

IN SEARCH OF (MAINTAINING) THE TRUTH: THE USE OF COPYRIGHT LAW BY RELIGIOUS ORGANIZATIONS[†]

*David A. Simon**

Cite as: *David A. Simon, In Search of (Maintaining) the Truth:
The Use of Copyright Law by Religious Organizations*,
16 MICH. TELECOMM. TECH. L. REV. 355 (2010),
available at <http://www.mttl.org/volsixteen/simon.pdf>

INTRODUCTION	356
I. RELIGIONS' REASONS FOR PURSUING COPYRIGHT PROTECTION	360
A. <i>Economic Motivations, Secrecy, and Identity</i>	360
B. <i>Censorship and Doctrinal Purity</i>	366
1. <i>Censorship</i>	367
2. <i>Doctrinal Purity</i>	372
II. THREE THEORIES OF COPYRIGHT AND RELIGIOUS MOTIVATIONS FOR PROTECTION	376
A. <i>Economic Theory</i>	377
B. <i>Property Rights Theory</i>	381
1. <i>Lockean View (Natural Law)</i>	382
2. <i>Historical View (Positive Law)</i>	390
C. <i>Cultural Theory</i>	397
III. DOCTRINAL OBSTACLES TO RELIGIOUSLY-MOTIVATED USES OF COPYRIGHT LAW	401
A. <i>Originality</i>	402
B. <i>Copyrightability of Facts and Compilations</i>	403
1. <i>Finding the Work Qualifies as a "Literary Work"</i>	404
2. <i>Copyrightable Contributions or Selection and Arrangement</i>	405
3. <i>Factual Estoppel</i>	406
4. <i>The Implications for Religious Organizations</i>	407
B. <i>The Merger Doctrine</i>	409
C. <i>Substantial Similarity</i>	412
D. <i>Fair Use</i>	415
CONCLUSION.....	416

[†] © 2010 David A. Simon, all rights reserved.

^{*} Judicial Law Clerk to the Honorable Martin C. Ashman, United States District Court for the Northern District of Illinois. I am grateful for the thoughtful and insightful comments given by Thomas Cotter, Mickie Piatt, and Rebecca Tushnet. This Article also benefited from others' comments and suggestions at the 2009 Intellectual Property Scholars Conference. All of the views contained in this Article are the author's and should not be attributed to any other individual, entity, or institution.

INTRODUCTION

One night, you, a lonely psychology professor at an Ivy League university, are working late.¹ From somewhere in the darkness, a voice saunters into your head.² The voice then informs you that it is Jesus.³ Sufficiently bewildered, you listen further as Jesus asks you to act as His scribe.⁴ Not one to thumb your nose at Jesus, you oblige.⁵

Soon you have amassed hundreds of pages, which, after editing, comprise the religious text itself, a workbook, and a manual.⁶ After some initial reluctance, you allow these materials to be copied and distributed with little to no restriction.⁷ But quickly, and much to your dismay, numerous unauthorized versions and compilations appear.⁸ This contravenes Jesus' command to reveal the works only as a complete set.⁹ To prevent any further distortions, Jesus instructs you to protect the works more closely by seeking copyright protection.¹⁰ Once again, you follow his command to keep the doctrine pure.¹¹

Or perhaps you are not a psychology professor through whom a divine being spoke, but merely an ordinary disciple of a religion. You practice your religion, as do nearly all its adherents, by using the writings of your religion's founder, which are viewed as sacred and precise.¹²

1. This is how one might imagine the author of the religious works in *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *2 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004). The facts described in the next two paragraphs are drawn from this case.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at *3.

7. *Id.* at *3-4.

8. *Id.* at *4, *6 ("One result of our lax policy was the appearance of a number of abridgements and poetic compilations of passages excerpted from the Course. In fact, these directly contravened Jesus' very specific instructions to Helen that the three books should never be separated from each other, nor should any of the material appear out of context in abridged form. The Course's curriculum is by its very nature an integrated and self-contained one. Therefore, any attempts to abridge or 'short cut' the process of teaching and learning forgiveness could only prove detrimental, and would alter the very essence of the Course both as a theoretical thought system and a process of spiritual development.").

9. *Id.*

10. *Id.* ("It was not until the early 1980s that we began to appreciate the wisdom behind Jesus' insistence on obtaining a copyright. At that time a number of unauthorized translations of 'A Course in Miracles' were beginning to appear worldwide. Many of these were, to say the very least, inaccurate, leading to unacceptable distortions of the Course's central teachings.").

11. *Id.* at *4, *7.

12. The facts in this and the following paragraph are adopted from numerous cases involving the religion of Scientology, including *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 154 (2d Cir. 1990).

Indeed, the religion claims that catastrophic harm will result from unsupervised exposure to these texts.¹³ For that reason, they are kept secret.¹⁴

One member, however, has defected and begun to criticize the religion, its founder, and its theology.¹⁵ These criticisms often take the form of written expressions, which use parts of the founder's written works.¹⁶ Viewing this act as a transgression of and an affront to your religion, you galvanize your religious organization, which holds the copyrights to the founder's writings.¹⁷ The organization decides the best way to censor the former member's heresy is to sue him for copyright infringement.¹⁸

* * * *

These scenarios represent the two primary reasons that religious organizations use copyright law: to preserve doctrinal purity and to censor others. This Article first explores these two objectives of religious organizations, detailing how such motivations take shape in the courts. Given these religious motivations for pursuing and enforcing copyright protection, this Article asks the following normative question: should religious organizations use copyright law to achieve these aims?¹⁹

13. This is one of the reasons the Church of Scientology asserted infringement in *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077–78 (9th Cir. 1986), and *Religious Tech. Ctr. v. Lerma* (Lerma II), No. 95-1107, 1996 WL 633131, at *1 (E.D. Va. Oct. 4, 1996).

14. *Lerma II*, 1996 WL 633131, at *1.

15. *Carol Publ'g*, 904 F.2d at 154.

16. *Id.*

17. *Id.* at 154–55.

18. *Id.*

19. Perhaps the conflict described in this Article results from copyright being “liberal in the classic sense.” E-mail from Rebecca Tushnet, Professor of Law, Georgetown University Law Center (May 26, 2009, 18:30 CST) (on file with author). Nomi Maya Stolzenberg explored the legal conflict between liberalism and fundamentalism in her article, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993). Stolzenberg's article focuses on the problems law has with recognizing fundamentalist claims as they relate to education. *Id.* at 613–632. In particular, she noted how the fundamentalist “challenge to ‘secular humanism’ and ‘liberalism’ represents an attack on the entire worldview of modernity—a worldview that emphasizes the ascendancy of reason over social conditioning and ‘superstition.’” *Id.* at 614. Fundamentalists argue that the objective nature of liberalism “‘brackets the truth question,’ and deals instead with personal, subjective beliefs.” *Id.* at 632. In essence, Stolzenberg argues that the current jurisprudential outlook “confirms the implicit reliance of constitutional doctrine on the subjectivist model of religion.” *Id.*

Copyright law does not seem to conflict with fundamentalists or religions in the way Stolzenberg describes. Of course, the views of fundamentalists, such as “biblical errancy”—“a radical emphasis on the divine authorship of all of the letters of the Scripture[,] including its authorized translations”—diverge from the goals of copyright law. *Id.* at 615. Also, copyright law does more than merely “bracket the question of truth”—it rejects any claims of “truth or falsity,” though it does recognize the difference between factual and fictional works. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (discussing the idea/expression dichotomy and noting that facts can be used at will because they are not copyrightable); *id.* (discussing

To date, no scholar has attempted to answer that precise question. A few scholars have done an excellent job exploring the intersection between religion and copyright. Thomas Cotter, for example, has published two probing and insightful pieces that analyzed current copyright law vis-à-vis religion and proposed amending or creating legal concepts to accommodate religion.²⁰ Thomas Berg has explored the problems that would arise if copyright law granted an exemption to religious works.²¹ Meanwhile, one comment has analyzed the current treatment of religious claims in copyright.²² What all of these pieces have in common is a focus on “religious uses” of copyright. While all of these authors, some more than others, touch on religious groups’ motivations for using copyright law,²³ none of them examine this issue in great depth.

The goal of this Article is to do what others have not: determine whether religious organizations should use copyright law to advance their goals of censorship and doctrinal purity. Answering this question entails a two-step analysis. First, the religious motivations must be compared with the underlying theories of, or justifications for, copyright law. Whether those principles align or conflict with religious motivations will

“the ‘fair use’ defense,” and stating that it “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (discussing the idea/expression dichotomy and noting that, as to a “factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will”); *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (“In general, fair use is more likely to be found in factual works than in fictional works.”). Indeed, copyright law is content neutral—it does not, theoretically speaking, assert or assess the value of particular beliefs insofar as they can be valued independent of their “originality.”

Even if religious organizations view content neutrality as damaging, I doubt that many religions view copyright law as completely adverse to their interests or antithetical to their religions. As this Article shows, the economic motivation for copyright law aligns with some religious motivations for creating or using religious works. *See infra* Part III.A.1. That being said, there may be some merit to the view that conflicts do emanate from the ideologically neutral nature of copyright law. That view must be tempered by the fact that religious organizations are using, or attempting to use, copyright law to protect their religious texts.

20. Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 *CARDOZO ARTS & ENT. L.J.* 43 (2004); Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 *CAL. L. REV.* 323 (2003).

21. *See generally* Thomas Berg, *Copyright for Religious Reasons: A Comment on Principles of Copyright and Religious Freedom*, 21 *CARDOZO ARTS & ENT. L.J.* 287 (2003) (analyzing religious claims in copyright and discussing a possible religious exemption for copyright law).

22. Chris Heinss, Comment, *Beyond the Smoke and Mirrors: Defeating the Urge to Nullify or Glorify Religious Copyright Law*, 33 *CUMB. L. REV.* 677 (2003) (exploring the intersection between religious rights and copyright law, reviewing the cases that have touched on this issue, and arguing that there should be no separate “religious” standard for copyright law using the mantra, “copyright law is copyright law, and infringement is infringement”).

23. *See, e.g.*, Walter A. Effross, *Owning Enlightenment: Proprietary in the “New Age” Marketplace*, 51 *BUFF. L. REV.* 483 (2003).

inform our normative answer. Regardless of the answer to the aforementioned inquiry, the second step analyzes whether substantive copyright law doctrine facilitates or impedes the achievement of the ends advanced by these religious motivations.

As a result of this analysis, this Article finds that these religious motivations for pursuing and enforcing copyright protection are antithetical to its foundational principles. Not only do these religious motivations run counter to the basic theory of copyright law, they directly conflict with specific copyright doctrines that exist today. Therefore, this Article argues that copyright law is an inadequate tool for “protecting” religion or members of a religion. Although inadequate, copyright law can aid religious goals in some instances. Those instances, however, are drowned out by the foundational and doctrinal noise that religions must mute to protect their religious works. This analysis shows that copyright is not designed to address many concerns of religious organizations. Therefore, it should not be used to advance the religious motivations of censorship and doctrinal purity.

Part I explains the reasons that religious organizations might employ copyright law. To accomplish this task, this Part reviews literature and case law. From those two sources, this Article deduces that among these motivations, two are the most prominent: (1) censoring spiritual dissension, denigration, or criticism and (2) maintaining doctrinal purity.

Part II of this Article explores the interaction between religious motivations for seeking copyright protection and the underlying principles of copyright law. To achieve this objective, this Part explains three theories of copyright: economic theory, property rights theory, and cultural theory. After explaining each theory, this Part examines whether the religious motivations identified in Part I harmonize or clash with the principles underlying each theory. This discussion focuses heavily on the property rights theory of copyright because many religious organizations frame their motivations in natural law terms.

Part III recounts the doctrinal obstacles that copyright presents for religious organizations and the achievement of their goals. To do this, this Part explains several copyright doctrines and explicates how they prevent religious organizations from achieving their goals. Among the doctrines examined are originality, the merger doctrine, and fair use. Part III concludes that copyright law doctrines do not facilitate the achievement of censorship and doctrinal purity.

Based on the analysis in Parts II and III, the Article concludes that religious organizations’ attempts to censor and preserve doctrinal purity are wrongheaded. Therefore, religious organizations should not use copyright law to achieve these aims.

I. RELIGIONS' REASONS FOR PURSUING COPYRIGHT PROTECTION

Religious organizations are litigating their copyright claims.²⁴ The legal issues of these cases, however, do not address the fundamental question underlying them: why are religious organizations using copyright law at all? Religious organizations may seek protection for numerous reasons,²⁵ such as for money or to protect its members.²⁶ This Part explores the various reasons for this phenomenon. After reviewing these reasons, it focuses on the most prominent, justifiable, and identifiable reasons that motivate religious groups to seek copyright protection. This Part concludes that, although religious organizations may seek copyright protection for manifold reasons, including economic ones, they use copyright law primarily to preserve doctrinal purity and censor others.²⁷ While this Part examines reasons besides these two motivations, it emphasizes them because they appear most prominently in the case law. Additionally, these two motivations are used in the following Part to examine whether they dovetail with the goals of copyright law.

A. *Economic Motivations, Secrecy, and Identity*

Some religions might seek copyright protection, and litigate copyright infringement cases, because they seek money. *Sinkler v. Goldsmith* illustrates this motivation.²⁸ In *Sinkler*, Joel Goldsmith founded a “non-traditional, non-structured spiritual movement” called, “The Infinite Way” in 1947.²⁹ Lorraine Sinkler met Goldsmith in 1949 and became his student.³⁰ Until Goldsmith’s death in 1964, Sinkler and Goldsmith exchanged “hundreds of letters” and wrote, edited, and published a number of articles together.³¹ Goldsmith even asked Sinkler to edit and collaborate on rewriting a transcript of Goldsmith’s recording entitled, “The Easter of Our Lives.”³² After Goldsmith’s death, Sinkler used many recordings of Goldsmith’s classes as source material for a newsletter she published.³³ Goldsmith’s widow, Emma, entered into an agreement re-

24. See the cases discussed *infra* this Part.

25. Effross, *supra* note 23, at 646–664 (arguing that religious organizations may use copyright law to protect their members and students of the religion).

26. *Id.* at 647–677.

27. The works that religious organizations seek to protect in this regard typically are the works underlying the religion itself. Put another way, they are the works upon which the religion is based.

28. *Sinkler v. Goldstein*, 623 F. Supp. 727 (D. Ariz. 1985).

29. *Id.* at 729–30.

30. *Id.* at 730.

31. *Id.*

32. *Id.*

33. *Id.*

garding the newsletter and other works produced using Goldsmith's writings.³⁴ The apparent purpose of the agreement was to provide income for Emma.³⁵

Other cases confirm that fights over religious texts, while not always between strictly religious entities, often are economic in nature.³⁶ In one of these cases, *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, the plaintiff—a publishing arm of a corporation representing a Hasidic group—sought an injunction against another publisher of religious materials, the sole owner of which was a former employee of the plaintiff.³⁷ The plaintiff alleged that the defendant had infringed its copyright in “a new version of Siddur Tehillat Hashem, a prayerbook,” by copying and disseminating it.³⁸ A later district court opinion finding the defendant in contempt shows that this dispute was not one over religious doctrine: the plaintiff was not concerned with the use or copying of the work *per se*. Instead, the plaintiff was concerned with copying and dissemination without payment.³⁹

In spite of monetary undertones such as those in *Sinkler* and *Merkos*, this Article argues that the vast majority of religious organizations seek not monetary gain, but spiritual or religious consonance. For example, religious organizations also might use copyright law to protect their identity.⁴⁰ This motivation, however, seems to be peripheral to religious organizations, mainly because trademark law lends itself to protecting

34. *Id.*

35. *Id.*

36. *See, e.g.*, *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir. 2002) (*per curiam*); *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chicago*, 754 F.2d 216 (7th Cir. 1985); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956); *Neva, Inc. v. Christian Duplications Int'l, Inc.*, 743 F. Supp. 1533 (M.D. Fla. 1990); *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chicago*, 506 F. Supp. 1127 (N.D. Ill. 1981), *rev'd* 214 U.S.P.Q. 409 (7th Cir. 1982); *F.E.L. Publ'ns, Ltd. v. Nat'l Conference of Catholic Bishops*, 466 F. Supp. 1034, 1037–39 (N.D. Ill. 1978).

37. *See Merkos*, 312 F.3d at 96.

38. *Id.*

39. *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 2004 WL 2550313, at *1–2, *4–5 (E.D.N.Y. Nov. 9, 2004) (finding, among other things, the work at issue produced large revenues and that the defendant's revision of the work amounted “to nothing more than a copy of the [the plaintiff's work] in flimsy disguise”).

40. *See* Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 189 (2007) (discussing how Native American cultural property, including religious symbols and stories, exists in perpetuity under Native American law, which embodies “the idea that certain works are of unique cultural significance and their value is best preserved through continual control of their use”); Suzanne Milchan, Note, *Whose Rights Are These Anyway?—A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 161–62 (2004) (noting that Native American cultural identity is tied to its religious property and advocating a relativist application of copyright law).

identity better than copyright law.⁴¹ Furthermore, most of the cases regarding religious copyright do not touch explicitly on identity, though it certainly plays a role in the protection and enforcement of copyrights by religious organizations.

Another reason religious organizations may use copyright law is to keep their religions secret.⁴² Religious groups may not want to disclose their works to protect the general public,⁴³ students, teachers, or teaching techniques.⁴⁴ Scientology is a religion that has attempted to keep the details of its religion secret, though its reasons for doing so are multifarious. In *Religious Technology Center v. Lerma I*,⁴⁵ a Church of Scientology organization (COS),⁴⁶ which held the license to the copyrights of L. Ron Hubbard, Scientology's founder, sued for a temporary restraining order to prevent a former member from posting Scientology writings on the Internet.⁴⁷ COS alleged copyright infringement and trade secret misappropriation.⁴⁸ In assessing the trade secret claims, the court commented:

Unquestionably, the plaintiff has taken extraordinary measures to try to maintain the secrecy of the [copyrighted texts]. Plaintiff and the Church of Scientology employ numerous and elaborate security measures to prevent church members from removing the texts from the Church. In addition, while the California court file remained unsealed, Church members conducted a daily vigil in which they signed out the file and retained it until the Clerk's office closed.⁴⁹

Religious organizations also may desire secrecy to protect their students. Walter Effross hypothesizes that some "spiritualities" can harm a student who learns them because it may shake the student's epistemo-

41. See David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion, and Identity*, 49 IDEA 233, 236–40 (2009).

42. See *Religious Tech. Ctr. v. Lerma (Lerma I)*, 897 F. Supp. 260, 266 (E.D. Va. 1995) (stating that "[u]nquestionably, the plaintiff has taken extraordinary measures to try to maintain the secrecy of [its] . . . texts").

43. *Religious Tech. Ctr. v. Lerma (Lerma II)*, No. 95-1107, 1996 WL 633131, at *1 (E.D. Va. Oct. 4, 1996) (stating that the Scientology "Church doctrine teaches that improper disclosure of the [works at issue], both to non-Scientologists and even to church members if done prematurely . . . risks . . . harm of global proportions").

44. Effross, *supra* note 23, at 664–677.

45. *Lerma I*, 897 F. Supp. at 266.

46. For the sake of ease, this Article will refer to the Church of Scientology and related organizations like the one in *Lerma* as "COS."

47. *Id.* at 262. COS also sued, among others, the *Washington Post*, which had published an article that contained brief quotations from some of the copyrighted materials. *Id.*

48. *Id.*

49. *Id.* at 266.

logical foundations.⁵⁰ Some religions posit that an individual cannot fully experience the religion through text alone, and, therefore, the text must be kept secret to test students' will, memory, and understanding.⁵¹ Similarly, a religion may require "tailoring" to specific students,⁵² perhaps to aid their spiritual development.⁵³ Or, maybe secrecy is part and parcel of, or necessary to the practice of, the religion itself.⁵⁴

Again, Scientology illustrates many of these reasons. Scientologists may keep their religious texts secret because disclosure would render the religion ineffectual. That is what COS argued in *Religious Technology Center v. Lerma II*. Instead of a temporary restraining order (at issue in *Lerma I*), the issue was a motion for summary judgment on a copyright infringement claim.⁵⁵ Prior to discussing the merits of the case, the court noted why COS sought to protect these documents: "the texts at issue . . . allegedly provide a detailed program for warding off these evil influences through the creation of 'free zones.'"⁵⁶ According to COS, to have the desired effect, these documents must "be [disclosed and] executed precisely according to the procedures laid out by Hubbard and under the guidance of an assisting church official."⁵⁷ If they are disclosed prematurely to anyone, member or non-Scientologist, they will not have the desired effect.⁵⁸ In fact, "[u]nauthorized disclosure also risks further harm of global proportions."⁵⁹

50. Effross, *supra* note 23, at 649 ("Less colorfully, even a beginning student of a spiritual group might become distressed when led, either by lectures or by physical or mental exercises, to reexamine her basic philosophical assumptions. In fact, some spiritual groups maintain that even the seemingly best-adjusted people are unaware of potentially shattering realities."). See also *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986) ("The unsupervised, premature exposure of an adherent to these materials will produce a spiritually harmful effect.").

51. Effross, *supra* note 23, at 656–58 ("Modern spiritual groups' references to 'training' their participants imply that the transformative nature of their material requires experiencing it personally and directly, and internalizing the realizations gained." (citations omitted)).

52. *Id.* at 653 (stating that some religions, such as Sufis, Kabbalists, and Gurdjieff, require "prescription of specific exercises").

53. *Id.* at 660 ("The experiences and circumstances that a student encounters in such contexts may have been deliberately designed to aid in her spiritual growth . . .").

54. *Id.* at 652 ("Secrecy requirements may themselves be seen as a method of enhancing the spiritual discipline of students, forcing them to be more conscious and to conserve energy that would otherwise be dissipated in discussing experiences and teachings, particularly those they might not yet have fully assimilated.").

55. See *Religious Tech. Ctr. v. Lerma (Lerma II)*, No. 95-1107, 1996 WL 633131, at *1 (E.D. Va. Oct. 4, 1996).

56. *Id.*

57. *Id.*

58. *Id.* ("Church doctrine teaches that improper disclosure of the [works], both to non-Scientologists and even to church members if done prematurely, prevents achievement of the desired effect.").

59. *Id.*

Scientologists have emphasized the “harm” disclosure of their religion would cause in other cases, as well. In *Religious Technology Center v. Wollersheim*, COS sought an injunction against a splinter group’s use of its documents, claiming the use violated the Racketeer Influenced and Corruption Organization Act (RICO) and constituted a misappropriation of trade secrets.⁶⁰ In describing COS doctrine, the court noted that “[COS] assert[ed] that the unsupervised, premature exposure of an adherent to these materials will produce a spiritually harmful effect.”⁶¹ It also noted that, to prevent this harm, “[COS] [kept] the higher level materials in secure places, and [made] the materials available only to adherents who agree[d] in writing to maintain their confidentiality.”⁶²

A similar harm-centered justification was given for copyright enforcement in *Penguin Books U.S.A. v. New Christian Church of Full Endeavor (NCCFE)*.⁶³ The original creator of the work—who, at the time of the statement, also was the copyright owner—stated that her relaxed copyright enforcement gave rise to distortions of the work.⁶⁴ This was problematic because “[t]he [work’s] curriculum is by its very nature an integrated and self-contained one. Therefore, any attempts to abridge or ‘short cut’ the process of teaching and learning forgiveness could only [sic] prove detrimental, and would alter the very essence of the [work] both as a theoretical thought system and a process of spiritual development.”⁶⁵

The *NCCFE* case touched on another reason Effross gives for religious secrecy: protecting teachers and religious doctrine. Effross suggests religious organizations keep works secret to ensure that no one misrepresents the doctrine or pursues self-interested goals, such as unauthorized teaching.⁶⁶ Religions also may seek to prevent the “desanctification” of the materials.⁶⁷ Desanctification is the process by

60. 796 F.2d 1076, 1076–77 (9th Cir. 1986).

61. *Id.* at 1077.

62. *Id.* at 1078; *see also* *Religious Tech. Ctr. v. Netcom On-Line Comm’n Svcs.*, 923 F. Supp. 1231, 1238 n.4 (N.D. Cal. 1995) (“The Church asserts that the unsupervised, premature exposure of an adherent to these materials will produce a spiritually harmful effect.” (quoting *Wollersheim*)).

63. 2000 WL 1028634, at *6.

64. *Id.* (“One result of our lax policy was the appearance of a number of abridgements and poetic compilations of passages excerpted from the Course. In fact, these directly contravened Jesus’ very specific instructions to Helen that the three books should never be separated from each other, nor should any of the material appear out of context in abridged form.”).

65. *Id.*

66. Effross, *supra* note 23, at 665–66 (noting that teachers have carefully evaluated material for students, and that having a teacher pursuing self-interested goals may distort the teachings’ meaning). Unauthorized use of religious names that qualify as trademarks may fall into this category as well. *See* Simon, *supra* note 41, at 264–95.

67. Effross, *supra* note 23, at 666 (describing the prevention of desanctification as a goal of spiritual secrecy).

which religious techniques or texts that have therapeutic value are commercialized and used primarily for the therapeutic effects,⁶⁸ rather than for religious purposes.⁶⁹

Additionally, secrecy might be sought to prevent “premature publication.”⁷⁰ This reason resembles the rationale that protects the student who may not be able to fully comprehend the work: “for pedagogical or other reasons, the equivalent of bicycles ‘training wheels’ might have been inserted into the teachings or techniques,” with later versions revealing more of the secret text.⁷¹ This concept certainly is plausible, and law schools use it to teach students about nearly every subject.⁷² Indeed, almost every discipline utilizes this approach in some respect. In mathematics, for example, students must learn basic principles, like addition and subtraction, before they can perform more advanced tasks, such as solving algebraic equations.

Effross suggests two final teacher-centered reasons for secrecy: prevention of ridicule and maintenance of lineage.⁷³ The former

68. *Id.* at 667 (discussing how “[t]he desanctification of the primarily spiritual into the merely therapeutic has also been condemned by a Tibetan Buddhist meditation teacher as ‘spiritual materialism’”).

69. Desanctification is a type of exploitation where a nonreligious organization commodifies (and secularizes) a religious product. Trademark law contains two doctrines that prevent individuals from using scandalous or disparaging marks. *See, e.g., Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 125 (D.D.C. 2003). Uses of scandalous or disparaging trademarks often come closer to desanctification than the copyright abuses described in this Article.

Desanctification may seem to be a concern directed at only nonreligious groups that use religious works. This process, however, does not require that the exploitation secularize the religious work. Another religious group could commodify the work by exploiting it in a religious manner; for instance, it could sell the religious text for profit, or use the text during its services such that it, in some way, generates profits for the organization. Brian D. Wassom acknowledges as much in his article, *Unforced Rhythms of Grace: Freeing Houses of Worship From the Specter of Copyright Infringement Liability*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 61, 128–77 (2005). Wassom spends a considerable amount of time detailing how the use of copyrighted materials has been a boon to religious organizations everywhere. *Id.* at 128–38, 150–70.

Thus, because religious organizations use copyrighted materials so frequently, they may derive benefits from such use in a number of ways. Religious organizations could, for example, receive donations from their members, who may attend services in which the copyrighted religious texts are used. In this way, the texts themselves, which contain religious doctrine or other practical information, are being used to generate money for the organization. The point is that money need not be generated solely by selling the works themselves for them to be desanctified.

70. Effross, *supra* note 23, at 668.

71. *Id.*

72. In the first-year contracts course, for example, professors often use this method. The professor may teach remedies first, using cases that discuss aspects of contract law that students do not yet fully understand. Only later, after progressing through offer, acceptance, consideration, the Statute of Frauds, and the like, do students begin to comprehend how each contract issue fits with the others.

73. *Id.* at 672–74.

encapsulates the idea that it is impossible to criticize the substance of something that is unknown.⁷⁴ The latter means that religions want to “identify and maintain the lineage of a spiritual tradition or practice.”⁷⁵ This often entails the approval of a centralized or respected authority.⁷⁶ While the primary objective is secrecy, these goals also suggest that religions desire to censor the use of materials and maintain their doctrinal purity.

B. *Censorship and Doctrinal Purity*

Indeed, the two main reasons that religious organizations use copyright law are to censor others’ uses of their works and to protect the purity of their religious doctrine as embodied in their text(s). While both of these views focus on controlling the copyrighted work, they are conceptually different. Censorship is focused on preventing others from using the work; religious organizations desire to censor others’ use of their works to prevent negative publicity, to prevent criticism, or to destroy competition for members. Doctrinal purity, on the other hand, is not concerned with others’ use of the work per se; rather, it is concerned with maintaining the religious coherency and consistency of the work. In both cases, though, religious organizations view copyright law as a tool that they can use to achieve these goals.⁷⁷

74. *Id.* at 672.

75. *Id.* at 673.

76. *Id.*; Simon, *supra* note 41, at 250–51.

77. In a way, the issue is one of control. The desire by copyright owners to exercise control over their works is not specific to religious works. *See, e.g.,* *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (entering a preliminary injunction in a suit by original author J.D. Salinger against the writer of a book that retells *The Catcher in the Rye* from the perspective of Holden Caulfield “sixty years” after the story in the original work), *vacated*, No. 09-2878, 2010 WL 1729126 (2nd Cir. Apr. 30, 2010); Neil Weinstock Netanel, COPYRIGHT’S PARADOX 111–16 (2008) (describing how copyright as a form of censorship can burden speech); Dave Itzkoff, *Author Responds to Salinger Lawsuit*, ArtsBeat: The Culture at Large, N.Y. TIMES, June 16, 2009, <http://artsbeat.blogs.nytimes.com/2009/06/16/author-responds-to-salinger-lawsuit/?hp> (explaining that J.D. Salinger sued Fredrik Colting, the author of *60 Years Later: Coming Through the Rye*, which he described as “a transformative exposition about one of our nation’s most famous authors, J.D. Salinger, and his best known creation, Holden Caulfield”). Nevertheless, the nature of religious claims to copyright—i.e., a claim of *divine right* to control—makes this issue different from these claims in other spaces of copyright law. Additionally, even if one concludes religious infringement claims are not different from others, the analysis in this Article applies to other claims that seek to censor others or preserve their work’s “doctrine.” Finally, this Article observes that, in nearly every area of law, organizations and entities will attempt to bastardize the law for their benefit. This Article, however, focuses only on how religious organizations use the law in ways that may conflict with copyright law.

1. Censorship

Religious organizations may use copyright law to censor or suppress viewpoints that compete with, oppose, or are critical of their religion. This motivation can be called “censorship motivation.” This motivation has three basic objectives: preventing negative publicity; squelching opposition and dissent; and destroying competition.

a. Preventing Negative Publicity

One goal of censorship is to prevent the religion from suffering bad publicity at the hands of its critics.⁷⁸ Religions depend not only upon the purported truth of their religious doctrine, but also upon its perceived reputation or the perceived truth of its doctrine.⁷⁹ Religious organizations view copyright as a means to squelch negative publicity. That is, the organizations want to suppress the views of those critical of their religion.

Two cases illustrate this point.⁸⁰ In *New Era Publications International v. Carol Publishing Group*, COS filed a copyright infringement suit against a former member who had recently written a book that the court characterized as “an unfavorable biography of Hubbard and a strong attack on Scientology.”⁸¹ Indeed, “the author’s purpose [was] to expose what he believe[d] [was] the pernicious nature of the Church and the deceit that is the foundation of its teachings.”⁸² To accomplish this task, the defendant used many quotations from L. Ron Hubbard’s writings.⁸³ COS sued to enjoin publication of the book.⁸⁴

This is not uncommon, at least for the Church of Scientology. Two years prior, in 1988, the same organization sued a similar defendant, alleging copyright infringement.⁸⁵ The defendant had published a biography that criticized and discredited L. Ron Hubbard.⁸⁶ The district court noted that a previous suit commenced in England had failed

78. See *New Era Publ'ns v. Carol Publ'g Group*, 904 F.2d 152, 154 (2nd Cir. 1990); *New Era Publ'ns Int'l v. Henry Holt & Co., Inc.*, 695 F. Supp. 1493, 1497 (S.D.N.Y. 1988). See also *Urantia Found. v. Burton*, 1980 WL 1176, at *2 (W.D. Mich. Aug. 27, 1980) (deciding a case where plaintiff, a religious organization, sued a disillusioned former member for copyright infringement to prevent him from disseminating the work in a manner different than the organization).

79. See Simon, *supra* note 41, at 268–84.

80. Compare *Carol Publ'g*, 904 F.2d at 152, and *Henry Holt*, 695 F. Supp. at 1493.

81. *Carol Publ'g*, 904 F.2d at 154.

82. *Id.* at 153–54.

83. *Id.* at 154.

84. *Id.* at 153.

85. *Henry Holt*, 695 F. Supp. at 1497.

86. *Id.* at 1508 (quoting the introduction of the defendant’s book).

because the court found that “the litigation was instituted to ‘stifle criticism.’”⁸⁷

b. Squelching Dissent and Opposition

A second goal of censorship is to squelch dissent and opposition.⁸⁸ Oftentimes, religious groups splinter from their mother organization.⁸⁹ When this happens, the new group and the old group disagree about doctrinal issues, some of which will be fixed in written form.⁹⁰ Usually one group will attempt to prevent the other from publishing or using alternative or edited versions of these works.⁹¹ To do this, religious organizations invoke copyright law, with which they can prevent unauthorized copying, public performance, display, distribution, and derivative works.⁹²

Again, the case law is illustrative. In *Worldwide Church of God v. Philadelphia Church of God (WCG)*, the plaintiff was the original religious group founded by Herbert Armstrong.⁹³ At the ripe old age of

87. *Id.* at 1497 (quoting *Church of Scientology v. Russell Miller*, High Ct. of Justice, Ch. Div., Oct. 9, 1987, at 16).

88. Berg, *supra* note 21, 287–88 (discussing the *WCG* case, *infra* note 90, and stating that the panel on which his article reports discussed the case and how it showed “copyright law can be misused to suppress religious disagreement”); Heinss, *supra* note 22, at 704 (noting that copyright may be “used to suppress a religious minority or religious dissent” and arguing for a neutral application of copyright law to religious organizations).

89. See Simon, *supra* note 41, 268–84.

90. *Worldwide Church of God v. Philadelphia Church of God (WCG), Inc.*, 227 F.3d 1110, 1113 (9th Cir. 2000); see Simon, *supra* note 41, 268–84.

91. Berg, *supra* note 21, at 315 (describing *WCG*, *supra* note 90, and stating that, “[w]hile the defendant’s use might have usurped demand (in the core copyright sense) for the original work of *Mystery of the Ages*, the plaintiff was not seeking to capture that demand. It wanted to suppress demand for that work instead of exploiting it.”). This type of use also looks like the maintenance of doctrinal purity, discussed *infra* Part I.B.2.

92. See 17 U.S.C. § 106 (2006) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”); 17 U.S.C. § 501 (2006) (“(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).”).

93. *WCG*, 227 F.3d at 1113.

ninety two, Armstrong wrote a book that became a literary pillar of the religion; and the Church adhered to many of its doctrines.⁹⁴ After Armstrong died, however, a doctrinal schism arose in the Church. The plaintiff concluded that Armstrong's book espoused "ecclesiastical error" because it "conveyed outdated views that were racist in nature."⁹⁵ As a result of this doctrinal shift, a splinter group (the defendant) arose, "grew to over six thousand members[,] . . . and claim[ed] strictly [sic] to follow the teachings of . . . Armstrong."⁹⁶ The defendant then began copying and distributing Armstrong's book,⁹⁷ which the plaintiff subsequently sued to prohibit.⁹⁸ One scholar has commented, "While the defendant's use might have usurped demand (in the core copyright sense) for the original work of *Mystery of the Ages*, the plaintiff was not seeking to capture that demand. It wanted to suppress demand for that work instead of exploiting it."⁹⁹

c. Destroying Competition

Another motivation behind censorship is to destroy competition.¹⁰⁰ To understand this goal, one needs to view the religious world as a marketplace.¹⁰¹ In this marketplace, religions compete for potential members.¹⁰² To do this, an organization might argue about the validity of

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id. at 1114.*

99. Berg, *supra* note 21, at 315.

100. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1076 (9th Cir. 1986). This goal is probably less prominent in copyright law than in trademark law, which deals with competition more explicitly.

101. *See R. LAURENCE MOORE, SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE 4–7* (1994) (noting that as religions lost control of their members, they entered the cultural fray, engaging in efforts to maintain membership by commodifying their religions); *id.* at 7 (arguing that the First Amendment contributed to the commodification of religion); WADE CLARK ROOF, *SPIRITUAL MARKETPLACE: BABY BOOMERS AND THE REMAKING OF AMERICAN RELIGION 78* (2001) ("Religion in any age exists in a dynamic and interactive relationship with its cultural environment; and, in our time we witness an expansion and elaboration of spiritual themes that counts to a major restructuring of religious market dynamics."); *id.* at 80 (noting that "[n]ew religious movements [carve out niches for themselves, creating a constituency] when they reach out to people who feel alienated from the established faiths and offer them a more satisfactory alternative"); *id.* ("If we think of this larger spiritual marketplace as a 'social field' where all the agents, conventionally religious or not, try to generate and/or preserve religious capital, i.e., legitimacy, acceptance, and influence, then we can begin to grasp the breadth and depth of a huge, highly competitive spiritual marketplace."). Many theists or religious people may reject this conception of religion; however, many religions inherently recognize the marketplace of religion despite the fact they couch their recognition in religious terms.

102. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, No. 95-20091, 1997 WL 34605244, *9–12 (N.D. Cal. Jan. 6, 1997). In *Netcom*, the court noted, when deciding

its views, framing the debate in terms of theological contentions. But argument alone is not as powerful as argument without rebuttal, and less powerful still than the only argument in existence. In other words, by censoring competition, religious organizations seek to prevent, not only counterarguments (i.e., squelching criticism), but also any argument at all. If no rivals exist, the original organization's religious argument becomes stronger. Like a product manufactured and sold by only one company, an organization that espouses a religion without any alternatives with which to compete is more likely to succeed—that is, to retain and attract members, and to prevent new religious groups from arising.

Courts explicitly touch on this issue when discussing fair use, which they assess using the four factors stated in the Copyright Act.¹⁰³ The fourth fair-use factor considers “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰⁴ In *WCG*, the court stated that the analysis of this factor should not change for religious organizations: “Religious institutions . . . would suffer if their publications invested with an institution's reputation and goodwill could be freely appropriated by anyone.”¹⁰⁵ The court noted that the people responding to the defendant's ads for the infringing work likely were people “who would be interested in *WCG*'s planned annotated version or any future republication of the original version.”¹⁰⁶ In fact, the court said, *WCG*'s new book was an attempt “to reach out to those familiar with Armstrong's teachings and those in the broader Christian community.”¹⁰⁷ But that attempt could be impeded or fail because “[the defendant's] distribution of its unauthorized version of [the work] . . . harm[ed] *WCG*'s goodwill by diverting potential members and distributions from *WCG*.”¹⁰⁸ Interestingly, though, the court explicitly noted that *WCG*'s purpose in suing was the same reason it had not published the work: it sought to promote the “correct” church doctrine.¹⁰⁹

whether to grant a preliminary injunction, that the “defendant ha[d] not established the extent to which the specific processes and instructions contained in the works are known generally or to potential competitors.” *Id.* at 12. It went on to comment that it was uncertain “[h]ow to identify ‘potential competitors.’” *Id.* at 12 n.17. This shows that when deciding a trade secret claim, the court must view, and presumably the religious organization does view, religions as competitors for members or, at the very least, adherents.

103. For a description of the fair use factors, see *infra* Part III.D.

104. 17 U.S.C. § 107(4) (2006).

105. *Worldwide Church of God v. Philadelphia Church of God (WGC), Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000). The court here seems to focus on goodwill, which is a concept prominent in trademark law, not copyright law.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (“*WCG* explained that it ceased distribution because the Church's position on various doctrines had changed, continued distribution would offend cultural standards of so-

In *Bridge Publications v. Vien*, COS brought a claim for copyright infringement against a former member of COS who had abandoned the Church and set up her own competing church.¹¹⁰ The defendant also copied and used Scientology works in her religion course, which she sold to students.¹¹¹ The court noted, when discussing the fourth fair use factor (market effect), that, “since [the] defendant use[d] the works for the same purpose intended by plaintiffs, it appear[ed] [the] defendant’s unauthorized copies fulfill[ed] ‘the demand for the original’ works and ‘diminish[ed] or prejudice[d]’ their potential sale.”¹¹²

Another example of this censorship occurred in *Religious Technology Center v. Netcom On-Line Communication*, where COS filed a copyright infringement suit against a former member who had posted L. Ron Hubbard’s writings on the Internet.¹¹³ The former member “ha[d] been a vocal critic of Scientology and . . . consider[ed] it part of his calling to foster critical debate about Scientology through humorous and critical writings.”¹¹⁴ COS tried to ride on the *Vien* court’s coattails, arguing “that [the former member’s] posting of plaintiffs’ copyrighted works over the Internet, where more than 25 million subscribers could access them, could potentially have a detrimental [market] effect on plaintiffs.”¹¹⁵ The court rejected this argument, holding that the defendant’s works were not meant compete with COS, and, even if they were, COS failed to show that the defendant’s works would compete with COS.¹¹⁶

Wollersheim, in its discussion of trade secrets,¹¹⁷ demonstrates how otherwise “religious” objectives are, in reality, competitive objectives. In *Wollersheim*, COS brought a claim for trade secret misappropriation against a former member.¹¹⁸ Part of a trade secret claim (in this case under California law) requires that the information stolen has “independent

cial sensitivity, and dissemination would perpetuate what the Church considered ecclesiastical error.”).

110. *Bridge Publications v. Vien*, 827 F. Supp. 629, 632 (S.D. Cal. 1993).

111. *Id.* at 632 (“The undisputed evidence shows that defendant copied or directed her students to copy plaintiffs’ copyrighted materials as part of a ‘Dynamism’ course which she offered for sale.”).

112. *Id.* at 636.

113. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 923 F. Supp. 1231, 1239 (N.D. Cal 1995).

114. *Id.*

115. *Id.* at 1248 (discussing fair use).

116. *Id.*

117. Although the court discusses trade secrets, it makes the point that religions do compete in a marketplace, and that fact does not change simply because the plaintiff’s theory of liability does.

118. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. Cal. 1986).

economic value.”¹¹⁹ While the court held that the Church failed to claim the materials had economic value, it also held that trade secrets claims “can[not] be based on the *spiritual advantage* the Church believes its adherents acquire over non-adherents by using the materials in the prescribed manner.”¹²⁰ This case illustrates that the Church’s motivations included the desire to prevent other groups from competing with it.

This anti-competitive spirit provides at least one motivation for religious organizations to invoke copyright law.¹²¹ Religious organizations, though, often see competing religions as improperly stating versions of their own religious doctrines, or as improperly stealing or appropriating “their” religious ideas.¹²² To combat this problem, they invoke copyright law.

2. Doctrinal Purity

In addition to censorship, a desire to control religious doctrine may motivate religious organizations to seek copyright protection.¹²³ The abil-

119. *Id.* at 1090. See UNIFORM TRADE SECRETS ACT § 1(4) (1985) (defining a trade secret to include information that “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use”).

120. *Id.*

121. See *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992); Berg, *supra* note 21, at 315 (“[T]he nature of the competition between the two [religious] parties is still ideological.”). In *Arica*, the defendant had published a book that described the principal devices used in the plaintiff’s religion (enneagrams). 970 F.2d at 1071. The defendant’s book described the enneagram and its history. *Id.* It also displayed several enneagrams that were “virtually identical to [the] [plaintiff’s] counterparts.” *Id.* The plaintiff sued because it felt the defendant’s book would allow others to have access to its religion, or at least a variation of its religion. Indeed, the court commented, when assessing the fourth fair use factor (market effect), that “[b]oth [plaintiff’s and defendant’s] works might well interest those pursuing emotional and psychological self-help.” *Id.* at 1078.

122. See *Phillips v. Beck*, No. 06-628, 2007 WL 2972605, at *1 (D. Hawai’i Oct. 9, 2007). See also *Phillips v. Murdock*, 543 F. Supp. 2d 1219, 1221–22 (D. Hawai’i 2008) (deciding a case where plaintiff sued defendant for copyright and trademark infringement based on defendant’s advertisement for his book, which plaintiff felt “ha[d] a ‘similar’ title to [her] work”). In *Beck*, the plaintiff alleged that “she founded the Stoic Church of Philosophy” and wrote a book for the Stoic Church. 2007 WL 2972605, at *3. Later, the defendant published a book, which described the same philosophy and bore the same short title as the plaintiff’s book. *Id.* The plaintiff also brought a trademark claim and called the defendant’s book “plagiarism.” *Id.* at *3, *9. While not expressly declared, one can infer that the plaintiff sought to prevent the defendant from “stealing” her ideas or religious doctrine, or otherwise competing with her book.

123. See *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 633 (S.D. Cal. 1993); Beryl R. Jones, *Copyright and Suppression of Religious Dissent*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 107, 107 (Paul Finkelman ed., 1999). In *Vien*, COS sued the defendant, alleging that the Scientology texts the defendant had appropriated constituted trade secrets. 827 F. Supp. at 632–33. The Court stated that the plaintiff’s “[religious text] is confidential and kept under tight security, is disclosed only to those who have attained the requisite level of

ity to control the text of a religion is extremely important, at least to religious organizations.¹²⁴ A related goal is to preserve doctrinal purity.¹²⁵ Religions may conceive of their texts, like Islam does of the Qur'an, as pure and precise, and properly distributed only as a facsimile.¹²⁶ Unrestricted copying and distribution of a text places it at risk of change or interpretation.¹²⁷

When unlimited distributions and copies are permitted, abridgements, distortions, and rearrangements of the original work may appear.¹²⁸ Religious works change depending on ordering or sequencing, and new editions or poetic compilations may change the ordering or the context in which the language appears.¹²⁹ As a result, these derivative works can change the meaning of the doctrine or message in the original work. To prevent these changes, religious groups will invoke copyright law, suing to prevent unauthorized copying and distribution of the (derivative) religious works.¹³⁰

Those were precisely the concerns of the plaintiff in *NCCFE*.¹³¹ In that case, Schucman, an associate professor of medical psychology at Columbia University, had written a religious work called *A Course in Miracles* (the Course), claiming to be merely the "scribe" through which Jesus spoke.¹³² After writing the Course, though, the author claimed to have been pressed by Jesus to obtain a copyright: "At some point during the summer of 1975, after it became apparent that an interest for the Course was developing, Schucman heard from . . . [Jesus] that copyright registration should be sought for the Course, ostensibly in order to preserve the form of the Course against the possibility of incomplete or

spiritual training, and cannot be accessed without first signing an agreement to maintain its secrecy and confidentiality." *Id.* at 633.

124. WILLIAM A. GRAHAM, *BEYOND THE WRITTEN WORD: ORAL ASPECTS OF SCRIPTURE IN THE HISTORY OF RELIGION* 79–80 (1993) (noting that the Qur'an's text is so important because the book is read aloud to communicate its message).

125. *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist (UCS)*, 829 F.2d 1152, 1155 (D.C. Cir. 1987). Doubtlessly, censorship and doctrinal purity motivations may overlap, but they are distinct. Squelching dissent or opposition is fundamentally different from preserving purity, even if both motivations may have similar results or similar means of achieving those results.

126. *E.g.*, *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *1–7 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004).

127. *E.g.*, *id.*

128. *See id.* (entering judgment in favor of the defendants and dismissing the case). *See also* *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1291 (D. Utah 1999) (granting a preliminary injunction after the defendant posted the plaintiff's *Church Handbook of Instructions* on its website without permission).

129. *NCCFE*, 2000 WL 1028634, at *6.

130. *See id.* at *7–8.

131. *Id.* at *6.

132. *Id.* at *2.

corrupted editions.”¹³³ While the organization holding the copyright to this work at first took “a very liberal stance regarding permission to quote from the Course,” that stance changed as interest in the work increased.¹³⁴ The group stepped up enforcement because the “lax policy” gave rise to “a number of abridgements and poetic compilations of passages” that “directly contravened Jesus’ very specific instructions . . . that the three books should never be separated . . . nor should any of the material appear out of context in abridged form.”¹³⁵ Furthermore, translations emerged, which Schucman asserted were, “at the very least, inaccurate, leading to unacceptable distortions of the Course’s central teachings.”¹³⁶

Religious organizations have done more than just initiate copyright infringement actions to preserve doctrinal purity. One religious group successfully lobbied the United States Congress to pass a private law that extended the copyright term of the group’s religious works.¹³⁷ At issue in *United Christian Scientists v. Christian Science Board of Directors, First Church of Christ, Scientist*, was a private law passed by Congress that granted and extended the copyright term of the works held by the First Church of Christ (the First Church).¹³⁸ A splinter group, the United Christian Scientists (UCS), disagreed with the First Church on matters of membership and doctrine.¹³⁹ This dispute concerned the accuracy or propriety of the doctrine contained in a later edition in one of the First Church’s works.¹⁴⁰ The conflict emanated from UCS’s distribution of work without permission.¹⁴¹ In response to the First Church’s accusations that UCS infringed its works, UCS brought an action seeking a declaratory judgment that the private law was unconstitutional.¹⁴²

The impetus for the law was a desire to protect the religion’s doctrinal purity.¹⁴³ The First Church explained its concern for doctrinal purity this way:

133. *Id.* at *4.
134. *Id.* at *6.
135. *Id.*
136. *Id.*
137. *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist (UCS)*, 829 F.2d 1152, 1157 (D.C. Cir. 1987).
138. *Id.*
139. *Id.* at 1155.
140. *Id.*
141. *Id.*
142. *Id.* at 1157–58.
143. *Id.* at 1163 (“Church witnesses testifying on behalf of the legislation explained pointedly that their purpose in seeking copyright protection for [the work] was to maintain its doctrinal purity.”).

Changes of wording . . . are extremely important to members of our church. To others they may seem minor, but, as those of you know who are familiar with matters religious, centuries in the Christian church were devoted to clarifying just such questions of wording. Words, of course, stand for religious positions of vast significance in the lives of thousands of believers.¹⁴⁴

In effect, the members the First Church saw themselves as stewards or “guardians of doctrinal purity.”¹⁴⁵ *UCS* shows what was at stake for the First Church, and what is at stake for most religious organizations: “powers greater than commercial interest[s].”¹⁴⁶ Their mission is to “protect religion . . . [and] to protect what God wants his children to hear.”¹⁴⁷ Indeed, the purpose of the legislation at issue in *UCS*, as echoed, amazingly, by Senate and House Committee members,

was not to provide pecuniary profit or material gain for the Trustees or the Church, but to preserve and maintain the purity and integrity of the statement of the religious teachings of this denomination, . . . to protect [against] . . . distorted version[s] of the teachings of Christian Science[,] [and to] . . . preserve the true and correct version.¹⁴⁸

Beyond *UCS*, cases like *WCG* also demonstrate the desire of religious organizations to protect doctrinal purity using copyright law. In *WCG*, as discussed *supra*, one of the reasons the *WCG* brought an infringement action was to prevent “dissemination [that] would perpetuate what the Church considered ecclesiastical error.”¹⁴⁹

These two religious motivations—to censor others’ use of the organization’s works or to preserve doctrinal purity—represent the primary reasons that religious organizations seek copyright protection. The critical role that written works play in religion explains why religious organizations value their texts. It also explains why they attempt to protect those works. In their efforts, however, these groups employ a secular disciple: copyright law. Without much inspection, this arrangement may seem benign, or even beneficial. After all, religious organizations are

144. *Id.* at 1163 (citation omitted).

145. *Id.* at 1164 (explaining that this is what the witnesses testified they felt their role was in the Church and in seeking the passage of the private law).

146. *Id.* at 1163 (quoting witness testimony before Congress articulating the reasons for passing the private law extending the copyright term in the religious works).

147. *Id.* (citation omitted).

148. *Id.* at 1165 (quoting S. REP. No. 280, 92d Cong., 1st Sess. 2 (1971); H.R. REP. No. 604, 92d Cong., 1st Sess. 3 (1971)).

149. *Worldwide Church of God v. Philadelphia Church of God (WCG), Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000).

allowed to use the courts just as nonreligious organizations and authors. Closer inspection performed in the next Part explains why these uses of copyright law are, not only harmful, but fundamentally conflict with the underlying principles of copyright law.

II. THREE THEORIES OF COPYRIGHT AND RELIGIOUS MOTIVATIONS FOR PROTECTION

The previous Part provided the necessary introduction to religious uses of copyright. It left unaddressed, however, the normative questions about these religious uses. This Part lays the foundation needed to address those questions, exploring the underlying principles of copyright law and analyzing whether they conflict or comport with religious uses. Because understanding whether religious uses of copyright law align or conflict with copyright law generally depends upon the underlying principles of copyright law, this Article reviews and explains three theories of copyright law: economic theory, property rights theory, and cultural theory. Each of these theories espouses at least one justification for copyright. This Part explicates each theory individually and, in the process, evaluates whether the religious reasons for using copyright align or conflict with them.

The first two theories—economic theory and property rights theory—are the most traditional.¹⁵⁰ The last theory examined, known as cultural theory, is somewhat marginalized and has been given attention only recently.¹⁵¹ While this Article explores all of these theories, it will focus mainly on the property rights theory because religious organizations, like ordinary people, think mainly in terms of property and natural rights.¹⁵² Furthermore, it gives the reader a chance to see how copyrights may not have as strong a relationship to natural law as initially thought.

150. Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1155–56 (2007).

151. *Id.* at 1152–53, 1155–56 (describing how rights and economic theorists overlook other methodological approaches to copyright, including the approach Cohen defines).

152. See Roger Syn, © *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 23 (2002). Syn notes that the Bible may dictate who owns copyright in natural law terms:

There is a further overriding doctrine, however. The foundation church doctrine is that Jesus Christ is Lord, with Christians at least as servants. Employers own the copyright in employees' works. Hence, if an author confesses to being God's servant, and that Jesus is his Lord, Master, and King, under copyright law that infers God has first claim to his copyright. Moreover, if Jesus is king, then Crown rights and eminent domain apply. Aside from this copyright reasoning, the doctrine of Christ's Lordship claims every aspect of an author's creativity: the ideas, expression, and translation of those ideas; the copyright; and everything else.

A. Economic Theory

The basic economic theory of copyright is driven by incentives: by protecting the expression of ideas (and not ideas themselves), copyright incentivizes the creation of new works and reduces the negative externalities of free riders. To promote economic efficiency, most economists agree that two propositions are required: (1) copyright ownership of (2) limited duration.¹⁵³ In other words, the system of copyright promotes economic efficiency by encouraging innovation using a monopoly over the artists' work and by limiting the term of copyright to lessen the cost of producing works.¹⁵⁴

Copyright law corrects for inefficiencies that would exist absent the protection it provides. In the absence of copyright, publishers would have a disincentive to announce publication dates or promote works, and copiers would have incentives to begin copying as quickly as possible.¹⁵⁵ The incentive to create "faddish" works also would increase because they generate revenue quickly while being least susceptible to (loss of revenue because of) copying.¹⁵⁶

While economists note the paucity of data available to determine exactly how long a copyright should be to create the proper economic

Id. at 24 (citations omitted). Syn goes on to observe that courts do not accept such a theory as the basis for copyright ownership. *Id.* As a result, religious groups may face a difficult choice:

If God is as the Bible reveals Him to be, then copyright principles point to God owning the copyright. But courts ignore such theological reasoning and accept humans as the copyright owners. Therefore, there may be a dilemma in adopting business practices which reflect the courts' secular assumptions about God and the Bible.

Id. at 25.

153. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright* 4 (John M. Olin Law & Economics, Working Paper No. 154, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319321 ("Two propositions are widely believed by most economists The first proposition is that so far as is feasible, all valuable resources, including copyrightable works, should be owned, in order to create incentives for their efficient exploitation and to avoid overuse. The second proposition is that copyright should be limited in duration.").

154. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Copyright protection—the right of the copyright's owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place."). For a broader and more complete economic analysis of copyright law, see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* *passim* (2003).

155. Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 154, at 332.

156. *Id.*; LANDES & POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, *supra* note 154, at 57.

incentives for creation,¹⁵⁷ this remains “the central problem” for economic scholars of copyright law.¹⁵⁸ The debate, therefore, is not really over whether copyright should exist, but for how long copyright should protect a work. Richard Posner and William Landes note that, beyond some point, copyright protection becomes counter-productive because production costs become too high.¹⁵⁹ As the cultural theorists so vehemently emphasize,¹⁶⁰ authors necessarily borrow others’ ideas and expressions when creating a work.¹⁶¹ Less copyright protection gives the creator greater “borrowing ability,” freeing the author to take more at less cost.¹⁶² Conversely, more monopolistic protection creates higher creation costs—because the author can borrow less freely—which, in turn, reduces the total number of works produced.¹⁶³

Religious organizations that pursue copyright, at least in part, for economic reasons have almost no trouble with these economic goals of copyright. In many ways, the economic incentives that copyright law provides benefit creators of religious works. Some authors and organizations may seek to recoup the costs of penning religious texts, and the economic theory of copyright provides them a way of doing so.

157. See Stan Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=488085.

158. See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 154, at 326 (“Striking the correct balance between access and incentives is the central problem in copyright law.”). See also Liebowitz & Margolis, *supra* note 157, at 1–20; Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 12, *Eldred v. Ashcroft*, 537 U.S. 186 (No. 01-618) (discussing why the Copyright Term Extension Act, which (retroactively) extended U.S. Copyright terms by twenty years, should be declared unconstitutional).

159. Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 154, at 332.

160. See *infra* Part II.A.3.

161. LANDES & POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, *supra* note 154, at 58–60 (explaining how Shakespeare, T.S. Eliot, Kafka, and others borrowed heavily—and sometimes outright copied—(portions of) others’ works). As a legal historian friend of mine commented when starting her Ph.D., “I have begun to realize that scholarship is just a nuanced way of presenting many different ideas that have been written about already.”

162. See *id.* at 52 (explaining that the “absence of copyright protection . . . reduces the cost of [creating] by enabling the author to freely copy from his predecessors”).

163. Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 154, at 332 (“The effect [of overly-monopolistic protection] would be to raise the cost of creating new works—the cost of expression, broadly defined—and thus, paradoxically, perhaps lower the number of works created.”); LANDES & POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, *supra* note 154, at 67–70. Some may see the effect of a monopoly as indeterminate—that is, it may actually spur incentive to create, thereby creating more works, or it may have the opposite effect. That indeterminacy vanishes, however, at some point—the point at which the incentive power of a monopoly fades because of the sheer length of the monopoly. I wish to make only the point that *increasingly* monopolistic protection may not lead to an increased incentive to create. Thanks to Thomas Cotter for raising this objection.

Nevertheless, conflicts exist when comparing economic theory to doctrinal purity and censorship motivations. First, the issue of duration is often a sticking point for religions. Article I, section 8, of the United States Constitution states that Congress has the power “[t]o 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.”¹⁶⁴ Although Congress has continually expanded the “term” of the copyright, which currently stands at the life of the author plus seventy years,¹⁶⁵ the term must be for a fixed period of time.

Since many religious organizations seek doctrinal purity or immunization from criticism, a copyright term is insufficient. While they like the idea of incentives that do not create faddish works, their primary concern is everlasting doctrinal purity and censorship.¹⁶⁶ While copyright scholars debate the length a copyright should last, for religious groups there is no debate: protection of religious works should last forever.¹⁶⁷ In that sense, the economic justification of copyright directly conflicts with religious motivations.

Furthermore, copyright law’s economic incentive to create may have little to no effect¹⁶⁸ on creators of religious works since the authors may

164. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

165. See 17 U.S.C. § 302(a) (2006).

166. E.g., Ali Kahn, *Islam as Intellectual Property: “My Lord! Increase Me in Knowledge”*, 31 CUMB. L. REV. 631, 635–36 (2001) (“Another important attribute distinguishes intellectual property from the protected knowledge of Islam. Intellectual property is often commercial in nature, protected only for a short duration. Furthermore, the knowledge underlying intellectual property may be faulty, frivolous, or even harmful. Unlike intellectual property, the protected knowledge of Islam is not for sale or commercial exploitation. Islamic knowledge is based on assured certainty, which the Quran describes as *elm-al-yaqqin*. As such, the protected knowledge of Islam is timeless and imperishable. It is handed down from one generation of Muslims to the next without innovations, alterations, or diminishment in value.”) (citation omitted).

167. See, e.g., *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist (UCS)*, 829 F.2d 1152, 1157 (D.C. Cir. 1987).

168. Much debate currently surrounds whether copyright law should account for noneconomic creation incentives. Some have argued that copyright law should take into account the author’s creation incentives. See *infra* note 169. While that issue is outside the scope of this Article, some courts have misconstrued the certain rights granted to copyright owners as accommodating (endorsing?) this view. E.g., *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009). In *Colting*, the court stated:

[S]ome artists may be further incentivized to create original works due to the availability of the right *not* to produce any sequels. This might be the case if, for instance, an author’s artistic vision includes leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently. Just as licensing of derivatives is an important economic incentive to the creation of originals, so too will the right *not* to license derivatives sometimes act as an incentive to the creation of originals.

create out of a moral obligation or spiritual motivation, not a financial one.¹⁶⁹ But even religious organizations need money to remain in business, and another author has termed use of copyright to generate

Id. at 268 (first emphasis added). In a somewhat similar vein, the Supreme Court has suggested that the copyright owner may have a First Amendment interest in not speaking. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

169. *See* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1951–62 (2006) (detailing the narrative accounts of religious and spiritual innovation and creation incentives); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives With Realities by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1, 8 (2008) (noting that organizations like the Vatican “ha[ve] sufficient incentive to both create and distribute papal texts without regard for the rights afforded by copyright protection . . . [because] [t]he Vatican seeks to provide guidance to those of the Catholic faith on a wide array of matters”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 526 (2009) (endorsing Kwall’s account of creation narratives, though qualifying this endorsement by stating that “[w]hereas Kwall emphasizes . . . the author [a]s an instrument of God . . . I will speak more of compulsion and nonrational calculation”).

Many individuals write for reasons other than money. Paul Auster, a renowned novelist, has articulated an almost religious sentiment about writing (at least for literary authors): “I don’t think about my reputation, I don’t think about my so-called ‘career.’ What I do is push on every day, doing the best I can to write the things I feel I have to write.” *Interview, Paul Auster*, <http://www.failbetter.com/08/AusterInterview.php> (last visited April 13, 2009). A growing body of literature has begun to acknowledge that other factors besides copyright incentivize and motivate people to create and use, or abstain from using, others’ works. *See generally* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (explaining and expanding on his conception of collaborative, commons-based peer production); Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L. J. 369 (2002) (describing the emergence of collaborative, “commons-based peer production,” which is separate from the traditional explanations of markets of managerial hierarchies, and explaining why these collaborative efforts arise and how they are sustained); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007) (arguing that creators of original dishes, doctrinally speaking, could be given copyright protection but that such protection would be inappropriate at least in part because chefs have a “culture of hospitality”); Emmanulle Fauchart & Eric Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (Mass. Inst. Of Tech. Sloan Sch. Of Mgmt., MIT Sloan, Working Paper No. 4576-06, 2006) (describing the norms-based structure that regulates the use and nonuse of recipes among French chefs); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (explaining the norms governing stand-up comedians and the re-use of jokes).

In a future work, I will argue that creation *memes*—over which the “creator” has limited control—are a mechanism for cultural production. David A. Simon, *A Memetic Account of Creativity*, (forthcoming 2011) (abstract available at <http://ssrn.com/abstract=1516380>). For a brief introduction to how memetics might work, see, for example, SUSAN BLACKMORE, *THE MEME MACHINE* 38–42 (1999) (describing how successful memes are those that require our brains to rehearse them). The memetic account of creation should not be confused with Professor Roberta Kwall’s account. Where Kwall focuses on the artist as a singular creator inspired by the divine, memetics conceptualizes creation as a less-original process influenced, in large part, by replicators.

sufficient income (but not profit) a “sustenance right.”¹⁷⁰ This sustenance right aligns to a greater degree with the economic theory of copyright than the moral motivation. But, to the extent that religious works are the product of nonmonetary motivations, they do not accord with this justification of copyright law.¹⁷¹

B. *Property Rights Theory*

Copyright is often conceptualized as a form of property. The term “intellectual property” leads some people to regard copyrights as fruit of the Lockean labor theory.¹⁷² Indeed, some scholars, such as Richard Epstein, have advocated for a Lockean-based theory of intellectual property.¹⁷³ Other scholars, however, have rejected such a theory as outright wrong, noting that history illustrates that copyrights are fundamentally not property, and that copyrights have been hijacked by classifying them as “intellectual property.”¹⁷⁴

These two competing views represent a split among scholars as to whether intellectual property should be viewed (more) like tangible property. They also illustrate two underlying principles of copyright today. The first view, what we may call the Lockean View or Natural Law View, argues that because copyrights are the product of personal labor, they should be treated the same as any other property. The second view, which we may call the Historical View or Positive Law View, disagrees,

170. Syn, *supra* note 152, at 26–27 (noting that economic rights need not mean that religions fail to generate income from their works, stating that “[a]nother misconception is that non-enforcement of economic rights means giving [the work] away free,” and concluding that “[m]any in the church advocate copyright as a *sustenance* right, while de-emphasizing that copyright only sustains because it is also a *legal enforcement* right”) (citations omitted). See also Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1410 (6th Cir. 1996) (Ryan, J., dissenting) (noting, while discussing fair use and analyzing licensing fees as an incentive, that “[m]ore than one hundred authors declared on the record that they write for professional and personal reasons such as making a contribution to a particular discipline, providing an opportunity for colleagues to evaluate and critique the authors’ ideas and theories, enhancing the authors’ professional reputations, and improving career opportunities”).

171. Cotter, *Gutenberg’s Legacy*, *supra* note 20, at 338 n.56 (arguing against differential treatment of religious works based on the fact that “the copyright incentive [may] be unnecessary for the creation and dissemination of at least some religious works”).

172. See Peter S. Menell, *The Property Rights Movement Embrace of Intellectual Property: True Love or Doomed Relationship*, 34 *ECOLOGY L.Q.* 713, 720 (2007). Menell notes that, even though the term “intellectual property” is relatively new, the courts have treated copyright as a form of property throughout the seventeenth, eighteenth, and nineteenth centuries. *Id.* at 720–21.

173. Richard Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 *SAN DIEGO L. REV.* 1 (2005).

174. E.g., see Liam Séamus O’Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 *U. CIN. L. REV.* 143, 145–61 (2007); see also *infra* Part II.A.2.ii.

contending that copyright is a creature of statutory grant that has never been, and should never be, treated exactly like real or personal property.

This subpart explores each of these views. It first considers the Lockean View, tracing the arguments scholars have made in its support, and noting relevant court decisions where necessary. Next, this subpart examines the Historical View, explaining the linear approach that many scholars have taken to copyright law and also noting legislation and relevant court decisions where necessary. Again, after each view is explained, the Article analyzes whether the religious uses of copyright align or conflict with them.

1. Lockean View (Natural Law)

a. Lockean Theory and Its Provisos

Understanding why some scholars treat copyrights as property requires an understanding of the Natural Law View of property that remains part of American law today. The father of this view was the English political philosopher John Locke.

Locke's theory of property is based on natural law. Locke believed that states of nature set conditions that gave rise to laws, collectively referred to as natural law.¹⁷⁵ One such aspect of his natural law philosophy was his theory of property, which had several conceptual steps. This theory first posited that there existed in nature, as bestowed upon the world by God, a "commons" to which no one person held ownership.¹⁷⁶ Lakes, streams, animals, and all other fruits produced by the "spontaneous hand of nature" fell into this category.¹⁷⁷

In addition to the idea of a "commons," Locke viewed "every man [as] ha[ving] property in his own person."¹⁷⁸ This right is held by each

175. At least one author interprets the transition from the state of nature to civil society as destroying the property rights acquired in the state of nature. Barbara Friedman, Note, *The Herbert Tenzer Memorial Conference: Copyright in the Twenty-First Century: From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 *CARDOZO ARTS & ENT. L.J.* 157, 163 (1994) ("The transition from the state of nature to civil society may be seen as marking the end of deontological private property in Locke's theory and its replacement by consequentialism."). A society must have rules, and those rules will decide individuals' rights—the state of nature is not an imperative.

176. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 25 (Hackett Publishing Co. 1980) (stating that "it is very clear, that God, as king *David* says, *Psal. cxv. 16. has given the earth to the children of men; given it to mankind in common*"). See Ian Shapiro, *John Locke's Democratic Theory*, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 312 (Ian Shapiro, ed., Cambridge Univ. Press 2003) ("Locke's frequent appeals to metaphors of workmanship and watch making in the *Two Treatises* and elsewhere make it fundamental that men are obliged to God because of his purpose in making them.").

177. LOCKE, *supra* note 176, at § 26.

178. *Id.* at § 27.

individual, and no other individual has a right to another's person.¹⁷⁹ It stands to reason, then, according to Locke, that the results of one's labor are hers. And, concluding the thought, Locke asserted that when an individual "mixes his labour with" something in the commons, it becomes her property.¹⁸⁰

To summarize, Locke claimed that the fruits of an individual's labor can rightly be called her own property based on three conceptual steps. First, all natural objects existed in "the commons," which has no current owner and which every individual is free to appropriate. Second, an individual has property in her own body. Thus, when an individual mixes labor (i.e., her body) with the commons, the resulting product becomes her property.

Locke's theory, however, has its caveats—or "provisos" as they are known in philosophy.¹⁸¹ The first proviso states that an individual appropriating property must leave enough in the commons so that others may obtain their own property.¹⁸² So, where there exists a forest of boars that sustain the human population, a man who can eat only one boar may not kill all the boars in the forest, keeping them to rot. To do so would violate this first proviso by not leaving enough boars for others to eat. Because copyrighted expressions are nonrivalrous¹⁸³—i.e., since use of copyrighted expression by one person does not inhibit simultaneous use of the same copyrighted expression by another—there will always be "enough and as good" for others.¹⁸⁴

179. *Id.*

180. *Id.* Others, such as Wendy Gordon, have explained Locke's conception of property, after the expended labor, in terms of desert. Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1561 (1993). She states that "the laborer's claim to deserve property is itself justified . . . [by] two primary elements: an assumption that to take the product of the laborer's effort is to cause harm to the laborer, and the law of nature that all persons have a duty to refrain from causing harm." *Id.* (citations omitted). In other words, all claims to property are based on Lockean harm principles.

181. Wendy Gordon explains these two provisos as only one proviso. *Id.* at 1562–65.

182. Locke, *supra* note 176, at § 27 ("[F]or this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."). This is called the "enough and as good" proviso.

183. *See infra* Part II.A.2.i.b.

184. This seems to imply that copyright should not be treated as Lockean property because there will be "enough, and as good" only if the copyright owner is unable control subsequent copies. There are three reasons why this is not so. First, use does not imply infringement. In other words, numerous individuals can use a copyrighted work for a variety of purposes without copying or otherwise infringing. Second, the law permits copying of the unprotected materials in the public domain from which the work was created. Third, the ideas in the copyright are not protected. This is significant if the primary concern with respect to copyrights is the ability to appropriate ideas. In Lockean terms, there always will be "enough,

Locke's second proviso is a response to the objection that people hoard resources if they own what they gather.¹⁸⁵ Locke begins by eloquently responding to this objection: "Not so. The same law of nature, that does by this means give us property, does also bound that property too."¹⁸⁶ The second proviso requires that no individual take more out of the commons than he can rightly use.¹⁸⁷ For example, one who can till only 10 acres of land may not possess 50 acres for himself. The nonrivalrous nature of copyrighted materials also seems to easily satisfy Locke's no-spoilage proviso:¹⁸⁸ an individual cannot take more of a copyrighted work than he can rightly use because anyone can appropriate the work.¹⁸⁹

and as good" ideas left over in spite of the copyright—ideas are not protected by copyright law. I am indebted to Rebecca Tushnet for raising this objection.

185. Locke, *supra* note 176, at § 31 ("It will perhaps be objected to this, that if gathering the acorns, or other fruits of the earth, etc. makes a right to them, then any one may engross as much as he will."). This is known as the "no-spoilage proviso."

186. *Id.*

187. *Id.* ("As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.").

188. Some scholars point out that Locke did not apply his natural law theory of property directly to intellectual property. See, e.g., Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 402 (2005) (stating that "[a]ll of John Locke's examples of the just acquisition of property are based upon the laborer investing effort to creating tangible, rivalrous property, such as food" and arguing that, from a memetic perspective, it is not clear why simultaneous use of memes should cause any harm). But, Richard Epstein has rejoined that "it hardly follows that his theory has no implications for the area." Epstein, *supra* note 173, at 21. Indeed, Epstein argues, the labor theory of intellectual property is stronger because there is nothing physically appropriated from the commons. He meets the arguments of those—like Carys J. Craig, *Locke, Labour and Limiting the Authors' Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEENS L. J. 1, 31–32 (2002)—who contend that authors do not wholly own copyrights in the same manner as tangible property, by claiming that those who contribute to an author's work "get implicit in-kind compensation for their contributions, in their ability to use the creator's works for their own creations." Epstein, *supra* note 173, at 22–23. Thus, Epstein claims, as long as the economic incentives for copyright encourage the creation of new works, there is no problem.

189. Scholars have disputed that point, noting that "it would be reductionist to assume that the acquisition of objects of intellectual property cannot violate the no-spoilage proviso simply because of their abstract nature." Craig, *supra* note 188, at 31. While Justin Hughes notes such depreciation in copyrights, he dismisses this loss as "social," noting the inherent value of the idea itself never changes. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 328 (1988) ("While the social value of an idea may decline below an optimal point, the value of the idea, apart from its value to society, may remain constant."). But, again, Craig has a retort: this description of "value" does not eschew the problems of depreciation or spoilage. Craig, *supra* note 188, at 31–32. She notes that that the "true value" of an idea depends upon its social value, and that even Locke was concerned with social value when he described property. *Id.* In other words, saying that the no-spoilage proviso does not apply because a work loses only social value is like saying a boat loses its value only when it's not in water: the contextual value of a something is what makes it valuable to begin with—nothing has value in a vacuum.

Regardless of what arguments scholars make, traces of the natural law theory taint copyright law today.¹⁹⁰ The Lockean View is perhaps the most consonant with religious reasons for seeking copyright protection, though it does not comport with it entirely. The core of the Lockean theory is that people should own what they create. In some sense, this also means that the owner of the copyright should have some control over how the copyrighted material is used (or not used). That idea is embodied in two primary motivations of religious organizations; at the heart of doctrinal purity and censorship is the maintenance of control over the religious texts.

But some aspects of the Lockean View do not accord completely with religious motivations for copyright protection. Religious works are often seen as the handiwork of God, not individuals.¹⁹¹ Although Locke thought that all humans were God's creation,¹⁹² it does not follow that all of God's creations belong solely to him. Even if it did, that does not mean that God's texts created by human hand should receive special protection, or should be owned under copyright by God. This gives rise to problems of textual management: How could humans manage religious texts that belong wholly to God? How could they decide what needs to be protected and what does not? In other words, human beings could not act as stewards of God's copyrights because only God has the right to control the works He creates. If He did not, then deciding who exactly had the right to control those works would be a matter of ecclesiastical handwaving.¹⁹³

While many religions do not, strictly speaking, act as if God owns the works, they do act in a way inconsistent with Lockean principles. Assuming religious organizations agree that there is no author per se, they still act as if one exists, often claiming that they are entitled to control the work. In other words, because God created the work or because the work is sacred, religious groups seek to control it. The *UCS* case provides just such an example. Christian Scientists successfully lobbied Congress to pass a private law protecting their works because they were religious and sacred. If the work always was attributed to, or created by,

190. See Menell, *supra* note 172, at 720–21.

191. See, e.g., *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *2 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004); Syn, *supra* note 152, at 23.

192. Locke, *supra* note 176, at § 25 (stating that “it is very clear, that God, as king *David* says, *Psal.* cxv. 16. *has given the earth to the children of men; given it to mankind in common*”). See Shapiro, *supra* note 176, at 312 (“Locke’s frequent appeals to metaphors of workmanship and watch making in the *Two Treatises* and elsewhere make it fundamental that men are obliged to God because of his purpose in making them.”).

193. I suppose God could delegate this right to humans, but untangling where He did this in certain works would prove challenging (if not impossible).

one individual, this argument might find some traction in Lockean theory. Many times, however, there is no putative owner of the religious work. In *NCCFE*, for example, the actual author disclaimed ownership, yet sought to maintain control over the work to prevent its distortion.¹⁹⁴

In other respects, religious motivations directly clash with the Lockean View. The Lockean proviso that requires leaving “enough, and as good” for others, as has been shown, faces problems in copyright law theory generally. This proviso also encounters problems with respect to religious motivations. Specifically, if religious organizations seek to wholly control, and therefore prevent others from seeing or using, religious works, they are closing a gateway that would otherwise remain open.¹⁹⁵ Not only are the religious organizations not leaving “enough, and as good,” for others, they are leaving nothing at all.¹⁹⁶

Although one might rejoin that “enough, and as good” merely means the ability to write one’s own religious work, that point does not address the problematical uses of religious works.¹⁹⁷ Individuals are not necessarily looking to write their own work. Often times they are looking to expound upon, criticize, or analyze a religious work. If this type of use is censored or prevented entirely, and individuals are left with whatever remains in the public domain, then there is almost nothing—let alone “enough, and as good”—left to appropriate. Because hoarding religious works cuts against this Lockean proviso, religious claims conflict with Lockean notions of copyright.

The second (no spoilage) proviso also runs counter to religious motivations for copyright. The social value¹⁹⁸ of a religious work may

194. 2000 WL 1028634, at *5–6.

195. Theists cannot get around this argument by claiming that the proviso applies only to those who *rightly* use God’s work, or to only those entitled to use the work. Copyright law does not differentiate works based on the religious merit of the user—nor should it.

196. Some might argue that a copyright owner’s denial to use a work is not equivalent to waste, as I suggest, because the work still may be available on the copyright owner’s terms. But that objection does not dispense of the argument in this Article; it highlights it. Limiting uses of religious works to situations dictated by the owner means that any value the work may have from being used in another way—for comment, criticism, etc.—largely is lost. When COS, for example, prevents individuals from accessing or using a work except on its terms, it prevents possible uses of the work that may yield socially beneficial results, and potentially flouts the fair use doctrine. I am indebted to Tom Cotter for raising this objection.

197. I am indebted to Rebecca Tushnet for raising this objection.

198. Here, social value means the possible value derived from the use of the work by others. Social value does not mean, then, the “inherent” value of a work, or the value of a work to members of a certain social group. This view finds support in copyright law, which recognizes rights in works demonstrating originality, rather than assessing the inherent value or artistic merit of a particular work. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). See *infra* Part III.A. Indeed, as the next subpart will show, the basis for copyright itself is the potential “value” generated by works—i.e., copyright is designed for

decline if the work is kept secret or at least unavailable for public use. While the work itself may remain, continual failure to evaluate the text may make it difficult to evolve and transcend generational and ideological shifts.¹⁹⁹ If this is true, religious secrecy or isolation of these works actually may impede the spread, adoption, or practice of religions.

Regardless, a decline in the social value of the work also deprives others (nonmembers) of the value of the work. And, if a work possesses a nominal social value, the ability of an individual to learn from that work also may be nominal. Additionally, the value of work may decline if it is not open to criticism or comment, which in themselves may create valuable works.²⁰⁰ In other words, the value of access cannot be understated.²⁰¹ Yet, when religious organizations seek to maintain doctrinal purity or censor others, they reduce the social value of the work, violating the no spoilage proviso. In all of these ways, religious motivations of censorship and doctrinal purity run against the grain of copyright law.

b. The Property-Like Attributes of Copyright

Lockean theory, then, presents a mixed bag for religious organizations, and the implications it has for religious organizations extend beyond basic theory. Locke's theory was one of tangible, not intangible, property. Although this subpart does not address whether Locke's theory should apply to copyright, it does examine how, given the differences between Lockean tangible and intangible property, religious organizations motivations align or conflict with copyright law's design.

A portion of this task has just been completed; however, another task lies ahead. This project involves examining the attributes that flow from a Lockean theory, as to both tangible property and copyrighted material.

the public benefit. *Infra* Part II.A.2.ii. It would be backwards to argue that copyright should protect texts, the content of which contains certain "inherent" qualities, some more than others—copyright law treats the contents of all texts equally.

199. To understand how the social value of a work might decline, imagine that it is 1960, and the television that you have just purchased came with a remote control, as well as a manual to describe how the remote functions. Imagine further that your great-grandchildren find this manual many years after you are dead. The manual essentially will be useless to them—it cannot help them *use* the remote because the television has been destroyed. The manual could still be used to learn about the workings of the remotes in the 1960s, but it would have lost some of its original value, which was temporal.

200. That believers might claim the "value" of a religious work is preserved only if it is free from criticism is dubious. It is not clear how any "value" could be lost from a work being criticized, discussed, or used. The original work will exist as usual—the only thing that "changes" is the group of people who use it. Any definition of value that seeks to isolate and define the value of a copyrighted work by reference to individuals or social groups, as already discussed, is incompatible with copyright law.

201. Loren, *supra* note 169, at 7 ("When considering the effects of the marketable right created by copyright, it is important to remember that knowledge is advanced not only by new works being created, but by those new works being shared with others as well.").

As a starting point, one must recognize that copyrighted material has different attributes from real property. These differences allow us to highlight how religious motivations for seeking copyright protection do not comport with the purpose or structure of copyright law.²⁰²

The most commonly noted difference between real and intellectual property is the nonrivalrous nature of intellectual property. Nonrivalrous property is property that, when used, does not decrease the amount of property remaining. Larry Lessig explained the use of nonrivalrous property this way: “A nonrivalrous resource can’t be exhausted.”²⁰³ Put another way, the use of copyrighted material “does not prevent the intellectual property owner from simultaneously using the work.”²⁰⁴ An easement on real property, however, “invites the entire public to come onto the property and use it, thus depriving the landowner (at least temporarily) of the use and enjoyment of those portions that others are physically occupying at any point in time, and preventing him from using the property in any manner inconsistent with the public’s use and enjoyment.”²⁰⁵ Because copyrighted materials are nonrivalrous, so the argument goes, they are unlike real or personal property, and can be used *ad infinitum* without the problems that arise when individuals use tangible property.

Related to the characteristic of nonrivalrousness is the attribute of exclusion. Property rights have been called a “bundle of sticks,” with the most crucial stick being the right to exclude nonowners from using property.²⁰⁶ Copyrights are creatures of statutory grant, and without the Copyright Act, copyright owners would have no right to exclude.²⁰⁷ As Tom Bell points out, copyrights have even “weaker exclusionary rights” than tangible property or patents,²⁰⁸ as the Act fails to exclude nonowners’

202. This subpart explores only those differences between tangible and intellectual property that are relevant to this discussion.

203. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 21 (2002).

204. Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 563 (1998).

205. *Id.*

206. *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

207. Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523, 534 (2008); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 17–27 (2008).

208. While Bell’s point is well taken, it overlooks the nonrivalrous nature of copyrighted materials. The fact that rights are weaker for copyrighted works than tangible property is a function of the differences in rivalrousness. The reason personal uses of copyrighted works are allowed, whereas they are prohibited in cases of tangible property, is probably because personal use of tangible property ultimately depletes a finite resource. Copyrighted works are,

personal uses of a copyrighted work and, in some cases, allows uses over the objections of the owner.²⁰⁹

Related to the right to exclude is the right to use property. If the Copyright Act was nonexistent, “the author of a fixed expressive work would have no more right to use it than anyone else.”²¹⁰ What’s more, under the Copyright Act, authors must endure some unauthorized uses—even some that profit others.²¹¹ This right is similar to the right of acquisition, which notes that, absent the copyright, authors would, at best, own title to the tangible copies in their possession.²¹²

We can wrap up and tie off the bundle with the final stick: preservation. With tangible property, ownership generally exists indefinitely without action by the owner.²¹³ Ownership of a copyright, on the other hand, is for a fixed term, after which time it enters the public domain.²¹⁴ Bell’s phrasing, which I have adapted, illustrates this difference: tangible property endures in the hands of the owner; intellectual property assimilates into the public domain.²¹⁵

These attributes present conflicts with the motivations of censorship and the maintenance of doctrinal purity. For religious organizations, as for any author of a copyrighted work, the primary problem is the nonrivalrous nature of, as well as the use and ability to exclude others from using, copyrighted materials. Religious groups seek to censor other uses of their works; but the nonrivalrous nature of copyright works makes this task difficult, especially given the apparent lack of “harm” from the use.

Nevertheless, the fact that a religious work can be used without “depleting” the religious resource does not make the right antithetical to copyright law. The opposite, in fact, is true. Copyright law was designed

after all, nonrivalrous, and personal uses may affect the profitability of the work, but the work itself remains undepleted.

209. *Id.* In this sense, Bell finds *copyprivilege* to be a more appropriate term than *copyright*. *Id.* at 535. See also 17 U.S.C. § 107(1)–(4) (2006).

210. Bell, *supra* note 207, at 535.

211. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–594 (1994) (holding that a commercial use of the song “Oh, Pretty Woman” constituted fair use because it parodied the song and satisfied the test of the four fair-use factors). A forthcoming work explores more deeply the issue of when and how courts should determine whether a work qualifies as a parody. David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. (forthcoming 2010) (abstract available at <http://ssrn.com/abstract=1569193>).

212. Bell, *supra* note 207, at 537.

213. There are some situations, however, where the owner’s rights can be extinguished—as where the land is adversely possessed—or encumbered—as where an easement gives the public a right of access to the owner’s land.

214. See, *e.g.*, 17 U.S.C. § 302 (2006).

215. Bell, *supra* note 207, at 538 (“Tangible property endures; intellectual ‘property’ evaporates.”).

because nonrivalrous uses exist.²¹⁶ On the other hand, copyright law is a statutory right—a Congressional grant that allows certain types of exclusions. Simply because a statute protects the author of a work in one way does not mean it protects her in all ways. Copyright law, for example, requires the author of the work to endure some unauthorized uses. And therein lies a conflict between this attribute and the goals of religious organizations: religious organizations pursue copyright protection to avoid any unauthorized uses.

Perhaps most importantly for religious organizations, however, are the rights to possess and preserve intellectual property. With some exceptions,²¹⁷ real property can be possessed exclusively forever, and this is exactly the kind of copyright protection religious organizations seek.²¹⁸ Doctrinal purity, for instance, depends upon eternal ownership; the doctrine itself must remain pure forever, not merely for the term of its copyright. Religious organizations' desire to censor, too, lacks durational constraints. Squelching criticism and dissent is not an activity that, in the minds of religious organizations, should be pursued only for the term of copyright. Criticism and dissent always are detrimental and always should be suppressed.

Copyright law, however, provides a limited monopoly; the express purpose of this limited monopoly is to give authors an incentive to create and distribute their works. Furthermore, copyrighted works never can be wholly possessed in the way real property can be. The advent of digital media, and digital networks like peer-to-peer networks, means that copyrighted material can be possessed only in limited ways, such as through encryption and the enforcement of legal rights. The implications for religious organizations are significant. Their use of copyright law to achieve eternal goals conflicts with the Constitutional "limited times" requirement of copyright law. All of the attributes discussed in this subpart conflict with religious motivations for seeking copyright protection.

2. Historical View (Positive Law)

Many scholars, however, do not agree that a Lockean theory is the correct justification for copyrights. In fact, these scholars oppose linking copyrights to Lockean notions of property. To explain why copyrights lack Lockean foundations, these scholars turn to history. Much of the

216. Indeed, the limited monopolistic rights given to a copyright owner are designed to provide an incentive to create and distribute the work. That is, if the author knows that she can recoup her costs of creation by charging a price for the work, she is more likely to create.

217. See *supra* note 213.

218. *United Christian Scientists v. Christian Science Board of Directors*, 616 F. Supp. 476, 477 (D.D.C. 1985) (regarding the successful lobbying of the U.S. Congress for an extension to the copyright term of several religious works of Christian Science).

copyright literature has detailed the origins of the first English copyright, illustrating its incongruous relationship with Lockean notions. It does not hurt to briefly recount that history here.

A good place to start this brief historical sketch is Rome. The Romans did not conceive of authors or musicians as owning their works or performances.²¹⁹ Although legitimate possession of a work entitled Romans to copy it,²²⁰ they did conceptualize (noncodified) rights beyond mere possession, such as the author's right to prevent unauthorized publication of their work.²²¹

England is the next stop on the copyright tour.²²² There, the Crown employed the "printing privilege[, which] was an ad hoc form of policymaking that could range widely in subject matter, scope, and duration."²²³ But King Phillip and Queen Mary Tudor decided that this system, which regulated religious and political speech, was not effective enough.²²⁴ Using the letters patent to create more religious uniformity in literature, Phillip and Mary granted an exclusive monopoly over book printing (i.e., a copyright) to the Stationers' Company,²²⁵ which, in exchange for profits, regulated the content of books by determining which books to print.²²⁶ The Stationers' Company acted "as the policemen of the press,"²²⁷ and was granted the right to "the copie" of the work it printed.²²⁸

219. Katharina de la Durantaye, *The Origins of the Protections of Literary Authorship in Ancient Rome*, 25 B.U. INT'L L.J. 37, 58 (2007). Romans used their observations about the natural world to describe a theory of natural law. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517, 523 (1990).

220. Durantaye, *supra* note 219, at 77 (stating that, "in ancient Rome[,] any individual in legitimate possession of a copy of an already published work could reproduce and distribute copies of the work at will").

221. *Id.* at 58–77 (detailing rights, such as moral rights, recognition of authorship rights and appropriation rights).

222. Yen, *supra* note 219, at 523. Yen also notes that Locke and the English changed the effect of natural law. Whereas the Romans thought natural law merely reflected the current state of men, the English saw natural law as prescribing how the current state of men should be.

223. Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 921 (2005). The Crown often used the privilege—in the form of the "letters patent" or a "royal license"—to control what was printed. *Id.*

224. See O'Melinn, *supra* note 174, at 153; Yen, *supra* note 219, at 378.

225. L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 377 n.32 (2000) (quoting the language of the charter).

226. Yen, *supra* note 219, at 525 (noting that the Stationers' Company also had the right to seize unauthorized presses and regulate content).

227. Patterson, *supra* note 225, at 377.

228. *Id.* at 378. Because the right to print particular books was specific to each individual member of the Stationers' Company, the company needed a system to control its members—that is, to describe who was entitled to print what. *Id.* To prevent the chaos that could have resulted from reckless profit-seeking by individual members of the Stationers'

And so the first copyright was born. It is important to note that only booksellers and printers, not authors, could be members of the Stationers' Company; therefore, only booksellers and printers could own the copyright in the individual work.²²⁹ Votaries of the Historical View often emphasize that this copyright—the first copyright—was not derived from the Lockean theory giving authors rights in their works. To the contrary, authors had almost no rights in their works.²³⁰ Copyrights were devised originally as a mechanism for content control,²³¹ not a system designed for promoting, or subscribing to a Lockean notion of, authorial rights.²³² Even Augustine Birrell, many years ago, went so far as to state that the “author’s copyright had . . . in practice no independent existence.”²³³

After a series of battles between the Stationers' Company and the public, and after the abolishment of the Star Chamber,²³⁴ the Parliament enacted the Statute of Anne (the Statute) in 1709.²³⁵ While some scholars

Company, a simple system was adopted: “[a] member who registered the title of a work in the company register was entitled to ‘the copie,’ that is copyright, of that work.” *Id.*

229. *Id.* See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 249 (2008) (“In England prior to 1710, it was stationers and only stationers that could register copyright.”).

230. Oren Bracha has pointed out that authors may have had limited rights under the Stationers' Company system. *Id.* at 249 n.264. He states that informal norms, “backed by sporadic formal enforcement[,] . . . created” limited rights for authors to compensation and possibly first publication. *Id.*

231. Dennis W.K. Khong details the use of copyright for censorship, including the search and seizure powers of the crown, throughout English history in *The Historical Law and Economics of the First Copyright Act*, 2 *ERASMUS L. & ECON. REV.* 35, 37–42 (2006).

232. Patterson, *supra* note 225, at 378. Patterson even points out that the Stationers' Company enacted the first regulations regarding copyright, which it designed to benefit itself, not authors. *Id.*

233. AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 74 (1899).

234. The Star Chamber was originally a location at which The Council, a judicial body, sat. W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 274 (1903). During the 1500s, the Star Chamber exercised primary jurisdiction over The Council's judicial activities but never seriously became a separate judicial body. *Id.* at 272. The name itself was said to be derived by Blackstone from the term “Starra,” which meant the obligations and contracts of the Jews. *Id.* at 272–73. The prominent room that was appropriated to the council at the exchequer at Westminster in which these cases were heard became known as the “Star Chamber.” *Id.* The Star Chamber heard only certain cases (both civil and criminal), and not all matters that the Star Chamber heard were heard by The Council. *Id.* at 274, 279–280. Although its jurisdiction extended only to certain matters, those matters concerned the state or private parties. *Id.* at 279. In fact, the Star Chamber “continually interfered with private disputes.” *Id.* at 281. The Star Chamber also engaged in administrative duties. *Id.* at 272–78. Because its growing role constituted a threat to the common law and many lawyers' occupational sustenance, *id.* at 285–86, 289–90, the Star Chamber was abolished by an act establishing the Privy Council in 1640. *Id.* at 278.

235. Although Parliament enacted the Statute in 1709, it did not go into effect until April of 1710. Patterson, *supra* note 225, at 374 n.26. During its tenure as the censorship machine, the Stationers' Company continually sought increases in its power from the Star Chamber. *Id.* at 378–79. But after the abolishment of the Star Chamber in 1640, the Stationers' Company

have stated that the interest for the enactment of the Statute was economic,²³⁶ all agree that its purpose was devoted to the public interest.²³⁷ There is evidence that the Statute was drafted with reference to both the stationers' copyright and the Licensing Act of 1662, "presumably to make sure that undesirable features of the stationers' copyright protection by provisions of that statute were not part of the new statutory copyright."²³⁸ Furthermore, Dennis Khong notes that drafter Edward Wortley's first composition of the Statute did not include the word "vesting" in the title; it read "A Bill for the Encouragement of Learning and for *Securing* the Property of Copies of Books to the Rightful Owners thereof."²³⁹ Khong has suggested that the change in language indicates that the House of Lords, by using the term "vesting," *created* the copyright—whereas the use of the word "securing" would have meant copyrights existed already, and were merely being codified.²⁴⁰

The copyright to which the author became entitled, however, had its limits. First, the duration was limited to two fourteen-year terms, with the second term renewable only if the author was living at end of the first term; if the author was dead, the copyright lapsed and the work entered the public domain.²⁴¹ Second, the Statute was devoted to the

lost much of its power, though not much of its zeal, and it continually lobbied Parliament to increase its monopoly. Yen, *supra* note 219, at 525. It achieved its aim to some degree when Parliament enacted the Licensing Act of 1662, which continued the booksellers' monopoly. Patterson, *supra* note 225, at 379. That victory, however, was short-lived. The sunset provision in the Act was allowed to lapse in 1694, and the booksellers' renewed efforts to regain their monopoly—lobbying Parliament for new Acts in 1703, 1706, and 1709—proved unavailing. Khong, *supra* note 228, at 41.

Unfortunately for the booksellers, their efforts produced a radically new statute in 1709: the Statute of Anne. Patterson, *supra* note 225, at 379. Unlike the previous statutes that granted the booksellers a monopoly for the purposes of censorship and corporate profit, the Statute of Anne was entitled, "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." *Id.* at 374–75.

236. Yen, *supra* note 219, at 526.

237. *Id.*; Patterson, *supra* note 225, at 379–80. Also, it is important not lose sight of what is meant by "public interest." A recent discussion with a friend causes me to fear the reader will devolve into a semantic attack on the term "public interest." As a general note, public interest means that the statute was enacted to benefit the public as a whole, not the individuals who retain the copyright.

238. Patterson, *supra* note 225, 376.

239. Khong, *supra* note 231, at 44.

240. *Id.* (citing MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 43 (1993)). While the change in prose is an interesting point that illuminates the possible intended meaning of the Statute, it should be obvious that it does not conclusively determine any question about what attributes copyrights *should* have. Whatever weight we afford to the author's use of words, we ultimately can decide that he was wrong (or right), and we can evaluate the essence of copyright apart from any statute or words.

241. Patterson, *supra* note 225, at 379.

public interest.²⁴² Additionally, the Statute seemed to apply to only literary authors and booksellers, excluding the creators of paintings, songs, etc.²⁴³ Scholars emphasize these points to show how the original authorial copyright grew out of a desire to destroy a censorship-copyright and to promote the public interest, not out of a natural law theory of property.

Although copyright in the United States has some traces of natural law,²⁴⁴ its justification—like the statute upon which it was based, the Statute of Anne²⁴⁵—lies in the public interest. Article I, Section 8, of the Constitution states the following: “The Congress shall have power . . . [t]o 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.”²⁴⁶ While the Constitutional Convention yielded almost no records of the Founders’ thoughts on copyright law,²⁴⁷ the Copyright Clause and its antecedents show the United States adopted a copyright system primarily focused on the public benefit, though the proprietary interest of the author did receive some attention.²⁴⁸

242. *Id.* at 368. Patterson’s basic argument can be phrased as a syllogism: Congress has the power to create copyrights only in those things that are original creations and cannot expropriate anything in the public domain. Copyrights are limited and eventually lapse into the public domain. Therefore, a primary purpose of copyrights is to protect the public domain.

243. Carroll, *supra* note 223, at 923 n.74.

244. See Patterson, *supra* note 225, at 392. See also Yen, *supra* note 219, at 529; Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 *passim* (1990). Patterson notes that “[w]hile the monopolists failed in their use of the author in seeking to override the Statute of Anne, they made natural law copyright a part of Anglo-America copyright jurisprudence in the form of the common law copyright.” Patterson, *supra* note 225, at 392. Professor Jane Ginsburg observes that some of the early U.S. state copyright laws were author centered. Ginsburg, *supra*, at 995. She goes on to discuss sources from the late 1700s—such as essays, academic letters, and state statutes—to argue that Lockean conceptions of authorship were “acknowledged.” *Id.* at 1000.

245. Patterson, *supra* note 225, at 374.

246. U.S. CONST. art. I, § 8, cl. 8.

247. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 23–45 (1994). Walterscheid details the lack of records on the question of why the Copyright Clause was included and proposes several theories to explain this fact. *Id.* As an added bonus, he concludes that Charles Pinckney and James Madison played the most active role in the inclusion of the Copyright Clause, with Pinckney initially introducing the idea. *Id.* at 46–47. While Pinckney’s motives were less apparent, Madison’s objectives, as a scholar, seem to have been to protect the author’s work. *Id.* at 47–48.

248. Although the Copyright Clause was based on the Statute of Anne, Patterson, *supra* note 225, at 374, as the law crossed the ocean, the nautical winds bent copyright theory in a different direction than that taken in *Donaldson v. Becket*, 4 Burr. (4th Ed.) 2408, 2417, 98 Eng. Rep. 257, 262 (H.L. 1774), where the House of Lords ruled that no common law copyright existed. Yen, *supra* note 219, at 529; Patterson, *supra* note 225, at 383 (“History before 1787 demonstrates the English concern for the primitive copyright in the form of a natural (or common) law monopoly, and history after 1787 shows that this concern was transferred to the United States.”). A broad reading of *Donaldson* would eliminate a natural law theory of copyright, but “early Americans saw copyright as a matter of both economic policy and natural

But the legal system based this dualism (public interest versus authors' rights) on two entirely different legal sources. Whereas the natural law theory of copyright found its roots in the common law, the public interest framework had a Constitutional basis.²⁴⁹ On their face, then, there is a powerful difference between the two rights. This difference is made even more powerful because the 1976 Copyright Act abolished the common-law authorial property-right.²⁵⁰

law." Yen, *supra* note 219, at 529 (emphasis added); Ginsburg, *supra* note 247, at 995, 999–1001 & n.44 (explaining that some early American state copyright laws reflected concerns for authors' rights as a result of lobbying by authors). This argument is based on language from the State Constitutions existing at the time of the Constitutional Convention, as well as statements made by James Madison reflecting this belief. *Id.* at 528–29. Despite this, another scholar claims that Madison "extolled the Constitution's Copyright and Patent Clause because the 'public good fully coincides in both cases with the claims of individuals.'" O'Melinn, *supra* note 174, at 159. In other words, Madison's support for the limited monopoly conferred by the Copyright Clause emanated from his desire for copyrights to benefit the public, not from the natural law theory (of authorship). James Boyle also supports the view that the influential architects (e.g., Thomas Jefferson, James Madison, etc.) of U.S. intellectual property rights were concerned primarily with the public benefit, and sought to achieve that aim by providing the author with a carefully circumscribed and limited monopoly. BOYLE, *supra* note 207, at 257 n.19. Boyle wonders, somewhat rhetorically, whether the natural-law discussions of copyright among the Founders were "signal[s] or noise?" *Id.*

In any event, the colonists had no formal copyright practice. Walterscheid, *supra* note 247, at 20. And, while the individual states enacted some copyright laws, Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 428 (1992) (pointing out at least seven states had copyright clauses with preambles that suggested a natural-law basis for American copyright law), there is not "much evidence of any early state copyright practice." Walterscheid, *supra* note 247, at 20. Notwithstanding this fact, the copyright question endured, and from 1783 to 1786, several states enacted copyright laws. *Id.* at 22 (noting that scholars have suggested that these statutes were never operable). Patterson notes that "twelve of thirteen states (all except Delaware) had used the Statute of Anne as a model for enacting state copyright statutes during the period of Confederation—from 1783 to 1786." Patterson, *supra* note 225, at 374.

But that tide shifted, and the Articles of Confederation were amended because administering numerous copyright systems became unduly complex. Walterscheid, *supra* note 244, at 22–23. The earliest known formal discussion of federal copyright law came in the form of a resolution at the Continental Congress, May 2, 1787, and it hinted at a system of copyright founded upon propriety and public interest. *Id.* at 20.

249. Patterson, *supra* note 225, at 392.

250. 17 U.S.C. § 301(a) (2006) ("On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."); *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 (2006) ("Congress explained what the statute made obvious: '[t]he intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works, within the scope of the Federal copyright law.'" (quoting H.R. REP. NO. 94-1476, at 130 (1976)). *But see* 17 U.S.C. § 301(b)(1)–(4) (stating that "[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to," among other things,

The Historical View, at the very least, gives an argument about the wrongheaded nature of our copyright system today. It points out that the Natural Law View of copyright is neither required by the English origins of copyright, nor is it a natural outgrowth of our own copyright system. History shows that copyright law finds its primary justification as a tool for promoting the public interest and protecting the public domain.

If the votaries of the Historical View are correct, religious motivations for copyright are seriously misguided. The Statute of Anne, the Statute after which the Delegates to the Constitutional Convention modeled the Copyright Clause, was designed to destroy the censorship that had plagued England under the Stationers' Company. But one of the two primary reasons religious organizations seek to use copyright is to censor others' writings. In preventing bad publicity, squelching criticism and dissent, and stifling competition, religious organizations' uses of copyright seek to unravel the basic principles that the Statute of Anne and the Copyright Clause wove together. In other words, religious organizations' attempt to censor others' works looks more like Queen Mary and King Phillip's regulation, and less like the Statute of Anne and the Copyright Clause's public-interest-centered incentives. For that reason, the religious organizations' desire to use copyright law to censor others conflicts with the law's most basic goal.

Furthermore, on the Historical View, religious uses of copyright to maintain doctrinal purity seem fundamentally wrong. The Historical View posits that copyright law was created to promote the public interest, and did not originate from any natural law philosophy. Religious motivations for seeking copyright protection and enforcement, by contrast, ground themselves in the right to control. Thus, they find support in a natural law justification of copyright—one that presupposes an authorial right to at least some control of the work. But without that natural law justification, attempts to maintain doctrinal purity lose legal support. Focusing on the public interests substantially dilutes the author's right, which includes, in some way or another, the ability to control the work. This renders the religious claim—the claim that a religious work needs

works not fixed in a tangible medium of expression). Patterson notes that proponents of authorial rights may have sought to merge into the statutory framework the property right created by common law. Patterson, *supra* note 225, at 380–81 (explaining how booksellers sought a copyright based on natural rights in the legendary “Battle of the Booksellers”); *id.* at 387–88 (explaining how natural law theory slips into U.S. copyright in, for example, the right to copy). But, he argues, given Parliament's elimination of the common law right—and the United States' general adoption of the Statute's framework (carefully circumscribed copyright, fear of monopoly, and a design to further the public interest)—common law copyright was all but dead. *Id.* at 381–83, 390–92. Since the Copyright Clause is aimed at promoting the public interest and (almost) no common law authorial right exists, there is little to no justification for retaining a natural law theory of copyright today, many argue.

to be preserved in its “pure form”—effete. Without a natural law theory of copyright, religious organizations must rely on economic rationales, which, as this subpart has shown, conflict, though not entirely, with religious motivations for copyright protection.

The only saving grace for religious groups is the fact that modern U.S. copyright does have some natural law inclinations.²⁵¹ As a corollary, claims of control and rights of ownership thus have more validity than the Historical View would otherwise permit. Thus, while the Historical View of copyright does clash with religious motivations, the implications of this clash under current copyright law are not as prominent as the proponents of the Historical View might like.

C. Cultural Theory

Often overlooked or unnoticed are the cultural theorists. Unlike economic theorists, cultural theorists employ “literatures and methodologies that focus on the interactions between self and culture.”²⁵² Rights-based theorists,²⁵³ such as property-rights theorists, view (and therefore dismiss) cultural theorists as lacking a norm-creating structure. In some sense, rights-based theorists cannot accept a relativist conception of law because law is normative by design. Julie Cohen argues that this aversion is driven by a fear of undermining traditional conceptions of individual autonomy by cultural theorists’ focus on the “endogenous relationship of self to culture,”²⁵⁴ or merely out of disdain for postmodernism and the “pernicious relativism” cultural theory represents.²⁵⁵

But, at its core, cultural theory seeks to understand copyright law as a constantly evolving and shifting series of events;²⁵⁶ there is no absolutist framework from which copyrights should emanate. This means that

251. See 17 U.S.C. § 106A (2006) (describing moral rights for certain works); *supra* note 241. *But see, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (“[C]opyright does not immunize a work from comment and criticism.”); *id.* at 1283 (“Copyright law is not designed to stifle critics.” (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (citation and internal quotation marks omitted)).

252. Cohen, *supra* note 150, at 1156.

253. Rights-based theories are those that premise the existence of copyright on fundamental rights, such as right to one’s labor, instead of focusing on consequentialist theories, as does the economic theory of copyright.

254. Cohen, *supra* note 150, at 1157.

255. *Id.* at 1162.

256. *Id.* at 1165–66 (“This account seeks to understand how existing knowledge systems have evolved, and how they are encoded and enforced. It explores the dialectic between settled truths and disruptive upheavals, and seeks to illumine the ways in which particular innovations become accepted as truth or enshrined as artistically valid.”); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 727, 728–42 (1993) (using literary theory to critique copyright work, and asserting that all works are “unstable and dependent upon context”).

cultural theorists do not so much justify the system of copyrights as seek to explain that system and offer insights into how it might function better.²⁵⁷

The fundamental pillar, or normative commitment, of cultural theory is that systems of knowledge not become entrenched or ossified.²⁵⁸ The idea of cultural theory, which is not uniform, is that methods of understanding are constantly evolving, and copyright law is no exception. While cultural theorists agree that copyright law should promote “progress,” they differ from rights-based theorists on what “progress” means.

Cohen argues that cultural theorists construe “progress” to have a broader meaning: “progress consists . . . in that which causes knowledge systems to come under challenge and sometimes to shift.”²⁵⁹ In other words, progress is anything that creates new ideas, or at least new ideas that challenge old ideas in some way.²⁶⁰ Cultural theorists also evaluate the current social framework for rewarding and internalizing “progress.”²⁶¹

257. See *id.* at 729 (“In suggesting a reevaluation of how copyright approaches the ‘work,’ this Article suggests an alternative structure—a different way of looking at what copyright protects—that can bring the policies underlying the central decisions in a copyright case into sharper focus. In this sense, the Article is descriptive rather than prescriptive.”). See *id.* at 750 (“I emphasize that this discussion does not seek to dictate how copyright’s approach to originality should be, but rather how, in light of contemporary literary theory, the inquiry into ‘originality’ might be refocused to consider the policies underlying the protection of copyrighted texts.”); Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L. J. 455, 456 (1991) (noting that his article critiquing the copyright law concept of “authorship” “says little about what the content of copyright law should be”). Perhaps this statement is too strong. After all, cultural theory understands culture and creativity in a particular way, and it advocates a system of copyright that most efficaciously promotes this understanding. Nevertheless, it is harder to characterize cultural theory as a justification because it is grounded in observations rather than a normative theory. In other words, cultural theory explains how culture functions (i.e., constantly changes) and seeks to promote the relationships that it explains. Nevertheless, the rights-based approaches can still add valuable structure to copyright in cultural theory, as Cohen argues. Cohen, *supra* note 150, at 1195–97 (explaining what cultural theory adds to copyright theory generally, and how it encourages using a variety of different methodologies to shape copyright law).

258. Cohen, *supra* note 150, at 1168.

259. *Id.*

260. Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 101 (1993) (stating that “postmodern ‘Progress’ deconstructs the linear and forward nature of ‘Progress’ (postmodern progress is circular, sideways, or even upside-down)”; *id.* at 123–134 (detailing the postmodern approach to “Progress” and how it differs from the contemporary approach, stating that “[p]ostmodern’ progress is . . . consistent with the ‘bottom-up’ approach of postmodernism, one that recognizes that ‘progressive’ acts may be backward as well as forward, perhaps sideways, and most often circular (as exemplified by the accelerated reflexivity of knowledge”).

261. Cohen, *supra* note 150, at 1168 (stating that “a postmodernist approach to knowledge demands careful attention to social, cultural, and legal mechanisms for evaluating, rewarding, and internalizing progress”).

The main resource for evaluating cultural progress, then, is the thought-structure with which it is analyzed.²⁶² Born from this thinking is the belief that copyright should be re-examined from a culturalist perspective. The observations made should be used to realign the current legal framework of copyright law. For example, Cohen describes traditional economic and philosophical theories as obsessed with abstraction, “presum[ing] access to extant cultural resources regardless of their location in space and time.”²⁶³ Cultural theorists, by contrast, view culture and creation as limited by “the ubiquity of constraint in the creative process,” or “situatedness.”²⁶⁴ In other words, individuals can create culture based on only their current context (i.e., inasmuch as their current culture, time, location, etc. allow).

From this standpoint, it is easy to see how cultural theories, such as strict constructivist theory of technology (SCOT)—which asserts that texts have no fixed meanings—arise.²⁶⁵ While Cohen uses SCOT as a starting, rather than ending, point, she does advocate the application of variant theories to copyright, using them to create new understandings of copyright and to critique the existing legal framework.²⁶⁶ She finds support in this understanding within the “creative play” school of psychology, which holds that the individual lacks control, to some degree, over what the individual creates.²⁶⁷ Cultural theorists posit that understanding culture and the creative process as fluid and (to some degree) uncontrollable will aid our analysis of copyright law generally.²⁶⁸

In the end, this understanding leaves us with a conception of copyright law that is fundamentally different than rights-based or consequentialist theories. First, it deemphasizes copyright law’s incentivizing role²⁶⁹

262. Cohen devotes much of her article to a discussion of how cultural theory critiques copyright in ways different from theories grounded economics or political philosophy. Those critiques derive from the idea that cultural theorists evaluate copyright and its goals from fundamentally different perspective—one which, for example, views the idea/expression dichotomy as an abstraction that obfuscates the study of the transmission of culture and “makes grappling with difficult policy choices in copyright even more difficult than it ought to be.” *Id.* at 1175–76.

263. *Id.* at 1180.

264. *Id.* at 1178.

265. *Id.* at 1184.

266. *Id.*

267. *Id.* at 1190 (discussing how philosophical and economic justifications view the individual as intentionally creating creative works, and explaining how some psychology studies support the opposite view). This view also finds support in creativity research and moral rights scholarship. *See generally*, Simon, *supra* note 169.

268. *Id.* at 1187 (explaining how her discussion of culture as networks illustrates the numerous interaction points of copyright and culture, which say something about copyright itself).

269. By “incentivizing role” I mean the view that copyright is a vehicle to spur creativity and innovation.

because creative products are the result of serendipity and constraint rather than pure intention.²⁷⁰ Second, since cultural theory, unlike rights-based utilitarian theories, explains the harm of rigid controls on situated users of culture, it provides a stronger argument for fewer legal constraints.²⁷¹ Yet, a cultural theory of copyright does not abandon wholesale the ideas of economic and rights-based theories. Instead, Cohen argues these are necessary to complete the cultural theories, blending elements from a variety of disciplines to make a framework that can accommodate the ever-shifting nature of copyright.²⁷²

In almost every way, the cultural theory of copyright conflicts with the religious motivations of censorship and doctrinal purity. While cultural theorists abhor the “ossification” of knowledge systems, religious groups extol and pursue it. Preserving a doctrine and preventing it from criticism is antithetical to the cultural theory, but it is essential for many religious groups. A religious organization that sought, for example, to maintain its doctrine would ardently resist the argument that its doctrine could not and should not be maintained.

Moreover, theories like SCOT clash so drastically with religious motivations for copyright that it is difficult to see how the two could co-exist. SCOT claims that there is no fixed meaning in a text; religious organizations often claim there is only one true and absolute meaning. Religion groups may make the less-categorical claim that a religious text has multiple true and absolute meanings. But these true and absolute meanings are derived from, and fixed (i.e., they are diachronically stable) by, precise religious language.

Religious texts and religions are not, at least in the minds of religious organizations, uncontrollable, constantly evolving cultural elements. Religious motivations for copyright are almost exclusively about having or maintaining control over the meaning of a text. The objective of doctrinal purity, as evidenced by the UCS case, is to maintain control of doctrine and ensure its stasis. Religious organizations would not pursue this objective if they thought their doctrine had, or should have, more than one meaning. A similar statement can be made about the desire of religious organizations to censor. Censorship, as we have seen, is a tool used by religious organizations to prevent criticism of their doctrine—or anything that might suggest their doctrine is wrong or misguided. Achieving that objective would be meaningless if religions accepted that their works had more than one meaning.

270. Cohen, *supra* note 150, at 1193.

271. *Id.* at 1193–94.

272. *Id.* at 1197–98.

The contrast in theory is evident. Religious organizations argue that their texts transcend time and space and exist as universal truths. For cultural theorists, the idea of universal truths, let alone those embodied in a text, are not only quixotic, but fantastical. Yet, religious organizations maintain that their texts are universally applicable and must be preserved in that form. Doctrinal purity depends, after all, on the maintenance of sacred texts in their pure form.²⁷³

On its most basic level, cultural theory articulates reasons opposite to the religious motivations for pursuing copyright. While religious organizations seek to maintain the meaning of their works, some cultural theories hypothesize that works do not have fixed meanings. Furthermore, cultural theory argues that individuals are limited in what they create by their situatedness.²⁷⁴ In direct conflict with religious motivations, cultural theory asserts “that the text is not a line of words releasing a single ‘theological meaning’ (the ‘message’ of an Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from innumerable centers of culture.”²⁷⁵ For these reasons, religious organizations seeking copyright protection do so for reasons antithetical to a cultural theory of copyright law.

III. DOCTRINAL OBSTACLES TO RELIGIOUSLY-MOTIVATED USES OF COPYRIGHT LAW

The previous Parts have shown that religious organizations pursue copyright protection and enforcement primarily to maintain the purity of their doctrine, or to censor others’ uses of their religious texts. These two reasons, as we have seen, conflict with the underlying principles of copyright and clash with nearly all theories of copyright. That analysis, however, did not elaborate on whether copyright could, in fact, be used to achieve the goals of religious organizations.

That is the aim of this Part. Better phrased, the inquiry is this: irrespective of the conflict articulated in Part II, do the basic copyright law

273. Doctrinal purity also depends on practice. An unchanged text may still result in changing doctrine if the text is disregarded or not used at all. Despite this fact, textual maintenance goes a long way toward preserving doctrinal purity using texts—and toward maintaining an unchanging religious practice.

274. In some ways, the idea of situatedness might not clash entirely with religious beliefs. The *NCFE* case, for example, may illustrate that religions often believe that a sacred text must be limited by the author’s ability to write it, drawing on his own experiences.

275. Rotstein, *supra* note 256, at 737–38 (quoting ROLAND BARTHES, *IMAGE, MUSIC, TEXT* 146 (1967), *quoted in* JOHNATHAN D. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982)).

doctrines impede or facilitate the success of religious groups' attempts to censor or maintain doctrinal purity? The most logical place to begin this inquiry is with the prominent copyright doctrines that exist in U.S. copyright law today. In describing these doctrines, this Part assesses how each doctrine fits with religious uses. It bears emphasizing that each doctrine is assessed on its ability to achieve religious goals, not on whether the principles underlying the doctrine conflicts with these goals.²⁷⁶ This Article concludes that copyright law doctrine in most cases inhibits the achievement of religious goals. That conclusion is reached after examining the following doctrines: originality, copyrightability, the merger doctrine, substantial similarity, and fair use.

A. Originality

To create a copyrightable work, the law requires that the work be "original."²⁷⁷ The Supreme Court expounded upon this requirement in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁷⁸ At issue was the copyrightability of an alphabetically organized phonebook.²⁷⁹ The Court, before reaching its conclusion, highlighted the importance of originality in copyright: "The *sine qua non* of copyright is originality";²⁸⁰ indeed, "[i]t is the very 'premise of copyright law.'"²⁸¹

The Court observed in *Feist* that, in the past, some courts mistakenly invented "a new theory . . . , [k]nown as 'sweat of the brow' or 'industrious collection,'" which viewed "copyright [as] a reward for the hard work that went into compiling facts."²⁸² The Supreme Court stated that "without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles."²⁸³

Religious organizations would probably agree that originality is more important than the amount of effort used to create the work.²⁸⁴ The

276. The harmonization of religious goals with the principles of copyright law is different from copyright law doctrine's ability to achieve religious goals. This Part's inquiry is concerned only with copyright doctrine, not the underlying principles giving rise to those doctrines.

277. 17 U.S.C. § 102 (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .").

278. 499 U.S. 340, 345–46 (1991).

279. *Id.* at 342–43.

280. *Id.* at 345 (second emphasis added).

281. *Id.* at 347.

282. *Id.* at 352.

283. *Id.* at 354.

284. While the originality requirement is philosophically inconsistent with the natural law theory of copyright—and thus with many religious reasons for seeking copyright—it is not a doctrinal bar for religious organizations seeking copyright protection. Nevertheless, it does cause problems for religious organizations seeking to attribute their works to divine authors. Although religious organizations have not lost their copyright claims on this basis alone,

reason for this is because God's word, in the eyes of the believer, must be original. So, the originality requirement in the abstract probably is not objectionable to religious organizations. Problems arise, however, when religious organizations seek copyright protection for works authored by a supernatural being.²⁸⁵

The originality requirement also undermines both the quest for doctrinal purity and the attempt to censor other groups' use of the religious work. Because the copyright extends only to original works of authorship, their religious doctrine that the text embodies will not be protected entirely. Instead, copyright protects only the original expressions contained in the work. Preserving doctrinal purity will, therefore, be difficult because other groups can copy the ideas that the text embodies, as well as the noncopyrightable expressions that the work contains. Additionally, censoring works wholesale will be difficult. Because critics or dissidents may be able to copy certain unoriginal portions of a work verbatim, or criticize the ideas embodied in the works, the concept of originality further conflicts with religious motivations for copyright protection.

B. *Copyrightability of Facts and Compilations*

Much like ideas, facts are not copyrightable.²⁸⁶ Unlike ideas, however, compilations of facts are copyrightable.²⁸⁷ These compilations, of course, must be original: the author must arrange the facts or data in a manner that merits copyrightability. To the extent that the compilation is original, copyright law protects it.²⁸⁸ The law, however, does not protect the facts contained in the compilation, or an unoriginal arrangement of the facts. Individuals can quote factual works more liberally than

they have not been able to secure their copyrights in the manner they desire. The reason is because courts use the originality requirement to eschew divine claims of authorship. While this subject could be grouped under the heading of "originality," I have placed it *infra* Part III.B.

285. See *infra* Part III.B.

286. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 344 (1991) (stating that "facts are not copyrightable").

287. 17 U.S.C. § 103(a) (2006) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); *Feist*, 499 U.S. at 344 (stating "that compilations of facts generally are" copyrightable).

288. 17 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").

nonfactual works.²⁸⁹ Nevertheless, because compilations are copyrightable, other can infringe them.

Underneath the umbrella of copyrightability, religious organizations encounter problems. In particular, a problem arises when a group or individual claims the author is a supernatural being.²⁹⁰ Because a supernatural author cannot hold a copyright or create a copyrightable work,²⁹¹ religious organizations cannot argue that “Jesus,” for example, created or owns the copyright to a work. Instead, where the plaintiff claims a divine or supernatural author, three scenarios result.

1. Finding the Work Qualifies as a “Literary Work”

First, the court may find copyrightability by disregarding the “divine” nature of the book and hold that it still qualifies as a “literary work,” regardless of whether “the [work’s] authorship stem[s] from human effort.”²⁹² In *Urantia I*, for example, the plaintiff sued for copyright infringement but claimed its work was written by God.²⁹³ The district judge originally punted on the metaphysical issue, stating:

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. § 102.²⁹⁴

289. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

290. *See, e.g., Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *11 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004).

291. *Urantia Found. v. Maaherra (Urantia II)*, 114 F.3d 955, 958 (9th Cir. 1997) (noting that, while “[t]he copyright laws . . . do not expressly require ‘human’ authorship[,] . . . it is not creations of divine beings that the copyright laws were intended to protect, and that in this case some element of human creativity must have occurred in order for the [work at issue] to be copyrightable”).

292. *Urantia Found. v. Maaherra (Urantia I)*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995) (stating “that the uncontroverted evidence is that *The Urantia Book* is a ‘literary work[.]’ [because] [t]he work itself ‘possesses at least some minimal degree of creativity’”).

293. *Id.* at 1338.

294. *Id.*

Thus, the judge disclaimed a religious basis for his decision and used copyright principles to decide the dispute. The judge found that the work qualified for copyright protection as a “literary work.”²⁹⁵

2. Copyrightable Contributions or Selection and Arrangement

Second, a court may find the work copyrightable on the basis of the individual’s contributions, or her selection or arrangement of material in the work, like the courts did in *Urantia II* and *NCCFE*.²⁹⁶ In *Urantia II*, the Ninth Circuit used the originality requirement to avoid deciding the metaphysical question. It focused on the neutral purpose of copyright law: although the plaintiff claimed the work’s author was a divine being, the court held that individuals who wrote the book exercised a sufficient degree of originality to render it copyrightable when they “compiled, selected, coordinated, and arranged” it.²⁹⁷

The *NCCFE* court used a similar strategy. The “[d]efendants maintain[ed] that [the] [p]laintiffs d[id] not possess a valid copyright because the Course [was] not an original work of Schucman but of Jesus.”²⁹⁸ Because the court could not resolve the question of whether Jesus in fact used Schucman as a scribe, it eschewed the defendants’ argument. Instead of evaluating the validity of the religious claim of authorship, the primary inquiry became whether Schucman’s contribution constituted a sufficient amount of originality in which copyright could inhere. It stated that, while the plaintiffs “have repeatedly asserted that Jesus dictated the Course to Schucman,” “it is not disputed that the arrangement of the materials in the Course was initiated by Schucman, with assistance from Thetford, Wapnick, and others.”²⁹⁹ Using *Urantia* as a template, the court stated:

[E]ven if the Course came from Jesus, significant aspects of it are the direct result of it having come *through* Schucman. In this way, Schucman is as much an author as the members of the Contact Commission in *Urantia*, since even Defendants in this action have

295. *Id.*

296. *Urantia II*, 114 F.3d at 958; *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *14 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004) (finding that the individual who wrote the religious work, even if he believed Jesus dictated it to him, was the author of that work).

297. *Urantia II*, 114 F.3d at 958 (citing 17 U.S.C. § 101); *see also* *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941) (holding that originality of a “factual” religious work may be found in the “arrangement, manner and style,” but noted that the plaintiff had not claimed the defendant infringed that aspect of the work).

298. *NCCFE*, 2000 WL 1028634, at *9.

299. *Id.* at *10.

essentially conceded that had the Course been channeled through any other individual, its form would have been different.³⁰⁰

In other words, Schucman's contributions had the requisite degree of originality to be copyrightable.

3. Factual Estoppel

Finally, if prior to litigation the religious group represents the work as factual, then during litigation claims it to be nonfactual, the court may use factual estoppel to bar the existence of a valid copyright.³⁰¹ The courts in *Oliver*,³⁰² *Arica*,³⁰³ and *NCCFE*³⁰⁴ analyzed this issue.

In *Oliver*, the court noted that the writer of the religious work believed that God authored the work.³⁰⁵ The court stated that, while “[t]he law deals with realities and does not recognize communication with and the conveyances of legal rights by the spiritual world as the basis for its judgment[,] . . . equity and good morals will not permit one who asserts something as a fact . . . to change that position for profit in a law suit.”³⁰⁶ In other words, factual estoppel prevented the plaintiff from claiming something as an “original work of authorship” when he previously asserted that the work was a factual one that he did not create.

Many years later, the court in *Arica* took a similar approach. There, the copyright holder of religious works asserted that its works were “discovered” and contained “scientifically verifiable ‘facts’ of human nature.”³⁰⁷ The court gave one example of these factual claims: the religion's founder had asserted in a publication that “[t]he nine fixations, as well as the entire Arica system, are based upon our proven scientific knowledge.”³⁰⁸ The founder further stated that “‘the entire system [is]

300. *Id.*

301. *Arica Institute v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992). Factual estoppel did not apply where the plaintiff argued that Jesus dictated the work to him. *NCCFE*, 2000 WL 1028634, at *12. Factual estoppel, said the court, applies only when the plaintiff claims that the contents of the work are factual. *Id.*

302. 41 F. Supp. 296, 298 (S.D. Cal. 1941).

303. 970 F.2d at 1075.

304. 2000 WL 1028634, at *12.

305. 41 F. Supp. at 298–99 (“It is perfectly clear, therefore, that [the plaintiff] wished to impress in the strongest terms possible, his sincere belief in the truthfulness of his statement that he, a mortal being, was not the author, and to induce those who might read to believe that it was dictated by a superior spiritual being, whose motive was to uplift and benefit the human race spiritually, religiously and morally.”).

306. *Id.* at 299.

307. *Arica*, 970 F.2d at 1075.

308. *Id.* (quoting Letter from Oscar Ichazo, in *LETTERS TO THE SCHOOL* 9 (Arica Institute Press ed., 1988)).

scientific, in the laboratory and clinically.’”³⁰⁹ Yet, “[o]n appeal, Arica argue[d] that its statements [were] only metaphoric claims of philosophical truth.”³¹⁰ The court rejected this tactical shift; echoing *Oliver*, it stated that, “[h]aving expressly represented to the World that [the founder’s] theories are factual, . . . Arica is not now permitted to make an inconsistent claim so as to better serve its position in litigation.”³¹¹

The *NCCFE* also examined this issue, though it reached a conclusion opposite to the *Arica* court’s. Although Schucman, the creator of the work in *NCCFE*, claimed that Jesus had dictated the Course that he wrote, the court held that fact inapposite to its factual estoppel determination.³¹² Instead, the court focused on the content of the Course. The court stated Schucman’s belief in divine dictation “only [sic] demonstrates that Plaintiffs have stated on many occasions their belief that it was Jesus who dictated the” work to Schucman.³¹³ In other words, a belief that Jesus had dictated the work did not constitute a claim that the contents of the work were factual.³¹⁴ “[E]ven if it could be established as a ‘fact’ that Jesus dictated the Course to Schucman, it would not make the material in the Course factual[] . . . [because] [m]uch of the Course is prescriptive rather than descriptive.”³¹⁵ For those reasons, the court held that factual estoppel did not apply.³¹⁶

4. The Implications for Religious Organizations

The first scenario—where the court finds the writer as the author of the work—arguably is the best for religious organizations, as it provides a strong copyright to the work. Nevertheless, even in this “winning situation,” religious organizations partially lose: the “divine authorship” they claim never can be recognized. Furthermore, at least one scholar has proposed a sensible rule that would disfavor claims of religious authorship at all.³¹⁷ Scholars, of course, are not judges, and currently the law

309. *Id.* (quoting Letter from Oscar Ichazo, in *LETTERS TO THE SCHOOL 9* (Arica Institute Press ed., 1988)).

310. *Id.*

311. *Id.*

312. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *12 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004).

313. *Id.*

314. *Id.* (“Plaintiffs’ statements of belief that Jesus dictated the Course to Schucman do not make the Course a factual work.”).

315. *Id.*

316. *Id.*

317. Cotter has opined that the current treatment of divine authorship is misguided and, essentially, amounts to a declaration that divine claims of authorship are false. Cotter, *Gutenberg’s Legacy*, *supra* note 20, at 343–44. For that reason, he has advocated that courts avoid deciding any religious aspect of a claim by employing “[a] default rule against copyrightability.”

allows religious organizations to claim divine authorship and still receive a copyright.

The latter two scenarios—copyrightable compilations and factual estoppel—represent stumbling blocks for religious organizations. Factual estoppel is a doctrine that prevents a plaintiff, who represents the work at issue as factual (or “scientifically proveable”), from claiming the work is an original, nonfactual, and copyrightable one.³¹⁸ If factual estoppel applies, then the work is generally not protected at all.³¹⁹ Although a party may argue that its “factual work” is original in its selection or arrangement, these claims will fail because the plaintiff has previously argued against the originality of the work and thus failed to raise this issue.³²⁰ In that case, religious organizations cannot use copyright law to censor others or preserve doctrinal purity.

Additionally, if the court holds that the work constitutes a copyrightable compilation, the resulting copyright is “thin.”³²¹ In other words,

Id. at 344. This rule “does not entail acceptance of the claim of divine authorship, but rather allows the court to remain neutral.” *Id.* He states:

[I]f the claim of divine authorship is true, the human intermediary is not an author, and therefore the work lacks copyright protection; but if the claim is false, then . . . the human intermediary should be barred, under either the doctrine of unclean hands or copyright estoppel, from subsequently asserting authorship of the work. Since the result is the same either way, the court need not indulge in any theological speculation in order to determine the copyright status of the work.

Id. Thus, to summarize, Cotter argues that, when it comes to divine authorship,

Either the claim of supernatural authorship is true, or at least sincere, in which case a supernatural being authored the work, and the work is not subject to copyright protection; or the claim is false, and the human author should be estopped from later asserting her own authorship of the work. In either case, the work is not copyrightable, and courts should be spared the difficult—and probably unconstitutional—task of deciding the validity of the human author's revelation.

Id. at 353.

318. See *Arica Institute v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992) (holding that the doctrine of estoppel barred the plaintiff's claim of copyrightability as to certain aspects of a work after it “represented to the world that [its] claims [were] factual,” and then argued, “[o]n appeal, . . . that its statements [were] only metaphoric claims of philosophical truth”).

319. Religious organizations are still free to argue, as the plaintiff in *Arica* did unsuccessfully, that the arrangement or sequence of facts is original. *Id.* at 1076–77; but see *infra* note 320.

320. E.g., *Oliver v. Saint German Foundation*, 41 F. Supp. 296, 299 (S.D. Cal. 1941). Note that if factual estoppel applies, it means that the plaintiff, after representing the work as factual, then commits herself, in litigation, to the position that the work *is not* factual in nature. As a result, this generally will preclude a claim of originality based on selection or arrangement. This is because the party to whom factual estoppel applies never will have made the alternative argument that its work was factual. If it had, then factual estoppel would not apply in the first instance.

321. E.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that “the copyright in a factual compilation is thin”).

because copyright protection applies only to the selection and arrangement of the work, it cannot protect anything more than that. The words and phrases in isolation are freely appropriable. That means that religious organizations will have a difficult time preventing others from using any part of the work—a claim of infringement likely will exist only as to verbatim copying of the arrangement, thereby hampering their ability to censor others and to preserve doctrinal purity.

B. *The Merger Doctrine*

In addition to originality, the merger doctrine erects further hurdles for religious organizations seeking to censor and maintain doctrinal purity. Laypeople commonly assert they have an “idea” they want to “copyright.” Much to these people’s frustration, the Copyright Act prohibits such protection.³²² Of course, copyrighted materials can contain ideas—but copyright law does not protect them.³²³ What it protects instead is the expression of those ideas.³²⁴

The merger doctrine—which either is a defense to copyright infringement or a rule that precludes copyright protection³²⁵—applies

322. 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

323. H.R. REP. NO. 94-1476 at 56–57 (1976) (stating that “[c]opyright does not preclude others from using the ideas or information revealed by the author’s work”).

324. 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of *expression*.”) (emphasis added); *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (“The copyright protects *originality* rather than novelty or invention—conferring only ‘the sole right of multiplying copies.’”) (emphasis added) (quoting *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 94 (2d Cir. N.Y. 1922)). In *Baker v. Selden*, the plaintiff claimed copyright in a published book that described a system of bookkeeping and displayed tables of the system used. 101 U.S. 99, 100 (1879). Defendant reproduced a “similar plan . . . but [made] a different arrangement of the columns, and [used] different headings.” *Id.* The Court concluded that “whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise and use the art itself which he has described and illustrated therein.” *Id.* at 104. The Court went on to note the confusion between ideas and expressions: “The plausibility of the claim put forward by the complainant in this case arises from a confusion of ideas produced by the peculiar nature of the art described in the books which have been made the subject of copyright.” *Id.* The court held the expression of the idea as copyright-protected. *Id.* at 105.

325. Professor David Nimmer has noted that some courts have held that the merger doctrine is a defense to infringement while others have stated that it renders a work uncopyrightable. He endorses the former approach because it “[evaluates] the inseparability of idea and expression in the context of a particular dispute, rather than attempting to disqualify certain expressions from protection per se.” DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][3] (2009) (citations omitted).

where an idea can be expressed in a limited number of ways.³²⁶ Thus, where there is “essentially” only one way to express an idea, the defendant is free to copy that idea (or expression)³²⁷ *ad infinitum* and without restriction.³²⁸ Where, however, the idea and the expression are not completely inseparable, but the idea can be expressed only a limited number of ways, “the burden of proof is heavy on the plaintiff who may have to show ‘near identity’ between the works at issue.”³²⁹

The merger doctrine presents problems for religious organizations seeking to censor others or preserve doctrinal purity. Many religious doctrines subsist in a text; but not all of them require precise and exact copying to reproduce the ideas they embody. At the very least, some variant of the idea contained in the text can be reproduced as a different expression. And, since copyright law protects only expressions, religious organizations will have difficulty protecting their doctrines or censoring others. In this way, the merger doctrine prevents religious organizations from achieving their two primary goals of using copyright law.

Although this doctrine, generally speaking, makes achieving religious goals difficult, it may facilitate infringement claims in cases where verbatim copying exists. The *NCCFE* and *Lerma II* cases illustrate how this happens. In *NCCFE*, the court held that the merger doctrine did not apply to the plaintiff’s text because “a brief glance through the Course reveals that the same or remarkably similar ideas are restated continually in a myriad of ways.”³³⁰ Therefore, “these ideas could be further restated in an endless variety of forms.”³³¹

326. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606–07 (1st Cir. 1988) (stating that “[s]ome ideas admit of only a limited number of expressions” and also appearing to endorse Nimmer’s preferred approach that, in such a case, “copyright is no bar to copying that expression,” and later stating that “[c]onversely, of course, ‘as a work embodies more in the way of particularized expression, it moves further away from [merger of idea and expression] and receives broader copyright protection’”) (quoting *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982)).

327. *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 136 n.3 (2d Cir. 2004) (“It is of course true that similarity which necessarily results from the replication of an idea will not support a finding of infringement.”). This is the same as saying that the defendant is free to copy the merged *expression*—after all, the idea and the expression have *merged*. Because they are inseparable, either may be copied.

328. *See Coquico, Inc. v. Rodríguez-Miranda*, 562 F.3d 62, 68 (1st Cir. 2009) (taking the approach Nimmer rejects, stating that “the merger doctrine denies copyright protection when creativity merges with reality; that is, when there is only one way to express a particular idea.”); *Mattel*, 365 F.3d at 136 n.3.

329. *Concrete Mach. Co.*, 843 F.2d at 606. Nimmer has called the First Circuit’s rule “a questionable extension of the merger doctrine.” Nimmer, *supra* note 325, at § 13.03[B][3] (2009).

330. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor (NCCFE)*, No. 96-4126, 2000 WL 1028634, at *19 (S.D.N.Y. July 25, 2000), *vacated*, No. 96-4126, 2004 WL 906301 (S.D.N.Y. Apr 27, 2004).

331. *Id.*

The court in *Lerma II* reached the same conclusion. There, the defendant argued that the merger doctrine applied to COS materials because “Hubbard describes the [works] as primarily factual, and he insists that their contents must be followed *exactly* as written.”³³² The court rejected this argument, stating the “voluminous record . . . and . . . [the] parties’ numerous briefs” demonstrated that “[t]he ideas and concepts of the Scientology religion can be discussed independently of the [works].”³³³ The court also suggested that religious texts generally will not fall within the confines of the merger doctrine because “theological musings on the sources of (and remedies for) spiritual harm have dominated discussion about religion for centuries,” and “spiritual healing is clearly not a concept inherently tied to the [copyrighted works].”³³⁴

Despite the inapplicability of the merger doctrine in cases like *NCCFE* and *Lerma II*, the resulting infringement liability does not entirely serve the core goals of religious organizations. This follows from how doctrinal distortions arise. It is more likely than not that an individual who copies a text verbatim will not distort religious doctrine.³³⁵ And when the individual does not copy the text verbatim but instead paraphrases the ideas, that noninfringing writing is more likely to distort religious doctrine.

In some ways, then, the merger doctrine can, somewhat paradoxically, facilitate infringement claims and concomitantly foster distortions. Even so, because the merger doctrine did not apply in *NCCFE* and *Lerma II*, the defendant was prohibited from copying the text verbatim. Although the merger doctrine may limit verbatim copying and encourage distortions of religious ideas, it cannot prevent all uses of quotations.³³⁶ One court has noted that quoting may often be necessary to ensure accuracy, stating that “quoting modestly for the purposes of making *accurate* rendition of an idea commented upon in the critical work” is a “strong justification.”³³⁷ In cases where an individual seeks to pass judgment on certain ideas, “it behooves [the author] to set forth those ideas accurately.”³³⁸ In these ways, copyright law actually provides, rather than

332. *Religious Tech. Ctr. v. Lerma (Lerma II)*, No. 95-1107, 1996 WL 633131, at *3 (E.D. Va. Oct. 4, 1996).

333. *Id.*

334. *Id.*

335. Or, at the very least, verbatim copying reduces the risk of the quoted passage’s distortion. In any case, it seems fair to say that verbatim copying of religious work is less likely to result in a distortion than a general discussion of the work itself.

336. *See infra* Part III.D–E.

337. *See New Era Publ’ns Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1518 (S.D.N.Y. 1988).

338. *Id.*

prevents, opportunities for transmogrification of the ideas contained in religious texts.

Before exiting the merger-doctrine discussion, one final comment is in order. Thomas Cotter has noted that because “courts apply the [merger] doctrine only when the need to access the text *in haec verba* is (more or less) universal[,] . . . [t]he doctrine does not apply when most users could get by with a paraphrase, even though for some class of users access to the exact text is necessary.”³³⁹ This is relevant because there are cases where, “in the minds of its believers[,] no paraphrased text would be an adequate substitute for the original,” or where “a defendant has a compelling need to access a specific text in order to make its point most effectively.”³⁴⁰ Cotter calls these cases “partial merger[s].”³⁴¹ Some religions may regard the idea as inseparable from the expression. For Cotter and others, this raises the question: what should the law do when, for a subgroup, the idea and the expression are inseparable? Cotter states that “courts should consider accommodating the latter class through fair use or, perhaps better, by means of a liability rule.”³⁴²

But this Article’s answer is different: it advocates the destruction of any “partial merger” or contextual analysis of the merger doctrine.³⁴³ The fact that a particular group views the idea and the expression as inseparable does not make them so. The law evaluates such questions as objectively as possible. Cultural theorists, of course, will debate whether such an objective view is in fact possible.³⁴⁴ I submit that they are, at least in the sense that the decision-maker should not try to “stand in the shoes” of the subgroup asserting inseparability. If this was legally impossible, then many legal inquiries would fail.

C. Substantial Similarity

Beyond originality and the merger doctrine, copyright law doctrine provides more hoops through which religious organizations must jump to censor others and preserve the purity of their doctrines. Among these hoops is substantial similarity, a doctrine used to prove “non-literal in-

339. Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1298 n.74 (2008).

340. *Id.* at 1298.

341. *Id.* at 1298 n.74.

342. *Id.* See, e.g., *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96, 98 (2d Cir. 2002) (arguing that exact duplication of a translated Jewish prayerbook was necessary to practice the religion and contending that “copyright law does not permit the monopolization of the recommended form of a religious prayer”).

343. See Heinss, *supra* note 22, at 680–81 (articulating a neutral stance to religious copyright claims).

344. See, e.g., Rotstein, *supra* note 256, at 727, 728–42.

fringement”—that is, infringement where the exact text is not copied.³⁴⁵ To determine if a plaintiff has successfully shown that its work and the defendant’s work are “substantially similar,”³⁴⁶ the court undertakes a two-part inquiry:³⁴⁷

First, the court must determine whether the two works are “extrinsically similar because they contain substantially similar ideas that are subject to copyright protection.” And second, the court must ask whether the works are “intrinsically similar” in the sense that they express those ideas in a substantially similar manner from the perspective of the intended audience of the work.³⁴⁸

Extrinsic similarity requires similarity between the “ideas that are subject to copyright protection.”³⁴⁹ The assessment of extrinsic similarity is based on objective criteria, such as access to the works, the identity of the works’ titles, as well as objective similarities between plot and theme, for example.³⁵⁰ Intrinsic similarity refers to manner in which those ideas are expressed—it looks to the “total concept and feel” of the works.³⁵¹ Intrinsic similarity should be assessed from the standpoint of the “ordinary observer.”³⁵² Typically the ordinary observer will be the public at large.³⁵³ Where, however, the copyrighted work is intended for a

345. To prove a claim of nonliteral infringement, the plaintiff must prove both access and substantial similarity. *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001) (stating that, “when the plaintiff possesses no direct evidence that the defendant copied its protected work, it may create a presumption of copying by indirect evidence establishing that the defendant had access to the copyrighted work and that the defendant’s work is ‘substantially similar’ to the protected material”).

346. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946) (“In some cases, the similarities between the plaintiff’s and defendant’s work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation.”); see also *Lyons P’ship*, 243 F.3d at 801 (describing ways of establishing substantial similarity).

347. There are several analytical approaches to substantial similarity other than the one recited here. NIMMER, *supra* note 325, at § 13 (2009) (describing “comprehensive nonliteral similarity,” “fragmented literal similarity,” and the tests developed within each, as well as describing how to “negate” similarity); Nancy E. Wolff, *Special Problems Concerning Visual Works*, 932 PRACTISING L. INST. 379, 394–405 (2008) (reviewing the different approaches to substantial similarity).

348. *Lyons P’ship*, 243 F.3d at 801 (citation omitted).

349. *Id.*

350. See *Shaw v. Lidheim*, 919 F.2d 1353, 1356, 1362–64 (9th Cir. 1990).

351. *Lyons P’ship*, 243 F.3d at 801 (quoting *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733 (4th Cir. 1990)).

352. *Id.* The Ninth Circuit has held that the intrinsic test is a “subjective assessment of substantial similarity”—that is, a question of fact. *Shaw v. Lidheim*, 919 F.2d at 1359–60. Thus, if a court finds that a work may satisfy the extrinsic test, it cannot find pass judgment on the intrinsic test because it is a question for the trier of fact. *Id.* at 1358. Nimmer has criticized this approach heavily. NIMMER, *supra* note 325, at § 13.03[E][1] (2009).

353. *Lyons P’ship*, 243 F.3d at 801.

particular audience, at least in the Fourth Circuit, “the court’s inquiry must be focused upon the perspectives of the persons who comprise that group.”³⁵⁴

At first glance, this test may seem to provide religious organizations with a weapon for protecting their doctrines and censoring others. After all, because substantial similarity does not require literal infringement, the scope of possible infringement widens, which, in turn, broadens the range of meritorious claims a religious organization can make. The main advantage this doctrine provides to religious organizations, however, resides in their audience. Where a work is directed to a particular audience—in this case a religious audience—the substantial similarity test uses the perspective of an ordinary observer *in that religious audience*. Doubtless this gives religions more protection; a religious audience is more likely to find works similar if they contain religious messages.

This nuance, however, can take claims of infringement only so far. Critical biographies and explanatory or informative works likely will fall outside the scope of infringement.³⁵⁵ In other words, works produced for nonreligious purposes likely will not be infringing. That is problematic for religious organizations because they seek to censor all works that may result in negative publicity or that represent opposition or dissent. Furthermore, preservation of doctrine is not limited to other religious works because nonreligious works also can adulterate a religious doctrine. Many of these works have a different “feel”—and in other cases a decidedly unreligious feel—from the original works.

The substantial similarity doctrine can give rise to other problems, as well. For example, in *Religious Technology Center v. Scott*,³⁵⁶ the court noted that the substantial similarity “inquiry is complicated by two characteristics of the copyrighted material: (1) [the work] describes a process or procedure which cannot itself be copyrighted, . . . and (2) [the work] is alleged to be the sacred scripture of a religion.”³⁵⁷ The court held that neither of these features precluded a finding of copyrightability or infringement, but they did make the analysis more difficult.³⁵⁸ Although the court concluded that the ideas in the two works “express[ed] substantially the same idea,” it declined to hold they were substantially similar

354. *Id.* This has been referred to as the “intended audience test.” The Ninth Circuit has, on at least one occasion, followed this approach. *E.g.*, *Aliotii v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (applying the intended audience method under the “intrinsic test”).

355. *See, e.g.*, *New Era Publ’n Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1525–26 (S.D.N.Y. 1988) (“In the past, efforts to suppress critical biography through copyright injunction have generally not succeeded because courts (sometimes straining) have found fair use.”).

356. 660 F. Supp. 515 (C.D. Cal. 1987), *aff’d*, 971 F.2d 364 (9th Cir. 1992).

357. *Id.* at 518.

358. *Id.*

under the intrinsic arm of the test, stating that a reasonable person would not find “[the two works] substantially similar in expression.”³⁵⁹

Generally speaking, the doctrine of substantial similarity presents a roadblock for religious organizations. Although the doctrine does not require literal identity of the works, it still cannot protect the ideas contained in the work. For that reason, it does not aid religious organizations in their quests to maintain doctrinal purity and censor others.

D. Fair Use

Fair use is a doctrine in copyright law that allows individuals to use an author’s work without authorization and without recompensing the author.³⁶⁰ The Copyright Act states that “fair use of a copyrighted work” includes “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.”³⁶¹ The statute also sets out four factors courts must employ “[i]n determining whether the use made of a work in any particular case is a fair use”:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”³⁶²

Fair use presents a huge stumbling block for religion. Numerous articles have analyzed courts’ treatment of religious works under the fair use doctrine.³⁶³ The purpose of this Article is not to rehash these analyses, but only to identify the problems the fair use doctrine causes for religious

359. *Id.* at 520.

360. 17 U.S.C. § 107 (2006).

361. *Id.*

362. *Id.*

363. *E.g.*, Cotter, *Accommodating the Unauthorized Use*, *supra* note 20, *passim*; Cotter, *Gutenberg’s Legacy*, *supra* note 19, at 368–91; 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, 493–98 (2001); Wassom, *supra* note 69, at 206–39; Heiness, *supra* note 22, at 696, 699–701; Renae S. Kelderman, Note, *You Cannot Hide Behind Religion in Copyright Law: The Ninth Circuit Correctly Rejected a Religious Extension to the Fair Use Defense in Worldwide Church of God v. Philadelphia Church of God, Inc.*, 35 CREIGHTON L. REV. 1107 (2002).

organizations seeking protection using copyright law. Fair use defeats many of religious organizations' efforts to censor others. The Copyright Act explicitly provides that individuals can copy a religious work (or any other work) to, among other purposes, comment or criticize it.³⁶⁴ Religious organizations seeking to censor others have confronted the fair use stumbling block with limited success.³⁶⁵

The same can be said of these organizations' success when seeking to maintain doctrinal purity. Religious organizations often seek copyright as a means to protect anyone from using, commenting on, or otherwise changing how a text reads. Fair use thwarts this effort by providing individuals with the right to use copyrighted works for various purposes. These can include commenting on the material itself, or teaching it in some way that may be "unauthorized" or incongruous with religious organizations' teachings or objectives.

CONCLUSION

This Article has identified and tracked religious organizations' motivations for seeking copyright protection and for enforcing their copyrights. These two motivations were identified as preserving the purity of religious doctrine and censoring others' use of religious works. These motivations were then analyzed to determine whether they accord with copyright law's underlying principles and substantive doctrine. Ultimately, this analysis showed that religious motivations conflict with both the copyright's principles and its doctrine.

Part I explained the situations in which religious organizations may seek copyright protection. It noted that, while religious organizations seek copyright protection for a variety of reasons, the two most prominent are a desire to censor others and a desire to maintain doctrinal purity.

Part II explored the underlying justifications and principles of copyright law, examining the dissonance between these principles and religious motivations for pursuing copyright protection. First, this Part

364. 17 U.S.C. § 107. There are also general exemptions provided by the Copyright Act, some of which apply in educational circumstances. 17 U.S.C. § 110 (2006). For a more detailed analysis of how fair use applies in the educational context, see generally David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 52 453 (2010).

365. See also *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir. 1986) (stating, ostensibly, that "[t]he commission of errors in borrowing copyrighted material is a proper ingredient to consider in making the fair use determination," but not using this factor, which was "but one of many" because "as a judicial body, we consider it highly undesirable to hinge a legal determination solely on the relative truth or accuracy of statements made in the context of debate on a highly volatile social issue").

delineated three theories of copyright law: economic theory, property rights theory, and cultural theory. While examining these theories, this Part analyzed whether the previously articulated religious motivations for copyright protection comported or clashed with each one. It found that the two primary reasons religious organizations seek copyright protection conflicted with nearly all aspects of these theories of copyright. In other words, this Part concluded that copyright law's fundamental principles conflict with religious motivations for seeking copyright protection.

Part III explored whether, despite this dissonance, religious organizations could effectively employ copyright law to achieve their objectives. To complete this analysis, this Part reviewed several copyright law doctrines, exploring how each doctrine interacted with the religious motivations explored in Part I. Part III found that copyright law was not up to the task, as its doctrines did not fully enable religious groups to achieve their goals. As a result of the failures of copyright law documented in Parts II and III, this Article concluded that copyright law should not be used by religious organizations to achieve doctrinal purity or censorship.

All of the aforementioned analysis has shown that religious organizations sometimes use copyright law in a manner that conflicts with its design and, in the process, confront numerous doctrinal hurdles that prevent these organizations from achieving their objectives. This fundamental conflict poses problems for religious organizations. More importantly, however, it illustrates that religious organizations should find other means to achieve their objectives. In other words, they should not use copyright law to achieve doctrinal purity or censorship.