

REPORT BY THE COPYRIGHT & LITERARY PROPERTY COMMITTEE

**RECOMMENDATION TO REJECT THE AMERICAN LAW INSTITUTE’S
PROPOSAL TO CREATE A RESTATEMENT OF LAW, COPYRIGHT**

INTRODUCTION

The Copyright & Literary Property Committee of the New York City Bar Association (“City Bar”)¹ respectfully opposes the publication by the American Law Institute (“ALI”) of the Restatement of Law, Copyright.

As explained more fully below, United States copyright law is particularly ill-suited to summary and explanation in the form of a Restatement. Moreover, a restatement of copyright law is unnecessary and, as currently drafted, potentially undermines ALI’s reputation for producing accurate explanations of the law.

The Restatement as currently drafted appears inconsistent with the ALI’s long-standing goal of promoting clarity in the law: indeed, rather than simply clarifying or restating that law, the draft offers commentary and interpretations beyond the current state of the law that appear intended to shape current and future copyright policy. Such efforts seem particularly inapposite in the copyright context where the law did not develop through the common law but, rather, is governed by a federal statute, the United States Copyright Act—and where the courts are obligated to construe that law in accordance with the statute’s express terms, and, where appropriate, Congressional intent. In addition, the United States Copyright Office publishes a comprehensive and Congressionally authorized *Compendium* that largely covers material presented in the draft Restatement, thus making a Restatement of the copyright law superfluous.

The City Bar recognizes the thoughtful and valuable work put into this project by the Reporters and others, and suggests that this project may be transformed into an endeavor, such as a principles project, that is more appropriate for this area of the law. Accordingly, the City Bar

¹ The Copyright & Literary Property Committee addresses a wide variety of issues of concern to the copyright bar and to industries focused on content creation, distribution, and publication, including book and magazine publishing, online content delivery technologies and business models, media, entertainment, music, art, and film. Our diverse membership is made up of solo practitioners, law firm associates and partners, in-house and business affairs counsel, academics, law students, representatives from various non-profit organizations in media and the arts, and government employees.

respectfully submits that the Council should reject Council Draft No. 1, Restatement of Law, Copyright.

1. The proposed Restatement goes beyond the traditional Restatement format and seeks to shape the development of federal copyright law.

The proposed Restatement is inconsistent with the role of the courts in the development of copyright law. Copyright law arises from federal statutory law, rather than through common law.² Indeed, the Copyright Act expressly preempts any claimed equivalent rights “under the common law or statutes of any State.”³ Accordingly, the role of the courts in this context is to interpret the Copyright Act as enacted (and updated from time to time) by the United States Congress, not create new doctrine or policy.

The proposed Restatement, however, asserts that “it is proper for an organization of lawyers” to “effect changes in the law” and to help to “produce agreement on the fundamental principles of the common law [and] give precision to use of legal terms.”⁴ This may be true for traditional common-law subject matters for which federal and state courts are tasked with creating and developing legal principles. Here, however, only Congress, or, to the extent authorized by Congress, the United States Copyright Office, can “effect changes in the law.” Therefore, the role of courts is to discern Congress’s intent in passing the Copyright Act and to interpret the statute to effectuate that intent—that is, to determine what copyright policy *is*, rather than what copyright policy *should be*.

ALI has never issued a Restatement of Law for a subject matter that is primarily governed by a federal statutory scheme. This is for good reason. The common law is comprised of cases across many federal, state, and local jurisdictions. Thus, the typical Restatement serves a crucial role by canvassing the state of the law across all jurisdictions and distilling it into a centralized and easily accessible format. This aids practitioners, courts, and students in understanding how and why the law has developed in certain ways.

Unlike the common law, copyright law is already centralized. The Copyright Act provides comprehensive legislation, and its text and legislative history provide an interpretive framework for the law’s implementation. Copyright law is further explained by the United States Copyright Office’s *Compendium*. Accordingly, copyright law does not require, and is not well suited for, a Restatement. ALI’s explanation of its Restatement projects underscores this point. According to the ALI, its Restatements are “intended to reflect the flexibility and capacity for development and growth of the common law. That is why they are phrased in the descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of a statute.”⁵

² Notably, the draft Restatement (erroneously) suggests otherwise. See, e.g., *Council Draft No. 1* at xi–xii (repeatedly referring to “common law” and “common-law judges”).

³ 17 U.S.C. § 301.

⁴ *Id.* at xii.

⁵ “How the Institute Works”, The American Law Institute, <https://www.ali.org/about-ali/how-institute-works/>.

2. Illustrative Examples of Concern.

As noted above, the draft Restatement aims to effect changes in, and/or articulate fundamental principles of, the law of copyright. Accordingly, it includes positions that conflict with the actual state of the law or that advocate policy preferences divorced from Congressional intent.

For instance, the draft Restatement asserts that “courts have not addressed whether § 105 makes copyright protection unavailable for a joint work created by one or more private individuals or entities together with one or more employees or officers of the U.S. government working within the employee’s or officer’s official duties.”⁶ The comment goes on to advocate that “the better rule” would be for the work to not be copyrightable. Even if ALI believes this to be the “better” rule, a court is obligated to determine what Congress intended § 105 to mean, rather than defer to ALI’s preferred policy positions—even when offered in the authoritative form of a “Restatement.”

Another example can be found in *Preliminary Draft No. 2* and *3*,⁷ where the draft Restatement addresses the copyrightability of computer programs. Specifically, the draft Restatement spends a significant amount of time approvingly discussing the First Circuit’s 1995 decision in *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1st Cir. 1995).⁸ In that case, the First Circuit found that a menu command hierarchy was not protectable because it was a “method of operation” ineligible for protection under § 102.⁹ More recently, however, the Federal Circuit expressly rejected the First Circuit’s analysis.¹⁰ The Federal Circuit found that Java declaring code was copyrightable, and rejected the contention that “Section 102(b) . . . automatically den[ies] copyright protection to elements of a computer program that are functional.”¹¹

The draft Restatement treats the decision as an anomalous opinion issued by a confused and unsophisticated court.¹² Moreover, it makes no mention of the United States’ brief in opposition to certiorari in support of the decision. Instead, the draft Restatement suggests that *Lotus* is the law of the land by featuring it prominently in the “Comments” section and relegating

⁶ *Council Draft No. 1* at 78.

⁷ This section of the Preliminary Drafts is not included in *Council Draft No. 1*, but it appears that the Reporters intend to present the section to the Council at a later date, when other sections of the proposed Restatement are considered.

⁸ *Preliminary Draft No. 2* at 124–25; *Preliminary Draft No. 3* at 16–17.

⁹ *Lotus Dev. Corp.*, 49 F.3d at 818.

¹⁰ *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

¹¹ *Id.* at 1367. While Google’s petition for a writ of certiorari was pending, the United States Solicitor General submitted a brief to the Supreme Court at the Supreme Court’s request. The Solicitor General argued that the Federal Circuit’s decision was correct, particularly its interpretation of Section 102(b), and that the petition for a writ of certiorari should be denied. See United States Amicus Brief at 20–21, *Google, Inc. v. Oracle Am., Inc.*, No. 14-410 (U.S., filed May 2015). The Supreme Court ultimately denied the petition.

¹² See *Preliminary Draft No. 2* at 129 (“Courts sometimes have difficulty with application of this principle.”); *Preliminary Draft No. 3* at 21 (asserting that the Federal Circuit failed to grasp the “clear direction in § 102(b)”).

Oracle to the “Reporter’s Notes” section, explaining that the *Oracle* decision is “difficult to reconcile” and “[t]ypically, an API is composed of code and structural elements that . . . should be excluded from protection under § 102(b) regardless of whether they contain expression.”¹³

This discussion is problematic for a number of reasons. First, it is inaccurate; if anything, *Oracle* is more persuasive as the more recent decision. Second, the draft does not make clear that the Restatement’s disagreement with *Oracle* is the opinion of the drafters. This treatment of a developing copyright issue (the application of copyright to computer programs) improperly suggests to the lay reader that *Oracle* is anomalous and should not be followed; and it suggests to the sophisticated reader, knowledgeable of both sides of the debate, that the Restatement is not a neutral and complete expression of the law but is, instead, either biased towards restricting the scope of copyright or is inaccurate in its portrayal of major precedent. Either way, the Restatement as drafted would do more harm than good to the state of copyright law.

This discussion of *Lotus* and *Oracle* raises another concern with the efficacy of a Restatement of Copyright: copyright law is uniquely impacted by developments in technology. For example, *Lotus* was decided in 1995 and *Oracle* was decided in 2014. It goes without saying that both the courts’ understanding of technology and technology itself have progressed a great deal between the two decisions. This concern becomes more acute with each passing day, as new technological developments hit the market with increasing frequency. The constant changes in technology (and with them, the law) make it less likely that a Restatement will be able to accurately discern a “majority rule” or that said rule will remain relevant in the face of new technologies. Further, any attempt to apply existing copyright law to new technologies inevitably raises questions about what copyright law *should be* in the digital age, making it that much more difficult for a Restatement to remain objective.

Another example of where the draft Restatement presents what copyright policy *should be*, rather than what it is, can be found in its discussion of the “recurring question” of “how stable a particular embodiment must be for it to qualify as a fixation under the Act.”¹⁴ This section of the draft calls into question the validity of multiple judicial decisions that—despite the opinion of the Reporters—remain good law. For instance, it asserts that a 2011 Seventh Circuit decision, *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011), “should not be read too broadly,” and that a Central District of California decision from the same year, *Kim Seng Co. v. J & A Importers*, 810 F. Supp. 2d 1046 (C.D. Cal. 2011), is “incorrect.”¹⁵ The draft’s lack of neutrality in its discussion of fixation is a worrisome sign for how the Restatement may approach more discretionary and controversial areas of copyright law such as fair use.¹⁶

¹³ *Id.*; *Preliminary Draft No. 3* at 21.

¹⁴ *See Council Draft No. 1*, at page xiii and continuing on page 53.

¹⁵ *Id.* at 54 (“*Kim Seng*’s conclusion . . . is therefore incorrect.”).

¹⁶ The issues discussed in this section are representative examples—there are additional areas where a Restatement of copyright law that attempts to shape current and future policy in a manner that is inconsistent with the language of the statute and/or Congressional intent would be problematic.

3. The Restatement would be redundant with the *Compendium*.

Congress authorized the United States Copyright Office to administer the Copyright Act. As recently as September 29, 2017, the Register of Copyrights issued an administrative manual known as the *Compendium of U.S. Copyright Office Practices, Third Edition* (the *Compendium*).¹⁷ The *Compendium* operates as a guidebook for authors, copyright licensees, practitioners, scholars, the courts, law students, and members of the general public. It addresses fundamental principles of copyright law, routine questions about accessing the Office’s public services, and the policies and procedures the Office uses in the course of conducting business. The *Compendium* largely covers the material presented in the proposed Restatement. Thus, the Restatement would be, at best, redundant with the *Compendium*. At worst, and as currently drafted, it would instill needless confusion into the legal landscape where it differs from the *Compendium*.

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Given these fundamental concerns, we respectfully recommend that ALI discontinue its effort to compile a Restatement of copyright law and that the Council not approve *Council Draft No. 1*. As set forth above, United States copyright law—as a creature of statutory construction rather than common law, and susceptible to constant reevaluation due to ongoing changes in technology—is not suited to summary in Restatement form. A different endeavor, such as a principles project, may be more appropriate for this area of law.

Copyright & Literary Property Committee
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¹⁷ Available at <https://www.copyright.gov/comp3/>.