Copyright Law and The Ethics of Non-Fiction

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This project concerns the epistemic nature of non-fiction writing, and the implications for legal regulation of such works. I turn to copyright and advertising law to try to answer the question: should the law deal with non-fiction writing as art, or truth, or both? Copyright treats nonfiction differently fiction: protection is "thinner" for non-fiction, the more closely it tracks actual events. A line of cases shows that the law strives to prevent overprotection of accounts of historical importance, for example, to ensure that future authors will be able to offer other accounts of the same events. In other words, copyright on some level distinguishes "truth" from "art." From *Burrow-Giles* through the recent *Mannion v. Coors*, copyright case law reflects that distinction by stressing that the more artistic choices an author makes in the creation of a work, the greater the likelihood that copyright protection will attach. Yet choices that lead to heightened artistic aspects to the work might in theory diminish the work's status as unvarnished "truth." Recent controversies over James Frey's *A Million Little Pieces* and Greg Mortenson's *Three Cups of Tea* suggest that readers attach particular importance to the truth status of works of non-fiction. From a legal perspective, however, should a cause of action arise based on readers' expectations? Turning to advertising law, I examine theories of materiality, typicality, and substantiation to investigate the status of non-fiction on a theoretical level. What do, and what should, consumers expect when they purchase a work of non-fiction? Should the label "non-fiction" determine the legal standards to which the work is held, and if so, might we expect fewer works to be labeled thus, just as, inversely, after Campbell v. Acuff-Rose, more works could be labeled "parody" so as to benefit from parody-friendly copyright jurisprudence?