

Congress of the United States
Washington, DC 20515

VIA ELECTRONIC TRANSMISSION

January 15, 2020

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

Dear Director Revesz:

Thank you for your response to our December 3, 2019 letter concerning the American Law Institute's (ALI) efforts to develop a Restatement of Copyright Law. While you have provided insight into your position with regard to the Restatement's process and purpose, we would appreciate more specific details that directly address the questions and concerns set forth in our letter.

Fundamentally, your assertion that ALI has for more than a century "prided itself on producing impartial, non-partisan, and independent scholarly works that clarify, modernize, and otherwise improve the law" addresses – but does not resolve – many of the concerns that we still have regarding the ALI's Restatement of Copyright Law. To be clear, we welcome the efforts of private entities to provide clarity regarding the legal landscape, as well as opinions on how the law may be improved and better effect desired outcomes. The risk we associate with this project, however, is its semblance of authoritativeness where the law is governed by a federal statute.

We understand that Restatements are not legally binding and that courts may decline to follow them. That said, as you are well aware, ALI's publications "are enormously influential in the courts and legislatures, as well as in legal scholarship and education."¹ Widespread judicial reliance on the accuracy and impartiality of Restatements – which stems from the credibility ALI has earned over the course of decades – renders them an important tool, the corruption of which would risk harmful consequences. We are concerned that this Restatement, by its very nature, may not provide the degree of reliability and integrity that makes these resources so valuable. As a result, judges may be misled by such a Restatement, rather than aided in their application of the copyright laws that Congress promulgated. Separately, your "Director's Letter" in the winter 2019 edition of the ALI's newsletter, explains how Restatements influence legislative text.² This is highly problematic given your assurance that the ALI does not seek to supersede or replace the importance of statutory law.

¹ <https://www.ali.org/publications/#publication-type-restatements>

² https://www.ali.org/media/filer_public/d7/63/d763c4d0-2eba-4265-9ffb-3c2ad62e4818/ali_winter_reporter-3152-web.pdf

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As mentioned in both your letter and ours, the ALI's work on Restatements of *common law* are understandably necessary. However, our view is that Restatements for topics rooted in *statutory law*, such as copyright, pose significant risks, because such laws already have been articulated by Congress in both the statute and ample legislative history. In your letter, you state that the "ALI has for decades undertaken significant efforts in areas in which there are important federal statutes," but that does not alleviate our concerns in this instance. There are also significant differences between prior efforts and this one. Copyright law is encompassed almost exclusively within federal statute. On the other hand, in the three prior efforts you reference in your response, the federal statute is a mere component of a larger body of law that is being analyzed. The risk of politicization of a Restatement where statutory law governs the subject matter almost exclusively, as in the case of copyright law, seems greater than in the common law context.

This project, it seems to us, is especially vulnerable to that risk. It is our understanding that a Restatement of Copyright Law was first proposed because of the "long and contentious process" of Congressional lawmaking, and that "comprehensive reform of [copyright] . . . is unlikely to happen any time soon." In addition, the Lead Reporter on the Restatement of Copyright has said that "Congress is unlikely to proceed any time soon with copyright reform" and that the Restatement would have the objective of "shaping the law that we have, and perhaps, the reformed law that in the long term we will almost certainly need." This express intent to "shape" and "reform" existing and future copyright law runs counter to the assertion in your letter that "an ALI Restatement is not a legislative endeavor."

We fear that this project was built on an unstable foundation, with the aim of moving judicial interpretations of copyright law away from the existing statute and toward changes in the law. Indeed, the Copyright Office itself expressed such concerns in its 2015 letter stating, "Although presented as a 'Restatement' of copyright law, the project would appear to be more accurately characterized as a rewriting of the law." A Restatement drafted with this aim would obscure, rather than clarify, the law, and thus would be counterproductive to ALI's stated mission, and harmful to our legislative prerogative.

The concerns we expressed in our original letter to you, reflecting many of the Copyright Office's own concerns from its 2015 letter, remain largely unaddressed. Accordingly, please answer the following questions by no later than March 1, 2020:

1. What course of events triggered the ALI's interest in a Restatement of Copyright project? Was there a specific case which prompted this project?
2. The Restatement's own Table of Contents currently conveys that the ALI will focus on the entirety of copyright law, in apparent conflict with your statement to the contrary. Further, while you assert that the ALI will only restate those parts of the statute that are the source of significant judicial commentary and disagreement, your own Advisors to the Restatement project have criticized the Reporters for citing to fringe cases on a topic, which do not seem sufficient to represent "significant . . . disagreement." Please reconcile

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these inconsistencies and clarify how decisions are made regarding what constitutes significant judicial commentary and disagreement so as to merit inclusion in the Restatement.

3. Historically, the courts have given deference to the views of the U.S. Copyright Office, while the ALI only says that they will give them "careful consideration." This comment suggests that the ALI is unaware that the Copyright Office is specifically charged by law with interpreting and applying this statute. Please explain the level of deference the ALI will give the Copyright Office's interpretation of copyright law.
4. Please explain the specific methodology behind determining when and how gaps in the case law or statute are addressed, and how it is determined if they will be included in the Restatement at all?

Thank you in advance for your consideration of this letter and your Responses to our questions. If you have any questions, please do not hesitate to contact us.

Sincerely,



Thom Tillis
United States Senator



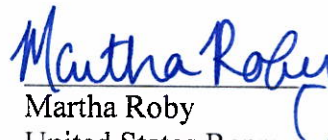
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