**17.25 Copyright—Affirmative Defense—Implied License**

The defendant contends that [he] [she] [other pronoun] is not liable for copyright infringement because the plaintiff granted [him] [her] [other pronoun] an implied license in the plaintiff’s copyrighted work. The plaintiff cannot claim copyright infringement against a defendant who [copies] [distributes] [uses] [modifies] [retains] the plaintiff’s copyrighted work if the plaintiff granted the defendant an implied license to [copy] [distribute] [use] [modify] [retain] the work.

In order to show the existence of an implied license, the defendant has the burden of proving that:

First, the defendant requested that the plaintiff create a work;

Second, the plaintiff made that particular work and delivered it to the defendant; and

Third, the plaintiff intended that the defendant [copy] [distribute] [use] [modify] [retain] the plaintiff’s work.

If you find that the defendant has proved by a preponderance of the evidence that the plaintiff granted [him] [her] [other pronoun] an implied license to [copy] [distribute] [use] [modify] [retain] the copyrighted work, your verdict should be for the defendant [on that portion of the plaintiff’s copyright infringement claim].

**Comment**

This instruction is based on *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990), and *Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 754-57 (9th Cir. 2008). *See also U.S. Auto Parts Network, Inc. v. Parts Geek,* *LLC*, 692 F.3d 1009, 1019-20 (9th Cir. 2012) (reversing a grant of summary judgment because a reasonable jury could find an implied license).

Although this model instruction accurately captures one recurring set of implied license facts, implied licenses arise in a wide variety of circumstances, including many—such as express contracts that fail because of the statute of frauds or partnership arrangements—for which the elements of an implied license defense will be different.

Implied license is an affirmative defense to copyright infringement. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 (9th Cir. 2020). When a plaintiff contributes copyrightable work to the defendant in exchange for some benefit (such as a share in partnership profits, a fee, or a salary), a license for the defendant to use the plaintiff’s work may be implied. *See U.S. Auto Parts*, 692 F.3d at 1019-20 (discussing the existence of an implied license in the context of an employment relationship); *Asset Mktg.*, 542 F.3d at 750, 754-55 (involving an independent contractor relationship); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) (involving a partnership relationship). A license is often implied when “without such a license, [the plaintiff’s compensated] contribution . . . would have been of minimal value.” *Id*.

A license may be implied by the parties’ conduct. *See Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir. 2001). An implied license may be unlimited in scope or restricted to certain rights. *Compare Asset Mktg.*, 542 F.3d at 757 (that plaintiff granted defendant “unlimited” implied license “to retain, use, and modify” work), *with Oddo*, 743 F.2d at 634 (plaintiff granted defendant implied license to use work in a manuscript, but not “in any work other than the manuscript itself”). The defendant bears the burden of proof as to the scope and existence of an implied license. *See id.* at 634 & n.6.

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