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January 15, 2021

The American Law Institute
 4025 Chestnut Street
 Philadelphia, PA 19104

Submitted via online portal

Re: ALI Copyright Restatement Council Draft No. 5

Dear ALI Council Members:

We write regarding the American Law Institute (“ALI”) Restatement of the Law, Copyright (“Copyright Restatement”) project’s Council Draft No. 5.

IPO is an international trade association representing a “big tent” of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO’s mission is to promote high quality and enforceable intellectual property rights and predictable legal systems for all industries and technologies. Our vision is that this will result in the global acceleration of innovation, creativity, and investment necessary to improve lives.

We thank ALI for allowing IPO to participate in the Copyright Restatement project. As we reviewed Council Draft No. 5, however, we found that our earlier concerns about the Copyright Restatement, as stated in our letter of October 16, 2019, remain salient. Our primary concern is that the draft, in many places, is inconsistent with existing copyright law. As a result, the Copyright Restatement is at risk of being unhelpful to courts and litigants and, should these inconsistencies go unnoticed, courts may issue decisions based on an erroneous view of the law. IPO understands that many other stakeholders have raised concerns about the issue of inconsistency, as well as about the process and format of the Copyright Restatement.

In light of these ongoing concerns, we recommend that the Council closely reconsider whether a statutory scheme as detailed as the Copyright Act requires a restatement and whether the Copyright Restatement as drafted would meet ALI’s historical standards. In our view, the Copyright Act does not require restatement

but, if the project is to proceed, the Restatement is in need of much improvement before approval.

We are aware that sections of the Copyright Restatement that already have been approved by the ALI Council, and potentially sections in Council Draft No. 5 that could be approved at your next meeting, may be presented to ALI's members for approval at their next meeting. In light of our concerns, we do not believe the Copyright Restatement is ready for that step, particularly given that many of the sections of the restatement interrelate (and updates to one section require revisions to many others). Thus, if the project is to proceed, we strongly encourage the Council to wait until a full draft can be presented to the ALI membership.

With respect to Council Draft No. 5 specifically, although we trust that other stakeholders will provide line-by-line comments and edits, in addition to our general concerns as stated above, we specifically provide comments on three parts of the draft.

First, Comment *f* in § 2.05 states that an opinion expressed as a number, letter, symbol, or short phrase is not copyrightable. Yet, as the draft indicates, this is not a restatement of the law. Rather, Comment *f* is in direct conflict with two court of appeals decisions that held that such opinions that were produced by personal judgment and therefore showed the requisite creativity for copyrightability were protected. *See CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999); *CCC Information Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994). This position also conflicts with a series of undisclosed cases that have held that copyright protects words or short phrases that are creative. *See Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1362 (Fed. Cir. 2014); *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 52 (1st Cir. 2012). Although the draft relies on *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.* to support its decision, *NYME* was decided on the basis of the merger doctrine, not the words and short phrases doctrine, and explicitly accepted *CCC's* reasoning for the purposes of deciding the case. 497 F.3d 109, 115–16 (2d Cir. 2007). There are two lines of cases with contradictory holdings, but *NYME* is not described correctly.¹ To the extent that the Reporters disagree with the binding precedent of the Second and Ninth Circuit, such disagreement is better reserved to a Reporter's Note or omitted from the Copyright Restatement entirely. It does not belong in the draft's comments, which we

¹ The other cases on which the draft relies similarly are distinguishable. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 644 (7th Cir. 2003) (holding that plaintiff could not assert a copyright claim when defendant sought only to copy underlying facts, not plaintiff's original arrangement); *BanxCorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 303 (S.D.N.Y. 2013) (holding average interest rates to be uncopyrightable where "simple mathematical average[s]" were computed by an "industry standard" method with no weighting or judgment and the output "clearly attempt[ed] to measure an empirical reality"); *RBC Nice Bearings, Inc. v. Peer Bearing Co.*, 676 F. Supp. 2d 9, 22–23 (D. Conn. 2009) (holding that judgment required for determining load ratings for ball bearings was "very minimal" and based on "industry guidelines" and the ratings were therefore "mechanical derivations" rather than copyrightable expression).

understand are intended to restate the law as it exists, not to advocate for changes in the law.

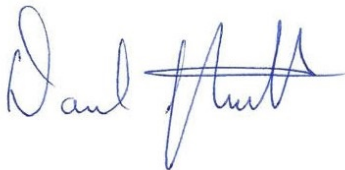
Second, in § 6.02, comment *b*, the draft asserts that a work is fixed when it exists long enough to “permit the enjoyment or exploitation of the work’s expressive content.” As has been pointed out by the Copyright Restatement’s Advisors, this language does not appear in the statute or in any judicial opinion. Even the cases on which the draft relies use the more appropriate statutory definition of fixation. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (considering whether copy exists for “more than transitory duration”); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (same). Thus, again, instead of restating the law, the draft has created a definition that diverges from the statutory definition and does not align with precedent.

Third, some comments heavily cite case law, while others have few or no citations. For instance, in § 2.05 and § 6.06, relevant cases are discussed in the comments at length. In contrast, in § 6.04, comment *c* references “judicial opinions that have examined the issue” of transmission as a violation of the distribution right and Comment *d* mentions what “[s]ome courts have held,” but the two comments have only one case citation, instead relegating the cases to the unauthoritative Reporter’s Note. It is unclear why the draft uses different approaches. Given that this is an issue that pervades the Copyright Restatement, we reiterate our suggestion that either ALI abandon the project or wait for a complete draft that it can consider as a whole.

* * *

We thank ALI for considering IPO’s comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,

A handwritten signature in blue ink that reads "Daniel J. Staudt". The signature is written in a cursive style with a large, stylized initial "D".

Daniel J. Staudt
President