



THE AMERICAN LAW INSTITUTE

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September 30, 2021

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Dear Mr. Quaadman:

Thank you for your interest in The American Law Institute's ongoing Restatement of the Law, Copyright and for the opportunity to respond to [your questions](#) regarding the project. The ALI is the leading private organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. To fulfill this mission, the ALI drafts, discusses, revises, and publishes Restatements of the Law, as well as Model Codes and Principles of the Law. These publications have been helpful to courts and legislatures, as well as to legal scholars, teachers, and students of the law.

Our Restatements are designed to help courts make difficult judgments, thereby increasing predictability and consistency in judicial decision making. To achieve this goal, a Restatement surveys a legal field and renders it more intelligible through synthesis of legal doctrines, supported by extensive citations to U.S. case law and other sources of legal authority.

As part of this process, we value and take seriously the insights of everyone with an interest in our work. High-ranking officials of the U.S. Copyright Office are Advisers for the Restatement of the Law, Copyright. Liaisons for this project include representatives from the American Bar Association Section of Intellectual Property Law, the Association of the Bar of the City of New York, the Copyright Alliance, the Intellectual Property Owners Association, McGraw-Hill Education, and the Recording Industry Association of America. We appreciate the U.S. Chamber of Commerce's engagement on this project and welcome your participation and comments going forward.

Responses to your specific questions regarding the Restatement of the Law, Copyright are enclosed. Please let me know if you have any additional questions.

Sincerely,

Richard L. Revesz
ALI Director

Enclosure

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The Chamber believes that a restatement is not necessary, as the Copyright Act is a federal statute.

The Copyright Restatement recognizes that copyright law is governed by a federal statute and treats the statutory text as controlling. It seeks to be an aid to judges, lawyers, legal scholars, law students, and others seeking to understand the statutory text as it has been interpreted by the courts. For this reason, the Restatement focuses on areas of copyright law in which the Copyright Act gives broad scope for judicial interpretation and discretion. While some provisions of the Copyright Act provide precise policy guidance, many of the most fundamental statutory provisions codify common-law principles with the expectation that the courts will continue to develop the law.

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. And many copyright doctrines are not in the statute. The Copyright Office's Compendium 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." 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. The Copyright Restatement can therefore aid judges and lawyers, as the ALI's Restatements do in traditional common-law fields.

Many ALI projects address areas of the law governed by federal statute. For example, our Restatements Third and Fourth of the Foreign Relations Law of the United States deal extensively with a range of federal statutes, such as the Foreign Sovereign Immunities Act and the many laws governing international trade. Our Restatement of the Law Third, Unfair Competition takes up federal trademark law enacted in the Lanham Act. Similarly, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act are major topics in our Restatement of the Law, The Law of American Indians.

Those concerns are heightened as the ALI has, in some instances, rephrased the statutory language of the Copyright Act, rather than interpret the statute as written.

The goal of the Restatement is to survey the field and render 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. The Copyright Act has been interpreted by the courts for more than four decades, and the Restatement generally uses the language developed by the courts. In some cases, the Restatement, like other Restatements, may also offer new terminology to describe what courts are doing. In all these cases, the ALI is mindful of the primacy of the statutory text. It is not the function of a Restatement to rewrite the law or to say what a better version might look like.

Although Restatements reflect the culmination of meticulous work from some of the finest legal minds, they are not independent sources of legal authority and do not state rules that courts must follow. That is, Restatements are not, have never been, and do not purport to be controlling law for courts. Judges and practitioners understand that Restatements do not displace controlling statutes and precedents. They serve as useful secondary sources to aid judicial interpretation and advance understanding more generally.

When you addressed the Chamber seven years ago, you stated the ALI "think[s] of a Restatement as what a great common law judge would do...." Indeed, common law on the Federal level is limited in scope and then only when there is no controlling Federal statute. That is not the case with copyright.

As ALI's founding Director William Draper Lewis pointed out in 1923, many statutes codify common-law principles and are then interpreted by the courts in light of previous case law. Likewise, as Lewis explained, there "are other statutes which may go into considerable detail; but not until the statute passes through the Courts, do we know in full detail what the law of the subject is."

Consistent with Lewis's observations about a "common law of the statute," our Restatements increasingly have covered areas of statutory law, as many U.S. jurisdictions have enacted statutes addressing issues that previously were controlled by judge-made rules and that continue to receive judicial gloss and interpretation.

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.

But in many important areas the Copyright Act requires judicial interpretation and discretion. During a panel discussion, Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit explained:

It is true that the statute contains *some* detailed prescriptions, and, for these, the statute is the place to look. Those provisions set forth very precisely what the boundaries should [be].

However, for the most fundamental provisions of the copyright law, the statute is something quite different. The meaning of those doctrines comes from the common law process. Since 1710, when copyright was born, they have been shaped by the common law process, which has brought big changes and revolutions. With respect to most of those, the statute represents a vague, approximating catch-up, modeled to reflect in an approximate way the earlier common law developments.

I don't see any reason why the ALI should not undertake a Restatement project with respect to the copyright law. For these fundamental provisions, it would be enormously valuable to judges, who find the statute difficult to understand, because it is difficult to understand.

The best example of this kind of an area is Section 107 for fair use, which is probably the most frequently litigated issue in copyright. Fair use is a doctrine that entered the copyright law through the common law process. For 250 years, it was never even mentioned in the statute. In 1976, Congress drafted Section 107, which tried loosely and vaguely to approximate Justice Story's 1841 formulation in *Folsom v. Marsh*. Section 107 does not explain how to discern fair use. Furthermore, Congress accompanied the new section with a legislative report saying essentially, "We are not dictating what the law of fair use should be; fair use comes from the common law, and we are leaving it to judges to continue to develop it through the common law of copyright."¹

Copyright scholars have noted the unwillingness of the project leadership to accommodate legitimate comments and concerns about the substance of the drafts.

Both the ALI and the Copyright Restatement's Reporters have considered and in some cases accommodated comments or concerns about the substance of the draft.

The ALI values and takes seriously the insights of everyone with an interest in our work. From the beginning of this project, the Reporters have continually revised the draft text in response to the feedback offered by Advisers, Liaisons, ALI members (including those serving on the Members Consultative Group for the Copyright Restatement), and the ALI Council. In a [recent letter](#), for example, the Copyright Office, expressed gratitude "to see that the revised draft reflects a number of points raised in our prior comments." In response to feedback from Advisers and the Council, recent drafts have added to the Black Letter additional quotations from the Copyright Act's statutory language.

At the 2021 Annual Meeting (the first Annual Meeting at which this project was presented to members), our membership considered several motions to make changes to the project. At this Meeting, the Reporters accepted two proposed amendments that they viewed as helpful and agreed would bring additional clarity to the Restatement. Other amendments were rejected upon vote of the ALI membership after both sides presented their views. In fact, one motion was made to change the Restatement because it was argued that it incorrectly altered the language in the Copyright Act. One of the Restatement's most outspoken critics opposed the motion because "the Restatement has correctly applied the case law." The membership then voted to reject the motion.

¹ June M. Besek, Peter S. Menell, Irene Calboli, Devlin Hartline, Justin Hughes, Pierre N. Leval, & William F. Patry, The ALI Copyright Restatement Project: A Horse of a Different Color?, Proceedings of the Twenty-Sixth Annual Conference International Intellectual Property Law & Policy, Fordham University School of Law Skadden Conference Center, New York, NY, April 6, 2018, available at <https://ssrn.com/abstract=3200429>.

This may indicate a predetermined outcome that is not in line with existing statutes or their interpretation by the courts.

ALI's process ensures that none of our projects allow for undue influence or predetermined outcomes. The approved language of every Restatement reflects the views of The American Law Institute as a whole, not the views of any individual Reporter, member, or group of members. It is the result of our careful 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 (at a Council Meeting) and membership (at an Annual Meeting).

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, these citations ensure that judges, scholars, and practitioners know the foundations for each of our conclusions and mitigates the danger that readers might be uncertain as to how or why the ALI reached its conclusions and whether other outcomes were considered.

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.

Our drafting process remains ongoing. Twenty-one sections of the Copyright Restatement were approved by ALI's membership at our 2021 Annual Meeting. These sections had all previously been approved by the ALI Council. 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 agree with every word in the drafts or the final product. But the ALI's deliberative process ensures that every issue receives a full airing of viewpoints and that the final product will represent the considered scholarship, experience, and judgment of the ALI as a whole.

The ALI's copyright project has been the subject of intense criticism from many quarters...

Because copyright is an area of the law with high stakes, it is no surprise that the Copyright Restatement has attracted significant attention and intense criticism. As with other Restatements affecting economic interests, to the extent that any segment of the economy benefits from lack of clarity in the law, efforts to simplify and clarify will receive harsh criticism from that segment. But our mission is to further the overall public interest in clear legal rules. While a Restatement cannot resolve all disagreements about copyright's role in society, it can help to bring clarity to the complex and often differing precedents that have emerged from the courts.

As part of this process, the ALI welcomes constructive criticism and has made numerous changes to the project in response feedback from Advisers, members serving on the project's Members Consultative Group, Liaisons, and the ALI Council. The Institute has carefully responded to questions from critics concerned about the project. For instance, I provided [detailed responses to inquiries from several members of Congress](#).

We have also made substantive changes based on comments from the Copyright Office and others. But we disagree that a Restatement is not appropriate merely because there is a federal statute (see above for details). In fact, the Copyright Office itself seeks to provide guidance to the courts through its Compendium.

Although the Copyright Restatement has received criticism from some parties, it is important to recognize that the Restatement has also received strong support from an array of judges, lawyers, and scholars. And ALI's membership overwhelmingly voted to approve the initial sections of the project after critics explained their substantive misgivings during our 2021 Annual Meeting.