

EXHIBIT 4

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

H

Only the Westlaw citation is currently available.

United States District Court, N.D. California.
A & M RECORDS, INC., et al, Plaintiff(s),

v.

NAPSTER, INC., Defendant(s).

Jerry LEIBER, individually and doing business as

Jerry Leiber Music, et al, Plaintiff(s),

v.

NAPSTER, INC., Defendant(s).

No. C9905183MHP, C000074MHP.

Aug. 10, 2000.

Named Expert: Jay, Fine, Fader, Hall, Lessig, Tygar

MEMORANDUM AND ORDER RE ADMISSIBILITY OF EXPERT REPORTS

PATEL, Chief J.

*1 On July 3, 2000, in conjunction with its opposition to plaintiffs' motion for a preliminary injunction, defendant Napster, Inc. ("Napster") filed a motion to exclude the reports of plaintiffs' experts, Dr. E. Deborah Jay ("Jay Report") and Michael Fine ("Fine Report"). Defendant objected separately to the expert report of Dr. David J. Teece ("Teece Report"). Plaintiffs filed a brief opposing the exclusion of the Jay and Fine Reports on July 13, 2000. Plaintiffs also objected to three of defendant's expert reports—those of Dr. Peter S. Fader, Dr. Robert Hall, Professor Lawrence Lessig, and Dr. J.D. Tygar ("Fader Report," "Hall Report," "Lessig Report," and "Tygar Report," respectively). Plaintiffs request the exclusion of the first three reports in their entirety and object to certain portions of the Tygar Report.

After considering the parties' arguments, and for the reasons set forth below, this court now enters the following memorandum and order.

LEGAL STANDARD

I. *Federal Rules of Evidence*

Both the relevant case law and the parties' briefs make reference to three [Federal Rules of Evidence—Rules 104, 403, and 702](#). [Rule 104](#), governing general questions of admissibility, states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence, except those with respect to privileges.

The trial judge initially must determine if the expert is proposing to testify to scientific or other specialized knowledge that "will assist the trier of fact to understand or determine a fact in issue." [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[Rule 403](#) provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[Rule 702](#) applies to testimony by experts and states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

In its landmark *Daubert* opinion, the Supreme Court held that [Rule 702](#) does *not* embody the requirement that an expert opinion is inadmissible un-

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

less it is “generally accepted” as reliable in the relevant scientific community.” *Daubert*, 509 U.S. at 584 (rejecting the test articulated in *Frye v. United States*, 293 F. 1013, 1014 (1923)); *see id.* at 597.

II. *Daubert* Gatekeeping Obligations

*2 In *Daubert*, the Supreme Court held that the Federal Rules of Evidence—particularly Rule 702—give the trial court the duty of ensuring that expert testimony is “relevant to the task at hand” and has a reliable basis in the knowledge and experience of the relevant discipline. *Daubert*, 509 U.S. at 597. To determine the relevance and reliability of scientific evidence, the *Daubert* Court said, the trial judge must undertake a flexible inquiry, focusing on the principles and methodology used, rather than the conclusions reached. *See id.* at 594-95. Several factors may bear on a judge's gatekeeping determination. These factors, include, but are not limited to, whether (1) the “theory or technique ... can be (and has been tested);” (2) the theory or technique “has been subjected to peer review and publication;” (3) the technique has a “known or potential rate of error;” (4) there are “standards controlling the technique's operation;” and (5) the theory or technique enjoys “general acceptance” within a “relevant scientific community.” *Id.* at 592-94. The Supreme Court emphasized that it did not intend to create a “definitive checklist or test.” *Id.* at 594; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

In *Kumho Tire*, the Supreme Court extended *Daubert* principles to the testimony of engineers and other technical experts who are not scientists. *See Kumho Tire*, 526 U.S. at 141. It held that the gatekeeping obligation *Daubert* imposed on trial courts applies to all expert testimony. *See Kumho Tire*, 526 U.S. at 147.

DISCUSSION

I. Defendant's Objections

A. Jay Report

Dr. E. Deborah Jay is the President and Chief Executive Officer of Field Research Corporation, which plaintiffs retained “to conduct a survey with a random sample of college and university students in order to identify persons who use Napster to download music.” Jay Rep. at 1. Jay focused exclusively on college students because journalistic articles discussed college students using Napster. *See* Heather Mewes Dec., Exh. A (Jay Dep.) at 18:4-12, 22:2-13. The survey purported to track the reasons survey respondents used Napster, *see* Jay Rep. at 13-14, and the impact of Napster on their music purchases. *See id.* at 15-16.

Defendant challenges the admissibility of the Jay Report on the ground that the survey was fatally under-inclusive because it only surveyed college or university students without obtaining data on the extent of Napster use outside colleges and universities. In her deposition, Jay admitted that she did not analyze non-college Napster use or have any information about it. *See id.* at 24:15-25, 25:1-2. She did not know the median age of Napster users. *See id.* at 17:25-18:1. Jay also stated that she could project her results to the universe of college users, but declined to project them to Napster users as a whole. *See id.* at 24:15-25:9.

*3 Defendant contends that the proper universe for determining lost sales or injury to plaintiffs is *all* of plaintiffs' customers, not merely those who currently attend college or university. According to Napster, “if Napster users other than college students were increasing sales sufficient to offset any purported loss among college students ..., Plaintiffs' claim of harm would evaporate.” Def.'s Mot. to Exclude Jay Rep. at 2.

In opposing defendant's motion to exclude the Jay Report, plaintiffs primarily argue that (1) defendant's criticisms of the report are invalid, and (2) objections to survey methodology affect the weight, rather than the admissibility of evidence.^{FNI} Ac-

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
 (Cite as: 2000 WL 1170106 (N.D.Cal.))

ording to plaintiffs, Napster executives themselves have opined that college students constitute the target demographic and the largest portion of Napster users. *See* Pl.'s Opp. to Def.'s Mot. to Exclude Jay Rep. at 3 (citing Fanning Dep. at 303:9-11, Brooks Dep. at 145:10-12, and Richardson Dep. at 246:13-14). Plaintiffs contend that, because college students represent an important segment of both Napster users and the record-buying public, survey results showing a linkage between college Napster use and a decline in college record sales is probative of plaintiffs' harm.

FN1. Plaintiffs also contend that Napster's motion is improper because it violates this court's rule prohibiting separate motions to strike. *See* Rules of the Hon. Marilyn Hall Patel, at Addendum I. The court considers this argument disingenuous and will disregard it because plaintiffs have also filed separate motions to strike the opinions of Drs. Fader, Hall, and Tygar and Professor Lessig.

Identification of the relevant target population or universe constitutes one of the first steps in designing a survey; the researcher must design that universe carefully. *See Reference Manual on Scientific Evidence* 235 (Fed. Judicial Ctr.1994). Although Jay appears to have chosen her target population from only a portion of the Napster user base, depositions of Napster executives corroborate the media reports upon which she relied. For example, Elizabeth Brooks testified, "We believes [sic] ourselves to have a high college demographic, and beyond that to be primarily [ages] 12 to 24." Julia Greer Reply Dec. (Brooks Dep.) at 145:10-12 Defendant has failed to produce persuasive evidence that college or university students do *not* constitute a significant percentage of Napster users. Even if a statistic cited by defendant's expert Dr. Peter S. Fader were to be believed, college students still account for about a quarter of Napster's users. *See* Dec. of David Lisi (Fader Rep.) ¶ 49. The court recognizes the Jay Report for what it is—a report that looks at

only one segment of the Napster user population. That segment is significant, and the court finds evidence of lost sales attributable to college use to be probative of irreparable harm for the purposes of the preliminary injunction motion.

Defendant misreads Ninth Circuit case law on the impact of *Daubert* on methodological flaws in surveys. The Ninth Circuit has stated that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997) (holding that exclusion of survey about trademark confusion was not abuse of discretion). Far from providing that methodological flaws render a survey inadmissible, the court in *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir.1997), specifically stated: "Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value." *Id.* at 1143 n. 8; *see also Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283, 1296 (N.D.Cal.1991), *aff'd*, 964 F.2d 965 (9th Cir.1992) (holding that alleged under-inclusiveness of survey in copyright infringement action affected "the weight of the survey, not its admissibility"), *cert. denied*, 507 U.S. 985, 113 S.Ct. 1582, 123 L.Ed.2d 149 (1993).

*4 Defendant cites several district court cases outside the Ninth Circuit for the proposition that methodological flaws in surveys render them inadmissible under *Daubert* and *Kumho Tire*. *See e.g.*, *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F.Supp. 1454, 1467 (D.Kan.1996) (holding that under-inclusiveness of survey rendered it inadmissible); *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F.Supp. 1189, 1204 (E.D.N.Y.1983) (stating that failure to satisfy one or more criteria for trustworthiness of surveys, including definition of the proper universe, may lead to exclusion of the survey). These cases do not constitute controlling authority, and the court may disregard them. Here, the choice of the universe is but one potential flaw in a survey that otherwise comports with the applic-

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

able standards.

The Jay Report is probative of irreparable harm and will be admitted. The court need not opine whether the report is probative of damages, as that issue has not yet ripened.

B. *Fine Report*

Plaintiffs engaged Michael Fine—the Chief Executive Officer of Soundscan—to determine the effect of online sharing of MP3 files. *See* Fine Rep. at 1. They seek to introduce his report as evidence of irreparable harm, not to establish a specific amount of monetary damages. *See* Pl. Opp. to Def.'s Mot. to Exclude Fine Rep. at 5.

Fine's study examined retail music sales trends in three types of stores in the United States: (1) all stores located within one mile of any college or university on a list acquired from Quality Education Data; ^{FN2} (2) all stores located within one mile of any college or university on a list of colleges and universities that have banned Napster use; ^{FN3} (3) all stores within one mile of any college or university listed among the “Top 40 Most Wired Colleges in 1999,” according to Yahoo Internet Life. ^{FN4} Researchers working on the Fine Report used Soundscan Point of Sale data to compare music sales totals from the latter two categories with (1) national totals and (2) sales from the first category, “All College Stores.” The report tracked retail sales in the first quarter (“Q1”) of 1997, 1998, 1999, and 2000. Napster was not online until the final data point, Q1 2000. *See* Def.'s Mot. to Exclude Fine Rep. at 5; Mewes Dec., Exh. B (Fine Dep.) at 24:1-8.

^{FN2}. 4,454 schools and 2099 stores. *See* Fine Rep. at 5.

^{FN3}. 67 schools and 48 stores. *See id.* Fine admits that he did not check to see why the schools banned Napster. *See* Mewes Dec., Exh. B (Fine Dep.) at 58:8-10.

^{FN4}. 40 schools and 44 stores. *See* Fine Rep. at 5. Fine concedes that he did not verify the accuracy of the Yahoo Internet Life report. *See* Mewes Dec., Exh. B (Fine Dep.) at 17:15-17.

After examining the data, Fine concluded that “on-line file sharing has resulted in a loss of album sales within college markets .” Fine Rep. at 1. While national sales grew “significantly and consistently” in the quarters he studied, sales at stores near colleges or universities declined, with sales in the “Top 40 Most Wired Colleges” and “Napster-banned” subsets showing an even sharper decline than those in the “All College Stores” category. Fine's conclusions were not limited to Napster, but rather assessed the effects of online file sharing in general. *See id.*; Pl.'s Opp. to Def.'s Mot. to Exclude Fine Rep. at 7.

*5 Defendant argues that the Fine Report should be excluded because it employed a flawed methodology. First, the report failed to consider all causal factors in the decline of retail music sales. Specifically, it did not account for the possible effects of Internet record sales on sales in retail stores. Defendant contends that the fact that the report shows a decline in retail sales beginning in Q1 1999—before Napster came into existence—demonstrates that some factor besides Napster caused a decline in music sales in retail stores. Second, Fine compared weighted national sales numbers with raw numbers from the three college-related categories. Defendant maintains that this method of comparing the college sub-populations with national sales was invalid. Moreover, Soundscan's proprietary database is not subject to peer review. Thus, according to defendant, Fine's research results must be excluded pursuant to *Daubert* and *Kumho Tire*.

Plaintiffs respond that Fine had valid, practical reasons for excluding Internet sales data. First, because he could not determine the location of Internet purchasers, he could not adjust the data for sales at college stores (which were identified geographically) to include Internet sales. Second, plaintiffs

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

claim that Internet sales volume is *de minimis* compared to retail sales. Internet sales purportedly account for only one percent of national sales, if sales by Amazon.com are excluded. *See* Pl.'s Opp. to Def.'s Mot. to Exclude Fine Rep. at 6 n. 4. Third, Fine excluded Internet sales from all his comparisons.

As to defendant's other objections, plaintiffs note that Fine averred that the use of weighted national sales data was necessary because Soundscan does not have contracts with every retail outlet. His results were computed as percentages, rather than actual dollar values. According to Fine, the use of percentages means that weighting has no absolutely no effect on the results. *See* Mewes Dec., Exh. B (Fine Dep.) at 42:4-14. Finally, plaintiffs dispute defendant's assertion that the Fine Report is inadmissible under *Daubert* and *Kumho Tire* because the proprietary nature of the Soundscan database makes it unavailable for peer review.

The court finds some aspects of the Fine Report troubling-especially the fact that it shows a decline in retail sales *prior* to the launching of Napster. This limitation, combined with Fine's decision not to track Internet music sales, reduces the study's probative value. The court nevertheless declines to exclude the Fine Report. The primary case upon which defendant relies, *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir.1988), involved the exclusion of expert studies that posed a great danger of misleading a *jury* about the proper amount of *damages*. In contrast, plaintiffs offer the Fine Report to aid the court in determining whether they have suffered irreparable harm. Although the Fine Report may not be probative of the exact amount of damages, the court does not confront that question now.

*6 The Ninth Circuit has expressed confidence in a jury's ability to decide whether asserted technical deficiencies undermine the probative value of non-scientific expert studies. *See Southland Sod Farms*, 108 F.3d at 1143 n. 8. Certainly then, the court can determine the proper weight to give the Fine Re-

port. The danger of confusion is reduced because the Fine Report does not make claims beyond the limits of its methodology; Fine admits that his conclusions encompass all music file-sharing, not just that facilitated by Napster.

The court also rejects defendant's contention that the proprietary nature of the Soundscan's software system mandates exclusion under *Daubert*. Soundscan is widely used in the recording industry to track music sales, and plaintiff apparently made the software available to defendant to run its own tests. Although publication or some other form of peer review is a pertinent consideration, the Supreme Court specifically noted that this factor is not dispositive of reliability. *See Daubert*, 509 U.S. at 594. Accordingly, this court declines to exclude the Fine Report, insofar as it is offered to show irreparable injury.

C. Teece Report

Defendant objects to the entire Teece Report under the *Daubert* standard, [Rule 702](#), and [Rule 403](#). Plaintiffs engaged Teece to analyze the way that Napster, Inc. benefits from value creation for Internet companies; whether plaintiffs have suffered or are likely to suffer harm in their existing and planned businesses due to defendant's activities; and the importance of intellectual property protection to the United States' economy. *See* Teece Rep. at 2.

The court finds no fault with Teece's expert qualifications. Teece earned a Ph.D. in Economics from the University of Pennsylvania in 1975. *See id.* at 1. He is currently a professor at the Haas School of Business and Director of the Institute for Management Innovation and Organization at the University of California, Berkeley. *See id.* He also directs an international economics consulting firm that he co-founded in 1988. *See id.*

Teece examined depositions and documents produced in conjunction with this litigation, as well as

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

outside studies and media reports. His conclusions were drawn from consideration of Napster, Inc.'s internal documents. Although the Teece Report has not undergone peer review, it is not the type of document that is ordinarily subject to such scrutiny. See *Daubert*, 509 U.S. at 594 (stating that peer-review factor is not dispositive). The Teece Report comports with the standards that professional economists generally follow. Accordingly, defendant's objections to it are overruled.

II. Plaintiffs' Objections

A. Fader Report

A tenured Associate Professor of Marketing at the Wharton School of the University of Pennsylvania, Dr. Peter S. Fader specializes in using data generated by new information technology, such as the Internet, to assist companies in developing marketing strategies. See Lisi Dec. (Fader Rep.) ¶¶ 1-2. He considers himself an expert on consumer surveys. See Greer Dec. of July 13, 2000, Exh. 1 (Fader Dep.) at 28:18-20. However, he admitted in his deposition that he has never before prepared a consumer survey for litigation and he is unfamiliar with the standards set forth by federal courts for the reliability of such surveys. See *id.* at 20:8-9, 35:14-18.

*7 The Fader Report concludes that Napster is beneficial to the music industry because MP3 music file-sharing stimulates more compact disc sales than it displaces. See Lisi Dec. (Fader Rep.) ¶¶ 6-8. Fader relied on three types of evidence to reach this conclusion: (1) analysis of media reports, surveys, and other reports prepared and authored by other people; (2) a survey, conducted by Greenfield Online, over which Fader exercised some supervisory control; and (3) Fader's analysis and criticism of the Jay and Fine Reports.

The centerpiece of the Fader Report is the Greenfield Online survey, which Fader purportedly designed and oversaw. See *id.* ¶ 65. He cited the

Greenfield survey as evidence that Napster use is associated with overall increases-rather than decreases-in CD purchases. See Lisi Dec. (Fader Rep.) ¶ 67. The Greenfield Online profile describes the company as "the pioneer in using the Internet for marketing research." *Id.* Exh. C ¶ 1. However, in his deposition, Fader stated that his knowledge of Greenfield's purported expertise came from representations that Greenfield itself made. See Greer Dec., Exh. 1 (Fader Dep.) at 226:19-25, 227:1-2.

Greenfield maintains a proprietary database of over 500,000 registered panel members. To choose a survey sample from this panel, Greenfield relied on Forrester Research Inc.'s Year 2000 Benchmark survey of 80,000 offline and online individuals in the United States. See Lisi Dec. (Fader Rep.), Exh. C ¶ 2. The Forrester Benchmark survey was used to assign a sample weight to panel members. See *id.* Fader admitted under oath that he had never seen the Forrester Benchmark survey, nor does he know how it was conducted. See Greer Dec. (Fader Dep.) at 236:17-25, 237:1-2, 241:19-23, 242:1-2.

After choosing its sample, Greenfield sent an invitation letter to a "randomly-selected, Internet-representative sample of 35,000 panel members" who were not informed about the purpose of the survey. See Lisi Dec. (Fader Rep.), Exh. C ¶ 2. While the Fader Report states that letter recipients "did not receive any incentive to participate," *id.*, Greenfield offers potential members of its larger panel chances to win sweepstakes and other incentives to join. See Greer July 13, 2000 Dec., Exh. 1 (Fader Dep.) at 245:18-22. Fader never reviewed a copy of the invitation letter. See *id.* at 244:8-9.

Of the 12,940 persons who completed the survey questionnaire, 8,517 were included in the Fader Report according to age, residence, familiarity with downloading MP3 files, and completion of the entire survey. See Lisi Dec. (Fader Rep.), Exh. C ¶ 3. Fader admitted at his deposition that he does not believe survey responses were validated to insure that the person who answered the questions was the one to whom the survey was sent. See Greer July

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

13, 2000 Dec. , Exh. 1 (Fader Dep.) at 254-24-25, 255:1-3.

Plaintiffs object to the Greenfield survey on the ground that it was not conducted according to recognized standards governing the reliability of surveys offered as evidence in litigation. The greater problems, in this court's view, are that Fader played a minimal role in overseeing the administration of the survey, and his report contains almost no tables or other objective data about the survey respondents and their answers. Defendant admitted at the preliminary injunction hearing that Exhibit 7 to the Fader Report constitutes the only objective, statistical breakdown of the Greenfield survey, aside from Fader's own characterization of the results. This lack of data prevents the court from conducting its own impartial review of the survey pool and responses. Furthermore, Fader contracted the work on the Greenfield survey to a company about which he knew relatively little and did not review key documents, such as the invitation letter or the Forrester Benchmark survey. In short, his claim to have designed and overseen the Greenfield survey appears exaggerated, and the generality of his report renders it of dubious reliability and value.

*8 Aside from the Greenfield study, Fader primarily relied on newspaper and magazine articles that he did not write or research and studies that he did not conduct. For example, to support his contention that college students do not constitute the majority of Napster users, he cited two reports: the Pew Internet & American Life Project, *Internet Tracking Report* ("Pew Report"), June 8, 2000; and Cyberdialogue, Inc., *Cybercitizen Entertainment Continuous Advisory Service: CyberBits Trend Report*, No. 1, 2000. *See* Lisi Dec. (Fader Rep.) ¶ 49. He admitted in his deposition that he does not know how the Pew Report selected its participants or whether it followed proper survey methodologies. *See* Greer July 13, 2000 Dec. (Fader Dep.) at 136:15-24, 160:16-22. The "chorus of data refuting plaintiffs' finding of substantial negative impact on music purchasing" also turns out to be a handful of studies

and surveys conducted by others. *See* Lisi Dec. (Fader Rep.) ¶¶ 36-45. Fader appears to have limited knowledge of how these surveys were conducted. For instance, he conceded in his deposition that he had not seen the interview instructions for a 1999 survey by Digital Mogul and CENTRIS, nor could he vouch for its methodological rigor. *See* Greer July 13, 2000 Dec. (Fader Dep.) at 141:17-25, 142:10-16.

Given these limitations, the court finds that Fader cannot attest credibly that the surveys upon which he relied (including the Greenfield survey) conformed to accepted survey principles. Nor is the court willing to rely on opinions based on information reported in newspapers and magazines. Although plaintiffs' motion to exclude the Fader Report is denied, the court chooses not to rely on Fader's findings in determining the issues of fair use and irreparable harm.

B. Lessig Report

Plaintiffs challenge the Lessig Report because they believe it constitutes inadmissible legal opinion. Lawrence Lessig is a Professor of Law at Stanford Law School. *See* Lisi Dec. (Lessig Rep.) ¶ 2. He has written extensively in the field of Internet regulation, *see id.* ¶ 3, but he is not formally trained in computer science or computer programming. *See id.* ¶ 6. He states that the expertise he brings to this case lies "in understanding the relationship between law and technology." *Id.* His report expresses the view that this court should follow the Supreme Court's approach of considering the practical effect of legal regulation on Internet technology before wielding its injunctive power. *See id.* ¶¶ 10-11.

The Ninth Circuit does not allow attorneys to testify about the applicable law. *See Aguilar v. International Longshoreman's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir.1992). Treatises also opine that expert legal testimony is inadmissible. *See McCormick on Evidence* § 12, at 31 (E. Cleary's Law-*yer*, 3d ed.1984); VII Wigmore on Evidence §

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

1952, at 81. The Lessig Report merely offers a combination of legal opinion and editorial comment on Internet policy. Therefore, this court grants plaintiffs' motion to exclude it.

C. Hall Report

*9 Dr. Robert E. Hall is a tenured Professor of Economics at Stanford University and a Senior Fellow at the Hoover Institution. *See* Lisi Dec. (Hall Rep.) ¶ 1. The parties do not dispute Hall's qualifications as an expert in economics. Defendant offers the Hall Report to show that Napster will not reduce plaintiffs' profits in the near future, whereas "shutting down" Napster with a preliminary injunction creates a significant probability that Napster will lose most of its value. *See id.* ¶ 6. Hall reasons that Napster promotes more sales than it displaces. *See e.g., id.* ¶ 31.

Plaintiffs challenge the Hall Report on two broad bases. First, they contend that Hall failed to consider evidence that was inconsistent with his position. Specifically, he disregarded the Jay Report, ignored relevant data in studies by the University of Southern California and *Rolling Stone* magazine, and attacked aspects of the Fine Report showing that music sales near college campuses were lower than the national average. Plaintiffs cite [Concord Boat Corp. v. Brunswick Boat Corp.](#), 207 F.3d 1039, 1056-57 (8th Cir.2000) to show that other courts have criticized Hall for ignoring inconvenient evidence. Plaintiffs also point to passages in Hall's deposition indicating that he neglected to consider the Jay Report, which he obtained and even cited, and that in retrospect, he thought his analysis of the USC Study was "not completely fair." Pl.'s Mot. to Exclude Hall Rep. at 6-7 & n. 4.

Second, plaintiffs contend that the Hall Report is irrelevant, insofar as it discusses the potential hardship created by "shutting down" Napster. Plaintiffs note that they do not seek to preliminarily enjoin *all* of Napster's activities—for example, they do not object to the chat room, the New Artist Program, the

news feature, or the instant messaging.

The court agrees that Hall relied too heavily on outside studies that favored defendant without performing any analysis of the Jay Report. However, these shortcomings are not grave enough to warrant exclusion of his expert opinion. Insofar as the Hall Report assumes the requested injunction would put defendant out of business, it tends to corroborate plaintiffs' argument that Napster has no legitimate non-infringing uses. Since this conclusion benefits plaintiffs, they would be wise not to object too strenuously to admission of the Hall Report.

D. Tygar Report

Dr. J.D. Tygar is a tenured Professor of Engineering and Computer Science at the University of California, Berkeley. He is an expert in software engineering, computer security, and cryptography. *See* Lisi Dec. (Tygar Rep.) at 1. He offers conclusions about, *inter alia*, Napster's ability to detect and prevent infringement. Plaintiffs make individual objections to the conclusions offered in his report.

1. Conclusion 1: Comparability of Napster Software to Cassette Decks

In Conclusion 1 of his report, Tygar likens Napster to cassette decks, VCRs, digital audio tape recorders and other devices because of its ability to reproduce music. Plaintiffs challenge this opinion on the grounds of relevance and lack of foundation in either empirical evidence or expertise. The court sustains this objection. The instant litigation is not confined to Napster's software, but encompasses the entire system that defendant Napster, Inc. operates. The court has indicated previously that it considers Napster's search engine to be part of the Napster system. *See A & M Records, Inc v. Napster*, 2000 WL 57136, at *6 (N.D.Cal. May 12, 2000). As plaintiffs note, cassette decks do not perform search functions. Tygar's deposition testimony reveals that he did not conduct any tests to determine whether cassette decks or the other devices he mentioned

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
(Cite as: 2000 WL 1170106 (N.D.Cal.))

are capable of performing critical Napster functions like searching and indexing. Many of them clearly do not perform such tasks. Accordingly, Conclusion I will be struck in its entirety.

2. Conclusion 2: Applicability of 17 U.S.C. Section 512(a)

*10 In Conclusion 2, Tygar opines that Napster is similar to “existing file sharing techniques” like the search engines Lycos and Alta Vista, email, and the World Wide Web-among others. He further states that he believes Napster qualifies for the safe harbor in 17 U.S.C. section 512(a). See Lisi Dec. (Tygar Rep.) at 26. Tygar's opinions in Conclusion 2 conflict with this court's ruling on defendant's motion for summary adjudication. See *A & M Records, Inc v. Napster*, 2000 WL 57136, at *7-8 (N.D.Cal. May 12, 2000). There, the court expressly held that section 512(a) does not cover Napster because, unlike protected Internet service providers, Napster does not act as a mere conduit for file sharing. See *id.*

Lay persons may not offer expert testimony about the content of the law. See, e.g., *United States ex rel Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir.1999), cert. denied, ___U.S.___, 102 S.Ct. 2657 (2000); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir.1996). Such testimony is especially inappropriate when it conflicts with past rulings of the court. Therefore, Conclusion 2 is inadmissible.

3. Conclusion 3: Access to Copyright Information and Ability to Obtain Authorization from Copyright Owners

According to Conclusion 3, Napster cannot distinguish copyrighted material restricted by the owner from either uncopyrighted material or copyrighted material for which the owner or the law permits free distribution. Tygar further opined that it would be “technically infeasible” to require Napster to obtain information from the rights-holder before

providing access to the material. See Lisi Dec. (Tygar Rep.) at 28. At his deposition, Tygar clarified that, by “Napster,” he meant the computer program, rather than the defendant company. See Greer July 13, 2000 Dec. (Tygar Dep.). at 84:3-10.

Plaintiffs first challenge Tygar's opinion regarding Napster's ability to identify copyrighted material on the ground that it does not reflect “good science” under *Daubert*. They object that Tygar did not interview Napster employees or conduct any empirical research about rights-checking. See *id.* at 172:14-25, 173:1-2. He also failed to confer with his peers in the field of computer science. See *id.* at 172:6-13, 175:11-14. At his deposition, he characterized his research as qualitative, rather than quantitative. See *id.* at 175:9-10.

Plaintiffs also argue that Tygar's opinion on Napster's ability to obtain information about copyrights must be excluded because it is not the product of his expertise as a computer scientist. According to plaintiffs, Tygar does not understand (and hence cannot offer opinions about) how other copyright users like radio and television stations obtain authorizations. Tygar does not discuss these other channels of distribution, however. As plaintiffs note, he generally limits his conclusions to the capabilities of the Napster computer program.

*11 The court overrules plaintiffs' objection to the extent that Conclusion 3 discusses whether the Napster system can determine if a given MP3 file has been pre-authorized for distribution. Tygar's failure to give a more detailed explanation of how he analyzed the Napster service bothers the court; however, given his expert qualifications, this shortcoming does not warrant excluding his report. However, speculation on pages 32 and 33 about the ability of humans to check for pre-authorization lies beyond the scope of Tygar's expertise and must be excluded.

4. Conclusion 4: Napster's Ability to Check Authorizations

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)
 (Cite as: 2000 WL 1170106 (N.D.Cal.))

Plaintiffs object to this conclusion because it does not encompass other methods of checking authorizations “both on the Internet and in the real world.” Pl.’s Mot. to Exclude Tygar Rep. at 8. However, Conclusion 4 is limited to the ability of the Napster computer program to check authorizations. This lies within Tygar’s expertise as a computer scientist. The court therefore overrules plaintiffs’ objection.

5. Conclusion 5: Authorization Would Change the Web to a “Centralized Utility”

Conclusion 5 merely amounts to editorial comment on Internet policy. It does not appear to be based on any research or expertise. Because it does not aid the trier of fact, it will be excluded.

6. Conclusion 6: Watermarking Could Carry Rights Information with a Recording

Plaintiffs object that Conclusion 6 is irrelevant because the preferred watermarking standard is not an issue in this case. The court disagrees. Because Napster has raised acquiescence and waiver as defenses, Tygar’s expert opinion about the recording industry’s failure to develop technologies to protect its copyrights has relevance. The court overrules plaintiffs’ objection.

7. Conclusion 7: Napster’s Ability to Tell Whether a Use of the System is Infringing

Here, Tygar speculates about possible legitimate uses of the Napster system. While this opinion is relevant to defendant’s fair use defense, neither a lay person nor an attorney may presume to instruct the court in the law. Accordingly, Conclusion 7 is inadmissible.

CONCLUSION

For the foregoing reasons, defendant’s motion to exclude the Jay Report and the Fine Report is DENIED. The court also DENIES plaintiffs’ motion

to exclude the Fader Report and the Hall Report, but GRANTS plaintiffs’ motion to exclude the Lessig Report. Plaintiffs’ motion to exclude the Tygar Report is GRANTED as to Conclusions 1, 2, 5, 7, and the portion of Conclusion 3 on pages 32-33 that deals with humans’ ability to check for preauthorization. The court deems the remainder of the Tygar Report to be admissible.

IT IS SO ORDERED.

N.D.Cal.,2000.

A & M Records, Inc. v. Napster, Inc.

Not Reported in F.Supp.2d, 2000 WL 1170106 (N.D.Cal.)

END OF DOCUMENT