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## Normative Resources and Domain-specific Principles for an Ethics of Copying



**Reinold Schmücker** has worked extensively on fundamental problems in aesthetics, ethics and political philosophy. In his recent research, he has been particularly interested in the philosophy of artefacts, meta-ethics and applied ethics. Bringing together these interests, his present research is focused on the distinction between originals and copies, the ontological and normative implications of contemporary intellectual property law, and the elaboration of an ethics of copying.

### The Need for an Ethics of Copying

Copying has always been a widespread human practice. In which cases and to what degree it might or might not be legitimate to copy an artefact is, however, a question that is more controversial today than ever. This is true anyway if one prescind from the production of copies in order to deceive someone—as it is the case with fakes and forgeries and plagiarism. The moral wrongness of fakes, forgeries and plagiarism seems to be beyond dispute: Since deceiving is morally wrong, copies may neither be produced nor brought into circulation in order to deceive. Copying, however, does not necessarily involve deceiving. And it is ‘mere’ copying, i. e. copying that does not involve the intention to deceive, that raises serious ethical questions. For technological progress has given rise to entirely new forms and ways of copying. They allow for completely or partially copying objects with a hitherto unknown ease and without any loss of quality. Technical means for creating high-quality copies have become much more affordable, in particular digital copying technologies, but also 3D printers. Techniques for copying artefacts are now easily available for more or less everyone. The amount of copies that can be made of an object is limited only by the availability of the required resources.

In this situation, copying artefacts gains an important cultural, economic, and socio-political significance. It is essential not only for the cultural development of a society, but also for its economic success. Today, the availability of mass produced and online copies contributes significant to democratizing the access to important cultural goods and information. At the same time, restrictions

on copying become more and more important. Such restrictions do not only regulate a society's cultural development and promote or prevent the economic success of certain industries; they also affect the social distribution of a great number of welfare-determining goods by making access to generally desirable artefacts more difficult. Copying restrictions also safeguard the social status and economic capital of people who have produced or own original artefacts—such as engineers, designers of artefacts, artists, scientists, or proprietors and sellers of originals that possess a sometimes enormous cultural or economic value due to their authenticity and carefully maintained scarcity. On the other hand, easy and unrestricted access to reproducible goods would, in many cases, be highly beneficial for many people. This limits the social acceptance of copying restrictions. Copying restrictions can also stifle democratization processes on a political level which, to a certain degree, depend on making access to important goods easier for many people. At the same time, abolishing copying restrictions might weaken the motivation to create new, innovative objects. Once more, it should be noted that the notion of “copying” is not limited to exact (1:1) duplicates, but also encompasses products that differ in shape and form from their respective originals, as well as the imitation of someone's behaviour and acts of appropriating creative ideas.

In modern societies, the medium for normatively restricting acts of copying is the law, in particular copyright law, but also patent and trademark law and laws regulating unfair competition. These laws are—at least partially—concerned with acts of misappropriation and passing off. However, the limits of regulating acts of copying by mere legal means have become obvious. Restricting copying by largely controlling the use of digital media is hardly compatible with the freedom of communication in a free, democratic state. Furthermore, effective technical copy protection and prevention tend to affect an owner's right of disposal of his property to a degree that is legally problematic. More importantly, many legal restrictions on copying are not globally accepted, and even on the national level the acceptance for existing laws imposing such restrictions is limited and diminishing. The same is true of legal distinctions between private copies and commercially relevant copying activities.

On the one hand, many creators of artefacts think that copyright restrictions do not go far enough. On the other hand, many people worldwide use the technical means of copying without thinking that there is anything wrong in what they are doing, even if they infringe the existing copyright law (e.g. by illegally downloading music or movies from the internet). Some of them demand a liberalisation or even the abolition of copyright law and intellectual property rights. Some of them contribute to the emergence of new ethical frameworks. Recent surveys on new media ethics have shown how and to what degree such new ethical frameworks “have arisen in the absence of a robust and adaptive legal regulatory apparatus, and often in contradistinction to the letter of copyright law itself” (LATONERO/SINNREICH 2014).

The discrepancy between the legal assessment of many copying processes and the widespread lack of a sense of guilt about copying in everyday life points to a normative deficit: major parts of the existing copyright law—and of the intellectual property law in general—are not regarded as normatively appropriate by a growing number of people. This discrepancy tends to become even greater due to the current shift from owning and copying physical things to merely having access to electronic data (streaming, cloud computing).

One factor adding to this growing discrepancy between the norms of copyright law and widespread normative intuitions certainly is the availability of copying equipment and the effortlessness of producing copies. Another factor might be that the law is often perceived as being the result of lobby pressure from various parties, ranging from Hollywood to Google. But this alone does not explain the remarkable discrepancy between the existing legal situation and common morality, which is also not limited to particular societies—notwithstanding differences concerning the normative

treatment of copying based on cultural differences or particular historical circumstances. Currently, there is no ethics of copying that could present a just balance of interests for those affected by copying practices (BAHR 2013, 283). Although such an ethics neither can be carved in stone, nor be the result of scientific reflection alone, proposals concerning such a balance could be developed in interdisciplinary research. These proposals might influence future legislation and facilitate the formation of inter-subjective moral standards for distinguishing between legitimate and illegitimate forms of copying.

An ethics of copying is also necessary from a legal perspective. If the law is supposed to shape reality in a way that can be normatively justified, lawmakers should seek to avoid a grave divergence between positive law and common morality. This, however, requires a scientific reflection about the rationality and justifiability of normative attitudes that contradict the law, but are nonetheless manifest in common practices and, in particular, in ongoing developments in the arts (cf. sampling, remixing, digital art and appropriation art) or in social expectations and habits concerning the access to and use of information (cf. the use of computer programs, information contained in databases or internet-based social networks). The law might also benefit from an ethics of copying, because such an ethics of copying can expose and discuss the implicit normative premises of the law. For instance, the universalistic foundation of copyright law in natural law, going back to LOCKE's justification of intellectual property, has facilitated restrictions of copying processes across borders and states. But the limits of this paradigm also become visible: an ethics of copying raises the question of whether this paradigm prioritizes certain normative rights of copyright owners over the justified claims for access and use made by third parties. This prioritization might no longer be generally acceptable.

### A Normative Basis for an Ethics of Copying

The reasons for being sceptical about the possibility of an ethics of copying are manifold and understandable. Of course, the mere existence of moral norms—or the simple fact that some people assume some norms to be moral—does not guarantee that they will be respected—just as the existence of legal norms does not guarantee that people keep with them. Moral norms might even be less respected than legal norms, since ignoring them will, at most, be sanctioned informally, by contempt or exclusion from a social group, for instance. Ignoring moral norms will not be sanctioned by forms of punishment that affect the physical integrity of a person, such as a prison sentence. But the fact that norms cannot guarantee that people will comply with them is neither an argument against the need for norms nor does it exclude that a norm can morally be justified that is widely disapproved. But still, the question remains what the normative foundations of an ethics of copying might be, what the areas are to which it applies and which kinds of normative statements it can make.

If we were to understand an ethics of copying literally as an applied ethics, we would delve into a quagmire. Simply applying rules and principles that some ethical theory prescribes—such as KANT's ethics of the categorical imperative or MILL's or SIDGWICK's utilitarianism—will surely not suffice to establish an ethics of copying. All of the well-known ethical theories are far too problematic and disputed within Western cultures—regardless of the question of how they could function as the basis of a *globally* convincing ethics. The idea that an ethics of copying could be developed by deriving concrete rules from the general principles of an ethical theory is also untenable, because there is no well-known ethical theory from which rules could be derived that are sufficiently concrete for an ethics of copying. It would be particularly absurd to assume that the principles that can be found in general ethical theories—such as the golden rule, the categorical imperative, or the moral principle of classical utilitarianism—would merely have to be applied to the normative questions of a specific

area in order to find the answers that we are looking for. However, this is exactly what the term applied ethics seems to suggest. But the subject of an ethics of copying is far too heterogeneous and too specific for an application of this kind. It would require too many additional normative assumptions.

We should therefore drop the common term ‘applied ethics’ and rather consider the ethics of copying to be what is sometimes called a *domain-specific ethics* (NIDA-RÜMELIN 2005): an open set of assumptions or moral judgements that specifically refer to a certain domain of action, e.g. acts of copying. A domain-specific ethics of copying will be a set of normative intuitions, beliefs and rules that are based on the attempt to critically reconstruct and systematize the moral intuitions and beliefs that we have concerning the regulation of acts of copying. This is why an ethics of copying has to take empirical data about given moral beliefs into account and can therefore only be achieved in an inter-disciplinary approach.

However, for a critical reconstruction, it is also important to investigate whether the intuitions and beliefs of individual persons, certain groups or cultures can be traced back to particular interests of this group or culture—and, maybe, to their particular skills. These interests, however, may not matter from a moral point of view. This also means that we investigate whether moral intuitions and beliefs about copying are compatible with other fundamental moral intuitions and beliefs—especially with moral intuitions and beliefs that many people, or even cultures, share. And of course moral beliefs can be questioned—some of them might be justified, others might have to be refuted. Carrying out these investigations from a moral point of view most basically means to assess actions and beliefs impartially (HUME 1751) and based on the criterion of fairness (RAWLS 2001).

The reconstruction and systematization that an ethics of copying is concerned with should not only be critical, but also constructive—which means spelling out the rules and norms that should apply in the regulation of acts of copying. These are the rules that can be best justified from a moral point of view. Of course an ethics of copying that is constructive in this sense can only develop theses and suggestions that are contributions to the social discourse about regulating acts of copying. We will have to see whether they are in fact as convincing as they might seem to the members of the research group and whether other people will regard them as an adequate reconstruction of their own moral intuitions. Nobody has an exclusive access to the moral point of view.

### The Main Focus of an Ethics of Copying

When we judge an actual or possible action, we sort this action into a certain category. The basic categories of moral judgements are what is morally required, permissible and prohibited plus certain sub-categories (SCHMÜCKER 2011). These categories are basic, because moral judgements always presuppose that we can distinguish between what is morally prohibited and what is required—independently of which ethical theory we endorse. Regarding these categories as the basic categories of moral judgements actions is therefore compatible with a pluralistic and even relativistic meta-ethics, because it does not presuppose a specific justification of moral duties or a specific ethical theory. The basic categories of moral judgements are rather the framework of categories that are at our disposal for morally assessing actions.

With regard to acts of copying, the following can be stated: (1) Normative conflicts about acts of copying rarely concern the question of whether an act of copying is morally required or not. In an emergency situation, such as a dangerous epidemic, copying the drugs that are needed to fight the epidemic might be morally required, even if the owner of the respective patent does not agree. It might also be morally required to copy the prescription for a vital drug that the pharmacist will not provide without a prescription. So we can say: acts of copying are morally required in an emergency

situation, where ignoring certain norms—which would hold in a normal situation—is morally permissible. The definition of an emergency situation, however, is the task of an ethics of emergencies (SCHMÜCKER 2014) and not of an ethics of copying. (2) Normative conflicts about acts of copying rarely concern the question of whether an act of copying is morally condemnable and therefore strictly prohibited or not. Of course an act of copying can be a central element of a deed that we consider to be morally condemnable. But what we consider to be morally condemnable is this action, which might be a capital crime, treason, deliberate deception (as in scientific plagiarism) or fraud, but not the act of copying itself that is part of the action. (3) In many cases of copying the question of whether they are morally permissible is a matter of dispute. However, even people who think that illegally downloading software or movies is morally prohibited do not seem to think that this is as strictly condemnable as burglary or capital crimes. We can take this fact into account by adding an intermediate category to the basic categories for the moral judgement of actions, that is, the category of morally objectionable actions, located somewhere between the category of morally permissible and morally prohibited actions (cf. fig. 1). This allows us to specify the main focus of moral judgements that are relevant for an ethics of copying. In many or maybe even most cases, normative conflicts regarding acts of copying concern the question of whether a non-authorized act of copying should be considered as morally acceptable—and therefore morally permissible—or if they should be considered as morally objectionable.

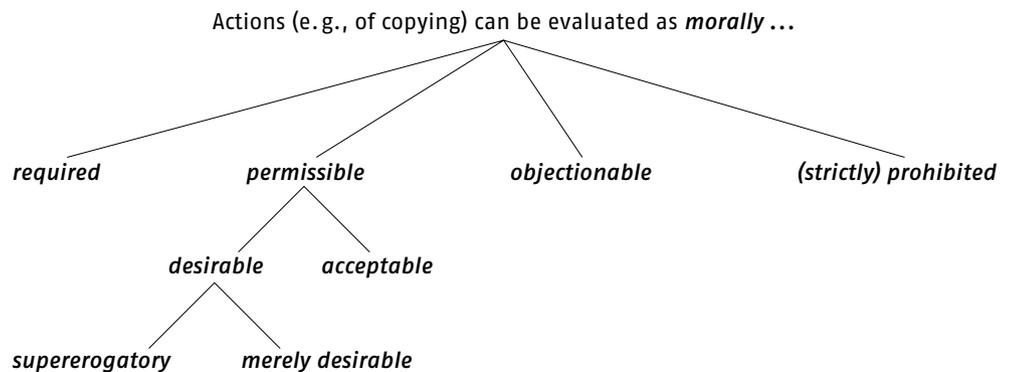


Figure 1: Basic categories of moral evaluation

### Some Examples for Domain-specific Rules of an Ethics of Copying

In order to give an idea how domain-specific rules might look like that an ethics of copying might propose I shall suggest four principles that I think most of us could agree upon. They are akin to the principles of medium range that are established in medical ethics (BEAUCHAMP/CHILDRESS 2013, esp. ch. 6), and their persuasiveness depends upon whether they can be regarded as plausible consequences of a systematisation of common moral intuitions and considerations.

1. Our meta-ethical considerations so far suggest a first principle. It follows from a general moral principle that can be called the principle of limited legal strictness: *The legal evaluation of acts of copying should not be stricter than their moral evaluation.* This sounds like a very abstract principle and armchair philosophy. But the impression is misleading. If you agree with my diagnosis that

normative conflicts about acts of copying mostly concern the question of whether an action is morally (still) acceptable or (already) objectionable, then you will be sceptical about criminalising non-authorized acts of copying. If it were clear that, for instance, acts of illegally downloading music are at most a morally objectionable, but not a strictly prohibited action, we would merely consider such actions to be minor offences. In contrast to that, paragraph 106 of the German Copyright Law, for instance, determines that the duplication, dissemination and public playback of a copyrighted work will be punished by a prison sentence of up to three years or a fine, unless it takes place in certain contexts specified by the law as contexts of legal copying or is authorized by the copyright holder. If you agree with the principle of limited legal strictness, you will not think that this law can be morally justified. In fact, it seems to be morally required that acts of copying of this kind should be de-criminalized, even though many people might consider them to be harmful and therefore morally objectionable. It is implausible that we legally evaluate an act of copying more harshly than an action such as speeding, since we consider both to belong to the same moral category. So we can arrive at the following conclusion: *Since the legal evaluation of acts of copying should not be stricter than their moral evaluation, illegitimate acts of copying should only be sanctioned as minor offences.*

How about the objection that there are also illegitimate acts of copying that are morally strictly prohibited—maybe copying the biscuit with the ‘gold codes’ of the US President? I am not convinced by this objection. For what is morally strictly prohibited in cases like this is, as stated above, not an act of copying as such but a deed the act of copying is a part of, e.g. the dissemination of a document that should remain secret for very good reasons. § 106 of the German copyright law, however, prohibits the mere duplication of a copyright-protected work and includes passing on copies to other persons, even without financial gain, beyond the right to own a private copy. A protection of the rights of authors and exploiters that is this far-reaching cannot be morally justified by the fact that acts of copying can be part of offences that we consider to be morally prohibited. The same applies to other actions that can be part of a crime, such as driving a car, and nobody would want to criminalise these actions per se. Also, the prevention of morally objectionable actions that involve acts of copying does not require a criminalisation of acts of copying as such. The prevention is already covered by criminalising the respective morally objectionable action.

2. Here is the second principle I would like to suggest: *Acts of copying that do not result in an entity that could substitute the template with regard to at least one of its principal purposes should be permissible, as long as there is no particular reason to protect the template against possible damages caused by the copying.* We could call this the principle of permissible non-substitutional copying. It seems to me that this principle is supported by common intuitions and beliefs. The moral rights or claims of the copyright holders can only be violated if the act of copying leads to the production of one or more objects that could substitute the template with regard to whichever of its principal purposes—for instance as the template for further copies or as an exemplar of a multiply instantiable artefact. (Of course this only applies if we assume that the mere wish of the creator or others that there should be no copies does not constitute a sufficient justification for a moral demand to refrain from copying. But there are good reasons for this assumption.)

It is worth noting that the principle of permissible non-substitutional copying does in fact imply some moral restrictions of copying. It does not only ban copying that would damage the template. It only allows producing copies which cannot substitute the respective template at all, i.e. with regard not even to one of its principal purposes. However, this does not imply that the production of copies that could be used to substitute the copied object, in whichever respect, is morally forbidden at any rate. For there might be other reasons allowing the production of copies that could be used instead of the template.

Acknowledging the principle of permissible non-substitutional copying would allow for implementing a law that prescribes the right to produce partial copies, with the exceptions mentioned

above. It is clear that not all conflicts about copyrights that concern the use of partial copies or, for instance, reappearances of a fictional character (YOUNG 2016) could be mitigated this way. However, acknowledging the principle of permissible non-substitutional copying would, for instance, avoid the absurdity that digital art as such would have to be regarded as a violation of copyright law for the very fact only that it involves copying pixels—even if the pixels copied obviously constitute a completely different entity (DREIER 2016).

3. A third principle is a close relative of the second. It should make us sceptical about the results of software that detects instances of plagiarism. We should not automatically regard these results as cases of illegitimate acts of copying. For the vast majority of cases of so-called self-plagiarism are covered by a principle that can be called the principle of permissible partial copying by the author. *It should be allowed in principle (and not be subject to the disposition of contracting parties) that an author may copy parts of her own previously published works.* It does not seem morally objectionable if an author takes over parts of her own work—even if she has sold the copyright to an exploiter. For there is no deception about the actual authorship, and no reputation of an original author is harmed. One could argue, however, that such self-repetitions by an author who has sold the copyright to someone else harm the copyright holder (for instance, the publishing house), because it might compromise the sales of the previous work. But note that the principle does only allow for partial copying. Of course, even partial copying may under certain circumstances affect the sales of a work. But the risk that partial copying will cause this effect does not only seem negligible since in most cases a partial copy is not a substitute for the template. From a moral point of view, it rather seems to be outbalanced in principle by the positive effects to be expected by the acknowledgement of the principle of permissible partial copying by the author, namely that an author is generally entitled to re-present parts of her own works—specific formulations or visualisations for instance—in a new context or to another audience, thereby enabling new insights. For if the principle of permissible partial copying by the author is acknowledged, an exploiter could calculate the expected sales by taking this right of the author into account, and there would be no harm done to the exploiter.

Re-using parts of one's own texts could only seem morally objectionable with respect to readers' attention. If I say (partly) the same in two different texts without pointing this out explicitly to the reader, she might feel annoyed for having spent time reading a passage that she was already familiar with. In fact, I was told once that self-plagiarism must not be permissible, because otherwise an appointment committee in medicine could not trust the calculation of the impact factor of an applicant's publications—which would mean that the commission would have to actually read them! However, even if we assume that a different context in which a certain passage appears will not lead to new insights, it is hard to see how a waste of the readers' attention resources would constitute a morally objectionable act. Otherwise any waste of someone's time would be an immoral act, for instance the remake of a movie that is not explicitly designated as such. This would be absurd. The repeated use of parts of an already published text can be illegal if one assumes—as e.g. British copyright law does—that authorship constitutes a mere right of control over the use of certain forms of expression that can be transferred to a third person with the effect that it will then be theirs. So if I have transferred the copyright to a publishing house, the use of parts even of my own text can be a copyright violation. I think this shows that it makes sense to stick to the conception of a copyright as an author's right that cannot be transferred, as it is codified in the European *droit d'auteur* tradition. The morally well-justified idea that an author can use her own thoughts and phrasing as often as she wants – without having to note that she has already uttered them elsewhere – is better reflected by the *droit d'auteur* than by the copyright tradition.

4. A fourth principle should be uncontroversial, because most copyright legislations are explicitly or implicitly based on it: *The regulation of acts of copying should be governed by rules that establish a fair*

and impartial balance between the interests of authors, exploiters, users or consumers, people who potentially copy works, and the general public. We could call this the principle of a fair and impartial balance.

Of course, details can be tricky. The principle itself might be uncontroversial, but what the concrete regulations are that should follow from it has been a matter of dispute throughout the history of copyright laws. To this day, discussions about reforming copyright legislation mostly centre around this point. Our research group will therefore have to pay close attention to the question what the principle of a fair and impartial balance prescribes. The following aspect seems to be particularly relevant here.

Acknowledging the principle of a fair and impartial balance will require paying attention to the heterogeneity of interests between the parties mentioned before. This is currently a very important aspect due to the strongly diverging interests of first-order exploiters – that is, traditional publishing houses, the holders of image rights, the film and music industry – and second-order exploiters like Google. These conflicts of interest are also frequently taken to court.

The principle is also important because of the diverging interests of groups that usually gain less attention. For people working in an area of culture that is not very profitable, it is important to be able to make copies without running the risk of the high costs that a lawsuit would entail. People who can expect high profits from their copyrighted work, on the other hand, will usually be interested in maximising their profit.

It is obviously important to strengthen the interests of authors compared to the interests of exploiters in order to adjust existing unfair imbalances. Who ever tried to remove the clauses about far-reaching ancillary rights from the contract for a scientific book will know what I mean. But an unfair advantage of second-order exploiters, such as Google, over first-order exploiters has to be avoided. This requires, first of all, the explicit acknowledgement of the fact that the use of published material by databank based online-platforms is also a form of exploiting texts in the sense of the copyright law, even if there is no corresponding agreement between the authors or first-order exploiters and second-order exploiters. The next step would be to discuss how the interests of authors and first-order exploiters can be protected by copy restrictions.

How can an ethics of copying acknowledge the principle of a fair and impartial balance so that the interests of the public as well as the interests of authors and exploiters are equally taken into account, and also the diverging interests between different groups of authors? Surely, a further extension of copyright terms is not the right solution. In Germany, until 1934, it lasted for the lifetime of the author plus 30 years for the heirs. Since 1965, it lasts for 70 years after the death of the author. The revised Berne Convention established 50 years after the author's death as international minimum. Many critics of current copyright policy think that is too much. 70 years *post mortem auctoris* is far too long. The 70-year period means that authors, their heirs and contractual partners like publishers and possibly a collecting society can restrict any reference to the work and thus limit the creativity of artists who want to refer to the work for two generations after the original author's lifetime. And thanks to the progress of modern medicine, the life expectancy even of authors has increased considerably. A prominent example might be ERNST JÜNGER, who published his first best seller, *In Stahlgewittern*, in 1920 and lived another 78 years until he passed away in 1998. The copyright in his works will not expire before 2069; concerning the book *In Stahlgewittern* that will be 149 years after its publication. There is no reason to think that the interests of the public are less important than the interests of authors and exploiters now than they were in the 19<sup>th</sup> century. On the contrary: the fact that many works today can be utilised globally, without any problems, and in countless ways, rather suggests a shortening of the copyright protection. It is implausible that the ideal interests of an author should be protected longer than her mortal remains, which are protected for between 15 and 30 years in Germany.

Given the general interests of a society that grants far-reaching artistic freedom, artists will have to accept a shorter protection period for their works. The potential financial losses that this would entail would hardly affect the large majority of authors who are not commercially successful anyway, but only a small minority of successful authors and their heirs. According to our moral intuitions, this would be unproblematic. The advantages that commercially successful authors gain from their activities are considerable and need to be restricted to a certain degree in favour of the public's interest in having an open access to works. I would even go further and suggest that the protection of promptly successful works should be limited for a shorter term than that of the works of commercially less successful authors, since even authors who are less commercially successful should, ideally, have a chance to earn at least enough to cover the costs of their creative activity (and maybe even the costs of living). Thus, it would be nothing but fair to give those authors who failed to have prompt economic success that might have enabled them to cover the costs of their creative activity an additional chance to get reimbursed for their investments by offering them an option for an extended copyright term.

A consequence of the principle of a fair and impartial balance would be a shorter copyright term of, say, 30 years after the date of publication that could be extended, maybe even several times. The extension should only be possible if the authors and exploiters can prove that the income generated by the work has, so far, not exceeded a certain threshold that should be determined for the different kinds of works. (Since the income generated by copyrighted works has to be taxed in every country known to me, it should not be too difficult to determine the respective sum without belying bureaucracy.) This model would turn highly successful works into the public domain much earlier than less successful works. This effect would be desirable for several reasons: it would ensure that authors and exploiters of works who failed to have prompt economic success are given an additional break to cover at least their costs. At the same time, the success and popularity of a work prove that the respective work has become part of the cultural (or technical) "vocabulary" of a community or even the global community. This vocabulary should be accessible to everyone, unless there are particularly grave reasons against it.

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