

**Congress of the United States**  
**Washington, DC 20515**

**VIA ELECTRONIC TRANSMISSION**

December 3, 2019

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

Dear Director Revesz:

We write today regarding the efforts of the American Law Institute (ALI) to develop a Restatement of Copyright. It has come to our attention that the first 18 sections of the proposed Copyright Restatement were considered for approval by the ALI Council in mid-October and two of the sections were approved. Those two sections and any other sections that are subsequently approved by Council then are considered by the full ALI membership, and if approved by the full membership, will be made publicly available and may then be cited by federal courts.

ALI is a respected organization, whose Restatements are often cited as highly persuasive authority in court cases and scholarly works. Traditionally, Restatements have focused almost exclusively on areas of common law because judicial rulings across different jurisdictions may vary and ALI's interpretations are predisposed to assembly, analysis, and summaries.

By contrast, laws created through federal statute, including federal copyright law, are ill-suited for treatment in a Restatement because the law is clearly articulated by Congress in both the statute and the legislative history. In creating legislation, Congress develops legislative history through hearing testimony and Committee Reports. Legislation is then expertly interpreted by agencies charged with that authority by Congress – such as the U.S. Copyright Office<sup>1</sup> and U.S. Patent and Trademark Office.<sup>2</sup> The ALI has long recognized that federal statutes do not require a Restatement and are not an appropriate platform to effect changes in federal law.

Throughout its almost 100 years of existence, the ALI has *never* chosen to draft a Restatement of an area of the law that is almost exclusively federal statutory law – until now. We are deeply concerned by the ALI's current Copyright Restatement Project. In fact, any Restatement or other treatise relied on by courts that attempts to diminish the importance of the statutory text or legislative history relating to that text would warrant concern. Courts should rely on that statutory text and legislative history, not Restatements that attempt to replace the statutory language and legislative history established by Congress with novel interpretations.

We are not the first to raise these concerns to the ALI. The U.S. Copyright Office, the preeminent expert within the federal government on issues relating copyright law, has shared its concerns

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<sup>1</sup> See, e.g., 17 USC § 701(b)(1), 701(b)(2), 701(b)(4).

<sup>2</sup> See, e.g., 35 USC § 2(b)(8), 2(b)(9).

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relating to the Copyright Restatement Project with the ALI.<sup>3</sup> One of the statutory duties of the Register of Copyrights is to “[a]dvice Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.” As advisers to Congress and experts in this area, we value the Register’s input and share her concerns.

The fact that similar concerns were raised by other copyright experts, including the U.S. Patent and Trademark Office, the American Bar Association (IP Law Section), and numerous academics and federal judges, further demonstrates to us the seriousness of the concerns relating to this project.<sup>4</sup>

We also understand that the ALI has come under some scrutiny relating to other controversial projects. The late Justice Antonin Scalia, who was the most frequent author of opinions citing ALI publications in nine opinions,<sup>5</sup> wrote that “modern” Restatements “are of questionable value, and must be used with caution.” He added that, “[o]ver time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.” In his dissent in *Kansas v. Nebraska*, Justice Scalia stated that newer Restatements “should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”<sup>6</sup>

Lately, many states have also begun to repudiate the more recent and controversial Restatement projects, such as the Insurance Liability Restatement. Arkansas, Michigan, North Dakota, Ohio, Tennessee, and Texas have all recently passed legislation that in some form seeks to curtail, or

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<sup>3</sup> Letter from Register of Copyrights Karyn Temple to President Levi, et al, Re: Council Draft No. 1, Restatement of the Law, Copyright (Jan. 16, 2018), [https://www.authorsguild.org/wp-content/uploads/2018/01/usco\\_ali\\_letter\\_council\\_draft\\_1\\_11618\\_final.pdf](https://www.authorsguild.org/wp-content/uploads/2018/01/usco_ali_letter_council_draft_1_11618_final.pdf); see also Letter from US Copyright Office General Council Regan Smith, et al, to Director Revesz, et al, Re: Preliminary Draft No. 4 (March 4, 2019); Letter from US Copyright Office General Council Regan Smith, et al, to President Levi, et al, Re: Council Draft No. 2, Restatement of the Law, Copyright (Oct. 16, 2018); Letter from US Copyright Office General Counsel Sy Damle, et al, to Director Revesz, et al, Re: Preliminary Draft No. 3 (Dec. 4, 2017); Letter from US Copyright Office General Counsel Sy Damle, et al, to Director Revesz, et al, Re: Preliminary Draft No. 2 (Nov. 9, 2016); Letter from US Copyright Office General Counsel Jacqueline Charlesworth, to Director Revesz, et al, Re: Preliminary Draft No. 1 (Dec. 1, 2015), [https://cdn.ymaws.com/www.csusa.org/resource/resmgr/AM16/Course\\_Materials\\_/USCO\\_Letter\\_--ALI\\_Prelimina.pdf](https://cdn.ymaws.com/www.csusa.org/resource/resmgr/AM16/Course_Materials_/USCO_Letter_--ALI_Prelimina.pdf).

<sup>4</sup> Letter from USPTO Director Iancu to Director Revesz, et al, Re: ALI Restatement of Copyright Law (Oct. 1, 2018); Letter from ABA Intellectual Property Law Section Chair Dickson to President Levi, et al (Oct. 3, 2018).

<sup>5</sup> Richard Revesz, *The American Law Institute and the U.S. Supreme Court*, *The ALI Adviser* (Dec. 14, 2016), <https://www.ali.org/news/articles/american-law-institute-and-us-supreme-court/>.

<sup>6</sup> *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (J. Scalia, concurring in part and dissenting in part).

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even condemn, the use of the Insurance Liability Restatement under their respective insurance laws. The Kentucky and Indiana legislatures have also passed resolutions stating their opposition to the Insurance Liability Restatement.<sup>7</sup>

Since copyright law is predominantly federal law, codified in Title 17, it would be Congress, and not the states, that would take action in this case. By sending this letter today, we are hoping that you will address our concerns with the Copyright Restatement Project. Given the significance of this issue and the importance of copyright law to this country's economy and culture, we respectfully request your response to the following questions:

1. The ALI has been in existence for close to 100 years. The federal copyright law has been in existence for more than twice as long. Why has the ALI chosen to draft a Restatement of Copyright now? What change in the law or in the ALI's mission or scope necessitates taking on the Copyright Restatement Project today?
2. How are the ALI and the Reporters approaching a complex federal statute like copyright law? Does that approach differ from the approach taken in the usual Restatements that focus on common law? How is the ALI purporting to restate a federal statute?
3. When drafting the Copyright Restatement, how much weight do the Reporters and the ALI Council give to the statutory text and to the legislative history?
4. When there is a discrepancy in the interpretation of copyright law, how do the Reporters decide to take one position over the other? Do they consider the statutory text? Do they consider the legislative history? Are the views of Copyright Office experts given greater weight than the views of others? To what extent does the proposed draft give deference to Copyright Office interpretations of the Copyright Act? Could an expert from the Copyright Office be chosen as a Reporter?
5. When there are gaps in the statutory or case law, how do the Reporters decide when to fill in those gaps as opposed to declining to take a position?
6. Copyright law is constantly changing. In fact, just last year, Congress passed the Music Modernization Act. And, this year, Congress is considering other copyright-related bills – e.g., the Copyright Alternative in Small-Claims Enforcement Act of 2019. How does and will ALI deal with changes to the copyright law made by Congress and how are these reflected in the proposed Restatement?

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<sup>7</sup> Lucian McMahon, *Pushback Continues Against ALI Restatement of Liability Insurance*, The Triple-I Blog (May 10, 2019), <https://www.iii.org/insuranceindustryblog/pushback-continues-restatement-liability-insurance/>.

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7. The U.S. Copyright Office raised several concerns in its January 2018 letter, along with a number of other letters sent to ALI throughout the development of this project. Has the ALI formally considered those concerns? How is the ALI addressing those concerns?
8. How does the ALI address potential conflicts of interest? What steps does the ALI take to prevent bias from affecting the proposed draft?
9. Will the ALI attempt to restate other federal laws, such as patent law, in the future?

We ask that you respond to this letter with answers to these questions by January 3, 2019. Thank you in advance for your consideration of this letter and our concerns – and for responding to our questions. If you have any questions, please do not hesitate to contact us.



Thom Tillis  
United States Senator

Sincerely,



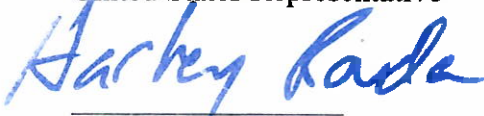
Ben Cline  
United States Representative



Theodore E. Deutch  
United States Representative



Martha Roby  
United States Representative



Harley Rouda  
United States Representative