



## Copyright and the “Derivative Work”

### Legal Disclaimer

- Law is ever-changing. This briefing is a synopsis only and cannot substitute for personal legal advice. Everyone’s facts and circumstances are different and you should not rely on the contents of this publication to make substantive legal decisions. Please contact me for a further consultation.

People are usually confused about the whole notion of “derivative works” – works of authorship that contain elements drawn from other copyrightable works. Let’s take a few examples:

- A movie based on a play
- A television documentary that contains archival footage and photographs
- A litho based on a painting
- An audio CD that is a remix of previously released songs
- A musical arrangement based on a piece by Mozart
- A translation of a novel from another language
- An audio CD that contains some songs previously put online
- A sculpture based on a drawing
- A drawing based on a photograph
- A book of maps containing both public-domain images and new materials
- A biography that contains selections from the subject’s journal
- A biographical drama that contains selections from the subject’s journal
- Libretto containing words from a particular translation of the Bible
- Libretto and musical arrangement based on a work by Mozart

All of these examples are derivative works.

### The Definition

Speaking of definitions, a “derivative work,” is a work based on (or derived from) one or more already existing works. It’s subject to copyright if it includes an “original

work of authorship.” Derivative works – or “new versions” - include translations, musical arrangements, dramatizations, fictionalizations, art reproductions, and condensations. Any work that contains annotations, editorial revisions, elaborations or other modifications can be a derivative work if the changes amount to a new original work. Typically, a derivative work is one that is primarily a new work but incorporates some previously published material. It’s the previously published stuff that makes it a derivative work.

Now for copyright to arise, the derivative work must be different enough from the original to be regarded as a new work or it must contain a substantial amount of new material. Making minor or inconsequential changes or additions to a preexisting work will not qualify the work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases and formatting, for example, are not copyrightable.

### Compilations and Abridgments

Now there are also those things called “compilations” and “abridgements”. Here are a few examples:

- A book of news photos selected from newspapers and newsmagazines
- A book of short stories selected from various journals and publications
- An audio recording of pop songs selected from other recordings
- A “condensed” edition of a novel

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## Derivative Works

For a compilation or an abridgment to be copyrightable, they must also contain a new work of authorship. And the “new work” is the editorial selection, deletion and arrangement of the preexisting material. And believe or not, editorial work is creative work as well. If the editor has to use creative judgment to decide which are the most appropriate materials to include, then that editorial touch becomes the new work.

But when the collection process is simply mechanical, with no creativity or judgment, then you may not claim copyright protection for the compilation or abridgment as a new version. In all of the examples above, the “original authorship” is the judgment used to decide which are the best stories, hits or photos and how the material should be arranged.

### What’s Protected?

Any copyright in a derivative work will extend only to the additions, changes, or other new material appearing for the first time in the work. The derivative copyright does not extend to the preexisting material in the derivative work.

As an additional note, you can’t extend the length of copyright protection of the preexisting material by including it a derivative work. If the preexisting materials have fallen into the public domain the derivative work is protected, but there is no revival of copyright for the public-domain material. And you can’t prevent anyone else from using the same public-domain materials for

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another derivative work. If preexisting materials are used without permission of the owner – that is to say, illegally – then copyright cannot be extended to the misappropriated parts.

### Can I Prepare a Derivative Work?

The short answer is: only if you’re the copyright holder. Only the copyright owner has the right to prepare - or grant someone permission to prepare - a new version of that work. The copyright owner is generally the actual author or someone who has obtained permissions from the author. Anyone interested in a work who does not know the owner of the particular copyright may search Copyright Office records.

### Copyright Notices

In the US prior to March 1, 1989, you had to place a copyright notice on all published works - and any work first published before that date should have carried a notice. After 1989, use of a notice is strictly optional.

While it’s certainly not a requirement, it’s a very good idea to place a notice on any work. On a derivative work, the notice might look something like this (and in this instance, an existing book with a new introduction):

© 1950 John Q. Smith; introduction © 2009 Mary Doe