ACCOMMODATING THE UNAUTHORIZED USE OF COPYRIGHTED WORKS FOR RELIGIOUS PURPOSES UNDER THE FAIR USE DOCTRINE AND COPYRIGHT ACT § 110(3)

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INTRODUCTION

From time to time the question has arisen whether copyright's fair use doctrine sometimes permits the otherwise unauthorized reproduction, adaptation, and distribution of copyrighted works of authorship for religious purposes.[1] In the leading case on point, *Worldwide Church of God v. Philadelphia Church of God*,[2] a divided panel of the Ninth Circuit held that fair use did not excuse the defendant's unauthorized copying and distribution of a work, titled *Mystery of the Ages*, for purposes of evangelization.[3] On one reading, this outcome stands in stark contrast with the permissive attitude embodied in another provision of the Copyright Act, § 110(3),[4] which creates a blanket exemption for the otherwise unauthorized public performance of nondramatic literary and musical works in the course of religious services.[5]

In a companion piece, I discuss these and other copyright issues arising in connection with religious works or works that are

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1 *See* Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001); Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d (BNA) 1680 (S.D.N.Y. July 25, 2000); Bridge Publ. Inc. v. Vien, 827 F. Supp. 629 (S.D. Cal. 1993).

2 227 F.3d 1110 (9th Cir. 2000).

3 *See id.* at 1121.

4 *See* 17 U.S.C. § 110(3) (2001).

5 *See id.* The full text of § 110(3) reads as follows:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright . . . performance of a nondramatic literary or musical work or of a dramatic-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 . . . .

used for religious practice.[6] In this essay, I focus more explicitly on the contrast between the policies embedded in the fair use doctrine and in § 110(3). I shall argue that the use at issue in *Worldwide Church of God* probably should have been deemed a fair use – or else should have subjected the defendant in that case to damages liability only, but not injunctive relief – but that most instances in which people copy, adapt, or distribute copyrighted works for religious purposes are not, and should not be deemed, fair. If this reasoning is correct, however, it calls into question the viability of § 110(3), which permissively accommodates public performances *tout court.* I shall argue that the best reason for upholding § 110(3) may lie in its irrelevance to all but a small number of cases in which the fair use defense, as I conceive it, is plausible but would be inordinately costly to vindicate. Even on this reasoning, however, the constitutionality of § 110(3) is dubious.

I. Two Concepts of Fair Use

It is perhaps glib to assert that there are only two ways of looking at the fair use doctrine; one is reminded of the joke that there are only two kinds of people in the world, those who divide everything into two types, and those who don't. I will nevertheless focus on two principal ways in which commentators in the United States view the fair use doctrine, which for want of better terms (or a better imagination), I will refer to as the economic approach and the social well-being approach. I will suggest that both approaches are utilitarian in a broad sense of that term, in that both seek to maximize certain social benefits over social costs, and that they differ largely in their conclusion as to what counts as a social benefit. I will then argue that, under the social well-being approach—and possibly under the economic approach as well—the type of use at issue in *Worldwide Church of God* probably should be excused as fair; but that other, more common uses of works for purposes of religious practice typically would not be excused under either approach.

The economic approach posits that fair use should apply when there is a market failure, such as when the copyright owner and the user are unlikely to reach agreement on the terms of a license, due to the presence of transaction costs or other bargaining obstacles.[7]

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[6] *See* Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 Cal. L. Rev. 323 (2003).

[7] *See, e.g.*, Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 Colum. L. Rev. 1600, 1614-15 (1982) [hereinafter Gordon, *Fair Use*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*

Under this rationale, fair use typically applies only when the value of the use is less than the cost of negotiating for permission.[8] Fair use therefore may come to the rescue in some such cases, that is, when TC > WTP > WTA. Strictly speaking, it might make sense to excuse the would-be user from seeking permission even when TC does not exceed WTP, as long as (1) WTP > WTA, and (2) WTP - TC < WTA. Rearranging terms, this becomes 0 < WTP - WTA < TC. Thus, in the example above, if TC > 2, transaction costs would eat up all the gains from trade and therefore deter a bargain from going forward; the result would be non-use. If the would-be user is not required to bargain, and simply permitted to use, social welfare increases by the amount of his gain. The copyright owner is no worse off, because in the absence of fair use he would not have earned any licensing revenue anyway. Such cases might arise, for example, when an author wishes to include a brief quotation from a copyrighted work in her own work, because the cost of finding the owner of the quoted material and negotiating for permission to use is probably higher than the (presumably minimal) value of the quote. Another common example arises when a teacher distributes to his class copies of an article from the morning newspaper; here the cost of obtaining permission within the relevant time frame probably exceeds the value of the use. Yet another example would be the use of excerpts in critical works, such as book or movie reviews. In this setting, even if it is feasible for reviewers to negotiate with copyright owners, owners may be better off if reviewers are free to include excerpts in their reviews without permission, because in the aggregate reviews stimulate sales – but more so if readers perceive them as credible, which they might not do if the independence of reviewers were open to question. Absent a fair use doctrine, however, the author of a work that is unfavorably reviewed might have an incentive to sue the reviewer for copyright infringement, even though authors in the aggregate are better off

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Law, 18 J. LEGAL STUD. 325, 357-58 (1989). Professor Gordon's most recent work, however, clarifies that she does not believe fair use should apply only in cases of market failure. *See* Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, *in* THE COMMODIFICATION OF INFORMATION 149, 150 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) [hereinafter Gordon, *Excuse and Justification*].

[8] To illustrate, suppose that the would-be user would be willing to pay (WTP) up to five dollars for the use, and the copyright owner would be willing to accept (WTA) as little as three dollars to permit the use. Absent transaction costs or other obstacles to bargaining (which I will abbreviate as TC), one would expect the parties to agree to the use for some fee X, where 5 > X > 3. In other words, one would expect the parties to reach an agreement as long as WTP > WTA. If, however, TC exceeds WTP, an otherwise mutually beneficial bargain will not occur. For instance, in the preceding example, if TC = 7, it exceeds the value of the use to the would-be user, in which case it is not worthwhile for the would-be user to seek permission.

not suing. In this sense, fair use may be seen as a means for economizing on the transaction costs or other obstacles that would arise if authors had to reach agreement with one another to prevent opportunistic litigation on the part of the criticized.

Advocates of what I shall refer to as the social well-being approach do not necessarily disagree with the transaction-cost approach rationale for fair use, but suggest that this approach does not account for all of the circumstances in which fair use does and should apply.[9] Scholars advocating this second approach, therefore, argue that fair use should apply in other circumstances in which the social benefits of uncompensated uses outweigh the social costs. Thus, one might excuse some copying for purposes such as teaching, scholarship, news reporting, and criticism because these uses tend to increase the level of education, and the ability to exercise self-governance among the general public.

The economic approach is not necessarily inconsistent with this view. In the language of economics, one might excuse some uses of copyrighted materials, even though transaction costs are low, if these uses would give rise to substantial positive externalities.[10] The fact that a small benefit is distributed among a large class of third parties, for example, might make it difficult for the user of a copyrighted work to appropriate a large portion of the social benefit; this difficulty in turn decreases the amount he is likely to be willing to pay for the use of the material and might be viewed as a type of market failure. Because the value of these third-party benefits is often unquantifiable, however, advocates of the economic approach are often more skeptical about the nature of these benefits.[11] The social well-being approach also is more likely to include as social benefits some productive uses of copyrighted expression by persons who are unable, and therefore unwilling, to

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9 *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-94 (1988) (arguing in favor of a "utopian" approach to fair use); Gordon, *Excuse and Justification*, *supra* note 7, at 184; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 308-11 (1996) (arguing that fair use should promote self-governance).

10 *See* Gordon, *Fair Use*, *supra* note 7, at 1630-32. In terms of the analysis presented above in footnote 8, suppose that the social value of the use (SV) is 7, the owner's WTA is 5, and the user's WTP is 3. Absent fair use, no bargain will be struck, because WTA > WTP. From the standpoint of society as a whole, however, the use is desirable because SV > WTA. In other words, the use gives rise to some external social benefit which the individual user does not fully capture. If transaction costs and other bargaining obstacles were zero, society as a whole could negotiate with the copyright owner, but the cost of negotiating and avoiding holdout problems may be difficult to surmount.

11 *See* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 581 n.110 (1998); Gordon, *Fair Use*, *supra* note 7, at 1632.

pay for the privilege.[12] Under a strictly economic approach, by contrast, social well-being is measured by willingness-to-pay and these latter benefits would not "count."[13]

II. When Is the Unauthorized Reproduction, Adaptation, or Distribution of a Work for Religious Purposes a Fair Use?

To illustrate some of the circumstances in which a defendant might assert a fair use defense for a religious use of a copyrighted work, let us consider briefly three reported decisions in which this issue has arisen.

The most recent of these is *Worldwide Church of God v. Philadelphia Church of God.*[14] Toward the end of his life, Herbert W. Armstrong, the founder of a Christian denomination known as the Worldwide Church of God (WCG), authored and published a book titled *Mystery of the Ages.*[15] During the remainder of Armstrong's life, and for a short period of time after his death, WCG (which owned the copyright to *Mystery of the Ages*) distributed nine million free copies of the book.[16] Two years after Armstrong's death, however, WCG repudiated some of the views expounded in *Mystery of the Ages* and stopped distributing it.[17] Two members thereafter formed a breakaway church, the Philadelphia Church of God (PCG), which preaches strict adherence to Armstrong's teachings and requires new members to read *Mystery of the Ages.*[18] In 1997, PCG began reproducing verbatim and distributing copies of the work in English and other languages, without WCG's permission.[19] WCG sued PCG for copyright infringement.[20] The district court found in favor of PCG on the issue of fair use,[21] but the Ninth

12 *See* Cotter, *supra* note 6, at 369-70.

13 *See id.* at 84 n.284. *But see* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 989-98 (2001) (arguing that a narrow focus on "wealth maximization" as a social welfare criterion is favored more by some legal academics than by economists).

14 227 F.3d 1110.

15 *See id.* at 1113.

16 *See id.* Armstrong is said to have desired for *Mystery of the Ages* to reach the "largest audience possible." Petition for a Writ of Certiorari at 3, Philadelphia Church of God, Inc. v. Worldwide Church of God, 121 S. Ct. 1486 (2001) (No. 00-1276). Whether his actions can be construed as an intent to dedicate the work to the public domain, and if so whether this intent has legal significance, goes beyond the scope of this paper. *Cf.* Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303, 1305-07, 1309 n.* (N.D. Ill. 1970) (noting, but not deciding the case on the basis of, Pablo Picasso's intent to dedicate a sculpture to the people of Chicago).

17 *See id.*

18 *See id.*

19 *See Worldwide Church of God*, 227 F. 3d at 1113.

20 *See id.*

21 *See id.* at 1115.

Circuit reversed and remanded with instructions to enter judgment for WCG,[22] with one judge dissenting.[23]

Another case in which the fair use issue arose is *Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor, Ltd.*[24] This case involved a work known as *A Course in Miracles*, which Jesus allegedly dictated to a Columbia University professor, Helen Schucman, beginning in the mid-1960s.[25] The defendant, New Christian Church of Full Endeavor (NCC), is a new religious movement, or "NRM," that considers *A Course in Miracles* to be one of its scriptures.[26] In order to disseminate the message of *A Course in Miracles*, NCC had copied the work, translated it into other languages, and distributed copies free of charge, all without permission of Penguin Books, the purported copyright assignee.[27] The case raises several fascinating issues concerning the validity of copyright in works that purport to be scriptural in character.[28] Having decided these issues (wrongly, in my view) against the defendant, the court went on to consider the fair use defense, which it likewise rejected.[29] For present purposes, the principal factual distinction between this case and *Worldwide Church of God* is that Penguin Books continues to sell authorized copies of *A Course in Miracles*,[30] whereas WCG no longer distributes, or authorizes the distribution of, copies of *Mystery of the Ages*.

The earliest of the three cases, *Bridge Publications, Inc. v. Vien*,[31] involved certain works in which the copyright belongs to the Religious Technology Center (RTC), an organization affiliated with the Church of Scientology.[32] Scientologist organizations have been the

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[22] *See id.* at 1121.

[23] *See id.* at 1122-25 (Brunetti, J., dissenting).

[24] 55 U.S.P.Q.2d (BNA) 1680 (S.D.N.Y. July 25, 2000).

[25] *See id.* at 1683-84.

[26] *See id.* at 1687.

[27] *See id.*

[28] For analysis of these issues, *see* Cotter, *supra* note 6, at 338-64.

[29] *See Penguin Books*, 55 U.S.P.Q.2d (BNA) at 1695-96.

[30] New copies of *A Course in Miracles* are available on amazon.com for about thirty dollars. *See* http://www.amazon.com (visited April 1, 2002). Used copies are available for lower prices. *See* http://www.half.com (visited April 1, 2002).

[31] 827 F. Supp. 629.

[32] *See id.* at 632-34. Apparently, some of the copied materials were sound recordings of lectures given by L. Ron Hubbard. *See id.* at 632. Others were "works known generally as the 'Advanced Technology.'" *See id.* The opinion makes it clear that RTC asserted trade secret rights in the Advanced Technology documents and copyright in the sound recordings. *See id.* at 632-34. It does not make it clear whether RTC asserted a copyright claim in the Advanced Technology documents, but RTC has asserted copyright in these documents in other cases. *See* Religious Tech. Ctr. v. Lerma, 40 U.S.P.Q.2d (BNA) 1569, 1572 (E.D. Va. Oct. 4, 1996); Religious Tech. Ctr. v. Netcom On-Line Communication Services, Inc., 923 F. Supp. 1231, 1239 (N.D. Cal. 1995); Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1521 (D. Colo. 1995).

plaintiffs in a number of copyright and trade secret cases involving Scientologist documents, in most cases directed against former church members who had allegedly copied and distributed excerpts from these documents without permission.[33] Some of these cases involve more traditional fair use issues, analogous to the critical book reviews noted above.[34] In *Vien*, however, the defendant copied and distributed certain documents not for purposes of critique, but rather to set up a competing, apparently for-profit organization.[35] In some respects this case presents a mix of the facts of *Worldwide Church of God* and *Penguin Books*. As in *Worldwide Church of God*, the copyright owner might be viewed as trying to suppress competition in the market for religious believers. Unlike WCG, however, the Church of Scientology makes the documents at issue available to people who want them, though at a much higher cost in terms of time, effort, and money, than Penguin Books makes available *A Course in Miracles*.[36]

In all three cases the defendant ultimately lost on the issue of fair use. The question therefore arises whether these were the correct outcomes, or whether the courts in all three instances were insufficiently sensitive to the needs of religious believers to access certain documents for purposes of religious practice. The answer will depend, in part, upon which theory of the fair use doctrine one finds more persuasive, as well as upon the specific facts of each case.

As noted above, under the economic approach, the unauthorized reproduction, adaptation, or distribution of a work should be excused as a fair use only when the market fails, such as when the cost of obtaining permission is prohibitive.[37] As a general matter, it is doubtful whether this approach would confer any greater privilege upon religious uses of copyrighted works. To be sure, one can

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[33] *See, e.g.*, Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986); *Lerma*, 40 U.S.P.Q.2d (BNA) 1569; *Netcom*, 923 F. Supp. 1231; *F.A.C.T.Net*, 901 F. Supp. 1519.

[34] *See Lerma*, 40 U.S.P.Q.2d (BNA) at 1574; *Netcom*, 923 F. Supp. at 1242; *F.A.C.T.Net*, 901 F. Supp. at 1525.

[35] *See Vien*, 827 F. Supp. at 633-34 (stating that Vien admitted charging "$3000 for a course package which includes the Advanced Technology materials"); *see also Netcom*, 923 F. Supp. at 1253 (describing Vien's organization as one that used the Advanced Technology works for its profit). The *Wollersheim* litigation also involved a splinter church that allegedly copied Scientologist scriptures. *See Wollersheim*, 796 F.2d at 1078-79. None of the reported *Wollersheim* decisions, however, address the splinter church's fair use defense.

[36] *See Vien*, 827 F. Supp. at 633 (stating that RTC keeps the Advanced Technology materials confidential and under tight security, disclosing them "only to those who have attained the requisite level of spiritual training" and who sign confidentiality agreements); *Lerma*, 40 U.S.P.Q.2d (BNA) at 1572 & n.1. By contrast, anyone with thirty dollars to spare can obtain a copy of *A Course in Miracles* from amazon.com. *See supra* note 30.

[37] *See supra* text accompanying note 8.

imagine instances in which the cost of obtaining permission to copy, adapt, or distribute a work for a religious purpose might exceed the would-be user's expected benefit from the use, and in these cases fair use would excuse that use. A minister who recites a brief passage of *A Course in Miracles* in the course of a sermon, for example, probably would be excused under this rationale even if this "public performance" were not exempted under Copyright Act § 110(3). Similarly, a seminary teacher who quotes a portion of the Scientology documents in a scholarly article on NRMs, or a religious broadcaster that quotes a portion of *Mystery of the Ages* in a documentary on Herbert Armstrong, probably would be covered by fair use as well, assuming that the quoted portions are sufficiently brief. In none of these hypothetical cases, however, does the religious nature of the teaching, scholarship, or reporting appear to be a material fact. The uses would be excused, or not, regardless of their religious nature.

More importantly, a narrow economic approach would condemn the unauthorized uses at issue in *Worldwide Church of God*, *Penguin Books*, and *Vien*, because in none of these cases does it appear that the cost of negotiating for permission was prohibitive. In *Penguin Books*, the copyright owner (presumably) simply wanted to be paid the market price for its work. The same may be true in *Vien*, although in that case the RTC also may have wanted to hinder the growth of a rival sect. Nevertheless, as in *Penguin Books*, the relevant documents are available to those who want them at the owner's stated price. The closest case is *Worldwide Church of God*, in which the copyright owner may have been unwilling to make the subject work available at any price–particularly to a user that it deemed to be not only a rival, but a schismatic or heretical group. Nevertheless, if the defendant's expected gains from use are less than the plaintiff's expected losses, the fact that the plaintiff refuses to license the work does not necessarily mean that the market has failed; to the contrary, the market may have correctly allocated the right to the work to its highest value.

Under the social well-being approach, by contrast, one could argue that religious uses should be given more deference than other uses, to the extent that one views the accommodation of religious practice as a legitimate goal of civil society. Whether accommodation is, in general, such a goal is, to be sure, a contested issue. Although I am personally sympathetic to it, there are cogent arguments to the contrary and I do not wish to recapitulate that

particular debate at length here.[38] Moreover, even if one accepts in principle the idea that some degree of accommodation is desirable, the question remains how far this principle can be stretched before it collides with the Establishment Clause. In the present context in particular, according religious uses more weight than other uses might appear to favor religion, in violation of the neutrality principle that courts have read into the Establishment Clause.[39]

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[38] For what it's worth, I tend to side with those scholars who argue that the state should attempt to accommodate religious belief – for example, by requiring the government to provide a substantial justification for not exempting religious believers from generally applicable laws that inhibit the practice of their religion. In my view, accommodation promotes religious pluralism, which has both intrinsic and instrumental value. As for the latter, religious groups are one of many intermediate institutions within which citizens learn and practice the values of community, self-definition, and self-governance that are crucial to the development of civil society; in addition, religious groups can provide a source of sometimes prophetic resistance to the values of the dominant culture and the state. For works developing these themes, *see, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION ch. 7 (1993); STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 54-89, 123-24 (1998); STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 166 (2000); BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM ch. 9 (1997); Michael W. McConnell, *Religious Freedom at the Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 115, 169 (1992); Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1630-31 (1995); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14-24; *cf.* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 380-82 (1989-90) [hereinafter Marshall, *The Case Against*] (arguing that the pluralism theory "fails to establish why only religious groups, and not secular groups that share the same characteristics, merit special treatment"). Putting aside those arguments that focus primarily on the supposed intent, or lack thereof, of the Framers, *see, e.g.*, Philip A. Hamburger, *A Constitutional Rights of Religious Exemption: A Historical Perspective*, 60 GEO. WASH. L. REV. 916 (1992) (arguing that the Framers were not accommodationists); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (arguing that they were). Other arguments in favor of accommodationism are that it promotes liberty of conscience, which is a good in and of itself, *see* MICHAEL PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 28 (1997); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317, 347 (1996); Michael. W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685, 691-92 (1992) [hereinafter McConnell, *Update*], and that it promotes equality among believers and nonbelievers, or between majority and minority sects, *see, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 112 (1991); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L. J. 1611, 1640 (1993); McConnell, *Update, supra*, at 693. Among the principal arguments against accommodation are that it bestows special favors upon religious practice, in violation of the neutrality required by the Establishment Clause, *see, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452-60 (1994); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591, 600 (1990), that it violates the principle of equality by conferring greater rights upon the religious (or perhaps only religious majorities), *see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991); Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2381-83 (1997); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 129-38 (1993), and that it threatens to entangle government and religion, *see, e.g.*, West, *supra*, at 609-11; Marshall, *The Case Against, supra*, at 386-88.

[39] The Supreme Court has provided some limited guidance on the issue of how far the

I nevertheless will argue that, whatever one's views may be on accommodation as a general matter, there are good reasons for according religious uses more weight in the fair use calculus under some, albeit limited, circumstances. This more limited accommodationist argument is that courts should deploy fair use to facilitate competition among religious sects. This argument is defensible, though certainly not indisputable, under either the economic or social well-being approach. Under the economic approach, one might argue that a copyright owner's refusal to license a work specifically for the purpose of inhibiting its dissemination—rather than to inhibit competition in the market for the work itself—constitutes a market failure, because the principal reason for conferring copyright rights is to stimulate dissemination.[40] In the present context, this failure is all the more troubling, because the copyright owner's exercise of her rights threatens not only to restrict the flow of information but also to impose a cost upon minority religious practice. Alternatively, under the social well-being approach, if competition among sects is viewed as a good in and of itself, then fair use might be a tool for attaining this good, at least under some circumstances.

The idea that competition among religious sects is a social good is, of course, a contested principle. Theocratic states, for

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state may permissively accommodate religious practice without violating the Establishment Clause. *See infra* notes 89-93 and accompanying text.

[40] *See* Gordon, *Fair Use, supra* note 7, at 1632-35; Gordon, *Excuse and Justification, supra* note 7, at 155. On this view, perhaps the religious nature of the work is a red herring. The fact that the copyright owner is not making the work available himself, and is preventing others from copying and distributing it because he wants to suppress the views expressed therein, might suffice to create a fair use privilege. Consider, for example, a case involving two rival political factions. Faction 1 owns the copyright to a work that it once considered, but no longer considers to be "politically correct," and so it neither distributes nor authorizes others to distribute copies of that work; Faction 2, a splinter group, still considers the work to be useful and wishes to copy and distribute it for political purposes. Faction 2 might have a good fair use defense on these facts because, among other things, the effect of its use upon the non-existent market for the copyrighted work is nil. *Cf.* Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986) (affirming judgment that defendant's reproduction of 4.3% of an out-of-print book was a fair use, where plaintiff had denied permission due to disagreement with the defendant's position on abortion); Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966) (affirming judgment that defendant's reproduction was a fair use, where plaintiff had purchased the copyright and then denied reproduction rights in order to suppress the work). Whether a political faction would have as good an argument as a religious faction for copying and distributing the exact text of the work, in its entirety, is nevertheless unclear. A religious group may have a greater need than a political group to access the exact words of a founder. *See* Cotter, *supra* note 6, at 359-64. This need is relevant to fair use because in determining whether fair use applies a court must consider whether the defendant took more of the work than was necessary to achieve the defendant's purpose. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573, 587, 589 (1994); Kelly v. Arriba Soft Corp., 280 F.3d 934, 943 (9th Cir. 2002). For this reason, I would argue that the religious nature of the use should, in some limited class of cases, weigh in favor of the fair use determination.

one, probably would reject it. So too might a religion, whether or not backed by state power, that views itself as embodying the One True Faith. And even from a secular perspective, opinions are mixed as to whether religious diversity is a good thing.[41] Nevertheless, whether by design or accident, the separation of church and state as embodied in the Establishment Clause seems to advance the principle of competition among sects.[42] From an economic perspective, the basic idea is not hard to grasp. In other contexts, monopolies do not satisfy consumer wants as fully as does competition.[43] Separation of church and state makes it more difficult for one religion or one sect to gain monopoly power, and thus makes it more likely that competition among religions and among sects will flourish.[44] The analogy may be imperfect, but nevertheless does seem to be at least roughly consistent with evidence. It has been argued that, as a general matter, nations that have no established church exhibit a greater degree of religious commitment than do nations that have such a church.[45]

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[41] Adam Smith favored competition among religious sects, on the grounds that small groups are less likely to cause social problems, and more likely to succeed in enforcing compliance with the group's moral code, than are large groups. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 345-47 (William Benton, Publisher, Encyclopedia Brittanica, Inc. 1952) (1776). David Hume, by contrast, argued in favor of an established church precisely *because* he believed that established churches tended to weaken religious enthusiasm and factionalism, which he saw as a sower of discord. *See* David Hume, *The Idea of a Perfect Commonwealth*, *in* 3 DAVID HUME: THE PHILOSOPHICAL WORKS 480, 490 (T.H. Green & T.H. Grose eds. 1992) (1882); *see also* RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 221-22 (2001) (noting that the German sociologists Ernst Troeltsch and Max Weber both opposed the religious pluralism they witnessed in America during a visit here in 1904, on the ground that pluralism strengthened Americans' religious commitment); *cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 27.6, at 679 (4th ed. 1992) (noting the possibility that, when there are a multiplicity of sects from which to choose, people will choose those that demand the least, resulting in an aggregate reduction in morals).

[42] *See, e.g.*, POSNER, *supra* note 41, § 27.6, at 678-79; STARK & FINKE, *supra* note 41, at ch. 9; Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 55 (1989).

[43] Absent perfect price discrimination, a monopolist who equates marginal cost with marginal revenue will charge a higher price, and produce less output, than would be obtained under perfect competition. *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 76-78 (2d. ed. 1995). Because the monopolist's gain is less than consumers' loss, monopoly is less efficient than competition absent some other overriding factor (such as the need to confer monopoly rights in order to induce production of the good in the first place). *See id.* at 76-78, 831-33. In addition, monopolists may engage in a variety of socially unproductive activities to maintain their monopoly position, and may be more likely to engage in "satisficing" behavior than to continue to innovate. *See id.* at 83, 834-5; Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 872 nn.140-141 (1990).

[44] *See supra* note 42.

[45] *See* POSNER, *supra* note 41, § 27.6, at 678; STARK & FINKE, *supra* note 41, ch. 9; 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 319-20 (Henry Reeve et al. trs. 1945) (observing that the separation of church and state in the United States encouraged religious commitment); McConnell & Posner, *supra* note 42, at 55.

If we accept the idea that the Establishment Clause promotes competition among religious sects, the principle that fair use should excuse some religious uses when doing so will promote competition should reduce any potential conflict between accommodation and establishment. In the context of three cases described above, *Worldwide Church of God* comes closest to one in which the copyright owner sought to use its copyright to undermine competition from a rival sect.[46] Granted, PCG can still practice its religion to some extent without having the right to copy *Mystery of the Ages.* Members and prospective members can read and distribute the existing lawfully-made copies, because the first-sale doctrine permits the owner of lawfully-made copies to distribute them without permission from the copyright owner.[47] Moreover, PCG could express in its own words the ideas set forth in *Mystery of the Ages,* without running afoul of WCG's copyright.[48] And WCG does not appear to have monopoly power in any meaningful sense–there are plenty of other religious sects out there from which one may choose. Even so, a church's assertion of copyright in a work that it no longer publishes is troubling, because this

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[46] WCG argued that it planned to market its own, annotated version of *Mystery of the Ages,* and that it wanted to prevent competition from PCG's unauthorized, unannotated version. *See* Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1113, 1119 (9th Cir. 2000). When a copyright owner refuses to license his work to another, in order to avoid competition with his own embodiment of that work, the refusal is both legal and unremarkable. There was reason to doubt, however, whether WCG's motivation was to avoid competition in the market for versions of *Mystery of the Ages.* Although it had been ten years since WCG ceased publishing the book, WCG still had no concrete plans for an annotated version. *See id.* at 1122, 1124 (Brunetti, J., dissenting). It is also questionable whether annotated and unannotated versions of *Mystery of the Ages* would serve as substitutes for one another. *See id.* at 1124 (Brunetti, J., dissenting). Even the majority seemed to concede that WCG's real motivation was to avoid competition in the market *for believers*:

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

Id. at 1119.

[47] *See* 17 U.S.C. § 109(a) (2001).

[48] *See* § 102(b) (stating that copyright does not subsist in ideas). To the extent that the ideas set forth in *Mystery of the Ages* can be expressed in only one way or a small number of ways, the merger doctrine would strip the work of all copyright protection. *See, e.g.*, Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (discussing the merger doctrine). The application of this principle to religious texts is tricky, however, for reasons I discuss at more length in the companion article. *See* Cotter, *supra* note 6, at 359-64.

assertion makes it more difficult (how much more difficult will vary from one case to another) for breakaway factions to practice their religious beliefs. Imagine the problems that Martin Luther would have encountered if he had had to obtain permission from the Catholic Church to translate the New Testament into German! Thus, whether one views religious diversity as a goal in and of itself, or suppression as a failure of the copyright system, WCG's refusal to license *Mystery of the Ages* to PCG is problematic, even if for most people there are adequate (or better) substitutes for the book.

By contrast, one can hardly claim that Penguin Books is censoring the message of *A Course in Miracles* just because it makes this book, like every other book in its catalog, available for a price. To be sure, the price may have some marginal impact on readers who cannot easily afford to pay thirty dollars for a copy of the book, but this impact is much less severe than in *Worldwide Church of God.* (Would-be readers could pool their resources to buy a copy, for example.) Further, to hold that church members must *always* prevail on fair use when they copy, distribute, or adapt works that are important to their religious practice might undermine the incentive to produce and publish these works in the first place.[49] *Vien* is a slightly more difficult case than *Penguin Books,* insofar as the Scientology works are available to anyone who wants them, but at a relatively high price. RTC's refusal to license the works at a lower price may well inhibit others from competing by setting up rival Scientology organizations. Unless courts are to get into the business of regulating the prices of copyrighted works, however, there is no obvious way to avoid this problem. *Worldwide Church of God* is nevertheless distinguishable, in that the copyright owner in that case refused to make the work available to anyone, in much the same way that the targets of critical reviews and parodies are unlikely to consent to their critics' use.[50] *Vien* would be more like *Worldwide Church of God* if the defendant there had copied and dis-

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[49] Perhaps the incentive provided by the copyright system is less important in the context of religious works, because authors and publishers of these works are motivated, in part, by the moral conviction that they should disseminate these works to the public. No one really knows, however, and presumably even religious authors and publishers must at least make up their sunk costs in order to stay in business.

[50] The market-failure rationale for critical books reviews and commentary may not apply with as much force to religious works. Although authors generally are better off if their books are reviewed, if the reviews contain excerpts from their books, and if the public perceives reviewers as independent, it is not clear that all authors of religious works would, *ex ante,* invite independent criticism. *See, e.g.,* Michael J. Walsh, *Church Censorship in the 19th Century: The Index of Leo XIII, in* CENSORSHIP AND THE CONTROL OF PRINT IN ENGLAND AND FRANCE 1600-1910 (Robin Myers & Michael Harris eds., 1992) (discussing the (now-defunct) Index of Forbidden Books).

tributed the Scientology scriptures out of a desire to set up a church that differed with the Church of Scientology in matters of faith or doctrine, and RTC selectively refused to license the works for this purpose.

Moreover, as I have argued elsewhere, the principle that fair use should excuse uses like the one at issue in *Worldwide Church of God* seems consistent with the history of copyright law, as well as with the principle of separation of church and state. The first modern copyright law in England, the Statute of Anne,[51] embodied a sharp break with earlier practice under which the Crown granted exclusive publishing rights to the Stationers' Company (the printers' guild) in exchange for the Stationers' assistance in policing compliance with the various licensing decrees and acts designed to censor the publication of, among other things, heretical works.[52] The pre-Statute of Anne "copyright" system (if we may refer to it as such) was, in other words, designed to inhibit, *inter alia*, the practice and spread of minority religions. The Statute of Anne took a new tack by, among other things, vesting copyright in authors (rather than publishers); limiting the copyright term; and, importantly for present purposes, divorcing copyright from censorship.[53] It is ironic that, nearly 300 years later, a court has construed copyright law as once again permitting a copyright owner to wield its rights for the purpose of inhibiting religious dissent.

There are nevertheless some problems with applying fair use in the manner I have sketched out above. Exempting a defendant's use in order to promote competition among religious sects necessarily would require courts to determine, unless the relevant facts are stipulated, whether the defendant's beliefs comprise a "religion;" whether the defendant's use of the plaintiff's copyrighted work is important to her religious practice; and (perhaps) the sincerity of the defendant's commitment to the religion. Inquiries of this nature are intrusive and threaten government entanglement in religious matters. In addition, in cases in which the owner and would-be user belong to competing sects, there may be some concern that a decision in favor of the user favors one religion over another, in obvious violation of the Establishment Clause. But these objections are not insuperable. In other contexts, courts

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[51] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1710) (Eng.).

[52] *See* Cotter, *supra* note 6, at 326-28.

[53] *See id.* at 327-28.

sometimes *do* have to determine what constitutes a religion,[54] whether a given practice is important within a given religious tradition,[55] and whether the party seeking accommodation sincerely holds a given belief.[56] Uncomfortable as these inquiries may be, it is not impossible for courts to undertake them.[57] Moreover, conferring some additional weight to religious uses might allow courts to avoid having to make other fine distinctions, such as whether proselytization and evangelization qualify as "teaching" or "scholarship" for purposes of fair use.[58] Nor does the proposed rule favor one religion over another. Because copyrights are nonrivalrous, both the mother church and the splinter group can use a copyrighted work without depleting it.[59] In this sense, disputes over the right to copy, adapt, or distribute a copyrighted work are different from disputes over real property, where one party or the other normally winds up in sole possession.[60]

In addition, most religious uses probably will fail to qualify for

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[54] *See, e.g.*, United States v. Meyers, 95 F.3d 1475, 1482-84 (10th Cir. 1996) (listing various criteria that courts have considered for purposes of determining whether a set of beliefs constitutes a religion, and therefore may be entitled to some degree of accommodation either under the Free Exercise Clause or the Religious Freedom Restoration Act (RFRA)).

[55] *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1952-54 (2001).

[56] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 905-07 (1990) (O'Connor, J., concurring); Magarian, *supra* note 55, at 1952-54.

[57] In addition, if the work at issue purports to be, literally, the Word of God, or if it is the central document within a given religious tradition, it is possible that the work falls outside the scope of copyright protection in whole or in part under the copyright estoppel or merger doctrines. For discussion of these issues, *see* Cotter, *supra* note 6, at 338-53, 359-64. A court that is asked to consider these doctrines as well necessarily will have to decide if a given text is important for some religious believers, and (perhaps) whether the defendant's claim is sincere.

[58] *See* Cotter, *supra* note 6, at 374 nn.224 & 376.

[59] *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 94-95, 115-16 (Random House, 2001) (noting the nonrivalrous nature of intellectual property). The fact that intellectual property is nonrivalrous – as well as the fact that, in my suggested fair use analysis, fair use would apply only in cases in which the defendant's use has no effect upon the market for the copyrighted work – suggests that the defendant's use would cause the mother church no harm that copyright law ought to be concerned about. *See infra* note 60 and accompanying text; *see also* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622-35 (2000) (arguing that courts should be less deferential to claims for religious exemptions from generally applicable laws, when the exemption would cause demonstrable third-party harm).

[60] In deciding disputes over real property, courts may not decide which claimant more faithfully follows the tenets of the religion at issue. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976). To hold that PCG may copy *Mystery of the Ages* for purposes of its religious practice, however, is not to pass judgment on the merits of PCG's theology, or to decide whether WCG's or PCG's position on the issues discussed in the book is correct as a matter of church doctrine. And while the mother church may feel that some sort of "moral rights" in its work are appropriate, so that rival groups may not distort or amend that work, granting the Mother Church rights that go beyond the copyright rights conferred upon other works in the United States would almost certainly violate the

fair use under the standard proposed above, as well as under the application of the traditional fair use factors. As for the latter, copying all or most of a work usually weighs against fair use,[61] and although this factor is not dispositive,[62] it certainly does not help defendants such as PCG. Some religious works may be nonpublished or may be more creative than factual or information, and these factors as well cut against the assertion of fair use.[63] And in most cases the owner of the work probably does make the work available, as in *Penguin Books*, and so the effect on the market for the work should the defendants' activity become widespread may be substantial.[64]

Finally, as I have suggested elsewhere,[65] it is not clear that the fair use exemption was warranted even in *Worldwide Church of God*. Perhaps a better resolution in cases of this nature would be for the court to find the defendant liable for copyright infringement, but to award damages only and not injunctive relief. Although courts typically enjoin copyright owners from future infringement, the Supreme Court has on two recent occasions noted that injunctive relief is discretionary.[66] Much analysis still needs to be done to flesh out the types of copyright cases in which courts should decline to award injunctions,[67] but perhaps cases like *Worldwide Church of God* are among them. Awarding damages only would in effect be equivalent to a compulsory license, and whatever the demerits might be of compulsory licenses generally,[68] from the standpoint of the copyright owner, compulsory licenses may be preferable to no remedy at all.[69] Courts also may be more comfortable awarding

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Establishment Clause. *See* Cotter, *supra* note 6, at 337 n.55 (suggesting that Congress may not confer greater copyright protection upon religious, as opposed to secular, works).

61 *See, e.g.*, Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998).

62 *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984).

63 *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 563-64 (1985).

64 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994). What if the copyright owner makes the work available to interested parties, but charges more to members of religious groups with whom it disagrees? On the one hand, this practice would seem to be designed to inhibit dissenting groups from making use of the work. On the other hand, it would not absolutely prevent them from doing so, and once again I should stress that it would probably be a bad idea for courts to start deciding the just price at which copyrighted works may be sold. In any event, at least outside the digital environment, price discrimination is difficult to enforce, so perhaps this problem will remain hypothetical.

65 *See* Cotter, *supra* note 6, at 384-85.

66 *See* New York Times Co. v. Tasini, 121 S. Ct. 2381, 2393 (2001); *Campbell*, 510 U.S. at 578, n.10.

67 *See* Gordon, *Fair Use*, *supra* note 7, at 1622-24; *see also* Gordon, *Excuse and Justification*, *supra* note 7, at 192 (cautioning that adopting a liability-rule approach might have negative consequences, such as encouraging the further expansion of copyright rights).

68 *See* Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1613-16 (1998).

69 *Cf.* Bollard v. California Province of Soc'y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999) (concluding that risk of government entanglement with religion was diminished in a case

some relief, rather than excusing as fair the widespread unauthorized use of 100% of a copyrighted work. If courts take up this suggestion and concentrate more on the remedy than the right, any change to the fair use doctrine in the context of religious uses ultimately may be vanishingly small.

III. Copyright Act Section 110(3)

Section 110(3) of the Copyright Act, which permits the otherwise unauthorized public performance of copyrighted works in the course of religious services, has never been cited in any reported decision. Perhaps there is good reason for this lacuna. First, many works that are used in the course of religious services are already in the public domain, and therefore would not require permission even in the absence of § 110(3).[70] Second, some works that are used in religious services and that are subject to copyright protection are owned by the religious groups whose congregations are the principal users of those works (or by entities affiliated with those groups), and thus as a practical matter, the § 110(3) exemption is not likely to be problematic.[71]

Third, in yet other cases, the copyright owner probably would be willing to license the public performance of the work for a nominal fee, particularly if the user has already paid for copying and distribution, or if the owner itself is a religious person or institution. Even in other instances, copyright owners may not wish to be viewed as obstructionists. Remember the bad publicity that ASCAP

in which the sexual harassment plaintiff, a former Jesuit seminarian, sought only damages against the order).

70 Some works are old enough that the question of copyright protection no longer can arise. Among these works would be the King James Version of the Bible, the Torah in Hebrew, and the original Arabic version of the Koran, as well as any hymns published prior to the year 1923. *See* 17 U.S.C. §§ 304(a) - (b) (effectively conferring, as of October 27, 1998, a copyright term of ninety-five years from the date of first publication for works not already in the public domain as of that date). In other cases, the copyright holder may have chosen to dedicate the work to the public. For example, the Episcopal Book of Common Prayer was published without copyright notice at a time when such publication resulted in forfeiture of copyright. *See* 17 U.S.C. § 405(a) (invalidating copyrights in works published without copyright notice, prior to the effective date of the Berne Convention Implementation Act, subject to certain exceptions); The Book of Common Prayer and Administration of the Sacraments and Other Rites and Ceremonies of the Church, Together with the Psalter or Psalms of David, According to the Use of the Episcopal Church (1979) (containing no copyright notice). Professor Paul Heald informs me that the Church deliberately chose to place the work in the public domain.

71 An example would be the Episcopal Hymnal 1982, which copyright is owned by Church Publishing Group, Inc., successor in interest to the Church Hymnal Corporation, an organization founded in 1918 by the Trustees of the Church Pension Fund. *See* Hymnal 1982 According to the Use of the Episcopal Church (1982) (listing Church Hymnal Corporation as copyright owner); *see also* http://www.churchpublishing.org/index.cfm?fuseaction=aboutus (providing a brief history of Church Publishing Inc.).

encountered a few years ago, when it argued that the Girl Scouts needed a license to publicly perform copyrighted songs around the campfire?[72]

A fourth possibility is that some congregations may already be authorized licensees of composers' public performance rights, under licenses from ASCAP, BMI, or SESAC. I do not know, however, whether this is a common practice, and of course even these licenses would not cover the public performance of other works, such as literary works or sound recordings.

It is nevertheless easy to imagine cases in which copyright owners might object to the uncompensated public performance of their works in the course of religious services. For example, suppose that members of the Church Without Christ (CWC)[73] sing the copyrighted works of Composer during the course of their religious services. Composer, a devout Christian, sues for infringement of his exclusive right of public performance;[74] the Church pleads in its defense § 110(3) and Composer counters that § 110(3) is unenforceable because it confers a special benefit upon religion in violation of the Establishment Clause. The absence of any case law thus far involving similar facts may suggest that even in these cases the stakes are typically too low to justify protracted litigation. Since everything that can happen is bound to happen sooner or later, it may be useful to give some preliminary thought as to what the correct result should be if and when such cases arise. A few observations follow.

The first is that, in a case based on the facts described above, transaction costs are not necessarily a problem. To be sure, the value of performing one song on one occasion may be less than the transaction cost of obtaining permission from the copyright owner. If CWC plans on repeated use of Composer's works, however, the value of the use should, at some point, exceed that cost, particularly if Composer licenses his work to ASCAP or BMI.[75] Thus, if there is a market failure, the source of the failure is not necessarily transaction costs.

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[72] *See* Elisabeth Bumiller, *Battle Hymns Around Campfires: ASCAP Asks Royalties from Girl Scouts, and Regrets It*, N.Y. TIMES, Dec. 17, 1996, at B1. In the 1970s, however, a publisher of Catholic hymnals did sue the Catholic Archdiocese of Chicago for allegedly violating the reproduction and distribution right with respect to copyrighted hymns. *See* F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 214 U.S.P.Q. (BNA) 409 (7th Cir. 1982).

[73] *See* FLANNERY O'CONNOR, WISE BLOOD 105 (Harcourt, Brace and Company 1962) (1951) (describing the "Church Without Christ," "where the blind don't see and the lame don't walk and what's dead stays that way"). O'Connor herself was a devout Catholic and her description of the Church Without Christ is satiric.

[74] *See* 17 U.S.C. §106(4) (2001).

[75] *See supra* note 72 and accompanying text.

A second observation is that, on the assumed facts, the reason that Composer does not wish to license his work to CWC is that he disapproves of CWC. His motive, in other words, is to inhibit the religious practice of a heretical group. Note that to state the facts in this manner is not to pass judgment on Composer. Presumably, Composer would be violating his own religious precepts if he permitted use of the work by CWC. Indeed, a rule requiring Composer to give real or personal property to such a group may well violate Composer's rights under the Religious Freedom Restoration Act (RFRA),[76] if not the Free Exercise Clause.[77] If there is a difference in the present context, it must be that, as noted above, copyrights are nonrivalrous property;[78] CWC's use of Composer's song does not deprive Composer or anyone else of its simultaneous use. CWC's use may cause Composer mental anguish, but if the analysis presented in the preceding Part is correct, this harm does not "count" for purposes of assessing the defendant's fair use right to use the work.[79] Composer's refusal to license therefore might be viewed as a type of market failure, given that the dissemination of information is a goal of copyright law, but we should perhaps not be too quick to describe the facts in this way; unlike WCG, Composer is not necessarily restricting access to the work to the entire world, rather just to one group. Still, if we view religious diversity as a type of good that copyright law should encourage, Composer's refusal to license the work to CWC is problematic.

Under the above analysis, CWC might have a valid fair use defense on these facts, but if so, the question arises why § 110(3) is necessary at all. Two plausible reasons suggest themselves. The first is that the cost of vindicating fair use rights can be high, so perhaps § 110(3) can be defended on the ground that relying upon fair use would, under some circumstances, be so impractical that religious dissenters would be chilled from exercising their fair use rights. A second reason for short-circuiting the fair use inquiry is that doing so also economizes on judicial resources. If, as sug-

[76] To the extent that RFRA still applies at all in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997), it requires the federal government to show that any application of federal law that substantially burdens religious practice serves a compelling state interest and is the least restrictive means available for serving that interest. *See* 42 U.S.C. § 2000bb-1; *see also* Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) (holding that RFRA applies to the federal government); In re Young, 141 F.3d 854, 859-60 (8th Cir. 1998) (same).

[77] As a general matter, the Free Exercise Clause does not compel the state to exempt religious believers from valid, neutral laws of general applicability. *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

[78] *See supra* note 59 and accompanying text.

[79] *See supra* notes 40-53 and accompanying text.

gested above, the only cases in which § 110(3) is likely to give offense are precisely those cases in which defendants are likely to have a plausible fair use defense, perhaps the more efficient rule is simply to permit the use without an intensive inquiry into the specific facts. Although there is nothing in the legislative history to indicate whether Congress had any of these considerations in mind when it enacted § 110(3), perhaps these factors would suffice in the event that the statute were ever challenged in court.

The question is nevertheless a close one, under *Texas Monthly, Inc. v. Bullock*,[80] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*,[81] and other case law on so-called "permissive" accommodations. In *Texas Monthly*, the Supreme Court struck down a Texas law that exempted religious publications from state sales tax.[82] There is no majority opinion in *Texas Monthly*, but a plurality of the Court suggested that a broader exemption might be constitutional–for example, one that, like state and federal charitable tax deductions, exempted all not-for-profit organizations, not just religious ones.[83] The fact that § 110(3) is just one of many exemptions set forth in the Copyright Act[84] therefore might suffice to save it, but the point is far from certain. Although a few of the other exemptions favor specific groups (such as the handicapped),[85] and one exemption from the public performance right is applicable to not-for-profit organizations generally,[86] none of these other exemptions is quite so broad as § 110(3). To fit within the general not-for-profit exemption, for example, one must show, among other things, that the performance at issue involves no "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers" and that either there is no admission charge, or the proceeds are used exclusively for educational, religious, or charitable purposes, and the copyright owner has not objected in advance.[87] To qualify for the religious services exemption, by contrast, all that the defendant must show is that the work was performed in the course of such services.[88] No other class of exemption beneficiaries is allowed such

[80] 489 U.S. 1 (1989).

[81] 483 U.S. 327 (1987).

[82] *See Texas Monthly*, 489 U.S. at 5.

[83] *See id.* at 15-16 (plurality opinion); *see also* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding New York's charitable exemption to state sales tax).

[84] *See* 17 U.S.C. §§ 107-22 (2001 & Supp. 2003) (exempting, or providing for the compulsory licensing of various otherwise infringing activities).

[85] *See id.* §§ 110(8), 110(9).

[86] *See id.* § 110(4).

[87] *See id.*

[88] *See id.* § 110(3).

an unqualified privilege.

Commentators also have isolated from the case law a variety of additional factors that may be relevant to the question of whether a law that accommodates a religious group, but which is not required under the Free Exercise Clause, violates the Establishment Clause. Among these are[89]:

1. Whether the exemption covers specifically religious conduct, or a close proxy thereof.[90]
2. Whether the religious beneficiary will suffer, in the absence of an exemption, some injury not shared by the general population.[91]
3. The cost of implementing the exemption, including the burden that it places on non-beneficiaries.[92]
4. Whether the exemption reduces the likelihood that courts will meddle in church affairs, or confers secular power upon religious organizations.[93]
5. Whether the exemption appears to convey a message of government endorsement of religion.[94]

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[89] For a slightly different reworking of the factors, *see* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 289-90 (1994) (citations omitted):

> (1) the extent to which the governmentally created exemption is extended to nonreligious persons or institutions, and not simply to religious ones; (2) whether the exemption applies to all religions or whether it is preferential; (3) the degree to which the exemption accounts for the needs of the accommodating party, such as an employer, as opposed to being absolute; (4) the magnitude of the resulting burden placed on nonbeneficiaries; (5) the substantiality of the free exercise burden removed due to the exemption; and (6) the extent to which permitting the accommodation might induce, rather than simply facilitate, religious belief or practice.

Id. Factor (1) is the one I discuss above in connection with *Texas Monthly*. *See supra* text accompanying notes 82-83. Factor (2) is satisfied in the present context. Factors (3) through (5) are incorporated into my factors (2) and (3) above. Factor (6) does not appear to be at issue in the present context, insofar as no one is likely to adopt a particular religious practice merely to take advantage of § 110(3).

[90] *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343-46 (Brennan, J., concurring); Zorach v. Clauson, 343 U.S. 306 (1952) (holding that releasing students from class time to attend outside religious instruction did not violate the Establishment Clause).

[91] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion); Board of Educ. v. Grumet, 512 U.S. 687, 724 (1994) (Kennedy, J., concurring); Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L. J. 433, 460 (1995); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 700 (1992); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 79 n.5 (2000).

[92] *See Texas Monthly*, 489 U.S. at 15, 18 n.8 (plurality opinion); *Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985); Berg, *supra* note 91, at 461; Idleman, *supra* note 89, at 289; McConnell, *supra* note 91, at 702.

[93] *See Grumet*, 512 U.S. at 696; *Amos*, 483 U.S. at 339; Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982); McConnell, *supra* note 91, at 711.

[94] *See Amos*, 483 U.S. at 348 (O'Connor, J., concurring); *Thornton*, 472 U.S. at 711 (O'Connor, J., concurring).

In the present context, although the exemption covers specifically religious conduct, the other factors are at best ambiguous. Perhaps religious users such as CWC will suffer a "unique" injury if they are chilled in exercising their fair use rights in order to avoid ruinous litigation costs, but anecdotal evidence suggests that nonreligious users are sometimes chilled as well.[95] To this observation, one might respond that the suppression of religious dissent is a uniquely bad thing, such that there is something worse about chilling religious as opposed to other users from exercising their fair use rights. But is this really so? To the extent that fair use is intended to protect constitutional free speech interests as well,[96] cases in which copyright owners chill secular users from exercising their fair use rights may be equally troubling. And, of course, the question remains whether religious users like CWC would be entitled to a valid fair use defense very often. Perhaps the performance of Composer's songs at CWC's services is not, at the end of the day, all that important to the practice of the CWC religion; other songs in the public domain, or songs written by persons who lack Composer's scruples, may be adequate substitutes. If adequate substitutes for a particular work exist, there is no suppression or inhibition of religious practice if the copyright owner of that work denies access. In such a case, however, the fair use defense is very weak, and the permissive accommodation embodied in § 110(3) does not really protect the church from *any* injury, unique or otherwise.

As for the other factors, the exemption places a (perhaps small) burden upon one class of nonbeneficiaries–namely, copyright owners–assuming that the lack of licensing income qualifies as a burden. As noted above, however, in the context of fair use, copyright exemptions do not deprive copyright owners of any real or personal property, and thus may be distinct in some respects from deprivations involving tangible property.[97] The exemption

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[95] *See, e.g.*, Jeet Heer, *Pow! Wham! Permission Denied!*, LINGUA FRANCA, Mar. 2001, at 21-22 (recounting a publisher's unwillingness to publish a scholarly article that included comic book panels allegedly supporting the author's thesis of a Batman-Robin gay relationship); Fred S. McChesney, *Just Let Me Read Some of That Rock 'n Roll Music*, 1 GREEN BAG 2D 149 (1998) (recounting a publisher's unwillingness to publish a scholarly book that included snippets of song lyrics that reinforced the author's thesis).

[96] *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556-60 (1985).

[97] Similar issues sometimes may arise in the context of determining whether the government's use of intellectual property constitutes a taking for which just compensation is due. The correct resolution of this question is, like much of takings law, a muddle. *See* Christina Bohannon & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of* Seminole Tribe?, 67 FORDHAM L. REV. 1435, 1458-77 (1999); Thomas F. Cotter, *Do Federal Uses of Intellectual*

does confer a veto power of sorts on religious organizations–they get to decide whether a copyright owner will be paid or not for the public performance of his work–and arguably conveys a message of government endorsement of religion, to the extent that secular organizations generally must satisfy a number of additional conditions in order to qualify for one of the Copyright Act's other exemptions.[98]

The best argument in favor of § 110(3) would thus appear to be that it reduces the risk of government entanglement in things religious by foreclosing inquiry, under the fair use exemption, into the nature of the belief at stake and the role played by the copyrighted work in advancing that belief. As suggested above, however, it is not altogether uncommon for courts to have to consider evidence of whether a set of beliefs constitutes a religion, whether a particular belief is important within the context of a religion, and whether the defendant's assertion of the need for an exemption is sincere.[99] More importantly, if most defendants' assertion of fair use would be weak, an exemption that avoids inquiry into fair use avoids entanglement only at the very steep cost of wrongly deciding most of the relevant cases. Absent some showing of unique injury, or strong reasons to believe that users would prevail in a large number of fair use cases, the constitutionality of § 110(3) is dubious.[100]

Conclusion

The extent to which the government may, must, or should accommodate religious practice by exempting certain religious uses

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Property Implicate the Fifth Amendment?, 50 FLA. L. REV. 529, 558-71 (1998). The takings problem may be distinguishable, however, in that a regulation that leaves the owner with even a small portion of the value of the work sometimes fails to qualify as a taking, *see* Cotter, *supra*, at 555-58, whereas an exemption that deprives the owner of substantial licensing revenue might, conceivably, be viewed as imposing a substantial burden for purposes of accommodation law.

[98] *See supra* text accompanying notes 85-88.

[99] *See supra* notes 54-57 and accompanying text.

[100] Perhaps one could argue that the government is obligated to exempt a person who publicly performs a copyrighted work in the course of religious services, under a hybrid Free Exercise/Free Speech claim. *See Smith*, 494 U.S. at 881-82. The precise nature of the "hybrid rights" exception remains murky, however. *See* Jonathan B. Hensley, Comment, *Approaches to Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119 (2000); Lipson, *supra* note 59, at 644-47. Moreover, if adequate substitutes are available for the work at issue, a constitutional claim for an exemption might be no stronger than a fair use claim. *See supra* nn.90–94 and accompanying text. Moreover, while the First Amendment guarantees an absolute freedom to believe, it does not guarantee an absolute freedom to act upon that belief. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). In the present context, the need for a broad exemption for the *act* of publicly performing copyrighted works remains unclear.

of copyrighted works from the scope of copyright liability is an issue that is likely to become more important in the coming years. New religious movements are proliferating at a rapid pace,[101] and their scriptural and theological works (unlike the works of many more well-known religious groups) are often of recent enough vintage to qualify for copyright protection. Presumably, more cases will arise in which splinter groups claim a right to use these works in their religious practice. I have argued above that the fair use doctrine ought to be more accommodating of these splinter groups in some cases, but that in most instances religious groups probably have no greater claim than other groups to an exemption from copyright liability. The broad exemption from the public performance right that is granted under Copyright Act § 110(3) is therefore problematic. Although the application of this exemption is typically not important enough to merit litigation, if and when the issue does make its way to court, there is a substantial likelihood that it will be found to go too far in permissively accommodating religious practice.

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[101] *See* Cotter, *supra* note 6, at 331 n.36.