To: The Members of the American Law Institute

From: Professor Marketa Trimble

Date: May 14, 2025

Subject: Restatement of the Law, Copyright

Dear Members of the American Law Institute:

I respectfully express my dissent from the current version of the draft Restatement of the Law, Copyright (the "Restatement"), and join the request by the Copyright Alliance that the "clear and conspicuous disclaimer" mentioned in the Copyright Alliance's letter be added to the final version of the Restatement to state that "The Restatement of Law, Copyright does not represent the views of many of the Advisers and Liaisons who participated in the project" (letter of Mr. Kupferschmid of the Copyright Alliance of May 8, 2025), with the addition, after "Liaisons," of "and members of the Consultative Group." If the Restatement is approved and the disclaimer is not added, or if the disclaimer is added but without MCG, I request that my name be removed from the list of the Members Consultative Group in the final version of the Restatement.

It has been an honor for me to submit comments on and follow the progress of the Restatement project; I appreciate the Institute's receipt of all comments, including from the members of the Consultative Group. Unfortunately, the development of the project has been disappointing, considering that many crucial comments, including by the Copyright Office and project Advisers, who are preeminent experts in copyright law, have been discounted or indefensibly rejected. I share the opinion of Mr. Kupferschmid of the Copyright Alliance, as expressed in his letter of May 8, 2025, that the Restatement drafts "reflect more [an] aspirational desire of where the law ***should*** tend rather than where it is ***actually*** tending" (emphases in the original), and that "the Restatement, in many areas, fails to accurately reflect the law." I concur with the additional objections in that letter and with the conceptual objections that Professors Balganesh, Ginsburg, Menell, and Nimmer list in their letter of May 12, 2025.

The current version of the draft Restatement project is unfortunate, not least because of the existing pressure on copyright law from certain industry players. I am concerned that by approving the Restatement as is, the ALI will imply that it has yielded to industry pressure to misstate current copyright law, which does not serve well the Institute's reputation.

The following are but two examples from Tentative Draft No. 6, April 2025, that may be perceived as inappropriate concessions to certain industry players in a document labeled a "Restatement" of copyright law. These examples appeared in earlier comments.

(1) A comment on Restatement § 10.02 (Tentative Draft No. 6, April 2025) defines "access" in the context of s. 1201 of the Copyright Act, which concerns the circumvention of copyright protection systems, as acts of "view[ing], read[ing], hear[ing], or otherwise access[ing a work] by those without authorization" (page 196, lines 17–18). In another comment to § 10.02, the text refers only to viewing, reading, and hearing (page 199, lines 23–24). These definitions of "access" imply that s. 1201 concerns only access through human perception of copyright-protected works. However, nothing in s. 1201 requires or suggests that "access" under that provision must be through human perception; for example, contrary to the comment's suggestion, the automated scraping of content online for the purposes of collecting works and their further processing into a humanly imperceptible form could also qualify as "access" under s. 1201 and be in violation of that section, if the additional requisite conditions were met.

(2) A comment on Restatement § 10.02 (Tentative Draft No. 6, April 2025) advances an interpretation of s. 1201 of the Copyright Act that is contrary to the statutory language, legislative history, court decisions, and the practice of the Copyright Office. According to the comment, the "Restatement … takes the position that for an act of circumvention to be prohibited under 17 U.S.C. § 1201(a), that act must have some relationship to a copyright owner's exclusive rights in a copyrighted work" (page 204, lines 15–17). The comment further states the Reporters' opinion that "[p]remising a 17 U.S.C. § 1201 violation on circumvention that is entirely unrelated to any of the exclusive rights of the copyright owner would create an expansive new right of access far broader than required to fulfill the purpose of 17 U.S.C. § 1201 …" (page 204, lines 11–13). While this comment reflects the Reporters' desire for what s. 1201 should say, s. 1201 does not say what the Reporters state; the Reporters' assertion relies on a *non*-precedential court decision while discounting another precedential court decision to the contrary that is well-accepted and well-reasoned. Some may agree with the opinion of the Reporters regarding what copyright law should be, but established law clearly says otherwise. The interpretation promoted by the comment could support the scraping of online content to further process collected copyright-protected works into a humanly imperceptible form, if a notion were also accepted that the collecting and processing are not copyright-infringing, for example because of fair use.

Respectfully submitted,

/s/ Marketa Trimble