**17.15 Copyright Interests—Derivative Work**

**(17 U.S.C. §§ 101, 106(2))**

A copyright owner is entitled to exclude others from creating derivative works based on the owner’s copyrighted work. The term derivative work refers to a work based on one or more pre-existing works, such as a [translation] [musical arrangement] [dramatization] [fictionalization] [motion picture version] [sound recording] [art reproduction] [abridgement] [condensation] [, or any other form in which the pre-existing work is recast, transformed, or adapted]. Accordingly, the owner of a copyrighted work is entitled to exclude others from recasting, transforming, or adapting the copyrighted work without the owner’s permission.

If the copyright owner exercises the right to create a derivative work based on the copyrighted work, this derivative work may also be copyrighted. Only what was newly created, such as editorial revisions, annotations, elaborations, or other modifications to the pre-existing work is considered to be the derivative work.

If the copyright owner allows others to create a derivative work based on the copyrighted work, the copyright owner of the pre-existing work retains a copyright in that derivative work with respect to all of the elements from the pre-existing work that were used in the derivative work. The author of the derivative work is entitled to copyright protection only for original contributions made by that author that are more than trivial. If the derivative work incorporates [pre-existing work by others] [work in the public domain], the derivative author's protection is [limited to elements added by the derivative author to the [pre-existing work of others] [public domain work]] [, or] [limited to the manner in which the derivative author combined the [pre-existing elements by other persons] [pre-existing elements in the public domain work] into the derivative work].

[The author of the derivative work may enforce the right to exclude others from the original elements added by the author in an action for copyright infringement.]

[The copyright owner of the pre-existing work may enforce the right to exclude others in an action for copyright infringement to the extent that the material copied derived from the pre-existing work.]

**Comment**

In the case of a recorded performance (i.e. a sound recording) of a musical work, the sound recording constitutes a derivative work of the musical work. *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985).

In addition to the criteria set out in this instruction, in order for a sound recording to qualify as a derivative work, the actual sounds fixed in the recording must be “rearranged, remixed, or otherwise altered in sequence or quality.” 17 U.S.C. § 114(b). If a sound recording is at issue, the instruction should be adjusted to account for the § 114(b) factors.

“When a copyright owner authorizes a third party to prepare a derivative work, the owner of the underlying work retains a copyright in that derivative work with respect to all of the elements that the derivative creator drew from the underlying work and employed in the derivative work.” *DC Comics v. Towle*, 802 F.3d 1012, 1023 (9th Cir. 2015). The copyright owner of the underlying work “is entitled to sue a third party who makes an unauthorized copy of an authorized derivative work to the extent that the material copied derived from the underlying work.” *Id*. at 1024.

“The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work . . . [and] . . . is independent of . . . any copyright protection in the preexisting material.” 17 U.S.C. § 103(b); *see also Stewart v. Abend*, 495 U.S. 207, 223 (1990) (holding that aspects of derivative work added by derivative author are that author’s property and elements drawn from pre-existing work remain property of owner of pre-existing work); *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1016 (9th Cir. 2012) (“[A] derivative work may be independently copyrightable, but the scope of this copyright is limited.”); *Batjac Prods. Inc. v. Goodtimes Home Video*, 160 F.3d 1223, 1234-35 (9th Cir. 1998) (holding that under 17 U.S.C. § 103(b), as under 1909 Act, copyrighted underlying work remains copyrighted even if derivative work based on it enters public domain).

A derivative work is saved from being an infringing work “only because the borrowed or copied material [in the derivative work] was taken with the consent of the copyright owner of the prior work, or because the prior work has entered the public domain.” *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976); *see also U.S. Auto Parts*, 692 F.3d at 1016 (“[I]f a third party uses preexisting work in violation of the Copyright Act, the resulting derivative work is not entitled to copyright protection.” (citation omitted)).

“In order to be copyrightable, (1) ‘the original aspects of a derivative work must be more than trivial’ and (2) ‘the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.’” *Id*. at 1016 (quoting *Durham Indus. v. Tomy Corp*., 630 F.2d 905, 909 (2d Cir.1980)).

“[W]hen a derivative work includes copyrightable elements of the unregistered original work, the owner's registration of the derivative work also registers the included elements of the original work.” *Enter. Mgmt. Ltd. v. Construx Software Builders, Inc.*, 73 F.4th 1048, 1057 (9th Cir. 2023).

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