

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

HILLER, LLC,)	
)	
Plaintiff/Counter-Defendant,)	
)	
v.)	No. 3:17-cv-743
)	
SUCCESS GROUP, INTERNATIONAL)	
LEARNING ALLIANCE and REBECCA CASSEL,)	
)	
Defendants/Counter-Plaintiffs,)	
)	
and)	
)	
CLOCKWORK IP, LLC,)	
)	
Intervenor/Counter-Plaintiff)	

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you on the rules of law that you must follow and apply in deciding this case.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice, or passion.

You must follow the law as I explain it to you whether you agree with it or not. You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

All of the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

A. Organization Not to Be Prejudiced

In this case, the Plaintiff Hiller, Defendant SGILA and Intervenor Clockwork are business organizations. The fact that the parties in the case are organizations must not influence you in your deliberations or in your verdict.

You may not discriminate between businesses and natural individuals. Each is a person in the eyes of the law, and each is entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. An organization is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, governments, and government entities, stand equal before the law, and are to be dealt with as equals in a court of justice.

It is your duty to decide this case with the same impartiality you would use in deciding a case between individuals.

B. Organizations/Corporations Act Through Their Authorized Employees or Agents

While Hiller, SGILA, and Clockwork are the parties in this case, that does not mean that only the actions of each business organization as one body are to be considered by you in determining its claims or defenses. A corporation or business organization acts not only through the policies and decisions it makes, but also through its designated supervisory employees, such as its managers, officers, and others designated by the corporation to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual employees, managers, or agents were authorized to act on behalf of the party you are considering.

C. Burden of Proof and Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When a party denies the material allegations of the other party's claims, the law places upon the party bringing a claim the burden of supporting and making out each element of each claim by the greater weight or preponderance of the evidence.

The preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of which party presented it.

Where the plaintiff has the burden of proving particular facts as to the defendants, you must consider each defendant separately and determine whether or not the plaintiff has established by the greater weight or preponderance of the evidence the facts necessary as to the particular defendant you are considering.

D. Credibility and Weighing of Evidence

You, the members of the jury, are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who appears before you and to give the testimony of the witnesses the weight, faith, credit, and value to which you think it is entitled.

You should consider the manner and demeanor of each witness while on the stand.

You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood, and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience, and your common observations gained by you in your various walks of life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict between the testimony of different witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses that you are not able to reconcile in accordance with these instructions, then you must determine which of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular set of facts. Rather, it depends on the weight, credit, and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then you must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

Remember, you are the sole and exclusive judges of the credibility or believability of the witnesses who testify in this case.

Ultimately, you must decide which witnesses you believe and how important you think their testimony was. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

E. Impeachment — Inconsistent Statements or Conduct

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves; you may, of course, accept any part you decide is true. This is all for you, the jury, to decide.

An act or omission is done "knowingly" if committed voluntarily and intentionally, and not because of mistake or accident, or some other innocent reason.

F. Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is testimony by a witness about what a witness personally saw, heard, or did. Circumstantial evidence is indirect evidence—that is, proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

G. Evidence

You are to decide this case only from the evidence that was received—that is, evidence that was presented for your consideration during the trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified;
2. The exhibits that were received and marked as evidence;
3. Any facts to which the lawyers for all sides have agreed or stipulated.

H. “Inferences” Defined

Although you are to consider only the evidence in this case, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions that reason and common sense lead you to make from facts established by the evidence in the case.

I. Statements and Arguments of Counsel

You must not consider as evidence any statements of counsel made during the trial.

If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked of a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

J. Totality of the Evidence

You should consider all of the evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things that a decision maker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the jury, to decide.

K. Limited Admission of Evidence

You will recall that during the course of this trial, certain evidence was admitted for a limited purpose only. For example, some financial evidence was admitted for the limited purpose of damages. You must not consider such evidence for any other purpose.

L. Juror Notes

If you took notes, please remember that your notes are not evidence. You should keep your notes to yourself. They may only be used to help refresh your personal recollection of the evidence in this case. It is the evidence itself, and not your notes, that you should discuss with the other jurors.

If you cannot recall a particular piece of evidence, you should not be overly influenced by the fact that someone else on the jury appears to have a note regarding that evidence.

Remember, it is your recollection and the collective recollection of all of you upon which you should rely in deciding the facts in the case.

M. Comments by the Court

During the course of this trial, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

On the other hand, you are required to follow the Court's instructions on the law, whether you agree with these instructions or not.

N. Opinion Testimony

You have heard the testimony of Kevin McElroy and Glenn Perdue, who rendered opinions in this case.

A witness is allowed to express his or her opinion on those matters about which the witness has special knowledge, training, or experience. Opinion testimony is presented to you on the theory that someone who is experienced or knowledgeable in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing each opinion witness's testimony, you may consider his qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case.

You should not, however, accept a witness's testimony merely because he is an opinion witness. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

O. Deposition Testimony

Certain testimony has been placed into evidence by the playing of video depositions. A deposition is testimony taken under oath in advance of this trial and preserved in writing or on video tape. You are to consider all such testimony as if it had been given in this Court.

While most depositions are simply the testimony of an individual regarding what that individual personally knows, certain witnesses in this case have been designated by organizations to testify on those organizations' behalf about designated topics. It is not literally possible to take the deposition of an organization; instead, when an organization is involved in a lawsuit, its testimony must be obtained from natural persons it designates to speak on its behalf about the designated topics. Such testimony is binding on the organization on those designated topics as if the organization had given the testimony itself.

P. Demonstratives

Certain demonstratives have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These demonstratives are not themselves evidence or proof of any facts. If the demonstratives do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard the demonstratives.

II. STATEMENT OF THE CASE

A. Hiller's Statement of the Case

Plaintiff Hiller, Inc. alleges that it owns a valid copyright to a training manual called the Technician Guide and that Defendants SGILA and Rebecca Cassel infringed that copyright by the unauthorized creation, reproduction, and distribution of the Learner's Guides for SGILA Service Essentials classes. Hiller contends that the Learner's Guides were directly copied from Hiller's Technician Guide or, at a minimum, are substantially similar to the Technician Guide.

B. SGILA and Cassel's Statement of the Case

Defendants SGILA and Cassel contend that they were joint authors of the Technician Guide and therefore authorized to use it. SGILA and Cassel further contend that the Technician Guide is a compilation and that the SGILA Manuals are not substantially similar to the Technician Guide. SGILA and Cassel also allege that Hiller's claims are barred by the affirmative defenses of joint authorship, estoppel, implied license, and unclean hands.

C. Clockwork's Statement of the Case

Intervenor Clockwork contends that Counter-Defendant Hiller does not own the copyright in the Technician Guide because it derived or copied from Clockwork Preexisting Materials without Clockwork's authorization. Clockwork further contends that Hiller's copyright registration for the Technician Guide is invalid as Hiller cannot have a valid copyright registration in a compilation or derivative work based on Clockwork Preexisting Materials without Clockwork's authorization. Clockwork claims that Clockwork owns the copyright in the Technician Guide.

D. Stipulations

Stipulations are facts all parties have agreed to. You must take the stipulations as true. In this case the parties have stipulated to the following:

1. The Technician Service Training Manual Guide, which Hiller registered with the United States Copyright Office, contains pre-existing material whose copyright is not owned by Hiller.
2. Direct Energy purchased an affinity group known as Success Group International (“SGI”) and the training organization known as Success Academy as part of the Clockwork Home Services business in 2010.
3. SGI is a home services business that provides management tools, marketing, group buying, coaching, and training to companies offering heating, air conditioning, plumbing, electrical, and roofing services in Canada and the United States.
4. Hiller LLC (“Hiller”) is a home services company that provides plumbing, heating, cooling, and electrical services to residential and commercial customers.
5. Hiller was a member of SGI from 1999 to mid-2016.
6. In 2015, Bob Pike contracted with Hiller to provide Hiller with new methods for teaching technicians how to perform service calls using content that Hiller was to provide (the “Hiller Project”).
7. In connection with the Hiller Project, Bob Pike was to provide Hiller with a two-day training course, a leader’s guide (or manual that the course leader could use to teach the class), and a learner’s (or participant’s) guide (or a manual that the participant’s taking the class could use to take notes).
8. Of the deliverables from the Hiller Project, only the learner’s guide, which the parties will refer to as the Technician’s Guide, is at issue in this case.

9. Trial Exhibit 29 is version 1 of the Service Essentials Learner's Guide, which was used in SGILA Service Essentials classes on January 14-15, 2016
10. Trial Exhibit 62 is version 2 of the Service Essentials Learner's Guide, which was used in SGILA Service Essentials classes between January 27, 2016 and April 7, 2016.
11. Trial Exhibit 64 is version 3 of the Service Essentials Learner's Guide, which was used in SGILA Service Essentials classes between April 8, 2016 and October 19, 2016.
12. Trial Exhibit 65 is version 4 of the Service Essentials Learner's Guide, which was not used in any SGILA Service Essentials classes.
13. Trial Exhibit 66 is version 5 of the Service Essentials Learner's Guide, which was used in SGILA Service Essentials classes between October 21, 2016 and January 31, 2019.

III. APPLICABLE LAW

A. Legal Theories of the Case

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. But it is your duty, and your duty alone, to determine what the facts are and after you have determined what the facts are, to apply the law to those facts, free from any bias, prejudice, or sympathy, either one way or the other.

B. Definitions

The United States Copyright Act, 17 U.S.C. § 101, contains the following definitions which are applicable in this case:

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

C. Nature of the Action

In this case, Hiller brought a copyright infringement action against Defendants SGILA and Cassel, and Clockwork intervened seeking a declaratory judgment. You must consider each claim separately and decide each claim without regard to your determination as to any other claim.

The claim by Hiller against SGILA and Cassel is for copyright infringement of the Technician Guide. Clockwork's claim is for declaratory judgment against Hiller that Hiller does not own a valid copyright of the Technician Guide and that Clockwork owns it. Clockwork, SGILA, and Cassel are not making any claim of copyright infringement. SGI is not a party to this case and has not brought any claims.

I will instruct you on the applicable law for each of these claims. I will first instruct you on the law for Hiller's copyright infringement action. I will then instruct you on the law for SGILA and Cassel's affirmative defenses against Hiller. I will then instruct you on the law for Clockwork's declaratory judgment claims against Hiller.

D. Copyright Infringement

I will now instruct you about Hiller's copyright infringement claim. In order to prevail on its copyright infringement claim, Hiller has the burden of proving each of the following facts by a preponderance of the evidence:

First, that Hiller owns a valid copyright in the Technician Guide.

Second, that SGILA and/or Cassel copied the protected elements of Hiller's copyrighted work.

I will now explain these elements to you. I'll begin with instructions on validity and then explain ownership and infringement. After that I'll explain defenses and remedies.

E. Ownership of a Valid Copyright (First Element)

To be eligible for copyright protection, a work must be original and in a form that can be seen, heard, reproduced, or communicated, either directly or with the aid of a machine or device. A work is original if it was created independently, as opposed to being copied from another work, and if it contains at least some minimal degree of creativity. A work can be original even if it incorporates elements that are not original, but only the work's original elements are protected by copyright.

A copyright registration issued by the United States Copyright Office is prima facie evidence of a valid copyright and a party challenging that copyright has the burden of showing the copyright is invalid.

F. Ownership in a Valid Copyright – Derivative Works (First Element)

The term derivative work refers to a work that recasts, transforms, or adapts a pre-existing work, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the pre-existing work may be recast, transformed, or adapted.

The copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material. The author of a derivative work is entitled to copyright protection only for the original contributions made by that author that are more than trivial.

Copyright protection for a derivative work does not extend to any part of the derivative work in which such material has been used unlawfully.

Where use of unauthorized preexisting material pervades the entire work or is inextricably intertwined with the preexisting material, copyright protection may not be granted. To pervade means “to pass or spread through the whole extent of; to become diffused throughout every part of.”

G. Ownership of a Valid Copyright – Compilations (First Element)

A person, including a business organization, is entitled to copyright protection of a compilation. A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. To have a copyright in a compilation, a person, including a business organization, does not need to own a copyright in the separate works themselves. A person who owns a copyright in one of the separate works does not acquire a copyright in the collective work.

The copyright in a compilation extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

H. Ownership of a Valid Copyright – Ownership Generally (First Element)

Now that I've explained validity, we'll move to the issue of ownership. Hiller must prove ownership of a copyright in the Technician Guide by a preponderance of the evidence. Hiller can prove ownership by evidence showing that it:

- is an author (or creator) of the work,

OR

- acquired legal ownership by transfer.

I. Ownership of Valid Copyright – Authorship (First Element)

The creator of an original work is called an author of that work. Others may help or may make valuable or creative contributions to a work. However, one must translate an idea into a fixed, tangible expression in order to be the author of the work. Merely giving an idea to another does not make the giver an author of a work embodying that idea.

You can also find that Hiller is an author of the Technician Guide based on the creation of the work for Hiller as a work made for hire. If the work is a work made for hire, Hiller is considered the author and the copyright's owner. To prove ownership of a work for hire, Hiller must prove that Hiller specifically ordered or commissioned the Technician Guide for use as an instructional text, and Hiller and the person who created the work signed a written document confirming that the work was to be considered to be a work made for hire. Instructional text is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

J. Ownership of a Valid Copyright – Transfer (First Element)

A transfer of copyright ownership, other than by operation of law, must be in writing and signed by the owner of the copyright or the owner's authorized agent. The writing may be an instrument of conveyance, such as a contract or assignment, or a note of memorandum of transfer.

K. Ownership of a Valid Copyright – Protected and Unprotected Matter (First Element)

Copyright protection does not extend to all the elements of a copyrighted work. Elements covered by the copyright protection are called “protected matter,” and non-covered elements are “unprotected matter.” Because unprotected matter is not entitled to copyright protection, another author may copy it.

There are various types of unprotected matter. They include:

- a portion of the work that is not original to the author;
- a portion of the work that is in the public domain; and
- an idea, concept, principle, discovery, fact, actual event, process, or method contained in a work.

In copyright law, it is important to distinguish between the ideas in a work and the author’s expression of those ideas. Copyright law protects only a work’s original “expression.” This includes the *way* that the work expresses ideas, but it does not include the ideas themselves. For example, in a book, creative combinations of word choices are protectable, but individual words, common turns of phrase, reported facts, and underlying themes cannot be protected. Copyright law does not give an author the right to prevent others from copying or using the underlying ideas contained in the author’s work, such as procedures, processes, systems, methods of operation, concepts, principles, or discoveries.

Additionally, a copyrighted work’s protected expression does not include the work’s components that are indispensable or at least standard in treatment of a particular subject. This includes components that are dictated by external factors and components that are standard or commonplace in the relevant field.

L. Copying – Copying Generally (Second Element)

A plaintiff can establish that a defendant copied the protected components of the plaintiff's work by introducing EITHER:

1. Direct evidence of the defendant's copying,

OR

2. Indirect evidence of the copying by the defendant you are considering, specifically evidence that (a) the defendant you are considering had access to the plaintiff's work; and (b) the plaintiff's work and the work of the defendant you are considering are substantially similar with respect to the protected components of the plaintiff's work.

If the plaintiff shows indirect evidence of copying, the burden shifts to the defendant you are considering to show that that defendant's work was independently created.

M. Copying - Direct Evidence (Second Element)

Hiller can satisfy the second element of copyright infringement by showing direct evidence that the defendant you are considering actually copied the copyrighted material.

N. Copying – Indirect Evidence– Access (Second Element)

Hiller need not prove access and substantial similarity if Hiller proves direct copying. However, Hiller can show that the defendant you are considering had “access” to the Technician Guide by showing that that defendant had a reasonable opportunity to see Hiller’s work and, thus, had the opportunity to copy.

It is not necessary to show that the defendant you are considering actually saw Hiller’s Technician Guide. But you can’t base a finding that that defendant had access to Hiller’s work on mere speculation, conjecture, or guesswork. To support a finding of access, there must be more than just a slight possibility of access. There must be a reasonable possibility of access.

O. Copying – Indirect Evidence– Substantial Similarity (Second Element)

Having discussed access, I will now discuss the issue of substantial similarity. Hiller must prove that the infringing works are substantially similar to copyrightable expression in the Technician Guide. The accused works are “substantially similar” to the Technician Guide if an ordinary person would consider the works as a whole substantially similar to one another.

Even if the degree of similarity between the Technician Guide and the accused works is small in quantity, you can still find substantial similarity if the similar portions are important to the copyrighted work in quality. On the other hand, if the similarities are minimal and trivial, then you should find that the works are not substantially similar.

P. Vicarious Liability—Vicarious Infringement

If you find that there was a direct infringement, you may then consider whether there has also been a vicarious infringement.

To find a defendant liable for vicarious infringement, you must find that:

(i) the defendant you are considering had the right and ability to control or supervise the infringing conduct of another person or entity and either controlled the action or failed to exercise its right and ability to prevent the infringement; and

(ii) the defendant you are considering directly profited from the other person or entity's infringement.

You can find vicarious infringement even if the defendant you are considering initially lacks knowledge of the direct infringement.

Q. Willful Infringement

Hiller has the burden of proving by a preponderance of the evidence that a willful infringement occurred.

An infringement is willful when:

1. The defendant you are considering engaged in acts that infringed a copyright; and
2. The defendant you are considering knew that those actions infringed the copyright.

A Defendant who has acted in a manner that exhibits a reckless disregard for, or willful blindness to, the Plaintiff's rights under the Copyright Act has acted willfully.

IV. DEFENSES

A. SGILA and Cassel's Defenses

If Hiller proves that it owns a valid copyright in the Technician Guide and that this material has been unlawfully copied by the defendants, then you must consider the defendants' affirmative defenses. In this case, SGILA and Cassel contend that Hiller's copyright infringement claim is barred by each of the following separate affirmative defenses:

1. Joint Authorship;
2. Estoppel;
3. License/Implied License; and
4. Unclean hands.

SGILA and Cassel bear the burden of proof for each of these defenses by the greater weight or the preponderance of the evidence.

B. Authorized Copying – Joint Author

Even if you find Hiller owns a valid copyright and that it was copied by SGILA and/or Cassel, you must also find that the copying was unauthorized. SGILA and Cassel contend that they were authorized to copy portions of the Technician Guide because either: (1) they jointly authored the Technician Guide with Hiller, Janice Horne, and/or SGI; or (2) SGI was one of the joint authors of the Technician Guide and provided SGILA and Cassel with a license to use the work.

Authors of a joint work are joint owners of the copyright in the joint work. A company whose employees create a work under a for-hire arrangement may be a joint author with an individual who is not for-hire.

A joint work is a work that has been prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. As I previously instructed you, authorship requires more than merely supervising or providing sketches for a project; an individual must translate one or more ideas into a fixed, tangible expression entitled to copyright protection within the work before they can be considered a joint author. So long as they meet this standard, each joint author's contribution need not be equal.

With respect to intent, the question is whether it was the intention of the joint authors, at the time the work was created, that the portions they contributed be absorbed or combined into a single unit, although the parts themselves may be either “inseparable” (as [in] the case of a novel or painting) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song). In determining intent, you may examine objective factual criteria to determine whether the requisite intent has been manifested. Such criteria can include letters, e-mails, agreements between the parties, relative contribution of the parties, sharing of benefits, credit billings, licensing of third parties, and registration with the Copyright Office. No one criteria is

determinative. Also, as long as the requisite intention is jointly present, the parties need not be in physical proximity to each other.

Each of the joint authors of a joint work shares an undivided interest in the entire joint work, despite any differences in each joint author's contribution. Each joint owner/author is entitled to all of the exclusive rights held by copyright owners, including a unilateral right to copy the work as well as to issue non-exclusive licenses of the work. Joint owners may also convey their individual interest in the joint work to a third party.

A copyright infringement claim cannot be maintained by one joint author against a fellow joint author. This is because a copyright infringement claim can only be brought against one who violates the exclusive rights of the copyright owner, and a joint owner does not have rights exclusive of the other joint owners' rights. Also, a license from one joint author is a defense to a claim of infringement brought by the other, non-licensing joint author.

If you find that SGILA and Cassel have shown, by a preponderance of the evidence, that SGILA, Cassel and/or SGI are joint authors of the Technician Guide, then you must find in favor of SGILA and Cassel as to Hiller's claim that they infringed the Technician Guide.

C. Estoppel

A copyright owner may be barred from asserting a copyright claim against an infringing party if the copyright owner engages in misleading behavior sufficient to trigger a doctrine known as estoppel. To prevail on the affirmative defense of estoppel, an infringing party must prove by a preponderance of the evidence that:

1. the copyright owner was aware of the infringement or that the infringer intended to infringe;
2. the infringing party reasonably believed that the copyright owner did not intend to assert an infringement claim; and
3. the infringing party relied on the copyright owner's conduct to its detriment.

D. License/Implied License

Defendants claim that Hiller granted them a license to use Hiller's copyrighted work. A license is a contract giving someone permission to use the work. A license doesn't have to be in writing. A license can be implied from conduct. To establish this defense, Defendants must prove each of the following by a preponderance of the evidence:

First you must find that Hiller created the work, or caused it to be created, at Defendants' request or the request of someone acting on Defendants' behalf.

Second, you must find that Hiller delivered the work, or caused it to be delivered, to Defendants or someone acting on Defendants' behalf.

And third, you must find that Hiller intended that Defendants copy, distribute, or create derivative works based upon its copyrighted work. Hiller's intent may be inferred from the work's nature or the circumstances surrounding the work's creation.

If you find that Defendants have proved these elements by a preponderance of the evidence, your verdict must be for the Defendants on the claim of copyright infringement if Defendants' use doesn't exceed the scope of their license. Defendants can still commit copyright infringement if they exceeded the scope of the license.

E. Unclean Hands

A copyright owner may be barred from asserting a copyright claim against an infringing party if the copyright owner engaged in wrongdoing of serious proportions related to the matter at issue. The copyright owner's misconduct must relate directly to the transaction about which the copyright owner has made a complaint.

The affirmative defense of unclean hands does not distinguish between a little or a lot of cheating, a small theft or a major one. In deciding whether to apply this defense, you should look at the type of misconduct alleged.

SGILA and Cassel contend that: (1) Hiller invited them to participate in the creation of the Technician Guide and later sent a copy of the manual with the understanding that they could use it in preparing the SGILA manuals; (2) Hiller failed to acknowledge that the Technician Guide contains material created, owned, or licensed to SGILA and Cassel or their affiliates; and (3) Hiller has copied the SGILA manuals for use in its own training classes.

If you find that SGILA and Cassel have proven that the affirmative defense of unclean hands applies here, then you must find in their favor as to Hiller's claim that they infringed the Technician Guide.

V. DAMAGES

A. Consider Damages Only if Necessary

I will now instruct you on the law as it relates to damages. If a party has proven by a preponderance of the evidence that another party is liable on a claim, then you must determine the damages if any to which the party is entitled. You must do this only under the instructions I will give you as to how to calculate damages. You should not infer that Hiller is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that Hiller is entitled to recovery.

B. Copyright Infringement: Damages

If you find for Hiller on its copyright infringement claim, you must determine Hiller's damages. A copyright owner is entitled to recover any of the infringers' profits that are attributable to infringement. In establishing the infringers' profits, the copyright owner is first required to present proof of the infringers' gross revenue associated with infringement. Once the copyright owner has met that initial burden, then, the infringer is required to prove its deductible expenses and elements of profits attributable to factors other than the copyrighted work. Profit is calculated by subtracting all deductible expenses from gross revenue.

You may award Hiller a portion of SGILA and/or Cassel's profits only if you find that Hiller has shown a reasonable relationship between the infringing activity and SGILA and/or Cassel's gross revenue. Hiller has the burden of proving, by a preponderance of the evidence, the existence and the amount of defendants' gross revenue that is reasonably related to infringement.

If Hiller meets this burden, SGILA and/or Cassel will have the burden of proving, by a preponderance of the evidence, the amount of deductible expenses incurred in producing the revenue that Hiller has shown was related to infringement. In determining SGILA and/or Cassel's damages, you must subtract these deductible expenses from the gross revenue Hiller has shown was related to infringement.

SGILA and/or Cassel will also have the burden of proving, by a preponderance of the evidence, the portion of its profit, if any, that is attributable to factors other than infringement. Once Hiller proves the amount of SGILA and Cassel's gross revenues that is reasonably related to infringement and deductible expenses are subtracted, all of that profit on that revenue is presumed to be attributed to infringement unless Defendants can show otherwise.

VI. CLOCKWORK'S DECLARATORY JUDGMENT CLAIMS

A. Invalidity of a Copyright

Clockwork claims Hiller's copyright of the Technician Guide is invalid. A party asserting invalidity bears the burden of proof to establish by a preponderance of evidence that the copyright is invalid. A copyright is invalid where unauthorized preexisting material pervades the entire work or is inextricably intertwined with the preexisting material.

B. Ownership of a Valid Copyright

Clockwork asserts it owns the copyright of the Technician Guide. Apply the same legal standards for ownership of a copyright I previously discussed regarding Hiller's claims. These are the instructions that will be on pages 27-33 of the physical copy of these instructions which you will receive.

VII. VERDICT

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Each of you should deliberate and vote on each issue to be decided.

Before you return your verdict, however, each of you must agree on the answer to each question so that each of you will be able to state truthfully that the verdict is yours.

The verdict you return to the Court must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to each answer. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your mind if you are convinced that you were wrong. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits that have been marked and received in the case. You may not have seen all of these previously and they will be there for your

review and consideration. You may take a break before you begin deliberating, but do not begin to deliberate and do not discuss the case at any time unless all of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

If a question arises during deliberations and you need further instructions, please write your question on a sheet of paper, knock on the door of the jury room, and give the question to the court security officer.

I will review your question, and after consulting with all counsel in the case, will either respond to your question in writing or have you return to the courtroom for further oral instructions. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence. I caution you, however, that with regard to any message or question you might send me, you should not tell me your numerical division at any time.

I remind you that you are to decide this case based only on the evidence you have heard in court and on the law I have given you. You are prohibited from considering any other information and you are not to consult any outside sources for information. You must not communicate with or provide any information, photographs, or video to anyone by any means about this case or your deliberations. You may not use any electronic device or media, such as a telephone, cell phone, smart phone or computer; the Internet, any text or instant messaging service; or any chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate with anyone or to conduct any research about this case.

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