



United States Copyright Office

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May 8, 2023

Hon. Diane P. Wood
Director Designate, 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: Tentative Draft No. 4

Dear Judge Wood 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.¹ As advisers to this project, we have reviewed Tentative Draft No. 4 of the ALI’s Restatement of the Law of Copyright, which is being presented to the ALI’s membership for approval at the 2023 Annual Meeting. We appreciate the revisions in this draft that are responsive to our comments on Council Draft No. 7.² But before the ALI finalizes the text of the Tentative Draft, we encourage the ALI to make further targeted revisions to improve the clarity and accuracy of the Draft, as explained below.

Section 45

We note a few typographical errors and omissions in this section:

- In the language added to Comment *j* on page 81, line 27, “Copyright Offices” should be singular.
- In Comment *p* on page 89, line 14, the letter “b” in the citation to “Circular 7b” should be capitalized.
- In Reporters’ Note *c* on page 92, line 36, the word “all” should be italicized in the quoted language from Registration of Copyright: Definition of Claimant, 77 Fed. Reg. 29257, 29258 (May 17, 2012); and parentheticals should be added to indicate emphasis in

¹ 17 U.S.C. § 701(a), (b).

² See Letter from Suzanne Wilson, General Counsel and Associate Register of Copyrights, and Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, to Eleanor Barrett et al., American Law Institute (Jan. 10, 2023) (“USCO Letter re: Council Draft No. 7”).

original and that the source is a “notice of proposed rulemaking,” as opposed to a final rule.

- And in Reporters’ Note *d* on page 96, line 1, the last revision date for Circular 38A should be updated from “2021” to “June 2022.”

Section 6.11

As an overarching point, we continue to believe that splitting the discussion of the Visual Artists Rights Act (VARA) between sections 6.11 and 7.07 could be a source of confusion, rather than elucidation.³ We suggest reorganizing the sections to avoid this issue.

Reporter’s Note *b* on page 174, line 19 states that it is “doubtful” that digital art would be covered by VARA, but cites no authority for that proposition. Rather, this conclusion seems to rest solely on the assumption that digital art could not comply with VARA’s requirement that there be no more than 200 copies and that they be individually signed. Although the Note does acknowledge the “possibility that technology could allow” compliance with this requirement, we nonetheless believe that—given the evolving technology in this area and the absence of any authority on point—it is premature to make any assessment about whether digital art may be covered by VARA. Therefore, we suggest omitting this paragraph.

Section 7.01

We continue to believe that the citation to *Yamashita v. Scholastic Inc.*, 936 F.3d 98 (2d Cir. 2019) in Comment *g* on page 190, lines 3–4 is misplaced. The Restatement quotes *Yamashita* as saying that a plaintiff “must plausibly allege that the defendant exceeded particular terms of the license.” *Yamashita*, 936 F.3d at 105. That is a pleading burden, however, and the focus of this Comment is on the burden of production or persuasion. Accordingly, including the citation to *Yamashita* here, among other sources discussing the burden of production or persuasion, may confuse readers about what is required of parties at the pleading stage versus at the fact-finding stage.

Section 7.02

For Comment *g*, we reiterate our suggestions regarding the discussions of 411(b) and *Unicolors* from our previous letter:⁴ First, we recommend discussing 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. The role of the Register is critical in execution of the statutory provision, but the draft as written could mislead readers to assume that section 411(b) challenges are accomplished solely through briefing by the parties.⁵ Second, we again note that the discussion of *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941 (2022), appears to misrepresent the state of the law. Rather than discussing the

³ See *id.* at 5, 8.

⁴ See *id.* at 6–7.

⁵ The new version of Section 45, Comment *k* was revised to include this information, so it may be worth at least adding a cross-reference to that discussion here.

Court’s specific holding, the draft focuses on the intent-to-defraud requirement, relying entirely on cases that predate the Court’s decision in *Unicolors*.

While Reporter’s Note *j* has been improved, the newly added text contains a misstatement. The Note on page 215, lines 17–19 now incorrectly states that “to be named as a claimant in an application for copyright registration, a person or organization must own all rights in the work; ownership of only some of the rights is not sufficient.”⁶ This statement should be qualified — while as a general rule, claimants must own all exclusive rights, authors are subject to different treatment. Under the Office’s regulations, an author may be listed as a claimant even if they do not own all exclusive rights in the work.⁷ That is why, as we suggested in our previous letter,⁸ registration applications should list the author as the claimant when less than all rights in a work have been transferred.

Finally, please note that in the parenthetical following the citation to *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 166 (2d Cir. 2003) in Reporters’ Note *d* on page 209, line 39, there is a typographical error—“Registrar” should be “Register.”

Section 7.03

As noted in our previous letters, Comment *i* discusses striking similarity in a way that omits mention of access. We again 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. In addition, the Comment on page 227, line 1 states that striking similarity only applies when the “copyrighted work is sufficiently complex, nonroutine, or contains significant uncommon expression not found in other works.” The Comment and corresponding Note do not cite any cases to support this proposition, and the Office is unaware of any authority for finding complexity in particular as a basis for striking similarity. We would recommend removal of this sentence before this Section is approved. If the Reporters declines to remove this sentence, the word “complexity” should be omitted.

We also again respectfully suggest that the cited cases in Comment *l* and Reporter’s Note *l* do not support the implication that subconscious copying requires a higher level of proof than other forms of copying.⁹ Accordingly, we suggest that the statements be deleted unless further support can be cited.

Reporters’ Note *j* on page 237 properly indicates that the quotation from *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018) uses the term “presumption” to describe how the burdens of production may be shifted regarding copying. However, the Note’s discussion states that even if there is a “presumption,” the defendant may not have to introduce evidence to rebut the presumption. If there is truly a presumption, then the defendant must introduce some evidence to

⁶ The Restatement cites to 35 C.F.R. § 202.3(a)(3)(ii) for this proposition. The citation should be corrected to 37 C.F.R. § 202.3(a)(3)(ii).

⁷ See 37 C.F.R. § 202.3(a)(3)(i).

⁸ See USCO Letter re: Council Draft No. 7 at 7.

⁹ See *id.*

rebut it. What the Note describes is a permissible inference, which may be what the court intended in *Rentmeester*, but should be made clear in the Note.

Section 7.04

We offer two comments concerning Illustrations in this Section. First, we would suggest that the second sentence of Illustration 1 on page 240, lines 19–21 refer to B as having reproduced the “code.” Second, we again suggest relocating Illustration 2, which offers as an example of noninfringement of a photograph in the background of a film that is shown for a few seconds and appears to refer to the doctrine of *de minimis* infringement, to Comment *k*, which discusses *de minimis* infringement in depth.¹⁰

In addition, we are concerned that Comment *k* could be read as misstating the copyright doctrine of *de minimis* infringement. The draft implies that there are two *de minimis* doctrines: a copyright *de minimis* doctrine and a general common law doctrine of *de minimis non curat lex* that could also apply in copyright cases.¹¹ While the Reporters do not seem to be taking this position, the draft risks creating confusion for readers by not clearly explaining that the doctrine of *de minimis* infringement is the way that courts apply the general doctrine of *de minimis non curat lex* in copyright cases. We note that the Comment on page 254, lines 19–20 cites *Ringgold v. Black Entm’t TV, Inc.*, in which the Second Circuit clearly explained that the *de minimis* doctrine in copyright is the application of “[t]he legal maxim ‘de minimis non curat lex’ (sometimes rendered, ‘the law does not concern itself with trifles’)” and is not a separate doctrine. 126 F.3d 70, 74 (2d Cir. 1997).

Section 7.07

Comment *e* on pages 277–279 relies on a single First Circuit case, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, 593 F.3d 38 (1st Cir. 2010), as the basis for determining that VARA does not provide a damages remedy for violations of the right of attribution. However, as Paul Goldstein points out in his treatise, a reasonable argument exists that the First Circuit has not properly interpreted Congress’ intent.¹² We suggest that the drafters not take a position on this issue until more case law has emerged. At a minimum, the drafters should set out Goldstein’s alternative argument in favor of a damages remedy.

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¹⁰ See *id.* at 7–8.

¹¹ Comment *k* describes the doctrine initially as permitting copyright of a *de minimis* quantity of material. Tentative Draft at 254:10–11 (“If the protected expression copied is *de minimis*, there cannot be, as a matter of law, the substantial similarity necessary to establish improper appropriation.”). It later goes on to say that “the doctrine of *de minimis non curat lex* (the law cares not for trifles), which denies a plaintiff relief for technical but trivial violations of the plaintiff’s rights, is part of the established background of legal principles.” *Id.* at 255:28–30. This phrasing could be read as describing two separate doctrines.

¹² See GOLDSTEIN ON COPYRIGHT § 7.14.1 (3rd ed. 2022).

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. We suggest, however, that our comments be considered and addressed through appropriate revisions before Tentative Draft No. 4 is finalized in full as the ALI's official position.

Sincerely,

A handwritten signature in black ink that reads "Suzanne V. Wilson". The signature is written in a cursive style with a large, stylized initial 'S'.

Suzanne V. 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 large, stylized initial 'R'.

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