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COPYRIGHT, FAIR USE, AND RELIGIOUS LIBERTY

BY SAMUEL COURTNEY¹

The fundamental question this paper seeks to address is whether religious free exercise constitutional interests should supersede copyright and fair use doctrine. The recent Ninth Circuit decision in *Worldwide Church of God v. Philadelphia Church of God* raised interesting issues on whether the copyright defense of fair use may properly be applied to religious free exercise constitutional interests.² This decision will have a significant impact on religious sects that choose to break off from a larger religious organization and whether they are subject to liability for infringing on the religious doctrine of the original organization. In cases where this issue comes before a judge, copyright law may demand that a court determine the most important part of a work or even whether a work is fact or fiction. While the court must adhere to these principles in making its decision, it should also refrain from making subjective judgments on the inherent value or truthfulness of a particular faith. The United States prides itself on the separation of church and state, and we generally believe that a court or judge is not the proper authority to determine the goodness or truthfulness of our religious beliefs.

Copyright infringement cases involving religious doctrine, however, simultaneously ask courts to determine which sections of religious doctrine are the most significant, whether the work is factual, and, perhaps most difficult and subject to judicial restraint, who authored the religious text. The question of religious fair use is also particularly tricky because religious organizations are typically seeking recruitment and membership growth, not necessarily commercial monetary gain. These fair use principles clash with constitutional religious free exercise interests, and this tension appears to be an issue that will be raised in court for years to come.

This paper argues that constitutional free exercise considerations should not supersede neutral copyright doctrine, and that the policy underlying the fair

¹ Samuel Courtney, J.D., University of St. Thomas, School of Law, 2019. The author is very appreciative to Professor Thomas Berg for his input and counsel with this Note.

² *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).

use defense is an important value that should be upheld in religious copyright cases.

I. RELIGIOUS COPYRIGHT OVERVIEW

United States copyright law protects original works fixed in any tangible medium of expression.³ Works of authorship cover the following categories: literary works, musical works, dramatic works, pictorial, graphic, and sculptural works, motion pictures, sound recordings, and architectural works.⁴ The copyright owner of a work has the following exclusive rights: to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public by sale, to perform the work publicly, and in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁵ A showing of a direct infringement of any of these exclusive rights does not turn on intent or negligence; the infringer is strictly liable.

One can anticipate that many, if not all, of these exclusive rights may be relevant to or litigated by a religious organization. Religious organizations are in the “business” of distributing, reproducing, and performing, by way of sermon, their scripture and religious text.⁶ Interestingly, Congress included a section within the limitations on these rights to exclude performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.⁷ We will see later in the discussion of the fair use defense that showing a commercial harm or harm on the potential market for the copyright holder is a crucial factor in determining whether a use is fair.

In cases of religious intellectual property disputes, copyright protections most often involve religious text or scripture. Because most faiths have scripture that they believe was authored by a divine figure, the infringing of their religious text is extremely important to the reputation and pride of a religious organization. Misappropriation or infringement of scripture is an

³ 17 U.S.C. § 102(a) (1990).

⁴ *Id.*

⁵ *Id.* § 106(1-6).

⁶ Here the word “business” is in quotes due to the question of the non-commercial nature of faith.

⁷ *Id.* § 110(3).

often-litigated issue, for example, by the church of Scientology.⁸ It is also the basis of the *Worldwide* Ninth Circuit case where a religious sect broke off from its organization and published, distributed, and preached on the identical religious scripture of the larger organization.⁹ This type of dispute is the primary category of religious copyright litigation.

The most relevant and persuasive defense in cases of religious scripture infringement is the doctrine of fair use. Fair use is a limitation of the exclusive rights of the copyright holder.¹⁰ This limitation allows for reproduction of a copyrighted work without permission from the copyright owner for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.¹¹ There are four factors to be considered in determining whether use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work (is it transformative?); (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.¹²

The general policy idea behind fair use is similar to that behind the First Amendment; we want to be able to criticize and comment on speech and written works without being subject to legal liability. This is good policy and exemplifies the American ideals of freedom to speak your mind and have open-forum debate without the fear of government intervention or private litigation. Fred von Lohmann argues that the doctrine of fair use allows United States industry pioneers such as Apple to innovate in areas of technology without fear of copyright legal liability: “[t]here would be no iPod if Apple could not count on copyright law to permit iPod buyers to copy their existing CD collections...there would be no TiVo but for the ability of consumers to copy programming from broadcast, cable, and satellite television.”¹³

This logic also applies to new religious organizations. Fair use arguably allows dissatisfied members of a religious organization to use the same scripture in a new organization that they believe more closely conforms to

⁸ Wired Staff, *Scientology: The Web's First Copyright-Wielding Nemesis*, WIRED (Sept. 21, 2009, 12:00 PM), <https://www.wired.com/2009/09/mf-chanology-sidebar/>.

⁹ 227 F.3d 1110.

¹⁰ 17 U.S.C. § 107 (1992).

¹¹ *Id.* § 107 (1-4).

¹² *Id.*

¹³ Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 837 (2008).

the teaching of that scripture. This fair use defense is the primary argument of defendants in religious copyright cases.

The most persuasive counterargument against fair use in religious copyright infringement cases is that while we want to permit fair commentary and criticism, we do not want to permit direct infringement of a work simply to profit off of the time, energy, and creativity spent by the original author. There may be a question as to whether a church seeking new members is a “commercial benefit” but the idea of directly copying religious scripture verbatim and profiting one way or another is generally not fondly looked upon in the United States. This was the argument of the Satanist temple in a recently filed complaint, as well as Worldwide Church of God in the significant Ninth Circuit case.

It is also important to note that because United States copyright doctrine is federal law, the Religious Freedom and Restoration Act (RFRA) applies to these proceedings. The Religious Freedom and Restoration Act was enacted in 1993, and states that Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, with the exception of the compelling interest/least restrictive means test. This Act set a new course for religious freedom litigation. Prior to RFRA, the Supreme Court of the United States in *Employment Division v. Smith* held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.”¹⁴ RFRA added the neutral and general applicability test and requires that the government not substantially burden religious exercise, unless there is a compelling government interest and is the least restrictive means of furthering that compelling government interest.¹⁵

RFRA currently applies only to federal law, and thus applies to copyright and fair use doctrine. Without RFRA, the accuser would likely succeed easily under the theory that the Copyright Act is a neutral and generally applicable law not specifically targeting any one religion and therefore the infringing religious organization’s free exercise is not being violated. As it stands now, the accuser faces more of an uphill battle proving a compelling government interest to protect their copyright.

¹⁴ *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment)).

¹⁵ 42 U.S.C. § 2000bb-1 (b)(1, 2) (1993).

A. Importance of protecting religious copyright interests

Protecting the copyright of its scriptures is extremely important to religious organizations. This is important to emphasize because it not only shows how far religious organizations are willing to go to protect their intellectual property, but it also shows that a court may be looking at these issues when determining whether there is a commercial loss or harm on their potential market. The Church of Scientology is the most extreme example of how far churches are willing to go to protect their copyright.

The Church of Scientology views protecting their intellectual property as protecting the rights of all internet users: “The Church has taken legal action to protect Scientology intellectual properties from unauthorized copying and distribution, resulting in landmark legal precedents that secure and preserve the freedoms and legal rights of all who travel the information superhighway.”¹⁶ Whether or not the strong language here is true, it is evident that the Church believes that protecting their copyright and intellectual property is crucial to the potential success of their congregation. Reports from news organizations have shown that the Church “scours the Net for alleged copyright and trademark violations.”¹⁷ The Church of Scientology has also hired private investigators to look into “Rathburn’s [former member] appropriation of the Church’s intellectual property, his threat to destroy its copyrights, his exhortations to others to engage in theft of Church materials and property and his public attacks upon Scientology and its officials.”¹⁸ The Church of Scientology may be an anomaly in terms of its “scouring,” yet it is still evident how important protecting religious scripture can be for major religious organizations.¹⁹

The Satanic Temple (TST) is another example of a religious organization that takes legal measures to protect its copyright. In a recently filed complaint in the Southern District of New York, TST alleged that “the Netflix television series known as the *Chilling Adventures of Sabrina* benefited from and

¹⁶ *What Has Been the Church’s Role in Protecting Free Speech and Intellectual Property Rights on the Internet?*, SCIENTOLOGY NEWSROOM, <https://www.scientologynews.org/faq/what-has-been-the-church-role-in-protecting-internet-free-speech.html> (last visited Feb. 11, 2019).

¹⁷ *Scientologists in Trademark Disputes*, CNET (Jan. 29, 1998), <https://www.cnet.com/news/scientologists-in-trademark-disputes/>.

¹⁸ *Scientology Takes Aim at “Going Clear” Documentary*, NBC News (March 20, 2015, 8:59 AM), <https://www.nbcnews.com/news/us-news/scientology-takes-aim-going-clear-documentary-n325256>.

¹⁹ Scientology also has other litigation concerns over its “auditing” materials, which should not be compared to its religious scriptures. This is more of an economic concern than a religious freedom issue, and the distinction is important.

defamed TST's unique original expression of the historic Baphomet, an androgynous goat-headed deity."²⁰ The Baphomet was an original sketch made in the 1800's, which TST argues it modified and transformed into a statue to include children and several other original details, which constituted TST as the copyright owner of those modifications.²¹ For example, TST argues that the children were strategically placed in the model to find a "specific expression of bi-racial childlike innocence by children of different races, looking up in reverence at the Baphomet."²² Additionally, TST claims that it made specific detail changes from the original sketch such as the angle of the Baphomet's arms, softening the eyes of the Baphomet so as to imply wisdom, and the clothing design on the children.²³ Finally, TST believes that their version of the Baphomet was not only an original modification for which they own the copyright, but that extensive publicity has made their specific statue and its changes a famous symbol of the TST.²⁴

The Netflix series *Chilling Adventures of Sabrina* depicts the Baphomet, TST argues, in conformity with an evil antagonist and misappropriates the TST Baphomet to publish a false and defamatory depiction.²⁵ TST argues that comments from the series' producer show that they knew about the modifications attributed to the creativity of TST, specifically that the TST statue was the only depiction, which included children and a male chest instead of the original sketch, which included female breasts.²⁶

TST is seeking \$50 million in damages, no doubt looking to send a message that their deity figure is not to be freely copied.²⁷ This is another example of how religious organizations take their intellectual property seriously and why this litigation is only in its early stages. The public controversy and potential damaging reputation of being a litigious organization appears to be less significant than protecting the reputation and pride of the church's intellectual property.

²⁰ Complaint at 1, United Federation of Churches LLC d/b/a The Satanic Temple v. Netflix, Inc. and Warner Bros. Entertainment Inc., No. 1:18-cv-10372 (S.D.N.Y. 2018)

<https://www.courthousenews.com/wp-content/uploads/2018/11/Netflix-Satanic-Temple.pdf>.

²¹ *Id.* at 3.

²² *Id.* at 8.

²³ *Id.*

²⁴ *Id.*

²⁵ Complaint at 3, United Federation of Churches LLC d/b/a The Satanic Temple v. Netflix, Inc. and Warner Bros. Entertainment Inc., No. 1:18-cv-10372 (S.D.N.Y. 2018)

<https://www.courthousenews.com/wp-content/uploads/2018/11/Netflix-Satanic-Temple.pdf>.

²⁶ *Id.* at 13.

²⁷ *Id.* at 6.

B. Divine Authorship

A fascinating issue surrounding religious copyright disputes is the matter of authorship. To hold a copyright in the United States, you must be the author of an original work fixed in a tangible medium (or otherwise have a license or authority to use the work).²⁸ Authorship is not often a difficult hurdle to cross; the parties in a copyright suit generally stipulate to the matter of authorship, unless there is some question of joint authorship or licensing agreement. In the case of most religious disputes, however, the plaintiff organization believes that their scripture was authored by God or a divine figure. The obvious question then is who can have ownership to scripture written by God? In the case of Scientology, the answer is easy. L. Ron Hubbard authored all of the Church of Scientology's scripture, and he (now his estate) is the obvious copyright owner of the scripture.²⁹

In the matter of more widely followed faiths, the question isn't quite as simple. Without researching or looking into this issue, one might believe that no organization or person has standing in court to sue on behalf of, for example, the Christian Bible as its copyright owner. While this may be an entertaining dinner table debate for lawyers, the U.S. Copyright Office has answered the question in its Compendium of Practices. The third edition of the compendium provides a "Human Authorship Requirement," and specifically excludes worked alleged to be created by a divine being.³⁰

To have standing in court, religious organizations must show that they made some sort of original modification to the scripture. By admitting this to the court, are they not simultaneously admitting to their congregation that the scripture they teach is not authored by God and is instead the product of human intervention? In some cases, groups may claim that God inspired the authors of the scripture but that they used human characteristics to complete the product. In this case, it should be clear that the copyright belongs to the human author. Merely being inspired by the divine does not attribute the credit to God. The copyright should be owned by the human that put the inspiration to paper and created the work. The Church could also argue that it merely translated the work from another language or added some original

²⁸ 17 U.S.C. § 102(a) (1990).

²⁹ History.com Editors, *L. Ron Hubbard Publishes Dianetics*, HISTORY (Aug. 21, 2018) <https://www.history.com/this-day-in-history/1-ron-hubbard-publishes-dianetics>.

³⁰ Jarrod Welsh, *Copyrighting God: New Copyright Guidelines Do Not Protect Divine Beings*, 17 RUTGERS J. L. & RELIGION 121, 121–22 (2015).

commentary so that their congregations could more easily understand the teachings of the divine scripture, but it is nevertheless a tricky issue.

Another answer is that most religious scriptures were created prior to 1923 and are therefore in the public domain.³¹ Literary works in the public domain no longer have a copyright owner. They are owned by the public and anyone can use them, save for a few exceptions like the “complete collections” exception where one may have used creativity in putting together a collection of works in the public domain for a commercial purpose. Translations and commentary to works in the public domain constitute protectable copyright, because the freedom to make new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright (in this case, the translation or commentary).³²

The question of authorship appears to be answered in religious copyright cases, but still presents an interesting situation for religious organizations who profess their scriptures to be the work of God or a divine figure.

II. ARE CONSTITUTIONAL FREE EXERCISE INTERESTS PROTECTED BY INTELLECTUAL PROPERTY COPYRIGHT DOCTRINE?

When a group of members become dissatisfied with the direction of the organization and break off into their own sect, the intellectual property of the organization becomes necessary for the new group to freely exercise their religious practices. Such disputes are becoming more frequent in religious free exercise litigation. No case models this situation more closely than the Ninth Circuit’s *Worldwide Church of God v. Philadelphia Church of God*.³³

A. *Worldwide Church of God v. Philadelphia Church of God*

Before founding the Worldwide Church of God, Herbert Armstrong grew up in poverty, and began his career as a writer at a local Des Moines newspaper.³⁴ He later founded the Radio Church of God, renamed to

³¹ Rich Stim, *Welcome to the Public Domain*, Stanford Univ. Libraries (Oct. 2010) <https://fairuse.stanford.edu/overview/public-domain/welcome/>.

³² Warner Bros. Entm’t v. X One X Prods., 644 F.3d 584, 596 (8th Cir. 2011).

³³ 227 F.3d 1110.

³⁴ *Herbert W. Armstrong: An Unofficial Ambassador for World Peace*, Phila. Church of God, <https://www.pcog.org/about/herbert-armstrong>.

Worldwide Church of God (WCG), in 1934.³⁵ He wrote the Church's scripture, *Mystery of Ages* (MOA), between 1984 and 1985.³⁶ He distributed this religious scripture in *The Plain Truth* magazine free of charge to millions to people.³⁷ While religious organizations want to protect their intellectual property, they also want to distribute their text on a wide scale. These two interests come into conflict with one another in cases like *Worldwide* because the group breaking off from the larger organization may not use the widely distributed text to the organization's liking. This results in "misappropriation" and infringement lawsuits.

After Armstrong's death his estate bequeathed his intellectual property rights to the church and the church chose to discontinue distribution of the MOA for views that they believed were outdated.³⁸ Examples of these outdated views include ideas expressed regarding divorce, remarriage, and divine healing.³⁹ The Advisory Council of Elders believed that the MOA also contained outdated views that were racist in nature and stopped distributing the MOA because of "cultural standards of social sensitivity."⁴⁰ Two former members, Gerald Flurry and John Amos, later founded a new religious organization, Philadelphia Church of God (PCG), which asserted that the MOA was to be taken as true religious doctrine, and used the text as required reading for all members.⁴¹ WCG and PCG stipulated to the fact that PCG copied the MOA verbatim, outside of a "suggested reading" section and a warning against reproduction.⁴² WCG sent a demand to PCG that it cease infringing its copyright, and PCG ignored the demand.⁴³

WCG filed a copyright infringement suit against PCG, alleging that PCG was "reproducing, distributing, promoting, advertising, and offering unlawful and unauthorized copies of the MOA."⁴⁴ At the district court level, the court denied a summary judgment motion by WCG and granted PCG's motion for summary judgment.⁴⁵ In just two paragraphs, the Ninth Circuit concluded

³⁵ 227 F.3d at 1113.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Worldwide Church of God*, 27 F.3d at 1113.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1114.

that WCG was the proper and valid owner of the copyright to the MOA.⁴⁶ PCG argued that Armstrong granted a nonexclusive, implied license for MOA for those who value its religious message, but the court held that there was not enough evidence to show Armstrong intended to create the MOA for dissemination by third parties.⁴⁷

The issue of ownership in this case is interesting because WCG was attempting to distance itself from what appears to be significant values described in Armstrong's scripture. If Armstrong were alive to see this dispute, he might very well prefer, as the copyright owner, to grant a license or permission to the group that was sticking to the core tenets of his teachings rather than the organization that labeled his views as "outdated." He may have even disavowed the WCG and cited them for infringement if they continued using their makeshift version of his scripture. As it stands, however, the Ninth Circuit was correct in determining that WCG had proper ownership of the MOA.

The far more controversial issue arising in this case is whether PCG's use of the MOA was fair as an exception to the exclusive rights of the copyright owner. The Ninth Circuit adopted the reasoning of a Seventh Circuit case in which the court held that the copyright owner may "prevent churches from copying or publishing its copyrighted works, even if the churches only intend to use the copies or publications at not-for-profit religious services."⁴⁸ This reasoning is sound, because churches may "profit" in the form of recruitment and membership services the same way that a business may commercially benefit from copyright infringement.

It would not be good policy to allow religious organizations to freely infringe on the copyright of others merely because they are a non-profit organization. The idea of the copyright owner being able to utilize their exclusive rights should not be thrown by the wayside for churches. This principle is important for reasons outside of monetary gain. The copyright holder may want to strictly control the reputation of their work and not allow certain organizations to be associated with the copyright holder. That should absolutely be within the prerogative of the owner. There will be further religious free exercise arguments that are more compelling, but the non-profit nature of churches should not escape copyright doctrine.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, No. 81-1333, 1982 WL 19198 (7th Cir. Mar. 25, 1982).

The court also briefly analyzed this issue from a First Amendment free speech perspective. They cited a Second Circuit case, which noted that “the public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts.”⁴⁹ This issue will be discussed further in the section on judicial restraint, but it is important to note that the court is essentially saying that the MOA is not a scripture of fact, but is rather the product of original creativity that may validly be protected as copyright and not as a collection of facts. If the court did believe that this was a book of facts, the First Amendment issue may be worth a second look because facts are generally not subject to copyright. As it stands, the Ninth Circuit believed that the MOA was sufficiently creative to warrant copyright protection and that right is not limited by First Amendment free speech concerns.

All four factors of fair use in this case were discussed and are worth analyzing. Fair use in this case was a close question, but PCG’s failure to provide any additional commentary or original modification to the MOA prevents a fair use defense.

The first factor of fair use is the purpose and character of the use.⁵⁰ In other words, was the use for commercial purposes or for educational means? Generally, evidence of commercial gain turns against fair use when the infringer is clearly profiting off the copyright of another. This factor is more difficult in this case because the definition of “commercial gain” is not clear. The Supreme Court of the United States broadly defined noncommercial use in its *Sony Corp. of America v. Universal City Studios* opinion: “A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown.”⁵¹ Harm to the potential market of WCG will be discussed further with the fourth fair use factor, but it seems clear from this Supreme Court holding that WCG must be able to show that PCG’s use of their copyrighted work is harmful, not necessarily that they are losing money.

⁴⁹ 227 F.3d at 1113 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560 (1985) (quoting *Iowa State Univ. Research Found., Inc. v. American Broad. Cos., Inc.*, 621 F.2d 57, 61 (2d Cir.1980)).

⁵⁰ 17 U.S. Code § 107 (1) (1992).

⁵¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

A more recent Supreme Court opinion held that the first factor also turns on “whether the new work merely supersedes the objects of the original creation or instead adds something new...and to what extent the new work is ‘transformative’.”⁵² The Ninth Circuit correctly noted that while a showing of transformative use is not absolutely necessary under *Campbell*, in this case there is no question that PCG copied the MOA verbatim and did not attempt to make any such transformation or original modification.⁵³ PCG may also argue that they are putting the work in a new context, and therefore are adding some original content to the work. The court would not likely side with PCG, however, because the context in which PCG is using the MOA is the same as it was used by WCG. The only difference now is that MOA no longer wishes to exercise their right to perform or distribute the work.

PCG also argued that its use was not for a commercial purpose or for profit. The court reasoned that the absence of a commercial use merely eliminates the presumption of unfairness.⁵⁴ There is an argument, however, that PCG does financially gain from their copying. During the time of their use of the MOA, PCG’s membership grew to seven thousand members, who tithe ten percent of their income.⁵⁵ The court therefore ruled that the first factor weighed against fair use in this case.

The second factor of fair use is the nature of the copyrighted work.⁵⁶ This is probably the weakest factor for PCG, as the work is undoubtedly creative and not informational. The court reasoned that “while it may be viewed as ‘factual’ by readers who share Armstrong’s religious beliefs, the creativity, imagination, and originality embodied in MOA tilt the scale against fair use.”⁵⁷ The only possible argument for PCG here is that the court should show restraint in determining whether the MOA is a work of fact or creativity. This is not an argument that appears to have been made or discussed by the court, but the opinion does seem to suggest that the MOA is not a work of fact. At the very least, it determined that there is enough creativity in the MOA to turn against fair use and against its use as a factual, informational guide.

⁵² *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579(1994).

⁵³ 227 F.3d at 1117.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 107(2) (1992).

⁵⁷ *Id.*

The third factor of fair use is the amount and substantiality of the portion used in relation to the copyrighted work as a whole.⁵⁸ In this case, PCG copied the entirety of the MOA save for a page or two. The court stressed that copying an entire work “militates against a finding of fair use.”⁵⁹ In almost all non-religious cases, the analysis would stop there. PCG argued, however, that its copying was reasonable because the MOA is religious in nature.⁶⁰ The court did not find merit to this argument and cited a previous Ninth Circuit case which reasoned that copying and using a work for the same purpose as the owner is a strong indication against fair use.⁶¹ Here, PCG’s purpose of using the MOA is the same purpose as WCG; to recruit members and raise charitable funds for the use of the religious organization. The court held that a “reasonable person would expect PCG to pay WCG for the right to copy and distribute MOA created by WCG with its resources.”⁶²

The fourth factor is the effect of the use upon the potential market for the value of the copyrighted work.⁶³ In accordance with the policy of allowing criticism, effect on the market must come from exhaustion of the demand, not from criticism of the work.⁶⁴ PCG and WCG are not seeking a typical commercial market, but rather a market of membership and donations. Additionally, because WCG no longer agrees with the teachings of the MOA, aren’t PCG and WCG merely competing in the market of ideas, not the same religious market? The court correctly reasons that “[r]eligious, educational and other public institutions would suffer if their publications invested with an institution’s reputation and goodwill could be freely appropriated by anyone.”⁶⁵ If the purpose behind protecting copyright is to allow the owner to control the associations and reputation of their work, outside of preventing commentary and criticism, then it makes sense that a rival organization should not be able to freely appropriate that work with the goal of recruiting the same potential members. The court also noted that WCG planned on creating an annotated version of the MOA, which harms the potential of such a venture if PCG was to freely distribute the original copy.⁶⁶

A compelling counterargument to this note is that an annotated copy would itself be an original modification and an entirely separate copyrighted work.

⁵⁸ 17 U.S.C. § 107(3) (1992).

⁵⁹ 227 F.3d at 1117 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)).

⁶⁰ 227 F.3d at 1118.

⁶¹ *Id.*

⁶² *Id.* at 1118-19.

⁶³ 17 U.S.C. § 107(4) (1992).

⁶⁴ Jason M. Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2112-13 (2012).

⁶⁵ 227 F.3d at 1119.

⁶⁶ *Id.*

PCG's use of the original MOA would not dissuade a potential customer from instead purchasing the WCG's annotated version. That customer may very well agree with WCG that the original views of Herbert Armstrong are outdated and would prefer an annotated copy of the MOA to reflect more socially progressive ideas. Additionally, PCG is the one making the pitch and persuading new members to join their organization, not necessarily the MOA alone. If WCG weren't planning its own annotated copy, then PCG could make a persuasive argument that there is no longer an exhaustion of demand, but they are now instead competing in the marketplace of ideas since WCG no longer believes in the teachings of the MOA. If the MOA scripture alone is not persuading the potential market, then the market demand has not been exhausted as a result of PCG's use.

PCG could also make the argument that because WCG no longer has an interest in distributing the original MOA, it is holding the original Armstrong teachings hostage under the shield of copyright law. Therefore, under RFRA, they are substantially burdened from practicing their faith without being able to orally reproduce or read the scriptures in the MOA. I will discuss the RFRA argument in more detail below.

The Ninth Circuit Court ultimately did not buy the argument from PCG that the MOA no longer had market value to WCG.⁶⁷ The court reasoned that the author's decision not to use his copyright does not mean that they are no longer entitled to protection of the copyright.⁶⁸ Additionally, WCG planned on distributing an annotated version of the MOA, so the argument that WCG had completely abandoned their rights was not fruitful.

I agree with the court's decision that fair use does not favor PCG. While I recognize the harm to PCG in that they cannot continue to use the religious text on which their faith is based, there was nothing to stop PCG from creating their own modification or annotated copy of the MOA for its own recruitment and membership purposes. They could have created a new copy of the MOA in which they discussed why they believed modifying the MOA to conform with societal trends was wrong and why they believed WCG was moving in the wrong direction. Such a modification to the MOA would likely have been fair use because it would have been a commentary on the original copy while PCG could also maintain to its members that the original foundation of the scriptures was the proper reading of their faith.

⁶⁷ *Id.*

⁶⁸ *Id.*

The only protectable practice in this case was PCG's public performance (sermons) and educational Sunday school teachings from the MOA. In the case of religious performance, however, it is difficult to perform a sermon or religious teaching without the scripture, and PCG was likely reading from the protected scripture as part of its performance. The members of the church are also likely following along with the text. The first factor, purpose and character of the use, favors PCG in the case where they are reading the MOA or teaching the MOA for educational purposes. Additionally, Section 110 on the limitations on exclusive rights has a section which excludes the performance of a "nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."⁶⁹ If PCG was merely preaching about the teachings of the MOA or teaching a Sunday School class about Herbert Armstrong's core religious doctrines, then Section 110 would likely have allowed for this use. Distributing the scripture for gain in the market of recruitment, however, is not an educational purpose or performance and almost certainly harms the potential market of WCG. Therefore, I believe the court's fair use finding was missing some analysis but was ultimately decided correctly.

The final consideration in this case was PCG's contention that preventing their congregation from using the MOA would amount to a violation of RFRA.⁷⁰ As discussed earlier, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."⁷¹ PCG argued that an injunction preventing them from using the MOA would substantially burden a "central tenet of its religious doctrine, namely, distribution of MOA to current and potential adherents of its church."⁷² The court acknowledged that whether RFRA can be extended to the copyright doctrine is an unresolved and open issue, but ultimately dodged the issue.⁷³ The Ninth Circuit came to that conclusion because PCG failed to take any steps in seeking a license or negotiating with WCG to come to an agreement that would allow them to co-exist.⁷⁴ Therefore, the court did not believe that PCG had shown that it was being subjected to a substantial burden.⁷⁵

⁶⁹ 17 U.S.C. § 110 (3) (2005).

⁷⁰ 227 F.3d at 1120.

⁷¹ 42 U.S.C. §§ 2000bb-2000bb-4 (1993).

⁷² 227 F.3d at 1120.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

While the Ninth Circuit did opine in one sentence as to whether RFRA should override copyright doctrine, it did not rule on this “knotty” question.⁷⁶ The court merely speculated that it is unlikely that Congress meant for RFRA legislation to include “the protection of intellectual property rights against unauthorized appropriation.”⁷⁷ Unfortunately, this is the only bit of analysis we got on the issue, but it appears the Ninth Circuit is unlikely to override copyright law with RFRA arguments.

If the court was sufficiently convinced that a restriction on the use of copyrighted religious doctrine was a substantial burden to the defendant, it would have had to analyze whether copyright law and fair use passes the strict scrutiny test contained within RFRA.⁷⁸ Once it has been established that there is a substantial burden, the first test of RFRA’s strict scrutiny requirement is whether the government has a compelling interest in substantially burdening a person’s exercise of religion.⁷⁹ In this case, WCG, or the plaintiff owner in any copyright case involving a RFRA issue, would likely argue that protecting the translations, annotations, commentaries, and creative works included in scripture is a compelling interest that the court should uphold.

As a matter of policy, the United States values innovation and the financial incentive to innovate. Christopher Yoo from Vanderbilt University law school succinctly describes the economic purpose for copyright law, “Nonrivalry is generally modeled by assuming that the marginal cost of making an additional copy of a copyrightable work is zero. These assumptions imply that markets provide insufficient incentives to produce copyrightable works and provide insufficient access to those works that are produced.”⁸⁰ Professor Yoo goes on in this article to critique this conventional way of thinking about the policy behind copyright, but his description of the conventional thinking is the way that WCG would likely frame the issue. Without copyright protection, the market may allow a copycat writer with better marketing and more fame to copy a work verbatim and profit off the back of another writer.

⁷⁶ *Id.* at 1121.

⁷⁷ *Id.*

⁷⁸ 42 U.S.C. §§ 2000bb-2000bb-4 (1993).

⁷⁹ 42 U.S.C. § 2000bb(b)(1) (1993).

⁸⁰ Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 637–38 (2007).

We allow this free market structure for most industries because it incentivizes companies to put out better products, but it does not apply the same to copyright. The market cannot protect the years of work it takes an author to write a novel or the time spent by a musician writing the lyrics to a hit song. In this case, there is an additional wrinkle that the copyright owner no longer uses or believes in the work. This is tricky for the “exhaustion of demand” analysis because PCG could argue that the demand for a religious organization which follows the teachings of the MOA is a different market from that which WCG now seeks. The general understanding of the policy behind copyright is that we protect artists so that they are incentivized to create. To allow copyright infringement may not be as extreme a consequence as allowing, for example, human sacrifice in the name of religion, but both consequences would allow religious organizations to escape justice.

On the other side, PCG and other parties in favor of overruling copyright law with RFRA would likely argue that protecting free exercise of faith is a more significant government interest than protecting the individual, personal gain interest. If these interests cannot align, then the infringing party would argue that the court should uphold free exercise interests over copyright law.

The second prong of RFRA is that the furtherance of the compelling government interest must be the least restrictive means of furthering that interest.⁸¹ Putting aside the two parties for a moment, I believe that the least restrictive means of furthering both copyright law and religious free exercise is solved by enforcing the fair use doctrine. In the *Worldwide* case, PCG’s use would have been fair if it had just added its own commentary or annotations to the MOA.⁸² Fair use allows religious scripture to be copied as long as there is some original addition or difference in the new work. Asking the infringing or copying party to include or add commentary or some additional creative contribution to religious scripture is not a substantial burden on a person’s ability to practice their faith. PCG would likely counter by saying the text of the MOA is their core religious doctrine, and any modification would be against the intent of Herbert Armstrong. They may also argue that their use of the work is verbal, and their verbal teachings provide additional commentary that makes the use fair. A court may have to entangle itself in religious questions with this argument, because they would have to decide whether the verbal use was a “substantial” section of the original text.

⁸¹ 42 U.S.C. § 2000bb(b)(2) (1993).

⁸² 227 F.3d 1110.

PCG also argues that their audience is a different market than that of WCG, as they are trying to distance themselves from the “outdated” views written by Armstrong. Therefore, PCG would likely pass the fourth test of fair use without issue.

Professor Thomas Berg suggests in his piece on this issue that a possible solution would be for a court to award damages but deny an injunction.⁸³ This may be a less restrictive means of enforcing the interest of copyright law, but still comes with the problem of religious organizations believing that infringement amounts to misappropriation. Ultimately, the copyright holder should be the one to determine to whom they license the work. Refusing to issue an injunction may still result in harm to the potential market. This is especially relevant to religious organizations because recruitment and membership is generally more important to a congregation (as long as they can keep the doors open) than financial gain. WCG, for example, was making changes to their religious scripture because they wanted to manage the reputation of the church. If that scripture is still attached to WCG as the copyright owner and is being used elsewhere in a way they disapprove of, then damages cannot solve the issue. PCG may not advertise the fact that the MOA was originally owned and used by WCG, but it’s possible people may still associate the two together. This is more typical of a trademark dispute, but reputation of the copyright owner is still an important factor for the owner to consider in copyright use. Professor Berg’s solution may be better than nothing, but still does not satisfy significant concerns of the religious organization copyright holder.

Whether RFRA invalidates the copyright doctrine in the case of religious disputes will likely continue to be a heavily-litigated issue. Until the Supreme Court has an opportunity to rule on this issue, circuit courts will also likely continue to dodge a precedential holding.

B. Judicial Restraint in Religious Copyright Litigation

The basic idea of judicial restraint is that judges should only comment or rule on issues where they have and are the proper authority. For example, this generally means that judges should not be activists in their decisions unless

⁸³ Thomas C. Berg, *Copying for Religious Reasons: A Comment on Principles of Copyright and Religious Freedom*, 21 CARDOZO ARTS & ENT. L.J. 287, 317 (2003).

the law is clearly unconstitutional.⁸⁴ Because most judges are appointed and not elected, citizens do not have an opportunity to vote out a judge because of a bad ruling. Citizens do, however, have the opportunity to remove members of Congress if they do not like the legislation the Congress member supports. The primary principle of judicial restraint is that even if a judge disagrees with the content of the suit or the consequences of a statute, they will not rule based on their personal views but rather on whether the Constitution has been violated or not.⁸⁵ This principle is not practiced by all judges but is an important federalist value.

Judicial restraint in free exercise litigation is crucial to uphold the ideals of federalism. Judges are not and should not be the source that Americans turn to when determining whether faith is based in fact or whether a particular religious practice is appropriate. On the other hand, we don't want judges to allow injustices under the guise of a religious practice. This issue was raised all the way back in 1878 in the famous *Reynolds v. U.S.* by Chief Justice Waite:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? ...To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.⁸⁶

This is, again, a more extreme version of the principle that we do not want to allow civil or criminal wrongdoings in the name of free religious exercise. In the case of religious copyright, while judges shouldn't comment or rule on the truthfulness or factual/fictional nature of faith, they need to be able to determine whether use of religious scripture is fair. This tension isn't always a difficult issue to overcome. Professor Thomas Berg commented on this issue, "A court could easily decide that the intention of a religious work was to convey spiritual information without determining whether the information

⁸⁴ Zachary Baron Shemtob, *Following Thayer: The Many Faces of Judicial Restraint*, 21 B.U. PUB. INT. L.J. 61, 84 (2011) (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893)).

⁸⁵ Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 521 (2012).

⁸⁶ *Reynolds v. United States*, 98 U.S. 145, 166, 25 L. Ed. 244 (1878).

is true.”⁸⁷ He cited a case involving the Church of Scientology where the Second Circuit concluded that Ron Hubbard’s works were informational, and therefore a biography quoting those works was more subject to a fair use defense.⁸⁸ In these cases, judges need not practice judicial restraint if the court is not required to make judgments on the truthfulness or inherent goodness in a particular faith.

It is important for judges to practice judicial restraint in cases where they must make a judgment on the truthfulness or factual nature of religious scripture when it is not clearly informational. Courts should generally avoid entanglements with religious pronouncements, but fair use litigation may require a court to listen to expert witnesses as to which part of the scripture is most significant and substantial. Luckily for most judges, it is usually clear if a scripture appears to try and persuade or rather merely conveys information.

C. CONCLUSION

The doctrine of fair use should be the solution to the conflict between RFRA or religious free exercise issues and copyright law. As highlighted by the *Worldwide* case in the Ninth Circuit, the infringing party has the opportunity to add original modifications to religious scripture including commentary, annotations, translations, or creative new additions. If the infringing party copies a religious text verbatim and there is no attempt to modify the protected work, then courts should hold that the infringing party is strictly liable as the Ninth Circuit did.

In the same way that we do not want to allow human sacrifice under the shield of religion, we should not allow verbatim copying without some sort of original modification to religious scripture. Religious organizations are not substantially burdened by having to comment on or annotate their religious scripture and even if they were, fair use would pass the strict scrutiny test set out in RFRA.

⁸⁷ Berg, *supra* note 82, at 306.

⁸⁸ *Id.* (quoting *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152 (2d Cir. 1990)).