Copyrightability of Immoral and Illegal Works

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Copyright law does not explicitly impose content-restrictions on the copyrightability of works. Any work that is original and fixed in a tangible medium of expression is entitled to copyright protection and eligible for registration. Although until 1979, most courts considered immoral and illegal works non-copyrightable, the contemporary status of immoral and illegal, works, when examined by courts, is unclear. Thus, an author of an immoral or an illegal work can possibly redeem losses caused by infringement even though society does not necessarily benefit, and might even be harmed, by these works. This scheme does no benefit society and should be resolved.

This Article examines the current and desired copyright protection of immoral and illegal works. I review elements of copyrightability while addressing content-restrictions in copyright, comparing them to other IP laws. After evaluating whether copyright law should impose content-restrictions on immoral and illegal works, and whether such impositions would be constitutional, I conclude that while immorality should not bar copyright protection, certain works that are linked to criminal activities and cause harm should not grant the felon profits. I, thus, propose a new doctrine of illegal copyright that de-incentives the creation of undesired works by eliminating profitability from copyrighted materials related to the crime and by reducing increased profitability from the associated esteem, while compensating the victim.