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Additional Comments on Preliminary Draft 9

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From: Jane Ginsburg

To: Project Reporters, ALI Restatement of the Law, Copyright

Subject: Preliminary Draft No. 9 (August 2023)

Date: September 27, 2023

I am adding to the comments submitted by Profs. Balganes, Menell and myself a list of points in PD9 that I believe require correction or clarification. These comments do not include Chapters 8, 10 or 11.

Section 6.03

Comment d

Page 6, lines 8-11: this statement is dictum and misleading: the court held the work at issue DID infringe the derivative work right.

Comment e

Page 8, line 6: Stuffed animal – you mean rag doll?

Comment j

Page 16, lines 10 et seq.: under PD9’s analysis, the Family Movie Act isn’t an exception to the derivative works, or any other, right because there is no “incorporation,” and no reproduction or public performance. See, e.g., page 6, lines 23-25 (“In order to violate clause (2), the infringing work must incorporate a sufficient portion of the pre-existing work so as to constitute an infringement of either the reproduction right, or of the performance right.”). Does that mean this legislation is superfluous? Or does it suggest that derivative works might not necessarily “incorporate” the underlying content?

Section 6.10

Comment b

Page 27, lines 21-23: this is correct, but you might explain that it’s not a transmission because sec 101 defines “to ‘transmit’ a performance or display” as “to communicate it by any device or process whereby images or sounds are *received beyond the place from which they are sent.*” (Emphasis supplied)

Page 27, lines 29-30 and Page 30, Illustration 7: The Second Circuit in the cited case did hold that a download of a static file wasn't a performance, but it also acknowledged that there could be cases implicating both rights (that weren't before it, and therefore didn't yet need to be decided). See 627 F.3d at 74, n. 10 ("Our opinion does not foreclose the possibility, under certain circumstances not presented in this case, that a transmission could constitute both a stream and a download, each of which implicates a different right of the copyright holder."). Consider the following: the service delivers a file as a download, as soon as the download complete, the file starts automatically to play. Does everything turn on whether the performance occurs during download or immediately afterwards? Or the file is delivered in a manner permitting simultaneous listening, and temporary storage, but the user hits the "pause" button before the file starts to play; when the user later hits "play," the performance originates from the stored copy. The delivery could have been a "performance" but because the user first hit "pause," it's only a reproduction?

Page 28, illustration 6: This is correct, but because the acts described aren't a "transmission" in the first place.

Comment d

Page 31, line 5: what about personalized playlists automatically generated by the service based on the user's listening history?

Section 6.13

Comment f

Page 73, Illustration 4: showing a film illegally downloaded from a pirate site would be a more current example.

Comment i

Page 78, line 17, you might add that the dispute resolution panel of the WTO found sec 110(5)(B) to violate art 13 of TRIPS.

Comment r

Page 89, lines 14-17: you might clarify that the license also does not permit reproducing a prior sound recording incorporating the musical composition.

Section 7.05

Comment e

Page 105, lines 27-28: this example may be overbroad: Suppose a party has exclusive possession of the single original copy of a public domain work (e.g., an unpublished manuscript by an author dead for more than 70 years), is exacting a fee for its publication misuse?