



United States Copyright Office

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October 28, 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: Preliminary Draft No. 10

Dear Judge Wood and Reporters:

The U.S. Copyright Office is responsible for advising Congress and 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 As Advisers to this project, we have reviewed and prepared comments on Preliminary Draft No. 10 of the ALI's Restatement of the Law of Copyright, which is being discussed at the Project Meeting on October 31. We have focused our comments on those high-level issues where the black letter law is inconsistent with the relevant statute(s) or common law, case cites are incomplete or misleading, or there is insufficient authority to support a position. In the latter case, it appears that in some places the draft expresses the Reporters' views rather than restating the law. To facilitate discussion of the draft and improve it, we offer the following comments.

Section 6.09: Performing or Displaying a Work "Publicly"

Comment *f* states that "it is clear from both the statute and legislative history that one must actually 'transmit or otherwise communicate' a performance or display of a work in order to publicly perform that work." In our view, this is a misreading of the statutory provisions and contrary to congressional intent. As the Office concluded in its Making Available study, no actual transmission is required to implicate the public performance right and the right encompasses offers to stream where no transmission occurs.² Under the plain language of the statutory provisions, "excluding such offers would require reading the text in a manner that is inconsistent with Congress's clear intention to make a performance's accessibility, not its actual

¹ 17 U.S.C. § 701(a), (b).

² U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 39 (2016).

receipt, the determining factor under the Transmit Clause.”³ Further, excluding offers to stream would ignore the functional equivalency between streaming and traditional communications systems, such as broadcasting.⁴ The Office therefore recommends that the Restatement revise Comment *f*, including Illustration 14, to indicate that there is disagreement about whether an actual transmission is required to implicate the public performance right and cite to our study as interpreting the statutory provisions to cover offers to stream. If the Reporters’ view is that the statutory provisions require an actual transmission, that should be expressed in a Reporters’ Note.

Section 9.01: Remedies for Copyright Infringement

Subsection (e) of the black letter indicates that 17 U.S.C. § 512 shields qualifying online service providers from “monetary relief and equitable remedies for certain activities,” but does not mention that certain injunctive relief remains available. As the Office’s Section 512 Report states: “Section 512, while it bars monetary relief against OSPs, does allow limited forms of injunctive relief, specified under section 512(j).”⁵ We recommend revising this language to clarify that 17 U.S.C. § 512(j) provides for limited equitable relief even where monetary relief is not available.⁶

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

Subsection (c)(1) of the black letter indicates 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[.]’” This is partially incorrect. The term used and defined in section 512(k) is simply “service provider.”⁷ In some instances, this definition could be broader than the more limited category of “online service provider.” We recommend revising the language in this subsection to reflect accurately that the relevant statutory term is “service provider.”

In Comment *l*, we have identified a few typographical errors relating to the quotation from 17 U.S.C. § 512(g), beginning with the word “informing.” The word informing should include brackets to reflect a change to the verb tense from the statute, as follows: inform[ing].⁸ The quotation should then close after the semicolon preceding roman numeral (iii). Quotation marks should then be inserted following that roman numeral. We also suggest that it may be clearer to use the letters A, B, and C, as found in the statute, to designate the various requirements rather than roman numerals.

Section 10.02: Circumvention of Copyright-Protection Systems

Comment *b* notes that access controls are technological measures that prevent a work from being “viewed, read, or heard by those without authorization.” This list is incomplete as there are other ways to access a work that do not necessarily involve a user viewing, reading, or

³ *Id.* at 39.

⁴ *Id.* at 40.

⁵ U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 6 (2020).

⁶ *See* 17 U.S.C. § 512(j). The black letter of section 9.07 of the draft more accurately alludes to the fact that certain types of equitable relief are available under 17 U.S.C. § 512(j).

⁷ *Id.* § 512(k)(1) (defining “service provider”).

⁸ *See id.* § 512(g)(2)(B).

hearing the work. For example, a user may access a computer program that enables a wireless device to connect to a wireless telecommunications network⁹ or access a computer program that operates a 3D printer for the purpose of using alternative material in the printer.¹⁰ We propose revising this sentence to read: “Access controls are technological measures that prevent a work from being viewed, read, heard, or otherwise accessed by those without authorization.”

Comment *f* should be substantially revised to more fairly characterize the circuit split regarding the existence of a “nexus requirement” for liability under 17 U.S.C. § 1201(a). The draft states that in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*¹¹ “the Ninth Circuit refused to follow the Federal Circuit’s holding in *Chamberlain [Group, Inc. v. Skylink Technologies, Inc.]*¹²” This statement incorrectly implies that the Ninth Circuit had an obligation to follow the Federal Circuit instead of more accurately indicating that Ninth Circuit conducted its own analysis and reached a different legal conclusion, thus resulting in a clear difference of opinion among the circuits. The Restatement should not elevate the Federal Circuit (which considers far fewer copyright cases than the Ninth) over the Ninth Circuit in presenting the circuits’ divergent interpretations of section 1201(a) liability. Instead, to accurately restate the law, the draft should acknowledge that the *Chamberlain* holding is an outlier that has not been adopted by any other circuit¹³ and clearly indicate that there is a circuit split on the issue.¹⁴ If the Reporters wish to take a position on the “best understanding” of the requirements for liability under 17 U.S.C. § 1201(a), those views should be presented in a Reporters’ Note.

To provide a more complete analysis about whether section 1201(a) requires a nexus to infringement, the Office recommends that the draft include the Ninth Circuit’s critique of the *Chamberlain* decision. In *MDY*, the Ninth Circuit rejected *Chamberlain*’s nexus requirement as “contrary to the plain language of the statute.”¹⁵ In addition, as the Office observed in its Section 1201 Report, the “adoption of an infringement nexus requirement . . . would substantially diminish copyright owners’ ability to prevent widespread unauthorized access to their works.”¹⁶ Finally, we note that section 1201’s “distinct legal protection for access controls not

⁹ See 37 C.F.R. § 201.40(b)(8).

¹⁰ See *id.* § 201.40(b)(19).

¹¹ 629 F.3d 928 (9th Cir. 2010).

¹² 381 F.3d 1178 (Fed. Cir. 2004).

¹³ The Fifth Circuit in an opinion in *MGE UPS Systems, Inc. v. GE Consumer & Industrial, Inc.* had relied on *Chamberlain* to conclude that “[t]he DMCA prohibits only forms of access that would violate or impinge on the protections that the Copyright Act otherwise affords copyright owners.” 612 F.3d 760, 765 (5th Cir. 2010) (citing *Chamberlain*, 381 F.3d at 1202). The court, however, subsequently withdrew this opinion and substituted an opinion that omitted its discussion of a nexus requirement. Prior to the court issuing a substituted opinion, the United States government filed a brief in the case urging rehearing on the ground that the court’s reasoning in its initial opinion was “inconsistent with the text, structure, and legislative history of the DMCA.” Brief for the United States as Amicus Curiae Supporting Rehearing at 3, *MGE UPS Sys., Inc. v. GE Consumer and Indus., Inc.*, 622 F.3d 361 (5th Cir. 2010) (No. 08-10521).

¹⁴ See U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 30 (“Section 1201 Report”) (“There currently is a circuit split as to whether a violation of the access-control provisions under section 1201(a) requires a ‘nexus’ to infringement—*i.e.*, that the circumvention be done for the purpose of, or otherwise relate to, infringing an exclusive right under section 106 of the Copyright Act.”).

¹⁵ 629 F.3d 928, 950 (9th Cir. 2010).

¹⁶ Section 1201 Report at 45, 102 (pointing out non-infringing activity that violates section 1201 can harm the value of the copyrighted work).

only reflects the consistent policy judgment of both the Legislative and Executive Branches, but also constitutes a longstanding requirement under U.S. international agreements.”¹⁷

Compounding the draft’s misstatements, Comment *h* “endorses” a nexus requirement instead of restating the law. We recommend that the Reporters’ views be conveyed in a Reporters’ Note rather than in a Comment that purports to restate the law. Comment *h* also characterizes the section 1201 rulemaking process as a “mechanism to vindicate societal interests in facilitating critical commentary and other uses of copyrighted works that courts previously have classed as fair uses.” The word “vindicate” seems inapt here and argumentative, and we suggest that “protect” or another term may be more appropriate.

Finally, we note that by the time this draft is approved, the Office will have concluded the ninth triennial section 1201 rulemaking. We suggest that references to “eight” triennial rulemakings should be updated accordingly in subsequent drafts.

Section 11.02: Subject Matter Jurisdiction and Extraterritoriality

Comment *c* states that when looking at a well-pleaded complaint, “courts generally decide whether a case arises under the copyright laws by focusing on the nature of the principal claim asserted by the plaintiff.” In explaining this “general[.]” approach, the draft approvingly cites a case that states the inquiry should be into the “fundamental controversy,” and the “gist” or “essence” of the well-pleaded complaint. This appears to be inconsistent with the *T.B. Harms* test explained in Comment *b*. At minimum, it ignores case law to the contrary.¹⁸ We recommend noting that at least some courts have not decided “arising under” jurisdiction by focusing on the nature of the principal claim. Alternatively, the discussion in this Comment could be moved to the Reporters’ Note to Comment *b* because the Note discusses approaches that amend or modify the *T.B. Harms* test and that have not been universally adopted.

Section 11.04: Relationship of Federal Courts to Copyright Claims Board

The CASE Act’s addition to title 17 is relatively new and includes very detailed provisions relating to procedures of the Copyright Claims Board (“CCB”) and the scope of its authority. Despite the clear language of the Act, there are a number of places where the draft’s purported summary of the law is either incomplete or incorrect. The draft’s paraphrasing of the statute’s text has no support and risks misleading its readers.

For example, subsection (a) of the black letter states that “[a] party may bring a claim of copyright infringement before the Copyright Claims Board.” This statement is incomplete. The claims that may be resolved by the CCB are very specific and also include claims for a declaration of noninfringement, misrepresentation claims, and certain related counterclaims.¹⁹ In

¹⁷ *Id.* at 45; *see also id.* at 44–45 (listing ten “FTAs with other nations expressly requiring that a violation of a TPM protection be treated as a separate cause of action independent of any infringement of copyright”).

¹⁸ *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 349-352 (2d Cir. 2000) (rejecting the “essence-of-the-dispute” and “merely incidental” tests, in part, because they are inconsistent with the *T.B. Harms* test); *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839 (D.C. Cir. 2002) (reversing a district court holding that a case did not “arise under” federal copyright law, although copyright infringement was alleged, because a contract dispute was “at the core of [the] action”).

¹⁹ *See* 17 U.S.C. § 1504(c).

fact, over the last two years, there have been 855 infringement claims, 38 claims for declaration of noninfringement, and 99 misrepresentation claims filed with the CCB. In addition, subsection (b)(2) of the black letter states that district courts are required to issue a stay of any claim that is already active or pending before the CCB. We recommend aligning this with the statutory text, which directs such district courts to “issue a stay of proceedings *or such other relief as the court determines appropriate.*”²⁰

Different portions of the remainder of the draft also contain incomplete or imprecise statements. Comment *b* describes the statute of limitations set forth in 17 U.S.C. § 1504(b)(1) as “a separate statute of limitations for bringing claims before the Board.” To avoid confusion, we recommend mentioning that the CCB’s statute of limitations is materially identical to that set forth in 17 U.S.C. § 507(b).

Comment *c* details the limited statutory grounds for challenging a CCB determination in federal district court; however, it fails to include one of the grounds found in the statute. Specifically, a party may challenge a determination on the grounds that the CCB “failed to render a final determination concerning the subject matter at issue.”²¹ Comment *c* also mentions that “[a]ny pending proceedings to enforce the CCB award being challenged, as described in Comment *e*, may be stayed.” This paragraph is confusingly worded, and we recommend reworking it to make clear that where there are district court actions (1) to enforce a CCB determination and (2) to challenge that same CCB determination, a judge may issue an order staying the action to enforce the CCB determination (assuming the authority to issue orders staying other actions in the same court).²²

Comment *e* discusses when awards of costs and attorney’s fees are available, but in addition to the shorthand description, the Comment should provide the statutory criteria for what is considered to be “bad faith conduct.” The statute clearly states the standard for such an award is where “it is established that a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact.”²³ The Comment also does not mention that such awards are not available if granting the award would be inconsistent with the interests of justice and does not address the separate rules that apply to *pro se* parties.²⁴

In Reporters’ Note to Comment *a*, we request that the references to legislative history include a reference to the Office’s 2013 *Copyright Small Claims* report, as that report is a part of the CASE Act’s legislative history.²⁵

In Reporters’ Note to Comment *c*, we suggest that the reference to the Federal Arbitration Act be properly contextualized. As written, it could confusingly suggest that the Federal Arbitration Act’s provisions apply in the context of CCB determinations. Consider deleting that text or

²⁰ *Id.* § 1509 (emphasis added).

²¹ *See id.* § 1508(c)(1)(B).

²² *See id.* § 1508(c)(2)(B).

²³ *Id.* § 1506(y)(2).

²⁴ *See id.* § 1506(y)(2).

²⁵ H.R. REP. NO. 116-252, at 19 (2019) (“The Copyright Office’s report and supporting materials are incorporated here as part of the legislative history of the CASE Act.”); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013), <https://www.copyright.gov/docs/smallclaims/>.

adding the following text to the Note: “The CASE Act’s Senate Report notes that parties before the CCB may ‘seek review in federal district court on grounds similar to those available under the Federal Arbitration Act’ and that ‘[c]ase law construing parallel provisions of the Federal Arbitration Act, 9 U.S.C. § 10, may be instructive in further elucidating the scope of this limited right to appeal to federal court.’ S. Rep. 116-105, at 23, 34.”

We recommend that the example contained at the end of Reporters’ Note to Comment *d* be removed as it is conjecture unsupported by citations and otherwise unnecessary.

Section 11.05: Preemption with Respect to Other Laws

Subsection (c) of the black letter omits language found in section 17 U.S.C. § 301(c) about nonsubscription broadcast transmission of sound recordings.²⁶ We recommend including this language for completeness.

In Comment *o*, case support for some of the statements in the first two paragraphs appears deficient. For example, the first paragraph makes several overarching statements, but then cites a single unreported district court case where the concern was not just that the contracts lacked the “hallmarks of voluntary assumed obligations,” but rather that “a massive regime of adhesive terms . . . stands to fundamentally alter the rights and privileges of the world at large (or at least hundreds of millions of alleged X users).”²⁷ The second paragraph only cites to *ProCD, Inc. v. Zeidenberg*,²⁸ which is somewhat misleading because the court ultimately held that the breach of contract claim was not preempted based on the equivalence prong. To provide further support for the statements made in these paragraphs, we recommend including additional citations and examples.

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²⁶ 17 U.S.C. § 301(c) (“Nothing in this subsection may be construed to affirm or negate the preemption of rights and remedies pertaining to any cause of action arising from the nonsubscription broadcast transmission of sound recordings under the common law or statutes of any State for activities that do not qualify as covered activities under chapter 14 undertaken during the period between the date of enactment of the Classics Protection and Access Act and the date on which the term of prohibition on unauthorized acts under section 1401(a)(2) expires for such sound recordings. Any potential preemption of rights and remedies related to such activities undertaken during that period shall apply in all respects as it did the day before the date of enactment of the Classics Protection and Access Act.”)

²⁷ *X Corp. v. Bright Data Ltd.*, No. C 23-03698, 2024 WL 2113859, at *12 (N.D. Cal. May 9, 2024).

²⁸ 86 F.3d 1447 (7th Cir. 1996).

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

Sincerely,

A handwritten signature in black ink that reads "Suzanne V. Wilson". The signature is written in a cursive style with a large, looped initial "S".

Suzanne V. Wilson
General Counsel and Associate Register of Copyrights

A handwritten signature in black ink that reads "Robert J. Kasunic". The signature is written in a cursive style with a large, looped initial "R".

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