United States Copyright Office
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February 26, 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: Revised Sections 6.09 (Performing or Displaying a Work "Publicly") and 10.02 (Circumvention of Copyright-Protection Systems)

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 the revised versions of sections 6.09 and 10.02 of the ALI's Restatement of the Law of Copyright and appreciate that there a number of revisions responsive to prior comments submitted on Council Draft No. 10.[2] While we acknowledge that a number of edits have been made, two substantive issues persist in this draft. We respectfully request that the Council withhold approval of these subsections until those issues are addressed.

Section 6.09: Performing or Displaying a Work "Publicly"

The Office acknowledges the revisions made in this draft to Comments *e* and *f* as well as to the corresponding Reporters' Notes. In particular, we appreciate that these sections now thoroughly engage with the Office's rationale for its positions that no actual transmission is required to implicate the public performance right and that the right encompasses offers to stream where no transmission occurs.[3] We respectfully disagree that the "unambiguous statutory language" favors the Restatement's contrary interpretation, while recognizing that there are no judicial decisions that address the issue. To underscore this point, we recommend that the Restatement

[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. 17, 2025) ("USCO Letter re: Council Draft No. 10").
[3] *See* U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 15–18, 37–40 (2016) ("Making Available Study").

note that no U.S. court has yet opined on whether an offer to transmit or otherwise communicate a work is sufficient to infringe the public performance right or if an actual transmission is required.[4]

Turning to the Restatement's discussion of the WIPO Copyright Treaty (WCT), the Office objects to a substantive misstatement introduced in the revised draft that affects the analysis of why U.S. copyright law covers offers to stream. The Restatement claims that "[t]he treaty's language does not expressly indicate that a mere offer to communicate a work to the public constitutes 'the making available to the public' of that work." However, this statement is contradicted by the language in WCT Article 8, which covers "the making available to the public of their works in such a way that members of the public *may access* these works."[5] As the Office explained in its study, because the making available right encompasses providing access to a work, and because Congress chose not to alter the scope of any exclusive rights when implementing the WCT in the Digital Millenium Copyright Act (DMCA), it is the better interpretation that those existing rights cover offering access to a work.[6] Accordingly, the Office recommends that the discussion of the WCT making available right in Comment *e* be revised to clarify that this right extends to offering access to a work to the public and that U.S. law complies with this treaty obligation through the exclusive rights in section 106.

Section 10.02: Circumvention of Copyright-Protection Systems

The Office recognizes the substantial revisions to Comment *f* and the corresponding Reporters' Note. These revisions have generally improved the draft by more accurately characterizing applicable precedent.[7] We continue to object, however, to the decision to conclude Comment *f* with the Restatement's position, which is "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." As we explained previously, a Comment that purports to restate current law is not the appropriate place to advance a new legal test.[8] Instead, advocacy for this

[4] The Office further observes that, in its discussion of the distribution right, the Restatement acknowledges uncertainty about whether making a work available is sufficient to constitute distribution, declining to take a position on the issue because differing interpretations exist. *See* Restatement of the Law, Copyright, Tentative Draft No. 3, § 57, Comment *d* and Reporters' Note to Comment *d*. For consistency and given the lack of caselaw directly supporting either position, we believe that adopting a similarly neutral approach would be appropriate here.

[5] WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 (1997) (emphasis added).

[6] *See* Making Available Study at 15–18. In addition, the conclusion that U.S. law encompasses the making available right, including offers to access works, is supported by the *Charming Betsy* canon—a principle of statutory interpretation directing that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *See id.* at 55–57 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)).

[7] One continuing mischaracterization does persist. In a new parenthetical, the Restatement paraphrases a footnote from the D.C. Circuit's decision in *Green v. United States Department of Justice* 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). While the Office appreciates that a citation to *Green* was added in this draft, 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.

[8] *See* USCO Letter re: Council Draft No. 10 at 2–3.

interpretation of section 1201(a), which is derived from a minority view and not directly supported by any precedent, should be expressed in a Reporters' Note.[9]

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In sum, the Office concludes that approving the draft as written and without further edits will ratify misstatements of copyright law. We therefore recommend that the Council vote not to approve—in their current form—the subsections in which we have identified substantive issues (*i.e.*, sections 6.09 (Comment *f* and Reporters' Note to Comment *f*) and 10.02 (Comment *e* and Reporters' Note to Comment *e*)).[10] Upon further revision consistent with our comments, these sections could be ready for approval.

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

[9] 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.

[10] The Office has generally limited our comments on this draft to addressing issues that should preclude Council approval of certain sections. The absence of a comment on other portions of the draft should not be interpreted to signal our agreement with the text.