

1 J. Andrew Coombs (SBN 123881)
andy@coombspc.com
2 Annie S. Wang (SBN 243027)
annie@coombspc.com
3 J. Andrew Coombs, A Prof. Corp.
4 517 E. Wilson Ave., Suite 202
Glendale, California 91206
5 Telephone: (818) 500-3200
Facsimile: (818) 500-3201

6 Attorneys for Plaintiff Louis
7 Vuitton Malletier, S.A.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

10 Louis Vuitton Malletier, S.A.,)
11)

12 Plaintiff,)

13 v.)

14 Akanoc Solutions, Inc., et al.)

15 Defendants.)

Case No.: C 07 3952 JW (HRL)

OPPOSITION OF PLAINTIFF LOUIS
VUITTON MALLETIER, S.A. TO
DEFENDANTS' MOTION IN LIMINE
NO. 3 TO EXCLUDE ALL TESTIMONY
ABOUT DEFENDANTS' ALLEGED
REPUTATION; DECLARATION OF J.
ANDREW COOMBS, EXHIBITS IN
SUPPORT

16 **INTRODUCTION**

17 Defendants' Motion in Limine No. 3 to "Exclude All Testimony About Defendants'
18 Alleged Reputation" ("Motion No. 3") should be denied because such testimony is governed by the
19 "law of the case" doctrine, and because it speaks not only to elements at issue in the litigation but is
20 offered as evidence of Defendants' knowledge of infringing activity on their servers, their ability to
21 control activity using goods and services provided by them and profits gained by them from
22 ignoring complaints by intellectual property owners. Moreover, Defendants rely upon inapplicable
23 cases and, worse, improperly cite unpublished decisions.

24 Also contrary to Defendants' assertions, Plaintiff has designated no evidence concerning
25 third parties not involved in the litigation as bulletproof hosts.

26 **A. The Rules of Evidence Favor Admissibility**

27 Motions in limine should be granted sparingly. Alliance Fin. Capital, Inc. v. Herzfeld, 2007
28 Bankr. LEXIS 4511, at *2 (N.D. Ga. December 17, 2007) citing Sperberg v. Goodyear Tire &

1 Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975); Middleby Corp. v. Hussmann Corp. 1992 U.S. Dist.
2 LEXIS 13138, at *9-10 (N.D. Ill. August 27, 1992). “A pretrial motion in limine forces a court to
3 decide the merits of introducing a piece of evidence without the benefit of the context of trial.”
4 CFM Communs., LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005); see
5 also U.S. v. Marino, 200 F.3d 6, 11 (1st Cir. 1999) (recognizing that proffered evidence can be
6 more accurately assessed in the context of other evidence).

7 Evidence should be “excluded on a motion in limine only if the evidence is *clearly*
8 inadmissible for any purpose” (internal quotations omitted, emphasis added). Fresenius Med. Care
9 Holdings, Inc. v. Baxter Int’l, Inc., 2006 U.S. Dist. LEXIS 42159, at *14 (N.D. Cal. June 12,
10 2006). This means Defendants will have to overcome the well established policies favoring
11 admissibility. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 587 (1993) (“The Rules’ basic
12 standard of relevance thus is a liberal one.”); U.S. v. Curtin, 489 F.3d 935, 942 (9th Cir. 2007)
13 citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988) (the version of Rule 404(b) which
14 became law was intended to “plac[e] greater emphasis on admissibility than did the final Court
15 version”); see also U.S. v. Williams, 445 F.3d 724, 732 (4th Cir. 2006) (relief against admissibility
16 under Rule 403 should be granted sparingly); U.S. v. Fleming, 215 F.3d 930, 939 (9th Cir. 2000)
17 (Rule 403 favors admissibility); U.S. v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (“the
18 application of Rule 403 must be cautious and sparing”); F.R.E. 102 Adv. Comm. Notes (“rules are
19 to be liberally construed in favor of admissibility” within the bounds of the Rules to achieve goals
20 of “speedy, inexpensive, and fair trials designed to reach the truth”). Defendants fail to meet their
21 burden given the probative value of the evidence, the Rules, sound case law, and in light of these
22 policies.

23 **B. The Law of the Case Precludes Defendants From Revisiting This Issue**

24 The Court’s prior consideration of Defendants’ objection to evidence of “reputation” was
25 overruled and now constitutes “law of the case” which precludes re-litigation of the issue absent
26 very narrow exceptions not applicable here.

1 “The law of the case doctrine provides that ‘a court is generally precluded from
2 reconsidering an issue that has already been decided by the same court...’” U.S. v. Cuddy, 147
3 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)
4 (internal quotation and citation omitted). Defendants previously objected to the “reputation”
5 testimony. See Defendants’ Evidentiary Objection to the Holmes Declaration in Support of
6 Vuitton’s Opposition to Defendants’ Motion for Summary Judgment Filed August 25, 2008, ¶ 2.

7 The Court overruled these objections and cited this evidence in its ruling partially denying
8 Defendants’ Motion for Summary Judgment. MSJ Ruling at 6 fn. 9. None of the exceptions to the
9 doctrine apply to Defendants’ renewed objection: 1) the first decision was not *clearly erroneous*; 2)
10 there have been no intervening changes in the law; 3) the evidence is not substantially different; 4)
11 no other changed circumstances exist; and 5) no manifest injustice would otherwise result. Cuddy,
12 147 F.3d at 1114. Thus, Defendants objection has already been decided and this motion should be
13 summarily denied as barred by the law of the case.

14 Defendants’ arguments are similarly contrary to law and practice and Defendants’ motion
15 should be denied in its entirety.

16 **C. Admissibility of Reputation Evidence Is the General Rule of F.R.E. 404**

17 While Rule 404(a) states a general rule of exclusion, Rule 404(b) is a “specialized but
18 important application of the general rule.” U.S. v. McCourt, 925 F.2d 1229, 1232 fn. 1 (9th Cir.
19 1991) citing Notes of Advisory Committee on Proposed Rules. “The House made clear that the
20 version of Rule 404(b) which became law was intended to ‘plac[e] greater emphasis on
21 admissibility than did the final Court version.’ The Senate echoed this theme: ‘[T]he use of the
22 discretionary word ‘may’ with respect to the admissibility of evidence of crimes, wrongs, or other
23 acts is not intended to confer any arbitrary discretion on the trial judge.’ ‘Thus, Congress was not
24 nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with
25 *ensuring that restrictions would not be placed on the admission of such evidence.*’” U.S. v. Curtin,
26 489 F.3d 935, 945 (9th Cir. 2007) citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988).

1 “Because the rule recognizes the admissibility of prior crimes, wrongs, or acts, with only the one
2 stated exception, it is understood to be a rule of inclusion.” U.S. v. Queen, 132 F.3d 991, 994 (4th
3 Cir. 1997). Thus, the Court should rule on any character evidence under 404(b) in favor of
4 admissibility.

5 **D. Defendants’ Sheltering of Illegal Activity is “In Issue” in the Case**

6 Courts of this Circuit and others have held that Rule 404 does not require exclusion of
7 evidence “‘inextricably intertwined’ with, or ‘intricately related’ to, charged conduct that it helps
8 the factfinder form a more complete picture of the activity.” U.S. v. Hale, 448 F.3d 971, 985 (7th
9 Cir. 2006); citing U.S. v. Paladino, 401 F.3d 471, 475 (7th Cir. 2005); U.S. v. Gougis, 432 F.3d
10 735, 742 (7th Cir. 2005); Stewart v. U.S., 311 F.2d 109, 112 (9th Cir. 1962) (“evidence of other
11 criminal acts has been held admissible by this court when they are so blended or connected with
12 the one on trial as that proof of one incidentally involves the other; or explains the circumstances
13 thereof; o[r] tends logically to prove any element of the crime charged. Such evidence is
14 admissible if it is so related to or connected with the crime charged as to establish a common
15 scheme or purpose so associated that, proof of one tends to prove the other, or if both are connected
16 with a single purpose and in pursuance of a single object; as well as to establish identity, guilty
17 knowledge, intent and motive.”). This law could not be more applicable than in the present case.

18 Here, Defendants’ business model is predicated upon allowing anonymous and often
19 offshore users to interact with the Internet with impunity from the application of local laws. This
20 includes website operators who put whatever material they want on the world wide web without
21 accountability, not because Defendants cannot regulate such material on their servers, but because
22 they choose not to. This is essentially what has been described as “bulletproof hosting”.¹
23 Counterfeiters need hosts who will let them conduct their illegal businesses without recourse or
24 interruption. Defendants have established this kind of a business to shield and foster counterfeiters,

25 ¹ Significantly, Defendants appear to attempt to include the term “bulletproof hosting” within the
26 ambit of their motion to exclude reputation evidence. Louis Vuitton submits that evidence of
27 Defendants’ business model will support application of this widely-used term, at least as much as it
28 does the Defendants’ own euphemistic “unmanaged hosting”. The term chosen to describe
Defendants’ business model is not reputation evidence and not properly the subject of the proposed
motion to exclude in any event.

1 among other illegal actors, creating a safe haven for them that is not only materially essential to a
2 websites' survival and success but also particularly attractive to a counterfeiter whose livelihood
3 depends on staying online. The testimony regarding Defendants as bulletproof hosts speaks to
4 Defendants' knowledge of infringing activity occurring on their equipment as well as their material
5 contribution to contributory infringement. Thus, testimony regarding Defendants' notoriety as a
6 bulletproof host should be admissible because it is so "inextricably intertwined" to Plaintiff's
7 claims of contributory infringement.

8 **E. The Testimony is Admissible to Prove Knowledge, Control, Modus Operandi and**
9 **Motive Aside From Defendants' Acts in Conformity**

10 The testimony is also admissible under F.R.E. 404(b) as it speaks to Defendants'
11 knowledge of infringing activity on their servers, of their modus operandi, and particularly their
12 motive for ignoring complaints by intellectual property owners.

13 Aside from proving knowledge of infringing activity on its servers, the ability to control
14 and the lack of exercise of such control, and Defendants' modus operandi of looking the other way
15 when faced with complaints from intellectual property owners, the most compelling listed 404(b)
16 application for the disputed testimony relates to Defendants' motive. Defendants' creation and
17 maintenance of that notoriety as bulletproof hosts attracts a robust "business" of counterfeiters,
18 spammers, and other individuals looking for dedicated server space and a safe-haven from the law.
19 Defendants ignored abuse complaints, failed to penalize even those that violated their own terms of
20 use, and continued to do business with infringers despite notice, Declaration of J. Andrew Coombs
21 ("Coombs Decl.") at ¶¶ 2-3, Exs. A-B (Depositions of Steve Chen ("Chen Depo") and Juliana Luk
22 ("Luk Depo.")), purposefully to create and foster its "reputation" as a bulletproof host because it
23 was good for the bottom line.

24 The testimony is admissible even under the Ninth Circuit's four-part test for admission of
25 404(b) evidence that: (1) it must prove a material element of the offense for which the defendant is
26 now charged; (2) in certain cases, the prior conduct must be similar to the charged conduct; (3)
27 proof of the prior conduct must be based upon sufficient evidence; and (4) the prior conduct must

1 not be too remote in time. U.S. v. Basinger, 60 F.3d 1400, 1408 (9th Cir. 1995). Defendants' status
2 as bulletproof hosts proves knowledge of infringing activity on their servers, control, ability to
3 remedy violations easily and goes to prove one of the most material contributions to a
4 counterfeiting enterprise, security and protection. Plaintiff's witnesses are basing their testimony
5 on personal experience both in having been ignored by Defendants on repeated occasions but also
6 in terms of the frequency they are connected to investigations by Plaintiff's investigator for
7 intellectual property violations. Court's Ruling on Motion for Summary Judgment ("MSJ Ruling")
8 9:8-12; Coombs Decl. at ¶ 4, Ex. C (Deposition of Robert Holmes ("Holmes Depo."), p. 172-175)
9 (describing frequency of Defendants' connections to his investigations of infringement). The
10 conduct complained of was within the statute of limitations and gave rise to this claim, defeating
11 any argument that the prior conduct was too remote in time.

12 **F. "Reputation" Testimony is Specifically Excepted from the Hearsay Rule and**
13 **Widely Accepted in Courts**

14 Defendants' overreaching efforts to exclude admissible evidence and to avoid the
15 unavoidable outcome should Louis Vuitton proceed to trial on the merits is nowhere more apparent
16 in the clearly inappropriate invocation of the hearsay rule to exclude evidence of reputation.

17 F.R.E. 803(21) expressly states that "[r]eputation of a person's character among associates
18 or in the community" is not excluded by the hearsay rule. Defendants' argument is thus flatly
19 inconsistent with the Federal Rules and should be denied.

20 To the extent Mr. Livadkin's and Mr. Holmes' statements are based on personal
21 knowledge, they are not hearsay. MSJ Ruling 9:8-12 (Mr. Livadkin sent letters that Defendants
22 received); Holmes Depo. at 172-175 (relaying frequency of Defendants' connections to his
23 investigations of infringement).

24 Defendants' argument that "reputation" testimony is hearsay and should be excluded is
25 almost always overruled. This is most likely why the cases cited by Defendants are not applicable
26 or should never have been cited by Defendants. Parada v. Gonzales, 204 Fed. Appx. 610, 611 (9th
27 Cir. 2006) was an unpublished opinion that the Ninth Circuit makes clear is not precedent and may
28

1 not be cited. 9th Cir. R. 36-3 (no exceptions apply). Turner v. Calderon involved some
2 declarations that the Court excluded because they were “made without providing an adequate legal
3 foundation for that knowledge” not because they were hearsay. Turner v. Calderon, 281 F.3d 851,
4 877 (9th Cir. 2002) (“Not only do some of the declarations rely heavily upon inadmissible hearsay,
5 *but others* speak to knowledge of Savage’s reputation in the community without providing an
6 adequate legal foundation for that knowledge.” (emphasis added)).

7 Instead, reputation by definition is a summation of what a witness has heard in the
8 community regarding another person’s character. Michelson v. U.S., 335 U.S. 469, 477 (1948).
9 Reputation type testimony is widely admissible particularly under F.R.E. 404 as described above,
10 and it is well settled that a defendant can offer such testimony to prove his good reputation.
11 However, “[t]he price a defendant must pay for attempting to prove his good name is to throw open
12 the entire subject which the law has kept closed for his benefit and to make himself vulnerable
13 where the law otherwise shields him.” Michelson, 335 U.S. at 479. If a defendant chooses to
14 make such assertions about a specific kind of character, the other side is almost always allowed to
15 present contrary evidence.

16 Defendants have opened the door to such testimony by asserting, most recently in the
17 Pretrial Conference Statement, that “[w]henver the Plaintiff has complained about infringement,
18 Akanoc or MSG has taken appropriate action, consistent with its protocol and industry practices.”
19 Pretrial Conference Statement filed 2/23/09, p. 4. Defendants’ assertions that they are in line with
20 industry standards requires the admissibility of Plaintiff’s offered testimony as to Defendants’
21 reputation of being bulletproof hosts that do nothing in response to complaints.

22 A denial of Defendants’ motion on this basis would be sound in the law and necessary in
23 light of Defendants’ statements regarding their propriety.

24 **G. Impeachment**

25 Because Defendants elect to put Louis Vuitton to the proof of virtually every element of its
26 case, reputation evidence is also admissible to impeach Defendants when they claim they are acting
27

1 as a responsible business, that they have no control rather than choose not to exercise any, and that
2 they do not know what is occurring on their servers, among other things.

3 **H. The Evidence Is Also be Admissible as Habit, Practice or Custom Evidence Under**
4 **F.R.E. 406**

5 Evidence of a person's habit or the routine practice or custom of a business is admissible to
6 prove conduct on a specific occasion in conformity with that habit, practice or custom. F.R.E. 406;
7 Jones v. Southern Pac. R.R., 962 F.2d 447, 449 (5th Cir. 1992). Mr. Livadkin's and Mr. Holmes'
8 testimony as to Defendants' status as bulletproof hosts that "would not respond to notifications
9 from trademark owners to preserve the hosting of its clients' customers" is admissible as the kind
10 of semi-automatic response, or lack thereof in this case, that rises to the level of habit or practice.
11 Defendants' Motion No. 3 p. 2:10-11. It was Defendants' policy to look the other way which gave
12 rise to Plaintiff's claims. Mr. Livadkin has corroborating personal knowledge of such facts through
13 his history of being ignored by Defendants, even though such knowledge is unnecessary, making
14 the evidence even more probative. F.R.E. 406, Adv. Comm. Notes (corroboration or eyewitnesses
15 unnecessary). Defendants state they had no policy for dealing with letter complaints and ignored
16 them for almost a year at one time. Chen Depo., 100:13-104:12, 109-111 (mail piled on
17 unoccupied desk and Defendant Chen admitting Defendants have no mechanism to take care of
18 letter complaints); Luk Depo., 19:8-11, 31:12-32:1 (employee's faulty memory is her only record
19 of past complaints). Evidence of Defendants' habit and practice as bulletproof hosts should be
20 admissible.

21 **I. The Probative Value of the Testimony Outweighs Any Prejudice**

22 Relief against admissibility under Rule 403 should be granted sparingly as Rule 403 favors
23 admissibility. U.S. v. Fleming, 215 F.3d 930, 939 (9th Cir. 2000); see also U.S. v. Hankey, 203
24 F.3d 1160, 1172 (9th Cir. 2000). Some circuits have required that the unfair prejudice be
25 "exceedingly great" while looking at the evidence "most favorable to its proponent, maximizing its
26 probative value and minimizing its prejudicial effect." U.S. v. Stout, 509 F.3d 796, 806 (6th Cir.
27 2007). "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially
28

1 outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless
2 trials are to be conducted as scenarios, or unreal facts tailored and sanitized for the occasion, the
3 application of Rule 403 must be cautious and sparing. Its major function is limited to excluding
4 matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial
5 effect.” Hankey, 203 F.3d at 1172.

6 The evidence objected to by Defendants is highly probative because it illuminates the
7 driving force behind Defendants’ irresponsible and infringing business model. Defendants’ status
8 as bulletproof hosts is intertwined with the cause of action and explains Defendants’ motives.
9 Defendants offer their goods and services to anyone who will pay for them and will not take action
10 against those users despite their violations of the law. Defendants do not enforce their own
11 penalties, Luk Depo., 33:22-34:12, 62:5-8; Chen Depo., 67:18-69:17, they have no mechanism for
12 handling letter complaints, and keep no records of repeat infringers because then their client base,
13 which relies on their look-the-other-way approach, may no longer do business with them. Chen
14 Depo., 100:13-104:12, 109-111 (mail piled on unoccupied desk and Defendant Chen admitting
15 Defendants have no mechanism to take care of letter complaints); Luk Depo., 19:8-11, 31:12-32:1
16 (employee’s faulty memory is her only record of past complaints). Defendants are in the business
17 of protecting and fostering illegal activity, whether they agree or not. Defendants cannot now say
18 that this is prejudicial when their own acts have created this status. Testimony regarding
19 Defendants as bulletproof hosts should be admitted.

20 In light of the overriding policy favoring admissibility of evidence, character evidence
21 specifically, and for the foregoing particularized reasons, Defendants’ Motion No. 3 should be
22 denied.

23 Dated: March 9, 2009

J. Andrew Coombs, A Professional Corp.

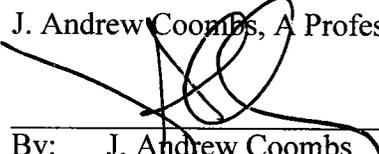
24
25 
26 By: J. Andrew Coombs
Anne Wang
Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

Exhibit A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOUIS VUITTON MALLETTIER, S.A.,)

Plaintiff,)

vs.) Case No. C073952JW

AKANOC SOLUTIONS, INC., MANAGED)

SOLUTIONS GROUP, INC., STEVEN)

CHEN and DOES 1 through 10,)

inclusive,)

Defendants.)

DEPOSITION OF STEVEN CHEN

VOLUME I

Glendale, California

Tuesday, April 8, 2008

Reported by: Janalee Whitacre

CSR No. 12223

NDS Job No.: 127887

1 from the beginning, the whole Web hosting business
2 actually -- I mean, the foundation of this business is
3 started by Jacques Pham. So at the time he was
4 Managed.com, and before that he was United Colo, and
5 before that he was something else. So I think that at
6 the time I was not handling anything dealing with the
7 customer: sales end and, you know, Website and all that
8 stuff. So pretty much he got all these things done his
9 way. And when we have the Akanoc, when we set up the
10 Akanoc business, we basically just took the same thing,
11 copy over and then start monitoring this, and so we
12 missed that one.

13 Q. It's what we lawyers call a cut-and-paste
14 mistake.

15 A. I think even worse.

16 Q. So it's a mistake?

17 A. Yeah, yeah.

18 Q. Paragraph 9 on the second page refers to a
19 penalty fee of \$10 per violation, and I think you
20 mentioned that's one thing that may have changed --

21 A. Right.

22 Q. -- over the last few years?

23 A. Yeah.

24 Q. What is the current penalty fee?

25 A. I don't even know because very, very seldom

1 that we actually get into so-called penalty. I don't
2 even want to call it "penalty" myself, because a lot of
3 times -- well, let's say a customer says, "Oh, yeah, you
4 just unplug it and I respond back to you and then you
5 need to replug it. In that case, you know, you want to
6 penalize me for \$25 or something." You know, I always
7 explain to them that it takes people to go into the cage
8 to do the physical work, document everything. It's just
9 process fee, so.

10 Q. I don't mean to hold you to the term
11 particularly.

12 A. Right.

13 Q. But whatever that fee is, it's now \$25?

14 A. I don't recall. I don't know, because I --
15 very, very, very seldom that I run -- I personally, I
16 never -- I never charge anybody anything. I personally
17 don't. I've seen Juliana fighting with customers that
18 "you need to give me \$25, otherwise I won't replug you,"
19 simply because that customer is just bad.

20 Q. Whose decision is it to impose the penalty?
21 Juliana's?

22 A. I mean, if she sends out the e-mail and says,
23 "I will unplug you" and that "you need to pay \$25," in
24 some sense, I need to support her in a sense. A lot of
25 times customer will come to me and says, "Can we waive

1 this?" and things like that. It depends on whether I
2 want to support it or not.

3 Q. This morning you mentioned that -- earlier this
4 morning you mentioned that you would forward abuse
5 complaints to the customer and that generally that would
6 be the end of it unless there was some repetition.

7 A. Right.

8 Q. Would it be your practice to impose a penalty
9 if you did have that kind of repetition?

10 A. Even we unplug, very, very seldom that we
11 charge customer.

12 Q. Are there specific procedures or conditions
13 where you will impose the penalty?

14 A. Not really. Very, very discretionary.

15 Q. And that discretion is basically Juliana's or
16 yours?

17 A. Yes.

18 Q. Is it -- to the extent that this fee is
19 imposed, is it usually for a violation of the Acceptable
20 Use Policy, or are there other situations where the fee
21 might be imposed?

22 A. It's AUP.

23 Q. AUP being short for acceptable --

24 A. Right.

25 Q. -- use policy?

1 A. That is correct.

2 Q. -- at that time?

3 And the address at the top of the page, the
4 45535 Northport Loop, is that the address for Akanoc
5 Solutions?

6 A. That is correct.

7 Q. This appears to have been sent both by e-mail
8 and by United States -- or hard copy mail; is that
9 correct?

10 MR. LOWE: Objection, it doesn't state that it
11 was sent by U.S. mail. It says by e-mail.

12 BY MR. COOMBS:

13 Q. Does Akanoc Solutions receive infringement
14 notices by post as opposed to e-mail?

15 A. Very seldom.

16 Q. And are those maintained by Akanoc? Are copies
17 of those kept?

18 A. We had a period of time, I would say July,
19 starting July of 2006, we were merging two data centers
20 together because of the other data center lease is up
21 and we decide to merge it together. And at the same
22 time we are gradually losing business to Managed.com all
23 the way to February to April, somewhere around there,
24 that Managed.com was sold to WebHostPlus and they made a
25 physical move of everything out from us. So we --

1 during that period of time, the whole company is more or
2 less in turmoil, because we're losing business, we're
3 having a lot of the overhead expense and things like
4 that.

5 At the time we were also losing staffs,
6 internal staffs, who, I think at that time, there was a
7 Joe, there was Chi, and some other person that was
8 actually handling mails. So for that period of time,
9 there were mails that gets in, receive by -- you know,
10 we had the second floor, so the first floor has a
11 general receptionist. She may have received a letter
12 and signed up for that, and then eventually it's deliver
13 to upstairs, and then it might set on the desk and
14 whatnot. So I think that was the time that a lot of the
15 mail was not even being open, nobody really pay
16 attention to it.

17 Q. That's not true of e-mail, though; that's just
18 hard copy mail?

19 A. Yes, that's correct.

20 Q. And the period you're talking about again is
21 fall of 2006?

22 A. To middle of, I would say, about July, August
23 time frame. Because I remember that August of 2006 that
24 was the lease up, so we were moving -- am I right?
25 2003, '4, '5, '6 -- yes, 2006. That was the time that

1 we're moving and everything.

2 Q. Until when?

3 A. To, I think it's April, March or April that
4 WebHostPlus move everything out.

5 Q. And that is March or April of 2007?

6 A. That is correct.

7 Q. And the handling of hard copy correspondence of
8 what you've described, that would apply even if it came
9 by some kind of courier like Federal Express or DHL; is
10 that correct?

11 A. Yes, at that time, yes.

12 Q. And the procedure for responding to a notice of
13 infringement like the one evidenced by Exhibit 2 is the
14 same as you've already described with respect to
15 Exhibit 1?

16 A. Yes.

17 Q. And do you ever have a practice of replying to
18 individuals or companies that send abuse complaints like
19 those evidenced by Exhibit 1 or 2?

20 A. Very seldom, very seldom.

21 Q. Are there particular circumstances where you
22 do -- where Akanoc does, I mean?

23 A. Legal authorities, meaning police, FBI,
24 Homeland Security, I would -- most likely I would
25 personally reply. The general type of abuse we don't

1 reply because we -- we cannot reply in a sense that once
2 we forwarded the issues out, we don't know when it's
3 been taken care of or things like that, unless that is
4 constant, and then we need to do a precise follow-up.

5 MR. COOMBS: I'll mark as 3 a letter dated
6 February 19th.

7 (Plaintiffs' Exhibit 3 was
8 marked for identification and
9 is annexed hereto.)

10 BY MR. COOMBS:

11 Q. Have you seen that before?

12 A. No, not -- I don't have any recollection.

13 Q. Is there any way you could determine whether or
14 not Akanoc received that correspondence on or about the
15 date it bears?

16 A. No.

17 Q. Now, on that particular one, on the upper
18 left-hand side it says "By express mail." Do you see
19 that?

20 A. Yes.

21 Q. But consistent with what you said before, this
22 was during a period of turmoil at the company --

23 A. Yes.

24 Q. -- and so there was nobody looking at mail; is
25 that correct?

1 A. That's most likely true.

2 Q. And what happened to the mail that was received
3 during that time frame?

4 A. There was a desk that one of the girl used to
5 sit and everything just piled up there.

6 Q. Was it ever opened or filed away? What was
7 done with it?

8 A. I don't recall that. Some comes in as a letter
9 form. It may have opened by somebody that just want
10 to -- just want to know where to put it. But once it
11 sits on that desk, then there's virtually nobody
12 watching it.

13 MR. COOMBS: Mark as 4 a letter dated
14 February 21, 2007.

15 (Plaintiffs' Exhibit 4 was
16 marked for identification and
17 is annexed hereto.)

18 THE WITNESS: Same thing, I have no
19 recollection.

20 BY MR. COOMBS:

21 Q. Does Akanoc operate an e-mail address
22 info@Akanoc.com?

23 A. Should.

24 Q. And who is responsible for looking at the
25 contents of that mailbox?

1 A. I don't know.

2 MR. COOMBS: I'll mark as 6 a letter dated
3 April 20, 2007, and ask the witness if he has seen that.
4 (Plaintiffs' Exhibit 6 was
5 marked for identification and
6 is annexed hereto.)

7 THE WITNESS: I have no recollection of this.

8 BY MR. COOMBS:

9 Q. Would you have any way of determining whether
10 or not this letter was in fact received by you on or
11 about the day it bears?

12 A. I remember I receive one of this from your
13 office and I took it to the office, and since it's
14 concerning Akanoc, so I pretty much just put it in the
15 pile.

16 Q. Okay. When you say you took it to the office,
17 that's because the Onondaga Drive address is your home
18 address?

19 A. That is correct.

20 Q. So you do recall receiving a letter at your
21 home?

22 A. Yes.

23 Q. Concerning Louis Vuitton?

24 A. Yes.

25 Q. When you say you took it to the office and put

1 it on a pile, what does that mean?

2 A. I mean put it on the desk.

3 Q. Whose desk?

4 A. That particular -- the empty desk I was talking
5 about. Because that was -- at that time that was the
6 place that we put all this type of letters.

7 Q. To your knowledge, what happened with the
8 letter after you put it on the desk?

9 A. There were -- there were too many people trying
10 to share the workload over there, so I have no idea.

11 Q. Was there some -- were some people assigned
12 with the responsibility for handling the correspondence
13 that was put on the desk?

14 A. I don't recall that we specifically assigned
15 anybody. Everybody just more or less like sharing the
16 load.

17 Q. Okay. To the extent I understand that you
18 can't say what happened with this letter, but in terms
19 of Akanoc's policies and procedures, what should have
20 happened with this letter after it was put on the desk?

21 A. We -- very, very seldom that we receive
22 complaint through e-mail -- I mean, through regular
23 mails, so most of the abuse issues were all resolved in
24 the e-mail format. So this type of e-mails -- I mean,
25 letters, actually something from, like, things like

1 subpoena, we need to respond. Or something like come in
2 from legal authority, we need to respond. But general
3 complaints, we just don't have a lot of experience with
4 it, and we don't have any mechanism to take care of
5 letter complaints.

6 Q. So there was no real policy to handle --

7 A. Yes.

8 Q. Did Akanoc have an agent for service with the
9 copyright office as of April 20th, 2007?

10 A. No.

11 Q. When did it first have a designated agent with
12 the copyright office?

13 A. End of last year.

14 MR. COOMBS: We'll mark as 7 another letter,
15 dated November 26th, 2007.

16 (Plaintiffs' Exhibit 7 was
17 marked for identification and
18 is annexed hereto.)

19 BY MR. COOMBS:

20 Q. Have you seen that letter before?

21 A. It came in through my attorney's e-mail, so
22 that's what I got instead of a mail.

23 Q. Can you tell me what, if anything, Akanoc did
24 in response to receipt of this letter from your
25 attorney?

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

LOUIS VUITTON MALLETIER, S.A.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. C073952JW
)	
AKANOC SOLUTIONS, INC., MANAGED)	
SOLUTIONS GROUP, INC., STEVEN)	
CHEN and DOES 1 through 10,)	
inclusive,)	
)	
Defendants.)	
_____)	

DEPOSITION OF JULIANA LUK
VOLUME I
Glendale, California
Saturday, April 12, 2008

Reported by: Janalee Whitacre
CSR No. 12223
NDS Job No.: 128150

1 MR. EDWARDS: Objection, vague and ambiguous.
2 You can answer if you understand.

3 THE WITNESS: I think it's called Thunderbird.

4 BY MS. WANG:

5 Q. Is Thunderbird the e-mail program that you use
6 for Akanoc?

7 A. Yes.

8 Q. Do you ever print out your e-mails for Akanoc?

9 A. No.

10 Q. Do you ever save these Akanoc e-mails?

11 A. No.

12 Q. Do you ever create any files of any kind in the
13 course of your work for Akanoc?

14 A. Only the files with the complaint letter.

15 Q. Can you describe to me what you mean by when
16 you create the files for the complaint letter?

17 A. It's a cover letter to send along with the
18 complaints to the customer.

19 Q. You draft a cover letter for the complaint that
20 you send to the customer?

21 A. I don't draft them.

22 Q. Where do you get the cover letters?

23 A. Akanoc send it to me.

24 Q. Do they send you different cover letters
25 depending on the complaint?

1 the complaints to customers?

2 A. No.

3 Q. Do you do any follow-up after receiving the
4 spamming complaints?

5 A. No.

6 Q. If you receive a second complaint about the
7 same IP address or customer, do you do follow-ups then?

8 A. No, I'll just send it like I used to do it.

9 Q. Do you respond to a second complaint the same
10 way you would respond to a first complaint?

11 A. Yes.

12 Q. How do you know if a complaint that you receive
13 is a second or a third complaint as opposed to a first
14 complaint?

15 A. I don't know.

16 Q. You stated before that if you remember the
17 IP address or the complaint, then that would be the only
18 record that you would have that there was a repeat
19 complaint?

20 MR. EDWARDS: Objection, misstates prior
21 testimony.

22 You can answer.

23 THE WITNESS: Unless it is so many complaints
24 all together in one day, that would make me remember the
25 IP. Otherwise, the next day I'll forget everything.

1 How can I remember so many things?

2 BY MS. WANG:

3 Q. The only record you have of repeat complaints
4 is what you remember in your brain?

5 A. Yes.

6 Q. Was there anything that you wrote on a regular
7 basis in the subject line of the forwarded e-mails?

8 A. I beg your pardon?

9 Q. Did you ever have a standard line that you
10 would type into the subject line when you were
11 forwarding e-mail complaints to customers?

12 A. No.

13 Q. Did you use the subject line of the person who
14 sent you the complaint?

15 A. Because I forward the complaint to the
16 customer, the subject line is already filled out, I
17 don't have to put anything there.

18 Q. Did you ever change that subject line?

19 A. No.

20 Q. You stated you sent the same cover letter to
21 customers regarding these complaints that you would
22 receive. Was there any action that you required them to
23 take in response to your e-mail?

24 A. You mean in the covering letter?

25 Q. Yes.

1 A. They are supposed to resolve it within
2 24 hours.

3 Q. Was there any other action they were supposed
4 to take, other than resolving it in 24 hours?

5 A. I don't know.

6 Q. Did you ever require any one of your customers
7 to do something other than resolve it within 24 hours?

8 A. No.

9 Q. Would you ever check to make sure that they
10 complied with your request, that they resolve the
11 problem within 24 hours?

12 A. No.

13 Q. Did you ever review any Website content to make
14 sure that something that someone was complaining about
15 was removed?

16 A. No.

17 Q. Did you ever check to see if a Website that was
18 the subject of a complaint had moved from one IP address
19 to another IP address within the block assigned to
20 Akanoc?

21 A. No.

22 Q. Are you familiar with a \$25 penalty for
23 violation of your agreements with the customers?

24 A. Yes.

25 Q. And when was that penalty enforced?

1 A. I don't think -- it never enforced.

2 Q. Do you know when it was supposed to be
3 enforced?

4 MR. EDWARDS: Objection, lacks foundation.

5 THE WITNESS: When Akanoc unplug them, I think
6 they are supposed to pay that.

7 BY MS. WANG:

8 Q. Why would Akanoc unplug their customers?

9 A. I don't know.

10 Q. Did you ever decide if someone should have to
11 pay a \$25 penalty for any reason?

12 A. No.

13 MS. WANG: Can we go off the record for a
14 second.

15 (A brief recess was taken.)

16 (Whereupon the interpreter entered the
17 room and was sworn to interpret, as needed.)

18 MS. WANG: For the record, we have the
19 interpreter, Ms. Jackie Luk, joining us. And should the
20 witness ever feel that she needs an interpretation, just
21 let me know and we can have Ms. Jackie Luk interpret for
22 you.

23 THE WITNESS: Yes, thank you.

24 BY MS. WANG:

25 Q. Just so I'm clear, your job function at Akanoc,

1 read his e-mail.

2 Q. Is this one instance where you would follow up
3 to make sure that this problem had been addressed?

4 A. No.

5 Q. So when you say, "If any more complaints come
6 in, I shall have no choice but to shut it down," is that
7 an empty threat?

8 A. Yes.

9 Q. Okay. If we're looking at both situations
10 between Exhibit 43 and 44, why would you in one instance
11 just close the ticket, in 43, and then in 44 say, "If I
12 have any more problems from you, I'll shut you down"?

13 A. Because attacking or hacking, if his IP
14 continue do that, I might receive a lot of complaints.
15 Just like I said, spamming, it will come 20 or 30 pieces
16 a day. And then I would -- I would unplug him, because
17 at that time I can remember his IP.

18 This -- the other one he says he has resolved
19 it, so I trusted him, he resolve it. So I just say,
20 okay, fine.

21 Q. So you had just said that if you do receive
22 more complaints, you would have unplugged the person
23 referenced in Exhibit 44?

24 A. Yes.

25 Q. So your threat was not empty; you would

Exhibit C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LOUIS VUITTON MALLETTIER, S.A.,)
)
 PLAINTIFF)
 VS) C.A. NO. C 07 3952 JW
)
 AKANOC SOLUTIONS, INC., MANAGED)
 SOLUTIONS GROUP, INC., STEVEN)
 CHEN AND DOES 1 THROUGH 10,)
 INCLUSIVE,)
 DEFENDANTS)
 _____)

ORAL DEPOSITION OF ROBERT L. HOLMES,
produced as a witness at the instance of the Defendants,
and duly sworn, was taken in the above-styled
and -numbered cause on the 1st day of April, 2008, from
9:31 AM to 6:22 PM, before Ronald R. Cope, a CSR in and
for the State of Texas, Registered Professional Reporter
and Certified Realtime Reporter, reported by machine
shorthand at the offices of U.S. Legal
Support/MillerParker, Inc., 5910 North Central
Expressway, 100 Premier Place, Dallas, Texas, 75206,
pursuant to the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

1 A. That's not my common practice to do that.

2 Q. The answer is no, you wouldn't do that,
3 normally?

4 A. I wouldn't do that, normally.

5 Q. Have you ever done that on behalf of Louis
6 Vuitton, to look at every domain that's resolved to a
7 particular IP address just because that IP address
8 happens to cover a particular domain that Louis Vuitton
9 asked you about?

10 A. That's a really good question, because when
11 your clients' names started appearing in my database
12 frequently, I started getting curious, and I did start
13 looking and started to see that -- again, I -- just out
14 of my own curiosity, I do, because my business is to
15 understand trends. I do investigate things like that on
16 my own so I can understand the trends. And even though
17 they're not part of a particular assignment, I will try
18 to understand what is going on in the industry. So my
19 answer is yes, I would typically do that if my curiosity
20 piques me to do so.

21 Q. How many times have you done so on behalf of
22 Louis Vuitton?

23 A. I work 14-hour days.

24 Q. How many times have you done so on behalf of
25 Louis Vuitton?

1 A. Again, this is -- I don't know. Countless.

2 Q. More than once?

3 A. Oh, yes.

4 Q. More than a dozen times?

5 A. Most likely, yes.

6 Q. More than a hundred times?

7 A. I would be safe to say a hundred times.

8 Q. So let's assume there are hundreds or thousands
9 of websites that resolve to a particular address. You
10 would look at each of those websites?

11 A. No, sir. I explained to you before that I
12 often -- when I find a situation like this, in order to
13 establish a trend, you have to conduct a survey. You
14 can't -- just as if you wanted to conduct a political
15 survey or something like that, you would actually sample
16 the public just like you would -- say if we had a
17 thousand domain names, I may investigate the first 50,
18 the first hundred. You know, depends on what I want to
19 do. I may investigate two per page and then flip six
20 pages. You know, what I end up doing is I end up
21 looking at the domains and looking at the trends like I
22 see here. Llvouisvuitton.com; Louis Vuitton Bagz, with a
23 Z; Lover Nike; Lux Like; LV Bags; LV-Nike. When I see
24 names like this that are marketed toward carrying
25 counterfeit product, I do get curious and I do start

1 looking at that stuff to establish the trends.

2 Q. Do you report that to Louis Vuitton?

3 A. Not typically, no.

4 Q. You just do it for your own curiosity?

5 A. I do it for my own research, because I consider
6 myself to be an expert in this industry.

7 Q. You mentioned a database a moment ago. What
8 database are you talking about?

9 A. That's my own proprietary database.

10 Q. What does it contain?

11 A. Data from my investigations.

12 Q. What sort of data?

13 A. Information that you saw on our chain of
14 custody, on our Internet Buy Summary, that type of data.

15 Q. Anything else?

16 A. Sure.

17 Q. What?

18 A. Names of cases, other data we may acquire.

19 Q. What do you mean? What other data?

20 A. A lot of that is just proprietary.

21 Q. What other data? Tell me what other data you
22 collect in your database.

23 A. Name servers, common name servers among
24 subjects, which also link cases together where I can
25 catalog -- I often -- happened to about -- I don't know

1 if it was as a result of your clients or other
2 typical -- you know, other people in the same business,
3 but I started to see certain people and certain name
4 servers appearing over and over and over. And name
5 servers and hosts, those are two different roles, as
6 well, often played by the same people. And when I
7 started seeing common name servers just like I started
8 seeing common IP addresses, I started logging those as
9 well. So now my database, ever since possibly 2005 or
10 so, I have been cataloging name servers. So every time
11 my employees or I conduct a Whois search or something
12 like that, not only do we catalog the IP address but we
13 will catalog the two name servers that are part of that
14 search as well. That's an example of some of the data.
15 Some of the other data could be the registrant data, the
16 name and address of the host; some of that data could be
17 telephone numbers that are found on the website, names.
18 It's typically information that's gathered from the
19 observation of the investigation, so contact information
20 from websites, things like that.

21 Q. What is a name server, as you understand it?

22 A. A name server is -- a name server is a place --
23 it's actually -- it's another IP address that the packet
24 has to bounce from to get to the IP address. So say,
25 for example, like I used the IP address as your