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Letter to Council Members Regarding Council Draft 4

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Professor David Levi
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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 4 (CD4) of the Restatement of the Law, Copyright (Copyright Restatement) project at its meeting on January 16-17, 2020. We appreciate the opportunity to provide comments on CD4. We hope that you will give careful consideration to these comments and send CD4 back to the Reporters to address the problems we describe below.

CD4 is an improvement over earlier drafts that address these topics. Nevertheless, this draft, like earlier ones, treats legal issues inconsistently. As we demonstrate below, CD4 departs from existing law in the following different ways. First, the black letter continues to omit statutory provisions. Second, some of the black letter announces rules that do not exist in the statute and that lack caselaw support. Third, some of the comments propose rules that do not exist in the statute and that lack caselaw support. These departures from positive law sometimes adopt policy positions we might endorse in a different kind of endeavor, such as a "Principles" project, or an acknowledged advocacy piece. But we do not believe it accurate to characterize these departures, however substantively desirable, as "*RE*stating" the law (as opposed to altering or inventing it).

Below we explain our overarching concerns about CD4. We include additional suggestions and corrections in the Appendix.

In some cases, CD4 announces legal standards unsupported by statute, case law, or administrative ruling; in others, it omits statutory provisions from its black letter provisions.

CD4 describes some propositions as law – in some cases giving them "black letter" status – even though they are not supported by the statute, case law, or administrative rulings. In other respects, it perpetuates its predecessors' infidelity to the text of the Copyright Act by selecting some statutory provisions for treatment as black letter but omitting others.

CD4, like its predecessors, reflects an unfortunate tendency to "fill holes" – that is, to declare a legal principle where there is nothing in the statute and no relevant cases on point. This approach raises at least two concerns: first, the Reporters are making up the law, rather than synthesizing it. Second, they are inhibiting "the flexibility and capacity for development" of the law, contrary to the goals articulated in ALI's Revised Style Manual.[1]

Statutory text omitted from CD4's black letter:

17 U.S.C. § 201(c). CD4's black letter does not include 17 U.S.C. §201(c) (which concerns contributions to collective works),[2] and it includes only a portion of it in Comment c to section 3.01. This provision is significant for authors who contribute to collective works but do not sign agreements transferring rights; without a written transfer, these authors retain copyright in their contributions, apart from the publisher's "revision" privilege. The interpretation of section 201(c)'s privilege was at the heart of the Supreme Court's decision in *New York Times Co.v. Tasini*, 533 U.S. 483 (2001). As a result of *Tasini*, publishers may be more likely to demand transfers of rights from collective works contributors, but section 201(c) remains relevant. It is not appropriate to leave out of the black letter a statutory provision that, moreover, was construed by the Supreme Court.

Black letter lacking support in statute or caselaw:

Black letter §3.01 (f): "Abandonment of Copyright." Section 301's table of provisions (p. 13) lists a planned section 301(f), "Abandonment of Copyright" (formerly titled "Dedication to the Public Domain" and included as section 301(e)). Nothing in the Copyright Act alludes to abandonment of copyright. We understand that a commitment to an expansive public domain (or a desire to reduce the overall number of copyright-protected works) might underlie a wish to create a black letter rule for abandoning copyright. But there are relatively few cases on abandonment. Elevating this subject to a black letter provision is not merely a *restatement* of the law. Including this provision in black letter could reinforce perceptions, expressed in connection with other drafts, of a pervasive anti-copyright predisposition. This topic belongs, if at all, in Comments.

Black letter §3.04: "Fractional interest." See page 44 and comment b at 44-45. Despite the changes to comment b since the last draft, the discussion of "fractional interest" is confusing and the term "undivided fractional interest" is inherently contradictory. Moreover, CD4 elevates to black letter status a designation that does not appear in the Copyright Act, and that, as used in CD4, lacks support in other sources of positive law.

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[1] "Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law." Excerpt of the Revised Style Manual approved by the ALI Council in January 2015, PD4 at xi.

[2] 17 USC § 201(c) provides:

> Contributions to Collective Works.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

There is a distinction between, on the one hand, joint ownership of a copyright as it arises under the Copyright Act and principles of tenancy in common, and on the other hand, fractional licensing and administration of co-owners' interests.[3] The legislative history of the 1976 Act indicated that Congress considered joint authors to be tenants in common; accordingly, each author enjoys an undivided interest in the whole of the work. That is, each may license the *entire work* (not just a fraction) on a nonexclusive basis, and can collect the *entire licensing fee* (subject to an accounting to co-authors). In terms of profits, each author is entitled only to a portion – as they have agreed, or under a default rule, where each would get an equal amount. In the case of two joint authors, for example, each gets 50% under the default rule. But to emphasize, *each joint author can license (nonexclusively) and administer the whole.*

The music industry practice of "fractional" licensing and administration is different. It recognizes that co-authors may agree to license and collect only for a *portion* of the work – that is, by agreement, each controls a fractional (or divided) interest. In many cases those interests are not equal. In contrast to the treatment of joint ownership under principles of tenancy in common, under a fractional licensing approach, the joint author (or the author's successor) *may not grant a license for the whole*.[4]

It is oxymoronic to say, as the current Restatement draft does, that each author owns an "undivided" yet "fractional" interest in the whole. On the contrary, each owns an *equal interest* in the whole *that extends to the whole*, and thus each can exploit the whole. That is not a fractional, or divided interest – it is an undivided interest that is shared. Even Restatements concerning other bodies of law use the term "fractional" in the context of ownership, use of that term in CD4 is confusing, in part because of the legislative history cited above, and in part because in the copyright field, this term has been used only with respect to copyright ownership in the music industry. Finally, in some places use of the term is inaccurate, as it conflates principles of joint authorship with the practice of fractional licensing.[5]

Comments proposing rules that do not exist in the statute and that lack caselaw support:

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[3] Note that we use "joint authors" and "co-authors" interchangeably with "joint owners" and "co-owners" in this memo.

[4] This means that if co-authors join different performing rights organizations (PROs), e.g., author A joins ASCAP and author B joins BMI, a user seeking to license that work must generally get a license from both PROs to exercise public performance rights in the work. This principle was recently upheld by the Second Circuit in *United States v. Broadcast Music, Inc*., 720 Fed. Appx. 14 (2d Cir 2017) (holding that unless the BMI consent clearly prohibits BMI from offering fractional licensing – which it does not – then BMI may offer them).

[5] The term is not used at all in the legislative history of the 1976 Copyright Act. Instead, the legislative history states: "Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to license the use of a work, subject to a duty of accounting to the other coowners for any profits." H.R. Rep. No.94-1476 at 121. The term "fractional interest" did not appear in the copyright statute or in the legislative history until the Music Modernization Act of 2018 (MMA). There is a single instance of the word "fractional" in the MMA, which doesn't use the term in relation to joint works or joint authorship (neither of which is referenced in the legislation), and there is nothing to suggest that the employment of this term was intended to address or override longstanding principles of joint authorship. To our knowledge, the terms fractional interest or fractional licensing have not appeared in copyright cases, other than *United States v. Broadcast Music, Inc.* See materials on the Music Modernization Act collected on the Copyright Office website at https://www.copyright.gov/music-modernization/.

Section 3.04, Comment f., pages 51-52, lines 28-31/1-13: This portion of the comment appears to mean that a pre-creation agreement to vary the default allocation of equal ownership is not a transfer of ownership requiring a writing, but a post-creation to do the same thing is a transfer of ownership and does require a writing. This seems very formalistic. Is the theory that the pre-creation agreement addresses a work that does not yet exist, but when it comes into being, copyright vests according to the agreed allocation? The rule leads to perverse effects: an oral agreement would not suffice to transfer post-creation shares, but oral agreement pre-creation would. Such a rule seems to invite abuse. (The comment's next paragraph appears to recognize potential problems with characterizing a pre-creation agreement as a non-transfer of ownership.) The Reporters Notes indicate that there is no law on this. We do not believe the Restatement should venture into uncharted waters, particularly with such a questionable conclusion.

Section 3.04, Comment f, page 52, lines 14-21. This portion of the comment proposes a rule to counteract the conclusion reached in the prior paragraph. Comment f here discusses the legal question whether agreements among co-authors must be in writing, and takes the position that "an agreement that specifies the proportions in which co-authors' copyright ownership interests will vest should be in writing, regardless of when the agreement is made." But the statute does not mandate this result with respect to agreements in advance of creation. The Reporters cite no cases on point, and it is contrary to long-established business practices in some fields. Even if the proposal offered a desirable rule, the absence of positive law support counsels against its inclusion as a rule in "Restatement" comments.

Section 3.04, Comment g. This comment asserts that when a co-creator of a joint work is an employee for hire (e.g., she is an employee working within the scope of her employment, or an independent contractor whose engagement meets the conditions of the Copyright Act), then the employer or hiring party of that creator will be a co-author of the joint work. Comment g cites no case in support of this rule. Reporters' Note g states that there is no relevant appellate case, and cites no lower court cases in support of this announced rule. Again, the proposal may be sensible and desirable, but its lack of positive law grounding makes it inappropriate for designation by the Comments as a rule.

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, 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 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,

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

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 takes 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 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.

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[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.

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.

APPENDIX

Black letter §3.03(b) and Comment d: Concerning the requirements that "an author must contribute copyrightable expression that is, in the context of the entire work, substantial enough to qualify that author as one of the co-authors of that work as a unitary whole," and that each co-author make a "non de minimis contribution of copyrightable expression." The black letter and the discussion in the Comment seem to vacillate between requiring that each co-author's contribution must contain discernible expression and simply requiring that the contribution yield a work that as a whole contains copyrightable expression. The statute's definition of a joint work as being by "two of more authors," read most sensibly, means that the contributors are the authors of the *whole*, not that each participant's *part* is itself a work of authorship. Thus, it does not make sense to say that each contributor must "first, in fact, be an author" (Comment d, p. 27, lines 26-27), at least not if that implies that each contributor have been an "author" before the contributions are merged into a joint work. As the Comment recognizes (p. 28, lines 9-11), such a requirement is particularly nonsensical for inseparable joint works, and could result in "improper denial of joint work status." The Comment offers an example of copyrightable expression that would qualify: "Contributors' decisions about what contributions, or portions of contributions, to include or not include in the work can, themselves, constitute copyrightable expression" (p. 28, lines 15-17). It is not clear however, that such decisions, though certainly part of the collaborative process (and therefore sufficient to make one a joint author if one recalls the legislative history's reference to collaboration), truly are copyrightable expression. Is a decision not to include elements "fixed" expression? The example in fact illustrates the absurdity of looking to the separate contributions to identify co-authorship rather than the combined whole. (To the same effect, see §3.03, Comment d, Illustration 8, p. 29: This is clearly a collaboration and, accordingly, a joint work. Is it really necessary to examine the archaeology of the contributions?)

Black letter §3.03(c) and Comment c. CD4 is ambiguous as to whether contributions must be made contemporaneously, or whether seriatim contributions suffice if the author first in time intended that another person finish the work and the later in time contributor intends to merge her contributions with the prior contribution. According to the black letter, to have the necessary intent to be a co-author of a joint work, "an author must intend, at the time the author creates that author's contribution to the work, that the contribution be merged into the joint work as a unitary whole." See also p. 23, lines 23-25. This formulation does not clearly exclude asynchronous joint works. Indeed, Illustration 2, pp. 25-26, states that a joint work results from later additions if both authors intended that their works be combined. In that example, however, the contributors at least are known to each other. If asynchronous contributions could form a joint work, anomalous results might follow. Suppose that in 2010 a composer writes music with the intention that a lyricist at some point provide words. In 2020 the lyricist comes along and fulfills the composer's wish. Was the musical composition a solo-authored work in its own right for 10 years, and then became converted to a joint work once the lyricist supplied the words? How would rights be administered from 2010-20, and then from 2020 henceforth? It seems unlikely Congress intended such a result. The requirement of intent "at the time the writing is done" to merge contributions "overruled" the *12th Street Rag* case, which found a joint work in later-added lyrics. In that case, there was no evidence that the composer intended for words to accompany the music. But merely curing the deficiency of intent does not solve the case's other problem, the disparity in the timing of the contributions.

The legislative history supplies other clues that Congress rejected both prongs of the *12th Street Rag* case. The House Report refers to collaboration, which implies both temporal proximity and acquaintance among contributors. The legislative history also states that a work is a joint work if "each of the authors prepared his or her contribution with the knowledge and intention that [her contribution] would be merged with the contributions of other authors." H.R. Rep. 94-1476 (1976) at 120. While an intention criterion might imply that contributions need not be contemporaneous, a requirement that co-authors *know* of each other's contributions would exclude sequential co-authorship or an inchoate invitation to unknown third parties to contribute to a work's creation.

§ 3.04, Comment c, Illustration 7, p.47: How would the Restatement address this *David v Blige*-inspired problem: Z pays D $1.00; E gets 50 cents. D & Z create derivative work; does D owe E an accounting for D's profits from the derivative work? What if D & Z agree that all profits will go to Z?

§3.04, Comment e, p. 49, lines 24-30: Does this mean that a transferring co-owner (A) doesn't have to account to co-owners B & C for profits from that transfer? New co-owner D must account to B & C for profits from any of its unilateral exploitation. But B & C are not entitled to profits from the transfer of A's ownership share to D. Is this because the A-D transfer doesn't exploit the work? Please clarify.

§3.05, Comment b, p. 64, line 6, reference to 17 USC § 104: This is not quite accurate. Section 104 does not refer to works made for hire. Section104(b)(1) states, with respect to published works: "one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled;" Under US law, "author" includes employers for hire. But per *Itar-Tass Russian News Agency v. Russian Kurier, Inc*., 153 F.3d (2d Cir. 1998), and per §104A(b), the law of the source country of a restored work (i.e., not US law) determines who is the author or initial rightsholder. The comment, as currently written, could lead readers to conclude (incorrectly) that the US-law characterization of works for hire would apply to the eligibility of foreign works for protection in the US.

§3.05, Comment e, p. 70, line 12: The text mentions two requirements, but subsequent discussion in this comment in fact develops 3 requirements:

> 1. Specially ordered or commissioned (i.e. works made at creator's initiative aren't "specially ordered or commissioned" when subsequently acquired by, e.g., a periodical or a motion picture company)
>
> 2. Comes within 1 of 9 categories
>
> 3. Writing signed by both parties stating work is "for hire"

§**3.05**, Comment g, p. 73, lines 23-26: Regarding the necessity of the writing before creation of commissioned work for hire: The Second Circuit now seems to be leaning toward a pre-existing writing rule, see *Estate of Kauffman v Rochester Institute of Technology* (2d Cir 2019).

§**3.05**, Comment g, p. 74, lines 14-19: The proposed rule now accurately reflects the positive law, given the 2d Cir.'s distinguishing of *Dumas* in *Estate of Kauffman*.

§ 3.06 re transfers of ownership of copyright

We note that this section does not address interpretation of the scope of transfers (particularly the old license/new media problem). Since this has been the subject of considerable, and inconsistent, caselaw, do the Reporters intend to address it? Is it part of the planned content for §3.09? (See §3.01(d), p. 13).

§ 3.06, Comment e, p. 91, lines 7-16: Is there a general rule of nontransferability of nonexclusive licenses?

§ **3.06,** Comment f, p. 93: We recommend that the Restatement (here or at least in Reporters' Notes) mention *droit de suite* to note its absence after preemption of the California statute, and also to observe that other countries recognize these rights; that the Copyright Office has extensively studied and published a report on resale rights, see https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf: and that in the 115th Congress two bills were introduced to provide resale royalty rights. S.3488 and H.R. 6868 "American Royalties Too Act of 2018."