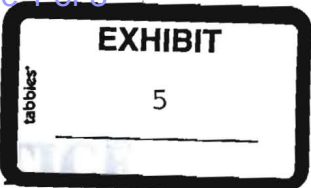


1 of 14



Copyright

FEDERAL JURY PRACTICE AND INSTRUCTIONS

CIVIL

FIFTH EDITION

By

KEVIN F. O'MALLEY

The O'Malley Law Firm
Saint Louis, Missouri

JAY E. GRENIG

Professor of Law
Marquette University School of Law

HON. WILLIAM C. LEE

Chief Judge, United States District Court
for the Northern District of Indiana

Judicial Advisors

HON. MICHAEL DALY HAWKINS

Judge, United States Court of Appeals
for the Ninth Circuit

HON. SIDNEY H. STEIN

Judge, United States District Court
for the Southern District of New York

Volume 3B

Chapters 160 to 168

ST. PAUL, MN
WEST GROUP
2001

RECEIVED

SEP 18 2001

VERMONT LAW SCHOOL
LIBRARY



INSTRUCTIONS FOR FEDERAL CIVIL CASES

c. Actual Damages and Profits

Section 504(b) of the Copyright Act of 1976 provides as follows with respect to actual damages and profits:

(b) Actual Damages and Profits.—The Copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

In addition to actual damages, the copyright owner is entitled to any profits attributable to the infringement, to the extent they are not duplicated in the award of actual damages.¹²⁶ It may be possible to recover profits based on the sale of noninfringed goods as a measure of lost goodwill, provided that the owner can establish an adequate causal connection.¹²⁷

d. Enhanced Damages

In any case in which the court finds that a defendant proprietor of an establish who claims as a defense that its activities were exempt under Section 110(5)¹²⁸ did not have reasonable grounds to believe that its use of a copyrighted work was exempt under that section, the plaintiff is entitled to, in addition to any award of damages under Section 504.¹²⁹

A. GENERALLY**§ 160.01 Nature of the Action**

This is an action for copyright infringement. A "copyright" is the exclusive right to copy. A copyrighted work can

126. *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876, 881 (9th Cir.), cert. denied, 506 U.S. 1001, 113 S.Ct. 605, 121 L.Ed.2d 541 (1992) (any doubt as to correctness of profit calculation should be resolved in favor of plaintiff). See also *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514-15 (9th Cir.1985) (discussing calculation and proof of profits attributable to infringement).

127. See *Business Trends Analysts v. Freedonia Group, Inc.*, 887 F.2d 399, 404 (2d Cir.1989).

128. 17 U.S.C.A. § 105(5) involves "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes...." See generally, Halpern, Nard, & Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent, and Trademark* § 6.4.5.7.1 (exemption would exempt performance consisting of having a simple radio or television receiver turned on in a restaurant).

129. 17 U.S.C.A. § 504(d).

LAL CIVIL CASES

COPYRIGHT INFRINGEMENT

§ 160.01

les as follows with

right owner is
him or her as
the infringer
not taken into
establishing the
ed to present
re infringer is
; and the ele-
the copyright-

*Individual
Standard
features,*

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, mask works fixed in semiconductor chip products, or a 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.

r is entitled to any
ent they are not
ay be possible to
ls as a measure of
n adequate causal

The owner of a copyright generally has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time. One who [reproduces] [~~prepares derivative works~~] [~~distributes~~] [~~performs~~] [~~or~~] [~~displays~~] a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner

dant proprietor of
ities were exempt
ids to believe that
ction, the plaintiff
ler Section 504.¹²⁹

In this case, plaintiff *Claim to be* is the owner of a copyright. Plaintiff ~~is seeking seeks damages from defendant for copyright infringement.~~

ment. A "copy-
ghted work can

Defendant _____ denies infringing the copyright [and contends that the copyright is invalid] [other affirmative defense]. *and that plaintiffs licensed the use of the Foundation NOTES Plan by permitting*
In General Isbitski to use it.

§ 105(5) involves
transmission embody-
display of a work by
of the transmission on
aratus of a kind com-
ute homes. . . . " See
Vard, & Port, Funda-
ates Intellectual Prop-
, Patent, and Trade-
mption would exempt
ig of having a simple
ceiver turned on in a

See 17 U.S.C.A. § 501(a).

This instruction may be given at the beginning of the trial.

Ninth Circuit

PRELIMINARY INSTRUCTION—COPYRIGHT

The plaintiff, _____, the owner of a copyright, seeks damages against the defendant, _____, for copyright infringement. The defendant denies infringing the copyright [and contends that the copyright is invalid]. To help you understand the evidence that will be presented in this case, I will explain some of the legal terms you will hear during this trial.