1

Introduction

1.1 GOD AND COPYRIGHT

In 1984, at the age of 92, Herbert W. Armstrong, founder and leader of the Worldwide Church of God (WCG), penned his last work, *Mystery of the Ages*. *Mystery* begins by proposing that we live in "a world ridden with escalating crime and violence, immorality, injustice (even in its courts of law), dishonesty, corruption in government and business, and continual wars, pointing now to the final nuclear World War III" (Armstrong, 1985).[1] The world would be better, and saved from this "paradox of progress and degeneration," he proposes, by a proper, literal reading of the Bible. Armstrong perceived two primary obstacles to acceptance of such a reading: the general acceptance of evolutionary theory and an incorrect interpretation of Scripture by established Christianity.

In the remainder of the introduction, Armstrong recounts his own 1926 conversion from the world of business – advertising specifically – to religion, a conversion that culminated in the founding of WCG in 1968. Originally challenged by his wife's decision to celebrate the Sabbath on Saturday, he read both evolutionary theory and the Bible, deciding along the way that the Biblical text seemed to promise "death" and not damnation for those who were not saved. In this and other ways, he came to believe that established Christianity departed substantially from the Bible. Armstrong also wrote with millenarian urgency: As he argues in the last chapter, the Kingdom of God was to be a literal kingdom on earth, since "man has proven his utter incapability of ruling himself." The arrival of this kingdom was near, as "the last, final, brief resurrection of the Roman Empire by ten European groups or nations" had already begun. This final reincarnation of what he later calls the

[1] I refer to the online versions of these works, as they are readily available. All Armstrong references are from this edition of *Mystery*.

"United States of Europe," he says, "is to endure but a very short time. It is to fight against Christ at his Second Coming! That will be its end."

Armstrong had a very idiosyncratic vision of messianic time. For example, overpopulation would be solved by God's increase of the amount of arable land. In addition, "once the returning Christ conquers this earth, he will usher in an era of total literacy, total education – and give the world one, new, pure language." So too, the world's economy will be done with capitalism and wage labor (although Armstrong does not use those words): "never again will any person become rich from investing in the labors and creative ability of another person. No more stock markets, world banks, financing centers, insurance companies, mortgage companies, loan agencies, or time payments." Armstrong's description of the world to come is at times remarkably granular; in one passage, for example, he proposes that "Job will be director of worldwide urban renewal." He concludes by arguing that, after a thousand years of the Kingdom of God on earth and a final judgment in which those who are not saved die a final death, God will open the entire universe to humanity, and "we shall impart life to billions and billions of dead planets, as life has been imparted to this earth. We shall create, as God directs and instructs. We shall rule through all eternity!"

In the ensuing few years, WCG put over nine million copies of *Mystery* into circulation at no charge (*WCG*, p. 1113). Two years after Armstrong's death, however, WCG undertook substantial doctrinal revision. Many points of the theology of *Mystery* were abandoned, and seeking to "prevent a transgression of conscience by proclaiming what the Church considered to be ecclesiastical error," and in deference to "cultural standards of social sensitivity," the Church under the leadership of Joseph Tkach, Sr. both ceased publication of *Mystery* and destroyed excess inventory copies (Tkach, 1997b). The doctrinal revisions indeed affected core beliefs of WCG. For example, in Tkach's son's version of events, a central problem related precisely to Armstrong's embrace of the Sabbath on Saturday, which was connected in his mind to "Anglo-Israelism," the view that parts of Europe and the United States represented the lost Israeli tribes, and that they were accordingly going to receive preferential treatment when Christ returned.[2]

Tkach's son called Anglo-Israelism a "central plank" of WCG doctrine. He also thought that it "silently worked to foster racial prejudice" (Tkach, 1997a). Anglo-Israelite doctrine appears in the fifth chapter of *Mystery*; in it, Armstrong proposes that "the probability is that these [ancient Hebrew, chosen] people were all – or nearly all – of the white racial strain, unchanged since creation." (They were not, he argues repeatedly, all Jewish.) He then suggests that when God came to govern the Israelites by way of Moses, "one reason was to preserve the original physical racial

[2] "The peoples of the United States, the British Commonwealth nations, and the nations of Northwestern Europe are, in fact, the peoples of the Ten Tribes of the House of Israel. The Jewish people are the House of Judah" (qt. in Tkach, 1997a).

strain." The Biblical lost tribes reemerged in the years 1800–1804, "when national supremacy and economic dominance was to become theirs" as promised to Abraham (Armstrong, 1985). WCG officially abandoned Anglo-Israelism in 1995.

Not everyone thought Anglo-Israelism was problematic. In 1989, two former WCG ministers, Gerald Flurry and John Amos, formed their own Church, the Philadelphia Church of God (PCG), committed to the literal teachings of Armstrong. Flurry began work on a manuscript and started meeting with other disaffected church members, including Amos. Many of their concerns had to do with finances and other institutional arrangements, but Flurry was apparently particularly bothered by the withdrawal of *Mystery*. After an apparently contentious meeting on December 7, 1989, Tkach, Jr., fired Flurry and Amos. Flurry's son later referred to WCG doctrinal revisions as the "WORST SPIRITUAL SHIPWRECK SINCE THE FIRST-CENTURY CHURCH SPLINTERED ON THE ROCKS OF APOSTACY" (Flurry, 2006).

At this point, what otherwise might seem to be a story about internecine politics in fringe religious movements took an unusual turn. PCG faced a problem: access to *Mystery*, which not only was WCG no longer publishing, but for which it also owned the rights. By 1997, PCG had run out of available copies, and so it began making its own copies of *Mystery*, distributing them to its members free of charge. When PCG ignored a cease and desist demand from WCG, WCG sued for copyright infringement. PCG claimed the right to distribute the work under the First Amendment's Free Exercise clause, the Religious Freedom Restoration Act, and as Fair Use under the Copyright Act. In 2000, the Ninth Circuit issued a split ruling in favor of WCG, denying PCG's request for an injunction.

Several years later, after a protracted negotiating process, WCG sold the rights to *Mystery* and a number of Armstrong's other texts to PCG for $3 million (Flurry, 2006). In his own recounting of the litigation, Flurry's son could hardly contain himself:

> What did happen is this: They [WCG] sold us a storehouse of literature for an amount of money that, by our estimate, barely covered their legal costs, if even that. They retrieved no "profits" or "damages" from us. All their "overwhelming" victories in court were conditioned on them making Mr. Armstrong's works available. And in the end, they were exactly where they started before the case, money-wise, but having forfeited ownership of all 19 copyrights.
>
> (Flurry, 2006)

In recounting WCG's efforts to prevent his attendance at some of the proceedings, Flurry's son framed the issue as one of ethics:

> [WCG] wanted to strip away all the *historical* intrigue – the PASSIONATE spiritual and emotional involvement we had invested in this case, in this *way of life* under Mr. Armstrong. They knew we were righteously indignant – even angry – about

> what Tkachism had done. They knew we would intensely fight for our spiritual livelihood – so they didn't want us around. They wanted this battle to be fought between lawyers only – and over what they considered to be purely a legal matter involving the Copyright Act and "stolen" property.
>
> (Flurry, 2006)

In Flurry's view, the question was one of a way of life. The opposing view, he suggests, was merely a matter of "law."

In arguing that PCG was trying to preserve a way of life, Flurry calls attention to two things. The first is of course the way that PCG members used Armstrong's writings as part of what French philosopher Michel Foucault would call a "technology of the self" or an "ethos" – in this case, a coordinated set of doctrinal beliefs and material practices that constituted those who followed them as members of PCG. The second is the role of law – in this case Copyright – in fostering or inhibiting that form of life. As Flurry suggests, a decision in PCG's favor would foster PCG by enabling the easy dissemination of a text central to its members' beliefs. *Mystery* and the associated Armstrong writings that PCG obtained with it are not only central to PCG doctrine; as Flurry repeatedly emphasizes in his memoir, in PCG's view, they define its specificity, especially in relation to WCG and mainline evangelical Protestantism. On the other hand, what Flurry calls the "purely legal" construal of the dispute as being about the theft of property also had implications for PCG's way of life. A decision that PCG's use of *Mystery* was not a fair use would mean that PCG's ability to access that text would depend on both WCG's willingness to license or sell the rights to it and the successful negotiation of a price or fee. As Flurry's narrative makes apparent, neither of those conditions was guaranteed.

A copyright decision, in either direction, would thus necessarily be involved in the most intimate details of how members of PCG – and possibly WCG – understood themselves as people. In that way, the litigation illustrates the way that intellectual property (IP) law is deeply imbricated in shaping ways of life. In short, IP law is part of making people.[3] In a variety of ways, and in a broad set of social contexts, IP is intimately tied to how all of us understand ourselves as people, as well as the sorts of people we become. Religious practice and belief (or their absence) are central to most people's understanding of what it means to be human. Particularly with contemporary religious practices, there exists the real possibility that the foundational works would be under copyright, as original authorship would be both attributable and recent. The WCG case is not isolated; Scientology's use of copyright is most well-known in this regard. The Church claims that copyright can be used to preserve its doctrine and its use; critics see a bad faith effort to stifle dissent.[4]

[3] I draw the term from Hacking (1986); Hacking is working in a broadly Foucauldian spirit.

[4] For the Church, see its own statement on IP: "Scientology and Dianetics are technologies that work if applied exactly. If they are altered, the results will not be uniform. To safeguard the scripture and ensure it could never be altered or misused, Mr. Hubbard copyrighted all the

However, in any case where texts are involved, there are potential questions of copyright and originality, even in cases, such as the Dead Sea Scrolls, where the ancient text in question was reconstructed from fragments (for a summary and critical discussion, see Nimmer, 2001).

IP is also, on this account, a kind of power. At one level, it interacts with First Amendment discourse about the limits of state power to regulate expression or to regulate access to property. It is this sense of power that Flurry dismisses as mere lawyering. As Flurry recognizes, however, its ability to modulate ways of life is also an exercise of power. Of course, this view requires that we see power as more than the capacity of the state to repress. Instead, as I will develop over the course of the book, we need to see power in broader, social terms, where the repressive state apparatus is only one version. As Foucault puts it in a famous passage, "power produces: it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production" (1977, p. 194). In this regard, copyright can be seen as operating in at least two ways: as a regulation by law of traditional, judicial things like rights, and as an intervention into ways of life.

Interestingly, the Ninth Circuit's opinion in the WCG litigation evidenced both ways that copyright functioned. The majority proceeded in relatively formal legal analysis of the doctrinal requirements for fair use, finding that all four factors tended to push toward a ruling against fair use.[5] In particular, the Court noted that the first factor – the nature of use – which is generally the most important one in fair use litigation, worked against PCG. After all, there was nothing even remotely transformative about PCG's use of *Mystery*, since it was for religious instruction. The Court also found that the use, though perhaps instructive for individuals, nonetheless profited PCG by "providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of MOA

materials of the religion. While to guarantee that Dianetics and Scientology could not be misrepresented, he further trademarked many of the religion's identifying words and symbols. These copyrights and trademarks provide a legal mechanism by which to ensure Scientology's religious technologies are standardly ministered in exact accordance with scriptures and not altered by misappropriation or improper use. Over the years, unscrupulous persons have attempted, through dishonest conduct, to profit from the technologies of Dianetics and Scientology. The subjects were developed for spiritual salvation, not for anyone's personal enrichment. By owning the trademarks and copyrights of the religion and enforcing their proper use, the Church can ensure such ill-intentioned actions will never occur" (www.scientology.org/faq/scientology-in-society/why-is-everything-copyrighted-and-trademarked-in-scientology.html, accessed June 2018).

[5] In determining if a use is fair, and thus not infringement, Courts are to consider four statutory factors on a case-by-case basis: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107.

[*Mystery*] new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth" (*WCG*, p. 1118).

The Court then makes fairly short work of the second and third factors, finding that *Mystery* is a creative (not factual) work, that PCG copies the entirety of it, and that such copying is not like the home recording of a TV program to watch it later. Instead, "PCG uses the MOA as a central element of its members' religious observance; a reasonable person would expect PCG to pay WCG for the right to copy and distribute MOA created by WCG with its resources" (*WCG*, pp. 1118–1119).

Finally, the Court finds that PCG appropriation of the text damages WCG's market for those who might be interested in the Church because of *Mystery*, arguing that "PCG's distribution of its unauthorized version of MOA thus harms WCG's goodwill by diverting potential members and contributions from WCG" (*WCG*, p. 1119). That WCG did not plan to publish the book did not mean it no longer retained rights over the material, which it now found heretical.[6] WCG argued that it planned to produce an annotated version of the work (presumably with errors noted and explained); when PCG replied that the annotated text would not be the same and could not serve the same purpose as the original, the Court reiterated its original point: "the argument . . . misses the point. The fact remains that PCG has unfairly appropriated MOA in its entirety for the very purposes for which WCG created MOA" (*WCG*, p. 1120).

The fair use analysis, whatever one thinks of the outcome, is notable for its application of the four statutory standards and the effort to interpret the litigation in the terms suggested by traditional copyright analysis in terms of markets and market harm. Judge Melvin Brunetti's dissent, on the other hand, proposes that fair use be understood as an "equitable rule of reason." For the first factor, Brunetti argues that "the noncommercial and religious elements of PCG's use overwhelm any commercial aspects" and push toward a finding of fair use. After suggesting that the second and third are irrelevant in this case, he turns to the fourth. Here, he finds WCG's objections to continuing to distribute *Mystery* as dispositive in ruling that PCG is not depriving WCG of present or future market value, since "WCG's decision to cease publication of MOA, destroy inventory copies, and disavow MOA's religious message in the context of its doctrinal shift as a church demonstrates that MOA is no longer of value to WCG for" attracting tithing members (*WCG*, p. 1124). He then dissects the claim about a future annotated version:

> In contrast to PCG's evangelical use, the central purpose behind WCG's proposed annotated version of MOA is to identify Armstrong's historical, doctrinal, and social errors. The target markets for the two versions of MOA are different because it simply does not make sense for WCG to widely distribute an annotated MOA

[6] John Tehranian (2012) suggests that texts which occupy a "sacralized" social status (his example is J. D. Salinger's *Catcher in the Rye*) are more likely to succeed in warding off fair use claims. Here that is literally true.

> highlighting the errors of the original MOA to the general public in order to recruit new members.
>
> (*WCG*, p. 1124)

In short, as he concludes, "WCG appears less interested in protecting its rights to exploit MOA than in suppressing Armstrong's ideas which now run counter to church doctrine" (*WCG*, p. 1125). Unlike the analysis in the majority opinion, the dissent foregrounds precisely the questions of religion as a way of life, and the role that access to *Mystery* plays in it.

I do not wish to assess the validity of either argument. What I do want to emphasize is that their logics are subtly different. In ways that I will make explicit, the majority's focus on economic power and markets evidences one background set of assumptions about the social role of IP, and the dissent's emphasis on communal religious practices evidences another.

1.2 THEORIZING THE EXPANSION OF IP

In a general sense, IP – principally copyright, patent and trademark – seems to have insinuated itself into all aspects of life. It is in the mundane – the proliferation of brand logos on everything, or the sudden disappearance of videos from YouTube – and it is in the vital, as in the price of prescription drugs. This observation is reflected in academic work, where it has been commonplace over the last twenty years or so to claim that IP is rapidly growing in legal and social importance. For example, after citing debates around the patentability of the human genome, James Boyle puts matters this way:

> The genome is not the only area to be partially "enclosed" during this second enclosure movement. The expansion of intellectual property rights has been remarkable – from business method patents, to the Digital Millennium Copyright Act, to trademark "anti-dilution" rulings, to the European Database Protection Directive. The old limits to intellectual property rights – the anti-erosion walls around the public domain – are also under attack. The annual process of updating my syllabus for a basic intellectual property course provides a nice snapshot of what is going on. I can wax nostalgic looking back to a five-year-old text, with its confident list of subject matter that intellectual property rights could not cover, the privileges that circumscribed the rights that did exist, and the length of time before a work falls into the public domain. In each case, the limits have been eaten away.
>
> (2008, p. 46)

Boyle is one of the most prominent critics of the expansion of IP, and three of the expansions Boyle cites – patents on genetic code, the anti-circumvention provisions of the Copyright Act, and the expansion of trademark into anti-dilution – will be among the principal case studies of this book.

Legal developments do not occur in a vacuum, and there are technological, political, and larger economic forces at play. One of the most significant technological factors is digitization, as the move to digital technologies means that more aspects of daily life are covered by IP. For example, to read something on a computer requires making a copy of it in the computer's memory, so virtually anything done online involves copyright. More consequentially, perhaps, the Digital Millennium Copyright Act of 1998 made it illegal to tamper with copyright protection schemes built into things like DVD players, making it illegal to evade regional coding, copyright notices, and (frequently) advertising. Both the easy copying that the DMCA provision was designed to thwart and the way it tries to do so are affordances of digital technologies. On the political side, pressure by content owners is a significant factor in driving a steady upward ratcheting of IP law itself, which now lasts longer, covers more areas, and is treated as more important than ever before. For example, the Copyright Term Extension Act of 1998 retroactively extended copyright protections for twenty years, keeping Mickey Mouse out of the public domain for that period. In a more general sense, Susan Sell (2003) argued that the current expansion in IP was at the initiative of twelve pharma executives who engaged in a sustained campaign to make IP important to Congress, first as an international trade and competitiveness issue. Finally, the development of neoliberalism in the larger economy is, as I will demonstrate in detail, a significant factor both in driving changes in IP and in what those changes are. Neoliberalism has accompanied a relative decline in the importance of traditional, Fordist manufacturing to the economy, and the rising importance of immaterial goods and services.[7]

The expansion of IP is important to track and understand. But, as the story of Armstrong and *Mystery* indicates, behind it there is another question: what, exactly, does IP law *do*? More precisely, as an exercise in law, it is also an exercise in sociopolitical power.[8] Power comes in a variety of forms, of course, from social norms against smoking to spending by corporations to influence legislation. Law is thus only one institutional structure through which power operates, but it is nonetheless an important one, especially where, as here, IP is so central to culture. A moment's reflection will validate the further intuition that even legal power operates in different ways. A law requiring the installation of speed bumps, for example, operates on different premises from a law appropriating funds to hire more police officers,

[7] For neoliberalism, see the discussion in Chapter 2. For a succinct history, see Harvey (2005).

[8] The analysis here thus has much in common with critical legal studies and other critical or "postmodern" accounts of law. There is a rich literature, much of it important to what follows, on the nexus of IP and critical legal theories. For a survey, see, e.g., Craig (2019) (including a substantial literature review); Goodrich, Katyal, and Tushnet (2013) (giving their own theoretical backgrounds); and Tehranian (2012) (arguing that IP is central in preserving hegemonic social structures and norms). My emphasis on Foucault's later work, in particular on the different kinds of forms of power expressed by law, and on the ways that power exists as a process of subjectification, has received less emphasis (but not none, of course: see the discussion of Coombe, later).

even if the goal in both cases is to reduce speeding. An eighteenth-century public torture and execution is clearly premised on a different understanding of legal punishment than current debates about minimizing the pain experienced during an execution. It is that kind of question, about the nature of power expressed in IP, that this book addresses.

The core of my argument is that the kind of power expressed in IP is subtly changing. Initial evidence for this claim is that new doctrinal developments have been difficult to incorporate into traditional models of IP. For example, retroactive copyright extension is hard to square with a theory that says copyright is about incentives to create new works. Presumably, Walt Disney will be unmotivated by any changes in IP today. Trademark dilution, which allows action against expression that damages a brand's image in consumers' minds, is difficult to square with the standard theory that says that trademark is about avoiding consumer confusion. And the patentability of living organisms and (until recently) isolated genetic fragments is difficult to reconcile with the traditional view that products of nature should not receive patent protections. In cases such as these, I will argue, it is necessary to recognize that IP is performing a different and new social function, one that requires a rethinking of the kind of power expressed by IP laws and regulations.

I take my theoretical starting point from the work of Michel Foucault, for whom modern power has operated in two basic forms.[9] The first, associated with the social contract tradition, conceptualizes a rights-bearing, juridicial subject, for whom law operates as a system of constraint and coercion. That which law does not prohibit is allowed, and the most important questions revolve around the limits to law's ability to prohibit. The second, associated with the modern, administrative state, Foucault calls "biopower" or "biopolitics," and it is concerned with productively managing and even optimizing populations through such measures as public health and education programs. Biopower is thus fundamentally generative. Closely aligned with the rise of capitalism, biopower has emerged as central to the operation of the modern state, which tends to emphasize regulatory agencies and administrative law, even if it also retains a framework of judicial rights.

In the years since Foucault's death in 1984, it has become clear that biopower has at least two forms. One is concerned with the productivity of populations in a general sense, and can be seen in large-scale, publicly funded infrastructure programs. The second, a neoliberal variant, attempts to achieve many of the same results by directly incentivizing individual behaviors. The strategies and techniques of neoliberal biopolitics derive from an extension of economic reasoning to all factors of life. If classical liberalism attempted to allow markets to function,

[9] I offer a detailed analysis in the following chapter; the primary Foucault texts on this topic are all initially from the mid-late 1970s: *Discipline and Punish* [1975], *History of Sexuality, Vol. I* [1976], *Society Must Be Defended* [lectures from 1975–1976] and *Security, Territory, Population* [lectures from 1977–1978]. Foucault offers an initial reading of neoliberal theory, especially Gary Becker, in *Birth of Biopolitics* [lectures from 1978–1979].

neoliberalism not only tries to create markets where previously there had been none, it also understands problems and regulations only insofar as they are presented in market-oriented terms. Individuals are no longer rights-bearing subjects or equivalent members of a population; instead, they are understood to be economically rational agents, seeking to maximize their own outcomes. Good policies are those which are efficient in facilitating this process. For example, if developing human capital is a goal of government, then citizens need to understand themselves as involved in developing their human capital; a decision to pursue education or good health practices should be something that people make on the basis of expected returns on that investment. Similarly, people should avoid behaviors that are likely to damage their future earning capacity. This process of subject formation, accomplished through a complex web of nudges, pushes, legal strictures, environmental and architectural restraints, works to create the sorts of individuals who most easily work toward neoliberal biopolitical aims.

A quick look at the US Constitutional text suggests that IP exists at the nexus of juridical and public biopower.[10] The goal – progress in the arts and sciences – is clearly biopolitical, but the mechanism – property rights – is juridical. It is my central contention that IP has shifted markedly (if unevenly) in the last twenty years or so in the direction of neoliberal biopolitics. Even when they were economically justified, earlier iterations of IP functioned much more along the public biopower model, attempting to improve the welfare of the public as a whole, with provisions such as limits on term length designed to ensure that the public benefited as much and as quickly as possible. Neoliberal IP maintains the idea of welfare enhancement, but it grants many more rights to producers, and instead of benefiting the public at large, it increasingly targets individuals in the public directly, reconceptualizing them as consumers and their welfare in strictly economic terms.

At the same time, the expression of power in IP is deeply contested within the very institutions through which it operates. For example, the Supreme Court's patent jurisprudence has repeatedly insisted that IP is to be treated juridically, through standard judicial norms and vocabularies. Similarly, §1201 of the Copyright Act, which prohibits the circumvention of copyright protection technologies, has operated in practice to allow copyright owners to regulate how copyrighted material is consumed, strongly nudging individuals to approach this material only as paying customers, not as members of a more amorphous public. At the same time, the Copyright Office carves out periodic exemptions to the law for such public functions as education.

I thus trace, primarily through a series of studies of IP litigation, the contours of both the shift in statutory IP toward a neoliberal biopolitics and the various forms of

[10] Among the enumerated Congressional powers is: "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" (U.S. Constitution, Art. 1, §8, clause 8).