The Copy Process

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ABSTRACT. There's more than one way to copy. The process of copying can be laborious or easy, expensive or cheap, educative or unenriching. But the two intellectual property regimes that make copying an element of liability, copyright and trade secrecy, approach these distinctions differently. Copyright conflates them. Infringement doctrine considers all copying processes equally suspect, asking only whether the resulting product is substantially similar to the protected work. By contrast, trade secrecy asks not only whether but also how the defendant copied. It limits liability to those who appropriate information through means that the law deems improper.

This Article argues that copyright doctrine should borrow a page from trade secrecy by factoring the defendant's copying process into the infringement analysis. To a wide range of actors within the copyright ecosystem, differences in process matter. Innovators face less risk from competitors if imitation is costly than if it is cheap. Consumers may value a work remade from scratch more than they do a digital reproduction. Beginners can learn more technical skills from deliberately tracing an expert's creative steps than from simply clicking cut and paste. The consequences of copying, in short, often depend on how the copies are made.

Fortunately, getting courts to consider process in copyright cases may not be as far-fetched as the doctrine suggests. Black-letter law notwithstanding, courts sometimes subtly invoke the defendant's process when ostensibly assessing the propriety of the defendant's product. While these decisions are on the right track, it's time to bring process out into the open. Copyright doctrine could be both more descriptively transparent and more normatively attractive by expressly looking beyond the face of a copy and asking how it got there.

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