October 3, 2018

Professor David Levi
President, American Law Institute
Council Members, American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

via email to Stephanie Middleton: smiddleton@ali.org

Dear Professor Levi and Council Members:

On behalf of the ABA Section of Intellectual Property Law (the “Section”), I write to respectfully convey our concerns about the American Law Institute’s (“ALI’s”) ongoing project to develop a Restatement of the Law, Copyright (“Copyright Restatement”), and to request that the ALI Council send Council Drafts 1 and 2\footnote{CD 2 is apparently before Council at its October meeting; CD 1 was initially before the Council at its January 2018 meeting but, as far as we know, Council did not formally act upon it. Some of CD 1’s provisions are included in CD 2, but several are not and, as far as we know, remain unchanged.} back to the Reporters, with appropriate instructions, for their further study and review. The views expressed herein are presented on behalf of the Section of Intellectual Property Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

ALI is a highly respected institution; many judges, practitioners (domestic and foreign) and students rely on its publications, particularly its published Restatements and Principles. Consequently, it concerns the Section that the Copyright Restatement project and the drafts so far are headed in the wrong direction. As one example of the criticism that has come from many quarters, the U.S. Copyright Office criticized the project as creating a “pseudo-version” of the Copyright Act that would be misleading and “would not serve the ALI’s mission ‘to promote the clarification and simplification of the law.’”\footnote{Letter from U.S. Copyright Office to David Levi 1, 3 (Jan. 16, 2018) [hereinafter “Copyright Office Letter”].} Because the Copyright Restatement remains under development and the substance remains vigorously disputed, it is troubling that the drafters have deemed parts of the draft Restatement ready for review by the ALI Council.
As detailed below, the drafts to date (those circulated to the ALI Council, and those that are still being reviewed by the Advisors) all raise serious concerns because they (i) present black letter text containing material differences from the Copyright Act itself, and (ii) fail to provide a balanced description of the current state of the law. The examples below are representative of problems that pervade the drafts.

**Black letter text**

To illustrate the problem of black letter text being materially different from the Copyright Act, the following chart, which compares the black letter text to the Copyright Act, focuses on CD1’s definition of “fixation” under copyright law.

<table>
<thead>
<tr>
<th>Black Letter of Restatement Draft, §§ 1.01, 1.05. Fixation</th>
<th>Copyright Act, 17 USC §§ 102(a), Subject Matter of Copyright; 101, Definition of Fixation</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) To qualify for federal copyright protection, a work of authorship must be “fixed in any tangible medium of expression now known or later developed under the rule specified in § 1.05.” CD 2, § 101(a)(2).</td>
<td>§ 102(a): Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, 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.</td>
</tr>
<tr>
<td>(b) A work is “fixed in a tangible medium of expression” when its embodiment in a material object is sufficiently permanent or stable to permit the work to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A “period of more than transitory duration” is a period that is long enough to allow enjoyment or exploitation of the work’s expressive content from the material object after the work is embodied in that material object. CD 1, § 105(b).</td>
<td>§ 101: A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.</td>
</tr>
</tbody>
</table>

*Note: The material underlined above is not included in the statute.*

*Note: The material underscored in the statutory provisions above is not reflected in the black letter text of the draft Copyright Restatement.*

**First.** black letter §1.05(b) inserts a definition of “more than transitory duration” as a “period that is long enough to allow enjoyment or exploitation of the work’s expressive content from the material object after the work is embodied in that material object.” This definition appears neither in the statute nor the case law, and the meaning of “transitory duration” is an area of controversy. If the black letter text creates standards that do not exist in the law, it will inevitably confuse or mislead readers. Despite many objections, including by the Copyright Office, this newly-created definition was not removed.
Second, black letter §1.01\(^3\) includes the requirement that a work “(1) be fixed in a tangible medium of expression now known or later developed under the rule stated in §1.05.” Yet, this formulation ignores the balance of the Copyright Act’s definition of “copies” which includes “material objects. . . 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 either directly or with the aid of a machine or device.” In CD 1, black letter §1.05 did not incorporate this statutory principle, and CD 2 does not include §1.05. The statute was intended to be broadly inclusive; by leaving those words out, the black letter text diminishes the significance of Congress’s decision in 1976 to include forms of media that cannot be perceived directly.\(^4\)

Third, the black letter text of the definition of fixation omits the statutory provision concerning fixation simultaneous with live transmission. Instead, the draft reduces this statutory provision to a comment, when it is an integral part of the copyright legislation passed by Congress.

Instead of omitting material statutory provisions, the black letter text should employ either the actual terms of the statute or a significant consensus of courts. Thus, we agree with the Copyright Office that “[t]here can be no more accurate statement of the law than the words that Congress has enacted in the Copyright Act”\(^5\) and agree with several copyright law professors that the current black letter text would introduce a “new problem: interpreting the interpretation of the statute.”\(^6\) CD 2 perpetuates this problem.

**Fundamental differences from the current state of the law**

Where the courts differ in fundamental ways on important legal questions, the Restatement should clearly explain the competing perspectives and the reasoning behind each. This principle is not consistently followed in the drafts to date.

For example, copyright protection for computer programs was one of the most contentious areas discussed. The current Restatement draft approves of *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d 807 (1st Cir. 1995), which held that a menu command hierarchy was a “method of operation” excluded from copyright protection under 17 U.S.C. § 102(b). But recently, the Federal Circuit in *Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339 (Fed. Cir. 2014), rejected the *Lotus* court’s analysis and found that Oracle’s “declaring code” was copyrightable, notwithstanding § 102(b). In so doing, the Federal Circuit joined the Tenth Circuit, which also rejected

---

\(^3\) We recognize that black letter §1.01 was submitted for context but not for approval, but the text we highlight demonstrates issues that occur throughout the draft, and the difficulties that arise in trying to deal with them in a piecemeal fashion.


\(^6\) Letter from Shyamkrishna Balganeshe et al. to ALI Council Members 2 (Jan. 11, 2018). These professors recommend a different structure for the Restatement of Copyright than ALI has employed in previous restatements—one that would start with the statute itself instead of black letter text formulated by the Copyright Restatement’s drafters.
Lotus in *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997), as have various other courts. We agree with one commentator who explained the draft mistreats the *Oracle* decision “as an anomalous opinion issued by a confused and unsophisticated court” and relegates the “more persuasive” decision to the “Reporter’s Notes” section, which “would do more harm than good to the state of copyright law.”

The treatment of *CCC Information Services, Inc. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), is another instance where conflicting views are not fully explained or considered. In CCC, the court upheld copyright protection in a compilation of estimates of used automobile values. The Restatement draft dismissed this case (and other similar cases) as incorrectly decided because such estimates are merely the authors’ unprotectable ideas. But CCC identifies the flaw in such reasoning: on some level, *every* compilation represents the compiler’s idea of how best to select, coordinate and arrange data, and every value assessment by the author is a “fact.” If compilations were analyzed in this manner, copyright protection for compilations would be virtually meaningless—yet Congress clearly intended that compilations enjoy copyright protection. See 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes compilations . . . .”). The CCC court’s resolution of this issue led it to conclude that the compilation and the estimates were protected by copyright. The Restatement draft, in contrast, recommends a rule that endangers protection for compilations, without describing or addressing the rationale of CCC and similar cases.

Even where submitted comments describe these problems, later drafts often fail to address them. The Copyright Alliance points out that many comments identifying “significant problems” with the drafts “have largely been ignored,” cautioning that “Preliminary Draft No. 3 and Council Draft No. 1 fail to reflect copyright law as accurately and faithfully as has come to be expected of an ALI Restatement.” The Association of American Publishers has expressed similar concerns.

Many comments express concern that the Copyright Restatement project is being used as a vehicle to modify the copyright law. As one expert group observed, “[t]he Restatement as currently drafted appears inconsistent with the ALI’s long-standing goal of promoting clarity in the law: indeed, rather than simply clarifying or restating that law, [CD 1] offers commentary and interpretations beyond the current state of the law that appear intended to shape current and future copyright policy.”

---


8 Memorandum from Copyright Alliance to ALI Director et al. concerning Copyright Alliance Comments on Restatement of the Law, Copyright, Preliminary Draft No. 3 at 1 (Jan. 8, 2018).

9 See Letter from Allan Adler and Sofia Castillo, Association of American Publishers (AAP) to Richard Revesz and Stephanie Middleton of ALI (Jan. 16, 2018) (“[D]espite many intervening comments from the project’s Advisers and other copyright experts, many of the legal and policy distortions in the first two [drafts] persist in PD3 . . . [which] continues to favor minority views without any justification and, even worse, articulate[s] rules that lack support in current law and are wholly inappropriate in a true Restatement effort.”).

10 Report by the Copyright & Literary Property Committee of the New York City Bar Association: Recommendation to Reject the American Law Institute’s Proposal To Create a Restatement of Law, Copyright (Jan. 2018) [hereinafter “NYCBar Report”].
We recommend that the Copyright Restatement acknowledge and explain conflicting views and why the draft rejects them. The lack of attention to contrary perspectives disserves users of the Restatement, who are entitled to a reasoned explanation of relevant authorities, and could lead to situations where courts adopt the views of the Restatement, despite contrary, well-reasoned authority.

* * * *

These problems cause us to question whether, and how, a Copyright Restatement could remain current given the rapid changes in technology and the law. To ensure that a Copyright Restatement will reflect favorably on ALI and benefit its potential users, including the nearly 18,000 members of the Section, any Copyright Restatement should be an accurate reflection of the law and include a fair and even-handed description of different views in cases and regulations. It should not be used as a tool to effect significant and non-transparent change in copyright law.

We appreciate the opportunity to make these comments. If you have any questions after reviewing them, we would be happy to provide further input.

Very truly yours,

Mark K. Dickson
Chair, ABA Section of Intellectual Property Law

---

11 NYC Bar Report, supra note 4, at 4 (“[C]opyright law is uniquely impacted by developments in technology. . . . The constant changes in technology (and with them, the law) make it less likely that a Restatement will be able to accurately discern a “majority rule” or that said rule will remain relevant in the face of new technologies.”).