Copyright Law

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Topics:

- The Adaptation Right (The Exclusive Right to Prepare Derivative Works)
- Section 106(2)
- Conflicts with Other Exclusive Rights and Defenses?

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(2) to prepare **derivative works** based upon the copyrighted work;

- *Note that §106(2) does not require proof that the infringer prepared **copies**, in contrast to §§106(1) and 106(3).*
- *The adaptation right is* separate *from the question of copyright in derivative works; copyrightability of derivative works is determined under* Feist *and § 103 ("minimal creativity" w/r/t the source").*

A **"derivative work"** is a work based upon one or more preexisting works, such as a 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. 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."

17 U.S.C. § 101 (2022)

Note the 3 overlapping but distinct definitions of "derivative work."

Section 106(2): The adaptation right and its (possible) economic logic

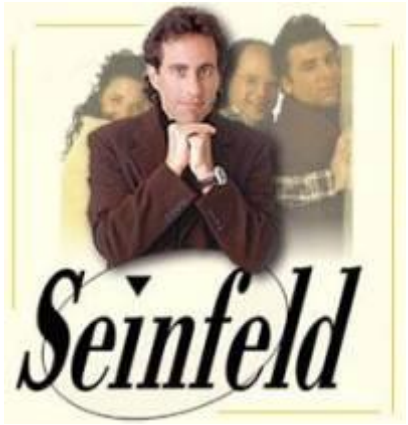
Modern: (maybe) § 106(2) helps producers / authors structure and incentivize (pre-creation) investment in different markets. *The adaptation right enables price discrimination – even if item 1 and item 2 differ not in creative content but only in form/format.*

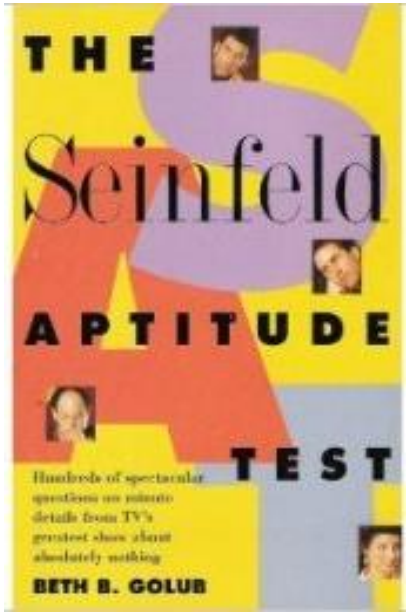
Implication: Does that logic have limits? What are the limits of the © owner's power to control re-use/ downstream uses of the work?

Historical: The adaptation right was added initially in 1870 as a right to control dramatizations and translations – long before those were parts of (the predecessor to) § 106 or the development of the doctrine of "substantial similarity" (which also pre-dates § 106). *The adaptation right captures harmful, non-identical re-use.*

Implication: Is the adaptation right still needed today, given the broad modern scope of the reproduction right and the distribution right (i.e., "substantial similarity" is a broad, elastic concept)? Essentially all substantially similar copying infringes *both* § § 106(1) and 106(2).

And: What about fair use? A derivative work "transforms" the original (see § 101). But a "transformative use" is likely to be fair use – and not a derivative work (see *Campbell* on factor (1) under § 107). *§ 106(2) is explicitly subject to § 107.*





Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc. (2d Cir. 1998): §106(2) liability requires appropriation via "substantial similarity" – just like the reproduction right (§106(1)).

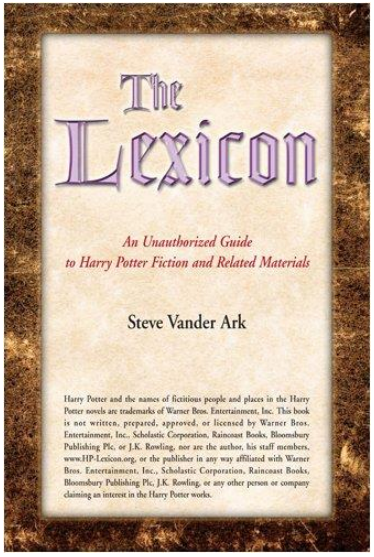
(If so, again: why have §106(2) at all? A: (i) the adaptation right is a historical "appendix"; (ii) adaptations are "patterns" of creation that we recognize; (iii) because of (ii), some disputes have a 106(2) "feel" rather than a 106(1) "feel")

So: characterization and scope matter. The defendant published The Seinfeld Aptitude Test, a book about *Seinfeld*. Is *The SAT* a book of facts about *Seinfeld*? An unauthorized derivative work (appropriation of copyrighted characters and plot points (events))? Fair use?

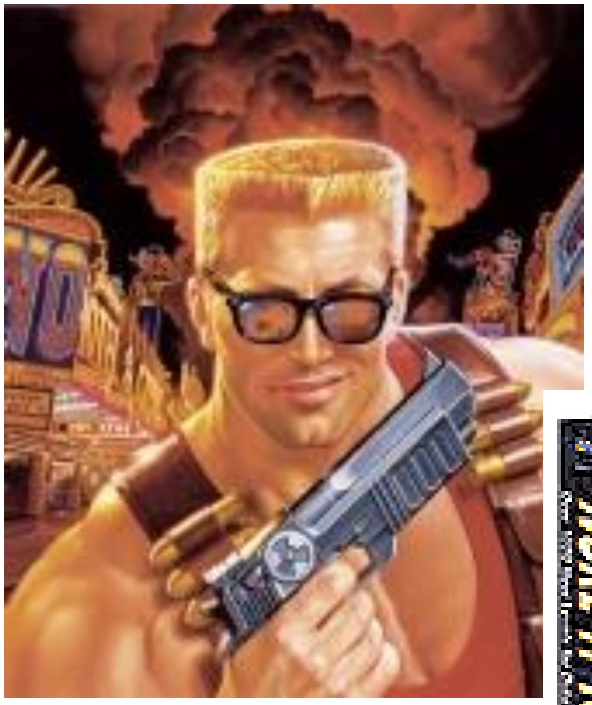
Warner Bros. Entertainment, Inc. v. RDR Books (S.D.N.Y. 2008):

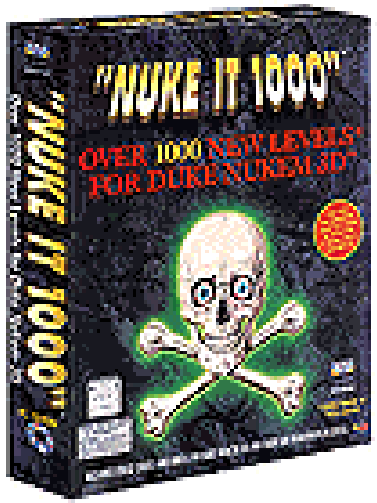
The defendant published an encyclopedia about the world of Harry Potter.

- Is *The Lexicon* a book of facts about *Harry Potter*?
- Is it a reproduction of *Harry Potter*? (If so, a reproduction of what?)
- Is it a derivative work?
- Is it fair use?
- **Does *The Lexicon* interfere with a protectable economic interest or expectation covered by Warner's copyright?**



Section 106(2): The adaptation right and "copies" (but cf. *Galoob v. Nintendo)*





Micro Star, Inc. v. Formgen, Inc. (9th Cir. 1998):
Customary / traditional / conventional understandings of the © owner's right to control adaptations matter. "Everyone knows" that unauthorized sequels infringe the © in the source. There is a doctrinal problem, though: If a derivative work must be "substantially similar" to the original in order to infringe, then are sequels "substantially similar" to the originals? If so, how?

Section 106(2): The adaptation right and “copies”

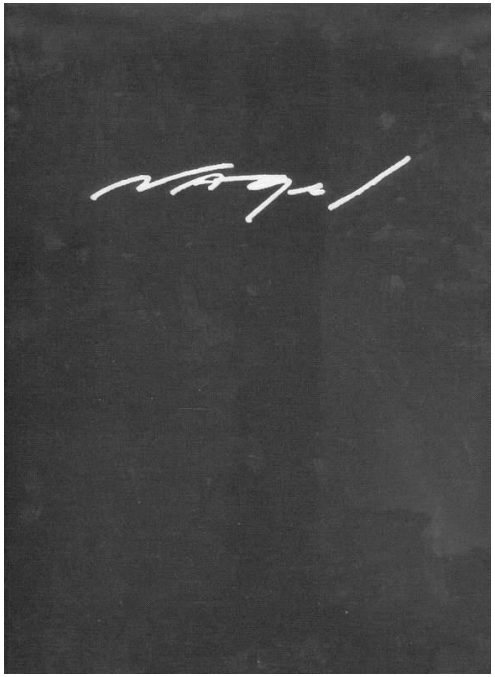
Galoob v. Nintendo (9th Cir. 1992):

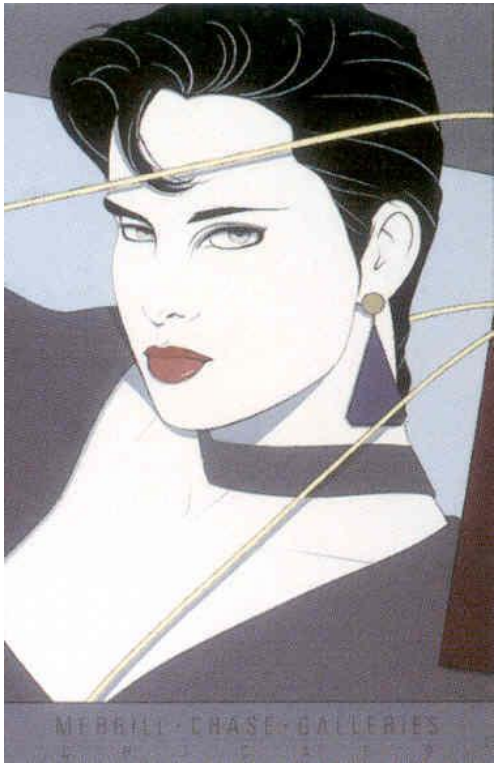
Must a derivative work be “fixed” to infringe? (The Ninth Circuit: yes, sort of, despite the statute omitting the word “copies” from 106(2)

Section 106(2): The adaptation right as a (too?) flexible or fuzzy tool

Worlds of Wonder v. Vector Intercontinental (N.D. Ohio 1986)

Section 106(2): The adaptation right & first sale under Section 106(3) & Section 109(a)





Does mounting a copyrighted card on a tile create a derivative work? Should "traditional" uses be immune and "creative" uses infringe?

Mirage Editions v. Albuquerque A.R.T (9th Cir. 1988) (the tile infringes) *and* **Lee v. A.R.T. Co.** (7th Cir. 1997) (the tile does not infringe)

Section 106(2): Summing up (so far) *and* remember the various purposes of ©

The adaptation right:

(1) (Some say) Encourages / allows copyright owners to control the structure of "downstream" markets for their works. That giving them (revenue) predictability as they decide whether to invest in creating a new work. E.g.: a producer of a Hollywood film that wants to control licensing of videogame versions, theme park adaptations, merchandise, etc.

(2) (Some say) Should be limited to "traditional" or "conventional" adaptations of copyrightable works. Books or plays that become films; sequels to books or films; English translations to other languages; and so on. And the absence of the word "copies" from § 106(2) means that adaptation in unfixed versions should be covered (i.e., extemporaneous or improvisational uses of books/plays). But the "substantial similarity" requirement should apply across the board and prevent the adaptation right from applying to any/all other sorts of changed versions.

(3) (Some say) The § 106(3) / § 109(a) first sale rule should trump § 106(2), where the two conflict.

(4) (Now in the hopper) (How) is § 106(2) ("© owner [seems to control] transforming the work") subject to § 107 (*Campbell:* "transformative use" is favored, especially under factor 1 of the fair use statute)? *Re-read Warhol v. Goldsmith.*

The adaptation right v. fair use

(1) Is it an “either/or”? Or a “both/and”?
(2) Read the statute.
(3) If the Warhol silk screen is a derivative work, can it nonetheless consist of fair use of Goldsmith’s photo?
(4) The Supreme Court: no; look at the images; don’t consider “meaning.”
(5) If it is possible that an (unauthorized) derivative work is fair use of the original work, then how do you know?
Possibilities:
- Emphasize “transformative use” as defined in *Campbell* (meaning, message count, from … who’s point of view?)
- Conduct “all factors” review (does “transformative” use matter at all? What to do about possible factor 4 economic injury?)


the end