**ANNOTATIONS AND COMMENTS**

This jury instruction applies when there is a claim of contributory infringement. Before there can be contributory infringement by one Defendant, there must first be a direct or primary infringement by another. Further, before there can be contributory infringement, the Defendant must have acted with the requisite knowledge.

The above change does not include a requirement that the alleged contributory infringer have acted “intentionally.” *See Cable/Home Communication Cooperation et al v. Network Productions*, 902 F.2d 829, 845 (11th Cir. 1990); *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) (“The test for contributory infringement has been formulated as ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.’”).

However, after *Casella*, the United States Supreme Court included a specific reference to an “intentional” inducement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S. Ct. 2764, 2776, 162 L. Ed. 2d, 781 (2005) (“*Grokster”*) (“One infringes contributorily by intentionally inducing or encouraging direct infringement.”). *See also BUC Intern. Corp. v International Yacht Council*, 489 F.3d 1129, 1138 n.19 (11th Cir. 2007). (“Contributory infringement refers to the intentional inducement, causation or material contribution to another’s infringing conduct.”). Under the Eleventh Circuit’s prior panel precedent rule, the *Casella* version of contributory infringement (rather than the *Grokster* language) was incorporated into this jury instruction. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*,475 F.3d 1228, 1230 (11thth Cir. 2007) (quoting *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981)); *Cohen v. Office Depot, Inc.*,204 F.3d 1069, 1076 (11th Cir. 2000).

The Eleventh Circuit’s standard for “knowledge” in a contributory infringement case is objective: “Knowledge or have reason to know.” *Casella*,820 F.2d at 365.

In *Grokster*, the Supreme Court held that intent can be found from “[e]vidence of active steps… taken to encourage direct infringement… such as advertising an infringing use or instructing how to engage in an infringing use . . . .” *Id.* at 936. Nonetheless, where the claim for contributory infringement is based on sale of a copying device, “mere knowledge of infringing potential or of actual infringing uses” of the defendant’s device is not enough to support a finding of intent. 545 U.S. at 937. “Thus, where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement,” the “staple-article rule” in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442, 104 S. Ct. 774, 788; 78 L. Ed. 2d 574 (1984), “will not preclude liability.”

The Supreme Court has looked to other intellectual property law for guidance as to contributory infringement copyright claims. For example, *Grokster* looked to patent infringement jurisprudence for guidance in determining the standard to be applied in a case claiming contributory infringement. *Id. See also, Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754, 131 S. Ct. 2060, 179 L. Ed. 2d 1167, 1175 (2011) (*Global*-*Tech* established a “willful blindness” standard for the knowledge element in a contributory infringement claim in a patent case.).