

1 GRODSKY & OLECKI LLP
 Allen B. Grodsky (SBN 111064)
 2 John Metzidis (SBN 259464)
 2001 Wilshire Blvd., Ste. 210
 3 Santa Monica, California 90403
 310.315.3009 (phone)
 4 310.315.1557 (fax)
 allen@grodsky-olecki.com
 5 john@grodsky-olecki.com

6 Attorneys for Defendants Adams, Pineda,
 Gomez, Ferguson, will.i.am music, inc.
 7 and Tab Magnetic, Inc.

8 *(Additional counsel listed on*
second page)

9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12

13 GEORGE CLINTON, an individual,) Case No. CV 10-9476 ODW (PLAx)
 14)
 Plaintiff,)
 15)
 v.) Honorable Otis D. Wright II, Ctrm 11

16 WILL ADAMS, p/k/a will.i.am,) **JOINT PROPOSED JURY**
 17 individually and d/b/a WILL.IAM MUSIC) **INSTRUCTIONS**
 PUBLISHING, an individual; ALLAN)
 18 PINEDA, p/k/a apl.de.ap, individually and)
 d/b/a JEEPNEY MUSIC PUBLISHING,)
 19 an individual; JAIME GÓMEZ, p/k/a)
 Taboo, individually and d/b/a NAWASHA)
 NETWORKS PUBLISHING, an)
 20 individual; STACY FERGUSON, p/k/a)
 Fergie, an individual; GEORGE PAJON,)
 21 JR., an individual; JOHN CURTIS, an)
 individual; UNIVERSAL MUSIC)
 22 GROUP, INC., a Delaware corporation;)
 UMG RECORDINGS, INC., a Delaware)
 23 corporation; WILL I AM MUSIC, INC., a)
 California corporation; CHERRY LANE)
 24 MUSIC PUBLISHING COMPANY, INC.,)
 a New York corporation; EL CUBANO)
 25 MUSIC, INC., a California corporation;)
 EMI BLACKWOOD MUSIC INC., a)
 26 Connecticut corporation; TAB)
 MAGNETIC, INC., a California)
 27 corporation; and DOES 1 through 10,)
 28)
 Defendants.

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

6 Attorney for Plaintiff
George Clinton
7

8 CALDWELL LESLIE & PROCTOR, PC
LINDA M. BURROW, State Bar No. 194668
9 burrow@caldwell-leslie.com
ALISON MACKENZIE, State Bar No. 242280
10 mackenzie@caldwell-leslie.com
1000 Wilshire Boulevard, Suite 600
11 Los Angeles, California 90017-2463
Telephone: (213) 629-9040
12 Facsimile: (213) 629-9022

13 Attorneys for Defendant
UMG Recordings, Inc.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF JOINT PROPOSED JURY INSTRUCTIONS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<u>NO.</u>	<u>TITLE</u>	<u>SOURCE</u>	<u>PAGE NO.</u>
1	Duty of Jury (Court Reads Instruction Only)	9 th Cir. 1.1B	2
2	Duty of Jury (Court Reads and Provides Written Instructions at End of Case)	9 th Cir. 1.1C	4
3	Claims and Defenses	9 th Cir. 1.2	6
4	Burden of Proof–Preponderance of Evidence	9 th Cir. 1.3	8
5	Two or More Parties–Different Legal Rights	9 th Cir. 1.5	10
6	Corporations and Partnerships	9 th Cir. 4.1	12
7	What is Evidence	9 th Cir. 1.6	14
8	What is Not Evidence	9 th Cir. 1.7	16
9	Evidence for Limited Purpose	9 th Cir. 1.8	18
10	Direct and Circumstantial Evidence	9 th Cir. 1.9	20
11	Ruling on Objections	9 th Cir. 1.10	22
12	Credibility of Witnesses	9 th Cir. 1.11	24
13	Conduct of the Jury	9 th Cir. 1.2	26-27
14	No Transcript Available to Jury	9 th Cir. 1.13	29
15	Taking Notes	9 th Cir. 1.14	31
16	Bench Conferences and Recesses	9 th Cir. 1.18	33
17	Outline of Trial	9 th Cir. 1.19	35
18	Stipulations of Facts	9 th Cir. 2.2	37
19	Impeachment of Evidence–Witness	9 th Cir. 2.8	39
20	Use of Interrogatories of Party	9 th Cir. 2.10	41
21	Expert Opinion	9 th Cir. 2.11	43
22	Charts and Summaries not Received in Evidence	9 th Cir. 2.12	45
23	Charts and Summaries in Evidence	9 th Cir. 2.13	47
24	Evidence in Electronic Format	9 th Cir. 2.14	49-50
25	Duty to Deliberate	9 th Cir. 3.1	52
26	Communication with Court	9 th Cir. 3.2	54

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF JOINT PROPOSED JURY INSTRUCTIONS (Cont'd)

27	Return of Verdict	9 th Cir. 3.3	56
28	Preliminary Instruction–Copyright	9 th Cir. 17.0	58-60
29	Copyright–Defined	9 th Cir. 17.1	62
30	Copyright Infringement–Elements– Ownership and Copying	9 th Cir. 17.4	64
31	Copyright–Affirmative Defense–Express License	Specially Prepared	66
32	Agent and Principle–Definition	9 th Cir. 4.4	68
33	Agent–Scope of Authority Defined	9 th Cir. 4.5	70
34	Act of Agent is Act of Principal	9 th Cir. 4.6	72
35	Copyright Infringement–Ownership of Valid Copyright–Definition	9 th Cir. 17.5	74
36	Copyright–Damages	9 th Cir. 17.22	76
37	Copyright–Damages–Actual Damages	9 th Cir. 17.23	78
38	Copyright–Damages–Defendant’s Profits	9 th Cir. 17.24	80-81
39	Copyright–Damages–Defendant’s Profits–Apportionment Factors	Specially Prepared	83
40	Copyright–Damages–Three Year Limitation	Specially Prepared	85
41	Copyright–Damages–Statutory Damages	9 th Cir. 17.25	87
42	Copyright–Damages–Innocent Infringement	9 th Cir. 17.26	89
43	Copyright–Damages–Willful Infringement	9 th Cir. 17.27	91

1 Pursuant to Local Rule 51-1 and the Court's Scheduling and Case Management
2 Order dated April 29, 2011 (Dkt. 38), Plaintiff and Defendants submit the following
3 set of Joint Proposed Jury Instructions as to which Plaintiff and Defendants agree.

4 Plaintiff and Defendants reserve the right to modify these joint proposed jury
5 instructions in response to the Court's ruling on the motion for partial summary
6 judgment filed by Defendants Adams, Pineda, Gomez, Ferguson, will.i.am music, inc.
7 and Tab Magnetic, Inc.

8 Respectfully submitted,

9 Dated: April 30, 2012

10 GRODSKY & OLECKI LLP
11 Allen B. Grodsky
12 John Metzidis

13 By: /s/ Allen B. Grodsky
14 Allen B. Grodsky

15 Attorneys for Defendants
16 Adams, Pineda, Gomez, Ferguson, will.i.am
17 music, inc., and Tab Magnetic, Inc.

18 Dated: April 30, 2012

19 DOBRUSIN THENNISCH, PC
20 Jeffrey P. Thennisch

21 By: /s/ Jeffrey P. Thennisch (w/ permission)
22 Jeffrey P. Thennisch

23 Attorneys for Plaintiff George Clinton

24 Dated: April 30, 2012

25 CALDWELL, LESLIE & PROCTOR PC
26 Linda M. Burrow
27 Alison Mackenzie

28 By: /s/ Linda M. Burrow (w/ permission)
Linda M. Burrow

Attorneys for Defendant UMG Recordings, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
DUTY OF JURY (COURT READS INSTRUCTIONS ONLY)

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 1
DUTY OF JURY (COURT READS INSTRUCTIONS ONLY)

AUTHORITY: Instruction No. 1.1B, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
DUTY OF JURY (COURT READS AND PROVIDES
WRITTEN INSTRUCTIONS AT END OF CASE)

Members of the Jury: Now that you have heard all of the evidence [and the arguments of the attorneys], it is my duty to instruct you as to the law of the case.

[Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.]

or

[A copy of these instructions will be sent with you to the jury room when you deliberate.]

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 2
DUTY OF JURY (COURT READS AND PROVIDES
WRITTEN INSTRUCTIONS AT END OF CASE)

AUTHORITY: Instruction No. 1.1C, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

COURT'S INSTRUCTION NUMBER ____

CLAIMS AND DEFENSES

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiff, George Clinton, claims that the defendants – William Adams, Allan Pineda, Jaime Gomez, Stacy Ferguson, will.i.am music, inc., Tab Magnetic, Inc., and UMG Recordings, Inc. – are liable to Clinton for copyright infringement. The plaintiff has the burden of proving this claim.

The defendants deny this claim and also contend that Clinton's claim is barred by express license. The defendants have the burden of proof on this affirmative defense.

JOINT PROPOSED INSTRUCTION NUMBER 3

CLAIMS AND DEFENSES

AUTHORITY: Instruction No. 1.2, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Modified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____

BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 4
BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

AUTHORITY: Instruction No. 1.3, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS

You should decide the case as to each party separately. There are eight parties in this lawsuit:

- Plaintiff George Clinton;
- Defendant William Adams;
- Defendant Allan Pineda;
- Defendant Jaime Gomez;
- Defendant Stacy Ferguson;
- Defendant will.i.am music, inc.;
- Defendant Tab Magnetic, Inc.; and
- Defendant UMG Recordings, Inc.

Unless otherwise stated, the instructions apply to all parties.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 5
TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS

AUTHORITY: Instruction No. 1.5, Ninth Circuit Manual of Model Jury Instructions – Civil (Jan. 2012 ed.). Modified to identify expressly each of the eight parties to the lawsuit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
CORPORATIONS AND PARTNERSHIPS—FAIR TREATMENT

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 6
CORPORATIONS AND PARTNERSHIPS—FAIR TREATMENT

AUTHORITY: Instruction No. 4.1, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Modified only to delete reference to
“partnerships.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____

WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence; and
3. any facts to which the lawyers have agreed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 7

WHAT IS EVIDENCE

AUTHORITY: Instruction No. 1.6, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1 **COURT’S INSTRUCTION NUMBER ____**

2 **WHAT IS NOT EVIDENCE**

3
4 In reaching your verdict, you may consider only the testimony and exhibits
5 received into evidence. Certain things are not evidence, and you may not consider
6 them in deciding what the facts are. I will list them for you:

7
8 (1) Arguments and statements by lawyers are not evidence. The lawyers are not
9 witnesses. What they have said in their opening statements, [will say in their] closing
10 arguments, and at other times is intended to help you interpret the evidence, but it is
11 not evidence. If the facts as you remember them differ from the way the lawyers have
12 stated them, your memory of them controls.

13
14 (2) Questions and objections by lawyers are not evidence. Attorneys have a
15 duty to their clients to object when they believe a question is improper under the rules
16 of evidence. You should not be influenced by the objection or by the court's ruling on
17 it.

18
19 (3) Testimony that has been excluded or stricken, or that you have been
20 instructed to disregard, is not evidence and must not be considered. In addition
21 sometimes testimony and exhibits are received only for a limited purpose; when I
22 [give] [have given] a limiting instruction, you must follow it.

23
24 (4) Anything you may have seen or heard when the court was not in session is
25 not evidence. You are to decide the case solely on the evidence received at the trial.
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 8

WHAT IS NOT EVIDENCE

AUTHORITY: Instruction No. 1.7, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
EVIDENCE FOR LIMITED PURPOSE

Some evidence may be admitted for a limited purpose only.

When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [*describe purpose*] and for no other purpose.]

JOINT PROPOSED INSTRUCTION NUMBER 9
EVIDENCE FOR LIMITED PURPOSE

AUTHORITY: Instruction No. 1.8, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 10
DIRECT AND CIRCUMSTANTIAL EVIDENCE

AUTHORITY: Instruction No. 1.9, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 11
RULING ON OBJECTIONS

AUTHORITY: Instruction No. 1.10, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1 **COURT'S INSTRUCTION NUMBER ____**

2 **CREDIBILITY OF WITNESSES**

3
4 In deciding the facts in this case, you may have to decide which testimony to
5 believe and which testimony not to believe. You may believe everything a witness
6 says, or part of it, or none of it. Proof of a fact does not necessarily depend on the
7 number of witnesses who testify about it.

8
9 In considering the testimony of any witness, you may take into account:

10
11 (1) the opportunity and ability of the witness to see or hear or know the things
12 testified to;

13
14 (2) the witness's memory;

15
16 (3) the witness's manner while testifying;

17
18 (4) the witness's interest in the outcome of the case and any bias or prejudice;

19
20 (5) whether other evidence contradicted the witness's testimony;

21
22 (6) the reasonableness of the witness's testimony in light of all the evidence; and

23
24 (7) any other factors that bear on believability.

25
26 The weight of the evidence as to a fact does not necessarily depend on the
27 number of witnesses who testify about it.

28

JOINT PROPOSED INSTRUCTION NUMBER 12

CREDIBILITY OF WITNESSES

AUTHORITY: Instruction No. 1.11, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **COURT'S INSTRUCTION NUMBER ____**

2 **CONDUCT OF THE JURY**

3
4 I will now say a few words about your conduct as jurors.

5
6 First, keep an open mind throughout the trial, and do not decide what the verdict
7 should be until you and your fellow jurors have completed your deliberations at the
8 end of the case.

9
10 Second, because you must decide this case based only on the evidence received
11 in the case and on my instructions as to the law that applies, you must not be exposed
12 to any other information about the case or to the issues it involves during the course of
13 your jury duty. Thus, until the end of the case or unless I tell you otherwise:

14
15 Do not communicate with anyone in any way and do not let anyone else
16 communicate with you in any way about the merits of the case or anything to do with
17 it. This includes discussing the case in person, in writing, by phone or electronic
18 means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other
19 feature. This also includes posting comments on Facebook, Twitter, Myspace, or any
20 other social networking web site. This applies to communicating with your fellow
21 jurors until I give you the case for deliberation, and it applies to communicating with
22 everyone else including your family members, your employer, the media or press, and
23 the people involved in the trial, although you may notify your family and your
24 employer that you have been seated as a juror in the case. But, if you are asked or
25 approached in any way about your jury service or anything about this case, you must
26 respond that you have been ordered not to discuss the matter and to report the contact
27 to the court.

1 Because you will receive all the evidence and legal instruction you properly may
2 consider to return a verdict: do not read, watch, or listen to any news or media
3 accounts or commentary about the case or anything to do with it; do not do any
4 research, such as consulting dictionaries, searching the Internet or using other
5 reference materials; and do not make any investigation or in any other way try to learn
6 about the case on your own.

7
8 The law requires these restrictions to ensure the parties have a fair trial based on
9 the same evidence that each party has had an opportunity to address. A juror who
10 violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial
11 could result that would require the entire trial process to start over]. If any juror is
12 exposed to any outside information, please notify the court immediately.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 13

CONDUCT OF THE JURY

AUTHORITY: Instruction No. 1.12, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Modified to add reference to “Facebook, Twitter,
Myspace, or any other social networking web site.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
NO TRANSCRIPT AVAILABLE TO JURY

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

1 **JOINT PROPOSED INSTRUCTION NUMBER 14**

2 **NO TRANSCRIPT AVAILABLE TO JURY**

3
4 AUTHORITY: Instruction No. 1.13, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____

TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 15

TAKING NOTES

AUTHORITY: Instruction No. 1.14, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
BENCH CONFERENCES AND RECESSES

From time to time during the trial, it [may become] [became] necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury [is] [was] present in the courtroom, or by calling a recess. Please understand that while you [are] [were] waiting, we [are] [were] working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we [will do] [have done] what we [can] [could] to keep the number and length of these conferences to a minimum. I [may] [did] not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

1 **JOINT PROPOSED INSTRUCTION NUMBER 16**
2 **BENCH CONFERENCES AND RECESSES**

3
4 AUTHORITY: Instruction No. 1.18, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 17

OUTLINE OF TRIAL

AUTHORITY: Instruction No. 1.19, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____

STIPULATIONS OF FACT

The parties have agreed to certain facts [to be placed in evidence as Exhibit ____]
[that will be read to you]. You should therefore treat these facts as having been
proved.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
IMPEACHMENT EVIDENCE—WITNESS

The evidence that a witness has been convicted of a crime, or lied under oath on a prior occasion, may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
USE OF INTERROGATORIES OF A PARTY

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers [have been] [were] given in writing and under oath, before the actual trial, in response to questions that were submitted in writing under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

1 **JOINT PROPOSED INSTRUCTION NUMBER 20**

2 **USE OF INTERROGATORIES OF A PARTY**

3
4 AUTHORITY: Instruction No. 2.10, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____

EXPERT OPINION

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not received in evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 22
CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

AUTHORITY: Instruction No. 2.12, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries [may be] [have been] received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

1 **JOINT PROPOSED INSTRUCTION NUMBER 23**
2 **CHARTS AND SUMMARIES IN EVIDENCE**
3

4 AUTHORITY: Instruction No. 2.13, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **COURT’S INSTRUCTION NUMBER ____**
2 **EVIDENCE IN ELECTRONIC FORMAT**
3

4 Those exhibits capable of being displayed electronically will be provided to you
5 in that form, and you will be able to view them in the jury room. A computer,
6 projector, printer and accessory equipment will be available to you in the jury room.
7

8 A court technician will show you how to operate the computer and other
9 equipment; how to locate and view the exhibits on the computer; and how to print the
10 exhibits. You will also be provided with a paper list of all exhibits received in
11 evidence. (Alternatively, you may request a paper copy of an exhibit received in
12 evidence by sending a note through the [clerk] [bailiff].) If you need additional
13 equipment or supplies, you may make a request by sending a note.
14

15 In the event of any technical problem, or if you have questions about how to
16 operate the computer or other equipment, you may send a note to the [clerk] [bailiff],
17 signed by your foreperson or by one or more members of the jury. Be as brief as
18 possible in describing the problem and do not refer to or discuss any exhibit you were
19 attempting to view.
20

21 If a technical problem or question requires hands-on maintenance or instruction,
22 a court technician may enter the jury room [with [the clerk] [the bailiff] [me] present
23 for the sole purpose of assuring that the only matter that is discussed is the technical
24 problem.] When the court technician or any non-juror is in the jury room, the jury
25 shall not deliberate. No juror may say anything to the court technician or any
26 non-juror other than to describe the technical problem or to seek information about
27 operation of equipment. Do not discuss any exhibit or any aspect of the case.
28

1 The sole purpose of providing the computer in the jury room is to enable jurors
2 to view the exhibits received in evidence in this case. You may not use the computer
3 for any other purpose. At my direction, technicians have taken steps to make sure that
4 the computer does not permit access to the Internet or to any "outside" website,
5 database, directory, game, or other material. Do not attempt to alter the computer to
6 obtain access to such materials. If you discover that the computer provides or allows
7 access to such materials, you must inform me immediately and refrain from viewing
8 such materials. Do not remove the computer or any electronic data [disk] from the jury
9 room, and do not copy any such data.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **JOINT PROPOSED INSTRUCTION NUMBER 24**
2 **EVIDENCE IN ELECTRONIC FORMAT**
3

4 AUTHORITY: Instruction No. 2.14, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **COURT'S INSTRUCTION NUMBER ____**

2 **DUTY TO DELIBERATE**

3
4 When you begin your deliberations, you should elect one member of the jury as
5 your presiding juror. That person will preside over the deliberations and speak for you
6 here in court.

7
8 You will then discuss the case with your fellow jurors to reach agreement if you
9 can do so. Your verdict must be unanimous.

10
11 Each of you must decide the case for yourself, but you should do so only after
12 you have considered all of the evidence, discussed it fully with the other jurors, and
13 listened to the views of your fellow jurors.

14
15 Do not hesitate to change your opinion if the discussion persuades you that you
16 should. Do not come to a decision simply because other jurors think it is right.

17
18 It is important that you attempt to reach a unanimous verdict but, of course, only
19 if each of you can do so after having made your own conscientious decision. Do not
20 change an honest belief about the weight and effect of the evidence simply to reach a
21 verdict.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [marshal] [bailiff], signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

1 **JOINT PROPOSED INSTRUCTION NUMBER 26**
2 **COMMUNICATION WITH COURT**
3

4 AUTHORITY: Instruction No. 3.2, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____

RETURN OF VERDICT

A verdict form has been prepared for you. [Any explanation of the verdict form may be given at this time.] After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

1 **HOW COPYRIGHT IS OBTAINED**

2
3 Copyright automatically exists in a work the moment it is fixed in any tangible
4 medium of expression. The owner of the copyright may register the copyright by
5 delivering to the Copyright Office of the Library of Congress a copy of the
6 copyrighted work. After examination and a determination that the material deposited
7 constitutes copyrightable subject matter and that legal and formal requirements are
8 satisfied, the Register of Copyrights registers the work and issues a certificate of
9 registration to the copyright owner.

10
11 **PLAINTIFF'S BURDEN OF PROOF**

12
13 In this case, the plaintiff, George Clinton, contends that the defendants, William
14 Adams, Allan Pineda, Jaime Gomez, Stacy Ferguson, will.i.am music, inc., Tab
15 Magnetic, Inc., and UMG Recordings, Inc., have infringed the plaintiff's copyright.
16 The plaintiff has the burden of proving by a preponderance of the evidence that the
17 plaintiff is the owner of the copyright and that the defendants copied original elements
18 of the copyrighted work. Preponderance of the evidence means that you must be
19 persuaded by the evidence that it is more probably true than not true that the
20 copyrighted work was infringed.

21
22 **PROOF OF COPYING**

23
24 To prove that the defendants copied the plaintiff's work, the plaintiff may show
25 that the defendant had access to the plaintiff's copyrighted work and that there are
26 substantial similarities between the defendants' work and the plaintiff's copyrighted
27 work.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LIABILITY FOR INFRINGEMENT

One who reproduces or prepares derivative works from a copyrighted work without authority from the copyright owner during the term of the copyright, infringes the copyright.

DEFENSES TO INFRINGEMENT

The defendant contends that there is no copyright infringement. There is no copyright infringement where the defendant had a valid license that authorized them to use the copyrighted work.

1 **JOINT PROPOSED INSTRUCTION NUMBER 28**
2 **PRELIMINARY INSTRUCTION—COPYRIGHT**

3
4 AUTHORITY: Instruction No. 17.0, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Modified to supply names, supply defense, fill in
6 blanks, and remove paragraphs regarding copyright interests and non-direct
7 infringement.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **COURT'S INSTRUCTION NUMBER ____**

2 **COPYRIGHT—DEFINED**

3
4 Copyright is the exclusive right to copy. This right to copy includes the
5 exclusive rights to:

6
7 (1) authorize, or make additional copies, or otherwise] reproduce the
8 copyrighted work in phonorecords;

9
10 (2) recast, transform, or adapt the work, that is, prepare derivative works based
11 upon the copyrighted work;

12
13 (3) distribute sound recordings of the copyrighted work to the public by sale or
14 other transfer of ownership, or by rental, lease, or lending;

15
16 (4) perform publicly a copyrighted musical work;

17
18 (5) display publicly a copyrighted musical work; and

19
20 (6) perform a sound recording by means of digital audio transmission.
21

22 It is the owner of a copyright who may exercise these exclusive rights to copy.
23 The term "owner" includes the author of the work, an assignee, or an exclusive
24 licensee. In general, copyright law protects against production, adaptation,
25 distribution, performance, or display of substantially similar copies of the owner's
26 copyrighted work without the owner's permission. An owner may enforce these rights
27 to exclude others in an action for copyright infringement.
28

1 **JOINT PROPOSED INSTRUCTION NUMBER 29**

2 **COPYRIGHT—DEFINED**

3

4 **AUTHORITY:** Instruction No. 17.1, Ninth Circuit Manual of Model Jury

5 Instructions – Civil (Jan. 2012 ed.). Modified to delete references to non-musical

6 audiovisual works, and to remove the final sentence in brackets.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT INFRINGEMENT—ELEMENTS—
OWNERSHIP AND COPYING

Anyone who copies original elements of a copyrighted work during the term of the copyright without the owner’s permission infringes the copyright.

On the plaintiff’s copyright infringement claim, the plaintiff has the burden of proving both of the following by a preponderance of the evidence:

1. the plaintiff is the owner of a valid copyright; and
2. the defendants copied original elements from the copyrighted work.

If you find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff, unless you also find that the defendants have proved an affirmative defense. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

1 **JOINT PROPOSED INSTRUCTION NUMBER 30**
2 **COPYRIGHT INFRINGEMENT—ELEMENTS—**
3 **OWNERSHIP AND COPYING**

4
5 AUTHORITY: Instruction No. 17.4, Ninth Circuit Manual of Model Jury
6 Instructions – Civil (Jan. 2012 ed.). Modified to add to the penultimate sentence the
7 language, “unless you also find that the defendants have proved an affirmative
8 defense.”

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____

COPYRIGHT—AFFIRMATIVE DEFENSE—EXPRESS LICENSE

Someone who is not the owner of the copyright may use the copyrighted work if he or she obtains permission from the copyright owner. This permission is called a license. The existence of a valid license is an affirmative defense to a claim of copyright infringement.

The defendants contend that they obtained a valid license from the plaintiff for use of the sound recording (*Not Just Knee Deep*). The plaintiff disputes the validity of the license. The defendants have the burden of proving this affirmative defense by a preponderance of the evidence.

If you find that the defendants proved by a preponderance of the evidence that they obtained a valid license for use of the plaintiff’s work, then your verdict should be for the defendants.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 31
COPYRIGHT—AFFIRMATIVE DEFENSE—EXPRESS LICENSE

AUTHORITY: Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1114 (9th Cir. 2000) (“The existence of a license creates an affirmative defense to a claim of copyright infringement.”). Modeled after Instruction Nos. 17.18 and 17.19, Ninth Circuit Manual of Model Jury Instructions – Civil (Jan. 2012 ed.).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____

AGENT AND PRINCIPAL—DEFINITION

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other’s control or right to control the manner and means of performing the services. The other person is called a principal. One may be an agent without receiving compensation for services. The agency agreement may be oral or written.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 32

AGENT AND PRINCIPAL—DEFINITION

AUTHORITY: Instruction No. 4.4, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
AGENT—SCOPE OF AUTHORITY DEFINED

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT PROPOSED INSTRUCTION NUMBER 33

AGENT—SCOPE OF AUTHORITY DEFINED

AUTHORITY: Instruction No. 4.5, Ninth Circuit Manual of Model Jury
Instructions – Civil (Jan. 2012 ed.). Unmodified.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
ACT OF AGENT IS ACT OF PRINCIPAL—
SCOPE OF AUTHORITY NOT IN ISSUE

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

1 **JOINT PROPOSED INSTRUCTION NUMBER 34**

2 **ACT OF AGENT IS ACT OF PRINCIPAL—**

3 **SCOPE OF AUTHORITY NOT IN ISSUE**

4

5 AUTHORITY: Instruction No. 4.6, Ninth Circuit Manual of Model Jury

6 Instructions – Civil (Jan. 2012 ed.). Unmodified.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT INFRINGEMENT—OWNERSHIP OF VALID
COPYRIGHT—DEFINITION

The plaintiff is the owner of a valid copyright in the sound recording (*Not Just*) *Knee Deep* if the plaintiff proves by a preponderance of the evidence that:

1. the plaintiff’s work is original;
2. the plaintiff is the author or creator of the work; and
3. the plaintiff complied with copyright notice requirements by placing a copyright notice on publicly distributed copies of the allegedly infringed work.

1 **JOINT PROPOSED INSTRUCTION NUMBER 35**
2 **COPYRIGHT INFRINGEMENT—OWNERSHIP OF VALID**
3 **COPYRIGHT—DEFINITION**

4
5 AUTHORITY: Instruction No. 17.5, Ninth Circuit Manual of Model Jury
6 Instructions – Civil (Jan. 2012 ed.). Modified to select the alternative instruction for
7 works distributed prior to March 1, 1989 for which no exception stated in 17 U.S.C. §
8 405(a)(1), (2), or (3) applies.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES

If you find for the plaintiff on the plaintiff's copyright infringement claim, you must determine the plaintiff's damages. The plaintiff is entitled to recover the actual damages suffered as a result of the infringement. In addition, the plaintiff is also entitled to recover from each defendant any profits of that defendant that are attributable to the infringement. The plaintiff must prove damages by a preponderance of the evidence.

1 **JOINT PROPOSED INSTRUCTION NUMBER 36**

2 **COPYRIGHT—DAMAGES**

3
4 **AUTHORITY:** Instruction No. 17.22, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Modified to refer to the profits of “each”
6 defendant rather than “the” defendant, as there are seven defendants.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—ACTUAL DAMAGES

The copyright owner is entitled to recover the actual damages suffered as a result of the infringement. Actual damages means the amount of money adequate to compensate the copyright owner for the reduction of the fair market value of the copyrighted work caused by the infringement. The reduction of the fair market value of the copyrighted work is the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendants of the plaintiff's work. That amount also could be represented by the lost license fees the plaintiff would have received for the defendants’ unauthorized use of the plaintiff's work.

1 **JOINT PROPOSED INSTRUCTION NUMBER 37**
2 **COPYRIGHT—DAMAGES—ACTUAL DAMAGES**

3
4 AUTHORITY: Instruction No. 17.23, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Modified only to pluralize references to “the
6 defendant.”

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—DEFENDANT'S PROFITS

In addition to actual damages, the plaintiff is also entitled to recover from each defendant any profits of that defendant that are attributable to the infringement.

For each and every defendant that you find is liable for infringing the plaintiff's work, you must make a separate determination of that defendant's illegal profits. Each such defendant is liable only for his or her own illegal profits.

You may not include in an award of profits any amount that you took into account in determining actual damages.

A defendant's profit is determined by subtracting all expenses from that defendant's gross revenue.

A defendant's gross revenue is all of the defendant's receipts from the sale of a work containing or using the copyrighted work. The plaintiff has the burden of proving each defendant's gross revenue by a preponderance of the evidence.

Expenses are all operating costs, overhead costs, and production costs incurred in producing the defendant's gross revenue. A defendant has the burden of proving his or her expenses by a preponderance of the evidence.

After you have determined a defendant's profit, you must determine what portion of that profit, if any, is not attributable to the infringement.

1 Unless you find that a portion of the profit from the sale of a work containing or
2 using the copyrighted work is attributable to factors other than use of the copyrighted
3 work, all of the profit is to be attributed to the infringement. The defendant has the
4 burden of proving the portion or percentage of the profit, if any, that is attributable to
5 factors other than infringing the copyrighted work.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **JOINT PROPOSED INSTRUCTION NUMBER 38**
2 **COPYRIGHT—DAMAGES—DEFENDANT'S PROFITS**

3
4 AUTHORITY: Instruction No. 17.24, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Modified to refer to the profits of “each”
6 defendant rather than “the” defendant, as there are seven defendants (additions at lines
7 7-9); changed subsequent references from “the” defendant to “a” defendant. Modified
8 to add instruction that the jury determine illegal profits for each defendant. See
9 Comment to Instruction No. 17.24; Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.,
10 772 F.2d 505, 519 (9th Cir. 1985). Modified to delete sentence regarding “causal
11 relationship” or “nexus,” as that relates to a theory of “indirect profits” that is not at
12 issue here. Modified to more clearly and accurately state the jury’s obligation to
13 determine whether portions of a defendant’s profits are not attributable to the
14 infringement (additions at lines 25-26).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—
DEFENDANT’S PROFITS—APPORTIONMENT FACTORS

In determining the portion of a defendant’s profits that is attributable to factors other than use of the copyrighted work, you may consider the following factors:

- the popularity of the infringing song as compared with the popularity of the other songs on the same album;

- the popularity, fame, notoriety, talent, or celebrity of the defendants;

- the creativity of the defendants in creating the infringing work.

1 **JOINT PROPOSED INSTRUCTION NUMBER 39**

2 **COPYRIGHT—DAMAGES—**

3 **DEFENDANT’S PROFITS—APPORTIONMENT FACTORS**

4

5 AUTHORITY: Caffey v. Cook, 409 F. Supp. 2d 484, 506-07 (S.D.N.Y.

6 2006) (factors for apportionment include “defendants’ own notoriety” and “the

7 outstanding performances, talent and drawing power of defendants”); ABKCO Music,

8 Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798, 800 (S.D.N.Y. 1981) (“[a] hit song

9 contributes more to the sale of a record than does a less popular song”); 20th Century

10 Fox Film Corp. v. Stonesifer, 140 F.2d 579, 584 (9th Cir. 1944) (“It is now settled that

11 where a portion of the profits of an infringing work is attributable to the appropriated

12 work, to avoid an unjust course by giving the originator all profits where the infringer's

13 labor and artistry have also to an extent contributed to the ultimate result, there may be

14 a reasonable approximation and apportionment by the court of the profits derived

15 therefrom”).

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—THREE YEAR LIMITATION

If you award the plaintiff any damages, you may not award damages that occurred more than three years before the filing of this lawsuit. This lawsuit was filed on December 10, 2010, so you may not award damages that occurred prior to December 10, 2007.

1 **JOINT PROPOSED INSTRUCTION NUMBER 40**
2 **COPYRIGHT—DAMAGES—THREE YEAR LIMITATION**

3
4 AUTHORITY: 17 U.S.C. § 507(b); Polar Bear Prods., Inc. v. Timex Corp.,
5 384 F.3d 700, 705-07 (9th Cir. 2004); Roley v. New World Pictures, Ltd., 19 F.3d 479,
6 481 (9th Cir. 1994); see also Los Angeles News Serv. v. Reuters Television Int’l, Ltd.,
7 149 F.3d 987, 992 (9th Cir. 1998) (“[a] plaintiff’s right to damages is limited to those
8 suffered during the statutory period for bringing claims”); 3 Nimmer on Copyright §
9 12.05[B], 12-132-133 (2004) (“The prevailing view is . . . that the statute of limitations
10 bars recovery on any damage claim that accrued over three years prior to filing of
11 suit”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—STATUTORY DAMAGES

If you find for the plaintiff on the plaintiff’s copyright infringement claim, you must determine the plaintiff’s damages. The plaintiff may seek a statutory damage award, established by Congress for the work infringed. Its purpose is to penalize the infringer and deter future violations of the copyright laws.

The amount you may award as statutory damages is not less than \$750, nor more than \$30,000 for each work you conclude was infringed.

However, if you find the infringement was innocent, you may award as little as \$200 for each work innocently infringed.

However, if you find the infringement was willful, you may award as much as \$150,000 for each work willfully infringed.

Instructions ____ and ____ will tell you what constitutes innocent infringement and what constitutes willful infringement.

1 **JOINT PROPOSED INSTRUCTION NUMBER 41**
2 **COPYRIGHT—DAMAGES—STATUTORY DAMAGES**
3

4 AUTHORITY: Instruction No. 17.25, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Modified at line 5 to clarify that the plaintiff
6 “may” seek an award of statutory damages, as the plaintiff may elect statutory damages
7 after the case is submitted to the jury.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT’S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—INNOCENT INFRINGEMENT

An infringement is considered innocent when the defendant has proved both of the following elements by a preponderance of the evidence:

1. the defendant was not aware that his or her acts constituted infringement of the copyright; and
2. the defendant had no reason to believe that his or her acts constituted an infringement of the copyright.

1 **JOINT PROPOSED INSTRUCTION NUMBER 42**
2 **COPYRIGHT—DAMAGES—INNOCENT INFRINGEMENT**

3
4 AUTHORITY: Instruction No. 17.26, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NUMBER ____
COPYRIGHT—DAMAGES—WILLFUL INFRINGEMENT

An infringement is considered willful when the plaintiff has proved both of the following elements by a preponderance of the evidence:

1. the defendant engaged in acts that infringed the copyright; and
2. the defendant knew that those acts infringed the copyright.

1 **JOINT PROPOSED INSTRUCTION NUMBER 43**
2 **COPYRIGHT—DAMAGES—WILLFUL INFRINGEMENT**

3
4 AUTHORITY: Instruction No. 17.27, Ninth Circuit Manual of Model Jury
5 Instructions – Civil (Jan. 2012 ed.). Unmodified.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28