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RHETORIC, COPYRIGHT, *TECHNE*

The Regulation of Social Media Production and Distribution

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We have to start by recognizing that *all writing is property and as such is regulated*—and one key way it is regulated is through copyright law, copyright custom, and copyright lore,[1] a vast copyright system composed of laws, policies, and regulations but also of practices, attitudes, and ideologies, and enforced and directed via various technological functions, blocks, and filters. This system is not all bad. It is generative as well as prohibitive: in many ways it promotes and supports writing, and encourages its production and distribution. In other ways the system impedes it.

This regulatory system shapes the composing process and determines, to use Foucaultian terms, what can be said and what must not be said; what discourses are allowed to appear (and when and where); how discourses are to be packaged, framed, compiled, and distributed; and, most importantly, who gets to speak/write and who doesn't, and who gets to see these discourses and who doesn't. The regulatory system sets the roles, limits, and sometimes rules for writing and reading. And the system has an economic component as well: it locates and defines value, and makes determinations about cost and credit.

Understanding how these regulatory procedures work is vital knowledge for rhetors—particularly relevant to the production and distribution of discourse in public spaces. Particularly in the age of digital writing and social media, we have to think thoroughly and carefully about how copyright in its various forms—laws, policies, practices, custom, lore—shapes both the production of writing (its invention, generation, creation) and its distribution, and thus is central to the *techne* of rhetoric in the digital age.

For example: When writers post to social media sites such as Facebook and Instagram they are involved in an exchange of property rights. Facebook and Instagram both have policies specifying that users own the content they post there (and so users retain liability if that content infringes someone's copyrights). However, both platforms also claim a "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [users] post on or in connection with the site." In other words, as a condition for your using their writing platforms, Facebook and Instagram claim the right to use your postings however they

wish—including for commercial gain—even though you are the copyright owner and carry the liability associated with that ownership (Reed 571). Of course there is an economic component to this relationship as well: in exchange for using Facebook you allow Facebook to monitor and sell your data.

Thus, the writing you produce and post to the Internet may or may not be "yours" to have and to hold and control in any way you wish. Under US copyright law, once you put your ideas into a tangible written format—once you post something on the Internet for digital distribution via social media—then the writing becomes intellectual property, and a number of legal questions arise: Does your posting infringe the copyrights of others (if you have copied pieces of their discourse in your post)? Do you own the copyrights to that posting—or do you surrender some of those rights when you post to a platform such as Facebook, or Pinterest, or your university's online course server? If you are retweeting a Twitter post with a picture of Mickey Mouse included, does your post infringe Disney's copyright? Do you have the right to block, impede, or put restrictions on others' uses of your posting? These are fundamental questions about writing in the digital age—about *the right to produce, distribute, and circulate writing*—of importance to rhetoric.

What this chapter does is (1) highlight a few basic copyright principles and briefly track the emergence of copyright law in the Western tradition, as pertains to the *techne* of rhetoric; and (2) explore a few representative developments in the current social media scene, focusing in particular on policies and ideologies that encourage rhetorical production and generation versus those that prohibit, restrain, or impede that production. My main point overall is this: Because copyright is a contested public issue pertaining centrally to *the right to write*, rhetoric needs to embrace copyright as fundamental to its art and disciplinary territory, particularly in the digital age.

Some Copyright Basics: Principles and History

Copyright[2] refers quite literally to the right to make copies:[3] the right to copy, reuse, and circulate others' writing, or your own, in whole or in part. As a legal principle, copyright covers both a thing (*the copy*) and a process (*the act of copying*). In this respect, copyright, like the field of rhetoric, is caught in a tension between product and process—and the process is multifaceted.

First, there is the production side: the creation of an original, what is known traditionally as authorship. Authorship is often represented nostalgically and romantically as the lone individual/intellectual creator, the romantic poet or genius essayist, but there is also the corporate, governmental, and collaborative author. The author can be a publisher (Oxford University Press), a media franchise (Disney), or a corporation (Microsoft). Authorship can certainly be social—and even individual authors get their ideas from somewhere (i.e., authorship involves copying, too). Authorship itself is a conflicted term: Does it refer to the *creator* of the work, or to the *owner* of the work, or to both? In the public and professional realms, as opposed to the academic realm, the author-as-creator is often different from the author-as-owner.

Second, there is distribution or delivery: the act of making the copy, or multiple copies, which could be as simple as handwriting an essay or as complicated as setting a book for the printing press. And distribution of course includes the acts of sharing, distributing, disseminating the copy or copies—publishing in the distribution sense, or what rhetoric has called the canon of *delivery* or simply circulation (Trimbur; Porter, "Recovering").

Each of these stages in the process entails labor and costs, and in the case of distribution, a complicated political/economic network supporting the enterprise. So the object itself, *the copy*, is just the tip of the iceberg; the copy is typically part of a much broader process of production

and delivery involving multiple stakeholders, all of whom are hoping (or expecting) to be paid or credited for their labors. Copyright law represents the effort to balance the competing rights of these various stakeholders.

Copying what others have said and written has long been a fundamental and highly respected method for rhetorical invention, and also for teaching and learning. Through much of the history of Western rhetoric education, the act of copying—in the form of specific practices such as *memoria*, *imitatio*, and *compilatio*—was integral not only to the canon of rhetorical invention but also to the education of the rhetor overall (Corbett; Murphy). This was especially true in the Roman era and well into the era of medieval rhetoric. The writers of the Christian patristic era (Augustine, Jerome, Bernard of Chartres) "borrowed" others' work heavily, frequently without attribution, and that was a sign of respect for the authority of those existing texts.

If you were a student in the Roman system of rhetorical education, you were expected to copy and memorize the wisdom of your elders and of the past (for example, in the form of maxims and fables). You were supposed to imitate good examples. You were supposed to collect sayings and pieces of texts and put them together in new configurations. One common technique for copying, *compilatio*, involved collecting fragments from various sources and putting them together into a new whole—what we call, in the digital age, *remixing*.

To put it another way, the reuse of text was integral to rhetorical invention. This process served an immediate generative purpose in helping you produce a particular speech or text at a particular moment, but it also served a larger purpose, aiding your intellectual and moral development as a rhetor needing to speak wisely and effectively within your culture. These practices were born out of respect for intellectual ancestry and wisdom and out of respect for culture. Copying is how you *learn* your culture; it is also how you *make* it.

In many ways current attitudes favoring free and unrestricted digital copying, filesharing, and downloading documents and MP3s—what might be termed the *hacker ethic*—recall classical and medieval notions of the ethics of copying and reusing texts. This digital scribe is also somebody who takes images into Photoshop and "manipulates," crops, resizes, adds text, changes. Writing in the digital age is, appropriately, memory, imitation, and compilation, as well as repackaging, redesigning, repurposing, redelivering text, as it was in an earlier age of rhetorical practice.

The problem of copyright infringement (and of its cousin, plagiarism) emerged much later in Western history, out of the realm of print culture. Copyright was not much of an issue prior to the age of the printing press because copying technology was primitive and expensive (stylus, ink, parchment), and the process long, difficult, and laborious: copying a Bible by hand was tedious, hard work for monks in the medieval scribal age. The technology of the printing press made it much easier to produce multiple copies of that Bible—but printing required expensive machinery as well as labor and specialized knowledge, not to mention an elaborate economic, political, and social network of ships, horses and carriages, trains, trucks, planes, mailing systems, bookstores, and delivery *people*, as well as treaties, trade agreements, contracts, law enforcement mechanisms, and governments (*people* again) to hold the process together, what we might call a publishing network (McKee and Porter).

Copyright law came into being because this elaborate system needed a mechanism for balancing the competing economic interests of authors, publishers, commercial tradespeople, and the state—and also to define that deep and perplexing philosophical question, What is a copy, and who should own it? Copyright as a system of legal regulation did not exist until the eighteenth century, when it emerged in England in the Statute of Anne in 1710. Up until then ownership of texts in Western Europe was largely "derived from privileges bestowed by princes" on the book publishing trade (Darnton). With the emergence of the publishing trade, and thanks to the presence of book pirates—an important influence on the system[4]—some kind of legal system

for determining ownership and rights was needed. That was the beginning of European copyright law. As it formed and evolved, the law was pressed into service to reconcile the competing needs, priorities, interests, and rights of the state, of book publishers, of book sellers, and, eventually, of authors. Copyright laws helped regulate a complex economic network based on the production and distribution of texts.

The idea of the author as the lone, creative, genius writer is a fairly recent historical development tied largely to economic interests: writers wanted to be paid and credited for their work, and not just at the point of sale. As Woodmansee, Rose ("Author," "Nine-tenths"), Foucault ("What"), and others point out, authorship is a legally constructed concept first theorized in German Romantic philosophy and literary theory and then later in English Romantic poetic theory, where the author was invested with an almost sacred status as poet, genius, creator. This change required a "major aesthetic realignment" (Rose, "Author" 56) of the notion of the writer.

The very basis of US copyright law, its first principle, is premised on the existence of the author and the possibility of originality: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression" (§102a). That is a staggering statement. The presumption of the statement is that in order to be said to own something, you need to have an originating creator and something original to be owned, to which there is no prior claim to ownership.

The idea of original, lone proprietorship to language would have seemed preposterous and distorted, say, to classical rhetoricians or to members of a tribal culture who understand language as a shared resource and who see ideas and language as originating in community beliefs and practices and so in that sense "belonging" to the community. More contemporaneously, from the standpoint of social rhetorics, we borrow our language and ideas, we don't make them. A key tenet of the principle of intertextuality is, first, that language is a shared resource, and, consequently, that writers are always borrowing, copyright, repeating, retweeting the texts of others—and often without attribution (Porter, "Intertextuality," "Response"). This is normal practice; this is not unusual, and this is not always piracy, stealing, or plagiarism (though of course sometimes it is).

On the other hand, writers do exert labor, they do work, they perform a valuable service for society—nobody contests that. Writers' efforts deserve some sort of credit, and we want to have a system that motivates more writing, not less. So the eventual resolution of this complexity was to identify intellectual expression as a particular type of property, *intellectual property*, and to assign the author rights to control that property, but typically only for some limited period of time.

Copyright law serves to balance a number of competing interests—and maybe most especially the interests of the *polis*, the community, society, as articulated by Supreme Court Justice Sandra Day O'Connor, writing for the majority in *Feist v. Rural Telephone*:

> The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. . . . [Copyright law] ultimately serves the purpose of enriching the general public through access to creative works. (US Supreme Court)

This, too, is a staggering statement. Copyright law, as articulated by the US Supreme Court, exists primarily to "promote the Progress of Science and useful Arts" and to "enrich the general public"—"not to reward the labor of authors." Social good, not personal gain, is the ultimate purpose. However, what is needed is a system that both credits authors' labors and that encourages new authors "to build freely upon the ideas and information" of old authors. Putting

this in rhetoric terms, the system needs to credit the labors required for rhetorical invention while at the same time promoting and protecting the continuance of new rhetorical invention. How do we achieve such a balance?

The answer to that question, at least in US copyright law, is the Fair Use provision. US copyright law assigns authors "exclusive rights" to their own works—but there is an important limitation on those rights, outlined in Section §107, the Fair Use provision. The Fair Use provision is warranted by two important principles: (1) That the good of society at large, the enrichment of the public, is the ultimate good and goal. And (2) For that good to be achieved, writers need to have license to use others' intellectual property—even *without their permission*, and particularly in certain kinds of rhetorical circumstances that directly serve the public good: news reporting, criticism and commentary (such as political protest), scholarship and research, and teaching. There are limits placed on those uses—the so-called four factors of Fair Use—but in general these types of rhetorical situations have a highly protected status. The law exists to protect and encourage such rhetorical activities, not discourage them.

Copyright and its rhetorical *techne* are constantly challenged by new technologies: the printing press, the Xerox copy machine, the desktop computer, the phone or computer linked to the Internet, etc. Each new technology challenges existing patterns, habits, and social norms about what is appropriate, fair, and just in regards to making and redistributing copies. Copying has changed dramatically in the digital age thanks primarily to two technological developments:

1. The set of functions on your computer (or your phone, or, perhaps, your sweater, or, eventually, your frontal lobe) that allow you to copy/paste or download written content—that is, it is quite easy to make or collect a copy, instantly. You no longer need to pay a scribe to copy content for you, or the publisher to make you a print copy.
2. The vast social network known as the Internet, which allows you to distribute written content globally. It is technically quite easy and fast to copy, distribute, and publish content, instantly and, for a time at least, with relatively few restrictions.

The Internet is a vast, powerful, and fast copying machine that is simultaneously connected to a vast, powerful, and fast broadcast system. Copies can be made and distributed easily and quickly. Just as the emergence of the printing press changed Western culture during the Renaissance and the Enlightenment (Eisenstein), the emergence and ubiquitous embrace of this digital composing/publishing technology called the Internet is changing contemporary culture globally. The lone individual user sitting at a computer or holding a relatively inexpensive smartphone has the technological capacity to *instantly* become a worldwide publisher, or pirate, and to compete with media conglomerates such as Disney and Netflix and publishers such as Random House and Bloomsbury. Hence, the crisis for copyright law in the digital age.

The other significant shift of relevance to this question is the metaphoric frame shift from understanding writing as *expression* (hence, intellectual property) to seeing writing as *information product, aka content*. In an information economy, information is your product—and in order to maximize profit from that product, you need to be able to restrict others' copying of that product. When writing is called information, it becomes content, and the object for sale is treated more like physical property, like an air conditioning unit or a Ford Focus. This framework views writing as a digital asset, as a commodity (Dush)—hence, as just plain physical property. A copyright philosophy that values fair use, sharing, and free and open public access to information poses a threat to that business model.

Copyright Impedances and Affordances

The copyright system provides significant regulatory impedances—and yes, also, affordances and incentives—for digital writing. Regulations based on strict proprietary control of copyright (and hardwired tools enforcing such policies) are examples of copyright impedance, or what is called *copyright maximalism*, or simply *CopyRight*: that is, fiercely protectionist efforts to restrict remix and circulation of existing materials, to extend the term of copyright, and to severely punish copyright offenders. Examples of this regulatory regime include legislation such as the Sonny Bono Copyright Extension Act and the Digital Millennium Copyright Act (DMCA); cease-and-desist takedown warnings issued by corporations; and copyright control technologies such as YouTube's Content ID.

However, other copyright initiatives, policies, advocacy groups, and court rulings—for example, Creative Commons, the Open Access movement, centers and organizations such as Berkman Center and the Electronic Frontier Foundation—do push back, opposing overly restrictive copyrightist legislation and crafting affordance policies that encourage reuse, remix, and circulation. Sometimes termed *CopyLeft*, such initiatives emphasize copyright licenses and practices that encourage wide, yet responsible, sharing.

This is the ongoing tension in copyright law: between those who favor sharing and open access versus a more protectionist approach to copyright, or what Jessica Reyman terms the distinction between "open architecture" and "closed law." This tension, which has always existed in copyright law and custom, is between two different philosophies for authorship/ownership, innovation, and economic development—two different business models, but also, to put it a different way, two different philosophies for how writing works. This is where rhetoric overlaps with economics: Where is the value in writing? How should we promote value in writing? Who should be assigned credit for that value, and for how long? These are questions of economics, but they are also fundamental questions of copyright and rhetoric.

Lawrence Lessig has emphasized that our culture is not simply transmitted and distributed through language, it is *made* through language, and the ability of writers to interact with their culture, to remix that culture, to change it, depends critically on the ability to share cultural artifacts, memes, bits and pieces of text, and to remix them and redistribute them in new ways, building new from old. Our culture is built from remix. But Lessig warns that our ability to share and reuse—the very *right to write*, as he calls it—is eroding under the hyperproprietary regime of copyright maximalism. Some think that it is not too strong to say that "the sharing culture is under attack" (Grinvald 1063).

An example: in 2007, YouTube was forced by Universal Music Publishing Group (UMPG) to take down a video that a mother had posted of her baby because a Prince song was playing in the background. With the Electronic Frontier Foundation serving as counsel, the mother filed a complaint against YouTube. The case, *Lenz v. Universal*, has been in the courts now for over nine years, and in 2016 the Ninth Circuit decision (in favor of the mother) was appealed to the Supreme Court, where it awaits disposition.

From the standpoint of Fair Use, the reuse of a copyrighted Prince song in the background of a person's private family video (non-commercial use) would seem not to pose a serious threat to UMPG's copyright interests in the song—but the point is not whether or not the use is infringing so much as defending the principle of absolute control. Any use, even a fair use, threatens the philosophy of maximalism, a philosophy that is chipping away at rights enumerated and protected in Section §107. Plus, because the case itself attracted a good deal of public notice, it serves the purpose of scaring ordinary people into a kind of hypercompliance, and that self-policing also erodes Fair Use.

In 2007 YouTube began using a copyright filtering technology called Content ID to scan video contributions to YouTube to identify possible copyright infringements (Edwards; Soha and McDowell). One troubling feature of Content ID is that it shifts the burden of proof from the copyright owner to the ordinary user, who must now argue that her/his use is indeed a protected use under the Fair Use provision of copyright law. If a copyright holder feels that a user's use of material is infringing they can request a "copyright strike," that penalizes that user's account. Such an approach makes copyright protection rather than Fair Use the presumptive position and has a chilling effect on public uses of the Internet.

YouTube does have an appeals process in place for users to challenge decisions, but, as Dustin Edwards argues, the appeals process is so elaborate and legalistic that the process itself discourages counterclaims. The system is designed from a protectionist standpoint, and even from that framework, Edwards argues, there are "deep flaws" in the system: "it can't accurately determine fair use, it puts copyright holders in a position of control and users in a position of permission, and it often misidentifies copyright matches."

Dustin Edwards's research shows how copyright regimes of various kinds impede the flow of discourse—and in the age of social media, rhetorical impact is all about flow and circulation: Is your tweet retweeted? Is your posting tagged and redistributed? Is your message shared, does it move, does it collect likes, does it appear on the nightly news? Rhetorical impact now has more to do with how and where your message *travels* (flows) rather than with what your message *says*. As Edwards points out, Content ID is by no means neutral but rather represents a strong protectionist position that does not accommodate fair use. It is a filtering technology that particularly impedes the flow of news, parody, and critique, and in that respect is a mechanism for regulating political speech.

Of course copyright does not only exercise a prohibitive influence. It is also supposed to have a generative influence (Zittrain): it is supposed to promote the production of writing. Digital technologies themselves, especially in their early stages of development, were designed to promote copying. The keystroke command <control><c> allows us to easily copy a piece of text, and its partner <control><v> allows us to paste it somewhere else. The copy/paste functionality built into the computer is a generative technology, nudging us in the direction of copying. So, too, the screenshot and the download function. These copying functions, so basic to computing technology, encourage us to copy/paste, download, remix, and they do so without threatening us or commenting at all on the copyright implications of our actions. Internet functionality—the global network of the World Wide Web—allows us to distribute our copied/pasted entries to the world. You could say that in general digital technology is designed to promote copying and sharing. The philosophy of Open Access is built into the fundamental architecture of the digital network system.

Hence the desperation of copyright maximalists to install restrictive mechanisms into the open system. Various kinds of deterrent strategies are deployed, ranging from hard technical lockdowns—"wired shut," in the terms of Tarleton Gillespie–to softer forms of deterrence called "nudges" (Tan; Yeung).

- Hard-wired constraints → The technology itself is hard wired, technically locked down, to prevent users from copying material.[5]
- Strong regulatory constraints → Users can still technically perform copying, but strong copyright regulations and warnings threaten infringement (e.g., FBI warnings about copyright piracy at the beginning of movies).
- Soft regulatory nudges → Through indirect means and "soft" choices, the technology coaxes you away from copying activities (and other forms of writing deemed problematic).

Social media sites establish interaction policies and what Tan calls "nudges" to push users in certain directions, to promote certain kinds of generative activities, but also to impede other sorts of activities. Twitter allows you to do certain things with tweets, but not certain other things (Tan 65; Gillespie, "Politics," "Platforms").

The softer approach to copyright deterrence may ultimately be the most dangerous one to Fair Use. It is an approach that does not use law by itself to regulate a behavior, but rather attempts to change the frame for behavior, and in so doing creates a system in which writers regulate themselves, called self-censorship or panoptic surveillance in Foucauldian terms. When you view movies at home and the opening screen keeps repeating the words *Piracy, Piracy, Piracy*, consciously you may rationally understand that you are not guilty of piracy, but seeing the word over and over reinforces the message that copying = piracy. This is what we might term a frame nudge: repetition of certain messages and metaphors can, over time, create a frame of understanding. The alternate frame of *Fair Use, Fair Use, Fair Use* doesn't have quite the same metaphoric power as *Piracy*.[6]

Numerous legal scholars (Benkler, Boyle, Lessig, Litman, Samuelson, Vaidhyanathan) have warned that the copyright system is changing in the direction of greater and greater protectionism. They view copyright maximalism as threatening the Fair Use provision of US copyright law; as eroding the public domain (and the very idea of public access and ownership); as opposing the ethic of sharing, access, and collaboration; and ultimately as limiting the ability of writers to protest, to criticize, to create, to generate new ideas, to make culture.

The alternative, these scholars argue, is an Open Access ethics for digital assets based on a metaphor of sharing—a public commons approach, or what Reyman terms "the cultural conservancy model." While such a model is often characterized as being hostile to business interests or naïve about economics, Yochai Benkler points out that is, rather, an alternative business model rather than an anti-business model: it is a model that promotes development, and that levels the business playing field for smaller and start-up businesses, allowing them to compete with established conglomerate interests.

Conclusion

Copyright pertains to issues of access, ownership, property, control—use rights—that impact all the rhetorical canons, but most particularly production (invention) and distribution/circulation (delivery). Copyright laws, regulations, and codes, some written, some unwritten, both constrain and enable writing. There are prohibitions, there are affordances; there are things that can be said, and things that cannot be said; there are rights bundled into every act of expression. And these things change culturally and kairotically, from one venue to the next. These codes are governed by questions of economy—and I'm not talking only about capital, but about the flow of value, and value is really about the very *purpose* of writing. *Cui bono*? For whose good are we writing?

Scholars affiliated with the Intellectual Property Caucus of the Conference on College Composition and Communication (CCCC) have been making the case, for more than twenty years, that intellectual property is not an extraneous topic for rhetoric/composition, not a matter for legal scholars analysis only (DeVoss and Rife; Gurak and Johnson-Eilola; Logie; Ratcliff and Logie; Reyman; Rife; Rife, Slattery, and DeVoss; Westbrook). Rather, they have shown, issues of copyright, regulation, and ownership and use of text are fundamental to rhetoric and of practical importance for understanding how writing works, particularly (but not only) in the digital age. They have demonstrated that intellectual property needs to be embraced wholeheartedly as a topic integral to rhetoric/composition because in a very practical way the intellectual property system regulates writing practice.

Copyright is of central importance to rhetoric, to writers, and to writing instruction at all levels. It is not a specialized topic "for lawyers only." Copyright—and the question of intellectual property generally—is fundamental to rhetoric and *techne*, the art of production and distribution of writing in all its forms.

Notes

1. Copyright *law* as a formal system needs to be distinguished from copyright *custom* (what people actually do in various cultures and circumstances) and also from copyright *lore* (informal, imprecise, often inaccurate information that is distributed widely and believed to be true, despite its lack of authority or accuracy).
2. This chapter focuses primarily on *copyright*, not *intellectual property*. In law intellectual property is a broader term that refers to a number of different areas including copyright, trademark, patent, and trade secrets. In other words, copyright is only one facet of the much larger realm—but, along with trademark, copyright is the area of greatest relevance to rhetoric. Trademark refers to a type of expression—whether written (textual), aural, graphic, or cinematic—that distinctively represents the image or branding of a commercial interest (e.g., the Apple logo) and is therefore afforded a special type of intellectual property status.
3. Copyright refers to a bundle of related rights that include not only the right to make copies (rights of reproduction) but also rights of adaptation (i.e., the right to make derivative works), sale, performance, display, etc.
4. Robert Darnton points out that the eighteenth century was an age of robust book piracy (American book publishers being among the most notorious culprits). Piracy had an important remediating effect on publishing: Pirates help keep down publishing costs. Piracy serves as a check on the temptation of publishers to raise costs to prohibitive levels. In a sense, Darnton suggests, pirates serve an important role in the economic system of text distribution.
5. Digital right management (DRM) refers to software that functions as "locks" to impede or monitor digital copying.
6. The hacker ethic of *Rip, Mix, Burn* is an attempted counterframe—but is perhaps a bit too radical for those who believe in a balanced approach to copyright (Bowrey and Rimmer; DeVoss and Porter).

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