

1 JEFFREY P. THENNISCH  
 2 (Michigan Bar Number P51499)  
 3 (appearing Pro Hac Vice)  
 4 jeff@patentco.com  
 5 DOBRUSIN THENNISCH PC  
 6 29 West Lawrence Street, Suite 210  
 7 Pontiac, Michigan 48342  
 8 Telephone: (248) 292-2920  
 9 Facsimile: (248) 292-2910  
 10 Attorney for Plaintiff GEORGE CLINTON

11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

13 GEORGE CLINTON, an individual,  
 14 Plaintiff,  
 15 v.  
 16 WILL ADAMS, p/k/a will,I,am  
 17 individually and d/b/a will.i.am  
 18 music, inc., et al.,  
 19 Defendants.

20 Case No.CV 10-09476-ODW-PLA  
 21 The Honorable Otis D. Wright II  
 22 **PLAINTIFF’S DISPUTED JURY**  
 23 **INSTRUCTIONS**  
 Pretrial Conference: May 22, 2012  
 Trial Date: June 5, 2012  
 Place: Courtroom 11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

In accordance with Local Rule 51-1 of the U.S. District Court for the Central District of California and the April 29, 2011 Case Management Order in this action at D/E 38, Plaintiff, George Clinton (“Clinton”) hereby submits the following set of Plaintiff’s Disputed Jury Instructions. Each proposed instruction is followed by a statement from the Defendants supporting their objection(s) to the instruction, and a reply, if any, from the Plaintiff supporting the instruction.

Dated: April 30, 2012

Respectfully submitted,

/s/Jeffrey P. Thennisch  
Dobrusin & Thennisch PC  
29 W. Lawrence Street, Suite 210  
Pontiac, Michigan 48342  
(248) 292-2920 telephone  
(248) 292-2910 fax

## JURY INSTRUCTIONS

COURT'S INSTRUCTION NUMBER \_\_\_\_\_

### PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 1

#### **17.5 COPYRIGHT INFRINGEMENT—OWNERSHIP OF VALID COPYRIGHT (17 U.S.C. §§ 201-205)**

A person who holds a copyright may obtain a certificate of registration from the Copyright Office of the Library of Congress. This certificate is sufficient to establish the facts stated in the certificate, unless outweighed by other evidence in this case.

The evidence in this case includes a certificate of copyright registration from the Copyright Office. You are instructed that the certificate is prima facie evidence that there is a valid copyright in the sound recording Knee Deep.

Plaintiff's ownership of Knee Deep is also confirmed by the federal court order issued by Judge Real on June 17, 2005, D/E 121 in Case 03-08955.

#### ***Plaintiff's Authority:***

Ninth Circuit Manual of Model Jury Instructions (Civil) No. 17.5 modified to note only supplemental instructions: Copyright Certificate to reflect that a copyright registration certificate can shift the burden of coming forward with proof of plaintiff's ownership of a valid copyright. Real's June 17, 2005, Order at D/E 121 in Case 03-08955.

**DEFENDANTS’ OBJECTION TO  
PLAINTIFF’S DISPUTED INSTRUCTION NUMBER 1**

Defendants object to this proposed instruction on two grounds.

First, the instruction is improper because it tells the jury that Plaintiff’s ownership of *Knee Deep* is “confirmed” by the June 17, 2005 federal court order. At best, this 2005 order has the effect of a valid copyright registration issued directly to Plaintiff: it is prima facie evidence of ownership, but does not establish ownership conclusively.

Second, the instruction omits the third element listed in the primary version of the model instruction: the requirement that the plaintiff “complied with copyright notice requirements by placing a copyright notice on publicly distributed copies of the allegedly infringed work.” See Instruction No. 17.5, Ninth Circuit Model Jury Instructions—Civil (Jan. 2012). Because *Knee Deep* was first published in 1979, it is still subject to the requirement that a copyright notice be placed on publicly distributed copies. “[W]orks distributed prior to March 1, 1989 . . . may enter the public domain if their owner failed to comply with the notice procedures.” See Comment to Model Instruction No. 17.5 (citing Lifshitz v. Waller Drake & Sons, Inc., 806 F.2d 1426, 1432–34 (9th Cir.1986)); see also 2 Nimmer et al., Nimmer on Copyright, § 7.02[C][2] p. 7-16 (2010) (explaining

notice requirements for “decennial publications,” such as *Knee Deep*).

Defendants request that the Court issue Joint Proposed Instruction No. 35, in lieu of Plaintiff’s proposed instruction.

**PLAINTIFF’S REPLY TO DEFENDANTS’ OBJECTION TO PROPOSED  
JURY INSTRUCTION NO. 1**

Plaintiff responds by stating that the June 17, 2005 Order from Judge Real is a clear Order from an Article III Court which not only speaks for itself, but also involves the adjudication and ownership of Plaintiff’s rights in the same master recordings at issue in this action. Defendants’ objection that the June 17, 2005 Order “tells the jury” something is, at best, speculative. Rather, the prior June 17, 2005 Order from this very Article III Court is concise and carries the force of law as to the Plaintiff’s ownership in the same master recordings at issue in this action AND provides guidance that any license obtained by any other party (which these Defendants) claim to have is not valid unless it was issued by the Plaintiff himself. Plaintiff deserves any benefit from his own prior action especially where these Defendants have taken no action to limit, vacate, or modify Judge Real’s June 17, 2012 Order in any fashion. Defendants’ objection is akin to a collateral attack on this prior Order in that the absence of this instruction would actually deprive the jury and the Plaintiff of well-accepted legal doctrines, such as stare decisis.

Turning to the second component of Defendant’s objection, the existence of Judge Real’s June 17, 2005 Order in no way limits any element which Plaintiff may have to separately prove in this action, including any putative “notice” requirement.



**COURT'S INSTRUCTION NUMBER \_\_\_\_\_**

**PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 2: DEFINITION OF  
A LICENSE**

A contract is an agreement to do a certain thing. A license is a type of contract. A copyright license gives the recipient of the license permission to copy, distribute, and otherwise use a copyrighted work in accordance with the license's terms.

A license between the copyright holder and the defendants is a defense to a claim of copyright infringement.

***Plaintiff's Authority:***

Cal. Civ. Code § 1549; *see generally, Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121-22 (9th Cir. 1999).



**DEFENDANTS' OBJECTION TO  
PLAINTIFF'S DISPUTED INSTRUCTION NUMBER 2**

Defendants object to this proposed instruction and Plaintiff's Disputed Instruction No. 3 on two grounds.

First, Plaintiff's proposed instructions are cumbersome and confusing in that they require two (or three) instructions regarding a license, whereas the joint proposed instructions already accomplish this in one instruction. See Joint Proposed Instruction No. 31.

Second, Plaintiff's proposed instructions improperly characterize the issues as whether "plaintiff gave [defendants] a license" and whether "plaintiff granted a license." This suggests that the Defendants must have had some direct contact with the Plaintiff in order to obtain a valid license. In reality, Defendants could have obtained (and did obtain) a valid license through an entity that held the licensing rights to *Knee Deep* (as with the 2003 Shut Up Remix), or through Plaintiff's agent (as with the 2009 Shut Up Remix).

Defendants request that the Court issue Joint Proposed Instruction No. 31, in lieu of Plaintiff's proposed instructions.

**PLAINTIFF’S REPLY TO DEFENDANTS’ OBJECTION TO PROPOSED  
JURY INSTRUCTION NO. 2**

Plaintiff responds by stating that the proposed Jury Instruction No. 2 is neither cumbersome nor confusing in any manner. Rather, the instruction properly and legally characterizes any putative license that may exist between the parties as a “contract” under applicable and cited Ninth Circuit precedent. Clearly, Plaintiff possess a property interest in his copyrighted subject matter (U.S. Constitution, Article I, Section 8, Clause 8) and this property was, in fact, confirmed to be property of the individually named Plaintiff by Judge Real as part of the June 17, 2005 Order. That is the reason why the June 17, 2005 Order exists and why this same Plaintiff litigated that case before Judge Real. The same Order clearly states and outlines the parameters of any valid license and that such a license – to be valid – needs to come from the Plaintiff himself, not a third party. Once again, the June 17, 2005 Order from an Article III Court which not only speaks for itself, but also involves the adjudication and ownership of Plaintiff’s rights in the same master recordings at issue in this action. This prior Order exists to provide the very type of guidance that these Defendants now attempt to sidestep as follows: Any license obtained by any other party is not valid unless it was issued by the Plaintiff himself.

Turning to the second component of Defendant's objection, there is no such distinction between whether Plaintiff either "gave" or "granted" a license for his work since the existence of Judge Real's June 17, 2005 Order in no way limits any Defendants ability to assert their own affirmative defense of the existence of a license which Plaintiff may have "gave" or "granted" to them if, in fact, such a license exists.

**COURT'S INSTRUCTION NUMBER \_\_\_\_\_**

**PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 3: PURPORTED  
LICENSE FROM PLAINTIFF**

Defendants assert that the plaintiff gave them a license to use the plaintiff's copyrighted work. The burden is on the defendants to prove the existence of a license by a preponderance of the evidence.

The plaintiff and defendants disagree about whether plaintiff granted a license for Knee Deep to any of the defendants.

***Plaintiff's Authority:***

7A Fed. Proc., L. Ed. § 18:195. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1890 (1996).

**DEFENDANTS' OBJECTION TO  
PLAINTIFF'S DISPUTED INSTRUCTION NUMBER 3**

Defendants object to this proposed instruction and Plaintiff's Disputed Instruction No. 2 on two grounds.

First, Plaintiff's proposed instructions are cumbersome and confusing in that they require two (or three) instructions regarding a license, whereas the joint proposed instructions already accomplish this in one instruction. See Joint Proposed Instruction No. 31.

Second, Plaintiff's proposed instructions improperly characterize the issues as whether "plaintiff gave [defendants] a license" and whether "plaintiff granted a license." This suggests that the Defendants must have had some direct contact with the Plaintiff in order to obtain a valid license. In reality, Defendants could have obtained (and did obtain) a valid license through an entity that held the licensing rights to *Knee Deep* (as with the 2003 Shut Up Remix), or through Plaintiff's agent (as with the 2009 Shut Up Remix).

Defendants request that the Court issue Joint Proposed Instruction No. 31, in lieu of Plaintiff's proposed instructions.

**PLAINTIFF’S REPLY TO DEFENDANTS’ OBJECTION TO PROPOSED  
JURY INSTRUCTION NO. 3**

Plaintiff responds by stating that the proposed Jury Instruction No. 3 is neither cumbersome nor confusing in any manner. Rather, the instruction properly and legally characterizes any putative license that may exist between the parties as a “contract” under applicable and cited Ninth Circuit precedent. Clearly, Plaintiff possess a property interest in his copyrighted subject matter (U.S. Constitution, Article I, Section 8, Clause 8) and this property was, in fact, confirmed to be property of the individually named Plaintiff by Judge Real as part of the June 17, 2005 Order. That is the reason why the June 17, 2005 Order exists and why this same Plaintiff litigated that case before Judge Real. The same Order clearly states and outlines the parameters of any valid license and that such a license – to be valid – needs to come from the Plaintiff himself, not a third party. Once again, the June 17, 2005 Order from an Article III Court which not only speaks for itself, but also involves the adjudication and ownership of Plaintiff’s rights in the same master recordings at issue in this action. This prior Order exists to provide the very type of guidance that these Defendants now attempt to sidestep as follows: Any license obtained by any other party is not valid unless it was issued by the Plaintiff himself.

Turning to the second component of Defendant's objection, there is no such distinction between whether Plaintiff either "gave" or "granted" a license for his work since the existence of Judge Real's June 17, 2005 Order in no way limits any Defendants ability to assert their own affirmative defense of the existence of a license which Plaintiff may have "gave" or "granted" to them if, in fact, such a license exists.

**COURT'S INSTRUCTION NUMBER \_\_\_\_\_**

**PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 4: VALID  
CONTRACT**

There is no contract until there has been a meeting of minds on all material points. When it is clear, both from provision that proposed written contract will become operative only when signed by parties as well as from any other evidence presented by parties that they both contemplated that their acceptance of contract's terms would be signified by their signing it, then parties' failure to sign agreement means that no binding contract was created, even though the party later sought to be bound by agreement indicated a willingness to sign it.

***Plaintiff's Authority:***

*Banner Ent., Inc. v. Super. Ct. (Alchemy Filmworks, Inc.), 72 Cal. Rptr. 2d 598, 603 (Cal. App. 2d Dist. 1998).*



**DEFENDANTS' OBJECTION TO  
PLAINTIFF'S DISPUTED INSTRUCTION NUMBER 4**

Defendants object to this proposed instruction because it is unnecessary, misleading, and improperly delves into the substance of California contract law – a matter on which the jury does not need to be instructed.

Plaintiff relies upon a state case discussing California contract law, but there is no indication that California law governs the licenses at issue. To the contrary, these licenses were negotiated among people in New York, Florida, Virginia, and Delaware, and they do not appear to contain choice of law provisions.

Additionally, Plaintiff's proposed instruction appears to be limited to circumstances where there is a "provision that proposed written contract [*sic*] will become operative only when signed by parties." There is no indication that any of the licenses contained such a provision, making this instruction even more confusing.

Defendants request that the Court decline to issue Plaintiff's Disputed Instruction No. 4. Even if the Court were inclined to issue Plaintiff's Disputed Instruction Nos. 2 and 3, there is no basis to issue Plaintiff's Disputed Instruction No. 4 and doing so would risk confusing the jury.

## **PLAINTIFF’S REPLY TO DEFENDANTS’ OBJECTION TO PROPOSED JURY INSTRUCTION NO. 4**

Plaintiff responds by stating that the proposed Jury Instruction No. 4 is necessary and properly implicates contract law principles for the undeniable fact that these Defendants have asserted the affirmative defense of having an ‘express license’ from the Plaintiff himself to use his property consisting of the copyrighted musical work. Any such “license” by the Plaintiff, especially of an *express* one, is fundamentally grounded in contract law principles. In fact, the instruction properly and legally characterizes any putative license that may exist between the parties as a “contract” under applicable California precedent. The pleadings set forth in this action clearly support this position in that Defendants’ assert the existence of a license and the Plaintiff has submitted a declaration stating that no such license was given by him. This is the essence of the “meeting of the minds” component of the jury instruction and is not liable to confuse the jury, especially where Judge Real’s June 17, 2005 Order is equally clear that only the named Plaintiff could grant a valid “license” (i.e. could contract for) the same overlapping subject matter. Once again, that is the reason why the June 17, 2005 Order exists and why this same Plaintiff litigated that case before Judge Real. This same Order clearly states and outlines the parameters of any valid license and that such a license – to be valid – needs to come from the Plaintiff himself, not a third party. The June 17, 2005 Order from an Article III Court not only speaks for itself, but also involves the adjudication and ownership of Plaintiff’s rights in the same master recordings at issue in this action. This prior Order exists to provide the very type of guidance that these Defendants now attempt to sidestep as follows: Any license obtained by any other party is not valid unless it was issued by the Plaintiff himself.