



Derivative Works in US Copyright Law

September 23, 2010 by Bob Tarantino

Following up the earlier post "[Canadian Copyright and Derivative Rights in Non-Fiction Books](#)", Christina Bohannon has recently published [Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright](#) ((2010) 12 Vanderbilt Journal of Entertainment & Technology Law 669) which has a nice explanation of how US copyright law treats the matter of "derivative works". Bohannon advances the argument that the US derivative works right is possibly unconstitutional for vagueness or over-breadth, and recommends two interpretive approaches [citations omitted]:

First, courts should ensure that violation of the derivative works right requires not only that the allegedly infringing work is based upon the copyrighted work but also that it substantially incorporates copyrighted expression from that work. Many courts already limit the derivative works right in this way, but all courts should do so consistently. This requirement is the only way to maintain the idea/expression dichotomy; otherwise, copyright holders could prevent others from borrowing un-copyrightable ideas from their works in making new works. ...

Second, the catch-all language in the derivative works right must be interpreted more narrowly. As previously discussed, the language, "any other form in which a work may be modified, transformed, or adapted," renders the derivative works right overbroad. Courts currently interpret this language as applying to nearly all uses of copyrighted material that change the copyrighted work in some way, including uses that change not merely the form but also the content or message. This interpretation is not necessarily the best one, even on the definition's own terms. ... it should be interpreted under the principle *noscitur a sociis* in light of the more specific examples that precede it. Those examples reflect common forms of a copyright holder's own expression, not new works containing very different expression. For instance, works such as satire, parody, guide books, trivia books, etc. are conspicuously absent from the list of statutory examples; yet the catch-all language is clearly broad enough to include those types of works. A narrower and more reasonable interpretation of the language would cover the conversion of the copyright holder's own expression into other forms or media but would not cover subsequent works comprised largely of new substantive content. That is, this interpretation would include common forms of the copyright holder's own expression that are similar to the listed examples, but would not include works that borrow from a copyrighted work to create a work with different content.

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