

Derivative Rights and the Rule of Law: Judge Posner and Copyright

by Wendy Gordon and Boris Milman

Judge (and Professor) Richard Posner has changed the standards of originality in his Circuit for situations in which a downstream creator seeks copyright in the derivative works she has lawfully made from others' copyrighted works. Thus, in *Gracen v. Bradford Exchange*, he denied copyright to a painting of Dorothy and the Yellow Brick Road, even though the painter (who worked with permission) had won a contest for her creativity and had created a tableau that was not duplicated by any frame of the Wizard of Oz film. Under well established standards, the painter would have had a copyright; Judge Posner denied it to her.

Judge Posner has also suggested, albeit in dicta that he elsewhere contradicts, that no copyright can be attained in any derivative work that contains some unlawful use of another's copyright. That is, his dicta (in *Pickett v Prince*) would disallow copyright to the whole of a creative product that contains some unlawful use, even denying copyright as to portions that are not intermixed with the unlawfully copied material. The latter position is at odds with statutory language and legislative history.

In this paper, Gordon and Milman argue that Judge Posner has gone too far. Law and economics, like other policy tools, should be utilized to resolve ambiguities, not to rewrite the law. Yet where a clever lawyer can find ambiguities anywhere, how does one locate the proper limit to policy-oriented judicial discretion? The issue of derivative rights and derivative works in copyright provides a case study with which to examine this jurisprudential question, and deserves attention in its own right.

On the statutory side, Gordon and Milman argue that all derivative works should probably be subject to the same standard of originality. They concede that there is some 'wiggle room' for judges however, and the paper also explores the economic merits. From an economic perspective, Gordon and Milman argue that a heightened standard for copyright in derivative work copyrights is economically warranted only in the situation where the underlying work is in the public domain. By contrast, Posner holds that a heightened standard is warranted economically precisely and only where it isn't needed, that is, where a copyright owner stands able to control the terms on which derivative works are lawfully made. Moreover, any judicial raising or lowering of the originality bar should be slight; in *Gracen* Judge Posner turned a low fence into a barricade.

As for the terms of section 103a, which deny copyright to portions of follow-on works that employ preexisting works unlawfully, Gordon and Milman argue Posner was wrong in *Pickett v Prince* to suggest that any unlawful use fatally taints the copyright in the whole derivative work. Further, the authors submit that Congress should amend that section 103a to follow the patent statute. Under the patent model, the derivative work (or 'improvement' in patent law) can be exploited only with the combined consent of the

owner of the original *and* the maker of the derivative. That should be the pattern in copyright law as well.

Finally, Gordon and Milman suggest that Judge Posner has been influenced by a centralization-of-property model that is inappropriate for the copyright realm.