**17.15 Copyright Interests—Derivative Work**

**(17 U.S.C. §§ 101, 106(2))**

 A work is a derivative work if it [recasts,] [transforms,] or [adapts] a preexisting work. The owner of a copyright may exclude others from creating derivative works based on the

owner’s copyrighted work. If the owner allows others to create a derivative work based on the preexisting work, the owner retains a copyright in any elements of a derivative work that are [copied] [derived from] the preexisting work. The owner of a copyright in the preexisting work may enforce the right to exclude others from copying elements of the derivative work that were themselves [copied] [derived from] the preexisting work.

The creator of a derivative work may own a copyright in the original aspects of the work that the creator contributed, such as editorial revisions, annotations, elaborations, or other modifications to the pre-existing work, so long as the creator of the derivative work lawfully used the preexisting work and the contributions are more than trivial. The creator of a derivative work that lawfully used the preexisting work may enforce the right to exclude others from copying the original aspects of the derivative work.

You may find that the derivative work is copyrightable if:

First, the preexisting work is copyrightable or was copyrightable at

the time it was created;

Second, the derivative work lawfully uses the preexisting work;

Third, the derivative work includes new material that is independent

of the preexisting work and is itself copyrightable; and

Fourth, the derivative work’s new material is not so minimal as to be

trivial, such that a copyright in the derivative work could prevent the

owner of the copyright in the preexisting work from exercising a right

under copyright law.

A [work] [material] is copyrightable if it is an original work of authorship

fixed in any tangible medium of expression.

A derivative work lawfully uses preexisting material if either the copyright holder of the preexisting material authorized the use or the material has entered the public domain.

**Comment**

A copyright owner has the exclusive right to prohibit or authorize the preparation of derivative works. 17 U.S.C. § 106(2). A derivative work must actually incorporate the copyrighted work, either literally or nonliterally. *Oracle Int’l Corp. v. Rimini St., Inc*., 123 F.4th 986, 996 (9th Cir. 2024). In *Oracle*, the court rejected an “interoperability” test for derivative works—if a product can only interoperate with a preexisting copyrighted work, then it must be derivative. “Both the text of the Copyright Act and [Ninth Circuit] case law teach that derivative status does not turn on interoperability, even exclusive interoperability, if the work doesn’t substantially incorporate the preexisting work’s copyrighted material.” *Id.* “[A] derivative work must actually incorporate [the] copyrighted work, either literally or nonliterally . . . simply being an extension or modification of a copyrighted work without any incorporation is not enough to create a derivative work.” *Id.*

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