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Letter to Council Members Regarding Council Draft 2

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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:

We understand that the ALI Council will consider Council Draft 2 (CD2) of the Restatement of the Law, Copyright (Copyright Restatement) project at its meeting on October 18-19, 2018. We have had – and continue to have – significant concerns about the project and the work to date. We note that numerous parties have expressed concerns about CD2, including the US Patent and Trademark Office, the American Bar Association’s Section of Intellectual Property Law, academics and other Advisers, and that the US Copyright Office and the New York City Bar Association’s Committee on Copyright and Literary Property have done so with respect to CD1 and previous drafts.

We and other Advisers have commented extensively on the Restatement drafts to date. Although CD2 addresses some of those comments, significant problems remain. The methodology is obscure and problematic. The piecemeal nature of the provisions included in CD2 is misleading and impedes effective review. Finally, the black letter and Comments to date continue to betray a copyright-skeptical posture; the Reporters neglect copyright’s constitutional role in promoting the progress of knowledge by fostering authorship and, instead, give undue priority to the exclusions from and barriers to copyright protection. We address each of these points in turn.

A. The Lack of an Articulated Methodology and the Problematic Nature of Restating a Detailed Statute.

Advisers have repeatedly expressed considerable doubts about the wisdom of substituting the ALI’s text for Congress’, including in prior comments addressed to the Council. Nevertheless, this Restatement’s format has not substantially changed since the Council’s prior discussion of the perils of promulgating “black letter” that paraphrases the statutory text. Moreover, unaccountably, the proposed black letter sometimes substantively diverges from the statute (see, e.g., discussion of §1.01, *infra*, especially in relation to the deliberate omission of the word “subsists” from the black

letter). The ALI has yet to articulate clear principles and methods for how to draft a Restatement of a federal statute – principles and methods that could apply not only to a Restatement of the Copyright Act but also to the future Restatements of statutes that the ALI apparently envisions.

Regrettably, CD2 continues to reflect ALI’s and the Council’s lack of guidance. CD2 neither makes the statute the “black letter,” as many have urged, nor juxtaposes the pertinent statutory text with the corresponding “black letter.” CD2 includes an Appendix of some sections of the statute, and places quotes around actual statutory language when it appears in the black letter or Comments. The Reporters’ choices of which statutory text to elevate into black letter seems arbitrary, perhaps influenced by their preferences for some statutory language over other or by including copyright-narrowing language in the black letter (again, see discussion of §1.01, *infra*). Moreover, unless the reader systematically reviews the black letter against the Appendix, she would not know what parts of the statute the black letter does NOT incorporate.

B. The Piecemeal Nature of the Draft Under Review

The piecemeal nature of the provisions selected for inclusion in CD2 impedes thoughtful consideration by the Council. Since the Reporters have so far declined to start with the statutory text, meaningful review requires that the draft include all of the material statutory provisions because both the draft and the Copyright Act, like many statutes, has numerous provisions and concepts that are interlinked. It is extremely difficult to review and consider approval of CD2 when the Reporters have presented only a subset of relevant provisions for consideration. The Reporters are offering for approval black letter §§1.02, 1.06-1.08, plus §1.01 for background but not approval, and §§2.01, 2.02 and 2.07. But these sections cross-reference – or otherwise require an understanding of – the Reporters’ proposed treatment of many provisions of the Copyright Act that are not yet put before the Council. Many of the sections now absent from CD2 are too closely intertwined with sections that have been proffered to be able to consider the current draft without reviewing what has been omitted.

Two examples may suffice to illustrate this point. First, §2.07, on “scènes à faire,” and §2.06, on merger, should be treated together; they are related, though different, concepts and an analysis of the Reporters’ treatment of those concepts needs to be reviewed holistically. See, e.g., Reporter’s Note a to §2.07 at 59. Yet, CD2 includes their discussion of scènes à faire, but not their discussion of merger, even though merger was included in CD1. Second, both §2.06 and §2.07 are corollaries of the also-missing discussions of §2.03, which proposes to address the exclusion from protection for ideas, as well as of §2.04, the exclusion of methods. Reviewing the discussion of the provisions that are included in CD2 without having the opportunity to review the missing sections is like having to decide whether to purchase a pair of shoes having tried on only the left foot.¹

We are aware that Council Drafts often do not include all provisions of a particular Restatement, and sometimes do not even include all provisions of a particular chapter. If the included and omitted provisions addressed distinctly different legal principles, then reviewing only a handful of Chapter 1 and Chapter 2 provisions would not necessarily be problematic. Thus, we are not raising the problem of piecemeal review simply because the whole of Chapter 1 or Chapter 2 are not included in CD2, but rather, because the provisions included and some of those omitted are

¹In addition, as detailed in Judge McKeown’s Oct. 5, 2018 letter to the Council, §2.07’s treatment of the scenes à faire doctrine is misleading. CD2 in this respect deviates from Restatement protocol on treating majority/minority positions – as detailed in the ALI Style Manual on pp. 7-8. Advisers have offered similar criticisms of other provisions in earlier drafts).

integrally related. Approving some provisions now without seeing the others would require the Council to take a fresh look at the combination in due course, lest the prior approval of some provisions prejudice the subsequent consideration of the closely interrelated provisions.

C. The Problematic Perspective of the Drafts

The Reporters' belittling perspective on copyright protection pervades CD2. We provide three examples, below.

The Constitutional basis for copyright protection. Consistently with its overall copyright-skepticism, CD2 unaccountably omits an up-front discussion of the foundation for copyright protection – the Copyright Clause of the Constitution – while, instead, discussing the constitutional groundings for several limitations on copyright protection (see, e.g., p. 22; pp. 43-44; p. 51). We understand that the Restatement is directed to the Copyright Act, but difficult questions in copyright cases often require weighing constitutional considerations.² The Reporters have alluded to justifications for various exclusions and omissions from copyright (including First Amendment justifications, see, e.g., §2.01 (Comment *c*), and will almost certainly do so in later sections, such as those that relate to fair use. Accordingly, it is imperative that Restatement users understand that the Constitution is the well-spring for the Copyright Act and, therefore, *for* copyright protection.

The draft's focus on what copyright does not protect. Much of CD2 (and, particularly, the black letter of §1.01) is stated in the negative, in terms of what copyright does not protect rather than what it does protect. Throughout CD2 (and this has been true of both CD1 and the other drafts presented to the Advisers), the Reporters are evidently intent on according copyright a narrower scope than the case law warrants, including by reciting hurdles to copyright protection. As discussed immediately below, an apparent disinclination toward copyright-affirmative positive law characterizes CD2 and predecessor drafts.

The text of §1.01. We recognize that the Reporters are not presenting §1.01 for approval, but “for discussion only to help contextualize the additional sections of Chapter 1,” Reporters' Memorandum, page xiii. But, it is precisely their perspective on that context that we find especially problematic.

Perhaps the most telling example of this is the Reporters' decision to omit from CD2 the statutory term “copyright protection *subsists*. . . .” The term “subsists” reflects a bedrock principle of the Copyright Act – that copyright inheres in a creation that is an original work of authorship fixed in a tangible medium. Congress' decision to have copyright inhere automatically – embodied in the term “subsists” – marked a fundamental shift in the copyright law; prior to the 1976 Copyright Act, copyright was conditioned upon compliance with statutory formalities. The term was carefully chosen, see October 8, 2018 Comments of Professors Balganes, Menell and Nimmer on CD2. In Section 1.01, however, the Reporters describe copyright protection as something that can be achieved only after overcoming various exclusions and barriers and, not, as Congress had intended,

² See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218-22 (2003) (Copyright Term Extension Act was a valid exercise of Congress' power under the Constitution's Copyright Clause); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (white pages telephone directory lacked sufficient originality for copyright protection); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94-95 (2d Cir. 2014) (libraries' use of database containing full text of their published books to provide user with full text search capabilities, to preserve works in their collections, and to provide copies of works in appropriate formats for the visually impaired is not an infringement of copyright); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1391 (6th Cir. en banc 1996) (300+ page course pack containing 8-30% of six works reproduced for students by copy shop did not qualify as fair use).

as a right that arises from creativity. By choosing to restate the statutory language in a manner that decidedly omits the term “subsists,” CD2 obscures a key legislative determination underlying Congress’ fundamental reforms to the U.S. copyright system in the 1976 Act.

Comment *a* to §1.01 contends that the word “subsists” could be misleading because an original work fixed in a tangible medium may not be protected by copyright for reasons other than lack of originality or fixation, e.g., the work may have gone into the public domain. But Congress was certainly aware that works that met the criteria in 17 U.S.C. §102(a) may be unprotected by copyright for numerous other reasons, and nevertheless consciously chose to make this affirmative statement in §102(a). Certainly, the Reporters’ black letter §1.01 could be revised to include the word “subsists” by stating in (a): “Copyright protection subsists. . . (1) in an original work of authorship as identified in §1.02. . . .”

In a similar vein, the Reporters contort the statutory scheme by cramming multiple statutory exclusions from copyright protection into the very first provision of the proposed black letter for §1.01, which is titled “Basic requirements.” The black letter then enumerates six “basic requirements” to establish that a work is protected by copyright. Some of these are very broad (e.g., a work must “not be excluded from protection under the rules stated in §§1.08-1.09 *or elsewhere in this Restatement*”) (Black letter §1.01(a)(3), emphasis supplied). We believe Congress’ formulation is sufficiently clear; we are not aware of any case in which a party has argued that §102(a) misled her into believing that a work is protected by copyright despite the fact that the work is a work of the U.S. government (17 U.S.C. §105), that its copyright term has expired (17 U.S.C. §§302-05), or that it consists primarily of a work used unlawfully (17 U.S.C. §103(a)), etc. Moreover, few, if any, copyright scholars would think that some of the narrower exclusions set out in §1.01 (e.g., that the work is not that of the U.S. Government or is an edict of law) are part and parcel of the threshold analysis of whether a work meets the “basic requirements” of copyright protection.

Furthermore, the structure of §1.01, drafted as a series of exclusions that must be overcome to merit copyright protection, distorts case law and, in so doing, proposes a structure that could be interpreted to erect obstacles to a copyright plaintiff pursuing infringement litigation. Section 1.01 could be read to mean that a copyright owner must plead and prove, as part of her case-in-chief, that the copyrighted work meets all of the criteria in §1.01. It is not, however, plaintiff’s duty to allege or carry the burden of establishing, for example, that her work is “not excluded from protection under the rules stated in §1.09-1.10 *or elsewhere in this Restatement* . . .” It should not be the case that copyright owners would have to plead that their works are eligible for copyright protection because they are outside the exclusions “stated elsewhere” (which will be addressed by the Reporters in Chapter 2, §§ 2.01, 2.03-2.08, although CD2 includes only §§2.01, 2.02 and 2.07). Moreover, as the Reporters acknowledge in Chapter 2 (§2.07, Comment *b*), many of the exclusions are addressed in the context of infringement litigation – often as affirmative defenses (which have their own burdens of proof) rather than as part of the case-in-chief – so setting them out, up-front, as “basic requirements” of copyright protection is, at best, potentially confusing.

* * *

For all of these reasons, particularly the persistent lack of an articulated methodology or approach to this project, and the continuing problematic perspective of the work, we again suggest that the project, if it goes forward at all, should be reformulated as Principles. Many of the issues we and other Advisers have identified in comments to date would be mitigated or resolved if this were a Principles project rather than a Restatement.

Thank you for the opportunity to submit these comments.

Sincerely,

Jane C. Ginsburg³

June M. Besek⁴

³ Professor Ginsburg is an Adviser to the Restatement of Copyright project.

⁴ Ms. Besek is the liaison from the American Bar Association's Section on Intellectual Property Law to the Restatement of Copyright project, although the comments expressed in this letter are made in her individual capacity and not on behalf of the ABA Intellectual Property Law Section.