United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

January 17, 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: Council 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 Council Draft No. 10 of the ALI's Restatement of the Law of Copyright and appreciate that there a number of revisions responsive to prior comments submitted on Preliminary Draft No. 10.[2] At the same time, we have identified a number of substantive issues that persist in this draft. We respectfully request that the Council withhold approval of several subsections until those issues are addressed.

We have outlined here the specific sections that we believe require additional edits in order to accurately restate the law:

Section 6.09: Performing or Displaying a Work "Publicly"

The Office acknowledges the revisions made in this draft to Comment *f* and the corresponding Reporters' Note that are responsive to our previous comments.[3] In particular, we appreciate the inclusion of the Office's views, expressed in its 2016 Making Available study, that no actual transmission is required to implicate the public performance right and that the right encompasses offers to stream where no transmission occurs.[4] Yet, because differences in statutory

[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 (Oct. 28, 2024) ("USCO Letter re: Preliminary Draft No. 10").
[3] *See* USCO Letter re: Preliminary Draft No. 10 at 1–2.
[4] U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 39 (2016).

interpretation exist on this point, and because courts have yet to provide unambiguous guidance, we recommend that this disagreement be clearly acknowledged not only in the Reporters' Note, but also in Comment *f*. In addition, we recommend that Illustration 14 be removed as it suggests that there is only one correct interpretation of an unsettled point of law.

Section 9.01: Remedies for Copyright Infringement

Subsection (e) of the black letter uses the term "online service providers." We recommend instead using the statutory term "service providers," which the Restatement uses elsewhere in this section, so that the black letter is consistent with the statute and the rest of the draft.

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

We appreciate the edit in subsection (c)(1) of the black letter to move the opening quotation mark around "online service provider." In addition to this edit, as noted above we recommend striking the word "online" to be consistent with the statute and how the term "service provider" is used elsewhere in the draft section.

Section 10.02: Circumvention of Copyright-Protection Systems

The Office acknowledges the substantial revisions to Comment *f* and the corresponding Reporters' Notein response to our and other Advisers' concerns. Despite these revisions, however, the current draft persists in unfairly characterizing the circuit split concerning the existence of a "nexus requirement" for liability under 17 U.S.C. § 1201(a).

First, the draft fails to present the judicial split on this issue in unbiased fashion. To properly restate the law, Comment *f* should simply summarize the Federal Circuit's decision in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*[5] and Judge Merritt's concurrence in *Lexmark International, Inc. v. Static Control Components, Inc.*[6] as two opinions that, to find a violation of section 1201(a)'s prohibition against unauthorized circumvention of a technological protection measure to access a copyrighted work, would require a "nexus" between such circumvention and infringement of an exclusive right under 17 U.S.C. § 106. The Comment should then likewise summarize the Ninth Circuit's decision in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,[7] including the court's explanation about why it disagreed with the Federal Circuit's nexus requirement.

Instead, and before even discussing the Ninth Circuit's decision, the Restatement offers its own "somewhat different articulation of the purpose-based limitation" (*i.e.*, the nexus requirement) created by the Federal Circuit. It takes this position despite the fact that, as the D.C. Circuit recently observed, "[n]o other court of appeals has adopted [the Federal Circuit's] interpretation."[8] In any event, advancing a new legal test in a Comment is far from an evenhanded discussion of the circuit courts' conflicting approaches. If the Reporters wish to articulate their view that 1201(a) liability requires demonstrating a nexus to a section 106 right,

[5] 381 F.3d 1178 (Fed. Cir. 2004).
[6] 387 F.3d 522, 551–53 (6th Cir. 2004) (Merritt, J., concurring).
[7] 629 F.3d 928 (9th Cir. 2010).
[8] *Green v. United States Dep't of Justice*, 111 F.4th 81, 96 n.1 (D.C. Cir. 2024).

they should do so in a Reporters' Note where advocacy for new or minority interpretations of the law are more appropriate.[9]

The draft further inaccurately asserts that the Ninth Circuit's conclusion in *MDY—i.e.*, circumvention to access to a copyrighted work, for any purpose not subject to a specific exemption, can violate 1201(a)—"does not suggest that the *Chamberlain* court was incorrect in requiring that some linkage be shown between the particular circumvention at issue and the rights of the copyright owner." To the contrary, the Ninth Circuit's decision clearly refutes such a reading. In the court's view, imposing any nexus between circumvention and a section 106 right as a prerequisite to a 1201(a) violation is inconsistent with both the plain language of the statute and its legislative history.[10] While acknowledging the policy considerations expressed in *Chamberlain*, the Ninth Circuit nonetheless concluded that "those concerns do not authorize us to override congressional intent and add a non-textual element to the statute."[11]

In addition, new text added to this draft implies that the Ninth Circuit may have wrongly premised its finding of a 1201(a) violation on a possible breach of the copyright owner's terms of service (*i.e.*, provisions to ensure fair game play). This appears to be speculation, as such reasoning is nowhere to be found in *MDY*'s thorough analysis of section 1201, which focuses on interpreting the statute's plain text and legislative history.

Accordingly, the Office urges that Comment *f* and its corresponding Reporters' Note be withheld from approval until these issues can be corrected. In making further revisions, we recommend that the discussion of the Federal Circuit's purpose-based limitation on 1201(a) objectively engage with *Chamberlain* and *MDY*'s conflicting analyses of section 1201's statutory text and how its provisions should be read together. To the extent that the Reporters cite the policy concerns invoked in *Chamberlain* as supporting their preferred statutory interpretation, the draft should also present the Ninth Circuit's rebuttal of those concerns.[12]

Finally, we note that the Office concluded the ninth triennial section 1201 rulemaking in October 2024. References to "eight" triennial rulemakings should be updated accordingly.

Section 11.04: Relationship of Federal Courts to Copyright Claims Board

We again note that the CASE Act contains detailed provisions governing the Copyright Claims Board ("CCB"), and that some of the Restatement's paraphrasing risks misleading readers. Although we appreciate the revisions in this section that correct errors in the black letter as well in Comments *c* and *e*, there are several places where the draft's summary of the statute continues

[9] Likewise, Comment *h* "endorses" a nexus requirement instead of simply restating the law. We recommend that Comment *h* be revised to objectively present the law and that the Reporters' endorsement be moved to a Reporters' Note.

[10] 629 F.3d at 950–52.

[11] *Id.* at 952.

[12] Additional policy considerations that may be relevant to the interpretation of 1201(a) are outlined in the Office's Section 1201 Report. *See* U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 45, 102 (pointing out non-infringing activity that violates section 1201 can harm the value of the copyrighted work); *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").

to be either incomplete or incorrect.[13] We request that the Reporters review our previous comments and revise the draft to resolve our unaddressed concerns.

* * * *

In sum, the Office concludes that approving the draft as written will ratify several misstatements of important issues of copyright law. We therefore recommend that the Council vote not to approve—in their current form—the sections and/or subsections in which we have identified substantive issues above (*i.e.*, sections 6.09 (Comment *f* and Reporters' Note to Comment *f*); 9.01; 9.07; 10.02 (Comment *f* and Reporters' Note to Comment *f*, Comment *h*, references to eighth triennial rulemaking); and 11.04 (Comments *b*, *c*, and *e*, Reporters' Notes to Comments *c* and *d*).[14] Upon further revision consistent with our comments, these sections could be ready for approval at a future Council meeting.

Sincerely,

Suzanne V. Wilson
General Counsel and Associate Register of Copyrights

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

[13] *See* USCO Letter re: Preliminary Draft No. 10 at 5–6 (recommending revisions to Comments *b*, *c*, and *e* as well as Reporters' Notes to Comments *c* and *d*).

[14] 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.