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# Derivative Works, Original Value

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**ABSTRACT:** Many arguments offered by the free culture movement emphasize the ways in which new works rely on works, which have gone before, the discoveries and data of other scientists, and a general stock of common knowledge. An examination of the ways in which old works inform new works will show that drawing on previous works is a necessary and inevitable part of the act of creation. Despite the negative connotations surrounding the label “derivative,” all works are, in an important sense, derivative, and must be so in order to be recognized as novel and creative. As such, there should be greater freedom in the creation and circulation of derivative works. Under the current intellectual property regime, the creation of derivative works can be controlled at the discretion of the author. Therefore, any system of intellectual property rights must preserve the ability of creators to draw on previous works, including the ability to employ significant elements of protected works in their own creations

**M**ANY ARGUMENTS OFFERED BY THE FREE CULTURE movement emphasize the ways in which new works rely on works that have gone before, the discoveries and data of other scientists, and the general stock of common knowledge. In explaining his mission for the Creative Commons alternative copyright license, Lawrence Lessig says, “Its aim is to build a layer of reasonable copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people’s work” (Lessig, 282). In large part, the free culture movement, taking its name from one of Lessig’s books, has focused on reform to intellectual property law in order to preserve access to the works of others for the sake of innovation. Free culture advocates, such as Lessig, Yochai Benkler, James Boyle, and Jessica Litman, argue that before intellectual property law, building on the work of others was taken for granted. The rise of digital technology

and the Internet have provided tools for more efficient sharing of informational resources, and free culture advocates want to preserve the power of those tools against intellectual property owners who seek to inhibit free or open sharing of information because it threatens their ability to monetize (or in some cases, further monetize) their property.

### **Thinking about Derivative Works**

An examination of the ways in which old works inform new works will show that drawing on previous works is a necessary and inevitable part of the act of creation. Therefore, any system of intellectual property rights must preserve the ability of creators to draw on previous works, including the ability to employ significant elements of protected works in their own creations. The central focus of the following argument will be a critique of the current intellectual property institutions, in particular the treatment of derivative works and the prevailing standards of fair use. The critique will be grounded on an account of creativity and artistic expression that highlights the interrelated nature of works of art and the importance of creative expression, by way of “original” and “derivative” works alike, as important vehicles for critical commentary and public debate. Since a utilitarian (incentives-based) account of intellectual property is employed, some economic issues will have to be addressed. While the treatment of derivative works and fair use advocated by this argument might have negative economic consequences for copyright owners, the economic concerns must be tempered by the more pressing concerns about freedom of expression, as will be evident once the aesthetic arguments are fully in view.

In the language of fair use, a work that contains substantial elements of another work is known as a “derivative work.” Derivative works can include translations, novelizations of films, or abridged versions (17 USC sec 101). Works set in another author’s setting, such as a novel written in Tolkien’s Middle-Earth, are also derivative works. Under the current intellectual property system, “the owner of copyright under this title has the exclusive rights to do and authorize any of the following: ... (2) to prepare derivative works based upon the copyrighted work...” (17 USC sec 106). As an exclusive right explicitly defined by law, the copyright holder may authorize or withhold authorization for any derivative work. An unauthorized derivative work is presumed to be an infringement without the right-holder’s permission. There is nothing to prevent an author from authorizing a derivative that he finds flattering while at the same time suing the author of a less flattering derivative work for infringement. The arbitrary control held by the author unnecessarily constrains the creative engagement that makes creative works valuable to audience members and their own critical self-understanding. To highlight the value of derivative works, the discussion will center on two examples, the short fiction of H.P Lovecraft and his influence on literature, and Manet’s famous *Olympia*, the painting said to have begun the Modern Era in fine art.

## Derivatives Strong and Weak

Understanding the ways in which a given creative work is constructed from or influenced by other works is admittedly a complicated matter. At this stage, it will be helpful to distinguish between two senses in which a work can be derivative. U.S. copyright law and fair use standards concern “translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted” (17 U.S.C. § 101). I will refer to such works as strongly derivative works. An English translation of a French novel would simply not exist if not for the original novel. Likewise, a novelization of a film depends on the film just as strongly as a film adaptation depends on the original novel. In each case, there is a clear ancestral relationship between works. Strongly derivative works can be distinguished by the existence of clear, undeniable ties to another work such that the counterfactual “Were it not for work-A, work-B would simply not exist” holds. Very specific elements, such as main characters or setting, may be “borrowed” from another author’s work. For example, a short story that described the further adventures of Harry Potter would be strongly derivative of J.K. Rowling’s novels. Since only a handful of fair use cases have actually been heard by the Supreme Court, there has been little jurisprudence applied to derivative works. From the few existing opinions, US jurists have developed tests for “substantial similarity” in works. If two works closely resemble one another in “total concept and feel,” the later work may be an infringement of the earlier work (Sharb, 913).

In the absence of a clear ancestral relationship, a work may still have obvious influences or inspiration from other creative works. A schlock horror film may be little more than a distillation of tropes found in films such as *Nightmare on Elm Street*, *Friday the 13th*, and *Halloween* without being a clear child of any particular work. Such a work could be described as derivative, but in a much *weaker sense* than the translation or adaptation discussed above. Weakly derivative works “borrow” elements of existing works, but the borrowed elements are only similar on a very general level such that there is no dependence on any particular work. One could not say “Were it not for work-A, work-B would not exist” because the borrowed content could have come from other similar works (i.e. works in the same genre). The distinction between strongly and weakly derivative works forms a continuum along which a work can be placed depending on how much material the new work draws from a previous work (or works). Of course, borderline cases will exist. For example, a work might incorporate a main character from another work in a minor role. While the main character is a substantive element of the parent work, the incidental part played by that character indicates that other recognizable characters from a work in the same genre might have been sufficient. In that case, one might reasonably say that the counterfactual “Were it not for work-A, work-B would not exist” does not hold, or at least most likely does not hold. Whether such a work should be considered strongly or weakly derivative will then be a matter of

debate, the outcome depending on how concerns about the borrowing and the role played by the borrowed content are weighed.

For example, the short fiction of Howard Phillips Lovecraft has inspired both strong and weak derivative works. H.P. Lovecraft (1890-1937) spun fairly fantastic yarns in a style he came to call “weird fiction” (Joshi 2001, 3). In Lovecraft’s stories, the role of the Other is played by alien entities, extremely ancient beings who traveled across the vastness of space, arriving on Earth before the rise of human civilization (Joshi 1990, 192). Since the entities are from another galaxy, their physiology and psychology is beyond human understanding, and those people who come into contact with them, or artifacts associated with them, are driven insane (Joshi 1990, 205). John Carpenter’s film *In the Mouth of Madness* serves as a particularly strong example of a “Lovecraftian” derivative work, drawing from Lovecraft’s life as well as his stories. Carpenter’s film concerns the investigation of a reclusive New England author, well-known for his tales of terror. The author, Sutter Cane, has vanished just as a film version of his more recent book is to be released. The hapless protagonist finds that anyone who reads the book goes insane, and he soon finds out that the film version will have the same results. A somewhat weaker example can be found in a more recent film. *Cloverfield* plays with a different Lovecraftian device, the indescribable horrors that make their way into our world. Relying heavily on the techniques of *cinéma vérité*, the story is told from the perspective of a few victims by way of their amateur video recordings. The main characters’ limited point of view highlights their inability to comprehend the creatures that violently invade the city.

Lovecraft’s influence has also spread out of genre fiction and into the world of literary fiction. Celebrated authors such as Jorge Luis Borges and Joyce Carol Oates have referred to Lovecraft as an influence on their writing. Mark Danielewski’s *House of Leaves* provides an excellent example of a work that is only weakly derivative of Lovecraft’s tales yet nevertheless contains obvious Lovecraftian elements. With respect to themes and mood, *House of Leaves* is a classic Lovecraftian yarn, complete with lethal text, mysterious passageways, and an unseen horror lurking in the darkness. The novel itself centers around the unpublished scholarly analysis of a documentary known as *The Navidson Record*. The main character Johnny Truant discovers the manuscript in an apartment he hopes to rent, and begins editing it out of curiosity. The documentary itself is a record of a family’s explorations of a mysterious closet-space which appears in their home. As the family explores the space, they find that space occupied by the closet exceeds the dimensions of the house itself. As they explore, the dark passage grows, and some of the assistants they bring in to map out and study the space vanish in the darkness, as if consumed by something living in the labyrinthine passageways. The unseen creature is appropriately enough dubbed “the Minotaur.” Johnny Truant is eventually driven insane by his work on the manuscript, drawing further and further away from reality and ultimately slipping into paranoid delusions. While Danielewski’s novel is truly a terrifying tale, Danielewski also uses the novel to comment on academic writing and criticism, through copious and often inconveniently typeset editorial notes. The text itself is a melange of the scholarly

writing found in the manuscript, the rough, uncultured writing of Johnny Truant, and somewhat pedantic marginalia by unknown editors. *House of Leaves* essentially employs the Lovecraftian mode as a medium, transforming weird fiction into a commentary on the academic study of literature itself.

The denial that all creative works are somehow derivative, at least in the weak sense given here, simply flies in the face of reality. Margaret Boden describes creativity as transformations or explorations of conceptual spaces, attempts to get to the same places by different routes, to find connections between seemingly unrelated spaces, or to discover entirely new spaces (Boden 47). Lovecraft's work would be considered creative under this account just because he combined and transformed familiar elements in unexpected ways. Furthermore, the above examples show that derivation does not spell the end of creativity as all of the above projects contain something novel or innovative alongside (or perhaps because of) their reliance on Lovecraft's fiction as a background. Creative works begin with the creator's interactions with her physical, social, and linguistic environments. When an author wants to tell a story, he must do so in such a way as to be understood by his audience. Roland Barthes perhaps puts this point best in saying "The text is a tissue of quotations drawn from the innumerable centres of culture," (Barthes 1977a, 146). Narrative conventions are learned by observing their use in other stories. The same case can be made for poetry and poetic forms, painting and perspective, and other stylistic conventions in the creative arts. Creators need not be fully bound by these conventions, but they must be familiar with them in order to employ or subvert them in their works. Constraints also require an author to be more innovative or highlight the novelty of a work by contrasting it to a static form. As such, all creative works are at least weakly derivative of the works from which the creator has drawn his understanding of the relevant artistic conventions. Postmodern literary theory contains a recognition of relationship between texts, or intertextuality, as a necessary part of our understanding of any work (Barthes 1977b, 160). These sentiments are also echoed by Arthur Danto's account of the "artworld" in which he claims "It is the role of artistic theories, these days as always, to make the artworld, and art, possible," (Danto 1964, 581). Without some context or background, artistic theories, narrative conventions, a shared language, we cannot recognize the author's product as creative or as art.

### **Interpretative Control**

Strongly derivative works provide substantial opportunities for commentary and criticism of an original work. Nevertheless, some creators may worry about alternate interpretations eclipsing their original work. These concerns are the basis of the "self-expression" justification for intellectual property, the concern with protecting the integrity of the author as expressed through his or her work (Resnick, 326). Under the self-expression justification, intellectual property rights are based on a natural right of authors over their creations as domains for the free exercise of the creator's will and imagination. As such, control over interpretation is important to preserving that domain for the author. Imagine that a country music star releases

a song praising masculinity and celebrating the singer's possession of traits recognized as masculine. The song is popular among fans of country music and achieves some notoriety among the mainstream audience. In the gay community, the song also achieves some popularity because gay men view the song as a celebration of the masculinity they find desirable. While the country music star did not intend the song as an anthem for the gay community, many gay men read a certain subtext in the song and empathize with that subtext, even though it has nothing to do with the artist's original intent. Eventually, a troupe of gay dancers makes a video of themselves flamboyantly dancing to the song, and one of the members uploads the video to YouTube. The video is widely circulated, reaching fans of the original song and informing the audience at large about the gay community's interpretation of the country song.

The country music star's fans are largely social conservatives who are offended by homosexuality, and they are not happy about the video. The video becomes so popular that whenever the song is mentioned, many people immediately think of the gay dancers rather than the singer's original presentation of the song. Fans of country music begin to avoid the song even in the absence of the offending video because they would prefer not to be reminded of what they see as a gay spoof of their own values and aesthetic sensibilities. The backlash is so profound that the country music star sees his sales plummet and begins a large public relations campaign to uphold his image as a heteronormative conservative in order to maintain his target audience's perception of him and his music.

In the country music case, there is a strongly derivative work, the video, and what appears to be a harm to the original creator's domain of expression and his ability to profit from his work, the latter being important to utilitarian accounts of intellectual property that justify the institution as providing incentives for creators to release their works. From the artist's perspective, a certain amount of control may be desirable so that his work will be more likely to be viewed as he intended it. Providing that interpretive control would increase the value of intellectual property rights for the creator, increasing the incentive to publish works, no matter their content. The country music star would be assured that any derivative works that he finds offensive can be prohibited. On the other hand, audience members may find that allowing the creator strong control over derivative works diminishes the value of the work for them. If the country music star were able to demand the offending video be removed from YouTube, the gay community would find themselves alienated; the dancers would be unable to communicate their understanding of the song. The only acceptable understanding of the song would be the mainstream understanding. The rest of the audience would be deprived of an alternate point of view, the consideration of which they may find interesting and valuable. Commercially successful works represent the ordinary, the popular, or the mainstream. By extension, alternate interpretations of those works, including parody and criticism, represent alternate perspectives on the mainstream. If every creator had the ability to ban derivative works that highlight alternate interpretations of the parent work, the audience would be deprived of the ability to analyze and understand creative works for themselves. Consider the case *Walt Disney*

*Productions vs Air Pirates* in which Disney sued the producers of an underground comic strip for depicting Mickey and Minnie Mouse using illegal drugs (Waldron, 886). While Disney certainly has an interest in maintaining the reputation of their characters, the cartoon mice have become recognizable symbols. Employing those symbols as the Air Pirates did creates a powerful commentary on the distance between the mainstream and counterculture, a commentary that might not be possible without those symbols. Since utilitarian justifications for intellectual property maintain that creative works are valuable and therefore worthy of the incentives provided, a conflict arises between the benefits the audience hopes to gain through a proliferation of creative works and the protection of the author's domain of self-expression. The only way out of the conflict is to determine which claim is prior, the author's claim to his private domain or the audience's desire to benefit from creative works. A careful account of how the audience hopes to benefit from creative works will show that those benefits are one and the same with an essential political right in a liberal democracy: free expression.

### Truth in Copy

When Edouard Manet first exhibited *Olympia* at the Salon of 1865, the painting was met with jeers and harsh criticism. A little more than two decades later, Claude Monet organized a fund to raise money for the purpose of purchasing *Olympia* for the Louvre (King, 365). Manet's *Olympia* serves as a powerful argument for the need to creatively engage with important cultural works. Without the established tradition, *Olympia*'s showing would have been far less dramatic, and far less influential. To fully understand the scandal Manet caused, one must look not only at *Olympia*, but also at Titian's *Venus of Urbino*.

The nude in *Olympia* is depicted in a much different light than the faithful wife in Titian's painting. Manet's nude is anything but demure. Her gaze unshyly meets the viewer, appearing to make direct eye contact (Nehamas, 108). Rather than delicately placing her hand so as to cover herself as in the *Venus of Urbino*, *Olympia*'s hand is more aggressively stretched across her thigh. Where Titian's Venus uses her hand to mimic the shape of her genitals, Manet's *Olympia* stretches her fingers in a way more reminiscent of the male sexual organ (Nehamas, 108). Furthermore, Manet's nude cannot be mistaken for a faithful wife. The dog in Titian's painting is replaced by a cat in Manet's version; in the slang of Manet's Paris *les chattes* referred to both female genitals and prostitutes (King, 107). Likewise, the servant has been replaced by a black maid, a common sight in depictions of brothels because of the then-common belief that black women more libidinous than white women (King, 109). Combined, the gaze and posture of the nude, the cat, and the black maid, indicated to Manet's audience that his *Olympia* depicts a scene in a brothel. The goddess, transformed into a faithful wife by Titian, is now transformed into a common prostitute. The classic nude, whose lack of clothing was seen as appealing to elevated sensibilities rather than prurient interest, has been subverted, placed squarely within what Parisian society would consider

immoral. Nevertheless, Manet's work is rich in meaning and commentary, not just on depictions of the classical nude and Titian, but also on his own society.

Without engaging with, and subverting, the artistic tradition, Manet's work would not have had the same impact. Manet needed to employ something his audience would understand in order to comment on the artistic tradition, the artistic establishment, and controversial social issues. The critical mode made possible by derivative works such as Manet's *Olympia* is an explicit component of John Stuart Mill's defense of free expression. Mill upholds free expression as a key component of liberty because once expressed, an idea is subject to criticism and debate. Criticizing a view, or arguing against the view's critics, requires an agent to understand the view thoroughly, learning not just the content of the belief, but the arguments which support and refute the belief (Mill, 46). Without critical understanding, the agent does not truly comprehend his beliefs; he holds them "in the manner of a prejudice with little comprehension or feeling of its rational grounds" (Mill, 67). When agents are simply allowed to express their views and debate their beliefs in the public forum, critical understanding arises in the course of debate. The agents engaged in the debate, along with the observers, must reason for themselves to support their chosen side and come to understand their opponents' arguments as well as their own. Critical understanding of one's own beliefs is beneficial because with such understanding in hand, the agent can have warranted beliefs about himself, his goals, and his own satisfaction or happiness (Riley, 67). In the end, free expression is important to Mill because expression is a means to truth, and a means to truth that relies on nothing other than the spontaneous exercise of reason among free agents.

Mill's arguments most readily apply to rational discourse and debate (Skorupski, 369). Nevertheless, creative works can be deliberate communication tools used by the author to present some set of beliefs, or some evaluations of beliefs. Even if the author has not intended some particular communication, a creative work still reflects the prejudices and commonly held beliefs of the context in which it was produced. As such, creative works can stimulate discussion or reflection, making cultural values available for critical reflection and understanding. By presenting an alternate interpretation of a creative work, a derivative work informs the audience of a new way to look at the original work. Some members of the audience may not have considered the perspective presented, and their reflection on the original work may be deeper in light of what they have learned through the derivative work.

Derivative works provide openings for criticism and debate about mainstream values, prejudices, and expectations. Through considerations of such works, audience members can develop a critical perspective on their own culture, encouraging them to evaluate their own beliefs as well as those of the mainstream. The critical perspective and accompanying self-evaluations are very liberating for the individual agent. Through the critical perspective, the agent can come to understand his own beliefs very deeply and feel more secure in the rational foundations of his beliefs. An agent whose beliefs or lifestyles diverge from the relevant cultural norm may find great therapeutic value in criticizing the mainstream in creative form, or merely in appreciation of works that do so. The agent can find

himself free from the bondage of cultural routine because his reasons for choosing his lifestyle, occupation, and recreation are transparent. Since intellectual property rights restrict the creation of derivative works, some care must be taken to preserve this valuable channel of expression and debate.

Strongly derivative works allow a focused commentary on a particular work or even aspect of a work. For example, Mark Chamberlain's "Queer Batman" watercolors offer very specific commentary on a highly recognizable cultural icon. By depicting the characters Batman and Robin in homo-erotic situations, Chamberlain sought to highlight the similarities between the "dynamic duo" and gay culture. Secret (or "closeted") identities, close fraternal relationships, and fanciful costumes are important elements for superheroes and homosexual men alike. Chamberlain's watercolors were not well-received by DC Comics, holder of Batman-related intellectual property; the corporation demanded that Chamberlain's gallery hand over all unsold pieces from the series, as well as all profits from sold works. Fortunately, when news of the demand by DC Comics became public, Chamberlain received an overwhelming amount of public support, and DC Comics quietly dropped the matter. Chamberlain's work revealed and celebrated an interpretation of a cultural icon that had previously been discussed only negatively. Fredric Wertham's *Seduction of the Innocent* was the first work to publicize homosexual themes in Batman, but Wertham's goal was to expose the dangerous influence of comic books on impressionable children. By contrast Chamberlain's work can be understood to agree with Wertham's findings but disagree with his valuation of those themes. Chamberlain instead presents the homo-erotic subtext in Batman as something to celebrate, a positive image for young homosexuals.

Protecting the ability of the audience to release strongly derivative works also protects the ability of the audience to express, debate, and evaluate certain ideas. Artists should not have the right to censor discussions of their work, no matter what form the discussion takes. Here, we can return to the question of the country music star and the damaging YouTube video. Given the argument presented here, even considering any harms to his profit margins, allowing the country music star the right to suppress the creation and circulation of strongly derivative works would amount to an unconscionable license for censorship. The creator of a work may intend a particular meaning, but members of the audience will react differently to the work, articulating what the work means for them and how they relate to it. These alternate interpretations are simply the result of rational agents coming to understand works for themselves. Suppressing the creation of derivative works that express individual understandings are no more than attempts to avoid the circulation of truths uncovered by spontaneous acts of reasoning. As such, strongly derivative works should be understood as having expressive content on par with original creative works, and therefore intellectual property law should be so constituted as to protect free expression by way of derivative works.

## **Law and Social Policy Implications**

Finally, we come to the question of practical consequences. Given the considerations outlined, how should intellectual property rights change? At present, the author has exclusive control over derivative works, and fair use is treated as an affirmative defense (Tehrani, 16). In other words, fair use is a recognized defense, codified in law, that can be offered in response to a copyright suit. As such, the burden is on the defendant to prove that the offending use was fair. Treating fair use as an affirmative defense means that any use of copyrighted material constitutes an infringement, but infringement can sometimes be excused on certain legislatively defined grounds. The copyright holder has rights against the public, but the public has no such rights against the author. To preserve the interests in free expression outlined here, fair use should instead be construed as rights withheld by the public in order to protect the public interest in creative works. While creators need some way of securing a living through their creative labor, the audience must also preserve its ability to benefit from creative works. To this end, there should be a schema of fair use rights, which facilitate the audience's creative engagement with protected work.

With respect to derivative works, the commercial nature of the derivative work should be a key concern. Only strongly derivative works produced and distributed for profit should be subject to legal scrutiny. Creators would then be able to license their work for translation or adaptation to other media and to demand payment for such license. On the other hand, derivative works distributed non-commercially, such as fan fiction stories posted to a website, should be a fair use, a sign of the audience's incorporation of the work into the cultural conversation. The originating author may not be entirely happy with the contents of those works, but alternate views on a work should be understood as dissenting views in a conversation. Debate and discussion facilitates reflection on the work and the shared culture from which it emerged. Non-commercial derivative works are simply expressions of ideas or opinions, as protected by the right to free expression. There is no commercial competition with the original, so there is no harm to the copyright holder. On the other hand, allowing non-commercial derivative works as fair use benefits the audience, facilitating the realization of the desired benefits of a society rich in creative media.

## **Conclusion**

A study of derivative works shows that intellectual property law poses problems for free expression and creativity. All creative works can be understood as derivative works, even if only in a very weak sense. Creative works allow individuals to explore beliefs, cultural biases and prejudices, or simply the author's own point of view. Derivative works allow the same kind of discourse, but they also make possible a critical mode that is especially valuable for questioning mainstream or widely-accepted ideas. The example of the country music song and the gay dance troupe shows exactly how powerful and liberating that critical mode can be. Rather than being alienated by the country music star's views on masculinity, the dance troupe appropriates the song, offering a new interpretation that celebrates masculine

traits from the perspective of homosexual men rather than that of heteronormative socially conservative men.

Nevertheless, current intellectual property law upholds the country music star's ability to control the production and release of strongly derivative works, including works that express alternate interpretations. While the country music star may have good reason for wanting to control the reception of his work, the harm done by depriving the audience of the ability to creatively engage with works is too significant to ignore. Free expression, particularly expressions that criticize mainstream ideas, is chilled by the arbitrary control exercised by copyright holders. Without the ability to prepare derivative works of widely-recognized icons, creators are unable to express their own views about cultural biases and prejudices, and the critical mode that allows one to question both her own ideas and those of others is lost. Intellectual property law must accommodate the creation of derivative works for the sake of upholding the free expression so important to liberal democracy.

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