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Catholic Social Teaching, the Rule of Law, and Copyright Protection

SUSANNA FREDERICK FISCHER⁺

The rule of law is currently under grave threat in cyberspace. Even as copyright laws have been strengthened in many ways in response to new digital technologies, these laws are widely disrespected and cannot be effectively enforced against all those who willfully flout them.¹ The legislative response has been to strengthen copyright laws more and more, including expanding copyrightable subject matter, giving copyright owners new rights, and lengthening the copyright term. One example is the Copyright Term Extension Act of 1998. This amendment to federal copyright law retroactively extended the duration of copyright protection by twenty years.² The judicial response to challenges to these strengthened laws has often been to insist that the threat to the rule of law requires interpreting the law to give broad rights to copyright owners, while narrowly construing the rights of others who seek to use copyrighted works. Justice Ginsburg took this approach in her majority (7-2) opinion of the U.S. Supreme Court in *Eldred v. Ashcroft*, a constitutional challenge to the Copyright Term Extension Act.³ Yet these legislative and judicial responses have not succeeded in establishing a culture of respect for copyright law.⁴

This brief essay reflects on this situation from the perspective of Catholic social teaching.⁵ To this end, I first set out, as helpful paradigm, the case of

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¹ See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Copyright on the File-Swapping Networks*, 89 VA. L. REV. 505, 535-45 (2003) (describing the emergence of a “de-maximus” copyright infringement file-swapping norm after the development of Napster and similar technologies and noting the absence of sufficient societal support to enforce copyright laws). See also Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1127-28 (2003) (noting that lawsuits have not succeeded in preventing widespread copyright infringement by users of peer-to-peer technologies).

² Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.); support for the assertion that the CTEA was enacted in response to, *inter alia*, technological developments can be found in *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.14 (2003).

³ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴ See Julie L. Ross, *A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 55, 57 (2010) (contending that legislative enactment of higher civil and criminal penalties for copyright infringement have not stopped widespread digital copyright infringement).

⁵ Catholic social teaching is offered by the Church to all people of good will and, in its basic outlines, is intended as accessible to human reason. It has contributed, and continues to contribute, to public discourse on issues in law and public policy in the United States and elsewhere. See e.g. Jean Bethke Elshtain, *Catholic Social Thought, The City, and Liberal America*, in *CATHOLICISM AND LIBERALISM* 151-72 (R. Bruce Douglass & David Hollenbach eds., 1994).

Universal City Studios v. Reimerdes.⁶ Next, I give a basic introduction to the Church teaching on property rights and the rule of law, with its emphasis on the fundamental values of human dignity, solidarity, and the universal destination of goods, and I show the relevance of this teaching to a resolution of the problem. Finally, I undertake a critique of the Supreme Court's opinion in *Eldred* in light of these values. I conclude by showing that the extreme deference that Justice Ginsburg's majority opinion shows to Congress in interpreting the scope of the Copyright Clause of the U.S. Constitution is not consistent with Catholic teaching on these issues, because it is inconsistent with the demands of the common good. The dissenting judgment of Justice Stevens provides a contrast that is far more in keeping with the essential Catholic principles of human solidarity and the universal destination of goods and solidarity. The path staked out by Justice Stevens is more solicitous of the common good and thus is much more likely to foster a culture of respect for copyright law.

I. An Example of the Problem: Universal City Studios v. Reimerdes

A copyright case from just a few years ago, *Universal City Studios v. Reimerdes*, exemplifies, in a particularly clear way, the challenges that new digital technologies pose to the U.S. copyright regime and to the rule of law.⁷ At issue in *Reimerdes* was the scope of newly strengthened copyright protections in the Digital Millennium Copyright Act.⁸ This law addressed the concern that it was now quick and cheap to make many generations of virtually perfect copies of digital copyrighted works. Among other things, it sought to provide legal backup for technological protections, such as encryption.⁹ Some internet users responded to the Digital Millennium Copyright Act by willfully flouting it. They posted online DeCSS¹⁰ software that could decrypt copy protected motion pictures. Many others, including the defendants in *Reimerdes*, posted links to that software on their web pages. These links spread like wildfire across the internet.¹¹

The facts of *Reimerdes* make clear that many internet users lack respect for the rule of law. When some Hollywood studios obtained a preliminary injunction against some of those posting DeCSS, their reaction to the injunction was to post

⁶ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), *aff'd sub nom. University City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁷ *Id.*

⁸ Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860, 2905 (Oct. 28, 1998), codified at, 17 U.S.C. §§ 512, 1201-1205, 1301-1322, 28 U.S.C. § 4001.

⁹ 17 U.S.C. § 1201(a)(1)(A).

¹⁰ CSS is the acronym for "content-scrambling software."

¹¹ *Reimerdes*, 111 F. Supp.2d at 311-312.

links to other sites posting or linking to DeCSS.¹² The defendants claimed that these actions were “electronic civil disobedience” to an unjust law.¹³

The United States district court trial judge in *Reimerdes*, Lewis Kaplan, addressed the electronic civil disobedience argument by emphasizing the importance of the rule of law. Judge Kaplan was completely unreceptive to the defendants’ arguments that issuing an injunction against posting and linking would be inequitable for futility, like “locking the barn door after the horse is gone,” by reason of the hundreds of other sites all across the Internet that had also posted DeCSS.¹⁴ While Kaplan admitted being disturbed by this reality, he found other competing concerns more troubling. The first of these concerns was his fear that failing to issue an injunction would incite others to follow the defendants in encouraging widespread flouting of the law to immunize their own unlawful activity.¹⁵ The second was his related concern that widespread posting of DeCSS could seriously damage or destroy intellectual property rights. Just because others were harming the plaintiffs’ intellectual property did not mean that defendants were not also causing harm to it.¹⁶ Kaplan summarized his position with a striking metaphor: “In short, this Court, like others that have faced the issued [sic], is not persuaded that modern technology has withered the strong right arm of equity.”¹⁷ Kaplan stressed the importance of creating a legal deterrent that would “contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.”¹⁸

Yet despite Judge Kaplan’s ringing affirmation of the rule of law, DeCSS continues to be widely available online. It remains clear that many people do not respect copyright law and that the law cannot effectively be enforced against many of the people who wield the power of new digital technologies.¹⁹ How should legal institutions respond to this challenging situation?

Catholic social teaching on intellectual property offers a helpful perspective on the problem that can help courts and legislators to take a different and ultimately more effective approach to the problem of widespread social disrespect for copyright law in our digital era.

¹² Corley, 273 F.3d at 441.

¹³ *Id.*

¹⁴ *Reimerdes*, 111 F.Supp.2d. at 344.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 345.

¹⁹ See Ross, *supra* note 4, at 57 and Strahilevitz, *supra* note 1, at 535-45.

II. Catholic Social Teaching on the Rule of Law and on Intellectual Property

Since the end of the nineteenth century, the Catholic Church has developed a corpus of social teaching founded on Scripture and Church Tradition and set out in a body of texts, especially social “encyclicals” or circular letters authored by the popes since Leo XIII (1878-1903). The Church views itself as competent to provide guidance on the moral and spiritual aspects of political and economic policies because these policies impact the good of mankind, made in the image and likeness of God.²⁰ The first encyclical, *Rerum Novarum* (1891), considered social change resulting from the Industrial Revolution and focused on the plight of the worker.²¹ Since then, the Church has responded to many other social, civil, political, and economic issues, including the development of the internet and resulting ethical issues.²²

A. Catholic Teaching on the Rule of Law Emphasizes the Protection of the Fundamental Value of Human Dignity

Church teaching has emphasized the importance of the rule of law in safeguarding the quintessential value of human dignity, but has also warned that the rule of law may by itself not always be enough to adequately protect human dignity.²³ Law is a social instrument to foster fundamental values in society and culture. If legal norms depart from fundamental values, the law will no longer adequately safeguard human dignity.²⁴ On this view, the moral force of the *Reimerdes* defendants’ electronic civil disobedience argument would depend on whether the copyright law at issue indeed fosters fundamental human values.

Some may contend that Judge Kaplan did assess the fundamental values fostered by copyright law when he stated that enforcing the law would “contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.”²⁵ In other words, copyright law protects the fundamental value of private property, a value recognized in Scripture in

²⁰ RODGER CHARLES, AN INTRODUCTION TO CATHOLIC SOCIAL TEACHING 9 (1999).

²¹ POPE LEO XIII, *RERUM NOVARUM* [ON CAPITAL AND LABOR] (1891) [hereinafter *RERUM NOVARUM*].

²² See, e.g., Pontifical Social Communications Council, *Ethics in Internet* (February 22, 2002) 31 *ORIGINS* 672-76 (2002).

²³ See, e.g. U.N. GAOR, 63rd Sess., 6th comm. mtg., ¶¶ 16-18, U.N. Doc. A/C.6/63/SR.8 (Oct. 14, 2008) (statement of Archbishop Migliore, Permanent Observer of the Holy See to the United Nations, asserting that while “the rule of law is the mechanism by which the international organizations and national governments are called to provide effective recognition of the dignity of all persons regardless of their . . . status,” and also noting that “[i]n the present cultural context, in which law is often perceived as respect for formal procedures and not in more substantive terms, the rule of law could become insufficient by itself to defend the dignity of the human person.”).

²⁴ *Id.*

²⁵ *Reimerdes*, 111 F. Supp. 2d at 345.

both the Old and New Testaments.²⁶ But in the Catholic Church's reading of this tradition, private property ownership is not absolute, but rather is limited by other equal or yet more fundamental values.

B. Catholic Teaching on Real and Intellectual Property Mandates Both Rights of Private Ownership and Limits on Such Ownership

Catholic social teaching certainly affirms ownership of both real and intellectual property. The Church teaches that there is a natural right of private ownership.²⁷ Property ownership is required as an aspect of the principles of human dignity, autonomy, and freedom. As stated in the 1965 Pastoral Constitution of the Church in the Modern World, a product of the Second Vatican Council:

Since property and other forms of private ownership of external goods contribute to the expression of the personality, and since, moreover, they furnish one an occasion to exercise his function in society and in the economy, it is very important that the access of both individuals and communities to some ownership of external goods be fostered. Private property or some ownership of external goods confers on everyone a sphere wholly necessary for the autonomy of the person and the family and it should be regarded as an extension of human freedom. Lastly, since it adds incentives for carrying on one's function and charge, it constitutes one of the conditions for civil liberties.²⁸

Pope John XXIII contended that the relation of property ownership to freedom receives validation in the negative consequences of denying the right to own property. He stated in the encyclical letter *Mater et Magistra* (1961):

Further, history and experience testify that in those political regimes which do not recognize the rights of private ownership of goods, productive included, the exercise of freedom in almost every other direction is suppressed or stifled. This suggests, surely, that the exercise of freedom finds its guarantee and incentive in the right of ownership.²⁹

Despite its strong support of the right to own property, the Church, however, also teaches that property rights are not absolute. There are significant limits on property ownership mandated by the principle of "the universal destination of

²⁶ See, e.g. *Genesis* 1:26 (God gave man dominion "over all the earth"); *Matthew* 19:18 (God's Commandments prohibit stealing); and *Matthew* 5:40 (property rights are presupposed in New Testament exhortations to yield rights to others, e.g. "if anyone wants to go to law with you over your tunic, hand him your cloak as well)."

²⁷ See, e.g. POPE JOHN XXIII, *MATER ET MAGISTRA* [ON CHRISTIANITY AND SOCIAL PROGRESS] ¶109 (1961) [hereinafter *MATER ET MAGISTRA*] ("The right of private ownership of goods, including productive goods, has permanent validity. It is part of the natural order, which teaches that the individual is prior to society and society must be ordered to the good of the individual."). See also *RERUM NOVARUM*, *supra* note 21 at ¶¶ 8-11 and POPE JOHN PAUL II, *CENTESIMUS ANNUS* [ON THE HUNDRETH ANNIVERSARY] ¶30 (1991).

²⁸ SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* [PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD], ¶71 (1965) [hereinafter *GAUDIUM ET SPES*].

²⁹ *MATER ET MAGISTRA*, *supra* note 27, at ¶ 109 (1961).

goods.” This principle is founded on God’s desire that the created earth benefit all human beings.³⁰ As a result, property owners must use their property not only to benefit their own interests, but also to serve the common good.³¹ As the Catechism of the Catholic Church states:

The *right to private property*, acquired or received in a just way, does not do away with the original gift of the earth to the whole of mankind. The *universal destination of goods* remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise.³²

Church teaching has emphasized that the principle of the universal destination of goods extends to intellectual property as well as real property. Pope John Paul II pointed out:

As the Holy See has always stated, the protection of private property, including intellectual property, has the fundamental social task of serving the common good of the human family and, as such, should allow for safeguard mechanisms, even if this differs from market logic and the law of immediate economic return.³³

It follows that if a copyright law, such as the Digital Millennium Copyright Act or the Copyright Term Extension Act, fails to promote the common good, it would no longer conform to the essential principle of the universal destination of goods. Nor would a court decision upholding the legal validity of these laws where they fail to comport with the common good. Whether the Court’s decision in *Eldred v. Ashcroft* did so is the subject of the next section of this essay.

III. The Constitutionality of the Copyright Term Extension Act from the Perspective of Catholic Social Teaching: an Assessment of Eldred v. Ashcroft

In *Eldred v. Ashcroft* (2003), the Supreme Court rejected a constitutional challenge to the Copyright Term Extension Act.³⁴ The reasoning of Justice Ginsburg, who wrote the majority opinion, does not seem to me to be consistent with the essential principle of the universal destination of goods.

In rejecting to the contention that the Copyright Term Extension Act violated the constitutional requirement of “limited Times” in Art. I § 8 cl. 8, Justice Ginsburg took the view that the appropriate standard of scrutiny was a highly deferential rational basis scrutiny, but her approach fails to give sufficient weight

³⁰ GAUDIUM ET SPES, *supra* note 28, at ¶69.

³¹ POPE PIUS XI, QUADRAGESIMO ANNO [ON RECONSTRUCTION OF THE SOCIAL ORDER] ¶49 (1931), CENTESIMUS ANNUS, *supra* note 27, at ¶ 30.

³² CATECHISM OF THE CATHOLIC CHURCH ¶2403 (2d ed. 2000) [hereinafter CATECHISM].

³³ Pope John Paul II, *Message of the Holy Father to the Group “Jubilee 2000 Debt Campaign”* Sept. 23, 1999, available at (<http://www.fjp2.com/en/john-paul-ii/online-library/messages/6466-to-the-jubilee-2000-debt-campaign-23-september-1999->) (last visited on May 21, 2011).

³⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

to the fundamental principle of whether the term extensions serve the common good.³⁵ Ginsburg interpreted the rational basis standard as requiring extreme deference to the legislative choice to extend the copyright term.³⁶ While Ginsburg did not precisely enunciate her own version of the rational basis scrutiny test, her interpretative approach was in keeping with the version of this test that a law subject to rational basis scrutiny must only be rationally related to a legitimate government purpose to be sustainable.³⁷ She found that the long-standing historical practice of retroactive term extensions supported a finding that Congress had acted rationally in enacted the Copyright Term Extension Act.³⁸ But Ginsburg's emphasis on the need for deference to Congress and the interpretative weight of historical practice does not give searching enough scrutiny to the question of whether the legislation comports with the fundamental requirement that it serve the common good.

Indeed, Justice Ginsburg expressly rejected a powerful argument for invalidating the Copyright Term Extension Act based on an interpretation of the Constitution that emphasized the need to focus on the common good. The petitioners had contended that the Act did not "promote the Progress of Science" as required by the limitation in the preamble of the Copyright Clause in Art. I, §8, cl. 8.³⁹ While Ginsburg admitted that the Copyright Clause contained both the power to grant monopoly rights and the limitation that those rights must "promote the Progress of Science," she took the deferential position that whether the Copyright Term Extension Act was adequately limited to "promote the Progress of Science" was primarily a question for Congress.⁴⁰ In her opinion, the Court's role was limited to the determination of whether Congress had acted rationally in making this determination.⁴¹ Ginsburg concluded that Congress had acted rationally based on several justifications, including its desire to better protect authors and creators by, *inter alia*, (i) ensuring consistency with the copyright term required in the European Union so that American authors would receive the same protection in Europe as Europeans; (ii) giving longer protection to American creators and their heirs in the face of demographic trends, such as increasing longevity; and (iii) ensuring that the copyright term would better keep pace with the increased commercial life for many works as a result of the growth in communications media.⁴² Additionally, Congress rationally "credited

³⁵ *Id.* at 205, n.10.

³⁶ *Id.*

³⁷ *See, e.g.* *New Orleans v. Duques*, 427 U.S. 297, 303 (1976).

³⁸ *Eldred*, 537 U.S. at 204.

³⁹ *Id.* at 210-212.

⁴⁰ *Id.* at 212-213.

⁴¹ *Id.*

⁴² *Id.* at 205-207.

projections that longer terms would encourage copyright owners to invest in the restoration and public distribution of their works.”⁴³

Ginsburg’s opinion is not consistent with the principle of the universal destination of goods because the justifications accepted by Ginsburg as rational clearly benefit the copyright owner at the expense of users of copyrighted works. Ensuring that U.S. authors get the same copyright term as their European Union counterparts benefits authors but not users of copyrighted works. The same is true for the rationale that longer-lived authors deserve to have longer copyright terms. The justification that works need to be protected for a longer time because technological advances have increased their commercial life also benefits authors at the expense of users. The only justification that could arguably benefit the users of copyrighted works would be the incentive to restore old works, but Ginsburg provides no evidence that this would in fact make such works available on affordable terms to users. Nowhere in these justifications is any concern expressed for the social importance of furthering public access to creative works. This seems to me to violate the principle of the universal destination of goods.

Had Ginsburg taken an approach to intellectual property that was more in keeping with the universal destination of goods, she would have subjected the justifications for the Copyright Term Extension Act to heightened judicial review that would require not only a consideration of whether the justifications were rational, but also whether they furthered the common good.

The dissent of Justice Stevens is much more consistent with Catholic social teaching on intellectual property. Justice Stevens wrote:

By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). We should discharge that responsibility as we did in *Chadha*.⁴⁴

Justice Stevens took the view that under more searching scrutiny, the retroactive term extension in the Copyright Term Extension Act did not serve the common good. Retroactively increasing the creator’s compensation did not encourage new creative works, nor did it foster progress by increasing

⁴³ *Id.* at 207.

⁴⁴ *Id.* at 242 (Stevens, J. dissenting).

knowledge in the public domain.⁴⁵ Stevens also took the view that Ginsburg's only justification that could arguably benefit users, that of providing incentives to restore old works, was insufficient. Among other problems, this justification would apply equally to works in the public domain.⁴⁶ Moreover, even if Congress was concerned about protecting certain aging works, it could not justify across the board copyright term extensions for all types of work.⁴⁷

Why does it matter that the majority opinion in *Eldred* is not consistent with Catholic teaching? I think that it matters that the Court's opinion did not adequately weigh the value of the common good because the effect of this decision is to convince the general public that the copyright law almost entirely disregards the interests of copyright users in being able to have reasonable access to copyrighted works.⁴⁸ This fosters the continuing problem of disrespect for copyright law and ultimately weakens the rule of law in this area.

IV. Fostering Greater Respect for Copyright Law: a Catholic Approach

If courts take an approach to the constitutionality of copyright law and to the interpretation of the scope of copyright rights that is consistent with the principle of the universal destination of goods, this is likely to significantly reduce the problem of widespread disregard for copyright law exemplified by the *Reimerdes* case. A similarly socially beneficial result is likely to ensue if Congress enacts copyright laws that are consistent with the essential principle that private property is subject to a social mortgage. Doing so will further another fundamental principle of Catholic teaching, solidarity.

Solidarity, which is required for society to flourish, is a true community that brings together people of all backgrounds to help and support one another, supported by laws and social institutions based on fundamental values, such as the principle of the universal destination of goods.⁴⁹ Governments have a duty to encourage basic unifying principles that will foster solidarity.⁵⁰ Citizens have a corresponding duty to work with governments to develop solidarity.⁵¹

A society whose members adhere to the principle of solidarity should have a low incidence of disregard for copyright law, since in such a society the courts and legislatures enacting, interpreting, and assessing the validity of such laws

⁴⁵ *Id.* at 226-227.

⁴⁶ *Id.* at 239-240.

⁴⁷ *Id.*

⁴⁸ The stress on the common good in Catholic social teaching transmits a core normative emphasis of the Western tradition, including the American constitutional order.

⁴⁹ See e.g., POPE JOHN PAUL II, SOLLICITUDO REI SOCIALIS [ON SOCIAL CONCERN] ¶39 (1987) [hereinafter SOLLICITUDO REI SOCIALIS], CENTESIMUS ANNUS, *supra* note 27, at ¶¶ 10, 46 (1991). See also CATECHISM, *supra* note 32, at ¶1941.

⁵⁰ SOLLICITUDO REI SOCIALIS, *supra* note 49 at ¶39, CENTESIMUS ANNUS, *supra* note 27, at ¶15.

⁵¹ CATECHISM, *supra* note 32, at ¶2255.

would act in accordance with fundamental values and principles such as the universal destination of goods. Where citizens know that legal institutions enact and apply laws only where those laws serve the common good of all humankind, they will reasonably retain confidence in the justness of the laws. Unfortunately, citizens of the United States do not have this sort of assurance for the current copyright laws, such as the Copyright Term Extension Act. In assessing the constitutional validity of that law, the Court failed to give due regard to the value that private property ownership should ultimately serve the public good. It is unsurprising that such a lack of respect for the common good has led to many users of copyrighted works thumbing their noses at the rule of law, such as the defendants in *Reimerdes* and the host of other internet users who posted or linked to DeCSS. Such a situation is dangerous and destabilizing for the entire social order and for human flourishing. Catholic social teaching points to a better way.