IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LOUIS VUITTON MALLETIER, S.A.,	)	CV-07-3952-JW
	)	SAN JOSE, CALIFORNIA
PLAINTIFF,	)	
VS.	)	FEBRUARY 22, 2010
AKANOC SOLUTIONS, INC. ET AL,	)	PAGES 1-26
DEFENDANT.	)	

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

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

FOR THE PLAINTIFF: J. ANDREW COOMBS, A PROF. CORP.
BY: ANDREW COOMBS
ANNIE WANG
517 EAST WILSON AVENUE, STE 202
GLENDALE, CA 91206

FOR THE DEFENDANT: GAUNTLETT & ASSOCIATES
BY: JAMES LOWE
18400 VON KARMAN, STE 300
IRVINE, CA 92612

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

SAN JOSE, CALIFORNIA FEBRUARY 22, 2010

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: 07-3952. LOUIS VUITTON V. AKANOC SOLUTIONS. ON FOR DEFENDANT'S MOTION.

MR. LOWE: GOOD MORNING, YOUR HONOR. JAMES LOWE APPEARING ON BEHALF OF THE DEFENDANTS.

MR. COOMBS: AND ANDY COOMBS AND ANNIE WANG APPEARING FOR PLAINTIFF LOUIS VUITTON.

THE COURT: VERY WELL.

SO THIS IS A DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO THE COPYRIGHT AND THE TRADEMARK CLAIMS, OR IN THE ALTERNATIVE A MOTION FOR NEW TRIAL.

MR. LOWE: THAT'S CORRECT, YOUR HONOR.

THE COURT: I'M SURE YOU AREN'T GOING TO COVER ALL THE ISSUES IN THIS BRIEF ARGUMENT, BUT I'M HAPPY TO HAVE YOU ADDRESS WHICHEVER ONES THAT YOU WANT THE COURT TO HEAR THIS MORNING.

MR. LOWE: THANK YOU, YOUR HONOR.

WE HAVE OBVIOUSLY HAVE SUBSTANTIALLY BRIEFED THESE ARGUMENTS ALONG WITH COUNSEL OVER THE LAST SEVERAL MONTHS, BUT I DO WANT TO HIT CERTAIN HIGHLIGHTS.

AS THE COURT KNOWS IN AUGUST OF LAST YEAR THERE WAS A JURY TRIAL. THE JURY FOUND ON BEHALF OF LOUIS VUITTON AND AGAINST OUR CLIENTS WHO OPERATE AN INTERNET SERVICE PROVIDER, AND ONE OF THE DEFENDANTS IS AN OFFICER OF THE COMPANIES THAT OPERATE THE ISP.

AND THE JURY FOUND THAT THERE WAS CONTRIBUTORY TRADEMARKS AND COPYRIGHT INFRINGEMENT BECAUSE THE ISP'S HOSTED, IN A SENSE, OR HAD ON THEIR SERVERS CERTAIN ADVERTISEMENTS FOR BAGS AND OTHER PRODUCTS THAT ARE ALLEGED TO BE KNOCKOFFS OF LOUIS VUITTON PRODUCTS.

FURTHERMORE, AS THE COURT RECALLS, THESE WEBSITES THAT ARE APPEARING ON THIS SERVER HERE APPEAR TO ORIGINATE IN CHINA OR SOME OTHER PLACE OUTSIDE THE UNITED STATES. AND THE PARTIES DON'T KNOW WHO THEY ARE, AND VUITTON HAS NOT ESTABLISHED WHO THEY ARE.

BUT WE THINK THERE ARE SEVERAL MAJOR PROBLEMS. THE JURY, WE THINK, DIDN'T HEAR EVIDENCE THAT THEY WOULD HAVE TO HEAR IN ORDER TO FIND FOR VUITTON. AND THE JURY WAS NOT INSTRUCTED PROPERLY BECAUSE VUITTON HAS CREATED SOME PROBLEMS IN THE COURT'S INSTRUCTIONS.

THERE ARE TWO BASIC ISSUES. ONE IS

TRADEMARK INFRINGEMENT AND THE OTHER IS COPYRIGHT INFRINGEMENT. AS TO BOTH OF THOSE IT IS NECESSARY THE PLAINTIFF ESTABLISH DIRECT INFRINGEMENT BY SOME THIRD PARTY, NOT BY THEIR CLIENTS. AND OUR POSITION IS THAT UNDER RULE 50, THEY DID NOT ESTABLISH DIRECT INFRINGEMENT NOR DID THEY ESTABLISH CONTRIBUTORY INFRINGEMENT.

ON THE TRADEMARK MATTER, AS WE HAVE BRIEFED, THERE IS A REQUIREMENT FOR DIRECT INFRINGEMENT THAT THERE BE BOTH A USE IN COMMERCE AND A LIKELIHOOD OF CONFUSION. THE KARL STORZ ENDOSCOPY CASE OF THE NINTH CIRCUIT MADE THAT CLEAR AS OTHERS HAVE.

AND IT'S IMPORTANT TO RECOGNIZE THAT TRADEMARK INFRINGEMENT IS DIFFERENT FROM SERVICE MARK INFRINGEMENT IN TERMS OF THE USE IN COMMERCE REQUIREMENT, WHEREAS A SERVICE MARK CAN BE USED IN ADVERTISING. A TRADEMARK MUST BE AFFIXED TO GOODS THAT ARE SOLD OR TRANSPORTED IN COMMERCE, AND THAT MEANS ESSENTIALLY IN COMMERCE IN THE UNITED STATES.

SO IT'S NOT ENOUGH THAT SOMEONE OUTSIDE THE UNITED STATES MERELY ADVERTISE THAT THEY HAVE PRODUCTS FOR SALE IN CHINA, FOR EXAMPLE, BUT THEY ACTUALLY HAVE TO AFFIX THE TRADEMARK TO THE GOODS THAT ARE TRANSPORTED OR SOLD IN THE UNITED STATES.

THE COURT: ARE YOU ARGUING THEY HAVE TO AFFIX THE TRADEMARKS TO THE GOODS IN THE UNITED STATES?

MR. LOWE: NO, BUT THEY HAVE TO BE SOLD OR TRANSPORTED IN THE UNITED STATES AT LEAST.

NOW THE EFFORT OF VUITTON WAS TO SAY THERE IS SIMPLY THE ADVERTISING ON THE WEBSITES AND THAT'S GOOD ENOUGH. WE THINK IT'S NOT BECAUSE IT'S NOT USED IN COMMERCE. AND SECTION 1127 OF THE LANHAM ACT MAKES IT CLEAR YOU HAVE TO TREAT SERVICE MARKS AND TRADEMARKS DIFFERENTLY IN THIS USE IN COMMERCE ISSUES.

THE SECOND POINT IS THE LIKELIHOOD OF CONFUSION HAS TO EXIST. AND THERE IS NO EVIDENCE PRESENTED AT THE TILE OF LIKELIHOOD OF CONFUSION IN THE UNITED STATES CERTAINLY. MOST OF THE SITES THEY COMPLAINED ABOUT ACTUALLY MADE IT CLEAR THEY WERE ONLY SELLING REPLICAS, THEY WERE NOT SELLING ACTUAL VUITTON PRODUCTS.

AND THE ONLY EVIDENCE THAT WAS SUBMITTED OF ANYTHING THAT WAS DONE WITH RESPECT TO THESE WEBSITES WAS THAT ONE OF THEIR INVESTIGATORS IN TEXAS, AT THE SPECIFIC INSTRUCTION OF LOUIS VUITTON, ORDERED SOME PRODUCTS KNOWING THAT THEY WERE NOT VUITTON PRODUCTS BUT ORDERED CERTAIN

PRODUCTS, ABOUT A DOZEN OF THEM OR SO, IN ORDER TO CREATE EVIDENCE FOR THIS TRIAL.

ASIDE FROM THE FACT THAT MR. HOLMES AND THE PEOPLE IN PARIS WHO DIRECTED HIM TO ACT KNEW PERFECTLY WELL THESE WERE NOT VUITTON PRODUCTS --

THE COURT: IS YOUR ARGUMENT THAT THE LIKELIHOOD OF CONFUSION IS LIMITED JUST TO THE PURCHASER? IN OTHER WORDS, IF YOU KNOW YOU ARE BUYING A KNOCKOFF OF A LOUIS VUITTON PRODUCT AND THERE IS DIRECT INFRINGEMENT BECAUSE THEY INDEED ARE NOT, THAT AS LONG AS THE PURCHASER KNOWS IT'S A KNOCKOFF, THAT CAN NEVER SATISFY THE LIKELIHOOD OF CONFUSION STANDARD?

MR. LOWE: NO, YOUR HONOR. WE WOULDN'T GO THAT FAR.

THERE IS CASE LAW THAT INDICATES THAT IF THE PUBLIC SO TO SPEAK, IF THE CONSUMERS ARE CONFUSED ABOUT PRODUCTS OF THAT SORT, THAT THAT MIGHT BE SUFFICIENT. BUT VUITTON PRESENTED NO EVIDENCE OF THAT. SPECULATION, PERHAPS, BUT THEY HAD NOBODY WHO HAS EVER COMPLAINED ABOUT ANY OF THESE PRODUCTS.

THE ONLY THING THEY SUBMITTED IN TESTIMONY WAS A LETTER FROM THE GENTLEMAN IN DENMARK WHO KNEW THAT THERE WERE KNOCKOFFS OUT

THERE AND WAS ANNOYED THAT THERE WERE. BUT THERE WAS NO EVIDENCE OF ANYTHING THAT HAPPENED IN THE UNITED STATES WITH RESPECT TO THIS LIKELIHOOD OF CONFUSION.

AND CERTAINLY THE EVIDENCE IS CLEAR THAT PEOPLE ARE PERFECTLY WELL AWARE THAT THERE ARE GENUINE VUITTON PRODUCTS AND THERE ARE KNOCKOFF PRODUCTS, AND YOU CAN BUY THE KNOCKOFF PRODUCTS IN A LOT OF PLACES, LA AND ANY MAJOR CITY.

THERE ARE DIFFERENT MARKETS FOR THESE THINGS BECAUSE WHEREAS A GENUINE VUITTON PRODUCT MIGHT BE FIVE THOUSAND DOLLARS FOR A HANDBAG, YOU CAN BUY IT FOR A HUNDRED DOLLARS IN SANTEE ALLEY. AND PEOPLE KNOW PERFECTLY WELL THAT IT'S NOT THE REAL THING. BUT YOU HAVE TO HAVE LIKELIHOOD OF CONFUSION.

THE PROBLEM SPECIFICALLY IN THIS CASE, YOUR HONOR, WAS THAT VUITTON PERSUADED THE COURT TO INSTRUCT THE JURY. THERE WAS A PRESUMPTION OF LIKELIHOOD OF CONFUSION.

THE COURT: IS THERE A DIFFERENCE IN YOUR VIEW BETWEEN THE TRADEMARK AND THE GOODS THEMSELVES? IN OTHER WORDS, IF YOU HAVE THE GENUINE LOUIS VUITTON TRADEMARK, YOU HAVE THE DYE THAT IMPRESSES THAT ON THE LEATHER AND YOU PUT IT

ON A PRODUCT THAT IS NOT MADE BY LOUIS VUITTON, HAVE YOU INFRINGED THE TRADEMARK?

MR. LOWE: NO, YOUR HONOR. YOU COULD, FOR EXAMPLE, DECORATE YOUR WALLS WITH VUITTON TRADEMARKS, BUT THAT'S NOT A USE IN COMMERCE.

THE COURT: I'M NOT TALKING ABOUT THE WALLS, I'M TALKING ABOUT PUTTING IT ON LEATHER GOODS. YOU'VE GOT THE GENUINE -- FOR EXAMPLE, YOU GO TO THE COMPANY THAT DOES MAKE THE DYE AND YOU SAY, GIVE ME THE DYE AND I WANT TO IMPRESS IT ONTO LEATHER, AND YOU ACTUALLY USE THE LOUIS VUITTON TRADEMARK BUT YOU USE IT ON SOMETHING THAT IS NOT A LOUIS VUITTON HANDBAG; HAVE YOU INFRINGED THE TRADEMARK?

MR. LOWE: THE QUESTION IS WHETHER YOU HAVE CREATED A LIKELIHOOD OF CONFUSION. THAT'S THE ONLY WAY YOU CAN INFRINGE A TRADEMARK. IT'S CREATING A LIKELIHOOD OF CONFUSION. IT'S NOT SELLING A PRODUCT, IT'S NOT ADVERTISING IT, NECESSARILY --

THE COURT: BUT HAVEN'T I BY DEFINITION CREATED CONFUSION IF I USE THE GENUINE TRADEMARK?

MR. LOWE: NOT NECESSARILY, YOUR HONOR. THE QUESTION IS WHETHER THAT HAS CREATED A LIKELIHOOD OF CONFUSION. IF, FOR EXAMPLE, YOU KNOW

AND WHOEVER YOU ARE DEALING WITH KNOWS THAT THIS IS NOT A GENUINE PRODUCT, THERE'S NO LIKELIHOOD OF CONFUSION. IN OTHER WORDS, IF IT IS SOLD AND TRANSPORTED IN COMMERCE IN A WAY THAT WOULD CREATE A LIKELIHOOD OF CONFUSION, THAT COULD BE, WHETHER OR NOT YOU USE THE GENUINE DYE OR SOME FACSIMILE OF IT.

THE COURT: SO YOU WOULD HAVE THE LAW STAND THAT YOU CAN INFRINGE THE TRADEMARK OF LOUIS VUITTON AS LONG AS YOU MAKE IT CLEAR THAT IT IS A KNOCKOFF?

MR. LOWE: NO, YOUR HONOR. THAT'S NOT QUITE RIGHT. THE QUESTION IS WHETHER IT IS AN INFRINGEMENT.

USE OF A TRADEMARK HAS TO BE IN AN INFRINGING WAY IN ORDER TO BE AN INFRINGEMENT. IT HAS TO BE USED IN COMMERCE, HAS TO BE USED ON GOODS SOLD AND TRANSPORTED AND IT HAS TO BE OTHER THAN DECORATIVE -- THIS IS -- A TRADEMARK IS NOT LIKE A COPYRIGHT PER SE, IT HAS TO ACTUALLY DO SOMETHING --

THE COURT: YOU CHANGED. I THOUGHT YOU WERE TALKING ABOUT LIKELIHOOD OF CONFUSION. IF I INCLUDE THE LOUIS VUITTON TRADEMARK OF IT AND I PUT JUST ABOVE IT "KNOCKOFF," YOUR ARGUMENT IS THAT

THAT IS NOT A VIOLATION BECAUSE THERE'S NO LIKELIHOOD OF CONFUSION BECAUSE I'M PROMINENTLY DISPLAYING IT AS A KNOCKOFF.

MR. LOWE: THAT COULD BE. THAT MAY NOT BE THE EXACT OUTCOME, YOUR HONOR, BECAUSE THERE ARE NUMEROUS FACTORS I SHOULD SAY UNDER SLEEKCRAFT, THE NINTH CIRCUIT HAS INDICATED THERE ARE VARIOUS FACTORS YOU CAN CONSIDER AS TO WHETHER THERE'S A LIKELIHOOD OF CONFUSION. AND THAT CAN INCLUDE WHAT OTHER PEOPLE THINK ABOUT IT, BUT OUR POSITION IS TWO-PRONG HERE.

ONE IS THAT THE JURY WAS INSTRUCTED THAT THERE WAS A PRESUMPTION OF A LIKELIHOOD OF CONFUSION, AND THAT'S SIMPLY WRONG. THE NINTH CIRCUIT HAS SAID THAT IS NOT THE LAW HERE IN THE NINTH CIRCUIT. AND WHEN VUITTON HAD THE JURY INSTRUCTED THAT THERE WAS A LIKELIHOOD OF CONFUSION, THAT ESSENTIALLY SENT THEM OFF THE RAILS.

SO THEY PRESENTED THAT AND THEY HAD NO EVIDENCE OF ANY LIKELIHOOD OF CONFUSION, THEY SIMPLY SAID THERE ARE THESE PEOPLE OUT THERE IN CHINA SELLING THESE THINGS AND WE DON'T LIKE IT.

THE COURT: GO TO YOUR COPYRIGHT --

MR. LOWE: THANK YOU.

YOUR HONOR, IN TERMS OF COPYRIGHT, THE PROBLEM IS THAT THE COPYRIGHT ACT ONLY APPLIES WITHIN THE UNITED STATES. AND EVERYTHING THAT WAS PRESENTED HAD TO DO WITH ACTIVITIES IN CHINA.

MR. HOLMES, ON BEHALF OF VUITTON PRODUCT, BOUGHT SOME OF THEM AND THEY ALLEGEDLY HAD AN ITEM ON THERE THAT LOOKED LIKE A COPYRIGHTED IMAGE. THERE ARE TWO COPYRIGHTS INVOLVED IN THIS CASE. THEY ARE BOTH TWO-DIMENSIONAL WORKS THAT ARE TO BE DONE IN LEATHER OR FABRIC WITH CERTAIN PATTERNS AND SO ON, AND THOSE ARE AFFIXED TO PHYSICAL PRODUCTS.

THE EVIDENCE WAS THAT THOSE WERE IN FACT AFFIXED TO PRODUCTS BY KNOWN MANUFACTURERS IN CHINA. AND MR. HOLMES ORDERED PRODUCTS, SENT MONEY TO CHINA, HE DIDN'T ORDER THEM THROUGH THE WEBSITES OF THE DEFENDANTS, BUT ORDERED THEM THROUGH E-MAIL, SENT THE MONEY THROUGH WESTERN UNION, PAID FOR AND COMPLETED THE TRANSACTION IN CHINA AND INSTRUCTED THE CHINESE WITH WHOM HE DEALT TO DELIVER THEM TO THE UNITED STATES SO THAT THIS COURT COULD HAVE JURISDICTION OVER THEM.

NONE OF THAT COPYRIGHT INFRINGEMENT HAPPENED IN THE UNITED STATES, IT HAPPENED IN CHINA. THE ONLY THING THAT VUITTON WAS ABLE TO SHOW WAS THERE WERE PICTURES ON A WEBSITE THAT WAS

HOSTED HERE IN THE UNITED STATES. THOSE PICTURES WERE NOT THE COPYRIGHT. VUITTON IS NOT CLAIMING THAT THEY OWN THE COPYRIGHT IN PHOTOGRAPHS OF BAGS. THEY OWN THE COPYRIGHTS OF THE TWO-DIMENSIONAL THINGS ON LEATHER AND FABRIC.

SO WHAT IS HAPPENING HERE IS SIMPLY THAT ON THE SERVERS THERE ARE SOME PHOTOGRAPHS TWO OR THREE GENERATIONS DOWN, PHOTOGRAPHS OF BAGS THAT HAVE BEEN MADE BY SOMEBODY OTHER THAN VUITTON, PHOTOGRAPHS THAT WERE NOT TAKEN BY VUITTON OF PRODUCTS THAT WERE ALLEGEDLY USING VUITTON'S IMAGES AND WHAT NOT IN CHINA WHICH IS NOT A VIOLATION OF U.S. LAW.

WHAT THEY THEN TRY TO DO IS CONFUSE THESE THIRD GENERATION IMAGES WITH THEIR ACTUAL TRADEMARKS -- OR THE COPYRIGHTS, I SHOULD SAY. AND THAT'S NOT WHAT THEY WERE RIGHT IN.

THE CASE THAT THEY CITED, THE AMAZON CASE, WAS A SIGNIFICANTLY DIFFERENT ONE ACTUALLY BECAUSE IN THAT CASE PERFECT 10 WAS ACTUALLY SELLING PHOTOGRAPHS THAT THEY TOOK AND THEY WERE SELLING THEM ON THE INTERNET. BUT GOOGLE AND AMAZON WERE FACILITATING THE SALE OF THOSE PHOTOGRAPHS THAT HAD BEEN TAKEN BY PERFECT 10; PERFECT 10 OWNED THE PHOTOGRAPHS.

SO THEY ARE NOT PHOTOGRAPHS OF SOMETHING ELSE THAT SOMEBODY ELSE MADE BUT THEY OWN THE PHOTOGRAPHS. WHEN THOSE PHOTOGRAPHS WERE SOLD THROUGH GOOGLE AND AMAZON, THE COURT FOUND THAT WAS A COPYRIGHT INFRINGEMENT.

BUT HERE WE DON'T HAVE VUITTON CLAIMING THEY OWN PHOTOGRAPHS, THEY OWN THESE OTHER COPYRIGHTS.

THE COURT: YOU'VE GOT A VERY -- AND I APPRECIATE THERE'S SOME EXTENSION OF THE LAW THAT'S GOING ON HERE. BY THE WAY, I DID LOOK BACK AT MY INSTRUCTIONS AND I THINK THE PRESUMPTION THAT I DID INSTRUCT ON HAD TO DO IF IT'S AN IDENTICAL MARK.

THERE IS A PRESUMPTION OF LIKELIHOOD OF CONFUSION BECAUSE THERE CAN BE SITUATIONS WHERE THE MARKS ARE SIMILAR BUT NOT IDENTICAL. IN THIS CASE THE EVIDENCE WAS THAT THEY WERE IDENTICAL.

LET ME HAVE YOU RESERVE MORE OF YOUR ARGUMENT TO RESPOND TO VUITTON PRODUCTS' ARGUMENT.

MR. COOMBS: AS TO THE LIABILITY ISSUES THAT HAVE BEEN LARGELY ADDRESSED ALREADY, AND THE NEW EXTRA TERRITORIALITY ISSUE I WOULD LIKE TO HAVE MY ASSOCIATE ADDRESS THAT.

MS. WANG: YOUR HONOR, AS A COMMON THEME, AS YOU'VE NOTICED IN THE BRIEFING, THE DEFENDANTS

HERE ARE MISSTATING THE LAW. IN TERMS OF THE TRADEMARK INFRINGEMENT CLAIM AN OFFER OF INFRINGING IS SUFFICIENT TO ESTABLISH TRADEMARK LIABILITY.

IN ADDITION TO THE STATUTES IN THE LANHAM ACT, THE NINTH CIRCUIT AUTHORITY -- I ALSO HAVE ANOTHER CASE FROM THE NINTH CIRCUIT LEVI STRAUSS & CO. V. SHILON, 121 F.3D 1309 WHICH STATES EXPLICITLY THAT AN OFFER TO SELL WITHOUT MORE WOULD SUFFICE TO ESTABLISH LIABILITY.

IN THAT CASE IT WAS A SITUATION WHERE AN INVESTIGATOR ON BEHALF OF A RIGHTS OWNER WENT TO A STORE AND WAS ABLE TO GET AN OFFER FOR COUNTERFEIT SALES WITHOUT SECURING ANY SALES.

IN THIS CASE WE ACTUALLY HAVE EVIDENCE OF SALES IN ADDITION TO OFFERS, ET CETERA.

THE COURT: I THINK THAT THE PLAINTIFF'S CONCERN THOUGH IS THAT WAS NOT TRANSACTED THROUGH THE SERVICES OF THE DEFENDANT. THAT THEY PROBABLY IDENTIFIED WHO THE SELLER WAS AND THEN WENT IN SOME OTHER ROUTE RATHER THAN THROUGH THE SERVER TO MAKE THE PURCHASE.

ISN'T THAT A STRONG ARGUMENT?

MS. WANG: NO, IT'S NOT, YOUR HONOR BECAUSE THE OFFERS THAT WERE ON THE WEBSITE IN THE FIRST PLACE WERE HOSTED ON THE DEFENDANT'S SERVERS.

THERE'S NO WAY ANYBODY WOULD HAVE SEEN THAT OFFER IN THE FIRST PLACE IF NOT FOR THE DEFENDANT'S INVOLVEMENT OF HAVING THAT INFORMATION STORED HERE IN SAN JOSE.

SO IN TERMS OF THE ARGUMENT THERE ARE ALL THESE SORT OF IN-BETWEENS. THERE'S NO WAY THAT THAT SALE WOULD HAVE BEEN CONSUMMATED IF NOT FOR THE WEBSITE OFFER AND THE DIRECTIONS ON THAT WEBSITE DIRECTING THAT SALE.

THE COURT: I ALSO REMEMBER THAT THERE WERE BARRIERS THAT THE SELLER, ANTICIPATING THAT PERHAPS THEY WOULD BE IN SOME DIFFICULTY IN SELLING THE PRODUCTS, HAD SET UP WAYS IN WHICH THE TRANSACTION WAS DONE TO DO AN INDIRECT SALE THAT ACTUALLY HAD TO GO THROUGH SOME E-MAIL PROCESS.

WELL, HOW ABOUT THIS LIKELIHOOD OF CONFUSION ISSUE.

MS. WANG: YOUR HONOR, AS YOU POINTED OUT IN TERMS OF THE CASE LAW CITED BY THE DEFENDANTS THAT CASE DID NOT SAY THAT MR. LOWE INDICATED. THAT CASE WAS NOT A CASE ABOUT COUNTERFEITS, FOR ONE THING.

BUT IT ALSO -- THE COURT DID INSTRUCT ON THE IDENTICAL ISSUE AND DID INSTRUCT ON THE SLEEKCRAFT FACTORS. AND THE CASES CITED BY THE

DEFENDANTS, THE KARL STORZ ENDOSCOPY CASE DOES SAY THAT THE LIKELIHOOD OF CONFUSION IS NOT LIMITED TO THE PURCHASER AND THAT THE JURY COULD HAVE MADE THAT DETERMINATION JUST ON A SIDE-BY-SIDE COMPARISON, THAT IT WOULD OBVIOUS IN THIS CASE BECAUSE THE POINT OF A KNOCKOFF IS TO LOOK LIKE THE REAL THING.

THE COURT: VERY WELL.

FINAL WORDS?

MR. LOWE: YOUR HONOR, A COUPLE MORE POINTS, AND I WOULD LIKE TO ADDRESS THAT. FIRST OF ALL, NO ONE SAW THESE ITEMS EXCEPT FOR MR. HOLMES AND SOME PARTIES OUTSIDE THE UNITED STATES, ACCORDING TO THE EVIDENCE PUT ON. SO IT WASN'T AS IF THERE WAS GREAT ACTIVITY GOING IN THE U.S.

AND I THINK THE CASES THAT COUNSEL IS TALKING ABOUT EITHER ARE TALKING ABOUT SERVICE MARKERS OR THEY ARE TALKING ABOUT DEALING WITH A DIRECT SELLER HERE IN THE UNITED STATES. AND THE PROBLEM IS THE LANHAM ACT DOESN'T APPLY TO THINGS GOING ON IN CHINA UNLESS THERE'S SOME IMPACT ON THE U.S. TRADE, AND THERE'S NO EVIDENCE OF THAT.

THE COURT: YOU KNOW, THE INTERNET HAS CHANGED THE GEOGRAPHIC MEANS OF WHERE A SALE TAKES

PLACE. IF YOU GO TO A SITE THAT IS REALLY CONTROLLED BY A SERVER THAT'S LOCATED IN SAN JOSE AND THEY ARE SELLING A GOOD, PART OF THE TRANSACTION HAS TO TAKE PLACE, BY DEFINITION, IN SAN JOSE BECAUSE THE OFFER OF THE GOOD IS TAKING PLACE AS A RESULT OF THERE BEING THE IMAGE OF THE GOOD ON THE SERVER LOCATED IN SAN JOSE.

THE ULTIMATE MONEY MAY GO TO A BANK ACCOUNT LOCATED ANYWHERE, AND THE GOODS MAY COME FROM YET A THIRD LOCATION. THAT IS THE NATURE OF THE ONLINE SALE.

SO THIS IS NOT A -- THIS ONLINE WORLD HAS CHANGED THE NATURE OF COMMERCE, HASN'T IT? AND DOESN'T THE LAW NEED IT REFLECT THAT?

MR. LOWE: WELL, YOUR HONOR, I THINK THE COURT IS THINKING ABOUT THE TYPICAL E-COMMERCE SITUATION AMAZON OR EBAY OR SOME OF THOSE SITUATIONS WHERE THE TRANSACTION ACTUALLY TAKES PLACE, YOU PUT YOUR CREDIT CARD ON THE SITE AND YOU ACTUALLY BUY IT.

THIS IS NOT THAT KIND OF TRANSACTION. THE EVIDENCE IS THAT ALL THAT HAPPENED IS YOU SAW PICTURES ON THE WEBSITE HERE FROM THE SERVER IN SAN JOSE BUT YOU HAD TO ACTUALLY CONTACT SOMEONE IN CHINA, SEND THE MONEY TO CHINA PHYSICALLY, TAKE

DELIVERY OF THE PRODUCT IN CHINA, HAVE IT THEN SHIPPED TO THE UNITED STATES OR PARIS OR WHEREABOUTS YOU WANT TO HAVE IT SHIPPED.

SO IT'S NOT THAT KIND OF SITUATION. HAD THEY HAD THAT EVIDENCE WE WOULD BEING TALKING ABOUT A DIFFERENT CASE

THE COURT: BUT THIS IS CONTRIBUTORY INFRINGEMENT. DOESN'T THE FACT THAT THE WHOLE THING STARTS WITH AN ONLINE ADVERTISEMENT OF A PRODUCT THAT ALLEGEDLY VIOLATES THE COPYRIGHTED TRADEMARK, ISN'T THAT SUFFICIENT FOR CONTRIBUTION?

MR. LOWE: NO, YOUR HONOR. WHAT COURTS HAVE REFERRED TO IS IT'S MERELY A PRECONDITION TO POSSIBLE INFRINGING ACTIVITY; AND FRANKLY, IT WOULDN'T BE ANY DIFFERENT THAN THE ACTIVITY OF THE POSTAL SERVICE OR UPS OR EVEN THE UTILITY COMPANY THAT PROVIDED THE POWER TO THE BUILDING WHERE THE SERVERS ARE LOCATED. AT SOME POINT YOU HAVE TO STOP AND YOU HAVE TO HAVE SOME ACTUAL INTENTIONAL MATERIAL CONTRIBUTION BEFORE YOU CAN HAVE THAT --

THE COURT: I AGREE. LET'S NOT GO TO THE POWER COMPANY, BUT AT SOME POINT YOU DO HAVE TO START -- ISN'T IT AN APPROPRIATE PLACE TO START WITH CONTRIBUTORY INFRINGEMENT, TO START WITH THE SERVER THAT ACTUALLY HOSTS THE PLACE WITHOUT WHICH

YOU COULD NOT KNOW THAT THERE WAS A PRODUCT THAT WAS FOR SALE?

MR. LOWE: NO, YOUR HONOR. BECAUSE YOU HAVE TO DISTINGUISH BETWEEN MERELY A PRECONDITION AND THE MEANS OF THE INFRINGEMENT.

THE MEANS OF INFRINGEMENT IS A WEBSITE THAT IS CONTROLLED FROM CHINA MERELY SAT ON A SERVER HERE, AND THE DEFENDANTS DID NOT HAVE ANY REAL MEANS OF CONTROL OVER THAT OTHER THAN TO UNPLUG IT, TO DISABLE AN IP ADDRESS AS THEY DID CONSTANTLY.

SO THEY WERE NOT TRYING TO HELP OUT, THEY WERE ACTUALLY TRYING TO INTERFERE, THEY WERE TRYING STOP IT, BUT THIS IS A DIFFICULT SITUATION.

AS THE COURT MAY KNOW, NO COURT IN THE WORLD HAS YET FOUND AN ISP LIABLE FOR CONTRIBUTORY INFRINGEMENT IN THIS SITUATION. AND THE CASES THAT HAVE BEEN PUSHING THIS HAVE FAILED, AND WE SUBMITTED A NUMBER OF THOSE.

WE SUBMIT THAT THIS COURT SOME NOT BE THE FIRST TO SAY THAT IT'S OPEN SEASON ON ISP'S BECAUSE THAT WOULD ESSENTIALLY CRIPPLE INTERNET COMMERCE BECAUSE THE DEFENDANTS HAVE NO REAL MEANS OF STOPPING WHAT PEOPLE ARE DOING SOMEWHERE ELSE OTHER THAN WHAT THEY'VE TESTIFIED THAT THEY DID DO.

YOUR HONOR, THERE ARE TWO MORE QUICK POINTS, IF I MAY. ONE IS ON THE ISSUE OF MR. CHEN'S LIABILITY, THE OFFICER LIABILITY WE THINK HAS NOT BEEN ESTABLISHED MERELY BECAUSE HE WORKED THERE OR MANAGED THE BUSINESS DOES NOT MEAN THAT HE IS LIABLE --

THE COURT: ISN'T THAT A STATUTORY PROVISION?

MR. LOWE: NO, YOUR HONOR. THERE HAS TO BE ACTUAL CONDUCT BY MR. CHEN SEPARATE FROM THE BUSINESS.

ALL OF THE CASES THAT VUITTON HAS CITED INVOLVED INDIVIDUALS WHO DELIBERATELY WENT OUT OF THEIR WAY TO CAUSE A CORPORATION TO INFRINGE, MOST OFTEN DIRECTLY INFRINGE BY ORDERING THE INFRINGING PRODUCTS, BY LYING TO PEOPLE ABOUT WHAT THEY WERE DOING, BY CONCEALING WHAT WAS GOING ON AND SO ON.

AND NONE OF THAT EVIDENCE APPEARS IN THIS CASE. THERE'S SIMPLY NO EVIDENCE ABOUT MR. CHEN'S ACTIVITY EXCEPT HIS EFFORT TO STOP WHAT'S GOING ON. SO AT THE VERY LEAST HE SHOULD NOT HAVE ANY LIABILITY.

FINALLY, YOUR HONOR, IF I MAY JUST BRIEFLY, WE'VE BRIEFED THIS, BUT CLEARLY THE JURY WAS OUT OF CONTROL PERHAPS BECAUSE OF INSTRUCTIONS,

PERHAPS BECAUSE OF PASSION ABOUT LOUIS VUITTON, I DON'T KNOW. BUT CLEARLY, THEY CAME BACK WITH AN EXCESSIVE VERDICT, ONE THAT IS COMPLETELY BEYOND ANYTHING THAT'S EVER HAPPENED IN THE HISTORY OF THIS COUNTRY, AND WELL BEYOND THE MAXIMUM DAMAGES THAT COULD POSSIBLY BE IMPOSED UNDER EITHER THE TRADEMARK OR COPYRIGHT ACT.

AMAZINGLY, MR. COOMBS ASKED FOR A MILLION DOLLARS IN DAMAGES AND THEY CAME BACK WITH $32.4 MILLION IN DAMAGES, WELL BEYOND TWO OR THREE TIMES WHAT THE MAXIMUM DAMAGES ARE. AND WE ARGUED WHY THAT IS IMPROPER UNDER THE DISCUSSION OF PUNITIVE DAMAGES AND AS MUCH AS THERE WAS NO HARM THAT WAS SHOWN, SO IT'S ESSENTIALLY ALL PUNITIVE AND THE INSTRUCTIONS INDICATED THIS WAS TO PUNISH, AND THEY FRANKLY GOT CARRIED AWAY.

SO AT THE VERY LEAST THE COURT OUGHT TO ORDER A NEW TRIAL ON THIS ISSUE AND BECAUSE THEY OBVIOUSLY WERE CONFUSED ABOUT LIABILITY AND DAMAGES --

THE COURT: WHICH YOU ARGUE I HAVE THE POWER TO REMIT PORTIONS OF THE PUNITIVE DAMAGES IN EXCESS OF WHAT WOULD BE AN AMOUNT THAT WOULD BE -- ACTUALLY, IN THIS CASE THE JURY WAS GIVEN THE RANGES ON A STATUTORY BASIS AND IT WAS SIMPLY THE

MULTIPLE TIMES THE NUMBER OF INFRINGEMENTS.

HOWEVER, JUST ON THE ISSUE OF REMITTED, DO I HAVE THE RIGHT TO REMIT?

MR. LOWE: YES, YOUR HONOR. I THINK YOU DO. THE QUESTION IS HOW WOULD YOU GO ABOUT THAT? THIS HAS HAPPENED ONLY ON A FEW OCCASIONS AND COURTS HAVE STRUGGLED WITH HOW TO DO IT.

CERTAINLY, ONE OF THE POSSIBILITIES IS YOU JUST PICK A NUMBER WITHIN THE MAXIMUM AND MINIMUM RANGE, BUT THAT WOULD FRANKLY BE ARBITRARY BECAUSE THERE'S NO BASIS FOR FIGURING OUT WHAT THAT IS, AND ESSENTIALLY THIS IS A NUMBER THAT IS A PUNITIVE DAMAGE NUMBER THAT UNDER CONSTITUTIONAL LAW SHOULD BE TIED TO SOME ACTUAL DAMAGE FIGURE, SOME KIND OF HARM, EVEN IF YOU CAN'T EXACTLY QUANTIFY IT.

WE HAD ARGUED THAT AT THE VERY LEAST THE COURT SHOULD ORDER A NOMINAL DAMAGE FIGURE, A DOLLAR FOR EXAMPLE, BUT AT THE VERY LEAST, VUITTON ONLY ASKED FOR A MILLION DOLLARS. THEY CERTAINLY SHOULDN'T BE GETTING MORE THAN THAT, AND CLEARLY THE JURY WAS OUT OF CONTROL WHEN THEY MADE THE AWARD THAT THEY DID.

THE COURT: OKAY. AND COULD YOU ADDRESS THIS LAST POINT.

MR. COOMBS: QUICKLY ON THE POINT OF MEANS VERSUS PRECONDITION, THAT IS AN ALIEN CONCEPT THAT HAS NO BEARING HERE. IT'S TAKEN FROM A TRIAL COURT DECISION ENTERED A COUPLE WEEKS AGO IN AUSTRALIA AND HAS NO RELEVANCE FOR THE ANALYSIS THIS COURT HAS ENGAGED IN, THAT THE JURY IS ENGAGED IN, AND FRANKLY HAS NO IMPACT ON THE COURT'S REASONING.

AS FAR AS THE DOLLAR AMOUNTS ARE CONCERNED, I WOULD LIKE TO CORRECT MR. LOWE'S STATEMENT IN THE RECORD. WHAT I REQUESTED IN CLOSING ARGUMENT WAS NOT LESS THAN A MILLION DOLLARS, AND THE JURY CLEARLY DID AWARD NOT LESS THAN A MILLION DOLLARS. BUT TO SAY LOUIS VUITTON ONLY ASKED FOR A MILLION DOLLARS IS A MISSTATEMENT OF THE RECORD.

AS FAR AS THE STATUTORY DAMAGE AMOUNT IS CONCERNED, FIRST OF ALL, IT'S NOT SOLELY PUNITIVE. IT IS DESIGNED TO BE COMPENSATORY AND IT IS DESIGNED TO BE PUNITIVE AND IT IS DESIGNED TO BE A DETERRENT.

AND IN THIS CONTEXT WITH LITERALLY HUNDREDS OF SITES AND EACH SITE HAVING HUNDREDS OF OFFERS, SOME OF WHICH HAD BEEN SUBJECT OF NOTICES BEFORE THE COMPLAINT WAS FILED AND WERE STILL ON

WHEN MR. CHEN WAS SITTING ON THE STAND, THESE ARE NOT OUTLANDISH NUMBERS.

AND IN FACT, WE WERE ALL HERE WHEN THE JURY CAME BACK SEVERAL TIMES WITH QUESTIONS EVIDENCING THEIR CAREFUL DELIBERATION ON THE APPROPRIATE AMOUNT OF STATUTORY DAMAGES TO AWARD IN THIS CASE.

SO WE WOULD RESPECTFULLY SUBMIT THAT NOTWITHSTANDING MY CONSERVATISM IN CLOSING ARGUMENT THAT THE $31 MILLION IS AN APPROPRIATE DAMAGE AWARD WHICH SHOULD BE ALLOWED TO STAND.

THE COURT: AND I AM REMINDED THAT THIS IS A CASE WHERE THERE WAS A REQUEST FOR INJUNCTIVE RELIEF WHICH CAN SOMETIMES PLAY IN THE COURT'S MIND WITH RESPECT TO WHETHER OR NOT A LARGE PUNITIVE AWARD SHOULD BE ALLOWED TO STAND IN LIEU OF SIMPLY HALTING THE PRACTICE; HOWEVER, I'M ALSO REMINDED THAT THE DEFENDANT'S POSITION IS IT HAS NO MEANS OF ACTUALLY COMPLYING WITH EVEN A LIMITED INJUNCTION BECAUSE IT DOESN'T HAVE THE ABILITY TO UNPLUG ITS SERVER AND STAY IN BUSINESS. AND BY BEING A SERVER, IT'S FOREVER PREY TO INTERNET SITES THAT SEEK TO SELL KNOCKOFF PRODUCTS.

THANK YOU BOTH FOR YOUR ARGUMENT, MATTER IS SUBMITTED.

MR. COOMBS: YOUR HONOR, ONE QUESTION.

WHEN WE WERE HERE LAST MONTH IT WAS YOUR HONOR'S INTENTION TO TRANSMIT A DRAFT FORM OF THE INJUNCTION BEFORE THIS HEARING TODAY.

I DON'T THINK WE'VE SEEN ANYTHING AND I WAS WONDERING IF WE HAD AN UPDATE ON THE STATUS OF THE INJUNCTION.

THE COURT: THANKS FOR REMINDING ME. I WILL TAKE A LOOK AT THAT. I PERHAPS DIRECTED BY STAFF TO HOLD OFF UNTIL I HAD THE BENEFIT OF THIS ARGUMENT BECAUSE IT COULD HAVE INFLUENCED THE LANGUAGE OF WHAT I DID ON THE INJUNCTION, BUT I'LL FOLLOW THROUGH ON THAT.

MR. COOMBS: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL 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, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

_____
SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185