



**United States Copyright Office**

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January 10, 2023

Ms. Eleanor Barrett  
Deputy Director, ALI  
Professor Christopher Jon Sprigman  
Professor Daniel J. Gervais  
Professor Lydia Pallas Loren  
Professor R. Anthony Reese  
Professor Molly S. Van Houweling  
Reporters, ALI Restatement of the Law, Copyright

Re: Council Draft No. 7

Dear Ms. Barrett and Reporters:

The U.S. Copyright Office is responsible for administering the nation’s copyright law and providing expert advice to Congress, federal agencies, and the courts on copyright matters.<sup>1</sup> As advisers to this project, we reviewed Preliminary Draft No. 8 of ALI’s proposed Restatement of the Law of Copyright and provided commentary at the Project Meeting on October 14, 2022. In the course of preparing additional thoughts in writing, the Reporters released Council Draft No. 7, which is substantially based on Preliminary Draft No. 8. While our comments below were prepared initially for the Preliminary Draft, we have modified them to address the new numbering and edits in the Council Draft.<sup>2</sup>

***Section 42***

Section 405(a)(2) of the Copyright Act (“Act”) provides that a work distributed without a copyright notice retains copyright protection provided it is registered either (1) *before* publication without notice or (2) within five years after publication without notice. In the black letter section, as well as in the headings to Comment *f* and Reporters’ Note *f*, the draft combines these two alternatives in a way that appears to omit the option of registration before publication. We recommend revising to track the statutory language to remove any ambiguity.

Moreover, Comment *a* makes the statement that, under the 1909 Act, publication without notice “sent that work into the public domain” and cites to section 10 of the 1909 Act. But section 10 does not expressly support this proposition. Rather, section 10 merely outlines how to secure

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<sup>1</sup> 17 U.S.C. § 701(a), (b).

<sup>2</sup> In addition to our substantive comments provided below, we identified smaller errors and omissions in Preliminary Draft No. 8 during our review. We have included those in a separate appendix, which uses the pagination in the Preliminary Draft.

copyright by publication with notice without addressing the implications of failing to do so. We suggest correcting this citation by using the case cite used later in Section 46: *See Roy Export Co. Establishment of Vaduz, Liech. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1101–02 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982) (“The owner secures federal protection by complying with the requirements of the 1909 Act; if he does not, his published work is in the public domain.”).

In Comment *f*, the parenthetical “Dealers, etc.” seems incomplete in describing types of intermediaries. We recommend the Reporters consider adding wholesalers, distributors, and/or retailers as other types of intermediaries.

### ***Section 45***

We appreciate the revisions to Reporters’ Notes *a* and *d* in this draft, which are responsive to the Office’s comments on section 45 in Council Draft No. 6.<sup>3</sup> At the same time, we reiterate our previous observations and recommendations concerning Comment *g*, seeking clarity about the significance of highlighting the term “civil action for infringement” and whether it applies to Copyright Claims Board claims. In addition, we reiterate that now-Comment *q*’s citation to 37 U.S.C. § 220.20(d) should be changed to 37 C.F.R. § 220.20.<sup>4</sup>

We also suggest clarifying the discussion in Comment *c* about registration reconsideration in two respects. First, the draft should clarify that there are two levels of reconsideration that can occur within the Office. Applicants may seek initial reconsideration by the Registration Program, and those who are refused again may seek reconsideration before the Copyright Office Review Board.<sup>5</sup> The first two sentences of the last paragraph in this Comment suggest that there is only one level of reconsideration. Second, the draft should clarify that copyright applicants are not required to exhaust the reconsideration process before a court can consider whether a work is subject to copyright protection. The mention of judicial review in the Comment implies that applicants are required to exhaust administrative remedies before a court can adjudicate whether their work is protected by copyright. As the Reporters’ Note acknowledges, applicants who have been refused registration can also follow the procedure set out in section 411(a) to file an infringement action and serve notice on the Office.<sup>6</sup>

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<sup>3</sup> See Letter from Kimberley A. Isbell, Acting General Counsel and Deputy Director of Policy & International Affairs and Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, to Richard Revesz et al., American Law Institute at 8–9 (Jan. 18, 2022).

<sup>4</sup> *Id.* at 9.

<sup>5</sup> 37 C.F.R. § 202.5(b), (c).

<sup>6</sup> We also suggest revising Reporters’ Note *d* to more clearly describe the holding in the *UAB Planner5D* case, as the current draft could be read to imply that applicants are not required to exhaust their administrative remedies before challenging refusal of registration under the Administrative Procedures Act. For example, consider inserting an additional sentence describing the holding, such as “The court stated that exhaustion of the administrative review procedures within the Copyright Office is required before a party can challenge a refusal in federal court under the Administrative Procedure Act, but a party may initial an infringement action in federal court based on a refusal by following the requirements of section 411(a) despite the fact that the same party is pursuing reconsideration of the refusal within the Copyright Office.”

Comment *d* quotes the Supreme Court’s discussion in *Fourth Estate* about the Office’s registration processing times. While the quoted seven-month processing time was accurate when the decision was issued, current processing times average 2.7 months, with 77% of claims decided in a little over a month.<sup>7</sup> We suggest revising this discussion to use the current numbers, and potentially to note that applicants needing an expedited decision can obtain one under the special handling process.<sup>8</sup>

The discussion in Comment *k* of section 411(b) largely focuses on the necessary state of mind for applicants who provide inaccurate information to the Office during the registration process. It may be helpful to add discussion of section 411(b)(2). In our experience, courts and litigants have varying levels of awareness of section 411(b)(2) and the Office’s role to advise courts on the effect of inaccurate information. Including that information here would bolster the Restatement as an aid to courts and litigants seeking to understand this area of law.

We suggest revising several Comments to provide more detail about the Office’s deposit requirements for registration. First, Comment *o* would benefit from noting at the outset that the Office has a process to provide special relief from any registration deposit requirement.<sup>9</sup> Second, Comment *p* should be revised to explain that the best edition requirement operates through regulations set out in Appendix B to Part 202 of Title 37;<sup>10</sup> Circular 7b is simply an informational summary of those regulations. Third, we suggest revising Comment *q* to separate discussion of identifying material and special relief into separate paragraphs. With respect to identifying material, it would be helpful for readers to know that the Office accepts identifying material for most two-dimensional and three-dimensional artwork.<sup>11</sup> And fourth, Comment *r* would benefit from elaborating that when source code contains trade secrets, the Office’s regulations provide for several methods of submitting a redacted deposit.<sup>12</sup>

We think Reporters’ Note *i*’s discussion of the presumption of validity would benefit from addressing the presumption’s application to unpublished works. In our view, the registration of an unpublished work would be entitled to the presumption, as the work was necessarily registered “before . . . first publication” under the statute.<sup>13</sup>

To provide further resources about registration formalities, we recommend the Restatement include citations to additional sources in two instances. In Comment *l*, in addition to the

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<sup>7</sup> See U.S. COPYRIGHT OFFICE, *Registration Processing Times Apr. 1, 2022–Sept. 30, 2022*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

<sup>8</sup> See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 623.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”). Similarly, the discussion in Comment *g* about registration in connection with a Copyright Claims Board decision may benefit from noting that expedited registration is available for those claims as well. See 37 C.F.R. § 221.2.

<sup>9</sup> A string cite in Comment *q* briefly references these regulations, but we think it would be helpful to include that as part of the general discussion of deposits, since it is a general option for applicants regardless of the work they seek to register.

<sup>10</sup> See 37 C.F.R. § 202, App. B.

<sup>11</sup> *Id.* §§ 202.20(c)(2)(iv), (xi).

<sup>12</sup> *Id.* § 202.20(c)(2)(vii)(A)(2).

<sup>13</sup> 17 U.S.C. § 410(c).

citations to the Office’s regulations, we recommend citing to the relevant sections of the Compendium (sections 1802–1802.12), which discuss supplementary registration in detail.<sup>14</sup> In Reporters’ Note *a*, alongside the relevant statutory provisions, we suggest also citing the relevant sections of the Office’s regulations governing registration of mask works, vessel designs, and schedules of pre-72 sound recordings.<sup>15</sup>

## ***Section 52***

Comment *a* refers to the “dual-term structure for these existing works.” While context suggests that the phrase “these existing works” refers to works that were already copyrighted when the Copyright Act of 1976 became effective, the use of the term “existing works” instead could be read to suggest that all works in existence as of the effective date of Copyright Act of 1976 remained subject to the dual-term structure. Since preexisting unpublished works were made subject to a unitary term of protection under the Copyright Act of 1976,<sup>16</sup> we suggest clarifying that only previously copyrighted works remained subject to the dual-term structure.

Comment *e* briefly references certain benefits that come with registering a claim to a work’s renewal copyright before the renewal copyright term begins. While Comments *h* and *j* discuss some of these benefits in more detail, we recommend briefly listing the specific benefits of timely renewal registration in one place: (1) that the renewal registration is *prima facie* evidence as to the copyright’s validity during the renewal and as to the facts in the certificate, (2) that a derivative work made during the original term cannot continue to be used during the renewal term without the owner of the renewal copyright’s permission, and (3) that the registration determines in whom the renewal copyright vests once the renewal term begins.<sup>17</sup> We also recommend including that renewal registration is required to bring an infringement claim where a work was not registered during its original term.<sup>18</sup>

Comment *f* notes that neither the Copyright Act of 1909 nor the Copyright Act of 1976 provided a definition for the term “proprietor.” Both Comment *f* and Reporters’ Note *f* provide citations to cases that have defined this term. We suggest including the Compendium’s definition of “proprietor” as well.<sup>19</sup>

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<sup>14</sup> The discussion in Comment *l* would also benefit from noting that the Office assigns a new effective date of registration to a supplementary registration. 37 C.F.R. § 202.6(f)(1). The Office expressly defers to courts on which effective date should be followed. COMPENDIUM (THIRD) § 1802.12 (both effective dates of registration “coexist with each other in the registration record” so that courts can decide “(i) whether the changes made by the supplementary registration are material, and (ii) whether those changes should or should not be deemed effective as of the date that the basic registration was made or the date that the supplementary registration was made”).

<sup>15</sup> See 37 C.F.R. § 201.35 (schedules of pre-72 sound recordings); see generally *id.* pt. 211 (mask works); *id.* pt. 212 (vessel designs).

<sup>16</sup> 17 U.S.C. § 303(a).

<sup>17</sup> *Id.* §§ 304(a)(2)(A)(i), 304(a)(4); see also COMPENDIUM (THIRD) § 2107.

<sup>18</sup> COMPENDIUM (THIRD) § 2109.

<sup>19</sup> *Id.* § 2109 pt. VII, Glossary of Terms (defining “proprietor” as “The owner of copyright in a proprietary work on the date the renewal claim was filed during the renewal filing period or on the last day of the original term if no renewal registration was made before that date. To claim the renewal copyright as a proprietor, the claimant should derive title directly or indirectly from the original copyright claimant.”).

### ***Section 6.07***

Comment *b*'s emphasis of public display covering “material objects” could suggest to readers that it does not apply to copies of digital works. We suggest clarifying in the text that the term “material” includes both physical and electronic objects in this context.

### ***Section 6.08***

The illustrations throughout this section include a disclaimer that they are meant only to illustrate whether a performance has occurred and not whether the performance was made publicly. The previous section on the public display right did not include this disclaimer for all illustrations in that section, and those illustrations instead appeared to be crafted to include a “public” element as well. We suggest taking a similar approach with the illustrations in this section to avoid confusion concerning what the public performance right encompasses.

We suggest adding additional discussion to Comment *b* to clarify the definition of performance with respect to video games (as opposed to board games) as well as computer programs generally. Readers would benefit if discussion in this Comment is expanded to include more discussion of these digital works, in addition to the Illustrations currently provided.

Comment *c* states that a work is performed if more than one image of an audiovisual work is shown, “regardless of the sequence in which those images are shown.” The Comment then states that the legislative history supports the use of the language “in any sequence” in the statutory definition of “perform”<sup>20</sup> and quotes a portion of the House Report to underscore this: “The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a ‘performance’ rather than a ‘display,’ but no particular order need be maintained.”<sup>21</sup> While the Comment accurately quotes this language from the House Report, this paragraph may benefit from additional clarification, as the use of “sequence” and “sequential” could be confusing and could be seen as contradictory.

### ***Section 6.11***

In our view, the most significant problem with this section is that the discussion of VARA is divided between here and section 7.07. While violations of VARA are considered infringement, VARA violations differ markedly from ordinary copyright infringements. Because VARA is so unique, it would be better to treat the subject in one section, rather than splitting it up across chapters. This is particularly true of a Restatement, which is intended to educate and assist people unfamiliar with copyright law. The Office also supports comments made by other Advisers regarding potential revisions to the black letter law, including that some works may be designed with a specific destruction date in mind (*e.g.*, Burning Man creations).

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<sup>20</sup> 17 U.S.C. § 101.

<sup>21</sup> H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

We also think readers unfamiliar with VARA would benefit from additional discussion of its applicability to digital art. While many forms of digital art may be excluded due to the statutory definition of “works of visual art,” we think it is a point worth explaining to readers.

Finally, we suggest adding an additional citation to the Office’s moral rights study in Comment *d*. The Comment discusses site-specific works and states on page 161 that the Restatement agrees with *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011). We note that the Office reached the same conclusion in its study and a citation would support the Restatement view here. See U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES at 73 (Apr. 2019), <https://www.copyright.gov/policy/moralrights/>.

### ***Section 7.01***

We appreciate the revisions to the black letter law that have been included in the Council Draft. Revised Section 7.01 will give clearer guidance to judges and practitioners with less experience with copyright law.

We appreciate the revisions in the Council Draft to the discussion of volitional conduct and causation in Comments *d* and *e*, as well as the accompanying Reporters’ Note. The new discussion in the Council Draft provides greater clarity about the origins of the doctrine and is a significant improvement.

We found Comment *g* difficult to follow, and we suggest giving additional attention to its content and presentation. This Comment seems to focus on when accused infringers have the evidentiary burden to show the existence of a license and when copyright owners bear the burden of proving that any authorization, implied or express, was exceeded. But the Comment also suggests that there are burdens of pleading at the complaint stage by quoting the language in *Yamashita v. Scholastic Inc.* that copyright owners “must plausibly allege that the defendant exceeded particular terms of the license.” 936 F.3d 98, 105 (2d Cir. 2019). We believe it would be helpful for readers to clarify what is required of parties at the pleading stage and at the fact-finding stage.

### ***Section 7.02***

Comment *d* describes the copyright examination process as less “thorough and probing” than that for patents. We respectfully suggest some changes here to note that while the Office generally does not independently confirm factual information provided in copyright applications, the Office does engage in an independent analysis of creativity. For this reason, courts may treat as distinct the presumption of validity with respect to factual information and the existence of copyrightable material.

As we suggested for Section 45, we recommend modifying Comment *g* to discuss the process in section 411(b)(2) in which courts request the Register of Copyright’s opinion on whether an inaccuracy in a copyright application would have resulted in refusal of registration. As written, the draft may cause readers to wrongly believe that section 411(b) challenges are accomplished solely through briefing by the parties. Moreover, we suggest revising the discussion of *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.* to make clear the holding that a plaintiff must

be shown to have actual knowledge of (or be willfully blind to) an inaccuracy on the certificate. 142 S. Ct. 941, 948 (2022). As part of that process, we advise spending more time discussing the decision in *Unicolors* and less time on the existence of an intent-to-defraud requirement, given that all cases cited on this point predate the Court’s decision in *Unicolors*. As a result, the current discussion misrepresents the current state of the law on this issue.

We suggest providing additional information regarding the Office’s treatment of transfer statements, potentially in Reporters’ Note *j*. Specifically, it would be helpful to note that in an application for registration, section 409(5) only requires the Copyright Office to obtain a “brief statement” about how a claimant obtained ownership if the claimant is not also the author of the work. While any such transfer statement made in the application would be entitled to *prima facie* validity, the Office never verifies the validity of the transfer or that all of the exclusive rights have been transferred. If the presumption of the validity of this fact is rebutted by a defendant, the court must assess whether a valid transfer of ownership of all rights has occurred. As a practical matter, in an application for registration, if less than all rights have been transferred to a party, the author should always be named as the claimant in the work. The owner of less than all exclusive rights would have to prove ownership of the relevant right in court without the benefit of an evidentiary presumption under section 410(c) as discussed in Comment *e*.

### ***Section 7.03***

Both the black letter law and Comment *i* discuss striking similarity in a way that omits mention of access. We suggest incorporating some of the discussion in Reporters’ Note *i*, which explicitly addresses the element and describes striking similarity as overwhelming circumstantial evidence of access.

Reporter’s Note *e* cites several cases that are characterized as “rejecting evidence of widespread distribution.” We suggest instead rephrasing the description to be that plaintiff’s *allegations* of widespread access were rejected. Based on our review, the courts appear to have found the evidence insufficient to constitute “widespread access.”

We respectfully disagree that the cases cited in Reporter’s Note *l* support the idea that subconscious infringement requires a higher degree of similarity than other forms of substantial similarity. Unless the drafters can cite additional support to the last sentence in that note, we suggest eliminating the statement entirely.

### ***Section 7.04***

The Office appreciates the revisions made to the black letter law after our discussion at the October advisers meeting. We shared the concerns of other project advisers that the previous draft was confusing. The new draft is a significant improvement.

We suggest relocating Illustration 2 in this Section. Comment *b* states that complete duplication of a work is “almost” always infringement, but Illustration 2 offers as an example of noninfringement a photograph in the background of a film that is shown for a few seconds. This appears to refer to the doctrine of *de minimis* infringement, since the example is drawn from

*Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998). But because that doctrine is not explained in the Comment, readers may misunderstand why the reproduction and use of a copyrighted photograph would not constitute infringement under those facts. We suggest moving the Illustration to Comment *k*, which discusses *de minimis* infringement in depth.

### ***Section 7.07***

As we noted for section 6.11, we think the better approach is to handle VARA in a single section rather than dividing it between these two sections. But in either event, the black letter law here is organized differently than section 106A. Because this may confuse readers comparing the Restatement and the statute, we recommended retaining the organization and text of the enacted law.

We recommend revising the first paragraph of Comment *d* to make clear that intentional activity must be “prejudicial to [an author’s] honor or reputation” as required by section 106A(a)(3)(A). Because the Comment as drafted states only that authors have a right to prevent “intentional distortion, mutilation, or modification” of a work of visual art and that “such an intentional alteration is a violation of the author’s right,” it implies a broader prohibition than contained in the statute.

Finally, we suggest revising the citation in Comment *f* to *Thompson v. U.S.*, 795 F. App’x 15 (2d Cir. 2019) to make clear that the quoted language is a summary of the district court’s holding rather than a direct holding.

### ***Section 8.02 (Preliminary Draft No. 8)***

Finally, we want to offer a comment on Section 8.02, which appeared in Preliminary Draft No. 8 but not the new Council Draft. Comment *d* makes a broad statement that court decisions interpreting “material contribution” to a direct infringement “align with” cases setting out proximate cause. We are not aware of any court recognizing this “alignment.” Accordingly, we suggest making it clearer that this is a position taken by the Restatement and the Reporters, and not a connection that courts have explicitly drawn themselves.

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The Office welcomes public evaluation and discussion of U.S. copyright law and thanks the ALI and the Reporters for their past attention to our comments.

Sincerely,

A handwritten signature in black ink that reads "Suzanne Wilson". The signature is written in a cursive style with a long, sweeping underline.

Suzanne Wilson  
General Counsel and Associate Register of Copyrights

A handwritten signature in black ink that reads "Robert J. Kasunic". The signature is written in a cursive style with a long, sweeping underline.

Robert J. Kasunic  
Associate Register of Copyrights and Director of Registration Policy & Practice

## Appendix: Errors and Omissions

### Section 42

- Comment *a*: On page 14, line 15, the draft references “subsection (f) of the black letter of this Section,” which should be corrected to refer to “subsection (e).”
- Comment *b*: On page 15, line 14, the title of the U.S. Code in the citation should be corrected from “7” to “17.”
- Comment *d*: On page 17, line 12, the word “no” should be added before the word “date” in the quotation from 17 U.S.C. § 406(c).
- Comment *e*: On page 17, line 28, the word “copyright” should be changed to the word “copies” in the quotation from 17 U.S.C. § 405(a)(1).
- Comment *f*: There are a few errors and omissions in this Comment.
  - On page 19, in lines 23 and 24, there is missing punctuation in the quoted language from the House Report. A comma should be added after “effort” and before the closed internal quotation mark; and a period should be added after the word “thereafter.”
  - On page 20, line 9, the pin cite for the citation to *Charles Garnier, Paris v. Andin Int’l Inc.* should be changed from page 93 to page 96.
- Comment *j*: There are two incorrect citations to the statutory provisions in the first paragraph.
  - On page 26, line 26, section 401(b)(2) should be changed to 401(b)(3).
  - On page 27, line 8, the citation to 17 U.S.C. § 404(a) should be changed to 17 U.S.C. § 406(a).
- Comment *k*: On page 28, line 13, there is missing punctuation in the quotation from the House Report. A period and closed quotation mark should be added after the word “notice.”
- Comment *l*: On page 29, line 9, the citation to 17 U.S.C. § 406(c) should be changed to 17 U.S.C. § 405(c).
- Reporters’ Note *a*: On page 30, line 26, a pin cite to page 143 should be added to the citation to the House Report.
- Reporters’ Note *c*: There are two omissions in this Note.
  - On page 31, line 40, we recommend “(1976)” be added to the citation to 17 U.S.C. § 403 because the quoted language is from the Copyright Act of 1976. The word “preponderantly” that appears in the quoted language was later changed to “predominantly” by the Berne Convention Implementation Act.
  - On page 32, line 22, a period after should be added after “domain” at the end of the quoted language in the parenthetical following the citation to *Canfield v. Ponchatoula Times*.
- Reporters’ Note *d*: On page 32, line 40, a section mark (§) should be added to the citation to “17 U.S.C. 402(b)(3).”
- Reporters’ Note *e*: There appear to be several typographical errors and omissions in this Note.

- On page 33, line 25, the quotation marks around “a particular copy or copies” should be changed to internal quotation marks.
- On page 33, line 26, the citation to *Goldstein on Copyright* should be updated to section 3.7.2.1.
- On page 33, lines 34 through 37, the quotation marks indicating language quoted from *Ford Motor Co. v. Summit Motor Prods., Inc.* are incorrect and should be cleaned up to conform to the opinion.
- On page 34, line 3, in the parenthetical following the citation to *Donald Frederick Evans and Associates, Inc. v. Continental Homes, Inc.*, the open quotation mark before “holding” should be removed.
- On page 34, lines 10 and 11, we recommend that the citation to “Supplementary Register’s Report on the General Revision of the U.S. Copyright Law” be changed to its official title “Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.”
- On page 34, lines 25 and 26, in the parenthetical following the citation to *Bateman v. Mnemonics, Inc.*, the phrase “as a matter of law” should be italicized as it was emphasized in the original and an internal closed quotation mark should be added after the word “number.”
- On page 34, line 30, in the parenthetical following the citation to *P. Kaufman, Inc. v. Rex Curtain Corp.*, there appear to be a few errors in the quoted language: subsection “A” should be lowercase, “405(a)(1)” should be in brackets, the ellipses indicating an abridgement should be removed, and the comma after “with” should be removed.
- On page 34, line 34, the citation to *Goldstein on Copyright* should be updated to section 3.7.1.1.
- On page 35, line 19, in the citation to *Princess Fabrics, Inc. v. CHF, Inc.*, a period should be added to “Inc.” and a pin cite to page 102 should be added.
- On page 35, lines 22 and 23, the subsequent history indicating *Cooling Systems* was “overruled on other grounds by” *Unicolors* is incorrect. Instead, this should state that *Cooling Systems* was overruled on other grounds by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).
- Reporters’ Note *f*: There are several typographical errors and omissions in this Note.
  - On page 35, line 35, in the parenthetical following the citation to *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, the quotation marks around “reasonable effort” should be changed to internal quotation marks.
  - On page 36, line 4, a section mark (§) should be added to the citation to “17 U.S.C. 410.”
  - On page 36, line 21, in the quoted language from *Nimmer on Copyright*, the phrase “in the United States” should be italicized and a parenthetical should be added indicating emphasis in original.
  - On page 37, line 19, in the parenthetical following the citation to *Shapiro & Son Bedspread Corp. v. Royal Mills Assoc.*, the word “all” should be italicized; and a parenthetical should be added indicating emphasis in original.

- On page 37, line 36, in the parenthetical following the citation to *Lifshitz v. Walter Drake & Sons, Inc.*, page 1433 should be added to the range of the pin cite as that is where the quoted language appears.
- One page 38, line 16, in the quoted language from *Nimmer on Copyright*, the word “public” should be italicized; and a parenthetical should be added indicating emphasis in original.
- On page 38, line 26, in the parenthetical following the citation to *Lloyd v. Schlag*, a period should be added at the end of the sentence after the bracketed statutory section.
- On page 39, line 5, the citation to *Goldstein on Copyright* should be updated to section 3.7.1.2.
- On page 39, lines 28 and 29, in the citation to *Encore Show Corp. v. Bennett Indus.*, the lead defendant (*i.e.*, Bennett Indus.) should be added to the case name and page 1876 should be added to the pin cite.
- Reporters’ Note *g*:
  - On page 40, line 29, in the quoted language from *Nimmer on Copyright*, the quotation marks around “reasonable effort” should be changed to internal quotation marks.
  - On page 40, line 29, in the parenthetical following the citation to *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, a period should be added at the end of the sentence after “mistake.”
  - On page 40, lines 36 and 37, for the citation to *O’Neill Devs., Inc. v. Galen Kilburn, Inc.*, page 714 should be added to the pin cite to capture the full analysis summarized in the parenthetical.
  - On page 41, line 2, in the parenthetical following the citation to *Flag Fables, Inc. v. Jean Ann’s 39 Country Flags and Crafts, Inc.*, the word “test” should be changed to “tides” in the quoted language.
- Reporters’ Note *h*:
  - On page 41, line 22, in the parenthetical following the citation to the House Report, the period should be removed from section “4.05” and the comma after “authorized” should be changed to a period.
  - On page 41, line 24, in the citation to *Fantastic Fakes, Inc. v. Pickwick International, Inc.*, the lead defendant (*i.e.*, Pickwick International, Inc.) should be added to the case name.
  - On page 41, line 39, for the citation to *Jackson v. MPI Home Video*, 694 F. Supp. 483, 491 (N.D. Ill. 1988), footnote 5 (*i.e.*, “n.5”) should be added to the pin cite.
  - On page 42, line 7, the West reporter citation for *Saxon v. Blann* is missing a number and should be corrected to 1991 WL 350748.
- Reporters’ Note *i*:
  - On page 42, line 31, the pin cite for *Lifshitz v. Walter Drake & Sons, Inc.* should be changed from page 1434 to page 1435.

- On page 43, line 33, in the parenthetical following the citation to the House Report, a period should be added to the end of the sentence after “section 405(a)(3).”
- On page 44, line 27, the reporter volume number for the citation to *Raco Car Wash Sys., Inc. v. Smith* should be corrected from volume 739 to volume 730.
- Reporters’ Note *j*: On page 45, line 40, in the parenthetical following the citation to *Bagdadi v. Nazar*, the word “initial” should be italicized; and a parenthetical should be added indicating emphasis in original.
- Reporters’ Note *k*: On page 46, line 14, in the parenthetical following the citation to the House Report, a period and a closed quotation mark should be added and one closed parenthesis should be removed after the word “notice.”

### ***Section 43***

- Comment *b*: On page 51, line 11, the word “phonorecord” should be plural (*i.e.*, “phonorecords”).
- Reporters’ Note *b*: On page 53, line 13, for the citation to *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, a pin cite to pages 752–53 should be added.
- Reporters’ Note *c*:
  - On page 54, line 28, for the citation to *Idearc Media Corp. v. Nw. Directories, Inc.*, a pin cite to page 1230 should be added.
  - On page 55, lines 1 through 5, although the language quoted at the end of the sentence is from *New York Times v. Tasini*, the quoted language “a troublesome problem” is from the House Report, so a citation to H.R. Rep. 94-1476, at 146 should be added.

### ***Section 44***

- Reporters’ Note *a*: On page 63, line 15, the reporter volume number for the citation to *M. Kramer Mfg. Co., Inc. v. Andrews* should be corrected from volume 73 to volume 783.
- Reporters’ Note *d*:
  - On page 64, line 6, for the citation to *Videotronics, Inc. v. Bend Electronics*, the pin cite should be corrected to refer to pages 480–481, not 480–811.
  - On page 65, line 5, for the citation to *Langman Fabrics v. Graff Californiawear, Inc.*, page 115 should be added to the pin cite.
- Reporters’ Note *f*: On page 65, line 30, the quotation marks for the quotation from *Nimmer on Copyright* should be revised. The quotation marks around the phrase “the name of the owner of copyright in the sound recording” should be changed to internal quotation marks while retaining a closed quotation mark at the end of the sentence.
- Reporters’ Note *g*:
  - On page 66, line 9, for the citation to *Twentieth Century-Fox Film Corp. v. Dunnahoo*, the reporter volume number should be corrected from volume 647 to volume 637.

- On page 66, line 18, the citation to *Goldstein on Copyright* should be updated to section 3.6.2.1.
- Reporters' Note *j*:
  - On page 67, line 22, for the citation to *Idearc Media Corp. v. Nw. Directories, Inc.*, a pin cite to page 1230 should be added.
  - On page 67, lines 35 through 39, although the language quoted at the end of the sentence is from *New York Times v. Tasini*, the quoted language “a troublesome problem” comes from the House Report, so a citation to H.R. Rep. 94-1476, at 146 should be added.

### ***Section 45***

- Comment *c*: On page 70, line 31, in the citation to “37 C.F.R. § 202,” the section mark (“§”) should be changed to “pt.” as all regulations governing registration, other than claims in mask works and vessel hulls, are codified as sections contained in part 202 of the Code of Federal Regulations.
- Comment *k*: On page 84, lines 8 through 13, three instances of “Registrar of Copyrights” should be changed to the correct title: “Register of Copyrights.”
- Comment *p*:
  - On page 88, line 9, the citation to “37 C.F.R. § 220(c)(iv)” should be “37 C.F.R. § 202.20(c)(1)(iv).”
  - On page 88, line 23, the letter “b” in the citation to “Circular 7b” should be capitalized.
- Reporters' Note *c*: In the paragraph beginning on page 91 and ending on page 92, in the quoted language from Registration of Copyright: Definition of Claimant, 77 Fed. Reg. 29257, 29258 (May 17, 2012) (notice of proposed rulemaking), the word “all” should be italicized; and a parenthetical should be added indicating emphasis in original. The Office also recommends indicating in a parenthetical to the citation that the source is a “notice of proposed rulemaking.”
- Reporters' Note *d*: On page 95, line 4, the last revision date for Circular 38A should be updated from “2021” to “June 2022.”
- Reporters' Note *k*: On page 100, lines 19 through 25, for the citation to *Beatriz Ball v. Barbagallo Company*, the citation should be updated to the federal reporter cite: 40 F.4th 308, 315–16 (5th Cir. 2022). In the quoted language in the parenthetical following the citation, brackets should be added around the “e” at the beginning of “everything.” Also, we recommend the Reporters consider referring to *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.* as “Unicolors” for short rather than “H&M” given that Unicolors is the first party name to appear in the full case citation.

### *Section 7.03*

- Reporter's Note *b*: On page 214, the paragraph starting on line 7 states that the introduction of evidence of similarities probative of copying creates a presumption, which shifts the burden of production. But the drafters state on line 16 that the defendant need not introduce evidence. These statements appear contradictory.
- Reporter's Note *g*: On page 217, line 5, it appears that the drafters mean to say that the Second, Fourth, and Ninth Circuits have stated that "bare corporate receipt" is not sufficient to prove access.