**United States Copyright Office**
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October 11, 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: Council Draft No. 9

Dear Judge Wood and Reporters:

As Advisers to this project, the U.S. Copyright Office appreciates the opportunity to review Council Draft No. 9 of the ALI's Restatement of the Law of Copyright. While we acknowledge that the draft was revised in some respects in response to our prior comments, we are concerned about the number of substantive issues we had identified that still persist. We respectfully request that the Council withhold approval of this section until these issues are addressed through further revision by the Reporters, with input from the project Advisers as appropriate.

As stated in our earlier letters, the Office brings to this project significant experience and expertise regarding copyright law. It is responsible for advising Congress on copyright law and for providing information and assistance to the courts and executive agencies on issues relating to copyright matters, as well as other matters arising under Title 17 of the U.S. Code.[1] The Office fulfills this responsibility in a number of ways, including by filing amicus briefs with the courts on issues involving interpretation of the Copyright Act, including the application of the fair use doctrine.[2] For example, we co-authored the government's amicus brief in the *Warhol* case before the Supreme Court, which agreed with our analysis. We created and maintain a Fair Use Index available on our website for the benefit of the public, including practitioners and the courts. The Index "tracks a variety of judicial decisions to help both lawyers and non-lawyers

[1] 17 U.S.C. § 701(a), (b).
[2] *See, e.g.,* Brief of the United States as *Amicus Curiae* Supporting Respondents, *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869), *available at* https://www.copyright.gov/rulings-filings/briefs/andy-warhol-found-for-the-visual-arts-v-goldsmith-no.21-869-2022.pdf; Brief of the United States as *Amicus Curiae* Supporting Respondent, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (No. 18-956), *available at* https://www.copyright.gov/rulings-filings/briefs/google-llc-v-oracleamerica-inc-no-18-956-2020.pdf.

better understand the types of uses courts have previously determined to be fair—or not fair."[3] In addition, the Office opines every three years on whether numerous proposed exemptions to the anti-circumvention provisions of the Digital Millennium Copyright Act are likely to be fair use.[4]

We believe that it is important that the Restatement provide an objective and accurate summary of the state of the fair use doctrine, as interpreted by the courts. When the document strays from an objective stance, it functions more as a treatise reflecting the voice of the Reporters than a traditional Restatement. We made a number of suggestions to the earlier drafts to ensure that this section captured the courts' treatment of fair use and accurately described the cases cited by the Reporters. But comments that we previously made, as well as similar comments made by others, have not been resolved.

With that background, we make note of our following previous feedback that is not addressed in the draft:

In Comment *d* or in a corresponding Reporters' Note, we recommend that the Restatement cite to examples of cases where multiple uses of the same work(s) were at issue to illustrate the point that fair use focuses on the particular use alleged to be infringing.[5]

As we previously suggested with respect to Comment *g*, one portion of the discussion addressing *Google LLC v. Oracle America, Inc.* should be revised or moved to a Reporters' Note because the Comment text appears to represent the Reporters' views rather than restate the law. Specifically, the Comment states that the copied elements of Oracle's software "were subject to, at best, 'thin' copyright protection," citing *Google*.[6] Neither the pin cite nor any portion of the decision directly supports the proposition that the Court considered the protection for Oracle's software to be "at best, 'thin.'"

We previously explained that Comment *q*'s use of the term "derivative markets" is confusing as the draft uses the term to refer to both potential or unrealized markets for derivative works relevant to the analysis of the fourth statutory factor, as well as markets for "transformational" uses that courts have held are not relevant to this analysis. We concede that some of the confusion arises out of the manner in which the term "derivative" has been used by the courts in

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[3] *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE, www.copyright.gov/fair-use/. The Index is a user-friendly resource that allows for searching based on the deciding court or the subject matter of the case.

[4] *See* U.S. Copyright Office, Rulemaking Proceedings under Section 1201 of Title 17, https://www.copyright.gov/1201/.

[5] *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (distinguishing between digitization of copyrighted works, creation of search functionality, display of snippets, and distribution of digital copies as separate uses); *Fioranelli v. CBS*, 551 F. Supp. 3d 199 (S.D.N.Y. 2021) (distinguishing between uses of video footage in certain documentary films, works focusing on conspiracy theories, political documentaries, and a feature film); *Chapman v. Maraj*, 2:18-cv-09088-VAP-SSx, 2020 WL 6260021 (C.D. Cal. Sept. 16, 2020) (distinguishing between using a musical work to experiment in creating a new musical work with distributing a sound recording embodying the new musical work); *Fox News Network v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2015) (distinguishing between different uses of video clips available through defendant's service, including the ability to archive content; download content; search for and view television content by the date, time, and channel on which a program aired; and share content by email).

[6] 141 S. Ct. 1183, 1203 (2021).

this context. We suggest that courts and practitioners would benefit if the section shifted its focus to the difference between cognizable versus non-cognizable markets (including potential ones) for the copyrighted work. We also reiterate our suggestion that Comment *q* would benefit from citing *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*[7] as an example of a case where fair use was not found and the infringing work was determined to cut off a potential market. Although a footnote in *Castle Rock* is cited elsewhere in the Comment for the proposition that a copyright owner cannot cut off all derivative markets, an accurate discussion of the case would indicate that a derivative market *was* found in that case.[8] Similarly, while the Comment provides examples of cases where the allegedly infringing work was found *not* to cut off a derivative market, it is important to also include examples of cases where the secondary work *was found* to have interfered with a potential derivative market. Only by presenting cases that reach different results can a reader of the Restatement understand the nuances of this doctrine.

The Reporter's Note to Comment *m* continues to suggest that factual/functional works and fanciful/highly expressive works are to be treated identically in the second factor analysis. While it may be the view of the Reporters that a use of a more expressive work *should not* be presumptively unfair, courts have generally found that the second factor disfavors fair use where the nature of the work is creative, at least where the use relies on the work's creative expression as opposed to the factual or functional nature of the work.[9]

In addition, Reporters' Note to Comment *m* continues to state that "[m]ore probative than a general inquiry into the nature of [the] work is careful analysis of the nature of what the defendant took from [a] work, and why." Even assuming this assertion finds support in the caselaw, the analysis of the portion taken and why it was taken are primarily third and first factor considerations, not inquiries to be made when considering the nature of the work under the second factor. There is, of course, interplay among the four fair use factors that can affect how each factor is analyzed and its relative weight within an overall equitable determination. But we again caution against implying that analysis of the second—or any other statutory—factor receive diminished consideration in favor of other factors.[10]

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[7] 150 F.3d 132, 145–46 (2d Cir. 1998).
[8] *Id.* at 145–46 (concluding that defendant's work "is likely to fill a market niche that [plaintiff] would in general develop" and "[a]lthough [plaintiff] has evidenced little if any interest in exploiting this market for derivative works . . . copyright law must respect that creative and economic choice").
[9] *See generally* 4 NIMMER ON COPYRIGHT § 13F.06[A]; PATRY ON COPYRIGHT § 10:138.
[10] Indeed, as Comment *m* acknowledges, the second factor was given significant weight in the Supreme Court's fair use analysis in *Google v. Oracle*.

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 its current form—section 6.12.

Sincerely,

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General Counsel and Associate Register of Copyrights

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

CC: Council Members