



RICHARD L. REVESZ
DIRECTOR

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

1. *The ALI has been in existence for close to 100 years. The federal copyright law has been in existence for more than twice as long. Why has the ALI chosen to draft a Restatement of Copyright now? What change in the law or in the ALI's mission or scope necessitates taking on the Copyright Restatement Project today?*

The ALI has not undertaken this project in response to any particular change in the law, nor does the project reflect a change in the ALI's mission.

Restatements are primarily addressed to courts, and the Restatement of the Law, Copyright focuses primarily on areas of copyright law in which the scope for judicial interpretation and discretion is broad. Because of the absence of intercircuit stare decisis and because the decisions of a district judge do not have stare decisis effect with respect to other district judges even in the same district, conflicting lines of precedent can emerge. The Restatement of the Law, Copyright can therefore aid judges, as the ALI's Restatements do in traditional common-law fields.

For example, Section 102(b) of the Copyright Act states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work,” yet, in application, the courts have struggled to define the boundaries of these categories.

The ALI believes that a Restatement of the Law, Copyright can serve as a valuable secondary source to aid judicial decision making on these and other questions that arise during the course of litigation.

2. *How are the ALI and the Reporters approaching a complex federal statute like copyright law? Does that approach differ from the approach taken in the usual Restatements that focus on common law? How is the ALI purporting to restate a federal statute?*

The ALI's approach to the Restatement of the Law, Copyright follows the approach taken in other Restatements, which we have used since we began publishing Restatements almost a century ago to address the need for a national perspective as the United States developed an integrated national economy.

The ALI Style Manual sets forth “four principal elements” of the Restatement process: “The first is to ascertain the nature of the majority rule. . . . The second step is to ascertain trends in the law. . . . A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules.” ALI,

DEDICATED TO CLARIFYING AND IMPROVING THE LAW

4025 CHESTNUT STREET PHILADELPHIA, PA 19104 TEL +1 215 243 1632 FAX +1 215 243 1636 WWW.ALI.ORG

Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 5 (rev. ed. 2015), available at <https://www.ali.org/publications/style-manual/>.

This Restatement will not restate the entirety of the Copyright Act but will focus on those parts of the statute that have been the source of significant judicial commentary or disagreement.

3. *When drafting the Copyright Restatement, how much weight do the Reporters and the ALI Council give to the statutory text and to the legislative history?*

The drafts don't just give weight to the statutory text—they recognize that the statutory text is controlling.

The goal of the Restatement is to aid courts responsible for interpreting this law. For this reason, Restatements rely mostly on judicial decisions. They also consider and rely on legislative history to the same extent that courts do.

For the most part, we do not intend to restate portions of the Copyright Act that are specific and clear or that have caused the courts little difficulty in interpretation.

4. *When there is a discrepancy in the interpretation of copyright law, how do the Reporters decide to take one position over the other? Do they consider the statutory text? Do they consider the legislative history? Are the views of Copyright Office experts given greater weight than the views of others? To what extent does the proposed draft give deference to Copyright Office interpretations of the Copyright Act? Could an expert from the Copyright Office be chosen as a Reporter?*

Former Director and Professor Herbert Wechsler summarized how the ALI evaluates competing approaches to a particular issue:

We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

The Reporters always consider the statutory text, which is controlling. They also review the legislative history and relevant U.S. Copyright Office interpretations or guidelines, affording them the same weight that a judge would give them in deciding a case. Reporters also provide thorough citations to U.S. case law.

Because the drafting process requires significant time and labor, Reporters are usually law professors. Representatives from the U.S. Copyright Office are advising this project, as are Liaisons from relevant industry groups.

5. *When there are gaps in the statutory or case law, how do the Reporters decide when to fill in those gaps as opposed to declining to take a position?*

If a Restatement takes a position on an issue in which there has been conflicting judicial authority, that position may be followed (or not) to the extent that courts find it persuasive (or not).

Restatements also occasionally, though infrequently, deal with issues that courts have not addressed, or not addressed extensively. As in the case of any other position a Restatement may take, courts may adopt it if they find it persuasive.

This situation, which is discussed in my Summer 2019 quarterly letter to our membership (<https://www.ali.org/news/articles/debate-over-role-restatements/>), is not unique to copyright. Any gap filling of the case law, which would generally involve subsidiary or generally minor matters, must be governed by the statutory language and structure, analogous judicial decisions, and trends in the case law. And, it must be transparent about the sources on which it relies.

6. *Copyright law is constantly changing. In fact, just last year, Congress passed the Music Modernization Act. And, this year, Congress is considering other copyright-related bills – e.g., the Copyright Alternative in Small-Claims Enforcement Act of 2019. How does and will ALI deal with changes to the copyright law made by Congress and how are these reflected in the proposed Restatement?*

Because the law is always evolving, the ALI routinely faces this issue with its Restatements, as subsequent legislation or judicial decisions render certain provisions moot.

The bottom line is that legislation is always controlling. If Congress enacts legislation after a section is drafted but before the final project is approved, the ALI will modify the section to take into account the new legislation.

If legislation is enacted after the Restatement is approved and published, any Restatement provision inconsistent with the new legislation becomes inoperative. Courts should follow a statute or a controlling judicial precedent over a contrary Restatement rule.

In many cases—such as contracts, torts, and conflict of laws—the ALI has revisited completed projects and published new Restatements taking account of subsequent developments in the law. We also publish yearly inserts that update case and statutory citations.

7. *The U.S. Copyright Office raised several concerns in its January 2018 letter, along with a number of other letters sent to ALI throughout the development of this project. Has the ALI formally considered those concerns? How is the ALI addressing those concerns?*

The Reporters, project participants, and ALI Council members have carefully considered comments from the U.S. Copyright Office at regular project meetings, which are attended by U.S. Copyright Office representatives.

We regularly revise project drafts in response to Adviser and Liaison comments, and the draft text is currently undergoing revision in response to feedback from our Council.

To be adopted by the ALI, draft text must be approved separately by the ALI Council and by the ALI membership, which can withhold support if draft text fails to adequately address problems identified by commentators.

I can assure you that the views of the U.S. Copyright Office will continue to be given careful consideration.

8. *How does the ALI address potential conflicts of interest? What steps does the ALI take to prevent bias from affecting the proposed draft?*

For more than a century, our organization has prided itself on producing impartial, non-partisan, and independent scholarly works that clarify, modernize, and otherwise improve the law.

The ALI has developed specific procedures to address conflicts of interest on the part of the Director and Reporters. Those procedures are set forth in a Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects, *available at* https://www.ali.org/media/filer_public/13/6e/136e2528-3be7-4b65-beb0-9d59f5c7b403/conflicts-of-interest-with-respect-to-institute-projects.pdf.

Moreover, Council members and officers may not represent clients in the ALI's deliberative processes. *See* ALI, Conflicts of Interest Policy, *available at* https://www.ali.org/media/filer_public/5d/b7/5db71e75-62a8-43b1-956c-98a4854d72f9/conflictspolicy.pdf.

Ultimately, the best guarantor of objectivity is the breadth of our membership body and the range of views and experiences of our Advisers and the many others who contribute to and comment upon the many drafts.

9. *Will the ALI attempt to restate other federal laws, such as patent law, in the future?*

The ALI currently has other projects addressing federal law. For example, the Restatement of the Law, The Law of American Indians and the Restatement of the Law, Children and the Law deal with federal statutes. The ALI currently has no plans for a Restatement project involving patent law.