

# **EXHIBIT 17**

Not Reported in F.Supp.2d, 2003 WL 25781901 (C.D.Cal.)  
(Cite as: 2003 WL 25781901 (C.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,  
C.D. California.  
TICKETMASTER CORP.  
v.  
TICKETS.COM, INC.  
**No. CV 99-07654 HLH (VBKx).**

Feb. 10, 2003.

Named Expert: Mark A. Lemley  
[Steven E. Sletten](#) (Gibson, Dunn & Crutcher, LLP),  
[Robert E. Cooper](#), Joseph M. Freeman, [Robert H. Platt](#) (Manatt, Phelps & Phillips, LLP), [Mark S. Lee](#)  
, [Chad S. Hummel](#), for Plaintiffs.

[William Taylor](#) (Brobeck, Phleger & Harrison),  
[Howard Holderness](#), James L. Miller, Heather B.  
Nolan, for Defendants.

**PROCEEDINGS: TICKETMASTER'S NOTICE  
OF MOTION AND MOTION TO EXCLUDE  
EXPERT TESTIMONY OF MARK A. LEM-  
LEY, FILED 1/13/03**

[HARRY L. HUPP](#), District Judge.

\*1 Arlene Chavez, Deputy Clerk.

Cynthia L. Mizell, Court Recorder.

ORDER (also, if applicable, findings and memorandum opinion):

The motion of plaintiff Ticketmaster Corporation (hereafter TM) to exclude on *Daubert* grounds the expert testimony of Professor Mark A. Lemley (hereafter Lemley) on behalf of defendant Tickets.Com (hereafter TX) is denied, subject to the exceptions set forth below.

The essence of TM's motion is that Lemley cannot

testify on the workings of the internet because he is not a technically trained computer expert, but is, instead, a mere law professor. Further, the objection is that certain of his opinions are now moot (in view of the dismissal of certain of plaintiff's claims) and that there are certain legal opinions contained in Lemley's report which are in the sole province of the court, not that of an expert witness.

Lemley has expressed certain opinions as to the possibility of confusion from TX using factual material derived from the TM web pages. However, the recent dismissal of the Lanham Act claims makes such opinions irrelevant because of mootness and will be excluded from Lemley's testimony. Likewise, any other items solely directed toward the dismissed claims will, of course, be excluded.

Lemley has also expressed certain legal opinions in his statement. Those items identified as legal opinions will be excluded as being within the sole province of the court. The court does not mean that Lemley is incompetent to express such opinions. Indeed, he may be more competent to express them than is the court. However, in our system, the sole source of the law for the jury is the judge, not the expert witness. For example, Lemley notes that in the course of acquiring factual material from the TM internal web pages, the "spider" program momentarily takes a "copy" of the TM interior web page onto the TX computer. Lemley explains how and why this is done in the process of obtaining facts from the TM interior web page. He also expresses the legal opinions that the factual material is not subject to copyright protection and that the momentary copying is "fair use" of taking the copy in order to obtain the non-protected facts. The description of how the process works is within the expertise of Lemley. The opinion that factual material is not protected and that the momentary copy is "fair use" (as expressed preliminarily by the court in connection with the preliminary injunction motion) is for the court and may not be stated by Professor Lemley to the jury, no matter how capable he

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is of expressing it to the court if he were counsel in the case. There are numerous such legal opinions contained in Lemley's statement, and they will be excluded by the court from testimony of the witness. The court requests that Professor Lemley and counsel for TX do a preliminary job of removing these legal conclusions before pretrial and serve the result to plaintiff.

The balance of the motion is denied. Lemley has shown extensive study and research into the operation of the internet. His voluminous publications on the subject in journals of high repute show his background and the impressive extent of his knowledge of how the internet works and the issues regarding the working of various aspects of the internet. One does not have to be a computer expert to have gained the knowledge from a different perspective than plaintiff's experts of how the various techniques used by the parties work. Thus, Lemley has the background and experience to describe how information is retrieved by one computer from the web page of another, how the URL works, how to use the URL to gain access to a web page, how linking is used to ease the work of transferring from one web page to another, the protocols used to construct web addresses, the difference between static and dynamic web pages and the problems connected with each, how dynamic web pages are constructed, modified, and accessed, how spiders work and retrieve information from publically available web sites, how security functions can work, how conditions of access and their various forms can be used, including the passive warning versus the affirmative key stroke to denote acceptance of conditions, the use and technique of "deep" linking to interior web pages, and how the same is used by search engines, the difference between purely factual information and the method of expression of the same, and the like. While Lemley has opinions on the legal effect of these facts, which he may not express, he shows that he has the experience and background to describe what is taking place in terms understandable to a jury (or even to a judge).

\*2 Accordingly, Professor Lemley's years of background and experience with the internet qualify him to describe the workings of the items at issue in this case whether or not he could actually write the computer program for a spider, which is not what the case is about in any event.

C.D.Cal.,2003.

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