

17.21 Secondary Liability—Contributory Infringement—Elements and Burden of Proof

A defendant [name] may be liable for copyright infringement engaged in by another if [he] [she] [other pronoun] knew or had reason to know of the infringing activity and intentionally [induced] [materially contributed to] that infringing activity.

If you find that [name of direct infringer] infringed the plaintiff [name]’s copyright in [allegedly infringed work], you must determine whether [name of alleged contributory infringer] contributorily infringed that copyright. The plaintiff [name] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the defendant [name] knew or had reason to know of the infringing activity of [name of direct infringer]; and

Second, the defendant [name] intentionally [induced] [materially contributed to] [name of direct infringer’s] infringing activity.

[The defendant [name]’s intent to induce the infringing activity must be shown by clear expression of that intent or other affirmative steps taken by the defendant [name] to encourage.]

If you find that [name of direct infringer] infringed the plaintiff [name]’s copyright and you also find that the plaintiff [name] has proved both of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, the plaintiff [name] has failed to prove either or both of these elements, your verdict should be for the defendant [name].

Comment

This instruction is based on *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-63 (9th Cir. 1996), *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004), and *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 937-38 (9th Cir. 2010), *amended* (Feb. 17, 2011).

This instruction is also supported by the following cases: *Erickson Products, Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019) (“A party engages in contributory copyright infringement when it ‘(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.’” (quoting *VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 745 (9th Cir. 2019))); *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1147 (9th Cir. 2018) (“We have adopted the well-settled rule that ‘[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.’” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007) (alteration in original) (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005))).

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court adopted “[t]he rule on inducement of infringement.” The Court held that “one who distributes a device with the object of promoting its use to infringe a copyright, as shown by clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936-37. The Court clarified that, “in the absence of evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device were otherwise capable of substantial noninfringing uses.” *Id.* at 940 n.12.

In *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), the Ninth Circuit recognized that, under *Grokster*, the inducement rule has four elements: “(1) the distribution of a device or product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright, and (4) causation.” *Id.* The court explained those elements and clarified that the inducement copyright rule “applies to services available on the internet as well as to devices or products.” *Id.* at 1033-39; *see also Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007) (describing inducement rule and material contribution test as “non-contradictory variations on the same basic test”).

In *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671 (9th Cir. 2017), the court addressed material contribution to infringement in the online context and explained that “a computer system operator may be liable under a material contribution theory if it has actual knowledge that specific infringing material is available using its systems, and can take simple measures to prevent further” infringement, and yet fails to do so. *Id.* (internal quotation marks omitted); *see also VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 745 (9th Cir. 2019) (holding that Zillow’s actions did not constitute “material contribution or inducement” because it had no means to identify the allegedly infringing images uploaded by users and thus did not have “appropriately ‘specific’ information necessary to take ‘simple measures’ to remedy the violation”).

In *Cox Communications, Inc. v. Sony Music Entertainment*, 607 U.S. ___, 146 S. Ct. 959, 967 (2026), the Supreme Court clarified the contributory infringement standard for service

providers. A service provider is “contributorily liable for the user’s infringement only if it

intended that the provided service be used for infringement. The intent required for contributory

liability can be shown only if the party induced the infringement or the provided service is

tailored to that infringement.” *Id.* Critically, “mere knowledge that a service will be used to

infringe is insufficient to establish the required intent to infringe.” *Id.* at 968.

The bracketed language in the jury instruction paraphrases the test for inducement set forth in *Grokster*, 545 U.S. at 919, 936-37, and reiterated in *Columbia Pictures*, 710 F.3d at 1032. The court should include this language if there is a dispute regarding whether the defendant took sufficient action, or any action, demonstrating its intent to encourage infringement. *See, e.g., id.* at 1035-36 (“As for the necessary ‘clear expression or other affirmative steps’ evidence indicative of unlawful intent, the most important is Fung’s active encouragement of the uploading of torrent files concerning copyrighted content.”).

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