



**United States Copyright Office**

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May 16, 2025

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: Tentative Draft No. 6

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, as well as other matters arising under Title 17 of the U.S. Code.<sup>1</sup> We have reviewed Tentative Draft No. 6 of the ALI’s Restatement of the Law of Copyright and appreciate that there are revisions in this draft responsive to our comments submitted on previous drafts.<sup>2</sup> However, we have identified substantive issues that persist or were introduced in this draft. We respectfully request that the ALI Members withhold approval of several subsections until those issues are addressed through further revision by the Reporters, with input from the project Advisers as appropriate.

We note our previous feedback that was not addressed in the draft, as well as additional substantive feedback to share regarding new text:<sup>3</sup>

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<sup>1</sup> 17 U.S.C. § 701(a), (b).

<sup>2</sup> 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 Hon. Diane P. Wood et al., American Law Institute (Feb. 26, 2025) (“USCO Letter re: Revised Sections 6.09 & 10.02”); 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 Hon. Diane P. Wood et al., American Law Institute (Jan. 17, 2025) (“USCO Letter re: Council Draft No. 10”); 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 Hon. Diane P. Wood et al., American Law Institute (Oct. 11, 2024) (“USCO Letter re: Council Draft No. 9”). For ease of reference, copies of these letters are posted to the Office’s website at: <https://www.copyright.gov/rulings-filings/restatement/>.

<sup>3</sup> In addition to our substantive comments below, we note a few minor typographical errors and omissions. In Comment *e* of section 6.09, the citation to the Office’s Making Available Report should say “Register of

## ***Section 41: Publication On or After January 1, 1978***

In Comment *e*, the explanatory parenthetical following the second citation to *Brunson v. Cook*<sup>4</sup> would benefit from additional context about the facts of the case. Specifically, the parenthetical should indicate the copyright owner authorized the posting of a work with knowledge that the platform included a download button and that there was no indication that the owner reserved any rights.

## ***Section 6.09: Performing or Displaying a Work “Publicly”***

We appreciate the revisions made in this draft that address some of the concerns raised in our previous letters. We do, however, have an additional concern about a new citation to *Elektra Ent. Grp., Inc. v. Barker*<sup>5</sup> that was added to the Reporters’ Note to Comment *e* in this draft. While the quoted language about the court being hesitant to attribute the legislative intent of one Congress to a subsequent Congress is correct, this statement is dicta in a footnote in a case that does not involve an offer to transmit a work or the public performance right generally.<sup>6</sup> Accordingly, we recommend that the citation be removed.

## ***Section 6.12: Fair Use***

Comment *a* states that “it would be unwise to treat any judicial precedent on fair use—even including the Supreme Court’s most recent fair use decisions—as representing a final understanding of the law.” If such an obvious point is even necessary, we recommend revising this sentence to instead state that “one should be mindful that the doctrine will continue to develop as courts apply recent judicial precedent to new or different factual scenarios.”<sup>7</sup>

Comment *m* and the corresponding Reporters’ Note focus on explaining that the second factor will often weigh in favor of fair use for factual works. For completeness and balance, the

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Copyrights” not “Register of Copyright.” In Comment *a* of section 9.07, the quotation from *Capitol Records, LLC v. Vimeo, Inc.*, 125 F.4th 409 (2d Cir. 2025) includes an incorrect article and should read: “a plaintiff must [also] bear the burden of persuasion in showing that the defendant was disqualified from the safe harbor because it received a financial benefit directly attributable to the infringing activity while having the right and ability to control such activity.” In the Reporters’ Note to Comment *p* in section 9.07, the pin cite for the *Lenz* case should also include page 1154 because the court’s holding regarding evidence contradicting an assertion of subjective good faith appears at the end of that page. Finally, in the Reporters’ Note to Comment *f* in section 11.02, the word “protected” is missing from the quotation from *Nat’l Football League v. PrimeTime 24 Joint 26 Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>4</sup> *Brunson v. Cook*, No. 20-cv-1056, 2023 WL 2668498, at \*7 (M.D. Tenn. Mar. 28, 2023).

<sup>5</sup> 551 F. Supp. 2d 234, 242 n.7 (S.D.N.Y. 2008).

<sup>6</sup> Instead, the court found that plain language of the statute was clear that an “offer to distribute” could infringe the distribution right. 551 F. Supp. 2d 234, 242 (“[T]he Court holds that the offer to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display can violate the distribution right of Section 106(3).”) (cleaned up).

<sup>7</sup> See H.R. REP. NO. 94-1476, at 66 (1976) (“The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine. However, the endless variety of situations and combinations of circumstances that case rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).

discussion would benefit from also explaining that courts have generally found that the second factor disfavors fair use where the nature of the copyrighted work is creative.<sup>8</sup> In addition, while the Comment and Reporters' Note are correct that in most fair use cases the second factor has not played a significant role, particularly relative to the other factors, we suggest that courts and practitioners would benefit from a reminder that each of the enumerated statutory factors – including the second – must be considered in the fair use analysis.<sup>9</sup> It would also be useful to note that the second factor has been an important starting point for several important cases involving uses of computer programs.<sup>10</sup>

In Comment *n*, the citation to *Brammer v. Violent Hues Prods.*<sup>11</sup> does not support the proposition that the unpublished nature of a work is not determinative on the second factor. Rather, the *Brammer* quotation is making a different point entirely, which is that publication status is not relevant in every case. In addition, *Brammer* concerns a published work; and the court explicitly rejects the defendant's argument "the fact that [plaintiff] published the Photo must necessarily weigh in *favor* of fair use."<sup>12</sup> Because the citation does not support the proposition and does not concern an unpublished work, we recommend it be removed.

### ***Section 9.01: Remedies for Copyright Infringement***

Subsection (e) of the black letter still uses the term "online service providers." We reiterate our recommendation to instead use the statutory term "service providers,"<sup>13</sup> which the Restatement uses elsewhere in this section, so that the black letter is consistent with the statute and the rest of the draft.

### ***Section 9.07: Limitations on Remedies: Safe Harbors for Online Service Providers***

As in section 9.01, subsection (c)(1) of the black letter for section 9.07 continues to indicate that the limitations on remedies provided for in 17 U.S.C. § 512 apply only to entities that "meet[] the applicable statutory definition of an 'online service provider[.]'" Here too we reiterate our recommendation to instead use the statutory term "service providers," which the Restatement uses elsewhere in this section, so that the black letter is consistent with the statute and the rest of the draft.

In revisions to Comment *c*, the parenthetical following *Perfect 10, Inc. v. CCBill LLC*<sup>14</sup> inaccurately describes the Ninth Circuit as "rejecting, on a motion for summary judgment, plaintiff's assertion that credit-card company did not qualify as a service provider because it did not itself transmit the infringing material." Instead, this parenthetical should reflect that the

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<sup>8</sup> See USCO Letter re: Council Draft No. 9 at 3 (citing 4 NIMMER ON COPYRIGHT § 13F.06[A]; PATRY ON COPYRIGHT § 10:138).

<sup>9</sup> See, e.g., *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 25–29, 40 (finding the functional nature of the computer software at issue significant in its conclusion that the use was fair); see also USCO Letter re: Council Draft No. 9 at 3.

<sup>10</sup> See *Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 603–06 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524–26 (9th Cir. 1992).

<sup>11</sup> 922 F.3d 255, 267 (4th Cir. 2019).

<sup>12</sup> *Id.*

<sup>13</sup> "Service provider" is the term defined in subsection 512(k). 17 U.S.C. § 512(k).

<sup>14</sup> 488 F.3d 1102 (9th Cir. 2007).

Ninth Circuit was reviewing and affirming the district court’s summary judgment rulings, not denying a motion for summary judgment. Also, the defendant CCBill is more aptly described as an electronic transaction *processing* company, not a credit-card company.

In the Reporters’ Note to Comment *q*, the parenthetical for *Wolk v. Photobucket.com, Inc.*<sup>15</sup> includes factual findings not discussed in the Second Circuit’s summary opinion. To the extent such findings are referenced in the draft, it should cite the district court opinion as well.<sup>16</sup>

### ***Section 10.02: Circumvention of Copyright-Protection Systems***<sup>17</sup>

We continue to object to the decision to conclude Comment *f* with the Restatement’s position “that for an act of circumvention to be prohibited under 17 U.S.C. § 1201(a), that act must have some relationship to a copyright owner’s exclusive rights in a copyrighted work.” Because neither the statutory text of 1201(a), nor its legislative history,<sup>18</sup> nor its interpretation by the Ninth Circuit<sup>19</sup> and the Office<sup>20</sup> support requiring any nexus to an act of copyright infringement (or to an exclusive right), it is difficult to justify the Restatement taking this position in a Comment. As we explained previously, a Comment that purports to restate current law is not the appropriate place to advance a new legal test; instead, such a position should at most be expressed in a Reporter’s Note.<sup>21</sup> Moreover, to the extent that the Restatement insists that some form of a “nexus” requirement must exist, we suggest that its position could be revised to state that section 1201(a) requires a “nexus” to a copyrighted work, but not to the exclusive rights of a copyright owner or to an infringement of any of those rights.<sup>22</sup>

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<sup>15</sup> 569 F. App’x 51, 52 (2d Cir. 2014).

<sup>16</sup> See *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724 (S.D.N.Y.2012).

<sup>17</sup> In addition to our concern about the conclusion in Comment *f* of this section, the Office again notes that the Restatement mischaracterizes a footnote from the D.C. Circuit’s decision in *Green v. United States Department of Justice* by paraphrasing as “noting disagreement between Ninth Circuit and Federal Circuit regarding the ‘nexus’ requirement but expressing no opinion on the issue.” The D.C. Circuit, however, was not only “noting disagreement,” but also observing that “[n]o other court of appeals has adopted [the Federal Circuit’s] interpretation.” 111 F.4th 81, 96 n.1 (D.C. Cir. 2024). To accurately capture the D.C. Circuit’s observation that no other appellate court has adopted the Federal Circuit’s nexus requirement, we recommend that the Restatement quote directly from the court’s opinion.

<sup>18</sup> See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 943–52 (9th Cir. 2010) (rejecting the imposition of a nexus requirement).

<sup>19</sup> See STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4TH, 1998, at 5–8 (Comm. Print 1998).

<sup>20</sup> See U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 42–47 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

<sup>21</sup> See USCO Letter re: Revised Sections 6.09 & 10.02 at 2–3; USCO Letter re: Council Draft No. 10 at 2–3.

<sup>22</sup> The Office also notes that the Restatement’s position relies primarily on competition policy arguments and speculation about congressional intent that is unsupported by the statute and its legislative history. Even granting that the policy concerns expressed in this section may have some merit, the Comment fails to acknowledge that Congress explicitly exempted certain activities from liability and included an additional safeguard in 1201(a) that provides a mechanism to exempt other types of noninfringing uses that are, or are likely to be, adversely affected by the anti-circumvention provision. See 17 U.S.C. § 1201. The statutory scheme, including the exemption provisions, represents the clearest expression of Congress’s intent to balance policy interests in protecting copyrighted works against unauthorized access with policy interests in permitting noninfringing uses of those works that require circumvention to access.

#### ***Section 11.04: Procedural Issues and Relationship to Other Bodies of Law***

Comment *c* states there is “some tension” between two provisions in 17 U.S.C. § 1508(c) concerning the process and bases for challenging a determination by the Copyright Claims Board (“CCB”), questioning how a “final determination in a proceeding” would fail to be “a final determination concerning the subject matter at issue.” Although such a scenario is likely rare, it is not entirely unforeseeable that a final determination could fail to address an issue that was raised or that some portion of a determination might be unintentionally omitted when published. In other words, the statute contemplates that a final determination may be challenged where the determination, for whatever reason, does not address “the subject matter at issue.” Because there is no clear conflict between the two statutory provisions, we recommend that the paragraph suggesting that there is one be deleted.

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In conclusion, to avoid ratifying misstatements of copyright law and to maintain the Restatement’s ability to serve as an objective resource, we recommend that the Council vote not to approve—in their current form—sections 41 (Comment *e* and Reporters’ Note to Comment *e*), 6.09, 6.12, 9.01, 9.07, 10.02, and 11.04. Upon further revision consistent with our comments, these sections could be ready for approval by the Members at a future meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Kasunic". The signature is fluid and cursive, with the first name "Robert" being more prominent and stylized than the last name "Kasunic".

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