**17.5 Copyright Infringement—Elements—Ownership and Copying**

**(17 U.S.C. § 501(a)**-**(b))**

Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner’s permission infringes the copyright.

On the plaintiff’s copyright infringement claim, the plaintiff has the burden of proving by a preponderance of the evidence that:

First, the plaintiff is the owner of a valid copyright; and

Second, the defendant copied original expression from the copyrighted work.

If you find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

**Comment**

The elements in this instruction are explained in Instructions 17.6 (Copyright Infringement**—**Ownership of Valid Copyright**—**Definition), 17.14 (Copyright Infringement**—**Originality), 17.17 (Copying**—**Access and Substantial Similarity), 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 Substantial Similarity—Extrinsic Test; Intrinsic Test). Copying and improper appropriation are issues of fact for the jury. *See Three Boys Music Corp v. Bolton*, 212 F.3d 477, 481-82 (9th Cir. 2000).

The elements of copyright infringement cited in this instruction were stated in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); *see also Seven Arts Filmed Entm’t Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013); *Great Minds v. Office Depot*, 945 F.3d 1106, 1110 (9th Cir. 2019).

The Ninth Circuit considers the word “copying” as “shorthand” for the various activities that may infringe a copyright owner’s six exclusive rights described at 17 U.S.C. § 106.  *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153-54 (9th Cir. 2012).

To establish the defendant’s liability on a direct infringement theory, the plaintiff must show that the defendant was the cause of the infringement. *See Perfect 10, Inc. v. Giganews, Inc*., 847 F.3d 657, 666 (9th Cir. 2017) (“[W]here it is clear that infringement has occurred, courts must determine ‘who is close enough to the [infringing] event to be considered the most important cause’” (citation omitted)); *see also VHT Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) (“‘[D]irect infringement requires ‘active’ involvement.”). If causation is contested, it may be appropriate to modify this instruction to explicitly include causation as an element. In *VHT, Inc. v. Zillow Group, Inc.*, the Ninth Circuit provided an extensive discussion of the causation requirement in a case involving alleged copyright infringement of website images. 918 F.3d at 731-32 (“[T]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.”).

In *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc), a case involving the alleged copyright infringement of a musical composition, the Ninth Circuit worded the elements slightly differently: “proof of copyright infringement requires [the plaintiff] to show: (1) that he owns a valid copyright in [the work]; and (2) that [the defendant] copied protected aspect of the work . . . The second prong of the infringement analysis contains two separate components: ‘copying’ and ‘unlawful appropriation,’” *id.* at 1064 (citing *Rentmeester v. Nike, Inc*., 883 F.3d 1111, 1117 (9th Cir. 2018)).

*Revised Dec. 2023*