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Comments on Preliminary Draft 8 [black letter and comments]

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To: ALI Restatement of Copyright Reporters
Subject: Comments on PD8 [black letter and comments]
Date: October 11, 2022
From: Jane Ginsburg¹
Via posting to Projects page and via email: RLCRcomments@ali.org.

Note: References in this memo are to Preliminary Draft No. 8, (Sept. 2022) (“PD8”) (internal page numbers).

General Comments

PD8 represents a great deal of labor, for which the Reporters deserve recognition. As detailed below, however, PD8’s occasional departures from or omissions of statutory text may not only be misleading or confusing, but – as has been the case with prior drafts – often have the result, if not the purpose, of whittling down the scope of copyright protection. In addition to identifying those instances and explaining their consequences, the following comments will suggest clarifications to some of the Comments and Illustrations.

Specific Comments

§ 42. Use of Copyright Notice On or After January 1, 1978, and Before March 1, 1989

Page 12, lines 19-24:

(c) When omission of notice been excused as provided in subsection (b)(1) or (b)(3), or cured as provided in section (b)(2), “[a]ny person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted” is not liable for actual or statutory damages for infringing acts committed before receiving actual notice that registration for the work has been made, although other remedies may be available.

This subsection omits an important qualification set out in sec 405(b): such person incurs no liability for actual or statutory damages **“if such person proves that he or she was misled by the omission of notice.”** While Comment a refers to “innocent infringers’ who were misled by the omission” and Comment i quotes the relevant language of section 405(b), the obligation of the alleged innocent infringer to prove that she was misled (comment a omits the need to prove) is *in the statute, and belongs in the black letter*. The effect of this omission is to make the universe of “innocent infringers” appear larger than the statute defines.

¹ Jane Ginsburg is an Adviser to the Restatement Project.

The same observation applies to Blackletter subsection (d): error in name or date **“could result in a complete defense based on innocent infringement”**

Subsection (c): **“. . . although other remedies may be available”**: The statute, sec. 405(b) specifies:

“In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer’s profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.”

Comment i quotes this language, but to be more consistent with the statute, the Blackletter should at least state that those remedies can include an award of profits and injunctive relief.

Page 13, lines 1-2

Subsection (d): **“. . . and/or a reduction in the duration of protection, depending on the nature and extent of the error(s).”**

This is misleading, sec 406(b) provides, with respect to errors in date (not name) that a notice showing a date “earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice.” If duration runs from the death of the author, there will be no reduction in duration if the stated date of publication is more than a year early. See also my comment on p. 28, lines 20-21.

Page 26, line 3 (Comment i)

“On the other hand, this reading is in significant tension with the statutory text.”

The reading is not in significant tension with the statutory text, because innocent infringer has to prove reliance, etc., and once the infringer is notified of copyright claim, he can no longer establish that proof.

Page 26, line 8 (Comment i)

“copyright was merely incipient until the omission of notice was cured.”

Under the clear language of sec. 102(a) (“copyright subsists”), this is incorrect (*Sparkle Toys* notwithstanding): Copyright vests on creation and fixation. Uncured omission of notice might *divest* copyright, but it is incorrect to suggest that the work was not protected by copyright until registration.

Page 28, lines 20-21 (Comment i)

“The upshot of the interaction between 17 U.S.C. 19 §§ 406(b) and 302 is that the error in date redounds to the benefit of the public, because the 20 copyright will expire earlier than it would have if the date specified in the notice had been correct.”

This is not necessarily so: it makes no difference for works whose duration runs from the death of the author.

Page 49, lines 7-18, sec. 43, Comment b

“Implications of proper notice for availability of damages”:

the statements in the paragraph are correct. Do the Reporters nonetheless wish to acknowledge that reducing actual damages for improper notice is in tension with Berne Conv. art 5(2), which provides that “The enjoyment and the exercise of these rights shall not be subject to any formality”? Berne is not self-executing in the US, but Congress in the BCIA did not bring US copyright law fully into conformity, either.

Page 50, lines 22-23: sec 43, Comment b

“phonorecords of works other than sound recordings”:

What does this mean? Sec 101 defines phonorecords as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed” and sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds.” What would be a “phonorecord” of a “work other than a sound recording”? Do you mean a recorded musical composition fixed in a phonorecord?

Page 51, lines 3-4: sec 43, Comment b

“the notice might well be sufficient for the plaintiff to defeat a defendant’s claim to have been unaware that the plaintiff’s work was protected”

– especially since copyright subsists from fixation, and ignorance of the law does not make one “innocent”

Page 73, lines 23-26, sec 45, Comment d

“A work does not qualify as a “United States work” if it (1) was first published in a foreign nation that is not a treaty party, unless (a) it was simultaneously first published in the United States *or* (b) **all of the authors “are nationals, domiciliaries, or habitual residents of,** or in the case of an audiovisual work legal entities with headquarters in, **the United States”**

This is an accurate quotation and description, but the Reporters may nonetheless wish to note that US law is inconsistent with the Berne Convention art. 5(4) definition of a work’s “country of origin”: for published works, the point of attachment is the Berne country of first or simultaneous publication; the nationality of the author is not relevant to determining the country of origin unless first publication occurs in a non Berne country. Thus, the US is not the country of origin of a work first published in another Berne country, even if all the authors are US nationals or residents.

Page 83, lines 18 et seq. sec. 45, Comment j

“Infringement commences when an initial infringing act by the defendant occurs, even if followed by a series of acts constituting continuing infringement; if statutory damages and attorney’s fees are barred based on the timing of the initial infringement relative to registration, they remain unavailable for the continuing infringement.”

It is not clear from this discussion whether post-registration infringement of a different right in a work initially infringed pre-registration would result in the unavailability of statutory damages and attorneys fees for infringements of 106 rights that weren’t infringed pre-registration. According to sec 412, statutory damages and attorneys fees are not available for “any infringement of copyright commenced after first publication of the work and before the effective date of its registration.”

Under sec 501, “(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright . . .” Under the statutory language, “an infringement of copyright” means of a particular 106 *right*; it does not mean infringement of the *work*. To clarify my query, (1) suppose an infringement of the reproduction right occurred before registration (and more than 3 months post publication); (2) Copyright owner then registers the work; (3) suppose the same infringer then, post-registration, violates a different sec 106 right, e.g., derivative works or public performance. If the copyright owner initiates an infringement action she will receive no statutory damages or attorneys fees for the violation of the reproduction right, even if that violation continues post-registration. But what about post-registration violations of the other rights?

If, as per sec 501, infringement goes to rights, it should it follow that statutory damages and attorneys fees should be available for post-registration violations of different rights, albeit in the same work. The Reporters, however, are not entirely clear what they mean by "continuing infringement." Comment j cites *Derek Andrew, Inc. v. Poof Apparel 21 Corp.*, 528 F.3d 696, 701 (9th Cir. 2008), which stated: "the first act of infringement in a series of ongoing infringements **of the same kind** marks the commencement of one continuing infringement under § 412." (boldface supplied). In that case, the same rights (reproduction and distribution) were repeatedly violated, pre- and post-registration. The 9th Circuit's statement arguably supports allowing claims for statutory damages and attorneys fees for post-registration infringement of a different kind.

In the cases cited by the 9th Circuit (and the Reporters) in support of barring statutory damages and attorneys fees for continuing infringements, the pre- and post- registration infringements appear to have been of the same 106 rights. *Bouchat v. Bon-Ton 24 Dep’t Stores, Inc.*, 506 F.3d 315, 330 (4th Cir. 2007) ties interpretation of sec 412 to sec 504 (“Section 412 cannot be read in isolation. That section, which defines the registration prerequisite for statutory damages awards, must be read in harmony with § 504, which allows statutory damages ‘for all infringements involved in the action ... for which any one infringer is liable individually . . .’”) but if the post-registration infringement was of a right not “involved

in the action” with respect to the pre-registration infringement, then disallowing statutory damages and attorney's fees for the post-registration infringement of a different right would bootstrap infringements not “of the same kind.” Moreover, in *Bouchat*, the same right (reproduction) was the subject of pre- and post-registration infringements.

Language in *Johnson v Jones*, 149 F.3d 494, 505 (6th Cir. 1998), may be broad enough to cover infringements of different rights in the same work: “infringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs.” But, again, only the reproduction right appears to have been at issue.

Mason v. Montgomery Data, 30 Inc., 967 F.2d 135, 144 (5th Cir. 1992) offers the best support for the proposition that infringement of any 106 right pre-registration will bar statutory damages for infringement of different 106 rights in the same work post-registration:

Mason argues, section 412 allows him to recover statutory damages and attorney's fees for any infringement that the defendants commenced after he registered the copyrights, even though they commenced other, separate infringements of the same work prior to registration. The district court rejected this argument because it interpreted the term “infringement” to mean all of a defendant's acts of infringement of any one work. Thus, the court interpreted “the words ‘commencement of infringement’ to mean the first act of infringement in a series of on-going separate infringements.” 741 F. Supp. at 1286.

We find section 412 to be ambiguous and open to either interpretation. But we find support for the district court's interpretation in the legislative history of section 412. The House Report explains that “clause (2) [of section 412] would generally deny an award of [statutory damages and attorney's fees] *where infringement takes place before registration.*” H.R.Rep. No. 1476 at 158, reprinted in 1976 U.S.C.C.A.N. at 5659, 5774 (emphasis added). In contrast to the “for any infringement” language of section 412, this language reveals Congress' intent that statutory damages be denied not only for *the particular infringement* that a defendant commenced before registration, but for **all of that defendant's infringements of a work if one of those infringements commenced prior to registration.**” (Italics in original; boldface supplied.)

The *Mason* court also looked to sec 504, emphasizing that an award of statutory damages covers all infringements of any one work: “So if a plaintiff proves that one defendant committed five separate infringements of *one* copyrighted work, that plaintiff is entitled to only one award of statutory damages . . . It would be inconsistent to read section 504 to include all of one defendant's infringements of one work within ‘an award of statutory damages,’ and then read section 412 to treat each infringement separately for purposes of barring that award.” (italics in original).

But, as with the other cases the Reporters cite, *Mason*, which involved copying and updating land ownership maps, did not in fact involve pre- and post-registration infringement of different 106 rights. It seems that *Mason* and *Johnson v Jones* are addressing infringement of a *work*, while section 501 of the statute defines infringement in relation to rights. That is, one doesn't infringe "a work," one infringes rights in a work. I think sec 504(c) maintains the distinction in stating " an award of statutory damages for **all infringements** involved in the action, **with respect to any one work.**" 504(c) is clear that a court may not multiply the maximum statutory damages by the number of rights infringed. It does not follow (*Mason* notwithstanding), however, that the grouping of rights for purposes of calculating the amount of the award of statutory damages implies that infringement of one right pre-registration gives the infringer a remedial discount for post-registration infringement of other rights.

Page 133, lines 18-23: sec. 6.05, Comment c

"17 U.S.C. § 602 makes importation or exportation of such unlawfully made copies or phonorecords an infringement of the copyright owner's exclusive right under 17 U.S.C. § 106(3) to distribute to the public copies or phonorecords embodying the work. That distribution right, as discussed in § 6.06 of this Restatement, is subject to the first sale limitation, which therefore applies to importation and exportation."

This statement makes it seem – incorrectly – as if unlawfully made copies are subject to first sale limitation.

Page 139, lines 1-3: Sec. 6.07, Comment a

120(a) "(permitting the public display of pictures, paintings, photographs, or other pictorial representations of a constructed architectural work if the building in which the work is embodied is located in or ordinarily visible from a public place)"

This is misleading to the extent it could be read to mean that the creator of pictures, paintings, etc. of publicly visible architectural works has no public display right in her picture, painting, etc.. Section 120(a) goes to the copyright in the architectural work, not to the copyright in the photograph, painting or other pictorial representations.

With respect to the public display right, Section 120(a) is in fact redundant: if there is no right of public display of the architectural work in the first place (because architectural works aren't listed in sec. 106(5) – which may have been an oversight in the 1990 Architectural Works Copyright Protection Act), then it adds nothing to say that "The copyright in an architectural work that has been constructed does not include the right to prevent the . . . public display of pictures [etc. of the work when visible from a public place]."

Page 141, lines 5-6; Sec. 6.07, Comment e, Illustration 5

"5. Same facts as Illustration 3. The museum would be exempted from liability under 17 U.S.C. § 109(c) provided it displayed images one at a time."

This assumes the museum either owns the painting, or has been authorized by the owner of the painting.

Page 142, lines 6-11, Comment e, Illustration 7

“7. Author gives A a digital memory storage device containing a copy of one of her 6 photographs, in which Author owns all copyright rights. A inserts the device in her 7 computer and grants access to the device online. Internet users can then access the 8 photograph online. A has displayed Author’s photograph. A is not exempted from liability 9 under 17 U.S.C. § 109(c) because the display is not occurring at the place where the copy 10 of the work is located.”

This is substantively correct, but doesn't correspond to the point made in the immediately preceding text. I suggest an Illustration along the following lines:

Art Collector lends a painting to her niece to decorate her new apartment. Niece lends the painting to Gallery. Because Niece possesses, but does not own, the painting, she cannot, without Art Collector's authorization, authorize Gallery to display it publicly.

Page 153, lines 5-8, Sec. 6.08, Comment c, Illustration 24

“24. Audiophile uses a sound system to play a CD that contains the soundtrack of a motion picture. Audiophile has not performed the motion picture, but Audiophile has performed any literary, dramatic, or musical works that are made audible by playing the CD.”

The CD is a sound recording because the sounds of the soundtrack do not in this hypothetical “accompany[] a motion picture or other audiovisual work,” they have been separated from the images. Audiophile has also performed the sound recording.

Page 155, lines 20-23, Section 6.11, Blackletter sec. c.

(c) The rights described in subsection (a) “endure for a term consisting of the life of the author,” or, in the case of a joint work, “endure for a term consisting of the life of the last surviving author,” running in all cases “to the end of the calendar year in which they would otherwise expire.”

This is correct but a little misleading: VARA rights indeed expire with the life of the author, but 17 USC sec 301(f)(2)(C) specifies that state law protections of rights of attribution and integrity can continue beyond the death of the author; sec. 301(f)(2)(C) indicates no terminal date for state-based moral rights.

Page 157, lines 29-31, sec. 6.11, Comment b

“In the area of photography, only a subset of photographs falls under the statutory definition, which covers a photograph only if it is ‘produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and . . .’”

Actually, the definition is even narrower than stated in Comment b. The statutory definition of a “work of visual art” is “a still *photographic image* produced for exhibition purposes only . . .” (emphasis supplied). While VARA generally applies only to material objects, the strange drafting of the definition distinguishes the incorporeal image from its fixation in copies. Which would seem to mean that even if the *copy* is produced for exhibition purposes and exists in a limited edition signed and consequently

numbered, the copy won't be protected by VARA unless the *image* was produced for exhibition purposes (which doesn't make a lot of sense, but certainly does curtail VARA's application to photographs). See also my comment to Illustration 3, below.

Page 158, lines 26-29, sec. 6.11, Comment b, Illustration 3

“3. In 2005, Nature Photographer takes, prints, and frames a single copy of a photograph of a sunset at Yosemite National Park for an exhibition on national parks at a local museum. The photograph is signed by Photographer. The photograph is a statutory work of visual art protected under VARA.”

The statute says “still photographic *image* produced for exhibition purposes only,” not “print produced for exhibition purposes only.” On the facts in Illustration 3, so long as Photographer doesn’t make any other uses of the image, the original print is within VARA. Reading the statute literally, however, could result in retroactive divestment of VARA protection for the original single print, if the photographer makes other uses of the image, such as publishing it in a book or a magazine. This seems like a very undesirable result. On the other hand, if Photographer makes and sells up to 200 signed and numbered copies of an image produced for exhibition purposes only, those copies should be covered, even if the copies weren’t exhibited.

Page 159, lines 6-8, Sec. 6.11, Comment b, Illustration 6

“6. Designer makes lamps that are offered for sale in an online furniture store. 6 Museum acquires a lamp from Designer for an exhibit on modern design. The lamps are 7 utilitarian objects of applied art and are not statutory works of visual art.”

Same result if the lamp base qualified as a PGS work (and existed in 200 or fewer signed and numbered copies)?

Page 159, lines 12-14, Comment c

“(b) the right to ‘prevent the use of his or her name as the author of any work of visual art which he or she did not create,’ that is, the author’s right to be protected against the use of his or her name in connection with works created by others;”

The right is (unfortunately) narrower than stated in Comment c. Sec 106A(a)(1)(B) says “work of visual art,” which means that putting the artist's name on another's work that exists in fewer than 200 signed and numbered copies would violate VARA, but putting the artist’s name on a third-party work that exists in more than 200 copies (or that aren’t signed and numbered) would not.

Page 164, lines 30-31, Sec. 6.11, Comment i

“*i. Duration of protection and application to works of visual art in existence on VARA 30 effective date*”
This Comment should acknowledge that states may provide VARA-like (or broader) rights after the author's death, see 17 USC sec. 301(f)(2)(C).

Page 174, lines 8, 10, Section 7.01 Blackletter sections (a)(4) and (5); page 178, lines 3-4, Comment b; and page 178, lines 26-29, Comment b; and page 179, lines 3-5 Comment b, Illustration 1; and page 179, lines 27-28, Comment c; and page 180, lines 5-10, 19-22, Comment c, Illustrations 5 and 8

The use of “copying” to describe infringements of rights other than the reproduction right is very confusing. For example:

Page 178, lines 26-29

“For example, to prevail on a claim of infringement of the public performance right, a copyright owner must demonstrate that the public performance copied from the copyrighted work, see Illustrations 1 and 2, and that the public performance copied a sufficient amount of protected expression from the plaintiff’s copyrighted work,”

What does "the public performance copied from the copyrighted work" mean? The public performance doesn't produce copies. Do you mean that the public performance or display communicates a sufficient amount of the work to be substantially similar? For example, a public reading of portions of a literary work?

Another example, Page 158, Illustration 5

“ 5. Artist A creates an original painting. Five years later, Museum publicly displays artwork created by Artist B. Artist A claims Museum is violating Artist A’s public display right in Artist A’s painting because Artist B’s painting is similar to Artist A’s painting. Evidence presented at trial shows that Artist B never saw Artist A’s painting. In Artist A’s suit against Museum for infringement of her public display right, Artist A has not proven that Artist B’s painting was copied from Artist A’s painting”

This compounds the confusion. Here there is no infringement in the first place. If B had copied, then displaying an unlawfully made copy would violate 106(5). But the display need not make a copy to be infringing. Displaying a lawfully made copy can still violate 106(5), e.g. if the display occurs by transmission.

Another example, Page 179 lines 24-28

“For example, if a copyright owner sues a retailer alleging that the retailer is selling copies in violation of the exclusive right under 17 U.S.C. § 106(3) to distribute copies of the plaintiff’s copyrighted work to the public, see § 57 of this Restatement, the retailer could be liable for direct infringement even if the retailer had not produced the copies being sold (and therefore had not itself copied any content from the plaintiff’s work into the allegedly infringing copies).”

This example shows why using "copying" as the basis for all 106 violations is very confusing: one can infringe the distribution right even when the copies have been lawfully made, but not yet sold.

Another example, Page 180, Illustration 8

“ 8. Same facts as Illustration 6. The evidence at trial shows that Artist B copied a sufficient amount of protected expression from Artist’s A painting such that the two paintings are substantially similar. In its suit against Museum for infringement of its public display right, Artist A has proven the element of improper appropriation”

This makes it seem as if there's no violation of the display right unless the work displayed is an infringement of the reproduction right. Very confusing and incorrect.

Page 174, lines 16-17, Section 7.01, Blackletter section (b)

“(b) To prove a claim of direct infringement, the plaintiff must demonstrate that the defendant’s volitional conduct was the cause of the infringing activity” Also p. 176, lines 23-24, Comment a
It is not established that “volition” is a requirement; the proposition is highly contested, see, e.g., the extensive analysis and discussion of the caselaw in Nimmer on Copyright sec 13.98[c].

Page 180, lines 29-31, sec. 7.01, Comment d

“assertions of direct liability do require demonstrating causation as part of the plaintiff’s prima facie case, which courts considering claims of copyright infringement often refer to as proving ‘volitional conduct’.”

Causation and volition are not the same thing

Page 181, lines 11-12, comment d

“In the context of direct copyright infringement, volition ‘is *choosing* to engage in an act that causes infringement”

This sounds like intent to infringe

Page 189, line 28, Sec. 7.02, Comment a

This Comment references “beneficial ownership,” but the term is not defined in this section. It would be desirable to explain who is a beneficial owner in this section, as well as in the later section on standing.

Page 193, Section 7.02, Comment e

This Comment could include an explanation and discussion of beneficial ownership, since the Comment covers authors who transferred their rights in return for royalties; the author remains the beneficial owner even if the original grantee has transferred its rights.

Page 195, lines 25-28, Section 7.02, Comment g

“Another example of a factual rebuttal would be evidence that the plaintiff, prior to the acts asserted to constitute infringement, abandoned the copyright rights allegedly infringed. See § 54 of this Restatement (discussing abandonment).”

This example gives far more prominence to abandonment than it has in positive copyright law. It looks like part of a pattern of whittling copyright down by taking marginal situations and giving them more play than they deserve.

Page 204, line 14, Section 7.03, Comment a

“In such cases, the plaintiff must prove copying in fact by someone other than the defendant, . . .”

Not necessarily: the copies might have been lawfully made, but their first distribution might be unauthorized and therefore infringing.

Page 206, lines 15-20, Section 7.03, Comment c

“Copying can also occur even when the defendant does not produce any new material object 15 embodying some or all of the plaintiff’s copyrighted work. For example, a singer who memorizes 16 a song she hears played on the radio and then sings that song in front of an audience at her next 17 concert has copied the musical work, even if she has not replicated it in any new material object. 18 See § 7.01, Comment *b* (discussing the concept of ‘copying’ as a component of copyright-19 infringement analysis, versus the concept of ‘copies’ as material objects).”

I still find this confusing and suggest a different formulation, e.g. taking or appropriating.

Page 208, line 4, Section 7.03, Comment f

“that the defendant actually observed the subject work”

It might be better to say “encountered.” “Observed” seems strange in the context of musical works.

Page 227, lines 1-2, Section 7.04, Comment d

“Availability of the work on the internet is also, by itself, insufficient proof that the defendant had access to the plaintiff’s copyrighted work”

But defendant’s internet browsing history may establish access.

Page 227, Comment g. *Proving access: access through intermediaries*

An example: "Dodgeball: the Movie" case (Price v. Fox Entertainment Group, 2007 WL 241389 (S.D.N.Y. 2007)), plaintiff and defendant's screenwriter had a common agent who could have shown plaintiff's ms. to the screenwriter.

Page 210, lines 14-16, Section 7.03, Comment h

“Caution is warranted when the similarities are based on unprotectable elements, however, because those similarities may be the result of the defendant copying not from the plaintiff’s copyrighted work but rather from another source”

Not in the case of “seeding” - the widespread practice of planting invented information in order to prove copying (if information was invented there can be no alternate sources), e.g. *Feist* (fictitious phone

listings proved copying, but plaintiff failed to establish that the compiled listings were an original work of authorship).

One could also establish copying by showing identity of identifying information from a digital file, e.g., a watermark

Page 210, lines 23 et seq., Comment i (inverse ratio rule)

See comments of Shyam Balganes and Peter Menell

Page 221, lines 28-29, Section 7.04, Comment a

The black letter of this Section uses the phrase ‘infringing use’ rather than ‘infringing work’ or ‘infringing copy’”

Consider employing a similar phrase in sec.7.01 to avoid confusion about infringement of rights that don't involve reproduction

Page 233, lines 24-26, Sec. 7.04, section i

“In some cases, courts articulate a test that involves asking ‘whether the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’ *Peter Gaito*,”

This is originally a Learned Hand quote: *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

Page 236 line 15, Section 7.04, Comment k

“If the amount copied is de minimis,”

But substantiality can be qualitative not merely quantitative. A recognizable “hook” in a musical composition may be only a few notes, but they may be instantly identifiable. Copying a haiku may reproduce few words, but that wouldn't justify the taking.

Page 248, line 11, Section 7.07, Blackletter sec (b)(1)

“(1) prevented the author from claiming authorship of a ‘work of visual art’”

This formulation makes it seem as if the violation requires a frustrated attempt by the author to assert authorship; it does not in common parlance cover acts such as removing the author's name from the work.

Page 252, lines 4-6, section 7.07, Comment d

“§ 106A(a)(3)(B) states that an author has the right ‘to prevent any destruction of a work of recognized stature’ but that only ‘any intentional or grossly negligent destruction’ of such a work ‘is a violation of that right.’”

The statute does not say “but that only”; it says: “to prevent any destruction of a work of recognized stature, **and** any intentional or grossly negligent destruction of that work is a violation of that right.”

Sincerely,

A handwritten signature in black ink, appearing to read "Jane Sims". The signature is written in a cursive style with a long horizontal flourish extending to the right.