

NOTE
THE RULE IS A MESS, SO IT NEEDS
AMENDMENTS¹: REEXAMINING AND REVISING
THE RELIGIOUS EXEMPTION OF THE
COPYRIGHT ACT

I. INTRODUCTION

How does a statute, enacted by lawmakers of our nation, somehow contain a loophole overlooked by generations?² The Copyright Act was born out of a constitutional motivation to protect authors of creative works and new ideas.³ These ideas can come in the form of scientific formulae for cures for previously fatal diseases, technological developments that could add convenience to our everyday lives, or new forms of entertainment across different media.⁴ Society at large overwhelmingly rewards new ideas,⁵ and the Copyright Act was born as a means for the law to reward these ideas; the Act protects authors, scientists, and

1. See ORIGINAL BROADWAY CAST OF HAMILTON, *Non-Stop, on HAMILTON* (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original lines are: “The [C]onstitution’s a mess. So it needs amendments.” *Id.* In a Note inspired by the unfair copying of *Hamilton*, I would be remiss if I failed to credit those pieces of my own work which were inspired by *Hamilton*.

2. See ORIGINAL BROADWAY CAST OF HAMILTON, *Alexander Hamilton, on HAMILTON* (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). This line pays tribute to the famous “How does a . . .” motif that occurs in several songs throughout the play, most notably the opening line. *Id.*

3. U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have 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.”).

4. See 17 U.S.C. § 102 (2018). The Copyright Act provides that works of authorship “include . . . (1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural work.” *Id.* § 102(a). Notably, the use of the word “include” in the statute suggests that this list is not exhaustive, and very well could encompass scientific formulae and technologic developments. *See id.*

5. See *Hamilton*, BROADWAY WORLD, <https://www.broadwayworld.com/grosses/HAMILTON> [<https://perma.cc/XZG2-HNM3>] (last visited Feb. 21, 2024). What is a more fitting way to display that society rewards new ideas than to look at the statistics from the first few weeks prior to the opening night of *Hamilton*? *See id.* The show was sold out for weeks on end and grossed in excess of \$1,000,000 per week from the moment it opened. *See id.* Society rewards new ideas by enjoying the ideas and—in the case of plays such as *Hamilton*—paying for such enjoyment. *See id.*

creators from having their work stolen and reclaimed by others.⁶ The rationale behind this law is that, without protections in place to prevent the theft of ideas, innovators would not be incentivized to put their ideas into the world.⁷ J.K. Rowling may have thought twice about publishing the *Harry Potter* novels, for example, if there was no law preventing the subsequent publication of millions of stories about a boy wizard with a lightning-shaped scar and Horcruxes to hunt.⁸ With the Copyright Act in place, authors can reap the benefits that come with a successful new work without fear that it will be stolen or manipulated.⁹

Art undoubtedly falls within the scope of the Copyright Act.¹⁰ Just as there is societal motivation to reward new scientific developments such as cures for diseases, society loves to consume art and continues to incentivize further artistic creation by reading books, watching television and movies, going to see plays, and traveling to art museums.¹¹ The

6. See *Copyright Law Explained: What Is the Purpose of Copyright Law*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/purpose-of-copyright> [<https://perma.cc/HK5X-FNWW>] (last visited Feb. 21, 2024) (“The primary purpose of copyright is to induce and reward authors, through the provision of property rights, to create new works and to make those works available to the public to enjoy.”).

7. *Id.* (“The theory is that by granting certain exclusive rights to creators that allow these creators to protect their creative works against theft, creators receive the benefit of economic rewards and the public receives the benefit of the creative works that might not otherwise be created or disseminated.”).

8. See Meg Reid, Case Note, *Harry Potter and the Copyright Act: Have the Courts Finally Waved a Magic Wand By Defining Fair Use For Secondary Authors?*, 16 VILL. SPORTS & ENT. L.J. 291, 293 (2009) (“Rowling holds a U.S. copyright for each of the seven *Harry Potter* books.”); see also *Promoting Intellectual Property Law to Protect Creativity*, UNITED NATIONS, <https://www.un.org/en/academic-impact/promoting-intellectual-property-law-protect-creativity> [<https://perma.cc/6AY2-5TKC>] (last visited Feb. 21, 2024) (“By compensating and rewarding creators’ effort and creativity, copyright acts as an incentive to continue to create new work.”). Taken together, we can conclude that J.K. Rowling’s possession of a copyright in her works enables her to be adequately compensated and rewarded for her efforts; in turn, this reward incentivizes her to share with the public any subsequent creative work she may produce. See Reid, *supra*, at 293; *Promoting Intellectual Property Law to Protect Creativity*, *supra*.

9. See Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1680 (2009) (“Providing creators with economic incentives to create new works is one of the principal justifications, if not *the* justification, for copyright’s expansion.”) (emphasis in original).

10. See 17 U.S.C. § 102 (2018). The Copyright Act protects literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. *Id.* § 102(a). This encompasses different modes of art as we understand them; for example, literary works include books, and pictorial work includes graphic art or photography. See *id.* § 101.

11. See generally Olafur Eliasson, *Why Art Has the Power to Change the World*, WORLD ECON. F. (Jan. 18, 2016), <https://www.weforum.org/agenda/2016/01/why-art-has-the-power-to-change-the-world> [<https://perma.cc/CA35-C7UG>] (highlighting potential reasons as to why art consumption permeates society by claiming that “most of us know the feeling of being moved by a work of art,” and that consumption of art can lead to tolerance and shared experiences between people who have otherwise polarizing world views).

Copyright Act disincentivizes the theft of works of art and therefore allows these new creative works to flourish.¹² It is not surprising, therefore, that copyright issues came to the forefront of discussion after the Door McAllen Church in Texas publicly put on a production of the wildly popular play *Hamilton* which was not only nearly identical to the original, but which *Hamilton* creator Lin-Manuel Miranda called “unauthorized.”¹³ The Door McAllen’s production of *Hamilton* went viral in the summer of 2022 for copying the original play’s costumes, choreography, and a vast majority of the lyrics.¹⁴ Notably, the few lyrics that were changed were done so to promote the church’s specific messages and teachings.¹⁵

Lin-Manuel Miranda’s case against the Door McAllen seemed airtight, so much so that the church admitted to copyright infringement and promised to pay damages.¹⁶ But should the issue have been resolved so quickly?¹⁷ The Copyright Act contains a religious exemption.¹⁸ Though

12. See Alan Garfield, *Copyright Law’s Delicate Balancing Act*, 35 DEL. LAW., no. 1, 2017, at 12, 12 (“By giving authors an incentive to create new works, copyright law both rewards authors and encourages the creation of works for the public to enjoy.”).

13. See Lin-Manuel Miranda (@Lin_Manuel), TWITTER (Aug. 10, 2022, 10:14 AM), https://twitter.com/Lin_Manuel/status/1557369846396080128 [<https://perma.cc/V3S6-Z3W9>]; Ryan Wood, *Texas Church Under Fire for Staging Unauthorized Production of ‘Hamilton’ Musical That Added Religious Text*, WFAA (Aug. 9, 2022, 7:21 AM), <https://www.wfaa.com/article/news/state/texas-news/hamilton-musical-texas-church-unauthorized-production/287-a89d6a81-caff-476e-b647-31e3b7c5356e> [<https://perma.cc/6R9S-U5DP>].

14. See TAG Media, [COMPLETE SHOW] *Hamilton (aka Scamilton) - The Door Christian Fellowship*, YOUTUBE (Aug. 28, 2022), https://www.youtube.com/watch?v=p0epuHf_gP8 [<https://perma.cc/7HDS-6M6B>]; HAMILTON (Disney+ 2020). As an example of similar costuming, the Schuyler sisters in *Hamilton* wear 1700s-style dresses in pink, blue-green, and yellow, respectively. See HAMILTON, *supra*. The actors portraying the Schuyler sisters in the Door McAllen’s production wear similarly styled dresses in the same colors. See TAG Media, *supra*. Additionally, the ensemble of background dancers in both productions wear off-white Revolutionary War uniforms. See *id.* As for the choreography, we notice at minute 7:33 of the Door McAllen’s performance of “Aaron Burr, Sir” that the characters are huddled around a bar table, banging on the table for rhythm and drinking beer. See *id.* This choreography is directly lifted from the original Broadway cast’s performance of “Aaron Burr, Sir.” See HAMILTON, *supra*. The melodies of the songs from the original play, notably, are not changed by the church. See TAG Media, *supra*; HAMILTON, *supra*.

15. See Jaz Garner, *Lin-Manuel Miranda Slams Texas Church for “Illegal” Performance of “Hamilton” with Added Anti-Gay Messaging*, CBS NEWS, <https://www.cbsnews.com/news/hamilton-producers-texas-church-altered-lyrics-lin-manuel-miranda> [<https://perma.cc/M2AW-G895>] (Aug. 24, 2022, 4:42 PM) (detailing a variety of lyrics that the Door McAllen changed to promote themes of anti-homosexuality and the importance of repenting, neither of which were present in the original production of *Hamilton*); Wood, *supra* note 13; HAMILTON, *supra* note 14.

16. Greg Evans, *Texas Church to Pay Unspecified Damages for Altered ‘Hamilton,’* DEADLINE (Aug. 23, 2022, 10:06 AM), <https://deadline.com/2022/08/hamilton-door-mcallen-texas-church-apology-damages-1235098261> [<https://perma.cc/4RXV-J2VK>].

17. See Tiffany Hu, *Church’s ‘Hamilton’ Show Likely Runs Afoul of Copyright Law*, LAW360, <https://www.kirkland.com/news/in-the-news/2022/08/church-hamilton-show-likely-runs->

only two lines long, it states that “performance . . . of a dramatico-musical work of a religious nature . . . in the course of services at a place of worship or other religious assembly” shall not constitute an infringement of copyright.¹⁹ Lawyers were generally quick to agree that this exemption does not reach the Door McAllen’s actions, as the original *Hamilton* is not a work of a religious nature, and that the church is still guilty of infringement.²⁰ However, one attorney is skeptical of dismissing this issue so quickly; she warns, “The fact that the church changed the play to make it more Christian ironically might help them argue it’s part of a service”²¹ This quote was buried in an article that conclusively stated that the Door McAllen would lose its legal battle on this issue,²² but this warning should not be taken lightly, as it points to a massive loophole in the Copyright Act.²³

This Note argues that the vaguely worded, easily circumnavigated religious exemption to the Copyright Act only serves to threaten the creators that the Act is meant to protect, thus rendering the current religious exemption ineffective vis-à-vis the purpose of copyright at large.²⁴ If a religious institution only has to make a minor, religiously based change to a creative work to fall under an exemption that otherwise would not apply, there is no limit to the infringements that would be allowed.²⁵ Could a church then put on a production of *Wicked* without fear of liability if it adds a scene in which Elphaba is baptized and claims that the production is part of a service?²⁶ This notion directly opposes the

afoul-of-copyright-law [<https://perma.cc/U67F-9Q5F>] (last visited Feb. 21, 2024) (warning that the church “may” have a “stronger argument” than it appears to at first glance).

18. See 17 U.S.C. § 110(3) (2018).

19. *Id.*

20. See Hu, *supra* note 17 (“The Door McAllen’s performances don’t appear to be shielded by the exemption, which does not apply to dramatic stagings of musicals, legal experts say. The exception for ‘dramatico-musical works’ is limited to those of a religious nature, and ‘‘Hamilton’’ is not a religious work,’ says Xiyin Tang, a law professor at UCLA School of Law. Though the original ‘Hamilton’ script may include some biblical references . . . [a]n ‘underlying religious theme’ isn’t enough to render a work into one of religious nature, she said.”).

21. *See id.*

22. *See id.*

23. *See generally* § 110(3) (describing the religious exemption). The loophole is the religious exemption itself, as this Note argues it leaves creators vulnerable to having their work stolen. *See infra* Part III.

24. *See infra* Part III–IV.

25. See Hu, *supra* note 17. Nicole McLaughlin’s warning that “[t]he fact that the church changed the play to make it more Christian ironically might help them argue it’s part of a service” ought not be applied only to *Hamilton*. *See id.* The effects of the Door McAllen’s copying under the current religious exemption may spell doom for creators attempting to preserve copyright protection in their work. *See infra* Part III–IV.

26. *See Wicked*, BROADWAY, <https://broadway.fandom.com/wiki/Wicked> [<https://perma.cc/6SYP-WVKY>] (last visited Feb. 21, 2024). Notably, there are no overtly religious

inherent purpose of American copyright law; a playwright would no longer have the motivation to release any more creative work if religious institutions can tweak the work to conform with their messages and pass it off as their own.²⁷

Circumnavigating well-established law should not be so easy, especially to the detriment of those the law seeks to protect.²⁸ This Note proposes a change to the language of the religious exemption of the Copyright Act that would place a higher burden on religious institutions in order to ensure that creative works are adequately protected.²⁹ The problem with the current religious exemption is that it completely ignores religious institutions that perform nonreligious works, thus rendering those works vulnerable to a religious institution copying them and adding a religious message to claim immunity under the statute.³⁰ The new statute should expressly state that, to properly protect creators and incentivize further creation, a religious entity performing a copyrighted, nonreligious dramatico-musical work must perform it in a way that constitutes fair use.³¹ Though religious institutions would inevitably take issue with this new, higher standard, this Note argues that any burden imposed on religious institutions to pass the fair use test, when juxtaposed with the massive threat to creators' rights with regard to their own work, sways

scenes in the plot of *Wicked*, implying that a church or other religious institution which puts on a production of *Wicked* that contains a baptism scene would have added in this religious scene of its own accord. *See id.*

27. *See* Ku et al., *supra* note 9, at 1680 (“[P]roviding creators with economic incentives to create new works is one of the principal justifications, if not *the* justification, for copyright’s expansion.”) (emphasis in original).

28. *See* § 102. The Copyright Act is meant to protect creators—such as Lin-Manuel Miranda—of the listed kinds of works (i.e., literary works, dramatic or musical works, etc.) from having their works manipulated or stolen by the general public. *See id.*

29. *See infra* Part IV.

30. *See generally* § 110(3) (providing an exemption solely for performances of works of a religious nature and remaining silent on performances of nonreligious works).

31. *See* U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use> [<https://perma.cc/T9G4-QQKV>] (last visited Feb. 21, 2024).

Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses . . . as examples of activities that may qualify as fair use. Section 107 calls for consideration of the following four factors in evaluating a question of fair use: [p]urpose and character of the use . . . [n]ature of the copyrighted work . . . [a]mount and substantiality of the portion used in relation to the copyrighted work as a whole . . . [and] [e]ffect of the use upon the potential market for or value of the copyrighted work.

Id. Fair use will be discussed in greater detail in the context of the religious exemption and *Hamilton* later in this Note. *See infra* Part II.B.

heavily in favor of further restricting religious entities' use of dramatic works to convey their own messages.³²

II. BACKGROUND

This Part first addresses the purpose and general scope of the Copyright Act.³³ It next discusses the affirmative defense of fair use, and then exemptions to the Copyright Act that allow for copying that does not pass the fair use test.³⁴ Finally, this Part concludes with a summary of the Door McAllen's production of *Hamilton* compared with the original play, which will bring to light the abundant copying that brought the Door McAllen under fire.³⁵

*A. You'll Always Be Adored Because of the Things You Create*³⁶: *The Copyright Act Explained*

As previously stated, American copyright law is founded in the Constitution.³⁷ Its purpose is twofold: in preventing creators' work from being stolen, copyright law incentivizes creators to share their new ideas in exchange for benefits like fame and fortune and, as a result, enables the general public to reap the benefits of these ideas.³⁸ Copyright law achieves this purpose by awarding protection to a wide breadth of creative works.³⁹

The Copyright Act provides that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of

32. See *infra* Part IV.

33. See *infra* Part II.A.

34. See *infra* Part II.B–C.

35. See *infra* Part II.D.

36. See ORIGINAL BROADWAY CAST OF HAMILTON, *Schuyler Defeated*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: “You’ll always be adored by the things you create.” *Id.* This line is particularly potent in this context, as one of the purposes of copyright law in general is to protect the author’s work so that the original author—and no one else—can be adored via the thing he creates. See Maria Törhönen et al., *Fame and Fortune, or Just Fun? A Study on Why People Create Content on Video Platforms*, 30 INTERNET RSCH. 165, 171 (2020). The authors cite “motivations such as income, career development and reputation” as “prominent” driving forces behind creating. *Id.* “Reputation” especially coincides with being “adored by the things you create.” See *id.*; *Schuyler Defeated*, on HAMILTON, *supra*.

37. See U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have 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.”).

38. See *Copyright Law Explained: What Is the Purpose of Copyright Law*, *supra* note 6 (“The theory is that by granting certain exclusive rights to creators that allow these creators to protect their creative works against theft, creators receive the benefit of economic rewards and the public receives the benefit of the creative works that might not otherwise be created or disseminated.”).

39. See 17 U.S.C. § 102 (2018).

expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁴⁰ Though the Act gives some examples of common works that it protects, it is important to examine the terms of this statute in order to understand its scope.⁴¹

1. “I Am Inimitable, I Am an Original”⁴²: The First Requirement for Copyright Protection

“Copyright protection subsists . . . in *original* works of authorship fixed in any tangible medium of expression”⁴³ Originality is perhaps the most important requirement for copyright protection; in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,⁴⁴ Justice O’Connor stated that “[o]riginality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”⁴⁵ *Feist* famously and quite extensively examines the scope of the Copyright Act’s originality requirement.⁴⁶ Before this decision, it was more than obvious that “original” meant an “independent creation of its author,”⁴⁷ but how much did the author have to create to meet this requirement?⁴⁸

The threshold for meeting the originality requirement is quite low, as the *Feist* court decided that only a “modicum of creativity” by the author is needed for the creative work to be considered original.⁴⁹ For an analysis of how much creativity constitutes a “modicum,” it helps to look at the *Feist* decision itself, in which the Court unanimously decided that Rural’s White Pages were not creative enough to meet the

40. *Id.* § 102(a).

41. *See id.*

42. ORIGINAL BROADWAY CAST OF HAMILTON, *Wait for It, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015).

43. § 102 (emphasis added).

44. 499 U.S. 340 (1991). In this case, both parties published and distributed phone directories. *Id.* at 342. *Feist* covered a much larger geographic area than Rural and asked Rural for permission to use its white pages. *Id.* at 343. When Rural refused to license this use, *Feist* lifted what it needed from Rural’s white pages anyway. *Id.* Though some entries were changed, most of the copying was identical. *Id.* at 344.

45. *Id.* at 348.

46. *See Feist Publ’ns, Inc.*, 499 U.S. at 361-62 (analyzing originality to determine that a phonebook was not entitled to copyright protection).

47. *Copyright Basics*, UNIV. OF MICH. LIBR., <https://guides.lib.umich.edu/copyrightbasics/copyrightability> [<https://perma.cc/7WG6-TQHE>] (last visited Feb. 21, 2024).

48. *See Feist Publ’ns, Inc.*, 499 U.S. at 362 (establishing a minimal original creativity requirement for copyright protection).

49. *Feist Publ’ns, Inc.*, 499 U.S. at 346. “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* at 345.

originality standard, and therefore were not protectible under the Copyright Act.⁵⁰ The Court held that

Rural's selection . . . could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. . . . Rural [cannot] claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may . . . owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.⁵¹

In sum, an original work must be created independently and must have “at least a modicum’ of creativity,” meaning that the work must contain evidence of at least a minimal creative effort by the author.⁵²

2. Protection for Everything You Can Get Your Hands On⁵³: The Second Requirement for Copyright Protection

“Copyright protection subsists . . . in original works of authorship *fixed* in any tangible medium of expression”⁵⁴ The concept of fixation simply means that a work must be physically accessible to others.⁵⁵ This requirement is often easily satisfied, and examples of a fixed work include “[w]riting a work on paper or on a computer hard drive, recording a work on tape, and sculpting a work out of marble”⁵⁶ Conversely, fixed work would not include, for example, “unrecorded

50. See *id.* at 363-64.

51. *Id.* at 362-63.

52. See *Copyright Basics*, *supra* note 47.

53. See *Alexander Hamilton*, on HAMILTON, *supra* note 2. The original line is “scammin’ for every book he can get his hands on” *Id.*

54. 17 U.S.C. § 102 (2018) (emphasis added).

55. See *Fixed in a Tangible Medium of Expression*, CORNELL L. SCH., https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression [<https://perma.cc/VBS7-D3A2>] (last visited Feb. 21, 2024).

56. See *Copyright Basics*, *supra* note 47.

improvisation[s],”⁵⁷ as such creative displays as these are not “put into a physical medium.”⁵⁸

Though easy to understand, the fixation requirement is quite important, as it helps to establish the origins of the work and who copyright protection should be awarded to⁵⁹:

By requiring that protectable works be committed to a tangible and enduring form, copyright avoids problems of proof that would otherwise stymie enforcement efforts. Fixation clarifies questions of authorship and ownership, and it defines the bounds of the copyright grant through reference to a stable instantiation that can be compared to alleged infringements. If unfixed works could be protected, “copyright law would forever be mired in disputes over the definition and boundaries of the works claiming copyright protection.”⁶⁰

3. Just an Expression to Protect⁶¹: The Third Requirement for Copyright Protection

“Copyright protection subsists . . . in original works of authorship fixed *in any tangible medium of expression . . .*”⁶² For a work to be fixed in a tangible medium of expression “generally means the work can be communicated to others whether through visual or audio means.”⁶³ Conversely, this means that mere ideas are explicitly excluded from protection under the Copyright Act; the expression of the idea is what is protectible.⁶⁴ From a practical standpoint, this does make sense, as “it would be virtually impossible for the government to manage a copyright for an idea in someone’s head, and copyright exists to prevent others from copying the work of others, which they cannot do if the work remains uncommunicated.”⁶⁵

57. *Id.*

58. *Fixed in a Tangible Medium of Expression*, *supra* note 55.

59. See Aaron K. Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1093-94 (2010).

60. *Id.* at 1094.

61. See *Wait for It*, on HAMILTON, *supra* note 42. The original line is: “Just a legacy to protect.” *Id.*

62. 17 U.S.C. § 102 (2018) (emphasis added).

63. See *Fixed in a Tangible Medium of Expression*, *supra* note 55.

64. See § 102(b). This provision of the Act states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.*

65. *Fixed in a Tangible Medium of Expression*, *supra* note 55.

Despite the idea/expression distinction, the tangible medium of expression requirement is also a simple one to meet.⁶⁶ “Once a work has been expressed such as through a book or film, the work has been expressed.”⁶⁷ Simply stated, if an author wants his creative work to satisfy the “tangible medium of expression” requirement of the Copyright Act, he must simply give some “permanence” to the work—write it down, record it, or save it to a computer.⁶⁸

4. I’m Protectin’ This Show Now⁶⁹: Examining the Copyrightability of Plays

After examining the scope of the Copyright Act, it is important to address the question of whether *Hamilton*, a play, is a creative work eligible for copyright protection.⁷⁰ The Copyright Act provides that “copyright protection subsists” in “dramatic works, including any accompanying music”⁷¹ Though the Copyright Act does not explicitly define “dramatic works,”⁷² the United States Copyright Office has explicitly stated that dramatic works apply to plays such as *Hamilton*.⁷³ Despite this explicit classification of plays as dramatic works, it is overwhelmingly apparent that *Hamilton*—along with plays in general—is eligible

66. See *id.* (“Most works attempting to receive copyright protection easily fulfill these requirements as people typically know what can be copyrighted from daily interaction with written and digital copyrighted works.”).

67. *Id.*

68. See Dawn Ellmore, *What Does ‘Tangible’ Mean in Copyright Law?*, MEDIUM (Oct. 12, 2017), https://medium.com/@dawn_ellmore_employment/what-does-tangible-mean-in-copyright-law-83002f81a357 [<https://perma.cc/A45Z-5MVF>] (“The work must be saved in a permanent way so it [can] be communicated at a later date. If the original work only exists in the moment in time that it is transmitted or communicated, then it isn’t fixed.”).

69. See ORIGINAL BROADWAY CAST OF HAMILTON, *Blow Us All Away*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: “I’m watchin’ this show now.” *Id.*

70. See *supra* Part I. As this Note pertains to the potential copyright issues that arose from an unauthorized copying of *Hamilton*, it is important to ensure that *Hamilton* would even be afforded copyright protection. See *supra* Part I (detailing the issues surrounding the Door McAllen’s unauthorized production of *Hamilton*); *infra* Part II.D (detailing same).

71. 17 U.S.C. § 102(a)(3) (2018).

72. See generally § 101 (lacking a definition for “dramatic works”).

73. See *Works of the Performing Arts*, COMPENDIUM OF U.S. COPYRIGHT OFF. PRAC., THIRD EDITION (Jan. 28, 2021), <https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf> [<https://perma.cc/U2NM-XT3U>] (“For purposes of copyright registration, a dramatic work is a composition generally in prose or verse that portrays a story that is intended to be performed for an audience such as plays, musicals, or operas.”). *Hamilton* is undoubtedly a play intended to be performed for audiences, as evidenced by the overwhelming success its Broadway appearances have enjoyed since the curtains rose in 2015. See *Hamilton*, *supra* note 5.

for copyright protection, as it satisfies each of the Copyright Act's requirements for protection.⁷⁴

The first requirement for copyright protection, originality, is met easily.⁷⁵ Originality simply requires that the work be created independently and have “at least a modicum” of creativity.⁷⁶ *Hamilton* creator Lin-Manuel Miranda can be said to have created his work as independently as possible; he is listed as the writer of both the music and lyrics of the entirely sung-through play.⁷⁷ As for the modicum of creativity, Miranda's unprecedented forty-six original songs about a founding father who was alive over 200 years ago certainly constitutes at least the “minimal creative spark” which Justice O'Connor found lacking in *Feist*.⁷⁸

Hamilton also meets the fixation in a tangible medium of expression requirement for protectability under the Copyright Act.⁷⁹ Again, fixation merely requires a work to be physically accessible to others.⁸⁰ The play is physically available in more ways than one; it can be viewed live in a number of cities throughout North America, Europe, and even Australia,⁸¹ and it is now available for streaming from the comfort of one's home.⁸² The tangible medium requirement requires that a work “be communicated to others whether through visual or audio means.”⁸³ As previously established, *Hamilton* is communicated to others visually

74. See *supra* Part II.A.

75. See § 102 (“Copyright protection subsists . . . in *original* works of authorship fixed in any tangible medium of expression . . .”) (emphasis added); see also *supra* Part II.A.1 (defining the originality requirement).

76. *Copyright Basics*, *supra* note 47.

77. See *Hamilton: An American Musical*, INTERNET BROADWAY DATABASE, <https://www.ibdb.com/broadway-production/hamilton-499521> [<https://perma.cc/DYG9-9D6U>] (last visited Feb. 21, 2024); *Why Hamilton Is Making Musical History*, GUARDIAN (Nov. 5, 2016), <https://www.theguardian.com/stage/2016/nov/05/why-hamilton-is-making-musical-history> [<https://perma.cc/3DWS-NBP7>] (“*Hamilton* was created by one man, Lin-Manuel Miranda, who wrote the music, lyrics, and book about the musical . . . Almost all of *Hamilton* is sung through . . .”).

78. See Alec Bojalad, *Hamilton: Ranking Every Song from the Soundtrack*, DEN OF GEEK (July 3, 2020), <https://www.denofgeek.com/movies/hamilton-ranking-every-song-soundtrack> [<https://perma.cc/J6H4-QSJB>] (“The *Hamilton* soundtrack features [forty-six] . . . tracks . . .”); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363 (1991).

79. See *supra* Part II.A.2–3 (describing the fixation requirement as the second requirement for copyright protection and the tangible medium requirement as the third).

80. See *Fixed in a Tangible Medium of Expression*, *supra* note 55.

81. See *Tickets & FAQ*, HAMILTON ON BROADWAY, <https://hamiltonmusical.com/new-york/tickets> [<https://perma.cc/8FQG-N4Q3>] (last visited Feb. 21, 2024).

82. See Kelly O'Sullivan, *How to Watch 'Hamilton' Online: Stream the Hit Musical on Disney+*, PIONEER WOMAN (Feb. 28, 2021), <https://www.thepioneerwoman.com/news-entertainment/a35631638/how-to-watch-stream-hamilton-the-movie> [<https://perma.cc/WN7Y-XFV7>].

83. *Fixed in a Tangible Medium of Expression*, *supra* note 55.

either live on stage or via pre-recorded streaming.⁸⁴ Additionally, as the entire play is sung-through,⁸⁵ the availability of the *Hamilton* soundtrack on music platforms such as Spotify means that the play can be communicated through audio means as well.⁸⁶ Per the terms of the Copyright Act, *Hamilton*, as a play, is absolutely entitled to copyright protection.⁸⁷

B. “*I Can Prove That I Never Broke the Law*”⁸⁸:
Fair Use as an Affirmative Defense to Illegal Copying

“Fair use is the right to use a copyrighted work under certain conditions without permission of the copyright owner.”⁸⁹ When a defendant is sued for copyright infringement, he can assert the affirmative defense of fair use if he can prove that, notwithstanding the provisions of the Copyright Act, his copying does not constitute infringement.⁹⁰ If the defendant succeeds on his fair use defense, he can continue legally copying the work at issue without permission from the owner.⁹¹

Since unauthorized copying can be deemed fair use in some contexts but not others, courts examine the fair use defense on a case-by-case basis.⁹² “[T]he outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a predetermined percentage or amount of a work . . . may be used without permission[,]”⁹³ but the Copyright Act provides four factors for courts to evaluate when determining whether an unauthorized use is fair, discussed in the following Parts of this Note.⁹⁴

84. See *Tickets & FAQ*, *supra* note 81; O’Sullivan, *supra* note 82.

85. *Why Hamilton Is Making Musical History*, *supra* note 77 (“Almost all of *Hamilton* is sung through . . .”).

86. See *How to Listen to the Hamilton Soundtrack on Spotify*, F.-THEATRE (Oct. 16, 2022), <https://forum-theatre.com/how-to-listen-to-the-hamilton-soundtrack-on-spotify> [<https://perma.cc/U2FS-SQ5B>].

87. See 17 U.S.C. § 102(a) (2018).

88. ORIGINAL BROADWAY CAST OF HAMILTON, *We Know, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015).

89. Office of the General Counsel, *Copyright and Fair Use*, HARV. UNIV., <https://ogc.harvard.edu/pages/copyright-and-fair-use> [<https://perma.cc/T6UZ-NF79>] (last visited Feb. 21, 2024).

90. See § 107. Fair use can be seen in a copyright suit where a defendant essentially says, “Yes, Plaintiff, I copied your work without asking. However, the Copyright Act provides that there are certain times where unauthorized use is fair, and I think this is one of those times.” See *id.*

91. See *id.*

92. See U.S. Copyright Office, *supra* note 31.

93. *Id.*

94. See § 107; *infra* Part II.B.

1. “What Was It All For?”⁹⁵ The First Factor in Evaluating Fair Use

The first factor of a fair use evaluation is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”⁹⁶ Typically, a court will look to how the copying defendant is using the copyrighted work, “and [is] more likely to find that nonprofit educational and noncommercial uses are fair”⁹⁷ This is because the Copyright Act itself states that use of a copyrighted work for “purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research is not an infringement of copyright.”⁹⁸ The law itself determines that the purpose of “promot[ing] the Progress of Science and useful Arts” is best served by allowing creative works to be used to foster educated discussion and development.⁹⁹ Some examples of fair use in the educational context would be if a professor distributed copies of a journal article to his class, or if a teacher of a music course created a slideshow containing several copyrighted songs by different musicians.¹⁰⁰

Despite the language of the law, it is important to note that not all copying for an educational or noncommercial purpose is automatically deemed fair, and not all copying for commercial purposes is automatically deemed unfair.¹⁰¹ As previously stated, a fair use analysis must be conducted on a case-by-case basis according to specific facts and a number of different factors.¹⁰² That a work is copied for an educational purpose is not enough to demonstrate fair use.¹⁰³ If the copying work is commercial or noneducational in purpose, there is still hope that the copying defendant can win a finding of fair use.¹⁰⁴ The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*,¹⁰⁵ in holding that a song’s

95. *Non-Stop*, on HAMILTON, *supra* note 1.

96. § 107(1).

97. U.S. Copyright Office, *supra* note 31.

98. § 107.

99. U.S. CONST. art. 1, § 8, cl. 8; § 107.

100. *See Copyright and Fair Use: Common Scenarios*, CAL. STATE UNIV. LIBR., LONG BEACH, <https://csulb.libguides.com/copyrightforfaculty/scenarios> [<https://perma.cc/WC2C-43CE>] (last visited Feb. 21, 2024).

101. *See id.*

102. *See supra* note 94 and accompanying text.

103. *See supra* note 94 and accompanying text.

104. *See* U.S. Copyright Office, *supra* note 31 (emphasizing that, besides educational and non-commercial purposes, there are “transformative” purposes of copying work that could constitute fair use).

105. 510 U.S. 569 (1994). The issue in this case was 2 Live Crew’s parody of Roy Orbison’s song “Oh, Pretty Woman.” *Id.* at 571-72. 2 Live Crew was expressly denied permission to release this song, but the song was nonetheless released. *Id.* at 572. 2 Live Crew’s song contained the same

unauthorized copying was actually fair use, explained that commercial works can be deemed fair use if the works are “transformative” in character.¹⁰⁶ The Court wrote:

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” . . . The enquiry here may be guided by the examples given in the preamble to section 107, looking to whether the use is for criticism, or comment, or news reporting, and the like The central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” . . . Although such transformative use is not absolutely necessary for a finding of fair use, . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.¹⁰⁷

As with works of educational and noncommercial purposes, a work that uses and transforms another work contributes to the progress of science and the arts, so courts are more likely to deem this kind of transformative copying fair use.¹⁰⁸

2. You Can Use Facts, but You Can’t Use Acts¹⁰⁹: The Second Factor in Evaluating Fair Use

The second factor of a fair use evaluation is “the nature of the copyrighted work.”¹¹⁰ A holding of fair use could depend on the type of work

first line as Roy Orbison’s, but then 2 Live Crew’s lyrics changed drastically and comically, “to satirize the original work.” *Id.*

106. *See generally id.* (analyzing the definition of a transformative work and applying this definition to the song at issue).

107. *Id.* at 578-79. The Court held that the use of the first line of Orbison’s original song was fair use, as the rest of the song was so different that it transformed the original work into a different, more parodical version of itself. *See generally id.* (holding fair use).

108. *See id.*; U.S. CONST. art. 1, § 8, cl. 8.

109. *See* ORIGINAL BROADWAY CAST OF HAMILTON, *Take A Break, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015). The original line is: “You can write rhymes, but you can’t write mine.” *Id.*

110. 17 U.S.C. § 107(2) (2018).

that is copied.¹¹¹ Works that are “factual” and “scientific” in nature are more likely to result in a holding of fair use than more creative works, such as “plays, poems, fictional works, photographs, [and] paintings”¹¹² Furthermore, copying an unpublished work as opposed to a published work may also weigh against a finding of fair use because authors have a right of first publication and are awarded the freedom to decide how their work should be displayed to the public, if at all.¹¹³

3. “Too Many Damn Pages?”¹¹⁴ The Third Factor in Evaluating Fair Use

The third factor of a fair use evaluation is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”¹¹⁵ A court will look at both the quality and quantity of the infringer’s unauthorized use to determine just how substantial the copying was.¹¹⁶ “Although there are no numerical or percentage limits, the larger the amount of a work one uses, the less likely it will be fair use.”¹¹⁷ There are also situations, however, where minimal copying in quantity may still not be fair use.¹¹⁸ If only a small portion is copied but that portion is so substantial as to constitute the “heart” of the original work, a court will not find fair use.¹¹⁹

An example of copying that is too quantifiably substantial to constitute fair use would be if an independent filmmaker released a movie about wizards and sixty percent of the lines were identical to lines in a *Harry Potter* movie.¹²⁰ Less obviously, an example of copying that may

111. See *The Meaning of the Four Fair Use Factors*, BYU COPYRIGHT LICENSING OFF., <https://copyright.byu.edu/the-meaning-of-the-four-fair-use-factors> [https://perma.cc/5QW9-EKPV] (last visited Feb. 21, 2024).

112. *Id.*

113. *See id.*

114. ORIGINAL BROADWAY CAST OF HAMILTON, *Cabinet Battle #1*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015).

115. § 107(3).

116. See Richard Stim & Glen Secor, *Fair Use: The 4 Factors Courts Consider in a Copyright Infringement Case*, NOLO, <https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html> [https://perma.cc/W3MR-S7Z2] (last visited Feb. 21, 2024).

117. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*, S. ILL. UNIV. MORRIS LIBR., <https://lib.siu.edu/copyright/module-02/amount-and-substantiality-of-the-portion-used-in-relation-to-the-copyrighted-work-as-a-whole.php> [https://perma.cc/W3TJ-GHC7] (last visited Feb. 21, 2024).

118. *See id.*

119. *Id.*

120. See generally *Four Factors of Fair Use—Third Factor: Amount and Substantiality of the Portion Taken*, UCSF LIBR., <https://www.library.ucsf.edu/news/four-factors-of-fair-use-third-factor-the-amount-and-substantiality-of-the-portion-taken> [https://perma.cc/EA2W-H6JM] (last

be small in quantity but of such substantial quality as to constitute the heart of the work would be copying “a small section of a magazine article . . . which contained the ‘scoop.’”¹²¹ Though there is no specific formula to determine how much is too much, analyzing the amount and substantiality of the portion used is a helpful tactic when a court is attempting to determine whether an unauthorized copying was actually fair use.¹²²

4. All You Do Is Move My Money Around¹²³: The Fourth Factor in Evaluating Fair Use

The fourth and final factor of a fair use evaluation is “the effect of the use upon the potential market for or value of the copyrighted work.”¹²⁴ In a fair use analysis, courts will look at the current and future market values of the original copyrighted work and try to determine whether the new, copying work impacts that market value in any way.¹²⁵ “[C]ourts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.”¹²⁶

Returning to the *Harry Potter* example,¹²⁷ suppose that after reading J.K. Rowling’s *Harry Potter* books another author publishes seven books with the same plot and wildly similar characters, except the main character is a young girl instead of a young boy.¹²⁸ This would certainly affect the market value of the original *Harry Potter* novels because, when faced with a choice, it is more likely that young boys will buy the original *Harry Potter* novels, but young girls will buy the similar novel

visited Feb. 21, 2024) (stating that the more copying present, the less likely a court is to find fair use).

121. *Id.* If a journalist were to write a twenty-page article breaking the news to the world that Ben Affleck and Jennifer Lopez reunited, but a blogger reads the article and then publishes “Ben and Jen Back On,” it is not likely a court will find fair use, as the blogger in five words managed to copy the message that was the entire crux of the journalist’s article. *See id.*

122. *See* 17 U.S.C. § 107(3) (2018).

123. *See Cabinet Battle #1, on HAMILTON, supra* note 114. The original line is: “You just wanna move our money around.” *Id.*

124. § 107(4).

125. *See More Information on Fair Use – Copyright.gov*, IWASAKI LIBR. EMERSON COLL., <https://guides.library.emerson.edu/FairUse> [<https://perma.cc/HZ52-VHMR>] (last visited Feb. 21, 2024).

126. *Id.*

127. *See supra* Part II.B.3.

128. *See* Alison Eldridge, *Harry Potter: Fictional Character*, BRITANNICA, <https://www.britannica.com/topic/Harry-Potter> [<https://perma.cc/4QPK-3DPF>] (Aug. 25, 2023) (describing Harry Potter as a “boy wizard”).

with a female protagonist.¹²⁹ If roughly half of J.K. Rowling’s potential readers are abandoning her work in favor of a similar work with a slightly different protagonist, it can easily be said that the market value of Rowling’s work has been negatively affected.¹³⁰ Works that harm the market value of an original work by either competing with that work directly or negatively impacting its potential for sales cannot succeed under a fair use evaluation.¹³¹

*C. Most Disputes Die and No One Sues*¹³²:
Exemptions to the Copyright Act

The Copyright Act does permit some forms of copying that would otherwise be considered infringement.¹³³ The Act contains several exemptions, for example, that provide statutory guidelines allowing certain kinds of copying, or copying by certain parties.¹³⁴ One such exemption is the religious exemption, which states that “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of

129. See Brooke Auxier et al., *The Gender Gap in Reading: Boy Meets Book, Boy Loses Book, Boy Never Gets Book Back*, DELOITTE. INSIGHTS (Dec. 1, 2021), <https://www2.deloitte.com/us/en/insights/industry/technology/technology-media-and-telecom-predictions/2022/gender-gap-in-reading.html> [<https://perma.cc/AJ36-DCMV>]. This article asserts that “men . . . read fewer books with female protagonists than do women” and that women are more likely to read a novel with a female protagonist because “[w]hen we read, we put ourselves in the characters’ shoes to see their points of view, fears, hopes, and experiences.” *Id.*

130. See *More Information on Fair Use – Copyright.gov*, *supra* note 125 (citing displacement of sales as an example of an effect on the potential market of the original work).

131. See *id.*

132. See ORIGINAL BROADWAY CAST OF HAMILTON, *Ten Duel Commandments, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015). The original line is: “Most disputes die, and no one shoots.” *Id.*

133. See Kevin M. Lemley, *A Proposal to Expand the Religious Services Exemption Under the Copyright Act*, 34 U. ARK. LITTLE ROCK L. REV. 481, 482 (2012).

Copyright vests in the owner the exclusive rights to reproduction, distribution, preparation of derivative works, performance, and display. Anyone that violates these rights is subject to a claim for copyright infringement. An infringement claim can be avoided if the use qualifies as a fair use, the owner grants a license for the use, or if the use falls under a statutory exemption.

Id. (emphasis added) (footnotes omitted). See *supra* Part II.B for further discussion on fair use.

134. See 17 U.S.C. § 110 (2018). This section, titled “Limitations on exclusive rights: Exemption of certain performances and displays,” lays out when a performance normally constituting illegal copying would not be subject to liability. *Id.* Section 110(1), for example, provides an exemption for “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities . . .” *Id.* Simply put, Don McLean cannot sue every math teacher who uses the tune of his song “American Pie” to teach their students about the concept of pi, so long as the song was used in the course of a face-to-face teaching activity. See *id.*

worship or other religious assembly” is “not [an] infringement[] of copyright”¹³⁵

The religious exemption was originally established to protect artistic expression during religious ceremonies.¹³⁶ “This exemption allows congregants to sing hymns during service without first getting permission. It also allows pastors to recite poems in their sermons.”¹³⁷ Since a majority of people are not pastors that have to worry about infringement when writing a sermon, and since there are so few religious exemption issues litigated, it is easy to forget the religious exemption and its impact.¹³⁸ However, issues with copyright infringement and the religious exemption were thrust into the spotlight in the summer of 2022 thanks to a church’s decision to put on a special performance.¹³⁹

*D. My Name Is Alexander Scamilton, and There’s a Million Things I Haven’t Given the Original Author Credit For*¹⁴⁰

Seven and a half years after its original release, *Hamilton* once again began trending on social media but, this time, it was not an influx of people singing the musical praises.¹⁴¹ It began on TikTok;¹⁴² people started posting snippets of what appeared to be a knock-off performance

135. § 110(3).

136. See *Copyright for Religious Organizations*, EMORY LIBRS., <https://sco.library.emory.edu/copyright/religious-organizations.html> [<https://perma.cc/22ZV-EY9R>] (last visited Feb. 21, 2024).

137. *Id.*

138. See Hu, *supra* note 17 (“There have been relatively few cases involving the interpretation or application of the religious services exemption . . .”).

139. See TAG Media, *supra* note 14.

140. See *Alexander Hamilton*, on HAMILTON, *supra* note 2. The original line is: “My name is Alexander Hamilton. And there’s a million things I haven’t done” *Id.*

141. See Julyssa Lopez, *People Seeing Hamilton for the First Time Are Sharing Their Reactions on Twitter*, GLAMOUR (July 3, 2020), <https://www.glamour.com/story/people-seeing-hamilton-for-the-first-time-twitter-reactions> [<https://perma.cc/K4V9-PUY5>]. The responses to *Hamilton*’s release were overwhelmingly positive across social media platforms, especially Twitter, and this article highlights some of the positive reactions written by those who had not seen *Hamilton* live but were able to experience it for the first time when it was released on Disney+ during the 2020 Broadway shutdown. See *id.*

142. See Werner Geysler, *What Is TikTok? – Everything You Need to Know in 2023*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/what-is-tiktok> [<https://perma.cc/LP2Q-HNVJ>] (Dec. 30, 2022).

TikTok is a video-sharing app that allows users to create and share short-form videos on any topic. . . . The TikTok app has simplified video creation and sharing and taken it to the next level. All users have to do is record anything and everything from their daily routines and post it instantly.

Id.

of *Hamilton*.¹⁴³ Dubbed “Scamilton,”¹⁴⁴ this performance was given by members of the Door McAllen Church in Texas and live-streamed on the church’s YouTube channel, which caused it to go viral for all the wrong reasons.¹⁴⁵

1. The Music’s Not Where the Resemblance Stops¹⁴⁶: The Extent of the Door McAllen’s Copying

The Door McAllen’s performance went viral in large part due to its substantial similarity to *Hamilton*,¹⁴⁷ the church staged a production that was nearly identical in plot and distributed its performance to a widespread audience.¹⁴⁸ The most noticeable copying is that of the background music.¹⁴⁹ Since *Hamilton* is a sung-through play, the music is a substantial and important part of what makes the work unique.¹⁵⁰ Viewers will notice that the Door McAllen used the same backing music as is used in *Hamilton*.¹⁵¹ However, as substantial as it is to copy the entire musical catalog, the Door McAllen’s copying only becomes more blatant and egregious as one continues to watch its performance.¹⁵²

Earlier in this Note, the issue of costuming was briefly discussed.¹⁵³ The similarity in the female characters’ and ensembles’ costumes,

143. See Megan Cartwright, ‘Hilarious’ Unauthorized Production of ‘Hamilton’ Goes Viral: ‘#Scamilton,’ NEWSWEEK (Aug. 15, 2022, 12:50 PM), <https://www.newsweek.com/hamilton-hilarious-viral-tiktok-videos-scamilton-1733690> [https://perma.cc/9BMA-S2UE].

144. *Id.*

145. See Chris Peterson, *Door McAllen Church Apologizes for Unauthorized ‘Hamilton’ Will Pay Damages*, ONSTAGE BLOG (Aug. 23, 2022), <https://www.onstageblog.com/editorials/2022/8/23/door-mcallen-church-apologizes-for-unauthorized-hamilton-will-pay-damages> [https://perma.cc/4PMJ-RQFZ].

146. See *Blow Us All Away*, on HAMILTON, *supra* note 69. The original line is: “The ladies say my brain’s not where the resemblance stops!” *Id.*

147. See Peterson, *supra* note 145.

148. See *id.*

149. See TAG Media, *supra* note 14; Josue Mendez, *Full Hamilton Soundtrack (Instrumental)*, YOUTUBE, https://www.youtube.com/playlist?list=PL4QruBuFRA69zo9ycMNxZ_PtqgJHAqZuS [https://perma.cc/GW7E-K25U] (Dec. 3, 2020).

150. See Marisol Adame, *History Has Its Eyes on Us: The Importance and Relevance of ‘Hamilton’ Today*, PROSPECTOR (July 21, 2020), <https://www.theprospectordaily.com/2020/07/21/history-has-its-eyes-on-us-the-importance-and-relevance-of-hamilton-today> [https://perma.cc/4JZW-7M9W]. *Hamilton*’s “use of hip-hop, rap, rhythm and blues as part of the musical . . . is what sets this Broadway show apart from others.” *Id.*

151. See TAG Media, *supra* note 14; Mendez, *supra* note 149 (playing the same background music in each song that occurs in both the original *Hamilton* and the Door McAllen’s version).

152. See *infra* Part II.D.1.

153. See *supra* note 14 (discussing the similarity of the colors and styles of the costumes worn by the actresses portraying the Schuyler sisters in both *Hamilton* and the Door McAllen’s production).

however, was not an isolated incident of copying.¹⁵⁴ In both *Hamilton* and the church's production, the actors playing King George III can be seen carrying staffs and wearing red and gold outfits, crowns, and similarly colored capes;¹⁵⁵ the actors playing Thomas Jefferson in the second act can be seen wearing purple suits from head to toe;¹⁵⁶ and the actors playing Alexander Hamilton and Aaron Burr are dressed in black and white for their dueling scene.¹⁵⁷

Remarkably, there are still even more specific instances of copying in the Door McAllen's production of *Hamilton*.¹⁵⁸ On the live-streamed version of the church's performance, there is a still image of the original *Hamilton* logo displayed on the screen before the performance begins.¹⁵⁹ This Note has previously mentioned instances of similar choreography in the two plays,¹⁶⁰ but the Door McAllen's actors copy precise, small movements from the original play throughout their performance, which only serves to make their copying look more pointed and less coincidental.¹⁶¹

2. They Modulate the Play and They Think That's Okay¹⁶²: Small but Significant Changes the Door McAllen Made to Their Performance

Despite its copious similarities to the original, the Door McAllen's performance is not an exact copy of *Hamilton*.¹⁶³ First, and presumably to save time, a number of songs were cut from the church's

154. See generally TAG Media, *supra* note 14 (depicting the similarly designed costumes the Door McAllen used in its performance); HAMILTON, *supra* note 14 (depicting the original costumes).

155. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

156. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

157. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

158. See *infra* Part II.D.1.

159. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

160. See *supra* note 14 (discussing the characters' choreography in one particular scene where they are drinking beer and rhythmically banging on a table).

161. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14. In the original performance of *Hamilton*, during the performance of "Aaron Burr, Sir," Burr (Leslie Odom, Jr.) asks Hamilton (Lin-Manuel Miranda), "You punched the bursar?" HAMILTON, *supra* note 14. Before saying "yes," Hamilton snaps his fingers and points at Burr. *Id.* It is a small movement by Lin-Manuel Miranda that draws a laugh out of the audience in the original play, and this exact movement is adopted in the Door McAllen's performance. TAG Media, *supra* note 14; HAMILTON, *supra* note 14. Similarly, the exact posture Lin-Manuel Miranda slumps into in the scene where Hamilton is shot is copied in the church's performance. TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

162. See ORIGINAL BROADWAY CAST OF HAMILTON, *Farmer Refuted*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: "Don't modulate the key then not debate with me!" *Id.*

163. See *infra* Part II.D.2; TAG Media, *supra* note 14.

performance.¹⁶⁴ Additionally, throughout the church's performance, a number of original lyrics are censored and replaced by more family-friendly words and phrases.¹⁶⁵

Perhaps the most obvious creative liberty taken by the Door McAllen was the introduction of religious messages and teachings into their performance.¹⁶⁶ *Hamilton*, though it makes references to religion in general,¹⁶⁷ is not a work that contains religious themes or messages.¹⁶⁸ It becomes obvious, then, that the religious messages or teachings throughout the performance belong entirely to the church.¹⁶⁹

The first example of an overtly religious diversion from the original script comes directly after the performance of the song "Stay Alive (Reprise)."¹⁷⁰ In the original production of *Hamilton*, Philip Hamilton dies from a gunshot wound at the end of the song.¹⁷¹ His mother cries out, and seconds later the actress portraying Angelica Schuyler arrives on stage and transitions to the next song, "It's Quiet Uptown."¹⁷² Importantly, there is no dialogue between these two songs.¹⁷³ In the Door McAllen's performance of *Hamilton*, after Philip's mother cries out at the end of "Stay Alive (Reprise)," the actor portraying Alexander Hamilton can be seen standing alone on stage.¹⁷⁴ A man holding a bible¹⁷⁵ approaches him and says:

164. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14. Among the original songs omitted by the Door McAllen are "The Story of Tonight," "Farmer Refuted," and "Hurricane." TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

165. See TAG Media, *supra* note 14. In the song "Alexander Hamilton," the Door McAllen replaced the word "bastard" with the word "scoundrel." *Id.*; *Alexander Hamilton, on HAMILTON*, *supra* note 2. Additionally, in the song "What'd I Miss," the line "[p]issed him off" was replaced by "ticked him off," and the line "I've been in Paris meeting lots of different ladies" was replaced by "I was in Paris so long, my mind's hazy." TAG Media, *supra* note 14; ORIGINAL BROADWAY CAST OF HAMILTON, *What'd I Miss, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015).

166. See TAG Media, *supra* note 14.

167. See Nick Baker & Meredith Lake, *What Hamilton the Musical Says About Race, Religion and America's 'Unfinished Revolution,'* ABC (June 7, 2021, 1:00 AM), <https://www.abc.net.au/news/2021-05-21/what-hamilton-the-musical-says-about-race-and-religion/100122256> [<https://perma.cc/4MFE-F6R7>] ("George Washington quot[es] Scripture and Aaron Burr cit[es] his 'fire and brimstone preacher' grandfather Jonathan Edwards.").

168. See *id.* (asserting that religion is not a theme as "overt" as others in *Hamilton*).

169. See Wood, *supra* note 13.

170. TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

171. HAMILTON, *supra* note 14.

172. *Id.*

173. *Id.*

174. TAG Media, *supra* note 14.

175. *Id.* It is unclear whether this man is meant to be another character in the show such as Aaron Burr, or just a man who arrives to speak with Alexander about religion. *Id.*

Mr. Hamilton. I'm so glad I found you, sir. I am so very sorry for your loss. We all go through difficult times in life, and only God can help us pull through. God is the only one that can help you right now and give you an uncomprehensible [sic] peace during this tragic time. He knows exactly what you're going through, even though you may not understand it. . . . It may be that the circumstances you now face are the consequences of decisions made in the past.¹⁷⁶ . . . Stop running from God, Alexander. His word says if we confess our sins, he is faithful and just to forgive us our sins and to cleanse us of all unrighteousness. Pray with me, sir. Receive Jesus Christ in your heart right now. Do you not only confess, but repent of all your sin? [Alexander answers, "Yes."] Do you accept him as your lord and savior? [Alexander answers, "Yes."] Amen.¹⁷⁷

Similar religious messages run rampant throughout the church's performance, making clear that it was the church's intention to use their production of *Hamilton* to communicate certain religious teachings.¹⁷⁸ In the monologue spoken by Hamilton during his duel with Burr in the original play, Hamilton turns to the audience and says, "What is a legacy? It's planting seeds in a garden you never get to see."¹⁷⁹ The line delivered in this scene by the Door McAllen is, "What is a legacy? It's knowing you repented and accepted the gospel of Jesus Christ that sets men free."¹⁸⁰

Finally, after the Door McAllen finishes their performance, a man comes out and gives a sermon comparing Hamilton's affair to those of biblical adulterers.¹⁸¹ The man explains that, despite Hamilton's wishes that no one learn of his affair, his life was negatively affected by it because God knew about it.¹⁸² Ultimately, the purpose of the sermon is to use Alexander Hamilton as an example to persuade the audience to pray for help avoiding the consequences and struggles of such sins as "broken marriages, . . . alcohol, . . . drugs, [and] homosexuality."¹⁸³ Notably, no

176. *Id.* The decision "made in the past" being referred to is Alexander Hamilton's extramarital affair with Maria Reynolds, an important plot point included in both the original *Hamilton* and the Door McAllen's performance. *Id.*; HAMILTON, *supra* note 14. Later in this monologue, the man explicitly prays for the restoration of the Hamiltons' marriage. TAG Media, *supra* note 14. After this, the play continues on, as it did in the original, with the song "It's Quiet Uptown." *Id.*; HAMILTON, *supra* note 14.

177. TAG Media, *supra* note 14.

178. *See id.*

179. ORIGINAL BROADWAY CAST OF HAMILTON, *The World Was Wide Enough*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015).

180. TAG Media, *supra* note 14.

181. *Id.*

182. *Id.*

183. *Id.*

such sermon exists at any point in the original production of *Hamilton*.¹⁸⁴

The church's religious additions to *Hamilton* partially contributed to its performance going viral.¹⁸⁵ Many people took to social media to critique the Door McAllen both for the quality of its performance and for its decision to add a religious undertone to a play that does not originally have one.¹⁸⁶ However, while people on social media were having a field day ridiculing the Door McAllen, legal scholars were focused on something else entirely: how the religious exemption of the Copyright Act had wiggled its way into popular culture.¹⁸⁷

III. LEGAL ISSUE: CHURCHES ARE UNIQUELY SITUATED BY VIRTUE OF THEIR POSITION IN THE COPYRIGHT ACT TO SKIRT INFRINGEMENT LIABILITY¹⁸⁸

The following Subparts address the legal implications of the Door McAllen's performance and highlight the fact that the religious exemption of the Copyright Act could potentially save the Door McAllen from liability.¹⁸⁹ They will examine the religious exemption in depth and highlight both what it says and what it does not say.¹⁹⁰ Finally, this Part will expose the issue with a law that does not punish flagrant, unauthorized copying: the law itself threatens the very creators it seeks to protect.¹⁹¹

A. The Evidence Suggests They've Engaged in Infringement¹⁹²: The Illegality of the Door McAllen's Performance

As previously stated, copying is typically allowed if the creator authorizes the copier to use his work or if the copying falls under some

184. See HAMILTON, *supra* note 14.

185. See Erielle Sudario, *A Texas Church Performed an Illegal, Specifically Anti-LGBTQ Version of 'Hamilton,' Internet Reacts*, WE GOT THIS COVERED (Aug. 8, 2022, 7:27 PM), <https://wegothiscovered.com/movies/a-texas-church-performed-an-illegal-specifically-anti-lgbtq-version-of-hamilton-internet-reacts> [https://perma.cc/YPH9-XRSN].

186. See *id.*

187. See *id.*; Hu, *supra* note 17.

188. See *We Know*, on HAMILTON, *supra* note 88. The original line is: "You are uniquely situated by virtue of your position . . ." *Id.*

189. See *infra* Part III.

190. See *infra* Part III.B.

191. See *infra* Part III.B.

192. See *We Know*, on HAMILTON, *supra* note 88. The original line is: "[T]he evidence suggests you've engaged in speculation . . ." *Id.*

exemption to the Copyright Act.¹⁹³ Unfortunately for the Door McAllen, there is ample evidence that the performance was not authorized.¹⁹⁴ First, a spokesperson for *Hamilton* said that “*Hamilton* does not grant amateur or professional licenses for any stage productions and did not grant one to The Door Church[.]”¹⁹⁵ despite the Door McAllen’s initial insistence that it did receive a license to perform the show.¹⁹⁶ Additionally, *Hamilton* creator Lin-Manuel Miranda took to Twitter to explicitly confirm that the church’s performance was “unauthorized.”¹⁹⁷ After coming under fire, the Door McAllen ultimately released a statement that it did not have proper authorization for its production of *Hamilton*.¹⁹⁸

Since the Door McAllen’s copying was clearly unauthorized, the only way for the church to avoid liability for copyright infringement would be if the copying falls under some exception to the Copyright Act.¹⁹⁹ As the performance at issue was given by a church, the religious exemption is most fitting.²⁰⁰ However, the general consensus among legal scholars is that the religious exemption is not applicable to the Door McAllen’s actions.²⁰¹ By failing to obtain authorization or meet the

193. Lemley, *supra* note 133, at 482 (“Copyright vests in the owner the exclusive rights to reproduction, distribution, preparation of derivative works, performance, and display. Anyone that violates these rights is subject to a claim for copyright infringement. An infringement claim can be avoided if . . . the owner grants a license for the use, or if the use falls under a statutory exemption.”) (footnotes omitted).

194. See Carla Sosenko, ‘*Hamilton*’ Fans Mobilize to Stop Texas Church’s ‘Unauthorized’ Performance, NEWSWEEK (Aug. 8, 2022, 3:34 PM), <https://www.newsweek.com/unauthorized-hamilton-performance-door-christian-fellowship-ministries-texas-1731894> [<https://perma.cc/8XUY-EPEY>].

195. *Id.*

196. See Wood, *supra* note 13.

197. Miranda, *supra* note 13.

198. Scottie Andrew, Texas Church That Performed ‘*Hamilton*’ Without Permission Apologizes and Says It Will Pay Damages, WRAL NEWS (Aug. 24, 2022, 11:25 AM), <https://www.wral.com/texas-church-that-performed-hamilton-without-permission-apologizes-and-says-it-will-pay-damages/20430599> [<https://perma.cc/KS6H-AHKJ>]. The statement reads:

The Door Christian Fellowship McAllen Church did not ask for, or receive, a license from the producers or creators of ‘*Hamilton*’ to produce, stage, replicate or alter any part of ‘*Hamilton*’; nor did we seek prior permission to alter Lin-Manuel Miranda’s work by changing the music, the lyrics, deleting songs, and adding dialogue . . .

Id.

199. Lemley, *supra* note 133, at 482 (“An infringement claim can be avoided if the use qualifies as a fair use, the owner grants a license for the use, or if the use falls under a statutory exemption.”) (emphasis added) (footnotes omitted).

200. See 17 U.S.C. § 110(3) (2018).

201. See, e.g., Hu, *supra* note 17.

The Door McAllen’s performances don’t appear to be shielded by the exemption, which does not apply to dramatic stagings of musicals, legal experts say. The exception for “dramatico-musical works” is limited to those of a religious nature, and “‘*Hamilton*’ is not a religious work,” says Xiyin Tang, a law professor at UCLA School of Law.

parameters of a known exception to the Copyright Act, the Door McAllen seems wholly liable for copyright infringement.²⁰² However, as one scholar points out, the church's ample religious changes to *Hamilton*'s original script may be its saving grace.²⁰³

B. "The Issue on the Table"²⁰⁴: Churches May Be Able to Circumnavigate the Religious Exemption of the Copyright Act, Leaving Creators Vulnerable

Despite the seemingly open-and-shut case of copyright infringement and the Door McAllen's having already paid damages for its unauthorized performance,²⁰⁵ "there may be a stronger argument that the church's rendition [of *Hamilton*] does fall under the [religious] exemption."²⁰⁶ Attorney Nicole K. McLaughlin highlights the significance of the Door McAllen's religious additions to *Hamilton*, stating that "the fact that the church changed the play to make it more Christian ironically might help them argue it's part of a service"²⁰⁷

Under the religious exemption to the Copyright Act, a "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature . . . *in the course of services* at a place of worship or other religious assembly" is shielded from infringement liability.²⁰⁸ While the Copyright Act does not include a definition for "services,"²⁰⁹ religious services are generally defined as "any sectarian or nondenominational service, rite, or meeting that involves worship

Though the original "Hamilton" script may include some biblical references . . . [a]n "underlying religious theme" isn't enough to render a work into one of religious nature, she said.

Id. Additionally, the religious exemption shields the "performance of a nondramatic literary or musical work," and *Hamilton* is a dramatic work. See § 110(3); *supra* Part II.A.4. Finally, "the church seems to have advertised the two-hour performance . . . separately from any church services . . . which would mean the Texas church's rendition does not meet the exemption." Hu, *supra* note 17.

202. Lemley, *supra* note 133, at 482 ("Copyright vests in the owner the exclusive rights to reproduction, distribution, preparation of derivative works, performance, and display. Anyone that violates these rights is subject to a claim for copyright infringement.") (footnotes omitted).

203. See Hu, *supra* note 17.

204. ORIGINAL BROADWAY CAST OF HAMILTON, *Cabinet Battle #2*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015).

205. See *Texas Church to Pay Unspecified Damages for Altered 'Hamilton,' supra* note 16.

206. Hu, *supra* note 17.

207. *Id.*

208. 17 U.S.C. § 110(3) (emphasis added).

209. See generally *id.* § 101 (lacking a definition for "religious services," "services," or the like in the "Definitions" section of the Copyright Act).

of a higher being.”²¹⁰ Given this definition, it is plain to see how the Door McAllen could argue that its changes ultimately rendered its production of *Hamilton* a religious service.²¹¹ A new character entered the play in the middle of a scene to lead a prayer, and a pastor gave a sermon after the final song to an audience most likely made up of the church’s congregants.²¹² It would seem that the addition of such overtly religious activity transforms the play into a “meeting that involves worship of a higher being[.]”²¹³ thus rendering it a service qualifying for protection under the religious exemption of the Copyright Act.²¹⁴ This protection would mean a legal victory for the Door McAllen, but the effects of this victory on creators are dire.²¹⁵

The language of the religious exemption of the Copyright Act contains a loophole entirely too beneficial for religious organizations at the expense of original creators.²¹⁶ If all a religious organization has to do to shield itself from infringement liability is add a sermon and a few religious lines to someone else’s creative work, there is no limit to the copying that these organizations will get away with under the guise of a religious service.²¹⁷ This leaves creators such as Lin-Manuel Miranda vulnerable to having their work manipulated and distributed with religious messages with no legal remedy, which would in turn threaten the very purpose of copyright law.²¹⁸ Without proper legal protection for their work, creators will be less motivated to share their work,²¹⁹ and society at large will suffer from a hindrance in the progress of arts and sciences.²²⁰

210. *Religious Service Definition*, L. INSIDER, <https://www.lawinsider.com/dictionary/religious-service> [<https://perma.cc/HUN9-RAUV>] (last visited Feb. 21, 2024).

211. *See supra* Part II.D.2 (detailing the religious changes made to the original play).

212. *See supra* Part II.D.2 (detailing the religious changes made to the original play).

213. *Religious Service Definition*, *supra* note 210.

214. *See* § 110(3).

215. *See supra* Part I; *infra* Part III.B.

216. *See* § 110(3).

217. *See supra* Part I; *infra* Part III.B.

218. *See Copyright Law Explained: What Is the Purpose of Copyright Law*, *supra* note 6 (“The primary purpose of copyright is to induce and reward authors, through the provision of property rights, to create new works and to make those works available to the public to enjoy.”).

219. Garfield, *supra* note 12, at 12 (“By giving authors an incentive to create new works, copyright law both rewards authors and encourages the creation of works for the public to enjoy.”). This incentive may come in the form of notoriety or financial reward. *See* Ku et al., *supra* note 9, at 1680 (“[P]roviding creators with economic incentives to create new works is one of the principal justifications, if not *the* justification, for copyright’s expansion.”) (emphasis in original).

220. *See* U.S. CONST. art. 1, § 8, cl. 8.

IV. I’VE SEEN INJUSTICE IN COPYRIGHT LAW, AND I’VE CORRECTED IT²²¹: HOW TO ENSURE CREATORS ARE PROPERLY PROTECTED UNDER THE RELIGIOUS EXEMPTION

In the face of such an extreme threat to creators, the only solution to ensure that creators do not fall victim to those that tweak their art just enough to be able to reclaim it is to change the language and meaning of the religious exemption entirely.²²² Though the religious exemption typically does not apply to performances of non-religious works, the statute must acknowledge the performance of non-religious works by religious institutions in order to avoid a free-for-all of manipulation and infringement.²²³ The new exemption should explicitly provide that, in the performance of a dramatic work that was not originally a religious work, a religious institution must meet the standards of fair use.²²⁴ This ensures protection for creators regardless of whether the dramatic work is changed enough to constitute a religious “service.”²²⁵

*A. Hey, You Can Keep Using My Work, if the Use Is Fair²²⁶:
Why Should Religious Institutions Be Held to the Fair Use Standard?*

The fair use standard, though a higher burden for religious institutions to meet, best protects creators.²²⁷ The purpose of American copyright law is to give creators “exclusive rights . . . that allow these creators to protect their creative works against theft . . .”²²⁸ The religious exemption, as it is written, fails to adequately protect against theft, as it allows religious institutions to steal entire works as long as they modify enough of the work so as to constitute a religious service.²²⁹ Because this burden is low enough to benefit copying religious institutions at the expense of creators, it becomes necessary to raise the burden of legal

221. See *Non-Stop*, on HAMILTON, *supra* note 1. The original line is: “I’ve seen injustice in the world and I’ve corrected it.” *Id.*

222. See *infra* Part IV.A.

223. See generally 17 U.S.C. § 110(3) (addressing only the performance of dramatic works of a religious nature, and ignoring entirely the performance of dramatic works of a non-religious nature).

224. See *infra* Part IV.A.

225. See § 110(3).

226. See ORIGINAL BROADWAY CAST OF HAMILTON, *Say No to This*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: “And hey, you can keep seein[g] my . . . wife, if the price is right . . .” *Id.*

227. See generally § 107 (detailing that, to protect creators from having their work unfairly copied, a successful fair use claim requires a copying defendant to satisfy a test which balances four elements).

228. *Copyright Law Explained: What Is the Purpose of Copyright Law*, *supra* note 6.

229. See § 110(3); *supra* Part III.

copying to ensure that the purpose of copyright law is fulfilled.²³⁰ Fair use is the better standard precisely because it is a higher burden.²³¹ Additionally, fair use is already a well-known legal standard, so asking religious institutions to meet this standard would not burden those institutions, their attorneys, or judges with learning new law.²³² This standard simply asks religious institutions to make sure that they are copying in a way that comports with copyright law in general and ensures that original creators are the ones reaping the benefits of their works.²³³

*B. Let's Follow the New Test and See Where It Goes*²³⁴:
Applying the New Standard to "Scamilton"

An application of the fair use test demonstrates that, even under this new standard, the Door McAllen's performance constitutes an illegal infringement.²³⁵ Despite one factor weighing in favor of the Door McAllen,²³⁶ the facts surrounding the copying overwhelmingly suggest that the church's use of *Hamilton* would not constitute fair use.²³⁷ The following Subsections of this Note examine the newly proposed fair use standard for religious institutions²³⁸ with respect to the Door McAllen's copying.²³⁹

1. "What Is the Meaning of This?"²⁴⁰ Is "Scamilton's" Purpose Educational, Noncommercial, or Transformative?

As previously stated, the first prong of the fair use test is to evaluate "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . ."²⁴¹ Though the Door McAllen would undoubtedly assert that, as it contained religious teachings throughout, its performance was educational and

230. See *Copyright Law Explained: What Is the Purpose of Copyright Law*, *supra* note 6.

231. See § 107.

232. See *id.*

233. See § 107; *Copyright Law Explained: What Is the Purpose of Copyright Law*, *supra* note 6.

234. See ORIGINAL BROADWAY CAST OF HAMILTON, *Washington on Your Side*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: "Let's follow the money and see where it goes." *Id.*

235. See § 107 (outlining the four-prong test); *infra* Part IV.B.

236. See *infra* Part IV.B.4.

237. See § 107 (outlining the four-prong test); *infra* Part IV.B.

238. See *supra* note 224 and accompanying text.

239. See *infra* Part IV.B.

240. ORIGINAL BROADWAY CAST OF HAMILTON, *Meet Me Inside*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015).

241. § 107(1). The purpose and character element of the fair use test is discussed in more detail in Part II.B.1 of this Note. See *supra* Part II.B.1.

noncommercial in nature,²⁴² a court is likely to find that its performance is not “transformative” enough to satisfy this prong of the fair use test.²⁴³ Though it did add religious lines and a sermon to the original performance of *Hamilton*, the Door McAllen did not do enough to transform *Hamilton* into a religious work.²⁴⁴ The costumes, plot, and solution of the plays are identical; there is no overtly religious ending or plot to the Door McAllen’s performance that transforms the original *Hamilton* into an independent creative work.²⁴⁵

2. You Don’t Get a Win if It’s a Play, I’m Afraid²⁴⁶: *Hamilton* Is a Creative Work for Purposes of Fair Use Analysis

The second prong of the fair use test is to evaluate “the nature of the copyrighted work”²⁴⁷ As discussed, the unauthorized use of creative works such as plays are less likely than factual works to constitute fair use.²⁴⁸ Since the work copied by the Door McAllen—*Hamilton*—was a play that is creative in nature, the second prong of the fair use test weighs against a finding of fair use for the Door McAllen.²⁴⁹

3. Their Copying Looms Quite Large²⁵⁰: The Door McAllen Copied a Far Too Substantial Amount from *Hamilton*

The third prong of the fair use test is to evaluate “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”²⁵¹ This is the prong of the test that weighs most heavily

242. See generally TAG Media, *supra* note 14 (containing various religious messages).

243. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). A transformative work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” *Id.*

244. Hu, *supra* note 17 (“Though the original ‘Hamilton’ script may include some biblical references . . . [a]n ‘underlying religious theme’ isn’t enough to render a work into one of religious nature”).

245. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

246. See ORIGINAL BROADWAY CAST OF HAMILTON, *The Room Where It Happens*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: “But you don’t get a win unless you play in the game.” *Id.*

247. 17 U.S.C. § 107(2) (2018). The nature element of the fair use test is discussed in more detail in Part II.B.2 of this Note. See *supra* Part II.B.2.

248. See *supra* Part II.B.2.

249. See *supra* Part II.B.2.

250. See ORIGINAL BROADWAY CAST OF HAMILTON, *I Know Him*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is, “There’s nobody else in their country who looms quite as large” *Id.*

251. § 107(3). The amount and substantiality element of the fair use test is discussed in more detail in Part II.B.3 of this Note. See *supra* Part II.B.3.

against a finding of fair use for the Door McAllen.²⁵² This Note has previously detailed merely some of the copious similarities between the Door McAllen’s production and the original *Hamilton*.²⁵³ The dialogue the Door McAllen used throughout its entire performance—with the exception of the words that were censored to more family-friendly alternatives, the omission of some songs, and the addition of religious lines—was substantially similar to that in *Hamilton*,²⁵⁴ and the religious additions did not change the overall “heart” of the work; the play was still clearly and predominantly one about the life of Alexander Hamilton.²⁵⁵

4. Two Performances of *Hamilton* Given on the Stage, Diametrically Opposed, Foes²⁵⁶: Potential Effects of “Scamilton” on the Market

The final prong of the fair use test is to evaluate “the effect of the use upon the potential market for or value of the copyrighted work.”²⁵⁷ The main question to ask is whether the Door McAllen’s performances detracted from *Hamilton*’s ability to sell tickets and promote itself.²⁵⁸ There are some factors that may lead certain people to choose the Door McAllen’s performance over the original *Hamilton*: the church livestreamed its show for free,²⁵⁹ and people who agree with the Door McAllen’s teachings are more likely to watch its performance for the religious messages.²⁶⁰ However, *Hamilton*’s impact has not suffered

252. See *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*, *supra* note 117 (stating that the larger the amount of an original work one uses, the less likely it is to be fair use).

253. See *supra* Part I, II.D.1.

254. See TAG Media, *supra* note 14; HAMILTON, *supra* note 14.

255. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*, *supra* note 117. The “heart” of the work refers to the essence of the work. See *Measuring Fair Use: The Four Factors*, STAN. LIBRS., <https://fairuse.stanford.edu/overview/fair-use/four-factors> [<https://perma.cc/HX4F-FCEP>] (last visited Feb. 21, 2024) (“In other words, you are more likely to run into problems if you take the most memorable aspect of a work. For example, it would probably not be a fair use to copy the . . . words ‘I can’t get no satisfaction’ from the song ‘Satisfaction.’”).

256. See *The Room Where It Happens*, on HAMILTON, *supra* note 246. The original line is: “Two Virginians and an immigrant walk into a room . . . [d]iametric[al]ly opposed, foes.” *Id.*

257. 17 U.S.C. § 107(4) (2018).

258. See *More Information on Fair Use – Copyright.gov*, *supra* note 125.

259. See Morgan Miles, “Scamilton” Flaunts Copyright and Faces Outrage, XAVIER NEWSWIRE, <https://xaviernewswire.com/2022/08/24/scamilton-flaunts-copyright-and-faces-outrage> [<https://perma.cc/25XP-RTGY>] (last visited Feb. 21, 2024). Conversely, as of February 21, 2024, tickets to see *Hamilton* on Broadway are selling for anywhere between \$124 and \$298. See *Hamilton* (NY), TICKETMASTER, <https://www.ticketmaster.com/hamilton-ny-tickets/artist/2095830> [<https://perma.cc/5EX4-EKE9>] (last visited Feb. 21, 2024).

260. See generally TAG Media, *supra* note 14 (displaying the religious messages within the Door McAllen’s performance of *Hamilton*).

because of the Door McAllen’s copying.²⁶¹ Especially since its release on Disney+, *Hamilton* has been viewed both on stage and online by millions of people.²⁶² In contrast, certain snippets of the Door McAllen’s performance have been viewed hundreds of thousands of times—numbers that seem significant but are absolutely dwarfed by *Hamilton*’s worldwide impact.²⁶³ Since *Hamilton*’s market has not been affected by the Door McAllen’s performance, the fourth fair use factor actually weighs in favor of the church.²⁶⁴

*C. Reckon with the Effects of Fair Use on Religious Institutions*²⁶⁵:
Addressing Possible Counterarguments

Religious institutions have a long and complicated history of gaining religious exemptions with respect to established laws.²⁶⁶ It stands to reason then that any law that would make it more difficult for religious institutions to do their work would be met with hesitation from those institutions.²⁶⁷ The following Subsections of this Note address potential concerns religious institutions may have with imposing a stricter religious exemption to the Copyright Act.²⁶⁸

1. “And So the Balance Shifts”²⁶⁹: Does It Make Sense to Impose a Higher Burden on Religious Institutions?

Obviously, holding religious institutions to a higher standard²⁷⁰ will lead to some objections; these institutions would likely argue that their

261. See Jeffrey Silverman, *The World Turned Upside Down: Hamilton, Disney+ and the Great Democratization of Musical Theater*, SAMBA TV (July 29, 2020), <https://www.samba.tv/resources/the-world-turned-upside-down-hamilton-disney-and-the-great-democratization-of-musical-theater> [https://perma.cc/ZN5U-CJ6Q].

262. *Id.*

263. See *id.*; Cartwright, *supra* note 143.

264. See 17 U.S.C. § 107(4) (2018).

265. See ORIGINAL BROADWAY CAST OF HAMILTON, *Your Obedient Servant*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). The original line is: “[A]s I reckon with the effects of your life on mine.” *Id.*

266. See *generally Religious Exemption Final Rule Frequently Asked Questions*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/faqs/Religious-Exemption-Final-Rule> [https://perma.cc/9VWM-52WW] (last visited Feb. 21, 2024) (highlighting religious exemptions at work in areas outside of copyright law).

267. See *generally* § 107 (imposing a higher burden on religious institutions with respect to copying than the current religious exemption does).

268. See *infra* Part IV.C.

269. ORIGINAL BROADWAY CAST OF HAMILTON, *Guns and Ships*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015).

270. See Copyright Advisory Services, *Fair Use*, COLUM. UNIV. LIBRS., <https://copyright.columbia.edu/basics/fair-use.html> [https://perma.cc/VG45-W77U] (last visited Feb. 21, 2024). The standard proposed in this Note is undoubtedly higher than the current standard

own artistic expression and creativity will be stifled under the proposed change to the religious exemption.²⁷¹ However, as previously stated, this burden is justifiable when weighed against the immense threat to creators without a stricter religious exemption in place.²⁷² If the religious exemption is not changed, religious institutions could continue to steal dramatic works and, under a law that does not protect them, creators will simply stop releasing works to be stolen and manipulated.²⁷³ Despite the higher burden on religious institutions, it simply does not make sense to continue honoring the current religious exemption while it violates the purpose of copyright law that is present in the Constitution.²⁷⁴

2. But, Do We Not Fight for Free Speech and Exercise?²⁷⁵ Addressing the New Rule's First Amendment Concerns

The First Amendment of the Constitution establishes two of the most fundamental rights for citizens of the United States: free speech and free exercise of religion.²⁷⁶ Under the First Amendment, the Door McAllen is perfectly free to express its religious beliefs how it chooses without fear of laws that restrict these choices.²⁷⁷ However, the “First Amendment protects us from the government impinging on our speech rights, but it doesn’t give us the right to say anything, anywhere we want.”²⁷⁸ It is perfectly legal to “limit[] others’ speech in private spaces,” such as the stages in a playhouse,²⁷⁹ especially when that speech

of “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 . . .” § 110(3).

To determine whether a use is or is not a fair use, always keep in mind that you need to apply all four factors. . . . You still need to evaluate, apply, and weigh in the balance the nature of the copyrighted work, the amount or substantiality of the portion used, and the potential impact of the use on the market or value of the work. This . . . approach to fair use is critical in order for the law to . . . meet innovative needs

Copyright Advisory Services, *supra*.

271. *See id.* In order to pass muster under fair use, religious organizations would have to work harder to ensure that their productions of dramatic, non-religious works pass the fair use test. *See id.*

272. *See supra* Part IV.A.

273. *See generally supra* Part III (detailing the problems with the current religious exemption).

274. *See* U.S. CONST. art. 1, § 8, cl. 8.

275. *See Cabinet Battle #2, on HAMILTON, supra* note 204. The original line is: “But sir, do we not fight for freedom?” *Id.*

276. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

277. *See id.*

278. Adam Kovacevich, *The First Amendment Protects Freedom of Speech, Not Your Right to Someone Else’s Megaphone*, RAPON SOC’Y (Aug. 2022), <https://riponsociety.org/article/the-first-amendment-protects-freedom-of-speech-not-your-right-to-someone-elses-megaphone> [<https://perma.cc/KD8U-YK5J>].

279. *Id.*

interferes with the constitutional rights of other private citizens—such as those of copyright protection.²⁸⁰

Furthermore, the concept of fair use was developed, in the words of Justice Ginsburg, as a “built-in free speech safeguard.”²⁸¹ The Door McAllen is perfectly free to use *Hamilton* without a license “under certain circumstances and for various purposes[,]” and these purposes are not restrictive in nature.²⁸² For example, if the sermon at the end of the Door McAllen’s performance invoking the plot of *Hamilton* to warn against the dangers of adultery stood on its own, it is likely that this would be a fair use, as the sermon would serve as both a criticism of the original play and a religious education to the church’s congregants.²⁸³ There are many ways in which the Door McAllen could have legally included *Hamilton* in its teachings, and a religious exemption requiring fair use in a church’s performance of a dramatic work only limits the exact action the Door McAllen took: copying the entire original play.²⁸⁴

V. CONCLUSION

Hamilton acknowledges the importance of “the benign influence of good laws [u]nder a free government”²⁸⁵ The effect of the current religious exemption on creators, however, has been far from benign.²⁸⁶ As the law currently stands, all a religious institution has to do to legally copy an entire creative work is add just enough religious subtext for their performance of the creative work to be considered a religious “service.”²⁸⁷ This poses an incredible threat to original creators, as the law leaves them susceptible to having their entire works stolen and manipulated by religious institutions without any legal remedy.²⁸⁸ This susceptibility violates the purpose of American copyright law as laid out in the Constitution; if creators can have their work stolen, they will not be

280. See U.S. CONST. art. 1, § 8, cl. 8.

281. Krista L. Cox, *The First Amendment and Copyright Law: Can't We All Just Get Along?*, ABOVE L. (Aug. 31, 2017, 3:20 PM), <https://abovethelaw.com/2017/08/the-first-amendment-and-copyright-law-cant-we-all-just-get-along> [<https://perma.cc/P22J-PF4P>].

282. *Id.* Permitted purposes include but are not limited to “criticism, comment, new reporting, teaching, research, and scholarship” *Id.*

283. See *id.*

284. See *id.* (detailing permitted uses of *Hamilton* that the Door McAllen could have adopted rather than putting on a copycat performance of the play); 17 U.S.C. § 107 (2018) (detailing same).

285. ORIGINAL BROADWAY CAST OF HAMILTON, *One Last Time, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. 2015).

286. See *supra* Part III.

287. 17 U.S.C. § 110(3).

288. See *supra* Part III.

incentivized to publish new creative works, and the progress of arts and sciences in society will ultimately come to a halt.²⁸⁹

To avoid such dire consequences on creators and copyright law at large, it is imperative that the language of the religious exemption be changed to clearly state that a religious institution performing a dramatic work must do so in a way that meets the fair use standard.²⁹⁰ This solution would eliminate the loophole created by the vague use of the term “religious services” in the religious exemption, as it would no longer matter whether the performance was part of a service; as long as the performance at issue is that of a dramatic work, it must be a fair use.²⁹¹ This change, though it imposes a higher burden on religious institutions, only does so to the extent that the institution decides to perform a dramatic work.²⁹² Additionally, this burden when weighed against the threat to creators and the purpose of copyright law in the United States renders a stricter religious exemption more than justifiable.²⁹³ The language of the religious exemption must be tightened in order to give creators some control over who tells their story.²⁹⁴

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289. See U.S. CONST. art. 1, § 8, cl. 8.

290. See *supra* Part IV.

291. See *supra* Part IV.

292. See *supra* Part IV.

293. See *supra* Part IV.

294. See ORIGINAL BROADWAY CAST OF HAMILTON, *History Has Its Eyes On You*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atl. 2015). Ironically, the original line is: “You have no control: Who lives, who dies, who tells your story.” *Id.*

* “Pride is not the word I’m looking for.” To Mom and Dad, my very first teachers who will leave me a legacy to protect, I owe everything. To my sister Deanna, you’re the closest friend I’ve got. To my Notes Editor Amanda Ricci and the *Hofstra Law Review* staff who worked like tomorrow won’t arrive to make my Note come to life, my dream came true because of you. To my Note advisor, Professor Irina Manta, whose Copyright class—the Zoom where it happened—absolutely inspired this Note. To Emily Grabow Yorke, my law school bird of a feather, I can’t look at this chapter of my life and not be thankful for all we’ve endured together. And finally, to Raymond James Sheridan, best of husbands and best of men, I’m dedicating every day to you.