Ms. Roberta Cooper Ramo, President
Mr. Douglas Laycock, 1st Vice President
Ms. Lee Rosenthal, 2nd Vice President
Mr. Wallace Jefferson, Treasurer
Mr. Paul Friedman, Secretary
Mr. Richard Revesz, Director
Ms. Stephanie Middleton, Deputy Director
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

October 14, 2015

Re: Restatement of the Law, Copyright

Dear ALI Directors and Officers:

We write to express our significant concerns about the forthcoming ALI project, Restatement of the Law of Copyright.

Copyright is a hotly debated topic today. There is significant disagreement about whether the greatest overall creativity and diversity of expression arises from strong copyright laws and the reliance on exclusive rights vested in authors, or from relaxing certain aspects of copyright laws to permit greater use of unlicensed copyrighted content. This disagreement is manifested in arguments over the interpretation of the current Copyright Act in the courts and in advocacy concerning potential changes to the Copyright Act in Congress. The decision to proceed with a Restatement of the Law of Copyright in this environment is troubling and controversial. Of even greater concern is that the conception of the project and the recent appointment of its Reporter indicate a significant risk that it would be used as a vehicle not to *restate* the law of copyright, but, rather, to *rewrite* it to benefit a particular viewpoint in the copyright debate.

This project commenced in response to a letter from Professor Pamela Samuelson to ALI in September 2013. https://wlflegalpulse.files.wordpress.com/2015/04/samuelson-letter-to-ali-leadership.pdf. Professor Samuelson has written prolifically to express her dissatisfaction with the current state of copyright law and to advocate substantial revisions, including reduced statutory damages, a narrow interpretation of the exclusive right to prepare derivative works, and shorter copyright terms. In her letter, Professor Samuelson makes clear her view that that advocacy in Congress and the courts will not have the same power to effect the changes she supports as will an ALI Restatement of Copyright. *Id*. at 3-4. Professor Samuelson points out in her letter that many people in the copyright community, including Register of Copyrights Maria Pallante, have called for changes in the Copyright Act, and acknowledges that Congress is considering these issues. But, she asserts that the pace of legislative change will be too slow, and suggests that a Copyright Restatement can fill the void. *Id.* at 5.

These goals are reiterated by Professor Christopher Sprigman – who was later appointed Reporter for this project -- in his September 2, 2014 memo to ALI Director Richard Revesz outlining his proposal for the Restatement project (attached). In the memo, Professor Sprigman states conclusively that the copyright law is in a "bad state" (Letter at 1), which is not a view shared by all or even most of the parties in the copyright community. He goes on to explain that the pace of legislative change in Congress will be slow and therefore, a Restatement could be influential "in shaping the law that we have, and, perhaps, the reformed law that in the long term we will almost certainly need" (*id*. at 3). These motivations – changing the law to support a certain viewpoint in ongoing policy debates concerning copyright and helping accelerate the rate of change – seem fundamentally inconsistent with the usual grounds on which ALI undertakes a Restatement project. Nevertheless, it is our understanding that Professor Samuelson's and Sprigman's letters were precisely the basis on which the ALI agreed to take up the Copyright Restatement project and express the goals for the project.

ALI is an enormously respected organization, and its Restatements are cited as highly persuasive authority in thousands of court cases, treatises and scholarly works. With rare exception, these Restatements address common law subjects such as torts and contracts, where judicial interpretations over time and across jurisdictions are susceptible to synthesis and summarization. By contrast, laws created through federal statute, such as tax and securities, are not appropriate for a Restatement because the law has been clearly articulated by a legislative body. This is so even though those areas of law are subject to interpretation by federal courts and accordingly take on elements of common law; are subject to conflicting interpretations by different courts; and require periodic correction by higher courts and Congress. Traditionally, ALI has not attempted to arbitrate these issues, presumably recognizing that laws dominated by federal statutes do not require restatement, and that an ALI Restatement is not an appropriate platform to effect changes in the law. Notably, many of the concepts Professor Sprigman proposes as suitable subjects for a Restatement (*see id*. at 3-4) -- including copyright term, the scope of exclusive rights and copyright formalities (such as registration requirements) -- are precisely the areas that are explicitly addressed in the Copyright Act and thus the least appropriate for restatement.

Our concern with this project is increased by ALI's choice of Professor Sprigman as lead Reporter. Professor Sprigman has, much like Professor Samuelson, consistently argued in favor of a limited scope of copyright and other forms of intellectual property.[1] He has signed numerous amicus briefs or was himself counsel in various contentious copyright cases, always arguing for a more restrictive view of the rights conferred by the Copyright Act – the most recent was filed a few months ago.[2]

He has even weighed in recently in the political arena, advocating to Congress that it should take a relatively narrow view of copyright, aimed at prioritizing the interests of "innovation" and a burgeoning "remix culture," over the rights of authors.[3] He

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[1] For example, in *Berne's Vanishing Ban on Formalities*, 28 Berkeley Tech. Law Journal 1565 (2013), he explains how "new-style" formalities (ones that do not prevent copyrights from being registered but merely restrict the remedies copyright holders enjoy such as preliminary injunctions and monetary awards) could be enacted consistent with the Berne Convention. In *Copyright and the Rule of Reason*, 7 Journal on Telecomm. & High Tech. Law 317, 340 (2009), he suggests that the law should be changed to shift the burden of proving harm in certain types of copyright infringement cases (primarily those involving derivative works) to the plaintiff, rather than allowing harm to be presumed. A complete list of his writings can be found here: https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=pubs&personID=37891.

[2] *See ABC et al. v. Aereo, Inc.* (US Sup. Ct.) (amicus brief filed April 2, 2014 in support of Aereo, found here: http://isp.yale.edu/sites/default/files/American%20Broadcasting%20Companies%20v.%20Aereo.pdf); *Authors Guild, et al. v. Google, Inc.* (2d Cir.) (amicus brief dated July 10, 2014 in support of Google found here: https://docs.justia.com/cases/federal/appellate-courts/ca2/13-4829/153); *Oracle America, Inc. v. Google, Inc.* (Fed. Cir.) (amicus brief in support of Google dated May 30, 2013 found here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272272); *Fox Broadcasting Co., v. Dish Network, LLC* (9th Cir.) (amicus brief in support of Dish Network dated January 24, 2013 found here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206972); *Kahle et al. v. Ashcroft* (9th Cir.) (Prof. Sprigman acted as counsel for plaintiffs in this case; the opening brief can be found here: https://cyberlaw.stanford.edu/files/publication/files/Amended%20AOB%20-%20Kahle.pdf); *Fox News Networks, LLC v. TVEYES Inc. (S.D.N.Y.)* (amicus brief in support of TVEYES dated June 17, 2015 found here: https://tushnet.files.wordpress.com/2015/06/ip_profs_tveyes_amicus_final.pdf); *Capitol Records, Inc. v. Thomas* (D. Minn) (amicus brief in support of Thomas dated June 13, 2008 found here: http://www.wired.com/images_blogs/threatlevel/files/tenprofessors.pdf).

[3] Earlier this year, a consortium of over sixty advocacy groups and individuals dedicated to preserving intellectual property rights wrote an "open letter" to the 114th Congress urging it to recognize the importance of IP to the American economy and to support robust protection of these rights. (http://www.propertyrightsalliance.org/userfiles/PropertyrightsalliancE_IPGuidelinesLetter.pdf). This letter prompted a response on March 9 from some 45 organizations and individuals, including Professor Sprigman, taking an opposing position. They urged Congress to allow an expansive interpretation of fair use, preserve safe harbors from infringement actions for online platforms and enforce copyright law only to the extent it does not "stifle innovation." (http://www.rstreet.org/wpcontent/uploads/2015/03/CopyofReCreatecopyrightlettertoHillFeb2015.pdf). The March 9 letter, while couched in terms of moderation, takes an extremely one-sided view of copyright. It argues that copyright is worth protecting only to the extent it furthers

also recently addressed the International Trade Commission, advocating that it should not exercise its existing authority to protect copyright holders in the digital environment.[4] The length and breadth of Professor Sprigman's advocacy on behalf of technology companies, and against the interests of creators and copyright owners, demonstrate that he is firmly on one side of this era's vigorous copyright debates.

Of course we recognize that Professor Sprigman is entitled to his views on copyright policy issues. However, we believe ALI expects its Reporters to have a more neutral view of the subject on which they are reporting. Indeed, ALI's own Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects (http://www.ali.org/doc/conflicts.pdf) states that "[r]eporters . . . should perform their responsibilities with the objectivity expected of legal scholars. Accordingly, they must exercise sensitivity to the risk and appearance of conflict of interest in their work for the Institute." Policy Statement at B(1).

It is not the purpose of this letter to argue one side of the copyright debate. Professors Samuelson and Sprigman have long-held strong views about copyright, and they are entitled to advocate for them. Rather, our purpose is to express our concern about the genesis and apparent objectives of the Copyright Restatement project. The Institute's reputation for objectivity and neutrality is one of its most valuable assets. We are concerned that the ALI will jeopardize this reputation by undertaking an advocacy-oriented project, under the banner of a Restatement, which is designed to recommend extensive changes in existing federal law and is led by a Reporter who has demonstrated a commitment to a particular viewpoint. While the appointment of a Reporter with such strongly held views and a record of activism might be questionable even for a Principles project, where the stated objective is to recommend changes to law, it runs contrary to and runs a high risk of compromising the objectivity of the effort for a Restatement project. If ALI chooses to proceed with the project, we will of course work with ALI to make sure the Restatement is just that – and not a brief for one side in ongoing policy debates. But we would be remiss in failing to raise these serious concerns now, before any draft Restatement is circulated, so that all appropriate steps may be taken to ensure that the project is executed with objectivity and impartiality.

Sincerely,

American Photographic Artists

American Society of Composers, Authors and Publishers

American Society of Media Photographers

Association of American Publishers

The Authors' Guild

Broadcast Music, Inc.

Church Music Publishers Association

Digital Media Licensing Association

Graphic Artists Guild

Independent Film & Television Alliance

The Association of Magazine Media

The Motion Picture Association of America

National Music Publishers Association

National Press Photographers Association

Nashville Songwriters Association International

Professional Photographers of America

Recording Industry Association of America

Society of European Stage Authors and Composers

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technological innovation and supports a "remix culture" in which copyrighted content is freely appropriated. These letters underscore the point that discussions about the future of copyright policy are alive and well in the legislative context, and as such, copyright is not an appropriate subject for a Restatement project.

[4] On April 10, 2015, Professor Sprigman weighed in on another highly contentious intellectual property matter, arguing to the ITC that it should circumscribe the impact of its holding regarding electronic transmissions in future cases to limit any beneficial impact to copyright holders. https://www.publicknowledge.org/documents/letter-to-the-international-trade-commission.

Attachment

To: Ricky Revesz **September 2, 2014**

From: Chris Sprigman

Re: Proposed ALI Restatement of Copyright Law

In this memorandum I will briefly outline a proposed ALI project to produce a Restatement of Copyright Law. Most importantly, I will explain why a Restatement in this field would be particularly valuable, provide an overview of the core areas of copyright law that would comprise the Restatement, and give you some sense of how I would organize the effort.

The Value of a Restatement of Copyright Law

As you know, I am convinced of the value of a Restatement in this area of the law. Copyright is a vital part of our American culture of innovation, and the subject of significant interest and controversy among policymakers and even in the public at large. Moreover, we benefit in the United States from an unusually high degree of clarity regarding copyright's purpose – the constitutional grant of power for Congress to make copyright (and patent) law sets out an explicitly utilitarian rationale, providing that Congress's grant of exclusive rights to authors must "promote the progress of science and useful arts". Given the law's importance to our culture and our economy, and in view of the constitutional mandate that Congress's copyright lawmaking must advance progress, we might expect that the copyright law would be a focus of significant ongoing study and improvement. Yet, by most accounts, copyright law is in a bad state, and has been for some time now. Among the public at large, and especially among young people, the law is widely disliked, and just as widely ignored. And despite significant efforts by private copyright owners and the U.S. government (in the form of criminal prosecutions, most recently of the owners of Megaupload, one of the leading "cyberlockers" and the platform for a very large amount of motion picture piracy), online copyright piracy is a major phenomenon that shows no sign of abating.

In part, copyright's current difficulties can be traced to the poor fit between a law that was conceived (for the most part) in the analog world of the 1970s and

the Internet and associated digital technologies, which took root almost two decades after our current copyright law was enacted and subsequently transformed how we create, distribute and consume culture.

In part, copyright law has foundered as the political economy of creativity has shifted. Copyright law was once made mostly for (and by) a small and close-knit group of large content producers. But with the arrival of the Internet, we've seen both an enormous growth in the number of content producers, and the rise of a technology industry that often finds itself at odds with the copyright policies favored by the incumbents in the music, motion picture, television, computer software and commercial publishing industries.

The result has been a marked decline in the effectiveness of copyright as a legal barrier to unauthorized copying, an explosion of piracy, and significant damage to at least some content producers. At the same time, critics of copyright law have begun to question whether copyright protection – at least of the scope and duration set out in current law – is indeed necessary to support the production of some important forms of creative work. Copyright's difficulties in adapting to new technologies, its decreasing effectiveness, the explosion of Internet piracy, the harm to some content producers and the apparent resilience of others, together create what seemed to be a perfect environment for a deep reevaluation of copyright law. And yet that has not happened.

Congress made some early attempts in the late 1990s to adapt copyright law to the digital age, but those reforms were, at best, incomplete. More recently, we've seen legislative stalemate. The most recent proposals for significant copyright law revision, the Protect IP Act (PIPA) and the Stop Online Piracy Act (SOPA), were abandoned in early 2012 after widespread public protests that included the blackout of Google, Wikipedia, Flickr, and a host of other leading websites. The House currently is holding hearings on copyright, but the expectation of almost everyone involved is that nothing will come of this latest initiative.

In sum, Congress is unlikely to proceed any time soon with copyright reform. As a consequence, it falls to the federal courts to attempt to improve the fit between a mid-20th century copyright law and 21st century digital technologies. Fortunately, the current copyright law is open-texted enough that its coherence and effectiveness could be advanced significantly via common law development. Unfortunately, however, aside from a few notable exceptions, there is a relatively low level of interest or expertise in copyright law among federal judges.

In light of these facts, I think it's plain that a Restatement of Copyright Law – at least if undertaken with the object of assisting the courts and mindful always of copyright's constitutional mandate to promote progress – could be enormously influential, both in shaping the law that we have, and, perhaps, the reformed law that in the long term we will almost certainly need.

How Best to Organize an Effort to Draft a Restatement of Copyright Law

The first thing to say is that it is unnecessary – and indeed would be folly – to attempt to draft a restatement that covers the entirety of the copyright law. A significant fraction of the copyright law is taken up with narrow, special-interest arrangements negotiated by specific industries. For example, the schemes whereby cable and satellite television providers are granted compulsory licenses to re-transmit television broadcast signals, in exchange for payment of a statutory fee. Or the provisions exempting certain small businesses from paying public performance licensing fees when they play music for their customers. These arrangements are typically negotiated by the relevant industry players, and ratified by Congress. Additionally, these provisions, because they are narrow and typically quite carefully specified, are litigated infrequently relative to the more generally applicable provisions of the Copyright Act, and are generally less susceptible to – or in need of – the clarifying effect of a Restatement.

For these reasons, a Restatement of Copyright Law should focus on the generally-applicable parts of the law – provisions that are, in any event, copyright law's viscera. These include

- the subject matter of copyright; including the boundary between copyrightable expression and uncopyrightable ideas, facts, systems, principles, processes, concepts, discoveries and methods of operation;

- the scope of the exclusive rights granted by copyright;

- copyright "formalities", including registration, notice, deposit, and recordation of transfers;

- the rules governing ownership and transfer of copyrights;

- the duration of copyright;

- the standard for copyright infringement;

- rules regarding the circumvention of copyright protection systems, and the removal or alteration or copyright management information;

- defenses to copyright infringement, including the first sale limitation and fair use; and

- remedies, including actual and statutory damages, the availability of attorneys fees, the availability and scope of preliminary and permanent injunctive relief; and the imposition of criminal penalties.

Each of these areas presents difficult interpretive questions. For example, in the first category, the subject matter of copyright, the statute makes clear that copyright protects creative expression and not facts (which are unprotectable by any form of IP) or useful things (which are the concern of patent law). And yet we see courts struggling to fix the boundaries that separate these categories. One example is the recurring question of what exactly is "creative expression". Do artistic gardens qualify? Sequences of yoga positions? Synthetic DNA? There have been significant copyright disputes relating to each of these. Another example is the persistent confusion over how to decide whether some potentially copyrightable thing should be denied protection because it is "useful". Apparel is useful, the courts say – and this extends to the $3000 cocktail dress that no woman buys for its warmth. On the other hand, jewelry is treated as purely ornamental and therefore copyrightable. Musical lullabies are not considered by the law to be useful, although I can attest that they are in fact employed to quiet babies. Toys are seen similarly as non-useful. This fundamental question of the boundary between copyright and patent law is urgently in need of rationalization. Although courts have developed several tests for separating useful articles from merely expressive ones, both the tests themselves and the results they yield seem nearly random.

Or take the fair use doctrine. In recent years, prompted in part by academic work by Judge Pierre Leval and others, courts have begun to employ the concept of "transformativeness" as an important element of the fair use analysis. But as courts have moved toward recognizing that a defendant's transformation of a plaintiff's work can be a key that unlocks fair use, they have

produced conflicting, poorly reasoned, and sometimes even unreasoned opinions regarding exactly what qualifies as "transformation". Is a transformative use necessarily one that shifts the *meaning* of the plaintiff's work? Or does a defendant who provides a new *use* for plaintiff's work, but does not change the work itself, also make a transformative use? This broader understanding of transformative use was accepted by the Second Circuit in the recent lawsuit brought by the Authors' Guild against Google and the Google Books Project. Google's digitization of many thousands of copyrighted books did not transform the content of those books in any way – the whole point of the project was to copy the books verbatim. But Google's use, the court held, qualified nonetheless as transformative. Google was not copying the books to publish them, but rather to build a searchable database that the public would use as a research tool.

Is this concept of transformativeness and the expansion of fair use that attends it consistent with copyright's purposes? Can it be squared with our prior understandings of the scope of the defense? These are questions that courts will be obliged to answer in the coming years, and carefully-reasoned guidance from a Restatement of Copyright Law is bound to have a substantial role in shaping the law.

Finally, a word about administration. I envision dividing principal responsibility for the subjects I have listed above among four Associate Reporters (I would like to name Profs. Neil Netanel (UCLA), Molly Van Houweling (Berkeley), Tony Reese (UC-Irvine) and Lydia Loren (Lewis & Clark) to these positions). I would participate in the deliberations and drafting process for all of the categories, though I would depend on each of the Associate Reporters to exercise substantial responsibility within the categories entrusted to them. I have candidates in mind, though I would want to review them with you. I have also thought about senior lawyers, judges and academics in the copyright field who would be suited for service as Advisers. If this project is approved, I am confident we could be ready to begin work promptly, and I would aim to produce a first draft within 18 months.

Thank you, and of course please do not hesitate to contact me with any questions.

Yours,

Chris Sprigman