



United States Copyright Office

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April 9, 2024

Hon. Diane P. Wood
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: Section 6.12 – Fair Use (Revised)

Dear Judge Wood and Reporters:

The U.S. Copyright Office is responsible for advising Congress and providing information and assistance to the courts, and executive agencies on issues relating to copyright matters, as well as other matters arising under Title 17 of the U.S. Code.¹ The Office fulfills this responsibility in a number of ways, including by filing amicus briefs with the courts on issues involving interpretation of the Copyright Act and Title 17, including the application of the fair use doctrine.² In addition, for the benefit of the public, including practitioners and the courts, we created and maintain a Fair Use Index available on our website. The Index “tracks a variety of judicial decisions to help both lawyers and non-lawyers better understand the types of uses courts have previously determined to be fair—or not fair. The decisions span multiple federal jurisdictions, including the U.S. Supreme Court, circuit courts of appeal, and district courts.”³

As advisers to this project, we have reviewed the revised draft of Section 6.12 of the ALI’s Restatement of the Law of Copyright, which is being discussed at the Project Meeting on April 12. Based on our extensive experience providing guidance to the courts and members of the public on the fair use doctrine, we have a particular interest in this Section and look forward to

¹ 17 U.S.C. § 701(a), (b).

² See, e.g., Brief of the United States as *Amicus Curiae* Supporting Respondents, *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869), available at <https://www.copyright.gov/rulings-filings/briefs/andy-warhol-found-for-the-visual-arts-v-goldsmith-no.21-869-2022.pdf>; Brief of the United States as *Amicus Curiae* Supporting Respondent, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (No. 18-956), available at <https://www.copyright.gov/rulings-filings/briefs/google-llc-v-oracleamerica-inc-no-18-956-2020.pdf>.

³ *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE, www.copyright.gov/fair-use/. The Index is a user-friendly resource that allows for searching based on the deciding court or the subject matter of the case.

the discussion on April 12. To facilitate this discussion and improve the draft, we offer the following comments.⁴

Comment *a* correctly explains that Congress’s codification of the fair use doctrine in the Copyright Act of 1976 was not intended to “change, narrow, or enlarge in any way” the judicial doctrine of fair use and that the doctrine’s development was intended to remain within the realm of the courts. The Comment notes that the Supreme Court has repeatedly “identified fair use as an affirmative defense.” It then turns to a lengthy discussion of the 1965 testimony of the then-Register of Copyrights in which she reached a different conclusion. This discussion is misplaced and misleading in light of the subsequent and much more recent rulings by the Supreme Court as well as multiple other courts. Moreover, whatever the views of the Register almost 60 years ago, prior to the codification of fair use in the 1976 Act, the current position of the Copyright Office follows that of the Court, *i.e.*, fair use is an affirmative defense. We suggest that the description of the 1965 testimony, as well as references to law review articles espousing a different treatment of fair use, should either be deleted or moved to a Reporter’s Note and clearly identified as not consistent with current law.

In Comment *d* or in a corresponding Reporters’ Note, to illustrate the point that fair use focuses on the particular use alleged to be infringing, we propose that the Restatement cite to examples of cases where multiple uses of the same work were at issue.⁵

We appreciate the new discussion in Comment *g* addressing “the question of justification for defendant’s use,” including the additional discussion about parody and satire, and how the distinction between the two has informed analysis of a particular use’s purpose and character. We suggest, however, that the Reporters revise or move portions of the discussion addressing *Google LLC v. Oracle America, Inc.* to a Reporters’ Note because the Comment text appears to represent the Reporters’ views rather than restate the law. For example, the Comment states that the copied elements of Oracle’s software “were subject to, at best, ‘thin’ copyright protection,” citing *Google*.⁶ Neither the pin cite nor any portion of the decision directly supports the proposition that the Court considered the protection for Oracle’s software to be “at best, ‘thin.’” The Comment goes on to suggest that the Court in *Google* was applying a different fair use standard, speculating that the Court did so “presumably because, if fair use of copyrighted software were governed by the same standards as have been applied to conventional copyright, using any portion of a copyrighted computer program in the creation of another program would

⁴ In addition to our substantive comments provided below, we note that there are several instances in the section where the parties in a case, particularly in discussions of *Andy Warhol Found. v. Goldsmith*, are incorrectly referred to as “plaintiff” and “defendant.” We suggest usage of these terms be reviewed and revised for accuracy. In addition, there are some places in the draft where the descriptions of the case facts should be double-checked. For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, the current draft misdescribes the images at issue as “thumbnail-sized,” when they were in fact appropriately described in the opinion as “reduced-sized.” (“Thumbnails” are referenced in the description of the *Kelly v. Arriba Soft Corp.* ruling).

⁵ See, e.g., *Fioranelli v. CBS*, 551 F. Supp. 3d 199 (S.D.N.Y. 2021) (distinguishing between uses of video footage in certain documentary films, works focusing on conspiracy theories, political documentaries, and a feature film); *Chapman v. Maraj*, 2:18-cv-09088-VAP-SSx, 2020 WL 6260021 (C.D. Cal. Sept. 16, 2020) (distinguishing between using a musical work to experiment in creating a new musical work with distributing a sound recording embodying the new musical work).

⁶ 141 S. Ct. 1183, 1203 (2021).

rarely be a fair use” Although the Comment correctly observes that the *Google* decision “emphasized the extent to which it was influenced by the fact that the work seeking copyright protection was software,” there is no indication that the Court was applying a fair use standard to software that differed from the governing statutory standard that applies to all copyrighted works. If this represents the Reporters’ view of the *Google* decision, it should be moved from the Comment to a Reporters’ Note.

In Comment *o*, as an additional example of a case considering evidence of market benefits, consider citing to *Bell v. Eagle Mountain Saginaw Independent School District*.⁷ In *Bell*, the court noted that rather than undermining the value for plaintiff’s work, a “properly attributed quotation of a short passage from [plaintiff’s book] might bolster interest in the book; it is free advertising.”⁸

Comment *q*’s (formerly Comment *o*) use of the term “derivative markets” is confusing as the draft uses the term to refer to both potential or unrealized markets for derivative works relevant to the analysis of the fourth statutory factor, as well as markets for “transformational” uses that courts have held are not relevant to this analysis. Some of the confusion arises out of the manner in which the term “derivative” has been used by the courts in this context. We suggest that courts and practitioners would benefit if the draft shifted its focus to the difference between cognizable versus non-cognizable markets (including potential ones) for a copyrighted work. We also reiterate our suggestion that Comment *q* would benefit from citing *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*⁹ as an example of a case where fair use was not found and the infringing work was determined to cut off a potential market. Although a footnote in *Castle Rock* is cited elsewhere in the Comment for the proposition that a copyright owner cannot cut off all derivative markets, a fair discussion of the case would indicate that a derivative market *was* found in that case.¹⁰ Similarly, while the Comment provides examples of cases where the allegedly infringing work was found *not* to cut off a derivative market, it would be useful to also include examples of cases where the secondary work *was found* to have interfered with a potential derivative market.

The Reporter’s Note to Comment *m* (formerly Reporter’s Note to Comment *k*) continues to suggest that factual/functional works and fanciful/highly expressive works are to be treated identically in the second factor analysis. While it may be true that a use of a more expressive work should not be presumptively unfair, courts have generally found that the second factor disfavors fair use where the nature of the work is creative, at least where the use relies on the work’s creative expression as opposed to the factual or functional nature of the work.¹¹

⁷ 27 F.4th 313 (5th Cir. 2022).

⁸ *Id.* at 325 (“The same is true for merchandise. An online post is not a market substitute for a coffee mug. Viral sharing of the [excerpt from plaintiff’s work] on Twitter might enhance the notoriety and appeal of [plaintiff’s] work, thereby increasing the incentive to purchase products displaying it.”).

⁹ 150 F.3d 132, 145–46 (2d Cir. 1998).

¹⁰ *Id.* at 145–46 (concluding that defendant’s work “is likely to fill a market niche that [plaintiff] would in general develop” and “[a]lthough [plaintiff] has evidenced little if any interest in exploiting this market for derivative works . . . copyright law must respect that creative and economic choice”).

¹¹ See generally 4 NIMMER ON COPYRIGHT § 13F.06[A]; PATRY ON COPYRIGHT § 10:138.

In addition, Reporters' Note to Comment *m* states that “[m]ore probative than a general inquiry into the nature of [the] work is careful analysis of the nature of what the defendant took from [a] work, and why.” Even assuming this assertion finds support in the caselaw, the analysis of the portion taken and why it was taken are primarily third and first factor considerations, not inquiries made when considering the nature of the work under the second factor. There is, of course, interplay among the four fair use factors that can affect how each factor is analyzed and its relative weight within an overall equitable determination. But we again caution against implying that analysis of the second—or any other statutory—factor receive diminished consideration in favor of other factors.¹²

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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 work and their attention to our comments.

Sincerely,



Suzanne V. Wilson
General Counsel and Associate Register of Copyrights



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

¹² Indeed, as Comment *m* acknowledges, the second factor was given significant weight in the Supreme Court's fair use analysis in *Google v. Oracle*.