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Follow-up Comments re Restatement of Copyright, Preliminary Draft No. 1

I submit the comments below following the Advisers' meeting held December 3, 2015, in the hope that the specific comments may assist the Reporters in revising the current draft, and that the general comments may contribute to further consideration by the ALI of the nature and scope of the project.

General Comments further to the December 3 Advisers' meeting

At the Advisers' meeting, many Advisers raised broader issues regarding the project, notwithstanding what was quite evidently a disinclination by those on the dais to address either the apparent lack of ALI precedent for the project or the need for a Restatement of the breadth contemplated by the proposed outline. Advisers questioned the consistency of a "Restatement" of an entire federal statute with ALI Restatement endeavors. The Chair adverted repeatedly to the 2015 Style Manual, but this document, in fact, is quite clear in detailing ALI's approach to restating *common law* subjects. For example, page 3 of the Style Manual states: "Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." The U.S. copyright law, set out in detail in Title 17, U.S. Code, can scarcely be described as "statutory elements" of the common law.

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.

The "Restatement" of Copyright, by contrast, treats a field of law that is the exclusive subject of a federal statute (there are state law copyright issues, but, perhaps anomalously, the draft outline for the Restatement does not propose to cover these). As the discussion during the meeting at several

points illustrated, there are many pitfalls in “restating” statutory language: the precise words matter, and, as was clear from this first draft, paraphrases introduce substantive differences and confusion, though it is not clear whether and when the differences in language were meant to connote differences in intent and meaning.

When some Advisers suggested that the “black letter” should be the statutory text, the response was that ALI style does not allow for that. That response was not persuasive to a number of Advisers because ALI’s own Style Manual makes it clear that Restatements are to be focused on the common law, where there is no supervening statutory text. Furthermore, a “restatement” of an act of Congress using words different than the statute would seem to contradict both the interpretive canon that every word of a statute has meaning and our American legal tradition that courts have a responsibility for imparting meaning to those exact words. Advisers questioned, therefore, whether the approach taken by ALI and the Reporters is consistent with the mandate and traditional role of ALI to synthesize common law principles.

For these reasons, the statutory text should serve as the “black letter” for a Restatement of that statute. In the example given of a Restatement that, in part, synthesizes the case law construing a statutory regime, the Restatement 4th of the Foreign Relations Law of the U.S. section on sovereign immunity, the black letter often tracks the Foreign Sovereign Immunities Act almost verbatim. Departures from the statute seem largely to reflect an attempt in the Restatement’s provisions to address both international instruments and U.S. law, and to enable the reader to understand where there are differences between U.S. and international norms. Since the Reporters for the Restatement of Copyright have made clear that they are not incorporating international norms, reconciling domestic law with international treaties does not here supply a basis for deviating from the words of a statute, enacted by Congress, that exercises exclusive jurisdiction over the subject matter.

Reporter-authored black letter makes complete sense when the project is to distill and synthesize caselaw; after all, what a court “says” is not the same thing as what it “holds.” But the words of a statute *are* the law; even taking judicial interpretation (which certainly can be distilled and synthesized) into account, statutory text is authoritative. Any project that aims to paraphrase virtually an entire federal statute risks both propounding misleading oversimplifications and introducing changes inconsistent with the substance and policy of the law.

At the meeting, the Chair at several points referred to the Style Manual to stress that the ALI is not bound by the positive law. Certainly where judicial decisions cannot be reconciled, a Restatement, after full and transparent analysis of conflicting authorities, properly chooses the “better rule.” But the freedom from positive law essayed by Preliminary Draft No. 1 pertains more to a Principles project than to a “Restatement.” At least that is what is envisioned by the 2015 Style Manual. See Style Manual, p. ix: “Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.”

The discussion at the Advisers meeting prompts concern that the ALI has not fully thought through what it means to “restate” a federal statutory regime. The Style Manual’s rules, designed for the derivation of rules from the analysis and reconciliation of state common law decisions, do not fit the project to “restate” copyright law. Black letter rules purport to be authoritative expressions of legal norms, but here statutory text fills that role. Deriving black letter from caselaw that addresses statutory gaps is one thing, but to substitute paraphrases where Congress has directly supplied a

rule is neither authoritative nor desirable.

Other Advisers' suggestions addressed the scope of a "Restatement" project, emphasizing that many aspects of the federal copyright law are almost purely statutory (for example, duration, formalities), and that the project should be confined to the caselaw-intensive areas, where the statute does not provide much guidance and for which restating would, therefore, be most helpful, such as originality, substantial similarity and fair use. Indeed, these three would be the essence of a worthwhile enterprise for restating certain critical areas of copyright and themselves would require great effort to reduce to Restatement form. Should this project proceed as a "Restatement," it would be most useful (and least subject to misstatement) were it limited to those aspects of copyright law that the statute leaves untreated, or which expressly (in the legislative history) anticipate further judicial development.

Timing was another consideration: the anticipated 4-5 years for a complete Restatement of federal copyright law seems very unrealistic, especially given the hotly debated nature of the subject, and all the more so in light of the dozen years it took to achieve finality in the recent Restatement relating to labor law. By way of further comparison, the ALI's project on INTELLECTUAL PROPERTY - PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008), on which I served as a Co-Reporter, was not a contested enterprise, neither as to nature, scope, nor basic substance, yet still took seven years from initiation to final approval by the ALI Membership.

Specific Comments further to the December 3 Advisers' meeting

In light of my observations regarding the dangers of paraphrasing statutes, I will compare Preliminary Draft No. 1's black letter with the corresponding text of the Copyright Act, and, where possible, will identify in boldface those departures from statutory text that differ substantively from the statute. In some instances, the contrast between the statutory text and the black letter is so extensive that it is not useful to identify individual departures. As a general matter, there should be a strong preference for tracking the statutory language, where it exists, and to confine glosses to the Comments and Reporters' Notes. The burden should be on the Reporters to justify why ALI black letter text should supplement or supplant the statutory text; the Reporters should demonstrate both that the statute leaves a gap or is unclear, and that the proposed ALI black letter language suitably fills the gap or appropriately resolves the ambiguity.

§ 2.01. Subject Matter of Copyright: Basic Requirements 1 and Types of Works Protected

(a) Federal copyright protection **is available** for a work of authorship, including a work of authorship that incorporates preexisting material as described in § 2.02, if that work

- (1) is fixed under the rule stated in § 2.03;
- (2) is original under the rule stated in § 2.04; and
- (3) is not excluded from protection under the rule stated in § 2.05.

(b) Categories of works of authorship recognized as protectable **are**: architectural works; audiovisual works (including motion pictures); choreographic works and pantomimes; dramatic works; literary works; musical works; pictorial, graphic, and sculptural works; and sound recordings.

17 U.S.C. § 102 · Subject matter of copyright: In general

(a) Copyright protection **subsists**, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship **include** the following categories:

- (1) literary works;
- (2) musical works, **including any accompanying words**;
- (3) dramatic works, **including any accompanying music**;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

Comments (additional to comment No. 1 of Nov. 30, 2015 regarding “are” versus “include”):

1. There is an immense normative difference between “subsists” and “is available”; as Judge Leval pointed out at the December 3 Advisers’ Meeting, the latter makes federal copyright appear to be conditional, while the statute makes clear that copyright inheres automatically in original works of authorship once fixed. The distinction between the statutory language and the draft’s black letter in this regard received extensive attention at the meeting; I hope it is not necessary to address it further here, but note that the term “to obtain” in black letter § 2.03(a), § 2.04(a) attracts the same criticism and should be deleted.

[I will address the differences between fixation in 17 U.S.C. § 102(a) and in draft black letter § 2.03 under my comments on that section]

2. The omission of “including any accompanying words” from 17 U.S.C. §102(a)(2), and “including any accompanying music” from 17 U.S.C. §102(a)(3) may make a difference to the characterization of musical and dramatic works, both in the context of joint works (which might not be deemed joint if, for example, words and music were separate works), and even for single-authored works (which might be deemed two works, requiring two separate registrations).

§ 2.02 Subject Matter of Copyright: Compilations and Derivative Works

(a) A derivative work or compilation that otherwise meets the definition in § 2.01(b) is a work of authorship.

(b) A derivative work is a work of authorship that recasts, transforms, or adapts the copyrightable expression of one or more preexisting works of authorship by incorporating original expressive elements sufficient to create a distinguishable variation.

(c) A compilation is a work of authorship that combines preexisting material, evincing originality in the way the material is selected, coordinated, and/or arranged.

17 U.S.C. § 103 · Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright

subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 101 Definitions

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

Comment:

3. In several respects the draft relegates statutory text to the Comments, for example Comment (a), page 11, lines 21-22 incorporates part of the § 101 definition of a compilation. Similarly, the statutory rules set out in § 103(a) and (b) are found not in the draft’s black letter, but in Comments (f) and (g). As indicated above, this is backwards. The norms set out in section 103 are “black letter,” not glosses. There is no reason – and no compelling explanation – for taking these parts of the statute and placing them in the Comments. By contrast, the draft’s § 2.02(b)’s black letter incorporation of the concept of “distinguishable variation” is a gloss. That phrase is not moored to the statutory text, where the requirement for a derivative work is that it be “based upon” a preexisting work and that, as to certain kinds of works, the modifications must represent an “original work.” Further, the draft’s black letter here is misleading in its adoption of the phrase “incorporating original expressive elements”: this makes it seem as if a derivative work must add to the underlying work(s), contrary to the statutory definition. Comment (a) acknowledges that subtractions from prior works can also produce a protectable derivative work, but why introduce complexity and confusion by demoting statutory language to a Comment?

§ 2.03. Fixation

(a) To **obtain** federal copyright protection a work of authorship must be fixed in a tangible medium of expression by or under the authority of the work’s author.

(b) To be “fixed” a **manifestation** of the work **must exist in stable form** for a period of more than transitory duration.

(c) A work exists in stable form for more than a period of transitory duration if an **instantiation** of the work is sufficiently stable **for the work to be exploited in some market**.

17 U.S.C. § 101 Definitions

A work is “fixed” in a tangible medium of expression when its **embodiment in a copy or phonorecord**, by or under the authority of the author, is **sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated** for a period of more than transitory duration. **A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.**

17 U.S.C. § 102 · Subject matter of copyright: In general

(a) Copyright protection **subsists**, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, **now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.**

Comments (in addition to my comments Nos. 15-16 [re black letter] and 23, 24, 26, 44 [re Comments] of Nov. 30, 2015)

4. The departures from statutory text here are pervasive, and both substantively and normatively troublesome. I have addressed some of the disparities above (“subsists” versus “obtain”), or in my previous comments, submitted Nov. 30 (the marketability condition).

5. In addition, the draft’s newly minted terms “manifestation” and “instantiation” not only are inconsistent with the statutory term “embodiment,” but introduce ambiguity and confusion. “Embodiment” supplies a limiting concept lacking in either “manifestation” or “instantiation.” Nor are the new terms, where they depart from the statutory text, seemingly justified by an effort to restate common law principles in the language of the common law: courts do not routinely use those words in their decisions interpreting the statutory term “fixed,” so, here, the black letter would not seem to represent a summary of how the principle of “fixation” might be “appropriately stated” by a court.

6. The phrase “a manifestation of the work must exist in stable form” does not mean the same thing as an “embodiment” that is “sufficiently permanent or stable to permit it [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The statute provides much more precision than “stable form” because it defines stability in terms of the actions – perception, reproduction or other communication of the work – that the embodiment enables. Conversely, those concepts have dropped out of the “black letter” principle, but without any apparent good reason.

7. The complete omission of the statutory rule of simultaneous fixation with transmission is mystifying. As some of the Advisers pointed out, this provision may be very important to ensuring the adaptability of the copyright law to digital media.

§ 2.04. Originality

Comment (in addition to Comments Nos. 45-54 of Nov. 30, 2015 regarding the black letter and Comments of § 2.04)

8. The Federal Copyright Act protects “original works of authorship” (§§ 101 definitions of “compilation” and “derivative work”; § 102(a); § 104(h)(6) defining a “restored work” as, inter alia an “original work of authorship”) but does not define the term “original work of authorship.” In the absence of substantial statutory guidance, much caselaw has addressed the issue. Originality therefore is an appropriate concept for a Restatement.

§ 2.05. Excluded Subject Matter: Works of the United States Government and Edicts of Law

(a) Works of the United States Government

(1) Copyright protection is not available for any work of authorship prepared by an officer or employee of the U.S. government as part of that person’s official duties, but it may be available for works of state, local, municipal, and foreign governments.

(2) Copyright protection is available for a work commissioned by the U.S. government and created by an author who is not an officer or employee of the U.S. government, or created by an officer or employee of the U.S. government but not as part of their official duties.

(3) The U.S. government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) Edicts of Law. Copyright protection is not available for any edict of federal, state, local, territorial, or foreign government, or any international agreement that operates as an edict of law, regardless of the status of the author. This rule applies to any edict of law, whether judicial, legislative, administrative, or in any other form.

17 U.S.C. § 105 Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

17 U.S.C. § 101 Definitions

A “work of the United States Government” is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.

Comments

9. The black letter here partly tracks the statute, but also incorporates judicial gloss. The black letter gloss (unlike some of the Comments – see my comments Nos. 55-57 of Nov. 30, 2015) by and large accurately represents judicial construction of § 105 in 2.05(a) and of constitutional norms in 2.05(b), but see comment 10 below.

10. Use of the phrase “is not available” in § 2.05(a), unlike the adoption of “is available” in § 2.01(a) (and the kindred “to obtain” in §§ 2.03(a) and 2.04(a)) is consistent with statutory language. By contrast, the use of “is available” regarding copyright in commissioned works or in works created by government employees outside their official duties is not appropriate, because copyright attaches automatically to these works (if original and fixed), so reference to availability improperly suggests additional conditions. The difference between “is available” and “is not available” may seem trivial and persnickety, but, as

elsewhere, it masks normative assumptions. Works of the U.S. government can be original works of authorship (if original and fixed) and copyright therefore would inhere, absent a specific disqualification. “Not available” in this context means that the work is otherwise copyrightable but for the status of its author.