**9.11 Copyright – Validity – The Merger Doctrine**

Copyright law provides that an author can usually copy unprotected matter but not copy the manner another author selected for expressing a particular matter. But there’s an exception to this prohibition if there’s only one way, or only a few ways, of expressing the ideas or other unprotected matter in a work. In such cases, an author may copy the expression in the work to the extent necessary to express the unprotected matter. [Name of defendant] claims that this exception applies in this case.

This exception is called the “merger doctrine” because when there is only one way of expressing unprotected matter, the expression is said to have “merged” with the unprotected matter. The merger doctrine can apply to any unprotected matter such as ideas, facts, or events. The doctrine can apply to literal text, such as when facts can be effectively expressed only by using specific words or a limited range of words. The merger doctrine can also apply to non-literal elements of a literary work, such as when it’s necessary to recount factual events in the same order as another work to present historical facts accurately and intelligibly.

The merger doctrine also applies to pictorial, graphic, and sculptural works, such as when there are a limited number of ways of representing certain sorts of objects. For example, a sculpture that depicts a mermaid will necessarily have certain similarities to other sculptures of mermaids. It will have a female human’s head, arms, and torso, and the tail of a fish. These necessary similarities among sculptures of mermaids can’t, under the merger doctrine, be the basis for a finding of infringement because copyright law would then protect the idea of a mermaid.

**Special Interrogatories to the Jury**

Do you find that [name of plaintiff] is seeking copyright protection in matter that may only be expressed in so few ways that to protect the expression would effectively grant [name of plaintiff] a monopoly over matter that isn’t protectable by copyright?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer to this question is “Yes” for any of the material in which [name of plaintiff] is claiming copyright protection, you should exclude that material from the material [name of plaintiff]’s copyright-infringement claim can be based on.