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Comments on Preliminary Draft 6

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To: ALI Restatement of Copyright Reporters
Subject: Comments on PD5 [black letter and comments]
Date: September 15, 2020
From: Jane Ginsburg and June Besek¹

Note: References in this memo are to Preliminary Draft No. 6, Aug. 12, 2020) (“PD6”) (internal page numbers).

Our comments below relate only to sections 9.01 and 9.02. The Reporters have indicated that we may rely on our earlier comments on PD5 since that draft hasn’t yet been substantively revised, so we haven’t repeated most of those comments.

General Comments

We briefly reiterate the principal General Comments we made with respect to PD5, because PD6 continues, including in its two new sections, to manifest the same overall shortcomings: (i) the relationship of the draft to the statute remains highly inconsistent; (ii) the Restatement needs a consistent and transparent methodology for restating a statute; and (iii) continuing to carry on without clear methodological principles will undermine the utility of this project and the credibility of the ALI.

Substantive Statutory Provisions Missing from the Black Letter of PD6

Neither blackletter 9.01 nor 9.02 includes 17 U.S.C. §501(a)(b). That section provides in pertinent part:

501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any

¹ Jane Ginsburg is an Adviser to the Restatement Project. June Besek is a liaison from the ABA Section of Intellectual Property Law, but these comments are done in her individual capacity and not on behalf of the ABA.

such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(Section 501 is provided in full in the Appendix.)

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

It may be that the Reporters intend to include discussion of § 501 elsewhere. But its apparent omission from a chapter of the Restatement that addresses statutory provisions that accompany § 501 cause us to question whether and how this statutory provision will be addressed in the Restatement.

The blackletter of section 9.02 omits 17 USC section 502 (b), which provides:

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk’s office.

Instead, this provision is addressed only in Comment (k). It is not apparent why the Reporters pick and choose among statutory provisions to include some in the blackletter, and others in Comments. This provision addresses the scope and enforcement of injunctions. This is an essential part of understanding copyright remedies, and the Reporters’ decision that it somehow has less significance doesn’t fairly represent the copyright law.

Other Comments

Section 9.01

- p. 113, sec. 9.01 (a): PD6 substitutes “preliminary” and “final” injunction for the terms in 17 U.S.C. § 502(a), “temporary” and “final” injunction.
- p. 113, sec. 9.01 (c): The statement of the impoundment and disposition remedy is not comprehensive. Section 503 of the Copyright Act includes the impoundment and disposition of the means by which copies or phonorecords are made; section 901(c) of PD6 does not. We assume that the remedy of impoundment and disposition will be treated more thoroughly in section 9.05, which is referenced but not included in P6.
- p. 113, sec. 9.01 (e): This provision states that a court may grant certain additional remedies for infringement of the Copyright Act, “but those remedies are not addressed in detail in this Restatement.” To the extent the Restatement mentions those remedies (even without detail), including a cross-reference would be helpful to readers who would otherwise be unaware of the remedies referred to here.

Section 9.02

- p. 123, lines 3-8: The statement that “some courts” have concluded that injunctions should be denied when only nominal damages are at issue has inadequate support. PD6 mentions only a couple district court cases and provides no discussion of cases that have held otherwise. A statement concerning injunctions and nominal damages needs more support than PD6 provides.
- p. 129, line 16 to p. 130, line 2: This section about injunctions against copyright owners doesn’t belong in this Restatement. The Restatement concedes that the Copyright Act doesn’t address this issue, and the cases cited are atypical.
- p. 130, comment j: The Restatement omits discussion of *Ex parte Young*, 209 U.S. 123 (1908), and its progeny. These cases provide means for an injunction that would not otherwise be available. Failure to address them disserves those who might look to a Restatement for information on injunctions.

Appendix to Comments of Jane Ginsburg and June Besek to PD6

17 U.S.C. § 501

501. Infringement of copyright³

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(3), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.