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RE: Comments on Small Copyright Claims

This comment is submitted in response to the United States Copyright Office's request for comment on how copyright owners have handled small copyright claims and the obstacles they encountered, published in the Federal Register (Vol. 76, No. 208) on Thursday, October 27, 2011.

Atkinson & Atkinson is submitting these comments on behalf of numerous clients who are impacted by current restrictions related to pursuit of alleged copyright claims as specifically illustrated later in this memo. Our clientele consists of multiple 501(c)(3) non-profit educational organizations that develop, administer, score and maintain uniform national licensing examinations for use by member licensing boards as one criterion in determining eligibility for licensure of the professions. The development of a legally defensible licensure examination program involves numerous complex and encompassing steps, including statistical analyses of examination performance. This process is time consuming and costly but allows for our clients to comply with contractual obligations with the various state boards regarding the minimum competence conclusions drawn from examination results. The developed item banks (examination questions) and test forms (a conglomerate of examination questions designed to assess competence areas identified in the exam blueprint) are in need of significant legal protection. One particular client is currently a party to litigation related to infringement of its copyrighted examinations.

To preserve the confidentiality and integrity of their examinations, our clients copyright register their item banks and test forms, in person, using the special procedure for secure examinations implemented by the US Copyright Office.¹ Like many groups that develop tests, our clients expend significant monetary sums to protect the security and validity of their copyrighted examinations. Beyond the financial ramifications, infringement of copyrighted examinations can significantly impact public safety by allowing unqualified test candidates who have advance access to actual examination questions to pass the examination and obtain licensure without

¹ 37 CFR §202.20(b)(4). *See, also*, US Copyright Office, Copyright Registration of Secure Tests, Circular 64, <http://www.copyright.gov/circs/circ64.pdf> (April 2011).

defendable competence determinations. Therefore, our clients have a strong need to safeguard their copyrighted test questions in order to protect consumers, and desire access to the best legal venue in the event that it needs to litigate an infringement claim.

Special Challenges

Investigating an allegation of secure examination infringement presents unique challenges. To support a copyright infringement lawsuit for damages or equitable relief, it is imperative to gather as much information as possible to determine the origin and circumstances surrounding the examination breach. At the same time, the testing organization must use extensive resources to assess the scope of the breach, reconstitute the examination, and ensure it is psychometrically sound, which can hamper or destroy the investigatory process if the breach is made public. Further, some testing organizations have contractual obligations requiring consistent and timely delivery of valid examinations on behalf of contracting party. The organizations themselves risk liability if their examination must be halted for purposes of damage assessment and eventual reinstatement. The costs to simultaneously conduct the investigation and galvanize organizational resources can be formidable. If a lawsuit is commenced, the confidential nature of the examination questions and the test development process necessitates costly protective orders, and typically requires use of expensive consultants and expert witnesses to determine the validity of the examination, the value of examination questions, or defend against claims that the organization did not properly secure its examination. The additional burden of litigation costs, particularly when compared to the potential damage award, may impede some testing organizations from fully pursuing their remedies.

State Sovereign Immunity versus Federal Copyright Law

Beyond the substantial internal and legal costs to pursue a copyright infringement matter, an additional challenge faces many damaged copyrighted examination owners: state actors.

One client currently in litigation filed a federal lawsuit against state entities alleging that they infringed on its copyrighted examinations; the matter is still pending. The Copyright Act² is the basis for our client's federal infringement lawsuit against state actors. However, the suit was barred by the Eleventh Amendment, which states that "[T]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³ Congress clearly abrogated state sovereign immunity through enactment of the Copyright Remedy Clarification Act (CRCA).⁴ That law added the following provision:

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, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity,

² 17 USC §101 *et seq.*

³ U.S. Const. amend. XI.

⁴ Pub. L. No. 101-553.

from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122 [17 USC § §106-122], for importing copies of phonorecords in violation of section 602 [17 USC 602], or for any other violation under this title.⁵

Under the CRCA, state actors can be found liable for copyright infringement. Ultimately, however, the court found that the only source of constitutional authority pursuant to which Congress can abrogate state immunity under the CRCA is the Due Process Clause of the Fourteenth Amendment. The court declined to find that the infringement violated the Fourteenth Amendment.⁶

The result is an alarmingly unfair dual standard for copyright infringers. State actors who infringe a private organization's copyright are not subject to federal jurisdiction and merely have to answer to state tort laws, such as trover. Private entities infringing the same copyright, on the other hand, are required to defend their actions in federal court under federal copyright law. Injured parties must sue state actors in the defendants' home state venue under a patchwork of tort laws. Moreover, criminal sanctions under federal copyright law are not available to entities infringed by state actors. State courts do not possess the copyright law expertise or experience of federal courts, causing further inequity to the injured copyright holder.

Opportunities for Remedies

Developing programs to educate state judges on copyright laws would assist copyright holders litigating infringement cases in state court. Specially designating retired or, to the extent permitted, active federal judges to hear such matters in state court or alternative tribunals, such as arbitration forums, may be potential options for private entities seeking to litigate copyright infringement cases against state actors. Limitations on discovery and other measures to expedite litigation and decrease costs may also aid copyright owners with small claims.

Conclusion

The ability of copyrighted examination owners to adequately protect their intellectual property and obtain expedient relief when their copyrights are infringed is the basis of the Copyright Act and its amendments. Unless substantial changes are made to the current legal process, copyrighted examination owners, and copyright holders harmed by state actors, will continue to be disadvantaged in the investigation, remediation, litigation, and damages phases of copyright infringement matters.

On behalf of our clients, Atkinson & Atkinson thanks the US Copyright Office for the opportunity to submit comments, and welcomes any questions or requests for further information.

⁵ 17 USC §511.

⁶ U.S. Const. amend XIV, section 1.