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8
 9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

11 Louis Vuitton Malletier, S.A.,)	Case No.: C 07 3952 JW
)	
12 Plaintiff,)	OBJECTIONS OF PLAINTIFF LOUIS
)	VUITTON MALLETIER, S.A. TO
13 v.)	DEFENDANTS' PROPOSED JURY
)	INSTRUCTIONS
14 Akanoc Solutions, Inc., et al.,)	
)	
15 Defendants.)	

16 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

17 PLEASE TAKE NOTICE THAT Plaintiff Louis Vuitton Malletier, S.A. ("Plaintiff" or
 18 "Louis Vuitton") submits the following objections to the Proposed Model Jury Instructions and
 19 Proposed Supplemental Jury Instructions submitted by Defendants Akanoc Solutions, Inc.,
 20 Managed Solutions Group, Inc. and Steve Chen (collectively "Defendants") as set forth below:

21 A. **Objections to Proposed Model Jury Instructions**

22 1. **Defendants' Proposed Instruction No. 1.2 Claims and Defenses**

23 Louis Vuitton objects to Defendants' proposed language of Louis Vuitton's claims as it
 24 does not fully explain the specific allegations of wrongdoing.

25 Louis Vuitton also objects to Defendants' proposed insertion of Defendants' defenses
 26 beginning from "Steve Chen is the manager of MSG and Akanoc..." until the end of Defendants'
 27 proposed instruction largely because they are not defenses, they state facts that are contrary to the
 28 evidence, state facts not in evidence, or misstate the law.

1 Defendants' statements that misstate or are contrary to the evidence and are improper for,
2 among others, the following reasons:

- 3 • Steve Chen is not only the General Manager, but the sole owner of MSG and
4 Akanoc and the sole full time employee vested with responsibility for handling
5 abuse complaints of the type at issue in this litigation;
- 6 • Louis Vuitton disputes the range of goods and services actually provided by
7 Defendants;
- 8 • Louis Vuitton contends Defendants will be unable to prove the alleged "reseller"
9 nature of their customers' business given Defendants' own evidence that they do not
10 know the uses made by their customers of the goods and service provided by them
11 and that, throughout the instructions the more general term "customers" should be
12 employed;
- 13 • The statement Defendants have no "direct or indirect relationship with the operators
14 of the websites" is misleading given their role in (a) providing server capacity; (b)
15 bandwidth which links their customers' servers with the Internet and (c) Internet
16 routing which insures that traffic intended for a particular server arrives at that
17 server;
- 18 • Any instruction stating or implying that Defendants have no advance knowledge is
19 contrary to the evidence of the notices Defendants and evidence of constructive
20 notice based on the pervasive wholesale hosting of websites infringing Louis
21 Vuitton's intellectual property rights;
- 22 • Inappropriate characterizations as "small" the monthly fee for its "provid[ing]
23 bundles of Internet Protocol, or IP addresses, partial or all of a computer server, and
24 a quantity of Internet bandwidth".

25 Additionally, Defendants are unable to produce any evidence of any response to abuse
26 complaints for a critical period of time in the case due to a "crash" or other unsupported stated
27 inability to produce documents which is contrary to Defendants' proposed instruction that
28 Defendants follow some kind of protocol.

1 Defendants' proposed instruction (here and elsewhere in the proposed instructions)
2 misstates the law asserting a purported duty to "monitor" content when none has been asserted in
3 this case or is required to prove the elements of Plaintiff's claims. The suggestion that such
4 monitoring is contrary to federal law is also contrary to prior holdings of this Court concerning the
5 application of the Stored Communications Act and are precluded by the "law of the case" doctrine.
6 "The law of the case doctrine provides that 'a court is generally precluded from reconsidering an
7 issue that has already been decided by the same court...'" U.S. v. Cuddy, 147 F.3d 1111, 1114
8 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotation and
9 citation omitted).

10 On the issue of monitoring, this Court has already ruled that "Defendants cannot remain
11 "willfully blind" to trademark infringement taking place on their servers." Judge Ware's Ruling on
12 Defendants' Motion for Summary Judgment ("MSJ Ruling") p. 17:4-5. Additionally, as adjudged
13 by both Magistrate Judge Lloyd and this Court, the Stored Communications Act does not apply to
14 publicly available content and does not prevent Defendants from accessing such data on their
15 servers. MSJ Ruling p. 16:1-5.

16 2. **Defendants' Proposed Instruction No. 5.1 Damages Proof**

17 Louis Vuitton objects to Defendants' insertion of "you should award damages or" as biased
18 and misleading. Louis Vuitton also objects to the omission of Plaintiff's claim for contributory
19 copyright infringement damages as well as the omission of any reference to statutory damages.

20 3. **Defendants' Proposed Instruction No. 15 Preliminary Instructions -**
21 **Trademark**

22 Louis Vuitton objects to Defendants' instruction to the extent that it includes the definitions
23 and descriptions of the transfer, sale, conveyance, assignment or license of a trademark. These
24 paragraphs are unnecessary as no transfer, sale, conveyance, assignment or license of any
25 trademark is at issue in this case. These paragraphs are misleading and confusing.

1 4. **Defendants’ Proposed Instruction No. 15.24 Trademark Damages –**
2 **Actual or Statutory Notice**

3 Louis Vuitton objects to Defendants’ instruction in its entirety as Defendants’ knowledge of
4 the registration status of Louis Vuitton’s trademarks is not at issue in this case, nor is it dispositive
5 on the issue of notice.

6 5.. **Defendants’ Proposed Instruction No. 15.25 Trademark Damages –**
7 **Plaintiff’s Actual Damages**

8 Louis Vuitton objects to Defendants’ instruction, and all others referring to proof
9 quantifying actual damages, in its entirety as Louis Vuitton’s actual damages are not at issue in this
10 case pursuant to the agreement between Louis Vuitton and Defendants in which Louis Vuitton
11 agreed not to seek actual damages predicated upon its loss – while reserving its right to prove
12 defendants’ unjust profit or statutory damages as it may elect at time of trial.

13 6. **Defendants’ Proposed Instruction No. 15.26 Trademark Damages –**
14 **Defendants’ Profits**

15 Louis Vuitton objects to Defendants’ instruction regarding actual damages. Specifically,
16 the last sentence of the first paragraph which states “[y]ou may not, however, include in any award
17 of profits any amount that you took in to account in determining actual damages” is irrelevant
18 because Louis Vuitton has agreed not to seek actual damages. This statement is misleading and
19 confusing.

20 Louis Vuitton also objects to the sentence “Gross revenue is all of defendant’s receipts from
21 using the trademark in the sale of a product” as it may be confusing or misleading in this
22 contributory case where Defendants are not alleged to have sold the counterfeit items directly.

23 7. **Defendants’ Proposed Instruction No. 17.0 Preliminary Instruction -**
24 **Copyright**

25 Louis Vuitton objects to the phrase “claims ownership of a copyright” in the first sentence
26 of Defendants’ instruction. This phrase is misleading because Louis Vuitton’s ownership of the
27 copyright is not at issue. Ownership of pertinent copyrights has been stipulated to by Defendants
28

1 in the Pretrial Conference Statement. Joint Pretrial Conference Statement p. 8:7 (Undisputed Fact
2 No. 10).

3 Louis Vuitton further objects to the sixth and seventh paragraphs of Defendants' instruction
4 because they include the definition or description of the transfer, sale, conveyance, assignment or
5 license of a copyright. These paragraphs are unnecessary, misleading and confusing as no transfer,
6 sale, conveyance, assignment, license or transfer of any copyright is at issue in this case.

7 8. **Defendants' Proposed Instruction No. 17.22 Copyright – Damages**

8 Louis Vuitton objects to Defendants' instruction to the extent that it discusses actual
9 damages as Louis Vuitton's actual damages are not at issue in this case pursuant to the agreement
10 between Louis Vuitton and Defendants in which Louis Vuitton agreed not to seek its actual
11 damages.

12 Louis Vuitton also objects to this instruction as it omits reference to the recovery of
13 statutory damages.

14 9. **Defendants' Proposed Instruction No. 17.23 Copyright – Actual**
15 **Damages**

16 Louis Vuitton objects to Defendants' instruction in its entirety as Louis Vuitton's actual
17 damages are not at issue in this case pursuant to the agreement between Louis Vuitton and
18 Defendants in which Louis Vuitton agreed not to seek its actual damages.

19 10. **Defendants' Proposed Instruction No. 17.24 Copyright – Damages –**
20 **Defendants' Profits**

21 Louis Vuitton objects to Defendants' instruction to the extent that it mentions actual
22 damages. Specifically, the last sentence of the first paragraph which states “[y]ou may not include
23 in an award of profits any amount that you took into account in determining actual damages” is
24 irrelevant, misleading and confusing because Louis Vuitton has agreed not to seek actual damages.

25 11. **Defendants' Proposed Instruction No. 17.25 Copyright Damages –**
26 **Statutory Damages**

27 Louis Vuitton objects to Defendants' instruction because the instruction is incomplete and
28 misleading. The Defendants' instruction does not contemplate multiple damage awards for

1 contributory copyright infringement stemming from each individual underlying act of direct
2 infringement of Louis Vuitton’s copyrights. Defendants’ instruction implies that damages may
3 only be awarded once for each of Louis Vuitton’s works that has been infringed. This is
4 misleading and contrary to the law which states that damages may be awarded for each individual
5 act of underlying direct infringement per infringer, not merely once for each work of Louis
6 Vuitton’s that has been infringed.

7 Louis Vuitton further objects to Defendants’ proposed language regarding the amounts that
8 may be awarded for each work infringed. Defendants’ wording is confusing and poorly organized
9 in that it states a minimum amount of statutory damages, then states a maximum amount of
10 statutory damages, and in the following paragraphs state amounts that may be awarded that are less
11 than the previously stated minimum and more than the previously stated maximum.

12 **B. Defendants’ Proposed Supplemental Jury Instructions.**

13 1. **Defendants’ Proposed Supplemental Jury Instruction No. 1**
14 **Contributory Copyright Infringement**

15 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
16 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
17 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
18 generally precluded from reconsidering an issue that has already been decided by the same
19 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
20 874, 876 (9th Cir. 1997) (internal quotation and citation omitted).

21 Louis Vuitton objects to the first line of the second paragraph of Defendants’ instruction
22 where it states “[y]ou must decide if any of the following...” as this wording is biased and
23 misleading.

24 Defendants also improperly seek to add additional burdens of proof to find an underlying
25 copyright infringement. There is no requirement to find a “a specific accused website” as
26 Defendants suggest. As stated succinctly by the Court, Louis Vuitton must own a valid copyright
27 and there must have been a violation of an exclusive right under 17 U.S.C. § 106. MSJ Ruling p. 5.
28

1 Defendants also misstate the law as pertaining to contributory infringement essentially
2 negating the possibility of a showing of constructive knowledge to prove the claim and distorting
3 the issue of notice. Defendants’ statement that Louis Vuitton must show Defendants “had actual
4 knowledge of *infringing conduct* by each individual website at the time of infringement” changes
5 the law. Defendants do not dispute that the claim can be satisfied upon a showing that Defendants
6 should have been aware, also known as “constructive” notice, and the inclusion of the language “at
7 the time of infringement” distorts the fundamental understanding that once notified, Defendants are
8 on notice of a particular infringement from that point forward. Defendants’ statements that
9 “[g]eneralized knowledge is not sufficient” and “[y]ou may not infer that any Defendant had such
10 knowledge simply because the infringing materials were stored on an Internet server” are vague,
11 biased and misleading in that they do not allow for constructive knowledge of direct infringement.

12 Defendants’ instruction on “Element Three” is misleading and inconsistent with the prior
13 summary judgment ruling and, as elsewhere, incorrectly states the burden of proof upon Plaintiff
14 by incorrectly asserting that Plaintiff must prove each act of infringement as to each website where
15 the correct burden is any act of infringement at any website.

16 2. **Defendants’ Proposed Supplemental Jury Instruction No. 2**
17 **Contributory Copyright Infringement – Substantial Non-Infringing**
18 **Uses**

19 Louis Vuitton objects to Defendants’ instruction because it is irrelevant and to the extent
20 that it contradicts the standards of law as stated in the Court’s Ruling on Defendants’ Motion for
21 Summary Judgment in violation of the “law of the case” doctrine. “The law of the case doctrine
22 provides that ‘a court is generally precluded from reconsidering an issue that has already been
23 decided by the same court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v.
24 Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). A finding
25 against “Substantial Non-Infringing Uses” is not an element required to be proved on the facts of
26 this case for a finding of contributory liability as Defendants suggest.

1 3. **Defendants’ Proposed Supplemental Jury Instruction No. 3**
2 **Contributory Copyright Infringement – Induced, Caused or Materially**
3 **Contributed to Direct Infringement**

4 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
5 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
6 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
7 generally precluded from reconsidering an issue that has already been decided by the same
8 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
9 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). This instruction misstates the
10 law and omits controlling Ninth Circuit authority on the liability of computer system operators
11 specifically. It is prejudicially misleading insofar as Plaintiff’s claims for contributory
12 infringement include no requirement that Plaintiff prove Defendants assistance was “in concert”
13 with the underlying direct infringers aided by them.

14 4. **Defendants’ Proposed Supplemental Jury Instruction No. 4**
15 **Contributory Copyright Infringement – Inducement of Direct**
16 **Infringement**

17 5. **Defendants’ Proposed Supplemental Jury Instruction No. 5**
18 **Contributory Copyright Infringement – Induced, Caused or Materially**
19 **Contributed to Direct Infringement**

20 6. **Defendants’ Supplemental Jury Instruction No. 6 Contributory**
21 **Copyright Infringement – Induced, Caused or Materially Contributed**
22 **to Direct Infringement**

23 Louis Vuitton objects to Defendants’ instructions because they do not make clear that these
24 are alternative bases for contributory liability and are accordingly misleading.

25 Louis Vuitton objects to Defendants’ instructions to the extent that they contradict the
26 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
27 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
28 generally precluded from reconsidering an issue that has already been decided by the same

1 court...” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
2 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). These instructions are also
3 misleading in omitting the specified standards and examples previously, and correctly cited by this
4 Court on the issue of Material Contribution.

5 7. **Defendants’ Proposed Supplemental Instruction No. 7 Copyright**
6 **Infringement – Induced, Caused or Materially Contributed to Direct**
7 **Infringement**

8 Louis Vuitton objects to Defendants’ instruction because the “content neutral” analysis is
9 not applicable to this case and thus is biased and misleading.

10 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
11 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
12 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
13 generally precluded from reconsidering an issue that has already been decided by the same
14 court...” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
15 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). This instruction misstates the
16 law and is prejudicially misleading.

17 8. **Defendants’ Proposed Supplemental Jury Instruction No. 8**
18 **Contributory Copyright Infringement – Induced, Caused or Materially**
19 **Contributed to Direct Infringement**

20 Louis Vuitton objects to Defendants’ instruction because it states Defendants did not
21 contribute materially if the website at issue could continue to operate on another IP address. This
22 instruction misstates the law and is prejudicially misleading.

23 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
24 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
25 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
26 generally precluded from reconsidering an issue that has already been decided by the same
27 court...” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
28

1 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). This instruction is without
2 support.

3 9. **Defendants' Proposed Supplemental Jury Instruction No. 9 Defenses to**
4 **Contributory Copyright Infringement – DCMA Safe Harbor –**
5 **Requirements**

6 Louis Vuitton objects to this instruction because it misstates the law and is prejudicially
7 misleading. The Digital Millennium Copyright Act does not create an immunity from liability but,
8 subject to detailed conditions which Defendants' Proposed Instruction fails to adequately explain,
9 carves out a limited exemption from certain remedies specified elsewhere in the Copyright Act. It
10 has no application to Plaintiff's claims for contributory trademark infringement. It also did not
11 apply when Defendants had no registered agent to receive notices with the United States Copyright
12 Office.

13 10. **Defendants' Proposed Supplemental Jury Instruction No. 10 Damages –**
14 **Contributory Copyright Infringement Award of Statutory Damages**

15 Louis Vuitton objects to the final sentence of Defendants' instruction because Louis
16 Vuitton's actual damages are not at issue and do not influence the determination of statutory
17 damages. If statutory damages are awarded, the number of underlying direct infringements and the
18 amount of statutory damages to be awarded for each underlying infringement are the only facts that
19 the jury must determine.

20 11. **Defendants' Proposed Supplemental Jury Instruction No. 11**
21 **Contributory Trademark Infringement**

22 Louis Vuitton objects to Defendants' instruction because it implies that Louis Vuitton must
23 successfully prove that all fifteen trademarks were infringed by third parties in order to be awarded
24 damages. Although the number of underlying direct infringements is necessary for establishing the
25 amount of statutory damages to be awarded, any infringement at any website (not just those listed
26 by Defendants) concerning which Defendants had notice, will suffice to meet Plaintiff's burden of
27 proof on the underlying elements of its claims.

1 Louis Vuitton also objects to Defendants’ instruction to the extent that it contradicts the
2 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
3 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
4 generally precluded from reconsidering an issue that has already been decided by the same
5 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
6 874, 876 (9th Cir. 1997) (internal quotation and citation omitted).

7 Defendants’ instruction purports to require additional elements to a finding of underlying
8 infringement, that a third party infringer be specifically identifiable. This is misleading and
9 contrary to the Court’s straightforward ruling that “[a]ll theories of secondary liability for
10 copyright and trademark infringement require some underlying direct infringement by a third
11 party.” MSJ Ruling p. 5.

12 Additionally, Defendants’ suggestion that Plaintiff must go through a multi-factor test to
13 prove a likelihood of confusion in this case involving counterfeits is contrary to law¹ and reason

14
15 ¹ *Brookfield Communs. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1056 (9th Cir. 1999) (“In light of
16 the virtual identity of marks, if they were used with identical products or services likelihood of
17 confusion would follow as a matter of course.”); *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d
18 234, 241 (4th Cir. 1997) (“Our cases make clear, however, that that presumption arises only where
19 the intentional copying is motivated by an “intent to exploit the good will created by an already
20 registered trademark””); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987)
21 (“Where, as here, one produces counterfeit goods in an apparent attempt to capitalize upon the
22 popularity of, and demand for, another's product, there is a presumption of a likelihood of
23 confusion.”); *see Lindy Pen Co. v. Bic Pen Corp.*, 796 F.2d 254, 256-57 (9th Cir. 1986) (reversing
24 a district court’s finding of no likelihood of confusion even though the six other likelihood of
25 confusion factors all weighed against a finding of likelihood of confusion); *Phillip Morris USA
26 Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004) *citing Phillip Morris USA Inc. v.
27 Felizardo*, 2004 U.S. Dist. LEXIS 11154, at *18 (S.D.N.Y. June 18, 2004) (“However, “in cases
28 involving counterfeit marks, it is unnecessary to perform the step-by-step examination . . . because
counterfeit marks are inherently confusing.”); *Phillip Morris USA Inc. v. Felizardo*, 2004 U.S.
Dist. LEXIS 11154, at *18 (S.D.N.Y. June 18, 2004) (“[C]ounterfeit marks are inherently
confusing.”); *Gucci America, Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y.
2003); (“[C]ounterfeits by their very nature, cause confusion...Indeed, confusing the customer is
the whole purpose of creating counterfeit goods.”); *Microsoft Corp. v. Software Wholesale Club,
Inc.*, 129 F. Supp. 2d 995, 1007 fn. 11 (S.D. Tex. 2000) (“However, in the case of a counterfeit
mark, likelihood of confusion is clear.”); *Dial-A-Mattress Operating Corp. v. Mattress Madness,
Inc.*, 841 F. Supp. 1339, 1346 (E.D.N.Y. 1994) (“Moreover, confusion is simply inevitable since
the parties are selling the same products in the same channels of commerce under the guise of the
identical Dial-A-Mattress mark.”).

1 when the entire purpose of a “knock-off” product is to deceive and some of the websites expressly
2 stated they were selling replicas.

3 Defendants’ instruction on “Element Two” is also incomplete, misleading and inconsistent
4 with the prior summary judgment ruling particularly regarding constructive knowledge and the
5 standard for liability. Defendants’ also include unnecessary and misleading discussion with regard
6 to whether Defendants provide products or services.

7 12. **Defendants’ Proposed Supplemental Jury Instruction No. 12**
8 **Contributory Trademark Infringement – Likelihood of Confusion**

9 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
10 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
11 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
12 generally precluded from reconsidering an issue that has already been decided by the same
13 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
14 874, 876 (9th Cir. 1997) (internal quotation and citation omitted).

15 This instruction is also inapplicable to this case involving counterfeits and is contrary to law
16 and practice. It is particularly inapplicable in light of common understandings of the very purpose
17 of “knock-offs” to confuse and to pass off as authentic products, thereby improperly infringing the
18 goodwill of legitimate rights holders who have expended significant resources in the creation,
19 promotion and protection of their marks.

20 13. **Defendants’ Proposed Supplemental Jury Instruction No. 13**
21 **Contributory Trademark Infringement – Likelihood of Confusion**

22 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
23 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
24 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
25 generally precluded from reconsidering an issue that has already been decided by the same
26 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
27 874, 876 (9th Cir. 1997) (internal quotation and citation omitted).

1 This instruction is also inapplicable to this case involving counterfeits and is contrary to law
2 and practice. It is particularly inapplicable in light of common understandings of the very purpose
3 of “knock-offs” to confuse and to pass off as authentic products, thereby improperly infringing the
4 goodwill of legitimate rights holders who have expended significant resources in the creation,
5 promotion and protection of their marks.

6 14. **Defendants’ Proposed Supplemental Jury Instruction No. 14**

7 **Contributory Trademark Infringement Direct Control and Monitoring**

8 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
9 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
10 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
11 generally precluded from reconsidering an issue that has already been decided by the same
12 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
13 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). This instruction misstates the
14 law on constructive knowledge, and improperly inserts additional requirements of control over
15 “operations at infringing websites including advertising and promoting infringing businesses...”
16 that are unfounded by law and reason. It is prejudicially misleading.

17 15. **Defendants’ Proposed Supplemental Jury Instruction No. 15**

18 **Contributory Trademark Infringement Willful Blindness**

19 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
20 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
21 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
22 generally precluded from reconsidering an issue that has already been decided by the same
23 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
24 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). This instruction misstates the
25 law. The Court has already stated the correct standards and they are in direct conflict with
26 Defendants’ improper instruction. Plaintiff further objects that the instructions inappropriately
27 limits what conclusions the jury is entitled to draw from the Defendants’ failure to comply with
28 conditions specified in the Digital Millennium Copyright Act.

1 16. **Defendants’ Proposed Supplemental Jury Instruction No. 16 Damages –**
2 **Willful Trademark Infringement**

3 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
4 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
5 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
6 generally precluded from reconsidering an issue that has already been decided by the same
7 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
8 874, 876 (9th Cir. 1997) (internal quotation and citation omitted).

9 Louis Vuitton also objects to Defendants’ suggestion that willfulness be proved by the
10 elevated standard of “clear and convincing evidence”. This is not the correct standard and
11 Defendants’ citation of one case from the District Court of Oregon, which was expressly rejected
12 by other courts of that district, should not singularly raise the bar on this burden of proof that is
13 contrary to accepted burdens of a preponderance on the issue of willfulness. See Albarran v. New
14 Form, Inc. (In re Barboza), 545 F.3d 702, 705, 707-08 (9th Cir. 2004) (in bankruptcy case, Ninth
15 Circuit reviewed jury instruction and later jury verdict based on a finding of willfulness by a
16 preponderance in similar copyright context); see also Adidas America, Inc., et al. v. Payless
17 Shoesource, Inc., 2008 U.S. Dist. LEXIS 69260, *34 (D. Or. Sept. 12, 2008) (rejecting Defendants’
18 cited holding and citing Gracie v. Gracie, 217 F.3d 1060, 1068-69 (9th Cir. 2000) as having
19 reviewed and approved jury instruction on willfulness without “clear and convincing” standard).

20 Louis Vuitton also objects to the instruction insofar as it purports to refer to Defendants’
21 willfulness when the issue is the willfulness of the underlying direct infringer. Moreover, language
22 describing that Defendants “intended to deceive Louis Vuitton” is a misstatement of the law as
23 Defendants’ intention to deceive Louis Vuitton is not an element which Louis Vuitton must prove
24 in order to show willful contributory trademark infringement.

1 17. **Defendants’ Proposed Supplemental Jury Instruction No. 17**
2 **Contributory Trademark Infringement – Continue to Supply Infringing**
3 **Product to Infringer**

4 Louis Vuitton objects to Defendants’ instruction to the extent that it states liability cannot
5 be found if “appropriate steps are taken to cut off the supply of its product or service to the alleged
6 infringer” because this implies that Defendants must only attempt to cut off supply when there are
7 “simple measures” at their disposal to actually cut off the supply of its product. MSJ Ruling p. 12.

8 18. **Defendants’ Proposed Supplemental Jury Instruction No. 18 Damages –**
9 **Contributory Trademark Infringement – Award of Statutory Damages**

10 Louis Vuitton objects to Defendants’ instruction because the third paragraph is
11 misleadingly worded such that it appears Louis Vuitton can only be awarded statutory damages
12 once for each of their trademarks. This is a misstatement of the law and would lead to Defendants
13 potentially avoiding liability for hundreds of underlying direct infringements and damages for
14 separate and distinct classifications per trademark.

15 20. **Defendants’ Proposed Supplemental Jury Instruction No. 20 Obligation**
16 **of Rights Holder to Notify ISP – ISP Prohibited From Monitoring**
17 **Content of Servers**

18 Louis Vuitton objects to Defendants’ instruction to the extent that it contradicts the
19 standards of law as stated in the Court’s Ruling on Defendants’ Motion for Summary Judgment in
20 violation of the “law of the case” doctrine. “The law of the case doctrine provides that ‘a court is
21 generally precluded from reconsidering an issue that has already been decided by the same
22 court...’” U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998) citing U.S. v. Alexander, 106 F.3d
23 874, 876 (9th Cir. 1997) (internal quotation and citation omitted). As adjudged by both Magistrate
24 Judge Lloyd and this Court, the Stored Communications Act does not apply to publicly available
25 content and does not prevent Defendants from accessing such data on their servers. MSJ Ruling p.
26 16.

