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 TomorrowNow, Inc.

20 UNITED STATES DISTRICT COURT
 21 NORTHERN DISTRICT OF CALIFORNIA
 22 OAKLAND DIVISION

22 ORACLE USA, INC., *et al.*,
 23 Plaintiffs,
 24 v.
 25 SAP AG, *et al.*,
 26 Defendants.

Case No. 07-CV-01658 PJH (EDL)
**AMENDED JOINT JURY
 INSTRUCTIONS AND PROPOSED
 SPECIAL VERDICT FORM**

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APPENDIX A

DUTY OF JURY

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3 You must not infer from the instructions or from anything that I might say during the
4 course of the trial as indicating that I have an opinion regarding the evidence or what your
5 verdict should be. It is your duty to find the facts from all of the evidence in the case, and to
6 those facts, you will apply the law as I give it to you. You must follow the law as I give it to you,
7 whether you agree with it or not. And you must not be influenced by personal likes, or dislikes,
8 opinions, prejudices, or sympathy. That means that you must decide the case solely on the
9 evidence before you. You will recall that yesterday, you took an oath to do exactly that. And in
10 following my instructions, you must follow all of them and not single out some and ignore
11 others. They are all equally important.

PARTIES AND CLAIMS

To help you follow the evidence, I will give you a brief summary of who the parties are and what their positions are.

As I explained yesterday, there is one plaintiff, Oracle International Corporation, which we will refer to as “Oracle International” or “Oracle.”

There are three defendants in this case. SAP AG, which will be referred to by that name; SAP America, Incorporated, which I will refer to as “SAP America”; and TomorrowNow, Incorporated, which I will refer to as simply “TomorrowNow.” Collectively, these defendants will be referred to as either Defendants or “SAP.” SAP America is a wholly owned subsidiary of SAP AG. And TomorrowNow is a wholly owned subsidiary of SAP America.

Oracle and certain of its related entities originally asserted ten claims against the defendants. As you will see from the stipulations that are included in your jury notebooks, TomorrowNow has agreed to liability for all ten claims.

Further, as to the first claim for copyright infringement, as you will see from the stipulations included in your juror notebook, SAP AG and SAP America have agreed to liability for vicarious and contributory copyright infringement.

Here, the only issue remaining for you to decide is damages. Specifically, you must decide the amount of damages that should be awarded to Oracle for Defendants’ stipulated infringement, as I will explain to you later in the case.

BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim by a preponderance of the evidence, it means that you must be persuaded by the evidence that the claim is more probably true than not true. And you should base your decision on all of the evidence regardless of which party presented it.

PARTY HAVING POWER TO PRODUCE BETTER EVIDENCE

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

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WHAT IS EVIDENCE

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

1. the sworn testimony of any witness;
2. the exhibits which are received here in court into evidence; and
3. any facts to which the lawyers have agreed. We refer to those statements as stipulations.

WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. There are other things, however, that are not evidence, and you may not consider them in deciding what the facts are. I will list them for you.

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

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

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

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

EVIDENCE FOR LIMITED PURPOSE

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

DIRECT AND CIRCUMSTANTIAL EVIDENCE

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

RULING ON OBJECTIONS

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

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

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CREDIBILITY OF WITNESSES

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

In considering the testimony of any witness, you may take into account the following things:

- (1) the opportunity and ability of the witness to see or hear or know the things about which the witness is testifying;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness's testimony;
- (6) the reasonableness of the witness's testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

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

Preliminary Instruction No. 11

WITNESS WILLFULLY FALSE

A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

INFERENCES DEFINED

You are to consider only the evidence in the case. However, 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 which reason and common sense lead you to draw from facts established by the evidence in the case.

NO TRANSCRIPT AVAILABLE TO JURY/TAKING NOTES

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

If at any time you cannot hear or see the testimony, any evidence, exhibits, questions or arguments, please let me know so we can correct the problem. Just raise your hand and I'll ask you to explain what difficulty you're having.

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

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

USE OF INTERPRETERS—OTHER LANGUAGES; COUNTRIES OF ORIGIN

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3 You must not make any assumptions about a witness or a party based solely upon the use
4 of an interpreter to assist that witness or party.

5 Some of the witnesses who will testify live in this courtroom, or via deposition video
6 clip, do not speak English as a native language. Some of the witnesses speak German as a native
7 language. You must not make any assumptions about a witness or a party based upon the
8 language that is used by any witness in communicating with his or her colleagues or others.

9 The evidence to be considered by you is only that provided through the official court
10 translators. Although some of you may know German, or any other foreign language used and
11 translated during this case, it is important that all jurors consider the same evidence. Therefore,
12 you must accept the English translation and you must disregard any different meaning or
13 understanding you might have of the words used.

14 One of the parties—specifically, defendant SAP AG—is incorporated in another country.
15 You must not make any assumptions about a party based on where it is incorporated or where it
16 is headquartered.

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STIPULATIONS OF FACT

The parties have agreed to certain facts, and their written stipulations of fact will be placed in evidence as Exhibits 1 through 3. These exhibits can be found in your juror notebook and may be referred to by the parties throughout this trial. You should treat facts within the stipulations as having been proved.

STIPULATIONS OF LIABILITY

The parties have reached stipulations, including that TomorrowNow is directly liable to Plaintiff for all of the claims that Plaintiff have asserted, and that SAP AG and SAP America are contributorily and vicariously liable for TomorrowNow’s copyright infringement. You should therefore treat these claims as having been proved. Those stipulations of liability will be placed in evidence as Exhibits 4 and 5. These exhibits can be found in your juror notebook and may be referred to by the parties throughout this trial.

1 **Plaintiff's Proposed Preliminary Instruction No. 17**

2 **THE PARTIES' BURDENS REGARDING DAMAGES**

3 As a result of Defendants' infringement, Oracle is entitled to recover both its actual
4 damages, and all profits Defendants earned that are attributable to the infringement and not taken
5 into account in computing actual damages.

6 Oracle's actual damages are the profits Oracle would have made without the Defendants'
7 infringement. Oracle's lost profits are therefore equal to the revenue Oracle would have made
8 without the infringement less any additional expenses it would have incurred in making the sales.
9 It is Oracle's burden to prove its lost profits by a preponderance of the evidence. Determining
10 lost profits may involve some uncertainty, and Oracle is not required to establish them with
11 precision.

12 Defendants' profits are all the gross revenues that Defendants received in connection with
13 the infringement they have admitted, less expenses incurred in producing the Defendants' gross
14 revenue. It is Oracle's burden to prove Defendants' gross revenue by a preponderance of the
15 evidence. Once Oracle meets this burden, it is Defendants' burden to prove their expenses by a
16 preponderance of the evidence. Insofar as Defendants seek to deduct indirect costs like overhead
17 expenses, they must show these expenses assisted in the production, distribution or sale of
18 infringing products. If you find that Defendants' infringement was willful, then you should give
19 extra scrutiny to the categories of overhead expenses claimed by the infringer to ensure that each
20 category is directly and validly connected to the production, distribution or sale of infringing
21 products. If Defendants do not meet their burden of proving expenses, the gross revenue figure
22 stands as the Defendants' profits. Any doubt as to the computation of Defendants' costs or
23 profits is to be resolved in favor of Oracle.

24
25 Authority: See Previous Final Jury Instruction No. 11 (See Dkt. 1005 at 11; Final Trial Tr.
26 2218:01-2219:04) (modified); Ninth Circuit Manual of Model Jury Instructions, Instructions
27 17.24 (Civil); 17 U.S.C. § 504; *Kamar Intern., Inc. v. Russ Berrie and Co., Inc.*, 752 F.2d 1326,
28 1331-33 (9th Cir. 1984); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514-

1 16 (9th Cir. 1985) (“Any doubt as to the computation of costs or profits is to be resolved in favor
2 of the plaintiff . . . If the infringing defendant does not meet its burden of proving costs, the gross
3 [revenue] figure stands as the defendant’s profits.”); *Hamil America Inc. v. GFI*, 193 F.3d 92,
4 107 (2d Cir. 1999).

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Defendants object to Oracle’s Proposed Preliminary Instruction No. 17 as the jury will be instructed about the determination of damages and respective burdens of the parties after the presentation of evidence. Defendants conditionally submit the following competing instruction in the event that the Court overrules Defendants’ objection to the instruction as a whole.

1 **Defendants’ Proposed Preliminary Instruction No. 17**

2 **THE PARTIES’ BURDENS REGARDING DAMAGES**

3 Oracle is entitled to recover the actual damages it suffered as a result of the infringement.
4 For the purposes of this case, actual damages means the profits Oracle lost because of the
5 infringement to which Defendants have stipulated. Lost profits are the revenue Oracle would
6 have made in the absence of the infringement, less any additional expenses it would have
7 incurred in generating that revenue.

8 Oracle must prove damages by a preponderance of the evidence. While there is no
9 precise formula for determining actual damages, your award must be based on evidence, not on
10 speculation, guesswork, or conjecture. Determining actual damages may involve some
11 uncertainty, and Oracle is not required to establish its actual damages with precision.

12 In addition to calculating Oracle’s actual damages, you must also determine the amount
13 of profits made by any defendant that are attributable to the stipulated infringement. You may
14 not include in an award of Defendants’ profits any amount that you already took into account in
15 determining lost profits.

16 You may make an award of Defendants’ profits only if you find that Oracle showed a
17 causal relationship between the infringement and the profits generated indirectly from the
18 infringement. Defendants’ gross revenue is all of Defendants’ receipts associated with the
19 stipulated infringement. Oracle has the burden of proving Defendants’ gross revenue by a
20 preponderance of the evidence.

21 Defendants’ profits are determined by subtracting operating costs, overhead costs, and
22 production costs incurred in producing Defendants’ gross revenue. Defendants have the burden
23 of proving their expenses by a preponderance of the evidence.

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

28 In calculating lost profits and infringer’s profits, you may not award any damages for the

1 purposes of punishment or deterrence.

2
3 Authority: Final Jury Instructions Nos. 6, 7, 8, 10, and 11 (*see* Dkt. 1005) (modified); Ninth
4 Circuit Manual of Model Jury Instructions, Instructions 17.22, 17.23, and 17.24 (Civil)
5 (modified); Seventh Circuit Model Jury Instruction 12.8.2 Damages — Actual Damages
6 (modified); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); Order
7 Denying Defendants’ Motion for Partial Summary Judgment, Dkt. No 628 at 4-5; *Harmsen v*
8 *Smith*, 693 F.2d 932, 945 (9th Cir. 1982) (“Although damages need not be proved to a
9 mathematical certainty, ‘sufficient facts must be introduced so that a court can arrive at an
10 intelligent estimate without speculation or conjecture.’”); Nimmer § 14.02[A], at 14-12
11 (“[U]ncertainty will not preclude a recovery of actual damages if the uncertainty is as to amount,
12 but not as to the fact that actual damages are attributable to the infringement.”).

DEPOSITION IN LIEU OF LIVE TESTIMONY

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3 A deposition is the sworn testimony of a witness that was taken before trial. The witness
4 is placed under oath to tell the truth and the lawyers for each party may ask questions. The
5 questions and answers are recorded. When a person is unavailable to testify at trial, the
6 deposition of that person may be used at the trial. In this trial, deposition testimony will be
7 presented by video clips.

8 Each side had an opportunity to select excerpts of video testimony for each witness. All
9 of the selected excerpts for a particular witness will be played together. Therefore, although the
10 video clips for a particular witness may be played during a particular side’s presentation, the
11 excerpts may have been selected by either side. As a result, the video clips, when played, may
12 seem slightly out of order to you. However, please listen to the entire video clip and consider all
13 of the witness’s testimony presented to you as a whole, just as you would with a live witness.

14 You should consider deposition testimony presented in lieu of live testimony in the same
15 way as if the witness had testified live.

USE OF INTERROGATORIES OF A PARTY

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

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USE OF REQUESTS FOR ADMISSION

Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them. You must also accept as true any stipulated facts I read to you, and those set forth in the stipulation(s) I will provide to you, as well as those that have already been provided in your juror notebook.

EXPERT OPINION

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

1 **Defendants’ Proposed Preliminary Instruction No. 22**

2 **EVIDENCE USED WITH EXPERT WITNESS**

3 During the examination of the parties’ respective experts, certain evidence may be
4 presented that cannot be considered as substantive evidence of truth. You may consider this
5 evidence only to evaluate the basis of the expert’s opinion. I will advise you as to which
6 evidence this applies to when it is admitted.

7
8 Authority: Court’s Final Pretrial Order (ECF No. 1171); Federal Rules of Evidence 703 and 705;
9 Defendants’ Opposition to Plaintiff’s Motion *in limine* No. 3 (ECF No. 1156); *U.S. v. 0.59 Acres*
10 *of Land*, 109 F.3d 1493, 1496 (9th Cir. 1997) (“When inadmissible evidence used by an expert is
11 admitted to illustrate and explain the expert’s opinion, however, it is necessary for the court to
12 instruct the jury that the [otherwise inadmissible] evidence is to be considered solely as a basis
13 for the expert opinion and not as substantive evidence.”); *Garcia v. Los Banos Unified School*
14 *Dist.*, No. 1:04-CV-6059-SMS, 2007 WL 715526, at *3 (E.D. Cal. Mar. 8, 2007) (“Further, the
15 Court emphasizes that if otherwise inadmissible evidence is admitted to explain the expert’s
16 opinion, then a limiting instruction should be given to the jury to inform it that the hearsay
17 evidence is to be considered solely as a basis for the expert opinion and not as substantive
18 evidence.”); *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1135 (4th Cir. 1991)
19 (permitting cross-examination of expert with inadmissible documents that expert chose not to use
20 as basis for opinion); *Ratliff v. Schiber Truck Co.*, 150 F.3d 949, 955 (8th Cir. 1998) (same);
21 *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995) (same).

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Plaintiff objects to Defendants' Proposed Preliminary Instruction No. 22. If an instruction on this subject becomes necessary based on the testimony of an expert, then an instruction should be issued based on the specific evidence relied upon.

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

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

CHARTS AND SUMMARIES RECEIVED IN EVIDENCE

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

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CORPORATIONS—FAIR TREATMENT

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

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INTERPRETATION OF INSTANT MESSAGES

Defendants did not produce in a timely fashion certain relevant instant messages, which we'll refer to as IMs, involving TomorrowNow employees. As a result, Oracle was unable to fully investigate and use the late-produced IMs during preparations for this trial. Therefore, if any of these IMs are introduced into evidence during trial, and if there is any dispute about their meaning, you should interpret them consistent with what you find to be any reasonable interpretation presented by Oracle.

CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors. First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case. Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise: Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

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

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

BENCH CONFERENCES AND RECESSES

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench, which we call a sidebar, or when the jury is not present, or by calling a recess. We will try to keep the number and length of these conferences to a minimum. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

OUTLINE OF TRIAL

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

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APPENDIX B

Defendants' Proposed Evidentiary Trial Instruction No. 1

**EVIDENCE USED WITH ORACLE'S DAMAGES EXPERT REGARDING COWLITZ
COUNTY**

During the cross-examination of Oracle's expert witness, the Defendants may present two declarations from customers of Cowlitz County, Washington. These declarations are relied upon by Plaintiff's damages expert in forming his opinions. The evidence contained is admissible only for the purpose of explaining the basis of Mr. Meyer's opinion. It is not offered for truth of the information contained in the declaration and should not be considered by you for that purpose.

Authority: Nov. 9, 2010 Trial Tr. at 1049-1050.

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**Plaintiff objects to Defendants' Proposed Evidentiary Trial Instruction No. 1.
If an instruction on this subject becomes necessary based on the testimony of
an expert, then an instruction should be issued based on the specific testimony
and the evidence on which it relies.**

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APPENDIX C

DUTY OF JURY

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law that applies in the case.

A copy of these instructions will be sent with you to the jury room when you deliberate so you don't need to take notes.

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

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

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

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WHAT IS EVIDENCE

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

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

WHAT IS NOT EVIDENCE

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

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

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

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

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

DIRECT AND CIRCUMSTANTIAL EVIDENCE

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

CREDIBILITY OF WITNESSES

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

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

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness's testimony;
- (6) the reasonableness of the witness's testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

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

REDACTED MATERIALS

From time to time, the Parties have offered into evidence documents that have been partially “redacted,” which means that certain contents of the document have been blacked or whited out and stamped “redacted.” Redactions are necessary for a wide variety of reasons, including that the redacted information is unrelated to the evidence in the case, that the Court has determined that the information is not admissible, or to protect as private the personal information of individuals or other companies not parties to this lawsuit. These are just examples. You may give the un-redacted information in any document whatever weight you choose, and you are not to consider any characterizations of the fact or existence of a redaction in any document, including by counsel.

DUTY TO DETERMINE DAMAGES

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 juror 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.

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COPYRIGHT—DEFINED

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

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

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

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 jury 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.

SECONDARY COPYRIGHT LIABILITY— STIPULATED VICARIOUS
INFRINGEMENT

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

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

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.

COPYRIGHT DAMAGES—INTRODUCTION

As a result of Defendants’ infringement, Oracle is entitled to recover both its actual damages in the form of its own lost profits, as well all profits Defendants earned that are attributable to the infringement and not taken into account in computing Oracle’s lost profits. I will now instruct you about the calculation of Oracle’s lost profits and Defendants’ profits.

COPYRIGHT DAMAGES—ACTUAL DAMAGES

Oracle is entitled to recover the actual damages it suffered as a result of the infringement Defendants have admitted. For the purposes of this case, actual damages means the profits Oracle lost because of the infringement Defendants have admitted. Lost profits are the revenue Oracle would have made in the absence of the infringement, less any additional expenses it would have incurred in generating that revenue.

In determining actual damages, you must consider the entire scope of Defendants' infringement, as reflected in the five stipulations in your jury notebook. Oracle must prove its actual damages by a preponderance of the evidence. While there is no precise formula for determining actual damages, your award must be based on evidence, not on speculation, guesswork, or conjecture. Determining actual damages may involve some uncertainty, and Oracle is not required to establish its actual damages with precision.

Authority: Final Jury Instructions Nos. 6, 7, 8, and 10 (*see* Dkt. 1005) (modified); Ninth Circuit Manual of Model Jury Instructions, Instructions 17.22 and 17.23 (Civil) (modified); Seventh Circuit Model Jury Instruction 12.8.2 Damages—Actual Damages (modified); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); Order Denying Defendants' Motion for Partial Summary Judgment, Dkt. No 628 at 4-5; *Harmsen v Smith*, 693 F.2d 932, 945 (9th Cir. 1982) ("Although damages need not be proved to a mathematical certainty, 'sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture.'"); Nimmer § 14.02[A], at 14-12 ("[U]ncertainty will not preclude a recovery of actual damages if the uncertainty is as to amount, but not as to the fact that actual damages are attributable to the infringement.")

1 **Defendants’ Proposed Final Instruction No. 13**

2 **COPYRIGHT DAMAGES—ACTUAL DAMAGES**

3 Oracle is entitled to recover the actual damages it suffered as a result of the
4 infringement. For the purposes of this case, actual damages means the profits Oracle lost
5 because of the infringement to which Defendants have stipulated. Lost profits are the revenue
6 Oracle would have made in the absence of the infringement, less any additional expenses it
7 would have incurred in generating that revenue.

8 Oracle must prove damages by a preponderance of the evidence. While there is no
9 precise formula for determining actual damages, your award must be based on evidence, not on
10 speculation, guesswork, or conjecture. Determining actual damages may involve some
11 uncertainty, and Oracle is not required to establish its actual damages with precision.

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13 Authority: Final Jury Instructions Nos. 6, 7, 8, and 10 (*See* Dkt. 1005) (modified); Ninth Circuit
14 Manual of Model Jury Instructions, Instructions 17.22 and 17.23 (Civil) (modified); Seventh
15 Circuit Model Jury Instruction 12.8.2 Damages — Actual Damages (modified); *Polar Bear*
16 *Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); Order Denying Defendants’
17 Motion for Partial Summary Judgment, Dkt. No 628 at 4-5; *Harmsen v Smith*, 693 F.2d 932, 945
18 (9th Cir. 1982) (“Although damages need not be proved to a mathematical certainty, ‘sufficient
19 facts must be introduced so that a court can arrive at an intelligent estimate without speculation
20 or conjecture.’”); Nimmer § 14.02[A], at 14-12 (“[U]ncertainty will not preclude a recovery of
21 actual damages if the uncertainty is as to amount, but not as to the fact that actual damages are
22 attributable to the infringement.”).

COPYRIGHT DAMAGES—INFRINGEMENTS' PROFITS

In addition to calculating Oracle's actual damages, 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.

Recoverable profits may be directly or indirectly related to the infringement.

You may make an award of Defendants' indirect profits only if you find that Oracle showed a causal relationship between the infringement and the gross revenues generated indirectly from the infringement. 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.

Defendants' profits are determined by subtracting 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. Insofar as Defendants seek to deduct indirect costs like overhead expenses, they must show these expenses assisted in the production, distribution or sale of infringing products. If you find that Defendants' infringement was willful, then you should give extra scrutiny to the categories of overhead expenses claimed by the infringer to ensure that each category is directly and validly connected to the production, distribution or sale of infringing products. Any doubt as to the computation of costs or profits is to be resolved in favor of Oracle.

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: Previous Final Jury Instruction No. 11 (*See* Dkt. 1005 at 11; Final Trial Tr. 2218:01-2219:04) (modified); Ninth Circuit Manual of Model Jury Instructions, Instructions 17.24

1 (Civil); *Kamar Intern., Inc. v. Russ Berrie and Co., Inc.*, 752 F.2d 1326, 1331-33 (9th Cir. 1984);
2 *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514-16 (9th Cir. 1985) ("Any
3 doubt as to the computation of costs or profits is to be resolved in favor of the plaintiff."); *Hamil*
4 *America Inc. v. GFI*, 193 F.3d 92, 107 (2d Cir. 1999).

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COPYRIGHT DAMAGES—INFRINGEMENTS’ PROFITS

In addition to calculating Oracle’s actual damages, 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’ 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.

Defendants’ profits are determined by subtracting 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.

In calculating lost profits and infringer’s profits, you may not award any damages for the purposes of punishment or deterrence.

Authority: Final Jury Instruction No. 11 (*See* Dkt. 1005) (modified); Ninth Circuit Manual of Model Jury Instructions, Instruction 17.24 (Civil) (modified); *Stehrenberger v. Reynolds Tobacco Holdings*, 335 F. Supp. 2d 466, 468 (S.D.N.Y. 2004) (“[C]oncepts of punishment for infringement, deterrence of similar behavior in the future, and recompense for the costs and effort of litigation . . . form no part of ‘actual damages’ under the [copyright] statute.”); *Faulkner v. Nat’l Geographic Soc’y*, 576 F. Supp. 2d 609, 612-613 (S.D.N.Y. 2008) (“[P]unitive damages are not available in statutory copyright infringement actions.”).

2 **COPYRIGHT DAMAGES—WILLFUL INFRINGEMENT**

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

- 5 1. Defendants engaged in acts that infringed Oracle's copyrights; and
- 6 2. Defendants knew that those acts infringed Oracle's copyrights.

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8 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.27 (Civil)
9 (modified).

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For the reasons set forth in Defendants’ Motion *in limine* No. 1 (ECF No. 1142) and Defendants’ Opposition to Plaintiff’s Motion *in limine* No. 5 (ECF No. 1156), and argued by Defendants in the Joint Statement Regarding Exhibit Objections (ECF No. 1182) and at the May 24, 2012 Pretrial Conference, and pursuant to the Court’s Final Pretrial Order (ECF No. 1171), Defendants object to Oracle’s Proposed Final Instruction No. 15 and do not offer a competing instruction.

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.

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

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

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.

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.

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APPENDIX D
Plaintiff's Proposed Special Verdict Form

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 ORACLE USA, INC., ORACLE
4 INTERNATIONAL CORP., and SIEBEL
5 SYSTEMS, INC.

Case No. 07-CV-1658 PJH (EDL)

6 Plaintiffs,

SPECIAL VERDICT FORM

7 v.

8 TOMORROWNOW, INC., SAP AMERICA,
9 INC., AND SAP AG

10 Defendants.

11 **We, the jury in the above-entitled action, find the following special verdict on the questions
12 submitted to us:**

13 **Actual Damages for Copyright Infringement**

14 1. What is the dollar amount that Oracle is entitled to from Defendants as actual damages in
15 the form of lost profits under Oracle's copyright infringement claim?

16 \$_____.

17 Please proceed to the following question.

18 **Infringers' Profits for Copyright Infringement**

19 2. What is the dollar amount that Oracle is entitled to from Defendants as infringers' profits
20 under Oracle's copyright infringement claim?

21 GROSS REVENUE: \$_____.

22 (Minus) Expenses: \$_____.

23 TOTAL: \$_____.

24 Have the presiding juror sign and date this form.

25 Signed: _____ Dated: _____

26 Presiding Juror

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APPENDIX E
Defendants' Proposed Special Verdict Form

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 ORACLE USA, INC., ORACLE
4 INTERNATIONAL CORP., and SIEBEL
5 SYSTEMS, INC.

Case No. 07-CV-1658 PJH (EDL)

6 Plaintiffs,

SPECIAL VERDICT FORM

7 v.

8 TOMORROWNOW, INC., SAP AMERICA,
9 INC., AND SAP AG

10 Defendants.

11 **We, the jury in the above-entitled action, find the following special verdict on the questions
12 submitted to us:**

13 **Actual Damages for Copyright Infringement**

14 1. What is the dollar amount that Oracle is entitled to from Defendants as actual damages in
15 the form of lost profits under Oracle's copyright infringement claim?

16 \$_____.

17 Please proceed to the following question.

18 **Infringers' Profits for Copyright Infringement**

19 2. What is the dollar amount that Oracle is entitled to from Defendants as infringers' profits
20 under Oracle's copyright infringement claim?

21 \$_____.

22 Have the presiding juror sign and date this form.

23 Signed: _____ Dated: _____
24 Presiding Juror

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