



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Professor Richard L. Revesz
Ms. Stephanie A. Middleton
Professor Christopher Jon Sprigman
Professor Daniel J. Gervais
Professor Lydia Pallas Loren
Professor R. Anthony Reese
Professor Molly S. Van Houweling
The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104

Re: ALI Restatement of Copyright Law

Dear Professor Revesz, Ms. Middleton and Reporters:

The United States Patent and Trademark Office (USPTO) is charged by statute with, among other things, advising the President, through the Secretary of Commerce, on national intellectual property policy issues (including copyright), and with advising Federal departments and agencies on matters of intellectual property policy in the United States. As the Under Secretary of Commerce for Intellectual Property and the Director of the USPTO, I am writing to communicate a fundamental concern about the process and format being used for the American Law Institute (ALI) project on a proposed Restatement of Copyright Law. If the project is to go forward, I suggest adapting the typical Restatement format to accommodate the specific characteristics of the Copyright Act, and to avoid undermining Congressional authority.

The copyright Restatement project differs from other ALI Restatements in that it involves an area of law governed by a comprehensive federal statute that is detailed and prescriptive, with most of its sections heavily negotiated or refined through lengthy expert study. On the other hand, the traditional Restatement "aim[s] at clear formulations of common law and its statutory elements or variations," and is intended "to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country." Revised Style Manual approved by the ALI Council in July 2015 ("Revised Style Manual"). The few Federal statutes addressed by other Restatements, consistent with these goals, generally provide broad rules or concepts, restate common law principles, or apply against a backdrop of state or common law. *See, e.g.,* Restatement of Foreign Relations Law of the United States.

In contrast, the detailed, prescriptive provisions of the Copyright Act have historically been considered "black letter" law. An attempt to rephrase them, providing an alternative "black letter," can only lead to ambiguity and contradiction. There will likely be inconsistencies, and if

so, the meaning of the statute will be clouded or altered. Courts could be faced with a decision as to which version to apply, and either Congress's prescriptions could be subverted or the ALI "black letter" would have no effect.

For these reasons, I believe that the copyright Restatement project as currently conceived will create more confusion than enlightenment. If the ALI is nevertheless determined to proceed with the project, I would urge that any such Restatement should begin by setting out each statutory section as the "black letter" law. Following the normal Restatement process, the Reporters could then describe how that law has been applied and interpreted, identify the majority rule, ascertain trends, and assess the relative desirability of different approaches. Recommendations of which approach is preferable, or proposals of a superior approach not yet adopted by any courts, might be appropriate as long as the Reporters make clear that these recommendations or proposals are based on their own views—ensuring full transparency. As described in the Revised Style Manual, "[t]he Institute . . . needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why."

In the end, it is critical that any copyright Restatement hews to the statutory text. I appreciate your consideration of these views.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrei Iancu". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrei Iancu