

## Between Code and Treatise: The Hard Challenge of the Restatement of Copyright

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The proposed Restatement of Copyright raises a question that has been obvious to everyone from the very start of the project: How do you restate an area of the law governed by a comprehensive federal statute? Restatements have, to date, focused near-exclusively on common law subjects. The Reporters of other Restatements thus did not operate in the shadow of an authoritative uniform federal statute. Instead, they faced an unruly and “ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States.”<sup>1</sup> From this mass of decisions, the Reporters derived the “black-letter law” and “restated” the law in a form resembling a code.<sup>2</sup> In doing so, reporters sought to bring order, clarity, and coherence to a body of law that lacked any other means of doing so. But if this act of restating the law in the form of a code is a central feature of a Restatement, then how do you restate an area of law that already has a comprehensive code? What is to be gained by essentially *re-codifying* the law?

Two Articles in this Special Issue provide two different answers to this question. Professors Jeanne Fromer and Jessica Silbey argue that a Restatement of Copyright can still be valuable because, although there exists a comprehensive copyright statute, much of copyright law is still judge-made.<sup>3</sup> In some cases, this is because the statutory language is open-ended, and the many federal courts have interpreted statutory terms in varying ways in the forty-plus years since the current Copyright Act was passed. In other cases, this is because the statute expressly delegates to the

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1. RESTATEMENT OF THE LAW, COPYRIGHT, at xi (AM. L. INST., Tentative Draft No. 1, Apr. 8, 2020) [hereinafter Restatement Tentative Draft No. 1 (2020)] (quoting AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (rev. ed. 2015) [hereinafter ALI, CAPTURING THE VOICE]).

2. *Id.* (“Restatements—‘analytical, critical and constructive’—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute’s founders envisioned a Restatement’s black letter statement of legal rules as being ‘made with the care and precision of a well-drawn statute.’” (quoting ALI, CAPTURING THE VOICE, *supra* note 1, at 5)).

3. See Jeanne C. Fromer & Jessica Silbey, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J.L. & ARTS 341 (2021).

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federal courts the task of implementing and articulating broad standards.<sup>4</sup> In still other cases, this is because the statute is built upon a foundation of pre-existing common law concepts.<sup>5</sup> In any case, a codification of these open areas of law can play a valuable and legitimate role by stating the black letter law and bringing order and coherence to a body of judge-made law.

Professors Shyamkrishna Balganesh and Peter Menell see a more fundamental problem with the Restatement project, as currently structured.<sup>6</sup> Judges writing copyright opinions are not acting as common law judges, free to adapt and change the law in response to broad principles. Instead, they are interpreting a statute, and thus are bound by the text and the interpretive methods (often contested) used to make sense of that text. Any attempt to “restate” the law is problematic because it displaces the primacy of the statutory text. The conventional approach taken by common law Restatements is thus ill-suited to a statutory area of law. Nevertheless, Balganesh and Menell believe that the Restatement project can be saved. Instead of attempting to restate the law, the Restatement should simply quote the relevant portion of the text of the statute. It should then follow this with a new section incorporating the relevant legislative history and other interpretive materials, before moving to the usual Comments and Reporters’ Notes. Thus properly reconfigured, the Restatement can still serve as a useful resource for federal judges dealing with open areas of copyright law.<sup>7</sup>

Although both Articles adopt very different attitudes towards the Restatement project, they share the view that the Restatement, whether in its current or a modified form, is a legitimate exercise and can serve a valuable role in bringing clarity to open areas of copyright law. From the start, the Restatement of Copyright has faced strong objections due to the statutory nature of the subject. Industry participants, agency officials, and even legislators have expressed concerns that the Restatement is an attempt to sideline the statutory text, to replace the positive law of copyright with a parallel code reflecting the policy preferences of a group of academics.<sup>8</sup> To address these concerns, Fromer and Silbey emphasize the conventional nature of the Restatement project. The Restatement falls within a long tradition of “re-telling” the law,<sup>9</sup> and the resulting provisions are “routine and straightforward. They will surprise no one and are almost boring in their adherence to and synthesis of the

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4. See, e.g., 17 U.S.C. § 107.

5. For example: originality, initial ownership, and infringement.

6. See Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285 (2021).

7. Note that as a latecomer to the Restatement debate, I do not have a stake in the controversies that led to the decision to proceed with the Restatement of Copyright. Thus, in this Response, I do not engage with the parts of both Articles that recount those controversies. Instead, my focus is on the current results of the Restatement process.

8. See Justin Hughes, *Restating Copyright Law’s Originality Requirement*, 44 COLUM. J.L. & ARTS 383, 386–87 (2021).

9. “Stating the law, saying what it means, and then applying it in a particular context are what lawyers and judges do all the time. In this way, restating—or ‘retelling’—the law is both normal and inevitable. A restatement of law is another way of saying what the law is.” Fromer & Silbey, *supra* note 3, at 343.

copyright statute and judicial interpretations of it.”<sup>10</sup> Balganes and Menell, by contrast, address concerns about legitimacy by essentially abandoning the task of restating the law and substituting the text of the statute itself. In this way, the Restatement does not seek to usurp the statutory text, but is instead a helpful supplement.

Yet in bolstering the legitimacy of the Restatement in these ways, the two Articles reveal another problem: a mismatch between what the Restatement of Copyright is and what it is perceived to be. The Restatement of Copyright, as envisioned by both Articles, resembles less a “codification” or a “well-drawn statute”—less a Restatement—and more a treatise or an annotated code. As Fromer and Silbey indicate, many of the provisions of the draft Restatement are indeed “routine and straightforward,” largely because they repeat what can be found in a copyright treatise or casebook.<sup>11</sup> And a Restatement configured along the lines Balganes and Menell suggest resembles a sophisticated annotated code, starting with the statutory text and then providing supporting interpretive materials and commentary. This is not to understate the value of such an undertaking. In both cases, the resulting work can be valuable. Yet the result falls short of what many expect a Restatement to be.

This is because a restatement of a common law subject is different, not only because the subject lacks a comprehensive statute, but because of a fundamental difference in *institutional structure* giving rise to the law. For a common law subject, there is no higher authority. The common law is found in decisions scattered across fifty-plus jurisdictions, and there is no institutional body charged with unifying or making sense of this mass of decisions. A common law Restatement thus stands alone, free to restate the law in the form of a code, to create a new centralizing and generative text, without concerns about repeating another code, and without the need to make its pronouncements consistent with those of any other institutional body. It is free to redefine terms, articulate broad principles, and restructure and organize the law. And although treatises for such common law subjects exist, they generally do not attempt to restate the law in the form of a code. A common law Restatement sits comfortably between the unruly body of common law and already-existing treatises.

The Restatement of Copyright enjoys no such freedom. Not only is it hampered by the awkward fact of an already-existing codification of the law. It is also not free to fully restate the law according to its own conception of what the law is or should be. Instead, it is bound by the authority, text, structure, and policies of the statute. And worse, not just by the statute, but by the authoritative decisions of the U.S. Supreme Court interpreting that statute. Thus, unlike a common law field, copyright already has a surfeit of authoritative centralizing institutions, expressly charged with resolving conflicts among courts and bringing order and consistency to the doctrine. The Restatement of Copyright must thus limit itself to the more modest task of

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10. *Id.* at 344.

11. This is not to say that none of the Restatement provisions is controversial. Indeed, some of the proposed provisions have generated a good degree of criticism and opposition. *See, e.g.*, Eric J. Schwartz, *Restatement of the Law, Copyright: A Useful Resource for Practitioners and the Courts or a Rashomon Exercise?*, 44 COLUM. J.L. & ARTS 425, 426–31 (2021). However, other provisions have not proven controversial.

working in the interstices, restating the parts of copyright law that have not yet been settled by Congress or by the Supreme Court.

The Reporters of the Restatement of Copyright thus face the unenviable task of steering a narrow course between the authoritative code, as interpreted by an authoritative court, on one hand and the many, already-existing copyright treatises on the other. And in doing so, the Reporters risk creating a gap between what the Restatement is and what many perceive it to be. A more constrained Restatement, as described above, sits in some tension with common understandings of what a Restatement is. This may explain why the project has been so controversial from the start. Why, in the end, is a Restatement necessary if we already have a code on the one hand and a number of treatises on the other? What distinct value does the Restatement add, if it cannot uniquely play the centralizing, codifying, and rationalizing role that other common law Restatements play?

In this Response, I will try to develop these arguments in more detail while commenting on the two articles described above. I start by focusing first on the way the two articles differ in their attitude towards the Restatement's central task of restating or recodifying copyright law. I then turn to the ways the two articles find common ground in their belief that a Restatement, in either its current or modified form, can play a legitimate and useful role in helping to clarify the open-ended areas of copyright law. I conclude by offering a number of thoughts and suggestions.

## I.

The two Articles described above differ significantly, and in interesting ways, in how they view judicial development of copyright law, and this directly affects their attitudes towards the Restatement of Copyright's central task: restating or codifying copyright law. Fromer and Silbey see little difference between restating traditional common law subjects and restating the portions of the Copyright Act that require the federal courts to interpret broad statutory terms or develop the law in a common law fashion. In both cases, the courts are given discretion to develop the law as they see fit, in accordance with broader principles and policies. In these areas, a Restatement can helpfully organize the body of potentially conflicting case law. Fromer and Silbey acknowledge that there are other parts of copyright law where Congress has legislated in exacting detail, and where courts do not have much discretion. In these areas, a Restatement approach may not fit, but in their view, these areas are peripheral to the larger body of judge-made law, the exception and not the rule.<sup>12</sup>

Balganesh and Menell, by contrast, see a more fundamental difference. Even in areas of copyright law where the law is unclear and judges have some discretion, that discretion is bounded by the methods and practices of statutory interpretation. Courts must look to the text, the legislative history, and/or the context in order to find the

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12. Fromer & Silbey, *supra* note 3, at 363. Note that it is not entirely clear from the Article precisely what Fromer and Silbey would do with these detailed provisions of the code, i.e., try to restate them despite the ill fit or exclude them from the Restatement entirely. Although they do not explicitly lay this out, I believe that their argument best suits the latter approach, although I want to make clear that this is my view, not necessarily theirs.

right answer. In their Article, Balganes and Menell explore the early hostility the ALI's Restatement project evinced towards statutory subjects and argue that many of the reasons for that hostility continue to apply today. Balganes and Menell unearth a historical precedent, the ALI's abandoned attempt to restate the law of business associations, which illustrates a "deep mismatch" between the Restatement methodology and a statutory subject.<sup>13</sup> Balganes and Menell then use the debate over the proper scope of the public distribution right to highlight the way judges engage with legislative materials in a way fundamentally different from that of common law judges. This fundamental difference requires changes in the typical methodology employed by the Restatements. Balganes and Menell are thus far more skeptical of the current approach.

I confess that my own sympathies lie with Balganes and Menell on this score. To some extent, one's view about the propriety of restating copyright law may depend on how one sees the Copyright Act as a whole, and the balance between the provisions that are open-ended and the provisions that are specific and detailed. The Copyright Act of 1976 is, in many ways, a hybrid act.<sup>14</sup> Parts of the Act do delegate a tremendous amount of discretion to the federal courts to develop the law in a common law-like fashion.<sup>15</sup> At the same time, other parts of the Copyright Act are exquisitely and sometimes painfully detailed.<sup>16</sup> Fromer and Silbey view the latter portions of the Copyright Act as "peripheral." I am not so sure, and this may affect my perspective on the wisdom of restating a statutory subject.<sup>17</sup>

More fundamentally, even in areas where the law is uncertain or open-ended, restating a statutory subject raises questions, not just about legitimacy (which seems to be the main concern of Fromer and Silbey), but of practical value and effect. A Restatement is more than just a useful reference work, or in Fromer and Silbey's terms, a "re-telling" of the law. Rather, it is, or aspires to be, a codification of the law: "Restatements—'analytical, critical and constructive'—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute's founders envisioned a Restatement's black-letter statement of legal rules as being 'made with the care and precision of a well-drawn statute.'"<sup>18</sup> This is reflected in the way the Restatement's sections are drafted, appearing for all intents and purposes like a statute. It is also reflected in how courts typically cite Restatement provisions, as persuasive statements of the law, rather than looser summaries; as another authority, rather than just the view of another treatise.<sup>19</sup>

13. Balganes & Menell, *supra* note 6, at 301–05.

14. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004); see also Shyamkrishna Balganes, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101 (2020).

15. For example: originality, initial ownership, infringement, third-party liability, and fair use.

16. For example: termination of transfers, limitations on public performance rights, statutory licenses for musical works, sound recordings, and cable and satellite television broadcasts.

17. It is hard to imagine how the Restatement will "restate" a provision like § 115, which is the result of intense interest group bargaining.

18. ALI, *CAPTURING THE VOICE*, *supra* note 1, at 5.

19. The Restatement is careful to note that it does not aspire to the authority of an actual statute: "Although Restatements are expected to aspire toward the precision of statutory language, they are also

Yet if a Restatement is a codification of the law, then a Restatement of copyright law is a *re*-codification of the law, since a code already exists. In restating a common law subject, the value of codification is clear, as there exists no similar authoritative code. But when there already exists a code, this raises the inevitable question: What is the value of restating the code? What is the value of constructing, in effect, a parallel code? And could the construction of such a parallel code do more harm than good? This is not a question that common law Restatements face since they do not have to compete with or operate in the shadow of a comprehensive code.<sup>20</sup>

One possibility is that, in some areas, recodification adds no value at all, and indeed the draft Restatement of Copyright seems to acknowledge this at points. For example, § 2 of the draft Restatement repeats nearly-verbatim portions of the text of § 102(a) of the Copyright Act, listing the “works of authorship” protected by copyright law.<sup>21</sup> Similarly, in §§ 3 and 4, the draft Restatement quotes verbatim from the statute’s definitions of “derivative work,” “compilation,” and “collective work.”<sup>22</sup> Section 8’s treatment of “fixation” also largely quotes the relevant statutory language.<sup>23</sup> In these places, the draft Restatement seems to recognize that nothing would be gained by rewriting the statutory provision in its own words.<sup>24</sup>

Another possibility is that recodification allows for a reorganization of statutory provisions that makes the new codification more useful to judges and practitioners by collecting a number of related doctrinal issues or providing a conceptual framework for understanding scattered and disparate provisions. Thus, § 1 of the draft Restatement collects in one place many of the requirements for copyrightability that are found in different sections of the Copyright Act.<sup>25</sup> The idea appears to be to collect in one place all, or at least many, of these requirements to make it easier for judges or practitioners to determine when a work is protected. This also allows the draft Restatement to bundle these issues conceptually and comment upon them as a whole.

A third possibility is that, in the areas of copyright law that are more expressly common law in nature, the Restatement will act as a true initial codification, insofar as the statutory text runs out. In these areas, the body of judge-made law truly resembles that of other common law Restatement subjects. Thus, in the areas of infringement, fair use, and others, the Restatement may in fact provide the kind of initial codification that has thus far been missing, a new text where none existed

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intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.” Restatement Tentative Draft No. 1 (2020), at xi (quoting ALI, CAPTURING THE VOICE, *supra* note 1, at 5).

20. Note that model codes also do not typically face this problem since, although there may be many codes in many jurisdictions, there is usually no single authoritative code that the model code must compete with.

21. Restatement Tentative Draft No. 1 (2020) § 2(a), at 9 (quoting 17 U.S.C. § 102(a)).

22. *Id.* §§ 3(a), 4(a), 4(b), at 26, 44 (quoting 17 U.S.C. § 101).

23. *Id.* § 8, at 74 (quoting 17 U.S.C. § 101).

24. In some instances, this recognition came in response to objections to initial efforts to restate some of these provisions. *See, e.g., id.* (fixation).

25. *Id.* § 1, at 1.

before. Fromer and Silbey argue that the value of the Restatement lies primarily in these areas of copyright law, and acknowledge that it may be of less value in the more detailed areas of the Copyright Act.<sup>26</sup>

Although there may well be value in such a recodification, there are risks as well. Just as the creation of a parallel code may clarify parts of the Copyright Act, it may also create more complexity and confusion. Courts and practitioners, in using the Restatement, will need to map its provisions to the relevant sections of the Copyright Act, since, as Balganesch and Menell argue, the actual text of the Copyright Act controls. Thus, there is a practical limit on the ability of the Restatement to comprehensively reorganize the field, as it must track in some way the governing statute. Moreover, it could be argued that the structure and framework of the Copyright Act itself is most important for judges and practitioners to understand, and thus any re-organization of the doctrines may not only be unhelpful but stand in the way of such an understanding. Indeed, as Balganesch and Menell argue, it may have the effect of obscuring the statutory origins of some doctrines and the need to consult materials relevant to statutory interpretation.

Finally, there is the risk that, in restating certain provisions or doctrines, the Restatement may introduce new terminology and ambiguities. One of the benefits of a common law restatement is the use of consistent and precise terminology in the face of many inconsistent or loose terms used in many jurisdictions. This kind of precision is helpful in bringing conceptual clarity and consistency to doctrines across jurisdictions. Any divergence between the terms used in particular jurisdictions and those used by the Restatement can be justified by the desire to bring uniformity and conceptual clarity to a common law field. Where there exists an authoritative statutory text, however, introducing new terms or formulations risks creating new uncertainties.

Professor Justin Hughes's contribution to the Special Issue provides a nice example of the risks posed by restating doctrinal or statutory terms.<sup>27</sup> Sections 5, 6, and 7 of the draft restate copyright law's "originality" requirement. Section 5 sets forth the black letter understanding of the statutory term "original," as consisting of two elements: (1) independent creation; and (2) minimal creativity.<sup>28</sup> Hughes notes in passing the draft's choice of "minimal" creativity, rather than a "modicum" of creativity, a formulation that appears more commonly in the case law, and wonders why the Reporters for the Restatement made this choice, as there is no explanation in the text.<sup>29</sup> Although it may be safe to assume that the two are one and the same, this formulation introduces a new term and the potential for uncertainty.

Hughes then takes a careful look at the precise language the draft provisions use to define both elements. He highlights ways in which the particular formulation of these requirements in the Restatement may not accurately reflect the underlying case law and could be drafted with more clarity.<sup>30</sup> Hughes's careful analysis of the precise

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26. See Fromer & Silbey, *supra* note 3, at 362–64.

27. See generally Hughes, *supra* note 8.

28. Restatement Tentative Draft No. 1 (2020) § 5, at 55.

29. Hughes, *supra* note 8, at 389.

30. *Id.* at 390–94, 403–09.

words used in the Restatement reflects the perspective of one experienced with legislative drafting and highlights the fact that, once again, a Restatement is not simply a treatise, which can describe an area of law in a looser fashion, with later clarification and development. Rather, it is a codification of an area of law, and the precise terms therefore matter. The act of restating the law thus brings with it the risk that new ambiguities or uncertainties may be introduced. In a common law field, the risk is outweighed by the benefit of codifying the law in the first instance. But in a statutory field, the question is whether these risks are worth running, whether the benefit of another codification is worth it when one already exists, even if imperfect.<sup>31</sup>

## II.

Despite the differences noted above regarding the wisdom and value of restating copyright law, both Fromer and Silbey, and Balganesch and Menell agree that the Restatement project, whether in its current form or properly modified, can play a legitimate and useful role in helping to rationalize the open areas of copyright law. As noted above, Fromer and Silbey bolster the legitimacy of the Restatement project by focusing on its role in clarifying the open areas of copyright law. Even though copyright is governed by a comprehensive federal statute, there are many areas where the federal courts have had to develop the case law, whether to interpret ambiguous terms, or to fulfill a legislative delegation of authority to develop the law, or to continue to interpret broad terms incorporated into the statute. Fromer and Silbey also emphasize that more than forty years have passed since the enactment of the statute, years characterized by dramatic changes in technology. The statute was meant to be a “copyright statute for the ages.” As a result, an extensive body of case law has been developed by the federal courts, and a Restatement can play an important role in bringing order and coherence to this body of law.<sup>32</sup>

In supporting the Restatement and countering arguments that the Restatement is attempting to supplant the statute, Fromer and Silbey repeatedly emphasize the unexceptional nature of the Restatement’s task:

The provisions at issue in the draft Restatement of Copyright Law on which ALI membership will vote at ALI’s upcoming annual meeting are central to copyright doctrine and have been the subject of numerous court decisions over the past several decades of technological and industry change: originality, fixation, categories of copyrightable subject matter, the idea-expression distinction, and authorship and ownership. This abundance of legal activity on copyright law demonstrates the value to the profession of this project retelling copyright. In contrast to the dramatic criticism of this Restatement project alleging political capture or illegitimate law reform, *the draft’s provisions are routine and straightforward. They will surprise no one and are almost boring in their adherence to and synthesis of the copyright statute and judicial*

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31. Note that both Hughes’s analysis of originality and Balganesch and Menell’s analysis of the public distribution right highlight the degree of granularity implicated by a Restatement of Copyright. Contrast this analysis with broad common law areas, which often operate at a higher level of doctrinal generality.

32. Fromer & Silbey, *supra* note 3, at 361–64.

*interpretations of it.* Far from being radical or ill-advised, the Restatement of Copyright Law is a reasonable and welcome addition to the work of the ALI.<sup>33</sup>

Fromer and Silbey thus justify the Restatement by arguing that it is no more than the ordinary practice of helping to clarify open areas of law. They place the process of restating the law within a long tradition that includes treatises and other explanatory materials.<sup>34</sup> Fromer and Silbey then proceed to show how the specific provisions of the current draft of the Restatement follow this framework.

Balganesh and Menell adopt a different approach to bolstering the legitimacy of the Restatement. They respond to concerns about displacing the statute by essentially abandoning or greatly constraining the task of re-codification. Instead of creating a new code to compete with the original, the Restatement should simply repeat the actual text of the statute itself. This should then be followed by a new section describing the legislative history behind the statutory provision, along with relevant judicial opinions and commentary. This could then be followed by the usual Comments and Reporter's Notes.<sup>35</sup> Moreover, Balganesh and Menell suggest that the Restatement should be cautious in advocating a particular position on an issue when different courts might apply different interpretive methods to the question, since interpretive methodology is itself a highly contested issue. Balganesh and Menell thus avoid the arguments about supplanting the text by keeping the text front and center, making it the focus of the commentary, and modifying the Restatement's methodology to make clear that courts are fundamentally engaged in a process of statutory interpretation.<sup>36</sup>

Although both Articles find ways to support the legitimacy of the Restatement project, in so doing, they reveal another problem, namely a mismatch between what the Restatement of Copyright is and what it is perceived to be. Both articles deal with the challenge of restating an authoritative federal statute by, in effect, cabining the role of the Restatement. This is necessary to avoid the argument that the Restatement is usurping the authority of the statute. But the resulting Restatement resembles less a Restatement than a particularly good treatise or a sophisticated annotated code. Fromer and Silbey are largely correct in that some sections of the current draft are "routine and straightforward. They will surprise no one and are almost boring in their adherence to and synthesis of the copyright statute."<sup>37</sup> Yet if

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33. *Id.* at 344 (emphasis added).

34. *Id.* at 358–59 ("Like legal treatises enthusiastically embraced by lawyers and judges and cited with frequency, the Restatement is one view on the state of the law. It is a collective view—not a singular one—and for that reason, maybe it is an improvement on solo-authored treatises. But the Restatement remains persuasive authority, at best, whose authority is grounded in respect for the ALI. The ALI Restatements are perhaps more persuasive than amicus briefs and experts at trial, which are nevertheless encouraged and considered seriously by courts.")

35. Balganesh & Menell, *supra* note 6, at 322–23. See also Jon O. Newman, *The Myths of Textualism and Their Relevance To the ALI's Restatement of the Law, Copyright*, 44 COLUM. J.L. & ARTS 411, 423 (2021) (proposing that each Restatement section include both the relevant statutory text and the Restatement text).

36. Balganesh & Menell, *supra* note 6, at 323.

37. Fromer & Silbey, *supra* note 3, at 344. This is not to understate areas of disagreement about the content of the "black letter law." Indeed, several provisions of the proposed Restatement have

this is the case, then what does a Restatement add beyond what one could find in a good treatise or set of treatises?<sup>38</sup> Similarly, Balganesch and Menell's proposed approach, by effectively abandoning the task of re-codification, creates a work that resembles less a Restatement and more a sophisticated and comprehensive annotated code.

This is not to understate the value of such an undertaking. Indeed, a Restatement thus conceived can still play a valuable role in helping judges and practitioners make sense of the extensive body of copyright case law that has arisen since 1976.<sup>39</sup> Copyright law does, in fact, contain areas that would benefit from rationalization and clarification. And although several copyright treatises already exist, a Restatement does add something insofar as it is the result of the considered judgments of, not one or a few authors, but a larger and somewhat more diverse set of authors who may have in-depth knowledge across a wide range of different areas of copyright law. Relatedly, a Restatement benefits from the imprimatur of the ALI, which enhances its authoritative nature (and which also explains why a Restatement is often more controversial than a treatise). This in turn may bolster its ability to play a useful role in rationalizing the case law and suggesting avenues for reform.

The problem is that, even with all of these potential benefits, this falls short of what many expect a Restatement to be. This is because a common law area of the law differs not only in the absence of a governing statute, but in the basic institutional structure that gives rise to the law. The critical difference is that for a common law subject, there is no central institution that has the ability or authority to resolve the disagreements and inconsistencies that arise from the law as developed in fifty-plus different jurisdictions. In each jurisdiction, the state supreme court has the final word on the state's common law, but no institution can resolve the differences that arise between jurisdictions. A Restatement can thus serve the vital function of codifying the black letter law across *all* of these jurisdictions, noting conflicts between jurisdictions, and suggesting ways to resolve them. In so doing, the Restatement is free to create its own organizing structure and clarifying terminology. And it can do all of this without having to compete with an authoritative code. There is no higher authority, so the Restatement stands alone. At the same time, the Restatement differs from a treatise, even an influential treatise, in its attempt to not only describe the law, but to codify it, to set it down in authoritative terms, thereby creating a centralized generative text that can be used by courts to develop the law further.

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generated a good deal of disagreement, as some critics have argued that these provisions do not accurately reflect the state of the law. It is simply to note that such disagreements are similar to disagreements about statements of law found in many treatises.

38. *But see* Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 498 (2014) (arguing that a Restatement as treatise can play an important role by minimizing potential biases found in existing treatises authored by one or a few individuals). Note of course that the Restatement project itself has not been immune to allegations of bias.

39. Note that in practice, the degree of disagreement among the lower courts may be overstated. Many of the provisions of the current draft Restatement do not identify or settle specific disagreements among the lower courts about the meaning of a statutory provision. Instead, many, if not most, of the provisions simply summarize the existing case law's interpretation of a term.

The Restatement of Copyright, as noted above, enjoys no such freedom. It is hampered by the existence of an authoritative code, and thus, as developed above, is not completely free to state the black letter law in the first instance. It must thus either limit itself to the areas of law that are left open by the statute or, alternatively, abandon the task of restatement and start with the text of the statute itself. It is thus not completely free to introduce its own terminology or to restructure the law in a more logical fashion. Nor is it completely free to derive underlying principles from the case law, since in many cases, as Balganesch and Menell point out, the principles and policies may be dictated or shaped by the specific legislative history of a particular provision. Balganesch and Menell's use of the public distribution right is a nice example of the challenges, in that the proper interpretation of an ambiguous term in the statute may be shaped, not by an appeal to broad principles, but by the specific historical context behind the enactment. The Restatement of Copyright is thus heavily constrained by the need to be faithful to an authoritative statute, its structure, and its history.

Even worse, the Restatement must also compete, not just with the statute, but with an institution already charged with the task of resolving inconsistencies in the doctrine and articulating the principles behind open areas of copyright law: the U.S. Supreme Court. Unlike a common law subject, copyright law does have an authoritative centralizing institution. The Restatement, in stating the black letter law, is not free to reject the opinions of the Court, but instead must do its best to faithfully articulate and apply the decisions of the Court. It must thus limit itself to bringing order, not to the case law of fifty-plus independent jurisdictions, but to the smaller set of lower federal court opinions, subject to consistency with both the statutory text and existing Supreme Court precedents.<sup>40</sup> It is true, as Fromer and Silbey argue, that the Supreme Court's limited docket means that it will be unable to adequately resolve or clarify all the doctrinal areas left open by the statute. Thus, a Restatement can still serve a useful purpose in clarifying many open areas of law. Yet the authoritative nature of Supreme Court opinions limits the ability of the Restatement to serve as a source of lasting guidance.

A good example of this issue can be found in the draft's treatment of the useful article doctrine. A number of years ago, this would have been a classic example, indeed perhaps the ideal example, of an area perfectly suited to the Restatement approach. The statutory text uses a broad term, "separately," not defined by the statute.<sup>41</sup> The legislative history sheds little additional light on the precise meaning of the term. And case law developed by the federal courts had created, by some accounts, up to nine different conflicting doctrinal tests for when the aesthetic features of a useful article could be "separated" from its utilitarian aspects.<sup>42</sup> The Restatement could have noted the conflicting tests, identified an underlying set of

40. See e.g., Hughes, *supra* note 8, at 389–90 (describing how the Restatement's treatment of "originality" is necessarily and unfortunately constrained by the need to abide by the U.S. Supreme Court's decision in *Feist*).

41. 17 U.S.C. § 101.

42. See Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 U.C. IRVINE L. REV. 275, 281 (2019).

principles, provided a new clarifying framework, and suggested, via codification, the “better” approach consistent with those principles.

Yet the Supreme Court’s intervention in *Star Athletica v. Varsity Brands* would have severely undercut the value of that work.<sup>43</sup> In *Star Athletica*, the Supreme Court wiped away the rich body of conflicting lower court doctrine and replaced it with its own test for separability. In so doing, the Court largely ignored the pre-existing case law and derived a test from the plain text of the statute. As many commentators have observed, the Court’s test suffers from a number of important flaws and will no doubt generate additional conflicting case law in the lower federal courts as they attempt to implement the new test.<sup>44</sup>

For present purposes, though, this example highlights the difficulty of restating the law, even in these open areas, when there exists an authoritative institution that has the power to definitively state the “black-letter law.” With a common law subject, there exists no similar centralizing institution. If a state supreme court issues an opinion on a particular issue, it need not diminish the value of the Restatement, as the opinion represents the law in only one jurisdiction and can comfortably be folded into the broader framework established by the Restatement. With copyright law, however, the Restatement enjoys no such flexibility. This is because the Restatement of Copyright is constrained by the need to state the black letter law, and the U.S. Supreme Court is the final and authoritative arbiter of how to interpret the Copyright Act.<sup>45</sup> And unlike a treatise, which can easily be updated to accommodate the new precedent, a Restatement’s codification is meant to endure or at least hold relevance for a longer period of time.<sup>46</sup>

The same exact phenomenon described above could occur in any open area of copyright law. For example, the Restatement could usefully address the many different and potentially inconsistent tests that various circuits have developed for determining “improper appropriation,” a critically important element of the basic copyright infringement claim. This is very much a common law area of copyright, largely free from statutory interpretation, subject to inconsistent and often confusing terminology in the lower federal courts. The Restatement could play a tremendously valuable role, clarifying the terminology, resolving inconsistencies between circuits,

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43. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002 (2017).

44. See, e.g., Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216 (2019); Christopher Buccafusco, Mark A. Lemley & Jonathan S. Masur, *Intelligent Design*, 68 DUKE L.J. 75 (2018); Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51 (2017); Mark P. McKenna, Essay, *Knowing Separability When We See It*, 166 U. PA. L. REV. ONLINE 127 (2017); Peter S. Menell & Daniel Yablon, Essay, *Star Athletica’s Fissure in the Intellectual Property Functionality Landscape*, 166 U. PA. L. REV. ONLINE 137 (2017); Christopher Buccafusco & Jeanne C. Fromer, Essay, *Forgetting Functionality*, 166 U. PA. L. REV. ONLINE 119, 121 (2017).

45. Note however that it is also possible that the Supreme Court might have listened to the Restatement and adopted its framework. See discussion of the problem of audience, *infra* Part III.

46. Note also that the Supreme Court is not the only institution that can play a centralizing role in copyright. The Copyright Office is also a source of interpretive guidance about open areas of copyright law, particularly ones involving copyrightability. See U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed., 2021). Thus, unlike common law Restatements, the Restatement of Copyright must compete with several institutions that play a centralizing role.

providing a clear analytical framework, and proposing a particular approach. Yet all of this useful work could be rendered moot with a Supreme Court opinion. Under a best-case scenario, the Court could adopt the Restatement's recommended approach. Yet it is just as likely that the Court could adopt an approach at odds with the Restatement's, thus making the Restatement's description of the black letter law not only moot but substantively erroneous. The existence of an authoritative institution thus casts a shadow over the Restatement's efforts.

Another way of highlighting the problem is by returning to this passage at the very beginning of the Restatement's style guide:

Webster's Third New International Dictionary defines the verb "restate" as "to state again *or* in a new form" [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.<sup>47</sup>

The "central tension" identified here plays a productive role in a Restatement of a common law subject. This is because the act of common law judging merges "is" and "ought," allowing development of the law in accordance with broad principles. A Restatement can thus bridge the gap between what the law is and what the law ought to be by setting out an idealized text that reflects both, and persuading common law courts to adopt it. That same tension is far more difficult to bridge when the body of law is governed by an authoritative statute interpreted by an authoritative body. If the Restatement focuses on what the law is, then it is limited to discerning congressional intent or predicting what the Supreme Court might do. If the Restatement focuses on what the law ought to be, then it raises concerns about legitimacy, since the statute and the Court are the final arbiters.

The end result is that the Reporters of the Restatement of Copyright face an unenviable task. On the one hand, the Restatement is hemmed in by the existence of, and need to defer to, an authoritative and comprehensive federal statute, authoritatively interpreted by the U.S. Supreme Court. On the other hand, a more modest Restatement adds only marginal value to a copyright treatise or annotated code, and thus falls short of the lofty goals generally expected of a Restatement. There is thus a gap between what the Restatement is and needs to be, in order to preserve its legitimacy, and what Restatements are commonly understood to be, namely broad restatements and codifications of areas of law.

This gap may explain why there has been so much controversy over the Restatement of Copyright. As Fromer and Silbey note, Restatements of common law subjects are not immune from controversy.<sup>48</sup> Yet the existence of an authoritative statute limits the obvious value of a Restatement in the context of copyright law, thus placing pressure on the question: Why a Restatement? If the Restatement does not add value in the traditional ways noted above, what is it trying

47. Restatement Tentative Draft No. 1 (2020), at xi (quoting ALI, *CAPTURING THE VOICE*, *supra* note 1, at 4) (alteration in original).

48. Fromer & Silbey, *supra* note 3, at 349.

to accomplish? This creates room for suspicions about ulterior motives, even when such motives may not exist. It is this disjuncture between what the Restatement purports to be and how it is regarded that contributes to this problem. If the same exact text had been styled a treatise, or even an annotated code, by a private group of academics, then there would be far less controversy.

### III.

In the end, there are several potential ways out of this conundrum, to eliminate or reduce the gap between what the Restatement is and what it is expected to be. The two Articles discussed above suggest two different possibilities. The Restatement could follow Balganesch and Menell's suggestion and, instead of making any attempt to restate the law, simply reproduce the statutory language, along with the relevant interpretive materials, and then comment upon the case law relevant to the statutory provision.<sup>49</sup> Although this would no doubt result in a very useful work, it would perhaps be better not to call this a Restatement, since it is missing an essential feature of common law Restatements. Calling it something else would have the advantage of clarifying precisely what the work is doing and avoiding the gap between the work as it exists and the work as it is perceived.

Alternatively, per Fromer and Silbey, the Restatement could hold onto its central task of codifying the law, but confine itself to only those areas of copyright law where the Copyright Act has expressly delegated the authority to the federal courts to make federal common law, i.e., where there is no competing codification.<sup>50</sup> Indeed, we could have separate Restatements: a Restatement of Fair Use perhaps, along with a Restatement of Infringement.<sup>51</sup> I would find such Restatements useful, as there exist in each of these areas a large body of federal case law, often pointing in different directions or articulating different standards or tests. Such an approach would abandon the task of trying to restate or clarify areas of copyright law that are more narrowly codified, even if there is ambiguity in the terms. Thus, the scope of such Restatements would be far more constrained. These Restatements would still be subject to the potential disruption of a conflicting Supreme Court precedent or, less likely, a change in the statute. But the benefit would be clarity and transparency, and a better fit with common law Restatements.<sup>52</sup>

More broadly, it may also be useful, in adapting the Restatement along either of the lines noted above, to revisit the question of the proper audience for the Restatement of Copyright, in light of the different institutional structure supporting copyright law. Common law Restatements are supposed to be directed to common law courts. As the ALI's Revised Style Manual of Restatements notes at the outset:

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49. Balganesch & Menell, *supra* note 6, at 323.

50. Fromer & Silbey, *supra* note 3, at 362–64.

51. See, e.g., RESTATEMENT OF THE LAW (THIRD) PROPERTY: SERVICITUDES (AM. L. INST. 2000).

52. Note that there are other alternatives to a Restatement project: model codes, principles projects, etc. Indeed, there were initial proposals to undertake a principles project for copyright law, but these proposals were ultimately rejected in favor of a Restatement. See Balganesch & Menell, *supra* note 6, at 313–16.

“Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.”<sup>53</sup> Balganes and Menell, in their Article, take this as the proper audience and structure their proposal in accordance with it, trying to make the Restatement more useful to the lower federal courts.

Although the focus on the courts as the audience makes sense for a common law Restatement, it may be worth considering whether it makes equal sense in the context of a federal statutory Restatement. In a common law field, any change in the law must come, in the first instance, from the courts themselves. A Restatement, by providing a centralized and rationalized codification of the black letter law, with a clear structure and consistent terminology, can help persuade individual jurisdictions (ultimately the state supreme courts) to adopt these rules. For a Restatement of Copyright, it may be that the lower federal courts play the same role. The Restatement can thus help the lower courts understand and make sense of inconsistencies in the judge-made law and choose the “better” approach. Such a result would be particularly valuable in, for example, the many inconsistent treatments of the standard for infringement currently found in the lower federal courts.

At the same time, the more complex institutional structure supporting copyright law suggests that this focus on the lower federal courts as the audience may not be entirely appropriate. For example, perhaps the proper audience is not the lower courts, but the U.S. Supreme Court? As mentioned above, copyright law, unlike areas of state common law, has an authoritative expositor of the law. So perhaps the proper audience, or at least an audience, whether expressly or implicitly, is the U.S. Supreme Court? Perhaps the goal is not to persuade the lower federal courts to coalesce around a particular understanding of copyright law, but to persuade the U.S. Supreme Court, as the final authority, to adopt that understanding? Or, to push this further, perhaps the proper audience is the ultimate source of authority on copyright: the U.S. Congress? Perhaps an additional goal of the Restatement might be to convince Congress to amend the statute to reform or bring clarity to existing copyright doctrines.

Of course, depending on the audience, the Restatement might look very different. A “restatement” directed at convincing Congress to change the law would look very little like a Restatement, and more a pure policy document, or perhaps a principles project. But the point is to ask, are we so certain that the Restatement is directed just at the lower federal courts? In not only summarizing the “black letter law,” but also commenting upon it, a Restatement is implicitly asking the Supreme Court to adopt a “better” understanding of the law. It may also be implicitly recommending that Congress change a particular portion of the Copyright Act. This is all just to suggest that the project of restating copyright law implicates a number of different institutional actors, and thus is even more complicated than one might expect. I do not envy the Reporters of the Restatement of Copyright.

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53. Restatement Tentative Draft No. 1 (2020), at xi (quoting ALI, *CAPTURING THE VOICE*, *supra* note 1, at 4).