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## As a Matter of Fact: Copyrighting Fictitious Entries Within Reference Works

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— Comment —

AS A MATTER OF FACT:  
COPYRIGHTING FICTITIOUS ENTRIES  
WITHIN REFERENCE WORKS

ABSTRACT

Fake facts and fictitious entries are common in reference works. While these irregularities exist for a variety of reasons, some are explicitly added as copyright traps to catch infringers. Because they are often perceived to be truth, they challenge the binary of fact and fiction. This Comment explores legal treatment of these fictitious entries, highlighting that these entries should be treated differently based on the degree to which they are false.

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*“As far as I’m concerned, the only difference between fact and what most people call fiction is about fifteen pages in the dictionary.”*<sup>1</sup>

- Charles de Lint

INTRODUCTION

In May 2005, *New Oxford American Dictionary* published its second edition, which “added nearly 3,000 new words, senses, and phrases” to its pages.<sup>2</sup> Within months, there were rumors that a made-up word

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1. CHARLES DE LINT, *Tallulah*, in DREAMS UNDERFOOT 398, 399 (Terri Windling ed., 1993).

2. *New Oxford American Dictionary*, ACADEMIC, <https://en-academic.com/dic.nsf/enwiki/13401> [<https://perma.cc/N332-FGLL>] (last visited Jan. 22, 2022).

beginning with the letter “e” had been added.<sup>3</sup> After scrutinizing through all 3,128 “e” entries, an independent investigator determined that there were six possible made-up terms:

Earth loop: n. Electrical British term for ground loop.

EGD: n. a technology or system that integrates a computer display with a pair of eyeglasses . . . abbreviation of eyeglass display.

Electrofish: v. [trans.] fish (a stretch of water) using electrocution or a weak electric field.

ELSS: abbr. extravehicular life support system.

Esquivalience: n. the willful avoidance of one’s official responsibilities . . . late 19th cent: perhaps from French *esquiver*, “dodge, slink away.”

Eurocreep: n. [informal] the gradual acceptance of the euro in European Union countries that have not yet officially adopted it as their national currency.<sup>4</sup>

These entries were sent to nine lexicographers to determine which was the dupe. Seven authorities reached the same conclusion: *esquivalience* wasn’t a word.<sup>5</sup> When confronted, the editor-in-chief of the *New Oxford*, Erin McKean, admitted that *esquivalience* was the fictitious entry. Comparing their trick to “tagging and releasing giant turtles,” she claimed the team had added the word to track when competitors copied their work.<sup>6</sup> Like *clockwork*, “*esquivalience*” was later spotted in other reference works.<sup>7</sup> As noted by one scholar, “certainly those turtles’

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3. Henry Alford, *Not a Word*, NEW YORKER (Aug. 21, 2005), <https://www.newyorker.com/magazine/2005/08/29/not-a-word> [<https://perma.cc/BK9U-BRQG>]. Interestingly, the fake word had also graced the pages of the first edition, though it was never spotted. *Id.*
  4. *Id.* (repunctuated and reformatted for readability).
  5. *Id.* The two dissenting authorities were Sidney Landau and Gareth Thomson. Landau, a dictionary editor, claimed it was “ELSS . . . for the simple reason that it’s short. A dictionary wouldn’t want to waste more than a line or two.” Thomson, a programmer for *pseudodictionary.com*, claimed the culprit must be the “clunky-sounding” “*electrofish*.” *Id.*
  6. *Id.*
  7. *Id.* (“The word has since been spotted on Dictionary.com, which [incorrectly] cites Webster’s New Millennium as its source.”). Dictionary.com has since removed “*esquivalience*.” Search Results for “*Esquivalience*,” DICTIONARY.COM, <https://www.dictionary.com/misspelling?term=Esquivalience> [<https://perma.cc/DU3R-892Q>] (last visited Mar. 6, 2022).

migration to *Dictionary.com* successfully dented its reliability and editorial probity.”<sup>8</sup>

Fake entries have been found in numerous industries, ranging from cartography<sup>9</sup> to computer science.<sup>10</sup> There are a variety of reasons that fictitious entries could ultimately be included in a reference work, such

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8. Eleanor Williams, *Unclear Definitions: Investigating Dictionaries’ Fictitious Entries through Creative and Critical Writing 17* (Apr. 12, 2016) (Ph.D. thesis, Royal Holloway, University of London) (on file with the Royal Holloway, University of London), [https://pure.royalholloway.ac.uk/portal/files/26331368/E.\\_Williams\\_PhD\\_FINAL\\_CORRECTED\\_21.3.2016.pdf](https://pure.royalholloway.ac.uk/portal/files/26331368/E._Williams_PhD_FINAL_CORRECTED_21.3.2016.pdf) [<https://perma.cc/832M-8RT4>].
  9. Michigan’s 1979 state highway map included two completely fabricated towns (known colloquially as “paper towns”), Beatosu and Goblu, poking fun at Ohio State University and University of Michigan’s longstanding rivalry (i.e., “Beat OSU” and “Go Blue”). MARK MONMONIER, *HOW TO LIE WITH MAPS* 50–51 (1991); Laura Moss, *‘Paper Towns’ and Other Lies Maps Tell You*, TREEHUGGER (May 21, 2020), <https://www.treehugger.com/paper-towns-and-other-lies-maps-tell-you-4863749> [<https://perma.cc/MEX5-8LG7>]. One of the most famous paper towns, Agloe, is described in more detail below. *See infra* Part III.
  10. As one example, honeytokens are fake data points “that trigger a notification to the owner when the entry is accessed,” helping owners track if their online data is stolen. ALEXANDER HUMEZ, NICHOLAS HUMEZ & ROB FLYNN, *SHORT CUTS* 41 (2010); *see also Honey Tokens*, FORTINET, <https://www.fortinet.com/resources/cyberglossary/honey-tokens> [<https://perma.cc/H9CE-TKQ9>] (last visited Jan. 22, 2022) (describing different types of honeytokens).

as by mistake,<sup>11</sup> as utter nonsense,<sup>12</sup> to prove a point,<sup>13</sup> or to entertain.<sup>14</sup> Though the means for inclusion of these fictitious entries can vary, many are used as copyright traps. For several industries, it was an open secret and long-held tradition to include them.<sup>15</sup>

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11. For instance, the ghost word “Dord” made an appearance in *Webster’s Second New International* from a slip which stated “D or d, cont. / density.” See P.B. Gove, *The History of ‘Dord,’* 29 AM. SPEECH 136, 136 (1954). While Dr. Austin M. Patterson, author of the slip, had intended to indicate that the word “density” could be written with either a capital or lowercase “D,” the transcriber interpreted it to be a new synonym for density: “Dord.” *Id.* at 137; Allen Walker Read, *The Sources of Ghost Words in English*, 29 WORD 95, 103 (1978).
12. A suspicious-sounding bird appeared in the 1943 *Webster’s New Twentieth Century Dictionary*. Richard Rex, *The Incredible Jungftak*, 57 AM. SPEECH 307, 307 (1982). Known as the jungftak, this single-winged bird could only fly in tandem when a right-winged male and a left-winged female came together. *Id.* Nearly 40 years later, when editor Ruth Kent was asked about the jungftak, she responded: “[W]e have gone through a good many sources and *jungftak* simply does not show up. It is quite a curiosity, for the various accounts of Persian mythology do not describe such a bird even under *another* name.” *Id.* (alteration in original). The jungftak has since been considered a piece of nonsense literature. Williams, *supra* note 8, at 38–41.
13. One such example occurred in 1996 when physicist Alan Sokal published a bogus academic paper about quantum gravity in a scientific journal in order to expose sloppy academic practices. Known as the “Sokal affair,” the incident caused controversy in academia for years. Christine Sinclair, *Learning from the Dupers: Showing the Workings, in THE EPISTEMOLOGY OF DECEIT IN A POSTDIGITAL ERA* 233, 242–43 (Alison MacKenzie et al. eds., 2021). Others have attempted to pass off fake facts in earnest scholarship. Musicologist Hugo Riemann’s inserted Magister Ugolino de Maltero Thuringi into his essays on music theory and history. Ugolino was added to bolster Riemann’s own theories on Western music. HUMEZ ET AL., *supra* note 10, at 43–44. This wasn’t the only fake musical character Riemann concocted. See *infra* notes 125–26 and accompanying text.
14. Some reference works highlight prank entries. German *Brockhaus Enzyklopädie* includes a new fake entry in each edition for readers to spot. Jack Lynch, *Ghost Words and Mountweazels*, LAPHAM’S Q. (Feb. 23, 2016), <https://www.laphamsquarterly.org/roundtable/ghost-words-and-mountweazels> [https://perma.cc/7QKP-ARGT]. Additionally, the *New Grove Dictionary of Music and Musicians* has a semi-annual “Spoof Article Contest.” *Spoof Articles*, OXFORD MUSIC ONLINE, <https://www.oxfordmusiconline.com/page/spoof-articles> (last visited Mar. 9, 2022) [https://perma.cc/53JN-CRA2]. *New Grove’s* history of fictitious entries is explored below. See *infra* Conclusion.
15. Alford, *supra* note 3. According to Richard Steins, an editor for the *New Columbia Encyclopedia*, “It was an old tradition in encyclopedias to put in a fake entry to protect your copyright.” *Id.* Echoing Stein’s sentiments, Dr. Henry Bosley Wool, former managing editor of the G. & C. Merriam dictionaries, admitted to *Merriam-Webster’s* use of these mountweazels: “Yes, I’ve heard the story that a phony word or two has been placed in

Falsities can be passed down from one work to the next.<sup>16</sup> Many creators of reference works assume that if their phony facts appear in a competitor's work, they have a surefire case of copyright infringement. Courts hesitate to agree.<sup>17</sup> While some have come out in favor of the creators,<sup>18</sup> many others have not.<sup>19</sup> This inconsistency is largely because copyright protection does not extend to factual information.<sup>20</sup> Somewhere between fake and fact, fictitious entries are false information presented in an otherwise factual body of work. As a result, courts waffle on their treatment of these irregularities. Maybe a false biography is based off of a historical person's life.<sup>21</sup> Or a fake word makes its way into the common lexicon.<sup>22</sup> What about works like *The Blair Witch Project*<sup>23</sup>—entirely fictitious but “presenting itself as a real

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Merriam-Webster dictionaries in order to spot plagiarism by the competition.” Read, *supra* note 11, at 102.

16. Lexicographer James Murray explained how errors are inherited in reference works: “It is marvellous, and to the inexperienced incredible, how Dictionaries and Encyclopedias simply copy each other, without an attempt either to verify quotations or facts. . . . So entries which are mere blunders are ignorantly handed down from Dictionary to Dictionary, each writer entering them as boldly and authoritatively as if he really knew of their existence.” HUMEZ ET AL., *supra* note 10, at 40–41 (quoting J.A.H. Murray, *Progress of the Dictionary*, in NINTH ANNUAL ADDRESS OF THE PRESIDENT, TO THE PHILOLOGICAL SOCIETY 4, 11 (1880)). Author William S. Walsh was less subtle about his views of plagiarism within reference works: “Printers do not follow copy, sheep do not follow their leader, more closely than one lexicographer used to follow another . . . .” WILLIAM S. WALSH, *HANDY-BOOK OF LITERARY CURIOSITIES* 886 (1892).
17. In one such example, freelance writer, Fred L. Worth, used a copyright trap when constructing his trivia book: “I knew that lexicographers used to make up a word and put it in the dictionary to see if it turned up in other dictionaries, . . . so I decided to plant a ringer of my own to see if anyone copied it.” 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/9WY3-23SV>]. When Worth spotted his fake fact in the popular board game *Trivial Pursuit*, he sued. *Id.* Unfortunately for Worth, the Ninth Circuit did not find evidence of copyright infringement. *See* *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573–74 (9th Cir. 1987).
18. *See infra* Part I(C).
19. *See infra* Part I(B).
20. 17 U.S.C. § 102; *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).
21. *See infra* Part II.
22. *See infra* Part III.
23. *THE BLAIR WITCH PROJECT* (Haxan Films 1999).

investigative project”?<sup>24</sup> These scenarios pose complex legal questions and suggest that there ought to be multiple approaches to dealing with fake facts and fictitious entries.

This Comment seeks to explore the different degrees of falsity and how they impact the legal analysis of fake facts. This Comment uses the terms “fictitious entry” and “fake fact” synonymously. Part I analyzes entirely fictitious entries and discusses three different approaches to addressing them. Part II examines the nuances of partially fictitious entries. Part III investigates fictitious entries that take on a life of their own. Finally, because the opportunity is ripe, I have included a fake fact of my own in this very paper.<sup>25</sup>

## I. TRULY FICTITIOUS ENTRIES

Courts differ in their approaches to purely false facts within reference works. This section analyzes three of these approaches: (1) largely ignoring the fake facts; (2) treating the fiction as fact; and (3) treating the falsities as fiction.

### A. *Insignificant Fictitious Entries*

To prove a prima facie case of copyright infringement, the plaintiff must show evidence that they own a copyright in their work, as well as evidence that the defendant copied that work.<sup>26</sup> Further, proof of copying typically consists of showing both defendant’s access to plaintiff’s work and a substantial similarity between the two.<sup>27</sup> As fake facts often serve as a minor portion of an entire body of a reference work, they are frequently treated only as evidence of copying and are not examined for copyright protection.<sup>28</sup>

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24. Jake Kring-Schreifels, ‘*The Blair Witch Project*’ at 20: *Why It Can’t Be Replicated*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/movies/blair-witch-project-1999.html> [<https://perma.cc/2RSX-YX4P>].

25. Though unlike most fake facts hidden in non-fiction, I will indicate its falsity within a footnote.

26. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2021), LexisNexis (internal citations removed) [hereinafter NIMMER ON COPYRIGHT, VOL. 4].

27. *See id.* § 13.01[B].

28. *See, e.g.*, Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991) (explaining that four of the addresses that the original writer had used in his white pages were “fictitious listings that [the original writer] had inserted into its directory to detect copying”). *See also* NIMMER ON COPYRIGHT, VOL. 4, *supra* note 26, § 13.03[C] (“[T]he courts have regarded the existence of common errors in two similar works as the strongest evidence of copying as a factual matter . . .”).

In *Alexandria Drafting Co. v. Amsterdam*,<sup>29</sup> the plaintiff was a well-established corporation that published maps. To protect its work, the company added copyright traps such as “fictitious streets, little dead-end additions to the roadways of the region that . . . had their genesis solely in the creative minds of [the plaintiff’s] cartographers who seeded these fictional geographic tidbits . . . to capture the unwary cartographic plagiarist.”<sup>30</sup> When eighty-one of these traps were discovered on several maps published by a competitor, plaintiff brought suit.<sup>31</sup> The court utilized these inaccuracies as showing evidence of copying.<sup>32</sup>

The other element needed to prove actual copying is a substantial similarity between the two works.<sup>33</sup> Fake facts are less useful in this analysis as “common errors are often so minimal as to be insubstantial [or] common errors may consist solely of unprotectible facts.”<sup>34</sup> For example, *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>35</sup> was a seminal copyright infringement case regarding similar phone directories. The plaintiff’s directory contained thousands of entries, four of which were fabricated. During trial, the plaintiff offered the inclusion of these phony numbers in the defendant’s directory as evidence of copying.<sup>36</sup> While the Supreme Court accepted the four entries as evidence of the plaintiff’s claim, it did not use the numbers in its substantial similarity analysis, nor any other analysis. Ultimately, the

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29. Nos. CIV. A. 95–1987, CIV. A. 95–6036, 1997 WL 325769, at \*1 (E.D.P.A. June 4, 1997), *withdrawn and vacated* (June 25, 1998). *Alexandria* was vacated because the parties settled, so “the logic of the federal judge . . . [remains] instructive.” Brief for Defendants-Appellees-Cross-Appellants, Sparaco v. Lawler, Matusky, Skelly, Engineers LLP, 303 F.3d 460 (2d Cir. 2002) (Nos. 99–9519(L), 01–9199(CON), 01–9289(XAP)), 2002 WL 32174330, at \*29–30 (“Settlement between [*Alexandria*] parties resulted in (1) withdrawal of judge’s opinion, and (2) forbidden commentary from litigants on nature of settlement [from information reported from attorney for defendant, August 25, 2000].”).

30. *Id.* at \*5.

31. *Id.*

32. *Id.* Even though *Alexandria* was later vacated, similar cases support this assertion. *See, e.g.*, *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, 768 F.2d 145, 147 (7th Cir. 1985) (“Rockford Map put these trap initials in the maps of four townships in Ford County. Directory Service’s maps contained 54 of the 56 trap initials.”); *Gen. Drafting Co., v. Andrews*, 37 F.2d 54, 56 (2d Cir. 1930) (“[S]ixteen common errors (plus some more ascertained at a later date) is so large a number as to leave practically no doubt that he went far beyond the permissible use of plaintiff’s maps to compare and check his own independent results, and actually copied plaintiff’s work to a considerable extent.”).

33. *See* NIMMER ON COPYRIGHT, VOL. 4, *supra* note 26, § 13.03[B].

34. *Id.* § 13.03[C] (footnote omitted).

35. 499 U.S. 340 (1991).

36. *Id.* at 344.

Court deemed the overall work to be largely factual and, therefore, not eligible for copyright protection.<sup>37</sup> This attitude is common in these types of cases.<sup>38</sup>

Notably, some compilations of reference works (including those with factual inaccuracies) can achieve copyright protection provided that “the materials are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes a new work.”<sup>39</sup> While this is outside the scope of this Comment, many scholars have argued for the protection of reference compilations.<sup>40</sup>

### B. *Fake Facts Treated as Facts*

It is well-accepted that copyright protection is limited to that which is owned.<sup>41</sup> Since “[f]acts are discovered rather than authored,”<sup>42</sup> facts are not entitled to copyright protection.<sup>43</sup> Everyday language echoes this sentiment. Percival Lowell *discovered* Pluto’s existence, he didn’t *possess* the idea of Pluto.<sup>44</sup> Children sitting at the dinner table tell their

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37. *Id.* at 361–63.

38. *See, e.g.*, *BellSouth Advert. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 999 F.2d 1436, 1446 n.23 (11th Cir. 1993); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 845 & n.23 (10th Cir. 1993).

39. U.S. COPYRIGHT OFFICE, CIRCULAR 14, COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS 1 (2020), <https://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/JRL4-P66F>].

40. *See generally, e.g.*, Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919 (2003); Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, 33 ARIZ. ST. L.J. 791 (2001); Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992); Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 6 ART & L. 96 (1981).

41. *See generally* Leonard G. Boonin, *The University, Scientific Research, and the Ownership of Knowledge*, in OWNING SCIENTIFIC AND TECHNICAL INFORMATION 253 (Vivian Weil & John W. Snapper eds., 1989).

42. Cathay Y.N. Smith, *Truth, Lies, and Copyright*, 20 NEV. L.J. 201, 211 (2019); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11 (2021), Lexis [hereinafter NIMMER ON COPYRIGHT, VOL. 1] (“Facts may be discovered, but they are not created by an act of authorship.”). *See also* Boonin, *supra* note 41, at 253 (“[W]e are not likely to speak of ourselves as owning or having a proprietary interest in knowledge. It is much more natural for us to say that we possess certain knowledge than that we own it.”).

43. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991); *see also* 17 U.S.C. § 102 (“Copyright protection subsists . . . in original works of authorship . . .”).

44. Congratulations, you’ve found the fake fact! While Percival Lowell did hypothesize a ninth “Planet X” and set up an observatory to find it, it was Clyde Tombaugh, a farmer with no formal astronomy training, who

parents facts that they *learned* in school that day, not facts that they now *own*. Archimedes shouted “Eureka!”—Greek for “I *found* it!”—when he came upon his theories of water displacement.<sup>45</sup> No one owns knowledge and, as a result, the law does not grant rights to it. Courts haven’t been shy in applying this rule.<sup>46</sup> The Supreme Court noted that “[t]he distinction [between what is entitled to copyright protection] is one between creation and discovery. The first person to find and report a particular fact has not created the fact, he or she has merely discovered its existence.”<sup>47</sup>

Fake entries are the opposite: they are authored rather than discovered. As a result, it would be logical to assume that all courts would treat them as works of authorship entitled to protection, yet only some do.<sup>48</sup> Instead, others believe that how the fictitious entries are presented matters.<sup>49</sup> These fictitious entries are assumed to be truths

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came to Lowell Observatory and discovered Pluto. *This Month in Physics History: March 13, 1930; Clyde Tombaugh’s Discovery of Pluto Announced*, APS NEWS, Mar. 2009, at 2, <https://www.aps.org/publications/apsnews/200903/upload/March-2009.pdf> [<https://perma.cc/N37B-KJC6>]. See generally Clyde W. Tombaugh, *Lowell’s Investigations for Planet X*, in OUT OF THE DARKNESS: THE PLANET PLUTO 77 (1980); Clyde W. Tombaugh, *The Ninth Planet Discovered*, in OUT OF THE DARKNESS: THE PLANET PLUTO, *supra*, at 125.

45. See KUROKI HIDETAKA, *What Did Archimedes Find at “Eureka” Moment?*, in HISTORY OF MECHANISM & MACHINE SCIENCE VOL. 11, THE GENIUS OF ARCHIMEDES 265, 265 (Stephanos A. Paipetis & Marco Ceccarelli eds., 2010) (emphasis added). Speaking of false facts that get carried down as true—there is disagreement on whether Archimedes truly shouted the now famous exclamation. See David Biello, *Fact or Fiction?: Archimedes Coined the Term “Eureka” in the Bath*, SCI. AM. (Dec. 8, 2006), <https://www.scientificamerican.com/article/fact-or-fiction-archimede/> [<https://perma.cc/L3YP-8KTM>].
46. See, e.g., *Feist*, 499 U.S. at 361–62 (finding names, towns, and telephone numbers to be facts and, therefore, not copyrightable); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981) (finding research not copyrightable because “[t]here is no rational basis for distinguishing between facts and the research involved in obtaining facts”); see also NIMMER ON COPYRIGHT, VOL. 1, *supra* note 42, § 2.03[E] & nn. 126–30.
47. *Feist*, 499 U.S. at 347.
48. See *infra* Part I(C).
49. See, e.g., *Nash v. CBS, Inc.*, 899 F.2d 1537, 1543 (7th Cir. 1990); *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 29 (C.D. Cal. 1984); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980); *Huie v. Nat’l Broad. Co.*, 184 F. Supp. 198, 200 (S.D.N.Y. 1960); *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941); *Davies v. Bowes*, 209 F. 53, 55 (S.D.N.Y. 1913).

by the mere fact that they exist within a reference work. Because of this, many courts will “hold you to your original representation.”<sup>50</sup>

This theory, known as the Factual Estoppel Doctrine,<sup>51</sup> was first applied over 100 years ago.<sup>52</sup> From a policy perspective, the courts utilize the Factual Estoppel Doctrine to maintain public trust in the validity of reference works. In *Nester Map & Guide Corp. v. Hagstrom Map Co.*,<sup>53</sup> District Judge Nickerson reasoned that

[t]o 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 such were the law, information could never be reproduced or widely disseminated.<sup>54</sup>

The Factual Estoppel Doctrine, however, has had an uneven application. Some courts appear to add a prerequisite of a defendant’s reasonable reliance in order to apply the doctrine.<sup>55</sup> In *Mosley v. Follett*,<sup>56</sup> the Southern District of New York ruled that the defendant had reasonably relied on the plaintiff’s book being factual to produce his own novel.<sup>57</sup> The court cited representations that the plaintiff had made within his work such as the book jacket reading that the book was “‘a true, unbelievably exciting spy story . . .’ [A] fascinating story that is fact, but that reads with the pace and suspense of the best

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50. Smith, *supra* note 42, at 213 (quoting Dan L. Burk, *Method and Madness in Copyright Law*, 3 UTAH L. REV. 587, 595 (2007)); *see also* JOHN L. GEIGER & HOWARD SUBER, CREATIVITY AND COPYRIGHT: LEGAL ESSENTIALS FOR SCREENWRITERS AND CREATIVE ARTISTS 9 (2019) (“[I]f the story is claimed to be factual, then it is in the public domain and free for the taking.”).
51. The Factual Estoppel Doctrine is also known as “copyright estoppel” and the “‘asserted truths’ doctrine.” *See* Smith, *supra* note 42, at 213 n.85; *Corbello v. Valli*, 974 F.3d 965, 979 (9th Cir. 2020).
52. *Davies*, 209 F. at 55–56 (finding that a newspaper article held out as a “real life drama” was not entitled to copyright protection as “it was presented to the public as matter of fact and not of fiction; the readers of the [newspaper] were invited to believe it”).
53. *Nester’s Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp. 729 (E.D.N.Y. 1992).
54. *Nester’s Map & Guide Corp.*, 796 F. Supp. at 733; *see also* *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at \*3 n.3 (C.D. Cal. Oct. 26, 1983) (“To permit otherwise would unduly chill authors seeking to write about historical issues or events.”).
55. *See* Smith, *supra* note 42, at 221–22 (discussing cases that required defendant’s reasonable reliance).
56. No. 80 Civ. 5628, 1980 WL 1171 (S.D.N.Y. Nov. 5, 1980).
57. *Mosley*, 1980 WL 1171, at \*3.

fiction.”<sup>58</sup> Finding that this and other representations made the defendant’s reliance reasonable, the court applied the Factual Estoppel Doctrine and ruled in favor of the defendant, thereby narrowing the doctrine.<sup>59</sup>

Professor Cathay Y.N. Smith illustrates the danger of requiring a defendant’s reasonable reliance by emphasizing the scenario of “publicly debunked” fake facts.<sup>60</sup> Smith poses the example of a playwright looking to create a drama based on Greg Mortenson’s *Three Cups of Tea*.<sup>61</sup> Mortenson’s *Three Cups of Tea* chronicled his charity, which purportedly developed schools in Afghanistan.<sup>62</sup> His work has since been debunked as containing largely fabricated stories.<sup>63</sup>

Using the framework of the Factual Estoppel Doctrine, it is unclear whether the playwright would need permission to utilize the work. On one hand, the playwright might not need permission because Mortenson had held his work out to be factual—and would therefore be estopped from enforcing copyright protection. On the other hand, the public now knows that Mortenson’s account is false. Mortenson’s work is thus publicly held out as fictitious, so the playwright might be required to obtain Mortenson’s permission. Which scenario would prevail?

Regardless of its shortcomings and inconsistencies, the Factual Estoppel Doctrine continues to be used by courts today. Most recently, the Ninth Circuit utilized the doctrine under a new name, the “‘asserted truths’ doctrine,” as “it is the author’s assertions within and concerning the work that the account contained in the [work] is truthful that trigger its application.”<sup>64</sup>

### C. Fake Facts Treated as Fiction

Despite some acceptance, not all courts utilize the Factual Estoppel Doctrine. Some courts acknowledge fictitious entries as creative and

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58. *Id.* at \*4.

59. *Id.*

60. Smith, *supra* note 42, at 223–24.

61. *Id.* at 223. *See generally* GREG MORTENSON & DAVID OLIVER RELIN, *THREE CUPS OF TEA* (2006).

62. *See generally* MORTENSON & RELIN, *supra* note 61.

63. *See* Kevin Sieff, *Mortenson Returns to Afghanistan, Trying to Move Past His ‘Three Cups of Tea’ Disgrace*, WASH. POST (Oct. 12, 2014) (citing JON KRAKAUER, *THREE CUPS OF DECEIT* (2011)), [https://www.washingtonpost.com/world/asia\\_pacific/mortenson-returns-to-afghanistan-trying-to-move-past-his-three-cups-of-tea-disgrace/2014/10/12/9774ae90-402f-11e4-b03f-de718edeb92f\\_story.html](https://www.washingtonpost.com/world/asia_pacific/mortenson-returns-to-afghanistan-trying-to-move-past-his-three-cups-of-tea-disgrace/2014/10/12/9774ae90-402f-11e4-b03f-de718edeb92f_story.html) [<https://perma.cc/UMU5-DMH4>].

64. *Corbello v. Valli*, 974 F.3d 965, 979 (9th Cir. 2020).

original works of authorship, which are entitled to copyright protection.<sup>65</sup>

This stance is consistent with courts' treatment of adding imagination to fact.<sup>66</sup> Once such example is *De Acosta v. Brown*. In *De Acosta*, the plaintiff had created a screenplay of a biographical movie centered around the life of Clara Barton, the founder of the American Red Cross. The plaintiff included, among other creative liberties, a "heart interest"—a plotline with the nonexistent Tom Maxwell.<sup>67</sup> When Barton's beau appeared in the defendant's work, the plaintiff brought suit.<sup>68</sup> The defendant admitted to the use of the screenplay but attempted to argue factual estoppel.<sup>69</sup> The court rejected the Factual Estoppel Doctrine by not addressing whether the screenplay was held out as factual.<sup>70</sup> Ultimately, it found that plaintiff had copyright protection because of the added "heart interest" element.<sup>71</sup>

Some fictitious entries, too, have been known to add a different kind of "heart." Perhaps no fictitious entry is more well-known than that of Lillian Virginia Mountweazel.<sup>72</sup> A creation of the *New Columbia Encyclopedia*, Mountweazel was alleged to have been a fountain designer and photographer from Bangs, Ohio, who met an unfortunate fate in an explosion.<sup>73</sup> "[F]rom bangs to boom,"<sup>74</sup> her somewhat humorous entry has been described as a metafiction.<sup>75</sup> Scholar Eley

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65. Note that this protection is often limited only to the expression of the work. *See, e.g.*, *Huie v. Nat'l Broad. Co.*, 184 F. Supp. 198, 200 (S.D.N.Y. 1960); *De Acosta v. Brown*, 146 F.2d 408, 410 (2d Cir. 1944); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

66. *See* NIMMER ON COPYRIGHT, VOL. 1, *supra* note 42, §2.11[A] ("Nonetheless, adding imagination to fact can result in a protected work.").

67. 146 F.2d at 409.

68. *Id.* at 409.

69. *Id.* at 410.

70. Smith, *supra* note 42, at 224 ("The [*De Acosta*] court did not consider whether the author had held out her screenplay as representing the true story of Clara Barton . . .").

71. *De Acosta*, 146 F.2d at 409–10.

72. Mountweazel's false existence is so well-known that fictitious copyright traps are known as "Mountweazels." HUMEZ ET AL., *supra* note 10, at 42.

73. NEW COLUMBIA ENCYCLOPEDIA 1850 (William H. Harris & Judith S. Levey eds., 4th ed. 1975).

74. Bryan A. Garner, *A Legal Lexicographer Looks at Law Reviews*, 16 GREEN BAG 2D 281, 284 (2013).

75. Williams, *supra* note 8, at 20 ("The *Mountweazel* entry is clearly not just written at random . . . for the entry contains a narrative and certain stylistic flourishes such as bathetic tension and a network of wordplay.").

Williams unraveled Mountweazel's entry in a Ph.D. dissertation, finding an assortment of literary devices within that short entry.<sup>76</sup> Williams points to Mountweazel's written work, *Flags Up!*, as a potential clue that the *New Columbia* author was being clever: "[A] demonstrative exclamation mark, the glyphic equivalent of jazz-hands, seems a strong idiomatic indicator that the reader should take a closer look: it deserves a 'flagging up', it raises a red flag."<sup>77</sup> A deeper look does show other clues such as the situational irony surrounding Mountweazel's death by explosion while on a shoot for the spurious *Combustibles* magazine, among others.<sup>78</sup>

Certainly, some fictitious entries demonstrate some degree of authorship. The only difference between these entries and works protected by copyright is in presentation. Taken outside of a reference work, these falsities appear just like any other work of fiction.

## II. PARTIALLY FICTITIOUS ENTRIES

In September 1919, botanist John Hendley Barnhart wrote a curious article for the *Journal of the New York Botanical Garden*.<sup>79</sup> Barnhart alleged that he had found fourteen fictitious botanists in the *Appletons' Cyclopædia of American Biography*, an encyclopedia of notable people in the New World.<sup>80</sup> Barnhart reproduced the biographies of all fourteen botanists.<sup>81</sup> His article brought a critical eye to the *Cyclopædia* and since, over 200 entries have been found to have some degree of misinformation.<sup>82</sup>

Inspired by Barnhart, Professor Margaret Castle Schindler continued the search. After tripling the number of false entries on Barnhart's list, she published her findings.<sup>83</sup> One of the most peculiar entries she noted is that of Charles Henry Huon de Penanster. Described by another scholar as a "composite fictional pastiche,"<sup>84</sup> Penanster's entry contained some element of truth. Penanster is credited with

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76. *See generally id.* at 20–33 (deconstructing the Mountweazel entry and arguing it exists as a metafiction).

77. *Id.* at 22.

78. *Id.*

79. John Hendley Barnhart, *Some Fictitious Botanists*, 20 J.N.Y. BOTANICAL GARDEN 171 (1919).

80. *Id.* at 171–72. *See generally* APPLETONS' CYCLOPÆDIA OF AMERICAN BIOGRAPHY (John Fiske & James Grant Wilson eds., 1887) [hereinafter APPLETONS'].

81. Barnhart, *supra* note 79, at 172–80.

82. Williams, *supra* note 8, at 13–14.

83. Margaret Castle Schindler, *Fictitious Biography*, 42 AM. HIST. REV. 680, 682 (1937).

84. Williams, *supra* note 8, at 15.

“smuggl[ing] specimens of the cochineal insect and the nopal plant, on which it feeds, out of Mexico in 1755 and . . . hav[ing] successfully introduced them into Santo Domingo . . . .”<sup>85</sup> Only problem? Nicolas Joseph Thiery was actually the one who performed this feat in 1777.<sup>86</sup>

To further the confusion, Thiery is credited with having written one book: *Traité de la Culture du Nopal, et de l’Éducation de la Cochenille dans les Colonies Françaises de l’Amérique, Précédé d’un Voyage à Guaxaca*, and Penanster is credited with three titles of his own, seemingly similar to Thiery’s: *Traité de Culture du Nopal, De l’Éducation de la Cochenille et de Leur Acclimation à Saint Domingue*, and *Voyage à Guaraza dans la Nouvelle Espagne*.<sup>87</sup> Rather humorously, the *Cyclopædia* admits to their similarities by including entries on both Thiery and Penanster.<sup>88</sup>

Unveiling these discoveries, Schindler noted the lengths to which the *Appletons’* authors went to create these characters. Commenting on the knowledge of the writers, Schindler noted:

The writer (or writers) of these articles must have had some scientific training, for most of the creations are scientists, and sufficient linguistic knowledge to have invented or adapted titles in six languages. He was certainly familiar with the geography and history of Latin America. Most of the places visited by his characters are real places, and most of the historical events in which they participated are genuine.<sup>89</sup>

She hypothesized that, “Perhaps each fictitious biography is founded on some historical personage or on a combination of several persons.”<sup>90</sup>

The curious Charles Henry Huon de Penanster appears to have been partially real and represents an interesting legal question: are quasi-truths considered facts? The answer is an all too famous one: it depends.

This issue most commonly arises with biographies as sensationalized elements are added to entice the public. The stories of real individuals become larger than life when translated to a larger audience. Recall that in *De Acosta*, when plaintiff drafted a screenplay based on the life of Clara Barton, the Second Circuit determined that plaintiff’s protection was limited solely to that of the added “heart interest” plot.<sup>91</sup>

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85. Schindler, *supra* note 83, at 682–83.

86. *Id.* at 683.

87. *Id.*

88. *Id.* at 682–83.

89. *Id.* at 683.

90. *Id.*

91. *De Acosta v. Brown*, 146 F.2d 408, 409–10 (2d Cir. 1944).

In contrast, in *Nash v. CBS, Inc.*,<sup>92</sup> when Nash wrote books describing his theories regarding the death of gangster John Dillinger, the Seventh Circuit determined that his theories were to be treated as fact.<sup>93</sup> The difference between *De Acosta* and *Nash* appears to lie in how the author constructed the story. In *De Acosta*, the author wrote Barton's love story without reference to any other work, whereas in *Nash*, the author wrote theories of Dillinger's death based on his research from other factual works.<sup>94</sup> This distinction is consistent with a number of other decisions.<sup>95</sup>

Using these cases as a starting point for fictitious entries, a court would likely have to determine the origin of the fake facts in order to decipher whether those entries should be treated as fact or fiction. In the case of Charles Henry Huon de Penanster, it is likely that a court would not extend copyright protection since he was based off of the real Nicolas Joseph Thiery.

### III. FICTITIOUS ENTRIES THAT BECOME FACT

In 1925, Otto G. Lindberg and Ernest Alpers were mapmakers at the General Drafting Company.<sup>96</sup> Scrambling their initials, they added a fictitious town, Agloe, in the western Catskills of New York.<sup>97</sup> A few years later, Lindberg and Alpers spotted Agloe on a Rand McNally map. Upset, the two threatened to sue.<sup>98</sup> Once confronted, Rand McNally claimed that Agloe was real.<sup>99</sup> It revealed that it had gotten

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92. 899 F.2d 1537 (7th Cir. 1990).

93. *Nash v. CBS, Inc.*, 899 F.2d at 1541 (“The inventor of Sherlock Holmes controls that character’s fate while the copyright lasts; the first person to conclude that Dillinger survived does not get dibs on history. If Dillinger survived, that fact is available to all.”).

94. *See De Acosta*, 146 F.2d at 409; *Nash*, 899 F.2d at 1538 (describing why Nash felt Dillinger’s death may have been an FBI cover-up).

95. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979–80 (2d Cir. 1980) (finding that even though a motion picture was based on a speculative book represented as a fact, the motion picture did not infringe on the book author’s rights); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) (determining that facts regarding a kidnapping are not protected by copyright).

96. Sam Roberts, *Seeking a Town on the Border of Fiction and Reality*, N.Y. TIMES (Mar. 28, 2014), <https://www.nytimes.com/2014/03/29/nyregion/in-search-of-agloe-ny-a-town-on-the-border-of-fiction-and-reality.html> [<https://perma.cc/6RC5-4V9Z>].

97. *Id.*

98. DAVID HUTCHINGS & JAMES C. UNGUREANU, OF POPES AND UNICORNS: SCIENCE, CHRISTIANITY, AND HOW THE CONFLICT THESIS FOOLED THE WORLD 199 (2022).

99. *Id.*

its information from the Delaware County records which showed an Agloe General Store right at the very location Lindberg and Alpers had placed Agloe.<sup>100</sup> In a strange turn of events, the Agloe General Store owners opened the store after seeing Agloe on a *third* map, one distributed by an Esso gas station.<sup>101</sup> Within a decade, Agloe had gone from being a paper town to a real one.

Today, Agloe is described as “just an old sign, some land, an incredible view of the mountains, and a long winding road leading back toward the highway and north toward other small towns.”<sup>102</sup> Yet it took on a second life, becoming a tourist attraction following the release of John Green’s young adult novel and accompanying movie, *Paper Towns*.<sup>103</sup> One visitor chronicled her experience: “Agloe is an important reminder that we get to decide what’s important, what exists, and what takes up space in our world . . . I helped make it real. I contributed to making it a reality.”<sup>104</sup> The former Chamber of Commerce president of the “neighboring” town—Roscoe—revealed her thoughts on Agloe: “Is it real? . . . What’s your definition of real? If it exists in enough minds, it’s real.”<sup>105</sup>

Yes, Virginia, there is an Agloe.<sup>106</sup>

Agloe is hardly the only example of fiction becoming a reality. Perhaps the most common example is that of former ghost words. Ghost words are contrived words that are not part of the common lexicon.<sup>107</sup>

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100. Moss, *supra* note 9.

101. Robert Krulwich, *An Imaginary Town Becomes Real, Then Not. True Story*, NPR (Mar. 18, 2014, 4:43 PM), <https://www.npr.org/sections/krulwich/2014/03/18/290236647/an-imaginary-town-becomes-real-then-not-true-story> [<https://perma.cc/XR9Q-84UV>].

102. Krystie Lee Yandoli, *Here’s What It’s Like to Visit an Actual Paper Town*, BUZZFEED (Oct. 27, 2015), <https://www.buzzfeed.com/krystieyandoli/welcome-to-the-agloe-general-store-come-back-soon> [<https://perma.cc/5HWB-VKXX>].

103. HUTCHINGS & UNGUREANU, *supra* note 98, at 199; *see also* Roberts, *supra* note 96 (using Agloe as a focal point, Green claims he was inspired by “the idea that a fiction created on paper could become real”).

104. *Id.* at 199 (citing Yandoli, *supra* note 102).

105. Roberts, *supra* note 96.

106. In 1897, an eight-year-old Virginia O’Hanlon wrote to the *New York Sun* asking if Santa Claus was real. The editor wrote back in response: “Yes, Virginia, there is a Santa Claus. He exists as certainly as love and generosity and devotion exist, and you know that they abound and give to your life its highest beauty and joy.” *Is There a Santa Claus?*, *SUN*, Sept. 21, 1897, at 6.

107. The term comes from British philologist W.W. Skeat: “Like ghosts, we may seem to see them, or may fancy that they exist; but they have no real entity. We cannot grasp them; when we would do so, they disappear.” Lynch, *supra* note 14.

Ghost words can find their way into dictionaries by incorrect transcription,<sup>108</sup> editing blunder,<sup>109</sup> personal preference,<sup>110</sup> or simply by copying.<sup>111</sup> As a humorous example, etymologist Allen Walker Read recounted his experience watching the creation of a ghost word:

[G]host words do not depend upon evanescence, but upon being carried along from an origin in blunders . . . . One occurred on the Columbia University campus a few years ago when a dull lecture was being criticized. One person remarked, “The lecture was soporific,” and his companion replied, “Yes, it was so very porific.” But *porific* has, so far as I know, remained a ghost.<sup>112</sup>

While most ghost words remain as such, some do, in fact, find their way into everyday use. Words like “gravy”<sup>113</sup> and “chortle”<sup>114</sup> have successfully graduated from ghost word to actual word.

In these instances, the fictitious entries would likely be treated as actual facts since they now represent a truth. However, because these situations are quite peculiar, there does not yet seem to be any case law to substantiate this position.

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108. Misinterpretations frequently cause ghost words. Examples appearing in dictionaries include “foupe” as a misreading of “soupe,” “adventine” instead of “adventive,” “dentize” in place of “dentire,” “to morse” as a misinterpretation of “to nurse,” or “kime” in place of “knife.” *Id.*

109. See *supra* note 11 and accompanying text.

110. Author of the *Philology on the English Language*, Richard Jodrell believed all terms consisting of two words should be written as one word. Taken from Homer’s *The Odyssey*, Jodrell coined the term “phantomnation” meaning “a multitude of spectres.” “Phantomnation” later appeared in a variety of dictionaries including *Webster’s*, *Worcester*, and *The Imperial*. F. HORACE TEALL, *THE COMPOUNDING OF ENGLISH WORDS* 17–18 (1891).

111. One scholar described the passing down of the ghost word “abacot,” a misprint of “bicocket”:

[A]nd so it spun merrily along, a sort of rolling stone of philology, shaping itself by continual attrition into something as different in sense as in sound from its first original . . . . So through Bailey, Ash, and Todd it has been handed down to our time,—a standing exemplar of the solidarity of dictionaries, and of the ponderous indolence with which philologists repeat without examining the errors of their predecessors.

WILLIAM S. WALSH, *HANDY-BOOK OF LITERARY CURIOSITIES* 8 (1892).

112. Read, *supra* note 11, at 98.

113. “Gravy” was originally a misspelling of “grané.” *Gravy (n.)*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/gravy> [<https://perma.cc/3HVL-ZK5E>].

114. “Chortle” is a portmanteau of both “snort” and “chuckle.” The word was first used by Lewis Carroll in *Through the Looking-Glass*. Williams, *supra* note 8, at 42.

## CONCLUSION

In 1980, *The New Grove Dictionary of Music and Musicians* (“*New Grove*”) was the largest single-subject reference work in the world.<sup>115</sup> Coming in at a massive 25 million words, the second edition chronicles the history of music and the stories of some of the most famous musicians.<sup>116</sup> It also includes an unusual article by David Fallows entitled “Spooof Articles.”<sup>117</sup> Fallows’s article acknowledges that the first edition had made some mistakes and that some of the musicians included in that edition weren’t real. Specifically, he noted two: Dag Henrik Esrum-Hellerup and Guglielmo Baldini.<sup>118</sup>

Danish composer Dag Henrik Esrum-Hellerup was written by editor Robert Layton in order to see “how well informed [his editors] really were.”<sup>119</sup> Layton added clues to make it more obvious, but his editors had missed them and Esrum-Hellerup was printed.<sup>120</sup> Soon after, the Royal Library in Copenhagen discovered Esrum-Hellerup’s entry and was so elated to celebrate the Danish composer that it attempted to commemorate him with a plaque.<sup>121</sup>

At this point, Layton revealed that Esrum-Hellerup was a sham. The Danes took the announcement in stride, finding it “hilarious.” Articles about the incident had already popped up in Denmark.<sup>122</sup> A

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115. BRIAN LEVISON & FRANCES FARRER, *How the Danes Discovered a New Composer: Dag Henrik Esrum-Hellerup (1803–91)*, in CLASSICAL MUSIC’S STRANGEST CONCERTS AND CHARACTERS 40, 40 (2007).

116. Fiona Maddocks, *Thank You for the Music...*, GUARDIAN (Jan. 27, 2001, 20:18 PM), <https://www.theguardian.com/books/2001/jan/28/music> [<https://perma.cc/ZVA9-DFEB>].

117. LEVISON & FARRER, *supra* note 115, at 42–43.

118. Surprisingly, *New Grove* claims that these were the only two fictitious entries that made it into print. John Rockwell, *News of Music; Despite Met Stoppage, Subscriptions Set Record*, N.Y. TIMES (Jun. 25, 1981), <https://www.nytimes.com/1981/06/25/arts/news-of-music-despite-met-stoppage-subscriptions-set-record.html> [<https://perma.cc/UM9A-M2PQ>]. Many more had been caught by editors prior to publication including the likes of Genghis Khan’t, Stainglit, and Lasagne Verdi. LEVISON & FARRER, *supra* note 115, at, at 42.

119. LEVISON & FARRER, *supra* note 115, at 40–41.

120. *Id.* at 41–42. Some of Layton’s clues included the fact that Esrum-Hellerup’s biographer was a specialist in a completely different musical period and that Esrum-Hellerup had planned performances of *Parsifal* in Sweden and Denmark during the 1880s—an unlikely performance given that *Parsifal* was first performed outside of the German city of Bayreuth in 1903. *Id.* at 41.

121. *Id.* at 42.

122. *Id.*

choir named after the composer had been founded.<sup>123</sup> Rumors about Esrum-Hellerup were everywhere.<sup>124</sup> Dag Henrik Esrum-Hellerup had transcended the pages of *New Grove*.

Guglielmo Baldini had a much different fate. Baldini, a brain-child of musicologist Hugo Riemann, was first created in the 1959 *Musik Lexikon*—Riemann’s own music encyclopedia—more than twenty years before the publication of *New Grove*.<sup>125</sup> Going undetected, Riemann added more details to Baldini’s life—including a faux correspondence between the composer and Pope Innocent IX—in the *Lexikon’s* 1972 supplement.<sup>126</sup> Riemann snuck the counterfeit composer into *New Grove* by citing his own work (and *only* his own work). Baldini failed to catch the attention of the general public and the music community, and his entry was removed upon the *New Grove’s* editors’ discovery of his non-existence.

These two entries were both bogus. Yet they were treated differently. Esrum-Hellerup had a life outside of the encyclopedia while Baldini stayed within the pages of *New Grove*. While Baldini was an unspotted phony, Esrum-Hellerup became the talk of the town. To some, Esrum-Hellerup was as real as any historical figure.

The lines between fact and fiction are continuously blurring as information is rapidly shared among a variety of platforms. This continual game of telephone can cause these fictitious entries, some of which were carefully and cleverly crafted by genuine creatives, to morph into a quasi-truth somewhere on a spectrum of fact and fiction. As a result, fictitious entries should not receive lump-sum treatment but

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123. *Id.*; Peter Ryom, *Dag Henrik Esrum-Hellerup*, GREAT DANE (May 2, 2017), [https://denstoredanske.lex.dk/Dag\\_Henrik\\_Esrum-Hellerup](https://denstoredanske.lex.dk/Dag_Henrik_Esrum-Hellerup) [<https://perma.cc/7FD8-2WVV>].

124. See Hans Brofeldt, *Esrum-Hellerup*, PIANO MUSIC FOR THE LEFT HAND ALONE, [http://www.left-hand-brofeldt.dk/Appendix\\_007\\_EsrumHellerup.htm](http://www.left-hand-brofeldt.dk/Appendix_007_EsrumHellerup.htm) [<https://perma.cc/25G3-7SN8>] (last visited Feb. 8, 2022) (“Esrum-Hellerup suddenly *came to life*, and on the net you will find many pages about him claiming the most fantastic things - for instance that he died choking on a fish bone during an out-door performance on *Esrum Lake* of Wagner’s opera *The Flying Dutchman* . . . . Somewhere you can also read that his father was in fact not a chamber flautist to King Christian IX - but a railway crossing guard. He himself was also somewhere described - not as a flute player - but an ophecleïde virtuoso . . . .”). See also Trevor Hold, *Rejected Reviews: 22. Esrum-Hellerup: An Unknown Composer*, MUSIC & VISION (Apr. 20, 2000), <http://www.mvdaily.com/articles/2000/04/rresrum.htm> [<https://perma.cc/9K4P-ATZZ>] (joking that Esrum-Hellerup choked on a fish bone); Tony Scupham-Bilton, *Homohoax: Legacy of a Nobody*, THE QUEERSTORY FILES (Mar. 22, 2021), <https://queerstoryfiles.blogspot.com/2021/03/homohoax-legacy-of-nobody.html> [<https://perma.cc/3U58-AZSA>] (joking that Esrum-Hellerup’s father was a railway crossing guard).

125. HUMEZ ET AL., *supra* note 10, at 45.

126. *Id.* at 46.

should instead be analyzed by their veracity. This evaluation, though subtle, should play a not-so-subtle role in a copyright-claim analysis.

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