



United States Copyright Office

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Professor Richard L. Revesz
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Ms. Stephanie A. Middleton
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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: Tentative Draft No. 3

Dear Professor Revesz, Ms. Middleton, and Reporters:

The U.S. Copyright Office is responsible for administering significant portions of the nation's copyright law and providing expert advice to Congress, federal agencies, and the courts on copyright matters.¹ As advisers to the American Law Institute (ALI) on the proposed Restatement of the Law of Copyright, we have reviewed Tentative Draft No. 3, which is being presented to the ALI's membership for approval at the 2022 Annual Meeting. In our view, the draft needs additional attention to ensure each section accurately and impartially reflects the current state of the law.

Over the last several years, the Office has reviewed each draft in detail and provided comments where we thought changes were called for or would be helpful. In some cases, we have identified instances where the *Compendium of U.S. Copyright Office Practices* provided additional context, and in others we have noted where the draft appeared to misstate specific aspects of a particular case. We appreciate the Reporters' attention to our past comments and the changes they have made to address them.

Several sections in Tentative Draft 3, however, retain problem we have highlighted in the past, including with respect to important doctrinal issues. Examples are provided below.

Section 10

This section appeared in several early drafts before being placed on hold after the Supreme

¹ 17 U.S.C. § 701(a), (b).

Court’s grant of certiorari in *Georgia v. Public.Resource.Org.*² After the Court issued its decision on April 27, 2020, a draft of this section was circulated on September 1, 2021, in Preliminary Draft No. 7.

In our letters on the two prior drafts of this section, the Office expressed concern that this section offered an “incomplete statement of the law” and did not accurately describe the copyright status of privately authored works, protected by copyright upon creation, that are subsequently adopted into law.³ Prior drafts of this section, as well as the current draft, suggest that copyright protection of such works is extinguished upon adoption into law.⁴ But, as we have explained, no court has ever held that copyright protection is lost in such instances. Courts have instead held that the work’s adoption into law offers a defense to infringement when the work is reproduced as an edict, rather than as a privately authored work.⁵

In response to our prior comments on Preliminary Draft No. 7, the Reporters added the sentence “An adopted model code or standard does not lose any copyright protection it may otherwise have as a model code or standard.”⁶ The Office appreciates this change, but we note that it remains at odds with contrary statements in the draft. For example, the draft also states that “Government adoption of a privately authored work as an edict of law may affect the copyright status of privately authored [works].”⁷ In addition, this section may need to be revisited when, in the next year, the D.C. Circuit issues its decision in *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*⁸ For these reasons, we believe this section should not be finalized until it receives additional attention and benefits from the D.C. Circuit’s analysis.

Section 15

Our concerns with this section are both procedural and substantive. On the procedural side, this section has not been through a full review by the project advisers. After Section 15 appeared in Council Draft No. 3, the section was held pending the Supreme Court’s decision in *Google v.*

² See Council Draft No. 3 at xv.

³ See Letter from Kevin R. Amer, Acting General Counsel and Associate Register of Copyrights, and Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, to Richard Revesz et al., American Law Institute at 2 (Oct. 5, 2021); 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 2 (Jan. 18, 2022).

⁴ See Tentative Draft No. 3 at 7 (stating “Government adoption of a privately authored work as an edict of law may affect the copyright status”); *id.* at 13 (“When a privately authored text is subsequently adopted by a government as an edict of law, the adopted text is excluded from copyright protection.”).

⁵ See *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 805 (5th Cir. 2002) (“[T]he result in this case would have been different if Veeck had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes.”); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735 (1st Cir. 1980) (reversing grant of preliminary injunction and expressing concern with private code organization’s ability “to enforce a copyright monopoly” over reproduction of building codes adopted into law) (emphasis added).

⁶ Tentative Draft No. 3 at 6.

⁷ Tentative Draft No. 3 at 7.

⁸ On appeal is the district court’s holding that privately authored standards adopted into law remained subject to copyright, owned by the author, but could be reproduced under the doctrine of fair use. *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, No. 13-cv-1215, 2022 U.S. Dist. LEXIS 60922, at *32, *54–55. (D.D.C. Mar. 31, 2022). This decision has been appealed to the D.C. Circuit.

Oracle, which was issued on April 5, 2021. While the draft was revised to “reflect the Court’s decision[,]” the revisions were first presented in Council Draft No. 6 last November.⁹ Project advisers did not have the opportunity to comment on the treatment of the *Google* opinion before the draft was reviewed by the Council.

As for substance, the draft has not been revised to respond to the Office’s comments on Council Draft No. 6.¹⁰ As we pointed out in January, the draft goes further than explaining the law.¹¹ Although Comment *c* accurately states that the expression of an unprotectable method can be subject to copyright protection,¹² we are concerned that, in context, the draft’s characterization of Section 102(b) could be read as denying copyright protection to an expression that simply describes, illustrates, or explains a method of operation when such expression has not been merged with the method itself.¹³ Further, it is premature for the draft to attempt to resolve copyright treatment of application programming interfaces (APIs) at this stage. The Supreme Court explicitly avoided this question in *Google v. Oracle*, warning that the “rapidly changing technological, economic, and business-related circumstances” of computer software cautioned against the Court “answer[ing] more than is necessary to resolve the parties’ dispute.”¹⁴ The Restatement should allow the courts to take the lead on this question rather than attempting to answer it.¹⁵ In its current form, the draft offers an incomplete and potentially misleading summary of the law.

Section 57

The Office previously raised concerns about this section’s misstatement of the scope of the Copyright Act’s distribution right. In response to our comments, the Reporters revised Comment *d* to remove a statement that “most courts” have required actual dissemination of a copy to implicate the distribution right. But a similar statement in the accompanying Reporters’ Note remains, although we had previously flagged it in our January 2021 letter. Because the draft no longer states that “most courts” have imposed this requirement, it is no longer accurate for the Reporters’ Note to describe that as the Restatement’s position.

⁹ Council Draft No. 6 at xvi.

¹⁰ The only changes to this section since the Council Draft are an added sentence in Comment *c* providing an example of the distinction between unprotectable methods and protectable expression and an additional sentence in Comment *e* discussing the holding in *Bikram’s Yoga Coll. Of India v. Evolution Yoga*.

¹¹ 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 2–7 (Jan. 18, 2022).

¹² Tentative Draft No. 3 at 29.

¹³ For example, the Reporters opine that the “fundamental policy” in Section 102(b) justifies the exclusion of a variety of elements from software, even those that are not subject to Section 102(b). Tentative Draft No. 3 at 35. Language such as this suggests Section 102(b) is broader than its terms.

¹⁴ 141 S. Ct. 1183, 1197 (2021) (declining to resolve copyrightability issue).

¹⁵ See Tentative Draft No. 3. at 33 (voicing “substantial doubt” about the “continued vitality of the Federal Circuit’s *Oracle* decision”), 34 (characterizing the Supreme Court’s *Google* opinion as making statements about what “kind of creativity gives rise to copyright protection” in software).

Section 59

This section contains substantive errors that were introduced at the Council Draft stage and have not been corrected in response to adviser comments. After it appeared in Preliminary Drafts No. 5 & 6, the section was revised in Council Draft No. 5 to state that there may be a common law first sale right, distinct from the statutory right originating in the 1909 Copyright Act.¹⁶ The Office is not aware of any court finding the existence of such a right, and we submitted comments on the Council Draft suggesting edits on that basis. But no changes have been made beyond edits to internal citations.¹⁷ Because the draft does not identify any case law supporting this proposition, we recommend against adoption of this section as written.

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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 past attention to our comments. But we caution that Tentative Draft No. 3 is not yet in a state to be finalized in full as the ALI's official position. We recommend that the ALI avoid adopting incomplete statements of law that would undermine the Restatement's value and create inconsistencies between the Restatement and the Copyright Act, as well as the Act's interpretation by the Copyright Office, the government agency tasked with administering its provisions.

Sincerely,



Suzanne V. Wilson
General Counsel and Associate Register of Copyrights



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

¹⁶ Council Draft No. 5 at 125 (stating without citation that “The first sale doctrine originated at common law and was first codified in statute in 1909. Courts have not addressed whether the statutory codification comprehensively defines the first sale limitation.”), 133 (“It may be, however, that the specific 17 U.S.C. § 109(a) limitation does not fully supersede common-law rules governing exhaustion of the copyright owner’s distribution right”).

¹⁷ We also note that, because no changes have been made to this section from the Council Draft, it retains drafting errors flagged by the Office, including a typo in a regulatory citation. The citation on page 211 should be to 37 C.F.R. § 201.24, not § 201.14. Similarly, Reporters’ Note *b* on page 211–12 describes *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) as construing the “1909 Copyright Act’s grant to the copyright owner of the ‘sole right of vending.’” The Court’s decision was issued a year before the 1909 Act, so it construed the statutes then in force.