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