

TUESDAY, JULY 18, 2023

PERSPECTIVE

Copyright: rights even heroes can't protect

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Copyright law protects original works of authorship. But what happens when the work is based on another original work of authorship? A derivative work may be protected if it incorporates some or all of a preexisting work and adds new original copyrightable authorship. For example, an author's modifications to standard superhero characters could be conceivably entitled to protection. A recent federal court decision illustrates the contours of derivative work protection and underscores the difficulty in establishing derivative rights to comic book characters.

In *O'Neal v. Sideshow, Inc.*, No. 21-cv-07735, 2023 WL 2681978 (C.D. Cal. Mar. 14, 2023), O'Neal, sued various defendants for copyright infringement. O'Neal is a freelance artist and sketched characters such as Batman, Superman, and the Joker (i.e., characters that previously appeared in comic books published by DC Comics). O'Neal took photographs of himself posing in superhero outfits and incorporated those poses into sketches. He asserted that the use of his own photographs as points of reference resulted in the creation of his own original, copyrightable contributions.

Between 2009 and 2011, O'Neal sent his sketches to the defendants with the hopes of securing full-time employment with a defendant. In 2020, Defendant Insight Editions published a book that included reproductions of O'Neal's sketches.

Litigation ensued, and defendants unsurprisingly asserted that O'Neal's sketches were not protected by copyright law. In granting

Defendants' motion for summary judgment, the court relied on the Second Circuit's two-prong test to determine "whether a derivative work is copyrightable." Under the Durham test, also adopted by the

original to justify protection as a derivative work. It noted that even though "originality in copyright is a low bar," the court was not persuaded that O'Neal added sufficient "nontrivial copyrightable

material." *Id.* at *8. The court noted if the plaintiff's derivative works received copyright protection, it would create substantial problems for other parties and require other parties to make substantial changes to their own work to avoid infringing on the plaintiff's rights. *Id.* The court was particularly concerned that parties who obtained a license from DC Comics could still be at risk of infringement claims by artists such as the plaintiff. It found that recognizing O'Neal's rights to the sketches would "effectively give him a pseudo-monopoly" over these characters, and thus, adversely affect the scope of the preexisting copyright protection. *Id.* at *8.

As the *O'Neal* court suggested, it is difficult to see "whether a derivative work based on a character could ever have any independently copyrightable elements that would not affect the scope of any copyright protection in that preexisting material." *Id.* at *8. This also holds true given other decisions holding that merely transferring copyrighted comic book characters to a different medium is insufficient to establish derivative rights.

As such, authors must add sufficient originality and creativity to an underlying work to achieve copyright protection. It is not enough to create a derivative work based on costuming in personal photos or body position. Nor is depicting a character in common fighting positions sufficient, as a character's original copyright generally includes stock elements of the superhero genre. Although O'Neal underscores the difficulty in obtaining derivative copyright protection over superhero modifications, creativity and ingenuity may yet yield derivative copyright protection.

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Ninth and other Circuits, a derivative work is copyrightable if, (1) its original aspects are more than trivial, and (2) the scope of protection afforded a derivative work reflects the degree to which it relies on preexisting material and does not affect the scope of any copyright protection in that preexisting material.

The court found it doubtful that O'Neal's work was sufficiently

elements" to satisfy the first prong of the *Durham* test. In particular, O'Neal's work did not add any modification to the sketches beyond minor, trivial alterations.

It also concluded under the second Durham prong that "granting Plaintiff a derivative copyright in the sketches would substantially affect the scope of the copyright protection in the preexisting ma-

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