

CREATED FACTS AND THE FLAWED ONTOLOGY OF COPYRIGHT LAW

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ABSTRACT

It is blackletter doctrine that facts are not copyrightable: facts are discovered, not created—so they will always lack the originality needed for copyright protection. As straightforward as this reasoning seems, it is fundamentally flawed. Using the “social facts” theory of philosopher John Searle, this Article explores a variety of “created facts” cases—designation systems, systematic evaluations, and privately written laws—in which original expression from private individuals is adopted by social convention and generates facts in our social reality. In the course of this discussion, the paper places facts in their historical and philosophical context, explores how courts conflate facts with expressions of fact, and explains the difference between social facts created by expression and the “facts” of literature and fiction.

Having established that the copyrighted works discussed in these cases produce facts, the question arises whether copyright’s merger doctrine eliminates the copyright protection—a result that is both seemingly harsh and seemingly necessary. This Article proposes a recalibration of the merger doctrine to acknowledge that “created facts” are a unique situation in which the incentive of copyright is needed not just to generate the expression, but also needed to generate the facts.

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