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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 AFL Telecommunications LLC,
10 Plaintiff,

No. CV11-1086 PHX DGC

ORDER

11 v.

12 SurplusEQ.com Incorporated; et. al.,
13 Defendants.

14 This case concerns claims by Plaintiff AFL Telecommunications LLC (“AFL”) against Defendants Surplus EQ.Com Incorporated (“SurplusEQ”), Tech Sales LLC (“Tech Sales”), Daniel Parsons, and Lisa Parsons (collectively, “Defendants”) for unfair competition, false advertising, and copyright infringement arising from Defendants’ sale of fusion splicers (devices used to splice fiber optic cable) made by AFL’s Japanese parent, Fujikura Ltd. (“Fujikura”). The parties have cross-moved for summary judgment. Docs. 147, 158. Also pending before the Court is the motion to seal documents filed by AFL (Doc. 155), and the motion to exclude AFL’s expert opinions filed by Defendants (Doc. 190). The motions are fully briefed and no party has requested oral argument. For the reasons set forth below, the Court will deny AFL’s motion for summary judgment, grant in part and deny in part Defendants’ motion for summary judgment, grant in part and deny in part AFL’s motion to seal, and deny Defendants’ motion to exclude AFL’s expert opinions.

27 **I. Background.**

28 The following background facts are not disputed by the parties. AFL is a wholly-

1 owned subsidiary of Fujikura, a Japanese manufacturer of fiber optic equipment. One of
2 Fujikura's products is a fusion splicer, a device that is manufactured in Japan and made
3 up of hardware and operating software. Fujikura sells its splicers under the FUJIKURA
4 trademark. The "FUJIKURA plus stylized F" design was registered with the U.S. Patent
5 and Trademark Office on March 21, 2000, for use with "OPTICAL FIBER SPLICERS."
6 Doc. 147-1, ¶¶ 12-13; Doc. 169, ¶¶ 12-13. The "FUJIKURA plus stylized F color"
7 design was registered with the U.S. Patent and Trademark Office on April 13, 2010, for
8 use with "OPTICAL FIBERS [and] OPTICAL FIBER FUSION SPLICERS." Doc. 147-
9 1, ¶ 14; Doc. 169, ¶ 14. AFL sells splicers bearing the FUJIKURA mark in the United
10 States, and, since 2003, has been the exclusive distributor of Fujikura splicers in North
11 America.

12 Fujikura manufactures a variety of splicers, including the FSM-50S, FSM-50R
13 FSM-60S, FSM-60R, FSM-18S and FSM-18R models. The hardware and software on
14 every Fujikura splicer is identical, regardless of where Fujikura intends to sell the splicer.
15 The software contains many available languages. During the manufacturing process,
16 Fujikura implements a lock that changes the splicer's settings to display only the
17 language suited to the region where the splicer is intended to be sold. Thereafter,
18 changes must be made to the splicer's software settings to make another language
19 available. In 2006, Fujikura added a "splash screen" to its FSM-60 and FSM-18 series
20 splicers which states that the unit is licensed for a particular country or region.

21 Fujikura employees, as part of their employment duties, developed the operating
22 software for the FSM-18 and FSM-60 series in Japan. Fujikura periodically upgrades the
23 software, and each successive version contains substantial code from the preceding
24 version and also incorporates some new content that the preceding version did not
25 contain. Doc. 147-1, ¶¶ 7-8; Doc. 169, ¶¶ 7-8. Fujikura registered version 1.32b of the
26 operating software for its FSM-60 series, and was granted a U.S. Copyright certificate of
27 registration on March 26, 2011. Doc. 147-1, ¶ 9; Doc. 169, ¶ 9. The certificate's
28 "Limitation of copyright claim" section states the following: "Material excluded from

1 this claim: Previous version.” Doc. 151, ¶ 52; Doc. 174-1, ¶ 52.

2 SurplusEQ¹ is a Phoenix-based company that sells several manufacturer brands of
3 fiber optic equipment, including Fujikura products, over the Internet. In 2005,
4 SurplusEQ began selling gray market Fujikura splicers that it had obtained from
5 companies in China and Hong Kong. In an Internet blog post, SurplusEQ referred to its
6 splicers as “new,” purchased directly from the manufacturer, and covered by a
7 manufacturer’s warranty. Doc. 147-1, ¶ 37; Doc. 169, ¶ 37. On its website, SurplusEQ
8 advertised some of its Fujikura splicers as “new and unused” and “[g]uaranteed not
9 modified in any way.” Doc. 147-1, ¶¶ 42, 46; Doc. 169, ¶¶ 42. SurplusEQ is not
10 authorized by AFL to sell Fujikura splicers. In late October 2011, SurplusEQ stopped
11 selling gray market Fujikura splicers.

12 Fujikura splicers sold in the United States through authorized channels carry a
13 manufacturer’s warranty that entitles the purchaser to obtain warranty service from AFL.
14 Those sold through unauthorized channels do not carry a manufacturer’s warranty.
15 SurplusEQ offers a one-year warranty on its splicers. In 2009, AFL began to offer an
16 additional year of warranty coverage for its FSM-60 series splicers.

17 In 2009, Entergy Mississippi Inc. (“Entergy”) purchased a FSM-60S splicer (the
18 “818 splicer”) from SurplusEQ. After using the splicer for approximately one year,
19 Entergy contacted AFL for service. AFL identified the 818 splicer as a gray market unit,
20 and offered Entergy a replacement splicer in exchange for the 818 splicer. AFL’s
21 inspection of the 818 splicer revealed the following alterations: the 818 splicer’s serial
22 number had been changed both on the outside of the unit and in a flash memory chip, the
23 splicer’s flash memory chip had been replaced and nearby components had been

24
25 ¹ Defendant Tech Sales is a company solely owned by Defendant Daniel Parsons
26 that never developed. Doc. 151, ¶ 1; Doc. 174-1, ¶ 1; Doc. 55, ¶¶ 4-6; Doc. 110, ¶¶ 4-6.
27 Any conduct related to Tech Sales is attributable to SurplusEQ. Doc. 151, ¶ 1; Doc. 174-
28 1, ¶ 1. Daniel Parsons is the sole officer and director of SurplusEQ. Doc. 55, ¶ 6;
Doc. 110, ¶ 6. Defendant Lisa Parsons (previously named as Jane Doe Parsons) is
married to Daniel Parsons. Doc. 55, ¶ 8; Doc. 110, ¶ 8.

1 subjected to heat damage, and the splicer’s protective coating had been damaged.

2 AFL and Fujikura developed a plan to eliminate gray market competition in 2009.
3 As part of that plan, on February 17, 2011, AFL and Fujikura entered into a copyright
4 license agreement that provided AFL with the exclusive license to distribute the software
5 that is preloaded on Fujikura’s splicers in North America and to register such rights with
6 the U.S. Copyright Office in AFL’s name. The agreement also assigned to AFL “all
7 claims for infringement of the right of distribution . . . that may exist as of the date of this
8 license.” Doc. 147-1, ¶¶ 15-16; Doc. 169, ¶¶ 15-16. On March 14, 2011, AFL and
9 Fujikura entered into a trademark license agreement that gave AFL the exclusive right to
10 purchase and distribute splicers bearing the FUJIKURA mark in North America and to
11 use the FUJIKURA mark in connection with its advertising and sales.

12 **II. AFL’s Motion for Partial Summary Judgment.**

13 AFL’s motion seeks summary judgment that SurplusEQ violated AFL’s exclusive
14 right to use the Fujikura trademark in North America, that SurplusEQ falsely advertised
15 its gray market Fujikura splicers, and that SurplusEQ infringed AFL’s exclusive right to
16 distribute copyright-protected software.²

17 **A. Legal Standard.**

18 A party seeking summary judgment “bears the initial responsibility of informing
19 the district court of the basis for its motion, and identifying those portions of [the record]
20 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
21 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
22 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
23 no genuine issue as to any material fact and that the movant is entitled to judgment as a
24 matter of law.” Fed. R. Civ. P. 56(a). Only disputes over facts that might affect the
25 outcome of the suit will preclude the entry of summary judgment, and the disputed

26 ² In response, Defendants raise several evidentiary objections to evidence
27 submitted by AFL in support of its motion. Doc. 176 at 6-7. Because the Court will
28 deny AFL’s motion, it will not address these objections.

1 evidence must be “such that a reasonable jury could return a verdict for the nonmoving
2 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

3 **B. Count I.**

4 AFL’s first claim for relief under Section 43 of the Lanham Act alleges unfair
5 competition in violation of 15 U.S.C. § 1125(a)(1)(A). To prevail on this claim, AFL
6 must show that the use of the FUJIKURA mark by SurplusEQ is likely to cause
7 consumer confusion. In the context of gray market goods – that is, foreign-manufactured
8 goods bearing a valid U.S. trademark that are imported without the consent of the mark
9 holder, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285 (1988) – “the likelihood of
10 confusion relates to the existence of material differences between the allegedly infringing
11 good and the [mark holder’s] product.” *Hokto Kinoko Co. v. Concord Farms, Inc.*,
12 810 F. Supp. 2d 1013, 1024 (C.D. Cal. 2011) (citation omitted). Although gray market
13 goods “are authentic in the sense that they originated with the mark owner, they are not
14 considered ‘genuine’ within the meaning of the Lanham Act if they are not authorized for
15 sale in the United States and they differ materially from those that are.” *Zip Int’l Grp.,*
16 *LLC v. Trilini Imps., Inc.*, No. 09-CV-2437 (JG)(VVP), 2010 WL 648696, at *3
17 (E.D.N.Y. Feb. 22, 2010) (citations omitted). “The sale of such goods is actionable by
18 the exclusive United States licensee not because consumers may be confused about the
19 manufacturer of the goods, but because consumers may unwittingly purchase the goods
20 on the basis of the domestic markholder’s reputation only to be disappointed when the
21 product does not meet their expectations.” *Id.* The parties agree that SurplusEQ sold
22 gray market Fujikura splicers. Doc. 147-1, ¶ 21; Doc. 169, ¶ 21.

23 The sale of gray market goods under the same trademark as the authorized goods
24 is likely to cause consumer confusion, and thereby run afoul of Section 43 of the Lanham
25 Act, where the gray market goods differ materially from the authorized goods.
26 *See PepsiCo, Inc. v. Reyes*, 70 F. Supp. 2d 1057, 1059 (C.D. Cal. 1999). “The threshold
27 of materiality ‘is always quite low.’” *Id.* (quoting *Societe Des Produits Nestle, S.A. v.*
28 *Casa Helvetia, Inc.*, 982 F.2d 633, 641 (1st Cir. 1992)). “The existence of any difference

1 between [the trademark owner's] product and the allegedly infringing gray good that
2 consumers would likely consider to be relevant when purchasing a product creates a
3 presumption of consumer confusion sufficient to support a Lanham Trade-Mark Act
4 claim.” *Societe Des Produits Nestle, S.A.*, 982 F.3d at 641; *see Beltronics USA, Inc. v.*
5 *Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1073 (10th Cir. 2009) (because many
6 factors influence a consumer's decision to purchase a product, the materiality standard
7 “must be kept low to include even subtle differences between products” (citation
8 omitted)); *see also PepsiCo*, 70 F. Supp. 2d at 1059 (labeling and language differences
9 were “material and demonstrate that there is a likelihood of confusion and deception
10 concerning the nature and origin of the goods”); *Hokto Kinoko Co.*, 810 F. Sup. 2d at
11 1025 (material differences can relate to a product's labeling and quality control
12 standards); *Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 721
13 (9th Cir. 2005) (“many cases have found a likelihood of confusion when a trademark
14 owner was prevented from exercising quality control over the merchandise bearing its
15 mark”).

16 AFL contends that SurplusEQ's gray market splicers are materially different from
17 its authorized splicers because of physical alterations, differences in warranty coverage,
18 and software licensing issues. As to the physical alterations, AFL points to the 818
19 splicer and changes that were made after its production by Fujikura. AFL argues that the
20 818 splicer had been modified before it was sold by SurplusEQ, but presents no evidence
21 of this fact. And as SurplusEQ notes, witnesses in this case were unable to say when or
22 by whom the splicer was modified. AFL argues that SurplusEQ has not shown that the
23 splicer was modified after its sale, but AFL has the burden of proof and has not shown
24 that the splicer had been modified when sold by SurplusEQ.

25 As to the warranty coverage, it is undisputed that Fujikura splicers sold through
26 authorized channels in the United States carry a manufacturer's warranty that entitles the
27 purchaser to obtain warranty service from AFL, whereas those sold through unauthorized
28 channels do not. Defendants argue that they offered an identical warranty, but this

1 clearly is not the case. The Fujikura warranty allowed the customer to return the splicer
2 to AFL for repair by AFL, a Fujikura-authorized dealer; the SurplusEQ warranty required
3 repair by SurplusEQ or, more likely, by whatever entity sold the splicer to SurplusEQ.

4 Defendants next contend that despite the difference between these warranties,
5 there is no likelihood of consumer confusion because SurplusEQ fully disclosed the
6 differences between the products. “The alleged infringer, of course, may attempt to rebut
7 this presumption, but in order to do so he must be able to prove by preponderant evidence
8 that the differences are not of the kind that consumers, on average, would likely consider
9 in purchasing the product.” *Societe Des Produits Nestle, S.A.*, 982 F.2d at 641; *Am.*
10 *Circuit Breaker Corp. v. Or. Breakers Inc.*, 406 F.3d 577, 585-86 (9th Cir. 2005) (finding
11 that there was no material fact as to infringement where customers who purchased the
12 gray market product “get exactly what they expect” (citing *Iberia Foods Corp. v. Romeo*,
13 150 F.3d 298, 303 (3d Cir. 1998)). In support of this proposition, Defendants point to the
14 deposition of Defendant Daniel Parsons who stated that “I always said make sure they
15 say we’re not authorized and that Fujikura won’t repair them.” Doc. 151-1 at 31:15-19.
16 Defendants also point to the deposition of SurplusEQ employee Cody Wood, who stated
17 that “Usually before they [customers] bought the unit from me, they would mention, oh
18 this is a gray market unit, can I send it to AFL, and I would say no.” Doc. 152-7 at 14:6-
19 9. Wood also stated that “On the website it would say this is a non-AFL unit. AFL will
20 not service this unit. You have to send it to SurplusEQ for service. . . . It would be on the
21 invoice, and we also made stickers and put them right on the units and carrying case as
22 well. . . . [the stickers say] this is a non-AFL unit. It must be sent back to SurplusEQ.
23 AFL will not service this unit.” *Id.* at 21:10 - 22:3. This evidence creates a genuine issue
24 of fact as to whether the warranty differences were material to consumers and gave rise to
25 consumer confusion.

26 As to software licensing, it is undisputed that SurplusEQ generally obtained
27 Fujikura splicers from Asian distributors and resold the splicers in the United States. It is
28 also undisputed that Fujikura changes the language settings on its splicers depending on

1 where the units are to be sold and, starting in 2006, added to its units a “splash screen”
2 stating that a unit was licensed for a particular region only. AFL argues from these facts
3 that its units sold in the United States were locked so that only the English language was
4 available to the user, while SurplusEQ units originally destined for a country in Asia
5 would be locked to display that country’s language. AFL also argues that the “splash
6 screen” on its units said that the unit was licensed for sale in the United States, while
7 SurplusEQ’s units would not say this, and that purchasers would consider their possible
8 copyright liability for using unauthorized software to be material. Although the Court
9 finds this to be a close question, it concludes that summary judgment should not be
10 granted to AFL. “[T]he question of likelihood of confusion is routinely submitted for
11 jury determination as a question of fact.” *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d
12 1352, 1362 n.5 (9th Cir. 1985) (citations omitted). Whether AFL has presented sufficient
13 evidence to show that SurplusEQ sold units with altered language displays or splash
14 screens, and whether software licensing issues were material, are questions best left to the
15 jury to decide when the totality of the evidence in this case can be considered.

16 **C. Count II.**

17 AFL’s second claim for relief under Section 43 of the Lanham Act alleges false
18 advertising in violation of 15 U.S.C. § 1125(a)(1)(B). Doc. 55 at 14. Section 43 of the
19 Lanham Act “explicitly furnishes a private right of action ‘against persons who make
20 false and deceptive statements in a commercial advertisement[.]’” *PhotoMedex, Inc. v.*
21 *Irwin*, 601 F.3d 919, 923 (9th Cir. 2010) (citation omitted). The following five elements
22 make up a false advertising claim under the Lanham Act:

- 23 (1) a false statement of fact by the defendant in a commercial advertisement
24 about its own or another’s product; (2) the statement actually deceived or
25 has the tendency to deceive a substantial segment of its audience; (3) the
26 deception is material, in that it is likely to influence the purchasing
27 decision; (4) the defendant caused its false statement to enter interstate
28 commerce; and (5) the plaintiff has been or is likely to be injured as a result
of the false statement, either by direct diversion of sales from itself to
defendant or by a lessening of the goodwill associated with its products.

1 *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012) (citations
2 omitted). To constitute a statement made in a commercial advertisement, the statement
3 must be:

4 (1) commercial speech; (2) by the defendant who is in commercial
5 competition with the plaintiff; (3) for the purpose of influencing consumers
6 to buy defendant's goods or services. While the representations need not
7 be made in a "classic advertising campaign," but may consist instead of
8 more informal types of "promotion," the representations (4) must be
disseminated sufficiently to the relevant purchasing public to constitute
"advertising" or "promotion" within that industry.

9 *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir. 2008) (citation
10 omitted).

11 AFL alleges that SurplusEQ falsely advertised in a blog post that it sold Fujikura
12 splicers that were "new," the "same machine" provided by authorized sellers, purchased
13 "direct from the manufacturer," and sold with "a full Manufacturers [sic] warranty."
14 Additionally, AFL alleges that SurplusEQ falsely advertised on its own website and its
15 eBay store that it sold "new" and "guaranteed not modified in any way" Fujikura splicers.
16 Doc. 147 at 13. The Court will analyze each advertisement separately.

17 **1. The Blog Post.**

18 Defendants argue that AFL has failed to establish that the blog post was
19 sufficiently disseminated to constitute a commercial advertisement. Doc. 176 at 14. AFL
20 does not respond to this argument. The blog post is not a "classic advertising campaign,"
21 and thus without any evidence establishing that the blog was disseminated to the
22 purchasing public, the Court cannot find that the post constitutes a commercial
23 advertisement. Accordingly, the Court denies AFL's motion for summary judgment on
24 its false advertising claim with regards to the blog post.

25 **2. SurplusEQ's Website and eBay Store.**

26 Unlike the blog post, the statements on SurplusEQ's website and on its eBay
27 webpage appear to constitute a classic advertising campaign. The speech is made for the
28 purpose of influencing customers to purchase a splicer and includes direct purchasing

1 information. AFL asserts that the eBay materials claimed the splicers were “new” and
2 “not modified.” Doc. 147-1, ¶¶ 44, 46. As found above with respect to the unfair
3 competition claim, however, genuine issues of material fact remain as to whether the
4 splicers sold by SurplusEQ had been modified at the time they were sold. The Court
5 therefore cannot grant AFL summary judgment on its false advertisement claim with
6 regards to the statements made by SurplusEQ on its website and eBay store.

7 **D. Count IV.**

8 Registration of a copyright is a prerequisite to filing a civil action for copyright
9 infringement of a U.S. work; there is no registration requirement if it is not a “United
10 States work.” 17 U.S.C. § 411(a); *see also Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*,
11 606 F.3d 612, 615 (9th Cir. 2010). To establish a prima facie case of copyright
12 infringement, a plaintiff must show (1) ownership of the allegedly infringed material and
13 (2) a violation of at least one exclusive right granted to copyright holders under 17 U.S.C.
14 § 106. *See A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

15 **1. Registration.**

16 AFL submits that the registration requirement is satisfied because either
17 (1) Fujikura’s software is a non-U.S. work (Doc. 147 at 15) or (2) Fujikura’s registration
18 of version 1.32b is sufficient because the registered version is a derivative work of earlier
19 versions (*id.*). Whether a work is a non-U.S. work depends largely on whether the work
20 has been published. *See* 17 U.S.C. § 101. In its motion for summary judgment, AFL has
21 cited no evidence on the issue of publication (Doc. 147 at 15), and AFL’s conclusory
22 assertion that Fujikura’s software is a “non-U.S. work” (*see* Doc. 147-1, ¶ 10; Doc. 169,
23 ¶ 10) will not suffice at the summary judgment phase. AFL has not established that the
24 registration requirement does not apply to its infringement claim.

25 It is undisputed that Fujikura obtained U.S. Copyright Registration No. TX 7-400-
26 942, which covers version 1.32b, the operating software for its FSM-60 series (Doc. 147-
27 1, ¶ 9; Doc. 169, ¶ 9), but it is not clear – contrary to what AFL submits (Doc. 147 at 15)
28 – that this registration is sufficient to maintain AFL’s action for infringement of all earlier

1 versions. Under the effective registration doctrine, the registration of a derivative work
2 satisfies the registration requirement for an infringement action based on preexisting
3 work not separately registered. See *Streetwise Maps v. Vandam, Inc.*, 159 F.3d 739, 747
4 (2d Cir. 1998) (holding that “the registration certificate relating to the derivative work . . .
5 will suffice to permit [the plaintiff] to maintain an action for infringement based on
6 defendants’ infringement of the preexisting work”); *Salestrag Am., LLC v. Zyskowski*,
7 635 F. Supp. 2d 1178, 1181 (D. Nev. 2009) (holding that a registration of a 2008 version
8 of a compilation of floor plans and locations was sufficient to maintain an action for
9 infringement of the 2007 unregistered version). AFL submits that version 1.32b is a
10 derivative work in that “Fujikura upgrades [its] operating software from time to time . . .
11 [and] each successive version incorporates some original, copyrightable content not
12 included in the preceding version, and each new version contains substantial code from
13 the original version.” Doc. 147-1, ¶ 7.

14 Defendants argue that AFL has failed to establish that version 1.32b is a derivative
15 work because AFL has not produced any evidence showing how Fujikura modified its
16 operating software over time. Doc. 176 at 19. Defendants argue that without this
17 evidence, AFL has failed to show that the registration of version 1.32b is sufficient to
18 register all related preexisting works. *Id.* Additionally, Defendants contend that the
19 effective registration doctrine is inapplicable because Fujikura’s registration specifically
20 excludes any “[p]revious version” from its claim (Doc. 151, ¶ 52; Doc. 174-1, ¶ 52), and
21 the registration does not otherwise reference preexisting versions as required by *Oravec*
22 *v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1229-30 (11th Cir. 2008) (holding
23 that when the registration of a work fails to identify the unregistered preexisting work, an
24 action for infringement of the unregistered work fails) (Doc. 176 at 19-20).

25 At the motion to dismiss phase, the Court found that the effective registration
26 doctrine, as stated in *Streetwise* and *Salestrag*, applied in this case because the Court
27 found it reasonable to infer from the complaint that each successive software version
28 incorporates the preceding versions. Doc. 64 at 4. The Court found that AFL’s

1 infringement claim was analogous to the claim in *Streetwise*, where the plaintiff had
2 asserted infringement of prior unregistered street maps based on a registration of a later
3 version of the same map. 159 F.3d at 747. The Court distinguished *Oravec* because the
4 plaintiff in that case sought to assert copyright infringement of unregistered three-
5 dimensional models of an architectural work based on registration of architectural
6 drawings, 527 F.3d at 1230, which was not a derivative work that incorporated material
7 from unregistered preexisting works as did the splicer software.

8 It is now evident, however, that Fujikura’s registration specifically disclaims
9 previous versions. The copyright application identifies the “[p]revious version” of the
10 software as “[m]aterial excluded from this claim[.]” Doc. 151, ¶ 52; Doc. 174-1, ¶ 52.
11 This situation is unlike *Streetwise*, where the plaintiff’s registration certificate stated that
12 the work for which it sought protection was derivative of previous versions of the map.
13 159 F.3d at 746-47. It is undisputed that Fujikura registered version 1.32b, but for
14 purposes of its summary judgment motion, AFL has failed to satisfy the registration
15 requirement with regard to any previous version of the software.

16 **2. Ownership and Infringement.**

17 As to the ownership element, AFL argues that Fujikura owns the software
18 preloaded on its splicers as a work made for hire, and that Fujikura granted AFL the
19 exclusive right to distribute the copyrighted work in the United States under a written
20 licensing agreement. As to infringement, AFL contends that SurplusEQ sold Fujikura
21 FSM-60 series splicers in the United States without AFL’s permission. According to
22 AFL, these sales constitute unauthorized distribution of copyrighted software and
23 violated AFL’s exclusive right to distribute. Since the Court has found that AFL has
24 presented evidence establishing only that Fujikura registered version 1.32b, to succeed on
25 its motion for summary judgment, AFL must point to evidence showing that SurplusEQ
26 sold splicers loaded with this software version. The record does not contain any evidence
27 regarding the software version loaded on the Fujikura splicers sold by SurplusEQ.
28

1 Accordingly, the Court denies AFL’s motion for summary judgment on its copyright
2 infringement claim.

3 **III. Defendants’ Motion for Summary Judgment.**

4 **A. Laches.**

5 Defendants argue that the doctrine of laches bars all AFL claims. “Laches is an
6 equitable time limitation on a party’s right to bring suit, resting on the maxim that one
7 who seeks the help of a court of equity must not sleep on his rights.” *Jarrow Formulas,*
8 *Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (internal quotation marks
9 and citations omitted). “It is well established that laches is a valid defense to Lanham
10 Act claims[.]” *Id.* Laches is also a defense to claims for copyright infringement. *See*
11 *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-51(9th Cir. 2001). “In order to succeed
12 on a defense of laches, a defendant must prove both: (1) an unreasonable delay by
13 plaintiff in bringing suit, and (2) prejudice to himself.” *Miller v. Glenn Miller Prods.,*
14 *Inc.*, 454 F.3d 975, 997 (9th Cir. 2006) (citation omitted). “In considering whether a
15 plaintiff’s delay was unreasonable, courts consider: (1) the length of the delay, measured
16 from the time the plaintiff knew or should have known about his potential cause of
17 action, and (2) whether the plaintiff’s delay was reasonable, including whether the
18 plaintiff has proffered a legitimate excuse for his delay.” *Id.*

19 Defendants rely on certain portions of Daniel Parson’s deposition as evidence that
20 AFL has been aware of SurplusEQ’s sale of Fujikura splicers since at least 2003, but the
21 record does not include the cited pages of the deposition. *See* Doc. 158 at 31 (citing
22 Doc. 151, ¶ 184 (citing Ex. 1, which does not contain the cited pages)). As a result,
23 Defendants have not identified any portion of the record demonstrating the absence of a
24 genuine issue of material fact as to when AFL learned that Defendants advertised and
25 sold Fujikura splicers.

26 **B. Count I.**

27 Defendants argue they are entitled to summary judgment on AFL’s Lanham Act
28 unfair competition claim because SurplusEQ fully disclosed the nature of the product it

1 sold, negating any claim of consumer confusion. As found by the Court above, however,
2 a genuine issue of material fact exists as to whether SurplusEQ sold splicers that were
3 materially different from the authorized units sold by AFL.³ Defendants argue that it is
4 undisputed that SurplusEQ disclosed all relevant information regarding any material
5 difference to customers, but Defendants have not pointed to any evidence establishing
6 that SurplusEQ disclosed to its customers the differences related to software licensing
7 and language settings. Defendants have failed to establish as a matter of undisputed fact
8 that there were no material differences between the splicers, or that even if there were
9 differences, that all differences were disclosed.⁴

10 **C. Count II.**

11 Defendants argue that summary judgment is appropriate on AFL's false
12 advertising claim because the record lacks evidence that any of SurplusEQ's statements
13 constitute a commercial advertisement under the Lanham Act. Specifically, Defendants
14 contend that the record lacks evidence showing that SurplusEQ's blog post was
15 disseminated. In response, AFL submits that the blog post discusses the products
16 SurplusEQ sells online and in-stores and that SurplusEQ used the blog to announce the
17 arrival of Fujikura FSM-60 series splicers – an announcement that directed potential
18 customers to a hyperlink to purchase a splicer – and another blog post that thanked
19 customers for their patronage. AFL has failed, however, to point to any evidence that the

20 ³ For this same reason, the Court cannot find that the first sale doctrine applies to
21 AFL's Lanham Act unfair competition claim. Issues of material fact remain as to
22 whether SurplusEQ sold "genuine" Fujikura splicers or "materially different" splicers.
23 *See, e.g., Sebastian Int'l, Inc. v. Longs Drug Stores Corp.*, 53 F.3d 1073, 1076 (9th Cir.
24 1995) ("It is the essence of the 'first sale' doctrine that a purchaser who does no more
25 than stock, display and resell a producer's product under the producer's trademark
26 violates no right conferred upon the producer by the Lanham Act. When a purchaser
27 resells a trademarked article under the producer's trademark, and nothing more, there is
28 no actionable misrepresentation under the statute.").

⁴ Defendants contend that they are entitled to summary judgment on AFL's
common law unfair competition claim for the same reasons they are entitled to summary
judgment on AFL's Lanham Act claims. Because the Court denied Defendants' motion
for summary judgment on AFL's Lanham Act unfair competition claim, the Court also
will deny Defendants' motion on the common law unfair competition claim.

1 blog post was disseminated. The record lacks evidence showing that anyone actually saw
2 the blog post, or, more importantly, that anyone responded to it and was influenced to
3 purchase a splicer. Without this evidence, the Court cannot infer from the blog post's
4 content alone that the blog was sufficiently disseminated. Accordingly, the Court will
5 grant Defendants' motion for summary judgment on AFL's Lanham Act false advertising
6 claim as it pertains to the blog post.

7 Unlike the blog post, the statements made on SurplusEQ's website and its eBay
8 store webpage constitute a "classic advertising campaign." As the Court found above,
9 material factual disputes remain as to whether SurplusEQ sold "new" or "not modified"
10 splicers. These disputes foreclose the entry of summary judgment with respect to the
11 website and eBay store advertisements.

12 **D. Count IV.**

13 Defendants submit that they are entitled to summary judgment on AFL's copyright
14 infringement claim under the first sale doctrine, because AFL's claim is barred by
15 copyright misuse, and because AFL has failed to present evidence establishing ownership
16 of an infringed copyright.

17 **1. The First Sale Doctrine.**

18 Under the first sale doctrine, "once a copyright owner places a copyrighted item in
19 the stream of commerce by selling it, he has exhausted his exclusive statutory right to
20 control its distribution." *Quality King Distribs., Inc. v. L'anaza Research Int'l, Inc.*, 523
21 U.S. 135, 152 (1998). "[T]he 'first sale' doctrine applies to copies of a copyrighted work
22 lawfully made abroad." *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1355-56
23 (2013). Defendants assert that the first sale defense protects SurplusEQ's sale of any
24 Fujikura splicers containing the copyright protected software. The parties agree that
25 SurplusEQ sold Fujikura splicers that were manufactured and first sold outside the United
26 States. Fujikura's authorization of that initial foreign sale triggered the first sale doctrine,
27 which qualified its otherwise "exclusive rights" "to distribute copies . . . of [a]
28 copyrighted work." 17 U.S.C. § 106(3). All subsequent owners of those Fujikura

1 splicers, including SurplusEQ, were “entitled, without the authority of the copyright
2 owner, to sell or otherwise dispose of the possession of that copy[.]” *Id.* § 109(a).
3 Accordingly, Fujikura, and AFL via the copyright license agreement, do not have a valid
4 copyright infringement claim against Defendants.

5 **E. Damages.**

6 Defendants argue that AFL’s damage theory is “pure speculation” and cannot
7 withstand summary judgment. Defendants contend that AFL’s request for damages “for
8 sales occurring prior to the licensing agreements” fails as a matter of law. Defendants
9 submit that AFL has standing only to pursue damages that occurred after Fujikura
10 granted it an exclusive license in 2011. The Court does not agree.

11 **1. Lanham Act Damages.**

12 Section 43 of the Lanham Act allows “any person who believes that he or she is
13 likely to be damaged” by the proscribed conduct to bring a civil action. 15 U.S.C.
14 § 1125(a). In the Ninth Circuit, “different causes of action alleged pursuant to the
15 different subsections of 15 U.S.C. § 1125(a) have different standing requirements.” *Jack*
16 *Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037
17 (9th Cir. 2005) (citation omitted). “[F]or standing pursuant to the ‘false advertising’
18 prong of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), a plaintiff must show:
19 (1) a commercial injury based upon a misrepresentation about a product; and (2) that the
20 injury is ‘competitive,’ or harmful to the plaintiff’s ability to compete with the
21 defendant.” *Id.* (citation omitted). “[W]hen plaintiff competes directly with defendant, a
22 misrepresentation will give rise to a presumed commercial injury that is sufficient to
23 establish standing.” *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 827 (9th Cir.
24 2011); *see, e.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (noting that
25 a plaintiff bringing a false advertising suit has to show a “discernibly competitive injury,”
26 and giving the example of a film distributor with a PG-rated film having standing to bring
27 a claim against a competitor who wrongfully indicated that a film was PG-rated when it
28 should have been R-rated). In addition, “parties with a commercial interest in the product

1 wrongfully identified with another’s mark . . . or with a commercial interest in the
2 misused mark” have standing to bring a Lanham Act unfair competition claim. *Waits*,
3 978 F.2d at 1109; *see also Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d
4 1213, 1226 (9th Cir. 2008).

5 AFL has been Fujikura’s exclusive splicer distributor in North America since
6 2003. This commercial interest in the FUJIKURA mark is sufficient to give AFL
7 standing to raise a Lanham Act unfair competition claim. Accordingly, the Court denies
8 Defendants’ motion for summary judgment on AFL’s claims for damages relating to
9 sales predating the 2011 license agreement. *See, e.g., Halicki v. Carroll Shelby Int’l,*
10 *Inc.*, No. CV 04 8813 SJO, 2005 WL 5253338, at *11 (C.D. Cal. Nov. 11, 2005) (noting
11 that “the question of ownership is immaterial to standing,” and that to maintain a
12 § 1125(a) claim a plaintiff “must show that it has a commercial interest in the allegedly
13 misused mark that is likely to be damaged” (quotation marks and citations omitted)).

14 Under the Lanham Act, when “a violation under section 43(a) . . . ha[s] been
15 established in any civil action . . . , the plaintiff shall be entitled . . . to recover
16 (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the
17 action.” 15 U.S.C. § 1117(a). In this action, AFL seeks to recover lost profits for every
18 infringing sale made by Defendants and all of Defendants’ profits on such sales.
19 Doc. 174 at 28. Given that AFL has standing to assert a Lanham Act unfair competition
20 claim for every gray market Fujikura splicer sold by Defendants, and that the claim has
21 withstood cross-motions for summary judgment, Defendants have not demonstrated that
22 AFL’s damages claim is purely speculative or otherwise subject to summary judgment.

23 Defendants also argue that AFL lacks standing to pursue damages for sales that
24 occurred outside of the territorial limits of its exclusive trademark license. AFL submits
25 that, under the Lanham Act, it is entitled to recover for all of SurplusEQ’s allegedly
26 infringing conduct that occurred in the United States, including conduct that resulted in a
27 Fujikura splicer being shipped outside of the United States. The Court agrees. A
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1 commercial interest, not an ownership interest, is necessary for standing under the
2 Lanham Act. Defendants have failed to establish that AFL cannot recover under the
3 Lanham Act for these sales.

4 **2. Damages Disclosure.**

5 The Federal Rules of Civil Procedure require “a computation of each category of
6 damages claimed by the disclosing party – who must also make available for inspection
7 and copying as under Rule 34 the documents or other evidentiary material, unless
8 privileged or protected from disclosure, on which each computation is based, including
9 material bearing on the nature and extent of injuries suffered.” Fed. R. Civ.
10 P. 26(a)(1)(A)(iii). Defendants argue that AFL has failed to produce a computation of
11 damages for each of its four claims and instead disclosed an insufficient lump sum
12 statement of damages. AFL has disclosed a damages calculation for its unfair
13 competition and false advertising claims (Doc. 174-2 at 15), and a separate calculation
14 for its copyright damages claim (*id.* at 16). Additionally, AFL disclosed a detailed
15 damages calculation showing Defendants’ profits and AFL’s lost profits. Doc. 153-1
16 (“Doc. 153-1”) at 2-11; Doc. 174-2 at 17-24.

17 The Court disagrees with Defendants’ argument that these disclosures should be
18 excluded for violation of Rule 26(a)(1)(A)(iii). Rule 26 provides that disclosures under
19 subpart (a) must be supplemented unless “the additional or corrective information has not
20 otherwise been made known to the other parties during the discovery process or in
21 writing.” Fed. R. Civ. P. 26(e)(1)(A). AFL made additional damages disclosures in
22 writing during the discovery process related to expert opinions, satisfying
23 Rule 26(e)(1)(A) and AFL’s disclosure obligations. Moreover, evidence not disclosed
24 under Rule 26(a) may be excluded only if its lack of disclosure was not substantially
25 justified or harmless (Fed. R. Civ. P. 37(c)(1)), standards not addressed by Defendants.

26 Defendants also argue that AFL failed to disclose documents that underlie its
27 disclosed damages. Defendants do not claim that they served a Rule 34 document
28 production request for this information, arguing instead that the documents should have

1 been disclosed under Rule 26(a)(1)(A)(iii). As noted above, however, evidence will be
2 precluded for failure to disclose under Rule 26(a) only if the failure is not substantially
3 justified or harmless, standards Defendants fail to address. In addition, AFL asserts that
4 information about the relevant figure – the material margin used to compute lost profits –
5 was derived from an internal computer report and was incorporated into its damages
6 expert’s report. Defendants reviewed the report and deposed the expert, and yet never
7 sought the Court’s assistance in obtaining more complete disclosures if any were needed.
8 The Court will not preclude AFL’s damages claims on the ground of non-disclosure.⁵

9 **IV. AFL’s Motion to Seal.**

10 AFL asks the Court to seal the following documents: (1) its damages expert report
11 (Doc. 153-1), (2) a memorandum discussing strategies for combating gray market sales
12 (Doc. 152-1 at 55-57), and (3) portions of the deposition transcript of Stephen Althoff
13 (Doc. 152-1 at 26-36) that concern the strategies in item two (Doc. 155 at 4-5).⁶ The
14 documents were attached to dispositive motions: Defendants’ motion for summary
15 judgment (Doc. 151) and Defendants’ motion to exclude expert opinions (Doc. 190). The
16 federal common law right “to inspect and copy public records and documents” extends to
17 materials submitted in connection with dispositive motions. *San Jose Mercury News,*
18 *Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999) (quoting *Nixon v. Warner*
19 *Comm’ns, Inc.*, 435 U.S. 589, 597 (1978)). This right is not absolute, however, and can
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21 ⁵ The Court is also unpersuaded by Defendants’ arguments regarding AFL’s
22 failure to disclose profit information from Fujikura. The profit claim in this case is made
23 by AFL, not Fujikura, and the Court therefore is not persuaded that any such disclosure
24 was required under Rule 26(a)(1)(A)(iii). Nor have Defendants addressed the
25 requirements for exclusion under Rule 37(c)(1), as noted above. To the extent
26 Defendants believe that AFL’s profit calculation is rendered unreliable by undisclosed
27 information about Fujikura’s finances, it can make this assertion through cross-
28 examination at trial.

26 ⁶ Defendants assert that AFL also seeks to seal Defendants’ expert report
27 (Doc. 154-12) and excerpts from the deposition transcript of AFL expert witness Robert
28 Crowder (Doc. 152-9), but AFL withdrew its request to seal these exhibits in its motion
to seal. Doc. 155 at 5.

1 be overcome if compelling reasons supported by specific factual findings outweigh the
2 general history of access and the public policies favoring disclosure. *Pintos v. Pac.*
3 *Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Kamakana v. City & Cnty. of*
4 *Honolulu*, 447 F.3d 1172, 1178, 1178-79 (9th Cir. 2006)); see also *See San Jose Mercury*
5 *News*, 187 F.3d at 1102.

6 “Under the ‘compelling reasons’ standard, the Court must weigh ‘relevant factors,’
7 base its decision ‘on a compelling reason,’ and ‘articulate the factual basis for its ruling,
8 without relying on hypothesis or conjecture.’” *Pintos*, 605 F.3d at 679 (quoting *Hagestad*
9 *v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). “‘Relevant factors’ include the ‘public
10 interest in understanding the judicial process and whether disclosure of the material could
11 result in improper use of the material for scandalous or libelous purposes or infringement
12 upon trade secrets.’” *Id.*, 679 n.6 (quoting *Hagestad*, 49 F.3d at 1434).

13 AFL submits that its damages expert report (Doc. 153-1) should not be made
14 publicly available because it contains information setting out AFL’s material margin –
15 “the excess of its average sales price over its incremental costs of sale of an additional
16 Fujikura fusion splicer.” Doc. 155 at 5. AFL argues that this is the sort of business
17 information that might harm its competitive standing because a competitor could use it to
18 strategically price its units to AFL’s detriment or a customer could use it to effectively
19 negotiate a desired price. Defendants argue that AFL has no compelling reason to seal
20 the exhibit because the report does not disclose the names of specific AFL customers or
21 any trade secret. The Court disagrees with Defendants. *See In re Elec. Arts, Inc.*, 298
22 Fed. Appx. 568, 569-70 (9th Cir. 2008) (finding that information related to “pricing
23 terms, royalty rates, and guaranteed minimum payment terms” is “the precise sort of
24 information” that might harm a litigant’s competitive standing. (citation omitted)). After
25 carefully reviewing this exhibit and the record, the Court notes, however, that this
26 material margin data is similar to the information contained in the expert rebuttal report
27 (Doc. 174-2 at 8-24), and, if anything, that the information contained in the rebuttal
28 report is more detailed and could be used to inflict even more harm onto AFL than the

1 original report (Doc. 153-1). AFL has not moved to seal the rebuttal report. Because the
2 public already has access to AFL’s material margin information, the Court cannot find
3 that a compelling reason exists to seal the original report.

4 As to the documents and deposition testimony relating to AFL’s efforts to combat
5 gray market sales (Doc. 152-1 at 26-36, 55-57), AFL argues that if this information were
6 made publicly available, “gray market sellers could gain valuable information about what
7 has been done and what might be done in the future,” and that “[a]nything that assists
8 gray market sellers in avoiding efforts by Fujikura and AFL to prevent such infringing
9 sales is detrimental to AFL’s business.” Doc. 155 at 6. After carefully reviewing each
10 exhibit, the Court agrees, for reasons stated by AFL, that these exhibits contain
11 information that could cause competitive harm if publicly divulged. Accordingly, the
12 Court grants AFL’s motion to seal with respect to the memorandum discussing strategies
13 for combating gray market sales (Doc. 152-1 at 55-57) and portions of the Althoff
14 deposition transcript (Doc. 152-1 at 26-36).

15 **V. Defendants’ Motion to Exclude Expert Testimony.**

16 An expert may offer “scientific, technical, or other specialized knowledge” if it
17 “will assist the trier of fact to understand the evidence,” provided the testimony rests on
18 “sufficient facts or data” and “reliable principles and methods,” and “the witness has
19 reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702.
20 The trial court acts as a “gatekeeper for expert testimony to assure that it is both relevant
21 and reliable,” *Avila v. Willits Env’tl. Remediation Trust*, 633 F.3d 828, 836 (9th Cir.
22 2011), an exercise that “entails a preliminary assessment of whether the reasoning or
23 methodology is scientifically valid and of whether that reasoning or methodology
24 properly can be applied to the facts in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509
25 U.S. 579, 592-93 (1993).

26 **A. Robert Crowder.**

27 Robert Crowder is AFL’s chief financial officer (“CFO”), a position he has held
28 since December 2007. Crowder is also a certified public accountant with more than 20

1 years of experience in accounting and business administration. According to AFL, “[a]s
2 a result of his education and experience, Crowder is quite familiar with the methodology
3 of calculating a company’s profits.” Doc. 192 at 3. Crowder’s testimony relates to
4 AFL’s damages claim, and specifically, AFL’s lost profits and SurplusEQ’s profits.

5 Defendants ask the Court to exclude Crowder’s testimony because it is based on
6 the erroneous assumption that every Fujikura splicer sold by SurplusEQ was an
7 infringing sale and that AFL would have made all of these sales. In response, AFL
8 submits that “[b]ecause Mr. Crowder has provided detailed calculations, the numbers can
9 be adjusted according to the findings of the trier of fact with regard to lost sales.”
10 Doc. 192 at 9. Crowder’s opinion goes to the calculation of profits, an area of his
11 expertise as AFL’s CFO, and Defendants can challenge the assumptions underlying that
12 opinion at trial. As the Supreme Court noted in *Daubert*, “[v]igorous cross-examination,
13 presentation of contrary evidence, and careful instruction on the burden of proof are the
14 traditional and appropriate means of attacking shaky but admissible evidence.” 509 U.S.
15 at 596.

16 Defendants also argue that Crowder’s testimony should be excluded because his
17 math is incorrect. There appears to have been a miscalculation in Crowder’s original
18 report (Doc. 153-1), but this error was corrected in the rebuttal report (Doc. 174-2 at 7-
19 24). This is not a basis to exclude Crowder’s testimony.

20 Defendants submit that Crowder’s opinion is inadmissible because it relies on
21 documents AFL failed to produce. Specifically, Defendants point to AFL’s failure to
22 produce internal documents about its material margin. In calculating AFL’s lost profits,
23 Crowder relies on the material margin, AFL’s average selling price for the particular
24 model in that year less its average cost in that year. The material margin for each
25 Fujikura splicer model from 2007 through 2011 was provided with Crowder’s expert
26 report. Doc. 153-1 at 2. Subsequently, AFL submitted Crowder’s rebuttal report, which
27 provided an expanded chart showing how the material margin was calculated for each
28 model and year. Doc. 174-2 at 14. Crowder is not a witness “whose duties as the party’s

1 employee regularly involve giving expert testimony,” and thus a written expert report
2 was not required under Rule 26(a)(2)(B). Instead, AFL was required to provide a
3 summary of the facts and opinions to which the witness is expected to testify. Fed. R.
4 Civ. P. 26(a)(2)(C). Defendants have not shown that AFL’s disclosure failed to satisfy
5 this more limited obligation. To the extent Defendants contend that Crowder’s testimony
6 should be excluded because AFL failed to make the document disclosures required by
7 Rule 26(a)(1)(A)(iii), the Court has rejected this argument above.

8 **B. Douglas Duke.**

9 Douglas Duke is a mechanical engineer who has been employed by AFL since
10 1991. He began his career as a splicing applications engineer. Since then, he has helped
11 AFL diagnose and repair problems on splicers and has assisted with the development of
12 new splicer technology. Duke will testify about alterations found in the 818 splicer and
13 about what problems these modifications may cause in the future.

14 Defendants argue that Duke is not qualified to offer an opinion regarding the
15 quality of the repair made to the 818 splicer’s circuit board because only electrical
16 engineers are qualified and authorized by AFL to perform work on splicer software and
17 hardware. AFL responds that Duke is qualified not only because of his engineering
18 education and training, “but because of his long relevant work experiences, including as a
19 member of AFL’s engineering team for 20 years – sometimes as the only engineer.”
20 Doc. 192 at 4. The Court agrees. Rule 702 permits expert testimony based not only on
21 training, but also on experience. Defendants can cross-examine Duke on his
22 qualifications at trial and argue that his testimony should be accorded less weight because
23 he lacks an electrical engineering degree.

24 According to Defendants, Duke’s opinion relating to the alleged effects of the
25 modifications found on the 818 is inadmissible. Defendants point to Duke’s lack of
26 experience in testing the reliability of Fujikura splicers. In their reply, Defendants
27 concede that Duke is qualified to provide an opinion regarding the modifications found in
28 the 818 splicer, but not to opine about the “‘possible’ effects of any of the alleged

1 modifications,” an opinion that Defendants argue is based only on Duke’s “*ipse dixit*.”
2 Doc. 194 at 8, 10. The Court does not agree. Duke’s opinion about the possible effects
3 of the modifications found in the 818 splicer is based on his experience repairing splicers,
4 not on “subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 589. The
5 shortcomings identified by Defendants go to the weight and not the admissibility of
6 Duke’s opinion, and Defendants will be fully capable at trial of pointing out the
7 weaknesses in his opinion so a jury can hear Duke’s response and decide what weight to
8 accord his opinions.

9 **IT IS ORDERED:**

- 10 1. AFL’s motion for summary judgment (Doc. 147) is **denied**.
- 11 2. Defendants’ motion for summary judgment (Doc. 158) is **granted** with
12 respect to AFL’s copyright infringement claim and false advertising claim
13 as it pertains to the blog post, and is otherwise **denied**.
- 14 3. AFL’s motion to seal (Doc. 155) is **granted** with respect to the material
15 relating to AFL’s efforts to combat gray market sales (Doc. 152-1 at 26-36,
16 55-57) and **denied** with respect AFL’s damages expert report (Doc. 153-1).
- 17 4. The Clerk shall file the material relating to AFL’s efforts to combat gray
18 market sales (Doc. 152-1 at 26-36 and 55-57) **under seal** and shall accept
19 for filing the remainder of the document lodged as Doc. 152 on the docket.
- 20 5. The Clerk shall accept for filing Doc. 151 with all attachments, Doc. 153
21 with all attachments; Doc. 154 with all attachments; Doc. 169 with all
22 attachments; Doc. 185 with all attachments.
- 23 6. Defendants’ motion to exclude AFL’s expert opinions (Doc. 190) is
24 **denied**.

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7. The Court shall set a Final Pretrial Conference by separate order.
Dated this 20th day of May, 2013.



David G. Campbell
United States District Judge