**17.26 Copyright—Affirmative Defense—First Sale**

**(17 U.S.C. § 109(a))**

The defendant contends that [he] [she] [other pronoun] is not liable for copyright infringement for [reselling] [redistributing] a particular copy of the plaintiff’s copyrighted work because the plaintiff sold or otherwise transferred ownership of that copy. The plaintiff may not claim copyright infringement for subsequent distributions of a copy that it sold or otherwise transferred ownership of. [The defendant may invoke this [“first sale”] defense only if [he] [she] [other pronoun] is an owner of a particular copy of the plaintiff’s copyrighted work, and not a licensee.]

If you find that the defendant was an owner of a particular copy of the plaintiff’s copyrighted work and that the plaintiff sold or otherwise transferred ownership of that particular copy, your verdict should be for the defendant on the plaintiff’s copyright infringement claim.

**Comment**

The first sale doctrine is an affirmative defense to copyright infringement. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908) (articulating first sale doctrine); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010). The doctrine “allows owners of copies of copyrightedworks to resell those copies,” including copies lawfully made abroad, by limiting the copyrightholder’s exclusive distribution right to the first sale. *Id.* at 1106-07; *Kirtsaeng v. John Wiley & Sons*, *Inc.*, 568 U.S. 519, 529-30 (2013); *see also* *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d692, 695 (9th Cir. 2015) (holding that watch manufacturer had no infringement cause of actionbecause its rights to control importation and distribution of its copyrighted work expired after the authorized first sale); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1179 (9th Cir. 2011) (“Notwithstanding its distinctive name, the [first sale] doctrine applies not only when a copy is first sold, but when a copy is given away or title is otherwise transferred without the accouterments of a sale.”).

The first sale defense is unavailable to those who have only a license to use the copyrighted work. *Vernor*, 621 F.3d at 1107. For an analysis of the owner versus licensee distinction, *see Adobe Systems Inc. v. Christenson*, 809 F.3d 1071, 1078 (9th Cir. 2015) (analyzing distinction with respect to computer software); *UMG Recordings*, 628 F.3d at 1180-83 (analyzing distinction with respect to recipients of promotional music CDs); *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1155-56 (9th Cir. 2011) (involving computer software); *Vernor*, 621 F.3d at 1111-12 (involving computer software); and *United States v. Wise*, 550 F.2d1180, 1190-92 (9th Cir. 1977) (involving motion pictures in the criminal context). The party asserting the first sale defense has the initial burden of proving “ownership through lawful acquisition.” *Adobe*, 809 F.3d at 1078-79. If the plaintiff contends that the defendant could not have owned the work, then the plaintiff must prove “a license or the absence of a sale.” *Id.* at 1079.

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