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

U.S. copyright law grants authors of original works of authorship an exclusive right to “prepare derivative works based upon the copyrighted work.” It goes on to define “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. Even if one does not agree with treatise author William Patry that the derivative work right has replaced the fair use doctrine as “the most troublesome in copyright law,” it is hard to deny that copyright’s derivative work right is troublesome.

The problems with U.S. law’s derivative work right do not derive from the nine examples given in the statutory definition, for they are quite specific and comprehensible. There has been, for instance, no litigation over whether the defendant’s work is a translation or dramatization of another work. Most troublesome, at least in the case law, has been ambiguities arising from the 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. But the derivative work right has also been troublesome because courts have typically ignored it. All too often, they analyze infringement in derivative work cases under the rubric of the reproduction right, asking whether there is substantial similarity between the works in dispute and whether this resulted from copying.

After discussing the historical origins and evolution of this right, this article will present several modern conceptions of the derivative work right and after drawing insights from them, it will make several suggestions about how and why this right should be refined to make derivative work analysis more comprehensible, predictable, and normatively grounded. It will also argue that courts should analyze infringement of the derivative work right separately from that of the reproduction right, as some policy considerations are present in derivative work right cases that courts too often ignore.