



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

January 16, 2018

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

Re: Council Draft No. 1, Restatement of the Law, Copyright

Dear Professor Levi and ALI Council Members:

I write to you to express my significant concern with the ALI's ongoing project to create a Restatement of the Law, Copyright. The U.S. Copyright Office is charged with interpreting and administering the nation's copyright law and providing expert advice to Congress, federal agencies, and the courts on copyright matters. The Office also advises the Department of Justice when the United States expresses its views in copyright cases before the courts.

Given the Office's responsibilities, two Associate Registers of Copyrights have been serving as Advisors, to ensure that the project reflects as closely as possible the views of the expert administrative agency and the federal government more generally. Despite this effort to improve the overall process, unfortunately I must conclude that the project is a misguided one, and the Council should give serious consideration to suspending it.

The need for the Restatement is unclear, as an extensive body of positive copyright law already exists. Copyright is primarily a creature of 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. The statute is detailed and prescriptive, preempting state common law. Most of its sections were heavily negotiated or refined through lengthy expert study, so that each word has been carefully selected. Congress has also given the Copyright Office broad authority to issue substantive regulations and regulatory guidance in the exercise of its functions and duties,¹ to which the courts afford the usual level of judicial deference.² The Office has also provided significant

¹ 17 U.S.C. § 702 ("The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title."); *see, e.g.*, 37 C.F.R. § 202.1 (providing "examples of works not subject to copyright"); 37 C.F.R. § 202.11 (for architectural works, providing a regulatory definition of the undefined statutory term "building").

² *See, e.g., Cablevision Sys. Dev. Co. v. MPAA*, 836 F.2d 599, 610 (D.C. Cir. 1988) (Office's interpretations are "due the same deference given those of any other agency").

regulatory guidance in its *Compendium of U.S. Copyright Office Practices*³ and *Copyright Office Circulars*,⁴ which courts regularly rely on when deciding issues of copyright law.⁵

Moreover, this body of positive law is unlikely to remain static. Although Congress last comprehensively amended the Copyright Act in 1976, it has repeatedly adopted amendments in the intervening years, including significant updates in 1998 with the passage of the Digital Millennium Copyright Act.⁶ Moreover, the House Judiciary Committee is currently engaged in a comprehensive review of the Copyright Act,⁷ and Congress is considering a number of pieces of legislation to update the Copyright Act.⁸ On the regulatory front, the Copyright Office has engaged in a significant effort to modernize its regulations, including releasing a fully revised *Compendium* in 2014,⁹ which itself received a significant update in 2017,¹⁰ issuing a series of revised *Circulars* in 2017,¹¹ and promulgating over 10 final rules in the last two years.¹²

In this regard, the copyright Restatement project differs significantly from other ALI Restatements. Indeed, the rationales underlying ALI's development of other Restatements are not present here. ALI's stated goal in preparing Restatements is to provide "clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court."¹³ A Restatement "will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country."¹⁴

In light of these goals, we question the need for ALI to "restate" the extensive body of positive copyright law. There is a vast difference between restating state common law, which develops slowly in the courts of 50 separate states, and "restating" a body of positive federal law. There can be no more accurate statement of the law than the words that Congress has enacted in the Copyright Act and those that the Copyright Office has adopted in its regulations. Even if the drafters sought to remain entirely faithful to the statute or regulations, any departure from the words used in the positive law will lead to confusion and misinterpretation. Substituting words, condensing text and otherwise tinkering with complex statutory and regulatory provisions, and the manner in which they relate to each other, will inevitably alter sense and meaning. To the

³ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICE (3d ed. 2017), <https://www.copyright.gov/comp3/>.

⁴ U.S. COPYRIGHT OFFICE, CIRCULARS, <https://www.copyright.gov/circs/> (last visited Jan. 10, 2018).

⁵ See, e.g., *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 685 (9th Cir. 2014) (finding the interpretation provided in the *Compendium* "persuasive" concerning the registration requirements for databases); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2nd Cir. 2002) (deferring to the Copyright Office's view, as expressed in a Circular, regarding the scope of collective work registrations).

⁶ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁷ More information about the Committee's review of the Copyright Act may be found at <https://judiciary.house.gov/issue/us-copyright-law-review/>.

⁸ Music Modernization Act of 2017, H.R. 4706, 115th Cong. (2017); CASE Act of 2017, H.R. 3945, 115th Cong. (2017); Register of Copyrights Selection and Accountability Act of 2017, H.R. 1010, 115th Cong. (2017).

⁹ *Compendium of U.S. Copyright Office Practices*, 79 Fed. Reg. 78,911 (Dec. 31, 2014).

¹⁰ *Compendium of U.S. Copyright Office Practices*, 82 Fed. Reg. 45,625 (Sept. 29, 2017).

¹¹ *Copyright Office Begins Release of Refreshed and Updated Circulars*, U.S. COPYRIGHT OFFICE (Sept. 21, 2017), <https://www.copyright.gov/newsnet/2017/682.html>.

¹² *Rulemakings*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/rulemaking/> (last visited Jan. 10, 2018).

¹³ ALI Style Manual at 4.

¹⁴ ALI Style Manual at 6.

extent that law is uncertain due to an ambiguous statute, that ambiguity should be resolved using the standard tools of statutory interpretation, including, where appropriate, deference to the expert agency's interpretation. Nor is there variation in that positive law among different states, because copyright is almost exclusively a body of federal law. And where there are areas of uncertainty in the copyright law, the Supreme Court has not shied away from resolving them, and with each such decision the Court conclusively establishes the governing law for the entire Nation.

The few federal statutes addressed by other Restatements are all quite different—they provide broad rules or concepts, restate common law principles, or apply against a backdrop of state or common law.¹⁵ While copyright law includes some similar doctrines, the Restatement project here is not limited to those. As to the detailed, prescriptive provisions of the statute, these have historically been considered “black letter” law. An attempt to restate them, providing an alternative “black letter,” can only lead to greater ambiguity and confusion.

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.

Sincerely,



Karyn Temple Claggett
Acting Register of Copyrights

cc:

Professor Richard L. Revesz
Director, ALI

Stephanie A. Middleton
Deputy Director, ALI

¹⁵ For instance, although parts of the Restatement Third, Unfair Competition address federal statutes, the Restatement itself notes that “[f]or the most part the federal legislation does not preempt state law, and both federal and state unfair competition statutes generally rely without significant elaboration on concepts derived from the common law.” Restatement Third, Unfair Competition, Foreword. The tentative draft of the Restatement Fourth of the Foreign Relations Law of the United States includes a chapter, with four sections, addressing the Foreign Sovereign Immunities Act (FSIA). Restatement Fourth, The Foreign Relations Law of the United States, Sovereign Immunity (Tentative Draft No. 3, 2017). But in that instance, the ALI's decision to address the FSIA can be justified by the fact that earlier Restatements had addressed the topic, before Congress's enactment of the FSIA.

Professor Christopher Jon Sprigman
Professor Daniel J. Gervais
Professor Lydia Pallas Loren
Professor R. Anthony Reese
Professor Molly S. Van Houweling
Reporters, ALI Restatement of the Law, Copyright