



**United States Copyright Office**

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October 16, 2018

Professor David F. Levi  
President, American Law Institute  
Council Members  
American Law Institute

Re: Council Draft No. 2, Restatement of the Law, Copyright

Dear Professor Levi and ALI Council Members:

The U.S. Copyright Office (the “Office”) is responsible for administering significant portions of the nation’s copyright law and providing expert advice to Congress, federal agencies, and the courts on copyright matters.<sup>1</sup> The Office also advises the Department of Justice when the United States expresses its views in copyright cases before the courts. We have reviewed Council Draft No. 2 of ALI’s proposed Restatement of the Law, Copyright, which includes drafts of sections on subject matter eligible for copyright registration (§§ 1.01–1.02, 1.06–1.08) and the scope of copyright protection (§§ 2.01–2.02, 2.07).

As previously expressed by the Acting Register of Copyrights in her letter of January 16, 2018, the Office is concerned with the Restatement’s sometimes incomplete, misleading, or inaccurate descriptions of the law. The current draft has not cured these significant issues. As the Acting Register stated:

Ultimately, as thoughtful and ambitious as it may be, the Restatement project appears to create a pseudo-version of the Copyright Act that does not mirror the law precisely as Congress enacted it and one that will quickly become outdated as Congress amends it or the courts clarify it. As a result, the attorney or judge who relies on it will often be misled. That outcome would not serve the ALI’s mission “to promote the clarification and simplification of the law.” For these reasons, we again urge the ALI to reconsider the project as a whole.<sup>2</sup>

The latest revisions do not resolve the intractable difficulties created by a project attempting to “restate” a body of carefully considered positive federal law. And they underscore the risks in seemingly endorsing particular judicial interpretations of that positive law at a time when case

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<sup>1</sup> 17 U.S.C. § 701(a), (b).

<sup>2</sup> Letter from Karyn Temple Claggett, Acting Register of Copyrights, to The American Law Institute (Jan. 16, 2018).

law on these topics continues to evolve. While not exhaustive, the Office highlights the following examples in the draft before the Council that may generate ambiguity and confusion regarding the Copyright Act and judicial doctrines, rather than promote the clarification and simplification of the law.

Should the project continue, we wish to reiterate the Office’s view that the Restatement must play a limited role in analysis of the Copyright Act.<sup>3</sup> It should not displace any of the “traditional tools of statutory construction,” including examination of the statute’s text, structure, purposes, and legislative history. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–450 (1987). Nor would the Restatement supplant the Office’s rules and regulatory guidance that interpret and apply the text of the Copyright Act, which are entitled to ordinary and appropriate levels of judicial deference, even where they differ from views expressed in the Restatement. The Office believes that the Council must avoid conflicts between the Restatement and Office regulations or other interpretive guidance, including the *Compendium of U.S. Copyright Office Practices (Third Edition)* (“*Compendium (Third)*”), or at a minimum, acknowledge the government’s contrary position.

## CHAPTER 1

### *Section 1.02*

Section 1.02 contains numerous incorrect or incomplete characterizations of the *Compendium (Third)*.

In Comment *f*, it is incomplete to state that the Office “identifies a choreographic work as one that ‘directs the rhythmic movements of one or more dancers’ bodies in a defined sequence and a defined spatial environment.” Rhythmic movement in a defined space is only one element that may be contained in a choreographic work, and its “absence . . . is not determinative of whether a particular dance constitutes choreography.”<sup>4</sup> The *Compendium (Third)* describes many other elements that may be present in a choreographic work.<sup>5</sup>

Relatedly, *Compendium (Third)* §§ 805.5(B)(3) and 806.5(B) do not provide support for the statement that “[t]he Copyright Office takes the position that these principles exclude exercise routines, aerobic dances, yoga positions, football plays, slam-dunking maneuvers, gymnastic programs, ice-skating or ice-dancing routines, skateboarding or snowboarding, synchronized swimming, cheerleading routines, marching-band routines, golf swings, track and field events, wrestling, weightlifting, fencing, and martial arts.” Rather, those sections list only some of the activities included in the Restatement: exercise routines, aerobic dances, yoga positions, football plays, slam-dunking maneuvers, skateboarding or snowboarding.<sup>6</sup> Similarly, those sections do

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<sup>3</sup> The U.S. Patent and Trademark Office expressed similar concerns regarding the Restatement. *See* Letter from Andrei Iancu, Under Sec’y of Commerce for Intellectual Prop. & Dir., U.S. Patent & Trademark Office, to The American Law Institute (Oct. 1, 2018).

<sup>4</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (THIRD EDITION) § 805.2 (3d ed. 2017).

<sup>5</sup> *Id.* § 805.2(B)–(F).

<sup>6</sup> *Id.* §§ 805.5(B)(3), 806.5(B).

not provide support for the statement that “the Copyright Office deems magic acts, circus acts, juggling, fight sequences, and martial-arts routines” to be categorically excluded from choreographic or pantomime works. Out of that list, the *Compendium (Third)* references only magic tricks in connection with pantomimes by citing to a case discussing that magic tricks, in isolation, are not copyrightable.<sup>7</sup>

Moreover, Comment *m* misquotes *Compendium (Third)* § 307, and Reporters’ Note *o* misquotes *Compendium (Third)* § 804.3(B).

## CHAPTER 2

### *Section 2.01*

Section 2.01 should be revised to clarify its treatment of copyrightable expression and unprotectable ideas. Reporters’ Note *b* states the interaction of sections 102(a) and 102(b) is ambiguous, but to the contrary, a straightforward reading makes clear that if a work constitutes original expression, it is protectable under 17 U.S.C. § 102(a).<sup>8</sup> Section 102(b) “is not a limitation on what kinds of expressive works may be protected by a copyright,”<sup>9</sup> but instead “is a limitation on how broadly the copyright extends.”<sup>10</sup>

The current language in Reporters’ Note *g* implies that creative expression of an unprotectable element would not be protectable. The language should be revised; although section 102(b) prohibits protection of such elements, original, creative expression remains protectable under 102(a).<sup>11</sup>

### *Section 2.07*

The Office remains concerned with the formulation of Comment *f*, which incorrectly suggests that courts agree with the “general concept” that elements of a work can become *scènes à faire* over time. The comment offers little case support, citing *Warner Bros. Inc. v. American Broadcasting Cos., Inc.* in support<sup>12</sup> and citing numerous appellate cases holding the opposite.<sup>13</sup> This is insufficient support for the propositions’ broad framing.

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<sup>7</sup> *Id.* § 806.4(D).

<sup>8</sup> Brief for the United States as Amicus Curiae at 13, *Google Inc. v. Oracle Am., Inc.*, 135 S. Ct. 2887 (2015) (No. 14-410) (“U.S. Google v. Oracle Br.”) (stating “[i]f a work constitutes expression (and if it is original), it is copyrightable under section 102(a)”).

<sup>9</sup> U.S. Google v. Oracle Br. at 12.

<sup>10</sup> *Id.*

<sup>11</sup> See *Baker v. Selden*, 101 U.S. 99, 105 (1879) (“The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent.”).

<sup>12</sup> As the Office explained in its December 2017 letter, the holding in *Warner Bros.* was predicated on an idea/expression distinction, with the allegedly copyrighted material being too “general” “to even approach the degree of concreteness and particularity deserving of copyright protection.” 654 F.2d 204, 209–10 (2d Cir. 1981) (finding “the expression of the general idea of a hero with miraculous strength in Hero and Superman substantially

If the draft does not remove Comment *f*, entirely, as the Office has suggested, it should clarify that this principle has received mixed adoption by the courts, and cases focusing on the time of creation are not mere “outliers.”<sup>14</sup> For example, the district court decision in *Lotus v. Borland* ordered a trial on the functional constraints on the Lotus menu command hierarchy that limited potential expression “at the time of its creation,”<sup>15</sup> but the Ninth Circuit affirmed the district court opinion in *Apple v. Microsoft*, where the lower court found that Apple’s subsequent success in marketing a graphical user interface limited its ability to stop competitors from using similar interfaces.<sup>16</sup> Further, the Comment should account for section 2.06 Reporters’ Note *a*, which quotes *Harper & Row* defining expression as “aspects of the work that display the stamp of the author’s originality.”<sup>17</sup> This language is in tension with Comment *f* suggesting the “stamp of originality” can morph from protectable expression into common theme.

The Office continues to question the need for ALI to “restate” the extensive body of positive copyright law. Conflicts among the Courts of Appeals in their interpretation of the statute are ultimately resolved by the United States Supreme Court, as in the case of *Star Athletica v. Varsity Brands* 137 S. Ct. 1002 (2017) or *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018). Until such conflicts are resolved by the Court, ALI’s stated role is to “restate” the law rather than to decide the proper interpretation of the law.

We appreciate your consideration of the Office’s views.

Sincerely,



Regan A. Smith  
General Counsel and Associate Register of Copyrights



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

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differs”). The *Warner Bros.* opinion makes only a single reference to *scènes à faire* to justify exclusion of a specific scene in both works where the hero lifts a car with one hand from the substantial similarity analysis. *Id.* at 210.

<sup>13</sup> Comment *f* cites cases from the Third Circuit, Tenth Circuit, and Federal Circuit as disagreeing with the principle and only offers the N.D. Cal. Opinion in *Apple Computer, Inc. v. Microsoft Corp.* in contrast.

<sup>14</sup> The Office notes that Goldstein approaches this principle as an element of merger adopted only by some courts. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §2.3.2.1 (2018 ed.).

<sup>15</sup> 831 F. Supp. 202, 207 (D. Mass. 1993).

<sup>16</sup> *Apple Comput., Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1024–25 (N.D. Cal. 1992) (stating that “[s]ome visual displays are or become so closely tied to the functional purpose of the article that they become standard”), *aff’d*, 35 F.3d 1435, 1445 (9th Cir. 1994).

<sup>17</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

CC:

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