



**United States Copyright Office**

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · [www.copyright.gov](http://www.copyright.gov)

January 14, 2021

Professor Richard L. Revesz  
Director, ALI  
Ms. Stephanie A. Middleton  
Deputy 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: Council Draft No. 5

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.<sup>1</sup> We have reviewed Council Draft No. 5 of the ALI’s proposed Restatement of the Law of Copyright and offer the below commentary to help guide consideration of the draft.

As we have stated in prior letters, the Copyright Office does not believe that the Restatement should displace any of the “traditional tools of statutory construction,” including examination of the statute’s text, structure, purposes, and legislative history. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–50 (1987). Nor should the Restatement supplant the Copyright Office’s rules and regulatory guidance that interpret and apply the text of the Copyright Act, which are entitled to appropriate levels of judicial deference. Relatedly, we continue to urge the Reporters to avoid conflicts between the Restatement and Copyright Office regulations or other interpretive guidance, including the *Compendium of U.S. Copyright Office Practices (Third Edition)* (“*Compendium (Third)*”), as conflicts could produce significant confusion and adversely affect Copyright Office operations.

The Office appreciates the efforts of the Reporters to address in this latest Draft many of the concerns we have previously expressed, particularly in Chapters 2, 3, 5, and 9. While not

---

<sup>1</sup> 17 U.S.C. §701(a), (b).

comprehensive, the following comments reflect the Office’s primary areas of concern with the most recent Draft, ordered by their appearance in the Draft.

### ***Section 6.01***

We acknowledge and appreciate the change to Comment *c*, deferring any discussion of infringement standards to Chapter 7.

### ***Section 6.02***

We note, as expressed in previous letters, our continuing concerns with the definition of fixation provided in Comment *b*, which refers to “allow[ing] the enjoyment or exploitation of the work’s expressive content.” The Office remains of the view that the Draft should “retain the terms used in the statute and not suggest additional requirements unless it is simply pointing out what a particular court or courts have stated, with appropriate citations.”<sup>2</sup>

In Reporters’ Note *b*, we appreciate the addition of further discussion of the possible effect of the Music Modernization Act (“MMA”) on the relationship between reproduction and fixation. The Note disagrees with the proposition that Congress’s inclusion of interactive streams within the scope of the section 115 license was intended “to work a general redefinition of the concept of ‘reproduction’ as it appears in 17 U.S.C. § 106, [or of fixation as defined by the statute and interpreted by the courts.” In support of that conclusion, however, the Draft cites only a law review article on text and data mining. We believe that this citation should be deleted, as it does not appear to be on point. Instead, the Reporters may wish to give fuller consideration to the historical development of the legislative language. Professor Nimmer’s analysis of prior legislation, regulatory proceedings, and Copyright Office statements may be instructive in this area.<sup>3</sup>

More generally, we believe that the Draft should make clear that there is little or no case law discussing this issue and therefore, any discussion of the statute’s effect on the reproduction right is speculative. In addition, we suggest that you consider a cross reference to this discussion in the discussion of the distribution right in section 6.04.

We acknowledge and appreciate the addition to Comment *e* of an illustration demonstrating that infringement of the reproduction right can occur without distribution.

---

<sup>2</sup> Letter from Regan A. Smith, General Counsel & Associate Register of Copyrights and Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, to Professor Richard L. Revesz, Director, ALI, et al., at 5 (May 29, 2020).

<sup>3</sup> Professor Nimmer notes that the MMA’s definition of “interactive digital stream” grew out of a 2009 Copyright Royalty Board regulation reflecting the parties’ settlement in a section 115 ratemaking proceeding. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.28[D][3][d]; *see also id.* § 8.28[D][3][b] (discussing earlier proposed legislation to extend mechanical license to the making of incidental reproductions to facilitate streaming).

## Section 6.04

Comment *c* states that “[w]hen a recipient of a transmission independently records the transmitted work in a copy or phonorecord, that act itself should not result in the transmission being considered a distribution.” Although the preceding sentence notes that courts have not addressed this issue, we recommend that the Comment expressly note that this is a position taken by this Restatement. It appears that the previous draft included such a statement.

Similarly, Reporters’ Note *c* takes the position that “[i]f . . . a recipient of the transmission creates a copy of a transmission merely streamed by a broadcaster for real-time viewing, the transmission should not be held to constitute a distribution by the broadcaster.” But Illustration 5 after Comment *c* appears to acknowledge that a distribution potentially could be found to have occurred in these circumstances depending on the specific facts: “As part of its monthly subscription plan, Video Streaming Service offers the option of downloading motion pictures on Subscribers’ computers or tablets for offline viewing. Subscribers make use of the option and download copies of motion pictures. Video Streaming Service has distributed copies of motion pictures.” As noted, the Reporters appear to be taking the position that courts should look to whether the recipient of a transmission “independently records the transmitted work in a copy or phonorecord” to distinguish between those transmissions that constitute distributions and those that do not. Even assuming, however, that that is an accurate characterization of the legal standard, the Illustrations do not indicate a principle by which to determine whether the recipient’s action is in fact “independent,” which courts have suggested is a highly fact-specific inquiry.<sup>4</sup>

We acknowledge that Comment *d* has been revised to remove the statement that “most courts” have required actual dissemination of a copy to implicate the distribution right. Reporters’ Note *d*, however, still says that “most courts that have considered the issue have held that infringement of the distribution right requires distribution of an actual copy or phonorecord.” That statement should be revised so as to be consistent with the Comment.

Reporters’ Note *d* says that the Restatement is not taking a position on the existence of a making available right, but the newly added language appears to effectively take a position against such a right, contending that “the legislative history should not be used to create an ambiguity in statutory language that otherwise appears on its face to clearly identify ‘distribution’ as the ‘distribution of copies or phonorecords to the public.’” To the extent the Reporters have now decided to take a position on this issue, the Reporters’ Note should state expressly that this is a position taken by this Restatement rather than a description of settled law. The Office continues to believe that the analysis and conclusions set forth in its 2016 policy report reflect the correct determination of this issue.<sup>5</sup>

---

<sup>4</sup> Cf. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 444 (2014) (“In other cases involving different kinds of service or technology providers, a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.”).

<sup>5</sup> U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES (2016), [https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf).

## Section 6.06

We believe that the references in Comment *a* and Reporters Note *f* to a possible common law first sale right that is separate from the statutory right, should be removed. Neither the Comment nor the Reporters' Note cites any actual support for such a right, nor do they indicate what role such a right, if it existed, would play. The quotations from the Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc.* and the Ninth Circuit's decision in *Close v. Sotheby's, Inc.* merely acknowledge the common law roots of the statutory right.<sup>6</sup> They do not support the existence of a separate common law right.

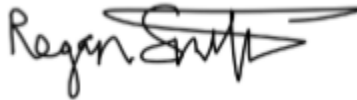
As we pointed out in our previous letter, the reference in Comment *g* to 37 C.F.R. § 201.14 is erroneous—the correct reference is 37 C.F.R. § 201.24. Section 201.14 provides the warning of copyright used by certain libraries and archives at the place where orders for copies or phonorecords are accepted; it references Copyright Act sections 108(d)(2) and (e)(2). Section 201.24 provides the warning of copyright for software lending by nonprofit libraries; it references Copyright Act section 109(b)(2)(A).

Regarding the Reporters' Note to Comment *b*, we respectfully suggest that *Bobbs-Merrill*, decided in 1908, construed the statutes then in force, not the 1909 Copyright Act.

## Conclusion

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

---

<sup>6</sup> The Draft erroneously identifies the quoted passage as appearing in Justice Ginsburg's opinion in *Kirtsaeng* (and incorrectly refers to that opinion as a concurrence rather than a dissent). The statement is in the majority's opinion. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013).