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DENVER

May 14, 2007

BY ECF AND FIRST-CLASS MAIL

BOULDER

Hon. David G. Trager
U.S. District Court, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York 11201

Hon. Robert M. Levy
U.S. District Court, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, NY 11201

COLORADO SPRINGS

Re: UMG Recordings, Inc. v. Lindor, No. 05 Civ. 1095 (DGT)(RML)

Dear Judge Trager and Magistrate Judge Levy:

LONDON

Plaintiffs submit this opposition to defendant's motion *in limine*. Defendant's motion is based on the same misstatements of the roles of Dr. Jacobson and MediaSentry that defendant has repeatedly espoused in this and other cases.¹ Defendant's motion should be denied.

LOS ANGELES

On August 7, 2004, MediaSentry discovered massive infringement occurring on the computer in defendant's home and for which defendant is responsible. MediaSentry discovered this infringement by using Kazaa in the same way as any other user could do. Once connected to defendant's computer, MediaSentry made copies of the computer screens showing defendant's share folder. See Mizzone Decl., at Exh. A thereto (attached as Exhibit A). It then downloaded a sampling of the sound recordings contained in defendant's share folder, so that plaintiffs could verify that the recordings are what they purport to be, which plaintiffs subsequently did. Finally, MediaSentry copied the text files that it found in defendant's share folder and the data files showing the communications between defendant's computer and MediaSentry's computer. See id. at ¶¶ 12-18 & Exhs. D-H thereto (Exh. A). MediaSentry did not create any of this data, all of which existed independently, and defendant has offered nothing to indicate that this data, which MediaSentry has authenticated, see id., is in any way inaccurate.

MUNICH

SALT LAKE CITY

Once plaintiffs had collected the data described above, none of which involved any interpretation or opinion, they retained Dr. Doug Jacobson, Ph.D., an Associate Professor of Electrical and Computer Engineering at Iowa State University with over 20 years of experience in the fields of computer networking, security, and forensics, to interpret this data (Dr. Jacobson's CV is attached as Exhibit B). In his expert report and declaration (attached as Exhibit C), Dr. Jacobson describes the technologies involved in this case, including how IP addresses are assigned and how peer-to-peer networks work. He further describes how the Kazaa file-sharing program works. Then, he applies these settled and undisputed principles to the undisputed data collected to explain what those data mean. See also Jacobson Dep. at 62:8-69:18, 82:3-89:13, 96:2-21, 125:2-127:23 (attached as Exhibit D). Notwithstanding defendant's assertions to the

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¹ Defendant makes these bald assertions, but she has not sought discovery from MediaSentry.

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contrary, this methodology amounts to no more than applying settled principles to the undisputed data collected in this case. Not only is this a method used by reasonable experts in Dr. Jacobson's field, but also it is the only way to do what Dr. Jacobson did here, and there is nothing that could be peer-reviewed. See Jacobson Dep. at 149:8-16 (Exh. D).

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 586-89 (1993), the United States Supreme Court made clear that the Federal Rules of Evidence govern the admissibility of proffered expert testimony. Fed. R. Evid. 702, in turn, sets forth certain standards aimed at ensuring that proffered expert testimony is both reliable and relevant. See Daubert, 509 U.S. at 589-92. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to scientific knowledge. See id. at 590. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance. See id. at 591.

Pursuant to Fed. R. Evid. 104(a), the trial judge is to perform a gatekeeper function and make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. In Daubert, 509 U.S. at 592-95, the Supreme Court set forth the list of nonexclusive factors cited by defendant that a trial court may but need not consider. The Court emphasized that the inquiry is a flexible one. See id. at 594-95; accord Mustafa v. Halkin Tool, Ltd., No. 00-CV-4851 (DGT), 2007 WL 959704, at *7 (E.D.N.Y. Mar. 29, 2007) (factors not a definite checklist); Clarke v. LR Systems, 219 F. Supp. 2d 323, 332 (E.D.N.Y. 2002). Indeed, the Daubert factors may not even apply in a particular case, as long as the trial court determines that the expert testimony is sufficiently reliable and not mere subjective belief or speculation. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (citations omitted); Israel v. Spring Industries, Inc., No. 98-CV-5106 (ENV)(RML), 2006 WL 3196956, at *1 (E.D.N.Y. Nov. 3, 2006); accord Fed. R. Evid. 702 advisory committee notes ("Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education— may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience."). These standards are liberally construed, and, as this Court has observed, "[T]he Second Circuit's standard for admissibility of expert testimony is especially broad." Clarke, 219 F. Supp. 2d at 332. Thus, "rejection of expert testimony is the exception rather than the rule." Id.; accord Israel, 2006 WL 3196956, at *2 (noting the presumption of the admissibility of expert testimony in the Second Circuit).

Here, Dr. Jacobson's credentials are extensive and impeccable. Indeed, based upon his expertise, he was invited to testify before the United States Senate Judiciary Committee as an expert on the uses of peer-to-peer protocols. See Exh. C. Nor can there be any question as to the relevance of Dr. Jacobson's testimony. In United States v. Ganier, 468 F.3d 920 (6th Cir. 2006), which defendant provided to this Court (Doc. No. 127), the court made clear that the very type of testimony that Dr. Jacobson proffers in this case, namely, testimony interpreting computer data, is relevant and helpful to fact finders, because it reflects scientific knowledge beyond the ken of the ordinary juror. Finally, Dr. Jacobson's testimony is sufficiently reliable to assist the finder of fact. As noted above, Dr. Jacobson's role is merely to explain how Kazaa works and to apply settled and undisputed principles regarding computer networks to explain the data that MediaSentry collected. As such, the only methodology employed is the application of settled and undisputed principles to the facts of this case, and this case falls precisely within the factual scenario

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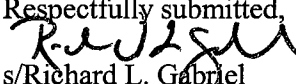
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envisioned by the Supreme Court in Kumho Tire, 526 U.S. at 156, when it held, “[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”

Notwithstanding the foregoing, defendant argues that Dr. Jacobson’s opinion is not the product of reliable principles and methods and that his opinion is not based upon facts but upon untested assumptions regarding the reliability of MediaSentry’s methods. Both of these assertions are baseless. As to the first, defendant simply ignores the fact that Dr. Jacobson’s method is no more than the application of settled and undisputed principles to interpret data. As Dr. Jacobson testified, without dispute, everyone in his field proceeds the same way that he did, and, indeed, there is no other way to do what he did. See Jacobson Dep. at 149:12-151:18 (Exh. D). Likewise, defendant’s claim that Dr. Jacobson is not interpreting facts but rather is applying principles to “unsubstantiated conclusions masquerading as data” is meritless. As this Court has held, an expert may incorporate assumptions into his opinion if those assumptions are supported by admissible evidence. See Israel, 2006 WL 3196956, at *12. Likewise, numerous cases support the proposition that an expert may rely on data collected by others, as long as others in the expert’s field would reasonably rely on such data.² Here, plaintiffs have authenticated the MediaSentry data, see Exh. A,³ and defendant has not offered one shred of evidence to contest the accuracy or reliability of such data. Thus, the sole issue is whether the undisputed MediaSentry data is of a type reasonably relied on by experts in Dr. Jacobson’s field. See Fed. R. Evid. 703. Here, it is undisputed that it is.⁴

For all of the foregoing reasons, defendant’s challenge to Dr. Jacobson’s proffered testimony is baseless. Defendant’s motion rests solely on the arguments of counsel, since defendant has not designated an expert of her own in this case and since defendant has offered no expert to challenge Dr. Jacobson’s opinions or methodologies. At best, defendant’s position goes to weight and not admissibility, and defendant’s motion should be denied. See Clarke, 219 F. Supp. 2d at 333 (alleged faults in an expert’s decision to use a particular methodology go to weight, not admissibility).

Respectfully submitted,

s/Richard L. Gabriel
Counsel for Plaintiffs

RLG:ah

cc: Ray Beckerman, Esq. (by ECF and e-mail)
Richard Guida, Esq. (by ECF and e-mail)

² See, e.g., Jaasma v. Shell Oil Co., 412 F.3d 501, 514 (3d Cir. 2005); Barnes v. Continental Tire North America Inc., No. C05-5214 RBL, 2006 WL 2076561 (W.D. Wash. Jul. 24, 2006).

³ Although MediaSentry will authenticate all of the data that it collected, it will not offer any opinion or interpretation of that data.

⁴ Numerous federal courts have relied on this data in entering judgment for record companies like plaintiffs against infringers like defendant (representative cases are attached as Exhibit E). Indeed, to date, no court in any of the numerous other cases like this brought by plaintiffs and other record companies has found MediaSentry’s data to be unreliable or inadmissible.