

Restatement of Law, Copyright
Tentative Draft No. 2

Proposed Amendment to Chapter 1, §8. Fixation, Black Letter
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Proposed Amendment to black letter:

Black letter, page 75, after line 6, add a new subsection:

(c) A work consisting of sounds, images, or both, that are being transmitted, is “fixed” if a fixation of the work is being made simultaneously with its transmission.

Discussion:

In general, the fixation provision and its comments provoked particularly strong objections in Advisers’ meetings from the start. Over multiple drafts, and notwithstanding consistent pushback from the Advisers, the Reporters have persisted in an approach that both omits statutory text from the black letter, and in the Comments applies a definition that has no basis either in the statute or in the caselaw. This amendment concerns the black letter of sec. 8. A separate set of amendments addresses the Comments to sec. 8.

The definition of “fixation” in Section 101 of the Copyright Act has two parts. Subsection (b) of the Draft’s black letter correctly sets out the first sentence of the two-part definition – that a work is “fixed” for purposes of the Act when “its embodiment . . . is sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” But the black letter of the Draft omits the second part of the definition – which states that works are also fixed if the fixation occurs simultaneously with the transmission of the work. This is a critical point and a crucial one for copyrighted works that rely on live broadcasting or other forms of live transmission – that the work need not first have been embodied to be copyrightable. The work can be fixed during transmission. The statutory rule regarding simultaneous fixation is an integral part of the definition of “fixation,” and accordingly should be in the black letter. It is not appropriate for TD2 to pick and choose which substantive norms belong in the black letter. Congress has made that choice.

Relegating this statutory rule to Comment *e* conveys a misleading impression of the copyright law. For example, the Reporters state that “the fixation requirement also reflects a constitutional limitation,” TD2 at 75, and by omitting the simultaneous fixation rule from the black letter, while in the Comments emphasizing that fixation is assessed “*after* the embodiment is initially made” (TD2 p 79, line 6, emphasis in original; see also *id.* – 83, line 10 and Illustrations 15 and 16), the Reporters imply that the Constitution requires that a work have been fixed before Congress may protect it. But the statutory simultaneous fixation rule reveals Congress’ interpretation of the Constitutional grant of authority to encompass not only the power to recognize exclusive rights in already-fixed works,

but also in works that were not yet fixed when Congress provided for copyright to attach. Congress therefore has adopted a more flexible interpretation of its Constitutional authority than that espoused by the Reporters. The Restatement should not be winnowing the breadth of protection clearly set out in the text of the statute.