May 12, 2025

Dear Director Wood and Members of the ALI Council,

For the reasons described below, we write to formally resign as Advisers to the *Restatement of Law, Copyright* ("Restatement of Copyright") effective immediately, and ask that our names be removed from any drafts of the project that the Institute puts out.

We begin by emphasizing our high regard for the American Law Institute's twin goals of clarifying and simplifying the common law through Restatements, goals that it has admirably realized for a century. We have previously written about the Institute and its influential work,[1] and remain committed Members and Life Members of the Institute. All the same, we firmly believe that the Restatement of Copyright is materially different from anything that the Institute has done,[2] and is unsuccessful when measured against the very goals of the Restatements. It risks undermining the ALI's reputation for careful, balanced, representative and trustworthy work product.

We fully recognize that Restatements of Law were never intended to be purely descriptive accounts of the law, devoid of Reporters' judgment on important issues that reveal divergent opinions. That judgment, informed by the Reporters' consultation with the Advisers and Consultative Group, was undoubtedly the very *raison d'être* for the Restatement initiative. This, in turn, permitted Reporters to speak in the voice of the common law judge, reconciling different strands of analysis and offering courts guidance for the future. With the Restatement of Copyright, something very different has transpired.

U.S. federal copyright law has always been a principally statutory regime. Judges do, of course, have an essential role in the development of copyright law. Yet, unlike with the common law, their role is predominantly *interpretive*, and revolves around the centrality of the *statute*. A restatement of a statutory field remains fully plausible if it (i) recognizes itself to be engaged in the interpretation of a statute and (ii) transparently and in good faith identifies its consistent method of interpretation. Unfortunately, the Restatement of Copyright does neither.

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[1] Shyamkrishna Balganesh, *Relying on Restatements*, 122 Colum. L. Rev. 2119 (2022); Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 Colum. J.L. & Arts 286 (2021).

[2] See Balganesh & Menell, *supra* note 1, at 287-337. The previous Director contended that the copyright Restatement did not differ from prior Restatements incorporating statutory components. For the reasons we set out in our comments of Dec. 21, 2015, the comparison fails both methodologically and substantively. As we explained: "Asked if there were any antecedents in statutory restatement, the Chair referred to the Restatement (3d) of Unfair Competition law and to the ongoing Restatement (4th) of the Foreign Relations Law of the United States. These comparisons, however, are not entirely pertinent because the statutory aspects of these Restatements were but one component of much larger judge-made fields of law, and to a significant extent codified judge-made norms. Indeed, as the Style Manual, p. 8 recognizes, citing the Restatement (3d) of Unfair Competition, "In some instances these statutes can be regarded as essentially codifications of the common law. Such legislation and its judicial interpretations, constituting the 'common law of the statute,' can therefore be treated as part of the common law's own evolution." In other words, the starting point for the Restatement (3d) of Unfair Competition remains the common law, of which the statute serves as evidence. Similarly, the area of foreign sovereign immunity, the ALI's first effort, in the Restatement 2d in the 1960s, was a classic "Restatement" in that there was no statute at the time."

As we have repeatedly noted in our comments to the Reporters and the Council,[3] the Restatement of Copyright refuses to acknowledge the centrality of the statute, and instead routinely re-phrases (with strategic intent) the wording of the statute in a way that is at odds with an interpretive exercise. Further, the Restatement of Copyright is inconsistent in its own method of statutory interpretation. For instance, at times it places heavy reliance on the legislative history of a provision at the cost of the statutory text, while at other times it overlooks legislative history for the wording of the text even when courts themselves have done the opposite. It ignores pertinent passages of legislative history on key issues where that language does not align with Reporters' preferences even as it relies on other passages from the same legislative history report where it aligns with the Reporters' revisionist agenda. And while we might see some merit in advocating substantive statutory changes were this a Principles Project, we believe that it is misleading to courts when such revision is passed off as an accurate (rather than aspirational) interpretation of the law as part of a Restatement.

At the core of the Restatement efforts of the Institute has been the ability of courts to trust that the process by which a Restatement was produced reflected a transparent deliberation and broad agreement among a body of experts. Just the opposite has occurred with the Restatement of Copyright, despite our decade-long call for greater transparency and candor in the process. The current draft of the Restatement does not reflect a consensus or even broad agreement of the Adviser group, nor does it adequately address the innumerable objections made by the group as well as, and especially, by the Copyright Office. Yet, the draft and the Reporter's video to the membership misleadingly suggest that its positions were derived and faithfully synthesized from the inputs of its participants as well as of the Copyright Office, when in fact the drafts have taken positions directly contrary to those of the Copyright Office (and in the face of repeated Copyright Office objections, as documented in the Office's many Comments throughout the process) and of many of the Advisers. In so doing, it takes advantage of the extensive trust that courts and policy-makers have come to place on the work of the Institute; that trust in this instance is unwarranted.

We do not arrive at this decision lightly. For the last decade, we have diligently and mostly fruitlessly submitted numerous detailed and carefully supported comments on Preliminary Drafts, Council Drafts and Tentative Drafts, both about the specific content of the Restatement as well as the process and methodology that it deploys. When we sought to have our dissent memorialized

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[3] See Comments filed re **PD 1**, Nov. 30, 2015 (Balganesh) (Ginsburg), Dec, 21, 2015 (Ginsburg); **PD 2**, Nov. 8, 2016 (Ginsburg & Besek), Nov. 18, 2016 (Nimmer); **PD 3**, Nov. 30, 2017 (Menell), Dec. 4 2017 (Ginsburg & Besek), January 26, 2018 (Nimmer); **CD 1**, January 11 2018) (Balganesh, Dinwoodie, Menell & Nimmer), Jan 12, 2018 (Ginsburg, Besek, Charlesworth, Cunard, Fries); **CD 2**, Oct. 8, 2018 (Balganesh, Menell, Nimmer), Oct. 10, 2018 (Ginsburg & Besek): **PD 4**, March 4, 2019 (Ginsburg & Besek); **CD 3**, Oct. 10, 2019 (Ginsburg & Besek), Oct 15, 2019 (Balganesh, Menell & Nimmer); **CD 4**, Jan. 16, 2020 (Balganesh, Menell & Nimmer); **PD 5**, March 30, 2020 (Ginsburg & Besek); **TD 1,** July 16, 2020 (Ginsburg & Besek); **PD 6**, Sept. 10, 2020 (Balganesh, Menell & Nimmer), Sept. 15, 2020 (Ginsburg & Besek); **CD 5**, Jan 13, 2021 (Ginsburg & Besek), Jan. 18, 2021 (Balganesh, Menell & Nimmer); **TD 2**: Motions to amend sections 8 and, comments g and d, 25, June 1, 2021, (Balganesh & Ginsburg); Motion to amend page viii to note Advisers' disapproval of TD 2 (Balganesh, Ginsburg, Menell & Nimmer); **PD 7**, Oct. 4, 2021 (Ginsburg & Besek); **CD 6**, Jan 18, 2022 (Ginsburg & Besek); **TD 3**: Motions to amend section 40, 41, 46, 54, May 9, 2022 (Balganesh, Ginsburg, Nimmer & Robbins); **PD 8**, Oct. 11, 2022 (Ginsburg), Oct. 13, 2022 (Balganesh & Menell); **CD 7**, Jan. 16, 2023 (Ginsburg); **PD 9**, Sept. 26, 2023 (Balganesh, Ginsburg & Menell), Sept. 27, 2023 (Ginsburg); **CD 8**, Jan. 18, 2024 (Balganesh & Ginsburg); **Supplemental Memo to CD 8**, March 1, 2024 (Ginsburg); **PD 9, revised sec. 6.12**, April 10, 2024 (Balganesh, Ginsburg & Menell); **CD 9, revised sec. 6.12**, Oct. 15, 2024 (Balganesh, Ginsburg & Menell); **PD 10**, Oct. 30, 2024 (Balganesh, Ginsburg, Menell & Trimble); **TD 5**: Motion to amend section 6.03, comment g, May 10, 2024 (Balganesh, Dinwoodie, Ginsburg, Kane & Trimble); **CD 10,** Jan. 12, 2025 (Balganesh, Ginsburg, Menell &Trimble); **CD 10, revised secs. 6.09, 10.02**, Feb. 26, 2025 (Balganesh, Ginsburg, Menell & Trimble).

on the draft through a notation, we were informed that this was not permissible under the Institute's protocols.[4] With the project nearing completion, we do not wish to have our names associated with it, since to do so would mislead courts into believing that we support the effort without serious objection. An organization committed to freedom of expression and the rule of law should appreciate these concerns.

In the interests of copyright law, processual integrity, and the continuing success of the Institute, we hereby resign from the project, and request that our names be removed from the list of Advisers.

Sincerely

Shyam Balganesh
Sol Goldman Professor of Law, Columbia Law School

Jane Ginsburg
Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School

Peter Menell
Koret Professor of Law, UC Berkeley School of Law

David Nimmer
Of Counsel, Irell & Manella LLP

[4] Email from Stephanie Middleton to Shyamkrishna Balganesh, June 3, 2021 (informing recipients that "[t]he ALI does not add to the draft what various advisers or members think about different sections or the draft as a whole").