

January 9, 2018

Director Richard Revesz
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Re: Restatement of the Law, Copyright

Dear Director Revesz and Members of the American Law Institute Council:

We write to express our significant concerns with the first Council Draft (the “Draft”) of ALI Restatement of the Law, Copyright (the “Copyright Restatement Project” or the “Project”). We urge you not to approve the Draft in its present form. The Draft has a variety of problems including inaccurately summarizing the text of the Copyright Act, confusing explanations of important principles and misleading illustrations. Moreover, as further detailed below, these problems uniformly reflect an unduly restrictive view of copyright law that is not consistent with the robust statutory rights granted by Congress to authors. Numerous examples of these issues are included in Attachment A.

Background

It is our understanding that the Copyright Restatement Project was commenced in September 2013 at the urging of Professor Pamela Samuelson of Berkeley Law School. She expressed dissatisfaction with the current state of copyright law and suggested an ALI Principles Project that she hoped “would include an analysis and framework that would over time be helpful to Congress, the Copyright Office and others considering reform” of the Copyright Act (her letter is included as part of Attachment B). This proposal ultimately evolved to become the current Restatement of Copyright Project. Several organizations and others engaged in the creation of copyrighted content sent a letter to ALI in October 2015 (Attachment B hereto) to detail their substantial reservations about the Copyright Restatement Project. In particular, the October 2015 letter expressed the concern that the original goal articulated in Professor Samuelson’s letter -- using a Principles Project as a vehicle for effecting changes in the law that the Reporters and like-minded critics of existing copyright law have been unable to achieve through legislation -- continues to live on in the Restatement Project. The October 2015 letter also set forth the view that copyright, which is the subject of a comprehensive and detailed federal statute, is not an area of law appropriate for restatement.

Despite these concerns, the undersigned agreed to participate as Advisers to the Copyright Restatement Project, adding our expertise to the effort in the hope that the end product would be accurate and doctrinally neutral. Unfortunately, our efforts have thus far not succeeded. While the Reporters have incorporated some of our edits, many of the most significant criticisms have not been addressed.

Problems with the Draft

Although the Council Draft that you recently received has improved after two rounds of Adviser input, it still falls well short of what the legal community has come to expect from the ALI. Attachment A is a representative, but by no means exhaustive, list of the problems with the Draft, including citations to the written comments of the individuals who made them. (We note that many of these same comments were made orally at the Advisers' Meetings but are not citable here since no transcript is kept of those sessions.) The list includes errors in restating the black-letter law of copyright, misleading illustrations or confusing explanations of nuanced topics, and biased treatment of issues that are the subject of ongoing, and vigorous, debate.

While many of the examples considered individually may not seem overly distorting, collectively they render the Draft an inaccurate portrayal of the current state of copyright law. In addition, we are concerned about what approval of this Draft might portend for future chapters. The problems we identify are not random mistakes scattered evenly across copyright's ideological spectrum. Rather, each of these examples is consistent with and advocates for an interpretation of copyright that does not comport with federal statutory law and restricts copyright protection in a manner not intended by Congress. Overall, the Draft's substance and quality are not consistent with what one would expect from an ALI Restatement. We therefore urge the Council to, at minimum, reject this Draft and send it back to the Reporters for further work. We also suggest that the Council consider whether this Project should be converted to a Principles project where efforts to reform the law might be more appropriately considered.

Sincerely,

Advisers

Simon Barsky
Jacqueline Charlesworth
Michael Fricklas
Janet Fries
Dean Marks
Steven Marks
Mickey Osterreicher
Mary Rasenberger
Jay Rosenthal
Ben Sheffner

Liaisons

Keith Kupferschmid
Mark Seeley (retired from Liaison position after this chapter was considered)

cc:

Stephanie Middleton, Esq., Deputy Director (for further distribution within ALI)

Attachment A: List of Problems in the Council Draft

The list below includes problems of various types, grouped together into general headings. These are not the only issues that advisers have raised, but are illustrative of the types of misleading provisions in the draft, and most importantly, its divergence from black letter law. The individual points are followed by citations to the written comments of the Advisers, Liaisons or Members in the Consultative Group who made those remarks and the date the comments were submitted to the Reporters. Each individual's title and affiliation are listed only the first time that person's name appears.

Errors and Omissions in the Black Letter Law

- The black letter of § 1.02 in the Draft states that there is a set number of categories of works “recognized to date as protectable under the Copyright Act”. **This misleadingly implies a requirement that a work must fall squarely within one of the listed categories, contrary to the express statutory language.** Section 102 of the Copyright Act clearly states: “Works of authorship include the following categories....” Section 101 of the Act (Definitions) makes clear that “including” is “illustrative and not limitative.” Comment ‘1’ to this section of the Draft recognizes that the category list is not intended to be restrictive and Congress has stated that the courts are free from “rigid or outmoded concepts of the scope of particular categories.” H.R. Rep. No. 94-1476 at 53 (1976). Since the Reporters acknowledge that Congress did not intend the category list to be inflexibly applied, the black letter section should remain faithful to the statutory text. The Reporters’ discussion of their contrary views at most should have been limited to the Reporter’s Notes.
 - *Commentators Discussing this Point in Preliminary Draft 2:*
 - Hon. Pierre N. Leval, Senior Judge, U.S. Court of Appeals for the Second Circuit (Nov. 9, 2016).
 - Guy Miller Struve, Senior Counsel, Davis Polk & Wardwell LLP (Nov. 11 2016).
 - *Commentators Discussing this Point in Preliminary Draft 1:*
 - Jacqueline Charlesworth, General Counsel & Associate Register of Copyrights, U.S. Copyright Office (Dec. 1, 2015).
 - Jane Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School (Nov. 30, 2015).
 - Keith Kupferschmid, CEO, Copyright Alliance (Jan. 15, 2016).
 - Mary Rasenberger, Executive Director, The Authors Guild (Nov. 6, 2015).
- § 1.03 describes the requirements for copyright protection of a derivative work, including that the work be original. **The Draft omits any discussion of infringing derivative works which do not need to be original. That is, the Copyright Act does not require originality in the derivative work in order for that work to infringe another.** This distinction is important because the Restatement of Copyright is likely to be used by courts more often in considering whether a derivative work is infringing as opposed to whether it is copyrightable. Even if the Reporters intend to cover this topic in a later chapter, the Draft does a disservice to these courts in failing even to mention in a

Comment that the owner of the original work can make out a claim of infringement against the creator of a derivative work without showing that the alleged infringing work is separately copyrightable.

- Commentators Discussing this Point in Preliminary Draft 2:
 - Hon. Pierre N. Leval (Nov. 9, 2016).
 - David Nimmer, Co-author of the treatise *Nimmer on Copyright* and Counsel, Irell & Manella LLP (Nov. 18, 2016).
 - Jane Ginsburg & June Besek, Executive Director, Kernochan Ctr. for Law, Media, and the Arts at Columbia Law School (Nov. 8, 2016).
 - Keith Kupferschmid (Dec. 21, 2016).
 - Dean Marks, Executive V.P. & Deputy General Counsel, Motion Picture Ass'n of America; Ben Sheffner, Senior V.P. & Associate General Counsel, MPAA; and Dan Robbins, Senior V.P. & Associate General Counsel, MPAA (Jan. 11, 2017).
 - Mark Seeley, Senior Vice President and General Counsel, Elsevier, Inc. (Dec. 20, 2016).
- Commentators Discussing this Point in Preliminary Draft 1:
 - Hon. Pierre N. Leval (Dec. 20, 2015).
 - Jane Ginsburg (Nov. 30, 2015).
 - Keith Kupferschmid (Jan. 15, 2016).
 - Troy Dow, Vice President and Counsel, Government Relations and IP Legal Policy and Strategy, The Walt Disney Co. (Nov. 6, 2015).
- **Similarly, the Draft fails to make clear that derivative works do not need to be fixed in a tangible medium to be infringing.** While fixation is an essential element if the author of the derivative work claims copyright protection, it is not necessary for infringement liability. The omission of this concept renders the Draft potentially misleading to a future court considering an infringement case.
 - Commentators Discussing this Point in Preliminary Draft 2:
 - Dean Marks, Ben Sheffner & Dan Robbins (Jan. 11, 2017).
 - Keith Kupferschmid (Dec. 21, 2016).
 - Commentator Discussing this Point in Preliminary Draft 1:
 - Troy Dow (Nov. 6, 2015).
- **Comment 'e' to § 1.04 errs in stating categorically that copyright protection for a collective work does not extend to the underlying works.** It is true that both the underlying works and the collective work are distinct works of authorship given separate copyright protections. However, the law and Copyright Office practices are clear that copyright registration for collective works can extend registration to the underlying works in limited circumstances. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices §§ 509.1, 509.2 (3d ed. 2017). Since copyrightability and registrability are often confused, the ALI should clarify and distinguish how the underlying works within the collective works are handled in both situations.

- *Commentators Discussing this Point in Preliminary Draft 2:*
 - Sarang V. Damle, General Counsel and Associate Register of Copyrights, U.S. Copyright Office & Robert Kasunic Associate Register of Copyright and Director of Registration Policy & Practice, U.S. Copyright Office (Nov. 9, 2016).
- **The black letter text of § 1.05 omits the statutory rule for simultaneous fixation.** 17 U.S.C. §101's definition for fixation includes: "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." Simultaneous fixation should be included in the black letter since the Copyright Act includes it in its fixation definition and because it is a crucial point for all copyrighted works that rely on live broadcasting. Instead it is left out of the black letter law of § 1.05 and is relegated to the supporting materials (*see* Comment 'e', Illustration 8, and Reporters Notes d).
 - *Commentators Discussing this Point in Preliminary Draft 2:*
 - Hon. M. Margaret McKeown, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit (Nov. 7, 2016).
 - Jane Ginsburg & June Besek (Nov. 8, 2016).
 - Keith Kupferschmid (Dec. 21, 2016).
 - *Commentators Discussing this Point in Preliminary Draft 1:*
 - Jane Ginsburg (Nov. 30, 2015).
 - Keith Kupferschmid (Jan. 15, 2016).
 - Fred von Lohmann, Legal Director, Google Inc. (Dec. 4, 2015).
- For a work to be copyrightable, it must be fixed in a tangible medium of expression for "a period of more than transitory duration." That phrase is not defined in the Copyright Act, nor settled in case law. 17 U.S.C. §§ 101, 102. **The Reporters simply manufactured their own definition of that phrase -- "long enough to allow enjoyment or exploitation of the work's expressive content from the material object" -- and included it in the black letter of § 1.05. No court has articulated much less adopted this definition.** Comment 'd' attempts to justify the Reporters' new rule, but it succeeds only in demonstrating that this definition is anything but black letter law. This issue is controversial because even though fixation is only statutorily required for copyright protection, not for infringing works, some courts have applied the fixation requirement to infringements. For such courts, raising the bar as to what constitutes a copy by applying the Reporters' definition of fixation means that activities that would otherwise be deemed infringing may no longer be, thus shrinking the scope of the copyright owner's rights. The issue is one of great importance in current leading-edge copyright debates. An even-handed approach would treat the law in this area as continuing to evolve. But the extent of the debate is nowhere reflected in the Draft, and the inclusion of the Reporters' new definition in the black letter inappropriately gives the impression that the issue has been settled.

- Commentators Discussing this Point in Preliminary Draft 2:
 - Sarang V. Damle & Robert Kasunic (Nov. 9, 2016).
 - Hon. M. Margaret McKeown (Nov. 7, 2016).
 - Jane Ginsburg & June Besek (Jan. 11, 2017).
 - Keith Kupferschmid (Dec. 21, 2016).
- Commentators Discussing this Point in Preliminary Draft 1:
 - Jacqueline Charlesworth (Dec. 1, 2015).
 - Jane Ginsburg (Nov. 30, 2015).
 - Keith Kupferschmid (Jan. 15, 2016).
 - Troy Dow (Nov. 6, 2015).
 - Dean Marks & Ben Sheffner (Nov. 20, 2015).
 - Jared Jussim, Adjunct Professor Southwestern Univ. Law School (Dec. 7, 2015).
- **The Draft adds a category of works in § 1.08 – works jointly authored by U.S. government employees and private individuals or entities – to subject matter excluded from copyright protection, despite that no authority exists for doing so.** The Draft acknowledges in Comment ‘d’ that the statute and case law do not address the status of these works, yet takes a policy position on one side of the debate, notably in favor of narrowing copyright.
 - Commentators Discussing this Point in Preliminary Draft 2:
 - Jane Ginsburg & June Besek (2016).
 - Mark Seeley (Dec. 20, 2016).
 - Keith Kupferschmid (Dec. 21, 2016).
 - Commentator Discussing this Point in Preliminary Draft 1:
 - Jane Ginsburg (Nov. 30, 2015).
- **The black letter of § 1.09 states that edicts of any government *including foreign governments* are not protectable. This statement is an innovation of the Reporters that is not reflected in the Copyright Act or otherwise an accurate statement of U.S. law today.** Laws of foreign governments are often protected by copyright in their home countries (e.g. “Crown Copyrights”) and have not been excluded from protection under U.S. law. Again, the Reporters have chosen the position that restricts copyright protection.
 - Commentator on this Point in Preliminary Draft 2:
 - David Nimmer (Nov. 18, 2016).
- **The black letter portion of § 1.10 as well as Comment ‘b’ describe unpublished works as “eligible” for copyright protection. That is not accurate.** Section 104(a) of the Copyright Act says unpublished works “are subject to protection under this title”. The Draft fails to acknowledge that the act of creating an original and fixed work of authorship automatically gives rise to copyright protection and misleadingly suggests that something more may be required.

- *Commentators Discussing this Point in Preliminary Draft 2:*
 - Jane Ginsburg & June Besek (Nov. 8, 2016).
- *Commentators Discussing this Point Generally in Preliminary Draft 1:*
 - Jane Ginsburg (Dec. 21, 2015) (explaining generally that the difference between copyright “subsists” versus copyright being “available” or can be “obtained” is that the latter terms are problematic and make copyright seem conditional).
 - Hon. Pierre N. Leval (in the December 3, 2015 Adviser’s Meeting as referenced in Professor Ginsburg’s comments cited above).
 - Dean Marks & Ben Sheffner (Nov. 20, 2015).

Unclear Explanations and Misleading Examples

- § 1.01 Comment ‘a’ discusses the merger doctrine, which states that where the idea and the expression of that idea are merged (that is, there are very few ways to express a particular idea), copyright will not extend to the merged elements of a work. The Draft gives the example of a chair design and gives the incorrect impression that the entire work can never qualify for protection. **While a standard chair would typically not be protectable, many decorative chairs could qualify for protection if sufficiently original. The Draft glosses over this important distinction in a misleading manner that serves to limit copyright protection.**
 - *Commentators Discussing this Point in Preliminary Draft 2:*
 - Jane Ginsburg & June Besek (Nov. 8, 2016).
- **Comment ‘e’ of § 1.03 has the same flaw as the earlier discussion of originality – it misleadingly fails to distinguish between issues of copyrightability and infringement.** The Draft states that new elements of an infringing derivative work that are not derived directly from the underlying work can be copyrighted, and gives several examples of when unauthorized derivative works might be entitled to protection. The Draft entirely omits the inverse scenario – when the owner of the original work may sue the creator of the derivative work for infringement, even where the derivative work author has contributed new copyrightable expression. Courts are more likely to encounter this scenario rather than the former, and thus the Draft may add confusion by not including a reference to the latter. **The Reporters focus entirely on the copyrightability of the derivative work, but fail to make clear that the author of an unlawful derivative work is still subject to liability for infringement, effectively ignoring the rights in the original work, which generally serves to narrow the scope of the copyright interest of the original owner.**
 - *Commentators Discussing this Point in Preliminary Draft 2:*
 - Dean Marks, Ben Sheffner & Dan Robbins (Jan. 11, 2017).
 - Keith Kupferschmid (Dec. 21, 2016).

- Commentators Discussing this Point in Preliminary Draft 1:
 - Dean Marks & Ben Sheffner (Nov. 20, 2015).
 - Troy Dow (Nov. 6, 2015).
 - Steven Marks, Chief, Digital Business & General Counsel, Recording Indus. Ass’n of America & Jay Rosenthal, National Music Publishers Ass’n (Dec. 2, 2015).
- § 1.07 Illustration 16 confuses the Draft’s discussion about when arbitrary conduct can be considered minimally creative for copyright protection. **The illustration introduces an “authorial intent” requirement that is not set forth in the statute or case law.** See Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul Law Review 1063, 1086 (2003). And even if this element were adopted as part of copyright doctrine, Illustration 16 does not help illuminate where to draw the line in deciding whether arbitrary conduct in a particular case is minimally creative.
 - Commentators Discussing this Point in Preliminary Draft 2:
 - Jane Ginsburg & June Besek (Nov. 8, 2016).
 - Sarang V. Damle & Robert Kasunic (Nov. 9, 2016).
 - Keith Kupferschmid (Dec. 21, 2016).
 - Dean Marks, Ben Sheffner & Dan Robbins (Jan. 11, 2017).
- Comment ‘c’ to § 1.08 explains that when the government commissions a work from a non-government employee and that work does not qualify as a work for hire, the government “may permit the assertion of some or all copyright rights in such a work” As explained above in connection with the black letter of § 1.10, the government does not grant authors the right to assert a copyright interest. Copyright arises automatically upon creation of a creative work. When the government hires a contractor to create a work and does not enter into a written work-made-for-hire agreement, the author enjoys a copyright in that work. Any restrictions on that right would be negotiated as a matter of contract. **The discussion of this issue in the Draft incorrectly implies that the government has the power, as a matter of copyright law, to confer or withhold a copyright interest in a contractor’s work.**
 - Commentators Discussing this Point Generally in Preliminary Draft 1:
 - Jane Ginsburg (Dec. 21, 2015)
- § 1.09 Comment ‘b’ categorically states that when a government adopts a private code as a requirement, the code becomes an “edict of law” that is not subject to copyright. **The Draft fails to acknowledge the limitations of the main decision supporting this rule** (*Veeck v. S. Bldg. Code*, 293 F.3d 791, 795-799 (5th Cir. 2002) (en banc)) in which the code was specifically written to be adopted as a legal regulation. In addition, other cases omitted by the Reporters have upheld copyright protection for privately developed codes and standards that are incorporated into law. *CCC Info. Servs., Inc. v. McLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994); *Am. Soc’y. for Testing and Materials v. Public.Resource.org, Inc.*, No. 13-cv-1215 (TSC) (D.D.D.C. Feb. 2, 2017).

- *Commentator Discussing this Point in Council Draft 1:*
 - Carol F. Lee, Special Counsel, Taconic Capital Advisors and Council Member, American Law Institute (Dec. 12, 2017).
- *Commentators Discussing this Point in Preliminary Draft 2:*
 - Jane Ginsburg & June Besek (Jan. 11, 2017).
 - Mark Seeley (Dec. 20, 2016).
- *Commentators Discussing this Point in Preliminary Draft 1:*
 - Mark Seeley (Dec. 2, 2015).
 - Troy Dow (Nov. 6, 2015).

Pervasive Problems and Lack of Balance

- **Overall the Reporters take a more restrictive view of copyright than is accurate or balanced.** This is displayed in the specific examples discussed above and more generally in the way that copyright is described. For example, the Draft describes the purpose of copyright law solely as promoting the progress of knowledge (e.g. § 1.05 Comment ‘d’) and nowhere mentions that “encouraging and rewarding authors’ creations” is the fundamental means the drafters of the Constitution chose to achieve this end. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016). The lack of acknowledgement of creators’ property rights in their work is more prominent in the forthcoming Chapter 2 of the Restatement, but the unbalanced treatment of the goals of copyright law is also evident in this Chapter.
 - *Commentators Discussing this Point in Preliminary Draft 2:*
 - Jane Ginsburg & June Besek.
 - Dan Robbins (Jan. 11, 2017).
 - Mark Seeley (Dec. 20, 2016).
 - Dean Marks, Ben Sheffner, & Dan Robbins (Jan. 11, 2017).
 - Keith Kupferschmid (Dec. 21, 2016).
 - *Commentators Discussing this Point in Preliminary Draft 1:*
 - Keith Kupferschmid (Jan. 15, 2016).
- In §1.08, Reporters’ Notes ‘a’ and ‘c’, the value that a copyright owner is entitled to is referred to as “taxation” and Note ‘d’ suggests that copyright protection can be used as a tool for government censorship. **Taken together, these notes provide a pejorative view of copyright that is not appropriately balanced and fails to convey the importance of copyright to society.**
 - *Commentators Discussing Point 2 in Preliminary Draft 2:*
 - Keith Kupferschmid (Dec. 21, 2016).
 - Dan Robbins (Jan. 11, 2017).
- As discussed above, copyright is not *obtained* by creators. The act of creating an original and fixed work of authorship automatically gives rise to a copyright in the

work and the Copyright Clause in the Constitution authorizes Congress to “secure” exclusive rights to authors. The Draft describes authors “obtaining” copyright protection numerous times, rather than using a more accurate and neutral term such as authors “qualifying for” copyright protection. **This language in the Draft serves to undermine one of the core principles of copyright and subject the right to government action.**

- Commentators Discussing this Point in Preliminary Draft 2:
 - Jane Ginsburg & June Besek (Nov. 8, 2016).
- Commentators Discussing this Point in Preliminary Draft 1:
 - Jane Ginsburg (Dec. 21, 2015).
 - Hon. Pierre N. Leval (in the December 3, 2015 Adviser’s Meeting as referenced in Professor Ginsburg’s comments cited above).
 - Dean Marks & Ben Sheffner (Nov. 20, 2015).



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October 14, 2015

Re: Restatement of the Law, Copyright

Dear ALI Officers and Directors:

We write to express our significant concerns about the forthcoming ALI project, Restatement of the Law of Copyright.

Copyright is a hotly debated topic today. There is significant disagreement about whether the greatest overall creativity and diversity of expression arises from strong copyright laws and the reliance on exclusive rights vested in authors, or from relaxing certain aspects of copyright laws to permit greater use of unlicensed copyrighted content. This disagreement is manifested in arguments over the interpretation of the current Copyright Act in the courts and in advocacy concerning potential changes to the Copyright Act in Congress. The decision to proceed with a Restatement of the Law of Copyright in this environment is troubling and controversial. Of even greater concern is that the conception of the project and the recent appointment of its Reporter indicate a significant risk that it would be used as a vehicle not to *restate* the law of copyright, but, rather, to *rewrite* it to benefit a particular viewpoint in the copyright debate.

This project commenced in response to a letter from Professor Pamela Samuelson to ALI in September 2013. (See Attachment A below). Professor Samuelson has published extensively concerning her dissatisfaction with the current state of copyright law and to advocate substantial revisions, including reduced statutory damages, a narrow interpretation of the exclusive right to prepare derivative works, and shorter copyright terms. In her letter to ALI, Professor Samuelson makes clear her view that advocacy in Congress and the courts will not have the same power to effect the changes she supports as will an ALI Restatement of Copyright. *Id.* at 3-4. Professor Samuelson points out in her letter that many people in the copyright community, including Register of Copyrights Maria Pallante, have called for changes in the Copyright Act, and acknowledges that Congress is considering these issues. But, she asserts that the pace of legislative change will be too slow, and suggests that a Copyright Restatement can fill the void. *Id.* at 5.

These goals are reiterated by Professor Christopher Sprigman – who was later appointed Reporter for this project – in his September 2, 2014 memo to ALI Director Richard Revesz outlining his proposal for the Restatement project (See Attachment B below). In his memo, Professor Sprigman states conclusively that the copyright law is in a “bad state” (*id.* at 1), which is not a view shared by all or even most of the members of the copyright community. He goes on to explain that the pace of legislative change in Congress will be slow and therefore a Restatement could be influential “in shaping the law that we have, and, perhaps, the reformed law that in the long term we will almost certainly need” (*id.* at 3). These motivations – changing the law to support a certain viewpoint in ongoing policy debates concerning copyright and helping accelerate the rate of change – seem fundamentally inconsistent with the usual grounds on which ALI undertakes a Restatement project. Nevertheless, it is our understanding that Professor Samuelson’s and Professor Sprigman’s letters were precisely the basis on which the ALI agreed to take up the Copyright Restatement project and express the goals for the project.

ALI is an enormously respected organization, and its Restatements are cited as highly persuasive authority in thousands of court cases, treatises and scholarly works. With rare exception, these Restatements address common law subjects such as torts and contracts, where judicial interpretations over time and across jurisdictions are susceptible to synthesis and summarization. By contrast, laws created through federal statute, such as tax and securities, are not appropriate for a Restatement because the law has been clearly articulated by a legislative body. This is so even though those areas of law are subject to interpretation by federal courts and accordingly take on elements of common law; are subject to conflicting interpretations by different courts; and require periodic correction by higher courts and Congress. Traditionally, ALI has not attempted to arbitrate these issues, presumably recognizing that laws dominated by federal statutes do not require restatement, and that an ALI Restatement is not an appropriate platform to effect changes in the law. Notably, many of the concepts Professor Sprigman proposes as suitable subjects for a Restatement (*see id.* at 3-4) -- including copyright term, the scope of exclusive rights and copyright formalities (such as registration requirements) -- are precisely the areas that are explicitly addressed in the Copyright Act and thus the least appropriate for restatement.

Our concern with this project is increased by ALI’s choice of Professor Sprigman as lead Reporter. Professor Sprigman has, much like Professor Samuelson, consistently argued in favor of a limited scope of copyright and other forms of intellectual property.¹ He has signed numerous amicus briefs or was himself counsel in various contentious copyright cases, always arguing for a more restrictive view of the rights conferred by the Copyright Act – the most recent was filed just a few months ago.²

He has even weighed in recently in the political arena, advocating to Congress that it should take a relatively narrow view of copyright, aimed at prioritizing the interests of “innovation” and a burgeoning “remix culture,” over the rights of authors.³ He

¹ For example, in *Berne’s Vanishing Ban on Formalities*, 28 Berkeley Tech. Law Journal 1565 (2013), he explains how “new-style” formalities (ones that do not prevent copyrights from being registered but merely restrict the remedies copyright holders enjoy such as preliminary injunctions and monetary awards) could be enacted consistent with the Berne Convention. In *Copyright and the Rule of Reason*, 7 Journal on Telecomm. & High Tech. Law 317, 340 (2009), he suggests that the law should be changed to shift the burden of proving harm in certain types of copyright infringement cases (primarily those involving derivative works) to the plaintiff, rather than allowing harm to be presumed. A complete list of his writings can be found here: <https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=pubs&personID=37891>.

² See *ABC et al. v. Aereo, Inc.* (US Sup. Ct.) (amicus brief filed April 2, 2014 in support of Aereo, found here: <http://isp.yale.edu/sites/default/files/American%20Broadcasting%20Companies%20v.%20Aereo.pdf>); *Authors Guild, et al. v. Google, Inc.* (2d Cir.) (amicus brief dated July 10, 2014 in support of Google found here: <https://docs.justia.com/cases/federal/appellate-courts/ca2/13-4829/153>); *Oracle America, Inc. v. Google, Inc.* (Fed. Cir.) (amicus brief in support of Google dated May 30, 2013 found here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272272); *Fox Broadcasting Co., v. Dish Network, LLC* (9th Cir.) (amicus brief in support of Dish Network dated January 24, 2013 found here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206972); *Kahle et al. v. Ashcroft* (9th Cir.) (Prof. Sprigman acted as counsel for plaintiffs in this case; the opening brief can be found here: <https://cyberlaw.stanford.edu/files/publication/files/Amended%20AOB%20-%20Kahle.pdf>); *Fox News Networks, LLC v. TVEYES Inc. (S.D.N.Y.)* (amicus brief in support of TVEYES dated June 17, 2015 found here: https://tushnet.files.wordpress.com/2015/06/ip_profs_tveyes_amicus_final.pdf); *Capitol Records, Inc. v. Thomas* (D. Minn) (amicus brief in support of Thomas dated June 13, 2008 found here: http://www.wired.com/images_blogs/threatlevel/files/tenprofessors.pdf).

³ Earlier this year, a consortium of over sixty advocacy groups and individuals dedicated to preserving intellectual property rights wrote an “open letter” to the 114th Congress urging it to recognize the importance of IP to the American economy and to support robust protection of these rights. (http://www.propertyrightsalliance.org/userfiles/Propertyrightsalliance_IPGuidelinesLetter.pdf). This letter prompted a response on March 9 from some 45 organizations and individuals, including Professor Sprigman, taking an opposing position. They urged Congress to allow an expansive interpretation of fair use, preserve safe harbors from infringement actions for online platforms and enforce copyright law only to the extent it does not “stifle innovation.” (<http://www.rstreet.org/wpcontent/uploads/2015/03/CopyofReCreatecopyrightlettertoHillFeb2015.pdf>). The March 9 letter, while couched in terms of moderation, takes an extremely one-sided view of copyright. It argues that copyright is worth protecting only to the extent it furthers

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also recently addressed the International Trade Commission, advocating that it should not exercise its existing authority to protect copyright holders in the digital environment.⁴ The length and breadth of Professor Sprigman's advocacy against the interests of creators and copyright owners demonstrate that he is firmly on one side of this era's vigorous copyright debates.

Of course we recognize that Professor Sprigman is entitled to his views on copyright policy issues. However, we believe ALI expects its Reporters to have a more neutral view of the subject on which they are reporting. Indeed, ALI's own Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects (<http://www.ali.org/doc/conflicts.pdf>) states that "[r]eporters . . . should perform their responsibilities with the objectivity expected of legal scholars. Accordingly, they must exercise sensitivity to the risk and appearance of conflict of interest in their work for the Institute." Policy Statement at B(1).

It is not the purpose of this letter to argue one side of the copyright debate. Professors Samuelson and Sprigman have long-held strong views about copyright, and they are entitled to advocate for them. Rather, our purpose is to express our concern about the genesis and apparent objectives of the Copyright Restatement project. The Institute's reputation for objectivity and neutrality is one of its most valuable assets. We are concerned that the ALI will jeopardize this reputation by undertaking an advocacy-oriented project, under the banner of a Restatement, which is designed to recommend extensive changes in existing federal law and is led by a Reporter who has demonstrated a commitment to a particular viewpoint. While the appointment of a Reporter with such strongly held views and a record of activism might be questionable even for a Principles project, where the stated objective is to recommend changes to law, it runs contrary to and runs a high risk of compromising the objectivity of the effort for a Restatement project. If ALI chooses to proceed with the project, we will of course work with ALI to make sure the Restatement is just that – and not a brief for one side in ongoing policy debates. But we would be remiss in failing to raise these serious concerns now, before any draft Restatement is circulated, so that all appropriate steps may be taken to ensure that the project is executed with objectivity and impartiality.

Sincerely,

American Photographic Artists	Independent Film & Television Alliance
American Society of Composers, Authors and Publishers	The Association of Magazine Media
American Society of Media Photographers	The Motion Picture Association of America
Association of American Publishers	National Music Publishers Association
The Authors' Guild	National Press Photographers Association
Broadcast Music, Inc.	Nashville Songwriters Association International
Church Music Publishers Association	Professional Photographers of America
Digital Media Licensing Association	Recording Industry Association of America
Graphic Artists Guild	Society of European Stage Authors and Composers

technological innovation and supports a "remix culture" in which copyrighted content is freely appropriated. These letters underscore the point that discussions about the future of copyright policy are alive and well in the legislative context, and as such, copyright is not an appropriate subject for a Restatement project.

⁴ See letter filed with the ITC on April 10, 2015: <https://www.publicknowledge.org/documents/letter-to-the-international-trade-commission>.

Attachment A

Pamela Samuelson

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September 12, 2013

Via Email and U.S. Mail

Lance Liebman
Director
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
lliebman@law.columbia.edu

Re: Proposal for an American Law Institute Principles of Copyright Project

Dear Lance:

You may remember that during the American Law Institute (ALI) Young Scholars Conference on Patent and Copyright Law held at Georgetown University Law Center in February 2013, I suggested that ALI should undertake a copyright reform project. I am writing now to follow up on that suggestion with a more concrete proposal for a project that articulates principles that courts, lawyers, and scholars can use without the need for legislation and that would provide an analysis and framework that would aid additional reform efforts. Such a project would enable the ALI to bring reason and order to this important area of the law and help clarify and simplify it in accordance with the Institute's mission. I enclose my recent essay in the Harvard Law Review, *Is Copyright Reform Possible?*, and the recent report of the Copyright Principles Project. (These references are also available online: http://www.harvardlawreview.org/media/pdf/vol126_samuelson.pdf; http://www.law.berkeley.edu/files/bclt_CPP.pdf.)

Principles That Courts, Lawyers, and Scholars Can Use Without the Need for Legislation

Many of the most important and contested issues of U.S. copyright law—among them, its originality standard, disputes over authorship, infringement standards, fair use, equitable or monetary compensation for infringement, and preemption of state laws—are matters for statutory interpretation in a common law fashion that judges and lawyers must address with little or no help from the statute. There is considerable uncertainty, lack of clarity, and undue complexity on these and other important aspects of copyright law. It is unfortunate that the length and complexity of the statute today obscures the normative underpinnings of the law. With a Principles of Copyright Project (or other type of project that the Institute thinks is appropriate), the ALI could help rectify this problem. Although the proposed project would concentrate on principles that courts, lawyers, and scholars can use now, without statutory amendment, it would include an analysis and framework that would over time be helpful to Congress, the Copyright Office, and others considering reform.

In the essay, *Is Copyright Reform Possible?*, I consider various modes and venues in which copyright reform can take place. The essay points out that the Institute has already contributed



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significantly to law reform in the intellectual property field through, for instance, its RESTATEMENT (THIRD) OF UNFAIR COMPETITION and its PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS. The essay also explains why the Institute is the optimal institution to undertake a project that would bring clarity and normative principles to interpretation and application of U.S. copyright law. In the essay, I give a dozen examples of common law copyright issues on which courts have been at odds that an ALI project might usefully address.

Clarification and other reforms of U.S. copyright law were also the focus of a 2010 report by the Copyright Principles Project (CPP), a group I convened in 2007 comprised of twenty copyright professionals. Following three years of deliberation and discussion, the CPP Report identified and discussed twenty-five specific areas for reform. The CPP Report provides additional reasons for copyright reform to get under way. Although some recommendations in this report would require legislative change, many of them would be susceptible of consideration and articulation in an ALI project.

It bears noting that numerous key principles of copyright law originated with the courts. For example, Justice Story's famous decision in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) is often cited as the origin of the fair use doctrine, which the courts continue to refine and apply even following its codification. The U.S. Supreme Court has shaped the law with regard to the quantum of originality required to support copyright protection in a work of authorship. *See, e.g.*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (O'Connor, J.); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (Holmes, J.). Courts have also been called upon to interpret what constitutes copyright subject matter. *See, e.g.*, *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011) (garden not copyrightable). Standards for judging infringement are also common law developments in copyright law. *See, e.g.*, *Computer Associates Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

Coordination with Other Institute Projects

A Principles of Copyright project will also enable the Institute to build on and coordinate the effort with other relevant and important projects it has undertaken and that have contributed meaningfully to the sound development of intellectual property rules:

RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995) addresses trademarks, trade secrets, and the right of publicity and includes discussion of their interaction with patent law and copyright law.

INTELLECTUAL PROPERTY PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008), whose reporters—Rochelle Dreyfuss, Jane Ginsburg, and François Dessemontet—are prominent intellectual property scholars, concentrates on jurisdiction, choice of law, and judgments; it does not substantially address the underlying principles of copyright law envisioned for this proposed project.

PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010) addresses preemption, public policy, and unconscionability issues, among others, and the role of courts in the software contract context, which could be built upon in the copyright context.

At least four ALI projects have also addressed federal/state common law issues with respect to intellectual property, including copyright:

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The RESTATEMENT (THIRD) OF UNFAIR COMPETITION addresses the intersection of federal trademark law and state law and also addresses intersecting statutory and common law issues on trade secrets. It also provides useful materials on remedies and explanatory comments on the relationship of copyright to other relevant laws and on preemption.

PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS addresses the federal/state balance and presents legal principles to provide clarity in disputes involving state contract and commercial law and federal intellectual property law.

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) addresses—although briefly—the intersection of the class action problem with the statutory damages problem; further explication, with reference to the aggregate litigation project, would be useful to courts and lawyers (both in raising the due process and fairness issues before the court and in counseling their clients about class action exposure and the pros and cons of potential settlement).

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) includes a section discussing the application of restitution principles in the context of intellectual property rights and statutory law.

The Institute's continuing interest in intellectual property matters was also evident during the Institute-sponsored conference on February 21, 2013, at Georgetown University Law Center, which brought together a select group of judges, lawyers, and professors (including me) to discuss the ways in which copyright law and patent law intersect and borrow from one another. Because there continues to be considerable confusion in the law currently about whether or to what extent copyright and patent protection can be available for the same intellectual creation (e.g., data structures of computer programs), an ALI copyright project could address this important issue as well. This issue is currently being hotly litigated in the *Oracle v. Google* case, which is currently pending before the Court of Appeals for the Federal Circuit (the trial judge having opined that the Java APIs that Google copied may be patentable but cannot be protected by copyright law, a proposition that Oracle strongly challenges).

A Principles of Copyright project would be readily susceptible to coordination with other ongoing or future Institute projects. For example, if the Institute pursues a project on federal preemption or on patent law, the analysis and insights gained from a copyright project would be useful.

In the absence of an Institute project, courts, practitioners, and scholars are left to rely on their own interpretation of relevant statutes and cases, as sometimes supplemented by treatises and law review articles. No matter how carefully written, however, such supplementary sources, do not reflect both the objectivity and independence and the thorough process that the Institute brings to its projects. For example, one of my articles describes a famous treatise's misinterpretation of a seminal copyright case and its decades-long influence on lawyers and judges. See Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 Tex. L. Rev. 1921 (2007), available at <http://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=346&pubID=175>).

In other scholarly writings, I have tried to contribute to the sound development of U.S. copyright law on other specific issues. Most recent is my article, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 Geo. L. J. 1505 (2013). It explains why this right is narrower in scope than some courts and commentators have realized and it criticizes several decisions that have given an overbroad interpretation to this right. It offers guidance about how far the right should extend. Another example is *Statutory Damages in U.S. Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L.

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Rev. 439 (2009) (with Tara Wheatland). It demonstrates that courts have failed to develop guidelines to ensure that awards of statutory damages for copyright infringement are “just,” although the statute directs that they should be so; under the current confused state of the law, egregiously excessive awards are possible and have occurred. I have also tackled the subject of fair use, a subject that is ripe for systemization in a coherent set of principles that can be understood and applied by judges and practitioners. *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537 (2009). While I and others will continue to pursue scholarship that aims to reform copyright law, such efforts, as I well understand, are not going to have the impact on the law that an Institute project could have. (The articles are available online at <http://georgetownlawjournal.org/files/2013/09/Samuelson.pdf>; <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1011&context=wmlr>; <http://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=346&pubID=193>.)

An Institute Project Could Also Provide an Analysis and Framework for Other Reform Projects

Not only would an ALI copyright project demonstrate the Institute’s continuing leadership in clarifying and simplifying the law now, but it could also provide an invaluable and timely analysis and framework for other reform efforts that are currently under way, both in this country and internationally. Given the reform activity that has been initiated recently, it would be particularly useful and timely for the Institute to contribute to and influence developments.

In the United States, for example, several recent events reflect the growing and pressing sense that the current copyright law is under considerable stress and needs to be fixed:

- On March 4, 2013, Maria Pallante, Register of Copyrights of the U.S. Copyright Office, delivered the Manges Lecture at Columbia University, entitled *The Next Great Copyright Act*, in which she articulated the need for copyright reform. Register Pallante outlined several objectives for that reform and identified issues that need to be addressed. (The text of her lecture is available at http://www.copyright.gov/docs/next_great_copyright_act.pdf.)
- Later that month, on March 20, 2013, Register Pallante testified as the sole witness before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, restating her call for updates to U.S. copyright law. (Hearing materials are available online on the House site at http://judiciary.house.gov/hearings/113th/hear_03202013.html.)
- A month after Register Pallante’s congressional appearance, on April 24, 2013, Representative Bob Goodlatte, chair of the House Judiciary Committee, announced the initiation of a comprehensive review of U.S. copyright law. (Rep. Goodlatte’s press release can be found at http://judiciary.house.gov/news/2013/04242013_2.html.) Noting that “[t]here is much work to be done,” Rep. Goodlatte announced a series of hearings in the coming months.
- On May 16, 2013, the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet held its first hearing on copyright reform, entitled “A Case Study for Consensus Building: The Copyright Principles Project.” I and four other CPP members testified on the need for copyright reform and answered questions from attending representatives. (Hearing materials are online on the House site at http://judiciary.house.gov/hearings/113th/hear_05162013.html.) A second round of hearings, focusing on the roles of content industries and innovative technology, was held on July 25 (http://judiciary.house.gov/hearings/113th/hear_07252013.html) and August 1, 2013

(http://judiciary.house.gov/hearings/113th/hear_08012013.html). Additional hearings are expected to be scheduled later this year and into next year.

- On June 6, 2013, the Subcommittee heard further testimony involving copyright law. In a hearing to consider H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, sponsored by Rep. Goodlatte, the subject was Section 1201 of the Digital Millennium Copyright Act of 1998, which prohibits certain circumvention activity, such as cell phone unlocking, unless the Library of Congress in its rulemaking authority expressly exempts it. (Hearing materials are available at http://judiciary.house.gov/hearings/113th/hear_06062013.html.) On July 31, the Judiciary Committee approved the legislation, which moves next to the House floor. Similar legislation is pending in the Senate.
- The National Academies' Board on Science, Technology, and Economic Policy (STEP) appointed an ad hoc committee to consider the current state of research and to offer recommendations on expanding and improving research on copyright and its impacts on innovation in the digital environment. On May 2, 2013, STEP issued the resulting report, entitled "Copyright in the Digital Era: Building Evidence for Policy," outlining a research agenda to inform copyright policy and reform choices. (The report is available online at http://www.nap.edu/catalog.php?record_id=14686.)
- In July 2013, the Department of Commerce Internet Policy Task Force (IPTF) issued its green paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. (The paper is available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.) It provides an overview of the state of copyright law with regard to online digital works and points to copyright issues that the government and private sector are addressing, as well as issues that courts are currently engaged in interpreting, including remedies, the meaning of "public performance" for video streaming, the scope of the distribution right as to online works, and applying contract terms to new uses. Outreach efforts to solicit public comments and organize roundtables are under way.

The above developments primarily reflect initial steps of discussion and research leading to possible legislative change. While congressional efforts to improve the Copyright Act—whether in the form of minor statutory amendments or a more substantial overhaul—may be a welcome and beneficial development, it will almost certainly be a long and contentious process, particularly given the relatively few number of bills passed by the 113th Congress. Register Pallante in her Manges Lecture described the complexity of the law and the complex range of views of interested parties, not least of all including the public, in noting generally that "Congress has moved slowly in the copyright space."

Because a comprehensive reform of the statute is unlikely to happen any time soon, it is all the more important that aspects of U.S. copyright law that rely on judicial interpretation, such as fair use and secondary liability, are clarified through something like an Institute project. An Institute project such as the one I envision would emphasize principles that courts can use without any need for amendment of the Copyright Act or other federal legislation. Indeed, the principles articulated in an Institute copyright project would provide guidance to future legislators and policymakers as well as judges.

Turning to the international front, there is considerable interest in copyright reform throughout the world. Hence, it might be possible for an Institute copyright project to influence the evolution of copyright law

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beyond U.S. boundaries. Here are a few examples of significant copyright reform activities taking place in the international arena. The WIPO-administered Marrakesh Treaty (text available at http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf), signed by fifty-one countries on June 27, 2013, commits nations to create a copyright exception to improve access to published materials for the visually impaired. The Enterprise and Regulatory Reform Act, with provisions to modernize the UK copyright regime, obtained Royal Assent on April 25, 2013. (The UK copyright provisions are available at <http://www.legislation.gov.uk/ukpga/2013/24/part/6/enacted>.) In parallel is a call by the European Commission to review and update the EU copyright framework (see the press release at http://europa.eu/rapid/press-release_MEMO-12-950_en.htm). There is an increased call not only for the modernization of copyright laws but also harmonization across borders. The Institute has long been recognized for its international influence, and it is the logical choice to head a copyright law project that holds the promise not only of clarifying and simplifying U.S. law but also fostering sound principles in other countries.

Resources for a Copyright Project: Financial, Academic, Institutional, and Educational

Undertaking a copyright reform project will require a significant commitment of time, money, and effort. Independent of its own resources, the Institute should be able to raise the appropriate funding for the project. The STEP Board, for example, was able to raise money for its copyright study. I would be glad to help with fund-raising efforts for such a project if the Institute thinks that would be helpful.

An Institute Principles of Copyright project will attract leading judges, scholars, and practitioners to serve in various relevant capacities. There are many ALI members who can help with sources of names for reporters, advisers, and liaison members and I would be glad to make suggestions if you would like them. I expect also that many members of the Institute would be interested in serving on a members' consultative group for the project.

The Reporter or Reporters, the Advisers, and the Institute should be able to engage and draw on significant law school resources. These include, to give just a few examples, the Berkeley Center for Law & Technology at Berkeley Law (BCLT, <http://www.law.berkeley.edu/bclt.htm>), of which I am a Director and which has hosted important copyright events such as a conference commemorating the 300th anniversary of the Statute of Anne, a conference on orphan works and mass digitization, and a conference on copyright formalities; the Center for Internet and Society at Stanford Law School (<http://cyberlaw.stanford.edu/>), which concentrates on public policy issues such as copyright and fair use; and the Berkman Center for Internet & Society at Harvard (<http://cyber.law.harvard.edu/>), which focuses on cyberspace issues through projects and initiatives such as the Digital Public Library of America.

There are additional organizations that could provide potential liaison and other support to the project. They include: The National Academies, especially the Board on Science, Technology, and Economic Policy (STEP); the Copyright Society of the USA; the Federal Judicial Center; the American Bar Association Section on Intellectual Property Law; the American Intellectual Property Law Association (AIPLA); and the World Intellectual Property Organization (WIPO), among others.

An Institute project on copyright reform is well-suited for coordination with continuing legal education programs, especially those sponsored by the Institute. I am confident that lawyers would welcome webinars on various current and practical issues, for example, to name just four: fair use; remedies, especially the considerations affecting the choice between equitable and monetary relief; federal preemption; and the intersection of patent and copyright issues (a topic that would build on the Institute's recent conference).

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Conclusion

The time is ripe for bringing normative clarity to copyright law. Significant reform can be accomplished by courts, in addition to reforms that Congress and international legislative bodies may consider. As I stated in my Harvard Law Review essay, the American Law Institute is the institution most capable of taking on such a significant law reform project that would bring greater normative clarity, predictability, and balance to U.S. copyright law.

I have shared a draft of this letter with several ALI members to see whether they would be willing to support the idea of an ALI Principles of Copyright project. Appellate court judges Margaret McKeown and Richard Posner, practitioners Ian Ballon and Michael Traynor, and Professors Robert Berring (Berkeley), Dan Burk (UC Irvine), Robin Feldman (Hastings), Jeanne Fromer (NYU), Dorothy Glancy (Santa Clara), Eric Goldman (Santa Clara), Wendy Gordon (Boston University), Timothy Holbrook (Emory), Mark Lemley (Stanford), Harvey Perlman (Nebraska), Arti Rai (Duke), Christopher Sprigman (NYU), and Jason Schultz (NYU) responded by expressing support for this idea.

I would welcome the opportunity to visit with you to discuss a possible project and would be pleased to arrange a visit in Philadelphia or elsewhere in the East at a mutually convenient time. Please let me know if there is any other information that would be helpful to move this idea forward.

Thank you for your time and attention.

Sincerely,

A handwritten signature in blue ink, appearing to read "Pamela Samuelson", with a long horizontal flourish extending to the right.

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law

cc: Roberta Ramo, President
Michael Traynor, President Emeritus
Stephanie Middleton, Deputy Director

encl: *Is Copyright Reform Possible?*, 126 Harv. L. Rev. 740 (2013)
The Copyright Principles Project: Directions for Reform, 25 Berkeley Tech. L.J. 1175 (2011)

Attachment B

Attachment B

To: Ricky Revesz

September 2, 2014

From: Chris Sprigman

Re: Proposed ALI Restatement of Copyright Law

In this memorandum I will briefly outline a proposed ALI project to produce a Restatement of Copyright Law. Most importantly, I will explain why a Restatement in this field would be particularly valuable, provide an overview of the core areas of copyright law that would comprise the Restatement, and give you some sense of how I would organize the effort.

The Value of a Restatement of Copyright Law

As you know, I am convinced of the value of a Restatement in this area of the law. Copyright is a vital part of our American culture of innovation, and the subject of significant interest and controversy among policymakers and even in the public at large. Moreover, we benefit in the United States from an unusually high degree of clarity regarding copyright's purpose – the constitutional grant of power for Congress to make copyright (and patent) law sets out an explicitly utilitarian rationale, providing that Congress's grant of exclusive rights to authors must "promote the progress of science and useful arts". Given the law's importance to our culture and our economy, and in view of the constitutional mandate that Congress's copyright lawmaking must advance progress, we might expect that the copyright law would be a focus of significant ongoing study and improvement. Yet, by most accounts, copyright law is in a bad state, and has been for some time now. Among the public at large, and especially among young people, the law is widely disliked, and just as widely ignored. And despite significant efforts by private copyright owners and the U.S. government (in the form of criminal prosecutions, most recently of the owners of Megaupload, one of the leading "cyberlockers" and the platform for a very large amount of motion picture piracy), online copyright piracy is a major phenomenon that shows no sign of abating.

In part, copyright's current difficulties can be traced to the poor fit between a law that was conceived (for the most part) in the analog world of the 1970s and

the Internet and associated digital technologies, which took root almost two decades after our current copyright law was enacted and subsequently transformed how we create, distribute and consume culture.

In part, copyright law has foundered as the political economy of creativity has shifted. Copyright law was once made mostly for (and by) a small and close-knit group of large content producers. But with the arrival of the Internet, we've seen both an enormous growth in the number of content producers, and the rise of a technology industry that often finds itself at odds with the copyright policies favored by the incumbents in the music, motion picture, television, computer software and commercial publishing industries.

The result has been a marked decline in the effectiveness of copyright as a legal barrier to unauthorized copying, an explosion of piracy, and significant damage to at least some content producers. At the same time, critics of copyright law have begun to question whether copyright protection – at least of the scope and duration set out in current law – is indeed necessary to support the production of some important forms of creative work. Copyright's difficulties in adapting to new technologies, its decreasing effectiveness, the explosion of Internet piracy, the harm to some content producers and the apparent resilience of others, together create what seemed to be a perfect environment for a deep reevaluation of copyright law. And yet that has not happened.

Congress made some early attempts in the late 1990s to adapt copyright law to the digital age, but those reforms were, at best, incomplete. More recently, we've seen legislative stalemate. The most recent proposals for significant copyright law revision, the Protect IP Act (PIPA) and the Stop Online Piracy Act (SOPA), were abandoned in early 2012 after widespread public protests that included the blackout of Google, Wikipedia, Flickr, and a host of other leading websites. The House currently is holding hearings on copyright, but the expectation of almost everyone involved is that nothing will come of this latest initiative.

In sum, Congress is unlikely to proceed any time soon with copyright reform. As a consequence, it falls to the federal courts to attempt to improve the fit between a mid-20th century copyright law and 21st century digital technologies. Fortunately, the current copyright law is open-texted enough that its coherence and effectiveness could be advanced significantly via common law development. Unfortunately, however, aside from a few notable exceptions, there is a relatively low level of interest or expertise in copyright law among federal judges.

In light of these facts, I think it's plain that a Restatement of Copyright Law – at least if undertaken with the object of assisting the courts and mindful always of copyright's constitutional mandate to promote progress – could be enormously influential, both in shaping the law that we have, and, perhaps, the reformed law that in the long term we will almost certainly need.

How Best to Organize an Effort to Draft a Restatement of Copyright Law

The first thing to say is that it is unnecessary – and indeed would be folly – to attempt to draft a restatement that covers the entirety of the copyright law. A significant fraction of the copyright law is taken up with narrow, special-interest arrangements negotiated by specific industries. For example, the schemes whereby cable and satellite television providers are granted compulsory licenses to re-transmit television broadcast signals, in exchange for payment of a statutory fee. Or the provisions exempting certain small businesses from paying public performance licensing fees when they play music for their customers. These arrangements are typically negotiated by the relevant industry players, and ratified by Congress. Additionally, these provisions, because they are narrow and typically quite carefully specified, are litigated infrequently relative to the more generally applicable provisions of the Copyright Act, and are generally less susceptible to – or in need of – the clarifying effect of a Restatement.

For these reasons, a Restatement of Copyright Law should focus on the generally-applicable parts of the law – provisions that are, in any event, copyright law's viscera. These include

- the subject matter of copyright; including the boundary between copyrightable expression and uncopyrightable ideas, facts, systems, principles, processes, concepts, discoveries and methods of operation;
- the scope of the exclusive rights granted by copyright;
- copyright “formalities”, including registration, notice, deposit, and recordation of transfers;
- the rules governing ownership and transfer of copyrights;

- the duration of copyright;
- the standard for copyright infringement;
- rules regarding the circumvention of copyright protection systems, and the removal or alteration or copyright management information;
- defenses to copyright infringement, including the first sale limitation and fair use; and
- remedies, including actual and statutory damages, the availability of attorneys fees, the availability and scope of preliminary and permanent injunctive relief; and the imposition of criminal penalties.

Each of these areas presents difficult interpretive questions. For example, in the first category, the subject matter of copyright, the statute makes clear that copyright protects creative expression and not facts (which are unprotectable by any form of IP) or useful things (which are the concern of patent law). And yet we see courts struggling to fix the boundaries that separate these categories. One example is the recurring question of what exactly is “creative expression”. Do artistic gardens qualify? Sequences of yoga positions? Synthetic DNA? There have been significant copyright disputes relating to each of these. Another example is the persistent confusion over how to decide whether some potentially copyrightable thing should be denied protection because it is “useful”. Apparel is useful, the courts say – and this extends to the \$3000 cocktail dress that no woman buys for its warmth. On the other hand, jewelry is treated as purely ornamental and therefore copyrightable. Musical lullabies are not considered by the law to be useful, although I can attest that they are in fact employed to quiet babies. Toys are seen similarly as non-useful. This fundamental question of the boundary between copyright and patent law is urgently in need of rationalization. Although courts have developed several tests for separating useful articles from merely expressive ones, both the tests themselves and the results they yield seem nearly random.

Or take the fair use doctrine. In recent years, prompted in part by academic work by Judge Pierre Leval and others, courts have begun to employ the concept of “transformativeness” as an important element of the fair use analysis. But as courts have moved toward recognizing that a defendant’s transformation of a plaintiff’s work can be a key that unlocks fair use, they have

produced conflicting, poorly reasoned, and sometimes even unreasoned opinions regarding exactly what qualifies as “transformation”. Is a transformative use necessarily one that shifts the *meaning* of the plaintiff’s work? Or does a defendant who provides a new *use* for plaintiff’s work, but does not change the work itself, also make a transformative use? This broader understanding of transformative use was accepted by the Second Circuit in the recent lawsuit brought by the Authors’ Guild against Google and the Google Books Project. Google’s digitization of many thousands of copyrighted books did not transform the content of those books in any way – the whole point of the project was to copy the books verbatim. But Google’s use, the court held, qualified nonetheless as transformative. Google was not copying the books to publish them, but rather to build a searchable database that the public would use as a research tool.

Is this concept of transformativeness and the expansion of fair use that attends it consistent with copyright’s purposes? Can it be squared with our prior understandings of the scope of the defense? These are questions that courts will be obliged to answer in the coming years, and carefully-reasoned guidance from a Restatement of Copyright Law is bound to have a substantial role in shaping the law.

Finally, a word about administration. I envision dividing principal responsibility for the subjects I have listed above among four Associate Reporters (I would like to name Profs. Neil Netanel (UCLA), Molly Van Houweling (Berkeley), Tony Reese (UC-Irvine) and Lydia Loren (Lewis & Clark) to these positions). I would participate in the deliberations and drafting process for all of the categories, though I would depend on each of the Associate Reporters to exercise substantial responsibility within the categories entrusted to them. I have candidates in mind, though I would want to review them with you. I have also thought about senior lawyers, judges and academics in the copyright field who would be suited for service as Advisers. If this project is approved, I am confident we could be ready to begin work promptly, and I would aim to produce a first draft within 18 months.

Thank you, and of course please do not hesitate to contact me with any questions.

Yours,

Chris Sprigman