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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

24 ORACLE USA, INC., *et al.*,

25 Plaintiffs,

26 v.

27 SAP AG, *et al.*,

28 Defendants.

Case No. 07-CV-01658 PJH (EDL)

JOINT FINAL JURY INSTRUCTIONS

1 **JOINT FINAL JURY INSTRUCTIONS**

2 Pursuant to the Court’s direction at the September 30, 2010 Pretrial Conference,
3 the Court’s Final Pretrial Order (Dkt. No. 914), the October 28, 2010 Status Conference
4 Proceedings (Dkt. No. 952), and the Court’s guidance at the November 1, 2010 and November
5 19, 2010 proceedings, Plaintiffs Oracle USA, Inc., Oracle International Corporation, and Siebel
6 Systems, Inc. (collectively, “Oracle”) and Defendants SAP AG, SAP America, Inc., and
7 TomorrowNow, Inc. (collectively, “Defendants,” and with Oracle, the “Parties”) submit the
8 following final jury instructions. The Parties have succeeded in resolving all disputes but two.
9 The first relates to the relationship between the fair market value licenses presented by the
10 Parties and infringers’ profits, and the second relates to inclusion of the word “full” in Instruction
11 Nos. 9, 10, and 11. To facilitate the Court’s resolution of this dispute, each side submits the
12 following brief statement of its position:

13 **Oracle’s Statement**

14 **The fair market value license presented by Oracle Includes Infringers’ Profits.**

15 Consistent with the discussion at the charging conference (Tr. 1956-1959), Oracle believes that
16 language should be added to the preliminary instruction on copyright damages (Proposed
17 Instruction No. 6) to clarify that the fair market value license “as presented by Plaintiffs”
18 includes infringers’ profits. This clarification is necessary because Defendants’ calculation of
19 the fair market value based on a running royalty by definition does not include all of Defendants’
20 infringers’ profits. Counsel for Defendants made this distinction clear during the argument with
21 Your Honor on Friday afternoon:

22 **MR. LANIER:** ...THE ISSUE IS, DOES THE FAIR MARKET VALUE
23 LICENSE, AS PRESENTED BY PLAINTIFFS, SUBSTITUTE FOR THE
24 OTHER TWO MEASURES OF DAMAGES THAT ARE POSSIBLE, IT DOES
25 AS PRESENTED BY THEM. THE JURY, WE THINK, SHOULD BE
ALLOWED TO BE GIVEN THE CHOICE AND THERE IS EVIDENCE IN
THE RECORD OF BOTH SIDE'S POSITIONS ON THAT ALTERNATIVE
APPROACH.

26 ...

27 **THE COURT:** I AGREE WITH DEFENDANTS. I THINK THAT THE
28 HYPOTHETICAL LICENSE DOES INCLUDE THE INFRINGER'S PROFITS

1 REGARDSLESS OF WHAT NUMBER THE JURY COMES BACK WITH. SO
2 THAT SETTLES THAT PART OF IT.

3 November 19th Final Transcript at 1959:10-22.

4 Oracle has proposed a corresponding change to the verdict form so that the jury
5 has the option to award infringers' profits in the event it does not accept the fair market value
6 license as presented by Oracle. The new language in Oracle's proposed verdict form is taken
7 directly from the first paragraph of Ninth Circuit model jury instruction 17.24.

8 "Full Actual Damages." Oracle believes the word "full" is necessary clarification
9 in light of the competing damages theories and the disparity between them. On November 19,
10 2010, the Parties discussed this issue with Your Honor:

11 **MR. BOIES:** IF LOST PROFITS ARE A HUNDRED AND FAIR MARKET
12 VALUE IS 50, WE ARE STILL ENTITLED TO A HUNDRED BECAUSE
13 THE LAW SAYS WE ARE ENTITLED TO BE FULLY COMPENSATED.
14 EITHER OF THOSE TWO DAMAGES WE ARE ENTITLED, AND THE
15 JURY NEEDS TO BE TOLD THAT WE ARE ENTITLED TO OUR FULL
16 DAMAGES, WHICH, IN EFFECT, IT'S WHICHEVER IS GREATER AS
17 LONG AS THEY ARE PROPERLY CALCULATED.

18 **THE COURT:** I AGREE. I AGREE. AND THE JURY WILL DECIDE WHAT
19 THE FULL ACTUAL DAMAGES ARE. AND THEY WILL DO THAT BY
20 EITHER DECIDING THAT THE HYPOTHETICAL LICENSE REPRESENTS
21 THE FULL ACTUAL DAMAGE OR THAT THE LOST PROFITS
22 REPRESENTS THE FULL ACTUAL DAMAGE.

23 November 19th Final Transcript at 1997:25-1998:10. There is no dispute that Oracle is entitled
24 to its "full" actual damages. Oracle requests that the instruction reflect that fact. This is
25 particularly important if the Court adopts Defendants' request regarding whether Defendants'
26 fair market license includes infringers' profits.

27 **Defendants' Statement**

28 Based on the Court's guidance, the parties resolved all disputes addressed during the
charge conference. There remain two additional disputes, which Plaintiffs raised for the first
time after the charge conference: (1) Plaintiffs' attempt to instruct the jury that awarding a fair
market value license may not include infringers' profits (an issue that also affects the Parties'
separately submitted special verdict forms) (Instruction No. 6), and (2) Plaintiffs' insistence on

1 adding the word “full” in Instruction Nos. 9, 10, and 11. The Court should reject both of
2 Plaintiffs’ eleventh hour changes as inconsistent with this Court’s guidance.

3 **Instruction No. 6:** At 2:46 p.m. on Sunday, November 21, 2010, after the Parties had
4 agreed to jointly submit Instruction No. 6, Plaintiffs proposed, for the first time, a change
5 intended to reflect the possibility that a fair market value license award may not include
6 infringers’ profits:

7 If you award Oracle actual damages based on the fair market value of a license **as**
8 **presented by Plaintiffs** for the rights infringed, that award takes into account
9 Defendants’ profits attributable to their infringement and Oracle is not entitled to
any additional award. Oracle must prove damages by a preponderance of the
evidence.

10 11/21/10 2:46 p.m. E-mail from G. Howard to J. Lee (change in bold underline). Plaintiffs’
11 attempt to limit the situations in which a hypothetical license award will include an award of
12 infringers’ profits contradicts the Court’s unambiguous guidance at the charge conference that
13 actual damages in the form of a fair market value license encompasses infringer’s profits,
14 whatever the form of the license award:

15 **THE COURT: I AGREE WITH DEFENDANTS. I THINK THAT THE**
16 **HYPOTHETICAL LICENSE DOES INCLUDE THE INFRINGER’S PROFITS**
17 **REGARDLESS OF WHAT NUMBER THE JURY COMES BACK WITH. SO**
THAT SETTLES THAT PART OF IT.

18 11/19/10 Trial Tr. at 1959:19-22. It also contradicts Plaintiffs’ previous position in this case that
19 an award of a fair market value license takes into account infringers’ profits.

20 **Instruction Nos. 9, 10, and 11:** Plaintiffs’ proposed deviation from the model
21 instructions to include the word “full” is neither necessary to reflect the particularities of this
22 case, nor supported by legal authority. Its only discernible purpose is to improperly include
23 precluded damages in the jury’s award; its only effect is to confuse the jury.

24 The Ninth Circuit Model Jury Instructions provide that a plaintiff copyright owner “is
25 entitled to recover the actual damages suffered as a result of the infringement.” *See* Ninth
26 Circuit Manual of Model Jury Instructions, Instructions 17.22, 17.23 (Civil). This instruction is
27 plain on its face, and Plaintiffs have not provided any authority to support their position that the
28 instruction should be modified with the word “full.” The only reason Plaintiffs offer for this

1 eleventh hour change is the Court’s statements at the charge conference, during which the Court
2 provided guidance in response to Plaintiffs’ attempt to retroactively “elect” the hypothetical
3 license measure of damages, stating “[t]he jury will decide what the full actual damages are and
4 they will do that by either deciding that the hypothetical license represents the full actual damage
5 or that the lost profits represents the full actual damage.” *See* 11/19/10 Trial Tr. at 1998:6-10.
6 The Court’s rejection of Plaintiffs’ argument was not an invitation to depart from the otherwise
7 unambiguous language of the model instructions. Rather, the Court advised the parties
8 throughout the charge conference that the parties should rely on the language of the model
9 instructions. *See id.* at 1979:6-9, 1980:17-19.

10 The only plausible motivation behind Plaintiffs’ last minute request to include “full” in
11 Instruction Nos. 9, 10, and 11 is to impermissibly inflate Plaintiffs’ damages with damages
12 precluded by the Court; adding the word “full” to otherwise unambiguous instructions runs the
13 risk that the jury will issue an award that improperly includes these precluded damages.

14 Thus, Defendants request that the Court reject adding the word “full” to Instructions 9,
15 10, and 11 and select Defendants’ instructions.

16 * * *

17 By submitting these instructions, the Parties do not withdraw or modify previous
18 arguments, nor do the Parties waive the right to appeal any previous rulings of the Court.
19 Specifically, although the Parties have agreed to the form of the instructions herein, based on the
20 Court’s guidance at the November 19, 2010 proceedings, the Parties continue to preserve the
21 following objections:

22 **Oracle’s Statement**

23 Oracle objects to all instructions relating to a lost profits theory of damages.
24 Oracle has elected to proceed with the fair market value of license theory of damages, and
25 therefore, the lost profits instructions are not relevant, misleading and prejudicial. *See*
26 *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384-85 (Fed. Cir. 2001);
27 *Linkco v. Fujitsu*, 232 F. Supp. 2d 182, 188-191 (S.D.N.Y. 2002) (precluding evidence of a lack
28 of profits by a defendant “because it is unfairly prejudicial to [the plaintiff] and would defeat the

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**INTRODUCTORY INSTRUCTION
(JOINT)**

Proposed Instruction No. 1 (Joint)

PRELIMINARY INSTRUCTION

Over the course of this trial, you have heard evidence on Oracle’s damages claims against TomorrowNow, SAP AG, and SAP America. As reflected in the stipulations between the Parties contained in your jury notebook, the Parties agree that TomorrowNow is liable for the copyright infringement asserted by Oracle, and that SAP AG and SAP America are also vicariously and contributorily liable for that copyright infringement.

You must now decide the amount of damages that should be awarded to Oracle for Defendants’ stipulated infringement of Oracle’s copyrights. You must make this determination based on the instructions I will give you regarding the law on copyright infringement, and the damages you may award based on the agreed copyright infringement in this case.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.0 (Civil) (modified)

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**INTRODUCTORY COPYRIGHT
INSTRUCTIONS
(JOINT)**

2 **COPYRIGHT—DEFINED**

3 A copyright is the exclusive right to copy. This right to copy includes the
4 exclusive rights to:

- 5 1) reproduce the copyrighted work;
- 6 2) prepare derivative works based upon the copyrighted work by adapting or
7 transforming it; and
- 8 3) distribute copies of either the copyrighted work or any unauthorized
9 derivative work; and
- 10 4) display publicly a copy of either the copyrighted work or any unauthorized
11 derivative work.

12 It is the owner of a copyright who may exercise these exclusive rights. The
13 “owner” refers to the author of the work, or one who has been assigned the ownership of
14 exclusive rights in the work. In general, copyright law protects against the production,
15 adaptation, distribution, or public display of the owner’s copyrighted work without the owner’s
16 permission. An owner may enforce these rights to exclude others in an action for copyright
17 infringement. Even though one may acquire a copy of the copyrighted work, the copyright
18 owner retains certain rights and control of that copy, including uses that may result in additional
19 copies or alterations of the work.

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21 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.1 (Civil) (modified).
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Proposed Instruction No. 3 (Joint)

COPYRIGHT—STIPULATED DIRECT INFRINGEMENT

The parties have entered into several stipulations of liability and facts. These stipulations are now Orders of the Court. The stipulations have been referred to by the Parties throughout this trial and entered into evidence labeled JTX 0001 through 0005. They also can be found in your juror notebook and are referenced in the Table of Contents as Numbers 2 through 6. In these stipulations, Defendants have admitted that TomorrowNow is directly liable to Oracle for all of Oracle’s claims for direct copyright infringement of all 120 Oracle, PeopleSoft, J.D. Edwards and Siebel copyrights listed in Attachment A to Trial Stipulation No. 3. Trial Stipulation No. 3 also contains counts of the “minimum numbers” of infringing copies and downloads made by TomorrowNow. Defendants have also admitted that SAP AG and SAP America are contributorily and vicariously liable for all of TomorrowNow’s copyright infringement. You should therefore treat all of Oracle’s copyright infringement claims as having been proved.

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**SECONDARY LIABILITY
(COPYRIGHT INFRINGEMENT)
(JOINT)**

2 **SECONDARY COPYRIGHT LIABILITY— STIPULATED VICARIOUS**
3 **INFRINGEMENT**

4 SAP AG and SAP America agree they are liable for all of TomorrowNow's
5 infringement based on principles of vicarious liability. By agreeing to vicarious liability, SAP
6 AG and SAP America agreed that:

- 7 1) They both received a direct financial benefit from the infringing activity of
8 TomorrowNow; and,
9 2) They both had the right and ability to supervise or control the infringing
10 activity of TomorrowNow.

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12 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.20 (Civil)
13 (modified).

Proposed Instruction No. 5 (Joint)

SECONDARY LIABILITY—STIPULATED CONTRIBUTORY INFRINGEMENT

SAP AG and SAP America also agree they are liable for all of TomorrowNow’s infringement based on principles of contributory infringement. By agreeing to contributory infringement, SAP AG and SAP America agreed that:

- 1) They knew or had reason to know of the infringing activity of TomorrowNow; and,
- 2) They intentionally and materially contributed to TomorrowNow’s infringing activity.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.21 (Civil) (modified).

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COPYRIGHT DAMAGES

2 **COPYRIGHT DAMAGES—INTRODUCTION**

3 You must determine Oracle’s damages resulting from the copyright infringement
4 agreed to by the Defendants. Oracle is entitled to recover the actual damages suffered as a result
5 of the infringement. As the measure of its actual damages, Oracle, as the plaintiff, has the right
6 to seek to recover either the fair market value of a license for the rights infringed or its lost
7 profits. If you award Oracle actual damages based on its lost profits, then Oracle is also entitled
8 to recover any profits that each Defendant made that are attributable to their infringement. If you
9 award Oracle actual damages based on the fair market value of a license as presented by Oracle
10 for the rights infringed, that award takes into account Defendants’ profits attributable to their
11 infringement and Oracle is not entitled to any additional award. Oracle must prove damages by a
12 preponderance of the evidence.

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14 Authority: Ninth Circuit Manual of Model Jury Instructions, Instructions 17.22, 17.23 (Civil)
15 (modified); 17 U.S.C. § 504(b); Final Trial Transcript at 1959:10-22 (THE ISSUE IS, DOES
16 THE FAIR MARKET VALUE LICENSE, AS PRESENTED BY PLAINTIFFS’, SUBSTITUTE
17 FOR THE OTHER TWO MEASURES OF DAMAGES THAT ARE POSSIBLE, IT DOES AS
18 PRESENTED BY THEM.”) (emphasis supplied).

Proposed Instruction No. 6 (Defendants)

COPYRIGHT DAMAGES—INTRODUCTION

You must determine Oracle’s damages resulting from the copyright infringement agreed to by the Defendants. Oracle is entitled to recover the actual damages suffered as a result of the infringement. As the measure of its actual damages, Oracle, as the plaintiff, has the right to seek to recover either the fair market value of a license for the rights infringed or its lost profits. If you award Oracle actual damages based on its lost profits, then Oracle is also entitled to recover any profits that each Defendant made that are attributable to their infringement. If you award Oracle actual damages based on the fair market value of a license for the rights infringed, that award takes into account Defendants’ profits attributable to their infringement and Oracle is not entitled to any additional award. Oracle must prove damages by a preponderance of the evidence.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instructions 17.22, 17.23 (Civil) (modified); 17 U.S.C. § 504(b).

Proposed Instruction No. 7 (Joint)

COPYRIGHT DAMAGES—ACTUAL DAMAGES

Oracle is entitled to recover the actual damages suffered as a result of the infringement. Actual damages means the amount of money adequate to compensate Oracle 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 Defendants of Oracle’s works. That amount also could be represented by the lost license fees the Oracle would have received for Defendants’ unauthorized use of Oracle’s works.

In determining the fair market value of the rights infringed, you must consider the entire scope of infringement, which is reflected in the five stipulations in your jury notebook.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.23 (Civil) (modified).

3 **COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED**

4 While there is no precise formula for determining actual damages, your award
5 must be based on evidence, not on speculation, guesswork, or conjecture. Determining the fair
6 market value of the rights infringed may involve some uncertainty, and Oracle is not required to
7 establish its actual damages with precision.

8 Authority: *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); Order
9 Denying Defendants’ Motion for Partial Summary Judgment, Dkt. No 628 at 4-5; *Harmsen v*
10 *Smith*, 693 F.2d 932, 945 (9th Cir. 1982) (“Although damages need not be proved to a
11 mathematical certainty, ‘sufficient facts must be introduced so that a court can arrive at an
12 intelligent estimate without speculation or conjecture.’”); Nimmer § 14.02[A], at 14-12
13 (“[U]ncertainty will not preclude a recovery of actual damages if the uncertainty is as to amount,
14 but not as to the fact that actual damages are attributable to the infringement.”)
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Proposed Instruction No. 9 (Plaintiffs)

COPYRIGHT DAMAGES—ACTUAL DAMAGES—FAIR MARKET VALUE LICENSE
CALCULATION

If you decide that the best measure of Oracle’s full actual damages is a fair market value license, you should consider all of the information known to and all of the expectations of the parties on the dates of the hypothetical negotiations, which are the dates on which infringement began. You must determine what would have been the result of this negotiation in order to establish the fair market value. The fair market value is an objective measure of Oracle’s damages that is meant to approximate the fair market value of a license for all of the copyrights Defendants infringed, calculated at the time the infringement commenced, which the Parties agree is January 19, 2005 for the PeopleSoft, JD Edwards and database copyrights infringed, and September 29, 2006 for the Siebel copyrights infringed.

The value of a hypothetical license is not necessarily the amount the Defendants in this case would have agreed to pay, or that Oracle would have actually agreed to accept.

You may consider evidence of events and facts that happened after the date of the hypothetical negotiation only to the extent that it provides insight into the expectations of the parties at the time the infringement first began, or insight into the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement.

You may not limit or increase the fair market value of the rights infringed based on the actual profits Defendants made.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.23 (Civil) (modified); Model Patent Jury Instructions for the Northern District of California, Instruction 5.7; Final Trial Tr. 1997:19-1998:10 (“**THE COURT: I AGREE. I AGREE. AND THE JURY WILL DECIDE WHAT THE FULL ACTUAL DAMAGES ARE. AND THEY WILL DO THAT BY EITHER DECIDING THAT THE HYPOTHETICAL LICENSE REPRESENTS THE FULL ACTUAL DAMAGE OR THAT THE LOST PROFITS REPRESENTS THE FULL ACTUAL DAMAGE.**”).

Proposed Instruction No. 9 (Defendants)

**COPYRIGHT DAMAGES—ACTUAL DAMAGES—FAIR MARKET VALUE LICENSE
CALCULATION**

If you decide that the best measure of Oracle’s actual damages is a fair market value license, you should consider all of the information known to and all of the expectations of the parties on the dates of the hypothetical negotiations, which are the dates on which infringement began. You must determine what would have been the result of this negotiation in order to establish the fair market value. The fair market value is an objective measure of Oracle’s damages that is meant to approximate the fair market value of a license for all of the copyrights Defendants infringed, calculated at the time the infringement commenced, which the Parties agree is January 19, 2005 for the PeopleSoft, JD Edwards and database copyrights infringed, and September 29, 2006 for the Siebel copyrights infringed.

The value of a hypothetical license is not necessarily the amount the Defendants in this case would have agreed to pay, or that Oracle would have actually agreed to accept.

You may consider evidence of events and facts that happened after the date of the hypothetical negotiation only to the extent that it provides insight into the expectations of the parties at the time the infringement first began, or insight into the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement.

You may not limit or increase the fair market value of the rights infringed based on the actual profits Defendants made.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.23 (Civil) (modified); Model Patent Jury Instructions for the Northern District of California, Instruction 5.7.

3 **COPYRIGHT DAMAGES—ACTUAL DAMAGES—LOST PROFITS**

4 If you decide that the best measure of Oracle’s full actual damages is lost profits,
5 you must determine what profits Oracle proves it would have made without the infringement.
6 Lost profits are the revenue Oracle would have made without the infringement, less any
7 additional expenses it would have incurred in making the sales.

8 Authority: Seventh Circuit Model Jury Instruction 12.8.2 Damages — Actual Damages; Final
9 Trial Tr. 1997:19-1998:10 (“**THE COURT:** I AGREE. I AGREE. AND THE JURY WILL
10 DECIDE WHAT THE FULL ACTUAL DAMAGES ARE. AND THEY WILL DO THAT BY
11 EITHER DECIDING THAT THE HYPOTHETICAL LICENSE REPRESENTS THE FULL
12 ACTUAL DAMAGE OR THAT THE LOST PROFITS REPRESENTS THE FULL ACTUAL
13 DAMAGE.”).

Proposed Instruction No. 10 (Defendants)

COPYRIGHT DAMAGES—ACTUAL DAMAGES—LOST PROFITS

If you decide that the best measure of Oracle’s actual damages is lost profits, you must determine what profits Oracle proves it would have made without the infringement. Lost profits are the revenue Oracle would have made without the infringement, less any additional expenses it would have incurred in making the sales.

Authority: Seventh Circuit Model Jury Instruction 12.8.2 Damages — Actual Damages

Proposed Instruction No. 11 (Plaintiffs)

COPYRIGHT DAMAGES—INFRINGEMENTS’ PROFITS

If you decide that the best measure of Oracle’s full actual damages is lost profits, you must also determine the amount of profits made by any defendant that are attributable to the stipulated infringement. You may not include in an award of Defendants’ profits any amount that you already took into account in determining lost profits.

You may make an award of Defendants’ profits only if you find that Oracle showed a causal relationship between the infringement and the profits generated indirectly from the infringement. Defendants’ profits are determined by subtracting all expenses from the Defendants’ gross revenue. Defendants’ gross revenue is all of Defendants’ receipts associated with the stipulated infringement. Oracle has the burden of proving Defendants’ gross revenue by a preponderance of the evidence. Expenses are all operating costs, overhead costs, and production costs incurred in producing Defendants’ gross revenue. Defendants have the burden of proving their expenses by a preponderance of the evidence.

Unless you find that a portion of the profit from the use of the copyrighted works is attributable to factors other than use of the copyrighted works, all of the profit is to be attributed to the infringement. Defendants have the burden of proving the portion of the profit, if any, attributable to factors other than infringing the copyrighted works.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.24 (Civil) (modified); Final Trial Tr. 1997:19-1998:10 (“**THE COURT: I AGREE. I AGREE. AND THE JURY WILL DECIDE WHAT THE FULL ACTUAL DAMAGES ARE. AND THEY WILL DO THAT BY EITHER DECIDING THAT THE HYPOTHETICAL LICENSE REPRESENTS THE FULL ACTUAL DAMAGE OR THAT THE LOST PROFITS REPRESENTS THE FULL ACTUAL DAMAGE.**”).

Proposed Instruction No. 11 (Defendants)

COPYRIGHT DAMAGES—INFRINGEMENTS’ PROFITS

If you decide that the best measure of Oracle’s actual damages is lost profits, you must also determine the amount of profits made by any defendant that are attributable to the stipulated infringement. You may not include in an award of Defendants’ profits any amount that you already took into account in determining lost profits.

You may make an award of Defendants’ profits only if you find that Oracle showed a causal relationship between the infringement and the profits generated indirectly from the infringement. Defendants’ profits are determined by subtracting all expenses from the Defendants’ gross revenue. Defendants’ gross revenue is all of Defendants’ receipts associated with the stipulated infringement. Oracle has the burden of proving Defendants’ gross revenue by a preponderance of the evidence. Expenses are all operating costs, overhead costs, and production costs incurred in producing Defendants’ gross revenue. Defendants have the burden of proving their expenses by a preponderance of the evidence.

Unless you find that a portion of the profit from the use of the copyrighted works is attributable to factors other than use of the copyrighted works, all of the profit is to be attributed to the infringement. Defendants have the burden of proving the portion of the profit, if any, attributable to factors other than infringing the copyrighted works.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.24 (Civil) (modified).

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**CONCLUDING INSTRUCTIONS
(JOINT)**

Proposed Instruction No. 12 (Joint)

DUTY TO DELIBERATE

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

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

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

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

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

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 3.1 (Civil).

2 **THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR**
3 **COMMUNICATE ABOUT A CASE**

4 During your deliberations, you must not communicate with or provide any
5 information to anyone by any means about this case. You may not use any electronic device or
6 media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the
7 internet, any internet service, or any text or instant messaging service; or any internet chat room,
8 blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to
9 anyone any information about this case or to conduct any research about this case until I accept
10 your verdict.

11
12 Authority: Proposed Model Jury Instruction
13 (<http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>).

Proposed Instruction No. 14 (Joint)

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the 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.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 3.2 (Civil).

Proposed Instruction No. 15 (Joint)

RETURN OF VERDICT

A verdict form has been prepared for you. 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.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 3.3 (Civil).

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