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INTERPRETATION OF COPYRIGHT'S DERIVATIVE WORKS AND THEIR ECONOMIC EXCLUZIVE RIGHTS

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ABSTRACT

This paper aims to address the meaning of derivative works; which are cases where they can be expressed. Derivative works are considerd as variants of a masterpiece created by an existing opera that is protected by copyright or by the acts that enter into the public domain. The use of public domain works does not preclude the author to add in their masterpieces other works and creations which derive from the original work form creating a new derivative creation work or masterpiece. Essential in these works is the expression of originality. The limits of defence to a creation of a derivative work lie only in the author"s proces of contributing on this work in a manner. This last process must be distinctual from the work that already exists. Unauthorized derivative works have already become part of the exploitive culture in online environment.

Which are the features that distinguish this kind of works from other works in the field of copyright? What economic benefits can the author obtain from these works in the intellectual market? What are the exclusive economic rights? Furthermore it is important to be noted that violations of copyright to derivative works, recently, as a result of technological developments is a challenge for creative authors, the media in general and the institutions

responsible for the drafting and implementation of the legal framework protecting the intellectual property rights.

Although the creation of a derivative work requires more than one element to be materialized. The main question is: what is the measure of originality that must exist to benefit the protection of copyright? Is sufficient legal framework of the copyright in the international context and one clarified to balance between the interests of parties when it comes to benefit from creative industries? How must things lie in the case of the creation of not for profit works? What are exclusive rights of the author is him able to control the mix and new transformations of original works of previous technology though the process of development today?

Keywords: Derivative works, originality, legal framework, economic exclusive rights, infrigement of copyright rights

INTRODUCTION

Any form of adoptation or modification on existing works constitutes derivative work, that for shure will enjoy the protection of law.

Characters or contributions that are added or removed from an existing work have in their core creative originality of copyright that may constitute a different work from where it is based , works such as musical arrangements , translations , photographic works remixes , reviews editing , documentaries , art reproductions and other forms of art , etc.

It is important that the exclusive right for making a derivative work belongs to the holder of a work on which is based the new work . Since the adoption of the Statute of Anne that was focused on printing and distribution of literary works appears the first case based in Status of Anne which had as an object a derivative work.

The american and european jurisprudence after this case show that in cases which have as object a derivative work are some difficulties in distinguishing which aspects of works are protected by law of copyright , namely the level and extent of the transformation of the original.

Constitutions and internal and international laws recognizes the right of copyright or of an invention. Also is recognised the right to authorize indivduals or another subjects to create derivative works based on them. It is understandeble that this is alouded with the socpe to promote the economic interest and the promotion of culture and science in general.

Another category to use the new creations are regarding the original works that are already in public domain, after the term of protection of the right holder passed. These new creators do not have to require a permit or authorization in way to exploit the original work.

The biggest difficulty regaring the derivative works consists on the capability that the author has on checking the modifications that his original work subbmits with or without his permission. The economic profits that can come as a result of exploit of a novel or work in way to realise a movie requests not only the exclusive right to copyright of the novel but also the control of this movie that will be considered a derivative work. This is calld the limited monopoly for all the economical profits that will come from this movie[1].

This process is even more difficult today in conditions in which the technology enlarges the field of works and another forms that derivate from basic works. “In this case the best strategy is the determination of derivative work and their elements ilustrating all their variants and forms also replacing the general definitions on copyright legislations with more specific ones[2].

[1] Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK L. REV. 1213, 1241 n.154 (1997)

[2] Abridgements had been among the subject matter eligible for copyright protection under section 7 of the Copyright Act of 1909. Condensations were not included in the 1964 definition and were seemingly added to the 1965 definition at the behest of some industry organizations. *See, e.g.*, HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 228 (Comm. Print 1965) (comment submitted by the American Book Publishers Council and the American Textbook Publishers Institute suggesting, inter alia, the addition of “condensation” to the list of exemplary works under the “derivative work” definition). For a discussion of how U.S. and British Commonwealth copyright laws have treated abridgments, condensations, and abstracts, see Vaver, *supra* note 53, at 225–29.

1. The definition of a derivative work and it most important elements

Actually there are a lot of definitions regarding the "derivative works" and this paper aims to give only some of the most important definitions in way to elaborate afterwards some legal opinions and argues.

The Berne Convention for the Protection of Literary and Artistic Works [3]Berne Convention) is one of the first international agreements involving copyright law. This Convention does not explicitly refer to derivative works. Instead, it lists certain uses of copyrighted works for which member countries must provide copyright protection. Specifically, the Berne Convention Article 2, Section 3 states: *"Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright of the original work*." In other words, derivative works shall be protected on their own merits irrespective of the protection of the work on which they are based. The copyright protection of the derivative work does not affect the copyright protection of the original work. This provision is also incorporated into the TRIPS Agreement[4].

Regarding the U.S Code Title 17 Chapter 1 parag 101 the legal American concept of derivative work is: *a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, consideration, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a"derivative work".*

The copyright goal of advancing knowledge has constitutional roots in the U.S. tradition. The part of the Constitution that authorizes Congress to enact copyright legislation

[3] Berne Convention for the Protection of Literary and Artistic Works, Paris revision (1971), available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

[4] TRIPS Agreement, Marrakesh, Morocco, April 15 1994, available at http://www.worldtradelaw.net/uragreements/tripsagreement.pdf

is explicit that the purpose of the grant is "to promote the Progress of Science" (by which the founders meant knowledge)[5].

The founders of American Consitution believed that an educated populace would be necessary to sustain the democratic republic they had founded.8 The Supreme Court has repeatedly recognized that "'the sole interest of the United States and the primary object in conferring the copyright monopoly lie in the general benefits derived by the public from the labors of authors.'

Interesting is the fact that at the beginning states were so awarded to give a guaranty to the authors regarding to their rights of copy right such was approximatively interdicted to interfere in a preexisting work. But this was not normally because science, arts and life are aimed to progress and to be better. The case of American court Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) explained that ("The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright .

Derivative works are those that are based on an earlier work, but whose modifications are substantial enough to create a new work. The "amount" of modification necessary to qualify for protection as an autonomous derivative work varies from country to country and is usually connected with levels of originality or creativity.

What is important follows:

1. A derivative work is a "new" work, based on a previous one, but independently protected from it and its term of protection (50 or 70 years after the death of the author) will begin to elapse from the year in which the "derivative author" dies;

2. The creation of derivative works is a right that copyright law usually reserves to the author of the original work of authorship, so the only person allowed to create or authorize the creation of a derivative work is the rights holder.

In the case of primary or secondary sources, the specific version, edition, or translation must be examined. While it is indisputable that Nietzsche's works are in the

[5] U.S. CONST. art. I, § 8, cl. 8; *see, e.g.*, EDWARD C.WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 125-26 (2002) (explaining that the founders used the word "science" in this clause to mean "knowledge").

public domain, a given translation or re-elaboration might still be protected because the translator or re-elaborator, although not Nietzsche, might have created the work just a few years ago. A derivative work is a new work, a kind of creative reelaboration, where the reasons for a new, autonomous protection resides in the originality or creativity that the "derivator" puts into the activity. However, the "derivator" must have been authorized by the original author, the original work must already be in the public domain, or the modification does not require authorization for other legal reasons (such as the presence of specific exceptions or limitations to copyright)[6].

Another important definition to be taken in consideration is the one that is given by the european directive 2001/29/EC conform which: *"Derivative Work" means a work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this License."*

In Europe, the term can be related to the adaptation matters in the relevant legislations.

The Foundation of Information Policy Research however did define derivative works in its guidance to implementing the EU Copyright Directive. Derivative works under that were to be considered works that were based upon the original work or upon the original work and other pre-existing works, such as translation, musical arrangement, dramatization, sound recording or any other form in which the original work may be recast, transformed or adapted.This definition is essentially a copy of the U.S definition and emphasises further the matter that the derived work has to be based upon the original work in order to fall within the scope of derivative works. In principle, both EU and U.S. recognise derivative work rights as part of copyright that does also include the right to alter content of an initial work, take extracts from the original work, combine them, translate them, or otherwise create a new

[6] http://www.ivir.nl/publicaties/download/437

work from the existing work, an owner of the creative work does have the absolute right to create such derivative works[7].

As we observe the derivative work stands for a concept of work that is correlated with another work which is created before this second work but this one is inspired from the first work but comes in a new form or manner. Important also is the fact that in order to have a legal derivative work if the original work is not part of a public domain, the author of the derivative work must require the permission of the author that created the first and original work, otherwise the derivative work done without permission is illegal. Also in this content is important to stress that collective works are not included in the category of derivative works as whole, this is more evident at the European legal framework. But this argument does not mean that parts of collective works done by individual authors are not classified as derivative works. Collective works in principle consist of separate and independent copyrightable materials that have then been organised into a single unit[8].

Generally periodicals, encyclopaedias or other forms of collective pieces fall within the scope of collective works. The main common aspect for collective and derivative works lies in the fact that they are both based on pre-existing copyrightable works.

As we observed by the American legislation are evidently some exemplary derivatives as :

1.1 Abridgements

These two types of derivatives are similar but they are not exactly the same. Abridgements and condensations may be targeted to readers who would be disinclined to consume a much longer, more detailed work. To that extent, they may operate in a different

[7] AVE LIIS SALUVEER, Faculty of Law Lund University, "The concept of derivative works under the European copyright law in relation to the digital era: free and open source software licensing", JAEM03 MASTER THESIS, Spring 2014

[8] M.Webbink,*PackagingOpenSource*,(2010).Available,at:http://www.groklaw.net/article.php?story=20100204170037353 (Last accessed: 15.01.2015)

market segment. Yet, abridgements and condensations are likely to supplant demand for the original as to a nontrivial set of consumers[9].

1.2 Condensations.

Condensations involve iterative copying, but even if a condensation uses different words than an abridgement, the degree of similarity between the original and a condensed work is likely to be substantial.

1.3 Translations

Operas as translations and art reproductions are derivative works that are considered "faithful renditions". These faithful renditions are mainly intended for a different segment of the market than the original, although there may be some market overlap between the original and the derivative for some consumers. For example, unauthorized translations pose some risk of supplanting demand for the original for multilingual persons. Yet, for most consumers, the original work and a translation do not compete in the same market[10]. In Albania for example due the fact that copyright is still a new field are a lot of problems regardind to the right of translators and reproducers.

1.4 Reproductions

Reproductions generally operate in the same part of the art market as originals. Art reproductions pose a relatively modest risk of supplanting demand for originals.

It is possible, for instance, that some consumers might be willing to pay $200 for an original if a $10 poster was unavailable. However, for many art lovers, demand may exist

[9] Pamela Samuelson, The quest for a Sound Conception of Copyright`s Derivative Work Right – pg 13

[10] Ibidem

only for originals, and art reproductions may mainly appeal to more financially constrained consumers[11].

1.5 Transformations of expression from one medium or genre to another

Usually dramatizations and versions of expressive elements, characters underlay work to a different medium. The interior of a room for example can be described in a book but at the same time can be dramatized by a scenery.

Changes in medium have implications for the markets for the underlying and derivative works. The primary market for a dramatization (stage performances) is quite different than the primary market for a novel (sales of copies). Motion-picture derivatives of novels may be exploited by theatrical performances, television broadcasts, and sales of DVDs or the like[12].

For example: "the English translation of the novel *Dr. Zhivago* is derivative of Boris Pasternak's original Russian text, while the 1965 film and the 2002 ITV television serial, both titled *Dr. Zhivago*, are derivative of both; the 1959 Brazilian film *Doutor Jivago* is derivative of the original novel, as is the 2006 Russian TV series *Доктор Живаго*. All of these make some plot and characters changes from the original, but are still recognizably the same work. The 2005 musical *Zhivago*, opening at San Diego's La Jolla Playhouse in 2005, is derivative as well […]. The 2007 Russian musical *Доктор Живаго* and the forthcoming opera of the same name, each with their own original music, are similar. Had any of these adaptations of *Dr. Zhivago* been made without authorization, they would have violated Pasternak's copyright[13]".

[11] NAOMI Z. SOFER, MAKING THE "AMERICA OF ART": CULTURAL NATIONALISM AND NINETEENTHCENTURY WOMEN WRITERS 128 (2005) ("[T]he market for lithographs, good-quality full-color reproductions that sold for 'the price of a pair of slippers,' is entirely different from the market for original art, and . . . one does not cannibalize the other . . . ." (quoting James Parton, Popularizing Art, ATLANTIC MONTHLY, Mar. 1869, at 355)

[12] PAUL GRAINGE, BRAND HOLLYWOOD: SELLING ENTERTAINMENT IN A GLOBAL MEDIA AGE 9 (2008)

[13] A. SCHWABACH, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*, Ashgate, Farnham, 2011, at 65.

2. THE IMPORTANCE OF THE ELEMENT OF ORIGINALITY IN A WORK

2.1 The legal framework of original authorship and fixation

When we talk about the copyright and derivative works the most important element is originality. As we observed the american legal framework stressed very good two important aspects regarding the originality: original authorship and fixation. Fixation is an element that is most corelated with the electronic and software programs. Source code in most incarnations is considered sufficiently fixed within the meaning of the stature[14].

These exploitations may be unlikely to supplant demand for copies of the original book. In some cases, motion-picture versions of a book may create positive demand for the original version. A key factor in this type of derivative work analysis is whether an unauthorized derivative will supplant demand for an authorized dramatization or motion-picture version of the literary work.

Fictionalization is another derivative that will implicate the derivative work right insofar as it transposes expression from the work upon which it is based. A history or a biography may inspire a second author to fictionalize episodes from the lives of persons discussed in the underlying work. As long as the fictionalization draws only upon the facts or research materials from the nonfiction work, infringement of the derivative work right is unlikely[15].

What realy happens in markets? To answer this question we must evaluate some common behaviours of creators which in harry to do everything fast and to have back the economical profit do not take in consideration an important thing which is time to be given in way to guaranty all their economical and copyrights. So composers look to markets for sound recordings and rearrangements to recoup their investments in the creation of music. Novelists

[14] Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1243 (3d Cir. 1983).
[15] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980) (rejecting historian's claim that a movie about the Hindenberg disaster infringed copyright in his history book).

expect translations, dramatizations, and motion-picture versions to be derivative markets of their books. Nonfiction writers anticipate translations, fictionalizations, abridgements, and condensations of their works. Painters and sculptors may regard art reproductions as viable derivative markets. Although the derivative work right is no longer statutorily linked with particular types of works, the nine examples nevertheless generally remain limited by type. Musical arrangement is the most specific and obvious example. Art reproductions as derivative works seem applicable only to pictorial, sculptural, and graphic works. Fictionalization implies a nonfiction literary work as the based-upon work. Translations and dramatizations are likewise types of derivatives most likely to be undertaken with literary works. A translation right would make no sense as applied, for instance, to architectural works any more than pantomimes could be recast as sound recordings.

"The originality requirement is not particularly stringent," and, as discussed in the U.S. Supreme Court case Feist Publications, Inc. v. Rural Telephone Service, Co. which considered the copyrightability of an alphabetically organized phone book, is comprised of two elements: "that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." A work satisfies the "independent creation" element so long as it was not literally copied from another, even if it is fortuitously identical to an existing work.[16] It is important to have in attention that a work is componed by original and unoriginal elements, but it is imperative for a work to have in majority original elements and components in way to be consideret not only an original work but at the same time a work that is protected by the law of copyright.

In this situation we must evaluate the size and the substantiality of infringement of originality.

Usualy an affirmative defence to infringement of originality is „the fair use" which does not implicate the infirned work`s copyrightability. But here we must consider the amount of substantiality of the portion of work used in relation to the work as a wholem and are a lot of cases in which is addmissible to create a new work which is original by itself by using in fair mood an old work without infringing the copyright of the first work.

[16] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991).

Another important issue on infringement is the fact that implicates the size of the copied work. This is called the factor "de minimis" in copying. The de minimis analysis touches on two of the factors in the fair use analysis: whether a substantial portion of the work was copied, and also whether the copying would "diminish the value of the original."

Albanian legislation for Hight Education has included an interesting providement regarding to the factor "de minimis" at the master or Phd thesis. This is a procent of 70% of originality. It means that a master or Phd thesis has to be at least 70% original and only 30% can be reproduction. In this procent of originality is permited and the analyse of the doctrine but in an original way by each master candidate and Phd candidate.

But how we can react with hybrid works? In this regard the Supreme Court of US has already estabilished the framework for analyzing such hybrid works in Feist.Though *Feist* dealt in particular with mixed factual and expressive works, it applies with equal force to other hybrid works, and has been applied as such by lower courts.

Feist recognized that an author's original contribution to a hybrid work may comprise two types of expression: an author may "clothe facts with an original collocation of words. . . [and] claim a copyright in this writte expression," and she may also "select and arrange" uncopyrightable elements in an original manner and claim copyright in that selection and arrangement. *Feist* emphatically reiterated that mere collections of unoriginal elements are not copyrightable, stated that only a "thin" copyright subsists in "original selection[s] or arrangement[s]" of unoriginal elements, and established that some arrangements undertaken by (and thus in a sense originating with) the author will nonetheless be "so mechanical or routine as to require no creativity whatsoever[17].

These are highly questionable indicia of originality even if original is taken only to mean "having its source in the author," and leaving to one side the creativity requirement. Furthermore, E.F. Johnson Co. Was decided before Altai,and the features identified by the judge as non-trivial original contributions would most likely be considered not copyrightable under Altai as elements "dictated by efficiency. . . [or] external factors," or as residing in the public domain.For all of these reasons, the Minnesota District Court's interpretation of Durham can be considered incorrect under current law[18].

[17] Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 711 (2d Cir. 1992).
[18] Ibidem paragraphs 41-46

3. INTERNATIONAL LEGAL FRAMEWORK

An important international legal framework to be taken in consideration is the WIPO Copyright Treaty (WCT) and the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These legal frameworks have made explicit that the standards set forth in the Berne Convention for the Protection of Literary and Artistic Works are also applicable to software. The Berne Convention does not provide for a uniform originality test but refers to the laws as established by each country. Nevertheless, the Conventions make clear that no other requirements have to be met by software to be protected under international copyright law. In addition, the Berne Convention specifically states that "Translations, adaptations. . . and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.[19]"

This provision is also applicable to software. Therefore, derivative works of software are protected under the Berne Convention if they meet the normal standards for derivative works of literary and artistic works.

For E.U. signatories to the Berne Convention, these agreements ensure that works of software, including derivative works, containing the requisite originality will be eligible for copyright. Because the E.C. standard is so similar to that of the U.S., for practical purposes, originality under one indicates originality under the other. Consequently, copyright for software will be coextensive under both sets of laws.

[19] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2, para. 7, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

4. CONCLUSIONS

As a conclusion we believe that the american and European legislation are almost unificated and the terminology is well developed, but having in regard the progress of technology and culture is necesary *de lege ferenda* to have more specific definitions in way to respond to all the requests that reality offers. In a general definition aproved by the most part of lawers derivative works are works that consists in adoptations and other works that have been based upon pre-existing works, aleready protected by the copyright laws. EU and US in their legislations recognise the copyright of the author that has done a derivative work. But it is essencial for the derivative work to have its own originality and indipendence of the initial original work, otherwise the second work based in a initial work will be not clasified as a derivative work but it will be a bad copy.

Derivative works help in general the promotion of culture, technology and art but still is an immediatly need to educate in first instance the authors about their rights and about the modalities they have in their hands in way to check all the modifications are done by other authors in their original work, with or without their permission. Also at least for Albanian courts and judges is very important to have trainings and interships in way to improve their knowledges in such cases. It is still a lacke of doctrine in Albania regarding copyrights as a hole and derivative works epecialy. Also notions as abridgements and Condensations usually are confused with each other.

In interesting topic that needs big attention allways regarding the derivative works is the originality of a work. As we presented above there are some criterias that need to be respected in way a new work that will be considered a derivative work must fullfill in way not to be a plagiature or a bad copy which damages the original work.

A work satisfies the “independent creation” element so long as it was not literally copied from another, even if it is fortuitously identical to an existing work. It is important to have in attention that a work is componed by original and unoriginal elements, but it is imperative for a work to have in majority original elements and components in way to be consideret not only an original work but at the same time a work that is protected by the law of copyright.

In this situation we must evaluate the size and the substantiality of infringement of originality.

Usualy an affirmative defence to infringement of originality is „the fair use" which does not implicate the infirned work`s copyrightability.

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