



United States Copyright Office

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Reporters, ALI Restatement of the Law, Copyright

Re: Council Draft No. 4

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 We have reviewed Council Draft No. 4 of ALI's proposed Restatement of the Law of Copyright and offer the below commentary to help guide consideration of the draft.

In providing comments, we remain of the view that the Restatement should not displace traditional tools of statutory construction or the Copyright Office's rules and regulatory guidance interpreting and applying the Copyright Act. Such guidance is entitled to ordinary and appropriate levels of judicial deference. To that end, the letter highlights prior views expressed by the Office in areas relevant to the latest draft, including guidance set forth in the *Compendium of U.S. Copyright Office Practices, Third Edition* ("*Compendium*"), so that the Reporters may avoid or harmonize potential areas of conflict.

On behalf of the Copyright Office, we are gratified to see that the revised draft reflects a number of points raised in our prior comments. We encourage the consideration of the following points regarding the most recent draft, ordered by their appearance in the draft.

Section 2.05

Comment *f* addresses the copyrightability of opinions presented as facts, including numerical estimates. As another basis for exclusion, consider including the *Compendium*'s discussion of names and short phrases, which explains that "individual numbers, letters, sounds, and short

¹ 17 U.S.C. § 701(a), (b).

phrases consisting of such elements are not copyrightable, because they do not contain sufficient creative authorship.”² Citation of the regulatory text of 37 C.F.R. § 202.1(a) would also be appropriate. Citation to that section of the *Compendium* would also support Comment *e*’s explanation that facts are not individually copyrightable, but their creative selection and arrangement is protectable.

Section 3.02

As set out in the Office’s March 4, 2019 letter,³ we continue to recommend reference to the Copyright Office’s practices in Reporters’ Note *a* by direct citation to *Compendium* § 306: “The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being. The copyright law only protects ‘the fruits of intellectual labor’ that ‘are founded in the creative powers of the mind.’”

Section 3.03

As explained in its December 2017 and March 2019 letters, the Office disagrees that the Copyright Act establishes an independent requirement that contributions by joint authors be “significant” to the work as a whole. The Office welcomes removal of black letter law making reference to joint authors contributing “significant” expression within the context of the work. We retain some concern, however, about the discussion of that issue in the Comment *e*.

First, the added citation to the *Compendium* in Comment *e* incorrectly suggests that the Office has endorsed a separate “significance” requirement for contributions by joint authors. The comment quotes language from *Compendium* § 505.2 explaining that each joint author must contribute “a sufficient amount of original authorship to the work.”⁴ But it is apparent from context that that phrase is intended to indicate simply that the contribution must be sufficiently original to sustain a copyright claim, not that it also must meet some threshold of significance to the overall work. This is clear from the last sentence of the quoted paragraph, which expressly distinguishes a joint author’s contribution from that of “a collaborator who merely contributes a *de minimis* amount of expression.” The paragraph then cites *Compendium* § 313.4(B), which defines “*de minimis*” authorship to include contributions such as “Editing that merely consists of spelling and grammatical corrections,” substituting pronouns in an existing work of authorship, and other types of trivial changes that “contain no expression or only a *de minimis* amount of original expression [and thus] are not copyrightable.” Comment *e* should be revised so as to avoid any possible mischaracterization of the *Compendium*’s guidance on this question.

Separately, the draft Comment continues to overstate the role of a “significance” factor for contributions beyond what is supported by its cited cases. For example, while it is true that *Aalmuhammed v. Lee* warned against limiting the test for joint authorship “to whether [an

² *Compendium* § 313.3(C).

³ Letter from Regan A. Smith, 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 (Mar. 4, 2019).

⁴ *Compendium* § 505.2.

author] made a substantial creative contribution,”⁵ the court’s ultimate holding was based on who exerted control over the joint work, and none of the three factors enumerated by the court explicitly discuss the significance of a joint author’s individual contribution.⁶

A better framing for this Comment would reflect the removal of “significance” from the black letter law by more directly tying this discussion to the intent requirement for joint authorship. It was through application of that requirement that the court in *Childress v. Taylor* ultimately addressed its concern over “the risk that a sole author [could be] denied exclusive authorship status simply because another person renders some form of assistance”⁷ To avoid granting a windfall to someone who provided only limited assistance, the court construed the intent requirement such that “equal sharing of rights [w]ould be reserved for relationships in which all participants fully intend to be joint authors.” *Id.* at 509. Similarly, *Aalmuhammed*’s second suggested factor of “shared intent to be coauthors”⁸ seems most relevant to the relationship between a contribution and the final work, as extremely unequal contributions would weigh against a finding of intended coauthorship.

This also is how the Copyright Office approaches this inquiry, as explained in the *Compendium*. The Office considers the intent of authors to merge into an inseparable whole the “key requirement” of joint authorship, and such authorship is “implausible” where works “contain[] a major contribution from one author combined with a minor contribution by another author.” *Compendium* §§ 505.1–.2. The Office does not engage in a separate determination of significance of contribution; it merely acknowledges that intent is less clear when one creator contributes significantly less to a work than another.

Section 3.05

The Office appreciates the revised discussion in Comment *c* of *Kirk v Harter*, 188 F.3d 1005 (8th Cir. 1999) and the draft’s acknowledgment that those factors are not central to employee status, as recommended in our previous letters.

The Office also approves removal of the paragraph in Reporters’ Note *b* stating that there is no reason why nonjuridical entities cannot commission works for hire. The Office would still recommend, however, removal of the sentence in the following paragraph stating that the Copyright Office’s practices for works created by an individual for their unincorporated association address a “special case” and “do[] not speak to the general issue of ownership.” Given that Note only cites the subsequently reversed district court determination in *CCNV* as an instance where an unincorporated association was found to be the owner of a work for hire, it

⁵ 202 F.3d 1227, 1233 (9th Cir. 2000).

⁶ *Id.* at 1234–35 (listing factors that “suggest themselves as among the criteria for joint authorship” as who “superintends” the work, whether authors “make objective manifestations of a shared intent to be coauthors,” and whether work’s “audience appeal” turns on both contributions and cannot be easily allocated to an individual contribution).

⁷ 945 F.2d 500, 504 (2d Cir. 1991).

⁸ *Aalmuhammed*, 202 F.2d at 1234.

would be more prudent to remove the final sentence of this Reporters' Note to accurately state the existing law and guidance on this issue.

Section 3.07

The Office agrees with elevating *Eden Toys* to the text of Comment *l*. We remain concerned, however, that the Comment downplays the widespread adoption of *Eden Toys* by appellate courts in stating that courts “sometimes” express hostility to transfer challenges despite describing the case as being “widely-cited.”

Moreover, the rest of that paragraph makes qualitative recommendations about what courts “should” do without support. If the Reporters believe that *Eden Toys* has been applied more broadly than the court intended, they should be clear that it is the position of the Restatement rather than the conclusion of other courts. Alternatively, the Comment could be revised to clarify that some cases have indeed read *Eden Toys* to stand for a narrower principle solely for written transfer agreements, with, as the corresponding Reporters' Note acknowledges, attention paid to whether both parties to the transfer are joined in suit.⁹

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

Sincerely,



Regan A. Smith
General Counsel and Associate Register of Copyrights



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

⁹ See, e.g., *Urbont v. Sony Music Entm't*, 831 F.3d 80, 86–88 (2d Cir. 2016) (in case involving work-for-hire issues, court could not assume Marvel agreed that Iron Man theme song belonged to plaintiff composer where “Marvel is not a party to the lawsuit and has not had the opportunity to clarify its position with respect to ownership”).