

Proposed Amendment to p. viii of Tentative Draft No. 2

Submitted by: Shyamkrishna Balganes, Jane Ginsburg, Peter S. Menell, and David Nimmer

WHEREAS the *Restatement of the Law, Copyright* purports to restate the law of federal copyright without adopting a methodology that accounts for the presence of a comprehensive federal statute in the field,

WHEREAS the Founding Director of the American Law Institute, William Draper Lewis, stated that in dealing with a subject that “depends . . . on a federal statute . . . it is obvious that the Restatement, if it deals with the subject at all, must set forth the statutory provisions as Principles of Law . . . printed at the head of the section,”¹

WHEREAS the Register of Copyrights, who heads the U.S. Copyright Office, which administers the federal copyright system, has emphasized that the *Restatement* should be “centered on the statutory text” since “there is no substitute for the words of the statute itself,”²

WHEREAS respected federal judges have emphasized the need for the *Restatement* to “put the statutory text first” and that it is a “very odd approach” and “will not be helpful” to judges without “put[t]ing the statute front and center,”³

WHEREAS the project leadership and the ALI Council have rejected multiple calls from Advisers for the *Restatement* to implement a modified methodology and template that would recognize the primacy of the statute and the role of legislative history in interpreting the statute,⁴

THEREFORE we propose that on p. viii of Tentative Draft No. 2, the following be included:

The following Advisers oppose approval of Tentative Draft No. 2 for reasons including its failure to treat the text of the Copyright Act as blackletter rules:

SHYAMKRISHNA BALGANESH, Columbia Law School, New York, NY

JANE GINSBURG, Columbia Law School, New York, NY

PETER S. MENELL, University of California, Berkeley School of Law, Berkeley, CA

DAVID NIMMER, Irell & Manella, Los Angeles, CA

¹ American Law Institute, Report on Business Associations by William Draper Lewis 78 (1924). Relevant portions of the Report are appended herewith.

² Letter from Shira Perlmutter, Register of Copyright to Richard Revesz et al. (May 21, 2021), at 1-2.

³ The Restatement of Copyright Law: Past, Present, and Future, Symposium at Columbia Law School, April 23, 2021 (statements of Judge Jon Newman and Judge Stephanos Bibas), <https://bit.ly/3p3bDHx> at 2:03:05 et seq.

⁴ Letter from Shyamkrishna Balganes, Peter S. Menell, and David Nimmer to the ALI Council (Jan. 18, 2021); Letter from Shyamkrishna Balganes, Graeme Dinwoodie, Peter S. Menell, and David Nimmer to the ALI Council (Jan. 11, 2018).

1143

Report No. 5
Business Association
11-1-24

The American Law Institute

REPORT *of*

ON

BUSINESS ASSOCIATIONS

by

WILLIAM DRAPER LEWIS, *Director*

NOVEMBER 1, 1924

0

US
903.1
AMC

ciple of Law and may also contain Comment and Illustrations. A Principle of Law is a direct statement of law printed at the head of the section. Comment consists either of direct statements of law, or of reasons for the statements of law made in the Principle of Law or Comment, the reasons being stated in a non-argumentative manner.

The first suggested Rule for the treatment of statutes is as follows:

Rule I. *When the subject under consideration is Uniform Statutory Law, the statutory or constitutional provision may be set forth in the Restatement as a Principle of Law or Comment.*

As has already been pointed out, the subject under consideration is Uniform Statutory Law only when the law depends on the Federal Constitution, a Federal statute, or a statute adopted in practically all the States. Under these conditions it is obvious that the Restatement, if it deals with the subject at all, must set forth the statutory provisions as Principles of Law or Comment.

It may be asked: "Wherein is the law either clarified or simplified by merely stating the words of the statute?" The mere reprinting of a constitution, or statute in the form of a series of Principles of Law, or statements of law in Comment, of course, does not by itself either clarify or simplify the law; but it does enable the Restatement intelligently to set forth in conjunction therewith interpretative principles concerning which much confusion may exist. For instance, if the subject were the Federal Constitution, or the Negotiable Instruments Act, though the various Sections of the Constitution and the Act would naturally be set forth as Principles of Law in the Restatement, the real value of the Restatement would consist in the clarification of the interpretative principles.