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ALI's Copyright Restatement Lacks Consensus and Credibility

by

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On May 20, the American Law Institute (ALI) [approved](#) a much-contested treatise that it calls the "Restatement of the Law, Copyright." Significantly, the ALI's decision was overshadowed by mass resignations by participants in the Copyright Restatement project days earlier. The copyright experts who tendered resignations criticized the ALI project's biased processes, inconsistent analytical methods, and over-emphasis on peculiar cases to undermine copyright protections. They also criticized inaccurate interpretations of certain statutory terms and court decisions.

Disavowals of the ALI Copyright project by so many of its participants and the criticisms they leveled against the biased processes by which the so-called Restatement was produced show plainly that the treatise lacks the modicum of a requisite consensus. Yet the credibility of prior restatements of the law depended on such consensus. Attorneys representing copyright owners in litigation therefore should be prepared to discredit the treatise on those grounds whenever opposing counsel cite to it.

And judges should not accord the contested "Restatement of the Law, Copyright" an authoritative status, because it is not the neutral, broad-based document that the ALI purports it to be. Upon the Restatement's release, the U.S. Copyright Office and congressional committees focused on copyrights should be ready to offer critiques and corrections to any confusing or erroneous legal interpretations in the treatise that are biased and hedged against copyright protection.

The ALI is a private, exclusive member organization of law professors, lawyers, and judges that develops "Restatements of the Law" that are intended to summarize, based mostly on judicial decisions, the principles, reasoning, and trends in property, contracts, torts, and other areas. The primary intended audience for the Restatements consists of lawyers and judges, whom the ALI seeks to inform and influence to further an understanding of law. On innumerable occasions, going back to the ALI's founding in 1923, state courts have adopted or incorporated Restatement provisions into state common law, with reported decisions across the U.S. citing such provisions.

There is good reason to at least question the propriety of law courts according privileged status or deference to an unofficial exclusive private group that is devoid of even indirect democratic accountability, such as the ALI. At least in earlier times, the purported answer has been that the ALI's Restatements reflect objective explanations and analyses of legal doctrines developed by a consensus of subject-matter experts. The ALI's founding committee recommended that "the first undertaking should address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was." The primary purpose of creating and publishing such a treatise was to facilitate improvement in understanding law, primarily by restating it, not by transforming the law in accordance with the writers' preferences or agendas.

In recent years, some of the ALI's restatements on topics such as product liability, intentional torts, insurance liability contracts, and consumer contracts have been criticized for disregarding objectivity and consensus understanding of the law and inserting new and disputed legal conclusions. Justice Antonin Scalia even criticized the ALI's course change in [Kansas v. Nebraska](#) (2015), wherein he wrote: "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." Similarly, in a dissenting opinion in [Liu v. SEC](#) (2020), Justice Clarence Thomas rebuked the "Restatement (Third) of Restitution and Unjust Enrichment," writing that "'Restatement' is an inapt title for this edition of the treatise," because it introduced novelty into the law of equity.

Since the "Restatement of the Law, Copyright" has not yet been published and the ALI's meetings and discussions take place behind closed doors, members of the public are still in the dark about its final content. Nonetheless, evidence has surfaced that the Copyright Restatement has broken further from the ALI's original mission.

In *FSF Blog* posts from [December 2019](#) and [February 2018](#), we highlighted serious concerns about project leadership bias, unfair process, and erroneous interpretations that are meant to give copyright a "remix culture" or "copyleft" bent that curtails protections afforded to copyright owners under the Copyright Act of 1976. Confusing or misleading portions of draft sections of the document prompted a 2018 letter by then-Acting Register of Copyrights Karyn Temple stating that ALI's project "appears to create a pseudo-version of the Copyright Act."

Indeed, a March 2021 *Perspectives from FSF Scholars*, "[Copyright Law Needs a Modernization, Not a Restatement](#)," called attention to the unfitness of a restatement for copyright law. Unlike the common law of contract, property, or tort, the core of copyright law rests not in judicial decisions but in legislation passed by Congress. This *Perspectives* paper noted the scholarship of

Law Professors Shyamkrishna Balganesh and Peter Menell, both Advisers to the project who resigned in May. According to those scholars, historically, "the ALI's Restatements of Law avoided direct engagement with fields dominated by statutes." As Professors Balganesh and Menell explained, there is a "mismatch" between restatements and statutes. Statutes pose unique interpretive issues regarding congressional intent and legislative history that constrain judicial discretion, but those issues are absent in fields dominated by judicial decisions. Since copyright law is pervasively governed by the Copyright Act of 1976 and later amendments, both scholars conclude that the Copyright Restatement overtly manifests that "mismatch."

The mass resignation of Advisers and Liaisons to the ALI Copyright project that took place in May is a death blow to the legitimacy of the so-called "Restatement of the Law, Copyright." A [resignation letter](#) submitted to the ALI on May 12 by distinguished copyright scholars Jane Ginsburg, David Nimmer, Shyamkrishna Balganesh, and Peter Menell declared: "The current draft of the Restatement does not reflect a consensus or even broad agreement of the Adviser group, nor does it adequately address the innumerable objections made by the group as well as, and especially, by the Copyright Office." In their letter, they wrote that "the Restatement of Copyright refuses to acknowledge the centrality of the statute, and instead routinely re-phrases (with strategic intent) the wording of the statute in a way that is at odds with an interpretive exercise." Their letter also criticized a near-final draft of the Restatement for an inconsistent method of statutory interpretation, including cherry-picked use or disregard of legislative history.

A group of fourteen additional Advisers and Liaisons similarly disavowed the ALI's Copyright Restatement project in a May 15 [resignation letter](#). The group's letter stated that "[t]hroughout the Restatement project, the Reporters routinely disregarded and dismissed concerns and comments... because they differed from the Reporters' views or biases about copyright law," resulting in "an inaccurate and unbalanced view of copyright law that deviates from the U.S. Copyright Act and judicial precedent." And a May 16 [press release](#) by Copyright Alliance CEO Keith Kupferschmid stated that "approximately half of the advisors and liaisons have, or are in the process of, resigning from this project."

The clear lack of consensus support for the Copyright Restatement and significant faultfinding with the process that produced the draft render the soon-to-be-published treatise untrustworthy. Accordingly, attorneys representing parties in infringement litigation ought to be ready to discredit the treatise on those grounds whenever party defendants invoke the treatise to plead for a narrowed scope of protection and to attempt to escape liability. Also, judges should not treat the "Restatement of the Law, Copyright" as an authoritative source but, instead, weigh its content, if reasonably necessary, in the context of a partisan advocacy document.

Moreover, the U.S. Copyright Office and congressional committees with oversight on copyrights should closely scrutinize the Restatement's substantive content upon the treatise's release. The office and members of Congress should be willing to publicly critique or correct confusing or erroneous renderings of copyright law contained in the treatise. Congress has a unique responsibility, entrusted to it by the Constitution's Article I, Section 8 Copyright Clause, to ensure that Americans' copyrights are secure and to define the scope of copyright protections by statute. Congress has also delegated authority to the Copyright Office to assist in fulfilling that responsibility. Both Congress and the Office should be ready, if necessary, to vindicate

straightforward readings of the Copyright Act of 1976 and later amendments from any misunderstandings or deviations arising from a pseudo-version of the Copyright Act.

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Further Readings

Solveig Singleton, "[Hindsight Should Not Hasten AI Regulation](#)," *Perspectives from FSF Scholars*, Vol. 20, No. 26 (June 5, 2025).

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