A PROPOSAL TO EXPAND THE RELIGIOUS SERVICES EXEMPTION UNDER THE COPYRIGHT ACT

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The Copyright Act, like its 1909 predecessor, contains a number of exemptions that permit certain types of use without first obtaining permission from the copyright owner or proving fair use.[1] This article will focus on the exemption for religious services.[2] No court has yet interpreted this exemption, and scholars have given it a similar level of review. As such, an analysis of this exemption's constitutionality and adequacy to fulfill its intent in the twenty-first century is an issue that has largely gone unaddressed by both the judiciary and academic communities.

The principal argument is that the religious services exemption is constitutional and should be expanded to cover: (1) any work used in the course of services; and (2) the recording, broadcast, and transmission of the services. As set forth below, the present state of the Copyright Act and fair use doctrine serve as a regulation that burdens the exercise of religion. The expansion proposed in this article is a reasonable accommodation to religion that is needed to lift this regulation. Consequently, the expansion does not run afoul of the Establishment Clause of the First Amendment.[3] Alternatively, should the proposed expansion be deemed in violation of the Establishment Clause, the proposed expansion could be further expanded to cover other teaching and philosophical concerns.

Part I analyzes the existing religious services exemption under the Copyright Act to delineate the bounds of which uses fall under the exemption. Part II presents a proposal for expanding the exemption to accommodate the needs of modern religious organizations. Part III addresses the Establishment Clause and the constitutionality of the current religious services exemption. Additionally, Part III will demonstrate that the religious services exemption can be saved from an Establishment Clause challenge by expanding the exemption to cover other non-religious ventures, such as teaching in general. Part IV discusses traditional fair use under copyright law, particu-

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1. 17 U.S.C. § 110 (2006).
2. 17 U.S.C. § 110(3).
3. U.S. CONST. amend. I.

larly how the fair use analysis will apply to works used during the course of religious services.

I. THE CURRENT RELIGIOUS SERVICES EXEMPTION AND PROPOSAL FOR EXPANSION

Copyright vests in the owner the exclusive rights to reproduction, distribution, preparation of derivative works, performance, and display.[4] Anyone that violates these rights is subject to a claim for copyright infringement.[5] An infringement claim can be avoided if the use qualifies as a fair use,[6] the owner grants a license for the use,[7] or if the use falls under a statutory exemption.[8] This article addresses the religious services exemption, which exempts certain uses of certain works during religious services.[9]

The religious services exemption was not a new addition to the current Copyright Act of 1976; this exemption stems from Section 104 of the 1909 Act.[10] In its entirety, the exemption states that "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" is not copyright infringement.[11] Legislative history regarding the exemption is sparse, for the House Report explaining this exemption contains only three brief paragraphs.[12] The following subsections will deconstruct the existing religious services exemption to highlight both the types of uses covered by the exemption and the types of uses that fall outside the exemption.

A. Applicable Works Under the Religious Services Exemption

Of the five rights that comprise copyright, the religious services exemption only applies to certain performance and display rights.[13] Any type of reproduction, distribution or derivative work is presently outside the ex-

4. 17 U.S.C. § 106. Moral rights are also afforded to authors of certain works. *See* 17 U.S.C. § 106A.
5. 17 U.S.C. § 501.
6. 17 U.S.C. § 107.
7. 17 U.S.C. § 201(d).
8. 17 U.S.C. § 110. Other exemptions do exist, but this article is concerned with the religious services exemption provided in 17 U.S.C. § 110(3).
9. 17 U.S.C. § 110(3).
10. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:36 (West 2011).
11. 17 U.S.C. § 110(3).
12. H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99.
13. 17 U.S.C. § 110(3).

emption.[14] Rather than provide categorical protection, the exemption carves out limited exercise of a limited amount of rights.

The performance rights provided for in the exemption refer to certain nondramatic and dramatic works. However, neither the current 1976 Act nor the prior 1909 Act provide a definition of "dramatic."[15] From case law examining the nature of dramatic works, it can be stated that dramatic works tell a story through dialogue and action, rather than narrating or describing the action.[16] As an illustration, movies and plays are dramatic works, whereas novels and poetry are nondramatic works.[17] Additionally, the phrase "of a religious nature" modifies only dramatico-musical work, not nondramatic literary or musical works.[18] The House Report provides insight for the restriction on dramatico-musical works, stating the intent was "to exempt certain performances of sacred music that might be regarded as 'dramatic' in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like."[19]

The religious services exemption also applies to the display of all kinds of works.[20] This display right, unlike the performance right, has no concern with whether a work is dramatic or nondramatic.[21] Any work may be freely displayed during the religious service. For example, the exemption would extend to display of any sculpture, photograph, painting, map, or other type of work subject to the display right.

This prong of the religious services exemption is quite limited in scope, and many types of uses by religious organizations are not covered under the exemption. Secular movies or plays, which comprise a great deal of modern pop culture, are not covered at all under the exemption. As discussed in Section III, religious organizations can often communicate their messages more effectively using secular works rather than religious works. Even for covered works, the religious organization's use can quickly exceed the bounds of the exemption. For example, it is very common today for religious organizations to project the lyrics to songs on large screens during services. While the exemption covers the performance of the song, it does not extend to display of the lyrics on a screen. In fact, any derivate work of a covered work will exceed the permissible bounds of the exemption.

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14. *Id.*

15. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.06[A] (Matthew Bender 2011).

16. *Id.*

17. *Copyright Glossary*, WASHBURN UNIVERSITY, http://www.washburn.edu/copyright/glossary/ (last visited Mar. 21, 2012).

18. 17 U.S.C. § 110(3); 2 Nimmer & Nimmer, *supra* note 15, § 8.15[D][1].

19. H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99.

20. 17 U.S.C. § 110(3); H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99 ("[I]n addition, it extends to displays of works of all kinds.").

21. 17 U.S.C. § 110(3).

B. Temporal and Geographical Limitations of the Religious Services Exemption

The temporal and geographical limitations of the exemption significantly limit the exemption's applicability. The exemption only applies to performances or displays that occur "in the course of services at a place of worship or other religious assembly."[22] The temporal limitation of "in the course of services" precludes the exemption from other events that occur at the place of worship, such as social, educational, fund raising, or entertainment purposes.[23] Use of a qualifying work would be exempted during the formal services but not exempted for, say, a spaghetti supper fundraiser for youth mission trips. For many places of worship, a large part of their activities would fall under these other purposes rather than formal services.

It is important to note there is presently no case law defining the scope of "in the course of services." A narrow interpretation would restrict this definition to a handful of regularly scheduled services. A broad interpretation would extend this definition to other functions of the religious organization. For example, weddings often involve readings from religious texts and a brief discussion from a religious leader. Under a broad interpretation, the wedding would qualify as a service under the exemption, as would other meetings of particular groups, such as a men's Bible study or a youth group ministry. The narrow interpretation more closely fits Congressional intent, and this article proposes the following definition: any regularly scheduled meeting of a religious organization, that is open to all members of the religious organization, where the primary purpose of the meeting is to worship or to discuss the beliefs of the religious organization through words or music.

Whether this or a similar definition is ever adopted by the courts, what is important now is to realize that religious organizations often have numerous activities at the place of worship that are not religious services. The exemption will not cover any use of copyrighted works at these activities that fall outside the accepted definition of religious services. This yields the situation where use of the same work will be exempt during the religious service but not exempt during other activities, such as weddings or picnics.

Regarding the geographical limitation, the phrase "at a place of worship or other religious assembly" was written to include places such as auditoriums, outdoor theatres, and the like.[24] As such, the exemption is not limited to a particular type of building. Limiting the exemption to a particular

22. 17 U.S.C. § 110(3).

23. *Id*.; H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99.

24. 17 U.S.C. § 110(3); H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99.

type of building would have been ineffectively restraining. Some religions meet at members' private homes rather than having a fixed place of worship.[25] A disaster that damages the normal place of worship could cause the congregation to temporarily meet at a new location, such as a school cafeteria.[26] Both the private home and the cafeteria would qualify as a place of worship for purposes of the exemption.

C. Recording, Broadcasting, and Transmitting Copyrighted Works

Congress clearly intended for the exemption to not extend to broadcasts and other transmissions. The phrase "at a place of worship or other religious assembly" was written so that "the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship."[27] Additionally, the religious services exemption does not grant any type of protection to recordings of religious services, even those that are not later disseminated.[28] While use of a qualifying work is exempted during the service, the exemption will not extend to a recording, broadcast, or transmission of the service.

The analysis above shows that the religious services exemption affords some practical benefits to religious organizations. In the same vein, the exemption is limited and does not extend to uses that are essential for religious organizations in the digital age. The next section will present a proposal for expanding the religious services exemption in hopes of overcoming the shortfalls in the present exemption.

II. PROPOSAL TO EXPAND THE RELIGIOUS SERVICES EXEMPTION

There can be no dispute we live in a much different world than when the religious services exemption took effect in 1976. Advancements in technology and communication have altered the ways in which people communicate and expect others to communicate. Also prevalent is a changing society heavily influenced by pop culture—one where Rutgers University

25. Even religions that typically have a fixed place of worship are experiencing a growth in home-based churches. House Church Central is an organization dedicated to the growing house church movement for Christianity. *See* HOUSE CHURCH CENTRAL, http://www.hccentral.com/ (last visited Mar. 22, 2012).

26. This illustration is based upon my personal experience in the mid-1990s when a fire caused our church to meet for a time at a local school cafeteria. Another example would be the aftermath of a natural disaster, such as the recent tornado that ravaged Joplin, Missouri on May 22, 2011.

27. 17 U.S.C. § 110(3); H.R. REP. NO. 94-1476, at 84–85, *reprinted in* 1976 U.S.C.C.A.N. 5698–99; *see also Simpleville Music v. Mizell*, 451 F. Supp. 2d 1293, 1298 (M.D. Ala. 2006).

28. 17 U.S.C. § 110(3).

pays television reality star Snooki more money to appear on campus than it does for Nobel and Pulitzer Prize winning author Toni Morrison to deliver the commencement address.[29] These technological and societal forces have changed the ways in which religious organizations need to communicate their religious messages. The religious services exemption should be expanded to accommodate the needs of religious organizations in the digital age.

A. Expand the Exemption Substantively to Encompass all Uses of all Works

The exemption should be expanded to cover all uses, including derivative works, of all types of works used during religious services. The need for this expansion is caused by a shift in how the public seeks spirituality. Americans are turning to sources of popular culture, rather than religious organizations, for discussions about spirituality and supreme beings.[30] This development cannot be described as surprising. Given the present state of our culture, popular media communicates to Americans much more effectively than traditional worship services provided by religious organizations.[31] As a result, religious organizations have been forced to move away from a service consisting of preaching and a few songs to a "'multisensory approach comprised of many dimensions and expressions of worship.'"[32] Religious organizations have responded to the modern American culture by adapting their worship services—in case you had not noticed, worship services today are much different from the services conducted in the 1990s. Contemporary services now employ new elements including musical instruments, Internet broadcasts, video clips, and live performances.[33] Modern worship services now typically include videos, music, and the digital display of art.[34] Video editing and production is quite common as the cost has now

29. Gus Lubin, *State University Rutgers Paid Snooki $32,000 for a Speech About Partying and Tanning*, BUSINESS INSIDER (April 4, 2011), http://articles.businessinsider.com/2011-04-04/news/29965833_1_snooki-budget-gap-commencement-address.

30. Brian D. Wassom, *Unforced Rhythms of Grace: Freeing Houses of Worship from the Specter of Copyright Infringement Liability*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 61, 106–10 (2005).

31. *Id.* at 112–22.

32. *Id.* at 133. This movement also extends to communication outside the service. By way of example, consider how Creative Church Culture ("C3") markets its speakers for its annual conference. *See Speakers*, C3 CONFERENCE (2011), http://www.c3conference.com/2011/speakers.php (last visited Mar. 22, 2012). For every speaker, C3 only provides electronic communication information such as Twitter, Facebook, websites and blogs; there are no phone numbers or physical addresses for speakers.

33. Wassom, *supra* note 30, at 130–31.

34. *Id.* at 134.

been drastically reduced.[35] "'From beginning to end [in many cotemporary houses of worship], the whole service is a popular culture event, or spectacle, with secular music, TV and film clips, slice-of-life dramatic skits, and visual art.'"[36]

The most notable aspect of this digital shift in worship services is that religious organizations are no longer limited to use of sacred or religious works. In fact, the use of secular works can have a much greater impact for religious services because secular works often represent our environment more accurately than sacred works.[37] Moreover, the religious organization can use the congregation's existing connection with the secular work as a springboard for theological discord.[38] By way of example, religious organizations have incorporated in their services scenes from the movies APOLLO 13 and THE LORD OF THE RINGS: THE TWO TOWERS, as well as numerous others.[39] The organization's message can be especially powerful when a derivative work is made, such as projecting images of a movie while the congregation sings a song.[40]

For religious organizations to communicate effectively and promote their religious purposes in the digital age, they must make use of copyrighted works. This need extends to the use of both secular works and religious works. Expanding the religious services exemption to cover all uses of all works will accommodate the modern needs of religious organizations.

B. Recordings, Broadcasts, and Transmissions of Religious Services

The exemption should be expanded to include recordings, broadcasts, and other transmissions of religious services. When the exemption was created in 1976, our capabilities were limited to record, broadcast, or transmit events like religious services. Today the opposite is true as the Internet and a plethora of readily available electronic devices easily facilitate the instant recording, broadcasting, and transmitting of events like religious services. It is quite the understatement to say that we now live in a society steeped in technology where every form of expression is accessible instantly and electronically.[41] Along with cell phones, computers, and the Internet, "Google,

35. *Id.*
36. *Id.* at 136 (*citing* ROBB REDMAN, THE GREAT WORSHIP AWAKENING: SINGING A NEW SONG IN THE POSTMODERN CHURCH 163 (2002)).
37. Wassom, *supra* note 30, at 124–25.
38. *Id.* at 153.
39. *Id.* at 153–55.
40. *Id.* at 151–52.
41. *Id.* at 103–04.

Facebook, and Twitter, have become ubiquitous in today's culture."[42] Professor Werbach describes these technologies, along with YouTube and Skype, as "the emerging infrastructure of communication and community for a changing society."[43]

If any doubt persists as to the impact of these technologies, consider this example from California. Over a fifty-three hour period during July 15–17, 2011, the city of Los Angeles shut down a ten mile stretch of the 405 Freeway.[44] This closure was expected to affect 500,000 vehicles, and authorities dubbed the expected turmoil as "carmageddon."[45] To give proper notice of the closure, the Los Angeles Police Department asked Lady Gaga, Kim Kardashian, Ashton Kutcher, and Demi Moore to tweet about the closure.[46] These celebrities were selected because they have a combined Twitter following of more than 30 million people.[47] Officer Karen Rayner of the LAPD said, "'We're utilizing TV and radio, but not everyone uses those mediums so we're reaching out through social media contacts.'"[48]

Online social media and related technologies have progressed to a point that we have fostered a culture where people are never out of reach.[49] At present, what is the longest amount of time you can go without receiving a text, email, or social media message? How about using the Internet? Do you spend more time on your cell phone actually talking or using electronic communication tools? Because our modern culture consists of a wealth of digital media that encompass our daily lives, religious organizations must be able to employ these media when communicating.[50] In fact, people today "find it only natural to expect this type of communication from their houses of worship."[51] Not only do people expect communication through digital media, the religious organization's message is easily lost without use of digital media. We live in an era where we are bombarded with hundreds, if not thousands, of digital communications every day. Not only have we grown to expect ongoing, instant access to communications, we have come to rely upon this type of access in regards to information retention. Religious

42. Timothy J. Fallon, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can be Done to Fix it*, 38 HOFSTRA L. REV. 935, 937 (2010).

43. Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 538–39 (2010).

44. *LAPD Asks Lady Gaga, Kim Kardashian to Tweet About 405 Closure*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/06/30/lady-gaga-traffic-reporter_n_887850.html (last updated Aug. 30, 2011).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Wassom, *supra* note 30, at 149.

50. *Id.* at 105–06.

51. *Id.* at 134.

organizations can no longer rely on weekly meetings to effectively communicate; they must compete amid this sea of digital communication that offers instant access to information. Religious organizations have felt social pressure to communicate to their members through the popular media of the day. For some time, religious organizations have had an inherent need to broadcast services.[52] Along with television and radio, that inherent need of broadcast has extended to the Internet. Many religious organizations now broadcast their services on the Internet.[53] The FCC recently decided that religious organizations are not automatically exempt from providing closed-captioning in their broadcasts.[54]

Expanding the exemption to allow for recording, broadcast, and other transmission will allow religious organizations to effectively communicate in the digital era. It should be emphasized that religious organizations have broadcasted their services over radio and television for several decades and over the Internet for a decade or so. There are no cases where religious organizations have been sued for copyright infringement over these broadcasts. This is strong evidence that copyright owners either do not object to these broadcasts[55] or that social norms would not permit infringement actions for these broadcasts.

C. Social Norms Favor Expansion of the Religious Services Exemption

Social norms, which alter the practical scope of copyright,[56] favor expansion of the exemption. While no cases exist where a religious organiza-

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52. 2 W. COLE DURHAM AND ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 19:1 (2011); *see also* Loretta Fulton, *First Baptist Church Enters Digital Age*, ABILENE REPORTER NEWS (Feb. 1, 2009, 8:48 AM), http://www.reporternews.com/news/2009/feb/01/first-baptist-church-enters-the-digital-age/ (stating the local First Baptist Church has broadcast its services on local television since 1971).

53. Fulton, *supra* note 52. A company called StreamingChurch.tv provides services exclusively to religious organizations to broadcast their religious services on the Internet. *See* STREAMINGCHURCH.TV www.streamingchurch.tv (last visited Mar. 22, 2011).

54. Brendan Giusti, *FCC: Religious Broadcasts Now Need Closed-Captioning*, CHRISTIAN POST REPORTER (Nov. 1, 2011, 5:53 PM), http://www.christianpost.com/news/fcc-religious-broadcasts-now-need-closed-captioning-60002/.

55. Sony Corp. of Am. v. Universal Cities Studios, Inc., 464 U.S. 417, 443–47 (1984).

56. Michael Grynberg, *Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*, 79 FORDHAM L. REV. 435, 446–48 (2010); *see generally* Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009), Jacqueline D. Lipton, *Copyright's Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1 (2010); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004). In fact, enforcing copyrights through infringement actions may create a backlash that inadvertently strengthens social norms against copyrights. Ben Depoorter, Alain Van Hiel, & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1289 (2011).

tion was sued for copyright infringement for use that was restricted to the religious service, one example does exist where the National Football League (NFL) threatened to sue churches for copyright infringement.[57] This campaign ended with disastrous results for the NFL. It is no secret that religious organizations across the United States hold Super Bowl parties. These parties typically include food, drink, and projection of the game on a large screen or wall. The NFL threatened religious organizations with litigation if they held these Super Bowl parties without paying royalties at the cable rate.[58] Although the NFL was technically correct in its interpretation of the Copyright Act, the NFL's actions sparked an intense public outcry.[59] The public frustration was fueled in part by the NFL's selective enforcement policy that permitted Super Bowl parties at bars, restaurants, and other sports viewing establishments.[60] The NFL caved under this pressure from the public, including members of Congress, and the NFL now allows religious organizations to host Super Bowl parties without paying royalties.[61]

The classic case of social norms and copyright involved the American Society of Composers, Authors and Publishers (ASCAP). In 1995, ASCAP demanded royalties from the Girl Scouts of America for all performances, including when the girls sang campfire songs.[62] Anti-ASCAP advertisements appeared in newspapers, and television news programs showed girl scouts dancing a silent Macarena without any accompanying music for fear of a lawsuit.[63] The public backlash was so intense that ASCAP's public relations consultant described it as "p.r. hell."[64] ASCAP refunded all royalties paid and ceased any further enforcement attempts against Girl Scouts of America.[65]

Both the NFL and ASCAP were technically correct in their arguments under the black letter law of the Copyright Act, but social norms simply would not allow infringement claims against religious organizations and the

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57. Michael Foust, *NFL: Sports Bars In, Churches Out*, BAPTIST PRESS, (Feb. 1, 2007), http://www.bpnews.net/bpnews.asp?ID=24878.

58. *See* Steven D. Jamar, *Religious Use of Copyrighted Works After Smith, RFRA, and Eldred*, 32 CARDOZO L. REV. 1879, 1900 (2011); Tyler McCormick Love, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. INTELL. PROP. L. 369, 378-79 (2008); Foust, *supra* note 57.

59. Jamar, *supra* note 58, at 1900; Foust, *supra* note 57.

60. Love, *supra* n. 58, at 378; Foust, *supra* note 57.

61. Jamar, *supra* note 58, at 1900.

62. *Id*. at 1901; Elisabeth Bumiller, *Battle Hymns Around Campfires; Ascap Asks Royalties from Girl Scouts, and Regrets It*, N.Y. TIMES,(Dec. 17, 1996), *available at* http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html?pagewanted=all&src=pm.

63. Bumiller, *supra* note 62.

64. *Id*.

65. *Id.*

Girl Scouts.[66] Similar social norms exist for the expansion of the religious services exemption, which this article proposes. Religious organizations are using copyrighted works during religious services beyond those allowed in the exemption.[67] Additionally, religious organizations are broadcasting and otherwise transmitting their services, which include use of copyrighted works.[68] The public demands these types of uses by religious organizations, and any attempt to file copyright infringement lawsuits for these types of uses would be met with the same negative results experienced by the NFL and ASCAP. Ironically, Christian Copyright Licensing International (CCLI) and other Christian organizations have been most vocal in threatening infringement litigation against religious organizations, but they have not gone so far as to file copyright infringement lawsuits.[69]

The expansion of the religious services exemption proposed in this article is necessary to allow religious organizations to effectively communicate their religious messages in the digital age. This expansion would be embraced by social norms, which are unlikely to permit infringement actions against religious organizations for communications made during religious services. Now the analysis must turn to whether the religious services exemption can survive an Establishment Clause challenge.

III. THE RELIGIOUS SERVICES EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE SIMPLY BECAUSE IT BENEFITS RELIGIOUS ORGANIZATIONS

Professor Cotter has twice expressed concern that the religious services exemption may violate the Establishment Clause,[70] basing this conclusion primarily upon the Supreme Court's decisions in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[71] and *Texas Monthly, Inc. v. Bullock*.[72] A close examination of these cases gener-

66. *Id*.

67. Wassom, *supra* note 30, at 79–89.

68. *Id*. at 130–34.

69. *Id*., *supra* note 30, at 181–82. This is not a new development, for owners holding the copyright to music of a religious nature have a history of enforcing rights against religious organizations. *See* F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi., 754 F.2d 216 (7th Cir. 1985); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962). To date, I am not aware of any infringement cases filed against religious organizations for uses made during religious services.

70. Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 CARDOZO ARTS & ENT. L.J. 43, 60–65 (2004)[hereinafter *Accommodating*]; Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323, 388–91 (2003) [hereinafter *Gutenberg's Legacy*].

71. 483 U.S. 327 (1987).

72. 489 U.S. 1 (1989).

ates the opposite conclusion, and it is important to consider that Professor Cotter's work assumed the scenario of a religious organization making a general use of copyrighted works. This article considers religious organizations making use of copyrighted works that is restricted to religious services.

Any Establishment Clause analysis must begin with the three-factor test set forth in *Lemon v. Kertzman*.[73] Regarding the applicable policy when interpreting the Establishment Clause, the *Lemon* Court stated that "we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[74] From there, the Court set forth the classic *Lemon* test: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[75] This test established a framework for numerous laws to pass constitutional muster even though they accommodate religious purposes: "'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'"[76] Since *Lemon*, the most recent Supreme Court cases addressing the Establishment Clause have drawn a clear distinction between a liability exemption and an exemption from paying taxes.

A. Exemptions From Liability Are Less Likely to Violate the Establishment Clause Than Exemptions From Payment of Taxes

In *Amos*, the Court used a systematic application of the *Lemon* factors. This case involved a section of the Civil Rights Act that exempted religious organizations from Title VII's prohibition against employment discrimination based upon religious beliefs.[77] Addressing the first factor, the *Amos* Court stated this factor mainly prevents action with intent to promote a particular point of view on religious matters.[78] "[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[79] The Court stated that, without the exemption, religious organizations would be significantly burdened trying to predict which activities courts would

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73. 403 U.S. 602 (1971).
74. *Id*. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
75. *Lemon*, 403 U.S. at 612–13.
76. *Amos*, 483 U.S. at 334 (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987)).
77. *Id*. at 329.
78. *Id*. at 335.
79. *Id*.

deem religious.[80] They would have to make these predictions under penalty of substantial liability if they were proved wrong in court.[81] "Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[82]

Addressing the second *Lemon* factor, the Court stated that laws are not rendered unconstitutional solely for the fact that they allow religious organizations to better advance their purposes.[83] The Court observed that religious organizations were better able to advance their purposes after passage of many laws that were held constitutional.[84] "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[85] The key analysis is whether a clear advancement of religion exists that can be attributed to the government.[86] The Court directly stated that statutes are not *per se* invalid simply because they give special consideration to religious organizations.[87] "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."[88] Finally, regarding the third *Lemon* factor, the Court found "the statute effectuates a more complete separation of [church and state] and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case."[89] After considering the *Lemon* test in its methodical approach, the Court held the exemption for religious organizations was constitutional.[90]

The Court took a more categorical approach in *Texas Monthly*. There the Court reached the opposite conclusion regarding a state sales tax exemption for religious periodicals.[91] In a plurality opinion, the Court struck down the law as violative of the Establishment Clause.[92] Rather than methodically reviewing the *Lemon* test, the Court made a key distinction between a liability exemption (as was the case in *Amos*) and a tax exemption, stating that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'"[93] The

80. *Id.* at 336.
81. *Id.*
82. *Amos*, 483 U.S. at 336.
83. *Id.* at 337.
84. *Id.* at 336.
85. *Id.* at 337 (emphasis in original).
86. *Id.*
87. *Id.* at 338.
88. *Amos*, 483 U.S. at 338.
89. *Id.* at 339.
90. *Id.* at 340.
91. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989).
92. *Id.*
93. *Id.* at 14 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983)).

Court was concerned with these types of religious subsidies that either burden nonbeneficiaries or do not remove a state-imposed deterrent to the free exercise of religion.[94] Under these circumstances, the subsidy "'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."[95]

A major concern was the fact that the exemption itself created state entanglement with religion: "Not only does the exemption seem a blatant endorsement of religion, but it appears, on its face, to produce greater state entanglement with religion than the denial of an exemption."[96] The Court went on to state that an "'overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.'"[97]

The religious services exemption, as it currently exists and in expanded form as proposed in Section I, substantively aligns with the allowed exemption in *Amos*. The religious services exemption does not require taxpayers to subsidize religious organizations, as was the case in *Texas Monthly*. As will be discussed more thoroughly in Section III, there is no litigation history of infringement claims for uses made during religious services only. What few cases do exist have all involved uses that occurred outside of religious services. Copyright owners are not burdened by the exemption, for it exempts a use that has not been attacked by copyright owners, much less prohibited by courts. Also to be discussed more thoroughly in Section III, the exemption removes two evils the Court warned about in *Amos* and *Texas Monthly*. First, without the exemption, religious organizations would be significantly burdened trying to predict (under penalty of substantial liability) which uses would be fair use. This burden could be seen as a significant state-imposed burden to use by religious organizations. Second, by relying solely on the fair use test instead of an exemption, it is all but certain that courts will approve some uses by some religious organizations but disapprove similar uses by other religious organizations. This could be seen as the government favoring some religious organizations over other religious organizations.

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94. *Texas Monthly*, 489 U.S. at 15.

95. *Id.* (quoting *Amos*, 483 U.S. at 348).

96. *Id.* at 20.

97. *Id.* (citing United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

B. The Religious Services Exemption Would Not Violate the Establishment Clause if Expanded to Include Secular Uses

The *Texas Monthly* Court issued a profound holding when it said, "If the State chose to subsidize . . . all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption upheld in *Walz*."[98] This view was adopted by the Eighth Circuit in *McCarthy v. Ozark School District*.[99] The state law at issue in that case required children to receive various immunizations before attending school, but the law provided an exemption if the immunization conflicted with the beliefs of "'a recognized church or religious denomination.'"[100] This appeal was a consolidation of four district court cases; in each case, the district courts held the exemption violated the Establishment Clause.[101] While the appeals were pending, the state legislature changed the law by omitting the word "recognized" and expanding the exemption to include religious or philosophical beliefs.[102] By expanding the exemption to cover philosophical beliefs, the claims on appeal were rendered moot.[103]

If the religious services exemption is deemed to run afoul of the Establishment Clause, the exemption could be saved by further expanding it to cover other non-religious activities. Suppose the exemption was expanded to include all regularly scheduled meetings of all teaching organizations, both of religious and secular nature. Following the analyses in *Amos* and *McCarthy*, this simple expansion would alleviate any constitutional problems with the Establishment Clause. For this reason, it is highly unlikely copyright owners would ever raise an Establishment Clause challenge. Instead, an Establishment Clause challenge would most likely come from other organizations seeking to expand the religious services exemption to cover the activities of their respective organizations.

It is doubtful that this type of expansion will ever be necessary for the religious services exemption. As will be discussed in the next section, the fair use test produces greater state entanglement with religion than the religious services exemption. Consequently, the religious services exemption would likely survive a challenge under the Establishment Clause.

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98. *Id.* at 15–16.
99. 359 F.3d 1029 (8th Cir. 2004).
100. *Id.* at n.2; ARK. CODE ANN. § 6-18-702(a), (d)(2) (West 2011).
101. *McCarthy*, 359 F.3d at 1031–32.
102. *Id.* at 1034; ARK. CODE ANN. § 6-18-702(d)(4)(A).
103. *McCarthy*, 359 F.3d at 1036.

IV. THE FAIR USE TEST PRODUCES GREATER STATE ENTANGLEMENT WITH RELIGION THAN THE RELIGIOUS SERVICES EXEMPTION

Fair use of a copyright is not copyright infringement,[104] although delineating the bounds of fair use is more art than science. Fair use is meant to encompass "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[105] To determine if a use is a fair use, the court's review should include analysis of four factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[106] While courts typically limit their review to these four factors, it is not an exhaustive list, and courts should consider any factors that would be helpful in the analysis.[107] Not surprisingly, the fair use analysis leads to wildly varying results.[108] Even comparable cases yield opposite conclusions—using forty-one seconds of a Muhammad Ali boxing match in a movie about Ali is fair use,[109] while using seventy-five seconds of a seventy-two minute Charlie Chaplin film in a television news program is not fair use.[110]

From a pedagogical standpoint, the fair use test is a flexible test that can accommodate a variety of uses. From a practical standpoint, the fair use test imposes significant costs and yields unpredictable results.[111] As seems to be a common thread of modern litigation, asserting fair use rights is expensive.[112] In fact, the cost of asserting fair use rights is so high that religious

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104. 17 U.S.C. § 107.

105. *Id.*

106. *Id.* Fair use is now codified in the Copyright Act, but it developed as a device of common law in the nineteenth century. *See* Jamar, *supra* note 58, at 1894–95; Folsom v. Marsh, 9 F. Cas. 342, 344–45, 348 (C.C.D. Mass. 1841).

107. 17 U.S.C. § 107; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978-2005, 156 U. PA. L. REV. 549, 563–64 (2008); Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1786–87 (2010).

108. *E.g.*, Beebe, *supra* note 107, at 577–78 (providing tabular representations of the results of fair use cases at various stages of litigation).

109. Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc., 935 F. Supp. 490 (S.D.N.Y. 1996).

110. Roy Export Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095 (2d Cir. 1982).

111. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496 (2007) ("[S]cholars generally agree that it is now virtually impossible to predict the outcome of fair use cases.").

112. Cotter, *Accommodating*, *supra* note 70, at 61; Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y U.S. 513, 515 (1999); Gideon

organizations will often be chilled from exercising their fair use rights.[113] Along with the expense of asserting these rights, the vague fair use analysis causes uncertainty when attempting to predict if a use is fair or not.[114] The high costs and unpredictability of fair use rights lead to overdeterrence, as users err on the side of caution and avoid asserting optimal fair use rights so as to protect themselves from substantial liability.[115]

Aside from a handful of cases involving materials of the Church of Scientology,[116] only five cases have substantively addressed fair use by religious organizations.[117] Four of these cases involved a religious organization disseminating the religious material of another religious organization. For ease of reference, I will refer to these cases as the same intrinsic purpose (SIP) cases. The remaining case, *Hustler Magazine, Inc. v. Moral Majority, Inc*., involved the use of a secular work by a religious organization. None of these cases evaluated the fair use of any type of work where the use was restricted to a formal religious service.[118] The fair use defense was unsuccessful in the SIP cases[119] but was successful in *Hustler Magazine*.[120] The manner in which the courts reached their conclusions will be particularly important for evaluating the constitutionality of the religious services exemption.

Before analyzing these cases, it is important to observe that no cases exist where a religious organization was sued for use of a copyrighted work that was restricted to religious services. It is widely known that religious

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Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 100–01 (2010); Xiyin Tang, *That Old Thing, Copyright…: Reconciling the Postmodern Paradox in the New Digital Age*, 39 AIPLA Q.J. 71, 86 (2011).

113. Cotter, *Accommodating*, *supra* note 70, at 61.

114. Parchomovsky and Weiser, *supra* note 112, at 100; Jamar, *supra* note 58, at 1896–97.

115. Parchomovsky and Weiser, *supra* note 112, at 100–01; Jamar, *supra* note 58, at 1896–97; Snow, *supra* note 107, at 1784–85.

116. New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152 (2d Cir. 1990).

117. Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986); Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo., 685 F. Supp. 2d 217 (D. Mass. 2010); Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d 1680 (S.D.N.Y. 2000); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629 (S.D. Cal. 1993). Four other cases have addressed the issue briefly, finding a lack of fair use without meaningful discussion. *See* Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94 (2d Cir. 2002); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); Merkos L'Inyonei Chinuch, Inc. v. John Doe Nos. 1-25, 172 F.Supp.2d 383 (E.D.N.Y. 2001); F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi., 754 F.2d 216 (7th Cir. 1985).

118. *See supra* note 117 and accompanying text.

119. *Id.* It should be noted that the *Penguin Books* decision was later reversed when, after trial, the district court concluded that the copyright was void. *Penguin Books*, No. 96 Civ. 4126 (RWS), 2004 WL 906301 (S.D.N.Y. 2004).

120. *See Hustler Magazine, Inc.*, 796 F.2d at 1148.

organizations use copyrighted works in their services, and it is safe to presume that license fees are not paid for all such uses. This lack of prior litigation is evidence that copyright owners do not object to use made during formal religious services only.[121] In the following sections, I will attempt to predict how courts would evaluate the fair use analysis for use restricted to the formal religious service, considering use of both religious works and secular works. This approach has been missing from academic endeavors.[122]

A. Purpose and Character of Use

The main goal of this factor is to analyze whether the use is transformative from the original work.[123] The use is transformative when it furthers a different purpose or character or alters the original work with new expression.[124] While the Court said "transformative use is not absolutely necessary for a finding of fair use,"[125] recent copyright case law indicates that the transformative use analysis has become the touchstone inquiry regarding the first fair use factor.[126] The commercial or nonprofit purpose of the use is not dispositive.[127] "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[128]

Each of the SIP cases decided this factor against fair use. In all four cases, the defendant's use served the same intrinsic purpose as the original work.[129] Only one defendant made a direct profit from the use.[130] In both *Society of the Holy Transfiguration* and *Penguin Books*, the courts were not swayed that the defendants gave away the works for free and instead fo-

121. Sony Corp. of Am. v. Universal Cities Studios, Inc., 464 U.S. 417, 443–47 (1984).

122. *See* Cotter, *Accommodating*, *supra* note 70, at 52–58; Cotter, *Gutenberg's Legacy, supra* note 70, at 388–91. While Professor Cotter has opined that most religious uses would not qualify as fair use, his analysis was limited to cases where two religious organizations competed over one religious work.

123. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994).

124. *Id.*

125. *Id.* at 579.

126. Parchomovsky & Weiser, *supra* note 112, at 100.

127. *Campbell*, 510 U.S. at 584.

128. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985).

129. Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo., 685 F. Supp. 2d 217, 226 (D. Mass. 2010); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993); Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d 1680, 1695 (S.D.N.Y. 2000).

130. Bridge Publ'ns Inc. v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993).

cused on the fact that the uses were not transformative in the least.[131] The *Worldwide Church* court made two important observations. First, it stated that religion, like academia, is "'not dollar dominated.'"[132] Second, the court observed that providing the work to church members at no cost helped the church attract new members who would donate money, which would help the church grow.[133] The court held this was a profit that gave the church an advantage or benefit from the use.[134]

In *Hustler Magazine*, Jerry Falwell distributed copies of the work as part of a direct financial appeal that raised nearly one million dollars.[135] The court noted that the financial profit made the use presumptively unfair.[136] However, Falwell used the article to make a statement about pornography rather than merely selling the copies.[137] The court stated that the commenter may use as much of the work as is reasonably necessary to make an understandable comment.[138] Since the Hustler work made a personal attack against Falwell, the public interest in allowing Falwell to rebut the attacks served to rebut the presumption of unfairness.[139]

First, there is a commercial/non-commercial aspect of this factor. While many religious organizations are nonprofits, all religious organizations seek to promote and advance their religious beliefs. Consequently, religious organizations will engage in activities to grow their membership, including the direct solicitation of monetary contributions. If courts follow the *Hustler Magazine* analysis, the use will always be presumptively unfair at the outset of the fair use analysis. If courts follow the *Worldwide Church* analysis, this factor will always turn against fair use. Both approaches should be rejected because they take the most fundamental tenet of religion—promotion of the organization's religious beliefs—and use it as a catalyst for impeding fair use (although Falwell was able to overcome the presumptively unfair use in *Hustler Magazine*).

The transformative use aspect of this factor plays out differently whether the religious organization is using a religious work or a secular work. For secular works, the religious organization's use should always be considered transformative in that the religious organization's use will serve a different intrinsic purpose than that of the original. Religious leaders will

131. *Soc'y of the Holy Transfiguration*, 685 F. Supp. 2d at 226–27; *Penguin Books*, 55 U.S.P.Q.2d at 1695.
132. *Worldwide Church*, 227 F.3d at 1118.
133. *Id.*
134. *Id.*
135. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir. 1986).
136. *Id.*
137. *Id.* at 1153.
138. *Id.*
139. *Id.*

have to add commentary and criticism to communicate its religious message, for an effective worship service cannot consist entirely of artistic expression.[140] The transformative use analysis will not be a slam dunk for religious organizations, because they will most often use the actual work without any modifications. For religious works, the SIP cases establish precedent against fair use when a religious organization makes a general use of religious works. These cases have not addressed the situation where the purpose and character of the use was limited to a particular religious service. When the use is restricted to a particular religious service, the purpose and character of the use is quite different from a general use of the same work. While the latter use permits a general advancement (and possibly profit) of the religious organization, the former is a restricted use for the purpose of educating the religious organization's members during a limited service. It is likely that courts would view use of a work that is restricted to a religious service as fair use, which is again indicated by the lack of any cases where a religious organization was sued for use that was restricted to the religious service.

Courts should be wary of setting one standard for secular works and a different standard for religious works, for the distinction is not always clear. Consider for a moment Carrie Underwood's hit single *Jesus Take the Wheel*. Underwood is known as a country artist rather than a Christian artist, but the song is about letting Jesus take control of your life, which is the very basis of the Christian faith. The song rose to number one on the country charts and number four on the Christian charts. It won awards from both the Country Music Association and the Gospel Music Association. Should this song be considered a secular work or a religious work? The "right" answer to this question is irrelevant, for if courts interpret this factor in a way so that the distinction between a secular work and a religious work is important, then entanglement with religion is created.

B. Nature of the Copyrighted Work

The *sine qua non* of copyright is originality.[141] Consequently, fictional works that incorporate more creativity and originality are afforded greater protection than more fact-based works.[142] All four SIP cases concluded that, while the religious works may be deemed factual by the religion's members, these works embody creativity and imagination so that this factor weighs

140. Wassom, *supra* note 30, at 156.

141. Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

142. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 143–44 (2d Cir. 1998).

against fair use.[143] Although each case danced around the issue, none of these courts directly stated that the religious works at issue were fictional.[144] *Hustler Magazine* reached the same conclusion, finding that a sexually deviant article is creative and will restrict the scope of fair use.[145]

This factor shows the most direct entanglement with religion of the four fair use factors. It requires courts to comment on the factual accuracy, or truthfulness, of religious works. While courts have delicately broached the subject, they have essentially declared religious works to be fictional works. By doing so, the analyses discussed above declared the religious texts involved to be substantively false. Clearly, practitioners of these religions strongly disagree with these declarations by the courts. Because courts have taken this position, this factor will always go against fair use, unless the religious organization is using a secular, fact-based work.

C. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The amount of copying allowed for fair use purposes depends on the purpose and character of the use.[146] If a substantial portion of the work is copied verbatim, it is evidence of the work's value to both the owner and the copying party.[147] Once again, this factor weighed against fair use in all the SIP cases.[148] In three of these cases, the defendants copied all or a substantial portion of the works.[149] The outlier was *Society of the Holy Transfiguration*, where the defendant copied only one of seventy-seven homilies, which comprised about three pages of the 383 pages of the original work.[150] The court acknowledged that the defendant's work did not span a large portion of the plaintiff's work, but it did copy the one homily in its entirety.[151] In a

143. Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo., 685 F. Supp. 2d 217, 227 (D. Mass. 2010); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629, 636 (S.D. Cal. 1993); Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d 1680, 1695 (S.D.N.Y. 2000).

144. *Worldwide Church*, 227 F.3d at 1118; *Bridge Publ'ns*, 827 F. Supp. at 636; *Penguin Books*, 55 U.S.P.Q.2d at 1695.

145. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1154 (9th Cir. 1986).

146. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-87 (1994); *e.g.*, Sony Corp. of Am. v. Universal Cities Studios, Inc., 464 U.S. 417, 449-50 (1984) (permitting copying of entire works).

147. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 565 (1985).

148. *Soc'y of the Holy Transfiguration*, 685 F. Supp. 2d at 227; *Worldwide Church*, 227 F.3d at 1118; *Bridge Publ'ns*, 827 F. Supp. at 636; *Penguin Books*, 55 U.S.P.Q.2d at 1695.

149. *Worldwide Church*, 227 F.3d at 1118; *Bridge Publ'ns*, 827 F. Supp. at 636; *Penguin Books*, 55 U.S.P.Q.2d at 1695.

150. *Soc'y of the Holy Transfiguration*, 685 F. Supp. 2d at 227.

151. *Id.*

related case under the 1909 Act, the Eighth Circuit held that copying all or most of a song would not be fair use.[152]

The *Hustler Magazine* court had a more interesting issue on this factor, for the court had to first decide if Hustler's article was an entire work or a component of the magazine issue.[153] To do so, the court considered the relationship of the article to the magazine as a whole.[154] The court concluded that the article represented the essence of Hustler Magazine, that the article could stand alone rather than being an interwoven component of the magazine, and that the article was not on public display like a magazine cover.[155] The court concluded the article itself was an entire work, copied in its entirety by Falwell.[156] The amount of copying militated against fair use.[157]

This factor should carry little, if any, weight when dealing with uses restricted to religious services. Religious services have two significant constraints that a general use will not have—time and message. The religious service has a limited time; an hour should serve as a sufficient proxy for most religions. The service is also limited to a particular message being delivered in that day's service. These twin constraints will naturally constrict the amount of time a religious organization can devote to using a copyrighted work. If this factor is afforded any significant weight, this factor will just permit religious organizations to use longer works over shorter works. Thus, religious organizations would be able to use works like movies or plays, but not songs or homilies. Consequently, this factor should be neutral or carry little weight when evaluating a use restricted to a religious service.

This factor should not vary depending on whether the work used is secular or religious, for this factor is concerned with the amount of the work used rather than the nature of the work. However, the cases above demonstrate that religious organizations will more likely prove fair use by copying all of a secular work rather than a small amount of a religious work. As a result, the courts have effectively held that there is more freedom to copy large amounts of secular works rather than religious works. These outcomes are incorrect because we have a substantial public interest in allowing religious leaders to make effective commentary on our world, particularly during religious services. Religious leaders should be afforded wide latitude to copy as much of works as needed to make effective commentary during religious services, no matter the secular or religious origin of the work. The fact that any distinction between secular or religious works has arisen re-

152. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

153. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1154-55 (9th Cir. 1986).

154. *Id.*

155. *Id.* at 1155.

156. *Id.*

157. *Id.*

garding the amount of the work that can be copied demonstrates state entanglement with religion through the fair use test.

D. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The final factor is the least understood and most misapplied.[158] Under this factor, fair use cannot materially impair the marketability of the work.[159] Courts must consider the extent of market harm caused by the defendant and also "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[160] The analysis must examine harm to the original work and to the market for derivative works.[161] Even noncommercial copying may negatively affect the copyright owner's ability to reap the full benefits of the copyright.[162]

In all the SIP cases, this factor also weighed against fair use.[163] Two of the cases gave it a cursory conclusion.[164] In *Worldwide*, the court said the religious text at issue was used as a marketing device by the plaintiff,[165] which was the crucial point for the court since the defendant appropriated the text for the same purpose as the plaintiff.[166] In *Society of the Holy Transfiguration*, the defendant pointed out that the plaintiff had proven no lost sales or profits from the copied work.[167] The court focused on the plaintiff's expenditure of time and resources to enforce its copyright as well as *Campbell*'s emphasis on deterring injurious conduct by others.[168]

The *Hustler Magazine* court handled this factor in a couple of steps. First, the court noted that Falwell's dissemination occurred after the magazine was off newsstands.[169] Any effect on sales of back issues would be *de*

158. Patry, *supra* note 10, § 10:145.

159. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566-67 (1985).

160. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (quoting 3 Nimmer & Nimmer, *supra* note 15, § 13.05[A] [4]).

161. *Campbell*, 510 U.S. at 591.

162. Sony Corp. of Am. v. Universal Cities Studios, Inc., 464 U.S. 417, 450 (1984).

163. Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo., 685 F. Supp. 2d 217, 228 (D. Mass. 2010); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1119-20 (9th Cir. 2000); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629, 636 (S.D. Cal. 1993); Penguin Books U.S.A. Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d 1680, 1695-96 (S.D.N.Y. 2000).

164. *Bridge Publ'ns*, 827 F. Supp. at 636; *Penguin Books*, 55 U.S.P.Q.2d at 1695–96.

165. *Worldwide Church*, 227 F.3d at 1119.

166. *Id.* at 1120.

167. *Soc'y of the Holy Transfiguration*, 685 F. Supp. 2d at 228.

168. *Id.* at 227.

169. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1156 (9th Cir. 1986).

minimis.[170] This type of analysis is likely obsolete today but was a legitimate consideration in the pre-Internet world. Second, Falwell did not actually sell copies of the article to his supporters, and his supporters would not be the type of consumer to purchase Hustler.[171] Consequently, Falwell's use did not diminish the plaintiff's sales, interfere with the original's marketability, or serve as a substitute for the original.[172] This factor weighed in favor of fair use and overcame the presumption of unfair exploitation from Falwell's commercial use.[173]

This factor could swing depending on the distinction of the work being used as secular or religious. For secular works, this factor should always weigh in favor of fair use. Use of a secular work, combined with a religious message, cannot operate as a substitute for the original work. It would certainly not displace sales or detract licensing revenues from the owner. For religious works, this factor will be a closer call but should still generally favor fair use. At first blush, it would seem that the religious services use could displace sales or cause loss of licensing revenues. However, the religious service use would not displace potential sales to congregation members. The use is limited to the service itself and can only be enjoyed by congregation members when experiencing the service. It is doubtful members would experience the service over and over, complete with all its attendant messages and rituals, just to experience a particular copyrighted work. Additionally, unless a copyright owner had a history of receiving licensing payments from other religious organizations for religious services use, the copyright owner would be hard pressed to show a loss of licensing revenues from a religious services use. Finally, as discussed above, no case has ever been filed against religious organizations for unlicensed use of copyrighted works during religious services.

E. The Fair Use Analysis Produces a Greater State Entanglement with Religion Than the Religious Services Exemption

After reviewing the fair use factors and how they have been applied in cases involving religious organizations, it is clear that analysis of the individual fair use factors causes unnecessary entanglement with religion. Each of the factors, some more than others, show entanglement with religion for courts to perform their analyses. Courts simply cannot perform the fair use analysis without making subjective evaluations of religion that go to the very heart of our right to religious practice. Professor Cotter was previously

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

skeptical of this conclusion, but he assumed that most uses falling under the exemption would fail the fair use test.[174] It should be noted that Professor Cotter analyzed cases where religious organizations made use that was not restricted to religious services.[175] The lack of any record of attempted enforcement by copyright owners, coupled with the analysis in this section, demonstrates that use restricted to religious services is presumptively fair use.

Moreover, the end result of various fair use analyses will lead to disparate results, which fosters unnecessary entanglement with religion. The likelihood of disparate results is already evident from the small body of available case law. It is fair use for Jerry Falwell's religious organization to make seven hundred thousand copies of a copyrighted work and directly use these copies to raise nearly one million dollars,[176] while it is infringement for another religious organization to distribute free copies of a fundamental religious text to its members.[177] A secular author writing a biography may quote large portions of a religious work for profit,[178] but a religious author cannot reproduce 0.8% of a work for free on the Internet.[179] It is infringement to publish a small amount of an unpublished secular work,[180] but it is fair use for to publish a large amount of unpublished religious works.[181] Even if all these results are generally accepted as correct, they could be viewed as the courts favoring certain religious groups over other religious groups, just as the *Texas Monthly* court warned.[182] This is the type of entanglement with religion that must be avoided.

Additionally, the United States is dominated by small religious organizations that cannot afford to search and purchase multiple licenses or to litigate fair use claims.[183] Because the expense of asserting fair use rights is often enormous, most religious organizations are placed at a significant disadvantage to assert fair use rights. Larger religious organizations will be better equipped to assert the same fair use rights, which would show favoritism to large religious organizations over small religious organizations.

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174. Cotter, *Accommodating*, *supra* note 70, at 65.

175. *Id.*

176. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1148 (9th Cir. 1986).

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

178. New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 152 (2d Cir. 1990).

179. Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo., 685 F. Supp. 2d 217, 217 (D. Mass. 2010)

180. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 539 (1985).

181. *See* Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1527 (D. Colo. 1995).

182. *Texas Monthly*, 489 U.S. at 20 (citing United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

183. Wassom, *supra* note 30, at 180.

After careful consideration how the fair use test would apply to use of copyrighted works during religious services, it is certain that the fair use test would produce greater state entanglement with religion than the religious services exemption. The fair use test also imposes the significant risk that the government can be seen as favoring some religious organizations over others. The religious services exemption, either as it currently stands or in its expanded state as suggested in this article, would survive an Establishment Clause challenge. Even if a concern remained regarding the Establishment Clause, that concern could be alleviated by further expanding the religious services exemption to encompass other forms of secular teaching.

V. CONCLUSION

Since its inception, the United States has protected religious practice and speech. While the government avoids entanglement with religion, it also allots accommodations for religious organizations when needed. The religious services exemption under the Copyright Act is one such accommodation. However, our society is now heavily influenced by pop culture and governed by a system of instant access to communication. These forces have changed the way in which religious organizations need to effectively communicate their religious messages. The current religious services exemption is inadequate to meet these needs. The expansion of the religious services exemption proposed in this article will satisfy these needs and pass constitutional muster under the Establishment Clause. More importantly, the expansion proposed here is supported by social norms and merely codifies the actions of copyright owners and religious organizations that have been in effect for decades. It is best to expand the exemption now, lest religious services become the next battleground of copyright infringement.