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Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace

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The author is not affiliated with any of the spiritual organizations discussed, nor has any of them endorsed this Article's analysis or conclusions. This Article is not intended to promote, criticize, or equate any of those organizations, their teachings, or their practices. Nor should it be construed as providing legal advice.

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This Article is dedicated to the memory of the author's cousin, Joel R. Oseroff.

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INTRODUCTION

Over the last four decades,¹ the proliferation of spiritual movements has led commentators to characterize their teachings and techniques, many of which are based on traditional Asian disciplines, as commodities² competing in a burgeoning "marketplace" for the time, allegiance, and funds of often-eclectic³ and sometimes-indiscriminate⁴ seekers.

1. This period has popularly been referred to as the "New Age," denoting not only the approach to and beginning of the third millennium but also the astrological conception that the "Age of Pisces" is ending and the "Age of Aquarius" beginning. See, e.g., Pontifical Council for Culture, The Vatican, *Jesus Christ, The Bearer of the Water of Life: A Christian Reflection on the "New Age"* (Feb. 3, 2003) (explaining derivation of term), at <http://www.petersnet.net/browse/4604.htm>, at 4 [hereinafter *Christian Reflection*]; JAMES RADO ET AL., *AQUARIUS* (1968) (song from long-running musical *Hair* indicates that the planets are approaching the astrological position that will usher in "The Age of Aquarius," which will be marked by "mystic crystal revelations/And the mind's true liberation"); DAN BROWN, *THE DA VINCI CODE* 268 (2003) (suggesting that the transition is one from an age in which "man must be *told* what to do" spiritually to one in which "man will learn the *truth* and be able to think for himself").

2. See, e.g., Richard Smoley, *Why the Enneagram? An Interview With Helen Palmer*, *GNOSIS*, Summer 1994, at 18, 22 (including a statement by interviewee that "[w]e are in a time now when the teachings are in the marketplace and on every metaphysical shelf from every tradition"); WADE CLARK ROOF, *A GENERATION OF SEEKERS* 195 (1993) ("Deeply influenced by a culture of consumption, boomers have grown up with religion made into a commodity and have looked on it in much the same way as other purchasable goods."); Richard Leviton, *Trademarking the New Age*, *EAST/WEST*, Mar. 1991, at 32, 36 ("What was formerly hard-won esoteric knowledge is now available in mass-market paperback. The metaphysical world has been turned inside out and dumped into the fertile American marketplace. Mystical truths now have a price tag as if they were consumer products."); *SPIRITUAL CHOICES* 1 (Dick Anthony et al. eds., 1987) ("To shop in today's psychospiritual market is to encounter a confounding diversity of offerings."); HARVEY COX, *TURNING EAST* 129-30 (1977) ("The greatest irony of the neo-Oriental religions is that in their effort to present an alternative to the Western way of life most have succeeded in adding only one more line of spiritual products to the American religious marketplace. They have become part of the 'consumer culture' they set out to call in question.").

3. See, e.g., *Christian Reflection*, *supra* note 1, at 4 (observing that "New Age" thinking "shares many of the values espoused by . . . the consumer culture," as indicated by "the rapidly-growing numbers of people" who create mixtures of Christian and New Age beliefs "by taking what strikes them as the best of both"); Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 *BUFF. L. REV.* 127, 165-66 (2003) (describing the emerging practice of "grocery cart religion," in which one "assembles her own bricolage religion after filling a grocery cart with pieces

As they have gained attention and adherents, spiritual groups have become increasingly involved in identifying their doctrines and practices—sometimes called "technologies"⁵—as intellectual property, and in bringing legal actions against alleged misappropriators. Though generally undiscussed, a growing body of caselaw concerning these works addresses the legal implications of their mysterious or reportedly unusual origins, their allegedly transformative (and even dangerous) effects, and their arguably scientific, as opposed to creative, nature. The Internet and World Wide Web, by fostering a "dramatic

from several different types of religious practice"); RICHARD CIMINO & DON LATTIN, *SHOPPING FOR FAITH: AMERICAN RELIGION IN THE NEW MILLENNIUM* 23 (1998) ("This 'pick-and-choose' approach to faith . . . will continue in the coming century."); RAM DASS [RICHARD ALPERT], *GRIST FOR THE MILL* 60 (1976) ("[A]t the beginning of the [spiritual] journey, you are very eclectic" and have "[m]any methods to choose from to the spiritual smorgasbord.").

4. ROBERT GREENFIELD, *THE SPIRITUAL SUPERMARKET* 212 (1975) ("By the mid-Seventies, the supermarket had grown so big, so truly American in size that anyone willing to chase the dream salesmen out of the doorway and offer a solution of his own would attract an immediate following."); CHOGYAM TRUNGPA, *CUTTING THROUGH SPIRITUAL MATERIALISM* 17 (1973) (warning that "if we regard knowledge as an antique, as 'ancient wisdom' to be collected [rather than to be assimilated into one's life and being], then we are on the wrong path"); THEODORE ROSZAK, *THE MAKING OF A COUNTER CULTURE* 145 (1969) ("[T]he young do not by and large understand what the traditions are all about. . . . In [the] turgid floodtide of discovery, sampling, and restive fascination They have happened upon treasure-troves long buried and are busy letting the quaint trinkets spill through their fingers.").

5. See, e.g., MARILYN FERGUSON, *THE AQUARIAN CONSPIRACY* 87 (1980) (asserting that new and newly-popular spiritual techniques "might be called *psychotechnologies*—systems for a deliberate change in consciousness"); DAVID V. BARRETT, *THE NEW BELIEVERS: A SURVEY OF SECTS, CULTS, AND ALTERNATIVE RELIGIONS* 429 (2001) (quoting Art Schreiber, Chairman of the Board of Directors, Landmark Education Corporation: "The nature and material of Landmark Education's programmes is based on a technology originally developed by Werner Erhard, which technology has been redesigned and updated by Landmark Education."); EUGENE G. D'AQUILI & ANDREW B. NEWBERG, *THE MYSTICAL MIND: PROBING THE BIOLOGY OF MYSTICAL EXPERIENCE* 207 (1999) (concluding that religious "ritual is an extremely powerful technology that in itself, is neither good nor bad"); Smoley, *supra* note 2, at 23 (quoting Helen Palmer: "There's so much similarity between the Buddhist, the Sufi, the Hindu, and the Western, the Christian models—of which the enneagram is one—and the Kabbalah; there's so much similarity in the sacred technology."); YEHUDA BERG, *THE 72 NAMES OF GOD: TECHNOLOGY FOR THE SOUL* (presenting a Kabbalistic technique of meditation based on visualizing triplets of Hebrew letters); see also *infra* notes 481, 482, and 485 and accompanying text (discussing the "technology" of the Church of Scientology).

expansion of this new marketplace of ideas,"⁶ provide not just another medium for the unauthorized dissemination of such works but also a new "marketplace" context in which to evaluate their trade secret status, as well as the fair use and merger defenses to the alleged infringement of their authors' copyrights.

This Article analyzes, in the context of three major sets of litigation, the extent to which spiritual teachings and techniques can be identified and protected as intellectual property. To examine in detail the background and evolution of the Arica Institute's copyright infringement claims in the late 1980s and early 1990s against authors (among them, several Jesuits) who reinterpreted and popularized its "enneagram" system of personality typology, Part I draws on an extensive range of contemporaneous sources: publications by Arica's founder and students; pleadings and trial transcripts; and a range of works interpreting the enneagram in a psychological or a religious context. This Part analyzes the resulting caselaw and settlement agreement, as well as their implications for the application to spiritual works of the doctrines of moral rights, copyright, trade secret, and trademark law.

Also discussed are the possibilities of copyrighting sequences of meditative movements as choreographic works, and of patenting such procedures (an especially uncertain approach, in light of the controversies that have surrounded the proposals to patent sports moves, the actual patenting of surgical techniques, and the increasing concerns about protecting the intellectual property of indigenous peoples).

Part II reviews and evaluates the sequence of trademark, trade secret, and copyright infringement actions brought in the mid-1980s through the mid-1990s by the Church of Scientology against unauthorized teachers or duplicators of its advanced material, both online and offline. Even as the Church's litigation generally shaped the contours of "cyberlaw," it forced courts to decide whether spiritual information could qualify as a trade secret, and to determine when that status was jeopardized or destroyed by the exposure of such material though the Internet. In addition, the Church's attempts to protect the

6. *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (striking down statute designed to protect minors from obscene or indecent material on the Internet).

confidentiality of its works implicated two separate First Amendment issues: the right of the press to publish brief quotations from closely-held documents, and the authority of the judiciary to assess the Church's claims about the dangers of exposing its religious material to the unprepared.

Part III addresses the copyright infringement lawsuit brought in 2001 by the developer of the Avatar self-awareness training program against the author of *The Source Course*, who had characterized this manual as the equivalent of the course materials that Avatar's students were not allowed to retain. The court of appeals opinion, handed down in April 2002, illustrated the continuing difficulty of assessing whether, and which elements of, a set of spiritual techniques constitute copyrightable expressions rather than uncopyrightable ideas. The district court's July 2003 decision, which analyzed the components of the two works and found some instances of copyright infringement, will certainly not be the last word on this general issue.

Part IV collects and examines the various reasons given by spiritual teachers, from Biblical times until today, to justify the secrecy of certain doctrines and practices; it also identifies several parallels with current issues of confidentiality in the psychotherapeutic profession. This Part concludes that legal redress for the unauthorized dissemination of such works can generally not be grounded in claims based on the materials' special spiritual nature; potential plaintiffs would be better served by fashioning their actions as traditional allegations of contractual breach and intellectual property infringement.

I. ARICA INSTITUTE⁷

A. *Background*

In April 1971, Oscar Ichazo began in the city of Arica, Chile, to lead in spiritual practices⁸ fifty-five people (the

7. The author was introduced to several of Arica's lower-level exercises and meditations in connection with his enrollment in public T'ai Chi courses offered by the New York School of T'ai Chi Ch'uan.

8. *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1058 (S.D.N.Y. 1991), *summary judgment granted*, 770 F. Supp. 188, *aff'd*, 970 F.2d 1067 (2d Cir. 1992).

"Chile Group"), many of them affiliated with Esalen, the pioneering "human potential" center in Big Sur, California.⁹ Ichazo, a Bolivian who demonstrated an extensive background in mystical traditions,¹⁰ directed the group through a variety of meditative exercises¹¹ and lectured on

9. See WALTER TRUETT ANDERSON, *THE UPSTART SPRING* 227 (1983) (indicating that "more than thirty . . . assorted Esalen leaders and Esalen followers" went to Chile for this experience, and quoting one of Esalen's founders: "Arica . . . cleared our bench"); see also TONY SCHWARTZ, *WHAT REALLY MATTERS: SEARCHING FOR WISDOM IN AMERICA* 75 (1995) ("Gestalt therapy, encounter groups, and [various] body-oriented therapies . . . all first came to wide attention at Esalen. . . . [T]he primary experiential testing ground for new approaches to the search for wisdom in America."); LAWRENCE LESHAN, *HOW TO MEDITATE* 17 (1974) ("[A]s Paris dictates the fad of the moment in women's clothing, Esalen Institute . . . dictates the fad of the moment in meditation.").

One commentator, discussing the wide variety of practices and experiences offered under the auspices of Esalen, suggested that this center itself "might be likened to a marketplace where different merchants present their wares." C. WILLIAM HENDERSON, *AWAKENING: WAYS TO PSYCHOSPIRITUAL GROWTH* 38 (1975). More colorfully, a (literally) era-defining essay commented that "Esalen's specialty was lube jobs for the personality." Tom Wolfe, *The Me Decade and the Third Great Awakening*, *NEW YORK*, Aug. 23, 1976, at 26, reprinted in TOM WOLFE, *MAUVE GLOVES & MADMEN, CLUTTER & VINE* 126, 145 (1976).

10. See *Arica Inst.*, 761 F. Supp. at 1058 (noting that Ichazo had studied Zen, Sufism, Yoga, Buddhism, Confucianism, *I Ching*, and the Kabbalah).

Sufism is "the generally accepted name for Islamic mysticism." ANNEMARIE SCHIMMEL, *MYSTICAL DIMENSIONS OF ISLAM* 3 (1975). The *I Ching*, or Chinese "Book of Changes," though popularly considered to be a manual for divination, is "one of the world's oldest books" and has also been seen "as a book of wisdom, containing the most profound lessons on how to live one's life in a changing and confusing world." JACK M. BALKIN, *THE LAWS OF CHANGE* 3 (2002). Kabbalah is "the traditional and most commonly used term for the esoteric teachings of Judaism and for Jewish mysticism, especially the forms which it assumed in the Middle Ages from the 12th century onward." GERSHOM SCHOLEM, *KABBALAH* 3 (1974).

11. See OSCAR ICHAZO, *INTERVIEWS WITH OSCAR ICHAZO* 175 (John Bleibtrau ed., 1982) [hereinafter ICHAZO, *INTERVIEWS*] ("[T]he first seven months of the [10-month training] comprised about sixty percent traditional methods and about forty percent new . . . techniques."). This book collects nine interviews, most previously published, including one by Sam Keen (see Sam Keen, "We have no desire to strengthen the ego or make it happy": A conversation about ego destruction with Oscar Ichazo, *PSYCHOL. TODAY*, July 1973, at 64, 69, reprinted as *Breaking the Tyranny of the Ego*, in ICHAZO, *INTERVIEWS*, supra, at 3, 15), that were conducted with Ichazo by a variety of different publications between 1973 and 1981. See also OSCAR ICHAZO, *LETTERS TO THE SCHOOL* 102 (1988) [hereinafter ICHAZO, *LETTERS*] (asserting, in a collection of four letters responding to "the constant assault on and misuse of the Arica material by plagiarists, and unauthorized trainings," *id.* at 9, that he had always

related topics. Among Ichazo's teachings was Protoanalysis, which he had previously presented to other groups in Chile,¹² subject to "an introductory agreement that the materials would be kept confidential."¹³

Twenty years later, Protoanalysis had become part of the third stage of "nine successive levels of dietary, physical, meditative, logical and analytical instruction"¹⁴ offered by the Arica Institute, Inc. ("Arica"). This element of Arica's system was described by Arica's Executive Director, Elliott Dunderdale, as:

an introductory approach to understanding the nine ego fixations. An ego fixation is an accumulation of life experience organized during one's childhood and which shapes one's personality. Arica training seeks to overcome the control and influence of the ego fixations so that the individual may return to the inner balance with which he or she was born.¹⁵

acknowledged the provenance of the traditional techniques, which he had introduced to give his students a wider background in systems of mysticism).

12. See OSCAR ICHAZO, *BETWEEN METAPHYSICS AND PROTOANALYSIS 1* (1982) ("[T]his theory was completed by me in 1960 when I began teaching it to small groups In 1968 I founded the Institute of Gnosiology in Santiago, Chile, with a branch in the city of Arica Most of the work at this time was also [taught in] the Institute of Applied Psychology in Santiago, Chile.")

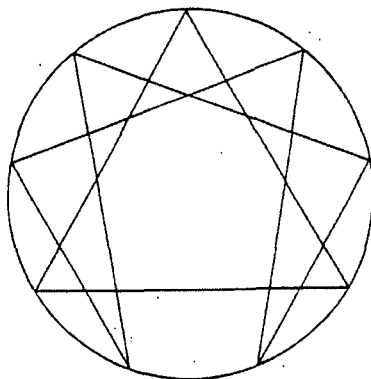
13. *Oscar Ichazo Interview with Professor Effross*, 3 *SYMBOL* 9, 15-16 (2003) [hereinafter Ichazo, *SYMBOL*]. That article reproduces the author's questions and the responses e-mailed to him by Mr. Ichazo in early 2003.

14. *Arica Inst.*, 761 F. Supp. at 1058.

By early 2003 these levels encompassed approximately thirty different trainings, and were supplemented by eleven other "group work trainings or practices." Ichazo, *SYMBOL*, *supra* note 13, at 18-19 (identifying such trainings).

15. Elliott Dunderdale Affidavit in Support of Preliminary Injunction and Temporary Restraining Order at 6-7, *Arica Inst.* (90 Civ. 5153) [hereinafter Dunderdale Affidavit]; see also ICHAZO, *LETTERS*, *supra* note 11, at 68 ("Though an understanding of the fixations is indispensable for opening the process of self-observation in the Arica system, the fixations are just a foundation."); CLAUDIO NARANJO, *ENNEA-TYPE STRUCTURES 1 n.1* (1990) [hereinafter NARANJO, *STRUCTURES*] (observing, as former student of Ichazo's, that "Protoanalysis constitutes the first stage in a process" of spiritual clarification); Judith P. Smith, *The Arica Training: A Resocialization Process Within the Human Potential Movement 17* (1972) (unpublished dissertation for degree of Master of Social Work, Smith College School for Social Work) (on file with author). Smith quotes unpublished Arica materials that described Protoanalysis as "[a] study of the human personality, individually and socially. In the practical work the student uses the tools of protoanalysis to reduce his own negativity and subjectivity which enables him to contact the higher levels of consciousness." *Id.*

To discuss the nine different "fixations" and their interactions, Ichazo employed a figure known as the enneagram (or, in Arica's terminology, the enneagon):¹⁶ a circle on whose perimeter are nine evenly-spaced points, each of which is connected to two of the other points by lines that span the interior of the circle.



Although of undetermined origin,¹⁷ this figure had previously appeared in other philosophical contexts, most notably in the work of the mystic G.I. Gurdjieff¹⁸ several

16. According to Dunderdale, the terms "enneagon" and "enneagram" are interchangeable. *Arica Inst.*, 761 F. Supp. at 1058 n.3. Thus, except for direct quotations that include the term "enneagon," this Article will, like the district court, *id.*, use the term "enneagram."

This Article uses the term, "Aricans" to designate the members of the Arica Institute, Inc., rather than natives or residents of Arica, Chile.

17. Dunderdale testified that "Enneagons have appeared throughout history . . ." Transcript at 292, *Arica Inst.* (90 Civ. 5153) [Hereinafter the pages of the transcript of the trial, which took place on March 12, 15, and 18, 1991, are referenced by the prefix "TR" and identification of the individual testifying]; see also ICHAZO, INTERVIEWS, *supra* note 11, at 112 ("About the enneagon, all that we have is a legend; we don't have historical data. But it is said that it is extremely old, extremely old.").

18. Mystery still surrounds the background, sources, and implications of the teaching of G.I. Gurdjieff (c.1870-1949), a Russian/Greek/Armenian mystic who in the early decades of the 20th century taught not only self-awareness techniques but also spiritual and philosophical theories to groups of seekers in Russia, Europe, and the United States. See P.D. OUSPENSKY, IN SEARCH OF THE MIRACULOUS 286 (1949) [hereinafter OUSPENSKY, IN SEARCH] (quoting, in the author's account of Gurdjieff's work with students in Russia from 1915 to 1918, Gurdjieff's claim that "[t]he teaching whose theory is here being set out is completely self-supporting and independent of other lines and it has been completely unknown up to the present time"); see generally JAMES MOORE,

decades earlier. The mathematician P.D. Ouspensky, a leading student of Gurdjieff, insisted that "[t]his symbol cannot be met with anywhere in the study of 'occultism,' either in books or in oral transmission. It was given such significance by those who knew, that they considered it necessary to keep the knowledge of it secret."¹⁹ A biographer of Gurdjieff and Ouspensky concurred: "if the disciples of Gurdjieff have in fact discovered the figure [in other systems of thought], they have kept it very quiet."²⁰

Ichazo claimed to have discovered the enneagram in the 1940s in various readings, including a medieval book and the work of Ouspensky, and to have participated in 1950 in "long discussions about the work of Gurdjieff and Ouspensky" with "a closed study group" to whom he explained the relationship of these concepts to those of Greek philosophy.²¹ Indeed, he asserted that "[b]efore reading [Gurdjieff] I found all the same ideas totally developed in the Pythagorean, Platonic, Stoic, Hermetist, Gnostic, and Kabbalist traditions [T]hey are all obvious, basic postulates."²²

In any event, although commentators have attempted to link the fixations with elements of the works of

GURDJIEFF (1991) (biography, and discussion of Gurdjieff's teachings); JAMES WEBB, *THE HARMONIOUS CIRCLE* (1980) (history of Gurdjieff, his followers, and his ideas).

19. OUSPENSKY, *IN SEARCH*, *supra* note 18, at 287; *see also* 2 MAURICE NICOLL, *PSYCHOLOGICAL COMMENTARIES ON THE TEACHING OF GURDJIEFF & OUSPENSKY* 379 (Shambhala 1985) (1980). Nicoll, a prominent student of Gurdjieff and teacher of his system, observed that the enneagram "is peculiar to this teaching. It is found nowhere else. When it was first given by [Gurdjieff] he observed that several things in this system could be found in other ancient systems of esoteric teaching, but not the [e]nneagram." *Id.*; *see also id.* at 379-91, 402-38 (providing extended discussions of the principles illustrated by the enneagram).

20. WEBB, *supra* note 18, at 505; *see also id.* at 505-519 (linking the enneagram to the work of: Pythagoras; Ramon Lull, a thirteenth-century mystic; Athanasius Kircher, a seventeenth-century Jesuit; and the Kabbalists).

21. *See* Andrea Isaacs and Jack Labanauskas, *Interview With Oscar Ichazo*, ARICAN, Autumn 1996, at 8, 23 (originally published in the November, December, and January 1995-96 issues of the ENNEAGRAM MONTHLY) [hereinafter *Ichazo, Isaacs Interview*].

22. Oscar Ichazo, *Letter to the Transpersonal Community*, ARICAN, *TEACHINGS OF THE GREAT TELESMA*, 1991, at 87, 93 [hereinafter *Ichazo, Transpersonal*]. Ichazo has credited his "ability to have a profound understanding of [the] main doctrines and practices" of traditional Sufi sects to his study of "Platonic, Aristotelian, and Neoplatonic sources." Ichazo, *SYMBOL*, *supra* note 13, at 17.

Chaucer,²³ Dante,²⁴ and Homer,²⁵ Ichazo seems to be the first²⁶ to have publicly identified these nine personality

23. Claudio Naranjo identified correspondences between the nine fixations and famous fictional characters, including several of the pilgrims of Chaucer's *Canterbury Tales*. CLAUDIO NARANJO, TRANSFORMATION THROUGH INSIGHT: ENNEATYPES IN LIFE, LITERATURE AND CLINICAL PRACTICE 243-44 (1997) [hereinafter NARANJO, TRANSFORMATION] (identifying Chaucer's "Oxford Cleric" as an "Enneatype 5"); *id.* at 347-49 (identifying the Friar as an "Enneatype 7"); *id.* at 395-97 (identifying the Miller and the Summoner as examples of "Enneatype 8"); *id.* at 439 (identifying the Host as an "Enneatype 9").

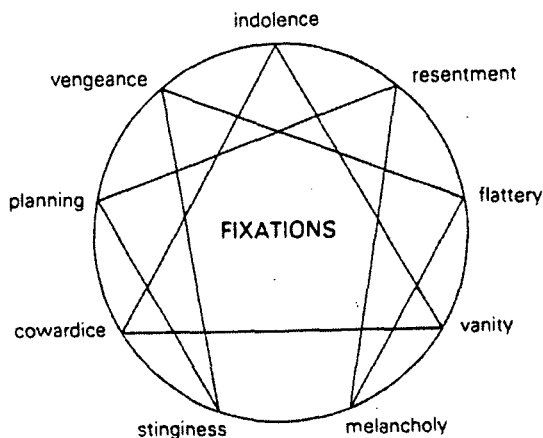
24. See HELEN PALMER, THE ENNEAGRAM IN LOVE & WORK: UNDERSTANDING YOUR INTIMATE & BUSINESS RELATIONSHIPS 21 (1995) [hereinafter PALMER, LOVE & WORK] (discussing parallels, in Chaucer's *Parson's Tale* and Dante's *Purgatorio*, to the spiritual transformations of each of the nine types). In light of suggestions that the enneagram appears in Sufi mysticism, see *infra* notes 66, 156, 166, 176, 184, 186, 196 and 204 and accompanying text, it is significant that several scholars have detected an Islamic influence on Dante. See, e.g., Paul A. Cantor, *The Uncanonical Dante: The Divine Comedy and Islamic Philosophy*, 20 PHILOSOPHY & LITERATURE 138, 140 (1996) (analyzing "Dante's debt to Islamic thought in general and to one Islamic philosopher [Averroes] in particular"); Vincente Cantarino, *Dante and Islam: History and Analysis of a Controversy*, in A DANTE SYMPOSIUM, at 175-198 (William de Sua & Gino Rizzo, eds. 1965) (discussing perspectives on this issue); MIGUEL ASIN PALACIOS, ISLAM AND THE DIVINE COMEDY xiv (Harold Sutherland ed. & trans., 1968) (1919) (concluding that Islamic sources provide "a key to much that had already been accounted for, and to what was still obscure, in the Divine Comedy").

25. See Andrea Isaacs & Jack Labanauskas, *Conversation with Michael Goldberg*, ENNEAGRAM MONTHLY, Feb. 2001, at 1, 21-22 (suggesting a correspondence between the internal path among the points of the enneagram and the hero's journey in THE ILIAD and THE ODYSSEY). Yet the enneagram has found audiences beyond spiritual seekers and literary critics: for example, the Central Intelligence Agency engaged Goldberg to discuss with them the diagram's implications for "how leadership works in real life." *Id.* at 22.

26. Gurdjieff often referred to the "chief features" of individuals in his group, yet taught that personality "types and their differences cannot be defined in ordinary language, and the language in which they could be defined you do not as yet know and will not know for a long time. . . . There are things for the understanding of which a different being is necessary." OUSPENSKY, IN SEARCH, *supra* note 18, at 246; see also P.D. OUSPENSKY, THE FOURTH WAY 177 (Arkana 1986) (1957) [hereinafter OUSPENSKY, FOURTH WAY]. In a collection of his own lectures, Ouspensky indicated that "[c]hief feature or chief weakness is in false personality. . . . Our language has often no words, no forms to describe it and it can only be indicated in a roundabout way." *Id.*

It appears, though, that Gurdjieff did not explicitly link to the enneagram the kinds and identification of chief features. See DON RICHARD RISO & RUSS HUDSON, UNDERSTANDING THE ENNEAGRAM 32 (rev. ed. 2000) [hereinafter RISO & HUDSON, UNDERSTANDING] ("Gurdjieff never taught anything about a system of understanding character related to the Enneagram symbol."); Michael J. Goldberg, *Inside the Enneagram Wars*, L.A. WEEKLY, Oct. 15, 1993, at 16, 18 ("Gurdjieff never explained the Enneagram as a coherent personality system."). Ichazo has asserted that Gurdjieff's "chief feature" method "was never clear and

categories²⁷ and to assign them specific correspondences to the nine points of the enneagram.²⁸



He also introduced several other enneagrams,²⁹ which differed not geometrically but only in the terms used to label their nine points, to elaborate on the nine basic

was mainly an artistic expression of the power of observation of Mr. Gurdjieff, who could find what was ridiculous in all his friends." Ichazo, *Transpersonal*, *supra* note 22, at 115.

The absence of an earlier known work associating the enneagram with personality types, and of a battle by competing scholars or commentators over access to such a document, distinguish this situation from that of the Dead Sea Scrolls, examined in depth in David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001).

27. At trial, Dunderdale agreed that a fixation was essentially the same as a personality type. See Dunderdale Testimony, TR 343 (providing an affirmative response to the question, "Is a fixation similar or identical to personality feature?"). Helen Palmer and others who wrote about the enneagram similarly equated the two. See, e.g., Palmer Testimony, TR 224 ("For fixation you could read personality type."); DON RICHARD RISO, PERSONALITY TYPES: USING THE ENNEAGRAM FOR SELF-DISCOVERY (1987) [hereinafter RISO, PERSONALITY TYPES]; RICHARD ROHR & ANDREAS EBERT, DISCOVERING THE ENNEAGRAM 3 (Peter Heinegg trans., 1991) [hereinafter ROHR & EBERT 1991] (stating, in introductory paragraph, that the enneagram "shares with many other typologies the crude reduction of human behavior to a limited number of character types").

28. The diagram at the top of this page appears in Keen, *supra* note 11, at 64, 69, reprinted as *Breaking the Tyranny of the Ego*, in ICHAZO, INTERVIEWS 3, 15.

29. See *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1070 (2d Cir. 1992). These include enneagrams labeled Passions, Traps, Holy Ideas, Virtues, Preservation, Social, and Sexual. See *infra* notes 73-79. A total of 108 enneagrams are used in the various Arica trainings. Dunderdale Testimony, TR 422.

fixations and to indicate how an individual could achieve greater spiritual clarity by overcoming her particular fixation. Ichazo employed the enneagram as a central tool of his system of consciousness-enhancement, and used this figure to explain the internal relationships³⁰ within many different classes of nine elements. As complex as this system was—for instance, it actually identified three different fixations for each individual³¹—Ichazo claimed to have suddenly and directly apprehended its validity:

I didn't receive the enneagrams from anybody They came to me, 108 in all, as in a vision, showing their internal relationships with complete clarity, in 1954 in Santiago, Chile. Since then, they have never required any correction or change. . . . I never considered [them] my invention, but a discovery as scientific discoveries are, with exactly the same qualifications of being verifiable and objective. . . . [They] reflect something real in human nature itself. We feel³² that the categories have been discovered rather than invented.

Elsewhere he indicated that, as opposed to "the multitude of modern psychological doctrines," Arica's "psychological model . . . allows us to see all our

30. Although it is beyond the scope of this Article to explore the internal dynamics of the enneagram, that topic has been the subject of intense interest among Aricans and various enneagram authors discussed *infra*, Parts I.C through I.E. See, e.g., OSCAR ICHAZO, THE HUMAN PROCESS OF ENLIGHTENMENT AND FREEDOM 63-67 (1976) [hereinafter ICHAZO, HUMAN PROCESS] (discussing the dynamics of each fixation in relation to the others); ROHR & EBERT 1991, *supra* note 27, at 199 ("In situations of stress, people searching for relief and consolation move . . . to another type on the Enneagram that is the stress point. . . . [O]n the way to spiritual maturity, . . . we move . . . to our 'consolation point.' "); HELEN PALMER, THE ENNEAGRAM 7 (1988) [hereinafter PALMER, ENNEAGRAM] (claiming that "each [type] is actually a composite of three major aspects—a dominant aspect, which identifies a type's world view, and two additional aspects that describe behavior in security or under stress").

31. Ichazo asserts that from his first presentation of Protoanalysis in Chile in 1968, it involved the identification of *three* separate fixations for each individual, corresponding to the three basic psychological "instincts" that his theory posits. See Ichazo, SYMBOL, *supra* note 13, at 9-10 (discussing the instincts); see also NARANJO, TRANSFORMATION, *supra* note 23, at 501 (observing that Ichazo further subdivided each of the nine "basic type[s] of ego (characterized by a single passion and fixation) [into] three varieties according to the predominance of the sexual, self-preservation or social drive").

32. ICHAZO, LETTERS, *supra* note 11, at 70-72; see also *id.* at 84 ("The nine fixations . . . are based upon our proven scientific knowledge of the anatomical description of the systems of our body, as well as our physiological functions. Because of this, I am not coming from thin air or inventing anything.").

psychological processes with exactitude, transparency, rational classification, and precise definitions."³³

The ten-month training of the Chile Group ended in April 1971. Later that year, Ichazo and a number of the group's members moved to New York City to create the Arica Institute, a tax-exempt corporation authorized to conduct charitable and educational services.³⁴ In a September 1971 full-page advertisement in the *New York Times*,³⁵ Arica offered to the public at large the first of several three-month courses³⁶ in Ichazo's system of teachings and practices, intended "to develop the whole human being and to enable individuals to clarify their consciousness and achieve enlightenment."³⁷ One interviewer of Ichazo described Arica's curriculum as "an amalgam of techniques and disciplines taken from esoteric and religious traditions of the East and West that have been streamlined to give modern Americans a practical path toward almost guaranteed enlightenment," and characterized the Institute as "the nearest thing we now have to a university for altered states of consciousness."³⁸

33. Oscar Ichazo, *The School*, ARICAN, Winter 1990, at 47, 58 [hereinafter Ichazo, *School*].

34. See Dunderdale Testimony, TR 270; see also Dunderdale Affidavit at 4-5, *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1058 (S.D.N.Y. 1991) (90 Civ. 5153).

35. See *The Mosquito that bites the Iron Bull*, N.Y. TIMES, Sept. 28, 1971, at C30 (indicating that Ichazo and forty-two members of the Chile Group were to teach a forty-four part curriculum, of which the first part was entitled, "essence and personality"; the fourth part, "the meditation enneagram"; the fifth part, "protoanalysis and fixation"; and the thirty-third part, "the karma enneagram"). The title of the advertisement appears to refer to a Zen expression for something "incomprehensible by intellectual thinking." Kazuaki Tanahashi, *Glossary and Index*, in MOON IN A DEWDROP: WRITINGS OF ZEN MASTER DOGEN 257, 309 (Kazuaki Tanahashi ed., 1985).

36. Arica's first three-month training began in the fall of 1971, and was followed by two more three-month trainings. John C. Lilly & Joseph E. Hart, *The Arica Training*, in TRANSPERSONAL PSYCHOLOGIES 329, 332 (Charles T. Tart ed., 1975) (indicating that seventy-six students entered this training); see also ADAM SMITH [GEORGE J.R. GOODMAN], POWERS OF MIND 254 (1975) ("The course was for three months, six days a week, fourteen hours a day, and it cost \$3,000."). In this context, "transpersonal" has been defined as "of, relating to, or being psychology concerned [especially] with esoteric mental experience (as mysticism and altered states of consciousness) beyond the usual limits of ego and personality." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1255 (10th ed. 1995).

37. Dunderdale Affidavit at 5, *Arica Inst.* (90 Civ. 5153).

38. Keen, *supra* note 11, at 64, 64, reprinted as *Breaking the Tyranny of the Ego*, in ICHAZO, INTERVIEWS 3, 5.

Arica trained interested students to become teachers of its system. According to Executive Director Dunderdale, by 1991 the Institute had approximately 300 teachers in forty training centers in the United States, South America, Europe and Australia,³⁹ and 250,000 people had taken one or more levels of its trainings or otherwise "had some significant interaction" with it.⁴⁰

Unlike the Arica Institute itself, the training centers were conducted for profit, as independent licensees.⁴¹ As Dunderdale testified, the training centers "pay a license fee per training manual, to use a particular proprietary training manual, and they pay a royalty to Arica based on the tuition amounts received for particular trainings."⁴² Not only training manuals but books, and issues of the journal, *The Arican*, were among the more than forty works copyrighted by Arica by 1991.⁴³ Arica's copyrighted material

Though he asserts that has credited various mystical traditions for elements of Arica trainings, see *supra* note 11, Ichazo prepares all trainings and lectures for Aricans. Ichazo, SYMBOL, *supra* note 13, at 14-15 ("[Arica's] trainings are developed by me . . . [T]he Arica work is unique and original in itself.").

39. Dunderdale Affidavit at 5, *Arica Inst.* (90 Civ. 5153).

40. Dunderdale Testimony, TR 280. Arica trainings are designed for students who "have a regular job and a regular life and it's not designed to impede in any of that"; it is possible to complete all nine levels over a period of two to three years. *Id.* at 278, 373.

41. *Id.* at 369; see also HENDERSON, *supra* note 9, at 167 ("The Teaching Houses [in fifteen specified locations], though they coordinate with [the Institute's headquarters in] New York, are really independent and self-sufficient. So you will discover that while the training follows a similar format, prices may vary to some degree.") In many cases, the trainers worked for Arica for nominal or no salary. See Annette Duffy, *Arica: Opiate of the Elite*, VILLAGE VOICE, Jan. 27, 1975, at 6, 8 (observing that being an Arica trainer "is not always a paying career").

42. Dunderdale Testimony, TR 374. The licensing agreement contains provisions concerning "guidelines for copyright notation on advertising, the status of the licensee in relation to the Arica Institute"[;] "a royalty agreement"[;] quality control guidelines and recordkeeping and enrollment form guidelines. "It also contains a proviso for returning the training manuals and materials." *Id.* at 287.

43. *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1059 (S.D.N.Y. 1991), summary judgment granted, 770 F. Supp. 188, *aff'd*, 970 F.2d 1067 (2d Cir. 1992). This journal, several issues of which are available in the Library of Congress, was later replaced by *The Symbol*, whose readers are required by Arica to sign a confidentiality agreement.

The current version of this agreement, in use virtually unchanged for at least a decade, extends to forty-nine pages, and governs the Arica trainers' use of the organization's trademarks, service marks, trade secrets, and copyrighted material. Arica Institute Sponsor License Agreement (on file with author); see

also included eight separate volumes of *The Lectures of Oscar Ichazo*, deposited as unpublished works with the Copyright Office in 1973⁴⁴ after having been transcribed by Dunderdale from audiotapes surrendered to Arica by almost all of the members of the Chile Group.⁴⁵

also infra note 698 (discussing confidentiality provision at issue in another litigation).

44. TR 374; TR 412-13; *Arica Inst.*, 761 F. Supp. at 1059 (referring to "approximately 46" works copyrighted by Arica); 970 F.2d at 1070 (referring to "approximately 47 [copyrighted] training manuals, books, and journals"). Though these volumes, as well as four different Arica training manuals, are deposited with the Copyright Office as unpublished works, they are available for inspection at that Office (Room 402 of the James Madison Building in Washington, DC) by anyone willing to pay a fee for their retrieval from the warehouse and to sign a form agreeing to the following conditions:

1. Anyone copying this work without the copyright owner's permission may become liable for infringement of the copyright.
2. The copyright law (Title 17, United States Code) provides that all works deposited and retained in the Copyright Office shall be open to public inspection (section 705), subject, however, to the exclusive rights granted to the copyright owner (Sections 106 through 118).
3. Note: Request for photocopies in connection with litigation or with the written authorization of the copyright owner should be referred to the Head of the Certification and Document Section.
4. Title of the Work: ___ Registration No.: ___ Copyright Year Date: ___

5. I hereby agree that I will not copy by any means whatsoever any of the above-mentioned works, and furthermore that I will not mark, mutilate, or otherwise deface or alter any of the material whose inspection I have hereby requested.

6. Request for Inspection of Copyright Deposit.

A supervisor at the Copyright Office provided in a telephone interview the text of the this form, but would not furnish a copy of the form itself, asserting that it was an "internal" document. Telephone Interview with Jarletta Walls, Supervisor, Copyright Office (Jan. 16, 2003). *See generally* U.S. Copyright Office Circular 6, "Obtaining Access to and Copies of Copyright Office Records and Deposits," available at <http://www.copyright.gov/circs> (last visited Sept. 18, 2003); 17 U.S.C. § 408(b)(1) (requiring, for copyright registration, deposit of "one complete copy" of an unpublished work); *see also* Ichazo, SYMBOL, *supra* note 13, at 20 (indicating that "I am not concerned" that this material is available for public viewing).

45. *Arica Inst.*, 761 F. Supp. at 1058; Dunderdale Testimony, TR 277. Dunderdale testified that in Chile, "Oscar would address either the entire work group or small groups or individuals in individual work sessions and . . . as far as I know, almost every single one of those lectures was tape recorded" by students. Dunderdale Testimony, TR 275-76; *see also* JOHN C. LILLY, THE CENTER OF THE CYCLONE 141 (1972) [hereinafter LILLY, CENTER] (In mid-1970, "Oscar was doing a lot of individual work. Each student would take a tape recorder to each session and record everything that was said."); *id.* at 180-96 (reproducing a transcription of such a discussion between Lilly and Ichazo).

One court stated that the instruction manuals were to be returned to Arica by students at the end of their training.⁴⁶ However, Dunderdale distinguished "proprietary training manuals," which were returned to Arica by the franchise teaching centers at the end of each training, from student training manuals, "which students may purchase and keep."⁴⁷

Perhaps the most widely-disseminated discussion of Arica's work was provided by Ichazo in a 1973 interview with Sam Keen of *Psychology Today*.⁴⁸ In the context of Ichazo's distinction between one's "ego" (or, acquired traits of personality) and one's natural "essence,"⁴⁹ and to

Dunderdale testified that the transcriptions were "kept within Arica's archives and used exclusively for research purposes and archival historical purposes." Dunderdale Testimony, TR 281.

The practice of allowing individual students to tape-record Ichazo's remarks continued in at least one of the early trainings in New York. See SMITH, *supra* note 36, at 256 ("Oscar's talks . . . always had something of the air of a Presidential press conference because there were always twenty microphones in front of him. Everybody with a tape recorder wanted his own cassette.") Smith did not indicate whether Arica required the surrender of these tapes as well.

46. *Arica Inst.*, 761 F. Supp. at 1059.

47. Dunderdale Testimony, TR 281-82. According to Dunderdale, "the majority of the material" in the proprietary manuals "is published and available in one way or another to the public," but these manuals contain schedules, timings, and exercise sequences that "are specifically for the purpose of conducting trainings and they wouldn't in and of themselves be in any particular benefit to the public." *Id.* at 286.

These manuals "are kept within the network of Arica teaching centers and these teaching centers are licensed by the Institute to use the training manuals and then return them at the end of the trainings." *Id.* The teaching centers license these materials from the Arica Institute, which maintains a log to confirm the return of the materials after each training. *Id.* at 286-87.

48. See ICHAZO, INTERVIEWS, *supra* note 11, at 22 (including interviewer's statement that the magazine was read by "three million people a month").

49. *Id.* at 9 ("In essence, every person is perfect, fearless, and in a loving unity with the entire cosmos. . . . Every human being starts in pure essence. Then something happens: the ego begins to develop; karma accumulates; . . . man falls from essence into personality.") Cf. C.S. NOTT, TEACHINGS OF GURDJIEFF 65 (1961). Nott quotes Gurdjieff as distinguishing between "essence," which "is the real part of us [and] does not change," and "personality," which "is an accidental thing, which we begin to acquire as soon as we are born When we speak of inner development and inner change, we speak of the growth of essence." *Id.*

Ichazo's system does not appear to define the "ego," or its role in an individual's mental and spiritual health, in the same fashion as did Freud. See Robert L. Lincoln, *The Relationship Between Depth Psychology and Protoanalysis* 16 (1983) (unpublished Ph.D. dissertation, California Institute of Transpersonal Psychology) (on file with author) ("Ichazo employs the term ego

illustrate his abbreviated example of one "ego type"⁵⁰ and its challenges,⁵¹ the magazine reproduced—and identified Arica as the copyright holder of—five enneagrams most closely associated with Ichazo's theories of spiritual types.⁵²

Although this article⁵³ surely sparked public interest in Arica's trainings, the dissemination of enneagram material would not for long remain within Arica's control.

B. *Tales Out of School (I): John Lilly's "Operational" Approach*

One of the most distinguished members of the Chile Group, one of the oldest (at 55 years old), and probably the most scientifically accomplished, was John Lilly. Noted one surveyor of the spiritual movements of the early 1970s,

to refer to a completely different structure from Freud's use of the same word."). Cf. SIGMUND FREUD, *The Ego and the Id*, in 19 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 25 (James Strachey ed., Hogarth Press 1961) (1923) ("The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions.").

50. See ICHAZO, INTERVIEWS, *supra* note 11, at 13.

51. *Id.* at 14 ("The indolent type goes out looking for the love and meaning he feels deprived of; he becomes a continual seeker, but never a finder. This is his trap. He is always searching outside of himself for what can only be found within. . . . [T]he remedy for indolence is . . . the idea of holy love."); *id.* at 15-16 ("With holy love comes the awareness that although the laws which govern reality are objective, they are not cold, because they lead to the creation of organic life that fulfills a cosmic purpose.").

52. *Id.* at 15-16, 18 (providing enneagrams of: Fixations; Traps; Ideas; Passions; and Virtues); see also Keen, *supra* note 11, at 64, 69-70, reprinted as *Breaking the Tyranny of the Ego*, in ICHAZO, INTERVIEWS 3, 15 (including the same diagrams, accompanied by Arica's copyright notation). One contemporary observer familiar with restrictions imposed on students of the Arica enneagrams noted that "[s]urprisingly, Ichazo recently allowed the publication of several enneagrams in *Psychology Today* . . ." Phyllis Masek Beauvais, Claudio Naranjo and SAT: A Modern Manifestation of Sufism? 108 (1975) (unpublished Ph.D. dissertation, Hartford Seminary Foundation) (on file with author). Yet to less public notice, even more of Ichazo's enneagrams were reproduced by Arica in a 1976 collection of five of Ichazo's lectures to Aricans. See ICHAZO, HUMAN PROCESS, *supra* note 30, at 35-42 (including enneagrams of the domains, energies, divine principles, psychocatalyzers, fixations, passions, and virtues); see also *id.* at 60-63 (explaining the nine "characters of the fixations," or fixation types); *id.* at 63-67 (discussing the dynamics of each fixation in relation to the other fixations).

53. Also appearing in this issue of the magazine was "Adam Smith" [George J.R. Goodman], *Alumni Notes—Altered States U*, PSYCHOL. TODAY, July 1973, at 75, 75-76 [hereinafter Smith, *Alumni Notes*] (discussing Smith's participation in an early Arica training in New York, and his talks with Ichazo). A version of this article appeared in Smith's *Powers of Mind*, *supra* note 36.

"Lilly had perhaps more academic credentials than anyone on the consciousness circuit. He was an M.D., a psychiatrist, a research neurophysiologist, and after a lot of work on the brain and sensory deprivation he worked with government and foundation aid on communicating with dolphins . . ."⁵⁴ Lilly's extensive scientific background, as well as his writings and lectures about his experiences with Ichazo and the Chile Group, undoubtedly attracted numerous seekers to Arica's trainings.⁵⁵ Yet his "operational" approach led him to publish many elements of Ichazo's closely-held teachings and techniques, to disassociate himself from Arica's larger mystical system, and ultimately to become disaffected from Ichazo's "esoteric school."

Lilly heard of Ichazo from Chilean psychiatrist Claudio Naranjo, who was then at Esalen, in the summer and fall of 1969.⁵⁶ Naranjo also taught Lilly and others some of Ichazo's spiritual exercises.⁵⁷ Impressed by one meditation sequence that Arica named "mentations," Lilly "pursued [them] further and began using them and teaching them in my own workshops."⁵⁸

54. SMITH, *supra* note 36, at 253. Lilly was the inspiration for the science fiction novels, ROBERT MERLE, *THE DAY OF THE DOLPHIN* (Helen Weaver trans., 1969) (1967) (based very loosely on his experiments in communication with dolphins) and PADDY CHAYEFKY, *ALTERED STATES* (1978) (based on Lilly's 1954 invention of, and later experiences in psychedelic drug use with, isolation tanks, also known as "sensory deprivation" or "flotation" tanks), and the subsequent movies (1973 and 1980, respectively) of the same names. See Andrew C. Revkin, *John C. Lilly Dies at 86; Led Study of Communication With Dolphins*, N.Y. TIMES, Oct. 7, 2001, at A30.

55. JOHN LILLY & ANTONIETTA LILLY, *THE DYADIC CYCLONE* 39 (1976) [hereinafter LILLY, *DYADIC*] ("Other people took the [Arica] training on the basis of my experience in Chile, recounted in lectures afterward. Other persons have taken the training on the basis of having read *The Center of the Cyclone*."); see also TIMOTHY WILSON, *ALL IS MY OWN DREAM* 331 (1982) (citing Lilly's book, in the author's account of his own experiences in Arica trainings, as encouraging his interest and enrollment in Arica); SMITH, *supra* note 36, at 293 (referring to *Center of the Cyclone* as "a cult book").

56. LILLY, *CENTER*, *supra* note 45, at 118 (observing that he knew Naranjo as "a West Coast psychiatrist with considerable background in mystical disciplines and a staff member of Esalen"); see also Audio tape: JOHN C. LILLY & CLAUDIO NARANJO, *A DAY WITH TWO SCIENTIFIC CONSCIOUSNESS EXPLORERS 1* (Sound Photosynthesis 1987) (recalling that Naranjo "wrote me a letter about Oscar, and I went down [to Chile] to see him").

57. LILLY, *CENTER*, *supra* note 45, at 119.

58. *Id.* (finding the mentations "an aid in terms of one's own thinking and in terms of teaching. . . . [O]ne places one's consciousness plus a specific idea in a

Lilly had just completed an extended report on "the processes of finding metaprograms and methods and substances [including LSD] which control, change, and create the basic metaprograms of the human biocomputer"⁵⁹—that is, the brain—and had declared that in "the province of the mind . . . what one believes to be true either is true or becomes true within limits to be determined experimentally."⁶⁰ He was thus attracted by Ichazo's emphasis on the empirical⁶¹ and experiential.⁶² However, on his one-week visit to Chile in May 1970 to assess Ichazo and decide whether to join the nascent Chile Group, Lilly did not disclose that "I did not like the idea of being in a closed group, esoteric or otherwise. I have pursued my own path, learning from whomever and wherever I could."⁶³

specific part of one's body"); see also *id.* at 119-22 (explaining this meditative process). Ichazo offered readers a brief summary of the mentations in his 1973 interview in *Psychology Today*. See ICHAZO, INTERVIEWS, *supra* note 11, at 12-13 ("Any question or problem you are considering can be thought through more completely by allowing each part of the body to become infused with consciousness."); see also ICHAZO, HUMAN PROCESS, *supra* note 30, at 84-86 (describing mentations meditation).

One workshop presentation of the mentations has been preserved on audiotape. See Audio tape: JOHN LILLY, EGO, SELF & ESSENCE (Big Sur Recordings 1971) (Tape 3535, Side 2) [hereinafter LILLY, EGO] ("[T]he mentations were brought back to us [at Esalen] by Naranjo . . . I started using them in workshops right away."). It is unclear whether Ichazo gave explicit permission to either Naranjo or Lilly to share this technique with those outside the Chile Group.

59. JOHN C. LILLY, PROGRAMMING AND METAPROGRAMMING IN THE HUMAN BIOCOMPUTER: THEORY AND EXPERIMENTS 5 (Julian Press rev. ed. 1972) (1967).

60. *Id.* at 57.

61. LILLY, EGO, *supra* note 58, at Tape 6, Side 1 (asserting that "Oscar and I are in total agreement on empiricism—you don't have to believe, or have faith, or worship" to perform and benefit from Arica's practices). Cf. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 20 (Martin E. Marty ed., Penguin Books 1985) (1902) (observing that Christian mystics traditionally distinguished legitimate from spurious visions and messages by an "empiricist criterion: By their fruits ye shall know them, not by their roots").

62. LILLY, CENTER, *supra* note 45, at 144 (recalling approvingly that "Oscar said he was not trying to convince anybody except by direct personal experience of the phenomena"); LILLY, EGO, *supra* note 58, at Tape 6, Side 1 (warning workshop participants to "take everything I say skeptically. Until it's your own [through experience], it's nonsense"); Oscar Ichazo, *Foreword* to A.H. ALMAAS, FACETS OF UNITY: THE ENNEAGRAM OF HOLY IDEAS v, v-vi (1998) [hereinafter Ichazo, *Foreword*] ("[T]he entire [Arica] teaching has to be understood in terms of an 'alive philosophy' that cannot be embodied unless it is practiced.").

63. LILLY, CENTER, *supra* note 45, at 144 (suggesting that participating in a loosely-knit network of individuals is "far more effective" than belonging to a

The latter of those statements appears applicable to both Gurdjieff⁶⁴ and Ichazo,⁶⁵ each of whom claimed to have been trained in a range of "esoteric schools,"⁶⁶ in which age-

highly structured group, whose internal political struggles would hinder the individual's progress).

64. Noted one of Gurdjieff's leading students, "about schools and where he had found the knowledge he undoubtedly possessed he spoke very little and always superficially." OUSPENSKY, IN SEARCH, *supra* note 18, at 36. The same could be said for Ichazo. See SCHWARTZ, *supra* note 9, at 380 ("Like Gurdjieff, Ichazo has long been somewhat secretive and elliptical about his past."); ICHAZO, INTERVIEWS, *supra* note 11, at 5 (including observation by interviewer Sam Keen of *Psychology Today* that "[t]he facts [that Ichazo] chooses to reveal about his life and training are few and misty").

However, Gurdjieff did claim to have had access to certain esoteric schools in Central Asia. See G. GURDJIEFF, MEETINGS WITH REMARKABLE MEN (1963) (autobiographical, and probably allegorical, account of the author's early travels in search of wisdom preserved by such schools); SMITH, *supra* note 36, at 242 (Gurdjieff was supposedly trained by "[t]he Masters of Wisdom [, who] are an old tradition of central Asia. There are, it is said, some people with extra powers, who affect the destiny of mankind from time to time, changing the course of events, averting calamity, injecting new modes of thought into the needs of the changing age."); J.G. BENNETT, GURDJIEFF: MAKING A NEW WORLD 56-57 (1973) (exploring Gurdjieff's link to a Sufi brotherhood in Asia, and suggesting that Gurdjieff learned the enneagram system from such a group).

65. See LILLY, EGO, *supra* note 58, at Tape 4, Side 2 (reporting that Ichazo had been in "about twenty or thirty esoteric schools from age fourteen to now," including Sufi schools, and that "he would convince a school to take him on"); ICHAZO, LETTERS, *supra* note 11, at 40 ("It has been the karma of my life to be blessed with the Internal Initiations of the most important and ancient mystical ways of religion and to be recognized by undeniable authorities on these matters throughout the world."); ICHAZO, INTERVIEWS, *supra* note 11, at 112 (discussing his having worked with "the Expectant Church"; "in the Tibetan tradition with the main four sects" and one other; as well as with "most of the Sufi sects"); *id.* at 132 ("I studied tantra in the northern part of Kashmir and in the south of Iran, and Sufism in the Pamir."); *id.* at 133 ("I went to Hong Kong [and] became deeply involved in the Muslim, Indian, Japanese, and Chinese cultures."); Ichazo, SYMBOL, *supra* note 13, at 17 ("I have been honored by knowing intimately the most traditional and respected Sufi sects, which have great centers distributed in India, the Kashmir, Afghanistan, Iran and Turkey.").

66. Today, the fraternal order known as the Freemasons is probably the best-known "esoteric school" (or descendant thereof) in the United States. See, e.g., Bressler v. Am. Fed'n of Human Rights, 44 Fed. Appx. 303, 307-10 (10th Cir. 2002) (discussing the history and evolution of this organization); *id.* at 307 ("Early in its history, Freemasonry laid claim to secret knowledge of great antiquity, to be shared only among its initiates."); Robert Graves, *Introduction to IDRIES SHAH, THE SUFIS* ix, xix (1964) ("Freemasonry itself began as a Sufi society. . . and was introduced into Scotland disguised as a craft guild at the beginning of the fourteenth century . . ."); BROWN, *supra* note 1, at 205 (observing that the "best known" tests for initiates of such schools are those of "the Masons").

old and carefully-preserved techniques and teachings⁶⁷ were imparted to students in personalized ways⁶⁸ to develop in tandem their intellectual understanding and their spiritual awareness.⁶⁹ Both Gurdjieff and Ichazo⁷⁰ characterized their own groups as such schools; Ichazo explicitly told his students that he had been entrusted by an Eastern esoteric school with the task of bringing a special new accelerated method of spiritual work to the West.⁷¹ Both teachers

Ichazo has asserted that "[t]he sense of considerations of lineage, authority and secrecy in the transmission of spiritual material is not unfamiliar to the American culture if we think of the well-established secret Masonic Lodges" but that otherwise "our culture lacks the understanding of the importance of sustaining the lineage and authority of [spiritual] traditions . . ." Ichazo, *SYMBOL*, *supra* note 13, at 15.

67. OUSPENSKY, *FOURTH WAY*, *supra* note 26, at 393 (characterizing esoteric schools as "accumulators" of knowledge to be made available to their members).

68. See, e.g., NOTT, *supra* note 49, at 5-6 (indicating that in Gurdjieff's school, the prescription of appropriate spiritual exercises for an individual could only be accomplished once his true "type" was discovered).

A later author noted that in current groups that study and practice Gurdjieff's teachings, "the group is used to create conditions favorable to work on oneself, to generate energy, to produce psychological heat through interpersonal frictions, to provide mutual support and for many other purposes as well." Kathleen Riordan, *Gurdjieff*, in *TRANSPERSONAL PSYCHOLOGIES*, *supra* note 36, at 281, 317.

69. OUSPENSKY, *FOURTH WAY*, *supra* note 26, at 93 (A student's "development of [knowledge] without a corresponding development of [being] gives wrong results. Schools are necessary to avoid such one-sided spiritual development and the undesirable results connected with it."); 1 MAURICE NICOLL, *PSYCHOLOGICAL COMMENTARIES ON THE TEACHING OF GURDJIEFF AND OUSPENSKY* 146 (Shambhala ed., 1984) (1952) (explaining, as a prominent student of Gurdjieff and leader of groups studying this system, that "the full *understanding* of this knowledge will not be possible until our level of being corresponds with the level of knowledge that the Work teaches").

70. See LILLY, *CENTER*, *supra* note 45, at 195-96. Ichazo responded, when asked by Lilly about naming the training, that, "We call it always 'The School.' . . . [T]he name is something new because the teaching is completely new." *Id.*; see also ICHAZO, *INTERVIEWS*, *supra* note 11, at 103 (defining the school as "a group of people that have the same qualities, characteristics, and the same goals, aim, unity of purpose, interaction, work, everything"); *id.* at 173 (stating that the transmission of the Arica system "can only be done in a school, understanding the term 'school' in a mystical sense, which is a body of people who coordinate themselves and become a nucleus, or an organism which lives, functions, and has all the particulars of an individual").

71. The most colorful accounts of this claim are those provided in audiotapes, some contemporaneous with the early Arica trainings, made by John Lilly and/or Claudio Naranjo. See LILLY & NARANJO, *supra* note 56, at Tape 1, Side 2. Naranjo reported that "Oscar spoke of himself as a 'seed individual,' as somebody who had been entrusted by the tradition to transpose the Oriental experience into the terms of American karma . . . and because of

maintained that the development of their students' spiritual awareness would benefit humanity as a whole.⁷²

In this "school" framework, marked by lectures and notetaking,⁷³ Lilly had been, by his own account, a leading

this particular function was given this particular method." *Id.*; see also Audio tape: JOHN C. LILLY, CULTURAL IMPLICATIONS OF THE CHILE EXPERIENCE (Big Sur Recordings 1971) (Tape 4390) [hereinafter LILLY, CULTURAL IMPLICATIONS] (indicating that Ichazo "said he was authorized by the 'Kingdom of the Bees' School to start teaching masters—teaching teachers. And this is the first time in 2,000 years that the authority has been given by the esoteric school. So he was released from his secrecy."); CLAUDIO NARANJO, REPORT FROM CHILE: OSCAR ICHAZO AND THE SCHOOL (Sausalito, CA: Big Sur Recordings 1970) (Tape 4204) [hereinafter NARANJO, REPORT] ("[Ichazo] says he's using a Sufi method called Rapidness which is not normally used, reserved for historical emergencies. . . . He also said that a new culture will be born out of his efforts. . . ."); Audio tape: JOHN C. LILLY, FIRST REPORT ON ARICA TRAINING IN CHILE (Big Sur Recordings 1970) (Tape 3520) (stating that Ichazo claimed to be the prophesied bearer to the West of an esoteric teaching that had been reserved for this moment in history, and to have been authorized to start the first school in 2,000 years to train teachers); see also IDRIES SHAH, THE SUFIS 404 (1964) (noting that the practices of " 'The Rapidness' (the Shattari Method) "have been strenuously sought by Indian and other Seekers," and linking them to "the Naqshbandi Order of Sufis").

The print account is comparatively tame. See Lilly & Hart, *supra* note 36, at 340 (reporting the Arican understanding that "in the Sufi school of which Oscar is or was a member, a store of Baraka or divine energy had been built up over the ages to be used at the proper time for the enlightenment of mankind," and that it would be made available to Aricans to pass to others); ANDERSON, *supra* note 9, at 226-27 ("Oscar confirmed [to Naranjo] that . . . [H]e, like Gurdjieff, was connected with the legendary Sufi order known as the Sarmouni or the Bees.").

72. Ichazo has repeatedly warned that if humanity does not quickly choose to evolve, it might be doomed. See Lilly & Hart, *supra* note 36, at 341 (noting Ichazo's prediction that "if men refuse to seek enlightenment within the next ten years, there will be a holocaust which can and probably will destroy this planet"); SMITH, *supra* note 36, at 256-57 ("Oscar surprised us. This training, he said, was not for self-improvement, it was for humanity, because the planet faced a crisis, a great cosmic wave, in the next ten years. . . . Humanity had to come to consciousness, or face extinction."); ICHAZO, INTERVIEWS, *supra* note 11, at 121 (estimating, in a 1979 interview, that humanity had "no more than [a] five percent" chance of survival); Oscar Ichazo, *Questions and Answers at the Reunion*, ARICAN, TWENTIETH ANNIVERSARY ISSUE, 1991, at 77, 92 [hereinafter Ichazo, *Questions and Answers*] (repeating this estimate).

Gurdjieff similarly linked humanity's survival to its spiritual evolution. See WEBB, *supra* note 18, at 150 ("Gurdjieff taught that war was the result of man not producing certain energies—in other words, becoming conscious—and that instead, nature was forced to obtain such energies from the expenditure of human life."); OUSPENSKY, IN SEARCH, *supra* note 18, at 306 (quoting Gurdjieff: "the cessation of [human] evolution may mean the destruction of humanity.").

73. LILLY, CENTER, *supra* note 45, at 147 ("Among our other school activities were the general sessions with Oscar in which he lectured and showed us

student.⁷⁴ Yet he certainly did not feel wedded to the system as it had been presented to him. In late January 1971, simultaneously with the rest of the Chile Group, he performed under Ichazo's direction a several-day retreat in solitude "to reach divine guidance as to whether we should continue working with the group or whether something else was in store for us."⁷⁵ The message that Lilly received internally was that he should return to the United States.⁷⁶

Although the biographical note at the back of his 1972 work, *Center of the Cyclone*, stated that Lilly "intends to update and translate this traditional teaching for scientific purposes,"⁷⁷ his epilogue might have given careful readers pause. Stating that he was no longer the same person who had experienced—or even written about—the events described, Lilly reiterated that as a "scientific explorer" he was loyal to "objective exploration, objective experiment, and repeatable testable observations. I value above all else verifiable operational theory, which gives one insight into universal nature and our own inner natures. . . . I abhor dogmas and the dogmatic doctrinaire 'unique truth' of the esoteric schools."⁷⁸

Indeed, in a book published in 1975 Lilly reproduced notes that he had taken in the Chilean desert during October 1970: these clearly indicated that, even while immersed in Arica's group processes, he had regarded much of Ichazo's theoretical system, including the "enneagram

mantra, chants, and so forth. We kept notes during these lectures. We also kept another notebook in which we maintained a journal of internal happenings within each one of us."). It is unclear whether Arica requested that students surrender their notes, as they had been requested to surrender their audiotapes.

74. Lilly claimed that, of the members of the Chile Group, only he and three other people reached one of the highest states of consciousness. See LILLY, CULTURAL IMPLICATIONS, *supra* note 71; see also LILLY, CENTER, *supra* note 45, at 183 (quoting Ichazo: "In this very moment in our group there are only three persons who can [reach that state]. You, Marcus, and me. . . . You have to be a little bit patient with the other ones.").

75. LILLY, CENTER, *supra* note 45, at 211.

76. *Id.* Ichazo has stated that neither Lilly nor Claudio Naranjo (discussed *infra* Part I.C.) "complete[d] the actual work with the Fixations plus the theoretical explanation of how the system of the Fixations comes to be and manifests and behaves in the world of man." Ichazo, SYMBOL, *supra* note 13, at 16.

77. LILLY, CENTER, *supra* note 45, at "About the Author."

78. *Id.* at 217.

arrangements of concepts,"⁷⁹ as no more than initial assumptions to be provisionally adopted in order to attain certain mystical experiences. Unlike the physicist of anecdote, who told surprised friends that he had a horseshoe hanging in his laboratory because he'd heard that it brought good luck "even if you don't believe in it,"⁸⁰ or Pascal, who famously "wagered" that God exists,⁸¹ Lilly enthusiastically experimented with the results of actually, but only temporarily, changing his own belief systems.⁸² For example, although acknowledging that a more elaborate and personalized version of Ichazo's work on the "mentations" triggered his own skepticism about astrology, Lilly nonetheless reported that this approach "led me to look at certain ideas in a new way. This does not prove its 'truth': it only shows its didactic usefulness."⁸³

Yet even as he felt himself "programmed" by Ichazo's sequence of teachings and techniques, Lilly resolved to "*re-formulate in a more scientific and operational language what happens and how to get there. I must do my own work (as always), and study the results from my own knowledge and not lean on Oscar or his theories as be-all and end-all.*"⁸⁴

Thus Ichazo, whose insistence on the scientific nature and precision of his system would later hobble Arica's

79. JOHN C. LILLY, SIMULATIONS OF GOD 240 (1975) [hereinafter LILLY, SIMULATIONS].

80. R.L. WEBER, A RANDOM WALK IN SCIENCE 14 (E. Mendoza ed., 1973).

81. Blaise Pascal, *Pensees*, in PASCAL, PENSEES AND OTHER WRITINGS 1, 154 (Honor Levi trans., Oxford 1995) (1670) (calculating that a belief in God is rational, since "if you win, you win everything [that is, "an eternity of life and happiness"]; if you lose, you lose nothing [since there will be no afterlife in which you can recognize, or suffer from, your error]").

82. See, e.g., LILLY, CENTER, *supra* note 45, at 218-19 (setting forth steps for "scientific exploration of any of the inner realities," including: the investigation of and provisional adoption of "the basic beliefs" of such new areas; fully experiencing those areas; returning to ordinary reality and shedding the acquired beliefs; and testing, and possibly adapting, one's model of "this consensus reality" in light of the experience).

83. LILLY, CENTER, *supra* note 45, at 150 (indicating that this teaching involved the individual's "astrological rising sign as determined by our birth time and place"); see also *id.* at 150-55 (detailing this approach of "ego deviations" and its application to Lilly's situation).

84. LILLY, SIMULATIONS, *supra* note 79, at 245. Reaffirming his allegiance to the empiricist approach that had first attracted him to Ichazo, Lilly refused to "swallow uncritically Oscar's traditional assumptions-beliefs to do his trip . . . [W]ith Oscar I do not need to believe in his system—just do the trip and work on theory on my own." *Id.* at 243.

copyright infringement lawsuit against Helen Palmer,⁸⁵ appeared to have encountered a student with an even more stringent commitment to the experiential and experimental approach—but also to the scientific community's open discussion of ideas, techniques, and results.

In fact, subsequent authors on the enneagram system would draw heavily on the material co-authored by Lilly in *The Arica Training*,⁸⁶ a chapter of the 1975 scholarly collection, *Transpersonal Psychologies*. (The editor, psychology professor Charles Tart, had himself been introduced to the fixations system by Naranjo.)⁸⁷ Under the heading "Assumptions Inherently Unprovable,"⁸⁸ this overview of the Arica work reproduced, and provided brief interpretations of the labels attached to points of, eight of the Arica enneagrams: Ego Fixations;⁸⁹ Traps;⁹⁰ Ideas;⁹¹

85. See *infra* notes 276-278 and accompanying text.

86. Lilly & Hart, *supra* note 36, at 330. Hart was also a member of the Chile Group, and had served as one of Arica's teachers and directors until July 1972. *Id.*

87. Andrea Isaacs and Jack Labanauskas, *Conversation with Charles T. Tart, Part 1*, ENNEAGRAM MONTHLY, Feb. 1999, at 1, 20 (discussing how Tart was greatly impressed by Naranjo's enneagram-based analysis of Tart's own psychology).

88. Lilly & Hart, *supra* note 36, at 332.

89. *Id.* at 333. The authors observed that within Arica the types derived from the corresponding fixation were "[p]opularly called": Ego-Resent (resentment), Ego-Flat (flattery), Ego-Go (vanity), Ego-Melan (melancholy), Ego-Stinge (stinginess), Ego-Cow (cowardice), Ego-Plan (planning), Ego-Venge (vengeance), and Ego-In (indolence). *Id.* at 333-34. The Ego-In, for example, "seeks love outside himself and makes no effort to find his essence and peace." *Id.* at 333. Yet only a few years later a commentator noted that Arican "terminology is . . . apt to change. . . . [A] 'Stinge' is now known as an 'over-observer.'" Rick Fields, *Arica: Inside the Metasociety*, NEW AGE JOURNAL, June 1976, at 20, 29.

By 1996, Arica itself had adopted a "Basic Enneagon of the Fixations" that displayed the following names for the types: The Perfectionist, The Independent, The Displayer, The Reasoner, The Observer, The Adventurer, The Idealist, The Moralist, and The Seeker. See Ichazo, *Isaacs Interview*, *supra* note 21, at 8.

As a brief illustration of the corresponding points of these enneagrams, *infra* notes 90 through 96, reproduce the title and descriptions given in *The Arica Training* of those for the Ego-In (the fixation that Ichazo had discussed in his interview with *Psychology Today*, *supra* note 38). However, the authors of that article have cautioned that someone with a given fixation "does not necessarily have the [corresponding] point on the social, conservation, and syntony enneagrams." Lilly & Hart, *supra* note 36, at 347.

90. Lilly & Hart, *supra* note 36, at 334. "Each fixation has a 'trap,' a habitual way of acting that stems from the ego." *Id.* The trap of the Ego-In is

Passions;⁹² Virtues;⁹³ Social;⁹⁴ Conservation;⁹⁵ and Syntony.⁹⁶ Although Arica's executive director testified that he had been aware of this article "sometime in the early 80s,"⁹⁷ Arica apparently objected to the book's publisher, Harper & Row, only in late 1986,⁹⁸ and to no avail.⁹⁹ Thus, the

that he is a "Seeker"; that is, "he is always seeking outside himself for the solution of his problems, running from guru to guru." *Id.*

91. *Id.* at 335. When a person realizes that his fixation "is getting him nowhere . . . he is ready for the 'idea' that will pull him through the door of the trap and into his essence." *Id.* at 334. The Ego-In's idea is "Holy Love": "The seeker is seeking for someone to truly love him, so that he can feel lovable. The experience of 'Holy Love' reveals that his essence is pure love. Then he is both loving and lovable." *Id.* at 335.

These ideas, which are also known within Arica as "psychocatalyzers," or "holy ideas that match reality and catalyze the psyche," WILSON, *supra* note 55, at 358, are the subject of ALMAAS, FACETS OF UNITY, *supra* note 62.

92. Lilly & Hart, *supra* note 36, at 338. "The passions are the emotional survival systems of the ego [and] will set the emotional tone of [one's] personality." *Id.* at 336. The Ego-In's passion is "Laziness": that is, "the ego will persuade him to be very lazy in searching for his essence, though he may be hyperactive in finding ways to avoid working toward his essence." *Id.*

93. *Id.* at 337. "To counteract these passions of the ego, . . . a person is led by special exercises to experience the opposite virtues or essential feelings." *Id.* Lilly had earlier published his interpretations of the virtues and their definitions. See LILLY, CENTER, *supra* note 45, at 206-07 ("Oscar had given us these ideas in the form of nine-sided figures called enneagrams . . ."). The virtue of the Ego-In is "Action": "action directed toward experiencing one's essence, overcoming laziness." Lilly & Hart, *supra* note 36, at 338.

94. Lilly & Hart, *supra* note 36, at 347. This enneagram indicates "distortions in social relationships" caused by the corresponding fixations. *Id.* The social distortion of the Ego-In is "Participation," or "[t]he need to be in the group." *Id.*

95. *Id.* at 348. This enneagram identifies "the different ego traps in providing for the necessities and luxuries of life . . ." *Id.* at 347. The conservation trap of the Ego-In is "Appetites," which concerns "[s]atisfying one's hungers." *Id.* at 348.

96. *Id.* at 349. This enneagram concerns the "general attitudes of the different fixation points" concerning sexual relationships between individuals. *Id.* at 348. The syntony of the Ego-In is "Union," or the "[n]eed for the love of another [to establish] one's own identity." *Id.*

97. Dunderdale Testimony, TR 294.

98. *Id.* at 294-97.

99. *Id.* at 297. Helen Palmer testified that her "personal friend" Charles Tart, editor of TRANSPERSONAL PSYCHOLOGIES, *supra* note 36, who had written the preface to her book, had advised her that there had "never been any litigation directed at him or the [Lilly and Hart] article. . ." *Id.* at 238. Palmer asserted that she had not been aware that Ichazo or Arica had objected to the article. *Id.* at 262.

Palmer, who used the Tart book in her classes "[p]robably since the moment it came out," was able to obtain copies from Tart directly, who published a paperback edition after Harper & Row stopped publishing the original, hard-

material was now available to the general public to comment on and interpret (or, in Arica's view, misinterpret).¹⁰⁰

By suggesting that the source of some of Arica's material was literally otherworldly, this chapter undoubtedly complicated the public's—and even some Aricans'—view of Ichazo's system. According to *The Arica Training*, Ichazo taught that in a spiritually elevated state a person "may receive instructions from the higher entities such as Metatron, the prince of the archangels, who has given instructions to Ichazo," and from various other "archangels and angels."¹⁰¹ Although the purported incorporeality of the source of a "channeled" literary work has not prevented the human scribe or intermediary from holding copyright in the work as its author,¹⁰² both Ichazo¹⁰³ and Dunderdale¹⁰⁴ would later insist that these statements

cover edition (apparently in 1983). *Id.* at 242. At trial, Elliott Dunderdale was uncertain about whether Arica had complained to Tart about the publication of the paperback. *Id.* at 377.

100. Apparently in response to Arica's heightened legal presence in the enneagram world in the late 1980s, one author referred readers to *The Arica Training* for Arica's names of the fixations, apologizing that "due to copyright restrictions, it is impossible to quote Arica material or to present a scholarly examination of the Arica interpretation." DON RICHARD RISO, UNDERSTANDING THE ENNEAGRAM 25 (1990) [hereinafter RISO, UNDERSTANDING]. Especially in light of the subsequent decisions in Arica's litigation against Palmer, this conclusion seems incorrect; indeed, the same author cited in his bibliography relevant doctoral theses, including several that "explore various aspects of the relation between depth psychology and the traditional Arica interpretation of the Enneagram." *Id.* at 278.

101. Lilly & Hart, *supra* note 36, at 341.

102. See *Urantia Found. v. Maaherra*, 114 F.3d 955, 958-59 (9th Cir. 1997) (determining that human editors' prompting, compiling, selecting, coordinating, and arranging the allegedly channeled works involved sufficient creativity to render the humans the authors of the works for purposes of copyright law); *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 2000 WL 1028634, at *10-*11, 55 U.S.P.Q.2d 1680, 1690-91 (S.D.N.Y. 2000) (holding that humans' efforts in editing and shaping the work, *A Course in Miracles*, which was allegedly dictated by Jesus Christ, met the minimal level of creativity required for authorship and copyrightability); *id.* at 12 ("As a matter of law, dictation from a non-human source should not be a bar to copyright."); *Garman v. Sterling Publ'n. Co., Inc.*, No. C-91-0882 SBA (ENE), 1992 U.S. Dist. LEXIS 21932, at *7, *8 (N.D. Cal. Nov. 4, 1992) (finding copyright properly asserted by interviewer of individual who allegedly served, while unconscious, as conduit for spiritual guides); *Cummins v. Bond*, 1 Ch. 167, 173 (1927) (holding that copyright rests with the human scribe of a purportedly channeled work, not with its alleged author, "who has been dead and buried for some 1900

odd years," because the court had "no jurisdiction extending to the sphere in which he moves").

Unusual intellectual property questions have also arisen in situations where the defendant has claimed to "channel" the same entity as did the plaintiff. See *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941) (finding no copyright infringement and only "slight similarity" where both the defendant's work and the plaintiff's work involved "earthly creatures receiving from the spiritual world messages for recordation and use by the living," and suggesting that "the spirit of the Master or Masters . . . might . . . see fit to use both men as instrumentalities or amanuenses for communicating their messages of guidance and direction to humanity"); *JZK, Inc. v. Glandon*, No. 22361-9-II, 1999 Wash. App. LEXIS 820, at *3, *8 (Ct. App. Wash. May 7, 1999) (finding "doubtful at best" the trademark dilution claim brought by the channeler of, and trademark holder of, "Ramtha," after the defendant had published—to little demand—divergent material reportedly derived from the same alleged entity).

But see Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323, 353 (2003) (arguing that if the human's claim of spiritual dictation—without her own editing or other contribution—is sincere, the work is not subject to copyright protection, and that if it is false, she should not be able to claim copyright for herself).

In March 2003, the Tenth Circuit Court of Appeals, reviewing the unusual genesis claimed for *The Urantia Book*, which was allegedly dictated by spiritual beings to one unnamed human in response to questions submitted by other humans, concluded that it was "neither a composite nor a commissioned work," and therefore found invalid the copyright owner's renewal of copyright in this material. *Michael Found., Inc. v. Urantia Found.*, 61 Fed. Appx. 538, 551 (10th Cir. 2003). For further detail on the origin of *The Urantia Book*, including the possibility that this work itself is actually a pastiche of uncredited quotations from human-authored publications, see BRAD GOOCH, *GODTALK: TRAVELS IN SPIRITUAL AMERICA* 3-61 (2002) and the comprehensive MARTIN GARDNER, *URANTIA: THE GREAT CULT MYSTERY* (1995).

103. Cf. Ichazo, *Questions and Answers*, *supra* note 72, at 96 (reassuring Aricans that the archangels visualized and called upon in meditation "are archetypes in a metaphysical sense, and not persons or entities," and that "they are not something to be found 'out there.' They do not exist outside of us"); SCHOLEM, *supra* note 10, at 180-81 (indicating that in some traditional Kabbalistic meditations that "bear a marked resemblance to those of both Indian Yoga and Muslim Sufism," the meditator "lives through a personal identification with an inner spiritual mentor or guru who is revealed to him and who is really Metatron, the [archangel who is the] prince of G-d's countenance, or in some cases, the [meditator's] own true self."); see also MICHAEL BERG, *THE WAY: USING THE WISDOM OF KABBALAH FOR SPIRITUAL TRANSFORMATION AND FULFILLMENT* 101-102 (2001) (stating, as teacher of popular Kabbalah courses, that "the idea that we create our own angels is a basic kabbalistic teaching . . . They are the direct experience of what is in our hearts and minds").

Without equating the two practices, it should be noted that Arican meditations involving archangels, see, e.g., *The Emptiness Meditation: Indications*, ARICAN, *TEACHINGS OF THE GREAT TELESMATTA* issue (1991) at 63-68 (invoking protection of named archangels), have at least one precedent in Jewish tradition. See *The Bedtime Shema*, in *THE COMPLETE ARTSCROLL SIDDUR* 288, 295 (Rabbi Nosson Scherman trans. and ed., 1990) (prayer calling, in the

were metaphorical rather than literal. Moreover, despite Ichazo's statement to one early interviewer that Arica had "a true message that comes only by way of divine revelation,"¹⁰⁵ and his repeated accounts of having derived Arica's enneagram system from his experiences during states of altered consciousness,¹⁰⁶ Ichazo later declared that this material had not been revealed to him in a fully-developed form: "I do *not* have visions of flying archangels . . . and the Arica system and method is the product of my whole life's work."¹⁰⁷ Indeed, "when I say that I saw the entire system of enneagrams *like* in a vision, it was a reference to this clarity of thought with which I could

name of G-d, for archangels Michael, Gabriel, Uriel, and Raphael to stand at the four sides of the worshiper).

104. Presented at trial with these excerpts from *The Arica Training*, Dunderdale clarified that the archangels were seen in Arica not as "external beings that exist outside there and we get information from . . . but, rather they are part of us . . . in the sense of higher consciousness." Dunderdale Testimony, TR 420. Cf. PERLE EPSTEIN, *KABBALAH: THE WAY OF THE JEWISH MYSTIC* 86-87 (1978) (discussing thirteenth-century Kabbalistic master's teaching that archangels "were merely names for human tendencies which the meditator could subdue and conquer by personifying them as angels . . .").

105. ICHAZO, INTERVIEWS, *supra* note 11, at 54.

106. *See id.* at 55 (noting that among his many mystical experiences, "one . . . of the most radical of all was that seven days of coma which came after really tremendous training"); *id.* at 56 (asserting that "I was [in that mental state] not one time, but many times; that undoubtedly made me an expert in that field."). In another interview, Ichazo stated that during a year of solitude,

I had an experience . . . that came without my effort and really surprised me. I felt that this experience was it—that I didn't need to learn anything else. I had reached the totality . . . I had many visions . . . I saw how the laws have organized the cosmos itself . . . I had experiences of cosmology, of how the world was created.

Id. at 134 (observing that "when I went out of that state I started having my doubts"). Another participant in an early Arica training learned that:

Oscar got his indications by Direct Revelation . . . 'I spent forty days in the desert . . . I was in a space without connection, my consciousness went inside the enneagram, I returned from the experience and each enneagram was complete, but it was very hard to put into words. Of course, this was my psychic projection.'

SMITH, *supra* note 36, at 263; *see also* NARANJO, *STRUCTURES*, *supra* note 15, at 1 ("Oscar Ichazo frequently used the expression 'this theory' notwithstanding the fact that he regarded the view of the psyche that he presented as an objective knowledge originally arrived at through revelation.").

107. Ichazo, *Transpersonal*, *supra* note 22, at 116. Ichazo elaborated: "I did *not* receive this material from any archangel or entity whatsoever, but . . . it was the fruit of a long, careful, and dedicated study of the human psyche and the main problems of philosophy and theology." *Id.* at 106.

envision the entire system after so many years of dedicated, intense work."¹⁰⁸

Lilly's next book, *The Dyadic Cyclone*, disclosed that although Ichazo had been very pleased with the manuscript of *The Center of the Cyclone*, Lilly had omitted from that work various negative material, including Lilly's personal notes from the Chilean desert.¹⁰⁹ Attributing part of his decision to leave the Chile Group to "a very strong ambivalent feeling" about Ichazo's adoption of a "new format" that featured "the concept of the group as dominating all individuals,"¹¹⁰ Lilly claimed that he had been ostracized by the trainers during Arica's first three-month training in New York, in which Toni, Lilly's wife and co-author, had enrolled.¹¹¹ At that time, Lilly's mixed feelings toward Arica were resolved when a Chile Group member proposed that he could rejoin on the condition that he withdraw the manuscript for *The Center of the Cyclone* from publication: Lilly refused.¹¹²

Toni Lilly found the trainers angry that John was independently teaching Arica practices: their objections

108. *Id.* at 106; see also Goldberg, *supra* note 26, at 24 (quoting Ichazo: "[The enneagrams] didn't just appear. I started visualizing it. It was not that some Archangel Metatron came and said, 'Here it is.'"); Ichazo, *Questions and Answers*, *supra* note 72, at 93 ("Arica is not based on revelation.").

109. LILLY, DYADIC, *supra* note 55, at 36-37. Only later would Lilly reveal a "key ingredient" of his experiences with the Chile Group: "[o]n his own initiative . . . he [had] dosed himself with LSD about every four weeks." FRANCIS JEFFREY & JOHN C. LILLY, JOHN LILLY, SO FAR . . . 174-75 (1990).

110. LILLY, DYADIC, *supra* note 55, at 34. *The Arica Training* concluded by discussing the "dangers" of the program, and warning that "the group is all-important in the Arica system . . . The individualist, of course, will find that he has great difficulty accepting group life twenty-four hours a day and in accepting without question the decisions and statements of the group." Lilly & Hart, *supra* note 36, at 351.

Another source of Lilly's ultimate disenchantment with the training was Ichazo's decreased role. See LILLY, DYADIC, *supra* note 55, at 36, 45 (indicating that in 1971, Ichazo "was already becoming more remote, doing less teaching and turning more of the teaching over" to Chile Group members involved in new Arica trainings).

111. See LILLY, DYADIC, *supra* note 55, at 36-37.

112. See *id.* Lilly's observations that "[s]everal self-starters" were expelled from the Chile Group, *id.*, and that "each independent self-starter . . . taking the [New York] training, left the New York group on his own initiative," *id.* at 39, are echoed by Adam Smith's own decision to leave the group, see SMITH, *supra* note 36, at 263, and by Smith's recollection that "it bothered me that the people who [were asked to leave] were more interesting than those who stayed," *id.* at 266.

included the fact that he was not a member of Arica; their disagreement with accuracy of his form of the techniques; and their concern that the manuscript for *The Center of the Cyclone* contained material that was "too dangerous [to teach or learn] unless it is under their supervision."¹¹³ Nevertheless, the Lillys presented as an appendix to *The Dyadic Cyclone* a five-page series of "Revised Mentations,"¹¹⁴ as "a first attempt to modernize the mentations for practical use by Americans in our particular culture."¹¹⁵ In a subsequent book Lilly would re-emphasize his focus on the search for "operational" tools for exploring states of consciousness.¹¹⁶

Arica apparently took no legal action against John or Toni Lilly for their independent interpretations and presentations of Arica's techniques and teachings; nor do the approaches of the Lillys appear to have been widely adopted. Of greater concern to Arica would be the enneagram teachings of another former student, who translated the material into a contemporary psychiatric framework and transmitted it to the spiritual community of the Jesuits.

C. *Tales Out of School (II): Claudio Naranjo's Psychotherapeutic Approach*

More than a quarter-century after the Chile Group returned to the United States, Claudio Naranjo observed, "[i]f we give [Ichazo] credit as the 'seed' of the enneagram movement, I should rather compare myself to the gardener who has watered the plant."¹¹⁷ Naranjo claimed that, with regard to Protoanalysis, he had translated Ichazo's "living

113. LILLY, DYADIC, *supra* note 55, at 49.

114. *Id.* at 239-43.

115. *Id.* at 243 ("This group seems much more operational than the group given in *The Center of the Cyclone*, for American businessmen, scientists, professionals, housewives and students.").

116. See JEFFREY & LILLY, *supra* note 109, at 176 (noting that, properly followed, a recipe for angel food cake will work "whether one understands the chemical changes the ingredients undergo, or, instead, believes that it is made with the help of real angels").

117. OM C. Parkin & Boris Fittkau, *The Distorted Enneagram: The Gnosis Interview with Claudio Naranjo*, GNOSIS (Fall 1996) at 20, 21 [hereinafter Naranjo, *Distorted Enneagram*].

understanding only barely articulated in words" into "character descriptions and a theory of neurosis."¹¹⁸

Naranjo, a Gestalt therapist, had originally been introduced to the enneagram in a group studying the work of Gurdjieff,¹¹⁹ but had reencountered it in 1969 when he investigated reports by some of his Chilean patients about an unusual man "who led them through meditative experiences that approached those that they'd had on drugs."¹²⁰ While attending Ichazo's lectures at the Instituto de Psicología Aplicada (Santiago), which were given under the sponsorship of the Chilean Psychological Association,¹²¹ Naranjo was invited for private discussions by Ichazo, who arrestingly "formulated (in a six-hour-long monologue) my 'Protoanalysis'—that is, the map of my personality—in the form of five interlocking enneagrams."¹²² During the training of the Chile Group, Ichazo worked "personally and separately" with Naranjo on Protoanalysis material, and subsequently "explained to him" advanced material on this topic.¹²³

Yet though he had been instrumental in organizing the Chile Group,¹²⁴ Naranjo, like Lilly, left that group before its training ended. The circumstances leading to Naranjo's departure have been disputed, with Lilly indicating that Naranjo had been "summarily ejected" as "a new phase of more intensive training began";¹²⁵ Ichazo denying rumors that he "had a 'falling-out' with Claudio Naranjo, because he wanted to make this work public and I wanted to keep it

118. *Id. Cf.* MOSHE IDEL, *KABBALAH: NEW PERSPECTIVES* 254-55 (1988) (discussing the work of medieval Kabbalist Abraham Abulafia in reinterpreting the elements of this system "as referring to human actions and psychological states; thus he neutralized the esoteric aura [that characterized them as constituting] a mysterious divine structure whose true nature could be realized only by the few who were the recipients of ancient traditions").

119. See Naranjo, *Distorted Enneagram*, *supra* note 117, at 22.

120. NARANJO, *REPORT*, *supra* note 71.

121. See Ichazo, *Questions and Answers*, *supra* note 72, at 90 (discussing his attendance at these lectures); NARANJO, *STRUCTURES*, *supra* note 15, at viii (same).

122. Naranjo, *Distorted Enneagram*, *supra* note 117, at 22 (recalling his appreciation of the speed, depth, and subtlety with which Ichazo analyzed Naranjo's personality and psychology).

123. Ichazo, *SYMBOL*, *supra* note 13, at 16.

124. See ANDERSON, *supra* note 9, at 228 (identifying Naranjo as "the chief agent in [the Chile Group's] coming together, since most of the students were Americans whom he knew through Esalen").

125. LILLY, *DYADIC*, *supra* note 55, at 37.

the secret lore of the Arica School";¹²⁶ and Naranjo, who had apparently been the only group member selected by Ichazo "to undergo the supreme training experience, an ordeal of forty days and nights alone in the desert,"¹²⁷ recalling that "Oscar had secretly *sent* me [to the desert] and then said that I was a 'megalomaniac' who had gone off on my own trip."¹²⁸

Naranjo later implied that Ichazo had deliberately separated him from the group, possibly in order to further or test Naranjo's own spiritual development,¹²⁹ though Ichazo has denied this.¹³⁰ In fact, similar speculation surrounded the split between Gurdjieff and his leading student, P.D. Ouspensky: Gurdjieff himself observed that "[s]ometimes such tests are arranged intentionally. A man is placed in such a position that he is obliged to leave and he is fully justified in having a grievance either against the teacher or against some other person. And then he is watched to see how he will behave."¹³¹ (Such practices would complicate the question of spiritual lineage, discussed in more detail in Part IV, *infra*.)

Unlike the other members of the Chile Group, Naranjo did not relinquish to Arica his tape recordings of Ichazo's lectures.¹³² After leaving Chile, Naranjo requested Ichazo's permission to teach but received no reply.¹³³ Naranjo proceeded to constitute, and teach Protoanalysis to, various "Seekers After Truth" ("SAT") groups¹³⁴ in Berkeley,

126. Ichazo, *Transpersonal*, *supra* note 22, at 108.

127. ANDERSON, *supra* note 9, at 228.

128. Goldberg, *supra* note 26, at 18 (quoting Naranjo).

129. *See id.* (quoting Naranjo: "I am inclined to think that [Ichazo] was doing one of his Sufi things.").

130. *See* Ichazo, *SYMBOL*, *supra* note 13, at 25 ("I cannot see any relation between what happened between Gurdjieff and Ouspensky and between Claudio Naranjo and me.").

131. OUSPENSKY, *IN SEARCH*, *supra* note 18, at 228.

132. *Arica Inst. v. Palmer*, 761 F. Supp 1056, 1058 (S.D.N.Y. 1991).

133. Goldberg, *supra* note 26, at 18 (quoting Naranjo: "I wrote Oscar wanting to know what I was free to teach, and I took his failure to reply as an indication that I should decide for myself. I decided to teach privately.").

134. Naranjo began the first SAT group in August 1971, a few months after his return from Arica, Chile. Beauvais, *supra* note 52, at 44-45. Like Ichazo's program for the Chile Group, SAT featured "an armory of tools for self-development from all religious and psychotherapeutic lineages, [including] meditation, contemporary therapeutic approaches, psychic therapy, *enneagram*, *type study*, . . . journal, dreamwork, body movement, storytelling, group work,

California, although "explicitly declaring that this was something for 'personal consumption' only"¹³⁵ and requiring from participants signed secrecy agreements¹³⁶ that included the following provision: "I agree to keep silent about all techniques that I learn in the context of this teaching—whether of Taoist, Buddhist, Moslem, Christian, or American origins—and about portions of the theory to be specified."¹³⁷ Naranjo advised his students that to use such techniques and ideas outside the context of his training, especially as "parlor-game psychology" or as "publishable articles or saleable psychological gimmicks," would dissipate their force,¹³⁸ and threatened that students breaching this requirement "may be 'thrown out' in the sense of not being invited back for another season of study."¹³⁹

In 1973¹⁴⁰ Naranjo conducted a series of nine evening meetings, at each of which he questioned a panel of previously-identified individuals who exemplified one of the nine fixations.¹⁴¹ Naranjo did not attempt to impose a

and retreats." *Id.* at 78 (emphasis added) (introducing a detailed summary of SAT's application of these experiential methods).

135. Claudio Naranjo, *Preface to ENNEATYPES IN PSYCHOTHERAPY: SELECTED TRANSCRIPTS OF THE FIRST INTERNATIONAL SYMPOSIUM ON THE PERSONALITY ENNEAGRAMS* ix (Claudio Naranjo ed., 1995).

136. Naranjo asserted that, mindful of the secrecy that Ichazo had maintained when teaching this material, "I went so far [during the period from 1970 through 1980] as to obtain from every participant a signed contract, one item of which addressed itself to an agreement not to disclose some of the ideas and the spiritual practices [that I] taught." NARANJO, *CHARACTER AND NEUROSIS* xxx-xxxi (1994) (indicating that by the end of this period, various students had breached the agreement).

137. Beauvais, *supra* note 52, at 60. For this reason, at least one of Naranjo's students believed herself "not permitted at this time or in this context [*i.e.*, her Ph.D. dissertation] to present specific materials on the ego fixations or types—partly because my own understanding is still incomplete at this point, and partly because Naranjo prefers to preserve this information for a certain phase of the work." *Id.* at 110.

138. *Id.* at 63.

139. *Id.* at 64.

140. Palmer Testimony, TR 184.

141. *Id.* At least two Arica trainings in New York also involved the grouping of participants into nine subgroups, according to their fixations, for special work relevant to that fixation. See ANDERSON, *supra* note 9, at 242 (stating that "[i]n the second six weeks of the [first New York] program, the entire group, trainees and trainers alike, was separated into nine subgroups"); SMITH, *supra* note 36, at 255-56 ("[W]e began to do group work that had overtones of encounter. We were given nine types of ego . . . The staff had already assigned each of us into a group, with the help of a questionnaire . . ."); WILSON, *supra* note 55, at 384.

confidentiality requirement on members of his audience, since "I didn't foresee that anybody witnessing such a demonstration would venture to teach the characterology."¹⁴² In the early 1980s he staged another series of nine meetings, at the San Francisco area's John F. Kennedy University, at which nine of his former students "presented what they had learned in the course of the past ten years about their characters while I once more questioned panels."¹⁴³

Naranjo's public teaching appears to have been quite faithful to the substance of Ichazo's original work. Helen Palmer, who attended several of his public presentations, testified that Naranjo's 1990 book, *Ennea-type Structures*,¹⁴⁴ "codified" the material that he had delivered in that context.¹⁴⁵ Around the time that this book was published, Ichazo benignly advised a gathering of Aricans that "Naranjo presents the structure and psycho-dynamics of [the psyche] in the same way that I presented them, as can be seen in the Arica publications, so he contradicts Arica neither fundamentally nor substantially."¹⁴⁶ More recently, in the foreword to a book written by one of Naranjo's students to elaborate on Ichazo's enneagram of "Holy Ideas," Ichazo praised Naranjo as "one of the best theoreticians of our time," who had "shown his proven ability, along with his scholarly presentation and intellectual integrity, by passing to his students an accurate transmission of what I taught. . . . Naranjo produced

Wilson observed that in Arica's second Advanced Training, which began in July 1974, "everyone meets in their ego-fixation groups We give specific examples from our lives and learn how the ego fixations have manifested in our own and other people's lives." *Id.*

142. Palmer Testimony, TR 186.

143. *Id.* Naranjo also gave a workshop in November 1983, concerning "Reflections on the Enneagram." An audiotape of this presentation, produced by the Ojai Foundation, reveals that Naranjo focused on "the fixations and the passions: this corresponds to what in Arica is called Protoanalysis, the first stage of the work," although he offered his own labels in place of Ichazo's for various points on these two enneagrams.

144. NARANJO, *STRUCTURES*, *supra* note 15.

145. Palmer Testimony, TR 184-85.

146. Ichazo, *Questions and Answers*, *supra* note 72, at 90. Separately, Ichazo has recognized that "Claudio Naranjo started teaching Protoanalysis exactly the way I taught him and the others of the Arica School, but he knew perfectly well that it was certainly not the entire method" of Arica's system. Ichazo, *Isaacs Interview*, *supra* note 21, at 9.

excellent psychological insights into the passions and the fixations, and their relationship to the entire psyche."¹⁴⁷

In 1990, Arica considered taking legal action against Naranjo for disclosing this material.¹⁴⁸ However, the idea was dropped when Naranjo informed Ichazo that "he never denied the origin of the material he used concerning the Fixations."¹⁴⁹

D. *The Jesuit Approach*

However, Arica did ultimately pursue legal action against various authors who had reconfigured into a Christian context the enneagram material that they had learned directly from, or indirectly through, Naranjo.¹⁵⁰ (Because of the apparently informal methods in which the enneagram material was transmitted at that time outside the Arican community,¹⁵¹ their failure to attribute these

147. Ichazo, *Foreword*, *supra* note 62, at v, vii.

148. See *Minutes of October 28, 1989 Meeting of Board of Directors of Arica Institute, Inc.*, in ARICAN, Winter 1990, at 75, 76 ("Arica is now proceeding with lawsuits against Harper and Row, Helen Palmer, and Claudio Naranjo" in order to "make a point in the U.S. judicial system [and to] promote public discussion of the entire matter.").

149. Ichazo, *SYMBOL*, *supra* note 13, at 20. Ichazo has acknowledged that "Claudio and everyone else was surprised by the [Jesuit authors'] unwarranted publication of all the material that I [conveyed to] him in Arica, Chile." *Id.* at 15; see also Ichazo, *Isaacs Interview*, *supra* note 21, at 10 (commenting that "I can understand [Naranjo's] enormous surprise when [the first enneagram book] appeared on the market, after knowing all too well that Claudio was [teaching] this information with total confidentiality . . .").

150. By one account, "the first brief notes on the [enneagram] personality types were written down and passed around in informal seminars at Jesuit theological centers, particularly those at the University of California at Berkeley and Loyola University, Chicago" as early as 1972. RISO, *PERSONALITY TYPES*, *supra* note 27, at 17 ("Before the Jesuits became involved with the Enneagram, as far as I can tell, the descriptions of the nine personality types were transmitted orally, from teacher to student.").

151. See Richard Riso and Russ Hudson, *Enneagram Contributions*, at <http://www.enneagraminstitute.com/articles/Ncontribute.asp> ("[T]he Enneagram [system] was originally disseminated in the seventies by enthusiasts passing around photocopied notes from the Arica and Jesuit traditions. These notes were usually not attributed to anyone, and so it was extremely difficult to know who had authored them."); RICHARD ROHR & ANDREAS EBERT, *THE ENNEAGRAM: A CHRISTIAN PERSPECTIVE* 22 (Peter Heinegg trans., 2001) [hereinafter ROHR & EBERT, *ENNEAGRAM*] (noting that when Rohr himself was "initiated by my Jesuit spiritual director . . . into the Enneagram system in the early 1970s, . . . we were enjoined not to pass it on in writing nor to let anyone know where we got it").

works to Oscar Ichazo or the Arica Institute should not be seen as implicating the defendants—or other authors identified in this section—in plagiarism; dishonesty; or other scholarly, or legally actionable, misconduct.)

Moreover, although Ichazo had incorporated into the Arica trainings techniques from established mystical traditions,¹⁵² he vehemently denied that his system was a mere "cocktail of things."¹⁵³ Particularly objectionable to Ichazo was the tendency of many authors to ascribe the origin of the fixations material to a nebulous Sufi "oral tradition"¹⁵⁴ instead of to him and Arica.¹⁵⁵ For example, Jerome P. Wagner, in his 1980 Ph.D. thesis, attributed the enneagram's origin to Sufism. Without citing a source, Wagner asserted that a Sufi master, in consultations about

The distinction between copyright infringement and plagiarism is addressed *infra* at 550-51.

152. See *supra* note 8.

153. ICHAZO, INTERVIEWS, *supra* note 11, at 176 (recognizing that this impression "triggered other groups to start with what we call cocktails of mysticism which of course became spurious").

154. To Ichazo, this term indicates "a tradition transmitted under great secrecy, only and directly from Master to student or from mouth to ear—an oral approach that is never to be put in writing because of the limitations of human language and conceptuality." Ichazo, SYMBOL, *supra* note 13, at 17; see also JACOB NEEDLEMAN, CONSCIOUSNESS AND TRADITION 155-56 (1982) (noting that "the esoteric traditions . . . are always associated with what is called oral transmission," defined as "personal, direct contact with a guide and community and to the entire set of conditions of living and human interaction established in the community."); SCHOLEM, *supra* note 10, at 372 (observing that, as with the "major part" of the meditative teachings of Kabbalistic scholar Isaac Luria, "[i]n Jerusalem's kabbalistic yeshiva Bet El practical guidance on meditation was handed down orally for about 200 years and the initiates of this form of Kabbalah refused to make the details of their practice public knowledge"); IDEL, *supra* note 118, at 20 (confirming that "[t]he main medium of transmission of these traditions was, as the Kabbalists themselves indicate time and again, oral teaching."); Judith L. Lief, *Editor's Foreword*, in CHOGYAM TRUNGPA, TRAINING THE MIND & CULTIVATING LOVING-KINDNESS xiii, xix-xx (Judith L. Lief ed., 1993) Lief indicates that Trungpa, a Tibetan Buddhist teacher, "stressed the importance of the oral tradition in which practices are transmitted personally and directly from teacher to student" as part of "an unbroken wisdom tradition," and she herself cautions that "[t]he essential living quality of practice being conveyed is a very human one and cannot be acquired simply from books." *Id.*

155. See ICHAZO, LETTERS, *supra* note 11, at 46 (stating that "not only am I the holder of the beginning of this tradition, but also, as can be absolutely and concretely proven, the one hundred and eight enneagons and the entire system in all its terms have been developed by me, *only and exclusively*"). Naranjo concurred: "[A]t a time when people begin to make videos claiming to bring the 'oral tradition' [of the enneagram] to the market, it is appropriate to say that there is no such thing." Naranjo, *Distorted Enneagram*, *supra* note 117, at 22.

an individual student's spiritual growth, "would gradually delineate various aspects of the individual's personality. . . . The disciple would learn only about his own personality. The entire system would not be divulged."¹⁵⁶

Alluding to both an "oral tradition" behind the transmission of the enneagram, and "a concerted effort not to reveal the Sufi personality typology in written form,"¹⁵⁷ Wagner observed that he had found useful but fragmentary information in various publications by and about Arica,¹⁵⁸ which he identified as the sources of several of the enneagrams that illustrated his work.¹⁵⁹ Additional enneagrams included by Wagner, but whose origins were not specified, indicated each personality type's "idealized self-image," "avoidance," "defense mechanism," and "manner of communicating," as well as "interrelationships among the personality types."¹⁶⁰

Wagner also acknowledged using as sources "the unpublished notes of the Arica Institute training programs,"¹⁶¹ "the Arica training instructor's manual,"¹⁶² and

156. Jerome P. Wagner, *A Descriptive, Reliability, and Validity Study of the Enneagram Personality Typology 2* (1980) (unpublished doctoral dissertation, Loyola University of Chicago) (on file with author) [hereinafter Wagner, *Descriptive*]; see also Jerome P. Wagner & Ronald E. Walker, *Reliability and Validity Study of a Sufi Personality Typology: The Enneagram*, 39 J. CLINICAL PSYCHOL. 712, 712 (1983) (attributing the origin of the enneagram material to "the Naqshbandi order of Sufism" and asserting that Ichazo "translated and elaborated the system").

157. Wagner, *Descriptive*, *supra* note 156, at 2.

158. *Id.* at 3 (noting that information on the enneagram can be found "in the barest outline form in the following published sources"; and citing ICHAZO, *HUMAN PROCESS*, *supra* note 30, Keen, *supra* note 11, reprinted as *Breaking the Tyranny of the Ego*, in ICHAZO, *INTERVIEWS* 3, 15, and Lilly & Hart, *supra* note 36).

159. *Id.* at 55 (noting the 1972 and 1975 copyrights held by the Arica Institute and reproducing the enneagram identifying the "over-preoccupations" of each type); *id.* at 28, 34, 57, 125, and 130 (reproducing five of the enneagrams from the *Psychology Today* interview, and indicating the pages on which they were originally published and that they were copyrighted in 1972 by Arica); *id.* at ii (noting that Wagner had received Arica's permission to reprint the *Psychology Today* enneagrams).

160. *Id.* at 31, 40, 41, 56, 111.

161. *Id.* at 3.

162. *Id.* at 260 (listing in "Reference Notes"). This appears to be the same work identified as the *Arica Training Manual* by Lincoln, *supra* note 49, at 2. Lincoln, who had been taught by one of Naranjo's leading students, quoted repeatedly from this work in conducting his own evaluation of Protoanalysis: he asserted that it had been compiled by members of the Chile Group from their

"the unpublished class lectures of Robert Ochs, S.J. (1970), who became acquainted with the system through Claudio Naranjo, one of the original group taught the system by Ichazo."¹⁶³ Father Ochs, who had taught this system to other Jesuits, had, like Naranjo, imposed on his students a confidentiality requirement that was apparently widely breached.¹⁶⁴

The Ochs notes may have also been an important source for a 1982 book published by Dimension Books:

"longhand notes [of Ichazo's lectures] which seldom amounted to more than a statement or two on any particular point." *Id.*

163. Wagner, Descriptive, *supra* note 156, at 3 ("Both Ochs and Naranjo are preparing manuscripts on the Enneagram for publication within the year."). The Ochs notes were also useful to enneagram authors Don Richard Riso and Dick Wright. See Jerry Wagner, *Chicago Enneagram History*, ENNEAGRAM MONTHLY, July 1996, at 12 ("Don Riso came upon a copy of Ochs' class notes, got interested in the subject, elaborated on what he found, and has become a major theorist since then."); DICK WRIGHT, *THE ENNEAGRAM TRIADS: A KEY TO PERSONAL AND PROFESSIONAL GROWTH* ix (1997) (thanking "Suzanne Zuercher, O.S.B. [who] introduced me to the Enneagram by way of a series of workshops she was conducting in the late 1980s"); *id.* at x (thanking a Jesuit for "providing me his written Enneagram notes," apparently taken "in the early seventies [at] the first workshop on the Enneagram given at Loyola University of Chicago by Robert Ochs, S.J., who . . . had just attended Claudio Naranjo's first Enneagram workshop").

164. See Mitchell Pacwa, S.J., *Tell Me Who I Am, O Enneagram*, CHRISTIAN RES. J., Fall 1991, at 14 (acknowledging that he and other Jesuit seminarians who learned the enneagram from Father Ochs "promised not to teach it to anyone for at least two years, until we could integrate it into our own lives. However, many of us, myself included, could not resist the temptation to share this esoteric teaching with others."), at <http://www.iclnet.org/pub/resources/text/crj/crj-jrnl/web/crj0146a.html>; MITCH PACWA, S.J., CATHOLICS AND THE NEW AGE 106 (1992) [hereinafter PACWA, CATHOLICS] (recalling that upon returning from Father Ochs' eight-day intensive seminar on the enneagram in May 1972, Pacwa and a colleague, despite their days-earlier promises of secrecy, spread the information they had learned: "It was just too tempting not to answer people's questions with insights from the new wisdom we had just acquired. Perhaps it was the belief that we had received secret knowledge about everybody else in the world . . ."); Goldberg, *supra* note 26, at 19 (quoting Patrick O'Leary, a Jesuit who studied with Father Robert Ochs: "There was a great emphasis on secrecy—and a total violation of same. Bob [Ochs] taught that we were not to pass it on to anyone, but here he was passing it on. And, of course, we glibly talked about it to anyone who'd listen."); *id.* at 19 (observing that the earliest written forms of the enneagram material in the Jesuit community were "Ochs' few pages [of notes] and O'Leary's detailed notes"). Cf. BERNARD TICKERHOOF, *CONVERSION AND THE ENNEAGRAM* 4 (1991) (recalling that Ochs, who introduced him to the enneagram in the late 1970s, *id.* at 147, instructed him "to respect its oral tradition and interpersonal medium; it was not to be written down," since to do so would be to "destroy its complex nuances, and freeze human experience in conceptualization").

Sister Diane Myers's *Using the Enneagram: Paths to Self-Knowledge*.¹⁶⁵ Myers claimed that the enneagram originated "in the Sarmeni culture of European Russia east of the Balkans. It is influenced by Greek thought and philosophy [and mathematics]. The Enneagram, as far as we know, was passed on orally by the Nagshbadi Sufis . . . and was never recorded."¹⁶⁶ She triumphantly declared that "[t]hough the Enneagram in its 'native form' does not have Christian roots, I have found it a very easy process to 'baptize' the Enneagram."¹⁶⁷ (However, not all Christian commentators approve of the use or study of the enneagram.)¹⁶⁸

Though observing that "there is nothing [to date] published on the Enneagram,"¹⁶⁹ Myers named as her own sources not only another Jesuit (thanked for "sharing her own knowledge and understanding")¹⁷⁰ but "a store of unidentified notes gathered through the years from many random sources."¹⁷¹ Nowhere did her text, though including such concepts as each type's "trap," "divine idea," "passion," "virtue," "conservation," "social relations," and "sexual relations," mention Oscar Ichazo or the Arica Institute.

165. DIANE MYERS, *USING THE ENNEAGRAM: PATHS TO SELF-KNOWLEDGE* (1982).

166. *Id.* at 5.

167. *Id.*

168. See Pacwa, *supra* note 164, at 14 ("Once I learned about its occultic roots, . . . it became clear that some of these teachings seeped through to us, despite demythologization of the system. Bad theology and poor pastoral practice have accompanied the enneagram, for which reasons I now criticize it."); PACWA, *CATHOLICS*, *supra* note 164, at 122 ("There are serious theological problems with the notion of salvation in the enneagram system. In general, these ideas are inconsistent with Christianity. Thus, they should not be taught in retreats or parish workshops."); *A Brief Report on the Origins of the Enneagram* [Draft from the U.S. Bishops' Secretariat for Doctrine and Pastoral Practices], National Catholic Reporter, available at http://www.natcath.com/NCR_Online/documents/ennea2.htm (posted Oct. 19, 2000; corrected Oct. 23, 2001) (finding that "the attempt to adapt the enneagram to Christianity as a tool for personal spiritual development shows little promise," because it involves "numerology. . . a form of superstition" and because the enneagram authors are prone to distorting Christian beliefs); see also *Christian Reflection*, *supra* note 1, at 6 (observing that "the enneagram . . . when used as a means of spiritual growth introduces an ambiguity in the doctrine and the life of the Christian faith").

169. MYERS, *supra* note 165, at 5.

170. *Id.* at 10.

171. *Id.*

The first enneagram book that appears to have provoked Arica's litigation—*The Enneagram: A Journey of Self Discovery*¹⁷²—was published by Dimension Books in 1984, and has been characterized as "a fair presentation of the traditional [!] Jesuit materials as they have been circulated in notes and workshops since the early 1970s."¹⁷³ One of the authors (Patrick H. O'Leary, S.J.) had been introduced to the enneagram "in a course on Religious Experience given by Bob Ochs at Loyola University in Chicago in 1971"¹⁷⁴ and was then teaching enneagram workshops with a second author (Maria Beesing, O.P.); the third author (Robert N. Nogosek, C.S.C.) had participated in three such workshops, and had supplemented and helped to organize the book's material.¹⁷⁵

As had Wagner, these authors claimed that until the 20th century the enneagram "remained strictly an oral tradition known only to Sufi masters who would reveal to an individual disciple only the part of the Enneagram pertaining to that person's personality type."¹⁷⁶ They credited Ichazo only with "bringing the Sufi Enneagram to public attention first in Chile and then in the United States."¹⁷⁷

Though generally identifying the various fixations numerically (e.g., as "ONES," "TWOS," etc.),¹⁷⁸ Beesing,

172. MARIA BEESING, O.P., ROBERT N. NOGOSEK, C.S.C., & PATRICK H. O'LEARY, S.J., *THE ENNEAGRAM: A JOURNEY OF SELF DISCOVERY* (1984) [hereinafter BEESING ET AL].

173. RISO, *PERSONALITY TYPES*, *supra* note 27, at 19-20 (indicating that the book "was written to be used in conjunction with Enneagram workshops at Catholic retreat houses").

174. BEESING ET AL., *supra* note 172, at 1.

175. *Id.* at 2.

176. *Id.* at 1 [emphasis omitted].

177. *Id.*; see also *id.* at 99, 124 (referring to Ichazo's *Psychology Today* interview in discussing the distinction between ego and essence, and with regard to the development of a fixation).

178. *Id.* at 9 (noting that by using such nondescriptive labels for the fixations, "the door is left open to whatever content is to be discovered in each type through experience").

The creativity of subsequent authors on the enneagram, perhaps combined with their reluctance to enter into a moral or legal argument with Arica over intellectual property issues, spawned a variety of labels for the nine types. See TICKERHOOF, *supra* note 164, at 146 (observing that because Ichazo was "rather protective of his system," other authors emphasized "their own individual exploration of the ideas," resulting in the system's transmission "in a variety of forms"); MARY E. MORTZ, *OVERCOMING OUR COMPULSIONS* 12-14 (1994) (comparing five different authors' sets of names for the nine fixations).

Nogosek, and O'Leary did reproduce an enneagram of the fixations that was adapted from that in *The Arica Training*,¹⁷⁹ as well as adapted enneagrams of the "Passions" and "Virtues."¹⁸⁰ The authors also diagrammed and discussed, without referring to Ichazo, the "Traps" and redemptive "Holy Ideas" for each fixation.¹⁸¹

Other works emerging from the Jesuit interpretation of enneagram material include: Barbara Metz and John Burchill's *The Enneagram and Prayer* (1987);¹⁸² Margaret Frings Keyes' *Out of the Shadows* (1988) and *Emotions and the Enneagram* (1989);¹⁸³ Richard Rohr and Andreas Ebert's *Discovering the Enneagram* (1991);¹⁸⁴ Suzanne Zuercher's *Enneagram Spirituality* (1992)¹⁸⁵ and *Enneagram*

179. BEESING, ET AL, *supra* note 172, at 135 (reproducing diagram and citing article).

180. *Id.* at 194.

181. *Id.* at 180 *et seq.* The authors' other discussions, for which there might not be direct parallels in the Arica system, relate to the correspondences between types and "The Experience of Time," *id.* at 114-20, and colors, *id.* at 210-18. Their writings on each type's "totems," or symbolic animals, *id.* at 120-23 and 210-18, were objected to by Ichazo, who asserted that these were "copyrighted in their totality by the Arica Institute." ICHAZO, LETTERS, *supra* note 11, at 59.

182. BARBARA METZ & JOHN BURCHILL, THE ENNEAGRAM AND PRAYER 5 (1987) ("[Enneagram] theory has been uncovered in recent years as men and women have delved into spiritualities that are not their own. Through workshops and some limited written materials, it has begun to be popularized.").

183. MARGARET FRINGS KEYES, EMOTIONS AND THE ENNEAGRAM xi (1989) ("In the early 1970s, the Jesuit priest Bob Ochs introduced me to the Enneagram.").

The copyright page of Keyes' book indicated that "[t]he opinions expressed in this book are those of the author. They are not derived from, and do not represent, the teachings of any institution or school." *Id.* at v; *see also id.* at xii (supplying Arica's address for "[r]eaders interested in the occult and esoteric origins of the Enneagram or the Enneagon theory of Oscar Ichazo," and warning that "[t]he author's view of the Enneagram in the light of Jungian psychology would probably be considered a distortion by Aricans rather than an extension of Enneagon theory").

184. ROHR & EBERT 1991, *supra* note 27, at 7 (noting that over many years "Sufi masters . . . discovered nine constant models" of spiritual obstruction); *id.* at 8 ("The wisdom of the Enneagram was evidently a strictly oral tradition that over the centuries was passed down from master to disciple."); *id.* at 9 ("What is today the best known form of the Enneagram as a 'mirror of the soul' is mainly derived from Oscar Ichazo.").

185. SUZANNE ZUERCHER, ENNEAGRAM SPIRITUALITY: FROM COMPULSION TO CONTEMPLATION 157 (1992) ("The enneagram is an oral tradition. Because this is so, it is difficult to pinpoint individuals who originated specific reflections on the theory."); *id.* at 167 n. 3 ("Those familiar with the enneagram will note that

Companions (2000);¹⁸⁶ and Dick Wright's *The Enneagram Triads* (1997);¹⁸⁷ as well as the writings of Don Richard Riso.¹⁸⁸

Thus, to Ichazo's great frustration, Arica's limited publication of his work in "what are basically study-manuals, with diagrams and propositions for the purpose of making ready-to-use handouts and workbooks," had encouraged "an extensive group of authors . . . to believe that it is just an old skeletal structure which demands a great deal of polishing and exploring in proper Western terms."¹⁸⁹

Though Ichazo had earlier told students that he was the representative of a special esoteric school, and had linked the enneagram to both Sufism and Gurdjieff,¹⁹⁰ he now strenuously denied that Arica's methods and systems had been taken directly "from some obscure Sufi sect or from anyone else," and claimed unequivocally to be "the only source of the Arica theory and method."¹⁹¹ Indeed, he

I follow the theory of Oscar Ichazo, founder of the Arica Institute in New York.").

186. SUZANNE ZUERCHER, *ENNEAGRAM COMPANIONS: GROWING IN RELATIONSHIPS AND SPIRITUAL DIRECTION* 178 (2000) ("There is a risk in writing down what has been, is now, and always will be an oral tradition in the best sense. . . . Once these words are put on pages, they may lose not only vitality, but also some urgency to explore further.").

187. WRIGHT, *supra* note 163.

188. See, e.g., RISO, *PERSONALITY TYPES*, *supra* note 27; RISO, *UNDERSTANDING*, *supra* note 100.

189. Ichazo, *Questions and Answers*, *supra* note 72, at 90 ("All this disrespect and misappropriation is frankly insulting."); see also Lincoln, *supra* note 49, at 414 ("Protoanalysis shows itself seriously lacking [as a] useful theory of personality [and is] a 'barebones' system that has been filled in by the psychodynamic insights of . . . Claudio Naranjo. . . and many others, including the present author.").

190. ICHAZO, *INTERVIEWS*, *supra* note 11, at 112 (Traditionally the enneagram "was taken in a very secluded way; it was only given under very tough conditions of initiation after a long time of being in a [Sufi] sect, more than twenty years at least. However, Gurdjieff had the mission of popularizing some of these ideas . . .").

191. Ichazo, *Transpersonal*, *supra* note 22, at 116 ("The Arica theory and method are directly and completely proposed and presented exclusively by me."); ICHAZO, *HUMAN PROCESS*, *supra* note 30, at 2 ("[The] Arica Theory is radically new . . . the method is entirely new. The techniques that are employed are also new."); Ichazo, *Questions and Answers*, *supra* note 72, at 90 ("[T]hose who claim that the theory belongs to an obscure and ancient Sufi sect . . . are misled."); see also Ichazo, *Isaacs Interview*, *supra* note 21, at 9 ("Then the book of Patrick O'Leary comes out, proclaiming that this theory was an old Sufi

insisted that "I know Sufism extensively . . . and I know realized Sufi sheiks. It is not part of their theoretical framework. They couldn't care less about the Enneagon."¹⁹² Ichazo also characterized as "misguided" the "implication that [Arica's] Teachings have a Catholic root."¹⁹³

1. *The Dimension Books Lawsuit*. In March 1988, after an extended period of discussions with the publisher of *The Enneagram: A Journey of Self-Discovery* and of *The Enneagram and Prayer*, Arica brought a copyright infringement and unfair competition action in the United States District Court for the Southern District of New York against authors Patrick O'Leary, Robert Nogosek, Barbara Metz, Maria Beesing, and John Burchill, as well as against Dimension Books and one of its executives, Thomas Coffey.¹⁹⁴ Arica sought financial damages and the withdrawal of these books from publication,¹⁹⁵ as well as the

story, which was now brought to the intelligent light of Western culture, out of the depths of darkness by himself and his co-authors.").

At this point, Naranjo reiterated his view that, however much Ichazo had contributed to the fixations material, Ichazo was "a bearer of something that originated beyond him." Naranjo, *Distorted Enneagram*, *supra* note 117, at 22. Yet he noted sympathetically, "[l]ately Ichazo has been claiming more authorship in relation to enneagram applications than he did when I knew him, and I understand this as an appropriate reaction to the world's attempt to spread esoteric information with an incorrect attitude . . . [H]e needed to claim authorship to invoke the copyright law." *Id.*

192. Goldberg, *supra* note 26, at 24 (quoting Ichazo); *see also* Ichazo, SYMBOL, *supra* note 13, at 11 ("To insist that the enneagram belongs to the Sufi tradition . . . totally misconceives and misuses its real purpose . . . [In my own work] I am speaking about logical terms of a serious science and philosophy, and not about anything that corresponds to the vagueness of the enneagram theoreticians.").

193. Ichazo, SYMBOL, *supra* note 13, at 25. *Cf.* ROHR & EBERT, ENNEAGRAM, *supra* note 151, at 8-21 (connecting the enneagram to the traditions of the Desert Fathers, fourth-century Christian monks).

194. Complaint for Infringement of Copyright and Unfair Competition, Arica Inst., Inc. v. Dimension Books, Inc., No. 88 Civ. 2004 (S.D.N.Y.). Elliott Dunderdale stated in an affidavit [hereinafter Dunderdale Dimensions Affidavit (dated Sept. 30, 1988; pages unnumbered)] that although Arica had "[f]or several years [been] vaguely aware that some clandestine trainings using Oscar's material were going on" among Naranjo and his students, the publication of these books had "moved [us] to act to protect our copyrights."; Arica initially contacted Dimension Books in November 1985. Dunderdale Dimensions Affidavit, ¶ 11, *Dimension Books* (No. 88 Civ. 2004) (S.D.N.Y.).

195. *Id.*

inclusion of a disclaimer "in any future publications that make reference to Arica material."¹⁹⁶

In an affidavit, Elliott Dunderdale, then a director of Arica and its Vice President of Operations, asserted that the defendants' "bogus" publications not only lacked the "complete and integrated" nature of Arica's system,¹⁹⁷ but that their limitations would disillusion readers, foster "an incorrect assumption that all people who teach Enneagons have an income earning motive,"¹⁹⁸ and, by enabling readers to misidentify their fixations, might "cause irreparable harm, obstruction, and retardation of the process and path toward self-realization."¹⁹⁹

However, Ichazo claimed that Arica "had won the case completely and unconditionally"²⁰⁰ when, as part of a settlement of the litigation in July 1990, each of these authors apparently agreed in writing that "Oscar Ichazo is the sole originator of the theory of the ego fixations and the system of enneagons (including the six enneagons attached as Exhibit 'A' hereto) representing the different functions of the human psyche."²⁰¹

196. *Minutes of October 28, 1989 Meeting of Board of Directors of Arica Institute, Inc.*, in ARICAN, Winter 1990, 75, at 76 (anticipating that settlement would include such elements). Arica's attorneys were also to "review the possibility of legal action against" enneagram authors Don Richard Riso and Margaret Frings Keyes. *Id.*

197. Dunderdale Dimensions Affidavit, ¶ 21, *Dimension Books* (No. 88 Civ. 2004) (S.D.N.Y.).

198. *Id.* at ¶ 24.

199. *Id.*; see also *id.* at ¶ 25 ("The potential Arican members will turn to other far less accelerated and potentially hazardous means of self-realization due to defendants' infringement.").

200. ICHAZO, LETTERS, *supra* note 11, at 112; see also Ichazo, *Questions and Answers*, *supra* note 72, at 91 (insisting that "none of this [litigation] would ever have happened had they, as is due, had the decency to acknowledge origin and source."); Ichazo, SYMBOL, *supra* note 13, at 19 (asserting that "I had no other solution but to instigate [this] lawsuit in order to obtain clarification about the origin and source" of the authors' material, "which, in fact, had no correlation with the followers of Gurdjieff and his extremely vague assumptions about the enneagram").

201. See *Legal*, ARICAN, Spring 1990, at 26 (reproducing the Settlement Agreement). The six referenced enneagrams were those for Fixations, Traps, Passions, Virtues, Ideas, and Hypergnostic Systems. *Id.* at 28. A subsequent work by one of these authors contained a disclaimer qualifying his ideas as "different and distinct" from Ichazo's, indicating that the book had not been endorsed or authorized by Ichazo or Arica, and providing Arica's address and telephone number for readers who wanted information concerning Arica's "numerous books and other publications" on Ichazo's theory. ROBERT J. NOGOSEK, *THE ENNEAGRAM JOURNEY TO NEW LIFE* iv (1995).

Ironically, the demise of the "oral tradition" argument encouraged other enneagram authors to assert intellectual property claims for their own creative efforts in this area. For example, one enneagram book indicated that its contents "are the result of the original work of the authors, and no body of Enneagram material has been passed down in a preexisting 'oral tradition' in the public domain," and asked readers to "[p]lease respect the rights of the authors by not photocopying or otherwise infringing this copyrighted material. . . ." ²⁰² One of the authors warned, on his Web site, that:

[P]ropagating this vague, romantic view of [the enneagram's Sufi] lineage has been harmful to those of us engaged in doing original work with it[, who are] seen as merely transmitting an existing body of knowledge that is in the public domain . . . Many teachers and writers felt that they could therefore help themselves to the work of others with impunity. ²⁰³

Yet Arica now concerned itself with a larger threat: the disclosure of its material beyond religious communities, to the general public.

202. RISO & HUDSON, UNDERSTANDING, *supra* note 26, at iv; *see also id.* at viii (reiterating that "the Enneagram information about the types has not been originated by 'the Sufis' and transmitted to us in an 'oral tradition' of any kind that is in the public domain, although some have popularized this misleading phrase."); *id.* at 32-33 (clarifying that, although Ichazo made use of traditional mystical approaches, "the actual combination of those traditions connected with the Enneagram symbol is purely his creation. Thus, the 'traditional Enneagram' only goes back to the 1960s when Ichazo was first teaching it . . .").

203. Don [Richard] Riso, *Romancing the Enneagram*, at <http://www.enneagraminstitute.com/articles/NartRomE.asp>; *see also* Riso & Hudson, *Enneagram Contributions*, *supra* note 151 (discussing the enneagram-related work of Gurdjieff and Ichazo and itemizing in detail the authors' own contributions to this field).

E. Helen Palmer and "The Worst-Kept Secret in Spiritual History"²⁰⁴

Present at the first series of Naranjo's nine public meetings in 1973, and at the first two of the second series approximately ten years later, was Helen Palmer, who (like Naranjo) had been introduced to the enneagram by studying Gurdjieff's teachings.²⁰⁵ Palmer, who did not attend any Arica trainings,²⁰⁶ would recall, "I only saw the nine types worked once. It was rather clumsy . . . Claudio was the Rosetta Stone. He brought it into a contemporary venue" by correlating the nine fixations with established diagnostic categories of mental disorders.²⁰⁷

204. Jurgen Gundel, *The Enneagram in Contention*, GNOSIS, Winter 1997 at 12, 13-14 [hereinafter *Contention*]. Palmer stated that "[b]etween the worldwide Catholic network and the thousands who met the system through California universities and workshops, the enneagram was arguably the worst-kept secret in spiritual history." *Id.* Indeed, to the authors of one work on the enneagram, the popularization of this material was (so to speak) pre-ordained: "When we Americans got hold of it, what had to happen happened: the hidden wisdom was offered for mass consumption." ROHR & EBERT, ENNEAGRAM, *supra* note 151, at 22-23.

205. Palmer Testimony, TR 186. Palmer had been affiliated since 1965 with groups studying and practicing the work of Gurdjieff. *Id.* at 180. She testified that in 1970, when word about Ichazo's teachings began to spread, "the feeling at the time through the Gurdjieff Foundation was that Ichazo was leaning heavily on Gurdjieff-based material, but not acknowledging it." *Id.* at 182.

206. Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1071 (2d Cir. 1992); *see also* Palmer Testimony, TR 218 (stating that she had not attended any of Ichazo's lectures or seen any of his training manuals before writing the first of her own books on the enneagram).

207. Smoley, *supra* note 2, at 20 (quoting Palmer); *see also Contention*, *supra* note 204, at 13. Palmer recalled that "[t]here I witnessed Naranjo's impressive alignment of Ichazo's Enneatypes with the DSM diagnostic categories. This is Naranjo's real contribution to the study." *Id.*

The "DSM" is the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, whose fourth (1994) edition, or DSM-IV, is currently available to mental health professionals and to the public. The volume's editors describe it as "a categorical classification that divides mental disorders into types based on criteria sets with defining features," *id.* at xxii, and note that it was "developed for use in clinical, educational, and research settings." *Id.* at xxiii. In a "Cautionary Statement," the editors warn that "[t]he proper use of these [diagnostic] criteria requires specialized clinical training that provides both a body of knowledge and clinical skills." *Id.* at xxvii. The DSM-IV has been recognized as "the definitive reference for mental health professionals." *In re Commitment of Pletz*, 619 N.W.2d 97, 105 (Wis. Ct. App. 2000). However, the formulation of this manual, much less the identification of a given individual's disorder(s), seems to be far from a precise science. *See* John Cloud, *How We Get Labeled*, TIME, Jan. 20, 2003, at 101, 104 (observing that

Palmer recalled that anyone who wished to pay the tuition could have attended Naranjo's public presentations of enneagram material, at which there had been no requirement of secrecy.²⁰⁸ The presentations had been conducted orally and through blackboard lectures,²⁰⁹ although Naranjo had distributed written materials, Palmer stated that she was unsure of the origin of their contents.²¹⁰ Yet Naranjo's panel discussions by individuals who shared a given personality type fell within Palmer's broad definition of the "oral tradition," which emphasized not the secrecy but instead the experiential nature of the spiritual transmission: "when [an enneagram] panel is focused, they internally generate all the power and conviction of lived experience, and a receptive audience will be triggered into sharing the same consciousness."²¹¹ Palmer dismissed as "more than likely wishful thinking" the notion that "oral tradition" necessarily involved "mysterious initiation and secret knowledge [or] a well-worn piece of parchment, handed down from one generation to another. . . . Oral teaching is often public."²¹²

Palmer, who holds a Masters degree in clinical psychology,²¹³ formed a for-profit sole proprietorship, the Center for the Investigation and Training of Intuition, in

"there is no biological test for any of these disorders," and suggesting that "many forces besides science shape [the list of diagnoses], including politics, fashion, and tradition").

Ichazo himself later applied the DSM categories to his system of fixations. See Ichazo, *Questions and Answers, DSM-III-R*, ARICAN, TEACHINGS OF THE GREAT TELESMATTA issue (1991), at 69-80. Michael Goldberg pointed out to me that Ichazo and Naranjo attached different DSM categories to the fixations.

208. *Contention*, *supra* note 204, at 13.

209. Palmer Testimony, TR 199.

210. *Id.* at TR 192, 219-220.

211. Andrea Isaacs & Jack Labanauskas, *Conversation with Helen Palmer, Part 2*, ENNEAGRAM MONTHLY, February 1998, at 5, 14 (quoting Palmer: "[t]he oral tradition . . . relies on teachers who embody an aspect of higher consciousness and can draw others into a similar state" through not just their words but their very presence).

212. *Id.* at 15; see also PALMER, ENNEAGRAM, *supra* note 30, at 4 ("The Enneagram of types is part of an oral teaching tradition, and the material is still best transmitted by seeing and hearing groups of people of the same type speak about their lives."); SCHWARTZ, *supra* note 9, at 377 ("[I]t is in what she calls the 'oral tradition'—Palmer's way of teaching through live interviews with people—that she makes most vivid the psychological characteristics of each type and their predictable patterns of perception and behavior.").

213. *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1070-71 (2d Cir. 1992); see also Palmer Testimony, TR 171.

1974,²¹⁴ and two years later began teaching the enneagram system in Berkeley.²¹⁵ Of particular interest to her was that Ichazo appeared to have correlated Christianity's seven deadly sins,²¹⁶ which Gurdjieff had discussed,²¹⁷ with seven of the nine points on the enneagram, and to have completed the diagram by adding two more spiritual failings: self-love (or vanity)²¹⁸ and fear.²¹⁸

Also familiar to Palmer through her study of Gurdjieff was Ichazo's emphasis on the distinction between "ego and of personality and essence."²¹⁹ Moreover, Ichazo's enneagrams corresponded with the three psychic centers that Gurdjieff had identified, in the head, heart, and lower abdomen.²²⁰ Thus, "[w]hat was so exciting about Ichazo's work was that we could overlay seven diagrams which he produced on the Gurdjieff model, and so what was promised through Gurdjieff, in my opinion, came to a kind of fruition through the work of Ichazo."²²¹ Indeed, Palmer seemed to assert that if anyone were a plagiarizer, it was not she but Ichazo.²²²

Palmer testified that even before Dimension Books' publication of *The Enneagram: A Journey of Self Discovery*, Arica had begun to contact teachers of the enneagram system, "letting us know that we would be sued for teaching this material, regardless of our sources, because Arica had

214. Palmer Testimony, TR 172-74.

215. *Contention*, *supra* note 204, at 14.

216. These are: anger, pride, envy, greed, gluttony, lust, and sloth. Palmer Testimony, TR 187.

217. Palmer interpreted Gurdjieff's identification of the "chief feature" of different persons, as a "kind of rudimentary way of describing personality types." Palmer Testimony, TR 191.

218. *Id.* at 186-87. Palmer stated that "[t]he reason I was so excited about hearing about the Arica training was that Ichazo was using basic Gurdjieff concepts. One of those concepts was the elucidation of the basic Enneagram diagrams." *Id.* at 187.

219. *Id.* at 207.

220. *Id.* at 189; *see also* NARANJO, STRUCTURES, *supra* note 15, at 5 (correlating, by means of a diagram, seven different enneagrams to elements of a person's "intellectual center," "feeling center," and "instinctive center").

221. Palmer Testimony, TR 190.

222. *Id.* at 207 ("I am accused of plagiarizing materials that clearly do come from the Gurdjieff tradition . . . but [are] apparently claimed by Ichazo as original ideas of his own. He doesn't say he is using the framework of the Gurdjieff material."). *But see* Dunderdale Testimony, TR 399-400 (stating that Ichazo developed the enneagram system on his own, and reporting that "[h]e has never said that something came from him if it didn't come directly from him and exclusively from him.").

copyrights on it."²²³ In June 1988, after reviewing galley proofs of Palmer's forthcoming book, *The Enneagram*, Arica's attorneys provided copyright and trademark registrations, and a copy of *Interviews With Oscar Ichazo* ("*Interviews*") to HarperCollins, Palmer's publisher.²²⁴

Nevertheless, in November 1988, HarperCollins published a hardcover edition of *The Enneagram*, which offered readers an exploration of "an ancient Sufi teaching that describes nine different personality types and their interrelationships. . . ."²²⁵

Holding that the enneagram "is intrinsic to Sufi mysticism . . . yet appears to have no written history of its own,"²²⁶ Palmer attributed to Ichazo the correspondence of the nine personality types to specific points of the enneagram, and the identification of the "Holy Idea" and "Virtue" associated with each point.²²⁷ By Palmer's account, she had supplemented the "very cursory" material that she had received from Naranjo's experience in Arica²²⁸ and the "small description" of Naranjo's subsequent correlation of this material with "current psychological thinking,"²²⁹ by adding "20 pages on each of these nine types. The 20 pages includes an immense amount of material that never was developed through either man, but came through my many,

223. Andrea Isaacs & Jack Labanuskas, *A Conversation with Helen Palmer*, ENNEAGRAM MONTHLY, Jan. 1998 at 1, 14. Palmer herself received at least two warning letters from Arica, in March 1987 and March 1988. Leviton, *supra* note 2, at 35. Dunderdale testified that by this time, notes from Palmer's classes were already circulating. Dunderdale Testimony, TR 304-305, 381 (alleging that the availability of these materials was in part responsible for the declining enrollment in Arica trainings in this period).

224. *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1061 (S.D.N.Y. 1991).

225. *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1071 (2d Cir. 1992) (quoting both the opening paragraph of the paperback (1991) version of PALMER, ENNEAGRAM, *supra* note 30, at 3, and the author's suggestion, *id.*, that her work "can further your own self-understanding, help you work out your relationships with other people, and acquaint you with the higher abilities that are particular to your type of mind").

The Second Circuit observed that this book discussed Ichazo's work with enneagrams, and that "at page 50 . . . there are seven enneagrams, six virtually identical to their Ichazo counterparts." *Id.*

226. PALMER, ENNEAGRAM, *supra* note 30, at 10.

227. *Id.* at 46-47. Palmer also recognized that Ichazo "is the major modern source for the material and continues [to explore it]." *Id.* at 54.

228. Palmer Testimony, TR 222.

229. *Id.* at 222-23.

many interviews of people with whom I work and from whom I take their stories.²³⁰

Arica took no legal action against Palmer when the book was first published.²³¹ However, after communications with HarperCollins,²³² which included the publisher's offer in February 1990 to insert a disclaimer that Palmer was not associated with Arica and that Arica was not endorsing the book,²³³ Arica in August 1990 sued Palmer and Harper & Row for copyright infringement, seeking a temporary restraining order to prevent the publication of a paperback version of *The Enneagram*.²³⁴

Palmer denied that she had been exposed to unpublished Arica materials, including the transcripts of Ichazo's lectures and the various training manuals closely held by Arica. Palmer did identify as her sources: the Naranjo lectures that she had attended; her own exposure to material related to the teachings of Gurdjieff; interviews that she had conducted of her own students, since 1976; *Interviews*; and *The Arica Training*.²³⁵

1. *The District Court—Preliminary Injunction Denied.* The district court summarized its analysis by agreeing with the defendants'²³⁶ contention that "the real charge in this

230. *Id.* at 223.

231. *See Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1067-68 (S.D.N.Y. 1991).

232. In April 1989 and March 1990, Arica provided HarperCollins with materials indicating the points of comparison between Palmer's book and Arica's copyrighted material. *Id.* at 1061; *see also Arica Copyrighted Material / Palmer's Taking*, ARICAN, THE TEACHINGS OF THE GREAT TELESMATTA, 1991 at 118-122 (specifying similarities identified by Arica between Ichazo's works and Palmer's book).

233. *See* Testimony of James Fox, in-house counsel for Harper & Row, TR 88-90 (indicating, *id.* at 89, that "I knew there were other litigations brought by [Arica against] other publishers who had published materials who used an Enneagram, and others had been settled in this manner").

234. *See id.* William Baker, an executive at HarperCollins, testified that "trade paperback" versions of hardcover books, which are formatted and distributed in the same way as hardbound copies, usually sell approximately the same number of copies as the corresponding hardcover versions. William Baker Testimony, TR 461.

235. *Arica Institute, Inc. v. Palmer*, 761 F. Supp. 1056, 1060 (1991); *see also PALMER, ENNEAGRAM*, *supra* note 30, at 392 (citing *The Arica Training* and Sam Keen's 1973 interview with Ichazo).

236. This Article occasionally refers to defendants Palmer and Harper & Row collectively as "Palmer."

case is not copyright infringement, but heresy."²³⁷ (In this context, it could not have helped Arica for Dunderdale to have told an interviewer that "[w]e're not trying to keep the expression of the enneagram to ourselves But the only accurate presentation of the information about the 'nine fixations of the enneagon' originates with Arica Institute."²³⁸) Despite Arica's insistence that Palmer's interpretation of the enneagrams of personality would confuse the general public,²³⁹ the court refused to enjoin the publication of the paperback version of her book.

Much of the material that Arica had registered for copyright protection qualified as an "idea, procedure, process, system, method of operation, concept, principle, or discovery"²⁴⁰ and therefore was not protectable by copyright. Comparing Arica's system²⁴¹ of personality analysis to astrology, both in its substantive descriptions of personality types²⁴² and in the specific ordering of those descriptions,²⁴³

237. *Arica*, 761 F. Supp. at 1061, citing Defendants' Post-Hearing Brief in Opposition to Motion for Preliminary Injunction (filed Mar. 22, 1991) [hereinafter Defendants' Post-Hearing Brief], at 12. The defendants argued in that pleading that "the marketplace of ideas" rather than the court should determine whether Palmer's or Ichazo's interpretation of the enneagram was correct, and criticized Arica for its attempt to claim "a monopoly on any discussion of the enneagrams of personality." *Id.* at 23.

For a discussion of the linkage between the establishment of "a quasi-copyright regime" and the censorship of heresy in sixteenth through eighteenth century England, see Cotter, *supra* note 102, at 326-27.

238. Leviton, *supra* note 2, at 36. This interview was itself the result of Aricans' vociferous objections to an August 1989 article by Leviton in *New Age* magazine, that had discussed Palmer's and other non-Aricans' work with the enneagram: "I hardly ever get 'fan mail,' but this Article brought it in by the sackful [I]t was the Aricans' contention that they had sole authority—both legally and spiritually—to teach and publish the enneagram model" *Id.* at 32 (noting that the Aricans' litigiousness "really got my attention.").

239. Dunderdale had testified that through Palmer's work, "[p]eople are led to believe that they can pick their own fixation arbitrarily and they do [T]he net effect of that is they are relegating themselves and other people to a further life of ignorance" *Arica Inst.*, 761 F. Supp. at 1061 (quoting Dunderdale Testimony, TR 352-54).

240. 17 U.S.C. § 102(b) (2000) (exempting from copyright "an original work of authorship" in any such category, "regardless of the form in which it is described, explained, illustrated, or embodied in such work").

241. *Arica Inst.*, 761 F. Supp. at 1062 (acknowledging that the "Arica system is equivalent to a philosophy or program" (citing Dunderdale Testimony, TR 435)).

242. See *id.* at 1063 (taking "judicial notice of the fact that [the] very same terms [that Palmer allegedly copied from Ichazo's description of one type] are

the court concluded that neither the structure nor the sequence of the enneagram labels could be copyrighted. Indeed, "fragmentary words and phrases do not exhibit the minimal level of creativity necessary for copyright protection."²⁴⁴ Thus, many of the alleged instances of copyright infringement (such as similarities between individual phrases or sentences in Arica's and Palmer's works) were dismissed because they did not involve the duplication of copyrightable material.²⁴⁵

Even if Arica's individual labels for enneagram points were copyrightable, Arica could not prove that the similarities between the works at issue had resulted from Palmer's access to unpublished Arica works. Palmer's book credited the material in the article, *The Arica Training*,²⁴⁶ she had adapted some of the enneagram labels in that publication by choosing common synonyms from a limited set,²⁴⁷ and Palmer had learned some of Ichazo's terminology from Naranjo's presentations.

commonly used to describe the astrological sign of Virgo, another system of personality types in this genre.").

243. *See id.* at 1063 n.22 (noting that "books describing the astrological signs are commonly structured in order of the birth months for each sign"). The court distinguished *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 690 (S.D.N.Y. 1974), *aff'd per curiam*, 500 F.2d 1221 (2d Cir. 1974) (unrebutted evidence of actual copying of structure and sequence of astrological material justified finding of copyright infringement). *Id.*

244. *Id.* at 1063.

245. *See id.*

246. *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1065 (S.D.N.Y. 1991) (citing PALMER, ENNEAGRAM, *supra* note 30, at 50 and acknowledging that a chart of enneagrams had been "[a]dapted from *Transpersonal Psychologies*, Edit. Charles Tart, Harper & Row, 1975. Reprinted by Psychological Processes, Inc. 1983, Charles Tart.").

247. *See id.* (noting, as example, "substituting 'veracity (honesty)' for [the Lilly/Hart article's] label 'Truthfulness' "); *see also id.* at 1065 n.24 ("Out of 63 total labels [for the nine points of each of the seven enneagrams reproduced in the article], in five cases Palmer substituted her own word In four other cases Palmer added a second synonymous term in parentheses. . . .").

Arica had argued that "Palmer has adopted the Arica philosophy using its terms and expressions. She has not introduced anything new—her approach is simply to leave important parts of Arica's philosophy out." Plaintiff's Post-Hearing Memorandum of Law in Support of Motion for Preliminary Injunction at 23, *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056 (S.D.N.Y. 1991) (No. 90 Civ. 5153).

In response, Palmer had insisted that Ichazo's names for the ego fixations were so basic to his system that they in turn should be as uncopyrightable as were his ideas themselves. Defendants' Memorandum of Law in Opposition to Motion for Preliminary Injunction at 21, *Arica Inst.* (No. 90 Civ. 5153) ("To deny

Although dismissing the majority of the comparisons set out in Arica's 388-page filing, either because the similarity involved an uncopyrightable idea or because Palmer's work expressed a "different idea in a different way,"²⁴⁸ the court found three instances of similarity between Palmer's work and *Interviews*, which she had acknowledged using as a source.²⁴⁹

Yet these similarities fell within the copyright infringement defense of fair use, which protects the copying of limited portions of a work for purposes of criticism,

Defendants the right to use those basic categories of analysis would be tantamount to denying Defendants the right to use Plaintiff's system and concepts."); Defendant's Post-Hearing Brief in Opposition to Motion for Preliminary Injunction at 30, *Arica Inst.* (No. 90 Civ. 5153) (asserting that the enneagram diagrams and Ichazo's labels "are essential to any discussion of Ichazo's ideas—indeed, they *are* his ideas"); *Cf. Kepner-Tregoe, Inc. v. Carabio*, 203 U.S.P.Q. 124, 132 (E.D. Mich. 1979) (holding that because the plaintiff, which "dominates the market" for management-training programs, "is a known quantity and [the market's] expectations have been molded in its direction," the court would tolerate "a certain similarity" from competitors' services); *McGraw-Hill v. Worth Publishers, Inc.*, 335 F. Supp. 415, 421 (S.D.N.Y. 1971) (recognizing, in declining to issue a preliminary injunction against alleged copyright infringement, that similarities between the substance and organization of the plaintiff's and defendant's economics textbooks were due in part to the profound influence on all introductory economics courses of a third, and leading, textbook, as well as to the shared necessity of dealing with "a large corpus of technical words and phrases whose meanings have been fixed, and of concepts whose importance is generally acknowledged" in the field).

The district court in *Arica* did not directly address either of these arguments.

248. *Arica Inst.*, 761 F. Supp. at 1065.

249. *Id.* at 1066. The three examples were:

(1a) ICHAZO, INTERVIEWS, *supra* note 11, at 9: "In essence . . . ; there is no conflict within the person between head, heart, and stomach"

(1b) PALMER, ENNEAGRAM, *supra* note 30, at 18: "In essence we are like young children: there is no conflict between our thoughts, our emotions, or our instincts."

(2a) ICHAZO INTERVIEWS, *supra* note 11, at 9: "A contradiction develops between the inner feelings of the child and the outer social reality to which he must conform."

(2b) PALMER, ENNEAGRAM, *supra* note 30, at 19: "A contradiction developed between the child's central trust of the environment and the family reality, which must be obeyed."

(3a) ICHAZO INTERVIEWS, *supra* note 11, at 9: "Personality forms a defensive layer over the essence. . . ."

(3b) PALMER, ENNEAGRAM, *supra* note 30, at 19-20: "From the point of view of a psychology that includes a concept of essence, personality develops in order to protect and defend essence from injury in the material world."

Arica Inst., 761 F. Supp. at 1066.

commentary, and scholarship.²⁵⁰ Though it does not address the question of whether the defendant should have attributed the copied work to the plaintiff,²⁵¹ and has been perceived by one scholar as a method of retroactively justifying courts' more informal analyses of the fairness of the copying,²⁵² this test focuses on four independent and fact-sensitive elements.

Only the second of these—the nature of the plaintiff's works—favored Arica, since its material was largely unpublished.²⁵³ The first factor—the purpose and character of the defendant's work—helped Palmer because her work "undeniably constitutes a combination of comment,

250. See 17 U.S.C. § 107 (2000) ("[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright" factors to be considered in making a fair use determination include: "(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.").

Courts have incorporated into the first of these factors the element of the defendant's good faith in using the appropriated material. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562-63 (1985) (stating that "relevant to the 'character' of the use is 'the propriety of the defendant's conduct' "). Good faith has also been identified as a prerequisite of the fair use test. See, e.g., *Harper & Row*, 471 U.S. at 562-63 (noting that "[f]air use presupposes 'good faith' and 'fair dealing,' " quoting *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)).

251. See Laurie Sterns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 529 (observing that the fair use doctrine "is silent on the question of attribution," and noting that "attribution is largely irrelevant to a claim of copyright infringement," as opposed to a claim of plagiarism). The questions of plagiarism and of a "moral right" to attribution are discussed in detail at *infra* Part I.E.4.

252. See David Nimmer, "*Fairest of Them All*" and *Other Fairy Tales of Fair Use*, 66 J. LAW & CONTEMP. PROBS. 263, 281 (2003) (concluding, after charting and evaluating the four-factor fair use analysis in sixty decisions, that "[c]ourts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can.").

253. *Arica Inst.*, 761 F. Supp. at 1066-67 ("Because the great majority of Arica's manuals and lectures, even though they date back to the early 1970s, are unpublished, they are entitled to greater copyright protection than published works.") The court did not evaluate the degree to which, for purposes of this factor, Arica's works were creative, and thereby entitled to more protection, or factual/scientific, in which case they would be correspondingly less protected.

criticism, scholarship, and research."²⁵⁴ The third—the amount and substantiality of Arican material that she had used—favored Palmer because the alleged infringements were mostly of "clichés or ordinary word combinations," and at worst, merely "close paraphrasing" of only a small portion of Arica's forty-six copyrighted works.²⁵⁵

Nor did the effect of Palmer's work on the market for Arica's work—the fourth, and the single most important, of the fair use factors²⁵⁶—appear to aid Arica: "Since only one of the plaintiff's works [*i.e.*, *Interviews*] is sold to the general public in bookstores, the actual and potential market for Arica's works comprises Arica members or persons enrolling in Arica training programs."²⁵⁷ Though Arica had attributed its declining enrollments to Palmer's work, the court effectively found that Arica's lawsuit had been brought too late: approximately six years after the

254. *Id.* at 1067 (noting that all of these purposes "enjoy favored status under § 107"). Indeed, Palmer and Harper & Row pointed out in their pleadings that in his own *LETTERS TO THE SCHOOL*, *supra* note 11, Ichazo had without express permission quoted 117 lines from another work on the enneagram in the course of attacking its analysis. See Defendants' Post-Hearing Brief at 43, *Arica Inst.* (No. 90 Civ. 5153).

255. *Arica Inst.*, 761 F. Supp. at 1067 (determining that, because Arica's copyrighted materials "span a range of topics, a conclusion that in these isolated passages Palmer has appropriated the qualitative 'heart' of the copyrighted works would be more than inappropriate").

256. *Id.* (citing *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 566 and indicating that the fourth factor is "the single most important element of fair use").

257. *Id.*; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994) (indicating that in this context the market harm includes the effect of the defendant's work on the potential market for the plaintiff's work); *id.* at 592 (noting that the potential market for the plaintiff's work includes the market for potential derivatives of that work, whether developed by the plaintiff itself or by those to whom the plaintiff licensed the original work or a derivative).

The defendants, pointing out that Palmer's work "gives credit to Oscar Ichazo and mentions the work of the Arica Institute," argued that "*The Enneagram* is more likely to introduce new followers to Arica than it is to deter potential customers A reader . . . who feels more comfortable with [a "mystical"] approach such as Ichazo's will turn to the Arica Institute" rather than to Palmer's approach, which is "linked to contemporary psychology." Defendants' Supplemental Memorandum of Law in Opposition to Motion for Preliminary Injunction: Fair Use at 10-11, *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056 (S.D.N.Y. 1991) (No. 90 Civ. 5153) ("That is, after all, what the marketplace of ideas is all about."). This argument, of course, evaded Arica's contention that Palmer was delivering to her readers flawed interpretations of Arica's material, as well as Ichazo's larger concern that the fixations system should not be reduced to a mere psychological technique, see *infra* Part IV.B.2.

circulation of Palmer's class notes and the publication of the paperback version of *The Arica Training* (which had appeared in hardcover fifteen years before the lawsuit) had apparently begun to cut into Arica's market,²⁵⁸ and two years after the hardcover publication of Palmer's book.²⁵⁹

2. *The District Court—Summary Judgment Granted to Palmer.* Four months after denying Arica's motion for a preliminary injunction, the court granted the defendants' motion for summary judgment: it dismissed not only Arica's claims for copyright infringement but also those for false designation of origin and common law unfair competition.²⁶⁰

The court reiterated that only the three passages it had previously identified could be found to exhibit the substantial similarity to copyrighted expression that would ground an infringement claim.²⁶¹ However, its fair use analysis this time was restricted to consideration of the comparisons between *Interviews* and *The Enneagram*, not between Arica's entire system of courses and publications and Palmer's work.

The first factor continued to favor Palmer, since "[t]he purpose and character of *The Enneagram* can be described as a combination of comment, criticism, scholarship and research."²⁶² The second factor—the nature of the plaintiff's work—now shifted away from Arica and towards Palmer, because *Interviews* was a published work.²⁶³ The third factor—amount and substantiality of use—still helped Palmer, since the similarities "constitute a minor if not

258. Dunderdale had testified that enrollment began to decline in the mid-1980s. Dunderdale Testimony, TR 302. As a result of Palmer's book, "[a] great many people who would otherwise have come to Arica trainings are not coming. They are going to her trainings. . . . When this material started appearing our cash flow dropped off radically in the late '80s." *Id.* At trial, the court suggested that falling enrollment for Arica's spiritual courses during this period might instead have resulted from a culture of general "self-indulgence and greed" during that decade. *Id.* at 382.

259. See *Arica Inst.*, 761 F. Supp. at 1068 (observing that testimony had established that trade paperback versions of books do not reach a wider audience than hardcovers, and concluding that "publication of Palmer's paperback is merely an extension of any impairment which may have resulted from publication of the hardcover in 1988, for which plaintiff took no legal action").

260. *Arica Inst., Inc. v. Palmer*, 770 F. Supp. 188 (1991).

261. *Id.* at 193.

262. *Id.* at 195.

263. *Id.*

minuscule portion of the 181-page [book] and cannot be said to comprise the qualitative 'heart' of the work.²⁶⁴

Finally, the fourth factor now focused only on possible competition between Palmer's and Ichazo's books, with predictable results: because the former work was "more of a psychological self-help tool" and the latter "in the nature of a biography," the court determined that Palmer's work had no effect on the market for Ichazo's.²⁶⁵

The court found unjustified Arica's Lanham Act claim that by subtitled her book, "The Definitive Guide to the Ancient System for Understanding Yourself and Others in Your Life" and by describing herself as the leading teacher and practitioner of this system, Palmer and her publishers were confusing the public.²⁶⁶ Although Arica claimed that the enneagram system was created solely by Ichazo and that he was the source of all of the information that Palmer discussed,²⁶⁷ the court noted that the paperback version of *The Enneagram*²⁶⁸ contained a conspicuous and explicit disclaimer that effectively dissociated Palmer, her work, and HarperCollins from Ichazo and Arica.²⁶⁹

264. *Id.* ("In the quoted passages, Ichazo is responding to questions relating to his theory of personal fulfillment. The book as a whole more broadly describes Ichazo's life and experiences and the purpose of Arica as a mystical school.").

265. *Id.* at 295-96. ("Rejecting the fair use defense in this case would stifle the very creativity the copyright laws are designed to foster.").

266. 770 F. Supp. at 196, citing § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (Supp. II 1990) (creating civil liability for one who misrepresents the origin of his goods, services, or commercial activities, or their affiliation with, connection to, or sponsorship or endorsement by, another person).

267. *Id.*

268. In February 1991, six months after the lawsuit began, Harper & Row had printed 35,000 copies of the paperback version of *The Enneagram* with this disclaimer; the following month, it shipped approximately 21,000 of these copies from its central warehouse to fill back orders dating from September 1990. 761 F. Supp. at 1060.

269. 770 F. Supp. at 196. The disclaimer, which appeared after the preface, 761 F. Supp. at 1060, read:

Arica Institute Press is the publisher of numerous books and other publications written by Oscar Ichazo that describe Mr. Ichazo's theories of the "enneagrams." Ms. Palmer has developed theories about the use of the enneagram in understanding human personality and its relationship to aspects of higher awareness that are different and distinct from those expounded by Mr. Ichazo. Neither Helen Palmer nor HarperCollins is affiliated with Arica Institute, Inc., nor has this book been endorsed or authorized by Arica Institute, Inc. or by Mr. Ichazo.

3. *The Court of Appeals—Palmer Victorious.* On appeal, Arica argued that the labels of Ichazo's enneagrams were indeed copyrightable and that Palmer's use of these phrases and their sequences constituted infringement. Yet both of these contentions failed.

First, the Second Circuit agreed with the district court that the "single words or short phrases" that constituted the great majority of Arica's infringement allegations "do not exhibit the minimal creativity required for copyright protection."²⁷⁰

Second, although it had recently found infringement where the defendant had quoted or paraphrased the plaintiff's "ordinary" words and phrases in such a fashion as to appropriate enough of the plaintiff's "sequence of thoughts, choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity,"²⁷¹ the court held that in *Arica* the similarities in question did not rise to that level.²⁷²

A similar disclaimer, minus the first sentence, appears before the introductory material of PALMER, LOVE & WORK, *supra* note 24 (page unnumbered). The court also observed that Palmer had "always acknowledged Oscar Ichazo's contributions to enneagram theory." 770 F. Supp. at 196 n.2.

270. 970 F.2d at 1072 (upholding the district court's decision on this issue and noting that "of the approximately 250 instances of alleged copying" from INTERVIEWS or *The Arica Training*, "all but twenty or so" refer to such words or phrases).

271. *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987).

272. The court cited the following passages as a "typical" example of Arica's allegations of copying:

The indolent type goes out looking for the love and meaning he feels deprived of; he becomes a continual seeker, but never a finder. This is his trap. He is always searching outside of himself for what can only be found within. But in a perverse way the seeker is ignorant about himself. He believes he knows all about other people and he doesn't hesitate to tell everyone else. The hell of the indolent is the worst of all the fixations because it leads to inner paralysis and indecision.

970 F.2d at 1073 (quoting ICHAZO, INTERVIEWS, *supra* note 11, at 14).

Nine's [sic] can go along with a situation for a long time while still trying to decide. It is so easy for them to identify with another person's point of view that they can see the rightness on all sides of a question. Why take a position, when every side has merit? Why have a personal priority, when it's so easy to feel the rightness of all concerned? Nines say that it is easier to know the inner condition of others than it is to find a viewpoint of their own. . . . Because Nines obsess over a decision does not mean that they can be hurried into resolving it. . . . A Nine's decision is to make no decision. . . .

id. (quoting PALMER, ENNEAGRAM, *supra* note 30, at 346-47).

Nor did the court accept Arica's argument that Palmer's use of single words and short phrases implicated the doctrine of "comprehensive non-literal similarity" by capturing the "fundamental essence or structure" of Arica's work.²⁷³ Arica's seventy-page listing of individual correspondences of terms in Arica's publications and Palmer's book did not establish similarity on this level.²⁷⁴

Moreover, although Palmer had admitted owning *Interviews* and *The Arica Training*, both of which contained Ichazo's labeled enneagrams,²⁷⁵ and although Arica had demonstrated "substantial similarity from which copying may be inferred," such similarities did not result from the copying of copyrightable elements: by Ichazo's own statements, not only the fixations²⁷⁶ but their sequence²⁷⁷ were scientific facts²⁷⁸ and therefore not copyrightable. Under the doctrine of copyright estoppel, the court refused

273. 970 F.2d at 1073.

274. *Id.*

275. *Id.* at 1074 (noting that in determining copyright infringement, the defendant's "access [to the plaintiff's work] through a third party is legally sufficient . . . [t]here is, at minimum, a material issue of fact as to whether Lilly and Hart derived these figures from the copyrighted materials").

276. *Id.* (quoting ICHAZO, *INTERVIEWS*, *supra* note 11, at 71, 84). *See supra* note 32, and accompanying text.

277. 970 F.2d at 1076 (describing the series of fixations as "a 'natural declension' comparable to 'the spectrum of colors,' " and stating that "the sequence of the series cannot be changed at will by subjective preference") (quoting ICHAZO, *LETTERS*, *supra* note 11, at 74). *Cf.* *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 1992 WL 281474 (S.D. Tex. 1992) (identifying, in analyzing the second fair use factor, a management training program's arrangement of questions and definitions as "a creative work"), *judgment aff'd as modified by Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527 (5th Cir. 1994), *cert. denied by Leadership Software, Inc. v. Kepner-Tregoe, Inc.*, 513 U.S. 820.

278. Ichazo applied the claim of scientific accuracy and precision not only to the Protoanalysis material but to the entire system that he had developed. *See, e.g.*, ICHAZO, *HUMAN PROCESS*, *supra* note 30, at 7-8 (asserting that his theory provided "the tool for systematizing the description of all the human psyche [and process] . . . with complete knowledge of all the parameters and the possible variables . . . completely and scientifically."); *id.* at 33 (announcing "a scientific method for spiritual realization, for making the journey with precise calculation, and for reducing the time of necessary work to the minimum under maximum conditions of efficiency"); WILSON, *supra* note 55, at 343 (quoting an Arica training lecture: "We can give the exact scientific laws of awakening. These laws are objective and demonstrable."). *Cf.* JAMES, *supra* note 61, at 39. James observed that when discussing religious experience "there is not a single conception that can be sharply drawn. . . . The boundaries are always misty, and it is everywhere a question of amount and degree." *Id.*

to allow Arica, for purposes of this litigation, to recharacterize its statements as "only metaphoric," rather than literal, claims.²⁷⁹

Unlike the district court, the court of appeals recognized that Arica had demonstrated enough creativity in attaching labels to the points of the enneagram and emphasizing the connections among the points²⁸⁰—as opposed to other ways of graphically representing the fixations²⁸¹—to make this feature of its system copyrightable. Because Palmer could employ other methods to depict the fixations and their interactions, her use of labeled enneagrams was not defensible under the merger doctrine, which denies expressions copyright protection when there are so few ways to communicate the underlying idea that protecting its expression would effectively protect, and allow the author to monopolize, the idea itself.²⁸²

279. 970 F.2d at 1075; *see also* *Oliver v. St. Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941) (rejecting the notion that, for purposes of copyright infringement litigation, plaintiff could claim authorship of a work that he had previously asserted had been dictated to him by a nonphysical entity); *see also* *Cotter*, *supra* note 102, at 377 (arguing that a form of copyright estoppel applies to the second factor of the fair use test in context of "many scriptures and works of theology [which] should be treated as factual or informational works: either the plaintiff sincerely believes the work to be factual or informational, in which case we should credit her belief [and hold that the material is uncopyrightable], or she does not, in which case she should be estopped from denying it").

280. 970 F.2d at 1076 (noting that, by crediting Ichazo with labeling the points of the enneagram and using its connecting lines to discuss relationships among the various personality types, Palmer's own testimony and book "create[d] a genuine issue of material fact as to whether Ichazo was the first" to add these elements to this application of the enneagram).

281. *Id.* ("Ichazo could have diagramed the ego fixations in any number of ways including, for example, a numbered listing of the nine fixations with arrows drawn to represent the relationships among them."); *see also* *Garman v. Sterling Publ'g Co., Inc.*, No. C-91-0882, 1992 U.S. Dist. LEXIS 21932, at *13 (N.D. Cal. 1992) (concluding that the plaintiff's presentation, in the form of a matrix or chart of correspondences between ailments and the gems purported to cure them, was copyrightable "because there are other effective ways of presenting the data").

282. In such situations, the normally-copyrightable expressions "merge" with the uncopyrightable idea. The prime historical example of the merger doctrine is *Baker v. Selden*, 101 U.S. 99 (1879), in which the Supreme Court held that the uncopyrightable status of an accounting system extended to the lined ledger sheets marketed by the system's author: to find those blank forms copyrightable, the Court acknowledged, would be tantamount to granting copyright protection to the idea that they embodied; *see also* *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (dismissing a copyright infringement action because the plaintiff's "jeweled bee pin is . . . an

However, Palmer's use of this element of Arica's material was protected by the fair use defense to copyright infringement. With regard to the first factor of the fair use test, the court of appeals agreed with the district court that Palmer's work "fits easily into all four" of the permissible categories of "criticism, comment . . . scholarship [or] research."²⁸³ Indeed, Palmer had not only elaborated on the nine fixations identified by Ichazo but had supplemented her analysis with material drawn from her interviews of individuals who displayed these personality features, and had attempted to use her 172-subject study to fit these personality types into modern theories of personality.²⁸⁴ The fact that Palmer's book was a commercial enterprise did not disrupt this analysis.²⁸⁵

The second factor—the nature of the copyrighted work—favored Palmer as well, since *Interviews* had been published and was available to the general public.²⁸⁶ The third factor, the amount and substantiality of the portion of the copyrighted work used, also supported Palmer: the Second Circuit agreed with the district court that the three passages of similarity were a minimal portion of

'idea' that defendants were free to copy" by producing substantially similar jewelry).

The *Arica* Court of Appeals noted previous instances of the extension of copyright protection to charts and diagrams that, though they expressed the ideas of an underlying system, had been found to display enough originality and creativity to merit such protection. 970 F.2d at 1077 (citing *Ninanov v. Simon & Schuster*, 246 F.2d 501, 503-504 (2d Cir. 1957)) (arrangement of Russian alphabet in chart for teaching Russian to English speakers); *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938) (chart correlating handwriting and personality characteristics); *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545, 548 (S.D.N.Y. 1968) (chart conveying color matching system).

Yet the court observed that, far from being compelled to express the fixations through Ichazo's method, Palmer had developed a different diagram, which emphasized 'three core mental preoccupations' and their 'wing points' " (*i.e.*, the two points adjacent to the enneagram point in question). 970 F.2d at 1076. (quoting PALMER, ENNEAGRAM, *supra* note 30, at 42).

283. *Id.* at 1077 (quoting 17 U.S.C. § 107 (West Supp. 1992)).

284. *Id.* at 1077-78 (noting, *id.* at 1078, that "Palmer thus builds upon Ichazo's work to further develop our store of knowledge in this area").

285. *Id.* at 1078 (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736-37 (2d Cir. 1991) (holding that anticipation of profits does not offset the strong presumption that the first factor of the fair use test favors a defendant whose use of copyrighted work is for purposes of criticism, comment, scholarship, or research)).

286. 970 F.2d at 1078.

Interviews,²⁸⁷ and added that Ichazo's copyrightable linkage of labels to the enneagram was an element "insubstantial in relation to the work as a whole."²⁸⁸

Finally, while acknowledging (as the district court had not) that Palmer's book might well compete with *Interviews* in the market of "those pursuing emotional and psychological self-help,"²⁸⁹ the court of appeals held that this factor also aided Palmer. The appropriate market effect to assess was not that of Palmer's work as a whole, but only that of the portions of Palmer's work that infringed on Arica's copyright:²⁹⁰ that is, the three passages in question and Palmer's labeling of the enneagram. Finding this effect "negligible" because of the minimal amount of infringement at issue,²⁹¹ the Second Circuit affirmed the district court's grant of summary judgment to Palmer on the copyright infringement claim and, without further discussion, upheld the district court's disposition of Arica's claims of Lanham Act violations and common law unfair competition/palming off.²⁹²

4. *Aftermath: The Moral Rights Issue.* Just as Ichazo had characterized as a complete victory the Dimension Books settlement, in which Arica received no damages but only the authors' formal acknowledgment of his authorship of the theory and enneagrams of ego fixations,²⁹³ so he explained that Arica had been "vindicated" by proceeding to judgment in its litigation with Helen Palmer.²⁹⁴ Ichazo claimed that "the purpose of the lawsuit from the beginning" was to obtain Palmer's public acknowledgment

287. *Id.*; cf. *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 534 n.13 (5th Cir. 1994) (approving district court's comparison, for purposes of determining substantial similarity, of juxtaposed passages from the two sets of management-training works at issue, and observing that in *Arica v. Palmer* the Second Circuit "probably would have found infringement had it not held that the defendant was entitled to a 'fair use' defense").

288. 970 F.2d at 1078.

289. *Id.*

290. *Id.* (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991)).

291. 970 F.2d at 1078.

292. *Id.*

293. See *supra* notes 200 and 201, and accompanying text.

294. Ichazo, *SYMBOL*, *supra* note 13, at 20 (responding to query about why the Palmer litigation, unlike the Dimension Books litigation, had not been settled).

"that, in fact, all the enneagrams and typology presented by her were originally from Arica" rather than from the teachings of Gurdjieff.²⁹⁵

In this respect, however, the litigation appears to have been a costly exercise for Arica. Palmer testified that she and other students of Gurdjieff's material had suspected when Ichazo's work began to be publicized that it had been derived from that of Gurdjieff;²⁹⁶ and, as the case was on appeal to the Second Circuit Court of Appeals, she reiterated these allegations in a letter to "the Transpersonal Community."²⁹⁷ Although Ichazo swiftly responded that the lawsuit had been "won by Arica totally and completely"²⁹⁸ when Palmer had not disputed the ownership and validity of Arica's copyright, the fact remains that a copyright recognizes and protects the expression, not the underlying ideas, of the work at issue.

Thus, in light of Ichazo's insistence on the scientific precision of his theory of fixations, Arica's copyright could cover only his labeling the points of the associated enneagrams, and his creative, and apparently original, use of these diagrams for personality characterizations.²⁹⁹ The mere issuance of the copyright to Arica could not resolve the historical question of whether Gurdjieff (or the Sufis, for that matter) had used unlabeled enneagrams for similar purposes; nor could it settle whether, and to what degree, Ichazo had made use of ideas previously employed by Gurdjieff or other teachers.

Moreover, by bringing an action against Palmer for copyright infringement, Arica had compelled the courts to identify and distinguish the copyrightable and non-copyrightable elements of its own fixations system. The resulting caselaw provided an intellectual property

295. *Id.*

296. *See supra* note 166 and accompanying text.

297. Helen Palmer, *The Enneagram Heresy* (Aug. 2, 1991), reprinted in *ARICAN, TEACHINGS OF THE GREAT TELESMA*, 1991, 83 at 84-85 (questioning, "why . . . Ichazo drop[ped] the Enneagram's already existing spiritual context" and alleging that "Ichazo has difficulty in crediting his own sources"), immediately preceding Ichazo's detailed response in that journal. *See* Ichazo, *Transpersonal*, *supra* note 22, at 90 ("I would like to say very clearly that there is not one single original 'idea' of any importance in the entire work of Mr. Gurdjieff."). It is, of course, beyond the scope of this Article to analyze this particular issue.

298. Ichazo, *Transpersonal*, *supra* note 22, at 112.

299. *See supra* notes 280 and 281 and accompanying text.

blueprint to authors of subsequent works on the enneagram: the nature and sequence of the nine fixations were now definitively fair game, as uncopyrightable ideas; Arica's specific labels for the enneagram points had also been deemed to be uncopyrightable.³⁰⁰

In the wake of the court of appeals decision, Ichazo expressed equanimity about independent interpretations of his fixations enneagrams, even if he personally disagreed with them.³⁰¹ Ichazo has, however, continued to insist on being granted credit as the originator of this material, particularly when interpretations diverge from his own.³⁰² Whether from some sense of ethical, scholarly, historical, or legal obligation, or because they were aware of Arica's previous attempts to protect its intellectual property, many

300. Cf. Walter Effross, *Assaying Computer Associates v. Altai: How Will the 'Golden Nugget' Test Pan Out?*, 19 RUTGERS COMPUTER & TECH. L.J. 1, 56 (1993) (suggesting that a recently-enunciated test for copyright infringement of software would discourage potential plaintiffs from bringing such actions, "since the court would then define in detail those elements of their [computer] programs that would be permissible targets of copying"); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (setting forth the "abstraction-filtration-comparison" test for copyright infringement, under which the plaintiff's software is exhaustively analyzed and all of its copyrightable elements identified before the court proceeds to determine whether substantial similarity between the plaintiff's and defendant's works has resulted from copying of copyrightable, as opposed to uncopyrightable, elements); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 834 (10th Cir. 1993) (adopting the *Altai* test); *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342 (5th Cir. 1994) (same); *Mitek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548 (11th Cir. 1996) (applying the *Altai* test); see also *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276 (S.D.N.Y. 2001) (concluding that under the *Altai* test none of the features of the plaintiff's database or software, which reconfigured the Hebrew letters of the words of the "Hebrew Bible" in order to display prophetic messages allegedly encoded therein, was protectable by copyright).

301. See Goldberg, *supra* note 26, at 26. Goldberg quotes Ichazo as stating that if the author acknowledges that it is derived from Ichazo's work, any such interpretation of his material is "[a]bsolutely okay. That's what it's for."; and as noting that even if he disapproved of an interpretation, "[i]t's not my responsibility any longer." *Id.*

302. See Ichazo, *SYMBOL*, *supra* note 13, at 21 ("As long as the original source of the Fixations material is properly credited, I am satisfied. However, if the interpretation of the material is different than mine, this needs to be clearly pointed out. . . ."). Ichazo also indicates that any presentation other than Arica's "would be merely a subjective and relative interpretation of the author, for which only the author is responsible." *Id.*

subsequent authors on the enneagram carefully credited Ichazo while distinguishing their ideas from his.³⁰³

Although acknowledging Ichazo's origination of this material (or at least his claim to have originated it) appears to be a minimal gesture, is it legally required or enforceable? The answer would appear to be negative: what Ichazo asks for is the "moral right" of attribution for written works, which, although it is well-established in the law of France³⁰⁴ and in the Berne Convention,³⁰⁵ generally has no counterpart in United States copyright law.³⁰⁶

303. One of Palmer's subsequent enneagram books contains, in a final section on "A Brief History of Enneagram Contributors," a detailed statement acknowledging that "[w]ithout doubt [Ichazo] is the major modern contributor to the system" and indicating that Palmer's own ideas were "different and distinct from" his. HELEN PALMER, *THE ENNEAGRAM ADVANTAGE: PUTTING THE 9 PERSONALITY TYPES TO WORK IN THE OFFICE* 283 (1997).

Other authors have been equally scrupulous about acknowledging, yet differentiating their own work from, Ichazo's contributions. See, e.g., ELI JAXON-BEAR, *THE ENNEAGRAM OF LIBERATION* v (2001) ("Oscar Ichazo, although we never met, is the modern father of the Enneagram, and everything that I may have added is built on the solid foundation that he established."); SONDRÁ MAITRI, *THE SPIRITUAL DIMENSION OF THE ENNEAGRAM* (2000) (indicating, in copyright page disclaimer, that she "has no connection with Mr. Ichazo or the Arica Institute, and her interpretation and methodology are strictly her own"); DON RICHARD RISO & ROSS HUDSON, *The Traditional Enneagram*, ("[W]e do not claim to be representatives of Ichazo's teachings, but rather wish to offer our own interpretation of a few of them based on our own work with the system over the last few decades.") available at <http://www.enneagraminstitute.com/history.asp> n.3 (last visited Oct. 12, 2003); MICHAEL J. GOLDBERG, *THE 9 WAYS OF WORKING* 344 (1999) ("I don't pretend to represent Oscar's complex ideas herein, and I refer interested readers to his original works."); RISO, *PERSONALITY TYPES*, *supra* note 27, at 15-17. Riso observes that the author's interpretation of the enneagram "diverges from Ichazo's approach on a number of important points. . . . In fact, Ichazo's approach to the Enneagram and mine are really quite different." *Id.*

Even the author of an analysis approved by Ichazo himself carefully noted that although "each chapter begins with Ichazo's definition as it was presented through the Arica Institute in 1972 . . . [w]e do not claim that our perspective reflects Ichazo's view, for we do not know his view beyond the definitions." ALMAAS, *FACETS OF UNITY*, *supra* note 62, at 15.

304. See, e.g., Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States. Part 1*, 28 BULL. COPYRIGHT SOC'Y 1, 4 (1980) (indicating that *droit à la paternité*, one of the moral rights accorded by French law, recognizes "the right of an author to be acknowledged as the creator of his work, and to disclaim authorship of works falsely attributed to him"); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 366-69 (1998) (discussing how the recognition of the moral right of attribution sharply diverged from the

Moreover, plagiarism "is not in fact a legal doctrine [Instead,] plagiarism is an ethical, not a legal, offense and is enforceable by academic authorities, not courts."³⁰⁷ Material whose copyright has expired, that has been

practice, in the Middle Ages, of the Church's commissioning work from, but not allowing authorship to be attributed to, individual artisans).

305. See Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, art. 6bis(1) (granting the author, among other rights, the right to claim authorship of the work).

306. See Berne Convention Implementation Act, Pub. L. No. 100-568, § 3(b), 102 Stat. 2853 (1988) ("The provisions of the Berne Convention, the adherence of the United States thereto, and the satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or common law—to claim authorship of the work. . ."); Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) (indicating that American copyright law "does not recognize moral rights or provide a cause of action for their violation," and noting that equivalent actions have been brought on the grounds of contract law or the tort of unfair competition); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, §8D.02 at 8D-21 (2002) (concluding that United States law, whether derived from statute or caselaw, "apparently fails to accord the full-fledged protection contemplated by article 6bis" of the Berne Convention); DaSilva, *supra* note 304, at 39 (observing that in 1977 and in 1979 Congress "ignored" bills on moral rights legislation, and that "[m]ost American courts . . . have rejected the moral rights doctrine in name."); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985, 996-97 and 1020 (2002) (indicating that the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-803 (2000)), does not provide for the equivalent of the "moral right" of attribution). Cf. 2 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 122 (Norman Lamm ed., 1983) (Vol X of THE LIBRARY OF JEWISH LAW AND ETHICS) (citing rabbinical statements "establishing an absolute obligation [among Talmud scholars] to acknowledge the source of scholarly insights").

307. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 12 (1994); see also Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law*, 54 HASTINGS L.J. 167, 171 (2002) (observing that because plagiarism "is not, strictly speaking, a legal concept, it has mostly been ignored by legal commentators"); *id.* at 207 (finding anti-plagiarism rules more akin to moral rights legislation than to intellectual property or antitrust laws); JOSEPH GIBALDI, MLA STYLE MANUAL AND GUIDE TO SCHOLARLY PUBLISHING 151 (2d ed. 1998) ("Plagiarism is a moral and ethical offense rather than a legal one.").

Some courts have found plagiarism claims to be preempted by the Copyright Act. See *Caldwell-Gadson v. Thomson Multimedia, S.A.*, No. IP 99-1734-C-TIG, 2001 WL 1388052, at *10 (S.D. Ind. Sept. 18, 2001) (holding that because "the right protected against plagiarism is a right equivalent to a right comprised by a copyright . . . Plaintiff's claim for plagiarism in general is preempted by the Copyright Act"), citing *United States ex rel. Berge v. Bd. of Tr. of the Univ. of Ala.*, 104 F.3d 1453, 1464 (4th Cir. 1997) (equating to copyright infringement plaintiff's claims of plagiarism); *Wharton v. Columbia Pictures Indus., Inc.*, 907 F. Supp. 144, 146 (D. Md. 1995) (holding that Copyright Act preempts claims for plagiarism in general).

created by the federal government, that is not by nature copyrightable (such as an idea or fact), or that is otherwise in the public domain,³⁰⁸ cannot be the subject of a copyright infringement lawsuit, but its use without attribution could still ground an accusation of plagiarism.³⁰⁹ On the other hand, an infringer of copyright might not necessarily have plagiarized—if for example, her reproduction of copyrighted material exceeded the bounds of fair use but she had still given credit to the original author.³¹⁰

The closest equivalent for Arica's purposes would be section 43(a) of the Lanham Act, which bars commercial misrepresentation of authorship or origin;³¹¹ indeed, Palmer had defeated Arica's claim under this statute precisely by means of such a disclaimer.³¹² (Had an online version of Arica's material been copied and Ichazo's or Arica's name removed or altered without authorization, an action might also lie under the Digital Millennium Copyright Act.)³¹³

308. See Ashley Packard, *Copyright Term Extensions, the Public Domain, and Intertextuality Intertwined*, 10 J. INTELLECT. PROP. 1, 15 (2002) (including, among categories of material in the public domain, works that are "deserving of copyright protection [but that] have fallen into the public domain because their creators have allowed them to, either purposely or by accident").

309. See Green, *supra* note 307, at 200-201 (adding that there is no fair use exception for plagiarism, as there is for copyright infringement); see also *Kindergartners Count, Inc. v. DeMoulin*, 249 F. Supp. 2d 1233, 1251 (D. Kan. 2003) (holding that a finding of plagiarism is not contingent on a finding of copyright infringement).

310. See Green, *supra* note 307, at 201. Of course, if the infringer did not attribute the material at issue, she could also be accused of plagiarism.

311. See Kwall, *supra* note 306, at 1020 (noting that, unless the defendant's false representations of such features are material to the sale, section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1) (2000), also fails to incorporate the right of attribution).

Narrowing further this application of the Lanham Act, the Supreme Court held in June 2003 that § 43(a) does not bar the reproduction, without attribution, of materials whose copyright has expired. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003) ("When Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin.'").

312. See *supra* note 269 and accompanying text.

313. 17 U.S.C. § 1202(b) (2000) prohibits the unauthorized removal or alteration of a work's "copyright management information," defined in 17 U.S.C. § 1202(c)(2), (c)(3) as including "[t]he name of, and other identifying information about, the author of a work" and "the copyright owner of the work," respectively. Among the commentaries drawing parallels between this legislation and moral rights laws are Jane C. Ginsburg, *Art and the Law: Suppression and Liberty*, 19 CARDOZO ARTS & ENT. L.J. 9, 11 (2001) ("The

F. *Lessons from the Arica Litigations*

Arica's "arduous and difficult task"³¹⁴ of protecting its teachings and techniques from apparent misappropriation, misinterpretation, and misattribution mirrors that of groups including the Kabbalists and the students of Gurdjieff. Yet Arica's resort to litigation, however belated it may have been, illuminates several principles and pitfalls of protecting spiritual material as intellectual property.

1. *Nondisclosure Agreements.* An obvious lesson of the Arica litigation is that spiritual teachers concerned about the unauthorized dissemination of their material should require prospective students to sign a confidentiality agreement prohibiting oral or written discussion of these works without the teacher's or school's permission. Indeed, Arica has in recent years made use of such agreements.³¹⁵

DMCA may contain the seeds of a more general attribution right" than does the Copyright Act of 1976, and "with sufficient ingenuity and effort, these seeds might be made to germinate.") and Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS 377, 379 (2003) (suggesting that if the protection of copyright management information "creates a sort of *power* to attribute the work to its rightful owners, it does so by a peculiar logic, closer to the interests of the producers, publishers, and distributors of works than the [moral] *rights* generally recognized as belonging to the artist").

314. Ichazo, SYMBOL, *supra* note 13, at 25 (characterizing Arica's efforts to protect its intellectual property).

315. Arica began using signed confidentiality agreements in the 1980s. Ichazo, SYMBOL, *supra* note 13, at 17. Bound into the Winter 1990, Spring 1990, and two 1991 issues (20th Reunion issue and "Teachings of the Great Telematta" issue) of *The Arican* were application cards for an advanced Arica training, which note that "[a]ll participants must sign the *Enrollment agreement* to respect the confidentiality of the contents of the training."

Similarly, advanced course registration forms bound into each of these issues required applicants to sign a statement that "I am fully aware of the confidential nature of this training, and I take full responsibility for keeping it protected." Virtually the same language appears in the confidentiality agreement distributed in 2001 to those interested in obtaining THE SYMBOL, a journal that succeeded *The Arican*. THE SYMBOL, *Confidentiality Agreement between the journal and subscriber* (on file with author).

A recent Confidentiality Agreement, designed for use with a variety of Arica trainings, adds to the above language, "[e]xcept for my personal use, I will not reproduce or utilize any of the printed materials in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage or retrieval system without permission in writing from Oscar Ichazo." Confidentiality Agreement between Arica Ins't. and Arica Participant (on file with author).

Such agreements might specify which elements of the material disclosed to the student constitute trade secrets,³¹⁶ and might also specifically bar the student from teaching this material without authorization. (Of course, it would be in a student's best interest before signing such an agreement to specify, and attempt to exclude from the agreement, the related spiritual material with which she is already familiar; to the extent that such information is public knowledge, it should not be covered by an agreement in any event.)³¹⁷ To prevent loss of trade secret status through the dissemination of these materials by a third party unaware of such status³¹⁸—for example, a relative or heir of a group member, who discovers the materials and sells them through a Web site, or offline—they should be clearly labeled as confidential and as trade secrets.³¹⁹

The current license that Arica requires its trainers to sign contains a confidentiality agreement of its own, as well as provisions restricting duplication of and access to various Arican materials. Arica Institute Sponsor License Agreement, *supra* note 43, at 20-23.

316. The issue of trade secret status for spiritual material is discussed in more detail in connection with the works of the Church of Scientology. *See infra* Part II.

317. *Cf.* Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 336 N.Y.S. 2d 944, 948 (1972) (denying trade secret protection for information brought to employer by employee with 35 years of experience in the metals industry, in the absence of a nondisclosure agreement); Mulei v. Jet Courier Service, Inc., 739 P.2d 889, 892 (Colo. Ct. App. 1987), *rev'd on other grounds*, 771 P.2d 486 (Colo. 1989) (holding, in the absence of a nondisclosure agreement, that "the general ability and know-how an employee brings into employment, . . . are not the employer's property").

A potential student or potential trainer might also examine the training agreement to determine whether her own sensitive personal information (such as her medical or sexual history) that is disclosed in her application form or during trainings will be considered confidential by the trainers and their organization, and whether other students will be instructed not to repeat it.

318. *See, e.g.*, 2 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 7.02[2][a] at 7-87 (1998) (indicating that a trade secret plaintiff has no valid claim against someone who, in good faith, acquires knowledge of the trade secret without breach of contract or of a confidential relationship).

319. *See, e.g.*, Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel. Co., 214 Cal. Rptr. 276, 281 (Cal. Ct. App. 1985) (concluding that for trade secret protection to apply, defendant must have had actual, rather than constructive, notice of the secrecy of the material, such as would be provided by labeling the documents "confidential"); Hoffmann-La Roche Inc. v. Yoder, 950 F. Supp. 1348, 1361-62 (S.D. Ohio 1997) (identifying as a factor in determining trade secret status the absence of "confidential" or similar labelings on the documents at issue); Daily Int'l Sales Corp. v. Eastman Whipstock, Inc., 662 S.W.2d 60, 63 (Tex. App. 1983) (same).

These arrangements certainly cannot guarantee nondisclosure: as the dissemination of the enneagram material demonstrates, students might not consider them legally or even morally binding. Those students who breach the agreement might be judgment-proof. Moreover, attempts to enforce the agreements through legal proceedings might focus unwelcome public attention on the plaintiff and its works, might confer credibility on the defendant by demonstrating that the plaintiff views it as a competitor, and might even encourage further misappropriation, by the defendant's sympathizers, of the plaintiff's intellectual property.

The failure of oral or written agreements not to publish closely-held spiritual teachings predates by centuries the Arica litigation. In the year 1575, students of a leading Kabbalist in Safed³²⁰ agreed in writing to "relate to no one else anything of the mysteries which we shall learn from him or which he taught us in the past [E]xcept it be that we receive his consent."³²¹ Yet twelve years later copies were secretly made and circulated of this teacher's books,³²² indeed, another teacher, falsely claiming to belong to the same Kabbalistic lineage, spread his own innovative and influential version of the teachings.³²³

In the early decades of the 20th century, G.I. Gurdjieff prohibited his students not just from publishing but also from writing, even for personal use, "anything connected

In any event, spiritual groups might wish to monitor the Internet regularly to detect unauthorized attempts to sell, auction, or display their confidential materials.

However, such labeling will not by itself invoke trade secret protection for material not otherwise qualified for such status. *See, e.g., Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 680 n.17 (N.D. Ill. 1997) (concluding that the fact that the plaintiff had labeled information as "confidential" did not elevate it to trade secret status); *Eutectic Welding Alloys Corp. v. West*, 160 N.W.2d 566, 570 (Minn. 1968) (same); *Nalco Chem. Co. v. Hydro Techs., Inc.*, 149 F.R.D. 686, 692 (E.D. Wis. 1993) (same).

320. Safed is located in the Galilee region of what is now the state of Israel.

321. GERSHOM SCHOLEM, *MAJOR TRENDS IN JEWISH MYSTICISM* 256 (1955)

322. *Id.* at 256-57. Long before the Kabbalists agreed, in the late eighteenth century, to the publication of these books, "the business of copying [this teacher's] writings from manuscripts had become in some places, e.g., Jerusalem, Italy and Southern Germany, almost an industry." *Id.* at 258.

323. *Id.* at 257 (observing that "down to our own days" this misappropriation of authority had not been recognized, and that "in certain essential points [this author] gave an entirely new turn to [the received] thought and enriched it by speculative ideas of his own").

with him or his ideas, or any other participants in the work, or to keep letters, notes, and so on³²⁴ P.D. Ouspensky, who obtained Gurdjieff's consent to retain certain notes and drawings (including those concerning the enneagram)³²⁵ and then to publish Ouspensky's chronicle of his studies,³²⁶ barred his own students from writing about the system without his permission.³²⁷ In the 1940s, after J.G. Bennett, another Gurdjieff student, gave not only private but public lectures on these topics, Ouspensky's lawyer demanded that Bennett return all materials received from Ouspensky, and Ouspensky instructed his students not to communicate further with Bennett.³²⁸

Nonetheless, many accounts have been published by Gurdjieff's students of their experiences with their teacher, his doctrines and techniques, their fellow students, and their own teaching of his work.³²⁹ The rich literature³³⁰ on

324. OUSPENSKY, IN SEARCH, *supra* note 18 at 384 (indicating that although "[d]uring the first years G. insisted strongly upon the obligatory nature of this rule," after 1920 "G. accepted in his work people who paid no attention to this rule or who did not wish to consider it"). It is unclear whether this obligation was considered legally, as opposed to morally, binding, and whether it was memorialized in a written and signed agreement. *See also* Stephen S. Hall, *Is Buddhism Good for Your Health?*, N.Y. TIMES MAG., Sept. 14, 2003, at 46, 48 (noting that in the last decade, "the neuroscientific study of Buddhist practices has crossed a threshold of acceptability as a topic worthy of scientific attention").

325. *Id.* at 376.

326. *Id.* at 383 (acknowledging that Gurdjieff "authorized me to write and publish" that very work). This volume featured extended reproductions of Gurdjieff's lectures and remarks, including those on the enneagram. *Id.* at 286-95, 376-78. Yet Ouspensky seemed reluctant to publish this work. *See* WEBB, *supra* note 18, at 451 (noting Ouspensky's "emphatic declarations," toward the end of his life, that the book was not to be published); JOHN G. BENNETT, WITNESS 185 (1974). Bennett justified his own efforts to document aspects of Gurdjieff's system by recalling that "Ouspensky had said that he probably would not publish what he had written." *Id.*

327. WEBB, *supra* note 18, at 402 (noting Ouspensky's "inflexible ban" on such writings).

328. *Id.* at 446. Bennett denied having copied his lectures from Ouspensky's material, and insisted that, "I knew well enough that I was self-willed, and that I had not obeyed him when ordered to stop writing. But the whole point of my writing was that I should express my own and not borrowed ideas." BENNETT, *supra* note 326, at 206.

329. *See, e.g.*, NOTT, *supra* note 49, at ix (characterizing his work as "a partial record of my early years of work (1923 to 1928) with G.I. Gurdjieff and A.R. Orage . . . compiled from diaries and hundreds of pages of notes"); C.S. NOTT, JOURNEY THROUGH THIS WORLD: THE SECOND JOURNAL OF A PUPIL (1969); KENNETH WALKER, VENTURE WITH IDEAS: MEETINGS WITH GURDJIEFF AND

Gurdjieff and his work even includes partial transcripts of question-and-answer sessions led by Gurdjieff³³¹ or by his senior students.³³²

Why did such disclosures not result in litigation? First, although various foundations carry on the Gurdjieff work, they appear to be averse not just to marketing themselves but also to publicity in general.³³³ More importantly, though

OUSPENSKY viii (1952) (stating that, after the publication of books by Ouspensky and by Gurdjieff, the author considered himself released from Ouspensky's confidentiality requirement); HENRI THOMASSON, *THE PURSUIT OF THE PRESENT: JOURNAL OF TWENTY YEARS IN THE GURDJIEFF WORK* 13 (Rina Hands trans., 1980) (indicating that the book was derived from "a journal kept from 1947 to 1967"); MAURICE NICOLL, *INFORMAL WORK TALKS AND TEACHINGS 1940 TO 1950* (Lewis Creed ed., 1995); KATHRYN HULME, *UNDISCOVERED COUNTRY: A SPIRITUAL ADVENTURE* (1966) (presenting Hulme's account of her studies with Gurdjieff); THOMAS DE HARTMANN, *OUR LIFE WITH MR. GURDJIEFF* xxi (1983) (asserting, as a leading student who lived with Gurdjieff from 1917 to 1929, that he felt "obliged" to write his recollections, "especially because my wife and I are almost the only ones left" from that phase of Gurdjieff's career, "and also because, however small, everything concerning him is of tremendous value"); BENNETT, *supra* note 326.

The only comparable publications dealing with the Arica training appear to be those of John Lilly, discussed *supra* Part I.B, and WILSON, *supra* note 55.

330. See J. WALTER DRISCOLL, *GURDJIEFF: AN ANNOTATED BIBLIOGRAPHY* (1985) (cataloguing and commenting on over 1,100 Gurdjieff-related publications written in English, 581 in French, and sixteen in other languages).

331. G. I. GURDJIEFF, *VIEWS FROM THE REAL WORLD* vi (1973) [hereinafter *GURDJIEFF, VIEWS*] (describing this work as "notes put together from memory by some of those who heard [Gurdjieff's] talks and recorded them faithfully afterwards. . . . [E]ven the fact of the existence of these notes became known only gradually."); G.I. GURDJIEFF, *The Material Question*, in *MEETINGS WITH REMARKABLE MEN* 247 (1963) (noting that this appended chapter is derived from Gurdjieff's remarks at a 1924 gathering, reproduced from listeners' memory and the notes of "the stenographer who took down all Mr. Gurdjieff's talks and lectures in America, so that people who asked questions which had been asked before could simply read through what Mr. Gurdjieff had already said on these subjects and thus economize his time"); WILLIAM PATRICK PATTERSON, *VOICES IN THE DARK* (Barbara Allen Patterson ed., 2000) [hereinafter *PATTERSON, VOICES*] (presenting transcripts of portions of Gurdjieff's meetings with students in Paris from 1940 to 1944).

332. See OUSPENSKY, *FOURTH WAY*, *supra* note 26, at v (indicating that the work "consists of verbatim extracts from talks and answers to questions given by Ouspensky between 1921 and 1946"); WILLIAM PATRICK PATTERSON, *EATING THE "I"* vii (Barbara Allen Patterson, ed. 1992) (providing "a direct and unvarnished account of my years in an esoteric school" that studied the teachings of Gurdjieff and was led by Lord Pentland); JOHN PENTLAND, *EXCHANGES WITHIN* (1997) (consisting of transcripts of selected questions and answers from Sir Pentland's group meetings in California from 1955 to 1984).

333. HENDERSON, *supra* note 9, at x ("Some organizations were excluded [from the book's cataloguing of modern spiritual approaches] by their own

these publications discuss in depth various aspects of Gurdjieff's teachings, they provide only sparingly the details of his awareness techniques, and certainly too few to enable a reader to cobble together a "self-help" course from them.³³⁴

However, the publication of the teachings and techniques of one contemporary of Arica in the early 1970s did become an issue. Although est (also known as "EST" or Erhard Seminars Training) clearly announced that participants were not to take notes during its four-day meetings,³³⁵ several different mass-market books nonetheless disclosed many elements of the training's content and sequence.³³⁶ Est reportedly failed in its attempt to seek an injunction preventing the publication of one such work.³³⁷

In conjunction with a nondisclosure program, the leaders of spiritual groups should themselves take care not to disseminate broadly material integral to their teachings and techniques: whether or not their nondisclosure agreements allow group members to repeat, acknowledge,

request or because they were noncommunicative. The Gurdjieff groups are an example of both.").

334. Cf. SCHOLEM, *supra* note 10, at 4 (observing that although some books, over the objections of many kabbalists, discussed theoretical material, "there remained areas where . . . limitations [against publication] were still more or less adhered to; for example, in the meditations on . . . practical Kabbalah"); *id.* at 370 ("The instructions on the methods to be employed in performing meditation form part of the hidden and secret teachings of the kabbalists which, apart from some general rules, were not made public.").

335. See, e.g., SHERIDAN FENWICK, *GETTING IT: THE PSYCHOLOGY OF EST* 23 (1976) (observing that rules announced at the beginning of the two-weekend training included "no note-taking"); SMITH, *supra* note 36, at 283. Smith quotes the EST leaflet: "There is no note-taking; there is no written material to study. . . . When the training is over just the result is left." *Id.*

336. See FENWICK, *supra* note 335, at 114 ("My description of the training was written from notes during my Christmas vacation while the experience was fresh."); ROBERT A. HARGROVE, *EST: MAKING LIFE WORK* 45-47 (1976) (interpreting the agreement to allow him to "discuss everything [about the training], with the exception of the specific processes [*i.e.*, guided meditations] themselves"); PAT R. MARKS, *EST: THE MOVEMENT AND THE MAN* 23 (1976) (asserting that the author did not take notes during the training but is writing from recollections of the experience).

337. See WILLIAM GREENE, *EST: 4 DAYS TO MAKE YOUR LIFE WORK* 147-48 (1976) (alleging, after providing the author's own detailed summary of the est training, that a court refused to grant est an injunction against the publication of another book: "Th[at] book is out now, and so are many others [describing est]").

or discuss material that has been publicly unveiled by their teachers or by other group members, this might be the members' natural assumption. From this point of view, and because it enabled commentators to make "fair use" of the disclosed information, it was not helpful for Ichazo to allow *Psychology Today* to publish his fixation enneagrams—or for Werner Erhard, the founder of est, to endorse a first-person account of an est training,³³⁸ even one which provided only simulations of est's "processes," or guided meditations.³³⁹ (However, the publicity that both groups achieved from such exposure during crucial periods of their expansion may have been seen as justifying the intellectual property risk.)

Although the decisions in the Arica litigation did not discuss the trade secret status of spiritual material, that issue is addressed in detail in Part II of this Article in connection with legal actions brought by the Church of Scientology.

2. *Copyright Protection.* Systems of spiritual practice, whether traditional or more recently developed, generally consist both of teachings and techniques: that is, of doctrines and of procedures (such as meditation or physical exercises) for developing one's spiritual awareness. Intriguing as Arica's fixation system may be, it is arguably a teaching only; though Arica asserted that participants in the fixations training were given techniques to help them assimilate and experience this information,³⁴⁰ it was possible for other enneagram authors to present similar material in book (and, to Aricans, bastardized) form to the general public as a stand-alone "self-help" tool.

Although substantial copyright precedent would apply to the protection of spiritual teachings, whether disseminated in written or oral form, to large groups or to

338. See Werner Erhard, *Foreword* to ADELAIDE BRY, EST: 60 HOURS THAT TRANSFORM YOUR LIFE v (1976) (stating that "I support the author"); Werner Erhard, *Foreword* to LUKE RHINEHART, THE BOOK OF EST (1976) ix [hereinafter Erhard, *Rhinehart Foreword*]. Erhard observed that the author "brilliantly . . . communicate[s] clearly to the reader both a sense of being in the training room and the spirit of what takes place there." *Id.*

339. See BRY, *supra* note 338, at 24 (indicating that the author is providing only a simulation of an actual est "process," since to reveal the actual meditation would deprive the reader of the opportunity to experience it directly in an est training).

340. See *infra* note 466 and accompanying text.

small ones, there has been little caselaw or commentary on a growing trend—the application of copyright law to spiritual techniques. Copyright protection now automatically applies to eligible works upon their creation;³⁴¹ however, groups should consider registering their material for copyright protection, since registration with the Copyright Office provides a (rebuttable) presumption that the material is original and copyrightable.³⁴²

To prevent forfeiture or abandonment of one's copyright interest, and thereby the relinquishment of the works to the public domain,³⁴³ attention should also be paid not only to ensuring that a copyright notice³⁴⁴ appears on all published copies of the works in question,³⁴⁵ but to objecting actively to their unauthorized duplication.

341. See *infra* note 358.

342. See, e.g., *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 n.20 (11th Cir. 1996); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1513 (1st Cir. 1996).

343. To establish abandonment, the defendant must show the copyright holder's intent to surrender rights in the work as well as an overt act indicating such intent. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 262 F. Supp. 2d 204 (S.D.N.Y. 2003); *Bell v. Combined Registry Co.*, 397 F. Supp. 1241, 1248 (N.D. Ill. 1975) (same), *aff'd*, 536 F.2d 164 (7th Cir. 1976).

To establish forfeiture, the defendant must show that the work was published without a correct notice of copyright. *Bell*, 397 F. Supp. at 1248; see also *Bell*, 536 F.2d at 168 (indicating that forfeiture would result from "a general publication" of the work without proper copyright notice); *id.* at 170 (distinguishing forfeiture from abandonment, which requires a "long-term intent to contribute [the work] to the public"); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 732 (D. Ariz. 1985) (concluding that an author's widow had abandoned the copyright in his letters by giving permission for, or acquiescing in, their publication); *Atl. Monthly Co. v. Post Pub. Co.*, 27 F.2d 556, 558 (D. Mass. 1928) (holding that the "wide and general publication of [plaintiff's article] without recognition of any copyright, which was assented to by the plaintiff, amounted to an abandonment of the copyright").

344. Such a notice includes: the symbol ©, the word "Copyright," or the abbreviation "Copr."; the year of first publication of the work; and the name of the copyright owner. 17 U.S.C. § 401(b)(1)-(3) (2000). If the notice appears on copies that the defendant had access to, then, generally, "no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages . . ." 17 U.S.C. § 401(d).

345. Under 17 U.S.C. § 405(a)(1), copyright is not forfeited for works distributed with the copyright owner's authorization before the effective date of the Berne Convention Implementation Act of 1988 if "the notice has been omitted from no more than a relatively small number of copies . . . distributed to the public." Nor does forfeiture occur if copyright registration is made before or within five years after the publication of the work without such notice, and if a

A prime example of copyright forfeiture involves *Desiderata*, one of the most widely-disseminated, if inauthentically-attributed, inspirational documents of the 1960s. Copies of this poem, which begins, "Go placidly amid the noise and the haste, and remember what peace there may be in silence," often indicated that this set of guidelines for a harmonious life had been found in "Old St. Paul's Church, Baltimore A.D. 1962."³⁴⁶ In fact, the work had been written by Max Ehrmann in the early 1920s and registered by him in 1927 for copyright.³⁴⁷ Yet because Ehrmann had in the early 1940s authorized a U.S. Army psychiatrist to distribute copies of the poem to patients (apparently without a copyright notice attached),³⁴⁸ he was found to have forfeited the copyright.³⁴⁹ (A similar situation was averted in late 2001: an author who had registered his inspirational statements for copyright protection decades earlier, long before versions not crediting him gained widespread attention, convinced Warner Books not to publish another writer's book elaborating on these "anonymous" sayings, and announced a book deal of his own.)³⁵⁰

reasonable effort is made to add the notice to all copies distributed publicly after the omission has been discovered. 17 U.S.C. § 405(a)(2). See *Evans & Assocs., Inc. v. Cont'l Homes*, 785 F.2d 897, 912 (11th Cir. 1986) (discussing these provisions in affirming a holding of forfeiture).

346. *Bell*, 397 F. Supp. at 1248. The poem appears in full as an appendix to the district court opinion. See *id.* at 1250.

347. *Id.* at 1243.

348. *Bell*, 536 F.2d at 168.

349. *Id.* at 170 (indicating that this conclusion renders moot the question of whether, as the district court had concluded, Ehrmann had abandoned the copyright). Cf. ELISABETH SIFTON, *THE SERENITY PRAYER* 292 (2003) (discussing the authorized inclusion in World War II soldiers' prayer booklets of the "Serenity Prayer," authored by Sifton's father, theologian Reinhold Niebuhr). Though Niebuhr subsequently permitted the recently-formed Alcoholic Anonymous organization to use the prayer in their services, he "didn't fuss when the wordings were altered, though he minded it. There are, after all, several large differences between the two formulations But since my father never copyrighted his prayer—it was inconceivable to him to construe prayers as a source of revenue—he could not control its misquotation, misattribution, or embellishment." *Id.* at 292-93. The Alcoholics Anonymous form of the prayer, which has been widely disseminated, reads: "God, grant me the serenity to accept the things I cannot change, courage to change the things I can and wisdom to know the difference." *The Serenity Prayer*, http://www.a-lasociates.com/AA/serenity_prayer.htm (last visited Oct. 13, 2003).

350. See David D. Kirkpatrick, *Good Things for Maxim Writer Who Waited*, N.Y. TIMES, Mar. 8, 2002, at A4 (discussing the newfound fame of Kent M.

One key to protecting the material from a fair use defense to copyright infringement would be to focus on the second factor of the fair use test, the only one within the plaintiff's control. If the material is seen as creative rather than scientific, and unpublished rather than widely-distributed, this factor of the fair use test would generally weigh in the plaintiff's favor.

In light of the third factor of the fair use test, developers of spiritual teachings and techniques might also consider (at the risk of invoking correspondingly less protection for the remainder of their material) identifying in their publications and nondisclosure agreements the crucial aspects that constitute "the heart" of each work³⁵¹ and of their system as a whole; if these elements are duplicated without authorization, the argument would be stronger that this factor should weigh against the alleged infringer.

a. *Copyrighting Teachings*

i. *Lectures and Speeches.* To qualify as copyrightable "literary works" under the Copyright Act,³⁵² lectures must be "original works of authorship fixed in any tangible medium of expression."³⁵³ In this context, it is relatively easy for a work to satisfy the requirement of originality.³⁵⁴ The tangibility requirement, however, is more complex: the simplest way for a lecturer to meet it is to lecture verbatim from prepared notes, which themselves constitute the fixation of the work.³⁵⁵ For a presentation that involves

Keith, author of statements that had circulated, without correct attribution, under the title, *Anyway*); Teresa Wiltz, *Paradox Found: At Last, Author Gets Credit for "Commandments,"* WASH. POST, May 8, 2002, at C1 (recounting the history of Keith's *Paradoxical Commandments*).

351. See *infra* note 372, for a discussion.

352. See 17 U.S.C. § 102(a)(1) (2000) (identifying literary works as copyrightable "works of authorship").

353. 17 U.S.C. § 102(a).

354. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv., Inc.*, 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."). However, a mere arrangement of facts, such as an alphabetized list of the names and corresponding telephone numbers of an area's residents, would not qualify as original. *Id.* at 363.

355. See Robert A. Gorman, *Copyright Conflicts on the University Campus*, 47 J. COPYRIGHT SOC'Y U.S.A. 291, 301 (2000) ("Ironically, the more dreary and

improvisation, the lecturer could also make a simultaneous audiotape or videotape of the lecture, thereby capturing in tangible form the spontaneous material as soon as it is created.³⁵⁶

However, even lectures that are largely improvised or extemporaneous can be protected by state copyright law,³⁵⁷ which still applies to intangible works that do not qualify for protection under the Copyright Act of 1976.³⁵⁸ Courts have held that by delivering to a select audience a purely intangible work, such as a lecture, its creator has not surrendered his rights to prevent its duplication or further

mechanical the . . . lecturer, who reads verbatim from yellowing notes, the clearer the protection he has under the federal [copyright] act.").

356. *Id.* at 301. A videotape, though perhaps more difficult for the faculty member to arrange, would serve the same purpose. Of course, "sound recordings" and "audiovisual works" are eligible for copyright protection in their own right, under 17 U.S.C. §§ 102(a)(7) and (a)(6), respectively. *See also* Fritz v. Arthur D. Little, Inc., 944 F. Supp. 95, 99 (D. Mass. 1996) (concluding that if a lecturer extemporaneously delivers oral material while teaching, he has no copyright infringement claim against a notetaker who includes that material in the notetaker's own course, because the notes are "independent creations based on a non-copyrighted source"); *id.* at 100 (noting that, in that situation, "the source of the allegedly infringing materials was not 'fixed in any tangible medium of expression' when copied," therefore obviating any claim of copyright infringement).

357. Gorman, *supra* note 355, at 300 (citing 17 U.S.C. § 301(b)(1)). Pursuant to 17 U.S.C. § 301(b)(1), common law copyright is protected from preemption: "Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . subject matter that does not come within the subject matter of copyright as specified by [17 U.S.C. § 102], including works of authorship not fixed in any tangible medium of expression." However, the Copyright Act abolishes, as of January 1, 1978, any common-law copyright for works that do fall within the subject matter of copyright as specified in sections 102 and 103. 17 U.S.C. § 301(a); *see also* Hays v. Sony Corp. of Am., 847 F.2d 412, 415 (7th Cir. 1988) (observing that this section "explicitly abolishes common law copyright as of January 1, 1978, whether the work was created before or after that date."); *Ehat v. Tanner*, 780 F.2d 876 (10th Cir. 1985) (holding that the Copyright Act preempted state law copyright infringement, unfair competition, and unjust enrichment claims of a scholar whose quotations from closely-held documents in the archives of the Church of Jesus Christ of Latter-Day Saints had been published by the defendant without his consent).

358. Historically, state common law protected a work until it was published, after which point the author could protect it only by obtaining a federal copyright. The Copyright Act of 1976 simplified this system by eliminating common law copyright, as of January 1, 1978, for any work eligible for federal copyright protection, but it made federal copyright attach to any such work when it was created, not when it was published. *See Hays*, 847 F.2d at 415.

transmission.³⁵⁹ Notably, the Second Circuit Court of Appeals enjoined one party from presenting to audiences of professionals lectures that were very similar to an appellant's memory-enhancement lectures: "[e]ven where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not obtained the right to sell."³⁶⁰

If a teacher is concerned that her students will sell or publish their notes, she should require them to agree in writing, as a condition of registering for a course, that unless she agrees otherwise in writing they will make only personal use of their notes and will not transfer or distribute them commercially.³⁶¹ Where she has authorized

359. See *Williams v. Weisser*, 273 Cal. App. 2d 726, 741 (Cal. Ct. App. 1969) ("[T]he oral delivery of [a college professor's] lectures did not divest [him] of his common law copyright to his lectures. Nothing tangible was delivered to the students and [all relevant precedent] has reached the conclusion that the giving of a lecture is not a general publication."); *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 256 (N.Y. 1968) (holding that state copyright protection applies to oral presentations when "the speaker indicate[d] that he intended to mark off the utterance in question from the ordinary stream of [conversational] speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication").

360. *Nutt v. Nat'l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929) (finding copyright infringement of appellee's lectures, where the similarity of the two works' underlying themes, treatment of ideas and topics "makes it inconceivable" that the appellant did not copy appellee's copyrighted work); see also *Crowe v. Aiken*, 6 F. Cas. 904 (N.D. Ill. 1870) (upholding, in dictum, rights of a lecturer to an unpublished and unprinted lecture and of a clergyman to an unpublished but delivered sermon); *Abernethy v. Hutchinson*, 47 Eng. Rep. 1313 (L.C. 1825) (restraining medical students from publishing commercially, or selling to others to publish, notes that they had taken at lectures given by a prominent surgeon). *But see* *Kepner-Tregoe, Inc. v. Carabio*, 203 U.S.P.Q. 124, 127 (E.D. Mich. 1979). The *Kepner* Court observed that in the period after the *Nutt* decision was handed down, "[c]opyright analysis has become more sophisticated. I would hesitate to even imply protection could attach to isolated 'key words,' 'theme,' 'arrangement,' and 'plan.'" These are abstract rather than concrete expression, and in a technical or applied art context, they perhaps have little, if any protection." *Id.*

361. See *Gorman*, *supra* note 355, at 301. One such policy, supplied by Kansas State University for faculty to add to their syllabi, states: "Copyright 1999 [professor's name] as to this syllabus and all lectures. Students are prohibited from selling (or being paid for taking) notes during this course to or by any person or commercial firm without the express written permission of the professor teaching this course." Ashley T. Barnett, Note, "Profiting at My Expense": An Analysis of the Commercialization of Professors' Lecture Notes, 9 J. INTELL. PROP. L. 137, 139-40 (2001) (noting that this policy does not apply to non-students who attend the class for the purpose of taking lecture notes for their employers).

partial disclosure of such material, that fact should be conspicuously noted in the derivative work itself.³⁶²

Of course, even delivering a speech to an enormous audience does not necessarily constitute "general publication" so as to divest the speaker of his copyright. In holding that the estate of the Rev. Dr. Martin Luther King, Jr. retained the copyright to his famous "I Have a Dream" speech, which had been delivered in August 1963 to approximately 200,000 people surrounding King, and had been heard by millions more in simultaneous radio and television broadcasts,³⁶³ the court noted that King had not distributed written copies of the speech to the general public but only to the news media, to allow them to report the event more accurately.³⁶⁴ In fact, under the Copyright

362. See, e.g., Erhard, *Rhinehart Foreword*, *supra* note 338, at ii (indicating, on copyright information page, that the work contains "material based in part on unpublished lectures created and copyrighted by Werner Erhard and used by the author with his permission. No material created and copyrighted by Werner Erhard may be used or disseminated in any medium or language without his prior written authorization."). Of course, quotation of this material without authorization might still be protected by the defense of fair use; see also *Lish v. Harper's Magazine Found.*, 807 F. Supp. 1090, 1102 (S.D.N.Y. 1993) (holding that "publication" involves a determination of "whether there were 'implicit restrictions' on further distribution or disclosure of [a] document's contents"); *id.* (finding no "public dissemination" where the document in question, containing guidelines for a writers' class, "was restricted both by purpose and number" to the several dozen people believed to be signed up for the class); *Love v. Kwitny*, 706 F. Supp. 1123, 1134 (S.D.N.Y. 1989) (determining that for purposes of the second fair use factor, the plaintiff's distribution of his work to several professors, and his allowing them to use particular portions of it, "cannot be construed as dedicating his paper to wholesale use in the academic or any other community").

363. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999).

364. *Id.* at 1216-17; see also *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 107 (S.D.N.Y. 1963) (holding that King's oral delivery of the speech, "no matter how vast his audience, did not amount to a general publication of his literary work"). Because a television network that had aired footage of the speech without obtaining the estate's permission had not demonstrated that the speech itself constituted general, rather than limited, publication, the court denied its motion for summary judgment to dismiss the estate's copyright infringement action. *Id.* at 1216-17.

But see 1 NIMMER ON COPYRIGHT § 4.13 at 4-74.4 (2000) (suggesting that King's provision of copies of his speech to the press might constitute general publication because this distribution was "apparently for ultimate dissemination to the public").

Act of 1976, the presentation of a speech does not constitute "publication" of its content.³⁶⁵

ii. *Use of Unpublished Documents (or Other Works)*. As discussed in connection with nondisclosure agreements, the circulation of closely-held documents, audio recordings, or video recordings could be made subject to an agreement that the recipient will allow only sufficiently advanced members of the group (or perhaps no one else) to gain access to these materials.³⁶⁶

If collections of personal or institutional papers are given to a library by a teacher or student, care should be taken to specify whether and how these materials are to be made available to the public. However, it seems that, except for restricting access to qualified researchers and specifying the earliest date that such access can be granted, agreements with libraries might not effectively prevent such works from being quoted or paraphrased.³⁶⁷

Denial of access to such "unpublished" materials, such as private letters and journals, has haunted any number of biographers, including those of Gurdjieff.³⁶⁸ But if, after

365. *Estate of Martin Luther King, Inc.*, 194 F.3d at 1221 (Cook, J., concurring in part) (observing that 17 U.S.C. § 101 defines "publication" as "the distribution of copies or phonorecords of a work to the public" but does not include a public performance of the work).

366. *See* *Carpenter Found. v. Oakes*, 103 Cal. Rptr. 368, 26 Cal. App. 3d 784 (Cal. Ct. App. 1972) (upholding as a matter of contract law an agreement that called for closely-held historical documents of Christian Science to be made available only to sufficiently advanced members of that group).

367. *See* *Wright v. Warner Books*, 953 F.2d 731, 740-41 (2d Cir. 1991) (determining that fair use protected Richard Wright's biographer's paraphrasing Wright's journal entries, and copying and paraphrasing Wright's letters; and finding that such fair use did not constitute "publication" so as to breach an agreement between Wright and Yale University's Beinecke Library that "Yale University Library manuscripts may not be published in whole or in part unless such publication is specifically authorized"); *see also* *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (upholding use of plaintiff's unpublished letter by biographer of William S. Burroughs and finding no bad faith because the biographer had found the plaintiff's letters at "Fales Library of New York University, a public library").

368. *See* WEBB, *supra* note 18, at 13 (indicating that, as a biographer of Gurdjieff, "I have been refused permission to quote from certain unpublished writings, and it is also probable that a large quantity of potentially useful information has been withheld or suppressed"); *Interview with James Moore*, 1 TELOS [later renamed GURDJIEFF JOURNAL], No. 4 (1992), at 1, available at <http://www.gurdjieff-legacy.org/40articles.moore.htm>. Moore recalled that in preparing his own biography of Gurdjieff, "[v]ital unpublished texts I . . . found

having managed to gain legitimate access,³⁶⁹ someone quotes from or summarizes such works, should she still be able to invoke the fair use defense against a claim of copyright infringement? The former editorial manager of the company that holds the copyrights on Gurdjieff's published and unpublished writings has suggested that the sensitivity of these materials demands a self-imposed and higher moral standard from those who would quote them.³⁷⁰

A series of decisions, beginning in the mid-1980s, explored this area, though not specifically in the context of spiritual material. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,³⁷¹ the Supreme Court held that fair use would not encompass the "scooping" by *The Nation* magazine of excerpts—indeed, "essentially the heart of the book"³⁷²—from the forthcoming memoirs of former President

embargoed. I knew their scope. I knew who 'owned' them. I knew their vibrancy. . . . But I simply could not lay lands [sic] on them." *Id.*

369. See MOORE, *supra* note 18, at 405 (indicating that although "a significant" amount of material on Gurdjieff and his students "remains in private family holdings," there are "[c]ertain special collections in the public domain in the USA [that] include relevant material relating to specific pupils"; and proceeding to identify such collections held by the Archive of the Library of Congress and by various university libraries).

370. See Roger Lipsey, *Copyright Conventions in an Unconventional World: A Note About the Writings of Gurdjieff and His Circle*, 3 GURDJIEFF INT'L REVIEW, No. 2 (Spring 2000) (suggesting that even if the copyright in "unpublished reports by his pupils on meetings with Gurdjieff, which quote him as accurately as possible" is legally held by a student, or by a library in whose archives the material resides, "one still wonders where ownership, by the light of conscience, actually lies"), available at <http://www.gurdjieff.org/lipsey3.htm> (last visited Sept. 23, 2003).

371. 471 U.S. 539 (1985).

372. *Id.* at 556, 565 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)) (noting that the excerpts were among the most powerful passages in the book); see also *Los Angeles News Serv. Inc. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) (concluding that the third fair use factor weighed against the defendant because, although the defendant "copied only a small part of the raw footage shot [by the plaintiff], it was the most valuable part of that footage . . . its 'heart'").

However, it is not always clear whether the plaintiff's work has such a "heart" to be extracted; and courts are sometimes reluctant to infer that the defendant's choice of material to copy reveals by itself this central core. *Wright v. Warner Books, Inc.* 953 F.2d 731, 738 (2d Cir. 1991) (distinguishing duplicated portions of deceased author's unpublished writings from the material at issue in *Nation Enterprises*, and adding that "it is unclear whether the letters and journal entries in this case even have" similarly central or key portions); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998) (declining to infer that "because [an officer of the defendant] chose to quote it, the material copied necessarily must be the 'heart of the work'"); *Princeton Univ. Press v.*

Gerald Ford, which had been carefully protected by a confidentiality agreement among Ford, his publisher, and others involved in publishing his work.³⁷³ Because the copying of an unpublished work "seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works,"³⁷⁴ the Court concluded that in most circumstances this right of the author would trump a fair use defense.³⁷⁵ The fact that a work was (as yet) unpublished was "critical" in evaluating the second fair use factor, which takes into account the nature of the work.³⁷⁶ (Similar issues were raised in June 2003 in connection with the unauthorized publication, before the books' official publication dates, of passages from the latest Harry Potter novel³⁷⁷ and from Senator Hillary Clinton's autobiography.)³⁷⁸

Mich. Document Servs., Inc., 99 F.3d 1381, 1406 (6th Cir. 1996) (finding "no evidence to suggest that even the 30% [of the work at issue] selected [for duplication and inclusion in an academic "coursepack"] extracted the heart of the work rather than just those portions that the professor deemed instructive for his limited classroom purposes"), *aff'd in part (en banc)*, 99 F.3d 1381, 1389-90 (6th Cir. 1996) (concluding that the third fair use factor weighed against the plaintiffs, observing that "the fact that the professors thought the excerpts sufficiently important to make them required reading" was "fairly convincing" proof of the material's value, and stating that the excerpts were presumably "representative of the major idea of the work[s] as a whole").

373. *Harper & Row*, 471 U.S. at 564 (observing that everyone to whom the manuscript was shown was required to sign an agreement to keep it confidential).

374. *Id.* at 551. This "right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.* at 564. *Cf. Sundeman*, 142 F.3d at 205 (holding that the fact that the plaintiff's work had been published "militates against a finding of 'fair use,' [but] does not foreclose" such a finding).

375. *Harper & Row*, 471 U.S. at 555.

376. *Id.* at 564; *see also id.* ("The scope of fair use is narrower with respect to unpublished work."); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 732 (D. Ariz. 1985) (holding that publication by the recipient of previously-unpublished letters from the founder of the spiritual movement, The Infinite Way, without the founder's or his estate's permission, constituted copyright infringement).

377. *See, e.g.,* David D. Kirkpatrick, *Effort to Keep a Big Secret Collides With Free Speech Concerns*, N.Y. TIMES, June 21, 2003, at A16 (suggesting that litigation brought by the publisher of new Harry Potter novel against those who had leaked or would leak its contents before the official publication date would not succeed under the *Nation Enterprises* test, because the plaintiff would be required to show both that "dramatic focal points" had been copied and that it had thereby suffered a loss of revenue).

378. *See, e.g.,* David D. Kirkpatrick, *Sound Familiar? A Leak, an Uproar, and Talk of a Suit*, N.Y. TIMES, June 5, 2003, at A24 (indicating that *Nation Enterprises* "appears to be a legal precedent" for a suit contemplated by Simon

Two years after the *Harper & Row* decision, the Second Circuit Court of Appeals held that the famously reclusive (so to speak) author J.D. Salinger should be granted a preliminary injunction preventing the publication of a biography that had without his permission quoted his unpublished letters extensively.³⁷⁹ Following the reasoning of that decision, the appeals court found that the second fair use factor weighed heavily in Salinger's favor.³⁸⁰ Not only did the biographer not have an inherent right to reproduce the author's exact words, but their very colorfulness was precisely the aspect of Salinger's expression that the copyright laws protect.³⁸¹

The same court held in 1989, in a copyright infringement action brought by the publishing arm of the Church of Scientology against the publisher of an unauthorized biography of the Church's founder, L. Ron Hubbard, that in assessing the fair use of unpublished material (there, journals and other documents authored by Hubbard), the analysis of the second factor should not take into account whether or not such material had been quoted to make "significant points" about the subject.³⁸²

& Schuster, Senator Clinton's publisher, against the Associated Press, which had widely disseminated passages from her work).

379. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

380. *Id.* at 97 (construing the *Harper & Row* decision to indicate a "diminished likelihood that copying will be fair use when the copyrighted material is unpublished").

381. *Id.* at 96.

382. *New Era Publ'ns Int'l v. Henry Holt & Co., Inc.*, 873 F.2d 576, 583 (2d Cir. 1989). The district court had held that the plaintiff's copyrighted expression could be quoted if "reasonably necessary to the communication and demonstration of significant points being made about the subject," *New Era Publ'ns, Int'l v. Henry Holt & Co., Inc.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988), such as when the biographer needed to use the subject's own words to demonstrate his "traits of character." *Id.* at 1523-24.

Though affirming the district court's denial of an injunction for the plaintiff, the court observed that "[w]here use is made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here." *New Era Publ'ns Int'l*, 873 F.2d at 583; *see also* *Lish v. Harper's Magazine Found.*, 807 F. Supp. 1090, 1101 (S.D.N.Y. 1993) ("Our precedents . . . leave little room for discussion of [the second fair use] factor once it has been determined that the copyrighted work is unpublished."). *Cf. New Era Publ'ns Int'l*, 904 F.2d 152 (2d Cir. 1990) (determining that fair use protected a biographer who quoted some of Hubbard's published works in order to convey the facts contained in such material rather than Hubbard's method of expressing them).

To clarify this situation, on October 25, 1992, Congress enacted a bill on the Fair Use of Unpublished Works, which added to the "fair use" section of the Copyright Act an explicit statement that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [four traditional] factors."³⁸³ Thus, biographers and other researchers are encouraged to incorporate into their own works material considered by its authors to be private or restricted.

iii. *Suppression as Market Failure.* When the defendant has published, without authorization, material that the plaintiff had attempted to keep secret, the plaintiff's copyright infringement claim is stronger if it asserts its intent, even a long-range one, to publish a version of its material itself. Thus, the Ninth Circuit Court of Appeals found the fair use defense unavailable to a breakaway group that produced unauthorized copies of *Mystery of the Ages*, a religious text once published by the plaintiff organization but now withheld by it as erroneous and culturally offensive.³⁸⁴ The court concluded that "[b]ecause the [plaintiff] plans at some time to publish an annotated version of [the work], it is entitled to protection of its copyright."³⁸⁵ Fair use would be justified, though, in instances of "market failure," such as when the copyright

383. Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (amending 17 U.S.C. § 107); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1118 (1990) (suggesting, as the district court judge whose opinions in the *Salinger* and *New Era* cases had been reversed by the Second Circuit Court of Appeals, that "[a] ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life—the 'widow censor,' who demands to see a manuscript before approving the author's use of such documents); *id.* at 1122 ("The fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication.").

384. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); see also Jess Bravin, *Bad Tithings: Sect Disavows Tenets, and Woe to Him Who Printeth Them Anyway*, WALL ST. J., Feb. 21, 2001, at A1 (noting that the plaintiff "hasn't lost sales of its founder's book because it never charged for it . . . , and certainly has no wish to sell it now [although it] claims it is entitled to all the tithes and other contributions" received by the splinter group as a result of that group's free distribution of the work).

385. 227 F.3d at 1119 n.2.

owner was deliberately attempting to suppress certain ideas.³⁸⁶

The dissent suggested that this was in fact the plaintiff's intent, and noted that the plaintiff "appears less interested in protecting its rights to exploit [the work at issue] than in suppressing [the author's] ideas which now run counter to church doctrine."³⁸⁷ In fact, one commentator argues that in the context of a market for membership between two factions of a religious organization, neither the plaintiff's loss of revenue nor its loss of membership resulting from the defendant's sale of a purportedly-heretical text should be relevant for purposes of fair use analysis, "lest we permit copyright law to become a tool for censoring disfavored religious practices."³⁸⁸

Yet it would be only a short step to apply that reasoning to defendants such as Helen Palmer, who are not members of the plaintiff organization but who create and seek to publish documents that the plaintiff regards as heretical. The *Arica* decisions, whether or not they compared the appropriate works and markets for purposes of the fair use test's fourth factor, reflected the view that if spiritual works

386. *Id.* (citing Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1634 (1982)).

In this connection, Gurdjieff made one of his most unusual contentions: that esoteric "knowledge cannot belong to all, cannot even belong to many," because such knowledge "like everything else in the world, is material" and therefore limited. OUSPENSKY, IN SEARCH, *supra* note 18, at 37 (quoting Gurdjieff). It would therefore follow that for maximum effect, "knowledge should be preserved among a small number of people and not be dispersed among the masses. . . . If it is preserved among a few, each will receive not only enough to keep, but to increase, what he receives." *Id.* at 37-38. Indeed, only "two hundred conscious people. . . could change the whole of life on the earth." *Id.* at 310.

However, Gurdjieff made serious efforts to give introductory lectures to large groups in Russia, Europe, and the United States. Ouspensky advised his own students that although "[i]t is quite true that this system cannot belong to all [or even to many,] we must make every effort to give it to as many people as possible. . . . [I]f it is limited to a small group it will never reach the right people. Small groups. . . will distort and spoil" the ideas if they jealously guard them. OUSPENSKY, FOURTH WAY, *supra* note 26, at 278 (noting also that "only a certain number of people gives a sufficient variety of [personality] types" for successful group work). Cf. Ichazo, SYMBOL, *supra* note 13, at 22 (dismissing the concept of the materiality of knowledge as "point[ing] to a serious and impossible misunderstanding on the part of Ouspensky and Gurdjieff," and as "untenable and absurd").

387. 227 F.3d at 1125.

388. Cotter, *supra* note 102, at 383.

are not necessarily more deserving of intellectual property protection than other works, they are certainly not *less* deserving of such protection.

Nonetheless, it remains unclear under the Ninth Circuit's analysis to what degree a "market failure" can be declared if, rather than refusing to license or publish an existing work, the plaintiff declares, as Oscar Ichazo has for decades, that the work at issue is not yet completed.³⁸⁹ Nor did the Ninth Circuit indicate how long a promised publication may be delayed until a "market failure" exists.

b. *Copyrighting Techniques*

i. *As Instructions*. Are the actual instructions for a spiritual group's meditative techniques and physical exercises eligible for copyright protection? At first glance, these might seem similar to the instructions contained in recipes, whose literary expression,³⁹⁰ but not actual

389. Although Ichazo frequently announced plans to complete and make available to the general public his accounts of the history, development, substance, and applications of the Arica system, to date this work has not been published. *See, e.g.*, Ichazo, SYMBOL, *supra* note 13, at 18 (indicating that "I have insisted since 1968 that my work should be kept confidential until I publish my complete work"); Goldberg, *supra* note 26, at 25 (asserting, in 1993, that publication of his book has been delayed until the Arica school reaches the appropriate level of development); ICHAZO, LETTERS, *supra* note 11, at 31 (predicting, in a January 1986 communication to Aricans, a book that "will offer a history and explanation of the entire Arica material and how to deal with it practically"); ICHAZO, INTERVIEWS, *supra* note 11, at 143 ("I'm writing the books one by one, once and for all . . . to describe things in a way that the general public can read and understand"); ICHAZO, HUMAN PROCESS, *supra* note 30, at 1 ("The explanation that this material really needs will be presented in a book . . . I feel that it is necessary to begin presenting the Arica Theory and System to the general public.").

390. *See* UNITED STATES COPYRIGHT OFFICE, FACTSHEET FS 122, *Recipes* (indicating that although "mere listings of ingredients" cannot be copyrighted, "there may be a basis for copyright protection" if the recipe is "accompanied by substantial literary expression in the form of an explanation or directions"), available at <http://www.copyright.gov/circs>; *see also* Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996) (holding that a recipe's "functional listing of ingredients [is not] original within the meaning of the Copyright Act" and thus is not subject to copyright protection); *Lambing v. Godiva Chocolatier*, 1998 WL 58050, at *1 (6th Cir. Feb. 6, 1998), at *1 ("The identification of ingredients necessary for the preparation of food is a statement of facts" and is not copyrightable"); *Barbour v. Head*, 178 F. Supp.2d 758, 764 (S.D. Tex. 2001) (declining to conclude as a matter of law that the recipes at issue, which were "infused with light-hearted or helpful commentary," are

underlying ideas,³⁹¹ can be copyrighted.³⁹² In both the culinary³⁹³ and the consciousness³⁹⁴ realms, courts have

"nothing more than mere recitations of facts that are not entitled to copyright protection," and therefore denying summary judgment in favor of defendant).

391. See UNITED STATES COPYRIGHT OFFICE, CIRCULAR 31, *Ideas, Methods, or Systems* (advising that although copyright in a book about a new system of food processing protects the holder against the unauthorized duplication of the text and illustrations, "it will not give the author any rights to prevent others from adopting the ideas for commercial purposes or from developing or using the machinery, processes, or methods described in the book"), at <http://www.copyright.gov/circs> (June 1999); see also *Publ'ns Int'l Ltd.*, 88 F.3d at 480-81 (concluding that "[t]he [specific] recipes' directions for preparing the assorted dishes fall squarely within the class of subject matter specifically excluded from copyright protection by 17 U.S.C. § 102(b)... as either a 'procedure, process, [or] system' " and suggesting that patent protection might be possible); *Lambing*, 1998 WL 58050, at *1 (concluding that "recipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b)").

392. Of course, recipes can qualify as trade secrets. See, e.g., *Buffets, Inc. v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996) (denying trade secret status to recipes for traditional American foods such as BBQ chicken and macaroni and cheese, since they "lack the requisite novelty and economic value for trade secret protection"); *Pretzel Time, Inc. v. Pretzel Int'l, Inc.*, No. 98 Civ. 1544, 1998 WL 474075, at *1 (S.D.N.Y. Aug. 10, 1998) (observing that plaintiff "has developed trade secrets, including a unique recipe for its pretzel flour"); *Christopher M's Hand Poured Fudge, Inc. v. Hennon*, 699 A.2d 1272, 1275 (Pa. 1997) (determining that plaintiff's recipe for fudge was a trade secret); *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1428-29 (N.D. Iowa 1996) (holding that bagel recipes were trade secrets); *Sweetzel, Inc. v. Hawk Hill Cookies, Inc.*, No. CIV.A.95-2632, 1995 WL 550585, at *11-12 (E.D. Pa. Sept. 14, 1995) (concluding that cookie recipes were trade secrets); *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 294 (D. Del. 1985) (finding "beyond dispute" that the formulae for the company's soft drinks constituted trade secrets); *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1163 (S.D. Ind. 1985) (determining that "KFC Seasoning, its blending system, and the method of preparing Original Recipe Kentucky Fried Chicken are subject to protection as trade secrets").

Culinary processes are also patentable. See, e.g., *Oscar Mayer Foods Corp. v. Conagra, Inc.*, 869 F. Supp. 656 (W.D. Wis. 1994) (upholding validity of patent on process for preserving fish and poultry); *Laitram Corp. v. Depoe Bay Fish Co.*, 549 F. Supp. 29 (D. Or. 1982) (upholding, and finding infringement of, patent in process for peeling shrimp mechanically after they are cooked).

393. See *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (observing that the plaintiff's recipe booklet contained not only "informational" material available in other publications on cake decorating and recipes, but also "creative hints she derived from her own experiences or ideas," and concluding that the second fair use factor neither favored nor weighed against the defendant).

394. See *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 157 (2d Cir. 1990) (acknowledging that "[w]e have some hesitation in trying to characterize Hubbard's diverse body of writings as solely 'factual' or 'non-

grappled with a key aspect of the second fair use factor: whether or not the work at issue is creative, and thereby deserving of more copyright protection; or factual, and thereby deserving of less.

One prominent yoga teacher,³⁹⁵ whose nationwide group of instructors offers a standardized version of his course, has copyrighted "not only his posture series but the dialogue that goes with it"³⁹⁶ and has trademarked his name. Bikram Choudhury, who in 1978 stated that "I have worked thirteen years to formulate the exact series of poses, the exact scientific technique that will give total health to anyone who will listen,"³⁹⁷ recently "threatened legal action against about 25 yoga studios that incorporate his program."³⁹⁸ His intellectual property attorney stoutly denied the proposition that "yoga belongs to the world," insisting that Choudhury's sequence "is one of the most easily protectable pieces of intellectual property there is."³⁹⁹

factual "); *id.* at 158 (indicating that "reasonable people can disagree over how to classify Hubbard's works").

395. See Paul Keegan, *Yogis Behaving Badly*, BUSINESS 2.0, Sept. 2002, 118, 120 (estimating that Bikram Choudhury receives "at least \$7 million" annually from his yoga classes and related enterprises, "making him one of the biggest players in the burgeoning industry of Yoga Inc.," in which "an estimated 18 million practitioners in the United States today [spend] hundreds of millions of dollars" on their practices).

396. See Sally McGrane, *Have Yoga Mat, Will Travel*, N.Y. TIMES, Jan. 31, 2003, at F1 (discussing the availability and standardization across the United States of classes in the "26-posture routine of classic yoga positions developed (and copyrighted last year) by [Bikram] Choudhury, [as 'Bikram Yoga']"). According to the Copyright Office records available through <http://www.copyright.gov/records/cohm.html>, registrations by Bikram Choudhury include: a book and sound cassette entitled, *Bikram's Beginning Yoga Class* (registered in the years 2000 and 2002, respectively) and a printed version of *Bikram's Yoga College of India Beginning Yoga Dialogue* (registered as an unpublished work in 2002).

397. Bonnie Jones Reynolds, *Introduction to BIKRAM CHOUDHURY, BIKRAM'S BEGINNING YOGA CLASS* (1978) (Introduction pages unnumbered) (quoting Choudhury).

398. Vanessa Grigoriadis, *Controlled Breathing, In the Extreme*, N.Y. TIMES, July 6, 2003, Section 9, at 1.

399. Hilary E. MacGregor, *Had Your McYoga Today?*, L.A. TIMES, July 7, 2002, at E1, E3 (quoting Choudhury's intellectual property attorney); see also Keegan, *supra* note 395, at 122 (characterizing yoga techniques as "a collection of highly marketable intellectual properties").

Choudhury's activities in the intellectual property arena sparked the creation of a nonprofit California corporation formed "to resist the enforcement of the copyright protection of any Yoga style thereby ensuring its continued

In June 2002, Choudhury filed a copyright and trademark infringement suit against a former authorized instructor of his "Bikram Yoga" system, alleging that she had offered classes that altered the sequence of and instructions for his poses, added music during the classes, and omitted the characteristic 105-degree heat of his exercise rooms; she had also allegedly offered unauthorized certification courses in Bikram Yoga.⁴⁰⁰ Although the defendants' Answer contested the validity of Choudhury's trademarks and copyrights, and also asserted a "fair use" defense to copyright infringement,⁴⁰¹ the case was settled out of court in June 2003.⁴⁰²

Are the individual exercises copyrightable? First, they would have to be "original works of authorship,"⁴⁰³ a phrase "purposely left undefined"⁴⁰⁴ by the Copyright Act of 1976 but taken by the Supreme Court to indicate "independent creation plus a modicum of creativity."⁴⁰⁵ This requirement would clearly not be satisfied by a teacher's wholesale appropriation of generations-old techniques. However, even if the individual exercises could be shown to be in the public

natural unfettered practice for all to enjoy and develop." *Open Source Yoga Unity*, at www.yogaunity.org (last visited July 9, 2003).

400. Second Amended Complaint, *Choudhury v. Schreiber-Morrison*, (C.D. Cal.) (No. SA02-565) [hereinafter *Second Amended Bikram Complaint*] at 9-11. The initial Complaint was filed on June 10, 2002, and the Second Amended Complaint on January 22, 2003. Choudhury also claimed that the unauthorized use of his name to advertise a distorted version of his yoga sequence not only caused him commercial harm but resulted in "injury to his reputation and standing in the community to his humiliation, embarrassment, [and] mental anguish." *Id.* at 21-22.

401. Answer to Second Amended Bikram Complaint, *Choudhury* (No. SA02-565).

402. Grigoriadis, *supra* note 398, at 9.

403. 17 U.S.C. § 102(a) (2000).

404. See H.R. Rep. No. 94-1476, at 51 (1976) (noting that the drafters "intended to incorporate without change the standard of originality established by the courts under the [previous] copyright statute [, which did] not include requirements of novelty, ingenuity, or esthetic merit").

405. *Feist Publ'ns, Inc. v. Rural Tel. Serv., Inc.*, 499 U.S. 340, 346 (1991); see also *Runge v. Lee*, 441 F.2d 579, 581 (9th Cir. 1971) (finding that sufficient evidence had been presented to the jury to support a finding that a book of facial exercises satisfied the originality requirement); *Consol. Music Publishers, Inc. v. Hansen Publ'ns, Inc.*, 339 F. Supp. 1161, 1163 (S.D.N.Y. 1972) (concluding that the existence of significant differences in the arrangement, presentation, and language of the plaintiff's and defendant's guitar instruction books "demonstrates that there are various ways of presenting this type of instructional material and supports the conclusion that plaintiff's work is indeed copyrightable").

domain,⁴⁰⁶ their innovative sequencing or adaptation would probably satisfy the "minimal degree" of creativity necessary for originality.⁴⁰⁷ Nor would the author of the sequence be legally required, under either the Copyright Act or the Lanham Act, to credit the original creator of the individual exercises.⁴⁰⁸

Choudhury apparently does not claim to have invented the specific yoga postures of his routine but only to have created an effective sequence using those exercises that he chose from among the hundreds available. In a somewhat similar fashion, Arica offers as "Psychocalisthenics" a routine of two dozen physical exercises apparently derived

406. For instance, although their history and provenance might be difficult to document, "some 7,000 different exercises" fall under the rubric of *qigong* (or *chi kung*), an increasingly-popular genre of meditative movement and breathing practices based on age-old Chinese techniques. Jane Spencer, *The Next Yoga: a Sweat-Free Workout*, WALL ST. J., May 13, 2003, at D1.

407. *Feist*, 499 U.S. at 348 (noting that although facts are uncopyrightable, their selection, ordering, and arrangement in a compilation, so long as it "entail[s] a minimal degree of creativity, [renders the resulting work] sufficiently original that Congress may protect such compilations through the copyright laws"). Beyond the requisite creativity, the Supreme Court stated, "the originality requirement is not particularly stringent. A compiler [of facts] may [independently] settle upon a selection or arrangement that others have used; novelty is not required." *Id.* at 358.

See also *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 682-83 (2d Cir. 1998) (observing, in finding certain elements of West's case reports not copyrightable, that "creativity in selection and arrangement. . . is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that render certain selections 'garden variety' "); *Grolier, Inc. v. Educ'l Reading Aids Corp.*, 417 F. Supp. 665, 667 (S.D.N.Y. 1976) (holding that "[t]o the extent that defendants base their [copyright infringement defense] on the fact that plaintiffs have compiled a collection of essentially non-original . . . exercises [to teach pre-school age children skills needed for learning to read], this does not suffice to defeat plaintiffs' right to a copyright as to an original compilation of such non-original exercises"); *id.* at 668 (suggesting that the defendants could challenge the validity of the plaintiff's copyright on "public domain" grounds by demonstrating that "essentially the same arrangement and format" of such exercises had been marketed before the plaintiffs' version); *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1518 (1st Cir. 1996) (holding that a work can be copyrightable despite its author's borrowing of elements from previous works, if the author has created a new version of the work "or has otherwise rearranged or transformed it so as to have made an original contribution").

408. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S.Ct. 2041, 2048 (2003) (holding that the public has "the right to copy, and to copy without attribution, once a copyright has expired").

from yoga and other disciplines.⁴⁰⁹ Among the 127 copyrights registered by Arica, many of which relate to its techniques, are those for two books detailing Psychocalisthenics,⁴¹⁰ whose name it has successfully defended as a service mark.⁴¹¹

Other Arican exercise sequences include a combination of nine different versions of the traditional Sufi "zhikr"

409. See OSCAR ICHAZO, ARICA PSYCHOCALISTHENICS 7 (1976) [hereinafter ICHAZO, PSYCHOCALISTHENICS] (including instructions for "a sequence of [twenty-five] exercises designed to restore the balance of the body and the psyche"); OSCAR ICHAZO, MASTER LEVEL EXERCISE: PSYCHOCALISTHENICS 42 (1986) [hereinafter ICHAZO, MASTER LEVEL EXERCISE] (introducing an updated version of Psychocalisthenics: "[t]his set of [twenty-three] exercises I designed for my own routine and for the group I directed in 1958"). John Lilly, who practiced an early version of this exercise set in Chile, described its components as "mainly based on Hatha Yoga and Aikido," but also including "Air Force exercises" and "dance and ballet steps." LILLY, CENTER, *supra* note 45, at 156-57. Lilly detected "no new movements or positions. Possibly a new aspect is the sequencing and timing." *Id.* at 157.

410. See ICHAZO, PSYCHOCALISTHENICS, *supra* note 409, at 107 (indicating that this sequence of exercises "is used in Arica to support the intensive process of the development of consciousness [but] may be learned independently for improved physical and psychic health"); ICHAZO, MASTER LEVEL EXERCISE, *supra* note 409, at 42 (noting that the movements focus on "the five cavities of our organism . . . which we feel as the head, chest, abdomen, pelvis, and spinal column"); *West & Co. v. Arica Inst., Inc.*, 194 U.S.P.Q. 32, 34 (S.D.N.Y. 1976). The *West* Court observed, in the course of barring the plaintiff from creating consumer confusion by marketing a book on "Psycho-Calisthenics," that Arica's Psychocalisthenics exercises "are described as related to yoga exercises but are distinct in that Arica's exercises require continual motion. . . . An Arica brochure characterized the movements as 'a combination of various yoga systems, dance and calisthenics.'" *Id.*

411. See *West & Co.*, 557 F.2d at 343 (determining that Arica's use of "psychocalisthenics" for a series of physical exercises is a valid service mark and was infringed by appellant's use of "psycho-calisthenics" for series of mental exercises). A "service mark" is defined by the Lanham Act as a word, name, or symbol used "to identify and distinguish the services of one person" from those of others, and to indicate their source; a "trademark" is similar except that it identifies goods or products. 15 U.S.C. § 1127.

Arica's web site indicates that Arica has registered as trademarks seven terms, including Arica, Psychocalisthenics and Protoanalysis, and that Ichazo claims as service marks an additional seventy-five terms, including Autodiagnosis, Autodiagnosis Training, and Fixations and Autodiagnosis. See <http://www.arica.org> ("copyright 2002" link) (last visited Mar. 4, 2003). In addition, the last (and unnumbered) page of the 20th Reunion (1991) issue of *The Arican* identified dozens of phrases, including twenty-one different "enneagons," as "service marks of Arica Institute."

practice⁴¹² (which is purportedly "more powerful" than any one of those types alone),⁴¹³ and a meditative motion practice called Kinerhythm, which Ichazo asserts "is not a new exercise, but has been synthesized by me in a new form that doesn't contradict the tradition and makes the experience more available to our time":⁴¹⁴ that is, "[t]here is less to do, and it takes less time and less space, but it is more intense."⁴¹⁵ (One advanced Arican training, "The Cutting of the Adamantine Pyramid," involves an elaborate schedule of twelve weeks of weekday sessions, over which dozens of different exercises or meditations are practiced.)⁴¹⁶ Carlos Castaneda presented his own "Tensegrity" system of mystical exercises, in which "the long groups [of physical movements] have been reassembled, and a great number of the fragments have been kept as single, functioning units" from a version allegedly taught to Castaneda by a Yaqui Indian "sorcerer."⁴¹⁷

Yet despite the degree of creativity and authorship asserted by the assemblers of these sets of movements, it would appear that the directions for the underlying exercises themselves—as opposed to the specific literary expression of these instructions—are not copyrightable as literary works, since they are in essence descriptions of functional steps in an uncopyrightable process or procedure.⁴¹⁸ Moreover, even the literary expression of the

412. See OSCAR ICHAZO, 9 WAYS OF ZHIKR RITUAL (1976) (detailing, as an Arican training manual, the various movements and associated chants of a group meditative exercise).

413. ICHAZO, INTERVIEWS, *supra* note 11, at 136.

414. *Id.* at 94.

415. *Id.* at 95.

416. See OSCAR ICHAZO & JENNY PEREDA, THE CUTTING OF THE ADAMANTINE PYRAMID (2d ed. revised 1980) (providing detailed instructions for exercises and meditations); THE CUTTING OF THE ADAMANTINE PYRAMID SCHEDULE (2d ed. 1980) (specifying the schedule of practices).

417. CARLOS CASTANEDA, MAGICAL PASSES: THE PRACTICAL WISDOM OF THE SHAMANS OF ANCIENT MEXICO 23 (1998). Castaneda's books are discussed at *infra* notes 456-60, and accompanying text; see also VICTOR SANCHEZ, THE TEACHINGS OF DON CARLOS: PRACTICAL APPLICATIONS OF THE WORK OF CARLOS CASTANEDA xxiv (Robert Nelson trans., 1995) (providing 75 exercises in self-awareness, "using as a starting point the more or less general techniques or proposals from the work of Castaneda"); *id.* at v (noting that Castaneda "has neither participated in writing this work, nor has endorsed the views expressed herein").

418. Even proponents of patenting sports moves, discussed *infra* Part I.F.3, have suggested that the functionality of such movements would deprive them of copyright protection. See Carl A. Kukkonen, III, *Be a Good Sport and Refrain*

instructions could, in some cases, be found uncopyrightable under the merger doctrine if, for instance, it included such common and practical directions as "let your breath be long and slow" or emphasized allowing the diaphragm muscle to lower or expand as the lungs fill and to return to its normal position as they empty.⁴¹⁹ Not only are such directions not original, but to allow enforcement of a copyright on these near-universal elements of meditative techniques would be to allow the monopoly by the copyright-holder of what amount to ideas.

In addition, just as courts are loathe to find copyrightable those features of a computer program that are dictated by the specific hardware and software with which the program is designed to interact,⁴²⁰ deep breathing and other common elements of meditative techniques

From Using My Patented Putt: Intellectual Property Protection for Sports-Related Movements, 80 J. PAT. & TRADEMARK OFF. SOC'Y 808, 814 (1998) (contending that, because they "are simply entertainment," sports moves that satisfy the originality and subject matter requirements of the Copyright Act should not be excluded from copyrightability merely because they are functional). Cf. Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 315, 355-56 (2000) (arguing that functional moves should not be copyrightable but aesthetic moves should be).

419. See, e.g., KENNETH S. COHEN, *THE WAY OF QIGONG: THE ART AND SCIENCE OF CHINESE ENERGY HEALING* 114-15, 124-25 (1997) (providing similar instructions for "Natural Breathing" and a variation, "Dan Tian Breathing"); OSCAR ICHAZO, *PACIFICATION OF THE PSYCHE* 14-16 (1986) (providing, in an Arican training manual, such instructions for the practices of "Diakath Breathing" and "Alpha Breathing"); YOGA FOR HEALTH AND HEALING 15-16 (Alice Clagett & Elandra Kirsten Meredith eds., 1989) (providing, in a Kundalini Yoga manual, similar instructions for "Long, Deep Breathing" exercise); see also *infra* note 743 and accompanying text (finding that a discussion of breathing from the lower abdomen is unprotectable by copyright law, as a process or procedure).

420. See, e.g., *Computer Assocs. v. Altai*, 982 F.2d 693, 709-10 (2d Cir. 1992) (eliminating, in the process of isolating the copyrightable portions of the plaintiff's software, elements dictated by such external factors as the "mechanical specifications" of the computer on which the program was designed to run and the other programs that it would interact with). The court analogized this analysis to the *scenes à faire* doctrine, which excludes from copyright infringement determinations similarities resulting from the presence in both plaintiff's and defendant's works of " 'stock' or standard literary devices" common in representing "a particular historical era or fictional theme." *Id.* at 709 (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) for the proposition that infringement could not be based on the incorporation, in different movies depicting life in Nazi Germany, of scenes involving beer halls, German greetings such as "Heil Hitler," and the singing of certain German songs).

appear to be based on factors of human physiology and psychology, and by analogy should not be effectively monopolized. For example, Harvard Medical School professor Herbert Benson authored a best-selling manual in 1975 that extracted from Christian, Jewish, and Asian spiritual traditions a simple and secular method to achieve meditative calm; it also explained the common physiological, if not philosophical and cultural, elements involved.⁴²¹ (Benson subsequently instructed readers how to augment the power of this technique by combining it with the "faith factor" of their own spiritual or religious beliefs;⁴²² and, most recently, described the "faith factor" itself as only one of a variety of mechanisms that could trigger "a powerful mind-body impulse that severs prior mental patterns and . . . opens an inner door to a host of personal benefits . . .")⁴²³

Indeed, a decade before the pioneers of "neurotheology" began to explore whether the capacity for mystical experiences was "hardwired" into the human mind,⁴²⁴

421. See HERBERT BENSON, M.D., *THE RELAXATION RESPONSE* 110-35 (1975). Cf. ALDOUS HUXLEY, *THE PERENNIAL PHILOSOPHY* 273-92 (Harper & Row 1972) (1945) (detailing and comparing "Spiritual Exercises" from Eastern and Western traditions).

422. See HERBERT BENSON, M.D., *BEYOND THE RELAXATION RESPONSE* 103-17 (Berkley Books 1985) (1984) (discussing "The Fundamentals of the Faith Factor: How to Combine the Relaxation Response with Your Personal Beliefs").

423. HERBERT BENSON, M.D. & WILLIAM PROCTOR, *THE BREAK-OUT PRINCIPLE* 4 (2003); see also MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 4 (1990) (examining the psychology behind achieving, through yogic and other methods, "the [mental] state in which people are involved in an activity [so enjoyable] that nothing else seems to matter").

424. See, e.g., CAROL RAUSCH ALBRIGHT ET AL., *WHERE GOD LIVES IN THE HUMAN BRAIN* 164 (Sourcebooks, Inc., 2001) (1997) (providing "an analysis that finds in the human brain a mirror of [various religious] images of God—and thus may suggest further ways of comprehending them"); JAMES H. AUSTIN M.D., *ZEN AND THE BRAIN: TOWARD AN UNDERSTANDING OF MEDITATION AND CONSCIOUSNESS* 461-65, 516-18, 622-24 (1998) (summarizing a neurologist's intensive discussion of the neurophysiology of Zen meditation); EUGENE G. D'AQUILI & ANDREW B. NEWBERG, *THE RELIGIOUS MIND: PROBING THE BIOLOGY OF MYSTICAL EXPERIENCE* 109-20 (1999) (presenting a neurophysical analysis of mystical experience); JOHN HORGAN, *RATIONAL MYSTICISM* (2003) (interviewing and critiquing the work of, among others, Newberg and Austin); ANDREW NEWBERG, M.D. ET AL., *WHY GOD WON'T GO AWAY: BRAIN SCIENCE AND THE BIOLOGY OF BELIEF* 86-91, 117-23 (2002) (describing neurophysiological effects of religious rituals and meditative practices).

A useful profile of the emerging discipline of "neurotheology" can be found in Sharon Begley, *Religion and the Brain*, *NEWSWEEK*, May 7, 2001, 50, 53, which features a psychologist's hypothesis that the consistency of spiritual experiences

Werner Erhard, himself a former student of Scientology,⁴²⁵ suggested that the Church of Scientology had not been able to establish that his "est" course infringed their copyrights because "[a]ll programs that deal with human beings will be in some ways similar, if for no other reason, simply because we all have minds and bodies, and we all think and feel."⁴²⁶

ii. *As Choreography*. It appears that no attempt has yet been made to copyright certain patterns of yogic or other meditative movements as choreography.⁴²⁷

across cultures implies the existence of "a common core that is likely a reflection of structures and processes in the human brain."

In the neurotheological approach, the physical or mental procedures that invoke special states of consciousness might be analogized to the unlikely sequences of keyboard strokes or mouse-clicks that allow videogamers or viewers of DVD movies access to undocumented features of the software or presentation (such as new levels of a game or extra scenes of a movie). See, e.g., *The Easter Egg Archive*, at <http://www.eeggs.com> (cataloguing more than 6,000 such features) (last visited July 16, 2003).

425. See WILLIAM WARREN BARTLEY, III, WERNER ERHARD: THE TRANSFORMATION OF A MAN, THE FOUNDING OF EST 147 (1978) (indicating that "Werner went through five Scientology [training] levels" before founding *est*).

426. JANE SELF, 60 MINUTES AND THE ASSASSINATION OF WERNER ERHARD 19 (1992) (quoting Erhard).

427. See 17 U.S.C. § 102(a)(4) (2000) (including "choreographic works" within the scope of copyrightable "works of authorship"); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (indicating that the Copyright Act "does not define choreography, and the legislative reports on the bill indicate only that "social dance steps and simple routines" are not included" (quoting H.R. REP. NO. 94-1476, at 53-54 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666-67)); 1 NIMMER ON COPYRIGHT § 2.07[B], at 2-69, 70 (2002) (discussing the "ambiguity as to whether a choreographic work by definition requires 'dramatic content,' as opposed to being " 'abstract' dance," and noting the Copyright Office's position that a "choreographic work" does not have to have been prepared for presentation to an audience).

However, that Office's COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, defines choreographic works as "a related series of dance movements and patterns organized into a coherent whole [but excluding] mere exercises, such as 'jumping jacks' or walking steps." COMPENDIUM II, at 400-18 (displaying §450.03 and .03(a)); see also U.S. COPYRIGHT OFFICE, FACTSHEET 119, *Dramatic Works: Scripts, Pantomimes, and Choreography* (June 1999) (advising that, for purposes of registering a choreographic work, "the work may be embodied in a film or video recording or be precisely described on any phonorecord or in written text or in any dance notation system. . . ."), available at <http://www.copyright.gov/fls/fl119.pdf>. See, the movie *Bring It On* (Universal Studios 2000) (screenplay by Jessica Bendinger), which focused on high school cheerleading competitions and highlighted the social and competitive, if not the legal, consequences of unauthorized use of another group's choreographic routines.

Although works of choreography are not defined in the Copyright Act and their protection by copyright is rarely addressed by caselaw,⁴²⁸ serious candidates for choreographic protection, in addition to sequences of yogic or martial arts movements,⁴²⁹ are the "movements," also known as "temple dances" or "sacred dances," taught by Gurdjieff to his followers to enhance their awareness and attention,⁴³⁰ and on several occasions displayed in public exhibitions. These patterns of motion, supposedly derived from age-old exercises that Gurdjieff was exposed to in remote Asian monasteries,⁴³¹ appear to be some of the most closely-held of the Gurdjieff system's techniques.⁴³² Even

428. See *The Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002) (determining copyright ownership, or public domain status, of dozens of dances created by choreographer Martha Graham), *reargument denied*, 2002 WL 31056812 (S.D.N.Y. Sept. 13, 2002); *Horgan*, 789 F.2d at 163 (concluding that the copyright to the choreography of Balanchine's *The Nutcracker* ballet had been infringed by a book containing still photographs of the performance, since each photo "may, for example, capture a gesture, the composition of dancers' bodies or the placement of dancers on the stage. . . [and] may also convey to the viewer's imagination the moments before and after the split second recorded").

429. Cf. Wm. Tucker Griffith, Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 730 (1998). Griffith concludes that figure-skating and gymnastic routines, among others, are "demonstrably favorable candidate[s] for copyright" protection, because "[s]uch athletic expression normally has an independent origin, a modicum of creativity, and may be easily fixed into a tangible medium of expression." *Id.*

430. See *The Role of the Movements: An Interview with Pauline de Dampierre*, in GURDJIEFF: ESSAYS AND REFLECTIONS ON THE MAN AND HIS TEACHING 290, 295 (Jacob Needleman & George Baker eds., Continuum Publishing Co. 1996) (1992) (the Movements "develop a very special sensitivity just below the surface in all the situations of our lives."); see also *id.* at 291 ("Engaging in these exercises the individual begins to feel that he is trying to contact deeper energies in himself which, until then, were completely unknown to him.").

431. See Jacob Needleman, *G.I. Gurdjieff and His School*, in MODERN ESOTERIC SPIRITUALITY 359, 378 (Antoine Favre & Jacob Needleman eds., 1992) ("Gurdjieff reconstituted the 'movements' exercises he had met with in Central Asia for his own pupils under intensive conditions of inner discipline."); *id.* at 379 (observing that the Gurdjieff Foundation "has taken precautions to transmit these exercises under comparable conditions").

432. See Beauvais, *supra* note 52, at 132-33 (observing that the movements "have been carefully preserved within the Gurdjieff Institute and, under the contract of secrecy demanded by that system, these and other practical aspects of the Gurdjieff Work have been rarely and inadequately described"; and indicating that a "mandate of secrecy" is similarly applied to them within Claudio Naranjo's SAT groups); MOORE, *supra* note 18, at 353 ("Transmission of

one of Gurdjieff's biographers confessed that although he had read about, discussed, and examined musical and choreographic notations for the movements, "I have not practiced them myself, nor have I seen a live performance or a showing of the films on which they are recorded. This is not for want of trying."⁴³³

However, recently at least one group has offered, through a Web site, a CD-ROM represented as "the first attempt ever to show a relevant selection of these Movements to all potential students, without any discrimination."⁴³⁴ The Web site indicates that this group is based in the Netherlands; the copyright status of their product is not indicated.

3. Patent Protection

a. *Patenting Techniques.* It is also unclear whether a method of meditation could be patented as a "new and useful process, . . . or any new and useful improvement thereof."⁴³⁵ Although commentators have recently suggested that sports moves—such as a "skyhook" maneuver in basketball—could be patented,⁴³⁶ few such patents appear to

the Sacred Dances is direct, from teacher to pupils; no text-book exists, nor could usefully exist."); Needleman, *G.I. Gurdjieff and His School*, *supra* note 431, at 379 (reporting the Gurdjieff groups' position that "without the help of prepared teachers and without a solid connection to the ideas and the inner work, the practice of the movements cannot give the results intended").

433. WEBB, *supra* note 18, at 12.

434. See CD-ROM: *The Art of the Sacred Movements*, at <http://www.gurdjieffmovements.net/shop/cdrom/index.php3> (last visited Jan. 12, 2003). The disk also includes "a separate step-by-step analysis of the Movements in unprecedented detail by means of the additional demonstration of all patterns, positions and gestures by an expert." *Id.*

435. 35 U.S.C. § 101 (2000). Under the "novelty" requirement, to be patentable the invention must not have been known or used by others in this country, or patented or described in a printed publication in any country, before it was invented by the applicant for the patent. 35 U.S.C. § 102(a) (2000). The "non-obviousness" requirement denies patent protection to an invention that "would have been obvious" from the "prior art," or existing inventions, "at the time the invention was made to a person having ordinary skill" in the relevant field. 35 U.S.C. § 103(a) (2000).

436. See Robert M. Kunstadt et al., *Recent Patent, Copyright and Trademark Law Developments Could Suggest Novel IP Uses*, NAT'L L.J., May 20, 1996, at C2 (proposing that "[p]atent protection might be considered for [athletic] moves that impart a useful result, such as faster races or longer jumps," so long as they met the requirements of being new, non-obvious, and a "useful process"); Kukkonen, *supra* note 418, at 820 ("[S]ports methods feasibly

have been granted.⁴³⁷ Sports moves, it has been argued, are not generally socially useful, and thus should not be patentable.⁴³⁸ However, meditative techniques clearly could be distinguished on this basis, and clearly meet the minimal level of utility required for patentability.⁴³⁹

Yet, as opposed to sports moves, meditative techniques may have so much societal importance that objections could be raised similar to those used to oppose the patenting of medical procedures. Indeed, patent claims asserted for a method for making incisions during eye surgery⁴⁴⁰ led the American Medical Association to condemn the awarding of such patents as unprofessional, as likely to result in denial of proper care to patients, and as a potentially inappropriate influence on doctors' choices of medical procedures.⁴⁴¹ In relatively short order, Congress amended

would be included in the subject matter of the Patent Act. Although the evidentiary proof required to show that a human movement is novel may be difficult since a major portion of prior art is not recorded in any medium, utility is easier to prove."); Jeffrey A. Smith, *It's Your Move—No It's Not! The Application of Patent Law to Sports Moves*, 70 U. COLO. L. REV. 1051, 1071 (1999) (suggesting that sports moves may be patentable as "a procedure or method, consisting of a series of steps, designed to produce a given result that previously was non-existent in that sport").

437. See U.S. Patents: 5,616,089 (issued Apr. 1, 1997); 5,776,016 (July 7, 1998); 6,019,689 (Feb 1, 2000); and 6,296,577 (Oct. 2, 2001) (issued for methods of golf putting).

438. See Kukkonen, *supra* note 418, at 823-24 (arguing that for this reason "pure sports method patents claiming bodily motion fall outside of a reasonable interpretation of protectable subject matter").

439. See *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1366 (C.D. Cal. 1999) ("The threshold of utility is not high: An invention is useful under [35 U.S.C. § 101] if it is capable of providing some identifiable benefit.")

440. See *Pallin v. Singer*, 36 U.S.P.Q.2d 1050 (D. Vt. 1995) (denying defendant's motion for summary judgment with regard to validity of patent, since factual questions remained concerning prior art and invention's non-obviousness); *Pallin v. Singer*, No. Civ.A.2:93-CV-202, 1996 WL 274407 (D. Vt. Mar. 28, 1996) (consent judgment declaring four patent claims invalid, prohibiting claimant from enforcing remaining claims, and holding that defendants did not infringe on remaining claims).

441. See Am. Med. Ass'n, COUNCIL ON ETHICAL AND JUD. AFF., *Ethical Issues in the Patenting of Medical Procedures*, 53 FOOD & DRUG L.J. 341, 351 (1998) ("The patenting of medical procedures poses substantial risks to the effective practice of medicine by limiting the availability of new procedures to patients, and it should be condemned on this basis. . . . [I]t is unethical for physicians to seek, secure, or enforce patents on medical procedures."). *But see* Joel J. Garris, *The Case for Patenting Medical Procedures*, 22 AM. J.L. & MED. 85, 108 (1996) (asserting that such patents are justifiable "as a means of improving medical care"); William B. Lafferty, *Statutory and Ethical Barriers in the Patenting of Medical and Surgical Procedures*, 29 J. MARSHALL L. REV. 891, 921 (1996)

the patent laws to exempt medical practitioners and their associates from any claim of infringement of a patent for medical or surgical procedures.⁴⁴²

This category does not include spiritual, psychological, or meditative processes: in fact, in 1993, to little critical discussion, a patent was granted for a method of psychologically assessing an individual's character by analyzing her drawings of a specific set of symbols.⁴⁴³ Should a similar exemption from patent infringement liability be granted for the unauthorized use of spiritual techniques? Not only might the social importance of these techniques (even outside a doctor-client relationship) justify such an exemption, but such an exemption would also respond to suggestions that the opponents of such patents might not easily be able to locate "prior art,"⁴⁴⁴ especially if, unlike publicly-performed sports moves, the spiritual practices in question had been shrouded in decades or centuries of secrecy.

b. *Issues Concerning Traditional Knowledge.* Patenting or copyrighting meditative techniques derived from other cultures would also implicate the growing concern that "indigenous peoples" are being deprived of recognition of, and compensation for, their intellectual and cultural property,⁴⁴⁵ or "traditional knowledge."⁴⁴⁶ Such

(concluding that such patents "play an important role in initiating medical research").

442. 35 U.S.C. § 287(c) (2000). For the factual background and legislative history of this provision, see Eric M. Lee, *35 U.S.C. § 287(c): The Physician Immunity Statute*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 701 (1997).

443. See U.S. Patent No. 5,190,458 (issued Mar. 3, 1993).

444. See Kukkonen, *supra* note 418, at 824 ("[A]n adequate prior art bank for human movements does not exist."). For this reason, and because of the difficulty of demonstrating infringement, the author concludes that patent protection for sports methods "may be found to be worthless in practice." *Id.* at 829.

445. See, e.g., *Draft Declaration on the Rights of Indigenous Peoples*, 11th Sess., at art. 29, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) (declaring that "indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property," including "medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, and designs"), quoted in David J. Stephenson, Jr., *The Nexus Between Intellectual Property Piracy, International Law, the Internet, and Cultural Values*, 14 ST. THOMAS L. REV. 315, 327 (2001) (observing that "[t]he Declaration is not a binding legal document but has strong persuasive authority as an indicator of

valuable information, particularly that concerning methods of healing, is often closely-held and communicated through "oral tradition and apprenticeship through older practitioners."⁴⁴⁷

Yet questions of ownership may plague attempts to attribute the copyright or patent to such groups. Indeed, although in 1976 the Supreme Court of the Northern Territory of Australia barred an anthropologist from publishing sacred information communicated to him by an aboriginal group,⁴⁴⁸ the court grounded this relief on a breach of confidence claim, and not on copyright protection.⁴⁴⁹ In 1993, a Congressional Research Report suggested that established forms of intellectual property protection would be unavailable to protect traditional knowledge: copyright would protect only the expression of

the aspirations of indigenous peoples to comprehensively protect" such property).

446. See Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 40 (2001) (indicating that this expression was adopted at the 1999 WIPO Roundtable in Geneva). For a detailed and thought-provoking treatment of this issue, see MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 247 (2003) (concluding that "in the United States and Australia, and quite possibly in Canada and New Zealand as well, laws and public politics have already created a formidable legal overhang, in the shadow of which groups are successfully negotiating workable solutions to disputes about sensitive cultural information and access to sacred sites").

447. See Michael J. Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U. L. REV. 1678, 1701 (1995) (finding this pattern of transmission characteristic in the training of "bone-setters, midwives, shamans, and herbalists").

448. See *Foster v. Mountford* (1976) 29 F.L.R. 233, 236 ("[R]evelation of the [tribal] secrets to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community."); see also *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998) 86 F.C.R. 244, 264 (suggesting that legal remedies would be available through the Australian court system to Aboriginal clans "if the copyright owner of an artistic work which embodies [their] ritual knowledge . . . is being used inappropriately [and] fails or refuses to take appropriate [legal] action to enforce the copyright"); *Milpurrurru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240 (enjoining unauthorized manufacturing of carpets that reproduce images linked to sacred rituals and stories of Aboriginal clans); *Yumbulul v. Reserve Bank of Austl.* (1991) 21 I.P.R. 481 (concerning a license dispute with regard to the reproduction of a sacred Aboriginal design).

449. See Ragavan, *supra* note 446, at 47-48. Ragavan observes that there had actually been no agreement of confidentiality, and that despite the court's "very rare exhibition of sensitivity" to issues of cultural property, the fact "[t]hat a copyright vests in the author of the book reflects the inadequacy of the prevailing system." *Id.*

that knowledge,⁴⁵⁰ the novelty requirement and absence of an individual to whom the invention could be attributed,⁴⁵¹ as well as the problem of determining prior art,⁴⁵² would stymie attempts to protect such knowledge with patents; and although trade secret protection might be available, to protect this status researchers would be reluctant to share traditional information.⁴⁵³

Issues might also be raised about the authenticity of information held out as indigenous peoples' spiritual knowledge.⁴⁵⁴ For instance, a shaman's information about the pharmacological properties of native plants, and the methods by which those plants should be prepared and ingested, can be verified empirically in the laboratory. However, his cultural—or personal—interpretation of the altered states of awareness that might be attained through the use of such plants remains open to debate.⁴⁵⁵

The most well-known writings in this genre are surely those of Carlos Castaneda. Published in 1968, *The Teachings of Don Juan* presents Castaneda's account of his spiritual training, facilitated in part by the use of peyote and other hallucinogenic plants, by "Don Juan" Matus, a Yaqui Indian whom he had met near the Mexican border "[i]n the summer of 1960, while I was an anthropology [graduate] student at the University of California, Los

450. Josephine R. Axt & M. Lynne Corn, BIOTECHNOLOGY, INDIGENOUS PEOPLES, AND INTELLECTUAL PROPERTY RIGHTS, CONGRESSIONAL RESEARCH SERVICE REPORT 93-478A, at 47 (Apr. 16, 1993) (*available at* http://www.ipmall.info/hosted_resources/crs/93-478-pdf) (discussing protection of information about a plant's medicinal properties). However, sacred dances or martial arts—and perhaps other meditative movements—might be copyrightable as choreographic works, as suggested *supra* Part I.F.2.b.ii.

451. *Id.* at 57 ("[T]he nature of traditional knowledge is that it has been passed on from generation to generation and it may be known to more than one member of the group.").

452. *Id.* at 59.

453. *Id.* at 63.

454. See STEPHEN A. HANSEN & JUSTIN W. VANFLEET, *Traditional Knowledge and Intellectual Property* 47 (2003) at <http://shr.aaas.org/tek/handbook> (defining, in handbook for holders of "traditional knowledge," the category of spiritual knowledge as including "knowledge used during religious ceremonies, considered sacred within a community, known only by sacred and religious persons within the community, or not to be taken out of its religious context").

455. *Cf. supra* notes 78-84, and accompanying text (discussing the divergence of John Lilly and Oscar Ichazo over whether Ichazo's teachings presented only one conceptual model among many of psychological and spiritual truths, or were actually the only precise and scientific way to represent them).

Angeles [and] collect[ing] information on the medicinal plants used by the Indians of the area."⁴⁵⁶ Though Castaneda would write nine additional books chronicling and interpreting his adventures with "sorcerers,"⁴⁵⁷ as well as one manual of physical exercises based on his alleged experiences,⁴⁵⁸ his authority and accuracy have been questioned by some, including Ichazo.⁴⁵⁹ In 1973, a *Time* magazine cover story on Castaneda observed that "there is no corroboration—beyond Castaneda's writings—that Don Juan did what he is said to have done, and very little that he exists at all."⁴⁶⁰

456. See CARLOS CASTANEDA, *THE TEACHINGS OF DON JUAN: A YAQUI WAY OF KNOWLEDGE* at xxvii (1968). After serving a little more than four years as Don Juan's apprentice in the art of spiritual development, Castaneda divided his notes into the following categories (in decreasing order of personal importance to him): "uses of hallucinogenic plants; procedures and formulas used in sorcery; acquisition and manipulation of power objects; uses of medicinal plants; songs and legends." *Id.* at xxxiii.

457. See CARLOS CASTANEDA, *A SEPARATE REALITY* (1971); *JOURNEY TO IXTLAN* (1972); *TALES OF POWER* (1974); *THE SECOND RING OF POWER* (1977); *THE EAGLE'S GIFT* (1981); *THE FIRE FROM WITHIN* (1984); *THE POWER OF SILENCE* (1987); *THE ART OF DREAMING* (1993); *THE ACTIVE SIDE OF INFINITY* (1998). A sign of the popularity of Castaneda's books in college courses was the publication, in a well-known series of student guides to major literary works, of *CLIFFS NOTES: THE TEACHINGS OF DON JUAN; A SEPARATE REALITY; AND JOURNEY TO IXTLAN* (summarizing plot and character development and discussing Castaneda's major themes).

458. See CARLOS CASTANEDA, *MAGICAL PASSES: THE PRACTICAL WISDOM OF THE SHAMANS OF ANCIENT MEXICO 2* (1998) (claiming to present a modified version of ancient Mexicans' "very complex series of movements that [produce] . . . tremendous results in terms of mental and physical prowess").

459. See Ichazo, *INTERVIEWS*, *supra* note 11, at 82 (stating that Castaneda "absolutely" fabricated his material, and that "the sorcery that he says is Indian is not Indian at all"); see also, RICHARD DE MILLE, *CASTANEDA'S JOURNEY: THE POWER AND THE ALLEGORY* 38 (1976) ("All the evidence ever needed to prove a case of big-time fictioneering can be found [by examining the chronology] in Castaneda's first three books."); *id.* at 166-72 (detailing alleged inconsistencies in these accounts); *THE DON JUAN PAPERS: FURTHER CASTANEDA CONTROVERSIES* (Richard de Mille, ed., 1980) (examining whether Castaneda's work was factual or fictional); JAY COURTNEY FIKES, PH.D., *CARLOS CASTANEDA: ACADEMIC OPPORTUNISM AND THE PSYCHEDELIC SIXTIES* 162 (1993) (concluding, as an anthropologist, that Castaneda's presentation of Native American spirituality is "most accurately characterized as largely invalid and unauthentic."); Simon Romero, *Peyote's Hallucinations Spawn Real-Life Academic Feud*, N.Y. TIMES, Sept. 16, 2003, at D2 (detailing "a feud between two anthropologists— one a former associate of Mr. Castaneda, the other [Fikes] a harsh critic— that has now reached the New Mexico Supreme Court").

460. *Don Juan and the Sorcerer's Apprentice*, TIME, Mar. 5, 1973, 36 at 38. For a disturbing account of Castaneda's relations with his personal students,

4. *The Unanswered Question*. Neither the district court nor the court of appeals directly addressed Arica's argument that by isolating, popularizing, and encouraging self-application of one segment of Arica's larger system, Palmer had not just diluted the material's value and deprived her readers of an opportunity for true transcendence,⁴⁶¹ but had seriously endangered their psychological and spiritual well-being.

Just as some in the Gurdjieff tradition have claimed that that indiscriminate revelation of someone's "chief feature" to her can cause serious psychological problems and possibly madness,⁴⁶² Ichazo has warned that the unauthorized mixing of spiritual techniques into "mystical cocktails" can produce "irreparable damage, confusion, breakdowns, and deep scars, possibly incurable,"⁴⁶³ and insisted that "[v]ariations in the [Arica] method really produce different results, which afterwards are very difficult to correct, if not impossible."⁴⁶⁴

In light of such purported perils, both systems are said to handle with great sensitivity the discovery of a person's

see AMY WALLACE, *SORCERER'S APPRENTICE: MY LIFE WITH CARLOS CASTANEDA* (2003).

461. See Dunderdale Testimony, TR 353-54 (stating that most people could not determine their own fixation, and that Palmer's work was "relegating . . . people to a further life of ignorance" because an erroneous self-diagnosis would only strengthen one's actual fixation). Cf. WILSON, *supra* note 55, at 383-84 (indicating that although Wilson and his Arica trainer initially disagreed on the identification of his fixation, the examination of Wilson's characteristic facial tension, and his discussions with other participants said to share his fixation, convinced him that his trainer was correct).

462. NICOLL, *supra* note 329, at 105. "If you were told your *Chief Feature* you would not believe it, and if you were able to believe it you would go mad." *Id.*; see also DE HARTMANN, *supra* note 329, at 42 ("In esoteric schools. . . when the chief weakness is made clear to a man, it is revealed with great care, because the truth about himself can sometimes bring a man to such despair that he might end his life."); NICOLL, 4 *PSYCHOLOGICAL COMMENTARIES ON THE TEACHING OF G. I. GURDJIEFF AND P.D. OUSPENSKY*, 1371 (Watkins London 1976) (1955) (recommending a prolonged period of self-observation to discover one's chief feature, because "if you are told something from outside that you have not yet reached the stage of seeing the truth of from inside, it will handicap you and, in fact, hinder you in this gradual process").

463. ICHAZO, *LETTERS*, *supra* note 11, at 41.

464. ICHAZO, *INTERVIEWS*, *supra* note 11, at 121; see also ICHAZO, *HUMAN PROCESS*, *supra* note 30, at 2 (claiming that in the misappropriation of Arica material, "for the purpose of masking the plagiarism, some variations have been introduced that not only destroy the intention of the exercises but also inevitably produce negative and dangerous effects in some cases").

true character. Ouspensky observed that in esoteric schools "specially created" situations exposed students' chief features as "their reactions to this artificially induced friction are carefully watched."⁴⁶⁵

John Lilly and a co-author similarly noted that the Arica training involves "[m]uch use" of " 'ego-reduction exercises' which . . . are carefully prepared and are given only when the person has been prepared to undergo them."⁴⁶⁶ Though reproducing seven of Arica's fixation enneagrams, they cautioned readers that "[b]ecause of the action of the individual ego, no person is really capable of determining for himself his own ego fixation,"⁴⁶⁷ and thus that "[i]t would be a mistake to try to determine and correct one's personality structure from the treatment of the enneagrams given here."⁴⁶⁸ Claudio Naranjo, who had suggested in a 1990 work that some readers could identify their own type "through reading [this] book alone,"⁴⁶⁹ acknowledged five years later that "with increasing time I am ever more appreciative of the fact that when you tell somebody [his fixation] you are not doing so much a service. Generally, something that is earned through exploration is something that goes deeper"⁴⁷⁰

In Arica's early years a student's fixation was identified by Ichazo⁴⁷¹—from an examination of the student's facial features (sometimes from a photograph alone)⁴⁷²—and only

465. See WALKER, *supra* note 329, at 100 (quoting Ouspensky).

466. See Lilly & Hart, *supra* note 36, at 337. These exercises "deliberately try to arouse the passions so that the person can become aware of his weak points." *Id.*; see also Dunderdale Aff. at 7 ("Arica emphasizes support for the individual before, during and after the process of becoming aware of one's ego fixation."); ICHAZO, INTERVIEWS, *supra* note 11, at 146 (recognizing that Arica does provide "techniques of support," such as meditation, to aid the process of recognizing and overcoming one's fixation).

467. Lilly & Hart, *supra* note 36, at 346.

468. *Id.* at 347.

469. NARANJO, STRUCTURES, *supra* note 15, at 155.

470. Claudio Naranjo, Address at the Sixth Annual San Diego Regional Conference of the Association of Christian Therapists, (Feb. 22-25, 1990) [hereinafter Naranjo, *Stumbling Block*]. Generations of law professors have justified the Socratic method by this reasoning.

471. See *The Arica School*, ARICAN, Fall 1992, at 89, 94 (description of "Protoanalysis/Fixations" course notes that "[i]n this training, the fixation is determined by Oscar Ichazo."); Dunderdale Testimony TR 353, (asserting that in Arica "the only person who picks the fixation . . . is still Oscar Ichazo").

472. See Fields, *supra* note 89, at 34. When asked to determine the interviewer's fixation, Ichazo replied, "Let me look at you for a minute." *Id.*; see also Goldberg, *supra* note 26, at 25 (quoting Ichazo: to determine a fixation,

at higher levels of training.⁴⁷³ However, Arica's position on the actual hazards of this enterprise appears to have changed: in 1996 it began to offer a one-weekend training in "Fixations and Autodiagnosis,"⁴⁷⁴ whose "lecture material, self-diagnostic exercises, group processes, and two meditations"⁴⁷⁵ enable a participant to identify her own fixations "independently and without any other person's determination."⁴⁷⁶

II. THE CHURCH OF SCIENTOLOGY

Arica's actions against the Jesuit authors and Helen Palmer occurred in the late 1980s and early 1990s, just as the Internet was beginning to attract public attention. At that time, the Church of Scientology (the "Church") was enforcing copyright, trademark, and trade secret claims against individuals who, without authorization, were offering personal instruction in the Church's teachings and techniques. However, as a burgeoning number of chat rooms, newsgroups, and Web pages spawned increasingly complex legal issues, the Church quickly emerged as one of

"[f]irst, I would like to have a photograph. . . . The fixations are anatomical. I base [fixation diagnosis] on a reading of people's anatomies."); ICHAZO, LETTERS, *supra* note 11, at 74 ("[T]he Arica system. . . includes the way to find the fixation by the careful analysis of our facial features."); Ichazo, SYMBOL, *supra* note 13, at 15 (indicating that he originally determined the fixations "on a one-on-one basis" with students, and sometimes from photographs of their faces); WILSON, *supra* note 55, at 383 ("A trainer explains that the ego-fixation is determined by areas of tension or distortion in the face, each fixation having a specific area in the face where tension manifests.").

It is unclear whether the correspondences provided by Wagner, *supra* note 156, between patterns of facial tension and the nine fixations were derived directly from Arican materials.

473. See Fields, *supra* note 89, at 34 ("Aricans don't usually get their ego fixation from Oscar until after the Advanced Training.").

474. See *A New Look at Three Trainings*, ARICAN, Fall 1996, at 41 (stating that the training will identify an individual's three fixations: "One Fixation is the major or predominant Ego-entity and the other two Fixations are the minor Fixations or Co-egos.").

475. This description of the "Autodiagnosis" training appears at *T'ai Chi and the Arica School*, at <http://www.taichifoundation.org/arica.shtml> (last visited Dec. 19, 2002) ("Since you know yourself better than anyone, the work and exercises are designed to support a self-discovery process based on your experience and perspective about your life."); see also Ichazo, SYMBOL, *supra* note 13, at 18 (including, in a list of programs currently offered, group trainings in "Autodiagnosis" and in "Advanced Fixations and Autodiagnosis.").

476. Ichazo, SYMBOL, *supra* note 13, at 15.

the most prominent and aggressive defenders of intellectual property rights in cyberspace.⁴⁷⁷ Unlike commentators of this period who suggested that traditional regimes of intellectual property protection were inapplicable to the Internet,⁴⁷⁸ the Church steadfastly insisted that copyright,

477. See, e.g., Alison Frankel, *Making Law, Making Enemies*, AMERICAN LAWYER, Mar. 1996, at 69, 76 (discussing how "Scientology's Internet cases have raised all sorts of knotty legal questions about copyrights, trade secrets, and the Internet"); Natalie Hanlon-Leh, *Lessons from Cyberspace & Outerspace: The Scientology Cases*, 27 A.B.A.-SUM BRIEF 48, 58 (1998) ("The Scientology cases present some novel issues regarding the transmission of allegedly confidential and copyrighted documents over the Internet"); David G. Post, *New World War*, REASON, April 1996, at 28, 30 (suggesting that Scientology's litigation over the online use of its intellectual property is "[i]n many ways . . . a primer on the way that disputes will be handled in the networked world, . . . and on just how different it will be to exercise any degree of control over this environment using traditional legal tools").

Beyond the scope of this Article is a detailed discussion of the Church's pioneering and controversial efforts to invoke the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1988) (codified, once amended, at 17 U.S.C. §§ 1201-1205 (Supp. 1998), amended by 17 U.S.C.A. §§ 1201-1204 (West Supp. 2000)) ("DMCA"), to prevent the search engine Google (<http://www.google.com>) from providing links without authorization to a site that displays copyrighted Church material. See, e.g., David F. Gallagher, *New Economy*, N.Y. TIMES, April 22, 2002, at C4 (indicating that, although Google soon restored the links, "the episode highlights problems with the law that can make companies or individuals liable for linking to sites they do not control."). For a pre-DMCA situation in which a religious organization obtained a preliminary injunction requiring the operators of a Web site to remove from that site not only material copyrighted by the plaintiff but also—under a theory of contributory copyright infringement—links to other sites posting these works, see *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999), which involved portions of the *Church Handbook of Instructions* of The Church of Jesus Christ of Latter-Day Saints. This suit was settled in November 2000. See *Settlement Signed by All Parties*, at <http://www.utlm.org/underthecoveroflight/signedsettlementandthankyou.htm> (last visited July 26, 2003).

478. See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, HUMANIST, May/June 1996, at 18 (available at <http://www.eff.org/~barlow/Declaration-Final.html>) (maintaining that cyberspace is not, and should not be, regulated by traditional concepts of intellectual property law); David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that the virtual world of cyberspace "needs and can create its own law and legal institutions," particularly with regard to trademark and copyright issues); see also, Roger Clarke's *Information Wants to be Free*, at <http://www.anu.edu.au/people/Roger.Clarke/II/IwtbF.html> (last visited July 7, 2003) (tracing the 1984 origin of, and the "intense ambiguity" subsequently surrounding, the phrase, "Information wants to be free"; and noting that its author, Stewart Brand, had prefaced this remark by stating: "[o]n the one hand, information wants to be

trademark, and trade secret laws "apply in full to the citizens of the computer world."⁴⁷⁹

Like Arica, the Church asserts that its spiritual techniques are precise, scientific, and not dependent on faith;⁴⁸⁰ indeed, the Church refers to its practices "collectively as the *technology* of the Scientology religion."⁴⁸¹ In addition, the Church, like Arica, claims to be "new" in the history of spiritual methods.⁴⁸²

Yet not even the extraordinary security measures employed by the Church⁴⁸³ could prevent its works from appearing on the Internet. While raising the same copyright issues (such as the scope of the fair use defense) as had Arica, the Church established that spiritual works could qualify for trade secret status; however, it would have to identify clearly which elements of its vast collection of training material deserved such protection.

To date, the litigation has left unclear the effect of Internet exposure on the trade secret status of this material. Also uncertain is the degree to which the fair use defense protects otherwise-infringing postings in an Internet chat room.

expensive, because it's so valuable. The right information in the right place just changes your life.").

479. See, e.g., *Intellectual Property Rights in Cyberspace—no different than anywhere else*, (at <http://www.scientology.org/copyright/position.htm>) (last visited Sept. 14, 2001) [hereinafter *I.P. Rights*].

480. See THEOLOGY AND PRACTICE OF A CONTEMPORARY RELIGION: SCIENTOLOGY (1998) [hereinafter T&P] at xii-xiii ("There is nothing in Scientology that one is expected to take on faith or on the basis of arbitrary authority. . . . The religious practices of Scientology include exact, precise methods by which a person achieves greater spiritual awareness"); *I.P. Rights*, *supra* note 479, (identifying as "[a] fundamental doctrine of the Scientology religion . . . that the path outlined in these works is to be followed without deviation, for it is an intensively researched and workable route toward spiritual freedom."). Cf. *supra* notes 32, 277, and 278 and accompanying text (concerning Arica's claim to technical precision).

481. T&P, *supra* note 480, at xiii ("Technology' describes the *methods of application* of the principles of something, as opposed to mere knowledge of the subject itself.").

482. T&P, *supra* note 480, at 16; see also, *I.P. Rights*, *supra* note 479 ("[W]hat Scientology ultimately represents is new. Its religious technology is new."). Cf. ICHAZO, LETTERS, *supra* note 11, at 103 ("Arica is a new concept, with new techniques. . . . [i]t is a new tradition.").

483. See *infra* note 661.

A. Background

The Church teaches that an individual's awareness, health, and well-being can be enhanced by the process of "auditing," in which a member is directed "through a series of . . . closely structured questions and answers" that are designed to remove "engrams," or impressions that were "recorded by the unconscious mind in times of trauma in this life or in previous lives [and that] return in moments of similar stress to the detriment of the person's behavior."⁴⁸⁴

Although the "Scriptures" of the Church include numerous documents and audiotapes created by its founder, L. Ron Hubbard,⁴⁸⁵ the organization's litigation has focused on the unauthorized disclosure of a limited number of its advanced texts, which are known as "Advanced Technology" or "Operating Thetan" documents. These materials provide detailed and precise procedures, to be practiced by members only under the guidance and supervision of a qualified Church official,⁴⁸⁶ for negating the influences of "lingering spirits of an extraterrestrial people massacred by their ruler, Xenu, over 75 million years ago. These spirits attach themselves by 'clusters' to individuals

484. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (2d Cir. 1986). For a more detailed summary of the tenets of Scientology see the Church's publication *WHAT IS SCIENTOLOGY?* 141-169 (1992) which provides "A Description of Scientology"; *id.* at 215-23 (describing "Auditing Services").

485. See T&P, *supra* note 480, at xii (explaining that "[t]he full body of knowledge that comprises the religious Scripture is contained in more than 40 million spoken and written words on the subject—all by L. Ron Hubbard, the source and founder of the Scientology religion"); *id.* at 45 ("This Scripture includes more than half a million written pages, over 3,000 tape-recorded lectures and some 100 films"); see also *WHAT IS SCIENTOLOGY?*, *supra* note 484, at 705-781 (providing a *Complete List of Books and Materials* used by Church members).

The original text of Scientology, which has for decades been widely available in paperback format, is L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* 401 (1950) (claiming that "[t]he goal we have here reached is a science which is workable and which can be worked with success by briefly taught individuals. This goal has not hitherto been attained or even approached.")

486. Scientology's Course Supervisors are prohibited from lecturing about, or otherwise providing their own interpretation of, Hubbard's writings. T&P, *supra* note 480, at 40-41 ("However unintentional, such interpretations would inevitably include alterations from the original.").

in the contemporary world, causing spiritual harm and negatively influencing the lives of their hosts."⁴⁸⁷

The Church holds to Hubbard's teaching that premature disclosure of the Advanced Technology to non-Scientists, or to Scientists not yet qualified to use it, could not only cause "devastating, cataclysmic spiritual harm" to those individuals⁴⁸⁸ but might even result in "destruction on a planetary scale."⁴⁸⁹

The security and confidentiality of these documents is the responsibility of the Religious Technology Center ("RTC"),⁴⁹⁰ "the owner and protector of the trademarks and service marks"⁴⁹¹ (as well as some of the copyrights)⁴⁹² held

487. *Religious Tech. Ctr. v. Lerma*, 1996 WL 633131 (E.D. Va. 1996), at *1. Cf. CARLOS CASTANEDA, *THE ACTIVE SIDE OF INFINITY* 218-29 (1998) (detailing, in the author's last major book, the grand revelation of Castaneda's mentor in "sorcery": that human consciousness is preyed on by extraterrestrial beings).

488. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1357 (E.D. Va. 1995) (quoting Church's brief).

489. *Id.* at 1358 (quoting one Scientologist's prediction, in Church pleadings, that unauthorized dissemination of Church material could "let loose a hurricane upon the world through our materials coming into unethical or suppressive or psychiatric hands").

490. *Id.* "[T]he church has charged RTC . . . with securing the sacred texts and aggressively policing any breaches in security or unauthorized disclosures that may occur. . . . RTC has also been relentless in tracking down suspected offenders and vigorously pursuing legal remedies against them." *Id.*; see also T&P, *supra* note 480, at 71 (noting that RTC "performs the essential function of preserving, maintaining and protecting the orthodoxy of the Scientology religion for eternity"); WHAT IS SCIENTOLOGY?, *supra* note 484, at 359 (acknowledging that RTC "possesses ultimate ecclesiastical authority over the international hierarchy concerning the maintenance and standard application of L. Ron Hubbard's technology").

This Article, like some of the decisions discussed, refers to legal actions or positions taken by RTC on behalf of the Church as actions or positions taken by the Church itself.

491. *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 40 (2d Cir. 1986) (indicating that Hubbard assigned to RTC in 1981 all of his rights in the Scientology trademarks); see also T&P, *supra* note 480, at 71 (stating that Hubbard "donated" the trademarks in 1982 to "the newly formed" RTC, and that RTC "maintains the purity of the Scientology technology and guards against any misuse or misrepresentation" through its trademark registrations and enforcement actions); WHAT IS SCIENTOLOGY?, *supra* note 484, at 359 (indicating that this transfer occurred in May 1982).

492. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1078 n.2 (2d Cir. 1986) (noting that "[m]any lower level materials are copyrighted, and these copyrights apparently passed to the Religious Technology Center in Hubbard's will."); *Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, 923 F. Supp. 1231, 1239 (N.D. Cal. 1995) (observing that "RTC claims to be the

by the Church. The Center "makes available the higher level materials of the advanced technology to Church offices around the world in the form of 'packs.'"⁴⁹³ Security measures for the material include "locked vaults, numerous guards, key cards, and signed nondisclosure statements by all church members."⁴⁹⁴

B. Trademark Protection: The Elmira Mission Decision

In 1984, after almost ten years of operation,⁴⁹⁵ the Elmira Mission of the Church of Scientology (the "Mission"), directed by Harry Palmer⁴⁹⁶ and Avra Honey-Smith, ceased paying licensing fees to Scientology Missions International, a unit of the Church.⁴⁹⁷ In the Church's subsequent

exclusive licensee of the copyrights and the owner of the other rights in the unpublished Advanced Technology works" at issue in that litigation; and that rights to other forms of the Church's intellectual property are held by other Church affiliates); see also T&P, *supra* note 480, at 45-46 (declaring that "[t]o ensure the purity and orthodoxy of the Scripture, the copyrights on all of its published works, which are owned exclusively by the Church for the benefit of the religion, have been registered in all relevant countries.").

493. *Wollersheim*, 796 F.2d at 1078 n.2 (2d Cir. 1986) (observing that "Hubbard apparently intended the Center to be the 'trustee of the scriptures' of Scientology").

494. *Religious Tech. Ctr. v. Lerma*, 1996 WL 633131 at *1 (E.D. Va. 1996); see also Melvin F. Jager, *Legal Expertise on Trade Secret Law: Melvin F. Jager*, Sept. 1995 (at <http://www.scientology.org/copyright/jager.htm>) (last visited Jan. 12, 2003) (asserting, as outside counsel for Scientology, that "I have never seen a concern for confidentiality of materials which is greater than that of the Church of Scientology and its adherents, nor have I ever worked with any group which was willing to put more resources into the protection of its secrets.").

495. *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 614 F. Supp. 500, 501 (W.D.N.Y. 1985), *rev'd*, 794 F.2d 38 (2d Cir. 1986).

496. Harry Palmer is apparently not related to Helen Palmer, who was discussed in Part I.E of this Article, *supra*. However, Harry Palmer's spiritual, business, and legal activities subsequent to this litigation are the subject of Part III, *infra*.

497. *Elmira Mission*, 614 F. Supp. at 501; see also *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 40 (2d Cir. 1986) (indicating that one year after the Mission was incorporated in 1975, it licensed the right to use Scientology trademarks and service marks, for a fee in the amount of ten percent of its income).

In September 1982, the defendants signed a new agreement that raised the fee to fifteen percent of the Mission's income; although they rejected the agreement the next day, they continued to use the licensed marks and to pay the original ten percent fee. *Id.* at 41. In November 1984, the defendants stopped paying entirely; after they refused to participate in the arbitration

litigation against the Mission and its directors, the district court denied the Church's motion for a preliminary injunction against trademark infringement, holding that the Church had not established that irreparable harm would result from the Mission's continued operation during the course of the litigation.⁴⁹⁸

Although such harm could be presumed if the plaintiff proved that the defendant was either exploiting the trademark for its own benefit or diminishing the goodwill and reputation connected to the trademark,⁴⁹⁹ the court found neither of those situations present. First, even if the Mission were infringing the Church's trademarks, it was not siphoning business away from the Church in the Elmira area, since the Mission was the Church's only facility within 150 miles of Elmira.⁵⁰⁰ Any possible diversion of business from the Church would thus be "minimal at best, easily calculated, and readily compensated by monetary damages."⁵⁰¹ Second, the Mission's continued use of the Scientology trademarks during the litigation would not dilute the Church's reputation: the Church had offered no evidence "that the courses and services offered by the Elmira Mission are in any way inferior to, or even different from, those being provided by authorized missions and churches."⁵⁰² Thus, the only threat of consumer confusion

called for by the license agreement, a default judgment was entered against them. *Id.*

498. *Elmira Mission*, 614 F. Supp. at 501; "Plaintiffs have made no serious attempt to explain with evidentiary detail how that requirement [for a preliminary injunction] might be satisfied under the particular facts of this case." *Id.* The court observed that a preliminary injunction against trademark infringement should be granted only if the court has found "irreparable harm" from the facts of the case. *Id.* at 503.

499. *Id.* at 504.

500. *Id.* The court concluded that "[a]ll of the evidence presented to this Court indicates that the impact of the Elmira Mission's activities is entirely confined to an area where the plaintiffs have had no competing business interests at all." *Id.* at 504-05.

501. *Id.* at 505.

502. *Id.* A detailed affidavit submitted by the Church indicated that a college student who had visited the Mission after the licensing dispute began had been provided with teachings consistent with the Church's and had been offered the opportunity to purchase the Church's books and materials. *Id.* at 506.

Nor would the Mission's continued use of the Church's trademarks during litigation wrongly suggest to the public that the Church authorized local operations: "[o]n the contrary, plaintiffs concede that they have licensed 33 churches and over 80 missions of Scientology in the United States alone, and

would involve consumers' ignorance of the commercial dispute between the Mission and the Church, which threatened no irreparable harm to the Church's trademarks.⁵⁰³

In reversing this decision, the Second Circuit Court of Appeals emphasized that the license agreement gave the Church the right to oversee "all operations" of the Mission with regard to the trademarks:⁵⁰⁴ a preliminary injunction against the defendants was justified by the "mere possibility" that the defendants would, once their relationship with the Church was severed, teach material that deviated from established Church doctrine and techniques. The possibility of consumer confusion was only heightened by the fact that, as a former licensee of the Church's trademarks, the Mission was already associated in the public's mind with the Church.⁵⁰⁵

The control exercised by the Church over its trademarks protected it from the treatment accorded the following year by the Supreme Court of New Jersey to the founding branch, or "Mother Church,"⁵⁰⁶ of Christian

each uses the term 'Church of Scientology' as part of its name." *Id.* at 505. See T&P, *supra* note 480, at 60 ("Individual churches are housed in their own distinct non-profit corporations or associations, which provide a legal framework from which to conduct their day-to-day affairs in relation to the secular society.").

503. *Elmira Mission*, 614 F. Supp. at 507; see also *id.* at 507. The *Elmira* Court suggested that the "potential economic consequences" of the dispute resembled "the case of a bookstore which orders and retails authentic 'Scientology' books without paying the publisher for the books. Nothing could be further from irreparable injury." *Id.*

504. *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 43 (2d Cir. 1986); see also *id.* (quoting license agreement provision granting the Church "the right to monitor all operations of MISSION with respect to the Marks, inspect all books, records and facilities pertaining to use of the Marks and . . . insure compliance with all standards, specifications, and guidelines").

505. *Id.* at 44. Although it had found irreparable harm without addressing the issue of economic competition between the Mission and the Church, the court of appeals nonetheless characterized the district court's reasoning in that regard as "highly questionable": the Mission's very operation in Elmira indicated the Church's interest in maintaining its presence in this area, "where there is a demonstrated interest in their teachings" and which now "falls within [the Church's] area of natural expansion" after the dispute with the Mission's current management. *Id.* at 45. Consumer confusion over the affiliation of the Mission with the Church would divert business from the Church's further operations in the Elmira area. *Id.* at 42.

506. Also known as "The First Church of Christ, Scientist," the "Mother Church" is the organization (established in Lynn, Massachusetts in 1889 and

Science.⁵⁰⁷ Holding that "as a matter of pure common sense, 'Christian Science Churches' is a generic name for churches in which Christian Science is practiced,"⁵⁰⁸ the Justices allowed a church and bookstore not formally affiliated with the "Mother Church" to identify itself nonetheless as a "Christian Science" church.⁵⁰⁹ Expressing their "discomfiture in addressing this religious dispute in terms more appropriate to the commercial world," the court

relocated to Boston in 1892) of which Mary Baker Eddy, founder of Christian Science, was the principal. See *Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Evans*, 520 A.2d 1347, 1349 (N.J. 1987), citing 2 J. MELTON, *THE ENCYCLOPEDIA OF AMERICAN RELIGIONS* 74-77 (1978).

507. Christian Science is:

[A] religion founded and developed by [Mary Baker Eddy] in the late 19th century as a result of her discovery of a mental or spiritual means of healing ailments and illnesses. . . . Eddy published a book in 1875 entitled *Science and Health With Key to the Scriptures* which has evolved into the denominational textbook.

Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Evans, 467 A.2d 268, 270 (N.J. Ch. 1983). The court granted an injunction to the plaintiff to prevent a breakaway church from identifying itself as a "Christian Science Church" and from using the term "Christian Science Reading Room." *Id.* On appeal, the Appellate Division held that the use of "Christian Science Church" was generic, and could be used by a breakaway church. 488 A.2d 1054, 1059-60 (N.J. Super. Ct. App. Div. 1985), *aff'd*, 520 A.2d 1347 (N.J. 1987).

508. *Evans*, 520 A.2d at 1352. *But see Jandron v. Zuendel*, 139 F. Supp. 887, 888-89 (N.D. Ohio 1955) (recognizing the "Mother Church" as "the highest authority and judicatory of the Christian Science denomination," and thus granting its motion for an injunction to prevent plaintiff's use of the terms, "Church of Christ, Scientist," "Christian Science Church," and variations thereof to identify their religious organization); *Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Robinson*, 115 F. Supp.2d 607, 610 (W.D.N.C. 2000) (allowing the Mother Church to pursue a Lanham Act claim against breakaway group, and distinguishing *Evans* on the ground that in that case "the defendant's name [was] sufficiently different [renamed, the Independent Christian Science Church, Plainfield, New Jersey] to distinguish it from the Mother Church"), *reconsideration denied*, 2000 WL 33422739 (W.D.N.C. 2000), *aff'd*, 1 Fed. Appx. 157, 2001 WL 20537 (4th Cir. 2001). *Cf. Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 910 (9th Cir. 1995) (holding that "self-realization" was generic, and thus not a trade name or trademark, in the context of "Hindu-Yoga spiritual organization[s]," which generally recognize and aim for this form of spiritual attainment), *appeal after remand*, 206 F.3d 1322 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001); *see also General Conference of Seventh-Day Adventists v. Perez*, 97 F. Supp. 2d 1154, 1164 (S.D. Fla. 2000) (concluding that enforcement of plaintiff's trademark rights in marks, "Seventh-Day Adventist" and "SDA" did not violate unaffiliated church's constitutional rights).

509. *Evans*, 520 A.2d at 1355 ("[D]isputes similar to the one before us have been addressed by numerous other courts" and "[w]e draw our support from their decisions.").

nonetheless concluded that "the policies against allowing monopolization of generic names, which lead to monopolization of supply, should be applied at least as strictly to religious as to commercial products."⁵¹⁰

It should also be noted that not only has "nearly every sacred yoga word or phrase . . . been trademarked,"⁵¹¹ but, in a more secular context, "Pilates" (like "Primal Therapy" before it)⁵¹² was recently held invalid as a service mark or equipment mark, since it was found to be "generic" with regard to a particular method of practice. That is, the term identified a general type of exercise, rather than a particular service or equipment producer.⁵¹³

C. Copyright and Trade Secret (I): The Vien Decision

In 1993, the Church won a summary judgment motion on its copyright and trade secret claims against Enid Vien in connection with the "Dynamism" course that she offered to students.⁵¹⁴

The Church's ownership of the copyright in various literary works and sound recordings, published and unpublished, and Vien's direct or indirect copying of these works were undisputed.⁵¹⁵ Nor would the fair use defense⁵¹⁶

510. *Id.*

511. Keegan, *supra* note 395, at 122.

512. See *Primal Feeling Center, Inc. v. Janov*, 201 U.S.P.Q. 44 (TTAB 1978) (upholding challenge to defendant's federal trademark registration of the term "Primal Therapy," since that was the common, and sole, term for his practice). Cf. Anderson, *supra* note 9, at 109. Anderson chronicled an early conflict by Esalen teachers over the use of the term "sensory awareness" to describe various techniques: one party ultimately "agreed that he would no longer call his work sensory-awareness exercises. For a while he called it sensing experience, and, later, sensory awakening." *Id.*

513. See *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp.2d 286, 304-05 (S.D.N.Y. 2000); see also *Pilates, Inc. v. Georgetown Bodyworks Deep Tissue Massage Centers, Inc.*, 157 F. Supp. 75, 81 (D.D.C. 2001) (holding that "Pilates Studio" is not registerable as a trademark, since neither of its component words is). Material concerning—and celebrating the outcome of—the *Current Concepts* action, including pleadings, is at <http://www.pilates-cancel.com> (last visited July 2, 2003).

514. *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993).

515. *Id.* at 632 (observing that "[t]he undisputed evidence shows that defendant copied or directed her students to copy plaintiffs' copyrighted materials" for the Dynamism course: Vien admitted that "she must use bootleg or copied materials as part of the courses she offers her students" and that she "copied, or directed the copying of," various tape recordings of L. Ron Hubbard's lectures).

shield Vien: indeed, all four of its factors weighed against her. First, she had used the copyrighted material commercially, and for the same purposes as the Church.⁵¹⁷ Second, L. Ron Hubbard's works were deemed by the court to be creative, and thus deserving of more protection than works that were informational or factual.⁵¹⁸ Third, Vien had copied much of, and in some cases all of, the works at issue.⁵¹⁹ Finally, Vien's course directly competed with, and diminished the market for, the Church's services.⁵²⁰

The court also found that the Scientology works known as the "Advanced Technology"⁵²¹ qualified as trade secrets under California law.⁵²² The material "is confidential and kept under tight security, is disclosed only to those who have attained the requisite levels of spiritual training, and cannot be accessed without first signing an agreement to maintain its secrecy and confidentiality."⁵²³ Vien herself had signed such an agreement.⁵²⁴ Moreover, the Advanced Technology clearly had independent economic value: not only were the Church's operations supported in part by

516. The fair use defense was also unavailing for the defendant in *Religious Tech. Ctr. v. Henson*, 182 F.3d 927, 1999 WL 362837 at *1 (9th Cir. 1999) (unpublished) (affirming district court's rejection of the defense, where Henson had copied all of one of the works in the Advanced Technology, and had admitted that such copying would diminish the market for the original work), *cert. denied*, 528 U.S. 1105 (2000).

517. *Vien*, 827 F. Supp. at 635 (observing that Vien admitted earning up to \$12,000 per year for the ten years that she had offered such courses, and that generally, "commercial use of copyrighted material is presumptively unfair, whereas noncommercial use weighs in favor of the defendant"). *Cf. Wright v. Warner Books*, 953 F.2d 731, 736-37 (2d Cir. 1991) (holding that anticipation of profits does not presumptively deprive the defendant of the benefit of fair use, if her use of the copyrighted work is for purposes of criticism, scholarship, or research).

518. *Id.* ("When the nature of the copyrighted works is creative, as opposed to informational, use of those works is less likely to be deemed fair.")

519. *Id.* at 336 (noting that for fair use purposes, "the commercial nature of the use" aggravated the effect of such copying).

520. *Id.*

521. *Id.* at 632. These works were not enumerated in the decision.

522. *Id.* (summarizing the definition, in California Civil Code section 3426.1, as "information which has independent economic value from not being generally known, the secrecy of which has been reasonably protected, or reasonably attempted to be protected.")

523. *Id.* at 633.

524. *Id.*

providing it, but Vien herself was paid for courses offering this material.⁵²⁵

D. *Trade Secret Status, Reexamined: The Wollersheim Decision*

In December 1983, Robin Scott and two other persons stole materials related to advanced levels of Scientology training from Church offices in Copenhagen, Denmark.⁵²⁶ Although these materials were recovered (and Scott was convicted in Denmark of burglary), the Church brought suit in 1985 after learning that an institution known as the Church of the New Civilization (the "new church") intended to disseminate these materials.⁵²⁷ The new church had been established in 1983 by David Mayo, apparently a former close associate of Hubbard, who had helped develop the Church's higher level materials but had left the Church following a heated argument with its senior officials.⁵²⁸

In an unpublished opinion, the district court found not credible Mayo's testimony that he had written the new church's materials from memory and that he had added "improvements" that distinguished these works from those of the Church.⁵²⁹ The court ordered the new church to deposit with it under seal all versions of specified higher

525. *Id.* at 633-34.

526. *Religious Tech. Ctr v. Wollersheim*, 796 F.2d 1076, 1078 (2d Cir. 1986).

527. *Id.* This action was precipitated by the Church's discovery that counsel for defendant Larry Wollersheim, a former member of the Church who had brought a state tort action against the Church in California, had obtained the advanced materials during a deposition of two other individuals, one of whom had received them from a third individual, who in turn had received them from a member of the new church. *Id.* at 1079. The Church named as defendants in the federal action "the new church, its principal officers, Wollersheim, his counsel, and those allegedly involved in passing the materials to Wollersheim's counsel." *Id.*

Federal jurisdiction was based on the Church's civil claim under the Racketeer-Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. § 1994, on allegations that the new church had misappropriated a trade secret—the Church's higher level materials—by means of several acts of mail fraud or wire fraud that constituted a pattern of racketeering activity. *Id.* at 1079-80. The suit also stated several pendent California state law claims, including misappropriation of trade secrets. *Id.* at 1079.

528. *Id.* at 1078.

529. *Id.* at 1078 n.3. The *Wollersheim* Court quoted the district court's conclusion that "[t]he [new church] documents are too voluminous, too detailed and too nearly identical in substance and wording to have been created by Mr. Mayo without reference to the stolen documents." *Id.*

level Church materials, and not to use or disseminate any version of these materials.⁵³⁰

Without determining whether the new church's materials were copies of the Church materials stolen in Denmark,⁵³¹ the Ninth Circuit Court of Appeals recognized that the doctrines and techniques of the new church were "essentially identical" to those of the Church.⁵³² Although the legislative history did not justify giving the Church, as a private RICO plaintiff,⁵³³ the right to injunctive relief,⁵³⁴ the court proceeded to question whether the Church's advanced materials, which were protected by neither copyright nor trademark law,⁵³⁵ constituted trade secrets under California state law.⁵³⁶

Jeopardizing the Church's trade secret claim was its posture that it restricted access to these materials not for commercial advantage⁵³⁷ but to prevent irreparable spiritual harm to those who might otherwise be exposed to them without the proper preparation and supervision.⁵³⁸ The

530. *Id.* at 1079.

531. *Id.* (noting that the court was deciding on jurisdictional grounds the issue before it).

532. *Id.* at 1078.

533. *Id.* at 1088.

534. *Id.* (recognizing that "strong policy arguments can be made" in opposition); see also *id.* at 1082 (identifying the issue "as a matter of first impression for an appellate court").

535. *Id.* at 1078 n.2.

536. *Id.* at 1089 ("Even though the Church is not entitled to injunctive relief under RICO, we must also decide whether it is entitled to the same relief under state law.").

537. *Id.* at 1078. The court observed that "[t]he Church stated to the district court that it does "not safeguard these materials from any commercial consideration." *Id.*; see also *id.* at 1079 ("In additional comments from the bench, the district court . . . noted that the Church was not arguing commercial disadvantage as an injury."); *id.* at 1091 (noting that "the Church alleged no competitive advantage from maintaining the secrecy of its higher level materials.").

Indeed, before the district court, the Church had denied that it had suffered a monetary loss from the new church's operations. *Id.* at 1080 n.6. The court questioned whether "the harm caused to . . . adherents from premature, unsupervised exposure to the higher level materials . . . is sufficient to allow the Church to press even a civil RICO damages action." *Id.*

538. *Id.* at 1079. The *Wollersheim* Court noted that the district court "recognized that both parties accepted that adherents must be exposed to the materials in strict progression. On this basis, the court concluded that Church adherents may suffer irreparable harm from the unsupervised dissemination of the materials, thus justifying preliminary injunctive relief." *Id.*; see also *id.* at 1091 (observing that "the Church alleges that its precepts require adherents to

court held that to qualify for trade secret protection under either the Restatement of Torts⁵³⁹ or California trade secret law,⁵⁴⁰ "the confidential material must convey an actual or potential commercial advantage, presumably measurable in dollar terms,"⁵⁴¹ rather than a purely "spiritual advantage,"⁵⁴² to the Church's members. Accordingly, the court of appeals dissolved the injunction that had prohibited the new church from using these materials.⁵⁴³

E. Trade Secret Status, Reexamined: The Scott Decision

Returning to the district court, the Church argued that its advanced technology did in fact have economic value and that it did therefore qualify as a trade secret.⁵⁴⁴ After the

be audited in a structured manner with exposure to higher level materials only when the auditor considers the adherent ready").

539. *Id.* at 1089-90 (noting that Restatement of Torts § 757, comment (b) (1939), adopted by California courts before 1985, defined a trade secret as "any formula, pattern, devise or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.").

The same comment of the Restatement lists several factors to be considered in determining whether information at issue is a trade secret, including: the extent to which the information is known by those outside the claimant employer as well as by employees and others involved in the employer's business; the extent of the measures taken by the employer to keep the information confidential; the value of the information to the claimant's employees and competitors; the amount of effort or money expended by the employer in developing the information; and the ease with which the information could be legitimately acquired or duplicated by others. RESTATEMENT OF TORTS (FIRST) § 757 (1939).

540. *Wollersheim*, 796 F.2d at 1090, (quoting Cal. Civ. Code § 3426.1(d) (West Supp. 1986), which defines a trade secret as "information, including a formula, pattern, compilation, program, devise, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.").

At the time of this decision, no published California decision had interpreted this statute. *Id.*

541. *Id.*

542. *Id.*

543. *Id.* at 1091.

544. *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (quoting the Church's argument that in the absence of an injunction, it "will be forever at a loss to protect the confidential nature and resultant economic value of these materials" and that the "[d]efendant will obtain an economic advantage. . . which will be used to divert parishioners, the value and goodwill of which cannot be monetarily measured for plaintiffs").

district court, relying solely on the Ninth Circuit's opinion in *Wollersheim*, denied the application for a temporary restraining order and order to show cause,⁵⁴⁵ the Church took an interlocutory appeal.

Noting that in *Wollersheim* it had not addressed the issue of whether the Church's material could qualify as a trade secret (should the Church prove economic advantage), the Ninth Circuit Court of Appeals reversed, and remanded the matter to the district court.⁵⁴⁶

F. Substantial Similarity: The Scott Decision

Three months after the Ninth Circuit's first decision in *Wollersheim*, the executor of the Estate of L. Ron Hubbard registered a copyright in certain Advanced Technology materials (known as NOTs),⁵⁴⁷ designating them unpublished works,⁵⁴⁸ and promptly granted an exclusive license to the Religious Technology Center to duplicate, disseminate, and use these materials and to enforce their copyrights.⁵⁴⁹ The Church, after obtaining leave to file an

545. *Id.*

546. *Id.* at 1310. The court expressed no opinion "as to whether the district court should exercise its discretion and decline to consider this second application for interlocutory relief on grounds that the Church is needlessly burdening the courts with repetitive applications for the same relief." *Id.* However, a dissenting opinion by one Justice argued that the Church should have been estopped from asserting on a second interlocutory appeal the trade secret argument that it had made "a tactical choice" not to advance previously. *Id.* (Hall, J., dissenting).

547. *Religious Tech. Ctr. v. Scott*, 660 F. Supp. 515, 517 (C.D. Cal. 1987), *aff'd. sub nom. Religious Tech Ctr. v. Wollersheim*, 971 F.2d 634 (9th Cir. 1992). The materials protected included some of those stolen by Scott: "a series of bulletins describing a procedure known as 'New Era Dianetics for Operating Thetans,' 'NED for OTs,' or 'NOTs' ('NOTs')." *Id.* at 516.

548. *Id.* at 517 (citing the "TXU" registration number for the copyright registration).

The "masked form" in which these works were filed with the Copyright Office preserved their trade secret status. *Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, 923 F. Supp. 1231, 1255 n.28 (N.D. Cal. 1995). *Cf. supra* note 44, and accompanying text (discussing the copyright registration of certain of Arica's works as unpublished).

549. *Scott*, 660 F. Supp. at 517 (quoting license). Although the defendants argued that by not asserting a copyright claim earlier, the Hubbard Estate and the Church had effectively waived it, the court found no error in the Estate's "failure to register earlier its copyright in unpublished materials that were never meant to be distributed to the public." *Id.* at 518. Nonetheless, at the risk of allowing the public to view the material under restricted conditions, spiritual groups might wish to register unpublished works with the Copyright Office.

amended complaint stating a new claim for copyright infringement against Scott and the new church, petitioned the district court for a preliminary injunction on those grounds.⁵⁵⁰

Because the plaintiff clearly held a copyright in the works at issue and the defendants had had access to them,⁵⁵¹ the court proceeded to evaluate whether the new church's material was substantially similar to the NOTs. This analysis was complicated by the defendants' arguments that this material was uncopyrightable not only as a process but also as "the sacred scripture of a religion."⁵⁵²

Indeed, the court suggested that the Church, by initially framing its action against the new church in trade secret rather than copyright terms, had implicitly acknowledged that the NOTs were largely uncopyrightable, as ideas or processes.⁵⁵³ In evaluating the level and causes of relevant works' similarity, the court compared only those portions that did not result from the underlying parallels between their uncopyrightable "auditing" procedures.⁵⁵⁴

The first part of the similarity analysis, an "extrinsic test,"⁵⁵⁵ evaluates whether the ideas expressed in the two

550. *Id.*

551. *Id.* at 518 (noting that even if the Church could not prove that the new church had received the originals of, or copies of, the material stolen from the Church by Scott, various officers of the new church had inarguably been personally involved in developing and training with the NOTs materials).

552. *Id.*

553. *Id.* at 519.

554. *Id.* The court acknowledged that:

The nature of the procedure described in NOTs and in [the new church's Advanced Ability V materials] requires a certain level of similarity of expression. The NOTs procedure, briefly, treats a particular condition of the adherent through the use of a structured sequence of questions, dictated in part by the adherent's response to the questions as registered on a device known as the Hubbard E-meter. It appears that the wording of the questions must conform to a standard; in addition, there is a fairly large vocabulary of specialized terminology used to describe phenomena that might be encountered during the procedure. It can also be assumed that the use and behavior of the needles or dials on an E-meter can be described only in a limited number of similar ways.

Id.

555. *Scott*, 660 F. Supp. at 519, citing *Sid & Marty Krofft Television Prods, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). In *Sid & Marty Krofft*, the Ninth Circuit defined the "extrinsic test" as a "test for the similarity

works are similar: if they are not—for example, if one work is a sculpture of a nude human figure and the other is a statue of a horse, or a painting of a nude person—there has been no copyright infringement.⁵⁵⁶

The court concluded that conducting this test would not impermissibly entangle it in religious doctrine: "[w]here the statutory formalities have been met, scriptures must receive the same [copyright] protection as other works."⁵⁵⁷ Nor would the extrinsic test involve evaluation of religious differences between the two works, since "[t]he inquiry is

of ideas" between the plaintiff's and defendant's works: it is "a factual one, to be decided by the trier of fact." 562 F.2d at 1164.

556. *Id.* The court indicated that only "[i]f there is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement." *Id.*

557. *Scott*, 660 F. Supp. at 519 (observing that to hold otherwise would not only "offend the first amendment's guarantee of freedom of religion," but would also "inevitably involve courts in deciding whether various works are or are not religious scriptures—an inquiry of even greater constitutional infirmity."). *Cf.* *Urantia Found. v. Maaherra*, 895 F. Supp. 1329, 1333 (D. Ariz. 1995) (holding that if the author of religious material "is found to have a valid copyright or trademark, the enforcement of such cannot be said to be fostering the 'establishment' of [that material] as a religion" under the First Amendment).

For similar reasons, several state and federal courts have held that the Establishment Clause is violated by state laws that impose sanctions for falsely representing food as kosher, since the interpretation and enforcement of kosher standards involves the State in religious issues. *See Commack Self-Serv, Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445, 452 (E.D.N.Y. 2000) (indicating that the kosher laws at issue "require the State to enforce some level of religious standards"), *aff'd*, 294 F.3d 415, 426 (2d Cir. 2002) (concluding that "because the challenged laws interpret 'kosher' as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism."), *cert. denied sub nom. Weiss v. Commack Self-Service Kosher Meats, Inc.*, 123 S.Ct. 1250 (2003); *Barghout v. Mayor and City Council of Baltimore*, 833 F. Supp. 540, 546 (D. Md. 1993) (noting that the regulations "impose a wholly religious standard for compliance" and "mandate the excessive involvement of specific religious organizations and figures in interpreting and enforcing these standards."), *aff'd sub nom. Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1344 (4th Cir. 1995) (finding that the ordinance "fosters excessive entanglement between city officials and leaders of the Orthodox faith with each and every prosecution."); *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1360 (N.J. 1992) (holding that kosher food regulations inextricably intertwine secular law with Jewish religious law, and involve the State in judging matters historically subject to the oversight of Jewish organizations and institutions), *cert. denied sub nom. Nat'l Jewish Comm'n on Law & Pub. Affairs v. Ran-Dav's County Kosher, Inc.*, 507 U.S. 952 (1993). [While in private practice, the author prepared an *amicus* brief submitted to the Appellate Division of the New Jersey Superior Court on behalf of several rabbinical associations, in support of the regulations challenged in the *Ran-Dav's* litigation.]

one of linguistic, not theological, interpretation";⁵⁵⁸ moreover, the works themselves involved not theoretical discussions but the enunciation of practical techniques.⁵⁵⁹ Indeed, because the two works "treat the same conditions in the same ways by use of the same commands and steps," the extrinsic test was satisfied, and the court proceeded to the second and final step.⁵⁶⁰

This part of the analysis, an "intrinsic test," focuses on whether, given the similarity of the ideas underlying the plaintiff's and defendant's works, their expressions are substantially similar: if the ordinary reasonable person would find such similarity, the defendant has infringed the plaintiff's copyright.⁵⁶¹ In this instance, though the court noted a certain resemblance in the expressions⁵⁶² and reiterated its conviction that the new church's work could not have been created "without . . . a copy of NOTs at hand,"⁵⁶³ it did not detect enough similarity of expression to ground a finding of copyright infringement.

In addition, the balance of hardships weighed against enjoining the new church from using its works. Such relief

558. *Scott*, 660 F. Supp. at 520.

559. *Id.* (describing the process: "If A happens, the auditor is told, do B.").

560. *Id.* The defendants had also admitted, for purposes of the preliminary injunction analysis, the substantial similarity of the two procedures; in fact, they had published for their adherents a price list that directly indicated correspondences between their services and those of the Church, including the parallel between the two works at issue. In addition, prior to the litigation, two of the defendants had been captured on videotape as they made this comparison: one had helpfully characterized the new church's course as "not an interpretation or a reinterpretation of the [Church's] material; a very precise application and exactly the way the material was laid out, just legally we will be in jeopardy if we call it Scientology." *Id.*

561. *Id.* at 519, citing *Sid & Marty Krofft*, 562 F.2d at 1164 (defining the intrinsic test as the determination of "whether there is substantial similarity in the expression of the ideas" in the two works "so as to constitute infringement"; unlike the extrinsic test, it depends "on the response of the ordinary reasonable person," and it involves neither analytic dissection nor expert testimony).

562. *Id.* at 520-21. Though acknowledging that both works consisted of "numbered 'series'" that examine topics in a similar sequence; that both are written in an "informal" style, and that certain "sentences and images" were shared by the works, the court concluded that "[t]he actual percentage of the text that appears to have been copied verbatim is very small, although a much larger proportion of [the new church's work] seems to be a paraphrase of NOTs." *Id.*

563. *Id.*

would stifle the new church's religious practices,⁵⁶⁴ thus impinging on its members' constitutional rights to practice their religion freely.⁵⁶⁵ On the other hand, if the injunction were not granted, the Church could ultimately recover monetary damages for revenues lost to the new church because of any copyright infringement.⁵⁶⁶ The new church remained free to publish "a noninfringing description of the [auditing] procedure,"⁵⁶⁷ even though this version, were it to be less effective than the Church techniques that it was derived from, might ultimately damage the reputation of the Church's services.⁵⁶⁸

G. Copyright and Trade Secrets (II): The Lerma Decisions

In April 1993, in response to a lawsuit filed against him two years earlier by the Church, a former Scientologist named Steven Fishman filed with the United States District Court for the Central District of California a document (the "Fishman affidavit") to which was attached 69 pages of Advanced Technology ("AT") material.⁵⁶⁹ Despite applications by the Church at both the district court and court of appeals levels to have the file sealed,⁵⁷⁰ public access to the file was not formally barred until August 1995, more than two years later.⁵⁷¹

In the interim, Arnaldo Lerma, another former member of the Church, came into possession of a copy of the Fishman affidavit and its attachments, and published⁵⁷² the

564. *Id.* at 521 ("The first preliminary injunction in this case apparently put the new Church's Advanced Ability Center out of business.").

565. *Id.*

566. *See Id.* ("It is unclear how much, if any, of this loss could be traced to copyright infringement and how much to defendants' ability to offer the same procedures [without infringing].").

567. *Id.* ("[D]efendants have repeatedly expressed their own opposition to the publication of the advanced technology of Scientology, so the risk of this injury seems remote.").

568. *Id.* at 522.

569. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1364 (E.D. Va. 1995).

570. *Id.* (noting that the Church's appeal of the district court's refusal to seal the file was itself denied by the Ninth Circuit, in *Church of Scientology Int'l v. Fishman*, 35 F.3d 570 (9th Cir.1994)).

571. *Id.*

572. Lerma was affiliated with F.A.C.T.NET, a Colorado-based organization that collected and archived information concerning the Church. This organization maintained its own electronic bulletin board service, available through the Internet, but stored a number of files separately, offline, on its

attachments on the Internet on July 31 and August 1, 1995, through his Internet access provider, Digital Gateway Systems.⁵⁷³ The Religious Technology Center, after detecting the publication during its regular scans of the Internet, traced it to Lerma, but he refused to comply with their demands on August 11 that he return the hard copy of the material and refrain from further publication.⁵⁷⁴

By that time, Lerma had forwarded a printed copy of the material to Richard Leiby, an investigative reporter for The Washington Post ("The Post").⁵⁷⁵ The newspaper returned this copy to the Church after the Church represented that it might have been stolen. Yet one day before the court sealed the file in the Fishman litigation,⁵⁷⁶ The Post independently obtained a separate copy from the court clerk's office—despite the Church's tactic of having "staff members [checking] that file out and holding it all day to prevent anyone from seeing it."⁵⁷⁷

On August 19, The Post published an article by Marc Fisher: *Church in Cyberspace*⁵⁷⁸ discussed the Church's

computers. F.A.C.T.NET claimed that posting any of the Church's Advanced Technology documents online was not its policy, and asserted that Lerma's uploading of these materials had been "due to miscommunication." Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1522 (D. Colo. 1995). However, on August 15, 1995, the organization posted a message to an Internet newsgroup "claiming Lerma had acted on their behalf and with their endorsement and that they stood behind his actions." *Id.*

In a proceeding brought against F.A.C.T.NET by the Church, the district court held that the organization's scanning of the Fishman affidavit materials into its computers and placing them in the private section of its library, without making them publicly available (online or offline), was "well within" the fair use exception for copying protected works. *Id.* at 1524.

573. *Lerma*, 908 F. Supp. at 1362. Subsequently, the Church voluntarily dismissed its claims against Digital Gateway Systems. Religious Tech. Ctr. v. Lerma, 1996 WL 633131 at *2 (E.D. Va. 1995).

574. *Lerma*, 908 F. Supp. at 1364. The decision does not indicate whether Lerma had attempted to publish the material anonymously, or whether the Church had located him by identifying, through his Internet service provider or otherwise, the owner of Lerma's "screen name" or e-mail address. *Cf.* Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc., 923 F. Supp. 1231, 1239-40 (N.D. Cal. 1995) (defendant claimed that many of the Church documents he posted had previously been posted anonymously).

575. *Lerma*, 908 F. Supp. at 1364.

576. *Id.* at 1364-65.

577. *Id.* at 1368. The Post defeated the Church's "extraordinary efforts to control access to that file" merely by "asking the Clerk of the court to copy it." *Id.*

578. Mark Fisher, *Church in Cyberspace: Its Sacred Writ Is on the Net. Its Lawyers Are on the Case*, WASH. POST, Aug. 19, 1995, at C1.

action against Lerma, the temporary restraining order that the Church had obtained to ban Lerma from further publishing the material, and the seizure warrant that had enabled the United States Marshal to seize Lerma's computer, floppy disks, and copies of Hubbard's copyrighted works.⁵⁷⁹ The article also included three quotes, totaling forty-six words, from the AT documents.⁵⁸⁰

1. *August 30, 1995—Injunction Against The Post Denied.* On August 22, the Church filed a motion seeking to enjoin The Post, Fisher, and Leiby from copying or disseminating the AT materials attached to the Fisher affidavit.⁵⁸¹ Weighing four factors—the risk of irreparable harm to The Post if the injunction were issued; the risk of harm to the Church if the relief were granted; the likelihood of the Church's success on the merits; and the interest of the public⁵⁸²—the court denied the motion.

Balancing the first two factors, the court quickly concluded that the injunction sought by the Church would not only "work a profound harm" by preventing reporters from doing their jobs, but would constitute a prior restraint on expression, which was strongly presumed to be unconstitutional.⁵⁸³ After the Supreme Court had rejected the government's claim that publication of the Pentagon Papers would jeopardize national security, the threat that The Post posed to the Church's copyrights and trade secrets seemed "woefully inadequate."⁵⁸⁴ The danger of unauthorized dissemination here appeared particularly insignificant, because "[t]he documents in question are so

579. *Lerma*, 908 F. Supp. at 1364.

580. *Id.* at 1365.

581. *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 262 (E.D. Va. 1995).

582. *Id.* (citing *Blackwelder Furniture Co. of Statesville v. Seilig Mfr. Co.*, 550 F.2d 189, 196 (4th Cir. 1977) (enunciating four-factor test for granting interlocutory relief)).

583. *Id.* (citing *N. Y. Times Co. v. United States*, 403 U.S. 713, 713-14 (1971) In denying the United States' motion to enjoin *The New York Times* and *The Washington Post* from publishing the contents of a classified study on the Administration's policy towards Vietnam, the Court noted the strong presumption against the constitutional validity of prior restraints of expression. *Id.*

584. *Lerma*, 897 F. Supp. at 263. The threat of harm to its intellectual property was the sole justification advanced by the Church in support of the injunction. *Id.* at 262-63.

esoteric as to require years of training in Scientology to understand them.¹¹⁵⁸⁵

The court found that the fair use defense was likely to protect The Post's limited copying of the Church documents,⁵⁸⁶ not only because the copying had occurred pursuant to the preparation of a legitimate news article,⁵⁸⁷ but because the documents at issue appeared to be factual or informational rather than creative,⁵⁸⁸ the copying was minimal;⁵⁸⁹ and the market for the Church's services, which depend on personal counseling by a trained Scientology official, was unlikely to be disrupted by the articles.⁵⁹⁰ In addition, beyond the fair use analysis, the public interest tilted heavily towards allowing The Post to report freely on the news.⁵⁹¹

The trade secret claim was equally shaky: despite the "extraordinary measures" taken by the Church to maintain the security of the AT documents, and the attachments to the Fishman affidavit in particular, these documents had "escaped into the public domain and onto the Internet."¹¹⁵⁹² Nor had the Church established that these documents provided it with an economic advantage over any competitors.⁵⁹³

2. *September 15 and November 29, 1995—First Amendment vs. Copyright.* On November 29, 1995, the district court issued a memorandum opinion⁵⁹⁴ in support of

585. *Id.* The court identified as a potential harm only the possibility that Church adherents would choose to study the information on their own instead of through "the Church's elaborate system of instruction"; and observed that even in that case, as a religious organization the Church of Scientology was poorly positioned to claim loss. *Id.*

586. *See also id.* at 265 (determining that The Post, having obtained the Fishman affidavit legally from an open court file, had not surrendered the right to the fair use defense).

587. *Id.* at 263-64.

588. *Id.* at 264. *Cf. supra* note 518, and accompanying text (indicating, in the context of the *Vien* decision, that the Church's scriptures should be protected as creative rather than informational works).

589. *Lerma*, 897 F. Supp. at 265.

590. *Id.* "[T]he 'market' for these writings does not exist independently of the Church's services." *Id.*

591. *Id.* at 267.

592. *Id.* at 266 (noting that *Lerma* was not the only source on the Internet for these documents).

593. *Id.*

594. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995).

its order of September 15 and amended order of November 29. Those orders denied the Church's emergency motion for reconsideration and rehearing of its motion for a temporary restraining order and a preliminary injunction against The Post, Fisher, and Leiby.

Though its usual reluctance to revisit decided issues had been overcome by the Church's new strategy of alleging infringement of its members' First Amendment right of free exercise of religion,⁵⁹⁵ the court nonetheless made short work of this argument. The same Amendment's protection of the freedom of the press clearly trumped the Church's assertion⁵⁹⁶ that its faith required that the AT documents remain confidential;⁵⁹⁷ and its guarantee of free speech would void any governmental attempt to provide the public "paternalistic protection from 'harmful' thoughts."⁵⁹⁸ In addition, it appeared particularly ironic that in this action the Church championed the Free Exercise Clause of the First Amendment to overcome a fair use defense afforded by same copyright statute on which the Church had based its litigation.⁵⁹⁹

Though it declined to evaluate whether and how the secrecy of these documents was necessary to the Church's

595. *Id.* at 1355 (indicating that rehearings are usually reserved for situations in which the court clearly misunderstood a party or where there has been a significant change in the law or facts of a case, and suggesting that the Church should have raised the First Amendment argument in its original motion).

596. See *Questions and Answers: Religious freedom, copyright law and trade secret protections on the Internet*, at <http://www.scientology.org/copyright/qa.htm> (last visited Sept. 14, 2001) ("The belief and practice of preserving the confidentiality of [its advanced] scriptures is as fundamental to Scientology as the belief in the Resurrection is to Protestants, as a literal interpretation of the Bible is to Fundamentalist Christians, as strict adherence to the dietary laws of the Torah is to certain Jewish groups or as the belief in the absolute sanctity of life—including fetal life—is to a devout Catholic.").

Of course, in this context at least one of these analogies was notably inapt: the State's involvement in the promulgation and enforcement of kosher food regulations would be struck down as a violation of the separation of church and state and of the prohibition of state entanglement in religion. See *supra* note 557.

597. *Lerma*, 908 F. Supp. at 1355-56; see also *Questions and Answers*, *supra* note 596 (characterizing as "apostates" those individuals who made the Church's scriptures available online).

598. *Id.* at 1357.

599. *Id.* at 1356.

continued operation,⁶⁰⁰ the court observed that by upholding such neutral, secular laws it was not compelling Scientologists to engage in conduct offensive to them, such as publishing the materials themselves.⁶⁰¹

Finally, the court disposed of two separate arguments made by the Church about the economic harm that could result from the publication of the AT documents. First, it determined that the materials posted by Lerma could not provide enough information for a competitor of the Church to establish itself.⁶⁰² Second, to the degree that the exposure of such material out of context exposed the Church to ridicule and the potential loss of new adherents, "this is the price paid in a free society which encourages an open marketplace for ideas. Free speech protections and the fair use exemption to the copyright statute may deter some potential parishioners. Harm from legitimate criticism is not actionable under either the First Amendment or the copyright laws."⁶⁰³

3. *November 28, 1995—Summary Judgment for The Post Granted.* It was a relatively simple matter for the district court to grant the summary judgment motion of The Post, Fisher, and Leiby. Assuming for the purposes of this motion (though expressing "serious reservations" as a factual matter) that the Church had properly-registered and valid copyrights for the AT documents at issue,⁶⁰⁴ and recognizing that the defendants admitted copying the quotations from this material,⁶⁰⁵ the court held that this copying was protected by the fair use defense.

All four factors of the fair use test favored The Post and its writers. First, the purpose and character of its use of the documents appeared to be entirely for news gathering and reporting, and for responding to litigation.⁶⁰⁶ Second, in the course of the litigation the Church had described the AT documents as "training materials," thereby suggesting a broader scope of fair use copying than if it had claimed that

600. *Id.* at 1357. Such an analysis would be "inappropriate and beyond our capability to assess". *Id.*

601. *Id.*

602. *Id.* at 1358.

603. *Id.*

604. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1365 (E.D. Va. 1995).

605. *Id.*

606. *Id.* at 1366.

the works were creative.⁶⁰⁷ Third, the three brief quotations⁶⁰⁸ in the Leiby article were "not intended to offer a complete definition of the Scientology religion or to capture the total essence of what it means to be a Scientologist,"⁶⁰⁹ but rather were provided "solely as illustrations of the author's claims about Scientology."⁶¹⁰ Finally, the court found that the snippets of Scientology disclosed in the article would have no effect on the potential market for the Church's services;⁶¹¹ it did not discuss in this connection the possibility that competitors of the Church could use those quotations in developing their own competing programs.

The court awarded attorney's fees to The Post, on the grounds that the "reprehensible" motivation of the Church's lawsuit was not "traditional secular concepts of copyright and trade secret law" but instead "the stifling of criticism and dissent of the religious practices of Scientology and the destruction of its opponents."⁶¹²

607. *Id.* at 1367. The court noted, however, that "Hubbard's works are difficult to classify and courts dealing with this issue have differed in their conclusion." *Id.* at 1366 (citing *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 158 (2d Cir. 1990) (acknowledging that "reasonable people can disagree over how to classify Hubbard's works"; but ultimately concluding, *id.* at 157, that they were informational rather than creative) and *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 636 (S.D. Cal. 1993) ("The undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational.")).

608. The three quotations appear in italics below:

Most of the 103 pages of disputed texts from the Fishman file are instructions for leaders of the OT training sessions. They are written in the dense jargon of the church. *"If you do OT IV and he's still in his head, all is not lost, you have other actions you can take. Clusters, Prep-Checks, failed to exercise directions."*

[As part of] one high-level OT session trainees are asked to pick an object, *"wrap an energy beam around it,"* and pull themselves toward the object.

[In one exercise] trainees are to *"be in the following places—the room, the sky, the moon, the sun."*

Id. at 1367.

609. *Id.*

610. *Id.*

611. *Id.* ("As The Post cogently argues, no follower of Scientology could possibly be satisfied by these three random fragments quoted in its article so as to bypass the complete regime of indoctrination.")

612. *Id.* at 1368 (indicating that in light of The Post's purpose and minimal copying, "no reasonable copyright holder could have in good faith brought a copyright infringement action"). The court had previously expressed similar sentiments. See *Lerma*, 908 F. Supp. 1353, 1360 (E.D. Va. 1995) ("[T]he primary motivation of [the Church in this action] is to stifle criticism of Scientology in general and to harass its critics The [Church's] position

Even more disturbing to the Church, however, might have been the court's flat rejection of its claim against the newspaper for misappropriation of trade secrets. The Fishman affidavit and its exhibits had remained in a public court file for more than two years;⁶¹³ they had been available online through Lerma's postings during at least the ten-day period before a court entered a Temporary Restraining Order preventing him from further disseminating them; and even after the entry of that Order, the material "remained potentially available to the millions of Internet users around the world."⁶¹⁴

In this light, the Internet could be seen as a virtual Pandora's Box. As the court observed:

Once a trade secret is posted on the Internet, it is effectively part of the public domain, impossible to retrieve. Although the person who originally posted a trade secret may be liable for trade secret misappropriation, the party who merely down loads [sic] Internet information cannot be liable for misappropriation because there is no misconduct involved in interacting with the Internet.⁶¹⁵

4. *October 4, 1996—Merger and Fair Use Defenses Denied to Lerma.* On October 4, 1996, the district court issued a written opinion explaining its oral ruling on January 19 of that year that had granted summary

appears to be an attempt to silence comments about the *ideas* of Scientology and not just the particular expression of those ideas.").

613. *Lerma*, 908 F. Supp. at 1368.

614. *Id.*; see also *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1526-27 (D. Colo. 1995) (denying trade secret status under Colorado law to the Advanced Works because "they have come into the public domain by numerous means," including thefts, "members losing materials in their possession," postings to the Internet by "persons other than Lerma," the Fishman court record, and the article in *The Post*).

The *F.A.C.T.NET* court noted that although the church had initially asserted trade secret status for the entire Advanced Technology materials, it had subsequently claimed, when confronted with the public status of some of this material, that only portions of these works were trade secrets. The Church's "ambivalence and admission as to the non-secret nature of certain portions of the Works casts some doubt on the secret status of the Works as a whole." *Id.*

615. *Lerma*, 908 F. Supp. at 1368. Indeed, even if the material remained a trade secret after being posted, under Virginia law the only persons liable for the tort of misappropriation of a trade secret would be those who had used or published the material illegally or in breach of a contractual or implied duty. *Id.*

judgment for copyright infringement in favor of the Church against Lerma.⁶¹⁶

Although Lerma acknowledged that the Church had registered the OT documents for copyright protection,⁶¹⁷ he contended that, particularly since Hubbard had apparently characterized the OT documents and their procedures as precise and factual, the content of these works itself was uncopyrightable under the merger doctrine.⁶¹⁸

The court dismissed this argument, noting that the history of the current litigation indicated that the doctrines of Scientology, and the more general issues of spiritual harm and healing, could be discussed without specific reference to the OT documents.⁶¹⁹ Nor did the operational or technical nature of these works necessarily render them uncopyrightable: "Hubbard's instructional directions for spiritual healing are not less-deserving of protection than the admittedly copyrightable 'recipe' in a cookbook or copyrightable 'repair steps' in a maintenance manual."⁶²⁰

In response to Lerma's distinction that, unlike recipes, Hubbard's procedures were intended to be followed specifically and precisely, the court next compared the Church's awareness procedures to copyrightable "literary works such as a poem or haiku and musical works such as a symphonic score . . . [whose] desired effect cannot be achieved without precise repetition"⁶²¹—an analogy debatable to anyone who has heard dramatically different readings of the same poem or renderings of the same score. In fact, the court here appeared to confuse a literary or musical work itself with its public performance.

Nor could Lerma invoke the protection of the fair use defense to copyright infringement, as had *The Post*. In finding that the first factor—the purpose and character of

616. *Religious Tech. Ctr. v. Lerma*, 1996 WL 633131, at *15 (E.D. Va. 1995) ("That ruling was made orally, in open court, with the Court advising the parties that it would explain its reasons in a written opinion and thereafter give the parties an opportunity to address remedies.").

617. *Id.* at *2.

618. *Id.* at *2-3. For a discussion of the merger doctrine, see *supra* note 282, and accompanying text.

619. *Id.* at *3.

620. *Lerma*, 1996 WL 633131, at 4. *But see supra* Part I.F.2.b.i (discussing general agreement among caselaw and commentaries that the functional ideas of recipes and other sets of instructions are not copyrightable, although in certain cases the specific expression of these ideas may be protected).

621. *Id.* at *4.

the use—tilted against Lerma, the court was not persuaded by Lerma's likening his actions to those of a reporter⁶²² and a researcher⁶²³: although he had not posted the material for commercial gain, he had demonstrated decidedly "non-neutral and non-scholarly motives."⁶²⁴

The second factor—the nature of the copyrighted works—also cut against Lerma. The court found the OT documents to be informational, and thus more available for fair use than creative works would have been.⁶²⁵ On the other hand, because the Church had not consented to the availability of the works through the unsealed court file or through unauthorized postings on the Internet, they qualified as unpublished, and therefore subject to greater "fair use" protection.⁶²⁶

The third factor—amount and substantiality of copying—also disfavored Lerma. Though admitting its inability to determine whether the excerpts posted by Lerma constituted "the heart of" the works at issue,⁶²⁷ the court found that inquiry moot in light of his extensive copying.⁶²⁸

622. *Id.* at *5 ("Lerma's motives, unlike those of news reporters, were not neutral and . . . his postings were not done primarily 'for public benefit.'").

623. *Id.* ("The degree of copying by Lerma, combined with the absence of commentary on most of his Internet postings, is inconsistent with the scholarship exception.")

624. *Id.* at *6.

625. *Id.* (citing *Lerma*, 908 F. Supp. at 1367). *But see supra* notes 518 and 607, and accompanying text (indicating disagreement between courts on this issue).

626. *Lerma*, 1996 WL 633131, at *7 (observing that the Church "has not released these materials to the public and does not plan to release them"); *see also* Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc., 923 F. Supp. 1231, 1242 n.9 (N.D. Cal. 1995) (indicating that for purposes of copyright protection, "publication," as defined in 17 U.S.C. § 101, involves "consensual release of . . . works to the public" by the copyright holder).

627. *Lerma*, 1996 WL 633131 at *8 (acknowledging that "[t]he Court is unable to evaluate this component because many of the copyrighted materials are so incomprehensible.")

628. *Id.* (noting Lerma's "extensive copying and posting," "verbatim copying," and, in many cases, "virtually . . . total reproduction" of the works at issue).

The court dismissed Lerma's argument that for fair use purposes a collection of works is to be considered as a single work: though this approach would have substantially reduced the proportional amount of material that he had copied, it directly contradicted both the relevant statute, 37 C.F.R. § 202.3(b)(3)(B) (listing factors to be used in determining whether a set of works constitute a "collection"); caselaw; and the Church's listing of each of the items separately for copyright registration. *Id.* at *9.

Only the fourth factor—the effect on the market for the copyrighted work—tipped in Lerma's favor, and that only slightly:⁶²⁹ because the fair use defense could not insulate the Church against economic harm resulting from legitimate commentary, because it seemed "unlikely" that the posted excerpts "would provide a sufficient basis for would-be parishioners to defect from Scientology,"⁶³⁰ because Lerma was not a competitor of the Church, and because the Church had not demonstrated specific harms that would or could occur as a result of Lerma's postings.⁶³¹

Deprived of the merger and fair use defenses, Lerma was found liable for copyright infringement.⁶³²

H. *Copyright and Trade Secret Status (III): The Netcom Decision*

In mid-1995, the Church brought a copyright infringement and trade secret misappropriation action against Dennis Erlich, a former minister of the Church, for allegedly posting online a number of Church documents.⁶³³ Also named as defendants were Tom Klemesrud, who operated the bulletin board service, alt.religion.scientology,⁶³⁴ that Erlich used, and Netcom On-

Equally unavailing was Lerma's claim that each of his postings should be seen as a small element of the collection of all of the postings in the relevant newsgroup. *Id.* at *10. As the court observed, this recontextualization of pure copying, in the hope that it would be redeemed by subsequent commentary posted in the same newsgroup (which the newsgroup's users would not necessarily see together with the text of the Church document), would allow "cyberbandits' [to] easily cover their tracks." *Id.* A Colorado district court, however, appeared to have some sympathy for this argument. *See Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1526 (D. Colo. 1995) (noting, in connection with the third factor of a fair use analysis ultimately favoring the defendants, that Lerma's postings "form part of the topical debate concerning whether the Works are of substance or are perpetuated as part of systemic mind control.").

629. *Lerma*, 1996 WL 633131 at *11.

630. *Id.* at *10.

631. *Id.* at *11.

632. The statutory minimum damages sought by the Church amounted to \$2,500. Because of Lerma's apparent financial hardship, the court declined to award the Church any attorney's fees or costs. *Id.* at *16.

633. *Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, 923 F. Supp. 1231, 1238 (N.D. Cal. 1995).

634. *Id.* at 1239; *see also Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, 907 F. Supp. 1361, 1366 (N.D. Cal. 1995) (observing that the bulletin board service "is run out of [Klemesrud's] home and has

Line Communications Services, Inc., which provided Internet access to that bulletin board.⁶³⁵

1. *Copyright Claim Upheld.* With some minor exceptions, all of the works at issue in this litigation had been validly copyrighted by the Church.⁶³⁶ They fell into two categories—"Exhibit A Works," which were mainly policy letters and bulletins, and "Exhibit B Works," unpublished Advanced Technology materials.⁶³⁷ Erlich himself did not

approximately 500 paying users"). The Church separately pursued, in Finnish courts, the operator of anon.penet.fi, an anonymous remailing service that the Church alleged had been used for identity concealment by some of those posting purloined Church documents online; the operator of that service ultimately closed it. See Jonathan I. Edelstein, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 255-63 (1996).

635. *Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, 923 F. Supp. 1231, 1238 n.2 (N.D. Cal 1995). These co-defendants were the subject only of a copyright infringement action. *Id.* at 1240.

In a separate decision, the court considered "an issue of first impression regarding intellectual property rights in cyberspace:" whether the operator of the bulletin board service and the Internet service provider connecting that service to the Internet should be liable for copyright infringement committed by a subscriber of the service. See *Netcom*, 907 F. Supp. at 1365. Denying Netcom's motion for summary judgment on the Church's claim of contributory copyright infringement, the court held that the Church had "raised a genuine issue of fact concerning whether Netcom should have known that Erlich was infringing their copyrights after receiving a letter from plaintiffs, whether Netcom substantially participated in the infringement, and whether Netcom has a valid fair use defense." *Id.* at 1381. However, the court dismissed the Church's claims of direct and vicarious infringement. *Id.* The court also denied the Church's motion for a preliminary injunction against Netcom and Klemesrud, holding that the Church had not shown a likelihood of success on the merits against either of these defendants. *Id.* at 1383.

It remains unsettled as of this writing how quickly the operator of an online forum must, to avoid liability itself, remove material after receiving a notice under 17 U.S.C. § 512 of the Digital Millennium Copyright Act alleging copyright infringement. See *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1053-54 (C.D. Cal. 2002) (granting America Online's motion for summary judgment on this issue); Anna Wilde Mathews, *The Final Frontier: Battle-Scarred Author Takes On Web Pirates*, WALL ST. J., July 22, 2003, at A1 (profiling plaintiff, speculative fiction author Harlan Ellison, and indicating that he appealed the matter to the Ninth Circuit Court of Appeals).

636. *Netcom*, 923 F. Supp. at 1241 (noting that one of the works had fallen into the public domain because its initial 28-year copyright term had not been renewed by the Church).

637. *Id.* at 1239.

deny copying the works,⁶³⁸ but claimed the defense of fair use.

The court found that the first fair use factor weighed slightly in Erlich's favor. His purported purpose for posting the works—to foster critical discussion of the Church's philosophies—had not been undermined by any evidence that the copying "was made out of spite or for other destructive reasons."⁶³⁹ Because Erlich had added little commentary or criticism to the original documents he had copied, his use was only slightly transformative;⁶⁴⁰ thus, the court focused on whether Erlich had a commercial purpose, but concluded that he did not.⁶⁴¹

The Church did not demonstrate that Erlich had obtained his copies of the works through deceit.⁶⁴² However, compared with his legitimate acquisition of Exhibit A works, his receipt of anonymously-sent Exhibit B documents on the Internet would not contradict an inference that he had obtained the latter documents improperly.⁶⁴³

In evaluating the second factor, although the court expressed reluctance to make such distinctions in the context of religious material, it found that all of the works at issue were generally more instructive and functional than creative,⁶⁴⁴ and thereby less deserving of copyright protection. The second factor thus weighed in favor of Erlich with regard to the Exhibit A works, but not with

638. *Id.* at 1242.

639. *Id.* at 1243.

640. *Id.*

641. *Id.* at 1244. The court rejected the Church's argument that Erlich gained in nonmonetary ways (such as by enhanced status and recognition among others interested in this topic), noting that no such evidence had been introduced and that Erlich had not taken credit for authoring any of the Church's works that he had posted. *Id.* (distinguishing *Weissmann v. Freeman*, 869 F.2d 1313 (2d Cir. 1989) (recognizing, in the context of academia, the nonmonetary gain of enhanced scholarly reputation)).

642. *Id.* at 1244.

643. *Id.* at 1245 (holding that the first fair use factor would thus weigh against Lerma with regard to the Exhibit B works).

644. *Id.* at 1246 ("This court is not convinced . . . that this factor should play a major role in the context of religious works, which do not easily fit into the creative/informational dichotomy."). Erlich's comments consisted of such minimal additions as, "The perfect reference for any occasion," "I believe a discussion of this policy is in order," "Any questions?" and "Someone requested this, I assume, to discuss." *Id.* at 1247 n.18 ("Standing alone, these remarks are hardly criticism or commentary.").

regard to the Exhibit B works, because as unpublished⁶⁴⁵ and closely-held materials those received heightened protection in this segment of the fair use analysis.⁶⁴⁶

The third factor weighed against Erlich, who had copied large portions of various works but had added minimal commentary.⁶⁴⁷ As had the *Lerma* Court,⁶⁴⁸ this court dismissed the defendant's arguments that he had actually copied only a small proportion of the entirety of a collective work⁶⁴⁹ and that his postings should be considered in the larger context of the newsgroup's entire discussion.⁶⁵⁰

The fourth factor weighed in Erlich's favor: his "sporadic and incomplete" reproductions of portions of the Advanced Technology could hardly, at least at this stage,⁶⁵¹

645. *Id.* at 1245 ("Even though a work is read by a large group of people, it is still unpublished where it is held confidential and the authors do not relinquish control over their copies of the work.").

646. *Id.* at 1246.

647. *Id.* at 1247 ("It appears Erlich copied all or almost all of many of the works . . . and mostly with no comments or with very brief comments at the beginning or end.").

648. *Religious Tech. Ctr. v. Lerma*, 1996 WL 633131 at *9-10 (E.D. Va 1995).

649. *Netcom*, 923 F. Supp. at 1246-47 (citing precedent to the effect that for fair use purposes individual components of collective works are regarded as separate works).

650. *Id.* at 1247 n.18 ("While an entire thread [of such comments] might be considered one composite work authored by all those adding to the thread, there is no evidence in the record that any of Erlich's postings were followed up with further comments or criticism on the works that are excerpted."). The court suggested that "a particular quotation of a copyrighted work in the context of a long thread that involves significant criticism or commentary could be fair use." *Id.*

Sixteen months later, the court observed that Erlich had yet to provide "persuasive evidence" of such additional commentary in support of his argument that his posting of the works online was transformative. *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, *15 (N.D. Cal. Jan. 6, 1997). The court also noted, without comment, Erlich's claim that his posting of the works verbatim was intended "to ensure that his audience knows that he knows what he is talking about, to verify the accuracy of writings attributed to Hubbard, to overcome the Scientologists' continued rejection of anything that is not actually Hubbard's words, and to point out inconsistencies in Hubbard's writings." *Id.* at *14.

651. *Netcom*, 923 F. Supp. at 1248 ("It seems unlikely, although possible, that Erlich's postings, if continued and expanded, could supply such a group with the means to compete with plaintiffs."). *See id.* at 1249 ("If Erlich's use were to become widespread, it could potentially have an effect on the market for plaintiffs' works by supplying future splinter groups with the materials needed to compete with the Church. The court views this potentiality as somewhat

be used by competitors of the Church to develop their own courses. In addition, the Church not only provided the structure and sequence of the material itself but also supplied trained guidance to those using it.⁶⁵²

Balancing these factors, the court found that the second (with regard to the unpublished works) and third outweighed the weak support of the first and fourth factors, and thus denied a finding of fair use⁶⁵³ for both categories of works. It therefore granted a preliminary injunction to the Church, prohibiting Erlich from further copying of the copyrighted works at issue, except as allowed by fair use, pending a trial on the merits.⁶⁵⁴

2. Trade Secret Claim Rejected. Proceeding to analyze the Church's trade secret misappropriation claim under California law, the court rejected Erlich's claim that trade secret protection necessarily involved commercial information, and thus that religious works could not qualify for such protection.⁶⁵⁵ Indeed, the AT documents were similar to a cigarette-quitting program whose "trade secret resides in the composite program as it is arranged for step-by-step delivery to the attendees."⁶⁵⁶ However, by claiming

remote."); see also *Netcom*, 1997 U.S. Dist. LEXIS 23572 at *22-23 (finding it "questionable that Erlich's noncommercial use, or even widespread conduct like Erlich's, would diminish or prejudice the potential sale of [the Church's] works, interfere with their marketability, or fulfill the demand for the works").

The court did not address directly the possibility that, like Arica's fixations material, the Church material exposed by Erlich and others online might swiftly be subsumed into the lectures and practices of some teachers of more traditional paths (as, in Arica's case, by a number of Jesuits).

652. *Netcom*, 923 F. Supp. at 1248.

653. *Id.* at 1249.

654. *Id.* at 1258. Exempted from this ruling was the document on which copyright had lapsed and which had thereby entered the public domain. The court reminded Erlich that "copying the works in their entirety with very little added criticism is almost certainly not fair use." *Id.*

655. *Id.* at 1251 (holding that "[t]he Church's status as a religion does not prevent it from holding a trade secret" and citing, *inter alia*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. b (1995) ("[N]onprofit entities such as . . . religious organizations can also claim trade secret protection for economically valuable information such as lists of prospective members or donors.")).

656. *Id.* at 1252 (quoting *SmokEnders, Inc. v. Smoke No More, Inc.*, 184 U.S.P.Q. 309, 312 (S.D. Fla. 1974) and noting that "in both cases the 'commodity' that is produced from the trade secrets is the result achieved by the person using the course materials and their techniques (whether it be stopping smoking or reaching a 'higher spiritual existence.')").

trade secret status for the entire collection of Advanced Technology works, the Church had failed to define the trade secret with particularity: its "definition is problematic because it is impossible to determine when the 'secret' has been lost after portions of the works have been disclosed."⁶⁵⁷

The Church did establish that these materials provided independent economic value from not being known to the public generally. The president of the Religious Technology Center testified that the Advanced Technology provided significant income for the Church through licensing fees paid as percentages of the donations made by parishioners to local Scientology churches for services based on the works.⁶⁵⁸ Though the Church admitted that it had no competitors,⁶⁵⁹ this was not a requirement of trade secret status: potential competition, as evidenced by "several past instances of breakaway Scientology-like groups exploiting" these works, sufficed.⁶⁶⁰

Finally, the court found that the Church had taken reasonable measures to protect the confidentiality of the Advanced Works.⁶⁶¹

657. *Id.* ("[T]his court is not satisfied that plaintiffs have identified their trade secrets with sufficient definiteness to support injunctive relief.")

The Church was not the first spiritual organization to encounter this obstacle. In *John Does I-VI v. Yogi*, 110 F.R.D. 629 (D.D.C. 1986), former students of Transcendental Meditation brought suit against the developer of that system, Maharishi Mahesh Yogi, and his affiliated institutions for allegedly fraudulent misrepresentation of the meditation programs and their benefits. *Id.* The court rejected the defendants' motion to require that virtually all discovery materials be sealed. *Id.* Though the defendants alleged that such confidentiality of their information was necessary because the plaintiffs would convey it to "a competitor of the Yogi's in the meditation business," the court looked to the definition of trade secret for guidance on protecting proprietary business information. *Id.* at 631-32 (citing RESTATEMENT OF TORTS, § 757, cmt. b (1939)).

The court held that the defendants "have failed to demonstrate with specificity the existence of proprietary information [in their] compilation of information The Court would not know how to draw a protective order that limits access to 'a body of knowledge.'" *Id.* at 633.

658. *Netcom*, 923 F. Supp. at 1253 ("These donations and fees provide the majority of operating expenses of these various Church organizations.")

659. *Id.* (citing deposition evidence).

660. *Id.* (citing *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 634 (S.D. Cal. 1993) and *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1078 (2d Cir. 1986)).

661. *Id.* at 1254 (observing that, according to the Church, the protective measures included "use of locked cabinets, safes, logging and identification of the materials, availability of the materials at only a handful of sites worldwide, electronic sensors attached to documents, locked briefcases for transporting

Unlike the *Lerma* Court,⁶⁶² this court did not find that trade secret status of the Advanced Technology works had been lost by the availability of the Fishman affidavit in the court file⁶⁶³ or by the fragments published in The Post's articles.⁶⁶⁴ Yet because the Church had not specified its trade secrets, the court could not analyze whether any of these had lost such status by being made generally known to the public.⁶⁶⁵

However, as in *Lerma*, the availability of the Advanced Technology on the Internet jeopardized its trade secret status. Reflecting on Erlich's contention that "eight of the documents were allegedly previously posted anonymously to a public portion of the Internet,"⁶⁶⁶ the court declared itself:

[T]roubled by the notion that any Internet user, including those using "anonymous remailers" to protect their identity, can destroy valuable intellectual property rights by posting them over the

works, alarms, photo identifications, security personnel, and confidentiality agreements for all of those given access to the materials"); see also Fisher, *supra* note 578, at C1 (noting that Church members seeking access to this material sign confidentiality agreements, obtain magnetized photo ID cards, and enter a secured area, where "security guards unlock the scriptures from cabinets where they are wired in place. Then guards escort the members to a room where they are locked in and monitored on video cameras."); Frankel, *supra* note 477, at 70 ("The instructor has about 20 seconds to plug the binder in at the table before an alarm goes off and, presumably, security guards come rushing in.").

662. See *supra* note 592, and accompanying text.

663. *Netcom*, 923 F. Supp. at 1255 (noting that that file had recently been ordered sealed, and holding that even if the documents had been temporarily available to the public, trade secret status would not be lost "unless they were somehow made generally available to the public during the period they were unsealed, such as by publication").

664. *Id.* ("Arguably, the Church's alleged secrets are such that their value depends on the availability of the complete courses and not mere fragments, thus disclosures that describe parts of the works or disclose isolated portions do not necessarily suffice to ruin the value of the entire works as secrets.").

Yet it could also be argued that "fragments," or individual teachings and techniques presented in the context of a larger spiritual system, are particularly suitable for this treatment. Not only may specific meditations or doctrines offer (or appear to offer) immediate insight or reassurance, but they might be reconfigured to become part of another spiritual system (as in the case of Arica's enneagram material and its distribution and reinterpretation within the Jesuit community).

665. *Id.*

666. *Id.* The court observed that Erlich was not estopped from raising this argument, because he did not appear to be acting in concert with the previous misappropriators. *Id.* at 1256.

Internet The anonymous (or judgment proof) defendant can permanently destroy valuable trade secrets, leaving no one to hold liable for the misappropriation.⁶⁶⁷

Thus, because the works posted by Erlich "were possibly already generally available to the public. . . . [the Church] has not shown a likelihood of success on an essential element of its trade secret claim."⁶⁶⁸ Moreover, even if the posting of these works in a newsgroup was not the same as publishing them in major newspapers or on television, the court recognized that "those with an interest in using the Church's trade secrets to compete with the Church are likely to look to the newsgroup" at issue, and concluded that "posting works to the Internet makes them 'generally known' to the relevant people—the potential 'competitors' of the Church" to effect loss of trade secret status.⁶⁶⁹

Because the Church had failed to define its trade secrets adequately and to demonstrate that the material had been kept secret, the court denied its request for an injunction on trade secret grounds.⁶⁷⁰

3. *Reconsideration of Trade Secret Issue.* By January 1997, when the court ruled on the Church's motion for an expanded preliminary injunction, the Church had identified specific trade secrets. Though expressing doubt that the Church would ultimately be able to establish trade secret status for that material, the court recognized that publication before trial would make this point moot; it

667. *Id.* at 1256 (footnote omitted).

668. *Id.* at 1256-57. However, the court held open the possibility that misappropriation could be established because Erlich, however he obtained the materials, and whether or not he was a competitor of the Church or otherwise profited from his postings, "knew or had reason to know that his . . . knowledge of the trade secret was . . . [either] [d]erived from or through a person who had utilized improper means to acquire it [or] [a]cquired [it] under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.* at 1257 n.31 (quoting Uniform Trade Secrets Act, CAL. CIV. CODE § 3426.1(b) (1984)). See *supra* note 319 and accompanying text (suggesting that such material be labeled as "confidential").

669. *Id.* at 1256.

670. *Id.* at 1257 (holding that the Church "has failed to show a likelihood of success on its trade secret misappropriation claim").

therefore enlarged the injunction to prevent Erlich from disseminating any of the information so identified.⁶⁷¹

The court took the opportunity to characterize as "an overly broad generalization" its earlier statement that posting on the Internet makes information generally known to the relevant community and removes its trade secret status.⁶⁷² It acknowledged that in such a situation a determination of the effect on trade secret status would have to take into account the particular circumstances, including the interests and First Amendment rights of innocent third parties who had obtained the information from the postings at issue.⁶⁷³

III. AVATAR: HARRY PALMER AND THE CHAPTERS OF SECRETS⁶⁷⁴

Arica's litigation targeted individuals who had placed into a different context, and then published in book form, a set of material that Arica claimed as part of a mid-level training. By contrast, the Church of Scientology generally launched its intellectual property lawsuits against individuals who took isolated pieces of its advanced trainings and posted them online, allegedly not for purposes of scholarly criticism or elaboration but instead to attack the Church.

Star's Edge,⁶⁷⁵ a third group seeking to protect as intellectual property its teachings and techniques, confronted the clearest example yet of competition in the

671. See *Religious Tech. Ctr. v. Netcom On-Line Communication Svcs., Inc.*, No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, at **42-44 (N.D. Cal. Jan. 6, 1997).

672. See *supra* notes 667 and 668, and accompanying text. One commentator had interpreted the previous *Netcom* opinion and *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995), as holding broadly that "regardless of whether the original posting on the Internet was wrongful[,] those who subsequently gain access to the material are no longer misappropriating trade secrets." See *THE TRADE SECRET HANDBOOK: PROTECTING YOUR FRANCHISE SYSTEM'S COMPETITIVE ADVANTAGE* 36 (Michael J. Lockerby ed., 2000).

673. *Netcom*, 1997 U.S. Dist. LEXIS 23572, at *41.

674. With apologies to J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* (1999).

675. For ease of reference, this Article sometimes refers to Star's Edge as "Avatar."

spiritual marketplace. A former Star's Edge instructor published (and advertised online) materials claiming to allow readers to re-create the Avatar training experience offered by Star's Edge. The legal resolution of this fact-sensitive situation involved the degree to which Avatar's techniques (including not just the language but the sequence of various affirmations) are uncopyrightable ideas rather than copyrightable expressions, and engaged the court in an extensive comparison of features of the competing works.

A. Background

In 1987, Harry Palmer, an educational psychologist and former Scientology instructor,⁶⁷⁶ began to offer publicly through his company, Star's Edge,⁶⁷⁷ a system that "instruct[s] individuals how to effect positive changes in their lives through the management of their beliefs."⁶⁷⁸

676. See *Palmer v. Braun*, 287 F.3d 1325, 1327 (11th Cir. 2002) ("Palmer left the Church [of Scientology] in 1982."). Palmer testified that he had taught Scientology for ten years. Transcript of Nonjury Trial Before Hon. Gregory A. Presnell, *Palmer v. Braun*, Case No. 6:00-cv-1662-Orl-31JGG, at 95. [Hereinafter, the pages of the trial transcript, which was made on October 8 and 9, 2002, are referenced by the prefix "TRA" and an indication of the individual testifying.]

Palmer is the same person who was sued by the Church of Scientology for operating a Scientology mission without paying licensing fees for the Church's intellectual property. See *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 614 F. Supp. 500, 501, 506 (W.D.N.Y. 1985), *rev'd*, 794 F.2d 38 (2d Cir. 1986), discussed *supra* Part II.B.

Asked whether any ideas in Avatar also appeared in Scientology, Palmer replied, "I assume there are, yes." Harry Palmer Testimony, Transcript of Preliminary Injunction Hearing Before Hon. Gregory A. Presnell, Case No. 6:00-CV-1662-ORL-31JGG, June 28, 2001 [hereinafter TRPI], at 60.

677. See *Palmer v. Braun*, 155 F. Supp. 2d 1327, 1328 (M.D. Fla. 2001). Star's Edge is not a publicly traded corporation, and Palmer is its sole shareholder. Harry Palmer Testimony, TRA83.

678. *Palmer*, 155 F. Supp. 2d at 1328. Palmer also described Avatar as a "nine-day course that teaches a person to live deliberately, be responsible for their actions. . . . To act out of choice rather than to act out of unconscious impulse or urging." TRPI, *supra* note 676, at 21.

The course, which costs approximately \$2,000, "is conducted by trained course leaders, known as 'Masters,' and typically takes nine ten-hour days to complete." Plaintiff's Original Complaint and Request for Injunctive Relief at 2 [hereinafter Complaint]. By October 2002, the price had risen to \$3,000. Harry Palmer Testimony, TRA32. Palmer acknowledged having written in the *Avatar Journal*, a Star's Edge publication, in the early 1990s that one reason for

According to Palmer, at the time of litigation in 2001, more than 50,000 people had taken the course; the course materials had been translated into at least 14 languages; and the course was available in at least 60 countries.⁶⁷⁹

By Palmer's account, presented at trial and in his introductory book about the Avatar system, *Living Deliberately*,⁶⁸⁰ he developed the course slowly and with great introspection. After taking "a lot of different New Age and self-development and self-improvement courses," he decided to clarify his understanding of their material through a process of "sensory deprivation tanking, which was floating in a sealed tank where the sensory input that's coming from the senses of your body are shut off, so that basically you are just consciousness."⁶⁸¹ Over a period of eight weeks of such experiences in the fall of 1986, Palmer made notes and created lesson plans⁶⁸² to elaborate on his primary insight: "I create my experiences according to what I believe."⁶⁸³

The three sections of the Avatar course materials are progressively more expensive. Section I, a 264-page manual

setting the course prices this high was to attract a particular type of participant. *Id.* at 78-79.

679. Complaint, *supra* note 678, at 3. In October 2002, Palmer estimated that a total of 60,000 people had taken Avatar courses. Harry Palmer Testimony, TRA76.

680. HARRY PALMER, *LIVING DELIBERATELY: THE DISCOVERY AND DEVELOPMENT OF AVATAR* (1994) [hereinafter PALMER, *LIVING DELIBERATELY*].

681. TRPI, *supra* note 676, at 21; *see also* Palmer v. Braun, 155 F. Supp. 2d 1327, 1329 n.1 (M.D. Fla. 2001) (quoting Palmer more extensively on the process of sensory deprivation); *see also* SMITH, *supra* note 36, at 294-95 (discussing John Lilly's development of the sensory deprivation tank, and his experiments in using it while under the influence of psychedelic drugs.). *Cf.* CHAYEFISKY, *supra* note 54, at 136 (statement, by fictional character based on John Lilly, that after taking psychedelic drugs and entering a sensory deprivation tank he "programmed myself into my own original life force").

682. *See* TRPI, *supra* note 676, at 22; *see also* PALMER, *LIVING DELIBERATELY*, *supra* note 680, at 34 (claiming that the author spent "most of my time" for eight weeks in a sensory deprivation tank, isolated with his thoughts); *id.* at 37 ("Here was where the lessons of Avatar unfolded, watching consciousness define itself from the void, rising and ebbing in that no-space sea of inexpressible awareness."); *id.* at 53 (indicating that Palmer drained and dismantled the tank in September 1986, having realized that "there were easier ways" to change his state of awareness). *But see id.*, frontispiece ("The characters and events described in the text of *LIVING DELIBERATELY* are intended to entertain and teach rather than present an exact factual history of real people or events.").

683. PALMER, *LIVING DELIBERATELY*, *supra* note 680, at 31.

titled *ReSurfacing*,⁶⁸⁴ presents introductory meditations that are explored during a two-day course for which the registration fee is \$295.⁶⁸⁵ Section II, a thirty-nine-page manual entitled *The Exercises*, trains the student to "recover the effortless ability to create personal reality."⁶⁸⁶ Section III, which involves a seventy-seven-page handout of *The Procedures*, "explores the foundational beliefs that create the universe and presents a simple and effective technique for managing beliefs."⁶⁸⁷

Before students of Section II and Section III receive these materials, they are required by Avatar to sign a confidentiality agreement that requires them to return the materials at the conclusion of the course.⁶⁸⁸ Palmer asserted that these restrictions are necessary to preserve both the course's integrity and its economic value.⁶⁸⁹

Indeed, according to Palmer, the course materials cannot truly be experienced merely by reading them, but require the services of a "well-trained and disciplined

684. HARRY PALMER, *RESURFACING: TECHNIQUES FOR EXPLORING CONSCIOUSNESS* (Kayt Kennedy et al. eds., 1994) [hereinafter PALMER, *RESURFACING*]. Like PALMER, *LIVING DELIBERATELY*, PALMER, *RESURFACING* is available for sale to the general public. See Complaint at 3.

685. *Palmer*, 155 F. Supp. 2d at 1329. PALMER, *RESURFACING*, at iii, indicates that it was copyrighted in 1994. However, the Complaint states that the *ReSurfacing* registration was received by the Copyright Office on or about November 28, 2000. See Complaint at 4; see also Harry Palmer's own Affidavit in Support of Plaintiffs' Motion for Preliminary Injunction (filed June 25, 2001) at 2 [hereinafter Harry Palmer Affidavit], which also states that the application was submitted in November 2000.

Although Avatar does not allow students to retain materials distributed in connection with Sections I, II, and III, *ReSurfacing* itself is publicly available as "an inexpensive Avatar workbook of self-development materials that [people] could work on in their spare time in the privacy of their own home," in any "self-evolvement classes and study groups," or, with an Avatar master, as Section I of the Avatar Course. PALMER, *RESURFACING*, *supra* note 684, at ix.

686. *Palmer*, 155 F. Supp. at 1329 (quoting Exhibit 35 at ii).

687. *Id.* (quoting Exhibit 36 at ii). Section III offers students the ability to become "source,' or 'the seat of consciousness, creating everything outside through conscious intent.'" *Palmer v. Braun*, 287 F.3d 1325, 1327-28 (11th Cir. 2002) (quoting the Record at 2-60, Exhibit 11 at 5). "When a person is 'at source,' he has achieved the enlightenment that the Avatar Course offers and is in control of his reality." *Id.* at 1328.

The materials for Section II and for Section III were copyrighted in 1988. Harry Palmer Affidavit, *supra* note 685, at 1-2.

688. *Palmer*, 155 F. Supp. at 1329. These Sections of the Avatar course, as well as defendant's allegedly-infringing Source Course, were filed under seal to preserve the confidentiality of the Avatar material. *Id.* at 1332 n.8.

689. *Id.* at 1329-30.

master . . . to ensure that the Avatar techniques make it off the page and into your life."⁶⁹⁰ The master can present the techniques in a fashion personalized for the individual student,⁶⁹¹ and in fact is trained to assist students who "get upset in doing some kind of self-examination."⁶⁹² By maintaining control over the materials and the authority of masters to teach them, Avatar can ensure the quality of the course.⁶⁹³

The confidentiality requirement is also imposed on Avatar "Masters," who have completed Section IV of the course and are thereby qualified to be licensed by Star's Edge teach to others the earlier sections.⁶⁹⁴ However, Eldon

690. PALMER, RESURFACING, *supra* note 684, at 111; *see also* TRPI at 29 ("We want [the Avatar course] to be experience rather than an intellectual exercise. We want somebody to encounter it as an experience It is the difference between eating an apple and describing what an apple tastes like").

691. *See* TRPI at 29 ("We want [students] to hit it fresh and be given [the material] in an order that the licensed master considers is most beneficial to the person.").

692. *Id.*

693. *Id.* ("If somebody else were delivering our materials and was doing it in a way that wasn't proper, the reputation of Avatar would go downhill.").

Palmer unapologetically insisted that "[h]istorically, technologies not associated with profit are short-lived. . . . Somebody has to ensure that the technology is purely presented Somebody has to settle disputes and keep everything on track. Somebody has to pay the bills." PALMER, RESURFACING, *supra* note 684, at 113; *see also id.* at 114 ("We intend to set an example for the world: *prosperity and good works belong together.*").

694. *See* Complaint, *supra* note 678, at 3 (stating that "[a]mong other things, the Master Course trains graduates of the AVATAR course to become licensees of Star's Edge. The Master Course uses the Confidential Works as part of its curriculum."); *id.* at 4 (asserting that "[b]efore receiving access to the Confidential Works, participants in the Master Course must sign an agreement not to disclose the contents of the Confidential Works or the Master Course."); Harry Palmer Affidavit, *supra* note 685, at 2 (indicating that "Master of Awakening," commonly known as "Avatar Master's Course Materials Section IV," was copyrighted in 1988).

As of October 2002, the cost of the Masters course was \$3,000. Harry Palmer Testimony, TRA32. Masters are required to forward to Star's Edge a royalty of fifteen percent of the fees that they receive from each student that they train. *Id.* at 87.

Also offered by Star's Edge is Section V, "the Wizards Course", which endows its graduate with the "ability to transform civilization." *Palmer*, 155 F. Supp. 2d at 1329 n.3 (quoting Exhibit 4 at 147); *see also* PALMER, LIVING DELIBERATELY, *supra* note 680, at 112 (maintaining that Avatar's mission is to enable students to "perceive that the only difference between any of us is beliefs, and that beliefs can be created or discredited with ease, . . . [so that] world peace will ensue."). The Wizards course was offered, as of October 2002,

Braun, whose license to teach was revoked by Star's Edge in 1991 after a dispute over Braun's payment of royalties,⁶⁹⁵ did not return the materials as required by his Confidential Materials Security Contract.⁶⁹⁶ Whether or not he destroyed the materials as he claimed,⁶⁹⁷ Braun apparently had them in his possession when he began writing in 1991 a document that he would later market as *The Source Course*.⁶⁹⁸ In January 1991 Braun also wrote⁶⁹⁹ *The Wiz of*

at a price of \$7,500. Harry Palmer Testimony, TRA33. At that time, Avatar had designated approximately 8,000 masters and 4,000 wizards. *Id.* at 81. Sections IV and V, however, were not at issue in the litigation. *Palmer*, 155 F. Supp. 2d at 1329 n.3.

695. *Palmer v. Braun*, 287 F.3d 1325, 1328 (11th Cir. 2002).

696. *See Palmer*, 155 F. Supp. 2d at 1330. Braun, who like Palmer is a former student of Scientology, took the Avatar course in 1987, and became an Avatar Master in 1989. *Id.* at 1328.

697. *See id.* at 1330 n.4. Braun testified that in early 1991 the Avatar materials "were probably in the basement," but that he made no use of them in developing the Source Course: "I wasn't going to sit down and try to paraphrase that." Braun Testimony, TRA 242. Nine years later, Braun completed the document: "I printed it out [from a computer disk]. I read through some of the various metaphysical books that I had and looked around on the Internet . . . And I kind of expanded it and worked on it." *Id.* at 243.

698. *Palmer*, 155 F. Supp. 2d at 1330 n.6. This issue resurfaced, in a slightly different context, in August 2003, when NXIVM Corp. and First Principles, Inc., which offer professional training programs, sued the operator of a Web site that featured a critique of the programs as a cult and a form of mind control; other defendants included the author of this evaluation, and the student who, in apparent violation of a confidentiality agreement, supplied program materials to the Web site operator. *NXVIM Corp. v. Ross Inst.*, 03-CV-976 (N.D.N.Y.).

That agreement designated "[a]ll material, methods, and information contained in" the program as "proprietary and confidential," and prohibited their being "copied, duplicated, taught, or otherwise used" without the group's "express written permission." Executive Success Programs, Inc., Student Enrollment Application. (Exhibit B of Nancy Salzman, Affidavit in Support of Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, filed Aug. 6, 2003).

On August 21, the Federal District Court for the Northern District of New York denied the plaintiff's motion for a temporary restraining order and preliminary injunction that would have barred the online publication of this material. As of late September, the case was "heading to the U.S. Court of Appeals for the Second Circuit." John Caher, *Free Speech Challenged by Posting of Copyrighted Material on Web*, N.Y.L.J., Sept. 25, 2003, at 1; *see also* Michael Freeman, *Cult of Personality*, FORBES, Oct. 13, 2003 at 88, 92. Freeman indicated that the program's students must sign a nondisclosure agreement and "vow never to talk about what they learn. If they violate it, they are 'compromising inner honor and integrity.'"

Cf. *DVD Copy Control Assoc., Inc. v. Bunner* 75 P.3d 1, 16 (Cal. 2003) (holding that the defendant's First Amendment right to publish on Web sites information concerning the decryption of DVD's was trumped by "the significant

Orlando, an extended criticism of Palmer and the Avatar course,⁷⁰⁰ which he posted on the Internet in May 1996.⁷⁰¹

The Internet posed increasing threats to Avatar. In July 2000, Palmer obtained a default judgment against an individual who had offered the actual Avatar materials for sale online for the amount of \$100 and had made them available for free on several Web sites.⁷⁰² Also during that summer, messages posted on the Internet under the name "Free Tars" appeared to indicate that their author(s) possessed the confidential Avatar materials and intended to make them available online at no charge.⁷⁰³

Although "Free Tars" did not follow through on its threat,⁷⁰⁴ which was never traced to Braun, the incident apparently prompted Braun to post a statement that "I have a nearly completed manuscript that is an analog of the Avatar course called The Source Course."⁷⁰⁵ On October 5,

government interests served by the preliminary injunction" prohibiting such publication.)

699. Braun Testimony, TRA217.

700. See *Palmer*, 155 F. Supp. 2d at 1330. *The Wiz of Orlando* is available at <http://www.scientology-kills.org/avatarpg1.htm> or http://www.scientology-kills.org/The_Bastard_Child/the_bastard_child.htm. 287 F.3d at 1328 n.1.

701. Braun Testimony, TRA222.

702. See *Palmer v. Slaughter*, No. Civ.A. 99-899-GMS, 2000 WL 1010261 (D. Del. July 13, 2000) (granting Palmer an injunction prohibiting Slaughter from continuing to infringe Palmer's intellectual property rights, and compelling Slaughter to return Avatar materials; and awarding Palmer damages in the amount of \$20,000 for copyright infringement, treble damages in the amount of \$12,000 under the Lanham Act, and attorney's fees in the amount of more than \$8,000).

This episode might not be the same one referred to by the district court. See *Palmer v. Braun*, 155 F. Supp. 2d at 1330 n. 4 (indicating that "although an excerpt of the Master's notes recently began circulating on the Internet, Palmer and Star's Edge do not allege that Braun is responsible for the posting.")

703. See *Palmer v. Braun*, 155 F. Supp. 2d at 1330.

704. *Id.* at 1330 n.5 ("The threat turned out to be a hoax, and the publication never occurred.")

705. *Id.* at 1330 (quoting Exhibit 15). The Usenet groups on which Braun posted messages included alt.clearing.technology, alt.religion.scientology, and alt.clearing.avatar. Palmer Affidavit, *supra* note 685, at 5-8. (The defamation claims that Palmer brought against Braun in connection with such messages are beyond the scope of this Article.) As of July 2003, Braun appeared still to be posting messages in the last of these groups concerning the ongoing litigation with Palmer. [Search for "Source Course" conducted under the "Groups" feature of <http://www.google.com>, July 25, 2003].

Braun testified that until July 2000 he had mainly been using the last of these groups, Braun Testimony, TRA231, which featured occasional comments on Palmer and the Avatar course; he characterized a Usenet news group as

he claimed to have finished a first draft, and observed, a little more cautiously, that it would be useful to "Avatar graduates who lack a take-home manual. . . ." ¹⁷⁰⁶

On October 28, 2000, Braun posted a message asserting that "[t]he excuses Star's Edge uses for keeping the materials secret are, in my opinion, utter self-serving bullshit. That's why I am about to end the secrecy."⁷⁰⁷ The same day, a "Free Tars" message noted that "The Source Course could serve as the 'take home materials' that are missing from the Avatar course."⁷⁰⁸

On November 9, Braun posted messages offering The Source Course, for \$25 (or for free to those who could not afford his quoted price), and stating that "[i]f you've taken the confidential Avatar course, and wished you had received take-home materials, The Source Course can serve as a refresher for further work on your own."⁷⁰⁹

Star's Edge and Palmer contacted Braun on November 20, alleging that The Source Course infringed the copyrighted Avatar materials and demanding that Braun cease offering it.⁷¹⁰ Asked by Star's Edge for a copy of his work, Braun in turn requested payment and specific identification of the alleged infringements.⁷¹¹ Star's Edge and Palmer did not furnish such a list.⁷¹² three months

"sort of like a big international discussion board" divided by topic. Braun Testimony, TRA232. (Messages posted on alt.religion.scientology had also been at issue in *Religious Tech. Ctr. v. Netcom*, 923 F. Supp. 1231, 1239 (N.D. Cal. 1995); see *supra* note 634, and accompanying text.

706. *Palmer*, 155 F. Supp. 2d at 1330 (quoting Exhibit 21 at 1).

707. *Id.* (quoting Exhibit 23).

708. *Id.* (quoting Exhibit 24 at 1).

709. *Id.* (quoting Exhibit 28).

710. *Id.* at 1330.

711. Braun Testimony, TRA245 ("When [they] ordered a copy, I typed a letter, stuck it in the cover, and I said, 'You think there's copyright infringement. Here, tell me what it is point by point' . . . I said I would consider making amendments.")

712. *Id.* at 246. At trial, counsel Penny Phillips argued for Palmer that, "[c]opyright law does not require copyright owners to provide potential infringers with a road map by which they can avoid substantial similarity Mr. Braun cannot seriously have expected that he would receive that type of assistance." TRA 290-291.

Braun's counsel, John M. Merrett, responded that

[i]f I wander into . . . your hunt club's leased property, and you say, "Hey, this is private property . . ." is it unreasonable of me to say, "Where is the line? Where is the border?" . . . [T]he answer was not, "The big oak tree down there" There was no response.

later, they sought a preliminary injunction to prevent Braun from publishing the Source Course or otherwise revealing Avatar materials.⁷¹³ By the time of litigation, Braun had sold approximately 300 copies of The Source Course.⁷¹⁴

B. *The District Court: Preliminary Injunction Denied*

Because Braun did not dispute that Star's Edge held a registered copyright in Avatar, the court moved directly to determining which elements of the Avatar materials were protected by copyright as expressions, and then to examining whether Braun had infringed the copyright by copying enough of those elements to make his work substantially similar to Avatar's.⁷¹⁵

Infringement could not be grounded on the mere fact that both Avatar and The Source Course requested that participants complete a personality profile form. Since "anyone pursuing the idea of a personality profile would likely use a similar form to elicit the same basic information,"⁷¹⁶ the form itself was not an original work subject to copyright protection.⁷¹⁷

Id. at 298-99 (concluding that "there was an opportunity [for Star's Edge] to avoid all this").

713. See *Palmer*, 155 F. Supp. 2d at 1330. The plaintiffs requested the preliminary injunction on the grounds of libel, unfair competition, and trademark and copyright infringement, but did not argue the libel claim before the district court. *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002). As discussed *infra*, the district court denied the request on the copyright-infringement claim.

714. Braun Testimony, TRA262-63.

715. See *Palmer v. Braun*, 155 F. Supp. 2d at 1331, 1331 n. 7.

716. *Id.* at 1332 (citing *Baker v. Selden*, 101 U.S. 99, 25 L.Ed. 841 (1879) (indicating that an accounting form is not copyrightable when used to record rather than to discuss information)). A type of personality profile was also a part of the Arica training. See WILSON, *supra* note 55, at 341 (indicating that Arica's "concomitant association" exercise, presented early in its 40-Day Training, involved "writing in a notebook 500 names, 500 places and 500 ideas from my past."); *id.* at 425 (noting that Arica trainings include "a series of questions to assist us in remembering emotionally charged events in our lives").

717. See *Palmer v. Braun*, 155 F. Supp. 2d at 1332. On appeal to the Eleventh Circuit Court of Appeals, *Palmer* argued that the personality form was in fact copyrightable. See Brief of Appellants (filed Sept. 7, 2001), at 25 (citing *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626 (8th Cir. 1989) (indicating that a set of test statements, such as "No one seems to understand me," that constituted the Minnesota Multiphasic Personality Inventory (MMPI) were copyrightable)).

However, the court focused on the apparent similarity of four parallel sections of the Source Course and Avatar materials, each consisting of lists of statements or instructions. First, like Avatar's Section I, The Source Course offered students a list of sentences discussing how to identify "transparent beliefs."⁷¹⁸ However, since this underlying concept was not itself copyrightable, and because the court found no substantial similarity between the two lists, it did not find injunctive relief appropriate.⁷¹⁹

The distinction between the *Baker* and *Applied Innovations* decisions may rest on the purpose of the forms employed by Avatar and the Source Course, about which the record is unclear.

718. See *Palmer*, 155 F. Supp. 2d at 1333. These beliefs are apparently one's basic underlying assumptions about life and the world. Palmer emphasized the similarities between the following section of his Avatar course and that of the Source Course:

Avatar:

Transparent Beliefs:

A belief is transparent when you are operating through the belief without noticing it. Transparent beliefs are seldom helpful and, in fact, can be fatally debilitating. Most are self-sabotaging, adopted in a moment when you were something less than rational.

The first impression you have of a transparent belief is that it is unquestionably true. That's just the way life is. That's the way I am. Here's the proof! But then something funny happens: you discover that the proof for holding the belief is actually produced by the belief itself. A pattern begins to unfold.

Transparent beliefs are discovered by tricking yourself into expressing them and then stepping back and looking at what you said. Transparent beliefs are often hidden under the desire to be right, so finding transparent beliefs requires a degree of vulnerability.

The Source Course:

Your life and how you create it.

You've already been asked to write down some personal history and a few observations for future reference. Here are some more questions about your feelings and beliefs.

Note that "beliefs" may also be called facts, opinions, attitudes, emotions or thoughts. Any general statement that can be preceded by the word "because . . ." is a belief of one sort or another. The word "should" is often part of a generalized, broadly shared belief.

When you come across a belief or "fact" that seems absolutely true—one that many people would agree describes "the way things are"—you have hit on a transparent belief that may be manufacturing your own reality or a shared reality created within the mass consciousness of your culture or group. Generally accepted beliefs are worth checking out, just in case.

Id. at 1333.

719. *Id.* at 1333-34.

A second alleged infringement, involving seemingly analogous procedures for "dissolving thoughts," struck the court as "virtually incomprehensible" in each system:⁷²⁰ and yet, even though Braun had acknowledged in The Source Course material that his procedure was similar to that of the Avatar course, the court found that an ordinary observer would not be likely to detect the similarity between the two works.⁷²¹

720. *Id.* at 1334-35. *Cf. supra* notes 585 and 627, and accompanying text (acknowledging the court's difficulty in understanding the Church documents at issue).

Braun had introduced the procedure as one known as the Tibetan Void Gem.

It is a way of dissolving thought forms. It is described in the works of Tarthank [sic] Tulku, a Tibetan Buddhist leader, and has been included in many works. It is also related to the Sedona Method. A version called the "Creation Handling Procedure" is taught on [sic] the Avatar course. Here we'll call it the "Thought Dissolving Process," or TDP for short.

Palmer, 155 F. Supp. 2d at 1334.

721. *Palmer*, 155 F. Supp. 2d at 1334-35. The court reproduced the first step of the Source-Course's eight-step procedure and Avatar's six-step procedure:

Avatar:

Identify with and experience.

Awareness within a creation is consciousness. Every creation contains consciousness and is connected with every other creation through its beginning in awareness. Awareness is without definition; it cannot be described as this or that, existing or not. Only the creations of awareness exist. Consciousness is awareness being limited (defined) by a form or quality.

In the Feel-It Exercises of Section II, you learned to merge with a creation and feel how it feels. This is the essence of "identify with and experience." It requires that you surrender any resistance you might have to existing as the belief, the feeling, the emotion, the idea, the identity, the time, the space, or the mass of whatever you are seeking to identify with and experience. You become the limited expression of consciousness that is being the creation

The Source Course:

Grok it.

To dissolve a belief, you sense and enter the thought form in order to fully accept and experience it. You may feel you are entering the center of an energy field or moving toward to [sic] vortex of the belief or feeling. Just do a little circular breathing, and settle into it. Get the full feeling as intensely as possible, without any opinion or judgment.

Enjoy the ride.

Id. at 1334.

Explaining that the word "grok" first appeared in the science fiction novel, ROBERT HEINLEIN, *STRANGER IN A STRANGE LAND* (1961) (concerning the establishment of a new religion, and featuring an attorney well-versed in intellectual property law) and that it connotes an intuitive or empathetic understanding or rapport, *Palmer v. Braun*, 287 F.3d 1325, 1332 (11th Cir.

A third procedure, which was formulated in two steps in Avatar's Section III and nine in The Source Course, involved clarifying the student's belief system by examining her physical and mental reactions to her own rendition of a prescribed list of statements or affirmations.⁷²² Once again,

2002) (citing 6 OXFORD ENGLISH DICTIONARY 864 (2d ed. 1989)), the court of appeals proceeded to examine the remaining steps of these procedures:

Step two in CHP [Avatar's "Creation Handling Procedure"] asks students to "[d]efine the outermost limits" of the thought form; TDP [The Source Course's Thought Dissolving Process] instructs students to "[e]xpand to its outer edges". . . . CHP's step three is "[l]abel it without judgment;" TDP's is "[o]bserve it without filters." In step four of CHP, students are told to "[d]issociate from the creation" by saying, "This is not-I. This is my creation.;" TDP students are told in step four to "[s]ay to yourself. 'This isn't me. It's something I created.'" Step five of CHP tells students to "[d]iscreate the creation" by halting "an existing flow of energy" as one would "turn off a light at the switch.;" step five of TDP tells students to "[d]ecide to drop it, or let it dissolve" by "switch[ing] off its energizing force." CHP, in step six, asks students to "[c]reate what you prefer" and use CHP to eliminate any unwanted associations in the new creation. TDP tells students, in step seven, to "[d]ecide what, if anything, to put in its place" and, in step eight, to "[s]ee if any 'Yeah, buts' arise." If "Yeah, buts," or unwanted associations, do arise, TDP instructs students to "use the TDP on them individually."

Id. at 1332-33 (references to exhibits omitted).

722. The corresponding first steps of these procedures are:

Avatar:

Procedure. . .

The student voices a statement from the Source List as a primary origination and then discovers any secondary originations that are occurring spontaneously before, during, or after the primary origination.

The Source Course:

The Procedure:

State the affirmation as a declaration of truth. You want the feeling that this is absolutely true, with no reservations. Repeat it until you get a thought that opposes or qualifies the statement; or until you find a reaction like a physical sensation or twitch. There is your first "Yeah, but."

Palmer, 155 F. Supp. 2d at 1335.

Though it did not compare the rest of the steps in the corresponding procedures of these two courses, the Court of Appeals observed that Section III of the Avatar course: instructs students to focus on their thoughts about their bodies, then on beliefs about "limitations, identities, and persistent beliefs"; teaches them to acknowledge that "It's all right to feel like this" about "really persistent beliefs"; and finally involves students in an understanding of the "collective consciousness." *Palmer*, 287 F.3d at 1333 (quoting the Record at 4, Exhibit 36 at 66-69). The Source Course has a similar progression of focus; advises students to affirm, "It's OK to feel the way I do" about persistent beliefs;

the court found that the expression of the concept was not substantially the same, and thus that there had been no infringement.⁷²³

Finally, Avatar claimed that The Source Course had included, in a list of thirty-four affirmations,⁷²⁴ fifteen that were substantially similar to, and used for the same purpose as, the thirty-one statements provided in Avatar's Section II.⁷²⁵ Yet even if the sentences in question appeared "strikingly similar" to an eye untrained in these matters,⁷²⁶ the court doubted that the apparent copying of this relatively small portion of the Avatar materials was sufficient to ground an infringement judgment: thus, it would not grant injunctive relief.⁷²⁷

and "suggests that the TDP [procedure] be used on others' consciousness." *Id.* (quoting the Record at 4, Exhibit 37 at 50).

723. *See id.* at 1335.

724. The court of appeals clarified that the purpose of Avatar's list is to enable students to "assume control" of their beliefs, by noticing the mental associations that arise when they say any of the short statements included, and ultimately to eliminate such associations. *Id.* at 1331. The Source Course used its own statements in a similar process. *Cf. supra* Part II.A, (discussing the Scientology concept of engrams, and techniques designed to remove them).

725. *See Palmer*, 155 F. Supp. 2d at 1335-36.

726. Although the original lists were ordered differently, the court matched the 15 Avatar statements at issue with their Source Course counterparts:

Avatar	Source Course
I have everything I need.	I have what I need.
The past doesn't exist.	My past doesn't exist.
I create what I experience.	I own what I experience.
I am right here.	I am right here.
I don't know where I am.	I don't know where I am.
I am relaxed.	I am relaxed.
Everything I see is illusion.	Everything I see is illusion.
What I see is real.	Everything I see is real.
My mind is still.	My mind is quiet.
I am happy to be me.	I'm happy being who I am.
I am not a victim.	I am not a victim.
I feel like a victim.	I feel like a victim.
I am me.	I am just me.
I create it all.	I create everything.
I am source.	I'm the source of it all.

Id. at 1336.

727. *Id.* at 1337 (noting the absence of a "crystalline standard" for identifying "how much is too much" in determining the appropriate quantitative and qualitative amount of reproduction that would justify a finding of copyright infringement).

C. Court of Appeals-Affirmed

The Eleventh Circuit Court of Appeals, which had enjoined publication of The Source Course pending the appeal of Star's Edge,⁷²⁸ held that the district court had not abused its discretion in denying the preliminary injunction on the basis of the copyright-infringement claim, because Palmer had not shown a substantial likelihood of success.⁷²⁹

After reviewing the district court's findings and examining additional areas of similarity between the two works at issue,⁷³⁰ the court found that "Braun's exercises are virtually identical to Palmer's exercises, and a layman might conclude that The Source Course was appropriated from the Avatar Course."⁷³¹

On the more complicated issue of whether the similarities between the two sets of spiritual techniques stemmed from the duplication of uncopyrightable processes as opposed to copyrightable expressions of those ideas,⁷³² the court expressed no opinion.⁷³³ In addition, although Braun had explained the likenesses between the works as an illustration of how "most [meditation techniques of this type] are so fundamental in nature that any discussion or exposition thereof will necessarily contain similarities of wording and phraseology not protected by copyright statutes,"⁷³⁴ the court did not resolve whether the affirmations shared by the courses "are so simple in structure and content that they are covered by the merger

728. *Palmer*, 287 F.3d at 1329.

729. *See id.* at 1335.

730. *See id.* at 1329-31.

731. *Id.* at 1334.

732. *Id.* ("[A] process for achieving increased consciousness . . . , even if original, cannot be protected by copyright.").

733. *Id.* ("We express no opinion on how these issues will finally be resolved[,] but recognizing that the distinction between process and expression "must be resolved on the totality of the facts.").

734. Defendant's Memorandum in Opposition to Plaintiff's Prayer for Injunctive Relief at 6, *Palmer v. Braun*, 155 F. Supp. 2d 1327 (M.D. Fla. 2001) [hereinafter Defendant's Memorandum in Opposition]. Indeed, Braun asserted that the content of both Avatar and The Source Course was "within the public domain as derivations of various and sundry widely published religious, metaphysical and psychological works including, but not limited to: Tibetan meditation techniques dating back as much as 1,000 years as published by Tarthang Tulku . . ." *Id.* at 5.

doctrine.⁷³⁵ This question would turn on whether the courses' exercises "might be served by any phrases, regardless of their content"—in which case the specific sentences chosen by Palmer might be copyrightable.⁷³⁶ In addition, even if these statements were specially chosen, and the merger doctrine rendered them uncopyrightable, their specific sequence might be discretionary, and thus copyrightable.⁷³⁷

The court concluded that the district court had not abused its discretion by denying a preliminary injunction to Palmer and Star's Edge.⁷³⁸ It returned the case for evaluation of the idea/expression distinction and the applicability of the merger doctrine.

735. *Palmer*, 287 F.3d at 1334. At the subsequent non-jury trial in October 2002, Palmer testified that the purpose of the exercise in Section II of the Avatar course was "[t]o teach a student to control his own mind," that such a purpose could have been served by sentences other than those that Braun had copied, and that those sentences could have been phrased in different ways. Harry Palmer Testimony, TRA31.

736. *Palmer*, 287 F.3d at 1334.

737. *Id.* at 1334 n.3 ("For instance, there may be only one way to express the idea of a particular color or number of fish. But when those ideas are arranged in particular order—such as 'one fish, two fish, red fish, blue fish'—the expression is no longer covered by the merger doctrine.").

In claiming that the merger doctrine covered the sequencing of Avatar's statements, Braun contended that Avatar required a strict order, and thus that "the number of means of describing [Avatar's] procedure is limited at best. There may be more than one way to skin a cat, but probably not more ways than one to describe any given method of cat skinning." Defendant's Memorandum in Opposition at 5.

Yet Palmer explained that the order of exercises should be "adapted to the person that's taking the course . . . It is not the same for every person every time." See Palmer Testimony, TRPI, *supra* note 676, at 53; *Palmer v. Braun*, 155 F. Supp. 2d 1327 (M.D. Fla. 2001); see also *id.* at 51 ("There are different exercises that are determined by the master as to what order they will be followed in."); *id.* at 52 (agreeing that "[y]ou would probably end up in the same place" even if the exercises were pursued in random order under a master's tutelage); *id.* at 54 (stating, in response to a question concerning whether earlier procedures in the Avatar materials were prerequisites for later ones, "[i]t would depend on the situation and what you are talking about."); Harry Palmer Testimony, TRA148-49 (agreeing that the order of presentation of the exercises in the Avatar course is not an integral part of the student's learning experience, and noting that the exercises "are arranged by the discretion of the master, but based upon the student who is taking it").

738. *Palmer*, 287 F.3d at 1335.

D. *The District Court—Judgment, Injunctive Relief, and Damages Granted*

In July 2003, after conducting a limited evidentiary hearing,⁷³⁹ the district court concluded that their similarities "would lead a lay observer to conclude that *The Source Course* might be a derivative of the Avatar works," and thus that Braun had infringed the copyright held by Star's Edge.⁷⁴⁰

First, the court found that Braun had copied from Palmer the fifteen affirmations that appeared in both Avatar and The Source Course, for students to enunciate and then examine their reactions. Although recognizing that in this context "any phrase may well work," the court "can only deduce that there is some importance in the choice of these specific phrases."⁷⁴¹

The court next examined various levels of non-literal similarity between the two programs, expressing its conclusions in columns that juxtaposed twenty-four passages from Avatar's material with allegedly infringing excerpts from The Source Course. Found to be unprotected as uncopyrightable ideas or processes were Avatar's discussions of: nonverbal communication; words as symbols of reality; beliefs as shaping one's perceptions; living by feeling rather than by thinking; and the ability to identify one's own beliefs.⁷⁴²

Nor could Avatar protect, as processes or procedures, its: general advice to start with easier meditations and gradually progress to more difficult ones; recommendation to find a quiet and comfortable place for a certain meditation; instructions for breathing from the lower abdomen, and for other processes; and directions to begin a particular process by focusing on a certain topic (particularly when the relation of that topic to the meditation was logical or commonsensical), or after completing another specified process to which it is logically related.⁷⁴³ In addition, Avatar's personality profile form was uncopyrightable under the merger doctrine.⁷⁴⁴

739. Palmer v. Braun, Case No. 6:00-cv-1662-ORL-31JGG (M.D. Fla. 2003), at 10.

740. *Id.* at 44-45.

741. *Id.* at 18.

742. *See id.* at 20-31.

743. *See id.* The district court rejected the court of appeals' conclusion that

However, Braun was nonetheless found to have infringed some aspects of the Avatar program, including an estimate of the length of time for completing the course,⁷⁴⁵ advice on what purposes,⁷⁴⁶ in what order,⁷⁴⁷ and how to begin⁷⁴⁸ to use certain processes, and an instruction to fill out the personality profile by writing down one's first impression of the answer.⁷⁴⁹ Prevented by court sanction (for his "persistent and willful discovery abuses")⁷⁵⁰ from presenting evidence that elements of Avatar were in the public domain, he appeared to have copied or paraphrased Braun's expression of certain ideas⁷⁵¹ and processes,⁷⁵² at least one of which was not covered by the merger doctrine because it could be performed in several alternative ways to Avatar's.⁷⁵³

In another category of alleged infringement, the court recognized that Palmer's "purported original explanations, insights, and descriptions of expected course results"⁷⁵⁴ could qualify as copyrightable expression: "because the processes involved are not scientific, Palmer's expected

the Source Course had also infringed by copying Palmer's advice to students about the areas of life to which that the techniques could be applied, the order in which to do so, and the way in which to handle particularly persistent problems. *Id.* at 23-24, citing *Palmer*, 287 F.3d at 1333.

744. *Palmer v. Braun*, No. 6:00-cv-1662-ORL-31JGG at 25-26 (observing that all such forms are likely to be similar in some respects, and that they exemplify ideas rather than serve as expression).

745. *Id.* at 30.

746. *Id.* at 28.

747. *Id.* at 27. The *Palmer* Court found that Braun copied "Palmer's advice to students on areas of life on which to use the recommended exercises [and] the order in which Palmer recommended students address these life areas." *Id.*

748. *Id.* at 26 (finding infringement in Braun's selection of a stone as the object on which to focus at the beginning of a meditation, since this feature qualified as protectable expression "because there is no evidence to suggest that the selection of this specific object is integral to the process").

749. *Id.* at 29.

750. *Id.* at 9. The court did, though, provide Braun an opportunity to address and submit evidence on such issues at a limited evidentiary hearing in February 2003. *Id.* at 10.

751. *Id.* at 21.

752. *Id.* at 28.

753. *Id.* at 23 (noting that Avatar's and The Source Course's method of "discovering and handling transparent beliefs" by examining "the feeling that something is true" could be accomplished by alternate examinations of "repeated failure, . . . the sudden appearance of an inappropriate emotion, or . . . repetitive thinking").

754. *Id.* at 31.

results are not the only potential result for the exercises."⁷⁵⁵ Infringements identified in this category included Braun's copying of: the insight that the student is not truly separate from the rest of existence; an explanation of "transparent or hidden" beliefs; and a description of the student's perceiving reality from within a transparent bubble.⁷⁵⁶

The bubble metaphor figured prominently in the evaluation of the final group of alleged infringements, that of Palmer's metaphors, labels, and analogies.⁷⁵⁷ Because Braun had not shown that the bubble imagery was not original to Palmer, the court found that Braun's own use of this metaphor constituted infringement.⁷⁵⁸ Nor could Braun legitimately use the same analogies chosen by Palmer—such as comparing a person's various identities to suits of clothes—where other options were available to Braun.⁷⁵⁹ However, as the district court had indicated in *Arica*, one- or two-word labels are generally not copyrightable: thus, Braun could use the phrase "core issues" to refer to what Palmer called "core creations."⁷⁶⁰

Finding that Palmer had suffered no actual damages from the copyright infringement, because sales of the Avatar books had continued to increase and Avatar's course enrollments had not fallen, the court awarded him statutory damages of \$36,000.⁷⁶¹ It also enjoined Braun from "selling, publishing, or distributing *The Source Course* in its current form."⁷⁶²

The court found that Braun had not infringed on the trademarks held by Star's Edge: Braun had claimed no affiliation with Palmer or Star's Edge; had offered a stand-

755. *Id.*

756. *Id.* at 31-35.

757. *Id.* at 35-43.

758. *Id.* at 36-38, 43.

759. *Id.* at 37-39. *Cf. id.* at 35, 41 (indicating that Palmer's use of the terms "energy" or "creating energy" is not original to him, and thus is not copyrightable).

760. *Id.* at 39-40 (citing *Arica Inst. v. Palmer*, 770 F. Supp. at 191-92).

761. The court did not discuss, however, the possibility that in the absence of *The Source Course* (whether it was actually bought or just available for sale), Avatar's sales and enrollments might have been even higher.

762. *Palmer*, No. 6:00-cv-1662-ORL-31JGG at 71. However, a message posted on the alt.clearing.avatar newsgroup on July 31, 2003 by "Eldon," using an e-mail address associated with earlier postings purportedly by Braun, indicated that he was "re-examining the Source Course and ways to present it in many languages, in a format that fits on an ordinary CD/DVD, into any computer."

alone book rather than a package of books and a training; had advertised differently and to different audiences than did Star's Edge; and had not intended to replace the Avatar course or confuse consumers about the distinction between that course and his own (nor had evidence of actual consumer confusion been introduced.)⁷⁶³

These issues, and the court's dissection of the Avatar course, may well be revisited on appeal. As in the Scientology litigations,⁷⁶⁴ the court's unfamiliarity with the types of works at issue, and with the purpose and function of their elements, suggests that the testimony of experts or special masters might be appropriate. However, it remains questionable whether the underlying spiritual and psychological disciplines would be found reliable enough to admit expert testimony under the Federal Rules of Evidence;⁷⁶⁵ and, if they are so found, it is unclear what qualifications would be required of such an expert or master and how they could be established. Finally, as in computer technology cases, there is a danger that experts might unduly influence the court's interpretation of legal issues; alternatively, their testimony "might be inappropriately applied to mask [the court's] more equitable analyses."⁷⁶⁶

763. *Id.* at 51-57, 71.

764. *See supra* notes 585 and 627, and accompanying text.

765. *See, e.g.,* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993) (requiring, under Federal Rule of Evidence 104(a), "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether [it] properly can be applied to the facts in issue."); *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that for expert testimony in scientific matters to be admissible, the principle or discovery upon which such testimony is based must enjoy "general acceptance in the particular field in which it belongs").

These tests of admissibility of scientific evidence were applied to all "testimony based on 'technical' and 'other specialized' knowledge" by *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). In that connection, the Supreme Court observed that an expert's testimony may be rejected "when the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy." 526 U.S. at 151; *see also* D. Michael Risinger, *Defining the "Task at Hand": Non-Science Forensic Science After Kumho Tire v. Carmichael*, 57 WASH. & LEE L. REV. 767, 776 (2000) ("[A]strologers might pass a simple experience test. They may have dealt with thousands of horoscopes. . . . It is not their experience that we doubt, but their methods of conclusion.").

766. Effross, *supra* note 300, at 53 (discussing the dangers of expert testimony on issues of alleged nonliteral copyright infringement of software).

IV. REASONS FOR SPIRITUAL SECRECY

In the "spiritual marketplace," which features the democratization and mass-marketing of information previously closely-held,⁷⁶⁷ one obvious reason for organizations to protect their teachings and techniques is to prevent imitations of their material from being provided by competitors. Another, and less palatable, justification for secrecy might be to bind "initiates" to the group until their investment of time, energy, and money obscures their ability to evaluate clearly (and, perhaps, to be disillusioned by) the "higher levels" of the system.⁷⁶⁸

However, spiritual organizations have also advanced less commercial or self-interested explanations for their placing restrictions on information. These reasons, which generally focus either on the protection of the student or the protection of the teaching itself, depend largely on the allegedly transformative nature of the material and the purportedly practical dangers of its distortion or premature dissemination. They also parallel some concerns of today's psychotherapeutic professionals. This Part collects and discusses such justifications for spiritual secrecy, but concludes that, in the absence of contractual arrangements or intellectual property claims, they generally do not lend themselves to judicial enforcement.

767. See, e.g., ANDERSON, *supra* note 9, at 241 (noting, in reference to enrollment in Arica's initial courses in the United States, see *supra* notes 35-36, and accompanying text, "[h]owever one gained admittance to the [Sufi monastery] in Afghanistan, in New York it was done the American Way: you read the ad in the newspaper and sent in your check."); THEODORE ROSZAK, UNFINISHED ANIMAL: THE AQUARIAN FRONTIER AND THE EVOLUTION OF CONSCIOUSNESS 12 (1975) (observing that in this period, "[e]very spiritual tradition in the human repertory is suddenly being asked to democratize its mysteries"); *id.* at 245 (warning that the teaching of much-demanded spiritual techniques is "in danger of becoming a mass-processing operation").

768. See R. LAURENCE MOORE, SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE 258-59 (1994) (observing that in "New Age" spiritual groups, "there is always a higher level to attain. It is a market of intense product differentiation. Each group's technique is [allegedly] unique [and] best."). Cf. LESHAN, *supra* note 9, at 117 (counseling, as meditation teacher and psychotherapist, that "the more complex a meditation is, the less useful it is."); CLARK STRAND, THE WOODEN BOWL: SIMPLE MEDITATIONS FOR EVERYDAY LIFE 76 (1998). Strand advised, as former Zen Buddhist monk, that "you needn't worry yourself over all the various teachings of the meditative traditions of East and West. It is enough to practice what is simple: . . . merely being present, without ritual . . ." *Id.*

A. *Protection of the Student*

1. *Spiritual Preparation Required.* Perhaps the most memorable moment of the 1992 movie, *A Few Good Men* occurred during a cross-examination scene: under pressure by Daniel Kaffee (portrayed by Tom Cruise) about the circumstances under which a Marine died, Colonel Nathan R. Jessup (Jack Nicholson) snarled, "You can't handle the truth!"⁷⁶⁹

Although that fictional character might have been speaking only figuratively (and attempting to cover up his criminal complicity), several spiritual groups have alleged that severe psychological consequences could befall those who are prematurely exposed to their advanced material. Various passages of the New Testament allude to Jesus Christ's accommodation of his disciples' incapacity to assimilate his higher teachings.⁷⁷⁰ A well-known Talmudic tale discusses an advanced meditative experience undertaken by four esteemed rabbis, only one of whom emerged with his faculties intact.⁷⁷¹ Authorities in

769. *A FEW GOOD MEN* (Columbia Pictures 1992) (screenplay by Aaron Sorkin) (implying that Jessup, unlike Kaffee, appreciated the nature and gravity of foreign threats to national security, and had experienced the rigors of military training and the dangers of combat). Similarly, T.S. Eliot, who had himself been exposed to Gurdjieff's teachings, famously observed that "human kind/ Cannot bear very much reality." T.S. Eliot, *Burnt Norton*, lines 42-43, in *FOUR QUARTETS* (1943); see also PAUL BEEKMAN TAYLOR, *GURDJIEFF AND ORAGE* 118 n.57 (2001) (revealing that two of Gurdjieff's leading students, P.D. Ouspensky and A.R. Orage, had presented his concepts to Eliot); PAUL MURRAY, *T.S. ELIOT AND MYSTICISM: THE SECRET HISTORY OF FOUR QUARTETS* 167-71 (1991) (examining the intellectual connection that Eliot had with Ouspensky and Orage); DONALD J. CHILDS, *T.S. ELIOT: MYSTIC, SON AND LOVER* 8-9, 18 (1997) (same).

770. See *I Corinthians* 3:2 (King James) ("I have fed you with milk, and not with meat: for hitherto ye were not able to bear it, neither yet now are ye able.");

Ye have need that one teach you again which [be] the first principles of the oracles of God; and are become such as have need of milk, and not of strong meat. For every one that useth milk [is] unskillful in the word of righteousness: for he is a babe. But strong meat belongeth to them that are of full age, [even] those who by reason of use have their senses exercised to discern both good and evil.

Hebrews 5:12-14 (King James); *John* 16:12 (King James) ("I have yet many things to say unto you, but ye cannot bear them now.").

771. GERSHOM SCHOLEM, *ON THE KABBALAH AND ITS SYMBOLISM* 57 (Ralph Manheim trans., Schocken Books 1965) (1960) (indicating that of the other

traditions ranging from Tibetan Buddhism⁷⁷² to the Kabbalah⁷⁷³ have emphasized the necessity of the student's properly preparing for advanced meditative practices. Gurdjieff advised his own students that in self-development exercises, "the smallest error of excess or pressure can lead to irreparable damage,"⁷⁷⁴ and therefore that "[I]f anyone here is experimenting with breathing [techniques], it is better to stop while there is still time."⁷⁷⁵

Unusual in its detail is an often-cited work describing the psychological and physiological problems that resulted from the author's sudden awakening of the "kundalini" spiritual energy through self-directed meditation.⁷⁷⁶ (Indeed, although a student of gymnastics, rock-climbing, or karate

three rabbis, one was said to have died, one to have become insane, and one to have renounced Judaism); *see also* GERSHOM SCHOLEM, MAJOR TRENDS IN JEWISH MYSTICISM 138 (1955) (observing that a famous Kabbalist "frequently warns against the mental and even physical dangers of unsystematic meditation and similar practices").

772. *See, e.g.*, CHOGYAM TRUNGPA, THE PATH IS THE GOAL: A BASIC HANDBOOK OF BUDDHIST MEDITATION 32 (Sherab Chodzin ed., 1995) [hereinafter TRUNGPA, PATH] (warning, in a 1974 seminar, that without proper training in mindfulness and awareness practices, meditations involving contemplation of visual objects "could be quite dangerous [and the student] could become . . . an egomaniac").

773. *See, e.g.*, EPSTEIN, *supra* note 104, at 42 (discussing the belief that "[s]o frightening . . . is the disorienting mental and physical experience of [a certain type of Kabbalistic] meditation that a man might die in the attempt."); EDWARD HOFFMAN, THE WAY OF SPLENDOR: JEWISH MYSTICISM AND MODERN PSYCHOLOGY 9 (1981) (citing statement in Kabbalistic literature that "[I]f adequately prepared through previous training, [the practitioner] would be able to utter the appropriate words at the right time and banish the visions that would shatter his soul"); ARYEH KAPLAN, JEWISH MEDITATION: A PRACTICAL GUIDE 38 (1985) (warning that because "[i]t is possible for a person to become completely lost in the mystic state, acutally [sic] swallowed up by it," works on Jewish meditation have emphasized the need for an experienced guide to help the meditator return to normal consciousness.).

774. GURDJIEFF, VIEWS, *supra* note 331, at 53.

775. *Id.* at 166.

776. GOPI KRISHNA, KUNDALINI: THE EVOLUTIONARY ENERGY IN MAN 48 (Shambhala 1997) (1970) (warning that "the sudden impact of powerful vital currents on the brain and other organs is often attended with grave risk and strange mental conditions"); *see also* RICK FIELDS, HOW THE SWANS CAME TO THE LAKE: A NARRATIVE HISTORY OF BUDDHISM IN AMERICA 326 (3d ed. 1992) (indicating that the "final teaching" of Tibetan Buddhism was regarded as secret, "not because it was a mysterious or hidden truth reserved for a spiritual elite, but because it was dangerous without the preparation and personal guidance of a guru."). *Cf.* ROBERT M. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1974) (chronicling the author's psychological deterioration during—and subsequent recuperation from—his intense philosophical quest for insight into the nature of "quality").

can not only observe the advanced practices of these disciplines but can easily imagine the ways in which she could be hurt by attempting them prematurely, groups restricting information about their higher-level spiritual techniques appear generally reluctant to detail the alleged hazards of these practices and the specific physiological, psychological, or spiritual mechanisms of their operation.)

Less colorfully, even a beginning student of a spiritual group might become distressed when led, either by lectures or by physical or mental exercises, to reexamine her basic philosophical assumptions. In fact, some spiritual groups maintain that even the seemingly best-adjusted people are unaware of potentially shattering realities.⁷⁷⁷ Oscar Ichazo asserts that Arica's techniques "give us a concrete experience that inevitably shocks us into the awareness that we live a life that can be characterized as somnambulistic [and into] the realization that we live in a state of dreamlike illusions and endless repetitions of states and situations of depression, anger, anxiety and fear."⁷⁷⁸ Similarly, in 1974, the head of Arica's Los Angeles group stated that performing Arica's exercises "makes you realize that most human beings are no more than mechanical dolls Without the school's support the person with the vision of the machine dolls can go mad, but with Oscar's [system to guide you] . . . [y]ou don't have to despair" ⁷⁷⁹

Similar concerns appear in certain areas of psychotherapeutic counseling. A text on psychotherapeutic

777. One meditation teacher observed that the practice of meditation "strengthens the personality organization until we are structurally strong enough to bear the shock of the new viewpoint of how reality is put together." LESHAN, *supra* note 9, at 22. A popularization of this idea was presented in the blockbuster 1999 movie, *THE MATRIX* (Warner Bros. 1999) (written by "The Wachowski Brothers" [Andy and Larry Wachowski]), in which Morpheus (portrayed by Lawrence Fishburne) advises Neo (Keanu Reeves) that although most people are unaware that their perception of reality is actually generated by a computer that is using their physical bodies for energy, they "are not ready to be [told] and many of them are so inured, so hopelessly dependent on the system, that they will fight to protect it." Morpheus apologizes for initiating Neo into this truth, explaining that in general "we never free a mind once it's reached a certain age. It's dangerous. The mind has trouble letting go."

778. Ichazo, *SYMBOL*, *supra* note 13, at 22.

779. Duffy, *supra* note 41, at 7 (quoting Jacob Brackman); see also Ichazo, *School*, *supra* note 33, at 54 (The "overpowering experience of observing reality directly" can make one feel "as though . . . witness to a wax museum spectacle in which everyone is posing as a famous character. Ordinary reality looks unnatural, forced, and terribly slow.").

malpractice cautions against "disrupt[ing] a patient's equilibrium . . . by interrupting a previously successful accommodation to an otherwise unacceptable reality or by removing a protective symptom."⁷⁸⁰ A manual for new psychotherapists warns that even sharing a diagnosis with the patient could be problematic, since it "often conveys meanings that cannot be anticipated, and that could be detrimental."⁷⁸¹ For example, after being diagnosed as schizophrenic, one patient attempted to commit suicide, "since he felt that [this] meant he was permanently disabled."⁷⁸²

Thus, in situations where the principle of obtaining a patient's informed consent to a procedure⁷⁸³ conflicts with the principle of avoiding harm to the patient,⁷⁸⁴ the "therapeutic privilege" operates to allow "information to be withheld from the patient . . . when its disclosure would be so upsetting that it would render the patient unable to engage rationally in decisionmaking."⁷⁸⁵ The reported decisions in this area, however, generally concern consent

780. BARRY R. FURROW, *MALPRACTICE IN PSYCHOTHERAPY* 14 (1980) (indicating that by dispelling the hallucinations and delusions of a patient whose satisfying fantasy life protected him from unwelcome realities, the unskillful therapist might even cause the patient to become suicidally depressed).

781. JOAN S. ZARO ET AL., *A GUIDE FOR BEGINNING PSYCHOTHERAPISTS* 82 (1977).

782. *Id.*

783. "Psychologists [should] obtain appropriate informed consent to therapy or related procedures . . . [I]nformed consent generally implies that the person . . . has been informed of significant information concerning the procedure" before consenting. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT* (1992) [hereinafter *ETHICAL PRINCIPLES*], Standard 4.02; see also GERALD COREY ET AL., *ISSUES AND ETHICS IN THE HELPING PROFESSIONS* 156 (6th ed. 2003) (endorsing "the practice of letting clients know that counseling might open up levels of awareness that could cause pain and anxiety, [and possibly] disruptions and turmoil in their lives.").

784. See *ETHICAL PRINCIPLES*, *supra* note 783, Standard 1.14 (noting that "[P]sychologists [should] take reasonable steps to avoid harming their patients or clients . . . and to minimize harm where it is foreseeable and unavoidable.").

785. CHARLES W. LIDZ ET AL., *INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY* 18-19 (1984) (adding that a less restrictive definition of this privilege allows the withholding of information concerning disturbing results of a treatment if such disclosure would not be in the patient's best interests); see also Tom L. Beauchamp, *Informed Consent*, in *MEDICAL ETHICS* 185, 203-04 (2d ed.) (Robert M. Veatch ed., 1997) (recognizing a range of interpretations of the scope of this exception to informed consent).

to surgical or other physical procedures⁷⁸⁶ or medication regimens⁷⁸⁷ rather than to pure psychotherapeutic counseling.

Spiritual groups have little hope of invoking the therapeutic privilege to protect their teachings and practices. First, they usually operate outside the scope of a professional psychotherapeutic relationship with their students. Second, for a court to take at face value their claims of their materials' transformative nature would arguably constitute, at a minimum, intellectual paternalism and overprotection of students, and at worst, unconstitutional endorsement of the groups' religious beliefs about their material.

However, to be consistent with its claims and to protect itself from some forms of liability, a group portraying its teachings and techniques as potentially psychologically disruptive might do well to have potential students sign waivers of any liability on the group's part for any psychological or physical harm suffered by the student in the course of spiritual instruction; they might also require potential students to disclose, and possibly prevent the admission of those individuals with, certain preexisting psychological or physical conditions. Moreover, these groups could require their students to agree that the teachings and techniques should not be disclosed to others, should only be attempted under the guidance of the group's own instructors, and should not be mixed with those of other groups.⁷⁸⁸ In this context, a recent cartoon in which a

786. The seminal decision in this context is *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d 170, 181 (1957) (holding that because of the possibility of "alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk" or who may suffer increased risk from "the physiological results of the apprehension itself," the physician's duty of full disclosure may be counterbalanced by "a certain amount of discretion"); see also *Nishi v. Hartwell*, 473 P.2d 116, 119 (Haw. 1970) (indicating that in applying such discretion "no hard and fast rule can be stated [and that] each case will depend on its particular facts").

787. A rare therapeutic privilege case concerning psychiatric treatment involves the danger of antipsychotic medication. See *Barcai v. Betwee*, 50 P.3d 946, 963 (Haw. 2002) (concluding that the defendant psychiatrist had not established the privilege where he "did not expressly testify that his decision to withhold information [from the plaintiff] was based on specific considerations. . . and did not identify those considerations").

788. Given the eclectic tendencies of some modern spiritual seekers, as well as the current penchant for referring to meditative and related techniques as

psychiatrist advises a patient, "Before I can put you in touch with reality, you'll have to sign this release form,"⁷⁸⁹ may well be less humorous than its author intended.

2. *Secrecy as Spiritual Discipline.* Secrecy requirements may themselves be seen as a method of enhancing the spiritual discipline of students, forcing them to be more conscious and to conserve energy that would otherwise be dissipated in discussing experiences and teachings, particularly those that they might not yet have fully assimilated. For example, Gurdjieff advised his students that the rule of secrecy "is a test, an exercise of will, and exercise of memory and understanding"⁷⁹⁰ that would give them increased self-awareness⁷⁹¹ and energy.⁷⁹²

Yet a group would hardly take legal action against the student merely for failing this test: he could more appropriately be severed from the group, or simply denied access to more advanced material.⁷⁹³

"technologies," see *supra* note 5, it remains an open question whether a copyright infringement action will lie against the developer of a technique claimed to complement, or to enhance, the practices of another spiritual group or program. Cf. *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1013-14 (7th Cir. 1983) (holding that the installation of defendant's circuit boards into plaintiff's video game machines, which speeded up their rate of play, created an unauthorized derivative work and thereby infringed plaintiff's copyrights); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1287 (S.D.N.Y. 1990) (finding "no basis to enjoin defendants from ever using the 'Weight Watchers' mark, nor from stating that Stouffer's Lean Cuisine products fit into the Weight Watchers program").

789. *Pepper. . . And Salt*, WALL ST. J., June 19, 2003, at D8.

790. OUSPENSKY, *FOURTH WAY*, *supra* note 26, at 287; see also BROWN, *supra* note 1, at 205 (indicating that Masonic initiations involve candidates' "ascend[ing] to higher degrees by proving they could keep a secret and by performing rituals and various tests of merit over many years.").

791. OUSPENSKY, *FOURTH WAY*, *supra* note 26, at 287 ("This helps enormously to self-remember, because it goes against all ordinary habits."); see also WEBB, *supra* note 18, at 140 ("[T]his silence is in itself a useful exercise because of the tendency of the human mind to jabber automatically of what most interests it."); LESHAN, *supra* note 9, at 104 (advising meditators "not to discuss the effects a meditational program is having on you too much . . . This is essentially a private matter between you and you.").

792. OUSPENSKY, *FOURTH WAY*, at 288 ("[B]y remembering rules and obeying rules you accumulate conscious energy. This is chiefly why rules are made.").

793. OUSPENSKY, *IN SEARCH*, *supra* note 18, at 15 (quoting Gurdjieff to the effect that most people are not sufficiently self-aware and focused to be able to pass such a test, and thus "we will not talk seriously" with them).

3. *Customization and Personalization.* Because of the sensitivity of a group's teachings and techniques, they (like certain psychotherapeutic methods and discussions) might be presented in forms tailored by the teacher to the individual student or to her entire training (or therapy) group. Such individual prescription of specific exercises appears to have been a practice of the Sufis,⁷⁹⁴ the Kabbalists,⁷⁹⁵ and Gurdjieff.⁷⁹⁶

With regard to the personalization of teachings, certainly no one has been more vociferous, or as widely published, than Bhagwhan Shree Rajneesh (later known as Osho), who in "more than six hundred fifty volumes"⁷⁹⁷ that

794. See, e.g., CLAUDIO NARANJO & ROBERT E. ORNSTEIN, *ON THE PSYCHOLOGY OF MEDITATION* 155 (1971) (explaining the absence of Sufi meditation manuals by noting that, according to this tradition, in prescribing spiritual exercises, "the time, place, and state of the student must be taken into account. Publication of the details of their practice would lead to faulty applications of the exercises. . . . [And] persistence in any technique after the appropriate period [of the student's development] might be a waste of time or even harmful."); SCHIMMEL, *supra* note 10, at 104 (indicating that in Sufi communities, "[i]t was well known that the methods could not be alike for everybody, and the genuine mystical leader had to have a great deal of psychological understanding in order to recognize the different talents and characters of his [students] and train them accordingly.").

795. See HOFFMAN, *supra* note 773, at 95 (observing that the Kabbalistic master Rabbi Nachman of Bratslav, in the late 18th and early 19th centuries, would "prescribe the specific practice necessary [for each person] to correct his or her flaws," and advise how long it should be pursued).

796. See, e.g., PATTERSON, *VOICES*, *supra* note 331 at 57 (quoting Gurdjieff, in transcription of group meeting in France in the early 1940's, as stating to one member: "This is for you only. (People must never do that which I indicate for one person only.)"); *id.* at 225 (quoting Gurdjieff's instructions to one student: "I am going to give you two exercises which are for you only, no one else."); WALKER, *supra* note 329, at 170. Walker recalled that in private interviews Gurdjieff would give specific instructions for "some psychological or physiological exercise" and tell the student that it "is for you alone and it must not be discussed with other people . . . when you come next time to Paris, you can report to me what you find." *Id.*

797. *About the Author*, in BHAGWAN SHREE RAJNEESH, *HYAKUJO: THE EVEREST OF ZEN WITH BASHO'S HAIKUS* 190, 191 (1989); see also *Books by Bhagwan Shree Rajneesh-English Language Editions*, in BHAGWAN SHREE RAJNEESH, *BODHIDHARMA: COMMENTARIES ON THE TEACHINGS OF THE MESSENGER OF ZEN FROM INDIA TO CHINA* xii-xvii (1987) (listing more than 95 different books, some of several volumes, as well as 48 "Darshan Diaries," or transcriptions of "Talks between Master and Disciple"). Beyond its range and volume, Rajneesh's corpus of work is unusual in at least one other respect: in a number of these volumes, particularly the later ones, discussions of spiritual subtleties are punctuated by sections containing jokes, many of which are ribald or play on various stereotypes.

were compiled from his lectures and interactions with disciples provided commentaries on a wide range of Eastern and Western spiritual traditions, from Buddhism to Yoga. Rajneesh, who proudly dubbed himself "the most inconsistent man on earth,"⁷⁹⁸ insisted that "the same

Rajneesh's controversial attempt in 1981 to establish a community of his followers in Antelope, Oregon resulted in intense local opposition, his arrest in North Carolina in 1985, and his subsequent deportation and return to his commune in Pune, India. See OSHO, *AUTOBIOGRAPHY OF A SPIRITUALLY INCORRECT MYSTIC* 248-65 (2000) (providing, after excerpts from Rajneesh's published work, a chronology of, and Rajneesh's comments on, these developments); JOHN UPDIKE, S. (1988) (acknowledging, in "Author's Note" of satirical novel about relationship between a guru and a Western follower, that "[s]ome details of this novel were suggested" by reports from Oregon).

Rajneesh died in Pune in 1990, leaving his followers to contest the intellectual property rights to his works. See Amy Waldman, *Pune Journal: Old Rajneesh Commune Lightens Up in Afterlife*, N.Y. TIMES, Dec. 10, 2002, at A4 (discussing struggles between communities of Rajneesh devotees in Pune and in Delhi). An arbitration forum decided in 2000 that the Pune group, which claimed to have registered "Osho" as a trademark and the domain names osho.com, osho.net, and osho.org, could not compel the Delhi group to transfer to it the domain name oshoworld.com. See also *Osho Int'l Found. v. Mandir*, Nat'l Arb. Forum No. FA0006000094990 (July 28, 2000) (Tilley, Arb.) at <http://www.arbforum.com/domains/decisions/94990.htm> ("Osho himself had little regard for or concern with intellectual property rights, including any relating to the use of his chosen name," that it was not disputed that "almost 500 meditation centers around the world, not affiliated with Complainant, operate using the 'Osho' name," and that "[t]o grant Complainant's request for relief would be to permit virtual monopolization on the Internet by Complainant of any domain name which includes the name of a great spiritual teacher and leader.").

As of July 2003, Osho International Foundation Corporation had trademark applications pending, over objections before the Trademark Appeals Board, for the marks, Osho Nadabrahama Meditation and Osho Kundalini Meditation; and its application scheduled to register the mark, Osho Active Meditations, had been withdrawn from that status. Previous attempts to obtain trademarks for Active Meditations, Dynamic Meditations, Gourishankar Meditation, Kundalini Meditation, Nadabrahma Meditation, and Nataraj Meditation were not successful. See <http://tess.uspto.gov> (last visited Jan. 12, 2003); see also Osho Int'l Copyright Info., at <http://www.osho.com/copyright.cfm> (last visited Jan. 12, 2003) ("Osho International Foundation is the sole and registered owner of all of the copyrights to all the published and unpublished words and works of Osho . . .").

798. 3 BHAGWAN SHREE RAJNEESH, *YOGA: THE SCIENCE OF THE SOUL* 257 (1976). Cf. RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS & LECTURES* 259, 265 (Library of America ed., 1983) (1841) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. . . . Speak what you think now in hard words, and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day."); WALT WHITMAN, *SONG OF MYSELF* 104 (Stephen Mitchell ed.,

question may be asked by different people and I may answer differently, because the questioner is different. . . . [D]ifferent individuals have different states of consciousness.¹⁷⁹⁹

Thus, one participant's indiscriminate discussion of her spiritual exercises, or of those of others in her training cohort, might raise similar dangers as one patient's passing on to other laypeople information about his own medical condition, his doctor's diagnosis, and the prescribed method of treatment (or, even worse, sharing his medication with them). The publication of that information, even if it were accurately reported, might misrepresent the full context of the (medical or spiritual) condition and the prescribed remedy, as well as the degree to which the "cure" had been tailored to the individual. For this reason, the Transcendental Meditation (or TM) movement asserts that it personalizes the mantras (chanting syllables) assigned to each participant, and discourages learning the system from a book rather than from one of its instructors.⁸⁰⁰

A loose analogy might also be made between the delicacy required, in the views of some spiritual groups, for the disclosure of certain advanced teachings and techniques, and the sensitivity generally accorded by

Shambhala 1998) (1855) ("Do I contradict myself?/ Very well then . . . I contradict myself;/ I am large . . . I contain multitudes.")

799. BHAGWAN SHREE RAJNEESH, TA HUI 356 (1987).

800. See DENISE DENNISTON & PETER MCWILLIAMS, *THE TM BOOK: HOW TO ENJOY THE REST OF YOUR LIFE* 287 (1975) (asserting that Transcendental Meditation cannot be learned from a book because "it's necessary that the mantra be personally selected by a trained teacher, and that it be imparted properly and usefully"); SMITH, *supra* note 36, at 126 (quoting TM instructor: "There was a guy in Rhode Island who used somebody else's mantram and he got edgy and irritable and lost energy.")

However, a Harvard Medical School professor, who with the approval of the Maharishi Mahesh Yogi, leader of the TM movement, studied the physiological effects of this form of meditation, concluded that these anti-stress benefits "*were in no way unique to Transcendental Meditation.*" BENSON, *supra* note 421, at 158-166 (explaining "How to Bring Forth the Relaxation Response")

In addition, at least one Web site has, "for historical and research purposes only," identified what it claims are the TM mantras and the manner in which the group determines which one is appropriate for a given individual. *The TM and TM-Sidhi Techniques*, at <http://minet.org/mantras.html> (last visited Aug. 28, 2003) (on file with the Buffalo Law Review); see also *TranceNet: TM Secret Teachings*, (providing, in the name of "giv[ing] people the dignity of making their own choices," various documents purportedly describing TM's procedures for meditation), at <http://www.trancenet.org/secrets/index.shtml> (last visited Aug. 28, 2003) (on file with the Buffalo Law Review).

society for discussion of sexual matters with those under the age of majority. In the latter situation, and allegedly in the former: careful consideration is given to the age, maturity, background, and individual characteristics of an individual before determining the appropriate amount of information to be imparted, how it should be phrased, and by whom; undeniable "facts of nature" are revealed; and great emphasis is placed on the dangers of psychological harm that might result from incorrect, inappropriate, or premature discussions of these matters, much less direct demonstration or experience of them.⁸⁰¹ Yet in both situations, such information, whether appropriate to the specific individual or not, is easier than ever to find (or to encounter by accident) in today's "marketplace," particularly online.

In this regard, personalization of a spiritual system's approach would enhance the chances of its being found creative, and thus copyrightable, even if it incorporated exercises or other materials in the public domain. To increase the possibility of preventing such disclosures, and of holding disclosers liable in subsequent litigation, groups could require participants to sign nondisclosure agreements. In addition, not only in these agreements, but to the degree that they publicly make available information about their teachings and techniques, these groups could assert that in their trainings, "one size does *not* fit all."

4. *Experiential Nature.* Modern spiritual groups' references to "training" their participants imply that the transformative nature of their material requires experiencing it personally and directly,⁸⁰² and internalizing

801. One possible failure of this analogy is that although the physiological process of sexual development follows the same general timetable among all human males and (on a somewhat different schedule) among all human females, there does not appear to be so clearly defined a set of growth stages, or associated timetables, for spiritual development. That is, one might generally consider twenty-year-old humans to be sexually mature, at least in the physiological sense, but by what definition or standard could one assess the spiritual maturity of someone of that, or any other, age?

802. Cf. PIRSIG, *supra* note 776, at 358. Before a climactic mystical experience, the narrator finds solace in the lyrics of the traditional Christian hymn, *That Lonesome Valley*: "You've got to walk that lonesome valley, You've got to cross it by yourself; No one else can cross it for you, You've got to cross it by yourself." *Id.* Oscar Ichazo similarly asserted that "the Arica way is one hundred percent experiential It has to be acquired, and there is no other

method than to do it oneself, just as nobody can eat for you." Ichazo, *School*, *supra* note 33, at 51.

The divorcing of training from personal experience appears to be a matter of great concern to teachers of Reiki, a non-invasive healing system developed in the 1920's by Dr. Mikao Usui, a Japanese Buddhist monk. A Reiki practitioner attempts to affect the flow of life force through and within the client (or herself) by placing her hands on the person's body in various positions, sometimes visualizing or tracing one of several special Reiki symbols on the body.

Though one of Reiki's most prominent teachers, who brought the technique to the West in the late 1930s, insisted that it was an "oral tradition" and thus prohibited students from taking notes or tape-recording the teachings, the original teaching materials have now been translated and made publicly available; Reiki teachers began in the late 1980s to allow their students "to take notes and tape record and provided handouts and instruction manuals. This is now a common practice." William Lee Rand, *Hawayo Takata's Reiki Story*, in WALTER LUBECK, FRANK ARJAVA PETTER, AND WILLIAM LEE RAND, *THE SPIRIT OF REIKI* 24, 27 (Christine M. Grimm trans., 2001) (noting that Dr. Usui and another early teacher had in fact distributed teaching manuals to their students).

Some teachers have objected both to the dramatic acceleration of the traditional initiation, or "attunement," schedule for students and to the availability on the Internet of some of the higher-level material, including the Reiki symbols, which are traditionally disclosed only to advanced students. *See, e.g.*, FRANK ARJAVA PETTER, *REIKI: THE LEGACY OF DR. USUI* 45 (Christine M. Grimm trans., 1998) (stating that putting this material on the Internet "go[es] much too far" and "is pointless and senseless"); William Lee Rand, *Reiki Training*, in *THE SPIRIT OF REIKI*, *supra*, at 101-05 (suggesting that, although some classes allow the student to progress in a day or a weekend through master teacher level, a minimum of five days should be allotted for this curriculum).

Moreover, among the variety of publicly-available books that describe certain elements of the Reiki system, at least one purports to cover every aspect, including illustrations of the Reiki symbols and instructions for their application, and to enable the reader to dispense with any personal instruction (regarded by many Reiki masters as essential for proper acquisition of information and skills) but instead "to perform self-initiation." MASTER NAHARO & GAIL RADFORD, *THE COMPLETE REIKI COURSE*, 8, back cover (2001). Another work "allows you, the reader, to advance from a Reiki novice to a Reiki master at your own pace [and] publishes the traditional and nontraditional attunement processes." BARBARA EMERSON, *SELF-HEALING REIKI* viii (1991).

Also available on the Web is detailed (though not necessarily accurate) information about the practice of the nine *mudras* (hand and finger positions) that are known as *kuji-in* in the Japanese *ninjutsu* system of martial arts and mysticism, which dates back centuries but became a popular subject of novels and movies in the 1970s. A recognized Western authority on and teacher of this system has published illustrations of the nine *mudras*, with the warning that "they are by no means complete lessons in themselves. . . . The crucial mind setting and breathing routines have not been included here, as they must be guided personally by a competent teacher." STEPHEN K. HAYES, *NINJA, VOL. II-WARRIOR WAYS OF ENLIGHTENMENT* 153 (1981). Hayes noted, before providing a series of photographs of the hand positions "as illustrations only," that "[a]nyone wishing to develop a control over the subtle energies of the body must

the realizations gained.⁸⁰³ Similarly, a modern manual advises that (beyond any question of the therapeutic privilege considered above) psychiatrists should not "tell patients the causes of their problems," but allow these to "emerge and be experienced both emotionally and intellectually in the context of a new relationship" between doctor and patient.⁸⁰⁴

For this reason, a leading teacher of Gurdjieff's work was reluctant, despite repeated inquiries from students, to reduce this system to writing.⁸⁰⁵ The Erhard Seminars Training ("est") programs that swept the country in the 1970's placed similar emphasis on direct experience, directing participants not to take notes during the programs.⁸⁰⁶ And an early student of the Arica Institute reported that he and his colleagues "simply came in each day and did what [the trainers] told us to do that day," without being supplied with, or given a chance to construct, a conceptual model that would taint their direct experience of the exercises.⁸⁰⁷

devote a considerable amount of study and concentration to build up skill in the *kuji-in* process." *Id.* Yet the author of one Web site offers "a very useful and provocative primer" on the positions, their purposes, and their associated mantras, or spiritual chants. See *Ninja Sorcery: Kuji In and Kuji Kiri*, at <http://www.deathandhell.com/corpus/enchantment/kujikiri.html> (acknowledging that this page presents "by no means a complete account" of the subject).

803. See, e.g., DASS, *supra* note 3, at 9. Dass advised spiritual seekers that "to have what you seek you have to go beyond knowing and become it. . . . [T]he knowledge can only be known by transforming yourself into the knowledge itself." *Id.*

804. ROBERT L. LEON, *PSYCHIATRIC INTERVIEWING: A PRIMER* 160 (2d ed. 1989).

805. NICOLL, 3 *PSYCHOLOGICAL COMMENTARIES ON THE TEACHING OF G.I. GURDJIEFF AND P.D. OUSPENSKY* 791 (1957). Nicoll warned that preparing written materials would convert the system into "something outside you and not inside you. It would not be emotional. It would not touch you." *Id.*; see also SHAH, *supra* note 71, at xxiii ("[T]he Way of the Sufis cannot be understood by means of the intellect or by ordinary book learning. . . . [I]t cannot be appreciated beyond a certain point except within the real teaching situation, which requires the physical presence of a Sufi teacher."). *Id.*

806. See, e.g., Erhard, *Rhinehart Foreword*, *supra* note 338, at xiv (indicating that "although this book dramatizes the highlights of the training and attempts to give you the vicarious experience of being at a training, this is a book, and the *est* experience cannot result from reading any book"); BRY, *supra* note 338, at 24 ("I cannot ethically reveal the training [meditations], nor would I choose to do so, because I feel that knowing them in advance significantly reduces the experience of them in the training.").

807. Smith, *Alumni Notes*, *supra* note 53, at 75-76.

This logic is also captured in the warning prominently printed on the inside front cover of each copy of *Cliffs Notes*, the college student's staple for rapidly assimilating the elements and contexts of literary classics.⁸⁰⁸ A student's experience of these works presumably depends on her degree of direct engagement with them, rather than her perusal of summaries, however well-written.⁸⁰⁹ (Similarly, though bar preparation courses enable law students to pass licensing examinations, they could not possibly provide the same opportunity as does law school for immersion in and direct engagement with the substance, procedure, and methods of the law.)

Moreover, in both esoteric "schools" and more traditional educational settings (such as law schools), the argument can be made that certain lessons and experiences are best assimilated by a group of students rather than a single one. Indeed, Oscar Ichazo asserts that the group format is "indispensable for spiritual nourishment"⁸¹⁰ and accelerates the process of spiritual "maturation."⁸¹¹ A parallel might be drawn to the psychotherapeutic practice of "group therapy" (most familiar to many Americans from the 1972-78 CBS television comedy, *The Bob Newhart Show*), "in which a small number of people meet together under the guidance of a professionally trained therapist to help themselves and one another."⁸¹²

808. CLIFFS NOTES: BILLY BUDD AND TYPEE: *A Note to the Reader* (indicating, in all-capitals: "These notes are not a substitute for the text itself or for the classroom discussion of the text, and students who attempt to use them in this way are denying themselves the very education that they are presumably giving their most vital years to achieve.").

809. Also printed on the inside front cover of CLIFFS NOTES guides is a warning that the outline's own material is not "incontrovertible": "There are many interpretations of any great work of literature. . . . [T]he aim is not for students to accept unquestioningly any one interpretation, but to make their own." *Id.*

810. Ichazo, *School*, *supra* note 33, at 51.

811. *Id.* at 55; see also Smith, *supra* note 15, at 27 (noting that twelve Arica trainers and students indicated that "by doing the work together in the groups, which ranged in size from nine to seventy, a group velocity was built up which facilitated both more rapid change and the ability of the group as a whole to support each individual").

812. American Group Psychotherapy Association, *Group Works! Information About Group Psychotherapy*, at <http://www.groupsinc.org/group/consumers/guide2000.html> (last visited Oct. 17, 2003). Group therapy gave rise to the "encounter groups" of the 1960s, which were introduced at the Esalen Institute. THOMAS R. VERNY, *INSIDE GROUPS: A PRACTICAL GUIDE TO ENCOUNTER GROUPS AND GROUP THERAPY* 10 (1974). In turn, the wide variety of techniques used in

However, as noted above, in the absence of a violation of a nondisclosure agreement (or of concerns about maintaining the privacy of participants), a court would be unlikely to bar the publication of information about a training experience. Potential participants in such ventures, or even just the curious, have a legitimate interest in learning about elements of the training. No one would seriously contend that a book about, say, participating in a group that climbed Mount Everest, could convey the author's full experience to the reader; yet no one claims that for this reason such books should not be published at all.

5. *Diagnostic and Treatment Functions.* The personalized and experiential character of some spiritual programs gives rise to another reason for secrecy. The experiences and circumstances that a student encounters in such contexts may have been deliberately designed to aid in her spiritual growth; her premature exposure to "the answers"—or even to the questions or situations—could result in an inaccurate assessment of an individual's condition, and thus in the prescription of, or resort to, inappropriate treatments or processes for dealing with it.⁸¹³

This issue parallels a growing concern in the mental health community, and one whose resolution might not be easily found in law. In June 2002, the front page of the *Boston Globe* revealed that "[a] quick search on the World Wide Web can turn up clues to fooling mental-health professionals, both explicit 'coaching' advice and the unintentional posting of psychological trade secrets."⁸¹⁴ Most

encounter groups ended up in the hands of "all levels of [group] leaders, nonprofessional as well as professional," fostering "an aura of gimmickry and hucksterism." MARTIN LAKIN, *THE HELPING GROUP: THERAPEUTIC PRINCIPLES AND ISSUES* 244 (1985); *id.* at 139-64 (providing "An Overview of Verbal and Nonverbal Group Techniques"); IRVIN D. YALOM, *THE THEORY AND PRACTICE OF GROUP PSYCHOTHERAPY* 481-510 (4th ed. 1995) (discussing the relationship between "Group Therapy and the Encounter Group").

813. Similarly, a distinction might be drawn between someone who does not know the ending of the movie she is about to see, and the same person, if she did know it (through friends, movie reviews, "spoiler" Web site, or previous viewings). One might well expect them to have different experiences at various points in the movie, and different experiences of the movie as a whole.

814. Ellen Barry, *Study Finds Web of Deceit on Mental Tests*, *BOSTON GLOBE*, June 15, 2002, at A1, A8 (noting that "the American Psychological Association last year convened a task force to address the Internet and

troubling to psychiatrists and psychologists, "while clinicians are ethically bound to keep the tests secret, the general public isn't, and it only takes one renegade to disseminate information on the Internet."⁸¹⁵

Thus, with a few mouse-clicks anyone can find a Web site that provides a detailed discussion of how to give desirable answers to the Rorschach ("ink-blot") test.⁸¹⁶ To

psychological testing"); see also Mark A. Ruiz et al., *Trying to Beat the System: Misuse of the Internet to Assist in Avoiding the Detection of Psychological Symptom Dissimulation*, in 33 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 297 (June 2002), at 297 (acknowledging the existence of "many Web sites that could adversely affect clinical practice," and concluding that "[i]ndividuals intent on 'beating the system' are likely to benefit from searching the Internet and the availability of this information may undermine the efforts of many practitioners.").

This theme appeared in a recent episode of a television drama, which featured a fictional father who had gained access to manuals for intelligence tests and the MMPI and had coached his young son on how to answer the questions. The ultimate results for both were unpleasant; and, for a college admissions consultant, fatal. See *Law & Order, Criminal Intent: Bright Boy* (NBC television broadcast, Oct. 6, 2002).

815. Barry, *supra* note 814, at A8 (quoting one individual who posted Rorschach answers as stating that he received many "outraged" e-mail and phone calls from mental health professionals, but no legal notice requiring him to remove them); see also Ruiz, *supra* note 814, at 294 (asserting that "psychologists are ethically obligated to maintain test security" under American Psychological Association and other relevant professional group guidelines); ETHICAL PRINCIPLES, *supra* note 783, at 2 (indicating that although not all psychologists are Association members, "membership in the APA commits members to adhere to the APA Ethics Code"); *id.* at Standard 2.01(a) ("Psychologists perform evaluations [or] diagnostic services . . . only within the context of a defined professional relationship"); Standard 2.02 ("Psychologists refrain from misuse of assessment techniques . . . and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide."); Standard 2.06 ("Psychologists do not encourage or promote the use of psychological assessment techniques by unqualified persons."); Standard 2.10 ("Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques . . ."); and Standard 6.04 ("Psychologists do not teach the use of techniques or procedures that require specialized training, licensure, or expertise . . . to individuals who lack the prerequisite training, legal scope of practice, or expertise.").

816. *The Rorschach Test*, (including outlines of all ten Rorschach images and suggestions for their interpretation), available at <http://www.deltabravo.net/custody/roorschach.htm> (on file with the Buffalo Law Review). This page is apparently maintained by Separating Parent Access and Resource Center [hereinafter SPARC], whose goal is "to ensure that children of divorce continue to have meaningful relationships with both parents, regardless of marital status." SPARC, *Information to Assist Fathers and Non-Custodial Parents*, at <http://www.deltabravo.net>. The same material also appears at other sites,

critics of this test, "rote memorization" of such responses is "a relatively easy strategy for beating" it, that is, for defeating its diagnostic function.⁸¹⁷

In fact, in response to "repeated letters from dozens of outraged psychologists and psychiatrists,"⁸¹⁸ one such Web page bears a prominent notice that "[t]he information presented here, including the outlines of the Rorschach inkblots, is not in violation of copyright law. Please don't waste your time writing us to complain or threatening to 'turn us in to the publisher.'⁸¹⁹

Yet books describing these tests and their clinical application and interpretation have always been available to those who know where to find them. The Internet may just make it easier to locate and acquire them—or at least to obtain excerpts for free.⁸²⁰

The most obvious spiritual counterpart of the Rorschach test is the Zen koan, a well-known example of which is, "What is the sound of one hand clapping?" Traditionally, a student would, under the supervision of a Zen master, concentrate for prolonged periods on solving this non-rational query. This process would ideally culminate in the student's demonstrating, usually in a seemingly illogical manner (for example, by thrusting one

including *The Hannibal Library*, at <http://www.pentaone.com/hannibal/rorschach.shtml> (last visited Nov. 6, 2002).

Also available through the Internet is a detailed description of the scenes on Thematic Apperception Test (TAT) cards, and suggestions for effective responses by those who are shown the cards and asked to invent stories to explain the scenes. *The Hannibal Library: The Thematic Apperception Test*, ("Copyright restrictions prevent showing the actual cards."), at <http://www.pentaone.com/hannibal/thematic.shtml> (last visited Sept. 8, 2003).

817. JAMES M. WOOD ET AL., WHAT'S WRONG WITH THE RORSCHACH? SCIENCE CONFRONTS THE CONTROVERSIAL INKBLOT TEST 316 (2003).

818. *The Rorschach Test*, *supra* note 816.

819. *Id.* This page does acknowledge that "[c]opyright restrictions prevent us from showing you the blots themselves, so we'll use outlines." *Id.*; see also Ruiz, *supra* note 814, at 298 ("[I]dentification of sites that violated copyright laws could . . . lead to copyright challenges."). *But see* WOOD, *supra* note 817, at 20 (indicating that "the copyright has apparently expired" on the Rorschach figures).

820. See Ruiz, *supra* note 814, at 296 (identifying, as "indirect threats" to psychological assessment, "various [online] bookstores where individuals could purchase highly sensitive material. For example, a popular Internet bookstore was noted to sell [name of book]."); *id.* (noting, as a "direct threat," that "[a] set of the Rorschach plates, which are generally restricted from unauthorized purchase, were also for sale on a popular Internet auction site.").

hand forward), his attainment of a heightened level of awareness.⁸²¹

However, for centuries, accounts have circulated of the questions and of recommended answers.⁸²² For example, a recent translation of a 1916 work claims to provide "all the koans which the Zen novice has to answer during the long course of his training for qualification as a Zen master, together with their traditional answers."⁸²³ The author asserts an intent to provide to Westerners the most accurate portrayal of Zen,⁸²⁴ yet warns that some of this material might be artificial or incorrect.⁸²⁵ In fact, after "what started as secret notebooks ended up becoming an indispensable reference for Zen practice" and such compilations were published for "a still larger public,"⁸²⁶ a

821. See NARANJO & ORNSTEIN, *supra* note 794, at 148 (asserting that "the desired answer is not verbal or logical" and that it "may be one of many possible [correct] ones"); STEVEN HEINE, *OPENING A MOUNTAIN: KOANS OF THE ZEN MASTERS* 6 (2002) (characterizing koans as "rhetorical devices that use paradox, wordplay, and ambiguity to communicate a message about the maddening quality and inherent limitations of language."); Bernard Tetsugen Glassman, *Notes on Koan Study*, in *ON ZEN PRACTICE* (Hakuyu Taizan Maezumi & Bernard Tetsugen Glassman, eds. 1976) 58, 60-61 (discussing progression of students through various levels of a system of koans).

822. See, e.g., Hirano Sojo, *Foreword to THE SOUND OF ONE HAND CLAPPING: 281 ZEN KOANS WITH ANSWERS* 3 (Yoel Hoffmann trans., Basic Books 1975) (1916) [hereinafter *SOUND OF ONE HAND*] (citing 12th century example of a disciple's burning a similar book); *id.* at 47 (providing the hand-thrusting answer to the koan of its title); Ishikawa Rikizan, *Transmission of Kirigami (Secret Initiation Documents)* (Kawahashi Seishu ed. & trans.), in *THE KOAN: TEXTS AND CONTEXTS IN ZEN BUDDHISM* 233, 234-36 (Steven Heine & Dale S. Wright eds., 2000) (discussing types of secret documents in the Zen tradition, including "monsans, or secret koan manuals or documents of 'the curriculum, questions, and expected responses for each koan'").

823. *SOUND OF ONE HAND*, *supra* note 822, at 39; see also *ZEN SAND: THE BOOK OF CAPPING PHRASES FOR KOAN PRACTICE* 70 (Victor Sogun Hori ed. & trans., 2003) (indicating that collections of "old cases," or koans, were being assembled as early as "the mid tenth century"). *But see* G. Victor Sogen Hori, *Koan and Kensho in the Rinzai Zen Curriculum*, in Heine & Wright, *supra* note 822, at 280, 294 (suggesting that, although "the responses for koan have now become standardized, . . . a [Zen master] can usually spot play-acting" on the student's part); AUSTIN, *supra* note 424, at 114 ("No hard-nosed [Zen master] who knows his students will be fooled by any such rehearsed, pretend answers.").

824. *SOUND OF ONE HAND*, *supra* note 822, at 41.

825. *Id.* at 43 (attributing the "stereotyped and artificial" nature of some answers, and the possibility that some of them are "missing the point of the koan," to their translation or editing by "some of [the] less-gifted disciples" of the Zen master who wrote the original work).

826. *ZEN SAND*, *supra* note 823, at ix.

new testing practice emerged: Zen masters confirmed students' insight into a given koan by asking them to find the appropriate "capping phrase," or *jakugo*, from such a collection.⁸²⁷

Yet just as there appears to be little legal recourse for the mental health community⁸²⁸ in the case of the unauthorized dissemination of the Rorschach test, the answer in the case of a "leaked" koan, a fixation in the Arica system, or other spiritual diagnosis is similarly one of ethical, and not legal, dimensions. Unless they could sue for breach of, or to enforce, an agreement not to disclose such material, spiritual groups would appear to have few legal avenues for redress in this context.

B. Protection of the Teachings and Techniques

1. *Prevention of Distortion and Misinterpretation.* Traditionally, teachers of esoteric material have carefully evaluated their potential and current students to prevent the material—and the personal insight and power that it could bring—from being acquired by those who would pursue self-centered goals.⁸²⁹

827. *Id.* at 30-31.

828. The person who administers psychodiagnostic tests like the Rorschach test might not herself be a psychotherapist, or even a therapist.

829. See NOTT, *supra* note 49, at 16 (quoting A.R. Orage, a leading student of Gurdjieff, as identifying the most important qualification for a student of Gurdjieff's teachings: "the future trustworthiness of the pupil, to ensure that he will not abuse the knowledge he may thus acquire for the pursuit of egoistic aims"); HOFFMAN, *supra* note 773, at 25 (indicating that from the late seventeenth century to the present day, orthodox Jewish thought held that "pursuit of the Kabbalah is forbidden until one is over forty years of age, married, and has already achieved a 'full belly' of knowledge of the Talmud and other essential aspects of normative Judaism"); GERSHOM SCHOLEM, *ON THE MYSTICAL SHAPE OF THE GODHEAD: BASIC CONCEPTS IN THE KABBALAH* 31 (Joachim Neurgroschel trans., Jonathan Chipman ed., 1991) (observing that certain sections of the Bible, considered to be "esoteric texts par excellence," "could be studied privately, but even then only by those who were worthy, mature, and held in esteem by their fellow citizens"), SHAH, *supra* note 71, at 292 (noting that in Sufi schools, candidates "who have been attracted by the repute of Sufis and the desire to attain miraculous powers are weeded out"); Mark C. Suchman, *Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies*, 89 COLUM. L. REV. 1264, 1287-88 (1989) (stating that the extended apprenticeships of shamans-in-training allow established shamans "ample opportunity to weed out unsatisfactory recruits" who cannot handle such power). *Cf.* Ichazo, SYMBOL, *supra* note 13, at

One such egotistic aim is to teach the material without authorization, whether or not the student has fully assimilated it.⁸³⁰ Thus, Gurdjieff explained to Ouspensky, when finally releasing him from certain conditions of secrecy, that previously Ouspensky "would not have been able to give a correct picture, a correct impression. Instead of giving people the possibility of coming to these ideas you would have repelled them for ever [sic]."⁸³¹ Besides confusing, misleading, or alienating potential and current students, unauthorized teachers might even, as discussed above, expose them to psychological harm.⁸³²

Yet, as the *Arica v. Palmer* litigation illustrates, the fair use defense to copyright infringement might protect the distribution even of a work substantially similar to the original material, so long as it has not damaged the market for the original. As in that situation, the purveyors of the

23 (noting that "[t]he Arica School does not put any conditions or limits on being accepted" as a student).

For a popular representation of the misguided application of spiritual power by an immature student, see the Walt Disney movie, *FANTASIA* (1940) (depicting, in "Sorcerer's Apprentice" segment, a student's nightmarish inability to control magical spells).

830. Cf. Alexander Pope, PASTORAL POETRY AND AN ESSAY ON CRITICISM 264-65 (E. Audra & Aubrey Williams eds., Broadwater Press, Ltd., 1961) (1709) ("A little learning is a dang'rous Thing;/Drink deep, or taste not the Pierian spring;/There shallow Draughts intoxicate the Brain,/And drinking largely sobers us again.") (emphasis in original).

831. OUSPENSKY, IN SEARCH, *supra* note 18, at 241. Ouspensky instructed his own students that the main reason for requiring confidentiality of new students is that the ideas taught should be given "only on certain conditions which safeguard them from being distorted. . . . It is very important to prevent these ideas from deteriorating" OUSPENSKY, FOURTH WAY, *supra* note 26, at 287.

832. See Ichazo, SYMBOL, *supra* note 13, at 23 (warning, without identifying the offender, that an "extremely dangerous" distortion of true spiritual work is "the creation of an artificial [but egotistic] self which is modeled upon formulas and defined by scripts of self-improvement"); Ichazo, *School*, *supra* note 33, at 57 (decrying the trivialization by "pseudo-gurus" of an unidentified method that he had used with the Chile Group, and warning that this technique is, "out of context . . . extremely dangerous, for it is not only shocking but can produce a violent catharsis" and in the wrong hands "does nothing but expose people to confrontation that will ignite a manic-depressive pattern of exaltation followed by depression"); Ichazo, LETTERS, *supra* note 11, at 56. Ichazo declared that a certain exercise cannot be properly performed "outside a mystical school. Otherwise it loses its value completely, and . . . opens the internal self to diabolic temptations." *Id.* Cf. JAMES, *supra* note 61, at 96 (discussing the "innumerable failures and self-deceptions that are mixed in with" the Panglossian "Mind-cure" movement of his era).

new system might carefully distinguish their version from the original in order to avoid liability under the Lanham Act. Beyond resolving secular issues of intellectual property law, courts will be reluctant to intervene in issues of alleged "heresy."⁸³³ One commentator has even suggested that the merger doctrine might exempt religious texts from copyrightability, since their own adherents believe that they "cannot be adequately paraphrased without distorting their meaning."⁸³⁴

2. *Prevention of Desanctification.* Oscar Ichazo strongly opposed, as "a catastrophe of an incredible magnitude in our culture,"⁸³⁵ any attempt to reduce the Protoanalysis system to a set of "psychological self-help" techniques. He attacked the facile uses of the fixations system to divide people into "'personality types' as tools for ego aggrandizement, instead of [as] a method of . . . transcendence of the lower ego,"⁸³⁶ and argued that other

833. See *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1061 (S.D.N.Y. 1991) (indicating that Arica's motivation appeared to be the suppression of what it regarded as heresy, rather than the enforcement of its copyrights), *summary judgment granted*, 770 F. Supp. 188, *aff'd*, 970 F.2d 1067 (2d Cir. 1992).

834. Cotter, *supra* note 102, at 359-60. This author notes, however, that "courts . . . have shown surprisingly little sympathy for this argument." *Id.* at 360.

835. Ichazo, *SYMBOL*, *supra* note 13, at 22 (decrying the use of Arica's techniques merely for "helping people to overcome their basic state of constant depression, anxiety, fear and the terrible burden of being a stranger to their own life," since this "prevents [them] from attaining real transcendence in this life."); see also Tony Hiss, *The Chic of Araby*, *SATURDAY REVIEW OF THE SOCIETY* (San Francisco) 1(4), April 21, 1973, at 53, 59 (quoting an unnamed "East Coast therapist": "it bothers me that therapists up and down the coast are taking Arica techniques . . . and just doing numbers on them."); Ichazo, *School*, *supra* note 33, at 51 (insisting that Arica is not "a set of formulas, or therapy, for promoting psychological well-being").

836. Ichazo, *Isaacs Interview*, *supra* note 21, at 22; see also ICHAZO, *LETTERS*, *supra* note 11, at 75 (cautioning that "when the fixations become intellectualized and played with, employing psychological insights originating in a subjective and ego-centered point of view, we will inevitably have exactly the reverse of their original proposition. . . . instead of reducing [the ego, they will] inflate it. . . ."); JACOB NEEDLEMAN, *THE NEW RELIGIONS* 200 (1970) (stating that when esoteric ideas "enter the lives of men who are not on the path, they immediately become 'exoteric,' or 'popular'. . . . They thus tend to fall into the service of the desires and fears, whereby they are misunderstood and may even become a force which obscures the way to the discipline in which they originated."); WILLIAM PATRICK PATTERSON, *TAKING WITH THE LEFT HAND* 40 (1998) (warning, as a long-time student of Gurdjieff's teachings, that "injecting esoteric ideas and practices into society weakens and distorts not only the

authors imposed a moral overlay and did not address "the internal relations of the Enneagons, their functions and their natural declension."⁸³⁷

The desanctification of the primarily spiritual into the merely therapeutic has also been condemned by a Tibetan Buddhist meditation teacher as "spiritual materialism,"⁸³⁸ by two recent authors in the Christian tradition as downgrading religion to one "commodity among others, or at least a way of obtaining commodities" such as health,⁸³⁹ and by the developer of another awareness program in the early 1970s, who distinguished a true "course *about* transformation" from a mere "well-presented package of useful techniques."⁸⁴⁰

Yet, barring a breach of a contractual obligation or an infringement of the intellectual property rights of the developer of a spiritual technique, this "stepping-down" of a practice's purpose does not seem to be remediable by law. Ichazo's current position, that the fixation material may be used by anyone so long as that person attributes the

teachings from which they are stolen, but corrupts society itself" because such powerful ideas "will necessarily be taken over by the ego and used for its own glorification and the domination of others").

837. Goldberg, *supra* note 26, at 26 (quoting Ichazo). Speaking at a conference of Christian therapists, Naranjo similarly criticized the popularization of the enneagram, finding the books and the "workshop industry" on this topic "not very much in the spirit in which I received this, which was as one element in a wider context of transformation and as information not to be divorced from the experience of it." Naranjo, *Stumbling Block*, *supra* note 470.

838. See Sherab Chodzin, *Notes*, to TRUNGPA, PATH, *supra* note 772, at 155, n.1 (defining this term as "the approach of trying to use spiritual techniques to achieve the goals of ego, such as becoming calmer, more efficient, more magnetic, or simply happier," and indicating that "[a] major feature of [Trungpa's] early teaching was a thoroughgoing critique of this attitude. . ."). Cf. Hall, *Is Buddhism Good for Your Health?*, *supra* note 324, at 46, 48 (noting that in the last decade, "the neuroscientific study of Buddhist practices has crossed a threshold of acceptability as a topic worthy of scientific attention").

839. JOEL JAMES SHUMAN & KEITH G. MEADOR, *HEAL THYSELF: SPIRITUALITY, MEDICINE, AND THE DISTORTION OF CHRISTIANITY* 8 (2003) (generally addressing the incorporation of Christian principles into the practices of health professionals and their patients); see also CIMINO & LATTIN, *supra* note 3, at 51 (suggesting that "[i]n the new millennium, many Americans will be more concerned with therapy than theology . . . [S]pirituality will be increasingly viewed as something that is medically and psychologically beneficial").

840. See BARTLEY, *supra* note 425, at 173 (quoting Erhard as indicating that he had developed the "est" training after resigning as the teacher of a personal development program that was an example of the latter but not of the former).

underlying work to him and distinguishes her own glosses on it,⁸⁴¹ would seem to recognize this.

3. *Prevention of Premature Publication.* Another way in which spiritual secrecy protects the teachings themselves concerns the dynamic nature of some of this material. For pedagogical or other reasons, the equivalent of bicycles' "training wheels" might have been inserted into the teachings or techniques: later versions of the material could remove or simplify these extra steps once students understand their purpose, or progress beyond the point of needing them. It is also possible that errors or extraneous material could have been deliberately installed in the material so that its developers could prevent or detect plagiarism,⁸⁴² or confuse outsiders.⁸⁴³

In addition, material that a student might consider the final word on a subject could actually be only an early version of an evolving teaching or technique. For example, both the Protoanalysis system⁸⁴⁴ and the "gym" or "Psychocalisthenics" series of basic physical exercises

841. See *supra* notes 301 and 302, and accompanying text.

842. Exactly such a motive was claimed by Arica in the Dimension Books litigation, discussed *supra* Part I.D.1. Not only did Arica cite as evidence of infringement the reproduction, in a book written by several defendants, of an error contained in an early Arica training chart, see Dunderdale Dimensions Affidavit, paras. 12-14, *Dimension Books* (No. 88 Civ. 2004), but it claimed that the error had been "purposefully" inserted "as a mechanism to detect potential infringers (a method frequently used by cartographers to detect infringement of maps)." Memorandum of Law in Support of Plaintiff's Motion to Dismiss Defendants' Counterclaims and to Strike Defendants' Affirmative Defenses, *Arica Inst., Inc. v. Dimension Books, Inc.*, 88 Civ. 2004 (S.D.N.Y.) at 18-19.

843. See EPSTEIN, *supra* note 104, at xvi ("The complicated diagrams and mystic texts that pass for Kabbalah today were often deliberately distorted in order to confuse the uninitiated eye.").

844. For example, Ichazo observed that with the Chile Group "my explanation of Protoanalysis corresponded only to the psychological level of teaching" See Ichazo, SYMBOL, *supra* note 13, at 16. See also Ichazo, *Foreword*, *supra* note 62, at vi (indicating, in discussing a more elaborate version of his system, that an earlier version "is complete in itself and reflects the totality of the system in a condensed form. The necessity of [teaching] a synthesized schema in 1969-1970 was important because of the need of my students to assimilate the method quickly and clearly in order to put it into practice"); Ichazo, SYMBOL, *supra* note 13, at 17 (indicating that his "Integral Philosophy," which integrates "all disciplines and sciences into one coherent schema," consists of eighteen "Spheres of Knowledge and Existence," which are "divided into six realms").

performed by Aricans⁸⁴⁵ have changed over the years (as has the method of determining fixations).

This would be especially true if the provider of this material were himself still a student. Carlos Castaneda, acknowledging that after his first book on "sorcery" he had realized that psychotropic plants were not necessary to induce certain spiritual experiences, attempted to "reinstate" in his second book his teacher's discussions on certain techniques.⁸⁴⁶ In his seventh work on his experiences, Castaneda claimed to include not only material that he had formerly vowed to keep secret until completing "everything in the sorcerers' teaching scheme," but experiences so at odds with "reason and common sense" that he had previously suppressed them from his own awareness.⁸⁴⁷ Castaneda characterized his publications as "the account of an ongoing process which becomes more clear to me as time goes by."⁸⁴⁸

Yet even a fully-realized author of spiritual materials can portray them as evolving works: she could be adapting them not just to current students but to the present time and culture.⁸⁴⁹ In fact, the degree to which spiritual

845. ICHAZO, PSYCHOCALISTHENICS, *supra* note 409 (detailing, in 1976, a sequence of twenty-five exercises); ICHAZO, MASTER LEVEL EXERCISE, *supra* note 409 (offering a slightly different set of twenty-three exercises). See LILLY, CENTER, *supra* note 45, at 156 (noting that the Arica "gym" included "about three dozen" exercises); Smith, *supra* note 15, at 18 (quoting, in 1972, unpublished Arican description of "Gym," a "series of approximately 40 exercises best described as a cross between various yoga systems, dance exercises and calisthenics [sic]").

846. CARLOS CASTANEDA, JOURNEY TO IXTLAN 13 (1972).

847. CARLOS CASTANEDA, THE POWER OF SILENCE 17 (1987).

848. *Id.* at 7.

849. For example, in mid-1970, when John Lilly first visited Arica, Chile, Oscar Ichazo asked him not to discuss with subsequent visitors from the United States the regimen that Ichazo had assigned to four early students, who were used "as guinea pigs, as samples of North Americans and what sort of things we needed in the training." See Lilly, CENTER, *supra* note 45, at 141; See WEBB, *supra* note 18, at 139 (suggesting that portrayal of Gurdjieff's teaching in Ouspensky's *In Search of the Miraculous* was affected by the nature of Gurdjieff's students and surroundings during the period in question, as well as by Ouspensky's own "personal preoccupations."); see also Fields, *supra* note 89, at 29 (observing of Arica, in mid-1976, that "I had the sense that 'new work' is introduced fairly often, and the older material is always open to revision The Trainings themselves are also likely to change This kind of ferment is either confusing or 'experimental,' depending on your point of view."); see also LILLY, CULTURAL IMPLICATIONS, *supra* note 71 (opining, as Ichazo was shortening the Chile Group's ten-month training to present three-month forms

techniques can or should be extracted from their cultural settings⁸⁵⁰ remains a matter of much dispute.⁸⁵¹ Considering whether one needs to or ought to practice all the Buddhist rituals in order to experience Zen meditation fully, Werner Erhard of *est* concluded, "I don't see that many of the rituals and the spirit of Zen are inextricably connected—except historically."⁸⁵² Yet one Tibetan Buddhist master

of it in New York, that the Chile Group was "using a lot of things that are totally irrelevant—Oscar's eliminated a lot of them, but he can do more.").

850. *See, e.g.*, Joel Stein, *Just Say Om*, TIME, Aug. 4, 2003, at 48, 51 ("As meditation is demystified and mainstreamed, the methods have become more streamlined."); Francis X. Clines, *Mysteries of the East Off Central Park*, N.Y. TIMES, Oct. 8, 1971, at 45 (quoting Joseph Hart, then a member of Arica's staff, about Arica's first training in New York: "The methods here are ancient, but the cultural trappings have been stripped away."). *Cf.* Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1728 (1989) (distinguishing between "technical traditions," such as building codes, which "result from an accumulation of numerous consciously purposive decisions made by particular rational actors in the past," and "organic traditions," such as those "concerning sexual behavior and marital relationships," which "have evolved over time without their effects being fully and accurately understood by any individual.").

851. FIELDS, *supra* note 776, at 324 (quoting Sonam Kazi on the proposed separation of "the nonconceptual aspects of *dzogchen*" meditation practice from "the preliminary practices and ceremonies and rituals that went along with it."); *see also* MARIANA CAPLAN, *HALFWAY UP THE MOUNTAIN: THE ERROR OF PREMATURE CLAIMS TO ENLIGHTENMENT* 22 (2001) (suggesting that some Asian teachers instructing Americans "fail to realize that their own understanding of and ability to work with the teachings is based on a cultural matrix" not shared by their students); CSIKSZENTMIHALYI, *supra* note 423, at 21 (suggesting that "the knowledge of how to control consciousness must be reformulated every time the cultural context changes. . . . [W]hen transplanted to contemporary California, [Sufi, Zen, and yogic systems] lose quite a bit of their original power."); EPSTEIN, *supra* note 104, at xvii (declaring that "[t]rying to practice kabbalistic 'meditation' without understanding its foundation in the Torah. . . would be like trying to fly without wings. One cannot even begin to live the mystical life as a Jew without a knowledge of Hebrew."); Jonathan Mahler, *Houses of Worship: Kabbalah Lite*, WALL ST. J., May 22, 1998, at W11 (quoting Rabbi Arthur Hertzberg on the popularization of esoteric Judaism: "like magpies, [people without a background in Jewish thought] are picking away at a body that they do not understand."); Smoley, *supra* note 2, at 23 (quoting Helen Palmer: "When the traditions came [to the West], they came with their cultural settings largely intact. And some of those cultural settings are highly abusive—to women, to people who are not financially advantaged. That has to wash out.").

852. BARTLEY, *supra* note 425, at 125 (quoting Erhard); *see also id.* at 121 (quoting Erhard: "Of all the disciplines that I studied, practiced, learned, Zen was the *essential* one. . . . While the *form* of Zen training is different from the form of the *est* training, we come from similar abstractions.").

warned that his own spiritual tradition "was like a finely woven carpet, and one could not pick or choose one thread or color over all the others without running the danger of unraveling the whole design."⁸⁵³ The same authority also condemned the American penchant for combining elements of different spiritual traditions, stating that, "You only end up . . . with a concoction like chop suey,"⁸⁵⁴ whose connections to Asia are legendarily (in both senses of that word) spurious.⁸⁵⁵

This rationale for secrecy, though, could easily be applied to monopolize certain teachings until their author deemed one version (if any) suitable enough for public release. Once again, the fair use defense might protect many authors who commented on and reproduced passages of even an early version of the works: in fact, one of the purposes of this doctrine is to encourage public commentary on the material. Although those exposed to the original works might be required to sign nondisclosure agreements, the Scientology decisions indicate that an innocent third party who finds the material on the Internet or elsewhere

For a thorough and fascinating compendium of Western-born teachers of Eastern traditions, as well as a useful categorization of their approaches, see ANDREW RAWLINSON, *THE BOOK OF ENLIGHTENED MASTERS: WESTERN TEACHERS IN EASTERN TRADITIONS* (1997).

853. FIELDS, *supra* note 776, at 324 (quoting Sonam Kazi). Another useful analogy might be to the attempt to provide in pill form the vitamins that naturally occur in a healthful diet. See, e.g., Marian Burros, *Eating Well: Vegetables and fruits still hit the mark*, N.Y. TIMES, Apr. 20, 1994, at C4 (suggesting that a good diet contributes more to one's health than does one's ingestion of vitamin supplements); Marian Burros, *Eating Well: Supplements? Even experts can't agree*, N.Y. TIMES, Apr. 14, 1993, at C4 (same). Cf. HOLDING THE LOTUS TO THE ROCK: THE AUTOBIOGRAPHY OF SOKEI-AN, AMERICA'S FIRST ZEN MASTER 188 (Michael Hotz ed., 2002) (criticizing earlier Zen masters for abandoning "the atmosphere of Buddhism . . . like the scientist of today who [eats a vitamin pill] instead of a meal . . . Real Buddhism must be a full-course meal").

854. FIELDS, *supra* note 776, at 324 (quoting Sonam Kazi).

855. Popular wisdom presents chop suey as "a dish which was invented in the United States, either as an adaptation of Chinese food to cover shortages of ingredients or to appeal to Western palates." J.A.G. ROBERTS, *CHINA TO CHINATOWN: CHINESE FOOD IN THE WEST* 139 (2002) (reviewing two popular versions of the origins of this item). However, this may itself be an urban legend: one source dismisses the "widely known origin myth" of American origin to trace the dish to "Toisan, the area south of Canton from which about half of all American Chinese trace their ancestry." (observing that in Cantonese, *tsap sui* means, "miscellaneous things"). E.N. Anderson, Jr. & Marja L. Anderson, *Modern China: South*, in *FOOD IN CHINESE CULTURE: ANTHROPOLOGICAL AND HISTORICAL PERSPECTIVES*, 355-56 (K.C. Chang ed., 1977).

(particularly if it is not labeled "confidential") is generally not bound to keep it secret.⁸⁵⁶

4. *Prevention of Ridicule.* Confidentiality might also prevent the system from being ridiculed. Whether the higher-level teachings involve a powerful personal experience of the truth of such a seeming platitude as "All is Love" or "All humans are brothers and sisters," or a deeper appreciation of the complex cosmological theories of the Church of Scientology,⁸⁵⁷ dissemination of such information, particularly selectively or out of context, invites criticism and perhaps mockery from the uninitiated. (It also poses a dilemma: an attempt to clarify the excerpts might involve exposing more of a group's inner teachings, which in turn could fuel further ridicule as well as aid competitors.) One authority on new religious movements has remarked that "[c]ritics of Scientology have attacked the [Church's advanced scriptures] as an unbelievable myth which no rational, thinking person can believe,"⁸⁵⁸ and the Church's trial counsel has stated that those who post such documents on the Internet intend "to ridicule and demean" the Church.⁸⁵⁹

This justification for secrecy, however, was rejected in the Scientology litigation as infringement of the free speech rights of commentators.⁸⁶⁰ Moreover, although criticism of a work (as opposed to duplicating it in its entirety) affects the market for the material, it is generally not subject to a remedy under copyright law.⁸⁶¹ However, spiritual groups

856. See *supra* Parts I.F.1 and II.D through II.H.

857. See JAMES, *supra* note 61, at 382 ("The simplest rudiment of mystical experience [is] that deepened sense of the significance of a maxim or formula which occasionally sweeps over one.").

858. J. GORDON MELTON, THE CHURCH OF SCIENTOLOGY 72 n.10 (2000).

859. Frankel, *supra* note 477, at 73 (quoting Earle Cooley); *but cf.* LAO TZU, TAO TE CHING 102 (D.C. Lau trans., Penguin ed. 1963) (c.500 B.C.) ("When the worst student hears about the way/ He laughs out loud./ If he did not laugh/ It would be unworthy of being the way."); Ichazo, SYMBOL, *supra* note 13, at 24 ("Any information concerning [Arica's] higher-level trainings can in no way become an object of ridicule inasmuch as the information is complete and accurate.").

860. See *supra* Part II.G.2-3.

861. See, e.g., *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 160 (2d Cir. 1990), *cert. denied*, 498 U.S. 921 (1990) (citing *Consumers Union of the United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983), (holding that although "[t]he fourth fair use factor will come into play if too much is copied or if the entire plot is revealed [in a review], thereby usurping

may begin to include in the licenses for their teachings and techniques "anti-criticism" clauses, prohibiting licensees from quoting their works in negative (or any) critiques.⁸⁶² The fate of such attempts to contract around the fair use provisions of copyright law is uncertain.

5. *Maintenance of Lineage.* A further reason for secrecy, and for the protection of intellectual property in general in the spiritual context, is to identify and maintain the lineage of a spiritual tradition or practice.⁸⁶³ Because spiritual activities, particularly outside established religious denominations, are subject to few standardized certifications, an affiliation with or endorsement by a respected authority or tradition is an important credential.⁸⁶⁴ As one commentator noted, "Sufi master is not

the demand for the original work," it would be irrelevant for purposes of the fourth factor analysis—and copyright protection generally—whether "the devastating critique had diminished sales by convincing the public that the original work was of poor quality.").

862. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 602 (1998) (observing that unlike other potential users of such provisions, who might be deterred by the costs of enforcing them, "[c]hurches often have very powerful non-monetary goals Most other copyright owners put finance before honor.").

863. See, e.g., GARUDA IV: THE FOUNDATIONS OF MINDFULNESS (Chogyam Trungpa ed., 1976) 86-87 (reproducing the lineage and empowerment document of its editor, a Tibetan Buddhist); THE RECORD OF TRANSMITTING THE LIGHT: ZEN MASTER KEIZAN'S *DENKOROKU* (Francis H. Cook trans., 1991) (chronicling fifty-three generations of a spiritual lineage in the Zen Buddhist tradition).

864. Of particular interest to commentators on the Buddhist community in America has been the lineage authority of American-born Zen masters. See MICHAEL DOWLING, *SHOES OUTSIDE THE DOOR: DESIRE, DEVOTION, AND EXCESS AT SAN FRANCISCO ZEN CENTER* (2001) (focusing on the controversies behind the removal of one American-born Zen master from a prominent position of spiritual authority, and assessing the differences between Asian and American Zen communities); MARTHA SHERRILL, *THE BUDDHA FROM BROOKLYN* (2000) (discussing the recognition in the Tibetan Buddhist lineage of a female, Brooklyn-born spiritual leader); HELEN TWORKOV, *ZEN IN AMERICA: PROFILES OF FIVE TEACHERS* 101 (1989) (noting, in her examination of the backgrounds, practices, and philosophies of such individuals, that "[t]he question at stake—and it is a crucial one—is to what extent can Zen become integrated into the American system of democratic organization without jeopardizing the idiosyncratic intimacy of the teacher-student relationship"); *id.* at 253 (charting the "dharma transmission," or spiritual lineage, connecting each of these teachers with the originator of Buddhism).

On a much different level, nascent efforts to support the credentialing of new forms of advisors on professional success and on physical fitness have not

like Berkeley Ph.D. You cannot call up Sufi U. and check the graduation date, because there is no Sufi U. anywhere.⁸⁶⁵ In the absence of more formal criteria, even having visited Asia to spend time with recognized masters would be valuable support for one's claim to spiritual authority.⁸⁶⁶

By considering only the intellectual property rights in question, courts have, without overstepping constitutional boundaries, effectively resolved competing claims for successorship to a spiritual lineage. For instance, a dispute over the spiritual leadership of a long-recognized Sufi Order⁸⁶⁷ involved the successor's rights not just to physical property but also to "teachings, works, and publications,"⁸⁶⁸ and to trademarks used to authenticate these materials.⁸⁶⁹ The Ninth Circuit Court of Appeals, acknowledging the threat that its secular intervention might pose to the First Establishment's separation of church and state,⁸⁷⁰

stopped commentators from pointing out the general lack of standards in these fields. *See, e.g.*, GINA KOLATA, *ULTIMATE FITNESS* 239-59 (2003) (criticizing the less-than-rigorous process of certifying the qualifications of personal fitness trainers); John Briley, *Who Trained the Trainer?*, WASH. POST, Dec. 3, 2002, at F1 (examining the wide range of standards for personal trainers); Cecilia Capuzzi Simon, *A Coach for "Team You,"* WASH. POST, June 10, 2003, at F1 (discussing the burgeoning ranks of, and vast differences in training among, "life coaches" who help "high-functioning" individuals identify and reach their long-term goals); Kathryn Tyler, *Scoring Big in the Workplace*, H.R. MAGAZINE, June 1, 2000 (available at 2000 WL 13760653) (indicating that "there are no established standards" for "corporate coaches," who help executives enhance their professional skills).

865. Smith, *Alumni Notes*, *supra* note 53, at 78.

866. *See* SMITH, *supra* note 36, at 272 (quoting Werner Erhard, founder of est, as indicating that he went to India not to seek enlightenment but primarily because "in my business, people should go to India," and commenting that "Werner's candor was always disarming."); TWORKOV, *supra* note 864, at 221 (quoting Richard Baker, one of the first American-born Zen masters: "When [my teacher] sent me to Japan, he said, 'You have to have the credibility of having been to Japan.'").

867. *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1246 (9th Cir. 1999).

868. *Id.*

869. *Id.* at 1247. The defendants, who had been expelled from the plaintiff group for alleged wrongdoing, had established their own Sufi organization, which they claimed was the true successor to the Order in question, and had allegedly distributed the plaintiff's publications as their own, using a mark similar to the plaintiff's trademark. *Id.*

870. For an extraordinary instance of legislative overreaching and entanglement with regard to intellectual rights in the spiritual context, see *United Christian Scientists v. Christian Science Bd. of Dirs. of the First Church*

nonetheless recognized two situations in which it could legitimately exercise its authority. The first—involving the court's deference to the established decision-making body of the religious organization—is clearly inapplicable when the status or identity of that hierarchy is itself the issue.⁸⁷¹ Yet the second situation—allowing the court to decide issues that turn only on secular principles of property, trust, and corporate law⁸⁷²—would allow the district court to apply the neutral principles of trademark law.⁸⁷³

More such cases, in the realm of "New Age" or "human potential" organizations, might be in the offing. Whether by

of Christ, Scientist, 616 F. Supp. 476 (D.D.C.1985), *aff'd*, 829 F.2d 1152 (D.C. Cir. 1987), which struck down as unconstitutional Private Law 92-60, 85 Stat. 857 (1971), which returned from the public domain to the defendant "Mother Church" of Christian Science the copyright on all editions of that group's central theological writing, Mary Baker Eddy's *Science and Health With Key to the Scriptures*.

The Senator who sponsored this legislation had stated that nonstandard editions of this work "would cause great distress and confusion" among Christian Scientists and the public. *Id.* at 480 (citing 117 CONG. REC. S 26822 (1971)). Even the Senate Committee Report had acknowledged that the bill was intended to "preserve and maintain the purity and integrity" of such teachings. *Id.* To the court's ears, though, "[s]uch proceedings have the sound of the 17th century to them . . . Heresy is no part of the business entrusted to Congress by the Constitution." *Id.*

The court of appeals agreed. 829 F.2d at 1165 ("It is not the function of government to promote religious worship, [or] to enable a religious entity to control statements of church doctrine, or to guide a 'confused' public to 'correct' religious authority.").

871. *Id.* at 1248, (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)). Thus, the district court might not be able to properly rule, "without unduly entangling itself in doctrinal issues," on the plaintiffs' request that the defendants be enjoined from representing that the Order was no longer in existence and that the plaintiffs are teachers or masters of the Order. *Id.* at 1250.

872. *Id.* at 1249, citing *Maryland and Virginia Eldership*, 396 U.S. 367 (1970).

873. *Id.* (noting that "[i]n determining whether the trademarks [owned by the plaintiffs] have been infringed, the district court can apply the regular factors that courts employ to determine infringement."); *see also Sinkler v. Goldsmith*, 623 F. Supp. 727, 729 (D. Ariz. 1985) (holding that the determination of whether publication of letters received from the founder of a spiritual movement constituted copyright infringement was not an "ecclesiastical" matter but merely one involving intellectual property rights, and thus that "[i]t would be improper for this court to abstain from resolving the issues.").

nature⁸⁷⁴ or design,⁸⁷⁵ such groups do not always have clear rules for identifying teachers, affiliates, and successors. However, given the nationwide scope and franchise-type arrangements⁸⁷⁶ of some organizations offering spiritual

874. See PACWA, CATHOLICS, *supra* note 164, at 117 (indicating that in the absence of "norms for deciding who is an authentic or qualified enneagram teacher, . . . most enneagram 'experts' have that title through self-declaration and workshop advertising"; and recommending, until practitioners are tested and licensed, that people avoid such workshops, seminars, and retreats). Cf. Ichazo, SYMBOL, *supra* note 13, at 24 (noting the existence of a special committee in Arica "that approves and authorizes individuals to sponsor and teach Arica trainings. . . . All trainings have complete training manuals that require following the guidelines, structure and presentation of the material at a standard level."); WEBB, *supra* note 18, at 567 ("Little is known about how the [Gurdjieff group] teachers are trained except the famous adage, 'to learn more you must teach,' and a rumor . . . that it takes seven years to make a group leader.").

875. Among recently-developed spiritual practices, perhaps the most welcoming for potential teachers is *A Course in Miracles* (the "Course"), purportedly dictated by Jesus Christ between 1965 and 1972 to an associate professor of medical psychology at Columbia University. See ROBERT SKUTCH, JOURNEY WITHOUT DISTANCE: THE STORY BEHIND A COURSE IN MIRACLES (1984) (chronicling the creation of this work); KENNETH WAPNICK, ABSENCE FROM FELICITY: THE STORY OF HELEN SCHUCMAN AND HER SCRIBING OF A COURSE IN MIRACLES (2nd ed. 1999) (same).

Anyone who feels called to teach this system is free to do so. See *Manual for Teachers* 3, in A COURSE IN MIRACLES (2nd ed. 1996) (defining a "teacher of God" as "anyone who chooses to be one"); D. PATRICK MILLER, THE COMPLETE STORY OF THE COURSE 56 (1997) (indicating that under the Course's own principles, "anyone can decide to start teaching the Course without certified training or official approval. . . . [T]here is no one anointed or appointed to verify anyone's qualifications"); *id.* at 161 (observing that "significant differences in interpretation of [this material] already exist, and the teaching is hardly two decades old.")

Best-selling books based on the principles of, and including (with permission) quotations from, the Course include GERALD G. JAMPOLSKY, GOOD-BYE TO GUILT (1985) and MARIANNE WILLIAMSON, A RETURN TO LOVE: REFLECTIONS ON THE PRINCIPLES OF A COURSE IN MIRACLES (1992).

However, in the late 1990s the foundation holding the copyright in the Course brought suit to stop the unauthorized free distribution, both through Web sites and in printed form, of significant, and sometimes altered, excerpts from the Course materials. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV.4126(RWS), 2000 WL 1028634 at *19, *22 (S.D.N.Y.2000) (indicating that all four fair use factors weighed against defendants and granting a preliminary injunction preventing the defendants from posting Course material on Web sites).

876. See, e.g., Second Amended Bikram Complaint, *supra* note 400, at 3 (asserting that "[t]here are now over 250 facilities worldwide that offer Bikram Yoga," and that, under a Bikram Yoga Teacher Training Course established in 1994, "[o]nly Bikram himself may grant [teacher] certification," which includes

teachings and techniques, the licensing of intellectual property⁸⁷⁷ and diligent trademark and service mark enforcement in these new "technologies" might be replacing formal recognition or initiation as the definitive indication of affiliation and authority.

CONCLUSION

As the "New Age" marketplace offers ever-wider access not just to spiritual teachings and techniques but also to global information networks, material traditionally held closely by small groups is escaping the control of its developers with increasing speed. The litigations of Arica, the Church of Scientology, and Star's Edge illustrate the need for spiritual groups to move swiftly to identify their intellectual property rights and to detect and combat possible infringement.

Although courts have generally disregarded arguments based on the special nature claimed for esoteric material, and their constitutional boundaries allow them to resolve only matters of secular law, there remains room for traditional doctrines of intellectual property law to be

"limited license rights" to use his "trademarks and copyrighted works in connection" with teaching "Bikram's Basic Yoga System").

877. In fact, the legal and business arrangements surrounding Landmark Education Corporation, which licensed from est's Werner Erhard certain "technologies" to present the human potential program known as The Forum, have been the subject of a case study at the Harvard Business School. See Karen Hopper Wruck & Mikelle Fisher Eastley, *Landmark Education Corporation: Selling a Paradigm Shift*, Harvard Business School Case Study 9-898-081 (1997; revised Jan. 9, 1998; withdrawn in 2001); Vanessa Grigoriadis, *Pay Money, Be Happy*, NEW YORK, July 9, 2000, 19, 23-24 (discussing, in profiling the Forum, Erhard's eighteen-year licensing of est's "technology" to Landmark in 1991 for a fee of up to \$18 million; and noting that Landmark subsequently "bought outright Erhard's license and his rights to [conduct trainings in] Japan and Mexico").

These arrangements were also of interest to the Internal Revenue Service. See *Erhard Seminars Training v. Comm'r*, 52 T.C.M. (CCH) 890, 1986 WL 21738 (T. C. 1986) (reproducing, in the course of discussing tax issues related to Erhard Seminars Training, its Agreement of Sale, Employment Contract, License Agreements, and corporate resolutions concerning Erhard's "Body of Knowledge" and personal services); *Est, An Educ. Corp. v. Comm'r*, 52 T.C.M. (CCH) 920, 1986 WL 21739 (T.C. 1986) (including in its analysis reproductions of est's Settlement Agreement, Agreement of Sale, Employment Contract, License Agreements, Termination Agreement, Purchase Agreement, Employment Agreement, Modification of Employment Agreement, and Agreement for Profit Participation).

anticipated, applied, and in some cases extended, by plaintiffs seeking to stem the de- or re-contextualization of their spiritual teachings and techniques.