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Copyright Law Needs a Modernization, Not a Restatement

by

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Amidst continuing controversy, the American Law Institute (ALI) is preparing a Restatement on the law of copyright. Copyright law is governed by statute, and thus a poor fit with the historic ALI model for restating "judge-made" case law. A forthcoming law review article by two copyright experts shines light on how ALI's Copyright Restatement project continues to skip over the serious problems with restating specific rules established by Congress.

As Free State Foundation President Randolph May and I explained in our most recent book, Congress should continue the task of *Modernizing Copyright Law for the Digital Age*. A new copyright statute is needed, not an ALI Restatement that glosses the existing statute with issue advocacy.

ALI is an exclusive member organization of law professors, lawyers, and judges that develops Restatements intended to serve as a "black letter law" of property, contracts, torts, and other areas determined primarily by judicial decisions. Historically, ALI's work is aimed principally at courts, as many have been influenced by the Restatements.

However, the objectivity of ALI and its Restatements has been called into question. ALI's treatments of product liability, intentional torts, insurance liability contracts, and consumer

contracts have been sharply criticized for deviating from accepted legal consensus views by inserting new rules. Observers have alleged that certain ALI members seek to leverage the prestige of the organization and its restatements to shift legal doctrines in ways that conform to those members' preferences. As the late Justice Antonin Scalia's opinion in *Kansas v. Nebraska* (2015) stated: "Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."

The public doesn't get a clear window into ALI's workings. But there is evidence that ALI's current Copyright Restatement project risks misstating the law rather than clarifying it. Prior blog posts by FSF President May and I have pointed to a 2018 letter by then-Acting Register of Copyrights Karyn Claggett that stated ALI's project "appears to create a pseudo-version of the Copyright Act." Several U.S. Senators as well as others have pushed back against the propriety of rewording copyright statutes and sharply questioned ALI's methodology for the project.

Further criticism of ALI's Copyright Restatement project appears in a forthcoming article from the *Columbia Journal of Law & the Arts* by Shyamkrishna Balganesh and Peter S. Menell titled *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*. (A version of their law review article is now posted on SSRN.) Professors Balganesh and Menell are both copyright law experts who have served as Advisers to the Copyright Restatement project.

Surveying ALI's history, Balganesh and Menell point out that "[s]tatutory restatements were seen as oxymoronic, reflecting a fundamental mismatch between erudite harmonization of evolving bodies of judge-made law resulting in so-called 'black letter law' and actual rules of law resulting from political institutions." And so, "the ALI's Restatements of Law avoided direct engagement with fields dominated by statutes." Statutes provide constraints on judicial decisionmaking. They involve textual interpretative issues not present in common law areas, including consideration of committee reports, legislative amendments, and other aspects of legislative history.

The article's authors rightly point out that federal copyright law is pervasively governed by the Copyright Act of 1976 and later amendments. Balganesh and Menell identified these same legislative drafting issues – including Copyright Office reports offering detailed statements about the intent of statutory provisions – as things "for which the common law restatement template is particularly inapt." Yet it appears the ALI doesn't take those interpretive issues seriously. As Balganesh and Menell state:

> Somewhat surprisingly, when the ALI embarked on the Restatement of Copyright, the fundamental mismatch that had so troubled its founders was ignored. The ALI leadership, as well as the newly appointed group of project reporters showed little concern for the idea that the original restatement model was intrinsically unsuited to areas governed comprehensively by statutory provisions. After nominally referring the matter to a committee (that met secretly and invited no input), the ALI concluded that there was indeed no mismatch whatsoever between the original restatement format and the demands of areas governed by statutes…

Professors Balganesh and Menell recount how, as ALI Advisers, they presented to relevant members the methodological problems as well as possible solutions. Apparently, their input was summarily rejected by the behind-closed-doors committee. At a later ALI meeting, Balganesh and Menell addressed interpretive deficiencies with Copyright Restatement's treatment of a copyright owner's exclusive right over the distribution of copies of their creative works under Section 106(3) of the 1976 Act.

Their law review article shows that the text of Section 106(3), amplified by the legislative history of the 1976 Act, demonstrates Congress's intent behind the right of distribution was to broaden pre-existing rights to "publish" and to "vend" copies of creative works. This basic outlook was shared by the Tenth Circuit Court of Appeals in *Diversey v. Schmidly* (2013) and also by a 2016 study by the Copyright Office titled "The Making Available Right in the United States." However, preliminary drafts of the Copyright Restatement apparently endorse a narrow wooden view of Section 106(e), elevate selected early district court cases that do not consider the legislative history, and criticize use of Copyright Office Reports for understanding the intent behind the distribution right – all without ever clearly establishing an overall interpretive methodology for the project. Balganesh and Menell push back:

> The Restatement's task was to clearly and faithfully explain the pertinent text, legislative history, and jurisprudence surrounding the Copyright Act—and then leave it to the judge to choose the appropriate subset of sources to use during the interpretation of the term, including in the court's assessment of its ambiguity.

In their law review article, Professors Balganesh and Menell offer proposals for mitigating the methodology problems. But the project has been underway for several years. ALI members doubtless have spent considerable time drafting, discussing, and voting on several Restatement section drafts. It seems highly doubtful that its members will now develop a fully thought out statutory interpretative framework that would call much of its prior work into serious question.

Copyright law needs to be modernized – but by Congress, not by a Restatement. Judges shouldn't rely on any future ALI glosses on copyright law that downplay its statutory basis and never set forth a clear and consistent method for interpreting statutes. The ALI should shelve its Copyright Restatement project.

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Further Readings

Seth L. Cooper, "Troubled ALI Copyright Project Should Be Abandoned," FSF Blog (December 9, 2019).

Randolph J. May and Seth L. Cooper, "ALI Should Abandon Its Copyright Restatement Project," FSF Blog (February 16, 2018).