

# **Toward an Ethic of Authorship**

*A positive approach to intellectual property in the Church.*

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*Presented to the Arizona-California District Pastors' Conference  
by Caleb R. Bassett on October 24, 2013*

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## ABSTRACT

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The topic of copyright and its associated legal detritus was formerly reserved for publishers, libraries, universities, and other large institutions (along with their armies of lawyers). Today, average people with no involvement in the publishing industry are not only aware of the term but also interact with the principles of copyright on a daily basis, even if they do not understand how copyright law applies to their day to day activity. Modern technology has turned even individual pastors and congregations into publishers, but many do not have a working understanding of copyright and, in worst cases, act without any regard for the philosophical and ethical goals that copyright was enacted to foster. Better understanding and a positive ethic are needed.

In this essay, I offer an overview of the history and purpose of copyright in the United States, which provides the foundation for an informed approach to works of authorship. Next, I discuss the most serious ethical challenges that authorship faces under the current copyright law, with special emphasis on the damaging effects of a negative approach to works of authorship. Finally, I propose a Christian ethic of authorship to provide the spiritual and intellectual framework in which to foster original, creative work for the good of the Church and its mission.

## 1 INTRODUCTION

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*The modern concept of copyright is difficult, complex, and on the whole, unsatisfactory.*

— LYMAN RAY PATTERSON

When reading copyright scholarship, you get the sense that no one likes it, not even the scholars who have devoted their professional lives to its study. Copyright seems to frustrate everyone. Scholars propose new solutions only to say that they doubt any change is likely to happen. Authors grow frustrated by the societal antipathy toward copyright. And individuals themselves feel stymied by the complex system of rules that govern the use of creative works.

The Church, whose members are part of society and whose ministerium functions within the laws of their government, must dive into this difficult and complex topic. Not only does our synod have a publishing house to fulfill one of its three stated purposes,<sup>1</sup> virtually every congregation also functions as its own publishing house. We produce Bible studies, service folders, sermons, booklets, informational documents, and more. We do this on our own computers; we print and bind them on our own copiers; we distribute them over the Internet. We often do so without a working understanding of copyright, and, in worst cases, without any regard for the philosophical and ethical goals that copyright was enacted to foster. Copyright is all about authorship, that is the pursuit of literary, visual, and audible works that benefit society. Even individual pastors must take time to consider how to approach authorship in a modern, digital society.

In this essay, I offer an overview of the history and purpose of copyright in the United States, which provides the foundation for an informed approach to works of authorship. Next, I discuss the most serious challenges that authorship faces under the current copyright law, with special emphasis on the damaging effects of a negative approach to works of authorship. Finally, I propose a Christian ethic of authorship to provide the spiritual and intellectual framework in which to foster original, creative<sup>2</sup> work for the good of the Church and its mission.

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<sup>1</sup> Wisconsin Evangelical Lutheran Synod, *Final Report and Recommendations of the Ad Hoc Commission*, 5-6. “Historically, the purpose of our synod has been to do together what we cannot do as individual congregations,” which includes “establishing and maintaining theological seminaries, colleges, academies, schools, and other institutions of learning,” and “printing, publishing, purchasing, selling, and disseminating literature that maintains Lutheran doctrine and practice.”

<sup>2</sup> “Creative” is a term so vague that it may not be useful. For the purpose of this paper let’s define “creative work” as “creations of the mind.”

## 2 AUTHORSHIP UNDER COPYRIGHT

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*Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air, and intense, devouring labor, an Appalachian Spring, a Sun Also Rises, a Citizen Kane.*

— PAUL GOLDSTEIN

Copyright has a colorful history. Understanding how competing values like censorship, guild monopoly, civil liberty, and pragmatic business negotiations have shaped copyright throughout its history provides the foundation for an informed approach to works of authorship.

### 2.1 THE BIRTH OF COPYRIGHT

In the past, publishing works of authorship<sup>3</sup> wasn't easy. Before Gutenberg invented movable type, the distribution of texts was prohibitively expensive. The wealthy patrons and large organizations that could afford the time and capital required to distribute texts served, for better or worse, as the gatekeepers to authorship. Relatively cheap printing ushered in a new era in which even individuals from the margins and footnotes of society could exert profound influence over history.

In Europe, the press empowered movements (e.g. the Reformation) that disrupted established civil and ecclesiastical powers. The importance of the press to the success of the Lutheran Reformation cannot be overstated.<sup>4</sup> Hoping to avoid what happened in continental Europe, English monarchs enacted statutes to outlaw unauthorized texts. In fact, Henry VIII's first censorship decree specifically cited the dangers of Luther's "dampnable Heresyes" as justification for government control of the press.<sup>5</sup> The Crown achieved its control by striking a careful bargain. The government gave to publishing guilds, specifically the Stationers' Company of London, monopoly control over the printing market. In exchange the Company agreed to serve as the Crown's censors. The Company's strict control over every aspect of the publishing industry ensured that print shops and booksellers distributed only authorized works. Both parties got

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<sup>3</sup> Throughout this paper the term "work of authorship" refers to any creative output that falls under the protection of copyright. Naturally, this includes written text, but also includes music and other auditory arts, as well as visual arts such as graphic arts, design, etc. So also the term "author" is synonymous with "creator" or "artist." All creative work, whether literary, audible, or visual is a work of authorship.

<sup>4</sup> Elisabeth Lewisohn Eisenstein, *The Printing Press as an Agent of Change* (Cambridge University Press, 1980), 303.

<sup>5</sup> Patterson, 23.

what they wanted in the bargain: private enrichment for the Company and censorship for the government. The legal control over the right to make copies, conceived at the invention of movable type, was born as a censorship bargain.

Over time, government censorship lost its luster as the Age of Enlightenment shifted political opinion. After almost two centuries of censorship, the English parliament decided to dismantle the legal bargain between Crown and Company. Parliament ended the censorship regime and enacted “a Statute for the Encouragement of Learning.”<sup>6</sup> This 1710 statute, commonly called “The Statute of Anne,”<sup>7</sup> was the first legal framework to recognize the authorship rights of all individuals.<sup>8</sup> The Statute of Anne permanently altered copyright’s development. The right to control the production of copies was formerly vested in the publisher; the Statute of Anne placed copyright in the hands of authors themselves. Born as censorship, copyright matured into a legal system to support individual authorship.

## 2.2 THE AMERICAN COPYRIGHT BARGAIN

American law descends from English law, thus American Colonies imported the thinking behind the Statute of Anne into their own territories. Colonies passed similar copyright acts; the Massachusetts act even echoed the language of the Statute of Anne citing “the improvement of knowledge, the progress of civilization, the public weal<sup>9</sup> of the community, and the advancement of human happiness” as the basis for the law.<sup>10</sup> It was only a formality, then, that the Constitution of the United States included a copyright provision. The Framers added the so-called “Copyright Clause” unanimously and without debate.<sup>11</sup> The clause grants Congress the power to enact copyright law, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive

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<sup>6</sup> *Ibid.*, 144-145.

<sup>7</sup> Glynn Lunney Jr, “The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act,” *Virginia Law Review* 87, no. 5 (2001): 815.

<sup>8</sup> Patterson, 144-145.

<sup>9</sup> “Weal” is an antiquated word for “wealth” or “welfare.”

<sup>10</sup> Patterson, 187.

<sup>11</sup> Paul Goldstein, *Copyright's Highway* (Stanford University Press, 2003), 41.

Right to their respective Writings and Discoveries.”<sup>12</sup> The Framers believed that a robust market for original works of authorship was essential for a democratic civil society—in fact, they considered the benefit of society to be copyright’s primary goal.<sup>13</sup> The language of the Copyright Clause and subsequent judicial interpretations confirm that “congress may enact a copyright statute, but only if, and to the extent that, it serves the public, and not merely a private, interest.”<sup>14</sup>

American copyright is a bargain between authors and the public. The public is to receive a wealth of knowledge and art thanks to a legal system that provides authors with the economic incentive to produce original work. During the limited term of copyright no one may print, sell, or distribute copies of the work except the copyright holder, which leaves one way to get the work—you pay for it. To safeguard the public’s interest in this bargain, copyright law includes two key limitations. These “safety valves”<sup>15</sup> ensure reasonable and flexible limits to the monopoly power that copyright grants. First, copyright lasts for a limited time.<sup>16</sup> Eventually all works of authorship will become part of the public domain. Second, the public may infringe on copyrighted works for certain, specific reasons, i.e., “fair use.”<sup>17</sup>

The Framers designed the copyright bargain to foster original, creative expression that promotes knowledge and useful arts for the good of society. There is little argument that America’s copyright bargain has paid big in both money and knowledge. The American public has received vast literary and artistic treasure while those who produce works of authorship

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<sup>12</sup> U.S. Const. art. 1, sec. 8, cl. 8. Congress quickly made use of its constitutional authority and passed the Copyright Act of 1790. This first Federal copyright act enacted four legal principles as the foundation for copyright protection in the new United States. (1) learning must be promoted, (2) copyright is a statutory privilege granted by the government, (3) monopoly is granted to the copyright holder, and (4) these are exclusive rights belonging to the author. Subsequent copyright acts have built upon foundational principles. In addition to the first in 1790, Congress has passed five subsequent copyright acts: Copyright Act of 1831, Copyright Act of 1909, Copyright Act of 1978, Copyright Renewal Act of 1992, and Digital Millennium Copyright Act of 1998. Furthermore, numerous court decisions, including cases heard by the Supreme Court, have provided extensive judicial interpretation and confirmation of these four legal principles. See Patterson, 193.

<sup>13</sup> Neil Weinstock Netanel, “Copyright and a Democratic Civil Society,” *The Yale Law Journal* 106, no. 2 (1996), 289.

<sup>14</sup> Lunney, 817.

<sup>15</sup> A term used by Paul Goldstein, who is the preeminent copyright scholar in the United States.

<sup>16</sup> The Copyright Clause says “for limited Times.”

<sup>17</sup> Paul Goldstein, “Copyright,” *Law and Contemporary Problems* 55:2 (1992): 86. For example, scholarly citation falls under the doctrine of fair use.



have reaped the financial value of their effort. The bargain has been mutually beneficial.

### 2.3 DISRUPTION OF LEGAL ASSUMPTIONS

Copyright law, like all civil law, is an intellectual pursuit with practical consequences. Good laws are practical laws, based not only on sound thinking but also on practical assumptions. Changing the assumptions on which a law is built will cause the legal framework to collapse. For instance, regulations based on the assumption that people travel by horse and wagon had to be changed when people began traveling in automobiles. In the case of copyright, each change to distribution technology tends to render existing legislation obsolete by changing the assumptions on which the law was based.<sup>18</sup> Whether the player piano or the videotape recorder, new distribution technologies have brought Congress and interested parties back to the drawing board for a renewed look at copyright legislation.<sup>19</sup> To remain relevant, the law has adapted by changing terms, extending copyright protection, making special exceptions, and adding new civil and criminal penalties.<sup>20</sup>

Today the advent of digital reproduction technology along with the Internet have accelerated the gap between the law and actual practice. The framework is teetering precariously. In fact, the digital media presents a set of unique challenges that go far beyond the obstacles that copyright has encountered in the past. The Internet has fundamentally altered how we think about works of authorship and their distribution. As long as the law is out of step with actual practice there will be practical consequences.

### 2.4 THE PROBLEM OF PROPERTY

Copyright is generally considered to be a limited property right.<sup>21</sup> On the surface copyright does function like a property right in the tradition of John Locke's classical liberalism. The Lockean model goes something like this, "If I take natural, physical resources and mix them with my own time and labor to produce something of value, I naturally have a moral right to that property, for what closer possession do I have than my own time and intellect?"<sup>22</sup> Locke's approach to property rights exerted profound influ-

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<sup>18</sup> Jessica Litman, *Digital Copyright* (Prometheus Books, 2006), 22.

<sup>19</sup> Jane C. Ginsburg, "Copyright and Control Over New Technologies of Dissemination." *Columbia Law Review* 101, no. 7 (2001): 1616.

<sup>20</sup> "The Criminalization of Copyright Infringement in the Digital Era." *Harvard Law Review* 112, no. 7 (1999): 1705-1722. See also Litman, chapter two, "The Art of Making Copyright Laws," 22-34.

<sup>21</sup> Goldstein, "Copyright," 86.

<sup>22</sup> John Locke, "Second Treatise of Civil Government," 1690, Chapter V, Section 27.

ence over the Framers' understanding of liberty and civil society.<sup>23</sup> Such philosophy also dovetailed nicely with the early practice of copyright because copyright originally protected actual, real property, namely the copies of books themselves.<sup>24</sup> Form and function were largely inseparable, and to acquire a work of authorship always meant laying hands on tangible, real property.<sup>25</sup> Today, form and function are not so intimately connected. Inexpensive digital media like optical discs (e.g. CD, DVD, Blu-Ray) and portable storage devices (e.g. thumb drives, hard drives) that are connected to computers linked to the global Internet make copying and distribution almost instant and virtually limitless.<sup>26</sup> Furthermore, some works never even take on the physical form of real property.<sup>27</sup>

Putting the word "intellectual" in front of "property" seems like a simple solution,<sup>28</sup> but a variety of conceptual holes in the property-centric approach remain, all of which create practical consequences.<sup>29</sup> Today, people may read a book but never touch the print edition. Purchasing and downloading works of authorship in digital format takes mere seconds. Digital technology, along with the global reach of the Internet, have all but erased the physical and temporal limits that once governed the economics of producing, selling, and consuming works of authorship. This is hardly trivi-

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<sup>23</sup> Maurice Cranston, "Locke and Liberty." *The Wilson Quarterly* 10, no. 5 (1986): 82–93.

<sup>24</sup> Patterson, 47ff.

<sup>25</sup> In fact, part of the appeal of books was not only the content but the physical medium itself. Reviews of books used to include a great deal of commentary about the quality of the paper, the binding, and other aspects that reflected the book-maker's and typographer's art. See Robert Darnton, "What Is the History of Books? Revisited," *Modern Intellectual History* 4, no. 3 (2007): 498.

<sup>26</sup> Of course, the types of creative works that are valuable either by virtue of their particular physical shape and location (e.g. sculpture) or by their singular value (e.g. original paintings, manuscripts) are not subject to rapid and faithful duplication.

<sup>27</sup> Technically speaking, even a digital copy is a "physical" copy in the sense that digital technology still uses physical or mechanical means to record and store information. Nevertheless, since that physical mechanism is usually invisible from our view we refer to these digital copies as "virtual." For the sake of distinction I will use the term "physical" to refer to items like printed books, audio CDs, Blu-Ray Discs, and other fixed-form delivery media.

<sup>28</sup> In reality, this is actually a novel solution. See Christopher Jensen, "The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms," *Stanford Law Review* 56, no. 2 (2003): 541.

<sup>29</sup> For instance, if the Lockean property model does not apply because material resources are not being used, from what does society derive the value of "intellectual property"? Does society base the concept on a moral right of the author, a solution that is common in Europe? Or does society consider the right a statutory construct that exists by virtue of society's elected leaders enacting legislation? Which philosophical path society chooses will exert practical effects.

al—indeed, it is revolutionary.<sup>30</sup> Furthermore, courts have only selectively upheld the property argument when deciding copyright cases,<sup>31</sup> and the Supreme Court has rejected the application of a Lockean, “sweat of the brow” approach to copyright.<sup>32</sup> The divorce of form and function has caused a profound change of paradigm, and with it has challenged the foundational assumptions of copyright. Not since Gutenberg has the portability of knowledge and art changed so drastically.

## 2.5 LEGISLATION FOR THE DIGITAL MILLENNIUM

The diminishment of physical and temporal limits has not only exposed copyright law to a new set of challenges, it has also threatened traditional business models. Understandably, these dramatic changes caused the sort of companies whose businesses rely on owning a large portfolio of copyrights to scramble for some sort of control. In the past, distributing works of authorship required a well-capitalized corporation to fund the upfront costs, not only for printing, but for paying advances to authors and managing distribution, marketing, and royalties over the lifetime of the work. There was, and still is, great wealth to be had by providing the upfront capital in exchange for ownership over the works produced.<sup>33</sup> But the Internet made wide distribution relatively cheap and easy. Now, virtually anyone in the industrialized world can distribute works of authorship to a massive audience.<sup>34</sup> The traditional business model of the publisher has become more vulnerable.

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<sup>30</sup> “Beyond the rhetoric, what happens to copyright if we take seriously the proposition that the Internet and digital technology are truly revolutionary?” Raymond Shih Ray Ku, “The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology,” *The University of Chicago Law Review* 69, no. 1 (2002): 267.

<sup>31</sup> Jensen, 565.

<sup>32</sup> Kathryn Judge. “Rethinking Copyright Misuse.” *Stanford Law Review* 57, no. 3 (2004): 913.

<sup>33</sup> Many authors and artists do not end up controlling the copyright of their works. Instead, they sell their rights to a major publisher in exchange for the publisher’s ability to produce and market the work.

<sup>34</sup> The tools needed to produce works of authorship in a wide variety of media now come pre-installed on the best-selling computers. Internet services exist that make distribution to a global audience possible within minutes. Some may lament these lower barrier to entry for publishing, but a barrier to entry does not necessarily lead to better works. Consider the tabloid rack at your grocery store, or the trashy romance novel section at your local bookstore. Then consider the wide variety of useful information that pastors, and teachers—even schoolchildren—have published to the world. Good editorial work will always be valuable, but removing barriers to publishing has been a good thing overall.

Major players in the copyright industry recognized as early as 1993 that they needed to tame the coming “Information Superhighway.”<sup>35</sup> Sensing that their business models could suffer in this new paradigm, they devoted substantial lobbying resources to convince Congress to pass a new copyright act to govern the digital market for works of authorship. Congress subsequently passed the Digital Millennium Copyright Act (DMCA) of 1998.<sup>36</sup> Scholars still criticize the controversial law for not only catering to industry lobbyists but also for demolishing the safeguards that have historically preserved the public’s interest in copyright.<sup>37</sup> Sadly, the public’s interest was unrepresented in negotiations over the DMCA.<sup>38</sup> The result was a law that expanded copyright control too far.

The DMCA extended copyright control over virtually every use of a digital work.<sup>39</sup> The law supports technology designed to artificially preserve the physical and temporal limits of the past by encumbering digital works with restrictions such as number of plays, a limit to the types of device on which the works may be enjoyed, a limit to the number of times one may copy and paste portions of a text, or even a time limit to access.<sup>40</sup> Furthermore, individual copyright holders may, through mandatory contracts, apply restrictions on works of authorship that go even beyond the wide-reaching control of the DMCA.<sup>41</sup> Audiences often believe that they are purchasing personal copies of a work when in reality the terms of use for

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<sup>35</sup> Litman, 89ff. Litman notes the sad irony that legislation for the “digital millennium” displayed a remarkable lack of imagination and did not take into account the transformative nature of the Internet. “Most of the high-level policy makers and lobbyists, and most of the reporters they spoke with, were completely innocent of the Internet and only slightly more conversant with computers. For some, computers were infuriating boxes that sat on their secretaries’ desks, and could be operated only by people young enough to know how to program a VCR. For others, computers were wonderful automatic typewriters and calculators that ran word processing and spreadsheet software, and perhaps a virtual solitaire game as well. In 1992, after all, only about five million people were connected to the Internet.”

<sup>36</sup> Litman, chapter 9, “The Bargaining Table,” 122-150.

<sup>37</sup> There is a remarkably common theme in current copyright scholarship that, while it is acknowledged that society does need some sort of approach to information in the so-called “digital millennium,” the DMCA has serious flaws which render it a poor approach to information policy that reflects modern needs, actual practice, and the goal of the Constitution’s Copyright Clause.

<sup>38</sup> Litman, 127.

<sup>39</sup> Litman, 151. Certain exemptions were carved out for those parties and industries who were present at the bargaining table.

<sup>40</sup> iTunes is perhaps the most famous example of a such a system. Content owners refused to sell music on the iTunes store unless there was “digital rights management” (DRM) technology which limited the number of devices on which the music could play. DRM has since been removed from iTunes.

<sup>41</sup> Judge, 907.

the most popular digital storefronts stipulate that consumers are only renting or licensing a work.<sup>42</sup> Copyright has long protected the content of a work, but the copy itself became the property of the purchaser. It was a sort of chattel property; the owner could do whatever he pleased with the copy, including reselling it. Now copyright owners seek to retain control over both the content and the copies, even after a “purchase.”<sup>43</sup>

To maintain such strict control, the DMCA prohibits the circumvention of technical barriers to copying. The law considers all circumvention illegal regardless of whether the circumvention is intended to gain fair use access to the work. In fact, the law has gone so far as to criminalize actions that were once legitimate, non-infringing actions. As a result, many legitimate uses and useful new technologies have been curtailed.<sup>44</sup> Furthermore, the DMCA radically criminalizes activities that many people consider to be non-infringing.<sup>45</sup> For example, converting a lawfully purchased DVD into a digital file for private use could, even for a first offense, cost five years in prison and half a million dollars in fines.<sup>46</sup>

These expanded legal controls strike at the heart of both fair use and the limited scope of copyright control, both of which are the most important safeguards that keep the copyright bargain in balance. Even Paul Goldstein, who is generally supportive and optimistic about copyright’s ability to carry out its Constitutional purpose, has grave concerns. Citing the

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<sup>42</sup> The iTunes Store terms and conditions include provisions that grant Apple the ability to enforce “usage rules” without any notice to the consumer. The terms and conditions also grant Apple and its licensors “the right to change, suspend, remove, or disable access to any iTunes Products, content, or other materials comprising a part of the iTunes Service at any time without notice. In no event will Apple be liable for making these changes. Apple may also impose limits on the use of or access to certain features or portions of the iTunes Service, in any case and without notice or liability.” Amazon’s “Conditions of Use” stipulate that the payment of fees only grants “limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use.” The Logos Bible Software End-User License Agreement (EULA) stipulates that purchased content is “unlocked” content that is licensed to the user.

<sup>43</sup> This fact is made more disconcerting by the fact that usually the first button you click on Amazon, Logos, or iTunes says, “Buy” and not “Rent” or “License.”

<sup>44</sup> Mark Lemley and Anthony Reese, “Reducing Digital Copyright Infringement Without Restricting Innovation,” *Stanford Law Review* 56, no. 6 (2004): 1381. One of the main sticking points during the DMCA negotiations was the issue of “safe harbor” exemption. Internet service providers, fearing that they could be sued for providing Internet service to infringing users, lobbied for exemption from liability and were granted such exemption under the condition that they quickly enforce any claim of infringement.

<sup>45</sup> “The Criminalization of Copyright Infringement in the Digital Era,” 843–877.

<sup>46</sup> *Ibid.*, 1705–1722.

opinion that the anti-circumvention provisions of the DMCA have granted content providers new rights that are “wholly divorced from copyright law,” Goldstein comments, “Indeed, the anti-circumvention proposals might more accurately be called anti-copyright law, for they challenged the principle that has been at the center of copyright law from its beginning—that the rule of law is a fairer and more efficient means for protecting literary and artistic works than are physical barriers.”<sup>47</sup>

## 2.6 THE DEATH OF COPYRIGHT

Copyright in America has always been a bargain between the public and copyright holders. While the bargain has been mutually beneficial, the door is always open to changes in the balance between these two competing interests. Where to draw the line between public good and private enrichment is the most bedeviling problem that legislators, judges, and scholars face. When copyright protection is too limited authors may not have the economic incentive to create. Expand copyright control too far and copyright holders may be able to exert such control that copyright again becomes a government-backed system of guild control, no longer governed by the Stationers’ Company of London, but by large media and publishing companies instead.<sup>48</sup>

Over time, the ability to spread knowledge through literature and art has steadily improved. But since the 1990s, major players in the content industry have subjected America’s approach to works of authorship to an all-or-nothing, scorched earth approach to copyright in an effort to control and even inhibit changes in the market for creative works. For a society entering an era of history in which digital communication will play a crucial role, such a one-sided legal framework is not satisfactory. For the Church, which relies heavily on legal protections governing the free exchange of ideas, such a strict system will not foster the values we need, nor is the situation helpful for Christians who unwittingly break laws they either don’t understand or don’t realize apply to them. Today the pendulum has swung in the direction of copyright expansion, so much so that copyright as a bargain that protects the public’s interest is nearly dead.<sup>49</sup>

While current policy may be a low point in our legal approach to authorship, there remains reason to be hopeful. History suggests that over

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<sup>47</sup> Goldstein, *Copyright’s Highway*, 175. This flaw in the DMCA was the most common objection to the DMCA that I encountered in my reading of current legal scholarship. For a comprehensive explanation and practical examination of the DMCA’s incompatibility with the doctrine of fair use see David Nimmer, “A Riff on Fair Use in the Digital Millennium Copyright Act.” *University of Pennsylvania Law Review* 148, no. 3 (2000): 673–742.

<sup>48</sup> Netanel, 285.

<sup>49</sup> Lunney, 813–920.

time the law governing authorship will eventually fall in line with actual practice. This came true in England as the censorship regime eventually succumbed to society's new paradigm. The same may come true in the United States as we further understand and embrace the new pattern enabled by digital technology. In the meantime, current law presents the Church and its ministerium with a series of ethical challenges as we pursue works of authorship in the digital millennium.

### 3 ETHICAL CHALLENGES TO AUTHORSHIP

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*Writing is thinking. To write well is to think clearly. That's why it's so hard.*

—DAVID McCULLOUGH

*In vain we can old notions fudge  
and bend our conscience to our dealing.  
The Ten Commandments will not budge  
And stealing will continue stealing.*

— OLIVER WENDELL HOLMES, SR.

“Lawful civil ordinances are good works of God,”<sup>50</sup> and as such Christians ought to participate in the functions of their civil government. Consequently, laws are to be obeyed.<sup>51</sup> Lutherans also “teach free will in civil affairs.”<sup>52</sup> The more we understand copyright the better equipped we are to follow its legal requirements and to navigate the complex ethical challenges that the law presents. In our society we are free to critique civil laws in an effort to improve the society in which we live. To support this process I now discuss the most serious ethical challenges to authorship, and place special emphasis on the damaging effects of an unsophisticated approach to authorship.

#### 3.1 STEALING, FREE RIDING, AND SOCIAL DISCONNECT

Scholars dispute whether “stealing” or “trespassing” are good metaphors to govern the debate over copyright.<sup>53</sup> Certainly, the stealing metaphor provides a clear-cut approach to the topic, which comes as a breath of fresh air amid the stifling confusion of copyright law. The metaphor also holds strong appeal to those who argue for aggressive copyright expansion.<sup>54</sup> There are certainly cases in which stealing is an accurate term; taking copies of a work that is for sale without paying for it is stealing. Nevertheless, the stealing metaphor is based on the concepts of real property laws, which I have demonstrated to be a problematic approach.

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<sup>50</sup> Augsburg Confession, Article XVI in Robert Kolb and Timothy Wengert, eds., *The Book of Concord: The Confessions of the Evangelical Lutheran Church*, (Fortress, 2000), 49.

<sup>51</sup> Romans 13:1,2; 1 Peter 2:13,14

<sup>52</sup> William Dow Allbeck, *Studies in the Lutheran Confessions* (Fortress, 1968), 175.

<sup>53</sup> Netanel, 537.

<sup>54</sup> The stealing metaphor was used to defend the DMCA’s anti-circumvention provisions. Lobbyists likened circumvention to breaking into a home and stealing books, discs, and other media. For a full analysis see Litman, 132ff.



The Seventh Commandment is direct: “You shall not steal.” The old self needs such a command to curb gross outbreaks of sin. So also the “You shall not copy” of copyright is necessary. Piracy is stealing and illegal. But a great deal of what has come to be called piracy is not. Piracy, or more accurately, bootlegging,<sup>55</sup> does not necessarily describe the dad who digitizes his music or movie collection and copies it to his iPad.<sup>56</sup> And yet, at the start of every movie, viewers see a blue reminder that even “infringement without monetary gain, is investigated by the FBI and is punishable by up to five years in federal prison and a fine of up to \$250,000.” In reality there is little practical or legal incentive for the FBI to concern itself with the usage of hundreds of millions of video discs. The ubiquitous threat of punishment without real enforcement only serves to reinforce a different point: “They say this is stealing, but they don’t really mean it.”

Insisting on the stealing metaphor only leads to confusion and tension. For example, the law explicitly grants that private copying of audio files is legal. But doing the same to a commercial DVD or Blu-Ray Disc is punishable by prison and massive fines. Most people assume that both activities are legal, especially since they are seemingly identical activities. Inconsistencies like this lead audiences to wonder what is actually stealing and what is not; they grow frustrated that the sort of uses that they consider fair and reasonable may not be permitted according to the law. Many disregard the law as a result.<sup>57</sup>

Let’s assume, for the sake of argument, therefore, that stealing is not the most useful description of the nature of copyright infringement. After all, “fair use” would become “fair stealing,” of which there is no such thing. Instead, copyright scholars prefer to discuss the effects of “free riding.” Free riding describes individuals who make use of a work without purchasing, licensing, or otherwise compensating the copyright holder. As long as

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<sup>55</sup> Piracy, strictly speaking, refers to violent theft. Bootlegging is the business of making unauthorized copies for profit.

<sup>56</sup> This example illustrates very clearly the divide between the public interest and private enrichment. Major content industry players argue that copyright entitles them to charge a fee for most conceivable uses of a work, including selling different versions of the same work for viewing on different devices or in different formats. The public interest model argues that an individual, having lawfully purchased a copy of a work, may make private copies for individual use, archiving, and general convenience. The private industry view calls the dad digitizing his movies a pirate; the public interest view calls this a reasonable, private use of a work lawfully acquired.

<sup>57</sup> Civil laws are useful not only in their strict enforcement but also in the social norms that they foster. A law so disconnected from social norms may actually achieve the opposite effect of its original intent. The strategy taken by modern copyright owners to aggressively expand copyright control may actually backfire by producing the opposite effect than what was intended.

free riding is concentrated among those who would not pay for a work in any circumstance, there is little economic harm from free riding, nor is there much economic benefit in trying to stop free riders.<sup>58</sup> History demonstrates that authors and publishers who quickly capitalize on new distribution technologies rather than attempting to stifle them are the ones who benefit the most.<sup>59</sup> Happily, available evidence suggests that most Americans do believe strongly in the economic rights of authors and are eager to participate in business models that pay authors.<sup>60</sup> But audiences also believe very strongly in a “free use zone,”<sup>61</sup> such as the ability to make and use private copies of works.<sup>62</sup> Society senses that the current law intrudes on this free use zone.<sup>63</sup> The sense will only grow keener over time as culture moves further along the path of free use and free exchange. The growing cultural sentiment is that knowledge and information should be more open than closed, and that lawfully acquired works should have flexible terms governing their private use. Indeed, there is nothing new about this thinking; the Framers believed the same. The cause of the gospel has benefited from such thinking as well.

Good civil laws require tight logic and clear conceptions for them to have their desired effect. Laws that make sense to those they govern are to be preferred. In the case of copyright, we have a law that is more confusing than clear; more noise than signal. Extending the stealing metaphor into the previously untouched realm of private copying leads to an adversarial attitude between authors, publishers, and their audiences. The challenge, therefore, is how the Christian is to approach a topic with so much confusing gray area.

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<sup>58</sup> Lunney, 867.

<sup>59</sup> Ginsburg, 1613–1647.

<sup>60</sup> The example of iTunes fits well here. iTunes provided a safe, legal alternative to downloading music files from peer-to-peer networks. The improved moral appeal led to the legal sale of billions of music files. The digital music economy grew by focusing on customers who are willing to pay and by ignoring free riders that would not pay under any circumstance. See Jensen, 569 for a prescient comment on the potential of iTunes.

<sup>61</sup> Litman, 117.

<sup>62</sup> For example, most pastors have a wide variety of digital notes, file snippets, and other resources from which they glean material. Notebooks with fragmented copies—all of which infringe the letter of the law—have long been considered acceptable because copyright was never intended to govern private copies. See Jonathan Dowell, “Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World,” *California Law Review* 86, no. 4 (1998): 843–877.

<sup>63</sup> An example of the perceived free use zone: A couple sets their wedding photo slideshow to a favorite song (that they have purchased) and perform it publicly at their wedding reception and, later, they post it on the Web. Many are surprised to learn that such an act is illegal.

## 3.2 POPULAR, MARGINAL, AND DERIVATIVE WORKS

Copyright uses economic forces to foster a public good by providing a legal framework that directs wealth to authors. But how much wealth does a work of authorship deserve in this system? The public interest would answer, “Enough wealth to incentivize the production of the work.” The economic interest would argue, “As much wealth as humanly possible.”<sup>64</sup> That current copyright law has shifted in favor of the latter presents a practical question. What impact does the market approach for works of authorship have on the nature and quantity of works?

Copyright’s structure tends to create a sort of lottery effect in which authors and publishers must invest in the sort of works that are most likely to generate substantial profit.<sup>65</sup> This portfolio approach relies on big winners to keep the business profitable; the hits pay for the failures. “By offering substantial, and in some cases almost unimaginable returns for popular works, copyright introduces a certain tension into the creative process.”<sup>66</sup> Authors must decide whether to produce a popular work or a great work.<sup>67</sup> This lottery-style system therefore impacts the production and quantity of marginal works.

Marginal works are those works that may be great, but not popular.<sup>68</sup> They are the sort of works that are supremely useful to their target audience but will not command the sort of market return that a popular work may garner. In other words, a marginal work is a work of authorship that will not be rewarded in wealth commensurate with its benefit to society. Copyright expansion reinforces the lottery effect by turning copyright into a tool to extract maximum value out of the most popular works. A popular song from Katy Perry will generate far more wealth than a useful Scripture commentary. In fact, the Katy Perry song will extract wealth far beyond its contribution to society, while the commentary will not earn enough to match its contribution to society. Because marginal works are less likely to reap massive profits, the lottery model reduces the incentive to create such works. Religious bodies, particularly small ones like ours, may actually suffer a more difficult market for authorship due to the expanding scope of copyright law.<sup>69</sup> That marginal works do not earn as much as popular

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<sup>64</sup> The relationship between money and creativity would be a useful exploration. Lunney asked, “Is it likely that Shakespeare would have written more works, or works of better quality, if he were paid unimaginable sums of money following his first popular success?” See Lunney, 887.

<sup>65</sup> Goldstein, “Copyright,” 83.

<sup>66</sup> Lunney, 888.

<sup>67</sup> Ideally, a work would be both popular and great, but this is not often the case.

<sup>68</sup> “Popular” in the sense of “enjoyed by many people,” not in the sense of “intended or suited to the taste of the general public.”

<sup>69</sup> Lunney, 879ff.

works is not unethical *per se*, but the fact poses a challenge to those who rely on marginal works. Marginal works are much more reliant on the support of their target market to be successful. Thus, free riding in small, marginal markets is much more likely to cause economic harm.<sup>70</sup>

Copyright law also impacts the Church by expanding control over derivative works. A derivative work is “a work based upon one or more preexisting works, such as a translation... abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>71</sup> Only Disney may authorize a work that derives from the likeness of Mickey Mouse.<sup>72</sup> The Copyright Act of 1978 granted control of derivative works to the copyright holder of the underlying work. An example that is fresh on the minds of WELS Lutherans in 2013 is control over the New International Version (NIV). The copyright holder of the NIV, is able to control the publication and even adaptation of the NIV.<sup>73</sup> It is unlawful, without first licensing the text, to create a derivative revision of the NIV. Furthermore, the

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<sup>70</sup> Christians should be thankful for their publishing houses. These publishers have adopted a mission that seeks first the good of the church body that they serve. Economic resources are carefully allocated to support or even subsidize works of authorship that have value but will not necessarily command a large financial return. For a view on the economic impact of free riding, as well as the moral implications of charging money for information, see Goldstein, *Copyright's Highway*, 144-145.

<sup>71</sup> 17 U.S.C. § 101. A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

<sup>72</sup> The irony, of course, is how much of Disney’s financial success has come from derivative works, e.g. Cinderella, Snow White and the Seven Dwarfs, The Little Mermaid, etc.

<sup>73</sup> While I did not research the point, I would hazard a guess that it was copyright’s public display or performance provision that gave Zondervan authority to pull the 1984 version of the NIV from online sources like BibleGateway.com. Another likely alternative is that licensing terms reserved for Zondervan the right to revoke online access. An interesting question is whether the Logos Bible Software terms of use could allow Zondervan to revoke access to any digital copies purchased through Logos. The DMCA as well as the Logos EULA certainly open the door to such an outcome, even if publishers do not choose to exercise the right.

copyright holder has no legal requirement to license the work for derivation and may, effectively, close the door to all derivative works.<sup>74</sup>

While we can certainly understand why Disney has a business interest to control derivative works, we may also entertain the thought of what further, creative, and interesting works of authorship could be produced if the strict control over derivative works were loosened. For now, copyright control over derivative works is unlikely to change, nor will the lottery effect it fosters. Nevertheless, it pays to be aware of the situation and take steps to give marginal and derivative works better support, for these are the sort of works on which the Church relies.

### 3.3 PLAGIARISM AND THE VALUE OF ORIGINALITY

No one has ever been prosecuted for plagiarism because plagiarism is not illegal.<sup>75</sup> Plagiarism is “easier to decry than to prevent, easier to detect than to litigate.”<sup>76</sup> It is a purely ethical topic where professional societies and academic institutions set the standards instead of Congress.<sup>77</sup> Nevertheless, plagiarism and copyright are kin; society’s sensitivity to plagiarism arose in the same century as authors’ rights.<sup>78</sup> Both deal with authorship. Copyright protects creative output while the ethics of plagiarism protect the creative process.<sup>79</sup>

Ever since the Roman poet Martial accused a contemporary of stealing “the servants of his imagination,”<sup>80</sup> Western society has considered plagia-

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<sup>74</sup> Zondervan does generously and voluntarily relinquish some of the copyright control to which they are entitled; they allow large quotations of the Bible text in other publications. “The NIV text may be quoted in any form (written, visual, electronic or audio), up to and inclusive of five hundred verses without the express written permission of the publisher, providing the verses quoted do not amount to a complete book of the Bible nor do they verses quoted account for twenty-five percent or more of the total text of the work in which they are quoted.” This voluntary copyright provision is interesting, first of all because it is so generous, and also because it attempts to set some reasonable boundaries for how the legal doctrine of fair use may apply to the text. One could try to quote beyond these terms and claim fair use, but such a claim would need to be strong enough to stand up in court.

<sup>75</sup> Amy Robillard, “Pass It on: Revising the ‘Plagiarism Is Theft’ Metaphor,” *Jac* 29, no. 1 (2009): 421.

<sup>76</sup> Daniel Lamm, quoted in Michael Grossberg, “Plagiarism and Professional Ethics: a Journal Editor’s View,” *The Journal of American History* 90, no. 4 (2004): 1337.

<sup>77</sup> Grossberg, Michael. “Plagiarism and Professional Ethics: a Journal Editor’s View.” *The Journal of American History* 90, no. 4 (2004): 1338.

<sup>78</sup> Thomas Mallon, *Stolen Words*, Harvest Books, 2001, 38-39.

<sup>79</sup> Laurie Stearns, “Copy Wrong: Plagiarism, Process, Property, and the Law.” *California Law Review* 80, no. 2 (1992): 525.

<sup>80</sup> The Latin word, *plagarius*, means “a person who owns servants of slaves.”

alism to be some sort of theft.<sup>81</sup> But words themselves don't behave like property. They are at the same time common and personal; words can hardly be controlled or reclaimed once spoken or written. Even so, society considers the act of passing off the product of another's mind as your own to be a serious breach of ethics. We value originality.<sup>82</sup> We crave not just innovation, but fresh perspectives on well-known topics. We delight in finding new insights and creativity. The best works are original works. But for all our emphasis on originality, we also crave continuity—even *hom-mage*<sup>83</sup>—to the works of authorship that we know from experience. Furthermore, all works of authorship must build somehow on the works that precede it. Authors and creators must be well-read to fill their minds (and their notebooks) with the material from which new works of authorship are made.

Copyright law seems to sense the need to preserve access to the stuff of authorship by maintaining a dichotomy between an idea and its expression. For example, a 1991 ruling by the United States Supreme Court determined that a white pages telephone book would not receive copyright protection.<sup>84</sup> According to the court, such a work did not display sufficient creativity or originality to warrant copyright protection. Copyright does not protect facts and ideas.<sup>85</sup> The logic supporting this idea-expression dichotomy is simple: Locking away the underlying ideas found in works of authorship would negate the Constitutional goal of copyright, that is, to spread knowledge.<sup>86</sup> Thus, copyright protects only verbatim copying; plagiarism is about something more abstract.

Perhaps it pays to revisit the bargain metaphor. Copyright is a bargain between two parties, and so is the creative process.<sup>87</sup> Communicating through authorship is participation in a dialogue—a dialogue between the

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<sup>81</sup> Darsie Bowden, "Coming to Terms: Plagiarism," *The English Journal* 85, no. 4 (1996): 82.

<sup>82</sup> That words may be "owned" is a distinctly Western notion. Eastern cultures consider words to be everyone's possession, so much so that slavishly copying another's work is considered both normal and acceptable. See Bowden, 83.

<sup>83</sup> *Hommage*, from the French for "homage," refers to a deliberate artistic nod to prior work. *Hommage* is particularly popular in serial film franchises.

<sup>84</sup> Goldstein, "Copyright," 88.

<sup>85</sup> Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," *The Yale Law Journal* 112, no. 1 (2002): 57. For example, Stephen Starke receives copyright protection for the text of "Jesus, Once with Sinners Numbered" (CWS 710), which is an original work of authorship praising God by teaching the active obedience of Christ demonstrated at his baptism. But Starke cannot copyright the actual historical facts or doctrinal interpretations that his hymn teaches.

<sup>86</sup> Some argue that this dichotomy does not go far enough to fulfill the Constitution's goal, especially as it pertains to the First Amendment. See Rubenfeld.

<sup>87</sup> Stearns, 528.

pastor and his flock, as well as between the pastor and his colleagues. The integrity of this dialogue rests on the honesty of its participants.

In the parish the dialogue is between a pastor whom his flock has called to be engaged in the Word of God and in the lives of God's people. This interaction forms the foundation for the weekly sermon, as well as the work of preparing and teaching Bible studies, publishing articles, and other pastoral works. While there will be many similarities among these works, especially in a church body that values lectionary preaching, a sermon or other work that substitutes the dialogue of a different pastor and different people does not demonstrate respect and honor to the people God has called us to serve. Instead of theft, think of plagiarism as lying. To say something is your work when it is the work of others is to tell a lie. Lying destroys trust, and without trust a congregation's confidence in their minister, as well as the office itself, will decay.

The dialogue among fellow ministers relies on the same trust. Our dialogue is a vocational, professional dialogue in which we produce original work for the sake of the Church at large. Pastoral ministry is a vocation that relies heavily on scholarship, writing, creativity, and useful dialogue. The erosion of the integrity of that process is harmful. Over time it reduces our respect for scholarship, research, good writing, and clear, evidence-based thinking. Plagiarism shows contempt for our brothers and damages the reputation and integrity of the ministerium itself.<sup>88</sup>

Plagiarism is laziness magnified by hubris.<sup>89</sup> Pastors must face the ethical challenge and engage honestly in the dialogue of their work. The works we publish are not isolated from the rest of the world; we are part of a community of believers (the congregation) and a community of brothers (the ministerium). These communities deserve honest, original work. Originality relies on being well-read, not on quickly cribbing work from others. Originality requires time, not cursory copying. Full engagement with the works of authorship that define our craft will give us the material we need to produce works of our own; devoting time and attention to the process will keep us free from plagiarism. The Church will benefit magnificently from the collective creativity and originality of all its ministers.

#### 3.4 THE CORROSIVE EFFECT OF MINISTRY PRAGMATISM

Any discussion of law and ethics must address the old self. The old self is our constant companion; he is a saboteur working at all times to dislodge us from faith in God and life according to his will.<sup>90</sup> The old self will flee the law and pursue every wrong path. This is part of our nature. Some ac-

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<sup>88</sup> "Statement on Plagiarism," *Academe* 75, no. 5 (1989): 48. See also Grossberg.

<sup>89</sup> I owe this clever turn of phrase to Rev. Jonathan Schroeder.

<sup>90</sup> Romans 8:7, "The mind governed by the flesh is hostile to God; it does not submit to God's law, nor can it do so."

tions of the old self are obvious and easy to judge. Conscience reminds us that taking something that does not belong to us is wrong. We have an intuition that authors deserve to reap the reward of their effort. There is a certain easy satisfaction in pointing to clear-cut situations and saying, “That’s stealing; that’s sinful.”

If only the influence of the old self were always so easy to see! Unfortunately, the old self is adept at hiding its impact behind carefully constructed façades, even concealing its actions under pious reasoning. Ministry pragmatism is one such façade. Pragmatism, as a philosophy, is “an approach that assesses the truth of meaning of theories or beliefs in terms of the success of their practical application.”<sup>91</sup> In other words, pragmatism says that ends justify the means. Ministry pragmatism is an approach to ministry in which practical benefits override values.

Pragmatism is a very appealing philosophy, even in the ministry. There is compelling logic to the argument that breaking the speed limit is acceptable when the pastor is rushing to visit a dying member. The greater good, so the argument goes, trumps obeying the letter of the law. Pragmatism is useful to make sense of extraordinary situations but is a poor guide for daily decision-making. Since so many of my priorities are of eternal significance, pragmatism provides me with a wide variety of pious excuses not to respect the law. “The law is unjust / confusing / cumbersome; how can I be expected to follow it?” “I only have so many hours per week, why should I bother with the administrative overhead of dealing with copyright?” “He says he’ll buy a copy later, so to help in a pinch I can email him this file.” “We have a school, which is education, so this is fair use.” Then there is the haymaker of ministry pragmatism, “This is for the good of the Church; souls are at stake here.” Each of these excuses present me just enough of a sense of moral justification—albeit a shallow one—to override my conscience and override my values.

Plagiarism and copyright infringement usually stem from academic and professional pressures.<sup>92</sup> We would all agree that a sermon on Sunday is better than no sermon on Sunday. So what if a brother finds my work useful and worth copying, and so what if I find his work useful and worth copying? Doesn’t Paul say that falsehood doesn’t matter as long as Christ is preached?<sup>93</sup> That God forces evil to serve his purposes does not equate to a

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<sup>91</sup> *New Oxford American Dictionary*, 2d ed., s.v. “pragmatism”

<sup>92</sup> Stearns, 520.

<sup>93</sup> Philippians 1:15-18, “It is true that some preach Christ out of envy and rivalry, but others out of goodwill. The latter do so out of love, knowing that I am put here for the defense of the gospel. The former preach Christ out of selfish ambition, not sincerely, supposing that they can stir up trouble for me while I am in chains. But what does it matter? The important thing is that in every way, whether from false motives or true, Christ is preached. And because of this I rejoice. Yes, and I will continue to rejoice.”



divine sanction of wrongdoing. To take Paul's words as a ringing endorsement for a valueless approach to ministry misses the point entirely. In the same letter Paul wrote, "Finally, brothers and sisters, whatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is admirable—if anything is excellent or praiseworthy—think about such things."<sup>94</sup> When Christians think they arrive at values, and when Christians have values they act on them. Christians place a high priority on what is right, pure, lovely, admirable, excellent, and praiseworthy; Christians value things like originality and creativity.

During preliminary discussions of my essay, one member of this conference's steering committee quipped via email, "Should I schedule time on the agenda immediately afterward for confession and absolution?"<sup>95</sup> I will be the first to confess that I have breached ethics, broken the law, trampled on the well-being of authors, and disrespected the dialogue to which I have been called. Pragmatism is a powerfully tempting and delightfully easy approach to ministry. But pragmatism's assumption that simply copying each other's work will result in a net benefit to the Kingdom deserves to be challenged. Copying to avoid the crush of deadlines is not a fitting approach to producing quality work for the good of our congregations. Distributing copies of works of authorship to help a strapped congregation avoid paying for the work is a clear violation of the law. The easy—even dishonest—way through our work is a strong temptation and quickly becomes habit. The Church benefits from the creative output of its ministers, but that creative output suffers if the creative process is short-circuited. An approach that values not only the product but also the process of authorship will support the Church and its mission with the kind of rich variety and depth that an unsophisticated, "beg, borrow, and steal" approach can never produce. A firm reminder of what is legal and ethical helps to curb our sinful nature, and a positive ethic of authorship guides the new self to vigorously participate in authorship for the good of our congregations, synod, indeed, even the whole Christian Church.

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<sup>94</sup> Philippians 4:8.

<sup>95</sup> Rev. Jonathan Bauer, email message to author, July 27, 2013.

## 4 TOWARD AN ETHIC OF AUTHORSHIP

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*Securing for myself from day to day means of an honorable subsistence, I would rather have the affectionate regard of my fellow men, than I would have heaps and mines of gold.*

— CHARLES DICKENS

*God does not want our neighbors deprived of their reputation, honor, and character any more than of their money or possessions.*

— MARTIN LUTHER

If three centuries of legislation, court arguments, and judicial decisions haven't produced a coherent approach to authorship, what chance do we have in carving out a workable system? The answer may be found in the Christian's unique perspective on civil society. Empowered by the Holy Spirit, the new self is eager to keep the Lord's will and promote what is good, beautiful, noble, and right. Moved by God's love and guided by his law we are able to bring a distinctively Christian approach to authorship. In this part I propose a Christian ethic of authorship to provide the spiritual and intellectual framework in which to foster original, creative work for the good of the Church and its mission.

### 4.1 RECOGNIZE YOUR OWN AUTHORSHIP

When the Statute of Anne was passed it only protected literary works. Today, all creative expressions receive copyright protection. Neither providing a copyright notice on the work itself nor filing a copyright registration with the U.S. Copyright Office is required.<sup>96</sup> Practically speaking, this means that copyright protection is the birthright of every creative expression in the United States.

While it may come as a surprise that, for instance, all of our sermons are copyrighted works, we should not be surprised that society has historically valued the contributions of all who produce works of authorship. Recognizing our own role as authors is the foundation of any ethic of authorship. We are more likely to treat others with respect when we recognize our own authorship.

The Lord created us in his image and gave us rational souls. As the crown of his creation we are thinking beings in whom God has given the powers of reason and creativity. God made Adam to tend his Garden, and I

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<sup>96</sup> Richard Stim, *Patent, Copyright & Trademark, 11 ed.* (Nolo, 2010), 196. It is commonly assumed that some sort of filing with the Federal Government is required to acquire copyright protection on a work. This was true in the past, but is no longer true today. See Patterson, 202.

fully expect that Adam, had he not fallen into sin, would have done more than only keep things tidy. He would have planned and built and expanded what God had given him, leaving his own signature on God's creation. He would have written songs about the Garden. He would have added sculpture to its arrangements. And eventually, he would have written the History of Eden. Instead, Adam brought disobedience into this world and the Garden was closed. The image was lost. Adam's reason and intellect fell into the control of sin and Satan.

But the Lord did not allow his world to fall into utter ruin. Man, fallen as he is, still retains many of the characteristics that make him the crown of the Lord's creative work. Not only that, the Lord affirmed mankind's place as the object of God's deepest love when he promised to redeem his fallen creatures through the Seed of the woman. Even as the world was plunged into darkness, the Lord illumined the hearts of Adam and his wife Eve to see that Good News still existed and life, with all its beauties and graces, was still worth living for the sake of a Savior God. These truths are recorded with words, songs, and imagery in the Scripture for all mankind to hear. God himself is an author whose authorship leads to salvation. He has invited us into his mission and ministry. Through the ministry of the gospel God brings souls into the Kingdom through our pens; God the author continues to write through us.<sup>97</sup> When we appreciate the role that our authorship plays in the advance of the gospel we will also take appropriate actions to foster authorship in others for the benefit of the Church.

#### 4.2 PAY WHEN POSSIBLE

Copyright always assumes that you have acquired your copies by legitimate means and have not impaired the market for the work.<sup>98</sup> The most common and acceptable way to acquire a copy of a work is to pay for it.<sup>99</sup> One of the core assumptions of copyright is that a thriving economic incentive for authorship will produce more and better works. An ethic of authorship will pay when possible.

Producing a work of authorship requires a sizable investment of time and money. Consider the value of a single, expertly-written book. That book may represent years of research, thousands of person-hours of re-

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<sup>97</sup> Jonathan Hein, "Treasure in Jars of Clay," Mequon: Institute for Worship and Outreach, October 8, 2011. <http://worshipandoutreach.org/paper/98/treasure-jars-clay>, 11.

<sup>98</sup> For example, purchasing one copy of a work and then sharing it between multiple congregations or schools is a clear violation of the law.

<sup>99</sup> There are, of course, other means to gain access to works of authorship. For example, one may borrow books from a library. But even in the case of libraries, the library has paid for the copy, and, in some cases, has even paid additional fees to offset the economic impact of borrowing.

search assistance, a huge time investment in editing, review, and iteration; and all these costs happen before the book even reaches print. Nevertheless, we often assume that the cost of a book is only in its printing and distribution. In reality, the real cost in producing a work of authorship is in the upfront production, not in the printing and distribution.<sup>100</sup> It takes money to cover those costs. Paying for a work helps an author or publisher to produce more works. Put another way, if we want more of the stuff we like, then we have to pay for it. There is a sort of bitter irony in the lament that not enough high-quality work is available for free. If we want useful works of authorship then we must support their creation.

The opposite is free riding. Free riding is self-destructive for the Church. In a marginal market like ours, free riding is likely to do more harm than free riding does in the mass market. Free riding is also easy—it only takes a few clicks to get a free ride, but lawfully purchasing a work is also only a few clicks away. Furthermore, the Internet is enabling authors to bypass a great deal of the complexity and overhead involved in publishing by enabling direct sales to their audience. Publishers are rethinking their strategies to identify where they provide the most value in a new type of marketplace. The potential for these opportunities is great.

During the Renaissance, the Church itself was one of the most important patrons of art and authorship in the Western world. This trend continued during the Reformation, especially as the Church, along with Christian political rulers, sought to foster useful works for the good of the faithful in their territories. After the Reformation, however, the Church became less and less of a patron of the arts. Civil governments grew as patrons and, in modern times, foundations have largely assumed the role.<sup>101</sup> The modern digital economy may allow the Church to directly patronize the arts once more. Digital technology is allowing more and more authors to connect directly with their audiences. Audiences are able to directly support the authors who produce the works they want and need. Today's emerging independent market actually "enhances the moral appeal" of copyright,<sup>102</sup> especially since authors are not often the copyright holders of their works—publishers are.<sup>103</sup> Time will tell, and there are many challenges

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<sup>100</sup> Kristine Laufer (Northwestern Publishing House), interview with Caleb Bassett, August 28, 2013.

<sup>101</sup> Jacques Barzun, "An Insoluble Problem: the Patronage of Art," *Proceedings of the American Philosophical Society* 131, no. 2 (1987): 123.

<sup>102</sup> Ginsburg, 1619.

<sup>103</sup> Patterson, 218-219.

standing in the way,<sup>104</sup> but the emerging digital marketplace seems poised to surpass both traditional patronage and modern copyright. Paying for work creates a positive feedback loop and uses the best qualities of the free market to stimulate further creativity. Whether supporting traditional business models or fostering newer ones, an ethic of authorship supports authors by paying when possible.

#### 4.3 USE FAIR USE FAIRLY

The word “fair” in “fair use” signals ambiguity. Even children understand that determining whether something is “fair” or “no fair” is difficult. Indeed, fair use is not as clear cut as we might like it to be, nor is the coverage provided by fair use as broad as we might think. Fair use is actually a legal defense and not a positive right.<sup>105</sup> In other words, whether a particular use is “fair” is only answered by a court of law. Any infringement, including fair use, carries with it at least some legal risk.<sup>106</sup> In all likelihood, however, a pastor will never be forced to present a fair use defense in court.<sup>107</sup> Instead, pastors must apply the principles of fair use to their own personal ethic of authorship, and for that reason fair use has much to teach us. An ethic of authorship will use fair use fairly.

Fair use is a legal provision that “excuses reasonable unauthorized appropriations when the user employs the appropriated material to advance public welfare without impairing the economic value of the first work.”<sup>108</sup> Fair use is another way of saying “fair infringement.” Fair use is one of the legal doctrines that helps to safeguard copyright’s goal of public good by providing an important limit to the monopoly copyright. Without fair use a copyright owner could prevent a wide variety of uses that benefit society, most importantly citation, comment, and criticism. Section 107 of the Copyright Act of 1976 codified fair use and enumerates four factors to guide courts in fair use cases. Fair use rulings depend on “(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 rela-

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<sup>104</sup> There are certainly challenges to the direct-sales model, namely the matter of curation and filtering. With so much content available, how will I find the best work? Social networks help good work to surface, but there is still a market opportunity for some sort of vendor who is able to assist audiences in sifting through the available work and finding what they need. Forward-thinking publishers may find themselves carving out such a market position in the future.

<sup>105</sup> DanThu Thi Phan, “Will Fair Use Function on the Internet?” *Columbia Law Review* 98, no. 1 (1998): 181.

<sup>106</sup> Stim, 200.

<sup>107</sup> And if this does happen you will hire a lawyer and will not hold me liable because this essay does not offer professional legal advice.

<sup>108</sup> Phan, 170.

tion 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.”<sup>109</sup>

From these four principles we may conclude that minor, nonprofit, economically minimal infringement is more likely to be judged fair than infringement that is major, for-profit, or has a strong economic impact on the market for the work. Church use tends to fit under the umbrella of fair use; our congregations are nonprofit institutions that pursue educational ministries.<sup>110</sup> As a result, we may be tempted to conclude that everything we do is simply fair use. Unfortunately, such an assumption is mistaken and is not supported by evidence.

Fair does not necessarily excuse reproducing or distributing entire works, nor does it excuse acquiring a work illegitimately. Instead, fair use protects reproduction of copyrighted material for the sake of creating a new work (citation and research), or nonprofit educational use. Courts may also limit the application of fair use in small markets in which even minor infringement may damage the economic market for the work. For example, infringing on materials specifically marketed for educational or nonprofit purposes is not fair use since those authors and artists rely on the educational and nonprofit markets they serve.<sup>111</sup> Fair use is not a discount coupon or a blanket authorization to do whatever we please with works of authorship.

Empirical studies have concluded that fair use cases are impossible to predict. In reality, no clear pattern has emerged.<sup>112</sup> But, the principles themselves are clear and applicable to our own ethic of authorship. If we cherry pick one of the four factors that govern fair use it is much easier to fit our actions into the fair use mold, but the law requires judges to weigh all four factors together; we should do the same. When we recognize that fair use is meant to be a much more precise, narrowly-defined practice than we might imagine, we will be more likely to act in a way that fosters the general good of society and the Church by stimulating the market for works, even as we cite, quote, and comment on those works fairly.

#### 4.4 RESPECT ATTRIBUTION

Johann Sebastian Bach signed his work, “S.D.G.,” which stood for the Latin, “Soli Deo gloria,” “to God alone be the glory.” One senses a certain pious

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<sup>109</sup> 17 U.S.C. § 107

<sup>110</sup> Sunday school, Bible class, Lutheran elementary schools, etc.

<sup>111</sup> Purchasing one copy of a textbook and then photocopying it for each student in a classroom would not be fair use.

<sup>112</sup> Barton Beebe, “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,” *University of Pennsylvania Law Review* 156, no. 3 (2008): 549–624.

appeal to anonymity in authorship.<sup>113</sup> After all, what better way to safeguard the glory of God than by removing any possibility that someone might glorify the author over the Lord? Vanity is excluded when names are omitted, or so the thinking goes.

If we are honest, though, we will realize that God's glory does not need any protection from us. Hebrews brings no more or less glory to God than the letters in which the first words are, "Paul, an apostle." On the contrary, the Scriptures are more than happy to mention and thank individuals by name for their positive contributions to the mission of the Church. Knowing the author and context of the Davidic psalms even enhances our appreciation of them. In a Christian ethic of authorship, attribution is to be preferred over anonymity.

Attribution may seem like a chore. Adding footnotes, acknowledgements, and copyright notices does take time. Omitting attribution is easier. But omitting attribution is usually illegal and unethical, and it causes a number of hidden consequences.

Omitting attribution hides the contributions of the original author or artist. We prevent other Christians from knowing whom to thank for the work and for whom to pray. When we omit an author's attribution we reduce the likelihood that another, interested individual will interact with the author for some sort of mutual benefit. When we omit attribution we also prevent interested individuals or organizations from purchasing private copies of the work, or even from contacting the author or artist to hire him for bespoke projects. Omitting attribution also opens the door for plagiarism by hiding the sources on which our works are based, and hides from readers the wide variety of sources, relationships, and literary and creative building blocks that are "necessary for the construction of knowledge."<sup>114</sup>

Attribution supports authorship and is also the key to improving our own authorship. When we produce our own works using the various building blocks of knowledge that we have discovered in our own study we take from what we have read and improve upon the work from which we borrow, citing the work at the same time to reveal the pedigree of our thoughts and words.<sup>115</sup> Attribution is the very antithesis of plagiarism and theft; in fact, it is the most important part of an ethic of authorship because attribution most directly impacts the individual person behind every creative work.<sup>116</sup> Luther himself, commenting on the 8th Commandment, offers compelling rationale for attribution. "God does not want our neigh-

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<sup>113</sup> Anonymity serves other purposes in authorship, such as protecting an author who has written a subversive tract or unauthorized satire. These types of work are less common, however, than signed works of authorship. For the sake of this discussion I will remain within the realm of common practice.

<sup>114</sup> Robillard, 427.

<sup>115</sup> Stearns, 520.

<sup>116</sup> Luther's Large Catechism, §256, in Kolb-Wengert, 420.

bors deprived of their reputation, honor, and character any more than of their money or possessions.” Attribution provides the framework for creative borrowing and building; it supports our own work and the work of others while promoting the good name of all who have participated in the dialogue of authorship.

#### 4.5 THE INTERESTS OF CHRISTIAN AUTHORSHIP

Copyright seeks to recognize the interests in authorship. Copyright also reminds us that our society values original works of authorship. We expect authors to participate in a dialogue based on mutual trust, respect, and integrity. Strictly following copyright, however, will not alone produce a satisfying ethic of authorship. Copyright is concerned mainly with balancing the competing interests of public good and private enrichment. While these interests are important in civil society, a Christian ethic of authorship is able to see a parallel set of interests that deserve to be supported also. The three-fold approach to authorship that I have proposed (i.e. pay when possible, use fair use fairly, and respect attribution) reflects a similar three-fold understanding of the interests in Christian authorship. My proposed ethic of authorship builds on copyright’s economic nature while also addressing a matter largely untouched by copyright: the creative interest. The proposed ethic also realizes that in Christian authorship there is also a ministerial interest. This three-part ethic is a practical guide for both a personal and organizational approach to authorship. There are, at times, tension between the three points of this ethic, but an approach that honors all three is possible.

The economic interest is easy enough to understand; people want to make a living from their work. Certainly Christians want authors to receive daily bread,<sup>117</sup> but the economic interest is much more than just daily bread. Some authors do not make a full-time living from their work, but only wish to have enough compensation to cover the costs that their work requires. Authors are also eager for a robust market for works of authorship so that the incentives are there for further works. Audiences want this too.

In addition to an economic interest, authors also have a creative interest in their works. Creative works are an extension of an author’s own personality.<sup>118</sup> Indeed, that’s why we love original work. Since creative works are an extension of one’s personality, those who produce such works are keenly interested in the creative integrity of their work. For some authors the creative interest even outweighs their economic interest because the creative integrity of an author’s work directly affects his own reputation and good name.

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<sup>117</sup> Luther’s Large Catechism, § 73 in Kolb-Wengert, 450.

<sup>118</sup> Patterson, 18.



Christian authors also have a third interest: a ministerial interest. All Christians have an internal motivation to carry out the mission of the Church. The ministerial interest in authorship flows from the gospel and leads authors to lend their intellect, production, and creative skills in service to the Church. The ministerial interest often leads authors to pour greater time and energy than they might have done for a purely secular project. The ministerial interest guides and motivates all Christian authors; they desire to see their work used to glorify God and serve his mission.

Paying for works, using them fairly, and providing proper attribution all foster and support economic, creative, and ministerial interests in authorship. These practices respect an author's need for daily bread, his good name and reputation, and his eagerness to use God's gifts in service to him.

#### 4.6 PROMOTE AND PURSUE THE ETHIC

Authorship is an especially pure manifestation of God's working through human vocation. God has given a wide variety of creative talents to individuals both within and outside the Church, and you and I are able to gain great benefits from their work. Gene Edward Veith commented, "That I am able to take such unmerited pleasure through the God-given talents of other people who have a vocation that I by no means have myself always fills me with a sense of praise. Not just to the artist, but also to the God who is so wildly generous in all of his gifts."<sup>119</sup> Professor J.P. Koehler called art of all forms, "the most intimate expression of the human spirit."<sup>120</sup> In fact, Koehler, during his years at Wisconsin Lutheran Seminary, vigorously pursued an effort to foster an appreciation of the arts among the future pastors of the Wisconsin Synod. This was not art for art's sake alone, but as a worthy expression of the Christian faith. Indeed, our theology urges us to "think about such things."<sup>121</sup> In civil society the value of art and knowledge is widely recognized for its benefits. How much more will Christians value art and knowledge? Won't we also support the authors whose vocations produce and extend these disciplines?

All of our attitudes and approaches deserve regular review and consideration, and our personal approach to authorship also deserves such a review. We pray for "useful vocations;"<sup>122</sup> we pray that God provide daily bread; we pray that the work of the Church grow and spread. Do we support what we pray for? If, upon careful introspection, we discover that our approach to authorship is purely pragmatic, or, indeed, simply does not

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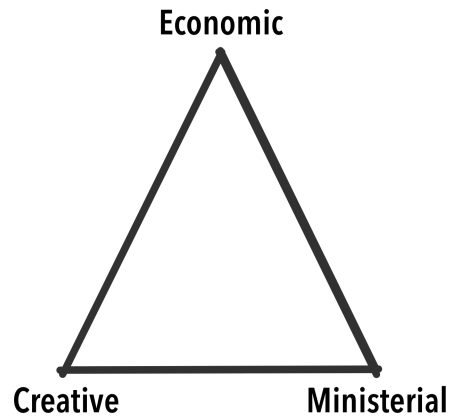
<sup>119</sup> Gene Edward Veith Jr, *The Spirituality of the Cross*, Concordia, 2010, 133.

<sup>120</sup> Peter M Prange, "The Wauwatosa Spring: Part I," *Wisconsin Lutheran Quarterly* 110, no. 1 (2013): 24.

<sup>121</sup> Philippians 2:8.

<sup>122</sup> *Christian Worship: a Lutheran Hymnal*, Northwestern, 1993, 42.

value authorship and the variety of interests in authorship—economic, creative, and ministerial—it may be time to look for ways to improve. If we do not see the manifold blessings of God in the beauty of these expressions of human spirit, perhaps it is time that we renew our approach through prayer and meditation—yes, “think about such things.”



*Figure: The three interests of Christian authorship. There are, at times, tension between the three points of this ethic, but an approach that honors all three is possible.*

## 5 CONCLUSION

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*Jiminy Cricket! Copyright Walt Disney Company, 1940!*

— KENNETH PARCELL (30 ROCK)

Copyright, as a civil law, continues to be challenging in theory and controversial in practice. The law has, unfortunately, progressed to a point where it caters too much to large content industries, which has damaging effects in society and the Church. Copyright today leads individuals to frustration and confusion and causes publishers to scratch their heads at what's happening as they scramble to maintain profits. Copyright scholars, legislators, and business leaders will continue to hammer out the best approach, but there is not much optimism that a suitable solution will be found.

The current nature of copyright presents Christians with a series of ethical challenges concerning how best to obey a law full of competing and confusing provisions. The latest changes in the law directly impact the Church by striking at key copyright practices that have, in the past, fostered the sort of works and uses (i.e. marginal and derivative works) on which the Church and other non-profit entities have relied. Society's confusion over authorship and how property rights apply to creativity has only muddied the ethical waters of both private copying and plagiarism. The temptation is to take a pragmatic—even cynical—approach to authorship. Pessimism abounds.

The use of mass media and electronic communication is on the rise in our society. Through digital books, video, audio, digital newsletters, all distributed by the Internet, people are able to inform, educate, and persuade. These changes make us uncomfortable because they are new and unfamiliar paradigms. These changes disrupt longstanding assumptions and leave many feeling bewildered by the lack of control in a digital world. Withdrawing from this world of information moves in the wrong direction. There are many challenges to be addressed when it comes to the spread of information and authorship in the digital millennium, but only by moving boldly in the direction of progress will we be able to have a seat at the table, so to speak, in negotiating the bargain that governs the exchange of ideas in the future.

Now is a time when the influence over works of authorship lies in the hands of audiences themselves. As the Internet and digital technology further move in the direction of direct distribution, audiences will be able to connect more directly with those who create works of authorship. This places more power in the hands of individuals and smaller organizations, which is why a tune up of our approach to authorship will pay in the long term. We can be part of the renaissance in authorship by taking a higher

view of our own works of authorship, participating in a robust community of interrelated works, and by supporting the market economy—especially the marginal and independent market—that drives the creation of more useful works of authorship.

My goal has been to provide an important step in the process by outlining a Christian ethic of authorship. Such an approach is Christian in character and ministerial in practice. It does not succumb to the ministry pragmatism that fosters short term gains at the expense of long term value. Furthermore, an ethic of authorship seizes the opportunities unique to our time while also respecting the established laws of our land. An ethic of authorship is exactly what we need as Christians seek to spread the gospel through creative works of authorship in a digital millennium. ☞

## APPENDIX

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### A COPYRIGHT CASUISTRY

In this appendix I present a series of common scenarios that pastors encounter in their work along with a comment on how to approach the scenario based on an understanding of the law and an ethic of authorship. My comments on these scenarios are presented as my personal assessment of each situation based upon the essays and books that I read to prepare this essay.

#### *Bible study based on a single, larger work*

*You've found a great book that you'd like to present as some sort of Bible study. The book is a little long to go through page by page in Bible class, so you abridge and condense the work in order to teach it more concisely. Recognizing that the work is not your own, you place a disclaimer to the effect that the work is based on a large work by another author. How does this approach square with copyright law and an ethic of authorship?*

Citation is commendable and shows honesty to the class. Nevertheless, the Bible study itself is a derivative work because it is an abridgment of a larger, base work. While the work is educational and nonprofit in nature, there is a compelling argument that the use has a noticeable effect on the market for the base work. A more appropriate course of action would be to purchase a copy of the base work for each participant in the class, either as copies for the participants to keep or as library copies. The pastor would instead produce study guides for the underlying work instead of violating copyright by producing a derivative work. A pastor could also try to secure written permission from the copyright owner to produce a derivative work.

#### *Bible study based on multiple resources*

A Bible study based on a variety of sources is of a different nature than one that is merely an abridgment or adaptation of an existing work. When a pastor produces an original Bible study produced by independent study and consultation with a variety of resources there is legitimate claim that the work is original and not simply a derivative work. Of course, even in an original work the author will want to provide citation for any facts gleaned from other works as well as for original or unique insights that came from resources like commentaries. Citing sources reveals to the audience the work the pastor has done, as well as the wide variety of works on which such works require.

*Searching Google for free clip art*

*You're working on a screen presentation for an upcoming Bible class. You'd love to have a photograph to illustrate the point you are making. You pay a visit to Google and search for some images. You find something you like and download it, not seeing the disclaimer under each image, "Image may be subject to copyright." You drop the image in your presentation; later you upload the presentation and the images to the Web.*

Browsing Google images for "free" clip art to spice up our screen presentations is an activity far afield of fair use. Fair use is designed for specific educational purposes. Thus, downloading a piece of copyrighted art to illustrate a point is different than displaying or distributing the image to teach or comment about the image itself. Fair use is for specific educational purposes and should be used carefully. Consider also that most of the images found on Google images are subject to copyright. The ethical dilemma is that Google facilitates easy infringement while profiting from searches by selling ads. In fact, many of the websites that store large libraries of "free" clip art do so in order to host a wide variety of ads and thus make money by facilitating infringement. As a general rule, the more ads you see on a website devoted to "free" art the more likely the works are being distributed unethically. The ethical concerns in such an arrangement are obvious. Finding works that are truly free is time consuming, but legitimate sources of free art do exist. There are also a wide variety of services that provide artwork in exchange for subscription fees or for à la carte licensing.

*Telling stories in a sermon*

*You're preaching the Sunday sermon and begin to tell a story in the first person. You heard this story from a friend, or you read the story on the Web. You tell the story in the first person, leading the congregation to believe that you were there. Or, you're telling a story in the sermon that is fictional, but you tell the story as if it is true. Curious about the story and wanting to learn more, a member of the congregation searches Google for more information only to discover that the story belongs to someone else or is fictional altogether.*

Copyright does not necessarily apply in this situation, but the ethics of plagiarism certainly do. Telling a story in the first person when you yourself were not there is unnecessary. The illustration will be equally as effective even with some sort of disclaimer from the pulpit that the story belongs to someone else or is fictional. Phrases like, "I heard a story once..." or "The story goes that..." signal the truth to the congregation.

*Installing software on multiple computers*

*You purchase a copy of Logos for your personal laptop. Realizing that your administrative assistant could use Logos to copy and paste Scripture texts in preparing the service folder for Sunday, you install a copy of Logos on the office computer using your personal license. You also install a copy on the old desktop in your office.*

Generally speaking, a software license applies to the person not to the computer. This is true of Logos and many other software licenses (some licenses stipulate that a license must be acquired for every computer on which the software is installed, but such licenses are less common). In other words, you may install the software on multiple computers so that you, the license holder, may use the software. Installing the same software for another person to use requires an additional license. The shared office situation may be a gray area, but since a second person is frequently accessing the software a second license would be appropriate to maintain legality. Under no circumstance may a software license for one computer or one person be installed on a number of computers to avoid purchasing additional licenses. Thankfully, many software companies offer volume discounts.

*Circumventing copy protection technology*

*You have lawfully purchased a Kindle book from Amazon. You have read the book on your Kindle and also downloaded the book to the Kindle app on your laptop. You are using the book for a book study. All of your students own a copy of the book and you are producing a study guide for your students. To save time, you are copying and pasting quotes from the book for your discussion guide. You run into a warning that you have now reached the copy limit set by the publisher. Your Kindle book has been locked and is no longer available for copy and paste. You search the Internet for ways to get around this artificial limit and discover a tool to convert Kindle books to a rich text document. You download the tool and convert the book so you can use it again.*

Accessing the text of a work is part of the copyright bargain. Copying the text for use in other works is also part of the copyright bargain. The license terms of the Kindle store are designed to undercut this bargain by providing contractual obligations that contradict copyright and fair use. Furthermore, the DMCA outlaws circumvention of digital rights management (DRM) and threatens severe penalties for those who circumvent DRM. Scholars will point out that in such a case the law is contradictory. Fair use, indeed, the purpose of copyright assumes that audiences have access to the copies they have purchased. The DMCA assumes that publishers may control when and how the audience accesses and uses the text. In this case,

circumvention violates the DMCA and the situation itself illustrates the problem with the DMCA. Some scholars argue that such circumvention is an act of civil disobedience and is necessary to counteract the DMCA. Perhaps in this case the best approach is to copy the citations by hand (note the loss in time efficiency) and consider purchasing hard copies of books in the future (note the DMCA's chilling effect on new technology).

*Photocopying music*

*You have 10 copies of a piece of music in your choral library. You ask your schoolchildren to sing the song; there are 42 children. You photocopy the music so that all the children may have a copy.*

The copyright notices on many pieces of music will explain that any copying is illegal. Certainly making copies to avoid purchasing copies is clearly a violation of copyright. What is less clear, however, is whether it would be ethical in this case to purchase an additional 32 copies but to distribute photocopies of the music so that the children may mark up the copies without damaging the originals. The letter of the law would say such use is illegal.

*Uploading copyrighted material to the Web*

*You've licensed some artwork (e.g. clip art, stock photography) for use in some sort of original work in the parish. You've produced and printed physical copies of the work but also upload the copy to the church Web site.*

The licensing terms of most artwork and stock photography will dictate whether the work may be uploaded or distributed online. Be sure to check those terms before uploading works to the Web. Keep in mind that uploading the work to the web may cause it to appear on search engines where other individuals may copy the work unlawfully. Many art and photo sources include options to license the work for usage on the web. The same is true for video or audio podcasting. Additional licenses are usually required to publish audio and video recordings of copyrighted music used in worship.



## B FREE WORK

Society has discovered that “the value of the author’s genius could outweigh the cost of the scrivener’s labor.”<sup>123</sup> Society works on the assumption that products of the mind have value and that compensating authors for that value is the best way to foster further works. So what can we say about the fact that many authors, especially those who participate in the more liberal sharing of knowledge fostered by today’s Internet culture, are often eager to give their work away for free? And how do we approach the matter of Christian authors who have a ministerial incentive to provide work for free or at a discounted rate? What impact will these behaviors have on the overall market for works of authorship? I am not aware of any empirical studies to determine the answers to these questions. I can, however, offer some thoughts on the matter.

I certainly applaud authors who seek to be part of a creative commons on the Web. The Internet seems to be fostering a new culture of collaboration and sharing that promises to be beneficial to society. The Creative Commons project is a fine example of this culture. There is an abundance of great work available for use under simple and permissive licensing terms. I myself have offered work under a Creative Commons license and have also made use of the work of others under a Creative Commons license.

This culture of collaboration and sharing is also alive and well in the Church. For example, consider the “Open” program by LifeChurch.tv.<sup>124</sup> Open is a repository of digital materials professionally produced by LifeChurch.tv and distributed free of charge via the Internet. The mission of Open by LifeChurch.tv states, “At LifeChurch.tv, we want to lead the way with irrational generosity. Our desire is to maximize the effectiveness of the resources that God has entrusted to us.” I can certainly applaud “irrational generosity.”

Free has its downsides, though. Giving work away for free may hide from audiences the actual cost in producing such work. In the case of “Open” from LifeChurch.tv I have no doubt that the video producers, graphic designers, writers, and other members of the creative team at LifeChurch.tv were compensated for their work producing materials for their ministry. Their economic needs were met. And distributing their work to the world also met their ministerial interests. They want to help the Church at large and they are doing so. But have their efforts contributed positively to the further creation of such works?

On the one hand, the quality of such work has certainly demonstrated that congregations can and should set a high standard for excellence. But the nonexistent price of the work may serve to promote the assumption

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<sup>123</sup> Goldstein, *Copyright's Highway*, 31.

<sup>124</sup> Cf. <http://open.lifechurch.tv>

that “free” is the starting point for any negotiation of value in works of authorship. I hope that these efforts to distribute good work for free lead congregations to consider purchasing or even commissioning similar work for use in their own congregations. I also believe that an ethic of authorship will still pay whenever possible. Christian artists with a ministerial interest in their authorship will be more likely to provide work at a discounted rate, or even for free. A pastor pursuing an ethic of authorship will consider carefully the impact of accepting such work for free. Will accepting the work impact the economic needs of this or other Christian authors? Does it honor their ministerial interests or simply provide a discount coupon? Will the work raise the standard for authorship in the congregation and Church at large?

An author’s ministerial interest will certainly resonate with pastors. “What we do, we would gladly do for free,”<sup>125</sup> but we must be careful not to abuse this fact. You can’t eat “free,” and exposure doesn’t pay the bills. We understand that Christian authors would be happy to provide all their work for free, it’s just that doing so won’t necessarily lead to more works. As pastors we must make sure that value is rewarded in a way that makes future work more likely. More often than not that means paying for a work. I am interested in seeing what role free and open sharing will play in the developing economy for digital works. Authors may find new ways to reap the value of their work. For now it pays to consider carefully the impact of our practices when asking for or accepting work for free.

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<sup>125</sup> Kenneth Cherney, “God’s Money in God’s Mission: Financial Support and the Minister of the Gospel,” *Wisconsin Lutheran Quarterly* 106, no. 2 (2009). <http://wlsessays.net/node/2096>, 3.

## C SHARING UNDER CREATIVE COMMONS

I sense a strong desire among the WELS ministerium to share resources in an effort to collaboratively improve the works we produce for our congregations. Pastors seem to have a sense that the more resources we have to build upon the better our own work will be. This approach recognizes the truth that all works of authorship must, in some way, be based on previous works. A collaborative approach also recognizes the unique advantages that authors enjoy in a digital age. The problem, though, is how to share and collaborate lawfully and ethically. Copyright protects all works of authorship, but the law can be difficult to apply consistently. Society expects originality, but the ethics are often challenging. What is a simple, practical solution?

Consider the Creative Commons project (hereafter “the Project”). Founded in 2001, the Project recognized how the current copyright system does not adequately meet the needs of an increasingly digital culture. The Internet produces a wide variety of new opportunities for sharing and collaboration, while copyright tends to restrict free sharing and derivation. Furthermore, fostering a system that relies on technical barriers to copying is myopic and counteracts the core principles of copyright itself. The Project set out to create a system of licensing terms more suited to the nature of digital collaboration. Creative Commons works to expand the range of works that are available to use and share legally. The Project offers free copyright licenses to offer a “simple, standardized way to give the public permission to share and use your creative work—on conditions of your choice. CC licenses let you easily change your copyright terms from the default of ‘all rights reserved’ to ‘some rights reserved.’”<sup>126</sup> This “some rights reserved” approach is designed to work alongside copyright by voluntarily relinquishing some of the exclusive rights that copyright applies by default to all works of authorship.

The Project’s website allows authors to download copies of the CC licenses to include with their own original works. The licenses are worldwide, royalty-free, and non-exclusive; in other words, they are close to the polar opposite of copyright. Susan Corbett provides an excellent summary of the six types of licenses (verbatim quote follows):

1. Attribution (CC BY) license. This is the least restrictive license and permits others to add to or amend the work, even for commercial reasons, provided they acknowledge the original author. Once modified the work does not have to be licensed under a Creative Commons license.

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<sup>126</sup> See the Creative Commons “About” page at <http://creativecommons.org/about> (last visited October 2, 2013).

2. Attribution Share-Alike (BY-SA) license. Others may modify the work but must acknowledge the original author when disseminating the work and must distribute the derivative work under the same Creative Commons license as the original work. The derivative work may be used for commercial or non-commercial purposes.
3. Attribution Non-commercial (BY-NC) license. Others may modify the work but must acknowledge the original author when disseminating the work and the derivative work may be used only for non-commercial purposes.
4. Attribution Non-commercial Share Alike (CC BY-NC-SA) license. Others may modify the work but must acknowledge the original author when disseminating the work and must distribute the derivative work under the same Creative Commons license as the original work. The derivative work may be used only for non-commercial purposes.
5. Attribution No Derivative Works (CC BY-ND) license. Other users must acknowledge the original author and may not make derivative works. They may copy and distribute the work for commercial and non-commercial purposes.
6. Attribution Non-commercial NoDerivative Works (CCBY-NC-ND) license. This is the most restrictive license. It allows others to download and share the original work with others so long as they mention the original author, but they cannot change the original work in any way or use it commercially.<sup>127</sup>

You'll notice a few appealing features in these licensing terms. First, attribution is always required. Attribution is the most important part of an ethic of authorship; the law recognizes this and so does Creative Commons. Second, authors may explicitly allow derivative works. Copyright on its own does not allow such works. Third, the licenses may differentiate between commercial and non-commercial uses. Fourth, the licensing terms may be tailored to an author's specific wishes.

These licenses have yet to be analyzed in court, yet there is evidence that courts will uphold the licenses.<sup>128</sup> The Project devotes considerable legal resources to ensure that the licenses are properly written. The Project even offers country-specific licenses that are tailored for each jurisdiction's copyright law. Creative Commons has also built technical tools to allow other websites to mark works as Creative Commons material. One of the most visible websites that has adopted Creative Commons as a tool for licensing is the photo-sharing site Flickr (flickr.com). It is possible to search Flickr for images that are free to use under a Creative Commons license.

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<sup>127</sup> Susan Corbett, "Creative Commons Licences, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?" *The Modern Law Review* 74, no. 4 (2011): 512-513.

<sup>128</sup> *Ibid.*, 513-514.

The Creative Commons website also offers a search engine to find CC-licensed content. Creative Commons is a promising alternative to copyright.

The Project is not without criticism, though. Some argue that the Project fosters a licensing culture instead of a free use culture. There may also be legal issues with the specificity of the “non-commercial” license. Empirical data from Flickr also suggests that a majority of people still prohibit derivative works, an obvious setback for those who wish to see more legal room for derivative works. On a more philosophical level, some argue that since society in general does not understand or value copyright, any system that seeks to promote information freedom from within copyright’s framework is doomed to failure.<sup>129</sup> In other words, Creative Commons may not become a viable social norm.

These criticisms notwithstanding, I believe Creative Commons licensing represents a practical way for pastors to license their own original work for use by other pastors. Doing so will respect authorship and also follow the law of our land. Licensing a work under Creative Commons is not difficult. The Creative Commons website provides the licensing wording; adding a Creative Commons copyright notice can be as simple as copying and pasting. As long as our work is original, a Creative Commons license offers a truly legal and ethical way to offer our work for free use by others. Creative Commons has been used by Wikipedia, the White House, and Google. The daily devotions on the WELS website are also licensed under Creative Commons (albeit the under strictest of the six main Creative Commons licenses).

A positive ethic of authorship finds an excellent practical solution for legal and free sharing of works in the Creative Commons system. Consider using Creative Commons in your original works.

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<sup>129</sup> Ibid.

D PRACTICAL SUGGESTIONS FOR CITATION

Citation does not need to be a chore. Investing a little time and money in our tools will pay off with time saved in the future. Consider some of the following practical tips to make an ethic of authorship easier to practice.

*Use a Reference Manager*

There are a number of software tools to make managing references easier. In fact, for this essay I used a reference manager for the first time. The software saved me a significant amount of time managing references, citations, and my bibliography. The software even assisted in annotating my resources. I hesitate to recommend a particular reference manager, but I will recommend that anyone who works with a number of references try out some of the reference managers available for Mac and Windows. Search Google for “reference management software” and explore the options.

*Provide Suggested Citations*

This is a minor suggestion for conference papers and other pastoral works: provide a suggested citation in the front matter of your essay. This practice is common in academia and essentially offers to your colleagues a quick, copy-and-paste solution to citing your work. This becomes all the more practical when you license your work under a Creative Commons license.

*Take Effective Notes*

Finally, time spent documenting sources carefully on the front end saves time on the back end as you produce the final product of your work. Consider an online note system like Evernote and use the easy capture tools Evernote offers to gather resources and also note from where you gathered the resources. Noting your sources also helps protect against unintentional plagiarism.

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