

Jury Instructions

As I explained in my preliminary instructions which I gave to you before the start of the trial, it is my duty to provide you with instructions regarding the law that you are to apply in this case. You will remember that, as I explained then, by following the law, you assure that each similar case will be judged in the same way. This is equal justice.

The first instruction I need to give you has to do with your duty, as the jury.

Duty of the jury

It is your duty to find from the evidence admitted into the record - including testimony and exhibits - what the facts are.

It is also your duty to apply the law, as I will explain it to you, whether you agree with it or not, to the facts as you find them.

You are to decide this case on the evidence and the law regardless of your personal opinions and without bias, prejudice, or sympathy.

Burden of proof

I also remind you again that in this civil action for copyright infringement. The Plaintiff is John Wiley & Sons, and the Defendant is Supap Kirtsraeng. The Plaintiff is the party that brought this lawsuit and the Defendant is the party against whom the lawsuit was filed.

The Plaintiff must prove each disputed element of his case, as I will provide you below, by what is called *the preponderance of the evidence*. This is sometimes called the "burden of proof" or the "burden of persuasion." This means the Plaintiff, for each disputed element of its copyright infringement action,

has the burden to produce evidence which, considered in the light of all the facts, leads you to believe that the Plaintiff's claims are *more likely true than not*. To put it differently, if you were now to put the Plaintiff's and the Defendant's evidence on opposite sides of the scales, the Plaintiff would have to make the scales tip in its favor. If the Plaintiff fails to meet this burden, then you should proceed no further, and your verdict must be for the Defendant.

If, however, you find that the Plaintiff has sustained its burden of proof, then you should consider the issue of the Defendant's defense. In this regard, the burden is upon the Defendant to establish, by a preponderance of the evidence, that he was not aware and had no reason to believe that his importing and selling activities infringed on the Plaintiff's U.S. copyrights. I will instruct you below on the facts that will be necessary for you to find on this defense. If you determine that the Defendant has sustained its burden of establishing this defense, you should keep this in mind when assessing damages against the Defendant.

Keep in mind that preponderance of the evidence refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case; therefore, you should put it out of your mind.

Evidence

Remember that the evidence from which you are to find the facts is *only* the testimony of witnesses, documents and other things received into the record as exhibits,

and any facts that the lawyers have agreed to or stipulate to or that I have instructed you to find.

I remind you again that certain things are not evidence and must not be considered by you. I will list them again for you now:

1. Statements, arguments, and questions by lawyers are not evidence. Arguments by lawyers are not evidence, because the lawyers are not witnesses. It is the witnesses's answers that are evidence, not the lawyers' questions. Also remember that if your recollection of the facts differs from the lawyers' statements, it is your recollection that controls.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection was sustained, ignore the question. If the objection was overruled, so that the question must be answered, treat the answer like any other.

If you have been instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.

4. Exhibits which have been marked for identification may not be considered by you as evidence until and unless they have been *admitted* in evidence by the court. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness's memory.

5. Nothing I may have said -- or what I may say in these instructions -- may be considered in

evaluating the evidence. Because you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

6. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial.

Direct evidence is direct proof of a fact, such as presentation of an object. "This is the pen he was holding." Evidence is direct when a witness testifies about something he knows by virtue of his own senses--something he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. It is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason, experience, and common sense from one established fact the existence or non-existence of some other fact.

Please keep in mind that you may consider both kinds of evidence. Circumstantial evidence is of no less value than direct evidence; the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict be based on a preponderance of all the evidence presented.

Evaluation of Witness Testimony

You have observed all the witnesses. It is your job to decide how believable each witness was in his or her

testimony. As the court previously instructed, you as the jury are the sole judges of the credibility of each witness and of the importance of his testimony.

"Credibility" means whether a witness is worthy of belief. Your determinations as to witness credibility should aid you in resolving factual issues raised by the parties.

You should carefully scrutinize all of the testimony of each witness. In deciding who and what to believe, you may consider a number of factors, including:

(1) the opportunity and ability of the witness to see or hear or know the things the witness testified to and the circumstances under which each witness testified;

(2) the quality and accuracy of the witness's understanding and memory, his candor or lack of candor, his intelligence, the reasonableness and probability of his testimony and its consistency or lack of consistency;

(3) the witness's demeanor while testifying--that is, his carriage, behavior, bearing, manner and appearance;

(4) whether the witness has an interest in the outcome of the case or any motive, bias, hostility, or prejudice -- however, it does not necessarily follow that an interested witness cannot tell you a truthful version of what happened and thus it is for you to decide the extent to which his interest has affected his testimony and whether you accept it or not;

(5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;

(6) how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and

(7) any other factors that bear on believability.

You must use your own judgment in deciding credibility of a witness. Always remember that you should use your common sense, your good judgment, and your own life experience.

[IF KIRTSAENG'S DEPOSITION USED] Some of the testimony before you was in the form of depositions which have been received in evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or an adversary party under oath before a court stenographer prior to trial. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial. But deposition testimony should be given the same weight as any other testimony.

The Law

My duty at this point is give you detailed instructions on the copyright law you are to apply. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

These instructions are to guide and control your deliberations and decision. You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the

wisdom of any rules that I state. Regardless of any opinion that you may have as to what the law may be--or ought to be--it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

In this case, the Plaintiff claims that the Defendant has infringed the Plaintiff's copyrights in eight (8) textbooks. According to the Plaintiff, the Defendant imported and/or sold foreign editions of eight (8) of the Plaintiff's U.S.-copyrighted textbooks.

The Plaintiff seeks to recover money damages from the Defendant for what the Plaintiff claims to be copyright infringement. The Defendant denies infringing the Plaintiff's copyrights, but also argues that, even if the Defendant did violate the Plaintiff's copyrights, the Defendant was not aware and had no reason to believe that his importing and selling activities infringed on the Plaintiff's U.S. copyrights. The Plaintiff argues instead that the Defendant acted willfully in infringing the Plaintiff's copyrights.

The court will now discuss the elements of copyright infringement for both importation and distribution of copyrighted materials.

I. Elements of Liability for Copyright Infringement

There are two main elements for copyright infringement in this action. To find liability for copyright infringement, you, the jury, must find from a preponderance of the evidence, for each of the eight (8) textbooks, that:

(1) the Plaintiff is the owner of a valid United States copyright on the textbook;

and

(2) the Defendant, without the Plaintiff's authorization, imported into the United States or distributed to the public copies of the Plaintiff's

copyrighted textbook.

Please note that the term "copies" can include foreign editions of the Plaintiff's copyrighted textbooks.

For each of the eight (8) textbooks, if you find that the Plaintiff proved both of these elements and the Defendant has failed to prove a valid defense, your verdict as to that textbook should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove either of these elements, your verdict as to that textbook should be for the Defendant.

The court will explain these two elements further.

First, the Plaintiff must prove that it is the owner of a valid United States copyright on the textbook.

The Copyright Act provides that only the owner of the copyright has a right to institute an action for any infringement; the right is exclusive. However, a copyright owner may transfer, sell, or convey to another person all or part of the owner's property interest in the copyright provided that the transfer is in writing; that transfer or assignment includes the right to exclude others from importing and selling the work. The person to whom the copyright is transferred, sold, or conveyed becomes the owner of the copyright in the work.

The Plaintiff's certificate of registration of the copyright constitutes evidence of the Plaintiff's ownership of the copyright, and of the Plaintiff's right to exclude others from copying the work. However, registration of a copyright is not conclusive as to the validity of the copyright. You may also consider any evidence offered by the opposing party that the registered copyright is invalid. From such evidence, you are free to find that a registered copyright is not valid, in accordance with the instruction on the defenses asserted by the Defendant, if you find that the Defendant has proved by a preponderance of the evidence that the copyright is invalid. As I explained

earlier, preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the registered copyright is invalid.

Second, the Plaintiff must prove that the Defendant, without the Plaintiff's authorization, distributed these copies to the public or imported copies of the Plaintiff's copyrighted textbook into the United States. The Plaintiff must prove that the Defendant engaged in at least one of these activities.

Distribution of the Copies in the United States

The Defendant has distributed copies of the Plaintiff's copyrighted textbook if he sold or otherwise transferred ownership of the copies to the public.

Importation of the Copies into the United States

The Defendant "imported" copies of a U.S.-copyrighted work if he brought those copies into the United States from another country. However, both the Plaintiff and the Defendant agree that the Defendant did not personally import the copies into the United States.

However, the Defendant may still liable for copyright infringement committed by another if he commits vicarious or contributory infringement.

Vicarious Infringement: The Defendant is liable for copyright infringement committed by another if the Defendant has an obvious and direct financial interest and right and ability to supervise the infringing activity, irrespective of whether the Defendant had knowledge of the infringement. This kind of copyright infringement is referred to as "vicarious infringement."

To demonstrate vicarious infringement on the Defendant's part, the Plaintiff has the burden of proving, by a preponderance of the evidence, each of the following:

(a) the Defendant had a right and ability to

supervise the importation of the infringing copies of the Plaintiff's copyrighted textbook;

and

(b) the Defendant had an obvious and direct financial interest in the importation of the infringing copies of the Plaintiff's copyrighted textbook.

Contributory Infringement: The Defendant is liable for copyright infringement committed by another if the Defendant, knows or should know of the infringing conduct, and induces, causes, or materially contributes to the infringing conduct of another. This kind of copyright infringement is referred to as "contributory infringement."

To demonstrate contributory infringement on the Defendant's part, the Plaintiff has the burden of proving, by a preponderance of the evidence, each of the following:

(a) the Defendant knew or should have known of the importation of the infringing copies of the Plaintiff's copyrighted textbook;

and

(b) the Defendant induced, caused, encouraged, assisted in, or materially contributed to the importation of the infringing copies of the Plaintiff's copyrighted textbook.

If you conclude that the Defendant has violated any the Plaintiff's rights, you must make a determination of the amount of damages to be awarded.

II. Election of Damages

Under the Copyright Act, the Plaintiff is entitled to recover the greater of

(1) defendant's profits from the infringement,

or

(2) statutory damages.

Here, the Plaintiff has elected statutory damages, which I will now discuss with you.

Copyright Damages – Statutory Damages

Statutory damages are damages determined in accordance with specific provisions of the copyright statute. The purpose of statutory damages is to penalize the Defendant and deter future violations of the copyright laws, both by the Defendant and by others. The Plaintiff seeks a statutory damage award for each of the eight (8) works infringed.

Where the Defendant has elected statutory damages, you must award as statutory damages an amount that you find is just under the circumstances, provided that amount is not less than \$750, nor more than \$30,000, *per copyright infringed*. Accordingly, if you find that defendant infringed all of the Plaintiff's copyrights, you may not award the Plaintiff less than \$6,000 in statutory damages, which represents minimum statutory damages of \$750 for each of the eight (8) copyrights. Moreover, you may not award the Plaintiff more than \$240,000, which represents maximum statutory damages of \$30,000 for each of the eight (8) copyrights.

This formula, however, is subject to two exceptions.

First, if the Plaintiff proves by a preponderance of the evidence that defendant willfully infringed its copyrights, you may, but are not required to, increase the statutory damages for infringement of each copyright that was willfully infringed to a sum as high as \$150,000 *per copyright infringed*. If you find the Defendant willfully infringed all of the Plaintiff's copyrights, you may award up to \$1,200,000 in statutory damages, which represents \$150,000 for each of the eight (8) copyrights.

Second, if the Defendant has sustained the burden of proving that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, you may, but you are not required to, reduce the award of statutory damages to a sum of not less than \$200 *per copyright infringed*. If you find the Defendant was not aware and had no reason to believe that his acts constituted an infringement of copyright, you may award as low as \$1,600 in statutory damages, which represents \$200 for each of the eight (8) copyrights.

It follows that to determine an amount of damages, you must consider whether the Defendant's violation of the Plaintiff's rights was willful, or whether the Defendant was not aware and had no reason to believe that his importing and selling activities infringed on the Plaintiff's U.S. copyrights. Please note that you cannot find both that the Defendant's infringement was willful and that the Defendant was not aware and had no reason to believe that his acts constituted infringement because an affirmative finding on both issues is contradictory.

The burden is on the Plaintiff to show, by a preponderance of the evidence, that the Defendant willfully importation or distribution of foreign editions of the Plaintiff's textbooks infringed on the Plaintiff's U.S. copyrights.

Statutory Damages – Willfulness

To prove willfulness under the Copyright Act, the Plaintiff must show that:

(1) the Defendant was actually aware of the infringing activity,

or

(2) the Defendant's actions were the result of reckless disregard for, or willful blindness to, the copyright holders' rights.

If the Plaintiff sustains its burden of proving, and you find, that the Defendant willfully infringed the Plaintiff's copyrights, you may but you are not required to, increase the award of statutory damages up to a sum of not more than \$150,000 per copyright infringed.

On the other hand, the burden is on the Defendant to show, by a preponderance of the evidence, that the Defendant was not aware and had no reason to believe that his importation or distribution of foreign editions of the Plaintiff's textbooks infringed on the Plaintiff's U.S. copyrights.

Statutory Damages – Lack of Awareness

Where the Defendant sustains the burden of proving, and you find, that the Defendant was not aware and had no reason to believe that his acts constituted an infringement of copyright, as I explained, you may but you are not required to, reduce the award of statutory damages to a sum of not less than \$200 per copyright infringed.

Again, please note that you cannot find both that the Defendant's infringement was willful and that the Defendant was not aware and had no reason to believe that his acts constituted infringement because an affirmative finding on both issues is contradictory.

Jury procedure and deliberations

It is now time for you to retire to the jury room and begin your deliberations.

1. Selection and duty of the foreperson.

When you go to the jury room you should first elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in open court.

2. Process of jury deliberation.

The process of jury deliberation is very important. To begin, please give careful attention to the views of each member of the jury as well as stating your own views.

It is also important that all of your discussion be considered and your deliberations focus on a rational discussion of the evidence.

Your purpose is to reach a *unanimous* verdict in this matter. At the same time, each of you, as independent jurors, has the obligation to decide the case for yourself, in the context of the evidence and the law, but this also involves careful and proper consideration of other jurors' views. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement.

Although your verdict must be unanimous, you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth. That said, you should not hesitate to change an opinion when persuaded by rational discussion.

The parties here have agreed to the use of a verdict form, which the courtroom deputy will provide to you. After you have reached a unanimous verdict, your foreperson is to fill out this form and review it with all of you, and then sign and date the form. The foreperson should then advise the marshal outside your door that you are ready to return to the courtroom. Then the form will be presented to the court.

To assure unanimity, I will ask each of you whether you agree with the verdict recorded on this form. Each of you should be in agreement with the verdict which is announced in court. Once your verdict is announced by

your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

Jury Communications

Any communication with the court should be made to me in writing, signed by your foreperson, and given to one of the marshals.

If during your deliberations you want to see any of the exhibits, you may request that they be brought into the jury room. If you want any of the testimony read back to you, may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of the testimony.

In any event, the jury must not disclose how it stands numerically or otherwise on the issues submitted. Do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached.

Deliberations

You are now to retire and consider your verdict. Please let the courtroom deputy know when you have concluded.