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Truth, Lies, and Copyright

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TRUTH, LIES, AND COPYRIGHT

Cathay Y. N. Smith*

Fake news may be trending right now, but fake news is not the only source of fake facts that we consume. We encounter fake facts every day in the historical or biographical books we read, the movies we watch, the maps we study, the telephone directories and dictionaries we reference, and the religious or spiritual guides we consult. While it is well-established that copyright does not protect facts because facts are discovered rather than created, fake facts are created and can often be as original and creative as fiction.

This Article is the first to offer a comprehensive analysis of copyright protection of fake facts contained in fake news and other sources. It details the different categories of fake facts we encounter today and courts' inconsistent protection of fake facts under copyright law. Even though copyright law may technically protect fake facts as original expression fixed in a tangible medium, this Article argues that the public interest in promoting efficiency, fairness, and production of socially valuable works justify treating fake facts as unprotectable facts under copyright law. Specifically, courts should apply copyright law's factual estoppel doctrine to treat fake facts as unprotectable facts in infringement cases where an author previously held out fake facts as facts, with the intent that the public rely on the fake facts as facts, if the public could believe the fake facts to be true.

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INTRODUCTION

Fake news. The Pizzagate conspiracy. Deep fakes. *A Million Little Pieces*. *Three Cups of Tea*. *In the Garden of Good and Evil*. Found-footage films. *The Blair Witch Project*. News satire. *The Onion*. *The Borowitz Report*. Paper towns. Trap streets. Ghost words. Every day, we are assailed with fake facts. Fake facts are fictions, created stories, or unverifiable illusions held out to the public as true. These fake facts can include fake news stories, deep fakes, fictional embellishments in nonfiction works, fictitious entries in data and knowledge repositories, unverifiable divine revelations or spiritual claims, and outright lies. Some fake facts are held out as true in order to deceive or mislead us. Some are held out to entertain us. Some fake facts are held out in order to detect plagiarism. Other fake facts are held out as true in order to induce us to believe. In spite of the recent media attention on fake news, fake news is not the only source of fake facts circulated for public consumption. Fake facts have long infiltrated our culture in the historical or biographical books we read, the

movies we watch, the maps we study, the telephone directories and dictionaries we reference, and the religious or spiritual guides we consult.

It is well-established that copyright law does not protect facts. Facts are discovered rather than authored and, therefore, are not subject to copyright protection.¹ Fake facts, however, are created and not discovered, and are often as original and creative as fiction. Copyright law, technically, would protect these fictions.² In the past, a handful of courts have considered the copyrightability of fake facts and have applied copyright law's factual estoppel doctrine to prevent authors from claiming their works to be fiction and, therefore, entitled to higher copyright protections after those authors previously held out the same works to the public as nonfiction.³ Under the factual estoppel doctrine, these courts treated the author's fake facts as facts, granting them limited copyright protection.⁴ The first case in the United States to consider copyright of fake facts was in 1913 when a journalist sued a playwright for copying the plot of the journalist's fake news article.⁵ The court held that the plot of the fake news article was not protected by copyright because it was previously held out as true.⁶ Since then, courts have applied the factual estoppel doctrine to treat fake facts as unprotectable facts in infringement cases involving fictional embellishments in historical or biographical works, fictitious entries in telephone directories, fake streets in maps or fake entries in encyclopedias, and claims of divine, extraterrestrial, or scientific revelations in spiritual and religious texts.⁷ Within those limited decisions, however, courts have sometimes been reluctant to apply the doctrine to treat fake facts as facts, or have been inconsistent in their application of the doctrine and uncertain when the doctrine should apply.⁸

This Article offers the first comprehensive analysis of copyright protection of fake facts and discussion of copyright law's factual estoppel doctrine. It advocates for courts to consistently apply the factual estoppel doctrine to treat fake facts as unprotectable facts where the author held out fake facts as facts, with the intent that the public rely on those fake facts as fact, and where the public could believe that the fake facts were true. Part I details the different categories of fake facts that pervade our society, including fake news and deep fakes, fictional embellishments in biographical or historical works, fictitious entries in factual compilations, and revelations in spiritual and religious works. It is surprisingly common to find fake or embellished "facts" in works that we

¹ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344–47 (1991) ("That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates'") (quoting Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985)).

² 17 U.S.C. § 102(a) (2018) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .").

³ See *infra* Part III.

⁴ See *infra* Part III.

⁵ Davies v. Bowes, 209 F. 53, 54–55 (S.D.N.Y. 1913).

⁶ *Id.* at 55.

⁷ See *infra* Part III.

⁸ See *infra* Part III.

typically rely on to be true. Part II explains why copyright law does not and should not protect facts. Part III outlines courts' inconsistent treatment of fake facts under copyright law, including their failure or reluctance to treat fake facts as facts and their conflicting requirements for applying the factual estoppel doctrine in copyright infringement cases. Part IV sets forth the reasons why copyright should not protect fake facts and justifies the factual estoppel doctrine under the public's interest in efficiency, fairness, and promotion of socially valuable works. While there are concerns that treating fake facts as unprotectable facts under copyright law could increase dissemination of fake facts and discourage production of certain genres of works, on balance, the justifications for applying the factual estoppel doctrine outweigh the concerns. Finally, Part V draws from other areas of the law, including false advertising, trademark infringement, and classic equitable estoppel defenses, to recommend a new factual estoppel doctrine framework for courts and litigants to determine when fake facts should be treated as unprotectable facts in copyright infringement cases.

I. FAKE FACTS

Recent media coverage has brought attention to the widespread problem of fake news.⁹ Fake news is “intentionally and verifiably false” news stories that “could mislead readers.”¹⁰ A recent study by Pew Research Center shows that at least 23 percent of Americans have accidentally or intentionally shared fake news,¹¹ and Statista reports that 52 percent of respondents see fake news on social media websites at least once a day.¹² The Pizzagate incident is just one infamous example of fake news that went viral.¹³ The Pizzagate incident began with fake news articles linking then-presidential candidate Hillary Clinton to an alleged child-sex-trafficking ring operated from a pizzeria in Washington, D.C.¹⁴ After this fake news went viral on the Internet, a man, believing the fake

⁹ See, e.g., David Graham, *Some Real News About Fake News*, ATLANTIC (June 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/fake-news-republicans-democrats/591211/> [<https://perma.cc/JFY8-S9CV>]; Amy Mitchell et al., *Many Americans Say Made-Up News is a Critical Problem That Needs to be Fixed*, PEW RES. CTR. (June 5, 2019), <https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/> [<https://perma.cc/XC8K-WTR6>].

¹⁰ Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017).

¹¹ Amy Mitchell et al., *Many Americans Believe Fake News is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/> [<https://perma.cc/3XJ7-EWHQ>].

¹² Amy Watson, *Perceived Frequency of Online News Websites Reporting Fake News Stories in the United States as of March 2018*, STATISTA, <https://www.statista.com/statistics/649234/fake-news-exposure-usa/> [<https://perma.cc/9TUW-FG8G>] (last visited Oct. 22, 2019).

¹³ See, e.g., Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017), <https://www.rollingstone.com/politics/news/pizzagate-anatomy-of-a-fake-news-scandal-w511904> [<https://perma.cc/GB2A-38Z7>].

¹⁴ Spencer S. Hsu, *'Pizzagate' Gunman Says He Was Foolish, Reckless, Mistaken – and Sorry*, WASH. POST (June 14, 2017), <https://www.washingtonpost.com/local/public-safety/>

news to be true, entered the pizzeria with a fully loaded AR 15 military-style rifle, “a .38 handgun[,] and a folding knife¹⁵ He shot open a lock and found cooking supplies. He whipped open another door and found [] fresh pizza dough. [He] did not find any captive children.”¹⁶ The Pizzagate story has since been debunked as fake news by multiple media sources, but there are still those who believe that it is true.¹⁷ The National Enquirer is another “news” source that publishes “outrageous and sometimes fake news stories.”¹⁸ Some even described it as being “the original fake news media outlet that profits by selling fake news.”¹⁹ For instance, in 2015, the National Enquirer published an article claiming that Hillary Clinton’s White House dreams were over because she only had six months to live.²⁰ An even more recent and troubling problem involves deep fakes. Deep fakes are videos generated by deep-learning computer applications “that look strikingly real.”²¹ These fakes are so realistic that an unaided observer would not be able to detect the fake.²² They operate through machine-learning algorithms and facial-mapping software to scan multiple photos of a person and their facial features, or record that person making different facial expressions, to generate “believable videos of people doing and saying things they never did.”²³ Deep fakes have already been used in abusive ways to create fake sex videos featuring celebrities or other women.²⁴ They have also been created to feature public officials “saying or doing things they have never said or done.”²⁵ Authors of fake news or deep fakes have different

pizzagate-shooter-apologizes-in-handwritten-letter-for-his-mistakes-ahead-of-sentencing/2017/06/13/f35126b6-5086-11e7-be25-3a519335381c_story.html [https://perma.cc/TV5BZK6N].

¹⁵ See *id.*; see also Robb, *supra* note 13.

¹⁶ Robb, *supra* note 13.

¹⁷ Scott Bauer, *Pizzagate is Real, Says Paul Ryan’s Challenger*, ASSOCIATED PRESS (Aug. 14, 2017), <https://www.mercurynews.com/2017/08/14/paul-ryan-opponent-says-he-believes-pizzagate-conspiracy/> [https://perma.cc/9KAX-466Q].

¹⁸ *National Enquirer*, MEDIA BIAS/FACT CHECK, <https://mediabiasfactcheck.com/national-enquirer/> [https://perma.cc/6AAC-ENZD] (last visited Oct. 22, 2019); see also Kathy Kiely, *Tabloid Newspapers Raise Ethical Eyebrows, but Social Media is Greater Worry for Democracy*, USA TODAY (Dec. 19, 2018), <https://www.usatoday.com/story/opinion/2018/12/19/national-enquirer-tabloid-fake-news-democracy-social-media-trump-column/2354021002/> [https://perma.cc/R48C-GMCR].

¹⁹ *National Enquirer*, *supra* note 18.

²⁰ *Id.*

²¹ Hilke Schellmann, *Deepfake Videos Are Getting Real and That’s a Problem*, WALL ST. J. (Oct. 15, 2018), <https://www.wsj.com/articles/deepfake-videos-are-ruining-lives-is-democracy-next-1539595787> [https://perma.cc/JHU8-2GW3].

²² Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy?*, LAWFARE (Feb. 21, 2018), <https://www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy> [https://perma.cc/3MS7-NLJA].

²³ *Id.*

²⁴ *Id.*

²⁵ Oscar Schwartz, *You Thought Fake News Was Bad? Deep Fakes Are Where Truth Goes to Die*, GUARDIAN (Nov. 12, 2018), <https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth> [https://perma.cc/7C5E-BKES].

incentives for creating them: some earn income through Internet search engine advertising, others seek to influence national political debates or election results.²⁶ In spite of the current increased attention on fake news and deep fakes, these deceptions are not the only source of fake facts circulated for public consumption. In fact, fake news is not even a new phenomenon. For instance, in 1835, the New York Sun published a series of fake news articles about the discovery of life on the moon.²⁷ In fact, the first published factual estoppel case in the United States, discussed later in this Article, was a 1913 decision denying copyright protection to the plot of a fake news article that detailed the (fake) dramatic criminal trial of a pregnant woman and her lover.²⁸

In addition to fake news and deep fakes, there are many other ways fake facts infiltrate our society. For instance, authors of historical or nonfiction works sometimes embellish their writings with fake facts in order to make their works more interesting and marketable to the public. A few recent high-profile cases involving this type of deception were James Frey's bestselling book *A Million Little Pieces* and Greg Mortenson's popular book *Three Cups of Tea: One Man's Mission to Fight Terrorism One School at a Time*. Take Frey's *A Million Little Pieces* as an example. *A Million Little Pieces* was originally marketed as a memoir about the author's painful recovery from substance abuse in a rehabilitation treatment center.²⁹ After making Oprah's Book Club selection in 2005, Frey's book topped the *New York Times* Best Seller list for fifteen consecutive weeks.³⁰ Two years after publication of the book, The Smoking Gun published *A Million Little Lies*, debunking many of the facts in Frey's book.³¹ Those fake facts included the amount of time Frey claimed he spent in jail, the manner of his girlfriend's death, details about an incident outside the rehabilitation center, and accounts of Frey receiving a root canal without anesthesia.³² Similarly, Mortenson's *Three Cups of Tea* was also on the *New York Times* nonfiction bestseller list for three years and a popular reading assignment for college students.³³ *Three Cups of Tea* detailed the story of Mortenson's hu-

²⁶ Allcott & Gentzkow, *supra* note 10, at 217.

²⁷ *Id.* at 214; N.Y. 'Sun' Launches Six-Part Fake News Series, 1835, NEWSEUMED, <https://newseumed.org/artifact/new-york-sun-launches-six-part-fake-news-series-1835/> [<https://perma.cc/UB5L-F7CW>] (last visited July 9, 2019).

²⁸ *Davies v. Bowes*, 209 F. 53, 54–55 (S.D.N.Y. 1913).

²⁹ *See A Million Little Pieces*, AMAZON, <https://www.amazon.com/Million-Little-Pieces-James-Frey/dp/0307276902> [<https://perma.cc/Q8L3-HGJ6>] (last visited Oct. 22, 2019).

³⁰ Adam White, *A Million Little Pieces: Without Mention of its Scandal, What is There Left to Say About James Frey's Addiction Opus?*, INDEPENDENT (Aug. 31, 2019), <https://www.independent.co.uk/arts-entertainment/films/features/a-million-little-pieces-movie-jamesfrey-oprah-adaptation-memoir-a9085796.html> [<https://perma.cc/74JJ-Y777>].

³¹ *A Million Little Lies: Exposing James Frey's Fiction Addiction*, SMOKING GUN (Jan. 4, 2006), <http://www.thesmokinggun.com/documents/celebrity/million-little-lies> [<https://perma.cc/SK2A-KV3V>].

³² Edward Wyatt, *Author is Kicked Out of Oprah Winfrey's Book Club*, N.Y. TIMES (Jan. 27, 2016), <http://www.nytimes.com/2006/01/27/books/27oprah.html> [<https://perma.cc/NF5R-8L2J>].

³³ *Three Cups of Tea*, WIKIPEDIA, https://en.wikipedia.org/wiki/Three_Cups_of_Tea [<https://perma.cc/74JJ-Y777>].

manitarian efforts in reducing poverty and increasing educational opportunities for girls in Pakistan and Afghanistan.³⁴ Mortenson followed the success of *Three Cups of Tea* with the book *Stones Into Schools: Promoting Peace with Books, Not Bombs, in Afghanistan and Pakistan*.³⁵ In 2011, Sixty Minutes reported on the fake facts in Mortenson's books, claiming that "some of the most touching and harrowing tales in Mortenson's books appear to have been either greatly exaggerated or made up out of whole cloth."³⁶ These fake facts included Mortenson's claim to have stumbled into the village of Korphe on his descent from K2, where he promised to build the village a school, and his sensational claim that he was captured by the Taliban.³⁷ The inclusion of fake facts in non-fiction works is surprisingly common.³⁸ Other noteworthy examples of this behavior are Louis Linton's *In Congo's Shadow*, a memoir about her volunteer time in Zambia, where she claims that she cared for an HIV-positive orphan and was forced to hide from murderous rebels.³⁹ Her memoir has been heavily criticized for being largely fake.⁴⁰ Author John Berendt likely missed out on a Pulitzer Prize for his blockbuster nonfiction book, *Midnight in the Garden of*

[/perma.cc/J2JX-CGQV](https://perma.cc/J2JX-CGQV)] (last visited July 6, 2019).

³⁴ Bernadette Murphy, 'Stones into Schools: Promoting Peace with Books, Not Bombs, in Afghanistan and Pakistan' by Greg Mortenson, L.A. TIMES (Nov. 30, 2009), <https://www.latimes.com/style/la-et-book30-2009nov30-story.html> [<https://perma.cc/SVZ8-BPQ4>].

³⁵ See *Stones into Schools: Promoting Peace with Books, Not Bombs in Afghanistan and Pakistan*, AMAZON, <https://www.amazon.com/Stones-into-Schools-Promoting-Afghanistan/dp/0670021156> [<https://perma.cc/ZFC3-NRFP>] (last visited July 8, 2019).

³⁶ 60 MINUTES, *Questions Over Greg Mortenson's Stories*, CBS NEWS (Apr. 19, 2011), <https://www.cbsnews.com/news/questions-over-greg-mortensons-stories-19-04-2011/> [<https://perma.cc/62UW-YPVY>].

³⁷ See *id.*; Ron Moreau & Sami Yousafzai, *Mansur Khan Mahsud: Greg Mortenson is a Liar*, DAILY BEAST (Apr. 18, 2011), <https://www.thedailybeast.com/mansur-khan-mahsud-greg-mortenson-is-a-liar> [<https://perma.cc/C9VY-ZSHF>] (last updated July 13, 2017).

³⁸ This Article is concerned with fake facts and not what other commentators have described as fictional facts. "Fictional facts are the narrative building blocks with which an author constructs a work of fiction." Matt Kellogg, *The Problem of Fictional Facts: Idea, Expression, and Copyright's Balance Between Author Incentive and Public Interest*, 58 J. COPYRIGHT SOC'Y U.S.A. 549, 550 (2011). Specifically, fictional facts are fictions created in works held out by authors as being fiction. The Harry Potter Lexicon is an example that illustrates the difference between fictional facts and fake facts. *Id.* at 549–50. The Harry Potter Lexicon was created by Steven Vander Ark, a Harry Potter fan, and included a detailed "index of every incident, character, spell, and object that appeared in the [Harry Potter] series." *Id.* These fictional details, which served as the narrative building blocks of the Harry Potter stories, are "fictional facts." *Id.* at 550. Fake facts, on the other hand, are fictions that are held out as being factual. Had the Harry Potter series been marketed and advertised as nonfiction, and the public could believe it to be nonfiction, the details in the stories would be considered fake facts. See *id.* at 551. For a detailed analysis of fictional facts, see Kellogg, *supra*.

³⁹ Craig Silverman, *People Are Calling Bullshit on This Woman's Memoir About Her "Gap Year in Africa"*, BUZZFEED (July 4, 2016), <https://www.buzzfeed.com/craigsilverman/people-are-calling-bullshit-on-this-memoir> [<https://perma.cc/UQZ7-D27T>].

⁴⁰ *Id.*

Good and Evil, when it was discovered that Berendt took too many liberties with facts in his story.⁴¹

Another way we are exposed to fake facts is through authors who purposefully include fake facts in their works to catch others who copy their works. In certain data-publishing industries, such as telephone directories, dictionaries, charts and ratings, or mapmaking, it is common for authors to plant fake facts in their works in order to detect plagiarism. For instance, publishers of telephone directories will often include a handful of fake names and numbers in their directories so that they can detect when a competitor copies their entries.⁴² If another telephone directory also includes those fake entries, the original publisher assumes that the latter publisher copied the first without doing any independent research. Indeed, it was four such fake entries that led Rural Telephone Company to accuse Feist Publications of copying its telephone directory, leading to the famous U.S. Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Co., Inc.*⁴³ Dictionaries or encyclopedias will also sometimes include made-up entries to detect and demonstrate plagiarism. For instance, “[i]n 1977, Fred L. Worth wrote *The Complete Unabridged Super Trivia Encyclopedia*” which included the fake fact that the 1970s TV detective Columbo’s first name was Philip.⁴⁴ When the board game Trivial Pursuit included that same fake fact in its popular game, Worth sued for copyright infringement.⁴⁵ Similarly, *The New Columbia Encyclopedia* of 1975 included an entry for “Mountweazel” with the biography for Lillian Virginia Mountweazel, a fake person born in Bangs, Ohio in 1942.⁴⁶ Mountweazel, described as “a fountain designer turned photographer who was celebrated for a collection of photographs of rural American mailboxes titled ‘Flags Up![,]’” died “‘at 31 in an explosion while on assignment for *Combustibles* magazine.’”⁴⁷ Similarly, the *New Oxford American Dictionary* included the made-up word “esquivalience” in 2001 to protect the copyright of its new electronic version of the dictionary.⁴⁸ It defined esquivalience as “the willful avoidance of one’s official responsibili-

⁴¹ Edward Wyatt, *His Blockbuster on Shelves, He Tempts Fate with Fire*, N.Y. TIMES (Sept. 21, 2005), <https://www.nytimes.com/2005/09/21/books/his-blockbuster-on-shelves-he-tempts-fate-with-fire.html> [<https://perma.cc/L39X-PCP9>].

⁴² See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991).

⁴³ *Id.*

⁴⁴ *Blog: It’s a Fake!*, PORTABLE PRESS (Aug. 12, 2013), <https://www.portablepress.com/blog/2013/08/its-a-fake-facts/> [<https://perma.cc/HYK6-JU73>] (citing to FRED L. WORTH, *THE COMPLETE UNABRIDGED SUPER TRIVIA ENCYCLOPEDIA* (1977)).

⁴⁵ Tamar Lewin, *Issues Pursued in Copyright Lawsuit Are Not Trivial*, N.Y. TIMES (Nov. 13, 1984), <https://www.nytimes.com/1984/11/13/us/issues-pursued-in-copyright-lawsuit-are-not-trivial.html> [<https://perma.cc/QT8M-5CRD>].

⁴⁶ Henry Alford, *Not a Word*, NEW YORKER (Aug. 29, 2005), <https://www.newyorker.com/magazine/2005/08/29/not-a-word> [<https://perma.cc/U9TC-YLRM>]; see also Bryan A. Garner, *A Legal Lexicographer Looks at Law Reviews*, 16 GREEN BAG 281, 284 (2013).

⁴⁷ Alford, *supra* note 46.

⁴⁸ *Id.*

ties.”⁴⁹ It is also common for mapmakers to include one or two fake towns or streets, commonly known as paper towns or trap streets, in their maps in order to catch others who plagiarize their maps.⁵⁰ These paper towns or trap streets do not exist in reality, but only on the mapmaker’s map. If another map were to include these trap streets or paper towns, the original mapmaker would know that its map had been copied. This strategy, however, has not always been successful. Agloe, New York, for instance, was a paper town that General Drafting included in its roadmap of New York State in the 1930s.⁵¹ At that time, the director of General Drafting Otto G. Lindberg and his assistant Ernest Alpers created the name “Agloe” for their fake town by mixing the first letters in their names: OGL with EA.⁵² The town did not exist in reality but was included in their map of New York to detect plagiarism.⁵³ A few years later, Rand McNally published a map of New York which included the town Agloe, New York.⁵⁴ General Drafting accused Rand McNally of copying its map; however, Rand McNally successfully defended itself by showing that the town actually existed.⁵⁵ There was indeed an Agloe General Store located at the precise location of General Drafting’s “Agloe.”⁵⁶ This was, however, not an incredible coincidence; the owners of the general store chose the name after seeing the fake town on General Drafting’s map.⁵⁷

The final category of fake facts is those created to entertain, including works such as found footage films, news satire or fictional news tabloids, and historical fiction. Authors of these fake facts hold out their works as being true in order to entertain their readers or audiences. Sometimes it is obvious that these works are fake, but other times it is less clear, and the public may be duped into believing that the facts or events described in these works are true. For instance, *The Blair Witch Project* was a popular 1999 horror found-footage film about three film students who, while making a documentary about the supernatural legend the Blair Witch, “disappear[ed] into the Black Hills with their

⁴⁹ Garner, *supra* note 46, at 284 (internal quotation marks omitted); *see also Is Esquivalience Now a Bona Fide Word?*, ENG. LANGUAGE & USAGE, <https://english.stackexchange.com/questions/87063/is-esquivalience-now-a-bona-fide-word> [<https://perma.cc/3PCR-JGHW>] (last visited June 24, 2019).

⁵⁰ MARK MONMONIER, *HOW TO LIE WITH MAPS* 51 (2d ed. 1991).

⁵¹ Robert Krulwich, *An Imaginary Town Becomes Real, Then Not. True Story*, NPR (Mar. 18, 2014), <https://www.npr.org/sections/krulwich/2014/03/18/290236647/an-imaginary-to-wn-becomes-real-then-not-true-story> [<https://perma.cc/ET7W-ZZX7>]; *see also* Laura Moss, ‘Paper towns’ and Other Lies Maps Tell You, MOTHER NATURE NETWORK (Mar. 19, 2015), <https://www.mnn.com/lifestyle/arts-culture/stories/paper-towns-and-other-lies-maps-tell-you> [<https://perma.cc/J23T-KS36>].

⁵² Krulwich, *supra* note 51.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

recording equipment.”⁵⁸ The producers of the film marketed the movie as a true story, supporting their claim with fake police reports, newsreel-style interviews, photographs, diary entries on the movie’s website,⁵⁹ false claims that the students were “missing and assumed dead” on websites such as IMDb, and missing-persons posters for the three actors.⁶⁰ Orson Wells’s *War of the Worlds* radio show from 1938 is an older example of the public being duped into believing entertaining fake facts. On October 30, 1938, Columbia Broadcasting System broadcasted Orson Wells and a group of actors reading a dramatic script, adapted from H.G. Wells’s *War of the Worlds*, about aliens from Mars invading earth.⁶¹ Many listeners who had tuned into the radio broadcast believed that the invasion from Mars was real and shared the news with others, creating a nationwide panic.⁶² Families fled their homes to nearby parks and some rushed out of their houses with wet cloths over their faces to flee from what they thought was an alien gas raid.⁶³ Thousands throughout the nation called the police and media seeking advice on how to protect themselves against the aliens.⁶⁴ Sometimes, even works that most people know are satire, fake, or even absurd have caused confusion. For instance, the *Weekly World News* publishes outlandish stories featuring supernatural or paranormal themes that are largely fictional.⁶⁵ These themes include discovering Bat Boy in a cave in West Virginia and reporting on his adventures and shenanigans; the *ALIVE!* series where dead celebrities are believed to have reemerged; and sightings of mummies, prehistoric monsters, Santa Clause, aliens, merfolk, and cryptids.⁶⁶ Similarly, the *Onion* publishes satirical news articles on international, national,

⁵⁸ Neil Davidson, *The Blair Witch Project: The Best Viral Marketing Campaign of All Time*, MWP (Aug. 5, 2013), <http://mwpdigitalmedia.com/blog/the-blair-witch-project-the-best-viral-marketing-campaign-of-all-time/> [<https://perma.cc/9FA6-NURT>].

⁵⁹ Rebecca Hawkes, *Why Did the World Think the Blair Witch Project Really Happened?*, TELEGRAPH (July 25, 2016), <http://www.telegraph.co.uk/films/2016/07/25/why-did-the-world-think-the-blair-witch-project-really-happened/> [<https://perma.cc/KT4G-2G77>]; Bernard Weinraub, *‘Blair Witch’ Proclaimed First Internet Movie*, CHI. TRIB. (Aug. 17, 1999), http://articles.chicagotribune.com/1999-08-17/features/9908170065_1_mark-curcio-amir-malin-artisan-entertainment [<https://perma.cc/MRX4-MKMT>].

⁶⁰ Nextmovie Staff, *The 12 Ballsiest Movie Publicity Stunts*, MTV (July 24, 2013), <http://www.mtv.com/news/2816554/best-movie-publicity-stunts/> [<https://perma.cc/26CD-4Q5K>] (internal quotation marks omitted).

⁶¹ HADLEY CANTRIL, *THE INVASION FROM MARS: A STUDY IN THE PSYCHOLOGY OF PANIC WITH THE COMPLETE SCRIPT OF THE FAMOUS ORSON WELLES BROADCAST 3* (1940).

⁶² *Id.*

⁶³ *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, <http://www.war-of-the-worlds.org/Radio/Newspapers/Oct31/NYT.html> [<https://perma.cc/Y2V5-VSHY>] (last visited June 24, 2019).

⁶⁴ *Id.*

⁶⁵ *Exactly what is Satire? Here’s an Answer if You’re Not Too Demanding*, NEUTRAL GROUND NEWS, <https://neutralgroundnews.com/satire-explained/> [<https://perma.cc/3VVF-7LJZ>].

⁶⁶ *See Weekly World News*, WIKIPEDIA, https://en.wikipedia.org/wiki/Weekly_World_News [<https://perma.cc/89UW-KTA8>] (last visited Oct. 22, 2019).

and local issues.⁶⁷ Even though its publications are formatted to appear like mainstream news articles with headlines, articles, and photographs,⁶⁸ most readers are aware that the *Onion's* news articles are satire and meant to entertain. Regardless, there have been a number of embarrassing public instances where other news media or prominent persons have believed *Weekly World News* and the *Onion's* articles to be true.⁶⁹

Fake facts are continuously and, by some accounts, increasingly circulated for public consumption. These fake facts are held out as true to either deceive or mislead us, induce us to believe, detect plagiarism, or to entertain us. How does copyright law deal with these fake facts and how should it? Should copyright law protect the fake facts described above, should it protect certain categories of fake facts, or should copyright law exclude fake facts from its protectable subject matter under the factual estoppel doctrine? With advanced digital technology, the rise of fake news and deep fakes, and increased and viral peer-sharing on social media, it is becoming harder to divine fake facts from facts and easier for individuals to share fake facts with the world. In light of the recent focus on the issues of fake news and deep fakes by the media and our society's appreciation of new forms of entertainment such as news satire, found-footage films, and nonfiction novels, this Article provides a timely analysis of copyright law's treatment of fake facts.

II. COPYRIGHTING FACTS

Copyright law does not protect facts.⁷⁰ Facts are discovered rather than authored and, therefore, do not meet copyright's originality standard. Specifically, copyright law only protects original works of authorship fixed in a tangible medium.⁷¹ In order to meet copyright's originality standard, a work must be independently created and exhibit a modicum of creativity.⁷² While this standard is low, courts have almost consistently held that facts do not meet copyright's

⁶⁷ *Don't Get Fooled by These Fake News Sites*, CBS NEWS, <https://www.cbsnews.com/pictures/dont-get-fooled-by-these-fake-news-sites/17/> [<https://perma.cc/VL4M-554M>] (last visited Nov. 11, 2019).

⁶⁸ *See id.*

⁶⁹ *See, e.g.*, Andrew Blankstein, 'Fox and Friends' Falls for Ruse Alleging Purchase of \$1 Billion of Jetpacks for LAPD, Fire Department, L.A. TIMES (Oct. 5, 2010), <https://latimesblogs.latimes.com/lanow/2010/10/fox-and-friends-falls-for-ruse-alleging-purchase-of-billion-dollars-of-jetpacks-for-lapd-la-fire.html> [<https://perma.cc/PY2T-7NX3>]; Kevin Fallon, Fooled by 'The Onion': 9 Most Embarrassing Fails, DAILY BEAST (Nov. 27, 2012), <https://www.thedailybeast.com/fooled-by-the-onion-9-most-embarrassing-fails> [<https://perma.cc/75FX-Q8A8>] (some of those instances involved elected officials or popular news journals believing headlines that "Planned Parenthood . . . [opens] \$8 billion Abortionplex" or that "Frustrated Obama Sends Nation Rambling 75,000-Word E[-]Mail") (updated July 14, 2017) (internal quotation marks omitted).

⁷⁰ 17 USC § 102(b) (2018).

⁷¹ *Id.* § 102(a).

⁷² *See id.*

originality requirement because they are not created and involve no creativity.⁷³ A fact does not originate with the author of a book that discovers or describes a fact; “[t]he discoverer merely finds and records. He may not claim that the facts are ‘original’ with him.”⁷⁴

Imagine a world where facts can be protected by copyright. This would allow the first person who discovers or describes a fact to exclusively control that fact and control when and how that fact is shared with the public. Rather than promoting “the Progress of Science and Useful Arts”⁷⁵ by increasing our understanding and knowledge of the world, protecting facts under copyright would steal away the “basic building blocks of public discourse,” impede progress, and harm society more than the copyright balance contemplates.⁷⁶ Protecting facts under copyright law could eliminate the freedom to discuss, recast, rethink, transform, joke about, and change how facts are presented and used, which influences the public’s thoughts and views.⁷⁷ It would allow private censors to hinder their critics and impede accurate, contrary, or entertaining discussions.⁷⁸ As one commentator explained,

‘the freedom of access to facts and ideas is the history of democracy’; such freedom has promoted theories about freedom of speech, the marketplace of ideas, and invigorated democratic dialogue . . . [both] copyright law and . . . the First Amendment . . . accept that some information must remain freely accessible and usable by all.⁷⁹

Therefore, most scholars and courts agree that copyright law should not protect facts.⁸⁰ Even though facts are not protected, an original arrangement of those facts, or the way an author expresses those facts, could be subject to copyright protection.⁸¹ For instance, in *Harper & Row Publishers, Inc. v. National Enterprises*, the Court held that President Ford could not prevent anyone from copying facts from his autobiography, but that he could prevent others from copying his expression of facts, such as his “subjective descriptions and portraits of public figures.”⁸² Nevertheless, copyright protection of original arrangements

⁷³ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 362 (1991).

⁷⁴ *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) (quoting 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.03[E], at 2–34 (1980)).

⁷⁵ U.S. Const. art. VIII, § 8, cl. 8.

⁷⁶ Robert Denicola, *News on the Internet*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 68, 78–79 (2012) (internal quotation marks omitted); Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 L. & CONTEMP. PROBS. 93, 95 (1992).

⁷⁷ Gordon, *supra* note 76, at 101.

⁷⁸ *Id.* at 100.

⁷⁹ Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299, 315 (1991).

⁸⁰ *See, e.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344–48 (1991); *Harper & Row Publishers, Inc. v. Nat’l Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting); Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445, 450–51 (2001); *see also* cases Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919, 921 n.8, 921 n.9, 923 n.13 (2003).

⁸¹ *Feist Publ’ns., Inc.*, 499 U.S. at 348.

⁸² *Harper & Row Publishers, Inc.*, 471 U.S. at 563–64.

or expressions of facts is thin.⁸³ Absent wholesale verbatim copying of an author's expression of facts, infringement claims involving copying of factual works are rarely successful.⁸⁴

Fake facts, on the other hand, are created and not discovered, and can often be as original and creative as fiction. Technically, fake facts would meet copyright's originality requirement by being independently created and embodying more than a modicum of creativity. The only barrier to copyright protection for fake facts is copyright law's factual estoppel doctrine. The factual estoppel doctrine is a judicial doctrine that treats fake facts as unprotectable facts in infringement cases if the author previously held out those fake facts to the public as true.⁸⁵ In other words, if authors claim that a story, theory, or cosmology is a fact, they are factually estopped from changing their position in copyright infringement litigation in order to benefit from the higher protection afforded to fictional creative works. As one commentator explained: "[i]f it is a fact, it is not protected by copyright; if it is protected by copyright, then it can't be a fact. You can't have it both ways, and courts will hold you to your original representation."⁸⁶ The factual estoppel doctrine, however, has not been widely accepted. Some courts, as described below, fail to recognize or refuse to apply the doctrine to treat fake facts as unprotectable facts.⁸⁷ Even courts that have considered the doctrine are split on what it means for an author to "hold out" their work as true, whether the doctrine should apply when there is no reasonable reliance on the part of the defendant, and whether the doctrine is most concerned with punishing an author's bad behavior or with protecting a defendant's reasonable reliance.⁸⁸

III. THE INCONSISTENT HISTORY OF COPYRIGHTING FAKE FACTS

In the early 1900s, journalist Action Davies sued the writer and producer of the Broadway-play *Kindling* for copyright infringement.⁸⁹ Davies alleged that *Kindling*, written by playwright Charles Kenyon and produced by radio-personality Edward Bowes, infringed a newspaper article Davies wrote and published in the *Evening Sun*.⁹⁰ Even though Davies had published his news article in the *Evening Sun* as a "real life drama," he claimed in litigation that it was actually fiction.⁹¹ Because his news article was fake news, Davies argued in his claim against Bowes that the fake news article deserved the same level of

⁸³ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[D] (2016).

⁸⁴ *Hochling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980).

⁸⁵ Some courts and scholars refer to the factual estoppel doctrine as "copyright estoppel." See 1 NIMMER & NIMMER, *supra* note 83 § 2.11[C] n.68 (internal quotation marks omitted).

⁸⁶ Dan L. Burk, *Method and Madness in Copyright Law*, 3 UTAH L. REV. 587, 595 (2007).

⁸⁷ See *infra* Part III.

⁸⁸ See *infra* Part III.

⁸⁹ *Davies v. Bowes*, 209 F. 53, 55 (S.D.N.Y. 1913).

⁹⁰ *Id.*

⁹¹ *Id.* at 54–55.

copyright protection as fiction.⁹² The court disagreed. In *Davies v. Bowes*, the court held that because Davies had published his article as news and the defendants relied on the article as news, Davies was factually estopped from claiming his article deserved the higher level of copyright protection afforded to fiction.⁹³ This was the first reported case in the U.S. to apply the factual estoppel doctrine to deny copyright protection to fake facts held out by the author as true.

Since that first decision in 1913, a handful of courts have applied the factual estoppel doctrine to deny copyright protection to fake news, fake facts and events in historical and biographical works, fake entries in phone books and maps, and claims of spiritual or divine experiences and revelations.⁹⁴ At the same time, there are cases where courts failed to recognize or refused to apply the factual estoppel doctrine and, instead, found fake facts to be as protectable as fiction.⁹⁵ This Part explores the inconsistent and conflicting applications of the factual estoppel doctrine, and the main considerations courts use to determine whether and when the factual estoppel doctrine should apply to treat fake facts as unprotectable facts. As evidenced in the cases below, copyright's protection of fake facts and the factual estoppel doctrine remain under-theorized and under-explained areas of copyright law.

A. Fake Facts "Held Out as Facts"

To determine whether copyright should protect fake facts, or if the factual estoppel doctrine should treat fake facts as unprotectable facts, a key question is whether the author held out fake facts as facts. If an author did not hold out fake facts as facts, then those fake facts should generally be protected as fiction. If the author did hold out fake facts as facts, then the factual estoppel doctrine should probably apply to exclude those fake facts from copyright protection. Indeed, according to one court, the determination of whether the work was presented to the public as factual is the "single, dispositive determination" to applying the factual estoppel doctrine.⁹⁶ In spite of its importance, "[c]ase law has not established the standard for determining whether plaintiff held the [work] out as fact [or] fiction," and courts have been inconsistent in their determination of when fake facts are "held out as" true.⁹⁷ For instance, what must an author do to "hold out" fake facts as facts? In some cases, an author's express statements that the work was entirely factual have invoked the factual estoppel doctrine.⁹⁸ In other cases, the mere inclusion of fake facts in a source

⁹² *Id.* at 55.

⁹³ *See id.*

⁹⁴ *See infra* Part III.A.

⁹⁵ *See infra* Part III.C.

⁹⁶ *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 31 (C.D. Cal. 1984).

⁹⁷ *Id.* at 28.

⁹⁸ *See infra* Section III.A.1.

most people would believe to be true has triggered the factual estoppel doctrine.⁹⁹

1. *Express Statements of Fact*

In situations where authors make express statements that their work is factual, courts have generally found the factual estoppel doctrine to apply and treated fake facts in the authors' works as unprotectable facts. In *Mosley v. Follett*, the court found the author to have held out his work to the public as true where he made several express representations that his work was factual.¹⁰⁰ In *Mosley*, the author wrote the book *The Cat and the Mice* based on the activities of the German spy John Eppler but added a number of fictional characters and incidents in his book.¹⁰¹ The author made a number of representations that *The Cat and the Mice* was factual, including statements in the book's introduction that "[m]ost foreign correspondents . . . eventually came home with half a dozen fantastic and yet true spy stories . . . I was no exception," and that the stories in the book involved the author's "own investigations."¹⁰² *The Cat and the Mice* book jacket proclaimed the book to be "a true, unbelievably exciting spy story" and "[a] fascinating story that is fact, but that reads with the pace and suspense of the best fiction."¹⁰³ The book was written in "[t]he 'first person' style in which [the author] inserts his own editorial comments as an actual observer" and included a series of "real life photographs."¹⁰⁴ The defendant relied on *The Cat and the Mice* to write his own fictional work.¹⁰⁵ When the author sued the defendant for infringing his copyright to the fictional characters and incidents he added in *The Cat and the Mice*, the court found that the author had held out his work to the public as true, and applied the factual estoppel doctrine to treat those fake facts as unprotectable facts.¹⁰⁶

Similarly, in *Marshall v. Yates*, the author, William Arnold, wrote the book *Shadowland* relaying the life story of Frances Farmer, "an actress and political activist who was prominent . . . in the 1930s and 1940s."¹⁰⁷ After being recognized as a Hollywood rising star with a brilliant future ahead of her, Frances Farmer was locked up in a state insane asylum and her name erased from Hollywood's roster, ending her fame abruptly.¹⁰⁸ With the exception of eight fake

⁹⁹ See *infra* Section III.A.2.

¹⁰⁰ *Mosley v. Follett*, No. 80 Civ. 5628, 1980 WL 1171, at *4 (S.D.N.Y. Nov. 5, 1980).

¹⁰¹ *Id.* at *1.

¹⁰² *Id.* at *3–4 (internal quotation marks omitted).

¹⁰³ *Id.* at *4 (internal quotation marks omitted).

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* at *1.

¹⁰⁶ *Id.* at *4 n.13.

¹⁰⁷ *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at *1 (C.D. Cal. Oct. 26, 1983).

¹⁰⁸ Elisabeth Sherman, *The Rise and Fall (and Rise Again) of Frances Farmer*, ATI (July 21, 2016), <https://allthatsinteresting.com/frances-farmer-lobotomy> [<https://perma.cc/NF5U-H7ZC>].

facts, Arnold's *Shadowland* was largely biographical.¹⁰⁹ When the defendant produced a film about Farmer's life and incorporated facts from Arnold's *Shadowland*, Arnold sued the defendant alleging that his film infringed Arnold's copyright in *Shadowland*.¹¹⁰ In its decision, the court found Arnold to have presented his book as nonfiction, including presenting the fake facts in his book as facts, where "[t]he book itself purports to be a true story. It was released to the public as a non-fiction work. All of the promotional materials and reviews of the book treated it as nonfiction."¹¹¹ In *Houts v. Universal City Studios*, the court came to the same conclusion when the author's book *Where Death Delights* included statements that the story was "one of the most absorbing books on true crime ever published and truth can be more brutal than fiction," and indicated on the spine of the paperback edition of the book that it was "N-F," non-fiction.¹¹²

In *Oliver v. Saint Germain Foundation*, Frederick Spencer Oliver authored a book titled *A Dweller of Two Planets*, which was dictated to him by the spirit of a dead man, a "superior spiritual being."¹¹³ In the book, Oliver dedicated at least six pages to convincing his readers that the spiritual-being, Phyllos, dictated the story to him and that the story was factual.¹¹⁴ These statements included the preface stating that "the following book . . . is absolute revelation; that I do not believe myself its Author, but that one of those mysterious persons . . . an adept of the arcane and occult in the universe . . . is the Author. Such is the fact. The book was revealed to me."¹¹⁵ According to the *Oliver* court, Oliver held out his work to the public as true in order to "induce those who might read to believe that it was dictated by a superior spiritual being" and to "give the book an origin similar to that claimed by the followers of Joseph Smith in the Book of Mormons, the Koran by the followers of Mohammed."¹¹⁶ The court applied the factual estoppel doctrine to treat the revelations in *A Dweller of Two Planets* as unprotectable facts, even though the court admitted that a reasonable reader might not believe the work was factual.¹¹⁷

In *Silva v. MacLaine*, Silva wrote the book *Date with the Gods* detailing his experience meeting an extraterrestrial woman in Peru.¹¹⁸ The book included the extraterrestrial's explanations about UFOs, astral projection (out of body travel while attached by a silver chain), and other divine experiences.¹¹⁹ The

¹⁰⁹ *Marshall*, 1983 WL 1148 at *2.

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.* at *2.

¹¹² *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 28–29 (C.D. Cal. 1984) (internal quotation marks omitted) (emphasis omitted).

¹¹³ *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 298–99 (S.D. Cal. 1941).

¹¹⁴ *Id.* at 297.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 299.

¹¹⁷ *Id.* (stating "[t]he law deals with realities and does not recognize communication with and the conveyances of legal rights by the spiritual world as the basis for its judgment.").

¹¹⁸ *Silva v. MacLaine*, 697 F. Supp. 1423, 1425 (E.D. Mich. 1988).

¹¹⁹ *Id.*

defendant, MacLaine, published the book *Out On A Limb*, in which MacLaine discusses a trip she took with Silva to Peru where they both met up with the same extraterrestrial woman.¹²⁰ MacLaine's book describes her experiences in Peru and her own astral projection.¹²¹ Silva sued MacLaine for infringing *Date with the Gods*.¹²² Ruling for MacLaine, the court explained,

Silva seems intent on relating his experience at meeting an extraterrestrial who, in this [litigation], he for the first time declares is a literary device and was not real. The clear implication of the book is that he actually met an extraterrestrial and is conveying her teachings to his readers.¹²³

In *Arica Institute, Inc. v. Palmer*, the court found enough evidence that the author held out his work as being true when he claimed to have “discovered” human ego fixations that “are based upon our proven scientific knowledge,” and that the entire ego fixation system described in his book was “scientific, provable in the laboratory and clinically” and is “a discovery as scientific discoveries are, with exactly the same qualification of being verifiable and objective.”¹²⁴

Finally, in *Lake v. Columbia Broadcasting System, Inc.*, the defendant used the author Stuart N. Lake's book *Wyatt Earp: Frontier Marshall* to produce a radio show.¹²⁵ Wyatt Earp was an American frontier lawman, saloonkeeper, gambler, miner, and bouncer who was known as Old West's “toughest and deadliest gunman” of his day.¹²⁶ Lake's best-selling book was adapted into a number of movies and television shows.¹²⁷ In *Lake*, the court found Lake to have held out his story of Wyatt Earp to be true where the author declared in the book's preface that the book was “an accurate historical biography based on a factual account of Wyatt Earp's career and ‘in no part a mythic tale.’”¹²⁸ The court found Lake to have held out his book as true even though most people recognize that “an element of fictionalization in recounting the life of a great western hero is almost *de rigueur*.”¹²⁹ Lake later admitted that many of the quotes by Wyatt Earp in his book were fake, and the book today is considered largely fictional.¹³⁰

¹²⁰ *Id.* at 1426.

¹²¹ *Id.*

¹²² *Id.* at 1424.

¹²³ *Id.* at 1430.

¹²⁴ *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992) (quoting OSCAR ICHAZO, LETTERS TO THE SCHOOL 9 (1988)) (internal quotation marks omitted).

¹²⁵ *Lake v. Columbia Broad. Sys., Inc.*, 140 F. Supp. 707, 708 (S.D. Cal 1956).

¹²⁶ *Wyatt Earp*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wyatt_Earp [<https://perma.cc/83GB-PSF8>] (last visited Oct. 22, 2019).

¹²⁷ *Wyatt Earp: Frontier Marshal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wyatt_Earp:_Frontier_Marshal [<https://perma.cc/XUL6-GH7A>] (last visited Oct. 22, 2019).

¹²⁸ *Lake*, 140 F. Supp. at 708.

¹²⁹ 1 NIMMER & NIMMER, *supra* note 83, § 2.11[C].

¹³⁰ *Wyatt Earp: Frontier Marshal*, *supra* note 127.

2. *Implications of Fact*

The cases above seem to demonstrate that, where authors expressly state that the fake facts in their works are true, courts have generally found them to have “held out” their work to the public as true.¹³¹ But absent an express statement of facts, some courts have found that implied representations of fact by authors can also lead to findings that they held out their works as true. These implications can be from the genre or style of the work or even where and how the fake facts were published. For instance, in *Collins v. Metro-Goldwyn Pictures Corp.*, the court found the stories in the book *Test Pilot* to be held out as true where Collins’s wife published a collection of “flying stories or air stories” written by her test-pilot-late husband.¹³² These short stories recounted the test pilot’s childhood, school, and “vivid descriptions of many of his own flights . . . his more spectacular test dives” and “his own prophetic account of his last test dive, concluding with the words ‘I am dead now.’”¹³³ When Collins’s wife sued Metro-Goldwyn for infringing her husband’s stories in Metro-Goldwyn’s motion picture *Test Pilot*, the court applied the factual estoppel doctrine to find the stories not protected by copyright because “[i]t is . . . apparent from the very nature of Collins’[s] articles that they are largely a recitation of actual facts.”¹³⁴ The court even refused to find copyright infringement where the defendant recreated a death scene in its motion picture based on the pilot’s prophecy of his own death.¹³⁵

Similarly, in the 1913 *Davies v. Bowes* case mentioned above, Davies wrote “[a] Massachusetts real life drama which eclipses the plot of ‘The Thief’” under the News of the Theater column for the *Evening Sun*.¹³⁶ Davies “cast [the story] in the form of an actual occurrence because he thought it more striking.”¹³⁷ Even though the short story did not include statements expressly claiming to be true, the court found Davies to have held out the story as true “because [[the story] was printed as news; it was presented to the public as matter of fact and not of fiction; the readers of the Sun were invited to believe it.”¹³⁸ Davies might have claimed that he held out the work as true intending to entertain his readers, but the court ascribed Davies’s action to “attracting attention and lending interest to an alleged occurrence which if told as fiction would have been tawdry and unconvincing.”¹³⁹

¹³¹ See *supra* Section III.A.1.

¹³² *Collins v. Metro-Goldwyn Pictures Corp.*, 25 F. Supp. 781, 782 (S.D.N.Y. 1938) (internal quotation marks omitted) (dismissal of plaintiff’s unfair competition claim reversed on appeal by *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83 (2d Cir. 1939)).

¹³³ *Id.*

¹³⁴ *Id.* at 783.

¹³⁵ *Id.*

¹³⁶ *Davies v. Bowes*, 209 F. 53, 54 (S.D.N.Y. 1913).

¹³⁷ *Id.* at 55.

¹³⁸ *Id.*

¹³⁹ *Id.* at 56.

In other cases, courts have assumed fake facts were held out as facts merely because they were published in sources that most readers would believe to be factual instead of fiction, such as a telephone book, encyclopedia, test preparation text, or map. *Feist Publications, Inc. v. Rural Telephone Service Co.* involved fake names and telephone listings in a phone book.¹⁴⁰ In *Feist Publications, Inc.*, Rural sued Feist for copyright infringement when Feist copied Rural's telephone directory.¹⁴¹ Rural was the sole provider of telephone service in its service area and published a telephone directory of the names and phone numbers for its service area.¹⁴² Feist published larger area-wide telephone directories and paid regional telephone companies like Rural to obtain white pages listings.¹⁴³ After Rural refused to license its listings to Feist, Feist went ahead and copied Rural's white pages, listing the names and telephone numbers of all of Rural's subscribers.¹⁴⁴ Rural discovered Feist's copying when the latter's telephone directory included four "fictitious listings that Rural had inserted into its directory to detect copying."¹⁴⁵ While recognizing that facts are not copyrightable, the Court's decision failed to address Rural's four fake listings. Instead, the Court found all of Rural's telephone listings—the actual listings as well as the four fake listings—to be unprotectable facts.¹⁴⁶ The Court's decision to ignore Rural's four fake listings, and to analyze them no differently than actual listings, implicitly applied the factual estoppel doctrine.¹⁴⁷

Worth v. Selchow & Righter Co. involved fake facts in an encyclopedia.¹⁴⁸ Fred L. Worth spent over six years researching and eventually publishing two encyclopedias on trivia in 1977 and 1981.¹⁴⁹ The creators of the popular board game Trivial Pursuit relied on Worth's encyclopedias to create up to 27.9 percent of the questions and answers in three game editions.¹⁵⁰ Trivial Pursuit copied facts from Worth's encyclopedias as well as at least one fake fact that Worth had included in his encyclopedia to detect copying.¹⁵¹ Specifically, Worth included the fake fact that the 1970s TV detective Columbo's first name was Philip.¹⁵² When Trivial Pursuit included a card revealing that Columbo's

¹⁴⁰ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991).

¹⁴¹ *Id.*

¹⁴² *Id.* at 342–43.

¹⁴³ *Id.* at 343.

¹⁴⁴ *Id.* at 343–44.

¹⁴⁵ *Id.* at 344.

¹⁴⁶ *See id.* at 345.

¹⁴⁷ *See Kellogg*, *supra* note 38, at 562 (stating "[t]he Supreme Court relied on factual estoppel, if tacitly, when it analyzed four 'fictitious' phone numbers in *Feist* no differently than it did the thousands of actual phone numbers at issue.>").

¹⁴⁸ *See Worth v. Selchow & Righter Co.*, 827 F.2d 569, 569–70 (9th Cir. 1987).

¹⁴⁹ *Id.*; *see also* Tamar Lewin, *Issues Pursued in Copyright Lawsuit Are Not Trivial*, N.Y. TIMES (Nov. 13, 1984), <https://www.nytimes.com/1984/11/13/us/issues-pursued-in-copyright-lawsuit-are-not-trivial.html> [<https://perma.cc/9SLB-DLEP>].

¹⁵⁰ *Worth*, 827 F.2d at 570.

¹⁵¹ *See It's a Fake!*, *supra* note 44.

¹⁵² *Id.*

first name was Philip, Worth sued for copyright infringement.¹⁵³ In upholding the lower court's dismissal of Worth's infringement claim, the court affirmed that Trivial Pursuit's "use of the factual content in Worth's books does not constitute infringement."¹⁵⁴ The court even went as far as explaining that "[t]he verbatim repetition of certain words in order to use the nonprotectible facts is also noninfringing . . . 'indispensable expression' of particular facts or ideas."¹⁵⁵ Like the decision in *Feist*, the court's opinion never addressed Trivial Pursuit's copying of Worth's fake fact, thereby treating that fake fact as an unprotectable fact.

The court in *Oxford Book Co. v. College Entrance Book Co.* took the same approach when it was faced with an author's assertion of "common errors of fact appearing in both [the author's and the defendant's] books."¹⁵⁶ The author and the defendant were both publishers of history outlines and other condensed books on history for students and teachers.¹⁵⁷ The court explained that the common errors of fact appearing in the author's *Visualized American History* and the defendant's *Visualized Units in American History* "only served to show [defendant's] use of the plaintiff's book and not necessarily that what they wrote infringed the copyright, for historical facts are not copyrightable per se nor are errors in fact."¹⁵⁸ A similar result occurred in *Nester's Map & Guide Corp. v. Hagstrom Map Co.*, where the court found the mapmaker to have held out the "obscure and erroneous" street and building listings in its street guide and map to be true merely because those fake facts were included in a publication titled "*Official New York Taxi Driver's Guide*."¹⁵⁹

Whether an author held out fake facts as facts is one of the most important considerations when deciding whether to apply the factual estoppel doctrine to treat fake facts as unprotectable facts. However, prior case law provides no clear guidance to courts, litigants, authors, or the creative industry on how to determine whether authors held out their works to the public as true, how clear authors must be about the fictionalized elements in their largely nonfiction work, and whether defendants can rely on authors' implied representations that their works are factual. This lack of clarity can be harmful to authors that fictitiously hold out their works as fiction in order to entertain, such as works of historical fiction, found-footage films, or satire news. If there is no guidance on what constitutes holding out a work as factual, it is possible that the novel marketing of *The Blair Witch Project* could subject the movie to the factual estoppel doctrine, the *Onion's* style of satirical news could render its articles unprotectable by copyright law, or works such as Sir Arthur Conan Doyle's *Sherlock*

¹⁵³ *Id.*

¹⁵⁴ *Worth*, 827 F.2d at 573.

¹⁵⁵ *Id.*

¹⁵⁶ *Oxford Book Co. v. Coll. Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938).

¹⁵⁷ *Id.* at 690.

¹⁵⁸ *Id.* at 690–91 (emphasis added).

¹⁵⁹ *Nester's Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp. 729, 731–33 (E.D.N.Y. 1992).

Holmes stories—which are presented as factual accounts by Dr. Watson—could be treated as unprotectable facts because they were held out as true.

B. Defendant’s “Reasonable Reliance”

An area of even greater conflict in factual estoppel case law is whether a defendant accused of infringing an author’s fake facts is required to have reasonably relied on the author’s fake facts as facts for factual estoppel to apply. In deciding whether the factual estoppel doctrine applies to treat fake facts as unprotectable facts, some courts have required a defendant to prove reliance.¹⁶⁰ Some courts have even required defendants to show that their reliance was reasonable.¹⁶¹ Other courts have explicitly rejected the requirement that defendant prove that they relied on the fake facts as facts, and have even found the factual estoppel doctrine to apply to clearly absurd fake facts that no reasonable person would believe were true.¹⁶²

1. Reasonable Reliance Required

A handful of courts require that a defendant reasonably relied on the fake facts as facts for the factual estoppel doctrine to apply. In *Mosely v. Follett*, discussed above, the court determined that the defendant had reasonably relied on the author’s representations that the work was factual when the defendant wrote and published a fictional work based on a spy character and episode from the author’s book.¹⁶³ The court focused on the defendant’s reliance and found it to be reasonable in light of the classification of the author’s work by the Library of Congress and other libraries as nonfiction, and the treatment of the work by book reviewers as being nonfiction.¹⁶⁴

The court in *Marshall v. Yates* similarly endorsed the reasonable reliance requirement for factual estoppel. As discussed above, in *Marshall*, the author’s biography of Frances Farmer, *Shadowland*, was released to the public as nonfiction, and all of the promotional materials and reviews of the book treated the book as nonfiction.¹⁶⁵ Based largely on research from *Shadowland*, the defendants wrote a movie script and produced a movie about Frances Farmer.¹⁶⁶ The author sued defendants for copyright infringement, claiming that even though the work was largely biographical, the author had included at least eight fictionalized elements in *Shadowland* that the defendants had copied and used in their movie.¹⁶⁷ The *Marshall* court found reliance because there was no “suffi-

¹⁶⁰ See *infra* Section III.B.1.

¹⁶¹ See *infra* Section III.B.1.

¹⁶² See *infra* Section III.B.2.

¹⁶³ *Mosley v. Follett*, No. 80 Civ. 5628, 1980 WL 1171, at *1, *3 (S.D.N.Y. Nov. 5, 1980).

¹⁶⁴ *Id.* at *4, *4 n.13.

¹⁶⁵ *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at *2 (C.D. Cal. Oct. 26, 1983).

¹⁶⁶ See *id.* at *1, *4.

¹⁶⁷ *Id.* at *2, *3 n.3.

cient showing that defendants in fact knew that these portions of the book were fabricated by [the author].”¹⁶⁸ The court further described the defendants’ reliance to be reasonable because *Shadowland* “was not so clearly incredible that defendants should have been put on notice that portions were fictionalized.”¹⁶⁹ The court’s statement indicated that had *Shadowland* been “so clearly incredible,” the defendants could not have reasonably relied on the fake facts as facts and the factual estoppel doctrine would not apply.¹⁷⁰

2. Reasonable Reliance Not Required

Other courts have explicitly rejected the requirement that the defendant show reliance, finding that the defendant’s reliance that the work was factual is not relevant to application of the factual estoppel doctrine. These courts seem to embrace the argument that factual estoppel is triggered purely by the author’s bad behavior and not by the defendant’s reliance. In *Arica Institute, Inc. v. Palmer*, the plaintiff-institute published books by its founder, Oscar Ichazo, which provided teachings on psychological self-help.¹⁷¹ The Arica System, embodied in the Arica training manuals and books, is based on the teaching that the human body and psyche consists of nine systems.¹⁷² Those systems can become imbalanced by “ego fixations,” including indolence, resentment, flattery, vanity, melancholy, stinginess, cowardice, planning, and vengeance.¹⁷³ Arica’s manuals and books used diagrams, including nine-point figures enclosed in a circle called “enneagons,” to illustrate humanity’s nine ego-fixations.¹⁷⁴ The plaintiffs claimed to have “discovered” these ego fixations as “scientifically verifiable ‘facts’ of the human nature,” which were based on “proven scientific knowledge . . . provable in the laboratory and clinically,” constituting “a discovery as scientific discoveries are, with exactly the same qualifications of being verifiable and objective.”¹⁷⁵ As of 1992, there were approximately forty Arica training centers in the United States, South America, Europe, and Australia.¹⁷⁶ Helen Palmer, an attendee at Ichazo’s trainings, wrote and published her own book, *The Enneagram: Understanding Yourself and the Others in Your Life*, based on the teachings of Ichazo and Arica’s manuals and books.¹⁷⁷ Palmer’s book included Arica’s enneagrams and ego fixations and theories.¹⁷⁸ The Arica Institute sued Palmer for copyright infringement.¹⁷⁹ After finding that

¹⁶⁸ *Id.* at *3 n.3.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1069 (2d Cir. 1992).

¹⁷² *Id.* at 1069–70.

¹⁷³ *Id.* at 1070.

¹⁷⁴ *Id.* (internal quotation marks omitted).

¹⁷⁵ *Id.* at 1075.

¹⁷⁶ *Id.* at 1070.

¹⁷⁷ *Id.* at 1070–71.

¹⁷⁸ *Id.* at 1071–72.

¹⁷⁹ *Id.* at 1071.

Arca held out its ego-fixations and theories as facts, the court applied the factual estoppel doctrine to deny Arca from claiming copyright protection over the ego-fixations, even though the court admitted that “a reasonable reader might not believe the representation.”¹⁸⁰ Nevertheless, the court ruled that the fact that a reasonable person may not believe the fake facts “does not negate the estoppel.”¹⁸¹

In *Houts v. Universal City Studios, Inc.*, the court was even clearer in its rejection of the idea that defendant’s reasonable reliance is necessary for factual estoppel to apply. Specifically, the *Houts* court held that factual estoppel is “created solely by plaintiff’s affirmative action and representation that the work was factual.”¹⁸² In *Houts*, the author wrote and published the book *Where Death Delights*, the story of Dr. Milton H. Helpern, chief medical examiner of the City of New York.¹⁸³ The defendants created and produced a television series, *Quincy*, based on the author’s book.¹⁸⁴ The author sued the writers and producers of the TV show *Quincy*, claiming that *Where Death Delights* is “an amalgam of fact and fiction, and hence it is entitled to full copyright protection.”¹⁸⁵ After finding that the author held out his book as being factual, the court rejected the author’s argument that defendants must show reliance as a necessary element to apply the factual estoppel doctrine.¹⁸⁶ The court went so far as to state that even clearly absurd stories that are “ludicrous to the average reader” do not overcome the evidence that the author expressly held out the work as being factual.¹⁸⁷ In other words, defendants need not show that they relied on the work as factual, nor do defendants need to show that their reliance was reasonable.

Courts’ conflicting requirements for defendants to assert the factual estoppel doctrine to treat fake facts as unprotectable facts can cause some absurd consequences. Take, for instance, fake facts that have been publicly debunked. If a playwright now wants to create a drama based on Greg Mortenson’s *Three Cups of Tea*, would that playwright need to seek permission from Mortenson before recreating an episode where a character is similarly captured by the Taliban? Now that the episode has been publicly debunked as fake, does it regain its protection under copyright because no one can claim anymore to reasonably rely on the episode as factual? For courts that require reliance to be reasonable, how “clearly incredible” or absurd must the author’s story be for the defendant’s reliance to be considered unreasonable? For instance, the plot of the film

¹⁸⁰ *Id.* at 1075.

¹⁸¹ *Id.*

¹⁸² *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 31 (C.D. Cal. 1984).

¹⁸³ *Where Death Delights: The Story of Dr. Milton Helpern and Forensic Medicine*, AMAZON, <https://www.amazon.com/delights-Milton-Helpern-forensic-medicine/dp/B00005X65Z> [<https://perma.cc/U7SC-VXTH>] (last visited Oct. 22, 2019).

¹⁸⁴ *Houts*, 603 F. Supp. at 27.

¹⁸⁵ *Id.* at 28.

¹⁸⁶ *Id.* at 31.

¹⁸⁷ *Id.* at 30.

Return of the Living Dead is clearly ridiculous to the average audience, but it is published with the statement that “[t]he events portrayed in this film are all true. The names are real names of real people and real organizations.”¹⁸⁸ Have the publishers of this film held out their work as being factual with this express statement of fact, or should the film’s ridiculous plot—involving the dead coming back to life as bloodthirsty, flesh-eating monsters—overcome its express statement?

C. Fake Facts Protected as Fiction

In addition to the uncertainty within decisions applying the factual estoppel doctrine, some courts fail to recognize, refuse to apply, or reject the doctrine altogether. For instance, in *De Acosta v. Brown*, the author wrote a screenplay titled *Angel in Service* based on the life of Clara Barton, founder of the American Red Cross.¹⁸⁹ Even though the screenplay was primarily based on Barton’s life, in order to make her “biographical screen play palatable to the movie audiences of America,” the author added a number of fictional elements to her work.¹⁹⁰ These “heart interest[s]” included giving Barton a fictional lover, inventing a fake letter, falsifying a controversy with the school board, creating a fictional villain, and other fake facts.¹⁹¹ The defendant, Beth Brown, wrote her own biographical work about Clara Barton and published extracts from her work in *Cosmopolitan* magazine’s “The Nonfiction Book Digest.”¹⁹² Brown’s work used the author’s screenplay as a source for information and copied approximately seven fake facts the author had included in her screenplay.¹⁹³ The *De Acosta* court found Brown’s work to infringe the author’s screenplay because, according to the court, “original treatment of the life of a historic character, like such treatment of any material even in the public domain, is entitled to protection against appropriation by others.”¹⁹⁴ The court did not consider whether the author had held out her screenplay as representing the true story of Clara Barton, or whether Brown had reasonably believed the screenplay to be a factual account of Barton’s life when Brown adopted it. Indeed, in light of Brown’s use of the screenplay as a source for her own nonfiction biography about Barton, it is likely that Brown believed the author’s work to be a true account of Barton’s life.

Another court refused to apply the factual estoppel doctrine to fake facts by categorizing fake facts as assertions of belief rather than assertions of fact. In *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*,

¹⁸⁸ *All Persons Fictitious Disclaimer*, WIKIPEDIA, https://en.wikipedia.org/wiki/all_persons_fictitious_disclaimer [<https://perma.cc/6CHZ-U8NN>] (last visited Oct. 22, 2019).

¹⁸⁹ *De Acosta v. Brown*, 146 F.2d 408, 409 (2d Cir. 1944).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (internal quotation marks omitted).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 410.

the author made statements that Jesus Christ dictated the script for her book, *A Course in Miracles*, which was held out as a “non-sectarian, non-denominational spiritual teaching” that included “numerous psychological terms and ideas, such as denial, projection, dissociation, and hallucination.”¹⁹⁵ Despite being factually analogous to some of the cases described above, the court in *Penguin Books* refused to find that the author held out her work as factual.¹⁹⁶ The *Penguin Books* court criticized or distinguished past courts’ applications of the factual estoppel doctrine in similar spiritual cases.¹⁹⁷ In the case of *Oliver*, for instance, the *Penguin Books* court found *Oliver*’s application of the factual estoppel doctrine to be bizarre and echoed criticism “wonder[ing] whether the *Oliver* court would have invoked the same [factual estoppel] defense against Sir Arthur Conan Doyle on the grounds his ‘Sherlock Holmes’ stories are presented as factual accounts by Dr. Watson.”¹⁹⁸ The court concluded by finding the factual estoppel doctrine inapplicable in *Penguin Books* because the author’s representation of fact was “a claim based on faith” and much of the book was “prescriptive rather than descriptive.”¹⁹⁹

Similarly, in the recent *Gerald Brittle v. Warner Bros. Entertainment, Inc.* dispute, the court failed to recognize the factual estoppel doctrine when it denied Warner Brothers’ motion to dismiss.²⁰⁰ Gerald Brittle published the book *The Demonologist* in 1980 about the adventures of paranormal investigators Ed and Lorraine Warren.²⁰¹ The Warrens “investigat[ed] hauntings and work[ed] with church officials to exorcise demons.”²⁰² One of their most infamous adventures was their 1972 investigation of a haunting at the West Point military academy.²⁰³ *The Demonologist* was marketed as and purported to be a true account of events in the Warrens’ lives.²⁰⁴ Each chapter of *The Demonologist* highlighted an episode of the Warrens’ paranormal investigations, and the book included real-life photographs by the Warrens and dialogue “supported by first-person testimony by witnesses, and/or tape recordings the Warrens made on the

¹⁹⁵ *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV. 4126(RWS), 2000 WL 1028634, at *3 (S.D.N.Y. July 25, 2000). The court vacated this decision in *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor*, No. 96 Civ. 4126(RWS), 2004 WL 906301 (S.D.N.Y. Apr. 27, 2004) because the author’s book was published without copyright notice, resulting in the invalidity of the copyright. See *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 288 F. Supp. 2d 544, 546, 556 (S.D.N.Y. 2003).

¹⁹⁶ *Penguin Books U.S.A., Inc.*, 2000 WL 1028634, at *12.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *13 (internal quotation marks omitted).

¹⁹⁹ *Id.* at *12.

²⁰⁰ Memorandum Order at 2, *Gerald Brittle v. Warner Bros. Entm’t, Inc.*, No. 3:16-cv-00908-JAG (E.D. Va. Aug. 28, 2017) [hereinafter Memo Order].

²⁰¹ *Id.* at 1–2.

²⁰² Brief for Defendants Warner Bros. Entertainment Inc. and New Line Productions, Inc. at 1, *Brittle v. Warner Bros. Entm’t, Inc.*, No. 3:16-cv-00908, 2017 WL 3047058 at 1 (E.D. Va. June 20, 2017) [hereinafter Defendants’ Brief].

²⁰³ *Id.*

²⁰⁴ *Id.* at 2.

scene while phenomena were in progress.”²⁰⁵ Brittle included statements in the preface of *The Demonologist* that “all the information presented in this book is true,” “[t]hese are real cases that happened to real people,” “[g]reat care has been taken . . . to include only those cases in the Warrens’ files that were witnessed by ordained clergymen and exorcists,” and “[i]t should . . . be stressed that there is no exaggeration . . . [in] this book.”²⁰⁶

After Warner Brothers released the blockbuster movie, *The Conjuring*, based on the Warrens’ paranormal investigations, Brittle sued Warner Brothers for copyright infringement.²⁰⁷ Warner Brothers moved to dismiss Brittle’s complaint on the ground that any similarities between Brittle’s book and *The Conjuring* movie were based on facts, which were unprotected by copyright.²⁰⁸ Warner Brothers argued that for decades Brittle told the public that the factual details in his book were true, and that these unprotectable “facts” cannot form the basis of a copyright infringement claim.²⁰⁹ The court, however, denied Warner Brothers’ motion to dismiss because it “decline[d] the parties’ invitation to wade into the truth or falsity of the Warrens’ paranormal escapades . . . at this stage of the case. This type of analysis, which b[ore] on evidence presented and factual determinations, [was] better suited for summary judgment or trial.”²¹⁰ In other words, instead of looking at whether Brittle had held out his accounts of the Warrens’ paranormal investigations in *The Demonologist* as factual and, therefore, possibly unprotectable under the factual estoppel doctrine, the court’s opinion indicated that it would eventually need to determine the truth or falsity of the facts presented in *The Demonologist*. Under the factual estoppel doctrine, however, the court should never need to “wade into the truth or falsity” of the events in *The Demonologist*; the court would merely need to determine whether Brittle was factually estopped from asserting that his work was fiction and entitled to a higher level of copyright protection.

Courts and litigants do not always recognize the factual estoppel doctrine, or the idea that fake facts—when held out by their author as facts—may not deserve the same level of copyright protection as fiction. If courts are not willing to apply the factual estoppel doctrine to treat fake facts as unprotectable facts, authors that wish to rely on factual works would need to take extra care and due diligence to ensure that the works they rely upon are truly and one-hundred percent factual. This inability to rely on the factual estoppel doctrine creates uncertainty, inefficiency, and additional burdens for authors who wish to use other authors’ factual assertions to create secondary works.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citations omitted) (quoting GERALD BRITTLE, *THE DEMONOLOGIST* (1980)) (internal quotation marks omitted).

²⁰⁷ See Memo. Order, *supra* note 200, at 3.

²⁰⁸ Defendants’ Brief, *supra* note 202, at 9–11.

²⁰⁹ *Id.* at 9.

²¹⁰ Memo. Order, *supra* note 200, at 4.

IV. JUSTIFYING FACTUAL ESTOPPEL

If fake facts are created, and copyright is designed to encourage and promote creativity, why not protect fake facts as fiction under copyright law? Copyright is traditionally justified in the U.S. under a utilitarian theory: copyright incentivizes authors to create expressive works that benefit society.²¹¹ If authors cannot rely on the exclusivity to their works granted to them by copyright law, the assumption is that they may not create expressive works because they will have no way of preventing others from copying them. In terms of fake facts, do the justifications for copyright prevail over denying protection to fake facts under the factual estoppel doctrine?

A. *Benefits of Factual Estoppel*

There are many benefits to applying the factual estoppel doctrine to treat fake facts as unprotectable facts, including promoting efficiency, fairness, and production of socially valuable secondary works. Authors of fake facts should not be able to benefit from their deceptions; and the factual estoppel doctrine, if standardized, could marginally deter authors from creating fake facts in the first place. Further, factual estoppel promotes efficiency by allowing creators to rely on authors' representations instead of expending time and energy attempting to distinguish fake facts from facts; it protects later creators from copyright liability when they rely on works that authors hold out as being factual, and it spares courts the effort of attempting to distinguish protected fiction from unprotected fact.

1. *The Factual Estoppel Doctrine Promotes Efficiency and Production of Socially Valuable Works*

One of the most important reasons for excluding fake facts from copyright protection is that such exclusion promotes efficiency and dissemination of public knowledge by allowing later creators to rely on factual works to create secondary works. Without the factual estoppel doctrine, authors who wish to rely on prior works for research or creation would need to "engage in difficult and often irresolvable empirical inquiries in order to determine copyrightability."²¹² As the court in *Nester's Map & Guide Corp. v. Hagstrom Map Co.* noted,

To treat 'false' facts interspersed among actual facts and represented as actual facts as fiction would mean that no one could ever reproduce or copy actual facts without risk of reproducing a false fact and thereby violating a copyright. If

²¹¹ See, e.g., U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts . . ."); see generally William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168–69 (Stephen R. Munzer ed., 2001).

²¹² Green, *supra* note 80, at 945.

such were the law, information could never be reproduced or widely disseminated.²¹³

If later creators are required to expend the time and labor to parse fiction from fact and can never be certain that they are copying only unprotectable facts, those later creators may be less inclined to create secondary works in the first place. This could “unduly chill authors seeking to write about historical issues or events,” and it could “inhibit the production of socially valuable secondary works,” and diminish rather than promote public knowledge.²¹⁴ The factual estoppel doctrine, which treats fake facts as unprotectable facts, spares later creators from having to expend the extraneous labor of sifting through a supposed factual work to distinguish protected fiction from unprotected fact. The doctrine also removes the uncertainty that a later creator may inadvertently infringe an author’s copyright if certain factual accounts in the author’s work later turn out to be fake.

2. *The Factual Estoppel Doctrine Promotes Judicial Efficiency*

In addition to making it more efficient for secondary creators to use factual works, the factual estoppel doctrine also promotes judicial efficiency by allowing courts to dispose of copyright infringement cases without having to undertake complex analyses parsing protected fiction from unprotected fact. For instance, as discussed above, Brittle alleged in *Gerald Brittle v. Warner Bros. Entertainment, Inc.* that Warner Brothers’ movie *The Conjuring* infringed Brittle’s copyright in his nonfiction book, *The Demonologist*.²¹⁵ Like *The Conjuring*, *The Demonologist* tells the “true” stories of the Warrens’ paranormal investigations of hauntings and their encounters with ghosts.²¹⁶ The court denied Warner Brothers’ motion to dismiss Brittle’s copyright infringement claim because the court was not yet ready to engage in the difficult and fact-intensive inquiry into “the truth or falsity of the Warrens’ paranormal escapades.”²¹⁷ However, if the court applied the factual estoppel doctrine, the court would never need to engage in the difficult task of “wad[ing] into the truth or falsity”²¹⁸ of the events described in Brittle’s book; it would merely need to determine whether the factual estoppel doctrine applied to treat Brittle’s entire work as a factual work, limiting the copyright protection to only original expression

²¹³ *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp. 729, 733 (E.D.N.Y. 1992).

²¹⁴ See *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at *3 n.3 (C.D. Cal. Oct. 26, 1983); Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323, 348 (2003).

²¹⁵ Bill Donahue, *Warner Bros. Can’t Ditch \$800M ‘Conjuring’ Copyright Suit*, LAW360 (Aug. 29, 2017), <https://www.law360.com/articles/958427/warner-bros-can-t-ditch-800m-conjuring-copyright-suit> [<https://perma.cc/MH2N-SQRT>].

²¹⁶ Defendants’ Brief, *supra* note 202, at 2–3; see also *The Demonologist* by Gerald Brittle, GOODREADS, https://www.goodreads.com/book/show/1139129.The_Demonologist [<https://perma.cc/Y4UG-RJ56>] (last visited Oct. 22, 2019).

²¹⁷ Memo Order, *supra* note 200, at 4–5.

²¹⁸ *Id.*

or arrangement. At the same time, the factual estoppel doctrine will also prevent courts from having to wade into the difficult task of distinguishing truth from falsity in claims involving spiritual or religious texts. Instead of requiring judges to adjudicate whether specific facts—such as divine revelations or religious facts—are true, which could trigger Establishment Clause concerns,²¹⁹ courts can instead apply the factual estoppel doctrine to treat the entire religious text as a factual work. This would limit copyright protection to only original expression or arrangement, if any, of the “facts.”

3. *The Factual Estoppel Doctrine May Marginally Deter Creation of Fake Facts*

Like unclean hands, the factual estoppel doctrine might even “increase[] the cost of making false representations of fact and therefore may marginally deter such statements.”²²⁰ Fake facts, when held out as true, are generally bad for society. We read the news or nonfiction works in order to be informed and to learn about or find meaning in the world. Fake facts create a false record and can contribute to the distortion of history. Fake facts could also be adopted and repeated and recited as true, resulting in falsification of the historical record. Therefore, deterring authors from creating fake facts “is a positive consequence, for both deontological and utilitarian reasons.”²²¹ Instead of rewarding authors with copyright protection of their created fake facts, the law should deter this type of behavior and any doctrine that even marginally deters fake facts’ creation should be considered. In spite of this endorsement, the factual estoppel doctrine’s ability to deter authors from creating fake facts is unclear. Because application of the factual estoppel doctrine merely grants fake facts the same scope of copyright protection they would have enjoyed had they been facts, it is unclear how excluding fake facts from copyright law deters authors from creating fake facts because those authors are not losing any protection they otherwise would have had.

4. *The Factual Estoppel Doctrine Is Fair*

The factual estoppel doctrine is fair and, like unclean hands, enforces “equity and good morals.”²²² Authors should not be able to reap the benefits of marketing their work as factual, but turn around and declare it as fiction in order to benefit again in a copyright infringement suit. In other words, “[t]here is no unfairness in holding people to their word.”²²³ In *Davies v. Bowes*, discussed above, the court justified applying the factual estoppel doctrine to treat Da-

²¹⁹ See Cotter, *supra* note 214, at 343 (stating “for a court to express either belief or disbelief in [an author’s religious] claim risks violating the principle of religious neutrality embodied in the Establishment Clause.”).

²²⁰ *Id.* at 348.

²²¹ *Id.* at 348 n.107.

²²² *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941).

²²³ 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:6 (2019).

vies's fake news article as factual because "it is a matter of morals that he who puts forth a thing as verity shall not be heard to allege for profit that it is fiction."²²⁴ Specifically, "because [the story] was printed as news; it was presented to the public as matter of fact and not of fiction; the readers of the Sun were invited to believe it," Davies, therefore, should not be able to turn around and claim the story to be fiction in order to profit from the defendant's use of his story.²²⁵ This result—preventing an author from benefitting from claiming their work to be true and claiming their work to be fake—is fair.

5. *The Factual Estoppel Doctrine Upholds Reasonable Expectations*

The factual estoppel doctrine also upholds parties' reasonable expectations and protects defendants that rely on authors' representations of fact. Once factual estoppel is established, an author's fake facts are treated as facts, limiting the protectable elements of the author's work to the expression or original arrangement of those facts.²²⁶ This significantly decreases the chance that an author, who holds out fiction as fact, will succeed in a copyright infringement case unless the defendant wholesale appropriated the expression or arrangement of those fake facts. The author's expectations are met in this situation because copyright does not protect facts, so authors that hold fake facts out as facts should not reasonably expect copyright to protect those facts. Similarly, a defendant's expectations are also upheld because they expected to be able to use facts without incurring copyright liability. On the other hand, where a defendant wholesale appropriates an author's work, including the author's original expression and arrangement, that defendant could still be liable for copyright infringement. For instance, even though it becomes very difficult to protect a work under copyright once a court applies the factual estoppel doctrine, it is not impossible. In *Urantia Foundation v. Maaherra*, the Urantia Foundation held out the plot of its spiritual guidebooks as having been authored by spiritual beings.²²⁷ Maaherra copied verbatim the entire Urantia Book, including the selection and arrangement of the revelations within the Book, and distributed it on computer disks.²²⁸ The court explained that, while the divine revelations in the Book were divine "facts" that "would be analogous to a 'fact,' and which of course would not be copyrightable[.]" in this case, Maaherra copied more than just the facts—but also the original expression, selection, and arrangement of those facts, which copyright law protects.²²⁹

²²⁴ *Davies v. Bowes*, 209 F. 53, 55 (S.D.N.Y. 1913).

²²⁵ *Id.* at 55–56.

²²⁶ *Supra* Part III.A.

²²⁷ *Urantia Found. v. Maaherra*, 114 F.3d 955, 956 (9th Cir. 1997).

²²⁸ *Id.* at 956, 959.

²²⁹ *Id.* at 959.

B. *Consequences of Factual Estoppel*

At the same time, applying the factual estoppel doctrine to treat fake facts as unprotectable facts could have unintended consequences, including increasing the dissemination of fake facts, stripping away copyright protection of fictional works that rely on facts for entertainment, and denying protection to original expression or arrangement of fake facts.

1. *The Factual Estoppel Doctrine Could, Theoretically, Increase Dissemination of Fake Facts*

Some commentators express concern that factual estoppel may increase the dissemination of fake facts.²³⁰ If fake facts are not protected by copyright, then subsequent authors may repeat an author's fake facts without incurring copyright liability. Some argue that this could increase the dissemination of fake facts as well as multiply the sources reciting those fake facts.²³¹ This result is contrary to copyright's goal of excluding facts, which—according to some—is to “provide consumers with accurate information at the lowest cost.”²³² This was a concern expressed by the court in *Belcher v. Tarbox* regarding denying copyright to fraudulent material; the court in that case stated that “[c]opyright protection restricts permissible publication. We fail to see what public policy would be served by eliminating this restriction in the case of fraudulent matter and permitting it to be reprinted and circulated freely.”²³³ Analogizing the *Belcher* court's concern to denying copyright to fake facts would mean that to treat fake facts as unprotectable facts could permit those fake facts to be reprinted and circulated freely, which would not serve public policy. While treating fake facts as unprotectable facts could theoretically allow the duplication or increase the dissemination of fake facts, the solution to this concern is not to protect fake facts under copyright law. Protecting fake facts under copyright only serves to punish gullible defendants that rely on authors holding out their works as factual. It also allows authors, whose intent was to dupe the public and benefit from claiming that their works are factual, to benefit again in infringement litigation against unwitting defendants. This result is not only unfair but would also create uncertainty that later authors may face copyright liability for inadvertently using fake facts in their secondary works, and potentially chill the production of these socially valuable secondary works.

²³⁰ See II PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 10.4 (3d ed. 2008); Cotter, *supra* note 214, at 348.

²³¹ GOLDSTEIN, *supra* note 230, § 10.4 (stating “[i]f one excuse the defendant's taking on the ground that the plaintiff's work generally represents itself as factual removes any incentive for the defendant to check the putative facts against other sources and multiplies the sources of inaccurate information available to consumers.”).

²³² *Id.*

²³³ *Belcher v. Tarbox*, 486 F.2d 1087, 1088 n.3 (9th Cir. 1973).

2. *The Factual Estoppel Doctrine Could Negatively Affect Production of Certain Genres of Works*

Some commentators are concerned that applying the factual estoppel doctrine to treat fake facts as unprotectable facts could negatively affect production of certain genres or categories of works. For instance, when courts extend the factual estoppel doctrine to deem “a work ‘factual’ regardless of the author’s intentions[,]” they may negatively affect semi-fabricated works “that (fictitiously) claim to tell a true story” for entertainment purposes.²³⁴ The court in *Garman v. Sterling Publishing Co.* expressed the concern that the factual estoppel doctrine “could hinder the goals of the Copyright Act by providing a disincentive to produce certain works,” citing as an example “an author of historical fiction might jeopardize her copyright if she attributed fictitious dialogue to historical characters.”²³⁵

Consider *The Blair Witch Project’s* innovative marketing scheme, where producers portrayed the events in their found-footage film as being real in various online sources.²³⁶ By marketing the work as a true story for the purpose of entertainment, a court could apply the factual estoppel doctrine to exclude the plot or events in the movie from copyright protection. Taking this argument to the extreme could mean works such as Sir Arthur Conan Doyle’s *Sherlock Holmes* series, written from the perspective of fictional-biographer Dr. Watson,²³⁷ or books like Jim Fergus’s *One Thousand White Women: The Journals of May Dodd*, written as the discovered journal of fictional character May Dodd, could be subject to the factual estoppel doctrine and not protected by copyright.²³⁸ Indeed, it would be contrary to copyright policy if “the result of applying copyright estoppel in the case of a literary or artistic hoax . . . could overdeter legitimate behavior.”²³⁹

These concerns, while legitimate, are avoidable. If courts apply factual estoppel consistently using the framework laid out at the end of this Article, and authors take the precautionary measure of including disclaimers about the fictional aspects of their works, those works are not likely to be subject to the factual estoppel doctrine. Indeed, because the new framework discussed below takes into consideration objective evidence regarding an author’s intent, fictional works written like nonfiction in order to entertain would not likely be

²³⁴ Kellogg, *supra* note 38, at 562; *see also* Cotter, *supra* note 214, at 348 (stating “an expansive application of [factual] estoppel might decrease the first author’s expected reward from producing genres such as historical fiction and fiction that purports to be a factual account written by one of the characters.”).

²³⁵ *Garman v. Sterling Publ’g. Co.*, No. C-91-0882 SBA (ENE), 1992 WL 12561293, at *4 (N.D. Cal. Nov. 5, 1992).

²³⁶ *See* Davidson, *supra* note 58.

²³⁷ Nimmer mentioned this possibility in his criticism of the *Oliver v. Saint German Foundation* decision, where he asks, “[o]ne wonders whether that court would have invoked the same defense against Sir Arthur Conan Doyle on the grounds his *Sherlock Holmes* stories are presented as factual accounts by Dr. Watson.” 1 NIMMER & NIMMER, *supra* note 83, § 2.11.

²³⁸ *See id.*

²³⁹ Cotter, *supra* note 214, at 352.

subject to the factual estoppel doctrine unless they are clearly held out as non-fiction and have the potential to deceive more than a de minimis portion of the public.

3. *The Factual Estoppel Doctrine Could Deny Protection to Original Arrangement or Expression of Fake Facts*

One commentator claims that once a court finds that factual estoppel applies, “the work is generally not protected at all . . . because the party to whom factual estoppel applies never will have made the alternative argument that its work was factual. If it had, then factual estoppel would not apply in the first instance.”²⁴⁰ This would mean that even if a defendant wholesale copied the author’s work, once a court determines that factual estoppel applies, that defendant is not likely to be liable for infringement of the plaintiff’s original expression or arrangement of fake facts. While most cases applying the factual estoppel doctrine do indeed result in findings of noninfringement, this is not always the case.

For instance, in *Urantia Foundation v. Maaherra*, discussed above, the court applied the factual estoppel doctrine to find that the individual revelations recited in the plaintiff’s spiritual guides were not protectable under copyright law, but that the defendant had infringed the original selection and arrangement of those revelations, which was protected as a copyrightable compilation.²⁴¹ Similarly, in *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, the court denied copyright protection of the “obscure and erroneous listings” the plaintiff planted in its map under the factual estoppel doctrine.²⁴² However, even treating those fake facts as facts, the court in *Nester* acknowledged that the author’s “list of numbers in its street address guide may be copyrightable not because the statements are fictional but because of the originality in selecting and assigning them to particular cross streets.”²⁴³ The court in *Garman v. Sterling Publishing Co., Inc.* came to the same conclusion where the author and publisher of the book *Gem Elixirs and Vibrational Healing* sued the defendant-author of *Crystal Workbook* for copyright infringement.²⁴⁴ The court admitted that “[a]lthough the ‘factual’ contentions advanced in both *Gem Elixirs* and *Crystal Workbook* are undoubtedly fanciful, they are still represented as facts. As such, subsequent researchers in this field of pseudoscience had a right to

²⁴⁰ David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. & TECH. L. REV. 355, 408, 408 n.320 (2010).

²⁴¹ *Urantia Found. v. Maaherra*, 114 F.3d 955, 959, 964 (9th Cir. 1997).

²⁴² *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp 729, 731, 733 (E.D.N.Y. 1992).

²⁴³ *Id.* at 733. Specifically, the court held that “Nester’s Map used sufficient creativity in implementing a plan to locate addresses along major streets to qualify this section of Nester’s guide as copyrightable.” *Id.*

²⁴⁴ *Garman v. Sterling Publ’g. Co., Inc.*, No. C-91-0882 SBA (ENE), 1992 WL 12561293, at *1 (N.D. Cal. Nov. 5, 1992).

make use of the facts and ideas contained in plaintiff's work."²⁴⁵ The court, however, refused to grant the defendant summary judgment because the author showed "sufficient evidence of copying of expressive elements of both the prose and the charts" from the author's book.²⁴⁶ Therefore, even though application of the factual estoppel doctrine makes finding copyright infringement significantly more difficult, it is not a blanket defense for infringing defendants.

While there could be unintended consequences from applying the factual estoppel doctrine to treat fake facts as facts, those consequences are minimal when compared with the efficiency, fairness, and social benefits in allowing later creators to rely on "facts" in their secondary works without worrying that those facts may be protected by copyright.²⁴⁷ On balance, the public interests of efficiency, fairness, and promoting production of socially valuable secondary works are better served when courts apply factual estoppel to treat fake facts as unprotectable facts in copyright infringement cases involving copying of fake facts.

V. A NEW FRAMEWORK FOR THE FACTUAL ESTOPPEL DOCTRINE

Having established that the public's interest is better served when courts apply the factual estoppel doctrine to treat fake facts as unprotectable facts, the next issue is how courts should determine when to apply the factual estoppel doctrine. The inconsistent treatment of fake facts under copyright law and the conflicting recognition and application of the factual estoppel doctrine can cause uncertainty to courts, litigants, authors, and the creative industry. Future authors who want to rely on factual works for research or inspiration can never be certain that they will not face liability for copying protected fiction, and litigants and courts waste valuable time and energy attempting to prove and parse

²⁴⁵ *Id.* at *4.

²⁴⁶ *Id.* at *7.

²⁴⁷ Some may argue that fair use would allow authors to use fake facts in their secondary works without facing copyright liability. This argument, however, falls short. As a preliminary matter, by applying the factual estoppel doctrine to treat fake facts as unprotectable facts, litigants never have to argue fair use, because facts are not protectable subject matter under copyright law. Additionally, even though fair use allows a follow-on creator to reproduce works for purposes such as criticism, comments, news reporting, teaching, scholarship, or research, it may not allow an author to reproduce protected fictional works for purposes such as creating a derivative fictional work. *See, e.g., Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *8-9 (C.D. Cal. Apr. 25, 1989) (the creation of a sequel with characters developed in *Rocky I, II, and III* infringes the copyright of those original works). Indeed, the fair use doctrine may not even allow an author to produce a secondary encyclopedic work based on a protected fictional work. *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 135, 146 (2d Cir. 1998) (defendant's trivia book about the *Seinfeld* television series was not fair use); *Warner Bros., Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 524, 551 (S.D.N.Y. 2008) (defendant's encyclopedia of *Harry Potter* fantasy novel series was not a fair use of the author's works). If the underlying works in all three of these above examples were nonfiction instead of fiction, the defendants' creation of a derivative creative sequel, an encyclopedia, and a trivial book based on facts would likely not have been infringing.

fiction from fact. Based on past case law and incorporating elements from other areas of the law, including false advertising, trademark infringement, and the equitable estoppel defense, this Part recommends a new practical and consistent framework for courts going forward to determine when the factual estoppel doctrine should apply to treat fake facts as unprotectable facts in copyright infringement cases.

When an author files a copyright infringement action accusing a defendant of copying fake facts or fictionalized elements of a nonfiction work, and the court determines that the factual estoppel doctrine applies, the court should treat the plaintiff's entire work as a factual work, limiting the protectable elements of the work to the expression or unique and original arrangement of the work. This significantly decreases the chances that a plaintiff will succeed in a copyright infringement claim unless the defendant wholesale appropriated the original expression or arrangement of fake facts. In order determine whether the factual estoppel doctrine should apply, the court should consider the following three questions: (1) whether the author held out fake facts as fact; (2) whether the author intended for the public to rely on their work as fact; and (3) whether the public could believe that the work is factual. If the answer to all three of these questions is yes, then the factual estoppel doctrine should apply to treat fake facts as unprotectable facts under copyright law.

A. The Author Held Out Fake Facts as Facts

When a court is faced with an author attempting to assert copyright protection over fake facts, the first step should be to determine whether the author represented those fake facts as facts. This is an important inquiry that examines how an author held the work out to the public, including the author's express representations, the style and source of the work, and whether or what types of disclaimers the author included with the work. If the weight of the evidence shows that the author held out fake facts as facts, then the author is more likely to be factually estopped from claiming the fake facts were fiction entitled to copyright protection.

One factor to consider under this first question is whether the author made express representations that fake facts were facts or that their work was nonfiction. These express representations could be within the work, on the work's cover, in the preface or book jacket of the work, as the official library's category, or in the author's statements. For instance, if the author claimed that the work was nonfiction, included statements in the preface or book jacket that the work is a true story or consisted of scientifically verifiable fact, allowed book reviews to claim that the work was nonfiction without issuing corrections, categorized the work as nonfiction in marketing and sale channels or with the Library of Congress, or made statements of the work's truth in interviews or media appearances, then this first question most likely leans in favor of the fake facts having been held out as facts.

Another factor to consider under this first question is the work's content, style, and source, and whether the work was written like nonfiction or published in a source the public would rely on as factual. For instance, does the work read like nonfiction, is it published as a journalistic, news-like source, or in a source that the public would rely on to be factual? Even where authors do not expressly represent that their work is factual, if the work reads like nonfiction and is included in a source that the public would generally assume to be factual—such as a dictionary, encyclopedia, map, or news section of the newspaper—then this first question weighs toward finding that the author held out fake facts as facts. This factor alone cannot prove that the author represented the work as nonfiction because that could prevent highly creative and obviously fictional works, including news satire, found-footage films, and historic fiction, from copyright protection. However, it is one factor that courts should consider in conjunction with the author's statements and explicit representations.

Whether the work included a disclaimer also helps determine whether the fake facts were held out as facts. For instance, did the author include disclaimers that the work was merely “inspired by a true story” or is “fiction”? These statements represent that the work is not entirely true, may include fictionalized elements, or is completely made-up. Similarly, in works where content and style are written like nonfiction, the inclusion of disclaimers such as the Borowitz Report's “[n]ot the news,” or the common disclaimer in books that “this is a work of fiction. Any names or characters, businesses or places, events or incidents, are entirely fictitious,” are also important considerations that the work was not held out as true. In fact, the existence of a clear disclaimer that the work is fiction within the work, such as being categorized as “fiction” in a book's jacket, should outweigh any consideration of a work's content or style.

B. The Author Intended the Public to Rely on Fake Facts as Facts

The second question that a court should ask is whether authors intended for the public to rely on their fake facts as facts. For instance, did the author intend to deceive or mislead the audience? Did they intend for their audience to rely upon their representations that their work was factual? Or was the author's intent merely to entertain and not for others to rely on the work as fact? Actual evidence of the author's intent, the work's genre, and the value consumers place on the author's work can be objective evidence to support an author's intent to deceive. This question draws from a number of other areas of the law, including the classic equitable estoppel defense in copyright infringement claims in which courts require “the plaintiff must intend that its conduct shall be acted on or must so act that the defendant has a right to believe that it is so intended.”²⁴⁸ It also finds support in trademark law, which considers the defendant's intent to confuse consumers as one factor in a likelihood of confusion analysis; and in the tort of fraudulent misrepresentation, which requires a show-

²⁴⁸ 4 NIMMER & NIMMER, *supra* note 83, § 13.07[A] (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960)).

ing that the actor “intends or has reason to expect [persons] to act or to refrain from action in reliance upon the misrepresentation.”²⁴⁹ Requiring a showing of intent to deceive also helps address concerns that the factual estoppel doctrine will chill works in the found-footage, news satire, historic fiction genres, and concerns that courts might extend the factual estoppel doctrine to deem “a work ‘factual’ regardless of the author’s intentions.”²⁵⁰ In the factual estoppel context, the stronger the evidence that the author intended the public to rely on their work as factual, the more likely the factual estoppel doctrine should apply to exclude fake facts from copyright protection.

Even though it can be difficult to find evidence of an author’s intent, there are certain factors that can help serve as objective evidence that the author intended the public to rely on fake facts as facts. As a preliminary matter, the genre of the author’s work may help determine whether the author intended to deceive or mislead the public. Specifically, authors that include fake facts in certain genres—such as news, biographical or historical works, maps, encyclopedias, telephone directories, dictionaries, religious or spiritual texts—are more likely to have the intent to deceive than authors that include fake facts in genres such as historical fiction, found-footage, or news satire. Therefore, courts may take into consideration the genre in which the fake facts appear in order to help discern the author’s intent. Authors hold out fake facts as facts for different reasons. It is in society’s interest to deny copyright protection of fake fakes that are held out as true to deceive the public into relying on those fake facts. As explained above, fake facts that deceive are bad for society because they distort history, falsely shape our views of society, and provide misinformation for posterity. On the other hand, it is in society’s interest to continue encouraging innovative and novel forms of literary or entertainment works that are not intended to deceive, but rather, are intended to entertain. Unlike fake facts that deceive, works that entertain—such as those in the historical fiction, found-footage, satirical news genres—benefit society similarly to a good novel, blockbuster movie, or creative painting. Under this consideration, the work’s genre can help determine the author’s intention in holding out fake facts as true.

Another factor to determine the author’s intent is whether audiences primarily valued the author’s work because they believed it to be factual. The more evidence that the author’s work was valued because it was factual, the more likely the author intended for the public to rely on the fake facts as facts. This consideration draws from false advertising law where a defendant’s misrepresentation may be found to be material “in the sense that it would have some effect on consumers’ purchasing decisions.”²⁵¹ Here, if consumers would only value the author’s work because it is nonfiction, then the author is more likely to have intended to deceive, and this second question would lean in favor of applying the factual estoppel doctrine to deny copyright. One commentator

²⁴⁹ RESTATEMENT (SECOND) OF TORTS § 531 (AM. L. INST. 1977).

²⁵⁰ Kellogg, *supra* note 38, at 562.

²⁵¹ 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:35 (5th ed. 2019).

acknowledged that application of the factual estoppel doctrine “makes sense because the real difference between factual and fictional material is not the extent to which it is true, but the reason the material is valued by consumers.”²⁵² Specifically, “material can be valued as factual, because it is considered correct, even if it is actually false. By the same token, material can be valued as fictional—for example, because it is entertaining—even if it turns out to be true.”²⁵³ Consumers value fact differently from fiction—they “value factual material as a guide for their action and in order to satisfy their curiosity about what the world is like. The reasons for their valuing fictional material are more aesthetic and recreational.”²⁵⁴ Found-footage films such as *The Blair Witch Project*, or news satire such as *The Borowitz Report*, are valued for their entertainment quality. Encyclopedias or the news are valued because they purport to tell the truth. If an author’s work is primarily valued because it is purportedly true, then a court may find that the author is more likely to have intended to deceive the public into relying on the work as fact.

C. *The Public Could Believe that the Work is Factual*

The final question that a court should ask is whether the public *could* believe the work is factual. Specifically, if more than a de minimis portion of the public²⁵⁵ could believe that the author’s work is factual, then the factual estoppel doctrine is more likely to apply. In order to answer this third question, a court should consider whether a defendant in a copyright infringement case was actually deceived into believing the work was true, whether the fake facts are so absurd that no reasonable person would be deceived, whether the work is one that most people would recognize as fiction, and whether the public was in fact deceived into believing that the work was nonfiction. This third question finds support in false advertising law, which requires a claimant to prove that a defendant’s representations of fact either deceived or *had the potential* to deceive consumers.²⁵⁶

One factor that could help answer this last question is whether the defendant relied on the author’s representations that the work was factual. As discussed above, a handful of courts required a defendant to show actual reliance on the author’s representations that the work was true in order to apply the fac-

²⁵² Green, *supra* note 80, at 945.

²⁵³ *Id.*

²⁵⁴ *Id.* at 945–46.

²⁵⁵ I have refrained from setting the bar too high because, as Cotter explains, “[i]f a small but nonetheless significant number of readers will likely rely upon the author’s presentation of the work as factual, the social interest in allowing these readers to use these ‘facts’ without fear of copyright liability may be substantial.” Cotter, *supra* note 214, at 350.

²⁵⁶ Malla Pollack, *Suing for False Advertising Under Federal Lanham Act*, 111 AM. JUR. *Trials* 303 § 18 (2009) (“Proof that a significant number of potential customers were deceived satisfies this element. However, likelihood of deception of a significant number of relevant persons is sufficient.”).

tual estoppel doctrine.²⁵⁷ Reliance is a typical element required to assert a classic equitable estoppel defense both in copyright infringement cases and other areas of the law. For instance, in order to assert the defense of equitable estoppel to copyright infringement, “the defendant must be ignorant of the true facts . . . [and] must rely on the plaintiff’s conduct to its injury.”²⁵⁸ Similarly, to establish equitable estoppel in enforcing an oral contract for the sale of real property, the parties must show that they acted to their detriment in reasonable reliance on the other’s oral promise.²⁵⁹ However, for factual estoppel to apply, defendant’s reliance should be considered as only one piece of evidence to support the argument that the public could believe that the work is factual. It should not be considered a dispositive issue on its own. On the one hand, the factual estoppel doctrine should not apply just because the defendant confused fiction with fact. For instance, just because one congressman might have believed the *Onion* article that “Planned Parenthood Opens \$8 Billion Abortionplex” is not enough to support a claim that the public could believe it to be true.²⁶⁰ Defendant’s own reliance, therefore, should only be one consideration. On the other hand, defendants should still be able to assert factual estoppel even if they cannot show that they relied on the author’s work as factual. If a defendant’s own reasonable reliance were a necessary element for factual estoppel, fake facts could technically regain their protection as fiction under copyright law once they are debunked. For instance, now that Pizzagate has been debunked as fake, a movie producer who wants to use the plot to produce a fictional comedy would not be able to show reasonable reliance and would need to seek permission to use the fake plot of that fake news article.²⁶¹ By eliminating the strict requirement of reasonable reliance, authors are not able to benefit from their fake facts either now or in the future.

Regardless, if defendants can show evidence that they reasonably relied on the work as factual, it could help prove that the public could believe the fake facts. For instance, the genre of the defendant’s secondary work—(i.e., whether the defendant’s work is fiction vs. nonfiction)—can serve as objective evidence that the defendant genuinely believed the author’s fake facts were facts. In *De Acosta v. Brown*, discussed above, the defendant incorporated the fake facts from the plaintiff’s screenplay about Clara Barton in a “nonfiction” biographical essay the defendant wrote and published.²⁶² The fact that the defendant

²⁵⁷ See *supra* Section III.B.1.

²⁵⁸ 4 NIMMER & NIMMER, *supra* note 83, § 13.07[A].

²⁵⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 129 (AM. L. INST. 1981).

²⁶⁰ Dino Grandoni, *Congressman Falls for the Onion’s Planned Parenthood ‘Abortionplex’ Story*, ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/congressman-falls-months-old-onion-story-about-planned-parenthood-abortionplex/332189/> [<https://perma.cc/YLA6-MVDN>].

²⁶¹ While the author meant for this to be a hypothetical, it looks like it is not far from reality. See Richard Whittaker, *First Trailer for Austin Conspiracy Comedy Duncan*, AUSTIN CHRON. (Feb. 1, 2019), <https://www.austinchronicle.com/daily/screens/2019-02-01/first-trailer-for-austin-conspiracy-comedy-duncan/> [<https://perma.cc/DDU6-EYHX>].

²⁶² *Supra* Section III.C.

used the screenplay as a source for her own nonfiction biography about Barton seemed to support that the defendant believed the plaintiff's work to be a true account of Barton's life. This could help demonstrate that more than a de minimis portion of the public could believe that the plaintiff's screenplay was a true account of Barton's life.

Some authors have argued that a defendant who relied on the author's work to produce a secondary work that is fiction rather than nonfiction should not be able to rely on the factual estoppel doctrine. For instance, in *Mosley v. Follett*, the plaintiff argued that that factual estoppel should not apply because the defendant's novel—which relied upon Mosley's *The Cat and the Mice*—was fictional and not a biographical or nonfiction work.²⁶³ As discussed above, if the defendant's secondary work was nonfiction, that could potentially support that defendant believed the fake facts to be true, because the defendant incorporated them into their own nonfiction work. However, the opposite is not true. In other words, the fact that the defendant's work was fiction instead of nonfiction should not weigh against factual estoppel. As described above, once a court determines that the factual estoppel should apply to fake facts, those fake facts are treated as facts and offered the same limited copyright protection as facts. Anyone can draw upon facts in order to create secondary works, including to create secondary factual works or fictional works. As the court in *Mosley* stated, “[t]he policy underlying the rule that history, like ideas, cannot be copyrighted applies even where the second work incorporates the factual material into a fictional ‘thriller.’”²⁶⁴ Many popular historical fiction novels draw upon factual locations and historical events for dramatic background. Authors of fiction should be afforded the same opportunity as nonfiction authors to rely on the factual estoppel doctrine when sued for copyright infringement of fake facts.

The incredibility of the fake facts also helps courts determine whether the public could believe the fake facts were facts. This inquiry is similar to the puffing defense in false advertising law, where grossly exaggerated advertising claims that no reasonable buyer would believe was true, or silly and unbelievable print and television advertising, are mere puffery not actionable under false advertising.²⁶⁵ In past factual estoppel case law, courts have considered whether fake facts are “so clearly incredible” that a defendant should be put on notice that the facts were fake.²⁶⁶ In other words, if the fake facts are so absurd and unbelievable that no reasonable person would believe them to be true, those courts indicated that the factual estoppel doctrine could not apply, and the fake facts would be protected by copyright as fiction.²⁶⁷ The absurdity of the fake facts should be one factor to help determine whether the public could believe

²⁶³ *Mosley v. Follett*, No. 80 Civ. 5628, 1980 WL 1171, at *1, *5 n.15 (S.D.N.Y. Nov. 5, 1980).

²⁶⁴ *Id.* at *5 n.15.

²⁶⁵ MCCARTHY, *supra* note 251, § 27:38.

²⁶⁶ *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at *3 n.3 (C.D. Cal. Oct. 26, 1983).

²⁶⁷ *See id.* at *3, *3 n.3.

the work to be true, but should not completely negate application of the factual estoppel doctrine. Whether fake facts are unbelievable is such a subjective analysis that courts could find themselves in dangerous territory when they judge, for instance, whether statements of spiritual encounters, divine interventions, creation stories, or other similar spiritual or religious facts are absurd or clearly incredible. That being said, the incredibility of the fake facts should be one factor to consider, especially when it is helpful to balance other evidence supporting the factual estoppel doctrine. For instance, the movie *Return of the Living Dead* featured the statement that “[t]he events portrayed in this film are all true. The names are real names of real people and real organizations.”²⁶⁸ This statement could support a finding for factual estoppel under the first question discussed above—that the author represented the work as factual. Nevertheless, the incredibility of the plot of the movie, the obviously fake events portrayed in the movie, and the fact that most people would recognize the horror film as being fiction, should help to balance out the weight of evidence supporting factual estoppel. Just as courts consider clearly over-the-top statements to be puffery in false advertising claims, so too should courts consider the incredibility of the fake facts to determine whether the public could believe that the author’s work was factual.

Finally, actual evidence of the public believing the work to be true would help demonstrate that the public could believe the work to be factual. This could be supported by actual evidence of public deception, such as book reviews or commentary by third parties, or survey evidence of public deception. For instance, Oprah Winfrey’s public endorsement and later rebuke of Frey and his book *A Million Little Pieces*, explaining how Winfrey felt “duped” and how Frey “betrayed millions of readers,” could be used to support that the public could be deceived.²⁶⁹ Similar to proving the actual confusion factor in a likelihood of confusion analysis in trademark infringement claims, actual confusion evidence or survey evidence is not required for a court to apply the factual estoppel doctrine to fake facts, but is helpful evidence to show that more than a de minimis portion of the public could believe the fake facts to be true.

D. Balancing the Evidence Supporting Factual Estoppel

In order to determine whether the factual estoppel doctrine should apply to treat fake facts as facts in a copyright infringement case, the court should balance and weigh the evidence supporting the three questions set forth above. For instance, if there is strong evidence showing that the author held out a work as being true, less evidence is needed to support that the author intended for the public to rely on the work as true or that the public could believe the work to be true. Similarly, if there is only slight evidence showing that the author held out the work as true, then there is a heavier burden to prove that the author intended

²⁶⁸ *All Persons Fictitious Disclaimer*, *supra* note 188 (quoting *RETURN OF THE LIVING DEAD* (MGM 1985)) (internal quotation marks omitted).

²⁶⁹ Wyatt, *supra* note 32.

for the public to rely on the work as fact and that the public could believe the work was factual. This new test prevents authors from protecting fake facts in news articles, historical or biographical books, encyclopedias and other knowledge repositories, and religious or spiritual texts, but allows authors of fake facts in news satire, found-footage films, historical fiction, and other works to fictitiously claim to tell a true story for entertainment purposes to maintain their copyright protection. If the court finds that the weight of the evidence supports that (1) the author held out fake facts as fact; (2) intending for the public to rely on the work as fact; and (3) the public could believe that the work is factual, the court should apply the factual estoppel doctrine to treat fake facts as unprotectable facts under copyright law. Once a court applies factual estoppel in a copyright infringement claim, the court need only determine whether the author's expression or arrangement of those facts were original enough to warrant copyright protection, and whether the defendant copied the author's original arrangement or expression of their facts. Because copyright for compilations or expressions of facts is thin, this creates a much heavier burden for an author to prove infringement. A defendant, however, can still be liable for copyright infringement of fake facts if that defendant wholesale appropriated the author's work.

CONCLUSION

Fake facts can be damaging to society and the historical record, especially where they are held out as true by an author, with the intent that the public rely on them as facts, if more than a *de minimis* portion of the public could believe that they are true. While facts are not protected by copyright because they do not meet copyright's originality standard, fake facts—which are created by an author and often original—technically do meet copyright's originality standard. These fake facts, however, should not be protected by copyright law, and the public's interest in efficiency, fairness, and promotion of socially valuable works justifies denying copyright protection to fake facts. The new factual estoppel doctrine framework proposed in this Article effectively and efficiently allows a court to treat fake facts as unprotectable facts under copyright where the author held out fake facts as facts, with the intent that the public rely on the fake facts as facts, and where the public could believe that the fake facts were true. Once a court finds factual estoppel, the author's fake facts are treated like facts under copyright law, allowing later authors and the public to freely use those fake facts without incurring copyright liability. This result is not only fair, but also supports the policy and justifications for copyright law.