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Carolyn Homer Thomas

THE COPYRIGHT ACT'S LICENSING EXEMPTION FOR RELIGIOUS PERFORMANCES OF RELIGIOUS WORKS IS UNCONSTITUTIONAL

*Carolyn Homer Thomas**

INTRODUCTION

George Frideric Handel's *Messiah* is one of the world's most widely known oratorios. Handel, an eighteenth-century musician facing debtor's prison, wrote *Messiah* after a Dublin, Ireland charity commissioned him to compose a work for a benefit concert.[1] Critical and popular acclaim spurred frequent performances of *Messiah* in both churches and secular theatres. These performances, and resulting royalties, enabled Handel to continue composing baroque music.[2] To this day, every Christmas and Easter season, soloists, church choirs, community groups, and professional companies perform excerpts of the work, including "Every Valley Shall Be Exalted," "For Unto Us a Child Is Born," and the "Hallelujah Chorus."[3]

Handel's works, written in the decades following the enactment of the 1709 Statute of Anne,[4] have long since entered the public domain. Today, churches and opera companies may perform *Messiah* without obtaining a copyright license. But even if, hypothetically, *Messiah* still retained copyright protection, churches could perform it without a license. Pursuant to the Copyright Act of 1976 (1976 Act), religious works performed during religious services need not obtain licenses.[5] As a result, even modern-day composers of religious oratorios are not

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1. For a biography of Handel's life and the circumstances surrounding composition of *Messiah*, see generally PAUL HENRY LANG, GEORGE FRIDERIC HANDEL 332–56 (1966).

2. *See id.* at 332.

3. For example, the Kennedy Center for the Performing Arts hosts an annual *Messiah* sing-along. *Event Calendar:* Messiah *Sing-Along*, KENNEDY CENTER (Dec. 23, 2013), http://www.kennedy-center.org/text/calendar/event_details.cfm?event=MOHFM. Other choruses have staged "flash mob" performances of the "Hallelujah Chorus" in major shopping centers. *E.g.*, Opera Philadelphia, *Opera Company of Philadelphia "Hallelujah!" Random Act of Culture*, YOUTUBE (Nov. 1, 2010), http://www.youtube.com/watch?v=WP_RHnQ-jgU.

4. Act for the Encouragement of Learning, 1709, 8 Ann., c. 21 (Eng.). The Statute of Anne was Britain's first copyright law.

5. *See* 17 U.S.C. § 110(3) (2012).

entitled to any revenue from the performance of those works during church services. For example, although Julian Anderson's *Heaven is Shy of Earth* premiered in London in 2010, his original settings of Latin religious texts[6] could theoretically be performed, without licensing, during Sunday services by American churches.[7]

While the 1976 Act also exempts various charitable, educational, and nonprofit performances from performance licensing, § 110(3) of that Act grants a broader exemption for religious performances in three ways. First, it exempts general nonprofits from liability for unlicensed performances of nondramatic and musical works.[8] For religious assemblies, in particular, it additionally exempts unlicensed performances of religious dramatico-musical works, such as Handel's *Messiah* or Anderson's *Heaven is Shy of Earth*.[9] Second, the 1976 Act forbids performances for "indirect commercial advantage" by general nonprofits, but places no commercial qualification on permissible religious performances.[10] Third, it requires that, to be eligible for exemption, general nonprofit performances must not compensate the musical performers, but places no such limitation on religious performances.[11] This licensing freedom allows churches to pay professional music staff.[12]

Pursuant to the Free Exercise Clause of the First Amendment, Congress is allowed to accommodate religious activity by exempting it from otherwise applicable laws, including copyright law.[13] Such statutory accommodations, however, risk being held unconstitutional under the Establishment Clause if they either do not alleviate "exceptional" government-created burdens on private religious exercise or if

6. *Anderson's 'Heaven is Shy of Earth' Revived at the Barbican*, FABER MUSIC (Nov. 4, 2010), http://www.fabermusic.com/news/story/andersons-heaven-is-shy-of-earth-revived-at-the-barbican.aspx?ComposerId=13. See a full description of the work at *Heaven is Shy of Earth (2006)*, FABER MUSIC, http://www.fabermusic.com/Repertoire-Details.aspx?ID=4619 (last visited Aug. 21, 2013).

7. The 1976 Act's exemption applies to musical performances across all faiths. However, because Christianity is the majority religion in America, *see* PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 10 (2008), and because music is important to Christian worship, *see generally* ANDREW WILSON-DICKSON, THE STORY OF CHRISTIAN MUSIC (Fortress Press 2003) (1992), this Article will primarily feature examples from that religious tradition. As a result, while "churches" will be used as the generic religious institution for this Article, the same legal principles would apply to synagogues, mosques, temples, and the like.

8. 17 U.S.C. § 110(4).

9. *Id.* § 110(3).

10. *Id.* § 110(3)–(4).

11. *Id.*

12. *See id.* § 110(3).

13. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 338–89 (1987).

they impose unreasonable burdens on third parties.[14] Additionally, these accommodations may be unconstitutional if they require the state to entangle itself in parsing what is religious content and what is not.[15] Because § 110(3) does not alleviate an exceptional burden on religious performances of copyrighted works, imposes more than a *de minimis* burden on copyright holders to subsidize religious performances, and requires courts to adjudicate what constitutes religious works performed in the course of religious services, it violates the Establishment Clause. Congress should cure this constitutional defect by amending the 1976 Act to grant the same performance-licensing exemption to all educational, charitable, and religious institutions, while preserving a much narrower accommodation which recognizes religious institutions' unique need for paid musical staff.

This Article first addresses U.S. copyright law's history of performance exemptions for nonprofit and religious organizations. Part II analyzes the legislative debate surrounding these exemptions prior to the enactment of the 1976 Act, explaining how the statute evolved to grant a broader exemption to religious performances than other nonprofit entities. In light of this legislative history and subsequent developments in First Amendment jurisprudence, Part III examines the constitutionality of the 1976 Act's religious exemption under the Establishment Clause of the First Amendment. Ultimately, this Article concludes that 17 U.S.C. § 110(3) is unconstitutional, and that Congress should either repeal or materially amend the clause to cure the defect.

II. The Evolution of Nonprofit Exemptions for Performance Licensing From 1909 to 1976

The Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[16] Pursuant to this authority, the First Congress passed the Copyright Act of 1790,—modeled on the 1709 British Statute of Anne—which only protected maps, charts, and books.[17] Later, Congress added an exclusive right of public performance.[18]

Congress significantly revised its copyright legislation in 1909. The Copyright Act of 1909 (1909 Act) continued to recognize performance

14. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).
15. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (plurality opinion).
16. U.S. Const. art. 1, § 8, cl. 8.
17. Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (repealed 1831).
18. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (repealed 1870).

rights, but it granted different performance rights to different classes of works. Authors of nondramatic literary works had the exclusive right to "deliver or authorize the delivery of the copyrighted work in public for profit."[19] Similarly, composers of musical works had the exclusive right to perform the copyrighted work publicly for profit.[20] Creators of dramatic works had even more expansive rights than these first two.[21] They possessed an exclusive right to "perform or represent the copyrighted work publicly," regardless of whether the performance was free or for profit.[22]

Thus, except for performances of dramatic works, nonprofit performances could not, by their very nature, constitute copyright infringement. This distinction between for-profit and nonprofit performances undergirded the entire 1909 Copyright Act. Exempting nonprofit performances stemmed from public concern that a blanket licensing requirement would be "too drastic a restraint upon . . . the free enjoyment of music."[23] In response to these concerns, the American Bar Association negotiated a compromise whereby authors' public-performance rights in musical works were limited to public performances for profit.[24] This compromise was ultimately codified into law through the 1909 Act.

A. The Educational, Charitable, and Religious Exemption from the Exclusive Right of Public Performance Under Section 104 of the 1909 Act

In addition to distinguishing between for-profit and nonprofit performances generally, the 1909 Act exempted various school groups,

19. Copyright Act of 1909, ch. 320, § 1(c), 35 Stat. 1075, 1075 (repealed 1978). Nondramatic literary works are those which are not, by their very nature, intended to be performed. The work is narrated, rather than scripted. Novels, textbooks, essays, articles, poetry, speeches, and sermons all fit within this category. *See* U.S. COPYRIGHT OFFICE, FL-109, COPYRIGHT REGISTRATION OF BOOKS, MANUSCRIPTS, AND SPEECHES (2011), *available at* http://www.copyright.gov/fls/fl109.html.

20. Copyright Act of 1909 § 1(e), 35 Stat. at 1075. Musical works are now categorized as nondramatic. These include songs, records, instrumental works, and sheet music. *See* U.S. COPYRIGHT OFFICE, FL-105, COPYRIGHT REGISTRATION OF MUSIC, *available at* http://www.copyright.gov/fls/fl105.html.

21. Dramatic works are those intended to be performed. These include skits, plays, musicals, operas, and movies as well as choreographed routines such as ballets. U.S. COPYRIGHT OFFICE, FL-119, DRAMATIC WORKS: SCRIPTS, PANTOMIMES, AND CHOREOGRAPHY (2010), *available at* http://www.copyright.gov/fls/fl119.html.

22. Copyright Act of 1909 § 1(d), 35 Stat. at 1075.

23. *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the H. and S. Comms. on Patents*, 59th Cong. 161 (1906) (statement of Arthur Steuart, Chairman, ABA Copyright Comm.).

24. *Id.*

church choirs, and vocal societies from copyright liability, so long as they performed for "charitable or educational purposes and not for profit."[25]

This language was redundant because most nonprofit performances could not be infringing; the 1909 Act only granted exclusive rights for for-profit performances.[26] The provision primarily served as evidence that educational, charitable, and religious activities were those which Congress found most deserving of an exemption.[27] Nevertheless, section 104 of the 1909 Act potentially added value by exempting some dramatic works, such as "oratorios, cantatas, masses, or octavo choruses," in addition to the nondramatic music already covered by the 1909 Act's for-profit limitation.[28] As the Copyright Office later understood the provision, section 104 "might be construed as allowing performance of some dramatico-musical works during religious services that would otherwise be prevented."[29] However, the Copyright Office slightly misconstrued section 104, as that exemption did not give any special preference to religion. Rather, it exempted both religious and secular dramatic works performed by both religious and secular community choral associations.[30]

Ultimately, only two courts ever interpreted the section 104 exception. In *John Church Co. v. Hillibard Hotel Co.*, the Second Circuit interpreted "for profit" as charging individuals for attending a public performance, with the proceeds benefiting a commercial enterprise.[31] There, the composer unsuccessfully sought to enjoin a professional

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25. Copyright Act of 1909, ch. 391, § 104, 61 Stat. 652, 662 (1947) (repealed 1978) (original version at ch. 320, § 28, 35 Stat. 1075, 1082 (1909)). This exemption was originally set forth in the 1909 Act as section 28. A subsequent act of Congress in 1947 repealed and reenacted the 1909 Act with a new structure, after which the exemption appeared as section 104. The language of the original section 28 and that of the later section 104 are nearly identical. Because much of the congressional materials regarding the copyright law revision in the 1950s and 1960s referred to the exemption as section 104, and for greater ease of understanding for the reader, this Author will continue to refer to the exemption as section 104 throughout the text of this Article.

26. Copyright Act of 1909 § 1(e), 35 Stat. at 1075.

27. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, STUDY NO. 16: LIMITATIONS ON PERFORMING RIGHTS 84 (Comm. Print 1960) (authored by Borge Varmer).

28. Copyright Act of 1909 § 104, 61 Stat. at 662. For example, Edward Elgar's religious oratorios *The Apostles* and *The Kingdom* were popular during this era. Both for-profit and nonprofit performances of those works would have been subject to infringement liability. Section 104 exempted performances by community vocal societies from this liability.

29. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISIONS, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965).

30. Copyright Act of 1909 § 104, 61 Stat. at 662.

31. John Church Co. v. Hilliard Hotel Co., 221 F. 229, 230–31 (2d Cir. 1915), *rev'd on other grounds sub nom.*, Herbert v. Shanley Co., 242 U.S. 591 (1917).

orchestra from playing his works in the lobby of the Hotel Vanderbilt.[32] Although the Hotel Vanderbilt paid the orchestra—and even though the district court held that the paid orchestra evinced a "for profit" motive to attract more customers—the Second Circuit concluded that the 1909 Act only required licenses for those performances which charged admissions fees.[33] In dicta, Judge Henry Ward contrasted this admission-fee construction with the choral exception granted in section 104.[34] In his view, section 104 permitted choral concerts to charge admission fees, so long as the proceeds were applied to a charitable or educational purpose.[35] Even if a community chorus performed a dramatic work, it would not infringe the work's copyright so long as it did not realize a commercial profit.

Judge Ward's interpretation of section 104 was not revisited for nearly sixty years, until a religious troupe utilized it as a defense to its infringement of Andrew Lloyd Webber's *Jesus Christ Superstar.* In *Robert Stigwood Group, Ltd. v. O'Reilly*, three Catholic priests formed a musical ministry which reached out to and performed for distressed youths in St. Louis.[36] The group achieved success, releasing albums, holding charitable concerts, and appearing on national television.[37] All monetary proceeds from these activities funded the group's charitable purposes.[38] The publicity from their music ministry's success led the priests to contract with a production company and form the for-profit International Rock Opera Company to adapt and perform *Jesus Christ Superstar*.[39] Neither the priests' ministry, nor the opera company, ever acquired a license for the musical.[40] When Andrew Lloyd Webber sued for infringement, the priests defended on the basis of section 104.[41] The priests asserted that their religious affiliation and charitable purpose insulated them from liability, in accordance with Judge Ward's analysis from *John Church*.[42]

The court rejected the priests' defense.[43] According to the court, while the priests' nonprofit organization may have independently

32. *Id.* at 229–231.
33. *Id.*
34. *See id.* at 230.
35. *Id.*
36. Robert Stigwood Grp., Ltd. v. O'Reilly, 346 F. Supp. 376, 379 (D. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976).
37. *Id.*
38. *Id.*
39. *See id.* at 379–80.
40. *Id.* at 380.
41. *Id.*
42. *See Robert Stigwood*, 346 F. Supp. at 380.
43. *Id.* at 382.

qualified as a church choir or vocal society under the 1909 Act, their contractual affiliation with the for-profit International Rock Opera Company most certainly did not.[44] Because the Company was a professional corporation which had already grossed $300,000 from fifty for-profit performances, section 104 did not apply.[45] Furthermore, "[t]he mere fact that the many professional performers are under the direction of a few priests cannot turn a professional touring company into a church choir," wrote the court.[46]

In the course of its section 104 analysis, however, the district court made a problematic distinction. It assumed that in order to qualify for the section 104 exemption, performances by church choirs must occur within a religious setting.[47] The court concluded that the International Rock Opera Company was not a church choir because the performances of *Jesus Christ Superstar* were "not given in churches nor [were] they part of any church services."[48] The court's interpretation did not comport with the express language of section 104. Section 104 placed no limits on where performances were conducted; rather, it only described the types of societies which were exempt[49]—a significant distinction considering that both religious and secular vocal societies have rich histories of musical performances in America.[50] Under the 1909 Act, both secular and religious musical organizations would have been equally entitled to the nonprofit copyright exemption, regardless of venue. The court's impulse to evaluate the religious quality of performances, however, presaged a development under the 1976 Act. As will be discussed later, statutory requirements that the state evaluate the religious character of copyrighted works and performances raise significant Establishment Clause concerns.

B. Congressional Debate Surrounding the Scope of Nonprofit Exemptions Prior to the Enactment of the Copyright Act of 1976

United States copyright law did not change significantly between 1909 and 1976. Congress floated bills to revise copyrights during this time frame but tabled all of them without significant consideration.[51] In 1955, Congress began a general copyright law revision to address

44. *Id.* at 381.
45. *See id.*
46. *Id.*
47. *See id.*
48. *Robert Stigwood*, 346 F. Supp at 381.
49. Copyright Act of 1909, ch. 391, § 104, 61 Stat. 652, 662 (1947) (repealed 1978).
50. *See generally* LOUIS CHARLES ELSON, THE HISTORY OF AMERICAN MUSIC 73–94 (1915).
51. *See generally* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPY-

intellectual property rights in light of new communications mediums.[52] This bill, largely based on draft legislation by the Copyright Office, laid the foundation for the Copyright Act of 1976.

The Copyright Office's initial draft eliminated the blanket "profit-versus-nonprofit" performance distinction which undergirded the 1909 Act.[53] The Copyright Office instead granted an exclusive performance right to authors and composers, subject to specifically delineated exemptions.[54] Unlike the "vocal society" exemption found in section 104 of the 1909 Act, which was largely redundant due to its nonprofit limitation,[55] the new exemptions carried substantive weight. Several exemptions continued to insulate educational, charitable, and religious performances from copyright liability.[56] In particular, § 110(4) exempted general not-for-profit performances, while § 110(3) exempted some religious performances more broadly.[57] The exact requirements of §§ 110(3) and 110(4) will be discussed next.

1. The Proposed Section 110(4) Exemption for Nonprofit Performances of Nondramatic and Musical Works

The proposed § 110(4) extended an exemption to general nonprofit activities.[58] This section preserved the essence of the exemption granted in section 104 of the 1909 Act.[59] Unlicensed performances were considered noninfringing if volunteers performed the work and

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RIGHTS, STUDY NO. 16: LIMITATIONS ON PERFORMING RIGHTS (Comm. Print 1960) (authored by Borge Varmer).

52. *Id.* at III.

53. *See* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 21 (Comm. Print 1965); *see also Copyright Law Revision: Hearings on S. 1005 Before the S. Subcomm. On Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary,* 89th Cong. 67 (1966) [hereinafter *S. 1005 Hearings*] (statement of Abraham L. Kaminstein, Register of Copyrights).

54. *See* STAFF OF THE H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 21 (Comm. Print 1965).

55. *See id*. at 38.

56. 17 U.S.C. § 110 (2012).

57. 17 U.S.C. § 110. The Copyright Office's original draft introduced these exemptions under § 109, but for the sake of consistency this Article will refer to them under § 110, where they were ultimately codified.

58. *See* 17 U.S.C. § 110(4). This was originally proposed as § 109(4). Because that proposal does not materially differ from the final codification at 17 U.S.C. § 110(4), the final codified version is included at this point. For comparison purposes, the earliest draft can be found at STAFF OF THE H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 196 (Comm. Print 1965).

59. *See* 17 U.S.C. § 110(3)–(4).

either (1) the public could freely listen, or (2) the proceeds served an educational, religious, or charitable purpose and the copyright owner did not specifically object to the performance.[60] This framework continued to allow deserving nonprofits to perform nondramatic and musical works without a formal license.[61]

At the same time, the proposed § 110(4) narrowed the scope of the exemption in three important ways. First, it codified the legislative intent, as theorized by Judge Ward in *John Church*, that admissions fees be permissible so long as they served a charitable purpose.[62] If a performance charged an admission fee, however, the copyright owner now had the right to veto the performance.[63] Second, § 110(4) eliminated the loophole that the Hotel Vanderbilt and the *Jesus Christ Superstar* musical ministry had attempted to exploit. Under the new provision, indirect commercial motives or paid professional performers automatically eliminated a group from infringement protection.[64] Third, § 110(4) notably did not cover performances of any dramatic or dramatico-musical works. As a result, general nonprofit institutions would now be required to license all dramatic works.

2. The Original Proposed Section 110(3) Exemption for Performances During Religious Services

In narrowing the scope of the exemption for general nonprofits, the Copyright Office created complications for religious performances. Church performances could now fail to qualify for the § 110(4) exemption, and thus face infringement liability, on three new grounds. First, churches would no longer be protected in their performances of dramatic religious works, such as Edward Elgar's *The Apostles* or Julian Anderson's contemporary *Heaven is Shy of Earth*. Second, particularly at megachurches, musical performances could arguably be of "indirect commercial advantage" as they serve to attract more congregants.[65] Third, churches' organists, vocalists, contemporary worship

60. H.R. REP. NO. 94-1476, at 85–86 (1976).

61. *See* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, STUDY NO. 16: LIMITATIONS ON PERFORMING RIGHTS 84 (Comm. Print 1960) (authored by Borge Varmer).

62. John Church Co. v. Hillard Hotel Co., 221 F. 229, 230 (2d Cir. 1915).

63. 17 U.S.C. § 110(4).

64. *See* H.R. REP. NO. 94-1476, at 85 ("[P]ublic performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.").

65. *See* Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000) (noting that churches profit from attracting new members and tithing). Additionally, megachurches often include coffee shops, bookstores, and other commercial enterprises within

bands, and music ministers are often paid professionals, which would preclude them from infringement protection.[66]

To forestall these particular concerns about the religious use of music, the Copyright Office proposed a more sweeping religious exemption than the one § 110(4) granted to general educational and charitable uses. Whereas the proposed § 110(4) restricted permissible performances by general nonprofits, § 110(3) expanded permissible performances for religious services.

Under the 1965 draft bill, performances during religious services would be categorically exempt from the restraints § 110(4) imposed on general nonprofits.[67] Churches could still pay their performers without nonprofit or admission-fee contingencies attached. Furthermore, such services did not need to take place in a church. As the Register of Copyrights testified in 1965, "[A]s long as services are being conducted before a religious gathering, the exemption would apply . . . in places such as auditoriums, outdoor theaters, and the like."[68] This "in the course of services" language effectively nullified the *Robert Stigwood* court's refusal to apply the church vocal society exception to performances outside of churches.[69]

The "in the course of services" language, however, limited religious performances in other ways. Not all church performances would be covered: Social, educational, or fundraising performances would have

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the church building. If these churches advertise their musical worship services in the community, a plausible case could be made that this is of indirect commercial advantage. *See* Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, and Smart Growth,* 21 ST. LOUIS U. PUB. L. REV. 313, 322 (2002) ("[I]f a megachurch is able to claim religious protection for [a] commercial entity, then it gains a competitive advantage over non-religious commercial enterprises.").

66. *See* H.R. REP. NO. 94-1476, at 85. The legislative history for § 110(4) provides that paying a salary for general duties that also encompass performances—such as those of a high school music teacher—would not override the exemption. *Id.* In the religious services context, it appears that some religious performances by salaried staff, such as full-time music ministers, might fall under this provision, but others would not. Paid singers and organists for Sunday services, for example, would not fall within § 110(4)'s exemption because they are paid for their performance duties alone. While barred from § 110(4) protection, however, the same religious performers would fall within § 110(3)'s exception. Thus, in at least this context, § 110(3)'s religious exemption is broader than the general nonprofit one.

67. *See S. 1005 Hearings*, *supra* note 53, at 115 (statement of Abraham L. Kaminstein, Register of Copyrights).

68. H.R. REP. NO. 94-1476 at 84–85; *cf.* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965).

69. Robert Stigwood Grp., Ltd. v. O'Reilly, 346 F. Supp. 376, 381 (D. Conn. 1972).

to comply with the terms of § 110(4) to be exempt.[70] Further, "services" only encompassed the live event; television broadcasts and other transmissions would constitute a separate performance and therefore be infringing.[71] The terms of the religious exemption would prove to be controversial.

3. The Debate and Subsequent Amendments Surrounding a Religious Exemption for Dramatico-Musical Works

Another critical difference between § 110(3)'s religious exemption and § 110(4)'s general nonprofit exemption was that, whereas § 110(4) only applied to nondramatic and musical works, § 110(3) also included dramatico-musical works.[72] While the Copyright Office had originally limited the religious exemption to the same classes of works as general nonprofits,[73] it was "very strenuously urged to expand the exemption" in order to cover cantatas, oratorios, and other dramatico-musical works.[74] The exemption was intended to give churches the freedom to perform sacred music that could be regarded as dramatic in character.[75]

Authors, composers, and publishers rapidly decried the dramatico-musical-works exception for religious services as overbroad.[76] The Copyright Office itself realized the language might be too permissive, and subsequently encouraged Congress to amend the Act.[77] Not wanting to authorize churches to perform "all or part of a secular opera or musical play under the color of it being 'in the course of religious services,'" the Copyright Office suggested that Congress "qualify

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70. *See* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965).

71. *Id.*

72. 17 U.S.C. § 110(3)–(4) (2012).

73. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965). In fact, the clause had changed during the drafting of the report itself—the draft text at the end of the report does not include dramatico-musical works, exempting only "performance or exhibition of the work in the course of services at a place of worship or other religious assembly." *Id.* at 197.

74. *Id.* at 38.

75. *See id.*

76. *See, e.g.*, *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the H. Comm. on the Judiciary, Part 1*, 89th Cong. 196 (1965) [hereinafter *H.R. 4347, 5680, 6831, 6835 Hearings*] (statement of Herman Finkelstein, General Counsel, American Society of Composers, Authors and Publishers).

77. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965).

'dramatico-musical work' with a phrase such as 'of a religious nature.'"[78]

The Judiciary Subcommittee on Patents, Trademarks, and Copyrights (Subcommittee) generated controversy by not adding the qualifying phrase "of a religious nature" prior to holding hearings on the bill.[79] On behalf of the Authors League of America, Rex Stout sought to limit the unlicensed performance of dramatico-musical works to those works of a religious nature.[80] Stout worried that "it could be too easily misunderstood and abused."[81]

> The concept of what constitutes a religious service is as varied as the diversity of religious denominations in our country. Jazz, ballet, plays, and other works—that are not conventionally thought of as the substance of a religious service—have been performed during some service[s]. The use of a popular musical comedy in the course of such a service might be helpful in attracting an audience or illustrating a religious theme, but it would be essentially a public performance of the work and should only be permitted with its author's consent.[82]

In this same series of hearings, numerous other author, composer, and publisher trade associations similarly advocated for a qualification that the exempt dramatico-musical works be "of a religious nature."[83] The Music Publishers' Association (MPA) sought to eliminate the exemption altogether because it discriminated against creators of sacred music.[84] The MPA testified that its members published 75% of the religious music used in Protestant churches nationwide.[85] While religious sheet music sold well, the performance-right exemption from the 1909 Act, carried into the present proposal, resulted in the loss of a

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78. *Id.*

79. *See H.R. 4347, 5680, 6831, 6835 Hearings*, *supra* note 76, at 157 (statement of Alfred H. Wasserstrom, Chairman, Copyright Committee, Magazine Publishers Association) ("[I]t does not seem to us to be in the wise public interest to immunize as completely as these subsections would those particular uses of works otherwise protected.").

80. *Id.* at 96 (summary of statement by the Authors League of America).

81. *Id.* at 90 (statement of Rex Stout, President, Authors League of America).

82. *Id.*

83. *See id.* at 134 (joint memorandum of American Book Publishers Council; American Guild of Authors & Composers; American Society of Composers, Authors, and Publishers; American Textbook Publishers Institute; The Authors League of America; Composers and Lyricists Guild of America; Music Publishers' Protective Association; Music Publishers Association of the United States); *see also id.* at 176–77 (statement of Herman Finkelstein, General Counsel, American Society of Composers, Authors, and Publishers).

84. *See id.* at 284 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.).

85. *H.R. 4347, 6580, 6831, 6835 Hearings*, *supra* note 76, at 281 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.).

significant amount of licensing revenue, which was detrimental to the creators' livelihoods.[86]

By March of 1967, the Senate had formally added the "dramatico-musical work of a religious nature" limiting language to § 110(3).[87] This change satisfied the American Society of Composers, Authors and Publishers (ASCAP) and, presumably, their peer trade associations.[88] In the final legislative history report on the 1976 Act, Congress specifically noted that the exemption for "dramatico-musical works of a religious nature" was "not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme."[89] Thus, Congress intended that works such as *Jesus Christ Superstar* and *Joseph and the Amazing Technicolor Dreamcoat* could not be performed during religious services without a license.

Even with the limiting language, some groups remained unhappy with the exemption, feeling that it conferred too great a benefit to religious institutions.[90] From the other side, the National Council of Churches (NCC) thought the limitations on religious performances were too strict. In April of 1967, Reverend William Fore, the Executive Director for the NCC, testified before the Subcommittee.[91] On behalf of the NCC's member churches, he requested that the exemption be made more encompassing by eliminating both the dramatico-musical works "of a religious nature" and the "performance . . . in the course of services" qualifications.[92] However, the Senate took no action on his recommendations. Thereafter, from the spring of 1967 until the final passage of the 1976 Act, § 110(3)'s religious exemption clause underwent no significant change.[93]

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86. *See id.* at 283–84.

87. *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, Part 1*, 90th Cong. 7 (1967).

88. *See Copyright Law Revision: Hearings on S. 597 Before the Subcomm. On Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, Part 2*, 90th Cong. 346 (1967) [hereinafter *S. 597 Hearings, Part 2*] (statement of Herman Finkelstein, General Counsel, American Society of Composers, Authors, and Publishers).

89. H.R. REP. NO. 94-1476, at 84 (1976).

90. *See, e.g.*, *H.R. 4347, 5680, 6831, 6835 Hearings*, *supra* note 76, at 282–83 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.).

91. *S. 597 Hearings, Part 2*, *supra* note 88, at 636 (statement of Rev. William F. Fore, Executive Director, National Council of the Churches of Christ).

92. *Id.* at 639.

93. For a while, the Senate version of the bill also exempted sound recordings played during religious services, but this language was dropped in September of 1974. *Compare* 120 CONG. REC. 30,343 (1974) (September 5, 1974 version), *with* 120 CONG. REC. 30,500 (1974) (September 9, 1974 version). The final legislative history noted that "the scope of the clause does not cover

On February 19, 1976, the Copyright Act of 1976 was unanimously passed by the Senate.[94] It was subsequently passed by the House in September, was signed by President Gerald Ford in October, and took full effect in 1978.[95] The final language of the religious exemption provided:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> . . . .
>
> (3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly . . . .[96]

The section remains untouched today.[97]

C. Judicial Interpretation of the Religious Performance Exemption

Only two courts have directly considered the scope of § 110(3)'s religious exemption, and both ruled against the churches that attempted to utilize it as an infringement defense. In *Simpleville Music v. Mizell*, two radio stations broadcasted fifteen songs without permission from ASCAP, including religiously themed works such as "I Can Only Imagine."[98] With respect to the religious works, the radio stations argued that because they had broadcast the performances directly from religious services, § 110(3) insulated them from liability.[99] The court rejected this assertion, noting that copyright law treats live perform-

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the sequential showing of motion pictures and other audiovisual works." H.R. REP. NO. 94-1476, at 84.

94. 122 CONG. REC. 3841 (1976).

95. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

96. *Id.* § 110(3), 90 Stat. at 2549 (codified at 17 U.S.C. § 110(3) (2012)).

97. In 1996, as part of the debate surrounding the Copyright Term Extension Act, Senators Hank Brown and Strom Thurmond proposed an amendment to expand the religious exemption. *Copyright Term Extension Bill is Approved by Senate Committee*, 52 PAT. TRADEMARK & COPYRIGHT J. (BNA) 137, 137 (1996). Under their proposed addition to § 110(3), public or closed circuit broadcasting of religious services would not be infringing so long as there was no commercial sponsor. S. 1628, 104th Cong. § 4 (1996), *reprinted in* 51 PAT. TRADEMARK & COPYRIGHT J. (BNA) 648 (1996). Senator Fred Thompson spoke out against the amendment as denying religious songwriters their fair compensation. *See Copyright Term Extension Bill is Approved by Senate Committee*, *supra*, at 137. The amendment was tabled without further debate. *See id.*

98. Simpleville Music v. Mizell, 451 F. Supp. 2d 1293, 1295 (M.D. Ala. 2006). The chorus of "I Can Only Imagine" is:

> Surrounded by Your glory, what will my heart feel? Will I dance for you Jesus, or in awe of you be still? Will I stand in your presence, or to my knees will I fall? Will I sing hallelujah? Will I be able to speak at all? I can only imagine!

MERCYME, *I Can Only Imagine*, *on* ALMOST THERE (INO Records 2001).

99. *Mizell*, 451 F. Supp. 2d at 1298.

ances and broadcasts of those performances as two separate events.[100] While live religious performances could be exempt, the radio stations' transmissions of those same performances were not.[101] The religious exemption did "not extend to religious broadcasts or other transmissions to the public at large," because "such broadcasts are not 'at a place of worship.'"[102]

In the only other § 110(3) case, *Worldwide Church of God v. Philadelphia Church of God, Inc*., a dispute arose over the permissible use of religious scripture after a schism in the denomination.[103] The Ninth Circuit held that using a copyrighted religious text without a license in a schismatic congregation was not a fair use.[104] Pursuant to its fair use analysis, the court noted that § 110(3)'s religious exemption applied only to performances, not paper copies of a work.[105] The Worldwide Church of God, as the owner of the scripture's copyright, had a separate exclusive right to reproduce and distribute copies of its former pastor's work, *Mystery of the Ages*.[106] While the schismatic Philadelphia Church of God's readings from the *Mystery of the Ages* during services might have been protected under § 110(3), its unauthorized copying and distribution of the work fell "outside of that narrow exception to copyright protection."[107]

D. The Current State of the Copyright Exemptions Governing Religious Entities

Ultimately, religious institutions qualify, along with other charitable and educational institutions, for the general protections of § 110(4). Under that section, unpaid performers of nondramatic or musical works need not acquire a license if either (1) the performance is free to the public, or (2) any admission fee contributes directly to an edu-

100. *Id.*; *see also* STAFF OF THE H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965).

101. *Mizell*, 451 F. Supp. 2d at 1298.

102. *Id.* (quoting H.R. REP. NO. 94-1476, at 84 (1976)).

103. Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1113 (9th Cir. 2000). Herbert Armstrong founded the Worldwide Church of God. After his death, Armstrong's original California congregation substantially revised the doctrine and stopped using Armstrong's book of teachings, *Mystery of the Ages*. The Philadelphia Church of God wished to continue using the book, but the original congregation sued it for copyright infringement.

104. *Id.* at 1121.

105. *Id.* at 1115.

106. *Id.*

107. *Id.*

cational, religious, or charitable purpose and the copyright owner has not objected to the performance.[108]

Religious institutions receive an additional exemption under § 110(3). A church is not required to obtain a license for live performances during the course of religious services.[109] Only nondramatic, musical, and dramatico-musical works of a religious nature may be performed without a license.[110] Secular musicals which happen to contain religious storylines or themes, however, do not qualify as "dramatico-musical works of a religious nature" and therefore must be licensed.[111]

Section 110(3) confers a small but discrete set of benefits upon churches alone. During religious services, churches may theoretically pay their performers, charge admission fees, and perform religiously themed dramatic works without a license.[112] Considering the diversity of religious services in America, religious institutions receive broader protection from infringement liability than other nonprofit organizations.[113]

III. Religious Exemptions and the Establishment Clause Dilemma

A. Legal Backdrop of Religious Accommodations

As the history of the § 110(3) religious exemption attests, neither Congress nor the courts have ever considered the underlying constitutionality of exempting religious performances from copyright liability. Granting a broader copyright exemption to churches than to similarly situated schools and charitable organizations, however, raises a serious constitutional concern. While Congress is constitutionally allowed to accommodate the free exercise of religion, such accommodation

108. 17 U.S.C. § 110(4) (2012).

109. *Id.* § 110(3). Live performances do not include audiovisual recordings or broadcast transmissions. *See id.* § 101 (defining what it means to perform a work "publicly").

110. *Id.* § 110(3).

111. H.R. Rep. No. 94-1476, at 84 (1976).

112. *See* 17 U.S.C. § 110(3).

113. Technically, § 110(3)'s language does not confer the exemption upon the type of institution, but rather only upon the type of performance. Therefore, theoretically, a professional troupe affiliated with no religion could rent out a church's auditorium, perform a religious work, charge admissions fees, earn a profit, and still qualify for the exemption if they could convince a jury that it occurred "in the course of religious services." Practically speaking, however, it is churches and other religious institutions which will be most credibly able to take advantage of the exemption.

risks trespassing on the First Amendment's prohibition against Congress making laws "respecting an establishment of religion."[114]

In the original hearings on § 110(3)'s religious exemption, only the National Council of Churches raised even a whiff of a constitutional question. In the NCC's introduction to its congressional testimony, it summarily defended § 110(3)'s constitutionality. Emphasizing Supreme Court rhetoric that "the place of religion in our society is an exalted one," the NCC favored interpreting § 110(3) as merely one exemption among many to the exclusive right of public performance.[115] Not a single Senator questioned the NCC on this point.[116]

Even if the NCC's analysis was constitutionally accurate in 1967, much has changed in constitutional law interpretation of the Religion Clauses since that era. In the landmark case *Employment Division v. Smith*,[117] the Supreme Court departed from precedent set in *Sherbert v. Verner*[118] and *Wisconsin v. Yoder*.[119] In *Smith*, the Supreme Court held that the Free Exercise Clause alone does not justify religious noncompliance with generally applicable statutes.[120] As the Court had previously unanimously held in *Corporation of the Presiding Bishop v. Amos*, a middle ground exists between how much government must recognize religion under the Free Exercise Clause and how much government must eschew religion under the Establishment Clause.[121] Under *Amos*, the legislature can specifically exempt religion from the requirements of generally applicable statutes.[122] Thus, as the *Smith* Court itself recognized, Congress remains free to accommodate religion by granting it specific exemptions to otherwise generally applicable statutes.[123]

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114. *See* U.S. CONST. amend. I. *See generally* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV 1907 (2011).

115. *See S. 597 Hearings, Part* 2, *supra* note 88, at 636–37 (statement of Rev. William F. Fore, Executive Director, National Council of the Churches of Christ) (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963)).

116. *See id.* at 636–39.

117. Emp't Div. v. Smith, 494 U.S. 872, 884 (1990).

118. Sherbert v. Verner, 374 U.S. 398 (1963).

119. Wisconsin v. Yoder, 406 U.S. 205 (1972).

120. *Smith*, 494 U.S. at 878–79.

121. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987).

122. *Id.*

123. *See Smith*, 494 U.S. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . ."). Nor does the Court's recent holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* affect this analysis. *Hosanna-Tabor* held that the government could not constitutionally interfere with matters of internal church governance, but noted that *Smith* still applied to "outward physical acts." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702, 707 (2012). Public performances of copyrighted works are outward physical acts.

Section 110(3)'s religious exemption to general copyright liability predates the *Smith* decision, but so did many other federal legislative provisions that exempted religions from otherwise generally applicable laws.[124] In the aftermath of the *Smith* decision, Congress passed the sweeping Religious Freedom Restoration Act (RFRA)[125] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[126] These Acts were designed to restore the *Sherbert* and *Yoder* strict scrutiny analysis for governmental burdens on religious exercise.[127] In addition, during the past two decades, Congress has inserted more than 200 targeted religious exemptions into numerous categories of legislation.[128] As a result of these heightened protections and special exemptions, "religious organizations of all faiths stand in a position that American businesses—and the thousands of nonprofit groups without that 'religious' label—can only envy."[129] The perennial question across these contexts becomes: At what point does exemption out of respect for free exercise become religious favoritism, trespassing on the domain of the Establishment Clause? While the Court has famously remarked that "there is room for play in the joints" between the two Religion Clauses, and thus allowed legislatures to make religious accommodations,[130] not all accommodations are constitutional.

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124. For example, section 702 of the Civil Rights Act of 1964 exempted religious institutions from its employment nondiscrimination requirements. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (2012)).

125. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

126. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)).

127. *Compare* 42 U.S.C. § 2000bb-1 (prohibiting government from substantially burdening free exercise of religion unless such "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest"), *and id.* § 2000cc(a)(1) (imposing the same restrictions on governmental regulation of land use that "substantial[ly] burden[s]" religious exercise), *with* Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a compelling state interest . . . ." (internal quotation marks omitted)), *and* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (noting that there must be "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

128. Diana Henriques, *Religion Trumps Regulation As Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at 1.

129. *Id.*

130. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

B. Section 110(3) and the Supreme Court's Test for Religious Accommodations in Cutter v. Wilkinson

The Supreme Court clarified the standards for evaluating religious accommodations in *Cutter v. Wilkinson*.[131] *Cutter* concerned the provision of various religious accommodations, including access to religious literature and opportunities to attend group worship, within Ohio prisons.[132] In examining the constitutionality of RLUIPA, the Court held that Congress is permitted to accommodate private religious exercise if the accommodation satisfies three requirements. First, the accommodation must "alleviate exceptional government-created burdens on religion."[133] Second, in accommodating such religious exercise, Congress may not unduly burden the interests of third parties.[134] Third, any accommodations must be applied "neutrally among different faiths."[135] Only the first two of *Cutter*'s standards are invoked in analyzing § 110(3), as the exemption does not facially discriminate between religious persuasions.

1. Section 110(3) Does Not Respond to an Exceptional Government-Created Burden on Religion

As a preliminary matter, religious exemptions that are incorporated into broad exemptions for similarly situated organizations are constitutional. Statutes enlisting a "wide spectrum of organizations" to address community issues, "neutral with respect to the grantee's status as a sectarian or purely secular institution," are routinely upheld.[136] Thus, in *Walz v. Tax Commission*, the Court held that it was not unconstitutional to exempt churches from property taxes, where the exemption similarly applied to other "association[s] organized . . . for the moral or mental improvement of men and women."[137] Because the statute in *Walz* "ha[d] not singled out one particular church or

131. *Cf. Cutter*, 544 U.S. at 727 n.1 (Thomas, J., concurring) (expressing delight that the majority abandoned the "discredited test of *Lemon v. Kurtzman*").

132. *Id.* at 713 (majority opinion).

133. *Id.* at 720.

134. *Id.*; *accord* Estate of Thornton v. Caldor, 472 U.S. 703, 709–710 (1985); Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

135. *Cutter*, 544 U.S. at 720.

136. Bowen v. Kendrick, 487 U.S. 589, 608 (1988). As the Court later put it, "The provision of benefits to [a] broad spectrum of groups . . . is an important index of secular effect." Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 11 (1989) (plurality opinion) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)). *But see* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 328 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."). *Cutter* reiterated *Amos*'s language. *Cutter*, 544 U.S. at 724.

137. Walz v. Tax Comm'n, 397 U.S. 664, 667 n.1 (1970).

religious group, or even churches as such," the exemption was constitutional.[138]

Government actions that exclude religious organizations from these laundry lists of beneficiaries are easy targets for other First Amendment challenges. In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court addressed just such a conundrum, where New York law permitted local school boards to adopt reasonable regulations governing community organizations' extracurricular use of school facilities.[139] New York courts had interpreted the law to allow a wide spectrum of community meetings in public school facilities, but to prohibit any religious meetings.[140] The Supreme Court forbade such religious viewpoint discrimination under the Free Speech Clause.[141] Excluding religious organizations also invites Free Exercise Clause challenges. As the Ninth Circuit explained in *Worldwide Church of God*, "we must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others. Such a deprivation would raise its own serious problems under the Free Exercise Clause."[142]

Under this analysis, the 1909 Act's performance rights exemption for "educational, religious, and charitable" institutions was not facially problematic. Neither is the modern § 110(4), which sets out specific nonprofit criteria for exemption that place religious activities on equal terms with schools and charities. While broadly applicable statutes can still be subjected to Establishment Clause challenges if, when applied, they primarily benefit religion,[143] there is no evidence that § 110(4) has in any way benefitted religious performances more than the other exempted categories.

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138. *Id.* at 672–73.

139. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386 (1993).

140. *Id.* at 387.

141. *See id.* at 394–95.

142. Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1115 (9th Cir. 2000) (quoting Maktab Tarighe Oveyssi Shah Maghssoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999)). Laws which expressly exclude religions from protection are also contestable under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (2008).

143. *Compare, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (invalidating state-funded educational programs in private schools, where 40 of the 41 beneficiaries were religious schools), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997), *with* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a private voucher program to help children escape failing public schools as private choice, even though 46 of the 56 schools were religiously affiliated). The Supreme Court recently heard arguments in a similar case, *Arizona Christian School Tuition Organization v. Winn*, but ultimately tossed it out on standing grounds. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011).

Analytical difficulties arise, however, where religion receives exemptions or benefits not granted to other institutions. Section 110(3) of the 1976 Act grants an exclusive benefit to religion, allowing for-profit performances of dramatic works by paid performers, so long as the works are "of a religious nature" and performed "in the course of services."[144] Such an exemption is only constitutional if it "alleviates exceptional government-created burdens on private religious exercise."[145]

The Supreme Court has not always allowed exemptions that vary by organization type. In *Texas Monthly, Inc. v. Bullock*, a plurality of the Court found that "[t]he fact that Texas grants other sales tax exemptions . . . for *different* purposes does not rescue the exemption for religious periodicals from invalidation."[146] *Texas Monthly* concerned a magazine which lost its sales tax exemption when the exemption law was repealed for all but religious magazines.[147] The magazine sued, asserting an Establishment Clause violation.[148] The state defended the repeal by noting that there were many sales tax exemptions for many purposes; considered broadly, the religious exemption was not unconstitutionally preferential.[149] The Supreme Court disagreed. A plurality held that although there were other sales tax exemptions in Texas, those exemptions did not apply to the sale of publications by similarly situated nonprofit organizations.[150] Because no similar exemptions existed, the plurality concluded that exempting religious magazines alone could not be "grounded in some secular legislative policy."[151]

The Supreme Court's secular policy language in *Texas Monthly* hearkened back to the required secular purpose-and-effect analysis under the now-outmoded test set out in *Lemon v. Kurtzman*.[152] In

144. 17 U.S.C. § 110(3) (2012).

145. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

146. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 n.4 (1989) (plurality opinion).

147. *Id.* at 5–6.

148. *Id.*

149. *See id.* at 14 n.4.

150. *Id.* at 5.

151. *Id.* at 14 n.4.

152. *Lemon* set out three criteria to determine a statute's constitutionality under the Establishment Clause: (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). There is a continuing debate about when and where the *Lemon* test actually applies. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) ("[T]he factors identified in *Lemon* serve as no more than helpful signposts.") (internal quotation marks omitted); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles

Cutter, the Court declined to consider a *Lemon*-based purpose-and-effect analysis in assessing the constitutionality of RLUIPA.[153] This is likely because, as Justice Thomas noted in his concurrence, strict adherence to *Lemon* would render *any* accommodation of religion per se unconstitutional.[154]

The need under *Lemon* to accommodate religion without evincing a religious motive led to the somewhat paradoxical holding in *Corporation of the Presiding Bishop v. Amos.* There, the Supreme Court held that accommodating religion can satisfy the secular purpose of averting government interference in religious affairs.[155] In *Cutter*, the Court attempted to resolve this doctrinal tension by recognizing that *Lemon*'s secular purpose-and-effect criteria were too limited.[156] The Court re-crafted the test to say, essentially, that Congress could act with the intent to benefit religion if it had a good reason—namely, alleviating an exceptional burden which another governmental action had placed on private religious exercise.[157]

In *Cutter*, the Court did not expressly foreclose all purpose-and-effect analysis in the accommodation context.[158] Rather, the Court only noted that alleviations of government-imposed burdens are more likely to be viewed as permissible accommodations than as unconstitutional establishments.[159] Because the Supreme Court signaled in *Cutter*, and in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* the following term, that accommodations would continue to be evaluated on an as-applied, case-by-case basis, the purpose-and-effect analysis could still be of importance in future Religion Clause jurisprudence.[160]

In *United Christian Scientists v. Christian Science Board of Directors*,[161] the Supreme Court provided an instructive example regarding unconstitutional purpose and effect. In that case, Congress granted one Christian Science branch a private, perpetual copyright to founder Mary Baker Eddy's writings.[162] Citing an extensive catalog of

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abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children . . . .").

153. Cutter v. Wilkinson, 544 U.S. 709, 717 & n.6 (2005).

154. *Id.* at 726 n.1 (Thomas, J., concurring).

155. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

156. *See Cutter*, 544 U.S. at 717 n.6.

157. *See id.* at 720.

158. *See id.* at 726.

159. *See id.*

160. *Id.* at 722, 726; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006).

161. United Christian Scientists v. Christian Sci. Bd. of Dirs., 829 F.2d 1152 (D.C. Cir. 1987).

162. *Id.* at 1157.

the legislative history, the D.C. Circuit found that Congress's purpose in granting this copyright was to preempt a dispute over doctrinal purity with another Christian Science organization.[163] Because Congress acted with the express purpose of favoring one religious branch over another, the Court held that the private law violated the Establishment Clause.[164]

It is debatable whether § 110(3) of the 1976 Act had a purpose to advance religion. On one hand, section 104 of the 1909 Act, as well as § 110(4) in the 1976 Act, simply sought to provide equal benefits across various educational, charitable, religious, and nonprofit societies. With that background, § 110(3)'s specific religious tailoring could be viewed as supplying a greater benefit to religions than to other comparable organizations.

On the other hand, § 110 read as a whole provides a broad list of exemptions, spelling out in greater detail what does or does not constitute infringing performances.[165] For example, §§ 110(1) and 110(2) provide greater clarity on permissible use in an educational context,[166] and § 110(10) extends the protection afforded to some classes of nonprofits.[167] Under that framing, § 110(3) takes into account the specific needs of churches in their performances, and specifically tailors the exemption to those needs.

This legislative attunement evinces a purpose to benefit religion in a singular way. However, such legislative attunements based on detailed fact-finding are not per se impermissible because one subject class is religious.[168] If the conferred benefit directly responds to an exceptional government-imposed burden on religious exercise, then it is a constitutional accommodation.[169]

The issue presented is therefore whether § 110(3)'s religious exemption alleviates an exceptional burden. Copyright law, broadly, is a

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163. *Id.* at 1162–65.

164. *Id.* at 1171.

165. *See* 17 U.S.C. § 110(1)–(10) (2012).

166. *See id.* § 110(1)–(2).

167. *Id.* § 110(10).

168. *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

169. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a public school's "released time" program for religious instruction as accommodating students' religious practice). Professors Lupu and Tuttle have indicated that under the *Cutter* accommodation factors, *Zorach* would have come out differently. *See* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 104 (2007).

generally applicable, government-imposed burden.[170] As the Copyright Office testified, the various § 110 exemptions were designed to extend the essence of the protections in section 104 of the 1909 Act to each of those nonprofit organizations which Congress found most deserving.[171] As discussed above, churches are unique in the performance context, in part because music is critical to their worship, and because they often maintain a professional musical staff.[172] Thus, for religions, Congress chose to specifically accommodate musical performances in worship services.[173]

The critical question is whether § 110(3) alleviated an "exceptional" government-imposed burden on religious exercise. While the *Cutter* court did not define exceptional burden, such a burden could be conceived of in two ways. First, exceptional could be thought of as a burden that is qualitatively "distinctive," or unique, to the religious context.[174] Alternatively, "exceptional" could be considered a quantitative matter of degree.

Under the first framing, a church's need to perform religious dramatico-musical works during its services could be considered analogous to a church's need to discriminate on the basis of religion in religious employment.[175] Musical performances during worship are unique to the religious context. Nonprofits, however, could readily respond to the religious exemption by saying that the burden on churches is not exceptional, or qualitatively different, than the burden placed on similarly situated nonprofits. Nonprofits could point to instances where they were burdened by their requirement, a requirement not always imposed on religious institutions, to obtain a license to perform dramatic works at their functions.[176] To music-centered

170. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("Congress . . . has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . .").

171. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, STUDY NO. 16: LIMITATIONS ON PERFORMING RIGHTS 84 (Comm. Print 1960) (authored by Borge Varmer).

172. *See* WILSON-DICKSON, *supra* note 7.

173. STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1965) (noting that churches had asked for a performance exemption to cover "sacred music which might be regarded as 'dramatic' in character").

174. *See* Lupu & Tuttle, *supra* note 169, at 110 (discussing the Court's findings and holding in *Amos*).

175. *Cf.* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336–37 (1987).

176. *See* 17 U.S.C. § 110(4) (2012). For example, the voice and theatre departments of conservatories must license dramatic works even for use in classroom workshops. No other exemption

schools and nonprofits, the burden placed on them to comply with copyright law's performance-licensing demands is comparable to the burden placed on religious worship. In *Texas Monthly,* a legislature confining a sales tax exemption "exclusively to publications advancing the tenets of a religious faith" ran afoul of the Establishment Clause.[177] In the copyright context, confining a licensing exemption exclusively to religious performances should fail by analogy.

Under the second framing, what is "exceptional" could be considered a matter of degree. A quantitative analysis simply asks: does this place a large burden on religion? This analysis compares that burden to those experienced by similarly situated nonprofits. This construction of exceptional burdens could thus be viewed in light of the "substantial burden" standard mandated by RFRA and applied in the analogous RLUIPA context in *Cutter*.[178]

RFRA gives courts the ability to carve out exemptions from otherwise generally applicable law, so long as the law substantially burdens religion and is not justified by a compelling governmental interest.[179] If an "exceptional" burden under *Cutter* is equated with a "substantial" burden under RFRA, or if courts consider exceptional to be an even higher standard, then § 110(3) cannot survive constitutional scrutiny. Copyright performance licensing is not a substantial burden on religion. Requiring licensing of musical performances is comparable to a government-mandated tax or fee. General taxes and fees which require religious activities to pay the same amount as other organizations have routinely been held to not impose substantial burdens.[180]

Deleting § 110(3) entirely would not impose a significant state-created deterrent to the free exercise of religion.[181] Copyright law already requires churches to purchase unique copies of sheet music and to license broadcast performances.[182] Requiring performance licens-

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in 17 U.S.C. § 110 covers any class of dramatic works. This Author's communications with the Executive Director of the National Association of Teachers of Singing confirm that universities license modern operas and musicals for educational purposes.

177. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion).

178. Prior to *Employment Division v. Smith*, 494 U.S. 872, 883–84 (1990), this analysis would have been conducted under the Free Exercise Clause. In response to *Smith,* strict scrutiny analysis is mandated by RFRA, and not the Constitution. 42 U.S.C. § 2000bb-1.

179. 42 U.S.C. § 2000bb-1.

180. Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989) (declining to order the IRS to treat purchases of Scientology audits as a tax-deductible religious contribution); United States v. Lee, 455 U.S. 252 (1982) (declining to exempt Amish employees from social security taxes).

181. *See Tex. Monthly*, 489 U.S. at 15 (plurality opinion).

182. *See* 17 U.S.C. § 106(1) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords . . . ."); *see also id.* § 101 (defining "[t]o perform or display a work 'publicly'" as including transmissions of the work); Simpleville Music v. Mizell, 451 F. Supp. 2d 1293, 1298

ing, even as it leaves the church fewer resources available for other religious activities, is a constitutionally insignificant fee.[183] A licensing fee does not affect the content of the music, the beliefs the music conveys, or the ability of churches to perform the work. Even if general licensing fees do constitute a substantial burden, the Supreme Court has ruled that Congress has a compelling interest in maintaining a straightforward copyright system "free of myriad exceptions."[184] Under either *Cutter* or RFRA, there is neither an "exceptional" nor a "substantial" reason to alleviate copyright law's performance licensing burden on religion.

Alternatively, "exceptional" burdens could be considered to be a lower standard than "substantial." Substantial burdens, after all, are the language of strict scrutiny; to equate exceptional and substantial would be to nullify the "play in the joints" language which *Cutter* itself recognized.[185] In this alternative analysis, exceptional burdens are those which merely present enough of a deterrent to private religious exercise as to be deserving of an exemption.[186] This construction allows churches to enhance their worship services by performing religiously centered dramatic works without the administrative and monetary burden necessitated by licensing requirements. Without § 110(3), some churches may cease performances of dramatic works altogether in order to avoid copyright infringement, even though sacred works have a traditional place in their liturgy. Under a standard weaker than strict scrutiny, § 110(3) would qualify as exceptional under *Cutter.*

Regardless of how courts define "exceptional," § 110(3) is overbroad. While the differences in the paid-performers requirements between §§ 110(3) and 110(4) may be justified by the specific needs of churches, the difference in profit requirements cannot be. Unlike § 110(4), § 110(3) does not impose no-admission-fee limitations.[187]

(M.D. Ala. 2006); STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1950).

183. *Cf.* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) (holding that religious organizations can be required to pay sales tax on the sale of religious materials).

184. *Hernandez*, 490 U.S. at 699–700 (internal quotation marks omitted) (citing *Lee*, 455 U.S. at 260).

185. *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005); *accord* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

186. *See generally* Zorach v. Clauson, 343 U.S. 306 (1952). In *Zorach*, the Court held that a public school accommodation for religious instruction was constitutional, *id.* at 314, even though the burden on parents and students to seek religious instruction outside of school hours would likely have been minimal.

187. *See* 17 U.S.C. § 110(3) (2012).

Preventing churches from performing *Jesus Christ Superstar*, *Joseph and the Amazing Technicolor Dreamcoat*, or *Godspell* for commercial gain was precisely what Congress intended to prevent.[188] Yet the express terms of the statute fail to foreclose such performances. Despite the *Robert Stigwood* result reached under section 104 of the 1909 Act,[189] the priest defendants whose for-profit performance of *Jesus Christ Superstar* was deemed infringing could plausibly have won under § 110(3). Justice Brennan commented in *Amos* that religious accommodations used to benefit for-profit entities would likely be unconstitutional.[190] Because § 110(3) allows religious institutions to convert their services from a nonprofit gathering of believers into a lucrative gathering of customers, it is an unconstitutional accommodation.

Under either interpretation of "exceptional," § 110(3) does not alleviate an exceptional burden on religion. Section 110(3) confers a benefit on religion that is neither qualitatively different than the burdens experienced by nonprofit institutions, nor is quantitatively exceptional in terms of the weight of the burden placed on religion. Furthermore, § 110(3) is overbroad because it exempts for-profit performances of dramatico-musical works for religious purposes only. This accommodation is an "unlawful fostering of religion"[191] and violates the Establishment Clause.

2. Section 110(3) Significantly Burdens Third-Party Nonbeneficiaries

Section 110(3) does not satisfy *Cutter's* second standard because it unduly burdens the interests of third parties.[192] *Cutter*'s third-party-burden standard was adopted from *Estate of Thornton v. Caldor*. In *Caldor*, the Supreme Court struck down a Connecticut statute that prohibited employers from disciplining or firing employees who refused to work on their respective Sabbath days.[193] The Court held that the statute "impermissibly advance[d] a particular religious prac-

188. *See* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 38 (Comm. Print 1950).

189. *See generally* Robert Stigwood Grp., Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976).

190. *See generally* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 340–46 (1987) (Brennan, J., concurring).

191. *Id.* at 334–35 (majority opinion) (quoting Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 145 (1987)).

192. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)*; see also* Estate of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

193. *Caldor*, 472 U.S. at 710–11.

tice" by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee."[194]

Cutter formalized *Caldor*'s analysis as part two of its three-part accommodation standard. In *Cutter*, the Court held that religious accommodations can impose some burdens on third parties, as long as they are not "unreasonable."[195] The Supreme Court has ruled elsewhere that private parties have only a *de minimis* duty to accommodate others' religious practices.[196] Religious accommodations cannot be used to categorically shift costs from religious individuals onto secular third parties.[197] Thus, the question is where the § 110(3) religious accommodation imposes unreasonable burdens on third parties.

Section 110(3) imposes an unreasonable burden on third parties. The significant burden under § 110(3) is not borne by churches, but rather by uncompensated authors and composers. As a result of § 110(3)'s religious exemption, composers of both nondramatic works and dramatico-musical works of a religious nature lose licensing royalties every week. These private third parties bear the brunt of the § 110(3) exemption.

Just compensation for composers and publishers of religious music was a critical issue in the Senate hearings on the 1976 Act.[198] As Ed Lorenz, the head of a religious music publishing house, pleaded with Congress:

> Gentlemen, you must leave no loopholes in this new copyright law by which small portions of people can claim the right to use the fruits of the labors and talents of the authors and composers of sacred music without paying them for their work. . . . Although the portion of people claiming this right is small, it is the only group who will use our copyrights. This income, small as it is, is necessary to our operations and the composers' and authors' livelihood.[199]

Lorenz's testimony illustrates how the § 110(3) accommodation is a double-edged sword. While alleviating the burden for religious users of copyrights to pay licensing fees, it simultaneously exacerbates the

194. *Id.* at 709–10.

195. *Cutter*, 544 U.S. at 726.

196. *Hardison*, 432 U.S. at 84.

197. *See Caldor*, 472 U.S. 709.

198. *See, e.g.*, *H.R. 4347, 5680, 6831, 6835 Hearings*, *supra* note 76, at 284 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.). The Lorenz Corp. still specializes in publishing music for churches. LORENZ CORP., http://www.lorenz.com/Divisions/LPC.

199. *H.R. 4347, 5680, 6831, 6835 Hearings*, *supra* note 76, at 284 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.).

burden on the creators of religious copyrighted works, many of whom are religious themselves, to work without compensation.[200]

While legislatures are allowed to accommodate private religious exercise, under *Cutter* those accommodations must not place undue burdens on third parties.[201] Just as the Supreme Court found that a law which required accommodation of religious employees over all others would discriminate against the nonreligious,[202] so here, § 110(3)'s required accommodation of religious performances "discriminate[s] against the publishers, authors, and composers of sacred music."[203] To illustrate: if a church performs part of a secular dramatico-musical work to illustrate a religious point, it must obtain a copyright license from the author or else face infringement liability. If the same church performs a religious work, however, the § 110(3) exemption means it can do so without obtaining a license. Thus, for qualitatively identical performances, secular authors receive compensation but religious authors do not. Presumably, authors of religious works wrote the works for religious use—but § 110(3) bars those authors from collecting licensing revenue from exploitations of their public performance rights.

Section 110(3) benefits churches by saving them licensing fees, but burdens authors by precluding payment. Because this regime places unreasonable burdens on third-party nonbeneficiaries, § 110(3) is unconstitutional.[204]

C. Section 110(3) Unconstitutionally Requires Courts to Assess the Religious Character of Works and Services

A separate Establishment Clause issue raised by § 110(3) is whether the judiciary is competent to evaluate the religious substance of the statute. The perennial problem with religious exemptions is that they force courts to define religion. Traditionally, the Supreme Court has defined religion by reference to individual and institutional "sincerely held beliefs."[205] While the Court has recognized that "distinguishing between religious and secular convictions" and "determining whether

200. *See id.* at 283 (noting that "[t]hese Christian composers and authors are fine people" pursuing "inspiration" in writing sacred music).

201. *See Hardison*, 432 U.S. at 80 (declining to require an airline to "circumvent[ ] the [neutral] seniority system" and deprive other employees of their "contractual rights under the collective-bargaining agreement" in order to absolutely prefer one person's Sabbath observance as mandated by the challenged statute).

202. *Id.* at 85.

203. *H.R. 4347, 5680, 6831, 6835 Hearings*, *supra* note 76, at 285 (statement of Ed Lorenz, Managing General Partner, Lorenz Publishing Co.).

204. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

205. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989).

a professed belief is sincerely held" are difficult tasks,[206] lower courts can look to evidence from the individual's life and the institution's history in order to make the assessment. Often, litigants concede religious sincerity upfront.[207]

One problem with § 110(3) is that it lacks an external reference point, such as individual or institutional belief, from which to define "dramatico-musical work of a religious nature." Similarly, although free speech caselaw in the public forum context attempts to define what constitutes religious worship services as opposed to religious meetings, the distinctions have been highly problematic, prompting a circuit split on indistinguishable facts.[208]

The *Lemon* court referred to this dilemma as one of "excessive entanglement."[209] The touchstone of excessive entanglement analysis is the extent to which a statute will necessitate governmental interference with and analysis of religious activities.[210] Detailed state scrutiny into "substantive ecclesiastical matters" can "only produce by its coercive effect the very opposite of that separation of church and state contemplated by the First Amendment."[211]

In the accommodation context, the *Amos* Court found that religious exemptions are constitutional where their purpose is to "effectuate a more complete separation of [church and state]" and therefore sidestep "intrusive inquiry into religious belief."[212] If Congress determined that accommodation of religious practice is the best solution to a legislative difficulty, courts should give deference to that congressional judgment.[213] Pragmatic recognition of unique religious inter-

206. *Id.* at 833.

207. *E.g.*, *id.* ("We do not face problems about sincerity or about the religious nature of Frazee's convictions . . . . [T]he State concedes it.").

208. *Compare* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 778–81 (7th Cir. 2010) (rejecting religious worship versus religious speech distinction), *and* Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278–79 (10th Cir. 1996) (rejecting religious worship versus religious speech distinction), *with* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011).

209. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

210. The prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

211. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

212. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987).

213. *See* Salazar v. Buono, 559 U.S. 700, 716 (2010) (plurality opinion).

ests is permissible;[214] not all "statutes that give special consideration to religious groups are per se invalid."[215]

In *Texas Monthly*, the Court pushed back against this analysis and followed the *Amos* decision's underlying logic that the goal is to avoid state and religious interaction to the greatest extent possible.[216] There, the Court found that the sales tax exemption "on its face, [appeared] to produce greater state entanglement with religion than the denial of an exemption," because the state would become the ultimate arbitrator of the religious themes of publications.[217]

As these cases illustrate, Supreme Court precedent forbids government creation and application of multifaceted tests for determining the religious character of an activity or institution.[218] Judicial inquiry into religious views and worship practices is "not only unnecessary but also offensive."[219] It is not appropriate for a governmental institution to parse what content is or is not religious.[220]

Most recently, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court reiterated that religious exceptions should ensure that the authority to control ecclesiastical matters belong to the church alone.[221] The 1976 Act's religious exemption violates this principle by demanding adjudication of whether or not church meetings and performances are "religious." Due to the multiple "religious" qualifiers presented in § 110(3), this accommodation invites, rather than avoids, judicial scrutiny into religious substance.

First, dramatico-musical works "of a religious nature" are not defined. Many purportedly "secular" works have strong religious under-

214. *Id.* at 719 ("The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.").

215. *Amos,* 483 U.S. at 338.

216. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (plurality opinion).

217. *Id.*

218. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979) ("It is not only the [religious] conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

219. Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) ("[C]ourts should refrain from trolling through a person's or institution's religious beliefs.").

220. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 844 (1995). Lower courts have found state actions to be unauthorized under the First Amendment where the state undertook to determine what foods are "kosher," Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 427 (2d Cir. 2002), whether church music is secular or religious, *see* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1041 (7th Cir. 2006), and which symbols in a church are religious, Does v. Enfield Pub. Sch., 716 F. Supp. 2d 172, 197 (D. Conn. 2010) (finding it problematic that "[w]hat constitutes a 'religious image or message' will be determined by the Enfield School Board or its agent").

221. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

pinnings because of religion's importance in society as a whole. For example, the composer Julian Anderson recently set the Latin Mass to music in his *Heaven is Shy of Earth*, yet expressly stated "this is not a sacred work."[222] If an American Catholic diocese performed this work during Mass, and Anderson sued, § 110(3) would require a detailed court analysis of whether Anderson's work was sufficiently religious to insulate a church from liability. Such determinations run afoul of the Supreme Court's longstanding aversion to government interpretation of religious qualities.[223]

Although this Article has used churches as a convenient shorthand for those who would most likely invoke the § 110(3) exemption, it is important to remember that the statute imposes no institutional requirement on these performances. It only requires that the work be "of a religious nature" and performed "in the course of services."[224] There is no statutory requirement that the work and the worship service be from the same religious tradition. Thus, nothing prevents one religion from using the sacred works of another. Atheists, whom some courts have recognized as belonging to a religion,[225] could perform *Godspell* in a meeting mocking others' belief in God, and still qualify for the exemption. Copyright holders would, presumably, loath that result. Yet, if the statute is interpreted to require the religious works to doctrinally align with the religious services, then it would force courts "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith," which is forbidden.[226]

Second, the "in the course of [religious] services" clause is similarly vague. The word "service" connotes state recognition of the principal hour-long Friday, Saturday, or Sunday meetings at a mosque, synagogue, or cathedral. Services are not limited to those contexts, however.[227] Religious "services" could also encompass events held at any time, potentially including Christian revivals, Sufi Islam *dhikrs*, and

222. *Heaven is Shy of Earth (2006)*, *supra* note 6 ("Despite the predominance of Latin religious texts, this is not a sacred work. It is not a Mass setting, but uses its range of texts (including part of the mass) to celebrate the beauties of the natural world. In this sense it is in the tradition of such 'secular' masses as Janacek's Glagolitic Mass or Martinu's Field Mass.").

223. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (recognizing "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

224. 17 U.S.C. § 110(3) (2012).

225. *See* Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005) (finding atheism to be a religion for purposes of the Religion Clauses).

226. Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981).

227. *See supra* note 82 and accompanying text.

Zoroastrian festivals. While the legislative history specified that charitable dinners and other events hosted by churches would not be covered by § 110(3)[228]—although they might by § 110(4)—in practice, it will be difficult for courts to separate extracurricular religious events from core religious services.[229] But courts are precluded from making this distinction.[230]

As an illustrative example, a Billy Graham Crusade, charging admission to fill an 80,000 seat stadium, employing a professional choir and orchestra, and performing excerpts of *Jesus Christ Superstar*, would not be required to obtain licenses for its performances if it could prove the Crusade was a religious "service." If a court were to distinguish such an event from a "service" on the basis that, for example, communion was not served, it would effectively engage in the fine parsing of religious questions which the Establishment Clause forbids. Because, under the Establishment Clause, it is neither appropriate for government to evaluate the religious versus secular components of dramatic works, nor desirable for government to differentiate between religious worship as opposed to religious meetings, § 110(3) is unconstitutional. Before this constitutional question is adjudicated in federal litigation, however, Congress should amend § 110 to remove its First Amendment defects.

D. Congress Should Repeal Section 110(3) and Amend Section 110(4) to Allow a More Limited Religious Accommodation

When faced with a statute that calls for courts to judge religious versus secular content, as in *Texas Monthly*, legislatures can correct

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228. *See* H.R. REP. NO. 94-1476, at 84–85 (1976).

229. In the public fora context, these distinctions between religious meetings and worship services have produced nightmarish results. *See supra* note 208 and accompanying text. *Bronx Household of Faith* distinguished meetings from services this way:

> While the conduct of religious services undoubtedly *includes* expressions of a religious point of view, it is not the expression of that point of view that is prohibited by the rule. Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. . . . What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion.

Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 36–37 (2d Cir. 2011), *cert. denied*, 1325 S. Ct. 816 (2011). For detailed analysis of the unconstitutionality of that definition, see Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners for Certiorari at 19–22, *Bronx Household of Faith*, 650 F.3d 30 (No. 11-386).

230. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001); *see also Widmar*, 454 U.S. at 269 n.6 (concluding that a distinction between religious worship and religious speech lies outside "the judicial competence to administer" and is hopelessly entangling).

the Establishment Clause violation in two ways: they may either eliminate the religious exemption, or they may extend the exemption to all who are similarly situated. Either solution has the constitutionally desirable effect of precluding the state from evaluating the religious merits.[231]

Here, Congress could avoid the quandary of judges evaluating the religious questions § 110(3) presents by eliminating the "in the course of services" and "of a religious nature" language altogether. Such an amended clause would exempt "performance of a nondramatic literary, musical, or dramatico-musical work at a place of worship or other religious assembly." This leaves the "at a religious assembly" clause intact, which could present its own difficulties. This qualifier is less severe, however, because whether or not a building is a place of worship is a common statutory definition, at least at the municipal zoning level,[232] and thus does not lead to the same level of state-interpretation concern.

While this solution would help remedy the excessive entanglement defect, it would also bestow an even larger exclusive benefit upon religions, heightening concerns under *Cutter*'s accommodation test. To eliminate this concern, either a broader exemption should also be extended to other nonprofits, or § 110(3) should be eliminated altogether.[233] If Congress chose to expand a dramatic works performance exemption to all nonprofits, hearkening back to the 1909 Act, it would clearly be constitutional.[234]

Realistically, however, copyright holders would vociferously oppose any such amendment. Such sweeping language would completely override the current limitations required by § 110(4), and would effectively eliminate a sizeable portion of copyright holders' exclusive public performance rights. From this pragmatic perspective, it would be better for Congress to repeal the religious exemption altogether.[235]

Congress could still choose, however, to alleviate copyright law's exceptional burdens on religion in a more narrowly tailored way. While repealing § 110(3), Congress could add an extra subsection under § 110(4) to specifically address the concern over paid performers and any other unique burdens born by religion. For example,

231. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15–16, 18 (1989) (plurality opinion).

232. *See generally* INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS (2012), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

233. *See Tex. Monthly*, 489 U.S. at 15–16, 18 (plurality opinion).

234. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

235. *Cf. Tex. Monthly*, 489 U.S. at 18 (plurality opinion) ("[N]othing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications.").

Congress could determine that the musicians need not be volunteers for nonprofit performances located at places of worship. Under the Supreme Court's accommodation jurisprudence, this narrower exemption would be permissible. This Author recommends an amended 17 U.S.C. § 110(4), which would add subsections (A)(i) and (C) as follows:

> 17 U.S.C. § 110
> Notwithstanding the provisions of Section 106, the following are not infringements of copyright
> . . . .
> (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if –
> (A) there is no direct or indirect admission charge;
> *(i) for performances at a place of worship, voluntary contributions by attendees, for the purposes of this subsection, do not constitute an admission charge and do not have a purpose of direct or indirect commercial advantage; or*
> (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:
> (i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and
> (ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and
> (iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;
> *(C) for a performance at a place of worship, it is not an infringement of copyright if the performers, promoters, or organizers are paid a fee or other compensation.*

This solution addresses the most important unique considerations of churches, while eliminating the for-profit "dramatico-musical work of a religious nature" exemption which currently raises the greatest Establishment Clause concerns. Under the proposed amendments to § 110(4), performances of dramatic works, such as *Jesus Christ Superstar*, would no longer be exempt; churches would always need to obtain licenses for those performances. This benefits composers, so that their religious works would not be performed without them receiving any compensation. For nondramatic works, churches would remain on largely equal terms with educational, charitable, and other non-

profit institutions. All nonprofit institutions could perform a nondramatic copyrighted work without a license, so long as they do not charge admission.

The first clarifying subsection states that voluntary contributions by attendees surrounding a performance at a place of worship cannot be construed as having a direct or indirect profit motive. This provision is intended to legally separate those institutions who charge admission as a requirement to attend an event, and those religious institutions who allow open attendance, but collect voluntary tithes or other offerings during the event. While tithes and offerings would likely qualify for an exemption under §110(4)(B), the clarifying addition in proposed § 110(4)(A)(i) means that for such donations, the author of the work cannot veto the performance. This is a minor amendment which does little to change the effect of § 110(4) overall, but it does grant clarity to the definition of an "admission charge," and thus lessens the risk of litigation incurred by churches.

The second clarifying subsection is narrowly targeted to address the most qualitatively unique burden born by churches during their performances, which is not born by nonprofits generally. As discussed earlier, music, text, and other nondramatic works are central to much religious practice. Churches frequently hire organists, other instrumentalists, vocalists, and conductors to perform music during their events. Under a strict reading of § 110(4), these paid performers would disqualify churches from the infringement exemption. The new subsection 110(4)(C) would alleviate this burden born by churches by allowing them to pay their musicians.

These amendments would combine to give much narrower protection to religious institutions. They could no longer perform dramatic works, and they could no longer operate for profit and still receive an exemption from infringement liability. These amendments would simultaneously eliminate the qualifiers on the type of religious event and type of religious music, which are the root of the entanglement concerns. As a narrow accommodation of religious practice, the amended section would be constitutional.

IV. Conclusion

In *Cutter*, the Supreme Court announced that religious accommodations are permissible where they alleviate exceptional government-imposed burdens on private religious exercise, and where they do not impose unreasonable burdens on third parties.[236] Section 110(3) is

236. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

unconstitutional because it fails both of *Cutter*'s standards. First, because it grants an overbroad exemption to religion, which is not justified by the difference in burdens experienced by religious and secular organizations, it is unconstitutional. Second, because it imposes an unreasonable burden on third-party composers and copyright holders to subsidize religious worship, it is unconstitutional.

Furthermore, the purpose of religious accommodations, under both *Amos* and *Texas Monthly*, is to avoid state scrutiny of religiosity. The language utilized in § 110(3), however, invites detailed judicial analysis of religious activities and religious works. Should copyright holders actively seek to enforce their performance rights at religious services, "continuing surveillance leading to an impermissible degree of entanglement" would be the inevitable result.[237] Courts would be forced to both evaluate the strength of religious themes in various dramatico-musical works and adjudicate various day-to-day events and performances across a panoply of religious denominations. This is unconstitutional under the Establishment Clause.

If a direct challenge to § 110(3) ever comes before the federal courts, it will most likely be struck down as an unconstitutional trespass upon the Establishment Clause. Congress should proactively cure this constitutional defect by repealing 17 U.S.C. § 110(3) and granting a more limited religious accommodation under 17 U.S.C. § 110(4) before such a controversy ripens.

237. *See Walz*, 397 U.S. at 675.