

To: The Members of the American Law Institute  
From: Simon Barsky  
Re: Restatement of the Law, Copyright, T.D. No. 6

As a Life Member of the Institute, it has been my honor to participate in its work for over a quarter of its life, and, among the other projects in which I have participated, to serve as an Adviser to the Restatement of the Law, Copyright for the last decade.

Part of the Institute's ethos, which I particularly value, has been 1) its commitment to creating high-quality, accurate, and needed legal commentaries that serve its core mission of clarifying, simplifying and improving the law, and 2) its ability to recognize when it has fallen into error, and not to persist in projects that ill-suit its mission.

When I joined the Institute, it was engaged in a multi-year effort with its Uniform Law Commission (ULC)<sup>1</sup> partner in the creation of a new Article 2B of the Uniform Commercial Code, for the first time setting out rules treating the license of software and most other digital media (including music, motion pictures, and video games) as a sale of goods and importing a set of warranties and obligations at variance with existing law and commercial practice. After protracted vigorous debate, when the Institute realized that the product was so flawed as to not constitute a worthwhile addition to the law, it withdrew its co-sponsorship of the effort, relegating the project to a ULC-only draft that was adopted in only two states and rejected in most others, with some adopting legislation specifically directing that software licenses were *not* to be construed pursuant to the laws of those two states.

I am concerned, for the reasons expressed in memoranda posted for this meeting and with which I associate myself<sup>2</sup>, that (to paraphrase)

while the basis of prior Restatement efforts of the Institute has been the ability of courts to trust that the process by which a Restatement was produced to reflect a transparent deliberation and broad agreement among a body of experts, just the opposite has occurred with the Restatement of Copyright before you. This draft does not reflect a consensus or even broad agreement of the Adviser, MCG or Liaison group, nor does it adequately address the innumerable objections made by the group as well as, and especially, by the U.S. Copyright Office. Yet, the draft and the Reporter's communications to the membership misleadingly suggest that its positions were derived and faithfully synthesized from the inputs of its participants as well as of the U.S. Copyright Office, when in fact the drafts have taken positions directly contrary to those of that statutorily created agency (and in the face of its repeated objections, as documented in the Office's many comments throughout the process) and of many of the Advisers and other participants. 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.<sup>3</sup>

Please see the full text of these memoranda for a fuller (and more eloquent) rendition of the defects of the Tentative Draft.

I, too, respectfully express my dissent from the current version of the draft Restatement before this body, and join the request of Professor Trimble and the Copyright Alliance that a "clear and conspicuous disclaimer" as described be added to the final version of the Restatement to state

that “the project does not represent the views of many of the Advisers, members of the Consultative Group, and Liaisons who participated in the project”. In the absence of such a disclaimer, I, with regret, request that my name be removed from the list of Advisers to the project.

I had hoped that improvements in this draft, or even a conversion of the project, given its overall *aspirational* rather than *accurate* statement of the law and its trends, to a Principles Project, be effected. Indeed, I had formulated and submitted a motion for this meeting in the form of a substitute for the Boskey Motion to refer the Restatement to the ALI Council with the recommendation to convert the project from a Restatement to a Principles Project, as under ALI Bylaw 4.01, only the Council has the authority to make such a change. I was advised that such a motion would not be considered at the meeting, as it was “out of order.”

I would have hoped that preventing the Institute as it enters its second century from serious error would not be considered “out of order.” I hope the Membership agrees.

Respectfully submitted,

Simon Barsky  
Valley Village, California

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<sup>1</sup> Formerly known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

<sup>2</sup> a. May 8, 2025 Memorandum from Keith Kupferschmid on behalf of the Copyright Alliance

b. May 12, 2025 Memorandum from Professors

Shyam Balganes, 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. Mr. Nimmer has served as a Professor at  
UCLA School of Law and as a Distinguished Scholar at the Berkeley Center for Law and  
Technology

c. May 14, 2025 Memorandum from Professor Marketa Trimble

d. May 15, 2025 Memorandum of Resignation from the Restatement project, from Advisers and  
Liaisons

Cynthia Arato

Kenneth Doroshow

Keith Kupferschmid

Mary Rasenberger

Suzanne Telsey

Dale Cendali

Michael Fricklas

Dean Marks

Jay Rosenthal (deceased)<sup>4</sup>

Suzanne Wilson

Jacqueline Charlesworth

Janet Fries

Mickey Osterreicher

Benjamin Sheffner

<sup>3</sup> May 12, 2025 Memorandum from Professors Balganes, Ginsburg, Menell, and Nimmer

<sup>4</sup> Mitchell, Silberberg and Knupp, the firm where Mr. Rosenthal worked, and the National Music Publishers Association, the group Mr. Rosenthal represented while working on the Copyright project, have asked that his name be removed as an Adviser on any future publications of the Copyright project.