**9.22 Copyright – Infringement – Software**

For a claim of copyright infringement for software, you must apply the same elements as in any other copyright-infringement claim, which include proof of access to the copyrighted work and substantial similarity. But even if you find that [name of defendant]’s software is substantially similar to [name of plaintiff]’s software, not all similarity supports a claim of infringement. And even if [name of defendant]’s software is literally (or even nonliterally) similar to [name of plaintiff]’s software, that isn’t necessarily enough to establish copyright infringement. You must determine whether there is “substantial similarity” between [name of defendant]’s allegedly infringing program and the original elements of [name of plaintiff]’s software that the law protects.

To do that, you’ll need to filter [name of plaintiff]’s copyrighted computer program to decide what part of [his/her/its] copyrighted software program is protected by the law and what part is not protectable.

You’ll need to break down the allegedly infringed program – [name of plaintiff]’s copyrighted work – into its structural parts so you can consider the individual elements of [name of plaintiff]’s copyrighted work. Then you’ll need to determine which of the elements that [name of plaintiff] claims have been infringed are protected by the law. The law doesn’t protect the following elements, and you should filter these out:

elements that are only an idea;

elements required based only on logic and efficiency;

elements required because of hardware or software, computer-industry programming, and practices or elements taken from the public domain; or

other elements of the program component under consideration that the law doesn’t protect.

Once you’ve applied this filter to eliminate items from consideration that aren’t legally protectable, you’re entitled to include in your consideration for copyright infringement both those items in [name of defendant]’s software (if any) that are literally similar as well as those elements that aren’t literally an exact copy of the copyrighted work.

But even if you find that [name of defendant] intentionally included literal and nonliteral copies of [name of plaintiff]’s copyrighted software that similarity must relate to [name of plaintiff]’s copyrighted software or components of software that are legally protectable.

**Special Interrogatories to the Jury**

**Do you find from a preponderance of the evidence:**

That [name of defendant]’s software has elements that are literally or nonliterally similar to any portion of [name of plaintiff]’s copyrighted software?

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

If you answered “Yes,” you don’t need to answer the remaining questions.

That the law protects any of the allegedly infringed portions of [name of plaintiff]’s copyrighted software that are literally or nonliterally similar to [name of defendant]’s software?

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

If you answered “No,” you don’t need to answer the next question.

For those portions of copyrighted software that the law protects and that [name of plaintiff] claims were infringed, that [name of defendant] wrongfully copied any of

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