**17.1 PRELIMINARY INSTRUCTION—COPYRIGHT**

The plaintiff, [name of plaintiff], claims ownership of a copyright and seeks damages against the defendant, [name of defendant], for copyright infringement. The defendant denies infringing the copyright [and] [contends that the copyright is invalid] [asserts an affirmative defense]. To help you understand the evidence in this case, I will explain some of the legal terms you will hear during this trial.

**DEFINITION OF COPYRIGHT**

The owner of a copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by copyright for a specific period of time.

A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.

Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot themselves be copyrighted.

The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.

**[COPYRIGHT INTERESTS]**

[The copyright owner may [transfer] [sell] [convey] to another person all or part of the owner’s property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom a right is transferred is called an assignee.]

or

[The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [describe the rights granted in the license].]

**[HOW COPYRIGHT IS OBTAINED]**

[Copyright automatically attaches to a work the moment the work is fixed in any tangible medium of expression. The owner of the copyright may apply to register the copyright by completing a registration form and depositing a copy of the copyrighted work with the Copyright Office. After determining that the material deposited constitutes copyrightable subject matter and that certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.]

**PLAINTIFF’S BURDEN OF PROOF**

In this case, the plaintiff, [name of plaintiff], contends that the defendant, [name of defendant], has infringed the plaintiff’s copyright. The plaintiff has the burden of proving by a preponderance of the evidence that the plaintiff is the owner of the copyright, that the defendant copied original expression from the copyrighted work, and that the defendant caused the infringement. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the copyrighted work was infringed.

**PROOF OF COPYING**

To prove that the defendant copied the plaintiff’s work, the plaintiff may use direct or indirect evidence. Direct evidence includes an admission that the defendant copied the plaintiff’s work. Indirect evidence is evidence showing that the defendant had access to the plaintiff’s copyrighted work and that there are substantial similarities between the defendant’s work and the plaintiff’s copyrighted work; or that there are striking similarities between the defendant’s work and the plaintiff’s copyrighted work that raises the inference of access.

The plaintiff must also prove that the defendant’s copying of the copyrighted work was substantial. In determining whether the defendant’s copying of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.

**LIABILITY FOR INFRINGEMENT**

One who causes a copyrighted work to be [reproduced] [publicly distributed] [publicly performed] [publicly displayed] [the basis of a derivative work] without authority from the copyright owner during the term of the copyright infringes the copyright.

[A person may be liable for another person’s infringement d by [vicariously infringing] [contributorily infringing].]

**[VICARIOUS INFRINGEMENT]**

[A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and had the right and ability to supervise or control the infringing activity, whether or not the person knew of the infringement.]

**[CONTRIBUTORY INFRINGEMENT]**

[A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and [induces] [or] [materially contributes to] the activity.]

**[DEFENSES TO INFRINGEMENT]**

[The defendant contends that there is no copyright infringement. There is no copyright infringement when [the defendant’s work is the result of independent creation, coincidence, or prior common source] [the defendant made fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment, news reporting, teaching, scholarship, or research] [the plaintiff abandoned ownership of the copyrighted work] [the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products] [the plaintiff granted the defendant an express license to [use] [copy] [other] the plaintiff’s copyrighted work] [the plaintiff granted the defendant an implied license to use the plaintiff’s copyrighted work] [the defendant, as an owner of a copy of the plaintiff’s copyrighted work, resold that copy after the plaintiff made the first sale].]

**Comment**

See generally 17 U.S.C. §§ 101-1511.

Regarding the “copyright interests” section of this instruction, when the entire bundle of rights is transferred, the person to whom the rights are transferred is called an assignee. When fewer than all rights are transferred, the person is an exclusive licensee. Gardner v. Nike, Inc., 279 F.3d 774, 778 (9th Cir. 2002). The examples of fair use given in Instruction 17.1 are representative, and other uses may qualify as fair use. See 17 U.S.C. § 107; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007) ("The fair use defense permits the use of copyrighted works without the copyright owner’s consent under certain situations. The defense encourages and allows the development of new ideas that build on earlier ones, thus providing a necessary counterbalance to the copyright law’s goal of protecting creators’ work product."); id. at 1163 ("We must be flexible in applying a fair use analysis; it is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis” (citation omitted)).

Regarding the “How Copyright Is Obtained” section of this instruction, “‘registration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.” Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 892 (2019).

Regarding the requirement that copying of the plaintiff’s work be substantial, “[f]or an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.” Newton v. Diamond, 388 F.3d 1189, 1192-93 (9th Cir. 2004) (citations omitted). “[W]e have consistently applied the de minimis principle to determine whether a work is infringing by analyzing the quantity and quality of the copying to determine if the allegedly infringing work is a recognizable copy of the original work, in other words, whether the works are substantially similar.” *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065 (9th Cir. Sept. 9, 2021). A use is considered de minimis, and therefore not substantial, “if it is so meager and fragmentary that the average audience would not recognize the appropriation.” Newton, 388 F.3d at 1193 (quoting Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986)).

Copying may also be considered de minimis when the use of the work is so fleeting or trivial that “a reasonable jury could not conclude that an average audience would recognize an appropriation of the [plaintiff’s] composition,” therefore rendering the works substantially dissimilar.  *Bell*, 12 F.4th at 1078 (quoting *VMG Salsoul,* *LLC v. Ciccone*, 824 F.3d 871, 886-87 (9th Cir. 2016). Unless the copying of the protected work is so de minimis as to “be non-recognizable as a copy,” the “[w]holesale copying or reproduction of another’s protected work . . . by definition cannot be de minimis copying.” *Id*. at 1078-79.

Regarding the requirement that the defendant cause the violation of one of the exclusive rights in copyright under 17 U.S.C. § 106, where the defendant hosts third party content on its website, the Ninth Circuit has referred to the causation element as the requirement that the defendant engage in “volitional conduct.” “[T]o demonstrate volitional conduct, a [plaintiff] must provide some evidence showing the alleged infringer exercised control (other than by general operation of its website); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution of its [work].” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) (brackets, internal quotation marks, and citation omitted). In this context, “volitional conduct” “does not really mean an ‘act of willing or choosing’ or ‘an act of deciding,’ but merely the unremarkable proposition that proximate causation historically underlies copyright infringement liability no less than other torts.” *Bell*, 12 F.4th at 1081 (internal quotation marks and citation omitted). “[A] website or service that provides only a platform for third-party users to upload, download, and share content, *i.e.*, merely using the platform as a vehicle, has not engaged in volitional conduct in this sense, because it is the users who cause infringement.” *Id.*

Regarding contributory infringement, a party is liable for contributory infringement where the party “(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.” *Perfect 10, Inc. v. Visa Int’l Serv., Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007). The inducement theory has “four elements: (1) the distribution of a device or product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright, and (4) causation.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1032 (9th Cir. 2013).

Revised March 2024