



Perspectives from FSF Scholars
March 11, 2026
Vol. 21, No. 12

The ALI's Failed Copyright Restatement Is Not Authoritative

by

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In a February 19 [joint letter](#), Senators Thom Tillis and Adam Schiff sent pointed questions to the American Law Institute (ALI) regarding its disputed and divisive [Copyright Restatement project](#). The ALI's project ended in disaster when nearly half of its advisors resigned before the ALI committee approved the so-called "Restatement of the Law, Copyright." Although the ALI has yet to respond to the letter, the Copyright Restatement project's credibility is damaged beyond repair and what work emerges should not be considered authoritative.

U.S. copyright law is ill-suited for an ALI restatement of the law. Legal authorities have long recognized that copyright rests on federal statute and must be adjudicated by reference to congressional enactments, not by importing the sources and methods associated with common law restatements. That statutory basis itself rests on the Constitution, which entrusts Congress with the authority and responsibility to secure copyrights. This makes the ALI's project a particularly serious form of overreach, because it places a purported private blackletter synthesis alongside a body of law whose source and meaning have long been understood to come from Congress.

Seemingly from the start, the project stirred controversy due to apparent reporter bias toward anti-copyright views, committee drafts that put one-sided opinion-driven glosses on the blackletter law, methodological ambiguity, departure from ALI's historic mission, and deep divisions among project advisors. Those problems resulted in an unprecedented fiasco when reportedly over a third of the project's participants resigned and demanded that their names be removed from the finished work before approval. What segment remained of the ALI committee approved its "Restatement of the Law, Copyright" in May 2025. The end product is apparently in the process of being finalized for future publication by the ALI.

In a June 2025 *Perspectives from FSF Scholars* paper titled "[ALI's Copyright Restatement Lacks Consensus and Credibility](#)," and in earlier publications, we criticized missteps made by the ALI's Copyright Restatement project. We pointed to, as stated above, reporter bias toward anti-copyright views, draft sections that placed one-sided glosses over blackletter law, methodological ambiguity, departures from ALI's historic mission, and deep divisions among project advisors.

Confronted with growing public pushback, the ALI could have saved face by shuttering the misguided project. Or it could have course-corrected by abandoning its quest for a Restatement and instead developing a Copyright Statement of Principles on areas of the law where consensus among copyright experts might have been achieved. Instead, advocates for a "copyleft" view of copyright – that is, a view with diminished respect for copyright protection – pushed ahead undeterred, producing a fiasco when mass resignations preceded the ALI committee's approval of its "Restatement of the Law, Copyright" in May 2025.

Many of the deep troubles besetting the ALI's Copyright Restatement project are alluded to in the February 19 letter from Senators Tillis and Schiff, who serve, respectively, as Chairman of the Senate Judiciary Subcommittee on Intellectual Property and its Ranking Member. The ALI has been asked to reply to the Subcommittee leaders' letter by March 19. It is unlikely that the ALI will be able to offer any good answers for its Copyright Restatement fiasco. The problems of bias and the rejection of consensus-building that caused the crash-and-burn of the Copyright Restatement project are not the only reasons why we oppose the "Restatement of the Law, Copyright." The conceptual premises of the entire project are also fatally flawed. Indeed, the "Restatement of the Law, Copyright" is a manifestly stark realization of the oldest forewarnings ever made about ALI overreach.

Those forewarnings date back to the ALI's beginnings in 1923, when critics warned that a private body might acquire quasi-legislative authority through its professional influence and institutional prestige. An early expression of that criticism was made by the sympathetic yet wary Professor Charles E. Clark, who wrote in an article titled "[The Restatement of the Law of Contracts](#)" in the *Yale Law Journal* in 1933 that the ALI seemed to be seeking "the force of a statute without statutory enactment." Notably, such criticism was leveled at ALI restatements of ordinary common law subjects, where the danger is that Restatements can push highly influential, seemingly final pronouncements on propositions that are actually contestable in reported judicial decisions across state court systems.

The ALI's "Restatement of the Law, Copyright" exposes the fundamental problem with applying the Restatement model to copyright law, a field whose governing rules arise from a uniform federal statute rather than from the dispersed sources of common law adjudication. As the Supreme Court has long recognized, that statutory foundation determines both the source of copyright rights and the method courts must use to interpret them.

Legal authorities have consistently recognized that the governing law for copyright protections is defined by federal statutes passed by Congress and must therefore be interpreted according to statutory sources and methods. That principle is traceable to the Supreme Court's landmark decision in *Wheaton v. Peters* (1834). In *Wheaton*, the Court rejected the argument that the Copyright Act of 1790 protected a preexisting common-law copyright and held instead that Congress, "instead of sanctioning an existing right, as contended for, created it." The Court then made the governing consequence unmistakable: if the plaintiff had any claim, "it must be sustained under the acts of Congress."

Wheaton thus provided both a source-of-law holding and a method-of-decision holding, and later Supreme Court cases built upon and closely connected both holdings. Identifying where the right comes from, the Court held in *Banks v. Manchester* (1888) that "[a] copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress." In *Bobbs-Merrill v. Straus* (1908), the Court observed that "copyright property under the Federal law is wholly statutory." Chief Justice Hughes wrote for the Court in *Fox Film Corp. v. Doyal* (1932) that copyright "is the creature of the federal statute," and that Congress "did not sanction an existing right, but created a new one." And as the Court put it in *Goldstein v. California* (1973), "[t]he copyright power in the United States is not based on the common law but on the Constitution and the statutes enacted under it." Although *Wheaton* and its progeny recognized a limited state common law right in unpublished manuscripts, statutes provide the only federal basis for protecting published works.

Because copyright rights arise from federal statute, the Supreme Court has repeatedly emphasized that courts must look to Congress's enactments when deciding copyright disputes. Thus, in *Banks*, the Court concluded that "the means for securing such right to authors are to be prescribed by Congress. It has prescribed such a method, and that method is to be followed." Likewise, in *Bobbs-Merrill*, the Court held that the Copyright Act should not be "unduly extended by judicial construction to include privileges not intended to be conferred." And in *Sony Corp. of America v. Universal City Studios, Inc.* (1984), the Court explained that because copyright rights are defined by statute, courts "must be circumspect in construing the scope of rights created by a statute."

Given its federal statutory grounding and long-standing judicial caution against extraneous sources of authority, copyright law stands out above other areas of federal law that are partly constitutional, treaty-based, administrative, or common law-inflected, such as admiralty, foreign relations, and Indian law. Thus, copyright is not a plausible candidate for a restatement. Yet the "Restatement of the Law, Copyright" constitutes the ALI's first Restatement directed to an area of law so predominated by federal statute. This is not merely an effort to organize doctrine in a mixed field; it is an effort by a private body to place its own blackletter gloss alongside a body of law whose source and meaning the courts have long said derive from Congress.

The February 19 letter from Senators Tillis and Schiff is a welcome step. Their questions reflect the serious concerns surrounding the ALI's Copyright Restatement project and the confusion it may sow about the source and proper understanding of copyright law. The Constitution assigns responsibility for copyright law to Congress, empowering it "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." That responsibility should not be diluted by a private organization proffering a shadow version of the Copyright Act with an ideological bent. Once the Restatement is published, Congress should direct the U.S. Copyright Office to assess its contents and publicly identify misleading interpretations.

Another way to address these concerns would be for Congress to adopt a resolution making clear that the ALI's "Restatement of the Law, Copyright" carries no special authority in interpreting the federal copyright law. Without such clarification, the Restatement risks being cited as a substitute guide to a body of law whose source and meaning Congress alone is empowered to define. By taking such steps, Congress can reaffirm a central principle: copyright law in the United States derives from Congress's authority under the Copyright Clause, not from the pronouncements of a private organization that has overreached.

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Further Readings

Randolph J. May and Seth L. Cooper, "[ALI's Copyright Restatement Lacks Consensus and Credibility](#)," *Perspectives from FSF Scholars*, Vol. 2x, No. (June 25, 2025).

Seth L. Cooper, "[Copyright Law Needs a Modernization, Not a Restatement](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 12 (March 5, 2021).

Randolph J. May and Seth L. Cooper, "[Troubled ALI Copyright Project Should Be Abandoned](#)," *The FSF Blog* (December 9, 2019).

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