THE AMERICAN LAW INSTITUTE

RICHARD L. REVESZ
DIRECTOR

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The Honorable Thom Tillis, United States Senator
The Honorable Ben Cline, United States Representative
The Honorable Theodore E. Deutch, United States Representative
The Honorable Martha Roby, United States Representative
The Honorable Harley Rouda, United States Representative
Congress of the United States
Washington, DC 20515

Dear Senator Tillis and Representatives Cline, Deutch, Roby, and Rouda:

I appreciate your continued interest in our work and welcome the opportunity to provide additional details on our project for a Restatement of the Law, Copyright. As I explained in my January 3, 2020 letter, it is not the function of this Restatement or of any of the American Law Institute's Restatements to rewrite existing statutory law or to say what a better statute would look like. Instead, the Restatement of the Law, Copyright aims to be a resource to the courts, and others, when the statutory text leaves broad scope for judicial interpretation and discretion.

This endeavor is no less beneficial for copyright than for those areas governed primarily by common law interpretation. Most judges lack specialized expertise in copyright law, and many cases are handled by lawyers with little experience in the field. Even experts will benefit from a Restatement's work surveying the field and rendering it more intelligible through synthesis of legal doctrines, supported by extensive citations to the statutory text, U.S. case law, regulations and guidance from the U.S. Copyright Office, and other sources of legal authority.

Congress has exercised its authority over copyright in the Copyright Act of 1976 and other federal statutes. In doing so, Congress incorporated prior common law principles and entrusted the courts to interpret and develop the law through common law interpretation. The doctrine of fair use provides an excellent example of an issue that Congress "codified at a high level in the 1976 Act" and left the courts to interpret "on a case-by-case basis." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 102.4 (3d ed. 2017). According to the House Report accompanying the 1976 Act, "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute." *See* H.R. REP. NO. 94-1476, at 66 (1976); *see also* S. REP. NO. 94-473, at 62 (1975);

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994). Congress envisioned that the courts would "adapt the doctrine to particular situations on a case-by-case basis." H.R. REP. NO. 94-1476, at 66. Section 107 thus included only "a very broad statutory explanation of what fair use is and some of the criteria applicable to it," leaving it to the judiciary to work out the specifics. *Id.* Likewise, the phrase "original works of authorship" in Section 102 was "purposely left undefined," and Congress sought to give the courts "sufficient flexibility" to give meaning to the categories of copyrightable works. *Id.* at 51, 53. Other doctrines, such as merger and scènes à faire, are also judge-made. Of course, Congress can choose at any time to legislate with more specificity in any of these areas by amending the Copyright Act. In the exercise of discretion and judgment, it has not yet done so.

The U.S. Copyright Office itself recognizes that "certain copyright law doctrines are derived largely from court decisions" and that "copyright law doctrines may differ among jurisdictions, as different circuits have followed different standards." COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 102.4. And the Copyright Office also points out that courts sometimes "decide issues that are not squarely addressed by the 1976 Act" and fill in elements of the law about which the statute is silent. *Id.* Thus, the Copyright Act leaves the courts with the responsibility for articulating the test used to determine whether a work's copyright has been infringed. Section 501 provides that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright," and the courts have developed the specific elements of an infringement claim, which are not set forth in the statute. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018). Courts rely on the concept of substantial similarity, and Congress and the Supreme Court have so far left its definition to the lower courts. 4 NIMMER ON COPYRIGHT § 13.03 (2019) ("Moreover, the entire exercise delves into judge-made law, as Congress has never legislated the appropriate standard—and the Supreme Court itself has not weighed in to give definition to the field, so all the decisions on point emanate from the inferior courts."). Similarly, judges regularly give meaning to provisions open to multiple interpretations. For instance, the Supreme Court has held that Section 102(b) excludes copyright in facts even though the word "fact" does not appear in the statutory text. *See Feist*, 499 U.S. at 356.

The Restatement of the Law, Copyright can help to bring clarity to the complex and often differing precedents that have emerged from the courts over the more than forty years since the Copyright Act's enactment. In this sense, our Restatement of the Law, Copyright is no different from our many other Restatements addressing statutory law or our many common law Restatements that clarify and simplify doctrinal lines of cases.

The ALI takes great care to produce impartial and independent scholarly work. To safeguard accuracy, precision, and balance, we provide extensive citations to U.S. case law and other sources of legal authority. This allows Advisers, Liaisons, Members, and our Council to evaluate our work during the drafting process. After publication, it ensures that judges, scholars, and practitioners know the foundations for each of our conclusions and mitigates any danger that readers might be misled.

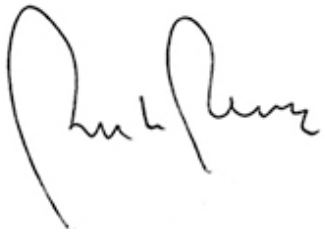
Our iterative and transparent drafting process—which involves the dedicated work of many minds and perspectives over many years, and which requires each draft to be separately approved by our extraordinarily diverse voluntary Council and Membership—further guards against any risk of politicization or the advocacy of special interests. The statement from a memorandum by our Reporter that you quote was made before he was selected to play this role and before the project had been approved. Once the ALI's Council decided to undertake the project, our Reporter, like all of the project's participants, was bound by the ALI's mandate to be a resource to the courts on matters in which they have discretion, but not to rewrite or otherwise change the meaning of statutory enactments. The approved language of every Restatement comes not just from the Reporters, but is the product of our Advisers, our Council, and our Members.

Those who use our work—including judges, academics, practitioners, and legislators—recognize that our Restatements are not independent sources of legal authority and do not state rules that courts must follow. Parties to litigation regularly direct courts to a wide range of sources that they hope courts will find persuasive, including law review articles and influential treatises such as *Nimmer on Copyright*. Lawyers in our adversarial system are well positioned to argue for or against the use of these sources in a particular case and to guard against any inappropriate semblance of authoritativeness.

Finally, while we do not seek to supersede or replace the statutory text, we appreciate and hope that legislators too benefit from our Restatements. *See* Richard L. Revesz, *When Legislatures and Agencies Rely on Restatements of* Law, ALI REPORTER, Winter 2019, at 1. As you pointed out in your December 3, 2019 letter to me, Congress continues to legislate in the copyright arena. I expressed the hope that the Restatement of the Law, Copyright might be helpful to Members of Congress interested in how the Copyright Act has been interpreted by the courts, including any trends or differing approaches in those interpretations, as Congress continues to shape and reform the law. While we welcome such interest, the Restatement of the Law, Copyright clarifies possible interpretations of the existing statutory provisions; it does not propose ways to rewrite them.

Responses to your additional specific questions are enclosed. I am often in Washington, D.C., and would be happy to come to your offices during one of my trips to further discuss these issues if that would be helpful.

Sincerely,



Richard L. Revesz
ALI Director

Enclosure

THE AMERICAN LAW INSTITUTE

RICHARD L. REVESZ
DIRECTOR

ALI Director's Responses to Additional Questions Concerning the Restatement of the Law, Copyright

1. What course of events triggered the ALI's interest in a Restatement of Copyright project? Was there a specific case which prompted this project?

There was no specific case that prompted this project. As Director, I work with our Projects Committee to generate ideas for new projects. We take into account the suggestions of our Members and others with an interest in the ALI's work. I solicited input from subject-matter experts on the merits of undertaking a Restatement of the Law, Copyright and presented a proposal to our Projects Committee for its advice and recommendation to the Council, which approves each project and its Reporters.

After careful consideration, the ALI's Council approved the launch of this project at its Fall 2014 meeting. As the ALI announced at the time, the project was intended to focus on "the generally applicable parts of copyright law" that would most benefit judges.

2. The Restatement's own Table of Contents currently conveys that the ALI will focus on the entirety of copyright law, in apparent conflict with your statement to the contrary. Further, while you assert that the ALI will only restate those parts of the statute that are the source of significant judicial commentary and disagreement, your own Advisors to the Restatement project have criticized the Reporters for citing to fringe cases on a topic, which do not seem to represent "significant … disagreement." Please reconcile these inconsistencies and clarify how decisions are made regarding what constitutes significant judicial commentary and disagreement so as to merit inclusion in the Restatement.

The Restatement of the Law, Copyright will not attempt to restate the entirety of U.S. copyright law. Instead, it will focus on those parts of the statute that leave broad scope for judicial interpretation and discretion, that are frequently litigated in U.S. courts, or that have given rise to a considerable body of judicial commentary, as well as those parts that are necessary background to understanding the fundamental structure of copyright law. I am not familiar with any Table of Contents conveying the ALI's intent to focus on the entirety of copyright law.

From the beginning of this project, our Reporters have recognized that many specific provisions are extremely detailed, are litigated infrequently relative to the more generally applicable provisions of the Copyright Act, and are less susceptible to the clarifying effect of a Restatement. These include the provisions under which cable and satellite television providers are granted compulsory licenses to retransmit television broadcast signals, in exchange for paying a statutory fee, and the provisions exempting certain

small businesses from paying public performance licensing fees when they play music for their customers. The Restatement will not take up such questions.

We rely on an iterative and transparent process in drafting our Restatements. Our Reporters, who are chosen on the basis of their expertise in the field, make the initial judgment over what constitutes significant judicial commentary and disagreement. Our Advisers, Liaisons, and Members, as well as our Council, then offer detailed suggestions and criticism of their drafts. This process ensures that our publications do not rely on "fringe cases" and that each proposition has sufficient authority.

In some circumstances, project participants may object to a draft's reliance on particular cases. We carefully consider their comments to ensure that the Restatement rests upon the strongest possible foundation, and we regularly make revisions based on this feedback.

Our drafting process remains ongoing, and our Membership has yet to vote on any portions of the Restatement of the Law, Copyright. It may be the case that some Advisers will disagree that the text represents the best view on a particular question, even if it receives the approval of our Council and Membership. No participant—even our Reporters—will walk away from the process fully in agreement with every section of the publication. Even so, the work will be of great benefit as a resource; we provide extensive citations to the statutory text, U.S. case law, the guidance of the Copyright Office, and other authorities so that judges and others relying on our work can see the basis on which each proposition rests.

According to our Style Manual, "[I]f a Restatement declines to follow the majority rule, it should say so explicitly and explain why." ALI, *Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 6 (rev. ed. 2015), *available at* https://www.ali.org/publications/style-manual/. Thus, if the Restatement of the Law, Copyright relies on a minority position, it will say so explicitly and will provide the rationale for the decision.

3. Historically, the courts have given deference to the views of the U.S. Copyright Office, while the ALI only says that they will give them "careful consideration." This comment suggests that the ALI is unaware that the Copyright Office is specifically charged by law with interpreting and applying this statute. Please explain the level of deference the ALI will give the Copyright Office's interpretation of copyright law.

The U.S. Copyright Offices brings tremendous expertise to the range of questions arising under copyright law. As I explained in my January 3, 2020 response to your initial letter, besides giving the views of the U.S. Copyright Office "careful consideration," the ALI will afford them "the same weight that a judge would give them in deciding a case."

Federal case law addresses the level of deference to which the interpretations of the U.S. Copyright Office are entitled. For example, several Circuit Courts of Appeals have held that the Copyright Office's determination that a particular work is protectable under the Copyright Act does not have the force of law but does merit deference insofar as it is persuasive. *See, e.g.*, *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 97 (2d Cir. 2016) ("The Copyright Office's interpretations of the Copyright Act are entitled to some deference insofar as we deem them to be persuasive."); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 477-80 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017) (reviewing cases and adopting *Skidmore* rather than *Chevron* deference). The Restatement of the Law, Copyright intends to give the views of the U.S. Copyright Office the level of deference mandated by the law.

In their most recent comment to the project, submitted on January 8, 2020, representatives of the Copyright Office stated that they were "gratified to see that the revised draft reflects a number of points raised in our prior comments." We are very appreciative of the Copyright Office's contributions to this project and will continue to give serious attention to its comments, affording its guidance and regulations the deference required under the law.

4. Please explain the specific methodology behind determining when and how gaps in the case law or statute are addressed, and how it is determined if they will be included in the Restatement at all.

In 1923, the committee responsible for establishing the ALI said that a Restatement "should also take account of situations not yet discussed by courts or dealt with by legislatures." Determining when to take account of such situations requires judgment, similar to the kind of judgment exercised by a judge.

For the Restatement of the Law, Copyright, the ALI is especially mindful that the area is governed by federal statute. Thus, any gap-filling must be governed by the statutory language and structure, analogous judicial decisions interpreting the statutory law, or trends in that case law. And, it must be transparent about the sources on which it relies and clear about when it is addressing a matter not taken up case law.

Because copyright is governed by a detailed federal statute that has been interpreted by the courts for over four decades, any gap-filling will generally involve minor or subsidiary matters.

Besides anticipating how the law should be applied to issues that have not yet arisen in the case law, a Restatement may also decide to distill a rule that is latent in a body of case law, but which never has been expressly announced by a court, or it might offer new terminology to describe what courts are doing.

In all these cases, the ALI is mindful of the primacy of the statutory text. That is, the Copyright Act and other applicable statutes are controlling law, and it is not the function of this Restatement to rewrite this law or to say what a better version might look like. Instead, the aim is to evaluate the possible interpretations of existing statutory provisions, especially when they leave broad scope for judicial interpretation and discretion, which is exactly the inquiry that a court applying the statute would engage in.