**9.27 Copyright – Defenses – Affirmative Defense – Implied License**

[Name of defendant] claims that [name of plaintiff] granted him a license to use [name of plaintiff]’s copyrighted work. A license is a contract giving someone permission to use the work. A license doesn’t have to be in writing. Rather, as alleged here, a license can be implied from conduct. To establish this defense, [name of defendant] must prove each of the following by a preponderance of the evidence:

First you must find that [name of plaintiff] created the work, or caused it to be created, at [name of defendant]’s request or the request of someone acting on [name of defendant]’s behalf.

Second, you must find that [name of plaintiff] delivered the work, or caused it to be delivered, to [name of defendant] or someone acting on [name of defendant]’s behalf.

And third, you must find that [name of plaintiff] intended that [name of defendant] [insert exclusive rights allegedly violated (i.e., copy, distribute, publicly display, publicly perform, or create derivative works based upon)] [his/her/its] copyrighted work. [Name of plaintiff]’s intent may be inferred from the work’s nature or the circumstances surrounding the work’s creation.

If you find that [name of defendant] has proved these elements by a preponderance of the evidence, your verdict must be for [name of defendant] on the claim of copyright infringement if [name of defendant]’s use doesn’t exceed the scope of the [his/her/its] license. [Name of defendant] can still commit copyright infringement if [he/she/it] exceeded the scope of the license.

**Special Interrogatories to the Jury**

 Did [name of plaintiff] create the copyrighted work at issue, or cause it to be created, at [name of defendant]’s request or the request of someone acting on [name of defendant]’s behalf?

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 plaintiff] deliver the copyrighted work at issue, or cause it to be delivered, to [name of defendant] or someone acting on [name of defendant]’s behalf?

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 plaintiff] intend that [name of defendant] [insert exclusive rights allegedly violated (i.e., copy, distribute, publicly display, publicly perform, or create derivative works based upon)] his copyrighted work?

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

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

 Was [name of defendant]’s use of the copyrighted work within the scope of the implied license?

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

 If the answer to the above question is “Yes,” do you find that [name of defendant] had an implied license to use [name of plaintiff]’s copyrighted work?

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