**9.26 Copyright – Defenses – Affirmative Defense – First Sale**

The exclusive right to distribute a particular copy of a copyrighted work under the Copyright Act extends only to the first sale (or other transfer of ownership) of the copy. Once title to a copy passes through a first sale (or other transfer of ownership) by the copyright holder, the owner of that copy may transfer it to another person, through sale or otherwise, without the copyright owner’s permission.

To establish the “first sale” defense to infringement of [name of plaintiff]’s distribution right, [name of defendant] must prove each of the following elements by a preponderance of the evidence:

First, you must find that the copy that [name of defendant] transferred was lawfully made under the Copyright Act.

And second, you must find that [name of defendant] owned the copy or was authorized by the owner of the copy to transfer it to another person.

If you find that [name of defendant] has proved the above elements by a preponderance of the evidence, your verdict must be for [name of defendant] on the claim for infringement of [name of plaintiff]’s exclusive right to distribute the copyrighted work.

This defense doesn’t apply to other copyright rights that [name of plaintiff] may own. For example, this defense doesn’t permit [name of defendant] to make additional copies of the copyrighted work.

**Special Interrogatories to the Jury**

Was the copy that [name of defendant] sold or otherwise disposed of lawfully made under the Copyright Act?

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

If the answer to the above question is “Yes,” answer the next question; if not, you should stop here.

Did [name of defendant] own the copy?

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

If the answer to the above question is “Yes,” skip the next question; if not, answer the next question.

Was [name of defendant] authorized by the copy’s owner to transfer it to another person?

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

If the answer to Question No. 2 or No. 3 is “Yes,” do you find that [name of defendant]’s first-sale defense precludes [name of plaintiff]’s claim for infringement of [his/her/its] distribution right?

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