

To: Professor David Levi, President, and Council Members,
American Law Institute
4025 Chestnut Street Philadelphia, PA 19104
From: Jane C. Ginsburg and June M. Besek¹
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Via posting to Project page and email to Stephanie Middleton: smiddleton@ali.org

Dear Professor Levi and Council Members:

We understand that the ALI Council will consider Council Draft 5 (CD5) of the Restatement of the Law, Copyright (Copyright Restatement) project at its meeting on January 20-21, 2021. We appreciate the opportunity to provide comments on CD5. We hope that you will give careful consideration to these comments and send CD5 back to the Reporters to address the problems we describe below.

Section 2.05:

Comment f: The Reporters have largely ignored critiques of their treatment of the case law on “opinion-based facts,” now called “opinions expressed as numbers, letters, common symbols and short phrases.” In addition to our remarks specific to CD5, we also reproduce below our analysis of sec. 2.05, Comment *f* as it appeared in CD4 since it remains equally valid with respect to CD5.

Comment *f* reveals a fundamental confusion in CD5 and its predecessors between copyright-original opinions and unprotectable facts. The Reporters recognize, in sec. 2.05 Comment *c*, that “fictional facts” is a misnomer and “do not properly fall within the exclusion of facts from copyright protection,” (CD5 p. 4, lines 2-3), but they fail to bring that insight to Comment *f*. To say that an “opinion” becomes a “fact” because it is presented as one (Comment *f*, page 6, lines 23-24) collapses subjective, intellectual labor-infused, assessments into objective observations. It is no more a “fact” that editors of the Red Book believe a used car is worth \$x, or that the editors of the Michelin Guide believe a restaurant merits 3 stars, than that the words comprising the message *Seinfeld* character George Costanza left on his answering machine are a “fact” (see Comment *c*, page 3). The Reporters recognize that a compilation of opinions presented as numbers, etc. can be protected (Comment *f*, p. 5 lines 22-23), but that is small comfort: if each evaluation is a “fact,” then their assembly into a guide or similar collection will not necessarily protect the creative endeavor underlying the assessments. If, as may often be the case, the guide’s organization is alphabetical and/or geographical, these modes of presentation lack originality

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(e.g., per *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)); as a result, copyright will cover neither the individual assessments nor their assembly. Under *Feist*, collection without original selection or arrangement does not produce a copyrightable work. For a specific example of the consequence of excluding numerically or symbolically-expressed opinions from copyright coverage, consider the following: Suppose a comprehensive ranking of all US law schools, based on the compiler's own criteria for evaluating merit, and organized alphabetically by State. There is no selection, and the organization is banal. The rankings themselves are subjective and creative,² but if they are not protectable, nothing prevents their entire copying. The rankings would be as free for the taking as the collected names and telephone numbers at issue in *Feist*. If the author accompanied the rankings with some further explanation, the latter might be covered, but that will not matter if a third party copies only the rankings themselves (which are likely to be the "heart" and most economically valuable part of the collection).

In addition, CD5 would relegate to the copyright dust heap even non "garden-variety" (*Feist*) means of organizing data to generate subjective assessments, on the ground that "the method or system employed to predict the value of a used car is unquestionably uncopyrightable." CD5, p. 6 at lines 22-23. Whether or not this assertion is unquestionably correct, it is certainly off-point: the *CCC* court did not state that the used car values resulted from the application of a method or system. In fact, the *CCC* court found the valuations "were based on professional judgment and expertise," *id.* line 13, citing *CCC* at 67. Exercise of professional judgment does not equate to an idea, method or system. The Second Circuit in *Kregos v. AP*, 937 F.2d 700 (2d Cir. 1991) – a decision uncited in CD5, but on which *CCC* relied – rejected the kind of reductionism that pervades CD5's approach. The court there declined to characterize as an unprotectable "method" the author's selection of baseball criteria that the author believed would best predict the outcome in any given match. CD5's syllogism that opinions or predictions are inevitably based on methods or systems, and since methods and systems are unprotectable, then so too are the resulting opinions or predictions, is extremely problematic (albeit consistent with the Reporters' apparent general objective of shrinking the scope of copyright).

These results are exactly the outcomes against which Judge Leval in *CCC* cautioned, when he observed that "The policy embodied into law is to encourage authors to publish innovations for the common good -- not to threaten them with loss of their livelihood if their works of authorship are found insufficiently imaginative," 44 F.3d at 66.³ (As for why *CCC* remains good law, and the supposedly "better reasoned decisions," p. 6, line 1, do not in fact undermine *CCC*'s analysis, see our comments on CD4, below.) CD5 demonstrates the hollow ring of the Reporters' assurances in response to Advisers' repeated concerns that the Reporters' approach endangers long-standing and well-recognized protection for ratings and similar collections of succinctly-expressed opinions.

² Under the Reporters' approach, however, the rankings are the unprotectable result of a "method" of evaluating, see discussion *infra*.

³ Similarly, conflating an opinion with an "idea" (see Comment *f*, p. 6, lines 26-27, the opinion "merges with the uncopyrightable idea of the car's value") clashes with the public policy underlying Congress' protection of compilations: "The consequences of giving *CCC* the benefit of the merger doctrine are too destructive of the protection the Act intends to confer on compilations, without sufficient benefit to the policy of copyright that seeks to preserve public access to ideas." 44 F.3d at 72.

The revisions to Comment *f* do, however, signal a way to achieve the Reporters’ goal of denying protection to individual numerically (or similarly)-expressed evaluations, while nonetheless assuring the protection of a *collection* of such assessments. On p. 5, lines 23-26, Comment *f* adverts to the Copyright Office policy of refusing to register “individual numbers, letters, sounds and short phrases.” While Comment *f*’s quoted basis of the refusal is insufficient creative authorship, sec. 313.4(C) of the Compendium of U.S. Copyright Office Practices (3d ed.), instead makes clear that the problem is a *quantitative, not a qualitative*, lack of creativity: “Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship.⁴ The U.S. Copyright Office cannot register individual words or brief combinations of words, *even if the word or short phrase is novel or distinctive or lends itself to a play on words.*” (Emphasis supplied.) In other words, just as a coined word, clever title, or pithy headline may be amply original, a numerically- or symbolically-expressed opinion may encapsulate intense creativity, but the Copyright Office takes the position that copyright will not cover the word, number, etc., *standing alone*. At some point, however, the aggregation of symbolic indicators of subjective opinion will hold sufficient heft to pass the border of *de minimis*. It is not necessary to specify where that border lies, merely to recognize that a collection of such numbers, symbols, etc. may be copyrightable, even if their selection or organization lack originality.⁵

The analysis of the copyrightability of a collection of opinion-expressing numbers or symbols is, of course, not purely quantitative - the opinions must first be original. But if they are, then sufficient quantities of original evaluations should be protectable, even in alphabetical or similarly non-creative arrangement. Unlike compilations of indisputably uncopyrightable (or copyright-expired) material, the claim would not be in the selection or arrangement of these elements, but in the elements themselves. Otherwise, as we have seen through the example of the collection of law school rankings, collections of subjective assessments would not qualify for copyright.

We strongly urge the Reporters to follow the nuanced Copyright Office approach rather than persisting in their current copyright-destructive course.

From Ginsburg-Besek Comments on CD4 (13 January 2020)

Section 2.05: The conclusions that CD4 reaches with respect to opinion-based “facts” are far broader than the caselaw supports. Section 2.05, Comment *f* cites *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) and *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999), both of which found numeric expressions of subjective opinions to be protectable by copyright. It then asserts that “several better-reasoned decisions” support CD4’s conclusion that opinion-based facts are uncopyrightable.” CD4, p.5, lines 21-25. The cases cited in support of CD4’s conclusions, however, do not in fact reject CCC. On the contrary,

⁴ The Compendium is available at <https://www.copyright.gov/comp3/> and <https://www.copyright.gov/comp3/announcement.html>.

⁵ Alternatively, it may make more sense to address the question of individual numerical assessments as a matter of infringement or fair use. But the Copyright Office’s practice provides an adequate basis in positive law to exclude the separate copyrightability of individual assessments.

they distinguish that decision; moreover, they reaffirm *CCC*'s determination that opinion-infused predictions are original creations. The cases CD4 cites contrast protectable predictions, assumptions, and opinions with the "preexisting facts" that were at issue in those cases.

We find it very problematic that section 2.05 has largely ignored the considerable body of caselaw at odds with its proposed rule. We appreciate that Reporters, after fully examining conflicting trends, may select the "better rule." But in this instance, we believe that section 2.05 not only fails to account for contrary caselaw, but the caselaw that it does cite does not in fact support the proposition section 2.05 advances.

One of the "better-reasoned decisions" that CD4 cites is *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*, 497 F.3d 109 (2d Cir. 2007) ("NYMEX"), in which the court found that even if NYMEX had created daily "settlement prices" for futures contracts through its judgment, the prices could not be protected because they merged with the underlying idea of fair market price. *CCC* can be distinguished from NYMEX, however, as CD4 concedes. As the NYMEX court explained, *CCC* did not involve a discovered market value, but a created value:

CCC is distinguishable on its facts. The used car prices in *CCC* were indeed created, they were the "editors' predictions . . . of expected values for 'average' vehicles for the upcoming six weeks in a broad region." *CCC*, 44 F.3d at 63. The values were based on assumptions about "average" cars; as these cars did not exist, there could be no actual market to discover. In contrast, settlement prices can be seen as "preexisting facts" about the outside world which are discovered from actual market activity. 497 F.3d 115 at n 5.

In *Kapes*, the editors of a wholesale price guide for collectible coins used their own judgment and expertise to assess the value of coins. The Ninth Circuit held that CDN's valuations were sufficiently original to be protectable by copyright. The court rejected *Kapes*' attempts to distinguish *CCC*, observing that both Maclean [in *CCC*] and CDN used their judgment to distill and extrapolate from factual data to develop the prices they list. "It is simply not a process through which they discover a preexisting historical fact, but rather a process by which they create a price which, in their best judgment, represents the value of an item as closely as possible. . . . What CDN has done is use its own judgment and expertise in arriving at that value for the dealers. This process imbues the prices listed with sufficient creativity and originality to make them copyrightable."⁶

CD4 also cites *Banxcorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280 (S.D.N.Y. 2013) in support of its position. *Banxcorp* did not reject *CCC*, but rather distinguished it. The court distilled the difference between *CCC* and *NYMEX*:

The crucial distinction between the two cases was that "[t]he values [in *CCC*] were based on assumptions about 'average' cars; as these cars did not exist, there

⁶ 197 F.3d at 1261. We agree with CD4, however, that it is incorrect to refer to an individual price as a compilation.

could be no actual market to discover. . . . [S]ettlement prices can be seen as 'pre-existing facts' about the outside world which are discovered from actual market activity." *Id.* at 279 (citations omitted)

According to the court in *Banxcorp*, there was no evidence that plaintiff exercised the type of judgment that "would infuse the data with 'originality' in the calculation of each individual average. Rather, Plaintiff inputs the relevant rates and the software runs an average, which Plaintiff then publishes verbatim." *Id.* at 303.⁷

CD4's position on opinion-based "facts" could extend even to compilations like the Michelin Guide or Robert Parker's Wine Guide, or any other collection of subjective ratings, which reflect the judgments or opinions of their authors. CD4 does not distinguish this type of compilation, sweeping all "opinion-based facts" out of copyright. If none of them can enjoy protection, then one could copy the opinion-based numerical ratings in guidebooks free of liability because the ratings are "facts." Disqualifying the numerical ratings on the ground that the assessments are "facts" – or, for that matter, "ideas" about how to evaluate – cannot be reconciled with Congress' choice to protect compilations, as Judge Leval recognized in *CCC*.⁸ The Copyright Act defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. The mere fact that ratings take a numeric form does not remove them from copyright protection.⁹

CD4's analysis not only fails to account for circumstances where opinion-based facts take a numerical form that does not represent a price quote, but it is also inconsistent with the caselaw. For example, several district court decisions involve numerical ratings or grades. In *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226 (D. Colo. 2009), the plaintiff developed and distributed objective ratings of hospitals, physicians and other healthcare providers. It had developed a "1–3–5 Star" rating system based on data and information obtained from a variety of (mostly publicly available) sources. *Health Grades* at 1230. The court determined that the ratings were created by Health Grades, rather than "discovered": "[t]hese ratings only exist because Health Grades has selected, weighed and arranged facts it has discovered to present the collected data in a form, Health Grades' ratings and awards for specific health care providers, that can be used more effectively by the reader to make judgments about

⁷ Other cases cited in CD4 are also distinguishable. See *Assessment Techs. Of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 642 (7th Cir. 2003) (raw data from tax assessors hired by municipalities not protected by copyright; no discussion of how "assessed valuations" were calculated by assessors or claim that these valuations contained sufficient creativity to be protected); *RBC Nice Bearings, Inc. v. Peer Bearing Co.*, 676 F. Supp. 2d 9, 23 (D. Conn. 2009) (holding that developing bearing load ratings involves only a minimal level of judgment "undoubtedly no more than that needed to determine the settlement prices at issue in *New York Mercantile Exchange*;" and distinguishing *CCC* "because the Red Book used car valuations were predictions of expected values for theoretical 'average' vehicles, whereas the load ratings at issue in this case represent physical characteristics of a tangible product).

⁸ *CCC*, 44 F3d at 70-71.

⁹ We do not contend that taking individual ratings is infringement; reproducing a single rating, or a small number of ratings, would likely be *de minimis* or fair use.

providers.” *Id.* at 1234. Following *CCC* and *Kapes*, the court found the merger doctrine did not apply:

The relevant idea to be preserved for free public access and use under these principles is that of creating rankings of healthcare providers, rather than Health Grades' specific “idea” of how a particular health care provider should be ranked. There are a multitude of ways to express the idea of ranking healthcare providers, as a comparison of providers may rely on different factual information or weigh it differently and thus may yield different results.

Health Grades at 1236–37 (footnote omitted). *See also Comparion Med. Analytics, Inc. v. Prime Healthcare Servs., Inc.*, No. 214CV3448SVWMANX, 2015 WL 12746228, at *5–6 (C.D. Cal. Apr. 14, 2015) (on motion to dismiss, plaintiff that created healthcare rating system “had a colorable argument that its ratings are copyrightable.”).

Similarly, in *Nat'l Football Scouting, Inc. v. Rang*, the court found that “a numeric expression of a professional opinion can be copyrightable.” 912 F. Supp. 2d 985, 990 (W.D. Wash. 2012). The case involved player ratings in National’s annual football scouting reports. National assigned each player an overall “Player Grade,” a numerical expression that represented National's opinion of the player's likelihood of success in the NFL. The court concluded, “undisputed evidence shows National arrives at its grade through a weighing of subjective factors, such as personal character, leadership, and poise. Much like valuing a product, [t]his is not a process that is so mechanical or routine as to require no creativity whatsoever.” *Nat'l Football Scouting* at 990.

Section 20(g) (previously 301(f))

As we wrote in connection with what in PD5 was section 301(f), this aspirational provision elevates to black letter status a topic absent from the Copyright Act and supported by only the slimmest of other authority. Black letter section 20(g) provides for “abandonment” of copyright, but there is nothing either in the Copyright Act or in substantial case law on this issue.¹⁰ To the extent that abandonment has any place in a Restatement of copyright, it is not in the provisions on ownership, but rather as a defense to copyright infringement, and should be treated there.

Section 3.10

Comment *c*, Illustration 3, p. 41: We suggest adding before the last sentence: “The article therefore is not a work made for hire.” (This is obvious to the copyright-informed, but perhaps not to lay judges.)

¹⁰ Our detailed commentary on PD5 secs. 3.01(f) and 311 is contained in our comments on PD5, available on the Project website.

Section 5.01

Comment *f*: p. 71: The duration of copyright in restored works belongs in the black letter, as it is in the Copyright Act, sec. 104A. At the very least, new Reporters' Note *f* should be incorporated into Comment *f*.

Section 6.02

Comment *b* p. 98, lines 28-31; also illustrations 2 and 3, lines 99-103: The “enjoyment or exploitation” characterization is *not the law*: it is not in the statute, and it has no caselaw support. It is an invention that the Reporters insist on reiterating (albeit watered down in successive drafts), *despite repeated objections from multiple Advisers*. The persistence of this would-be standard exacerbates the gap between the Restatement and the positive law.

Section 6.05

Page 119: The black letter is missing key language from 17 USC sec. 602. Sec. 602(a)(1) concludes “actionable under section 501” and sec. 602(a)(2) concludes “actionable under sections 501 and 506.” Without this language, Restatement sec. 6.05(a) and (b) seem inconsistent: why does sec. 6.05(a) simply refer to unauthorized importation, regardless of whether the copies were infringing, while sec. 6.05(b) requires that the copies have been infringing? The difference becomes clear in the Copyright Act: only infringing copies subject the importer to criminal liability under sec. 506. Without the reference to the kind of liability attaching to the different kinds of importation, sec. 6.05 makes no sense.

Section 6.06

Sec. 6.06(b), p. 124: this formulation of the black letter is hard to follow. It is not clear from the formulation that the first sale doctrine applies only to copies that have been sold (or whose ownership has otherwise been transferred), but not to copies where only possession has been transferred, for example by rental, lease or lending. The point emerges in Comment *f*, pp. 128-31, but should also be clarified in sec. 6.06(b).

Sections 9.01 and 9.02 are not submitted for approval; we note, however, that the Reporters have so far disregarded our principal critique to these provisions, as they appeared in PD6, that 17 USC sec. 501(a) and (b) should not have been omitted from 9.01:

It is unclear why these provisions were omitted here. They play a critical role in the statute. The 1976 Copyright Act adopted a general statement of “infringement of copyright,” setting forth in section 501(a) the rights whose violation constitutes infringement of copyright, and who can be a copyright infringer (i.e., who is embraced under the term “anyone” in § 501). Section 501(b) addresses who may bring a lawsuit when two or more persons have an interest in the copyright infringed (i.e., the beneficial owner and owners of exclusive rights in all or a portion of the work). “Divisibility of copyright” was introduced in the 1976 Copyright Act; § 501(b) was necessary to provide the relative rights and responsibilities concerning actions for infringement where there are multiple parties with an ownership interest in the infringed work. Since remedies follow from a finding of infringement, it seems strange to leave the remedies floating without their predicate, particularly when the statute structures remedies to come after infringement.