhibiting deceptive attribution (which, in the case of fake revelations if not fake Vermeers, is unlikely to be actionable under any other body of law).<sup>165</sup> More importantly, the logic of copyright estoppel—that others should be allowed to rely upon representations of fact, without finding themselves being sued for copyright infringement—would seem to apply equally in the case

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<sup>162</sup>See *supra* note \_\_\_\_.

<sup>163</sup>See 17 U.S.C. § 104 (limiting the ability of foreign authors to assert copyright rights in the United States, unless their country of origin and the United States are parties to a copyright treaty).

<sup>164</sup>For example, suppose that a forger in the year 2001 creates a painting; that he tries to pass it off as a genuine Renoir; and that he is estopped from asserting a copyright interest in the work. Even if the purported author or his heirs could be viewed as an equitable assignee of the copyright in the work, Renoir’s heirs would be unable to assert a copyright interest in this particular work if they waited too long. If the work were considered for equitable purposes to be a genuine Renoir that was unpublished as of January 1, 1978, it would be subject to copyright protection only until December 31, 2002 (Renoir having been dead for more than 70 years), unless published before that date, in which case the copyright would expire on December 31, 2047. See 17 U.S.C. § 303(a). Of course, it is unlikely that Renoir’s heirs would have any desire to assert a copyright interest in the work for any reason other than to prevent others from copying it. Other bodies of law, however, including the law of fraud and unfair competition, probably would give the heirs sufficient protection against the misattribution of the work as a genuine Renoir, and thus the lack of copyright protection should not be an obstacle to any legitimate interest the heirs may have.

<sup>165</sup>See *supra* note 149 and accompanying text.

of hoaxes, as long as a substantial portion of the audience for the work is likely to rely upon the real author's false representation of authorship. In the case of fake revelations in particular, although the majority of consumers are unlikely to be deceived by the misattribution--because most people do not subscribe to, and are not interested in reading about, new religions--one might reasonably presume that a substantial portion of the class of people who *do* read, comment upon, and reproduce these works are likely to take them at their word. If so, the estoppel should extend to the real author's false statement of attribution.

In sum, there are two possibilities. The first is that the claim of supernatural authorship is true, or at least sincere, in which case the author of the work is a supernatural being and the work is not subject to copyright protection. The second is that the claim is false, in which case the human author should be estopped from later asserting her own authorship of the work. In either case, the work is not copyrightable, and it is difficult to see how copyright policy would suffer as a result. Moreover, since the result is the same either way, a court would be spared the difficult--and probably unconstitutional--task of deciding whether the alleged revelation is true or false.<sup>166</sup>

### **B. Derivative Works, Compilations, and the Merger Doctrine**

In the cases discussed above, the courts have held or stated that, even if the expression purportedly dictated by a supernatural being was not copyrightable, the human intermediary could

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<sup>166</sup>I should note as well that, in many religious traditions, the idea that the religion's scriptures were dictated by God, word for word, would now be viewed as naive. See, e.g., THE OXFORD COMPANION TO THE BIBLE, *Inspiration and Inerrancy* 302-05 (1993) (discussing different views on what it means to believe that the Bible is the word of God). Someone who claims that a work is *inspired* by a supernatural being, but not literally *dictated* by that being, may well have a valid copyright (absent some other problem, such as merger). Many people--for that matter, other living creatures or even inanimate objects--may inspire an author without themselves being viewed as coauthors. See *infra* notes 171-72 and accompanying text (discussing joint authorship). The cases discussed in the text above, however, all appear to involve claims of literal dictation.

claim a copyright in the published work as a derivative work or a compilation.<sup>167</sup> A derivative work is “a work based upon one or more preexisting works, such as a translation . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted,”<sup>168</sup> including works “consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”<sup>169</sup> As a general matter, the author of a derivative work owns an enforceable copyright in that work provided that the derivative work manifests sufficient originality<sup>170</sup> and is lawfully made;<sup>171</sup> the work is lawfully made if the original work upon which it is based is in the public domain, or if the owner of the copyright in the original work has authorized the preparation of the derivative work.<sup>172</sup> A compilation is “a work formed by

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<sup>167</sup>See *Urantia Foundation*, 114 F.3d at 958-59 (holding that *The Urantia Book* is a copyrightable compilation); *Penguin Books*, 55 U.S.P.Q.2d at 1690 (holding that *A Course in Miracles* was a copyrightable both as a compilation and as a derivative work); *Oliver*, 41 F. Supp. at 299 (holding that plaintiff might have a copyright in the “style or arrangement” of *A Dweller on Two Planets*, but that defendant did not appropriate the style or arrangement); *Cummins*, [1927] 1 Ch. at 173 (characterizing *The Chronicle of Cleophas* as a translation from the language in which the spirit allegedly communicated to the plaintiff).

<sup>168</sup>17 U.S.C. § 101.

<sup>169</sup>*Id.*

<sup>170</sup>See *Gracen v. Bradford Exchange*, 698 F.2d 300, 302-03 (7<sup>th</sup> Cir. 1983). Although the Seventh Circuit requires that a derivative work manifest a greater degree of originality than a non-derivative work, if copyright is to subsist in the derivative work, *see id.*, most other courts have concluded that the originality requirement is the same for both derivative and non-derivative works. See 1 NIMMER & NIMMER, *supra* note 118, § 3.03[A], at 3-12 to 3-13.

<sup>171</sup>See 17 U.S.C. § 103(a) (stating that “[t]he subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully”); *see also id.* § 103(b) (stating that copyright in a derivative work “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work,” and that “[t]he copyright in such work is independent of . . . any copyright protection in the preexisting material”).

<sup>172</sup>See *id.* § 103(a) (stating that copyright in a derivative work “does not extend to any part of the work in which such material has been used unlawfully”); *id.* § 106(2) (conferring upon

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.”<sup>173</sup> The author of an original, lawfully-made compilation has a copyright in her original selection, coordination, or arrangement, though not in the underlying materials or data.<sup>174</sup> But for the fact that the Copyright Act appears to presume that supernatural beings cannot be authors,<sup>175</sup> a third possibility would be that the human intermediary and the supernatural being are authors of a joint work.<sup>176</sup> As joint authors, the human intermediary and the supernatural being would be tenants-in-common with respect to the work, meaning that the human intermediary would be free to grant nonexclusive licenses to exploit the work, subject only to an obligation (presumably unenforceable in the present context, at least in a court of law) to share any profits with the other joint author on

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copyright owners the exclusive right “to prepare derivative works based upon the copyrighted work”). If the derivative work is based upon a work in which copyright does not subsist—i.e., a work in the public domain—the derivative work is necessarily lawful as far as copyright law is concerned. An interesting issue is whether copyright in a derivative work may subsist in parts of the work based upon pre-existing materials the use of which violates *some other* body of law, such as the law of defamation or obscenity. See 1 NIMMER & NIMMER, *supra* note 118, § 3.06, at 3-34.27 (arguing that it does). Analytically, the issue is similar to the issue of whether copyright generally may subsist in obscene, fraudulent, or otherwise illegal works. See *supra* notes 120-25 and accompanying text.

<sup>173</sup>*See id.* § 101.

<sup>174</sup>*See id.* § 103. For example, a person who compiles an anthology of nineteenth-century poetry would have a right to prevent others from copying her selection or arrangement of the poems, as long as the selection or arrangement demonstrates some originality; but she would not have a right to prevent others from copying an individual poem, which today would be in the public domain. If the underlying materials were still subject to copyright protection, of course, the compiler would have to obtain permission from the individual copyright owners for her anthology to be “lawfully made.”

<sup>175</sup>*See supra* note 89.

<sup>176</sup>*See* 17 U.S.C. § 101 (defining a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”).

a *pro rata* basis.<sup>177</sup>

The manner in which the courts in two of the cases discussed above have applied the derivative work and compilation theories nevertheless has been odd. In the first case, *Urantia Foundation v. Maaherra*,<sup>178</sup> the Ninth Circuit held that the Urantia Foundation—the assignee of a group known as the “Contact Commission,” composed of a psychiatrist, Dr. William Sadler, and five or six followers—had a valid compilation copyright in *The Urantia Book*.<sup>179</sup> According to the Foundation, spiritual beings known as “the Divine Counselor, the Chief of the Corps of Superuniverse Personalities, and the Chief of the Archangels of Nebadon” began channeling the teachings through one of Dr. Sadler’s patients in the 1920s.<sup>180</sup> Between 1926 and 1935, the Contact Commission, “apparently in response to what they perceived to be prompting from the spiritual beings, and in collaboration with a larger group of followers called the Forum . . . began to pose specific questions to the spiritual beings.”<sup>181</sup> The spiritual beings’ answers to the questions, “as transmitted to the humans and arranged by them,” form the text of *The Urantia Book*.<sup>182</sup> To the extent that the human intermediaries purport to have made an original arrangement of the revelations, the conclusion that they own a compilation copyright appears correct and

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<sup>177</sup>114 F.3d 955 (9<sup>th</sup> Cir. 1997).

<sup>178</sup>*See id.* at 957; *see also Urantia Foundation*, 210 U.S.P.Q. (BNA) at 218-19.

<sup>179</sup>114 F.3d at 958-59.

<sup>180</sup>*See Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff’d*, 490 U.S. 730 (1989).

<sup>181</sup>*Urantia Foundation*, 114 F.3d at 957; *see also Urantia Foundation*, 210 U.S.P.Q. (BNA) at 218.

<sup>182</sup>*Urantia Foundation*, 114 F.3d at 957.

unremarkable.<sup>183</sup> The court nevertheless ventured beyond this simple conclusion and appears to have based its holding in part on a much more questionable premise:

In this case, the Contact Commission may have received some guidance from celestial beings when the Commission posed the questions, but the members of the Contact Commission chose and formulated the specific questions asked. These questions materially contributed to the structure of the Papers [forming the content of *The Urantia Book*], to the arrangement of the revelations in each Paper, and to the organization and order in which the Papers followed one another. We hold that the human selection and arrangement of the revelations in this case could not have been so “mechanical or routine as to require no creativity whatsoever.” We conclude, therefore, that the “extremely low” threshold level of creativity required for copyright protection has been met in this case.<sup>184</sup>

The problem with this passage is that, if taken literally and applied outside the spirit realm, it would appear to mean that an interviewer who merely poses a series of original questions owns a compilation copyright in the interviewee’s answers (once those answers are fixed in a tangible medium of expression)—even if the interviewer exhibits no originality in her subsequent selection or arrangement of which answers to publish (for example, even if she publishes a comprehensive, chronological transcript of the interviewee’s answers). Perhaps the court’s theory is that, by merely posing questions in a particular order, the questioner contributes to the originality of the order of the answers as they come out of the respondent’s mouth. The theory seems rather contrived, however, and is dubious from both a doctrinal and a policy perspective. From a doctrinal perspective, the theory runs up against the generally-accepted rule that copyright to the verbatim answers to an

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<sup>183</sup>As another commentator has pointed out, however, the Ninth Circuit’s conclusion that the Contact Commission exhibited sufficient originality in the arrangement of the revelations is at odds with the district court’s findings that the celestial beings allegedly controlled the entire process. See Christina Rhee, Note, *Urantia Foundation v. Maaheera*, 13 BERKELEY TECH. L.J. 69, 75 (1998) (citing *Urantia Foundation v. Maaheera*, 895 F. Supp. 1347, 1353 (D. Ariz. 1995), *aff’d*, 114 F.3d 955 (9<sup>th</sup> Cir. 1997)).

<sup>184</sup>114 F.3d at 959 (quoting *Feist*, 499 U.S. at 345, 362).

interviewer's questions belongs either exclusively to the interviewee<sup>185</sup> or to both parties, as a joint work.<sup>186</sup> In the case of a joint work, however, as opposed to a compilation, *either* joint author has a right to permit the nonexclusive exploitation of the work, subject only to a duty to share the profits

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<sup>185</sup>To be more precise, the rule is that where the interviewee consents to the fixation of his verbatim answers in a tangible medium of expression, federal statutory copyright subsists in those verbatim answers and belongs to the interviewee. *See* *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *Rokeach v. Avco Embassy Pictures Corp.*, 197 U.S.P.Q. (BNA) 155, 161 (S.D.N.Y. 1978); COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES, § 317, at 300-13 to -14 (1984); Vicki L. Ruhga, *Ownership of Interviews: A Theory for Protection of Quotations*, 67 NEB. L. REV. 675, 685-86 (1988). Where there is no such authorized fixation, the interviewee may retain a common-law copyright in his oral statements, although the few decisions on point have not been very receptive to this theory. *See* *Estate of Hemingway v. Random House, Inc.*, 296 N.Y.S.2d 771, 778-79 (1969); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1207-08 (W.D. Va. 1981); Ruhga, *supra*, at 679-83. A few cases also hold that where the interviewer reconstructs the answers in an original way, copyright in the answers belongs to the interviewer. *See* *Rosemont Enters. v. Random House, Inc.*, 256 F. Supp. 55, 61 (S.D.N.Y. 1966); *Harris v. Miller*, 50 U.S.P.Q. (BNA) 306, 307 (S.D.N.Y. 1941); Ruhga, *supra*, at 685. Furthermore, as suggested above, it is clear that when the interviewer creates an original selection or arrangement of the interviewee's answers, the interviewer has a copyright in the compilation. *See* *Quinto v. Legal Times, Inc.*, 506 F. Supp. 554, 559 (D.D.C. 1981). Finally, even if the interviewee has a copyright interest in his answers, courts often will infer that he has granted a nonexclusive license to the interviewer to exploit those answers. *See* *Quinto*, 506 F. Supp. at 559; I PAUL GOLDSTEIN, COPYRIGHT, § 4.2.1, at 4:19 (2001); *cf.* *Fallaci v. New Gazette Literary Corp.*, 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (not questioning interviewer's assertion of copyright interest in interview).

<sup>186</sup>*See* *Rosemont Enters.*, 256 F. Supp. at 61; *Harris*, 50 U.S.P.Q. (BNA) at 308; I GOLDSTEIN, *supra* note 181, § 4.2.1, at 4:19; Andrea S. Hirsch, Comment, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U. L. REV. 1071, 1081-83 (1982). An interviewer would have to prove two elements in order to establish her claim that she and the interviewee are joint authors: first, that each of the parties intended, at the time of his or her contribution, that that contribution would be merged with another's as inseparable or interdependent parts of a unitary whole; and second, that each party's contribution, standing alone, would constitute independently copyrightable material. *See* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231-36 (9<sup>th</sup> Cir. 1999); *Thomson v. Larsen*, 147 F.3d 195, 200-05 (2d Cir. 1998) (citing *Childress v. Talor*, 945 F.2d 500, 508-09 (2d Cir. 1991)); *Erickson v. Trinity Theatre, Inc.*, 13 F.2d 1061, 1067-73 (7<sup>th</sup> Cir. 1994). The reason for these two elements is to avoid deterring authors from soliciting and obtaining mere ideas from others prior to completion of a work; imagine the consequences if everyone who contributed an idea to a scholarly article qualified as a coauthor! *See* *Aalmuhammed*, 202 F.3d at 1235-36; *Childress*, 945 F.2d at 507.

with the other joint authors.<sup>187</sup> Characterizing a comprehensive, chronological reproduction of the answers as a compilation would add another layer of complexity to the problem by requiring *both* parties' consent to even a nonexclusive reproduction.<sup>188</sup> Whether the resulting increase in transaction costs would generate commensurate benefits, in terms of increasing the questioner's incentive to pose questions or to publish (verbatim) the resulting answers, is doubtful; in any event, except for *Urantia Foundation* there is no precedent that I am aware of for extending the scope of compilation copyrights to this extent.

Similarly, in *Penguin Books*, the court concluded that Schucman and her assistants had both arranged<sup>189</sup> and edited<sup>190</sup> the materials allegedly dictated to her by Jesus, to an extent sufficient to sustain a compilation or derivative work copyright. As in *Urantia Foundation*, the court's reasoning on this point appears unremarkable, except for one short passage elaborating upon Schucman's role in arranging the materials. In this regard, the court suggested that the book might not have come into existence had Schucman not "opened herself up to the possibility of receiving" her vision of Jesus.<sup>191</sup> The court also stated that "the form of the Course reflects many of Schucman's personal interests and tastes," such that "even if the Course came from Jesus, significant aspects of it are the direct result of it having come through Schucman," the defendants having "essentially conceded that

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<sup>187</sup>See *supra* notes 171-72 and accompanying text.

<sup>188</sup>This follows from the principle that copyright in a compilation is independent from the copyright in the underlying work. See 17 U.S.C. § 103(b).

<sup>189</sup>See *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1690.

<sup>190</sup>See *id.* (noting that, among other things, "personal references were removed, punctuation was added, chapter and section headings were created"; and that, while Jesus may have approved of these revisions, "the initial creative spark for these changes came from Schucman and the others, not from Jesus").

<sup>191</sup>See *id.*

had the Course been channeled through any other individual, its form would have been different.”<sup>192</sup> The relevance of these findings to the existence of a compilation copyright is murky, however. Suppose, for example, that Schucman’s claim was that a close friend—a living human being—had dictated the materials to her. In such a case, it is not unlikely that the speaker would have used figures of speech to which he knew Schucman could relate; but to claim that Schucman therefore would have a copyright in the dictated materials seems strange. Common experience suggests that speakers—professors, stand-up comedians, trial lawyers, and preachers, to name a few—frequently tailor their deliveries to their intended audience, and yet I can think of no other circumstances under which copyright law considers the *audience* to have a copyright interest in the resulting work. The closest analogy would be to a joint work, but as noted above even a non-passive audience member would not be considered a joint author absent a contribution of something more than a bare idea.<sup>193</sup> The court’s suggestion that the recipient of the message qualifies as a copyright proprietor, essentially for no other reason than merely being who she is, would turn copyright law on its head if applied to more common situations. As the Supreme Court has recently suggested in an entirely unrelated context, perhaps the principles announced in *Urantia Foundation* and *Penguin Books* need to be confined to their peculiar setting.<sup>194</sup>

Of course, even if there is a valid derivative work or compilation copyright in a work of alleged revelations, nothing should stop the would-be user from copying the *expression* and arranging it in his own way, assuming that the analysis presented in Part II.B.1 above is correct. The

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<sup>192</sup>*Id.*

<sup>193</sup>*See supra* note 182.

<sup>194</sup>*Cf.* *Bush v. Gore*, 531 U.S. 98, 109 (2000) (suggesting that the equal protection analysis applied in that case may be limited to questions involving election processes).

court in *Urantia Foundation*, which followed *Oliver v. St. Germain* in holding that expression purporting to be a divine revelation is not copyrightable, correctly noted this point.<sup>195</sup> This holding should give some comfort to adherents who feel the need to reproduce the expression of an alleged revelation, although even here there might be problems. Suppose, for example, that a human intermediary publishes a work that purports to be only a partial selection of divine revelations. If the intermediary exercised some judgment in determining which revelations to publish and which to keep secret, any substantial copying of the published work will reproduce in part the intermediary's original selection. For this reason, the copier still may need to rely upon other doctrines, including the merger doctrine and the defenses discussed herein in Part III, to establish his right to reproduce the materials.

With regard to the merger doctrine, the rule, as noted above, is that no copyright subsists in a work when there are only a small number of ways of expressing a given idea.<sup>196</sup> In such a case, copyright law assumes that the cost of affording exclusive rights—which include not only the potential deadweight loss attributable to monopoly power, but also the imposition of substantial transaction costs and the potential for inhibiting the creation of new works—outweigh the potential benefits.<sup>197</sup> In some cases a proper application of the merger doctrine might preclude the human intermediary from asserting copyright in an alleged revelation, even if a court were to reject the analysis set forth above in Part II.B.1. Here the argument would be that some religious texts--

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<sup>195</sup>See *Urantia Foundation*, 114 F.3d at 958-59.

<sup>196</sup>See *supra* note 30. Of course, this formulation leaves open several issues--among them what constitutes a "small number," and how specifically the idea must be defined for purposes of the analysis. These issues tend to resist satisfactory elaboration.

<sup>197</sup>See Roger D. Blair & Thomas F. Cotter, *Rethinking Patent Damages*, at \_\_\_ (unpublished manuscript, on file with authors) (discussing the cost/benefit tradeoff in the context of patent law).

including, but not necessarily limited to, religious scriptures--cannot be adequately paraphrased without distorting their meaning.<sup>198</sup> In fact, many mainstream religions take precisely this position with respect to their scriptures.<sup>199</sup> Given the lawlike nature of many purported revelations, this

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<sup>198</sup>For an adherent, access to some non-scriptural texts may be almost as necessary as access to scriptures, depending on the religion. For example, the teachings of a prophet or other leader may not rise to the level of a divine revelation but may nevertheless be considered highly authoritative within the prophet's or leader's faith community. *See, e.g.,* ENCYCLOPEDIA OF THE JEWISH RELIGION 332 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds. 1965) (stating that, under the traditional view, Mosaic law constitutes the highest revelation; the prophetic works exhibit a lesser degree of revelation; and "for other parts of Scripture the term inspiration rather than r[evelation] would be appropriate"); THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 465 (Richard P. McBrien gen. ed. 1995) (discussing the status of papal encyclicals within Roman Catholicism); *see also infra* notes 213-19 and accompanying text (discussing *Worldwide Church of God*).

To be sure, from the standpoint of the religion that expounds the text at issue, there may be a substantial interest in making sure that its message is not distorted, and copyright protection--rather than the absence thereof--would be one way of achieving this goal. This interest, however, should not take precedence if the merger doctrine, for sound policy reasons, renders the work uncopyrightable. Moreover, other law (such as the law of trademarks) might provide a religious organization with the ability to market an official or authorized version of its text, for the benefit of those followers who want to be certain that they are purchasing the genuine, non-distorted article.

<sup>199</sup>Islam, for example. *See, e.g.,* CYRIL GLASSÉ, ENCYCLOPEDIA OF ISLAM 231 (1989):

The substance of the Koran is completely wedded to its Arabic form. Because the Koran is what is called in Sanskrit *sruti* ("primarily revelation" or God Himself speaking)--unlike much of the New Testament which is *smṛti* "secondary revelation"--and because of the nature of Arabic as a sacred language, a language capable of transmitting *sruti*, it is completely impossible to translate the Koran in its *reality* into another language. Translations are therefore unusable for ritual and liturgical purposes. The sound itself, of inimitable sonority and rhythmic power, is numinous and sacramental.

*See also* MICHAEL COOK, THE KORAN: A VERY SHORT INTRODUCTION 88-94 (2000) (discussing problems with translating the Koran); Ali Khan, *Islam as Intellectual Property*, 31 CUMBERLAND L. REV. 631, 639 (2001). *Cf.* THE REVELATION OF ST. JOHN THE DIVINE 22:18-19 (stating, with respect to the words of the book, that "if any man shall add unto these things, God shall add unto him the plagues that are written in this book"; and that "if any man shall take away from the words of the book of this prophecy, God shall take away his part out of the book of life, and out of the holy city, and from the things which are written in this book") (King James version); STEVEN T. KATZ, JEWISH IDEAS AND CONCEPTS 173-74 (1977) (discussing "the idea that every syllable of the Bible has the verity and authorship of the word of God").

position is not difficult to comprehend. In an analogous context, U.S. copyright law exempts government works from the scope of copyright protection, on the theory that citizens need access to the precise wording of these texts in order to conform their behavior to the law's commands.<sup>200</sup>

The courts nevertheless have shown surprisingly little sympathy for this argument in any of the reported decisions involving religious scriptures. In *Penguin Books*, for example, the defendants argued that “the ideas in the Course could only have been stated in the form in which they are stated in the Course”<sup>201</sup> and that “because the words of the Course are . . . the words of Jesus, they could not have been phrased in any other way.”<sup>202</sup> The court curtly rebuffed these assertions, stating that “a brief glance through the Course reveals that the same or remarkably similar ideas are restated continually in a myriad of way” and “[d]oubtless . . . could be further restated in an endless variety of forms.”<sup>203</sup> Similarly, in *Religious Technology Center v. Lerma*,<sup>204</sup> the defendant contended that the merger doctrine applied to the so-called “Operating Thetan” (OT) documents, on the ground that Scientologists believe that the documents are “primarily factual” and “must be followed *exactly* as

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The fact that translations of scriptures are copyrightable might seem to undercut the idea that the idea and expression of religious scriptures merge, since translations can be rendered in a number of different ways. As noted above, however, in some religions such as Islam, translations are not viewed as adequate substitutes for the original, untranslated text. Moreover, to the extent that the original text is in the public domain, any scholar conversant in the original language can translate the work. In theory, this insures a variety of textual choices for religious believers who cannot read the original language, and thus tends to undercut the monopoly problem that would arise if the original, definitive text were copyrighted.

<sup>200</sup>See 17 U.S.C. § 105; Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENTER. L.J. 81, 89 (2000).

<sup>201</sup>*Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1696.

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>See *Religious Tech. Center v. Lerma*, 40 U.S.P.Q.2d (BNA) 1569 (E.D. Va. Oct. 4, 1996).

written.’<sup>205</sup> The court nevertheless concluded that the merger doctrine did not apply:

The ideas and concepts of the Scientology religion can be discussed independently of the OT documents. This has been amply demonstrated in the voluminous record accompanying this case and in all parties’ numerous briefs. Indeed, theological musings on the sources of (and remedies for) spiritual harm have dominated discussion about religion for centuries. Whether achieved through animal spirits, witches, demons, curses, Satan, angels, or “body thetans,” spiritual healing is clearly not a concept inherently tied to the OT documents.<sup>206</sup>

Implicitly, the district court in *Urantia Foundation v. Maaherra* came to the same conclusion with respect to *The Urantia Book*.<sup>207</sup>

The problem with all three cases is, once again, the courts’ refusal to take seriously the demands placed upon the adherents of at least some religious faiths to live by the exact words of their scriptures. To be sure, one probably could discuss some of the ideas embodied in *A Course in Miracles*, the OT documents, or *The Urantia Book* without having to quote from the texts, the same as one could discuss some of the ideas embodied in the Bible or Koran without quoting from those works. But just as an Orthodox Jew needs access to the Torah, and not to a mere paraphrase thereof, in order to practice his religion, a devout Urantian may need access to the actual words used in *The Urantia Book* in order to practice his faith; for people who take their religious traditions seriously, the words of religious scriptures *are* facts (or perhaps commands) for which there are no adequate substitutes.<sup>208</sup> In other contexts in which this is so, however, courts conclude that the

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<sup>205</sup>*Id.* at 1573.

<sup>206</sup>*Id.*

<sup>207</sup>*See Urantia Foundation*, 895 F. Supp. 1329, 1334 (D. Ariz. 1995).

<sup>208</sup>Or consider once again the analogy to law: permitting lawyers to reproduce the ideas but not the actual text of the Copyright Act, absent permission from the Act’s author, would impose a severe handicap on the practice of intellectual property law. *Cf.* Nimmer, *supra* note 36, at 102-03, 136, 214 (arguing that the Dead Sea Scrolls are uncopyrightable, due to the merger of ideas and expression).

expression merges with the idea and that the work is in the public domain—both for those who wish to use it for its intended purpose, and for those (like *Lerma*) who wish to critique it. To look at it another way, to reduce the “idea” embodied in religious scriptures to something as abstract as “spiritual healing” (as did the court in *Lerma*),<sup>209</sup> such that the idea can be expressed in almost an infinite variety of ways (which may involve, among other things, “animal spirits, witches, demons, curses, Satan, angels, or ‘body Thetans’”)<sup>210</sup> effectively means that, for copyright purposes, one religious scripture is an adequate substitute for any other. Common experience tells us that this can’t be right, however, for it misses the very point of the way in which people of faith interact with these documents. For a devout Muslim, the OT documents are not a substitute for the Koran; presumably a faithful Scientologist would agree.

There is, however, a serious counterargument to the one I have sketched out above in support of the merger doctrine. While it may be true that, for a devout Muslim (or for a non-Muslim student of Islam), there is no adequate way of paraphrasing the words of the Koran without distorting its ideas, the same may be true for a variety of secular works as well. To a devotee of modern poetry, for example, a paraphrase of T.S. Eliot’s *The Waste Land* simply won’t do: the reader needs to engage the actual text, not a paraphrase.<sup>211</sup> But it would be perverse to conclude that, in the case of

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<sup>209</sup>*Lerma*, 40 U.S.P.Q.2d (BNA) at 1573.

<sup>210</sup>*Id.*

<sup>211</sup>The story goes that an admirer once asked Eliot what he meant when he wrote, in his poem *Ash Wednesday*, “Lady, three white leopards sat under a juniper-tree.” Eliot replied “I meant, ‘Lady, three white leopards sat under a juniper-tree.’” See Adam Kirsch, *The End of Beauty*, NEW REPUBLIC, Mar. 13, 2000, at 35 (reviewing JORIE GRAHAM, *SWARM* (1999)). Kirsch agrees with Eliot: “If poetry really is the best words in the best order, then no paraphrase or explication of a line can ever be as accurate as the line itself.” *Id.*

Of course, *The Waste Land* itself might be viewed as a “religious work” under a broad enough definition. See *supra* note 40. For present purposes, my intent above is to compare poetry

a highly original<sup>212</sup> work such as Eliot's poem, the merger doctrine strips the work of copyright protection. One way to avoid this result would be to apply the merger doctrine only when it is *universally* true that a person who wishes to express the relevant idea would be limited to a small number of options--for example, in expressing the idea of how to enter a sweepstakes contest.<sup>213</sup> When there is no such universal consensus, on the other hand, no merger would take place and copyright could subsist in many expressions of the idea. Applied to the present context, although many readers may feel that there is no substitute for *The Waste Land's* depiction of the secular world adrift (or for the Koran's expression of the will of God), others may prefer the expression of these ideas in *Dover Beach* (or the Bible). The lack of consensus that there is only one way or a small number of ways to express the idea would suggest that the merger doctrine would not apply, and that both Eliot's poem and an original religious text could be subject to copyright protection.

The preceding analysis is unsatisfying, however, because it avoids what should be the central issue in any discussion of the merger doctrine: namely, how broadly or narrowly one should define the relevant idea. In the poetry example, the consequence of defining the idea too narrowly (at the limit, defining the idea as comprising Eliot's actual words) would be to deny copyright protection to highly creative works, at the risk of undermining the incentive to create and to publish these works. In this context, a definition of the idea at a relatively high level of abstraction therefore seems more consistent with the underlying rationale of copyright. In the sweepstakes example, on

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generally with more narrowly-defined religious works, such as scriptures and hymns.

<sup>212</sup>Maybe *The Waste Land* isn't the best example. See, e.g., B.C. SOUTHAM, A GUIDE TO THE SELECTED POEMS OF T.S. ELIOT 21-22, 69-93 (1968) (discussing Eliot's many sources for *The Waste Land*); T.S. ELIOT, THE SACRED WOOD 125 (1928) ("Immature poets imitate; mature poets steal"). Nevertheless, the selection and arrangement of *The Waste Land*, as well as a large portion of the expression, are original to Eliot.

<sup>213</sup>See *Morrissey v. Procter & Gamble*, 379 F.2d 675, 677-69 (1<sup>st</sup> Cir. 1967).

the other hand, the consequence of defining the idea too broadly (e.g., as “rules for a game”) might be to foreclose access to useful expression for little countervailing benefit; contest promoters will undoubtedly retain an incentive to create and to publish understandable sweepstakes instructions even when copyright protection is lacking.

For purposes of the merger doctrine, perhaps some religious works are more like sweepstakes instructions and less like *The Waste Land*, in that it makes sense to define the relevant idea in a narrow fashion. As noted above, some religious texts consist of words that purport to be commands, which arguably cannot be expressed in a large variety of ways without undermining the ability of those commanded to obey.<sup>214</sup> In addition, to the extent that the author of a religious text contends that the text is both factual and inseparable from its precise expression, the copyright estoppel doctrine might suggest that the number of ways of expressing the idea is sufficiently small for merger to apply.<sup>215</sup> Finally, the consequences of defining the idea more narrowly in this context may be desirable. As in the sweepstakes example, a strong incentive to create and to publish may exist even in the absence of copyright protection, assuming that religious authors and publishers are motivated more by a sense of moral obligation than by financial reward. At the same time, the risk of foreclosing access may be great, if the intended audience for these materials comes to rely upon them for its religious practice.

Even so, courts should be cautious not to apply the merger doctrine indiscriminately to religious texts. My assumption that a sense of moral obligation may induce religious authors and publishers to create and publish, even in the absence of a copyright incentive, is just that—an assumption, not backed by any empirical evidence—and may well be false. To the extent it is true,

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<sup>214</sup>See *supra* text accompanying note 196.

<sup>215</sup>See *supra* notes 126-61 and accompanying text (discussing copyright estoppel).

the assumption probably is more likely to hold when the text at issue is a “core” document, such as a scripture, as opposed to something less central to religious practice, such as a hymn or work of theology. With respect to the latter, even highly devout authors and publishers may need some assurance that they will be able to recoup their costs, if they are to continue producing and publishing these works. On the other hand, at least for those works which purport to be scriptural or lawlike, a commitment to take the author at her word if and when she states that the expression is inseparable from the idea; a respect for the needs of religious practitioners to access these works; and perhaps a somewhat lesser need for the copyright incentive suggests that in some cases no adequate alternatives exist and that merger should apply. The analysis nevertheless remains tentative and may be difficult to apply correctly in marginal cases; courts should be sensitive to the possibility that too broad an application of the merger doctrine could have an unintentionally negative impact upon some forms of religious diversity. Even when the doctrine does not apply, however, many of the same considerations just discussed will be relevant in determining whether a *specific* use is exempt from the scope of copyright liability, under the Free Exercise Clause, the fair use doctrine, or some other principle. It is to these issues that I now turn.

### **III. Accommodating the Unauthorized Use of Religious Works**

In this Part, I shall assume that a human author owns a valid copyright in a scripture, a theological tract, a hymn, or some other religious work; and that a user reproduces, adapts, distributes, or publicly performs the work without the author’s permission. Two types of users in particular may be of interest. The first is a person who makes use of the work in his own religious practice, such as for worship, study, or proselytization. The second is a person who reproduces and distributes the work, in whole or in part, for purposes of critique. Among the second type of user

are the defendants in several cases involving the Church of Scientology.<sup>216</sup> Because this latter use raises free speech issues that go beyond the scope of this article, my principal focus shall be upon the first type of user, although some of what I have to say relates to both types.

A recent case that illustrates the first type of user is *Worldwide Church of God v. Philadelphia Church of God*.<sup>217</sup> At issue was a literary work, titled *Mystery of the Ages*, authored toward the end of his life by the founder of the Worldwide Church of God (WCG), Herbert W. Armstrong.<sup>218</sup> During Armstrong's lifetime and for a period of time thereafter, WCG distributed over nine million free copies of the work, in which Armstrong expressed his views on a variety of issues, including divorce, remarriage, and race relations.<sup>219</sup> Two years after Armstrong's death, however, WCG changed its position on some of these issues and stopped distributing copies of *Mystery of the Ages*.<sup>220</sup> Dissatisfied with the church's change in direction, two members of WCG formed a breakaway faction, the Philadelphia Church of God (PCG), which preaches strict adherence to Armstrong's principles and requires new members to read *Mystery of the Ages*.<sup>221</sup> In 1997, PCG began reproducing and distributing the work without permission from WCG, thus provoking an infringement suit.<sup>222</sup> The district court found in favor of the defendants, but the Ninth Circuit reversed and remanded for entry of a preliminary injunction against PCG, pending a trial on

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<sup>216</sup>*See supra* note 32.

<sup>217</sup>227 F.3d 1110 (9<sup>th</sup> Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001).

<sup>218</sup>*See id.* at 1113.

<sup>219</sup>*See id.*

<sup>220</sup>*See id.*

<sup>221</sup>*See id.*

<sup>222</sup>*See id.*

damages.<sup>223</sup>

For purposes of this analysis, I shall concentrate on four possible defenses that may be relevant in cases resembling *Worldwide Church of God*. Although prudence usually dictates that one consider constitutional issues last, in this instance the relationship between the constitutional and fair use arguments compel me to begin with the argument that in some cases the Free Exercise Clause may exempt PCG and other similarly situated users from copyright liability; I will then consider the impact of fair use and of the RFRA. I shall argue that, although the Free Exercise argument is probably a loser, courts should apply the fair use doctrine more generously than they have done in the reported decisions, notwithstanding a possible Establishment Clause argument to the contrary; if correct, this argument obviates any need to rely upon the RFRA. I will conclude with a discussion of Copyright Act § 110(3), which provides a liability exemption for the public performance of nondramatic literary works and musical compositions within the course of religious services. I shall argue that, despite my plea for a more generous application of the fair use defense, § 110(3) probably goes too far in accommodating religious practice.

#### **A. Copyright and the Free Exercise Clause**

The first argument I shall consider is that the Free Exercise Clause of the First Amendment requires the state to exempt a user's unauthorized reproduction from liability, in some cases,<sup>224</sup> in order to accommodate his religious practice. Although the Supreme Court just might have been

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<sup>223</sup>*See id.* at 1121.

<sup>224</sup>Presumably the Free Exercise Clause could not require an accommodation in *all* cases in which a user wants to reproduce, adapt, distribute, or publicly perform a religious work, because to do so would render the copyrights in these works largely worthless. If it is constitutional to confer copyright in religious works, as it almost certainly is, *see supra* Part II.A, it cannot be *unconstitutional* to enforce those copyrights in some cases.

receptive to this argument at one time,<sup>225</sup> readers familiar the Court’s 1990 decision in *Employment Division v. Smith*<sup>226</sup> will recognize that the argument faces some serious obstacles today. At issue in *Smith* was whether the Free Exercise Clause required the State of Oregon to exempt followers of a Native American religion from compliance with an Oregon statute criminalizing the use of peyote, in light of the adherents’ claim that the sacramental use of peyote is a central part of their religious practice.<sup>227</sup> Citing concerns over religious adherents’ becoming “a law unto themselves,” the Court held that the Free Exercise Clause does not require exemption from valid, neutral laws of generally applicability.<sup>228</sup> In reaching this conclusion, however, the Court noted two possible exceptions. The first is that, in certain “hybrid” cases, accommodation may be required when the law under scrutiny interferes with both the exercise of religion and with some other constitutional right, such as freedom of speech,<sup>229</sup> expression,<sup>230</sup> or association,<sup>231</sup> or the right to educate one’s children.<sup>232</sup>

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<sup>225</sup>See *Texas Monthly*, 489 U.S. at 26-28 (Blackmun, J., concurring) (suggesting that the Free Exercise Clause might be read as requiring a sales-tax exemption for religious periodicals, although the exemption would have to be extended to a somewhat broader class of works in order to avoid an Establishment Clause violation); *Murdock v. Pennsylvania*, 319 U.S. 105, 110-17 (1943) (holding that the Free Exercise Clause required that Jehovah’s Witnesses be exempted from a door-to-door solicitation tax); *Follett v. Town of McCormick*, 321 U.S. 573, 574-78 (1944) (similar).

<sup>226</sup>494 U.S. 872 (1990).

<sup>227</sup>See *id.* at 874.

<sup>228</sup>See *id.* at 885.

<sup>229</sup>See *id.* at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940), *Murdock*, and *Follett*).

<sup>230</sup>See *id.* at 882 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

<sup>231</sup>See *id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

<sup>232</sup>See *id.* at 881-82 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

Second, the Court acknowledged a line of cases in which it had required the state to show a compelling interest in enforcing state unemployment compensation rules that substantially burdened religious practice, by “condition[ing] the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his religion.”<sup>233</sup> The Court suggested, however, that this balancing test may not apply outside the context of unemployment compensation or other similar laws that lend themselves “to individualized governmental assessment of the reasons for the relevant conduct.”<sup>234</sup> Subsequent case law also makes it clear that the state violates the Free Exercise Clause when it enacts a law specifically for the purpose of targeting a particular religious group for unfavorable treatment,<sup>235</sup> but this principle would not appear to be relevant in the present context.

*Smith* remains controversial. Although many commentators have denounced *Smith* for eviscerating the Free Exercise Clause and for undermining respect for religious diversity,<sup>236</sup> others have agreed with the majority that accommodation threatens to turn believers into a law unto themselves, or else collides with the Establishment Clause.<sup>237</sup> In the event, Congress agreed with the dissenters and in 1993 enacted the RFRA, which requires the state to justify actions that

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<sup>233</sup>*Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of Indiana Emp’t Sec’y Div’n*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987)).

<sup>234</sup>*Id.* at 883-84. The Court also noted that, in all of these cases, the conduct for which the petitioner sought an exemption was not proscribed by the criminal law. *See id.* at 875-76, 884.

<sup>235</sup>*See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

<sup>236</sup>*See, e.g.,* CARTER, *THE CULTURE OF DISBELIEF*, *supra* note 41, at 126-35; Gordon, *supra* note 44, at 115; Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990).

<sup>237</sup>*See, e.g.,* Eisgruber & Sager, *supra* note 46, at 452-60; Marci A. Hamilton, *Testimony, U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, H.R. 1691: The Religious Liberty Protection Act of 1999*, SE31 ALI-ABA 363, 370-71 (Oct. 18, 1999); Marshall, *supra*, at 309.

substantially burden religious practice by demonstrating a compelling state interest.<sup>238</sup> Although the Supreme Court subsequently held the RFRA to be unconstitutional as applied to the states, on the ground that it exceeded Congress's powers under § 5 of the Fourteenth Amendment,<sup>239</sup> at least two circuits have held that it continues to apply to actions of the federal government.<sup>240</sup> In Part III.C, I discuss the effect of the RFRA upon copyright infringement suits.<sup>241</sup>

Before reaching that issue, however, let us consider first whether there remains any point in arguing, post-*Smith*, that the Free Exercise Clause requires an exemption for a defendant such as PCG. At first blush, the answer appears to be clearly no; as discussed in Part II.A, copyright laws are valid, neutral laws of general applicability and thus are prima facie enforceable against anyone, religious or not. There are nevertheless some reasons to press the inquiry a little further. The first arises from the Court's recognition that, in some cases, the state may be required to accommodate religious practice when the law impinges both upon that practice and upon some other right, such as freedom of speech.<sup>242</sup> Perhaps in some cases this "hybrid" exception would exempt a defendant who claims both a religious duty and a free-speech interest in copying the exact wording of a protected text; because this exception raises a host of additional issues touching on freedom of speech,<sup>243</sup> however, I will not develop it here.<sup>244</sup> The second arises out of the unemployment

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<sup>238</sup>See 42 U.S.C. § 2000bb-1(b).

<sup>239</sup>See *City of Boerne v. Flores*, 521 U.S. 507, 532-35 (1997).

<sup>240</sup>See *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-59 (8<sup>th</sup> Cir. 1998); *but see* sources cited *supra* note 233 (arguing that RFRA violates the Establishment Clause).

<sup>241</sup>See *infra* notes 364-70 and accompanying text.

<sup>242</sup>See *supra* note 225-28 and accompanying text.

<sup>243</sup>For example, is it appropriate to grant preliminary injunctions in copyright cases involving serious freedom of speech issues? Should the courts apply strict, intermediate, or rational-basis

compensation schemes distinguished in *Smith*, in which the Court ordered states to provide compensation to claimants who refused jobs that would have violated their religious convictions. Like the unemployment compensation programs at issue in these cases, copyright's fair use doctrine lends itself "to individualized government assessment"<sup>245</sup> of a desired exemption.<sup>246</sup> This argument nevertheless probably fails. For one thing, it is not at all clear that refraining from copying *Mystery of the Ages* affirmatively violates PCG members' religious convictions<sup>247</sup> (although having to rely exclusively upon members' sharing existing copies would no doubt make it more difficult to practice those convictions). *Smith* also noted that in none of the distinguished cases were the unemployment compensation claimants seeking exemption from a generally applicable criminal law,<sup>248</sup> and criminal

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scrutiny? Should the appellate courts apply de novo review? For discussions, see Lemley & Volokh, *supra* note 35; Netanel, *supra* note 28; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

<sup>244</sup>As noted above, *all* copyright actions arguably give rise to free speech concerns, although courts generally shy away from recognizing these problems. See *supra* notes 28-35 and accompanying text. Even those scholars who favor a greater accommodation of free-speech principles in copyright actions, however, do not view verbatim copying as a right necessarily guaranteed by those principles. See Lemley & Volokh, *supra* note 35, at 210-13; Netanel, *supra* note 28, at \_\_\_. But there may be some cases in which the reproduction or distribution of a copyrighted text implicates greater-than-usual freedom of speech interests, as well as freedom of religion interests, and *Worldwide Church of God* may just be such a case. See Netanel, *supra* note 28, at \_\_\_ (appearing to characterize the case in this fashion). The interplay of copyright, freedom of speech, and freedom of religion is complex, however, and for purposes of the present analysis I shall defer its attempted resolution to another day.

<sup>245</sup>See *Smith*, 494 U.S. at 883-84.

<sup>246</sup>See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (noting that fair use rests upon case-by-case determinations, rather than bright lines).

<sup>247</sup>*Cf.* *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (noting that the payment of taxes is not forbidden by the Scientology religion).

<sup>248</sup>See *Smith*, 494 U.S. at 875-76, 884.

penalties are a possibility for willful copyright infringement.<sup>249</sup> Finally, although *Smith*'s suggestion that the standards applied in the unemployment cases might be limited exclusively to that body of law<sup>250</sup> makes no logical sense, to the extent it is taken seriously it reduces the likelihood that a court would find a Free Exercise exemption in the present context.

Nevertheless, as the majority in *Smith* and other cases has been quick to point out,<sup>251</sup> even when legislative accommodations are not required they are not necessarily unconstitutional; only a portion of these “permissive accommodations” rise to the level of an Establishment Clause violation. I shall argue below that even if the Free Exercise Clause does not require accommodation, the fair use doctrine can and should be applied to accommodate some religious uses, without running afoul of the Establishment Clause.<sup>252</sup>

## **B. Fair Use**

Fair use is an exception to copyright liability that applies under some circumstances in which “rigid application of the copyright statute . . . would stifle the very creativity which that law is designed to foster.”<sup>253</sup> Originally a judge-made exception to the copyright laws,<sup>254</sup> the doctrine is

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<sup>249</sup>See 17 U.S.C. § 506.

<sup>250</sup>See *Smith*, 494 U.S. at 884.

<sup>251</sup>See *Smith*, 494 U.S. at 890; *Amos*, 483 U.S. at 334 (stating that “government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause”) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987)); see also *Grumet*, 512 U.S. at 723 (Kennedy, J., concurring) (describing accommodation as “an accepted part of our political and cultural heritage”) (quoting *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part)); *id.* at 743 (Scalia, J., dissenting).

<sup>252</sup>See *infra* notes 250-363 and accompanying text.

<sup>253</sup>*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>254</sup>See *id.* at 575-76.

now codified in § 107 of the Copyright Act, which in relevant part states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.<sup>255</sup>

The statute goes on to list four non-exhaustive factors that are relevant in determining whether fair use applies, including “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”; “the nature of the copyrighted work”; “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>256</sup> Court and commentators have been quick to point out, however, that fair use is not susceptible to bright-line rules, but rather must be decided on a case-by-case basis, and that none of the factors by itself is necessarily dispositive.<sup>257</sup>

Copyright scholars offer varying interpretations of the policy underlying fair use. One perspective, grounded in the law and economics literature, is that fair use arises when the market for obtaining authorization from the copyright holder fails: for example, when the transaction cost of obtaining a license would outweigh the value of the desired use.<sup>258</sup> At times the Supreme Court

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<sup>255</sup> 17 U.S.C. § 107.

<sup>256</sup> *Id.*

<sup>257</sup> See *Campbell*, 510 U.S. at 578; *Sony*, 464 U.S. at 448 & n.31; Lloyd Weinrib, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990).

<sup>258</sup> See, e.g., Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1634 (1982); Landes & Posner, *supra* note 47, at 357-61.

has come close to adopting this rationale,<sup>259</sup> although the more recent case law appears to back away from this position.<sup>260</sup> A second school of thought views the market failure rationale as too narrow, and instead posits fair use as a tool for promoting a broader conception of social well-being.<sup>261</sup> One might attempt to apply fair use, for example, to facilitate the productive use of copyrightable expression by persons who might be unable (and therefore unwilling) to pay for the privilege.<sup>262</sup> Adherents to this perspective are concerned, among other things, about preserving fair use in the digital environment, where low transaction costs threaten to undermine the doctrine to the extent that it rests exclusively upon a market-failure rationale.<sup>263</sup> A third group views fair use as a more-or-less ad hoc doctrine reflecting judges' often unarticulated instincts about right and wrong.<sup>264</sup> As a description of the actual state of the case law, this third perspective arguably has much to recommend it, although it offers little in terms of normative analysis of what the law should be (though perhaps this limitation is inevitable).

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<sup>259</sup>See *Harper & Row v. Nation Enters.*, 471 U.S. 539, 566 & n.9 (1985) (describing the “effect of the use upon the potential market for or value of the copyrighted work” as “undoubtedly the single most important element of fair use,” and citing with approval the law-and-economics approach to fair use described above).

<sup>260</sup>See *Campbell*, 510 U.S. at 577-58, 590-94 (apparently not privileging the fourth factor over the other three).

<sup>261</sup>See, e.g., William Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-94 (1988); cf. Netanel, *supra* note 47, at 376-82.

<sup>262</sup>As I have discussed elsewhere, a common assumption of law-and-economics analysis is that value is determined by the amount that consumers are willing to pay to acquire an asset. See Thomas F. Cotter, *Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2125-27 (1996). To the extent that willingness to pay is in part a function of ability to pay, this method of analysis may be biased in favor of satisfying the preferences of the relatively well-off. See *id.* at 2127.

<sup>263</sup>See *supra* note 34.

<sup>264</sup>See, e.g., Weinrib, *supra* note 253, at 1138.

Notwithstanding their different approaches, advocates of the first and second schools often agree on some basic applications of the doctrine, at least in the nondigital environment. Permitting the unauthorized quotation of short passages from a copyrighted work for purposes of teaching, scholarship, and research, for example, may be justified on the basis of either the transaction cost analysis alluded to above<sup>265</sup> or on the basis of a broader principle of promoting teaching, scholarship, and research as social goods in and of themselves. Similarly, permitting the unauthorized reproduction of copyrightable expression for purposes such as criticism or news reporting may find support in the need for an educated public to have access to critique and reportage, as well as in a variation of the market failure idea. To illustrate the latter point, suppose that a reviewer had to obtain permission from the author of the work under review to obtain permission to quote from that work within the body of the review. A calculating author might permit the use of quotations for inclusion in a reviewing condemning the work as trash, but only for a price that is greater than or equal to her expected loss attributable to a bad review; at the same time, a calculating reviewer would be willing to pay a fee only if it is less than or equal to the expected profit to be earned from publication of the review. Unless the reviewer expects to capture the entire social value of the review, which is unlikely,<sup>266</sup> there will be some cases in which he is unable to conclude a bargain

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<sup>265</sup>*See supra* text accompanying note 254.

<sup>266</sup>This is unlikely for several reasons. First, unless the reviewer can price-discriminate—that is, charge each reader a price that reflects the amount that that individual reader is willing to pay—readers will derive some value that is not reflected in the fee the reviewer is willing to pay the author. *See* POSNER, *supra* note 45, § 9.4 (discussing price discrimination). Second, if as suggested above some of the value that readers derive does not translate into monetary terms, the social value reflected in readers' willingness-to-pay underestimates the true social value of publication. *See supra* text accompanying note 58. A third problem is that, at the time the author and reviewer would be expected to bargain, the expected profit the reviewer will earn from publication is hypothetical. Since the reviewer could either over- or underestimate that profit, it is not clear that, on average, reviewers would unduly censor themselves. If, however, one assumes (as a civil libertarian might) that the social value of publication typically outweighs the social loss, any instances of

with the author, even though the social value of publication might outweigh the social loss. A similar analysis might exempt parodies from liability, although advocates of the law-and-economics approach appear to be more skeptical of the social value of this particular genre.<sup>267</sup>

Among the standard fair use factors, the one that is often easiest to apply is the third factor, the amount and substantiality of the use in relation to the copyrighted work as a whole.<sup>268</sup> As one might expect, copying another's copyrighted expression substantially in its entirety usually weighs against fair use,<sup>269</sup> although it is not dispositive; the fundamental question is whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole’ . . . are reasonable in relation to the purpose of copying.”<sup>270</sup> Thus, depending on the circumstances, fair use

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underestimation deprive the public of potentially useful information.

I have been assuming thus far that the social loss is equivalent to the author's private loss, e.g., fewer sales following publication of a bad review. Of course, the social loss could exceed the private loss as well, if for example readers are misled by an unfair review. To the extent that one buys into the “marketplace of ideas” view of the First Amendment, however, the existence of a multiplicity of reviewers should tend to minimize this loss.

Note also that, as Landes and Posner point out, *ex ante* publishers may be better off, in the aggregate, under a regime that prevents them from censoring bad reviewers, because this makes book reviews (a form of advertising) more credible. *See* Landes & Posner, *supra* note 28, at 359.

<sup>267</sup>*See* Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 *AIPLA Q.J.* 305, 312 (1993); Richard A. Posner, *When Is Parody Fair Use?*, 21 *J. LEGAL STUD.* 67, 67 (1992); *but see* Anastasia Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff-Rose Music, Inc.*, 69 *S. CAL. L. REV.* 767, 809-12 (1996) (presenting a model that attempts to integrate economic analysis with sensitivity to the First Amendment).

<sup>268</sup>*See* 17 U.S.C. § 107.

<sup>269</sup>*See, e.g.,* *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (“stating that “the more of a copyrighted work that is taken, the less likely the use is to be fair”).

<sup>270</sup>*Campbell*, 510 U.S. at 586.

may apply even when the defendant has copied the entire work,<sup>271</sup> while in others it may not apply if the portion copied, though relatively small, constitutes the “heart” of the work.<sup>272</sup> In any event, the fact that the defendants in most of the religion cases discussed above (including *Penguin Books, Urantia Foundation v. Maaherra, Lerma*, and *Worldwide Church of God*) copied large portions of the plaintiff’s copyrighted text<sup>273</sup> militates against, but does not necessarily undermine, the fair use defense; in light of the other statutory factors, substantial copying may have been reasonable, even necessary, in relation to the defendant’s purpose, as we shall see.<sup>274</sup> In other cases that may arise, in which the defendant copies only a small portion of a religious text, inquiry will focus upon the significance of the portion taken and, more importantly, upon whether the defendant took more than was necessary to his purpose.

Among the remaining three factors, “the nature of the copyrighted work” is also often simple to apply, but the religion cases sometimes manage to muddle the analysis. As a general matter, two considerations are usually relevant: whether the work is “factual” or “informational” in character,

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<sup>271</sup>See, e.g., *Sony*, 464 U.S. at 449-50 (holding that consumers’ use of VCRs to copy copyrighted television programs for later viewing at a more convenient time constituted fair use, even though copying often extends to the programs in their entirety).

<sup>272</sup>See *Harper & Row*, 471 U.S. at 564-66. For the copyright owner to make out even a prima facie case, however, she must prove “substantial” copying, meaning that the defendant has appropriated more than a *de minimis* amount of the plaintiff’s protectable expression, selection, or arrangement. See *Sandoval v. New Line Cinema Corp.*, 147 F.2d 215, 217 (2d Cir. 1998) (discussing the distinction between “substantial” and “*de minimis*” copying).

<sup>273</sup>See *Worldwide Church of God*, 227 F.3d at 113; *Urantia Foundation*, 114 F.3d at 957-58; *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1688; *Lerma*, 40 U.S.P.Q.2d (BNA) at 1575.

<sup>274</sup>Of course, this assumes that the purpose itself is legitimate: copying only so much of a work as is necessary to defraud others, for example, probably would not count much in a defendant’s favor. Whether religious purposes should be specially *avored* is an issue I take up *infra* at notes 317-63 and accompanying text.

as opposed to “fictional” or “creative”;<sup>275</sup> and whether prior to appropriation it had been published with the copyright owner’s consent.<sup>276</sup> Fair use is more likely when the work is factual or informational in character,<sup>277</sup> and when it has been published.<sup>278</sup> Thus, one fact that should have weighed in favor of fair use in most of the religion cases discussed above was that the works at issue were published works.<sup>279</sup> Courts in several of the cases, however, have been reluctant to characterize religious works as factual or informational, due to their unwillingness to credit the plaintiff’s explanation that the works were divinely inspired.<sup>280</sup> This reluctance is misguided for two reasons.

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<sup>275</sup>See *Harper & Row*, 471 U.S. at 563 (distinguishing between “factual” works and “works of fiction or fantasy”); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9<sup>th</sup> Cir. 1997) (stating that fair use is less likely to succeed with respect to reproductions of “creative,” as opposed to “informational and functional,” works).

<sup>276</sup>See *Harper & Row*, 471 U.S. at 564.

<sup>277</sup>See *id.* at 563. The reason for this rule is the perception that, in general, it is possible to express an idea in a greater number of ways in a work of fiction than in a work of fact. See *Campbell*, 510 U.S. at 586 (stating that “some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”); *Harper & Row*, 471 U.S. at 563 (noting “a greater need to disseminate factual works than works of fiction or fantasy”).

<sup>278</sup>See *Harper & Row*, 471 U.S. at 564. Unpublished works are entitled to greater protection, due principally to the economic value of timing the work’s public disclosure. See *id.* The work’s status as unpublished is not dispositive, however. See 17 U.S.C. § 107 (second sentence).

<sup>279</sup>The exception has been in some of the cases involving the Church of Scientology. See *Lerma*, 40 U.S.P.Q.2d (BNA) at 1575 (holding that OT documents were unpublished); *Religious Tech. Center v. Netcom On-Line Communications Servs.*, 923 F. Supp. 1231, 1245-46 (N.D. Cal. 1995) (holding that certain other Scientology documents were unpublished); *Religious Tech. Center v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519, 1525 (D. Colo. 1995) (finding no substantial likelihood of success on the merits of plaintiff’s copyright claim, despite plaintiff’s claim that the works at issue were unpublished). For discussion of what counts as “publication” under the rather technical rules developed in copyright cases, see *Estate of King v. CBS, Inc.*, 194 F.3d 1211, 1214-16 (11<sup>th</sup> Cir. 1999); 1 NIMMER & NIMMER, § 4.04 at 4-21 to -25.

<sup>280</sup>See *Worldwide Church of God*, 227 F.3d at 1117 (stating that, despite PCG’s description of *Mystery of the Ages* as “primarily a textual, historical account of [Armstrong’s] views of the ‘the truth’ of the Bible,” and believers’ view that the work is “factual,” “the creativity, imagination and originality embodied in *MOA* tilt the scale against fair use”); *id.* at 1123 (Brunetti, J., dissenting)

First, if the analysis presented in Part II.B. above is correct, there should be no hesitation in classifying many scriptures and works of theology as a factual or informational works: either the plaintiff sincerely believes the work to be factual or informational, in which case we should credit her belief, or she doesn't, in which case she should be estopped from denying it.<sup>281</sup> Second, the fact

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(stating that *Mystery of the Ages* “defies easy classification . . . as either informational or creative”); *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1691 (stating that “[p]laintiffs’ statements of belief that Jesus dictated the Course to Schucman do not make the Course a factual work,” and also that even if Jesus did dictate the work, much of it is “prescriptive rather than descriptive”); *id.* at 1695 (stating again that *A Course in Miracles* “is not a factual work”); *Religious Tech. Center v. Netcom On-Line Communications Servs.*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995) (concluding that certain works of L. Ron Hubbard were “primarily functional or instructive,” while others were “more original and creative,” but concluding that this factor “should not “play a major role in the context of religious works, which do not easily fit into the creative/informational dichotomy”); *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (concluding that Hubbard works were “the product of his creative thought process, and not merely informational”); *but see New Era Publications Int’l v. Carol Publ. Group*, 904 F.2d 152, 158 (2d Cir. 1990) (concluding that “reasonable people can disagree over how to classify Hubbard’s works,” and that some of the works at issue “can accurately be described as expressive—e.g., Hubbard’s poetry,” but that “most simply cannot be so characterized”); *Lerma*, 40 U.S.P.Q.2d (BNA) at 1575 (stating that, given plaintiff’s characterization of the OT documents “as training materials, stressing their utility over their creativity,” they should be viewed as “informational rather than creative”) (quoting *Religious Tech. Center v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995)).

<sup>281</sup>*See supra notes* 126-62 and accompanying text. Of course, some scriptural works may be more “creative” than “informational.” Consider, for example, the Psalms or the Song of Solomon, poetic works that Jews and Christians consider to be part of their scriptures. Many Jews and Christians also view much of the Bible as being more in the nature of fable or allegory, rather than an account of historical events. Beginning largely with the efforts of German critics in the nineteenth century, scholars have demonstrated that the present-day text of both the Hebrew Scriptures and the New Testament are the result of many layers of editing and merging the underlying source materials. *See, e.g.,* KAREN ARMSTRONG, *THE BATTLE FOR GOD* 94-95, 143-45 (2000) (discussing the clash between advocates of the Higher Criticism, on the one hand, and evangelical or fundamentalist perspectives, on the other); OXFORD COMPANION TO THE BIBLE, *supra* note 162, *Interpretation, History of* 318-24 (discussing modern Biblical criticism); A.N. WILSON, *GOD’S FUNERAL: A BIOGRAPHY OF FAITH AND DOUBT IN WESTERN CIVILIZATION* 104-11 (1999) (contrasting contemporary and nineteenth-century perspectives). For copyright purposes, however, what should be dispositive in determining whether a purported scripture is more “instructional” or “creative” for purposes of the fair use analysis is the manner in which the author presents the work, as well as its likely reception among a substantial portion of its intended audience. *See supra notes* 126-62 and accompanying text.

that the works might be viewed as speculative, or might be refuted by subsequent works, is irrelevant. To cite one common example, works setting forth theories of or speculation about historical events are clearly “factual” or “informational,” even when subsequent research discloses that the theorist was in error.<sup>282</sup> On this basis, it is difficult to perceive any reason for classifying scriptural and theological works differently from other allegedly factual works--although some other types of religious works (such as hymns) probably fall on the “creative” side of the spectrum.

The two remaining factors--the nature of the use, and its effect upon the potential market for or value of the copyrighted work--can be more difficult to apply to religious works. As for the effect of the use, decisions consistent with the law-and-economics model tend to ask whether the defendant’s practice, if widespread, would deprive the copyright owner of substantial revenue from the licensing of the work.<sup>283</sup> To cite a few prominent examples, in *American Geophysical Union v. Texaco, Inc.*,<sup>284</sup> the Second Circuit declined to excuse corporate research scientists from making archival copies of articles appearing in scientific journals, because in doing so they bypassed an existing copyright-clearance market.<sup>285</sup> Similarly, in *Princeton University Press v. Michigan*

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<sup>282</sup>See Nimmer, *supra* note 28, at 26-27. The unpalatable alternative would be for the work to change classes, depending upon the status of research in the field.

An even better analogy for religious works would be works of speculative philosophy. Presumably these works would be viewed as “factual” or “instructional” for purposes of the fair use analysis, but I am not aware of any cases on point.

<sup>283</sup>See *Campbell*, 510 U.S. at 590 (stating that courts should “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original”) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-102.61 (1993)); *Harper & Row*, 471 U.S. at 566-68 & n.9.

<sup>284</sup>60 F.3d 913 (2d Cir. 1994).

<sup>285</sup>*Id.* at 926-31; *but see id.* at 935-38 (Jacobs, J., dissenting) (disputing this point).

*Document Services*,<sup>286</sup> the Sixth Circuit concluded that fair use did not shield the inclusion of substantial portions of copyrighted books and articles in student coursepacks, given the plaintiff's willingness to license these materials for a price.<sup>287</sup> Courts following this approach presumably would be reluctant to excuse religious adherents from paying copyright owners for the use of works the rights to which can be obtained on the open market.<sup>288</sup> Moreover, even if the critics of *Texaco* and *Princeton University Press* are correct in arguing that these decisions place too little value on the public benefits from uses such as teaching and research--some of which benefits might be lost, if teachers and scholars were to forgo the use altogether rather than incur a duty to pay royalties<sup>289</sup>--it is doubtful whether a similar rationale could provide a broad fair use exemption for religious users, just because religious practice (like teaching and research) unencumbered by a duty to pay royalties may give rise to some intangible public benefits. As discussed below with respect to Copyright Act § 110(3), the state probably cannot invoke the public benefits of religion alone as a reason for creating a broad exemption from religious users' having to comply with the copyright laws.<sup>290</sup>

In some of the religion cases, however, the "effect of the use" factor should weigh in favor of the defendant. In *Religious Technology Center v. Netcom On-Line Communications Services*,<sup>291</sup>

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<sup>286</sup>99 F.3d 1381 (6<sup>th</sup> Cir. 1996) (en banc).

<sup>287</sup>*See id.* at 1386-88.

<sup>288</sup>To cite two examples, *The Urantia Book* is currently available on amazon.com in three editions (paperback, hardcover, and leather bound), ranging in price from \$17.46 to \$20.96. *A Course in Miracles: Combined Volume* is available in a hardcover edition for \$20.96 and in paperback for \$28.00. *See* <<http://www.amazon.com>> (visited August 8, 2001).

<sup>289</sup>*See, e.g.,* Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 211 (1998).

<sup>290</sup>*See infra* notes 371-98 and accompanying text.

<sup>291</sup>923 F. Supp. 1231 (N.D. Cal. 1995).

for example, a former Scientologist copied and made public selections from the OT documents, specifically for the purpose of critiquing the religion.<sup>292</sup> Because the Church of Scientology does not authorize the distribution of these works to the general public<sup>293</sup> (including, presumably, critics), there is no market within which the defendant could have obtained a license to reproduce the works. Just as the author of a critical book review cannot be expected to obtain permission from the book author to reproduce quotations from the reviewed work, a dissenter cannot be expected to obtain permission from the mother church to critique the religion. Recognizing this principle, the court correctly found in favor of the defendant on the “effect of the use” factor.<sup>294</sup> On the other hand, when the defendant makes and distributes copies of a church’s religious texts for the purpose of competing against that church, it is not so clear that the use should be excused. In another Scientology case, *Bridge Publications, Inc. v. Vien*,<sup>295</sup> the opinion indicates that the defendant copied and distributed the OT documents not for the purpose of critique, but rather to compete against the church by offering, for profit, a rival course called “Dynamism.”<sup>296</sup> The court rejected the fair use defense, finding with respect to the “effect of the use” factor that the defendant’s copying tended to “fulfill ‘the demand for the original’ works and ‘diminish or prejudice’ their potential sale.”<sup>297</sup> By contrast, in yet another Scientology case in which the defendant’s conduct was more clearly

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<sup>292</sup>*See id.* at 1239, 1242, 1243.

<sup>293</sup>*See id.* at 1238 n.4, 1248

<sup>294</sup>*See id.* at 1249.

<sup>295</sup>827 F. Supp. 629 (S.D. Cal. 1993).

<sup>296</sup>*See id.* at 632, 633-34, 635-36.

<sup>297</sup>*Id.* at 636 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155-56 (9<sup>th</sup> Cir. 1986)).

critical than competitive, the court found that the fourth factor weighed in favor of the use.<sup>298</sup>

The analysis is more complicated, however, when the unauthorized copying and distribution of a copyrighted text might facilitate criticism or the practice of an alternative faith, on the one hand, but also could supplant the market for the text by competing against sales of authorized copies. In *Worldwide Church of God*, for example, although WCG had ceased marketing *Mystery of the Ages* and had destroyed its existing inventory of the work, retaining only archival and research copies,<sup>299</sup> the church asserted that it planned, at some future date, to issue an annotated version.<sup>300</sup> The fact that WCG had not even begun the preliminary work on this project, which had lain fallow for over ten years, led the dissenting judge to conclude that WCG's real motive was to suppress heresy, and that the "effect of the use" factor therefore weighed in favor of PCG.<sup>301</sup> Citing among other things the effect of the defendant's use upon the "potential market" for the copyrighted work, however, the majority rejected the fair use defense.<sup>302</sup> A close reading of the opinion nevertheless reveals that the

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<sup>298</sup>To be more precise, the court doubted whether merely making copies of the OT documents available to the public is a substitute for the guided instruction that the Church of Scientology offers to initiates. *See Netcom*, 923 F. Supp. at 1248-49; *see also F.A.C.T.Net*, 901 F. Supp. at 1525 (characterizing use as "to advance understanding of issues concerning the Church which are the subject of ongoing public controversy"); *cf. Lerma*, 40 U.S.P.Q.2d (BNA) at 1574 (questioning Lerma's motives). Alternatively, to the extent that the copiers succeed in their mission to debunk Scientology, the church stands to lose revenue, but this loss is no more relevant for copyright purposes than is an author's loss of profits following publication of a critical review. *See New Era Publications*, 904 F.2d at 160; *Netcom*, 923 F. Supp. at 1248 n.19; *F.A.C.T.Net*, 901 F. Supp. at 1525 n.7; *see also infra* notes 305-08 and accompanying text (applying this principle to the facts of *Worldwide Church of God*).

<sup>299</sup>*See Worldwide Church of God*, 227 F.3d at 1113; *id.* at 1122 (Brunetti, J., dissenting).

<sup>300</sup>*See id.* at 1113, 1119.

<sup>301</sup>*See id.* at 1122, 1124 (Brunetti, J., dissenting).

<sup>302</sup>*See id.* at 1119 (stating that "[e]ven an author who had disavowed any intention to publish his work during his lifetime was [sic] entitled to protection of his copyright, first, because the relevant consideration was the 'potential market' and, second, because he has the right to change his mind") (citing *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)).

majority and dissent disagreed not so much with respect to their understanding of WCG's motivation for filing suit as with respect to its relevance to fair use.

In assessing the merits of *Worldwide Church of God*, it is important to keep in mind two key principles discussed above. The first is that the copyright owner is normally entitled to prevent others from reproducing, adapting, distributing, or performing the copyrighted work when these acts pose a realistic risk of depriving the copyright owner of potential royalties.<sup>303</sup> As a general matter, then, the copyright owner has a right to prevent others both from competing against her by marketing the copyrighted work, and from usurping her right to authorize the creation of derivative works based upon the copyrighted work. The second principle, however, is that if the copyright owner would deny permission for a particular use for a reason such as avoiding criticism or suppressing ideas, fair use may apply, since there is no reasonable likelihood that a market for these uses will develop.<sup>304</sup> On one interpretation, then, *Worldwide Church of God* hinges upon the issue of which principle applies, which in turn depends upon the facts: as the majority read the facts, the first principle applied, while the dissent read them as giving rise to principle two.<sup>305</sup> A close reading

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<sup>303</sup>See *Texaco*, 60 F.3d at 929-30 (stating that, in determining whether a use deprives a copyright owner of “potential licensing revenues,” a court should consider “only traditional, reasonable, or likely to be developed markets”); accord *Princeton Univ. Press*, 99 F.3d at 1387.

<sup>304</sup>See *supra* notes 262-63 and accompanying text.

<sup>305</sup>The dissenting judge's reasons for concluding that the original and annotated versions of *Mystery of the Ages* would not compete against one another is worth quoting in full:

Here . . . the functions served by *MOA* and the proposed annotated as well as their potential markets are different. In contrast to PCG's evangelical use, the central purpose behind WCG's proposed annotated version of *MOA* is to identify Armstrong's historical, doctrinal, and social errors. The target markets for the two versions of *MOA* are different because it simply does not make sense for WCG to widely distribute an annotated *MOA* highlighting the errors of the original *MOA* to the general public in order to recruit new members. Unlike a publication which would provide a straightforward explanation of WCG's religious doctrines for the

of the majority opinion, however, shows that the majority did not necessarily disagree with the dissent's contention that readers are unlikely to view the original and annotated versions of *Mystery of the Ages* as substitutes for one another.<sup>306</sup> As noted above, the majority *did* credit the possibility that WCG might someday change its mind and begin publishing *Mystery of the Ages* in competition with PCG.<sup>307</sup> In principal part, however, the majority's analysis focused not on whether the defendant's copies of *Mystery of the Ages* might compete against WCG's hypothetical future sales of either an annotated or unannotated version of the work, but rather on the broader question of whether publication of the original would assist PCG in competing against WCG for church members:

WCG points out that those who respond to PCG's ads are the same people who would be interested in WCG's planned annotated version or any future republication of the original version. With an annotated *MOA*, WCG hopes to reach out to those familiar with Armstrong's teachings and those in the broader Christian community. PCG's distribution of its unauthorized version of *MOA* thus harms WCG's goodwill by diverting potential members and contributions from WCG. While the district court found that PCG's *MOA* and WCG's proposed annotated *MOA* "would not in any sense 'compete' in the same market," undisputed evidence shows that individuals who received copies of *MOA* from PCG are present or could be potential adherents of WCG. *MOA*'s value is as a marketing device: that is how PCG uses it and both PCG and WCG are engaged in evangelizing in the Christian community.<sup>308</sup>

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purposes of recruitment, an annotated version of *MOA* would require a reader to become familiar with the text of the original *MOA* and then to read WCG's response to or criticism of Armstrong's religious views in order to discover WCG's doctrines. Indeed, because WCG hopes to use an annotated *MOA* to reach out to those familiar with Armstrong's teachings, PCG's use creates a larger potential market for an annotation rather than interfering with it.

*Id.* at 1124 (Brunetti, J., dissenting).

<sup>306</sup>*See id.* at 1120 (characterizing the dissent's argument as "speculative," but concluding that it "misses the point" because "PCG has unfairly appropriated *MOA* in its entirety for the very purposes for which WCG created *MOA*").

<sup>307</sup>*See id.* at 1119.

<sup>308</sup>*Id.*

In a sense, then, both majority and dissent appear to agree that a principal danger facing WCG is that people who read *Mystery of the Ages* just might be persuaded to join PCG, rather than WCG.

This “danger,” however, should not count for purposes of the fair use analysis. As the courts have noted in several of the Scientology cases, the potential loss of revenues resulting from a critical use of copyrighted material is irrelevant to the fair use analysis,<sup>309</sup> in the same way that losses resulting from publication of an unfavorable book or movie review are irrelevant.<sup>310</sup> The reason for this rule seems apparent: if one of the purposes of copyright law (as well as the constitutional principle of freedom of speech) is to encourage a diversity of opinion, any financial harm resulting from merely being the losing party to a debate cannot be compensable. On the facts of *Worldwide Church of God*, any loss of church membership resulting from the publication of a heretical text should be equally irrelevant, lest we permit copyright law to become a tool for censoring disfavored religious practices. Ironically, the majority in *Worldwide Church of God* quoted with approval a famous article on fair use in which Professor Wendy Gordon argued that fair use should apply in cases of market failure, but that the market does not fail simply because an author wishes to avoid having to market her work in competition with the defendant.<sup>311</sup> Gordon’s concluding sentence, however, which the court quotes in full, is that “Market failure should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the

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<sup>309</sup>See *New Era Publications*, 904 F.2d at 160; *Netcom*, 923 F. Supp. at 1248 n.19; *F.A.C.T.Net*, 901 F. Supp. at 1525 n.7.

<sup>310</sup>See *Campbell*, 510 U.S. at 591-92 (stating that “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act”); *Fisher v. Dees*, 794 F.2d 432, 436 (9<sup>th</sup> Cir. 1986) (“Copyright law is not designed to stifle critics”).

<sup>311</sup>See *Worldwide Church of God*, 227 F.3d at 1119 (quoting Gordon, *supra* note 254, at 1634).

goals of copyright—notably a desire to keep certain information from the public.”<sup>312</sup> Surely the suppression of heresy “keep[s] certain information from the public” and is a goal “unrelated to the goals of copyright”; but then irony has never been the courts’ strong suit.

To approach the matter from a slightly different direction, as a general matter copyright owners have no duty to “work” their copyrights, subject only to a few compulsory licensing duties not relevant here,<sup>313</sup> and subject to the second principle described above.<sup>314</sup> Normally, then, a copyright owner may decide when the work is ready to be disclosed to the public.<sup>315</sup> Perhaps this right extends even to cases in which the suppression of the copyrighted work would inhibit competition with respect to some other, unrelated work or interest. In patent law, an analogous practice (known as patent suppression or preemptive patenting) occurs when a firm patents two or more rival technologies, intending to commercialize only one and to refuse to license the others to competitors; in this way, the firm may be able to forestall the competition that otherwise would have arisen if a competitor had been first to patent one of the rival technologies.<sup>316</sup> Most economic models suggest that preemptive patenting is rare (though probably legal), but that if and when it occurs the social welfare consequences are devastating.<sup>317</sup> Preemptive copyrighting is probably even more rare, since it would be difficult to copyright every single way of expressing even a novel idea

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<sup>312</sup>*Id.*

<sup>313</sup>See Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585,1614 n.137 (1998).

<sup>314</sup>See *supra* text accompanying note 300.

<sup>315</sup>See *supra* notes 272-74 and accompanying text.

<sup>316</sup>See Blair & Cotter, *supra* note 193, at \_\_\_.

<sup>317</sup>See *id.* at \_\_\_.

(and if that were possible, the merger doctrine would probably defeat the copyright).<sup>318</sup> In the peculiar context of *Worldwide Church of God*, however, what we observe might be thought of as a form of “preemptive copyright.” Here the copyright owner is suppressing a copyrighted work not to inhibit competition in the market for the work itself or for another work derived from it, but rather to forestall a broader form of competition—competition among religious sects—that is, on one reading of the First Amendment, constitutionally privileged.<sup>319</sup> Of course, that result will occur only when the copyrighted work at issue is of central importance to the defendant’s religious practice, but the majority itself conceded that *Mystery of the Ages* plays such a role for PCG.<sup>320</sup> In a case of this nature, the “effect of the use” factor should weigh in favor of the defendant.

The remaining fair use factor—the nature of the use—is in some ways the most difficult to assess in the context of the religion cases. In the typical fair use case, a use is more likely to be held fair if, among things, it falls within one of the categories specifically mentioned in § 107, such as criticism, reporting, or teaching;<sup>321</sup> it is noncommercial;<sup>322</sup> the document was obtained in good faith;<sup>323</sup> and it is “transformative,” as opposed to a verbatim copying.<sup>324</sup> None of these facts is

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<sup>318</sup>See *supra* notes 30, 192-93 and accompanying text.

<sup>319</sup>See *supra* note 45 and accompanying text; see also *Larson*, 456 U.S. at 245 (noting James “Madison’s vision—freedom for all religion being guaranteed by free competition between religions”).

<sup>320</sup>See *Worldwide Church of God*, 227 F.3d at 1118 (describing *Mystery of the Ages* as “the core text essential to [PCG] members’ religious observance”); see also *id.* at 1125 (Brunetti, J., dissenting) (“WCG appears less interested in protecting its rights to exploit *MOA* than in suppressing Armstrong’s ideas which now run counter to church doctrine”).

<sup>321</sup>See *Campbell*, 510 U.S. at 578-59; *Harper & Row*, 471 U.S. at 561.

<sup>322</sup>See *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451.

<sup>323</sup>See *Harper & Row*, 471 U.S. at 562-63.

<sup>324</sup>See *Campbell*, 510 U.S. at 579.

determinative, however, and thus a use may be fair even though it falls outside the types of use listed in the statute,<sup>325</sup> or is commercial rather than not-for-profit,<sup>326</sup> or is non-transformative.<sup>327</sup> In the religion cases discussed above, the defendants’ reproduction and distribution of the copyrighted text typically has been not-for-profit.<sup>328</sup> On the other hand, these reproductions also have tended to be largely verbatim.<sup>329</sup> It is also not clear that, in a case like *Worldwide Church of God*, the purpose for which much of the copying was done fits comfortably within the statutory list of privileged uses, unless “comment” or “teaching” is broadly construed (a point that I shall return to shortly). If not, the question arises whether a specifically religious use of a copyrighted work should weigh in favor of a finding of fair use.

Since this question threatens to raise a constitutional problem, it would be useful to know whether the statute itself contemplates that religious uses should be given additional weight in the

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<sup>325</sup> See *Sony*, 464 U.S. at 454-55 (affirming finding that private individuals’ uses of VCRs to record television programs for viewing at a more convenient time is fair use).

<sup>326</sup> See *Campbell*, 510 U.S. at 583-85.

<sup>327</sup> See *id.* at 579.

<sup>328</sup> See, e.g., *Worldwide Church of God*, 227 F.3d at 1123 (Brunetti, J., dissenting) (noting that PCG distributed *Mystery of the Ages* free of charge); *Urantia Foundation*, 114 F.3d at 957 (noting that Maaherra distributed *The Urantia Book* free of charge); *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1688, 1695 (noting that defendants distributed their version of *A Course in Miracles* free of charge). The majority in *Worldwide Church of God* nevertheless concluded that PCG’s distribution of *Mystery of the Ages* “unquestionably profit[ed] PCG by providing it at no cost with the core text essential to its members’ religious observance, by attracting . . . new members who tithe ten percent of their income to PCG, and by enabling the ministry’s growth.” See *Worldwide Church of God*, 227 F.3d at 1118. I have argued above, however, that these observations either cut in favor of fair use (i.e., that *Mystery of the Ages* is “the core text essential to . . . members’ religious observance”) or should be irrelevant. See *supra* notes 304-16 and accompanying text.

<sup>329</sup> See *Worldwide Church of God*, 227 F.3d at 1118; *Urantia Foundation*, 114 F.3d at 957; *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1688, 1695. Maaherra also prepared a study aid for *The Urantia Book*, however, see 114 F.3d at 957, and the defendants in *Penguin Books* also prepared unauthorized translations of *A Course in Miracles*, see 55 U.S.P.Q.2d (BNA) at 1688.

fair use calculus. As just noted, § 107 does not specifically mention religious uses, and the legislative history of that provision makes no mention of them either.<sup>330</sup> This is not dispositive, though, because the uses enumerated in the statutory text are not intended to be exhaustive.<sup>331</sup> The only case law on point consists of the religion cases themselves, only one of which (*Worldwide Church of God*) addresses this issue, and then only in dissent and only by way of assuming that the defendant's religious motivation matters.<sup>332</sup> On the other hand, a separate provision of the Copyright Act, § 110(3), specifically creates an exemption for the public performance of nondramatic literary works and musical compositions within the course of religious performances.<sup>333</sup> The legislative history of this provision is sparse,<sup>334</sup> and the provision's very existence can be interpreted in two different ways: either as evidence that Congress intended to favor at least some religious uses of copyrighted works, in which case it might make sense to interpret § 107 consistently with this purpose; or as evidence that Congress did not expect religious uses to be exempt under the more general fair use provision. The latter possibility is hardly determinative, however, since it is perfectly consistent for some religious uses to be shielded by fair use and for others to need the additional exemption created by § 110(3).<sup>335</sup> Given the lack of statutory guidance, the question

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<sup>330</sup>See H.R. REP. NO. 94-1476, at 65-74, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-88.

<sup>331</sup>See *Campbell*, 510 U.S. at 577-78.

<sup>332</sup>See *Worldwide Church of God*, 227 F.3d at 1122-23 (Brunetti, J., dissenting); see also *Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1695 (noting defendants' claim that their use of *A Course in Miracles* was "non-commercial and non-profit and for religious educational purposes only," but concluding that the verbatim, nontransformative nature of the use weighed against fair use).

<sup>333</sup>See 17 U.S.C. § 110(3).

<sup>334</sup>See *infra* note 372 and accompanying text.

<sup>335</sup>Or perhaps the intention was for § 110(3) to codify what was expected to be the typical result under the fair use doctrine, but this seems unlikely. See *infra* notes 396-98 and accompanying text.

remains whether courts *should* give additional weight to religious uses within the fair use calculus.

As I noted at the outset, much ink has been spilled on the topic of whether government should accommodate religious practice whenever feasible, or whether accommodation violates the principle of government neutrality towards religion.<sup>336</sup> Not surprisingly, those who favor accommodation generally agree that government may accommodate religion, up to a point, even when accommodation is not constitutionally mandated.<sup>337</sup> As I stated at the beginning, I do not intend to reargue these matters here; for better or worse, this article is written from the standpoint of accommodationism. It would be unsatisfying, however, to conclude that a commitment to accommodation requires that religious uses be given some weight in determining fair use, and simply to leave it at that. There must be some limits to accommodation, after all, and thus I feel some need to sketch out how much weight should be given to religious uses of copyrighted works, and under what circumstances. There is, of course, also some legal doctrine that delineates how far the state may go in accommodating religious belief before the accommodation bumps up against the Establishment Clause. Although the doctrinal contours are fuzzy, I shall discuss a few points that can be gleaned from the case law.

The principal argument in favor of according some weight to religious uses of copyrighted materials is that doing so is consistent with the accommodationist goal of promoting religious diversity. By definition, the suppression of heresy undermines religious diversity—that’s what “suppression of heresy” means--and thus the facts of *Worldwide Church of God* present a strong

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<sup>336</sup>See *supra* note 44-46 and accompanying text.

<sup>337</sup>See, e.g., McConnell, *Update, supra* note 44, at 710-12; but see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 559 & n.11, 580-611 (1991) (arguing, *contra Smith*, that the Free Exercise Clause requires some accommodations, but that those accommodations not required by the Free Exercise Clause are presumptively unconstitutional).

case for according substantial weight to the defendant's reproduction and distribution of *Mystery of the Ages*, assuming that access would otherwise be denied. Expanding the scope of fair use to encompass religious uses of copyrighted materials might remove an obstacle to PCG's religious practice; the alternative is to sanction the use of copyright as a tool for promoting religious conformity, which in this respect would return us to the pre-Statute of Anne copyright enjoyed by the Stationers' Company. This argument, however, does not necessarily support a substantially broader fair use doctrine for *all* religious uses. It is not clear, for example, that the goal of promoting religious diversity is substantially impeded in cases such as *Penguin Books* or *Urantia Foundation* (or, to cite an example involving a more mainstream religion, *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*<sup>338</sup>) by requiring religious users to pay for copyrighted materials that are available on the open market.<sup>339</sup> Indeed, an indiscriminately broad expansion of the fair use defense could have the perverse consequence of undermining religious diversity, to the extent that some religious authors and publishers rely upon the copyright incentive to recoup their costs of production.<sup>340</sup> This analysis suggests that the weight accorded to a religious use should vary, depending on the circumstances, with the type of use at issue in *Worldwide Church of God* being given considerably more significance than other, more typical uses.

A second argument in favor of according some religious uses more weight in the fair use analysis is that doing so will permit courts to avoid having to make fine distinctions between "comment" and "teaching," on the one hand, which are potentially privileged uses under § 107, and

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<sup>338</sup>214 U.S.P.Q. (BNA) 409 (7<sup>th</sup> Cir. 1982) (reversing judgment in favor of defendant, on the ground that parishes' unauthorized copying of copyrighted hymns violated the Copyright Act).

<sup>339</sup>See Note, *supra* note 36, at 1812 n.47 (making this point).

<sup>340</sup>*Cf. supra* text accompanying note 210.

the type of use at issue in cases such as *Worldwide Church of God*, which may not be quite so easy to characterize as “teaching.”<sup>341</sup> In one of the few<sup>342</sup> cases in which the Supreme Court has expressly addressed the issue of how far the state may go in accommodating religion, beyond what the Free Exercise Clause requires, it based its holding largely upon the desire to avoid making similarly fine distinctions. At issue in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*<sup>343</sup> was the application of a statutory exemption from Title VII’s prohibition of discrimination in employment on the basis of religious belief.<sup>344</sup> The exemption permits religious organizations to discriminate on the basis of religious belief, even with respect to employees hired to perform nonreligious jobs.<sup>345</sup> In upholding the exemption, the Court reasoned, first, that the exemption served a legitimate secular purpose of “alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their

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<sup>341</sup>According to the majority opinion, PCG claimed “that *MOA* is central to its religious practice and required reading for all members hoping to be baptized into PCG,” and that it had “distributed approximately thirty thousand copies of its *MOA* in English text, in addition to foreign-language versions.” *Worldwide Church of God*, 227 F.3d at 1113; see also *id.* at 1117 (stating that PCG’s copying “serve[s] religious practice and education”); *id.* at 1124 (Brunetti, J., dissenting) (stating that both parties had used *Mystery of the Ages* “as an educational and evangelical tool”). Reasonable minds may differ whether, in the abstract, the distribution of a work for purposes of evangelization should count as “teaching” or “education,” though arguably the better course is for courts not to attempt to distinguish the two. See *infra* notes 357-58 and accompanying text; cf. *Good News Club*, 121 S. Ct. at 2102 (declining to distinguish between speech and proselytization or worship).

<sup>342</sup>In a sense, every Establishment Clause case raises this issue. More precisely, *Amos* is one of the few cases that expressly frames the issue in terms of how far the state may go in permissively accommodating religious belief—that is, in accommodating it beyond that which is required under the Free Exercise Clause, without violating the Establishment Clause.

<sup>343</sup>483 U.S. 327 (1987).

<sup>344</sup>See 42 U.S.C. § 2000e-1.

<sup>345</sup>See *Amos*, 483 U.S. at 332 & n.9 (noting that the district court so construed the statute); *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991).

missions.”<sup>346</sup> In particular, the Court cited “the significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious,” noting that “[t]he line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.”<sup>347</sup> Second, the Court concluded that by enacting the exemption, the state neither advanced nor inhibited religion, but rather “simply . . . allows churches to advance religion, which is their very purpose.”<sup>348</sup> For that matter, the Court found no problem with the fact that the exemption singles out religious organizations for a special benefit, stating that when the state merely “lift[s] a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”<sup>349</sup> Finally, the Court perceived no excessive entanglement between church and state, noting that “the statute effectuates a more complete

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<sup>346</sup>*See Amos*, 483 U.S. at 335.

<sup>347</sup>*Id.* at 336; *see also id.* (“Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission”).

<sup>348</sup>*Id.* at 337 (emphasis in original). The concurring justices noted the artificiality of this conclusion: a church may advance its religious purpose by firing nonreligious employees only if the state permits it to do so. *See id.* at 340 n.1 (Brennan, J., concurring); *id.* at 347 (O’Connor, J., concurring). Justice Brennan, joined by Justice Marshall, based his concurrence on the premise that the state may exempt the religious activities of religious organizations from the scope of federal antidiscrimination laws; and that, because it can be difficult to distinguish religious from nonreligious activities, a broader exemption for nonprofit activities (as a proxy for religious activities) is similarly permissible. *See id.* at 343-45 (Brennan, J., concurring). Justice O’Connor also faulted the majority’s suggestion that government action allowing religious organizations to advance their religion does not have the effect of advancing religion. *See id.* at 347. She nevertheless concluded that this effect is permissible, as long as the government is perceived only as accommodating, and not endorsing, the religion’s message. *See id.* at 348. Justice O’Connor concluded that the statutory exemption at issue, as applied to the nonprofit activities of a religious organization, did not convey a message of government endorsement. *See id.* at 348-49. Justice Blackmun concurred in the judgment “essentially for the reasons set forth in Justice O’Connor’s opinion.” *See id.* at 346 (Blackmun, J., concurring).

<sup>349</sup>*Id.* at 338.

separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.”<sup>350</sup>

Commentators have pointed out some of the difficulties of squaring *Amos*’s conclusion that the state may single out religious groups as the beneficiaries of legislative exemptions not made available to others, in cases in which the exemption is not required by the Free Exercise Clause, with other case law forbidding the state from conferring special benefits on religious groups.<sup>351</sup> This commentary will be relevant in connection with my discussion of § 110(3).<sup>352</sup> For now, I note only that, as applied to the fair use doctrine, a rule that accords additional weight to religious uses finds some support in *Amos*. At first blush, one might assume that, to paraphrase *Amos*, a broader reading of the fair use doctrine would tend to alleviate state interference with the ability of a religious organization, such as PCG, to define and carry out its religious mission. It is difficult to make too much of this point, however, since the alleviation here would require state interference with the ability of a rival organization, WCG, to define and carry on *its* mission of suppressing heresy. Whoever loses in a case like *Worldwide Church of God* may consider itself a victim of state interference; and if so, this fact might seem to suggest that the better rule would be one of strict neutrality, according no greater or lesser weight to the fact that the use at issue is for a religious purpose. If a broader fair use exemption can be justified, then, it must be on some basis other than the desire to avoid state interference with religious organizations. As discussed above, in my view

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<sup>350</sup>*Id.* at 339.

<sup>351</sup>*See, e.g.,* Scott Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 288-95 (1994); Ira C. Lupu, *Risky Business*, 101 HARV. L. REV. 1303, 1315-20 (1988) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988)); *see also infra* notes 390-99 and accompanying text.

<sup>352</sup>*See infra* notes 389-94 and accompanying text.

this basis is the notion that it undermines religious diversity, as well as the history and purpose of copyright law, to permit copyright to be used as a tool for suppressing heresy.<sup>353</sup> *Amos* nevertheless is instructive insofar as it suggests that the desire to avoid meddling with religion may justify an exemption that obviates the need to distinguish religious from nonreligious activities. In the context of fair use, this principle might support a rule that accords weight to religious uses, on the ground that these uses cannot easily be distinguished from teaching and commentary. (A similar desire to avoid distinguishing between religious and other speech clearly motivates the line of cases culminating in *Good News Club v. Milford Central School*.<sup>354</sup>) Indeed, some of the language in *Amos* would appear to support even more categorical exemptions for specifically religious uses of copyrighted materials<sup>355</sup>—although, as we shall see, reliance upon this language to support the more categorical exception found in Copyright Act § 110(3) may go too far.<sup>356</sup>

In addition, the Establishment Clause case law discussed above in Part II.A suggests a few additional reasons why it should be permissible to accord religious uses some additional weight in the fair use analysis. First, by doing so courts would not be singling religion out for a special benefit (even if some singling out is permitted under *Amos*), but rather would be including religious uses among other types of nonprofit uses (such as teaching, scholarship, and reporting) that are already

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<sup>353</sup>See *supra* notes 1-39, 334-36 and accompanying text.

<sup>354</sup>See *supra* notes 79-84 and accompanying text.

<sup>355</sup>In particular, I am referring here to the language quoted above concerning the exemption's secular purpose of making the law more predictable, and thus removing a potential burden on a religious organization's ability to define and carry out its mission, *see supra* text accompanying note 343; and to the portions of the opinion concerning the exemption's effect of merely permitting religious organizations to carry out that mission, despite the fact that the exemption singles out these organizations for special consideration, *see supra* text accompanying note 344.

<sup>356</sup>See *infra* notes 371-98 and accompanying text.

expressly accorded special treatment under § 107.<sup>357</sup> Here the closest analogy would be the tax benefit cases, which as we have seen rely in part upon the fact that the state accords tax benefits to a broad class of nonprofit organizations, including religious institutions, that serve the public interest.<sup>358</sup> A second point is that a fair use accommodation for religious uses would be noncoercive. Recognizing a right, under some limited circumstances, to copy and distribute copies of religious texts would not entail forcing copyright owners to turn over their tangible copies; if PCG lacks access to copies of *Mystery of the Ages*, from which it can make further copies, the fair use doctrine would confer no practical benefit upon it.<sup>359</sup> As in the tax cases, the indirect nature of the benefit would militate in its favor; the government's role would be passive, in that no one would be forced to contribute to the maintenance of a religious organization.<sup>360</sup> Third, for courts to bestow special favors upon uses for secular teaching and commentary, but not for religious teaching and

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<sup>357</sup>See 17 U.S.C. § 107.

<sup>358</sup>See *supra* text accompanying note 62.

<sup>359</sup>People who think of intellectual property rights as analogous to real and personal property rights may object to this line of reasoning; from this perspective, conferring upon PCG a right to copy is a taking of WCG's "property." Because intellectual property rights are intangible and nonrivalrous, however—the latter simply means that many people can use these rights simultaneously, without depleting them--conferring upon PCG a right to make further copies of a copy it already owns would not involve any tangible or physical coercion directed against WCG. Contrast this situation with a rule conferring upon PCG a right to WCG's personal or real property.

This distinction should serve as well to eliminate any possibility that a finding of fair use violates the religious *plaintiff's* Free Exercise rights. A finding of fair use may permit someone to copy a work the copyright to which is owned by a religious plaintiff, but it is difficult to imagine a case in which this would prevent the religious plaintiff from practicing her religion. Maybe some hypothetical religion obligates its members to prevent others from making unauthorized photocopies of the religion's scriptures, but for a court to take this into account in assessing fair use would effectively turn the court into an enforcer of the plaintiff's religious doctrine. *Cf. Lerma*, 908 F. Supp. at 1355-56 (rejecting a similar argument raised by the Church of Scientology); *F.A.C.T.Net*, 901 F. Supp. at 1527 (same).

<sup>360</sup>Moreover, when both plaintiff and defendant are religious organizations, it is difficult to see how, on net, a broader application of the fair use doctrine promotes religion.

commentary, might run afoul of the nondiscrimination principle announced in *Good News Club*.<sup>361</sup> As noted above, it's not clear whether the use at issue in *Worldwide Church of God* can be easily characterized entirely as teaching or commentary, but the difficulty of distinguishing teaching or commentary from other uses such as proselytization weighs in favor of a broad definition.<sup>362</sup>

Finally, it should be clear that according somewhat more weight to religious uses of copyrighted materials does not necessarily mean that religiously-motivated defendants will always win. As suggested above, the argument that the goal of promoting religious diversity requires a broad exemption from the scope of copyright liability, even when there is a functioning market for the sale and licensing of the work at issue, is weak.<sup>363</sup> It is therefore difficult to argue that the defendant in a case such as *Penguin Books* or *Urantia Foundation* ought to win, assuming that the works at issue in those cases are protected by a valid copyright, even if the religious nature of the use is accorded some additional weight. Nor is it entirely clear that the defendant should have won even in *Worldwide Church of God*. According to the majority, PCG never sought to negotiate with WCG for permission to copy *Mystery of the Ages*.<sup>364</sup> Although negotiations may have been pointless, given the peculiar facts of the case, as a general matter the fair use defense should be more difficult to sustain in the absence of evidence that the copyright owner actually refused to license the work; otherwise, it may be speculative to assume that the market has failed.<sup>365</sup> Alternatively, the court might have considered the possibility of remanding the case with directions to enter judgment

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<sup>361</sup>See *supra* notes 79-84 and accompanying text.

<sup>362</sup>See *supra* text accompanying note 350.

<sup>363</sup>See *supra* notes 334-35 and accompanying text.

<sup>364</sup>See 227 F.3d at 1121; *but see* Note, *supra* note 36, at 1811 n.39 (disputing this finding).

<sup>365</sup>See *Merges*, *supra* note 263, at 307; *Winslow*, *supra* note 263, at 822.

for WCG, but with an award of damages only and no injunction. Although injunctive relief is the usual remedy in successful copyright infringement actions,<sup>366</sup> there is substantial authority in support of the proposition that injunctive relief is discretionary, particularly in cases in which an injunction might impinge upon other important interests such as freedom of speech.<sup>367</sup> Nevertheless, in some cases a rule according additional weight to religious uses might make a difference in the fair use analysis; from the standpoint of religious diversity, this is a desirable outcome.

### **C. The Religious Freedom Restoration Act**

If neither fair use nor the Free Exercise Clause excuse a particular reproduction, adaptation, or distribution for a religious purpose, the defendant's last defense would be the RFRA. The RFRA purports to require the federal government to justify the application of any federal law that substantially burdens religious practice by showing that the law serves a compelling state interest and is the least restrictive means available for serving that interest.<sup>368</sup> Thus far, courts have rejected this defense in two of the religion cases. In *Worldwide Church of God*, the court cited PCG's failure to negotiate with WCG for the right to copy *Mystery of the Ages*, and concluded that "[h]aving to pay for permission, and presumably to pay for the right to use an owner's copyrighted work may be an inconvenience, and perhaps costly, but it cannot be assumed to be as a matter of law a substantial burden on the exercise of religion."<sup>369</sup> In *Urantia Foundation*, the district court rejected the defense

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<sup>366</sup>See Blair & Cotter, *supra* note 309, at 1613-16.

<sup>367</sup>See *New York Times Co. v. Tasini*, 121 S. Ct. 2381, 2393 (2001); *Campbell*, 510 U.S. at 569 n.10.

<sup>368</sup>See 42 U.S.C. § 2000bb-1; *see also supra* text accompanying note 236 (noting that the RFRA may still be constitutional as applied to the federal government).

<sup>369</sup>See *Worldwide Church of God*, 227 F.3d at 1121.

on the ground that enforcement of the Copyright Act is a compelling governmental interest.<sup>370</sup>

Both cases are probably correct in rejecting the defense, assuming that the defendant's conduct is not exempt under the fair use doctrine. The court's statement in *Worldwide Church of God* that the burden of negotiating and paying for the use of copyrighted works does not substantially impede religious practice is generally consistent with the fair use analysis above (even if the court was wrong to apply that principle to the case before it), as long as a functioning market for the work exists.<sup>371</sup> When the owner refuses to negotiate, on the other hand, in order to impede the spread of heresy or criticism, the argument in favor of fair use is strong, and a court should reject that defense only on the basis of compelling counterevidence.<sup>372</sup> In such a case, however, it is hard to imagine much of a difference between the fair use analysis and the analysis that would apply under the RFRA. Finally, as others have noted, courts applying the RFRA in general have tended to find state interests sufficiently "compelling" to overcome burdens imposed upon religious practice.<sup>373</sup> In the present context, then, the state's interest in enforcing copyright law in the face

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<sup>370</sup>See 895 F. Supp. at 1336-37.

<sup>371</sup>See *supra* notes 334-35 and accompanying text. It may impede religious practice, in the same way that having to pay the electric bill impedes religious practice by leaving the payor with less money to devote to religious purposes; but surely a government-owned utility such as the TVA is not required to exempt churches from paying for electricity. Cf. *United States v. Any and All Radio Station Equip.*, 93 F. Supp. 2d 414, 419 (S.D.N.Y. 2000) (holding that FCC's prohibition of unlicensed broadcasting did not substantially burden claimants' religious practice, which required proselytization, despite financial hardship); *but see United States v. Any and All Radio Station Transmission Equip.*, No. Civ. A. 99-2260, 1999 WL 718646, at \* 2-4 (E.D. Pa. Aug. 31, 1999) (holding that FCC's ex parte seizure of broadcasting equipment pursuant to government moratorium on class D licenses substantially burdened church's ability to proselytize; that seizure was justified, however, by a compelling governmental interest; but that seizure failed the "least restrictive means" test).

<sup>372</sup>For example, that the defendant took much more than was necessary for the purpose of critique.

<sup>373</sup>See, e.g., *United States v. Hugs*, 109 F.3d 1375, 1378-79 (10<sup>th</sup> Cir. 1997) (holding that enforcement of Bald and Golden Eagle Protection Act served a compelling state interest,

of a *failed* fair use defense would almost certainly be considered substantial—particularly if, as suggested above, the fair use defense itself takes into account the users’ need for access to a work for purposes of religious practice.<sup>374</sup> In light of these factors, the fair use defense, properly construed, should obviate the need to resort to the RFRA.

#### **D. Copyright Act Section 110(3)**

A final problem centers upon § 110(3) of the Copyright Act, which exempts from liability “the performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.”<sup>375</sup> The legislative history sheds little light upon Congress’s reasons for enacting

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notwithstanding alleged burden upon Native American religious practice); *United States v. Gonzalez*, 957 F. Supp. 1225, 1228 (D.N.M. 1997) (similar); *United States v. Lundquist*, 932 F. Supp. 1237, 1241-42 (D. Or. 1996) (similar); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (holding that enforcement of Freedom of Access to Clinics Entrance Act served a compelling state interest, notwithstanding alleged burden upon abortion protesters’ exercise of their religion); *In re Hodge*, 220 Bankr. 386, 391-92 (D. Idaho 1998) (holding that enforcement of fraudulent transfer provision of Bankruptcy Act served a compelling state interest, notwithstanding alleged burden upon debtor’s ability to tithe); *In re Bloch*, 207 Bankr. 944, 951 (D. Colo. 1997) (similar); *In re Newman*, 203 Bankr. 468, 477 (D. Kan. 1996) (similar); Scott Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *IND. L.J.* 219, 249 & nn.82, 83 (2000); *but see In re Young*, 141 F.3d 854, 856-57 (8<sup>th</sup> Cir. 1998) (holding that enforcement of fraudulent transfer law does not serve a sufficiently compelling interest to prevent tithing).

<sup>374</sup>*See supra* notes 326-63 and accompanying text.

<sup>375</sup>17 U.S.C. § 110(3). A few other provisions of the Copyright Act confer benefits upon religious organizations, though in a less exclusive way. *See id.* § 110(4)(B) (permitting the unauthorized public performance of nondramatic literary and musical works subject to certain conditions, if the proceeds “are used exclusively for educational, religious, or charitable purposes”); § 112(c) (permitting governmental bodies or other nonprofit organizations to make certain ephemeral copies of transmission programs “embodying the performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work”); *id.* § 602(a)(3) (permitting the importation of certain works “by or for an organization operated for scholarly, educational, or religious purposes”).

this provision,<sup>376</sup> and it has never been cited in any reported decision.<sup>377</sup> The issue nevertheless arises whether the permissive accommodation embodied in § 110(3) could survive an Establishment Clause challenge, in the event that an author were to raise this issue in litigation. Some of the reasons cited above in support of a somewhat broader application of the fair use doctrine to religious works would no doubt work in favor of § 110(3) as well: the state's role is passive, there is no

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<sup>376</sup>The House Report states that the provision is intended to cover, among other things, the performance of "sacred music that might be regarded as 'dramatic' in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like," but not "secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme." H.R. REP. NO. 94-1476, at 84 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5698. It also clarifies that exempted performances and displays must occur in the course of religious services and at a place of religious assembly, "thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes" as well as religious broadcasts. *See id.* at 84-85, 1976 U.S.C.C.A.N. at 5698-99.

As Silversmith and Guggenheim report, similar exemptions exist in many other countries. *See Silversmith & Guggenheim, supra* note 36, at 485 n.140 (citing *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLAJ.L. & ARTS 513, 527 (1986)).

<sup>377</sup>The 1909 Copyright Act exempted from liability all nonprofit performances of musical compositions and nonliterary dramatic works. *See* 1909 Copyright Act, ch. 320, §§ 1(c), (e), 35 Stat. 1075, \_\_\_\_ (repealed 1976). Thus, under the 1909 Act, the nonprofit public performance of a musical composition during the course of religious services was exempt from liability, but the exemption was not limited performances occurring during religious services. *See F.E.L. Publications*, 214 U.S.P.Q. (BNA) at 411. Section 104 of the 1909 Act also included a provision stating that:

Nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Copyright Act of 1909, ch. 320, § 104, 35 Stat. 1075, \_\_\_\_ (repealed 1976). According to the few courts that ever construed § 104, the provision could apply in the case of a public performance for which an admission fee was charged, as long as the proceeds went to a charitable or educational purpose. *See F.E.L. Publications*, 214 U.S.P.Q. (BNA) at 413 n.8; *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229, 230 (2d Cir. 1915), *rev'd on other grounds*, 242 U.S. 591 (1917); *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F. Supp. 376, 380-82 (D. Conn. 1972).

coercion, and the benefit to religious organizations is indirect.<sup>378</sup> On the other hand, § 110(3) exempts religious uses only, and this limitation looks suspect under some of the cases cited in Part II.A above, including two of the tax benefit cases, *Texas Monthly, Inc. v. Bullock*<sup>379</sup> and *Walz v. Tax Commission*.<sup>380</sup> There are two possible ways out of this dilemma, but neither one is free of problems.

First, one might argue that § 110(3) is only one of a number of exemptions from copyright liability, and in that regard is like the tax benefit schemes that have passed muster under the Establishment Clause by bestowing benefits not only upon religious institutions but also upon a host of other nonprofit organizations.<sup>381</sup> Section 110 contains nine other exemptions for a variety of other activities, including some not-for-profit activities.<sup>382</sup> Several other provisions of the Copyright Act,

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<sup>378</sup>*See supra* notes 355-56 and accompanying text.

<sup>379</sup>489 U.S. 1 (1989).

<sup>380</sup>397 U.S. 664 (1970); *see also* Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) (invalidating New York legislature's establishment of a school district specifically for a community of Hasidic Jews).

<sup>381</sup>The 1909 Copyright Act provisions noted above were applicable to nonprofit ventures generally, and not to religious organizations only. *See supra* note 373.

<sup>382</sup>*See* 17 U.S.C. § 110(1) (exempting certain performances and displays made by instructors or pupils in the course of face-to-face teaching activities of nonprofit educational institutions); *id.* § 110(2) (exempting certain performances and displays of nondramatic literary works and musical compositions transmitted as “regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution”); *id.* § 110(4) (exempting certain other nonprofit public performances of nondramatic literary works and musical compositions, as long as no admission fee is charged or any proceeds are “used exclusively for educational, religious, or charitable purposes”); *id.* § 110(5) (the so-called “homestyle” exemption, which permits public establishments to tune into television and radio broadcasts subject to certain conditions); *id.* § 110(6) (exempting the performance of certain works at agricultural fairs); *id.* § 110(7) (exempting the public performance of nondramatic musical compositions by vendors of recordings or recording devices, in order to promote sales); *id.* §§ 110(8), (9) (exempting the public performance of certain works in transmissions intended for the use of handicapped persons); *id.* § 110(10) (exempting the public performance of certain works for nonprofit veterans' and fraternal organizations).

beginning with fair use in § 107<sup>383</sup> and concluding with § 122 (which deals with satellite transmissions<sup>384</sup>), also exempt, or provide for the compulsory licensing of, otherwise infringing activities.<sup>385</sup> Perhaps the existence of so many other exemptions is sufficient to rescue § 110(3) in the event of an Establishment Clause challenge.

This argument might just work, but the issue is surely a close one. The fact remains that § 110(3) applies *only* to performances of literary and musical works occurring in the course of religious services.<sup>386</sup> All of the other exemptions noted above have their own, often more complicated, rules of application; if public performances occurring during the course of religious services had to satisfy one of these other exemptions, it is not clear that all of them would pass muster. Section 110(4), for example, exempts from liability the nonprofit public performance of nondramatic literary and musical works, but only if (1) there is no “payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers,”<sup>387</sup> and (2) either (a) there is no admission charge or (b) the proceeds are used exclusively for educational,

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<sup>383</sup>*See id.* § 107.

<sup>384</sup>*See id.* § 122.

<sup>385</sup>*See id.* § 108 (permitting certain reproductions by libraries and archives); *id.* § 109 (recognizing the first-sale doctrine); *id.* § 111 (permitting certain secondary transmissions); *id.* § 112 (permitting certain ephemeral recordings); *id.* § 113 (imposing certain limitations on exclusive rights in pictorial, graphic, and sculptural works); *id.* § 114 (imposing certain limitations on exclusive rights in sound recordings); *id.* § 115 (providing for compulsory licensing for making and distributing phonorecords embodying nondramatic musical compositions); *id.* § 116 (similar provision for jukeboxes); *id.* § 117 (imposing certain limitations on exclusive rights in computer programs); *id.* § 118 (providing for compulsory licensing for the benefit of public broadcasting entities); *id.* § 119 (imposing limitations respecting satellite transmissions); *id.* § 120 (imposing limitations on exclusive rights in architectural works); *id.* § 121 (providing further exemptions for the benefit of the disabled); *id.* § 602 (a)(1)-(3) (imposing limitations on exclusive right of importation into the United States).

<sup>386</sup>*See id.* § 110(3).

<sup>387</sup>*Id.* § 110(4).

religious, or charitable purposes and the copyright owner has not objected in advance.<sup>388</sup> This provision might not cover hymn-singing at the local Baptist church on Sunday morning, if the music director is paid by the performance, or if passing the collection plate counts as an indirect admission charge and the copyright owner objects to the performance.<sup>389</sup> Given the differences between § 110(3) and the other exemptions, to uphold the former on the ground that it is just one among many may seem a little like defending a tax benefit that accrues to religious organizations only, and not to other nonprofit organizations, on the ground that it is just one tax benefit out of thousands that are available for other specified activities under the Internal Revenue Code. This reasoning seems hard to square with *Walz* and *Texas Monthly*, both of which prefer that the specific benefit at issue be available to a variety of organizations<sup>390</sup> (although *Walz* also relies upon history,<sup>391</sup> and *Texas Monthly* has no majority opinion<sup>392</sup>).

A second possible way to salvage § 110(3) is to liken it to the statutory exemption at issue in *Amos*. As noted above, *Amos* holds that it is permissible to single out religious groups for special accommodations in some cases,<sup>393</sup> though clearly there must be some limits to this principle or it collides head-on with long-standing Establishment Clause case law. The case law and commentary suggests that an *Amos*-like accommodation is more likely to withstand scrutiny when the following

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<sup>388</sup>*See id.*

<sup>389</sup>For a discussion of the meaning of some of the terms found in § 110(4), *see* 2 NIMMER & NIMMER, *supra* note 118, § 8.15[E]. The example in the text above is mine; I make no representation whether the authors of the treatise would agree with my analysis or not.

<sup>390</sup>*See supra* text accompanying note 62.

<sup>391</sup>*See Walz*, 397 U.S. at 676-80.

<sup>392</sup>*See Texas Monthly*, 489 U.S. at 1 (plurality opinion).

<sup>393</sup>*See supra* notes 339-46 and accompanying text.

factors are present: (1) the exemption covers specifically religious conduct, or else a close proxy thereof<sup>394</sup>; (2) in the absence of the exemption, the religious recipient will suffer an injury not shared by many others<sup>395</sup>; (3) the social cost of implementing the exemption, including the burden upon non-beneficiaries, will not be too great<sup>396</sup>; and (4) the exemption prevents courts from meddling in church affairs and does not confer secular power upon religious organizations.<sup>397</sup> Also relevant is whether the exemption appears to convey a message of government endorsement of religion,<sup>398</sup> although the other factors' presence by itself may tend to disprove endorsement.

With respect to § 110(3), the use at issue clearly covers specifically religious conduct, but the other factors weigh against the accommodation or are, at best, ambiguous. First, in the absence of the exemption, it is not clear that religious groups will suffer significant or unique injury,

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<sup>394</sup>See *Amos*, 483 U.S. at 343-46 (Brennan, J., concurring); *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding that a program releasing students from class for outside religious instruction did not violate the Establishment Clause).

<sup>395</sup>See *Texas Monthly*, 489 U.S. at 15 (plurality opinion) (stating that Texas law violated the Establishment Clause because, *inter alia*, it “cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion”); *id.* at 18 n.8; see also *Grumet*, 512 U.S. at 724 (Kennedy, J., concurring); Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 460 (1995); McConnell, *Update, supra* note 44, at 700; Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 78 n.5 (2000); cf. Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1025 (2001) (arguing that accommodations are constitutional as long as legislatures are willing to extend them to others similarly-situated persons); Idleman, *supra* note 347, at 290 (same).

<sup>396</sup>See *Texas Monthly*, 489 U.S. at 15 (plurality opinion) (stating that Texas law “burdens nonbeneficiaries markedly”); *id.* at 18 n.8; see also *Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); Berg, *supra* note 391, at 461; Idleman, *supra* note 347, at 289; McConnell, *Update, supra* note 44, at 702.

<sup>397</sup>See *Grumet*, 512 U.S. at 696; *Amos*, 483 U.S. at 339; *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126-27 (1982); McConnell, *Update, supra* note 44, at 711.

<sup>398</sup>See *Amos*, 483 U.S. at 348 (O’Connor, J., concurring); *Thornton*, 472 U.S. at 711 (O’Connor, J., concurring).

inasmuch as religious groups are only one of many organizations that make use of a variety of copyrighted works.<sup>399</sup> As for the social cost of implementing the exemption, in one sense this appears to be nil, since there are no reported decisions construing § 110(3). On the other hand, the exemption burdens those authors and publishers who would otherwise agree to license their works for a fee; and no one knows the social cost of the provision, if any, in terms of reducing the incentive to create and publish the type of works that tend to be performed in religious assemblies.

The fourth factor, the prevention of entanglement, may weigh in favor of the exemption, although this too is uncertain. Certainly a contrary rule could result in more litigation in which religious organizations assert a fair use right to perform religious works without authorization, and fair use is both messy and unpredictable; for this reason alone, it might be wise to enact a broad exemption, as *Amos* suggests.<sup>400</sup> On the other hand, if the fair use analysis presented in Part III.B above is correct, religious users might not prevail very often on fair use in the present context, even if religious use is given some additional weight in the calculus.<sup>401</sup> Serious fair use issues might arise, however, if some authors or publishers would refuse permission for the public performance of their works by religious groups with whom they disagree. Given the small stakes that would likely be

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<sup>399</sup>Indeed, they might not suffer much injury at all. For one thing, they already have to pay for the reproduction and distribution of copyrighted works, absent a fair use defense. *See F.E.L. Publications*, 214 U.S.P.Q. (BNA) at 411. And it is unclear just how much copyright owners would attempt to extract from religious organizations if § 110(3) went away; presumably most of them are themselves religiously motivated, and therefore might be willing to license the public performance of their works for a nominal fee. Moreover, some religious groups already own the copyright to the materials they perform in their services. *See, e.g.,* HYMNAL 1982 ACCORDING TO THE USE OF THE EPISCOPAL CHURCH (1982) (copyrighted by the Episcopal Church). And in some though probably not all cases, another exemption might cover the performance. *See supra* note 383 and accompanying text.

<sup>400</sup>*See Amos*, 483 U.S. at 336.

<sup>401</sup>*See supra* notes 359-61 and accompanying text.

at issue, it is hard to imagine too many of these cases being litigated--in which case, however, the copyright owner would have succeeded in using copyright as a tool to suppress heresy--and any cases that did come to trial would involve a potentially messy fair use defense. Perhaps § 110(3) can be defended on the ground that it avoids these problems, but the exemption is so broad as to call into question whether it can be justified by such hypothetical cases. Finally, by creating a more favorable exemption for religious use than for other purposes, the federal government does appear to be promoting or endorsing religious performances to the exclusion of other uses.<sup>402</sup>

At bottom, the issue is one of policy. A commitment to religious diversity suggests that the state should not assist in the use of the copyright laws as a tool for the suppression of religious practice, but it is doubtful whether the burden attendant upon religious organizations' *general* compliance with the copyright laws would be so great, in the absence of § 110(3), as to impede this goal. A broader exemption for nonprofit uses, such as the one found in the 1909 Copyright Act, would be much easier to defend than a specific exemption for religious performances.

#### **IV. Conclusion**

What goes around comes around. Although both copyright law and freedom of religion have made great progress since the days of the Stationers' Company, when the Crown conferred the exclusive right to copy expressly for the purpose of promoting censorship, cases still arise in which copyright can serve to silence dissenting views. As William James observed, however, "[t]he fact of diverse judgments about religious phenomena is . . . entirely unescapable, whatever may be one's

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<sup>402</sup>*Cf.* Berg, *supra* note 391, at 460 (suggesting that inquiry should "distinguish between government actions that remove a significant obstacle from religious practice, and those that promote or establish religious practices by creating an affirmative incentive to engage in them"). Arguably the exemption here creates an incentive to perform literary and musical compositions during the course of religious services, although religious practice alone creates a similar incentive and probably would continue to create it, even if religious users were required to pay.

own desire to attain the irreversible.”<sup>403</sup> I have argued herein that a healthy respect for religious diversity, coupled with a commitment to take seriously “the reality of the unseen,”<sup>404</sup> would affect copyright law in several ways. Taking religion seriously counsels in favor of taking copyright plaintiffs at their word, when they claim that God or another supernatural being has authored the work in question, even though this means that the human intermediary must forfeit any claim to copyright, at least in the expressive portion of the work. At the same time, respect for religious diversity suggests that courts should be more sensitive, in applying the merger and fair use doctrines, to the religious adherent’s need to access certain works for the purpose of religious practice.

Even so, not all of the cases have been wrongly decided, though their analysis often has been dubious; and in the one principal instance in which Congress has explicitly sought to accommodate religious users of copyrighted works, it probably has gone too far, by not extending as generous a privilege to other nonprofit users. It is nevertheless not surprising that, in negotiating the uncertain territory between Free Exercise and Establishment Clauses, and in applying the minutiae of copyright law, courts and legislators often appear to rely more upon instinct or sentiment than upon reasoned analysis. In this regard, judges and legislators are perhaps no worse (or better) than religious believers. James again:

I believe . . . that the logical reason of man operates in this field of divinity exactly as it has always operated in love, or in patriotism, or in politics, or in any other of the wide affairs of life, in which our passions or our mystical intuitions fix our beliefs beforehand. It finds arguments for our conviction, for indeed it *has* to find them. It amplifies and defines our faith, and dignifies it and lends it words and plausibility. It hardly ever engenders it; it cannot now secure it.<sup>405</sup>

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<sup>403</sup>JAMES, *supra* note 86, at 260.

<sup>404</sup>*Id.* at 58.

<sup>405</sup>*Id.* at 333. Or, as someone else once said, “We’re all legal realists now.” Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, *LEGAL*

Be that as it may, in the interest of preserving the ability to follow our “mystical intuitions,” wherever they may lead, the time has come to reject the use of copyright law to stifle—or unduly privilege—religious conduct.