



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

May 21, 2021

Professor Richard L. Revesz
Director, ALI
Ms. Stephanie A. Middleton
Deputy Director, ALI
Professor Christopher Jon Sprigman
Reporter, ALI Restatement of the Law, Copyright
Professor Daniel J. Gervais
Professor Lydia Pallas Loren
Professor R. Anthony Reese
Professor Molly S. Van Houweling
Associate Reporters, ALI Restatement of the Law, Copyright

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

Dear Professor Revesz, Ms. Middleton, and Reporters:

I am writing to notify the American Law Institute (ALI) that I am stepping down as an Adviser to the ALI's project on the Restatement of the Law, Copyright, a position I have served in since the project's inception. On October 25, 2020, I began my tenure as Register of Copyrights and Director of the U.S. Copyright Office. I have determined that it is no longer advisable to continue in the Adviser role given my current position and duties.

As you know, the Copyright Office is charged with interpreting and administering the nation's copyright law and providing expert advice to Congress, federal agencies, and the courts.¹ The Office also advises the Department of Justice when the United States expresses its views in copyright cases before the courts. In light of these responsibilities, two Associate Registers of Copyright, General Counsel Regan Smith and Director of Registration Policy and Procedure Rob Kasunic, have served as Advisers to the Restatement project to provide objective and technical input. They will continue to do so.²

As I step down from a formal role on the project, let me take this opportunity to offer my perspective as Register of Copyrights and in light of my past service as an Adviser. Based on careful consideration of the nature of the project and the debate it has engendered over the past few years, I believe there are three areas where a change in approach would be important to acceptance of the Restatement as a resource for judges and practitioners: elevating the treatment of statutory text and legislative history; affording appropriate deference to interpretations of the law by the Copyright Office; and enhancing transparency in the treatment of comments.

First, it is critical that any restatement of the Copyright Act, as codified in title 17 of the U.S. Code, be centered on the statutory text, rather than displacing it with paraphrases that by definition cannot be fully accurate recitations of the law. As the Copyright Office and others have noted, the Restatement of

¹ 17 U.S.C. § 701(a), (b).

² Of course, the participation of Copyright Office personnel as Advisers does not indicate their endorsement of the substance of the drafts considered or ultimately adopted by the ALI.

Copyrights is unusual among ALI projects in that it seeks to restate a body of law primarily embodied in a complex federal statute rather than common law. In the latest Tentative Draft, as in prior drafts, the “black letter” statement of the law at the beginning of each section sometimes quotes the applicable statutory provisions, but at other times rephrases them. In statutory interpretation, there is no substitute for the words of the statute itself.³ Rephrasing, however well-intentioned, inevitably introduces imprecision and interpretive choices. This is particularly true where the Restatement presents these statements as the law itself, not as interpretations of the law.⁴ The words of the statute have been carefully chosen by Congress and reflect a delicate balancing of various competing interests. Standard tools of statutory construction remain the best method to resolve any ambiguity in the text

The Copyright Office expressed concern about this issue before my tenure; as the project has progressed, the concern remains. We are aware of similar views expressed by judges and other Advisers as well as the U.S. Patent and Trademark Office, each opining that the statutory text should be primary. I strongly recommend that each section begin with the text of the statute, identified as the black letter law. Any rephrasing should follow after the statutory text and be clearly identified as such. Where the plain language of the statute is ambiguous, the Reporters should include the relevant portions of the legislative history. While not determinative, the 1976 Act legislative history is particularly persuasive due to the fact that the House and Senate Reports are largely identical.⁵ The Supreme Court has often relied on these legislative reports,⁶ and the Copyright Office routinely does so as well in order to faithfully carry out congressional intent. Especially given the long process of revision that led to the 1976 Act, it can be difficult to locate the relevant parts of the legislative history for particular provisions, and courts would benefit from the availability of this information in seeking to resolve ambiguities.

Second, the project should afford appropriate deference to the Copyright Office as the expert agency that administers title 17. Congress has given the Office broad authority to issue substantive regulations and regulatory guidance in the exercise of its functions and duties,⁷ to which the courts afford the usual level of judicial deference.⁸ The Office also provides public guidance in its *Compendium of U.S. Copyright*

³ The ALI itself recognizes that “the statutory text is controlling.” Letter from Richard L. Revesz, Director of ALI, to Sen. Thom Tillis, et al., at Responses page 2 (January 3, 2020).

⁴ This problem may inadvertently be exacerbated by the ALI’s own style manual, which states that the black letter provisions “should be drafted in the form of a codification of the subject in question; in the words of the Institute’s founders the black letter ‘should be made with the care and precision of a well-drawn statute.’” The American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* at 36.

⁵ See H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659; S. REP. NO. 94-473 (1975).

⁶ See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743, 747 (noting that “[t]he Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress” and finding “the legislative history of the Act is significant for several reasons”); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 174 (1985) (deeming the House report “certainly persuasive legislative history”); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 535 (2013) (repeatedly pointing to legislative history “for those who find [it] useful”).

⁷ 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”).

⁸ 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”).

*Office Practices*⁹ and *Copyright Office Circulars*,¹⁰ which courts regularly cite.¹¹ These statements are intended to apply uniformly, and there is a risk of misstatement if the Restatement relies on outdated regulations and/or interpretations. Since the Restatement project commenced in 2015, we have issued two significant updates to the *Compendium* in 2017 and 2021, refreshed our Circulars, and promulgated over 45 interim or final rules.¹²

I appreciate that the ALI has stated that it “affords [the views of the Office] the same weight that a judge would give them in deciding a case.”¹³ I urge that that this principle be adhered to as the project progresses, and that the Restatement acknowledge any instances where it may adopt a position contrary to the Office’s views.¹⁴ Conflicts between the Restatement and Copyright Office regulations or interpretive guidance, including the *Compendium*, are likely to produce confusion, especially to the extent they relate to issues involved in registering claims to copyright or administering statutory licenses.

Finally, it would be advisable to promote transparency throughout the drafting and decision-making process, as the ALI itself has recognized.¹⁵ Unfortunately the Restatement process to date has been perceived by onlookers, including some Advisers, as inadequately documented, leading to questions being raised about the possible influence of the normative views of the Reporters. Given the unusual context of the focus on a federal statute and the ensuing controversy, I believe the ALI should consider altering its customary procedures, and providing for the disclosure of records of the Advisers and Members Consultative Group Meetings, written comments submitted by Advisers, and/or records of the Council Meetings where the project was discussed.¹⁶

It would be helpful for the public—particularly members of the legal community that may rely on the Restatement—to know what advice is being given to the drafters as the project proceeds, and to be able to understand how that advice is considered, as well as the criteria under which it is accepted or rejected. To

⁹ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021), <https://www.copyright.gov/comp3/>. The Compendium is periodically updated following a period of public notice and comment.

¹⁰ U.S. COPYRIGHT OFFICE, CIRCULARS, <https://www.copyright.gov/circs/> (last visited May 6, 2021).

¹¹ 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).

¹² *Rulemakings*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/rulemaking/> (last visited May 11, 2021). The subject matter of these rules ranges from the Office’s administration of its registration and recordation services, to whether uses are likely to be non-infringing in connection with the triennial proceeding establishing exceptions to the anti-circumvention prohibition in section 1201 of the Copyright Act, to technical legal issues involved in implementation of the Music Modernization Act (MMA) such as the nature of the *sui generis* protection for pre-1972 sound recordings under the MMA and any copyright protection afforded to such foreign recordings by the Uruguay Rounds Agreement Act. See, e.g., <https://www.copyright.gov/rulemaking/termination-modernization/>; *Eighth Triennial Section 1201 Proceeding (2021)*, <https://www.copyright.gov/1201/2021/>; *Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited*, 84 Fed. Reg. 14232 (April 9, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06883.pdf>.

¹³ Letter from Richard L. Revesz, Director of ALI, to Sen. Thom Tillis, et al., at Responses page 2 (January 3, 2020).

¹⁴ For example, Tentative Draft No. 2, Chapter 3, § 22 could be improved by adopting the *Compendium*’s statement that “each joint author must contribute a sufficient amount of original authorship to the work,” rather than using the phrase “contribute copyrightable expression.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 505.2 (3d ed. 2021).

¹⁵ Letter from Richard L. Revesz, Director of ALI, to Sen. Thom Tillis, et al. at 3 (February 28, 2020).

¹⁶ See Shyamkrishna Balganesch & Jane C. Ginsburg, *Preface: The Past, Present and Future of the Restatement of Copyright*, 44 COLUM. J. L. & ARTS 279, 280, fn. 3 (2021), available at <https://journals.library.columbia.edu/index.php/lawandarts/article/view/8095/4175>.

assist in promoting this goal, the Copyright Office will post the letters that officials in the Office have sent to the ALI on our website for public inspection. I recommend that the ALI and all others participating in this project take similar steps to increase the transparency of the drafting process.

Thank you for considering these recommendations. In my view, their adoption would greatly enhance the acceptance and perceived legitimacy of the copyright Restatement project.

Sincerely,

A handwritten signature in black ink that reads "Shira Perlmutter". The signature is written in a cursive style with a large, sweeping initial 'S'.

Shira Perlmutter
Register of Copyrights and
Director, U.S. Copyright Office