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Re: Restatement of the Law, Copyright — Council Draft No. 2 (Aug. 17, 2018)

Dear Professor Levi and Council Members,

In my capacity as an Adviser to the Restatement of the Law, Copyright and on behalf of the Authors Guild, I respectfully submit the following comments on Council Draft No. 2 (the “Draft”). We understand that the Draft will be presented to the ALI Council for a vote this week and strongly recommend that the Draft not be approved.

We continue to have grave concerns about the project’s rationale and direction. The objectivity that we had hoped for in this project despite the personal views of the Reporters¹ has not transpired. Despite feedback and commentary from advisors and others involved in copyright practice, the revised Draft contains errors, misstatements, oversimplifications, and bias. In a number of places, the black letter restates statutory provisions in different language than the statute, using terms that provide different meanings to the provisions than that intended by legislators. The Reporters explain that they think their own formulations are better – but they are not entitled to usurp Congress by rewriting federal law.

We also share the skepticism others have expressed on the unusual nature of an ALI Restatement of the Law on copyright law. Copyright law—a creature of federal statute and judicial interpretations that vary widely among circuits—is, simply put, not a good subject for a Restatement. There are few areas of copyright law where the case law from the various circuits can be simplified into a single rule or otherwise addressed in the Restatement’s format. It is the judiciary’s role to synthesize rules, the Supreme Court role to decide circuit splits, and Congress’ role to amend the copyright statute; not the ALI’s.

This is not to suggest that lawyers in the field, judges, law students—and even creators—cannot benefit from practical, up-to-date, and accurate resources that explain copyright law. In my 28 years as a copyright lawyer, I often relied on copyright law treatises, including *Nimmer on Copyright* and *Goldstein on*

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Copyright, to research and understand complicated issues. But while these resources chart out the full expanse of copyright law from legislative history, case law, administrative experience, and scholarly articles—presenting the law *as it is* for practitioners to explore and form an understanding therefrom—the Draft prescribes and advances certain narrow views, which not only signals problems with the Draft’s present form and direction but raises serious questions about the possibility of synthesizing a large and quickly changing body of law into a Restatement.

The most authoritative resource on copyright law, Professor Nimmer’s treatise, for example, spans 11 volumes, thousands of pages, and is updated three times per year. It presents various courts’ interpretations along with an exhaustive list of the cases without cherry-picking to advance a certain view. While the treatise has courted a fair share of healthy criticism, both *Nimmer on Copyright* and Paul Goldstein’s treatise *Goldstein on Copyright* address the nuances and divergencies between circuits and decisions within a circuit, which is lacking in the revised Draft. Both treatises have been cited in thousands of cases and widely relied on by courts to understand the intricacies of copyright statute and judicial thinking. These treatises have excellent indices and their various sections can be accessible, so that despite their length they are easy to search and consult without ever being reductive in the manner of the Draft before us.

For practical guidance on the subject matter of copyright, we cannot think of a better resource than the Copyright Office’s Compendium of U.S. Copyright Practices, Third Edition (the “Compendium”), which provides a far more thorough and accurate treatment than the Draft. The Copyright Office, in the course of its examination of registration applications, considers every possible issue of copyrightability; its registration specialists and attorneys have over the decades looked at every potential issue of copyrightability inside and out. Their enormous expertise in this area deserves deference. It is unclear then why we need a Restatement to restate what the Compendium describes and does so with more expertise and more thoroughly. Indeed, we must pause to ask: what need is the Restatement attempting to fulfill?

We are also concerned that the Council will be voting on bits and pieces of two chapters rather than the entire chapters, especially when so much is cross-referenced to parts that are either not yet written or haven’t been circulated. The Draft cannot be appropriately reviewed in this piecemeal way. Given the interconnectedness of ideas and precepts within copyright law, it does not even make sense to approve one chapter without reviewing the whole Restatement.

Some of the errors and misleading aspects of the Draft are described below. As such, the Draft does not meet the standards of an ALI Restatement, and we strongly urge the Council not to approve the Draft in its present form; or to instead make it a Principles project.

If ALI insists on keeping this as a Restatement project, despite the concerns of the U.S. Patent and Trademark Office, the U.S. Copyright Office, the ABA Intellectual Property Section and many others, we urge ALI to appoint additional Reporters with more practical

day-to-day experience with copyright law and with advising clients from diverse industries. This Draft and prior drafts have focused far too frequently on areas in need of no explanation, creating needless explanation or arbitrary definitions, and provide too little discussion of the issues that need most clarification. The lack of discussion on some issues is as glaring as the biased discussion on others. The current Draft does not instill confidence in us about these efforts culminating into a useful resource for copyright practitioners. It is not a summary of the law that I would consult or send an associate to. It obfuscates more than it illuminates.

We highlight a number of specific issues with in the Draft below. Some of these issues arise from the incompleteness of the Draft but others are more serious and revealing of the Reporters' attempt to shift meaning or to narrow the scope of copyright protection.

Section 1.01. Basic Requirements for Copyrightability

Section 1.01(c) states that copyright protection for works created prior to January 1, 1978 “required compliance with formalities discussed in “Chapter X.” The Draft does not say what those formalities were, namely publication with notice or registration. It also fails to note that notice was a required formality for published works until 1989, and that the 1909 Act also required renewal to retain copyright after the first 28 years.

Section 1.01, Comment a: The Reporters criticize the use of the term “subsists” in Section 102 of the Copyright Act and replace it with the language “to qualify for copyright protection” because they think “subsists” could be “misleading.” (Draft at 2.) But Congress intentionally chose the word “subsists” after years of study (work on the 1976 Copyright Act began in the) because Congress intended for copyright to adhere to any “original work of authorship” upon creation. “To qualify” has a very different meaning than “subsists” and strays from the fundamental legislative intention of making copyright protection automatic and not subject to formalities or other legal qualifications. The “qualifying” language is the Reporters' pure invention; it does not clarify the law but rather changes the express meaning of the law that Congress enacted, thereby muddling the law.

If the goal is to present a version of the copyright law that the Reporters think is better than the current statute – that should be stated up front and should not be part of a Restatement of an area of law governed by federal statute. Copyright lawyers agree that many areas of the copyright law that need tweaking—this is not one of them. And in any event wherever amendments to the law are needed, it should be Congress that makes those changes.

Section 1.01, Comments a and c: The Reporters infer that the language “in accordance with this Act” in Section 102 means that there are “rules in other Sections of the Copyright Act and *in court decisions* interpreting those rules” that further “deny” protection. (Draft at 2, emphasis added.) Comment *c* further states that “the Restatement recognizes that basic requirements specifically enumerated in this Section are not exhaustive and other requirements also might also need to be met ...” (Draft at 2.)

It is simply not the case that court decisions add further requirements to copyrightability, nor can they. The Copyright Act itself sets out all rules for what is copyrightable and what is not. The examples provided in Comment *c*, e.g., merger, utilitarian objects, etc. are not “other

requirements,” but tools courts created for identifying what is “original authorship” under Section 102(a) of the Act and for what falls within Section 102(b)’s exclusions.

Section 1.01, Reporters’ Notes d states “Since January 1, 1978... no formalities have been required for a work to obtain copyright protection.” (Draft at 4.) While technically correct in the narrowest sense, it is misleading since it omits the fact that prior to March 1, 1989 a work created and published without notice (and not timely cured) lost copyright protection.

Section 1.02. Types of work protected

Section 1.02 fails to mention why the distinctions among types of work matters – namely that certain exceptions, limitations, statutory licenses in sections 108-122 of the Act apply only to certain types of works. Section 1.02 also fails to note that the Copyright Office requires “Type of Work” information for notation on the registration certificate. If the goal is to simply explain the meaning of each term used to describe a type of work, the Copyright Office’s Compendium goes into greater depth and offers more and better examples. The Copyright Office addresses issues concerning the various types of work it examines daily and updates the Compendium regularly to reflect any changes. As such, there is no need for the Restatement to partially restate information that is readily available from a more accurate and up-to-date source.

Section 1.02, Reporters’ Notes o states that “shrinking the size of works against which copying is measured may also cause problems for infringement and fair use analysis.” (Draft at 20.) Aside from the statement being unclear, the Draft provides no basis for the statement. Because this appears within a discussion of copyrightability of characters in other works, we presume that the Reporters mean that viewing an element of a work as a work in and of itself can provide problems when reviewing infringement and fair use. If so, not only is such a statement completely out of scope of this chapter but it appears to suggest a change in fair use law.

Section 1.07. Independent Creation

Section 1.07, Comment c, Illustration 6: Both the example offered of a programmer writing software that encodes rules to allow AI to compose music and the conclusion that the resultant musical work is copyrightable (Draft at 27) is highly controversial. accompanying. The Reporters’ Notes recognize that the Copyright Office and several scholars disagree, and yet provide no case law to support their example and conclusion.

The copyrightability of AI-created works is a complex and important issue that will have huge economic repercussions on different interests in the coming years. The Reporters have no business deciding the law on this themselves in a vacuum.

Section 1.08. Originality; Minimal Creativity Requirement

Section 1.08, Comment e: Here and, generally in Section 1.08, the Reporters reduce originality to a set of choices, conscious or not. While that may describe the creation of some creative works, such as compilations, it does not encompass all original creation, and there is

no support in the statute for reducing all original creation to choices. Further, there is no support for the distinction between illustrations 16 and 17, and they are bound to confuse more than enlighten. The accompanying Reporters' Notes on "choices" only further obfuscate the issues.

Section 2.01. Scope of Protection

The black letter includes only part of Section 102(a) of the Copyright Act and, without explanation, drops an important part of the provision: "now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" which modifies "fixed in a tangible medium of expression." Second, the black letter lists facts, merger, scènes à faire and the useful article doctrine as though they were additional carve-outs from copyright, when in fact they are part of the originality analysis. Facts in and of themselves are not original authorship by definition; scènes à faire elements are parts of a work that are not original; merger is another way of saying that an element or work is not original expression because it cannot be detangled from the idea. Rather than present them as carve-outs, the Draft should explain that the courts have devised ways to determine what is original and what is expression and then set out those rules.

Section 2.01, Comment a: The Reporters state that the Draft uses the term "can be protected" to "signal that, if other conditions for protectability are met... a particular element of a work so described would be protected by copyright." (Draft at 41.) The use of the phrase "can be protected" suggests that there are formalities that must be met for protection; *i.e.*, that some action must be taken. That is not in the law and only adds confusion. Use of the term "protectible" is standard and clear. Here again, the Draft dissimulates instead of clarifying by attempting to resolve a non-issue.

Section 2.02. Copyright Protects Expression

As a matter of practice, distinguishing expression from ideas, particularly with regards to the non-literal elements of expression, is one of the most important and complex concepts in U.S. copyright law, and yet the Draft spends a total four pages on this topic, including all comments and notes, as compared to the 17 pages devoted to the concept of scènes à faire. Non-literal expression is discussed in just one short comment (Comment *c*). Many judicial opinions have analyzed these elements and applied these principles; citing to them would help elucidate the concept better. It may be that the concepts are further discussed in other chapters that we have not yet seen, which, once again, illustrates the impossibility of reviewing the Draft based on random selections.

Section 2.02, Comment a: The Reporters, looking for a definition of "expression," a term that courts generally have not struggled with, explain that the "form" is "the essence of protectable expression." (Draft at 49.) This is another example of pondering and invention, not of reporting or of restating the law. The statute and cases use the term "expression" and it is understood what that means.

Section 2.01, Comment c: Nonliteral similarity is an important area of copyright law and yet a source of confusion for many. Courts often struggle with it because there is not bright line. It is given extremely short shrift in the Draft for being such an important topic. To truly elucidate the issue, it would be important to discuss all the ways that courts have looked at the issue and mention at least every circuit-level case on point. The only real guidance this short paragraph gives that “courts should keep in mind the underlying incentive rationale for copyright protection...” (Draft at 50.)

Section 2.07. Scènes à faire

The discussion of scènes à faire is confusing, misleading and is in the wrong chapter. Scènes à faire relates to the infringement analysis not copyrightability of a work of authorship. Oddly, this discussion is one place where the Reporters seem to have catalogued much of the case law, although they pick and choose what they like rather than report on the cases objectively. Moreover, the Draft fails to distinguish scènes à faire from the merger doctrine. While scènes à faire is a way to identify commonplace or standard elements in an otherwise protectible work, the merger doctrine was a way to identify ideas masked as expression. In both cases, courts use the doctrines, not to determine if a work is copyrightable in the first instance, but to “filter” out non-protectible elements of a work in an infringement analysis. The examples provided bear that out.

Section 2.07, Comment d describes “elements that flow naturally from unprotectible elements” as though it were a separate type of scènes à faire. (Draft at 55.) This may be a result of courts’ confusing the language used for merger and scènes à faire and so is an area that the Restatement could clarify rather than perpetuate. Each of the examples provided relate to commonplace or standard (i.e., non-original) expression in the particular contexts.

Section 2.07, Comment d, Illustrations: The illustrations should make clear that the works described are likely protectible, even if certain elements of them are not. Without such a clarification, the illustrations are apt to cause confusion.

Moreover, because the scènes à faire doctrine is not about copyrightability of a work—which is the context here – but of the limits on using copyright as a sword, the discussion belongs in the infringement chapter. The discussion here is backwards – it makes it sound like copyright law considers the copyrightability of elements not works, even though Section 102 of the Copyright Act clearly refers to “original works of authorship,” not “original elements” of works of authorship.

Scènes à faire is a key part of infringement analysis where the alleged infringing copy is not an exact replica. If copyright owners could assert their copyrights to prevent others from using commonplace or standard elements incorporated in their works, it would create a preposterous perversion of copyright law. And so, courts “filter” out these elements in trying to compare an allegedly infringing copy for substantial similarity.

The current outline for Chapter 7, Infringement, where this discussion belongs, however, contains no subheading for the infringement analysis – for determining whether works are

substantially similar (which would include filtration of non-copyrightable elements). This is startling since it is one of the areas of the copyright law that many courts do struggle with.

Section 2.07, Comment f states that “[e]lements can become scènes à faire over time.” (Draft at 57.) The Reporters present no case law to support this position, but simply explain that “it is odd that courts do not expressly address that timing in the vast majority of cases.” Actually, it is odd that the Reporters would say that. The reason other courts have not addressed the timing of scènes à faire is because the timing is not an issue under the recognized law. Indeed, it makes no sense for protectible elements to lose their protection simply because they have been copied by others and so become common. There is no doctrine of abandonment in copyright law due to the rightsholders’ inability to control infringement.

The Reporters do not attempt to reconcile to reconcile their position with recent case law that expressly supports the contrary, including decisions in the Federal Circuit, as well as in the Third and Tenth Circuits and a 2016 U.S. Copyright Office decision (see Draft page 57). The Draft simply dismiss those cases as “difficult to reconcile” with their invented rule.

In sum, in many places, the Draft departs from the law, creates new rules out of whole cloth and picks and chosés issues based on the Reporters’ views, not those most in need of summary or explanation. If ALI wants to support changes to the copyright law, it is of course free to do so, but it should not mask that support as a Restatement of Law.

Sincerely,

Mary E. Rasenberger
Executive Director

ⁱ See, e.g., Dina LaPolt, *Beware a Sneak Attack on Creators' Rights* (Guest Op-Ed); <https://www.billboard.com/articles/business/8479902/dina-lapolt-copyright-american-law-institute-creators-rights-op-ed>