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30 November 2015

Comments re Restatement of Copyright, Preliminary Draft No. 1

I submit the comments below in anticipation of the Advisers' meeting to be held December 3, 2015, in the hope that they may contribute to the proceedings and assist the Reporters in revising the current draft. As an initial matter, I would request that the Reporters consider including in the agenda of the meeting the opportunity to address the two topics of the General Comments, below, because they raise fundamental threshold issues whose discussion should, I believe, precede taking up the specific topics of Chapter 2 of the draft.

General Comments

1. Nature and scope of the project

Restatements, according to the excerpt of the January 2015 Revised Style Manual set out at pp. xi-xii of Preliminary Draft No. 1 of the Restatement of Copyright, "aim at clear formulations of common law and its statutory elements or variations . . ." A "Restatement" of a federal statute (one that, moreover, exercises exclusive jurisdiction over the subject matter, so that with few exceptions there is no state law on the topic) thus proposes a venture new to ALI practice. Title 17 US Code does not consist of "statutory elements or variations" on the common law; it is an extensively-articulated statutory regime. To my knowledge, this is the first time the ALI has "restated" a federal statute in its entirety, including with respect to matters for which there are no common law antecedents, or issues for which there is little if any case law to synthesize. (Curiously, the "Restatement" seems to forego the opportunity to clarify non statutory copyright questions, because this draft bypasses the two subsisting areas of State or common law copyright: unfixed works, and pre-1972 sound recordings.)

Beyond the object of "restatement," this project contrasts in other ways with the Institute's past work product. Restatements have traditionally synthesized state common law and resolved conflicts in favor of a documented and considered evaluation of the better rule. (See January 2015 Revised Style Manual, *supra*.) If the draft provisions are any guide, the "Restatement" of Copyright departs in several respects from the positive law of the statute and its judicial interpretation, sometimes without acknowledgement of the departures, and at other times with little if any case law support for the black letter rule or Illustrations. (See specific comments below.)

This "Restatement" appears to be a fundamentally aspirational endeavor; it promulgates comprehensive rules that the Reporters perceive as improvements on the "bad state" of the current

law (Sept 2, 2014 letter to ALI Executive Director proposing project). It gives the impression of a shadow copyright act prepared in anticipation of legislative action as Congress (perhaps slowly) undertakes copyright revision. While the ALI need not shirk from the kind of systematic law reform proposals the Restatement of Copyright projects, it might better do so under the guise of Principles or Model Codes.

2. Contents

Preliminary Draft No. 1 commences with Chapter 2, Subject Matter and Standards. The Projected Outline identifies Chapter 1 as “General Principles.” Since the General Principles necessarily inform the contents of all the sections that follow, it seems peculiar to propose that the Advisers begin their work in a contextual vacuum. The Reporters presumably know the principles from which they proceed; some glimmerings of their underlying philosophies and policy choices emerge in specific sections, notably concerning fixation (§ 2.03). But the Advisers should not have to play a guessing game with this or any future drafts. Submitting Chapter 2 or any other specific sections without first unveiling Chapter 1 obscures fundamental decisions about the scope and substance of this project. The “general principles” that underlie this project should be fully disclosed and debated from the outset.

A baseline principle of any “Restatement” of copyright should be that it not conflict with the statute. If Reporters wish to provoke conflict between their work product and the positive law in aid of statutory reform, they should acknowledge that objective (though I continue to query whether such an endeavor would properly be promulgated as a “Restatement”). Where the project is inconsistent with or proposes to modify the statute or established case law, it should do so transparently and with thoroughly articulated and documented explanations so that the drafters’ goals can be understood by the Advisers, by the ALI membership, and by the broader legal community – whether the project is dubbed a Restatement, or Principles, or any other kind of Institute production.

Specific Comments

1. *Page 1, line 8* §2.01 (b), black letter law: Stating that “Categories of works recognized as protectable *are. . .*” (emphasis supplied) is misleading. It contradicts the statute, which states that “Works of authorship *include* the following categories. . .” (emphasis supplied). As the draft recognizes, in §101 the statute states “[t]he terms ‘including’ and ‘such as’ are illustrative and not limitative.” A “restatement” of the law should not suggest that the listed categories are exclusive. The Reporters Notes contend that the case law has effectively foreclosed unlisted categories from the subject matter of copyright. Whether or not that is a correct characterization of the limited case law, *Congress* clearly has not barred the door to un contemplated forms of creativity. Consistent with the baseline principle articulated above, a “Restatement” should not adopt an interpretation opposed to the clear text of the statute.
2. *Page 2, lines 2-5* §2.01, comment a (1) What is the basis for concluding that the contribution must be “free-standing” to qualify as a work of authorship? Lest this draft provision prove in tension with rules for joint authorship – the statute’s coverage of

contributions “inseparably” merged makes clear that a joint author’s contribution need not be “free-standing” – there should be a cross reference to and reconciling with those rules.

3. *Page 4, lines 7-8* §2.01, comment c, second para. Note that the sound recording can also fix the musical work itself.
4. *Page 5, lines 28-31* §2.01, comment d: While the Compendium of US Copyright Office Practices, 3d edition (2014) [hereinafter, Compendium] lists these examples as excluded from the category of choreographic works, several in fact are capable of manifesting more than sufficient originality to be copyrightable works of authorship. Whether they are properly categorized as “choreographic works,” “pantomimes” or “dramatic works”, it would not be appropriate altogether to exclude gymnastic programs (particularly floor exercises), ice-skating routines, ice-dancing routines, synchronized swimming, cheerleading routines, marching-band routines, magic acts, circus acts, juggling and fight sequences. The Compendium’s explanation for excluding social dance routines – we don’t want to make the general ballroom dancing public liable for infringing public performances – does not apply to the above list of creative performance works.
5. *Page 6, lines 9-23* §2.01, comment e: This definition of dramatic works is far too restrictive. To take just one example, it would exclude much of the *oeuvre* of Samuel Beckett: e.g., “Not I” has no plot whatsoever and no dialog; it’s just a spotlight mouth speaking.
6. *Page 8, lines 8-9* §2.01, comment g, second para. This conclusion does not warrant excluding the possibility, in the black-letter law above, that other categories of works may be copyrighted.
7. *Page 13, lines 11-15* §2.02, comment b, Illustration 10: This conclusion requires more convincing explanation. An original selection and arrangement of names of or facts concerning 50 years of hand tools would be a compilation within the subject matter of copyright, even though facts are not protectable works of authorship; why is an original selection and arrangement of the objects themselves not a compilation within the subject matter of copyright? The compiled data need not be in literary form to constitute a protectable compilation; an original selection and arrangement of photographs of the hand tools would be a compilation within the subject matter of copyright, even if the photographs lacked originality.
8. *Page 13, lines 22-25* §2.02, comment c: It would be more accurate to say “compilations . . . merely combine preexisting works, **or portions of preexisting works**, unchanged.”
9. *Page 15, lines 7-9* §2.02, comment d, Illustration 19 “[C]ombining the[] two elements [of the novel and the granddaughter’s new introduction] does not manifest the requisite originality in selection, coordination, or arrangement” to be a collective work: The problem

isn't originality, it's numerosity. Two works are too few. The statutory definition of a collective work refers to "*a number of* contributions, constituting separate and independent works in themselves, [that] are assembled into a collective whole" (emphasis supplied), but does not indicate how many more than one are "a number". One might infer that the term implies more than two, because elsewhere the statute refers to "two or more" (e.g., § 101 definition of "joint work"; § 111(f)(3) definition of "cable system"; § 504(c) statutory damages), so if Congress had meant a "collective work" to include only two contributions, it could have used the "two or more" formulation. To the same effect, the Compendium, 509.1 states:

A work that contains "relatively few separate elements" does not satisfy this requirement, such as a work containing a single contribution, a composition that merely consists of words and music, a publication that merely combines a single work with illustrations or front matter, or a publication that merely contains three one-act plays. H.R. REP. NO. 94-1476, at 122, reprinted in 1976 U.S.C.C.A.N. at 5737; S. REP. NO. 94-473, at 105.

10. *Page 16, lines 1-3* §2.02, comment f, second para.: The proposition needs an Illustration. Perhaps Picasso's variations on Las Meniñas? (All of them? Some of them?) In almost all the variations, some elements of the Velazquez are recognizable; is that the same as substantially similar? Would it illuminate the proposition to explore the difference?
11. *Page 16, line 21* §2.02, comment f, Illustration 23: This should refer to Illustration 22 rather than 21.
12. *Page 18, lines 6-9* §2.02, comment h: This is confusing: the derivative work isn't lawful if it wasn't authorized by the author of the underlying work (assuming its creation was not fair use). Copyright arises on creation, so the underlying work's author's permission to create the derivative work implies acknowledgement of the derivative work author's resultant copyright. Perhaps what is meant is that the creator of an authorized derivative work does not require specific permission from the author of the underlying work in order to claim copyright protection for his derivative work (e.g., by registering it). It may be clearer to say "and the author of an authorized derivative work. . . does not require permission. . ." "Authorized" is capacious enough to include works used with permission or pursuant to an exception or limitation. With reference to compilations: a compilation can be a list (e.g., best movies of all time) so the concept of permission in this context is confusing.
13. *Page 18, line 16* §2.02, comment f, Illustration 23: Substitute "assert" for "obtain."
14. *Page 18, lines 22 et seq.*, §2.02, Reporters' Notes: It would be desirable to include a cross reference to Chapter 7, topic 4 (derivative work right) to clarify that a work that infringes the derivative work right need not otherwise have been protectable as an original derivative work. For example, a computer-generated translation is not original (for lack of human

authorship, see *infra* my comments on draft § 2.04), but if unauthorized by the author/rightholder or by law, would infringe the derivative work right.

15. *Page 20, lines 4-5* §2.03 (b), black letter law: This rule is not consistent with the statute. A more accurate paraphrase of the definition of fixation would be:

To be “fixed in a tangible medium of expression,” a manifestation of the work must permit the work to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

The “embodiment in a copy,” per the § 101 definition, does not have to endure for a period of more than transitory duration; the perceptibility (etc.) does.

16. *Page 20, line 7* §2.03 (c), black letter law: The requirement that the instantiation be “sufficiently stable for the work to be exploited in some market” is not a “restatement” but a substantively higher standard than the 17 USC §101 definition. Perhaps it is inspired by the EU InfoSoc directive 5.1, which refers to the lack of independent economic significance of a transitory copy? In the EU, however, the transitory copy *is* a copy, but it's exempted from the scope of the reproduction right. The market gloss betrays a particular slant on the nature and purpose of copyright law that is not consistent with positive law (see also my comment 23, *infra*).

17. *Page 21, lines 1-3* §2.03, comment a, Illustration 2: What if there's also an unauthorized recording made simultaneous with the authorized performance? Assuming that the federal copyright can be infringed only after the authorized fixation has been completed (unless the authorized recording is being “transmitted” and qualifies as simultaneous fixation, see below) is that unauthorized recording from the live event actionable only under state law?

More importantly, why is the fixation-with-simultaneous-transmission rule not included in this draft? Congress made an important modification to the fixation threshold for attachment of federal copyright; it is not appropriate for a “Restatement” to ignore this rule, particularly since the subsequent discussion of the constitutional dimension of fixation is inconsistent with the simultaneous transmission/fixation rule. See my comment 27 *infra*.

18. *Page 21, lines 21-25* §2.03, comment b (1), Illustration 3: Presumably the work was saved to the laptop hard drive and retained in RAM as it was being created: Aren't these fixations as well?
19. *Page 21, lines 27-29* §2.03, comment b (2): Delete the final sentence, which is not a restatement of the law. Neither the statute nor the case law impose a requirement of “authorial intention to obtain copyright protection”; a restatement should not suggest a higher or different standard.

20. *Pages 21, line 32-Page 22, line 5* §2.03, Illustration 4: The performance does not remain unfixed “because of the express prohibition on recording,” as stated in the Illustration. A surreptitious recording in itself is an unauthorized fixation, and therefore is not “fixed” within the meaning of the statute. The Illustration makes it seem that, in the absence of express assertion of the creator’s rights, authorization would be deemed implicit; the default thus would require affirmative rights-claiming steps by the creators. This is not the law.
21. *Page 22, lines 6-10* §2.03, comment b (2), Illustration 5: The initial fixation occurs with the transcription, whether on a steno pad or in the computer's memory, if the stenographer is working directly on a computer. Why focus on the printouts alone?
22. *Page 22, line 22* §2.03, comment b (3), para. 3: “Courts have held” – This is an overstatement: Only *Cartoon Network* has so held.
23. *Page 23, lines 3-9* §2.03, comment b (3), paragraph 5 (beginning “The last element. . .”): The statute does not define fixation in terms of market exploitation. Nor does the case law. This represents an economic positivist view of copyright inconsistent with the fundamental proposition that copyright arises out of the creation of a work, not from its marketing or marketability. Fixation is relevant to proving what the work *is*; it should not be freighted with additional normative criteria.
24. *Page 23, lines 10-13* §2.03, comment b (3), last paragraph before Illustration 6: Again, fixation is defined in terms of market exploitation (see comment above), which is not necessary to support a duration requirement.
25. *Page 23, lines 21-30* §2.03, comment b (3) Illustration 7: This is not consistent with the positive law, see my comment 36, *infra*.
26. *Page 24, lines 1-3* §2.03 comment c: But this doesn't address the normative issue; the Constitution doesn't require the marketability gloss.
27. *Page 24, lines 6-8* §2.03 comment c, Illustration 8: This is conclusory and conflates the statutory definition of fixation with the constitutional referent, “Writings.” The Constitution says nothing about whether a “Writing” can only be a creation that (1) has assumed concrete form (2) under the authority of the creator. Even were tangible form a constitutional predicate, the copyright clause can equally cover the right to determine whether the work/performance will be rendered concrete. Indeed, the statutory simultaneous-fixation-with-transmission rule requires such an understanding of “Writing” because the version of the work that the infringer is capturing in a live transmission has not in fact yet been “fixed” when the infringer copies or further transmits it. If “writing” necessarily implied pre-existing authorized fixation, then the work when copied is not yet a “Writing” and Congress would have no power to enact the legal fiction of simultaneous-fixation-with-transmission.

By the same token, even assuming a tangible form predicate, the Constitution (as opposed to the statute) does not mandate that the person rendering the work concrete have in fact been authorized to do so. UK law, for example, requires fixation (essentially for purposes of proving what the work is), but an unauthorized fixation brings the work within the scope of the copyright law. See UK Copyright Designs and Patents Act 1988 s. 3(2), 3(3). If the Constitution does not require that the fixation be authorized, then even if “Writings” necessarily implied a fixation, the third party’s fixation would bring the work within Congress’ power.

Finally, “Writings” could mean identifiable creations (works of authorship), regardless of tangibility. The Framers may have assumed the work would be in tangible form, but an assumption is not the same thing as a constraining norm. It is not, in any event, necessary to resolve this question of constitutional interpretation (nor to explore whether other constitutional provisions buttress Congress’ power to protect a right of fixation) in order to “restate” the positive law.

28. *Page 24, lines 29-31* §2.03, comment d (1): Again, this is not the law.
29. *Page 25, lines 14-22* §2.03, comment d (1), Illustration 11: Perhaps the Illustration could be changed so that it doesn’t suggest a higher durational standard (several hours) than warranted by the case law (several minutes).
30. *Pages 25-26, lines 25-30; 7-11* §2.03, comment e (1), and Illustration 13: But what's the "work"? Are subsequent drafts derivative works based on the first draft?
31. *Page 26, lines 13-20* §2.03, comment e (2): Fixation's role in implementing the idea/expression dichotomy should be emphasized, and could be tied back to the constitutional nature of the requirement: the "writings" are the authorial expression of the idea, not the idea itself. Without some fixed instantiation of the work it may be difficult to distinguish the expression from the idea.
32. *Page 26, lines 23-30* §2.03, comment e (2), Illustration 14: If the new drawings aren’t fixations of the lost 1995 drawings, what are they? The drawings were fixed in 1995, so they're within federal copyright. Could their reconstitution from memory be a copy of the lost work? They could be virtually identical. In any event, the case cited in the Reporters Notes to Illustration 14, *Kodadek v MTV Networks*, 152 F.3d 1209 (9th Cir. 1998), addressed the Copyright Office’s § 408 best evidence rule; it did not concern fixation.
33. *Page 28, lines 20-30* §2.03, Reporter’s note b, para. 4 (concerning *Kelley v. Chicago Park Dist.*): This case is wrongly decided and warrants criticism. Any combination of the flowers in the garden, albeit dynamic, was certainly fixed long enough to be perceived, reproduced or (images of it) further communicated. There do seem to be differing standards in the draft: no fixation in *Kelley*, yet fixation for other types of gardens -- or for ice sculptures, etc. that change form more quickly than did Kelley’s garden.

34. *Page 28, lines 31-36* §2.03, Reporter's note b, para. 5 (concerning *Kim Seng Co. v. J & A Importers*): Also wrongly decided (on this issue); a "food sculpture" will take days to rot. The example is also inconsistent with the earlier statement that an ice sculpture, though doomed to melt, is fixed for a sufficient duration.
35. *Page 28, line 37-page 29 line 12* §2.03, Reporter's note b, para. 6: This back pedaling demonstrates why neither *Kelley* nor *Kim Seng* should be included (or if included, only with disapproval). The attempts to distinguish these cases are unpersuasive.
36. *Page 29, lines 13-25* §2.03, Reporter's note b, para. 7 (beginning "Other courts. . ."): The draft asserts that *Williams Electronics, Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982), was incorrectly decided, embracing the losing argument made by defendants in *Williams* and several other cases: that the screen displays created by a videogame program are transient and cannot be "fixed" because the game creates new images each time it's played. The courts have consistently rejected this position, holding that game play involves repetitive sequences of a substantial portion of the audiovisual features of the game, which are embodied in the memory devices of the game. *See, e.g., Williams*, 685 F.2d at 873-74; *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 855-56 (2d Cir. 1982); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981); *see also M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 440-41 (4th Cir. 1986). These cases respond as well to the draft's additional argument, that the images don't stay on the screen long enough to be fixed, since it is the fixation in the memory device that is relevant. The draft simply asserts that *Williams* is wrong without reviewing cases with similar holdings, identifying any cases that reject the *Williams* holding, or considering the Copyright Office's position. The blanket repudiation of the principles set out in these cases is unsupported. Again, this seems inconsistent with a "restatement."
37. *Page 29, line 39-page 30 line 10* §2.03, Reporter's note c, para. 3: The Comment takes the *Goldstein* decision out of context. The issue there wasn't whether live performances were "writings;" the Court's statement was made to show how broad the constitutional concept of writings is -- so broad that it could include the recorded performances at issue in that case. The Court's discussion cannot reasonably be read as a limitation on the potential scope of "writings."
38. *Page 30, lines 17-38* §2.03, Reporter's note d, para. 2 & 3: The discussion of *MAI v. Peak* should be limited to the fixation issue, which is the subject of this chapter of the draft restatement. *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999) and the entire discussion of who is the "owner of a copy" does not belong here. Moreover, any discussion of who is the owner of a copy for purposes of the essential step defense must also take account of cases that determine whether someone is the owner of a copy for purposes of the first sale doctrine. *See, e.g., Vernor v. Autodesk, Inc.*, 631 F.3d 1102, 1109-10 (9th Cir. 2010). Finally, if and when it is appropriate to discuss *DSC*, it should be noted that the determination whether someone is the owner of a copy is more complex than the discussion in the draft suggests. Indeed, the *DSC* court distinguished *MAI*, concluding that it was proper in *MAI* to find that Peak was not an owner of the software copies, based on the terms of the license. 170 F.3d at 1360-61.

39. *Page 31, lines 6-18* §2.03, Reporter’s note d, final para.: The amendment to § 117(c) is invoked as part of a critique of the result in *MAI v Peak*; this discussion is not relevant. The Note acknowledges that the statutory amendment “did not overturn” the decision’s analysis of fixation. To the extent the amendment to § 117(c) is pertinent here, it is only to demonstrate that a later Congress endorsed *MAI*’s fixation ruling, as there would have been no need to enact an exception for computer maintenance were the RAM copy not otherwise a “copy.”
40. *Page 31, lines 27-35* §2.03, Reporter’s note e, para. 3, sentence 2: Fixation was implicitly required because federal copyright didn’t attach until publication, and publication meant distribution of tangible copies.
41. *Page 31, lines 31-35* §2.03, Reporter’s note e, para. 3: This is true but not relevant to the question of fixation. Also, the reference to “manifestation of intent to claim copyright protection” should be deleted as unsupported by the statute or case law. The description of the law can speak for itself.
42. *Page 32, lines 5-7* §2.03, Reporter’s note e, para. 5: But if one can’t register the reconstitution of the destroyed original fixation, then a US author can’t initiate an infringement action on the basis (and date) of that work. So the persistence of the original fixation does effectively -- for US works -- determine the existence of copyright.
43. *Page 32, lines 16-17* §2.03, Reporter’s note e, para. 6, end. Again, the reference to “intent to claim copyright protection,” which suggests that this is or should be a requirement, should be deleted.
44. *Page 32, lines 31-35* §2.03, Reporter’s note e, final paragraph, second sentence: This newly created “market test” advances a particular view of copyright’s mission. This is not a restatement of the law. Moreover, it is not the task of a Restatement to debate whether the U.S. should retain the fixation requirement. The requirement is unequivocally present in the statute; debating its elimination departs from the principle of adherence to statutory norms and takes this project into the much more contested waters of advocating legislative change.
45. *Page 33, lines 2-6* §2.04 (a) (b), black letter law: It is implicit that the work’s creator must be a human being. See Compendium, 306 “The Human Authorship Requirement,” citing *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). (“The copyright law only protects ‘the fruits of intellectual labor’ that ‘are founded in the creative powers of the mind.’”); 313.2 “Works That Lack Human Authorship.” See also my comment 47, *infra* re Illustration 1.
46. *Page 33, line 15* §2.04 (d), black letter law: “Primarily involving” and “involving” are very problematic. Many works may “involve” considerations of utility, but can still be created in many different ways (e.g., tests, maps, computer programs). A broad phrase like “involving practices standard to a particular type of work” could have the effect of excluding not only computer programs, maps and tests, but any kind of instructional or informational work, from textbooks to journalism, as well as many genres of literature, music and art. Better to reword to say “Choices *dictated* by the work’s function . . .” (emphasis supplied), and to delete the phrases regarding tools and practices.

47. *Page 34, lines 7-10* §2.04, comment a, Illustration 1: The work as a whole should also be protected, e.g., the way the various themes are ordered, interwoven, arranged.

This Illustration could also reinforce the requirement of human authorship, e.g., by cross referencing to §. 2.02, comment d, Illustration 14 (page 14), and positing a computer-generated piano-reduction of an orchestral score.

48. *Page 34, line 29 – page 35, line 2* §2.04, comment c (3): Same point as in my comment 46, *supra*, concerning *Page 33, line 15* §2.04 (d), black letter law.

49. *Page 35, lines 7-14* §2.04, comment c (3), Illustration 5: Why are the estimated prices not deemed original as a reflection of the creator’s judgment, as in *CCC Info. Servs. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994)? Many cases have relied on *CCC* or cited its holding with approval. *See, e.g., CDN, Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999); *Banxcorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 300-01 (S.D.N.Y. 2013); *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1234 (D. Colo. 2009). It remains good law. The Reporters’ Note that apparently will explain the rejection of existing law has not yet been provided, but it is doubtful whether this is consistent with a “restatement.”

50. *Page 35, lines 15-23* §2.04, comment c (3), Illustration 6: This is misleading to the extent it may imply that taxonomies are not original. Taxonomies are useful or functional, but the choices made in determining how to organize the presentation of information can be original. *E.g., ADA v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7th Cir. 1997).

The nuanced nature of determinations concerning copyrightability of compilations could be demonstrated with an illustration based on *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991), where the court found *Kregos*’ nine-category pitching form to be a protectable compilation. Conceding that protecting categories of data can potentially risk according protection to ideas, the court nevertheless concluded that where the selections involve matters of taste and opinion rather than matters of predictive analysis, “there is no serious risk that withholding the merger doctrine will extend protection to an idea.” *Id.* at 707. Since the court found there were various ways of selecting pitching statistics to assess pitching performance, it declined to apply the merger doctrine.

51. *Page 35, line 30 – page 36, line 1* §2.04, comment d, next-to-last sentence: The statement that “works such as factual compilations, maps, databases and other collections are vulnerable to falling short of the requisite minimal creativity” is far too sweeping and inconsistent with *Feist*, where the Supreme Court said “the requisite level of creativity is extremely low; even a small amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), quoting 1 M. Nimmer & D. Nimmer, COPYRIGHT, § 1.08[C][1].

52. *Page 36, lines 6-11* §2.04, comment d, Illustration 7: The selection and arrangement may not be protected if they copy the museum’s selection and arrangement of the underlying works.

53. *Page 36, lines 28-30* §2.04, comment e, Illustration 8: What about the sound engineer or other party doing the recording?
54. *Page 37, lines 5-8* §2.04, comment d, Illustration 10: What about adoption of unintentional creativity, as in *Alfred Bell v. Catalda*, 191 F.2d 99 (2d Cir. 1951)?
55. *Page 40, lines 24-27* §2.05, comment c(1): “require public domain status for the work” is either inaccurate or an invalid “agreement to the contrary” under 17 USC § 203. It would be more precise (and would avoid statutory conflict) to say that the US government agency that commissions the work could contractually require that the author assign or license the work to the US government, which could then make the work available without restriction for the duration of the assignment or license (subject to the author’s termination right).
56. *Page 41, lines 7-10 and 13-17* §2.05, comment c (2) and Illustration 8: What is the authority for these propositions? If a joint work is created by an employee for hire and a freelance creator (and there’s no agreement making the work “for hire”), isn’t the freelancer still the copyright owner? Her copyright isn’t subsumed within the work for hire status of the other creator. Why should it be different for works jointly authored by government employees and civilians?
57. *Page 42, lines 7-15* §2.05, comment d, Illustration 10: This example seems forced. If government employees can perform the task equally well and are available, why go outside? The government agency would be more likely to engage an outside cartographer where government employees are not available or are less competent than the outsider, but such resort hardly seems a “subterfuge.” If the cartographer did not transfer ownership to the government, she could condition exploitation of the maps on payment of a fee. It is not apparent why the government, upon transfer of the cartographer’s copyright, could not also charge a fee. The only difference between Illustration 10 and Illustration 9, once the implausible subterfuge scenario no longer applies, is that the work in Illustration 9 does not fall within the sorts of works the government body normally produces, while the work in Illustration 10 does. If the draft means to suggest that works normally done in-house should be considered works of the US Government if the government body commissions outsiders to create them, that is an interesting policy prescription, but it is not consistent with the statute.