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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

LOUIS VUITTON MALLETIER, S.A.,

Plaintiff,

vs.

AKANOC SOLUTIONS, INC., et al.,

Defendants.

) Case No.: C 07-3952 JW

) Hon. James Ware

) **DEFENDANTS' SUPPLEMENTAL**
) **MOTION FOR SUMMARY JUDGMENT**

) Date: September 8, 2008

) Time: 9:00 a.m.

) Dept.: Courtroom 8, 4th Floor

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1 **PLEASE TAKE NOTICE** that pursuant to Fed. R. Civ. P. 56 and Civil Local Rules 56-1
2 and 7-2 of the United States District Court for the Northern District of California, Defendants
3 Managed Solutions Group, Inc. (“MSG”), Akanoc Solutions, Inc. and Steve Chen (collectively
4 “Defendants”) will move on September 8, 2008 at 9:00 a.m. for summary judgment on the ground
5 that Plaintiff Louis Vuitton Malletier (“Vuitton”) cannot prove essential elements of contributory
6 trademark infringement, vicarious trademark infringement, and contributory and vicarious copyright
7 infringement. Defendants hereby file this supplemental motion for summary judgment in order to
8 obtain summary judgment in light of Vuitton’s First Amended Complaint (“FAC”), filed after
9 Defendants filed their original motion for summary judgment. Vuitton’s FAC only differs from its
10 original complaint in one respect. While its original complaint specified 5 websites¹ that were
11 allegedly hosted on Defendants’ Internet servers, Vuitton’s FAC now alleges 77 websites. This
12 supplemental motion for summary judgment is the appropriate means to address the 72 additional
13 websites referenced in Vuitton’s FAC. *See Colan v. Mesa Petroleum Co.*, 951 F.2d 1512 (9th Cir.
14 1991); *Carter v. Hewlett-Packard Co.*, No. C 04-3307 CW, 2007 WL 160820 (N.D. Cal. Jan. 17,
15 2007); *Oracle Corp. v. Warranty Corp. of America*, No. C 03-3146 PJH, 2005 WL 658976 (N.D.
16 Cal. March 22, 2005) (cases considering parties’ supplemental motions for summary judgment)

17 The Defendants move for a summary judgment in their favor on all causes of action because
18 no rational trier of fact, given the record as a whole, could find that Defendants are liable for
19 contributory trademark infringement, vicarious trademark infringement, or contributory or vicarious
20 copyright infringement even with the additional allegations in the FAC. Despite Vuitton’s addition
21 of 72 more allegedly infringing websites, summary judgment in this case is still proper because (1)
22 there is no admissible evidence to support Vuitton’s allegations that the 72 additional websites cited
23 in the FAC were ever hosted on Defendants’ Internet servers and (2) Vuitton still cannot prove the
24 necessary elements of its claims.

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¹The 5 websites listed in the original complaint are ape168.com, atozbrand.com, bag925.com, eshoes99.com, and wendy929.com.

1 **I. SUMMARY JUDGMENT IS PROPER BECAUSE VUITTON CANNOT PROVE**
2 **ESSENTIAL ELEMENTS OF ITS THREE CAUSES OF ACTION**

3 Summary judgment is proper where “there is no genuine issue as to any material fact and...”
4 the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). The moving
5 party “always bears the initial responsibility of informing the district court of the basis for its
6 motion, and identifying [the evidence] which it believes demonstrates the absence of a genuine issue
7 of material fact.” *Celotex v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).
8 The non-moving party must then identify specific facts “that might affect the outcome of the suit
9 under the governing law,” thus establishing that there is a genuine issue for trial. *See, e.g., Anderson*
10 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

11 When evaluating a motion for summary judgment, the court views the evidence through the
12 prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby*
13 *Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court draws all reasonable
14 inferences in favor of the non-moving party, including questions of credibility and of the weight that
15 particular evidence is accorded. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520,
16 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). The court determines whether the non-moving party's
17 “specific facts,” coupled with disputed background or contextual facts, are such that a reasonable
18 jury might return a verdict for the non-moving party. *T.W. Elec. Serv., Inc. v. Pacific Elec.*
19 *Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is
20 inappropriate. *Anderson*, 477 U.S. at 248. Summary judgment is, however, appropriate where a
21 rational trier of fact could not find for the non-moving party based on the record as a whole.
22 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538
23 (1986).

24 Summary judgment in favor of Defendants is proper and required here in light of the
25 uncontested evidence and lack of evidence. No rational trier of fact could find for Vuitton because,
26 despite its allegations about 72 additional allegedly infringing websites in its FAC, Vuitton still has
27 no admissible evidence to prove numerous essential elements of its three causes of action.

1 **II. VUITTON DOES NOT HAVE ADMISSIBLE EVIDENCE SHOWING THAT THE**
2 **ADDITIONAL WEBSITES NAMED IN ITS FIRST AMENDED COMPLAINT HAVE**
3 **EVER BEEN HOSTED ON DEFENDANTS' INTERNET SERVERS**

4 Vuitton has no admissible evidence that the additional 72 websites named in its FAC have
5 ever been located on Internet servers hosted by these Defendants, let alone that Defendants are liable
6 for any wrongdoing in connection with the additional third-party websites.

7 **A. Testimony of Vuitton's Counsel Is Admissible**

8 **1. Vuitton's Failure to Disclose Under Fed. R. Civ. P. 26(a)**

9 There is no evidence that Louis Vuitton has ever itself investigated any of the 72 websites
10 alleged in its FAC. The only information about these 72 websites that Vuitton appears to have is
11 based solely upon the investigation by Vuitton's counsel, J. Andrew Coombs. Defendants have
12 reached this conclusion because the only information they have ever received about the additional 72
13 allegedly infringing websites has come only in communications from Mr. Coombs and without any
14 indication of a source of information other than Mr. Coombs himself. Coombs, however, cannot
15 testify in this case because, among other reasons, Vuitton did not disclose him as a witness pursuant
16 to Fed. R. Civ. P. 26(a) or (e). Vuitton was required to disclose all individuals "likely to have
17 discoverable information" and all "documents, electronically stored information, and tangible
18 things" in Vuitton's possession that it might use "to support its claims or defenses, unless the use
19 would be solely for impeachment."² Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii), (C). Vuitton only disclosed
20 two witnesses, Nicolay Livadkin and Robert Holmes. Not having supplemented its disclosures to
21 name any additional witnesses or documents, Vuitton is prohibited from using any such witness or
22 document as evidence in a motion hearing or a trial. Under Fed. R. Civ. P. 37(c)(1) "[i]f a party fails
23 to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed
24 to use that information or witness to supply evidence on a motion." Because Vuitton failed to name
25 Coombs as a witness in its Rule 26(a) disclosures, Fed. R. Civ. P. 37(c)(1) precludes Coombs from
26 testifying.

27 _____
28 ² The parties' Rule 26(f) conference occurred on December 6, 2007. (HP's Notice of Mot. and Mot.
to Compel No. 1 n. 6.)

1 **2. Coombs' Testimony About the Website Contents Is Hearsay**

2 Coombs' testimony also may not be used because any such testimony would be inadmissible
3 hearsay. Defendants are not aware of any admissible evidence concerning allegations about any of
4 the 72 websites that Vuitton added to its FAC that would establish even a minimal connection to the
5 Defendants or show any infringing activity. If Vuitton seeks to introduce, for example, printouts or
6 screen shots from any websites, printed by Coombs, in an effort to establish contents of websites,
7 such material would be unauthenticated, inadmissible hearsay. Such material can only be
8 authenticated by the testimony of "someone with knowledge of the accuracy of the contents" of the
9 printouts.³ Vuitton has never disclosed, identified or produced a witness with personal knowledge
10 of the accuracy of the contents of any of the websites it has alleged, including the new 72. Because
11 of the lack of disclosure and because the discovery cut-off date has passed, Vuitton should not be
12 permitted to present evidence from additional witnesses about additional matters.⁴

13 Instead of repeating arguments made in the previously filed Motion for Summary Judgment,
14 Defendants refer the Court to the arguments in section I.D.2.d.(1) of Defendants' Motion for
15 Summary Judgment for further discussion on this issue.

16 **3. Coombs Is Incompetent As A Witness And His Letters are Inadmissible**

17 Louis Vuitton itself has never sent Defendant any correspondence referencing the 72

18 _____
19 ³See *Internet Specialties West, Inc. v. ISPWest*, No. CV 05-3296 FMC AJWX, 2006 WL 4568796, at
*2 (C.D. Cal. Sept. 19, 2006).

20 [M]ost of plaintiff's arguments are addressed to print-outs from websites and the
21 question of their admissibility. Plaintiff properly contends that these print-outs are
22 inadmissible unless properly authenticated. **Defendant's argument, that they could**
23 **be "authenticated" by the person who went to the website and printed out the**
24 **home page, is unavailing.** It is now well recognized that "Anyone can put anything
25 on the internet. No website is monitored for accuracy and nothing contained therein is
under oath or even subject to independent verification absent underlying
documentation ...hackers can adulterate the content on any web-site from any
location at any time. For these reasons, any evidence procured off the Internet is
adequate for almost nothing...." *Wady v. Provident Life and Accident Ins. Co. of*
America, 216 F.Supp.2d. 1060, 1064. (C.D.Cal.2002).

26 To be authenticated, someone with knowledge of the accuracy of the contents of the
internet print-outs must testify. See *In re Homestore.com, Inc., Securities Litigation*,
347 F.Supp.2d. 769, 782 (C.D.Cal.2004). (emphasis added).

27 ⁴ Fed. R. Civ. P. 37(c)(1) "If a party fails to provide information or identify a witness as required by
28 Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a
motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

1 additional websites or giving the Defendants notice of any alleged infringement. Its original
2 complaint only referred to 5 websites and Vuitton's Rule 30(b)(6) witness testified that after Vuitton
3 filed this lawsuit, Vuitton stopped sending any notifications to Defendant.⁵ Robert Holmes, the
4 private investigator that Vuitton hired, confirmed that Vuitton had only asked that he research
5 between "a half-dozen and a dozen and a half" websites for this lawsuit.⁶ Vuitton cannot use or even
6 authenticate any correspondence sent by its counsel in this case to Defendants' counsel that
7 discusses the 72 websites added in Vuitton's FAC.

8 Any letters sent by Vuitton's counsel, J. Andrew Coombs, to Defendants' counsel
9 referencing the 72 additional websites alleged in Vuitton's FAC, cannot be authenticated⁷ and are
10 inadmissible. Neither Louis Vuitton nor any competent witness sent any letters giving notice of
11 alleged infringement and the discovery cut-off date has passed over three months ago.⁸ The only
12 apparent plan Vuitton has for authenticating or presenting any testimony about the additional
13 websites would be through Mr. Coombs' personal testimony.⁹ But Mr. Coombs cannot testify in
14 this case because he is Vuitton's counsel in this case and therefore not a competent witness under the
15 advocate-witness rule.

16 The Ninth Circuit has recognized that:

17 **The advocate-witness rule prohibits an attorney from appearing as**
18 **both a witness and an advocate in the same litigation.** This
19 venerable rule is a necessary corollary to the more fundamental tenet
20 of our adversarial system that juries are to ground their decisions on
21 the facts of a case and not on the integrity or credibility of the
22 advocates. Accordingly, adherence to this time-honored rule is more
23 than just an ethical obligation of individual counsel; **enforcement of**
24 **the rule is a matter of institutional concern implicating the basic**
25 **foundations of our system of justice.**¹⁰ (emphasis added)

23 ⁵Deposition of Nicolay Livadkin 180:23-24 attached hereto as **Exhibit "1507"** to the Declaration of
24 James A. Lowe in Support of Defendants' Supplemental Motion for Summary Judgment ("Lowe
25 Decl.")

26 ⁶Deposition of Robert Holmes 32:12-18 attached hereto as **Exhibit "1508"** to the Lowe Decl.

27 ⁷See Fed R. Evid. 901. The requirement of authentication is a condition precedent to admissibility.

28 ⁸As Vuitton noted in its Motion for Leave to Amend to File its First Amended Complaint, all pre-
trial dates in this matter have passed, including the discovery cut-off date of April 29, 2008.

⁹See Fed R. Evid. 901(a), 901(b)(1).

¹⁰*U.S. v. Prantil*, 764 F.2d 548, 552-553 (9th Cir. 1985).

1 Rule 5-210 of the California Rules of Professional Conduct also follows the advocate-witness
2 rule, stating that an attorney may not testify in a matter where he also is an advocate. Rule 3.7 of the
3 ABA Model Rules Prof. Conduct also prohibit a lawyer from acting as an advocate in a matter where
4 he or she is a necessary witness. *See People v. Donaldson*, 93 Cal. App. 4th 916, 928 (2001).

5 **The foundations of the prohibition against a lawyer's acting as**
6 **both advocate and witness lie in due process** (ABA rule 3.7(a),
7 Legal Background): “The prohibition against a lawyer serving as
8 advocate and testifying as a witness in the same matter is essentially
9 aimed at eliminating confusion over the lawyer's role. This confusion
10 could prejudice one or more of the parties or call into question the
11 impartiality of the judicial process itself. As an advocate, the lawyer's
12 task is to present the client's case and to test the evidence and
13 arguments put forth by the opposing side. A witness, however,
14 provides sworn testimony concerning facts about which he or she has
15 personal knowledge or expertise. **The very fact of a lawyer taking on**
16 **both roles will affect the way in which a jury evaluates the**
17 **lawyer's testimony, the lawyer's advocacy, and the fairness of the**
18 **proceedings themselves.”** (Emphasis added.)

19 There is no justification for permitting Vuitton’s counsel to act as a witness in this case in an
20 attempt to correct inadequacies in the lawyer’s evidence and a lack of appropriate witnesses. Mr.
21 Coombs has never been identified or disclosed as a witness in this case and the time for doing so is
22 past, the discovery cut-off being long past. The Plaintiff’s designation of Rule 30(b)(6) witnesses
23 never included Mr. Coombs and was never supplemented. Whatever evidence Mr. Coombs may
24 want to present about his recent additions to the complaint in an attempt to salvage the suit cannot be
25 considered by this Court or by a jury. All such evidence, including Mr. Coombs testimony, is
26 precluded by the advocate-witness rule, F.R.Civ.P. Rule 37(c)(1) and by the hearsay rule, FRE Rule
27 802.

28 **B. No Evidence of Vuitton’s Required Compliance with the DMCA**

In addition to Vuitton’s lack of competent evidence about the additional 72 websites accused
of infringement, Vuitton has no evidence of compliance with a federal law that is a pre-condition for
use of an infringement notice in a case such as this. The Defendants are unaware of any notifications
about the additional 72 websites that comply with the Digital Millennium Copyright Act (“DMCA”).

The DMCA “creates a ‘safe harbor’ for internet service providers who satisfy the

1 requirements of the statute-protecting them against suits for damages and most injunctive relief”,¹¹
2 meaning the DMCA requires parties to send notice to the designated agent as a precondition to
3 pursuing infringement claims. Under Section 512(c)(1) of the DMCA, a service provider, like the
4 Defendants here, cannot be liable in a suit unless a complaining party sends an effective notification
5 of claimed infringement as defined under Section 512(c)(3) of the DMCA:

6 **A service provider shall not be liable** for monetary relief, or, except
7 as provided in subsection (j), for injunctive or other equitable relief,
8 for infringement of copyright by reason of the storage at the direction
9 of a user of material that resides on a system or network controlled or
10 operated by or for the service provider, **if the service provider—**

11 **(C) upon notification of claimed infringement as described in**
12 **paragraph (3),** responds expeditiously to remove, or disable access to,
13 the material that is claimed to be infringing or to be the subject of
14 infringing activity.¹²

15 Paragraph 3 of the DMCA specifies that notifications of possible infringements contain
16 certain elements:¹³

17 **(A) To be effective** under this subsection, **a notification** of claimed
18 infringement **must be a written communication provided to the designated agent**
19 of a service provider **that includes** substantially the following:

20 (i) A physical or electronic **signature of a person authorized to act** on
21 behalf of the owner of an exclusive right that is allegedly infringed.

22 (ii) **Identification of the copyrighted work** claimed to have been
23 infringed, or, if multiple copyrighted works at a single online site are covered by a
24 single notification, a representative list of such works at that site.

25 (iii) **Identification of the material that is claimed to be infringing** or to
26 be the subject of infringing activity and that is to be removed or access to which is to
27 be disabled, and information reasonably sufficient to permit the service provider to
28 locate the material.

(iv) Information reasonably sufficient to permit the service provider to
contact the complaining party, such as an address, telephone number, and, if

¹¹*Perfect 10, Inc. v. CCBill, LLC.*, 340 F. Supp. 2d 1077, 1086 (C.D. Cal. 2004) (aff’d in part, rev’d in part on other grounds at *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007))

¹²17 U.S.C. § 512(c)(1)(C).

¹³*See* 17 U.S.C. § 512(c)(3)(A).

1 available, an electronic mail address at which the complaining party may be
2 contacted.

3 (v) A statement that the complaining party has a good faith belief that use
4 of the material in the manner complained of is not authorized by the copyright owner,
its agent, or the law.

5 (vi) **A statement that the information in the notification is accurate,**
6 **and under penalty of perjury,** that the complaining party is authorized to act on
behalf of the owner of an exclusive right that is allegedly infringed. (emphasis added)

7 The Defendants know of no notification concerning the 72 additional websites of possible
8 infringement that were sent to Steve Chen, the Designated Agent for the Defendants pursuant to the
9 DMCA¹⁴ complying with Section 512(c)(3)(A)(ii) of the DMCA including signature by an
10 individual authorized to act on behalf of the owner of an exclusive right that is allegedly infringed,
11 and that properly identify the copyrighted works or other material claimed to have been infringed.¹⁵
12 Under § 512(c)(3)(A)(ii) and (iii), DMCA-compliant notification must identify the copyrighted work
13 claimed to have been infringed and the material that is claimed to be infringing with “information
14 reasonably sufficient to permit the service provider to locate the material.”

15 The Defendants know of no notifications about the 72 additional websites that include a
16 statement that Vuitton has a good faith belief that use of the material in the manner complained of is
17 not authorized by the copyright owner, its agent, or the law.¹⁶

18 The Defendants know of no notifications about the 72 additional websites that contain a
19 statement that the information contained in the letters is accurate, and under penalty of perjury and
20 that the complaining party is authorized to act on behalf of the owner of an exclusive right that is
21 allegedly infringed.¹⁷

22 Defendants are aware of no notifications about the additional 72 websites that comply with
23

24 ¹⁴Self-Authenticating copies of Akanoc’s and MSG’s Interim Designations of Agent to Receive
25 Notification of Claimed Infringement, respectively **Exhibits “1505”** and **“1506”** were filed on
26 November 30, 2007 with the U.S. Copyright Office. They are attached to the Declaration of Steve
Chen in Support of the Supplemental Motion for Summary Judgment. After that date any Vuitton
notifications of infringement were required to be sent to the Designated Agent.

27 ¹⁵See 17 U.S.C. 512(c)(3)(A)(ii) and (iii).

28 ¹⁶See 17 U.S.C. 512(c)(3)(A)(v).

¹⁷See 17 U.S.C. 512(c)(3)(A)(vi).

1 the DMCA. Vuitton cannot show compliance with federal law that is a pre-condition for use in a
2 case such as this.

3 Vuitton has not provided any notices about the additional 72 websites that comply with the
4 DMCA. Only notices that comply with the DMCA may be considered by the court. Besides being
5 inadmissible as evidence, Defendants are unaware of any letters from Vuitton’s counsel referencing
6 any of the 72 additional websites that complied with the notice requirements specified in the DMCA.
7 Vuitton may not use any non-compliant notices to support its claims because “under the DMCA, a
8 notification from a copyright owner that fails to comply substantially with § 512(c)(3) ‘shall not be
9 considered ... in determining whether a service provider has actual knowledge or is aware of the
10 facts or circumstances from which infringing activity is apparent.’ ” *Perfect 10, Inc.*, 340 F. Supp. 2d
11 at 1087 (citing 17 U.S.C. § 512(3)(B)(i)).

12 **III. VUITTON STILL CANNOT PROVE NECESSARY ELEMENTS OF ITS CLAIMS**

13 Vuitton does not have any evidence to prove the necessary elements of its causes of action.
14 Vuitton still has no evidence to overcome the argument in the pending Summary Judgment motion.

15 Vuitton has no evidence to prove the two essential elements of contributory trademark
16 infringement: (1) Defendant’s direct infringement of its marks or (2) Defendants’ intentional
17 inducement of infringement. Vuitton has no evidence to prove the two essential elements of
18 vicarious trademark infringement: (1) apparent or actual partnership and (2) joint ownership or
19 control. Vuitton’s sole Rule 30(b)(6) witness and its investigator testified that Vuitton had no such
20 evidence.

21 Vuitton has no evidence to prove three of the four required elements of contributory
22 copyright infringement: (1) copying of protected elements of Vuitton’s work, (2) Defendants’ actual
23 or constructive knowledge of infringement, and (3) Defendants’ material contribution, inducement
24 or causation. Defendants have established that the Federal Stored Communications Act legally
25 prevents them from monitoring, supervising or controlling any content on its servers. Vuitton has
26 admitted it has no evidence to prove the two required elements of vicarious copyright infringement:
27 (1) Defendants’ right and ability to supervise and control the infringing conduct and (2) Defendants’
28 direct financial interest in the infringing activity.

1 Vuitton has no additional evidence to support its claims, nor does not add any additional
2 substantive arguments in its FAC that suggest evidence to prove the necessary elements of
3 contributory trademark infringement, vicarious trademark infringement, or contributory or vicarious
4 copyright infringement. The same substantive arguments in Defendants' Motion for Summary
5 Judgment apply equally to the additional 72 accused websites, even if the Plaintiff had any way of
6 submitting any evidence of the additional websites. But the Plaintiff cannot establish anything about
7 the additional accused websites, or about its required notification, or to prove any wrongful action
8 about any of the 77 accused websites. Summary judgment against Defendants as to all its claims is
9 still proper.

10 **IV. CONCLUSION**

11 Vuitton has no admissible evidence that the 72 websites added in its FAC (or the 5 in the
12 original Complaint) have ever been stored on Defendants' Internet servers. Any letters sent by
13 Vuitton's counsel cannot be authenticated. Vuitton's counsel cannot be permitted to testify
14 (assuming he has some alleged knowledge) and any Internet printouts concerning any websites are
15 unauthenticated inadmissible hearsay. Vuitton has failed to comply with the notice requirements of
16 the DMCA. Vuitton offers no additional substantive arguments supporting its claim and Summary
17 Judgment should be entered dismissing all Plaintiff's claims.

18
19 Dated: August 4, 2008

GAUNTLETT & ASSOCIATES

20
21 By: /s/ James A. Lowe
22 James A. Lowe
23 Brian S. Edwards
24 Christopher G. Lai
25 Attorneys for Defendants Akanoc Solutions,
26 Inc., Managed Solutions Group, Inc., and Steven
27 Chen
28