BETWEEN HEAVEN AND EARTH: THE INTERRELATIONSHIP BETWEEN INTELLECTUAL PROPERTY RIGHTS AND THE RELIGION CLAUSES OF THE FIRST AMENDMENT

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Intellectual property rights are inherently at odds with the U.S. Constitution's religion clauses. Congress and state legislatures both recognize that an artist or a writer has a property right in the work he creates. In recognizing this right, legislatures grant a temporary monopoly to the holder of the property. Because that work may serve as a religious touchstone for another individual, the grant of property protection may interfere with another person's right to worship. The property protection is also a government action that establishes the owner's religion. This Article will examine the clash between intellectual property rights and the Free Exercise Clause and the Establishment Clause of the First Amendment.

The Constitution grants to Congress the exclusive power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] This is known as the Copyright Clause. The Bill of Rights, including the First Amendment, was subsequently enacted.[2] An absolutist reading of the Constitution would suggest that the Copyright Clause was invalidated because the First Amendment allows unauthorized use of information, including copyrighted texts. Such a position has no merit. In fact, Congress did not intend for the First Amendment to supersede the Copyright Clause; one year after enacting the Bill of Rights, Congress passed a copyright law.[3] Similarly, a subsequent statute created trademarks.[4] It would therefore appear that the legislative intent was not for the

1. U.S. CONST. art. I, § 8, cl. 8.
2. U.S. CONST. amend. I.
3. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).
4. *See* Lanham Trade-Mark Act (codified as amended at 15 U.S.C. §§ 1051-1127 (1994)).

First Amendment to supersede the Copyright Clause, but rather to constrain it.

Most intellectual property rights do not inherently have First Amendment implications. Nevertheless, there are certain times that the grant of a copyright or a trademark may ipso facto infringe upon the religion clauses of the First Amendment. This Article will focus on the application of copyright and trade name protection to religious organizations. This Article will also address Constitutional constraints on copyrights and trade names. Specifically, this Article will examine to what extent the religion clauses of the First Amendment prohibit the grant of these intellectual property rights to religious organizations.

First, this Article will provide an overview of the Supreme Court's jurisprudence in the area of the religion clauses. This will include an analysis of the Free Exercise Clause, the Establishment Clause, and the Court's doctrine relating to noninvolvement in intrachurch disputes. Second, this Article will address the application of copyright law to religious texts. In doing so, it will specifically focus on the right of one religious organization to enjoin another religious organization from using its copyrighted material. This Article will then examine whether the application of copyright law to religious organizations violates the religion clauses. Specifically, it will determine the merits of a First Amendment privilege and whether free exercise constitutes a valid defense under the fair use doctrine. This Article will also examine whether the Establishment Clause prohibits a religious organization from copyrighting sacred texts.

Next, this Article will examine how courts examine the property rights that religious organizations have in their names. Specifically, it will look at how a court balances the fact that most religious organizations' names consist of generic words with the confusion stemming from similarly-named organizations. It will also discuss to what extent the recognition of a church's trade name violates the Establishment Clause and the Free Exercise Clause. Finally, this Article will examine how courts refuse to involve themselves in doctrinal disputes.

I. AN OVERVIEW OF THE JURISPRUDENCE OF THE FIRST AMENDMENT'S RELIGION CLAUSES

The First Amendment states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] The Supreme Court has transformed the Religion Clause into three separate strands of constitutional jurisprudence. First, the Court has recognized that the Establishment Clause forbids the

5. U.S. CONST. amend. I.

state from supporting a religion. The Free Exercise Clause limits the ability of the state to enact a law that would interfere with an individual's ability to practice his religion. Finally, as a result of the First Amendment, the Supreme Court has developed a rule of judicial restraint regarding intra-church disputes.[6] The rule states that courts and legislatures should apply neutral principles of law to resolve these controversies.[7] In recent years, the Supreme Court has reshaped both the Free Exercise Clause and the Establishment Clause.[8] As a result of these new, narrower interpretations, the Court has limited the application of these constitutional rules.

A. The Establishment Clause

Recent Supreme Court decisions have undermined the potency of the Establishment Clause. In the 1971 decision of *Lemon v. Kurtzman*,[9] the Supreme Court enunciated a three-pronged test to determine if a state's actions tended to promote religion.[10] This test directed a court to examine three factors. The three-pronged test states: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[11] The so-called *Lemon* test, however, has fallen out of favor with the Court. By the 1980s, the Court began applying other tests to determine the constitutionality of laws under the Establishment Clause.[12] Although several justices maintain that the *Lemon* test remains alive and well,[13] others have pointed out that it has largely been ignored.[14]

One case that has had a significant effect on the jurisprudence of the Establishment Clause is *Rosenberger v. Rector & Visitors of Uni-*

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6. *See, e.g.*, Watson v. Jones, 80 U.S. 679 (1871).

7. *See, e.g.*, Bouldin v. Alexander, 82 U.S. 131 (1872).

8. *See, e.g.*, Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

9. 403 U.S. 602 (1971).

10. *Lemon*, 403 U.S. at 612.

11. *Id.* at 612-13 (citations omitted).

12. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

13. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993) ("*Lemon*, however frightening it might be to some, has not been overruled. This case . . . presents no occasion to do so.").

14. *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (suggesting that the Court abandon the *Lemon* test); *Lamb's Chapel*, 508 U.S. at 399 (Scalia, J., dissenting) ("The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will."); Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

versity of Virginia.[15] In *Rosenberger*, the petitioner had established a magazine of "philosophical and religious expression to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints."[16] Subsequently, the student government refused to pay the $5,862 from the student activities fund for reprinting the magazine.[17] The student government based its decision on the university's rules for the funding of student groups.[18] These guidelines delineated the criteria for the reimbursement of funds for each student organization. The rules based a group's funding on "the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities," but they also precluded the student government from funding certain religious activities.[19]

The petitioner appealed the student government's decision, first to the university, and then subsequently in a civil rights suit that he filed in federal court. After having lost in district court, the U.S. Court of Appeals for the Fourth Circuit denied his appeal. The Supreme Court granted certiorari and reversed the Fourth Circuit.[20] The Court based its decision on the rationale that "the government may not regulate speech based on its substantive content or the message it conveys."[21] The Court reasoned that the student activities fund, in essence, created a forum.[22] And, in doing so, the university effectively discriminated against religious groups by denying them funding because of their religious message.[23]

The Court then proceeded to hold that providing money to student-run religious magazines would not violate the Establishment Clause.[24] The Court explained that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[25] Here, the Court pointed out that the student magazine "did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal."[26] Thus, the Court concluded that the student activities

15. 515 U.S. 819 (1995).
16. *Rosenberger*, 515 U.S. at 825-26 (internal quotations omitted).
17. *Id.* at 827.
18. *Id.*
19. *Id.* at 824-25.
20. *Id.* at 846.
21. *Rosenberger*, 515 U.S. at 828 (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).
22. *Id.*
23. *Id.* at 830 (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993)).
24. *Id.* at 837-46.
25. *Id.* at 839 (citing *Grumet*, 512 U.S. at 704).
26. *Rosenberger*, 515 U.S. at 840.

fund "cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion" but it must be provided in a neutral manner to all organizations.[27] *Rosenberger* is an important case in the development of the Establishment Clause because it provides that benefits, including monetary ones, can be given to religious groups, so long as the decision to make the benefit is done in an impartial manner. It is apparent that the *Lemon* test, if not overruled *sub silentio*, is no longer the controlling law relating to the Establishment Clause.[28] As *Rosenberger* demonstrates, a statute does not run afoul of the Establishment Clause as long as it is neutral and applied evenhandedly and broadly.

B. The Free Exercise Clause

The Supreme Court has also significantly overhauled the jurisprudence of the Free Exercise Clause in the last decade. Prior to 1990, the Supreme Court had seemingly applied a "compelling interest" test to any legislation that burdened religious conduct.[29] The seminal Free Exercise case was *Sherbert v. Verner*.[30] In *Sherbert*, the plaintiff had been discharged from her job for refusing to work on a Saturday, the Sabbath day of her faith.[31] When the plaintiff filed a claim for unemployment benefits, the State of South Carolina denied the plaintiff's claim.[32] The state ruled that she had failed to show that she could not accept work without good cause.[33] The state reasoned that the statute places no restriction on the plaintiff's freedom of religion because her decision not to work on Saturday was voluntary.[34] The Supreme Court disagreed. In an opinion by Justice Brennan, the Court reasoned that the plaintiff's objection to working on Saturday was prompted by religious principles.[35] The Court compared the statute to a "fine imposed against [her] for her Saturday worship."[36] Thus, it explained that for the denial of benefits to withstand scrutiny under the First Amendment, "it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or because any incidental burden on the free exercise of ap-

27. *Id.* at 841.
28. *Id.*
29. Kenneth D. Sansom, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753 (1999).
30. 374 U.S. 398 (1963).
31. *Sherbert*, 374 U.S. at 400.
32. *Id.* at 400.
33. *Id.* at 401.
34. *Id.* at 401 (citing Sherbert v. Verner, 125 S.E.2d 737, 746 (S.C. 1962)).
35. *Id.* at 403.
36. *Sherbert*, 374 U.S. at 404.

pellant's religion may be justified by a *compelling state interest* in the regulation."[37]

Similarly, in *Wisconsin v. Yoder*,[38] the Supreme Court found that a state statute requiring compulsory education violated the Free Exercise Clause.[39] In *Yoder*, the state had penalized the respondents under the state compulsory education law for not sending their children to high school.[40] The respondents had stated that their church would censure them for sending their children to a state-run public school.[41] The Court pointed out that the state's goal of mandating that children between the ages of fourteen and sixteen attend school was not impaired by the Amish's refusal to send their children to high school.[42] The Court noted that the statute was passed to ensure that children are not victimized by child labor.[43] The Amish, however, employ their children under the guidance of their parents.[44] Therefore, the Court concluded that the purpose of the statute did not pass the compelling state interest test.[45] As a result, the Court found that the statute violated the Free Exercise Clause.[46]

The compelling interest test was firmly established in the Court's jurisprudence.[47] Although a statute could pass the Court's compelling interest test, it was a rigorous level of scrutiny. [48] In 1990, however,

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37. *Id.* at 403 (emphasis added) (internal quotations omitted).
38. 406 U.S. 205 (1972).
39. *Yoder*, 406 U.S. at 207.
40. *Id.* at 224.
41. *Id.* at 209. The Court explained that the Amish "view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." *Id.* at 211.
42. *Id.* at 224.
43. *Id.* at 228.
44. *Yoder*, 406 U.S. at 228-29.
45. *See id.*
46. *Id.* at 234.
47. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (state laws burdening religions "must be subjected to strict scrutiny and can be justified only by proof [by the State] of a compelling state interest"); Thomas v. Review Bd., 450 U.S. 707, 708 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). Although all of these cases were in the employment context, the Court's holdings do not identify that as a relevant distinction.
48. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); United States v. Lee, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."). Several other times, the Court has simply declined to apply the compelling interest test. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (noting that the Free Exercise Clause did not prohibit the government from harvesting lumber from sacred lands); Bowen v. Roy, 476 U.S. 693 (1986) (denying a parent the right to not have her child assigned a Social Security number over her religious objections); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the Air Force could require an orthodox Jew not

the Supreme Court departed remarkably from this rule by refining the Free Exercise standard. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[49] the respondents were dismissed from their job for ingesting peyote.[50] The state subsequently denied them unemployment benefits because they were terminated for work-related misconduct.[51] After a series of appeals, the Court held that the state's decision did not violate the respondents' First Amendment rights.[52] The Court reasoned that the criminal law was a generally applicable law and that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[53] The Court, in re-examining its free exercise jurisprudence, stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[54]

Three years later, the Court revisited its Free Exercise Clause jurisprudence. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[55] the Court found that a series of local ordinances, which prohibited the practice of Santeria, were unconstitutional.[56] In this case, the City of Hialeah had passed a series of ordinances that effectively forbade worshipers of Santeria from making animal sacrifices.[57] The legislative history of the ordinance effectively demonstrated that the laws were passed precisely for that purpose.[58] The Court stated that laws that "target religious conduct for distinctive treatment or advance[] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[59] As a result, the Court found that the law could not survive such a test.[60]

The Court's loose application of the Free Exercise Clause was not without its critics. In 1993, Congress passed the Religious Freedom

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to wear a yarmulke while on duty).

49. 494 U.S. 872 (1990).
50. *Smith*, 494 U.S. at 872.
51. *Id.* at 874.
52. *Id.* at 874-75.
53. *Id.* at 885 (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986)).
54. *Id.* at 878-79.
55. 508 U.S. 520 (1993).
56. *City of Hialeah*, 508 U.S. at 524.
57. *Id.* at 524-26.
58. *Id.* at 526-28.
59. *Id.* at 546.
60. *Id.* at 546-47.

Restoration Act ("RFRA").[61] The RFRA stated that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[62] In *City of Boerne v. Flores*,[63] the Court found that RFRA exceeded the constitutional bounds of Congress's power and that the law was, therefore, unconstitutional.[64] Subsequent decisions, however, have recognized that RFRA may serve as a self-imposed limit on Congress's power.[65] As a result, the current state of the Free Exercise doctrine can thus be summarized as follows: federal laws must still pass the "compelling interest" test, but the Free Exercise Clause does not relieve an individual of a duty to obey any generally applicable state law that infringes upon an individual's right to practice his religion unless that law was designed with that religious group in mind. Therefore, unless a state law is designed to suppress a religion, it is presumptively valid. With respect to the Copyright and Lanham Acts, however, it remains an "open question" whether RFRA applies because one court has suggested that it is "unlikely" Congress intended to include intellectual property laws under this broadened protection.[66]

C. Application of "Neutral Principles of Law" to Intrachurch Disputes

On several occasions, the Supreme Court has addressed a problem that occurs when a religious group splits into several factions and asks a court to determine which group is representing the true faith. The Supreme Court has concluded that the government must avoid becoming involved in these internal problems.[67] Rather, the organizations must let their own judicial bodies resolve the dispute. This doctrine is not "some detached fragment of constitutional law,"[68] instead it has

61. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb-1 (1994)).

62. 42 U.S.C. § 2000bb-1(b).

63. 521 U.S. 507 (1997)

64. *City of Boerne*, 521 U.S. at 511.

65. *See, e.g.*, Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831 (9th Cir. 1999); Adams v. Commissioner, 170 F.3d 173, 175 n.1 (3d Cir. 1999), *cert. denied,* 120 S. Ct. 937 (2000) ("In general, courts that have addressed the question of constitutionality have found that RFRA is constitutional as applied to the federal government."); Peterson v. Shanks, 149 F.3d 1140, 1145 (10th Cir. 1998).

66. Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1120-21 (9th Cir. 2000) (discussing the Copyright Act).

67. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

68. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1845 (1998).

effectively become a third strand of the religion clauses of the First Amendment.

The first, and seminal, case in this area of constitutional law is *Watson v. Jones*.[69] In *Watson*, the General Assembly of the Presbyterian Church had urged its members to support the Emancipation Proclamation.[70] After the Civil War ended, the church required that any supporter of the Confederacy "should be required to repent and forsake these sins" before being allowed to rejoin the church.[71] The proslavery faction of the church contested the election of antislavery members to local church positions in Kentucky.[72] If the church had permitted the proslavery members to participate in the vote, they would have prevailed. The proslavery faction of the church contested the election to Kentucky's highest court.[73] That court concluded that the church had violated its own rules by not permitting the proslavery members of the faction to participate in the election.[74]

Several other members of the church filed a lawsuit in federal district court.[75] The federal district court upheld the local election because it was held according to the church's charter.[76] The Supreme Court agreed, reasoning that, in the United States, citizens have the "full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine."[77] The Court further explained that "it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction, . . . which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action."[78] The Court concluded that it could not resolve these intrachurch disputes.[79]

The Court has revisited this issue on several occasions. In *Bouldin v. Alexander*,[80] a minority of the members of the church removed the church's trustees.[81] The Court found that the removal of the trustees

69. 80 U.S. (13 Wall.) 679 (1871).
70. *Watson*, 80 U.S. at 691.
71. *Id.*
72. *Id.*
73. *Id.* at 688.
74. *Id.* at 688-69 (citing Watson v. Avery, 65 Ky. (2 Bush) 332 (1867)).
75. *Watson*, 80 U.S. at 694.
76. *Id.* at 697-98.
77. *Id.* at 728.
78. *Id.* at 733.
79. *Id.* at 733-34.
80. 82 U.S. (15 Wall.) 131 (1872).
81. *Bouldin*, 82 U.S. at 134.

was impermissible and, thus, had to be set aside.[82] The Court reasoned that it could inquire to determine if the actions taken were taken by members of the church—an intrachurch dispute—or individuals acting outside the scope of their authority.[83]

The Court reviewed this doctrine fifty years later. In *Gonzalez v. Roman Catholic Church Archbishop of Manila*,[84] the plaintiff had petitioned a court to appoint him chaplain against the Roman Catholic Church's wishes. The Supreme Court refused to uphold a lower court's decision appointing the plaintiff chaplain.[85] The Court again reasoned that it cannot involve itself in an intrachurch dispute unless there is evidence of "fraud, collusion, or arbitrariness."[86]

In *Kedroff v. St. Nicholas Cathedral*,[87] the New York legislature passed a law requiring that the head of the Russian Orthodox Church be chosen within the United States by New York churches, not by the Patriarch of Moscow who served as the nominal leader of the Russian Orthodox Church. The New York legislature had believed that the anti-religious sentiment in Russia prevented that church from making a reasonable selection.[88] The Court disagreed, relying on *Gonzalez* to note that in the absence of evidence of any improper method, the Orthodox Church of Russia's decision must stand.[89] In *Kedroff*, the Court also emphasized, more so than it had done before, that the First Amendment was the basis for this rule of law. The Court has further refined this position in subsequent decisions.[90] Most recently in *Jones v. Wolf*,[91] the Court reiterated its position that a court may not involve

82. *Id.* at 140.

83. *Id.* (finding that the Court could not "decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off"; instead, the Court took "the fact of excommunication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others.").

84. 280 U.S. 1 (1929).

85. *Gonzalez*, 280 U.S. at 18.

86. *Id.* at 16 ("Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.").

87. 344 U.S. 94 (1952).

88. *See Kedroff*, 344 U.S. at 102-03.

89. *Id.* at 116-21. Subsequently, in *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), the New York courts gave the American-controlled faction of the Russian Orthodox Church authority over the Church's property. The Supreme Court also set this decision aside, explaining that civil courts, like legislatures, had to defer to ecclesiastical authorities. *Kreshik*, 363 U.S. at 191.

90. Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Maryland & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

91. 443 U.S. 595 (1979).

itself in doctrinal disputes.[92] Instead, a court must examine property disputes on the basis of applicable charters, trusts, and relevant state statutes.[93]

II. COPYRIGHTS, THE ESTABLISHMENT CLAUSE, AND THE FREE EXERCISE CLAUSE

The intersection of copyright law and the religion clauses of the First Amendment may arise in a variety of scenarios. Thus, the legal discussions on the subject are disparate, and creating a coherent rule is difficult. Copyright and trade secret litigation in a religious context is rare for a variety of reasons. First and foremost, most religious organizations do not aggressively enforce the copyrights to their works. Copyrights were designed to ensure that the writer or creator of a literary or artistic endeavor would be reimbursed for her work. Religious copyrights are generally believed by their adherents to be divine, or divinely inspired, abrogating concern over "uncompensated" use.

Furthermore, copyright infringement actions are uncommon because religious organizations do not always copyright works such as their prayer books. Instead, these organizations place their organization's seal on the prayer book.[94] By affixing a seal on the relevant text, the organization sends a clear message to its members that the book is spiritually accurate, and the organization avoids copyrighting information that may be in the public domain.[95] The profit motive that provides the incentive to copyright a literary work is subordinated to an organization's concerns about its members using incomplete or erroneous textbooks.

Trade secrets have a similar purpose. Trade secrets typically involve business skills, technology or commerce, so their application to this context is generally remote. States permit businesses to retain trade secrets in order to promote entrepreneurship.[96] With a few exceptions, religious organizations are less likely to misappropriate trade secrets or

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92. *Jones*, 443 U.S. at 602-04.

93. *Id.* at 602-03.

94. *For the Relief of Clayton Bion Craig, Arthur P. Wuth, Mrs. Lenore D. Hanks, David E. Sleeper, and DeWitt John: Hearings on S. 1866 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 22 (1971) [hereinafter *Hearings*] (statement of Rep. Drinan); *see also* 117 CONG. REC. S26822-23 (daily ed. July 22, 1971) (statement of Sen. Hart).

95. *Hearings*, *supra* note 94, at 22.

96. *See, e.g.*, CAL. CIV. CODE § 3426.1(d) (West 1984) (defining a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process," which "(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."), *cited in* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1090 (9th Cir. 1986); VA. CODE ANN. § 59.1-336 (Michie 1992).

infringe upon intellectual property rights than a commercial enterprise. Likewise, religious trade secrets are less likely to be misappropriated or infringed upon as a commercial trade secret. Therefore, although the statutory definition of trade secrets would seemingly permit a religious organization to possess trade secrets, there does not appear to be any cases in which a court has identified a religious organization that owns a trade secret.[97]

A. Can Divine Works Be Copyrighted?

The first question is whether "divine" works may be copyrighted at all. Not surprisingly, the case law has permitted some groups to use the ideas of religious groups without violating copyright laws, but courts prohibit the duplication of copyrighted expressions of those ideas. In *Urantia Foundation v. Maaherra*,[98] the defendant prepared a study aid containing the entire text of the Urantia Book.[99] The "words in the Book were 'authored' by non-human spiritual beings described in terms such as the Divine Counselor."[100] "The Chief of the Corps of Superuniverse Personalities, and the Chief of the Archangels of Nebadon. These spiritual entities are thought to have delivered the teachings, that were eventually assembled in the Book."[101] Several human beings, who anointed themselves the Contact Commission, began to pose specific questions to spiritual beings. These questions and their respective answers became the Urantia Book.[102]

The Urantia Foundation, which claimed ownership of the copyright to the Urantia Book, sought to enjoin the defendant from copying the book. As a threshold issue, the court had to address whether or not a human being had authored the book.[103] To determine whether the book

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97. In *Wollersheim*, the court recognized that a religious organization *may* have trade secrets. *Wollersheim*, 796 F.2d at 1089-91. In that case, however, the court suggested that Scientology texts were not trade secrets. *Id.* at 1090-91. In *Wollersheim*, the Religious Technology Center argued that the defendant was providing access to these texts at a much lower rate than the Scientologists would have. *Id.* at 1091. The court concluded that these materials did not have "independent economic value." *Id.* Rather, the court found that these documents were spiritual, and thus not protected under California's trade secret law. *Id.* In a subsequent decision, however, the court explained that while it expressed doubts about "whether the Church [of Scientology] could allege the competitive market advantage required without 'rais[ing] grave doubts about its claim as a religion and a not-for-profit corporation,'" it did not decide one way or another "whether the scriptures could qualify as trade secrets should the Church allege and prove economic advantage." Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1310 (9th Cir. 1989).

98. 114 F.3d 955 (9th Cir. 1997).

99. *Urantia Found.*, 114 F.3d at 957.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 958.

was copyrightable, the court examined the text of the Copyright Act, which states that "[c]opyright protection subsists in . . . [the] original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[104] "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[105]

The defendant argued that the plaintiff could not possess a copyright in the Urantia Book because it lacked the "requisite ingredient of human creativity."[106] The court disagreed. The court noted that a work is copyrightable if a copyright is claimed by the first human being who compiled the work,[107] observing that

> [i]n this case, the Contact Commission may have received some guidance from celestial beings when the Commission posed the questions, [but the court noted] that the members of the Contact Commission chose and formulated the specific questions asked. These questions materially contributed to the structure of the Papers, to the arrangement of the revelations in each Paper, and to the organization and order in which the Papers followed one another.[108]

In affirming the plaintiff's motion for summary judgment, the court found that the plaintiff could demonstrate that it had compiled the papers for the purposes of satisfying the copyright laws.[109]

The *Urantia Foundation* court contrasted its case with *Oliver v. Saint Germain Foundation*.[110] In *Oliver*, the plaintiff sued the defendant for publishing a book that was substantially similar to his book.[111] Both books addressed metaphysical ideas and were religious in nature. In writing his book, the defendant "wished to impress in the strongest terms possible, his sincere belief in the truthfulness of his statement

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104. 17 U.S.C. § 102(a) (1994).

105. *Urantia Found.*, 114 F.3d at 958 (citation omitted) (quoting Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

106. *Id.*

107. *Id.* (citing 17 U.S.C. § 101).

108. *Id.* at 959.

109. *Id.* The district court had found that the plaintiff had not adequately demonstrated that it owned the copyright. The Ninth Circuit found that because the Urantia Foundation had published the work in 1955, it had established a statutory copyright. *Urantia Found.*, 114 F.3d at 960.

110. *Urantia Found.*, 114 F.3d at 959 (quoting Oliver v. Saint Germain Found., 41 F. Supp. 296 (S.D. Cal. 1941)).

111. *Oliver*, 41 F. Supp. at 296.

that he, a mortal being, was not the author and to induce those who might read to believe that it was dictated by a superior spiritual being."[112] The court denied the plaintiff's motion for summary judgment on the issue of copyright infringement.[113] It reasoned that "[t]here is no charge of infringement here based upon style or arrangement, but it is upon the subject matter or stories of two earthly creatures receiving from the spiritual world messages for recordation and use by the living."[114] Thus, the court concluded that the plaintiff could not show that the defendant copied his works.[115] Instead, the best the plaintiff could show was that both parties had a similar experience.[116] That similar experience, the court concluded, was not a sufficient basis for a valid copyright infringement claim.[117]

The *Robert Stigwood Group Ltd. v. O'Reilly*[118] case is analogous to the *Urantia Foundation* case because it involved the "human" expression of religious ideas. That case involved a ministry that performed a slightly altered version of Andrew Lloyd Weber's rock opera *Jesus Christ Superstar*.[119] The owner of the copyright of the opera sought to enjoin the defendants from performing the play.[120] In finding for the plaintiffs, the court explained that the plaintiffs may possess copyrights to the musical expression of the last days of Christ in the form of the play *Jesus Christ Superstar*, but the plaintiffs could not possess "copyrights to the Biblical narration, characters, or sequence of events of the last seven days of Christ."[121] The court dismissed the defendants' defenses of both fair use and First Amendment privilege, and granted the plaintiffs' motion for a preliminary injunction.[122]

These three cases demonstrate that ascribed religious ideas cannot be copyrighted, but that the method by which someone expresses those ideas may be. The case law, however, fails to address what happens when an infringer attempts to use an individual's copyrighted expression of a religious idea. A court's decision to grant an injunction regarding such material may run afoul of the Free Exercise Clause.

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112. *Id.* at 298-99.
113. *Id.* at 299.
114. *Id.*
115. *Id.*
116. *Oliver*, 41 F. Supp. at 298-99.
117. *Id.*
118. 346 F. Supp. 376 (D. Conn. 1972), *rev'd*, 530 F.2d 1096 (2d Cir. 1976).
119. *O'Reilly*, 346 F. Supp. at 379.
120. *Id.* at 380.
121. *Id.* at 383.
122. *Id.* at 382-85.

B. Copyright Infringement and the Free Exercise Clause

To prevail in a copyright infringement action a plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[123] Once the plaintiff shows that the defendant has infringed upon his copyright, the defendant may argue that his appropriation was a fair use.[124] The Copyright Act provides four factors that a court must consider when determining whether the use of a work was fair:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (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.[125]

These factors, however, are not exclusive. Rather, the fair use doctrine is "an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[126] The fair use doctrine oftentimes must balance expression with ideas. Ideas cannot be copyrighted, but the expression of those ideas may be.[127]

The Supreme Court analyzed the application of the fair use doctrine in *Harper & Row, Publishers, Inc. v. National Enterprises*.[128] That case concerned an article in *The Nation*. The article contained excerpts of a forthcoming, but still unpublished, autobiography by President Ford. The defendant had argued that its decision to reprint excerpts of Ford's memoirs was a fair use of the copyrighted material.[129] The Supreme Court disagreed and reached its conclusion by analyzing the § 107 factors.[130] Of note, the Court delineated the first factor, explaining that part of the purpose of the use is the profit mo-

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123. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). If the plaintiff has obtained a valid registration within the first five years after the first publication of the work, then there is a rebuttable presumption that the plaintiff has met the first prong of this test *See* 17 U.S.C. § 410(c) (1994).

124. 17 U.S.C. § 107.

125. *Id.*

126. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

127. *Feist Publications*, 499 U.S. at 350.

128. 471 U.S. 539 (1985).

129. *Harper & Row*, 471 U.S. at 543.

130. *Id.* at 560-69.

tive of the infringer.[131]

> The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. 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.[132]

Further, the Court explained that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[133] In a similar vein, the Supreme Court explained that a trial court must address whether a work is published or unpublished, because an author has a right to control the first appearance of his work.[134] Finally, with reference to the last factor, the Court explained that the effect of the infringement on the work is "undoubtedly the single most important element of fair use."[135]

Harper & Row Publishers is the seminal case in the area of fair use. The guideposts that the Supreme Court established clearly demonstrate that the fair use doctrine is designed to protect an author's financial rewards for publishing an article. Because a religious organization's use of a copyrighted work frequently will not be for profit, it would appear that fair use would be a valid defense in a copyright infringement suit filed by the owner of a religious copyrighted work. This supposition is wrong, as the statutory and constitutional defenses available to infringing groups are limited.[136] As this Article will show,

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131. *Id.* at 562.
132. *Id.*
133. *Id.* at 563.
134. *Harper & Row*, 471 U.S. at 564.
135. *Id.* at 566.
136. At least two courts have suggested that the First Amendment may serve as a valid defense to copyright infringement in certain circumstances. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), the owner of a copyrighted magazine article filed suit against the author of a biography of Howard Hughes. The owner of the copyright argued that the biography contained facts that were drawn from his article. *Id.* at 305. The biography relied heavily on the copyrighted articles, but the court concluded that the use of these articles did not constitute infringement. *Id.* at 306.

In reaching its conclusion, the court noted that the Copyright Clause in the Constitution was designed "to Promote the Progress of Science and the Useful Arts." U.S. CONST. art 1, § 8, *cited in Rosemont Enters., Inc.*, 366 F.2d at 307. The court reasoned that a biography promoted exactly that goal: the fair use "privilege has been applied to works in the fields of science, law, medicine, history, and biography." *Rosemont Enters., Inc.*, 366 F.2d at 307 (citation omitted). The court stated that "it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works." *Id.* (citation omitted). Thus, as long as the use is reasonable, as opposed to wholesale copying, fair use will likely be a valid defense. *Id.* at 309-10.

In a concurring opinion, however, two judges were even more poignant; they identified a First Amendment privilege as a valid defense. Chief Judge Lumbard, in an opinion joined by Judge

the few cases in which the courts have addressed these issues show the restricted nature of these defenses.

1. Legislative Carve-outs

One reason that copyright litigation is so rare in this context is that Congress had the foresight to provide a legislative carve-out. As mentioned above, copyrights were created to reward an artist or writer for her contribution. Congress, however, recognized that there were certain instances where the holder of a copyright should not have a cause of action for infringement. Section 110 of the Copyright Act provides a copyright exemption for performances that occur within nonprofit organizations such as those that are educational, governmental, or otherwise nonprofit in nature.[137] Section 110 includes an exemption for the "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."[138] In creating this exception, Congress has provided little direc-

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Hays, wrote that it "has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity." *Id.* at 311 (Lumbard, C.J., concurring). Rather, the court explained that the "spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest." *Id.* Thus, a majority of the panel suggests that the First Amendment concerns must trump the Copyright Clause.

Similarly, in *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980), the court confronted another fair use issue. At issue in this case was the *Miami Herald*'s decision to juxtapose the cover of a *TV Guide* magazine with the cover of its new television insert. The district court found that the newspaper's decision was permitted under the First Amendment. *Triangle Publications*, 626 F.2d at 1173. On appeal, 5th Circuit affirmed, but it based its decision on a fair use defense, not the First Amendment. *Id.* at 1178. One concurring judge explained that "under limited circumstances, a First Amendment privilege may, and *should* exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts or expressions." *Id.* at 1184 (Tate, J., concurring) (emphasis in original). Nevertheless, he believed that the court should reserve this issue for a case involving "the fundamental values of a free society." *Id.*

Rosemont Enters., Inc and Judge Tate's concurrence in *Triangle Publications* suggest that the First Amendment ideals will likely trump the Copyright law in certain circumstances. A reasonable reading of *Rosemont Enters., Inc*, in the context of this Article, is that parroting the works of another individual would not be protected by the First Amendment, but that using these works for the free exercise of religion would be.

137. 17 U.S.C. § 110 (1994). While § 110 does provide exemptions for nonprofit organizations, some people have criticized the legislative carve-out as being too narrow. *See* Julien H. Collins III, *When In Doubt, Do Without: Licensing Public Performances by Nonprofit Camping or Volunteer Service Organizations Under Federal Copyright Law*, 75 WASH. U. L.Q. 1277 (1997). Prior to the 1976 revision of the Copyright Acts, § 1(e) forbade copyright holders from charging not-for-profit groups for performing their copyrighted works. Pub L. No. 60-349, 35 Stat. 1075, 1082 (1909) (amended by later enactment). That exemption, which would have simplified this analysis significantly, was repealed in 1976. *See* Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. § 110).

138. 17 U.S.C. § 110(3).

tion. The legislative history of the 1976 amendments to the Copyright Act provides only minimal guidance. It states:

> The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works . . . . The purpose here is 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. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place "in the course of [religious] services."
>
> To be exempted under [§ 1103(3)] a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes . . . . Since the performance or display must also occur "at a place of worship or other religious assembly," 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. On the other hand, as long as services are being conducted before a religious gathering, the . . . exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.[139]

This legislative carve-out exists in many of the countries that adhere to the Berne Union.[140]

As both the plain language of the statute and the legislative history demonstrate, § 110(3) allows the use of uncompensated copyrighted religious (as well as nonreligious) nondramatic works and religious dramatic musical works during services. As a result, it frequently will not be possible for the owner of a religious work to enforce his copyright against unauthorized use by a religious group.

Only two courts have provided any substantive analysis of § 110(3), and those courts dealt with predecessor statutes.[141] In *F.E.L.*

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139. 17 U.S.C.S. app. § 704-705 (1994) (quoting H.R. Rep. No. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5698-99).

140. The religious services exemption "is one of the most widely adopted of public performance exemptions in the laws of Berne Union countries." *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 527 (1986).

141. Section 110 was enacted in 1976. Prior to that the 1909 Copyright Act contained two exemptions that were slightly broader. *See* § 1(e) (requiring payment of the for-profit performance of a work). Section 104 of the 1909 Copyright Act provided that:

> [N]othing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained

Publications, Ltd. v. Catholic Bishop of Chicago,[142] the Seventh Circuit examined the scope of this legislative carve-out.[143] The plaintiff, a music publisher, held the copyrights for many of the hymns that were used by Catholic parishioners in Chicago. These hymns were copied by the Church and distributed in violation of the copyright agreement between the parties. Among the defenses asserted was that the agreement between the parties was superseded by §§ 1(e) & 104. In ruling for the plaintiff, the court explained that these statutes did not apply to the current circumstances. Rather, an earlier version of the Copyright Act prohibited a copyright holder from preventing a not-for-profit group from performing his work or exacting a fee for this performance.[144] The agreement between the two parties, however, addressed only the reproduction of the hymns, not their performance. As a result, the court explained that the law, at the time of the infringement, allowed these churches to perform their hymns without paying a fee because of § 1(e). In a footnote, the court further elaborated on the purpose of § 110(3)'s predecessor statute as "probably refer[ing] to those situations where, for example, a church choir charges a fee for a performance and donates the proceeds to a charitable cause."[145] This case is of marginal precedential value, however, because § 110(3) now contains different language than either the old version of § 1(e) or § 104. Nevertheless, the case does demonstrate that, even today, the Copyright Act provides no exemption for the duplication of religious materials that will be used to worship. Rather, as this case illustrates, the only exemption is applied to the performance of musical or literary works.

Robert Stigwood Group Ltd. further shows that even this exemption for performances is a narrow one.[146] In this case, discussed above, the court granted a preliminary injunction to the authors of the play *Jesus*

> from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 378 (D. Conn. 1972), *rev'd*, 530 F.2d 1096 (2d Cir. 1976).

142. 214 U.S.P.Q. (BNA) 409 (7th Cir. 1982).

143. *F.E.L. Publications*, 214 U.S.P.Q.(BNA) at 412.

144. *Id.* at 411 (citing 17 U.S.C. § 1(e) (1994)).

145. *Id.* at 413 n.8.

146. *Robert Stigwood Group Ltd.*, 346 F. Supp. at 378. One other court has addressed the predecessor statute, but its analysis was scant. In *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229 (2d Cir. 1915), *rev'd on other grounds*, 242 U.S. 591 (1917), the Second Circuit found that a restaurateur who had hired a performer to entertain his patrons with copyrighted music was not engaged in a for-profit enterprise. The court concluded that because the restaurateur was not charging an admission fee, he was exempted from paying any copyright fees. The Supreme Court reversed the Second Circuit. In dicta, however, the Second Circuit explained that the purpose of what is now the § 110 carve-out is "to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose." *Id.* at 230.

Christ Superstar, thereby prohibiting the defendants from performing a slightly altered rendition of the play.[147] In granting the injunction, the court rejected the defendants' defenses under the predecessor statute of § 110(3).[148]

The defendants were a contemporary mission, who "through their 'musical ministry,' have performed innumerable acts of charity, aided the poor and disadvantaged, and attempted to influence the lives of youngsters, Catholic and non-Catholic."[149] The ministry also traveled and performed *Hard Job Being God* and *Jesus Christ Superstar*.[150] Some members' relationship with the ministry was commercial in nature, and by the time this suit was filed, the ministry was traveling across the United States and had performed the musical over fifty times.[151] Although the group was a not-for-profit organization, some of its members were "professional actors and musicians who are not clergy and who are hired and perform for personal profit."[152]

The defendants argued that they had complied with the terms of § 110(3)'s predecessor.[153] Alternatively, the defendants argued that to enforce the copyright of *Jesus Christ Superstar* would violate the defendants' free exercise rights under the First Amendment.[154] Finally, the defendants argued that the use was a fair use under the copyright laws.[155] The court rejected the defendants' position.[156]

In addressing the defendants' first argument, the court explained that the carve-out rule would include the defendants' performance if they could show that: "1) they are a church choir or vocal society who 2) perform a work such as an oratorio, which 3) was rented or obtained from a public library, public school, church choir, school choir, or vocal society, for 4) charitable or educational purposes and not for profit."[157] The court rejected the defendants' argument, finding that because the defendants were not a church or vocal society, they could not properly use the exemption as a defense.[158]

In dicta, the court also clarified part of the statutory scheme. The court explained that the issue was not whether the defendants were violating the statute by performing an opera, as opposed to an orato-

147. *Robert Stigwood Group Ltd.*, 346 F. Supp. at 378.
148. *See id.* at 380-82.
149. *Id.* at 379.
150. *Id.*
151. *See id.* at 379-80.
152. *Robert Stigwood Group Ltd.*, 346 F. Supp. at 381.
153. *See id.* at 380-82
154. *Id.* at 382-84.
155. *Id.*
156. *See id.* at 385.
157. *Robert Stigwood Group Ltd.*, 346 F. Supp. at 381.
158. *Id.* at 381-82.

rio.[159] "The phraseology of the pertinent portion of the statute contains the general words 'such as' which precede the particular classes of works set forth. Therefore, since the similarities between an oratorio and an opera are significant . . . [§] 104 includes within its boundaries an opera or a rock opera."[160] This is significant because an oratorio is presented without a stage action, scenery, or costumes.[161]

In passing the 1976 amendments to the Copyright Act, Congress re-wrote this provision of the law to include not just recitals of songs, but also full-fledged performances of certain literary works. As the law currently stands, § 110(3) of the Copyright Act carves out from the Act the performance of certain types of copyrighted material in a house of worship during a service. This legislative carve-out effectively vitiates some copyright infringement actions brought against religious organizations. The Copyright Act thus permits religious organizations to perform hymns or other musical works, but the limited carve-out would probably not protect the use of a copyrighted text. Further, the Act does not allow the infringing group to duplicate the text to distribute to its members.

2. *The Free Exercise Clause*

The Free Exercise Clause poses a further potential barrier to copyright protection. At least in theory, the monopolistic protection of copyrights might be at odds with organizations' ability to worship with all texts and materials they believe are necessary. If copyright protection is paramount, use and reproduction of such materials could only be at the discretion of the copyright holder. Even though the United States, in adopting the precepts of the Berne Convention, has provided a limited statutory solution to this problem, as noted above, there are some contexts in which § 110(3) will not preclude the owner of a copyright from filing an infringement action against a religious organization. A scenario where this would occur might include a teacher's copying of religious texts for his followers. In certain circumstances, the holder of the copyright is challenging the infringer's decision to copy the expression of those ideas. Nevertheless, if the holder of the copyright were to file a lawsuit alleging copyright infringement, the defendant may have two valid defenses: the First Amendment and fair use.

159. *See id.* at 382.
160. *Id.*
161. WEBSTER'S NEW WORLD DICTIONARY 952 (3d ed. 1988).

a. Free Exercise Concerns

The above cases do not address a factual scenario where the defendant seeks access to the plaintiff's copyrighted works because the defendant claims that those materials are necessary for his religious exercise.

Prior to the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, one court pointed out that by enforcing a copyright through an injunction, a court may inadvertently violate the First Amendment. In *Religious Technology Center v. Wollersheim*,[162] the defendant obtained several high-level, confidential Scientology documents.[163] The defendant obtained these documents after they were stolen from the plaintiff's headquarters in Denmark.[164] The parties did not dispute that the documents were stolen. The plaintiff sought to enjoin the defendant from using these materials in the defendant's religious practice. The court denied the plaintiff's injunction because it found that RICO, the statute under which the plaintiff filed its suit, forbade private parties from obtaining injunctive relief.[165] In dicta, the court pointed out, however, that this decision allowed it to avoid any constitutional issues. The court noted that "[b]y resolving this appeal on jurisdictional grounds we avoid deciding the significant [First Amendment] issues raised by the district court's injunction."[166] The court noted that issuance of an injunction may run afoul of the Free Exercise Clause,[167] may create an impermissible entanglement in matters of religious doctrine,[168] or may constitute a violation of the Establishment Clause.[169]

Since *Smith*, however, a court might not run afoul of the Free Exercise Clause in granting an injunction to prohibit a breakaway group from using a copyrighted religious text. In the district court opinion of *Urantia Foundation v. Maaherra*,[170] the court denied the defendant's Free Exercise and Establishment Clause claims. It reasoned that the Free Exercise Clause "has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects."[171] The court

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162. 796 F.2d 1076 (9th Cir. 1986).
163. *Wollersheim*, 796 F.2d at 1089 n.15.
164. *Id.* at 1078.
165. *Id.* at 1088.
166. *Id.* at 1089 n.15.
167. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).
168. *Wollersheim*, 796 F.2d at 1089 n.15 (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).
169. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
170. 895 F. Supp. 1329 (D. Ariz. 1995).
171. *Maaherra*, 895 F. Supp. at 1332 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

noted that the "copyright and trademark laws are such neutral laws of general applicability to which the defendant must adhere."[172] As a result, the court denied the defendant's Free Exercise claim.[173]

In *Worldwide Church of God v. Philadelphia Church of God, Inc.*,[174] the Ninth Circuit suggested that RFRA does not apply to the Copyright Act.[175] Although the court suggested that the Supreme Court's analysis in *Smith* was controlling, the court reasoned that requiring the defendant-church to pay a fee for the use of the text was not a substantial burden and, hence, was also constitutional under the *Sherbert* standard.[176] The court evaded the issue raised in *Wollersheim* because it reasoned that the defendant may have been able to negotiate an agreement to copy the work from the plaintiff.[177] In the absence of any effort to negotiate by the defendant, the court assumed that the parties would have reached an agreement that allowed the defendant to duplicate the copyrighted work.[178] The court did not address whether granting an injunction in the light of two parties being unable to reach an agreement violates the Free Exercise Clause.[179] Thus, the reasoning of *Wollersheim* would appear to remain viable.

There are several other cases involving Scientologists, and, as these cases show, the Scientologists have aggressively pursued individuals who have taken religious materials from their church.[180] In

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172. *Id.*

173. *Id.* at 1333. Similarly, the court found that no Establishment Clause violation could exist because the recognition of copyright or trademark protection for the

> Urantia Foundation in common with all other entities that comply with statutory formalities 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'

Maaherra, 895 F. Supp. at 1334 (quoting Sherbert v. Verner, 374 U.S. 398, 409 (1963)). In a separate order, the court also found that the Religious Freedom Restoration Act, which at the time had not yet been ruled unconstitutional, was not a valid defense. *See Maahera*, 895 F. Supp. at 1336-37.

174. 227 F.3d 1110 (9th Cir. 2000).

175. *Worldwide Church of God*, 227 F.3d at 1120-21.

176. *Id.*

177. *Id.*

178. *Id.* at 1121. The court explained that "[h]aving to ask for permission, and presumably to pay for the right to use an owner's copyrighted work may be an inconvenience, and perhaps costly, but it cannot be assumed to be as a matter of law a substantial burden on the exercise of religion." *Id.* at 1121. The court went on to hold that "[i]n the absence of evidence that [the defendant's] needs could not reasonably be accommodated under the copyright laws, *we decline to hold that enforcement of those laws in these circumstances constitutes an unreasonable burden.*" *Worldwide Church of God*, 227 F.3d at 1121 (emphasis added).

179. *Id.*

180. These materials typically involve higher level documents that adherents to the Scientologist faith believe, must remain confidential. These documents are "confidential and kept under tight security, disclosed only to those who have attained the requisite level of spiritual training, and cannot be accessed without first signing an agreement to maintain its secrecy and confidentiality." Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 633 (S.D. Cal. 1993).

Bridge Publications, Inc. v. Vien,[181] Scientologists sought to enjoin the defendant from reproducing several of the plaintiffs' documents. The defendant in this case directed her students to copy several Scientology texts.[182] The defendant admitted, "she must use bootleg or copied materials as part of the courses she offers her students."[183] The students apparently used these materials for worship. Nevertheless, the court perfunctorily denied defendant's First Amendment claims. It wrote:

> Defendant argues that because plaintiffs refuse to sell defendant the materials she needs to practice her religion, enforcing the copyrights and trade secret rights restricts her free exercise of religion, and unconstitutionally prefers the religion of Scientology over defendant's religion. Defendant has offered no authority supporting this contention. Rather, the case law cited supports the proposition that neutral application of copyright and trade secret law to religious works does not offend the constitution.[184]

Again, the court relied on the language in *Smith* to show that the copyright laws do not violate the Constitution.[185]

In *Religious Technology Center v. F.A.C.T.NET, Inc.*,[186] the court ruled that the Free Exercise Clause is not violated by state action that is neutral on its face. In this case, the court had issued a temporary restraining order and ordered the defendants to hand over their computers, which the plaintiff alleged contained stolen Scientology documents.[187] Subsequently, the court denied the plaintiff's motion for a preliminary injunction and ordered the plaintiff to return the defendants' computers.[188] The plaintiff argued that by returning these docu-

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Scientologists believe that turning over their materials to persons who have not yet attained the requisite level will result in "devastating, cataclysmic spiritual harm." Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1353, 1357 (E.D. Va. 1995). *See also* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1077 (9th Cir. 1986). Admittedly, it would appear that the Scientology's free exercise defense only impairs nonadherents to the faith and the Court has held that this is not a valid reason to hold that a law violates the First Amendment. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988).

181. 827 F. Supp. 629 (S.D. Cal. 1993).

182. *Vien*, 827 F. Supp. at 632.

183. *Id.*

184. *Id.* at 635.

185. *Vien* also recognizes the right of a religious organization to have trade secrets. *Id.* at 634-35. In doing so, it concluded that trade secrets do not violate the religion clauses. *Id.* at 634 (citing Jones v. Wolf, 443 U.S. 595, 604 (1979); Order of St. Benedict v. Steinhauser, 234 U.S. 640, 644 (1914); United Christian Scientists v. Christian Science Bd. of Dirs., 829 F.2d 1152, 1159 (D.C. Cir. 1987); Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1309-10 (9th Cir. 1989); *Wollersheim*, 796 F.2d at 1090-91).

186. 901 F. Supp. 1528 (D. Colo. 1995).

187. *F.A.C.T.NET*, 901 F. Supp. at 1529.

188. *Id.*

ments to the defendants, the court would release secret Scientology documents back to the defendants, as "a central tenet of the Scientology religion forbids all Scientologists from furnishing any copies of the AT materials to anyone who has not fulfilled the required spiritual and ethical prerequisites and any apostates of the religion."[189] Thus, plaintiff argued that returning these documents would violate the First Amendment. The court denied the plaintiff's motion, carefully skirting the free exercise concerns. It explained:

> My order of return, although legalistically addressed to RTC, was intended to be directed to those persons to whom . . . the law enforcement officers [delivered] the seized articles. [The] order required the law enforcement officers to deliver the articles to counsel for RTC, rather than RTC itself. Compliance with my order of return created no obligation on the part of RTC to return materials. Rather, it required counsel for RTC, whom this court had authorized to take possession of the seized articles from the law enforcement officers, to do so. Accordingly, my order cannot be perceived as requiring RTC or any member of the Church of Scientology to violate any religious belief nor constitute a threat to a central tenet of the religion. For this reason, my order did not involve any First Amendment issue concerning the free exercise of religion nor can RTC be held in contempt for violating that order.[190]

Ultimately, however, that analysis may not be correct. As noted above, the Ninth Circuit has recently questioned whether RFRA applies to religious copyrights.[191] Although it suggested that it does not, in essence, it dodged the question. In its holding, it concluded that RFRA's requirement that organizations pay a royalty does not impose a substantial burden on a religious organization.[192] Further, in reaching its decision, the court failed to conduct any substantive analysis, weakening the credibility of its findings. As a result, courts will still have to struggle to find an appropriate balance. The answer to this question is critical. Under a *Smith* analysis, an injunction would be constitutional; under a *Sherbert* analysis, it would not. Whatever conclusion a court reaches, it must balance the interests of both parties. If the plaintiff-church has a vested interest in keeping its copyrighted material secret,

189. *Id.* at 1530.

190. *Id.* at 1531.

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

192. *See Worldwide Church of God*, 227 F.3d at 1120-21. Although the court granted a permanent injunction against the defendant, the court explained that the defendant did not show that it could not obtain the right to reproduce this material without the plaintiff's permission. *See id.*

a court must consider this as well. After all,

> depriv[ing] religious organizations of all recourse to the protections of civil law that are available to all others . . . would raise its own serious problems under the Free Exercise Clause. It would also leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it.[193]

Whether a religious organization may be entitled to an exemption under the Copyright Act may only be answered definitively by Congress.

b. Fair Use Defense

One question that remains is whether an unauthorized use by a religious organization is a fair use. Although a cursory analysis of this question would suggest that the noncommercial use would likely allow a finding of fair use, a split panel of the Ninth Circuit has recently held that wholesale duplication of a religious work is not permitted under the Copyright Act.

In *Worldwide Church of God*, the late pastor of the plaintiff-church authored a text that he subsequently copyrighted.[194] The text was published and copyrighted in the name of the church.[195] The church subsequently stopped distributing the information because the text "conveyed outdated views that were racist in nature."[196] At the time of the lawsuit, the book was out of print. The defendant, a church group that broke away from the plaintiff, copied the material in its entirety, deleting only the plaintiff's name from the copyright page and placing a warning against reproduction without permission.[197] The plaintiff subsequently filed a motion for a preliminary injunction to enjoin the duplication.[198] The defendant filed a cross-motion arguing that its use constituted a fair use under 17 U.S.C. § 107.[199]

In ruling for the plaintiff, the court explained that the defendant was not entitled to a qualified defense because it was a not-for-profit organization or because it did not realize a monetary benefit from the use of the copyrighted work.[200] Further, the court conducted the four-

193. Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999) (citations omitted).

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

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 1113-14.

199. *Worldwide Church of God*, 227 F.3d at 1114.

200. *Id.* at 1115 (citing F.E.L. Publications Ltd. v. Catholic Bishop of Chicago, 214

pronged analysis delineated in § 107 and concluded that the defendant's use was not a fair use.[201]

The first prong of the fair use analysis requires that the court examine the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[202] Despite the noncommercial nature of the defendant's use, the court found that the prong favored a finding of infringement.[203] It noted that the defendant's use—merely reproducing the work—"bespeaks no 'intellectual labor and judgment.'"[204] The court explained that

> [t]he central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."[205]

As Justice Story put it: "[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."[206]

Here, the court reasoned that the defendant's duplication

> bespeaks no 'intellectual labor and judgment.' It merely 'supersedes the object' of the original [text, even though] transformative use is not absolutely necessary for a finding of fair use, where the 'use is for the same intrinsic purpose as [the copyright holder's] . . . such use seriously weakens a claimed fair use.'[207]

Further, the court echoed the Supreme Court by noting that "[t]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement."[208] Instead, the Ninth Circuit panel

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U.S.P.Q. (BNA) 409, 411 (7th Cir. 1982)).

201. *Id.* at 1117-20.

202. 17 U.S.C. § 107(1) (1994).

203. *Worldwide Church of God*, 227 F.3d at 1117-18.

204. *Id.*

205. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (citations omitted).

206. *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C. Mass. 1841).

207. *Id.* at 1117 (quoting Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989)).

208. *Worldwide Church of God*, 227 F.3d at 1117 (citing *Campbell*, 510 U.S. at 584, (1994)); *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 450, (1984) ("Even

noted that "[t]he 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."[209] The court reasoned that although the defendant was not motivated by dollars, the defendant still profited

> by providing [the copies] at no cost with the core text essential to its members' religious observance, by attracting through distribution of [the text] new members who tithe ten percent of their income to [the defendant], and by enabling the ministry's growth. During the time of [the defendant's] production and distribution of copies of [the text] its membership grew to some seven thousand members. It is beyond dispute that [the defendant] "profited" from copying [the text]—it gained an "advantage" or "benefit" from its distribution and use of [the text] without having to account to the copyright holder.[210]

Accordingly, the court found that the first fair use factor, character and purpose, favored a finding of infringement.[211]

Next, the court examined the nature of the copyrighted work. [212] The court noted that a finding of fair use tends to occur more in the case of factual works, whereas fair use was rarely a valid defense in analyzing creative works.[213] The court concluded that although this religious text may be "viewed as 'factual' by readers who share [the late pastor's] religious beliefs, the creativity, imagination and originality . . . tilt the scale against fair use."[214] Accordingly, the court found that the second prong also favored a finding of infringement.[215]

The court next examined the third prong of the fair use analysis. That factor examines "the amount and substantiality of the portion

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copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have.").

209. *Worldwide Church of God*, 227 F.3d at 1117 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

210. *Id.*

211. *Id.*

212. 17 U.S.C. § 107(2) (1994).

213. *Worldwide Church of God*, 227 F.3d at 1118 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.") (citing *Harper & Row*, 471 U.S. at 563); *see also Sony*, 464 U.S. at 455 n.40 ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture."); New Era Publ'g Int'l v. Carol Publications Group, 904 F.2d 152, 156-57 (2d Cir. 1990) (recognizing that biographical information about Scientology founder L. Ron Hubbard is primarily factual and granting defendant's fair use defense because of the factual nature of the information); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153-54 (9th Cir. 1986) ("The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved.").

214. *Worldwide Church of God*, 227 F.3d at 1118.

215. *Id.*

used in relation to the copyrighted work as a whole."[216] The court noted that the defendant copied the text verbatim and that it copied the text for the use initially intended for the work.[217] Further, since the defendant used the text "as a central element of its members' religious observance; a reasonable person would expect [the defendant] to pay [the plaintiff] for the right to copy and distribute [the text]."[218]

Finally, the court examined the "effect of the use upon the potential market for or value of the copyrighted work." [219] Although most copyright cases address infringement in the context of for-profit works, the court noted that "it cannot be inferred from that fact that the absence of a conventional market for a work, the copyright to which is held by a nonprofit, effectively deprives the holder of copyright protection." [220] Thus, in light of the nonprofit nature of the work and the fact that the plaintiff no longer used the work, the court found that the fourth factor weighed only marginally in favor of the plaintiff.[221] The court did note that the plaintiff might wish to publish an annotated version of the text in the future, and the defendant's illegal use might hamper those plans.[222] Nevertheless, in light of the court's finding that the first three factors weighed so heavily in favor of infringement, the court granted the plaintiff's motion for an injunction and remanded to the district court for damages.[223]

One judge on the panel dissented.[224] The dissenting judge's analysis was based on the fact that when the plaintiff renounced many of the teachings appearing in the text, the defendant's members could no longer practice their faith within the organization.[225] Thus, Judge Brunetti concluded that the defendant needed to copy the text to protect its members' right of free exercise.[226] Besides that, the dissenting judge rejected the court's fair use analysis. He found that the first factor weighed in favor of the plaintiff. "In my view, the noncommercial and religious elements of [the defendant's] use overwhelm any commercial aspects and weigh in favor of fair use under the first statutory factor."[227] In particular, Judge Brunetti did not take exception with the

216. 17 U.S.C. § 107(3) (1994).
217. *Worldwide Church of God*, 227 F.3d at 1118.
218. *Id.*
219. 17 U.S.C. §107(4).
220. *Worldwide Church of God*, 227 F.3d at 1119.
221. *Id.*.
222. *Id.*
223. *Id.*at 1121.
224. *Id.* at 1122-25 (Brunetti, J., dissenting).
225. *Worldwide Church of God*, 227 F.3d at 1122.
226. *See id.*
227. *Id.*

fact that the duplicated work did not "transform" the original.[228] Rather his analysis implied that because the defendant had used the text precisely for its original, noncommercial purpose, its use constituted a fair use.[229] The dissenting judge also argued that the fact the book was out of print weighed in favor of the defendant, as the book was not readily available except for the copies the defendant illegally disseminated.[230]

With regard to the second and third factors of § 107, the dissenting judge found that they do not apply to this unique setting.[231] Of particular note, the judge took exception with the fact that the majority classified the book as creative.[232] He believed that the book was neither informational nor creative, but rather defied classification at all.[233] Finally, unlike the majority, Judge Brunetti found that the fourth factor weighed in favor of the defendant. Since the plaintiff had intentionally suppressed the publication, and had no concrete plans to market it in the future, the judge believed no market interference had occurred.[234]

Although the decision in *Worldwide Church of God* has a unique set of facts, the case does provide some insight into how future religious copyright decisions may turn. First, the court's willingness to look beyond the financial profits gained when examining the purpose and character of the use strongly favors against the dissemination of a religious text. More interestingly, however, is the court's decision to characterize the religious work as creative when conducting the analysis of the nature of the work itself. Ultimately, it is unclear how future cases will be resolved. The fact that the decision was 2-1 suggests that the answer is certainly close. Moreover, the court suggested that requiring a religious organization to pay a copyright fee would pass the compelling interest test. Thus, the majority concluded that the Copyright Act did not run afoul of either the Free Exercise Clause or RFRA.[235] As noted above, if future parties are unable to come to terms on the appropriate royalties that should be paid, the owner of the copy-

228. *Id.*

229. *See id.*

230. *Worldwide Church of God*, 227 F.3d at 1123 (Brunetti, J., dissenting). "A key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential user. If the work is out of print and unavailable for purchase through normal channels, the user may have more justification for reproducing it." *Id.* (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 553 (1985) (citations omitted)).

231. *Id.*

232. *Id.* at 1123-24.

233. *Id.*

234. *Worldwide Church of God*, 227 F.3d at 1124. The judge also noted that even if the plaintiff had intended to publish the work subsequently, the evidence adduced at the district court showed that the future publication would be to provide a historical context of the work. Thus, even if the plaintiff published the work at some future date, its use—a teaching tool—would differ from that of the defendants—evangelical in nature. *Id.*

235. *Id.* at 1120-21.

right may seek an injunction. In granting that injunction, the court will be inhibiting the free exercise of religion. If that is the case, the court will then be forced to revisit the application of the constitutional issue that it took pains to avoid in *Wollersheim*.[236] The Ninth Circuit's decision in *Worldwide Church of God* may have raised as many questions as it answered.

C. Copyrights and the Establishment Clause

Although the aforementioned cases may have touched on Establishment Clause issues, the cases largely involved Free Exercise issues. In each case, the court limited the ability of the defendant to worship as he or she desired. The court was able to effectuate its order by issuing an injunction. Thus, the court was not really establishing a religion so much as it was limiting a defendant's religious exercise.

The Establishment Clause prohibits the governmental establishment of a religion. It is beyond the cavil of constitutional law that a religious organization may receive the same rights and privileges that a secular organization has. Thus, religious organizations may possess copyrights. As mentioned before, a religious organization may also own trade secrets, so long as that trade secret does not infringe upon another religious organization's free exercise.[237]

Nevertheless, the United States Court of Appeals for the District of Columbia has explicitly ruled that Congress does not possess the right to provide private copyright laws to religious organizations.[238] In 1971, Congress debated and passed a private bill that would delay the expiration of the copyright of all versions of Mary Baker Eddy's seminal work, *Science and Health*.[239]

Eddy's *Science and Health*, along with the Bible, serves as Christian Science's central theological reading.[240] Eddy constantly updated the work prior to her death in 1910, and she obtained copyrights for many editions of the book.[241] Notably, the last copyright that Eddy secured was in 1906, but prior to her death, she made more than 4,000 changes to the work.[242] Before Congress passed the private bill in 1971, all of Eddy's copyrights had expired except her 1906 copy-

236. *See supra* text accompanying notes 1632-69.

237. *See supra* text accompanying notes 96-97.

238. United Christian Scientists v. Christian Science Bd. of Dirs., 616 F. Supp. 476 (D.D.C. 1985).

239. Priv. L. No. 92-60, 85 Stat. 857 (1971). Congress has the constitutional right to create a private copyright or patent. *See, e.g.*, Radio Position Finding Corp. v. Bendix Corp., 205 F. Supp. 850 (D. Md. 1962), *aff'd*, 371 U.S. 577 (1963) (per curiam).

240. *United Christian Scientists*, 616 F. Supp. at 477.

241. *Id.*

242. *Id.*

right.[243] Private Law 92-60 granted to the trustees of Eddy's will the copyright to "all editions [of *Science and Health*] . . . in English and translation heretofore published, or hereafter published by or on behalf of said trustees, their successors or assigns, for a term of seventy-five years from the effective date of this Act or from the date of first publication, whichever is later."[244] Thus, in passing the law, Congress effectively expanded Eddy's copyright from 1906 until at least 2046, "and, arguably, subsequently published editions would each be protected for 75 years from their date of publication."[245]

Christian Scientists explained why this bill was necessary in a House subcommittee hearing. First, they told the congressional committee that the copyright was necessary because they feared that adherents who used an unofficial copy of Eddy's works might be confused.[246] "Only through use of the authentic edition of the textbook can there be any assurance to a user that the copy of this book which he has is adaptable to the religious purposes of this church and can be used for the study and practice of Christian Science."[247] Thus, the trustees of Eddy's estate, who had held the copyright, maintained that if an adherent used an unauthentic edition, they might inadvertently be misled.[248] The trustees also pointed out that even minor changes could seriously undermine the effectiveness of an edition of *Science and Health*. Thus, the Church of Christian Science viewed the renewal of the copyright as implicit to their free exercise of religion.[249] For this reason the trustees also reasoned that all prior copyrights of Eddy's

243. *Id.*

244. Priv. L. No. 92-60, 85 Stat. 857 (1971).

245. *United Christian Scientists*, 616 F.Supp. at 477.

246. *Hearings*, *supra* note 94, at 7.

247. *Id.* (statement of C. Ross Cunningham, Manager, Washington Office, Christian Science Committee on Publication). Interestingly, the subcommittee consisted of a priest, Father Robert F. Drinan (D-MA), and future D.C. Circuit Judge Abner J. Mikva (D-IL). Mikva also served on the D.C. Circuit when the court found the bill to be unconstitutional, but he was not on the panel that reached the decision.

248. *Id.* at 8. "Without this copyright protection there would be serious danger that the course of Christian Science church services and the basis of individual religious study by Christian Scientists would be seriously impaired. The result would be a definite limitation on the freedom of adherents of this denomination to practice their religion . . . . Without copyright protection there is no reason at all to doubt that such interests would attempt to capitalize on the situation. Piracy, plagiarism and adulteration would be commonplace, thereby disrupting for no valid reason the lives of a significant body of sincere religious citizens of this Nation and the world." *Id.* (statement of Cunningham).

249. *Id.* at 9, 13. "[I]t is absolutely essential to the free practice of their religious beliefs that Christian Scientists, as well as those of the general public who wish to learn of this religion, be certain that any copy of 'Science and Health' which they obtain be exactly the same as originally copyrighted by its author . . . ." 117 CONG. REC. S26822 (1971). Similarly, the Senate Report stated that "the purpose of seeking further copyright protection is not material gain, but to maintain the purity and integrity of the statement of the religious teaching and practice of Christian Science." *Hearings*, *supra* note 94, at 30.

works needed to be restored.[250] Otherwise, an individual could simply republish an older version of her work.[251]

The decision to pass this private law was far from unanimous. Several Senators spoke out against the legislation. Senator Javits, for example, stated that the legislation was itself unconstitutional.[252] He pointed out that the bill would allow the Christian Scientists to

> continue to receive all proceeds—now about $200,000 per year—from the sale of Mrs. Eddy's book. Furthermore, the bill may, to some extent, inhibit the formation of dissident groups within the Christian Science Church or could limit the public's right to enjoy great books in the public domain, because it will deprive anyone but the trustees of Mrs. Eddy's estate from publishing a revised version of [*Science and Health*].[253]

Senator Javits also identified several organizations that opposed the legislation, including the Bar of the City of New York.[254] Senator Hart also argued that the legislation was inappropriate.[255] He stated that the legislation created a monopoly on Eddy's ideas.[256] The result, he believed, undermined the First Amendment.[257] He proposed an alternative:

> These constitutional problems can be easily avoided—and with no adverse effect upon the Christian Science Church. An official, authorized version of the text could be established and denominated as such by the church to assure the exact replication of the original text, which the church deems essential to its members. This is a well-recognized practice in other religions with regard to their basic texts.[258]

The legislative hearings also suggest that several publishing houses would have published copies of Eddy's works had Congress not enacted the copyright extension.[259]

Congress passed the law in December 1971, and supporters of the

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250. *Hearings*, *supra* note 94, at 9.
251. *Id.*
252. 117 CONG. REC. S46070-74 (daily ed. Dec. 10, 1971) (statement of Sen. Javits).
253. *Id.* at S46073.
254. *Id.* at S46070-71.
255. 117 CONG. REC. S26822 (daily ed. July 22, 1971) (statement of Sen. Hart).
256. *Id.*
257. *Id.* at S26822-23.
258. *Id.* Congressman Drinan echoed this point in the subcommittee hearing. *Hearings*, *supra* note 94, at 22.
259. *Id.*

bill tried to allay any Establishment Clause concerns by arguing that:

> Certainly the grant of copyright on a religious book does not establish religion. If it did, all such copyrights would be void and it seems most unlikely that nearly 180 years would have been required to discover such invalidity. A grant of copyright to a religious book is not violative of the establishment clause.[260]

Supporters of the bill dodged questions as to whether the private copyright might stifle breakaway groups, thereby creating an Establishment Clause problem.[261]

Nevertheless, in 1985, the United Christian Scientists sought a declaratory judgment stating that this private law was unconstitutional.[262] The plaintiff argued that the bill violated both the Establishment Clause and the Free Exercise Clause.[263] The district court found that the defendant could not show that the private law had a secular purpose or that it did not inhibit religion.[264] Thus, it concluded that the law was unconstitutional.[265] The court also suggested that the private law would fail the third prong of the *Lemon* test—excessive entanglement.[266]

The D.C. Circuit opinion, in affirming the district court, also relied heavily on the *Lemon* test.[267] First, the court reasoned that "a grant of a copyright on a religious work poses no constitutional difficulty. Religious works are eligible for protection under general copyright laws, and for decades *Science and Health* was unproblematically the beneficiary of that security, as more than thirty editions and translations of the Bible currently are."[268] Nevertheless, in analyzing Private Law 92-60, the court took exception with the legislative history that demonstrated that Congress passed the law to maintain the "doctrinal purity" of *Science and Health*.[269] The court concluded that this legislation runs afoul of the Establishment Clause because it "lent the Church leadership the assistance vital to shaping the beliefs of lay worshipers and thereby involved itself in the task of inculcating religion."[270] The

260. *Hearings*, *supra* note 94, at 4 (statement of Rep. Edward Hutchinson).
261. *Id.* at 19-20.
262. *United Christian Scientists*, 616 F. Supp. at 476.
263. *Id.*
264. *Id.* at 479.
265. *Id.*
266. *Id.* at 480 ("While the law is unlikely to entail much in the way of administrative oversight, the same cannot be said with respect to further judicial engagement.") (footnote omitted).
267. United Christian Scientists v. Christian Science Bd. of Dirs., 829 F.2d 1152, 1162-71 (D.C. Cir. 1987).
268. *First Church of Christ*, 829 F.2d at 1159 (footnote omitted).
269. *Id.* at 1163.
270. *Id.* at 1166 (footnote omitted).

court pointed out that Congress is "barred from assuming a position in the debate by attempting to establish religious truth by fiat."[271] By virtue of the legislative history, the court concluded that this legislation "flies in the face of this tradition and transgresses [First Amendment] principles of separation of church and state" and as a result, the legislation serves as an impermissible prior restraint.[272]

This decision seems more tenuous in light of the Supreme Court's recent Establishment Clause jurisprudence.[273] Since the D.C. Circuit's opinion in *United Christian Scientists*, the Supreme Court has narrowed the scope of the Establishment Clause.[274] One of the Court's most recent decisions, *Rosenberger v. Rector & Visitors of University of Virginia*, suggests that the D.C. Circuit's holding may no longer be good law.[275] It is important to note that *Rosenberger* states that the state may not deny a religious organization access to the same forum that other organizations have access to.[276] Admittedly, *Rosenberger* addressed the rights of student organizations to receive funding from a state university, and its decision regarding the Establishment Clause was tied to viewpoint discrimination. Nevertheless, *Rosenberger* does provide religious organizations with more rights than they had before. The ability to procure a private copyright is open to any individual or organization. Accordingly, this right may not be unconstitutional if applied to the private copyright of religious organizations in an even-handed manner.

Furthermore, in *United Christian Scientists*, the court explained:

> In interceding on behalf of First Church, Congress did more than grant a copyright, even one with the stupendous features accorded by the special law. After considering the content of *Science and Health* and the claim of First Church upon it, it

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271. *Id.* at 1167.

272. *Id.* at 1168. The court also pointed out that the legislation violates the second prong of the *Lemon* test. The court noted that the legislation's effects are more than incidental. Because the legislation limits the ability of dissident religious groups from using Eddy's works and serves a prior restraint, it inhibits religion. Therefore, the court concluded that it violates the First Amendment. *First Church of Christ*, 829 F.2d at 1169-71.

273. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

274. *See, e.g.*, *Agostini*, 521 U.S. 203 (holding that a federally funded program that provides remedial education to students on a neutral basis is not invalid under the Establishment Clause); *Rosenberger*, 515 U.S. 819 (noting that a state-run university fully complies with the Establishment Clause when it makes direct payments to a religious magazine, so long as those payments are made to all organizations in a neutral manner); *Lamb's Chapel*, 508 U.S. 384 (New York law that authorizes use of school facilities may not exclude religious organizations from using these facilities).

275. *See generally* Rosenberger v. Plector, 515 U.S. 819 (1995).

276. *Id.* at 845.

> awarded the Church the extended copyright for the stated purpose of ensuring that all published versions would conform to the Church's religious needs, that all aspects of central church doctrine would remain pure, and that the public would be spared confusion over the authentic version of *Science and Health*. Congress thus unequivocally and unqualifiedly endorsed First Church as first interpreter and guardian of that work. In so doing it approved, both literally and figuratively, the Church as possessor of special rights in the text of *Science and Health* as against all others—Christian Science dissidents, historians, and the public at large.[277]

The court's language would thus appear to criticize all copyrights owned by religious organizations, not just private copyright laws owned by religious organizations, despite the fact that the court had previously stated the opposite. It seems rather arbitrary to hold that a seventy-five year copyright extension is invalid because it is a departure from the normal practice, when the initial copyright is a permissible practice. Furthermore, Congress recently enacted a new copyright extension law that effectively permits some authors to receive a 100-year copyright on their work.[278] The law now permits authors of works for hire to receive a copyright for seventy years, plus the life of the author.[279] In light of this legislation which practically allows the grandchildren of authors to receive royalties from a copyrighted work, the D.C. Circuit's statement that a seventy-five year copyright extension is frivolous seems incorrect. Thus, in light of *Rosenberger* and Congress's recent legislative enactment, it appears that the grant of a private copyright to a religious organization would not violate the Establishment Clause. Nonetheless, a case-by-case analysis would need to be done to determine if the legislation violated the Free Exercise Clause. If after an analysis of the legislative history or other surrounding circumstance a party can show that the law, even though facially neutral, results in "covert suppression of particular religious beliefs,"[280] the statute would violate the Free Exercise Clause.

D. Conclusion

The grant of a copyright to the author of a divine work faces several constitutional barriers. First, the author must demonstrate that the

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277. *First Church of Christ*, 829 F.2d at 1170 (footnote omitted).

278. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

279. *Id.* at 2828.

280. Church of Lukumi Babalu Aye v. City of Hialeah, Inc, 508 U.S. 520, 534 (1993) (citing Bowen v. Roy, 476 U.S. 693, 706 (1986)).

author herself wrote the work. If the author claims that the work is the result of word-for-word divine inspiration, she may in essence be seeking a copyright on unprotectable religious ideas. Furthermore, until the Supreme Court's decision in *Smith*, the grant of a copyright to a religious organization would not likely pass the compelling interest test. Now, in light of the Supreme Court's holding in *Smith*, the Copyright Act clearly does not violate the Free Exercise Clause because it is a neutral law that was not passed with any invidious motives. Assuming a copyright for religious material is obtained, however, religious free exercise as a fair use will not prove to be a viable defense to suits for unauthorized use if courts follow the Ninth Circuit's decision in *Worldwide Church of God*. Further, any constitutional decision must also address whether RFRA applies to the Copyright Act.

With regard to the Establishment Clause, it appears that short of a perpetual copyright, a religious organization may obtain additional copyright rights for any of its works through a private copyright law. Congress' enactment of a private copyright law would seemingly not violate the Establishment Clause in light of the Supreme Court's decision in *Rosenberger*.

III. TRADE NAMES, TRADEMARKS, AND THE ESTABLISHMENT CLAUSE

The trade name dispute has arisen in a variety of ecclesiastical contexts.[281] The prototypical dispute occurs when a small group of parishioners breaks away from its mother church. In doing so, they hope to use part of their mother church's name in the name of their new church. Out of a legitimate concern of confusion, or perhaps out of spite, the members of the mother church attempt to enjoin the breakaway church from using its name. One could imagine if a court grants an injunction, it may run afoul of the religion clauses of the First

281. Trademarks apply only to federally licensed names. *See* 15 U.S.C. §§ 1501-1527 (1994 & Supp. IV 1998). Trademarks are used for goods and services, while trade names are primarily used by business entities. Thus, a trade name may include the real name of an entity operating a business, including corporate or personal names. Prior to the Lanham Act, "trade name" was also used to denote descriptive marks and other distinctive designations that had through use acquired significance as indications of the source or sponsorship of goods or services. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 12 cmt. a (1995). Now, Congress defines a trade name as "any name used by a person to identify his or her business or vocation." 15 U.S.C. § 1127 (1994). For simplicity sake, we will call this dispute a trade name dispute even though some of the more recent lawsuits in this area involve trademarks. *See, e.g.*, Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1249-50 (9th Cir. 1999); Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902 (9th Cir. 1995); General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228 (9th Cir. 1989); Church of Scientology Int'l v. Elmira Mission of Church of Scientology, 794 F.2d 38 (2d Cir. 1986); Jews for Jesus v. Brodsky, 993 F. Supp. 282 (D.N.J.), *aff'd*, 159 F.3d 1351 (3d Cir. 1998).

Amendment. Furthermore, a court might also intertwine itself in a doctrinal dispute among church members.

The absence of First Amendment cases in the trademark and trade name area of the law is due primarily to the fact that most reported disputes in this area were litigated in state court prior to the Supreme Court's application of the First Amendment to the states.[282] However, even before the First Amendment was applied to the states, some state courts were mindful of First Amendment concerns.[283] Nevertheless, these state courts also recognized that trade names are property. As one court explained: "Nothing in the Constitution prohibits a religious organization from owning property—and a trademark is a property right—or prohibits the government from protecting that property from unlawful appropriation by others."[284]

The analysis in this Article will show that religious organizations may get trade name and trademark protection for their names so long as their names are not generic. Even if the words in name are individually generic, the composite name may not be generic if it indicates a source producer, such as the sect behind a generic church name. Additionally, even if the composite name is generic, it can lose its generic identification by attaining a secondary meaning, such that a church name over time can take on the connotation of a specific sect affiliation. Where the use of the name by another religious group will not likely confuse members of the public, a court will also allow other such religious organizations the right to use the name.

In deciding whether to protect a religious mark, a court must perform a constitutional analysis. As this Article will show, there is little likelihood that the grant of trade name protection violates either the Establishment Clause or the Free Exercise Clause. Still, a court must be careful not to intertwine itself in an interchurch dispute.

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282. *See generally* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

283. *See, e.g.*, Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church, 245 P.2d 481, 495 (Cal. 1952) ("[A]nd although there are property and contract aspects in this case, the provision here is too broad and does impinge upon freedom of speech especially when we consider that religious controversies are also concerned."); Church of God v. Church of God, 50 A.2d 357, 361 (Pa. 1947) ("It should be realized that differences of religious opinion are the inevitable result of moral, spiritual, and social growth, and may not be suppressed if conscience and intellect alike are not to be stunted.").

284. National Bd. of YWCA v. YWCA of Charleston, 335 F. Supp. 615, 625 (D.S.C. 1971).

A. Application of Trademark Law to Religious Organizations

In order to develop an understanding of how trademark and trade name law is applied to religious organizations, it is necessary to examine how the law is applied more generally to not-for-profit organizations.

1. Application of Trade Names to Not-for-Profit Organizations

Although religious organizations and benevolent societies may have trade names, the purpose of protection of trade names is seemingly inapplicable to nonprofit organizations.[285] Trademark protection is intended to enhance commerce.[286] Nonetheless, "[n]onprofit enterprises such as charitable, educational, governmental, fraternal, and religious organizations have analogous interests in protecting their good will, and the designations adopted by such enterprises to identify their goods or services are similarly eligible for protection as trademarks."[287] Not surprisingly, most courts have found that the threat of confusion between two nonprofit organizations is sufficient grounds for denying the newer group the right to use a similar name, despite the fact the parties have no economic or trade interests.

For example, in *Society of the War of 1812 v. Society of the War of 1812 in New York*,[288] the court enjoined the defendant from using "Society of the War of 1812" in its name. The court found that even though the plaintiff organization was "a military society" while the defendant organization was a civic society that had no military organization or uniform, the likelihood of confusion was too great.[289] In granting the injunction, the court found it could enjoin the use of the

285. As proof of this contention, one need look no further than the text of the Trademark law. The Lanham Act defines a trademark as any "word, name, symbol, or device, or any combination thereof - (1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127 (1994).

286. *See id.*

287. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. c (1995). *See, e.g.*, Missouri Fed'n of Blind v. National Fed'n of Blind, Inc., 505 S.W.2d 1 (Mo. Ct. App. 1973); Anti-Defamation League of B'Nai B'rith v. Arab Anti-Defamation League, 340 N.Y.S.2d 532 (N.Y. 1972). The Restatement recognizes that there is a public interest in protecting nonprofit organizations, including religious organizations, in order to prevent confusion. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 12 cmt. a (1995). The Restatement also explains that "[u]nauthorized use of a person's identity in solicitations for contributions or memberships by nonprofit entities such as charitable, educational, governmental, fraternal, and religious organizations also constitutes a use for purposes of trade." *Id.* § 47 cmt. a (1995).

288. 62 N.Y.S. 355 (N.Y. App. Div. 1900).

289. *Society of the War of 1812*, 62 N.Y.S. at 358.

name even if there were no commercial interference.[290]

> The right to injunctive relief depends upon the use by one party of a name or corporate designation of another so as to interfere with its business, whatever it may be,—not necessarily a commercial or trading business. This results from the fact that many corporations are created [and] have nothing to do with trade or commerce.[291]

Thus, the *Society of the War of 1812* court found that the likelihood of confusion was the appropriate standard for assessing a group's right to use a name, regardless of whether the organization was commercial or not-for-profit.[292] The New York court issued a similar ruling when it held that the "Salvation Army" had superior rights to its name over the "American Salvation Army." As a result, it enjoined the American Salvation Army from using the name.[293]

This inherent tension in applying common law trade-name restrictions, intended to protect commercial endeavors to benevolent societies, was readily apparent in two decisions of the Supreme Court of Illinois. In *International Committee Young Women's Christian Ass'ns v. Young Women's Christian Ass'n of Chicago*,[294] the International Committee sued a group of members of the YWCA who had broken away from the original organization for its failure to apply an "evangelical test" as a prerequisite for membership. The court found that the break-away group benefited from the confusion surrounding the two names.[295] Two members of the court dissented. Given the fact that both groups' names were generic, they argued the defendant should not be "perpetually enjoined from using those words in its name without proof of its having done anything except to carry on the charitable work for which it was incorporated."[296]

In *People ex rel. Felter v. Rose*,[297] the court addressed a nearly identical issue: is the name "National Liberty Legion" too similar to

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290. *Id.*
291. *Id.*
292. *Id.*
293. Salvation Army in United States v. American Salvation Army, 120 N.Y.S. 471 (N.Y. App. Div. 1909). In this case, the court noted that the defendant made every effort to emulate plaintiff. *American Salvation Army*, 120 N.Y.S. at 474. The court cited, as an example, that the American Salvation Army mimicked its international predecessor by creating a newspaper called the "American War Cry." *Id.* The Salvation Army had been using the name "War Cry" for its newspaper. In issuing its injunction, the court enjoined the defendant from using that as a newspaper name. *Id.* at 476.
294. 62 N.E. 551 (Ill. 1901).
295. *International Comm. YWCA*, 62 N.E. at 553.
296. *Id.* at 554 (Wilken, C.J., dissenting).
297. 80 N.E. 293, 294 (Ill. 1907).

"National Liberty League"? In *Felter*, the newly formed League had been denied its corporate charter because the Secretary of State felt that its name was too similar to the Legion's.[298] The plaintiff sought a writ of mandamus to force the Secretary of State to provide him with the name. On appeal, the Supreme Court of Illinois refused to grant the writ because of the similarity.[299] This time, three members of the court dissented. They again argued that the controlling statutory framework did not apply to not-for-profit corporations such as the ones involved in this case.[300] As a result, they would have granted the writ of mandamus, thereby ordering the Secretary of State to let the petitioner use the similar name.[301]

In contrast to *Society of the War of 1812* and *International Committee Young Women's Christian Ass'ns* decisions, the view that commercial trade names did not apply to not-for-profit organizations carried the day in 1899 when the Supreme Court of New York refused to enjoin the use of a benevolent society's name. In *Colonial Dames of America v. Colonial Dames of State of New York*, [302] there were three organizations with similar names: the Colonial Dames of America, the Colonial Dames of the State of New York, and the National Society of the Colonial Dames of America.[303] Although each group formed independently of one another and was run autonomously, all three groups were formed for the purpose of "perpetuating the memory of the men and events of those times."[304] The Colonial Dames of America filed suit to enjoin the other two groups from using the name. The plaintiff reasoned that the names were so similar that patrons would likely be confused. But, the court specifically found that there was

> no proof that any one has ever joined either of them in mistake for the plaintiff, or has been otherwise deceived or seriously confused as to the identity of the three societies, and, from the nature of the case, it seems hardly possible that any such mistakes can ever accrue, to an important extent.[305]

Moreover, in reaching its decision, the court heavily relied on the fact that defendant was a not-for-profit organization. "Reasons which may be all-sufficient to induce a court to restrain a defendant from making money that a plaintiff is entitled to make may be wholly inadequate to

298. *Felter*, 80 N.E. at 294.
299. *Id.*
300. *Id.* at 295 (Wilken, C.J., dissenting).
301. *Id.*
302. 60 N.Y.S. 302 (N.Y. 1899).
303. *Colonial Dames of Am.*, 60 N.Y.S. at 302.
304. *Id.*
305. *Id.*

warrant such interference where it is a question of doing good deeds."[306] Thus, in denying plaintiff's request for injunctive relief, the court stated that "it is more important that philanthropic work should be done than that any particular person should have the gratification of doing it."[307]

Likewise, in *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*,[308] a state court also ruled that trade name statutes were inapplicable to not-for-profit organizations.[309] That case involved a breakaway organization called the Improved Order Knights of Pythias. Both orders were fraternal organizations, but the "Improved" Order differed because its rituals could be printed in German.[310] The plaintiff in this case sought to enjoin the defendant from using its name.[311] As in the *Colonial Dames of America* case, the plaintiff argued that it had the exclusive right to this name.[312] The court disagreed. First, the court explained that "[n]o case, however, is cited holding that incorporation gives an exclusive right to a name already in use . . . by an existing voluntary society."[313] Rather, the court explained that the new order consists of Knights of Pythias, and it "carries out a policy which the Knights of Pythias formerly carried out and abandoned."[314] The court compared the case pendente lite with the issues surrounding ecclesiastical trade names:

> Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. So we have the Order of Foresters of America, formerly the Ancient Order of Foresters of America; the Canadian Order of Foresters; the Independent Order of Foresters,—all of which are, as I understand, offshoots of the Ancient Order of Foresters of England. No one has ever questioned the appropriateness of using the parent name as a part of the name of a new society formed under these circumstances, so far as I can learn. To my mind, it is clear, therefore, that defendants, in naming their order, not only

306. *Id.* at 304.
307. *Id.*
308. 71 N.W. 470 (Mich. 1897).
309. *Supreme Lodge Knights of Pythias*, 71 N.W. at 472.
310. *Id.* at 470.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Supreme Lodge Knights of Pythias*, 71 N.W. at 471.

> could, but were almost bound, in order to properly describe it, to make use of the words "Knights of Pythias."[315]

The court contrasted this case with a case involving two companies with commercial interests. The court explained that the owner of the name "Le Page's Liquid Glue" has the exclusive right to use the name "Le Page's Improved Liquid Glue."[316] As a result, a competitor cannot market a product called "Le Page's Improved Liquid Glue."[317] The court reasoned that the word "improved" signifies that the proprietor made the product better.[318]

In contrast, the court stated that by their very nature, when fraternal organizations are involved, it is clear that even a slight name change will signal that the two organizations are distinct:

> Every one who knows enough about secret societies to be qualified to join them knows that a different name of a society means a different society. He would know that the Improved Order Knights of Pythias was not a variety of the Order Knights of Pythias. The difference of names would indicate to him possibly a claim on the part of defendants that theirs was the better order, of which he must for himself determine; but certainly that it was a different order.[319]

Another court hesitated in granting the same bundle of rights to churches as it did to businesses in *Church of God v. Tomlinson Church of God*.[320] The Supreme Court of Tennessee explained that trade names "are thought of only in connection with commercial activities, the buying and selling of articles of merchandise wherein such articles have a special value due to the use of a trademark" and that it is

> very obvious that the law which gives protection to a tradename has no application to the instant case since neither the complainant nor the defendant is dealing in any article of merchandise that is the subject of barter and sale. However, the name, "Church of God," has a certain value as a tradename as where a rival organization uses it to the financial disadvantage of one who is entitled to its exclusive use.[321]

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315. *Id.*
316. *Id.* at 472 (citing Russia Cement Co. v. Le Page, 17 N.E. 304 (Mass. 1888)).
317. *Id.*
318. *See id.*
319. *Supreme Lodge Knights of Pythias*, 71 N.W. at 472.
320. 247 S.W.2d 63, 68 (Tenn. 1952).
321. *Church of God*, 247 S.W.2d at 68-69.

Colonial Dames of America, *Supreme Lodge Knights of Pythias*, and *Church of God* notwithstanding, courts have generally recognized that religious organizations are entitled to some sort of trade name protection.[322]

In summary, courts appear to be more permissive toward a new group with a similar name, if the original group does not solicit money and functions primarily for the benefit of its members or for purely nonprofit purposes. In contrast, groups that are closer to for-profit entities, such as those who solicit money, are more likely to get trade name protections from the courts. The rationale behind this policy is that the groups, which function solely for the purpose of their members, will not likely confuse the public. To the extent that they do confuse members of the public, the confusion will be minimal and will not cause financial harm.

2. *Trade Name Law and Religious Organizations*

There are two analyses that a court must make in analyzing the trade name rights of a religious organization. First, a court needs to determine if the existing name that the plaintiff seeks to enjoin the use of is generic. That is to say, does the church name contain words that are common words merely describing a set of beliefs? Second, a court must decide if the new name the defendant organization seeks to use will inadvertently mislead the public into believing that the defendant organization is affiliated with the plaintiff's organization.

a. Genericness of the Name

To determine if one religious organization can enjoin another religious organization from using a specific name, a court must examine the terms that the first organization uses and then determine if those terms are generic or have a secondary meaning. As a result, courts struggle to apply commercial law regarding generic names in a noncommercial context.

i. The Test for Genericness and Secondary Meaning in a Commercial Context

The test for genericness in a commercial context was initially described by Judge Learned Hand as, "What do the buyers understand by the word for whose use the parties are contending? If they understand

322. *See, e.g.*, National Board of YWCA v. YWCA of Charleston, 335 F. Supp. 615, 625 (D.S.C. 1971).

by it only the kind of goods sold, then, I take it, it makes no difference whatever what efforts the plaintiff has made to get them to understand more."[323] Thus, a name is generic if its use merely connotes a particular genus or class.

A name, even a name consisting entirely of generic words, may develop a secondary meaning if "the primary significance of the [generic] term in the minds of the consuming public is not the [product's name] but the producer."[324] A term is not generic if it has a secondary meaning.

Commentators note that the genericness test is difficult to apply because it "poses a question of fact in each case, and the trier of fact has the formidable task of ascertaining on the evidence submitted the meaning of the word among an indeterminate number of persons, perhaps millions."[325] In determining if a word is generic, courts typically use a variety of evidence. Courts may take judicial notice of the meaning of a word, as defined in a dictionary.[326] Also, the absence of such a word from the dictionary may provide additional proof that the term is not generic.[327] Of course, the appearance in a dictionary is not conclusive proof that a word is generic: "Merely because a word appears in a dictionary does not necessarily prove that the average person is familiar with its meaning."[328] Expert testimony is also germane as to whether or not a trademark is generic.[329] Other courts have relied on consumer survey evidence to determine what the purchasing public ascertains the meaning of the word to be.[330]

In 1984, Congress redefined the appropriate audience in determin-

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323. Bayer Co. v. United Drug Co., 272 F. 505, 509 (S.D.N.Y. 1921).

324. Jews for Jesus v. Brodsky, 993 F. Supp. 282, 298 (D.N.J.) (citation omitted), *aff'd*, 159 F.3d 1351 (3d Cir. 1998).

325. 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.02[1], at 2-21 (Supp. June 2000).

326. *See, e.g.*, Nix v. Hedden, 149 U.S. 304, 305-06 (1893); Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 101 (2d Cir. 1989); B.V.D. Licensing Corp. v. Body Action Design, Inc., 846 F.2d 727, 728 (Fed. Cir. 1988) ("practically a household word synonymous, primarily, with underwear for men"); Chicago Reader, Inc. v. Metro College Publ'g Co., 711 F.2d 801, 804 (7th Cir. 1983). Gilson notes that some dictionaries now simply define words as trademarks. He cites, for example, the AMERICAN HERITAGE DICTIONARY as defining "[l]ucite [as a] trademark for a transparent, thermoplastic, acrylic resin." 1 GILSON, *supra* note 325, § 2.02[2], at 2-33.

327. WSM, Inc. v. Hilton, 724 F.2d 1320, 1327-28 (8th Cir. 1984); Stix Prods., Inc. v. United Merchs. & Mfrs., Inc., 295 F. Supp. 479, 486-87 (S.D.N.Y. 1968); Hazeltine Corp. v. United States, 170 F. Supp. 615, 621 (Ct. Cl. 1959).

328. Frederick Gash, Inc. v. Mayo Clinic, 461 F.2d 1395, 1401 (C.C.P.A. 1972) (Rosenstein, J., dissenting).

329. *See, e.g.*, Trump v. Caesar's World, Inc., 645 F. Supp. 1015, 1019-20 (D.N.J. 1986), *aff'd*, 2 U.S.P.Q.2d (BNA) 1806 (3d Cir. 1987); Eastern Air Lines, Inc. v. New York Air Lines, Inc., 559 F. Supp. 1270, 1274-75 (S.D.N.Y. 1983).

330. American Thermos Prods. Co. v. Aladdin Indus., 207 F. Supp. 9 (D. Conn. 1962), *aff'd*, 321 F.2d 577 (2d Cir. 1963), *vacated*, 418 F.2d 31 (2d Cir. 1969).

ing if a term is "generic."[331] In passing this legislation, Congress codified the law to state that "[t]he primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used."[332] The statute also provides that "[a] registered mark shall not be deemed to be the generic name of goods or services solely because such mark is also used as a name of or to identify a unique product or service."[333]

ii. Application of the Genericness Test to Religious Organizations

The text of Judge Hand's quote above would suggest that religious organizations' names, like other names and marks that conjure up the image of a religious source or "producer," must receive broad protections under the law.[334] Courts, however, have been hesitant to recognize comprehensive protection for religious-oriented names.[335] Indeed, several courts have adopted the position that a religious name is per se generic.[336] As one court stated, religious names are generic because the name merely connotes:

> First, the system of religion which it teaches; and second, that it teaches that system through the medium of organizations known as churches. It surely is not in a position to successfully claim a monopoly of teaching this form of religious faith by means of organizations known by the generic names of churches.[337]

In *McDaniel v. Mirza Ahmad Sohrab*,[338] the plaintiffs sought to enjoin the defendant from using "Baha" in any of its religious materials because plaintiff claimed to be the authorized representative for the

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331. 15 U.S.C. §§ 1064(3), 1127 (1994).
332. 15 U.S.C § 1064(3).
333. *Id.*
334. *See supra* text accompanying note 323.
335. As an aside, we note that a court must define the relevant public. Magic Wand, Inc. v. RDB, Inc., 940 F.2d 638, 640 (Fed. Cir. 1991). Here, the relevant public would appear to be members of the religious organization, not the public at large, which would include anyone that might come into contact with the organization. Stocker v. General Conference Corp. of Seventh-Day Adventists, 39 U.S.P.Q.2d (BNA) 1385, 1394 (T.T.A.B. 1996).
336. *See, e.g.*, Christian Science Bd. of Dirs. v. Evans, 520 A.2d 1347 (N.J. 1987); New Thought Church v. Chapin, 144 N.Y.S. 1026 (N.Y. App. Div. 1913).
337. *Chapin*, 144 N.Y.S. at 1028.
338. 27 N.Y.S.2d 525, *aff'd*, 29 N.Y.S.2d 509 (N.Y. App. Div. 1941).

Baha religion.[339] The court denied the plaintiffs' request for injunctive relief, explaining:

> The plaintiffs have no right to a monopoly of the name of a religion. The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities. No facts are alleged in the complaint to indicate that the defendants have been guilty of any act intended or calculated to deceive the public into believing that . . . [they are] affiliated with . . . the plaintiffs.[340]

In *Christian Science Board of Directors of First Church of Christ, Scientist v. Evans*,[341] the most thorough case on the matter, the court reiterated the point made above.[342] This case involved a breakaway church that had sought to use the name "Independent Christian Science Church," and "Independent Christian Science Reading Room." The court held for the defendants with regard to the name of their church.[343] It wrote that "[p]laintiffs simply cannot appropriate, from the public domain, the common name of a religion and somehow gain an exclusive right to its use and the right to prevent others from using it."[344] In essence, the court's position was that the names of religious organizations are, by definition, generic. In this litigation, arising in the context of Christian Science, the court emphasized that even though the mother church had used the words "Christian Science" exclusively, the words were still generic.[345] "[T]he absence of other groups using the name of the religion in the names of their churches does not render the right to use of the name the exclusive property" of the mother church.[346] "Exclusive use 'cannot take the common descriptive [i.e., generic] name of an article out of the public domain and give the temporarily exclusive user of it exclusive rights to it, no matter how

339. *McDaniel*, 27 N.Y.S.2d at 526.
340. *Id.* at 527.
341. 520 A.2d 1347 (N.J. 1987).
342. *Evans*, 520 A.2d at 1352-53.
343. *Id.* at 1349.
344. *Id.* at 1352. The court analogized this situation to the situation in *Primal Feeling Ctr., Inc. v. Janov*, 201 U.S.P.Q. (BNA) 44 (T.T.A.B. 1978). In that case, the Board found that the term "primal therapy" was a common descriptive name that describes a separate type of psychotherapy. *Janov*, 201 U.S.P.Q. (BNA) at 57. The panel noted that an alternative name for the product did not exist. *Id.* Hence, the panel concluded that the defendant could not trademark "primal therapy" in using it to describe his own therapy. *Id.* The *Janov* case is particularly relevant because the test used,—does an alternative name exist—is applicable to the context of this Article.
345. *Evans*, 520 A.2d at 1353.
346. *Id.* (citing J. Kohnstram Ltd. v. Louis Marx & Co., 280 F.2d 437, 440 (C.C.P.A. 1960)).

much money or effort it pours into promoting the sale of the merchandise.'"[347] On the other hand, the court did not disturb the lower court's decision regarding the use of the term "Reading Room."[348]

Similarly in *Oklahoma District Council of Assemblies of God of State of Oklahoma Inc. v. New Hope Assembly of God Church of Norman, Oklahoma, Inc.*,[349] the Supreme Court of Oklahoma stated that the term "Assembly of God" did not necessarily denote affiliation with Oklahoma District Council of the Assemblies of God.[350] Quoting the district court, the state supreme court noted that

> taking judicial notice of the correct usage of grammar, "Assemblies of God" is found to be a correct denomination of a group constituting more than one "Assembly of God." Also, the trial court determined that an obvious qualification of the name, such as "Holiness Assembly of God", "Southern Assembly of God" or the like might constitute a different situation not posed by this defendant (New Hope) whose name indicates the "Assembly of God" church in the New Hope community of the city of Norman, Oklahoma.[351]

Other judges, however, have held that religious names may be source indicative, and therefore entitled to trademark protection.[352] In *Evans*, a dissenting Justice Garibaldi simply applied Judge Hand's commercial context test, which also states that a "term may be generic when applied to one product and descriptive, suggestive, or arbitrary when applied to another product."[353] Justice Garibaldi explained that because the evidence showed that the term "Christian Science" signi-

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347. *Id.*

348. The intermediate level court premised its decision to enjoin the use of the term "Christian Science Reading Room" on the fact that "Reading Room" had become synonymous with the plaintiff. To permit defendant to use a nearly identical name would cause the type of confusion referred to in the cases. Use of the generic term "Christian Science" in the name of another church espousing that religion renders the term purely generic. However, use of the term "Christian Science" in connection with a "reading room" renders the term merely descriptive that, if it has acquired a secondary meaning, becomes a valid trade name. Defendant undoubtedly recognized this in its offer of judgment in which it agreed to be restrained from using the following names or designations: (a) "Christian Science Reading Room" (b) "Independent Christian Science Reading Room," or (c) "[a]ny variation of the aforesaid names or designations using the words 'Reading Room.'" Christian Science Bd. of Dirs. v. Evans, 488 A.2d 1054, 1060 (N.J. Super. Ct. App. Div. 1985).

349. 597 P.2d 1211 (Okla. 1979).

350. *New Hope*, 597 P.2d at 1215.

351. *Id.*

352. *See, e.g.*, *Evans*, 520 A.2d at 1357-64 (Garibaldi, J., dissenting).

353. *Id.* at 1360 (Garibaldi, J., dissenting). Justice Garibaldi quotes *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 n.6 (2d Cir. 1976), which provides the following illustration: "'Ivory' would be generic when used to describe a product made from the tusks of elephants but arbitrary as applied to soap."

fied an affiliation with the mother church, so "[t]he fact that 'Christian Science Church' is not the 'official' name of the Mother Church has no effect on whether the term is protected. Unofficial names are protected if their primary purpose is source-denoting."[354] Because Justice Garibaldi believed that the name "Christian Science" had become a sign of affiliation with the mother church, he would have enjoined defendants from using it.

Justice Garibaldi's view is not unique. In *Jandron v. Zuendel*,[355] a federal district court faced with the same issue found that "'Christian Science Church' has one meaning, i.e., that it is a bona fide church of the Christian Science denomination related to the Mother Church."[356] The court enjoined defendant from naming his church "Third Church of Christ Scientist" because it was too close to plaintiff's prototypical names such as "First Church of Christ Scientist, in Boston, Massachusetts."[357]

Similarly, in *Brodsky*, the court addressed whether a critic of Jews for Jesus could register the Internet domain names "jewsforjesus.org" and "jews-for-jesus.com."[358] In this case, the plaintiff had registered the domain name "jews-for-jesus.org" and sought to enjoin the defendant, who had registered the two other names. The defendant was a vociferous critic of the organization and used the domain names to send possible members to his site, which criticized the plaintiff's organization. The plaintiff sought to enjoin the defendant from using its federally registered mark "Jews f✡r Jesus" and its common law service mark "Jews for Jesus."[359]

In holding for the plaintiff, the court first reasoned that the composite term "Jews for Jesus" was initially generic. But the court also recognized that the term had adopted a secondary meaning because "Jews for Jesus" signified the name of the organization.[360] The court further reasoned that "although the Plaintiff Organization sometimes

354. *Id.* at 1361-62 (citing Volkswagenwerk, AG v. Smith, 471 F. Supp. 385 (D.N.M. 1979) (The registered marks "Bug," "Beetle," and "VW" were protectible marks even though the "official" name of plaintiff's car was Volkswagen.); Metropolitan Opera Ass'n v. Metropolitan Artists, Inc., 212 N.Y.S.2d 435 (N.Y. 1961) (The term "The Met" was protectible even though the official name of plaintiff organization was "Metropolitan Opera Association.")).

355. 139 F. Supp. 887 (N.D. Ohio 1955).

356. *Jandron*, 139 F. Supp. at 889.

357. *Id.* at 887-89.

358. Jews for Jesus v. Brodsky, 993 F. Supp. 282 (D.N.J.), *aff'd*, 159 F.3d 1351 (3d Cir. 1998).

359. *Brodsky*, 993 F. Supp. at 287.

360. *Id.* at 298. The court explained that the term "Jews for Jesus" did not monopolize the description of a group of Jews who believed that Jesus was the Messiah. The court pointed out that individuals who espoused this belief had a variety of names from which to choose such as "Messianic Jews," "Hebrew Christians," "Jews for Christ," or "Jews for Christianity." *Id.* at 297.

refers to its members as 'Jews' who are 'for Jesus,' during the past twenty-four years the Plaintiff Organization has consistently used the phrase 'Jews for Jesus' to refer to the organization itself."[361] The court contrasted the facts in this case with *Blinded Veterans Ass'n v. Blinded American. Veterans Foundation*,[362] where the court found that the term "Blinded Veterans" was generic "because the plaintiff organization repeatedly used that term to denote formerly sighted soldiers, not the organization itself."[363] Since the court concluded that the term "Jews for Jesus" had a secondary meaning, the court found that the term "Jews for Jesus" was entitled to protection as a common law service mark, and it enjoined the defendant from using the Internet domain names that it registered.[364]

Another case which found that religious names can attain a secondary meaning is *National Board of Young Women's Christian Ass'n v. Young Women's Christian Ass'n of Charleston*.[365] In that case, the court re-visited the issue of whether or not YWCA was a valid trade name. The court found the words "young," "women's," "Christian," and "association" are publici juris and cannot be individually appropriated for monopolistic use.[366] However, the court indicated that these generic words, taken together over time, could garner a secondary meaning and thereby be protectable:

> "Young," "Women's," "Christian," and "Association," as a commune of words does not suggest the product-certain services provided by that organization. Therefore, whatever secondary meaning that has attached springs not from the words themselves but from an identification of those words with a history of services provided. Therefore, to assert that these words in commune are *incapable* of ever acquiring secondary meaning is to ignore the clear import and definition of secondary meaning itself.[367]

Not only do courts concern themselves with actual order of the words, courts have also examined the context in which the words are used. *In General Conference Corp. v. Seventh-Day Adventist Congre-*

361. *Id.* at 297.
362. 872 F.2d 1035 (D.C. Cir. 1989).
363. *Brodsky*, 993 F. Supp. at 297 (citing *Blinded Veterans Ass'n*, 872 F.2d at 1041).
364. *Id.* at 313.
365. 335 F. Supp. 615 (D.S.C. 1971); *see also* National Bd. of YMCAs v. Flint YMCA, 764 F.2d 199, 201-03 (6th Cir. 1985) (Kennedy, J., dissenting) (arguing that confusion would result from two separate organizations having similar names).
366. *National Bd. of YWCA*, 335 F. Supp. at 623-24.
367. *Id.*

gational Church,[368] the court held the term "Seventh Day Adventist" could be a generic term when applied to the name of a church, because Seventh-day Adventist describes "a system or set of Bible based christian beliefs, doctines [sic], and standards. One, therefore, is not necessarily a Seventh-day Adventist because of what organization he may be affiliated with, but rather, he is a Seventh-day Adventist because of what he believes."[369]

However, in *Stocker v. General Conference Corp.*,[370] the Trial Trademark and Appeal Board ("T.T.A.B.") addressed the rights that the General Conference had to use the term "Seventh Day Adventist" in its literature. The T.T.A.B. found that in this context, "Seventh Day Adventist" is a viable trademark. It explained that the General Conference "is engaged in wide-ranging activities, including its administration of churches, schools, hospitals, and colleges."[371] It concluded that "Seventh Day Adventist" "is used and recognized as a source indicator for [the General Conference's] goods and services."[372] Thus, the board refused to nullify the General Conference's trademark.[373]

Other courts have found that the context of a church's name should be treated differently than the context of the name of its religious text and materials. This was the controlling theory in *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*.[374] The court humorously explained the background of the dispute as follows:

> "Self-realization" is the ultimate goal of Hindu-Yoga teaching. The Hindu-Yoga spiritual tradition teaches that there exists an "Ultimate Reality." The Ultimate Reality is infinite, but it exists at the core of every person's being as the "Self." According to Yoga, the goal of life is to transcend one's finite limitations, like body, ego, and personality, to dissolve the barriers between the personal self and the infinite Self, to "realize" a union with the "Self." One prominent guru in this religious tradition was Paramahansa Yogananda, known to many Americans as the author of *Autobiography of a Yogi*.
>
> Modern-day disciples of this guru, this advocate of rising

368. 887 F.2d 228 (9th Cir. 1989).

369. *General Conference Corp.*, 887 F.2d at 231.

370. 39 U.S.P.Q.2d (BNA) 1385 (T.T.A.B. 1996). This case slightly differed from the other cases because here the plaintiff sought to have the T.T.A.B. hold that the term Seventh Day Adventist is generic rather than enjoin a defendant from using the name of the religious organization.

371. *Stocker*, 39 U.S.P.Q.2d (BNA) at 1398.

372. *Id.*

373. One member of the panel vigorously dissented. *See id.* at 1399-1411 (Hohein, J., dissenting).

374. 59 F.3d 902 (9th Cir. 1995).

> above worldly and ego-bound concerns, have founded two rival schools that are now engaged in a dispute about the intellectual property rights to such terms as Yogananda's name and "Self-realization." . . . "Church of Self-Realization" sounded too much like "Self-Realization Fellowship Church" for [plaintiff] to have peace of mind . . . .[375]

In this case, the court found that the term "Self-Realization" could have separate meanings depending on the applicable context. It noted that the term "Self-realization" book likely connoted that the book was designed to help its reader realize herself.[376] In contrast, the term "Self-realization" as applied to the "Self-realization spiritual organization" was different. This term, the court explained, likely refers to a class of spiritual organizations that reflect the Hindu-Yoga community. It found that the term "Self-realization spiritual organization" was also generic, but that it was generic because it connoted an organization that follows the tenets of Hindu-Yoga. [377] Thus, the reasons behind the court's decision to nullify the group's trade names differed based on what it was nullifying.

b. Likelihood of Confusion

A court may enjoin the name that a religious organization uses if it finds a likelihood of confusion.[378] A likelihood of confusion exists "when the consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark."[379]

In *Church of Scientology International v. Elmira Mission of Church of Scientology*,[380] the court granted the plaintiff's motion for a preliminary injunction because the defendant's use of its name created a likelihood of confusion.[381] In this case, the defendant had affiliated itself with the plaintiff's organization.[382] After seven years, the defendant renounced its membership in the plaintiff's organization.[383] The plaintiff filed suit to enjoin the defendant from using the Scientology

375. *Ananda Church*, 59 F.3d at 904.
376. *Id.* at 909.
377. *Id.* at 909-10.
378. *See, e.g.*, AT&T v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1442 (3d Cir. 1994); Fisons Horticulture, Inc. v. Vigoro Indus., Inc., 30 F.3d 466, 473 (3d Cir. 1994).
379. Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 292 (3d Cir. 1991) (quoting Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1229 (3d Cir. 1978).
380. 794 F.2d 38, 40 (2d Cir. 1986).
381. *Church of Scientology Int'l*, 794 F.2d at 45.
382. *Id.* at 40.
383. *Id.* at 41.

name.[384] The court found that if it were to permit a party who "loses its authorization, yet continues to use the mark, the potential for consumer confusion is greater."[385] Thus, the court enjoined the defendant from using its current name.[386]

Similarly, in *Purcell v. Summers*,[387] the court explained that the words Methodist and Episcopal were themselves generic, but that a breakaway organization could not use these words to call their church "Methodist Episcopal Church, South."[388] The court reasoned that the previous church, now existent under the name Methodist Episcopal Church had the exclusive right to its old name.[389] The court further reasoned that to permit the breakaway group to use this new name might result in confusion.[390]

Also, based on the likelihood of confusion, several courts have forbidden churches from calling themselves the "Polish National" church. For example, in *In re St. Stanislaus Polish National Reformed Church of Scranton*,[391] the court required the church to change its name from St. Stanislaus Polish National to St. Stanislaus Polish National Reformed Church.[392] Similarly, in *Incorporation of Matki Boski Bolesne Polish National Catholic Church*,[393] the court expressed concern regarding the use of the term "Polish National Church" because the national religion of Poland is Catholicism.[394] The court subsequently denied the charter because "there would be an undoubted tendency to mislead many of the persons living in the immediate neighborhood of the proposed church as to its ecclesiastical character."[395]

In *Board of Provincial Elders v. Jones*,[396] the majority, despite the likelihood of confusion, nonetheless granted the defendant the right to use the word "Moravian" in the name of his church until more fact-finding could occur.[397] The court reasoned that even though the defendants were not affiliated with the Board of Provincial Elders, which had used the word Moravian, the name Moravian was generic and,

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384. *Id.*
385. *Id.* at 44.
386. *Church of Scientology Int'l*, 794 F.2d at 45.
387. 145 F.2d 979 (4th Cir. 1944).
388. *Purcell*, 145 F.2d at 988.
389. *Id.*
390. *Id. But see In re* Clarion Baptist Ass'n, 10 Pa. D. & C. 189 (1927) (permitting two groups to co-exist, one called "the Clarion Baptist Association" and the other called "Clarion Baptist Association").
391. 12 Pa. D. 532 (1903).
392. *St. Stanislaus*, 12 Pa. D. at 535.
393. 67 Pa. Super. 493 (1917).
394. *Incorporation of Matki Boski Bolesne*, 67 Pa. Super. at 495.
395. *Id.*
396. 159 S.E.2d 545 (N.C. 1968).
397. *Jones*, 159 S.E.2d at 553-54.

hence, would not ipso facto convey an impression of affiliation with plaintiff.[398] The dissenting justices, however, found that the use did create a likelihood of confusion:

> The defendants are not proposing to use the word in a name so different from the plaintiff that no confusion would result. The word "Bible" in defendants' corporate name does not tend to distinguish the defendants from the other Moravian Churches, but tends to emphasize the similarity by following the pattern of names used by the plaintiff in designating its congregations, such as Advent Moravian Church, Immanuel Moravian Church, Home Moravian Church, etc.[399]

B. Constitutional Issues Surrounding the Grant of Trade Names to Religious Organizations

The application of the religion clauses of the First Amendment to this area of the law is relatively simple. In fact, courts have really only spent significant time analyzing the noninvolvement in intrachurch disputes rule.

1. The Establishment Clause

As discussed earlier,[400] under *Rosenberger*, the Establishment Clause is not infringed where a law is neutral and evenhandedly applied. Federal and state trademark law is facially neutral. By following general legal standards, the law will be applied evenly. Therefore, in permitting a religious organization to have exclusive use of its name, the government is not establishing a religion. Rather, it is ensuring that two separate, established religious organizations are not confused. Further, any decision that is made to grant a religious organization a monopoly right to its name does not establish that religion per se. Rather, the decision only establishes that religious organization.

2. The Free Exercise Clause

Similarly, the decision to grant a religious organization the exclusive right to a name does not violate the Free Exercise Clause. Again, the grant of the name does not inhibit worship in any manner. Under *Smith*, federal and state trademark law does not violate the Free Exercise Clause as long as it is based on a facially neutral religious statu-

398. *Id.* at 553.
399. *Id.* at 555 (Parker, C.J., dissenting).
400. *See supra* text accompanying notes 275-80.

tory scheme; there has been no suggestion that the trade name and trademarks legislation was passed with the invidious design of inhibiting one group's free exercise.[401] Further the grant of a trade name would also likely pass the compelling interest test first enunciated in *Sherbert*.[402] The state does have a compelling interest in ensuring that the two groups are not confused. Thus, the application of trademark law in this context would likely pass even the possibly outmoded *Sherbert* test.

3. *Neutral Principles of Law*

Recent Supreme Court case law suggests that a court must apply "neutral principles of law" instead of involving itself in intrachurch disputes.[403] Typically intrachurch conflicts in this context arise when a congregation breaks away from the mother church, and the congregation hopes to continue using the property that belonged to the mother church. In other situations, however, local members of the congregation hold the church's property in trust. In both circumstances, the mother church, in attempting to regain legal control of its property, oftentimes seeks to enjoin the breakaway congregation from using the name of the local congregation. For example, in *Church of God at Markleysburg v. Church of God at Markleysburg*,[404] the minister of the local congregation persuaded the local church to secede from its national General Assembly.[405] The local congregation planned to continue using the local church building.[406] The Supreme Court of Pennsylvania, however, held that they could not.[407] The court pointed out that the Church of God's General Assembly's by-laws reserved ownership of all church property in the General Assembly.[408] Thus, the court stated that "[a] local congregation which is a part of a larger religious organization cannot divorce or separate itself from the church family, set up a new independent organization, and by so doing entitle itself to retain the congregational property."[409] The court appropriately declined to examine any internal church doctrine:

> Nor will we ourselves assume to override an ecclesiastical judicatory unless a departure from accepted faith and teaching

401. Employment Div., Dep't of Human Resourses of Or. v. Smith, 494 U.S. 872 (1990).
402. Sherbert v. Verner, 374 U.S. 398 (1963).
403. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979).
404. 50 A.2d 357 (Pa. 1947).
405. *Church of God at Markleysburg*, 50 A.2d at 359-60.
406. *Id.* at 360.
407. *Id.* at 361.
408. *Id.* at 360 (citing minutes of the 15th (1920) Annual Assembly, p. 68).
409. *Id.* at 360.

> threatening to divert property to a purpose radically different from that for which it was acquired is plain and unmistakable, for it is not to be supposed that judges of the civil courts can be as competent to interpret the religious doctrines of every denomination as are the ablest men in each in respect to their own.[410]

Besides enjoining the local church from using the property, the court upheld the injunction relating to the church's name, stating that "it must be seen that to permit the defendants, after seceding from the General Assembly, to copy its name and that of the local Congregation . . . would result in material damage to the plaintiffs."[411]

Similarly, in *Oklahoma District Council of Assemblies of God of the State v. New Hope Assembly of God Church of Norman, Inc.*,[412] the court enjoined the defendant from using "Assembly of God" in its name. In that case, the defendant church had joined the General Council of the Assemblies of God and pledged to abide by its rules.[413] The General Council subsequently determined that the defendant church had failed to follow its tenets.[414] It expelled the defendant from the group's membership and forbade the defendant from using "Assembly of God," in its name.[415] The General Council subsequently went to Oklahoma district court, which granted it an injunction.[416] On appeal, the intermediate level court reversed. The court determined that the defendant was not violating any church rules.[417] The Supreme Court of Oklahoma, however, reversed the intermediate court.[418] It explained that it would not second-guess a mother church's decision.[419] The only time that it might intervene, it explained, was when "it is shown that the challenged decision of the church body was not based upon religious philosophy or doctrine, but was the product of a willful attempt to deprive one of valid property rights."[420]

In *Pilgrim Holiness Church-Illinois District v. First Pilgrim Holiness Church, Decatur, Illinois*,[421] the court again refused to intertwine itself in any doctrinal analysis to determine who owns the name "Pilgrim Holiness Church." Here, the original Pilgrim Holiness Church

410. *Church of God at Markleysburg*, 50 A.2d at 360.
411. *Id.* at 361.
412. 548 P.2d 1029 (Okla. 1976).
413. *Church of Norman*, 548 P.2d at 1030.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.* at 1029.
418. *Church of Norman*, 548 P.2d at 1032.
419. *Id.* at 1031.
420. *Id.* at 1031-32.
421. 252 N.E.2d 1 (Ill. App. Ct. 1969).

had merged with another church.[422] However, several individuals attempted to use the name "Pilgrim Holiness Church" in starting a new church for themselves.[423] The leadership of the original "Pilgrim Holiness Church" sued the defendants to enjoin them from using their old name.[424] The court, ignoring internal doctrinal disputes, found that the plaintiffs, in merging with the second church, had ceased to exist, and thus had abandoned the name, and gave the defendant permission to use it.[425]

Similarly, in *First Independent Missionary Baptist Church of Chosen v. McMillan*,[426] the court found a neutral application of the law gave the majority group ownership and control of the church's old building.[427] In this case, the plaintiff served as a trustee and founder of the church.[428] Approximately ten years later, after the congregation fell behind on its mortgage payments, a majority of the church's membership "voted to vacate the church building and convey it to the mortgagee and to build a new church elsewhere, but [plaintiffs] chose to remain in the original building and continue payment of the mortgage."[429] The plaintiff then alleged that the majority took possession of new property and "caused themselves to be incorporated and seated as members of a state Baptist association, all of which conduct was in derogation of [plaintiffs'] rights in the property and name of the church."[430] The court further recited that the church's by-laws stated that the majority of the congregation may exercise control over "the church building, parsonage and personality."[431] As a result, the court concluded that the plaintiffs had to pay the majority money for any part of the church's personality that they continued to use.[432] Furthermore, the court stated that the majority of the church owned the name of the church, and thus could prohibit plaintiffs from using the name.[433]

In *Hooper v. Stone*,[434] a case involving a student church group, the court denied a minority faction of the "Christian Science Society of the University of California" any right to use the organization's name.[435]

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422. *Pilgrim Holiness Church*, 252 N.E.2d at 3.
423. *Id.* at 4.
424. *Id.* at 3.
425. *Id.* at 6-7. *See also In re* Application of First Presbyterian Church of Bloomfield, 2 A. 574 (1886) (granting a church the right to use the name of a dissolved church).
426. 153 So. 2d 337 (Fla. Dist. Ct. App. 1963).
427. *McMillan*, 153 So. 2d at 342.
428. *Id.* at 338.
429. *Id.* at 339.
430. *Id.* at 338.
431. *Id.* at 341.
432. *McMillan*, 153 So. 2d at 341.
433. *Id.*
434. 202 P. 485 (Cal. Dist. Ct. App. 1921).
435. *Stone*, 202 P. at 485.

The court explained that the name was property of the group, and, hence, the majority faction of the organization had the exclusive right to use the name.[436] The court also refused to involve itself in a doctrinal debate.

In another series of lawsuits, the South Carolina Supreme Court and the Fourth Circuit arrived at differing conclusions. In that litigation, three churches merged into one. One of the churches, Methodist Episcopal Church, South, had a dissident group of members who opposed the merger. In *Turbeville v. Morris*,[437] the dissident group filed a petition in South Carolina court hoping to be able to continue using the name of the church, Methodist Episcopal Church, South. The Supreme Court of South Carolina stated that the original church had abandoned the name, so that the merged group no longer had any right to it.[438] The Fourth Circuit, in a subsequent lawsuit involving the same set of facts, reached the opposite conclusion.[439] That court reasoned that the original church had not given up any rights to the name even though it had merged.[440] The court explained that the fact that

> the seceding members had been members of the Methodist Episcopal Church, South, does not justify their use of the name of that organization after they had ceased to be members thereof. The right to use the name inheres in the institution, not in its members; and when they cease to be members of the institution, use by them of the name is misleading and if injurious to the institution, should be enjoined.[441]

Many times courts simply resolve the trade-name issue on property grounds. After all, the names and marks are intellectual property.[442] Indeed, by following the dictates of the Supreme Court, courts can easily dispose of these types of issues by applying the relevant property law. As the above cases demonstrate, courts do frequently recognize the names of religious institutions as property. The courts then determine which faction of the religious organization owns the property, and then awards ownership of the trade name to the rightful owner. By applying neutral principles of law, courts avoid unconstitutional involvement in intrachurch disputes.

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436. *Id.* at 487.
437. 26 S.E.2d 821 (S.C. 1943).
438. *Morris*, 26 S.E.2d at 833.
439. Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944).
440. *Purcell*, 145 F.2d at 987.
441. *Id.*
442. *See, e.g.*, Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1249 (9th Cir. 1999) (applying neutral principles of law to trademark infringement cases).

C. Conclusion

As this Article has shown, a court must examine both the trade name rights and the constitutional rights of a religious organization. In analyzing the trade name rights, a court must look at both the genericness of the original name and the likelihood of confusion that the use of the new name will create. If the court finds that the name is not generic or if it was originally generic but attained a secondary meaning, it will enjoin the second organization from using the name. Likewise, if the use of the name will confuse the public, the court will enjoin its use. As for the constitutional analysis, a court must only ensure that it avoids involving itself in doctrinal disputes. It appears that no decision in this area of the law will violate the Establishment Clause or the Free Exercise Clause.

IV. SUMMARY

This Article has examined the clash between the religion clauses of the First Amendment and the intellectual property rights of religious organizations. This Article has shown that, in light of the Supreme Court's more relaxed interpretation of the religion clauses, religious groups may obtain a copyright on religious material. Furthermore, in light of the Supreme Court's narrower interpretation of the Establishment Clause, Congress can also likely enact a private copyright for a religious organization. The only constitutional barrier that this type of legislation may run afoul of is the Free Exercise Clause. Although § 110(3) may permit a religious organization to use certain types of copyrighted material, in light of the Ninth Circuit's decisions in *Worldwide Church* and *Wollersheim*, it appears that religious organizations will be entitled to a religious text, but only after paying a reasonable fee. Of course, if a court explicitly determines that the RFRA does not apply to the Copyright Act, then the infringing religious organization will likely not be able to obtain access to the copyrighted materials if the parties cannot agree on the appropriate royalty.

With regard to trade names, there are very few restrictions. Religious organizations must really only concern themselves with the controlling intellectual property law. The only constitutional barrier is the doctrine first established in *Watson v. Jones* that limits a court's involvement in doctrinal disputes. Courts must only apply neutral principles of law to these disputes.

Thus, in order to preserve the exclusive right to a religious name or mark, a religious organization must only ensure that the name is not generic. If the name is generic, a religious organization may still re-

ceive trade name protection for the name but only if the name has become synonymous with that organization. As the case law demonstrates, on several occasions, a court has found that a name may be source denoting in one context and generic in another. Finally, even where a name has not taken on a secondary meaning, a court may still invalidate the use of the name by a second party if there is a likelihood of confusion among the groups.