

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4 LOUIS VUITTON MALLETIER,) C 07-03952 JW
5 S.A.,)
6 Plaintiff,)
7 vs.) San Jose, CA
8 AKANOC SOLUTIONS, INC.,) August 26, 2009
9 et al.,)
10 Defendants.)
-----)

11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE JAMES WARE
13 UNITED STATES DISTRICT JUDGE

14 A P P E A R A N C E S:

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1 San Jose, California

August 26, 2009

2 P R O C E E D I N G S

3 THE COURT: We're on the record out of
4 the presence of the jury. I asked Ms. Garcia to
5 ask you all to meet and confer to see if you
6 could reconcile any differences. The report back
7 to me was that you were ready to proceed, that
8 you didn't find that there were any differences
9 that you could reconcile, but I couldn't believe
10 that.

11 MR. COOMBS: There are some preliminary
12 issues that I think we're in agreement, but when
13 it gets to the substantive instructions I think
14 there are two or three areas of disagreement that
15 we probably do need to address with you.

16 THE COURT: All right. Now, it would
17 help if you have for me interlineation so that
18 you can show me what it is that you would wish me
19 to say other than what I'm planning to say.

20 MR. COOMBS: All of the ones in which
21 there are agreement are on the first six pages,
22 and I have interlineated on my copy if Your Honor
23 would like to --

24 THE COURT: Do you have similar?

25 MR. LOWE: We've conferred on that

1 particular copy, Your Honor. So we agree with
2 the interlineations on those six pages.

3 THE COURT: Okay.

4 MR. LOWE: It's the rest of it that's
5 the problem.

6 THE COURT: What am I to make of the
7 highlighted portions?

8 MR. COOMBS: Those are not related to
9 any interlineations. Those are just my notations
10 as I read through it. It's the ink marked either
11 in black or in blue ink.

12 THE COURT: The spelling of Daumier.

13 MR. COOMBS: It's actually "Damier."

14 THE COURT: Damier. So it D-A --

15 MR. COOMBS: -- M-I-E-R. Daumier is the
16 painter. I made that mistake, too, Your Honor.

17 THE COURT: I see a note not disputed.
18 Stipulated?

19 MR. COOMBS: Well, there are certain
20 issues that were stipulated to in the pretrial
21 conference order. However, I think that's come
22 out during the course of the trial. So it's
23 probably not necessary to get into it and it
24 probably isn't necessary for you to modify the
25 instructions.

1 THE COURT: All right. So let me
2 quickly ask one of my law clerks to give this to
3 the supervising clerk and then she can make those
4 changes and bring this back because counsel might
5 need it. All right?

6 So let's go to page -- that was pages 1
7 through 6.

8 MR. COOMBS: That's correct, Your Honor.

9 THE COURT: Through 5.

10 MR. LOWE: Your Honor, if I may, I think
11 the -- it might speed things up if I explain what
12 the fundamental problems are with the
13 instructions. Fundamentally, they misstate the
14 elements of the two claims, as I understand the
15 law.

16 THE COURT: So let's go to the first
17 claim.

18 MR. COOMBS: On pages 6 and 7, Your
19 Honor.

20 THE COURT: Yes.

21 MR. LOWE: These elements so far as --
22 that are listed on page 7 we don't think match
23 any of the law on the subject, the Grokster case
24 or -- in the Supreme Court or any of the Ninth
25 Circuit authority or any law that's been applied

1 by any court.

2 And, in fact, Your Honor, this Court has
3 previously discussed the elements in its ruling
4 on summary judgment and has listed what the
5 elements are in its order of December 23rd, 2008.

6 THE COURT: You're both in agreement on
7 that, that the elements are misstated?

8 MR. COOMBS: No, Your Honor.

9 THE COURT: I'm sorry. I just wanted
10 to know.

11 MR. COOMBS: We do. I'm sorry.

12 THE COURT: So tell me what your
13 language is as to the elements.

14 MR. LOWE: Well, Your Honor, we actually
15 have submitted a number of specific elements in
16 our proposed instructions and the Court has
17 those. And I'd like to direct the Court's
18 attention to certain pages in there that I think
19 cover this material.

20 For example, page 33, the elements are
21 listed. 33 of our Defendants' proposed
22 supplemental jury instructions.

23 THE COURT: Let me see if I can find
24 those. You don't have a copy?

25 MR. COOMBS: I have a copy here, Your

5

1 Honor, if it will do you some good.

2 THE COURT: So page 33 you want me to go
3 to?

4 MR. LOWE: Yes, Your Honor. That's
5 fairly thick principally because there are also a
6 lot of annotations in there as to where the
7 language comes from.

8 THE COURT: All right. So give me the
9 first element.

10 MR. LOWE: I don't have a copy of that
11 in front of me, Your Honor, but I believe the --

12 THE COURT: Oh, this is your copy. I
13 don't want to have what you need. Let me see if
14 I can find it.

15 Let's see. I have proposed supplement
16 jury instructions?

17 MR. LOWE: I believe that's correct,
18 Your Honor.

19 MR. COOMBS: Which pages are you looking
20 at, Counsel?

21 MR. LOWE: 33 of ours.

22 THE COURT: Elements -- it says
23 element 1, direct infringement.

24 MR. LOWE: That's correct, Your Honor.

25 THE COURT: There's no charge here of

6

1 direct infringement.

2 MR. LOWE: Well, direct infringement is
3 necessary under the case law in order for someone
4 to be contributorily infringing.

5 THE COURT: I understand that, but I
6 want to state the elements of contributory
7 infringement.

8 MR. LOWE: Well, our understanding is
9 that the first element of contributory
10 infringement is direct infringement by a third
11 party.

12 THE COURT: Yes.

13 MR. LOWE: And there are various
14 questions, factual questions as to that point.
15 For example --

16 THE COURT: Well, the second element I
17 can add the word "directly infringe."

18 MR. LOWE: Well, Your Honor, there are
19 several subparts to this that these instructions
20 go through that we think have a bearing on this.

21 For example, the actual confusion, the
22 likelihood of confusion, the issue of all of
23 those elements -- all of those pieces that come
24 together to establish likelihood of confusion
25 have to be established.

1 Additionally, there's the
2 extraterritoriality question which I think is
3 absolutely critical here because the evidence --

4 THE COURT: Well, I just -- stick with
5 me. I have language on page 7 which includes all
6 of the elements of direct infringement.

7 "Plaintiff must prove that a website of
8 Defendants' customers or some other successor in
9 interest to Defendants' customers knowingly and
10 intentionally used a mark in connection with the
11 offering for sale, sale or distribution of goods;
12 that the mark was counterfeit; that it was --
13 that is or was not a genuine mark applied to the
14 goods or authorized to be applied by the
15 Plaintiff and the use was likely to confuse or
16 deceive."

17 What element of direct infringement is
18 missing?

19 MR. LOWE: Well, there's the extra
20 territoriality question, Your Honor. Where did
21 this occur? Did this, for example, occur in
22 commerce in the United States or in some fashion
23 that would affect the United States?

24 THE COURT: All right. Well, I can add
25 that. So intentionally used a mark in connection 8

1 with the offer of sale or distribution of goods
2 in the United States. That's what I want. I
3 want you to annotate these to bring those
4 elements to bear.

5 "In the United States" or what was the
6 other language?

7 MR. LOWE: Or in a way that would
8 substantially affect commerce in the United
9 States I believe is the case law language.

10 THE COURT: All right.

11 MR. LOWE: And, further, that there must
12 be -- there's a likelihood of confusion.

13 THE COURT: I have that.

14 MR. LOWE: Well, the language I think
15 that -- I think the likelihood of confusion needs
16 some further explanation. For example,
17 discussion of the Sleekcraft factors or the
18 likelihood of confusion. There is no discussion
19 of that in here.

20 THE COURT: Is that a dispute in this
21 case?

22 MR. LOWE: I think it is, Your Honor,
23 because our position is that there is no
24 confusion, there is no likelihood of confusion
25 because there are different channels of

1 distribution. There are certainly major
2 different prices. There's disclosure of the fact
3 that this is not a genuine product and so on.

4 THE COURT: Where?

5 MR. LOWE: In the evidence that's been
6 presented.

7 THE COURT: No, no. In the ads
8 themselves, it discloses that they are not
9 genuine products?

10 MR. LOWE: Yes, Your Honor.

11 Mr. Livadkin testified that many of the websites
12 say we are selling replicas, we're not selling
13 genuine products.

14 THE COURT: And so your argument would
15 be if you use a registered mark on a good that
16 you say is a replica, that is not a violation of
17 the trademark law?

18 MR. LOWE: Yes, Your Honor. Because
19 using a mark by itself is not per se violation of
20 the law. The use of the mark must create a
21 likelihood of confusion. Now, that could happen
22 when you're selling a replica or it might not.

23 THE COURT: You can argue that.

24 MR. COOMBS: Your Honor, you already
25 have in your instructions about the presumption

1 of confusion that arises with the use of
2 counterfeit marks. We believe that's correct and
3 adequately covers it.

4 MR. LOWE: Your Honor, if I may, that
5 particular instruction, we think that piece of
6 the instruction is absolutely wrong. It is not
7 Ninth Circuit law. It is not Supreme Court law.
8 It's not taken from the -- from the Lanham Act.

9 There is exactly one case in the United
10 States that has ever mentioned that. It's a
11 Third Circuit case, Shakespeare versus Silstar,
12 and that case acknowledged that any discussion of
13 presumption is not the law outside of that
14 circuit.

15 THE COURT: Well, let me go back to your
16 other point. Don't jump just because counsel --
17 you shouldn't interject until I need you to.

18 So you want me to use the factors that
19 are in --

20 MR. LOWE: Sleekcraft factors basically.

21 THE COURT: So I will add those then.
22 That would satisfy you?

23 MR. LOWE: Well, yes. If the jury
24 understands --

25 THE COURT: I'll add that then at page 8 11

1 between lines 2 and 3 under -- after I say
2 "likely to confuse or deceive."

3 MR. LOWE: All right. And, also, Your
4 Honor, we think that it is necessary to explain
5 to the jury that there is -- that the confusion,
6 likelihood of confusion must be probable and not
7 merely possible and we discussed that in --

8 THE COURT: Likely to confuse is not the
9 standard?

10 MR. LOWE: No. Likelihood of
11 confusion. There must be probable likelihood of
12 confusion.

13 THE COURT: So the language that is in
14 the standard instruction is not likely to confuse
15 or deceive, but probably likely?

16 MR. LOWE: Well, this relates to the
17 question of --

18 THE COURT: Just give me the language.

19 MR. LOWE: At page 36 of our proposed
20 instructions, some language that says likelihood
21 of confusion requires that the confusion be
22 probable, not simply a possibility.

23 THE COURT: Yes, but what is that from?
24 I'm trying to get the language --

25 MR. LOWE: What is that from? That

1 is -- that particular language comes from Murray
2 versus Cable National Broadcasting, a Ninth
3 Circuit case, which says the confusion must be
4 probable, not simply a possibility.

5 THE COURT: Well, but doesn't that --
6 isn't that what "likely" means?

7 MR. LOWE: Well, this case discussed the
8 limitation on likelihood of confusion.

9 THE COURT: Yes, but what else could it
10 mean other than "likely" means probably it
11 could?

12 MR. LOWE: Well, we think that the jury
13 needs to understand that it's not merely a
14 possibility that somebody is going to --

15 THE COURT: It doesn't use the word
16 "possible to confuse." It says "likely to
17 confuse." So that's rejected. Move on to
18 others.

19 MR. LOWE: So the next issue regarding
20 likelihood of confusion is that it must confound
21 an appreciable number of reasonably prudent
22 purchasers exercising ordinary care, and that's
23 Ninth Circuit language out of Entrepreneur versus
24 Smith.

25 THE COURT: I'm not trying to capture

1 all of the language in various cases. If you
2 have a standard instruction from either the Ninth
3 Circuit preferably or another circuit, I would be
4 pleased to consider that. But I am not going
5 to -- and I often receive, as I have in this
6 case, voluminous instructions where various
7 courts have used various language. And I can't
8 capture all of that language.

9 My job is to state the law. If I
10 misstate the law, as you said earlier, I want to
11 get that correct, but every word like "likely" is
12 not something that I would wish to define.

13 Now, if the likely to confuse or deceive
14 is not good enough, if it only deceives a small
15 number of people and the law requires that I
16 instruct that it's got to be -- that the
17 Plaintiff has to prove some numerosity, I want to
18 instruct on that and what I'm asking you is to
19 show me that.

20 MR. LOWE: Well, as I say, the case law
21 from the Ninth Circuit in that particular case
22 says that the likelihood has to affect an
23 appreciable number of people who are prudent in
24 exercising ordinary care. Because likelihood of
25 confusion is obviously a complex term of art in

1 the law and a jury is not necessarily going to
2 understand.

3 THE COURT: What's your comment on
4 that?

5 MR. COOMBS: My comment on that is, to
6 the extent that an instruction on likelihood of
7 confusion is required, Sleekcraft has been used.
8 You've already indicated that you're going to
9 include it.

10 THE COURT: Is that included in that?

11 MR. COOMBS: And getting --

12 THE COURT: Sleekcraft factors. Would
13 you, please? Get me a copy of those factors.

14 MR. COOMBS: And coming back to Your
15 Honor's comment, which is what is required is
16 what's in Sleekcraft, going beyond that is
17 unnecessary and confusing and potentially
18 prejudicial to the extent that it might overstate
19 one factor as opposed to --

20 THE COURT: Do you disagree that if I
21 include the factors, that they won't include
22 language on that? I don't have them in front of
23 me. So I --

24 MR. COOMBS: I don't have them in front
25 of me either, but I think --

1 THE COURT: Let's wait for that. Let's
2 go on to other things. It's nine o'clock.

3 MR. LOWE: Your Honor, the other issue
4 has to do with -- let's see -- an element that I
5 think is necessary here -- excuse me.

6 The second -- the second element of
7 contributory infringement is that the Defendant
8 induced or directly controlled and monitored
9 infringement at specific websites. And I don't
10 think there's any reference to that in here.

11 THE COURT: That is not a statement of
12 law.

13 MR. LOWE: I think it is, Your Honor.
14 I'm sorry. I think that that's exactly what the
15 law says. In fact, this Court in this case has
16 said that.

17 THE COURT: Well, I might state that,
18 but that -- the standards for what you have to
19 prove for contributory trademark infringement are
20 not limited to websites. It seems to me that you
21 would wish me to comment on the evidence. And I
22 do state in my instruction that a web hosting
23 service provider is not liable for contributory
24 trademark infringement solely because the
25 provider does not monitor the content of websites 16

1 stored on its servers, but that is not to say
2 that there may not be circumstances under which
3 that company or person may not be liable for
4 contributory trademark infringement.

5 MR. LOWE: Your Honor, our concern is
6 that the instructions suggest that almost any
7 website posting facility would be liable for any
8 kind of infringement as long as they got any kind
9 of notice and anybody is doing it. We think
10 that's not the law.

11 And the Court -- this Court has
12 discussed that in its summary judgment order. If
13 I might approach, I can give the court a copy of
14 this order. And at page 8 you talk about -- I'm
15 sorry, not at page 8, but let me give you the
16 right page.

17 Page 14 you talk about what the elements
18 are, according to the Ninth Circuit.

19 If I may approach?

20 THE COURT: Just a moment.

21 Now I have the Sleekcraft factors in
22 front of me. I will ask my staff to incorporate
23 them in at the place. The only difference I
24 would make is it always in those factors referred
25 to the defendant's use of the mark. So I intend

1 to modify it to be defendant's customers' use of
2 the mark as I defined it because I do define it
3 as the customer's use or some successor of
4 interest use.

5 And it does seem to me that a lot of
6 these have to do with matters that are stipulated
7 to by the strength or weakness of the mark, but
8 to avoid further delay I will include those. And
9 it does seem to me that it speaks to actual
10 confusion, some of which such as product line
11 expansion I don't think are necessary for the
12 case, but since you haven't given me a set that
13 you've agreed to I'll incorporate that.

14 So that would be pulled in and placed on
15 page 8 between lines 2 and 3.

16 And, therefore, I don't need to include
17 this appreciable number of people who are
18 exercising reasonable care that counsel was
19 suggesting that I should include.

20 I'm sorry. You were speaking to a
21 different element. What was that?

22 MR. LOWE: The second element of
23 contributory trademark infringement, Your Honor,
24 universally recognized as Defendants induced or
25 directly controlled and monitored the

1 infringement.

2 THE COURT: Rejected.

3 MR. LOWE: Your Honor, if I may --

4 THE COURT: You may have circumstances
5 where you can contribute by inducing someone else
6 to do it, but I don't believe that that is a
7 statement of the law which says that you may only
8 be liable for contributory infringement if you
9 induce another to do it.

10 If they come to you already intending to
11 do it and you supply a service to facilitate
12 their doing so knowing that they are going to do
13 it and -- or continue doing it, that is
14 sufficient. And move on to another factor, if
15 you wish.

16 You may reserve your argument about this
17 by simply tendering to the Court proposed
18 instructions that are contrary to those that I am
19 about to give because you're not going to
20 persuade me to change my statement of the law to
21 say that inducement is necessary.

22 MR. LOWE: Well, Your Honor, I
23 apologize, but I would ask the Court to look at
24 its own language quoting the Inwood Labs case.

25 THE COURT: There may be cases where

1 inducement were involved -- inducement was
2 involved. That does not mean that inducement is
3 the only thing and is a necessary element of
4 contributory infringement.

5 MR. LOWE: As I understand the law, Your
6 Honor, the only other alternative, if it's not
7 inducement, is that a defendant directly control
8 and monitor infringement.

9 THE COURT: That may be your argument,
10 but that's not the law. This is a case where the
11 evidence is that someone came to a Defendant and
12 said your services are being used to infringe.
13 The argument is that the Defendant then turned a
14 blind eye to that and continued it. Your
15 argument may be, no, he did not or they did not.
16 They took action. But you can't argue that
17 coming to me I can ignore that because I didn't
18 induce this.

19 MR. LOWE: Well, we'll have to take
20 exception. We have, as I indicated earlier,
21 provided a set of instructions which we believe
22 incorporates this other language.

23 In going into the next parts, Your
24 Honor, apparently you're dealing with the issue
25 of willful blindness. And at page 42 of our

1 proposed instructions we have an instruction
2 concerning willful blindness which we believe
3 tracks the law appropriately. In other words,
4 there's a showing that the Defendant have
5 knowledge that they -- of specific infringement
6 and that they deliberately failed to investigate,
7 et cetera.

8 THE COURT: Well, I did ask to have
9 on -- some new language incorporated here because
10 I did not have in this draft the standard. And I
11 did ask my staff to modify this to incorporate
12 language that the standard of should have known
13 is an objective standard. In other words, the
14 language will be that in judging whether or not a
15 Defendant should have known, you must apply the
16 standard of what a reasonable person under the
17 same or similar circumstances would do.

18 It's not a subjective standard as to
19 what a particular Defendant in this case did, and
20 you will see that language shortly.

21 Now, anything further?

22 MR. LOWE: Yes, Your Honor. If I may go
23 to the issue of contributory copyright
24 infringement?

25 THE COURT: Yes.

1 MR. LOWE: Once again we think the
2 elements are not appropriately stated in the
3 instructions at the present time.

4 This -- the way they are stated makes it
5 sound almost like it's an offense that could be
6 committed by anybody at any time without any
7 particular knowledge or intention. But, first of
8 all, there is no discussion here of
9 extraterritoriality.

10 THE COURT: Without any knowledge? The
11 second element says "the Defendant knew or should
12 have known." I don't want you to waste my time
13 by arguing that I am instructing the jury that no
14 knowledge would be sufficient.

15 MR. LOWE: Well, "should have known" is
16 the problem and there must be some limit to the
17 should have known or the constructive knowledge,
18 and we think that -- that that's -- that what we
19 have to have is far more than just some
20 generalized knowledge and that's what I believe
21 the cases indicate.

22 But before I get to that, as I say, I
23 think the principal problem is that this doesn't
24 distinguish between some copyright infringement
25 that is going on outside the United States and

1 something that's going on within the United
2 States. And, first of all, of course, you have
3 to have direct infringement. And if something is
4 going on in China and the law is clear that there
5 is no --

6 THE COURT: Excuse me. Let me interrupt
7 you. I will add, unless counsel objects, the
8 same language with respect to the territoriality
9 language that I added in the United States or in
10 a way that would substantially affect commerce in
11 the United States.

12 MR. COOMBS: Your Honor, I have two
13 comments regarding that suggestion. The first is
14 I assume then you're not proposing to include the
15 use in commerce aspect of the earlier language
16 because use in commerce is not a requirement as
17 you yourself noted yesterday afternoon in the
18 copyright concept.

19 THE COURT: Yes. Do I have that?

20 MR. COOMBS: Yes. It's in the United
21 States or in a way that would substantially
22 affect commerce in the United States. So the
23 second clause would not be required.

24 THE COURT: In the United States, then.

25 MR. COOMBS: And then the second thing

1 is with respect to that language, I think it's
2 actually more correct to say in the trademark
3 instruction that it would have some effect on
4 commerce in the US, not substantial effect. I
5 don't think substantial is what the law
6 requires.

7 THE COURT: *De minimus* would do?

8 MR. COOMBS: Yes, Your Honor.

9 MR. LOWE: Your Honor, I think that
10 actually there is -- the law about this is a
11 little different between trademark and copyright
12 and while you may have a trademark -- trademark
13 infringement activity outside the United States
14 that might affect commerce in the United States
15 thereby giving the Lanham Act some authority over
16 it, the copyrighting law does not have that.

17 So it's clear from the cases that we've
18 cited to the Court that the action of a trademark
19 infringement must be wholly completed within the
20 United States.

21 THE COURT: I was at actually
22 copyright. And so at element No. 3 on page 10,
23 I'm adding "one or more Defendants' customers
24 used the services provided by the Defendants to
25 infringe Plaintiff's" -- it should be "copyright" 24

1 instead of "trademark" -- "or to facilitate by
2 infringement by another of Plaintiff's copyright
3 in the United States."

4 MR. LOWE: Okay. Thank you.

5 THE COURT: Now, I do want to add to
6 that the factors that I gave you in the
7 contributory trademark infringement may be used
8 to determine knowledge with respect to
9 contributory copyright infringement, so that they
10 can use the five factors on page 8 in a similar
11 fashion. Maybe I should say "the factors and
12 definition" because I will give a definition
13 having to do with objective standard. All
14 right?

15 MR. LOWE: Your Honor, the next element
16 we believe is necessary but missing is that the
17 Plaintiff prove that each Defendant had knowledge
18 of specific infringing conduct. The law on this,
19 I think, is extremely clear, particularly in the
20 Ninth Circuit where this has come up many times.
21 And generalized knowledge of possible
22 infringement is not sufficient, but there has to
23 be some specific knowledge of the infringing
24 activity.

25 THE COURT: What do you mean by

1 "specific knowledge"?

2 MR. LOWE: Knowledge of a specific
3 infringement and then action that then relates to
4 action to cause or materially contribute to that
5 infringement, not just that we know that there's
6 infringement going on in the world and maybe
7 some --

8 THE COURT: No, no, no. It says "knew
9 or should have known that one of Defendants'
10 customers were infringing." You want it to be
11 more specific than that?

12 MR. LOWE: More specific. That a
13 particular infringement has occurred and that
14 this Defendant, each Defendant has materially
15 contributed to that or induced or caused that
16 particular infringement. So in this case, for
17 example, we have a lot of big evidence about --

18 THE COURT: But the Defendant doesn't
19 have to induce it or cause it. It's a
20 contributory claim.

21 MR. LOWE: Well, Your Honor, I think
22 that the problem here is that the law actually
23 says that in a contributory infringement
24 situation it must be mentioned.

25 If I might briefly quote language from

1 MGM versus Grokster in the Supreme Court about
2 this very thing. This is a contributory
3 infringement case. It says: "The rule on
4 inducement of infringement as developed in the
5 earlier cases is no different today. Evidence of
6 active steps taken to encourage direct
7 infringement, such as advertising infringing use,
8 instructing how to engage in infringing use,
9 showing an affirmative attempt that the product
10 be used to infringe, and showing that the
11 infringement was encouraged, overcomes the law's
12 reluctance to find liability when a defendant
13 merely sells a commercial product suitable for
14 some lawful use."

15 Now, this gets back, of course, to the
16 Sony case and the other related cases. Clearly
17 the Defendants' services do provide substantial
18 non-infringing uses and the evidence at best
19 shows that there is some infringing use.

20 But the law requires that the jury be
21 instructed that it has to be some active material
22 inducement or causation by the Defendants and not
23 just the happening without their knowledge or
24 happening without them taking some steps. They
25 actually have to help it along.

1 THE COURT: This would be a stronger
2 argument in a case where the evidence doesn't
3 show notice by a Plaintiff to the hosting company
4 and with the volume and frequency that is
5 involved here. And it does appear to me that
6 I'll leave that to your argument that -- because
7 there have been, I thought, good evidence that
8 out of one particular customer who had 40 servers
9 and 1,000 names there were only nine incidents.

10 So you can argue that this is -- this
11 should not be contribution because they took
12 effective action when the de minimus number of
13 complaints were filed.

14 On the other hand, the Plaintiff has put
15 in correspondence and charts and diagrams with
16 long lists of cites, and it does seem to me that
17 I'm satisfied that that could serve as the basis
18 for the jury to find that there was actual notice
19 being given that a particular group of customers
20 were using this service as a matter of course for
21 purposes of infringement, and, therefore, that
22 changes the dynamics from a circumstance where
23 the lack of that notice might cause a different
24 reaction on the part of the web hoster.

25 I don't want to elevate the Defendants'

1 own policies to the force and effect of law, but
2 those policies do demonstrate an awareness that
3 its services can be used for illegal activity or
4 unlawful activity in a number of respects and
5 contractually binds the two parties, the hoster
6 and the user of the service, to restrict that.

7 And that's important in this -- in this
8 world now. This is a -- we're at the cutting
9 edge of the law and perhaps your argument will
10 carry the day that the web hoster is not
11 responsible even under the noticed kind of
12 circumstances here to do more than it did in this
13 case, but that's a factual determination that the
14 jury can make.

15 My instructions on the law allow for
16 either one of you to win. So I'm not going to
17 try to couch them so that the burden is higher on
18 anybody. The burden is to prove that there was
19 knowledge and after that knowledge conduct.

20 MR. LOWE: Your Honor, we think that
21 there has to be more than that. There has to
22 active inducement. For example --

23 THE COURT: I've heard that argument.
24 I've rejected it.

25 MR. LOWE: I appreciate that.

1 THE COURT: It's now 20 after 9:00. And
2 so if that's your only point, and you've well
3 made it, and I disagree that inducement to the
4 point that someone who is otherwise not inclined
5 to do it and so the contribution is to cause them
6 to do it as opposed to a circumstance where they
7 are regularly doing it and you know they are
8 regularly doing it and you provide the service
9 nevertheless to facilitate their continuing to
10 infringe.

11 MR. LOWE: In that situation, Your
12 Honor, the alternative to inducement would be
13 providing material contribution to that
14 infringement. And we certainly want to be able
15 to argue that the Defendants have not materially
16 contributed. They have merely been offering a
17 content-neutral service that is misused by some
18 people, but there was no evidence of any material
19 contribution and active intent to help out these
20 infringers.

21 THE COURT: Well, you see, that's where
22 the law, I think, is. In the past there have
23 been cases where the contribution is supplying
24 something to the -- the infringer so that they
25 can infringe that's tangible, like giving them

1 the color or the paint or the paper or the
2 whatever.

3 Here you are correct. The only thing
4 that the -- the Defendant supplies is a
5 content-neutral service. The question becomes
6 how do you effectively protect intellectual
7 property in a world where content-neutral
8 providers provide a vehicle for the
9 infringement. And it could well be that you'll
10 persuade the jury that that is -- the community
11 should reject that as a basis of liability. That
12 is one of the issues that the jury will be asked
13 to decide here.

14 I haven't given you much of a comment
15 period, but I do need to terminate this entire
16 process.

17 As I said, what I hear is you arguing
18 that I should give the instructions that you
19 submitted to me. My instructions reject that.
20 And so you have perfectly preserved on appeal
21 your ability to argue that the Court gave its own
22 instructions as opposed to mine, and mine were
23 correct, and the Court's were in error, so that
24 your rights are preserved on appeal.

25 MR. COOMBS: Your Honor, I have only two 31

1 comments. The first relates to the instruction
2 on the defense for copyright infringement, which
3 is a good segue seeing as it continues at the
4 bottom of the same page we were looking at,
5 page 10.

6 I think, you know, first, we're not
7 convinced this should go to the jury. And if you
8 wish to construe this as a motion for judgment on
9 that affirmative defense, you may do so, but it's
10 very clear, for example, that the Defendants had
11 not complied with this act at the time the
12 lawsuit was filed.

13 THE COURT: But that's an argument.
14 That's not an instruction.

15 MR. COOMBS: To the extent the Court
16 does instruct on the issue, we believe the
17 instruction is incomplete.

18 THE COURT: You give me the language you
19 want me to use.

20 MR. COOMBS: We think that in the middle
21 of page 11 where it shows the burden on the
22 Defendants, it list three items. We think there
23 are two additional ones that should be
24 identified.

25 THE COURT: Do you have those written

1 out?

2 MR. COOMBS: Well, the first one is to
3 file a designation of an agent with the Copyright
4 Office for receipt of notifications of
5 infringement.

6 THE COURT: You don't have those written
7 out?

8 MR. COOMBS: I don't. I'm reading from
9 the statute.

10 THE COURT: Ah. Well --

11 MR. COOMBS: If you wish me to cite --

12 THE COURT: You're starting at line 12?

13 MR. COOMBS: I'm starting at line --
14 well, we could put it at the end of line 18,
15 which is by 1, 2, 3, and then you could just add
16 4, 5.

17 THE COURT: All right. That said. All
18 right. "To avail itself of any of the four safe
19 harbors, the Defendants must prove they are
20 private service providers, they adopted
21 recently" -- "they adopted 'reasonably
22 implemented' and informed subscribers of a
23 policy. They accommodated and did not interfere
24 with the 'standard technical measures' used by
25 copyright owners to identify and protect."

1 MR. COOMBS: And (4) they designated an
2 agent to receive notifications of claimed
3 infringement with the Copyright Office.

4 THE COURT: That's not an issue here
5 because they received the notice.

6 MR. COOMBS: Well, to the extent they
7 are setting up an affirmative defense here
8 predicated upon that act, we have to be able to
9 show they were not, in fact, eligible for it
10 until at some point after the lawsuit was filed.

11 THE COURT: Designated an agent.

12 MR. COOMBS: And then (5) is that in
13 response to such notifications they expeditiously
14 remove the content complained of.

15 THE COURT: Well, that's the problem
16 because removing the content is not within their
17 power. I don't want to confuse the jury by
18 suggesting that removing the content -- they can
19 remove access to the content or they can --

20 MR. COOMBS: Actually, if I may read the
21 provision in the statute, maybe that will address
22 Your Honor's issue. "That upon obtaining such
23 knowledge acts expeditiously to remove or disable
24 access to the material." That is the language of
25 512(c)(1)(A)(3), which is one of the safe

1 harbor -- the language tracks in the different
2 provisions on that respect only.

3 THE COURT: All right. I'll look at
4 that.

5 Anything else?

6 MR. COOMBS: Yes. The other issue is on
7 the statutory damages and I think this applies to
8 both trademark and copyright. It appears to me
9 that the Court hasn't indicated to the jury what
10 factors they should consider in awarding
11 statutory damages. And I know that there were
12 various instructions and, as you already pointed
13 out, voluminous, but I think there are three
14 elements that the jury should be considering in
15 awarding statutory damages under both acts.

16 One is the amount of actual damages as
17 we argued yesterday afternoon; the second is to
18 punish the Defendants; and the third is to deter
19 conduct on the part of third parties.

20 THE COURT: Where do you draw that
21 language?

22 MR. COOMBS: If Your Honor will give me
23 just a moment, I had it about a moment ago. We
24 had submitted a proposed instruction No. 45
25 and with citations with some authority that

1 specifically related to trademark. It's more
2 detailed obviously, but it encompasses those
3 three key considerations.

4 My concern, Your Honor, is simply
5 that --

6 THE COURT: Well, I have that under --
7 on page 13, line 19 with respect to copyright
8 statutory damages. So it does seem to me that
9 all I have to do is to add that if it's true that
10 its purpose is to penalize the infringer to deter
11 future violations. I don't have actual damages
12 listed here because there wasn't any monetary
13 evidence of the amount of actual damages, but --

14 MR. COOMBS: I guess my point then, Your
15 Honor, is there's not similar language in the
16 trademark instruction.

17 THE COURT: All right. I'll add -- I'll
18 look at that.

19 Anything else?

20 MR. COOMBS: That would be it, Your
21 Honor.

22 MR. LOWE: Your Honor, if I might make a
23 couple of comments about the damages issue.

24 THE COURT: Yes.

25 MR. LOWE: First of all, I don't think

1 the language about "penalize" and "deter" and so
2 forth is appropriate.

3 THE COURT: Doesn't this come from a
4 standard instruction?

5 MR. LOWE: I'm not aware of any. There
6 are relatively few cases where this has gone to
7 the jury over the years. I think the language
8 has been more general.

9 THE COURT: Well, isn't that the point
10 of treble damages and those kinds of things, to
11 penalize?

12 MR. LOWE: Well, it might be. This
13 isn't treble damages. This is neither -- the
14 statutory damages are an alternative to actual
15 damages because of the difficulty of proving
16 actual damages, for example. And exactly what
17 the purposes are is, you know, perhaps a little
18 bit -- a little bit vague in the law.

19 THE COURT: Your argument would be that
20 penalty and the deterrence comes from the
21 willfulness side but not from the statutory
22 damage side?

23 MR. LOWE: I think that's correct, Your
24 Honor.

25 THE COURT: What's your response to

1 that?

2 MR. COOMBS: Well, the jury is being
3 asked to award damages based on alternate
4 measures, one for willfulness. They need to be
5 able to consider these in connection with
6 determining first what range they should be
7 awarding and then within that range what number
8 they should be awarding.

9 THE COURT: But Counsel's point is that
10 statutory damages are not necessarily punitive
11 damages, especially if I'm going to give an
12 instruction on the willfulness. It seems -- I've
13 tried to look at this because there isn't much
14 guidance that I can find in the standard
15 instructions as to whether or not within the
16 statutory damages is a punitive element.

17 And it seems to me that clearly the
18 provision in the law for willfulness and treating
19 that as allowing a greater amount because of
20 willfulness must mean that the statutory damages
21 don't take those factors into consideration
22 because otherwise it would be double accounting.
23 "I want to punish you here and because you're
24 willful I want to punish you there."

25 And so I think that in making the law

1 here is what we're doing, because these are
2 instructions that will be challenged perhaps, if
3 there's a Plaintiff victory, I would prefer to
4 err on the side of leading language having to do
5 with penalizing and deterrence to the willfulness
6 side and not include it on the statutory damage
7 side.

8 MR. COOMBS: Are you purporting to
9 remove it from the copyright instruction then?

10 THE COURT: Just to put it -- because
11 both refer to willfulness and allow the jury to
12 award a greater amount if they find that the
13 conduct is willful, just to move it to there.

14 MR. COOMBS: I think, Your Honor, if you
15 were to review, for example, the Nintendo case
16 that we discussed yesterday, that the Ninth
17 Circuit in discussing the availability of both
18 actual and statutory damages for the same
19 underlying acts with respect to copyright and
20 trademark does, in fact, talk about the punitive
21 purposes of statutory damages and that it would,
22 therefore, not be appropriate.

23 THE COURT: Well, there are statutory
24 damages -- statutory just means the damages are
25 called out by statute. There are treble damages

1 that are statutory, but they would be in the
2 nature of punitive damages.

3 MR. COOMBS: Well --

4 THE COURT: A thousand dollars per
5 violation seems to me, as Counsel argues, may
6 well be a substitute because I can't figure out
7 my actual damages. And so it's designed to award
8 to me the dollars that I would otherwise have
9 been able to recover.

10 MR. COOMBS: It's also designed to allow
11 an award of a larger amount. Just as in the
12 trademark context actual damages can be trebled
13 where willful, statutory damages can be in a
14 larger amount because willful.

15 THE COURT: Because willful.

16 MR. COOMBS: Right.

17 THE COURT: And so that's what I'm -- I
18 know that this is -- this leaves the jury with
19 the ability to include notions of punitives only
20 with respect to willfulness and creates an
21 opportunity for us to understand that if they
22 award any amount for statutory damages they are
23 not doing it to punish the Defendant but to award
24 to the Plaintiff the fair amount that they
25 believe should be awarded because of the damages

1 that it has suffered.

2 MR. COOMBS: Well, Your Honor, before
3 you finally resolve this issue I think it might
4 be a good idea to return to the underlying model
5 instructions as it relates to trademark
6 infringement.

7 THE COURT: I'll look at it.

8 MR. COOMBS: Because I believe they do
9 talk to some extent --

10 THE COURT: Yeah. That's why I asked
11 that question, is this language from the model
12 instruction. So I will look at that.

13 MR. COOMBS: And then the last point,
14 Your Honor, and we can deal with it very quickly,
15 is we take the position that the measure of
16 damages here is not one infringement of each of
17 the intellectual properties based on Defendants'
18 conduct. It is one infringement by underlying
19 customers.

20 THE COURT: Yes.

21 MR. COOMBS: And that it's joint and
22 several with those customers. So multiple awards
23 are possible.

24 MR. LOWE: Your Honor, may I make just
25 two brief comments?

1 THE COURT: Let me interrupt you because
2 I do have to bring this to a close.

3 I was looking at the verdict form and I
4 do think that given the nature of the statutory
5 damages I would ask the jury to answer yes or no
6 with respect to the various marks.

7 I want you to know that because in your
8 closing you need to pay attention because there's
9 been lots of evidence of websites and pictures,
10 but I don't know that there's been a very careful
11 systematic showing that a mark has been used and
12 tying that to the frequency of use or whatever.

13 And it just seems to me that we risk
14 that the jury will say everything has been
15 infringed without any clear evidence that indeed
16 they were. Dates and times have been used and it
17 was very frustrating for me not to have sort of a
18 summary chart which showed the use on the defense
19 side.

20 It was frustrating not to have any
21 identification to the customers and put that into
22 context with respect to dates and times and
23 notices to those various customers as opposed to
24 the web domain name, but they were directed to
25 customers. But that was never put in any kind of 42

1 a summary chart for me and the jury.

2 So I haven't quite finished that part.
3 I'll quickly do that in a few minutes before I
4 summon the jury to read the instructions. And so
5 it could be that you're going to have to make
6 your argument without the verdict form being in
7 front of you and them.

8 And then -- but I will try to -- it says
9 not less than \$1,000 nor more than 200,000 per
10 counterfeit mark per type of good offered for
11 sale.

12 So I need to have that sort of have
13 those in mind and answer yes with respect to that
14 mark having been used and, yes, I'm going to
15 award this amount of money with respect to that
16 mark and no as to that mark and then totaled.
17 And I'll try to get that to you as quickly as I
18 can.

19 MR. LOWE: Two things quickly, Your
20 Honor.

21 On the issue of determining statutory
22 damages, I think there is helpful language in a
23 recent Ninth Circuit case concerning this. It's
24 Dream Games versus PC Onsite, 561 F.3d at 992, as
25 I said, this year, the Ninth Circuit.

1 This is quoted in -- at page 2 and 3 of
2 our memorandum concerning statutory damages that
3 we previously filed, but what the language was
4 that the Ninth Circuit mentioned is that the jury
5 should be guided by, quote, "what is just in the
6 particular case considering the nature of the
7 copyright, circumstances of the infringement and
8 the like."

9 So what is just obviously is up to the
10 discretion of the jury and there are different
11 factors clearly we could argue.

12 THE COURT: I probably have --

13 MR. LOWE: I think that language might
14 be helpful.

15 THE COURT: Yes. I don't know that I
16 will use that, but I should go back to my
17 standard instructions which asks the jury in
18 setting damages to be reasonable, and those kinds
19 of words I think capture the essence of that.
20 I'll look at that.

21 MR. LOWE: One final thing. Concerning
22 the damages at page 12 at the bottom, you
23 indicate that -- or subparagraph 2 says there's
24 not more than \$2 million per counterfeit mark,
25 et cetera.

1 I believe that's not necessarily
2 applicable here. The law actually, I think, has
3 changed and the \$2 million number is applicable,
4 as I understand it, only after October 18, 2008.
5 The case was -- the infringements they are
6 talking about occurred prior to that time. So I
7 think it's really \$1 million.

8 THE COURT: All right. Do you agree?

9 MR. COOMBS: We don't agree, Your Honor,
10 but we're concerned about confusing the jury by
11 getting into different standards based on
12 different dates. And to be honest with you, we
13 would probably agree just to reduce it to the
14 million dollars.

15 THE COURT: Very well. I'll do that.
16 Thank you.

17 (Recess taken.)

18 THE COURT: Very well. We're on the
19 record out of the presence of the jury.

20 I estimate that it's going to take me
21 about twenty minutes or so to go through these
22 and -- which means that if an hour each is taken
23 by you, that will take us past the noon hour.

24 I'd like to finish the argument before
25 noon and I'll tell the jury that perhaps we'll

1 just take a little longer morning session and
2 break at about 12:30 so that we don't have to
3 break in between.

4 Summon the jury.

5 MR. LOWE: Your Honor, before you summon
6 the jury there is still this issue about whether
7 we get to call Mr. Livadkin to inquire about
8 Exhibit 1900.

9 THE COURT: Oh, I'm sorry. You should
10 have brought that up.

11 I went back to the in limines and it
12 does -- I'm satisfied that the questioning of
13 him, as I understand your proffer with respect to
14 sales, is irrelevant. The Plaintiff counsel
15 reminded me there is a claim to damages but not
16 lost sales or lost revenue.

17 The damages are those that would be
18 inherent in the use of the mark, the confusion
19 that would be caused, but not necessarily tied to
20 any monetary damages. And that's why their claim
21 is for statutory damages.

22 MR. LOWE: We will need to close then.

23 THE COURT: Say again?

24 MR. LOWE: We will need to rest.

25 THE COURT: Yes. Summon the jury.

1 MR. LOWE: One other quick question.

2 Does the Court intend to take a break in
3 between the arguments briefly?

4 THE COURT: Yes.

5 Summon the jury.

6 (Recess taken.)

7 THE COURT: Members of the jury, I
8 apologize for the delay, but it -- rather than
9 work late into the night we chose to come in this
10 morning, but we didn't leave ourselves enough
11 time.

12 There was the issue that I raised with
13 you yesterday as to whether or not there would be
14 further evidence based on my legal rulings.
15 There will be no further evidence.

16 And at this time does defense rest?

17 MR. LOWE: The defense rests, Your
18 Honor.

19 THE COURT: And I asked earlier whether
20 or not the Plaintiff intended to call any
21 rebuttal evidence.

22 And there is no rebuttal?

23 MR. COOMBS: That's correct, Your Honor.

24 THE COURT: Both sides have rested.

25 There are certain legal motions that the 47

1 parties are privileged to make at the close of
2 all the evidence. I'll presume that you've made
3 those motions.

4 If you want to make them, I'll give you
5 an opportunity when we take a break here today
6 and I'll consider that those motions have been
7 made at the close of all the evidence.

8 Have you given a set of the instructions
9 to the jury?

10 As you are receiving these let me just
11 give you a comment. As I read through the
12 instructions I sometimes see things that I would
13 wish to change and I'll change my wording as I
14 read through them.

15 I'll try and follow that by making that
16 modification and giving you a revised set. And
17 often there are things that occur during the
18 argument of counsel that will require me to go
19 back and give you further instructions. And so
20 as I've said to you before, all of my
21 instructions are important, but these are the
22 instructions I'm going to give you here at the
23 beginning of the close of the case and before
24 argument.

25 Members of the jury, now that you have

1 heard all of the evidence, it's my duty to
2 instruct you on the law which applies to this
3 case. Copies of these instructions have been
4 made available for you to consult.

5 As I have instructed you, it is your
6 duty to find the facts from all the evidence in
7 the case. To those facts you must apply the law
8 as I give it to you. You must follow the law as
9 I give it to you whether you agree with it or
10 not.

11 In deciding the case you must not be
12 influenced by any prejudices or sympathy. This
13 means that you must decide the case solely on the
14 evidence before you and according to the law.
15 You will recall that you took an oath promising
16 to do so at the beginning of the case.

17 You must follow all of my instructions.
18 You must not single out some and ignore others;
19 they are all important.

20 The evidence from which you are to base
21 your verdict consists of: The sworn testimony of
22 witnesses, both on direct and cross-examinations,
23 regardless of who called the witness; the
24 exhibits which have been received into evidence;
25 and the facts which have been admitted during

1 pretrial proceedings; and any facts to which the
2 lawyers have agreed or stipulated.

3 The deposition testimony of one or more
4 witnesses have been read or displayed.

5 Deposition testimony is given under oath. You
6 should give it the same force and effect as
7 testimony given here in trial.

8 You must decide all the questions of
9 fact in this case from the evidence received in
10 this trial and not from any other source. You
11 must not make any independent investigation of
12 the facts or the law or consider or discuss facts
13 as to which there is no evidence. This means,
14 for example, you must not perform any research on
15 your own or consult reference works for
16 additional information. You must also not
17 conduct any experiments.

18 If there is a conflict between the
19 testimony of one or more witnesses and that of
20 other witnesses, you may have to decide which
21 testimony to believe and which testimony not to
22 believe. You may disbelieve all or any part of
23 any witness's testimony. In making that
24 decision, you should take into account a number
25 of factors, including the following:

1 1. Was the witness able to see, or
2 hear, or know the things about which that witness
3 testified?

4 2. How well was the witness able to
5 recall and describe those things?

6 3. What was the witness's manner while
7 testifying?

8 4. Did the witness have an interest in
9 the outcome of this case or any bias or prejudice
10 concerning any party or any matter involved in
11 the case?

12 5. How reasonable was the witness's
13 testimony when considered in light of all the
14 evidence in the case?

15 6. Was the witness's testimony
16 contradicted by what that witness said or did at
17 another time, or by the testimony of other
18 witnesses, or by other evidence?

19 In deciding whether or not to believe a
20 witness, keep in mind that people sometimes
21 forget things. You need to consider whether a
22 contradiction is an innocent lapse of memory or
23 an intentional falsehood, and that may depend
24 upon -- it may depend on whether it has to do
25 with an important fact or with only a small

1 detail.

2 The persuasiveness of the evidence
3 presented by each side does not necessarily
4 depend on the number of witnesses testifying on
5 one side or the other. You must consider all the
6 evidence in the case, and you may decide that the
7 testimony of a smaller number of witnesses on one
8 side has greater persuasiveness than that of a
9 larger number on the other side.

10 You have heard testimony from
11 individuals who, because of education or
12 experience, have become experts in a particular
13 field. The law permits experts to state opinions
14 about matters in the field of their expertise and
15 they are permitted to state the reasons for those
16 opinions.

17 Expert opinion testimony should be
18 judged just like any other testimony. You may
19 accept it or reject it, and give it as much
20 weight as you think it deserves. In deciding
21 whether to believe an expert's testimony, you
22 should consider the expert's training and
23 experience, the facts the expert relied on, and
24 the reasons for the expert's opinion.

25 Evidence may be direct or

1 circumstantial. Direct evidence is testimony
2 about an event by a witness who personally saw or
3 heard or performed the event. Circumstantial
4 evidence is indirect evidence about an event;
5 that is, it is direct evidence that one event
6 took place from which one can infer that another
7 event, which was not itself directly observed,
8 took place.

9 You are to consider both direct and
10 circumstantial evidence. The law permits you to
11 consider direct and circumstantial evidence to be
12 of equal persuasiveness. However, it is for you
13 to decide how much persuasive -- how persuasive
14 to consider any evidence.

15 Now, during the trial I have ordered
16 that evidence be stricken from the record and
17 instructed you to disregard the evidence. When
18 you are deciding the case, you must not consider
19 evidence which I told you to disregard.

20 During your deliberations you will have
21 copies of the documentary evidence. With respect
22 to electronic evidence, we will provide you with
23 a computer on which to view the exhibits. I have
24 directed Ms. Garcia, the deputy clerk, to assist
25 you in understanding how to operate the

1 equipment. You will also be provided with a list
2 of all exhibits which have been received in
3 evidence. If you need additional equipment or
4 supplies, you may make a request by sending a
5 note.

6 The parties to this case include
7 corporations. All parties are equal before the
8 law and a corporation is entitled to the same
9 fair and conscientious consideration by you as a
10 party. Under the law, a corporation is
11 considered to be a person and like a person a
12 corporation is responsible for its conduct.

13 A corporation acts through its
14 employees, agents, directors, or officers.
15 During these instructions when I speak of the
16 conduct of Louis Vuitton Malletier, S.A., Akanoc
17 Solutions, Inc., Managed Solutions Group, Inc.,
18 MSGI, I am referring to the conduct of their
19 respective employees, agents, directors and
20 officers performed within the scope of their
21 authority.

22 You should decide the case as to each
23 Defendant separately. However, in doing so you
24 might find that one person took actions on behalf
25 of more than one Defendant. If so, you should

1 include each of those Defendants in your
2 decision. Unless otherwise stated, the
3 instructions apply to all parties.

4 The Plaintiff is making two claims
5 against the Defendants: Contributory trademark
6 infringement and contributory copyright
7 infringement. If the Plaintiff proves all of the
8 elements of each claim, the Plaintiff is entitled
9 to your verdict as to each claim.

10 Louis Vuitton has the burden of
11 establishing that Defendants Akanoc, MSGI and
12 Steven Chen contributed to trademark and
13 copyright infringement by another company by a
14 preponderance of the evidence. This means that
15 Louis Vuitton has to produce evidence which,
16 considered in light of all the facts, leads you
17 to believe that what Louis Vuitton claims is more
18 likely true than not true.

19 To put it differently, if you were to
20 imagine that the persuasiveness of evidence could
21 be weighed on scales, and you could put evidence
22 tending to prove, for example, the likelihood
23 that Akanoc, MSGI and Steven Chen contributed to
24 trademark and copyright infringement on one side
25 of the scales and evidence tending to prove the

1 likelihood that these Defendants did not
2 contribute to trademark and copyright
3 infringement on the other side of the scales, the
4 evidence on the likelihood of contributory
5 infringement side would have to make the scale
6 tip in Louis Vuitton's favor.

7 If you evaluate the evidence and you
8 find that the evidence is evenly balanced between
9 the two sides, your decision on contributory
10 copyright and trademark infringement must be in
11 favor of Akanoc, MSGI and Steven Chen.

12 If you evaluate the evidence and you
13 decide that what Louis Vuitton claims is more
14 likely true than not true, in other words, if the
15 scales tip to Louis Vuitton's side, even
16 slightly, then your decision should be in favor
17 of Louis Vuitton.

18 Plaintiff's first claim is for
19 contributory trademark infringement. A trademark
20 is a word, a name, a symbol, a device or a
21 combination of them that indicates the source of
22 goods. The owner of a trademark has the right to
23 exclude others from using that trademark.

24 The trademark laws balance three
25 often-conflicting goals:

1 1. Protecting the public from being
2 misled about the nature and source of the goods
3 and services so that the consumer is not confused
4 or misled in the market;

5 2. Protecting the rights of a business
6 to identify itself to the public and its
7 reputation in offering goods and services to the
8 public; and

9 3. Protecting the public interest in
10 fair competition in the market.

11 The balance of these policy objectives
12 vary from case to case because they may often
13 conflict. Accordingly, each case must be decided
14 by examining its specific facts and circumstances
15 of which you are the judge.

16 In my instructions I will identify types
17 of facts you are to consider in deciding if the
18 Defendants are liable to the Plaintiff for
19 contributory infringement of Plaintiff's
20 trademarks.

21 One way for the Plaintiff to prove
22 trademark validity is to show that the trademark
23 is registered. An owner of a trademark may
24 obtain a certificate of registration issued by
25 the United States Patent and Trademark Office and

1 may submit that certificate as evidence of the
2 validity and protectability of the trademark and
3 of the certificate holder's ownership of the
4 trademark covered by that certificate.

5 In this case you have received evidence
6 that the Plaintiff received registrations for the
7 trademarks identified during these proceedings,
8 including "Louis Vuitton," "LV" and "Damier,"
9 pattern trademarks and those -- and these
10 registrations are now incontestable under the
11 trademark laws. This means that the Plaintiff's
12 registration of the trademark is conclusive
13 evidence of Plaintiff's ownership of those
14 trademarks and that the trademarks are valid and
15 protectable.

16 There is a presumption of a likelihood
17 of confusion or a likelihood of confusion as a
18 matter of law when the offending mark is a
19 counterfeit mark or a mark virtually identical to
20 a previously registered mark coupled with the
21 intent to pass off or borrow from established
22 goodwill.

23 In order to recover for contributory
24 trademark infringement you must find that
25 Plaintiff has proved by a preponderance of the

1 evidence the following:

2 No. 1. Defendants sold web hosting and
3 Internet access services to some other persons or
4 companies or in the case of an individual
5 Defendant, owned or operated a company that sold
6 such services. I will refer to individuals or
7 companies to whom Defendants sold web hosting and
8 Internet access services as "Defendants'
9 customers."

10 No. 2. Defendants knew or should have
11 known that Defendants' customers were using
12 Defendants' services to directly infringe or to
13 facilitate infringement of Plaintiff's
14 trademarks.

15 No. 3. One or more of Defendants'
16 customers used the services provided by
17 Defendants to infringe Plaintiff's trademark or
18 to facilitate infringement by another of
19 Plaintiff's trademarks.

20 And 4. Plaintiff was damaged by the
21 infringement.

22 Now, in order to prove that "one or
23 more of Defendants' customers used the services
24 provided by Defendants to infringe Plaintiff's
25 trademark," Plaintiff must prove that a website

1 of Defendants' customers or some other successor
2 in interest to Defendants' customers knowingly
3 and intentionally used a mark in connection with
4 the offering for sale, sale or distribution of
5 goods in the United States or in a way that would
6 substantially affect commerce in the United
7 States; that the mark was counterfeit, that is,
8 it was not a genuine mark applied to the goods or
9 authorized to be applied to the goods applied by
10 the Plaintiff; and that the use was likely to
11 confuse or deceive.

12 You must consider whether the
13 Defendants' customers' use of the trademark is
14 likely to cause confusion about the source of the
15 Plaintiff's or the Defendants' customers' goods.
16 I will suggest some factors you should consider
17 in deciding this.

18 The presence or absence of any
19 particular factor that I suggest should not
20 necessarily resolve whether there is or there was
21 a likelihood of confusion because you must
22 consider all of the relevant evidence in
23 determining this.

24 As you consider the likelihood of
25 confusion, you should examine the following:

1 No. 1. Strength or weakness of the
2 Plaintiff's mark. The more the consuming public
3 recognizes the Plaintiff's trademark as an
4 indication of origin of the Plaintiff's goods,
5 the more likely it is that customers would be
6 confused about the source of the Defendants'
7 customers' goods if they use a similar mark.

8 No. 2. Defendants' customers' use of
9 the mark. If the Defendants' customers and
10 Plaintiff use their trademarks on the same,
11 related or complementary kinds of goods, there
12 may be a greater likelihood of confusion about
13 the source of the goods than otherwise.

14 3. Similarity of Plaintiff's and
15 Defendants' customers' marks. If the overall
16 impression created by the Plaintiff's trademark
17 in the marketplace is similar to that created by
18 the Defendants' customers' trademark in
19 appearance, there is a greater chance that
20 consumers are likely to be confused by
21 Defendants' customers' use of a mark.
22 Similarities in appearance weigh more heavily
23 than differences in finding the marks are
24 similar.

25 4. Actual confusion. If use by the

1 Defendants' customers of the Plaintiff's
2 trademark has led to instances of actual
3 confusion, this strongly suggests a likelihood of
4 confusion. However, actual confusion is not
5 required for a finding of likelihood of
6 confusion. Even if actual confusion did not
7 occur, the Defendants' customers' use of the
8 trademark may still be likely to cause
9 confusion.

10 As you consider whether the trademark
11 used by the Defendants' customers create for
12 consumers a likelihood of confusion with the
13 Plaintiff's trademark, you should weigh any
14 instances of actual confusion against the
15 opportunities for such confusion. If the
16 instances of actual confusion have been
17 relatively frequent, you may find that there has
18 been substantial actual confusion. If, by
19 contrast, there is a very large volume of sales,
20 but only a few isolated instances of actual
21 confusion, you may find that there has not been
22 substantial actual confusion.

23 5. Defendants' customers' intent.

24 Knowing use by Defendants' customers of the
25 Plaintiff's trademark to identify similar goods

1 may strongly show an intent to derive benefit
2 from the reputation of the Plaintiff's mark,
3 suggesting an intent to cause a likelihood of
4 confusion.

5 On the other hand, even in the absence
6 of proof that the Defendants' customers acted
7 knowingly, the use of Plaintiff's trademark to
8 identify similar goods may indicate a likelihood
9 of confusion.

10 6. Marketing/advertising channels. If
11 the Plaintiff's and Defendants' customers' goods
12 are likely to be sold in the same or similar
13 manner, such as on the Internet, stores or
14 outlets, or advertised in similar media, this may
15 increase the likelihood of confusion.

16 7. Purchaser's degree of care. The
17 more sophisticated the potential buyers of the
18 goods or the more costly the goods, the more
19 careful and discriminating the reasonably prudent
20 purchaser exercising ordinary caution may be.
21 They may be less likely to be confused by
22 similarities in Plaintiff's and Defendants'
23 customers' trademarks.

24 8. Product line expansion. When the
25 parties' products differ, you may consider how

1 likely the Plaintiff is to begin selling the
2 products for which the Defendants' customers are
3 using the Plaintiff's trademark. If there is a
4 strong possibility of expanding into the other
5 party's market, there is a greater likelihood of
6 confusion.

7 To find that "Defendants knew or should
8 have known that Defendants' customers' were using
9 Defendants' services to infringe or to facilitate
10 infringement of the Plaintiff's trademark," you
11 must find that Plaintiff has proved that
12 Defendants had actual knowledge that one or more
13 of Defendants' customers were in the business of
14 themselves or of facilitating others to sell
15 goods using counterfeit marks and would use the
16 services purchased from Defendants for that
17 purpose or should have known that one or more of
18 Defendants' customers were doing so.

19 In making that judgment, you may
20 consider a number of factors, including the
21 following:

22 No. 1. The timing, content and
23 frequency of notices provided to Defendants by
24 the owner of a mark that Defendants' services
25 were being used to infringe Plaintiff's

1 trademarks;

2 No. 2. Actions or inaction by
3 Defendants after receiving notice that the
4 effectiveness of any action -- and the
5 effectiveness of any action with respect to the
6 provision of services by Defendants;

7 3. Policies and practices by the
8 Defendants imposed on its customers with respect
9 to their using its services to infringe
10 trademarks of others;

11 4. The degree of control that
12 Defendants could and did exercise over its
13 servers or services and the use of its servers or
14 services;

15 5. The technical ability and
16 feasibility of Defendants terminating the use of
17 its servers or services by a direct infringer
18 without affecting its provision of services to
19 legitimate users.

20 Now, "knew or should have known"
21 standard is judged from the standpoint of what a
22 reasonable person would do under the same or
23 similar circumstances.

24 A web hosting server provider is not
25 liable for contributory trademark infringement

1 solely because the provider does not monitor the
2 content of websites stored on its servers.
3 Liability must be based upon proof that the
4 service provider knew that its services were
5 being used to infringe and then acting or failing
6 to act in a way to allow the infringement to
7 continue.

8 It is no defense to contributory
9 trademark infringement or contributory copyright
10 infringement that termination of services to a
11 direct infringer could be circumvented by the
12 direct infringer switching to use the services of
13 some other company to continue direct
14 infringement.

15 The second claim, contributory copyright
16 infringement. The owner of a copyright has the
17 right to exclude any other person from
18 reproducing, preparing derivative works,
19 distributing, performing, displaying, or using
20 the work covered by a copyright for a specific
21 period of time.

22 Copyrighted work can be a literary work,
23 musical work, dramatic work, pictorial work,
24 graphic work, as well as various other forms of
25 audio-visual works. However, facts, ideas,

1 procedures, processes, systems, methods of
2 operation, concepts, principles or discoveries
3 cannot themselves be copyrighted.

4 The copyrighted work must be original.
5 An original work that closely resembles other
6 works can be copyrighted so long as the
7 similarity between the two works is not the
8 result of copying.

9 Copyright automatically exists in a work
10 the moment it is fixed in any tangible medium of
11 expression. The owner of the copyright may
12 register the copyright by delivering to the
13 Copyright Office or the Library of Congress a
14 copy of the copyrighted work. After examination
15 and a determination that the material deposited
16 constitutes copyrightable subject matter and that
17 the legal and formal requirements are satisfied,
18 the Registrar of Copyrights registers the work
19 and issues a certificate of registration to the
20 copyright owner.

21 In this case Louis Vuitton alleges that
22 Akanoc, MSGI and Steven Chen have contributed to
23 the infringement of its valid copyrights.

24 The copyrighted works involved in this
25 trial are: A multicolor monogram on black print, 67

1 which is Exhibit 450, and a multicolor monogram
2 on white print, which is Exhibit 449.

3 If you find that the various websites
4 infringed Louis Vuitton's copyright in selling
5 counterfeit Louis Vuitton products, you may
6 proceed to consider the Plaintiff's claim that
7 the Defendants contributorily infringed that
8 copyright.

9 In order to recover for a contributory
10 copyright infringement you must find that
11 Plaintiff has proved by a preponderance of the
12 evidence the following:

13 No. 1. Defendant sold web hosting and
14 Internet access services to some other persons or
15 companies or in the case of an individual
16 Defendant, owned or operated a company that sold
17 such services. I will refer to individuals or
18 companies to whom Defendants sold web hosting and
19 Internet access services as "Defendants'
20 customers."

21 No. 2. Defendants knew or should have
22 known that Defendants' customers were using
23 Defendants' services to infringe or to facilitate
24 infringement of Plaintiff's copyright.

25 3. One or more of Defendants' customers 68

1 used the services provided by Defendants to
2 infringe Plaintiff's copyright or to facilitate
3 infringement by another of Plaintiff's copyrights
4 in the United States.

5 4. Plaintiff was damaged by the
6 infringement.

7 The factors and definition I gave you in
8 the instructions on contributory trademark
9 infringement may be used to infer knowledge with
10 respect to contributory copyright infringement.

11 Even if you find that Defendants'
12 customers use Defendants' services to sell
13 products that infringe Plaintiff's copyrights,
14 Defendants are entitled to rely on the "safe
15 harbor" provisions of the Digital Millenium,
16 Title II, entitled Online Copyright Infringement
17 Liability Limitation Act as a defense. I believe
18 that should be the Digital Millenium Copyright
19 Act. That's what the C stands for in that
20 initial.

21 This provision enables qualified service
22 providers to limit their liability for claimed
23 copyright infringement. These safe harbors
24 provide protection from liability for:
25 Transitory digital network communications;

1 systems caching; information residing on systems
2 or networks at the direction of users; and
3 information location tools.

4 To avail itself of any of the four safe
5 harbor provisions, Defendants must prove by a
6 preponderance of the evidence that:

7 No. 1. They are service providers;

8 No. 2. They adopted, reasonably
9 implemented and informed subscribers of a policy
10 providing that they may, in appropriate
11 circumstances, terminate the accounts of repeat
12 infringers;

13 3. They accommodated and did not
14 interfere with standard technical measures used
15 by copyright owners to identify or protect
16 copyrighted works;

17 4. They designated an agent to receive
18 notification of claimed infringement by making
19 available through its services, including on its
20 website in a location accessible to the public
21 and by providing to the Copyright Office,
22 substantially the following information:

23 A. The name, address, phone number, and
24 electronic mail address of the agent;

25 B. Other contact information which the 70

1 Registerer of Copyrights may deem appropriate;

2 And 5. Upon notification of claimed
3 infringement, they responded expeditiously to
4 remove, or disable access to, the material that
5 is claimed to be infringing or to be the subject
6 of infringing activity.

7 "Service provider" means a provider of
8 online services or network access, or the
9 operator of facilities therefor, and includes an
10 entity offering the transmission, routing or
11 providing of connections for digital online
12 communications, between or among points specified
13 by a user, of material of the user's choosing,
14 without modification of the content of the
15 material as sent or received.

16 "Reasonably implemented policy" means
17 that the service provider has a working
18 notification system, a procedure for dealing with
19 DMCA-compliant notifications, and if it does not
20 actively prevent copyright owners from collecting
21 information needed to issue such notifications.

22 An implementation is reasonable if,
23 under appropriate circumstances, the service
24 provider terminates users who repeatedly or
25 blatantly infringe copyright.

1 "Standard technical measures" are
2 defined as "technical measures that are used by
3 copyright owners to identify or protect
4 copyrighted works," and:

5 1. Have been developed pursuant to a
6 broad consensus of copyright owners and service
7 providers in an open, fair, voluntary
8 multi-industry standards process; and

9 2. Are available to any person on
10 reasonable and nondiscriminatory terms; and

11 3. Do not impose substantial costs on
12 service providers or substantial burdens on their
13 systems or networks.

14 I will instruct you about the measure of
15 damages. By instructing you on damages, I'm not
16 suggesting which party should win on any issue.

17 If you find for the Plaintiff on the
18 Plaintiff's contributory trademark infringement
19 claim, you must determine the Plaintiff's
20 damages. The Plaintiff seeks a statutory damage
21 award established by Congress for each work
22 infringed.

23 In a case involving the use of a
24 counterfeit mark in connection with the sale or
25 distribution of goods or services, the Plaintiff

1 is entitled to statutory damages if:

2 1. Not less than \$1,000 or more than
3 \$200,000 per counterfeit mark per type of goods
4 or services sold, offered for sale, or
5 distributed as the Court considers just; or

6 2. If you find that the use of the
7 counterfeit mark was willful, not more than
8 \$1 million per counterfeit mark per type of goods
9 or services sold, offered for sale or
10 distributed.

11 The Defendants are liable for willful
12 contributory infringement if you find that the
13 Plaintiff has proved by a preponderance of the
14 evidence at least one of the following:

15 No. 1. Defendants acted in bad faith;

16 2. Defendants acted with deliberate
17 disregard for Plaintiff's trademark rights; or

18 3. Defendants acted with intent that
19 Defendants' customers infringe the Plaintiff's
20 trademarks.

21 If you find for the Plaintiff on
22 Plaintiff's contributory copyright infringement
23 claim, you must determine the Plaintiff's
24 damages. The Plaintiff seeks a statutory damage
25 award established by Congress for each work

1 infringed. Its purpose is to penalize the
2 infringer and to deter future violations of the
3 copyright laws. The amount you may award as
4 statutory damages is not less than \$750 nor more
5 than \$30,000 for each work you conclude was
6 infringed.

7 However, if you find the infringement
8 was innocent, you may award as little as \$200 for
9 each work innocently infringed.

10 An infringement is considered innocent
11 when the Defendant proved both of the following
12 elements by a preponderance of the evidence:

13 No. 1. The Defendants were not aware
14 that their acts contributed to infringement of
15 Plaintiff's copyright; and

16 2. Defendants had no reason to believe
17 that their acts contributed to an infringement of
18 Plaintiff's copyright.

19 If you find that the infringement was
20 willful, you may award as much as \$150,000 for
21 each work willfully infringed. An infringement
22 is considered willful when the Plaintiff has
23 proved both of the following elements by a
24 preponderance of the evidence:

25 No. 1. Defendants engaged in acts that 74

1 contributed to the infringement of Plaintiff's
2 copyright; and

3 2. Defendants knew that those acts
4 contributed to the infringement of Plaintiff's
5 copyright.

6 I will now permit counsel for the
7 parties to make their closing arguments. Counsel
8 for the Plaintiff will make a closing argument,
9 followed by the closing argument by counsel for
10 the Defendants. If Plaintiff's counsel does not
11 use all of the allotted time, counsel for the
12 Plaintiff will be permitted a brief rebuttal
13 argument.

14 And then I'll have some brief additional
15 instructions for you with respect to the conduct
16 of your deliberations. And I'll also have an
17 opportunity then to comment on the verdict form
18 which I'm still preparing for you.

19 Because of the delay in our getting
20 started, instead of taking our normal break at
21 noon, in order to allow each side about an hour
22 for their argument, we may go a little beyond
23 noon, but we will take a break in between the two
24 arguments.

25 Should you need a break during the

1 course of the argument, restroom break or
2 something of that kind, we want you to be
3 comfortable. So raise your hand and let us know
4 and we'll take a break even in the course of the
5 argument. I hope that that won't be necessary.

6 At this point do you need a break to set
7 up the courtroom for your argument?

8 MR. COOMBS: No, I don't believe so,
9 Your Honor.

10 MR. LOWE: Very well. The Court will
11 call on Plaintiff's counsel for closing argument.

12 MR. COOMBS: Thank you, Your Honor.
13 Good morning, ladies and gentlemen.

14 And thank you again for the time that
15 you've taken to consider the evidence in
16 connection with Louis Vuitton's claims for
17 contributory infringement by the Defendants in
18 this matter.

19 Some things not showing up yet?

20 JUROR: No. We just were requesting a
21 bathroom break very quickly.

22 THE COURT: That's okay. I should have
23 anticipated that.

24 MR. COOMBS: Better now than in a few
25 minutes.

1 THE COURT: Why don't we give you five
2 minutes before we start. So we'll come back in
3 five minutes.

4 (Recess taken.)

5 THE COURT: Ready to resume?

6 MR. LOWE: Yes, Your Honor.

7 THE COURT: Summon the jury.

8 (The following proceedings were held in
9 open court in the presence of the jury:)

10 THE COURT: Very well. You may proceed,
11 Counsel.

12 MR. COOMBS: Thank you, Your Honor.

13 And again thank you and good morning.

14 You'll recall that at the beginning of
15 the case I told you that this was a simple case.
16 And before you think I'm crazy I want to explain
17 to you again why I think it's a simple case.

18 I agree with you that we're talking
19 about intangible properties and we're talking
20 about them in the virtual world and because of
21 that you've had to be introduced to a whole new
22 language over the course of a few days. And that
23 can make it seem kind of complicated at times and
24 on the Court's urging I think we've provided help
25 with that with the glossary that you've been

1 provided.

2 But the case may also seem more
3 complicated than it really is because the
4 Defendants in this case keep wanting us to walk
5 down some side alleys that really don't have much
6 to do with the issue that you are expected to
7 decide according to the Court's instructions.

8 Some of the issues that have been talked
9 about and are very interesting have some
10 relationship to the issues that you're going to
11 be asked to decide, have been asked to decide,
12 are things like the domain name registration
13 system, things like where is the infringement
14 occurring, what is -- what's happening in the
15 United States as opposed to somewhere else, what
16 happens when a website switches from one of the
17 Defendant's servers to someone else's servers.

18 Interesting issues. I'm sure you're
19 going to hear more about them in the Defendants'
20 closing statement, but in the final analysis
21 these issues do not change the fundamental issues
22 that I mentioned to you in the opening statement,
23 which is that this is about what the Defendants
24 could have done, should have done, didn't do and,
25 as we've seen during the trial, still aren't

1 doing.

2 Now, yesterday during Mr. Chen's
3 testimony you heard some references to an
4 apartment building. And in a way we're walking
5 down these laneways, but really we should be
6 walking towards the apartment building that
7 Mr. Lowe has been setting up as a metaphor for
8 Defendants' business.

9 And the point is that that apartment
10 building is the Defendants' business, not
11 Apartment 10B. Apartment 10B may be a server, it
12 may be a website, whatever. But the point is I
13 think the evidence demonstrates that the amount
14 of infringing activity that's going on using the
15 Defendants' equipment, using the Defendants'
16 servers a mere couple blocks from here is such
17 that the whole building is infested with
18 something that needs to be addressed.

19 Now, when you think of it in those terms
20 it's pretty clear that we can't just let that
21 happen. If this building were next door to you
22 and it was full of criminals, it was loud noise
23 every night, it was flooding, it was not
24 maintained according to health standards, we'd
25 all say, of course, something has to be done.

79

1 And, in fact, it's not just up to the
2 law to deal with it. If you're a neighbor of
3 such a building, you have rights, too. You have
4 an ability to bring a claim for nuisance or deal
5 with the problem through various mechanisms.

6 And that's essentially what Louis
7 Vuitton is trying to do in this case, to try to
8 make sure that the owner of that apartment
9 building, the Defendants here, live up to the
10 standards that are expected of people who are
11 engaged in that business.

12 What's interesting here, though, is that
13 Mr. Chen has put his business sort of like on a
14 city border to kind of make it more difficult.
15 He's trying to say, "Well, I'm on the border
16 between the United States and China and,
17 therefore, we're not really subject to US law."

18 But I think it's reasonable to infer
19 that if we were sitting in a Chinese court he'd
20 be saying the same thing. "If you have this
21 issue, you should be talking to me in San Jose."

22 We're talking to him here in San Jose
23 and we should expect you to sort of look to the
24 issues in terms of the huge amount of illegal
25 conduct that's going on using his servers and

1 continuing to use those servers after repeated
2 notices from Louis Vuitton.

3 When you're thinking about the evidence
4 that I'm going to briefly outline for you this
5 morning you should always keep in mind the
6 distinction between what was going on before
7 August of 2007 and after.

8 Remember, August 2007 is the date
9 Mr. Chen was served with process whether that was
10 August 20th, as he first said, August 15th, as
11 was indicated by the proof of service, or August
12 8th when he was corresponding with his customer
13 about one of the websites that was listed in the
14 complaint. But you'll see that the service of
15 the complaint acted as a trigger for different
16 action, more action, but still not enough action.

17 Now, you'll remember Mr. Lowe in his
18 opening statement said that we were mistaken in
19 this case because his clients aren't the
20 problem. He said that the Defendants are doing
21 everything that they possibly can to try to help
22 Louis Vuitton and other people in similar
23 businesses to avoid the sale of knockoffs on the
24 Internet.

25 And yet yesterday you heard Mr. Chen

1 say, "Oh, these are business decisions. I'm not
2 concerned with these. I just forward them on. I
3 don't handle them as seriously as everything
4 else. That should be something between whoever
5 it is doing the underlying wrongful act and Louis
6 Vuitton. I wash my hands of it."

7 That is not doing everything you can.
8 And Mr. Lowe's suggestion to you that they are I
9 think demonstrates that they know they are not
10 doing what the law requires.

11 Now, of course, we've also heard
12 testimony from Ms. Luft that if you're a big
13 company that they are somewhat scared of like
14 Microsoft, in your case we'll do more.

15 So I mentioned that you have to draw
16 this distinction between before August 2007 and
17 after it. And on the screen is a chart you have
18 not yet seen. And I apologize. There's a fair
19 bit of detail, but I think it conveys the
20 essential point, which is that from roughly
21 October 2006 to August of 2007 Louis Vuitton
22 transmitted 19 demands to the Defendant saying
23 please deal with this.

24 And at the bottom, and I know you can't
25 read it, but you can see that some of the

1 websites are indicated in red ink. Those are the
2 ones that are not the subject of the first
3 notification. They are the subject of the second
4 or a third or a fourth notification and the
5 problem persisted.

6 We do know one thing, actually. I
7 misspoke. Mr. Chen did say he remembered one of
8 the letters, the one that was sent in April of
9 2007 from Miles. He remembers it because it was
10 sent to his home as well as to the office. We
11 hadn't heard anything from him from any of the
12 notices that were sent to his office.

13 So what did he do with the one he does
14 remember? He stuck it on that pile that had been
15 sitting there for several months already
16 gathering dust. We still don't know what
17 happened to that letter. And, of course, I think
18 it's reasonable to infer that no action was taken
19 in response to any of the demands that were sent
20 before August 20th -- or August of 2007.

21 But even after -- 592.

22 Even after the lawsuit and one would
23 hope additional incentive to try and address the
24 problem and discourage this illegal use -- and
25 remember, Mr. Chen has agreed this is a violation

1 of law, it's a violation of its terms and service
2 and even a crime, but somehow he still thinks
3 it's just a business dispute.

4 But even at this point one would think
5 there would be more incentive to try and
6 cooperate with Louis Vuitton write to owners, as
7 Mr. Lowe suggested in his opening statement, you
8 can see here that in response to the letter of
9 July, one IP, one customer had 100 websites
10 offering counterfeit Louis Vuitton product and a
11 few months later in response to another letter in
12 January, same customer, same server and many of
13 the same websites still being on Mr. Chen's
14 servers.

15 Have they told you what they did?
16 Nothing. All they do is send the note to the
17 customer, "please deal with it." And you know
18 what they do? They move it from one extra IP to
19 another. And Mr. Chen has testified these things
20 are sort of freely available. They can contact
21 up and get more extra IP any old time they want
22 as part of the package that he offers.

23 So what is the "could have" that they
24 should have done? 21.

25 We've talked about their terms of

1 service, we've heard Mr. Chen's testimony about
2 their terms of service, and we've seen that they
3 send a warning to the customer.

4 Can you just scroll down? I think it's
5 towards the end of the documents where you have
6 the various remedies.

7 No. Next page. Keep going.

8 One more.

9 Okay. Thank you.

10 So in paragraph C, warning the customer,
11 we know they do that or at least after August of
12 2007 before we filed the lawsuit. We're not
13 clear that they did even that.

14 The next provisions, though, have not
15 really been invoked by the Defendants in any of
16 the numerous cases that they themselves admit.
17 Remember, we've looked at Exhibit 1598. We've
18 seen that since August of 2007 Louis Vuitton has
19 sent repeated notices with numerous websites
20 listed in those notices and the Defendants -- the
21 only thing that's escalated, contrary to
22 Mr. Gralnik's testimony, is the amount of
23 infringing activity.

24 And why is that? That's because the
25 only thing that ever happens is a warning. And,

1 yes, they sometimes disable or unplug, but
2 Mr. Chen made fairly clear that he does that to
3 sort of get the customer's attention. He's not
4 really suspending and he's not removing content,
5 which are among the other remedies that he has.

6 All he's doing is just saying, "Hey, I
7 didn't hear from you in response to my warning."
8 This will make sure he gets back to me. And in
9 some cases they do. And that's good. As I said
10 in my opening statement, we applaud the
11 improvement. We just wish there were more.

12 And as I said in my opening statement,
13 we think they do this because they have a
14 business model that works for them. I think the
15 amount of this activity demonstrates that it's of
16 value to them to have this added service.

17 They may not provide other services or
18 they may, or that's sort of irrelevant in a
19 manner of speaking, but the one thing they can
20 distinguish themselves from in this body of I
21 think Mr. Lowe said hundreds of ISPs in the
22 United States is the fact that they can help
23 website operators on their servers avoid
24 responding to abuse complaints.

25 Now, the judge has explained to you in

1 discharging your duties that you need to weigh
2 the evidence. And he said that if the scale tips
3 to the Louis Vuitton side even slightly, your
4 decision should be in favor of Louis Vuitton.
5 Interestingly, I see that the Court has a statue
6 of Lady Justice.

7 You're all familiar with the image of
8 the blindfolded woman who holds a scale. And the
9 blindfold is the impartiality that the judge
10 referred to in his instructions, and the scale is
11 that burden.

12 And we are all used to criminal cases
13 where we talk about beyond a reasonable doubt,
14 but in this case it's a civil case and it's
15 preponderance of the evidence, which means if
16 it's equal and you put a feather on one side,
17 then you have to rule for the party on where the
18 feather falls. We obviously think we go way
19 beyond the feather, but that's the balance that
20 needs to be weighed here.

21 Now, the concept of weighing evidence
22 also comes up in connection with how much weight
23 you assign to documents, testimony, demonstrative
24 evidence, physical evidence, anything else that's
25 part of the record that you're entitled to

1 consider in this case.

2 And you heard the Court say that you can
3 consider such factors as whether the witness has
4 an interest in the outcome of the case, how
5 reasonable was the witness's testimony and
6 whether it was contradicted by other evidence.

7 And we suggest to you that these factors
8 indicate that Mr. Chen's testimony should not be
9 accorded any considerable weight or should be
10 severely discounted because of the kinds of
11 issues that we've seen during the course of his
12 testimony.

13 But, unfortunately, it doesn't only
14 taint Mr. Chen's testimony. You will remember
15 that when Mr. Gralnik testified, he said he
16 didn't really have any background on these issues
17 until he was retained as an expert in this case.
18 And he talked about what he had done and the
19 significant part of it consisted of an interview
20 with Mr. Chen.

21 Well, if Mr. Chen under oath is --
22 raises issues without being under oath, as I'm
23 sure he was when he was talking to Mr. Gralnik,
24 we have to question whether the assumptions and
25 facts that Mr. Gralnik was relying on to come to

1 his conclusions should be accorded the same
2 weight as well.

3 Now, Louis Vuitton has, as I already
4 indicated, we think met and exceeded its burden
5 and we think that part of it is due to the fact
6 that many of the elements that the Court has
7 described to you are basically undisputed here.

8 The trademark certificates that are
9 given conclusive weight have been admitted into
10 evidence. The copyright certificates have been
11 admitted into evidence. And the Defendants don't
12 dispute Louis Vuitton's ownership of these
13 rights. They don't effectively dispute the value
14 of these rights.

15 There's no real dispute about
16 confusion. The counterfeit products are intended
17 to play off of Louis Vuitton's marks. And, in
18 fact, in this respect the Defendants try to have
19 their cake and eat it, too. I think they are
20 going to suggest to you that, well, when it says
21 that it's a knockoff on a website, then the
22 person who's buying it must know that it's a
23 knockoff and is, therefore, not confused.

24 But the test isn't that. The test is
25 likelihood of confusion. And there's two things

1 to say in response to that. First, the
2 Defendants can't then also say, "Well, it's hard
3 to tell Louis Vuitton. We can't tell." And,
4 second, the person who buys it, whether deceived
5 or not, is not the only measure. That's why it's
6 called likelihood of confusion.

7 If I buy this and I give it to -- I
8 won't give it to anybody, but I give to it
9 somebody. The recipient does not know that it's
10 not Louis Vuitton. The person who sees me pull
11 it out of my jacket pocket when I go to buy
12 something in the store doesn't know. They see
13 shoddy inferior merchandise that they are used to
14 holding up to the high standards that are also
15 undisputed in this case. The quality controls
16 that Mr. Livadkin has testified to are undisputed
17 here.

18 There's no real dispute that these
19 websites were infringing. You have the
20 documentary evidence, printouts of websites,
21 products you can take a look at. This activity
22 all occurred through various websites from ape168
23 to bigworldshoes to any number of other domains
24 that reference you to those websites and I
25 haven't heard any indication that there's any

1 dispute about that.

2 And Exhibit 1598 shows us there's no
3 real dispute that these websites were, in fact,
4 hosted on the Defendants' servers, which, as I
5 already indicated, are right here in San Jose.

6 1598 shows us the activity continued
7 after notice was given to the Defendants about
8 the activity. And not just once or twice. This
9 is a pervasive, systematic, ongoing over years
10 now infringement of Louis Vuitton's valuable
11 rights.

12 Now, Mr. Lowe in his opening statement
13 said, "Gosh. You know, there are over a hundred
14 million websites in the world. My clients don't
15 know what Bigworldshoes.com is doing." But if
16 you look at Exhibit 1598 and you scroll down to
17 Bigworldshoes, you'll see that Louis Vuitton told
18 them not once, not twice, not three times, but
19 four times. And then they have the temerity to
20 come in here and say, "Gosh, we don't know what
21 they're doing."

22 Now, the instructions also tell you that
23 you can consider whether or not the Defendants
24 should have known about that conduct. And,
25 frankly, we don't think you have to get there to

1 make a finding in favor of Louis Vuitton.

2 But as the judge indicated, the factors
3 on should have known also demonstrate that they
4 should have dealt with this problem, things like
5 the frequency of the notice, the fact that in
6 response to those notice, either no action was
7 taken or minimal action was taken and that their
8 own policies, which we were looking at earlier on
9 the screen, largely remain unimplemented. And,
10 in fact, Mr. Chen's testimony he's stated that he
11 doesn't even really understand what those
12 policies mean.

13 Now, the Court read an instruction on
14 the Defendants' only defense in this action, the
15 Digital Millennium Copyright Act which was passed
16 by Congress when the Internet was really just
17 getting going and it was passed to create a kind
18 of shield.

19 It's a typical Washington compromise
20 that companies that carry the data over the
21 Internet wanted to have some kind of immunity
22 from potential liability and for that they
23 negotiated a procedure to deal with those kinds
24 of infringements. And there are various
25 requirements associated with that law in order to 92

1 be eligible for that immunity.

2 Now, we've already heard -- and you've
3 heard the elements, and I'm not going to repeat
4 what the Court has already said, but one of them
5 was filing an agent with the copyright office,
6 and we've already heard that the Defendants did
7 not do that until after this lawsuit was filed.

8 Again, we applaud them. It's an
9 improvement, although based on Mr. Chen's
10 testimony I'm not sure how much of an improvement
11 because it's not clear to me that he understands
12 what the Act was for and what obligations follow
13 if you want to avail yourself of that immunity.

14 You have to publish information about
15 your policies and your agent on your website, but
16 we've heard Mr. Chen testify the Managed
17 Solutions Group still doesn't have a website. So
18 even if there's an arguable application of the
19 defense, it does not apply to that Defendant. It
20 is only as to copyright. We have a contributory
21 trademark claim. It is not a defense to that
22 claim.

23 And then finally, as the Court
24 explained, in order to avail yourself of the
25 defense, you have to reasonably implement your

1 policies and you have to expeditiously remove in
2 response to notices. I don't see it. I'm
3 sorry. I mean, they get notices. They get
4 repeated notices.

5 We looked, I think, last week at
6 Eastarbiz as just an example from the notices
7 sent in November, and that site was still up, the
8 same IP with the same customer doing the same
9 illegal activity about four months after Louis
10 Vuitton first notified them of the site.

11 That under no scenario constitutes
12 reasonably expeditious disabling of access or
13 removal of the content. And in fact, you heard
14 Mr. Gralnik yesterday say that a few days to a
15 week is more consistent with the industry
16 practices with which he became familiar during
17 the course of his preparation.

18 So that leads to the question of
19 damages. And I find it -- I accept the fact that
20 we're not talking about, well, we lost a sale
21 here because there was a sale of this bag here to
22 somebody else. But that does not mean that Louis
23 Vuitton didn't suffer damages.

24 You heard Mr. Livadkin testify about the
25 very long history of Louis Vuitton, the very

1 rigorous controls that it exercises and the high
2 regard within which it's held and the way that it
3 strictly controls the distribution of the product
4 to preserve its image as a luxury product.

5 And you also heard him explain how
6 that's undermined by the proliferation of cheap,
7 shoddy counterfeits. That alone is an enormous
8 harm to a company like Louis Vuitton that is
9 based upon the premium that it can derive from
10 the value that people seek in the merchandise and
11 in the strict control of its distribution.

12 To say that we can't say how much that's
13 worth based on the conduct in this case doesn't
14 mean it didn't happen and it's not something we
15 need to show. All we need to show is that the
16 damages occurred.

17 But the damages aren't even limited to
18 that. The damages are the damages in the way we
19 are perceived by our existing customers who, as
20 Mr. Livadkin testified, save up to buy this
21 merchandise and then are disappointed when they
22 see some shoddy knockoffs that sort of depletes
23 the value of the very special product that
24 they've worked hard to buy, and it deceives the
25 public.

1 Again, whether or not somebody is
2 deceived off a website, and some no doubt are, as
3 Mr. Livadkin testified, the fact is that
4 downstream purchasers and the general public here
5 is deceived. And, frankly, there would not even
6 be -- this argument wouldn't be considered if we
7 were talking about some other kinds of
8 merchandise.

9 The Defendants in this respect try to
10 have it both ways. Again, they say we're not
11 injured because sites are obviously selling the
12 counterfeit, but then, on the other hand, they
13 say it's too difficult for us to tell if it's
14 counterfeit.

15 So one more reason why we shouldn't do
16 anything in response to notices where we tell
17 them it's counterfeit and we tell them under
18 penalty of perjury. And they have not indicated
19 a single case where anyone has ever come back in
20 response to a notice from Louis Vuitton saying,
21 whoops, they made a mistake. This is good
22 product.

23 Now, the Court outlined the Plaintiff's
24 request for statutory damages in this case and
25 the range of damages that are provided for by the

1 Trademark Act and the Copyright Act. And we
2 think that, you know, given the number of
3 underlying infringements, given the repeated
4 notices, given the inaction and studied
5 indifference of the Defendants, the willful
6 blindness to the activity that's just pervasive
7 on their servers that you'll have no difficulty,
8 no difficulty whatsoever in coming to the
9 conclusion that their activity was willful.

10 And remember, willful reckless disregard
11 is just -- you know, you can't do this. But
12 given the number of notices that the Defendants
13 have received, there's really no question that
14 that's the case.

15 Given all of this, you could award a
16 large verdict in favor of Louis Vuitton, but
17 given the purposes of statutory damages, which
18 are to compensate the Defendant, to punish it and
19 to deter others from engaging in the same
20 activity, we think that an award of not less than
21 a million dollars is an appropriate award. And
22 you can come to that conclusion in a number of
23 different ways.

24 You've heard the Court explain that the
25 maximum award for willful infringement of a

1 trademark is a million dollars. You can find one
2 trademark infringement and award a million
3 dollars for that one. You can break it down and
4 find ten. You can find more and then just
5 multiply it out or you can mix and match because
6 the Copyright Act provides for a certain amount
7 and the Trademark Act provides for a certain
8 amount.

9 But the important point here is, as
10 you've heard from Mr. Livadkin, this is unique to
11 these Defendants. Louis Vuitton deals with
12 numerous ISPs around the United States over the
13 course of any given year. It even deals with
14 ISPs that are situated into a business model very
15 similar to the Defendants.

16 And notwithstanding that, these are the
17 only Defendants with whom they seem to have this
18 problem. And if the message isn't sent this is
19 an unacceptable way of doing business, the risk
20 is that this could become more prevalent, that
21 others will recognize or accept that they, too,
22 can be willfully ignorant, studiedly indifferent,
23 recklessly disregard illegal activity.

24 And it wouldn't necessarily be limited
25 to copyright or trademark infringement. We've

1 heard that the servers are used for pornography
2 and spam and who knows what else, but in the
3 context of a global telecommunications system
4 like the Internet to be able to sort of say, "I'm
5 not part of the jurisdiction in which I'm located
6 and you can't touch me," runs the risk of blowing
7 that activity out of all proportion.

8 We're not trying to put the Defendants
9 out of business here. We just need to send a
10 message that this is not an acceptable way of
11 doing business. It's what you could have done,
12 should have done. It's what everyone else does.
13 It's what they don't do.

14 Now, I mentioned that there's some
15 additional steps they could take earlier on, and
16 we talked about, for example, removal of
17 offending content, fines, suspension and
18 termination. And I know that removal of
19 offending content, there was a considerable
20 amount of testimony on the subject, but it is
21 something provided for by their own contract.

22 You heard Mr. Wilson testify that as
23 long as they have physical possession of the
24 machine, they have an ability to deal with it.
25 We know that when they want to get the

1 information from a customer, they can. And we
2 know that if a customer is not willing to give
3 them the access, then they risk the more
4 aggressive -- the more aggressive forms of
5 punishment.

6 So, in other words, it seems logical to
7 me if I'm a customer of the Defendants and the
8 Defendants come to me and say, "Look, you've got
9 a bad site. We need access to make sure that's
10 disabled and gone or we're going to have to
11 unplug your server," I think they are going to
12 give access so you can remove the content.

13 So the whole issue about passwords and
14 so forth, again, it's another one of those
15 laneways, but I don't think we really need to
16 decide that for purposes of concluding that the
17 contract is in the right. They have the physical
18 ability, and the contract also gives them
19 alternate mechanisms, should they choose to
20 employ them, and they clearly haven't.

21 In fact, they haven't even tried.
22 There's not been one word here from anybody from
23 the Defendants to suggest that they've taken any
24 steps to do the things that their contract allows
25 them to do.

1 Now, we've also heard a little bit of
2 testimony on suspension and termination of
3 customers and the potential ramifications for
4 innocent users, but I personally find it a little
5 ironic that the Defendants are more concerned
6 about these innocent users than their customers.

7 And I come back to the point I just
8 made, which is that if I'm a customer and I have
9 this web server with who knows how many websites
10 located on it, that I'm not eager to cooperate
11 and deal with the problem so that I don't
12 jeopardize the position of the other innocent
13 subusers, assuming they are.

14 And remember, Mr. Chen testified that in
15 the end, for all he knows, because he doesn't
16 really know his customers, they could be the
17 counterfeiters themselves, which may explain why
18 it really doesn't matter. But the point is that
19 if the Defendants were motivated, and they so far
20 haven't been, there's plenty they could do,
21 should do and still haven't.

22 They don't do what the industry does. I
23 mentioned earlier what Mr. Livadkin had testified
24 to about his experience with other ISPs. We've
25 talked about what he's testified to with respect

1 to his direct competitor. I think it was
2 SoftLayer that was identified in cross.

3 The Defendants aren't serious. They're
4 not reasonable, and, contrary to the defense
5 counsel's assertion, they have not done nearly
6 all the things that are available to them.

7 On the other hand, Louis Vuitton is
8 doing the only thing that is available to them.
9 You heard that they send letters to all of these
10 websites. You heard that they have challenges in
11 conducting enforcement in China where many of
12 them appear to be located.

13 And so when an entity like the
14 Defendants is trying to create a bridge to avoid
15 responsibility for this kind of illegal activity,
16 this is where Louis Vuitton has to look.

17 And the Defendants are situated
18 differently from the other entities you've heard
19 about. And when the Defendants had to chart
20 with how -- with a simplified outline of the
21 Internet. And, as you heard from Mr. Gralnik,
22 except for the user, all of the other points on
23 that chart are like milliseconds short.

24 They are transient communications that
25 do not reside where -- where it's located. They

1 do not provide the same subject as the Defendants
2 where this content is permanently resident. And
3 when I say "permanently resident," it's stayed
4 there and it seems to stay there no matter how
5 often you tell them, no matter how often it gets
6 moved around to different IP numbers that only
7 the Defendants can use.

8 Now, we're not asking the Defendants to
9 police the Internet. The whole issue of content
10 monitoring, you don't need to go there. I'm only
11 talking about the things they could have done,
12 should have done and didn't do in response to
13 very specific complaints about named websites
14 that were in numerous demands that are part of
15 the record before you.

16 Thank you very much.

17 THE COURT: Very well. Do you need a
18 break to set up the courtroom for your argument?

19 MR. LOWE: No, Your Honor.

20 THE COURT: Very well. At this point
21 then the Court will call on defense counsel for
22 closing argument.

23 MR. LOWE: Good morning, ladies and
24 gentlemen.

25 I, first of all, want to thank you on

1 behalf of the Defendants for your attention.
2 This has been a difficult case, I know, and all
3 cases are because you'd rather be doing something
4 else. And this has been difficult because of all
5 the technical testimony that you've had to
6 endure, and you've probably heard a lot more
7 about how the Internet works than anybody really
8 wanted to know, but we needed to talk about those
9 things in order to give you the proper
10 background.

11 There's an old joke that I'm reminded of
12 by the actions of Louis Vuitton in this case.
13 Someone is talking down the street and they see
14 someone scrambling around on their knees under a
15 streetlight. They are looking for something.
16 And they go to the person and they say, "What are
17 you looking for?"

18 And the guy says, "Well, I'm looking for
19 my keys. I lost my car keys."

20 So the fellow says, "Well, where did you
21 lose them?"

22 And he points. "Over there."

23 The guy says, "Well, why aren't you
24 looking over there?"

25 "Well, because the light is better

1 here."

2 This lawsuit is brought because Louis
3 Vuitton wants to sue somebody in the United
4 States for something that's going on in China.
5 The light is better here. They want to blame the
6 Defendants for things that the Defendants didn't
7 do and can't really control.

8 The Internet is a complex entity, as you
9 know. There are people out there doing things
10 they shouldn't be doing. There are people who
11 are infringing trademarks and copyrights of Louis
12 Vuitton, and we certainly don't dispute that they
13 have a right to protect their marks. We don't
14 dispute that this infringement, this
15 counterfeiting as it's sometimes called, is a bad
16 thing. We just think they are looking in the
17 wrong place.

18 So it's fine for Mr. Livadkin, for
19 example, to be talking about how they make their
20 bags and all the care and the fact that they want
21 to be the symbol of luxury in the world and that
22 they really are upset about the fact that people
23 see knockoff bags, but the question is not how
24 proud they are of the mark.

25 The question is have they met the

1 elements of proving contributory infringement on
2 the trademark and copyrights by the Defendants in
3 this case.

4 You know, it's ironic where we are
5 here. We're in the 21st century talking about
6 new technology that has made any number of
7 businesses possible only in the last 10 or 20
8 years, including the Defendants' business, and
9 the irony is that Louis Vuitton's history relied
10 upon taking advantage of new technology.

11 Remember Mr. Livadkin talked about how
12 they were able to start selling their bags and
13 other products, their suitcases, et cetera,
14 because of the development of the steam engines
15 and railroads and automobiles and steamships, and
16 at every stage of the Industrial Revolution you
17 might say they were able to increase their
18 business activity because they could take
19 advantage of the new technology that's going on
20 and sell more product.

21 And they are still selling more
22 product. They've been active, very active for
23 what? 150 years or so.

24 The irony is they are now complaining
25 about the march of technology. They don't like

1 the Internet. They don't like the fact that it
2 makes it possible for somebody on the other side
3 of the world to market products, make products
4 and sell them anonymously, you might say, in
5 order to infringe their marks.

6 They haven't adapted to this new
7 technology and they are upset about it. Or
8 perhaps they have adapted by saying, "Well, we'll
9 adopt the 20th century model. Let sue somebody.
10 We can't deal with these problems. We'll just
11 find someone to sue. And where better to do it
12 than in Silicon Valley and let's try to scare the
13 ISPs to death by awarding a large sum of money
14 against a small Internet service provider. Let's
15 put this country, the United States, out of the
16 business of dealing with the rest of the world in
17 China or elsewhere by coming here to the heart of
18 Silicon Valley and saying you can't run your
19 business because somebody out there -- we don't
20 know who they are -- somebody out there is
21 infringing our marks."

22 We think that is not fair. It is not
23 reasonable. It is not just. And this community
24 should not allow this to happen, to have a French
25 company come to California to complain about

1 something that's going on in China. And that's
2 really what this is about.

3 Have they gone to China? Yes. It is
4 not our problem if the Chinese authorities don't
5 do everything that Louis Vuitton wants them to
6 do. It is not our problem there are nearly
7 2 billion people in China that can be doing
8 things they don't like. It is not our
9 responsibility to protect Louis Vuitton from
10 everybody on the Internet.

11 We can only do what we can do here, and
12 if they get by with this claim, sort of a
13 cutting-edge claim they are making that copyright
14 and trademark infringement is the legal
15 responsibility of an Internet service provider,
16 where does it stop? Is everybody out of
17 business? Who gets sued next?

18 How about Western Union, the people that
19 their investigator used to transmit orders
20 through? How about UPS who actually delivered
21 the bags? How about the US Postal Service that
22 Mr. Holmes said he got the bags through?

23 How about the people that run the data
24 center down the street? After all, they are
25 providing facilities for the Internet service

1 provider to provide the customers who deal with
2 other people who are doing something that Louis
3 Vuitton doesn't like. Where's the cutoff?

4 The question here is what is it that is
5 reasonable for the Defendants to be doing under
6 these circumstances. That's what the law
7 requires you to figure out. And so you're doing
8 something in a lot of ways that nobody has ever
9 been asked to do before because, frankly, no one
10 has ever made the kind of claim, so far as I
11 know, that Louis Vuitton is making given the new
12 technology that's happening and that's being used
13 in this case.

14 One thing I'd like to comment on briefly
15 and that is any time in a lawsuit that lawyers
16 are making arguments like I am or like Mr. Coombs
17 is, our comments are not evidence. When we say
18 this is what someone said we're just using our
19 own memory. We're just trying hopefully to be
20 accurate about it and to tell you what we think
21 we heard here in this courtroom and what we think
22 is important.

23 But you must rely upon your own memory
24 and what you actually heard here in the courtroom
25 and not what one of the lawyers says. And that's

1 important for this reason: It seems to me that
2 what Mr. Coombs -- Mr. Coombs is talking about is
3 evidence that I haven't heard in this case. He
4 is drawing conclusions based upon a lack of
5 evidence.

6 There is a lot of wishful thinking going
7 on on the part of Louis Vuitton and its attorneys
8 because they haven't presented evidence showing
9 the responsibility of the Defendants in this
10 case. But, please, don't reply upon what I have
11 to say. I'll try to tell you what I think I
12 heard and what I think is important, as he did.
13 But we need to have you rely upon your own -- on
14 your own memory from your hearing.

15 I'd like to talk about the evidence or
16 lack of it.

17 A few years ago there were some
18 commercials being run on television between some
19 hamburger sellers and there was a complaint that
20 somebody out there selling hamburgers didn't have
21 much meat in their burgers. They were selling
22 big burgers with a small amount of meat and one
23 of their competitors had a fairly effective
24 advertising campaign based upon the phrase
25 "Where's the beef?" I think a few years later

1 even some politicians used that term.

2 But I'd like to raise that same argument
3 here. Where's the beef?

4 Let's talk about what they haven't
5 shown. They have talked a lot about counterfeit
6 bags. You've got a lot of bags here, but they
7 really don't count in a lot of ways. They don't
8 show any connection with the Defendants. None.
9 Not a single bag on this table has any connection
10 with the Defendants. In fact, there is no
11 connection that's been shown between anybody
12 who's making and selling counterfeit products or
13 infringing products and the Defendants.

14 In fact, Louis Vuitton has not
15 identified a single person who is directly
16 infringing their marks. Have we heard any
17 testimony about anybody who's doing this, let
18 alone how that person is connected with anybody
19 with the Defendants? No. Not a word.

20 We have heard about domain names, and
21 these are just made-up names that somebody has
22 registered with some international agency.
23 Mr. Coombs suggests that there is some kind of
24 connection here, that, as he put it, the
25 Defendants have this business on a border and

1 they are encouraging somehow people to do
2 business with them because it's easy to infringe
3 in the United States by using their technology
4 and their equipment.

5 Of course, there's not a word of
6 testimony to support that presumption or that
7 suggestion or that implication. None.

8 You may remember that Mr. Livadkin,
9 representative of Louis Vuitton, testified -- I
10 asked him a number of questions about certain
11 evidence that he had or didn't have and he said
12 he didn't have any evidence, Louis Vuitton had no
13 evidence of any connection between the Defendants
14 and any infringers. *Nada*.

15 Mr. Livadkin said they have no evidence
16 that the Defendants ever had any advance
17 knowledge of any infringement on their servers.
18 They got notice after things were there,
19 sometimes inaccurate notice, but they got notice
20 afterwards, and that's what we'll talk about in a
21 bit, but no notice or knowledge that they had --
22 that somebody was intending to go on their
23 servers and infringe in any specific case.

24 There was no evidence presented by the
25 Plaintiff about the ability to stop any

1 infringement by the people who are actually doing
2 it. There's no contradiction that the Defendants
3 cannot monitor these websites because of legal
4 reasons and because of technical reasons. They
5 can't see what's on their servers and they can't
6 break into the servers without a court order to
7 do that.

8 On the other hand, contrary to what
9 Mr. Coombs has suggested, the Defendants have
10 taken every reasonable step to stop this
11 infringing activity. We're not in favor of it.
12 They are not in favor of it. They don't make a
13 nickel on it. They rent out packages of servers
14 and IP addresses and bandwidth for what? 50, 80,
15 \$100 a month. That's all they get.

16 They don't get more because they are
17 renting to people who are selling infringing
18 products. They don't get any money because
19 someone sells an infringing product. They don't
20 get a penny out of any bag that's sold. They
21 don't get anything except big headaches.

22 Mr. Chen talked about the hours every
23 day he spends having to deal with these kinds of
24 complaints and he has another person that he has
25 to hire to deal with these complaints. Surely

1 he'd prefer to be elsewhere doing something
2 else.

3 So why would a person want to be in this
4 business so that they are causing all these
5 problems for themselves? I can't imagine.

6 Mr. Coombs wants to suggest that there
7 is some business model that they've created that
8 encourages infringers to come here and do
9 business with them. Have you heard any testimony
10 about that? Has any document shown that? The
11 answer is clearly no.

12 But they have taken every action that
13 they know how to take and they take it over and
14 over and over again. We've heard a great deal of
15 testimony about that. We have heard from
16 Mr. Wilson, the expert retained by the Plaintiff,
17 that the policies and procedures followed by the
18 Defendants are entirely consistent with industry
19 standards. They are doing everything that
20 everybody else in the industry does.

21 He had no complaint about that except
22 that he thought those procedures maybe ought to
23 be written down somewhere. Now, I don't think
24 that matters, but he didn't have any dispute with
25 the procedures.

1 Mr. Gralnik testified that after his
2 research ended into the industry he concluded
3 that the Defendants are doing everything and
4 exactly the same thing that every other ISP in
5 the country does, the biggest ones to ones his
6 size. There was no contradiction to that
7 testimony.

8 Now, Mr. Coombs suggests that there
9 is -- that they're not doing enough. They
10 haven't done anything, some of the other phrases
11 that he used, but the evidence actually
12 contradicts that argument.

13 And what's some of the evidence? Well,
14 one item of evidence is a document that you will
15 have, and you've been seeing and hearing
16 testimony about it. It's Exhibit 1598. It's a
17 summary prepared by Mr. Chen based upon his
18 e-mail records, all of which have been given to
19 the Defendants, to show complaints he got from
20 Louis Vuitton and what action he took on getting
21 those complaints.

22 And this goes on for 20 pages, I
23 believe, or thereabouts, and it is true that
24 there were multiple complaints about certain
25 websites.

1 Contrary to what Mr. Coombs suggests,
2 however, every time that there is a complaint
3 there is action taken except in one case. And
4 there are a lot of these cases, not just one, but
5 in a lot of cases the complaint comes in and it's
6 a false alarm. It is a false complaint, perhaps
7 not intentionally, but when Louis Vuitton, for
8 example, sends a letter or an e-mail to the
9 defense -- to the Defendants, very frequently the
10 website or the domain name that they are talking
11 about is not using an IP address that is assigned
12 to any of the Defendants.

13 And if you look through this document,
14 you'll see it over and over and over again. Over
15 and over again. So he keeps getting these
16 notices. It's not in our range. Nothing to do.
17 Nothing he can do.

18 Or it's not a functional website at
19 all. I can't find it anywhere. It's not
20 registered. It's not listed anywhere on the
21 Internet.

22 But when he does find one, when he does
23 get a notice about one that is a functioning
24 website, and it is then using their -- one of
25 their IP addresses, they take action. Contrary

1 to Mr. Coombs' suggestion doing nothing, they
2 take action. Either -- they generally start with
3 sending a notice to their customer saying, "We
4 have a complaint. Please take care of it."

5 And Mr. Chen explained that he doesn't
6 try to judge whether Louis Vuitton is right or
7 wrong. He doesn't know about these things. He
8 doesn't know whether the bags are legitimate,
9 illegitimate. He knows nothing about counterfeit
10 products.

11 He assumes that Louis Vuitton is
12 correct. He presumes that there is a problem
13 and, therefore, takes action. He doesn't sit
14 around saying, "Well, I wonder if there really is
15 infringement. Maybe I won't do anything this
16 week." That's not the evidence.

17 The evidence is he gets a complaint and
18 he acts on it. He sends that off to his
19 customer, the only people he really knows, and
20 tells them, "We have a complaint. Make it go
21 away. Take this off our system." And most of
22 the time that works.

23 If it doesn't work or if he gets a
24 complaint again about that, he can take two other
25 actions. One is to disable the IP address. Just

1 basically cancel the IP address so anybody using
2 that IP address is no longer on the Internet.

3 Or the most extreme action is to unplug
4 the server, an entire server. And you heard that
5 servers have multiple IP addresses assigned to
6 them and each of the IP addresses has multiple
7 users potentially. It might be one, but more
8 often it's many of them using the same IP
9 address.

10 And we've heard testimony from the
11 Plaintiff's own witnesses that sometimes in
12 excess of 100 websites, for example, are using
13 one IP address. So he will disable the IP
14 address, stopping whatever is going on or, if it
15 happens again and again, unplug the server.

16 Now, what does this case come down to in
17 Louis Vuitton's -- in Louis Vuitton's point of
18 view? What is their real complaint? Their
19 complaint is you didn't terminate any customers,
20 as if that's actually a reasonable thing to do.
21 We suggest it is not a reasonable thing to do.
22 Instead the actions that have been taken are
23 reasonable and have been effective.

24 Let me ask you this to think about: Has
25 Louis Vuitton identified any customer that should 118

1 be terminated other than Alice Chen? I suggest
2 the answer is no.

3 Did they have the ability to do that?
4 Yes, because of two things. Number one, they've
5 had the SEEPro database that lists all the
6 customer information. So they could identify a
7 customer just like they did Alice Chen and say
8 you should have terminated this one or that one.

9 And they could have gone -- even without
10 asking they could have gone to the ARIN
11 Whois website that is linked to the SEEPro
12 database for customer information and see it
13 directly.

14 Now, one of the things that Louis
15 Vuitton could have done other than just filing a
16 lawsuit or complaining with various letters is
17 they could have sent a notice of complaint to the
18 Defendants' customer directly because through the
19 ARIN database they have that customer
20 information.

21 They have the name of the customer using
22 that IP address and their -- at least their
23 e-mail just like they do for the Defendants. We
24 didn't hear any testimony they ever tried that.
25 They never looked at the ARIN database, according 119

1 to their testimony. Never looked at it.

2 Now, why is that? I would suggest that
3 it's easier to complain about somebody in Silicon
4 Valley than it is to send a notice to somebody
5 else. It's easier and more effective if you can
6 put somebody in Silicon Valley out of business by
7 putting together a gotcha case. "Oh, we sent you
8 letters and nothing happened or it came back."

9 There is no requirement, no legal basis
10 for them to suggest or to argue to you that the
11 only way they can avoid liability is to terminate
12 customers.

13 Let's talk about the Alice Chen
14 situation for a moment. At the time the
15 complaints from Louis Vuitton that we're talking
16 about here were made -- and I think that
17 Plaintiff identified seven or eight particular
18 complaints that happened to be dealing with IP
19 addresses that had been assigned to the
20 businesses associated with Alice Chen.

21 But Alice Chen was renting 100 servers
22 at the time approximately, according to Mr. Chen,
23 and had approximately a thousand IP addresses,
24 and you could have 100 websites, for example, on
25 each of those IP addresses, which would be a

1 million websites.

2 Seven or eight complaints out of a
3 million? Does that really amount to some
4 infestation or huge amount of infringement? I
5 suggest not.

6 And that's -- that is the worst case
7 they can come up with. That's the maximum
8 problem they can deal with. They say, "Well, if
9 you've got seven complaints out of a possible
10 million or maybe only out of a possible thousand,
11 you've got to get rid of that customer.
12 Otherwise, we're going to sue you, ask for a
13 million dollars and try to put you out of
14 business."

15 Is that fair? Is it reasonable? I
16 suggest it is not.

17 Have they suggested to you, have they
18 had any testimony that anybody else in the
19 business has ever done that? There's not a word
20 of testimony about it. Not a word.

21 Now, it is true that these acceptable
22 use policies do provide for termination,
23 suspension and so on. Mr. Chen explained why he
24 doesn't do that. Because these people are
25 cooperative with him. If he asks them to do

1 something, to take down a problem website or to
2 disable a server, they do that.

3 Now, why do they keep coming back?
4 Because that's really the problem here, isn't
5 it?

6 It's like the Defendants have to play
7 the old carnival game of Whac-A-Mole. You know
8 how that works? Where, you know, if something
9 pops up, you have to take a hammer and knock it
10 down and then another one pops up over here and
11 you have to get that one and then you have to get
12 this one over here and just try to keep up with
13 these things popping out of the holes in order to
14 win the game. And you have to move awfully fast
15 to do it, but it never stops. They just keep
16 popping up all over the place.

17 Now, what you see, for example, from
18 Exhibit 1598 is that some of these come back to
19 bother Louis Vuitton, and they make complaints
20 about it. They send notices out and the
21 Defendants check on it again and it's not on
22 their -- on their IP address or the website isn't
23 functional.

24 Now, maybe at a later time it will be
25 functional, but they don't have to monitor.

1 There's no requirement for them to do that. And
2 I'm not even suggesting that's necessary. But
3 let's look at the five websites they complained
4 about in the original complaint. These are
5 apel68, AtoZBrand, Bag925, eshoes99 and Wendy929.

6 The first four of those at the time this
7 lawsuit was filed approximately were not using an
8 IP address in the Defendants' range. In other
9 words, they were using somebody else's IP
10 address. And the fifth one wasn't functional at
11 all. There was no such website on the Internet.

12 Now, Mr. Coombs has presented some
13 evidence and no doubt will argue that there is --
14 there were earlier complaints that are not shown
15 on here. And that's true because this only deals
16 with the e-mails that were available from June of
17 2007 on because there was a server crash long
18 before this case got filed.

19 But the fact that when they first
20 checked on it the IP address was not using one of
21 the Defendants' addresses, the website was not
22 using one of the Defendants' addresses indicates
23 that if they ever had used the Defendants'
24 address, the Defendants had done something to get
25 rid of it. That's why on the 20th of August,

1 they are all -- you know, four of the five are
2 gone and the fifth one isn't operating at all.

3 Now, we get another complaint from Louis
4 Vuitton about those five. All of them they
5 complained about again at different times. But,
6 for example, the complaint they received on
7 January 3rd of '08 on apel68, AtoZBrand and --
8 for example, those ones. Let's talk about those
9 two.

10 When they got the complaint, it was,
11 number one, using a different IP address, not the
12 one they were using originally. And, number two,
13 it was not an IP address in the range of the
14 Defendants, not.

15 Bag925 hadn't changed their IP address,
16 but it still wasn't using an IP address that
17 belonged to the Defendants, not in their range.

18 Eshoes99 was not using an IP address in
19 their range.

20 Now, Wendy929, this time the website was
21 actually functional, but it was using a different
22 IP address than the first time. And the
23 Defendants did what they normally would do and
24 that's send a take-down notice. And when it was
25 next checked on January 3rd it wasn't

1 functional. So that was obviously -- obviously
2 effective.

3 Eshoes99 is a particular problem because
4 it obviously keeps coming back and back and back
5 to haunt Louis Vuitton. So the first time they
6 complained about it in August it wasn't in their
7 range. The second time they complained about it
8 in November of '07 it wasn't in the Defendants'
9 range.

10 The third time it was using a different
11 IP address. It was not in the Defendants'
12 range. And the fourth time it was using yet a
13 different IP address. This time it was in the
14 Defendants' range. They sent a take-down notice
15 and unplugged the server that day. And yet
16 Mr. Coombs has the temerity to tell you they
17 aren't doing anything about this.

18 Now, where is the evidence to support
19 that argument?

20 One of the interesting things about the
21 evidence is that no person has ever testified
22 from this stand, no one has ever testified about
23 the proposed solution to the problem that
24 Mr. Coombs has offered to you. No one has ever
25 said they should terminate.

1 Why is that? Because nobody thinks
2 that's a reasonable thing to do apparently.
3 Louis Vuitton hasn't done that. Their experts
4 haven't done it. Nobody has said that.

5 Instead the experts agree that what the
6 Defendants do is a reasonable thing. And,
7 frankly, unplugging servers and eliminating IP
8 addresses from use is effective termination
9 except he's saying, well, maybe there's some --
10 somebody out there that has a lot of these and
11 you ought to go terminate them. But no one has
12 said, oh, you should have terminated Alice Chen,
13 for example, and he hasn't identified anybody
14 else.

15 And contrary to his argument,
16 Mr. Livadkin I think it was testified that, you
17 know, they get cooperation from other ISPs. But
18 he could only identify one single ISP in the
19 United States, I guess, that -- that he could
20 even think about who had cooperated with Louis
21 Vuitton.

22 So where is the example of what they
23 ought to be doing? It doesn't exist. Actually,
24 what he said about that was they gave us the
25 information so we could go complain to their

1 resellers. Well, they've had that information in
2 the database from the Defendants and they've had
3 that information from ARIN, and we haven't heard
4 a word about why they didn't do anything with
5 that information.

6 So we have not tried to interfere with
7 them. We've tried to cooperate with them and
8 spent the last couple of years going through this
9 over and over and over again. And they keep
10 sending lists of domain names that they think
11 something should be done about. And most of the
12 time you'll see take-down notices are sent
13 immediately and the rest of the time servers are
14 unplugged, IP addresses are eliminated.

15 And you just won't see in this or in any
16 evidence they've presented anything showing that
17 any website, any domain name about which they've
18 complained has been ignored.

19 Mr. Coombs says they do nothing. I beg
20 to differ.

21 This is our evidence. Theirs is
22 non-existent.

23 Now, there are other problems with their
24 case aside from the fact that we have shown as
25 best we can tell maximum effort to deal with this

1 problem that exists, not because of anything we
2 do, not because of any money we make, not because
3 of any desire to help infringers. It just exists
4 because the world is a complex place and there
5 are a lot of bad people out there who want to
6 infringe trademarks, I suppose.

7 We have heard testimony from
8 Mr. Livadkin about a very few products that were
9 purchased, and we've heard testimony from
10 Mr. Holmes about very few products, roughly a
11 dozen, let's say. Maybe it was less. Maybe it
12 was eleven. And Mr. Livadkin testified that
13 products that he asked Mr. Holmes to purchase
14 were in his words "not genuine."

15 That is the -- that's essentially the
16 only evidence we've heard about any
17 infringement.

18 Now, Mr. Livadkin has testified about a
19 very few instances where he looked at a website
20 and he saw thumbnail pictures, for example, and
21 he didn't believe from his observation that they
22 were genuine. In fact, he assumed that they were
23 not genuine and part of that was because they
24 said they were just replicas.

25 But let's get back to the non-genuine

1 product that we've heard some testimony about and
2 no doubt you will have a chance to examine.

3 How did this come about? Why was it
4 that these products entered the United States in
5 the first place? They entered the United States
6 because Mr. Livadkin sitting in Paris calls
7 Mr. Holmes who's sitting in Dallas and tells him
8 to order this product from this website from
9 China and have it delivered to California. Why?
10 So he can create some jurisdiction here.

11 Did anybody in California order it?
12 No. Who authorized this purchase from China?
13 Louis Vuitton Malletier. That is not an
14 unauthorized import into the United States of
15 anything. When the trademark and copyright owner
16 directs someone on their payroll to order
17 something from overseas, that is authorized.
18 They are entitled to do that.

19 Why didn't Mr. Livadkin have it
20 delivered to Paris? Well, they didn't want to
21 sue them in Paris. Why didn't he have it
22 delivered to Dallas? He doesn't want to sue
23 people in Dallas. He wants to sue people here.
24 So Mr. Holmes creates mail drops, as he called
25 them, confidential addresses or whatever.

1 So every single purchase was authorized
2 by the owner of the trademark, by the owner of
3 the copyright, done at their express direction,
4 delivered from China to the United States so that
5 they can come here to this court and say here
6 they are, look how bad all this activity is.

7 Have they ever shown a single shred of
8 evidence that any customer outside of Louis
9 Vuitton has ever bought any product from these
10 websites in the United States? No. Not
11 anybody.

12 Now, if it were really such a big
13 problem and they really did have all these
14 complaints about this, surely they could have
15 done that. Now, they did show us one complaint.
16 One complaint. Not of a customer -- not somebody
17 who bought a product, but some guy in Denmark
18 who's complaining about some website in China.
19 And that has to do with the United States how?
20 It doesn't.

21 So they are just trying to create
22 evidence so that they can blame the Defendants,
23 so they can put them out of business, so they can
24 scare the rest of Silicon Valley and the rest of
25 the technology industry into not doing business

1 outside the United States because after all
2 someone might be doing bad things and you might
3 get sued.

4 Now, there's another interesting issue
5 about the way these purchases were made. There's
6 no evidence that any of these purchases were made
7 through the servers operated by the Defendants.
8 It's not even clear that they -- that at the time
9 Mr. Holmes saw the product on the Internet or
10 when Mr. Livadkin saw the product on the Internet
11 it was even using the servers. Maybe it was.
12 Maybe it wasn't. But these websites move around
13 a lot.

14 And, by the way, that moving around a
15 lot is established by their own domain tools
16 reports with reverse IP history, for example,
17 showing how they change frequently sometimes, you
18 know, every week, sometimes every couple months.
19 They change perhaps because people are chasing
20 them. Maybe they change because people are --
21 you know, they are just trying to get ahead of
22 somebody else who's about to complain about
23 them.

24 But Mr. Holmes' purchases had nothing
25 whatever to do with the Defendants. And yet we

1 have all this evidence here to prejudice you,
2 frankly, against the Defendants saying look at
3 all the bad stuff that these people did.

4 Well, what happened? Mr. Holmes was
5 instructed by Louis Vuitton to make a purchase.
6 He goes down to the 7-Eleven store, buys -- well,
7 let's back up a moment.

8 How does he do this? He can't
9 communicate to the people selling these products
10 through the servers or through the websites
11 even. The websites do not allow direct
12 communication to the sellers. Instead they tell
13 you send an e-mail to such and such an address,
14 and the e-mail goes through Yahoo or Yahoo China
15 or Gmail or somebody else, MSN.

16 He sends them an e-mail saying "I'd like
17 to buy such and such a protect." He doesn't know
18 who he's even sending it to or where. He
19 presumes it's China. And he gets an e-mail back
20 from some unknown person, a different person
21 usually, that says, well, if you want this
22 product, you need to send us money through
23 Western Union or some other source. One of them
24 was through another bank in China you had to set
25 up an account perhaps with.

1 So he goes down then to the 7-Eleven
2 store and he buys a Western Union money thing and
3 has it sent to somebody he doesn't know in
4 China. And then eventually somebody else in
5 China from a different address ships him a bag
6 through some delivery service and eventually goes
7 into US mail and it goes into some mail drop that
8 he has.

9 What's that's got to do with the
10 Defendants? Nothing, nothing.

11 This is not like buying something on
12 Amazon. It is not like buying something through
13 any normal e-commerce site where you give them a
14 credit card and they facilitate this. It's not
15 like eBay. It's not like anything we would
16 normally deal with.

17 Frankly, anybody buying something that
18 way is taking a big risk that their money is just
19 going to go into a hole somewhere. They don't
20 know who they are dealing with. They don't know
21 what's going to happen to it. They don't know if
22 they are going to get any products. But if --
23 some people are going to do that for various
24 reasons.

25 So all of the bags that were purchased

1 here really are phony evidence against the
2 Defendants. The entire transaction in those
3 cases took place in the People's Republic of
4 China, not in the United States. The order was
5 placed in China. The money was delivered in
6 China. The product was manufactured in China.
7 The sale was consummated in China. The agreement
8 was made in China and it was shipped from China.

9 The instructions that you will see, the
10 judge has read to you and you'll read it further,
11 tell you that copyright infringement and
12 trademark infringement which you find, if any,
13 has to occur in the United States. There wasn't
14 any. Not on those sales. Nothing happened until
15 it was all over with and Vuitton had them dumped
16 into the United States.

17 There is no evidence that anybody in the
18 United States has ever bought anything from any
19 of these websites, let alone through any servers
20 operated by the Defendants.

21 There's an interesting piece of
22 information that came out of Mr. Wilson's
23 investigations concerning bigworldshoes.com, and
24 that had to do with the rebuilding of this
25 website based upon a review of some servers from

1 the Defendants. You'll recall it took him ten or
2 twenty hours to do that, but eventually he
3 rebuilt this website, found logs, et cetera, that
4 were on there and he found a number of hits to
5 this website.

6 None of those hits came from the United
7 States. None of them. They came from France.
8 They came from China. They came from Canada.
9 They came from other countries, Great Britain,
10 The Netherlands, et cetera. No evidence shown in
11 those charts that Mr. Wilson talked about showed
12 any hits from the US. And that's the only, the
13 only website that was rebuilt from information
14 from the Defendants' servers.

15 So once again it doesn't show any
16 activity in the United States other than
17 someone is -- someone is contacting a server.

18 Let's talk about what's going on in the
19 United States, if anything. At most the
20 Plaintiff can say that there is something on the
21 servers here in San Jose that constitutes
22 trademark infringement or copyright
23 infringement.

24 And what is that something? Well, it's
25 a website, they say, that is hosted using a

1 server rented to somebody else that's sitting
2 here. Is there a picture on that website? Is
3 there a picture on the server? Is there
4 something that the Defendants could see? No.

5 What you have are a bunch of bits of
6 data. And Mr. Gralnik testified about that. You
7 saw exhibits of what it actually looks like on
8 the server. They don't know what's on the
9 server. They have no way of knowing what's on
10 the server. And yet it really is not in any
11 tangible form that's viewable by anybody looking
12 at the server or by any means that's within the
13 power of the Defendants.

14 The only way that you would see
15 something that is sitting on that server is if
16 someone in Topeka, Kansas, for example, happens
17 to call up their web browser and they happen to
18 access this website and through the complexity of
19 the Internet that transaction is routed here to
20 San Jose and then routed back to their -- their
21 desktop in -- or laptop in Topeka. And using the
22 web browsing software on the user's computer it
23 will reconstruct these bits into a picture.

24 So can you truly say that there's
25 anything happening here in San Jose other than

1 transient transmission of information or storage
2 of information that cannot be viewed in its
3 native form by anybody, any human person?

4 You need special software, browser
5 software, some such thing. Otherwise, if they
6 looked at it on a hard drive in San Jose, it
7 would just be maybe in hexadecimal form or
8 something. But there's no real connection.

9 And we would submit that is not an
10 infringement of a copyright as it sits on the
11 server. It's just bits and pieces -- bits of
12 data in magnetic form actually. It's not a
13 picture. It's not like there's, you know, some
14 physical object stored on there, not a physical
15 photograph stored on there, not an order form
16 stored on there. There's nothing except
17 electronic information.

18 It's sometimes hard for us to understand
19 how all of this works, but the reality is that
20 until that information is translated by a user,
21 there is no there there. And you heard from
22 Mr. Gralnik as well that oftentimes these
23 websites don't all reside in one place. They may
24 be spread around and they will cause information
25 to be drawn from various other places.

1 Now, there is another big problem you
2 need to consider. We've heard a lot of testimony
3 about a lot of different websites, but you
4 haven't really heard anything connecting them to
5 the Defendants or you haven't heard them
6 connected to an infringer or you haven't heard
7 them connected to a purchase of a bag or you
8 haven't heard them connected to a notice.

9 You've just got -- you know, he wants to
10 talk about this infestation of websites, but they
11 haven't established what those websites are.
12 They put one together, one, bigworld shoes.com.
13 And that one wasn't doing anything in the US,
14 according to them.

15 What you have is a lot of random
16 information. We sent notices. We bought bags.
17 We looked at something on domain tools. Where is
18 the chain connecting any of these things? Where
19 is the chain connecting any of it to the
20 Defendants? We submit there isn't any.

21 What they would love to have you think
22 is that because there are so many websites out
23 there and it looks like there might be some on
24 the server here and we've sent a lot of letters
25 to people here, there must be something going

1 on. Where there's smoke, there's fire kind of
2 thing. But they just haven't made the
3 connections. Nor have they necessarily
4 established that there is infringement going on
5 on all these websites.

6 They want you to assume all of these
7 websites are infringing. Where's the testimony
8 about that?

9 Well, we had occasional testimony that
10 someone looked at a picture on the Internet
11 through their web browser in Paris or someplace
12 or maybe in Dallas and we have some evidence that
13 someone bought a bag and we have some evidence
14 that people sent some letters, but some of these
15 things were in odd order.

16 For example, you buy the bag, Mr. Holmes
17 in some cases buys the bag before any notice gets
18 sent, or you send notices and all the take-down
19 activity occurs and then you buy a bag.

20 How does that show that the infringing
21 activity was going on on the server after notice
22 was given? They haven't made those connections.
23 But even if they had, it's not enough to show
24 infringement of the -- of the copyright,
25 contributory infringement, I should say, of the

1 copyright, and it doesn't show infringement --
2 contributory infringement of the trademark.

3 Let me briefly talk about some of the
4 elements which you have to deal with in terms of
5 making a decision as to whether the Defendants
6 are liable here. The judge has given you
7 instructions that include elements of each of
8 these claims that are being made.

9 For example, for trademark --
10 contributory trademark infringement, the judge
11 has instructed you that the Defendants knew or
12 should have known that their customers were using
13 their services to directly infringe or facilitate
14 infringement of the trademark.

15 Well, as I talked about, we haven't
16 really got any evidence of any knowledge prior to
17 the time it happened. All we have is they sent a
18 notice, action was taken, sent a notice, action
19 was taken, et cetera. If it was ever there in
20 the first place, because often it wasn't.

21 Or should have known is what Mr. Coombs
22 would like to talk about I'm sure next. And that
23 is under all the circumstances is it reasonable
24 that they would have known if they had only given
25 it any thought or they'd done what a reasonable

1 person would do or something.

2 There's no evidence of that. None.
3 None of their witnesses have ever said, "If they
4 had only done X, they would have seen Y. If they
5 had done this, we wouldn't have that." And you
6 can't blame the Defendants simply because
7 somebody whom they don't know is dealing with a
8 customer of theirs and is doing something
9 improper.

10 That's not an objective way of looking
11 at this, not part of the objective standard that
12 they have to meet.

13 They haven't shown, as I say, if any of
14 these bags were sold in the United States. They
15 haven't shown that the trademarks were used in
16 the United States in commerce. For example, in
17 order to -- just talking about trademarks, for
18 example.

19 You have to actually use a trademark in
20 commerce. You can't just put it on your wall and
21 that's trademark infringement. It has to be used
22 to show some connection between the person
23 wrongfully using it and something they are trying
24 to sell or advertise. And, of course, the
25 Defendants aren't selling anything or advertising

1 anything. It's only potentially these folks that
2 they don't know somewhere out there on the
3 Internet.

4 And that commerce has to occur in the
5 United States or substantially affect commerce in
6 the United States. We don't have any evidence of
7 that. None.

8 On the claim of contributory copyright
9 infringement, there are other elements similar,
10 but they are different -- somewhat different
11 elements. And, for example, they have to show,
12 the Plaintiff has to show that the Defendants
13 knew or should have known that the customers were
14 using services to infringe copyrights.

15 But they had no knowledge. There's no
16 evidence they had any knowledge. If they got a
17 notice, they terminated the service. They didn't
18 get the notice and say, "Oh, let's go out and
19 help these people along." And once again that
20 has to happen in the United States.

21 Now, there's another element to both of
22 these, both of these points, the fourth element,
23 and that is that the Defendants have to have been
24 damaged -- not the Defendants, the Plaintiff,
25 Louis Vuitton, has to have been damaged. There

1 is no evidence that Louis Vuitton lost a single
2 sale as a consequence of any of this infringing
3 activity going on anywhere in the world.

4 Nothing.

5 Now, they might want you to assume that
6 they would have sold more product if someone
7 wasn't buying these bags. You can just as easily
8 assume they sold more bags and it hasn't affected
9 them at all. But let's talk about the reality of
10 this whole business.

11 Louis Vuitton is selling bags for a
12 couple thousand, \$5,000 a piece. I know nothing
13 about handbags, but that seems an awfully high
14 price to me. So if I were going to buy these
15 bags, I would be very careful about how I do it.
16 I'd want to make sure it is, in fact, genuine.
17 And there would be a lot of things I might look
18 at to consider whether it was really a genuine
19 bag or not. And this goes to the whole
20 instruction about likelihood of confusion that
21 the judge was reading to you.

22 So if you find on the Internet somebody
23 offering to sell a bag, oh, say, for \$100 or
24 \$200, and you know that they really -- the real
25 ones sell for a couple thousand dollars or more,

1 is there any possibility that you would be
2 confused? Is there any likelihood of confusion
3 on the part of a reasonable prudent purchaser of
4 a bag? Clearly the answer is no.

5 That's one of the elements they need to
6 show for contributory copyright -- contributory
7 trademark infringement, that even to establish to
8 direct infringement of that trademark they would
9 have to show that there's on the part of the
10 consuming public the likelihood of confusion
11 based upon all the circumstances. And the judge
12 read a bunch of these factors that can be
13 considered in determining likelihood of
14 confusion.

15 One of them is the price. And if I'm
16 getting something that normally sells for
17 thousands of dollars for a hundred or so, I
18 couldn't rationally be confused. I couldn't
19 reasonably be confused about that and it is
20 not -- of course, it doesn't matter what I would
21 think personally, but what matters is what a
22 reasonable person under those circumstances would
23 think. No possibility of confusion.

24 What really is going on here is there
25 are two markets for these kinds of products. You 144

1 have people who want the symbol of luxury in the
2 world and they will buy a Louis Vuitton bag. I
3 submit there aren't very many people who actually
4 can do that.

5 And then there are people who want a
6 knockoff because they think they are pretty or
7 whatever. Do they really think they are genuine
8 product? Of course not. And are they likely to
9 buy a genuine product? Probably not.

10 For example, if one of these bags is
11 bought by some teenager, does she know that it's
12 genuine, not genuine? Of course, she knows it's
13 not genuine. Does she care? No. Is she likely
14 to buy a real bag? No. It's just not going to
15 happen.

16 So you have, you know, very vast
17 differences in the two markets.

18 Now, I know Mr. Livadkin said, "No, no.
19 It's all one market. Everybody wants a Louis
20 Vuitton bag and they are all going to save up
21 their money and buy a big one from us." They're
22 thousands of dollars and all of that.

23 I'm sorry. That's just not a rational
24 way to think. They want only a few people in the
25 world to buy the bags so they can feel really

1 nice about having spent so much money on a
2 handbag. That keeps Louis Vuitton in business.
3 But the people buying these things don't affect
4 them whatsoever. They just can't. They would
5 never buy the real product. They are not going
6 to do it.

7 So the question is have they suffered
8 damages from anything associated with this other
9 than hurt feelings? Which I suggest is not
10 damages. Yeah, they prefer that everybody only
11 did business with them. And there are a lot of
12 things that people would prefer, but that doesn't
13 make them damages in any -- in any legal sense.

14 Have they established any evidence
15 they've lost anything? No. Have they
16 established any evidence that people have stopped
17 buying Louis Vuitton products because of it?
18 No. Have they established any evidence that
19 their customers are harmed in any fashion except
20 psychically because some young girl buys a cheap
21 bag? No. They simply want you to assume there
22 are damages.

23 But here's a huge hole in their case.
24 They have no evidence of damages from the sale of
25 any of these products. Nothing. And they have

1 the burden of proof on that.

2 Now, that element about damages, it has
3 to do with proving the claim, both trademark
4 infringement and copyright infringement, and
5 contributory versions of those. There are
6 separate instructions dealing with them, assuming
7 you actually found some liability. We suggest
8 you should not do so.

9 But even if you found some liability,
10 then there's the question about what damages
11 should you award as statutory damages. And you
12 need to -- if you ever got to that point, you'd
13 have to find some just amount. That would be in
14 your discretion, but it would have to be on a
15 reasonable basis.

16 Mr. Coombs asked for a million dollars.
17 Has he explained why? No. Oh, maybe he
18 suggested it would punish the Defendants. It
19 might deter others, i.e., "we don't want to put
20 them out of business. We just want to get their
21 attention," I think was the phrase he used.

22 Yeah, their attention would be, "How
23 soon do we have to move out of the data center?"
24 They're gone.

25 And then what happens to the next ISP?

1 Their attention will be gotten, wouldn't it?
2 Because Vuitton would no doubt send a letter out
3 saying, "Look at what we did to Akanoc. You
4 could be next." That, I suggest, is the only
5 basis for having a million dollars in damages.

6 We suggest, however, that there is no
7 basis for damages whatsoever.

8 Would it make any difference, would it
9 make any difference if they did put them out of
10 business other than scaring everybody else in the
11 industry? The testimony is no because these
12 infringers move around all the time. So is it
13 going to deter an infringer? No. Is it going to
14 deter anybody? Probably not.

15 It just gets other people in trouble
16 because the people who are selling knockoff bags
17 are going to keep selling knockoff bags from
18 China. And if Vuitton can't deal with China,
19 that's too bad, but that's -- that's going to go
20 on.

21 And, frankly, they've in a sense created
22 their own problem because of their own success.
23 Obviously if you have such a high markup on
24 products, you're going to encourage people to
25 sell knockoffs. That would be true of any kind

1 of product any time in history because clearly
2 you have a lot of folks who probably figure "I
3 can make this bag a lot cheaper than Louis
4 Vuitton and I bet I can find somebody to buy it."
5 So they are going to keep going on that way.

6 And the Internet is not going to shrink
7 unless all the -- or a lot of the ISPs in the
8 United States get put out of business and then
9 they actually maybe have to go offshore and go
10 to -- I don't know -- Canada, Mexico, Costa Rica,
11 whatever. They'll keep doing it, the knockoff
12 artists. But what will have happened is that you
13 will have essentially destroyed the ISP business
14 as it exists in Silicon Valley today.

15 And then who goes next? "How about
16 Western Union? Let's go sue them." "How about
17 the Post Office? After all, they delivered these
18 bags."

19 I wanted to talk for a moment about
20 the -- the whole idea of trying to stop this
21 trade and we've heard some apartment analogies
22 and other kinds of things, but, you know,
23 let's -- and I think we even talked briefly about
24 this with Mr. Gralnik about a highway situation.
25 If you look at the Internet as being a highway,

1 how do you figure out that something is moving
2 down the highway, whether it's a virtual product
3 in electronic firm or a real product?

4 And let's assume that you have somebody
5 who's claiming that there's a -- they believe
6 that there is someone -- they don't know who they
7 are, but there's someone coming down this road,
8 and they are going to be bringing a shipment of
9 counterfeit bags into San Jose and they want
10 somebody to stop it. So what do you do?

11 You block all the highways. You set up
12 road blocks, checkpoints, and you have to inspect
13 every car that goes through. Soon this -- the
14 highways wouldn't function at all. And you do
15 that just because you have someone complaining
16 that someone is doing something illegal using the
17 highways.

18 If you're talking about an apartment
19 building, let's say that the Defendants are like
20 someone who is a developer and you build
21 apartment buildings and you, you know, lease them
22 out to somebody who's going to run them. Take an
23 apartment building and let say it's like a
24 server.

25 And that apartment building has multiple 150

1 floors. They have floors like an IP address and
2 then there are a bunch of apartments on that
3 floor. Maybe we can talk about those as, oh,
4 websites. There are various ways you could look
5 at this.

6 So you're the developer like the
7 Defendants here and you get a complaint from
8 somebody saying, "There's something going on over
9 there in that building. We don't know who it is,
10 but we think it might be in apartment, oh, 10B."

11 So what do you do? You go and complain
12 to whoever is running the building. Right? Just
13 like they complain to their resellers.

14 The reseller then goes to somebody who's
15 renting apartment 10B and says, "You've got to
16 stop this."

17 What happens if that doesn't work?
18 Well, according to their theory, you terminate
19 the deal with the guy who's running the apartment
20 building. Or maybe you just empty a floor, make
21 sure that, you know, nobody is on that floor
22 again, can't use that floor because, after all,
23 somebody -- we don't know who it is -- is doing
24 bad things down in that apartment.

25 Pretty soon everybody is out of

1 business. But the truth is the people running
2 the apartment building, the developer of the
3 apartment building, none of them know that the
4 bad stuff is going on and have no way to really
5 stop it other than try to identify it, try to
6 complain and, if need be, you know, empty a
7 floor. And that's been done in this case over
8 and over and over again.

9 Or you have someone -- let's say, to use
10 a different analogy, you have someone who is
11 running a self-storage unit. You just rent out
12 space in the self-storage unit. People put stuff
13 in there that's illegal, Louis Vuitton bags that
14 are knockoffs, for example.

15 Does the guy running the building know
16 this? Of course not. Is he liable for it
17 because it's sitting in that building, just like
18 he might be sitting on information about it on
19 his Internet server? I suggest the answer is
20 clearly no. You go after the people who are
21 doing the bad stuff. You don't go after somebody
22 who just happens to be convenient, somebody you
23 can easily sue.

24 THE COURT: I'm going to have you bring
25 your argument to a close.

1 MR. LOWE: Thank you, Your Honor.

2 Ladies and gentlemen, we really do
3 appreciate your attention today and this past
4 week. We believe that the Defendant has
5 presented more than sufficient evidence and that
6 the Plaintiff has presented essentially no
7 evidence to prove the elements necessary here to
8 show liability of these Defendants for
9 contributory trademark or copyright infringement,
10 let alone any damages. So we ask you when you go
11 back to deliberate, think about whether this is
12 fair and just and do the right thing.

13 Thank you.

14 THE COURT: I promised you about 12:30,
15 but Counsel only used about half of his time. So
16 I will permit you a brief rebuttal argument, if
17 you wish.

18 MR. COOMBS: Thank you, Your Honor.

19 This is why there are eight of you.
20 There are times I wasn't sure I was in the same
21 courtroom as Mr. Lowe, but you'll have an
22 opportunity to compare your notes and come to
23 your own conclusions. And fortunately, you'll
24 also have an opportunity to do that with respect
25 to the Court's jury instructions. And in that

1 respect, I will just quote one portion of what
2 was read to you this morning with the Court's
3 permission.

4 "It is no defense to contributory
5 trademark infringement or contributory copyright
6 infringement that termination of services to a
7 direct infringer could be circumvented by the
8 direct infringer switching to use of the services
9 of some other company or to continue direct
10 infringement."

11 So the argument about the ease with
12 which some of these counterfeiters can move from
13 the Defendants' servers to someone else is not an
14 excuse for the Defendants failing to do what we
15 know from the terms of service you looked at
16 again this morning what we know they can do.

17 Similarly, you've heard some discussion
18 about likelihood of confusion and Mr. Lowe talked
19 about the price point and how could anybody
20 reasonably be confused.

21 You heard Mr. Livadkin's testimony on
22 the subject. And I'm not going to restate it
23 again for you, but the fact of the matter is that
24 it's not only the confusion of the buyer. It is
25 the likelihood of confusion in the objective

1 consumer. And the instructions that were read to
2 you this morning contain a number of
3 considerations which includes the strength of the
4 mark, which is effectively undisputed here.

5 This mark -- these marks have been with
6 us for a long time. They are internationally
7 known and command an enormous premium in the
8 marketplace. They use the mark on identical
9 goods. This is the same product that Louis
10 Vuitton sells.

11 The Plaintiff's and Defendants'
12 customers are the same. They both market through
13 the Internet. And, as I said, Mr. Livadkin's
14 testimony will go to the issue of whether or not
15 the customers overlap. Are there some that are
16 not confused or deceived by the counterfeit
17 product that's being offered? I'm certain of
18 it. But are there others who think they try to
19 snag a deal? I'm sure there are those as well.

20 What were the Defendants' customers'
21 intent? Is there really any question that the
22 Defendants' customers were trying to knock off
23 the Defendants' marks? These are not serious
24 arguments, nor are there arguments based on the
25 territoriality of this activity.

1 We've heard plenty of testimony here
2 over the course of the past couple of weeks about
3 how these servers are located a couple of blocks
4 away. Sorry.

5 The sale of the goods is not the only
6 act of infringement. Now, first of all, Mr. Lowe
7 would have you believe this is it. All of these
8 websites, they sold the 14 products to Mr. Holmes
9 and none other. And that's not a reasonable
10 inference from the evidence and it's not a
11 reasonable inference from the Defendants' own
12 statements.

13 And in that respect I'm going to refer
14 you to I believe it was Exhibit 533, but that is
15 the exhibit in which the Defendants say that they
16 are marketing their services to China resellers
17 and customers who want access to the US market.

18 Let's not be fooled by this. It's the
19 United States consumer that is the target of the
20 illegal activity that is rampant on the
21 Defendants' servers.

22 But Mr. Lowe's argument is flawed in
23 another respect. You do not infringe only by
24 selling. In the case of copyright, for example,
25 you infringe by displaying. So the images, which

1 I could not see, Mr. Livadkin could not see,
2 Mr. Holmes could not see or Mr. Chen could not
3 see, are all located on the Defendants' servers.

4 Do not be distracted. This is another
5 laneway. Yes, the box itself is data and, as you
6 heard from Mr. Gralnik, the content of those
7 servers can be viewed by players. You know, you
8 could open the box and you'll see a disk.

9 Well, nobody is talking about that. Of
10 course, that in itself, that disk is not an
11 infringement. It's what it contains. And it is
12 not realistic to talk about data on a server
13 being just the magnetic polarity of the zeros and
14 ones that are represented by computer code.

15 The fact is all of these servers have
16 installed operating systems. And you heard
17 Mr. Gralnik testify that the way you would view
18 the content of the server with access to the
19 operating systems Mr. Chen and the Defendants
20 supply is to see the kind of file structure that
21 was represented in Exhibit 593.31. Thank you.

22 So take a look at 593.31. That's what
23 somebody is going to look at and they are going
24 to look at it through something you heard about
25 earlier called the KVM. I don't know if you'll

1 remember, but there was discussion from Mr. Chen
2 about -- was it Ms. Luk? I'm sorry.

3 But in any event, about KVMs, keyboard,
4 video, mouse, and then remote, keyboard, video,
5 mouse. And what that is is the hardware that's
6 required to take a look at the contents of the
7 server. Their customers can do it from China.
8 The Defendants can do it from their own cage.

9 Now, Mr. Lowe made some arguments about
10 termination not being a reasonable solution, and,
11 if we were saying to you that that's the first
12 thing they should do, I'd agree with it. In
13 fact, if it was the second thing I said they
14 should do, I'd agree with it. But it's not.
15 It's what their own expert witness testified to.

16 He testified to an escalation of
17 remedies and, if termination is the only thing
18 that can result in an end to this rampant illegal
19 activity, then so be it.

20 I don't think we need to feel sorry for
21 the customer at that point. They've had a chance
22 based on warning. They've had a chance based on
23 removing content. They've had a chance based on
24 fines. They've had a chance based on
25 suspension. What's left? Well, of course you

1 terminate. I'm not suggesting that's good, best,
2 advisable, but it is, according to the
3 Defendants' own terms of use and, according to
4 their own expert, the ultimate sanction if
5 nothing else secures compliance with the
6 Defendants' own terms of service.

7 Mr. Lowe commented on the issue of
8 contacting customers and you'll remember when we
9 were talking about Mr. Livadkin's testimony.
10 Now, he did testify about his communication with
11 a large number of ISPs. One was singled out
12 because it's in a business like one of the
13 Defendants here. It basically resells capacity
14 supposedly to users in China.

15 That company in response to Louis
16 Vuitton's demands now does two things. And you
17 can go back and take a look at his testimony if
18 you need clarification on this. It was in his --
19 his redirect at the very end of his testimony.
20 He said first that that company, SoftLayer,
21 provides customer contact information to them,
22 not through ARIN and not through any other
23 source, directly. So they have the same reliable
24 information to contact the customer that
25 SoftLayer has.

1 And this is the thing Mr. Lowe didn't
2 mention: And if that communication from Louis
3 Vuitton does not result in a resolution of the
4 abuse complaint, SoftLayer then takes action and
5 the activity stops. And the result is they do
6 not have the problem on those servers that they
7 have on the Defendants' servers.

8 Now, Mr. Lowe suggests, "Well, they can
9 look at ARIN, can't they?" And, of course, we
10 can. You can, too. Yesterday Mr. Cheng was
11 examined on the ARIN content information from
12 Bag925. We'll come back to that in a moment, but
13 the contact information.

14 Okay. Do you see any customer
15 information on it? Did the Defendants introduce
16 these detailed ARIN customer records that they're
17 talking about? I haven't seen them, but maybe
18 that's why Mr. Lowe and I were in a different
19 courtroom.

20 Now, can we pull up 1598 again.

21 Mr. Lowe said we got the complaint on
22 the 20th of August and the problem must have been
23 solved because, look, the four sites were gone
24 and one site wasn't functional. But we know
25 that's not really the case because you'll

1 remember when Mr. Chen took the stand, we were
2 looking at an e-mail, and that's Exhibit 528, I
3 believe. And in that e-mail, apel68, one of
4 those five websites, was pretty obviously on his
5 servers.

6 Now, conveniently he was corresponding
7 from a rocklogic.com e-mail address, but we
8 managed to get a copy of that e-mail. And that
9 e-mail shows, I think, that apel68 was pretty
10 clearly on their servers when he first heard
11 about the case and that whatever actions may or
12 may not have been taken before that time were
13 clearly ineffective.

14 But you remember, also, that when I
15 pressed Mr. Chen on this issue he admitted that
16 he could not at that point say that these other
17 sites were not also on his servers at the time he
18 first heard about the case.

19 So despite what Mr. Lowe has just told
20 you in his closing argument, for all we know --
21 well, we know one of them was definitely on,
22 apel68, and for all we know the other four were
23 as well and that none of whatever actions may or
24 may not have been taken were effective to address
25 the 19 Louis Vuitton complaints that preceded the

1 filing of this complaint.

2 We're not talking one or two complaints
3 catching them by surprise. We're talking about a
4 prolonged, deliberate patient effort to try and
5 get them to do what everyone else does.

6 Mr. Lowe also said something about one
7 site not functional with respect to Wendy929.
8 And whatever issues there may be with respect to
9 that one complaint, I want to refer you back to
10 the testimony about loverNike.com, which is also
11 on Exhibit 1598 and in which the Defendant
12 reports to us that the website wasn't functional,
13 but that if you go to look at Exhibit -- is it
14 613? 605? 615, which is the extract from the
15 Defendants' own SEEPro records, he's unplugging
16 that site the very next day.

17 That's a discrepancy I don't understand,
18 but it does suggest to me that when he's telling
19 us something is not functional, he may not be
20 telling us what's actually the case.

21 So having considered all of the
22 evidence, we're confident that in the end you
23 will come to a conclusion that the Defendants
24 should be held accountable for contributory
25 trademark infringement and contributory copyright 162

1 infringement, and that you will award an
2 appropriate amount of statutory damages to ensure
3 that his activity does not continue.

4 Thank you for your attention.

5 THE COURT: Very well.

6 Members of the jury, when you retire you
7 should elect one member of the jury as your
8 presiding juror. That person will preside over
9 the deliberations and speak for you here in
10 court. You will then decide the case with your
11 fellow jurors to reach agreement, if you can do
12 so. Your verdict must be unanimous.

13 Each of you must decide the case for
14 yourself but should do so only after you've
15 considered all the evidence, discussed it fully
16 with the other jurors and listened to the views
17 of your fellow jurors. Do not be afraid to
18 change your opinion if the discussion persuades
19 you that you should, but do not come to a
20 decision simply because other jurors think it is
21 right.

22 It is important that you attempt to
23 reach a unanimous verdict, but, of course, only
24 if each of you can do so after having made your
25 own conscientious decision. Do not change an

1 honest belief about the weight and the effect of
2 the evidence simply to reach a verdict.

3 Now, during the course of your
4 deliberations you may take rest breaks or lunch
5 breaks as you wish. Since we will be standing by
6 pending your deliberations, please send us a note
7 as to what your schedule will be. During any
8 break do not deliberate further upon the case.
9 Cease all deliberations until your presiding
10 juror has brought you back into session with all
11 of you present.

12 If it becomes necessary during your
13 deliberations to communicate with me, you will
14 find a form for that purpose included in the
15 materials sent into the jury room. Any one of
16 you may communicate with me by filling out the
17 form. You can bring it into my chambers, give it
18 to me or a member of my staff.

19 No member of the jury should ever
20 attempt to communicate with me except by a signed
21 writing; and I will communicate with any member
22 of the jury on anything concerning the case only
23 in writing or orally here in open court.

24 Remember you're not to tell anyone,
25 including me, how the jury stands numerically or

1 otherwise until after you've reached a unanimous
2 verdict or have been discharged.

3 I will shortly confer with counsel about
4 the verdict form. Let me just tell you what it
5 will look like. You will find that there are a
6 series of questions, and each claim, contributory
7 copyright claim and contributory trademark claim,
8 will be divided into questions.

9 Sometimes the question may look very
10 similar, but they are -- because the elements of
11 each claim are sometimes similar, but you must
12 answer each of them. And you may find on one
13 claim and not find on another or find on both as
14 I've instructed you.

15 You will also find that there is a
16 place for you to indicate your finding with
17 respect to each Defendant. And, again, it could
18 be that you will find with respect to one or more
19 or all of the Defendants. That's a matter for
20 you to decide.

21 When it comes to the question of
22 damages, again, you will have a place to indicate
23 your finding with respect to all of the
24 Defendants or each of them. I tell you in the
25 course of the instructions to ignore any

1 Defendant for which you've answered no to a
2 previous question which removes that Defendant
3 from your consideration.

4 And you will find that there are italics
5 instructions that guide you to the various
6 questions so that sometimes your answer will
7 require you to skip the question that follows.
8 Sometimes it will require that you proceed to the
9 next question.

10 If you have any questions about the
11 verdict form itself, feel free to send out a note
12 asking the Court to give you further directions
13 with respect to the verdict form.

14 I've given Ms. Garcia permission to give
15 you logistical instructions so that she can
16 assist you as I indicated with respect to using
17 the equipment, any matters that have to do with
18 your comfort and to give to us your various
19 requests. Otherwise, we lock the -- we don't
20 lock you in, but we close the door to the jury
21 room. Your deliberations are confidential and
22 you are not to be disturbed.

23 At this point I will ask Ms. Garcia to
24 take charge of the jury to conduct them to the
25 jury room for purposes of commencing their

1 deliberations. I'll send in the official verdict
2 form as well as copies shortly.

3 (The following proceedings were held in
4 open court out of the presence of the jury:)

5 THE COURT: I need to -- we're out of
6 the presence of the jury. I need to go to my
7 chambers and print out a copy of the verdict
8 form. So rather than take off immediately for
9 lunch I'll ask you to stand by so that you can
10 take a look at it. I'm sure that the jury itself
11 will go to lunch here fairly soon, but if you
12 would stand by.

13 To the extent you wish to leave the
14 environs of the courtroom while the jury is
15 deliberating, let me give you one caution. It is
16 my practice whenever I receive a note from the
17 jury to come into the courtroom to alert you to
18 the question.

19 If you're not here or if you don't have
20 someone who is here, I will assume that you are
21 waiving your right to be consulted with respect
22 to the question and the Court will proceed to
23 determine how to respond to the question because
24 my goal would be to keep the jury deliberating
25 and I wouldn't want to delay that because the

1 attorneys are absent from the courtroom.

2 I'm sure you could work that out further
3 with Ms. Garcia when she's done with her
4 logistical work with the jury.

5 I will give you an opportunity in the
6 course of the afternoon, if you let Ms. Garcia
7 know it, to go back on the record for the purpose
8 of making post-evidence motions. I indicated I
9 would permit that and I do want to honor that.

10 Any other matters out of the presence of
11 the jury before I start to work on the verdict
12 form?

13 MR. COOMBS: No, Your Honor.

14 MR. LOWE: No, Your Honor.

15 THE COURT: All right. I'll see you in
16 a moment.

17 (Recess taken.)

18 THE COURT: We're on the record out of
19 the presence of the jury. I had an opportunity
20 to review with counsel the verdict form. They
21 made certain interlineations, most of which were
22 noncontroversial. And the Court is preceding to
23 make them, but there was one objection that the
24 Plaintiffs wished to make that I will call on
25 Plaintiff's counsel now.

1 MR. COOMBS: Thank you, Your Honor.

2 Actually two. One we discussed was the
3 question 2 where it says substantially affect
4 commerce in the United States, and the Timberline
5 case which speaks to that issue in the Ninth
6 Circuit uses the words "some effect in the United
7 States."

8 But more importantly, in questions -- I
9 think it's 4 on the trademark construction and
10 question 10, if I'm not mistaken, on the
11 copyright instructions. There is sort of an
12 additional element, as it were, included in the
13 statement of the elements required to be approved
14 by Plaintiffs which I think goes beyond existing
15 law to which we object.

16 And in particular, that's the language
17 that speaks to the last clause, "and the
18 Defendants had reasonable means to withdraw its
19 services so that their services could not be used
20 to directly infringe, but Defendants continued to
21 provide the services to the customer." And I
22 believe that's similar language that tracks in
23 question 10. We'd object in both places.

24 THE COURT: Very well. As I explained,
25 this is a case that gives the Court concern

1 because this is not a case where goods or
2 services that are infringing or that are
3 contributing to an infringement are visible to
4 the alleged contributing infringer, and,
5 therefore, it is important under these
6 circumstances to the Court that it is post-notice
7 conduct which is the basis on which to find
8 contributory infringement, that is, notice by
9 someone to the Defendant that there is
10 infringement.

11 And it's also important given the nature
12 of the facility here, which is a -- in a sense a
13 facility which is available for legitimate uses
14 and is undifferentiated in many respects from
15 legitimate uses and non-legitimate uses, that the
16 Plaintiff carry the burden of proving that the
17 infringement can be -- the contribution can be
18 withheld without affecting legitimate use.

19 And I actually in my instructions gave
20 instructions to the effect that no service
21 provider should be expected to monitor or take
22 steps that are beyond controlling the infringing
23 use and reasonable steps are required.

24 And so that -- although that precise
25 language is not taken from the instruction, it

1 characterizes what I think the Plaintiff has to
2 prove. And indeed I believe there's evidence to
3 support Plaintiff's argument that there were
4 reasonable means to withdraw services so that the
5 services could not be used to directly infringe
6 but still preserving the right to legitimate
7 users.

8 More important is the language that the
9 Defendant continued to provide its services to
10 the customer. For me it is that post-notice
11 having the ability to control either
12 contractually or otherwise or technically and yet
13 not taking that step so that the contribution is
14 to continuing infringement.

15 Does the defense counsel wish to speak
16 to this?

17 MR. LOWE: No, Your Honor. I think that
18 given the instructions the Court has given, I
19 think that that's certainly an appropriate
20 minimal thing to have for these verdict forms.

21 THE COURT: Did you wish to speak
22 further to the verdict form? You indicated you
23 had some objections that were beyond this.

24 MR. LOWE: Yes, Your Honor. We would
25 object to the verdict forms because we believe

1 that they don't properly reflect the elements,
2 and we have made that argument in connection with
3 the jury instructions and we simply reassert the
4 same argument.

5 THE COURT: Very well. Give me a moment
6 to get my staff started on this and I did want to
7 stay on the record.

8 Still out of the presence of the jury.
9 At the close of the case I indicated that I would
10 recognize motions for judgment. It is necessary
11 in order to make a motion for judgment after the
12 verdict to have made it prior to the verdict, and
13 I didn't want -- given the delay we had in
14 starting this morning, I didn't want to stop to
15 have you make your legal motions.

16 We can take time for that, but I did
17 want to give you the opportunity and I indicated
18 I would recognize the motions that were made at
19 the close of the evidence.

20 Does the Plaintiff have a motion?

21 MR. COOMBS: Yes, Your Honor. We would
22 move for judgment as a matter of law on the
23 Plaintiff's claims. We believe the evidence
24 amply demonstrates the elements of the claims for
25 both contributory trademark and contributory

1 copyright infringement, or in the alternative, we
2 would move that the affirmative defense of the
3 Digital Millenium Copyright Act as being not
4 available to the Defendant.

5 THE COURT: Does defense have a motion?

6 MR. LOWE: Yes, Your Honor. We have
7 previously filed motions under Rule 50(a) at the
8 close of the Plaintiff's case and we would now
9 move under Rule 50(b) for a directed verdict as
10 to all of the claims in favor of the Defendants
11 and against the Plaintiff on the same grounds and
12 for the same reasons that we set forth in our
13 earlier motion.

14 THE COURT: I will give you an
15 opportunity actually to provide me with written
16 motions to flesh out your motion. There is a
17 matter that I would benefit from having more
18 particular briefing on and that is the argument
19 that came up actually during the closing argument
20 and perhaps otherwise having to do with the
21 territorial nexus.

22 This is a case where I believe the
23 evidence establishes that the Defendant operated
24 servers and other electronic equipment in the
25 United States and that the evidence is that users

1 of those services stored on those servers and
2 utilized the routers and other electronic devices
3 in a fashion which could support a finding of
4 direct trademark and copyright infringement.

5 The question that I am not as
6 comfortable with is whether or not the mere
7 storage of the information on servers in the
8 United States is in and of itself sufficient to
9 constitute -- to satisfy the nexus.

10 With respect to copyright, of course,
11 the owner of a copyright can control the
12 copying. At some point someone allegedly copied
13 the work and then converted that copy to a
14 digital form which is then stored.

15 Now, there wasn't any evidence that I
16 can recall as to where that copy was made that
17 was ultimately stored. It seems to me that the
18 Copyright Act could apply to that original copy,
19 but my question has to do with the storage of
20 that copy.

21 Now, the copy was stored, as the
22 evidence revealed, in a computer code that is not
23 synonymous with the copy. It is -- can be
24 converted by electronic equipment and programs
25 back into the copy so you can see it.

1 So the question becomes while it's
2 stored on the medium in the computer's
3 possession -- the Defendants' possession, is that
4 a violation of the law or must there be evidence
5 that it is accessed in a fashion which then
6 converts it from its computer form to a readable
7 form before the copyright infringement takes
8 place and back to the interstate part of -- or
9 the territorial nexus, must that conversion --
10 must that be proof that that conversion to an
11 image that displays the work take place in the
12 United States.

13 The same kind of problem is presented
14 with respect to the trademark. The mark itself
15 is an expression in a form of a medium. It is
16 copied and stored electronically as part of these
17 various web pages allegedly on Defendants'
18 servers and routers and transferred around. And
19 so I use the same parallel language.

20 Now, this is a circumstance where there
21 were actual purchases. I would wish to have you
22 brief on whether or not those purchases qualify
23 for conduct in the United States given the timing
24 and the nature of those purchases.

25 So far as the Court is concerned, I

1 didn't look back to see whether supplemental
2 pleadings or anything like that would have made
3 that evidence irrelevant given the timing of the
4 purchase. It just seemed to me that they were
5 circumstantial evidence of purchases or
6 commercial activity that took place during the
7 period of time of the complaint.

8 Be that as it may, it does seem to me
9 that the defense raises a fair question with
10 respect to the burden that the Plaintiff has is
11 whether or not the storage of the material in
12 whatever form on the server satisfies the nexus
13 or must there be something more and, if so, what
14 is that more and whether it was done, proved, in
15 the context of this case.

16 I don't mean to ask you to comment on
17 that now. I just wanted to throw it out to have
18 you think about it. There may be other matters
19 that are the basis of your -- of your motions
20 beyond the interstate -- or the territorial
21 nexus. I keep calling it "interstate" but
22 territorial nexus.

23 I know I've heard your argument with
24 respect -- the defense argument with respect to
25 the liability of a web hosting service given the

1 fact that its clients supply it with information
2 which is not visibly to it a violation, and I'm
3 satisfied that there is a basis for contributory
4 infringement once it knows, however, that that
5 information is infringing trademarks and
6 copyrights.

7 But the interstate -- but the national
8 nexus part of it is something I need help on.

9 MR. COOMBS: Conflict of law is always
10 challenging.

11 THE COURT: Say again?

12 MR. COOMBS: Conflict of law is always
13 challenging.

14 THE COURT: Yes. Okay?

15 MR. COOMBS: Do you have a timeline in
16 mind when you would like to receive that?

17 THE COURT: Oh. No, I don't. But I
18 would ask you to meet and confer. This may be
19 all academic after the verdict. So these are
20 anticipating that there is a verdict to which
21 these motions would now be renewed.

22 And so perhaps what I'll ask my staff to
23 do is once we have a verdict, if we get one,
24 we'll talk about any motions having to do with
25 that because I will assume that your motions just

1 made are under submission to the Court and I'll
2 wait for the verdict before I make any ruling.

3 MR. COOMBS: Thank you, Your Honor.

4 MR. LOWE: Thank you, Your Honor.

5 (Recess taken.)

6 (Court adjourned for the day.)

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CERTIFICATE OF REPORTER

I, Peter Torreano, Pro Tempore Court Reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript is a true and correct transcript of the proceedings had in Louis Vuitton Malletier, S.A. versus Akanoc Solutions, Inc., et al., Case No. C-07-03952-JW, dated August 26, 2009; that I reported the same in stenotype to the best of my ability, and thereafter had the same transcribed by computer-aided transcription as herein appears.

/s/

PETER TORREANO, CSR
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