



United States Copyright Office

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Professor Christopher Jon Sprigman
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Professor Lydia Pallas Loren
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Reporters, ALI Restatement of the Law, Copyright

Re: Preliminary Draft No. 1

Dear Professor Revesz, Ms. Middleton and Reporters:

The U.S. Copyright Office is charged with the responsibility of interpreting and administering the nation's copyright law and providing expert advice to Congress and federal agencies on copyright matters.¹ Having had the opportunity to review the initial draft covering sections 2.01 through 2.05 of the proposed Restatement of Copyright Law, as General Counsel of the Copyright Office and an Adviser to the project, I write to raise some questions about the nature and ultimate goals of this undertaking. Although presented as a "Restatement" of copyright law, the project would appear to be more accurately characterized as a rewriting of the law.

Our copyright law is governed by federal statute, enacted by Congress under the authority of Article I, Section 8 of the Constitution and codified in Title 17 of the U.S. Code. This positive law—that is, the Copyright Act—is the authoritative source upon which courts are to rely in analyzing and deciding issues of copyright. A natural question, then, is why there would be a need to "restate" a federal statute. There can be no more accurate statement of the law than the law itself.

Assuming, however, that what is envisioned by the Reporters is to somehow take what Congress wrote and articulate the same rules in a superior form, I do not believe that the draft achieves—or, realistically, could achieve—such a result. Even if the drafters sought to remain 100% faithful to the statute, misstatements and alterations would be unavoidable, because substituting words, condensing text and otherwise tinkering with complex statutory provisions, and the manner in which they relate to one another, will inevitably alter sense and meaning. In this regard, there is a vast difference between restating the common law—a traditional and respected role of ALI which necessarily involves evaluation and selection

¹ 17 U.S.C. §701(a), (b).

of competing formulations of law—and “restating” positive law, which by definition cannot involve these sorts of judgment calls.

In any event, from the preliminary draft it appears that the aspiration here is considerably more normative than a mere re-rendering of the Copyright Act. The “blackletter” provisions in the draft depart in material ways from—and sometimes simply elide—provisions enacted by Congress, and in many instances, the accompanying discussion and illustrations evince selective and particularized views that do not present a balanced interpretation of the statute. At various points, singular judicial decisions are treated as well-established rules, and contrary precedent is overlooked or brushed aside. Apart from questions of accuracy, the Reporters’ apparent approach of enshrining selected judicial decisions or favored interpretations as “blackletter” law is in tension with the Congress’ approach in the 1976 Act; in many areas (and in particular those covered by the draft), the law was purposely designed to articulate broad principles for courts to interpret over time in light of changing behaviors and technologies.²

To cite a few examples:³

- Section 2.01(b) of the draft provides that “[c]ategories of works of authorship recognized as protectable *are . . .*” But section 102 of the Act states that “[w]orks of authorship *include . . .*”⁴ The draft thus suggests incorrectly that the list of categories in section 102 of the Act (which is substantially, though not precisely, replicated in 2.01(b)) is exhaustive. The legislative history of the Act makes it clear that Congress intended the listing to be “illustrative and not limitative.”⁵ An obvious example here is courts’ protection of fictional characters independent of the literary or audiovisual works in which they appear.⁶
- Section 2.02 omits the statutory language in section 103(a)⁷ that precludes protection for any part of a compilation or derivative work that makes unlawful use of preexisting material. Although the statutory limitation is mentioned in comment g, it is unclear why this important qualification

² See, e.g., H.R. Rep. No. 94-1476, at 53 (1976) (section 101 sets out the area of copyrightable subject matter “with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories”); *id.* at 52 (explaining that the adoption of “broad language” in Act’s definition of “fixation” was “intended to avoid the artificial and largely unjustifiable distinctions . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed”); *id.* at 64 (explaining that the definition of “transmit” is “is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them”); *id.* at 66 (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

³ These are but a few instances where the draft substantially departs from or contradicts the statutory framework. There are numerous other statements made throughout the comments and illustrations that could also be cited for their lack of support in the law (and which the Copyright Office may choose to address in the future).

⁴ 17 U.S.C. § 102(a) (emphasis added).

⁵ H.R. Rep. No. 94-1476, at 53.

⁶ See 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.164 (2015) (explaining that while characters “are not enumerated in the statute as a separate class of copyrightable work,” courts “have long upheld copyright in original characters”); see also, e.g., *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (finding Batmobile protectable); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972), *rev’d in part on other grounds*, 581 F.2d 751 (9th Cir. 1978) (finding certain Disney cartoons protectable).

⁷ 17 U.S.C. § 103(a) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”)

is relegated to discursive text (which appears to minimize its import) and is not included in the “blackletter” rule.

- Section 2.03(b) and (c) prescribe criteria for fixation—apparently derived in part from the Second Circuit’s (controversial) *Cartoon Network* decision⁸—that depart very substantially from the definitional language in section 101 of the Act. Section 101 provides that “[a] work is ‘fixed’ in a tangible medium of expression [and, per section 102(a), eligible for protection under the Copyright Act] when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The same section separately defines “copies” (without imposing a “transitory duration” requirement) as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated” Instead of relying upon these statutory definitions (which are relegated to commentary), the draft introduces entirely new requirements—“manifestation” of a work “in stable form” for a period of more than transitory duration, and “instantiation” of a work that is “sufficiently stable” for the work to be “exploited in some market.” The Copyright Act does not employ the terms “manifestation” or “instantiation” and it is unclear how these concepts relate to the actual statutory terms or to one another. Further, section 101’s “transitory duration” requirement refers to the ability to perceive, reproduce, or communicate *the work*—not its embodiment or “manifestation.” Finally, and most glaringly, the draft language would appear to condition protectability—which is dependent upon fixation—on the ability to exploit the work in the marketplace. This is fundamentally at odds with the philosophy of the Copyright Act, under which protection attaches upon fixation and regardless of real or perceived economic value.
- Section 2.04(d) characterizes the level of creativity required for a work to meet the originality standard as “low.” This characterization does not appear in the Copyright Act. If the thought here is to incorporate the standard expressed in *Feist*, the wording should be “extremely low.”⁹
- Section 2.04(d) states that “[c]hoices primarily involving considerations of utility, such as those dictated by the work’s function; involving the tools used to produce the work; or involving practices standard to a particular type of work, are not creative for the purpose of satisfying the originality requirement.” This language is not only extraordinarily broad but a misstatement of the law. For example, it would seem to exclude virtually all computer programs—which are clearly protectable subject matter under the Act—since the writing of computer code is undoubtedly dictated by its function.
- Section 2.05(a)(1) states categorically that there is no copyright protection for U.S. government works, whereas the Act merely provides that there is no protection under Title 17.¹⁰ That is, the

⁸ See *Cartoon Network, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127-130 (2nd Cir. 2008).

⁹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁰ 17 U.S.C. § 105 (“Copyright protection *under this title* is not available for any work of the United States Government” (emphasis added)).

U.S. government can assert protection for its works in foreign jurisdictions.¹¹ Comment c(2) elaborates that copyright protection is unavailable for a work created jointly by the U.S. government and a private actor. Notwithstanding this pronouncement, the statute does not address this scenario; at best it is a debatable proposition under the law.¹²

- Section 2.05(b) states, again in categorical terms, that copyright protection is unavailable for any government “edict of law.” The Copyright Act does not say this, and case law on this issue is divided.¹³

As thoughtful and ambitious as it may be, the Restatement project appears to run the risk of creating a pseudo-version of the Copyright Act that is inconsistent with the law as Congress enacted it. Yet an attorney or judge who is not well-versed in copyright law—presumably among those who would be the primary audience for such a resource—might not be aware of this, believing the ALI publication to be a faithful presentation of the law as it is written.

It is, of course, fine to evaluate and opine on our copyright law, and to suggest ways in which the Copyright Act should be updated or rewritten. Indeed, consistent with its constitutional role, Congress is currently in the midst of a multi-year review of the Copyright Act to assess areas where legislative updates may be beneficial, an effort that has benefited, and will continue to benefit, from the critical analysis and assessments of academics and practitioners, as well as others affected by the copyright law.¹⁴

That said, it seems that a threshold consideration for this project must be whether the normative approach to statutory law apparently envisioned by the Reporters can legitimately be characterized as a “Restatement.” Such an effort is probably better deemed a declaration of principles or model code. Indeed, it is my understanding that this is how the project was conceived in its early stages.¹⁵ A

¹¹ H.R. Rep. No. 94-1476, at 59 (“The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. . . . There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use its works abroad.”). Despite the language of section 2.05(a)(1), the availability of foreign protection seems to be acknowledged at the end of reporter’s note e.

¹² 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 4:78 (2015) (noting that this is “[a]n extremely difficult issue not addressed in the statute or the legislative history”).

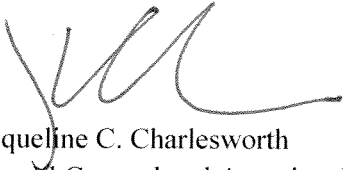
¹³ Reporter’s note f (citing conflicting case law); *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997) (upholding copyright in medical procedure code that was incorporated into federal regulations); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (upholding copyright in compilation of used car valuations that a state required to be used for insurance reimbursement purposes); see also Br. for the United States as Amicus Curiae, *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, No. 97-1254, at 15 (1998) (defending court of appeals decision upholding copyright in medical procedure code).

¹⁴ The Copyright Office, in its capacity as an impartial advisor to Congress, has played a substantial role in this effort, testifying and briefing Members on a wide range of topics, and producing in-depth reports to assist Congress in its review. See, e.g., U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION (2015); U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013). Each of these reports was produced after a transparent public process, including public notice, opportunity for written comment, and live hearings.

¹⁵ See Letter from Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, UC Berkeley School of Law, to Lance Liebman, Director, ALI, at 3-4 (Sept. 12, 2013) (proposing ALI undertake a “Principles of Copyright project” that could “provide an analysis and framework for other [copyright] reform projects”); see also Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 Utah L. Rev. 551, 556-57 (2007) (“It is, however, worth considering whether it would be a valuable project to draft a model copyright law, along the lines of model

recognition and appropriate redesignation of the project as prescriptive, rather than descriptive, would provide much-needed clarity to the drafting process and final product.

Sincerely,



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cc: Robert Kasunic
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law projects that the American Law Institute has frequently promulgated, with interpretive comments and citations to relevant caselaw, or a set of copyright principles that would provide a shorter, simpler, more comprehensible, and more normatively appealing framework for copyright law.”). This initial concept of a declaration of principles or model code appears to have evolved into a proposal by Professor Sprigman to create a Restatement that would be influential “in shaping the law that we have, and, perhaps, the reformed law that in the long term we will almost certainly need.” Letter from Chris Sprigman, Professor, NYU School of Law, to Ricky Revesz, Director, ALI, at 3 (September 2, 2014).