



United States Copyright Office

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November 9, 2016

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Professor Christopher Jon Sprigman
Professor Daniel J. Gervais
Professor Lydia Pallas Loren
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Professor Molly S. Van Houweling
Reporters, ALI Restatement of the Law, Copyright

Re: Preliminary Draft No. 2

Dear Professor Revesz, Ms. Middleton and Reporters:

The U.S. Copyright Office is responsible for administering significant portions the nation's copyright law and providing expert advice to Congress and federal agencies on copyright matters.¹ We have reviewed Preliminary Draft No. 2 of ALI's proposed Restatement of the Law of Copyright ("Draft No. 2"), which now includes two chapters covering subject matter and standards (§§ 1.01-1.10) and scope of protection (§§ 2.01-2.05).

We welcome the revisions that the Reporters made to the first chapter to address some of the concerns the Office raised in the December 2015 round of comments. We appreciate in particular the revisions that serve to bring the Restatement more closely in alignment with the text of the statute itself, its legislative history, and the interpretations of the Copyright Office. For instance, section 1.08, pertaining to U.S. government works, now tracks the statute and legislative history more closely and clearly acknowledges that "Congress did not intend the exclusion from copyright protection contained in [17 U.S.C.] § 105 to bar the U.S. government from asserting copyright in works of the United States government in foreign countries . . . [and that § 105] only bars copyright protection granted 'under this title'; it does not bar copyright protection that might be provided by the laws of foreign countries."² Additionally, while the Office still has concerns about the confusion that may be engendered by the proposed Restatement's new criteria for fixation, the Office appreciates that this revision is more closely tied to the statutory language and that it acknowledges that the fixation requirement—which applies equally to published and unpublished works—does not require a work to be "exploited in some market," but rather, that fixation can be satisfied "even if a work is not in fact enjoyed or exploited in any market."³

¹ 17 U.S.C. § 701(a), (b).

² AM. LAW INST., RESTATEMENT OF THE LAW OF COPYRIGHT, PRELIMINARY DRAFT NO. 2 84 (Oct. 14, 2016) ("DRAFT NO. 2").

³ DRAFT NO. 2 at 52-53.

That having been said, many of our general concerns about the nature and goals of this project persist. In particular, we believe it would be useful for the Reporters to clarify their understanding of the proposed Restatement's role in analysis of the Copyright Act. For its part, the Copyright Office does not understand the proposed Restatement to displace any of the "traditional tools of statutory construction," including examination of the statute's text, structure, purposes, and legislative history. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-50 (1987). Nor, as we understand it, is the Restatement intended to supplant the Copyright Office's rules and interpretive guidance. Indeed, we assume the Reporters would agree that the Office's interpretations would be entitled to ordinary and appropriate levels of judicial deference, even where those interpretations differ from views expressed in the Restatement. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864-66 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). Thus, ultimately, our understanding is that the Restatement will be, at most, secondary authority on matters of copyright law akin to a legal treatise, albeit one that is a product of a more formal and collaborative process.

In addition, we would urge the Reporters to make every effort to avoid conflicts between the Restatement and Copyright Office regulations or other interpretive guidance, including the *Compendium of U.S. Copyright Office Practices (Third Edition)* ("*Compendium IIP*"). Such conflicts could produce significant confusion and adversely affect Copyright Office operations, especially to the extent they relate to issues the Office addresses in registering claims to copyright or administering statutory licenses under the Copyright Act. In addition, there are some instances where the proposed Restatement conflicts with positions taken by the Copyright Office specifically or the United States government more generally, and we urge the Reporters to either remove those statements, or acknowledge the government's contrary position.

The following, while not comprehensive, are the primary areas of concern that the Office has identified in the most recent draft (in the order that they appear in the Restatement, rather than order of importance):

- Section 1.04, Comment *e*, explains that "[c]opyright in a compilation extends only to original elements contributed by the author of the compilation Therefore copyright protection for a collective work does not extend to the underlying works."⁴ Although collective works are a subset of compilations, the law and Copyright Office practice are clear that copyright protection for collective works can extend to the underlying works in particular circumstances. Specifically, the *Compendium*, citing legislative history, explains that "the copyright in the collective work 'extend[s] to the elements of compilation and editing that went into [creating] the collective work as a whole' . . . [and] it extends to 'the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors.'"⁵

⁴ DRAFT NO. 2 at 43.

⁵ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 509.2 (3d ed. 2014) ("COMPENDIUM (THIRD)") (quoting H.R. REP. NO. 94-1476, at 122 (1976); S. REP. NO. 94-473, at 106 (1976)); *see also id.* at § 613.8 ("An applicant may register a collective work together with the separate and independent works

- Section 1.07(d) states that “[t]he amount of time, labor, or investment employed by the author in creating a work does not *alone* satisfy the minimal creativity requirement.”⁶ Including “alone” in the draft text could mistakenly be read to suggest that time, labor, or investment are relevant, at least in part, to satisfying the minimal creativity requirement. Such a proposition was clearly rejected by the Supreme Court in *Feist*.⁷ Moreover, taking such factors into account is contrary to the Copyright Office’s examination practice. *Compendium III* § 310.7 states that the Office “will not consider the amount of time, effort, or expense required to create the work. These issues have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution.”
- Section 1.07, Comment *e*, regarding the “minimal creativity requirement” to qualify for copyright protection, states that “[w]hat matters” for meeting this requirement “is that the author *intends* to describe, explain, illustrate, or embody some creative contribution.”⁸ As explained in *Compendium III*, “[w]hen examining a work for original authorship, the U.S. Copyright Office *will not consider the author’s inspiration for the work, creative intent, or intended meaning*. Instead, the Office will focus solely on the appearance or sound of the work that has been submitted for registration to determine whether it is original and creative within the meaning of the statute and the relevant case law.”⁹ At no point does the Office assess “the personality of the author” or “the degree of rationality of the[ir] choices” to determine whether such “creative choices . . . satisfy the minimal creativity requirement.”¹⁰ This approach is ultimately rooted in the statutory text, which requires the Office to conduct an “examination” to determine whether “the *material deposited* constitutes copyrightable subject matter.”¹¹ Indeed, a regime that required the Copyright Office to assess the author’s intent would be impossible to administer.
- Section 2.03, Reporters’ Note *d*, posits that “[t]ypically, an API is composed of code and structural elements that are, by design, essentially functional and therefore should be excluded from protection under § 102(b) regardless of whether they contain expression.”¹² This directly conflicts with the Copyright Act, Federal Circuit precedent holding that APIs

contained therein if the collective work and the contributions were created by the same author and/or if the copyright in the collective work and the contributions are owned by the copyright claimant.”). In addition, the Copyright Office permits registration of a collective work together with the contributions contained therein only “[if] the contributions and the collective work have not been previously published or previously registered, and [if] they are not in the public domain.” *Id.* at § 509.2.

⁶ DRAFT NO. 2 at 169 (emphasis added).

⁷ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352-54, 364 (1991).

⁸ DRAFT NO. 2 at 78 (emphasis added).

⁹ COMPENDIUM (THIRD) at § 310.5 (3d ed. 2014) (emphasis added); see also *id.* at § 312.2 (“The authorship involved in selecting, coordinating, and arranging the preexisting material or data must be objectively revealed in the deposit copy(ies).”). Thus, illustrations 14-16 in section 1.07 of the proposed Restatement err in assessing the copyrightability of the works at issue by focusing on authorial intent, rather than an inquiry into whether the works contained human authorship. See COMPENDIUM (THIRD) at § 313.2 (“[T]he Copyright Act protects ‘original works of authorship’ . . . [and t]o qualify as a work of ‘authorship’ a work must be created by a human being. . . . [T]he Office will not register works produced by a machine or mere mechanical process that operates . . . automatically without any . . . intervention from a human author.”).

¹⁰ DRAFT NO. 2 at 82.

¹¹ 17 U.S.C. § 410(a) (emphasis added).

¹² DRAFT NO. 2 at 129.

are copyrightable, and the position taken by the United States government in its amicus brief in *Google v. Oracle*, which stated that “[i]f a work constitutes expression (and if it is original), it is copyrightable under Section 102(a). Section 102(b) merely excludes from copyright protection the subject matter explained or described in the expressive work.”¹³ Thus, “the underlying computer function triggered by the written code—for example, an algorithm that the computer executes to sort a data set[—would be unprotected]. The code itself, however, [would be] eligible for copyright protection.”¹⁴

- Section 2.03, Comment *d*, states that “lock-out codes and other elements of programs that permit interoperability are, like menu command hierarchies, not copyrightable because they are necessary to the competitive production of compatible software and hardware.”¹⁵ This statement directly conflicts with the position taken by the United States government in its *Google v. Oracle* amicus brief, which stated that “[i]nteroperability and lock-in concerns . . . can appropriately be considered as part of fair-use analysis”¹⁶ and that the “fact that a particular computer program or line of computer code has become well known and popular among programmers cannot change its fundamental character from an ‘original work of authorship’ (or segment thereof) to a[n unprotectable] ‘method of operation’ or ‘system.’ . . . [Rather], a focus on the circumstances that exist at the time of copying is typical of fair-use analysis.”¹⁷

The Office welcomes public evaluation and discussion of our copyright law, and thank the ALI and the Reporters for their attention to our comments. We look forward to continuing to collaborate with you on this project.

Sincerely,



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General Counsel and Associate Register of Copyrights



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

¹³ Brief for the United States as Amicus Curiae at 13, *Google Inc. v. Oracle Am., Inc.*, 135 S. Ct. 2887 (2015) (No. 14-410), *denying cert. to Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

¹⁴ *Id.* at 14.

¹⁵ DRAFT NO. 2 at 127 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 536 (6th Cir. 2004)).

¹⁶ Brief for the United States as Amicus Curiae at 17-18, *Google Inc. v. Oracle Am., Inc.*, 135 S. Ct. 2887 (2015) (No. 14-410), *denying cert. to Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 544-545 (6th Cir. 2004); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-605 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523-1524 (9th Cir. 1992)).

¹⁷ *Id.* at 18 n.2 (noting also that if “copyrightability of a particular work [were to] turn on events that substantially postdated the work’s creation [e.g., popularity, t]hat result [would be] at odds with the Copyright Act’s basic design, under which copyright protection subsists from the creation of a work through the prescribed statutory term”) (citing 17 U.S.C. § 302).