United States Copyright Office
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May 14, 2024

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. 5

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.[1] We have reviewed Tentative Draft No. 5 of the ALI's Restatement of the Law of Copyright and appreciate that there are revisions in this draft responsive to prior comments submitted on Council Draft No. 8.[2] Based on our review, we have identified a number of substantive issues that persist in this draft. We respectively 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 have outlined here the specific draft sections that we believe require additional edits to ensure they accurately reflect restate the law:

Section 6.03: The Copyright Owner's Exclusive Right to Prepare Derivative Works

In light of a number of concerns that we have previously raised regarding comments to Section 6.03, we recommend that the Members either withhold approval of the entire section or, in the alternative, delete certain comments from its approval.

[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 Hon. Diane P. Wood et al., American Law Institute (Jan. 12, 2024) ("USCO Letter re: Council Draft No. 8").

We continue to reiterate that the black letter of section 6.03 should be revised to make clear that a copyright owner has the exclusive right not only to prepare derivative works, but also to authorize the preparation of derivative works.[3]

We also reiterate our opposition to Comment *a* as currently drafted, and recommend approval be withheld to make further revisions. As explained in our January 12, 2024 letter, this Comment sets forth purported limitations and qualifications on the right to prepare derivative works, yet a few of these examples, such as 17 U.S.C. § 110(11) (Family Movie Act of 2005 ("FMA") and 17 U.S.C. § 203(b)(1) and 304(c)(6)(A) (derivative works exception to termination provisions), are not strictly limitations on this right.[4] Similarly, and as we have repeatedly raised, Comment *k* and the accompanying Reporters' Note incorrectly imply that the FMA as an exception to the right to prepare derivative works, in spite of the statutory language to the contrary. Accordingly, we recommend that approval of Comment *k* and the accompanying Reporters' Note be withheld.

Finally, we continue to take issue with the framing of Comment *g*. Specifically, as drafted, this Comment does not address the distinction between the test for copyrightability and the test for infringement of the right to prepare derivative works. As we have previously explained, under the former, only the products of human creativity may receive copyright protection, while the use of the term "preparation" in the derivative-works right indicates that nonhuman actions may be enough to infringe that right.[5] In line with this, we recommend that the discussion of "the status of derivative works generated by nonhuman authorship" in the accompanying Reporters' Note include a citation to 17 U.S.C. § 106(2). Moreover, we echo broader concerns about this section of the Restatement previously raised by Professors Balganesh, Ginsburg, and Menell who commented that the Reporters have taken the erroneous view that the derivative works right is infringed only if the alleged infringing work is an original work of authorship. We commend the Reporters to the professors' comments found in the Appendix to Professor Ginsburg's March 1, 2024, comments; and we recommend approval of this section be withheld until those concerns are adequately addressed.

Section 8.02: Contributory Copyright Infringement

We request that approval of Comment *d* be withheld until the Reporters have addressed concerns we have previously raised regarding this text. Specifically, we reiterate our previous comment that the discussion of the material contribution requirement in Comment *d*, inaccurately connects the analysis of "material contribution" in copyright law to analysis of proximate causation in tort law.[6] In addition, the draft preserves the assertion that "a defendant's contribution that is not essential—*i.e.*, not the but-for cause—of the underlying direct infringement is unlikely to be 'material.'" As we noted previously, this statement is contradicted by several cases in which courts found that the defendants' contributions were "material" without requiring that these

[3] *See* USCO Letter re: Council Draft No. 8 at 3; 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, at 1 (Sept. 26, 2023) ("USCO Letter re: Preliminary Draft No. 9") (citing 17 U.S.C. § 106(2)).
[4] *See* USCO Letter re: Council Draft No. 8 at 3.
[5] *See id.* at 3–4.
[6] *See id.* at 4.

contributions be "essential" or the "but-for cause" of the direct infringement.[7] Accordingly, we suggest withholding approval of Comment *d* until further revisions are made to adequately explain that if contribution is "essential" to or the "but-for cause" of direct infringement, that will favor a finding of materiality, but also acknowledge that courts have not imposed this imported tort law concept as necessary to such a finding, and some courts have found non-essential contributions to be sufficiently material.

* * * *

In conclusion, to avoid ratifying misstatements of copyright law, we recommend that the Members vote not to approve—in their current form—the sections and/or subsections in which we have identified substantive issues above (*i.e.*, sections 6.03 and 8.02 (Comment *d*)). After further revision consistent with our comments, we anticipate that the sections will be appropriate for the Members to approve at a future meeting. As always, 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.

Sincerely,

Suzanne V. Wilson
General Counsel and Associate Register of Copyrights

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

[7] *See* USCO Letter re: Council Draft No. 8 at 4; USCO Letter re: Preliminary Draft No. 9 at 7; *see, e.g., Fonovisa v. Cherry Auctions*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that providing "site and facilities" and the "environment and the market" for sales of infringing records constituted a material contribution); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-cv-2670, 2006 WL 842883, at *14–16 (D.N.J. Mar. 31, 2006) (concluding that providing flea market vendors with "basic requirements such as wooden tables, and booth spaces, security, free parking, maintenance of the market grounds (including cleaning and repair), and restrooms" as well as "extensive advertising" and refund services was sufficiently material); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1001 (E.D. Cal. 2004) (determining that "[o]perating a flea market or swap meet involves providing vendors with support services" and "[t]his is all that is required to satisfy the requirement of material contribution necessary to establish contributory liability").