**ANNOTATIONS AND COMMENTS**

17 U.S.C. § 109; *Am. Int’l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978).

The Eleventh Circuit has not addressed whether a copy of a copyrighted work manufactured outside the United States is “lawfully made under the Copyright Act.” The Second Circuit has held that Section 109 does not apply to copyrighted goods manufactured abroad. *See John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 222 (2d Cir. 2011). The Ninth Circuit also has held that Section 109 does not apply in this situation, although it has adopted an exception for goods manufactured abroad but first sold in the United States with the consent of the copyright owner. *See Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 985-90 (9th Cir. 2008), *aff’d by an equally divided court*, 131 S. Ct. 565, 178 L. Ed. 2d 470 (2010).

The Eleventh Circuit also has not addressed the circumstances under which a person acquires ownership of a copy of a copyrighted work. The Ninth Circuit has set forth a multi-factor test for determining whether a person is an owner of a copy or instead a mere licensee. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010); *see also UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1180 (9th Cir. 2011). The Second Circuit and Federal Circuit have adopted slightly different formulations for addressing the distinction between owners and licensees of copies, albeit under a separate provision of the Copyright Act. *See Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2d Cir. 2005) (“[C]ourts should inquire into whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy for purposes of § 117”); *DSC Commc’ns Corp. v. Pulse Commc’ns, Inc.*, 170 F.3d 1354, 1360-62 (Fed. Cir. 1999) (distinguishing the Ninth Circuit rule in the context of Section 117 of the Copyright Act).

Because the Eleventh Circuit has yet to weigh in and the case law is not yet settled, the model jury instruction for this defense is intentionally silent on these issues.