The Quest for a Sound Conception of Copyright’s Derivative Work Right

by
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Abstract:

Authors of original works of authorship have under U.S. copyright law an exclusive right to prepare derivative works based upon the copyrighted work. The statute defines “derivative work” as “a work based upon one or more works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work is recast, transformed or adapted.” There is no consensus in the legal literature or in the case law about the proper scope of or justification for this right.

Difficulties with the derivative work right do not derive from the nine examples set forth in the statutory definition, for they are quite specific and comprehensible. The source of most difficulties with the derivative work right, at least in the case law, has lain in the ambiguous last clause of the definition—“or any other form in which a work is recast, transformed or adapted.” There are, for example, conflicting appellate court cases about whether gluing a picture on a ceramic tile is a “recasting” that violates the derivative work right. Without a coherent and normatively grounded conception of the derivative work right, it is difficult for courts to resolve even simple questions such as this.

After discussing the historical origins and evolution of the derivative work right, this article will consider whether principles of intergenerational equity might provide a normative basis both for granting and for limiting the derivative work right. If one conceives of authorship in a multigenerational context, it becomes clear that while next generation authors should not be unjustly enriched by exploiting derivative markets that the previous generation authors have reasonable expectations of enjoying, next generation authors must be able to draw upon preexisting works to prepare new works to foster further social dialogue among authors of multiple generations. In this way, the constitutional goal of copyright law—to promote the progress of knowledge—can be achieved.