

COPYRIGHTING GOD: NEW COPYRIGHT GUIDELINES DO NOT PROTECT DIVINE BEINGS

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I. INTRODUCTION

Are the words of our divine beings and supernatural beings protected under the copyright laws of the United States? New guidelines issued by the United States Copyright Office (“U.S. Copyright Office”) suggest that no, the words of supernatural or divine beings are not entitled to a copyright.¹ Looking forward, what does this mean for the world’s major religions? In every religion, somewhere there is a divine, and in many a supernatural being. And also in most every religion those divine beings are quoted in each religion’s respective texts. So the issue now arises, with these new copyright guidelines, is there any legal standing for a religious group to obtain a copyright on the words of its divine figurehead? Can religious groups protect the teachings of their leaders from those who want to use, paraphrase, or take those teachings completely out of context so as to preserve the messages of their respective religions? This author hopes that we can find legal routes through copyright doctrine to continue to obtain copyrights for religious works, even if a group truly believes their work comes from a divine being.

The Compendium of U.S. Copyright Office Practices, 3rd Edition, provides an explicit “Human Authorship Requirement” for a work to be subject to copyright protection. The Compendium specifically excludes works alleged to be created by a divine being. Religious texts are often professed to be written by or quote a divine spirit or god-like being, and, therefore, religious texts will be at risk of exclusion from copyright protection. Religious groups should protect the secrecy of their religious doctrine, especially the origins, and present their texts for copyright in a way that conforms to U.S. copyright laws because the claim of divine authorship is no longer a legal route. Only recently released in August of 2014, the Compendium will be implemented by the

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¹ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101 (3d ed. 2014).

United States Copyright Office, making it virtually impossible for religious groups to obtain copyright protection if they are claiming divine authorship. Future appellate cases should reveal how strictly the courts will follow the Compendium.

This note will examine the new guidelines passed down by the U.S. Copyright Office in August of 2014. The guideline which this note primarily focuses on is known as the Human Authorship Requirement:

The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the deposit copy(ies) state that the work was inspired by a divine spirit.²

This note will take a brief look at some of the history of copyright practices in regard to divine beings and religious texts. Did the U.S. Copyright Office lean one way or the other on the issue of copyrights for divine beings before these new guidelines, and how did the U.S. Copyright Office's previous view influence the courts in their decisions of copyrights for divine beings? This note will then look at the recent events that spawned a legal battle, which in turn led the U.S. Copyright Office to include the human authorship requirement in the new copyright guidelines.

One major legal issue that will be examined is how the courts interpret the question of "what constitutes a divine being?" After some clarification on this legal issue, the note will then analyze the following questions regarding application of the new copyright guidelines:

- (1) Do the guidelines have any retroactive effect:
 - (a) Will previously granted copyrights to the speech of a divine being be revoked?
 - (b) Can copyrights already issued be repealed per the new guidelines?

² *Id.*

(2) What will be the impact of the new copyright guidelines looking forward:

- (a) Will speech by divine beings now be capable of being reprinted or reproduced out of context?
- (b) Do religious groups have any route through copyright doctrine to protect the words of their divine beings and the works of their respective faiths?

The first set of issues will be slightly easier to answer. To do so, we will analyze how the courts have handled retroactive change in copyright standards, along with our current federal copyright statute, and also the Copyright Clause of the United States Constitution. To answer the second set of issues, we will also look at copyright doctrine of today. We will map out the reasons that religious groups would want to obtain copyright in the first place, and their overall goals for protecting their works. We will then have to look at what rules and standards of copyright doctrine give religious groups issues with obtaining copyright even before human authorship became an issue. Then, we will take a quick look at how the courts have already handled requirements similar to human authorship in previous cases. Finally, we will see how the human authorship requirement will affect religious groups going forward, as we apply their goals and their struggles to the current copyright doctrine and new human authorship guideline.

The issues raised in this note are important to religious groups because such groups want their message and purpose to remain clear and true to their cause. If messages from divine beings are legally able to be misconstrued and taken out of context with no ramifications, the messages of religions may then be misunderstood, misrepresented, and even attacked by the public.

While the new guidelines appear on their face to put religious groups in danger of losing their copyrights or being unable to obtain new copyrights, this Note proposes that there are ways around these guidelines, which will allow religions to continue to legally copyright their religious works. The religious works that are already copyrighted will be safe. Religious groups seeking new copyrights will be able to do so, although it might cost them a bigger price than any religious person is willing to pay.

II. HISTORICAL BACKGROUND

The first copyright act in the United States was passed in 1790.³ From the Copyright Act of 1790, its revisions in 1831, 1870, 1904, and to the most recent revision under the Copyright Act of 1976, the Copyright Act has never explicitly addressed the issue of human authorship.⁴ Today's copyright laws do not expressly require human authorship.⁵ This omission did not raise any major issues until the 1960s, when the issue of whether works generated by computers and other information technologies should be copyrightable arose.⁶ This issue of computer generated material led to the most recent revision, the Copyright Act of 1976.⁷

When analyzing the issue of human authorship, the courts looked to the Copyright Act of 1976, which, in relevant part, attempts to explain what subject matter is copyrightable.⁸ While the statute leaves many ambiguities, there is one clear requirement for a work to be copyrightable. As was articulated in *Feist Publications, Inc. v. Rural Telephone Service Co.*, there must be some originality.⁹ The other point that is clear is there has to be an author. However, the ambiguity arises when we ask the question: does the author have to be human? It seems that some

³ *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBR., <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.VFvQ7PnF8gw> (last visited Nov. 17, 2014).

⁴ *See id.*

⁵ *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997) (*Urantia II*) (stating “[t]he copyright laws, of course, do not expressly require ‘human’ authorship, and considerable controversy has arisen in recent years over the copyrightability of computer-generated works.”).

⁶ Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since Contu?*, 106 HARV. L. REV. 977, 1043 (1993).

⁷ *See* ASS'N OF RES. LIBR., *supra* note 3.

⁸ Copyright Act of 1976, 17 U.S.C. § 102(a) (2015) (“Copyright protections subsists, in accordance with this title, in 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.”).

⁹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“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.”); *see also* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.27 (2007).

courts were reading a human authorship requirement into 17 U.S.C. § 102(a) even before the 2014 copyright guidelines.¹⁰

In 1941, a California District Court made a distinction between revelations as facts and the expressions of these revelations.¹¹ In *Oliver v. St. Germain Foundation*, the author who attempted to claim a copyright was explicitly clear that he, a mortal being, was not claiming to be the author of the book as thoughts and ideas of his own.¹² He claimed to be the “amanuensis” to whom the book was dictated to by a spiritual being.¹³ The court made a distinction in this case because the “author” was claiming a copyright to the subject matter of the book. While the subject matter was not protected, the court concluded that the arrangement could have been.¹⁴

In 1997, in *Urantia Foundation v. Maaherra*, while considering the copyrightability of a book that both parties believed to be authored by celestial beings through a psychiatric patient, the Ninth Circuit felt that the copyright laws did not

¹⁰ “[S]ome element of *human* creativity must have occurred in order for the book to be copyrightable.” *Urantia II*, 114 F.3d at 958 (emphasis added).

¹¹ *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941) (stating that “[o]ne who narrates matters of fact may be protected by copyright as to his arrangement, manner and style, but not as to material or ideas therein set forth.”); *see also* *Nichols v. Universal Pictures Corp.*, 34 F.2d 145, 147 (S.D.N.Y. 1929) (“At common law, as under the copyright acts, the element in intellectual productions, which secures such protection, is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, ‘some new collocation of visible or audible points—of lines, color, sounds, or words.’”).

¹² *Oliver*, 41 F. Supp. at 299.

¹³ *Id.* at 297 (the “author” of this work was adamant about the divine inspiration, clear from his statement: “By permission of the Author, whose letter addressed to me follows as his preface herein, and to meet the natural inquiry and satisfy, so far as any personal statement from me will, any honest inquiring mind, I humbly appear in order briefly to give the major facts concerning the writing of this, even to me, very remarkable book.”).

¹⁴ *Id.* at 299 (where the court was willing to give copyright to the author’s “arrangement, manner and style” but not to the ideas or content within the material); *Eichel v. Marcin*, 241 F. 404, 408–09 (S.D.N.Y. 1913) (“A poem consists of words, expressing conceptions of words or lines of thoughts; but copyright in the poem gives no monopoly in the separate words, or in the ideas, conception, or facts expressed or described by the words. A copyright extends only to the arrangement of the words.”); *see also* *Nichols*, 34 F.2d at 147 (“Emotions, like mere ideas, are not subject to pre-emption; they are common property. It is the incidents or elements, or grouping of them, which produce the emotion that are to be compared.”).

intend to protect the creations of divine beings.¹⁵ The Urantia Foundation consisted of members who first discussed the teachings that were “delivered” by spiritual entities and recorded onto what would be known as the “Urantia Papers.”¹⁶ The Urantia Foundation then compiled the Urantia Papers into what they referred to as “The Book,” their own sacred religious text.¹⁷ Afterwards, the primary goal of the foundation was “to preserve and disseminate the teachings contained in the Papers[.]”¹⁸

The Urantia Foundation received a gift from the courts, as the Ninth Circuit looked to the U.S. Copyright Statutes for a way to rule that a book that was believed to have celestial origins could be copyrightable.¹⁹ Instead of viewing a religious book as written by these “celestial beings,” the court viewed the book as a compilation under the Copyright Act,²⁰ compiled by humans.

Although the ideas in the book were alleged to be inspired by divine beings, the court applied the idea from *Feist* regarding compilations; that “a compilation of facts may possess the requisite originality when the author chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively.”²¹ The court ultimately held that the human selection and arrangement of the book required some creativity, and therefore met the threshold level of creativity for copyright protection.²²

¹⁵ *Urantia II*, 114 F.3d at 958.

¹⁶ *Id.* at 957.

¹⁷ *Id.* at 956–57.

¹⁸ *Id.* at 957.

¹⁹ *Id.* (“For copyright purposes, however, a work is copyrightable if copyrightability is claimed by the first human beings who compiled, selected, coordinated, and arranged the Urantia teachings, ‘in such a way that the resulting work as a whole constitutes an original work of authorship.’” (quoting 17 U.S.C. § 101 (2015)).

²⁰ Section 101 of the Copyright Act defines a “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ includes collective works.” 17 U.S.C. § 101. Moreover, § 103 provides that “[t]he subject matter of copyright as specified by § 102 includes compilations and derivative works” 17 U.S.C. § 103(a) (2015).

²¹ *Urantia II*, 114 F.3d at 958–59.

²² *Id.* at 959; *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (noting that the threshold level of creativity required for copyright protection is extremely low).

III. NEW COPYRIGHT GUIDELINES

The chain of events that led to the new guidelines issued by the United States Copyright Office begins at a much unexpected point, with a very obscure question: can a monkey “selfie” be copyrighted?

In 2011, David Slater, a professional British photographer, was in Indonesia visiting a park. During the visit, a group of black macaques came upon Slater, jumping on his equipment and “posing for the camera.”²³ One of the female macaques grabbed one of Slater’s cameras, resulting in hundreds of selfies of the macaque. One of the images, with a particularly happy smiling macaque, went viral after being posted on the internet. Slater claims to have made 2,000 euros from the picture in the first year after it was taken.²⁴ The profits stopped for Slater, however, when the image was posted to Wikimedia Commons; an online repository of free images.²⁵ Slater requested that Wikimedia take down the photo by claiming that he was the author of the photo.²⁶ Slater’s claims were a bit of a stretch; he even went so far as to claim on *The Today Show* that “the monkey was [his] assistant.”²⁷

In August of 2014, the monkey selfie returned to the spotlight when Wikimedia refused to take down the photo. Wikimedia took the position that Slater was not the photographer at all, and even included this position in the caption under the posted picture.²⁸ On August 19, 2014, shortly after Wikimedia

²³ Jay Caspian Kang, *Wikipedia Defends the Monkey Selfie*, *THE NEW YORKER* (Aug. 8, 2014), <http://www.newyorker.com/news/daily-comment/monkey-see-monkey-click>.

²⁴ Photographer ‘Lost £10,000’ in Wikimedia Monkey ‘Selfie’ Row, *BBC NEWS* (Aug. 7, 2014), <http://www.bbc.com/news/uk-england-gloucestershire-28674167>.

²⁵ Kang, *supra* note 23 (“According to Wikimedia’s Web site, anyone who downloads the monkey selfie, or any of the millions of images on the site, can “copy, use and modify any files here freely as long as they follow the terms specified by the author; this often means crediting the source and author(s) appropriately and releasing copies/improvements under the same freedom to others.”).

²⁶ Slater tried to claim that by buying the cameras, paying for his travel, and being negligent enough to allow the monkey to steal his camera entitled him to full authorship of the monkey “selfie”, regardless of the fact that he did not push the button on the camera. *Id.*

²⁷ *Monkey Selfie Drives Copyright Lawyers Bananas*, *TODAY* (Aug. 7, 2014), <http://www.today.com/video/today/55815745#55815745>.

²⁸ Kang, *supra* note 23. (noting that Wikimedia stated that “[t]his file is in the public domain because as the work of a non-human animal, it has no human author in whom copyright is vested.”) Wikimedia did not take the position that

announced their position on this issue, and nearly two years after Slater lodged his complaint, the U.S. Copyright Office released the third edition of *The Compendium of U.S. Copyright Office Practices*. The U.S. Copyright Office made it clear that only humans can qualify for copyright protection.²⁹ The updated guidelines ruled out copyrighting works produced by: nature, animals, plants, ghosts, and divine beings.³⁰ It could be argued that, given the timing of Wikimedia's decision, which nearly coincided with the release of the guidelines, a very long document that would take the U.S. Copyright Office possibly years to draft, there is no causal connection to the Slater/Wikimedia dispute and the new copyright guidelines rejecting copyright protection for animals. However, the guidelines include examples of works that are not eligible for protection and make a direct reference to the monkey selfie dispute.³¹ As this note goes to publication, Slater is continuing to fight Wikimedia, but has yet to officially file suit.³²

the monkey owns the copyright, but only that Slater does not and cannot own the copyright); see also *Macaca Nigra Self-Portrait*, WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait.jpg# (last updated Aug. 8, 2014 8:24 PM) (providing the licensing caption that accompanies the photo on Wikimedia's page).

²⁹ Laura Ryan, *Monkeys Can't Get a Copyright: The U.S. Copyright Office Includes Monkeys on a List of Things That do not Qualify for Copyright Protection*, NAT'L J. (Aug. 20, 2014), <http://www.nationaljournal.com/tech/monkeys-can-t-get-a-copyright-20140820> (noting "[t]he copyright law only protects the 'fruits of intellectual labor' that 'are founded in the creative powers of the mind.'").

³⁰ *Id.* (pointing out that new update states that the Office cannot register a work purportedly created by divine or supernatural being).

³¹ *Monkey Selfie Can't be Copyrighted, U.S. Regulators Confirm*, NBC NEWS (Aug. 21, 2014), <http://www.nbcnews.com/tech/social-media/monkey-selfie-cant-be-copyrighted-u-s-regulators-confirm-n186296> (mentioning the examples that would not be copyrightable due to the new human authorship requirement; examples include: "a photograph taken by a monkey" and "a mural painted by an elephant."); see also Wikipedia, *Animal-made Art*, http://en.wikipedia.org/wiki/Animal-made_art (as of Feb. 18, 2015 10:54 AM) (including a picture of an elephant painting, which the guidelines referenced in their examples, thereby showing that Wikimedia and its dispute with David Slater did gain the attention of the United States Copyright Office during the drafting of the new copyright guidelines).

³² David Hall & David Lincoln, *Who Owns the Monkey Selfie?*, JDSUPRA BUS. ADVISOR (Nov. 4, 2014), <http://www.jdsupra.com/legalnews/who-owns-the-monkey-selfie-16875/>.

IV. RETROACTIVE EFFECT

The first question posed concerns the retroactive effect of the new guidelines: can previously granted copyrights to divine or supernatural beings be revoked due to the new guidelines? The short and simple answer is yes, they can be . . . but that is not going to happen.³³

The reasoning for such a conclusion comes from the U.S. Constitution, congressional intent, and the landmark Supreme Court copyright case, *Eldred v. Ashcroft*.³⁴ *Eldred* was the first time that congressional authority to alter copyright terms was called into question.³⁵ The case came about due to the Copyright Term Extension Act of 1998 (“CTEA”), which essentially added twenty years to all existing and future copyrights.³⁶

While the plaintiffs in *Eldred* wanted to argue against the constitutionality of the CTEA for both existing and future copyrights, the argument before the Supreme Court was limited to the extension of existing copyrights, or retroactive term extensions.³⁷ The Court discussed a quid pro quo argument, similar to the patent system, when it comes to copyright: a copyright in exchange for a newly created work.³⁸ But ultimately, the Court held that when authors receive a copyright, they do so with an expectation they will also be entitled to any future copyright extensions.³⁹ Ultimately, the Court found that Congress

³³ Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets it Right*, 50 ST. LOUIS U. L.J. 307, 308 (2006) (theorizing that the Framers of the Constitution did not intend for the Copyright Clause to be interpreted in a way that allows limits to be imposed, similar to those limits pursued by opponents of the CTEA, and, therefore, the Framers did not intend for the Copyright Clause to be a tool for the courts to stop copyright legislation retroactively extending copyright terms).

³⁴ 537 U.S. 186 (2003).

³⁵ Dallan, *supra* note 33, at 308. (“*Eldred* was the first case to question the authority of Congress to extend copyright terms.”).

³⁶ *Eldred*, 537 U.S. at 193.

³⁷ *Id.* at 218 n.23 (where petitioners began their case by arguing the CTEA’s extension of both existing and future copyrights, but strategically chose to focus their argument on the CTEA’s extension of existing copyright and instead urge against consideration of the CTEA’s validity when applied to future copyrights).

³⁸ *Id.* at 216–17.

³⁹ *Id.* at 214–15.

does have the power to affect the length of a copyright term retroactively.⁴⁰

To come to such a conclusion, the Court also looked to the Copyright Clause of the United States Constitution,⁴¹ and most importantly, the Framers intent behind the Copyright Clause. The Clause gives Congress the power to grant “exclusive rights” to artists for “limited times.”⁴² Copyright was a known concept to the Framers at the time of the Constitutional Convention due to the English copyright statute, the Statute of Anne of 1710.⁴³ While drafting the Copyright Clause, but before ratification, the Framers passed a resolution to encourage the states to adopt their own copyright laws.⁴⁴ All thirteen original states, except Delaware, passed their own copyright laws by 1786.⁴⁵ At the time of the resolution, Congress did not have the power to establish a national copyright law, the only option at the time was to pass the resolution and encourage the states to secure copyrights.⁴⁶ The Framers knew, however, that the states were not equipped to properly protect literary property. James Madison made this view of the Framers known in the Federalist No. 43,⁴⁷ a view in which the individual states agreed with at the time of ratification of the Constitution.

All of these steps concluded in the Copyright Clause being included in the final, ratified Constitution, fueled with the intent to grant Congress authority to provide protection to authors for their writings without any limits on that congressional power.⁴⁸ The Court’s deference and holding in *Eldred* agree with the congressional intent of the Copyright Clause: to grant Congress

⁴⁰ *Id.* at 194.

⁴¹ Congress shall have power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

⁴² *Id.*

⁴³ See *Copyright Timeline*, *supra* note 3.

⁴⁴ 24 WORTHINGTON C. FORD, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 326–27 (2011) (reporting the text of the resolution to push states to ratify their own copyright laws).

⁴⁵ See COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 21 (Copyright Office ed., Bulletin No. 3, rev. 1963).

⁴⁶ FORD, *supra* note 44, at 326–27.

⁴⁷ One of Madison’s complaints was that the government, under the Articles of Confederation, was still lacking in the “want of uniformity in the laws concerning naturalization & literary property.” 2 JAMES MADISON, THE WRITINGS OF JAMES MADISON: 1783–1787, 363 (Gaillard Hunt ed., 1901)

⁴⁸ Dallon, *supra* note 33, at 313.

authority to create a copyright scheme and not to impose limits upon copyright interests.⁴⁹

As was shown above, Congress does have the power to affect the term of a copyright retroactively. They can do so because there is not to be any limit on the congressional power to regulate copyrights. To deny Congress the power to extend a copyright would be to put a limit on the copyright power; a direct violation of the Constitution. While Congress has free reign over copyright with little deference to the Court, there is still the quid pro quo requirement that was discussed in *Eldred*.⁵⁰ Congress gives an artist a copyright because the artist gives his or her work to society; this is the quid pro quo. But if Congress were to take away a copyright, what is Congress giving up in return? While Congress is not constitutionally bound to any quid pro quo when it comes to copyrights, they are controlled by the Takings Clause of the United States Constitution. If Congress revokes a copyright, they are taking property away from the author, which they cannot do without giving the author “just compensation.” This is why that while Congress does technically have the power to revoke a copyright after a change in the law, they do not actually have the power to take away a copyright without justly compensating the author.

So the new copyright guidelines will likely not affect any copyrights that are currently held by divine or supernatural beings. Those rights are guaranteed until their term expires. However, future religious groups seeking copyright for works by their divine beings will have to overcome the new copyright guidelines.

V. DIVINE BEINGS

In order to apply the new guidelines going forward, the courts will have to determine what has been classified as a divine being. In 1952, the Supreme Court recognized that our religious institutions have what they called a “Supreme Being.”⁵¹ In 2005, Justices Souter, Ginsburg, Stevens, and O’Connor recognized that there is a divine being, and that it has its own will, in *Van Orden*

⁴⁹ *Id.*

⁵⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003).

⁵¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (stating “[w]e are a religious people whose institutions presuppose a Supreme Being.”).

v. Perry.⁵² The Court was confronted with an Establishment Clause issue regarding Texas's display of the Ten Commandments on its state capitol grounds. In his dissent, Justice Souter labeled "God," in the Christian definition, as a divine being.⁵³ Therefore, it seems that the courts would be open to recognizing a non-human "God" or figurehead of other religions, such as Allah in the Muslim faith, or the similar understanding of God in the Jewish faith as divine beings. Justice Souter's assertion, however, limits divine beings to a more objective understanding as supernatural spirits that were never once thought to be human or of any other form that walked the Earth.

In 1983, Justices Brennan and Marshall stated that praying is to invoke divine guidance in *Marsh v. Chambers*.⁵⁴ This statement could be interpreted to mean that any figure that an individual prays to for guidance, with a true belief in the figure that they are praying to, could be considered a divine being. Under this interpretation, the legal definition of a divine being becomes more subjective. This could open up the definition of divine being to include some figures that were once human. For example, if some Christians pray specifically to Jesus Christ, then Jesus could be considered a divine being under *Marsh*. It could also open up the definition of divine being to things that were never human at all, but instead plant or animal. Some peoples, such as Native Americans, pray to the Earth, or to the Sun. The *Marsh* interpretation could also include these types of objects. The *Marsh* interpretation of divine being would also expand the amount of recognized divine beings. For instance, in the polytheistic Hindu religion, a prayer is directed to one of many deities.

While *Marsh* makes the definition of divine beings more subjective, it also sets a limit. *Marsh* only recognizes divine beings

⁵² 545 U.S. 677, 738 (2005) (J. Souter, dissenting) (stating "the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.").

⁵³ *Id.* (finding that the statement of the Commandments, quoting God himself, proclaims the will of the divine being).

⁵⁴ *Marsh v. Chambers*, 463 U.S. 783, 797 (1983) (J. Brennan, dissenting) ("That the 'purpose' of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws,' is nothing but a religious act.") (internal citations omitted).

that are a part of beliefs widely held among Americans.⁵⁵ Therefore, the understanding of divine being would not be so subjective as to recognize a being that only one person or a small group of people, such as a cult, pray to for guidance.

The Fourth Circuit has implicitly recognized that Jesus Christ was and is a divine being.⁵⁶ Therefore, it seems that this court recognizes religious figureheads that were once human. This could be extended to other human figures such as Siddhartha Guatama (“The Buddha”) or Muhammad.

In a claim that Earth Day violated the First Amendment, the Second Circuit found that the Earth is not a divine being.⁵⁷ This case started with the United States District Court ruling that the Earth was indeed a divine being.⁵⁸ However, the Second Circuit found that there was no support to designate that the Earth was a divine being.⁵⁹ This decision would limit the definition of divine being to preclude objects without consciousness, such as plants. However, this decision does leave open the possibility for humans, and possibly even animals to be legally considered divine beings.

Some courts have made an explicit ruling that the issue of whether the author of a work is a divine being is not an issue that the court should or can address.⁶⁰ This decision was made by

⁵⁵ *Id.* at 792 (“To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”).

⁵⁶ *Joyner v. Forsyth Cty.*, 653 F.3d 341, 342 (4th Cir. 2011) (where the court considered a pastor’s prayer as a seeking of divine guidance on world affairs for his people; the pastor concluded his prayer with “for we do make this prayer in Your Son’s Jesus’ name, Amen.”).

⁵⁷ *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 65 (2d Cir. 2001).

⁵⁸ *Id.* at 77 (“[T]he district court stated that the Earth Day ceremonies involved ‘addresse[s] to the Earth as if it were the Creator, or divine,’ and ‘prayers . . . to the Earth.’”).

⁵⁹ *Id.* (where the court denied the idea of the Earth being a divine being because the district court “did not cite evidence to support its statement that the Earth was designated the Creator, or as a Divine Being, or was worshiped at the School District’s Earth Day ceremonies.”).

⁶⁰ *Urantia Found. v. Maaherra*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995) (*Urantia I*).

Whether *The Urantia Book* is a divine revelation dictated by divine beings is a matter of faith, not of proof in a court of law. As a judge, I cannot—I must not—declare for anyone the truth or nontruth of an article of faith. If I were to declare *The*

looking at the copyright statute and regulations at that time, allowing the court to disregard the “divine” nature of the book and question and label it instead as a copyrightable “literary work.”⁶¹ While this route to come to a decision was allowed by the copyright law at the time, today it would be troublesome. Now that the copyright guidelines explicitly state that the work of a divine being is not entitled to a copyright, it seems that courts would have to determine if a work stemmed from a divine source. Also, now that the guidelines explicitly include the human authorship requirement, the courts will now have to determine whether the work’s authorship stemmed from a human effort.

VI. RELIGIONS SEEKING COPYRIGHTS

Some may ask why a religion would want a copyright on their works in the first place. Is it not one of the main goals of a religion to spread its message to as many people as possible? For many, but not all religions, this is a major goal. However, there are many reasons why a religious group would want to seek a copyright on their written works.

Some religions may seek copyright protection, and later on litigate copyright infringement cases, in order to obtain money. Sometimes a copyright is established just to provide income for the proper owner of the religious work.⁶² Some cases, even between two religious entities, are not concerned with religious doctrine,

Urantia Book to be a divine revelation dictated by divine beings, I would be trampling upon someone’s religious faith. If I declared the opposite, I would be trampling upon someone else’s religious faith. I shall do neither. Whether *The Urantia Book* is a divine revelation dictated by divine beings is irrelevant to the issue of whether the book is a literary work within the meaning of 17 U.S.C. § 102.

Id.

⁶¹ David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. & TECH. L. REV. 355, 404 (2010) (analyzing the method used by the court in *Urantia Foundation* of disregarding whether the work’s authorship stemmed from a divine or human effort).

⁶² See *Sinkler v. Goldstein*, 623 F. Supp. 727, 730 (D. Ariz. 1985) (discussing case where the widow of the founder of a “non-traditional, non-structured spiritual movement” entered into an agreement with a newsletter and other works produced using her husband’s writings to provide income for herself).

but instead are only concerned with copying religious texts without payment.⁶³

Some religions use copyright law to keep their religions secret; some religions do not want to disclose their works to the general public. For example, Scientology is a religion that has “taken extraordinary measures to try to maintain the secrecy” of its texts.⁶⁴ In *Religious Technology Center v. Lerma*, the Church of Scientology sought a restraining order and injunctive relief to keep a former member from posting some of the writings of Scientology on the internet.⁶⁵ The Church of Scientology alleged copyright infringement, but also trade secret misappropriation; their ultimate goal was to keep the Church’s writings a secret within the congregation.⁶⁶

Some religions may also seek copyright for secrecy, but secrecy to protect their students.⁶⁷ It’s possible that some religious teachings can damage a student who learns them because it can alter the student’s epistemological foundations.⁶⁸ The motivation behind religious secrecy can also be to protect teachers and religious doctrine. This is the motivation where religious groups become concerned with their works being misrepresented; they are typically also concerned with unauthorized teaching.⁶⁹ Another secrecy concern is that religious groups want to prevent the “desanctification” of their texts. Desanctification is the process by

⁶³ See *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002) (where publishing company representing a Hasidic group seeking an injunction against another publisher of religious materials was found to not be concerned with the use or copying of the work per se, but instead concerned with copying and disseminating without payment).

⁶⁴ *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 266 (E.D. Va. 1995).

⁶⁵ *Id.* at 261–62.

⁶⁶ *Id.*

⁶⁷ Walter A. Effross, *Owning Enlightenment: Proprietary Spirituality in the “New Age” Marketplace*, 51 BUFF. L. REV. 483, 649 (2003).

⁶⁸ *Id.* (“[E]ven a beginning student of a spiritual group might become distressed when led, either by lectures or by physical or mental exercises, to reexamine her basic philosophical assumptions. In fact, some spiritual groups maintain that even the seemingly best-adjusted people are unaware of potentially shattering realities.”); see also *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986) (stating that premature exposure of a student to religious materials without mentoring guidance will produce a spiritually harmful effect).

⁶⁹ Effross, *supra* note 67, at 664–66 (noting that teachers pursuing self-interested goals may distort the teachings’ meaning).

which religious techniques or texts that have therapeutic value are commercialized and used primarily for the therapeutic values.⁷⁰

Religions may wish to protect their works with copyright to protect the spiritual secrecy of their teachings, especially considering the dynamic nature of some of the materials. In this case, religion's desire to prevent what the legal community has labeled "premature publication."⁷¹ The idea is to protect the student who is not fully capable to comprehend the work.⁷² This could apply to young people who are not ready to comprehend any of the religious works. It could also apply in the cases where religious texts are structured in a cumulative, progressive manner. So if different versions of religious texts reveal more of their secret teachings, then religious groups would want to control the exposure of these works. It is the same method used to teach many subjects in education, especially mathematics. Religious groups would attempt to protect their works by holding a copyright and obtaining copyright on any new works.

All of these reasons for religions to seek copyright may apply in any given situation, but the main two reasons that religious groups obtain copyrights are to censor outside use of their religious works and to protect the purity of their religious doctrine. Censorship focuses on preventing outsiders or nonbelievers from using the works. While doctrinal purity is concerned with keeping

⁷⁰ Simon, *supra* note 61, at 364–65. See also Effros, *supra* note 63, at 667 (noting that "[t]he desanctification of the primarily spiritual into the merely therapeutic has also been condemned by a Tibetan Buddhist meditation teacher as 'spiritual materialism[.]'" (quoting Sherab Chodzin, *Notes*, to CHOGYAM TRUNGPA, *THE PATH IS THE GOAL: A BASIC HANDBOOK OF BUDDHIST MEDITATION* 32 (Sherab Chodzin ed., 1995)).

⁷¹ Effross, *supra* note 67, at 668:

For pedagogical or other reasons, the equivalent of bicycles' 'training wheels' might have been inserted into the teachings or techniques: later versions the material could remove or simplify these extra steps once students understand their purpose, or progress beyond the point of needing them. It is also possible that errors or extraneous material could have been deliberately installed in the material so that its developers could prevent or detect plagiarism

In addition, material that a student might consider the final word on a subject could actually be only an early version of an evolving teaching or technique.

⁷² Simon, *supra* note 61, at 365.

the religious works consistent and coherent as they are passed down and interpreted.⁷³

Copyright law can be used by religious groups through censorship to silence viewpoints that oppose, criticize, or are in competition with any given religion. This use of copyright law by religious groups can achieve multiple goals. The first goal is for a religion to avoid any bad publicity.⁷⁴ Religions care about publicity because the media can affect the perceived truth or perceived reputation of their religious doctrine.⁷⁵ If religious groups can successfully suppress the views of those who criticize their religion, then they can avoid the negative publicity.

A second goal for religious groups who seek copyright is to squelch opposition.⁷⁶ Opposition is especially common when a religious group breaks into multiple groups or when smaller groups splinter off from their original organization. The new groups may have disagreements with the original groups on doctrinal issues, even in the religious texts, especially when these new groups write their own version, or interpretation, of their religion's texts.⁷⁷ One group can prevent the other group from publishing edited or alternative version of their religious works by invoking copyright law. In these cases, the larger, more established religious groups are more likely to be successful in preventing unauthorized printing, copying, displaying, and distribution of their own works, and same for any derivative works.

A final goal for religious groups who seek copyright is to destroy other competing religious views.⁷⁸ This goal is one that only really applies if one looks at the whole religious choice as a

⁷³ *Id.* at 366.

⁷⁴ See *New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152, 154 (2d Cir. 1990); see also *New Era Publ'ns Int'l v. Henry Holt & Co., Inc.*, 695 F. Supp. 1493, 1497–98 (S.D.N.Y. 1988).

⁷⁵ David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion, and Identity*, 49 *IDEA* 233, 236–40 (2009).

⁷⁶ Thomas Berg, *Copyright for Religious Reasons: A Comment on Principles of Copyright and Religious Freedom*, 21 *CARDOZO ARTS & ENT. L.J.* 287, 287 (2003) (noting that copyright may be utilized to suppress a religious minority or religious dissent).

⁷⁷ *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1113 (9th Cir. 2000).

⁷⁸ *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1091 n.17 (9th Cir. 1986) (stating that while competition is more prominent in trademark law than it is in copyright law, this final goal was applicable in this outlier case).

shopping mall where religions compete for our membership.⁷⁹ There is the possible situation where religious groups see competing religions as incorrectly representing versions of their own religious beliefs.⁸⁰ Religious groups can use copyright law to censor competition by arguing about the validity of their competitors' views. This is a strong power of copyright law because if a group is successful in censoring its competition, they have prevented not only their competitors' counterarguments, but all of their arguments, making the group who censored stronger because their competition is now silenced.

This issue comes into play when courts address fair use, in which they use the four factors stated in the Copyright Act.⁸¹ Fair use is a copyright doctrine that allows an individual to use another author's work without authorization and without compensating the author.⁸² The analysis of the fourth factor to determine fair use does not change for religious organizations.⁸³

The other dominant reason that religious groups obtain copyrights is to maintain doctrinal purity. Something sacred to protect (religious texts) combined with the power to protect it (copyright law) comes a desire to protect it, or even a greedy desire to control the texts. This desire to control religious doctrine can

⁷⁹ R. LAURENCE MOORE, *SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE* 4–7 (1994)

⁸⁰ *Phillips v. Beck*, No. 06-628 SOM/KSC, 2007 WL 2972605, at *1 (D. Haw. Oct. 9, 2007).

⁸¹ Simon, *supra* note 61, at 415–16 (noting the “fair use” statute sets out four factors that courts must use in determining whether the use made of a work in any particular case is a fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work).

⁸² 17 U.S.C.A § 107 (2015).

⁸³ *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (“Religious institutions . . . would suffer if their publications invested with an institution’s reputation and goodwill could be freely appropriated by anyone.”); *see also* *Religious Tech Ctr. v. Netcom On-Line Comm’n Servs.*, 923 F. Supp. 1231, 1242–43 (N.D. Cal 1995) (finding that *Bridge Publ’ns v. Vien*, 827 F. Supp. 629, 632 (S.D. Cal. 1993), did not apply and that the defendant’s works were not meant to compete with the church of Scientology, when a former scientologist posted L. Ron Hubbard’s writings on the internet); *see also* *Vien*, 827 F. Supp. at 632 (holding that when discussing the fourth fair use factor that, since the defendant used the works for the same purpose intended by plaintiffs, the defendant’s unauthorized copies fulfilled “the demand for the original” works and “diminished or prejudiced” their potential sale).

motivate religious groups to use copyright protection to protect their religious works, even internally.⁸⁴ By using copyright law, religious groups can control the texts of their religion and maintain doctrinal purity, two important goals of most religions.⁸⁵

Controlling the text is so important to religious groups because unauthorized reproduction and distribution of a religious text places it at risk of interpretation or revision.⁸⁶ Keeping a work unprotected leaves the potential for distortions, rearrangements, and abridgements to appear.⁸⁷ Derivative works can also change the meaning of the doctrine or spirit behind the message in the original work. New editions of religious texts that are in sequence or cumulative can change the ordering of the sequence or the context of the language in the texts. To avoid these issues, religious groups can implement copyright law to prevent all impermissible copying and distribution of the religious works and any derivative works, and therefore maintaining their doctrinal purity.⁸⁸

Copyright protection and doctrinal purity are so linked because the wording of religious texts is important to religious groups. The copyright protection keeps the words of the religious texts from being changed, which keeps the doctrine from being altered. For many believers, in many religions, words stand for religious images or ideas of extreme significance.⁸⁹

VII. RELIGIONS' COMPLICATIONS WITH COPYRIGHT LAW

The human authorship requirement is a hurdle that religious groups will soon have to be able to address assuming that it becomes part of the doctrine of copyright law. If that's not enough, there are still other obstacles that religions face when trying to obtain copyright protection.

⁸⁴ *Bridge Publ'ns*, 827 F. Supp. at 633 (finding that the plaintiff's religious text was disclosed only to those who achieved the proper level of spiritual training, and could not be accessed without signing an agreement to keep its secrets confidential).

⁸⁵ *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist (UCS)*, 829 F.2d 1152, 1155 (D.C. Cir. 1987).

⁸⁶ *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor*, No. 96-4126(RWS), 2000 WL 1028634, at *1-7 (S.D.N.Y. July 25, 2000).

⁸⁷ *Id.*

⁸⁸ *Id.* at *5.

⁸⁹ *United Christian Scientists*, 829 F.2d at 1163.

Copyright law requires that a work be original for it to be copyrightable.⁹⁰ This requirement under the law can be agreeable, but also problematic for religious groups. Most religious groups would agree that originality is more important than time or effort consumed to create a new text. However, the originality requirement can compete with the religious goals of maintaining doctrinal purity and censoring other groups' use of religious works. Since copyright applies only to works of original authorship, religious doctrine embodied in a text cannot be fully protected. Copyright will protect the original expressions in the text, but it does not protect the ideas that the text embodies. Therefore, other groups can copy these ideas and interpret them into their own expressions.

Another hurdle in copyright law is that facts are not copyrightable.⁹¹ While this seems like a death blow for any religious texts with stories that the religion wants to present as factual, luckily for religious groups, compilations of facts are copyrightable.⁹² As long as the compilation is original, it can be protected by copyright.⁹³ However, it should be mentioned that the law does not protect facts contained in the compilation.

Copyright law also has a merger doctrine that is problematic for religious groups who want to censor others and maintain doctrinal purity. First of all, the Copyright Act actually prohibits protection of ideas.⁹⁴ Since copyrighted materials can

⁹⁰ 17 U.S.C. § 102 (2015) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression"); see also *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–47 (1991) ("The sine qua non of copyright is originality It is the very 'premise of copyright law.'")

⁹¹ *Feist*, 499 U.S. at 344 (recognizing that facts are not copyrightable).

⁹² 17 U.S.C. § 103(a) (2015) (stating "[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

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

⁹⁴ 17 U.S.C. § 102(b) (2015) (stating that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); H.R. REP. NO. 94-1476, at 56–57 (1976) (stating "[c]opyright does not

contain ideas, the copyright on said material protects it, but does not protect the idea that it may contain. It only protects the expression of the ideas.⁹⁵

The merger doctrine applies when such an idea can only be expressed in a finite number of ways.⁹⁶ If an idea can only be expressed one way, then a person is free to copy that expression.⁹⁷ In such an instance, the idea and the expression have merged. To allow a copyright in this instance would make it possible for everyone to unknowingly commit copyright infringement. This hypothetical scenario would be the same as a monopoly, except this would be a monopoly on an idea. The merger doctrine can also still apply when the idea and expression are not completely unique, but can only be expressed in a finite number of ways.⁹⁸

Many religious doctrines do not require an exact copy to understand the ideas they contain. An idea contained in a religious text could be reproduced by expressing it differently. The merger doctrine gives religious groups problems because it prevents their ideas from being copyrightable, and therefore the ideas of their predecessors and writers of their main texts (divine or not) are non-copyrightable. With copyright law protecting expressions and not ideas, religious groups will struggle with their main goals of protecting their doctrinal purity and censoring others because their ideas and religious principles are free to be used if expressed in a different way.

preclude other from using the ideas or information revealed by the author's work.”).

⁹⁵ 17 U.S.C. § 102(a) (stating that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

⁹⁶ *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606–07 (1st Cir. 1988) (“Some ideas admit of only a limited number of expressions . . . [C]opyright is no bar to copying that expression,” but later stating “[c]onversely, of course, ‘as a work embodies more in the way of particularized expression, it moves further away from merger of idea and expression and received broader copyright protection.’”) (quoting *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982)).

⁹⁷ *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 136 n.3 (2d Cir. 2004) (stating that “[i]t is of course true that similarity which necessarily results from the replication of an idea will not support a finding of infringement.”); see also *Coquico, Inc. v. Rodríguez-Miranda*, 562 F.3d 62, 68 (1st Cir. 2009) (stating that “[t]he merger doctrine denies copyright protection when creativity merges with reality; that is, when there is only one way to express a particular idea.”).

⁹⁸ *Concrete Mach.*, 843 F.2d at 606 (stating that in such a case, “the burden of proof is heavy on the plaintiff who may have to show ‘near identity’ between the works at issue.”).

Another hurdle for religious groups in copyright law is called “substantial similarity.” This doctrine is implemented to prove “non-literal infringement” or, infringement where the verbatim, exact text is not copied.⁹⁹ However, the protection can still apply if the plaintiff can show a substantial similarity between her work and an accused infringer’s work; a two part inquiry of extrinsic similarity and intrinsic similarity.

When ideas subject to copyright protection are similar, then you have extrinsic similarity.¹⁰⁰ This is an objective assessment, looking at factors such as similarities between the works’ plot and theme, each party’s access to the works, or identity of the works’ titles.¹⁰¹

When the concept and feel of subjects of copyright protection are similar then you have intrinsic similarity.¹⁰² Intrinsic similarity is an objective assessment from the standpoint of a reasonable observer, typically the public at large.¹⁰³

The substantial similarity doctrine does seem to broaden the scope of protection because it does not require literal infringement. The best part about the substantial similarity test for religious groups is that the test uses the perspective of an ordinary person. Since the texts are directed at a religious audience, then the perspective for the test will be one of an ordinary person in that religious audience. Of course, a religious audience will find works similar if they contain religious messages.

While this doctrine seems like a good thing for religious groups, it also has its problems for religious groups like most other copyright doctrines. Explanatory or informative works will not be protected.¹⁰⁴ Consequently, substantially similar works that are produced for nonreligious purposes will not be considered an

⁹⁹ *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001) (“When the plaintiff possesses no direct evidence that the defendant copied its protected work, it may create a presumption of copying by indirect evidence establishing that the defendant had access to the copyrighted work and that the defendant’s work is ‘substantially similar’ to the protected material.”).

¹⁰⁰ *Id.*

¹⁰¹ *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990).

¹⁰² *Lyons P’ship*, 243 F.3d at 801.

¹⁰³ *Id.* (finding that to analyze intrinsic similarity, the court must ask whether the works are similar in the sense that they express the ideas in a substantially similar manner from the eyes of the intended audience).

¹⁰⁴ *New Era Publ’ns Int’l v. Henry Holt & Co., Inc.*, 695 F. Supp. 1493, 1525–26 (S.D.N.Y. 1988) (stating that, “[i]n the past, efforts to suppress critical biography through copyright injunction have generally not succeeded because courts (sometimes straining) have found fair use.”).

infringement on the original work's copyright. The substantially similar doctrine can also be problematic for religions because the objective inquiry becomes more complicated when the work is alleged to be the sacred scripture of a religion.¹⁰⁵ Ultimately, since the doctrine does not protect the ideas contained in the works, it does little to help religious groups who wish to maintain their doctrinal purity.

One final doctrine in copyright law that gives religious groups serious problems is the doctrine of fair use. Fair use, as it applies to any copyright, not just religious copyrights, allows others to use a protected work without consent or compensating the author.¹⁰⁶ A fair use is assessed by the court through four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁰⁷

Fair use gives religious groups problems when individuals copy their works. The Copyright Act and fair use doctrine allows others to copy a religious work to comment on it or criticize it.¹⁰⁸ This leaves religious groups with no means to censor those who wish to criticize.

If all of these hurdles were not enough for religious groups to jump over, now they have the new human authorship requirement to deal with. However, it turns out that some religious groups may already have experience with dealing with a similar requirement.

¹⁰⁵ *Religious Tech. Ctr. v. Scott*, 660 F. Supp. 515 (C.D. Cal. 1987), *aff'd*, 971 F.2d 364 (9th Cir. 1992) (holding that two works “expressed substantially the same idea,” but were not substantially similar because a reasonable person would not find the works substantially similar in expression).

¹⁰⁶ 17 U.S.C. § 107 (2015) (“[F]air use of a copyrighted work including reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

¹⁰⁷ *Id.*; see also PATRY, *supra* note 9, § 1:1.

¹⁰⁸ 17 U.S.C. § 107.

VIII. HUMAN AUTHORSHIP ALREADY A FACTOR?

Even though the human authorship requirement was just produced in August's update to the copyright guidelines, religious groups have already had issues obtaining a copyright when claiming that the author is a supernatural being.¹⁰⁹ Even before the human authorship requirement was issued, there was already enough language on record at the federal circuit court level to suggest that creations of divine beings are not entitled to a copyright.¹¹⁰

In an early Supreme Court case, the court noted that while the term "writings" in the Copyright Clause is open to some interpretation and may be construed broadly, only those writings that are "original, and are founded in the creative powers of the mind" can be protected.¹¹¹ This sounds like a very early, implied human authorship requirement because it limits protectable works to only those created by the mind; although it doesn't explicitly state that the mind that the work comes from must be a "human" mind.

Before the new human authorship requirement, when religious groups tried to obtain a copyright while arguing that the author is a divine being, one of three outcomes resulted. First, the court may avoid the issue of the divine claim by disregarding any divine nature of the work claimed by the party, and instead use copyright principles to hold that the religious work still qualifies as a literary work.¹¹²

The second possible outcome when a religious group tries to obtain a copyright while claiming a supernatural author is that the court finds the work copyrightable on the basis of the contribution to the work by the individual presenting it for

¹⁰⁹ *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor*, No. 96-4126(RWS), 2000 WL 1028634, at *11 (S.D.N.Y. July 25, 2000).

¹¹⁰ *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997) (*Urantia II*) (mentioning that while "[t]he copyright laws . . . do not expressly require 'human' authorship . . . [I]t is not creations of divine beings that the copyright laws were intended to protect, and that in this case some element of human creativity must have occurred in order for the Book to be copyrightable.").

¹¹¹ *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) ("The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.").

¹¹² *Urantia Found. v. Maaherra*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995) (*Urantia I*), (in deciding a motion for partial summary judgment, the judge stated "that the uncontroverted evidence is that *The Urantia Book* is a literary work because the work itself possesses at least some minimal degree of creativity.").

copyright; these can be substantive contributions, or choices of selection or arrangement.¹¹³

The third and final outcome is when a religious group presents their work as factual before any litigation, and then changes the claim to submit that the work is nonfactual during litigation. When this happens, the court has the discretion to use factual estoppel to bar the existence of a valid copyright.¹¹⁴ The policy behind factual estoppel seems to be to promote good morals. For example, the court in *Oliver v. Saint Germain Foundation* found that factual estoppel prevented a plaintiff from claiming a work as original in order to protect it by copyright when he previously claimed that the work was factual and not created by him.¹¹⁵ When the court finds that factual estoppel applies, then the work in question is usually not copyrightable at all.¹¹⁶

The first scenario is the best result, as it gives a strong copyright to the work. However, it is a human that holds that copyright, and the religious group still loses in a sense because they do not get the “divine authorship” recognized by the court.

The scenarios of copyrightable compilations and factual estoppel are problematic for religious groups. Factual estoppel bars protection of a work even if the party could have made a claim of originality; as a result, the copyright resulting from a compilation claim is thin.¹¹⁷ It is thin because it only protects the selection and arrangement of the work, and it does not apply to anything more, like words and phrases. This makes it very difficult for religious groups to prevent others from using parts of the work.

¹¹³ See *Urantia II*, 114 F.3d at 955; see also *Penguin Books*, 2000 WL 1028634, at *1–7.

¹¹⁴ *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992) (where factual estoppel did not apply to a plaintiff that argued he created a work dictated to him by Jesus Christ); *Penguin Books*, 2000 WL 1028634, at *14 (where the court held that factual estoppel only applies when the plaintiff claims the contents of the work to be factual).

¹¹⁵ *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 298–99 (S.D. Cal. 1941).

¹¹⁶ *Arca Inst.*, 970 F.2d at 1075–76; *Oliver*, 41 F. Supp. at 299 (where the application of factual estoppel precluded claims of originality).

¹¹⁷ *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“[C]opyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”).

Therefore, the desirable outcome for a religious group is the first; for the court to grant copyright protection by circumventing the divine authorship issue and finding the work copyrightable using copyright law principles. This was the desirable outcome before the human authorship requirement was issued. Now that the requirement is in the copyright guidelines, this author believes that this outcome is now necessary for religious groups to obtain copyrights on their works. In other words, with a human authorship requirement now in place, a claim of divine authorship is moot. The claim will either be thrown out because it is against the guidelines, and most likely future doctrine, or the party claiming divine authorship would be instructed to present a factual argument that there was actually human authorship and not divine authorship. In doing so, the claim may be stopped again due to factual estoppel, making an attempt at divine authorship now legally impossible.

Before the human authorship requirement was released, there was already a trend moving toward such a requirement. The Ninth Circuit basically exercised a human authorship requirement while at the same time stating that there wasn't one.¹¹⁸ Legal scholars have proposed rules that would disfavor claims or religious authorship completely.¹¹⁹ It seems that with a human authorship requirement now in place, the best choice for a religious group seeking copyright protection is not to try and obtain divine authorship, but to seek human authorship of their religious works. This may present a moral problem for the actual members of various religious groups, but a good lawyer will still have options to get a copyright on the words and works of divine beings.

¹¹⁸ *Urantia II*, 114 F.3d at 958 (“[T]here can be no valid copyright in the Book because it lacks the requisite ingredient of human creativity, and that therefore the Book is not a ‘work of authorship’ within the meaning of the Copyright Act. The copyright laws, of course, do not expressly require ‘human’ authorship . . .”).

¹¹⁹ Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act* § 110(3), 22 CARDOZO ARTS & ENT. L.J. 43 (2004) (Cotter states that the treatment of divine authorship in 2004 was misguided and implies that divine claims of authorship are false, and therefore has advocated for courts to avoid deciding any religious aspect of any claim by adopting a “default rule against copyrightability.”).

IX. CIRCUMVENTING THE HUMAN AUTHORSHIP REQUIREMENT

Looking forward, courts will have to address the question of human authorship in cases involving copyright. In order to do so, the court has to find the answer to the question of “who is the author?”

The Supreme Court was challenged with the question of authorship in an early and well known copyright case involving photographs of Oscar Wilde, *Burrow-Giles Lithographic Co. v. Sarony*.¹²⁰ In dealing with the issue of whether a photograph is a writing by an author, the Court did not rule that all photographs are copyrightable, but instead looked at a case-by-case basis of how much mental effort and imagination the “author” put into staging the photograph.¹²¹ The Court did not answer the question of whether a machine, the camera (a non-human), was entitled to copyright. Instead, the Court looked to the dictionary and held that an “author,” as referred to in the Copyright Clause, is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”¹²² The Court also took note that the Framers understood copyright to be the “exclusive right of a man to the production of his own genius or intellect.”¹²³ This language could easily be interpreted to infer a human authorship requirement already, even though this didn’t seem to be the explicit intention at the time. However, it is important to keep in mind that the Court was not addressing or answering the issue of whether actual human authorship is required, and therefore may have overlooked their wording on a less material issue.

Congress has had to ask itself the question before of “who is the author” in regard to copyright in 1909. In that year, Congress amended and consolidated the copyright acts in the 1909 Act for

¹²⁰ 111 U.S. 53 (1884).

¹²¹ The Court found the photograph to be an original work of art and of the plaintiff’s intellectual invention because the plaintiff, “entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.” *Id.* at 54–55.

¹²² *Id.* at 58.

¹²³ *Id.* (emphasis added).

the purpose of bringing sound recordings into the realm of copyrightable material.¹²⁴ In this Act, Congress declined to formulate a single rule to be applied to every case. Congress felt that because authors' identities can vary in different situations, the 1909 Act should not specify the authorship of all sound recording; that matter should be left to "the employment relationship and bargaining among the interests involved."¹²⁵ Due to this reasoning on this issue by Congress, we get some inclination that the author of a religious work can be ascertained without having to create a statutory, bright-line rule for identifying the author.

Although it still has not been fully addressed in the courts, human authorship has been implied, like the above cases, in other copyright cases. In *Goldstein v. California*, the Supreme Court noted that "writing" and "author" are terms that "have not been construed in their narrow literal sense but, rather, with the flexibility necessary to reflect the broad scope of constitutional principles."¹²⁶ This outlook to copyright in *Goldstein* has become the pragmatic approach to authorship in the United States: analyzing the human aspect of authorship is not necessary when the medium in which the work is produced is already copyrightable by statute. This approach, or one very similar, can be seen by the results and reasoning in *Oliver* and *Urantia*, where the court circumvented the authorship issue by focusing instead on arrangements and compilations, respectively to the two cases.

With the human authorship requirement officially in the copyright guidelines and no longer just an implication through case law or the Copyright Clause, a decision has been made for the court that, as it appears, was not going to be decided anytime soon. As we have seen from past case law, anytime the courts have been presented with the issue of human authorship, they have usually found a way around it and resolved the case on another issue. Now, Congress has decided the issue for the courts; consequently, the courts and the U.S. Copyright Office cannot even consider claims of divine authorship. When presented with one, presumably the claim would be thrown out because there are no grounds for a copyright. Hopefully, however, the courts will still

¹²⁴ See Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

¹²⁵ H.R. REP. NO. 487, at 5 (1971). As a side note, Congress left this issue up to the courts when they already had decades of experience with sound recordings.

¹²⁶ *Goldstein v. California*, 412 U.S. 546, 561 (1973).

have deference to uphold a copyright on other grounds, as they were able to do in *Urantia* and *Oliver*.

Assuming that the court does still have such deference, then religious groups can still obtain copyright for their religious works through a number of methods. One option for religious groups seeking copyright is to present the work as a collaboration of the group. Copyright doctrine allows joint ownership of a copyright.¹²⁷ In such a case, all of the collaborators are co-owners of the copyright and co-authors of the collective work.¹²⁸ When a work is prepared by collaborators for a common employer, the employer is held to be the author.¹²⁹

This option would seem to yield a successful copyright for a religious group. The copyright would be held by multiple members of the group, which a religious group may favor as it can humble the individual members and remind them of their unity. Similarly, a religious group could hire a team of professional writers, or employ a group of their own members to create their religious works.¹³⁰ By doing so, the work produced by the employed group or individual, if copyrighted, would have its copyright held by the member or members of the religious group that employed them.

While the outcome of getting a successful copyright is a great one for religious groups in this scenario, to this author it seems like the religious group is sacrificing a lot by going this route. In order to get a jointly owned copyright, a religious group would have to admit on the record or in some public document that the group members wrote the work from their own ideas, and that the work was not inspired by a divine being. This may be easier or

¹²⁷ 17 U.S.C. § 201(a) (2015) (“Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”).

¹²⁸ 17 U.S.C. § 101 (2015) (defining “collective work” as a work such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole); *Id.* (defining “joint work” as a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole).

¹²⁹ 17 U.S.C. § 201(b).

¹³⁰ 17 U.S.C. § 101 (defining a “work made for hire” as— (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire).

harder for any given religious person to do; it would be especially hard for those with very devout faith. However, this option does give the group a copyright, and helps to promote their goals of doctrinal purity and censoring outside usage of their works.

Religious groups would have a similar spiritual problem with obtaining a copyright through the loophole of a work for hire. With this option, the religious group is publicly admitting that a non-believer, an outsider, wrote their religious work. Or, like the scenario above, the group would be publicly admitting that they wrote their words through their own ideas and not the ideas of a divine being.

The absolute best option that religious groups have to get the most protection for their works is to present it to the court as an original, non-factual work by a human author or group of human authors. This method should result in the grant of a copyright, lasting the lifetime of the author plus another seventy years.¹³¹ When using this method, the religious group seeking copyright will want to be very careful if there was a point in time where they publicly offered or professed their work to be factual or truthful. If that was ever the case, then factual estoppel could end up barring the work from being considered for copyright.

Essentially, if religious groups want to seek copyright for works that they believe to be from a divine being, they will most likely have to present their work in a way which they do not fundamentally agree. It seems to be a major sacrifice for a religious group to present its works in a public setting, but then claim them to be non-factual and basically just stories written by man. But that is what religious groups are now practically forced to do if they wish to receive a copyright. Unless courts can make this argument for them as they did in cases like *Urantia*, religious groups will have to publicly claim their works as human written stories if they wish to successfully obtain a copyright.

Given this spiritual dilemma, this author thinks that it would be appropriate for religious groups to handle these situations as quietly and delicately as possible. Meaning that when it comes time to obtain a copyright on their work, a religious group should claim as few human authors as possible, and those authors should not broadcast how the work will be presented to the court, nor should they have any reason to ever do so. The people of a religion never need to know that their work was

¹³¹ 17 U.S.C. §§ 302(a), (b) (2015).

presented to a court of man as non-factual. The people of a religion have no reason to know that a court is never going to recognize its divine being as a thing that can communicate ideas. People in their chosen religions are happy with their beliefs; if not, they would not be in that group. So it is completely counterintuitive to force an entire group to admit that there are no facts to its texts, and probably therefore its doctrines. Such a task should be handled by as few as possible; perhaps even by a trusted individual who is outside of the religious group and who would therefore not have to sacrifice any religious or spiritual beliefs to legally obtain a copyright for the group's religious works.

X. CONCLUSION

This note began as an analysis of the new copyright guidelines that were recently passed down in August of 2014. On its face, the new guidelines' human authorship requirement seemed as if it would be a major hurdle for religious groups seeking copyright for their religious works, especially those that the groups profess to be from a divine being.

The first thing we looked at was a win for religious groups: any copyrights held today, even if the claimed author is a divine being, are safe from any retroactive effects of the human authorship requirement, as are any copyrights from any other changes in the future.

We looked at how and why religious groups obtain copyrights, with their most important goals being doctrinal purity and censoring other groups' use of their works. It turns out that religious groups have run into other problems when it comes to copyright even before the human authorship requirement came into effect.

Next, we looked at today's existing copyright doctrine. We now know that for a religious group to obtain a copyright on a work, that work must be original and non-factual. They can also obtain a copyright on their works that can be considered compilations; though the facts contained in those compilations will not be protected. Religious groups also want to be careful not to attempt obtaining a copyright on their ideas, but rather the expression of those ideas.

We also took a look at the trend towards a human authorship requirement before the new copyright guidelines were issued and how the courts handled past claims of divine authorship. It turns out that divine authorship and the issue of

human authorship is an issue that courts have typically preferred to circumvent or avoid altogether. Courts have preferred to disregard claims of divine authorship and instead look to human factors that contributed to the work.

Finally, this note proposed that religious groups can still obtain copyrights for their religious works. However, in order to do so, their best approach is to circumvent the human authorship issue the way courts have done in the past. Except now, religious groups should start doing so intentionally, rather than entrusting courts to have the deference to do so. While this is great for religious groups, there is the spiritual sacrifice that they will have to make of presenting their work to the court as non-factual, and written by man.

The human authorship requirement has essentially brought the issue of whether a court could ever recognize a work written or inspired by a divine being to a close. At this point, it is clear that a court will never proclaim that a work was truly written by a divine being because the human authorship requirement does away with any reason to even inquire into claims of divine authorship. While it would be amazing for a religious group to see a court recognize their work as truly written or inspired by a divine being, this is now a legal impossibility.